

Cite as Det. No. 84-228, 11 WTD 301 (1992).

BEFORE THE DEPARTMENT OF REVENUE OF THE STATE OF WASHINGTON

In the Matter of the Petition	)	<u>D E T E R M I N A T I O N</u>
For Correction of Assessments of	)	
	)	No. 84-228
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. . .	)	Registration No. . . .
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TAXPAYER REPRESENTED BY: . . .  
. . .

DEPARTMENT OF REVENUE REPRESENTED BY  
INTERPRETATION AND APPEALS DIVISION: . . .

DATE AND PLACE OF CONFERENCE: . . .

FACTS:

Chandler, A.L.J. -- The taxpayers are orthodontists who engage primarily in the professional service business of straightening human teeth and correcting occlusion (the proper fitting together of the upper and lower teeth when jaws are closed). These services serve (depending upon the individual patient) to prevent the jaw bone deterioration, headaches, and to preserve (in some instances) mental health. An orthodontist may also undertake the straightening of teeth in connection with the healing of broken jaws. The orthodontists' patients are most generally referred to them by other dentists not specializing in this particular field of dentistry.

. . .

Hereinafter, the taxpayers collectively will be referred to in the singular case. Since in each instance the issues are identical, the taxpayers have agreed that their petitions be considered jointly in a single Determination.

TAXPAYER'S EXCEPTIONS:

The sole issue presented is whether use tax is properly levied upon the taxpayer's use of braces, collars, wires, screws, and bonds, etc., in the conduct of an orthodontic dental practice. The taxpayer contends that these items are exempt from retail sales tax as sales of orthotic devices under RCW 82.08.0283. The assessment of use tax on items that are obviously not orthotic devices such as floss, polishing and cleansing agents, etc., is not protested. Nor does the taxpayer protest the assessment upon orthodontic supplies for the period prior to [June 1980], the effective date of the exemption for orthotic devices.

It is contended that the orthodontic supplies here at issue are used to straighten human limbs. In this respect the taxpayer argues that the jaw is a limb because it is hinged and does extend irrespective that it is covered by skin and tissue and appears as an integral part of a human head. It is also maintained that the supplies under scrutiny are "prescribed" in the sense that the taxpayer (orthodontist) decides the treatment requiring their use; and that the items are sold inasmuch as their cost is included in the total billing to the patient. However, the taxpayer discards these items after completion or during treatment. The taxpayer also takes exception to the auditor's interplay of administrative rules, WAC 458-20-151 and WAC 458-20-18801, the former rule being declared inapplicable by the taxpayer.

The taxpayer's petition makes the following statement:

Our client feels that WAC 458-20-18801 (Rule 18801) is applicable in this instant case. An orthodontist is a specialized medical practitioner in the prevention and correction of irregularities in the position of the teeth and the bone structures of the jaws.

The orthodontist does not generally see patients except by referral of a general practice dentist or an oral surgeon or other physicians. The orthodontist prescribes a series of treatments for the patients to the referring practitioner. The orthodontist then performs the prescribed treatment using orthotic devices which include braces, collars, wires, screws, and bands. The use of these orthotic devices is to correct the occlusion of the teeth and relationship of the jaw structures and not for cosmetic purposes. The

orthodontist sometimes will use orthotic devices for cosmetic purposes when the patients psychological condition requires the teeth be straightened. This procedure has been used by the Department of Corrections in rehabilitation of certain criminals to improve their self esteem. The orthodontist also uses orthotic devices for holding the teeth in proper position when a patient has received a broken jawbone or other type of facial injuries. The use of orthotic devices in this instant case clearly fits in the exemption of sales or use tax set forth in WAC 458-20-18801 (Rule 18801).

#### DISCUSSION:

We must begin our discussion by observing that we are considering application for a use tax exemption provided by RCW 82.12.0277. The state of Washington Supreme Court has laid down the rule that tax exemption statutes must be strictly construed in favor of the application of the tax, Yakima Fruit Growers Association v. Henneford, 187 Wn. 252 (1936); no person should be declared exempt unless it clearly appears that such exemption is required by law, North Pacific Coast Freight Bureau v. State, 12 Wn.2nd 563 (1942); any claim of exemption is to be studied with care before depriving the state of revenue, Alaska Steamship Company v. State, 31 Wn.2nd 328 (1948), and in general tax exemption statutes must be strictly construed in favor of the tax, Miethke v. Pierce County, 173 Wn. 381 (1933); Norwegian Lutheran Church v. Wooster, 176 Wn. 581 (1934); Standard Oil Company v. King County, 180 Wn. 631 (1935), Boeing Aircraft Company v. Reconstruction Finance Corporation, 25 Wn.2nd 652 (1946).

RCW 82.12.0277, the exemption sought by the taxpayer, provides:

The provisions of this chapter shall not apply in respect to the use of insulin, prosthetic and orthotic devices prescribed for an individual by a person licensed under chapter 18.25 [chiropractors], 18.57 [osteopaths], or 18.71 [physicians], RCW; ostomic items; and medically prescribed oxygen. (Bracketing supplied.)

Orthodontists are licensed under the provision of chapter 18.32 RCW, Dentists. This being the case, whether by legislative oversight or not, orthodontists are not included among the professional practitioners specifically named in RCW 82.12.0277.

. . .

We find strong support for this conclusion in the Department's administrative rules WAC 458-20-151 and WAC 458-20-18801. Washington Administrative Code rules have the same legal force and effect as the law itself unless ruled void by a court of record unappealed. We find, contrary to the taxpayer's position, that it is proper to consider the thrust of both rules in this instance. This is so because each rule cross references the other. WAC 458-20-151 provides in pertinent part:

#### RETAIL SALES TAX

Dentists, dental laboratories and physicians primarily render professional services and are not required to collect the retail sales tax from clients and others paying for such services. Sales by supply houses to such persons of materials, supplies, and equipment which are used incidentally in the rendering of such professional services are retail sales upon which the retail sales tax must be collected. Such sales include, among others, sales of dental chairs, instruments, x-ray machines, office equipment, stationery; and sales of supplies, such as dressings, bandages, drugs and similar articles. However, the sales tax does not apply to sales of insulin, medically prescribed oxygen, and prosthetic devices. See WAC 458-20-18801 for definition of prosthetic device. (Emphasis supplied.)

Sales of drugs, medicines, and other substances prescribed by dentists and physicians are deductible by the seller from gross retail sales where the written prescription bearing the signature of the issuing medical practitioner and the name of the patient for whom prescribed is retained, and such sales are separately accounted for. See WAC 458-20-18801.

#### USE TAX

The use tax does not apply to the purchase of insulin, medically prescribed oxygen, nor to prosthetic devices or ingredients/components of prostheses. (Emphasis supplied.)

The exemption statutes, RCW 82.08.0283 and RCW 82.12.0277, became effective June 12, 1980. Rule 151, quoted above, was revised May 10, 1983. It is readily apparent that, in the process of revising and formally adopting the rule, the Department of Revenue carefully and thoughtfully omitted any reference of an exemption for dentists (or orthodontists) relative to orthotic devices. To include persons other than prescribing

chiropractors, osteopaths, and physicians would have been to legislate new law--an act forbidden to administrative agencies.

WAC 458-20-18801 was similarly revised effective May 10, 1983 to reflect the exemption which became law on June 12, 1980.<sup>1</sup> This rule explains that a deduction is allowed from gross sales to patients of drugs, medicines, prescription lenses or other substances when four listed requirements are met. The rule then provides that

The retail sales tax does not apply to sales of prosthetic and orthotic devices prescribed by physicians, osteopaths, or chiropractors, nor to sales of ostomic items. (Emphasis supplied.)

Again, notice the Department's close adherence to or required strict application of the exemptory language of the exemption statutes. The rule, like the statutes, limits the exemption or deduction to three specifically licensed professions.

The taxpayer claims to qualify as a "medical practitioner" as defined in Rule 18801. The fact is immaterial to any validity to the claim for exemption. An analysis of the rule reveals that the definition pertains only to the prescription drug exemption and is furnished only because the term is used in the rule as indicated below:

A deduction is allowed from gross retail sales for sales to patients of drugs, medicines, prescription lenses, or other substances, but only when

- a. dispensed by a licensed dispensary
- b. pursuant to a written prescription
- c. issued by a medical practitioner
- d. for diagnosis, cure, mitigation, treatment, or prevention of disease or other ailment in humans.

(Emphasis supplied.)

Under the rule, "medical practitioner" means a person within the scope of RCW 18.64.011(9) who is authorized to prescribe drugs . . . ." RCW 18.64.011(9), which deals with pharmacists, provides the following definition:

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<sup>1</sup> WAC 458-20-18801 has been amended subsequent to this Determination. The amendments do not affect the issue raised here.

(9) "Practitioner" means a physician, dentist, veterinarian, nurse, or other person duly authorized by law or rule in the state of Washington to prescribe drugs.

Thus, the fact that the taxpayer qualifies as a medical practitioner is relevant only to the exemption for sales of prescribed drugs, medicines, or other substances (substances meaning catalytics, hormones, vitamins, and steroids but not including devices, instruments, equipment, and similar articles). The fact has no bearing upon entitlement to the strictly limited exemption for sales of orthotic devices.

By letter dated October 26, 1984, the taxpayer furnished some requested factual information including a list of items the taxpayer uses and considers to qualify as orthotic appliances. The items fall under the following broad categories: archwires, ligature wire, gray rotating wedges, headgears, bands, direct bond brackets, lingual sheaths, welding brackets, elastic. Also: wire, wax, lingual holding arches, gold cement, duralon, bonding etch, adhesive, solder, monomer acrylic, polymer acrylic, biocryl, and acryl.

These items may or may not meet the Rule 18801 definition of "orthotic devices" which under the rule are

. . . fitted surgical apparatus designed to activate or supplement a weakened or atrophied limb or function. They include braces, collars, casts, splints, and other specially fitted 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 elastic stockings, arch pads, belts, supports, bandages, and the like, whether prescribed or not.

Since the legislature and the Department of Revenue have made it evident by both legislative and administrative rule process that the items for which the taxpayer seeks use tax exemption are deemed to be consumed by the taxpayer in providing professional orthodontic services, there is no need at this time to decide whether such items do in fact qualify as orthotic devices.

#### DECISION AND DISPOSITION:

The taxpayer's petition is denied.

DATED this 20th day of November 1984.