

Cite as Det. No. 15-0327, 35 WTD 462 (2016)

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. 15-0327
	)	
...	)	Registration No. ...
	)	

RCW 82.04.050(3); WAC 458-20-183; ETA 3104.2009 – RETAIL SALES TAX – RETAIL SALE – PHYSICAL FITNESS SERVICES – PILATES. Pilates classes are physical fitness services classified as retail activities because the primary focus of the classes is for the participant to improve or maintain his or her general fitness, strength, flexibility, conditioning, and/or health even though the classes may involve some varying degree of guidance or instruction.

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.

Eckholm, A.L.J. – A Pilates studio appeals an assessment of retailing business and occupation (B&O) tax and retail sales tax, asserting that its Pilates classes are not physical fitness services classified as retail activities because the primary focus of the classes is instructional. The taxpayer’s petition is denied.<sup>1</sup>

ISSUE

Whether Pilates classes are physical fitness services classified as retail activities under RCW 82.04.050(3)(g) and WAC 458-20-183(2)(l).

FINDINGS OF FACT

During the period relevant to this appeal, [Taxpayer] operated a training facility where it offered Pilates and Barre exercise classes. The taxpayer also offered a 12-month (500-hour) Pilates instructor certification course, rented facility space to health care providers, and sold various retail goods.<sup>2</sup> The Department of Revenue (Department) Audit Division reviewed the taxpayer’s records for excise tax purposes for the period January 1, 2010 through December 31, 2013. The taxpayer described its Pilates classes on its website . . . , as follows:

...

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

<sup>2</sup> The taxpayer indicates that it no longer offers the Pilates instructor certification course.

(Bracketed terms and emphasis added.)

The auditor determined that the taxpayer's Pilates classes were physical fitness services classified as retail activities and the taxpayer had incorrectly reported its associated income under the service and other activities B&O tax classification. The auditor discussed with the taxpayer the retail nature of the Pilates classes and shared the Department's Excise Tax Advisory 3104.2009 (ETA 3104) that explains the retail classification of physical fitness services, where improving and maintaining fitness (rather than instruction) is the primary focus of the services. The auditor informed the taxpayer that, consistent with ETA 3104, the taxpayer correctly reported its income from the Pilates instructor certification course under the service and other activities B&O tax classification, because the primary focus of the certification course was instruction.

The taxpayer asserted that instruction was also the primary focus of its Pilates classes and that, though the goal of the Pilates classes was to improve its customers' fitness, posture, and health, the goal of the classes included instructing customers on the proper methods behind each exercise. The taxpayer emphasized that the requirement that class participants earn permission to participate in the next level of class difficulty (Intermediate and Advanced) through review of written material, written questions, and demonstrating specific techniques learned, further illustrated the instructional nature of the exercise classes. The taxpayer provided a copy of the seven questions a class participant is required to answer to move up from the beginner level.

The auditor reclassified the taxpayer's income from its Pilates classes as income from retailing activities and issued an assessment against the taxpayer in the total amount of \$ . . . .<sup>3</sup> The taxpayer appealed the assessment, and asserted, that the Pilates classes were primarily instructional in nature and not retail physical fitness services.

### ANALYSIS

Persons who charge for services defined as retail sales are required to collect and remit retail sales tax and pay retailing B&O tax. RCW 82.04.050; RCW 82.08.020; RCW 82.04.250.<sup>4</sup> In contrast, persons who charge for services not defined as retail sales, or otherwise classified for B&O tax purposes, pay service and other activities B&O tax on their receipts. RCW 82.04.290. The term "retail sale" includes the sale or charge made for "physical fitness services." RCW 82.04.050(3)(g). "Physical fitness services" is defined in WAC 458-20-183(2)(l) (Rule 183(2)(l)), as follows:

(l) "Physical fitness services" include, but are not limited to: All exercise classes, whether aerobic, dance, water, jazzercise, etc., providing running tracks, weight lifting, weight training, use of exercise equipment, such as treadmills, bicycles,

<sup>3</sup> Document No. . . . , for the period January 1, 2010 through December 31, 2013, included assessments of retail sales tax of \$ . . . , retailing B&O tax of \$ . . . , a credit of service and other activities B&O tax of \$ . . . , a small business credit of \$ . . . , interest of \$ . . . , and assessment penalty of \$ . . . , for a total amount of \$ . . . .

<sup>4</sup> Effective January 1, 2016, operating an "athletic or fitness facility," that includes the use of that facility for exercise classes, strength and conditioning programs, or the use of Pilates equipment, constitutes a retail sale under RCW 82.04.050(3)(g), taxable as a retailing activity. Laws of 2015, ch. 169, § 1.

stair-masters and rowing machines, and providing personal trainers (i.e., a person who assesses an individual's workout needs and tailors a physical fitness workout program to meet those individual needs). “Physical fitness services” do not include instructional lessons such as those for self-defense, martial arts, yoga, and stress management. Nor do these services include instructional lessons for activities such as tennis, golf, swimming, etc. “Instructional lessons” can be distinguished from “exercise classes” in that instruction in the activity is the primary focus in the former and exercise is the primary focus in the latter.

(Emphasis added.) The definition above states that charges for instructional lessons in activities that are otherwise defined as retail sales are not classified as retail sales because the primary focus of the activity is the instruction. The Department issued ETA 3104 to clarify the distinction between physical fitness services and instructional lessons.<sup>5</sup> ETA 3104 states, in pertinent part:

Physical fitness services also include but are not limited to:

- Providing access to equipment or facilities at which a person can engage in physical fitness activities;
- Conducting an exercise class at which someone leads a group of persons through a physical fitness routine or regimen. These classes may or may not involve a specialized exercise or conditioning program such as Body Pump, Jazzercise, Pilates, Power Sculpting, and Neuromuscular Integrative Action (“Nia”); and
- Providing one-on-one personal training services to assess individual workout needs and/or tailor a physical workout program to meet those individual needs. Again, these services may or may not involve a specialized exercise or conditioning program.

In all three situations above, it is likely that some varying degree of instruction or guidance will be provided to the participant. As examples:

- A person who is working out in a weight room may ask an employee of the facility for tips on the proper use of a particular apparatus;
- A person leading an exercise class often demonstrates proper techniques for various movements used in the class; and
- Personal trainers demonstrate and provide guidance as to proper weight-lifting techniques.

In such cases, however, the instruction or guidance is not the primary focus. The primary focus is for the participant to improve or maintain his or her general fitness, strength, flexibility, conditioning, and/or health. Such instruction or guidance does not in itself result in that service being an “instructional lesson” subject to the service and other activities B&O tax.

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<sup>5</sup> ETA 3104.2009 was originally issued April 21, 2005, as ETB 2023.08.123.

ETA 3104 (emphasis added).

ETA 3104 specifically states that Pilates classes are exercise classes and, therefore, physical fitness services. ETA 3104 explains that exercise classes are considered physical fitness services even though they likely incorporate some degree of instruction or guidance because the primary focus of the exercise class is improving or maintaining some form of physical fitness and not providing the instruction. ETA 3104 provides examples of when instruction in exercise activities may rise to the level of an instructional lesson in the context of physical fitness services and Rule 183:

The primary purpose of the activity as instructional or physical fitness is the determining factor, not the label. For example, if techniques associated with a martial art or Body Pump are used in a physical fitness exercise context, the service is subject to retail sales tax. A Pilates “class,” for example, may be instructional (subject to the service and other activities B&O tax) if the class is taken by the participants as a part of a curriculum to gain certification as instructors. If the class or activity is primarily to improve flexibility, strength, or general fitness for the participant, the charge for participation is a retail sale.

(Emphasis added.)

As noted above, consistent with ETA 3104, the auditor agreed with the taxpayer that its Pilates instructor certification program constituted an instructional lesson and, therefore, not a retail physical fitness service activity.

In addition to the guidance provided in ETA 3104, the Department has also addressed what is deemed to be instructional in the context of physical fitness services in its published determinations. In Det. No. 02-0039, 21 WTD 318 (2002), where a taxpayer sought to have its personal strength enhancement services characterized under Rule 183 as instructional lessons, as opposed to retail physical fitness services, the Department held:

The taxpayer contends its sessions were instructional, which are not included in the “physical fitness services” definition. Instructional lessons primarily educate, rather than enhance fitness, strength, or health condition. The taxpayer's members paid and attended the sessions based upon physicians' orders for health purposes. Other members attended the sessions to become physically fit, whether in the form of an increase in strength or to lose weight. We do not find members attended sessions primarily for instruction. They attended to improve their physical fitness. The taxpayer's charges were for “physical fitness services.”

21 WTD at 321 (emphasis added). The Department applied this same analysis in Det. No. 04-0239E, 24 WTD 265 (2005), specifically related to Pilates classes, and determined that Pilates classes are exercise classes, and, therefore, physical fitness services per Rule 183, even though the classes incorporated instruction in the exercises. 24 WTD at 267. The Department stated:

In the present case, the taxpayer leads and instructs clients in Pilates exercises. We found above that Pilates is a type of physical exercise engaged in to build strength and flexibility, and to improve the conditioning and functionality of the body. Pilates classes are therefore exercise classes, and physical fitness services under Rule 183.

*Id.* The Department also held that where the taxpayer tailored the Pilates routine to meet a particular client's workout needs the taxpayer's services continued to fall within the definition of physical fitness service under Rule 183. 24 WTD at 267 (citing Det. No. 99-174, 19 WTD 172 (2000)). Similarly, in Det. No. 07-0113, 26 WTD 250 (2007), the Department addressed specialized coaching and training in movement therapy. The Department concluded that where the primary purpose of movement therapy is to improve the motion of clients' neuromuscular skeletal systems in order to enhance their general fitness, strength, flexibility, conditioning, and health, individual instruction in such activities is classified as physical fitness under RCW 82.04.050(3)(g). 26 WTD at 254. *See also* Det. No. 13-0404, 33 WTD 186 (2014) (strength and conditioning training services that are designed to improve an athlete's performance in a specific sport is a physical fitness service subject to retail sales tax).

Applying the criteria in ETA 3104 and the analysis contained in the Department's published determinations, we conclude that the taxpayer's Pilates classes are not primarily instructional in nature and that, as described by the taxpayer itself, the primary focus of its Pilates classes is "to achieve optimal alignment and posture . . . and to increase muscle tone and bone density which enhancing body awareness, coordination and flexibility" and "to provide health through fitness."<sup>6</sup> Under RCW 82.04.050(3)(g) and Rule 183(2)(l), the taxpayer's Pilates classes are physical fitness services classified as retailing activities subject to retail sales tax and retailing B&O tax. The taxpayer's petition is denied.

#### DECISION AND DISPOSITION

The taxpayer's petition is denied.

Dated this 24th day of November, 2015.

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