



STATE BOARD OF EQUALIZATION

STATE OF CALIFORNIA

BOARD OF EQUALIZATION

BUSINESS TAXES APPEALS REVIEW SECTION

In the Matter of the Petition for
Redetermination Under the Sales Use
Tax Law of:

X-----

Petitioner

DECISION AND RECOMMENDATION

The Appeals conference in the above-referenced matter was held by Staff Attorney Rachel Aragon on December 6, 1994 in Redding, California.

Appearing for Petitioner: X-----
X-----

Appearing for the
Sales and Use Tax Department: Steven M. Whelan
Branch Office Supervisor

Type of Business: Retailer of Orthotic Devices

Protested Item

The protested tax liability for the period July 1, 1990 through June 30, 1993 is measured by:

Item	State, Local and County
Disallowed claimed exempt medicine	\$41,314

Petitioner's Contentions

The corrective shoes and arch supports are entitled to the exemption because they are sold only on a prescription basis and are custom made.

Summary

Petitioner manufactures and sells a variety of orthotic devices. Petitioner, doing business under the name of X----- has been in business since February 24, 1983. Petitioner is a retailer and wholesaler of orthotic devices such as back braces, knee braces, orthopedic shoes, and arch supports.

The Sales and Use Tax Department, relying on Sales and Use Tax Regulation 1591, disallowed as exempt medicine the arch supports, and the corrective shoes. The Department had disallowed the Denis Browne Bar as exempt. In the report of discussion of the audit findings (included in the audit working papers), District Principal Auditor Robert Reichmuth allowed the exemption of the bar stating that: "[s]ince it is worn on the person for correction to the body structure (tibia rotation of the leg), the Denis Browne Bar would qualify as an exempt medicine." Mr. Reichmuth went on to say " [a]lthough it must be used in conjunction with an orthopedic shoe, the shoes would not qualify for exemption" because they were not an integral part of a leg brace or artificial leg.

Petitioner stated that all his products are sold strictly by prescription. Petitioner stated that Medi-Cal considers the products exempt as should the Department. Petitioner stated that in making the orthosis, a plaster cast is made of the foot. Using the case, a laminated cork platform is constructed and used to build the orthopedic shoes. The shoes are designed to support the deformed and weakened feet in a position of optimum balance to make weight-bearing and walking possible.

At the conference, petitioner presented a written description of the bar, the shoes, and the arch supports (attached at page 9 of the petition file). Petitioner stated that " [t]he supports are custom made or custom fitted which biomechanically correct the affected foot, whether they are custom molded, custom fabricated, with cast or blueprint."

Petitioner further stated that the corrective shoes "[w]hile ... not an integral part of an orthosis, their function is to support or correct malaligned or malformed feet. Biomechanically, shoes and arch supports work together by the design and adjustments to the patient. All shoes, whether custom made or custom fitted, are still adjusted to the patient's needs and problem areas. Without shoes and arch supports, patients will not be able to ambulate without severe problems. Therefore, the shoes become the orthosis along with the orthotic foot inserts to correct, relieve pressure, and to support the patient in ambulation."

Petitioner also stated that " [a]rch supports as any other orthotic device made or fit by X-----, are by prescription. All are custom made or custom fitted which

biomechanically correct the affected foot, whether they are custom molded, custom fabricated, with cast or blueprint. "

Petitioner stated that the Denis Browne Bar is a device which is used to correct improper rotation of the lower leg bones. "The bar is worn by the user and is attached to orthopedic shoes with a special ratchet device One does not work without the other". Petitioner stated that the bar is a leg brace within the meaning of Section 1591. Petitioner submitted a copy of a photograph of the bar (attached herewith as Exhibit I). Petitioner stated that since the shoe is attached to the bar, it is also exempt. The bar is described as a Denis Browne Splint or a Fillauer Detachable Denis Browne night splint.

The Department stated that the shoes do not qualify because they are not an integral component of a leg brace or artificial leg. The arch supports are manufactured by means of an ink impression or tracing made by petitioner. There is no evidence that any tests are made to determine the neutral subtalar joint position as opposed to manufacturing a custom-made support without making any biomechanical corrections to a mold.

Petitioner stated that the Department was contacted several times with respect to the taxability of the products. Petitioner stated that he was always told that the products were entitled to the medicine exemption.

Analysis and Conclusion

Revenue and Taxation Code section 6369 and Sales and Use Tax Regulation 1591 define which items of medicine and medical supplies, devices, and appliances are exempt from the sales and use taxes. Section 6369(c) states that medicine means and includes:

" (3) (A) Orthotic devices, other than orthodontic devices, designed to be worn on the person of the user as a brace, support, or correction for the body structure, and replacement parts for these devices. However, orthopedic shoes and supportive devices for the foot are not exempt unless they are custom-made biomechanical foot orthoses or are an integral part of a leg brace or artificial leg."

Regulation 1591(B) (4) defines custom-made biomechanical foot orthosis as follows:

" 'Custom-made biomechanical foot orthosis' means a device which is made on a positive model of the individual patient's foot. The model may be individually constructed from suitable model material such as plaster of paris, stone, or wax, and may be manually constructed or fabricated using electronic technology. The device described above excludes 1) any pre-made or pre-molded foot orthosis or shoe insert even if it has been modified or customized for an individual patient by the practitioner regardless of the method of modification; 2) any foot orthosis fabricated directly on the patient's foot regardless of the method and materials used and regardless of its individual character; and 3) any foot orthosis fabricated

inside of the patient's shoe regardless of the method of manufacture and materials used and regardless of its individual character."

Section 1591(c) (2) excludes from the definition of medicine:

"'Medicines' does not include arch supports, orthopedic shoes and supportive devices (unless an integral part of a leg brace or artificial leg), plastazote inserts, plastazote shoes, plastic shoes (custom or ready made), shoe modifications, spenco inserts, traction units (other than fully worn on the patient), thermophorepads, nor foot orthoses."

The arch support is specifically excluded from the definition of an exempt medicine unless it is an integral part of a leg brace or artificial leg, which it is not, thus, the arch support is not exempt.

The orthopedic shoes are also specifically excluded unless the shoes are an integral part of a leg brace or artificial leg, or are custom-made biomechanical foot orthoses. The shoes are not made on a positive mold of the patients's foot, therefore, the shoes are not custom-made biomechanical foot orthoses. Petitioner stated that the Denis Browne Bar is a leg brace, and since the shoe is attached to the bar, the shoe is exempt. Stedman's Medical Dictionary (25th ed. 1989) p.207, defines a brace as "[a]n orthosis or orthopedic appliance that supports or holds in correct position any movable part of the body and that allows motion of the part, in contrast to a splint, which prevents motion of the part."

The Denis Browne Bar does not allow motion of the feet; it prevents the feet from movement as a splint would. Also, the Denis Browne Bar is described in the literature as a splint. We conclude that the Denis Browne Bar is not a brace. Since the orthopedic shoes are not an integral part of an artificial leg or of a leg brace nor custom-made biomechanical foot orthoses, the shoes are not entitled to the exemption.

Petitioner also stated that the Department was contacted several times with respect to the taxability of the products and that he was always told the medicine exemption applied.

Revenue and Taxation Code section 6596 provides the only basis for relief from tax and interest where a taxpayer relies upon erroneous advice from the Board. A taxpayer is not entitled to relief under this section unless the taxpayer makes a written request for advice, the request discloses all relevant facts, the Board responds in writing to the taxpayer's request, and the taxpayer relies upon the advice in the Board's written response.

In this case petitioner did not allege that there was anything in writing from the Board. Petitioner stated that the oral advice was incorrect. Since petitioner does not have anything in writing which stated that the items were not subject to tax, petitioner is not entitled to relief.

Recommendation

We recommend that the petition be denied.

Rachel M. Aragon, Staff Counsel

Date: April 21, 1995

(w/Exhibit 1)