

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

TSB-A-02(43)S
Sales Tax
July 26, 2002

STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO. S010919A

On September 19, 2001, the Department of Taxation and Finance received a Petition for Advisory Opinion from Manhattan Athletic Club LLC, 277 Park Avenue, New York, NY 10017.

The issue raised by Petitioner, Manhattan Athletic Club LLC, is whether, the fees charged for the use of its facilities and additional fees charged for personal training and massage services are subject to New York State and local sales tax.

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

Petitioner, which does business as the Manhattan Athletic Club, provides a variety of participant sport and fitness activities at its facility in New York City. Petitioner offers over 100 specialized exercise stations, including treadmills, weight lifting equipment, exercise bicycles, stepping machines, new member fitness evaluations, exercise classes including boxing, traditional yoga and Iyengar yoga classes, and classes on "healthy back and stretch". In addition, petitioner provides certified fitness trainers, golf instruction, mini full-court basketball with corporate leagues, aerobic classes and massage therapy sessions.

Petitioner charges an initiation fee and monthly membership dues for use of its facility. There are no extra charges for classes offered. Members must pay extra fees for personal training services and massage therapy sessions. Petitioner's members do not control any social or athletic activities. Petitioner's members do not participate in the selection of members or management of the Manhattan Athletic Club. 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 . . . but excluding services rendered by a physician, osteopath, dentist, nurse, physiotherapist, chiropractor, podiatrist, optometrist, ophthalmic dispenser or a person performing similar services licensed under title VIII of the education law . . .;" 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.

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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 initiation fee and monthly membership dues for use of the facility, therefore, are not subject to the tax on admission charges under Section 1105(f)(1) of the Tax Law. Petitioner's initiation fee and monthly membership dues 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. 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 initiation fees and monthly membership dues, 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 and Peter J. Sferrazza and George Hart, as Partners, Dec Tax App Trib, July 22, 1997, TSB-D-97(30)S.

Petitioner also offers its members personal training services and massage therapy sessions for an additional fee. The additional fee for massage therapy sessions are receipts for services subject to New York City sales tax provided for in Section 1212-A of the Tax Law and Section 11-2002(h) of the New York City Administrative Code. Massage services which are provided by a physiotherapist, chiropractor, podiatrist, osteopath, or any person authorized to practice medicine, licensed under Title VIII of the Education Law may be excluded from New York City sales tax if the services are medical in nature, as are the services provided by the categories of professionals enumerated in Section 1212-A of the Tax Law and Section 11-2002(h) of the Administrative Code. However, the massage services provided by Petitioner are not medical in nature and do not qualify for the exclusion. See Carapan, Inc., Adv Op Comm T&F, June 21, 1993, TSB-A-93(40)S. Personal training services are not included in the services of beauty, barbering, hair restoring, manicuring, pedicuring, electrolysis, and massage services that are enumerated as taxable services in Section 11-2002(h) of the New York City Administrative Code and are not similar to such services. Accordingly, an additional fee for personal training services would only be subject to the New York City sales tax as a charge for services sold by a weight control salon, health salon, gymnasium, turkish and sauna bath or similar establishments, or as a charge for the use of such

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facilities. Since Petitioner's facility is not a weight control salon, gymnasium or similar establishment, and personal training services are not similar to the enumerated services in Section 11-2002(h) of the New York City Administrative Code, the fee for personal training services is not subject to the New York City tax. Section 1105(c) of the Tax Law imposes New York State sales tax on the receipts from certain enumerated services. Since massage services and personal training services are not included within the services taxed under Section 1105(c) of the Tax Law, the receipts from massage services and personal training services are not subject to the New York State sales tax.

Accordingly, the initiation fee, monthly membership dues and additional fee for personal training services 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. The additional fee for massage therapy sessions is subject to the tax imposed under Section 11-2002(h) of the New York City Administrative Code, but is not subject to the tax imposed under Section 1105(c) of the Tax Law.

DATED: July 26, 2002

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