

BEFORE THE APPEALS DIVISION
DEPARTMENT OF REVENUE
STATE OF WASHINGTON

In the Matter of the Petition For Correction of)	<u>D E T E R M I N A T I O N</u>
Assessment of)	
)	No. 98-112
)	
...)	Registration No. . . .
)	Warrant No. . . .
)	

RULE 18801; Rule 138; RCW 82.04.040; RCW 82.08.0281; RCW 82.08.0283:
RETAIL SALES TAX – LEASING DURABLE MEDICAL EQUIPMENT. A lease of durable medical equipment is not exempt from retail sales tax when the lessor is merely leasing the equipment to a patient pursuant to a third-party physician's prescription. Further, the equipment is not a tax-exempt prescription drug or other substance because it is not part of the delivery system for prescribed drugs or other substances. Lastly, the equipment is not a tax-exempt orthotic device because a patient does not wear it like a brace, collar, cast, or sprint to activate or supplement a weakened or atrophied limb or function.

Headnotes are provided as a convenience for the reader and are not in anyway a part of the decision or in any way to be used in construing or interpreting this Determination.

NATURE OF ACTION:

A foreign corporation (the taxpayer) protests the assessment of retail sales tax and related penalties on payments it received from patients for providing a prescribed medical device.¹

FACTS:

De Luca, A.L.J. -- The taxpayer manufactures a device . . . The device is regulated by the U.S. Food and Drug Administration (FDA). The level of regulation requires the taxpayer to maintain strict control with regard to the use of the device. A physician must prescribe the device before a patient may obtain and use it. . . . Based on the picture of the device that we have seen, the main operating unit appears to be somewhat smaller than a desk telephone. . . .

¹ Identifying details regarding the taxpayer and the assessment have been redacted pursuant to RCW 82.32.410

According to a copy of the service agreement, the taxpayer bills a patient a one-time service charge of \$ Once the patient's physician decides to terminate the treatment, the patient must return the device to the taxpayer.

The Department of Revenue (the Department) filed Warrant No. . . . against the taxpayer for retail sales taxes that were not collected and remitted for the rentals of the . . . devices to patients in Washington. The amount in dispute is \$. . . , which includes tax and penalties.

TAXPAYER'S EXCEPTIONS:

The taxpayer asserts three alternative arguments why the . . . device is not subject to retail sales tax. First, the taxpayer contends it performs a medical service pursuant to WAC 458-20-138 (Rule 138) because its "Service Agreement" with patients declares that the taxpayer earns a "one time service fee" for providing the device to users in Washington. The taxpayer further asserts that it is providing a tax exempt medical service because of the strict controls imposed by the FDA on the availability and use of the device.

Second, the taxpayer contends that the use of the . . . device is exempt from sales tax as a prescription drug or other substance according to RCW 82.08.0281 and WAC 458-20-18801 (Rule 18801).

Third, the taxpayer argues that its device is exempt from sales tax as an orthotic device pursuant to RCW 82.08.0283 and Rule 18801(5)(e).

ISSUES:

Are the charges for the . . . device exempt from retail sales tax because it is either part of medical services provided by the taxpayer to patients, or a prescription drug or other substance, or an orthotic device?

DISCUSSION:

Rule 138 provides in part:

The term "personal services," as used herein, refers generally to the activity of rendering services as distinct from making sales of tangible personal property or of services which have been defined in the law as "sales" or "sales at retail." (See RCW 82.04.040 and 82.04.050.)

The following are illustrative of persons performing personal services which are within the scope of this rule: Attorneys, doctors, dentists, architects, engineers, public accountants, public stenographers, barbers, beauty shop operators. (See also WAC 458-20-224.)

...

The retail sales tax does not apply to the amount charged or received for the rendition of personal services to others, even though some tangible personal property in the form of materials and supplies is furnished or used in connection with such services.

Persons performing such services are consumers of all materials and supplies used in connection therewith and must pay the retail sales tax upon the purchase of such material and supplies.

If persons engaged in a personal service business sell articles of tangible personal property apart from the rendition of personal services, the retail sales tax must be collected upon the sale of such articles.

The taxpayer is not a physician or other type of health-care professional who renders personal services to patients. Indeed, the taxpayer's service agreement reveals that the taxpayer is not performing personal medical services where it states:

[The taxpayer] is not prescribing a course of treatment for the User. [The taxpayer] merely provides instructions for the proper use of the equipment for whatever indication is prescribed by the physician.

Rather, the taxpayer, by its service agreement, is merely renting or leasing the . . . device to patients for a one-time charge. Consequently, the rental or leasing of tangible personal property is a retail sale and subject to retail sales tax. RCW 82.04.040 and -.050.

RCW 82.04.0281 provides an exemption from retail sales tax for sales of prescription drugs. The statute declares:

The tax levied by RCW 82.08.020 shall not apply to sales of prescription drugs, including sales to the state or a political subdivision or municipal corporation thereof of drugs to be dispensed to patients by prescription without charge. The term "prescription drugs" shall include any medicine, drug, prescription lens, or other substance other than food for use in the diagnosis, cure, mitigation, treatment, or prevention of disease or other ailment in humans, or for use for family planning purposes, including the prevention of conception, supplied:

Obviously, the . . . device is not a drug. However, the taxpayer contends that the device is a tax-exempt "other substance" as provided in the statute. Rule 18801 is the Department's rule that pertains to this statute and other related statutes concerning medical items that are tangible personal property. The rule provides in part:

(1)(c) "Other substances" means products such as catalytics, hormones, vitamins, and steroids, but the term generally does not include devices, instruments, equipment, and similar articles.

(Underlining ours). Thus, the . . . device is not an exempt “other substance” according to the rule. *See also* Det. No. 92-163, 12 WTD 199 (1992) which held that although a patient must have a prescription to obtain a transcutaneous electrical nerve stimulator (a TENS unit), the TENS unit is still a piece of equipment or a device. Therefore, it did not qualify for the sales tax exemption under Rule 18801. Although certain medical delivery devices have been held to be exempt along with the prescription drugs they deliver, the decision in Det. No. 92-163 ruled that a TENS unit cannot be classified as a delivery device. Likewise, the . . . device cannot be classified as a delivery system for prescribed drugs or other substances.

The final issue is whether the . . . device is a tax exempt orthotic device. RCW 82.08.0283 exempts from sales tax orthotic devices prescribed for individuals by authorized persons, such as licensed physicians. The statute does not define “orthotic devices.” However, Rule 18801(1)(g) does define the term as follows:

"Orthotic devices" are apparatus designed to activate or supplement a weakened or atrophied limb or function. They include braces, collars, casts, splints, and other similar apparatus as well as parts thereof. Orthotic devices do not include durable medical equipment such as wheelchairs, crutches, walkers, and canes nor consumable supplies such as embolism stockings, arch pads, belts, supports, bandages, and the like, whether prescribed or not.

(Underlining ours.) It certainly appears that the . . . device promotes the healing of broken limbs. However, the device is not like a brace, cast, collar, or sprint that is worn by a patient to activate or supplement a weakened or atrophied limb or function. Instead, the device is durable medical equipment The . . . device is not an orthotic device for purposes of this tax exemption.

DECISION AND DISPOSITION:

The taxpayer's petition is denied.

Dated this 30th day of June, 1998.