

Cite as Det. No. 91-290, 11 WTD 477 (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 Correction of Assessment of)	
)	No. 91-290
)	
. . .)	Registration No. . . .
)	. . ./Audit No. . . .
)	

[1] RCW 82.08.0283, RCW 82.12.0277 and RULE 18801: RETAIL SALES AND USE TAXES -- PROSTHETIC DEVICES -- DEFINITION. The term "prosthetic device" is not defined by the statute. Use of such devices for cosmetic purposes does not disqualify them as "prostheses" merely because the procedure is voluntary or because the body part replaced or augmented is not technically "missing." ACCORD: Deaconess Medical Center v. Department of Rev., Docket Number 87-2-2055-7 (Thurston County Superior Court, 1988), Det. No. 90-97, 9 WTD 195 (1990). Also cited: Plastic Surgery Clinic of Springfield, Inc. v. Director of Revenue, Case No. 88-001987RS (Mo.AHC, November 29, 1989).

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 petitions for correction of assessment of use tax.

FACTS:

Adler, A.L.J. -- Taxpayer is a physician specializing in plastic and reconstructive surgery. His records were audited for the period from January 1, 1986 through June 30, 1990. At issue is whether use tax applies to his purchases of collagen used for skin implants or to purchases of materials used as breast and chin implants.

The collagen is injected into the skin in an effort to remove lines or "pock" marks caused by aging or scarring. It is a protein material intended to "puff out" the skin where creases or indentations have occurred.

With regard to the breast implants, the auditor used an estimate supplied by the taxpayer's representative and assessed the tax on the portion of taxpayer's breast-implant materials purchased for cosmetic surgery. Conversely, the portion of materials deemed to have been purchased for reconstructive surgery was not subjected to use tax. Cosmetic surgery was deemed to include procedures such as enlargement or augmentation of breasts or receding chins. Reconstructive surgery was deemed to be surgery performed to return the breast to a normal appearance after the patient's breast was removed to prevent the spread of disease. Similarly, where implants were used to repair a chin injury, use tax was not assessed; where the implants were only to improve the patient's appearance, use tax was assessed.

TAXPAYER'S EXCEPTIONS:

Taxpayer argues that use tax should not apply to any purchases of materials where the items purchased are injected into, and remain in, the human body. He argues that the statute contains no limitations based on the type of use to which the device is put and contends that the Department is attempting to narrow access to the exemption by placing qualifications on the definition which exceed those contained in and authorized by the statute.

DISCUSSION:

[1] Physicians are subject to use tax on all materials deemed consumed by them in rendering medical services under WAC 458-20-151 (Rule 151), unless an exemption from use tax applies to the materials themselves. The rule references WAC 458-20-18801 (Rule 18801), which discusses the sales and use tax exemptions and defines "prosthetic device" to mean

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.

...

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.)

...

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.)

RCW 82.08.0283 and RCW 82.12.0277 contain no definition of "prosthetic," nor do they contain any limitations indicating that eligibility for exemption is conditioned on how the prosthetic device is used.

In Deaconess Medical Center v. Department of Rev., Docket Number 87-2-2055-7 (Thurston County Superior Court, 1988), the court used similar logic and commented:

prosthetic devices [are exempted from] sales and use taxes imposed by Chapters 82.08 and 82.12 respectively. In neither chapter is the term "prosthetic devices" defined (Brackets supplied.)

However, absent a statutory definition, terms used in statutes are to be given their ordinary meaning, which may be determined by reference to extrinsic aids, such as dictionaries. [Citation omitted.] In the ordinary meaning attached to "prosthetic devices," as defined in Dorland's Illustrated Medical Dictionary, 26th Edition, and Taber's Cyclopedic Medical Dictionary, there is not a requirement that the prosthesis be a permanent replacement. These definitions also indicate the prosthesis need only replace a missing part, organ, or part of an organ or the function of the part or organ. (Emphasis supplied.)

Therefore, since the department's definition, in so far as it requires the replacement be permanent, broadens the sales and use tax imposed by the statute. This results in this regulation being invalid to this extent.

In this case, as in Deaconess, the statute contains no language suggesting that the exemption can be denied based on the fact that the patient's choice to undergo the procedure is motivated by cosmetic concerns. The only limitation in the statute is that the device must be prescribed by a qualifying person. Under the broad interpretation given by the court, application of the law or rule in a manner that limits access to the exemption granted by the legislature is invalid. As a result, we find that the

fact that the surgery is generally voluntary is not determinative of whether the exemption applies.

Following the reasoning in Deaconess, we believe that collagen implantations, which become a part of the skin and remain in the body indefinitely, are prostheses. Although the decision to undergo the procedure may be motivated by cosmetic concerns, the collagen does replace a lost function of skin which has been damaged by disease, accident, or time.

We believe that the same logic governs taxability of breast and chin implants. Although this is a close question, the Deaconess court has instructed that, in the absence of a definition, "prosthetic device" cannot be administratively defined in any way that narrows the scope of the exemption. As a result, denying the exemption because the surgery is voluntary is invalid. Similarly, denial because the body part is perceived to be "missing" only in the eyes of the patient exceeds the statutory authority. The rule does not limit the exemption on these grounds, and the statute definitely does not.

We are further persuaded by an administrative opinion from Missouri on this exact issue. The state Administrative Hearing Commission was considering a statute which is virtually identical to RCW 82.08.0283 and RCW 82.12.0277, and applied logic consistent with that of the Deaconess opinion. The Missouri statute differs only slightly, in that it ties the definition of "prosthetic device" to Title XVIII of the Social Security Act of 1965. No such limitation exists in the Washington statute.

The Missouri state revenue division had assessed tax only on implants used for cosmetic, generally augmentation, purposes and had granted the exemption where they were used for reconstructive purposes. The commission's findings of fact stated that breasts were internal organs and that implants were prostheses, for medical purposes. Its conclusions of law stated

The Director argues that breast implants used for cosmetic augmentation replace nothing and are, therefore, outside of the statutory definition. We disagree. It is our view that a device is a prosthetic device whether the tissue or organ replaced was once present, but lost due to accident, surgery or disease, or was never present. The uncontroverted testimony of the Clinic's expert was that breast implants always replace natural tissue which is missing due to disease, surgery, malformation, or simply inadequate growth . .

. .

The Director concedes that implants used for other than cosmetic purposes are exempt, but insists that implants used for purely cosmetic purposes are not exempt because they are not prostheses. The prosthetic device exemption does not, however, unlike certain other exemptions, require a purpose or actual use test. The statute plainly and simply exempts all sales of qualifying devices and does not inquire into the uses to which devices are put Where the legislature has not included an express actual use requirement, we will not read one into the law. It is our determination that any sale of a qualifying device is exempt, regardless of the use to which it is put or, indeed, whether it is put to any use. (Emphasis supplied.)

Plastic Surgery Clinic of Springfield, Inc. v. Director of Revenue, Case No. 88-001987RS (Mo.AHC, November 29, 1989).

Because we believe the statute does not limit access to the exemption based on voluntariness of the surgery or on whether a patient can prove a body part is physically missing, we find that the substances or materials used by the taxpayer are not subject to use tax, either where the surgery is for reconstructive purposes or where it is for cosmetic purposes.

DECISION AND DISPOSITION:

Taxpayer's petition is granted. The file will be remanded to the Audit Division for adjustments consistent with this Determination.

DATED this 2nd day of October, 1991.