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BEFORE THE INTERPRETATION AND APPEALS DIVISION
DEPARTMENT OF REVENUE
STATE OF WASHINGTON

In the Matter of the Petition For Correction of Assessment of . . .	F I N A L D E T E R M I N A T I O N No. 90-35A Registration No. . . . . . ./Audit No. . . .

[1] RULES 151, 168 AND 18801: B&O TAX -- SERVICE -- PHYSICIANS -- CLINICS -- DRUGS. Income from charges for drugs administered by a physician or clinic to patients is subject to Service B&O tax rather than Retailing B&O because it is part of the medical services rendered by the physician or clinic. Accord: Det. No. 87-340A, 5 WTD 251 (1988).

[2] RULE 168 (2): B&O TAX -- RETAILING -- PHYSICIANS -- CLINICS -- DRUGS. Income from mere sales of drugs by physicians or a clinic to patients for off-premises self-administration is subject to Retailing B&O tax, provided taxpayer's records and bills to patients distinguish such sales from drugs administered by physicians or medical staff. F.I.D.

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 ACTION

Taxpayer appeals Determination No. 90-35. The Determination denied taxpayer's petition for correction of assessment of business and occupation (B&O) taxes. The assessment reclassified income from sales of prescription drugs to

"service and other activities" from the "retailing" classification. . . . .

FACTS

Roys, Sr. A.L.J. -- Taxpayer is a for-profit group of physicians specializing in internal medicine. The group has a clinic where patients are treated, but are not kept overnight. The doctors prescribe and administer chemotherapeutic drugs as part of their services. Taxpayer separately accounts for these drugs and itemizes their charges from services rendered when billing patients. However, taxpayer does not further separate the charges for the drugs which are administered by its medical personnel from those self-administered by their patients off-premises.

ISSUE

Does administering prescriptive chemotherapeutic drugs at the physicians' clinic constitute retail sales, or services rendered, when taxpayer separately accounts and itemizes the drugs on the patients' bills.

TAXPAYER'S EXCEPTIONS

Taxpayer contends it is entitled to report income from the drugs under the retailing B&O classification because it separately accounts and separately bills the patients for them. Further, taxpayer argues Determination No. 90-35 erred by relying on Department of Revenue v. Deaconess Hospital, No. 6098-1-II, Division Two, January 5, 1984 (an unpublished Court of Appeals opinion).

DISCUSSION

WAC 458-20-18801 (2) (Rule 18801) applies the B&O tax to the gross proceeds from sales of drugs and medicines used for diagnosis, cure, mitigation, treatment or prevention of disease or other ailments. WAC 458-20-151 (Rule 151) provides that physicians are taxable under the service and other business activities classification upon the gross income from charges for professional services. RCW 82.04.290. Likewise, WAC 458-20-168 (2) (Rule 168) states the gross income of hospitals, clinics and similar health care institutions is subject to the service and other B&O tax classification. The rule adds that the retailing B&O tax applies to sales of tangible personal property sold and billed separately from services rendered. (Emphasis ours.)

[1] Taxpayer argues Deaconess, supra, is not controlling because the clinic does not provide overnight care to patients or some other services typically associated with hospitals. We agree that taxpayer is not a hospital as defined in RCW 70.41.020 and WAC 458-20-168 (Rule 168). Nonetheless, that fact does not support the contention that Deaconess is inapplicable merely because the case concerned a hospital rather than a medical clinic or a sole practitioner. Taxpayer's contention is a distinction without a material difference because the holding and reasoning in Deaconess make it controlling whether the taxpayer is a hospital, medical clinic or sole practitioner. In short, the Deaconess court addressed only hospitals because other types of taxpayers, e.g. clinics, were not parties to the action. See Det. No. 87-340A, 5 WTD 251 (1988) which applied the service and other B&O tax to income from prescription drugs sold and administered by a physician at his office.

What does control this issue is the service rendered by taxpayer's doctors - administering chemotherapeutic drugs. Hospitals render the same service. As the Deaconess court stated:

> ... the contractual relationship between a hospital and a patient is not one of "sale" but one of "service"; the furnishing of blood, penicillin and other medicines, casts, bandages, etc. is part of the services performed by the hospital, even though such transfers of materials may result in separate charges to the patients. [citations].
>
> We agree with the idea that when a hospital supplies prescription drugs to its patients as a part of their course of treatment, it is part of the medical "services rendered" to patients -- regardless of how the drug dispensing is recorded for purposes of the sales tax. The fact that the hospital began in 1974 to characterize itself as a retailer of drugs for sales tax purposes does not mean that dispensing drugs to patients ceased to be part of its services rendered to patients.

The way taxpayer bills its patients for the drugs administered by the doctors or staff does not control whether its income is subject to the retailing or service and other rate. The transaction or service must be examined as a whole to determine the proper classification. Like Deaconess, the

contractual relationship between taxpayer and its patients is not one of sale, but one of service, even though such transfer or administration of drugs may result in separate charges.

[2] Although the Department does not favor bifurcation of income into separate classifications, taxpayer's argument for the Rule 168 (2) retailing category would apply if it merely sold drugs to the patients and its doctors and staff did not administer them. For example, taxpayer could classify income from such sales as retailing if the patients took the drugs home to administer them. By comparison to doctors or staff administering drugs, such sales do not involve medical services rendered to patients. The sales of drugs by physicians would be similar to sales of prescription drugs by a pharmacy.

To qualify for the retailing classification, taxpayer's records and patients' bills must distinguish between drugs which are self-administered by patients off-premises from drugs which are administered by the physicians or staff. Taxpayer did not bill the patients during the audit period in such a manner. Therefore, the retailing classification does not apply even to the patient-administered drugs. However, for the subject audit period, taxpayer is not precluded from attempting to show the Department's auditors that it can separate income from drugs administered by the clinic from those administered by the patients. Of course, any claim is subject to taxpayer's existing records and the limitations of RCW 82.32.060.

Finally, although we hold that service B&O tax applies whether taxpayer is a doctor's office, clinic or hospital, taxpayer argues alternatively that Rule 168 is inapplicable. Taxpayer maintains it is not a "clinic" within the meaning of the rule because it does not provide overnight or other long term care, unlike hospitals and the other health care institutions listed.

Taxpayer's argument fails. First, taxpayer has admitted it is a clinic. Second, the rule does not specify that all health care institutions, listed or implied, provide overnight or long term care. Moreover, RCW 70.41.020 (2) defines "clinics" as "where patients are not regularly kept as bed patients for twenty-four hours or more." Third, although "clinic" is not defined in the rule, its common meaning is consistent with taxpayer's situation:

> a place where patients are studied or treated by physicians specializing in various ailments and practicing as a group; as, a cancer clinic,....

Webster's New Universal Unabridged Dictionary 339 (2d ed. 1983).

Clearly, Rule 168 applies. If it did not, Rule 151 and RCW 82.04.290 require taxpayer to report its income under the service classification. Further, without Rule 168, taxpayer could not claim the retailing classification for future drug sales made and billed separately from services rendered.

DECISION AND DISPOSITION

Taxpayer's appeal to correct the assessment for income from prescription drugs is denied.

DATED this 23rd day of May 1990.