

STATE OF CALIFORNIA
BOARD OF EQUALIZATION
BUSINESS TAXES APPEALS REVIEW SECTION

In the Matter of the Petition for)	
Redetermination Under the Sales)	DECISION AND RECOMMENDATION
and Use Tax Law of:)	
)	No. REDACTED TEXT
)	
REDACTED TEXT)	
<u>Petitioners</u>)	

The Appeals conference in the above-referenced matter was held by Carl J. Bessent, Staff Counsel, on May 2, 1994 in Sacramento, California.

Appearing for Petitioners	REDACTED TEXT
(hereinafter "petitioner"):	Attorney

Appearing for the Sales	Leon Adams
and Use Tax Department:	District Principal Auditor

Protested Item

The protested tax liability for the period January 1, 1990 through December 31, 1992 is measured by:

<u>Item</u>	<u>State, Local and County</u>
B. Preventative veterinary medicines sold without professional services	\$REDACTED TEXT

Petitioner's Contention

Petitioner is a consumer of heartworm medicine refills.

Summary

Petitioner, a licensed veterinarian, operates veterinarian clinics in both REDACTED TEXT and REDACTED TEXT. This is the first audit.

The Sales and Use Tax Department (Department) audit determined that some sales of drugs were sold without any other specifically related professional services. Specifically, the

Department found that refills of heartworm medication or dogs were not taxed on the selling price.

Heartworm is a disease that blocks the flow of blood through the dog's heart, and, if untreated, can be fatal. Preventative care is the easiest and the safest way to deal with heartworm disease.

Heartworm medications used by petitioner; such as Heartgard, are designated as "legend drugs" by the Food and Drug Administration (FDA). A legend drug is defined as a drug (1) having obvious potential for human harm, (2) requiring diagnosis before administration, and (3) requiring a written description of lay use. As legend drugs, heartworm medications by law must be prescribed by a licensed veterinarian. Legend drugs have a warning on them that reads or has language similar to "Caution - Federal law restricts this drug to use by or on the order of a licensed veterinarian" (Title 16 Cal. Code Regs. Section 1747.1). Petitioner's representative read to me the warning on the Heartgard container which was identical to the quoted warning.

Before petitioner prescribes heartworm medication, petitioner examines the animal and performs a blood test. The general examination determines if the animal has other physical conditions which would complicate the administration of medication. The blood test is necessary to ascertain whether the animal does not already have heartworm disease. Administration of heartworm medicines like Heartgard to a dog with heartworms could cause sickness or death of the animal.

Petitioner indicates that the normal situation is one in which the dog is examined, the heartworm medicine is prescribed, and a notation of the prescription is written in the client/patient's file as required by law. (See Business and Professions Code Section 4855.) In the rare instance in which petitioner gives out a prescription, a notation is made on the prescription that it is limited to one year of medication.

Petitioner states that for a veterinarian to refill a prescription, the FDA requires a current doctor/client/patient relationship. The California Veterinary Medicine Board of Examiners deems a hands-on physical examination of the dog within the previous twelve months to be necessary for a doctor/client/patient relationship to exist.

In a Declaration dated May 19, 1994, petitioner states that he follows the following procedure each time a dog owner presents himself or herself at petitioner's office requesting a refill of heartworm medication: prior to dispensing the medication, he examines the dog's file in order to determine (1) that a current doctor/patient relationship exists (i.e., that the dog was examined by petitioner within the last twelve months), and (2) that the dog received a negative heartworm blood test within the last twelve months. In addition to the reasons for reviewing the file as stated in Petitioner's Declaration, petitioner establishes that there has been no change in the dog's health since the original prescription, and that the heartworm medication has not been previously refilled.

Petitioner argues that the heartworm medicine refills are obtained with specific related professional services and, therefore, petitioner is a consumer of medicines under Revenue and Taxation Code Section 6018.1 and Sales and Use Tax Regulation 1506 (h) (2) (B).

The Department considers petitioner a consumer of the initial supply of heartworm medication because professional services were rendered when the pills were initially furnished. The Department contends that refills of heartworm medication do not meet the criteria for the sales of the medications to be considered consumed by petitioner. The Department states that the refills of the medication are sold without specific related professional services, such as diagnosis, treatment or administration of the medication. The Department states that a refill is obtained by the dog owner without a further office visit or consultation with petitioner. The dog owner usually just calls petitioner's office and arranges to pick up the refill. Therefore, petitioner is considered a retailer of the medication refills.

Analysis and Conclusion

We are of the opinion that petitioner's refills of prescriptive heartworm medications such as Heartgard are specifically related to his professional services. The review of the files and filling the refills of legend drugs are sufficient specific related professional services to qualify petitioner as a consumer of the refills rather than a retailer.

Sales and Use Tax Regulation 1506 (h) (2) (B) states in pertinent part that " (L)icensed veterinarians are retailers of drugs and medicines which they furnish for a consideration without performing specific related professional services". Regulation 1506 (H) (1) (B) defines "drugs and medicines" as:

“...substances or preparations intended for use in the diagnosis, cure, mitigation, treatment, or prevention of disease in animals and which is commonly recognized as a substance or preparation intended for this use”.

The term "drugs and medicines" includes legend drugs. Heartworm medications such as Heartgard are legend drugs that are prescribed by veterinarians.

Title 16 Cal. Code Regs. Section 1747.1 (California Board of Pharmacy Regulations) states that all drugs which bear the legend such as "Caution - Federal law restricts this drug to use by or on the order of a licensed veterinarian" or similar words are dangerous drugs within the meaning of Business and Professions Code Section 4211. Heartgard bears a legend like the one listed in California Board of Pharmacy Regulation 1747.1. Thus, heartworm medications such as Heartgard are considered dangerous drugs.

Business and Professions Code Section 4211 defines "dangerous drug". In general, no person shall provide any dangerous drug, except upon the prescription of a physician and surgeon, dentist, podiatrist, or veterinarian. (See Business and Professions Code Section 4227.) Business and Professions Code Section 4228(b) states in part "physicians, dentists, podiatrists, and veterinarians may personally furnish any dangerous drug prescribed by them to the patient for whom prescribed..." Business and Professions Code Section 4229 states that "no prescription for any dangerous drug...may be refilled except upon authorization of the prescriber which may be given orally or at the time of giving the original prescription".

Thus, only a veterinarian may dispense heartworm medication such as Heartgard and only a veterinarian may do so "to the patient". A staff person in the veterinarian's office may not dispense a legend drug such as Heartgard, even as a refill.

The California Veterinary Medicine Board of Examiners considers a hands-on physical examination of the dog within the previous twelve months to be necessary for a veterinarian/client/patient relationship to exist. For petitioner to dispense a prescription refill for a legend drug, he pulls the dog's file and makes certain that (1) a current veterinarian/patient/client relationship exists (i.e. the dog has been examined by petitioner within the last twelve months) and (2) the dog received a negative heartworm blood test within the last twelve months. Petitioner, also, must establish that there has been no change in the dog's health since the original prescription and that the heartworm medicine has not been refilled previously. Petitioner must make a notation in the dog's file that the refill of a legend drug was dispensed. (See Business and Professions Code Section 4855, and Title 16 Cal. Code Regs. Section 2031 (a) (7)).

Recommendation

Grant the petition.

Carl J. Bessent, Staff Counsel

8/3/94
Date

REDACTED TEXT