



STATE BOARD OF EQUALIZATION

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Controller, Sacramento

BURTON W. OLIVER
Executive Director

March 24, 1995

[F]
[D]
P.O. Box XXX
XXXX --- ---
--- ---, CA XXXXX

Re: Sale of Prescription Safety Spectacles

Dear Mr. [F]:

This is in response to your letter dated December 19, 1994, which was directed to Mr. Gerald Jung of the State Board of Equalization in Oakland, California. Mr. Jung referred your inquiry to the Legal Division for an opinion considering the facts presented in your letter.

In your letter to Mr. Jung, you state:

“We are in the business of making industrial prescription safety spectacles which we sell directly to industrial plants for use by their employees.

“We have fabricated prescription safety spectacles for several employees of a particular company and have submitted 12 invoices to cover the costs of their employee’s prescription safety eyewear including handling, freight and sales tax as separate line items. The glasses were all delivered to the company’s [city], CA plant during August and September 1994.

“The company has remitted payment to us, but have (sic) deducted the sales tax from each invoice. Attached to their remittance is a photocopy of Regulation 1592 relating to eyeglasses and other ophthalmic material.

“We are not dispensing opticians nor optometrists.”

We have received additional information from the Oakland District office which indicates your customer is [M]. In addition, the district office tells us that the prescriptions for the employees are obtained by the respective employee from their private optometrist/doctor, given to [M], who in turn transfers them to you for prescription grinding and manufacture.

Further, we are advised that you are not a licensed dispensing optical laboratory. We shall consider this additional information in our response to your questions.

Section 6051 of the Revenue and Taxation Code imposes the sales tax on retailers for the privilege of selling tangible personal property at retail. The measure of tax is based on gross receipts from the retail sales in this state of tangible personal property.

Revenue and Taxation Code section 6015 provides in pertinent part that a retailer includes every seller who makes any retail sale or sales of tangible personal property. Section 6014 provides that the term "seller" includes every person engaged in the business of selling tangible personal property of a kind the gross receipts from the retail sale of which are required to be included in the measure of sales tax. Section 6007, in part, provides that retail sale means a sale for any purpose other than resale in the regular course of business in the form of tangible personal property.

Sales and Use Tax Regulation 1524 provides as follows:

“(a) ... Tax applies to the gross receipts from retail sales (i.e., sales to consumers) by manufacturers of tangible personal property the sale of which is not otherwise exempted. The measure of the tax is the gross receipts of, or sales price charged by, the manufacturer, from which no deduction may be taken by the manufacturer on account of the cost of the raw materials or other components purchased, or labor or service costs of any step in the manufacturing process, including work performed to fit the customer’s specific request, or any other services that are a part of the sale. In addition, no deduction may be taken on account of interest paid, losses or any other expense.

Revenue and Taxation Code section 6369, interpreted and implemented by Sales and Use Tax Regulation 1591, provides that sales of medicine, when prescribed and sold or furnished under certain conditions for the treatment of a human being, are exempt from sales or use tax. Sub-division (a)(c)(1) of Sales and Use Tax Regulation 1591 specifically excludes ophthalmic or ocular devices or appliances from the definition of “medicines.” Sales of such products are thus subject to tax unless a statutory exclusion applies.

Revenue and Taxation Code section 6018, interpreted and implemented by Sales and Use Tax Regulation 1592, provides that a physician, optometrist, or surgeon is the consumer of ophthalmic materials including eyeglasses, frames, and lenses used or furnished in the performance of his professional services in the diagnosis, treatment or correction of conditions of the human eye. A registered dispensing optician is the consumer of such property dispensed pursuant to a prescription prepared by a physician, surgeon, or optometrist.

A retailer may add sales tax reimbursement to the sales price of the tangible personal property sold at retail to a purchaser dependent solely upon the terms of the agreement of sale. It

shall be presumed that the parties agree to the addition of sales tax reimbursement to the sales price of tangible personal property sold at retail to a purchaser if the agreement of sale expressly provides for such addition of sales tax reimbursement. (See Civil Code section 1656.1.)

The treatment as a consumer provided in Regulation 1592 applies only to physicians, surgeons, optometrists, and licensed dispensing opticians. Thus sales by anyone other than those specifically included are sales at retail subject to sales tax. In that [D] does not fall within any of the categories listed in Regulation 1592, its sales to consumers do not meet the requirements for treatment of [D] as a consumer but do fall within the guidelines established in Sales and Use Tax Regulation 1524 as above cited. Under these facts, [D] is the manufacturer, as well as the retailer of the ophthalmic materials and its sales directly to consumers are subject to sales tax. [D] must report and pay sales tax on those sales measured by the full retail selling price. (Rev. & Tax. Code § 6006.)

We understand that [M] has refused to pay sales tax reimbursement which raises a different issue. The arrangement between the retailer and the consumer in regard to sales tax reimbursement is contractual in nature. There is no obligation on the part of a consumer to pay sales tax reimbursement unless that consumer contractually agrees to the acceptance of that obligation. I have not been provided with any of the documents or contracts between [D] and [M], therefore, I can make no judgment as to [M]'s obligation to pay sales tax reimbursement.

If you have any further questions in regard to the matters contained herein, please do not hesitate to write.

Your very truly,

Anthony I. Picciano
Staff Counsel

AIP:es

cc: --- District Administrator