Cite as Det. No. 02-0039, 21 WTD 318 (2002)

BEFORE THE APPEALS DIVISION
DEPARTMENT OF REVENUE
STATE OF WASHINGTON

In the Matter of the Petition For Correction of Assessment and Refund of	)	D E T E R M I N A T I O N
	)	No. 02-0039
. . .	)	Registration No. . . .
	)	Notices of Balance Due . . .
		Docket No. . . .

[1] RULE 183; RCW 82.04.050(3)(g): SALES TAX – PHYSICAL FITNESS SERVICES -- WEIGHT TRAINING – INSTRUCTIONAL. Members who participated in a health club's personal strength program primarily to enhance fitness, strength, or improve their health, paid for physical fitness services. Instructional benefits were secondary.

[2] RULE 18801; RCW 82.08.0281, RCW 82.04.4289: SALES TAX -- PRESCRIPTION – PHYSICAL FITNESS SERVICES. Charges for exercise prescribed by physicians were subject to retail sales tax. The prescription drug exemption applies to drugs and substances, not services.

[3] RCW 82.32A; ETA 419: TAX WAIVER – ORAL INSTRUCTIONS. The Department lacks legal authority to waive tax based upon oral 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.

NATURE OF ACTION:

An exercise gym protests the disallowance of deductions and reclassification of receipts from members who had written prescriptions from their doctors after calling the Department for reporting instructions. [1]

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

FACTS:

M. Pree, A.L.J. -- . . . , (taxpayer) operated a personal weight training facility in Washington. The taxpayer charged members on a month-to-month basis for two twenty minute personalized strength and/or weight loss training sessions per week (plus two additional "floating" sessions). Specially trained employees assisted the members one-on-one during each session. Some of the members had written prescriptions from their doctors directing them to exercise at the taxpayer's facility. The taxpayer did not charge retail sales tax on its charges to members whose physicians provided written prescriptions. The taxpayer reported receipts from members with prescriptions under the service and other activities business and occupation (B&O) tax classification.

In July 2001, the Department of Revenue's Taxpayer Account Administration Division (TAA) issued the above-referenced Notices of Balance Due for the quarterly periods from the third quarter of 1998 through the first quarter of 2001.[2] TAA reclassified all of the taxpayer's charges from the service and other activities classification to retail and assessed retail sales tax against the taxpayer. The taxpayer was unable to resolve the issue with TAA, and appealed the notices of balance due. The taxpayer has since amended its petition and not only appeals the notices of balance due, but also requests a refund of taxes collected and remitted from members who did not have prescriptions.

The taxpayer's president states he was advised by TAA employees in July of 1998 that gross income earned for physical fitness services, which were performed pursuant to a physician's written prescription, were exempt from retail sales tax. The president referred to WAC 458-20-183 (Rule 183) and WAC 458-20-18801 (Rule 18801). He also stated that on or about March 4, 1999, he returned a call from a TAA employee, who the president named. The TAA employee inquired about the deduction claimed and the president advised the employee about the taxpayer's circumstances. According to the president, the TAA employee advised him that the deduction was allowed, and faxed the president Rule 183 and Rule 18801, "[a]nd pointed out the sections authorizing the deduction." The president highlighted Rule 18801 subsections (5)(b)(ii) & (iii). On or about Nov. 30, 1999, the president states that the same TAA employee called and advised him to list the deduction on a different line. The president states that on March 9, 2000, a different TAA employee called the taxpayer and questioned the deduction. The president identified the second TAA employee and states the second employee also provided the same information. In July 2001, a third TAA employee (also named by the president) called the taxpayer, and questioned the deduction. The TAA employees have no recollection of advising the taxpayer to take the deduction.

The taxpayer states its program is unique. Members work out twenty to thirty minutes with one-on-one instruction from personal trainers during each session. The taxpayer does not offer other types of exercise lessons,[3] and generally, members may not otherwise access the taxpayer's

[2] A Notice of Balance Due was issued for the third quarter of 2001 on Dec. 4, 2001.
[3] One-on-one nutritional guidance is available, but not exercise classes.

exercise equipment or facilities.[4] The taxpayer maintains records of each individual's medical history, individual needs, and progress by session. Unlike a typical exercise club, members receive only one-on-one training for their payment. The taxpayer's facilities are not available for unsupervised exercise. The taxpayer likens its activities and facilities more to physical therapy clinics than to health or exercise clubs.

The taxpayer distinguishes its services from "physical fitness services" taxable as retail sales. The taxpayer notes the Department's Rule 183 excludes certain instructional lessons from the definition of "physical fitness services." The taxpayer refers to a broad description in Rule 224 (WAC 458-20-224) that in general persons providing professional or personal services are taxable under the service and other activities classification. Further, the taxpayer notes, Rule 168 (WAC 458-20-168) applies service and other activities classification to health resorts and similar health care institutions.

The taxpayer also asserts the taxpayer's receipts from members with physicians' prescriptions are exempt under Rule 18801 and RCW 82.08.0281, which exempt prescription drugs. Some of the taxpayer's members provided written statements from their physicians directing them to exercise with a personal trainer, such as the service offered by the taxpayer. The taxpayer did not collect sales tax from members who provided such a prescription. Finally, the taxpayer adds RCW 82.04.4289, which exempts specific health services and organizations, can be applied by analogy.

ISSUES:

1. Were the taxpayer's fees for retail services?

2. Were the taxpayer's charges to members who obtained the services under physicians' prescriptions exempt from retail sales tax as prescription drugs?

3. Could the taxpayer rely on advice obtained from Department employees over the phone?

DISCUSSION:

Washington's excise tax law requires persons who charge for services defined as retail to collect retail sales tax on the charges to their customers and remit the tax to the state. RCW 82.08.050. While the tax is imposed on the buyers of the retail services, providers of the services who fail to collect and remit the tax are liable for the tax. *Id.* We must determine whether the taxpayer's charges for its services were retail sales.

[1] RCW 82.04.050 provides the term retail sale includes the following services:

[4] The taxpayer states there is not a general workout room for member's use when the taxpayer provides its one-on-one workout sessions.

> (3) The term "sale at retail" or "retail sale" shall include the sale of or charge made for personal, business, or professional services including amounts designated as interest, rents, fees, admission, and other service emoluments however designated, received by persons engaging in the following business activities:
> (a) Amusement and recreation services including but not limited to golf, pool, billiards, skating, bowling, ski lifts and tows, day trips for sightseeing purposes, and others, when provided to consumers;
>
> . . .
>
> (g) The following personal services: Physical fitness services, tanning salon services, tattoo parlor services, steam bath services, turkish bath services, escort services, and dating services.

Titles, characterizations, and descriptions of the taxpayer's personal strength enhancement services, suggest the taxpayer provided physical fitness services, which fall squarely within the statutory definition of retail sale. However, the taxpayer notes the Department's Rule 183 excludes instructional lessons from the definition of "physical fitness services," which are defined in subsection (2)(l):

> (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.

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."

[2] The taxpayer contends statutory authority exists to exempt physical fitness services performed pursuant to a physician's prescription. First, the taxpayer refers to the Department's Rule 18801, which provides that prescription drugs are exempt from retail sales tax. *See also* RCW 82.08.0281. Rule 18801 defines "prescription drugs" in subsection (1)(a) and prescription in (1)(b):

> (a) "Prescription drugs" are medicines, drugs, prescription lenses, or other substances, other than food for use in the diagnosis, cure, mitigation, treatment, or prevention of disease or other ailment in humans ordered by (i) the written prescription to a pharmacist . . .
> (b) "Prescription" means a formula or recipe or an order written by a medical practitioner for the composition, preparation and use of a healing, curative or diagnostic substance . . .

The exemption applies to drugs, which are substances, not services. Neither RCW 82.08.0281, nor Rule 18801 exempt services from retail sales tax whether or not a physician orders the services.

The taxpayer also states, "other statutory authority can be applied by analogy" to support the prescription exemption. The taxpayer refers to RCW 82.04.4289, which exempts:

> . . . amounts derived as compensation for services rendered to patients or from sales of prescription drugs as defined in RCW 82.08.0281 furnished as an integral part of services rendered to patients by a kidney dialysis facility operated as a nonprofit corporation, a nonprofit hospice agency licensed under chapter 70.127 RCW, and nursing homes and homes for unwed mothers operated as religious or charitable organizations, but only if no part of the net earnings received by such an institution inures directly or indirectly, to any person other than the institution entitled to deduction hereunder.

While RCW 82.04.4289 exempts compensation for specific medical services to patients, the statute is expressly limited in its application. The taxpayer clearly is not an organization covered by the exemption.

Exemptions in Washington are strictly construed in favor of application of the tax and against the person claiming the exemption. *See, e.g.*, Det. No. 01-007, 20 WTD 214 (2001). The burden of proof is upon the one claiming the exemption. *See, e.g., Budget Rent-A-Car, Inc. v. Department. of Rev.*, 81 Wn.2d 171, 174-75, 500 P.2d 764 (1972); *All-State Constr. Co. v. Gordon*, 70 Wn.2d 657, 425 P.2d 16 (1967); *Yakima Fruit Growers Ass'n v. Henneford*, 187 Wash. 252, 258, 60 P.2d 62 (1936); Det. No. 01-007. Neither Rule 18801, RCW 82.08.0281, nor RCW 82.04.4289 exempts receipts for the one-on-one strength or weight loss services offered by the taxpayer.

[3] The Department lacks legal authority to waive the tax based on oral instructions. RCW 82.32A.020 only provides authority to waive tax based upon reliance on specific, official written advice or written reporting instructions from the Department. Det. No. 00-001, 19 WTD 681 (2000); *See also* Det. No. 87-130, 3 WTD 59 (1987); Det. No. 96-114, 16 WTD 188 (1996); and Det. No. 92-004, 11 WTD 551 (1992). A taxpayer will not be relieved of tax or interest liability because of a claimed oral representation of the Department. *See* Excise Tax Advisory 419.32.99. This is so in this case notwithstanding the fact that the taxpayer's accountant states he took notes

of the cited telephone conversation. Det. No. 90-165, 9 WTD 286-45 (1990). We lack authority to waive tax based upon oral instructions.

DECISION AND DISPOSITION:

The taxpayer's petition is denied.

Dated this 29th day of March 2002.