

Cite as Det. No. 15-0301, 35 WTD 344 (2016)

BEFORE THE APPEALS DIVISION
DEPARTMENT OF REVENUE
STATE OF WASHINGTON

In the Matter of the Petition for Refund of	)	<u>D E T E R M I N A T I O N</u>
)	
	)	No. 15-0301
)	
...	)	Registration No. ...
)	

RULE 18801; RCW 82.08.0283: RETAIL SALES TAX – MEDICALLY PRESCRIBED OXYGEN – HYPERBARIC CHAMBER. Because the primary use of a hyperbaric chamber system was not to generate or store medically prescribed oxygen, the hyperbaric chamber was not eligible for the exemption provided for medically prescribed oxygen. The hyperbaric chamber met the definition of durable medical equipment, and was subject to retail sales tax.

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

Pree, A.L.J. – A company protests the assessment of retail sales tax on its Washington sales of hyperbaric chamber systems. Because the primary use of the hyperbaric chamber is not to generate or store medically prescribed oxygen, the company’s sales of the chambers are subject to retail sales tax. We uphold the assessment.¹

ISSUE

Under RCW 82.08.0283 and WAC 458-20-18801 (Rule 18801), were the company’s sales of hyperbaric chamber systems exempt from retail sales tax as medically prescribed oxygen systems?

FINDINGS OF FACT

[Taxpayer] is a Washington company that treats its clients in hyperbaric chambers. The taxpayer also sells hyperbaric chambers to other clinics. The taxpayer’s hyperbaric chambers are sealed, pressurized chambers in which a patient lies down. The air is 95% oxygen. The atmospheric pressure may be comparable to being ten to thirteen feet under water. The increased pressure may allow the body to more readily absorb oxygen and promote healing.

The taxpayer’s clients paid a flat fee for one-hour use of the chamber. The taxpayer did not charge its clients retail sales tax on their use of the chambers. Nor did the taxpayer charge sales

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

tax when it sold chambers to clinics. The taxpayer reported gross income earned from sales of hyperbaric chambers to other clinics under the wholesaling business and occupation (B&O) tax.

The Department of Revenue (Department) reviewed the taxpayer's activities for the period from October 1, 2011 through June 30, 2012 (audit period). The Department's Taxpayer Account Administration Division (TAA) concluded that the taxpayer should have charged retail sales tax on the sales of chambers and reclassified the taxpayer's income earned from sales of hyperbaric chambers from the wholesaling B&O tax classification to the retailing B&O tax classification. On December 26, 2012, TAA issued Document No. . . . , which assessed \$. . . in retail sales tax and totaled \$. . . with B&O tax, the 5% assessment penalty and interest. The taxpayer paid the assessment and appealed.

The taxpayer's hyperbaric chambers consist of three parts: the chamber, made from flexible materials, which can be folded to fit in a suitcase; a frame for the chamber; and a concentrator, which provides a 95% concentration of pressurized oxygen for the chamber.² The atmospheric pressure can be raised or lowered by air compressors. The chambers can be used to treat divers or pilots afflicted with aeroembolism and to provide high-oxygen environments for certain medical treatments and operations.

The taxpayer obtained the chambers and frames from [an out-of-state] distributor, and bought the concentrators from [an out-of-state] company. The taxpayer provided its reseller's permit, and did not pay sales tax when it purchased these components. The taxpayer did not obtain reseller permits from its customers.

After we requested invoices representative of the taxpayer's bills during the audit period, the taxpayer provided invoices, one of which had the following breakdown of charges:

INVOICE # . . . – 12/1/12

Quantity	Description	Price	Total
1	Hyperbaric chamber system	. . .	. . .
1	Oxygen concentrator	Included	. . .
1	Shipping and Handling	Included	. . .
	Wire transfer to . . .	. . .	. . .
	Paid by [credit]	. . .	. . .
		Total	. . .

ANALYSIS

Retail sales tax is imposed on retail sales in Washington. RCW 82.08.050. RCW 82.04.050 defines "sale at retail" or "retail sale" as every sale of tangible personal property to all persons irrespective of the nature of their business. All tangible personal property sales are retail sales unless sold to persons for resale in the regular course of their business without intervening use

² Hospitals use a solid chamber filled with 100% oxygen. The taxpayer's chambers have a lower percentage of oxygen to reduce the fire danger. Unlike treatment in hospital chambers, where patients must wear special gowns, and restrict their activity, the taxpayer's clients may read a book, or operate electronic devices such as cell phones or laptops while receiving treatment in the chamber.

[or otherwise excluded from the definition of “retail sale” in RCW 82.04.050 or exempt].³ WAC 458-20-102 (Rule 102) explains that all sales in Washington State are considered to be retail sales unless the customer has a valid reseller permit or provides other Department-approved documentation showing the sale was properly made at wholesale. Resale sales supported by such documentation are subject to the wholesaling B&O tax under RCW 82.04.270. The taxpayer did not obtain reseller permits or other approved documentation from its customers.

RCW 82.08.050(1) requires sellers to collect retail sales tax from their customers and remit the sales tax to the Department. Under RCW 82.08.050(3), if a seller fails to collect and remit the sales tax, the seller becomes personally liable for the tax. TAA concluded that the taxpayer made retail sales and assessed the tax against the taxpayer.

The taxpayer contends that there is no sales tax on sales of its hyperbaric chambers if the customer or patient has a prescription for the equipment. The taxpayer states that its hyperbaric chambers are regulated as oxygen equipment under WAC 182-552-0800.⁴ We are aware of no specific exemption in the Washington Excise Tax Code, Title 82 RCW, that exempts sales of hyperbaric chambers from retail sales tax. We will discuss RCW 82.08.0283, which exempts medically prescribed oxygen and certain medical items from retail sales tax, and Rule 18801, the Department’s regulation for persons making sales of medical products.⁵

Specifically, RCW 82.08.0283(1)(c) exempts sales of, “Medically prescribed oxygen, including, but not limited to, oxygen concentrator systems, oxygen enricher systems, liquid oxygen systems, and gaseous, bottled oxygen systems prescribed for an individual by a person licensed under chapter 18.57 [Osteopathic medicine and surgery] or 18.71 RCW [physicians] for use in the medical treatment of that individual.” RCW 82.08.0283(3) states, “The exemption in subsection (1) of this section shall not apply to sales of durable medical equipment, other than as specified in subsection (1)(c) of this section, or mobility enhancing equipment.” Because the taxpayer has not verified that the patients’ physicians prescribed this oxygen treatment, we conclude that there is no basis to exempt retail sales tax from any of the taxpayer’s sales.

We recognize that the oxygen concentrator the taxpayer sells could qualify for the exemption if prescribed by a physician or by a person licensed under chapter 18.57 RCW so long as the equipment is primarily used “for the generation or storage of medically prescribed oxygen (O2).” Rule 18801(403)(h)(i). Rule 18801(403)(h)(ii) explains:

Accessories may not be exempt. Exempt medical oxygen systems are sometimes connected to the patient through taxable systems. The exemption for medically prescribed oxygen only applies to items up to the point the exempt oxygen system is connected to the taxable system. From that point of connection forward to the patient, masks, tubing, or other similar items remain part of the taxable system and are subject to retail sales tax.

³ RCW 82.04.250 states that [the seller’s gross proceeds from] retail sales made in Washington State is also subject to the retailing business and occupation tax.

⁴ The taxpayer sent a letter from the Food and Drug Administration (FDA) to its vendor, which allowed the vendor to begin marketing the devices. The taxpayer does not offer legal authority addressing retail sales tax on sales of the devices in Washington.

⁵ A comparable use tax exemption is provided in RCW 82.12.0277.

Rule 18801(403)(h)(iii) provides an example that distinguishes between exempt medical oxygen systems and nonexempt accessories:

(A) Example 12. A physician prescribes oxygen for a patient. The patient rents an oxygen concentrator system and a separate cart to transport the system. The prescribed oxygen concentrator system can be rented exempt of sales tax. However, the exemption for "medically prescribed oxygen" does not include a separate cart used to transport a tax-exempt system. For information about durable medical equipment, see Part 2 of this rule.
...

While the sale of oxygen concentrators [on their own] could qualify for the exemption if properly prescribed (and documented), the primary use of the hyperbaric chamber [system] is not to generate or store medically prescribed oxygen. *See* Rule 18801(403)(h)(i). Therefore, the hyperbaric chamber is not eligible for the exemption provided for medically prescribed oxygen. Rather, hyperbaric chambers meet the definition of durable medical equipment. *See* RCW 82.08.0283(4)(b).

DECISION AND DISPOSITION

We deny the petition.

Dated this 5th day of November, 2015.