



STATE BOARD OF EQUALIZATION

(916) 322-3684

July 9, 1986

Ms. O--- Z---
Administrative Assistant
X--- M--- Inc.
XXXXX --- Blvd., Suite XXX
--- ---, CA XXXXX

Dear Ms. Z---s:

Your letter of May 14, 1986 has been referred to me for a response. You request an opinion concerning the correct application of tax to the sale of your product, "N---". You enclosed with your letter a mailer that describes your product and a sample of the product (without the chemicals). You also inquire whether your company, X--- M--- Inc., which markets N---, is required to hold a California permit.

As I understand it, N--- is a specimen collection kit. The user collects a sample of sputum coughed from deep within the lungs into the N--- container which contains a preservative solution. The user then mails the container with the sputum to X--- M--- for laboratory analysis. The laboratory analysis detects potentially cancerous cellular changes in the lungs from an examination of the sputum. The results are sent to the user and the user's physician for followup. N--- is available only by prescription from a physician.

Except where the sales are specifically exempted by statute, sales tax applies to the gross receipts of retailers from all retail sales of tangible personal property in this state (Rev. & Tax. Code § 6051). Section 6015 of the Revenue and Taxation Code defines a "retailer" to include every seller who makes any retail sale or sales of tangible personal property . . ." Section 6369 of the Code exempts the sale of "prescription medicines" from tax and section 6369(b) defines "medicines" 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” (emphasis added.)

Section 6369(b)(2) specifically excludes from the definition of “medicines” articles which “are in the nature of . . . instruments, apparatus, contrivances, appliances, devices or other physical equipment or articles”

And finally, sections 6066 et seq. of the Code and Sales and Use Tax Regulation 1699, which interprets and applies the Code, requires that California retailers hold a permit for each place of business in this state at which sales transactions with customers are customarily negotiated.

Applying the above criteria, we are of the opinion that the sale of N--- is taxable. In our view, N--- is not a “prescription medicine” since it is not intended for use by internal or external application to the human body pursuant to section 6369(b). Instead, N--- is used to collect and store human sputum for subsequent laboratory analysis. Thus, we view N--- as more in the nature of a physical article that is specifically excluded from the definition of medicines pursuant to section 6369(b)(2). Therefore, since N--- is not an exempt prescription medicine, its sale is taxable pursuant to section 6051.

Also, since X--- M--- markets a taxable item of tangible personal property (N---) in California, X--- M--- must file an application for a permit with the Board pursuant to section 6066, and Regulation 1699.

We hope the above information is helpful. Enclosed for your review and reference is a copy of Sales and Use Tax Regulation 1699 (Permits). If you have any further questions on this topic, please do not hesitate to write this office.

Very truly yours,

Robert J. Stipe
Tax Counsel

RJS:sr

cc: --- – Auditing
--- ---