

Cite as Det. No. 12-0376, 32 WTD 309 (2013)

BEFORE THE APPEALS DIVISION
DEPARTMENT OF REVENUE
STATE OF WASHINGTON

In the Matter of the Petition for Correction of Assessment of)	<u>D E T E R M I N A T I O N</u>
)	
)	No. 12-0376
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)	Registration No. . . .
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RULE 183; RCW 82.04.050: RETAIL SALES TAX – PHYSICAL FITNESS SERVICES – DANCE FITNESS CLASSES. Since the primary focus of the taxpayer’s dance fitness class is fitness and health, the class is a physical fitness service, subject to retail sales tax.

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.

Chartoff, A.L.J. – A taxpayer who offers various classes, including [dance fitness], protests an Audit assessment of uncollected retail sales tax on revenues from [dance fitness] classes, contending the [dance fitness] classes are instructional lessons. We conclude that the taxpayer’s [dance fitness] classes are physical fitness services subject to retail sales tax and deny the petition.¹

ISSUE

Whether [dance fitness] classes are physical fitness services subject to retail sales tax under RCW 82.04.050(3) and WAC 458-20-183.

FINDINGS OF FACT

The taxpayer operates a studio in Washington offering martial arts and dance fitness classes In 2011, the Audit Division of the Department of Revenue conducted an audit of the taxpayer’s business activities for the period of July 1, 2008 through December 31, 2010. The taxpayer began offering [dance fitness] classes in 2010 and reported the revenue on its excise tax returns under the Service and Other B&O tax classification. Audit determined that [dance fitness] was a

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

physical fitness service taxable under the retailing B&O tax classification and subject to retail sales tax. Audit reclassified the income from service to retailing and issued an assessment for \$. . . , consisting of \$. . . uncollected sales tax, \$. . . retailing B&O tax, \$. . . service B&O tax, \$. . . interest and \$. . . penalty.

The taxpayer petitioned the Appeals Division for cancellation of the assessment. The taxpayer argues that its [dance fitness] classes are instructional lessons similar to ballroom dance classes or martial arts classes. [Dance fitness] classes involve the teaching of dance steps The taxpayer represents that its studio is unique because its instructors have extensive dance training and experience. The taxpayer asserts that many customers take their [dance fitness] classes to learn to dance. . . .

ANALYSIS

RCW 82.04.050(3)(g) states that the term “retail sale” includes the sale of or charge made for “physical fitness services.”

WAC 458-20-183(2)(l) defines “physical fitness services” as follows:

(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.* (italics ours).

Gross receipts from physical fitness services are taxable under the retailing classification. WAC 458-20-183(3)(a). “Gross receipts from activities not defined to be retail sales, such as tennis lessons, golf lessons, and other types of instructional lessons, are taxable under the service and other activities classification.” WAC 458-20-183(3)(b).

The Department issued ETA 3104.2009 (February 2, 2009) (ETA 3104) “Physical Fitness Services – Specialized Exercise and Conditioning Activities”, in part to clarify the distinction between physical fitness services and instructional lessons. ETA 3104 was originally issued April 21, 2005, as ETA 2023.08.183. ETA 3104 states in pertinent part:

Physical fitness services are activities involving physical exertion for the purpose of improving or maintaining the general fitness, strength, flexibility, conditioning, and/or

health of the participant. Physical fitness services do not include: (1) instructional lessons

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. These classes may or may not involve a specialized exercise or conditioning program such as Body Pump, Jazzercise, Pilates, Power Sculpting, and Neuromuscular Integrative Action ("Nia"); and
- 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.

Instructional lessons

Rule 183 explains that physical fitness services "do not include instructional lessons such as those for self-defense, martial arts, and stress-management." Rule 183 further provides that:

"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.

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.

Det. No. 07-0113, 26 WTD 250 (2007) analyzed the distinction between fitness services and instruction. In that case, the taxpayer was a movement educator and coach who used Pilates and other movement technologies in her sessions. The facts state in pertinent part:

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.... 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.

The decision held that the primary focus of the participant was to improve or maintain his or her general fitness, strength, flexibility, conditioning and/or health. Therefore the primary purpose of these classes is physical fitness. The determination noted that any exercise class involves some degree of imparting special knowledge or information. For example, “in a step aerobics class, students must learn to perform the various steps.” Such instruction or guidance does not in itself result in that service being an “instructional lesson” subject to the service and other B&O tax.

Applying the above cited authorities to the case under review, we find that the primary focus of taxpayer’s [dance fitness] classes is physical fitness of the participant. The [dance fitness] classes are described in the taxpayer’s marketing materials as “dance-fitness” and “fitness-party.” The taxpayer leads the participants in a choreographed dance-based exercise routine. The taxpayer lists the benefits of [dance fitness] to the participants as follows: lose weight, burn calories, tone the body, relieve stress, and total body makeover. Since the primary focus of the class is fitness and health, the class is a physical fitness service.

The taxpayer argues that its [dance fitness] classes are instructional lessons in dance. While the taxpayer’s classes involve the teaching of dance steps and choreography, mastery of the choreography is not the primary focus of the classes. Per the taxpayer’s website, the choreography changes to keep the classes interesting. The taxpayer’s classes do not have a curriculum or lesson plans. The taxpayer’s [dance fitness] classes do not involve levels of achievement similar to Martial Arts. The taxpayer’s classes are not offered as part of a curriculum to gain certification as an instructor. For these reasons, we reject the taxpayer’s

argument that the primary focus of the class is dance instruction and conclude [dance fitness] classes are not instructional lessons under Rule 183.

In sum, we conclude that the taxpayer has failed to demonstrate its [dance fitness] classes should be excluded from the definition of “physical fitness services.” Accordingly we sustain the audit assessment.

DECISION AND DISPOSITION

Taxpayer's petition is denied.

Dated this 27th day of December 2012.