

Cite as 9 WTD 015 (1989)

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

In the Matter of the Petition ) D E T E R M I N A T I O N  
For Correction of Assessment of )  
) No. 89-502 )  
) )  
) Registration No. . . . )  
) . . . /Audit No. . . . )  
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) Registration No. . . . )  
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- [1] RCW 82.08.0283 and RULE 18801: RETAIL SALES TAX -- OXYGEN -- CONCENTRATORS. Machines which compress room air and extract oxygen for delivery to medical patients are not exempt under the statute or rule. Exemptions in statute must be narrowly construed, unless the legislature clearly mandates a broader interpretation of its acts.
- [2] RULE 107: RETAIL SALES TAX -- SEPARATELY STATED -- CONCLUSIVE PRESUMPTION. Where retail sales tax is not separately stated, the law provides a conclusive presumption that the tax was not paid. Persons protesting the assessment of tax must provide documentation establishing that the amount has been paid by the buyer to the seller. Seller who purchases or leases equipment which manufactures oxygen for medical patients and who pays sales tax on the equipment acquisitions may take a credit for tax paid on the original acquisition price during the year in which the tax was paid. Det. No. 87-42, 2 WTD 201 (1987).

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: . . .

DATE OF TELEPHONE CONFERENCE: August 8, 1989

NATURE OF ACTION:

Taxpayer petitions for correction of assessment of retail sales tax.

FACTS AND ISSUES:

Johnson, A.L.J. -- Taxpayer [is] engaged in the business of providing oxygen to medical patients. . . .

Taxpayer's representative was the corporation's president. He explained the corporation purchases or leases equipment and supplies and that, at the time of the purchase or lease, the appropriate sales tax is paid.

The items supplied to its customers are prescribed by a physician, and the taxpayer in turn sets them up with whatever is required. The patients are then instructed on the use of the equipment by the taxpayer's representatives. The greatest percentage of taxpayer's customers are medicare patients, and the taxpayer accepts as payment for the service the amount which medicare allows on its preassigned price list. Taxpayer also works with several state and federal agencies.

Taxpayer repeatedly used medicare as an example of payment methods, because "virtually 100%" of its income is derived from medicare reimbursements.

As a dealer working with the physician, taxpayer decides which of three oxygen-delivery systems the customer will receive. Medicare reimburses the taxpayer at the same flat rate regardless of the type of system used. The amount is based on the number of liters to be received per hour or minute by the patient. Taxpayer's petition states that

there is no reimbursement for rental of the unit itself. There is no way these machines can be considered in the "Durable Medical Equipment" category. They are in the "Oxygen" category.

The three systems used by the taxpayer are high pressure, using steel tanks of oxygen; liquid oxygen; or the oxygen concentrator system which is at issue in this case.

Taxpayer contends that it is not leasing manufacturing equipment to patients, resulting in a taxable retail sale, which was the position taken by the person conducting the audit of the taxpayer's file. It stresses that the equipment is just something the taxpayer has to buy to be in business. Once the patient is finished with the concentrator, it is sent out to another patient.

Taxpayer contends that the Department employee initially told it that the wrong tax code was being used for its business type, so taxpayer changed the code. Then, it contends that the employee's position was that taxpayer was required to pay sales tax on the rental value of the concentrators. It stated that it disagreed with this conclusion, but paid some tax "not as an admission of guilt but in compliance with the laws." Taxpayer contends that the employee then "backdated" to 1985 and came forward with an audit which taxpayer feels is incorrect.

Its representative stated that

I would hope that if I was making a mistake. . .that the state would have taken a look at me before then, especially when I've gone ahead for these years with good faith and to the best of my knowledge. I specifically asked the [employee] in a telephone conference if he knew what a concentrator was and he said no. I asked him, "How can you do an assessment when you don't know what you are auditing?" I offered an opportunity for him to come into my office and look at it. He kept referring to it as "durable medical equipment." It is not referred to that way in the medical industry.

A representative of the company which manufactures the concentrator explained the operation of the equipment as follows:

Steel tanks delivering compressed oxygen were first on the market, followed by liquid, which goes from liquid to gas at the time of use. About 18 years ago, the concentrator system was developed. The model used by the taxpayer has been marketed for about six years.

The machine is a "molecular sieve." The concentrator takes room air, which is approximately 20% oxygen; it compresses the air; puts it through the molecular sieve material, which is like a filter; the size of the hole stops nitrogen from going through but allows oxygen to pass through; the result is 90% or more oxygen. The advantage of it is that with compressed gas tanks or liquid, the supplier had to go out frequently to service the equipment and replace the oxygen supply. With the compressor, the supplier only has to go out about every six months when the molecular sieve requires replacement or on the occasions where there is a problem with the equipment. The machine also contains another filter, which is similar to an air conditioner filter and which the patient can remove, rinse out about once a week, and replace in the machine.

The manufacturer's representative said that the equipment is considered by the medical profession to be "oxygen delivery equipment," just as are the steel tanks and the liquid oxygen, because they are only supplied to the patient in response to a physician's prescription. He stated that this is so because oxygen is always considered a drug. Additionally, a respiratory therapist generally checks up on the patient at regular intervals.

Taxpayer also contended that the Department employee used an incorrect figure in order to determine the amount of tax due. It states that

if I made \$100,000 over the year from medicare, that amount includes sales tax paid by medicare to [the company]. The auditor assessed sales tax on the full 100%. If the state rules that the auditor was right, then we would have to go back and find all sales tax paid on the equipment and petition for a refund.

#### DISCUSSION:

[1] RCW 82.08.0283 and the administrative rule implementing the statute, WAC 458-20-18801 (Rule 18801), both state that retail sales tax

shall not apply to sales of. . .medically prescribed oxygen.

Although we are impressed by the taxpayer's argument and by the evidence supplied by the manufacturer, we must find that retail sales tax applies to the rental to consumers in this

state of the oxygen concentrator. The machine's end product is, of course, the medically-prescribed oxygen supplied to the patient; however, the machine itself is a piece of durable medical equipment used for a manufacturing process. As such, it is considered to be a piece of equipment leased to the consumer for the purpose of manufacturing the desired item. The fact that the measure of the reimbursement to the taxpayer is calculated based on the amount of oxygen used by the patient is not determinative in this case.

The legislature has acted in exempting sales of medically-prescribed oxygen from sales tax. The language used by the legislature must be narrowly interpreted; and where it is unambiguous on its face, the words must be given their plain meaning. Exemptions to a tax are narrowly construed; taxation is the rule and exemption is the exception. Budget Rent-a-Car vs. Dept. of Rev., 81 Wn.2d 171, 174 (1972). This technology was in existence, and similar equipment was available, in 1975 when the sales tax exemption was enacted. The legislature elected to remain silent on the issue of whether it intended to include concentrators in the exemption. Department of Revenue, as an administrative agency, is empowered only to administer the laws as they are written. The language of the exemption is clear on its face. It is not open to interpretation by the Department. If sales or rentals of oxygen concentrators are to be tax exempt, the appropriate authorizing forum is the legislature of this state.

[2] WAC 458-20-107 provides that, where sales tax is not separately stated, there is a conclusive presumption that it has not been paid.

In this taxpayer's case, if the billings to patients or to the entities paying the costs for the patients' oxygen service do not separately state that sales tax was charged and in what amount, the law clearly presumes that the tax was not charged or collected. If taxpayer can provide true and adequate documentation showing that all billings showed a separate amount for sales tax, it will rebut the presumption. In that case, a credit will be issued against the sales tax assessed.

Additionally, RCW 82.04.050 and WAC 458-20-102 (Rule 102) both exempt from the definition of a retail sale property purchased "for resale in the regular course of business without intervening use." This taxpayer purchases or leases concentrators which are then made available for a charge to medical patients for the production of oxygen. The taxpayer is in the business of supplying such equipment to patients and

does not utilize the equipment for its own purposes. As a result, sales or leases of the equipment to the taxpayer are sales for resale and not subject to retail sales tax. The rentals of the equipment by the taxpayer are subject to retail sales tax, because they are retail sales to the users of the equipment. RCW 82.04.050. Sales tax is measured by the consideration paid to the taxpayer. RCW 82.08.010.

If taxpayer can provide proof that sales tax was paid at the time that it purchased or leased the equipment, the audit section will issue a credit in that amount for the year in which the sales tax was paid.

Finally, taxpayer contends that the Department's employee "backdated" to arrive at the amount of tax due, and that "I would hope that if I was making a mistake. . . that the state would have taken a look at me before then." We find that the employee correctly followed the language of RCW 82.32.050 in making the assessment of taxes. That statute provides that

No assessment or correction of an assessment for additional taxes due may be made by the department more than four years after the close of the tax year....

Under this statute, the employee properly limited the assessment of additional taxes owing to the four previous years, 1985-1988. While we sympathize with the taxpayer's frustration, we note that, given the number of businesses operating in Washington, the fact that its reporting error went unnoticed is not surprising. An audit would almost certainly have resulted in an similar assessment for the four-year period permitted by RCW 82.32.050.

DECISION AND DISPOSITION:

Taxpayer's petition is denied in part and granted in part.

. . . .

DATED this 2nd day of November 1989.