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October 15, 1996

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 E. L. SORENSEN, JR.  
 Executive Director

Mr. D--- H. D---, CSM  
 A--- T--- A---, Inc.  
 XX --- --- Street  
 ---, Ohio XXXXX

[No Permit Number]  
 Medical Devices

Dear Mr. D---:

I am responding to your letter dated August 7, 1996, to Assistant Chief Counsel Gary J. Jugum. You ask about the application of use tax to your client's sales. You break your client's products down into four general categories. Since you did not identify the taxpayer, this letter does not constitute specific written advice to the taxpayer under Revenue and Taxation Code Section 6596. Rather, it constitutes general comments regarding the applicability of California Sales and Use Tax Law to a set of hypothetical facts. Your client may thus rely on this letter as the opinion of the Legal Division, but it is not effective to estop the Board from asserting tax in the event of an adverse result at audit.

II. OPINION

A. Use Tax on Tangible Personal Property

In California, except where specifically exempted by statute, Revenue and Taxation Code Section 6051 imposes an excise tax, computed as a percentage of gross receipts, upon all retailers for the privilege of selling tangible personal property at retail in this state. (Unless otherwise stated, all statutory references are to the Revenue and Taxation Code.) Likewise, Section 6201 imposes a use tax on the storage, use, or other consumption in this state of tangible personal property purchased from any retailer for use, storage, or other consumption in this state, unless otherwise exempted from taxation by statute, purchased for use in this state in a transaction not subject to sales tax. The retailer must collect the use tax from the purchaser if engaged in business in this state. (§ 6303.)

"[I]t shall be presumed that all gross receipts are subject to tax until the contrary is established. The burden of proving that a sale of tangible personal property is not a sale at retail is upon the person who makes the sale ..." (§ 6091.) "Exemptions from taxation must be found in the statute." (Market St. Ry. Co. v. Cal. St. Bd. of Equal. (1953) 137 Cal.App.2d 87, 96 [290 P.2d 201.]) "The taxpayer has the burden of showing that he clearly comes within the exemption." (Standard Oil Co. v. St. Bd. of Equalization (1974) 39 Cal.App.3d 765, 769 [114 Cal.Rptr. 571].)

B. Prescription Medicines.

Section 6369, interpreted and implemented by Title 18, California Code of Regulations, Section 1591, provides that sales of medicine, when prescribed and sold or furnished under certain conditions for the treatment of a human being, are exempt from sales or use tax. (Reg. 1591(a).) Subdivision (b)(1) defines "medicine" to "mean and include any substance or preparation intended for use by external or internal application to the human body in the diagnosis, cure, mitigation, treatment, or prevention of disease and which is commonly recognized as a substance or preparation intended for such use." However, Regulation 1591(c)(2) adds that "medicines" do not include "articles which are in the nature of splints, bandages, pads, compresses, supports, dressings, instruments, apparatus, contrivances, appliances, devices, or other mechanical, electronic, optical or physical equipment or article or the component parts and accessories thereof." (Sales and Use Tax Regulations are Board promulgations which have the force and effect of law.) As a rule, then, items used to diagnose a condition or to apply medicine or treatment to the patient are not considered to be medicines.

Regulation 1591(b) does provide that certain items which might otherwise be considered as being devices, etc., are defined as "medicines." Regulation 1591(b)(4) includes orthotic devices, or their replacements, designed to be worn on the person of the user as a brace, support, or other correction for the body structure.

C. Tax Consequences.

1. You describe this line of products as follows:

"[T]he cornerstone of the business is a line of ankle braces used to treat various sprains and strains. The braces stabilize the ankle inside and outside, but allow movement up and down.... 98% of all sales are based on a physician's order or advice."

First of all, items that are not furnished pursuant to the written order of a licensed physician or podiatrist do not qualify for the exemption for sales of orthotic devices. (Reg. 1591(I).) Second, we cannot give you a definitive opinion, because whether or not an ankle brace qualifies as an orthotic device depends precisely on the function of the individual item. Although many such braces do qualify, many others do not, because they are supportive devices for the foot, which are excluded from the definition of an orthotic device under Regulation 1591(b)(4).

2. Cold Compression Therapy. As you note, “[t]hese units apply controlled compression to minimize hemostasis (blood filling joint cavities) and swelling along with the cold to minimize pain.” We have previously determined that cold compression therapy devices do not apply a substance or preparation as contemplated in Regulation 1591(b)(1). As a result, their sales are subject to tax.

3. Sequential Gradient Pumps. Your last two categories both involve sequential gradient pumps used to prevent blood clots from forming in the veins of the lower leg and to treat lymphedema, venous ulcers, and associated complications. We have previously determined that such devices generally do not qualify as orthotic devices since the pump itself rests on a table beside the patient during treatment and is usually not worn on the patient. (See, e.g., Annot. 425.0542 (12/28/93). Sales and Use Tax Annotations are excerpts from previous Board Staff opinion letters and serve as guides to Staff positions.) Sales of such items are thus generally subject to tax.

For your information, I have included a copy of Regulation 1591 and Tax Tip Pamphlet Number 45, “Hospitals.” I hope the above discussion has answered your question. If you need anything further, please do not hesitate to write again.

Sincerely,

John L. Waid  
Senior Tax Counsel

JLW:sr

Enclosure: Reg. 1591  
Pamphlet No. 45