

Cite as 9 WTD 195 (1990)

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</u>
<u>N</u>		
For Correction of Assessment of)	
)	No. 90-97
)	
. . .)	Registration No. . . .
)	. . ./Audit No. . . .
)	

[1] RCW 82.08.0283 and RULE 18801: RETAIL SALES TAX EXEMPTION -- ORTHOTIC DEVICES. Medically-prescribed braces and braces which continuously move hands or legs are "orthotic devices" within the meaning of the statute and rule notwithstanding the fact that such devices may be rented to a patient for the duration of treatment and then returned to the lessor for rental to another person. Disposable items, such as cushioning pads, which are included in "patient kits" rented with the orthotic devices are not themselves orthotics; retail sales tax must be collected on the value of this portion of the rental. . . .

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: February 13, 1990

NATURE OF ACTION:

Taxpayer petitions for correction of assessment of retail sales tax on its rentals of medical products on the grounds that the items rented are exempt "orthotic devices" and not taxable "durable medical equipment."

FACTS AND ISSUES:

Johnson, A.L.J. -- Taxpayer is engaged in business as a developer and supplier of medical products. At issue in this case are two types of items, both of which are provided to patients pursuant to a prescription from a medical practitioner.

The items involved are two Continuous Passive Motion (CPM) devices and a leg brace. Generally, these items are provided as a part of rehabilitation treatment following surgery; however, the CPM devices have been tested for use on burn victims, stroke patients and hemophiliacs.

During a routine inquiry, the Department determined that taxpayer's activities in this state were sufficient to subject its Washington sales to B&O tax. Additionally, taxpayer is responsible for collecting and remitting retail sales tax on its rentals of equipment or supplies which are subject to that tax. Taxpayer does not contest the finding that its rental or sales income in this state is subject to B&O tax. It does contest the determination that the two types of items described above are sales-taxable "durable medical equipment" rather than sales tax-exempt "orthotic devices."

Taxpayer's comprehensive materials included copies of medical journal articles explaining the research and development process for the CPM equipment, which is relatively new in the medical marketplace. There are two types of CPM at issue in this case. One is a small brace which moves the hand, and the other is a larger brace fitted to a leg. Both were developed to alleviate many problems caused by the necessity of immobilizing body parts following surgical procedures such as knee and hip replacements or as a part of physical therapy for broken bones. Additionally, the product has been used for treatment of burns. The treatment has been proven to shorten rehabilitation time and to avoid the onset of arthritis caused by prolonged immobilization of the afflicted body part. Additionally, the leg brace is being used to move the legs of stroke victims prior to the return of full functioning and to assist in moving cells and blood of hemophiliacs to speed healing of injuries to them.

Both devices consist of a brace and an electronic box, which controls the movement. As the patient progresses, the degree of movement is increased until the treatment is discontinued. At that time, the device itself is returned to the supplier

and used for rental to another patient. The disposable items, such as pads for the braces, are not reused.

The remaining device is a leg brace, which can be set to bend the leg at a particular angle. It has "velcro" strips to secure the brace to the leg and can be adjusted as the treatment indicates.

DISCUSSION:

[1] An exemption from sales tax on "orthotic" devices is granted by RCW 82.08.0283. WAC 458-20-18801 (Rule 18801) is the Department's duly-promulgated rule implementing the statute. It has the same force and effect as law unless overturned by a court.

The Rule defines "orthotic devices" as

fitted surgical apparatus designed to activate or supplement a weakened or atrophied limb or function. They include braces, collars, casts, splints, and other specially fitted apparatus as well as parts thereof. Orthotic devices do not include durable medical equipment such as wheelchairs, crutches, walkers, and canes nor consumable supplies such as elastic stockings, arch pads, belts, supports, bandages, and the like, whether prescribed or not.

We find that one source of confusion in this case is the reference in some of taxpayer's publications to this equipment as "durable medical equipment." In this case, we believe that taxpayer's CPM devices and its sports brace fall squarely within the definition provided in the rule: they are braces, and each type activates or supplements a weakened or atrophied limb or function. This finding is supported by the Thurston County Superior Court's ruling in Swedish Medical Center v. Department of Rev., Docket no. 87-2-2492-7 (1988). In that case, the trial court held that the portion of Rule 18801 which requires that the device be "specially fitted" is broader than the statutory provision which grants the exemption. If found that this language in the rule has the effect of taxing more broadly than the statute permits, and that portion of the rule was declared invalid.

The language of the statute does not limit braces in any way, including by the fact that they can be reused. Nor does the rule contain such language. Reusable wheelchairs and other non-brace devices are deemed durable medical supplies are not included within the sales tax exemption as orthotic devices,

but braces are. Because an interpretation of their status based on their durability has the effect of taxing more broadly than the statute, we find that it is invalid.

As a result, where the CPM hand and leg brace and the sports brace are prescribed as a part of the course of treatment for weakened or atrophied limbs or functions, and where taxpayer's records prove such use, we find that the rentals of these items are not subject to retail sales tax. Such courses of treatment would theoretically include the developing uses, such as in the cases of stroke victims to treat atrophy. Where taxpayer sells the items in this state, they are either sales for resale to health care providers or outright sales to patients, neither of which would be subject to sales tax.

We caution taxpayer, however, that all disposable supplies, such as cushioning pads, which accompany the equipment are not exempt from sales tax. These items are currently included in a "patient kit" supplied with the equipment. Because these items are taxable, their cost must be separately stated on invoices and the applicable sales tax must be collected on the sales or rentals.

DECISION AND DISPOSITION:

Taxpayer's petition is granted with regard to the sales taxability of the leg and hand CPM braces and with regard to the sports brace. It is denied with regard to all disposable items which accompany rentals or sales of the braces.

DATED this 26th day of February 1990.