

Cite as Det. No. 92-163, 12 WTD 199 (1993).

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. 92-163
	)	
. . .	)	Registration No. . . .
	)	. . ./Audit No. . . .
	)	

- [1] RULE 18801: RETAIL SALES/USE TAX -- EXEMPTION -- TENS UNIT. Because a TENS unit is not an artificial substitute which physically replaces missing parts of the human body, such as the nervous system, it is not a prosthetic device. A TENS unit actually blocks--by whatever means--the transmission of pain from the site of injury to the brain and thus impedes the nervous system.
- [2] RULE 18801: RETAIL SALES/USE TAX -- EXEMPTION -- PRESCRIPTION DRUG -- "OTHER SUBSTANCE" -- TENS UNIT. Although a patient must have a prescription to obtain a TENS unit, the unit is a "piece of equipment" or "a device." As such, does not qualify for exemption under RCW 82.08.0281 and WAC 458-20-18801. Although certain medical-delivery devices have been held to be exempt along with the prescription drugs they deliver, a TENS unit cannot be so classified.
- [3] RULE 18801 and RULE 190: RETAIL SALES/USE TAX -- EXEMPTION -- FEDERAL GOVERNMENT -- MEDICARE ASSIGNMENTS. When a provider takes an assignment of a patient's rights to Medicare reimbursement, the patient--and not the federal government--is still the buyer and user of the product or service. The patient will owe retail sales tax or use tax to the state. This is an obligation separate and apart from the amount charged and accepted under the Medicare assignment agreement, and the provider only collects these amounts and holds them in trust for the state.

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:

Petition concerning the application of the retail sales/use tax exemption to a Transcutaneous Electrical Nerve Stimulator (TENS) unit.

FACTS:

Bauer, A.L.J. -- The taxpayer's business records were audited, and an assessment was issued.

The taxpayer sells transcutaneous electrical nerve stimulators ("TENS units"). The auditor assessed uncollected retail sales tax on the rental and sales of these units.

A TENS unit helps control pain. Although the medical community's understanding of pain remains limited, TENS units have been proven to work to alleviate pain by electrically stimulating a patient's nerve fibers. Several theories exist on why this works to reduce pain, but the treatment has been proven to work despite the lack of a complete understanding of why.

A TENS unit transmits electrical impulses to nerves via the skin. The system consists of a battery-powered stimulator, lead cables, and electrodes. The stimulator converts the constant voltage of the battery into discrete packets of electrical stimulation called pulses. The electrodes transmit these pulses to the skin at a comfortable level. Lead cables connect the stimulator and electrodes. The electrical impulses produce a "tingling" sensation in the region under and between the electrodes which relieves pain. When used in the presence of pain, the tingling sensation reduces a patient's pain within minutes.

A patient must have a prescription in order to rent or buy a TENS unit.

TAXPAYER'S EXCEPTIONS:

The taxpayer finds error in the assessment of retail sales and/or use tax on taxpayer's sales of TENS units for the following reasons:

1. A TENS unit is a prosthetic device as defined in RCW 82.08.0283 and WAC 458-20-18801. The Department of Revenue has

already ruled kidney dialysis machines exempt from retail sales tax as a prosthetic device. The taxpayer cites Mosby's Medical and Nursing Dictionary, page 898, which defines "prosthetic device" as "a device designed and applied to improve body function." The taxpayer contends that a TENS unit fits this definition and that, since this definition is acceptable in the medical community, it should be accepted by the Department as consistent with legislative intent. In addition, Medicare specifically defines the TENS device as a prosthetic device. Further, the parts and components which make up the TENS unit are functionally inseparable from the process of nerve function and, therefore, are functionally integral and replaces a part of the human body just as does the tax-exempt machine which performs kidney dialysis.

2. A TENS unit is a prescription drug as defined in WAC 458-20-18801. A prescription is required in order to purchase or rent a TENS unit. The taxpayer not only has a written prescription for each TENS sale but also can identify each sale in detail by line item. The taxpayer relies on the Department ruling that irrigation solutions are prescription drugs, as are IV sets and other similar medical delivery systems.

3. The taxation of TENS units directly results in the State of Washington illegally and improperly taxing the U.S. (federal) government in violation of the U.S. Constitution. TENS units are covered under Medicare. One method of payment under the Medicare system is the assignment method, whereby the medical provider agrees to accept the allowed charge as the full fee for the TENS unit provided. The sales here at issue are exclusively under the "assigned" Medicare method meaning the sale is directly to the U.S. Government. Under this method, the federal government sets a limit on the taxpayer's sales price and the taxpayer is prohibited from charging sales tax. The State of Washington, by assessing the sales and/or use tax on the taxpayer's TENS units sales under the assigned Medicare system, is imposing a tax upon the U.S. Government.

#### DISCUSSION:

RCW 82.08.0283 and RCW 82.12.0277 exempt the sale or use of insulin, prosthetic and orthotic devices, ostomic items and medically prescribed oxygen from retail sales tax and use tax respectively.

The Department of Revenue's rule implementing these statutes is WAC 458-20-18801 (Rule 18801). The applicable portion of the rule in effect during the audit period provided as follows:

(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.

The rule was revised, effective February 18, 1992. The pertinent section therein provides a more liberal view:

(f) "Prosthetic devices" are artificial substitutes which generally 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.

[1] Under either of the above WAC 458-20-18801 definitions, a TENS unit is not an artificial substitute which "physically", or "generally", replaces a missing part of the human body--in this case the nervous system. It is therefore not an exempt prosthetic device under either the old or new Rule 18801. A TENS unit actually blocks--by whatever means--the transmission of pain from the site of injury to the brain and thus impedes the nervous system.

Because the TENS unit blocks the nervous system's transmission of pain, it therefore cannot be said that the TENS unit "improves" this body function, even if we were free to adopt the taxpayer's definition of "prosthetic device."

The taxpayer's petition as to this issue is denied.

RCW 82.08.0281 and RCW 82.12.0275 exempt the sale or use of prescription drugs from retail sales tax and use tax, respectively.

Former Rule 18801, effective during the audit period, implemented this statute as follows:

(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, and also includes written directions and specifications by physicians or optometrists for the preparation, grinding, and fabrication of lenses intended to aid or correct visual defects or anomalies of humans.

(b) "Other substances" means products such as catalytics, hormones, vitamins, and steroids, but the term does not include devices, instruments, equipment, and similar articles.

(Emphasis supplied.)

The revised rule provides:

(a) "Prescription drugs" are medicines, drugs, prescription lens, or other substances, other than food for use in the diagnosis, cure, mitigation, treatment, or prevention of disease or other ailment in humans ordered by (i) the written prescription to a pharmacist by a practitioner authorized by the laws of this state or laws of another jurisdiction to issue prescriptions, or (ii) an oral prescription of such practitioner which is reduced promptly to writing and filed by a duly licensed pharmacist, or (iii) by refilling any such written or oral prescription if such refilling is authorized by the prescriber either in the original prescription or by oral order which is promptly reduced to writing and filled by the pharmacist, or (iv) physicians or optometrists by way of written directions and specifications for the preparation, grinding, and fabrication of lenses intended to aid or correct visual defects or anomalies of humans.

(b) "Prescription" means a formula or recipe or an order written by a medical practitioner for the composition, preparation and use of a healing, curative or diagnostic substance, and also includes written directions and specifications by physicians or optometrists for the preparation, grinding, and fabrication of lenses intended to aid or correct visual defects or anomalies of humans.

(c) "Other substances" means products such as catalytics, hormones, vitamins, and steroids, but the term generally does not include devices, instruments, equipment, and similar articles. However, "other substances" does include the needles, tubing, and the bag which are part of an intravenous set for delivery of prescription drugs. It also includes infusion pumps and catheters when used to deliver prescription drugs to a specific patient. These items are not conceptually distinct from the prescription drug solution. This same rationale applies to tubing and needles which are used in placing prescribed nutritional products in the patient's system. The stand which holds the intravenous set is not included nor are plain glass slides, plain specimen collection devices, and similar items which are used in the laboratory. This term does include diagnostic

substances and reagents, including prepared slides, tubes and collection specimens devices which contain diagnostic substances and reagents at the time of purchase by a laboratory.

(Emphasis supplied.)

[2] In this case, although a patient must have a prescription to obtain a TENS unit, the TENS unit is still a piece of equipment or a device. It thus does not qualify for exemption under either the former or revised rule. Although certain medical delivery devices have been held to be exempt along with the prescription drugs they deliver, a TENS unit cannot be classified as a delivery device.

The taxpayer's petition as to this issue is denied.

As to the taxpayer's final argument that taxing these devices is, in essence, taxing the federal government when there has been an "assigned" Medicare reimbursement, we must likewise disagree.

WAC 458-20-190 provides, in part, as follows:

The retail sales tax does not apply to sales to the United States, its departments, institutions and instrumentalities, except sales to such institutions as have been chartered or created under federal authority, but which are not directly operated and controlled by the government for the benefit of the public generally.

[3] However, when a provider takes an assignment of a patient's rights to Medicare reimbursement, he is doing so with the agreement that he will accept that amount in full payment. The contracting party, however, is still the patient himself, not the U.S. government. Otherwise, there would be no need for an assignment of the patient's right to his Medicare reimbursement. The purchaser/user is the patient, who still owes retail sales tax or use tax to the state. This is an obligation separate and apart from the amount charged and accepted under the Medicare assignment agreement, and the provider is to collect these amounts and hold them in trust for the state. Failure to so collect and remit these amounts will render the provider liable to the state under RCW 82.08.050.

The taxpayer's petition as to this issue must be denied.

#### DECISION AND DISPOSITION:

The taxpayer's petition is denied.

DATED this 24th day of June 1992.