



**STATE BOARD OF EQUALIZATION**

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Fourth District, Los Angeles

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Executive Director

March 3, 1997

X-----

Re: X-----  
PROTONICS Device

Dear X-----,

Your letter dated December 10, 1997, to the State Board of Equalization has been forwarded to the Legal Division for a response. You indicate that X----- is a X----- distributor of medical devices and "related accessories" and that it is registered to collect use tax in California. You ask if tax applies to X----- sales in California of the PROTONICS Device and its related accessories. You attached to your letter a copy of a brochure showing the device and how it is used. You describe the device as follows:

"A PROTONICS device, which is used in functional active resistance knee rehabilitation, serves as the exercise system to increase muscle strength and neuromuscular function. The device is worn by the user allowing him/her to exercise and perform daily activities. The device eliminates the need for taping or soft bracing of the knee. PROTONICS provides a controlled resistance to the hamstring, reducing the load on the eccentric quadriceps and relieving the compression on the patella. Related accessories include replacement pads, straps, extension kits, and flexion kits."

The pictures in the brochure show that the device is strapped to the patient's leg both above and below the knee. Its joint can be set for different resistances to allow the patient to perform a rehabilitation program and daily activities without pain. You indicate that X----- sells most of the devices to patients under a prescription from a healthcare professional, but healthcare professionals also use the device in their offices and sometimes purchase the devices for resale to patients.

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 P2d . 201.J) "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. 571J.)

#### 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 or 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.

Regulation 1591(b) does provide that certain items which might otherwise be considered as being devices, etc., are defined as "medicines." 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.

#### C. Tax Consequences.

We have previously determined that hinged knee braces that are fully worn on the body of the patient, such as the PROTONICS Device, qualify as orthotic devices under Regulation 1591(b) (4). Sales of such devices are exempt from tax only when sold under specified conditions. (Reg. 1591(i).) You indicate that these items are sold to "healthcare professionals" and to patients either by or under a "prescription from a health care professional." In California, only a licensed physician, dentist, or podiatrist is authorized to prescribe or write a prescription for the treatment of a human being. (Reg. 1591(e).) As a result, for the sales of the PROTONICS Device to patients to be exempt from tax, they must be sold pursuant to the written order of a licensed physician or podiatrist. Sales of the device pursuant to the order of other persons, such as physical therapists, are subject to tax.

You indicate that X----- does not have a rental program, but sometimes a patient is allowed to return a device if a return fee is paid. A deduction for returned merchandise is allowed as follows:

“The amount upon which tax is computed does not include the amount charged for merchandise returned by customers if; (1) the full sale price, including that portion designated as sales tax, is refunded either in cash or credit and (2) the customer, in order to obtain the refund or credit, is not required to purchase other property at a price greater than the amount charged for the property that is returned.” (Reg. 1655(a).)

The elapsed time between the sale and the return has no bearing if both conditions of the regulation are met. (Annot. 490.0233 (3/19/91; 5/14/96). Sales and Use Tax Annotations are excerpts from previous Board staff opinion letters and serve as guides to staff positions.) You provide no information on how the “return fee” is calculated, but it seems highly unlikely that it amounts to merely a restocking charge. The customer would otherwise have free use of the product. With the dearth of facts, we cannot give you a definite opinion, but if the sale of the device was subject to tax under the above authority, then it is probable that no deduction for the returned merchandise as described would be available.

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