

**New York State Department of Taxation and Finance**  
**Taxpayer Services Division**  
**Technical Services Bureau**

TSB-A-82(2)S  
Sales Tax  
February 19, 1982

STATE OF NEW YORK  
STATE TAX COMMISSION

ADVISORY OPINION

PETITION NO. S810805A

On August 5, 1981 a Petition for Advisory Opinion was received from My Fathers Place - Bryan & Rose, Inc., 19 Bryant Avenue, Roslyn, New York 11576.

The issue raised is whether charges for admission made by Petitioner are subject to sales tax.

Petitioner rents premises in which live musical performances are presented. The performing stage is located at the rear of the building. The audience sits at long tables, on individual chairs. A bar which is open during the performance is located at the front of the building. Food is available before the performance and during intermissions. Menus are made available to patrons, and hot dishes may be purchased. However, patrons are not required to buy food or drink, nor must they pay a minimum or cover charge.

The premises are open only on those nights when performances are given. All performances, or acts, are advertised in advance. Petitioner's advertisements may consist solely of a listing of the performers and their scheduled appearance dates, but may also make reference to the availability of food. The entertainment furnished by Petitioner consists solely of performances by the advertised performers. Tickets may be obtained at Petitioner's box office or through Ticketron, and must be presented at the door to gain admittance. Prices of tickets for different shows vary, depending on the appearance fee Petitioner must pay the performer.

Section 1105(f)(3) of the Tax Law imposes a sales tax on:

"The amount paid as charges of a roof garden, cabaret or other similar place in the state."

Pursuant to section 1101(d)(4) of the Tax Law, the phrase "charge of a roof garden, cabaret or other similar place" means:

"Any charge made for admission, refreshment, service, or merchandise at a roof garden, cabaret or other similar place."

Section 1101(d)(12) of the Tax Law defines the terms "roof garden, cabaret or other similar place" to mean:

"Any roof garden, cabaret or other similar place which furnishes a public performance for profit."

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Section 527.12(b)(2)(ii) of the Sales and Use Tax Regulations further defines the terms "roof garden, cabaret or similar place" as follows:

"Any room in a hotel, restaurant, hall or other place where music and dancing privileges or any entertainment, are afforded the patrons in connection with the serving or selling of food, refreshment or merchandise." 20 NYCRR 527.12(b)(2)(ii)

The definition of "roof garden, cabaret or other similar place" found in the Sales and Use Tax Regulations is derived from the definition contained in the former federal excise tax on cabaret charges. I.R.C., §4231. That definition included establishments where food or drink was served to patrons while they were being provided with entertainment. It did not matter, for purposes of the federal definition, that the purchase of food or drink was not required, or that customers were primarily interested in the entertainment offered, rather than the purchase of food or drink. Avalon Amusement Corporation v. United States, 165 F2d 653; Geer v. Birmingham, 185 F2d 82. The definition of "roof garden, cabaret or other similar place" contained in the Sales and Use Tax Regulations, which is based on the federal definition, applies, therefore, to Petitioner's establishment. The premises used by Petitioner contains a bar in the same room where the musical performances are staged. Patrons may be served drinks at tables while watching the performances. Menus containing a listing of drinks and food items are furnished to patrons. Refreshment is furnished to patrons in connection with the presentation of entertainment. Petitioner's establishment is, therefore, a "roof garden, cabaret or other similar place" within the meaning of section 1101(d)(12) of the Tax Law, and amounts charged for admission are, therefore, "charges of a roof garden, cabaret or other similar place," within the meaning and intent of section 1105(f)(3) of the Tax Law. The amounts paid for admission to Petitioner's establishment are accordingly subject to the sales tax imposed under that provision.

DATED: December 30, 1981

s/LOUIS ETLINGER  
Deputy Director  
Technical Services Bureau