

**STATE BOARD OF EQUALIZATION**

1020 N STREET, SACRAMENTO, CALIFORNIA  
(P.O. BOX 942879, SACRAMENTO, CALIFORNIA 94279-0001)  
(916) 324-3828

October 3, 1990

Mr. H--- H. I---  
XXXX --- Avenue, #XXX-XXX  
---, CA XXXXX

RE: B--- M--- Equipment & Supplies, Inc.  
SR – XX-XXXXXX

Dear Mr. I---:

Mr. O. A. McCarty, Supervisor, Return Review, has forwarded your letter of August 10, 1990, to the legal staff; it has been assigned to me for a response. You want to know if the sales of certain food products or medicines and their infusion systems to skilled nursing facilities are exempt from sales or use tax.

I. FACTUAL BACKGROUND

Your letter indicates you are the Manger of B--- M--- Supplies, Inc. (hereinafter “B---”), and the factual context of the issue is as follows:

“[W]e submit hereunder our explanation of the claimed deduction of \$32,095.00 in our March, 1990 Sales and Use Tax Return, as follows:

“Of the claimed deduction, the amount of \$18, 725.00 represents canned/bottled food products or “medicines” fed to patients known as “tube feeders” in skilled nursing facilities (SNF’s)....

“These items are prescribed by doctors for patients who cannot normally eat through the mouth, and for the treatment of malnutrition, severe weight loss, for faster healing of decubitus, and other ailments.

“The amount of \$13,370 (making up the balance of \$32,095.00) represents the tubings and devises needed for the infusion of the

food or “medicine” to the patients, and was lumped with the food items as these items are essential and indispensable to the proper dispensation of the food or “medicine” to the patient unable in view of a diagnosed disease to ingest food voluntarily through the normal means. These same items are specifically covered, however, by Regulation 1591(b)(7) of the Sales and Use Tax Regulations. “These items are devised to pre-determine volumes or quantities that will be infused to the patient, and to automatically infuse the food or medicine in measured rates of flow per hour, and to limit such infusion to a prescribed number of hours. Whether lumped with the food item, or specifically claimed under line 10(e) as prescription medicine, therefore, these items are non-taxable.

“For your specific review of the items represented in the claimed deduction, we attach herewith some literature explaining the nature and function of such items. We also attach herewith samples of the covering prescription for such items by doctors for the treatment of the patients, e.g.: Certification of Medical Necessity, and hospital charts showing the need for such items, in relation to the treatment of the patient.....”

## II. OPINION

### A. Sales and Use Tax Generally.

In California, except where specifically exempted by statute, Revenue and Taxation Code Section 6051 imposes an excise 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.)

### B. Exemptions

#### 1. Food Products

The sale of and the use, storage, or other consumption in California of food products for human consumption are exempt from sales or use tax. (6359(a).) Excepted from this exemption are medicines and preparations sold as dietary supplements or adjuncts. (§ 6359(c).) Tax does not apply, however, to any such products which either are exempted by Section 6369 or are complete dietary foods providing the user in the recommended daily dosage with substantial amounts of vitamins, proteins, minerals and foods providing adequate caloric intake. (18 California Administrative Code § (hereinafter “Regulation” or “Reg.”) 1602(a)(5).)

## 2. Prescription Medicines

Section 6369, implemented by Regulation 1591, provides that the sale, storage, use or other consumption in this state of medicines prescribed by an authorized person and dispensed by a registered pharmacist, furnished by a licensed health care professional for the care of his patient, furnished by a health facility for treatment of a person pursuant to the order of a licensed health care professional for the treatment of a human being, or sold to or furnished by The State of California or any municipal or political subdivision for the treatment of a human being is exempt from sales or use taxation. (§ 6369(a).) Code Section 6369(c)(6) provides that “programmable drug infusion devices to be worn on or implanted in the human body” are considered “medicines” as that term is used in Section 6369. Regulation 1591(b)(7), which implements Section 6369, requires “programmable drug infusion devices” to be devices which automatically cause the infusion of measured quantities of a medicine into the body of the wearer of the device. Specifically excluded from the definition of “medicines” are, among other things, bandages, pads, compresses, dressings, apparatus, appliances, devices, or other mechanical or physical equipment or article or the component parts and accessories thereof. (§ 6369(b)(2); Reg. 1591(c)(2).)

### C. Tax Consequences to B---

The two prescription examples which you sent happened to prescribe “Ensure” liquid nutrition. The Legal Staff has previously determined “Ensure” and “Ensure Plus,” also on the nutrient source list you provided, to be exempt food products under Section 6359. (II. Bus. Tax. L. Guide, Annot. 245.1420.) If the other products on the list meet the definition of a complete dietary food as defined above, B---’s sales of those products would be considered to be sales of exempt food products also.

However, in order to have the sales of the infusion systems be considered exempt under Section 6369, B---’s products would have to be considered “medicines.” “Medicines” are not “food products” (Reg. 1602(a)(4)), but we have previously considered that enteral nutrient solutions prescribed for patients with functioning gastro-intestinal tracts but who due to disease, cannot ingest food orally are “medicines” the sales of which are exempt from tax under Section 6369.

The infusion systems are another matter. We have consistently determined in other contexts that where the words “worn on ... the human body” appear in the statute, the device itself must be fully worn on the person of the patient. If any part of the device is not worn on the person, the device will not qualify as exempt. (See, § 6369(c)(6).) The illustrations you enclosed indicate that the bags are hung from poles and that the pumps, or some of them, while capable of being worn on the person by the use of a transporter, are also designed to be hung from poles or set on tables. Indeed, in the two sample prescriptions, both patients are non-ambulatory and so would not be able to wear the pumps. Assuming that this conclusion is correct, these items are thus not exempt from tax.

B---'s sales of the infusion systems are not exempt for other reasons. First, we have previously concluded that the other components of the infusion system – tubing, catheters, filters, infusion bottles, bags, pumps, intravenous pole, needles, syringes, dressing, and tape – are dressings, devices or applications which are specifically excluded from the definition of medicines. Second, we have also previously determined that, to be considered as programmable, the device must be capable of being programmed to deliver the solution on an intermittent or continuous basis, at variable dose rates and at high or low fluid-volume, and give the doctor the capability to prescribe essentially a home-based therapeutic program. The nutrition bags illustrated merely administer the solution through the traditional drip method. The pumps you described appear to be capable at the most of being pre-set to different infusion levels but administer the solution at a steady rate once activated. As a consequence, we conclude that the infusion pumps are not “programmable drug infusion devices” within the meaning of Section 6369(c)(6).

### III. CONCLUSION

To summarize, we conclude that B---'s sales of liquid nutrition systems, such as Ensure, to skilled nursing facilities, are exempt from the sales tax as being sales of either exempt food products or (if administered under the conditions set forth in Section 6369) exempt medicines. However, the sales of the infusion systems are subject to tax as being appliances which are specifically excluded and not “programmable” as defined above.

I hope the above discussion has answered your question. If you need anything further, please do not hesitate to write again.

Very truly yours,

John L. Waid  
Tax Counsel

JLW:llt

cc: O. A. McCarty

bc: --- District Administrator