STATE OF MINNESOTA | TAX COURT

COUNTY OF HENNEPIN | REGULAR DIVISION

SlimGenics Minnesota, Inc., f/k/a OGB, Inc., d/b/a SlimGenics Weight Control Centers,

Appellant,

vs.

Commissioner of Revenue,

Appellee.

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER FOR JUDGMENT

Docket No. 8422-R

Dated: October 23, 2013

This matter came on for trial before The Honorable Joanne H. Turner, Judge of the Minnesota Tax Court.

Cynthia M. Klaus and Paul J. Linstroth, Attorneys at Law, represented appellant SlimGenics Minnesota, Inc.

Thomas C. Vasaly, Assistant Minnesota Attorney General, represented appellee Commissioner of Revenue.

The court, having heard the testimony of witnesses and the arguments of counsel, having reviewed the exhibits and submissions of the parties, and based upon all the files, records, and proceedings herein, now makes the following:

FINDINGS OF FACT

1. Appellant SlimGenics Minnesota, Inc., markets weight loss programs and operates weight loss centers in Colorado and Minnesota. Tr. 9. In addition, SlimGenics sells various protein bars, drink mixes, and other products. Tr. 9.

2. To help its clients drink more water throughout the day, in 2006 SlimGenics contracted with New Sun Nutrition for a powdered version of New Sun's existing energy drink, which SlimGenics marketed under the name Thermo-Boost. Tr. 12-13. Thermo-Boost is a flavored powder containing various vitamins and minerals (among other things), which is mixed with water. SlimGenics recommends that its weight-loss clients consume two servings a day, but clients can consume more if desired. Tr. 13-14. SlimGenics does not recommend Thermo-Boost to clients who are already drinking sufficient amounts of water. Tr. 70-71.

3. In 2008, SlimGenics contracted with SomaLabs, Inc., a Vermont company, to manufacture Thermo-Boost.

4. In October 2008, SomaLabs sent "structure/function" notifications to the federal Food and Drug Administration concerning Thermo-Boost and another product (Quik Stik). Jt. Exs. 2, 3, 4. These structure/function notifications identified Thermo-Boost as a dietary supplement. Jt. Exs. 2, 3, 4 (listing the name of the "dietary supplement" as "thermo-boost"). SomaLabs' notifications included copies of the Thermo-Boost packaging, which also identified Thermo-Boost as a "dietary supplement" and included a "Supplement Facts" box. Jt. Exs. 5, 6, 7 (product packages).[1]

5. By letter dated November 13, 2008, the Director of the FDA's Dietary Supplement Programs division wrote to SomaLabs that Thermo-Boost and Quik Stik "appear to be represented for use as conventional foods, namely they are promoted as beverages." Jt. Ex. 1.

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[1] Under federal regulations, packaging of products which are "food" must include a "Nutrition Facts" panel or box; packaging of dietary supplements, on the other hand, must include a "Supplement Facts" panel. A Supplement Facts panel must list, among other things, dietary ingredients for which there is no recommended daily intake; the same ingredients cannot be listed in a Nutrition Facts panel. *See* Food and Drug Administration, Dietary Supplement Labeling Guide (available at www.fda.gov/Food/GuidanceDocumentsRegulatoryInformation/Dietary Supplements) (last visited Oct. 11, 2013).

The November 13, 2008 letter indicated that if Thermo-Boost was a conventional food, it "must meet the regulatory requirements that apply to conventional foods rather than those requirements that apply to dietary supplements." Jt. Ex. 1. For example, Thermo-Boost would require nutrition labeling. In addition, it would be limited to ingredients either generally recognized as safe or used in accordance with regulations on food additives. Jt. Ex. 1.

6. SomaLabs challenged the FDA's contention that Thermo-Boost was being represented for use as a conventional food. In a December 10, 2008 response to the FDA, SomaLabs' Vice President for Scientific Affairs asserted that Thermo-Boost was "clearly identified" as a dietary supplement and was being marketed "in a form that meets the requirements of the [Dietary Supplement Health and Education Act of 1994], namely a powder." Ex. J. SomaLabs argued that the use of the word "beverage" in connection with Thermo-Boost was "perfectly proper" and did not cause Thermo-Boost to be represented as a conventional food. Ex. J.

7. In 2009, the FDA detained shipments of Thermo-Boost at the Canadian border. SlimGenics understood that the FDA detained the product because, in the FDA's view, the product was incorrectly labeled. Tr. 27.

8. SlimGenics had no direct communication with the FDA and was not aware of the FDA's November 2008 letter until notified by SomaLabs in December 2009 of the FDA detention. Tr. 23.

9. In early 2010, SomaLabs and/or SlimGenics removed the words "beverage" and "drink" from the Thermo-Boost label. Jt. Ex. 8; Tr. 19 (identifying Jt. Ex. 8 as the packaging in use starting in early 2010), 26. Thermo-Boost's package thereafter referred to the contents as a "thermogenic antioxidant energy powder blend" and as an "Herb and Vitamin Supplement with

Quercetin and Caffeine." Jt. Ex. 8. Thermo-Boost's package continues to include a "Supplement Facts" box and a warning that Thermo-Boost's claims "have not been evaluated by the Food and Drug Administration," and continues to describe Thermo-Boost as a "dietary supplement." Jt. Ex. 8.

10. Between July 1, 2006, and December 31, 2009, the period at issue here, SlimGenics did not collect or pay sales tax on retail sales of Thermo-Boost. Tr. 19-20. During that period, SlimGenics considered Thermo-Boost a food. Tr. 20.

11. On June 4, 2010, the Commissioner assessed SlimGenics with additional sales and use tax and interest, based primarily on retail sales of Thermo-Boost between July 1, 2006, and December 31, 2009. Ex. B.

12. SlimGenics timely filed an administrative appeal, disputing the taxability of Thermo-Boost but conceding the taxability of the other items on which the assessment was based. Jt. Ex. 11.

13. On December 21, 2011, the Commissioner denied SlimGenics' administrative appeal. Ex. A.

14. SlimGenics timely appealed to this court.

15. Thermo-Boost is intended to supplement the diet.

16. Thermo-Boost is a powder to be dissolved in water, and is therefore intended to be ingested in one of the forms listed in Minn. Stat. § 297A.67, subd. 2 (2012).

17. Thermo-Boost was labeled as a dietary supplement between July 1, 2006, and December 31, 2009.

CONCLUSIONS OF LAW

1. Between July 1, 2006, and December 31, 2009, Thermo-Boost was a dietary supplement within the meaning of Minn. Stat. § 297A.67, subd. 2 (2012).

2. Thermo-Boost was subject to Minnesota sales tax between July 1, 2006 to December 31, 2009.

ORDER FOR JUDGMENT

The December 21, 2011 order of the Commissioner assessing SlimGenics $249,624.92 in additional sales tax is affirmed.

IT IS SO ORDERED. THIS IS A FINAL ORDER. ENTRY OF JUDGMENT IS STAYED FOR A PERIOD OF 30 DAYS. LET JUDGMENT BE ENTERED ACCORDINGLY.

BY THE COURT:

Joanne H. Turner, Judge
MINNESOTA TAX COURT

DATED: October 23, 2013

MEMORANDUM

At issue in this matter is whether the Commissioner of Revenue properly assessed appellant SlimGenics Minnesota, Inc., for sales tax on Thermo-Boost, a powdered drink mix sold by SlimGenics between July 1, 2006, and December 31, 2009. We affirm.

The facts of the matter are largely undisputed. SlimGenics operates a chain of weight-loss centers in Minnesota that sell various diet-related products, including Thermo-Boost, a

powdered caffeinated drink mix labeled by SlimGenics as a "dietary supplement." Between July 1, 2006, and December 31, 2009, SlimGenics neither collected nor remitted Minnesota sales tax on its retail sales of Thermo-Boost. After an audit, the Commissioner assessed SlimGenics with additional sales tax on its retail sales of Thermo-Boost. SlimGenics timely appealed the Commissioner's assessment to this court.

Under Minn. Stat. § 297A.67, subd. 2 (2012), "food" and "food ingredients" are exempt from Minnesota sales and use tax. "Dietary supplements," although characterized in section 297A.67 as "food," are *not* exempt from Minnesota sales and use tax. *Id.* The question, therefore, is whether Thermo-Boost is "food" or a "dietary supplement."

> For purposes of section 297A.67, subdivision 2, a "dietary supplement" is defined as:
>
> 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.

Minn. Stat. § 297A.67, subd. 2. We consider each of these requirements in turn.

A. Intended to supplement the diet

SlimGenics contends that the threshold test of whether a product is a dietary supplement under Minn. Stat. § 297A.67 is whether it is intended to constitute a part of, rather than "supplement," the diet. SlimGenics contends that Thermo-Boost fails this threshold test:

> Thermo-Boost was not intended to supplement the diet. Thermo-Boost is a major part of a SlimGenics client's daily fluid intake and when incorporated into the diet, is an essential part of the diet, not an addition to the diet. Therefore, Thermo-Boost fails to satisfy this requirement for a dietary supplement and no further inquiry is necessary

Appellant's Post-Trial Br. at 2-3. We disagree.

To evaluate whether Thermo-Boost itself is intended to supplement the diet, we distinguish between Thermo-Boost and the water in which it may be dissolved. Thermo-Boost itself is a powder which, according to its labeling, incorporates various vitamins, minerals, caffeine, and a proprietary blend of flavors, colors, and extracts. One packet of Thermo-Boost itself contains only nominal calories and carbohydrates. *See, e.g.*, Jt. Ex. 2 (describing Thermo-Boost as containing 15 calories and 4 grams of carbohydrates per serving). There is no sense in which Thermo-Boost itself, apart from the water in which it may be dissolved, is "an essential part of the diet." Significantly, SlimGenics' witness testified that SlimGenics would not recommend Thermo-Boost to a client who was already drinking adequate amounts of water. Tr. 70-71.

Nor is there any evidence that SlimGenics intended Thermo-Boost (in water or not) to constitute part of the diet itself. For example, Thermo-Boost does not contain any protein. Tr. 50; Jt. Exs. 2-10. Although SlimGenics recommended that its clients consume two packets of Thermo-Boost per day, SlimGenics did not instruct its clients to substitute Thermo-Boost for any meal, or for any part of a meal. Tr. 50 (testifying that Thermo-Boost is not a meal

replacement and is not intended to be the sole item of a meal), 51 ("No one could live on Thermo-Boost by itself.").

We therefore conclude that, insofar as intent to supplement the diet is a threshold requirement, Thermo-Boost satisfies it.

B. Contains one or more of the following dietary ingredients.

Section 297A.67, subd. 2(1), requires that a dietary supplement contain one or more of a list of ingredients, including vitamins, minerals, herbs, and amino acids. There is no dispute that Thermo-Boost contains vitamins and minerals, *see, e.g.*, Jt. Ex. 2, and therefore satisfies this requirement of a dietary supplement.

C. Intended for ingestion.

Section 297A.67, subd. 2, requires that the product

> 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.

Minn. Stat. § 297A.67, subd. 2(2). Given the language of the statute, we need not decide here in what specific form (powder or liquid) Thermo-Boost is intended for ingestion: it is sufficient for our purposes that Thermo-Boost is marketed as a powder to be dissolved in a liquid, and is therefore intended to be ingested in one of the listed forms. We therefore conclude that Thermo-Boost satisfied the second prong of the statutory test of a dietary supplement subject to sales tax.

SlimGenics contends that the meaning of "liquid form" in subdivision 2(2) should be drawn from the definition of "dietary supplement" under federal law, under which the meaning of "liquid form" is limited to that which is consumed by the drop. SlimGenics contends that Thermo-Boost therefore is not intended for ingestion in liquid form. We disagree.

21 U.S.C. § 321(ff) (2006) defines "dietary supplement" for purposes of the federal Food, Drug, and Cosmetic Act, Title 21, chapter 9. For purposes of the federal act, "dietary supplement"

> (1) means a product (other than tobacco) intended to supplement the diet that bears or 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 man to supplement the diet by increasing the total dietary intake; or
>
> (F) a concentrate, metabolite, constituent, extract, or combination of any ingredient described in clause (A), (B), (C), (D), or (E); and
>
> (2) means a product that—
>
> (A) (i) is intended for ingestion in a form described in [21 U.S.C. § 350(c)(1)(B)(i)] [that is, in tablet, capsule, powder, softgel, gelcap, or liquid form]; or
>
> (ii) complies with [21 U.S.C. § 350(c)(1)(B)(ii)] [that is, not represented as conventional food and not represented for use as a sole item of a meal or of the diet];
>
> (B) is not represented for use as a conventional food or as a sole item of a meal or the diet; and
>
> (C) is labeled as a dietary supplement; and
>
> (3) does—
>
> (A) include an article that is approved as a new drug under [21 U.S.C. § 355] or licensed as a biologic under 42 U.S.C. § 262] and was, prior to such approval, certification, or license, marketed as a dietary supplement or as a food unless the Secretary has issued a regulation, after notice and comment, finding that the article, when used as or in a dietary supplement under the conditions of use and dosages set forth in the labeling for such dietary supplement, is unlawful under 21 U.S.C. § 342(f)]; and

> (B) not include—
>
> > (i) an article that is approved as a new drug under [21 U.S.C. § 355] of this title, certified as an antibiotic under [21 U.S.C. § 357], or licensed as a biologic under [42 U.S.C. § 262], or
> >
> > (ii) an article authorized for investigation as a new drug, antibiotic, or biological for which substantial clinical investigations have been instituted and for which the existence of such investigations has been made public,
>
> which was not before such approval, certification, licensing, or authorization marketed as a dietary supplement or as a food unless the Secretary, in the Secretary's discretion, has issued a regulation, after notice and comment, finding that the article would be lawful under this chapter.
>
> Except for purposes of paragraph (g) [defining "drug"] and [21 U.S.C. § 350(f)] of this title, a dietary supplement shall be deemed a food within the meaning of this chapter.

21 U.S.C. § 321(ff). A "dietary supplement" under federal law therefore includes products "intended for ingestion in a form described in" 21 U.S.C. § 350(c)(1)(B). 21 U.S.C. § 350(c)(1)(B)(i), in turn, provides that "a food shall be considered as intended for ingestion in liquid form only if it is formulated in a fluid carrier and it is intended for ingestion in daily quantities measured in drops or similar small units of measure." Putting these together, then, under federal law, a "dietary supplement" that is intended to be ingested in "liquid form" is intended for ingestion "in daily quantities measured in drops."

Turning to the meaning of "liquid form" under Minn. Stat. § 297A.67, subd. 2(2), the Legislature instructs us that in general, statutory "words and phrases are construed according to rules of grammar and according to their common and approved usage," although "technical words and phrases and such others as have acquired a special meaning, or are defined in [Minn. Stat. ch. 645], are construed according to such special meaning or their definition." Minn. Stat. § 645.08(1) (2012). We do not, however, consider "liquid form" to be a technical phrase or

a phrase which has acquired a special meaning under Minnesota law. Accordingly, we construe "intended for ingestion in liquid form" according to its common usage, namely, a product that consumers drink.

SlimGenics urges that "[w]hen a jurisdiction adopts the language of a statute from another jurisdiction, the definition of the terms within it are also applied." Appellant's Post-Trial Br. at 3 (citing *Capital Traction Co. v. Hof*, 174 U.S. 1, 36 (1899); *Anderson v. Comm'r of Taxation*, 253 Minn. 528, 532, 93 N.W.2d 523, 540 (Minn. 1958)). According to SlimGenics, we are therefore to presume "that the adopting jurisdiction knew the established meaning of the language and intended to adopt not only the words, but also their meanings." Appellant's Post-Trial Br. at 3 (citing *Carolene Products Co. v. United States*, 323 U.S. 18, 21 (1944)). Accordingly, SlimGenics contends, the Legislature intended not only to adopt the federal counterpart to section 297A.67, subd. 2, but to adopt the definitions of Title 21, and, more specifically, the federal definition of "liquid form" found in 21 U.S.C. § 350(c)(1)(B)(i).

Here, the definition for which SlimGenics argues is another federal statute, which the Minnesota Legislature could have adopted but did not. To apply that definition here is to add words to Minnesota's statute that the Legislature did not enact. We decline to do so. *See Frederick Farms, Inc. v. Cnty. of Olmsted*, 801 N.W.2d 167, 172 (Minn. 2011) (noting that a court cannot add words to a statute, whether the Legislature's omission of those words was intentional or inadvertent).

Moreover, the differences in purpose between the definition of "dietary supplement" under federal law and under Minnesota law reinforce the view that the Legislature did not intend the definition of "dietary supplement" under Minnesota law to be the same as the definition under federal law. Under Minnesota law we are to presume that all sales are taxable, unless

specifically exempted. *See* Minn. Stat. § 297A.665(a)(1) (2012) (presuming that all gross receipts are subject to tax), (b) (putting the burden of proving otherwise on the seller). To achieve the Legislature's purpose, we should therefore construe "food" (which is exempt from sales tax) narrowly and "dietary supplement" (which is subject to sales tax) broadly. In contrast, there is no indication that under federal law "dietary supplement" is to be construed broadly, that is, that under federal law one should presume that something is a dietary supplement, as opposed to a food or a drug.

For all these reasons, we conclude that Thermo-Boost satisfies Minn. Stat. § 297A.67, subd. 2(2).[2]

D. Required to be labeled as a dietary supplement.

Finally, Minn. Stat. § 297A.67, subd. 2, requires that a dietary supplement "is required to be labeled as a dietary supplement, identifiable by the supplement facts box found on the label and as required pursuant to [21 C.F.R. § 101.36]." 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.

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[2] SlimGenics further argues that Thermo-Boost does not satisfy the other parts of subdivision 2(2), in that it is "represented as conventional food," namely, as a beverage. *See* Appellant's Post-Trial Br. at 5 (arguing that Thermo-Boost "was represented as a conventional food"). Because we conclude that Thermo-Boost was intended for ingestion in one of the forms listed in subdivision 2(2), we need not, and do not, reach SlimGenics' arguments concerning the other parts of subdivision 2(2).

In summary, we conclude that between July 1, 2006 and December 31, 2009, Thermo-Boost satisfied all of the statutory requirements of a dietary supplement subject to Minnesota sales tax. There being no dispute between the parties as to the Commissioner's calculation of the applicable sales tax, we affirm the Commissioner's December 21, 2011 order.

J.H.T.