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| Kempf Surgical Appliances, Inc., | ) |                       |
|                                  | ) | CASE NO. 93-D-486     |
| Appellant,                       | ) |                       |
|                                  | ) | (SALES & USE TAXES)   |
| vs.                              | ) |                       |
|                                  | ) | DECISION AND ORDER    |
| Roger W. Tracy,                  | ) |                       |
| Tax Commissioner of Ohio,        | ) | (Upon remand from the |
|                                  | ) | Supreme Court)        |
| Appellee.                        | ) |                       |

APPEARANCES:

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ENTERED: July 18, 1997

Mr. Johnson, Ms. Jackson and Mr. Manoranjan concur.

An appeal was initiated, pursuant to R.C. 5717.02, by the appellant, Kempf Surgical Appliances, Inc. ("Kempf"), from a final determination rendered by the Tax Commissioner, dated April 30, 1993, In re Assessment Serial No. 92003331 S.

The assessment resulted from an audit of the appellant's sales and purchases during the period from January 1, 1988 through December 31, 1990. The Tax Commissioner assessed appellant for

uncollected sales taxes and penalties on various transactions with its customers which included the sale and rental of tangible personal property, i.e., certain types of devices.

On February 3, 1995, a final decision and order of this Board was issued. An appeal was taken therefrom to the Supreme Court of Ohio.

IT IS HEREBY CERTIFIED, pursuant to R.C. 5717.04, that on February 14, 1996, a judgment, together with an appropriate mandate, was rendered and issued by the Supreme Court. The Court affirmed in part and reversed in part this Board's decision and order issued February 3, 1995, and remanded the cause for further action consistent with the Court's opinion. The Court's opinion is reported in Kempf Surgical Appliances, Inc. v. Tracy (1996), 74 Ohio St.3d 517.

With respect to the matter of the remand, the Court's opinion states in particular part:

"The instant devices provide electrical charges to contract muscles that stabilize or support part of the body. However, the muscles provide the support, not the electrical devices. Thus, these devices are not braces or other devices that support weakened or non-functioning parts of the human body under R.C. 5739.02(B)(19).

"On reviewing the testimony, there appears to be a question as to whether these devices can be used 'to aid human perambulation.' But, the BTA did not review these devices in light of this latter clause of R.C. 5739.02(B)(19). Accordingly, we reverse the BTA's decision and remand this matter to it for it to rule on whether these devices are exempt as aiding in human perambulation." (Emphasis added.)

R.C. 5739.02( B)(19) [138 Ohio Laws, Part II, 3384], to which the Court's opinion refers, provides in pertinent part:

"The tax does not apply to the following:

\* \* \*

"(19) Sales of \* \* \* braces or other devices for supporting weakened or non-functioning parts of the human body; \* \* \* crutches or other devices to aid human perambulation; \* \* \* No exemption under this division shall be allowed for \* \* \* physical fitness equipment. This division does not apply to sales to a physician or medical facility for use in the treatment of a patient." (Emphasis added.)

The issue to which we have been directed pertains to transactions involving the sale or rental of certain types of devices, including transcutaneous electrical nerve stimulators ("TENS"), neuromuscular electrical stimulators ("NMES") and continuous passive motion devices ("CPM units"). It is not disputed that these particular kinds of devices were sold or rented by Kempf to their customers for the customer's personal use.

TENS is a type of device primarily used for the physical relief of chronic or post-traumatic pain in a specific part of the human body. The device, by way of electrodes attached to the skin of a person, provides a low voltage (electrical) charge to the surface area (skin) of the human body. The electrical charge causes a balanced contraction of particular muscles for the purpose of reducing or blocking pain impulses that otherwise emanate from that particular area or part of the body. See Exhibits 1-2; 4-6.

NMES, like TENS, provides electrical impulses to parts of the human body for the purpose of intentionally causing involuntary contractions or flexing of a muscle. Such electronically induced muscle contractions are primarily to prevent the disuse atrophy of such a muscle due to its lack of movement or exercise. See Exhibit 7.

The TENS and NMES devices may be attached and used during periods of human body rest (e.g., Ex.3) or worn during human (gait) training or during actual human perambulation (e.g., Exs. 2-4; 4-6).

CPM units are fixed location motorized mechanical devices used to mechanically move its parts which are attached to the human body and, in turn, physically actually cause the involuntary movement of the attached part of the human body, e.g., a person's fingers, arms, or legs. They are not worn during perambulation. See Exhibits 8 and 9. The CPM units are used most frequently after some type of joint surgery, to physically exercise and promote an improved post-operative movement of joints (ST.,76A). As we found in our initial decision, it appears that transactions involving these units were not assessed.

The TENS, NMES and CPM units are devices connected to the human body, often while the human body is not moving or is otherwise functionally operating while the wearer is not perambulating (e.g., while sitting (Ex.11), sleeping (Ex.10), or while engaging in a program designed to allow the patient to build endurance prior to using the unit as a functional orthosis (Ex.1,p.4). In our prior decision, we considered these devices in

the context of an exemption for braces or other devices as described in R.C. 5739.02(B)(19). We had not considered that the statutory phrase "other devices to aid human perambulation", extended the exemption to include devices not related generically to braces or crutches. Upon our reconsideration in accordance with the Supreme Court decision, we find that the devices, specifically TENS or NMES, may be actually used to aid human perambulation -- all dependent upon the purpose for which the particular device is being used at a particular point in time by a specific individual. (For illustrations, see Exs. 1 through 13).

In our prior decision, we held that these devices were not within the statutory exemption. Since we now hold that such devices may qualify for exemption, we must consider for the first time whether the appellant has established the intended or actual use of the purchased devices, TENS or NMES, by the consumer to determine whether the subject transactions qualify for exemption from taxation. The record contains no evidence adduced from the consumer (user) reflecting what the intended or actual use was with respect to the purchased device involved in each transaction. None of such devices in question, are functionally restricted to a single and primary use which is unquestionably an exempt use -- i.e., as an aid which enhanced the specific activity of human perambulation (human locomotion).

"Human perambulation" is a functional process or activity of the human body which effectuates the movement of the human body from one place to another. A device which is generally designed to transport a person from one place to another (an

automobile, for example) may be a device for the conveyance of a human being from one place to another, but it is not a device designed to be used to aid human perambulation. For example, while an automobile is designed to move a human from one place to another, such device is designed to effectuate such movement, not as an aid to, but as a substitute for, human perambulation.

A device which is used to aid the activity of human perambulation, in the context of R.C. 5739.02(B)(19) and to qualify for tax exemption, must be intended for use during and in conjunction with human perambulation to enhance the specific function of human perambulation.

As the statute specifies, physical fitness equipment (devices) that are used for the function and purpose of strengthening various parts of the human body, which may include the strengthening of dysfunctional parts, are expressly excluded from tax exemption.

Devices which are not designed to be used in conjunction with and as an aid and enhancement to the physical activity of the human perambulatory movement do not qualify for tax exemption.

From the evidence, the various devices in question, TENS or NMES, may be subject to a reasonable and primary use by the consumer for a form of exercise of muscles and joints that are not involved with or aid human perambulation; they are often used at times during which no human perambulation activity is taking place. As we have found, the CPM units were not used for human perambulation.

There may be times or situations when such devices, TENS or NMES, are in fact worn by the consumer and functionally used during the act of human perambulation by such consumer. In the context of the transactions determined taxable by the tax commissioner, however, the consumers did not advise the vendor (appellant) of any claim for exemption of these devices by virtue of their intended use by them as a specific aid and enhancement for and during their human perambulation.

The vendor cannot legally make their consumers' claims for exemption based upon what the vendor assumes will be the consumers' probable or expected use. Only the consumer can legally make such a claim by a certificate of exemption. The vendor may nevertheless make a claim for exemption where the item of tangible personal property the vendor sells is never subject to the tax imposed, regardless of use. R.C. 5739.03(B).

It is the appellant's claim that the consumers are entitled to tax exemption for the devices sold, based solely upon the nature of the device, itself, that is involved in the subject transactions. From the record considered as a whole, it is evident that such devices, by their nature and use, do not qualify for an exemption without regard to their intended use by the consumer.

The only testimonial evidence adduced at the hearing before this Board was that of Mr. Stephen R. Kempf, Vice President and co-owner of the vendor corporation. His testimony was to the effect that these particular devices, which his corporation sells or rents, are subject to various uses, including non-exempt uses (as the documentary exhibits demonstrate). In his professional

opinion, although not factually corroborated, the devices sold to the consumers were probably prescribed by doctors for their patient's use for one or more of functional activities provided by these particular devices. Whether the consumer's intended use or actual use legally constituted a taxable or exempt use, or both, was dependent upon the consumer's reason for purchase. Since Mr. Kempf was not personally involved with any of the consumers of the devices in the subject transactions, he had no personal knowledge with regard to the consumer's primary intended or actual use to be made of the device being acquired. The probative value of such testimony in the context of the use of the devices by the consumers is therefore necessarily of limited value and insufficient to establish the customer's right to exemption, if any. General Mills Fun Group, Inc. v. Lindley (1982), 1 Ohio St.3d 27, 30.

If any sale is claimed to be exempt under R.C. 5739.02, the consumer must furnish to the vendor, and the vendor must obtain from the consumer, a certificate specifying the reason that the sale is not legally subject to the tax. R.C. 5739.03(B). If an exemption certificate from the consumer required by R.C. 5739.03(B) is not timely furnished or obtained, it will be presumed that the sale is taxable. Union Metal Mfg. Co. v. Kosydar (1974), 38 Ohio St.2d 53.

The burden of proof to establish entitlement to any tax exemption rests with the one claiming to have the right of exemption. The court has consistently held that statutes granting an exemption from tax are to be strictly construed, and that one claiming an exemption must affirmatively establish his right

thereto. Dayton Sash & Door Co. v. Kosydar (1973), 36 Ohio St.2d 120, 122. The appellant cannot shift that burden of proof to the Tax Commissioner.

The appellant failed to establish any consumer's right to exemption based upon the consumer's intended or actual uses of the purchased item of tangible personal property. The various devices involved in the subject transactions might be used and may have been properly used other than as an aid in human perambulation, as the evidence demonstrates, which would not entitle the consumer to a tax exemption under R.C. 5739.02(B)(19).

Whether the devices, by virtue of their possible uses, might be entitled to an exemption from taxation based upon their use as an aid in human perambulation, this Board may not speculate or decide. Suffice it to say, based upon the record in this instance, the appellant has failed to establish that the devices were acquired to aid human perambulation which might meet the burden of proving the consumer's right to exemption under R.C. 5739.02(B)(19).

The Board of Tax Appeals, pursuant to the judgment and mandate of the Supreme Court duly certified to this Board, upon review of the evidence of record pertaining to the various devices involved in the light of particular provision of R.C. 5739.02(B)(19), to which the Court referred, finds and determines that the subject devices TENS or NMES can be used to aid in perambulation. However the appellant failed to establish as a matter of fact and law that the subject devices, by their nature and operation, were used to aid human perambulation. It also

appears, in terms of their design and function, that such devices are subject to use as a type of physical fitness equipment. The Board of Tax Appeals further finds that appellant has failed to establish that the subject devices were purchased by the consumers for an exempt use as required by R.C. 5939.03(B).

IT IS THEREFORE ORDERED, that the final determination rendered by the Tax Commissioner, dated April 30, 1993, In re Assessment Serial No. 92003331 S, be and hereby is affirmed.

IT IS FURTHER ORDERED that the certified copy of this order be sent to the Tax Commissioner, and to each of the parties hereto by and through their respective counsel. ohiosearchkeybta