

**New York State Department of Taxation and Finance**  
**Office of Counsel**  
**Advisory Opinion Unit**

TSB-A-14(12)S  
Sales Tax  
July 2, 2014

STATE OF NEW YORK  
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION      PETITION NO. S120517A

The Department of Taxation and Finance received a Petition for Advisory Opinion from [REDACTED]. Petitioner asks whether its facility constitutes a “weight control salon, health salon, or gymnasium” for the purposes of § 11-2002(a) of the Administrative Code of the City of New York (Administrative Code), or if it is an athletic club for the purposes of § 1105(f)(2) of the Tax Law.

We conclude that Petitioner’s facility is not a “weight control salon, health salon, or gymnasium” for the purposes of Administrative Code, and it is not an athletic club for the purposes of § 1105(f)(2) of the Tax Law.

**Facts**

Petitioner’s facility includes a fitness area equipped with a variety of fitness equipment, including treadmills, stepping machines, rowing machines, and weight-lifting equipment. The facility has a locker room and it provides laundry service to its customers. Petitioner’s facility also includes a substantial salt water swimming pool with an adjacent deck area.

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 both initiation and membership fees for the use of its facility. Petitioner also charges fees to its patrons entitling them to use its facility for activities intended to improve physical well-being and overall fitness. Petitioner offers a variety of classes, such as Pilates, yoga, aerobic step, Latin dancing, cardio sculpt, aqua classes and personal training services. The Pilates classes may include the use of Pilates equipment.

Petitioner provides a number of services, including physical therapy, acupuncture and nutrition counseling. Petitioner also provides personal training services, or members may engage a personal trainer directly for personal training services.

Petitioner sells snack bars, bottled water and “muscle” drinks. Petitioner also sells prepared dairy free smoothie drinks during the summer months that are made from fruit and

served in disposable cups. There is an area for customers to sit and consume these items. Petitioner also charges members for monthly and annual locker rentals.<sup>1</sup>

### Analysis

Petitioner asks the following questions:

**Q.** 1. Is Petitioner an “athletic club” for State and local sales tax purposes?

**A.** Petitioner is not an “athletic club” as defined by Tax Law § 1101(d)(13). Tax Law § 1105(f)(2) imposes sales tax on the dues paid to any “social or athletic club in this state if the dues of an active annual member, exclusive of the initiation fee, 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.” Tax Law § 1101(d)(6) defines dues as any “membership fee including any assessment, irrespective of the purpose for which made, and any charges for social or sports privileges or facilities, except charges for sports privileges or facilities offered to members’ guests which would otherwise be exempt if paid directly by such guests.” Sales and Use Tax Regulation § 527.11(b)(5) defines a club or organization as “any entity which is composed of persons associated for a common objective or common activities . . . . 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.”

Petitioner’s customers do not control any of the facility’s social or athletic activities. They do not participate in the management of the facility or in the selection of other participants, and do not possess any proprietary interest in Petitioner or its facility. The number of participants is restricted solely because of the physical size of the facility. Therefore, Petitioner’s facility is not a social or athletic club as defined in Tax Law § 1101(d)(13). *See* 20 NYCRR §§ 527.11(b)(5) & (7). Accordingly, a charge by Petitioner to use this facility would not be subject to tax as dues paid to a social or athletic club under § 1105(f)(2) of the Tax Law.

**Q.** 2. If not an athletic club, is Petitioner’s facility a “weight control salon, health salon, or gymnasium” for the purposes of the New York City Sales Tax under § 11-2002(a) of the Administrative Code of the City of New York?

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<sup>1</sup> The Petition also listed a number of services, including child care services, spa and related services provided by persons who are not medical professionals, sales of gym bags, towel services, and sales by vending machines. Petitioner asked that these items be removed from consideration as part of the facts of its Advisory Opinion. Likewise, Petitioner operates other facilities within New York City that are not part of the Petition. The only charges discussed in the Petition are those made by Petitioner for use of this one facility.

**A.** Petitioner is not a “weight control salon, health salon, gymnasium, turkish and sauna bath or similar establishment” for the purposes of the New York City local sales tax. Petitioner offers a variety of exercise equipment as well as a series of classes, including Pilates, yoga, aerobic step, Latin dancing, cardio sculpt, aqua classes, and personal training and rehabilitation services. Section 11-2002(a) of the Administrative Code imposes a local sales tax on the receipts from “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.” Petitioner’s charges are subject to the New York City local sales tax if its facility falls within the meaning of one of these terms. A gymnasium is commonly understood to be an indoor facility where sporting and/or exercise activities take place. Petitioner's facility offers access to a variety of exercise equipment and provides access to Pilates, yoga, aerobic step, Latin dancing, and cardio sculpt classes, all with an emphasis on these as exercise activities. However, weight control salons, gymnasiums, or similar establishments are establishments “which provide activities directed at the improvement of bodily appearance and not those which offer participatory sports and athletic facilities.” *See Matter of Prospect Park Health and Racquet Associates*, Tax Appeals Tribunal (July 22, 1997); TB-ST-329, *Health and Fitness Clubs*.

In Petitioner’s case, it states that it offers the general amenities of a gymnasium, plus the use of a swimming pool. If a facility that would otherwise be considered a gymnasium also provides access to participant sporting activities and facilities to its members, such as a swimming pool or racquetball courts, the facility is not considered to be a weight control salon, health salon, gymnasium, or other establishment for New York City sales tax purposes. *See* TSB-A-08(10)S; TSB-A-08(12)S; TB-ST-329, *Health and Fitness Clubs*. Because Petitioner’s facility includes a swimming pool, it will not be considered a facility subject to tax under New York City Administrative Code § 11-2002(a).

**Q.** 3. Is Petitioner required to collect New York City local sales tax for aerobic, Pilates or other exercise classes; acupuncture and Nutrition Counseling or personal training services?

**A.** As discussed above, Petitioner’s facility is not a weight control salon, gymnasium, or similar facility, pursuant to Tax Law § 1212-A(a)(2) and the New York City Administrative Code § 11-2002(a). Classes in aerobics, Pilates or other exercise classes, personal training or acupuncture services are not services that are subject to sales tax. *See* Tax Law § 1105(c). Generally, providing individualized nutritional advice or recommendations is not subject to the sales tax. However, Petitioner provided insufficient facts to allow us to make a determination about whether there is any aspect of its nutrition counseling service (such as the sale of tangible personal property, e.g. calorie counting books or food scales) that may be taxable.

**Q.** 4. Must Petitioner collect State and local sales tax on its charges for bottled water, dairy free smoothies, muscle drinks, snack bars or locker charges?

A. Water sold in bottles or by any means other than through a pipe or main is subject to tax. *See* Tax Law §1105(a). This is so whether or not the bottled water is sold for on-premises consumption.

Petitioner's sales of prepared smoothies are subject to tax. Section 1105(d)(i)(1) of the Tax Law provides that sales of food or drink are taxable in all instances where the sale is for consumption on the premises where sold. Accordingly, all sales for consumption on Petitioner's premises are subject to sales tax. Petitioner's sales of smoothies for off-premises consumption are also subject to tax. Section 1105(d)(i)(3) provides that sales of food or drink are taxable in those instances where the sale is for consumption off the premises of the vendor unless: (1) the food or drink is sold in an unheated state, and (2) the food or drink is of a type commonly sold for consumption off the premises and in the same form and condition, quantities and packaging, in establishments which are food stores (such as a grocery store). Petitioner's smoothies, which are prepared at the time of purchase and served in disposable cups, are not sold in the same form and condition, quantity or packaging as in grocery stores or other establishments which are food stores. *See* Tax Law § 1132(c); 20 NYCRR § 533.2; TSB-A-02(25). Thus, Petitioner's sales of smoothies for off-premises consumption also are subject to tax.

Petitioner's sales of muscle drinks for on-premises consumption are subject to tax pursuant to Tax Law § 1105(d)(i)(1). However, muscle drinks sold for off-premises consumption may not be subject to tax. Section 1115(a)(1) of the Tax Law provides an exemption from the sales and use tax on the sale of food, food products, beverages, dietary foods and health supplements, sold for human consumption. Health supplements are products that are intended to substitute for or supplement natural food in an ordinary diet. *See* 20 NYCRR § 528.2(c); TB-ST-160, *Dietary Foods and Health Supplements*. However, it is not enough that the manufacturer labels an item to be a dietary supplement; its ingredients must qualify as such. In addition, the labels of dietary foods should bear a statement of the dietary properties upon which the product's use is based. *See* TSB-A-10(49)S; TB-ST-160, *Dietary Foods and Health Supplements*. Petitioner did not provide sufficient facts to allow us to make a determination about whether the sale of this product is taxable. In any event, muscle drinks sold for consumption in Petitioner's eating area are subject to tax.

Petitioner's sale of snack bars would not be subject to tax if the bars are similar to granola or cereal bars. *See* TB-ST-283, *Food and Food Products Sold by Food Stores and Similar Establishments*. Section 1115(a)(1) of the Tax Law provides an exemption from the sales and use tax on the sale of food, food products, beverages, dietary foods and health supplements, sold for human consumption. This exemption does not include candy or confections. Snack bars, such as granola or cereal bars, are not considered to be candy and confectionery, and are therefore exempt when sold in the same form, condition, quantity and packaging as food stores (such as a grocery store). *See* TB-ST-103, *Candy and Confectionery*. Snack bars which are not similar to granola or cereal bars may be subject to tax.

Fees paid by members to rent lockers where they can store personal items are subject to State and local sales taxes pursuant to § 1105(c)(4) of the Tax Law. *See* TSB-A-08(11)S.

DATED: July 2, 2014

/S/  
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DEBORAH R. LIEBMAN  
Deputy Counsel

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. The information provided in this document does not cover every situation and is not intended to replace the law or change its meaning.