

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

TSB-A-92(56) S
Sales Tax
July 24, 1992

STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO. S920512A

On May 12, 1992, a Petition for Advisory Opinion was received from George W. Long, Inc., 4600 Culver Road, Rochester, New York 14622.

The issues raised by Petitioner, George W. Long, Inc., are:

1. Whether admission to Petitioner's amusement park for group sales customers is subject to sales tax where Petitioner provides free admission and a reduced rate for the rides to such customers.
2. Whether the installation of a tubeslide is a capital improvement and, therefore, exempt from sales tax.

Petitioner operates an amusement park. Petitioner has a variety of payment options available for its customers. A customer can pay solely for admission to the park without the right to ride the rides. For example, the price for admission to the park might be \$2.80 plus sales tax of \$.20. An adult customer can pay one price for admission to the park and the right to the rides. For example, this price might be \$10.00, including the price of admission of \$2.80 plus sales tax of \$.20 (which is separately stated) and \$7.00 for the right to ride the rides (which is separately stated). A child customer or an off-hour customer can pay one price for admission to the park and right to ride the rides. For example, this price might be \$8.00, including the price of admission of \$2.80 plus sales tax of \$.20 (which is separately stated) \$5.00 for the right to ride the rides (which is separately stated). In all of the above circumstances, Petitioner pays sales tax on the price of admission \$2.80 at 7% (\$.20). The price of admission is separately stated. Petitioner does not reduce the price of admission on a percentage basis (based on the adult price) for the child or off-hour customer. Petitioner considers \$2.80 to be the admission price no matter what the total price that is charged to the customer.

In addition, Petitioner has group sales customers. These customers purchase their tickets from Petitioner through an organization who is providing them with an opportunity to visit the park at a reduced rate. This reduced rate is based upon the number of persons in the group. The more persons in the group, the lower the price. Group sales business is very important to Petitioner, because these purchases are generally non-refundable advance sales and Petitioner receives the revenue whether or not the customer comes to the park (e.g. they may not come because of bad weather). In addition, the group customers get to see and enjoy the park at a reduced rate and it is hoped they will want to return and enjoy the park and pay Petitioner's regular retail prices. In order to encourage groups to come to the park, Petitioner provides all of its groups with "free" admission to the park (which is part of its agreement with each group and the related organization). Petitioner charges only for the right

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to ride the rides and for the food provided in the group sales food area. Since admission to the park for groups is separately stated to be "free", Petitioner has only been collecting and paying sales tax on food purchases of groups and not paying sales tax on the amount groups pay to ride the rides.

In addition Petitioner has added a tube waterslide to its waterpark. Petitioner contracted for the addition (a turnkey operation), except that it directly purchased the fiberglass for the tube waterslide (the part you slide on) and paid sales tax on that purchase. The installation of the fiberglass was performed by the contractor, as part of the contract.

Petitioner contends that the waterslide is a capital improvement and therefore no sales tax is payable on the labor related to the hanging of the fiberglass. The tubeslide was custom designed to fit precisely on Petitioner's unique terrain and around its existing waterslides. This type of slide is much different than amusement park rides like the used Sea Dragon Petitioner purchased and had moved to its park. The Sea Dragon, like most iron rides, is easily taken down and reassembled in a new location.

Petitioner contends that the tube waterslide is manufactured and custom designed specifically for Petitioner so that once the seams are joined, they are destroyed when separated. This construction is necessary in order to insure a safe, smooth surface for sliding. The waterslide is attached to Petitioner's terrain by being attached to concrete implacements.

Petitioner further contends that the waterslide has added to the value of the real property, since it has significantly increased Petitioner's park revenue. The waterslide is permanently affixed to the real property so that removal would cause material damage to the waterslide and it is intended to be a permanent installation.

In an audit conducted by the Department of Taxation and Finance the auditor contends that the installation of a waterslide involves numerous different projects which are required before the actual slide structure is installed. This would include the pouring of concrete for waterways, the digging of pools, excavating the land, and so on. For these types of projects, the auditor agrees that these are capital improvements and not subject to sales tax.

The auditor contends, however, that the installation of the actual fiberglass waterslide is subject to sales tax. The fiberglass structure is bolted into a cement foundation similar to the ski lifts in the matter of West Mountain Corporation [TSB-H-84(38)S]. It was determined in that case that the ski lifts were removable without material damage to the realty. Therefore, the auditor contends that the fiberglass structure itself and the supporting framework is not considered a capital improvement, but tangible personal property, and therefore the installation of the structure is subject to sales tax.

Concerning issue "1", Section 1105(f)(1) of the Tax Law imposes a tax on "[a]ny admission charge where such admission is in excess of ten cents to or for the use of any place of amusement in the state. . ."

Technical Services Bureau Memorandum TSB-M-87(15)S, November 13, 1987, provides, in part, as follows:

Where a place of amusement sells only one type of ticket and that ticket entitles the customer to admission to the park and use of the rides, the full price of the ticket is subject to sales tax. However, where a place of amusement sells both a pay-one price ticket and a general admission ticket, the portion of a pay-one price ticket attributable to the use of rides will not be subject to sales tax where:

- (i) the pay-one-price ticket separately states the charge allocated to the use of the rides and the charge for admission, and
- (ii) the general admission ticket does not allow the customer use of the rides, and
- (iii) the admission charge shown on the pay-one-price ticket is the same or reasonable in relation to the charge shown on the general admission ticket.

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Example 4 - An amusement park sells a \$4.00 general admission ticket which limits the customer to admission to the park; the customer cannot use any of the amusement rides unless he purchases a separate ticket or tickets. The park also sells a \$10.00 pay-one-price ticket which separately indicates a \$6.00 charge for the use of the amusement rides and a \$4.00 charge for admission. Since the separate charge for admission (\$4.00) on the pay-one-price ticket is the same or reasonable when compared to the general admission ticket limiting the customer to admission to the park, the separately stated portion of the pay-one-price ticket (\$6.00) representing the use of the amusement rides is not subject to sales tax.

Petitioner discounts its pay-one price ticket for group sale customers based upon the number of persons in the group. Pursuant to TSB-M-87(15)S, supra, where a place of amusement sells both a pay-one price ticket and a general admission ticket, the portion of the pay-one price ticket attributable to the use of rides will not be subject to sales tax where the charges for the rides and admissions are separately stated, general admission tickets do not allow customers the use of rides, and admission charges shown on the pay-one price ticket is the same or reasonable in relation to the charge shown on the general admission ticket. Petitioner considers \$2.80 to be the admission price no matter what the total price that is charged to the customer. Therefore \$2.80 of a group sale ticket constitutes a taxable admission. Accordingly, unless the discount ticket offered to group sale customers separately states the taxable admission charge and the non-taxable charge to ride the rides, the three conditions set forth in TSB-M-87(15)S, supra, are not met and the entire charge for a group sale ticket is subject to the tax imposed under Section 1105(f)(1) of the Tax Law.

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With respect to issue "2", pursuant to Section 1101(b)(9) of the Tax Law a "capital improvement" is an addition or alteration to real property which:

- (A) Substantially adds to the value of the real property, or appreciably prolongs the useful life of the real property; and
- (B) Becomes part of the real property or is permanently affixed to the real property so that removal would cause material damage to the property or article itself; and
- (C) Is intended to become a permanent installation.

Accordingly, pursuant to Section 1101(b)(9) of the Tax Law in the instant case if, as Petitioner contends, the installation of the tubeslide substantially adds to the value of the real property, is permanently affixed to the real property so that removal would cause material damage to the property or article itself, and is intended to become a permanent installation, the installation of such tubeslide would constitute a capital improvement and the labor charges would be exempt from sales tax. On the other hand, if the tubeslide is not permanently affixed to the real property, as contended by the auditor, so that removal would not cause material damage to the property or the tubeslide itself, the installation of the waterslide is not a capital improvement, and, therefore, the labor charges would be subject to sales tax.

A determination of whether the installation of the tubeslide constitutes a capital improvement is a factual question which cannot be determined in an Advisory Opinion. An Advisory Opinion merely sets forth the applicability of pertinent statutory and regulatory provisions to a "specified set of facts" Tax Law, section 171, subd. twenty-fourth; 20 NYCRR 2376.1(a).

DATED: July 24, 1992

/s/
PAUL B. COBURN
Deputy Director
Taxpayer Services Division

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