

Cite as Det. No. 99-174, 19 WTD 172 (2000)

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. 99-174
)	
..)	Registration No. . . .
)	FY. . . /Audit No. . . .
)	
)	

[1] RULE 183: B&O TAX – RETAIL SALES TAX – ATHLETIC CLUB – PERSONAL TRAINER. A personal trainer at an athletic club evaluates a member’s physical fitness needs and designs a workout program intended to meet those needs. His/her services are “physical fitness services”, taxable since July 1, 1993 as retail sales.

[2] RULE 172: B&O TAX – RETAIL SALES TAX – TENNIS COURTS – CLEANING OF. Specialized cleaning of tennis courts done infrequently at significant expense does not qualify for sales tax exemption as a “janitorial service”. It is a special clean-up job, not regularly or normally performed by a commercial janitorial service.

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:

Athletic club protests the retail sales taxation of income generated by personal trainers and the application of sales tax to a fee charged for the cleaning of a tennis court.¹

FACTS:

Dressel, A.L.J. – (Taxpayer) operates an athletic club.² His books and records were examined by the Department of Revenue (Department) for the period January 1, 1993 through September 30, 1996. As a result a tax assessment, identified by the above-captioned numbers, was issued for \$. . . . The taxpayer appeals portions of the assessment.

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

² [The Taxpayer] has other businesses that report under the same Department of Revenue registration number. Only activities of the athletic club are at issue in the present appeal, however.

The taxpayer is a membership organization. Members pay an initiation fee and monthly dues to use the taxpayer's athletic facilities. A particular service available from the taxpayer is the "one on one" advice of a personal athletic trainer. This qualified fitness expert will analyze the needs of a particular member and design a training program to benefit that individual. Income from this activity during the audit period was reported under the Service and Other Business Activities classification of the business and occupation (B&O) tax. In the audit, however, the Department cited a change in the statutory law and subjected this income, beginning July 1, 1993, to Retailing B&O tax and retail sales tax.

Another activity offered by the taxpayer is tennis. In 1996 the taxpayer hired an individual to "clean, sweep tennis court".³ The cost for this service was \$. . . . The taxpayer did not pay sales tax to the provider of the service. The taxpayer likens this to a service performed by a janitorial service and argues that it should be taxed as such, namely Service B&O tax paid by the vendor with no retail sales tax owed by the vendee. The Department, however, contends this activity is outside the scope of normal janitorial services and, thus, is taxable as the maintenance or repair of real property and subject to sales tax.

ISSUES:⁴

1. Are the services of a personal athletic trainer a retail sale?
2. Is the cleaning of tennis courts a janitorial service and, thus, not a retail sale?

DISCUSSION:

Effective July 1, 1993 the definition of *retail sale* was amended to include "physical fitness services". RCW 82.04.050(3)(h)⁵ and Laws of 1993, sp.s. c 25 § 301. Up to that time, income derived from furnishing physical fitness services had been classified under the Service B&O category. See WAC 458-20-183 (Rule 183)⁶ and former ETB 531.04.08.183. As a result of the statutory amendment, Rule 183 was amended, effective December 2, 1995, to read, in part:

(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).

³ This is how the activity is described on Schedule 8 of the audit report.

⁴ In its petition for correction of assessment, the taxpayer also raised an issue as to the proper allocation of its membership fees and dues. At the hearing, however, the taxpayer withdrew this issue.

⁵ Since re-codified at RCW 82.04.050(3)(g).

⁶ Prior to its December 2, 1995 amendment.

To help bridge the gap between the passing of the statutory and rule amendments, Excise Tax Bulletin (ETB) 901 was issued November 15, 1994. It read, in part:

(3) Detailed Information - New retail services. A number of new services have been added to the definition of a retail sale. These service providers continue to be subject to payment of the retail sales tax on purchases of equipment, which is used in providing the service. The following services have been added and are now subject to the retail sales tax and have not yet been included in permanent rule revisions:

...

(c) Physical fitness services. This includes all activities or services related to physical fitness such as weight lifting, providing running tracks, exercise equipment, aerobics classes, *personal trainers*, etc.

[1] (*Italics ours.*) With respect to the taxation of personal trainers, the taxpayer avers that Rule 183 is “unclear” and “ambiguous”. We disagree. We believe it could hardly be clearer. The rule describes a personal trainer as “a person who assesses an individual’s workout needs and tailors a physical fitness workout program to meet those individual needs”. This definition reflects precisely what the taxpayer’s personal trainers do, as stated in its petition and at the hearing. There is no ambiguity. Income from personal trainers is, per Rule 183, retail in nature and subject to Retailing B&O tax and retail sales tax.

While we acknowledge a gap between the passage of the legislation and the amendment of Rule 183, we have no awareness that the intent of the legislature or the Department was ever otherwise than as reflected in the amended rule. ETB 901 is consistent with such intent. The statutory phrase “physical fitness services” is consistent with the activity of a personal athletic trainer. A lay person, looking at that phrase on the effective date of the RCW 82.04.050 amendment, July 1, 1993, could reasonably contemplate that it was intended to encompass the services of a personal trainer. We believe that the Department’s adoption of ETB 901 and Rule 183 reasonably implemented the legislature’s intent vis-a-vis “physical fitness services”, and we find no reason not to enforce the same interpretation in the interim period, after the statutory amendment up to the date the ETB was promulgated.

On the first issue, the personal trainer, the taxpayer’s petition is denied.

The taxpayer contends that the cleaning of the tennis court(s) was a janitorial service and, thus, exempt of sales tax. WAC 458-20-172 (Rule 172) discusses janitorial services. It does state that janitorial services are taxable under the Service and Other Business Activities B&O category and that they are not subject to Retailing B&O or retail sales taxes. It also describes what janitorial services are. In this regard it reads:

The term “janitorial services” includes activities performed *regularly and normally* by commercial janitor service businesses. Generally, these activities include the washing of interior and exterior window surfaces, floor cleaning and waxing, the cleaning of interior walls and woodwork, the cleaning in place of rugs, drapes and upholstery, dusting, disposal

of trash, and cleaning and sanitizing bathroom fixtures. The term "*janitorial services*" *does not include*, among others, cleaning the exterior walls of buildings, the cleaning of septic tanks, *special clean up jobs* required by construction, fires, floods, etc., painting, papering, repairing, furnace or chimney cleaning, snow removal, sandblasting, or the cleaning of plant or industrial machinery or fixtures.

At the hearing the taxpayer's representative said that he thought the tennis courts were cleaned by a specialist, somebody other than the janitorial service used by the taxpayer. He also said that this was a "one-time" service.

In Excise Tax Advisory (ETA) 262.04.172 the Department was called upon to answer the question of whether snow removal and/or power sweeping of parking lots qualified for the janitorial services exclusion from "retail sales". In answering that question, the ETA states, in part:

The snow removal and/or power sweeping of parking lots is not, however, considered a cleaning or caretaking activity ordinarily performed by commercial janitor service businesses. These activities often require the use of plows or other mechanized equipment in the case of snow removal, and vacuum or power sweepers in the case of the cleaning of parking lots. These activities are often performed by businesses specializing in these services who do not generally perform interior janitorial services. These activities are retail in nature and subject to the retailing B&O and retail sales taxes when performed for consumers.

[2] We view the present activity of cleaning tennis courts as analogous to the snow removal/power sweeping activity described in the ETA. It is one not normally performed by a janitorial service. The facts that the taxpayer's own janitorial service did not do the cleaning of the tennis courts, the activity was done infrequently, and also that it cost \$. . . lead us to that conclusion. It is more akin to a "special clean up job" which, under Rule 172, is considered outside the scope of janitorial services.

We conclude, therefore, that the cleaning of these tennis courts was the cleaning of real property, which is taxable as a retail sale. RCW 82.04.050(2)(d). On this second issue, the taxpayer's petition is denied.

DECISION AND DISPOSITION:

Taxpayer's petition is denied.

DATED this 11th day of June, 1999.