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Executive Director

January 31, 1997

X-----

Re: X-----
Hot Tubs as
Medical Devices

Dear X-----,

I am responding to your letter dated December 4, 1996 to the Chief Counsel. You ask if sales or use tax applies to the sale to you of a hydrotherapy unit. You attached to your letter a copy of a letter "To Whom it May Concern," dated September 10, 1996, by X----- recommending that you procure a "hot tub or similar hydrotherapy device" to treat the discomfort resulting from your arthritis.

OPINION

A. Sales and Use Tax Generally.

In California, except where specifically exempted by statute, Revenue and Taxation Code section 6051 imposes a sales, 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. Bd. of Equal. (1953) 137 Cal.App.2d 87, 96 [290 P.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. Prescription Medicines.

Section 6369, interpreted and implemented by Title 18, California Code of Regulations, section 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.6r use tax. (Reg. 1591(a).) Subdivision (b) (1) defines "medicine" 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 and which is commonly recognized as a substance or preparation intended for such use." However, Regulation 1591(c) (2) adds that "medicines" do not include "articles which are in the nature of splints, bandages, pads, compresses, supports, dressings, instruments, apparatus, contrivances, appliances, devices, or other mechanical, electronic, optical or physical equipment or article or the component parts and accessories thereof." (Sales and Use Tax Regulations are Board promulgations which have the force and effect of law.) As a rule, then, items used to diagnose a condition or to apply medicine or treatment to the patient are not considered to be medicines .

When the medicine exemption was originally enacted in 1961, the only items considered to be "medicines" are those defined now in Regulation 1591(b) (1). Durable medical equipment (DME) was totally excluded. Gradually, beginning in 1970, some items of DME were defined as being "medicines." The statutes are very specific as to the items included, the only general classes of items being prosthetic and "orthotic devices." Regulation 1591(b) (4) includes orthotic devices, or their replacements, designed to be worn on the person of the user as a brace, support, or other correction for the body structure. Regulation 1591(b) (5) includes prosthetic devices and their replacement parts designed to be worn on or in the person of the user to replace or assist in the functioning of a natural part of the human body.

You liken a hot tub to a cane, etc., because it will "produce a substantial improvement in [your] motion." While use of the tub may produce the desired result, it is not one of the items listed in section 6369.2.

A hot tub is not one of the specific items listed nor does it qualify under Regulation 1591 (b) (4) or (b) (5) as an orthotic or prosthetic device for sales and use tax purposes. As a result, the sale to you of such a device is subject to tax.

For your information, I have included a copy of Regulation 1591. 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
Senior Tax Counsel

JLW:sr

Enclosure: Reg. 1591

Cc: X----- District Administrator