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July 29, 1996

[No Permit Number]
Orthotic Devices

Dear X-----,

I am answering your letter to me dated January 29, 1996. I apologize for the delay in answering. It was misrouted, and I only got it last May. You ask about the application of sales and use tax to your client's sales of various orthotic devices under Regulation 1591 (b) (4). As you know, since you did not identify the taxpayer, this letter does not constitute specific written advice to the taxpayer under Revenue and Taxation Code section 6596. Rather, it constitutes general comments regarding the applicability of the California Sales and Use Tax Law to a set of hypothetical facts. Your client may thus rely on this letter as the opinion of the Legal Division, but it is not effective to estop the Board from asserting tax in the event of an adverse result at audit.

One caveat. You, of course, know that if a device qualifies as an orthotic device for sales and use tax purposes under Regulation 1591 (b) (4), the actual application of tax is determined by whether or not the conditions of Regulation 1591(i) are met. As no information about your client's operations was contained in the letter, we will not discuss that aspect of the issue.

You attached to your letter several flyers describing the products at issue.

1. Post-op Cryotherapy Products. You indicate the such therapy is often applied in combination with compression therapy to reduce swelling, stimulate recovery, or otherwise diminish discomfort due to a variety of muscular and skeletal conditions. You state that sales of compression wraps have generally been considered exempt. The flyer shows that the device is wrapped around the affected area, usually a joint.

We have previously determined that products which apply heat or cold therapy (the product in the flyer, EZY Wrap, appears to be capable of providing both) to the body are devices or appliances excluded from the definition of "medicines" under Regulation 1591(c) (2). The devices you list in your letter as compression wraps--TED stockings, Jobst stockings, ,anti-

embolism stockings, etc.--have been determined to qualify as orthoses under Regulation 1591(b) (4) because they support the body structure in cases when the physician determines that the patient's limb has lost the ability to function properly without orthotic support. (See, e.g., Annot. 425.1105 (11/28/93).) On the other hand, the purpose of the instant devices is to apply treatment to the patient.

2. Dynowalker. You indicate that this item is "the high-tech equivalent of the cast" which, as you note, is considered an orthosis under the regulation. The flyer calls it a "fixed ankle walker" and indicates that it is used "whenever immobilization is required"--e.g., following ankle injury, in the treatment of stable fractures (fractures that do not tend to displace after being reduced and immobilized - Stedman's Medical Dictionary, 25th ed. 1990), or after surgery to the foot or ankle. Thus, the primary purpose of this item appears to be immobilization of the lower leg and foot in relation to each other rather than support of the body structure. Therefore, absent further information, we consider these items to be in the nature of splints under Regulation 1591 (c) (2), and so excluded from the definition of "medicine."

3. Abduction and Fracture Pillows. You indicate that these items are used to support, control, restrict motion, provide for limited exercising and/or elevate the legs after hip or knee surgery or in conjunction with traumatic injury to the hips and/or legs. The flyer states that the pillow is for femoral traction. Although the patient is strapped to the pillow as opposed to simply lying on it, the patient seems to be lying on the bed when it is used.

We have previously determined that traction devices not fully worn on the body do not constitute orthotic devices. (See, Annot. 425.0697 (10/22/91).) Despite the fact that it is strapped on, rather than the patient simply lying on it, this pillow appears to be no different than others that are placed under the neck or a limb while the patient lies on the bed, which we have previously determined are excluded from the definition of "medicines" under Regulation 1591 (c) (2) .

4. Restraints. We have previously determined that restraints are generally appliances excluded from the definition of medicines under Regulation 1591(c) (2) as they do not fit any statutory exemption. You mentioned that some of the restraints your client sells are used on wheelchairs and enclosed a flyer showing their use. Regulation 1591(k) exempts only the sale of wheelchairs "and replacement parts" under certain conditions. The picture in the flyer indicates that such a restraint is not part of the wheelchair at all but is actually a vest worn by the patient, a couple of the straps of which go around the wheelchair back. As a result, absent further information, sales of the wheelchair restraint your client sells are subject to tax.

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 Staff Counsel

JLW:sr