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*Executive Director*

September 13, 1994

[X]

Re: [X]  
Reg. 1592

Dear [X],

Your letter of July 5, 1994 to the Legal Division has been referred to me for a response. You ask if a manufacturer of ophthalmic material qualifies for the partial exemption from tax provided in Regulation 1592 when it sells such property to the general public. Since you did not identify the taxpayer, this letter does not constitute specific written advice to the taxpayer under Revenue and Taxation Code section 6596. Rather, it constitutes general comments regarding the applicability of California Sales and Use Tax Law to a set of hypothetical facts.

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. Ed. 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. Eyeglasses and Other Ophthalmic Materials.

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).) Sub-division (c)(1) specifically excludes ophthalmic or ocular devices or appliances from the definition of “medicines.” Sales of such products are thus subject to tax unless a statutory exclusion applies.

Section 6018, interpreted and implemented by Regulation 1592, provides that a physician, optometrist, or surgeon is the consumer of ophthalmic materials including eyeglasses, frames, and lenses used or furnished in the performance of his professional services in the diagnosis, treatment or correction of conditions of the human eye. A registered dispensing optician is the consumer of such property dispensed pursuant to a prescription prepared by a physician, surgeon, or optometrist.

C. Manufacturers of Tangible Personal Property.

Regulation 1524 provides as follows:

“(a) ... Tax applies to the gross receipts from retail sales (i.e., sales to consumers) by manufacturers of tangible personal property the sale of which is not otherwise exempted. The measure of the tax is the gross receipts of, or sales price charged by, the manufacturer, from which no deduction may be taken by the manufacturer on account of the cost of the raw materials or other components purchased, or labor or service costs of any step in the manufacturing process, including work performed to fit the customer’s specific request, or any other services that are a part of the sale. In addition, no deduction may be taken on account of interest paid, losses or any other expense.”

D. Tax Consequences.

By its terms, the partial exemption from tax provided in Regulation 1592 applies only to physicians, surgeons, optometrists, and licensed dispensing opticians. There is nothing in the legislative history to indicate that it was meant to apply when the manufacturer sold directly to the public. The manufacturer is the retailer of the ophthalmic materials, and we are of the opinion that, under the above authority, its sales directly to the public are fully subject to tax. As a result, the manufacturer must obtain a seller’s permit (§ 6066) and report and pay tax, measured by the full retail selling price, on those sales.

Since the manufacturer is the retailer of the finished ophthalmic products, it may purchase ex-tax for resale the raw materials which go into, and are sold as part of, the ophthalmic materials. To do so, it must timely issue its suppliers resale certificates conforming to the requirements of Regulation 1668.

[X]

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For your information I am enclosing a copy of Regulation 1668. 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

Enc.: Reg. 1668