



STATE BOARD OF EQUALIZATION

916-324-3828

April 8, 1991

X-----

Re: X-----

Dear X-----,

Your letter of February 22, 1991, to the Legal Division has been assigned to me for a response. You have asked for an opinion on the applicability of sales and use tax to X----- Hospital's (hereinafter X-----) rental of medical oxygen storage tanks from X-----.

I. FACTUAL BACKGROUND

You describe the factual background of your problem as follows:

"For the last six months, I have been unable to persuade X----- that the oxygen storage tank is an integral part of the Hospital's oxygen delivery system and is exempt from sales tax. X-----'s position is that the tank is rented to the Hospital but not re-rented to the end user ... therefore not tax exempt.

"The definition of the liquid oxygen storage tank appears to be germane to the question. I would define a storage cylinder as a vessel in which the content is to be used at some future time or the content is transferred into another container. The tank at X----- Hospital is an active part of the oxygen delivery system, admittedly a very large container. The patient is directly hooked up to the container. Oxygen therapy is prescribed by a Physician and consequently a patient charge is made for this therapy. There would be no difference should a bedside cylinder be used."

I assume from the context that X----- is actually collecting use tax measured by the receipts from X----- rentals of the storage tanks. I assume that X----- purchases the tanks from an outside supplier and fills them with medical oxygen prior to renting them to X-----.

II. Opinion

A. Medical Oxygen Delivery System Exemption

Section 6369.5, interpreted and implemented by Regulation 1591(m) provides as follows:

"There are exempted from [sales and use taxes] the gross receipts from the sale, and the storage, use, or other consumption, in this state of any medical oxygen delivery system, including, but not limited to, liquid oxygen containers, high pressure cylinders, and regulators, when sold, leased, or rented to an individual for the personal use of that individual as directed by a physician."

(Sales and Use Tax Regulations are Board promulgations which have the force and effect of law.)

B. Containers and Labels

Section 6364, interpreted and implemented by Regulation 1589, provides, an exemption from sales and use taxes for the sale, storage, use, or other consumption in California of nonreturnable containers when sold without the contents to persons who fill the containers and sell them together with the contents; all containers if sold with exemption contents; or returnable containers when sold with the contents in connection with a retail sale of the contents or when resold for refilling.

D. Tax Consequences to X-----

We have previously determined that oxygen storage tanks, large or small, qualify as part of a medical oxygen delivery system under Regulation 1591(m). Accordingly the rental to X----- of a medical oxygen storage tank is exempt from tax when the tank is then sold, leased, or rented to an individual for the personal use of that individual as directed by a physician. However, to qualify for this exemption, the transaction between the hospital and the individual must constitute an actual sale, lease, or rental, as those transactions are defined under sales and use tax law. Apparently, the patient's use of the storage tanks is limited to X----- premises. We have previously concluded, in a similar case, that the direction and control of the equipment thus never transfers to the patient. Accordingly, there can be no lease or rental of the storage tank to the patient under these conditions. Therefore, the medical oxygen delivery system exemption does not apply to X----- rentals of the storage tanks to X-----.

There is a different reason why X----- should not be paying tax on these transactions. We have previously concluded, that the only applicable tax on returnable gas cylinders which are purchased new and empty and filled by a lessor prior to renting them out is the tax measured by the purchase price to the lessor. The filling of the cylinders is not a use exempted by section 6364. Therefore, X-----'s purchase of the cylinders is not for the purpose of sale (here, lease) in the regular course of business, so X----- may not shift the tax burden downstream to X-----.

For your information, I have enclosed copies of regulations 1589 and 1660. 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

JLW:es
37981

Enclosures: Regulations 1589 and 1660

bc: KH - District Administrator
X----- was instructed on the proper tax by letter from Tax Counsel
Philip R. Dougherty, dated October 1, 1979 (attached). Please investigate.