



STATE BOARD OF EQUALIZATION

(916) 445-6453

December 20, 1985

Mr. A--- T. C---, Jr.
XXXXX --- --- Avenue
--- ---, CA XXXXX

Re: R--- A---, dba V--- P---
SR -- XX-XXXXXX
Prescription Records – Audit Examination

Dear Mr. C---:

This is in reply to your September 26, 1985 letter to me, in which you are responding to my September 23, 1985 letter to you regarding Mr. A---. You also enclosed with your letter to me your letter to Mr. Robert Nunes of the Board dated July 18, 1985.

In summary, your letters of September 26 and July 18 appear to raise two issues. The first issue relates to whether or not the Board can declare a prescription invalid, declare that those pills are therefore missing from the pharmacist's inventory, and assess tax against the pharmacist based on the audit pending of Mr. A---'s pharmacy, and you relate that the Board's auditor has told you that he could determine whether a particular prescription was written for legitimate medical purposes or not. You contend that the Board does not have the authority to determine whether or not a prescription is invalid, and that is the duty of other State agencies.

The second issue you raise relates to whether or not the Board has the authority to obtain the names and addresses of patients, and the medications which they received, which is information contained on the prescription records maintained by the pharmacist. You contend that my September 23, 1985 letter to you is the opinion of the auditing agency, and you are still requesting an opinion from another agency. You also ask if we would request an opinion from the Auditor General's office.

Opinion

With respect to the first issue you raise, we are not in a position to comment on what the Board auditor did or did not tell you in his conversations with you. We are in a position, however, to give you our opinion on what conditions must be met before a pharmacist's filling of a prescription for medicines qualifies for an exemption from sales and use tax.

Revenue and Taxation Code section 6369 provides an exemption from sales and use taxes for medicines which are prescribed for the treatment of a human being by a person authorized to prescribe the medicines, and dispensed on prescription filled by a registered pharmacist in accordance with law. Thus, a sale of prescription medicines which qualifies for this exemption is not a taxable retail sale.

Revenue and Taxation Codes section 6091 provides, among other things, that it shall be presumed that all gross receipts are subject to tax until the contrary is established, and that the burden of proving that the sale of tangible personal property is not a sale at retail is upon the person who makes the sale. Under this section, the pharmacist, and not the Board, has the burden of establishing that his filling of a prescription qualifies for the section 6369 exemption for prescription medicines.

Finally, Revenue and Taxation Code section 6481 provides, among other things, that if the Board is not satisfied with the return or the amount of tax required to be paid to the State by any person, the Board may compute and determine the amount required to be paid upon the basis of the facts contained in the return or upon the basis of any information within its possession or that may come into its possession. Thus, if a pharmacist has not established to the Board's satisfaction that a prescription does qualify for the section 6369 exemption, then the Board has the authority, and the duty, to make a determination of the amount of tax due based on any information available to it. An estimate of the "street value" of drugs qualifies as information available to the Board which it may use in determining the amount of tax due.

In summary, then, our opinion is that Mr. A--- has the burden of establishing by satisfactory evidence to the Board, during the course of the Board's audit of Mr. A---, that the prescription medications which he sold do in fact qualify for the section 6369 exemption. If he fails or refuses to do so, then the Board may use any information available to the Board to determine the correct amount of tax due.

The second issue you raise in your September 26 letter has already been answered in my September 23 letter to you, and there is no need to repeat the substance of that letter again. We see no need to request an opinion of this subject from the Auditor General's office, and we cannot see how the Auditor General's office would be involved in this issue in any event. However, you are free to request an opinion from that office if you wish, and we have no objection to your doing so.

You state in your September 26, letter, that "we have not withheld any information from the Board of Equalization." This is contrary to my understanding of the facts. My understanding is that you have withheld from the Board's auditor the names and addresses of the patients who received the medicines, contending that those records are confidential. While you may feel that those records are not relevant to the Board's audit, they are nevertheless records which the Board is entitled to inspect, and it is up to the Board's auditor to determine whether or not those records are relevant to the audit.

I also note that I received a copy of a letter dated November 15, 1985, from the Board of Pharmacy to you. In that letter, the Board of Pharmacy presumes that one of the questions you asked of them was who is authorized to inspect and remove prescriptions from a pharmacy. The Board of Pharmacy states that section 4232 of the Business and Professions Code specifies that all records of manufacturer and of sale, purchase of, or disposition of drugs are open to inspection authorized officers of the law. Section 4049.5 of the Business and Professions Code further defines "authorized officers of the law" as legally empowered peace officers, inspectors of the State Board of Pharmacy or the Department's Division of Investigation, and Inspectors of the State Bureau of Food and Drug Inspection.

There are several things I want to bring to your attention about this letter. First, there has been no indication to me that the Board of Equalization has sought to remove any of the records of Mr. A---'s prescriptions from the pharmacy. The Board has merely sought to inspect the records. Second, the effect of section 4232 is limited to certain specified dangerous drugs, and not all medicines sold by prescription by pharmacists. Third, the Board has not contended that it is entitled to inspect Mr. A---'s records under section 4232. Rather, as I pointed out in my September 23 letter to you the Board's authority to inspect these records is found in section 4331 of the Business and Professions Code which provides that all prescriptions filled shall be kept on file and open for inspection by duly constituted authorities. Section 4323 has no relevance to the issue of whether the Board is entitled to inspect Mr. A---'s prescription records for the purpose of determining whether those prescriptions qualify for the section 6369 exemption.

I trust that this letter will be satisfactory to answer the issues you have raised.

Very truly yours,

John Abbott
Tax Counsel

JA:nb