

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

TSB-A-03(38)S
Sales Tax
October 9, 2003

STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO.S030319A

On March 19, 2003, the Department of Taxation and Finance received a Petition for Advisory Opinion from William A. Barrett, 22 Jericho Turnpike - Suite 1100, Mineola, New York 11501.

The issue raised by Petitioner, William A. Barrett, regarding Petitioner's client is whether membership fees charged 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's client (Client) provides a variety of participant sporting and fitness activities at its facility in New York City. The facility has a thirty foot high rock climbing wall, a professional boxing studio complete with a boxing ring and an aerobic/dance studio. It also has steam rooms, saunas and locker rooms. In addition, the client offers traditional fitness and training facilities such as weight lifting equipment, stepping machines, running and cycling equipment, personal training, free nutritional and fitness classes, yoga, step, cardio Thai kickboxing, boot camp aerobics, salsa dance lessons, hip hop aerobics, bodies on the ball, urban rebounding, ultimate stretching, pilates mat and one on one rock climbing lessons.

Client charges an initiation fee and a membership fee for use of its facility and collects the New York State and New York City sales taxes on these fees. These fees allow its members access to all club and sporting facilities offered. Client's members must pay extra for personal training services and one on one boxing instruction. Client's members do not control any social or athletic activities. Client's members do not participate in the selection of members or management of the club. The members also do not possess any proprietary interest in the client. Membership is limited by the size of the facility on a first-come, first-served basis.

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, in part:

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 . . . 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 1137(a) of the Tax Law provides, in part:

Every person required to file a return under the preceding section whose total taxable receipts, amusement charges and rents are subject to the tax imposed pursuant to subdivisions (a), (c), (d), (e) and (f) of section eleven hundred five of this article shall, at the time of filing such return, pay to the tax commission the total of the following:

* * *

(iii) All moneys collected by such person, purportedly as tax imposed by this article or pursuant to article twenty-nine, with respect to any receipt, amusement charge or rent not subject to tax, and all moneys collected with respect to any receipt, amusement charge or rent subject to tax, purportedly in accordance with a schedule prescribed by the tax commission but actually in excess of the amount stated in such schedule as the amount to be collected.

Section 1139(a) of the Tax Law provides, in part:

In the manner provided in this section the tax commission shall refund or credit any tax, penalty or interest erroneously, illegally or unconstitutionally collected or paid if application therefor shall be filed with the tax commission (i) in the case of tax paid by the applicant to a person required to collect tax, within three years after the date when the tax was payable by such person to the tax commission as provided in section eleven hundred thirty-seven, or (ii) in the case of a tax, penalty or interest paid by the applicant to the tax commission, within three years after the date when such amount was payable under this article . . . Such application shall be in such form as the tax commission shall prescribe. *No refund or credit shall be made to any person of tax which he collected from a customer until he shall first establish to the satisfaction of the tax commission, under such regulations as it may prescribe, that he has repaid such tax to the customer. . . .* (Emphasis added)

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 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:

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 . . . 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

Client's charges to its patrons entitle them to use facilities for sporting activities in which the patron is to be a participant. Client'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. Client's initiation fee and monthly membership dues would be subject to sales tax under

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section 1105(f)(2) of the Tax Law if Client operated an athletic club as defined in paragraphs (5) and (7) of section 527.11 of the Sales and Use Tax Regulations.

Client'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 Client. Therefore, Client 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, Client'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 Client provides a variety of sporting activities and facilities to its members, Client'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. Client'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 the local New York City 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.

Client also offers its members personal training services and one on one boxing instruction. Personal training services and one on one boxing instruction 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, personal training services and one on one boxing instruction 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 facilities. Since Client's facility is not a weight control salon, gymnasium or similar establishment, and personal training services and one on one boxing instruction are not among the enumerated services in section 11-2002(h) of the New York City Administrative Code, the fees for personal training services and one on one boxing instruction are 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 personal training services and one on one boxing instruction are not included within the services taxed under section 1105(c) of the Tax Law, the receipts from personal training services and one on one boxing instruction are not subject to the New York State sales tax.

Accordingly, the initiation fee, monthly membership dues and additional fees for personal training services and one on one boxing instruction 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. However, section 1137 of the Tax Law requires that a registered vendor pay to the Department of Taxation and Finance all moneys collected by such person, purportedly as tax imposed by Article 28 of the Tax Law, with respect to any receipts, amusement charges, etc. not

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subject to tax. Accordingly, any moneys collected by Client, purportedly as sales tax, are required to be remitted to the Department of Taxation and Finance at the time of filing the sales and use tax returns of Client. However, a customer who has paid sales tax which was collected by Client in error may file a claim for refund within three years after the date when the tax was payable by Client to the Department of Taxation and Finance if he or she can substantiate the payment of the tax. See section 1139(a) of the Tax Law.

DATED: October 9, 2003

/s/
Jonathan Pessen
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Technical Services Division

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