

BEFORE THE TAX COMMISSION OF THE STATE OF IDAHO

In the Matter of the Protest of)	
)	DOCKET NO. 21249
[REDACTED],)	
)	DECISION
Taxpayer.)	
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On April 18, 2008, the staff of the Sales Tax Audit Bureau (Bureau) of the Idaho State Tax Commission (Commission) issued a Notice of Deficiency Determination to [Redacted] (taxpayer) proposing sales and use tax and interest for the period of January 1, 2005, through December 31, 2007, in the total amount of \$889.

On June 19, 2008, the taxpayer filed a timely appeal and petition for redetermination. The Commission held an informal hearing with the taxpayer on December 30, 2008.

The only issue in dispute is the imposition of sales tax on sales [Redacted]. The taxpayer argued that these sales ought to be exempt under Idaho Code § 63-3622N. This statute provides an exemption for certain sales of equipment when prescribed or administered by a licensed health care practitioner. [Redacted] are specifically included in the statutory definition of “practitioner.”

[Redacted] Subsection 63-3622N(c) defines “drug” as:

- (c) The term "drug" means a drug which is:
 - (1) Defined in section 54-1705, Idaho Code; and
 - (2) Either:
 - (i) Listed in a drug compendia which the state board of pharmacy requires to be maintained by Idaho licensed pharmacies; or
 - (ii) The use of which requires a prescription under state or federal law. The term shall not include articles intended for use in the diagnosis, cure, mitigation, treatment or prevention of disease in animals other than man.

Idaho Code § 54-1705 is part of the Idaho Pharmacy Act. Subsection 54-1705(7) states:

(7) “Drug” means:

- (a) Articles recognized as drugs in the official United States Pharmacopoeia, official National Formulary, official Homeopathic Pharmacopoeia, other drug compendia or any supplement to any of them;
- (b) Articles intended for use in the diagnosis, cure, mitigation, treatment or prevention of disease in man or other animal;
- (c) .Articles, other than food, intended to affect the structure or any function of the body of man or other animals; and
- d) Articles intended for use as a component of any articles specified in paragraph (a), (b) or (c) of this subsection.

The definition of “drug” in the Idaho Pharmacy Act is very similar to the definition of “drug” found in the Federal Food Drug and Cosmetic Act, 21 USCA § 321(g)(1), as it existed prior to the enactment of the Dietary Supplement Health and Education Act of 1994. Congress clearly intended to define the term “drug” broadly to give the FDA the widest scope possible in its regulatory authority. For the same reason, the Idaho legislature adopted a similar definition for the Idaho Pharmacy Act. In many ways, the Pharmacy Act and the Sales Tax Act are at cross-purposes. The definition of “drug” in the Sales Tax Act is part of an exemption statute. Tax exemptions are to be construed strictly against the taxpayer. *Leonard Construction Co. v. State ex rel. State Tax Comm’n*, 96 Idaho 893, 539 P.2d 246 (1975); *Kwik Vend, Inc. v. Koontz*, 94 Idaho 166, 483 P.2d 928 (1971), *Richardson v. State Tax Comm’n*, 100 Idaho 705, 604 P.2d 719 (1979).

[Redacted] stated that the Commission has never explained which [Redacted] could be sold exempt as drugs. The Commission’s current policy resulted from a settlement made with a different [Redacted] practitioner about eight years ago. The Commission agreed at that time to treat the sale of vitamin and mineral supplements [Redacted] as exempt sales of drugs because monographs are included for them in *Drug Facts and Comparisons* (Drug Facts), a drug

compendium published by Facts and Comparisons, St. Louis, Missouri. *Drug Facts* is one of the compendia that the Idaho Board of Pharmacy requires each pharmacy in Idaho to keep on hand.

Drug Facts contains no information on homeopathic remedies, herbal remedies, and new dietary substances such as melatonin and DHEA. Therefore, the Commission has instructed [Redacted] and other practitioners to collect tax when they sell such items.

Arguably, no dietary supplement should be considered a drug since the United States Food and Drug Administration prohibits manufacturers from making health claims for them. See 21 CFR § 101.14. On the other hand, the FDA has the authority to regulate any substance as a drug if the manufacturer makes a health claim for it. For instance, see *Whitaker v. Thompson*, 353 F.3d 947, 359 U.S.App.D.C. 222 (2004) in which the United States Court of Appeals ruled that saw palmetto would be considered a drug if the manufacturer claimed it could be used in the treatment of benign prostatic hyperplasia.

The statute, therefore, creates an undesirable situation in which most dietary supplements are not drugs, but any of them could be regulated as drugs if the manufacturer makes health claims for them. For this reason, the Commission has consistently adhered to the compromise in which it considers vitamin and mineral supplements to be drugs when sold [Redacted] or other qualifying practitioners. The Commission has consistently held sales of other supplements, that are not listed in *Drug Facts*, to be taxable. The sales at issue here are all in the latter category and are, therefore, taxable.

WHEREFORE, the Notice of Deficiency Determination dated April 18, 2008, is APPROVED, AFFIRMED, and MADE FINAL.

IT IS ORDERED and THIS DOES ORDER that the taxpayer pay the following tax and interest:

<u>TAX</u>	<u>INTEREST</u>	<u>TOTAL</u>
\$795	\$130	\$925

Interest is calculated through March 2, 2009, and will continue to accrue at the rate set forth in Idaho Code § 63-3045(6) until paid.

DEMAND for immediate payment of the foregoing amount is hereby made and given.

An explanation of the taxpayer's right to appeal this decision is enclosed.

DATED this ____ day of _____, 2009.

IDAHO STATE TAX COMMISSION

COMMISSIONER

CERTIFICATE OF SERVICE

I hereby certify that on this _____ day of _____, 2009, a copy of the within and foregoing DECISION was served by sending the same by United States mail, postage prepaid, in an envelope addressed to:

[REDACTED]

Receipt No.