



**STATE BOARD OF EQUALIZATION**

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October 17, 1990

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Dear ---:

Your letter of July 25, 1990 to Mr. D. J. Hennessy has been referred to the undersigned for reply. You have raised several questions as a result of the court's decision in Purdue Frederick v. State Board of Equalization, 218 Cal.3d 1020 (1990).

Before answering your questions specifically, we would like to provide you with a general analysis of the court's decision in this matter.

In the Purdue Frederick decision, the California Court of Appeals found that Betadine Surgical Scrub (Betadine) is an antiseptic, microbicidal, sudsing skin cleanser distributed and sold to hospitals for preoperative use on patients, preoperative scrubbing by doctors, nurses and other operating personnel, and for hand cleansing by hospital personnel caring for and treating patients was a "medicine" within the meaning of Revenue and Taxation Code section 6369 and Sales and Use Tax Regulation 1591. The Board's position in the case was that Betadine comes within the definition of the term "medicine" only when it was applied directly to patients. The court disagreed and found that the Board's definition of the words "treatment of patients" was too narrow. It concluded that when a substance such as Betadine "is applied by hospital personnel to their own bodies it is undeniable that its germicidal effects benefit the patient and constitutes a critical component of the patient's treatment." The court placed great weight on the different wording found in section 6369(a)(2) which exempts medicines "furnished by a licensed physician and surgeon, dentist or podiatrist to his or her own patient for treatment of the patient to section 6369(a)(4) which employs the broader term "human being" evidencing, according to the court, "a legislative intent to expand the exemption in a health facility context."

Finally, the court observed that the Board has also found the following non-prescription items to be exempt medicines when applied to patients in a hospital setting: baby powder and lubricating jelly (BTLG Anno. 425.0180), Diaperene powder, baby oil and ethyl alcohol (BTLG Anno. 425.0320), rubbing alcohol (BTLG Anno. 425.0780), enema preparations (BTLG Anno.425.0380) and vitamins (BTLG Anno. 425.0940).

Sales and Use Tax Regulation 1591(a) currently provides, as follows:

“Tax applies to retail sales of drugs, medicines, and other tangible personal property by pharmacists and others except as follows:”

“Tax does not apply to sales of medicines for the treatment of a human being which medicines are:

“(1) 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, or

“(2) furnished by a licensed physician and surgeon, dentist<sup>1</sup> or podiatrist to his own patient for treatment of the patient, or

“(3) furnished by a health facility for treatment of any person pursuant to the order of a licensed physician and surgeon, dentist or podiatrist, or

“(4) sold to a licensed physician and surgeon, dentist, podiatrist or health facility for the treatment of a human being, or

“(5) sold to this state or any political subdivision or municipal corporation thereof, for use in the treatment of a human being; or furnished for the treatment of a human being by a medical facility or clinic maintained by this state or any political subdivision or municipal corporation thereof, or

“(6) in the case of hemodialysis products supplied on order of a licensed physician and surgeon to a patient by a registered pharmacist or by a manufacturer, wholesaler, or other supplier authorized by Section 4050.7 or 4227 of the Business and Professions Code to distribute such products directly to hemodialysis patients.” (Footnote omitted.)

The general definition of the term “medicines” is found in Regulation 1591(b) which provides:

“‘Medicines’ 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.”

The remainder of the items listed in Regulation 1591(b) are specific exemptions provided by the Legislature.

We are of the opinion that no amendments are needed to Regulation 1591 as a result of the court’s decision in Purdue Frederick. The court did not change the definition of the term “medicines.” It merely expanded the Board’s previous interpretation of what constitutes the treatment of a human being within the context of a hospital/health facility. Under the court’s view, an item must still be a substance or preparation” and there must be a causal connection between its use and the treatment of a human being.

The practical result is that in addition to “Betadine,” other substances and preparations such as lubricating jelly and rubbing alcohol might also be considered exempt when applied by hospital personnel for use on patients. However, it does not appear that there are many items which would appear to meet the test of (1) a substance or preparation, which (2) is applied by hospital personnel and constitutes a critical component of the patient’s treatment.

Briefly summarized, your reading of the case is:

- “1. a medicine, if meeting the definition of Section 6369 (b), need not be applied to a patient specifically,
- “2. but merely to a person [Section 6369(a)(4)] for the prevention of disease,
- “3. when sold to, or purchased by, a health facility.”

Further, you note the court concluded that the “medicine” need not be a “prescription” medicine to meet the conditions of the section, only that “there is a medical necessity and required procedure commonly recognized and required by hospitals of their (surgical) personnel.

Working from the above concepts, you have looked at a broad range of products which seem to meet the following criteria:

- “A. sold to or purchased by health facilities,
- “B. applied internally or externally to the human body,

“C. mitigates or prevents disease, and

“D. (commonly) recognized substance or preparation intended for that use.”

Additionally, you have checked the definitions of the words “substance” and “preparation” and found that there is nothing implicit in either word suggesting a product’s essential nature. You have presented the Webster’s definitions of the terms preparation, medicinal, and substance.

Your conclusion is that the terms substance and preparation may be interpreted more broadly, rather than narrowly, in this context. That is, the words substance or preparation are limited more by the manner in which the code excludes specific items from the definition of medicines than by a limitation implicit in the terms themselves.

Finally, you ask that we consider the definition for application, as in “external or internal application: Act of laying on or administering.” Laying on is viewed as applying or spreading on a surface while administering is defined as applying as a remedy. Therefore, the word application does not appear restrictive with regard to a specific type or form of product.

Your specific questions and our answers follow:

Question: Are protective products worn by hospital personnel such as exam gloves, surgical gloves, surgical hoods, beard covers, masks, face shields, gowns, smocks, shoe covers, pants, shirts, and head coverings exempt from tax as a result of this decision?

You note by way of explanation that all of the above products are worn by personnel either; “to prevent contact with a patient’s diseased or infected bodily fluids, waste or body parts to prevent the transmission of disease to the hospital employee, or to avoid bringing germ-laden personnel into contact with patients in order to prevent transmission of disease or infection to the patient.”

With regard to the above items, you ask that we consider the following questions:

“1. How broadly should the term ‘personnel’ be defined? Would these same product worn by food service employees, floor nurses and orderlies be non-taxable as well?

“2. If re-usable body coverings are purchased by the health facility and laundered by the facility or its contractor, are re-usable body coverings non-taxable as well as disposable products?

Question: Are protective products worn by patients and guests such as gowns, masks, shoe coverings, head coverings, and surgical drapes exempt from tax as a result of this decision?

By way of explanation, you note that all of the above items are worn by the patient: “to keep infection-breeding germs away from the patient, or to prevent guest contact with a patient’s diseased or infected bodily fluids, waste or body parts to prevent transmission of disease to the guest, or to avoid bringing germ-laden guests into contact with patients in order to prevent transmission of disease or infection to the patient.”

Surgical drapes are laid on or affixed to the patient during surgery to keep the surgical area clean, free of debris and separated from other parts of the patient’s body which have not received full antimicrobial treatment to prevent transmission of disease and infection.

You have asked that we consider that with regard to the above items if re-usable body coverings are purchased by the health facility and laundered by the facility or its contractor, are re-usable body coverings non-taxable as well as disposable products?

Answer: We are of the opinion that none of the above listed items are considered “a substance or preparations” as that term is used in Revenue and Taxation Code section 6369. We disagree with your expansion of the term “substance or preparation” to include any particular kind of matter.” This expansion is not logical in light of the Legislature’s further definition of the term “medicines” which specifically excludes “[a]rticles 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,” and Regulation 1591 which provides that: “‘Medicines’ does not include arch supports, cervical pillows, exercise weights (boots or belts), hospital beds, orthopedic shoes and supportive devices (unless an integral part of a leg brace or artificial leg), plastazote inserts, plastazote shoes, plastic shoes (custom or ready-made) sacro-ease seats, shoe modifications, spenco inserts, traction units, (other than those fully worn on the patient), thermophore pads, nor foot orthoses.”

The Purdue Frederick decision did nothing to change the definition of the term “medicines” or the exclusions the Legislature has previously determined. Your interpretation completely ignores this distinction. Our opinion is buttressed by the court’s comment in Purdue Frederick which lists other similar “substances and preparations” such as lubricating jelly and ethyl alcohol.

Question: Are impregnated sponges and applicators exempt from tax under this decision?

You note that many of the vendors that sell antimicrobial surgical scrub products also sell preimpregnated sponges and/or applicators which, when brought in contact with water, lather up for scrub use or contain enough antimicrobial material to be used without water. Previously, similar products have been viewed as exempt when sold to hospitals and used on patients. Following the decision of the court, you trust that these products used on hospital personnel are also exempt. Is this correct?

Answer: Yes, we are of the opinion that a sponge impregnated with antimicrobial material would be considered an exempt medicine when sold to hospitals for use on patients or for use by hospital personnel in their treatment of a human being.

Question: You have generally concluded that numerous other products, such as instrument sterilizing agents, antimicrobial janitorial supplies, isolation laundry bags, etc., do not meet the conditions of the court's finding as the products are not applied to the human body. You would like to know if this is true.

Answer: Correct. We do not find the necessary causal connection between the use of these products and the treatment of the human being.

If you have further questions concerning this matter, please write this office again.

Very truly yours,

Mary C. Armstrong  
Senior Tax Counsel

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