

M e m o r a n d u m**425.0021**

To: Mr. Donald Herrmann
Senior Tax Auditor
Audit Rev. & Ref. Sect. (MIC:40)

Date: January 10, 1996

From: John L. Waid
Senior Staff Counsel

Subject: X-----

I am responding to your memorandum to Assistant Chief Counsel Gary J. Jugum regarding this taxpayer's claim for refund. The taxpayer has claimed a violation of its equal protection rights. You attached the Claim for Refund to your memorandum and asked for a suggested response to the taxpayer's allegations. We suggest the following:

“The basis for your refund claim is that the Department of Health Services (DHS) maintains that sales of creams and washes for incontinent persons are medical items not subject to sales tax under Regulation 1591(b) (1) but that such sales of creams and washes have been determined by the Board to be subject to tax when they are not sold or otherwise transferred pursuant to Regulation 1591(a). As a result, DHS does not reimburse medical supply houses for tax that they pay on their sales of such items. You claim that this situation violates your rights to equal protection under the Federal Constitution.

“Where taxation is concerned and no specific federal right, apart from equal protection, is imperiled, the States have large leeway in making classifications and drawing lines which in their judgment produce reasonable systems of taxation.” Lehnhausen v. Lake Shore Auto Parts Co. (1973) 410 U.S. 356, 359. There appears to be no federal issue here other than your assertion of equal protection. You assert your rights under "the federal system of funding and dispensing such funds to qualified providers via the California administered MediCal program is imperiled and should preempt the SBE's right to assert sales tax in a discriminatory fashion." MediCal is a state-run program in which the federal government supplies money for reimbursement of patients for their medicinal costs. As such, transfers of tangible personal property under MediCal are subject to the Sales and Use Tax Law. The courts have repeatedly upheld a state's right to draw rational classifications in furtherance of its tax programs. (See, Oliver and Williams Elevator Corp. v. St. Bd. of Equalization (1975) 48 Cal.App.3d 890, 894-895.)

"DHS has chosen, apparently, not to follow the Board's interpretation of Revenue and Taxation Code section 6369 as regards the sales of incontinence creams and washes by medicinal supply houses. The issue in this claim thus concerns an apparent conflict in opinions issued by two state agencies. As a state agency, the State Board of Equalization has no power to declare a state law unconstitutional. (Cal. Const. Art. III, § 3.5.) Therefore, the Board must enforce the statute as written.

"Finally, as no federal programs are involved, there is no specific federal right in danger. The resolution of this matter depends entirely on the state law principles set forth above."

JLW:sr

Cc: X----- District Office