

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

TSB-A-03(9)S
Sales Tax
March 4, 2003

STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO. S020717A

On July 17, 2002, the Department of Taxation and Finance received a Petition for Advisory Opinion from Trahanas Amusements, Inc., 4 Manhattan Avenue, Rye, NY 10580.

The issues raised by Petitioner, Trahanas Amusements, Inc., are:

1. Whether charges collected at an amusement park for participating in games with a chance to win a prize are subject to sales tax.
2. Whether the prizes awarded are subject to sales and use tax.

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

Petitioner operates rides and games at an amusement park located in Rye, New York. The amusement park is run by Westchester County, and admission to the park is free. Petitioner charges a certain dollar amount for a person to participate in a game with a chance to win a prize. Petitioner has been including sales tax in the amount charged to participate in games.

Applicable Law and Regulations

Section 1101(b) of the Tax Law provides, in part:

When used in this article for the purposes of the taxes imposed by subdivisions (a), (b), (c) and (d) of section eleven hundred five and by section eleven hundred ten, the following terms shall mean:

(1) Purchase at retail. A purchase by any person for any purpose other than those set forth in clauses (A) and (B) of subparagraph (i) of paragraph (4) of this subdivision.

* * *

(4) Retail sale. (i) A sale of tangible personal property to any person for any purpose, other than (A) for resale as such or as a physical component part of tangible personal property, or (B) for use by that person in performing the services subject to tax under paragraphs (1), (2), (3), (5), (7) and (8) of subdivision (c) of section eleven hundred five where the property so sold becomes a physical component part of the property upon which the services are performed or where the property so sold is later

actually transferred to the purchaser of the service in conjunction with the performance of the service subject to tax. . . .

Section 1101(d)(2) of the Tax Law defines admission charge as “[t]he 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 “[a]ny place where any facilities for entertainment, amusement, or sports are provided.”

Section 1105 of the Tax Law provides, in part:

Imposition of sales tax. On and after June first, nineteen hundred seventy-one, there is hereby imposed and there shall be paid a tax of four percent upon:

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

* * *

(f)(1) 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 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 526.6(c)(4) of the Sales and Use Tax Regulations provides, in part:

(i) Tangible personal property which is purchased and given away without charge, for promotion or advertising purposes is not purchased for resale. It is a retail sale to the purchaser thereof, and is not a sale to the recipient of the property.

(ii) Tangible personal property which is purchased for promotional or advertising purposes and sold for a minimal charge which does not reflect its true cost, or which is not ordinarily sold by that person in the operation of his business, is a retail sale to the purchaser thereof, and not a sale to the recipient of the property.

Opinion

Petitioner operates rides and games at an amusement park located in Rye, New York. Petitioner charges a certain dollar amount for a person to participate in a game with a chance to win a prize. Pursuant to Section 1105(f)(1) of the Tax Law, receipts from the admission charged to or for the use of any place of amusement in the state are subject to sales tax, with the exception of charges to a patron for the use of facilities for sporting activities in which such patron is to be a participant. The court in Outdoor Amusement Business Assn. v. State Tax Commn., 84 AD2d 950, revd on dissenting mem below 57 NY2d 790(1982), examined whether games, similar to those of Petitioner, would be deemed to be a place of amusement within the meaning of the statute. As determined in Outdoor Amusement Business Assn. v. State Tax Commn., *supra*, the fee was paid by the customer to participate in games in the hope of winning a prize and, since no charge was made for entering the tents or places where the games were played, the fee was not paid as admission to or for the use of a place of amusement. Therefore, the amounts charged by Petitioner for the games are not for admission to or for the use of a place of amusement and are not subject to sales tax.

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Petitioner awards prizes to its customers for no additional charge. Therefore, as provided for in Section 526.6(c)(4) of the Sales and Use Tax Regulations, the prizes are considered to be tangible personal property which is purchased and given away without charge, and are not ordinarily sold in the operation of Petitioner's business. Purchases of the prizes by Petitioner constitute purchases at retail within the meaning and intent of Section 1101(b)(4) of the Tax Law, and are, therefore, taxable under Section 1105(a) of the Tax Law. See Balsam Amusements, Dec St Tx Comm, December 7, 1983, TSB-H-83(209)S; Outdoor Amusement v. Business Assoc. Tax Comm, (Sup Ct Erie County, Johnson, J) 100 Misc.2d 961(1979), Outdoor Amusement Business Assoc. v. Tax Comm (Sup Ct Erie County, Stiller, J., Sept 19,1980) TSB-H-83(78)S.

Though Petitioner has been including sales tax in the amount charged to participate in games, these charges are not for admission to or for the use of a place of amusement and are not subject to sales tax. 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 subject to tax. Accordingly, any moneys collected by Petitioner, purportedly as sales tax, are required to be remitted to the Department of Taxation and Finance at the time of filing Petitioner's sales and use tax returns. However, a customer who has paid sales tax which was collected by Petitioner in error may file a claim for refund within three years after the date when the tax was payable by Petitioner 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: March 4, 2003

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