

1 Kempf Surgical Appliances, Inc., Appellant, v. Tracy, Tax Commr.,

2 Appellee.

3 [Cite as *Kempf Surgical Appliances, Inc. v. Tracy* (1996), \_\_\_\_\_ Ohio St.3d

4 \_\_\_\_\_.]

5 *Taxation -- Sales tax -- Orthotics -- Transcutaneous electrical nerve*

6 *stimulators and neuromuscular electrical stimulators -- Board*

7 *of Tax Appeals' decision denying exemption under R.C.*

8 *5739.02(B)(19) reversed and cause remanded for*

9 *determination whether the devices are exempt as aiding in*

10 *human perambulation.*

11 (No. 95-460--Submitted November 9, 1995--Decided February 14,

12 1996.)

13 Appeal from the Board of Tax Appeals, No. 93-D-486.

14 Kempf Surgical Appliances, Inc. ("Kempf"), appellant, sells or rents

15 transcutaneous electrical nerve stimulators ("TENS") and neuromuscular

16 electrical stimulators ("NMES") in its orthotics and orthoses business. Both

17 types of devices are small boxes with wires leading from them that attach to

18 the human skin surface. At preset intervals, the devices, powered by

19 batteries, deliver an electrical impulse through the wires to the skin.

1           According to the evidence, the electrical charges alleviate pain and  
2           cause muscle contractions. When contracted, the muscles hold joints in  
3           place, much as a brace might, and assist the user in moving his limbs.  
4           Among the conditions these devices alleviate is “foot drop.” The devices  
5           stabilize the foot in this condition so that the individual may walk almost  
6           normally. Customers also use these devices to rehabilitate their knees, and  
7           to walk after knee ligament surgery.

8           Kempf’s customers also use the devices to cure scoliosis. In this  
9           procedure, users attach the wires at designated points on their backs before  
10          going to bed at night. While the user sleeps, the electrical charges cause  
11          back muscles to contract, which pulls the spine into correct alignment. The  
12          user typically wears this device only in bed.

13          The Tax Commissioner, appellee, assessed sales tax on Kempf’s sales  
14          of these devices in 1988 through 1990. He found that these devices “serve  
15          as temporary therapeutic devices and assist patients in curing his or her  
16          medical problems.” Kempf appealed this order to the Board of Tax Appeals  
17          (“BTA”).

1           The BTA affirmed the commissioner’s order. It found that TENS  
2 devices delivered electrical stimulation “[to] nerves to relieve chronic or  
3 post-traumatic pain, but do not actually physically support a part of the body  
4 in any direct fashion.” As to the NMES devices, the BTA held that they  
5 delivered electrical stimulation “to muscles to cause their contraction, but  
6 do not actually physically support a part of the body in any direct fashion.”  
7 The BTA ruled that the devices do not function the same as braces.

8           This cause is now before this court upon Kempf’s appeal as of right.

9           *Lutz, Boster & Cornetet* and *John B. Cornetet*, for appellant.

10          *Betty D. Montgomery*, Attorney General, and *Steven L. Zisser*,

11          Assistant Attorney General, for appellee.

12          *Per Curiam*. Kempf applies for exemption from the sales tax under

13          R.C. 5739.02(B)(19), which provides:

14          “The tax does not apply to the following:

15          “\*\*\*

16          “(19) Sales of \*\*\* braces or other devices for supporting weakened or

17          non-functioning parts of the human body \*\*\* [and] crutches or other

18          devices to aid human perambulation \*\*\*.”

1 Kempf argues that these devices technologically replace braces and  
2 are exempt under R.C. 5739.02(B)(19), or that they aid human  
3 perambulation and are exempt also under R.C. 5739.02(B)(19). We agree  
4 with the BTA that these devices are not braces under this exemption, but  
5 find that the BTA neglected to decide whether these devices aid human  
6 perambulation. Consequently, we reverse the BTA and remand this matter  
7 to it for such determination.

8 In *Akron Home Med. Serv., Inc. v. Lindley* (1986), 25 Ohio St.3d 107,  
9 25 OBR 155, 495 N.E.2d 417, we addressed the predecessor statute (R.C.  
10 5739.02[B][18]) to this exemption. This statute exempted “braces and other  
11 similar medical or surgical devices for supporting weakened or useless parts  
12 of the human body \*\*\*.” We ruled that “braces are of that group which  
13 *physically* supports parts of the body, as opposed to a broader type of  
14 ‘support’ which could include chemically induced support of particular  
15 organs.” (Emphasis sic.) *Id.* at 109, 25 OBR at 157, 495 N.E.2d at 420.  
16 We ruled that oxygen and oxygen equipment, then under review, were not  
17 similar to braces. We judged the oxygen equipment to be delivery systems  
18 that do not actually support a part of the body in any direct fashion.

1           We find the same here. The instant devices provide electrical charges  
2 to contract muscles that stabilize or support a part of the body. However,  
3 the muscles provide the support, not the electrical devices. Thus, these  
4 devices are not braces or other devices that support weakened or non-  
5 functioning parts of the human body under R.C. 5739.02(B)(19).

6           Furthermore, the General Assembly amended the statute after the  
7 audit period (1977-1979) involved in our decision in *Akron Home Medical*  
8 *Services* to enact R.C. 5739.02(B)(19) and to exempt “crutches or other  
9 devices to aid human perambulation.” (138 Ohio Laws, Part II, 3384.) We  
10 note that the General Assembly did not, in amending this exemption,  
11 include the term “similar” to modify the clause “other devices to aid human  
12 perambulation” as it had for “braces and other *similar* medical or surgical  
13 devices” for our review in *Akron Home Medical Services*.

14           On reviewing the testimony, there appears to be a question as to  
15 whether these devices can be used “to aid human perambulation.” But, the  
16 BTA did not review these devices in light of this latter clause of R.C.  
17 5739.02(B)(19). Accordingly, we reverse the BTA’s decision and remand

1 this matter to it for it to rule on whether these devices are exempt as aiding  
2 in human perambulation.

3 *Decision affirmed in part,*  
4 *reversed in part*  
5 *and cause remanded.*

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7  
8 MOYER, C.J., WRIGHT, RESNICK, F.E. SWEENEY, PFEIFER and COOK,  
9 JJ., concur.

10 DOUGLAS, J., dissents.

11 DOUGLAS, J., dissenting. I respectfully dissent. I would affirm the  
12 BTA in all respects.

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