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

TSB-A-14(29)S
Sales Tax
August 21, 2014

STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION PETITION NO. S130814A

The Department of Taxation and Finance received a Petition for Advisory Opinion from [redacted]. Petitioner asks whether admission to its funhouses is subject to sales and use tax. We conclude that the funhouses constitute places of amusement and that the admission charges are taxable under Tax Law § 1105(f)(1).

Facts

Petitioner operates an annual haunted attraction ("the Attraction"), generally during the months of September through early November. The Attraction is made up of roughly five different funhouses that are all contained within the same building. Patrons enter the Attraction's common area without paying a fee. Once inside the common area, patrons will find the following to entertain them while they wait: a snack counter, costumed performers, videos (i.e., clips from scary movies, testimonials from other patrons, etc.) and music (a DJ may be on hand during periods of high attendance). Individuals who do not wish to enter the funhouses can wait in the common area. Though patrons can enter the common area for free, they must pay a fee to access any of the funhouses. Patrons who pay the fee are granted access to all five funhouses. Admission to the individual funhouses within the Attraction cannot be purchased separately.

Once inside a funhouse, patrons move through the funhouse (often by running) along a fixed route. Each funhouse has the same essential layout: an entrance, a direct path and an exit. Within each funhouse, patrons find certain effects, such as: mirrors, suspension bridges, tilt bridges, airbags, vortex tunnels, ramps, stairs, detailed sets, and animation. In all five funhouses, patrons are "scared forward" by a combination of trained actors and special effects. For example:

1. In one funhouse, there is a simulated ceiling drop, followed by a blast of CO2 behind the patrons that propels them forward.

2. In another funhouse, an actor simulates gunfire behind the patrons in order to propel them forward.

3. In another funhouse, patrons are forced forward by a vortex tunnel. The tunnel contains a ramp where ten foot drums rotate around the patrons. This effect disorients the patrons and forces them forward.

4. Finally, three of the funhouses contain an "airbag" effect at the exit. The 32-foot airbag "squeezes" or propels patrons out of the funhouses' exits—usually to the great amusement of the patrons in queue.

The actual funhouses consist of module theatrical flats that are built off-site, transported in semi-trailers, and pieced together on-site. The sets are not permanently attached to the floor or ceiling. An independent electrical system is designed to sit on top of the flats away from actors and patrons. Each year, Petitioner has one month or less to erect the amusements within the space it rents. After the season is over, Petitioner generally has three weeks to take the funhouses down.

The patrons' time within each funhouse is limited to a matter of minutes. Patrons are not permitted to loiter within the attraction. Live actors working within each funhouse are tasked with the job of ensuring that the patrons continue along the fixed route until they reach the main exit of the funhouse. Because the Attraction's funhouses are "haunted," the live actors move patrons along the fixed route by scaring them. Even though patrons are not moved through the attraction by mechanical means (i.e., a conveyor belt or motorized cart), their time inside each funhouse is limited, as discussed above, because the live actors ensure that the patrons continue to move through the funhouse.

The actors who work in Petitioner's funhouses go through a thorough training program ("boo school"), endure hours of make-up and costume application, and take their jobs very seriously. Though the employees' training includes scare tactics, engagement with patrons, emergency evacuation procedures, and medical emergency protocol, the most important topic taught in boo school is crowd control and flow. Petitioner instructs its employees to use scare tactics to move patrons through the attraction in a timely manner. If a patron is unruly or refuses to move forward, the employee is instructed to initiate the emergency procedure—the triggering of an emergency light located inside the funhouse. Once the emergency light is triggered, Petitioner's management and security officers move in to assess the situation and, if necessary, remove the patron from the funhouse.

Petitioner's funhouses are registered as "amusement devices" under New York Law. The New York State Department of Labor's Division of Safety and Health inspects Petitioner's funhouses each year as part of the permitting process for amusement devices. There is a long list of steps that Petitioner must take in order to obtain the permits to operate the Attraction's funhouses as amusement devices. These are the same steps that operators of amusement rides (e.g., roller coasters) must take to obtain permits.

Analysis

Section 1105(f)(1) imposes sales tax, as pertinent here, on "[a]ny 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…." 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 the facilities therefore." Section 1101(d)(10) defines "place of amusement" as

"[a]ny place where any facilities for entertainment, amusement, or sports are provided." In *Fairland Amusements, Inc., v. State Tax Commission* (110 AD2d 952, 953 [dissenting opinion of Mikoll J), revd on dissenting opinion below, 66 NY2d 932 [1985]), the plaintiff company provided portable amusement rides, such as Ferris wheels and merry-go-rounds, at fund-raising events sponsored by various organizations. The company did not charge any admission to the site where the rides were located; rather, the company sold tickets for individual rides. In analyzing whether the § 1105(f)(1) tax applied to the ticket sales, the dissenting opinion of Judge Mikoll distinguished between admission to "the physical space within which the amusement is provided" and "the amusement facility itself." 110 AD2d at 954. Judge Mikoll concluded that, while the term was ambiguous, "place of amusement" referred only to admission to the former, i.e., "the admission charge to enter the location where the amusement facilities are found." The Court of Appeals relied on the dissent at the Appellate Division to declare that the sale of tickets for the use of the company's rides were not subject to sales tax, 66 NY2d 932.

The Court of Appeals addressed the application of Tax Law § 1105(f)(1) again in *1605 Book Ctr., Inc. v. Tax Appeals Tribunal of State of N.Y.* (83 NY2d 240, 246 [1994]), in which the issue was the taxability of charges to view live peep shows. The Court held the charges taxable. Focusing especially on the presence of a live performer, it stated that, "[t]o treat the charge as one imposed for the use of a "device for amusement," as appellant suggests, would contradict the core reality of these human exchanges and taxable transactions."

In this case, we conclude that Petitioner's funhouse patrons were paying Petitioner to enter "the physical space within which the amusement is provided," rather than to use a ride, inasmuch as the funhouses are a defined space within a building, the patrons move through the funhouses mostly by their own locomotion, and the chief diversion is observation, rather than manipulation of devices. *See 1605 Book Ctr., supra; Fort William Henry Corp. v. State Tax Comm'n*, 52 AD2d 664, 665 (3d Dept. 1976)(charge for admission to museum where patrons could view artifacts, exhibits, and the firing of weapons by appropriately dressed personnel found to be taxable under Tax Law § 1105[f][1]); *Matter of Wien v. Murphy*, 28 AD2d 222, 225 (3d Dept 1972)(charge for admission to an observatory on Empire State Building is found to be a place of amusement); *cf. Bathrick Enterprises, Inc. v. Murphy*, 27 AD2d 215, 216 (3d Dept 1967), *aff'd*, 23 NY2d 664 (1968)(coin-operated amusement devices, such as automatic phonographs and bowling games, found to be facilities and not places of amusement and thus charges to use them were not taxable under Tax Law § 1105[f][1]). Accordingly, Petitioner's charges for admission to the funhouses are taxable. *See* also TSB-A-10(11)S.

In contending that the admissions to its funhouses are not taxable, Petitioner emphasizes that it employs actors in the funhouses who are trained to ensure that customers keep moving through the funhouses and do not loiter. According to Petitioner, this makes its funhouses similar to one of the funhouses in TSB-A-07(5)S that was found to be a device. To the contrary, Petitioner's use of actors makes its funhouses different than the funhouses at issue in TSB-A-07(5)S, which did not feature actors. In light of the decisions in *1605 Book Center, and Fort William Henry Corp., supra*, the presence of actors in the funhouses militates in favor of treating the charges to Petitioner's funhouses as taxable admission charges. Moreover, the funhouses in

that Advisory were all portable structures built on a semi-trailer platform, rather than spaces in a building, as is the case here.

Petitioner also points out that the New York State Department of Labor classifies Petitioner's funhouses as "devices" for purposes of the Labor Law and subjects them to safety inspections as a result. We do not find this fact persuasive in regard to the issue here: whether the funhouses are places of amusement or whether, alternatively, they are more similar to rides under the distinction made in *Fairland Amusement, supra*. *See Matter of St. Joe Resources Co. v. New York State Tax Commn.*, 132 AD2d 98, 103 (dissenting opn), *revd on dissenting opn below* 72 NY2d 943 [1988] ("The Internal Revenue Code and Environmental Conservation Law definitions of mining relied upon by the majority were conceived with vastly different goals in mind than that of a sales and use tax assessment".)

Accordingly, Petitioner's charges for admission to its funhouses are subject to tax under Tax Law § 1105(f)(1).

DATED: August 21, 2014

/S/
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.