

STATE OF CALIFORNIA  
BOARD OF EQUALIZATION  
APPEALS DIVISION

**425.0883.875**

In the Matter of the Petition for  
Redetermination Under the Sales and  
Use Tax Law of:

Petitioner

HEARING  
DECISION AND RECOMMENDATION

The above-referenced matter came on regularly for hearing before Hearing officer Michele F. Hicks on November 13, 1990 in San Jose, California.

Appearing for Petitioner:

X-----

Appearing for the  
Department of Business Taxes:

X-----  
Senior Tax Auditor

Protested Item

The protested tax liability for the period April 1, 1986 through December 31, 1988 is measured by:

<u>Item</u>	<u>State, Local and County</u>
A. Claimed exempt sales of medical supplies and equipment disallowed, test basis.	\$538,154
B. Claimed exempt rentals of medical supplies and equipment disallowed, test basis.	\$1,081,838

## Petitioner's Contention

Petitioner contends that the subject sales and rentals are exempt from tax pursuant to Revenue and Taxation Code Section 6369.

### Summary

Petitioner is a corporation which sells and rents medical supplies and equipment for home health care. During the audit period, petitioner reported only a small amount of taxable sales.

The auditor conducted a test of 10 percent of petitioner's billings. Among the items sold or rented were beds, trapeze bars, IV stands, continuous passive motion machines, catheters, traction items, thermophone moist heat neck, K-pumps and pads, Kangaroo enteral feeding pumps, pulmo aids, percussors and cones, wheels for walkers, alternating pressure pads and pumps, TENS units, tracheostomy appliances and supplies, gastrostomy appliances and supplies, suction machines, commodes, sponges, and dressings. The auditor classified the sales and rentals of these items as taxable. Petitioner contends that these items qualify as exempt medicines. Petitioner contends that the exemption created by Revenue and Taxation Code section 6369(a) is not limited to items specifically listed by name, but that all medical equipment and supplies prescribed by a physician and used to treat or ease a medical condition are exempt.

### Analysis & Conclusions

Revenue and Taxation Code Section 6369 provides in pertinent part as follows:

“6369. Prescription medicines. (a) There are exempted from the taxes imposed by this part the gross receipts from the sale, and the storage, use or other consumption, in this state of medicines:

\* \* \*

“(b) 'Medicines' as used in this section, means and includes 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. However, 'medicines' does not include any of the following:

\* \* \*

“(2) 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.

\* \* \*

“(c) Notwithstanding subdivision (b), 'medicines' as used in this section means and includes any of the following:

“(1) Sutures, whether or not permanently implanted.

“(2) Bone screws, bone pins, pacemakers, and other articles, other than dentures, permanently implanted in the human body to assist the functioning of any natural organ, artery, vein, or limb and which remain or dissolve in the body.

“(3) Orthotic devices, other than orthodontic devices, designed to be worn on the person of the user as a brace, support or correction for the body structure and replacement parts for these devices ..•.

“(4) Prosthetic devices, and replacement parts for such devices, designed to be worn on or in the person of the user to replace or assist the functioning of a natural part of the human body, other than auditory, ophthalmic and ocular devices or appliances, and other than dentures, removable or fixed bridges, crowns, caps, inlays, artificial teeth and other dental prosthetic materials and devices.

“(5) Artificial limbs and eyes, or their replacement parts, for human beings.

“(6) Programmable drug infusion devices to be worn on or implanted in the human body.

“(d) ‘Health facility’ as used in this section has the meaning described to it in Section 1250 of the Health and Safety Code.

“(e) Insulin and insulin syringes furnished by a registered pharmacist to a person for treatment of diabetes as directed by a physician shall be deemed to be dispensed on prescription within the meaning of this section.

“(f) Orthotic and prosthetic devices, and replacement parts for these devices, furnished pursuant to the written order of a physician or podiatrist, shall be deemed to be dispensed on prescription within the meaning of paragraph (1) of subdivision (a), whether or not the devices are furnished by a registered pharmacist.

“(g) Mammary prostheses, and any appliances and related supplies necessary as the result of any surgical procedure by which an artificial opening is created in the human body for the elimination of natural waste, shall be deemed to be dispensed on prescription within the meaning of this section.”

It is well established that exemptions from taxation are strictly construed and that the burden of proving entitlement to a statutory exemption is imposed upon the taxpayer.

(Standard Oil Company of California v. State Board of Equalization (1974) 39 Cal.App.3d 765.) Moreover, if a statute specifies exceptions to a general rule, other exceptions are excluded. (People ex rel. Cranston v. Bonelli (1971) 15 Cal.App.3d 129, 135; Re Estate of Pardue (1937) 22 Cal.App.2d 178, 181.)

Revenue and Taxation Code Section 6369(b) specifically excludes among other items, "[a]rticles 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." Thus petitioner's contention that Section 6369(a) should be broadly interpreted to include all prescribed medical equipment and supplies used to treat or ease a medical condition is contrary to the express terms of Section 6369(b) which specifically excludes certain medical equipment and supplies from the definition of medicines.

Subdivision(c) of Section 6369 then goes on to enumerate those items which are to be considered medicines "[n]otwithstanding subdivision (b)". With several exceptions, all of the items which the auditor categorized as taxable are of the kind specifically excluded from the definition of medicines by Section 6369(b) and not included by Section 6369(c) or exempted by any other statute.

Audit Schedule 12D-1 lists items which the auditor allowed as exempt such as wheelchairs, walkers, and oxygen equipment, as well as those items which the auditor disallowed. Of the disallowed items, I will briefly address those specifically questioned by petitioner at the hearing and in its brief and explain my reason for affirming the auditor's disallowance.

1. Hospital beds. Petitioner contends that hospital beds required for therapeutic positioning are exempt. This item is disallowed because hospital beds are specifically excluded from medicines by Regulation 1591(c)(2) and there is no statute or regulation which exempts hospital beds which can be positioned.

2. Trapeze bars, I.V. stands, continuous passive motion machines, thermophone moist heat neck, K-pumps and pads, Kangaroo enteral feeding pumps, pulmo aids, percussors and cones, alternating pressure pads and pumps, intra nutritional systems, suction machines, commodes and egg crate mattresses. These items are all excluded from the definition of medicines by section 6369(b)(2) as "instruments, apparatus, contrivances, appliances, devices, or other mechanical, electronic, optical or physical equipment ... " and are not included under any other provision.

3. Catheters. The audit work papers indicate that the catheters sold or rented by petitioner are not permanently implanted in the human body and are not designed to be fully worn on or in the human body. (Schedule 120-1, page 4.) Therefore the catheters are not exempt under either subdivision (c)(4) or (g) of Section 6369. They are articles in the nature of contrivances, appliances, or devices excluded from the definition of medicines by Section 6369(b)(2)

4. Traction items. Petitioner contends that the auditor disallowed exempt traction items on Schedule 120-1, page 9. The items listed are a traction frame, traction stand double pulley, bar bed attached, stand, and pelvic belt. Section 6369(c)(3) exempts orthotic devices "designed to be worn on the person of the user as a brace, support or correction for the body structure". The auditor allowed the exemption for the pelvic belt which is worn on the body. The remaining items are not "designed to be worn on the person of the user" and are non-exempt apparatus, contrivances, appliances, devices and equipment.

5. Transcutaneous electrical nerve stimulators. The Board has previously held that transcutaneous electrical nerve stimulators, which are fully worn on the body of the user, are prosthetic devices as that term is used in Section 6369(c)(4). However, transcutaneous electrical nerve stimulators which are not fully worn on the body of the user were held not to qualify as prosthetic devices and tax applies to their sale. (Business Taxes Law Guide Annotation 425.0885, 4/11/83.) The units which petitioner rents are electronic machines about the size of an electric typewriter and are not designed to be fully worn on the body. Therefore they do not qualify as prosthetic devices. Instead they are electric equipment excluded from the definition of medicine by Section 6369(b)(2).

6. Gauze dressings. Petitioner points out that gauze pads with medicines are exempt and contends that gauze pads without medicine should also be exempt. Section 6369(b)(2) specifically excludes "bandages, pads, compresses, supports, dressings" from the definition of medicines.

7. Tracheostomy appliances and supplies. Section 6369(i) exempts "appliances and related supplies necessary as result of any surgical procedure by which an artificial opening is created in the human body for the elimination of natural waste ...." A tracheostomy is defined in Dorland's Illustrated Medical Dictionary, 24th edition, as a "[s]urgical creation of an opening into the trachea through the neck, for insertion of a tube to facilitate the passage of air to the lungs, or the evacuation of secretions". A tracheostomy which is performed for the purpose of facilitating the passage of air is not created "for the elimination of natural waste", however, a tracheostomy which is performed to facilitate the evacuation of secretions is.

The following are items which the auditor categorized as taxable which should be categorized as exempt.

1. Tracheostomy equipment if used to facilitate the evacuation of secretions. (Section 6369(g).)
2. Wheels for walkers. (Section 6369.2)
3. Rubbing alcohol. (Business Taxes Law Guide Annotation 425.0780, 2/26/64)

Recommendation

Reaudit to delete from the test and projections in accordance with above.

MICHELE F. HICKS, HEARING OFFICER

2/22/91