

Cite as Det. No. 20-0233, 42 WTD 011 (2023)

BEFORE THE ADMINISTRATIVE REVIEW AND HEARINGS 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. 20-0233
)	
...)	Registration No. . . .
)	

[1] WAC 458-20-183; RCW 82.04.050: RETAIL SALES TAX – PARKOUR CLASSES. Parkour classes are a physical fitness activity because the primary focus of the classes is physical fitness. The revenue received from providing parkour classes is subject to retailing business and occupation (B&O) tax and retail sales tax.

[2] WAC 458-20-183; RCW 82.04.050: RETAIL SALES TAX – PARKOUR FACILITY. A gym used to provide parkour classes is an athletic or fitness facility, and revenue received from providing parkour classes at an athletic or fitness facility is subject to retailing B&O tax and 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.

Orwick, T.R.O. – A provider of parkour classes protests the Department of Revenue’s (Department) assessment of retail sales tax and retailing business and occupation (B&O) tax on income received from charges made for parkour classes, claiming that parkour is not a physical fitness activity, and the classes are not offered at a physical fitness facility. We deny the petition.¹

ISSUES

1. Whether parkour classes that occurred prior to January 1, 2016, are subject to retail sales tax under RCW 82.04.050 (2015) and WAC 458-20-183 (1995) (Rule 183) as physical fitness activities.
2. Whether Taxpayer operated a physical fitness facility as defined under RCW 82.04.050(3) for periods after January 1, 2016.

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

FINDINGS OF FACT

. . . (Taxpayer) operates a parkour gym in . . . , Washington and conducts parkour classes.² . . . Taxpayer initially offered classes at third-party facilities, . . . In 2016, Taxpayer leased a facility in . . . , Washington to serve as a parkour gym. Taxpayer indicates that it continues to conduct classes at third-party facilities, . . . , in addition to the classes at its facility.

Taxpayer’s website indicates that Taxpayer offers [several] classes at its facility[.]³

. . .

. . . Taxpayer offers a variety of classes to children and adults, beginning as early as age five. Certain classes offered by Taxpayer also require a base level of knowledge and experience. [The various parkour classes include lessons on techniques to traverse environmental obstacles, strategy, use of acrobatics, and developing movement creativity. Taxpayer also provides classes designed for special needs students.] Taxpayer offers several options for participants to access its facility, including single visit passes, unlimited open gym visits, monthly memberships, and multi-month memberships. Additionally, the monthly and multi-month memberships offer different tiers . . . which offer additional benefits.⁴

In 2019, the Department’s Audit Division (Audit) conducted an investigation of Taxpayer’s records for the period of January 1, 2015, through December 31, 2018. Taxpayer reported the income from parkour classes under the service and other activities B&O tax classification during the audit period. Audit determined that Taxpayer incorrectly classified its income received from classes provided prior to opening its own facility that were . . . offered through a third-party facility as well as the classes offered at its facility under the service and other activities B&O tax classification and that the income was properly classified under the retailing B&O tax classification and subject to retail sales tax. Audit determined that Taxpayer provided sufficient evidence to show that it offered some classes through third-party facilities and properly reported this income under the service and other activities B&O tax classification and did not reclassify this income as retail sales.

On July 24, 2019, the Department issued an assessment against Taxpayer. The assessment totaled \$. . . , which consisted of \$. . . in tax liability, \$. . . in interest, and \$. . . in assessment penalties for substantial underpayment. The tax liability consisted of \$. . . in sales and use tax, \$. . . in local sales and use tax and a credit of \$. . . for prior payments.⁵

Taxpayer timely petitioned for administrative review. Taxpayer argues that the income from parkour classes is properly classified under the service and other activities B&O tax. Taxpayer states that the classes are primarily catered toward small kids, but teens and adults also enroll in

² Parkour is not defined in the RCW or WAC. Merriam-Webster’s Dictionary defines “parkour” as “the sport of traversing environmental obstacles by running, climbing, or leaping rapidly and efficiently.” <https://www.merriam-webster.com/dictionary/parkour> (last accessed August 12, 2020).

³ . . .

⁴ . . .

⁵ . . .

Taxpayer's classes. Taxpayer contends that the classes are not primarily focused on physical fitness but instead focuses on a holistic approach to the students' health and wellness. Taxpayer states that in addition to teaching the physical movement and navigating obstacles, Taxpayer also works on emotional, cognitive, and social development for the younger children enrolled in the classes and as such, the classes are instructional in nature and not a physical fitness activity. Taxpayer provided a copy of a . . . [s]kill [t]ree that lists the type of movements, broken into three levels a parkour participant would learn as part of the classes. The skill tree lists numerous skills such as "lache," "rail balance," "cat hang," "tic tac," "basic climbup," "jump to cat," "pushups," "chin-ups," "pull-ups," and "full squat." Taxpayer did not provide any lesson plans or other curriculum to detail what is taught during each class. Taxpayer also provided a blueprint for the layout of its facility.

Audit found that the parkour classes are primarily focused on physical fitness, not instruction, and are a physical fitness activity subject to tax as retail sales. Audit also determined that Taxpayer operated an athletic or fitness facility because Taxpayer's facility is primarily used to conduct parkour classes, which are a physical fitness activity. Audit determined that the income received from parkour classes offered at Taxpayer's facility is subject to retailing B&O tax and retail sales tax.

ANALYSIS

Washington imposes retail sales tax and retailing B&O tax on each retail sale in this state. RCW 82.08.020; RCW 82.04.250. Retail sales tax is imposed on sales enumerated in RCW 82.08.020. The term "retail sale" also includes certain services listed under RCW 82.04.050. Persons who charge for services defined as retail sales are required to collect and remit retail sales tax and pay retailing B&O tax. *See* RCW 82.08.020; RCW 82.08.050; RCW 82.04.250. The definition of retail sale changed during the Audit Period. The change to the definition of retail sale was effective January 1, 2016. As such, it is necessary to examine Taxpayer's business activities separately under both the former and current RCW 82.04.050(3).

1. Parkour Classes prior to January 1, 2016

Prior to January 1, 2016, RCW 82.04.050(3) (2015) provided:

The term "sale at retail" or "retail sale" includes 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:

. . .
(g) The following personal services: Physical fitness services. . .

The version of WAC 458-20-183 that was in effect in 2015 provided:

(2) Definitions. . . .

- (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.
- (m) "Sale at retail" or "retail sale" include the sale or charge made by persons engaged in providing "amusement and recreation services" and "physical fitness services" as those terms are defined in (b) and (l) of this subsection. The term "sale at retail" or "retail sale" does not include: The sale of or charge made for providing facilities where a person is merely a spectator, such as movies, concerts, sporting events, and the like; the sale of or charge made for instructional lessons, or league fees and/or entry fees; charges made for carnival rides where the customer purchases tickets at a central ticket distribution point and then the customer is subsequently able to use the purchased tickets to gain admission to an assortment of rides or attractions; or, the charge made for entry to an amusement park or theme park where the predominant activities in the area are similar to those found at carnivals.

. . .

(3) Business and occupation tax.

- (a) Retailing classification. Gross receipts from the kind of amusement, recreation, and *physical fitness services* defined to be retail sales in subsection (2)(m) of this section are taxable under the retailing classification. . . .
- (b) Service and other activities classification. 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.

. . .

(5) Retail sales tax.

- (a) The retail sales tax must be collected upon charges for admissions, the use of facilities, equipment, and exercise classes by all persons engaged in the amusement, recreation, and *physical fitness services* that are defined to be retail sales in subsection (2)(m) of this section.

WAC 458-20-183 (1995) (emphasis added).

Parkour is not defined or mentioned in RCW 82.04.050 (2015) or former WAC 458-20-183 (1995). Thus, it is necessary to determine whether parkour classes are a physical fitness service or instructional lessons as instructional lessons were excluded from the definition of physical fitness services in the prior version of the law. An activity is an instructional activity when the primary focus is on instruction rather than exercise. *See* Rule 183(2)(l) (1995).

The distinction between “instructional lessons” and “physical fitness services” was developed in greater detail in Excise Tax Advisory 3104.2016 (ETA 3104). ETA 3104 states that 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.” ETA 3104 provided a list of examples of physical fitness services, which includes but is 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.

Further, ETA 3104 noted, based on the above examples, that an activity may involve some instruction as part of the physical fitness activities, but if instruction is not the primary focus, it remains a retail activity. In other words, the presence of some instruction does not automatically make the physical fitness service into an instructional lesson exempt from retail sales tax. *Id.* Further, by extension, if the primary focus of the activity is “for the participant to improve or maintain his or her general fitness, strength, flexibility, conditioning, and/or health,” the activity is a physical fitness activity subject to retail sales tax. *Id.*

ETA 3104 goes on to distinguish instructional lessons from exercise classes. ETA 3104 states:

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.

In Det. No. 13-0404, 33 WTD 186 (2014), we considered the issue in the context of physical fitness training services, and held as follows:

ETA 3104 acknowledges that the provision of physical fitness services may often involve some degree of instruction to the participant. We recognize that Taxpayer's lessons do include some degree of instruction and guidance (e.g., demonstrating proper form, teaching the underlying reason that certain exercises are performed, etc.). However, we conclude that the primary purpose of the lessons is to improve the client's performance in his or her sport through the strength and conditioning regimen that Taxpayer designs. Thus, the primary focus is for the client to improve "his or her general fitness, strength, flexibility, conditioning, and/or health," which ETA 3104 makes clear is not instructional. The inclusion of some level of instruction in Taxpayer's services does not outweigh the primary purpose of the services; nor does it transform such services into an instructional activity. Taxpayer provides physical fitness services on which he must pay retail sales tax.

The primary purpose of the activity is the determining factor as to whether the activity is instructional or physical fitness. For example, a Pilates class would be instructional if the class is part of the curriculum to obtain certification as an instructor. However, if the Pilates class is primarily aimed to improve the participant's flexibility, strength, or general fitness the activity is a physical fitness activity. *See* Det. No 13-0404, 33 WTD 186 (2014).

Here, Taxpayer does not have lesson plans or detailed curriculum to show what specifically occurs in the classes. The skill tree does show some skills that appear to be unique to parkour such as "lache," "climbup," "wall pop to stem," and "rail balance." Learning these skills requires a level of instruction, but it is unclear whether this alone makes the activity instructional. All of the skills relate to physical fitness, and many are more related to traditional physical fitness activities, including "pushups," "pull-ups," "chin-ups," "handstand," "planche," "full squat," and "crab table." The skills listed all appear to require a certain level of physical fitness and the classes would be primarily focused on helping the participant develop the necessary flexibility, strength, and general fitness necessary to perform these particular maneuvers. Thus, the parkour classes are a physical fitness service because the primary purpose is improving or maintaining the general fitness, strength, flexibility, conditioning, and health of the participant. Further, there is insufficient evidence to establish that the primary focus of the parkour classes is instruction. As such, we find that the primary focus of the parkour classes is physical fitness, and the classes are properly subject to retail sales tax and retailing B&O tax.

2. Parkour Classes from January 1, 2016, through end of Audit Period

Due to amendments to the statute, we must determine whether, under RCW 82.04.050(3)(g)(i), Taxpayer operates an athletic or fitness facility when determining the taxability of Taxpayer's parkour classes offered at its facility for periods after January 1, 2016.

The Legislature amended RCW 82.04.050 in 2015 to help simplify the taxation of amusement, recreation, and physical fitness services. Laws of 2015, ch. 169, § 1. RCW 82.04.050(3) now provides in relevant part as follows:

(3) The term "sale at retail" or "retail sale" includes 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:

...

(g)(i) Operating an athletic or fitness facility, including all charges for the use of such a facility or for any associated services and amenities, except as provided in (g)(ii) of this subsection.

(ii) Notwithstanding anything to the contrary in (g)(i) of this subsection (3), the term "sale at retail" and "retail sale" under this subsection does not include:

(A) Separately stated charges for the use of an athletic or fitness facility where such use is primarily for a purpose other than engaging in or receiving instruction in a physical fitness activity;

...

(C) Separately stated charges for services, . . . that do not require the customer to engage in physical fitness activities to receive the service. The exclusion in this subsection (3)(g)(ii)(C) does not apply to personal training services and instruction in a physical fitness activity;

...

(iv) For the purposes of this subsection (3)(g), the following definitions apply:

(A) "Athletic or fitness facility" means 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, such as treadmills, elliptical machines, stair climbers, stationary cycles, rowing machines, Pilates equipment, balls, climbing ropes, jump ropes, and weightlifting equipment.

...

(C) "Physical fitness activities" means activities that involve physical exertion for the purpose of improving or maintaining the general fitness, strength, flexibility, conditioning, or health of the participant. "Physical fitness activities" includes participating in yoga, chi gong, or martial arts.

Taxpayer states that it offers parkour classes at its gym. As discussed above, parkour classes are a physical fitness activity as they involve physical exertion for the purpose of improving or maintaining general fitness, strength, flexibility, conditioning, and health of the participant. As such, Taxpayer's facility, where it offers parkour classes, would qualify as an athletic or fitness facility because it is an indoor facility that is primarily used for exercise classes and strength and condition programs. Additionally, there is no evidence that Taxpayer's facility is used for any other activities beyond the parkour classes.

Taxpayer argues that it does not provide or use exercise or strength training equipment but uses specialized obstacles. We note that the definition of "athletic or fitness facility" in RCW

82.04.050(3)(g)(iv)(A) does not require that the facility use equipment to operate its facility, though Taxpayer's equipment would likely qualify as the exercise equipment contemplated by the statute. So long as the facility is used for exercise classes and other types of physical fitness activities, use of equipment is not required by the statute. *Id.* Use of equipment is one of the ways that an activity would qualify as the kind of activity done at an "athletic or fitness facility." Taxpayer's activities that it conducts at its facility are akin to those activities listed in RCW 82.04.050(3)(g)(iv)(A), qualifying it as an "athletic and fitness facility."

Based on the above, Taxpayer's gym is an athletic or fitness facility and income received from classes held at Taxpayer's facility is properly subject to retail sales tax and retailing B&O tax.

DECISION AND DISPOSITION

Taxpayer's petition is denied.

Dated this 21st day of August 2020.