Cite as Det. No. 16-0122, 38 WTD 008 (2019)

BEFORE THE APPEALS DIVISION
DEPARTMENT OF REVENUE
STATE OF WASHINGTON

In the Matter of the Petition for Correction of Assessment of	)	D E T E R M I N A T I O N
	)	No. 16-0122
. . .	)	Registration No. . . .

[1] RCW 82.08.020(1)(a); RCW 82.04.250(1): RETAIL SALES OF MEDICAL MARIJUANA AND MARIJUANA- INFUSED PRODUCTS. Sellers of medical marijuana and marijuana-infused products, whether as agent or as principal, are responsible to collect and remit retail sales tax on all sales.

[2] RCW 82.08.0281(1): RETAIL SALES TAX – MARIJUANA – PRESCRIPTION DRUG EXEMPTION. Sales of medical marijuana and marijuana-infused products do not qualify as exempt from retail sales tax as a prescription drug.

[3] RCW 82.08.0283(1)(b): RETAIL SALES TAX – MARIJUANA – MEDICINES OF A BOTANICAL ORIGIN EXEMPTION. Sales of medical marijuana and marijuana-infused products do not qualify as exempt from retail sales tax as the sale of a medicine of botanical origin.

Sattelberg, A.L.J. – A medical marijuana management company ("Taxpayer") protests the Department of Revenue's ("Department") assessment of retail sales tax and retailing business and occupation ("B&O") tax arguing that it is a management company providing management services to a collective garden only, and that neither party is making retail sales. It also argues that even if it is making retail sales, those sales are exempt either as sales of drugs pursuant to a prescription or sales of medicines of a botanical origin. We deny the petition.[1]

ISSUES

1. Is Taxpayer making retail sales of medical marijuana and marijuana-infused products, subject to retail sales tax under RCW 82.08.020(1)(a) and retailing B&O tax under RCW 82.04.250(1)?

2. If Taxpayer is making retail sales, are these sales exempt from retail sales tax as sales of drugs pursuant to a prescription under RCW 82.08.0281(1)?

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

3. If Taxpayer is making retail sales, are these sales exempt from retail sales tax as sales of medicines of a botanical origin under RCW 82.08.0283(1)(b)?

FINDINGS OF FACT

Taxpayer operates from its business location in . . . Washington. Taxpayer opened its tax reporting account with the Department as of August 1, 2012. Taxpayer reported income under the service & other activities B&O tax classification from the fourth quarter of 2012 through the end of 2014. Taxpayer staffed the business location, checked authorizations, documented memberships, and accepted payments in accordance, it alleges, with an agreement it had with a collective garden. Taxpayer has not provided the agreement.

In 2014, the Department's Taxpayer Account Administration Division ("TAA") began investigating Taxpayer's business activities. TAA found advertising on the internet that medical marijuana and marijuana-infused products were available on numerous websites at the same business location and phone number as Taxpayer. These advertisements included items such as its menu, prices, deals, photos, and customer comments. The business name being used in the advertisements was not Taxpayer's name or a trade name of Taxpayer. However, in addition to the common address and phone number, TAA found their controlling officer was the same. As Taxpayer was the only registered business open at this location, and since the controlling officer was the same, TAA concluded Taxpayer was the business making medical marijuana and marijuana-infused products available for sale.

In June of 2014, TAA notified Taxpayer of the taxability of marijuana sales and informed Taxpayer of the option to amend previously filed returns. In July of 2014, TAA requested a schedule of gross income, but Taxpayer did not provide one. In August of 2014, TAA notified Taxpayer of a pending assessment and again requested a schedule of gross income. On March 3, 2015, TAA issued Taxpayer an assessment using estimated sales amounts, since Taxpayer did not provide actual gross income amounts, totaling $ . . . .[2]

Taxpayer timely appealed contesting numerous aspects of the Department's assessment. Taxpayer argues that it is a management company providing management services to a collective garden,[3] and that neither party is making taxable sales. Taxpayer argues that even if either party is making taxable sales, those sales are exempt from sales tax as prescription drugs under RCW 82.08.0281. Taxpayer also argues that even if the collective garden is making taxable sales, those sales are exempt from sales tax as sales of a medicine of botanical origin under RCW 82.08.0283. Taxpayer did not provide any records to TAA or on appeal to support actual gross income amounts or that further explain its business activities.

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[2] The assessment consists of $ . . . in retail sales tax, $ . . . in retailing B&O tax, a credit of $ . . . for service & other activities B&O tax paid, a net reduction of the small business tax credit of $ . . . , $ . . . in interest, a $ . . . delinquent penalty, and a $ . . . substantial underpayment penalty. The audit period was August 1, 2012, through December 31, 2014.

[3] The term "collective garden" is defined, generally, as "qualifying patients sharing responsibility for acquiring and supplying the resources required to produce and process cannabis for medical use . . . ." RCW 69.51A.085(2). The statutes governing collective gardens address the criminal and civil sanctions that might otherwise be imposed on collective gardens based solely on their assisting with the use of medical marijuana. Ch. 69.51A RCW.

ANALYSIS

1. Management Company Making Sales

A. Retail Sales Tax

"Sale" means any transfer of the ownership of, title to, or possession of property for a valuable consideration. RCW 82.04.040(1). The term "retail sale" includes every sale of tangible personal property, subject to certain exclusions, none which apply here. RCW 82.04.050(1)(a). Retail sales are subject to retail sales tax under RCW 82.08.020(1)(a). Sellers must collect the full amount of the retail sales tax payable from buyers. RCW 82.08.050(1). If the seller fails to collect retail sales tax from the buyer and remit it to the Department, the seller becomes personally liable for the amount of the tax. RCW 82.08.050(3).

The term "seller" is a person "making sales at retail or retail sales to a buyer, purchaser, or consumer, whether as agent, broker, or principal." RCW 82.08.010(2); *see also* WAC 458-20-159 ("Rule 159"). As stated in Rule 159:

> Every consignee, bailee, factor, agent or auctioneer authorized, engaged or employed to sell or call for bids on tangible personal property belonging to another, and, so selling or calling, is deemed a seller, and shall collect the retail sales tax upon all retail sales made by him, except sales of certain farm property as hereinafter provided.

Here, there may be a collective garden growing the marijuana.[4] Taxpayer alleges that a collective garden hired it to provide operational assistance, such as staffing the location, checking authorizations, documenting memberships, and accepting payments. Whether Taxpayer is the principal itself or is actually acting as an agent of a collective garden, the result is the same. Taxpayer's exchange of medical marijuana or marijuana-infused products for consideration constitute sales under RCW 82.04.040(1)(a). As the seller of tangible personal property here, whether as agent or as principal, Taxpayer is responsible for collecting and remitting retail sales tax on all sales under RCW 82.08.050(1).

Taxpayer argues that it was not selling tangible personal property as owner, but merely providing management services to a collective garden. This, however, has not been shown to be the case through supporting documentation, such as a management agreement or books and records showing payment for management services. Even if Taxpayer was providing management services, however, this does not relieve it of its responsibility to collect and remit retail sales tax when making sales. Taxpayer was either selling tangible personal property as the owner or as an agent of a collective garden, and it was responsible for collecting and remitting retail sales tax on all sales.

Legislation passed in 2015 supports the conclusion that sales by collective gardens are subject to retail sales tax. RCW 82.08.9998(2) provides a temporary retail sales tax exemption for sales of marijuana and marijuana products by collective gardens in compliance with RCW 69.51A, from

[4] Taxpayer argues there is but does not provide any documentation to prove it.

July 1, 2015 until June 30, 2016.[5] If collective gardens in compliance with RCW 69.51A were not making retail sales, the legislature would not have needed to pass these exemptions. *See* Det. No. 07-0168, 27 WTD 19 (2008). *City of Seattle v. State*, 136 Wn.2d 693, 698, 965 P.2d 619 (1998) (Statutes must be interpreted and construed so that all the language used is given effect, with no portion rendered meaningless or superfluous (citing *Stone v. Chelan County Sheriff's Dep't,* 110 Wn.2d 806, 810, 756 P.2d 736 (1988); *Tommy P. v. Board of County Comm'rs,* 97 Wn.2d 385, 391, 645 P.2d 697 (1982)).

B. Retailing B&O Tax

B&O tax is levied and collected "for the act or privilege of engaging in business activities." RCW 82.04.220(1). The legislature intended to impose the B&O tax on virtually all business activities carried on within the state. *Time Oil Co. v. State*, 79 Wn.2d 143, 483 P.2d 628 (1971). [Persons making] retail sales are subject to retailing B&O tax under RCW 82.04.250.

Since Taxpayer is making retail sales of medical marijuana and marijuana-infused products, it is liable for retailing B&O tax on these sales. Taxpayer argues it is a management company only, and that its services are subject to B&O tax under the service & other activities B&O tax classification. However, it has not provided documentation to this effect as required by Rule 159 to be taxable only on commissions. In the absence of documentation to the contrary, we conclude it is making retail sales and is liable for retailing B&O tax on the gross amount of these sales.

2. Prescription Drug Exemption

Taxpayer argues that even if it is making retail sales, those sales are exempt as sales of drugs pursuant to a prescription under RCW 82.08.0281. RCW 82.08.0281(1) exempts from retail sales tax, ". . . sales of drugs for human use dispensed or to be dispensed to patients, pursuant to a prescription." WAC 458-20-18801 ("Rule 18801") explains that a seller may obtain an exemption certificate for this exemption: "A seller is not required to collect sales tax when it obtains a properly completed exemption certificate indicating prescription drugs, intended for human use sold to medical practitioners, nursing homes, and hospitals, will be put to an exempt use under the authority of a prescription." Rule 18801(403)(b). Otherwise, the retail sales tax must be collected. *Id.*

RCW 82.08.0281(4)(a) defines the term "prescription" as: "[A]n 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." However, no licensed practitioner may prescribe medical marijuana in Washington.[6]

[5] Chapter 4, Laws of 2015, 2nd Spec. Sess. (2ESSHB 2136).

[6] The website for Washington's Department of Health provides, "Healthcare providers cannot write prescriptions for medical marijuana. They may only write recommendations that a patient has a medical condition that may benefit from the medical use of marijuana." From http://www.doh.wa.gov/YouandYourFamily/Marijuana/MedicalMarijuanaCannabis/GeneralFrequentlyAskedQuestions#10 (last visited Nov. 24, 2014).

Under 21 U.S.C. § 812 and RCW 69.50.204, marijuana is a Schedule 1 controlled substance, which cannot be prescribed under federal and state law. *Seeley v. State*, 132 Wn.2d 776, 940 P.2d 604 (1997) (holding "[m]arijuana cannot be legally prescribed, nor can a prescription for marijuana be filled by a pharmacist in Washington . . . ."; *State v. Hanson*, 138 Wn. App. 322, 328-32, 157 P.3d 438 (2007) (holding Washington's Medical Use of Marijuana Act did not implicitly repeal marijuana's classification as a Schedule 1 controlled substance); *see also* Dep't of Revenue Special Notice dated May 31, 2011, entitled "Sales of Medical Cannabis Remain Subject to Sales Tax." Accordingly, medical marijuana is not covered by the exemption for prescription drugs.

We recognize that medical professionals can issue documentation authorizing the use of marijuana, but this does not change the outcome. The legislature enacted Chapter 69.51A RCW, which addresses medical marijuana. RCW 69.51A.030(2)(a) allows health care professionals, including naturopaths, to provide a patient with a valid documentation authorizing the medical use of marijuana,[7] provided certain requirements are met:

> (2)(a) A health care professional may only provide a patient with valid documentation authorizing the medical use of cannabis or register the patient with the registry established in **section 901 of this act if he or she has a newly initiated or existing documented relationship with the patient, as a primary care provider or a specialist, relating to the diagnosis and ongoing treatment or monitoring of the patient's terminal or debilitating medical condition, and only after:
>
> > (i) Completing a physical examination of the patient as appropriate, based on the patient's condition and age;
> >
> > (ii) Documenting the terminal or debilitating medical condition of the patient in the patient's medical record and that the patient may benefit from treatment of this condition or its symptoms with medical use of cannabis;
> >
> > (iii) Informing the patient of other options for treating the terminal or debilitating medical condition; and
> >
> > (iv) Documenting other measures attempted to treat the terminal or debilitating medical condition that do not involve the medical use of cannabis.

(Emphasis added).[8]

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[7] RCW 69.51A.010(7) defines "valid documentation" as:

> (a) A statement signed and dated by a qualifying patient's health care professional written on tamper-resistant paper, which states that, in the health care professional's professional opinion, the patient may benefit from the medical use of marijuana; and
> (b) Proof of identity such as a Washington state driver's license or identicard, as defined in RCW 46.20.035.

(Emphasis added.)

[8] RCW 69.51A.010(4) defines a "qualifying patient" as a person who:

Taxpayer argues that a valid documentation (defined in RCW 69.51A.010(7)) that a health care professional is permitted to provide a patient under RCW 69.51A.030(2)(a) equates to a prescription for purposes of RCW 82.08.0281. Taxpayer contends that a document authorizing use of medical marijuana is a prescription. We disagree. Had the legislature intended such a result, it would not have added the words "to prescribe" to RCW 82.04.0281 in 2003. Chapter 69.51A RCW does not authorize medical professionals "to prescribe" medical marijuana.

Generally, a person claiming a tax exemption, exception, or deduction has the burden of proving he or she qualifies for the tax benefit. *Group Health Cooperative of Puget Sound, Inc. v. State Tax Comm'n*, 72 Wn.2d 422, 433 P.2d 201 (1967). Taxation is the rule; exemption is the exception. *Spokane County v. City of Spokane*, 169 Wash. 355, 358, 13 P.2d 1084 (1932). Exemptions from a taxing statute must be narrowly construed. *Budget Rent-A-Car, Inc. v. Dep't of Revenue*, 81 Wn.2d 171, 174, 500 P.2d 764 (1972); *Evergreen-Washelli Memorial Park Co. v. Dep't of Revenue*, 89 Wn.2d 660, 663, 574 P.2d 735 (1978).

The legislature used the language of "valid documentation," instead of "prescription" when addressing medical marijuana in Chapter 69.51A RCW. The legislature's use of the concept of valid documentation, as opposed to prescription, was not the result of a relaxed use of language by the legislature. The legislature intended to limit the exemption in RCW 82.08.0281 to prescribed drugs. Where the legislature uses certain statutory language in one instance and different language in another, there is a difference of legislative intent. *United Parcel Service, Inc. v. Dep't of Revenue*, 102 Wn.2d 355, 362, 687 P.2d 186 (1984); *Agrilink Foods, Inc. v. Dep't of Revenue*, 153 Wn.2d 392, 397, 103 P.3d 1226 (2005).

Because of the use of different language, "prescription" and "to prescribe" in RCW 82.04.0281 and "valid documentation" in RCW 69.51A.010(7), we conclude that medical marijuana is not prescribed to patients, but rather patients receive a valid documentation from a health care professional that allows them to purchase medical marijuana. Therefore, Taxpayer's sales of medical marijuana to consumers do not qualify for the prescription drug exemption under RCW 82.08.0281(1).[9]

Recent legislation supports this conclusion. On March 28, 2014, the Governor signed SB 6505, which amended the definition of "drug" in RCW 82.04.0281(4)(b) to specifically exclude marijuana.[10] Laws of 2014, ch. 140, Section 19.

(a) Is a patient of a health care professional;
(b) Has been diagnosed by that health care professional as having a terminal or debilitating medical condition;
(c) Is a resident of the state of Washington at the time of such diagnosis;
(d) Has been advised by that health care professional about the risks and benefits of the medical use of marijuana; and
(e) Has been advised by that health care professional that they may benefit from the medical use of marijuana.

[9] [Furthermore, "valid documentation" for medical marijuana is not a "prescription" because it is not an "order, formula, or recipe" within the meaning of that definition. *Green Collar Club v. Dep't of Revenue*, 3 Wn. App. 2d 82, 95-98, 413 P.3d 1083 (2018).]

[10] "'Drug' means a compound, substance, or preparation, and any component of a compound, substance, or preparation, other than food and food ingredients, dietary supplements, or alcoholic beverages, marijuana, useable marijuana, or marijuana-infused products . . . ."

In 2015, the Governor signed 2SSB 5052, which replaced the words "valid documentation" in RCW 69.51A.010 with "authorization." Laws of 2015, ch. 70, Section 17(7)(a). After July 1, 2016, naturopaths and other qualifying health care professionals will have to use an authorization form issued by the Department of Health when authorizing medical marijuana. Laws of 2015, ch. 70, Section 17(7)(b). Section 17(7)(c) makes it clear that medical marijuana is not prescribed: "[a]n authorization is not a prescription as defined in RCW 69.50.101." Also, medical marijuana remains a Schedule 1 drug under the state's Controlled Substances Act after the Governor's veto of Sections 42 and 43. *See* Governor's veto message, Laws of 2015, ch. 70, p. 71-72. Accordingly, we deny Taxpayer's petition on this issue.

3. Botanical Medicine Exemption

In 1987, the Legislature began regulating and licensing naturopaths. RCW 18.36A. "The practice of naturopathic medicine includes . . . the prescription, administration, dispensing, and use . . . of . . . naturopathic medicines . . . ." RCW 18.36A.040. RCW 18.36A.020(10) defines the term "naturopathic medicines" as:

> [V]itamins; minerals; botanical medicines; homeopathic medicines; hormones; and those legend drugs and controlled substances consistent with naturopathic medical practice in accordance with rules established by the board. Controlled substances are limited to codeine and testosterone products that are contained in Schedules III, IV, and V in chapter 69.50 RCW.

(Emphasis added.) In 1998, the Legislature created a sales tax exemption for certain medicines used by naturopaths in their practice. RCW 82.08.0283(1) states, among other things, that the retail sales tax shall not apply to the sale of:

> (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; . . . .

(Emphasis added.)

Later the same year, citizens of Washington approved Initiative 692, codified at RCW 69.51A. RCW 69.51A.030(2)(a) allows health care professionals to issue an "authorization" to patients informing them that they may benefit from the use of medical marijuana. Those health care professionals are to discuss with their patients the benefits and risks of using marijuana. Neither the initiative, nor the Legislature's 2011 amendments to it, legalize the commercial sale of medical marijuana. *See State v. Reis*, 183 Wn.2d 197, 201, 351 P.3d 127 (2015). Rather, the primary purpose of the initiative was to provide an affirmative defense to criminal prosecution for individuals charged with possession of marijuana if those individuals had valid authorization from a health care professional. *Id*. at 209-11. The initiative said nothing about the creation of a tax exemption for medical marijuana.

The authorizations permitted by the initiative were originally limited to physicians and did not permit naturopaths to issue authorizations. 1999 c. 2 § 6. Only in 2010 did naturopaths become able to issue an authorization for medical marijuana. 2010 c. 284 § 2 (effective June 10, 2010).

Both federal and state law classify marijuana as a Schedule I controlled substance. 21 U.S.C. § 812(c)(10); RCW 69.50.204(c)(22). Consistent with this classification, RCW 18.36A.020(10) limits the legend drugs and controlled substances a naturopath may prescribe to certain Schedule III, IV, and V substances as permitted by rules of the state board of naturopathy. But the statute does not permit naturopaths to use Schedule I or II legend drugs or controlled substances in their practice, nor does it permit naturopaths to use controlled substances not approved by the board of naturopathy in their practice. This statute makes a clear distinction between controlled substances, such as medical marijuana, and botanical medicines. Under RCW 18.36A.040 and 18.36A.020(10), naturopaths cannot prescribe, administer, dispense, or use medical marijuana in their practice since it is a Schedule I controlled substance. The Washington Supreme Court recognized this in *Seeley*. The Court upheld the Legislature's classification and held: "Marijuana cannot be legally prescribed, nor can a prescription for marijuana be filled by a pharmacist in Washington . . . ." *Id*. at 783.

Taxpayer argues that since medical marijuana is of botanical origin, and because naturopaths are health care professionals allowed to provide patients with a valid documentation authorizing the medical use of marijuana, Taxpayer's sale of medical marijuana is exempt from taxation under RCW 82.08.0283(1).

The first problem in this case is that Taxpayer has not shown that the medical marijuana it sold was administered, dispensed, or used in the treatment by a naturopath. However, even if Taxpayer could show this, chapter 18.36A prohibits medical marijuana from being a "naturopathic medicine." *See* RCW 18.36A.020(10). RCW 18.36A.020(10) makes a clear distinction between controlled substances, such as medical marijuana and botanical medicines. If we were to conclude that because marijuana is of botanical origin, RCW 82.08.0283(1) exempts the sale of marijuana from taxation, we would render meaningless the distinction drawn between controlled substances and botanical medicines in RCW 18.36A.020(10).

Statutory provisions must be read in their entirety and construed together (*ITT Rayonier, Inc. v. Dalman*, 122 Wn.2d 801, 807 (1993)), and construed in a manner consistent with the general purpose of the statute (*Graham v. State Bar Ass'n*, 86 Wn.2d 624, 627, 548 P.2d 310 (1976)). "Strained, unlikely or unrealistic" statutory interpretations are to be avoided. *Bour v. Johnson*, 122 Wn.2d 829, 835 (1993); *Christie-Lambert v. McLeod*, 39 Wn. App. 298, 302 (1984)(A statutory provision should be interpreted to avoid strained or absurd consequences that could result from a literal reading). We are required, when possible, to give effect to every word, clause, and sentence of a statute. Det. No. 04-0180E, 26 WTD 206 (2007). No part should be deemed inoperative or superfluous unless the result of obvious mistake or error. *Id*. (Citing *Cox v. Helenius*, 103 Wn.2d 383, 387-88 (1985)).

We conclude that the botanical medicines referred to in RCW 82.08.0283(1)(b) equate to the botanical medicines referenced in RCW 18.36A.020(10). RCW 82.08.0283(1)(b) specifically refers to items administered, dispensed, or used in the treatment by a naturopath under chapter

18.36A and that chapter specifically limits the term "botanical medicines" to certain medicines, excluding most controlled substances. Medical marijuana has always been classified as a controlled substance, which is treated separately from the botanical medicines described in RCW 18.36A.020(10). Any other reading of RCW 82.08.0283(1) is contrary to the rules of statutory construction and interpretation outlined immediately above. We therefore conclude that Taxpayer's sales of marijuana are not exempt from retail sales tax under RCW 82.08.0283(1).

The 2015 legislation regarding medical marijuana only reinforces this interpretation. Laws of 2015, ch. 70, Section 17(7)(b). Section 17(7)(c) makes it clear that a naturopath cannot prescribe medical marijuana: "[a]n authorization is not a prescription as defined in RCW 69.50.101." Also, medical marijuana remains a Schedule 1 drug under the state's Controlled Substances Act after the Governor's veto of Sections 42 and 43. *See* Governor's veto message, Laws of 2015, ch. 70, p. 71-72.

The other 2015 legislation regarding medical marijuana, Laws of 2015, 2d Spec. Sess. ch 4, Sections 207 and 208, establishes an exemption from retail sales tax and use tax for sales of medical marijuana from July 1, 2015 until June 30, 2016, if customers meet specific conditions including registering their names on a statewide list, and if the seller applies for and is issued a license to sell medical marijuana products. The intent section states that "[i]t is also imperative to distinguish that the authorization for medical use of marijuana is different from a valid prescription provided by a doctor to a patient." *Id*., Section 101(1)(b). The legislature added these exemptions as new sections of Chapters 82.08 and 82.12 RCW, respectively. *Id*., Sections 207 and 208. If collective garden sales of medical marijuana had been exempt under RCW 82.08.0283, the legislature would not have needed to add these sections, further showing that there was no intent to previously exempt medical marijuana sales under RCW 82.08.0283. *See John H. Sellen Constr. Co. v. Dep't of Revenue*, 87 Wn.2d 878, 883, 558 P.2d 1342 (1976) ("[T]he legislature does not engage in unnecessary or meaningless acts, and we presume some significant purpose or objective in every legislative enactment."). Accordingly, we deny Taxpayer's petition on this issue.

DECISION AND DISPOSITION

Taxpayer's petition is denied.

Dated this 28th day of March 2016.