

Cite as Det. No. 17-0008R, 38 WTD 121 (2019)

BEFORE THE ADMINISTRATIVE REVIEW AND HEARINGS DIVISION  
DEPARTMENT OF REVENUE  
STATE OF WASHINGTON

In the Matter of the Petition for Reconsideration	)	<u>D E T E R M I N A T I O N</u>
of Assessment of	)	
	)	No. 17-0008R
	)	
. . .	)	Registration No. . . .
	)	

RULE 18801; RCW 82.08.0283: RETAIL SALES TAX – PROSTHETIC DEVICES – ADAPTIVE SERVO-VENTILATION DEVICE. Because the adaptive servo-ventilation device need not be worn on the body, the device was not eligible for the exemption provided for prosthetic devices. The adaptive servo-ventilation device met the definition of durable medical equipment, and was subject to retail sales tax.

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.

#### NATURE OF THE CASE

Gabriella Herkert, T.R.O. – A vendor of medical devices and equipment requests reconsideration of Det. No. 17-0008 denying that portion of its requested review of an assessment of retail sales tax on gross proceeds from sales to health care facilities of adaptive servo-ventilation devices (ASV) on the basis that they are prosthetic devices.<sup>1</sup> We deny Taxpayer’s petition.<sup>2</sup>

#### ISSUE

Are portable bi-level pressure capability devices exempt from retail sales tax as prosthetic devices under RCW 82.08.0283 and WAC 458-20-18801?

#### FINDINGS OF FACT

. . . (Taxpayer) is an independent respiratory equipment provider. Taxpayer sells sleep apnea, ventilator and oxygen equipment to consumers, health care professionals, and health care facilities. Taxpayer opened for business in 2003. Taxpayer has offices in [Washington]. Taxpayer bills insurance companies and Medicare directly. Taxpayer codes all products within its billing system

<sup>1</sup> [Det. No. 17-0008 granted partial relief to Taxpayer with respect to certain identified equipment; Taxpayer is now seeking reconsideration of the decision in Det. No. 17-0008 with respect to the equipment where relief was denied.]

<sup>2</sup> Identifying details regarding the taxpayer and the assessment have been redacted pursuant to RCW 82.32.410.

using the Healthcare Common Procedure Coding System (HCPCS).<sup>3</sup> Taxpayer is accredited by the Healthcare Quality Association on Accreditation (HQAA). HQAA is a healthcare accreditation organization providing Medicare accreditation for home medical equipment . . . and durable medical equipment . . . companies nationwide.<sup>4</sup>

The Department of Revenue's . . . Audit Division (Audit) reviewed Taxpayer's records for January 1, 2011, through March 31, 2015. Audit reviewed products sold by Taxpayer according to HCPCS codes.

Taxpayer referenced its ASVs under HCPCS code E0471. HCPCS defines E0471 as "respiratory assist device, bi-level pressure capability, with back-up rate feature, used with noninvasive interface, e.g., nasal or facial mask (intermittent assist device with continuous positive airway pressure device)."<sup>5</sup> ASVs are used to treat central sleep apnea, mixed sleep apnea and Cheynes-Stokes respiration (an abnormal pattern of breathing characterized by progressively deeper and sometimes faster breathing, followed by a gradual decrease that results in an apnea event).<sup>6</sup> ASVs support regular breathing using an algorithm that detects significant reductions or pauses in breathing and intervenes by delivering air pressure to reduce the physical work of breathing.<sup>7</sup>

Audit disallowed Taxpayer's deductions from gross proceeds for the sale of certain products Taxpayer deducted as prosthetic devices. Audit assessed Taxpayer \$ . . . .<sup>8, 9</sup> Taxpayer timely requested review of Audit's denial of the deduction for ASVs as prosthetic devices. In Det. No. 17-0008, we denied Taxpayer's petition as to that issue.

Taxpayer provided additional information with its petition for reconsideration, including a manual for its ASVs. The manual lists the battery life of an ASV as 13 hours and its weight as approximately two pounds. ASVs include a backpack that allows the unit to be transported easily. ASVs are equipped with cellular communication to enable wireless therapy. The ASVs deliver air pressure through a mask worn by patients and monitored by its electronic unit, which may or may not be in the backpack during use.

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<sup>3</sup> HCPCS was established in 1978 to provide a standardized coding system for describing the specific items and services provided in the delivery of health care. Each item has a HCPCS Code associated with it. Such coding is necessary for Medicare, Medicaid, and other health insurance programs to ensure that insurance claims are processed in an orderly and consistent manner. The Health Insurance Portability and Accountability Act of 1996 (HIPAA) was implemented to support that the use of the HCPCS for transactions involving health care information must be mandatory to properly identify the services provided. The HCPCS online system is free to access online at <https://www.cms.gov/Medicare/Coding/MedHCPCSGenInfo/index.html>.

<sup>4</sup> . . . (Last viewed December 20, 2016).

<sup>5</sup> HCPCS, Find-A-Code, E0471, <http://www.findacode.com/code.php?set=HCPCS&c=E0471> (Last viewed December 20, 2016).

<sup>6</sup> Petition, Exhibit 3.

<sup>7</sup> *Id.*

<sup>8</sup> Document No. . . . includes \$ . . . in retail sales tax, a credit of \$ . . . in retailing business and occupation (B&O) tax, \$ . . . in use tax and/or deferred sales tax and \$ . . . interest.

<sup>9</sup> Taxpayer does not dispute certain disallowed deductions, retailing B&O tax and use tax and/or deferred sales tax. Taxpayer submitted payment of \$ . . . for undisputed liabilities and interest on those liabilities. The remaining amount disputed by Taxpayer is \$ . . . .

## ANALYSIS

Retail sales tax is imposed on retail sales in Washington. RCW 82.08.050. RCW 82.04.050 defines “sale at retail” or “retail sale” as every sale of tangible personal property . . . to all persons irrespective of the nature of their business. All [tangible personal property] sales are retail sales unless sold to persons for resale in the regular course of their business without intervening use [or otherwise excluded from the definition of retail sale in RCW 82.04.050 or exempt].<sup>10</sup> WAC 458-20-102 . . . explains that all sales in Washington State are considered to be retail sales unless the customer has a valid reseller permit or provides other Department approved documentation showing the sale was properly made at wholesale. Sales for resale supported by such documentation are subject to the wholesaling B&O tax under RCW 82.04.270.

During the 2003 legislative session, the Washington State Legislature began its efforts to conform Washington laws to the [multi-state] Streamlined Sales and Use Tax Agreement (SSUTA). As a result, it passed the Streamlined Sales Tax Act, Chapter 168, Laws of 2003. Many of the statutory provisions of SSUTA took effect in 2004. For example, RCW 82.08.0281, which provides definitions and a sales tax exemption for the sales of prescription drugs, was amended to conform to SSUTA. Likewise, RCW 82.08.0283, with definitions and a tax exemption for sales of certain medical items, was amended to conform to SSUTA.<sup>11</sup>

The audit period in this matter began January 1, 2011, which is after the date the SSUTA statutes took effect in Washington. Consequently, we base our analysis on SSUTA and its Appendix L (Health Care Item List, Completion Date: June 2, 2006), Appendix M (Health Care Item list, Revision Date: January 29, 2007), and the Streamlined Sales Tax Governing Board Section 328 Taxability Matrix Library of Definitions for Washington, as amended through December 13, 2010. Indeed, SSUTA member states must adopt the definitions in the SSUTA Library of Definitions without qualifications, except those allowed by SSUTA. Det. No. 09-280, 29 WTD 80 (2010). *See also North Central Washington Respiratory Care Services, Inc. v. Dep’t of Revenue*, 165 Wn. App. 616, 641-43, 268 P.3d 972 (2011). We will also cite to the current version of Rule 18801 where applicable.

Because the above-referenced statutes are exemption statutes, we construe them narrowly where the items are not specifically addressed and categorized in Appendices L and M and the Library of Definitions. In general, exemptions from a taxing statute must be narrowly construed. Det. No. 08-0050, 27 WTD 189 (2008) (citing *Budget Rent-A-Car, Inc. v. Dep’t of Revenue*, 81 Wn. 2d

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<sup>10</sup> RCW 82.04.250 states that retail sales made in Washington State are also subject to the retailing business and occupation tax.

<sup>11</sup> WAC 458-20-18801 (Rule 18801) was the rule that DOR adopted to administer taxation of medical devices, etc. It was amended to conform to the SSUTA statutes in 2014. Consequently, the definitions and exemptions provided in the prior version of Rule 18801 were out of date in many instances and even in conflict with SSUTA during a portion of the audit period here. Therefore, the prior version of Rule 18801 is inapplicable to this appeal. In discussing the prior version of Rule 18801 in Det. No. 13-0388, 33 WTD 419 (2014), we stated: “Rule 18801 cannot be an independent basis for exempting the sales at issue when there is no statutory basis to do so. Therefore, Rule 18801 is not applicable to this appeal.” *See also* Det. No. 14-0356, 34 WTD 308 (2015).

RCW 82.08.0283 was amended again in 2007 (Laws of 2007, ch. 6, § 1101), but none of the amendments were material to the issues on appeal here.

171, 174, 500 P.2d 764 (1972); *Evergreen-Washelli Memorial Park Co. v. Dep't of Revenue*, 89 Wn.2d 660, 663, 574 P.2d 735 (1978)) and *North Central*, 165 Wn. App. at 625. The taxpayer claiming a tax exemption has the burden of proving that he or she qualifies for it. *Group Health Cooperative of Puget Sound, Inc. v. State Tax Commission*, 72 Wn.2d 422, 433 P.2d 201 (1967). Taxation is the rule; exemption is the exception. *Spokane County v. City of Spokane*, 169 Wash. 355, 358, 13 P.2d 1084 (1932).

RCW 82.08.0283(1) provides an exemption for “prosthetic devices prescribed, fitted, or furnished for an individual by a person licensed under the laws of this state to prescribe, fit, or furnish prosthetic devices . . . .” RCW 82.08.0283(3) further provides that the exemption does not apply to durable medical equipment. “Prosthetic device” is defined as:

[A] replacement, corrective, or supportive device, including repair and replacement parts for a prosthetic device, worn on or in the body to:

- (i) Artificially replace a missing portion of the body;
- (ii) Prevent or correct a physical deformity or malfunction; or
- (iii) Support a weak or deformed portion of the body.

RCW 82.08.0283(4)(a) (emphasis added).

"Durable medical equipment" means equipment, including repair and replacement parts for durable medical equipment that:

- (i) Can withstand repeated use;
- (ii) Is primarily and customarily used to serve a medical purpose;
- (iii) Generally is not useful to a person in the absence of illness or injury; and
- (iv) Is not worn in or on the body.

RCW 82.08.0283(4)(b).

Rule 18801(206), Table 5 provides a nonexclusive list of prosthetic device products. Included on the list are “continuous positive airway pressure (CPAP) machines which are specifically designed to be wholly worn on the body and portable” as well as “drainage devices for single patient use because they serve the same drainage functions as the body’s natural systems.” Rule 18801 provides information for persons making sales of medical products and the retail sales tax exemptions available for the sale of certain medical products.<sup>12</sup>

SSUTA and its Appendices L and M and the Library of Definition do not reference ASVs.<sup>13</sup> Taxpayer used HCPCS code E0471 in its internal documents to refer to the ASV.

ASVs provide support to regular breathing using an algorithm that detects significant reductions or pauses in breathing and intervenes with just enough support to maintain the patient’s breathing

<sup>12</sup> A comparable use tax exemption is provided in RCW 82.12.0277.

<sup>13</sup> SSUTA, Appendix L, [http://www.streamlinedsalestax.org/uploads/downloads/Appendix\\_L\\_\\_AD06002\\_Health-Care\\_List\\_June\\_2002-2006.pdf](http://www.streamlinedsalestax.org/uploads/downloads/Appendix_L__AD06002_Health-Care_List_June_2002-2006.pdf) (Last visited December 20, 2016).

at 90% of normal.<sup>14</sup> The ASV delivers air pressure assisting patient in maintaining normal breathing.

In *North Central*, the court held that a CPAP machine was not an exempt prosthetic device under RCW 82.08.0283 because it was not entirely worn on the body. The court stated, “The SSUTA makes a distinction between ‘C.P.A.P.—Not worn’ as ‘[d]urable medical equipment,’ while listing ‘C.P.A.P.—Worn’ as a ‘[p]rosthentic device.’” *Id.* at 644; *see also* Det. No. 07-0150, 27 WTD 114, 117 (2008) (holding that CPAP machines were not exempt prosthetic devices because they were not “worn on the body as a complete system”). Thus, portable CPAP machines worn entirely on the body qualify as “prosthetic devices” under RCW 82.08.0283. Based on the *North Central* holding, we conclude that devices that are not entirely worn on the body are not exempt prosthetic devices under RCW 82.08.0283(1)(a), while portable devices that *are* entirely worn on the body are exempt prosthetic devices under 82.08.0283(1)(a). Det. No. 12-0305, 32 WTD 163 (2013).

Taxpayer’s petition includes information to establish the ASVs as portable. ASVs weigh only two pounds, rely on battery packs, use wireless communication and come with a backpack for convenient transportation by the user. Taxpayer cites Example 5 of WAC 458-20-18801(206)(a) in support of its contention that a wheeled heart/lung device that plugs into the wall is not a prosthetic because it is wheeled and plugged into the wall. Taxpayer’s conclusion is incorrect. RCW 82.08.0283(4)(a) requires prosthetics to be worn on or in the body. While the device must be portable for it to be worn on or in the body it does not follow that all portable devices are worn on or in the body merely because they are portable. The ASVs may be transported by backpack, connected wirelessly and powered by battery but they need not be. Even when housed in the backpack, patients may set the device next to them to receive its benefits. Since devices must be worn on or in the body to qualify for exemption RCW 82.08.0283(1)(a) and the ASVs permit but do not require the device to be worn on or in the body, the ASVs do not meet the definition of prosthetic under RCW 82.08.0283(4)(a) necessary for exemption from retail sales tax under RCW 82.08.0283(1)(a). We deny Taxpayer’s petition.

#### DECISION AND DISPOSITION

Taxpayer’s petition is denied.

Dated this 20th day of October 2017.

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<sup>14</sup> Petition, Exhibit 3, p. 2.