

Taxability of Charges for Use of an Educational and Recreational Center

The issue is whether charges for use of an educational and recreational center are subject to sales tax.

X owns and operates a facility in a shopping mall that allows children and their parents or guardians to pay an enrollment fee for either a daily program or a six-week program to use specific areas of the facility to learn or improve specific mental and physical skills. The facility is advertised as a play center for children, offering a unique selection of play equipment (e.g., slides, teeter-totters, play mats, play houses, air hockey games, and climb-on toys) suited for both education and recreation. Parents or guardians are with the children for all visits to X's facility. The facility is used for several purposes. It is used as a school readiness center for preschoolers; pediatric physical therapists use the facility for patients that lack certain motor or mental skills; and teachers bring students to use the different centers (e.g., the reading center or motor skills center) to enhance learning on what is similar to a field trip. X also offers a six-week session of play groups, which include access to the play area and a snack, for preschool children and their parents or guardians. The six-week programs offer customers set periods of time for group activities. Any absences from the play group will result in a free play visit to the play center. The facility does not provide any amusement rides such as those found in an amusement park. Toys and play activities are available for educational and recreational purposes. Children and their parents or guardians interact with each other in all activities. X also interacts with the parents and children in a teaching capacity with respect to how to use the objects and/or toys for learning purposes. There are no specific charges for such instruction, and not all children who enter the facility require or receive instruction. Sharing and active participation in all of the learning tools are prominent factors.

The only other activity which takes place in X's facility is the rental of a small section for birthday parties. There are several different packages available for birthday parties; however, all parties include two hours of play time, a cake, invitations, table settings, beverages, and a balloon for each child. For an additional charge, birthday parties can be upgraded to include a play attendant host or hostess, a framed picture of the party group, piñata, goody bags, and pizza, which X purchases from a take-out pizza supplier. X also offers by-the-hour rental of the play center for customized events.

Applicable law and regulations

Section 1101(d)(2) of the Tax Law defines *admission charge* as "The amount paid for admission, including any service charge and any charge for entertainment or amusement or for the use of facilities therefor."

Section 1101(d)(10) of the Tax Law defines *place of amusement* as "Any place where any facilities for entertainment, amusement, or sports are provided."

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

(a) The receipts from every retail sale of tangible personal property, except as otherwise provided in this article.

Section 1105(d)(i) of the Tax Law provides for the imposition of sales tax, in part, on:

The receipts from every sale of beer, wine or other alcoholic beverages or any other drink of any nature, or from every sale of food and drink of any nature or of food alone, when sold in or by restaurants, taverns or other establishments in this state, or by caterers, including in the amount of such receipts any cover, minimum, entertainment or other charge made to patrons or customers (except those receipts taxed pursuant to subdivision (f) of this section):

(1) in all instances where the sale is for consumption on the premises where sold;

Section 1105(f)(1) of the Tax Law imposes sales tax on:

Any admission charge where such admission charge is in excess of ten cents to or for the use of any place of amusement in the state . . . 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. . . .

Section 1115 of the Tax Law provides, in part:

(a) Receipts from the following shall be exempt from the tax on retail sales imposed under subdivision (a) of section eleven hundred five and the compensating use tax imposed under section eleven hundred ten:

(1) Food, food products, beverages, dietary foods and health supplements, sold for human consumption but not including (i) candy and confectionery, (ii) fruit drinks which contain less than seventy percent of natural fruit juice, (iii) soft drinks, sodas and beverages such as are ordinarily dispensed at soda fountains or in connection therewith (other than coffee, tea and cocoa) and (iv) beer, wine or other alcoholic beverages, all of which shall be subject to the retail sales and compensating use taxes, whether or not the item is sold in liquid form. The food and drink excluded from the exemption provided by this paragraph under subparagraphs (i), (ii) and (iii) of this paragraph shall be exempt under this paragraph when sold for seventy-five cents or less through any vending machine activated by the use of coin, currency, credit card or debit card. With the exception of the provision in this paragraph providing for an exemption for certain foods or drink sold for seventy-five cents or less through vending machines, nothing herein shall be construed as exempting food or drink from the tax imposed under subdivision (d) of section eleven hundred five.

Section 527.8(f)(2) of the Sales and Use Tax Regulations provides, in part:

* * *

(ii) Food and beverages for resale. Food, such as meat, vegetables, fruit etc., may be purchased exempt from tax by a caterer in accordance with section 528.2 of this Title. Food, such as candy and confections, which is taxable in accordance with section 527.1 of this Part and does not qualify for exemption from tax under section 528.2 of this Title, may be purchased for resale, and thus not subject to tax, provided it is sold to the customer as part of the catering service.

Beverages, such as fruit drinks, soft drinks, soda, cocktail mixers, bottled water, beer, wine and other alcoholic beverages which are taxable in accordance with section 527.1 of this Part and not exempt under section 528.2(b) of this Title may be purchased for resale by caterers provided that such beverages are sold to the customer as part of the catering service. (Ice served in drinks may also be purchased for resale.)

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(iv) Taxable food or drink. Purchases by caterers of prepared food or drink (taxable under subdivision (a) of this section) may not be made for resale and are subject to tax at the time of purchase. However, a caterer may take a credit on its sales tax return for the tax paid on such food. (See subdivision (i) of this section for more information on the purchase of food or drink for resale.)

Opinion

X operates a play center facility that allows children and their parents or guardians to pay an enrollment fee for either a daily program or a six-week program to use the facility for educational and recreational purposes. X's facility provides children with various activities, some of which may have educational value; however, the facility's emphasis appears to be on providing the children with a recreational environment. A place of amusement is defined in section 1101(d)(10) of the Tax Law to include the physical space within which the amusement is provided. (See *Fairland Amusements v State Tax Comm.*, 110 AD2d 952, 954 [Mikoll, J., dissenting], rev'd 66 NY2d 932.) This definition is descriptive of X's play center, which is a site where facilities for amusement or entertainment are provided.

X charges a daily fee or a six-week fee. The fee entitles children and their parents or guardians to enter the play center and enjoy the use of the various amusement devices and attractions for a specified period of time. While X may provide instruction to the children when needed, there are no specific charges for such instruction and not all children who enter the facility require or receive instruction. The six-week programs are play groups which offer

customers set periods of time for group activities. However, a customer who has paid to participate in play group sessions may, in the event of an absence from the play group, bring his or her child in for free play time in lieu of attending the play group session. The daily and six-week fees are charges for the use of the facilities and are admission charges as defined in section 1101(d)(2) of the Tax Law. Therefore X's charges are subject to sales tax under section 1105(f)(1) of the Tax Law. See *Playspace 92nd Street West, Inc.*, Adv Op Comm T&F, September 29, 1997, TSB-A-97(61)S.

X also offers the facility for birthday parties with various options available for variable fees. X's charges for birthday parties, which include both the use of the facility and the provision of food and beverages to be consumed on the premises, are subject to the tax imposed on sales of food and drink by restaurants, taverns, other establishments, or caterers under section 1105(d)(i) of the Tax Law. See *Little Chefs, Ltd.*, Adv Op Comm. T&F, July 25, 2002, TSB-A-02(34)S.

X's purchases of items that are not exempt from sales tax under section 1115(a)(1) of the Tax Law, such as soda and ice for serving in drinks, may be made for resale and, therefore, not be subject to sales tax. See section 527.8(f)(2)(ii) of the Sales and Use Tax Regulations. However, X's purchases of food or drink taxable under section 1105(d) of the Tax Law, such as pizza, may not be made for resale and are subject to tax. X may take a credit for the sales tax paid to the pizza supplier and for any other sales taxes it may have paid on food and beverages that it resells against the tax collected on the charges for the birthday parties. X's purchases of items such as cake or other baked goods and milk, if not otherwise subject to tax under section 1105(d), are exempt from sales tax under section 1115(a)(1) of the Tax Law. See section 527.8(f)(2)(iv) of the Sales and Use Tax Regulations; and *Little Chefs, Ltd.*, *supra*.

With respect to charges for a party or other event that include fees for the use of the facilities but do not include the provision of food or beverages, the charges would be taxable as an admission charge under section 1105(f)(1) of the Tax Law.

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