

1 CALIFORNIA STATE BOARD OF EQUALIZATION

2 APPEALS DIVISION FINAL ACTION SUMMARY

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)
8 Petitioner)

Account Number: SR EH 97-756716
Case ID 400764
Riverside, Riverside County

8 Type of Business: Medical Equipment Retailer

9 Audit period: 07/01/03 – 06/30/06

10 <u>Item</u>	<u>Disputed Amount</u> ¹
11 Disallowed claimed exempt sales of wheelchairs, etc.	\$ 39,620
12 Disallowed claimed exempt sales of other medical devices	\$181,159
13 Tax as determined:	\$53,828.35
14 Adjustment - Sales and Use Tax Department	- 12,828.10
15 - Appeals Division	- 21,801.51
16 - Post Board hearing	- <u>1,353.31</u>
17 Proposed redetermination, protested	\$17,845.43
18 Less concurred	- <u>735.00</u>
19 Balance, protested	<u>\$17,110.43</u>
20 Proposed tax redetermination	\$17,845.43
21 Interest through 8/31/10	<u>8,695.50</u>
22 Total tax and interest	\$26,540.93
23 Payments	- <u>10.00</u>
24 Balance Due	<u>\$26,530.93</u>
25 Monthly interest beginning 9/1/10	<u>\$ 104.04</u>

21 The Board held the oral hearing in this matter on February 24, 2010, granting petitioner 30 days
22 to provide additional evidence that three specific disputed sales of wheelchairs were made pursuant to
23 oral prescriptions from physicians and the Sales and Use Tax Department (Department) 30 days to
24 _____

25 ¹ Petitioner concedes in its April 30, 2007 petition that tax applies to a measure of \$735, listing one conceded sale for \$39 in
26 the first item (wheelchairs) and seven conceded sales totaling \$647 in the second item (other medical devices), which total
27 \$686 rather than \$735. Petitioner also concedes in a February 9, 2009 letter that these amounts should be multiplied by 12
28 to account for the 12 quarters in the audit. Thus, total conceded measure for these two audit items appears to be \$8,232
(\$686 x 12). In addition, petitioner has never raised any contentions regarding the third audit item, a difference between
recorded and reported taxable sales of \$5,123 for the fourth quarter 2005. So, petitioner seemingly concedes tax of
\$1,035.01, measured by \$13,355 (\$8,232 + \$5,123). However, at the Board hearing and in its post hearing submissions,

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1 respond. The discussions of recommended adjustments under “Unresolved Issue” and “Resolved
2 Issue” below are as of the Board hearing, and the post-hearing submissions are discussed under Post
3 Board Hearing Developments.

4 UNRESOLVED ISSUE

5 **Issue:** Whether further adjustments are warranted to the disallowed claimed exempt sales of
6 medical equipment. We recommend no further adjustments.

7 Petitioner is a retailer of medical equipment and supplies. During its audit, the Department
8 conducted a test of claimed exempt sales for the first quarter 2006 resulting in disallowed claimed
9 exempt sales of wheelchairs, crutches, canes, and walkers (audit item 1) and disallowed claimed
10 exempt sales of other medical devices (audit item 2). Some of petitioner’s customers provided a
11 doctor’s written prescription, and, for some, the doctor’s office telephoned petitioner to order the type
12 of equipment needed. The remainder of petitioner’s customers came into the store on their own, and
13 petitioner states that it collected sales tax reimbursement unless the customer objected, in which case it
14 provided the customer a “Prescription Tax Form,” which includes a certification by the customer that
15 the purchase of the item was directed by the customer’s doctor, as well as information identifying the
16 customer, diagnosis, and doctor.

17 With respect to audit item 1, the Department disallowed claimed exempt sales of wheelchairs,
18 crutches, canes and walkers for which petitioner provided only a Prescription Tax Form because the
19 form is not a prescription. After the audit began, petitioner sent an email to the Department’s
20 Information and Advisory Unit (IAU) which was answered by memorandum dated October 23, 2006.²

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22 petitioner has translated its previously noted concessions into tax of \$735. Therefore, since petitioner now only concedes
23 tax of \$735 (which would be measured by \$9,484), the disputed amounts shown above are based on conceded tax of \$735.
24 ² It appears that IAU was not aware that an audit was underway since, in such circumstances, the Department generally
25 responds to an inquiry of this type only as part of the audit and not by way of separate opinion. In any event, IAU’s
26 memorandum explicitly states that it would not serve as a basis for relief under Revenue and Taxation Code section 6596.
27 Furthermore, since the opinion was issued after the end of the audit period, even if it had been an opinion coming within
28 section 6596, it would have been inapplicable to the transactions in dispute here. Further, we find that the opinion
introduces some ambiguity in its statement of the requirements for the documentation required to support the exemption by
indicating that the information petitioner stated it was obtaining from its customers appeared to be sufficient, and then
stating, “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.” To the extent that this statement implies that the form
submitted by the patient, alone, without petitioner’s contacting the physician, might even arguably be sufficient for the
exemption, it is wrong. It appears that the IAU must have meant that petitioner may want to confirm the doctor’s order

1 Essentially, IAU's reply states that the prescription for wheelchairs, crutches, canes, and walkers
2 required to satisfy the requirements of the exemption provided by Revenue and Taxation Code section
3 6369.2 can be oral, and that it appeared the information petitioner was obtaining from its customers
4 was sufficient. However, IAU also noted that the information solely from the customer may not be
5 sufficient for documenting the exemption, and suggested petitioner might want to confirm the order
6 with the physician rather than simply accepting the customer's statement.

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

15 In the D&R, we find that the prescription required as a condition to the exemption can be
16 provided by the doctor orally. Therefore, the D&R recommends that the Department perform a reaudit
17 to review disallowed claimed exempt sales of wheelchairs, crutches, canes, and walkers, for which
18 petitioner had a Prescription Tax Form, to determine whether petitioner actually contacted the doctors
19 for oral confirmation of their orders. During the reaudit, the Department found that one of the
20 disallowed claimed exempt sales was supported by a written prescription, and thus the Department
21 allowed that claimed exemption. It also found that, for the majority of the remaining disallowed
22 claimed exempt sales, petitioner had patient intake forms which include spots for the entry of the
23 doctor's name, Unique Physician Identifier Number (UPIN) and medical license number. All but three
24 of the intake forms included either the UPIN or the medical license number, or both, and by

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27 because, if petitioner were audited, the documentation from the patient alone would be insufficient to support the
28 exemption. The opinion should not have indicated the information from the customer appeared to be sufficient, and should
have instead unambiguously stated that petitioner must not only confirm the order with the physician, but if it does so
orally, must adequately document the oral prescription for purposes of audit.

1 researching the numbers on the Internet, the Department was able to confirm that the identifying
2 numbers on the forms were the correct identifying numbers of the doctors listed on each such
3 respective form. The Department allowed the claimed exemptions supported by such intake forms.

4 We assume that in doing the reaudit, the Department regarded the UPIN's on the form as
5 evidence that petitioner's employees contacted the doctor for confirmation of the customer's order, as
6 long as those identifying numbers could themselves be confirmed as the numbers of the actual doctors
7 asserted to have issued the prescriptions. For the remaining disputed transactions, where there is no
8 patient intake form at all or where the available patient intake form lacks both the UPIN and the
9 medical license number of the doctor, we conclude that petitioner has failed to establish that it
10 confirmed with the doctor that the doctor had directed the purchaser to use the purchased item. Thus,
11 we conclude that petitioner has not provided sufficient evidence to support its claim that the remaining
12 disputed sales were made pursuant to a physician's prescription and were therefore exempt.

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

22 Petitioner has not provided a specific basis for its contention that sales of slings, foam wedges,
23 and recliner chairs are exempt, and we find that such sales do not come within the section 6369.2
24 exemption. Petitioner states that lift-chairs and stair-lifts are mobility devices that fall under the same
25 U. S. Food and Drug Administration classification as wheelchairs, canes, and crutches, and that sales
26 of lift-chairs and stair-lifts are exempt because they fall within the category of sales the Legislature
27 intended to exempt when it enacted section 6369.2. We find that the classification of equipment by the
28 FDA is not relevant to the analysis of the application of sales tax. Section 6369.2 provides an

1 **POST BOARD HEARING DEVELOPMENTS**

2 After the Board hearing, the Department found that two of the three transactions disputed
3 during the Board hearing had already been allowed in the December 15, 2008 reaudit. With respect to
4 the third sale, the Department found that the evidence was sufficient to show that the sale, for \$1,595,
5 was made pursuant to an oral prescription and was therefore exempt. Since the deficiency is based on
6 the projection of errors from a test, the effect of removing the \$1,595 sale from the disallowed items in
7 the test is a reduction of \$17,462 in the measure of the deficiency, from \$247,725 to \$230,263.

8 There are seven claimed exempt sales in the first disputed item (wheelchairs) in the test period
9 which remain disallowed, four of which are not supported by intake sheets, two of which were sales to
10 Kaiser Permanente physicians, and one petitioner agrees was taxable. We find there is insufficient
11 evidence to show that any of these seven sales were made pursuant to a prescription of a physician.
12 Therefore, we do not recommend any adjustments other than the one discussed above.

13 In its post-hearing submissions, petitioner also reiterated its contentions that its sales of
14 nebulizers and sales of lift-chairs and other mobility devices should be regarded as exempt. Regarding
15 sales of nebulizers, petitioner argues that, when sold in a manner other than sold by petitioner, the sales
16 could be exempt. Whether a sale is exempt from tax depends on the circumstances of that particular
17 sale, and the fact that a sale of the item could be exempt in different circumstances is irrelevant.
18 Regarding sales of lift chairs and other mobility devices, petitioner is mistaken in its belief that the
19 Board found that sales of mobility devices are exempt, even if they do not qualify for exemption under
20 the provisions of section 6369.2. The types of mobility devices whose sales are exempt from tax when
21 made pursuant to a prescription by a physician, as specifically listed in section 6369.2 and Regulation
22 1591.2, are: wheelchairs, crutches, canes, quad canes, white canes used by the legally blind, and
23 walkers. Sales of the other mobility devices carried by petitioner are not exempt from tax under this
24 exemption.

25 We thus recommend the measure of the deficiency be reduced to \$230,263, and that no further
26 adjustments be made.

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