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

TSB-A-82(50)S
Sales Tax
December 30, 1982

STATE OF NEW YORK
STATE TAX COMMISSION

ADVISORY OPINION PETITION NO. S811006C

On October 6, 1981, a Petition for Advisory Opinion was received from Darien Lake Fun Country, Inc., 9993 Allegany Road, Corfu, New York.

Petitioner, the operator of an amusement park, raises the following questions:

(1) Is sales tax due on amounts paid by Petitioner under the terms of a concession lease agreement under which Petitioner leases amusement rides? The amount paid to the lessor by Petitioner is based on a percentage of "ride revenue."

(2) Is sales tax due on receipts from Pay-One-Price admission tickets?

(3) Would sales tax be due if Petitioner provided for a separate charge and ticket for admission to the amusement park and a separate charge and ticket for riding on the amusement rides?

(4) May Petitioner, under either the Pay-One-Price concept or the separate admission ticket and separate ride ticket concept, allocate receipts between non-taxable participating sports, such as Treasure Island Golf, and taxable non-participating sports, on the basis of turnstile count?

(5) Are receipts Petitioner receives from concessionaires, and receipts obtained by such concessionaires from customers, subject to sales tax?

Petitioner owns and operates an amusement park. During 1980, Petitioner entered into an agreement with Huss Trading Corporation of America, an unrelated company, whereby Huss would lease to Petitioner various rides on a turn-key basis. Under the terms of the agreement Petitioner is to pay to Huss, as rent for the rides, a percentage of the gross receipts derived from the Pay-One-Price admissions, "exclusive of an admission charge and/or sales and admission taxes." If a designated dollar amount is not paid under this formula by specified dates, Petitioner is required to pay a specified amount.

(1) Section 1105(a) of the Tax Law imposes the State sales tax on "the receipts from every retail sale of tangible personal property . . . ." The term "sale" includes a rental or lease. Tax Law, §1101(b)(5). A retail sale is defined, in relevant part, as one other than for resale. Tax Law, §1101(b)(4)(i). Petitioner's charge to its customer for riding on an amusement ride is not a retail sale but, rather, an "admission charge . . . to or for the use of any place of amusement," subject to tax under section 1105(f)(1) of the Tax Law. 20 NYCRR § 527.10(b)(3)(iv); Outdoor Amusement Business Association v. State Tax Commission, ____ NY 2d ____ (1982) (adopting the dissent in

84 AD 2d 952). Accordingly, Petitioner's payments under its lease do not constitute receipts from a purchase for resale. Such payments, therefore, constitute receipts subject to tax under section 1105(a) of the Tax Law. The foregoing applies irrespective of whether the receipts represent a percentage of Petitioner's receipts or a fixed amount.

(2) Under Petitioner's Pay-One-Price arrangement a customer pays a single fee covering both general admission and unlimited use of specified rides and attractions. These receipts are subject to the tax on admission charges imposed under section 1105(f)(1) of the Tax Law.

(3) It follows from the foregoing that the tax imposed under section 1105(f)(1) of the Tax Law would be due on receipts from the sale of separate admission and ride tickets.

(4) Petitioner's admission charges, whether under the separate admission or Pay-One-Price arrangement, are clearly admission charges of the type sought to be taxed. They are charges for admission to a place of amusement, and the entire amount is required to be paid in order to gain entry. Therefore, they are , in their entirety, taxable admission charges, irrespective of the fact that some customers, once inside, may choose to participate in activities a separate charge for which would not be taxable. Accordingly, there is no basis for such allocation as is suggested by Petitioner. Technical Services Bureau Memorandum, TSB-M-79(1)S, cited by Petitioner, dealt not with an allocation of a single receipt but with a determination as to the presumptive nature of various receipts. WEBR v. State Tax Commission, 58 AD 2d 471, also cited by Petitioner, dealt with a situation wholly unlike the one presented here. WEBR involved the sale of a radio station business, including both real and personal property, and the issue raised was the appropriate method of determining the portion of the unallocated purchase price which was attributable to the purchase of the personal property. A careful review of both TSB-M-79(1)S and WEBR compels no conclusion contrary to that expressed herein.

(5) The concessionaires in question are, in return for payments equal to specified percentages of gross receipts, granted by Petitioner, in various combinations, the exclusive right to operate certain businesses on the premises, the use of real property, the use of tangible personal property, and the service of equipment maintenance. Petitioner should in the case of each contract allocate the portion of its receipts to each of the elements described above. The receipts reasonably attributable to the rental of or license to use tangible personal property and the service of equipment maintenance would be subject to sales tax. The receipts reasonably attributable to the rental of or license to use real property, or attributable to the license exclusively to operate a business on Petitioner's premises, would not be subject to sales tax. In addition to these general rules, the following also apply. Petitioner's payments to Show Biz for the production of theatrical performances would not be subject to tax. Receipts from Petitioner's purchase of buildings and stands from Corfu Amusements at the end of the applicable lease would be subject to tax only insofar as they represented receipts from the sale of tangible personal property, as opposed to real property. Petitioner's payments to Omnivision would be subject to tax as receipts arising from a retail sale (rental) of the films and lens. Such

purchases would not be for resale, pursuant to the reasoning set forth in (1), above. As to the concessionaires' responsibilities, insofar as they make sales subject to tax they would be required to register as vendors, and to collect and remit tax (except as described below). It is to be noted, in this regard, that no tax is due on admission charges to theatrical performances, for the use of coin operated amusement devices, for carnival-type games of skill, or for the provision of parking. Where a concessionaire makes taxable sales, and pursuant to the contract with Petitioner is required to account for and pay over its receipts to Petitioner, the following applies:

"If a leased department or concession must account for and pay over its receipts to the lessor-vendor, the lessor-vendor must report and remit the tax thereon to the bureau with its return. The leased department or concession must also file a return reporting only its sales and have attached thereto a statement to the effect that (i) it is a leased department or concession; (ii) the lessor-vendor is responsible for reporting sales and remitting tax due; and (iii) identifying the lessor-vendor by name, address and vendor identification number. Both the leased department or concession and the lessor-vendor shall be jointly responsible for the collection and remitting of the taxes on the sales made by the leased department or concession." 20 NYCRR 526.10(g)(3)

DATED: December 14, 1982

s/FRANK J. PUCCIA
Director
Technical Services Bureau