

Cite as 11 WTD 95 (1991).

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 Ruling of Tax Liability)	
of)	No. 91-077
)	
. . .)	UNREGISTERED
)	
)	
)	

- [1] RULE 18801; RULE 102: SALES--BLOOD--TISSUE--HOSPITALS --RESALE--PRESCRIPTION ITEMS. Sales of blood to hospital for resale to patients are sales of tangible personal property. As such, they are taxable under the wholesaling classification of the B&O tax, and not subject to retail sales tax. When the blood is sold directly to a patient pursuant to a prescription, it is a retail sale, but subject to the prescription drug exemption of RCW 82.08.0281.

- [2] RULE 108; RULE 224: CHARGES FOR CROSSMATCHING--LABORATORY OPERATORS--SERVICE ACTIVITIES. When a hospital returns crossmatched blood to taxpayer, the charge made to the hospital for the crossmatching is subject to the service B&O tax.

- [3] RULE 193A: OUT OF STATE SALES--BLOOD--SHIPPING CHARGES. Where taxpayer sells excess blood to an out-of-state fractionator, as long as it can show that the it was the consignor of the blood and the out-of-state customer was the consignee, it will be allowed the deduction for out-of-state sales.

- [4] RULE 115: SALES FOR RESALE--PACKING CONTAINERS. The actual containers in which blood is resold are purchases for resale and not subject to the retail sales tax or use tax.

- [5] RULE 169: HEALTH AND SOCIAL WELFARE ORGANIZATION--BLOOD BANK--TISSUE BANK--HEALTH CARE ACTIVITIES. As

long as a blood/tissue/bone bank meets the requirements of RCW 82.04.431 for a health and social welfare organization, including being a nonprofit corporation and having at least eight seats on its board, it will qualify for the B&O tax deduction for amounts sold to federal, state, and municipal entities. The activity of obtaining and selling blood, tissue, and bone is a health care activity.

- [6] RULE 18801: LABORATORY REAGENTS--TESTING--RETAIL SALES TAX EXEMPTION. The exemption granted for laboratory reagents because of the Deaconess case is available only when the items are used for the treatment of a specific patient. When the reagents are used for testing blood to determine the presence of disease and the type of the blood, and they are not prescribed for a specific patient as required by RCW 82.08.0281 and Deaconess, they are not eligible for the exemption. Accord: Deaconess Medical Center v. Department of Rev., 58 Wn.App. 783 (1990).

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: . . .

NATURE OF ACTION:

Taxpayer requests a determination as to how it should be reporting its tax liability.

FACTS AND ISSUES:

Hesselholt, Chief A.L.J. -- [Taxpayer] is a nonprofit corporation organized under the laws of Washington and exempt from federal income tax under Section 501(c)(3) of the Internal Revenue Code. Taxpayer was incorporated in its present form in January 1978. . . . Current management can find no evidence that it ever registered with the Department, as it believed that it was exempt from Washington taxes. It at one time operated within a local . . . hospital and was believed to be operated in a manner similar to the exempt medical center described in Determination No. 86-290, 1 WTD 469 (1986).

Taxpayer operates as an intermediary between donors and recipients in the process of collecting and distributing blood. Taxpayer also recently began the operation of a tissue center which procures, stores and distributes musculoskeletal tissue. Revenue is derived principally from processing, compatibility testing and distributing blood and blood components. Additional sources of revenue include histo-compatibility testing, tissue and bone bank revenue, RH laboratory and other laboratory fees and sales of blood derivatives and related products.

Before donating blood, donors complete a thorough health-screening evaluation. The evaluation includes a medical history assessment and a mini-physical exam. If a donor meets the medical requirements, one pint of blood is drawn. Laboratory technicians perform a battery of seven tests on every unit of blood that is donated including tests for hepatitis and AIDS. Two thirds of the region's blood supply is used to treat cancer and surgery patients.

Taxpayer acts both as a "community blood center" and a hospital transfusion center. It provides blood to patients in over thirty-eight hospitals in eight counties in Washington, including federal and state owned and operated facilities. In over eighty-five percent of the cases taxpayer does not provide an inventory of blood to these hospitals. Instead, taxpayer provides blood that is cross-checked and matched for a specific patient. The blood is crossmatched for compatibility and includes typing, antibody screening, tabletop (slide) tests and antiglobulin tests. All blood is provided as a prescription medication by a medical doctor, and must contain the statement, "Caution: Federal law prohibits dispensing without a prescription" on the container label pursuant to federal law. (See 21 CFR §606.121 (c)(8)).

Taxpayer explains that revenue is derived in one of the following ways, and lists its anticipated tax treatment for each:

1. A telephone call or "REQUEST FOR BLOOD" form along with a patient sample is received by [taxpayer] from a hospital requesting blood for a particular patient. Blood, previously obtained from a donor and tested, is crossmatched for the particular patient and sent to the requesting hospital for transfusion. It is common for [one of taxpayer's medical doctors] to consult with the requesting Doctor with regard to the specific needs of the

patient or hospital. The hospital is billed for the blood processing and for crossmatching. (The blood processing charge is intended to recover the costs of recruiting donors and collecting, processing and testing of the blood). The hospital in turn bills the patient for these items. Taxpayer also maintains a tissue/bone bank. Typically, a hospital will be invoiced for items transferred to it from one of these banks. Taxpayer believes that these are wholesale sales and not subject to the sales or use tax.

2. Same as Situation 1, except the patient is billed directly by [taxpayer]. Taxpayer believes that this is a retail sale, but is exempt from sales or use tax under RCW 82.04.0281 and RCW 82.12.0275 as a prescription drug.
3. Same as Situation 1, except that the blood is later returned to [taxpayer] because it is not needed. [Taxpayer] issues a credit memorandum with the net affect being only a charge for crossmatching. Taxpayer believes that this is taxable at the wholesale rate on the charge for crossmatching.
4. [Taxpayer] is requested by an outside Doctor or hospital to perform certain laboratory tests. Histo-compatibility, PH laboratory and other laboratory tests are performed and billed to the requesting Doctor, hospital or the patient. Taxpayer believes this charge is subject to the service B&O tax.
5. Recipient packs containing certain medical solutions are provided to hemophiliac patients for their in-home use. Payment is generally received from either: (1) the patient directly or (2) from a third party insurance provider. Taxpayer believes that this is similar to irrigation solution and intravenous set that qualifies as a prescription drug under RCW 82.08.0281. Therefore, taxpayer believes that the sales are taxable under the retailing B&O tax, but exempt from sales or use tax.
6. Plasma not needed for transfusion is sold to a New York blood fractionator for processing into related products. The fractionator is billed directly for the plasma. Taxpayer believes that this is a sale in interstate commerce and therefore exempt from the

B&O tax and sales tax. If not a sale in interstate commerce, taxpayer believes that it qualifies as a sale for resale and is subject to the wholesaling B&O tax.

7. To a relatively small degree, [taxpayer] provides blood that has not been crossmatched for a specific patient to certain county blood banks located outside [the area] for sale to outlying hospitals. Taxpayer believes that this is a sale for resale and taxable at the wholesaling rate.

Taxpayer requests that it be treated as a health and social welfare organization to receive the deduction provided by RCW 82.04.4297. It also requested a ruling as to sales tax liability on bags and cartons it purchases and in which the blood is sold, and the sales tax liability for reagents used by it in testing blood.

DISCUSSION:

RCW 82.04.030 defines a person as follows:

"Person" or "company," herein used interchangeably, means any individual, receiver, administrator, executor, assignee, trustee in bankruptcy, trust, estate, firm, copartnership, joint venture, club, company, joint stock company, business trust, municipal corporation, political subdivision of the state of Washington, corporation, association, society, or any group of individuals acting as a unit, whether mutual, cooperative, fraternal, nonprofit, or otherwise and the United States or any instrumentality thereof.

RCW 82.04.140 defines business as follows:

"Business" includes all activities engaged in with the object of gain, benefit, or advantage to the taxpayer or to another person or class, directly or indirectly.

RCW 82.04.220 imposes the business and occupation tax as follows:

There is levied and shall be collected from every person a tax for the act or privilege of engaging in business activities. Such tax shall be measured by

the application of rates against value of products, gross proceeds of sales, or gross income of the business, as the case may be.

Taxpayer qualifies as a taxable entity under the laws of the state of Washington, as it is a corporation that exists to provide a benefit to another class of persons. An entity is only relieved of a tax burden if it is statutorily exempt, or if its income falls below the statutory minimum. RCW 82.04.300. There exists no general statutory exemption to relieve it of its tax obligation.

[1] When taxpayer sells blood, tissue, or bone products to a hospital for resale to a patient, that sale is a sale for resale and subject to business and occupation tax under the wholesaling rate. There is no sales tax liability for a wholesale sale. When blood is sold directly to a patient, and the patient is directly billed, the sale is a retail sale and taxable under the retailing rate.

RCW 82.08.0281 provides, in relevant part, as follows:

a prescription drug . . . is 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 ailments in humans ordered by the (1) the written prescription

Prescription drugs are exempt from sales and use tax under RCW 82.08.0281 and RCW 82.12.0275. To the extent that taxpayer's blood is dispensed pursuant to a written prescription for the mitigation of disease or other ailments in humans, it qualifies for the exemption provided by the statute.

[2] In Situation 3, taxpayer crossmatches the blood and sends it to the hospital, but it is returned because it is not needed. Taxpayer believes that it should be taxed on the actual amount charged at the wholesaling rate.

WAC 458-20-108 (Rule 108), provides, in part, as follows:

When a contract of sale is made subject to cancellation at the option of one of the parties or to revision in the event the goods sold are defective or if the sale is made subject to cash or trade discount, the gross proceeds actually derived from the contract and the selling price are determined by the transaction as finally completed.

In this case, the transaction as finally completed consists of a charge for crossmatching the blood, and no charges for the blood itself. This charge is subject to the service B&O tax. Activities for which no specific category is provided in Chapter RCW 82.04 are taxed in the service classification of the business and occupation tax. RCW 82.04.220. Laboratory operators are listed as one of the persons subject to the service tax in WAC 458-20-224. Taxpayer, when no sale of blood is actually made, is acting as a laboratory operator, and taxable under the service B&O tax rate. Similarly, under Situation 4, taxpayer is also taxable under the service B&O tax rate.

Taxpayer next argues that recipient sets provided to patients for in-home use are similar to irrigation solutions and intravenous sets which qualify as "other items" for purposes of the prescription drug exemption. Deaconess Medical Center v. Department of Rev., No. 87-2-02055-7, (1989). Taxpayer argues that they are not conceptually different from the solution they deliver. Taxpayer mentions a specific prescription drug prescribed by a doctor that is administered through one of these recipient sets. We agree that so long as the solution the recipient set is delivering is a prescription drug within the meaning of RCW 82.08.0281, the set itself will also be exempt of sales tax. The sale of the set to the patient is still subject to the retailing B&O tax.

[3] Taxpayer next argues that blood plasma sold to a New York fractionator is sold in interstate commerce. If the blood is delivered by a carrier for hire, and taxpayer is shown as the consignor and the buyer is shown as the consignee on a bill of lading or other contract document, it will qualify for the exempt for interstate sales. RPM 89-002, WAC 458-20-193A. Otherwise, it will be taxable under the wholesaling classification.

[4] Taxpayer argued that the "packing material and containers such as bags and cartons" were purchased for resale. The containers in which the blood is sold are considered part of the resale. Therefore, to the extent that they are, in fact, resold, the containers are purchases for resale and not subject to the use or sales tax. WAC 458-20-115.

[5] Taxpayer has also argued that it should qualify as a health and social welfare organization and therefore sales to the federal government, the state, and municipal entities should be deductible from the B&O tax.

RCW 82.04.431 defines a social and health welfare organization, in part, as follows:

a not-for-profit corporation under chapter 24.03 RCW and which is managed by a governing board of not less than eight individuals none of whom is a paid employee of the organization or which is a corporation sole under chapter 24.12 RCW. Health or social welfare organization does not include a corporation providing professional services as authorized in chapter 18.100 RCW. . . .

Additional restrictions are listed in the statute. Health or social welfare activities include health care services. Taxpayer's activity, of collecting and distributing blood, tissue, and bone are health care activities. So long as taxpayer meets the qualifications set forth in RCW 82.04.431, and can provide evidence to the Department, it qualifies for the deduction provided in RCW 82.04.4297. That deduction provides

In computing tax there may be deducted from the measure of tax amounts received from the United States or any instrumentality thereof or from the state of Washington or any municipal corporation or political subdivision thereof as compensation for, or to support, health or social welfare services rendered by a health or social welfare organization or by a municipal corporation or political subdivision, except deductions are not allowed under this section for amounts that are received under an employee benefit plan.

Finally, taxpayer argued that its purchases of laboratory reagents should be exempt from tax as prescription drugs. In Deaconess Medical Center v. Department of Rev., 58 Wn.App. 783 (1990), the prescription drug exemption of RCW 82.08.0281 and RCW 82.12.0275 was granted to the plaintiff hospitals, essentially because the Court of Appeals found that the Department had argued inconsistent positions before the Board of Tax Appeals and the appellate court. The court found for the hospitals on the doctrine of invited error. Nonetheless, in RPM 91-001, pending the amendment of WAC 458-20-18801, the Department stated that

Neither retail sales tax nor use tax will be imposed on legend drug sales for use in the diagnosis, cure,

mitigation, treatment, or prevention of disease or other ailments of humans. This exemption applies to all levels of sales and distribution of legend drugs (drugs which may not be legally dispensed without a prescription) including legend drugs given away as samples. No resale certificate or other exemption certificate is required for legend drug purchases.

The exemption also applies to nonlegend drugs (drugs which may be lawfully sold without a prescription) which are normally sold "over-the-counter," but only when such drugs are in fact prescribed. Vendors of nonlegend drugs or other substances must collect retail sales tax unless their purchasers provide them resale certificates or prescription drug exemption certificates (see below).

The exemption also applies to other prescribed substances including prescribed laboratory reagents used to analyze bodily fluids or tissues for treatment of a specific patient. Resale certificates or drug exemption certificates will be required if the other substances or laboratory reagents can be dispensed or used without a prescription.

(Emphasis added.)

[6] Laboratory reagents are used by the taxpayer to test and identify the blood it then sells. Some of the reagents are used to test blood before it is designated for a specific patient. Taxpayer apparently performs the disease testing and some basic typing on all blood, before it is ordered for any patients. These reagents are not used for the treatment of a specific patient. There is no evidence that the reagents are prescribed in accordance with the exemption provided in RCW 82.08.0281, which requires that to be exempt as prescription drugs, the substances must be

ordered by (1) the written prescription to a pharmacist by a practitioner. . . , or (2) upon an oral prescription of such practitioner which is reduced promptly to writing and filed by a duly licensed pharmacist, or (3) by refilling any such written or oral prescription. . . , or (4) . . . written directions and specifications for the preparation, grinding, and fabrication of lenses....

This is entirely consistent with the Deaconess decision. Deaconess denied the prosthetic device exemption provided by RCW 82.08.0283 to a heart-lung machine because the heart lung machines are sold only to hospitals, not to patients, and "their use is not 'prescribed' in the common medical meaning of the word. . . . " Deaconess, 58 Wn. App. at 788.

However, when taxpayer uses reagents to test blood that has been ordered for a specific patient, then it meets the terms of the statute and RPM 91-001. Those reagents would qualify for the deduction.

RULING:

Taxpayer is taxable in the manner outlined above.

DATED this 22nd day of March, 1991.