



STATE BOARD OF EQUALIZATION

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July 2, 2008

Dear Interested Party:

Enclosed is the Initial Discussion Paper regarding proposed amendments to Regulation 1591, *Medicines and Medical Devices*, to clarify the application of tax to sales of ear implant devices. Discussion regarding the proposed amendments is scheduled for the Board's **November 12, 2008, Business Taxes Committee** meeting.

However, before the issue is presented at the Business Taxes Committee meeting, staff would like to provide interested parties an opportunity to discuss the issue and present any suggested changes or comments. Accordingly, a meeting is scheduled in **Room 122 at 10:00 a.m. on July 16, 2008**, at the Board of Equalization; 450 N Street; Sacramento, California.

If you are unable to attend the meeting, but would like to provide input for discussion at the meeting, please feel free to write to me at the above address or send a fax to (916) 322-4530 before the July 16, 2008 meeting. If you are aware of other persons that may be interested in attending the meeting or presenting their comments, please feel free to provide them with a copy of the enclosed material and extend an invitation to the meeting. If you plan to attend the meeting on July 16, 2008, or would like to participate via teleconference, I would appreciate it if you would let staff know by contacting Lynda Cardwell at (916) 324-2924 or by e-mail at Lynda.Cardwell@boe.ca.gov prior to July 10, 2008. This will allow staff to make alternative arrangements should the expected attendance exceed the maximum capacity of Room 122 and to arrange for teleconferencing. In addition, please let Ms. Cardwell know if you wish to have future correspondence, including the second discussion paper and all attachments, sent to your e-mail address rather than to your mailing address.

Whether or not you are able to attend the above interested parties' meeting, please keep in mind that the due date for interested parties to provide written responses to staff's analysis is **August 1, 2008**. Please be aware that a copy of the material you submit may be provided to other interested parties. Therefore, please ensure your comments do not contain confidential information.

If you are interested in other topics to be considered by the Business Taxes Committee, you may refer to the "Business Taxes Committee" page on the Board's Internet web site (<http://www.boe.ca.gov/meetings/btcommittee.htm>) for copies of Committee discussion or issue papers, minutes, a procedures manual and calendars arranged according to subject matter and by month.

Thank you for your consideration. I look forward to your comments and suggestions. Should you have any questions, please feel free to contact Ms. Leila Hellmuth, Supervisor, Business Taxes Committee Team, at (916) 322-5271.

Sincerely,

Jeffrey L. McGuire
Chief, Tax Policy Division
Sales and Use Tax Department

JLM: lrc

Enclosures

cc: (all with enclosures)
Honorable Judy Chu, Ph.D., Chair, Fourth District
Honorable Betty T. Yee, Vice Chairwoman, First District (MIC 71)
Honorable Bill Leonard, Member, Second District (MIC 78)
Honorable Michelle Steel, Member, Third District
Honorable John Chiang, State Controller, c/o Ms. Marcy Jo Mandel (via e-mail)
Mr. Mark Ibele, Board Member's Office, Fourth District (via e-mail)
Mr. Steve Shea, Board Member's Office, Fourth District (via e-mail)
Mr. Alan LoFaso, Board Member's Office, First District (via e-mail)
Ms. Sabina Crocette, Board Member's Office, First District (via e-mail)
Mr. Gary Qualset, Board Member's Office, First District (via e-mail)
Ms. Mengjun He, Board Member's Office, First District (via e-mail)
Ms. Amber Kemp, Board Member's Office, First District (via e-mail)
Mr. Lee Williams, Board Member's Office, Second District (MIC 78 and via e-mail)
Mr. Erik Caldwell, Board Member's Office, Third District (via e-mail)
Mr. Ken Maddox, Board Member's Office, Third District (via e-mail)
Mr. Neil Shah, Board Member's Office, Third District (via e-mail)
Ms. Elizabeth Maeng, Board Member's Office, Third District (via e-mail)
Ms. Christina Rueck, Board Member's Office, Third District (MIC 77)
Ms. Melanie Darling, State Controller's Office (via e-mail)
Mr. Ramon J. Hirsig (via e-mail)
Ms. Kristine Cazadd (via e-mail)
Ms. Randie L. Henry (via e-mail)
Mr. Jeff Vest (via e-mail)
Mr. David Levine (via e-mail)
Mr. Randy Ferris (via e-mail)
Ms. Windie Scott (via e-mail)
Mr. Cary Huxsoll (via e-mail)
Mr. Robert Tucker (via e-mail)
Mr. Todd Gilman (via e-mail)
Ms. Lauren Simpson (via e-mail)
Ms. Freda Orendt (via e-mail)

Mr. Stephen Rudd (via e-mail)
Mr. Robert Buntjer (via e-mail)
Mr. James Kuhl (via e-mail)
Mr. Geoffrey E. Lyle (via e-mail)
Ms. Leila Hellmuth (via e-mail)
Ms. Lynda Cardwell (via e-mail)
Ms. Cecilia Watkins (via e-mail)

INITIAL DISCUSSION PAPER

Proposed changes to Regulation 1591, *Medicines and Medical Devices*, regarding ear implant devices

Issue

Amend Regulation 1591 to clarify the application of tax to sales of an ear implant device with mutually dependent internal and external components.

Background

Revenue and Taxation Code (RTC) section 6369, interpreted and implemented by Regulation 1591, provides that sales of medicines furnished for the treatment of a human being are exempt from sales or use tax if they are sold or furnished under certain conditions, as described in subdivision (a)(1) through (6) of the section. The term “medicines” is defined by RTC section 6369, subdivision (c), in part, to mean and include “bone screws, bone pins, pace-makers, 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.”

Regulation 1591, subdivision (b)(2), provides in part:

“Articles permanently implanted in the human body to assist the functioning of, as distinguished from replacing all or any part of, any natural organ, artery, vein or limb and which remain or dissolve in the body qualify as medicines....”

“Permanently implanted articles include, but are not limited to, permanently implanted artificial sphincters; bone screws and bone pins, dental implant systems including dental bone screws and abutments; permanently implanted catheters; permanently implanted hydrocephalus devices and their implanted pressure regulating components; implanted defibrillators and implanted leads; pacemakers; tendon implants; testicular gel implants; and **ear implants** [emphasis added].”

On February 27, 2008, the Board of Equalization (Board) heard a sales and use tax appeals case regarding the sales of cochlear implant devices by Advanced Bionic Corporation. At issue was whether sales of the microphone, sound processor, and transmitter system, the external components of the ear implant device, qualified for exemption from tax in the same manner as the permanently implanted internal components. The petitioner explained that the external and internal components of the ear implant were effectively one device, with each mutually dependent on the other to function. Together, the internal and external components of the ear implant device assist in the functioning of the ear, each necessary and integral to the ongoing function of the ear and, as such, both qualify as “medicines.” The Board agreed with the petitioner and instructed staff to amend Regulation 1591 to clarify the matter.

Under discussion is the proposed amendment of Regulation 1591 to clarify that the term “medicines” includes the mutually dependent internal and external components of an ear implant device, which are necessary and integral to the ongoing functioning of the ear. The Business Taxes Committee is scheduled to discuss the matter on November 12, 2008.

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Proposed changes to Regulation 1591, *Medicines and Medical Devices*, regarding ear implant devices

Discussion

Staff proposes to amend Regulation 1591, subdivision (b)(2), to clarify that an ear implant includes the interdependent components of an implant device, which are integral and necessary to the ongoing functioning of the ear. In addition, subdivision (c) would be amended to clarify that although auditory devices are excluded from the definition of “medicines,” such exclusion does not apply to the interdependent components of an ear implant device. Suggested amendments are underlined below. They are also reflected in Exhibit 1.

Staff proposes that the second paragraph of subdivision (b)(2) be amended, in part, as follows:

(2) PERMANENTLY IMPLANTED ARTICLES. Permanently implanted articles include, but are not limited, permanently implanted artificial sphincters; bone screws and bone pins... and ear implants including the integral components necessary for the ongoing functioning of the ear, such as the sound processor.

Staff also proposes that subdivision (c) be amended, in part, as follows:

(c) **EXCLUSION FROM THE DEFINITION OF “MEDICINES.”** Except as otherwise provided in subdivision (b), the following items are specifically excluded from the definition of medicines....

(1) Orthodontic, prosthetic (except as provided in subdivision (b)(5)), auditory (except as provided in subdivision (b)(2)), ophthalmic or ocular devices or appliances.

What is an ear implant?

In general, an ear implant is a partially implanted device, which is surgically implanted behind the ear or surrounding area to assist in the functioning of the ear. According to information on the web site of the Ear Institute of Chicago,¹ all implantable hearing devices consist of two basic parts: a sensor that picks up sound and a driver that transmits the sound to the appropriate portion of the ear/hearing system. Although manufacturers are working to develop totally implantable devices, currently, all implantable hearing devices have some form of external component that is necessary for the function of the internal component.

Staff is currently aware of four different ear implant devices that are available for surgical implanting, depending on the damage to the ear or nature of the hearing loss: a cochlear implant, a middle ear implant, a bone-anchored implant, and an auditory brainstem implant. All four ear

¹ The information in this paper was compiled from numerous web site sources, including the web sites of the manufacturers of various implant devices. The discussion specific to the four types of implant devices is based on information available on the web site of the Ear Institute of Chicago at www.chicagoeear.com, the FDA web site at www.fda.gov, and the House Ear Institute at www.hearinginstitute.org.

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implant devices have internal (the permanently implanted portion) and external components, which together assist in the ongoing functioning of the ear.

A cochlear implant is an electronic device that bypasses the damaged parts of the inner ear and directly stimulates the remaining hearing nerve fibers in the cochlea with electrical signals. The cochlear implant consists of two basic components: an outer (external) and inner (internal) device. The external device consists of a speech/sound processor, a transmitting coil, a directional microphone, and connecting cords. The internal device consists of a receiver/stimulator (placed directly below the skin) and a multi-electrode wire array, which is inserted into the inner ear (cochlea). The transmitting coil of the external component is secured over the receiver/stimulator of the internal device through magnetic attraction.

A middle ear implant is a small device that is implanted into the middle ear where it directly drives the ossicular chain (middle ear bones), bypassing the ear canal and tympanic membrane. The implant converts sound into mechanical energy that is directly transferred to the middle ear bone (auditory ossicles). Typically, the implant transmits sounds to the inner ear via a microphone that is placed behind the ear. Like the cochlear implant, the middle ear implant is only partially implantable, in that only the receiver (i.e., the magnet and associated transducer coil) is implanted. The audio processor (microphone and amplifier) is worn externally.

A bone-anchored implant consists of three components: a small titanium fixture that is implanted in the mastoid bone behind the ear, a connecting abutment, and a detachable sound processor. Together, the three components allow sound to be conducted through the bone of the skull directly to the inner ear (cochlea), a process known as direct bone conduction. The implanted component (i.e., titanium fixture) grows into the bone to form a permanent, functional bond with the bone of the skull.

An auditory brainstem implant is an implantable device intended to restore some degree of hearing function to persons deafened by tumors on both balance nerves. The device consists of a small electrode that is placed through the inner ear and connected to the auditory nucleus on the portion of the brainstem where the hearing nerve connects from the inner ear. The device also includes a small microphone placed on the outer ear and an external sound processor. The implant is the first device specifically designed to bypass the cochlea and the auditory nerve to transmit sound directly to the brainstem and is currently the only device that can restore limited hearing to people who have no remaining auditory nerves.

A component of the ear implant or an accessory?

All four of the implantable devices discussed above require external components in order to function. As such, the external components qualify as “medicines” for the purposes of the exemption provided by RTC section 6369 (c)(2).

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However, other items, which may be commonly referred to as components or accessories and may either be sold separately or for a single price with the implant, are also available to the patient or clinic, such as power cell charging stations, car adapters, diagnostic tools (system sensor), carrying or travel cases, etc. Since the implanted device can function effectively without these items, they would be excluded from the definition of “medicines.” This would also be true for the programming software used to create, adjust, fine tune, or optimize the sound/speech processing programs.

Summary

Staff proposes amendments to Regulation 1591 to clarify the application of tax to the sale or use of “components” that are necessary and integral to the operation and functioning of the ear implant. Staff welcomes any comments, suggestions, and input from interested parties regarding this issue.

Prepared by the Tax Policy Division, Sales and Use Tax Department

Current as of 06/26/2008

Regulation 1591. MEDICINES AND MEDICAL DEVICES.

Reference: Sections 6006 and 6369 Revenue and Taxation Code, and sections 1200, 1200.1, 1204.1, and 1250 Health and Safety Code.

(a) DEFINITIONS.

(1) ADMINISTER. "Administer" means the direct application of a drug or device to the body of a patient or research subject by injection, inhalation, ingestion, or other means.

(2) DISPENSE. "Dispense" means the furnishing of drugs or devices upon a prescription from a physician, dentist, optometrist, or podiatrist. Dispense also means and refers to the furnishing of drugs or devices directly to a patient by a physician, dentist, optometrist, or podiatrist acting within the scope of his or her practice.

(3) FURNISH. "Furnish" means to supply by any means, by sale or otherwise.

(4) HEALTH FACILITY. "Health Facility" as used herein has the meaning ascribed to the term in section 1250 of the Health and Safety Code, and also includes "clinic" as defined in sections 1200 and 1200.1 of the Health and Safety Code.

(A) Section 1250 of the Health and Safety Code provides that "health facility" means any facility, place or building that is organized, maintained, and operated for the diagnosis, care, prevention, and treatment of human illness, physical or mental, including convalescence and rehabilitation and including care during and after pregnancy, or for any one or more of these purposes, for one or more persons, to which the persons are admitted for a 24-hour stay or longer.

(B) Section 1200 of the Health and Safety Code provides that "clinic" means an organized outpatient health facility which provides direct medical, surgical, dental, optometric, or podiatric advice, services, or treatment to patients who remain less than 24 hours, and which may also provide diagnostic or therapeutic services to patients in the home as an incident to care provided at the clinic facility. A place, establishment, or institution which solely provides advice, counseling, information, or referrals on the maintenance of health or on the means and measures to prevent or avoid sickness, disease, or injury, where such advice, counseling, information, or referrals does not constitute the practice of medicine, surgery, dentistry, optometry, or podiatry, shall not be deemed a clinic for purposes of this subdivision.

(C) Section 1200.1 of the Health and Safety Code provides that "clinic" also means an organized outpatient health facility which provides direct psychological advice, services, or treatment to patients who remain less than 24 hours. As provided in section 1204.1 of the Health and Safety Code, such clinics serve patients under the direction of a clinical psychologist as defined in section 1316.5 of the Health and Safety Code, and are operated by a nonprofit corporation, which is exempt from federal taxation under paragraph (3), subsection (c) of section 501 of the Internal Revenue Code of 1954, as amended, or a statutory successor thereof, and which is supported and maintained in whole or in part by donations, bequests, gifts, grants, government funds, or contributions which may be in the form of money, goods, or services. In such clinics, any charges to the patient shall be based on the patient's ability to pay, utilizing a sliding fee scale. Such clinics may also provide diagnostic or therapeutic services authorized under Chapter 6.6 (commencing with section 2900) of Division 2 of the Business and Professions Code to patients in the home as an incident to care provided at the clinic facility.

(5) PHARMACIST. "Pharmacist" means a person to whom a license has been issued by the California State Board of Pharmacy, under the provisions of section 4200 of the Business and Professions Code, except as specifically provided otherwise in Chapter 9 of the Pharmacy Law.

(6) PHARMACY. "Pharmacy" means an area, place, or premises licensed by the California State Board of Pharmacy in which the profession of pharmacy is practiced and where prescriptions are compounded. Pharmacy includes, but is not limited to, any area, place, or premises described in a license issued by the California State Board of Pharmacy wherein controlled substances, dangerous drugs, or dangerous devices are stored, possessed, prepared, manufactured, derived, compounded, or repackaged, and from which the controlled substances, dangerous drugs, or dangerous devices are furnished, sold, or dispensed at retail. Pharmacy shall not include any area specifically excluded by paragraph (b) of section 4037 of the Business and Professions Code.

(7) PRESCRIPTION. "Prescription" means an oral, written, or electronic transmission order that is issued by a physician, dentist, optometrist, or podiatrist licensed in this state *and* given individually for the person or persons for whom ordered. The order must include all of the following:

(A) The name or names and address of the patient or patients.

(B) The name and quantity of the drug or device prescribed and the directions for use.

(C) The date of issue.

(D) Either rubber stamped, typed, or printed by hand or typeset, the name, address, and telephone number of the prescriber, his or her license classification, and his or her federal registry number, if a controlled substance is prescribed.

(E) A legible, clear notice of the conditions for which the drug is being prescribed, if requested by the patient or patients.

(F) If in writing, signed by the prescriber issuing the order.

(8) PHYSICIANS, DENTISTS, OPTOMETRISTS, AND PODIATRISTS. "Physicians," "dentists," "optometrists," and "podiatrists" are persons authorized by a currently valid and unrevoked license to practice their respective professions in this state. "Physician" means and includes any person holding a valid and unrevoked physician's and surgeon's certificate or certificate to practice medicine and surgery, issued by the Medical Board of California or the Osteopathic Medical Board of California and includes an unlicensed person lawfully practicing medicine pursuant to section 2065 of the Business and Professions Code, when acting within the scope of that section.

(9) MEDICINES. "Medicines" means:

(A) Except where taxable for all uses as provided in subdivision (c), any product fully implanted or injected in the human body, or any drug or any biologic, when such are approved by the U.S. Food and Drug Administration to diagnose, cure, mitigate, treat or prevent any disease, illness or medical condition regardless of ultimate use, or

(B) 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. The term medicines also includes certain articles, devices, and appliances as described in subdivision (b) of this regulation.

(b) "MEDICINES." In addition to the definition set forth in subdivision (a)(9) of this section, the term "medicines" means and includes the following items:

(1) PREPARATIONS AND SIMILAR SUBSTANCES. Preparations and similar substances intended for use by external or internal application to the human body in the diagnosis, cure, mitigation, treatment or prevention of disease and which are commonly recognized as a substance or preparation intended for such use qualify as medicines. Tax does not apply to the sale or use of such medicines sold or furnished under one of the conditions provided in subdivision (d)(1) through (d)(6).

"Preparations and similar substances" include, but are not limited to, drugs such as penicillin, and other antibiotics, "dangerous drugs" (drugs that require dispensing only on prescription); alcohol (70% solution) and isopropyl; aspirin; baby lotion, oil, and powder; enema preparations; hydrogen peroxide; lubricating jelly; medicated skin creams; oral contraceptives; measles and other types of vaccines; topical creams and ointments; and sterile nonpyrogenic distilled water. Preparations and similar substances applied to the human body in the diagnosis, cure, mitigation, treatment, or prevention of disease qualify as medicines. "Preparations and similar substances" also include Total Parenteral Nutrition (also called TPN), Intradialytic Parenteral Nutrition (also called IDPN), and food provided by way of enteral feeding, except when the TPN, IDPN, or food provided by enteral feeding qualifies as a meal under Regulation 1503. For purposes of this regulation, TPN, IDPN, and enteral feeding are means of providing complete nutrition to the patient; TPN and IDPN are provided in the form of a collection of glucose, amino acids, vitamins, minerals, and lipids, TPN being administered intravenously to a patient who is unable to digest food through the gastrointestinal tract and IDPN being administered to hemodialysis patients as an integral part of the hemodialysis treatment; enteral feeding is the feeding of the patient directly into the gastrointestinal tract.

(2) PERMANENTLY IMPLANTED ARTICLES. Articles permanently implanted in the human body to assist the functioning of, as distinguished from replacing all or any part of, any natural organ, artery, vein or limb and which remain or dissolve in the body qualify as medicines. An article is considered to be permanently implanted if its removal is not otherwise anticipated. Tax does not apply to the sale or use of articles 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 when such articles are sold or furnished under one of the conditions provided in subdivision (d)(1) through (d)(6).

Permanently implanted articles include, but are not limited to, permanently implanted artificial sphincters; bone screws and bone pins, dental implant systems including dental bone screws and abutments; permanently implanted catheters; permanently implanted hydrocephalus devices and their implanted pressure regulating components; implanted defibrillators and implanted leads; pacemakers; tendon implants; testicular gel implants; and ear implants [including the integral components necessary for the ongoing functioning of the ear, such as the sound processor.](#) Sutures are also included whether or not they are permanently implanted. A non-returnable, nonreusable needle fused or prethreaded to a suture is regarded as part of the suture.

Implantable articles that do not qualify as “permanently” implanted medicines include, but are not limited to, Chemoport implantable fluid systems; Port-a-Cath systems used for drug infusion purposes; disposable urethral catheters; temporary myocardial pacing leads used during surgery and recovery; and defibrillator programmer and high voltage stimulator used with an implanted defibrillator. The sale or use of these items is subject to tax.

(3) **ARTIFICIAL LIMBS AND EYES.** Artificial limbs and eyes, or their replacement parts, including stump socks and stockings worn with artificial legs and intraocular lenses for human beings, qualify as medicines as provided by Revenue and Taxation Code section 6369 (c)(5). Tax does not apply to the sale or use of these items when sold or furnished under one of the conditions provided in subdivision (d)(1) through (d)(6).

(4) **ORTHOTIC DEVICES.** Orthotic devices and their replacement parts, other than orthodontic devices, designed to be worn on the person of the user as a brace, support or correction for the body structure are medicines as provided under Revenue and Taxation Code section 6369(c)(3). The sale or use of orthotic devices and their replacement parts is not subject to tax when sold or furnished under one of the conditions provided in subdivision (d)(1) through (d)(6). Orthotic devices and their replacement parts do not need to be furnished by a pharmacist, within the meaning of subdivision (d)(1), to be considered dispensed on prescription provided the devices are furnished pursuant to a written order of a physician or podiatrist. For the purposes of this regulation, orthotic devices furnished pursuant to a written order of a physician or podiatrist by, but not limited to, medical device retailers, clinics, physical therapists, device suppliers, intermediate care facilities, or other such persons, are deemed to be dispensed on prescription within the meaning of subdivision (d)(1).

Orthotic devices worn on the body of the person include, but are not limited to, abdominal binders and supports, ace bandages, ankle braces, anti-embolism stockings, athletic supporters (only for patients recovering from rectal or genital surgery), casts and cast components, cervical supports, neck collars, cervical traction devices, clavicular splints, post-surgical corsets, elbow supports, head halters, pelvic traction devices, post-operative knee immobilizers and braces, legging orthoses, rib belts and immobilizers, rupture holders, sacral belts, sacro-lumbar back braces, shoulder immobilizers, slings, stump shrinkers, sternum supports, support hose (and garter belts used to hold them in place), thumb and finger splints, trusses, and wrist and arm braces. All of the above must be worn on the body of the person and act as a brace, support or correction for body structure to qualify as a medicine. If any part of the orthotic device is not worn on the person, the device is not a medicine for the purposes of this regulation.

Orthopedic shoes and supportive devices for the foot do not qualify as medicines unless they are an integral part of a leg brace or artificial leg or are custom-made biomechanical foot orthoses. “Custom-made biomechanical foot orthosis” means a device that is made on a positive model of the individual patient's foot. The model may be individually constructed from suitable model material such as plaster of paris, stone, or wax, and may be manually constructed or fabricated using electronic technology.

“Custom-made biomechanical foot orthosis” do not include:

(A) any pre-made or pre-molded foot orthosis or shoe insert even if it has been modified or customized for an individual patient by the practitioner regardless of the method of modification;

(B) any foot orthosis fabricated directly on the patient's foot regardless of the method and materials used and regardless of its individual character; or

(C) any foot orthosis fabricated inside of the patient's shoe regardless of the method of manufacture and materials used and regardless of its individual character.

(5) **PROSTHETIC DEVICES.** Prosthetic devices and their replacements parts designed to be worn on or in the patient to replace or assist the functioning of a natural part of the human body are medicines as provided under Revenue and Taxation Code section 6369(c)(4). The sale or use of prosthetic devices and their replacement parts is not subject to tax when sold or furnished under one of the conditions provided in subdivision (d)(1) through (d)(6). Prosthetic devices and their replacement parts do not need to be furnished by a pharmacist, within the meaning of subdivision (d)(1), to be considered dispensed on prescription provided the devices are furnished pursuant to a written order of a physician or podiatrist. For the purposes of this regulation, prosthetic devices furnished pursuant to a written order of a physician or podiatrist by, but not limited to, medical device retailers, clinics, physical therapists,

device suppliers, intermediate care facilities, or other such persons are deemed to be dispensed on prescription within the meaning of subdivision (d)(1). For purposes of this regulation only, prosthetic devices include bags and tubing, as well as filters, locks, tape, clamps, and connectors which are integral to the tubing, each of which is used to dispense enteral feeding to the patient, including: gastrostomy tubes (also called G tubes) which are used to deliver the nutrition directly into the stomach; jejunostomy tubes (also called J tubes) which are used to deliver the nutrition directly into the intestinal tract; and nasogastric tubes (also called NG tubes) which are used to deliver the nutrition directly through the nasal passage to the stomach. For purposes of this regulation only, prosthetic devices also include needles, syringes, cannulas, bags, and tubing, as well as filters, locks, tape, clamps, and connectors which are integral to the tubing, each of which is used to dispense TPN or IDPN to the patient, provided each of these items is used primarily to dispense the TPN or IDPN.

Prosthetic devices that are considered medicines when worn on or in the patient include, but are not limited to, acetabular cups, atrial valves, breast tissue expanders and tissue expanders, cervical cuff, dacron grafts, heart valves, orbital implant, nerve cups, rhinoplasty prosthesis, neuromuscular electrical stimulators, transcutaneous nerve stimulators, urinary incontinent devices, and wigs and hairpieces prescribed by a physician or podiatrist.

Prosthetic devices that do not qualify as “medicines,” include, but are not limited to, air compression pumps and pneumatic garments; noninvasive, temporary pace makers; and vacuum/constriction devices used to treat male impotency; auditory, ophthalmic and ocular devices or appliances; and dental prosthetic devices and materials such as dentures, removable or fixed bridges, crowns, caps, inlays, artificial teeth, and other dental prosthetic materials and devices. Sales of such items are subject to tax in the same manner as any other sale of tangible personal property.

(6) DRUG INFUSION DEVICES. Programmable drug infusion devices worn on or implanted in the human body which automatically cause the infusion of measured quantities of a drug on an intermittent or continuous basis at variable dose rates and at high or low fluid volume into the body of the wearer of the device qualify as medicines under Revenue and Taxation Code section 6369(c)(6). The sale or use of the qualifying infusion device is not subject to tax when the device is sold or furnished under one of the conditions provided in subdivision (d)(1) through (d)(6).

(c) EXCLUSIONS FROM THE DEFINITION OF “MEDICINES.” Except as otherwise provided in subdivision (b), the following items are specifically excluded from the definition of medicines. Sales of these items are subject to tax in the same manner as any other sale of tangible personal property.

(1) Orthodontic, prosthetic (except as described in subdivision (b)(5)), auditory [\(except as provided in subdivision \(b\)\(2\)\)](#), ophthalmic or ocular devices or appliances.

(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. “Medicines” does not include arch supports, cervical pillows, exercise weights (boots or belts), hospital beds, orthopedic shoes and supportive devices (unless an integral part of a leg brace or artificial leg), plastazote inserts, plastazote shoes, plastic shoes (custom or ready-made), sacro-ease seats, shoe modifications, spenco inserts, traction units (other than those fully worn on the patient), thermophore pads, or foot orthoses.

(3) Any alcoholic beverage the manufacture, sale, purchase, possession or transportation of which is licensed and regulated by the Alcoholic Beverage Control Act (Division 9, commencing with section 23000, of the Business and Professions Code).

(d) APPLICATION OF TAX—IN GENERAL. Tax applies to retail sales, including over-the-counter sales of drugs and medicines, and other tangible personal property by pharmacists and others. However, tax does not apply to the sale or use of medicines when sold or furnished under one of the following conditions:

(1) prescribed for the treatment of a human being by a person authorized to prescribe the medicines, and dispensed on prescription filled by a pharmacist in accordance with law, or

(2) furnished by a licensed physician, dentist or podiatrist to his or her own patient for treatment of the patient, or

(3) furnished by a health facility for treatment of any person pursuant to the order of a licensed physician, dentist or podiatrist, or

(4) sold to a licensed physician, dentist, podiatrist or health facility for the treatment of a human being, or

(5) sold to this state or any political subdivision or municipal corporation thereof, for use in the treatment of a human being; or furnished for the treatment of a human being by a medical facility or clinic maintained by this state or any political subdivision or municipal corporation thereof, or

(6) effective January 1, 1995, furnished by a pharmaceutical manufacturer or distributor without charge to a licensed physician, surgeon, dentist, podiatrist, or health facility for the treatment of a human being, or to an institution of higher education for instruction or research. Such medicine must be of a type that can be dispensed only: (a) for the treatment of a human being, and (b) pursuant to prescriptions issued by persons authorized to prescribe medicines. The exemption provided by this subdivision applies to the constituent elements and ingredients used to produce the medicines and to the tangible personal property used to package such medicines.

(e) SPECIFIC TAX APPLICATIONS.

(1) PRESCRIPTIONS. No person other than a licensed physician, dentist, optometrist or podiatrist is authorized to prescribe or write a prescription for the treatment of a human being. Tax does not apply to the sale or use of medicines prescribed by a licensed physician, dentist, optometrist, or podiatrist for the treatment of a human being and dispensed on prescription filled by a pharmacist.

(2) LICENSED PHYSICIAN, DENTIST OR PODIATRIST. Tax does not apply to a specific charge made by a licensed physician, dentist or podiatrist to his or her own patient for medicines furnished for the treatment of the patient. Tax also does not apply to sales of medicines to licensed physicians, dentists or podiatrists for the treatment of a human being regardless of whether the licensed physician, dentist or podiatrist makes a specific charge-to his or her patient for the medicines furnished.

(3) HEALTH FACILITY. Tax does not apply to sales of medicines by a health facility (as defined in subdivision (a)(4)) for the treatment of any person pursuant to the order of a licensed physician, dentist or podiatrist. Tax does not apply to sales of medicines to a health facility for the treatment of a human being regardless of whether or not a specific charge is made for the medicines.

(4) PHARMACEUTICAL MANUFACTURER OR DISTRIBUTOR. Tax does not apply to the storage, use or consumption of medicines furnished by a pharmaceutical manufacturer or distributor without charge to a licensed physician, surgeon, dentist, podiatrist, or health facility for the treatment of a human being or furnished without charge to an institution of higher education for instruction or research provided the medicines furnished are of a type that can be dispensed only (1) on prescription by persons authorized to prescribe and (2) for the treatment of a human being. The exemption from tax includes the costs of the materials used to package the "sample" medicines, such as bottles, boxes, blister packs, patches impregnated with medicines, or pre-filled syringes, and the elements and ingredients used to produce the "samples" whether or not such items are purchased under a resale certificate in this state or outside this state. When a pre-filled syringe or other such delivery device is used to package and contain a sample medicine (i.e., pre-filled with the medicine) as well as to inject or otherwise administer the medicine to the patient, the exemption from tax will not be lost due to the fact that the device is used for a dual purpose. However, the use of empty syringes or other such delivery devices, furnished to the licensed physician separately or included in the packages with the medicines, is subject to tax.

This exemption applies in the same manner to the use of clinical trial medicines during the United States Food and Drug Administration's drug development and approval process. "Clinical trial medicines" are substances or preparations approved as "Investigational New Drugs" by the United States Food and Drug Administration intended for treatment of, and application to, the human body, which are furnished by a pharmaceutical developer, manufacturer, or distributor to a licensed physician and subsequently dispensed, furnished, or administered pursuant to the order of the licensed physician. "Clinical trial medicines" do not include placebos. Placebos are not used for the treatment of a human being and, as such, do not qualify for the exemption provided under this subdivision. Thus, the use of placebos is subject to tax.

(5) ANTIMICROBIAL AGENTS USED BY HOSPITAL PERSONNEL. Tax does not apply to the sale or use of substances or preparations, such as antiseptic cleansers or scrubs, when such substances or preparations qualify as medicines and are used by hospital personnel on the patient or by hospital personnel on their own bodies to benefit the patient, and which constitute a critical component of the patient's treatment. Qualifying medicines used on the bodies of hospital personnel include antimicrobial agents used for preoperative scrubbing or hand cleansing prior to

any patient contact such as Accent Plus Skin Cleanser; Accent Plus Perinal Cleanser; Bacti-Stat; Betadine; and Medi-Scrub. However, antimicrobial agents such as Accent Plus 1 Skin Lotion; Accent Plus 2 Body Massage; Accent Plus 2 Skin Crème; and Accent Plus Total Body Shampoo applied to the body of hospital personnel are not considered used in the treatment of the patient and the sale or use of these products is subject to tax.

(6) **VITAMINS, MINERALS, HERBS, AND OTHER SUCH SUPPLEMENTS.** In general, sales of vitamins, minerals, herbs and other such supplements are subject to tax. However, when vitamins, minerals, herbs and other such supplements are used in the cure, mitigation, treatment or prevention of disease, and are commonly recognized as a substance or preparation intended for such use, they will qualify as medicines for the purposes of Revenue and Taxation Code section 6369. As such, their sale or use is not subject to tax when sold or furnished under one of the conditions in subdivision (d)(1) through (d)(6).

(7) **DIAGNOSTIC SUBSTANCES, TEST KITS, AND EQUIPMENT.** Tax applies to the sale or use of diagnostic substances applied to samples of cells, tissues, organs, or bodily fluids and waste after such samples have been removed, withdrawn, or eliminated from the human body. Diagnostic substances are applied to the samples outside the living body ("in vitro") in an artificial environment. They are not administered in the living body ("in vivo"). As the substances are not applied internally or externally to the body of the patient, they do not qualify as medicines under Revenue and Taxation Code section 6369.

Except as provided in Regulation 1591.1(b)(4), tax applies to the sale or use of test kits and equipment used to analyze, monitor, or test samples of cells, tissues, organs and blood, saliva, or other bodily fluids. Such items do not qualify as medicines regardless of whether they are prescribed for an individual by a person authorized to prescribe and dispensed pursuant to a prescription.

(f) INSURANCE PAYMENTS

(1) **MEDICAL INSURANCE AND MEDI-CAL.** The exemption of retail sales of medicines is not affected by the fact that charges to the person for whom the medicine is furnished may be paid, in whole or in part, by an insurer. This is so even though a joint billing may be made by the retailer in the name of both the person and the insurer.

(2) **MEDICARE**

(A) Medicare Part A. Tax does not apply to the sale of items to a person insured pursuant to Part A of the Medicare Act as such sales are considered exempt sales to the United States Government. Under Part A, the healthcare provider has a contract with the United States Government to provide certain services. Therefore, sales of medicines, devices, appliances, and supplies in which payment is made under Part A qualify as exempt sales to the United States Government.

(B) Medicare Part B. Tax applies to sales of items to a person in which payment is made pursuant to Part B of the Medicare Act. Sales made under Part B do not qualify as exempt sales to the United States Government even though the patient may assign the claim for reimbursement to the seller and payment is made by a carrier administering Medicare claims under contract with the United States Government. Under Part B, the seller does not have a contract with the United States Government. The contract is between the patient and the United States Government. Unless the sale is otherwise exempt (such as a sale of a medicine under subdivision (d)), the sale is subject to tax.

(3) **EMPLOYER MEDICAL CONTRACTS.** Certain employers have contracted with their employees to provide the latter with medical, surgical, and hospital benefits in a hospital operated by or under contract with the employer for a fixed charge. Usually the charge is by payroll deduction. These contracts are not insurance plans; rather, they are agreements to furnish specified benefits under stated conditions, one of which may be that no charge is to be made to the employee for prescribed medicines. The agreements may provide for making a charge for medicines furnished to out-patients but not to in-patients. This in no way affects the exemption of sales of medicines.

(g) RECORDS. Any pharmacy whether in a health facility or not must keep records in support of all deductions claimed on account of medicines. Section 4081 of the Business and Professions Code requires that all prescriptions filled shall be kept on file and open for inspection by duly constituted authorities.

Pursuant to section 4081 of the Business and Professions Code, physicians and surgeons and podiatrists must keep accurate records of drugs furnished by them. Any deduction on account of sales of medicines shall be supported by appropriate records.

(1) The following written information constitutes acceptable documentation for retailers in those cases where sales are made of supplies which are "deemed to be dispensed on prescription" within the meaning of Revenue and Taxation Code section 6369:

Name of purchaser

Name of doctor

Date of sale

Item sold

The sale price

(2) "DOUBLE DEDUCTION" UNAUTHORIZED. The law does not, of course, permit a double deduction for sales of exempt medicines. For example, if an exemption is claimed on account of a sale of a prescription medicine, no additional deduction for the same sale may be taken as a sale to the United States Government under the Medicare Program.

(3) Persons making purchases of items in which their sale or use is exempt under this regulation should give their suppliers an exemption certificate pursuant to Regulation 1667.