

New York State Department of Taxation and Finance
Office of Tax Policy Analysis
Taxpayer Guidance Division

TSB-A-08(12)S
Sales Tax
February 14, 2008

STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO. S071114A

On November 14, 2007, the Department of Taxation and Finance received a Petition for Advisory Opinion from The Paris Health Club Inc., 752 West End Avenue, New York, New York 10025. Petitioner, The Paris Health Club Inc., provided additional information pertaining to the Petition on November 19, 2007, and November 21, 2007.

The issue raised by Petitioner is whether the fees charged for use of its facilities and additional fees charged for personal training, baby-sitting, and massage services are subject to New York State and local sales taxes.

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

Petitioner operates a health and fitness club that provides a variety of fitness and participant sporting activities at its facility at 752 West End Avenue, New York City. Petitioner's club includes an indoor swimming pool; a fitness area equipped with fitness equipment, including treadmills, stepping machines, rowing machines, and weight-lifting equipment; and sauna and steam rooms. Petitioner's members do not control any social or athletic activities, selection of members or club management, or possess any proprietary interest in Petitioner. The number of members is restricted solely due to the physical size of the facility. Memberships are available to the general public on a first-come, first-served basis.

Petitioner charges initiation and membership fees for the use of its facilities. Petitioner's charges to its patrons entitle them to use its facilities for activities intended to improve physical well-being and overall fitness. Petitioner offers a variety of classes, such as Pilates, yoga, aerobic step, belly dancing, and personal training services. Petitioner also provides spa services, which include massages by New York State licensed massage therapists. Services for facials and waxing for both men and women can be scheduled at the club with outside individuals who provide the services and charge and collect their own receipts.

Certain services, such as personal training, baby-sitting, and massages are available for an additional fee. Members may engage a personal trainer directly for personal training services.

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 relevant part, on the following:

(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. . . .

(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 1212-A(a)(2) of the Tax Law authorizes New York City 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 (New York City Administrative Code) imposes sales tax, in part, on:

Receipts from 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. . . .

Section 527.10(d)(4) of the Sales and Use Tax Regulations provides, in part:

Charges to a patron to or for the use of sporting facilities or activities in which the patron is to be a participant are excluded from tax.

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.

(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 four-percent 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.

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Petitioner's charges to its members entitle them to use its facility, including an indoor swimming pool for sporting activities in which they are to be a participant. Petitioner's initiation fee and 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. Petitioner's initiation fee and monthly membership dues are subject to sales tax under section 1105(f)(2) of the Tax Law if Petitioner operates an *athletic club* as defined in paragraphs (5) and (7) of section 527.11(b) of the Sales and Use Tax Regulations.

Petitioner's members do not possess any proprietary interest in Petitioner, control any social or athletic activities, or participate in the selection of members or club management. Membership in the club is limited only due to the size of the facility. Therefore, Petitioner is not operating an athletic club as defined in paragraphs (5) and (7) of section 527.11(b) of the Sales and Use Tax Regulations. Accordingly, Petitioner's charges to its members for initiation fees and membership dues are not subject to tax as dues paid to an athletic club pursuant to section 1105(f)(2) of the Tax Law.

Since Petitioner provides participant sporting activities and facilities to its members, Petitioner's facility is not a weight control salon, gymnasium, or other establishment described in section 11-2002(h) of the New York City Administrative Code. See *William A. Barrett*, Adv Op Comm T&F, October 9, 2003, TSB-A-03(38); *Matter of Prospect Park Health and Racquet Associates and Peter J. Sferrazza and George Hart, as Partners*, Dec Tax App Trib, October 13, 1994, DTA nos. 811196 and 811608. Petitioner's charges to its members for initiation fees and membership dues, therefore, are not for services provided by, or for the use of facilities of, weight control salons, gymnasiums, or other establishments as described in such section 11-2002(h) and are, thus, not subject to the local New York City sales tax imposed by that section.

Petitioner also offers its members personal training services, baby-sitting services, and massage therapy sessions for additional fees. The additional fees for massage therapy sessions are receipts for services subject to New York City sales tax under section 1212-A(a)(2) of the Tax Law and section 11-2002(h) of the New York City Administrative Code. Massage services that are provided by a physiotherapist, chiropractor, podiatrist, osteopath, or any person authorized to practice medicine and licensed under Title VIII of the Education Law, may be excluded from New York City sales tax if the services are medical in nature, as are the services provided by the categories of professionals enumerated in section 1212-A of the Tax Law and section 11-2002(h) of the Administrative Code. However, the massage services provided by Petitioner are not medical in nature and do not qualify for the exclusion. See *Carapan, Inc.*, Adv Op Comm T&F, June 21, 1993, TSB-A-93(40)S; *Manhattan Athletic Club LLC*, Adv Op Comm T & F, July 26, 2002 TSB-A-02(43)S.

Baby-sitting services and personal training services 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, an additional fee for baby-sitting services and personal training services would only be subject to the New York City sales tax if it were a charge for services sold by a weight control salon, health salon, gymnasium, Turkish or sauna bath or similar establishment, or as a charge for the use of such facilities. Since Petitioner's facility is not a weight control salon, gymnasium, or similar establishment, the fees for baby-sitting services and personal training services are not subject to the New York City sales tax. Also, section 1105(c) of the Tax Law imposes New York State sales tax on the receipts from certain enumerated services. Since massage services, baby-sitting services, and personal training services are not included in the services taxed under section 1105(c) of the Tax Law, the receipts from such services are not subject to the New York State sales tax. *William A. Barrett, supra; Dianne C. Hoffman, C.P.A., Adv Op Comm T&F, December 27, 1993, TSB-A-93(64)S.*

Accordingly, the initiation fee, membership dues, and additional fees for baby-sitting services and personal training services are not subject to any of the taxes imposed under sections 1105(c), 1105(f), or 1107 of the Tax Law or section 11-2002(h) of the New York City Administrative Code. The additional fee for massage therapy is subject to the tax imposed under section 11-2002(h) of the New York City Administrative Code, but is not subject to the taxes imposed under sections 1105 and 1107 of the Tax Law.

The separate fees paid by patrons to outside individuals who provide facials and waxing at Petitioner's facility are receipts subject to the tax imposed by section 11-2002(h) of the New York City Administrative Code on the services of beauty, barbering, hair restoring, manicuring, pedicuring, electrolysis, massage services, and similar services. The person or entity selling such services is required to register as a vendor and is responsible for collecting and remitting any applicable taxes on such receipts.

DATED: February 14, 2008

/s/
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NOTE: An Advisory Opinion is issued at the request of a person or entity. It is limited to the facts set forth therein and is binding on the Department only with respect to the person or entity to whom it is issued and only if the person or entity fully and accurately describes all relevant facts. An Advisory Opinion is based on the law, regulations, and Department policies in effect as of the date the Opinion is issued or for the specific time period at issue in the Opinion.