

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

TSB-A-02(32)S
Sales Tax
July 24, 2002

STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO. S011218A

On December 18, 2001, the Department of Taxation and Finance received a Petition for Advisory Opinion from Waterside Plaza LLC, 30 Waterside Plaza, New York, NY 10010.

The issue raised by Petitioner, Waterside Plaza LLC, is whether fees charged by Petitioner for the use of its facilities are subject to New York State and local sales taxes.

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

Petitioner, a New York limited liability company doing business as Waterside Swim and Health Club, provides a variety of participant sporting and fitness activities in New York City. Petitioner's facility has a glass enclosed swimming pool and lounge area that opens onto a sundeck. It also has sauna and locker rooms. In addition, Petitioner offers traditional fitness and training facilities such as weight lifting equipment, stepping machines, running and cycling equipment, aerobics classes, along with personal training. It also offers swimming lessons, yoga and kickboxing classes.

Petitioner charges membership fees for use of its facility. Members pay extra fees for personal training services and swimming instruction. Petitioner's members do not control any social or athletic activities. Petitioner's members do not participate in the selection of members or the club's management. The members do not possess any proprietary interest in Petitioner. The number of members is restricted solely because of the physical size of the facility.

Applicable Law and Regulations

Section 1105(c) of the Tax Law imposes tax upon the receipts from every sale, except for resale, of certain enumerated services.

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

(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 sales tax at the same uniform rate, but at a rate not to exceed four per centum, 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 . . . 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. . . .

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. (Emphasis supplied)

(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.

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 membership fees for use of its facility, therefore, are not subject to the tax on admission charges under Section 1105(f)(1) of the Tax Law. Petitioner's membership fees 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, do not participate in the selection of members or club management, or possess any proprietary interest in Petitioner.

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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 for initiation fees and monthly membership dues 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 to its members for membership fees, 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 New York Health and Racquet Club, Adv Op Comm T & F, May 19, 1999 TSB-A-99(26)S; Matter of Prospect Park Health and Racquet Associates, Dec Tax App Trib, July 22, 1997, TSB-D-97(30)S.

Accordingly, the membership fees are not subject to any of the taxes imposed under Sections 1105(c), 1105(f) and 1107 of the Tax Law or Section 11-2002(h) of the New York City Administrative Code.

DATED: July 24, 2002

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