

Cite as Det. No. 14-0356, 34 WTD 308 (2015)

BEFORE THE APPEALS DIVISION  
DEPARTMENT OF REVENUE  
STATE OF WASHINGTON

In the Matter of the Petition for Correction of Assessment of  . . .	) ) ) ) ) ) )	<u>D E T E R M I N A T I O N</u>  No. 14-0356  Registration No. . . .
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[1] RCW 82.08.0281; RCW 82.08.935: RETAIL SALES TAX – EXEMPTION – SALE OF DISPOSABLE DEVICES. The essential characteristic of exempt disposable devices under RCW 82.08.935 is that they send prescription drugs into the human body via insertion into the human body, and that is what they are designed to do.

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.

Munger, A.L.J. – A hospital appeals the assessment of use tax and/or deferred sales tax on purchases of various medical equipment and other medical items in cases where it had not paid retail sales tax at the time of purchase from the vendors. The Taxpayer asserts that a list of 45 purchases represent items that are tax exempt under various statutes for medical items, or exempt as a service. As the Taxpayer’s claims of exemption are mainly based on statutes that were amended before the audit period, and an outdated administrative rule, the appeal is denied except as to eight specified items.<sup>1</sup>

ISSUES

1. Are various medical items, devices, equipment, and drugs discussed below exempt from retail sales tax per RCW 82.08.0281, 82.08.0283, and/or RCW 82.08.935?
2. Are some of these items subject to retail sales tax per RCW 82.08.190 and .195 as bundled transactions?
3. Did a purchase invoice for pre-written computer software include separately stated charges for training? WAC 458-20-15501.

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<sup>1</sup> Identifying details regarding the taxpayer and the assessment have been redacted pursuant to RCW 82.32.410.

## FINDINGS OF FACT

The Taxpayer, a corporation, is a hospital located in . . . Washington. As a routine part of its business, the Taxpayer purchases numerous medical devices, equipment, and other medical items. The Department of Revenue (the Department) audited the Taxpayer for the period of January 1, 2007 through December 31, 2010. On appeal the Taxpayer seeks a partial reversal of the assessment resulting from the audit, asserting that certain items purchased within the audit test period without payment of the retail sales tax were tax exempt medical items.

During the audit, the Department used a random sample to verify that sales or use tax was correctly paid on purchases. Amounts of \$85,000 or larger were removed from the sample population and examined on an actual basis, including [a software vendor] contract. The Department assessed use tax and/or deferred sales tax on those purchases where Taxpayer did not pay sales tax to the vendor (or tax to the Department). The assessment, issued September 25, 2013, included \$ . . . in use tax, and interest of \$ . . . , for a total of \$ . . . . The Taxpayer timely appealed.

## ANALYSIS

During the 2003 legislative session, the Washington state legislature began its efforts to conform Washington laws to the 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 sale 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>2</sup> Other statutory tax exemptions were enacted pursuant to SSUTA, such as RCW 82.08.925 (prescribed dietary supplements); RCW 82.08.935 (single use disposable devices, such as syringes, tubing, or catheters, used or to be used to deliver prescription drugs); RCW 82.08.940 (over-the-counter drugs prescribed for human use); and RCW 82.08.945 (prescribed kidney dialysis devices).<sup>3</sup>

But WAC 458-20-18801 (Rule 18801), which was the rule that DOR adopted to administer taxation of prescription drugs, medical devices, etc., was not amended to conform to the SSUTA statutes until 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 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.” Similarly, published determinations, such as Det. No. 91-261, 11 WTD 439 (1991) and Det. No. 91-261S, 12 WTD 23 (1993) and others cited by the taxpayer that pre-date enactment of the SSUTA statutes, also are not applicable because they, too, conflict with provisions of SSUTA. We will not cite or discuss those determinations further.

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<sup>2</sup> RCW 82.08.0283 was amended again in 2007 (Laws of Washington Ch. 6, Sec 1101), but none of the amendments were material to the issues on appeal here.

<sup>3</sup> There are corresponding use tax exemptions in Chapter 82.12 RCW. For brevity, we will limit our discussion to the sales tax exemptions with the understanding that an item that is either exempt or non-exempt for sales tax purposes [may be] exempt or non-exempt for use tax purposes.

The audit period in this matter began January 1, 2007, 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). For the Taxpayer's future reference 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 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, *supra*. The taxpayer claiming a tax exemption has the burden of proving that he or she qualifies for it. 27 WTD 189 (citing *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. 27 WTD 189 (citing *Spokane County v. City of Spokane*, 169 Wash. 355, 358, 13 P.2d 1084 (1932)).

Also critical to this appeal is that by Washington State law, taxpayers are required to keep and preserve their business records. RCW 82.32.070(1) states:

(1) Every person liable for any fee or tax imposed by chapters 82.04 through 82.27 RCW shall keep and preserve, for a period of five years, suitable records as may be necessary to determine the amount of any tax for which he may be liable, which records shall include copies of all federal income tax and state tax returns and reports made by him. All his books, records, and invoices shall be open for examination at any time by the department of revenue. . . .

See also WAC 458-20-254(3) and Det. No. 00-043, 20 WTD 39 (2001). Similarly, WAC 458-20-254(2)(a), the administrative rule regarding records, provides: "It is the duty of each taxpayer to prepare and preserve all books of record in a systematic manner conforming to accepted accounting methods and procedures."

### **Catheters and Contrasts**

Before addressing the Taxpayer's list of 45 specific purchase invoices, there are several recurring issues we will address at the onset. For many of the disputed purchases, the Taxpayer asserts that they are exempt because of the use of contrast media. The items, which include various types of catheters, canulae, and other similar items of medical tubing, often serve more than one medical function.

RCW 82.08.935, provides an exemption from sales tax for disposable devices used to deliver prescription drugs, and reads:

The tax levied by RCW 82.08.020 shall not apply to sales of *disposable devices* used or to be *used to deliver* drugs for human use, pursuant to a prescription. “Disposable devices used to deliver drugs” means single use items such as syringes, tubing, or catheters.

At issue in this appeal is the requirement that the devices be used to deliver a prescription drug to the patient. In cases where the devices were not disposable we have found that they are ineligible for the exemption by not being disposable. Most of the catheters in this case are single use, and disposable. In vascular surgery, contrast media is routinely used during the procedure so the physician can guide the catheter. The use of radiopaque (visible on imaging scans) contrast materials allows the physician to see the location of the surgical catheter with the use of medical imaging equipment. Depending on the type of medical procedure involved, contrast material may be injected or infused directly into the patient’s body. Some procedures involve the contrast material being used to fill a balloon or similar type of catheter, and although the catheter is inside the patient’s artery, the contrast media does not leave the catheter.

In a pre-SSUTA determination, we found that a balloon catheter need not release the contrast media into the patient’s body in order to qualify for exemption. Det. No. 95-122, 15 WTD 86 (1995). The exemption was based on the contrast media being considered a prescription drug, and the catheter was being used to deliver it. *See* the pre-2003 version of RCW 82.08.0281. Specifically, the Department viewed the balloon catheters at issue in that 1995 case to be “not conceptually distinct” from the contrast media and therefore entitled to the prescription drug exemption. *Id.*

However, RCW 82.08.0281, the prescription drug exemption, has been amended since this determination was issued. The current version of RCW 82.08.0281 was enacted in 2003 as part of revisions to comply with SSUTA. The new language is clearly limited to the drugs themselves, and does not include delivery devices. However, a separate exemption statute for disposable drug delivery devices, RCW 82.08.935, was also enacted in 2003.<sup>4</sup> It is the 2003 statute that is at issue, and which controls our decision, rather than tax decisions addressing prior statutory language.

As to some balloon catheters, because this device contains rather than delivers a prescription item it does not qualify for the exemption. As we previously noted, the requirement that the exempt device be used to deliver the prescription drug into the patient arises from the plain meaning analysis of the statute. Exempt devices under RCW 82.08.935, must be used for a specific purpose, namely “to deliver drugs for human use” and then goes on to list three

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<sup>4</sup> RCW 82.08.0281(4) defines “prescription” and “drug” as follows:

- (a) "Prescription" means an order, formula, or recipe issued in any form of oral, written, electronic, or other means of transmission by a duly licensed practitioner authorized by the laws of this state to prescribe.
- (b) "Drug" means a compound, substance, or preparation, and any component of a compound, substance, or preparation, other than food and food ingredients, dietary supplements, or alcoholic beverages, marijuana, useable marijuana, or marijuana-infused products:
  - (i) Recognized in the official United States pharmacopoeia, official homeopathic pharmacopoeia of the United States, or official national formulary, or any supplement to any of them; or
  - (ii) Intended for use in the diagnosis, cure, mitigation, treatment, or prevention of disease; or
  - (iii) Intended to affect the structure or any function of the body.

exemplar categories of such devices: syringes, tubing or catheters. RCW 82.08.935 does not define deliver, syringes, tubing, or catheters.

The definition of deliver includes, “to send (something aimed or guided) to an intended target or destination”.<sup>5</sup> *Webster’s Third New International Dictionary*, 597 (1993). “Syringe” is defined as “a device used to inject fluids into or withdraw them from the body or its cavities.” *Webster’s Third New International Dictionary*, 2322 (1993). The same dictionary defines “catheter” as:

[A]ny of various tubular medical devices designed for insertion into canals, vessels, passageways, or body cavities so as to permit injection or withdrawal of fluids or substances or to maintain openness of a passageway.<sup>6</sup>

*Webster’s Third New International Dictionary*, 353 (1993).

Thus, the essential characteristic of exempt disposable devices under RCW 82.08.935 is that they send prescription drugs into the human body via insertion into the human body, and that is what they are designed to do. Therefore, a plain meaning analysis of the items exempted by the statute requires delivery of the prescription drug into the patient. Under the updated Rule 18801(403)(b), the prescription drug must come into “direct contact” with the patient, either internally or externally. Contrast media that is only used to fill a catheter, but which never comes into direct contact with the patient, would not be a prescription drug as that term is used in RCW 82.08.0281 since the 2003 amendments. Based on the information provided, some of the catheters in this case do not perform this function (delivering prescription drugs to a patient) and therefore are not eligible for exemption under of RCW 82.08.935.

As noted above taxpayers bear the burden to establishing entitlement to exemption, and in some cases the Taxpayer has not provided sufficient factual information demonstrating exactly what the item in question does during the medical procedure. Merely stating that contrast media is used does not prove *how* it was used.

Another recurring matter with several of the items the Taxpayer disputes are items where the use of medical saline is involved. Under certain circumstances, saline solutions can be considered a drug, and a device of the type listed in RCW 82.08.0281 used to deliver it would be exempt. See Rule 18801(203)(a) Table 2. However, the use of saline with a surgical catheter does not automatically make it tax exempt. In Det. No. 10-0386, 32 WTD 81 (2013) we found that a “Cath EP Thermacool” was not exempt. We stated that: “...the saline is being used to regulate the temperature of the catheter itself, and the device is not similar in nature to a syringe, catheter, or tubing, designed to inject fluids into the human body. Thus, this device would not be exempt from sales or use tax.” Consequently, if the devices in this appeal are clearly surgical tools, they

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<sup>5</sup> In ascertaining the meaning of undefined statutory terms, courts frequently resort to dictionaries. *Codd v. Stevens Pass, Inc.*, 45 Wn. App. 393, 399, 725 P.2d 1008 (1986) (citing *State ex rel. Graham v. Northshore School District 417*, 99 Wn.2d 232, 244, 662 P.2d 38 (1983)). When statutory terms are not defined, the Department also turns to their “ordinary dictionary meaning.” Det. No. 04-0147, 23 WTD 369 (2004) (citing *Western Telepage, Inc. v. City of Tacoma*, 140 Wn.2d 599, 609, 998 P.2d 884 (2000)). Washington courts use Webster’s Third New International Dictionary in the absence of other authority. *State v. Glas*, 106 Wn. App. 895, 905, 27 P.3d 216 (2001), *rev’d on other grounds*, 147 Wn.2d 410 (2002).

<sup>6</sup> The definition of “tubing” at page 2460 of the same dictionary adds little to the discussion and analysis here, and is therefore not discussed. Tubing is part of the definition of catheter above.

will not be exempt merely because saline plays some secondary role in the procedure, unless we have clear evidence the device infuses saline as a prescription drug directly into the patient.

We now address the 45 purchases from the audit sample that the taxpayer asserts were exempt from the retail sales tax. As noted, for the Taxpayer's reference we will cite the current version of Rule 18801, as well as the statute in effect during the audit period.

1. Invoice No. . . . . This purchase of \$. . . from [a supplier] is for a "Tray" of several medical items. The Taxpayer has short handwritten notes on its documents, indicating that the sutures, a catheter, and syringes are exempt, but has provided nothing from the seller about the pricing of the tray's 20 items individually. Without this information we have no basis for exempting this purchase. RCW 82.08.190, .195, and Rule 18801 (501) Bundled Transactions, require that we have proof that over 50% of the value of the items in the tray were tax exempt items. That proof is missing here. The purchase is not exempt.
2. . . .
3. Invoice No. . . . . This purchase includes \$. . . from [a supplier] for items not well identified by Taxpayer's materials. Audit treated it as a taxable bundled transaction as the accompanying information refers to needles and "contrast." The Taxpayer seems to assume that it is exempt by including needles. We have reviewed the product description from the vendor.<sup>7</sup> These are [medical procedure] needles used to treat blood vessels or blood vessel malformations and also those of the lymphatic system. A medicine is injected into the vessels, which makes them shrink. The RCW 82.08.935 (*See also* Rule 18801 402(c) exemption for disposable devices used to deliver drugs is applicable here.)
4. Invoice No. . . . . This purchase of \$. . . shipping from [a supplier] is for infusion catheters. We agree with the Taxpayer, as does Audit, that these are used for administering drugs, and are exempt per the RCW 82.08.935/Rule 18801(402)(c) exemption for disposable devices used to deliver drugs.  
  
. . .
5. Invoice No. . . . . This purchase of \$. . . for [a sucrose and water solution] is asserted to be exempt as food. Audit disallowed it on the basis that food products are required to have contents labeled in compliance with Federal laws for food products. The Taxpayer provided description of the product states that it is used to sooth babies. It is described as a 24% sucrose/76% water solution, i.e., sugar water. RCW 82.08.0293(1) is the sales tax exemption for food, and WAC 458-20-244 is the Department's administrative rule regarding this exemption. Sugar water falls under the RCW 82.08.0293(2)(c)/Rule 244 description of "Soft drinks" as "nonalcoholic beverages that contain natural or artificial sweeteners." Soft drinks, per RCW 82.08.0293(2), do not qualify for the food exemption from the retail sales tax.
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7. Invoice No. . . . . This purchase of \$. . . from [a supplier] is for . . . [blood filters]. These are devices implanted in arteries to filter blood to help prevent blood clots. The filter remains in the patient's body.<sup>8</sup> The filter also prevents or corrects a physical malfunction, i.e., blood clots. RCW 82.08.0283(4)(a)(ii). The RCW 82.08.0283/Rule 198801(206)(a) & (403)(n) exemption for prosthetic devices is applicable here.
8. Invoice No. . . . . This purchase of \$. . . and \$. . . from [a supplier] for lab control materials. See item 12 below. Lab control materials are not exempt.
9. Invoice No. . . . . This purchase from [a supplier] includes \$. . . for cutting balloon catheters, a "microsurgical dilatation device" according to the provided product description. This a surgical tool to expand (vasodilatation) blood vessels. The fact that a contrast medium is used during the surgical procedure does not automatically make this a prescription drug delivery device. The product information states that a contrast medium is used to inflate the balloon, but it does not appear that the contrast medium is actually infused directly into the patient's body, which is what would be required for application of the RCW 82.08.935/Rule 18801(403)(c) exemption. This item is not exempt.
10. Invoice No. . . . . This purchase of \$. . . from [a supplier] is for two types of single use face masks that the Taxpayer's hand written notes state is an "oxygen breathing mask." Per RCW 82.04.0283(1)(c) and Rule 18801(403)(h)(ii), oxygen is exempt, but related equipment is not unless it is for oxygen generation or storage, and the provided description of the mask does not meet this test.
11. Invoice No. . . . . This purchase of \$. . . from [a supplier] has notes stating that the substances (control kits) are lab controls. The Taxpayer provided a copy of ETA 3064.2009. That ETA specifically states that it is referring to the version of RCW 82.08.0281 that existed *before* the 2004 amendments. The purchases here were made in 2008. The 2004 amendments to RCW 82.08.0281, and the Department's updated Rule 18801(402) make it clear that this prescription drug exemption is not as broadly applicable as previously described in the now updated Rule 18801. ETA 3064.2009's references to the outdated version of Rule 18801 are also inapplicable here. The current Rule 18801(403)(j) & (k) make it clear that lab test control materials are not exempt.
12. Invoice No. . . . . This purchase of \$. . . from [a supplier] includes diagnostic catheters used to deliver contrast media. The RCW 82.08.395 (*See also* Rule 18801 402(c)) exemption for disposable devices used to deliver prescription drugs is applicable here as the product information provided indicates that these are used "...to deliver radiopaque contrast medium to selected sites in the vascular system." The SSUTA Health Care Item List of June 2, 2006 list radiopaques as a drug, exempt as a prescription drug per RCW 82.08.395. The portion of this invoice for the diagnostic catheters was \$. . .
13. . . .

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<sup>8</sup> See product description at: . . .

14. Invoice No. . . . . This purchase of \$. . . from [a supplier] in 2009 is for more control kits. See item 12 above. Not exempt per Rule 18801(403)(j) & (k).
15. . . .
16. . . .
17. . . .
18. . . .
19. Invoice No. . . . . This purchase of \$. . . from [a supplier] is for catheters used for injecting contrast materials. The RCW 82.08.395 (*See also* Rule 18801 402(c)) exemption for disposable devices used to deliver drugs is applicable here as these are used for the injection of contrast materials. The product description describes an injection of contrast materials as distinguished from a balloon's inflation only of contrast materials. Exempt per RCW 82.08.395. *See also* #13 above
20. Invoice No. . . . . This purchase included \$. . . from [a supplier] for two [vascular surgery tools]. The Taxpayer's notes state that it infuses a prescribed drug. As the Taxpayer's photocopy of [suppliers'] product description was partially cut off, we reviewed this products description on the seller's website.<sup>9</sup> This is durable medical equipment used for lesion removal, and not a disposable device as required by the exemption for devices used for delivering prescription drugs. RCW 82.08.935, Rule 18801(403)(c).
21. Invoice No. . . . . This purchase of \$. . . from [a supplier] for a blood platelet separation system kit. Besides the bundled purchase issue first discussed in item 1 above, the Taxpayer cites no basis for exemption, and we find none. RCW 82.08.02806/Rule 18801(403)(l) provides a retail sales tax exemption for the sale of blood, however, there is no automatic exemption for related equipment.
22. Invoice No. . . . . This purchase of \$. . . from [a supplier] includes three purchases of coronary balloon dilatation catheters used in the treatment of coronary heart disease. The Taxpayer asserts that these are exempt because a contrast media is used during the procedure. The RCW 82.08.395 (*See also* Rule 18801 402(c)) exemption for disposable devices used to deliver drugs is inapplicable here as the product materials provided show that contrast material is used to inflate one of the balloons used in the procedure, but there is no evidence the contrast material is ever actually infused into the patient's body. These are not exempt. RCW 82.08.935, Rule 18801(403)(c).
23. . . .
24. Invoice No. . . . . This purchase of \$. . . from [a supplier] was for a [cardiovascular seal device] which the Taxpayer states is a temporary prosthetic device. Audit denied the exemption as not delivering a prescription drug. We have reviewed the Taxpayer's

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<sup>9</sup> <http://www. . . .>

materials, and also the product website.<sup>10</sup> The [device] is used in coronary artery bypass surgery. This system includes an aortic cutter, a seal loader & delivery device, and the proximal seals. The purchase here was just for the seals. The [suppliers'] description of the seal's use is that it helps avoid the use of clamps during heart surgery. After the artery grafting stage of the bypass surgery is completed, the proximal seal is removed. . . . Taxpayer's materials includes color illustrations on the seal's use, and the next to last sentence states [that the seal is removed] The RCW 82.08.0283/Rule 198801(206)(a) & (403)(n) exemption for prosthetic devices would not cover surgical clamps, which is what these seals serve as a replacement for. We find the proximal seals to be a disposable surgical tool, not a prosthetic device.

25. Invoice No. . . . . This purchase of \$. . . from [a supplier] is for infusion catheters. The materials provided by the taxpayer show how these catheters are used to infuse "pharmacologic agents." From the product description we find (and Audit now agrees) that these are exempt as disposable devices used to deliver drugs under RCW 82.08.935/Rule 18801(403)(c).
26. Invoice No. . . . . This purchase of \$. . . from [a supplier] included \$. . . for hemostasis catheters. This is an electrocautery (cauterization) single use endoscopic surgical tool. These particular catheters have the dual ability to provide saline irrigation. We see nothing in the device's description from [the supplier] that it is otherwise used to deliver prescription drugs, a requirement to be exempt under RCW 82.08.935/Rule 18801((403)(c). Based on the product description, the saline use is secondary to the electrocautery surgical function, and does not make the device exempt.
27. Invoice No. . . . . This purchase of \$. . . from [a supplier] includes stents, and two types of balloon catheters. This was not a bundled purchase. The stents, which are implanted in arteries, qualify as exempt under the RCW 82.08.0283/Rule 198801(206)(a) & (403)(n) exemption for prosthetic devices. Based on the product description provided by the Taxpayer, the balloon catheters are a surgical tool, and are not used to infuse a prescription drug as required by RCW 82.08.935/Rule 18801(403)(c). The product materials describe inflation of the balloons with a contrast material, and warn of the dangers of the balloon bursting. Clearly, this is not a catheter used to infuse a contrast medium directly into the patient. These catheters are not exempt per RCW 82.08.935/Rule 18801(403)(c). The stent purchase that we find to be exempt was for \$920.00 and is listed as item 0003 on this invoice.
- 28.
29. Invoice No. . . . . This purchase of \$. . . is for a dozen . . . blood autotransfusion systems.<sup>11</sup> The Taxpayer asserts that this system is exempt because the tubing portion of the system is single use. This item, based on the company's description appears mainly to be durable medical equipment. To the extent that a portion of the purchase includes single use tubing, it would be a bundled transaction Per Rule 18801(501), again without any evidence of the value of each part of the purchase. Additionally, the device is for use

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<sup>10</sup> <http://www. . . .>

<sup>11</sup> . . . <http://www. . . .>

with blood<sup>12</sup>, and while blood sales are exempt, related equipment is not automatically exempt.

30. . . .

31. Invoice No. . . . . This purchase of \$. . . from [a supplier] includes more balloon catheters. The Taxpayer asserts that these are exempt because they infuse contrast media. As in item 28 above, the product descriptions provided show them to be surgical tools, and the use of contrast media does not qualify a catheter as exempt unless there is evidence it infuses the contrast media into the patient's body. Not exempt per RCW 82.08.935/Rule 18801((403)(c).

32. Invoice No. . . . . This purchase of \$. . . from [a supplier] includes more [vascular surgery] items of medical equipment. The Taxpayer asserts that these are exempt because they inject contrast media. For the reasons outlined for this equipment under item 21 above, it is not exempt. RCW 82.08.935/Rule 18801((403)(c).

33. Invoice No. . . . . This purchase of \$. . . from [a supplier] for several pieces of medical equipment. \$. . . was for three [vein clot removal tools]. \$. . . was for two [balloon dilation catheters]. Both of these catheters are used for the removal of a thrombus (blood clot). The product descriptions for both describe how they use jets of water to break up and remove blood clots. The product materials provided also advertise a . . . . system that can also break up blood clots through [a proprietary infusion of medication]. This . . . . system was not part of what was ordered on this invoice. Without the direct infusion of a prescribed drug, a system that just uses saline as part of a surgical procedure is not exempt under RCW 82.08.935/Rule 18801(403)(c). Finally, \$. . . was for three "pump sets." The only information provided was a small picture that includes an illustration of what appears to be tubing and some items attached to it. Without further information we find no basis for an exemption.

34. Invoice No. . . . . This purchase of \$. . . from [a supplier] includes \$. . . for [a type of balloon catheter inflation device]. This device is used with catheters to remove plaque from inside blood vessels. This is a surgical device. The product materials warn that it should not be used with patients who have adverse reactions to contrast materials. There is no proof that it directly infuses contrast medium, and is therefore not exempt under RCW 82.08.935/Rule 18801(403)(c).

35. Invoice No. . . . . This purchase of \$. . . from [a supplier] is not accompanied by any product description. The Taxpayer states that it cleans and reinfuses a patient's blood, and that the tubing portion should be exempt. A patient's own blood would not be a prescription drug. This is not exempt for the same reasons as in item 30 above.

36. Invoice No. . . . . (Only a portion of the total invoice was provided.) This purchase from [a supplier] includes \$. . . for a box of 20 [vascular clips] that the Taxpayer states are an exempt suture delivery device. Also included is an e-mail from the Taxpayer's tax consultant that states these clips are left in the patient's body and are later passed through

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<sup>12</sup> . . .

the body. We have reviewed the vendor's product description.<sup>13</sup> . . . These metal clips are used to control internal bleeding during surgery. The product description (which warns against re-use) gives no indication that these metal clips are designed to stay in and later pass through the body. This is best categorized as a surgical tool; it is not akin to a suture. Sutures are exempt as prosthetic devices. *See* Rule 18801(206)(a) Table 5.

37. Invoice No. . . . . This purchase of \$. . . from [a supplier] is for four ten packs of [a vascular closure device], described by the Taxpayer as temporary prosthetics. These items are single use small metal wire mesh disks that aid in stopping arterial bleeding after surgery. It is completely removed prior to the patient's discharge. As with item 37 above, these are best categorized as surgical tools; they are not akin to a suture that is left in the body. While sutures are exempt as prosthetic devices, surgical tools are not. *See* Rule 18801(206)(a) Table 5.

38. . . .

39. Invoice No. . . . . This purchase of \$. . . from [a supplier] includes \$. . . for . . . cutting balloon catheters. As we described in items 28 and 32 above, these are surgical tools. The fact that the product warnings state that they should not be used with patients who have contrast media allergic reactions does not prove that these tools deliver prescription drugs. These are not exempt. RCW 82.08.935/Rule 18801(403)(c).

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41. . . .

42. . . .

43. . . .

44. **[Software Contractor]** This was a 2010 contract reviewed individually (not part of the audit sample) due to the larger amount involved. . . . The Taxpayer's contract with [the software contractor] was for a . . . pre-written computer software system.<sup>14</sup> The basis for the Taxpayer's dispute on this contract is that it asserts [the software contractors] line item invoices break down the retail sales taxable (pre-written software) portion of the contract vs. the service (staff training) portion not subject to retail sales tax. For the sale of software training combined in a contract with the purchase of pre-written computer software, the training portion of the contract must be "separately stated from the sale of prewritten computer software." Otherwise the entire contract is subject to retail sales tax. *See* WAC 458-20-15501.<sup>15</sup>

The Taxpayer has provided several documents in connection with this issue. The invoices in question fall into the following three categories:

<sup>13</sup> <http://www. . . .>

<sup>14</sup> . . . The purchase also included an [information management system].

<sup>15</sup> When the contract at issue was executed, WAC 458-20-15501(307)(e) covered the issue of contracts for retail software and training. WAC 458-20-15502(7)(e), effective March 28, 2013 addresses this issue in the same manner.

- The purchase order, No. . . . , dated December 30, 2009 from [the software contractor] is for \$. . . plus tax of \$. . . for a total of \$. . .<sup>16</sup> No other purchase contract was provided.
- Three subsequent installment invoices. The first (Invoice No. . . . , dated January 29, 2010) is listed as a down payment in the amount of \$. . . . This was the purchase order required 20% down payment. The second (Invoice No. . . . , dated June 22, 2010) is listed as a progress bill, and is for \$. . . . This represented the 60% due upon shipment plus sales tax. The third (Invoice No. . . . , dated December 17, 2010) is listed as the final invoice, and is for \$. . . . This represented the final 20% plus sales tax due “upon available for first patient use” as per the original December 30, 2009 purchase order.

In the original 2009 purchase order, and the three subsequent 2010 invoices, the [software] and [information management] systems are listed as the items purchased. There is no mention of any training.

- Also on appeal the Taxpayer provided 17 pages of copies of screen shots of what we assume are from someone’s electronic financial record keeping system. Only one of the documents mentions [the software contractor]. The others do reference the [software] system, and do include training. These documents refer to a “SCM standard invoice” and some contain references to invoice numbers and dates matching those listed above. Some of the dates and invoice numbers do not match the three listed above.

The second and third progress invoices charged retail sales tax totaling \$. . . , which the Taxpayer paid. The down payment invoice, however, did not charge retail sales tax. Consequently, the Taxpayer did not pay the full amount of retail sales tax that had been listed on the original 2009 purchase order. As shown on Schedule 5A of the Audit workpapers, this resulted in an underpayment of retail sales tax and an assessment of a little over \$. . . in use tax.

From the above documentation we find that the “separately stated” requirement in Rule 15501(307)(e) (now Rule in 15502(7)(e)) has not been met. The most clear and relevant document is the original 2009 purchase order, which makes no mention at all of training, and which correctly listed retail sales tax on the entire purchase price. Even if we were to treat the three subsequent progress invoices from 2010 as the purchase document, none of them mention training either. The remaining documentation appears to have been generated months after the purchase was executed, and may or may not have come from [the software contractor]. As such, we find no basis for modifying this portion of the audit calculations.

#### DECISION AND DISPOSITION

The petition is denied except as to the matters described in items 3, 4, 5, 8, 13, 20, 26, and 28 above. Dated this 12th day of November 2014.

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<sup>16</sup> An effective retail sales tax rate of 9.5%, the correct rate for . . . , Washington, where the Taxpayer is located.