

Cite as Det. No. 15-0075, 35 WTD 482 (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. 15-0075
	)	
...	)	Registration No. ...
	)	

[1] RCW 82.08.0293; WAC 458-20-244: RETAIL SALES TAX – EXEMPTION FOR FOOD AND FOOD INGREDIENTS – DIETARY SUPPLEMENTS: A chiropractor was not able to show that its sales of items labeled as “dietary supplements” did not meet the definition of dietary supplements in RCW 82.08.0293(2)(a). Therefore, the items sold were not exempt food and were subject to retail sales tax.

[2] RCW 82.08.925; WAC 458-20-18801: RETAIL SALES TAX – EXEMPTION FOR SALES OF DIETARY SUPPLEMENTS DISPENSED PURSUANT TO A PRESCRIPTION: A chiropractor’s sales of dietary supplements do not qualify for the exemption from retail sales tax in RCW 82.08.925 because a chiropractor is not authorized to write prescriptions.

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.

M. Pree, A.L.J. – A chiropractor protests the assessment of retail sales tax on nutrition products that he sold to patients. Because the products were dietary supplements, which the chiropractor could not prescribe, the chiropractor’s sales of the supplements were not exempt from retail sales tax. We deny the petition.<sup>1</sup>

ISSUES

1. Under RCW 82.08.0293 and WAC 458-20-244 (Rule 244), were products the chiropractor sold to its clients exempt as food or taxable dietary supplements?
2. Under RCW 82.08.925 and WAC 458-20-18801 (Rule 18801), did the chiropractor sell the products as dietary supplements pursuant to a prescription?

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

## FINDINGS OF FACT

[Taxpayer] operates a clinic in Washington. The taxpayer performs chiropractic and massage services, provides nutritional consulting, and sells nutrition products. The taxpayer's managing member is a chiropractor who will recommend nutrition products for the taxpayer's customers. The taxpayer purchases the products from an out of state vendor. The taxpayer then resells the products to its patients. The taxpayer did not charge retail sales tax on the products it sold.

The Department of Revenue (Department) reviewed the taxpayer's excise tax returns and records for the years 2010 through 2013. As a result, on June 12, 2014, the Department's Audit Division issued the assessment referenced above, which totaled \$ . . . , including the 5% assessment penalty of \$ . . . and interest of \$ . . . . The Audit Division assessed \$ . . . in litter tax and \$ . . . in use and/or deferred sales tax, which the taxpayer does not contest. The taxpayer appealed \$ . . . in retail sales tax assessed on its sales of nutrition products plus the corresponding interest and penalty.

The taxpayer contends that its sales of the nutrition products were exempt as food. In the alternative, the taxpayer contends the products were exempt as dietary supplements dispensed pursuant to a prescription. We asked the taxpayer for copies of prescriptions and the accompanying invoices for the products at issue, but none were provided.

The taxpayer purchases all of the nutrition products at issue from a single vendor, . . . via its website at . . . (last visited March 5, 2015) who markets the products as derived from whole organic food with few or no chemicals or additives. There is no evidence that the taxpayer paid retail sales tax or use tax on the products purchased. The products are capsules or liquids dispensed in plastic bottles. On the back of each bottle is a label entitled, "Supplement Facts." The labels list the ingredients. While the labels have a "supplement facts" box, they do not have a "nutrition facts" box. *See* . . . (last visited March 5, 2015). The vendor states it follows the current good manufacturing practices (cGMPs) for dietary supplements published by the Food and Drug Administration (FDA). *See* <https://www.standardprocess.com/About-Us/blog/February-2015/Thoughts-on-New-York-Attorney-Generals-Action> (last visited March 5, 2015). The vendor states that its chemists perform multiple assays to guarantee that its products meet label claims. *Id.*

According to the taxpayer, the vendor of these products only sells to professionals who may only resell the products to clients to whom the [professionals] prescribe the products. We asked the taxpayer to verify this claim, and the taxpayer provided a copy of a customer account application from the vendor, which appeared to require a professional health degree from an accredited school and/or a state license. The taxpayer also provided a copy of a pamphlet from the vendor directed to consumers of its products that provides its products are sold through health care professionals. On the vendor's website, we found the following:

. . .

*See* . . . (last visited March 5, 2015).

## ANALYSIS

Washington assesses a retail sales tax on the selling price of tangible personal property in each retail sale. RCW 82.08.020(1). However, the retail sales tax does not apply to sales of “food and food ingredients.” RCW 82.08.0293(1). “Food and food ingredients” is a broadly defined statutory term and means, “substances, whether in liquid, concentrated, solid, frozen, dried, or dehydrated form, that are sold for ingestion or chewing by humans and are consumed for their taste or nutritional value.” *Id.*

RCW 82.08.0293(2) excludes dietary supplements from the definition of “food and food ingredients” and defines, “Dietary supplement” as:

“Dietary supplement” means any product, other than tobacco, intended to supplement the diet that:

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

(A) A vitamin;

(B) A mineral;

(C) An herb or other botanical;

(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.

RCW 82.08.0293(2)(a). In order to be a dietary supplement, a substance intended to supplement the diet must meet all three statutory criteria. *Id.* The taxpayer claims its sales of the vendor’s products labeled as dietary supplements are exempt food sales.

The taxpayer does not dispute that the products meet requirements (i) or (ii) of RCW 82.08.0293(a)(a), but argues that the products are not dietary supplements because they do not meet (iii) of that statute. The labels include the ingredients in (i), and the products are ingested in tablet, capsule, powder, softgel, gelcap, or liquid form per (ii). Rule 244(3)(h) provides, “If a product is otherwise considered a food or food ingredient and labeled with both a ‘supplement facts’ box and ‘nutrition facts’ box, the product is treated as a food or food ingredient.” While the labels have a “supplement facts” box, they do not have a “nutrition facts” box.

The taxpayer argues that its vendor’s products are not *required* to be labeled as dietary supplements because it does not know whether the vendor qualifies for any exclusions under 21

C.F.R. Sec. 101.36(h), and therefore, does not meet requirement (iii) in RCW 82.08.0293(2)(a). We do not agree. In Det. No.14-0142, 34 WTD 96 (2015) we held:

The plain language of RCW 82.08.0293(2)(a)(iii) is unambiguous: Whether a product is required to be labeled as a dietary supplement is to be identified/determined by referring to the product's label and seeing whether it displays a "supplement facts" box meeting the requirements of 21 C.F.R. Sec. 101.36. Once the "supplement facts" box is identified on the product's label, RCW 82.08.0293(2)(a)(iii) concludes that the product "[i]s required to be labeled as a dietary supplement," and its criteria has been met.

34 WTD 96, 100.<sup>2</sup>

The taxpayer has not shown that its products are not dietary supplements as defined in RCW 82.08.0293(2) and Rule 244(3)(h). 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). Here the taxpayer has not met its burden.

We conclude that the vendor's products at issue are dietary supplements. Therefore, the taxpayer's sales of those products are not exempt from retail sales tax under RCW 82.08.0293.

In the alternative, the taxpayer contends that if the products at issue are dietary supplements, its sales of the dietary supplements are exempt under RCW 82.08.925, which provides, "The tax levied by RCW 82.08.020 shall not apply to sales of dietary supplements for human use dispensed or to be dispensed to patients, pursuant to a prescription. 'Dietary supplement' has the same meaning as in RCW 82.08.0293."

In Det. No. 13-0276, 33 WTD 153 (2014), we concluded that a chiropractor's sales of dietary supplements to patients do not qualify for the exemption in RCW 82.08.925. We reasoned that because chiropractors are not authorized under Washington law to prescribe or dispense drugs under RCW 18.25.005, the dietary supplements are not dispensed pursuant to a prescription. 33 WTD [153]. RCW 18.25.005(4) defines "chiropractic" for purposes of licensing and states, "Chiropractic care shall not include the prescription or dispensing of any medicine or drug . . . ." The taxpayer has not shown that it prescribes the dietary supplements or that it is authorized to prescribe any similar product. The taxpayer provides advice. The taxpayer may recommend or

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<sup>2</sup> Det. 14-0142, 34 WTD 96,100 explains:

The language of RCW 82.08.0293(2)(a)(iii) is from Appendix C – Library of Definitions, Part II – Product Definitions of Food and Food Products, of the Streamlined Sales and Use Tax Agreement Adopted November 12, 2002 and amended through October 30, 2013 ("SSUTA"). As such, this language has also been adopted by several other states that follow the SSUTA. Recently, the Minnesota Tax Court was asked to determine whether a powdered energy drink, containing vitamins and minerals, with a "supplement facts" box on its label, was a "dietary supplement" under Minnesota Statute § 297A.67, subd. 2(1)-(3). *SlimGenics Minnesota, Inc., f/k/a OGB, Inc., d/b/a SlimGenics Weight Control Centers, Appellant v. Commissioner of Revenue, Appellee*, Minnesota Tax Court, County of Hennepin, Regular Division, 8422-R (October 23, 2013). The Court adopted an interpretation similar to ours, looking to the objective factor of whether the label contains a "supplement facts" . . . , in determining whether the powdered energy drinks were "required to be labeled as a dietary supplement." [*Id.*, 8442-R at 12].

[advise] the use of the dietary supplements that it recommends. However, the taxpayer has not shown that it sold any dietary supplements “pursuant to a prescription” as required by RCW 82.08.925.

The taxpayer contends that the RCW 18.25.005(4) limit on chiropractic prescriptions only applies to drugs, and we erred in 33 WTD 153 when we concluded that chiropractors could not prescribe dietary supplements. The taxpayer argues that we erred by applying the narrow definition of “prescription” from RCW 82.08.0281. First, “Tax exemptions and deductions must be narrowly construed.” *Homestreet, Inc. v. Dep’t of Revenue* 166 Wn.2d 444 at 455, 210 P.3d 297 (2009). Second, we also noted that RCW 18.25.005(2) authorizes chiropractors to provide “dietary advice and recommendation of nutritional supplementation.” 33 WTD at 34, fn 2.

“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 . . .” who is authorized by Washington law to prescribe.” Rule 18801(402)(a). “The specific requirements for a prescription may differ depending on the item exempted and the RCW chapter under which the person issuing the prescription is licensed.” *Id.* Chiropractors are not authorized to write “prescriptions.” The taxpayer did not prescribe the products at issue. Because the taxpayer only recommended and advised its patients to buy the dietary supplements that it sold, we conclude that the RCW 82.08.925 prescription exemption did not apply to the taxpayer’s sales of its dietary supplements.

#### DECISION AND DISPOSITION

We deny the taxpayer’s petition.

Dated this 20th day of March, 2015.