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February 22, 2006

RAMON J. HIRSIG
Executive Director

Ms. J--- C---
B--- & A---
XXXX South --- Blvd., Suite XXX
--- ---, California XXXXX

Re: SR -- XX-XXXXXX
M--- DLP Vents & Sumps

Dear Ms. C---:

I am answering your letter to me dated July 26, 2005. You ask for an opinion regarding the applicability of sales and use tax to your client's sales of certain vents and sumps.

You attached to your letter a copy of a brochure, entitled "DLP Vents and Sumps," that describes the products in question. The cover page describes your client's products at issue thusly: "M--- DLP Vents & Sumps[:] A Complete Family Designed to Make Bypass surgery Easier and Safer." The first page regarding the vents states that "[m]odels are available for venting via the left ventricle, pulmonary artery, or aortic root." The first page regarding the sumps states that the sump tips are made for "optimal suction."

The Web site for your client describes its vents this way: "**Designed to make bypass surgery easier and safer** DLP® left heart vent catheters are designed to empty the left ventricle (LV), thereby providing a clearer operative field and preventing over-distension of the LV during CPB [i.e., cardiopulmonary bypass]." ("DLP® Vents http://www.m---.com/cardsurgery/arrested_heart/dlp_vents.html (as of Dec. 8, 2005).) The site describes the sumps as follows: "**Designed to make bypass easier and safer . . .** Th[is] Pericardial / Intracardiac Sump features a weighted perforated pool tip to maximize suction and minimize tissue trauma. This tip design is ideal for atraumatic suction within the heart chamber. . . ." (DLP® Sumps http://www.m---.com/cardsurgery/arrested_heart/dlp_sumps.html (as of Dec. 8, 2005).)

OPINION

A. Sales and Use Tax Generally.

In California, except where specifically exempted by statute, Revenue and Taxation Code section 6051 imposes a sales 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. . . .” (§ 6091.) “Exemptions from taxation must be found in the statute.” (Market St. Ry. Co. v. Cal. St. Bd. of Equal. (1953) 137 Cal.App.2d 87, 96.)

B. Prescription Medicines.

Section 6369, interpreted and implemented by California Code of Regulations, title 18, section (Regulation or Reg.) 1591, provides that sales of medicine, 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, subd. (a).) Subdivision (b)(1) of Regulation 1591 defines “medicine” to mean and include 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 such use.” However, Regulation 1591, subdivision (c)(2), adds that “medicines” do not include “[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.”

C. Tax Consequences to Your Client.

The descriptions on your client’s Web site and on the brochure of the two product lines about which you inquire state that these products are used during heart bypass surgery to keep the operating area clear of blood. As to articles that are not substances and preparations (i.e., like the vents and sumps about which you inquire), under Regulation 1591, subdivision (c)(2), such items used to diagnose a condition or to apply medicine or treatment to the patient are not considered to be medicines. Therefore, items used temporarily during surgical procedures to apply treatment to the patient are appliances, etc., are excluded from the term “medicines” under the regulation. (See, e.g., Annot. 425.0745 (3/31/92).)¹ Hence, your client’s sales of its vents and sumps are subject to tax.

¹ Annotations’ are published in either the Business Taxes Law Guide or the Property Taxes Law Guide and provide notice of the existence of and conclusions reached in selected legal rulings of counsel regarding the application of the statutory law, regulatory law, or judicial opinions to a particular factual circumstance.” (See Reg. 5200.)

For your information, I have included a copy of Regulation 1591. 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
Senior Tax Counsel

JLW:ef

Enclosure: Reg. 1591

cc: Out-of-State District Administrator (OH)