

Cite as Det. No. 14-0386, 34 WTD 273 (2015)

BEFORE THE APPEALS DIVISION
DEPARTMENT OF REVENUE
STATE OF WASHINGTON

[1] RULE 18801; RCW 82.08.0281: RETAIL SALES TAX – CANNABIS – MARIJUANA – PRESCRIPTION. A collective medical garden must charge its customers retail sales tax on their purchases of marijuana when they present written medical authorizations from their health care professional rather than prescriptions.

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.

M. Pree, A.L.J. – A non-profit, collective medical garden appeals a ruling that it must collect retail sales tax when it sells medical marijuana to patients who present written authorization from a health care professional that the patient may benefit from the medical use of cannabis. Because the authorization is not a prescription, the transfer of medical marijuana is not exempt from retail sales tax, and we deny the petition.¹

ISSUE

Under WAC 458-20-18801 (Rule 18801) and RCW 82.08.0281, may a collective garden sell medical marijuana without collecting sales tax from customers who present written authorization from a health care professional that the patient may benefit from the medical use of cannabis?

FINDINGS OF FACT

[Taxpayer] is a non-profit medical marijuana collective garden in the state of Washington. The taxpayer provides medical marijuana to persons who document that a health care professional has authorized in writing that the patient may benefit from the medical use of cannabis. The taxpayer asked the Department of Revenue (Department) whether it must charge patients retail sales tax when it transfers medical marijuana to them pursuant to this authorization.

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

The Department's Taxpayer Education and Information (TI&E) wrote a letter to the taxpayer, dated December 27, 2013, instructing the taxpayer to collect and remit retail sales tax, and to report its receipts under the retailing business and occupation (B&O) classification to the Department. The taxpayer appealed the ruling. While the taxpayer disputes the constitutionality of the Department taxing medical marijuana,² the taxpayer is limiting the scope of this administrative appeal to whether Washington law, specifically RCW 82.08.0281, exempts the transfers of cannabis from Washington retail sales tax when those transfers³ are pursuant to written authorization from a medical professional.

The taxpayer's customers are patients who have obtained written authorization from health care professionals licensed in Washington. The authorization states that the patient has a terminal or debilitating medical condition and may benefit from the medical use of cannabis. The form is printed on tamper-resistant paper and includes the health care professional's Washington Department of Health credential number. The health care professional signs the document. Each patient presents the document to the taxpayer. In exchange for cash, services, or other consideration, the taxpayer provides the marijuana or marijuana products to the customer.

The taxpayer contends that marijuana is botanical medicine, a drug. The taxpayer further contends that the written authorization form is a prescription. Because the health care professional authorizes the use of marijuana, the taxpayer concludes that its sales of marijuana to patients are exempt from retail sales tax.

ANALYSIS

Retail sales tax is imposed on each retail sale in this state. RCW 82.08.020(1). "Sale" means any transfer of the ownership of, title to, or possession of property for a valuable consideration and includes any activity classified as a "sale at retail" or "retail sale" under RCW 82.04.050. RCW 82.04.040(1). Because the taxpayer transfers cannabis for consideration, the transfers constitute "sales" under RCW 82.04.040(1).

"Retail sale" includes every sale of tangible personal property to all persons irrespective of the nature of their business. RCW 82.04.050(1)(a). B&O tax under the retailing classification is imposed upon the seller making the retail sales. RCW 82.04.250.

Medical marijuana is tangible personal property. Therefore, the sale of medical marijuana is a retail sale under RCW 82.04.050(1)(a) and subject to retail sales tax, unless an exemption applies to the sale.

RCW 82.08.0281(1) exempts from retail sales tax, ". . . sales of drugs for human use dispensed or to be dispensed to patients, pursuant to a prescription." Rule 18801 explains that a seller may obtain an exemption certificate for this exemption: "A seller is not required to collect sales tax when it obtains a properly completed exemption certificate indicating prescription drugs, intended for human use sold to medical practitioners, nursing homes, and hospitals, will be put to an exempt use under the authority of a prescription." Rule 18801(403)(b). Otherwise, the retail sales tax must be collected. *Id.*

² . . .

³ During the hearing, after reading RCW 82.04.040, the taxpayer also acknowledged its transfers were sales.

RCW 82.08.0281(4)(a) defines the term “prescription” as: “[A]n order, formula, or recipe issued in any form of oral, written, electronic, or other means of transmission by a duly licensed practitioner authorized by the laws of this state to prescribe.” The legislature added the words, “to prescribe” to RCW 82.02.0821 in 2003 when it explained, “A prescription for items or drugs that are exempt must be prescribed by a person whose license authorizes him or her to prescribe the item or drugs.” Final Bill Report (SB 6515), available at <http://lawfilesext.leg.wa.gov/biennium/2003-04/Pdf/Bill%20Reports/Senate/6515.FBR.pdf> (last viewed Nov. 25, 2014). However, no licensed practitioner may prescribe marijuana in Washington.⁴

Under 21 U.S.C. § 812 and RCW 69.50.204, marijuana is a Schedule 1 controlled substance, which cannot be prescribed under federal and state law. See Dep’t of Revenue Special Notice dated May 31, 2011, entitled “Sales of Medical Cannabis Remain Subject to Sales Tax.” Accordingly, medical marijuana is not covered by the exemption for prescription drugs.

We recognize that medical professionals can issue documentation authorizing the use of marijuana, but this does not change the outcome. The legislature enacted Chapter 69.51A RCW, which addresses medical marijuana. RCW 69.51A.030(2)(a) allows health care professionals, including naturopaths,⁵ to provide a patient with a valid documentation authorizing the medical use of marijuana,⁶ or to register a patient with a medical marijuana registry, provided certain requirements are met:

(2)(a) A health care professional may only provide a patient with valid documentation authorizing the medical use of cannabis or register the patient with the registry established in **section 901 of this act if he or she has a newly initiated or existing documented relationship with the patient, as a primary care provider or a specialist, relating to the diagnosis and ongoing treatment or monitoring of the patient's terminal or debilitating medical condition, and only after:

- (i) Completing a physical examination of the patient as appropriate, based on the patient's condition and age;
- (ii) Documenting the terminal or debilitating medical condition of the patient in the patient's medical record and that the patient may benefit from treatment of this condition or its symptoms with medical use of cannabis;
- (iii) Informing the patient of other options for treating the terminal or debilitating

⁴ The website for Washington’s Department of Health provides, “Healthcare providers cannot write prescriptions for medical marijuana. They may only write recommendations that a patient has a medical condition that may benefit from the medical use of marijuana.” From <http://www.doh.wa.gov/YouandYourFamily/Marijuana/MedicalMarijuanaCannabis/GeneralFrequentlyAskedQuestions#10> (last visited Nov. 24, 2014).

⁵ . . .

⁶ RCW 69.51A.010(7) defines “valid documentation” as:

- (a) A statement signed and dated by a qualifying patient's health care professional written on tamper-resistant paper, which states that, in the health care professional's professional opinion, the patient may benefit from the medical use of marijuana; and
- (b) Proof of identity such as a Washington state driver's license or identicard, as defined in RCW 46.20.035.

(Emphasis added).

medical condition; and

- (iv) Documenting other measures attempted to treat the terminal or debilitating medical condition that do not involve the medical use of cannabis.

(Emphasis added).⁷

The taxpayer argues that a valid documentation (defined in RCW 69.51A.010(7)) that a health care professional is permitted to provide a patient under RCW 69.51A.030(2)(a) equates to a prescription for purposes of RCW 82.08.0281. The taxpayer contends that a document authorizing use of medical marijuana is a prescription.⁸ We disagree. Had the legislature intended such a result, it would not have added the works “to prescribe” to RCW 82.04.0281 in 2003. Chapter 69.51A RCW does not authorize medical professionals “to prescribe” medical marijuana.

Generally, a person claiming a tax exemption, exception, or deduction has the burden of proving he or she qualifies for the tax benefit. *Group Health Cooperative of Puget Sound, Inc. v. State Tax Comm'n*, 72 Wn.2d 422, 433 P.2d 201 (1967). Taxation is the rule; exemption is the exception. *Spokane County v. City of Spokane*, 169 Wash. 355, 358, 13 P.2d 1084 (1932). Exemptions from a taxing statute must be narrowly construed. *Budget Rent-A-Car, Inc. v. Dep't of Revenue*, 81 Wn.2d 171, 174, 500 P.2d 764 (1972); *Evergreen-Washelli Memorial Park Co. v. Dep't of Revenue*, 89 Wn.2d 660, 663, 574 P.2d 735 (1978).

The legislature used the language of valid documentation, instead of prescription when addressing medicinal marijuana in Chapter 69.51A RCW. The legislature's use of the concept of valid documentation, as opposed to prescription, was not the result of a relaxed use of language by the legislature. The legislature intended to limit the exemption in RCW 82.08.0281 to prescribed drugs. Where the legislature uses certain statutory language in one instance, and different language in another, there is a difference of legislative intent. *United Parcel Service, Inc. v. Dep't of Revenue*, 102 Wn.2d 355, 362, 687 P.2d 186 (1984); *Agrilink Foods, Inc. v. Dep't of Revenue*, 153 Wn.2d 392, 397, 103 P.3d 1226 (2005).

Because of the use of different language, “prescription” and “to prescribe” in RCW 82.04.0281 and “valid documentation” in RCW 69.51A.010(7), we conclude that marijuana is not prescribed to patients, but rather patients receive a valid documentation from a health care professional that allows them to purchase marijuana. Therefore, the taxpayer’s sales of marijuana to consumers do not qualify for the prescription drug exemption under RCW 82.08.0281(1).

⁷ RCW 69.51A.010(4) defines a "qualifying patient" as a person who:

- (a) Is a patient of a health care professional;
- (b) Has been diagnosed by that health care professional as having a terminal or debilitating medical condition;
- (c) Is a resident of the state of Washington at the time of such diagnosis;
- (d) Has been advised by that health care professional about the risks and benefits of the medical use of marijuana; and
- (e) Has been advised by that health care professional that they may benefit from the medical use of marijuana.

⁸ [The taxpayer cites *Walters v. Conant*, 309 F.3d 629 (9th Cir. 2002), cert. denied, 540 U.S. 946 (2006). In *Conant*, the Ninth Circuit affirmed a federal district court order that enjoined the federal government from either revoking a physician's license to prescribe controlled substances or conducting an investigation of a physician that might lead to such revocation, where the basis for the government's action was solely the physician's professional “recommendation” of the use of medical marijuana. This case does not support the taxpayer's position.]

DECISION AND DISPOSITION

We deny the taxpayer's petition.

Dated this 8th day of December, 2014.