

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

TSB-A-98(1)S  
Sales Tax

STATE OF NEW YORK  
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO. S971118A

On November 18, 1997, the Department of Taxation and Finance received a Petition for Advisory Opinion from Cirque du Soleil America, Inc., 8400 - 2nd Avenue, Montreal, QC, H1Z 4M6.

The issue raised by Petitioner, Cirque du Soleil America, Inc., is whether the admission charges for performances presented by Petitioner are exempt from New York State and local sales taxes on admission charges.

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

Petitioner has from its beginnings tried to create a new form of art, a new type of theater-circus. Its first shows were entitled Re-inventing the Circus, New Experience and Saltimbanco. The word Saltimbanco comes from the French word Saltimbanque, which is defined as a street performer, artist, singer or dancer.

"Alegria" is currently one of the shows Petitioner is presenting. Like all of Petitioner's shows, Alegria features acrobats, gymnasts, trapeze artists and clowns in a theatrical setting, complete with sets, lights, costumes, music and choreography. Petitioner's shows do not include animals. Alegria is a Spanish word that expresses elation, jubilation and exhilaration. The story line links the acts, which feature a collection of characters such as court jesters, hobos, aristocrats and children who define the concept of power and transformation. Alegria questions the transformation of power through time from the old monarchies to the modern democracies, from the kings to the presidents.

The theme of Alegria is "The fools have lost their king." At the beginning of the show a potbellied hunchbacked clown takes the audience into the fourth dimension. Then the lighting changes as well as the music. It carries a nostalgic note, and the audience sees the old aristocracy trying to keep their world how it used to be and the young ones trying to revolutionize it into a new world. It is also reflected in the costumes where the audience sees the old birds representing the old aristocracy in very elaborate costumes and the new ones, the young birds, trying to push the old aristocracy away. The costumes of the young birds are simpler and not as elaborate. The set is dominated by a grid dome which looks like a half-rotunda, a mezzanine of sorts. The music is everywhere, it haunts the stage and then the audience hears the voice of the singer. The audience is left to wonder in which language she is singing, French, English, Spanish, Italian or gibberish sounds of those times.

Petitioner's shows require extensive planning. The planning for each show starts two years before its premiere. Meetings are held with the different members of the creative team to brainstorm, find new concepts and new ideas and set forth possible themes and storylines. The creative team includes the artistic director, choreographer, composer, costume designer, set designer, lighting designer and sound designer.

From the meetings a few themes are retained to be developed as the focus of the show. The concept research assistant then searches for any information on the themes: from costumes to colors, from the music to the instruments used, from the financial stability of the era to its work ethic and from the architecture to the language spoken.

The same creative team takes the research and decides from the point of view of artistic flexibility and innovation, and each with a view to his or her own specialty, which theme will be the thread that weaves and entwines itself through all the aspects of the show. The theme, when transformed into images, becomes the essence of the show.

Each member of the creative team then creates his or her plans and models, determines the musical instruments to be used and the types of singer and dancers, based on the chosen theme. At this time, the type of dance numbers, acrobatic numbers and comedy numbers which will best fit the creative plan and the storyline are determined so that the music and the performers will present the theme in music, dance, acrobatics and humor.

Dancers, singers, artists and acrobats are evaluated and chosen based on the four criteria of technical, theatrical, movement (dance) and personality. While the technical ability of an artist is extremely important, so is his or her ability to move and dance, to act and become a character, to show happiness and sadness, fear and excitement. The manner in which the artist interacts with the other performers, his or her ability to communicate with the singer and to present a whole theatrical show and not just a solo performance are also critical.

During the training phase, each artist participates in workshops that include theater, dance movement, physical expression, mask, mime and rhythm. The choreographer and artistic director during these workshops explore the personality of each artist to develop characters out of the sketches for that character.

The costume designer brings the characters alive with the designs, colors and materials which are chosen for the costumes. The set designer creates the stage as an environment for the artists to move through to make the Big Top and its structure part of the set design and theme. The composer creates the sounds that envelop the characters and animate the show. The composer imagines sounds that breathe with the artists' movements. The score creates a cohesion that links a series of diverse acts. While the stage direction sets the tone and the atmosphere for the show, the choreographer melds the energy of the acrobatics into the fluidity and expressiveness of dance. Lighting direction helps to create the ambiance and atmosphere of the show and is linked directly to how the space is used. The lighting is also used to direct the eyes, influence the perceptions and suggest ideas to the audience.

The theme of the show is the connection between the scenes of the show. The theme is designed to create and maintain a magical atmosphere that is uninterrupted by the need to take down and put up new equipment. The accessories, the costumes, the artists dancing, singing and moving about the stage, tell a continuing story which is based on the theme. The estimated preparation time for every one minute between scenes is two days. This preparation time is required

to assure that the transition between scenes becomes part of the show and maintains the show's theme.

Petitioner's show is a work in progress. The original dancers and singers as well as the replacement artists become part of the show and their growth and change are reflected in the growth and change of the show. The creative team continually monitors the show and provides ongoing advice to assure that the theme and storyline of the show are retained and that new and replacement artists are integrated into the show. Petitioner's show is a unique experience because of the total creative team, and all of the artists who together make and create the dramatic, theatrical event.

As part of its Petition, Petitioner furnished a copy of a video tape entitled "Saltimbanco's Diary: Making of Saltimbanco" which includes clips of actual performances and features, among other things, trapeze artists and acrobats and illustrates the results of these production aspects in a final show. The tape illustrates the choreography, lighting, music, acting, etc. as it pertains to Petitioner's shows.

Petitioner's shows have been billed as "Re-inventing the Circus." Performers in Petitioner's United States tour ensemble receive their visas as circus performers.

#### Applicable Tax Law

Section 1101 of the Tax Law provides, in part:

(d) When used in this article for purposes of the tax imposed under subdivision (f) of section eleven hundred five, the following terms shall mean:

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(5) Dramatic or musical arts admission charges. Any admission charge paid for admission to a theatre, opera house, concert hall or other place of assembly for a live dramatic, choreographic or musical performance.

Section 1105(f) (1) of the Tax Law as recently amended by Chapter 389 of the Laws of 1997, effective December 1, 1997, provides for the imposition of sales tax as follows:

(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 for admission to race tracks, boxing, sparring or wrestling matches or exhibitions which charges are taxed under any other law of this state, or dramatic or musical arts performances, or live circus performances, or motion picture theaters, and 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. For any person having the permanent use or possession of a box or seat or a lease or a license, other than a season ticket, for the use of a box

or seat at a place of amusement, the tax shall be upon the amount for which the similar box or seat is used or reserved by the holder, licensee or lessee, and shall be paid by the holder, licensee, or lessee. (emphasis added)

Opinion

Under Ringling Bros. and Barnum & Bailey Combined Shows, Inc. v. New York State Tax Commission and The City of New York, Sup Ct, New York County, August 10, 1977, Postel, J., (published by the Department of Taxation and Finance as TSB-H-78(16)S) the exemption for admission charges to dramatic or musical arts performances pursuant to Section 1105(f)(1) of the Tax Law was held to apply, on its face, to admissions to performances of the kind which are commonly regarded as part of the dramatic or musical arts and which are customarily given in theatres, opera houses, concert halls and similar places. The Court concluded that in order to qualify for exemption under Section 1105(f)(1) of the Tax Law, the performance must be predominantly one of the dramatic or musical arts, and that traditional circus performances are not within the definition of the term "dramatic or musical arts," as used in that Section.

In the instant case, while Petitioner's performances do contain some elements of the dramatic or musical arts, it would not seem that these elements predominate over the other traditional elements that are more characteristic of a circus (i.e., acrobats, gymnasts, trapeze artists, clowns, etc). See Ringling Bros. and Barnum & Bailey Combined Shows, Inc., supra. However, Sections 100 and 101 of Chapter 389 of the Laws of 1997, respectively, amended Sections 1105(f)(1) and 1101(d)(5) of the Tax Law, to specifically include live circus performances among the exhibitions, performances and amusements not subject to sales tax. Petitioner's performances qualify as live circus performances for purposes of Section 1105(f)(1) of the Tax Law. Therefore, effective December 1, 1997, the admission charges for Petitioner's performances are not subject to sales tax under Section 1105(f)(1) of the Tax Law.

DATED: January 30, 1998

/s/  
John W. Bartlett  
Deputy Director  
Technical Services Bureau

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