

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

TSB-A-93 (21)S  
Sales Tax  
March 30, 1993

STATE OF NEW YORK  
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO. S921029B

On October 29, 1992 a Petition for Advisory Opinion was received from 49th Street Sports Training Institute, Inc., 239 East 49th Street, New York, New York 10017.

The issue raised by Petitioner, 49th Street Sports Training Institute, Inc., is whether the services provided by it are subject to the sales tax imposed by Section 1212-A(a)(2) of the Tax Law and Section 11-2002(h) of the New York City Administrative Code as services rendered by a gymnasium or health salon.

Petitioner operates a facility for supervised physical therapy and rehabilitation. Petitioner directly employs professional physical trainers. The professional physical trainers are required to have bachelors degrees in exercise physiology or related fields. At least 30 percent of the professional physical trainers have masters degrees in their fields of study. Petitioner also employs administrative and managerial personnel who oversee the operation of the facility.

In addition to its direct employees, Petitioner also retains, under an exclusive contract, licensed physiotherapists employed by Sports Training Physical Therapy, P.C. ("STPT"). Historically, both Petitioner's current employees and the physiotherapists were employees of a single corporation: NSM Center, Inc. NSM Center, Inc. operated the 49th street facility in the same manner as it currently is operated and provided the identical services. In 1984, NSM Center, Inc. reorganized, with its operations divided into Petitioner and STPT. All of NSM's former employees (other than the physiotherapists) were employed by Petitioner. In other words, all receptionists, clerical, administrative, billing, physical trainers, and other employees (other than the licensed physiotherapists) remained on Petitioner's payroll. STPT employed only the physiotherapists; it had (and still has) no other employees, not even someone to answer the telephone. STPT does not need other employees because it obtains all of these services (reception, clerical, billing, etc.) from Petitioner. The two corporations operate in a totally integrated manner, using the same facility and all of the same administrative personnel.

The overall operation of Petitioner's facility is identical to the operations formerly conducted by NSM Center, Inc. The physiotherapists act as the on-site physical therapy department and work exclusively at Petitioner's facility. The two companies act as one enterprise, and in tandem, provide the physical therapy and rehabilitation services at Petitioner's facility. All client billing, administration, and management is performed by Petitioner, in exchange for which Sports Training Physical Therapy, P.C. pays a management fee to Petitioner.

At Petitioner's facility, no client is admitted without written authorization from a physician based on a recent physical examination. In many cases the physician's authorization extends to prescription of a specific program of physical therapy and rehabilitation designed to address a medical problem.

All clients, prior to using any of the equipment are thoroughly evaluated by the physiotherapists. This 1 ½ hour evaluation involves a review of the client's medical history, complete musculoskeletal screening, tests of body composition, aerobic capacity, strength, flexibility, cardiovascular performance, and muscular endurance. Only after this evaluation has been performed does the physiotherapist prescribe an individualized program designed to address the client's specific medical and physiological needs. No client uses any equipment except according to the program developed and supervised by the physiotherapist.

The programs developed by the physiotherapists are implemented through the client working one-on-one with either a licensed physiotherapist or a professional physical trainer. No client may use the facilities unaccompanied and unsupervised.

In those situations where the program is implemented by the professional physical trainer, the physiotherapist remains integrally and continuously involved in each client's progress under the program. The physiotherapist has on-going communication with both the professional physical trainer and the client's physician. The physiotherapists' only offices are located in the exact same space occupied by Petitioner's physical trainers. Thus, physiotherapists are on-site at all times and immediately accessible to evaluate progress, prescribe changes, or deal with any problems. Physiotherapists monitor the client's development and, if necessary, perform supplemental evaluations which may be even more extensive than the initial evaluation discussed earlier.

Section 1212-A(a)(2) of the Tax Law and Section 11-2002(h) of the New York City Administrative Code impose a tax on the receipts from every sale of" ... 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, whether or not any tangible personal property is transferred in conjunction therewith; 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 as amended .... "

New York State Department of Taxation and Finance Publication 846 (1/85), Sales Tax Information on Selected Services in New York City, in listing miscellaneous personal services subject to the New York City sales tax states, starting at page 14:

"Q. If a licensed physician operates a massage parlor for therapeutic purposes and staffs it with licensed physiotherapists and nurses, are the services rendered subject to the 4% sales tax imposed by New York City?

TSB-A-93 (21)S  
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March 30, 1993

- A. Not if the massage services are rendered by either the licensed physician or the licensed physiotherapists or nurses. However, if the establishment also employs attendants who are not licensed in the above-mentioned categories and they render the services, the services would be subject to the tax, regardless of who the owner or administrator of the facility might be.
- Q. What is the taxable status if the establishment in the previous question renders its services to clients only upon referral by physicians, and an attendant, although not licensed as a physician, physiotherapist or nurse, administers the massage under instructions from one of these licensed individuals?
- A. The service would be taxable, unless actually rendered by a licensed physician, physiotherapist or nurse."

Although Petitioner is not operating a massage parlor, Petitioner's sales of services are similar to the sales of services by gymnasiums, health salons and similar establishments. Accordingly, the services rendered by Petitioner are subject to the tax imposed under Section 1212-A(a)(2) of the Tax Law and Section 11-2002(h) of the New York City Administrative Code unless the services are actually rendered by a physiotherapist licensed under Title VIII of the education law as amended. It is noted that when Petitioner renders its service to a client upon referral by a physician the service will also be taxable unless actually rendered by a licensed physiotherapist. In all instances where an unlicensed physiotherapist or professional physical trainer renders services on behalf of Petitioner with or without supervision of a licensed physiotherapist, Petitioner's charges to the client for such services will be subject to the New York City sales tax.

DATED: March 30, 1993

/s/  
PAUL B. COBURN  
Deputy Director  
Taxpayer Services Division

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