

Cite as Det. No. 14-0195, 35 WTD 46 (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. 14-0195
...)	
)	Registration No. ...
)	

ETA 3104.2009; RULE 183; RCW 82.04.050: RETAIL SALES TAX – PHYSICAL FITNESS SERVICES – SPECIALIZED COACHING – RUNNING AND MOVEMENT. When the primary purpose of coaching/training sessions is to improve a client’s physical performance in running and movement, those improvements are to general fitness, strength, flexibility, conditioning, and/or health; and the primary purpose is physical fitness services and not instruction. A taxpayer providing such coaching/training sessions is providing physical fitness services and it must collect and remit retail sales tax.

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 fitness and training facility designed for athletic performance enhancement appeals an assessment of retail sales tax on the basis that it provides specialized coaching in running and movement, and not simply personal training. Petition denied.¹

ISSUES

Is specialized coaching in running and movement, a sale at retail of physical fitness services under RCW 82.04.050(3)(g) and WAC 458-20-183(2)(l)?

FINDINGS OF FACT

[Taxpayer] operates a fitness and training facility designed for athletic performance enhancement located in . . . Washington. Taxpayer specializes in providing speed and agility training; its owner/director has attained a professional certification as a “Speed and Agility Trainer/Coach” and “Corrective Exercise Specialist” and he does not consider himself a “personal trainer.”

Taxpayer provides group and individual training sessions designed to meet the needs of clients and may include training with respect to body strength, speed, power, endurance, flexibility, mobility, agility, nutrition, and recovery/regeneration techniques and strategies for rehabilitation,

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

pre-habilitation, and injury risk reduction. A majority of Taxpayer's clients are athletes seeking training on how to improve running form and movement, and many of Taxpayer's clients participate in professional, collegiate, or secondary education sport teams. Taxpayer's training lasts months to years, depending on the needs/goals of the client, and training sessions do not lead to a certification.

Taxpayer prescribes a minimum of three training sessions per week and provides clients with individualized instruction in movement techniques to increase body speed and agility and focus the client on his/her movement patterns that could cause muscular pain or increase paid sustained during injuries. Training sessions are meant to supplement strength coaching programs in which athletes are already participating. Taxpayer provides clients with basic training equipment, including a 55 foot long area for running and movement, evaluation, and drills, and clients pay monthly for training.

The Audit Division ("Audit") of the Washington State Department of Revenue (the "Department") reviewed Taxpayer's books and records from January 1, 2009 through December 31, 2012 (the "Audit Period"). On May 30, 2013, Audit issued an assessment against Taxpayer in the amount of \$. . . consisting of \$. . . in retail sales tax, \$. . . in retailing business and occupation ("B&O") tax, a credit of \$. . . for paid service and other activities B&O tax, \$. . . in use tax/deferred retail sales tax, \$. . . in interest, and \$. . . in 5% assessment penalty.

Taxpayer appeals the assessment of retail sales tax on training sessions.² Taxpayer asserts that the training sessions are specialized and instructional in running and movement and not personal training. In response, Audit acknowledges that Taxpayer provides specialized training as to running and movement, but maintains that the training activities are physical fitness services because the primary purpose for the training is to improvement or maintain clients' fitness, strength, flexibility, and conditioning.

ANALYSIS

Washington imposes retail sales tax on each retail sale in this state. RCW 82.08.020. 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) 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, 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

² On its appeal petition, Taxpayer lists the entire amount of the assessment as being at issue; however, Taxpayer also states that it is appealing only the assessment of retail sales tax and only addresses the assessment of retail sales tax in its explanation of why it is appealing. Pursuant to WAC 458-20-100, we need only address the assessment of retail sales tax.

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.

(m) "Sale at retail" or "retail sale" include the sale or charge made by persons engaged in providing "amusement and recreation services" and "physical fitness services" as those terms are defined in (b) and (l) of this subsection. The term "sale at retail" or "retail sale" does not include: The sale of or charge made for providing facilities where a person is merely a spectator, such as movies, concerts, sporting events, and the like; the sale of or charge made for instructional lessons, or league fees and/or entry fees; charges made for carnival rides where the customer purchases tickets at a central ticket distribution point and then the customer is subsequently able to use the purchased tickets to gain admission to an assortment of rides or attractions; or, the charges made for entry to an amusement park or theme park where the predominant activities in the area are similar to those found at carnivals.

WAC 458-20-183(l), (m) (emphasis added). The definitions above make clear 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. Taxpayer claims that the primary goals of the training sessions are specialized instruction in movement and running, rather than exercise of physical fitness.

Because of the specialty of instruction that Taxpayer claims it engages in, it does not consider such training sessions to be providing personal trainers. However, Taxpayer's sessions – while, perhaps, specialized – fall squarely within the definition of providing personal trainers as the term is defined in WAC 458-20-183(2)(l) because Taxpayer assesses individual clients' workout needs and tailors a workout regimen to meet those needs. Thus, under WAC 458-20-183(2)(l), Taxpayer provides physical fitness services, which are subject to retail sales tax.

Our conclusion is supported by ETA 3104.2009, which the Department issued to clarify the distinction between physical fitness services and instructional lessons.³ ETA 3104.2009 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. . . , 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.

³ ETA 3104.2009 was originally issued April 21, 2005 as ETB 2023.08.123. [Effective January 1, 2016, operating an "athletic or fitness facility," that includes the use of that facility for exercise classes, strength and conditioning programs, constitutes a retail sale under RCW 82.04.050(3)(g), taxable as a retailing activity. Laws of 2015, ch. 169, § 1.]

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.

ETA 3104.2009 (emphasis added).

ETA 3104.2009 also provides guidance on what constitutes instructional lessons in the context of physical fitness services and WAC 458-20-183:

Instructional lessons for activities such as Body Pump and Pilates are generally characterized as teaching the participant how to perform certain activities, generally following a specific curriculum that includes the study of the underlying philosophy of the activity. The purpose of the instruction includes the participant obtaining certification as a physical fitness trainer or a group fitness instructor, or mastery of the techniques and philosophy with possible advancement in levels of achievement usually associated with martial arts.

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.

ETA 3104.2009 (emphasis added).

The Department has addressed what is deemed to be instructional in the context of physical fitness services. In Det. No. 02-0039, 21 WTD 318 (2002), where a taxpayer sought to have its personal strength enhancement services characterized under WAC 458-20-183 as instructional lessons, as opposed to retail physical fitness services, the Department said:

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."

WAC 458-20-183 (emphasis added). Similarly, in Det. No. 07-0113, 26 WTD 250 (2007), we addressed specialized coaching/training in movement therapy. We 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/or health, individual instruction in such activities is classified as "physical fitness" under RCW 82.04.050(3)(g) and taxable as a retail sale. *Id.* And, most recently, in Det. No. 13-0404, 33 WTD 186 (2014), we held that 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.

In applying the criteria set forth in ETA 3104.2009 and our published decisions (Det. No. 02-0039, 21 WTD 318; Det. No. 07-0113, 26 WTD 250; Det. No. 13-0404, 33 WTD 186), we conclude that Taxpayer's sessions are not primarily instructional in nature due to their specialized nature. It is likely that Taxpayer's coaching/training sessions do contain some degree of instruction and education, as Taxpayer provides specialized coaching/training. However, Taxpayer's training sessions do not lead to a certification; rather, clients engage in such training sessions to improve running and movement – components of generally fitness. Where the primary purpose of such coaching/training sessions is to improve the clients' physical performance in running and movement; these are improvements to general fitness, strength, flexibility, conditioning, and/or health, which ETA 3104 makes clear is not instructional. The inclusion of some level of instruction in Taxpayer's services does not outweigh the primary purpose of the services; nor does it transform such services into an instructional activity. Taxpayer provides physical fitness services on which it must pay retail sales tax.

DECISION AND DISPOSITION

Taxpayer's petition is denied.

Dated this 16th day of June, 2014.