State of California

Board of Equalization
Legal Department-MIC: 82

M e m o r a n d u m

505.0865

To : Mr. Vic Anderson
Supervisor, Spec. Proj. Sec. (MIC:40)

Date: July 16, 2002

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Subject: SY -- XX-XXXXXX
S--- - C--- H--- C--- C--- [S---]
Refund of Tax Reimbursement

I am responding to your memorandum dated March 28, 2002, to assistant Chief Counsel Janice L. Thurston. I apologize for the delay. You attached a copy of a memorandum to Program Planning Manager Charlotte Paliani dated December 6, 2001, from Van Nuys District Principal Auditor Jack Infranca.

According to Mr. Infranca, the Board has received a Claim for Refund from S--- for sales tax paid on feeding tubes, the sales of which have been made exempt by a recent change to Regulation 1591. S--- avers that it is not required to refund the sales tax reimbursement it has received from Medicare B, Medi-Cal, or private medical insurer. Mr. Infranca attached several copies of Medicare billings to his memorandum.

As you note, there appears to be two different billing situations. In the first, Medicare B reimbursed the taxpayer for the sales of the tubes. In the second, Medicare B reimbursed the taxpayer for only a portion of the sale, and the taxpayer received reimbursement for the remainder from either a private insurer, Medi-Cal, or the patient. Apparently Medicare B set the price contractual allowance in both cases. You indicate that S--- considers reimbursements from Medicare to be tax included. S--- computed the tax as it was included on the total amount of reimbursement received and remitted that amount to the Board. S--- separately bills the tax reimbursement to second parties according to your information.

You indicated in your memo that, based on your review of the billings attached to Mr. Infranca's memo, S--- did not always increase its billing amount to include sales tax. I am not sure what that means. I presume from what you have said that S--- did not always bill Medicare B an

amount that was the full tax-included price but that S--- did consider the Medicare payment to include tax reimbursement.

You ask three questions. One, "Is S--- entitled to a tax-included deduction for sales to Medicare?" Two, "Of the amount of tax refunded to S--- for the exempt feeding tubes, must S--- refund the tax to Medicare, or may it retain the refund?" Third, "If S--- received partial reimbursement from a second party, must it pro-rate the refund among the parties who reimbursed it for the tax?"

OPINION

It is well established that the Board may condition its granting of a claim for refund of sales tax on the taxpayer remitting any amount of a refund to the customers that bore the economic burden of the tax. Otherwise, the claimant is unjustly enriched. (Decorative Carpets, Inc. v. SBE (1962) 58 Cal.2d 252.) Also, a taxpayer must demonstrate from his own records that he is entitled to a refund. (§ 7053; Paine v. SBE (1982 137b Cal. App. 3d 438.)

Based on these principles, the answer to your two latter questions is simple. The Board may condition any refund on S--- returning the reimbursement to the persons who paid it -either Medicare alone or Medicare in combination with the second parties who paid the portion of the billing that Medicare did not pay. Collecting sales tax reimbursement is, of course, not mandatory. (See, Civ. Code § 1656.1.) To the extent it was not reimbursed, S--- is the direct taxpayer (not merely a conduit for money from the patient to the Board) and may keep the refund.

The answer to your first is a little trickier. Mr. Infranca and you both quoted a portion of the Medicare Manual stating that suppliers may not separately bill Medicare B for tax but should add the tax into the item billing. S---'s apparent position is that, as Medicare B did not reimburse it for the full retail selling price of the items, then none of the payments is for tax. From this, and the reference to S--- treating all Medicare B payments as including tax, we conclude just the opposite. Using the example in your memorandum, the tubes cost $200 and the Medicare contract allowance was $150. If S--- billed the full amount of $150, it reported $11.43 as sales tax. S--- would be entitled to a tax-included deduction for these sales billed to Medicare. As a result, S--- would report $138.57 as taxable gross receipts. Of course, that would mean S--- was reimbursed for tax on 100% of those sales and could not keep any of the refund.

What is not clear is what happened if S--- billed Medicare some lesser amount for the tubes. Would the reimbursement also be on a tax-included basis or did Medicare add the tax to the billed amount? The language you quote indicates that Medicare B would assume that the amount it was billed included the tax since tax could not be added separately. Therefore, it is likely that if S--- billed, say, $135, and the contract allowance was $150, Medicare B reimbursed S--- $135, part of which was the included tax.

"Gross receipts" is the total amount received, not the amount billed. (§§ 6011(a) & 6012(a).) If, as seems likely, Medicare considered any billed amount as including tax, then the payments it made also included tax. Indeed, S--- treated its Medicare B payments as including tax. Therefore, the amount of gross receipts derived from these sales is the amount it actually received. In your example, the amount of S---'s gross receipts is $138.57, not $200. While it is not entirely clear, it appears that S--- was reimbursed for 100% of the tax.

JLW:ef

cc: Van Nuys District Administrator (AC)