

M e m o r a n d u m**425.0540**

To: Mr. Michael Kopp
Supervision Auditor – New York Branch Office

Date: March 7, 1991

From: John L. Waid
Tax Counsel

Subject: Memorandum to M. Rodriguez
Out-of-State District Office
RE: P--- F--- Co.XX-XXXXXX

Your memorandum of January 22, 1991, to the Legal Division has been referred to me for a response. You requested an opinion as to the applicability of sales and use tax to the taxpayer's sales of certain of its products.

You attached to your memorandum another memorandum, this one from Linden B. Edmonson, Auditor in the Board's New York Branch office, to Michael Kopp, Supervision Auditor in that office. In that memorandum, the auditor is requesting guidance as to the taxability of the sales by the taxpayer, P--- F--- Co. (hereinafter "P--- F---") of five of its products containing Betadine: Betadine Antiseptic Gauze Pad and Bandage, Betadine Medicated Douche/Douche Packettes, Betadine Mouthwash/Gargle, Betadine Whirlpool (presumably Betadine Whirlpool Concentrate), and Betadine Aerosol Spray. Attached to that memorandum are brochures explaining the functions and uses of these products.

OPINION

In determining whether or not a particular product qualifies as an exempt medicine, Regulation 1591 sets up a two-step analysis. First of all, the product must fit the definition of a "medicine": "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." (Reg. 1591(b)(1).) Second, in the hospital or health facility context, the medicine must be furnished by a health facility for treatment of any person pursuant to the order of a licensed physician, surgeon, dentist or podiatrist. (Reg. 1591(a)(3)).

Linden Edmonson's memorandum indicates that, in the wake of the Second District Court of Appeal's decision in Purdue Frederick Co. v. St. Bd. of Equalization (1990) 218 Cal.Rptr. 1027, 267 Cal.Rptr 482, P--- F--- is taking the position that all products containing Betadine sold to health facilities are "medicine" and so exempt from sales and use taxation. We

do not concur in such an expansive reading of this case. The court did not change the definition of the term “medicines”. It merely expanded the Board’s previous treatment of what constitutes the treatment of a human being in the hospitals/health facilities context. 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 (218 Cal.App.3d at 1027). In the case of Betadine products, the Board had previously held, that to be a “medicine” the product must be applied directly to the patient. The Court broadened the concept of “external application” to include cleansing agents which the medical personnel used to cleanse themselves prior to or while treating patients. (*Ibid.*) The Court did not abrogate any of the conditions under which the product must be sold or furnished. Therefore, we conclude, in order for P--- F---’s sales to qualify for the exemption, the product must still be a medicine, and in the health-facility context, the product must be “furnished by a health facility for treatment of any person pursuant to the order of a licensed physician and surgeon, dentist, or podiatrist”. (Reg. 1591(a)(3)).

The Court noted that the Board had recognized that Betadine itself was a “medicine” within the meaning of Regulation 1591. (218 Cal.App.3d at 1027).

Particular Products

I assume that the “Betadine Antiseptic Gauze and Bandage” are dressings which are impregnated with the Betadine antiseptic product for the purpose of medicating. We have previously concluded that the Board of Equalization did not intend to include bandages and dressings impregnated with medicine for the purpose of medicating when it excluded “bandages and dressings” from the definition of the term “medicine” in Regulation 1591(b)(2). Therefore, since the brochure indicates that the “Betadine Antiseptic Gauze and Bandage” is impregnated with Betadine for the purpose of preventing infection, it is a “medicine” within the meaning of the regulation.

We have also previously concluded that “Betadine Medicated Douch” and Betadine Whirlpool Concentrate” are “medicines” within the meaning of the regulation.

“Betadine Aerosol Spray” is described in the brochure as for use in cleansing wounds as part of treatment. It, therefore, fits the definition of a “medicine”.

The brochure describing “Betadine Mouthwash/Gargle” states its intended use as follows: “[It] is an aromatic mouth freshener which may be used as a refreshing mouth rinse...as an aid to daily care of the mouth ... and to help provide soothing temporary relief of dryness and minor irritations of the mouth and throat.” It thus appears that the purpose of the mouthwash/gargle is to freshen breath rather than to diagnose, cure, treat, mitigate, or prevent disease. Additionally, despite Madison Avenue’s best efforts, a mouthwash is generally recognized as a cosmetic preparation, not a medicine. Consequently, we conclude that the “Betadine Mouthwash/Gargle” is not a “medicine” within the meaning of the regulation.

The above products which we recognize as being medicines do not qualify for the exemption merely because they are sold to health facilities. They must also be furnished by the health facility, as that term is defined in Health and Safety Code Section 1250, for the treatment of any person pursuant to the order of a licensed physician, surgeon, dentist or podiatrist. The proof of use is, however, within the control of the health facility rather than P--- F---. Therefore, in situations where the purchasing health facility may use the betadine products for both exempt and taxable purposes, P--- F--- may sell these products to health facilities free of tax by accepting in good faith exemption certificates from the health facilities which must then pay use tax on account of any taxable uses which they make of the products.

At this point, I note that the brochures which accompanied Linden Edmonson's memorandum indicate that the primary market for the gauze, bandages, aerosol spray, and douche, is the general public for family use. Such sales do not qualify for the exemption.

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cc: Out-of-State District (M. Rodriguez)