

1 CALIFORNIA STATE BOARD OF EQUALIZATION

2 APPEALS DIVISION SUMMARY FOR BOARD HEARING

3 In the Matter of the Petition for Redetermination)
4 Under the Sales and Use Tax Law of:)5 MEDICAL EQUIPMENT & SUPPLIES)
6 DISCOUNT CENTER, INC.,)
7 dba Medical Equipment Discount Center)Account Number: SR EH 97-756716
Case ID 400764

8 Petitioner)

Riverside, Riverside County

9 Type of Business: Medical Equipment Retailer

10 Audit period: 07/01/03 – 06/30/06

11 Item Disputed Amount

12 Disallowed claimed exempt sales of wheelchairs, etc. \$ 57,082

13 Disallowed claimed exempt sales of other medical devices \$177,336

14 Tax as determined: \$53,828.35

15 Adjustment - Sales and Use Tax Department -12,828.10

16 - Appeals Division -21,801.51

17 Proposed redetermination, protested \$19,198.74

18 Less concurred 1,031.3019 Balance, protested \$18,167.44

20 Proposed tax redetermination \$19,198.74

21 Interest through 2/28/10 8,684.9522 Total tax and interest \$27,883.6923 Monthly interest beginning 3/1/10 \$ 111.99

24 UNRESOLVED ISSUES

25 **Issue:** Whether further adjustments are warranted to the disallowed claimed exempt sales of
26 medical equipment. We recommend no further adjustments.27 Petitioner is a retailer of medical equipment and supplies. During its audit, the Sales and Use
28 Tax Department (Department) conducted a test of claimed exempt sales for the first quarter 2006
resulting in disallowed claimed exempt sales of wheelchairs, crutches, canes, and walkers (audit item
1) and disallowed claimed exempt sales of other medical devices (audit item 2). Petitioner concurs
with seven of the disallowed claimed exempt sales in the test, one in the first category, and six in the
second. Since the Department tested one of the twelve quarters of the audit period, petitioner further

1 concedes that the amounts agreed to in the test should be multiplied by 12, resulting in concurred
2 amounts of \$468 for item 1 and \$7,716 for item 2.

3 Some of petitioner's customers provided a doctor's written prescription and for some the
4 doctor's office telephoned petitioner to order the type of equipment needed. The remainder of
5 petitioner's customers came into the store on their own, and petitioner states that it collected sales tax
6 reimbursement unless the customer objected, in which case it provided the customer a "Prescription
7 Tax Form," which includes a certification by the customer that the purchase of the item was directed
8 by the customer's doctor, as well as information identifying the customer, diagnosis, and doctor.

9 With respect to audit item 1, the Department disallowed claimed exempt sales of wheelchairs,
10 crutches, canes and walkers for which petitioner provided only a Prescription Tax Form because the
11 form is not a prescription. After the audit began, petitioner sent an email to the Department's
12 Information and Advisory Unit (IAU), which IAU answered in a memorandum dated October 23,
13 2006.¹ Essentially, IAU's reply states that the prescription for wheelchairs, crutches, canes, and
14 walkers required to satisfy the requirements of the exemption provided by Revenue and Taxation Code
15 section 6369.2 can be oral, and that it appeared the information petitioner was obtaining from its
16 customers was sufficient. However, IAU also noted that the information solely from the customer may
17 not be sufficient for documenting the exemption, and suggested petitioner might want to confirm the
18 order with the physician rather than simply accepting the customer's statement.

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20
21 ¹ It appears that IAU was not aware that an audit was underway since the Department generally does not respond to this
22 type of inquiry during the pendency of an audit by way of separate opinion (instead responding to it as part of the audit). In
23 any event, IAU's memorandum explicitly states that it would not serve as a basis for relief under Revenue and Taxation
24 Code section 6596. Furthermore, since the opinion was issued after the end of the audit period, even if it had been an
25 opinion coming within section 6596, it would have been inapplicable to the transactions in dispute here. We note also that
26 the opinion appears to introduce some ambiguity in its statement of the requirements for the documentation required to
27 support the exemption. The opinion indicates that the information petitioner indicated it was obtaining from its customers
28 appeared to be sufficient, but it goes on to state, "In situations where the physician does not contact you directly, but rather,
the customer indicates that their physician directed them to obtain a mobility assistance product, you may want to confirm
the doctor's order directly with the physician rather than just accepting the customer's statement." The reason petitioner
"may want" to contact the physician for confirmation of the order is that the statement solely from the customer would not
be sufficient documentation to support the claimed exemption. That is, it appears that the IAU must have meant that
petitioner may want to confirm the doctor's order because, if petitioner were audited, the Department may well require
more documentation than just the customer's statement, in which case petitioner would have to document having confirmed
the doctor's order to support the claimed exemption.. We believe that the opinion should not have indicated the
information from the customer appeared to be sufficient, and should have instead unambiguously stated that petitioner's
confirmation of the order with the doctor is required.

1 In a July 31, 2007 letter, petitioner advised the Department that it routinely contacted
2 physicians when a customer provided a Prescription Tax Form. The Department did not accept this
3 description of petitioner's procedures because petitioner had not mentioned calls to physicians until
4 after it received the memorandum from IAU. After the appeals conference, petitioner provided
5 declarations, signed under penalty of perjury by Mr. Shalika, the corporate president, and by other
6 employees, stating that petitioner's employees contacted the customers' doctors to verify that the
7 purchases had been directed by the doctors. The Department questioned the credibility of the
8 declarations, alleging petitioner's statements changed after receipt of the memorandum from IAU.

9 In the D&R, we find that the prescription required as a condition to the exemption can be
10 provided by the doctor orally. Therefore, the D&R recommends that the Department perform a reaudit
11 to review disallowed claimed exempt sales of wheelchairs, crutches, canes, and walkers where
12 petitioner had a Prescription Tax Form to determine whether petitioner actually contacted the doctors
13 for oral confirmation of their orders. During the reaudit, the Department found that one of the
14 disallowed claimed exempt sales was supported by a written prescription, and thus the Department
15 allowed that claimed exemption. With respect to all but two of the remaining disputed sales in audit
16 item 1, petitioner had patient intake forms which include spots for the entry of the doctor's name,
17 Unique Physician Identifier Number (UPIN) and medical license number. All but three of the intake
18 forms included either the UPIN or the medical license number, or both, and by researching the
19 numbers on the Internet, the Department was able to confirm that the identifying numbers on the forms
20 were the correct identifying numbers of the doctors listed on each such respective form. The
21 Department allowed the claimed exemptions supported by such intake forms. Thus, after the reaudit,
22 there remain five disallowed claimed exemptions in the test: two for which there is no patient intake
23 form and three for which there is a patient intake form that lacks any identifying number for the listed
24 doctor.

25 It appears generally unlikely that a patient would have his or her doctor's UPIN or medical
26 license number available to include on a patient intake form, so we believe in doing the reaudit the
27 Department must have regarded such identification numbers on the form as evidence that petitioner's
28 employees contacted the doctor for confirmation of the customer's order, as long as those identifying

1 numbers could themselves be confirmed as the numbers of actual doctors. Thus, we agree with the
2 Department's allowance of the claimed exemptions where the intake forms had such confirmed
3 identifying numbers. For the remaining five disputed transactions, where there is no patient intake
4 form at all or where the available patient intake form lacks both the UPIN and the medical license
5 number of the doctor, we conclude that petitioner has failed to establish that it confirmed with the
6 doctor that the doctor had directed the purchaser to use the purchased item. Thus, we conclude that
7 petitioner has not provided sufficient evidence to support its claim that those five sales were exempt
8 sales, ordered by a physician, and we recommend no further adjustments for this audit item.

9 Audit item 2 consists of disallowed claimed exempt sales of medical equipment other than
10 wheelchairs, crutches, canes, and walkers, such as lift-chairs, stair-lifts, nebulizers, shower benches
11 and chairs, commodes, recliner chairs, silverware grips, and foam bed wedges. The Department
12 concluded that none of these types of equipment fit within the exemption provided by Revenue and
13 Taxation Code section 6369.2 and concluded that all such sales were subject to tax. Petitioner agrees
14 that tax applies to sales of items such as silverware grips and shower benches and chairs. However, it
15 disputes the disallowance of claimed exempt sales of slings with commode openings to assist in
16 transportation of patients, foam bed wedges, recliner chairs, lift-chairs (electric positioning chairs),
17 stair-lifts (wheelchair elevators), and nebulizers.

18 Petitioner has not provided a specific basis for its contention that sales of slings, foam wedges,
19 and recliner chairs are exempt, and we find that such sales do not come within the section 6369.2
20 exemption. Petitioner states that lift-chairs and stair-lifts are mobility devices that fall under the same
21 U. S. Food and Drug Administration classification as wheelchairs, canes, and crutches, and that sales
22 of lift-chairs and stair-lifts are exempt because they fall within the category of sales the Legislature
23 intended to exempt when it enacted section 6369.2. We find that the classification of equipment by the
24 FDA is not relevant to the analysis of the application of sales tax. Section 6369.2 provides an
25 exemption for sales of "wheelchairs, crutches, canes, quad canes, white canes used by the legally blind,
26 and walkers, and replacement parts for these devices." Lift-chairs and stair-lifts are not included in the
27 list of qualifying items, nor is there any basis for expansion of the exemption to cover additional items
28 (such as if the statute were to also include "and similar items"). Thus, the question is whether either a

1 lift-chair or a stair-lift *is* a wheelchair. A lift-chair assists the patient in getting into a wheelchair, and a
2 stair-lift lifts the patient up the stairway in his or her wheelchair. We find that neither of these devices
3 is properly categorized as a wheelchair for purposes of the exemption. Accordingly, sales of lift-chairs
4 and stair-lifts do not qualify for exemption under section 6369.2.

5 Petitioner contends that sales of nebulizers are exempt sales of respiratory devices under
6 California Code of Regulations, title 18, section 1591.4. This is an exemption for sales of medical
7 oxygen delivery systems provided by Revenue and Taxation Code section 6369.5. Petitioner's
8 nebulizers are not qualifying medical oxygen delivery systems, and thus the claimed exemption is
9 inapplicable. We note in the D&R that if the nebulizer were sold as the container of medicine, the sale
10 of which was exempt, the sale of the combination (nebulizer as a container of medicine) would be
11 exempt, and we recommended that the Department determine if such were the case. During the
12 reaudit, the Department verified that petitioner sold only the nebulizer itself, and not as the container of
13 medicine. Accordingly, we find that petitioner's sales of nebulizers were taxable.

14 **RESOLVED MATTERS**

15 The Department performed a reaudit prior to the appeals conference to consider additional
16 documentation provided by petitioner, and accepted claimed exemptions that had previously been
17 disallowed, reducing the taxable measure of the Notice of Determination of \$694,559 by \$165,524 to
18 \$529,035. Audit item 2, which was for disallowed claimed exemptions under section 6369.2 for sales
19 of items which do not come within the exemption, included a disallowed claimed exempt sale of tires
20 for a wheelchair. Since replacement parts for wheelchairs can qualify for the section 6369.2, this sale
21 was not properly included in audit item 2. Rather, it should have been considered as part of audit item
22 1, and we recommended that the Department reclassify the claimed exemption, and allow it if the
23 requirements for prescription were satisfied. In the reaudit after the D&R, the Department allowed the
24 sale as exempt, along with the other adjustments discussed above.

25 **OTHER DEVELOPMENTS**

26 None.

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28 Summary prepared by Deborah A. Cumins, Business Taxes Specialist III