

Cite as Det. No. 07-0113, 26 WTD 250 (2007)

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>
Ruling of)	
)	No. 07-0113
...)	
)	Registration No. . . .
)	
)	Docket No. . . .

- [1] RULE 183; RCW 82.04.050; ETA 2023 -- RETAIL SALES TAX -- RETAIL SALE -- PHYSICAL FITNESS SERVICES - MOVEMENT THERAPY. Because 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, its individual instruction is classified as "physical fitness" under RCW 82.04.050(3)(g) and taxable as a retail sale.
- [2] MISCELLANEOUS -- INCONSISTENT COMPLIANCE. The fact that other taxpayers in similar businesses may be reporting their taxes inconsistently with the ruling Taxpayer received does not provide a basis for changing the taxpayer's tax reporting instructions.

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.

Bauer, A.L.J. – A movement therapist protests a letter ruling that her receipts are subject to retail sales tax and retailing B&O tax. We conclude that her receipts are from a physical fitness service and subject to retail sales tax and retailing B&O tax. Further, the Department need not classify her business as service simply because others in similar businesses may be reporting under the service classification. Accordingly, we sustain the ruling.¹

ISSUES

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

1. Whether a movement therapist, who includes Pilates and other movement “technologies” in her classes, is providing a physical fitness service subject to retail sales tax.
2. Whether the Department must classify a taxpayer’s business as service because other taxpayers in similar businesses may be reporting under the service classification.

FINDINGS OF FACT

[Taxpayer] is the owner of [a business providing movement therapies] in Washington. Taxpayer is a movement educator and coach. One aspect of her business includes a practice derived from “Pilates,” although the word “Pilates” does not appear in her business name or license.

Concerned about other Pilates studios being required to collect retail sales tax, Taxpayer wrote a letter . . . to Taxpayer Services of the Department of Revenue (Department) requesting a ruling on the taxability of her business activity. As a result, she was advised in writing . . . as follows:

[W]e have determined that the income from providing specific instructions and training persons that obtain certification as Pilates or other somatic practice instructors qualify as instructional lessons. The purpose of such lessons is to instruct persons. Your income from this activity should be reported under the *service and other activities business and occupation (B&O) tax classification*.

However, the activity of working with individuals falls under the general description of physical fitness services and the income is subject to retailing B&O and retail sales tax. We recognize that your activities may differ from a general “workout.” However, we find the primary purpose of your work with individual clients is to improve or maintain their general fitness, strength, flexibility, and conditioning. As noted in ETA 2023.08.183, such activities are retail transactions.

(Emphasis in the original.) . . . Taxpayer appealed the above ruling as to the sales taxability of her activities, arguing that she should be entirely taxable under the service and other activities tax classification because she provides an educational service to her clients.

Taxpayer describes herself as [an educational consultant]. Taxpayer has [an advanced degree and advanced training]. Although some one-on-one sessions are labeled “Pilates,” they do not resemble group fitness classes.

Taxpayer sees clients privately for individual sessions. Clients are provided with the tools and experiences they need to move efficiently in the world, with ease, flexibility, and integration. Her approach to Pilates is a somatic/movement practice for full functional and expressive movement.

Clients are first given a movement assessment. Taxpayer incorporates movement “technologies” . . . in order to develop lessons for her clients. Much time is given to movement education, since many who come to work with Taxpayer are dealing with the results of inefficient and dysfunctional movement patterns or the result of injury or accidents. Those with chronic postural or movement problems may come after they have seen physical therapists. There are

also individuals who wish to refine their movement life and skills or who wish to move as more fully integrated individuals.

Taxpayer thinks of herself as an educator whose job is not to get people more physically fit, but to teach them how to reach their maximum potential via movement and patterning. Therefore, Taxpayer thinks of herself as providing a service taxable under the service and other activities classification of the B&O tax.

ANALYSIS

1. [Whether a movement therapist, who includes Pilates and other movement “technologies” in her classes, is providing a physical fitness service subject to retail sales tax.]

Taxpayer believes her work is all about educating people, and not about bringing them to levels of fitness. Taxpayer sees her mission as body-mind integration. Taxpayer’s interest in working with clients is to “teach them how to fish,” as their body mechanics supports function. Because the mind is a partner in what is happening in the body, people can learn from their bodies who they are. Taxpayer explains that some movement patterns may have come from trauma. Pilates involves movement and has a meditation aspect to it that releases deep muscle tension.

Taxpayer likens her work to that of a physical therapist. She explains that in the body realm there is, on one hand, the physical fitness industry. On the other end of the spectrum is physical therapy. In the middle there is somatic practice -- “of the body.” Somatic practice is anything that involves the neuromuscular skeletal system in motion. . . . Taxpayer believes that all people involved in somatic practices would consider themselves either movement therapists or movement educators, and have some kind of professional certification.

Washington’s excise tax law requires persons who charge for services defined as retail sales to pay B&O tax under the retailing classification and to collect and remit retail sales tax on the charges to their customers. RCW 82.04.250; RCW 82.08.020, .050; *see* Det. No. 02-0039, 21 WTD 318 (2002). In contrast, persons engaged in a service activity that is not classified as a retail sale, or otherwise classified for B&O tax purposes, report their receipts under the service classification and do not collect and remit retail sales tax on those receipts. *See* RCW 82.04.290; WAC 458-20-194 (Rule 194).

RCW 82.04.050(3)(g) defines “retail sale” to include charges for “physical fitness services.” WAC 458-20-183 (Rule 183) defines physical fitness services and provides, in part:

"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 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.) Thus, the issue is whether Taxpayer's activities are "instructional lessons" or "exercise classes." The Department issued ETA 2023.08.183 (ETA 2023) to clarify this distinction.

ETA 2023 describes physical fitness services as "activities involving physical exertion for the purpose of improving or maintaining the general fitness, strength, flexibility, conditioning, and/or health of the participant." (Emphasis added.) The ETA further explains that physical fitness services include "Conducting an exercise class at which someone leads a group of persons through a physical fitness routine or regimen. Such classes may or may not involve a specialized exercise or conditioning program such as Body Pump, Jazzercise, Pilates,² Power Sculpting, Qigong, Tai Chi, Yoga, and Neuromuscular Integrative Action ('Nia')." (Footnote added.) In the ETA, the Department recognized that even in exercise classes, "some varying degree of instruction or guidance will be provided to the participant," such as the "person leading an exercise class . . . demonstrates proper techniques for various movements used in the class." In concluding that exercise classes are physical fitness services, the ETA explained:

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.

The ETA's description of exercise classes is consistent with dictionary definitions of "exercise."³

The fact that the term physical fitness services "includes" group exercise classes does mean that individual sessions, such as those provided by Taxpayer, are excluded.

²In Det. No. 04-0239E, 24 WTD 265 (2005), we concluded that a taxpayer's receipts from teaching a pilates class were receipts from a physical fitness service and, accordingly, subject to retail sales tax and retailing B&O tax. In that determination, we described pilates as "a series of body conditioning exercises . . . thought to improve body alignment and correct muscular imbalances, as well as increase overall physical conditioning and functionality of the body."

³Specifically, "exercise" is defined as "bodily exertion for the sake of developing and maintaining physical fitness." *Webster's Third New International Dictionary*, p. 795 (1993). As stated in *John H. Sellen Constr. Co. v. Department of Rev.*, 87 Wn.2d 878, 882, 558 P.2d 1342 (1976), "Words in a statute are given their ordinary and common meaning absent a contrary statutory definition." See also, e.g., Det. No. 05-0217E, 26 WTD 91 (2007). Further, "Washington courts use WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY in the absence of other authority." *State v. Glas*, 106 Wn. App. 895, 27 P.3d 216 (2001), citing, *In re Personal Restraint of Well*, 133 Wn.2d 433, 438, 946 P.2d 750 (1997); see also, e.g., Det. No. 05-0217E, 26 WTD 91 (2007).

In contrast to exercise classes, the ETA describes “instructional lessons” as “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.” Again, this is consistent with the dictionary definition of “instruction,” which is defined as “to give special knowledge or information to . . . to train in some special field.”⁴ The ETA goes on to explain that the purpose of the instruction “includes the participant obtaining certification as a physical fitness trainer or group fitness instructor, or mastery of the techniques and philosophy with possible advancement in levels of achievement usually associated with martial arts.” The ETA concluded, “The primary purpose of the activity as instructional or physical fitness is the determining factor, not the label.”

Applying these criteria to the facts here, we cannot conclude that Taxpayer’s instruction is primarily “instructional” in nature. While we understand that Taxpayer emphasizes the motion of her clients’ neuromuscular skeletal systems, we must conclude that the primary purpose of her instruction is “physical fitness” because her practice improves not only her clients’ physical fitness, but also their health.

Any exercise class involves some degree of imparting special knowledge or information. In a step aerobics class, students must learn to perform the various steps. In weight-lifting, students must learn how to perform the various exercises. However, the primary purpose of these classes is to improve physical fitness, and physical fitness is characterized as a retail sale.

Similarly, Taxpayer instructs her students on proper form and movement, but instruction is not the primary focus. Instead, the primary focus is for the participant to improve or maintain his or her general fitness, strength, flexibility, conditioning, and/or health. As explained in the ETA, 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.

We conclude that Taxpayer has failed to demonstrate that her activities as a movement therapist should be excluded from the definition of “physical fitness services.” Accordingly, we sustain the letter ruling Taxpayer received from TI&E.

2. Whether the Department must classify a taxpayer’s business as service because other taxpayers in similar businesses may be reporting under the service classification.

During the hearing in this matter, Taxpayer explained she knew other movement therapists who do not charge retail sales tax for their classes, and argued it is unfair for the Department to require her to collect retail sales tax when her competitors are not doing so.

In Det. No. 04-0239E, 24 WTD 265 (2005), we addressed this precise issue in upholding the application of retail sales taxes to Pilates classes. We reasoned:

⁴ *Webster’s Third New International Dictionary*, p. 1172 (1993).

Consistent treatment of taxpayers is a legitimate concern However, we cannot discuss other taxpayers by name because of confidentiality requirements. *See* RCW 82.32.330; Det. No. 00-206E, 21 WTD 66 (2002).

Statutes and rules require interpretation and application to specific facts. If the taxpayer believes the Department may have given advice to some of the taxpayer's competitors inconsistent with TI&E's current instructions to the taxpayer, it may inform the Department of the names of the competitors so that consistent instructions can be provided. Even if the taxpayer's concern should prove to be correct, however, that does not mean the Department must perpetuate past errors by repeating them with respect to other taxpayers. *See, e.g.*, Det. No. 00-206E.

Accordingly, the fact that other taxpayers in similar businesses may be reporting their taxes inconsistently with the ruling Taxpayer received does not provide a basis for changing the taxpayer's tax reporting instructions in this instance.

DECISION AND DISPOSITION

Taxpayer's petition is denied.

Dated this 2nd day of May 2007.