

**UTAH STATE TAX COMMISSION
MEETING MINUTES**

9:00 a.m., Thursday, January 24, 2019

Commission Hearing Room 1025, 210 North 1950 West, Salt Lake City, Utah

Participating:

John L. Valentine – Commission Chair
Michael J. Cragun – Commissioner
Rebecca L. Rockwell – Commissioner
Lawrence C. Walters – Commissioner
Scott W. Smith – Executive Director

Commission Office:

Jennifer Franklin, Commission Executive Assistant

Note: A copy of related materials and an audio recording of the meeting can be found on the Tax Commission website: <http://tax.utah.gov/commission-office/meetings>.

I. Call to Order

Commission Chair Valentine called the meeting to order at 9:00 a.m.

II. Public Comment (individuals or groups wishing to address the Commissioners for up to three minutes on matters not related to a pending or reasonably imminent appeal to the Tax Commission)

Commission Chair Valentine stated there are two matters that will be brought before the Commission during the public comment period. He recused himself due to a conflict of interest in the matter being presented by Gary Nielsen and his son Casey Nielsen. Commissioner Cragun assumed the role of conducting the meeting in Commission Chair Valentine's absence.

Gary and Casey Nielsen spoke with the Commission about documents they had submitted prior to the meeting (attached).

Commission Chair Valentine returned to the room and reassumed his role conducting the meeting.

Mr. Howard Stephenson of the Utah Taxpayers Association approached the Commission with the topic of sales and use tax penalties.

III. Consider Approving Special Commission Meeting Minutes of January 10, 2019

MOTION: Commissioner Walters moved to approve the Commission Meeting Minutes of January 10, 2019. The motion passed unanimously.

IV. Consider Tax Commission positions on pending legislation

1. [H.B. 24](#) - Property Tax Exemptions, Deferrals, and Abatement Amendments (*Rep. Eliason, S.*)

H.B. 24 – Property Tax Exemptions, Deferrals, and Abatements Amendments. This bill authorizes a person who is dissatisfied with a county property tax relief decision made by any designated decision-making authority to appeal to the Commission; allows an armed forces claimant to claim an armed forces property tax exemption regardless of when the claimant had ownership of the property during the year for which the exemption is claimed, previously had to be owner of record on January 1; effective January 1, 2020.

MOTION: Commissioner Rockwell moved that the commission support H.B. 24 – Property Tax Exemptions, Deferrals, and Abatements Amendments. The motion passed unanimously.

2. [S.B. 13](#) - Income Tax Domicile Amendments (*Sen. Bramble, C.*)

S.B. 13 – Income Tax Domicile Amendments. This bill requires owners of residential property to certify whether they received the primary residential exemption on any property during any part of 2019; the certification form must contain a statutorily proscribed statement informing the owner that claiming the primary residential exemption creates a rebuttable presumption of Utah domicile; failure to certify disqualifies the property from the primary residential exemption; amends the definition of resident individual for income tax purposes by removing the 183 day test; adds the 183 day test to the list of circumstances to consider when weighing the preponderance of the evidence to determine domicile; amends the domicile rebuttable presumption from a person registering to vote to a person that votes in this state and has not registered to vote in another state in that taxable year; specifies the circumstances when a spouse is not considered to have domicile in the state when the other spouse has Utah domicile for income tax purposes; retrospective for a taxable year beginning on or after January 1, 2018.

MOTION: Commissioner Rockwell moved that the commission support S.B. 13 – Income Tax Domicile Amendments. The motion passed unanimously.

3. [S.B. 49](#) - Homeless Shelter Funding Amendments (*Sen. Davis, G.*)

S.B. 49 - Homeless Shelter Funding Amendments. This bill clarifies that sales tax hold harmless entities shall contribute to the Homeless Shelter Cities Mitigation Restricted Account.

MOTION: Commissioner Rockwell moved that the commission support S.B. 49 – Homeless Shelter Funding Amendments. The motion passed unanimously.

4. [S.B. 79](#) - Sales and Use Tax Changes (*Sen. Harper, W.*)

S.B. 79 - Sales and Use Tax Changes. This bill modifies the definitions of "certified service provider" and "model 1 seller" to match recent amendments to the Streamlined Sales and Use Tax Agreement; both definition changes reference a contract between a certified service provider and the governing board of the streamlined Sales and Use Tax Agreement.

MOTION: Commissioner Rockwell moved that the commission support S.B. 79 – Sales and Use Tax Changes. The motion passed unanimously.

V. Consider Publication Revision

1. Publication 57: Military Personnel Instructions

Commission Chair Valentine gave a brief explanation of the changes that were made to Publication 57 and called for public comment on the Publications. There were none.

VI. Commissioners' Reports

Commission Chair Valentine indicated that he and Commissioner Rockwell will be occupied for the next 45 days as they fulfill their duties on Capitol Hill as needed during the Legislative Session.

VII. Executive Director's Report

Executive Director Scott Smith announced that the Tax Commission will have a new Deputy Director as of Monday, January 28, 2019. Deanna Herring from the Legislative Auditor's Office has accepted the position.

VIII. Adjourn

MOTION: Commissioner Cragun moved that the Commissioners adjourn. The motion passed unanimously.

Commission Chair Valentine adjourned the meeting at 9:35 a.m.

Approved on: February 14, 2019

Attested: Jennifer Franklin

Executive Assistant, Utah State Tax Commission



GOLD'S GYM.

2261 Kiesel Ave. Ste 200 Ogden Utah 84401

Ph: 801-399-5861 Fax: 801-528-5367

EXHIBIT #1 TFC HISTORY

TOTAL FITNESS CENTER

Total Fitness Center started in May 1993. Gary Nielsen purchased the Deseret Gymnasium in Ogden from the Church of Jesus Christ of Latter Day Saints after managing the facility for eight months. The gym name changed to Total Fitness Center on May 1st, 1993. The gym went from a nonprofit entity to a for-profit business and was then subject to several new state and local taxes.

In 1994 the State Legislature enacted the sales tax on admissions. At that time we started charging sales tax on all our membership dues and admission fees. We also collected and remitted sales tax on all day care and Aerobic classes which are nontaxable. We continued to pay the sales tax on day care and classes throughout the audit period ending July 31, 2015. From 1993 to 2015, we purchased 3 additional gym locations and changed the name to Gold's Gym.

If we had separated the day care fees and class fees on our memberships from 1994 when the admission tax was implemented, we would have paid at least \$1 million less in sales tax over the 21 year period.

The implementation of the admission tax in 1994 caused a double taxation situation with all health clubs and businesses that purchased equipment, and then was required to charge an admission sales tax for the use of the equipment. In 2013, John Valentine introduced and the Legislature passed SB33. This bill corrected the double tax issue for all businesses that had 51% of revenue coming from admission or use fees. The tax commission was the recipient of several million dollars of extra revenue in sales tax over that previous 19 year period because of the double taxation.

In 2007 we opened the Salomon Center in Downtown Ogden. It included our largest Gold's Gym and 3 other businesses. One of the businesses, Ifly Utah, is the subject of the tax audit Account No. 12232590-002, audit period 10/1/12 – 7/31/15.

Ifly is operated under a licensing agreement with Skyventure LLC. The agreement requires us to have 5 certified instructors trained before opening to the public and to maintain certified instructors at all times. The operation of the indoor skydiving tunnel is strictly defined in the licensing agreement and training and performance of instruction is strictly controlled by the certifying agency (IBA, International Bodyflight Association). The skills are the same as a skydiver is taught when learning to skydive. Skydiving lessons are nontaxable.

In our business, an instructor is in the wind tunnel at all times giving active instruction. No customer can use the wind tunnel without instruction.

OGDEN	LAYTON	ROY	SYRACUSE
2261 Kiesel Ave.	18 N. Fort Lane	1985 W. 5700 S.	1792 S. 1000 W.
801-399-5861	801-546-4653	801-779-3720	801-528-5478

STATEMENT OF FACTS

Exhibit 2

Lessons, Instruction, teaching, coaching, mentoring, or tutoring are not subject to sales tax under Utah State Code 59-12-103.

Lessons, Instruction, teaching, coaching, mentoring, or tutoring are not an exemption to sales tax under Utah State Code 59-12-104.

Administrative Rule R-865- 19S-33 provides that charges for lessons, public or private are not taxable as admission or user fees.

Without any definition of the word “lesson”, a taxpayer would rightly consider a lesson as any activity where there is a payment to learn a skill. This skill could be taught by an instructor, coach, teacher, trainer, mentor, tutor, etc. The Commission has ruled that “instruction” must be “active” and the essence of which is in development of skills, knowledge, and abilities to perform the related activities.

It should be noted the Instruction not only means teaching the skill but observing the practicing of the skill during subsequent lessons. Skills taught may need to be practiced over many lesson sessions over a period of months or years. For example: a beginning gymnast would require more intense instruction and as the student progress the instruction would become less frequent and the observation of practice sessions by the instructor would be more common.

Example #1:

If an individual opens a gymnastic studio or training facility to teach individuals of all ages the skill of numerous gymnastics activities, and he requires his staff to be instructors and give active instruction, the fees are nontaxable.

If an individual opens a trampoline park that has the same activities i.e. Trampolines, bars, foam pits, spring floors, etc. and does not include instruction, but only charges a fee to enter, the fee would be taxable as an admission fee.

The only difference in the operation of the two businesses is the presence of active instruction.

Example #2:

Admission to a batting cage is taxable as an admission charge.

If a business owner wanted to operate a batting cage where the customers were not allowed to participate in the activity without an instructor, the activity would be nontaxable.

The owner may decide to run his business with instruction so customers could learn the skills faster and would have a greater chance of being repeat customers. It would not be an admission charge. It would be a lesson.

Example #3

If an individual takes a golf or tennis lesson, it is nontaxable. The number of lessons or the frequency of lessons has no effect on whether the activity is taxable.

The individual pays for the lesson which includes the use of the golf course or tennis court. There is no charge separated out for the use of the facility during the lesson.

Even though both activities are “athletic events” listed in the Admission Charge Statute they are nontaxable because they are lessons involving active instruction.

SUBMITTED BY:

Gary Nielsen
2261 Kiesel Ave ste 200
Ogden Ut 84401
801-391-0932

glnpn@aol.com

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EXHIBIT #3 LESSON LIST

The following is a non-exhaustive list of “lessons” commonly taught in the State of Utah

ALL THE FOLLOWING ACTIVITIES ARE RECREATIONAL, ENTERTAINMENT OF ATHLETIC ACTIVITIES

ALL THE FOLLOWING ACTIVITIES ARE NON TAXABLE IN UTAH

- | | |
|--|------------------------------------|
| 1 Acting lessons | 26 Indoor rock climbing lessons |
| 2 Aerobic lessons | 27 Paragliding lessons |
| 3 Baseball lessons or camps | 28 Pilot flying lessons |
| 4 Basketball lessons or camps | 29 Quilting lessons |
| 5 Cheerleading lessons | 30 Scrapbooking lessons |
| 6 Computer lessons | 31 Ice skating lessons |
| 7 Cooking lessons | 32 Roller skating lessons |
| 8 Cycling lessons | 33 skateboard lessons |
| 9 Dance lessons or dance camps | 34 skiing lessons, |
| 10 Drill team lessons or camps | 35 snowboarding lessons |
| 11 Driving Lessons | 36 sewing lessons, |
| 12 Football lessons or training camps | 37 singing or voice lessons, |
| 13 Fly fishing lessons | 38 skydiving lessons |
| 14 Golf lessons or golf clinics | 39 Indoor skydiving lessons "IFLY" |
| 15 Gymnastic lessons or camps | 40 Scuba diving lessons |
| 16 Hang glyding lessons | 41 soccer lessons or camps |
| 17 Horseback riding lessons | 42 surf lessons |
| 18 Karate lessons | 43 indoor surf lessons |
| 19 Motocross riding lessons | 44 Swimming lessons |
| 20 Music lessons All types | 45 tennis lessons |
| 21 American ninja warrior training lessons | 46 tumbling lessons |
| 22 Race car driving lessons, | 47 tutoring |
| 23 Racquetball lessons | 48 wake boarding lessons |
| 24 Reading lessons, | 49 wake surfing lessons |
| 25 Rock climbing lessons | 50 water skiing lessons |

THE AUDITING DIVISION HAS SINGLED OUT IFLY AS TAXABLE. THAT IS AN UNJUST REPESENTATION

EXHIBIT #4

SKYVENTURE PURCHASE AND LICENSE AGREEMENT

THIS AGREEMENT (the "Agreement") is made and entered into between . SKYVENTURE, L.L.C., a Florida limited liability company, having an address of 7751 Kingspointe Parkway, Suite 58126, Orlando, Florida 32819 (hereinafter called "LICENSOR") and OGDEN CITY REDEVELOPMENT AGENCY, a political subdivision of the State of Utah with its principal place of business at 2549 Washington Boulevard, Ogden Utah, 84401, (hereinafter referred to as called "LICENSEE" or "BUYER"), further identified at the signature line below.

4. EQUIPMENT USE:

4.2. LICENSEE shall at all times have in its employ a minimum of five certified instructors; provided, however, that LICENSOR reserves the right to unilaterally amend the number of certified instructors up or down if it reasonably determines that such change is necessary for safety reasons.

6. TRAINING:

6.1. A copy of the SkyVenture Training Manual will be provided to LICENSEE at LICENSOR's Tender of the EQUIPMENT. It and all other training materials supplied by LICENSOR shall remain the sole and exclusive property of LICENSOR with LICENSEE enjoying a non-exclusive license to use the same in connection with the EQUIPMENT.

6.2. No later than sixty days prior to the anticipated start of commercial operation of the EQUIPMENT, LICENSEE shall designate up to five individuals for Flight Instructor training and LICENSOR shall provide each (hereinafter referred to as a "Trainee") instruction in the use, operation and maintenance of the EQUIPMENT. Only LICENSOR-authorized training shall be deemed acceptable for certification of Trainees as Flight Instructors. The certification process is intended to ensure, to the best of LICENSOR's ability, that LICENSEE's instructors can operate the EQUIPMENT safely and properly to known standards at the time of training.

6.3. Phase 1 of this training consists of 14 consecutive days of instruction conducted at LICENSOR's designated training site. Each Trainee must complete Phase 1 minimum requirements before proceeding to Phase 2. Phase 2 consists of 14 consecutive days of training at LICENSEE's LOCATION prior to commencement of operations. After successful completion (as determined solely by LICENSOR or its authorized designee) of Phase 2 training, each Trainee will be designated as a "Certified Flight Instructor".

ARTICLE 16

16. TERM AND TERMINATION:

16.3. LICENSOR may, at its discretion, either convert LICENSEE's exclusive licenses under this Agreement to non-exclusive licenses, or terminate this Agreement immediately upon written notice to LICENSEE (and without allowing LICENSEE thirty days to correct the breach) if the LICENSEE:

16.3.4. Allows commercial operation of the EQUIPMENT without a Flight Instructor certified by LICENSOR (or its authorized designee) in the Flight Chamber;

Exhibit #5 Ruling errors

FORMAL HEARING RULING ERRORS

1. From formal hearing ruling: " The evidence and testimony at this hearing establishes that before first participating in this activity, the individual takes a basic training class and receives instruction during the entire time in the wind tunnel from an instructor inside and one outside the tunnel that is operating the tunnel. Under the facts presented, it is clear that instruction and training are a significant component of the IFL Y activity, and also that the instruction is intense, physical and active. It is also clear that participants are paying to use the wind tunnel in order to participate in the activity.

RESPONSE:

If a "significant amount of instruction and training is given"; the activity must be a lesson! The participant does not pay for the use of the tunnel any more than a skier pays for the use of the ski lift during a lesson. A diver does not pay for the use of a pool during a dive lesson. A tennis player does not pay for the use of the tennis court during the tennis lesson.

2. From formal hearing ruling : "It is clear in this appeal that the instruction in IFL Y is active instruction, that instructors are teaching a skill to the participant. However, the fact that 95% of the IFL Y customers do not participate beyond the beginning level indicates that participants are consuming this more as a recreational activity."

RESPONSE:

There is no connection between the number of times an activity is done that determines whether it is taxable or not.

A person may take one or several golf lessons, they are all nontaxable.

Most individuals take only one skydiving, scuba, paragliding, hang-gliding lesson and they are all non-taxable.

3. From formal hearing ruling : a sport, athletic or recreation activity subject to tax under Utah Code Subsection 59-12-103(1)(f).

RESPONSE:

An entertainment, sport, athletic, or recreational activity is only taxable under the Admission law, if the activity is not a "LESSON".