



STATE BOARD OF EQUALIZATION

916-322-3684

April 15, 1986

X-----

Dear X-----,

Your letter of March 12, 1986 has been referred to me for a response. You request our opinion concerning the correct application of tax to the sale of "OvuSTICK Self Test" to physicians. You enclosed with your letter some literature and brochures describing the product.

Your letter indicates that X----- is a manufacturer of Medical Diagnostic Kits. One such kit is an ovulation product called "OvuSTICK Self Test". This product is an in-home diagnostic kit that is a simple urine test to aid the user in predicting the time of ovulation. Your letter indicates that the product is sold by prescription only; however, the attached literature indicates that "OvuSTICK" is a nonprescription product. In any event, X----- sells the product to pharmacies and physicians. You request a definite determination as to whether the sale of "OvuSTICK Self Test" is taxable. Further, it is your understanding that X----- sales to physicians are taxable unless the physician furnishes a resale tax number.

Unless otherwise exempt by statute, section 6051 of the Revenue and Taxation Code imposes a retail tax on all retailers for the privilege of selling tangible personal property within the State of California. Pursuant to section 6091 and 6092 and Sales and Use Tax Regulation 1668, which interprets and applies the code, a retail seller will be relieved of sales tax liability if a timely resale certificate is taken from the purchaser in good faith. In addition, section 6369(a) and Regulation 159 exempt from tax the sale of medicines, as defined. Medicines is defined in section 6369(b) 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)

Applying the foregoing criteria, we are of the opinion that "OvuSTICK" is not a medicine the sale of which is exempt from tax. As described, "OvuSTICK" is a product used to predict the time of ovulation. "OvuSTICK" is not used to diagnose, cure, mitigate, treat or prevent a disease. Therefore, the sale of "OvuSTICK" is taxable.

Finally, you are correct in your understanding that unless the physician purchasing "OvuSTICK" provides X----- with a resale certificate as described in section 6091 and 6092 and Regulation 1668, the sale is taxable.

We hope the above information is helpful. Enclosed for your review and reference is a copy of Sales and Use Tax Regulation 1591 (Prescription Medicines_ and 1668 (Resale Certificates). 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

Encs.

Cc: San Jose District Office
Compliance