

NO. 40642-0-II

COURT OF APPEALS
DIVISION II
STATE OF WASHINGTON
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**COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON**

NORTH CENTRAL WASHINGTON RESPIRATORY CARE
SERVICES, INC. d/b/a WHIDBEY HOME MEDICAL,

Appellant,

v.

STATE OF WASHINGTON, DEPARTMENT OF REVENUE,

Respondent.

BRIEF OF RESPONDENT

ROBERT M. MCKENNA
Attorney General

DONALD F. COFER
Senior Counsel
WSBA # 10896
7141 Cleanwater Drive SW
PO Box 40123
Olympia, WA 98504-0123
(360) 753-7082

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ORIGINAL

TABLE OF CONTENTS

I. INTRODUCTION.....1

II. ISSUES PRESENTED2

III. STATEMENT OF THE CASE2

IV. ARGUMENT4

 A. CPAP Devices Are Not “Prosthetic Devices” Under The
 Current Version Of RCW 82.08.0283 In Effect Since July
 1, 2004.....5

 1. A “prosthetic device” is worn on or in the body,
 while “durable medical equipment” is not.6

 2. Because most CPAP devices are not “worn on or in
 the body,” they do not qualify as “prosthetic
 devices.”10

 3. Adopting Whidbey’s proposed interpretation of
 “worn on or in the body” would result in Washington
 misclassifying CPAP devices and many other
 medical devices, causing Washington to be out of
 compliance with the Streamlined Agreement.....13

 4. As required by the Streamlined Agreement, other
 member States also distinguish between CPAP
 devices that are worn on the body and those that are
 not.15

 B. CPAP Devices Were Neither “Prosthetic Devices” Nor
 “Orthotics Devices” Under The Substantially Different
 Versions Of RCW 82.08.0283 In Effect Before July 1,
 2004.....19

 1. CPAP devices were not “prosthetic devices” under
 the former versions of RCW 82.08.0283.....20

2.	CPAP devices were not “orthotic devices” under the former versions of RCW 82.08.0283.	30
V.	CONCLUSION	40

TABLE OF AUTHORITIES

Cases

<i>Coast Pac. Trading, Inc. v. Dep't of Revenue</i> , 105 Wn.2d 912, 719 P.2d 541 (1986).....	29
<i>Condit v. Lewis Refrigeration Co.</i> , 101 Wn.2d 106, 676 P.2d 466 (1984).....	38
<i>Deaconess Med. Ctr. v. Dep't of Revenue</i> , 58 Wn. App. 783, 795 P.2d 146 (1990).....	21, 27, 30
<i>Dental Soc'y of N.Y. v. N.Y. State Tax Comm'n</i> , 110 A.D.2d 988, 487 N.Y.S.2d 894, <i>aff'd</i> , 66 N.Y.2d 939, 489 N.E.2d 766 (1985)	25
<i>Dep't of Ecology v. Theodoratus</i> , 135 Wn.2d 582, 957 P.2d 1241 (1998).....	29
<i>Home Med. Sys., Inc., v. S.C. Dep't of Revenue</i> , 382 S.C. 556, 677 S.E.2d 582 (2009).....	23, 24
<i>In re Sehome Park Care Ctr.</i> , 127 Wn.2d 774, 903 P.2d 443 (1995).....	21
<i>Mayflower Park Hotel v. Dep't of Revenue</i> , 123 Wn. App. 628, 98 P.3d 534 (2004), <i>review denied</i> , 154 Wn.2d 1022 (2005).....	29
<i>Medic House, Inc. v. Director of Revenue</i> , 799 S.W.2d 80 (Mo. 1990)	28
<i>Moore v. Whitman Cy.</i> , 143 Wn.2d 96, 18 P.3d 566 (2001).....	29
<i>Regence Blueshield v. Office of Ins. Comm'r</i> , 131 Wn. App. 639, 128 P.3d 640 (2006).....	38
<i>Roy v. Everett</i> , 118 Wn.2d 352, 823 P.2d 1084 (1992).....	38

<i>Simpson Inv. Co. v. Dep't of Revenue</i> , 141 Wn.2d 139, 3 P.3d 741 (2000).....	25
<i>Sprint Int'l Commc'ns Corp. v. Dep't of Revenue</i> , 154 Wn. App. 926, 226 P.3d 253, <i>review denied</i> , 169 Wn.2d 1023 (2010).....	5
<i>State v. Roggenkamp</i> , 153 Wn.2d 614, 106 P.3d 196 (2005).....	38
<i>Tesoro Ref. & Mkt. v. Dep't of Revenue</i> , 135 Wn. App. 411, P.3d 368 (2006), <i>aff'd</i> 164 Wn.2d at 310 (2008).....	29

Statutes

Laws of 1975, 1st Ex. Sess., ch. 291, § 10.....	20
Laws of 1980, ch. 37, § 1.....	21
Laws of 1980, ch. 37, § 48.....	20
Laws of 1980, ch. 37, § 81.....	20
Laws of 1980, ch. 86, § 1.....	31
Laws of 1998, ch. 168, § 2.....	19
Laws of 2001, ch. 75, § 1.....	20
Laws of 2003, ch. 168, § 1.....	5
Laws of 2003, ch. 168, § 1(1).....	7
Laws of 2003, ch. 168, § 1(3).....	7
Laws of 2003, ch. 168, § 409.....	5
Laws of 2004, ch. 153, § 101.....	5
Laws of 2007, ch. 6.....	5

Laws of 2007, ch. 6, § 1101	7
N.C. Gen. Stat. § 105-164.13(12)	17
N.C. Gen. Stat. § 105-164.3(30b)	17
N.C. Gen. Stat. § 105-164.3(8b)	17
N.J. Stat. Ann. § 54:32B-8.1	16
RCW 18.200.010	39
RCW 18.200.010(9).....	22
RCW 18.22	20
RCW 18.25	31
RCW 18.71	31
RCW 82.02.210(1).....	7
RCW 82.02.210(3).....	7, 14
RCW 82.08	14, 29
RCW 82.08.0281	27
RCW 82.08.0283	passim
RCW 82.08.0283(1).....	5, 6
RCW 82.08.0283(1)(a)	8
RCW 82.08.0283(1)(c)	10
RCW 82.08.0283(3).....	6
RCW 82.08.0283(4).....	6, 7, 8
RCW 82.08.0283(4)(a)	passim

RCW 82.08.0283(4)(b)	6, 13, 14
RCW 82.08.0283(4)(b)(iv)	6, 7
RCW 82.08.030	4, 20, 31
RCW 82.08.945	10
RCW 82.12.0275	27
RCW 82.12.0277	27
RCW 82.32.180	1, 4
RCW 82.32.300	29
Tenn. Code Ann. § 67-6-314	18
Wisc. Stat. § 77.51(11m)	15
Wisc. Stat. § 77.51(3pm)	15
Wisc. Stat. § 77.54(22b)	15

Regulations

WAC 458-20-18801.....	26, 39
WAC 458-20-18801(1)(f).....	26, 28
WAC 458-20-18801(1)(g)	36, 37, 39
WAC 458-20-18801(5)(e)	26, 27, 28, 29
Wisc. Admin. Code [Tax] § 11.08(1)	15
Wisc. Admin. Code [Tax] § 11.08(2)(c).....	16
Wisc. Admin. Code [Tax] § 11.08(4)(b).....	16
Wisc. Admin. Code [Tax] § 11.08(4)(c).....	16

Wisc. Admin. Code [Tax] § 11.08.(4)(d).....	16
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Treatises

Walter Hellerstein & John A. Swain, <i>Streamlined Sales and Use Tax</i> (2008/2009).....	passim
--	--------

Other Authorities

<i>Belmont Eye Clinic, Inc. v. Limbach</i> , 1988 WL 162216 (Ohio Bd. Tax App. 1988).....	25
<i>Blue Mountain Medical, Inc. v. Dep't of Revenue</i> , BTA Doc. No. 09-043 (2010).....	14
<i>Deaconess Med. Ctr. v. Dep't of Revenue</i> , BTA Nos. 85-186 & 86-29 (1987).....	27
Det. No. 07-0150, 27 WTD 114 (2008).....	10, 11, 15, 19
Det. No. 90-97, 9 WTD 195 (1990).....	37
Det. No. 98-112, 18 WTD 383 (1999).....	37
Dorland's Illustrated Medical Dictionary (29th ed. 2000).....	22, 33
Excise Tax Bulletin (ETB) 498.08.151.....	21, 23
Excise Tax Bulletin (ETB) 518.08.168.188.....	31, 32, 35
Final Bill Report on Substitute S.B. 5089, 60th Leg., Reg. Sess. (Wash. 2007).....	5
Final Legislative Report, 46th Leg. (Wash. 1980).....	35
House Journal, 46th Leg., Reg. Sess. (Wash. 1980).....	34
Sales and Use Tax Technical Bulletins § 13 (N.C. Dep't Revenue Dec. 1, 2008).....	17, 18
Stedman's Medical Dictionary (28th ed. 2006).....	22, 23, 32

<i>Swedish Hosp. Med. Ctr. v. Dep't of Revenue,</i> BTA No. 86-28 (1987).....	27
TB-63R (N.J. Div. Taxation Feb. 16, 2010)	17
Wash. St. Reg. 83-07-032	21
Wash. St. Reg. 92-05-065	26
Webster's Third New International Dictionary 1822 (2002).....	21, 22

I. INTRODUCTION

North Central Washington Respiratory Care Services, Inc. d/b/a Whidbey Home Medical Equipment (“Whidbey”) appeals from a summary judgment in favor of the Department of Revenue in Whidbey’s excise tax refund action it brought under RCW 82.32.180. Whidbey seeks a refund of retail sales taxes it paid for its retail sales of certain medical equipment during the period from January 2001 through September 2004, after it was assessed such taxes by the Department of Revenue. Whidbey bases its refund claim on certain provisions in the former and current versions of a retail sales tax exemption statute, RCW 82.08.0283, in effect during that period. Whidbey does not dispute that the taxes it paid were for retail sales of tangible personal property in Washington that would be subject to retail sales tax in the absence of any applicable statutory exemption. Retail sales of medical supplies, devices, and equipment in general neither were nor currently are exempt from retail sales tax. Whidbey does not argue that any statute other than RCW 82.08.0283 exempted the sales in question from retail sales tax. Thus, the dispute between Whidbey and the Department centers on the meaning and breadth of statutory language in the former and current versions of RCW 82.08.0283. Statutory tax exemptions are to be narrowly construed; taxation is the rule and exemption is the exception.

II. ISSUES PRESENTED

1. Is a medical device designed to rest on a flat surface, such as a nightstand, and connected by flexible tubing to a mask fitting over the patient's nose or nose and mouth "worn on or in the body" within the meaning of the current statutory definition of "prosthetic device" in RCW 82.08.0283(4)(a)?

2. In enacting a retail sales tax exemption for "prosthetic devices," did the Legislature in 1975 intend the exemption to extend broadly to any medical device designed to supplement, augment, or assist the function of any impaired, damaged, or defective body part or did the Legislature intend the exemption to extend only to devices designed to replace a missing body part?

3. In enacting a retail sales tax exemption for "orthotic devices," did the Legislature in 1980 intend the exemption to extend broadly to any medical equipment, device, or supplies designed to supplement any weakened bodily function or did the Legislature intend the exemption to extend only to orthopedic appliances or apparatuses?

III. STATEMENT OF THE CASE

Obstructive sleep apnea is a common sleep disorder characterized by recurrent episodes of partial or complete closure of the upper airway during sleep, resulting in temporary cessation of breathing. CP 8-9, 63. In

addition to causing daytime drowsiness, sleep apnea may contribute to high blood pressure, heart disease, stroke, motor vehicle accidents, and depression. CP 9-10, 63-64.

Continuous Positive Air Pressure devices and Bi-level Positive Air Pressure devices (collectively “CPAP devices”) are commonly prescribed by physicians to treat obstructive sleep apnea. CP 8, 65-66, 72. CPAP devices are connected by flexible tubing to a mask that fits tightly over the patient’s nose or nose and mouth. CP 11. CPAP devices force air at relatively low pressure through the mask into the patient’s upper airway. The air pressure levels the devices produce can be adjusted to the level determined by the physician to be sufficient to keep the patient’s upper airway open during sleep and thereby restore uninterrupted normal breathing. CP 11.

Whidbey made retail sales of CPAP devices in Washington during the period from January 2001 through September 2004. The Department’s Audit Division reviewed Whidbey’s business records for that period and assessed Whidbey for retail sales taxes it did not remit for those retail sales. CP 16-17. Whidbey appealed the assessment to the Department’s Appeals Division, arguing that the sales were exempt from retail sales tax under RCW 82.08.0283. CP 17. The Appeals Division rejected Whidbey’s arguments and denied its administrative appeal. CP 17.

Whidbey then paid the assessment and timely filed a de novo superior court refund action under RCW 82.32.180, seeking to recover the assessed taxes it had paid. CP 17.

Whidbey filed a motion for summary judgment in the superior court. CP 18-29. The Department opposed Whidbey's summary judgment motion and requested the court to enter a partial summary judgment in its favor as the nonmoving party. CP 33-54. The superior court denied Whidbey's motion and granted partial summary judgment to the Department for the taxes Whidbey paid for all periods before July 2004. CP 246-249. After Whidbey stipulated that during the period from July 2004 through September 2004, it "did not sell any battery-powered CPAP devices in Washington," the superior court granted summary judgment to the Department for those periods as well and dismissed Whidbey's refund action with prejudice. CP 250-251. Whidbey timely filed a notice of appeal to this Court. CP 252-253.

IV. ARGUMENT

The Legislature first enacted a retail sales tax exemption for "prosthetic devices" in 1975 as an amendment to former RCW 82.08.030 (which was recodified in 1980 as RCW 82.08.0283). In 2003 and 2004, the Legislature substantially revised RCW 82.08.0283 as part of lengthy enactments intended to bring Washington's sales and use tax system into

compliance with uniform definitions of terms required by the Streamlined Sales and Use Tax Agreement [the “Streamlined Agreement”]. *See* Laws of 2003, ch. 168, §§ 1, 409; Laws of 2004, ch. 153, § 101.¹ Those amendments became effective on July 1, 2004. Because the proper application of the current version of the statute is the only issue in this case with any ongoing significance for the parties, the Department will address that version of RCW 82.08.0283 first, even though a relatively small amount of the retail sales taxes in dispute in this case were governed by that version of the statute. The Department will then address the former versions of RCW 82.08.0283 in effect before July 1, 2004.

A. CPAP Devices Are Not “Prosthetic Devices” Under The Current Version Of RCW 82.08.0283 In Effect Since July 1, 2004.

RCW 82.08.0283(1) currently provides a retail sales tax exemption for “prosthetic devices” as follows:

The tax levied by RCW 82.08.020 shall not apply to sales of:

(a) 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;

.....

¹ The Legislature did not bring Washington’s sales and use tax system into full compliance with all the requirements of the Streamlined Agreement until it enacted further amendments in 2007. *See Sprint Int’l Commc’ns Corp. v. Dep’t of Revenue*, 154 Wn. App. 926, 940, 226 P.3d 253, *review denied*, 169 Wn.2d 1023 (2010); Laws of 2007, ch. 6; Final Bill Report on Substitute S.B. 5089, 60th Leg., Reg. Sess. (Wash. 2007).

RCW 82.08.0283(3) provides that the exemption in RCW 82.08.0283(1) “shall not apply to sales of durable medical equipment or mobility enhancing equipment.” RCW 82.08.0283(4) contains statutory definitions of “prosthetic device,” “durable medical equipment,” and “mobility enhancing equipment.”

1. A “prosthetic device” is worn on or in the body, while “durable medical equipment” is not.

The statutory definition of “prosthetic device” currently reads:

“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.

RCW 82.08.0283(4)(a) (*italics added*). The statutory definition of

“durable medical equipment” currently reads:

“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) (*italics added*).²

² This italicized language in RCW 82.08.0283(4)(b)(iv) was amended in 2007 to conform more precisely to the corresponding definition in the Streamlined Agreement. During the tax period at issue in this case, July through September 2004, the language in

The Legislature specifically stated in the 2003 act amending RCW 82.08.0283 that it intended “the provisions of chapters 82.08 and 82.12 RCW [to] be interpreted and applied consistently with the [Streamlined Agreement].” Laws of 2003, ch. 168, § 1(3) (codified as amended at RCW 82.02.210(3)).³ Therefore, the definitions of the terms “prosthetic device,” “durable medical equipment,” and “mobility enhancing equipment” currently in RCW 82.08.0283(4) must be interpreted and applied consistently with the definitions of those terms in the Streamlined Agreement for all tax periods at issue on or after July 1, 2004.

Under sections 316 and 327 of the Streamlined Agreement, every member State that enacts any product-based exemption must use common definitions of terms contained in the Library of Definitions in Appendix C of the Streamlined Agreement. CP 146-149.⁴ The Legislature enacted the

RCW 82.08.0283(4)(b)(iv) formerly read: “Does not work in or on the body.” See Laws of 2007, ch. 6, § 1101. Although section 1704 of the 2007 act states that section 1101 (along with many other sections) takes effect on July 1, 2008, this particular amendment of RCW 82.08.0283(4) seemed to be nothing more than a technical correction designed to more accurately reflect the Legislature’s overall intent in passing the 2003 and 2004 amendments to RCW 82.08.0283, with no intent to change the meaning of the statutory definition of “durable medical equipment.”

³ The same section of the 2003 act also explained that the Legislature intended to have Washington “join as a member state” in the Streamlined Agreement, to provide for “a simpler and more uniform sales and use tax structure among states that have sales and use taxes,” to bring our sales and use tax system into compliance with the Agreement “so that Washington may join as a member state and have a voice in the development and administration” of the Agreement, and to “substantially reduce the burden of tax compliance on sellers.” Laws of 2003, ch. 168, § 1(1) (codified at RCW 82.02.210(1)).

⁴ The entire Streamlined Agreement (as amended through September 5, 2008) is reprinted in Walter Hellerstein & John A. Swain, *Streamlined Sales and Use Tax* app. A at A-1 through A-120 (2008/2009). The current version of the Streamlined Agreement

current statutory definitions of “prosthetic device” and “durable medical equipment” in RCW 82.08.0283(4) to comply with these Streamlined Agreement requirements. Part II of the Streamlined Agreement’s Library of Definitions contains product definitions for health care matters.

The definition of “prosthetic device” in Part II reads as follows:

“Prosthetic device” means a replacement, corrective, or supporting device including repair and replacement parts for same *worn on or in the body* to:

- A. Artificially replace a missing portion of the body;
- B. Prevent or correct physical deformity or malfunction; or
- C. Support a weak or deformed portion of the body.

A member state may exclude any or all of the following from the definition of “prosthetic device”:

- A. Corrective eyeglasses;
- B. Contact lenses;
- C. Hearing aids; and
- D. Dental prosthesis.

A member state may limit the application of this definition by requiring a “prescription,” or limit an exemption based on Medicare or Medicaid payments or reimbursements.

CP 156-157 (italics added).⁵

The definition of “durable medical equipment” in Part II reads as follows:

(as amended through October 7, 2010) is available at <http://www.streamlinedsalestax.org/uploads/downloads/Archive/SSUTA/SSUTA%20As%20Amended%2010-7-10.pdf>.

⁵ The Legislature took advantage of the option under the Streamlined Agreement to limit the application of the definition of “prosthetic device” by requiring a prescription. See Walter Hellerstein & John A. Swain, *Streamlined Sales and Use Tax* ¶ 4.02[3][e] (2008/2009). That choice is reflected in RCW 82.08.0283(1)(a).

“Durable medical equipment” means equipment including repair and replacement parts for same, but does not include “mobility enhancing equipment,” which:

- A. Can withstand repeated use; and
- B. Is primarily and customarily used to serve a medical purpose; and
- C. Generally is not useful to a person in the absence of illness or injury; and
- D. *Is not worn in or on the body.*

A member state may limit its exemption to “durable medical equipment”:

- A. By requiring a prescription;
- B. Based on Medicare or Medicaid payments or reimbursement; or
- C. For home use.

A member state may limit the exemption using any combination of the above but in no case shall an exemption certificate be required.

CP 153 (*italics added*). The Streamlined Agreement further provides that a member state may exclude from the definition of “durable medical equipment” any of the following

for purposes enacting a product-based exemption:

1. Oxygen delivery equipment not worn in or on the body, including repair and replacement parts;
2. Kidney dialysis equipment not worn in or on the body, including repair and replacement parts; or
3. Enteral feeding systems not worn in or on the body, including repair and replacement parts.

CP 154. The Streamlined Agreement allows a member State to limit an exemption for

oxygen delivery equipment, kidney dialysis equipment, or enteral feeding systems using any combination of the following:

- a. By requiring a prescription;
- b. Based on Medicare or Medicaid payments or reimbursement; or
- c. For home use.

CP 154.⁶

2. Because most CPAP devices are not “worn on or in the body,” they do not qualify as “prosthetic devices.”

Under the plain language of both the statutory definition of “prosthetic device” in RCW 82.08.0283(4)(a) and the Streamlined Agreement definition of that term, the entire device must be designed to be “worn on or in the body” to satisfy those definitions. In a published determination, the Department confirmed the meaning of those definitions as applied to CPAP devices. Det. No. 07-0150, 27 WTD 114 (2008). The published determination stated that a device is not “worn on or in the body” merely if “part of it is attached to the body in some way for a period of time.” CP 162. The determination explained that, for purposes of the “prosthetic device” definition in RCW 82.08.0283(4)(a), a device satisfying the definition must be “designed to be wholly worn and portable, not partially floor-standing, or moved by virtue of dragging,

⁶ The Legislature took advantage of these options under the Streamlined Agreement to exempt sales of oxygen delivery equipment prescribed for an individual in RCW 82.08.0283(1)(c) and sales of kidney dialysis devices for human use pursuant to a prescription in RCW 82.08.945, while taxing sales of durable medical equipment generally. See Walter Hellerstein & John A. Swain, *Streamlined Sales and Use Tax* ¶ 4.02[3][e] (2008/2009).

wheels, or with the assistance of a separate device (e.g. a cart or intravenous stand), or partially resting on a nightstand.” *Id.*

Accordingly, the published determination held that most CPAP devices are taxable “durable medical equipment” under the current statute, not tax-exempt “prosthetic devices.” The taxpayer before the Department’s Appeals Division presented evidence of at least one CPAP device, however, that satisfied the statutory definition in RCW 82.08.0283(4)(a). It was a “rechargeable battery-powered” CPAP device that was “fully self-contained.” CP 162. Unlike other CPAP devices, it did not “rest on a nightstand.” Instead, it could be “worn completely on the body by wrapping it around the user’s neck and resting on the shoulders like a soft airline pillow.” *Id.* The device was “designed with travelers in mind for sleeping situations, such as on planes, trains, busses, etc., which require the unit to be worn completely on the body.” *Id.* The determination concluded that this CPAP model satisfied the statutory definition, and if there were other models with similar features, they too would satisfy the “prosthetic device” statutory definition. *Id.*

Whidbey criticizes the distinction explained in Det. No. 07-0150 between most CPAP models, which are taxable “durable medical equipment,” and CPAP models designed to be worn completely on the body, which are tax-exempt “prosthetic devices,” see Br. of Appellant at

12-15,⁷ but this distinction is required by the Streamlined Agreement. The Governing Board of the Streamlined Agreement has adopted Rule 327.3 to further refine the defined healthcare terms in Part II of the Streamlined Agreement’s Library of Definitions. The rule (which is part of the Streamlined Agreement itself) approves a list of healthcare products placed “within the correct defined healthcare term included in Part II of the Library of Definitions.” The rule provides that each member State “shall utilize the defined terms *and the placement of products within each of the defined terms* if a member state adopted any of the healthcare definitions” contained in the Library of Definitions. (Italics added.) The rule further provides that where a particular product is not included in the list, member states must “use the list as guidance in placement of products within the defined terms.”⁸

The list to which Rule 327.3 refers specifically addresses the proper placement of CPAP devices within the defined healthcare terms under the Streamlined Agreement. The list distinguishes between CPAP

⁷ Contrary to Whidbey’s characterization of the Department’s argument in the superior court, the Department did not ask the court to “judicially revise” the statutory language or “create” a requirement that the Legislature did not enact. See Appellant’s Br. at 12-14. Rather, the Department merely asked the court to enforce the plain language of the statutory definition of “prosthetic device” in RCW 82.08.0283(4)(a) and of the identical Streamlined Agreement definition. CP 53.

⁸ Rule 327.3 is reprinted in Walter Hellerstein & John A. Swain, *Streamlined Sales and Use Tax* app. F at F-22 through F-23 (2008/2009). Rule 327.3 also is available at <http://www.streamlinedsalestax.org/uploads/downloads/Rules/Individual%20Rules/Rule%20327.3%20Library%20of%20Definitions%20-%20Healthcare.pdf>.

models that are “not worn” (which are within the definition of “durable medical equipment,”) and CPAP models that are “worn” (which are within the definition of “prosthetic device”).⁹

3. Adopting Whidbey’s proposed interpretation of “worn on or in the body” would result in Washington misclassifying CPAP devices and many other medical devices, causing Washington to be out of compliance with the Streamlined Agreement.

Rule 327.3 and this list show conclusively that Whidbey’s proposed application of the words “worn on or in the body” in RCW 82.08.0283(4)(a) to CPAP devices is incorrect. Whidbey argues that all CPAP devices are “worn on or in the body” because the patient “wears a specially fitted mask” that is “connected by tubing” to the CPAP device “that supplies positive air pressure[.]” Br. of Appellant at 15. Thus, according to Whidbey, all CPAP devices are tax-exempt “prosthetic devices,” not “durable medical equipment” under the Streamlined Agreement’s definitions of those terms adopted by the Legislature in RCW 82.08.0283(4)(a) and (b) because all CPAP devices are connected to a mask worn by the patient.

⁹ The approved list of healthcare products is reprinted in Walter Hellerstein & John A. Swain, *Streamlined Sales and Use Tax* app. F at F-191 through F-210 (2008/2009). The approved list is also available at http://www.streamlinedsalestax.org/uploads/downloads/Appendix_L_AD06002_Health_Care_List_June_2002-2006.pdf and at [http://www.streamlinedsalestax.org/uploads/downloads/Appendix_M_Health_Care_Items_Addendum_List_2_5_07_\(2\).pdf](http://www.streamlinedsalestax.org/uploads/downloads/Appendix_M_Health_Care_Items_Addendum_List_2_5_07_(2).pdf).

That cannot be a correct interpretation of the statutory language “worn on or in the body.”¹⁰ It would lead to misclassifying not only most CPAP devices under chapter 82.08 RCW and the Streamlined Agreement, but also many other medical devices, including anesthesia machines, apnea monitors, blood pressure equipment, traction equipment, ultrasound equipment, anesthesia ventilators, continuous passive motion devices, parenteral pumps, oxygen delivery equipment, and kidney dialysis machines, all of which are attached to the patient’s body but clearly are not “prosthetic devices” under the Streamlined Agreement.

If this Court were to adopt Whidbey’s proposed interpretation of RCW 82.08.0283(4)(a) and (b), Washington would suddenly become substantially out of compliance with the Streamlined Agreement, defeating the Legislature’s basic purpose in passing the 2003, 2004, and 2007 acts designed to bring Washington into compliance with that Agreement. To do so would ignore the Legislature’s expressed intent in RCW 82.02.210(3) that Washington’s statutes “relating to the administration and collection of state and local sales and use taxes be interpreted and applied consistently with” the Streamlined Agreement.

¹⁰ The Washington State Board of Tax Appeals recently rejected another CPAP provider’s argument nearly identical to Whidbey’s concerning this phrase in RCW 82.08.0283(4)(a). See *Blue Mountain Medical, Inc. v. Dep’t of Revenue*, BTA Doc. No. 09-043 (2010), at 4-5, 23-25, 29-32.

4. As required by the Streamlined Agreement, other member States also distinguish between CPAP devices that are worn on the body and those that are not.

Several other States that are members of the Streamlined Agreement have issued official interpretations applying the Streamlined Agreement definitions of “durable medical equipment” and “prosthetic devices” to CPAP devices. Consistent with Det. No. 07-0150 and the list to which Rule 327.3 of the Streamlined Agreement refers, those States distinguish between CPAP devices that are worn on the body and CPAP devices that are not.

For example, the Wisconsin Department of Revenue has adopted detailed rules implementing the Streamlined Agreement.¹¹ Its rule concerning durable medical equipment, mobility-enhancing equipment, and prosthetic devices explains: “Certain items may qualify either as ‘durable medical equipment’ or a ‘prosthetic device,’ depending on whether or not the item is worn in or on the body.” Wisc. Admin. Code [Tax] § 11.08(1).¹² The rule lists examples of “durable medical equipment” that are exempt in Wisconsin if they are “purchased for use in a person’s home[.]” Included in the list are apnea monitors, blood

¹¹ As permitted by the Streamlined Agreement, Wisconsin exempts from retail sales tax sales of “durable medical equipment” if “for use in a person’s home” and sales of “prosthetic devices” if “used for a human being.” Wisc. Stat. § 77.54(22b). “Durable medical equipment” is not “worn on the body.” “Prosthetic device” is “worn on the body.” Wisc. Stat. § 77.51(3pm), (11m).

¹² Available at <http://legis.wisconsin.gov/rsb/code/tax/tax011.pdf>.

pressure machines and cuffs, dialyzers, oxygen concentrators and regulators, respirators and respiratory bags, traction equipment, ultrasound equipment, and anesthesia ventilators, all of which are attached to the patient's body when in use. *Id.* § 11.08(2)(c).

The Wisconsin rule then addresses “prosthetic devices.” It explains:

A device is “worn in or on the body” if the device is implanted or attached so that it becomes part of the body or if it is carried by the body and does not hinder the mobility of the individual. *Items that are attached to the body, but are either stationary or placed on a pole, cart or other device that makes them portable are durable medical equipment and not prosthetic devices.*

Id. § 11.08(4)(b) (italics added). The rule then lists many examples of prosthetic devices, which do not include CPAP devices. *Id.* § 11.08(4)(c). Finally, subsection (4) of the rule then lists “examples of items which *if worn in or on the body*” are “exempt as prosthetic devices.” *Id.* § 11.08(4)(d) (italics added). These items include “CPAP machines.”

New Jersey, another Streamlined Agreement member State, has a similar retail sales tax exemption scheme.¹³ The New Jersey Department of Treasury, Division of Taxation has issued a technical bulletin explaining health care exemptions and giving examples of how they apply.

¹³ Like Wisconsin, New Jersey exempts both “prosthetic devices” and “durable medical equipment for home use.” N.J. Stat. Ann. § 54:32B-8.1.

TB-63R (N.J. Div. Taxation Feb. 16, 2010).¹⁴ The bulletin first explains: “Prosthetic devices are exempt from sales tax.” It then lists examples of “items exempt as prosthetic devices.” The list includes “Apnea monitors (C.P.A.P. – worn).” *Id.* at 4. The bulletin then explains: “Durable medical equipment is only exempt when sold for home use.” It then lists examples of “durable medical equipment” exempt for home use. The list includes “Apnea monitors (C.P.A.P. – not worn).” *Id.* at 5-6. The list also includes blood pressure machines and cuffs, oxygen concentrators, regulators, tents and face masks, traction equipment, and ventilators. *Id.* at 6.

North Carolina, another Streamlined Agreement member State, also has a similar retail sales tax exemption scheme.¹⁵ As in New Jersey, the North Carolina Department of Revenue has issued a technical bulletin explaining health care exemptions and giving examples of how they apply. Sales and Use Tax Technical Bulletins § 13 (N.C. Dep’t Revenue Dec. 1, 2008).¹⁶ The bulletin first explains that prosthetic devices “are exempt regardless of whether they are sold on prescription.” It then lists examples of items “exempt from tax as prosthetic devices.” The list includes

¹⁴ Available at <http://www.state.nj.us/treasury/taxation/pdf/pubs/tb/tb63.pdf>.

¹⁵ Similar to Wisconsin and New Jersey, North Carolina exempts both “prosthetic devices” and “durable medical equipment sold on prescription.” N.C. Gen. Stat. § 105-164.13(12). “Durable medical equipment” is not “worn in or on the body.” “Prosthetic device” is “worn on or in the body.” N.C. Gen. Stat. § 105-164.3(8b), (30b).

¹⁶ Available at <http://www.dorncc.com/practitioner/sales/bulletins/section13.pdf>.

“C.P.A.P. – worn.” *Id.* at 1. The bulletin then explains that durable medical equipment is exempt from tax “when sold on prescription” and lists examples of “durable medical equipment.” *Id.* at 4. The list includes “C.P.A.P. – not worn” and “continuous positive airway pressure (CPAP) devices.” *Id.* at 5. The list also includes anesthesia machines, anesthesia ventilators, apnea monitors, blood pressure equipment, kidney dialysis machines and associated parts, oxygen concentrators, regulators, systems, and tents, oxygen delivery/respiratory equipment, passive motion exercise devices, respiratory equipment, traction equipment, ultrasound equipment, and ventilators. *Id.* at 4-7.

Tennessee, another Streamlined Agreement member State, also has a similar retail sales tax exemption scheme.¹⁷ The Tennessee Department of Revenue has issued a healthcare product list clarifying the proper placement of healthcare products within the Streamlined Agreement definitions. Healthcare Product List (Tenn. Dep’t Revenue Jan. 2008).¹⁸ In the Tennessee guidance document, “C.P.A.P. – Not Worn” is listed as taxable “durable medical equipment,” with the caveat that it is exempt “if sold for home use and dispensed with a prescription.” “C.P.A.P. – Worn” is listed as an exempt “prosthetic device,” with no prescription required.

¹⁷ Similar to Wisconsin, New Jersey, and North Carolina, Tennessee exempts both “prosthetic devices for human use” and “durable medical equipment for home use sold pursuant to a prescription for human use.” Tenn. Code Ann. § 67-6-314.

¹⁸ Available at <http://www.tn.gov/revenue/streamlined/healthcarelist0108.pdf>.

The same guidance document also lists anesthesia machines, anesthesia ventilators, apnea monitors, blood pressure equipment, continuous passive motion devices, multiple use dialysers, kidney dialysis machines and associated parts, oxygen delivery/respiratory equipment, parenteral pumps, traction equipment, and ultrasound equipment as “durable medical equipment.

Whidbey concedes that it sold no models of CPAP devices on or after July 1, 2004 that were the same as or similar to the battery-powered CPAP device described in Det. No. 07-0150, which was designed to be worn completely on the body of the patient. CP 250. Therefore, Whidbey is entitled to no relief for any sales of CPAP devices on or after July 1, 2004. The superior court correctly granted summary judgment to the Department on this issue.

B. CPAP Devices Were Neither “Prosthetic Devices” Nor “Orthotics Devices” Under The Substantially Different Versions Of RCW 82.08.0283 In Effect Before July 1, 2004.

Before the Legislature’s 2003 and 2004 acts became effective on July 1, 2004, the former versions of RCW 82.08.0283 were substantially different than the current version. At the beginning of the tax periods in dispute, in January 2001, the statute, as last amended by Laws of 1998, ch. 168, § 2, read in part: “The tax levied by RCW 82.08.020 shall not apply to sales of . . . prosthetic devices and the components thereof; . . . [and]

orthotic devices prescribed for an individual by a person licensed under chapters 18.25, 18.57, or 18.71 RCW[.]”¹⁹ Whidbey argues that CPAP devices were tax-exempt both as “prosthetic devices” and as “orthotic devices” under the former versions of RCW 82.08.0283. Br. of Appellant at 5-7, 10-11. To the contrary, CPAP devices were neither “prosthetic devices” nor “orthotic devices,” as the Legislature used those undefined terms in the former versions of the statute.

1. CPAP devices were not “prosthetic devices” under the former versions of RCW 82.08.0283.

No CPAP devices were tax exempt “prosthetic devices” under the former versions of RCW 82.08.0283 in effect until July 1, 2004. The Legislature first enacted a retail sales tax exemption for prosthetic devices in 1975, by adding a new subsection (30) to former RCW 82.08.030 exempting sales of “insulin, prosthetic devices, and medically prescribed oxygen.” Laws of 1975, 1st Ex. Sess., ch. 291, § 10.²⁰ None of those terms were defined in the original 1975 act.

¹⁹ Four months into the tax periods at issue, the Legislature amended the former version of the statute, with an immediate effective date of April 19, 2001. Laws of 2001, ch. 75, § 1. The amendment merely added chapter 18.22 RCW to the list of statutes in the exemption for orthotic devices. It had the effect of exempting orthotic devices prescribed by licensed podiatrists, in addition to those prescribed by chiropractors, osteopaths, and physicians. The amendment had no apparent effect on any of the issues presented in this case.

²⁰ In 1980, the Legislature repealed former RCW 82.08.030 and recodified the exemption in former subsection (30) for sales of insulin, prosthetic devices, and medically prescribed oxygen as a separate statutory section, which the Code Revisor numbered as RCW 82.08.0283. *See* Laws of 1980, ch. 37, §§ 48, 81. The 1980 act stated

On July 8, 1975, a few days after the law took effect, the Department issued Excise Tax Bulletin (ETB) 498.08.151. CP 99. The Department there stated that for purposes of the recently enacted exemption, “prosthetic devices” were “artificial substitutes which replace missing parts of the body, such as a limb, bone, joint, eye, tooth, or other internal or external organ or part thereof.” *Id.*²¹ The Department further stated that the term did not include “devices or apparatus used primarily to assist or supplement the functioning of existing parts of the body[.]” *Id.* Such a contemporaneous administrative construction of a statute is entitled to great weight. *In re Sehome Park Care Ctr.*, 127 Wn.2d 774, 779-80, 903 P.2d 443 (1995).

The Department’s contemporaneous administrative construction of “prosthetic device” in the 1975 act was consistent with the commonly understood meaning of those words as reflected in both general dictionaries and medical dictionaries. The general dictionary usually used as a reference by the Washington courts²² defines “prosthetic” as “of or relating to prosthesis or prosthetics < ~ hand > < ~ research >.” Webster’s Third New International Dictionary 1822 (2002). It defines

that “[t]his separation shall not change the meaning of any of the exemptions or deductions involved.” *Id.* § 1.

²¹ See also Wash. State Register 83-07-032 (incorporating same definition of “prosthetic device” into WAC 458-20-18801).

²² See, e.g., *Deaconess Med. Ctr. v. Dep’t of Revenue*, 58 Wn. App. 783, 788, 795 P.2d 146 (1990).

“prosthesis” as “an artificial device to replace a missing part of the body (as a suction socket to replace a lower leg or a dental restoration).” *Id.* It defines “prosthetics” as “the surgical and dental specialties concerned with the artificial replacement of missing parts.” *Id.* Those definitions reflect the ordinary meaning of the term “prosthetic devices” and support the Department’s argument that CPAP devices were not “prosthetic devices” under the former versions of RCW 82.08.0283.²³

Standard medical dictionaries contain similar definitions of those words. Dorland’s Illustrated Medical Dictionary (29th ed. 2000) defines “prosthetic” as “serving as a substitute; pertaining to the use or application of prostheses.” *Id.* at 1472. It defines “prosthesis” as “an artificial substitute for a missing body part, such as an arm or leg, eye or tooth, used for functional or cosmetic reasons, or both.” *Id.* It defines “prosthetics” as “the field of knowledge relating to prostheses, their design, use, etc.,” and “prosthetist” as “a person skilled in prosthetics and practicing its application in individual cases.” *Id.* CP 118.

A second medical dictionary also contains similar definitions. Stedman’s Medical Dictionary (28th ed. 2006) defines “prosthetic” as “[r]elated to a prosthesis or an artificial part.” *Id.* at 1578. It defines

²³ *Cf.* RCW 18.200.010(9) (defining “prosthesis” in part as an “artificial medical device” that is “used to replace a missing limb, appendage, or other external human body part” for purposes of licensing persons offering “prosthetic services” to the public).

“prosthesis” as a “[f]abricated substitute used to assist a damaged or replace a missing body part; or to augment or stabilize a hypoplastic [underdeveloped] structure.” *Id.* It defines “prosthetics” as “[t]he art and science of making and adjusting artificial parts of the human body,” and “prothetist” as “one skilled in constructing and fitting prostheses.” *Id.* CP 113.

In *Home Med. Sys., Inc., v. S.C. Dep’t of Revenue*, 382 S.C. 556, 558-59, 563-65, 677 S.E.2d 582 (2009), the South Carolina Supreme Court recently held specifically that CPAP devices were not “prosthetic devices” under that state’s statute exempting “medicine and prosthetic devices sold by prescription” from retail sales tax. Like the former versions of RCW 82.08.0283 in effect before July 1, 2004, the South Carolina exemption for “prosthetic devices,” which contained no statutory definition of the term, was enacted in the 1970s. In 1978, apparently shortly after the exemption was enacted, the South Carolina revenue department adopted a rule defining both “medicine” and “prosthetic device.” 382 S.C. at 563 & 564 n.6. The latter rule definition was “an artificial device to replace a missing part of the body.” *Id.* at 563.²⁴

The court held that the South Carolina revenue department’s rule “reasonably defines ‘prosthetic devices.’” *Id.* at 565. The court agreed with

²⁴ In substance, that South Carolina rule definition was the same as the definition of “prosthetic devices” the Department adopted in ETB 498.08.151 in 1975. *See* CP 99.

the revenue department's observation that many of the definitions for "prosthetic devices" and "prosthesis" the taxpayer cited "have as a primary definition one that is consistent with" the revenue department's rule definition. For example, the court noted, one such primary definition is "an artificial replacement of a body part." *Id.* The court reasoned that although "one current, acceptable definition in the medical community is a broad one" encompassing not only a device to "replace a missing part of the body," but also a device "to replace missing functionality," that was no reason to reject the revenue department's longstanding and reasonable rule definition. *Id.* Finally, the court noted that its holding was consistent with the statutory construction principle that tax exemptions should be "strictly construed against the taxpayer." *Id.*

Quoting from certain dictionaries and a Wikipedia entry, Whidbey argues that the "ordinary meaning of a prosthetic device" includes devices that merely "supplement, augment, or assist" the function of "an impaired, damaged, or defective body part." Br. of Appellant at 6-7. All those quotations demonstrate, however, is that the term in other contexts is capable of being used in a broader sense than its most common meaning. *See Dental Soc'y of N.Y. v. N.Y. State Tax Comm'n*, 110 A.D.2d 988, 487 N.Y.S.2d 894, 897 ("The ordinary, commonsense meaning of prosthesis is an artificial device used to replace a missing part

of the body[.]”), *aff’d*, 66 N.Y.2d 939, 489 N.E.2d 766 (1985) (affirming “for the reasons stated in the memorandum of the Appellate Division”); *Belmont Eye Clinic, Inc. v. Limbach*, 1988 WL 162216 (Ohio Bd. Tax App. 1988) (construing the phrase “other prosthetic devices for humans” in Ohio retail sales tax exemption statute consistent with the common definition of “prosthesis” to mean “devices which serve as an artificial substitute for a missing body part”).

Moreover, the Legislature’s subsequent amendment of RCW 82.08.0283 in 1980 (discussed in the next section of this brief) to add “orthotic devices” to the list of exempt items refutes Whidbey’s argument that the existing exemption for “prosthetic devices” enacted in 1975 already extended broadly to any device that “supplements, augments, or assists” the function of “an impaired, damaged, or defective body part.” Whidbey’s proposed interpretation of “prosthetic devices” in the 1975 act obviously would have included orthopedic appliances or apparatuses used to support, align, prevent, or correct deformities or to improve the function of movable parts of the body (the ordinary meaning of “orthotic devices”). The Legislature, however, “does not engage in unnecessary or meaningless acts,” and courts “presume some significant purpose or objective in every legislative enactment.” *Simpson Inv. Co. v. Dep’t of Revenue*, 141 Wn.2d 139, 159, 3 P.3d 741 (2000). The Legislature could

not have intended the exemption for “prosthetic devices” in the former versions of RCW 82.08.0283 to have the broad reach Whidbey claims.

Whidbey argues that WAC 458-20-18801(5)(e) stated that sutures, pacemakers, hearing aids, and kidney dialysis machines were examples of prosthetic devices because they “either replace missing body parts or assist dysfunctional ones.” Br. of Appellant at 8 n.3. In 1992, the Department amended WAC 458-20-18801 for the last time before the Legislature substantially amended RCW 82.08.0283 in 2003. Wash. State Register 92-05-065. In adopting those amendments, the Department made a minor change in the definition of “prosthetic devices” in subsection (1)(f), replacing the word “physically” with the word “generally” in that definition. The Department also added new language in subsection (5)(e).²⁵

The Department amended the rule in 1992 in the aftermath of litigation initiated by several hospitals in two Washington State Board of

²⁵ The Department amended that subsection as follows:

The retail sales tax does not apply to sales of prosthetic devices, orthotic devices prescribed by physicians, osteopaths, or chiropractors, nor to sales of ostomic items (~~(, medically prescribed oxygen, or hearing aids)~~). (See RCW 82.08.0283.) Sutures, pacemakers, hearing aids, and kidney dialysis machines are examples of prosthetic devices. Drainage devices which are particularly prescribed for use on or in a specific patient are exempt from sales or use taxes as prostheses because they either replace missing body parts or assist dysfunctional ones, either on a temporary or permanent basis. A prosthetic device can include a device that is implanted for cosmetic reasons. Hearing aids are also exempt when dispensed or fitted by a person licensed under chapter 18.35 RCW. A heart-lung machine used by a hospital in its surgical department is not an exempt prosthetic device.

Tax Appeals cases, *Swedish Hosp. Med. Ctr. v. Dep't of Revenue*, BTA No. 86-28 (1987), and *Deaconess Med. Ctr. v. Dep't of Revenue*, BTA Nos. 85-186 & 86-29 (1987). In that litigation, the hospitals disputed the Department's applications of the retail sales and use tax exemptions in earlier versions of RCW 82.08.0281, RCW 82.12.0275, RCW 82.08.0283, and RCW 82.12.0277 to various medical substances, supplies, and equipment. One of the two cases ultimately culminated in a published decision by this Court, *Deaconess Med. Ctr. v. Dep't of Revenue*, 58 Wn. App. 783, 795 P.2d 146 (1990). In that decision, this Court unanimously reversed a Thurston County Superior Court order that had held heart-lung machines qualified as "prosthetic devices" under an earlier version of RCW 82.08.0283. This Court reversed the superior court on that issue without resolving the meaning of the term "prosthetic device" in the statute, describing the parties' dispute on that point as "a war of conflicting dictionary definitions." 58 Wn. App. at 787.

The 1992 amended version of WAC 458-20-18801(5)(e) actually made the ambiguous statement about "replac[ing] missing body parts or assist[ing] dysfunctional ones" only in connection with "drainage devices," a vague reference to an unspecific category of medical devices. That portion of the rule gave no explanation for why it listed sutures, pacemakers, hearing aids, and kidney dialysis machines as "examples of

prosthetic devices.” Aside from those statements in subsection (5)(e) about other medical devices, Whidbey can point to nothing else in the rule even remotely suggesting that the Department ever regarded CPAP devices as prosthetic devices. Moreover, such a conclusion would be inconsistent with the rule’s definition of “prosthetic device” in subsection (1)(f).

Whether the Department correctly applied the statutory exemption for “prosthetic devices” to every medical device listed in WAC 458-20-18801(5)(e) when it amended the rule in 1992 or to other medical devices described in the Department’s determinations cited by Whidbey is not the proper issue before the Court. If the Department erred in treating some of those other devices as if they were exempt “prosthetic devices,” the appropriate response is not to extend that error to every other medical device as well. *See Medic House, Inc. v. Director of Revenue*, 799 S.W.2d 80, 82-83 (Mo. 1990) (“A taxpayer is not relieved of an obligation to pay taxes simply because the Director has failed to assess the tax correctly against other taxpayers. . . . [T]he issue on review is not whether the Director has been consistent, but whether the items in question are subject to taxation.”). To so hold would undermine the fundamental structure of our government and would elevate administrative agencies above legislative bodies. If an agency may alter

a statute merely by adopting a rule, then agencies may commandeer the authority of the Legislature to enact laws. Refusing to extend the ultra vires application of the law would be the appropriate course for this Court in such circumstances. See *Dep't of Ecology v. Theodoratus*, 135 Wn.2d 582, 598, 957 P.2d 1241 (1998). Stated simply, two wrongs do not make a right.

If WAC 458-20-18801(5)(e) created extra-statutory retail sales tax exemptions, as Whidbey seems to argue, then to that extent the rule was invalid. “[A]n agency may only do that which it is authorized to do by the Legislature.” *Moore v. Whitman Cy.*, 143 Wn.2d 96, 100, 18 P.3d 566 (2001). “[T]he department is without authority to amend the statute by regulation. It cannot properly carve out an exemption . . . when the statute makes no such exemption.” *Coast Pac. Trading, Inc. v. Dep't of Revenue*, 105 Wn.2d 912, 917, 719 P.2d 541 (1986) (quoting *Budget Rent-A-Car of Washington-Oregon, Inc. v. Dep't of Revenue*, 81 Wn.2d 171, 176, 500 P.2d 764 (1972)).²⁶ The statutory authority the Department cited when it amended the rule in 1992 was RCW 82.32.300. By its very terms, that statute authorized the Department to adopt rules “not inconsistent” with chapter 82.08 RCW, among other tax statutes.

²⁶ See also *Tesoro Ref. & Mkt. v. Dep't of Revenue*, 135 Wn. App. 411, 426, P.3d 368 (2006), *aff'd* 164 Wn.2d at 310 (2008); *Mayflower Park Hotel v. Dep't of Revenue*, 123 Wn. App. 628, 633, 98 P.3d 534 (2004), *review denied*, 154 Wn.2d 1022 (2005).

The issue presented for tax periods before July 2004 is whether CPAP devices were “prosthetic devices” within the Legislature’s intended meaning of that term when it enacted the exemption statute in 1975. The Legislature intended to create a limited exemption in for “prosthetic devices,” extending only to artificial substitutes that replace missing parts of the body.

A CPAP device cannot reasonably be characterized as an artificial substitute for any body part. Bearing in mind the well-established principle that exemption provisions in tax statutes should be narrowly and strictly construed, *see, e.g., Deaconess Med. Ctr. v. Dep’t of Revenue*, 58 Wn. App. 783, 788, 795 P.2d 146 (1990), this Court should hold that CPAP devices were not “prosthetic devices” under the former versions of RCW 82.08.0283 in effect until July 1, 2004. The superior court correctly granted summary judgment to the Department on this issue.

2. CPAP devices were not “orthotic devices” under the former versions of RCW 82.08.0283.

No CPAP and Bi-PAP devices were tax exempt “orthotic devices” under the former versions of RCW 82.08.0283 in effect before July 1, 2004. The Legislature first enacted a retail sales tax exemption for orthotic devices in 1980, during the same legislative session that it recodified as RCW 82.08.0283 the exemption for sales of insulin,

prosthetic devices, and medically prescribed oxygen in former RCW 82.08.030. The Legislature included orthotic devices and ostomic items as newly exempt items by amending RCW 82.08.0283 as follows: “The tax levied by RCW 82.08.020 shall not apply to sales of insulin((?)); prosthetic and orthotic devices((?)) prescribed for an individual by a person licensed under chapters 18.25, 18.57, or 18.71 RCW; ostomic items; and medically prescribed oxygen.” Laws of 1980, ch. 86, § 1.²⁷ Neither “orthotic devices” nor “ostomic items” were defined in the 1980 act.

On July 31, 1980, less than two months after the broadened exemption statute took effect, the Department issued Excise Tax Bulletin (ETB) 518.08.168.188. CP 103. The Department there stated that for purposes of the recently enacted exemption, “orthotic devices” were “fitted surgical apparatus designed to activate or supplement a weakened or atrophied limb or function.” *Id.* The Department further stated that the term included “braces, collars, casts, splints, and other specially fitted apparatus, and parts thereof (metal pieces, screws, bolts, etc.)” and that the devices “must be prescribed by a physician, osteopath, or chiropractor.” *Id.* The Department further stated that the term did not include “such durable medical equipment as wheelchairs, crutches,

²⁷ Chiropractors, osteopaths, and physicians were licensed under chapters 18.25, 18.57, and 18.71 RCW.

walkers, canes, elastic stockings, arch pads, belts, supports, bandages, and the like, whether prescribed or not.” *Id.*

The Department’s contemporaneous administrative construction of “orthotic devices” in the 1980 act was consistent with the commonly understood meaning of those words as reflected in medical dictionaries. Stedman’s Medical Dictionary (28th ed. 2006) reflects that the ordinary meaning of “orthotic device” is a medical device related to the musculoskeletal system, not the respiratory system as Whidbey argues. CP 110-112. This medical dictionary defines “orthotics” as “[t]he science concerned with the making and fitting of *orthopaedic appliances*,” and “orthotist” as “[a] maker and fitter of *orthopaedic appliances*.” *Id.* at 1384 (italics added). It defines “orthosis” as “[a]n external *orthopaedic appliance*, e.g., a *brace* or *splint*, that prevents or assists movement of *the spine or limbs*.” *Id.* (italics added). It defines “orthopaedic” or “orthopedic” as “relating to orthopedics” and “orthopedics” as “[t]he medical specialty concerned with the preservation, restoration, and development of form and function of *the musculoskeletal system, extremities, spine, and associated structures* by medical, surgical, and physical methods.” *Id.* at 1383 (italics added).

Dorland’s Illustrated Medical Dictionary (29th ed. 2000) contains similar definitions. CP 115-117. It defines “orthotic” as “serving to

protect or to restore or improve function; *pertaining to the use or application of orthoses.*” *Id.* at 1281 (italics added). It defines “orthosis” as “an *orthopedic appliance or apparatus* used to support, align, prevent, or correct deformities or to improve the function of movable parts of the body. See also *brace* and *splint.*” *Id.* at 1280 (italics added).²⁸ It defines “orthotics” as “the field of knowledge relating to orthoses and their use,” and “orthotist” as “a person skilled in orthotics and practicing its application in individual cases.” *Id.* at 1281. It defines “orthopedic” as “pertaining to the correction of deformities of *the musculoskeletal system*; pertaining to orthopedics.” *Id.* at 1280 (italics added).

The Department’s contemporaneous administrative construction of the term “orthotic devices” also was consistent with the legislative history of the 1980 amendment to RCW 82.08.0283. The amendment was contained in House Bill 1841. On the House floor, immediately before the vote on final passage of the bill, Representative Sommers, the Democratic co-chair of the Revenue Committee, directed a point of inquiry to Representative Craswell, the Republican co-chair of the

²⁸ Whidbey selectively quotes only a portion of this dictionary definition of “orthosis,” eliminating the words “an orthopedic appliance or apparatus,” to suggest that this dictionary defines “orthotic device” as including any device that “supports,” “aligns,” or “improves the function of” any part of the body. See Br. of Appellant at 10-11. Contrary to Whidbey’s misleading argument, the reference in the dictionary definition of “orthosis” to “movable parts of the body,” when read in context, obviously refers only to the spine and limbs.

Revenue Committee. The point of inquiry concerned the intended meaning of “orthotic device”:

Ms. Sommers: “For the purpose of clarifying the definition and to recognize the work of the Revenue Committee did on this definition, would you please tell us what is an orthotic device? Could recreational equipment, such as football helmets and pads, be considered an orthotic device?”

Ms. Craswell: “An orthotic device, as defined by the Revenue Committee, is intended to mean *an appliance or apparatus used to support, align or correct deformities or to improve the function of moveable [sic] parts of the body. For example, a brace used to align or relieve a low-back injury would be an orthotic device.* As far as recreation equipment, such as football helmets, qualifying under this definition, no, they couldn’t. It would have to be something which is prescribed for a particular impairment or injury.”

House Journal, 46th Leg., Reg. Sess., at 548 (Wash. 1980) (italics added).
CP 134-136.

The description of the term “orthotic device” by Representative Craswell as “an appliance or apparatus used to support, align or correct deformities or to improve the function of [movable] parts of the body” is essentially identical to the definition of “orthosis” in Dorland’s Illustrated Medical Dictionary. This is not merely coincidental. The Legislature intended to adopt the ordinary meaning of the term “orthotic device,” as reflected in medical dictionaries at the time the statute was enacted.

The 1980 Final Legislative Report (prepared by legislative staff) also contained a description of House Bill 1841. The report stated that

the existing sales and use tax statutes “grant tax exemptions for sales of insulin, prosthetic devices, and medically prescribed oxygen,” but “[o]rthotic and ostomic devices are not given any exemption.” The report then stated that an “orthotic device” is “a medical device used to support or control a part of the body (such as braces, crutches, and corsets).” Final Legislative Report, 46th Leg. (Wash. 1980), at 42. CP 130-132.²⁹ None of the examples listed in the report were respiratory or sleep therapy devices.

CPAP devices are not orthopedic appliances or apparatuses. CPAP devices treat obstructive sleep apnea, keeping the patient’s upper airway open during sleep and thereby restoring uninterrupted normal breathing. They do not correct deformities or improve the function of the patient’s spine or limbs. Therefore, they were not exempt from retail sales tax as “orthotic devices,” under the Legislature’s intended meaning of that term in the former versions of RCW 82.08.0283 in effect until July 1, 2004.

Whidbey offers no support for its argument that CPAP devices were “orthotic devices” under the former versions of the statute other

²⁹ The bill report mentioned “crutches” as an example of an “orthotic device.” However, the Department’s contemporaneous interpretation of the statute in Excise Tax Bulletin 518.08.168.188 and later in WAC 458-20-18801(1)(g) excluded crutches, among other items, from the meaning of the statutory term, and the Legislature never rejected that contemporaneous administrative construction.

than to quote out of context a few isolated words from the definition of “orthotic devices” in WAC 458-20-18801(1)(g). See Br. of Appellant at

11. The rule definition read:

“Orthotic devices” are apparatus 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.

Whidbey seems to argue that any medical equipment, device, or supplies that somehow could be viewed as “supplementing” any “weakened” body “function” satisfied the rule definition and thus fell within the ordinary meaning of the former statutory term “orthotic devices.”

That is a strained interpretation of the rule. That interpretation is so broad that it would encompass virtually any medical device, equipment, or supplies prescribed by a physician, osteopath, chiropractor, or podiatrist to treat some disease or disorder. Those medical practitioners would not be expected to prescribe any medical treatment for a patient in the absence of a “weakened” bodily function of some kind. When read as a whole, WAC 458-20-18801(1)(g) plainly expressed an intent to define “orthotic devices” as limited to braces, collars, casts, splints, and similar orthopedic apparatuses. Moreover, if

the rule were interpreted as broadly as Whidbey seems to suggest it should be, the rule plainly would have been inconsistent with the Legislature's intent in enacting the 1980 amendment to RCW 82.08.0283, as described on the House floor by Representative Craswell.

The second sentence of WAC 458-20-18801(1)(g), stating that "orthotic devices" include "braces, collars, casts, splints, and other similar apparatus," referred back to the first sentence of the rule, supplementing the general description in the first sentence and defining particularly what devices were within the class of "orthotic devices." *See* Det. No. 98-112, 18 WTD 383 (1999) (published determination holding that electrical bone growth stimulator was not an "orthotic device" because it was "not like a brace, cast, collar, or splint that is worn by a patient to activate or supplement a weakened or atrophied limb or function"); Det. No. 90-97, 9 WTD 195 (1990) (published determination holding that continuous passive motion devices and sports leg braces were "orthotic devices" because they were "braces," and "each type activates or supplements a weakened or atrophied limb or function"). CP 120-123, 125-128.

The second sentence of subsection (1)(g) stated that "orthotic devices" included "other similar apparatus" in addition to braces, collars, casts, and splints. Thus, the second sentence did not limit the term

“orthotic devices” only to braces, collars, casts, and splints. To properly interpret the meaning of “other similar apparatus” in the rule, however, it is appropriate to employ the ejusdem generis canon or tool of statutory construction, indicating that “when a general word or phrase follows a list of specifics, the general word or phrase will be interpreted to include only items of the same type as those listed.” *Regence Blueshield v. Office of Ins. Comm’r*, 131 Wn. App. 639, 641 n.2, 128 P.3d 640 (2006).³⁰

Applying this canon of construction to the second sentence of the rule requires that the phrase “other similar apparatus” be limited to prescribed medical apparatuses within the same class as braces, collars, casts, and splints, i.e., orthopedic appliances or apparatuses.

Furthermore, it is appropriate to employ a related canon or tool of statutory construction, *noscitur a sociis*, when interpreting the meaning of each of the specific words in the rule’s list of “orthotic devices”—braces, collars, casts, and splints. That canon provides that “a single word in a statute should not be read in isolation, and that ‘the meaning of words may be indicated or controlled by those with which they are associated.’” *State v. Roggenkamp*, 153 Wn.2d 614, 623, 106 P.3d 196 (2005) (quoting *State v. Jackson*, 137 Wn.2d 712, 729, 976 P.2d 1229 (1999)). All the specific examples of prescribed medical apparatuses in the second

³⁰ See also *Roy v. Everett*, 118 Wn.2d 352, 359-60, 823 P.2d 1084 (1992); *Condit v. Lewis Refrigeration Co.*, 101 Wn.2d 106, 111-12, 676 P.2d 466 (1984).

sentence of subsection (1)(g) were orthopedic appliances or apparatuses. The third sentence further supports this construction. It lists examples of prescribed durable medical equipment that were *not* within the class of “orthotic devices.” Several of those examples, such as wheelchairs, crutches, walkers, and canes, could be described as “supplementing” or “supporting” a “weakened or atrophied” function of the body, just as Whidbey seems to argue that CPAP devices do. See Br. of Appellant at 11. Therefore, the only reasonable interpretation of WAC 458-20-18801(1)(g) is that “orthotic devices” means orthopedic apparatuses, such as braces, collars, casts, or splints.

In any event, the meaning of the term “orthotic device” in the former versions of RCW 82.08.0283 is a question of the Legislature’s intent when it amended RCW 82.08.0283 in 1980, not a question of the Department’s intent when it amended WAC 458-20-18801 for the last time in 1992. Whidbey offers no sound argument or authority suggesting that the ordinary meaning of the term “orthotic device” includes CPAP devices. As reflected in medical dictionaries, the term “orthotic device” is ordinarily understood to refer to an orthopedic appliance or apparatus. *Cf.* RCW 18.200.010 (defining “orthotics,” “orthotist,” and “orthosis” for purposes of licensing persons offering “orthotic services” to the public). Because they are not orthopedic appliances or apparatuses, CPAP devices

were not “orthotic devices” as that term was used in the former versions of RCW 82.08.0283 in effect until July 1, 2004. Bearing in mind the well-established principle that exemption provisions in tax statutes should be narrowly and strictly construed, this Court should hold that CPAP devices were not “orthotic devices” under the former versions of RCW 82.08.0283. The superior court correctly granted summary judgment to the Department on this issue.

V. CONCLUSION

This Court should affirm the judgment of the superior court.

RESPECTFULLY SUBMITTED this 15th day of December,
2010.

ROBERT M. MCKENNA
Attorney General



DONALD F. COFER
Assistant Attorney General
WSBA #10896
7141 Cleanwater Dr. SW
PO Box 40123
Olympia, WA 98504-0123
(360) 753-5528

(e) The definitions in RCW 82.04.324 apply to this section. [2004 c 82 § 2; 1995 2nd sp.s. c 9 § 4.]

Additional notes found at www.leg.wa.gov

82.08.02806 Exemptions—Sales of human blood, tissue, organs, bodies, or body parts for medical research and quality control testing. The tax levied by RCW 82.08.020 shall not apply to sales of human blood, tissue, organs, bodies, or body parts for medical research and quality control testing purposes. [1996 c 141 § 1.]

Additional notes found at www.leg.wa.gov

82.08.02807 Exemptions—Sales to organ procurement organization. The tax levied by RCW 82.08.020 shall not apply to the sales of medical supplies, chemicals, or materials to an organ procurement organization exempt under RCW 82.04.326. The definitions of medical supplies, chemicals, and materials in *RCW 82.04.324 apply to this section. This exemption does not apply to the sale of construction materials, office equipment, building equipment, administrative supplies, or vehicles. [2002 c 113 § 2.]

*Reviser's note: RCW 82.04.324 was amended by 2004 c 82 § 1, deleting the definitions of "medical supplies," "chemicals," and "materials."

Effective date—2002 c 113: See note following RCW 82.04.326.

82.08.0281 Exemptions—Sales of prescription drugs.

(1) 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.

(2) The tax levied by RCW 82.08.020 shall not apply to sales of drugs or devices used for family planning purposes, including the prevention of conception, for human use dispensed or to be dispensed to patients, pursuant to a prescription.

(3) The tax levied by RCW 82.08.020 shall not apply to sales of drugs and devices used for family planning purposes, including the prevention of conception, for human use supplied by a family planning clinic that is under contract with the department of health to provide family planning services.

(4) The definitions in this subsection apply throughout this section.

(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;

(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.

(c) "Over-the-counter drug" means a drug that contains a label that identifies the product as a drug required by 21

C.F.R. Sec. 201.66, as amended or renumbered on January 1, 2003. The label includes:

(i) A "drug facts" panel; or

(ii) A statement of the "active ingredient(s)" with a list of those ingredients contained in the compound, substance, or preparation. [2004 c 153 § 108; 2003 c 168 § 403; 1993 sp.s. c 25 § 308; 1980 c 37 § 46. Formerly RCW 82.08.030(28).]

Retroactive effective date—Effective date—2004 c 153: See note following RCW 82.08.0293.

Effective dates—Part headings not law—2003 c 168: See notes following RCW 82.08.010.

Finding—1993 sp.s. c 25: "The legislature finds that prevention is a significant element in the reduction of health care costs. The legislature further finds that taxing some physician prescriptions and not others is unfair to patients. It is, therefore, the intent of the legislature to remove the taxes from prescriptions issued for family planning purposes." [1993 sp.s. c 25 § 307.]

Intent—1980 c 37: See note following RCW 82.04.4281.

Additional notes found at www.leg.wa.gov

82.08.0282 Exemptions—Sales of returnable containers for beverages and foods. The tax levied by RCW 82.08.020 shall not apply to sales of returnable containers for beverages and foods, including but not limited to soft drinks, milk, beer, and mixers. [1980 c 37 § 47. Formerly RCW 82.08.030(29).]

Intent—1980 c 37: See note following RCW 82.04.4281.

82.08.0283 Exemptions—Certain medical items. (1)

The tax levied by RCW 82.08.020 shall not apply to sales of:

(a) 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, and the components of such prosthetic devices;

(b) Medicines of mineral, animal, and botanical origin prescribed, administered, dispensed, or used in the treatment of an individual by a person licensed under chapter 18.36A RCW; and

(c) Medically prescribed oxygen, including, but not limited to, oxygen concentrator systems, oxygen enricher systems, liquid oxygen systems, and gaseous, bottled oxygen systems prescribed for an individual by a person licensed under chapter 18.57 or 18.71 RCW for use in the medical treatment of that individual.

(2) In addition, the tax levied by RCW 82.08.020 shall not apply to charges made for labor and services rendered in respect to the repairing, cleaning, altering, or improving of any of the items exempted under subsection (1) of this section.

(3) The exemption in subsection (1) of this section shall not apply to sales of durable medical equipment, other than as specified in subsection (1)(c) of this section, or mobility enhancing equipment.

(4) The definitions in this subsection apply throughout this section.

(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.

(b) "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.

(c) "Mobility enhancing equipment" means equipment, including repair and replacement parts for mobility enhancing equipment that:

- (i) Is primarily and customarily used to provide or increase the ability to move from one place to another and that is appropriate for use either in a home or a motor vehicle;
- (ii) Is not generally used by persons with normal mobility; and
- (iii) Does not include any motor vehicle or equipment on a motor vehicle normally provided by a motor vehicle manufacturer.

(d) The terms "durable medical equipment" and "mobility enhancing equipment" are mutually exclusive. [2007 c 6 § 1101; 2004 c 153 § 101; 2003 c 168 § 409; 2001 c 75 § 1; 1998 c 168 § 2; 1997 c 224 § 1; 1996 c 162 § 1; 1991 c 250 § 2; 1986 c 255 § 1; 1980 c 86 § 1; 1980 c 37 § 48. Formerly RCW 82.08.030(30).]

Part headings not law—Savings—Effective date—Severability—2007 c 6: See notes following RCW 82.32.020.

Findings—Intent—2007 c 6: See note following RCW 82.14.495.

Retroactive effective date—Effective date—2004 c 153: See note following RCW 82.08.0293.

Effective dates—Part headings not law—2003 c 168: See notes following RCW 82.08.010.

Effective date—2001 c 75: "This act is necessary for the immediate preservation of the public peace, health, or safety, or support of the state government and its existing public institutions, and takes effect immediately [April 19, 2001]." [2001 c 75 § 3.]

Finding—Intent—1991 c 250: "(1) The legislature finds:

(a) The existing state policy is to exempt medical oxygen from sales and use tax.

(b) The technology for supplying medical oxygen has changed substantially in recent years. Many consumers of medical oxygen purchase or rent equipment that supplies oxygen rather than purchasing oxygen in gaseous form.

(2) The intent of this act is to bring sales and rental of individual oxygen systems within the existing exemption for medical oxygen, without expanding the essence of the original policy decision that medical oxygen should be exempt from sales and use tax." [1991 c 250 § 1.]

Intent—1980 c 37: See note following RCW 82.04.4281.

Additional notes found at www.leg.wa.gov

82.08.0285 Exemptions—Sales of ferry vessels to the state or local governmental units—Components thereof—Labor and service charges. The tax levied by RCW 82.08.020 shall not apply to sales of ferry vessels to the state of Washington or to a local governmental unit in the state of Washington for use in transporting pedestrians, vehicles, and goods within or outside the territorial waters of the state; also sales of tangible personal property which becomes a component part of such ferry vessels; also sales of or charges made for labor and services rendered in respect to constructing or improving such ferry vessels. [1980 c 37 § 50. Formerly RCW 82.08.030(32).]

(2010 Ed.)

Intent—1980 c 37: See note following RCW 82.04.4281.

82.08.0287 Exemptions—Sales of passenger motor vehicles as ride-sharing vehicles. The tax imposed by this chapter shall not apply to sales of passenger motor vehicles which are to be used for commuter ride sharing or ride sharing for persons with special transportation needs, as defined in RCW 46.74.010, if the vehicles are used as ride-sharing vehicles for thirty-six consecutive months beginning from the date of purchase.

To qualify for the tax exemption, those passenger motor vehicles with five or six passengers, including the driver, used for commuter ride-sharing, must be operated either within the state's eight largest counties that are required to develop commute trip reduction plans as directed by chapter 70.94 RCW or in other counties, or cities and towns within those counties, that elect to adopt and implement a commute trip reduction plan. Additionally at least one of the following conditions must apply: (1) The vehicle must be operated by a public transportation agency for the general public; or (2) the vehicle must be used by a major employer, as defined in RCW 70.94.524 as an element of its commute trip reduction program for their employees; or (3) the vehicle must be owned and operated by individual employees and must be registered either with the employer as part of its commute trip reduction program or with a public transportation agency serving the area where the employees live or work. Individual employee owned and operated motor vehicles will require certification that the vehicle is registered with a major employer or a public transportation agency. Major employers who own and operate motor vehicles for their employees must certify that the commuter ride-sharing arrangement conforms to a carpool/vanpool element contained within their commute trip reduction program. [2001 c 320 § 4; 1996 c 244 § 4; 1995 c 274 § 2; 1993 c 488 § 2; 1980 c 166 § 1.]

Effective date—2001 c 320: See note following RCW 11.02.005.

Finding—1993 c 488: "The legislature finds that ride sharing and vanpools are the fastest growing transportation choice because of their flexibility and cost-effectiveness. Ride sharing and vanpools represent an effective means for local jurisdictions, transit agencies, and the private sector to assist in addressing the requirements of the Commute Trip Reduction Act, the Growth Management Act, the Americans with Disabilities Act, and the Clean Air Act." [1993 c 488 § 1.]

***Reviser's note:** RCW 46.16.023 was repealed by 2010 c 161 § 438, effective July 1, 2011.

Ride-sharing vehicles—Special plates: RCW 46.16.023.

Additional notes found at www.leg.wa.gov

82.08.02875 Exemptions—Vehicle parking charges subject to tax at stadium and exhibition center. The tax levied by RCW 82.08.020 does not apply to vehicle parking charges that are subject to tax under RCW 36.38.040. [1997 c 220 § 203 (Referendum Bill No. 48, approved June 17, 1997).]

Referendum—Other legislation limited—Legislators' personal intent not indicated—Reimbursements for election—Voters' pamphlet, election requirements—1997 c 220: See RCW 36.102.800 through 36.102.803.

Additional notes found at www.leg.wa.gov

[Title 82 RCW—page 99]

(4) By refilling any such written or oral prescription if such refilling is authorized by the prescriber either in the original prescription or by oral order which is reduced promptly to writing and filed by the pharmacist; or

(5) By physicians or optometrists by way of written directions and specifications for the preparation, grinding, and fabrication of lenses intended to aid or correct visual defects or anomalies of humans. [1993 sp.s. c 25 § 308; 1980 c 37 § 46. Formerly RCW 82.08.030(28).]

Finding—1993 sp.s. c 25: "The legislature finds that prevention is a significant element in the reduction of health care costs. The legislature further finds that taxing some physician prescriptions and not others is unfair to patients. It is, therefore, the intent of the legislature to remove the taxes from prescriptions issued for family planning purposes." [1993 sp.s. c 25 § 307.]

Severability—Effective dates—Part headings, captions not law—1993 sp.s. c 25: See notes following RCW 82.04.230.

Intent—1980 c 37: See note following RCW 82.04.4281.

82.08.0282 Exemptions—Sales of returnable containers for beverages and foods. The tax levied by RCW 82.08.020 shall not apply to sales of returnable containers for beverages and foods, including but not limited to soft drinks, milk, beer, and mixers. [1980 c 37 § 47. Formerly RCW 82.08.030(29).]

Intent—1980 c 37: See note following RCW 82.04.4281.

82.08.0283 Exemptions—Certain medical items. The tax levied by RCW 82.08.020 shall not apply to sales of insulin; prosthetic devices and the components thereof; dental appliances, devices, restorations, and substitutes, and the components thereof, including but not limited to full and partial dentures, crowns, inlays, fillings, braces, and retainers; orthotic devices prescribed for an individual by a person licensed under chapters 18.22, 18.25, 18.57, or 18.71 RCW; hearing instruments dispensed or fitted by a person licensed or certified under chapter 18.35 RCW, and the components thereof; medicines of mineral, animal, and botanical origin prescribed, administered, dispensed, or used in the treatment of an individual by a person licensed under chapter 18.36A RCW; ostomic items; and medically prescribed oxygen, including, but not limited to, oxygen concentrator systems, oxygen enricher systems, liquid oxygen systems, and gaseous, bottled oxygen systems prescribed for an individual by a person licensed under chapter 18.57 or 18.71 RCW for use in the medical treatment of that individual. In addition, the tax levied by RCW 82.08.020 shall not apply to charges made for labor and services rendered in respect to the repairing, cleaning, altering, or improving of any of the items exempted under this section. [2001 c 75 § 1; 1998 c 168 § 2; 1997 c 224 § 1; 1996 c 162 § 1; 1991 c 250 § 2; 1986 c 255 § 1; 1980 c 86 § 1; 1980 c 37 § 48. Formerly RCW 82.08.030(30).]

Effective date—2001 c 75: "This act is necessary for the immediate preservation of the public peace, health, or safety, or support of the state government and its existing public institutions, and takes effect immediately [April 19, 2001]." [2001 c 75 § 3.]

Effective date—1998 c 168: See note following RCW 82.04.120.

Effective date—1997 c 224: "This act takes effect October 1, 1998." [1997 c 224 § 3.]

Effective date—1996 c 162: "This act shall take effect July 1, 1996." [1996 c 162 § 3.]

Finding—Intent—1991 c 250: "(1) The legislature finds:

[Title 82 RCW—page 64]

(a) The existing state policy is to exempt medical oxygen from sales and use tax.

(b) The technology for supplying medical oxygen has changed substantially in recent years. Many consumers of medical oxygen purchase or rent equipment that supplies oxygen rather than purchasing oxygen in gaseous form.

(2) The intent of this act is to bring sales and rental of individual oxygen systems within the existing exemption for medical oxygen, without expanding the essence of the original policy decision that medical oxygen should be exempt from sales and use tax." [1991 c 250 § 1.]

Effective date—1986 c 255: "This act shall take effect July 1, 1986." [1986 c 255 § 3.]

Intent—1980 c 37: See note following RCW 82.04.4281.

82.08.0285 Exemptions—Sales of ferry vessels to the state or local governmental units—Components thereof—Labor and service charges. The tax levied by RCW 82.08.020 shall not apply to sales of ferry vessels to the state of Washington or to a local governmental unit in the state of Washington for use in transporting pedestrians, vehicles, and goods within or outside the territorial waters of the state; also sales of tangible personal property which becomes a component part of such ferry vessels; also sales of or charges made for labor and services rendered in respect to constructing or improving such ferry vessels. [1980 c 37 § 50. Formerly RCW 82.08.030(32).]

Intent—1980 c 37: See note following RCW 82.04.4281.

82.08.0287 Exemptions—Sales of passenger motor vehicles as ride-sharing vehicles. The tax imposed by this chapter shall not apply to sales of passenger motor vehicles which are to be used for commuter ride sharing or ride sharing for persons with special transportation needs, as defined in RCW 46.74.010, if the vehicles are used as ride-sharing vehicles for thirty-six consecutive months beginning from the date of purchase.

To qualify for the tax exemption, those passenger motor vehicles with five or six passengers, including the driver, used for commuter ride-sharing, must be operated either within the state's eight largest counties that are required to develop commute trip reduction plans as directed by chapter 70.94 RCW or in other counties, or cities and towns within those counties, that elect to adopt and implement a commute trip reduction plan. Additionally at least one of the following conditions must apply: (1) The vehicle must be operated by a public transportation agency for the general public; or (2) the vehicle must be used by a major employer, as defined in RCW 70.94.524 as an element of its commute trip reduction program for their employees; or (3) the vehicle must be owned and operated by individual employees and must be registered either with the employer as part of its commute trip reduction program or with a public transportation agency serving the area where the employees live or work. Individual employee owned and operated motor vehicles will require certification that the vehicle is registered with a major employer or a public transportation agency. Major employers who own and operate motor vehicles for their employees must certify that the commuter ride-sharing arrangement conforms to a carpool/vanpool element contained within their commute trip reduction program. [2001 c 320 § 4; 1996 c 244 § 4; 1995 c 274 § 2; 1993 c 488 § 2; 1980 c 166 § 1.]

Effective date—2001 c 320: See note following RCW 11.02.005.

(2002 Ed.)

NO. 40642-0-II

**COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON**

NORTH CENTRAL WASHINGTON
RESPIRATORY CARE SERVICES,
INC. d/b/a WHIDBEY HOME
MEDICAL,

Appellant,

v.

STATE OF WASHINGTON
DEPARTMENT OF REVENUE,

Respondent.

CERTIFICATE OF
SERVICE

I certify that I served a true and correct copy of the Brief of Respondent, via Electronic mail and U.S. Mail, postage prepaid, through Consolidated Mail Services, on the following:

SCOTT M. EDWARDS
LANE POWELL PC
1420 FIFTH AVENUE, SUITE 4100
SEATTLE, WA 98101-2338
edwardss@lanepowell.com

I certify under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED this 15th day of December, 2010, at Tumwater, WA.


KRISTIN D. JENSEN, Legal Assistant