

**STATE BOARD OF EQUALIZATION**

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(916) 324-3828

May 17, 1991

Mr. H--- J. B---, President
S--- D--- M--- E---, Inc.
XXX --- Blvd, #XXX
E---, California XXXXX

RE: SR -- XX-XXXXXX

Dear Mr. B---:

The State Board of Equalization has assigned for response your letter to the Legal Division, which has in turn assigned it to me. You have requested a ruling on the applicability of sales and use tax to sales and leases by your company (hereinafter "SDME") of certain items. We note that the Board Staff cannot issue tax rulings; only the Board itself may do that. However, we can give you our opinion regarding the correct application of tax to a given set of facts.

I. FACTUAL BACKGROUND

You set forth the background of your problem as follows:

"We are a Durable Medical Equipment company in --- --- County and dispense Transcutaneous Electrical Nerve Stimulators (TENS) and Neuromuscular Electrical Stimulators (EMS or NMES). As defined in the Revenue and Taxation Code Section 6369, TENS units are exempt from sales tax charge because they are considered medicines.

"... Currently we are charging the patient sales tax on [the sales and rentals of the EMS unit] and were recently informed that your office made a ruling a few years ago. I have enclosed a copy of [the letter of Tax Counsel Charles J. Graziano, dated may 31, 1983, on the "R--- II" neuromuscular stimulation system] to B--- M--- in San Francisco.

"We have also enclosed information on the EMS units that our company distributes to patients. You will notice that this unit is very similar to the TENS unit, in that the patient wears the unit on their clothing for a length of time needed for treatment."

II. 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 P.2d 201.)) “The taxpayer has the burden of showing that he clearly comes within the exemption.” Standard Oil Co. v. State Bd. of Equalization (1974) 29 Cal.App.3d 765, 769 [114 Cal.Rptr. 571].)

B. Prescription Medicines.

Section 6369 interpreted and implemented by Title 28, California Code of Regulation, Regulation 1591 provides that sales of medicines, 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) of Regulation 1591 defines “medicines” to “mean and include any substances 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.” (Regulations are Board promulgations that have the force and effect of law.) As a general 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 apparatus, 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. Each of the above categories is subject to certain exceptions.

C. Tax Consequences to SDME

As you are aware, on July 1, 1982, the Board ruled that TENS devices which are fully worn on the body of the user are prosthetic devices within the meaning of Regulation 1591(b)(5), and that tax does not apply to their sale when it is pursuant to prescription. TENS units which are not fully worn on the body of the user or are not sold pursuant to prescription do not qualify as prosthetic devices, and tax applies to their sale. (II Bus. Tax. L. Guide, Annot. 425.0885. Annotations are excerpts from previous Board Staff opinion letters and serve as a guide to Board positions.)

The brochures you enclosed indicate that SDME sells two EMS units, the R--- II and the E---. We have previously concluded, as expressed in Mr. Graziano's letter, that the R--- II, when fully worn on the patient, qualifies as a prosthetic device under the above regulation. He qualified his answer, however, by noting that it had been brought to his attention that some TENS units were not fully worn on the patient; sales of those units were subject to tax. The brochure you enclosed shows the patients undergoing therapy both with the R--- II unit resting beside them and with them carrying or wearing it. The unit is thus capable of being fully worn on the body of the patient and does not appear to be exclusively used one way or the other by its purchasers. We conclude that such a device which is obviously designed to be used while being worn on the body of the user qualifies for the exemption even though it may, at the convenience of the particular user, be set on a table or bed while the user is undergoing therapy. TENS devices which are not designed to be easily portable do not qualify. Therefore, we conclude that the R--- II qualifies as a prosthesis under the above regulation.

The brochure describing the E--- unit does not say what it does other than to indicate that the unit can be used for rehabilitation of muscle groups or multiple sites or can assist in the reduction of post-traumatic edema and muscle spasm. If the unit is used in much the same manner as the R--- II for similar reasons, it too qualifies as a medicine, subject to the same reservations regarding being fully worn on the body of the patient.

SDME may sell these units ex-tax by accepting from its purchasers exemption certificates substantially conforming to the requirements of Regulation 1667. Of course, SDME may also accept resale certificates, as set forth above, substantially conforming to the requirements of Regulation 1668 from those purchasers who will re-sell the units.

For your information, I have enclosed copies of Board of Equalization Pamphlet No. 45, "Hospitals," and Regulation 1667. 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

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Encs.: Pamphlet 45
Regulation 1667

cc: Mr. O. A. McCarty, Supervisor, Return Review
Mr. Donald J. Hennessy
Ms. Mary C. Armstrong