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August 23, 1994

BURTON W. OLIVER
Executive Director

X-----

Re: [No Permit Number]
Speech Therapy Device

Dear X-----,

I am responding to your letter to the Legal Division dated July 15, 1994. You ask about the application of sales tax to your sales of a device that provides fluency-enhancing auditory feedback to enable the users to speak fluently. You assert that your sales to school districts and the state Deaf & Disabled Telecommunications Program are exempt from tax under Regulation 1591(a) (5).

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. Rv. 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.

Regulation 1591(b) does provide that certain items which might otherwise be considered as being devices, etc., are defined as "medicines." Regulation 1591(b) (5) includes prosthetic devices and their replacement parts designed to be worn on or in the person of the user to replace or assist in the functioning of a natural part of the human body. As you note, this sub-division specifically excludes auditory, ophthalmic, ocular, and dental devices from its reach.

C. Tax Consequences to X-----

You did not enclose a description of the product, how it operates, and how it is used. You do refer to it as providing "fluency-enhancing auditory feedback to enable the users to talk fluently."

We have previously determined that speech aids do not qualify as prosthetic devices. They are "devices" under Health and Safety Code section 26009 rather than a "substance or preparation" under Regulation 1591(b) (1). They do not replace or assist the function of a natural part of the body, except for the ear, and auditory devices are specifically excluded from the definition of "prosthetic device" under sub-division (b) (5). As devices and appliances are excluded from the term "medicine" per sub-division (c) (2), whether or not school districts and the state Deaf & Disabled Communication Program are the kinds of state or municipal agencies to which medicines may be sold free of tax under Regulation 1591(a) (5) is moot.

We thus conclude that speech devices such as yours do not qualify as "medicines." As a result, sales of your product are subject to tax.

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:es