

New York State Department of Taxation and Finance
Office of Tax Policy Analysis
Technical Services Division

TSB-A-01(17)S
Sales Tax
May 23, 2001

STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO. S001215A

On December 15, 2000, the Department of Taxation and Finance received a Petition for Advisory Opinion from La Palestra Inc., 11 West 67th Street, New York, New York 10023.

The issue raised by Petitioner, La Palestra, Inc, is whether its charges for the use of its facilities are subject to tax under Section 1105(f)(2) of the Tax Law or Section 11-2002(h) of the New York City Administrative Code.

Petitioner submits the following facts as the basis for this Advisory Opinion.

Petitioner operates a health and sporting facility that provides traditional exercise and sporting activities.

As part of its health maintenance program, Petitioner offers traditional training facilities such as weight lifting equipment, aerobics, stepping machines, bicycles, lateral pull-down and saunas. It prescribes various diagnostic and therapeutic services focusing on cardiovascular and orthopedic conditioning, and patient education. Its professional staff includes a qualified physician, a physiologist and physiotherapists.

In addition, Petitioner offers participant sporting activities that include fencing, boxing, rope climbing and indoor baseball. It also designs customized training programs for members interested in participating in athletic activities recreationally or in improving their performance as competitive athletes.

Petitioner charges a membership fee for the use of the facility. Members pay separately for the services of the physician, physiologist and physiotherapists.

Members do not control any social or athletic activities, selection of the members, or management of the facility, nor possess any proprietary interest in Petitioner. The number of members is restricted solely because of the physical size of the facility.

Applicable Law & Regulations

Section 1105(f) of the Tax Law imposes sales tax, in part, on:

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(1) Any admission charge . . . except charges to a patron for admission to, or use of, facilities for sporting activities in which such patron is to be a participant, such as bowling alleys and swimming pools. . . .

(2)(i) The dues paid to any social or athletic club in this state if the dues . . . are in excess of ten dollars per year, and on the initiation fee alone, regardless of the amount of dues, if such initiation fee is in excess of ten dollars. . . .

Section 1107 (a) of the Tax Law provides:

General. On the first day of the first month following the month in which a municipal assistance corporation is created under article ten of the public authorities law for a city of one million or more, in addition to the taxes imposed by sections eleven hundred five and eleven hundred ten, there is hereby imposed on such date, within the territorial limits of such city, and there shall be paid, additional taxes, at the rate of four percent, which except as provided in subdivision (b) of this section, shall be identical to the taxes imposed by sections eleven hundred five and eleven hundred ten. Such sections and the other sections of this article, including the definition and exemption provisions, shall apply for purposes of the taxes imposed by this section in the same manner and with the same force and effect as if the language of those sections had been incorporated in full into this section and had expressly referred to the taxes imposed by this section.

Section 1212-A(a)(2) of the Tax Law authorizes the City of New York to impose a local tax on "beauty, barbering, hair restoring, manicuring, pedicuring, electrolysis, massage services and similar services, and every sale of services by weight control salons, health salons, gymnasiums, turkish and sauna bath and similar establishments and every charge for the use of such facilities;" such tax to be administered and collected by the Commissioner of Taxation and Finance.

Section 11-2002(h) of the Administrative Code of the City of New York imposes sales tax, in part, on:

(h) Receipts from . . . every sale of services by weight control salons, gymnasiums, turkish and sauna bath and similar establishments and every charge for the use of such facilities. . . .

Section 527.11(b) of the Sales and Use Tax Regulations provides, in part, the following definitions of terms that are contained in section 1105(f)(2) of the Tax Law:

(5) Club or organization. (i) The phrase club or organization means any entity which is composed of persons associated for a common objective or common activities. Whether the organization is a membership corporation or association or business corporation or other legal type of organization is not relevant. Significant factors, any one of which may indicate that an entity is a club or organization, are: an organizational structure under which the membership controls social or athletic activities, tournaments, dances, elections, committees, participation in the selection of members and management of the club or organization, or possession by the members of a proprietary interest in the organization. The organizational structure may be formal or informal.

(ii) A club or organization does not exist merely because a business entity:

(a) charges for the use of facilities on an annual or seasonal basis, even if an annual or season pass is the only method of sale and provided such passes are sold on a first-come, first-served basis;

(b) restricts the size of the membership solely because of the physical size of the facility. Any other type of restriction may be viewed as an attempt at exclusivity;

(c) uses the word club or member as a marketing device;

(d) offers tournaments, leagues and social activities which are controlled solely by the management.

* * *

(7) Athletic club. (i) An athletic club is any club or organization which has as a material purpose or activity the practice, participation in or promotion of any sports or athletics.

* * *

(ii) Athletic activities does not include exercising or calisthenics solely for health or weight reduction purposes, as contrasted to sports. An establishment that merely provides steam baths, saunas, rowing machines, shaking machines and other exercise equipment shall not be considered an athletic club. However, there is a four-percent local sales tax in the city of New York on every sale of services by weight control salons, health salons, gymnasiums, Turkish baths, sauna baths and similar establishments, and on every charge for the use of such facilities.

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Opinion

Petitioner's charges to its patrons entitle them to use facilities for sporting activities in which the patron is to be a participant. Petitioner's charges, therefore, are not subject to the tax on admission charges under Section 1105(f)(1) of the Tax Law. Petitioner's charges would be subject to sales tax under Section 1105(f)(2) of the Tax Law if Petitioner operated an athletic club as defined in paragraphs (5) and (7) of Section 527.11 of the Sales and Use Tax Regulations.

Petitioner's members do not control any social or athletic activities, selection of members or club management, or possess any proprietary interest in Petitioner. Therefore, Petitioner is not operating an athletic club as defined in paragraphs (5) and (7) of Section 527.11 of the Sales and Use Tax Regulations. Accordingly, Petitioner's charges to its members are not subject to tax as dues paid to an athletic club under Section 1105(f)(2) of the Tax Law.

Since Petitioner provides a variety of sporting activities and facilities to its members, Petitioner's facilities are not weight control salons, gymnasiums or other establishments described in Section 11-2002(h) of the Administrative Code of the City of New York. Petitioner's charges, therefore, are not for services provided by, or use of facilities in, weight control salons, gymnasiums or other establishments described in such Section 11-2002(h) and are thus not subject to that tax. See Town Sports International and Subsidiaries, Adv Op Comm T & F, July 1, 1998, TSB-A-98(42)S.

Membership charges for the use of Petitioner's facilities are therefore not subject to any of the taxes imposed under Sections 1105(f) and 1107 of the Tax Law or Section 11-2002(h) of the Administrative Code of the City of New York.

DATED: May 23, 2001

/s/
Jonathan Pessen
Tax Regulations Specialist III
Technical Services Division

NOTE: The opinions expressed in Advisory Opinions are limited to the facts set forth therein.