

Cite as Det. No. 15-0141, 35 WTD 6 (2016)

BEFORE THE APPEALS DIVISION  
DEPARTMENT OF REVENUE  
STATE OF WASHINGTON

In the Matter of the Petition for Correction of	)	<u>D E T E R M I N A T I O N</u>
Assessment of	)	
	)	No. 15-0141
	)	
...	)	Registration No. ...
	)	

RULE 18801; RCW 82.08.925: RETAIL SALES TAX – EXEMPTION – DIETARY SUPPLEMENTS – PRESCRIPTION. Physician’s supervisory role and Taxpayer’s assertion that the physician tells coaches that customers must take the supplements is insufficient evidence to prove that the participants purchase the supplements under the authority of the physician’s prescription.

Headnotes are provided as a convenience for the reader and are not in any way a part of the decision or in any way to be used in construing or interpreting this Determination.

Margolis, A.L.J. – A provider of physician services and seller of food and dietary supplements appeals the assessment of retail sales tax on grounds that the sales are exempt as dietary supplements dispensed pursuant to a prescription. We deny Taxpayer’s petition.<sup>1</sup>

ISSUE

Are Taxpayer’s sales of dietary supplements exempt from retail sales tax under RCW 82.08.925?

FINDINGS OF FACT

[Taxpayer] is owned by . . . [owner], a licensed physician, who operates a family medicine practice in . . . , Washington. It contracts with [Company], which offers a weight loss program that works by encouraging lifestyle changes and requiring participants to follow a specified diet that includes [Company] foods and supplements that can only be purchased from a licensed distributor. Taxpayer’s employees (including . . . , a clinical pharmacist) provide support sessions and nutrition education. On April 15, 2009, Taxpayer executed a “Clinic Agreement” with [Company] that reads as follows:

This Clinic Agreement (“Agreement”) is between [Company] and [Taxpayer], hereafter known as “Clinic.”

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<sup>1</sup> Identifying details regarding the taxpayer and the assessment have been redacted pursuant to RCW 82.32.410.

[Company] agrees as follows:

1. To provide [Company] nutrition products at wholesale prices.
2. To provide initial training to Clinic personal [sic] at no charge and on an as needed bases [sic] at no charge.
3. To provide Clinic with [Company's] Protocol for weight loss designed to be used with [Company] nutrition products.

Clinic agrees as follows:

1. To strictly follow [Company's] protocol for weight loss.
2. To use only [Company's] products with [Company's] protocols.
3. To not advertise or sell [Company's] products on the Internet without [Company] permission.
4. To not sell [Company] products below Suggested Retail Price without [Company] permission.
5. To collect and pay all taxes as required by the State where Clinic is selling [Company's] products.

Taxpayer provided [Company] documents describing the program and its products. The program is offered only by health professionals and requires the use of [Company] foods and supplements. Taxpayer explained that participants can purchase equivalent supplements elsewhere with approval from their coach, but the supplements are necessary to ensure that participants are getting requisite nutrition while following the diet protocol.

The protocol requires the use of four supplements ( . . . ), comprised of . . . . Supplement Overview, Pages 2-4. Taxpayer provided sample health profile forms completed by program participants, with attached progress notes. Participants initial a statement that they must take vitamins and minerals while on the program and, if they stop taking them, they may experience "undesirable side effects." Health Profile, Page 7. The sample progress notes indicate that Taxpayer regularly monitors participants' condition, taking health conditions such as diabetes or high blood pressure into account.

Taxpayer explained that [the owner] is not always directly involved with [Company] customers when the [Company] customers are not also [the owner's] patients, but [the owner] will discuss [Company] customers with the employees, advise the employees as necessary, and tells the employees that [Company] customers must take the dietary supplements.<sup>2</sup>

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<sup>2</sup> Taxpayer explained that the clinic works with customers' health care providers, and provided a form letter that the [Company] coach sends to the providers, advising as follows (in pertinent part):

Under the direct care of [a Company] coach and the supervision of [the owner], \_\_\_\_\_ will participate in this weight loss program until his/her goal weight is reached. . . . We will monitor his/her progress on the program weekly and check blood pressure and monitor their . . . log regularly if indicated, based on their medication condition and medications as prescribed by your office. . . As a precaution, we request periodic lab review. Our preference is to have this done through the prescribing doctor's office, and have all medical decision making, including medication adjustments, left to his/her discretion.

The Department of Revenue's (Department's) Audit Division (Audit) reviewed Taxpayer's records for the period January 1, 2010 through December 31, 2013, and on May 2, 2014, assessed Taxpayer \$ . . . . The assessment is comprised of \$ . . . in retail sales tax, \$ . . . in use/deferred sales tax, and \$ . . . in interest. Taxpayer purchased food (such as shakes, powdered drinks, and bars) and supplements from [Company], and then sold these items to program participants. Taxpayer did not charge retail sales tax, and on its excise tax returns deducted the sales from the measure of retail sales tax as exempt food. Audit found that Taxpayer was deducting sales of vitamin supplements in error, and assessed retail sales tax on these sales.<sup>3</sup> Taxpayer appealed, asserting that Audit erred in assessing retail sales tax on sales of dietary supplements that are exempt from retail sales tax under RCW 82.08.925.

### ANALYSIS

RCW 82.08.020 imposes a retail sales tax on each retail sale in this state. The seller must collect sales tax from the buyer, and then remit the collected tax to the Department. RCW 82.08.050. If the seller fails to collect the tax, the seller must still pay the tax to the Department. RCW 82.08.050(3).

RCW 82.08.925 provides an exemption for "sales of dietary supplements for human use dispensed or to be dispensed to patients, pursuant to a prescription." There is no dispute that the products at issue are dietary supplements. Taxpayer argues that its sales of dietary supplements are made under the auspices of a medical office and qualify for this exemption because it dispenses the supplements to patients pursuant to a physician's prescription.

WAC 458-20-18801 (Rule 18801) is the administrative rule that explains retail sales tax and use tax exemptions for medical products, including the exemption under RCW 82.08.925. Rule 18801(403)(e) states as follows:

**(e) Dietary supplements (also known as nutrition products) with a prescription are exempt from retail sales and use taxes.** Sales of dietary supplements not covered by either of the retail sales tax or use tax exemptions for "food and food ingredients" are generally subject to retail sales tax or use tax. See RCW 82.08.0293 and 82.12.0293. However, RCW 82.08.925 and 82.12.925 provide specific retail sales tax and use tax exemptions for sales of "dietary supplements" for human use, pursuant to a prescription. A "dietary supplement" is any product, other than tobacco, intended to supplement the diet, and that satisfies all three of the criteria listed in (e)(i) through (iii) of this subsection.

(i) Contains one or more of the following dietary ingredients:

(A) A vitamin;

(B) A mineral;

(C) An herb or other botanical;

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<sup>3</sup> Audit determined the amount of vitamin sales using the cost to purchase the [Company] inventory and the [Company] sales to get a markup percentage, and applying the markup to total vitamin purchases. At the hearing, Taxpayer asserted that in 2012, 28 bottles of vitamins that it had purchased expired unsold and were discarded, but Taxpayer retained no evidence to show that the product was discarded rather than sold. Absent records showing that Audit overstated the measure of sales, we have no grounds for adjustment.

- (D) An amino acid;
- (E) A dietary substance for use by humans to supplement the diet by increasing the total dietary intake; or
- (F) A concentrate, metabolite, constituent, extract, or combination of any ingredient described in this subsection.
- (ii) Is intended for ingestion in tablet, capsule, powder, softgel, gelcap, or liquid form, or if not intended for ingestion in such form, is not represented as conventional food and is not represented for use as a sole item of a meal or of the diet; and
- (iii) Is required to be labeled as a dietary supplement, identifiable by the "supplement facts" box found on the label as required pursuant to 21 C.F.R. Sec. 101.36, as amended or renumbered as of January 1, 2003. See RCW 82.08.0293.

(Emphasis in original.) Rule 18801(402) explains that most exemptions for medical products require that the item is purchased under authority of a prescription, which it defines as follows:

- (a) What is a prescription? A “prescription” is 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.

See also RCW 82.08.0281(4); Det. No. 13-0276, 33 WTD 153 (2014); Det. No. 07-0206, 27 WTD 36 (2008).

Exemptions and deductions are narrowly construed. *Budget Rent-a-Car, Inc. v. Dep’t of Revenue*, 81 Wn.2d 171, 500 P.2d 764 (1972); Det. No. 03-0252, 23 WTD 223 (2004). A person claiming a tax exemption, exception, or deduction has the burden of proving he or she qualifies for it. *Group Health Coop. v. Tax Comm’n*, 72 Wn.2d 422, 433 P.2d 201 (1967); Det. No. 89-268, 7 WTD 359 (1989).

In this matter, Taxpayer provided no records showing that [the owner] issued any order, formula, or recipe for the supplements at issue. The supplements are required under the [Company] program, which is administered by employees rather than [the owner]. We find that [the owner’s] supervisory role and Taxpayer’s assertion that [the owner] tells coaches that customers must take the supplements is insufficient evidence to prove that the participants purchase the supplements under the authority of his prescription.<sup>4</sup> We deny Taxpayer’s petition and sustain the assessment of retail sales tax.

## DECISION AND DISPOSITION

Taxpayer's petition is denied.

Dated this 9th day of June, 2015.

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<sup>4</sup> Taxpayer references 27 WTD 36 (2008) in support of its petition. In that determination, a licensed practitioner prescribed a treatment plan, and if the plan required a prescription for dietary supplements, she signed and dated the prescription, which included the type of dietary supplement and dosage, gave a copy to her patient, and filed a copy with the patient’s records. 27 WTD 36 is distinguishable because the taxpayer in that case sold dietary supplements pursuant to a prescription.