

**STATE BOARD OF EQUALIZATION**

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January 13, 1992

Ms. --- [A]
XXXX --- --- Rd.
--- ---, CA XXXXX

Dear Ms. [A]:

The Legal Division has tasked me to respond to your letter to it of November 23, 1991. You have asked whether or not sales of certain orthopedic foot devices are exempt from sales tax.

I. FACTUAL BACKGROUND

You recite the facts of this case as follows:

“I have a condition in my foot called Charcot’s joint that is caused by diabetes. My doctor prescribed shoes built from casts of my feet to enable me to walk and to prevent infection and amputation.

“I took this prescription to Davis Shoe Therapeutics in San Francisco who manufactured shoes for me from lasts made by casting my own feet. When I was billed I was charged state sales tax....”

Dorland’s Illustrated Medical Dictionary, 24th ed., defines Charcot’s Joint as a neurogenic joint disease. In your letter, you indicate that your seller believes that orthopedic shoes must be an integral part of a leg brace or artificial foot for their sales to be exempt from tax, citing Regulation 1591(c)(2). You believe that the shoes you bought qualify as “custom-made foot orthoses” under Regulation 1591(b)(4). Your conversation with the San Francisco District indicates that, for the sale of a foot orthosis to be exempt, it has to be part of a leg brace or an artificial leg.

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.) “Exemptions from taxation must be found in the statute.” (Market St. Ry. Co. v. Cal. St. Bd. of Equal. (1953) 137 Cal.Ap.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. State Bd. of Equalization (1974) 39 Cal.App.3d 765, 769 [114 Cal.Rprt. 571].)

B. Prescription Medicines

Section 6369 interpreted and implemented by Title 28, California Code of Regulations, Regulation 1591 provides that sales of medicines, 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) of Regulation 1591 defines “medicines” to “mean and include any substances 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.” (Regulations are Board promulgations that have the force and effect of law). As a general rule, then, items used to diagnose a condition or to apply medicine or treatment to the patient are not considered to be medicines.

Prior to 1987, an orthopedic shoe was considered to be a medicine only if it were an integral part of a leg brace or an artificial leg. However, in that year the Legislature enacted Statutes 1987, Chapter 384, which amended Section 6369(b)(3) to include an exemption for “custom-made foot orthoses” as interpreted and implemented in Regulation 1591(b)(4), in part, as follows:

“(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, effective September 3, 1978, 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 parties, 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 practitioner 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."

C. Tax Consequences

We are of the opinion that the shoes which you have purchased qualify under the above authority as "custom-made foot orthoses." They are constructed on a model of your foot rather than on the foot itself and are neither pre-made nor pre-molded nor are they fabricated inside of your existing shoes.

Regulation 1591(a)(2) provides that sales of medicines are exempt when the medicine is "furnished by a licensed physician ... to his ... own patient for the treatment of the patient." As a result, we conclude that custom-made foot orthoses qualify for the exemption even though the shoes may be sold by a vendor of such devices rather than a medical organization.

In order to obtain the benefit of the exemption, you need to present to your vendor an exemption certificate substantially conforming to the requirements of Regulation 1667. As noted above, the vendor is the taxpayer and so is the entity which must request a refund of the sales tax it paid (and for which it collected sales tax reimbursement from you) on previous transactions.

For your information, I have enclosed a copy of Regulation 1667. 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
Tax Counsel

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Enclosure: Regulation 1667