

STATE OF WISCONSIN
TAX APPEALS COMMISSION

ZIMMER US, INC.,

DOCKET NO. 17-S-264

Petitioner,

vs.

WISCONSIN DEPARTMENT OF REVENUE,

Respondent.

RULING AND ORDER

LORNA HEMP BOLL, COMMISSIONER:

This case comes before the Commission for decision on a Stipulation of Facts submitted by the parties and cross motions for summary judgment. The Petitioner, Zimmer US, Inc., is represented by Erica Love and Brian Browdy of Ryan, LLC, of Dallas, TX. The Respondent, the Wisconsin Department of Revenue ("the Department"), is represented by Attorney Julie A. Zimmer.¹ For the reasons set forth below, we grant summary judgment to the Department.

¹ The Department was initially represented by Attorney Carley J. Peich Kiesling, but the case was subsequently transferred to Attorney Zimmer.

FACTS

Procedural Facts

1. During the period at issue, January 1, 2012, through June 30, 2015, Petitioner accrued and paid use tax on the cost price of instruments² it purchased from third-party vendors and provided to hospitals in Wisconsin in conjunction with prosthetic implant devices. (Stip., ¶ 14.)

2. On March 15, 2016, Petitioner filed a claim for refund of this tax; the claim amount is \$656,274.29 (plus interest). (Stip., ¶ 15.)

3. In a letter dated March 19, 2017, the Department issued a Notice of Determination, denying the claim in its entirety. (Stip., Ex. A.)

4. On May 9, 2017, Petitioner filed a Petition for Redetermination, which the Department denied in a Notice of Action dated October 16, 2017. (Stip., Exs. B and C.)

5. Petitioner filed a timely Petition for Review with the Tax Appeals Commission on December 15, 2017. (Commission file.)

Material Facts

6. Petitioner is an Indiana-based manufacturer of prosthetic implant devices, such as artificial hips, knees, and elbows. (Stip., ¶ 1.)

² We will use the following terms interchangeably to refer to the specialized instruments required to implant the prosthetic devices at issue: specialized instruments, instrument kits, specialized tools, or simply tools. Similarly, to refer to the prosthetic devices, we may use artificial joints, medical devices, prosthetic implants, or simply implants. The term "hospital" will refer generically to the healthcare institutions and surgical facilities, which are customers of the Petitioner.

7. Petitioner markets and sells prosthetic devices to healthcare institutions nationwide, including hospitals and other surgical facilities in Wisconsin (collectively, "hospitals"). (Stip., ¶ 2.)

8. The prosthetic devices marketed and sold by Petitioner in Wisconsin are replacements, correctives, or supportive devices that are placed in people's bodies to artificially replace a missing portion of the body, to prevent or correct a physical deformity or malfunction, or to support a weak or deformed portion of the body. (Stip., ¶ 3.)

9. When Petitioner sells a prosthetic device to one of its customers, it also provides a specialty instrument kit at no charge to that customer which contains instruments used to insert the accompanying prosthetic device. (Stip., ¶¶ 4, 7.)

10. Petitioner purchases the specialty instrument kits from third-party suppliers and from an affiliated industrial processor. (Petition.)

11. The specialized instrumentation provided by Petitioner is necessary for a surgeon to safely or accurately implant a Zimmer prosthetic device into a patient's body. (Stip., ¶ 5.)

12. Once the specialized instruments are used to insert the prosthetic device, they do not remain in the body and have no ongoing or permanent connection to the prosthetic device. (Stip., ¶ 6.)

13. The contract between Petitioner and its customers for purchase of prosthetic devices includes a provision that states that Petitioner shall provide to its

customers, at no additional charge, standard non-disposable instruments necessary to perform a case. (Stip., ¶ 7.)

14. When Petitioner provides specialized instruments to a customer to be used with a prosthetic device, the invoice generated by Petitioner states “no charge” as the amount due for such specialized instruments. (Stip., ¶ 8.)

15. The contract between Petitioner and its customers for purchase of prosthetic devices includes a provision in which the customer promises to indemnify Petitioner for any loss, damage, or destruction of the instruments Petitioner provides. (Stip., ¶ 9.)

16. The contract between Petitioner and its customers for purchase of prosthetic devices also provides that the specialty instruments shall at all times remain the property of Petitioner and shall be returned to Petitioner upon termination of the contract. (Stip., ¶ 10.)

17. Not every implant device is sold with a set of specialized tools. Hospitals use and reuse the surgical instruments for implanting Zimmer devices. (Zimmer Aff. ¶ 3, Ex. 2.)

18. The specialized instruments have a useful life of seven to ten years. (Stip., ¶ 11.)

Applicable Law

Under Wis. Stat. § 77.53(1), an excise tax is imposed on the “storage, use or other consumption in this state of tangible personal property . . . purchased from any

retailer." The statutes explain that the use tax applies "unless an exemption in this subchapter applies." Wis. Stat. § 77.53(1b).

A taxpayer who seeks to recover a refund bears the burden of proving the invalidity of the Department's determination. *MRC Industries, Inc. v. Dep't of Revenue*, Wis. Tax Rptr. (CCH) ¶ 203-273 (WTAC 1991). To be entitled to a tax exemption, the taxpayer must fall within the exact terms of the exemption statute. *Wausau Paper Mills Co. v. Dep't of Revenue*, Wis. Tax Rptr. (CCH) ¶ 400-375 (Cir. Ct. 1998). The statute must be given a strict but reasonable construction in favor of taxation. *Wauwatosa Avenue United Methodist Church v. City of Wauwatosa*, 2009 WI App 171, 321 Wis. 2d 796, 776 N.W.2d 280.

Relevant to this case, the statutes allow an exemption from the sales/use tax for some durable medical equipment and for prosthetic devices. Accessories to such exempt equipment are also exempt. The parties disagree as to whether the exemption applies to the cost price of the specialized installation tool kits Zimmer provides to Wisconsin hospitals that use the tools to implant the prosthetic devices made and sold by Petitioner. The relevant exemption reads as follows:

Wis. Stat. § 77.54 General Exemptions.

(22b) The sales price from the sale of and the storage, use, or other consumption of durable medical equipment that is for use in a person's home, mobility-enhancing equipment, and prosthetic devices, and accessories for such equipment or devices, if the equipment or devices are used for a human being.

The following definitions, and lack thereof, are important to this case.

Wis. Stat. § 77.51 Definitions.

(3pm) "Durable medical equipment" means equipment, including the repair parts and replacement parts for the

equipment, that is primarily and customarily used for a medical purpose related to a person; that can withstand repeated use; that is not generally useful to a person who is not ill or injured; and that is not placed in or worn on the body. "Durable medical equipment" does not include mobility-enhancing equipment.

(11m) "Prosthetic device" means a replacement, corrective, or supportive device, including the repair parts and replacement parts for the device, that is placed in or worn on the body to artificially replace a missing portion of the body; to prevent or correct a physical deformity or malfunction; or to support a weak or deformed portion of the body.

Alas, the statutes do not include a definition of the term "accessory."

ANALYSIS

Summary judgment is granted if the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, show there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. Wis. Stat. § 802.08(2). Here, both parties have moved for summary judgment. The effect of cross motions for summary judgment is an assertion by the parties that the facts are undisputed, that in effect the facts are stipulated, and that only issues of law remain. *Healthcare Services Group, Inc. v. Dep't of Revenue*, Wis. Tax Rptr. (CCH) ¶ 402-086 (WTAC 2016).

The parties agree to the underlying facts. Petitioner sells prosthetic devices, such as artificial knee joints, to hospitals in Wisconsin. When a hospital purchases a prosthetic device, Petitioner supplies a set of specialized tools which are needed for the safe and proper installation of these particular devices. Petitioner provides the tools to the hospitals, which use the tools for no additional charge.

The prosthetic devices cannot be installed without the use of the specialized tools Petitioner supplies. Petitioner does not supply a set of tools with every device. Once a hospital has a set of tools, the tools can be reused to install additional devices purchased from Petitioner. A set of tools can be used for up to ten years.

Petitioner supplies the tools to the hospitals through an agreement separate from the purchase of the devices. Under the terms of the agreement, Petitioner retains ownership of the tools. The hospital is allowed to keep the tools and to reuse them until Petitioner replaces them or the contract ends. If a tool breaks or is lost, the hospital must indemnify Petitioner, essentially paying for the replacement. As with the original tool, Petitioner retains ownership of any replaced tools.

Wisconsin imposes a use tax on the use in Wisconsin of tangible personal property purchased from a retailer. Wis. Stat. § 77.53(1). Petitioner purchased specialized tools from third-party vendors. Those initial purchases were at retail; the purchases were not exempt as sales for resale because Petitioner retains ownership of the tool kits. Because Petitioner provided the tools for use at hospitals in Wisconsin, Petitioner paid Wisconsin use tax on the cost price of the tools.

Petitioner subsequently requested a refund of the use tax, claiming the tools to be exempt from sales/use tax under Wis. Stat. § 77.54(22b) as “accessories” to the prosthetic devices.³

³ Petitioner’s Petition for Review and Statement of the Case proffered several other arguments, but those arguments have not been presented, briefed, or argued on summary judgment.

Although the parties did not address the issue, logic first drew the Commission to the definition of “durable medical equipment.” The specialized tool kits required for installation of the prosthetic devices are equipment “that is primarily and customarily used for a medical purpose related to a person; that can withstand repeated use; that is not generally useful to a person who is not ill or injured; and that is not placed in or worn on the body.” Thus, we find that the specialized tool kits fall squarely within the definition of “durable medical equipment.”

Under Wis. Stat. § 77.54(22b), some durable medical equipment is exempt from sales and use tax. The tools in this case, however, are not because the statutory language limits the exemption of durable medical equipment to that which is “for use in a person’s home.” These tools are only used at a hospital. Given that these tools would not be exempt as “durable medical equipment,” Petitioner must show that these tools fall under another specific exemption to not be taxable.

Petitioner looks to Wis. Stat. § 77.54(22b), which extends to prosthetic devices and to “accessories” for prosthetic devices. Petitioner presents two arguments. First, the tools are so integrally involved with the artificial joints as to be part of the “prosthetic device” itself. Second, Petitioner argues that the tools used to install the devices are exempt as “accessories” to those prosthetic devices.

As noted above, the statutes provide no definition of the term “accessory.” Of note, Wis. Tax Bulletin 175 – April 2012, Tax Releases, p.18, Analysis 2, addressed “accessories” to prosthetic devices in the context of neck cords and small screwdrivers designed for glasses:

Section 77.54(22b), Wis Stats. (2009-10), provides, in part, an exemption from Wisconsin sales and use tax for “. . . prosthetic devices, and accessories for such . . . devices, if the . . . devices are used for a human being.” Neck cords, sunglasses designed to be worn over eyeglasses, repair parts and tools specifically for eyeglasses . . . are accessories and qualify for this exemption if purchased for corrective eyeglasses, corrective sunglasses, corrective reading glasses, or corrective contact lenses.

The Tax Bulletin discusses how the accessory must be for use with a medical device. For example, the neck cord and screw driver would not be exempt accessories if purchased for non-corrective sunglasses because those are not prosthetic devices like prescription glasses.

I. Are the tools functionally inseparable from the exempt prosthetic devices so as to be exempt under Wis. Stat. § 77.54(22b)?

In the absence of caselaw, Petitioner refers the Commission to Private Letter Ruling No. W1009008 (12/7/2009) (Stip., Ex. III), which addresses the Wis. Stat. § 77.54(14) definition of “drugs” on or after October 1, 2009. That ruling analyzes injectable drugs (tissue filler implants) which are packaged in single-dose disposable syringes. Petitioner’s Motion asserts that the PLR “confirmed that the exemption for ‘drugs’ under section 77.54(14) encompassed both tissue filler implants and the syringes required for their implantation – even though the syringes were not themselves ‘drugs’ within the meaning of that statute.” Similarly, Petitioner reasons that the term “prosthetic device” encompasses the tools in this case because they are “medically necessary for safe implantation” and “functionally inseparable from the prosthetics themselves.” The premise of the analogy is suspect; its conclusion is more so.

The PLR clarifies that the gel filler is exempt as a “drug.” Petitioner argues that the PLR declares that the definition of “drug” encompasses the drug’s delivery device (a disposable syringe) and therefore the delivery device is exempt from taxation. The language of this PLR makes no such declaration. The PLR does not directly discuss the nature of the syringes, and it does not establish any “functionally inseparable” standard. The Commission does not find the PLR applicable to the facts of this case.

We believe the syringes are more akin to packaging which may be otherwise exempt.⁴ In any case, even if there were a “functionally inseparable” standard, the tools in this case fail. The tools are not physically connected to the prosthetic devices. The parties stipulate that the tools are not disposable as waste left over from implantation but can be reused for years. They are not even necessarily supplied with the prosthetics if the hospital already has a set.

The Department presses a compelling analogy of a hammer and nails. While a hammer is needed to install the nail, the hammer can be used for many nails and it stays behind once the nail is in place. The hammer is not a nail and does fall within even a broad definition of a nail. Similarly, these specialized tools can be used on additional devices and remain with the hospital or are returned to the Petitioner. As noted above, the tools are better categorized as “durable medical equipment.”

⁴ For example, see Wis. Stat. § 77.54(6)(am) exempting “The sales price from the sale of and the storage, use or other consumption of: . . . 2. Containers, . . . or other packaging and shipping materials for use in packing, packaging or shipping tangible personal property . . . if the containers, . . . or other packaging and shipping materials are used by the purchaser to transfer merchandise to customers.” The syringe is a container used to transfer the merchandise to customers.

Petitioner points out that the tools are specialized to be compatible only with the specific prosthetics sold by Petitioner. However, the specialized tools are simply tools, similar to other equipment used in the operating room during an implant procedure. We cannot conclude that everything in the operating room should be exempt as “functionally inseparable” from a prosthetic device simply because it is used during the implantation procedure.

The tools are physically and functionally separate from the prosthetic device. Therefore, the tools do not fall within even a broad scope view of the term prosthetic device.

II. Are the specialized tools exempt as “accessories” for the prosthetic devices under Wis. Stat. § 77.54(22b)?

Petitioner’s primary assertion is that the tools are exempt as accessories of the prosthetic devices. The absence of a statutory definition of the word “accessory” is not helpful, but when there is no definitive answer to the meaning of a word or phrase in a statute, Wis. Stat. § 990.01(1) provides that the word or phrase “shall be construed according to common and approved usage.” Caselaw and this Commission have traditionally accepted consultation of dictionary definitions to determine the meaning of terms left undefined in the statutes. *See, e.g., Madison Newspapers, Inc., v. Dep’t of Revenue*, 228 Wis. 2d 745, 760, 599 N.W.2d 51 (Ct. App. 1999).

In their briefs, the parties point to numerous possibly conflicting dictionary definitions of the term “accessory.” Dictionaries, both online and traditional, describe accessories as supplementary, subordinate, or adjunct. The definitions generally indicate

that an accessory is not the original item itself but something which supplements or completes the item or enhances it by making it more attractive, convenient, efficient, safe, or effective.⁵

Starting from the premise that these tools are necessary for the implantation of the Zimmer devices, the parties turn to various definitions of the word "accessories." The Department points to definitions which describe items, such as fashion accessories, which normally would not be needed to use or enjoy the item itself, concluding that an accessory is by definition non-essential. Petitioner relies more on the supplemental enhancement idea contained in most definitions. Both parties cite the Department's guidance in Wis. Tax Bulletin 175 - April 2012, pp. 17-19, in which the Department took the position that Wis. Stat. § 77.54(22b) exempts neck cords and tiny screwdrivers for prosthetic devices (prescription eyeglasses) as accessories to prosthetic devices.

⁵ For example, from Dictionary.com:

Accessory, noun, plural *ac ces so ries*.

- 1) a subordinate or supplementary part, object, or the like, used mainly for convenience, attractiveness, safety, etc., as a spotlight on an automobile or a lens cover on a camera.

Subordinate, adjective

- 1) placed in or belonging to a lower order or rank.
- 2) of less importance; secondary.
- 3) subject to or under the authority of a superior.

Supplementary, adjective

Also supplemental. of the nature of or forming a supplement; additional.

Supplement, noun

- 1) something added to complete a thing, supply a deficiency, or reinforce or extend a whole.
- 2) a part added to a book, document, etc., to supply additional or later information, correct errors, or the like.

And from Merriam-webster.com

Definition of *accessory*

1a : an object or device that is not essential in itself but adds to the beauty, convenience, or effectiveness of something else. // auto *accessories* // clothing *accessories*;

b : a thing of secondary or lesser importance : adjunct.

Definition of *adjunct*

1 : something joined or added to another thing but not essentially a part of it.

While the parties argue over the aspect of necessity, both sides miss the point that the tools in question are completely unrelated to the patient's use of the joint. While the specialized tools are necessary for the safe and effective installation of the artificial joints, they are not accessories to the joint because the patient, the user of the joint, does not need, want, or have the ability to possess or purchase the tools. The tools do not in any way enhance the patient's everyday use of prosthetic devices any more than a mechanic's wrench, even a specialized wrench, used to install a new muffler enhances the car owner's use of the muffler.

An accessory is something intended for use with the item to enhance or supplement the item by making it more attractive, efficient, or effective. The accessories described in the Bulletin, neck cords and tiny screw drivers are not used to build the glasses; they are not part of the glasses; they do not improve the user's vision. They are used by the wearer of the glasses to enhance the use of the glasses. In contrast, the tools at issue assist in the installation of the artificial joints, but they are unrelated to improving or enhancing any aspect of patient's use of those prosthetic devices.

We have found that the tools in question fall clearly within the definition of durable medical equipment. Although we are not prepared to say that there can never be a time when durable medical equipment is also an accessory, the tools in this case are not accessories to the prosthetic devices sold by the Petitioner. They are simply durable medical equipment. Because the tools are not used in a person's home, the specialized installation tool kits are not exempt under Wis. Stat. § 77.54(22b).

CONCLUSIONS OF LAW

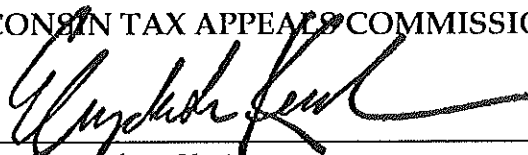
1. No issues of material fact exist, so this matter is ripe for summary judgment.
2. The specialized installation tool kits are not functionally inseparable from the prosthetic devices sold by Petitioner so as to be considered part of the prosthetic devices themselves.
3. The specialized installation tool kits are not exempt as accessories under Wis. Stat. § 77.54(22b).
4. The specialized installation tool kits are durable medical equipment as defined in Wis. Stat. § 77.51(3pm). Because they are not “for use in a person’s home,” they are not exempt under Wis. Stat. § 77.53(22b).
5. There being no applicable exemption, the tools kits are subject to Wisconsin use tax under Wis. Stat. § 77.53.

ORDER

1. Petitioner’s Motion for Summary Judgment is denied.
2. The Department’s Motion for Summary Judgment is granted.

Dated at Madison, Wisconsin, this 10th day of May, 2019.

WISCONSIN TAX APPEALS COMMISSION



Elizabeth Kessler, Chair



Lorna Hemp Boll



David L. Coon, Commissioner

ATTACHMENT: NOTICE OF APPEAL INFORMATION

WISCONSIN TAX APPEALS COMMISSION
5005 University Avenue – Suite 110
Madison, Wisconsin 53705

NOTICE OF APPEAL INFORMATION

NOTICE OF RIGHTS FOR REHEARING, OR JUDICIAL REVIEW, THE TIMES ALLOWED FOR EACH, AND THE IDENTIFICATION OF THE PARTY TO BE NAMED AS RESPONDENT

A taxpayer has two options after receiving a Commission final decision:

Option 1: PETITION FOR REHEARING BEFORE THE COMMISSION

The taxpayer has a right to petition for a rehearing of a final decision within 20 days of the service of this decision, as provided in Wis. Stat. § 227.49. The 20-day period commences the day after personal service on the taxpayer or on the date the Commission issued its original decision to the taxpayer. The petition for rehearing should be filed with the Tax Appeals Commission and served upon the other party (which usually is the Department of Revenue). The Petition for Rehearing can be served either in-person, by USPS, or by courier; however, the filing must arrive at the Commission within the 20-day timeframe of the order to be accepted. Alternately, the taxpayer can appeal this decision directly to circuit court through the filing of a petition for judicial review. It is not necessary to petition for a rehearing first.

AND/OR

Option 2: PETITION FOR JUDICIAL REVIEW

Wis. Stat. § 227.53 provides for judicial review of a final decision. Several points about starting a case:

1. The petition must be filed in the appropriate county circuit court and served upon the Tax Appeal Commission and the other party (which usually is the Department of Revenue) either in-person, by certified mail, or by courier, within 30 days of this decision if there has been no petition for rehearing or, within 30 days of service of the order that decides a timely petition for rehearing.
2. If a party files a late petition for rehearing, the 30-day period for judicial review starts on the date the Commission issued its original decision to the taxpayer.
3. The 30-day period starts the day after personal service, or the day we mail the decision.
4. The petition for judicial review should name the other party (which is usually the Department of Revenue) as the Respondent, but not the Commission, which is not a party.

For more information about the other requirements for commencing an appeal to the circuit court, you may wish to contact the clerk of the appropriate circuit court or, the Wisconsin Statutes. The website for the courts is <https://wicourts.gov>.

This notice is part of the decision and incorporated therein.