

Cite as Det. No. 16-0340, 38 WTD 017 (2019)

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>
Tax Ruling re:)	
)	No. 16-0340
)	
. . .)	Registration No. . . .
)	

RCW 82.08.925; RCW 82.08.0293; WAC 458-20-18801: RETAIL SALES TAX EXEMPTION FOR SALES OF DIETARY SUPPLEMENTS. A chiropractor's sales of dietary supplements do not qualify for the exemption in RCW 82.08.925 because a chiropractor is not licensed to dispense supplements pursuant to a 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.

October 24, 2016

. . .

Re: . . .
Determination No. 16-0340

Dear . . . :

This is the Department of Revenue's (Department) decision regarding your petition for administrative review¹ of the above-referenced Tax Rulings, in which . . . (Taxpayer) was informed that its sales of nutritional supplements to its clients are subject to retail sales tax and retailing Business and Occupation (B&O) tax.²

Tax Ruling Requests and Responses

On October 19, 2015, you requested a Tax Ruling on four questions. The Department's Taxpayer Information and Education Division (TI&E) responded to all four questions on November 2, 2015.

¹ Formerly known as the Appeal Petition. Effective April 1, 2016, Washington Administrative Code (WAC) 458-20-100 (Rule 100) was amended. The Appeal Division's name was changed to the Administrative Review and Hearings Division (ARHD) and the petitions are now referred to as Review Petitions.

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

On November 3, 2015, you sent a follow up request regarding the Tax Ruling on the second question only. That question and the original response are as follows:

[#2] Sale of nutritional supplements to patients.

Question: Business has current RESELLER PERMIT. Do these sales require a Sales tax added to the cost?

Response: You must collect and remit sales tax on your charges to clients for nutritional supplements. In addition, your gross income from these sales is subject to the business and occupation (B&O) tax under the Retailing classification. Based on the RCW 18.25.006, Chiropractors are not licensed to prescribe dietary supplements. Only drugs or supplements prescribed by a physician licensed to prescribe drugs in this state are exempt from sales tax. (RCW 82.08.0281).

In your November 3, 2015, follow up inquiry to TI&E you stated in part:

I have confirmed with the Washington Chiropractic Board that it is within the law and scope of Chiropractic to order and sale [sic] supplements to patients. Specifically, RCW 18.25.005 <http://app.leg.wa.gov/rcw/default.aspx?Cite=18.25.005> is the Washington State chiropractic scope of practice. Subsection two includes recommendation of supplementation under the chiropractic scope of practice. For your convenience, I am also providing the chiropractic website:

<http://www.doh.wa.gov/LicensesPermitsandCertificates/ProfessionsNewReneworUpdate/Chiropractor>.

In regards to RCW 82.08.0281:

"Prescription" means 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.

You asked TI&E whether “based upon the above does #2 needs to be revised?”

TI&E responded to this question on November 18, 2015, as follows:

There is no dispute over the fact that as a Chiropractor you can certainly give dietary advice and recommend nutritional supplements to your patients under RCW 18.25.005(2). The issue is whether or not you can prescribe them in a manner where the patient can purchase without having to pay sales tax.

However, in RCW 18.25.005(4) it specifically states that chiropractic care shall not include the prescription or dispensing of any medicine or drug. For nutritional supplements to be exempt from sales tax under RCW 82.08.0281(4)(a) a prescription must be issued by someone licensed to prescribe or dispense drugs. Since, chiropractors are not licensed to prescribe or dispense drugs under RCW 18.25.005 the nutritional supplements they recommend or sell to their patients are not eligible for sales tax exemption.

This does not mean that you cannot sell over-the-counter nutritional supplements you have recommended to your patients, only that you must collect sales tax. After reviewing the additional information you provided, we find that our previous answer must remain unchanged and that sales tax applies to your sales of nutritional supplements.

This response was issued on November 18, 2015, two days after you filed your petition for administrative review.

Petition for Review

On November 16, 2015, the Administrative Review and Hearings Division (ARHD) received your petition for review of the November 2, 2015, response to the second (#2, above) question. Your petition identifies this response as the only objection you have to the Tax Ruling. Your argument before ARHD is the same argument you expressed in the November 3, 2015, follow-up inquiry to TI&E.

However, on February 15, 2016, you provided supplemental information and submitted additional arguments specifically addressing the November 18, 2015, TI&E response/Ruling to your November 3, 2015, inquiry. You wrote:

Chiropractors are commonly confronted with patients with Osteoporosis as seen upon radiographs. As part of ‘best patient’ care follow up lab findings demonstrate abnormally low Vitamin D levels leading to the Chiropractic order of a nutritional supplement as part of management.

Currently in Washington, a chiropractic patient who is provided with this nutritional supplement by a Chiropractic Physician is required to pay ‘sales tax’. However, if an [sic] Medical Physician or Naturopathic Physician orders the nutritional supplement the patient does not have to pay the sales tax.

When this scenario was presented to the Chiropractic Board, . . . the Program Manager for the Chiropractic Quality Assurance Commission indicated,

“The Chiropractic Quality Assurance Commission doesn’t have jurisdiction over taxes. However, they do have laws regarding discriminating in RCW 18.25 as follows”, . . .

You included links to RCW 18.25.0192 - .0197³ and raised the following issues:

- Is the above interpretation of the Washington Department of Revenue unfair and discriminatory to chiropractic patients in the State of Washington?
- The issue is not over pharmaceutical drugs but nutritional supplements. Nutritional Supplements are not pharmaceutical drugs and this ruling is based upon a pharmaceutical drug scope of practice.

³ These laws relate to prohibitions against discriminatory treatment of chiropractors and chiropractic services.

- The ruling should be solely based upon nutritional supplements which is allowed under the Chiropractic scope of practice.

Decision on Petition for Administrative Review

Taxpayer provides chiropractic services and is licensed to do so in the state of Washington. Taxpayer purchases and sells nutritional supplements to its clients. The Department has informed Taxpayer that it may purchase the supplements without paying retail sales tax if it gives the seller a Reseller Permit. (See Tax Ruling issued November 2, 2015.) However, the Department issued the two above-referenced Tax Rulings to Taxpayer, informing Taxpayer that when it sells the supplements to its clients, it must charge retail sales tax and must report those gross sales under the retailing B&O tax classification. Taxpayer argues that the exemption from sales tax is discriminatory against chiropractic patients because only supplements sold by persons who may prescribe pharmaceuticals/drugs may make such sales without charging retail sales tax. Taxpayer references RCW 18.25.0192 - .0197.^[4]

Your references to the above statutes are not applicable to the tax statutes administered by the Department of Revenue or to the issue before us. Those laws relate to the governance of chiropractic activities in this state and are administered by another agency. This decision is limited to the issue of whether your sales of nutritional and dietary supplements to your clients are exempt from retail sales tax under chapter 82.08 RCW.

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). The sale of dietary and nutritional supplements is subject to retail sales tax and retailing B&O tax unless there is a specific exemption from such taxation. RCW 82.08.925 provides the following exemption:

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.

The term prescription is broadly defined as “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 law of this state to prescribe.” RCW 82.08.0281(4)(a). The term “dietary supplement” is defined for tax purposes in RCW 82.08.0293 (the retail sales tax exemption for food and food

⁴ [RCW 18.25.0192 prohibits “discrimination against the legally recognized and licensed profession of chiropractic” and was enacted so that the people of Washington have access to “health care to the greatest extent possible.” The provisions that follow detail the kinds of discrimination that are prohibited, including: requiring the state and its political subdivisions to provide health benefits that accept licensed chiropractor services (RCW 18.25.0193); preventing the state from “discriminating against licensed chiropractors in performing and receiving compensation for services covered by their licenses;” (RCW 18.25.0194); and preventing the state from entering into contracts that directly or indirectly discriminate against licensed chiropractors in performing their services (RCW 18.25.0195). None of these provisions prevent the state from imposing taxes on a Chiropractor or similar business.]

ingredients).⁵ 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) 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;

(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.

Thus, the Washington State legislature has provided an exemption from the retail sales tax for sales of dietary supplements for human use but such sales are only exempt under RCW 82.08.925 if the supplements are dispensed or to be dispensed to patients, pursuant to a prescription. *See also* RCW 82.08.0281(4). 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). The Department, as an administrative agency implementing the taxing statutes of this

⁵Pursuant to RCW 82.08.0293 (1) Food and Food ingredients are defined as "... 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. (2) The exemption of "food and food ingredients" provided for in subsection (1) of this section does not apply to ... dietary supplements. *See also*, WAC 458-20-244, the administrative rule that implements this statute.

state, does not have the authority to expand the exemption to include sales of supplements by persons who are not authorized under the law to prescribe [the supplements]. 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). Taxpayer has not provided any evidence that it is authorized under the laws of this state to “dispense supplements pursuant to a prescription.”

Taxpayer argues that it is not prescribing drugs or medicine but rather selling nutritional supplements and should be entitled to the same exemption as physicians and others who sell supplements. Taxpayer’s sales of dietary supplements to patients do not qualify for the exemption provided in RCW 82.08.925 because chiropractors are not authorized under Washington law to prescribe. RCW 18.25.005(4) states in relevant part: “Chiropractic care shall not include the prescription or dispensing of any medicine or drug ...” See Det. No. 13-0276, 33 WTD 153 (May 30, 2014) (Although chiropractors may recommend and sell supplements to their clients, they may not claim the exemption under RCW 82.08.925 as they are not authorized to dispense supplements pursuant to a prescription). See also Det. No. 15-0141, 35 WTD 6 (2016); Det. No. 07-0206, 27 WTD 36 (2008). Thus, the only basis under which a nutritional or dietary supplement may be sold to a consumer without charging the consumer the retail sales tax is if it is dispensed pursuant to a prescription. Taxpayer is not authorized to issue prescriptions for drugs and medicine. [T]herefore, it cannot sell the supplements to be dispensed through a prescription. Its sales of nutritional supplements do not fall within the exemption.

We conclude, under the facts of this case, that Taxpayer is not a person licensed to dispense supplements pursuant to prescriptions. Therefore, Taxpayer cannot sell nutritional supplements to its clients without charging retail sales tax. It simply does not qualify for the exemption under RCW 82.08.925. No other exemption applies.

We affirm the Tax Rulings issued to Taxpayer on November 2 and 18, 2015 in their entirety. This decision constitutes the final action of the Department of Revenue.

This decision is binding on the Taxpayer and the Department under the facts stated. It will remain binding until the facts change, the law by statute, rule, or court decision changes, the Department publicly announces a change in the policy upon which the decision is based, or the Taxpayer is notified in writing that the decision is no longer valid.

Jacqueline M. Danyo, T.R.O