

Cite as Det No. 10-0386, 32 WTD 81 (2013)

BEFORE THE APPEALS DIVISION  
DEPARTMENT OF REVENUE  
STATE OF WASHINGTON

In the Matter of the Petition For Refund and ) D E T E R M I N A T I O N  
Correction of Assessments of )  
  ) No. 10-0386  
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  ) Registration No. ....  
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- [1] RULE 18801; RCW 82.08.935, RCW 82.12.935: RETAIL SALES TAX – USE TAX – PRESCRIPTION DRUG EXEMPTION – DISPOSABLE DEVICE – HYDRO THERMABLATOR. A hydro thermablator is not exempt from sales and use taxes.
- [2] RULE 18801; RCW 82.08.935, RCW 82.12.935: RETAIL SALES TAX – USE TAX – PRESCRIPTION DRUG EXEMPTION – DISPOSABLE DEVICE – BIPOLEAR TISSUE SEALER. A bipolar tissue sealer is not exempt from sales and use taxes.
- [3] RULE 18801; RCW 82.08.935, RCW 82.12.935: RETAIL SALES TAX – USE TAX – PRESCRIPTION DRUG EXEMPTION – DISPOSABLE DEVICE – HOOK SEALING ENDOSCOPY. A hook sealing endoscopy is not exempt from sales and use taxes.
- [4] RULE 18801; RCW 82.08.935, RCW 82.12.935: RETAIL SALES TAX – USE TAX – PRESCRIPTION DRUG EXEMPTION – DISPOSABLE DEVICE – CATH EP THERMOCOOL. A cath ep thermocool is not exempt from sales and use taxes.
- [5] RULE 18801; RCW 82.08.935, RCW 82.12.935: RETAIL SALES TAX – USE

TAX – PRESCRIPTION DRUG EXEMPTION – DISPOSABLE DEVICE – CLEARVIEW MISTER BLOWER. A clearview mister blower is not exempt from sales and use taxes.

- [6] RULE 18801; RCW 82.08.935, RCW 82.12.935: RETAIL SALES TAX – USE TAX – PRESCRIPTION DRUG EXEMPTION – PROSTHETIC DEVICE – SUCTION CANISTERS. Suction canisters are not exempt from sales and use taxes.

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.

Pree, A.L.J. – . . . Related hospitals appeal the assessment of use tax/deferred sales tax on medical devices. . . . The hospitals request a credit for sales tax paid on items they claim were exempt from tax. We deny the taxpayers' petitions as to use tax/deferred sales tax due . . .<sup>1</sup>

#### ISSUES

1. Under RCW 82.08.935 is a purchase of a Hydro Thermablator exempt from retail sales tax?
2. Under RCW 82.08.935 is a purchase of a Bipolar Tissue Sealer exempt from retail sales tax?
3. Under RCW 82.08.935 is a purchase of a Hook Sealing Endoscopy exempt from retail sales tax?
4. Under RCW 82.08.935 is a purchase of a Cath EP Thermocool exempt from retail sales tax?
5. Under RCW 82.08.935 is a purchase of a Clearview Mister Blower exempt from retail sales tax?
6. Under RCW 82.08.0283 are suction canisters exempt from retail sales tax? . . .

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<sup>1</sup> Identifying details regarding the taxpayer and the assessment have been redacted pursuant to RCW 82.32.410. Nonprecedential portions of this determination have been deleted.

7. . .

8. Did the Audit Division properly sample the taxpayers' records, and project the errors into the assessment or have the taxpayers presented a basis for changing the statistical sampling outcome?

## FINDINGS OF FACT

[Taxpayers] are related hospitals whose staff treats patients in Washington. The taxpayers purchased medical devices and other items from vendors that did not charge the taxpayers sales tax. The taxpayers neither paid use tax on the medical devices and other items, nor did they charge their patients sales tax for these items.

The Department of Revenue (Department) reviewed the taxpayers' books and records for the years 2005 through 2007. The Audit Division concluded that the taxpayers should have paid retail sales tax on the various items because they did not qualify for the exemptions the taxpayers claimed. As a result, the Department's Audit Division issued the assessments referenced above. The taxpayers paid the assessments under protest and petitioned for refund. The taxpayers contend that the devices and other items at issue in this appeal were exempt from retail sales tax and use tax because the devices, which introduced saline to injured areas of patients' bodies, qualified for the exemptions as prescribed drug delivery devices. The taxpayers claimed other items were exempt from sales/use tax under longstanding positions of the Department resulting from court decisions, published determinations, unpublished rulings, and the Department's rules.

Because each taxpayer had similar protocol and restrictions on their use of the items at issue, we will generally describe each item and explain how the taxpayers used them and why the Audit Division found that these items did not qualify for the exemptions the taxpayers claimed.

Hydro Thermablator. The first item at issue was sold as . . . part of a kit, which included a control unit, rolling cart of the unit, a pole, and a fluid heater canister. . . . [It] is a single use item, which circulates temperature-controlled saline solution through a patient's uterine cavity to perform endometrial ablation. The physician inserts a probe into the uterus that includes a tiny telescope for viewing the lining of the uterus. Heated saline is circulated and is intended to destroy the lining of the uterus, even in an abnormal sized or shaped uterus, to eliminate or reduce bleeding to normal levels or less. The Hydro Thermablator does not remove fluids. The taxpayers purchase saline separately from a different vendor.

According to the manufacturer's website, Federal (USA) law and governing law outside the USA restrict this device to sale by or on the order of a physician. The taxpayers provided a letter from their manager of pharmaceutical services<sup>2</sup> stating that the sterile saline is dispensed under the written order of a physician, and considered a prescribed drug in the taxpayers' setting. After the

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<sup>2</sup> The manager states he is a licensed pharmacist.

hearing the taxpayer provided a letter from . . . its Vice President of Medical Affairs and CMO. [The CMO] stated the Hydro Thermablator is a single use item disposed of when the procedure is complete and can only be dispensed under written authorization of a physician.

The Audit Division responds that the Hydro Thermablator system is used to circulate heated saline during a surgical procedure, and concludes the saline is used for “auxiliary purposes.” In addition, the Audit Division states, “The saline solution used in the catheter is not a delivered prescription drug with a primary purpose to diagnose, cure, mitigate, treat or prevent disease or other human ailments.”

Bipolar Tissue Sealer. The next item at issue is a Bipolar Tissue Sealer . . . . The single use bipolar sealer delivers “RF [radio frequency] energy and saline for hemostatic sealing.” The sealer has two poles emitting radio frequency energy, which heats and cauterizes small ruptured blood vessels. One of the poles also channels saline to the tissue. [According to the] manufacturer . . . the saline was introduced to maintain temperature at or below 100° Centigrade to prevent burning.

As with the Hydro Thermablator, the taxpayer considers saline a prescribed substance, which qualifies the sealer for the exemption. . . . [According to the manufacturer] this sealing reduce[s] blood loss (and the need for transfusions) as well as keep[s] the area visible without the need for drainage. . . .

The taxpayers rely on their pharmaceutical service manager’s statement that the sterile saline is dispensed under the written order of a physician, and considered saline a prescribed drug in the taxpayers’ setting.

The Audit Division explains that, although the Bipolar Tissue Sealer uses saline in its function to seal a surgical site, the saline is used for auxiliary purposes. The Audit Division concludes that the saline solution used in the tissue sealer is not a delivered prescription drug with a primary purpose to diagnose, cure, mitigate, treat or prevent disease or other human ailments. Because it is for an auxiliary purpose, the Audit Division concludes that the taxpayers’ purchases of the Bipolar Tissue Sealer were not exempt from sales tax.

Hook Sealing Endoscopy. The Audit Division also assessed deferred sale/use tax on items identified as Hook Sealing Endoscopy SH2.0 . . . . This single use device simultaneously integrates saline and radio frequency energy allowing thermal energy to gently reach targeted tissues via saline-induced liquid electrodes. Used in the liver, pancreas, and other organs, this device seals blood vessels and bile ducts, reducing blood loss and bile leaks. The taxpayers contend that its purchases of the Hook Sealing Endoscopy SH2.0 should be exempt because the device delivers saline, a prescribed substance, into patients.

The Audit Division’s position is that the Hook Sealing Endoscopy SH2.0 is used for organ resection procedures. As it seals the surgical site, this device introduces saline to the area. The Audit Division concluded that the saline was used for auxiliary purposes and did not qualify for the exemption of retail sales tax or use tax. According to the Audit Division, the saline solution

used in the tissue sealer is not a delivered prescription drug with a primary purpose to diagnose, cure, mitigate, treat or prevent disease or other human ailments. The Audit Division concludes that because the saline is for an auxiliary purpose, the device that delivers it should not qualify for the exemption.

Cath EP Thermocool. . . . Cath EP Thermocool is a single use item used to maintain the temperature of the patient's healing tissue. The taxpayers' physicians authorize the use of the Cath EP Thermocool to deliver saline "to maintain safe tip-to-tissue temperature" [Taxpayer] did not pay retail sales or use tax, because it claims that the Cath EP Thermocool is a prescription drug delivery device and should be exempt.

The Audit Division assessed use tax, and projected the amount in the assessment. According to the Audit Division, the saline solution used in the catheter is not a delivered prescription drug with a primary purpose to diagnose, cure, mitigate, treat or prevent disease or other human ailments. The Audit Division concluded that the saline was introduced for auxiliary purpose, and therefore, the catheter was not exempt as a delivery device of a prescribed drug.

Clearview Blower/Mister. . . . The ClearView Blower/Mister is designed to enhance visualization at the surgical site by keeping it clear of blood during the procedure. A stream of misted saline blows blood off the surgical site, and out of the surgeon's view. [The vendor] did not charge sales tax and [Taxpayer] did not pay use tax on the blower.

The Audit Division assessed deferred sales/use tax on the blower.<sup>3</sup> The Audit Division's position is that the Clearview Blower/Mister system is a surgical tool used to enhance surgeon visualization by blowing blood from the surgical site using a mist of saline. The Audit Division contends that blowing blood away from the site is not for the diagnosis, cure, mitigation, treatment, or prevention of disease or other ailment in humans. The Audit Division concludes that the saline is for an auxiliary purpose, to blow away blood, rather than to treat or heal the area. Therefore, the Audit Division contends that the ClearView Blower/Mister should not qualify for the exemption. . . .

Suction Canisters. At the hearing, the taxpayers also challenged the use tax assessed on single use suction canisters. The Audit Division considered them consumable supplies. The taxpayers considered these canisters similar to the drainage devices, exempted in Det. No. 91-261S, 12 WTD 23 (1992). The taxpayers contend the canisters replace a bodily function, holding fluids.

Packing Materials for Drugs. The taxpayers contend that medi-cups and other materials used for packing drugs should be exempt from sales or use tax under WAC 458-20-115 (Rule 115). Rule 115 deems that title to containers pass to consumers for sales of food and beverages. Because the cups and other materials are transferred to the patients with drugs and other items sold to the patients, the taxpayers contend that they acquired these items for resale, and they should be exempt from sale/use tax. While patients may have been separately charged for medicine, the taxpayers did not separately charge the patients for these containers.

<sup>3</sup> The Audit Division included the blower in the stratified sample and assessed use tax on the projected amount.

Sampling and verification issues. During the course of the audit, the auditor met with the taxpayers' staff and discussed sampling the taxpayers' purchases, which may have been subject to retail sales or use tax. The sample population was determined by reviewing the chart of accounts and selecting the accounts of interest. The auditor discussed the accounts of interest to be sampled and methods available to select the sample with the taxpayers' accounting manager. They agreed on using stratified statistical sample. The auditor reviewed the taxpayers' invoices, and projected the tax assessed based on the error rate. Purchases of \$20,000 and above that were removed from the population and examined on an actual basis.

During the audit, and after a statistical sample was performed and the selected invoices reviewed by the auditor, the taxpayers disclosed that their consultant had previously performed a block sample of consumable purchases to verify that retail sales, deferred sales, or use tax was correctly paid on purchases. The consultant selected the first three months from each calendar year of the audit period for the sample test period and reviewed selected purchase invoices from those months to arrive at a net error amount. This error amount was then divided by the total supplies expense for the test period to arrive at a percentage of error. The error percentage was then multiplied by each monthly supply expense amount in the corresponding fiscal year to arrive at an amount of taxable error for each year of the audit period. The taxpayers then used the resulting retail sales and/or use tax credit amount to offset, monthly, any use tax accrued by their accounting department during the audit period. [Only] after the credit amount from the consultant's sample was exhausted for the corresponding year did the taxpayers report the full amount of use tax accrued in the books of account.

The Audit Division reconciled the use tax and deferred sales tax with the amounts found in the taxpayers' use tax accrual logs, prepared workpapers detailing reconciliation. The Audit Division assessed the use tax and deferred sales tax on the accrual reconciliation differences. . . .

The taxpayers dispute the sample method and period used by the Audit Division to determine the taxpayers' tax liabilities for the audit period. The taxpayers assert that its tax consultant's sample period should be used to determine the taxpayers' liabilities. The Audit Division explains that it was only after the statistical sample was discussed and agreed upon, and the audit was completed, did taxpayer disclose to the auditor that the taxpayers' consultant had previously performed a sample of consumable purchases to verify that retail sales, deferred sales, or use tax was correctly paid on purchases. The Audit Division contends that the statistical sample the auditor performed was not only sound, but was agreed upon, and should be relied upon for the proper tax application on consumable purchases.

## ANALYSIS

As part of the Streamlined Sales Tax legislation, Senate Bill 5783 included an exemption for disposable devices used to deliver prescription drugs for human use. RCW 82.08.0935 became effective July 1, 2004, and supersedes prior court decisions, regulations, and rulings \_\_\_\_ by the Department involving such devices. *See Laws of 2003, Chapter 168, §404; RCW 82.08.010.* RCW 82.08.935 states:

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.

RCW 82.12.935 exempts the same devices for use tax purposes, so our analysis of RCW 82.08.0935 applies to the use tax and the retail sales tax issues in this appeal.

RCW 82.08.935 is a tax exemption statute, and we construe tax exemptions narrowly. *Dot Foods, Inc. v. Dep't of Revenue*, 166 Wn.2d 912, 215 P.3d 185 (2009)(Stephens, J., dissenting op.)(citing *Budget Rent-A-Car*, 81 Wn.2d at 174-75, 500 P.2d 764). “A tax exemption presupposes a taxable status and the burden is on the taxpayer to establish eligibility for the benefit.” *Id.* (quoting *In re Sehome Park Care Ctr., Inc.*, 127 Wn.2d 774, 778, 903 P.2d 443 (1995)).

The goal when construing statutory language is to carry out the intent of the Legislature. *Seven Gables Corp. v. MGM/UA Entertainment Co.*, 106 Wn.2d 1, 6, 721 P.2d 1 (1986); *Yakima v. Fire Fighters*, 117 Wn.2d 655, 669-70, 818 P.2d 1076 (1991). To do so we look first to the language of the statute. *Lacey Nursing Center, Inc. v. Dep't of Revenue*, 128 Wn.2d 40, 53, 905 P.2d 338 (1995). Unless a contrary intent is revealed, the meaning of a statute must be derived and determined from its language alone. In other words, “[t]he intention of the legislature is to be deduced from what it said”. *Spokane v. State*, 198 Wash. 682, 691, 89 P.2d 826 (1939); *see also St. Paul & Tacoma Lumber Co. v. State*, 40 Wn.2d 347, 243 P.2d 474 (1952); *Christie-Lambert v. McLeod*, 39 Wn. App. 298, 302, 693 P.2d 161 (1984). We are required, when possible, to give effect to every word, clause, and sentence of a statute. Det. No. 04-0180E, 26 WTD 206 (2007). No part should be deemed inoperative or superfluous unless the result of obvious mistake or error. *Id.* (Citing *Cox v. Helenius*, 103 Wn.2d 383, 387-88 (1985)).

Absent ambiguity, we rely on the plain language of the statute. *City of Spokane v. Dep't of Revenue*, 104 Wn. App. 253, 258, 17 P.3d 1206 (2001). Under the “plain meaning” rule, examination of the statute in which the provision at issue is found, as well as related statutes or other provisions of the same act in which the provision is found, is appropriate as part of the determination whether a plain meaning can be ascertained. *Dep't of Ecology v. Campbell & Gwinn, L.L.C.*, 146 Wn.2d 1, 10, 43 P.3d 4 (2002); *C.J.C. v. Corporation of the Catholic Bishop of Yakima*, 138 Wn.2d 699, 708-09, 985 P.2d 262 (1999). When statutory language is plain the statute is not open to construction or interpretation. *N.W. Steel v. Dep't of Revenue*, 40 Wn. App. 237, 240, 698 P.2d 100, *rev. denied*, 104 Wn.2d 1006 (1985).

In *Silverstreak, Inc. v. Washington State Dep't of Labor and Industries*, 159 Wn.2d 868, 882, 154 P.3d 891 (2007), the Washington Supreme Court articulated the rule of ejusdem generis canon of statutory construction as follows:

The rule of ejusdem generis requires that general terms appearing in a statute in connection with specific terms are to be given meaning and effect only to the extent that the general terms suggest similar items to those designated by the specific terms. *Davis v. Dep't of Licensing*, 137 Wash.2d 957, 970, 977 P.2d 554 (1999); *Dean v. McFarland*, 81 Wash.2d 215, 221, 500 P.2d 1244 (1972). “[S]pecific terms modify or restrict the application of general terms, where both are used in sequence.” *Davis*, 137 Wash.2d at 970, 977 P.2d 554 (quoting *McFarland*, 81 Wash.2d at 221, 500 P.2d 1244); *see also In re Estate of Jones*, 152 Wash.2d 1, 11, 93 P.3d 147 (2004).

Therefore, devices exempt under RCW 82.08.0935 must be similar to, or of the same general class, as syringes, tubing, and catheters. RCW 82.08.935 does not define syringes, tubing, or catheters.

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).

*Webster’s Third New International Dictionary*, 2322 (1993) defines “syringe” as:

1: a device used to inject fluids into or withdraw them from the body or its cavities.

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>4</sup>

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

The essential characteristic of syringes and catheters [for purposes of the sales tax exemption is] that they facilitate the injection of fluids into the human body via insertion into the human body, and that is what they are designed to do. We will analyze the characteristics of each device, the

<sup>4</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.

Hydro Thermablator, the Bipolar Tissue Sealer, the Hook Sealing Endoscopy, the Cath EP Thermocool, and the Clearview Mister Blower and determine whether they were designed to inject fluids into the human body, such as with a syringe or catheter.

RCW 82.08.935 also requires that the devices deliver drugs for human use pursuant to a prescription. Each device at issue delivers saline to the affected area. Therefore, we must also determine whether the saline as used by the taxpayers is a prescribed drug.

RCW 82.08.0281 states that the “tax levied by RCW 82.08.020 shall not apply to sales of drugs for human use dispensed or to be dispensed to patients, pursuant to a prescription.” A drug is defined as “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. RCW 82.08.0281(4)(b).<sup>5</sup>

Normal saline (saline) is the common name for the saline solution used in a hospital setting to treat patients. Under the taxpayers’ protocol, saline can only be administered to a patient pursuant to a written prescription. Saline can be used both intravenously and directly as a wound cleaning solution. Care must be taken when using saline as there are several adverse reactions which can occur with its use. Such adverse reactions . . . [can occur in] the cardiovascular system, the central nervous system, the endocrine and metabolic system, and the respiratory system.

Although saline may seem to be a common solution used in numerous procedures, saline in the specific procedures requiring the use of the devices at issue, may only be dispensed at the taxpayers’ facilities pursuant to a prescription by a licensed individual. The saline as used in the taxpayers’ procedures as explained by [the CMO] meets the definition of drug.

[1] **Hydro Thermablator:** Under RCW 82.08.935 the device must be similar to a syringe, catheter or tubing. In this case, the Hydro Thermablator Kit includes a control unit, rolling cart, a pole, and a fluid heater canister used to heat, monitor, and circulate temperature-controlled saline solution through the uterine cavity to perform endometrial ablation. The heated saline circulates and destroys the lining of the uterus. Although the Hydro Thermablator as part of the procedure injects heated saline into the uterus, its function is not than that of a syringe. Thus, we conclude that the Hydro Thermablator is not a device that qualifies for the exemption from sales and use taxes.

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<sup>5</sup> To be considered a drug under this definition, it must meet one of the following:

- 1) The drug must be recognized in the official US pharmacopoeia, (4)(b)-1
- 2) Be intended for use in the diagnosis, cure, mitigation, treatment, or prevention of disease; or (4)(b)-2
- 3) Intended to affect the structure or any function of the body. (4)(b)-3

Thus, if saline used by the taxpayers meets one of these requirements, then it qualifies as tax exempt under RCW 82.08.020.

[2] **Bipolar Tissue Sealer:** The Bipolar Tissue Sealer is used to cauterize (seal) ruptured blood vessels during surgery. Heat from the Sealer sears the incised area, closing severed blood vessels, while the saline prevents excessive burning. According to the taxpayers, the saline is also introduced to promote healing in the area, and thus saline is used in conjunction to help facilitate this procedure. In this case, the injection of saline is not similar in nature to that of a syringe, catheter or tubing, because the purpose of the device is to cauterize blood vessels that the saline cools to prevent burning. Introducing saline to prevent burning is not similar in nature to a syringe catheter or tubing, which facilitate the injection of fluids into the human body via insertion into the human body. Thus, this device would not be exempt from sales or use tax.

[3] **Hook Sealing Endoscopy:** The purpose of this device is to seal blood vessels and bile ducts to reduce blood loss and bile leaks. Saline is injected through the device to support this function. In this case, the injection of saline is not similar in nature to that of a syringe, catheter or tubing, because the purpose of the device is to seal blood vessels and bile ducts. . . . Thus, under the rule of ejusdem generis, because this device was not designed to facilitate the injection of fluids into the human body via insertion into the human body, but to seal blood vessels and bile ducts to reduce blood loss and bile leaks, the Hook Sealing Endoscopy would not be exempt from sales or use tax.

[4] **Cath EP Thermocool:** The purpose of this device is to allow for efficient fluid delivery within the catheter itself and to allow heat to dissipate across the catheter tip. The device allows for the treatment of cardiac arrhythmias and saline is used to help control the temperature of the device so as not to burn the tissue. We construe RCW 82.08.935 narrowly as discussed above, and note in this case, 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.

[5] **Clearview Mister Blower:** The purpose of this device is to enhance visualization at the surgical site by keeping the area clear of blood during coronary suturing. While some of the saline may settle on the affected area, given that its purpose is to blow blood away from that area, we conclude it does not deliver a prescribed drug for human use as contemplated in RCW 82.08.0935. Further, because the Clearview Mister Blower is not similar to a syringe, catheter or tubing designed to facilitate the injection of fluids into the human body via insertion into the human body, it is not eligible for the exemption under RCW 82.08.0935.

[6] **Suction Canisters:** The taxpayers seek exemption of the suction canisters as prosthetic devices. On July 1, 2004, "prosthetic device" became a defined term in RCW 82.08.0283(4)(a):

"Prosthetic device" means 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.

Subsection (4)(a) specifically requires that it must be “worn on or in the body.”<sup>6</sup> In Det. No. 07-0150, 27 WTD 114, 117 (2008), we considered whether CPAP machines are exempt prosthetic devices under current law and found as follows:

. . . CPAP machines, in general, are durable medical equipment, and not prosthetic devices. Patients using CPAP machines are normally hooked up to the machines via tubing and individually tailored masks. Even though the mask is normally “worn” for significant periods of time each night, the mask by itself can not accomplish the intended purpose. The machine performing the function is not worn on the body as a complete system. Neither the mask separately, nor the machine as a whole system, is a prosthetic device.

Because the suction canisters were not worn in or on the body, their purchase was not exempt from sales and/or use tax under RCW 82.08.0283.

Sampling issues. The taxpayers also object to the sample projection over the audit period. The Department has previously addressed the use of sampling in determining the amount of deferred retail sales or use tax due on assets purchased by a business. *See* Det. No. 04-0084, 24 WTD 365 (2005); Det. No. 02-0114, 22 WTD 174 (2003). Det. No. 02-0114 contains the following explanation for use of sampling to identify the amount of deferred retail sales or use tax due on business purchases:

The goal of a sales and use tax audit is to identify the total amount of underpaid or overpaid tax for the period under review. For many businesses, in particular businesses with large numbers of transactions, it is a costly and time-consuming process for both the taxpayer and the Department to review all records for the entire period under review. The Department recognizes that a sampling of documents, rather than a review of all the records for the entire period, and projecting the results over the entire period, is an accepted and commonly used auditing method to estimate the amount of tax underpaid or overpaid. 22 WTD at 177.

The determinations go on to explain the difference between block sampling and statistical sampling. Block sampling uses test periods, in which the auditor will review documents provided for a certain group or block of transactions chosen by the auditor based on convenience and accessibility. *Id.*; citing Jeri Mulrow, Statistical Sampling as a Win-Win in Tax Audits, 15 State Tax Notes 1491 (December 7, 1998). The Department has often used block sampling as a means to determine a taxpayer’s liability. *See* Det. No. 88-233, 6 WTD 59 (1988); Det. No. 87-354, 4 WTD 293 (1987); Det. No. 93-240, 13 WD 269 (1994).

<sup>6</sup> We recognize that dialysis machines are provided as an example of prosthetic devices in Rule 18801(5)(e), yet they are not “worn on or in the body.” RCW 82.08.0283 became effective after Rule 18801(5)(e). Because the rule has not been amended since the statute which it interprets was changed, to the extent that examples in the rule do not comport with the revised statute such examples are no longer valid. *See, e.g., Kabbae v. Dep’t of Social and Health Services*, 144 Wn. App. 432, 435, 192 P.3d 903, 904 (2008); *Dep’t of Revenue v. National Indem. Co.*, 45 Wn. App. 59, 62, 723 P.2d 1187, 1189 (1986). The revised statute limits “prosthetic device” to a device worn on or in the body.

The Department has also used statistical sampling, which uses a randomly selected sample and the probability theory to evaluate the sample results. The Department has increasingly relied on statistical sampling in deferred retail sales or use tax audits. 22 WTD at 177. As pointed out in Det. No. 02-0114, while statistical sampling potentially yields greater accuracy and efficiency than block sampling, it may also be more costly. *Id.*; see also Roger C. Pfaffenberger, Use and Abuse of Sampling in Sales and Use Tax Audits, 97 COST State Tax Report, Issue 6, pp. 209 (November 1997), reprinted in 13 State Tax Notes 1673 (December 29, 1997).

In this case, the Audit Division assessed tax based upon a stratified statistical sample, with the consent of taxpayers. The taxpayers have assembled additional records for months outside the original sample period. We are concerned with the tax during actual audit period. Short of a review of every record during the audit period, the Audit Division's sample provides the best evidence of the taxes due during that period.

Statistical sampling is a widely used and accepted sampling method. Det. No. 04-0084, 24 WTD 365 (2005). The Department will not overturn the results of such a sample when the use of the statistical sampling method was discussed with the taxpayer prior to its use, no objection was raised until after the assessment was issued, and no factual error or legal authority was presented to overturn the results. 24 WTD at 369.

#### DECISION AND DISPOSITION

We deny the taxpayers' petitions...

Dated this 23<sup>rd</sup> day of December 2010.