

Cite as 9 WTD 286-13

BEFORE THE INTERPRETATION AND APPEALS DIVISION
DEPARTMENT OF REVENUE
STATE OF WASHINGTON

In the Matter of the Petition)	<u>D</u> <u>E</u> <u>T</u> <u>E</u> <u>R</u> <u>M</u> <u>I</u> <u>N</u> <u>A</u> <u>T</u> <u>I</u> <u>O</u>
<u>N</u>	
For Correction of Assessment)	
of)	No. 90-146
)	
. . .)	Registration No. . . .
)	. . . /Audit No. . . .
)	

[1] RULE 183: SALES TAX -- B&O TAX -- AMUSEMENT AND RECREATION ACTIVITIES -- SWIMMING. Lap swimming and open swimming are retail activities whereas swim team activities are of an instructional nature and, thus, non-retail subject to Service B&O 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.

TAXPAYER REPRESENTED BY: . . .

DATE OF HEARING: September 30, 1987

NATURE OF ACTION:

Protest by swim club of the classification of its income-producing swimming activities as retail sales.

FACTS AND ISSUES:

Dressel, A.L.J. -- [Taxpayer] is a private swim club. Its books and records were examined by the Department of Revenue (Department) for the period . . . through As a result, a tax assessment, identified by the above-captioned numbers, was issued in the amount of \$ The taxpayer appeals portions of said assessment.

In the audit the Department's auditor judged a number of club activities such as "water exercise", karate, and aerobics as non-retail and three others, lap swim, open swim and swim team workout as retail. The taxpayer's objections are to the three retail categorizations. Generally speaking, it claims all three are of a health and fitness or instructional nature so should not be subject to Retailing B&O or retail sales tax.

Specifically, with regard to lap swim, the taxpayer cites Excise Tax Bulletin (ETB) 531.04.08.183 as authority that treadmills, rowing equipment, stationary bicycles and running tracks are fitness activities and, thus, not subject to retail tax. It analogizes the activity of running around a track with that of swimming back and forth across a pool as one does when lap swimming. Both activities will lead to cardiovascular and musculoskeletal fitness and are of a repetitive nature so should be B&O tax-classified similarly. So says the taxpayer.

Regarding the open swim, the taxpayer argues, in effect, that one may achieve health and fitness in a manner similar to the way one may lap swimming. The taxpayer suggests that a little exertion by an elderly person during an open swim period may have a greater health and fitness benefit for that individual than continuous lap swimming does for a vigorous 25 year old. Because it is impractical, even impossible, to monitor what each individual participating in open swim is doing and what physical benefit each is deriving, it is inappropriate to presume there is no health and fitness benefit by classifying this activity in a category other than lap swim.

Lastly, is the subject of the swim team. The taxpayer says that this activity contains elements of both a health and fitness nature and an instructional nature. It states that structured learning programs, according to the above-cited ETB, are not subject to retail sales and B&O tax. Further it writes in part in its petition:

Clearly a swim team workout activity for school-age children is such a structured learning program as it provides an environment for children to learn the basics of competitive swimming techniques and styles under instructional supervision. In addition, such an activity is also a fitness activity since the activity involves the swimming back and forth in a swimming pool to strengthen and physically condition the body similar to using a stationary bicycle, rowing machine and running track.

The issue is whether lap swimming, open swimming, and swim team workouts are retail activities.

DISCUSSION:

Prior to July 1, 1984, the Department's WAC 458-20-183 (Rule 183) read in part:

PLACE OF AMUSEMENT OR RECREATION. The term "sale at retail" is defined by RCW 82.04.050 to include certain amusement and recreation businesses. Those activities specifically included within the definition are golf, pool, billiards, skating, bowling, and ski lifts and tows. Thus, while the legislature has not defined the term "amusement and recreation business," it has indicated the type of businesses it intended to tax under this classification, i.e., recreations in which the payment is for participation. Accordingly, the language of this classification is construed to include the following additional amusement and recreation businesses: Archery, badminton, bowling shoes rentals, croquet and handball courts, operation of charter boats for sport fishing, golf cart rentals, dancing, golf driving ranges, miniature golf, private fishing, shuffleboard, swimming facilities, tennis facilities, trampolines. (Emphasis, ours.)

Effective July 1, 1984 the listing of the additional amusement and recreation businesses was deleted from the rule but added to the Excise Tax Bulletin, 531.04.08.183, to which reference was made above. Not only were those businesses transferred to the ETB but a number of others were added to the ETB as well in an attempt to clarify which specific activities are subject to Retailing B&O and which are subject to Service and Other Activities B&O tax. The Department apparently didn't want to clutter up the rule with a voluminous list of sporting pursuits and thought that the excise tax bulletin was a better vehicle in which to include such lists. In the ETB the twelfth entry under the heading "Retailing Activities & Businesses" is "Swimming, pool charges, watersliding, etc."

[1] Neither the old rule nor the new ETB differentiates swimming activities into more than one kind. The ETB says "swimming", period. The rule said "swimming facilities". It strikes us that all three specific forms raised by the

taxpayer fit both the language of the ETB and the rule. Lap swim, open swim, and swim team are all "swimming" and they are all accomplished in "swimming facilities". Thus, both authorities, which cover all of the audit period, say income from all swimming activities ought to be subject to Retailing B&O and retail sales tax. That is our ruling in spite of the taxpayer's entirely logical argument that there is no difference, vis-a-vis health and fitness, between lap swimming and lap running. The rule and the ETB are unambiguous on how swimming is to be classified so they are deemed controlling. We note, incidentally, that there are other activities the Department has classified as retail which also have health and fitness benefits. Examples are golf, tennis, and skiing.

Another consideration comes into play with respect to the swim team activities, however. As correctly observed by the taxpayer, there is an instructional aspect to swim team workouts. While its magnitude may be less than in something like Red Cross swimming lessons where a student is trying to get her or his advanced beginner card so she or he can move to the intermediate level, nevertheless it is there. Stroke techniques and conditioning routines are doubtless taught to the participants as they practice their specialties be they the butterfly, crawl, backstroke, breaststroke, or whatever.

Recreational activities which are instructional in nature have long been specially categorized by the Department. In ETB 263.04.183, issued September 23, 1966, fees for swimming instructions were ruled subject to Service B&O rather than Retailing B&O and retail sales tax. That tax treatment was continued with the 1984 issuance of ETB 531.04.08.183. See item number three under the "Service Activities & Businesses" heading. The fact that an otherwise retail-classified amusement and recreation pursuit is part of a structured learning program will convert it into the Service B&O category for purposes of taxation. In our judgment there is a sufficient instructional aspect in swim team workouts to call income from them Service B&O taxable as well.

In summary, we conclude that lap swimming and open swimming are retail activities whereas swim team is a non-retail activity subject to Service B&O tax.

DECISION AND DISPOSITION:

The taxpayer's petition is granted in part and denied in part.

DATED this the 28th day of March 1990.

