

The majority of Taxpayer's clients are individual athletes aged 10 to 18 who participate in competitive sports, including baseball, softball, football, lacrosse, soccer, volleyball, basketball, track, and hockey.² Some of Taxpayer's clients include entire football, baseball, and other athletic teams. Every new client undergoes an initial evaluation before a formal lesson is scheduled. Taxpayer develops a personalized training regimen for each client, based on the client's chosen sport, age, and ability. The regimen is designed to enhance the client's performance in the chosen sport, as well as to prevent injuries in said sport. A typical lesson consists of the following:

- (1) Myofascial release, in which the clients roll on tennis balls and/or foam rollers to alleviate muscle stiffness and pain, improve flexibility and performance, and prevent injuries;
- (2) Dynamic warm-up, which primes and activates the specific muscles that will be performed later; and
- (3) Weight training, speed and agility, or plyometric exercise lesson, in which Taxpayer teaches techniques and demonstrates exercises that have been specifically tailored for that client.³

Taxpayer calls himself a "certified strength and conditioning specialist" (or a "strength coach"), and denies that he is a personal trainer. Each lesson is specifically designed to advance the client's performance in his or her respective sport. Taxpayer instructs and coaches his clients on techniques and philosophies applicable to that client's specific sport in order to "increase their understanding and advance their level of achievement."⁴ As the clients' performance improves, Taxpayer teaches them new techniques and philosophies that build on the knowledge and skills gained from previous lessons.

Taxpayer's website states:

[Taxpayer's] speed and agility training will teach you rhythm along with developing quicker foot speed and power when running, cutting and redirecting your body so that you can become lethal in your sport. [Taxpayer] teaches all the key components of speed and agility so that you can be a step ahead of the competition.

Taxpayer's website also provides: "Building strength that is functional and useable is the goal. It involves compound lifts along with sport specific movements that will help you perform on the field."

Taxpayer maintains a personalized file for every client, which contains the client's individualized training regimen. Taxpayer records the client's progress and other observations in the file during or after each lesson. Taxpayer also states that he often attends his clients' games and/or practices to observe their performance and evaluate their strengths and weaknesses on the

² Some of Taxpayer's clients also include semi-professional and professional athletes.

³ Taxpayer also provides nutritional counseling for his clients.

⁴ Taxpayer's Appeal Petition, at 3 (Feb. 12, 2013).

field. In some instances, Taxpayer communicates with the sports teams' coaches, who may inform Taxpayer of a particular athlete's goals and needs. Some of Taxpayer's clients advance enough to play their sport at the college level. In such cases, the college team's coach often consults with Taxpayer with respect to that individual.

Taxpayer states that instruction is his primary focus: "Without proper education and instruction, the purpose of the lesson has not been fulfilled and the client has not been provided a successful service."⁵ As an example of the instructional nature of his services, Taxpayer states that he quizzes his clients throughout the course of each lesson as to why they are performing an exercise one particular way versus another way. These quizzes require cumulative knowledge of the specific exercise techniques and philosophies that were taught in previous lessons. For each category of lessons (e.g., weight training, speed and agility, plyometrics), Taxpayer provides each client with a handbook called the "Teach Recap" that summarizes the lesson. For example, the Teach Recap for weight training provides, in part:

SCAPS:

WHAT ARE SCAPS? ARE THEY A MUSCLE OR A BONE?

YOUR SCAPS ARE YOUR SHOULDER BLADES WHICH ARE BONE. LOADING THE SCAPS. WHEN DOING ANY TYPE OF MOVEMENT, IT IS IMPORTANT, BECAUSE IT KEEPS YOUR POSTURE INTACT.

BACK:

YOUR BACK AS AN ATHLETE IS SO KEY TO BEING STRONG AND HEALTHY. YOUR LOWER BACK ALSO IS A KEY COMPONENT IN YOUR CORE THAT PEOPLE TEND TO FORGET ABOUT. THE CORE, INCLUDING THE LOWER BACK, IS TRULY AN IMPORTANT PIECE TO THE PUZZLE OF YOU AS AN ATHLETE STAYING HEALTHY THROUGHOUT THE SEASON.⁶

Taxpayer has been paying business and occupation ("B&O") tax under the service and other activities classification. On January 16, 2013, Taxpayer requested a written tax ruling from the Department of Revenue's (the "Department") Taxpayer Services Division, asking whether the services he provides is a retail sale. On January 28, 2013, the Taxpayer Services Division ruled that Taxpayer provides physical fitness services, which are subject to retail sales tax. Taxpayer now appeals the letter ruling.

ANALYSIS

Washington imposes retail sales tax on each retail sale in this state. RCW 82.08.020. The term "retail sale" includes the sale of 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") as follows:

⁵ Taxpayer's Appeal Petition, at 2 (Feb. 12, 2013).

⁶ Teach Recap for Weight Training at 1-2.

(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 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" includes 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 ... or, the charge made for entry to an amusement park or theme park where the predominant activities in the area are similar to those found at carnivals.

Rule 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 goal of his lessons is instruction and education, rather than exercise of physical fitness.

Because of the level of instruction Taxpayer claims he engages in, he does not consider himself to be a "personal trainer." However, he falls squarely within the definition of "personal trainer" as that term is defined in Rule 183(l) because he assesses his clients' individual workout needs and tailors a workout regimen to meet those needs. Thus, under Rule 183(l), Taxpayer provides physical fitness services, which are subject to retail sales tax.

Our conclusion is supported by ETA 3104.2009 ("ETA 3104"), which the Department issued to clarify the distinction between physical fitness services and instructional lessons.⁷ 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. . . , and

⁷ ETA 3104 was originally issued April 21, 2005 as ETA 2023.08.183.

- 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.

ETA 3104 (emphasis added).

ETA 3104 also provides guidance on what constitutes instructional lessons in the context of physical fitness services and Rule 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 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 (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 the 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 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.”

Rule 183 (emphasis added); *see also* Det. No. 07-0113, 26 WTD 250 (2007). ,

Applying the criteria set forth in ETA 3104 and 21 WTD 318, we cannot conclude that Taxpayer’s lessons are primarily instructional in nature. ETA 3104 acknowledges that the provision of physical fitness services may often involve some degree of instruction to the participant. We recognize that Taxpayer’s lessons do include some degree of instruction and guidance (e.g., demonstrating proper form, teaching the underlying reason that certain exercises are performed, etc.). However, we conclude that the primary purpose of the lessons is to improve the client’s performance in his or her sport through the strength and conditioning regimen that Taxpayer designs. Thus, the primary focus is for the client to improve “his or her 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 he must pay retail sales tax.

DECISION AND DISPOSITION

Taxpayer’s petition for correction of tax ruling is denied.

Dated this 31st day of December, 2013.