Cite as Det. No. 20-0297, 41 WTD 222 (2022)

BEFORE THE ADMINISTRATIVE REVIEW AND HEARINGS DIVISION
DEPARTMENT OF REVENUE
STATE OF WASHINGTON

In the Matter of the Petition for Correction of Assessment of	)	D E T E R M I N A T I O N
	)	No. 20-0297
. . .	)	Registration No. . . .

RCW 82.04.050(3)(g)(i): RETAIL SALES TAX – OPERATING ATHLETIC OR FITNESS FACITLITY – CHARGES FOR USING FACILITY. An athletic or fitness facility operator must collect retail sales tax on fees collected from third parties who pay the fees in exchange for using the facility because such fees are included in the definition of retail sale.

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.

Farquhar, T.R.O. – A company that operates a gym protests the Department's assessment of retail sales tax on fees the company charged to a personal training business for the use of the gym to host fitness classes. The company argues that its relationship with the personal training business is a "partnership" and the fees it collected are not for use of the facility but a "partnership fee." However, the contract between the parties specifically states that they did not intend to establish a partnership. Because fees charged to personal trainers by gym operators for using the operator's facilities are subject to retail sales tax under RCW 82.04.050(3)(g)(i), we conclude that company is liable for retail sales tax on those amounts. Petition denied.[1]

ISSUE

Whether an athletic or fitness facility operator owes retail sales tax under RCW 82.04.050(3)(g)(i) on fees it collected from a personal training business in exchange for allowing the personal training business to use the operator's facility to host fitness classes.

FINDINGS OF FACT

. . . ("Taxpayer") is a business located in . . . , Washington, that operates a fitness facility ("the gym"). Taxpayer offers access to the gym to customers in exchange for a membership fee. Gym members have access to "coached" fitness classes, an open gym area, locker rooms, and a basketball court, among other amenities. Members also have access to classes that are offered at the gym by a separate business . . . ("Trainer"). Trainer is also located in . . . , Washington. In

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

addition to offering classes at the gym, Trainer solely operates its own separate facility located in a different part of the city.

The relationship between Taxpayer and Trainer is governed by a contract . . . ("the Contract"), which went into effect on May 6, 2016. Taxpayer provided a copy of the Contract for our review. The Contract is ten pages long, including six pages of terms and three exhibits entitled "Exhibit A, Services of Contractor," "Exhibit B, Services of Company," and "Exhibit C, Compensation." The "Recitals" section of the Contract states that Taxpayer "operates a fitness club" and the Trainer "operates a personal training service." Contract, pg. 1. It also states that Trainer and Taxpayer "desire for [Trainer] to provide personal training services" to customers of both businesses at the gym. *Id.* Paragraphs 1 and 2 state that in exchange for Trainer providing the services described in Exhibit A and paying the compensation described in Exhibit C, Taxpayer agrees to provide various services as described in Exhibit B. The Contract specifies that it "shall not be construed as creating a partnership or joint venture between [Taxpayer] and [Trainer] . . . ." Contract, pg. 5.

Exhibit A contains five paragraphs and describes the services that Trainer promised to provide in relation to the Contract. The first three paragraphs describe how, when, and to whom Trainer will provide personal training services. The fourth paragraph states that Trainer will encourage its clients to become members of the gym and will otherwise promote Taxpayer's business. The final paragraph states that Trainer will collaborate with Taxpayer "at least quarterly" on "best business practices . . . and how each party can contribute to the ongoing success of [the Contract]." Exhibit A, paragraph 5.

Exhibit B lists the services Taxpayer agreed to provide in relation to the Contract. Exhibit B contains eleven paragraphs listing the various services. Six of the paragraphs describe the types of access to the gym that Taxpayer agreed to provide to Trainer, including access to the following: the gym and associated equipment for conducting training, shared office space, space at the reception area for Trainer's computer, shared office equipment, space in the gym for promoting Trainer's programs, and a secure space for storing client files. Exhibit B, paragraphs 2-7. The remaining paragraphs describe other actions, such as sharing membership information for promotional purposes, offering discounted memberships to Trainer's clients, and an agreement to collaborate "at least quarterly" on "best business practices . . . and how each party can contribute to the ongoing success of [the Contract]." Exhibit B, paragraphs 1, 8-11.

Exhibit C sets forth the compensation that Trainer agreed to pay to Taxpayer. The first paragraph states that Trainer will pay Taxpayer $. . . "as minimum monthly compensation, without deduction, setoff, notice, or demand[.]" Exhibit C, paragraph 1. Payment is due "in advance of the first day of each calendar month during the term of the [Contract]." *Id.* Additionally, Trainer agreed to pay Taxpayer an annual "percentage payment," which is described as follows:

> At the end of each year of [the Contract], [Trainer] shall pay a percentage payment . . . for each calendar month for the following year which falls in whole or in part during the term of this [Contract] in an amount equal to the positive difference, if any of (i) the product of the Gross Sales (as defined below) for such calendar month and ten percent (10%) . . . , minus (ii) the [$. . . monthly payment] payable for such calendar month.

Exhibit C, paragraph 2.1. The remainder of Exhibit C explains how the parties calculate the "percentage payment," as well as Trainer's record-keeping duties and late payment penalties. Exhibit C, paragraph 2.2 and 3.

On May 8, 2018, the Department's Audit Division ("Audit") began a review of Taxpayer's books and records for the period of January 1, 2016, through March 31, 2018 ("the Audit Period"). At Audit's request, Taxpayer provided copies of its financial information and sales data, as well as a copy of the Contract. Audit found that Taxpayer had reported the income it received from the Trainer under the service and other activities business and occupation ("B&O) tax classification. However, Audit concluded that charging Trainer a fee for using the gym constituted a retail sale. Accordingly, Audit reclassified the income under the retailing B&O tax classification and assessed retail sales tax on the amounts Taxpayer received from Trainer.

On October 18, 2019, Audit issued a Notice of Balance Due ("the Assessment") in the amount of $. . . . *See* Letter ID . . . . The Assessment is composed of $. . . in taxes, $. . . in penalties, and $. . . in interest. The tax portion of the Assessment includes $. . . in state and local retail sales tax and a credit of $. . . for overpaid B&O tax. Taxpayer has not paid the Assessment.

On November 4, 2019, Taxpayer submitted a timely petition for review ("the Petition"). Taxpayer argues that it did not collect retail sales tax from the Trainer because Taxpayer "did not believe [its] relationship with this partner met the guidelines defined under" the "Recreational services at a glance" page located on the Department's website. Petition, pg. 1; *see* https://dor.wa.gov/get-form-or-publication/publications-subject/tax-topics/recreational-services-glance ("web page"). As relevant here, the web page states that "[p]ersonal trainers that provide their services at an [Athletic or Fitness Facility ("AFF")] operated by another party must pay retail sales tax to the AFF on the charges for the use of the AFF, but they do not charge retail sales tax for the personal training services." Web page, "Personal training" section.

Taxpayer goes on to argue that the Contract with Trainer "is not a space use rental contract, but a partnership contract where they pay a base fee to manage and control all of the personal training and other designated services out of our facility." Attachment to Petition ("Attachment"), pg. 1. Taxpayer views its relationship with Trainer as "not just a personal training sub contractor [sic] where we charge a fee for space use, but a partner in our operation." *Id.* Taxpayer also refers to the relationship as a "full and comprehensive partnership" and asserts that the fee Trainer pays to Taxpayer is a "partnership fee" that "should be a non-sales taxable item." *Id.* at pg. 2.

Taxpayer also notes that one of the reasons the parties entered into the Contract was because Trainer "was looking to open a second location in our area and the barrier of entry (new location, buildout, equipment and so on) is very expensive." Attachment, pg. 1. Thus, instead of opening its own second location, Trainer pays a "base fee" to Taxpayer "for them to have their second location in [the gym] . . . ." *Id.*[2]

[2] Taxpayer also raised an issue regarding when, or whether, the personal training business must collect retail sales tax from its own customers. The personal training business is not a party to the present review petition and we lack the authority to address such an issue. WAC 458-20-100(1).

ANALYSIS

Washington imposes a retail sales tax on each retail sale made in this state. RCW 82.08.020. Sellers are required to collect retail sales tax from buyers on all retail sales and remit those funds to the Department. RCW 82.08.050(1). If a seller fails to collect the tax or, having collected the tax, fails to remit the funds to the Department, the seller is liable for the amount of the tax regardless of "whether such failure is the result of the seller's own acts or the result of acts or conditions beyond the seller's control[.]" RCW 82.08.050(3).

The definition of "retail sale" includes the following:

> [T]he 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 . . . [o]perating an athletic or fitness facility*, *including all charges for the use of such a facility or for any associated services and amenities . . . .*

RCW 82.04.050(3)(g)(i) (emphasis added).[3]

The definition of "athletic or fitness facility" includes "an indoor or outdoor facility or portion of a facility that is primarily used for: exercise classes; strength and conditioning programs; personal training services . . . or other activities requiring the use of exercise or strength training equipment . . . ." RCW 82.04.050(3)(g)(iv)(A).

Here, Taxpayer does not dispute that it operated an athletic or fitness facility during the Audit Period. The terms of the Contract indicate that Taxpayer received fees from the Trainer in exchange for allowing the Trainer to use Taxpayer's athletic or fitness facility, as well as for other services and amenities associated with Trainer's use of the facility, such as advertisements and promotions, and sharing lists of potential customers. Therefore, because fees "received by persons . . . [o]perating an athletic or fitness facility, including all charges for the use of such a facility or for any associated services and amenities [,]" are included in the definition of "retail sale" under RCW 82.04.050, Taxpayer was required to collect retail sales tax on the amounts it collected from Trainer and remit the funds to the Department. RCW 82.04.050(3)(g)(i); RCW 82.08.050(1); [*see also* Web page, "Personal training" section]. Taxpayer failed to do so, thus the Assessment is valid.

Taxpayer argues that its relationship with Trainer is a "partnership" and that the fee Trainer pays to Taxpayer is a "partnership fee" that is not subject to retail sales tax. . . . We disagree. The Contract clearly states that it "shall not be construed as creating a partnership or joint venture between" Taxpayer and Trainer. Furthermore, there is no evidence that the parties obtained a business license or tax registration for a partnership. Instead, the record indicates that the parties continued to operate as separate businesses after the Contract took effect, meaning they could not have become "partners" in a legal sense. Indeed, the fact that Trainer was required to pay Taxpayer

[3] The Department does not have a corresponding administrative rule regarding operating athletic or fitness facilities. WAC 458-20-183, the administrative rule addressing recreational services and activities, directs the reader to RCW 82.04.050(3) "for information about the taxability of operating an athletic or fitness facility . . . [.]" *See* WAC 458-20-183(1)(a).

a fee for using Taxpayer's facilities indicates that they remained separate businesses and did not become partners. Furthermore, as Taxpayer noted in the Attachment, one of the reasons the parties entered into the Contract was so that Trainer could avoid the expense of opening a second physical location. This further supports the conclusion that the fees are in exchange for Trainer's use of the gym, not to establish a joint business venture with Taxpayer.

DECISION AND DISPOSITION

Taxpayer's petition is denied.

Dated this 4th day of November 2020.