

Cite as Det. No. 91-261, 11 WTD 439 (1992).

BEFORE THE INTERPRETATION AND APPEALS DIVISION
DEPARTMENT OF REVENUE
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 Refund of)	
)	No. 91-261
)	
. . .)	Registration No. . . .
)	
)	

- [1] RULE 18801, RCW 82.08.0281, RCW 82.12.0275: PRESCRIPTION DRUGS -- SALES AND USE TAXES -- EXEMPTION -- SYRINGES. Syringes, whether purchased empty or with legend drugs contained in them, are not conceptually distinct from the prescribed drugs they subsequently deliver and, therefore, are exempt from sales and use taxes. Accord: Deaconess Medical Center v. Dept. of Rev., Docket No. 87-2-2055-7 (Thurston County Superior Court, 1989).
- [2] RULE 18801, RCW 82.08.0281, RCW 82.12.0275: PRESCRIPTION DRUGS -- SALES AND USE TAXES -- EXEMPTION -- MEDICAL GASES -- DELIVERY SYSTEMS. Medical gas delivery system components, including tubes, nebulizers, ventilators, masks, cannulae and similar items, are not conceptually distinct from the prescribed medical gases they deliver and, therefore, are exempt from sales and use taxes. Accord: Deaconess, supra.
- [3] RULE 18801, RCW 82.08.0283, RCW 82.12.0277: PROSTHESES -- DRAINAGE DEVICES -- SALES AND USE TAXES -- EXEMPTION. Drainage devices which are particularly prescribed for use on or in specific patients are exempt from sales and use taxes as prostheses because they either replace missing body parts or assist dysfunctional ones. The exemption applies even if the prostheses are not permanent replacements for body parts. Accord: Deaconess, supra.
- [4] RULE 18801, RCW 82.08.0281, RCW 82.12.0275, RCW 82.08.283, RCW 82.12.0277: PROSTHESES -- PRESCRIPTION DRUGS -- AIRWAY DEVICES -- SALES AND USE TAXES --

EXEMPTION. Various airway devices (tubes) which are prescribed to keep patients' airways open and to deliver medical gases are exempt from sales and use taxes because one, they are part of medical gas delivery systems and therefore qualify for the prescription drugs exemption and two, they replace the function of the body's own airway. The exemption applies even if the devices are used only temporarily. Accord: Deaconess, supra.

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.

TAXPAYER REPRESENTED BY: . . .

DATE OF TELEPHONE CONFERENCE: . . .

NATURE OF ACTION:

Pursuant to WAC 458-20-100(2)(a), the taxpayer seeks an estimated \$. . . refund of sales and use taxes paid on items which it claims qualify for the statutory exemptions for prescription drugs and prosthetic devices.

FACTS:

De Luca, A.L.J. -- The taxpayer is a hospital located in Washington. The taxpayer filed its petition [in December 1990].

TAXPAYER'S EXCEPTIONS:

First, the taxpayer asserts the prescription drug exemption applies to the purchase of empty syringes which subsequently are used to administer prescribed drugs. See RCW 82.08.0281 and RCW 82.12.0275. The taxpayer notes the Department of Revenue currently does not tax syringes which are purchased with legend or prescribed drugs already contained within them.

The taxpayer next claims the prescription drug exemption for gases used in anesthesia and the exemption for medically prescribed oxygen (RCW 82.08.0283 and RCW 82.12.0275) also apply to tubes, nebulizers, ventilators, circuit sets, masks, cannulae and similar items necessary to deliver the medically prescribed gases to patients.

To support these contentions and others discussed below, the taxpayer has provided the affidavit of is a physician licensed in Washington State and is board certified in anesthesiology and critical care medicine. He is a practicing

anesthesiologist who states he is familiar both with the nature and customary hospital use of the medical devices described above.

The doctor explained syringes are similar to intravenous (IV) sets because they provide the means to inject prescription drugs into patients. A syringe differs primarily from an IV set due to its size and the time required to use it. Generally, syringes are smaller. Moreover, syringes are used immediately while IV sets usually are placed into patients for longer periods of time. The doctor further explained the delivery devices used for medical gases such as oxygen, medical air and nitrous oxide and for volatile anesthetics are similar to IV sets. Medical gases and volatile anesthetics may only be given to a patient pursuant to a doctor's order. There is no way to safely deliver these gases without use of the delivery devices described above.

The doctor states the medical gas delivery systems' tubes, nebulizers and ventilators are likened to the tube and ports of an IV set. Similarly, the cannulae and masks which attach to the tubes and nebulizers of the gas delivery system can be compared to an IV's catheter or insertion device.

These products are ordered for each patient and are disposed of after use, just as IV sets are. Some of the gas delivery devices are sold and used in sets containing various components while others are customized to fit certain patients.

Many of these products also are used in respiratory therapy. Hospital patients only receive this therapy when conditions are present to medically justify it and only when a physician orders it.

The doctor next addressed devices used on patients to drain body fluids and/or keep airways open. The devices are prescribed for individual patients. The drainage devices include foley catheters, hemovacs and other suction devices, Penrose drains, chest tubes, cerebral intraventricular cannulae, naso-gastric tubes and similar tubes and catheters. The taxpayer asserts these devices are prostheses and, therefore, are tax exempt under RCW 82.08.0283 and RCW 82.12.0277. These drainage devices augment the circulatory, lymphatic and/or excretory systems. They help prevent swelling and excessive fluids from accumulating which reduce the chances of infection and other post surgical complications. Some devices allow otherwise lost blood to be collected and returned to the circulatory system.

The doctor states all of the devices either replace missing body parts or assist dysfunctional ones. The devices may only be

placed in or on the body pursuant to a physician's direct order. Many of them are only placed and/or removed by a physician.

The doctor last addressed devices used in the airways of unconscious patients. They, too, are prescribed for individual patients. The taxpayer claims these items are exempt both as prostheses and as prescription drugs. Tubes used in intratracheal, oral, nasal, bronchial airways as well as in tracheotomies secure the airways. Without such devices, an airway may be jeopardized and subject the anesthetized patient to the risk of oxygen deprivation, acid based metabolic imbalance and aspiration.

The doctor further explained that when conscious a patient's normal reflexes function to prevent these risks. However, during surgery these reflexes may not be functioning for an anesthetized patient and the normal airway may be inoperative and unprotected. Such devices both deliver oxygen and eliminate carbon dioxide.

These airway devices also are an extension of the medical gas delivery devices because they are used in delivering medical gases and volatile anesthetics to patients. Thus, the doctor concludes the airways are prosthetic devices by replacing bodily functions and at the same time are an extension of the medical gas delivery system.

ISSUES:

Are empty syringes which are subsequently used to inject prescription drugs into patients exempt from sales and use taxes?

Are medical gas delivery systems used in respiratory therapy and anesthetizing patients exempt from sales and use taxes? Likewise, are tubes and similar devices which keep patients' airways open also exempt from sales and use taxes?

Finally, are the devices used to drain fluids from patients exempt from sales and use taxes?

DISCUSSION:

The taxpayer's refund claim was filed [in December 1990] and therefore is barred for periods prior to January 1, 1986. RCW 82.32.060.

We have referenced above the statutes which exempt prescription drugs, prosthetic devices and medically prescribed oxygen from sales and use taxes, RCW 82.08.0281 and RCW 82.08.0283 and RCW 82.12.0275 and RCW 82.12.0277, respectively. The Department of

Revenue has adopted WAC 458-20-18801 (Rule 18801) to implement those statutes. Rule 18801 reads in part:

PRESCRIPTION DRUGS, PROSTHETIC AND ORTHOTIC DEVICES,
OSTOMIC ITEMS, AND MEDICALLY PRESCRIBED OXYGEN.

(1) DEFINITIONS. As used in this section:

(a) "Prescription" means a formula or recipe or an order therefor written by a medical practitioner for the composition, preparation and use of a healing, curative or diagnostic substance,

(f) "Prosthetic devices" are artificial substitutes which physically replace missing parts of the human body, such as a limb, bone, joint, eye, tooth, or other organ or part thereof, and materials which become ingredients or components of prostheses.

(5) EXEMPTIONS. The retail sales tax does not apply to ... 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. (See RCW 82.08.0281.)

(7) The retail sales tax does not apply to sales of prosthetic devices, orthotic devices prescribed by physicians, osteopaths, or chiropractors, nor to sales of ostomic items, medically prescribed oxygen, or hearing aids. (See RCW 82.08.0283.)

(9) USE TAX. The use tax does not apply to the use of articles and products which are exempt from sales tax as specified herein. (See RCW 82.12.0277.)

The drugs injected from syringes into patients as directed by physicians' orders are exempt prescription drugs. Likewise, the medical gases which are used in respiratory therapy and anesthetizing patients are themselves prescription drugs or prescribed oxygen and are exempt. The question is whether their delivery systems are also exempt.

In Deaconess Medical Center v. Department of Rev., Docket No. 87-2-2055-7 (Thurston County Superior Court, 1989), the court ruled that the component parts of an IV set, including tubing and the

needle, are not conceptually distinct from the solution they deliver. The ruling stated that only the stand holding the IV set is conceptually distinct from the solution. The court then concluded the IV sets are entitled to the prescription drug exemption found in RCW 82.08.0281 as "other substances for use in the ... cure ... treatment or prevention of disease ... in humans ordered by prescription".

[1] Likewise, we believe syringes are not conceptually distinct from the prescribed solutions they deliver. As explained by [the physician], syringes perform a function similar to an IV - injecting prescribed drugs into patients. The fact that it takes less time to inject with a syringe or that a smaller needle is used is not significant for our purposes. Therefore, syringes, whether purchased empty or with a legend drug contained in them, are exempt from sales and use taxes like the prescribed solutions they subsequently deliver. Deaconess, supra.

[2] Similarly, we find the components of the medical gas delivery systems are not conceptually distinct from the prescribed medical gases they deliver, including medical air, nitrous oxide and volatile anesthetics. Our finding is supported by [the physician]'s statement that there is no way to safely deliver these gases without use of the delivery devices.

We believe the comparison of the medical gas delivery system to an IV system has merit. They both deliver prescribed drugs to patients through tubing. There are some technical differences in the components of the two systems, but that is due to the requirements of each system. One delivers liquids while the other delivers gases. Furthermore, like IV sets, the items used in a gas delivery system are prescribed for each patient and are disposed of after use. Thus, the tubes, nebulizers, ventilators, masks, cannulae and similar items used in the medical gas delivery system are exempt from the sales and use taxes like the prescribed gases they deliver. Deaconess, supra, RCW 82.08.0281, RCW 82.12.0275.

[3] The next issue concerns whether drainage devices qualify for the prostheses exemptions from sales and use taxes per RCW 82.08.0283 and RCW 82.12.0277. According to the doctor's statement, the various catheters, drains, tubes, suction devices, cannulae and similar drainage items either replace missing body parts or assist dysfunctional ones. They may only be placed in or on the body pursuant to a physician's direct order. Many of the items are placed and/or removed only by a physician.

The Superior Court in Deaconess, supra, held that a "prosthesis need only replace a missing part, organ or part of an organ, or the function of the part or organ" in order to qualify for the

exemption. The court further held that current Rule 18801 is invalid to the extent the rule requires the replacement be permanent. In short, the trial court held a temporary prosthesis can qualify for the exemption.

The Washington Court of Appeals declined to address the issue whether a prosthesis need be permanent in order to qualify for the exemption. However, it held the exemption does not turn on whether the item is a prosthesis per se, but whether the prosthesis has been prescribed for the particular use of specific individuals. Deaconess Medical Center v. Department of Rev., 58 Wn. App. 783 (1990).

We hold the drainage items which are prescribed particularly for specific patients are exempt from sales and use tax whether they are temporary or permanent because they either replace a missing part or organ or the function of the part or organ. Deaconess, (Superior Court). These items are in contrast to heart-lung machines. Hospitals do not purchase heart-lung machines because they have been prescribed for individuals. Moreover, unlike the prescribed drainage devices, heart-lung machines are not sold or otherwise conveyed to patients at all. Deaconess, 58 Wn. App. 783.

[4] The final issue is whether the various devices (tubes) used to keep a patient's airways open are also exempt. It is our understanding the devices also are individually prescribed and disposed of after use. The taxpayer and the doctor assert these devices play a dual role. One, they deliver medical gas to the patients. Two, they allow for the delivery of oxygen and the elimination of carbon dioxide. As noted, an anesthetized patient's reflexes may not be functioning and the patient's normal airway may be inoperative and unprotected. Thus, the airway devices are used.

In the first instance, the devices qualify for the prescription drug exemption, discussed above, because they are not conceptually distinct from the medical gases they deliver. Second, they qualify for the prostheses exemption because they also replace the function of the body's own airway and are particularly prescribed for the patient. Again, the prostheses exemption applies even if the airway devices are temporary.

DECISION AND DISPOSITION:

A sales tax refund claim normally requires a purchaser to secure the tax overpayment from its vendor. Once the vendor makes the refund it may make its claim against the state. ETB 299.32.229. In its petition, the taxpayer is making both use tax and sales tax refund claims. Obviously, if it paid the use taxes directly

to the state, its vendors cannot refund those amounts. Instead, the Department would have to refund the use taxes directly to the taxpayer.

We will remand this matter to Audit Division to review the taxpayer's records in accordance with this decision. We will leave it to Audit's discretion whether to process all sales and use tax refund claims, or only use tax claims if it determines the taxpayer should submit its sales tax claims directly to its vendors.

DATED this 20th day of September 1991.