

STATE OF CALIFORNIA
BOARD OF EQUALIZATION

425.0161.775

BUSINESS TAXES APPEALS REVIEW SECTION

In the Matter of the Petition)	
for Redetermination Under the)	DECISION AND RECOMMENDATION
Sales and Use Tax Law of:)	
)	
S--- H--- C--- C---)	No. SR -- XX-XXXXXX-010
INC., ET AL)	
)	
<u>Petitioner</u>)	

The Appeals conference in the above-referenced matter was held by Senior Staff Counsel W. E. Burkett on June 27, 1994 in Houston, Texas.

Appearing for Petitioner: Mr. L--- S--- III, CPA
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Ms. B--- M---, CPA

Appearing for the Sales and Use Tax Department: Mr. Sidney Zigelman
Area Administrator

Mr. Steven S. Smith
Supervising Tax Auditor

Mr. Allen G. Knights III
Senior Tax Auditor

Protested Item

The protested tax liability for the period January 1, 1989 through September 30, 1991 is measured by:

<u>Item</u>		<u>State, Local and County</u>
A. Disallowed ex-tax rental receipts based on a test of 17 months resulting in a .30537% factor of error.	\$794,499	
Less: Reaudit Adjustment	<u>\$-22,376</u>	
Net Amount Item A		\$772,123

Contentions of Petitioner

A.1. The test methodology used to compute the measure of tax is incorrect or incomplete.

A.2. Certain leases included in the test disallowance actually qualify as leasing of exempt medicines.

Summary

The petitioner is a partnership engaged in the business of selling and renting medical equipment and supplies.

Protested Item A

The petitioner initially objected to the test period and test basis used to compute the separate percentage of disallowance for exempt medicines represented by protested item A. At the conference, petitioner's representative indicated that it did not wish to present any accounting evidence to dispute the methodology employed by the auditor, but did intend to present evidence to show that certain items disallowed in the test period actually qualified as exempt medicines and by reason of this the test percentage and total test amount would require a recomputation.

The petitioner has presented a schedule listing 32 separate items it contends qualify as exempt medicines. Its representative has also presented photocopies of certain sections of the Code of Federal Regulations which contain general descriptions of the use to be made of some of the listed items.

On August 17, 1994 a further meeting was held at the petitioner's place of business located at XXXX --- Street, ---, California. At this meeting L--- M---, a Licensed Respiratory Care Practitioner, employed by petitioner provided brochures and other information calculated to explain the use of the subject items. A summary description of the method of attachment and use of each protested item is set forth in our analysis followed by our conclusions and the reason for the classification of each item.

The following is a summary of the Sales and Use Tax Department's position:

(1) A visual inspection was made of medical equipment in question. This was done to determine if the articles could be considered medicine per Regulation 1591. Those items that qualified were eliminated from the tax measure in the reaudit.

(2) There is no evidence rental equipment was reported based on purchase price. Therefore, tax is due on rental receipts and this election is irrevocable.

Analysis & Conclusions

Our review indicates that the Department used the best available data to compute the adjustment for taxable rentals. Under ruling case law the petitioner has the burden of producing evidence to overcome the auditor's accounting evidence. (See Riley B's, Inc. v. State Board of Equalization (1976) 61 Cal.App.3d 610; also see E. C. Barnes v. State Board of Equalization (1981) 118 Cal.App.3d 994.) In the absence of such evidence, no adjustment is recommended to the methodology used to compute the measure of tax. We do recognize, however, that the amount of disallowance for each item must be recomputed if it is determined that any of the 32 items claimed to represent exempt medicines are determined to qualify for exemption.

The remaining question presented is whether any of the 32 listed items qualify as exempt medicines within the meaning of Revenue and Taxation Code Section 6369 which reads as follows:

“6369. **Prescription medicines.** (a) There are exempted from the taxes imposed by this part the gross receipts from the sale, and the storage, use, or other consumption, in this state of medicines:

Note changes to § 6369. SPJ 3/15/02.

“(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.

“(2) Furnished by a licensed physician and surgeon, dentist, or podiatrist to his or her own patient for treatment of the patient.

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

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

“(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.

“(b) ‘Medicines’ as used in this section, means and includes 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 that use. However, ‘medicines’ does not include any of the following:

“(1) Any auditory, prosthetic, ophthalmic or ocular device or appliance.

“(2) 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.

“(3) Any alcoholic beverage the manufacture, sale, purchase, possession or transportation of which is licensed and regulated by the Alcoholic Beverage Control Act (Division 9 (commencing with Section 23000) of the Business and Professions Code).

“(c) Notwithstanding subdivision (b), ‘medicines’ as used in this section means and includes any of the following:

“(1) Sutures, whether or not permanently implanted.

“(2) Bone screws, bone pins, pacemakers, and other articles, other than dentures, permanently implanted in the human body to assist the functioning of any natural organ, artery, vein, or limb and which remain or dissolve in the body.

“(3) Orthotic devices, other than orthodontic devices, designed to be worn on the person of the user as a brace, support or correction for the body structure, and replacement parts for these devices. However, orthopedic shoes and supportive devices for the foot are not exempt unless they are custom-made biomechanical foot orthoses or are an integral part of a leg brace or artificial leg. For purposes of this paragraph, ‘custom-made biomechanical foot orthoses’ means an individually prescribed foot orthosis which is custom fabricated over a neutral or near neutral subtalar joint with a pronated midtarsal joint position positive plaster model of the patient’s foot, which model, when the cast is modified to support the osseous position of the forefoot in relationship to the rear- foot, embodies the angular osseous relationships of the anterior and posterior portions of the foot.

“(4) Prosthetic devices, and replacement parts for such devices, designed to be worn on or in the person of the user to replace or assist the functioning of a natural part of the human body, other than auditory, ophthalmic and ocular devices or appliances, and other than dentures, removable or fixed bridges, crowns, caps, inlays, artificial teeth and other dental prosthetic materials and devices.

“(5) Artificial limbs and eyes, or their replacement parts, for human beings.

“(6) Programmable drug infusion devices to be worn on or implanted in the human body.

“(d) ‘Health facility’ as used in this section has the meaning ascribed to it in Section 1250 of the Health and Safety Code.

“(e) Insulin and insulin syringes furnished by a registered pharmacist to a person for treatment of diabetes as directed by a physician shall be deemed to be dispensed on prescription within the meaning of this section.

“(f) Orthotic and prosthetic devices, and replacement parts for these devices, furnished pursuant to the written order of a physician or podiatrist, shall be deemed to be dispensed on prescription within the meaning of paragraph (1) of subdivision (a), whether or not the devices are furnished by a registered pharmacist.

“(g) Mammary prostheses, and any appliances and related supplies necessary as the result of any surgical procedure by which an artificial opening is created in the human body for the elimination of natural waste, shall be deemed to be dispensed on prescription within the meaning of this section.”

Section 6369 is implemented by the provisions of Sales and Use Tax Regulation 1591. In addition to the cited provisions of the Federal Code of Regulations presented at the conference, the petitioner relies in particular on the provisions of Revenue and Taxation Code Section 6369(b) and Sales and Use Tax Regulation 1591(b)(4). The provisions of 1591(b)(4) of the regulation read as follows:

“(b) **DEFINITION OF ‘MEDICINES’.** The term ‘medicines’ means and includes:

“(4) Orthotic devices, or their replacement parts, designed to be worn on the person of the user as a brace, support or correction for the body structure; provided, that orthopedic shoes and supportive devices for the foot are not exempt unless they are an integral part of a leg brace or artificial leg or are custom-made biomechanical foot orthoses. ‘Custom-made biomechanical foot orthosis’ means a device which is made on a positive model of the individual patient’s foot. The model may be individually constructed from suitable model material such as plaster of paris, stone, or wax, and may be manually constructed or fabricated using electronic technology. The device described above excludes 1) any pre-made or pre-molded foot orthosis or shoe insert even if it has been modified or customized for an individual patient by the practioner regardless of the method of modification; 2) any foot orthosis fabricated directly on the patient’s foot regardless of the method and materials used and regardless of its individual character; and 3) any foot orthosis fabricated inside of the patient’s shoe regardless of the method of manufacture and materials used and regardless of its individual character. ‘Orthotic devices’ includes, but is not limited to, abdominal binders, ace bandages, ankle braces, anti-embolism stockings, casts, and cast components, cervical supports, neck collars, cervical traction devices, clavicular splints, post-surgical corsets, elbow supports, head halters, pelvic traction devices, post-operative knee immobilizers, rib belts and immobilizers, rupture holders, sacral belts, sacro-lumbar back braces, shoulder immobilizers, slings, stump shrinkers, support hose (and garter belts used to hold them in place), trusses, and wrist and arm braces.”

Note changes to Reg 1591(b)(4). SPJ 3/15/02.

Statutes granting exemption from taxation must be reasonably, but nevertheless strictly, construed against the taxpayer. (Santa Fe Transportation Co. v. State Board of Equalization, 51 Cal.2d 531, 539 [334 P.2d 907]; Fellowship of Humanity v. County of Alameda, 153 Cal.App.,2d 673, 680 [315 P.2d 394].) The taxpayer has the burden of showing that he clearly

comes within the exemption. (Fredericka Home for the Aged v. County of San Diego, 35 Cal.2d 789, 792 [221 P.2d 68]; Cedars of Lebanon Hospital v. County of Los Angeles, 35 Cal.2d 729, 734 [221 P.2d 31, 15 A.L.R.2d 1045].)

We understand that all of the leases denied exemption otherwise meet the requirements of subparagraph (a) of Section 6369. Our task is thus reduced to determining if the subject transactions qualify as exempt medicines within the meaning of subparagraph (b) of Section 6369.

A particular item may qualify as a medicine under Section 6369 if it is a “substance or preparation” applied to the human body in the diagnosis, cure, mitigation treatment, or prevention of disease. If the particular property is not a substance or preparation, then it still may qualify for exemption if it qualifies as an exception to the items specifically excluded from the medicine classification by subparagraph (b)(1), (2), and (3).

The petitioner’s representative relies primarily on subparagraph (c)(3) of Section 6369 the exception applicable to orthotic devices, other than orthodontic devices designed to be worn on the person of the user as a brace, support or correction for the body structure, and replacement parts for these devices. This provision is implemented by the provisions of Regulation 1591(b)(4).

Insofar as substances or preparations are concerned, the broad limitation is that the item must be applied to the body of a human being. With respect to orthotic devices, they must be worn on or in the person of the user. Medical devices, appliances or other similar articles which are merely attached to the body to perform monitoring or other measuring functions would not qualify for exemption even though the use may be ordered by a physician. The Board has previously ruled that the item must be worn entirely on the body of the user to meet the requirement of the statute for exemption. (Annot. 425.0242, Business Taxes Law Guide (BTLG) p. 3308.)

The term “orthotics” is defined as “the science concerned with the making and fitting of orthopedic appliances.” The commonly understood meaning of orthopedics is of “the medical specialty concerned with the preservation, restoration, and development of form and function of the musculoskeletal system, extremities and associated structures by medical surgery and physical methods.” (See Stedman’s Medical Dictionary, 25th ed.).

With these guideposts, we now consider the description and use of each of the 32 protested items followed immediately thereafter by our ruling on the classification on each item and the reasons therefor.

1. Air Purifier

A medical recirculating cleaner is a device used to remove particles from the air for medical purposes. (21 CFR 880.5045)

This is a mechanical device excluded from classification as a medicine pursuant to the provisions of Revenue and Taxation Code Section 6369(b)(2). It does not qualify for the orthotic device exception provided by Section 6369(c)(3) and Sales and Use Tax Regulation 1591(b) because it is not “designed to be worn on the person of the user as a brace, support or correction of the body structure”.

2. Alternating Pressure Pad and Pump

(a) An alternating pressure air flotation mattress is a device intended for medical purposes that consists of a mattress with multiple air cells that can be filled and emptied in an alternating pattern by an associated control unit to provide regular, frequent, and automatic changes in the distribution of body pressure. The device is used to prevent and treat decubitus ulcers (bed sores). (21 CFR 880.5550)

The mattress is placed on the hospital bed and inflated alternatively by panels which automatically relieve body pressure. A cover is placed over the mattress. A prescription is required for its use.

This is an item of physical equipment excluded from classification as a medicine by the provisions of Revenue and Taxation Code Section 6369(b)(2). It does not qualify for the orthotic device exception provided by Section 6369(c)(3) because it is not “designed to be worn on the person of the user as a brace, support or correction of the body structure”.

3. Apnea Heart Monitor

(a) A cardiac monitor (including cardiometer and rate alarm) is a device used to measure the heart rate from an analog signal produced by an electrocardiograph, vectorcardiograph, or blood pressure monitor. This device may sound an alarm when the heart rate falls outside preset upper and lower limits. (21 CFR 870.2300)

The unit marketed by the petitioner is a small monitor intended for use at home to monitor heart rate or respiratory rate. It is attached to the user by a belt and requires a “plug in” electrical source.

This is an item of equipment, appliance device or other article excluded from classification as a medicine by the provisions of Revenue and Taxation Code Section 6369(b)(2). (See Sales & Use Tax Annotation 425.0360 dated 10/30/62.) It does not qualify for the “orthotic device” exception provided by subparagraph (c)(3) of Section 6369 and Regulation 1591(b)(4) because it is not “designed to be worn on the person of the user as a brace, support or correction for the body structure”. Furthermore, before an item can qualify for the exception, the Board has ruled that the item must be fully worn on the person of the user. (See Sales & Use Tax Annotations 425.0850 dated 05/10/88 and 425.0242 dated 02/09/88.)

4. Aspirator

The Code of Federal Regulations does not contain a description of this item. The dictionary definition of an aspirator is as follows:

“An apparatus used for removal by suction of fluid or gasses contained within a cavity.”

It is our conclusion that this device does not qualify for exemption for the reasons stated in our ruling on item 3 herein. (See Sales & Use Tax Annotation 425.0530 dated 12/07/77.)

5. Blood Glucose Monitor

But see now Reg. 1951.1(b)(5) ¶2 SPJ 3/15/02. Glucose test strips and lancets are not subject to tax per change to Reg. 1591.1. SPJ 3/24/03.

(a) A glucose test system is a device intended to measure glucose quantitatively in blood and other body fluids. Glucose measurements are used in the diagnosis and treatment of carbohydrate metabolism disorders including diabetes mellitus, neonatal hypoglycemia, and idiopathic hypoglycemia, and of pancreatic islet cell carcinoma. (21 CFR 862.1345)

No additional information was provided for this item. It is obviously a device, however, which is used to measure blood glucose.

Our ruling for this item is the same as stated for item 3 and for the same reasons.

The Board has previously ruled that blood glucose monitoring equipment does not qualify for the medicines exemption. (Annot. 425.0215, BTLG p. 3307.) An exception is recognized for any substances used by a physician to affect a glucose test by internal application. (Annot. 425.0400, BTLG p. 3309.)

6. Chemstrips II 50's

See note at #5.

No additional information was provided for this item.

These are a form of glucose test strip which do not qualify as exempt medicines. (Annot. 425.0215, BTLG p. 3307.)

7. Compressor

A portable air compressor is a device intended to provide compressed air for medical purposes, e.g. to drive ventilators and other respiratory devices. (21 CFR 868.6250)

Our ruling for this item is the same as stated for item 3 herein and for the same reasons.

8. Continuous Passive Motion Devices

(a) Powered exercise equipment consist of powered devices intended for medical purposes, such as to redevelop muscles or restore motion to joints or for use as an adjunct treatment for obesity. Examples include a powered treadmill, a powered bicycle, and powered parallel bars. (21 CFR 890.5380)

The units marketed by the petitioner are specially configured to exercise a knee, shoulder, elbow, or wrist. They are placed on the floor or on the hospital bed and are powered electrically from a plug in source.

This is a device excluded from classification as medicine by the provisions of Revenue and Taxation Code Section 6369(b)(2). It does not qualify for the orthotic device exception provided by Revenue and Taxation Code Section 6369(c)(2) and Sales and Use Tax Regulation 1591(b)(4) because it is not “designed to be worn on the person of the user as a brace, support or correction of the body structure”. Furthermore, only items which are designed to be fully worn on the person of the user qualify for exemption.

9. Fetal Monitor

(a) A fetal ultrasonic monitor is a device designed to transmit and receive ultrasonic energy into and from the pregnant woman, usually by means of continuous wave (doppler) echoscopy. The device is used to represent some physiological condition or characteristic in a measured value over a period of time (e.g., perinatal monitoring during labor) or in an immediately perceptible form (e.g., use of the ultrasonic stethoscope). This generic type of device may include the following accessories: signal analysis and display equipment, electronic interfaces for other equipment, patient and equipment supports, and component parts. This generic type of device does not include devices used to image some relatively unchanging physiological structure or interpret a physiological condition, but does include devices which may be set to alarm automatically at a predetermined threshold value. (21 CFR 884.2660)

*Now see proposed amended Reg. 1591 operative 1/1/03; eff. approx. 5/29/03 which incorporates the Board's Memorandum Opinion in Action Medical Products Inc. re continuous passive motion machines. SPJ 3/24/03.

This device is attached by electrodes. It is used primarily in the latter stages of a pregnancy.

At the August 17, 1994 conference, petitioner's representative advised that investigation had disclosed that petitioner did not lease any fetal monitors. It is alleged that the description of the item disallowed was erroneous.

Our ruling on a fetal monitor is the same as stated for item 3 and for the same reasons.

An investigation will be required to determine if the auditor erred in his listing of this item.

10. Flywheel Exercycle

(a) Powered exercise equipment consist of powered devices intended for medical purposes such as to redevelop muscles or restore motion to joints or for use as an adjunct treatment for obesity. Examples include a powered treadmill, a powered bicycle, and powered parallel bars. (21 CFR 890.5380)

This is an item of powered exercise equipment utilized by the patient in the manner outlined above.

Our ruling for this item is the same as stated for item 3 and for the same reasons.

11. Full Fracture Frame

(a) A traction accessory is a nonpowered accessory device intended for medical purposes to be used with powered traction equipment to aid in exerting therapeutic pulling forces on the patient's body. This generic type of device includes the pulley, strap, head halter, and pelvic belt. (21 CFR 890.5925)

This is generally used with multiple traction devices. It consists of two vertical rods and one horizontal bar. It is somewhat of a connector for other traction devices. It is not portable but rather is attached to a hospital bed.

Our ruling for this item is the same as stated for item 3 and for the same reasons.

12. Glucoscan 30000 Meter

For numbers 12, 13, 14, 15, 17, and 20 (following), see note at #5 on page 9.

(a) A glucose test system is a device intended to measure glucose quantitatively in blood and other body fluids. Glucose measurements are used in the diagnosis and treatment of carbohydrate metabolism disorders including diabetes mellitus, neonatal hypoglycemia, and idiopathic hypoglycemia, and of pancreatic islet cell carcinoma. (21 CFR 862.1345)

Our ruling on this item is the same as stated for items 3 and 5 and for the same reasons.

13. Glucoscan Test Strips

These are glucose test strips. The Board has previously issued a ruling that this type item does not qualify as an exempt medicine. (See Annot. 425.0215, BTLG p. 3307.)

14. Glucose One Touch System

This is a separate type of glucose test system which does not qualify as an exempt medicine. The basic rule is that devices and other items used to conduct the tests are taxable. (Annot. 425.0215, supra.) Substances used to test by internal application are exempt. (Annot. 425.0400, supra.)

15. Hemocult Slides

Our ruling on this item is the same as stated for item 14 and for the same reasons.

16. Humidifier

(a) A therapeutic humidifier for home use is a device that adds water vapor to breathing gases and that is intended for respiratory therapy or other medical purposes. The vapor produced by the device pervades the area surrounding the patient, who breathes the vapor during normal respiration. (21 CFR 868.5460)

This is an acceptable definition of the item sold or leased by the petitioner. It does not qualify as an exempt medicine for the reason set forth in our ruling on item 3 herein.

The device does not qualify as part of an exempt oxygen delivery system as provided by Revenue and Taxation Code Section 6369.5 because it does not operate to deliver oxygen directly to the breathing passage of the patient.

17. Lancet Surelet

(a) A glucose test system is a device intended to measure glucose quantitatively in blood and other body fluids. Glucose measurements are used in the diagnosis and treatment of carbohydrate metabolism disorders including diabetes mellitus, neonatal hypoglycemia, and idiopathic hypoglycemia, and of pancreatic islet cell carcinoma. (21 CFR 862.1345)

No information was presented for this item other than the Code of Federal Regulation definition quoted above.

The item is excluded from classification as a medicine on the basis that it is a form of test equipment. The basis for our ruling is the same as stated for item 14 herein.

18. Nebulizers

(a) A nebulizer is a device intended to spray liquids in aerosol form into gases such as oxygen that are delivered directly to the patient for breathing. Heated, ultrasonic, gas, venturi, and refillable nebulizers are included in this generic type of device. (21 CFR 868.5630)

This is an adequate description of the device sold or leased by petitioner. It must be noted, however, that the unit operates to mix oxygen with medicine and to deliver the medicated air to the patient. It does not operate to deliver oxygen directly from the container to the patient.

It does not qualify as an exempt medicine because it is only a method of delivering medicine to a patient, and thus is a device excluded from the definition of "medicine". It does not qualify as an oxygen delivery system within the meaning of Revenue and Taxation Code Section 6369.5 for the reason set forth in our ruling on item 16.

19. Paraffin Bath

(a) A paraffin bath is a device intended for medical purposes that consists of a tub to be filled with liquid paraffin (wax) and maintained at an elevated temperature in which the patient's appendages (e.g., hands or fingers) are placed to relieve pain and stiffness. (21 CFR 890.5110)

This is an adequate description of the paraffin bath device sold or leased by petitioner.

It does not qualify as an exempt medicine for the reason set forth in our ruling on item 3 herein.

20. Penlet Auto Blood Sampling

(a) A glucose test system is a device intended to measure glucose quantitatively in blood and other body fluids. Glucose measurements are used in the diagnosis and treatment of carbohydrate metabolism disorders including diabetes mellitus, neonatal hypoglycemia, and idiopathic hypoglycemia, and of pancreatic islet cell carcinoma. (21 CFR 862.1345)

No information was submitted for this item other than the Code of Federal Regulations' definition quoted above.

The item is excluded from classification as an exempt medicine on the basis that it is a form of external test system. The basis for our ruling is the same as stated for item 14 herein.

21. Percussor

(a) A powered percussor is a device that is intended to transmit vibration through a patient's chest wall to aid in freeing mucus deposits in the lung in order to improve bronchial drainage and that may be powered by electricity or compressed gas. (21 CFR 868.5665)

No information was submitted for this item other than the Code of Federal Regulations' definition quoted above.

The evidence does not warrant a finding that the percussor is worn on the person of the user so as to come within the exception set forth in Revenue and Taxation Code Section 6369(c)(3) and Sales and Use Tax Regulation 1591(b)(4).

22. Portable Ultrasound

(a) A fetal ultrasonic monitor is a device designed to transmit and receive ultrasonic energy into and from the pregnant woman, usually by means of continuous wave (doppler) echoscopy. The device is used to represent some physiological condition or characteristic in a measured value over a period of time (e.g., perinatal monitoring during labor) or in an immediately perceptible form (e.g., use of the ultrasonic stethoscope). (21 CFR 884.2660)

No information was submitted for this item other than the Code of Federal Regulations' definition quoted above.

Our ruling on this item is the same as set forth for item 3 herein and for the same reasons.

23. Pulse Oximeter

(a) An oximeter is a device used to transmit radiation at a known wavelength(s) through blood and to measure the blood oxygen saturation based on the amount of reflected or scattered radiation. It may be used alone or in conjunction with a fiberoptic oximeter catheter. (21 CFR 870.2700)

No information was submitted for this item other than the Code of Federal Regulations' definition quoted above.

Our ruling on this item is the same as set forth for item 3 herein and for the same reasons.

24. Rowing Machine

This is a powered exercise equipment used to restore or redevelop muscles and to restore motion to joints. It is not fully worn on the person of the user.

It is our conclusions that this item is a device excluded from classification as a medicine under the provisions of Revenue and Taxation Code Section 6369(b)(2). It does not come within the orthotic device exception provided by Revenue and Taxation Code Section 6369(c)(3) and Sales and Use Tax Regulation 1591(b)(4) because it was not prescribed to be worn on the person of the user.

25. Stationary Bicycle

Same as stated for item 24 herein.

26. Tent Mist

(a) An electrically powered oxygen tent is a device that encloses a patient's head and, by means of an electrically powered unit, administers breathing oxygen and controls the temperature and humidity of the breathing gases. This generic type device includes the pediatric aerosol tent. (21 CFR 868.5710)

The item leased by the petitioner is a large tent type device with inlets for oxygen and water. They are delivered to the tent by separate delivery systems. The physician can regulate the density of the mist by use of the delivery systems.

Our ruling on this item is the same as stated for item 3 and for the same reason. The item does not qualify as a part of an oxygen delivery system within the meaning of Revenue and Taxation Code Section 6369.5 because it does not deliver oxygen directly from the receptacle to the patient. (See Sales & Use Tax Annotation 425.0910 dated 04/10/87.)

27. Trapeze

The trapeze is a bar-type device that is attached to the bed or to a separate traction system. It is used for entering or exiting the bed or for repositioning of the patient in the bed.

Our ruling on this item is the same as stated for item 3 herein and for the same reason.

28. Traction Std Sgl - Pull w/sp bar

Powered traction equipment consists of powered devices intended for medical purposes for use in conjunction with traction accessories, such as belts and harnesses, to exert therapeutic pulling force on the patient's body. (21 CFR 890.5900)

This is a form of bed traction utilized for treatment of a bed ridden patient. It is not worn fully on the person of the user and therefore does not qualify as a medicine within the meaning of Revenue and Taxation Code Section 6369(c)(3) and Sales and Use Tax Regulation 1591(b). It is excluded from classification as a medicine by the provisions of Revenue and Taxation Code Section 6369(b)(2).

29. Traction Overhead

Same general description as stated for item 28.

Our ruling on this item is the same as stated for item 28 and for the same reason.

30. Traction Necktrac System

This is another traction device that consists of a headcradle and pulley assembly. It is attached to a bed and used for stretching and/or manipulation of various body parts. This device does not qualify for the orthotic exception set forth in Revenue and Taxation Code Section 6369(c)(2) and Sales and Use Tax Regulation 1591(b)(4) because it is not worn fully on the person of the user. It is excluded from classification as a medicine by the provisions of Revenue and Taxation Code Section 6369(b)(2).

31. Traction 90/90

This is another form of bed traction device that is not worn fully on the person of the user.

Our ruling on this item is the same as stated for item 3 herein and for the same reason.

32. Weight Traction to 15 #

This is a nonpowered traction accessory that is used as a weight attachment for cables pulley, etc., in a bed traction set-up.

Our ruling for this item is the same as stated for item 3 herein and for the same reason.

We have carefully considered each of the protested items in light of the evidence provided and other information from the Board's files 1) none of the items constitute a substance or preparation; 2) all of the items constitute either appliances, devices, electrical or mechanical contrivances or other articles excluded from classification as medicines by the provisions of Revenue and Taxation Code Section 6369(b)(2); 3) none of the items qualify for the exception contained in Revenue and Taxation Code Section 6369(c)(3) for the reason that they were not designed to be worn fully on the person of the user; and 4) none of the items qualify for exemption under other sections of 6369 or any other provision of the sales and use tax law.

We also note that four of the items ruled on were considered to be nontaxable at various stages of the proceedings on one or more of the related accounts. This may have been the result of a prior ruling on a small humidifier that also served as a container for an exempt medicine. An exemption was granted upon a finding that the humidifier was a container. None of the items leased were sold as a unit with an item commonly understood to be an exempt medicine. Accordingly, a reaudit will be required to adjust for these items. At that time the auditor should also investigate the claim that fetal monitors included in tests were not sold or leased by this petitioner or any of the related accounts.

Recommendation

It is recommended that a reaudit be conducted to initiate adjustments as outlined herein.

W. E. BURKETT, SENIOR STAFF COUNSEL

DATE