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STATE OF CALIFORNIA

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November 23, 1994

Ms. L--- D---s
XXXX --- Court
--- ---, CA XXXXX

RE: [No Permit Number]
Medical Supplies

Dear Ms. D---:

I am responding to your letter to the Legal Division dated October 22, 1994. You ask for advice regarding the application of sales or use tax to the sales of several medical items. You just list the items and do not describe their function, so I can only give you a general answer.

OPINION

A. Sales and Use Tax Generally.

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.) "[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 PO.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 28, California Code of Regulations, Regulation 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.

C. Tax Consequences.

1. Intravenous Tubing, IV Pole Rental, Blood Glucose Monitors, Blood Glucose Test Strips, Needles/Syringes (not used by diabetics), Containers Used in Compounding Medications (Such as IV Solution Bags).

The exemption for sales of prescription medicines was originally very narrow and covered only things ingested by or placed on the patient. Durable medical items were excluded under Regulation 1591(c)(2). Over the years the Legislature has included some durable items, but, with an exception discussed below, items such as these that administer medicine to the person are considered appliances, devices, etc., excluded from the term "medicine" by that subdivision. Sales of these items are subject to tax. Insulin syringes are deemed to be medicines under sub-division (h).

2. Infusion Pump Rental. Whether the transfer is made by sale or rental, the rules as to taxability are the same. Infusion pumps that are programmable and fully worn on or implanted in the human body and which automatically cause the infusion of measures quantities of a medicine into the body of the wearer of the device are specifically defined as "medicines" by Regulation 1591(b)(7). Sales of these pumps are exempt from tax. Pumps that gravity feed (even though rate can be set), or are not fully worn on or implanted in the body of the patient, do not qualify. All other infusion pumps are excluded from the term "medicines" under sub-division (c)(2), and their sales are taxable.

3. Enteral Formulae (Ensure, Isocal, Advera, etc.). We have previously determined that Ensure and Isocal qualify as medicines with the result that their sales are exempt when they are sold or furnished pursuant to Regulation 1591(a). I should not like to give an opinion on Advera without seeing the label or package (preferably both).

4. Topical Creams/Ointments (with MD prescription/order). We have previously determined that topical creams or ointments qualify as medicines and, when sold or furnished pursuant to Regulation 1591(a), their sales are exempt from tax.

5. Catheters (Intravenous, Foley/Urinary). Generally, catheters do not qualify as medicines except those that are permanently implanted, used for drainage through a natural or artificial opening in the body, or are a necessary and integral part of another exempt item. We have previously determined that Foley catheters may qualify under Regulation 1591(b)(5), and that urinary catheters may qualify under either that sub-division or sub-division (j) as medicines; their sales may be exempt from tax depending on their use. If they are sold for temporary use during surgery, they do not qualify at all, and their sales are taxable.

For your information, I have included a copy of Regulation 1591. 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
Tax Counsel

JLW:te

Enclosure: Reg. 1591