M e m o r a n d u m

425.0167.200

To: Mr. Donald Herrman
Senior Tax Auditor
Aud. Rev. & Ref. Sect. (MIC:39)

Date: October 15, 1996

From: John L. Waid
Senior Tax Counsel

Subject: Splints v. Orthotic Devices

I am answering your memorandum to me dated July 30, 1996; You ask for advice regarding the standard to be used to distinguish "splints" from "orthotic devices."

Revenue and Taxation Code Section 6369 (b) (2) specifically excludes from the definition of the term "medicines" "[a]rticles that are in the nature of splints ... , supports ... , or other mechanical, electronic, optical or physical equipment or article or the component parts and accessories thereof." (See Reg. 1591 (c) (2).) In 1977, the Legislature enacted Section 6369(c) (3), which expanded the definition of ."medicine" to include "orthotic devices," defined in the statute as devices "designed to be worn on the person of the user as a brace, support, or correction for the body structure .... " (See Reg.
1591(b) (4).) As you note, we have concluded that articles termed "splints" which act as a brace or support for the body structure come within the term "orthoses" and so are "medicines" within the meaning of the statute. (See Annots. 425.0162 (12/9/92) & 425.0850 (5/10/88).)

Two canons of statutory construction are of critical importance here. "It will be presumed that every word, phrase and provision in a statute was intended to have some meaning and to perform some useful office [citations] and a construction making some words surplusage is to be avoided." (Van Nuis v. Los Angeles Soap Co. (1973) 36 Cal.App.3d 222.) "Courts do not favor repeal by implication. [Citation.] 'The presumption is always against the intention to repeal where express terms are not used. To justify the presumption of an intention to repeal one statute by another, either the two statutes must be irreconcilable, or .the intent to effect a repeal must be otherwise clearly expressed' [Citation] .... " (People v. Martin (1922) 188 Cal. 281, 285.) Following these principles, then, we must conclude that, because the Legislature did not take the word "splints" out .of Section 6369 (b) (2) when it enacted subdivision (c) (3), it must have intended "splints" to retain some meaning.

The words in a statute are to be given their natural and plain meaning unless the context or apparent scope of the statute shows use in a technical or arbitrary sense. (Barber v. Gonzales (1954) 347 U.S. 637, 641; People v. Eddy (1872) 43 Cal. 331. 336-337. Webster's New World Dictionary (3d. coll. ed., 1988) defines "splint" as "a thin rigid strip of wood, metal, etc., set along a broken bone to keep the pieces in place or used to keep a part of the body in a fixed position."

The Legislative History is of some help. The Interim Session report of the Assembly Revenue and Taxation Committee (Nov. 4, 1976), from whose recommendations AB 1082, the bill that initiated the exemption, was drawn, recommends the definition of "orthotic device" which eventually found its way into the statute but does not provide examples. Section 6369(c) (3) was originally enacted as part of SB 588, a companion bill. The Senate Committee Report (April 27, 1977) defines "orthotic devices" as "surgical devices designed to activate or supplement a weakened or atrophied limb." The Department of Finance Analysis (Aug. 4, 1977) gives as examples of "orthotic devices" "items such as a leg or neck brace." The Assembly Revenue and Taxation Committee Report (Aug. 15, 1977) states that the intent of the bill is to "stop state taxation of 'pain and suffering' by exempting certain devices required primarily by individuals with major, on-going disabilities."

Bearing these principles in mind, we conclude that the Legislature probably meant to exclude items whose primary purpose was holding the ends of broken bones, together from the definition of orthotic devices. We have, however, beginning in 1978, issued numerous opinions stating that devices which call themselves "splints" and do immobilize the bone ends but which also provide support to the body structure while the broken bones are healing qualify as “orthotic devices” under the statute. We have probably gone too far down that road to turn back; any change now would have to be made by regulation. As pointed out above, however, the word "splint" must retain some meaning. Previous opinions we have issued indicate that we have reserved that term for devices designed primarily to immobilize the bone pieces in relation to each and which provide no support for the body structure, such as a lower arm splint, or some support as an incidental effect. Such devices would be excluded from the definition of "medicines" as "splints" under Section 6369(b) (2). (See Annot. 425.0162 (12/9/92).) We agree with your suggestion that the term "brace" as used in subdivision (c) (3) should be limited to those devices designed to hold the body in its correct position to permit proper function when the malady is not related to broken bones.

JLW:sr