Cite as Det. No. 11-0139, 31 WTD 82 (2012)

BEFORE THE APPEALS DIVISION
DEPARTMENT OF REVENUE
STATE OF WASHINGTON

In the Matter of the Petition For Correction of Assessment of	)	D E T E R M I N A T I O N
	)	No. 11-0139
. . .	)	
	)	Registration No. . . .
	)	Document No. . . .
	)	Audit No. . . .
	)	Docket No. . . .

[1] RCW 82.08.0283: RETAIL SALES TAX – PROSTHETIC DEVICE. A medical device that delivers cold compression therapy to an injured body part and is not entirely worn on the body does not qualify as an exempt prosthetic device under RCW 82.08.0283.

[2] RCW 82.08.0283: RETAIL SALES TAX – PROSTHETIC DEVICE. A medical device worn entirely on the body that electronically generates bone to aid in bone repair and bone fusion is an exempt prosthetic device under RCW 82.08.0283.

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

Sohng, A.L.J. – A medical equipment provider protests the assessment of retail sales tax on the leasing of (1) a medical device that delivers cold therapy and intermittent compression therapy to an injured joint or limb; and (2) a medical device that generates spinal bone growth to aid in bone repair and to enhance bone fusion. We deny the petition in part and grant the petition in part.

ISSUES

1. Does a device that provides cold compression therapy to an injured joint or limb qualify as an exempt prosthetic device under RCW 82.08.0283 when a portion of the device is not worn in or on the body?[1]

[1] Identifying details regarding the taxpayer and the assessment have been redacted pursuant to RCW 82.32.410.

2. Does a device that electronically generates bone growth qualify as an exempt prosthetic device under RCW 82.08.0283 when the device is worn entirely in or on the body?

FINDINGS OF FACT

[Taxpayer] is a medical equipment provider [based outside of Washington] that leases and sells orthotic and prosthetic devices, medically prescribed braces, durable medical equipment (such as crutches and infusion pumps), and other medical devices to patients through hospitals, clinics, and doctors. The Audit Division examined Taxpayer's books and records for the period January 1, 2006, through December 31, 2009. The Audit Division issued an assessment on July 29, 2010.

At issue in the present case are two specific medical devices that Taxpayer contends are exempt from retail sales tax as "prosthetic devices": (1) [a device that provides cold compression therapy to an injured joint or limb]; and (2) [a device that electronically stimulates bone growth].

[Device that provides cold compression therapy (cryotherapy device)]

Soft tissue trauma causes an inflammatory response that raises the temperature of the affected tissue. Other symptoms of inflammation include increased blood flow and edema accumulation.[2] Patients who suffer from musculoskeletal injuries or undergo orthopedic surgery are generally instructed to follow the "R.I.C.E." method (rest, ice, compression, elevation) to aid in recovery.[3] Traditional cold therapy (or cryotherapy) consists of placing an ice pack or other cold object directly on the injured area for short periods of time. The primary reason for using cryotherapy in acute injury management is to lower the temperature of the injured tissue, which reduces the tissue's metabolic rate.[4] A reduced metabolic rate facilitates oxygen diffusion into injured tissues, which helps the tissue survive the period following the injury.[5]

Standard compression therapy consists of binding the injured limb in a bandage, which applies static pressure to the area. The external pressure applied to the tissue prevents swelling (or edema) by hindering fluid loss from the blood vessels in the injured area, making it more difficult for fluids to accumulate. Muscles in a healthy joint naturally move tissue debris and fluid out of the joint, whereas muscles in an injured joint are unable to do so. The [cryotherapy] device essentially replicates or mimics the activity of a healthy joint or muscle by eliminating excess fluid that causes edema and flushing it into the lymphatic system for proper drainage. The clinical efficacy of both cold therapy and compression therapy in reducing pain and swelling,

[2] *See* Susan G. Capps and Brook Mayberry, *Cryotherapy and Intermittent Pneumatic Compression for Soft Tissue Trauma*, Athletic Therapy Today, Jan. 2009, at 2.
[3] *See id*.
[4] Wikipedia, http://en.wikipedia.org/wiki/Cold_compression_therapy (last visited April 7, 2011).
[5] *See* Capps, *supra* note 1, at 2.

alleviating edema, and preventing blood clots in the lungs or legs is well documented in the medical literature.[6]

The [cryotherapy] device requires a doctor's prescription and is generally used following surgery or injury to a joint or limb. It simultaneously supplies intermittent compression and adjustable cold therapy. There are two primary components to the [cryotherapy] device. The first is a flexible fabric wrap that fits around and immobilizes the affected limb or joint. The wrap is anatomically designed to fit various body parts snugly and is secured with a simple hook and loop fastener. There are nine different wraps that fit around various body parts, including the ankle, knee, elbow, hip and groin, back, wrist, hand, and shoulder.

The second component of the [cryotherapy] device is a control unit that is attached to the wrap, from which the user can adjust the temperature and pressure being administered to the limb or joint. The temperature and amount of pressure to be applied is determined by the physician, physical therapist, or other clinician as part of a customized treatment program. The control unit is 5.5 inches wide, 16 inches long, 8.5 inches high, and weighs eight pounds empty. It contains a reservoir that is filled with ice and water. The [cryotherapy] device is operated in the following manner:

- The user fills the reservoir with ice and water;
- The user plugs the control unit into a wall outlet or a battery pack;
- The user attaches the connector hose to the wrap and the control unit;
- The user selects the appropriate pressure, temperature, and time settings on the control unit;
- The user presses the start button, which causes the control unit to inflate and deflate the wrap on a cyclical basis, providing the compression portion of the therapy.
- Simultaneously, the ice water from the reservoir is circulated through the wrap, providing the cryotherapy.

The [cryotherapy] device purports to be superior to the conventional treatment modalities of cold therapy and static compression therapy. According to Taxpayer, it provides superior cold therapy because the temperature can be adjusted by the user and the cold is dispersed over the entire affected area, unlike its conventional counterpart, the ice pack. Taxpayer further claims that the [cryotherapy] system provides improved compression therapy because it applies pressure on an intermittent or cyclical basis, rather than a static basis. This unique combination of both cold therapy and intermittent compression therapy, it is argued, is key in accelerating recovery.

Bone growth stimulating device

The second medical device at issue here . . . uses a pulsed electromagnetic field to aid in bone repair and to enhance bone fusion . . . . It promotes spinal fusion and helps heal non-union

[6] *See, e.g.*, JM Webb et al., *The Use of Cold Compression Dressings After Total Knee Replacements: A Randomized Controlled Trial*, 21 ORTHOPEDICS, No. 1, at 59 (Jan. 1998); *Clinical Evaluation of Vasopneumatic Cryotherapy Devices*.

fractures.[7] When a human bone is fractured, it generates a low-level electrical field, which activates the body's own repair mechanism. In some cases, the broken bone does not generate a sufficient electric field. [The bone growth stimulating device] generates a time-varying electromagnetic field similar to the electrical field that the human body generates. Application of the [bone growth stimulating device] directly to the fusion or fracture sites helps activate and augment the body's natural healing process and enhances bone fusion immediately following injury or surgery. The [bone growth stimulating device] may also be used as non-invasive treatment to salvage a failed spinal fusion.

The [bone growth stimulating device] requires a physician's prescription and is worn directly around the torso or neck for at least two hours per day. In general, there are two types of [bone growth stimulating devices]: internal (planted underneath the skin) and external (worn on the body). Taxpayer sells and leases external stimulators and most commonly provides cervical stimulators and lumbar stimulators to its customers. The cervical stimulators are worn around the neck, and the lumbar stimulators are worn around the torso. Both the lumbar and cervical [bone growth stimulating devices] are comprised of a control unit and a treatment transducer, both of which are completely worn on the body. The control unit contains a micro-processor that generates the electrical signal. The treatment transducer converts that signal into a low-energy magnetic field. When the device is centered over the treatment area, the therapeutic signal is delivered directly to the treatment site.[8]

ANALYSIS

[1] Under RCW 82.08.020, Washington imposes retail sales tax on "each retail sale in this state." RCW 82.08.0283[9] provides a retail sales tax exemption for sales of certain prosthetic devices. RCW 82.08.0283(1) provides an exemption for "prosthetic devices prescribed, fitted, or furnished for an individual by a person licensed under the laws of this state to prescribe, fit, or furnish prosthetic devices…." RCW 82.08.0283(3) further provides that the exemption does not apply to durable medical equipment. "Prosthetic device" is defined as 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.

RCW 82.08.0283(4)(a)(emphasis added.)

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[7] A non-union fracture is a failure of bone fragments to unite or heal following a broken bone. It is a serious complication of a fracture and typically occurs due to insufficient immobilization, inadequate blood supply, infection, poor nutrition, or metabolic bone disease. Wikipedia, http://en.wikipedia.org/wiki/Nonunion (last visited April 7, 2011).

[8] The [bone growth stimulating device] is charged by plugging it into a power outlet while it is not being worn. [bone growth stimulating device] cannot operate while it is charging.

[9] RCW 82.08.0283 was amended in 2007 with an effective date of July 1, 2008. 2007 Wash. Laws ch. 6, § 1101. The 2007 amendment has no effect on this appeal or on Taxpayer's future reporting instructions.

"Durable medical equipment" means equipment, including repair and replacement parts for durable medical equipment that:

(i) Can withstand repeated use;
(ii) Is primarily and customarily used to serve a medical purpose;
(iii) Generally is not useful to a person in the absence of illness or injury; and
(iv) Is not worn in or on the body.

RCW 82.08.0283(4)(b).

[Cryotherapy device]

In Determination No. 07-0150, 27 WTD 114 (2008), we considered whether a continuous positive airway pressure ("CPAP") machine was an exempt prosthetic device under RCW 82.08.0283. CPAP machines are used to treat obstructive sleep apnea by providing positive air pressure to support the walls of the airway during sleep. A CPAP machine consists of a mask and a base unit. The mask fits over the nose and forces air into the airway through the nostrils. The mask is connected by a hose to a heated base upon which a water reservoir is placed. The water reservoir supplies the desired level of humidity to the forced air. In Determination No. 07-0150, *supra*, we held as follows:

> Thus, 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.

Id. at 117. We conclude that the [cryotherapy device] is analogous to the CPAP machine. The compression and cold therapy that the [cryotherapy device] applies to an injured limb *does* (i) prevent or correct a physical deformity or malfunction; or (ii) support a weak or deformed portion of the body by mimicking the muscle contractions that a healthy joint performs to force fluid and tissue debris out of the affected area and into the lymphatic system. However, like the CPAP machine in the determination, the [cryotherapy device] is not "worn in or on the body" simply because the "wrap" portion of it is attached to the body for short periods of time. For purposes of the prosthetic exemption, the term "worn on or in the body" requires the *entire* device or system to be worn on a person, "to be carried with and habitually become part of the person as a whole, much in the sense that a person wears clothing or other personal items." *Id*. Exempt prosthetics are designed to be wholly worn and portable, not partially floor-standing, or moveable by the assistance of wheels or some other device (e.g. a cart), or partly resting on a table. *See id.*

Here, only the flexible wrap portion of the [cryotherapy device] is actually worn on the body. The control unit is connected to the wrap via a hose, but is not itself worn on the body. Given the weight and size of the control unit, especially when full of ice water, wearing it directly on the body and carrying it around is neither possible nor desirable. Like the mask component of the CPAP device in Determination 07-0150, the wrap component of the [cryotherapy device] alone cannot accomplish its intended purpose. Unless it is connected to the control unit, the wrap cannot continuously inflate and deflate, nor can the temperature on the wrap be adjusted. Thus, even though the wrap is normally "worn on the body" the wrap by itself can not accomplish the intended purpose of the device. The [cryotherapy device] is not worn on the body as a complete system. Like the CPAP machine in Determination 07-0150, the [cryotherapy device] is durable medical equipment, not a prosthetic device exempt from retail sales tax under RCW 82.08.0283.

Taxpayer relies on WAC 458-20-18801 ("Rule 18801"), the Department's administrative rule that interprets RCW 82.08.0283. Rule 18801(5)(e) exempts "orthotic devices" from retail sales tax. The term "orthotic devices" is defined as follows:

> [A]pparatus designed to activate or supplement a weakened or atrophied limb or function. They include braces, collars, casts, splints, and other similar 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 embolism stockings, arch pads, belts, supports, bandages, and the like, whether prescribed or not.

Rule 18801(1)(g). Taxpayer claims that the [cryotherapy device] is an orthotic device under Rule 18801 because it activates and supplements a weakened limb or joint.[10] Taxpayer also relies on Determination No. 90-97, 9 WTD 195 (1990), which considered the retail sales tax exemption for a continuous passive motion ("CPM") device. The CPM device consisted of a brace and an electronic box which controlled the movement of the brace. The Department held that the CPM device qualified as an "orthotic device" under Rule 18801.

The Legislature amended RCW 82.08.0283 in 2003 to comply with the Streamlined Sales and Use Tax Agreement ("SSUTA"),[11] effective July 1, 2004.[12] 2003 Wash. Laws, ch. 168, §409.

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[10] Taxpayer's Petition for Correction of Assessment

[11] The Streamlined Sales Tax Project was organized in March of 2000 with a wide range of participation from state and local tax administrators, state and local government representatives, and private industry groups. Kentucky Sales Tax Facts, Vol. 6 No. 3 (June 1, 2004). SSUTA is a multi-state project intended to simplify the administration of sales and use taxes in order to substantially reduce the burden of tax compliance. *Indiana Dep't of Revenue v. Kitchin Hospitality, LLC*, 907 N.E.2d 997, 1000, n.2 (Ind. 2009). SSUTA seeks to accomplish this goal by, among other things, providing uniform definitions within tax laws. *Id.* For states to participate, the state must enact laws, rules, and regulations that conform to its provisions. Kentucky Sales Tax Facts, *supra*. On November 12, 2002, Washington, along with 30 other states and the District of Columbia approved SSUTA. Hallie Hostetter & Carl. Gipson, *The Streamlined Sales and Use Tax Agreement* (Feb. 2007), available on the Washington Policy Center Website at http://www.washingtonpolicy.org/publications/notes/streamlined-sales-and-use-tax-agreement (last visited April 7, 2011.)

[12] During the 2003 legislative session, the Legislature began its effort to conform Washington laws to SSUTA. As a result, it passed the Streamlined Sales Tax Act, 2003 Wash. Laws, ch. 168. In Determination No. 07-0282, 27 WTD 162 (2008), we erroneously noted that RCW 82.08.0293 was amended by Senate Bill 6515-S, 2004 Wash. Laws, ch.

SSUTA member states must adopt the definitions in the SSUTA Library of Definitions without qualification, except those allowed by SSUTA.[13] Consequently, the retail sales tax exemption for the sales of certain prosthetic devices in RCW 82.08.0283 now mirrors SSUTA.

Prior to the 2003 amendment, RCW 82.08.0283 expressly exempted both "prosthetic devices" and "orthotic devices" from the retail sales tax. However, the 2003 legislation repealed the sales tax exemption for "orthotic devices," but retained the exemption for "prosthetic devices." 2003 Wash. Laws, ch. 168, §409. Under the 2003 legislation, "prosthetic device" became a defined term under which it was required to be "worn on or in the body." RCW 82.08.0283(4)(a). This legislative change was effective after Rule 18801 was promulgated.[14]

Because Rule 18801 has not been amended since the statute which it interprets was changed in 2003, provisions of the rule that are inconsistent with the amended statute 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). Thus, the sales tax exemption available for "orthotic devices" contained in Rule 18801, as well as any of the Department's determinations issued before the 2003 legislation which hold that "orthotic devices" are exempt from sales tax, are no longer valid. Taxpayer's petition is denied with respect to the [cryotherapy device].

[Bone growth stimulating device]

[2] The [bone growth stimulating device] is exempt from retail sales tax under RCW 82.08.0283. First, it may only be prescribed by a physician licensed under the laws of this state to prescribe such devices, as provided in RCW 82.08.0283(1)(a). Second, the [bone growth stimulating device] meets the definition of "prosthetic device" under RCW 82.08.0283(4)(a). By generating a low-level electrical field similar to that generated by broken bones, it "prevents or corrects a physical deformity or malfunction," namely a non-union bone fracture. And finally, because the [bone growth stimulating device] is worn entirely on the body, it meets the "worn on or in the body" requirement of RCW 82.08.0283(4)(a), as enunciated in Determination No. 07-0150, *supra*. Thus, the [bone growth stimulating device] is a "prosthetic device" and is exempt from retail sales tax under RCW 82.08.0283.

Moreover, our holding is consistent with SSUTA's treatment of similar devices. SSUTA provides a Health Care Item List and the Health Care Item List Addendum, both of which have

153 to comply with SSUTA. The Legislature passed Senate Bill 6515-S only to correct errors and omissions from the legislation passed the prior year.

[13] SSUTA § 328. Washington became a full member state on July 1, 2008. A full member state is a state that is in compliance with SSUTA through its laws, rules, regulations, and policies. *See* Streamlined Sales Tax Governing Board, Inc. website at http://www.streamlinedsalestax.org/ (last visited April 18, 2011).

[14] Rule 18801 was originally promulgated in 1974. The rule was subsequently modified in 1978, 1983, 1987, and 1992. No further amendments to Rule 18801 have been made since 1992.

been incorporated as part of SSUTA. SLAC Health Care Rule 327.[15] Under the Health Care Item List Addendum, revised on January 29, 2007, [bone growth stimulating device]s that are worn are classified as exempt prosthetic devices; whereas, [bone growth stimulating device]s that are not worn are classified as non-exempt durable medical equipment.[16]

Taxpayer's petition with respect to the [bone growth stimulating device]s that are worn is granted.

DECISION AND DISPOSITION

The petition is granted in part and denied in part. We remand the case to the Audit Division for adjustment to the assessment consistent with this determination.

Dated this 21st day of April, 2011.

[15] The State and Local Advisory Council (or "SLAC") was established under the Bylaws of the Streamlined Sales Tax Governing Board to advise the board on matters pertaining to the administration of the Agreement, including interpretations.

[16] In addition, the taxing authority in at least one non-SSUTA member state has extended similar treatment to bone growth stimulators under a statutory exemption for "equipment worn as a correction or substitute for any functioning portion of the body." Mass. Gen. Laws ch. 64H, §6(l). While rulings and case law decided under the laws of another state do not serve as precedential authority for the Department, they may nevertheless be instructive. In Massachusetts Letter Ruling No. 09-6 (2009), the Commissioner of Revenue distinguished between non-exempt stimulator devices used to control pain or to exercise muscle groups from exempt stimulator devices used to "correct or substitute any functioning part of the body." The Commissioner determined that bone growth stimulators correct a deficiency in the body's healing process by generating electrical currents that normally are produced naturally by the bones themselves. Because the bone growth stimulators were worn by the patient as a correction or substitute for a functioning part of the body (namely, the bones), the Massachusetts Department of Revenue exempted bone growth stimulators from sales tax.