

Cite as Det. No. 00-013, 19 WTD 923 (2000)

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. 00-013
	)	
...	)	Registration No. ...
	)	FY. . . /Audit No. . . .
	)	
...	)	Registration No. ...
	)	FY. . . /Audit No. . . .

[1] RULE 244; RCW 82.08.0293: RETAIL SALEX TAX – EXEMPTION – FOOD PRODUCTS – POWDERED DRINK MIXES SOLD PRIMARILY TO ATHLETES AND BODYBUILDERS – DIETARY SUPPLEMENTS OR ADJUNCTS. Sales of powdered drink mixes, which contain carbohydrates and/or protein (and may contain vitamins, minerals, and/or fat) are exempt from retail sales tax under RCW 82.08.0293 as food products. These products fall within the common and ordinary meaning of “food,” as material containing essential body nutrients, such as carbohydrates, fats, or proteins that is taken in and assimilated by an organism to maintain life and growth. The powdered drink mixes are not taken to meet special vitamin or mineral needs, and, as such, are not excluded from the exemption as dietary supplements or by the mixes.

[2] ...

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.<sup>1</sup>

NATURE OF ACTION:

Retailer of powdered drink mixes protests the Audit Division’s disallowance of its claimed retail sales tax exemption based on the Audit Division’s conclusion that the drink mixes do not qualify as “food.” ...<sup>2</sup>

ISSUES:

---

<sup>1</sup> Nonprecedential portions of this determination have been deleted. See RCW 82.32.410.

<sup>2</sup> Identifying details regarding the taxpayer and the assessment have been redacted pursuant to RCW 82.32.410.

1. Whether sales of powdered drink mixes, which contain carbohydrates and/or protein (and may contain vitamins, minerals, and/or fat) are exempt from retail sales tax under RCW 82.08.0293.
2. . . .

FACTS:

C. Pree, A.L.J. - Procedural History. [Mr. . . .] was audited for the period of January 1, 1994, through June 30, 1995. The audit resulted in the assessment of retail sales tax of \$. . . , litter tax of \$. . . , and interest of \$. . . . The assessment totaled \$. . . . Mr. . . . incorporated his business as . . . Inc. on July 1, 1995. . . . Inc. was audited for the period of July 1, 1995, through December 31, 1997. The audit resulted in the assessment of retail sales tax of \$. . . , litter tax of \$. . . , and interest of \$. . . . The assessment totaled \$. . . . . Inc. and Mr. . . . will hereafter collectively be referred to as the taxpayer.

. . .

The Taxpayer's Business/Product at Issue. The Audit Division characterized the taxpayer's business as follows:

The taxpayer operates retail discount nutrition stores in [City A and City B, Washington] (opened in 1996). The taxpayer sells vitamins, minerals, dietary supplements, herbs, amino acids, protein powders, weightgain powders, energy bars, pre-mixed drinks, fitness apparel, workout gloves, exercise belts, and nutrition books to athletes and body builders.

The taxpayer states that the products it sells fall into four basic categories: (1) pre-made drinks; (2) nutritional drink powders; (3) nutritional bars; and (4) herbs and vitamins.<sup>3</sup> The Audit Division recognized that the nutritional or "energy" bars and noncarbonated fruit juice drinks are exempt from retail sales tax as food. However, the Audit Division found that the taxpayer's "nutritional drink powders" do not qualify for the exemption for food.

The taxpayer notes that the drink powders can be broken down into three categories: (1) protein powders; (2) carbohydrate powders; and (3) protein/carbohydrate powders. The ingredients in the products vary, but almost all of the products have as their major component milk or egg protein and/or vegetable-based carbohydrate (often high fructose corn syrup, which is derived from corn). The protein and protein/carbohydrate powders generally contain either whey (or other milk protein) or egg protein. The carbohydrate and protein/carbohydrate powders generally contain vegetable-based carbohydrate, usually corn syrup. Some of the powders also contain fat, vitamins, and/or minerals. All of the drink powders supply calories.

---

<sup>3</sup> The taxation of the herbs and vitamins is not at issue.

## APPLICABLE STATUTE AND RULE:

RCW 82.08.0293 provides in pertinent part as follows:

(1) The tax levied by RCW 82.08.020 [the retail sales tax] shall not apply to sales of food products for human consumption.

“Food products” include cereals and cereal products, oleomargarine, meat and meat products including livestock sold for personal consumption, fish and fish products, eggs and egg products, vegetables and vegetable products, fruit and fruit products, spices and salt, sugar and sugar products, coffee and coffee substitutes, tea, cocoa and cocoa products.

“Food products” include milk and milk products, milk shakes, malted milks, and any other similar type beverages which are composed at least in part of milk or a milk product and which require the use of milk or a milk product in their preparation.

“Food products” include all fruit juices, vegetable juices, and other beverages except bottled water, spirituous, malt or vinous liquors or carbonated beverages, whether liquid or frozen.

“Food products” do not include medicines and preparations in liquid, powdered, granular, tablet, capsule, lozenge, and pill form sold as dietary supplements or adjuncts.

WAC 458-20-244 (Rule 244) is the administrative rule interpreting the exemption. It provides in pertinent part as follows:

Formerly, sales of food products were sometimes taxable depending upon how and where the products were sold. Under the changes in the law the intent is to tax such product sales or exempt them from tax in a uniform and consistent manner so that the tax either applies or not equally for all sellers and buyers. Generally, it is the intent of the law, as amended, to provide the exemption for groceries and other unprepared food products with some specific exclusions . . . .

In addition to the items listed in the statute, the rule includes in its nonexclusive list of exempt food products: baby foods and formulas, “diet food, not including dietary supplements or adjuncts,” powdered drink mixes, and spices and herbs.

The rule next defines “nonfood products,” as “certain substances which may be sold at food and grocery stores and which may be ingested by humans but which are not treated as food for purposes of the tax exemptions.” The rule provides that “nonfood product” includes: tonics, vitamins, and “dietary supplements or adjuncts.” The rule defines “dietary supplements or adjuncts” as follows:

“Dietary supplements or adjuncts” are medicines or preparations in liquid, powdered, granular, tablet, capsule, lozenge, or pill form taken in addition to natural or processed foods in order to meet special vitamin or mineral needs. . . .[T]he term “dietary supplements or adjuncts” does not include products whose primary purpose is to provide the complete

nutritional needs of persons who cannot ingest natural or processed foods. Also, this term does not include food in its raw or natural state which has been merely dried, frozen, liquified, fortified, or otherwise merely changed in form rather than content.

Such substances as dried milk, powdered spices and herbs, brewers yeast, desiccated liver, powdered kelp, herbal extracts, and the like are not dietary supplements or adjuncts subject to tax.

#### THE AUDIT DIVISION'S AND TAXPAYER'S POSITIONS REGARDING WHETHER THE POWDERED DRINK MIXES QUALIFY AS EXEMPT "FOOD PRODUCTS":

In assessing the tax, the Audit Division reasoned:

Examination of the various protein and carbohydrate powders you sell showed that these products are packaged and sold as dietary supplements.<sup>4</sup> The powders are intended to provide special nutritional needs of body builders and athletes. Retail sales tax applies to any edible item sold for medicinal or other special purposes. This means that in some cases the same product will be taxable in a different manner depending on how it is packaged and sold. For example, garlic packaged and sold as a seasoning is exempt from retail sales tax. Garlic packaged and sold to control high blood pressure is subject to retail sales tax . . . . The protein and carbohydrate powder products are taken in addition to natural or processed foods in order to meet supplement [sic] diets or provide for special needs and for their perceived health benefits. When the sales tax exemption for food was reinstated, the legislature did not indicate an intention to extend the exemption to items which, while arguably edible, were not conventional food products.<sup>5</sup>

(Footnotes added.) The Audit Division applied the same reasoning in its response to the taxpayer's petition.

In response to the Audit Division's reasoning, the taxpayer stated:

The auditor seems to find some special significance that these products are sold in a store catering to body builders and athletes and that the products are designed to meet their special dietary needs. The auditor's statement in the detail report that "This means that in some cases the same product will be taxable in a different manner depending upon how it is packaged and sold" . . . is taken out of context. The discussion in the newsletter [the Audit Division relied on] is about herbs and herbal extracts, which may be used as food spice or for medicinal purposes. The herbs might in some cases be deemed to be foods, and in others not, depending upon use. That is an entirely different situation than making the taxability turn on the differing uses of a substance which is always used as a food and

---

<sup>4</sup> The Audit Division noted that the taxpayer provided the nutritional facts sections of the labels of the products, but it did not provide the complete copies of the labels, despite the Audit Division's request. The Audit Division reasoned that the complete labels "would help to determine how the products are being sold."

<sup>5</sup> See Det. No. 93-16, 13 WTD 170 (1993).

never as a medicine. To attempt to force these [products] into any category other than “food products” is to ignore the plain meaning of the statute and rule 244, and is clearly at odds with the legislative intent. It is obviously not the type of sales activity or packaging which determines whether a food is taxable. In keeping with the legislative intent that unprepared food items should be exempt from the retail sales tax, the [products], which are unprepared food items taken for their nutritional (not medicinal) value, should be exempt.

In addition to its response to the Audit Division’s position, the taxpayer set forth three arguments regarding why the drink powders qualify for exemption.

The taxpayer first argues that the drink powders meet the definition of “food”:

All of the [products] . . . provide nutritional needs of the human body (primarily protein, carbohydrates, and fats, although in some cases the products also contain vitamins). They are intended to be used for nutrition. In fact, many of the [products] contain the words “Meal Replacement” or some variation thereof on their packaging. The protein/carbohydrate powders are known in the health and exercise industry generically as “Meal Replacement Powders”. Any vitamin content in the products is simply ancillary to the main function of providing proteins and/or carbohydrates for nutrition.

It is generally accepted that the human body needs four basic nutrients for good health: proteins, carbohydrates, water, and fats. In addition, vitamins and minerals are also necessary for good health. It is indisputable that products, with the exception of bottled water and vitamin and mineral “preparations”, which are consumed and which provide these nutrients are “foods”. (The Taxpayer recognizes that bottled water is exempted from the statutory definition of “food product”, and that vitamin and mineral preparations are, by definition, “dietary supplements or adjuncts”.) The [products] sold by the Taxpayer provide one or more of the three caloric nutrients necessary for good health – proteins, carbohydrates, and fats.

WAC Rule 244(2)(a) defines “food products” as “products . . . sold for use as food . . . .” When a term is not defined in the statute, it is given its ordinary meaning. City of Seattle v. Hill, 40 Wn. App. 159, 697 P.2d 596 (1985). “Food” is defined in the American Heritage Dictionary as: “Material, usually of plant or animal origin, containing or consisting of essential body nutrients, as carbohydrates, fats, proteins, vitamins, or minerals, that is taken in and assimilated by an organism to maintain life and growth.” (emphasis supplied). Since the [products] provide carbohydrates [sic], fats, and/or proteins, they are clearly “food” under this definition. Since they are food which is being sold for use by humans, these [products] fall clearly within the statutory and WAC definition of “food products”.

The RCW and the WAC also list a number of items which are “food products”: eggs and egg products, vegetable[s] and vegetable products, and milk and milk products. The

[products], without exception, have has [sic] their major ingredient, at least one or more of these items. Additionally, they seem to fall squarely within the plain meaning of the terms “powdered drink mixes” and/or “diet foods”, both of which are used in the WAC. If the [products] are made up primarily of items specifically listed under the statutory definition of “food products”, they must be “food products”. To find otherwise is to ignore the plain meanings of the words used in the statute and the WAC.

The taxpayer next argues that the drink mixes are “substantially the same” as other products, which the Audit Division determined were exempt. Specifically, the taxpayer notes that the nutrition bars were found to be exempt, and the ingredients used in the bars and in the drink mixes are substantially the same:

That is, the same sources of protein, carbohydrates, and fats are used in both types of products. The only difference between the two is that the bars may be consumed directly out of the package, while the powders are usually combined with a liquid before consumption. There is no distinction between the nutrition bars and the [products] that would justify any difference in the treatment of one as a “food product” and the other as a “dietary supplement or adjunct”.

The legislature has indicated its desire that the exempt nature of a food product should not depend on where it is sold . . . .

This legislative intent would be thwarted if similar products sold by other stores were accorded exempt status while Taxpayer’s sale of the [products] were held to be taxable. Most grocery stores, and the health section of stores such as . . . , normally sell some sort of diet shake or mix. Additionally, most grocery stores carry products like Carnation’s Instant Breakfast on their shelves. These products are essentially the same as the [taxpayer’s products]. The ingredients are similar, and the use is similar. That is, they provide caloric nutrients for the human body. There is no justification for treating these types of products as a food product and the [taxpayer’s products] as something different.

Finally, the taxpayer argues that the products are not taxable “dietary supplements”:

In addition to supporting the position that it is “medicines and preparations” that are excluded from the definition of “food product”, WAC Rule 244 also makes clear that the exclusion is for medicines or preparations which are used to meet “vitamin or [mineral] needs” . . . .

The auditor concluded that the [products] were “dietary supplements” because they are used by purchasers to meet “special nutritional needs of body builders and athletes.” Her conclusion is that sales of “any edible item sold for medicinal or other special needs” is subject to the retail sales tax.

The auditor's conclusion is clearly not supported by the statutory language or the language of the WAC rule she cites. First of all, use of "food" by a purchaser for his or her special needs does not somehow magically transform that food into a medicine. WAC Rule 244 recognizes that notwithstanding that foods are used to meet special dietary needs of a person, that use will not cause that food to be [a] "dietary supplement or adjunct". . . .

More importantly, these foods, even if used by persons to meet some special need, are not used to meet vitamin or mineral needs which is necessary under the definition in Rule 244 in order to find that the product is a "dietary supplement or adjunct". At most, these [products] are used to meet nutritional needs for additional carbohydrates and/or proteins. From that nutritional standpoint, using the [products] is no different than eating additional "traditional" foods. That the user chooses to meet his or her nutritional needs by ingesting a powdered form of food is simply a matter of convenience and has the added benefit of allowing the user to "fine tune" the ratio of carbohydrate, protein, and fat in the diet. WAC Rule 244 clearly recognizes that food in powdered form is still food, and not a "dietary supplement or adjunct."

Finally, Rule 244 clearly recognizes that food, even "diet food", is distinctly different than a "medicine or preparation used to meet vitamin or mineral needs", by specifically defining "diet food" as a "food product". The intent here is clear. There is a distinction between foods used to primarily meet nutritional needs, and "preparations" used to meet vitamin and mineral needs. The [products] sold by the Taxpayer served to meet nutritional needs of the purchasers and are therefore not "dietary supplements or adjuncts."

. . .

#### DISCUSSION:

##### **1. The powdered drink mixes qualify as exempt food products.**

a. The powdered drink mixes fall within the ordinary meaning of the word "food." In Martinelli v. Department of Revenue, 80 Wn. App. 930, 938, 912 P.2d 521 (1996), the Washington Court of Appeals construed the term "carbonated beverage" for purposes of the exclusion of carbonated beverages from the food products exemption.<sup>6</sup> The court found that carbonated fruit juices were subject to tax. In reaching its conclusion, the court provided guidance to be followed in construing the statute:

Where a term is not defined in a statute and no contrary intent is apparent in the statute, an appellate court should give the term its ordinary meaning. Nontechnical terms may be given

<sup>6</sup>The court was construing the use tax exemption for food products. RCW 82.12.0293. However, that statute is substantially the same as the retail sales tax exemption provision.

their dictionary definitions. The court may use the ordinary dictionary definition when a term . . . is not defined in a statute.

(Citations omitted.) The court also determined that the narrow rule of construction applicable to exemptions applies to the food products exemption. 80 Wn. App. at 940.

As the taxpayer notes, the American Heritage Dictionary defines food as: “Material, usually of plant or animal origin, containing or consisting of essential body nutrients, as carbohydrates, fats, proteins, vitamins, or minerals, that is taken in and assimilated by an organism to maintain life and growth.” (Emphasis supplied). RCW 82.08.0293 limits the definition of food to food for human consumption. There is no dispute that the powdered drink mixes are for human consumption. Nor is there any dispute that the powdered drink mixes are “taken in and assimilated to maintain life and growth.” Finally, there is no dispute that the powdered drink mixes supply carbohydrates, proteins, and/or fats. As such, the powdered drink mixes qualify as “food” under the common meaning of that word.

In addition, we note that RCW 82.08.0293 specifically includes within the definition of exempt food products “all fruit juices, vegetable juices, and other beverages,” with certain exceptions not applicable here. Rule 244 clarifies that powdered drink mixes are included in the definition of food. Further, we note that the products at issue contain as their primary ingredients items that are specifically included in RCW 82.08.0293 as exempt food products, i.e., egg products, vegetable products, and milk products.

In summary, we find that the powdered drink mixes qualify as an exempt food product.

b. The powdered drink mixes are not excluded from the definition of food as “dietary supplements.” RCW 82.08.0293 excludes “medicines and preparations in liquid, powdered, granular, tablet, capsule, lozenge, and pill form sold as dietary supplements or adjuncts” from the definition of food. The Audit Division assessed tax with respect to the powdered drink mixes because it concluded they are “dietary supplements.”

Rule 244 explains that dietary supplements, in addition to including medicines, includes substances “taken in addition to natural or processed foods in order to meet special vitamin or mineral needs.” As the taxpayer points out, the powdered drink mixes are not taken to meet special vitamin or mineral needs. Instead, the powdered drink mixes supply carbohydrates, protein, and/or fat; these nutrients are absent from the items included in the list of “dietary supplements.” The vitamins and minerals in the powdered drink mixes are combined with carbohydrates, protein, and/or fats, and we accept the taxpayer’s argument that the vitamins and minerals are simply ancillary to the carbohydrates, proteins, and fats supplied by the mixes.

In assessing the tax, the Audit Division interpreted the term “dietary supplements” to include “any edible item sold for medicinal or other special purposes.” It appears that the Audit Division believed that because athletes are the primary purchasers of the powdered drink mixes, the mixes fall within these “special purposes.” However, the Audit Division’s broad reading of the dietary



supplement exclusion is supported by neither the statutory nor the rule definition of that term. The fact that athletes are the primary purchasers of the powdered drink mixes does not change the fact that the mixes qualify as food.

Further, we agree with the taxpayer's assertion that the Audit Division misapplied the determinations and newsletter regarding garlic. Garlic can be used either for its perceived health benefits (a taxable use) or as a spice (which qualifies as a food). In that case, the packaging of garlic is important in determining its intended use, i.e., garlic sold in capsules is generally intended to be consumed for its perceived health benefits, rather than as a spice. The Audit Division argues that, like garlic, the powdered drink mixes are taken for their perceived health benefits. However, this can be said of many food products, such as fruits and vegetables. What sets the powdered drink mixes and fruits and vegetables apart from garlic is that these items can only be used as a food; there is no medicinal or other non-qualifying use for these products. As the taxpayer notes, "use of 'food' by a purchaser for his or her special needs does not somehow magically transform that food into a medicine."

In summary, the powdered drink mixes do not fall within the "dietary supplements" exclusion from the exemption set forth in RCW 82.08.0293. The taxpayer's petition is granted with respect to this issue.

...

#### DECISION AND DISPOSITION:

The taxpayer's petition is granted. The taxpayer's petition is remanded to the Audit Division for adjustment consistent with the decision. . . .

Dated this 31<sup>st</sup> day of January 2000.