

**STATE BOARD OF EQUALIZATION**

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December 18, 1992

Ms. --- [B]
Patient Accounts Representative
[O]
XXXX --- ---
---, CA XXXXX

BURTON W. OLIVER
Executive Director

Re: S-Y -- XX-XXXXXX

Dear Ms. [B]:

This is in response to your letter dated November 11, 1992 regarding the application of sales or use tax to sales and leases of tangible personal property when an insurance company makes certain payments with respect to those transactions. You state:

“I am from [O], which provides home IV therapy and nutritional services. Our company purchases and rents pumps and poles which are used by patients in their therapies as prescribed by their physicians.

“When [O] purchases these items, we pay the required tax. When a patient buys or rents the pump and pole from [O], the proper tax is itemized on their bill. This bill is then referred to their insurance company. It appears that the insurance company will not pay the tax for this item.

“We realize that a portable pump which is worn on a patient’s belt, for example, is noted as medicine and therefore non-taxable. A pump with a pole is not considered medicine and thus taxable.

“My question is, does the law require insurance companies to pay the tax and if so what law would apply?”

Discussion

A lease of tangible personal property is a continuing sale unless the lessor leases it in substantially the same form as acquired and has made a timely election to pay sales tax reimbursement or use tax measured by the lessor’s purchase price of the property. (Rev. & Tax. Code §§ 6006(g)(5), 6006.1, 6010(e)(5), 6010.1.) A lease that is a continuing sale is subject to

tax measured by rentals payable. The tax imposed on the lease is generally the use tax which is owed by the lessee and which the lessor is required to collect from the lessee and pay to this Board. (Rev. & Tax. Code §§ 6201, 6202, 6203, 6204, Reg. 1660.)

You state that when you purchase the property in question, you “pay the required tax.” You go on to state that when you sell or lease the property to the patient, the proper tax is itemized. These statements appear to be inconsistent. When you purchase property for resale prior to any use, no sales or use tax would apply to your purchase. (Rev. & Tax. Code §§ 6007, 6051.) Rather, sales tax would apply to the retail sale, that is, to your sale to the purchaser.

With respect to your leases, assuming that you lease the property in substantially the same form as you acquire it, your payment of sales tax reimbursement or use tax to your vendor would be an irrevocable election to treat the lease of such property as not subject to tax. It would then be improper for you to collect tax from the lessees with respect to such leases since those leases would not be taxable continuing sales. For purposes of this opinion, I assume that you do not pay sales tax reimbursement or use tax to your vendors when purchasing the property in question.

You ask whether the law requires an insurance company to pay the tax. Insurance companies pay a tax which is imposed on their gross premiums. (Cal. Const. Art. XIII, sec. 28, Rev. & Tax. Code § 12201.) As relevant here, that tax is in lieu of all other state and municipal taxes imposed *on the insurance company*, including sales and use taxes. (Cal. Const. Art. XIII, sec. 28(f), Rev. & Tax. Code § 12204.)

California’s sales tax is imposed in the retailer, not on the purchaser. (Rev. & Tax. Code § 6051.) The retailer may, however, collect reimbursement for its sales tax liability from its purchaser if their contract of sale so provides. (Civ. Code § 1656.1.) If you contracted directly with an insurance company to sell it tangible personal property in California, the in lieu provisions of the insurance tax mentioned above would have *no* effect on the application of tax to that sale. (This is covered by subdivision (b) of Regulation 1567, a copy of which is enclosed.) You would still owe sales tax and you would still be entitled to collect sales tax reimbursement from the insurance company if your contract so provided since that sales tax would not be imposed on the insurance company.

As mentioned above, the tax on a lease is generally the use tax, which would be owed by the lessee. However, subdivision (c) of Regulation 1660 states: “When the lessee is not subject to use tax (for example, insurance companies), the sales tax applies. The sales tax is upon the lessor and is measured by the rentals payable.” Thus, even if you contracted directly with the insurance company to lease the property to that insurance company, the applicable tax would not be imposed on the insurance company because the tax would be a sales tax imposed on you. Since it would be a sales tax, the provisions of Civil Code section 1656.1 apply, meaning that you could collect reimbursement from the insurance company for *your* sales tax liability. Since sales tax reimbursement is a contract term and not a tax imposed on the purchaser/lessee, the in lieu provisions of the insurance tax do not apply.

Thus, applying the rules discussed above, even if you were contracting directly with the insurance company to sell or lease it the property in question, tax would still apply. Your contracts presumably include the common provisions regarding tax (such as "purchaser/lessee to pay applicable taxes"). Thus, the insurance company, who also presumably would have agreed to that provision, would owe you tax reimbursement per the contract. (I note that just because your contract may have stated that the purchaser or the lessee will pay the applicable taxes does not alter the legal incidence of the tax. If it is a sales tax, that tax is imposed upon you regardless of the wording of your reimbursement provision.)

I note that I have provided you the analysis above because I believe it will help you in your dealings with this and other insurance companies. Based upon your description, however, I do not believe the discussion above is truly relevant to the transactions about which you inquire. My understanding is that you contracted with your patients to sell or lease the property to those patients. That they may have insurance coverage to reimburse them for their medical expenses, including the cost of leasing or purchasing the property in question, does not alter the fact that you contracted with those patients, *and not with the insurance companies*, to sell or lease the property. Even if the insurance coverage provides that the insurance company will pay you directly, without requiring the patient to pay you and then seek reimbursement from the insurance company, the analysis remains the same.

In summary, my understanding is that you have not contracted with the insurance company to sell or lease it anything. Thus, you are selling and leasing to your patients and the general rules for application of sales or use tax apply to your sales and leases. However, even if you were contracting directly with the insurance company to sell or lease it tangible personal property, those sales and leases would be subject to sales tax, imposed on you, for which the insurance company must reimburse you if the contract of sale or lease so provides.

If you have further questions, feel free to write again.

Sincerely,

David H. Levine
Senior Tax Counsel

DHL:es

Encs.: Regs. 1567 & 1660

bc: Sacramento District Administrator