

D. Purchases of assets and supplies from unregistered out-of-state vendors not reported.	<u>341,444</u>
	<u>\$1,142,698</u>
	<u><u> </u></u>

Petitioner’s Contentions

1. The hospital is the consumer of central supply items which it acquired tax paid. Petitioner provides services and does not make retail sales. No further tax is due.
2. Some of the supply items in the measure of tax from out-of-state vendors included items that were purchased from in-state vendors, involved in duplicate billings, or reflected fees for repair labor, not purchases of tangible personal property.

Summary

On June 19, 1990, I rendered a Decision and Recommendation involving petitioner at ---- concerning the tax period January 1, 1984 through September 30, 1986 (hereinafter A). That petition is incorporated by reference. Many of the issues raised in this petition concern similar tax-paid purchases of central supply items and duplicate issues in A. Petitioner submits to its patients itemized statements for all tangible personal property utilized in connection with their hospital stay. These itemized statements do not separately state a charge for administration of each enumerated item. Petitioner marks up its central supply items by approximately 400 percent. After excluding billings to Medicare and for worker’s compensation cases where the patient does not receive an itemized statement, all remaining itemized statements submitted to patients and/or their insurance carriers were audited on an actual basis.

As in A, both parties again take an all-or-nothing position on the issue of “administration” of central supply items. The Sales and Use Tax Department (hereinafter “the Department”) contends that until petitioner proves that an item is “administered,” it was sold at retail since it was separately itemized on the statement. Petitioner, on the other hand, contends that there are no circumstances under which central supply items would not be administered.

It was brought to petitioner’s attention that should it prevail on the issue of total self-consumption of all supply items, the result would be to deprive itself of the Medicare exemption from tax for supply items currently considered resold to the United States, its unincorporated agencies and instrumentalities. [Revenue and Taxation Code § 6381 and Sales and Use Tax Regulation 1614(f).] Petitioner’s representative has stated that nevertheless it would be to the overall benefit of his hospital clients to be the consumer of all supply items.

Assuming petitioner were allowed to treat all supply items as having been self-consumed, petitioner would achieve an overall reduction in tax by 2/3 of its current liability for retail sales. Petitioner states that twenty-five to forty percent (25% - 40%) of its sales are non-taxable sales to the U.S. Government under the Medicare program. Petitioner's calculations are illustrated by the following chart:

Current Measure on 100 Widgets

40 widgets at \$10 + 400% markup =	\$2,000.00	
(Medicare) tax rate	<u>.00</u>	
sales tax	-0-	-0-
60 widgets at 410 + 400% markup=	\$3,000.00	
tax rate	<u>.07</u>	<u>210.00</u>
sales tax	\$ 210.00	\$210.00

Proposed Hospital Tax Plan

100 widgets at \$10 (no markup) =	\$1,000	
tax rate	<u>.07</u>	
sales tax	\$ 70.00	<u>\$ 70.00</u>

Attached as Exhibit A is petitioner's analysis of the changing conditions of the hospital industry and its effects on patient's taxable sales in California. I have redacted this document to delete A's cover letter and the last page which pertained to specific items involving out-of-state purchases unrelated to the alleged sales of central supply items. (These out-of-state purchases will be addressed in the reaudit.) B is well-recognized in this state as having substantial background in matters involving application of the sales and use tax laws to hospitals. Exhibit A consists of 12 pages, the last seven of which contain a description of each central supply item in dispute in this petition. Petitioner claims all items are nontaxable either as exempt medicine or because they are "administered" item within Regulation 1503(b)(2) and they were acquired tax paid.

B's analysis is informative. It implies that billing restrictions by the state and federal government agencies, as well as private industry, concerning the matter in which payments are made to hospitals, have caused hospitals to significantly reduce the types of items made available to patients due to lack of reimbursement by insurers. B opines that many of the items acquired are disposable rather than reusable because of the AIDS crisis and other external factors, and that the requirements of the Health Care Financial Commission have all but done away with instances in which an item would be billed with a separate administration charge shown. B's analysis describes more grandiloquently than I could the background information which petitioner wishes the Board to consider in determining whether or not the regulation needs to be revised to reflect the realities of current hospital billing procedures. Nevertheless, it is not within my province to do so in this petition.

I have refrained from using information in Exhibit A other than for background purposes. My analysis strictly relates to application of the regulation as it currently exists.

In A, I disagreed with both extremes and recommended that a reaudit be performed because I concluded certain items are susceptible to "administration." Further investigation of the uses to which these items were put was recommended. I found instances in which the same item would be "administered" in connection with technical and professional services, while at other times, it would not be so used. This would require a reaudit to reallocate some of the purchases to self-consumption. Since central supplies were acquired ex-tax, no further tax would be due on those items which were self-consumed.

The Department has expressed concern that I am attempting to overrule a regulation. Such is not my intent nor function. My purpose is to disabuse both parties of the concept that a determination of "administration" is the only relevant criteria. Certain publications of the Board state that some types of central supply items are self-consumed, even if separately billed by a retailer, without regard to whether they are "administered" or not.

Analysis and Conclusions

A. The following items may be exempt medicines under Sales and Use Tax Regulation 1591. A reaudit is necessary and appropriate.

(1) Alco Wipes. Alco Wipes are pre-impregnated pieces of cotton, gauze or swab. Petitioner contends they contain unspecified exempt medicines. I note that Business Taxes Law Guide (hereinafter "BTLG") Annotation 425.0780 (2/26/64) provides that rubbing alcohol is an exempt medicine.

In a June 11, 1990 memorandum to Return Review, Tax Counsel --- stated that alcohol wipes were exempt medicines under Revenue and Taxation Code Section 6369. This is consistent with the May 17, 1990 memorandum in which she stated that Iodophor Preps were exempt if they were medicated wipes or pads applied to the patient's body. Similarly, --- stated in a March 14, 1990 letter that Chempads which contained the anesthetic lidocaine and menthol for use in conjunction with TENS machines were exempt medicine. She stated, "as a general rule, medicated dressings or pads qualify as medicines under Revenue and Taxation Code Section 6369 if the medication or substance with which the pad is impregnated qualifies as a 'medicine'." In her May 17 memorandum, --- also stated that Concha 1500 sterile water was an exempt medicine if it was specifically processed and sold in containers carrying the following legend: "Caution: Federal (U.S.A.) law prohibits dispensing without prescription." I therefore find that Alco Wipes and pads containing medications and/or sterile water are exempt medicines.

(2) Athletic Supports. In a May 1, 1986 letter to --- in response to their general inquiry, Tax Counsel --- [---] as supports for vasectomy, penile and testicular surgery and hemorrhoidectomy patients qualify as orthotic devices under [Sales and Use Tax] Regulation 1591(b)(4), and, therefore, their sale, pursuant to [Sales and Use Tax] Regulation 1591(a), is exempt from tax.” Since the sales and sue tax laws should be uniformly applied where there are no factual distinctions between different taxpayers, these items should be treated as exempt.

(3) Baby Wipes. In a May 8, 1989 memorandum to the principal tax auditor, Tax Counsel --- recognized that some over-the-counter products (for example, vitamins, baby lotion, oil and powder, and surgical soap) which are taxable when sold at retail, qualify as exempt medicines when furnished by institutions. BTLG Annotation 425.0180 (6/10/65) provides that baby powder and lubrication gels are medicines when furnished or used by a medical facility in the treatment of a human being. BTLG Annotation 425.0320 (11/28/69) also provides that Diaperene, ethyl alcohol, and baby oil are medicines when sold to state hospitals. That they are impregnated on a wipe or pad is no different than alcohol wipes, etc. I find no distinguishable reason why baby wipes, which are used by the hospital to accomplish the same purposes as the aforementioned products should be treated differently.

B. Central Supply Items.

Revenue and Taxation Code 6201 imposes a tax on the storage, use or consumption in this state of tangible personal property purchased from any retailer for storage, use or consumption in this state.

Section 6051 of the Revenue and Taxation Code imposes sales tax on all retailers for the privilege of selling tangible personal property at retail in this state. Revenue and Taxation Code Section 6091 creates a presumption 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. (Id.) Revenue and Taxation Code Section 6006(a) defines a sale to include any transfer of title or possession, exchange, barter, conditional or otherwise, in any manner or by any means whatsoever, of tangible personal property for a consideration. “Transfer of possession” includes only transactions found by the Board to be in lieu of a transfer of title, exchange, or barter.

Sales and Use Tax Regulation 1503(b) attempts to distinguish when medical facilities such as petitioner are self-consuming items purchases and must pay tax on the sales price of their purchases (Revenue and Taxation Code Section 6201) or when they are retailers and must pay sales tax on their gross receipts (Revenue and Taxation Code Section 6051.) That subdivision provides, in pertinent part, as follows:

“(1) SALES TO INSTITUTIONS. Tax applies to sale to institutions of tangible personal property for which a separate charge is not made to patients, residents, nurses, doctors, and others, except sales of medicines specifically exempted, and meals and food products (including hot prepared food products) furnished and served to and consumed by residents or patients. Sales to institutions of tangible personal property for which the institution makes a separate charge are sales for resale and tax does not apply with respect thereto....

“(2) SALES BY INSTITUTIONS...Tax applies to charges made by institutions to residents or patients for appliances, dressings, and other supplies, except medicines subject to exemption. When a charge is made with respect to property administered to the resident or patient and no separate charge is made which is identified as a charge for the administration of the item, the charge is not taxable. The charge is deemed to include the administration of the property to the resident or patient. The institution is the consumer of the property, and tax applies with respect to the sale to the institution. For purposes of this regulation ‘administration’ requires the utilization of the services of the hospital employees, attending physician or patient’s private nurse, and such services must be of a technical or professional nature, such as injections or other internal applications, or applying casts, splints, dressings and bandages. The term does not include oral applications (e.g., administering pills or liquids for swallowing) or external applications (e.g., rubbing on skin).”

Relying on subdivision (b)(1) of the Regulation, the Department contends that petitioner is a retailer of all non-administered items for which it makes a separate charge. This is a strict application of the Regulation. As explained more fully below, however, it is inconsistent with the Department’s previous interpretation of the Regulation as expressed in numerous publications and private letters. These prior interpretations restrict the Regulation to items “furnished” to patients, that is, items as to which title or possession is transferred to patients. Hospitals have traditionally been regarded as consumers of property they use in rendering professional services to their patients, without transferring title or possession, even if the patient is billed separately.

Additional research reveals that the “administration” provisions in subdivision (b)(2) of the Regulation are based on similar considerations. Under Ruling 7 (the predecessor to Regulation 1503), hospitals were classified as retailers of property furnished to patients for a separate charge, including “drugs” and “medicines.” This created an economic incentive for hospitals not to bill separately for many items commonly furnished to patients, an incentive which largely disappeared with the 1961 adoption of the exemption for medicines in Revenue and Taxation Code Section 6369 (operative January 1, 1962). Apparently, hospitals then objected to being classified as retailers of certain items used in treating patients which did not qualify for the medicine exemption as it read at that time, items such as casts, bandages and non-prescription medications. (See generally, Holden, California Business Taxes [1963] at p.42.) In line with the traditional view of hospitals as service enterprises and consumer, which become retailers only in exceptional situations, the Board resolved these problems by adding the “administration” language to Regulation 1503 in 1970.

The “administration” language served as a red herring in A in that all parties were incapable of articulating a precise definition for it. Much like pornography, all parties felt that they knew it when they saw it, but none could set parameters or guidelines. This deflected attention from a more fundamental issue: Were some of the disputed items consumed by petitioner, even if not administered? To put it another way: Does the word “supplies” in Regulation 1503 include all non-administered items, or are some items consumed by hospitals regardless of how the patient is billed?

For reasons set forth more fully below, I have retracted my prior analysis of items where the result was predicated upon a finding of “administration” by the rendition of technical and professional services. “Administration” will be limited to internal applications and to the specifically enumerated externally applied items in the regulation such as bandages, splints, casts, dressings, etc. Since the same items that were discussed in A on the basis of “administration” are at issue herein, my decision here as to the further taxability of identical items should supersede my conclusions in A.

The Department is being inconsistent as to certain central supply items when statements in the tax tip pamphlets and the tax information bulletins are compared with the audit treatment of hospitals under Sales and Use Tax Regulation 1503(b). For instance, in A, the Department did not include surgical drapes, surgical gloves and disposable needles in the measure of tax, but the Department has asserted tax on these items in A-II].

Our research reveals that the above inconsistency between Sales and Use Tax Regulation 1503(b) and the aforementioned Board publications derives from an April 12, 1979 memorandum from then Principal Tax Auditor [---] to the then District Principal Auditor in Inglewood. (Exhibit B.) Much of the memorandum’s language was transcribed verbatim into the March 1982 Tax Information Bulletin. (Exhibit C.)

“APPLICATION OF SALES AND USE TAX TO HOSPITALS

“Hospitals are generally regarded as the consumers of tangible personal property used in the performance of their services or in the operation of hospital facilities and should normally pay sales or use taxes to their suppliers on the purchases of equipment, furniture, fixtures and supply items administered to patients or used in the operation of the hospital facilities.

* * *

“Supply items for which the patient is billed a separate charge but to which the patient does not obtain title or possession, such as disposable surgical drapes or surgeons gloves used in surgery, are considered as hospital supplies on which the hospital should pay sales or use tax to its supplier on the purchase price....”

To further assist taxpayers such as petitioner in analyzing the regulation, the Board publishes and distributes Tax Tips Pamphlet No. 45 dealing with hospitals. At page 5 of the 1990 pamphlet, the following statement appears:

“Hospitals are predominantly service enterprises and as such are generally considered to be consumers of all tangible personal property used in providing services. As consumers, hospitals should normally pay sales tax to their suppliers on purchases of tangible personal property for which a separate charge is not made to patients, nurses, etc. . . .

“The following are listings of special items and categories of items that are taxable when purchased by hospitals:

“Equipment such as hospital beds, microscopes, x-ray equipment, apparatus, instruments, contrivances or other mechanical, electronic, optical or physical equipment or article or the component parts and accessories thereof . . .

“Housekeeping supplies including bedding...

“Articles such as splints, bandages, pads, compresses, supports, dressings, and other items not considered to be medicines which are administered. Hospitals are consumers even though a separate charge for the item is made when no other charge identified as a charge for the administration of the item is made.

“Supply items such as disposable drapes or surgeons’ gloves used in surgery for which the patient does not obtain title or possession but is billed a separate charge.”

The above guidelines derived from Board publications will be referred to herein as “the tax tip rule.” These publications reflect the Board’s longstanding interpretation of the statutes or regulations. In essence, they acknowledge that hospitals are primarily service providers which self-consume most of the supplies they purchase, regardless of how the item is billed. In contrast, the Department’s current audit position is that petitioner is a retailer of all central supply items for which a separate charge is made unless petitioner proves the items were “administered.” Restricting one’s analysis by applying the above criteria of “administration” would result in a finding that petitioner could only self-consume exempt medicine, splints, casts, etc. The result would be that petitioner become a retailer of all other supply items.

Clearly, this result is antithetical to the Board’s public statements in Tax Tip Pamphlet No. 45 and the March 1982 Tax Information Bulletin. (Exhibit C) These publications recognize that there are certain central supply items that should not be considered sold at retail no matter what the form of the billing because there is no physical transfer of any possession or title and because they are used by the hospital staff in the performance of technical and professional services. Hospitals are consumers of supply items they retain for reuse, even if they bill the patient separately, since they do not sell (i.e., pass title or possession) of such items to the patient. It does not necessarily follow, however, that hospitals are retailers of separately billed items which they throw away after use. For example, the Tax Tip Pamphlet states that hospitals are consumers of disposable surgeons gloves, even if separately billed. Thus, the fact than an item is reusable may be crucial to the tax classification, but the fact that an item is disposable is of little or no consequence.

The Board, by regulation, has often looked to the matter in which an item is billed to determine if there has been self-consumption or if title passed prior to use. [See: Printing Aids and Related Arts - - Sales and Use Tax Regulation 1541(d).] Here the Board’s statements in the tax tip pamphlets and tax information bulletin clearly state that the form of the billing is no controlling with regard to some central supply items which are used by hospital personnel in rendering professional services. (Exhibit C).

Applying the Board's announced criteria in its several publications, I have concluded that:

(1) The following supply items were sold at retail.

- (a) Shave cream with razor¹
- Toothbrush¹
- Toothpaste¹
- No-rinse body bath¹
- Mouthwash¹
- Shampoo
- Swab lemon (a mouth refresher)
- Lotion
- K Pad disp
- Breast pump
- Pad poly²
- Slippers
- Pad foam
- Sponge unsterile
- Disp bowl
- Bra pads
- Dipster undergarment

Many of the above items are contained in the hospital admit kit. Issuance of an admit kit recognizes that a hospitalized patient may not have brought certain personal convenience items with him or her. It is provided, in part, to afford creature comforts to the patient while he or she is institutionalized in the hospital. Generally it is the patient, not the hospital, who consumes these items.

(b) Tampax

This item was not previously raised in A. I am not aware of any physician, who, in rendering gynecological or obstetrical services to a female patient, would risk toxic shock syndrome by ordering the use of Tampax. This appears to be an item provided by the hospital for the convenience of female patients being treated for illnesses or injuries other than obstetrics and gynecology.

¹ This item was treated as a retail sale in A.

² Petitioner was unable to locate any information about the product and therefore provided no evidence that it was self-consumed.

(c) Sheepskin Pad, Rubber Donuts, Sitzbaths, and Ice Packs

Hospitals generally deliver these items outright to patients upon discharge for the prevention of a recurrence of the illness or injury. Therefore, I find that unless these items are retained and reused by petitioner, they are sold at retail when separately stated on billings.

(2) The following supply items are self-consumed.

(a) In a July 25, 1985 letter to another taxpayer, Tax Counsel Vicki Owens noted the longstanding Board policy not to treat a hospital as the seller or lessor of items such as masks and tubings when the use is limited to the hospital's premises.

In Tax Counsel ---'s May 30, 1975 letter to ---, he concluded that catheter trays, irrigation trays, blood administration kits, intravenous medication and feeding kits, enema kits and douche kits which are used solely for the benefit of the patient while confined to the hospital and are never delivered outright to the patient are self-consumed by hospitals. The same result would follow by application of "the tax tip rule." While some of these items may have been reused, others may not. (I note that many of these items are generally disposable, yet they have traditionally been regarded as self-consumed, even if billed separately.)

I find the following disputed items are consumed by doctors or nurses during surgery or other procedures to maintain a sterile bacteria and germ-free operating environment. Most of these items appear to be disposable. Title, possession, and control of these items never passes to a patient.

Q-Tips (not sent home with the patients)

¾ sheet (surgical drape)

Scrub brush used by surgical nurse to prepare incision site

Sponge Kerlix (sterile dressing)

Isolation masks

Disposable hair clip (used by nurse or doctor to remove hair from patients wound during procedure)

Fluffs (sterile dressing)

Exam glove worn by a doctor or nurse when performing procedures and/or treating a patient

Surgeons glove (used during surgery or for other tactile contact)

Pad elbow/pr (placed under patient's elbows and heels during surgery)

Sponge prep (used by nurse to wash patient prior to surgery or other procedure)

Blanket

Towel disp

Drape zimmer

Sheet disp

Scalpel disp

bk table cover

mayo cover

gown disp

sleeve disp

cover x-ray

cover scope

cover vidrape

Lap sponges

Raytec sponges

Neuro sponges

Arm drape

Basin disp or sheet disp

Bottle disp

Sheet extremity

Ioban drape

Laser drape

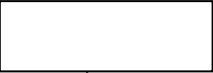
Micro laser drape

Drape hip

Morgan Lens (a contact-style lens with a tube attached used only by a doctor or nurse for irrigating the eye.)

As noted above, page 5 of the Tax Tips Pamphlet states that optical equipment or apparatuses, as well as housekeeping supplies including bedding, and items such as pads, compresses, supports and dressings are self-consumed even if billed as separate charges. That page specifically states that disposable drapes and surgeons gloves used in surgery for which the patient does not obtain title and possession but which are billed as separate charges must be purchased tax-paid because they are self consumed. I alternatively conclude that since hospital blankets are bedding and are generally retained and reused, they fall within the definition of bedding in the pamphlet. Therefore, there was no sale at retail of the blankets.

(b) Disposable Needles.

 Tax Counsel [---], in a March 2, 1982 letter, stated that syringes which are used as part of a hospital's medicine delivery system and which never leave the hospital are self-consumed. I can find no logical nor legal reason to treat a disposable needle differently from a disposable syringe. Disposable needles can only be delivered to patients upon prescription by a doctor. In hospitals, needles are used by professional staff only for rendition of treatment to patients. They are self-consumed.

(c) Bedpan Fracture and Urine Collector

New items in this petition are (1) a bedpan fracture which is used with a patient with severely limited activity and also serves as a container for output measure and (2) a urine collector provided to obtain samples for measurement, chemical testing or fluid retention monitoring. For the reasons set forth above, the items are self-consumed regardless of being disposable.

COMMENT: This makes no sense. The issue here appears to be self-consumption/passage of title, not medicine vs. nonmedicine. Thus, if the hospital gives a disposable needle to the patient for his or her own use, this would obviously be a different situation than a syringe (or needle) used by hospital staff. Nevertheless, the conclusion is based on use by hospital staff (as opposed to transfer to patient).

DHL 3/30/98

(d) Chux.

Chux are the plastic-lined pads which are often placed under various parts of the patient's body in the hospital bed to gather fluids and catch debris. They are routinely placed on hospital beds, etc., as a form of disposable bedding. When so used, they are self-consumed. [See linen exclusion in Exhibits B and C.]

Use of Chux occasionally requires professional or technical services of nurses to examine and weigh them in order to determine the amount of body fluid discharged into the Chux for purposes of treatment and diagnosis. When so used, the Chux are self-consumed as part of the technical or professional services rendered by petitioner.

(e) Alternative Birthing Pads

Another new item now in dispute is an alternative birthing pad which was described as a shoulder-to-the-basin pad placed on the birthing bed under the mother during delivery to keep the birth area relatively clean and to catch body waste and fluids for observation and measurement. Title and possession never passes to the patient. These items are used to render technical and professional services.



(f) Bedpans, Urinals, and Thermometers.

Bedpans and urinals are generally plastic and non-reusable. These are not items routinely given to all patients as part of an admit kit. They are primarily used by the hospital staff to provide services to nonambulatory patients. The nursing staff is often required to measure the post-operative output in these containers and to obtain samples for lab tests. They are self-consumed in the performance of professional or technical services for treatment of the patient or diagnosis.

Thermometers and thermometer covers are self-consumed by hospitals as part of the technical and professional services they render to patients. Petitioner routinely maintains patient data concerning the temperature, blood pressure, and other monitorable vital signs. Patients are not allowed to take their own vital signs or enter such information on their medical charts. Such uses of thermometers and thermometer covers³ are self-consumed uses.

³ I infer that the thermometer covers are plastic sheathes which cover the sensors of computerized, reusable thermometers.

(g) Peri-bottles

Peri-bottles are plastic squeeze bottles with applicator lids that often contain sterile or medicated fluids used to rinse stitches and wounds. They are commonly used after episiotomies to prevent infection from germs and bacteria and to promote the decomposition of stitches. Often, however, after the patient's condition improves and the patient has been trained as to procedure, further use of the peri-bottles is left to the patient. The logic underlying Tax Counsel [---]'s aforementioned May 30, 1975 letter to [---] concerning enema and douche kits would seemingly be equally applicable to peri-bottles.

I note that similar disposable bottles, when they are used in connection with enema preparations, are treated as exempt containers under BTLG Annotation 425.0380 (5/15/85). It is my understanding that these peri-bottles often contain medications and other irrigation solutions. BTLG Annotation 425.0480 (9/13/62) provides that irrigation solutions furnished in the manner described in Sales and Use Tax Regulation 1591(a) constitute medicines exempt from tax and that in some instances distilled water can also be exempt from tax. [See: BTLG Annotation 425.0350 (6/10/70).] In a March 2, 1982 letter responding to a general inquiry by [---], Tax Counsel --- stated tax applies to the purchases by hospitals of empty intravenous solution containers and empty enema bags because no sale of the containers occur. "We have previously determined that such containers are part of the hospital's medicine handling system and never leave the hospital's possession until they are thrown out by the hospital. As such, the hospital is the consumer of the containers. Tax will apply to their sale to the hospital." It is my opinion that peri-bottles serve a function similar to the aforementioned containers and should be treated as self-consumed.

(3) Other Items.

I recognized specific circumstances in A, where a particular central supply item could be self-consumed when used in a certain manner by hospital employees or doctors and sold at retail at other times. For example, diapers used in nurseries by nurses may be self-consumed whereas diapers provided to parents upon discharge of a newborn would be sold at retail. Other examples are sanitary pads, sanitary belts, adult diapers and infant diapers.

Since petitioner has taken a nonproration posture on the issue of self-consumption, in retrospect I believe it would be shifting the burden of proof to now require the Department to investigate all uses of these central supply items in order to develop its own allocation. Because these items are sold and petitioner has not proved that all their uses are self-consumed under "the tax tip rule" guidelines, I am retracting my reaudit instructions. I therefore find that these items to have been sold at retail.

C. Use Tax on Purchases from Out-of-State Vendors

Petitioner produced documents to prove that certain purchases from out-of-state vendors were erroneously included in the measure of use tax determined by the Department. The

Department stated it would review these documents with other related records during any reaudit. If the parties do not agree after the reaudit, both sides may submit written arguments.

Recommendation

Reaudit in accordance with the opinions set forth above.

Janice M. Jolley, Staff Counsel
(with Exhibits A, B, and C)

April 30, 1992
Date