

Cite as Det. No. 14-0142, 34 WTD 96 (2015)

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. 14-0142
))	
. . .)	Registration No. . . .
))	

[1] RCW 82.08.0293: RETAIL SALES TAX – FOOD AND FOOD INGREDIENTS – DIETARY SUPPLEMENTS – JUICE PRODUCT. A company that sells a juice product is subject to the retail sales tax for selling a “dietary supplement,” and cannot claim the exemption from the retail sales tax for selling “food” or a “food ingredient,” when its juice product contains vitamins, are labeled as “liquid dietary supplements,” are ingested in liquid form, and the packaging displays a “supplement facts” box.

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.

Anderson, A.L.J. – A nutritional products company disputes an assessment of retail sales tax resulting, in part, from the classification of its goji juice as “dietary supplements” and asserts its goji juice-based products are “food and food ingredients” exempt from retail sales tax because its products are not required to be labeled as a dietary supplement. Petition denied.¹

ISSUE

Pursuant to RCW 82.08.0293, are sales of a goji juice product, subject to retail sales tax as sales of “dietary supplements” or exempt from retail sales tax as “food or food ingredients”?

FINDINGS OF FACT

[Taxpayer] uses multi-level marketing to distribute and sell its products. This appeal concerns the Taxpayer’s sales of goji juice products in this state. Goji berries (or wolfberries) are the fruit of *Lycium barbarum* and *Lycium chinense*, two plant species native to southeastern Europe and Asia.²

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

² <http://en.wikipedia.org/wiki/Goji>, citing, Flint, Harrison Leigh (1997). "*Lycium barbarum*". *Landscape plants for eastern North America: exclusive of Florida and the immediate Gulf Coast*. Chichester: John Wiley & Sons. p. 326. ISBN 978-0-471-59919-7. (October 1, 2013).

Goji juices have been marketed by Taxpayer as “[t]he healthiest super juice on the planet . . .” and during the period at issue, Taxpayer sold two such goji juices: [Juice variety A] and [Juice variety B] (collectively, the “goji juices”).³ [Juice Variety A] is Taxpayer’s original goji juice and its ingredients are: “Proprietary [registered trademarked] Juice (reconstituted goji juice from fresh whole *Lycium barbarum* fruit), grape juice concentrate, pear juice concentrate, apple juice concentrate, pear puree and natural flavor, with sodium benzoate and potassium sorbate added to maintain freshness.” [Juice Variety B] is the goji juice that Taxpayer sells today and its ingredients are: “Proprietary [registered trademarked] Juice (reconstituted goji juice from fresh whole *Lycium barbarum* fruit utilizing our exclusive . . . Process*), white grape juice concentrate, red grape juice concentrate, pomegranate juice concentrate, and natural flavor.”

The labels on the goji juices identify them as a “Liquid Dietary Supplement” underneath the product name. Taxpayer sells the goji juices in one liter bottles for \$. . . - \$. . .⁴ The serving size is listed as 1 fl. oz., and the recommended use is consumption of 1-4 fl. oz. daily. Each bottle’s label contains the United States Food and Drug Administration’s “supplement facts” box with the amount of calories, total carbohydrate, and sugar, per serving. The “supplement facts” box on [Juice Variety A] also contains the amount of Vitamin C and Potassium per serving. The “supplement facts” box on the [Juice Variety B] lists the amount of calories, total, carbohydrate, and sugar, per serving. There is no “nutrition facts” box on the goji juices’ labels.

Audit reviewed Taxpayer’s books and records from January 1, 2007 through June 30, 2011 (the “Audit Period”) and determined the goji juices were not “food or food ingredients” and were “dietary supplements” subject to retail sales tax. On March 29, 2013, Audit issued an assessment against Taxpayer in the amount of \$. . . consisting of \$. . . of retail sales tax, \$. . . in retailing business and occupation (“B&O”) tax, a \$. . . credit for paid wholesaling B&O tax, \$. . . in interest, and \$. . . in 5% assessment penalty.

Taxpayer appeals the assessment of retail sales tax and asserts that the goji juices do not meet a single statutory element of “dietary supplement”, let alone, all three, which are required for a product to be excluded from the definition of “food and food ingredients.” RCW 82.08.0293. It asserts that no vitamins or minerals are added as separate ingredients, it represents the goji juices as conventional foods, and it is not required to label its goji juices as a dietary supplement and it includes a “supplement facts” box for marketing purposes.

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.*

³[Taxpayer website:] (April 8, 2014). . . .

⁴[Taxpayer website:] “Retail Price” listed as \$. . . and “Your Price” listed as \$. . . (April 8, 2014).

Several substances are excluded from the definition of “food and food ingredients,” and, as relevant here, one such exclusion is for a “dietary supplement.” RCW 82.08.0293(2). “Dietary supplement” is statutorily defined as follows:

- (a) “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). In order to be a dietary supplement, a substance intended to supplement the diet must meet all three statutory criteria. *Id.* We conclude that the goji juices satisfy the criteria and are a dietary supplement for the following reasons.

“Contains one or more of the following dietary ingredients . . .”

RCW 82.08.0293(2)(a)(i) requires a product to “Contain one or more of the following dietary ingredients: (A) A vitamin; (B) A mineral; (C) An herb or other botanical; . . .” In the present case, Audit found the labels on the goji juice state that they contain the following dietary ingredients: Vitamin C (or Ascorbic Acid) (a vitamin) and Potassium (a mineral). Taxpayer does not dispute this. However, Taxpayer asserts the goji juices “. . . do not contain vitamins, minerals, herbs, or other botanicals as ingredients; rather, as clearly reflected on the label, they are ‘100% juice’ products whose only ingredients are fruit juices, natural flavorings, and preservatives.”

Taxpayer’s argument ignores the plain language of the statute. When interpreting a statute, we look first to its plain language. *Homestreet, Inc. v. Dep’t of Revenue*, 166 Wn.2d 444, 451 (2009). If the plain language is subject to only one interpretation, our inquiry ends because the plain language does not require construction. *Id.* We find that RCW 82.08.0293(2)(a)(i) is subject to only one interpretation and does not require construction. The plain language of the statute requires only that the product contain one or more of the listed and defined dietary ingredients.⁵ There is nothing in the statute that requires the dietary ingredients to be separately added as ingredients of the supplement.⁶

⁵ The Dietary Supplement Health and Education Act of 1994 contains a definition of “dietary supplement” at 21 U.S.C. §321(ff) and sets forth a first element at 21 U.S.C. §321(ff)(1) that is nearly identical to that found at RCW 82.08.0293(2)(a)(i). We note, the U.S. Food and Drug Administration’s interpretation of this element is consistent

Taxpayer concedes that the goji juices contain the following dietary ingredients: a vitamin (Vitamin C) and a mineral (Potassium). Thus, the first element of being classified a “dietary supplement” is met.

Ingestion Form

RCW 82.08.0293(2)(a)(ii) provides the second element of being classified a “dietary supplement” and states as follows:

(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;

The RCW 82.08.0293(2)(a)(ii) criteria is met if the product either: (1) “Is intended for ingestion in tablet, capsule, powder, softgel, gelcap, or liquid form,” or (2) “[I]f 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”, where “such form” refers to tablet, capsule, powder, softgel, gelcap, or liquid form. Thus, if a product is intended for ingestion in a tablet, capsule, powder, softgel, or liquid form, RCW 82.08.0293(2)(a)(ii) is met and it is not necessary to determine if the product is represented as a conventional food or the sole item of a meal or of the diet.

The goji juices are labeled as “liquid dietary supplements.” There is no dispute that the juices are intended to be ingested in liquid form. Accordingly, we find that Taxpayer’s goji juices are intended for ingestion in liquid form, and the second element of being classified a “dietary supplement” is met. RCW 82.08.0293(2)(a)(ii).

Required to Have a Supplement Facts Box On Label

RCW 82.08.0293(2)(a)(iii) provides the third and final element of being classified a “dietary supplement” and states as follows:

(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.

Audit determined that this requirement was met because the goji juice labels display a “supplement facts” box that contains the information required by 21 C.F.R. Sec. 101.36. Taxpayer argues that the goji juices are not required to be labeled as a “dietary supplement” asserting they do not meet the federal statutory definition of a “dietary supplement” and the “supplement facts” box is on its label for marketing purposes. Taxpayer does not contest that the “supplement facts” box on its label meets the requirements of 21 C.F.R. Sec. 101.36.

with our interpretation – the statutory language defines “dietary ingredients.” See, http://www.fda.gov/food/dietarysupplements/qadietarysupplements/#must_all (April 22, 2014).

⁶ Because we conclude that the goji juices contain vitamins and minerals, it is not necessary to determine whether the goji juices also contain botanical or other dietary ingredients.

We find that RCW 82.08.0293(2)(a)(iii) is subject to only one interpretation and does not require construction. 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.

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").⁷ As such, this language has also been adopted by several other states that follow the SSUTA.⁷ 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).⁸ *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" box on its label, in determining whether the powdered energy drinks were "required to be labeled as a dietary supplement" and stated as follows:

Our previous order, which we incorporate by reference, concluded that under the unambiguous language of Minn. Stat. § 297A.67, subd. 2(3), whether a product is required to be labeled as a dietary supplement is to be determined by referring to the product's label. Order (Apr. 21, 2013) at 7. In this case, SlimGenics labeled Thermo-Boost a dietary supplement between July 1, 2006, and December 31, 2009. We therefore conclude that between July 1, 2006, and December 31, 2009, Thermo-Boost satisfied the third prong of the statutory test of a dietary supplement subject to sales tax.

SlimGenics Minnesota, Inc., f/k/a OGB, Inc., d/b/a SlimGenics Weight Control Centers, 8442-R at 12.

Further, Taxpayer has not provided evidence that the goji juices are conventional foods and required to be labeled as such. And, were we to look to Federal law, 21 U.S.C. § 321(ff)(2)(B) provides that beverages are conventional foods that may not be marketed as dietary supplements. See "Guidance for Industry, Distinguishing Liquid Dietary Supplements from Beverages," U.S.

⁷ The following states have adopted the definition of "dietary supplement" contained in the SSUTA or a similar definition: Arkansas, Iowa, Georgia, Kansas, Louisiana, Michigan, Minnesota, Nebraska, New Jersey, North Carolina, North Dakota, Ohio, Rhode Island, Tennessee, Utah, Vermont, West Virginia, Wisconsin, and Wyoming.

⁸ Minnesota Statute 297A.67, subd. 2, reads . . . For purposes of this subdivision, "dietary supplements" means any product, other than tobacco, intended to supplement the diet that: (1) contains one or more of the following dietary ingredients: (i) a vitamin; (ii) a mineral; (iii) an herb or other botanical; (iv) an amino acid; (v) a dietary substance for use by humans to supplement the diet by increasing the total dietary intake; and (vi) a concentrate, metabolite, constituent, extract, or combination of any ingredient described in items (i) to (v); (2) 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 (3) is required to be labeled as a dietary supplement, identifiable by the supplement facts box found on the label and as required pursuant to Code of Federal Regulations, title 21, section 101.36. (Emphasis added.)

Department of Health and Human Services, Food and Drug Administration, Center for Food Safety and Applied Nutrition, January 2014. As the goji juices are labeled as a liquid dietary supplement, it appears the Food and Drug Administration would conclude that the goji juices are not conventional foods, even if, for argument purposes, we looked to the FDA requirements, as taxpayer contends.

As Taxpayer's goji juices display a "Supplement Facts" box on their labels, they are "required to be labeled as a dietary supplement," pursuant to RCW 82.08.0293(2)(a)(iii) and the third element is met. Accordingly, as all three requirements of RCW 82.08.0293(2)(a) are met, we conclude that the goji juices are a "dietary supplement," excluded from the definition of "food and food ingredients" and subject to retail sales tax. Assessment sustained.

DECISION AND DISPOSITION

Taxpayer's petition is denied.

Dated this 29th day of April, 2014.