

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

TSB-A-98(42)S
Sales Tax

STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO. S971229B

On December 29, 1997, the Department of Taxation and Finance received a Petition for Advisory Opinion from Town Sports International and Subsidiaries, 888 Seventh Avenue, New York, New York 10106. Petitioner, Town Sports International and Subsidiaries, submitted additional information pertaining to the petition on March 19, 1998 and March 25, 1998.

The issue raised by Petitioner is whether the fees charged by it for the use of its facilities are subject to New York State and local sales taxes.

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

Petitioner and its wholly owned subsidiaries, doing business as New York Sports Clubs, operate athletic clubs in the New York City area. Petitioner provides a variety of sporting activities at its clubs. Most of Petitioner's clubs have squash courts, cycling, running, rowing, boxing, in-line skating, martial arts, and dance facilities. Certain locations offer indoor swimming pools, tennis courts, and rock climbing. In addition, Petitioner offers traditional training facilities such as weight lifting equipment, aerobics, stepping machines, saunas and steam rooms. Brochures and flyers submitted by Petitioner indicate that members must pay an extra fee for use of the squash and tennis courts.

Petitioner offers lessons at its clubs for sports such as tennis and squash. It organizes tournaments in various sports at its facilities and sponsors teams in a number of athletic leagues throughout New York City.

Petitioner charges an initiation fee and a membership fee for use of its facilities. These fees allow members access to all sporting facilities offered by Petitioner. Members have access to the facilities available at all of Petitioner's locations (on either an unlimited or off-hour basis, depending upon a member's choice of membership plan).

Petitioner's members do not control any social or athletic activities, selection of members or club management, or possess any proprietary interest in Petitioner.

Applicable Law & Regulations

Section 1105(f) of the Tax Law imposes sales tax, in part, on:

(1) Any admission charge . . . 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.

(2)(i) The dues paid to any social or athletic club in this state if the dues. . . 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.

Section 1107(a) of the Tax Law provides:

General. On the first day of the first month following the month in which a municipal assistance corporation is created under article ten of the public authorities law for a city of one million or more, in addition to the taxes imposed by sections eleven hundred five and eleven hundred ten, there is hereby imposed on such date, within the territorial limits of such city, and there shall be paid, additional taxes, at the rate of four percent, which except as provided in subdivision (b) of this section, shall be identical to the taxes imposed by section eleven hundred five and eleven hundred ten. Such sections and the other sections of this article, including the definition and exemption provisions, shall apply for purposes of the taxes imposed by this section in the same manner and with the same force and effect as if the language of those sections had been incorporated in full into this section and had expressly referred to the taxes imposed by this section.

Section 11-2002(h) of the Administrative Code of the City of New York imposes sales tax, in part, on:

(h) Receipts from . . . every sale of services by weight control salons, gymnasiums, turkish and sauna bath and similar establishments and every charge for the use of such facilities. . .

Section 527.11(b) of the Sales and Use Tax Regulations provides, in part, the following definitions of certain terms that are contained in section 1105(f)(2) of the Tax Law:

(5) *Club or organization.* (i) The phrase *club or organization* means any entity which is composed of persons associated for a common objective or common activities. Whether the organization is a membership corporation or association or business corporation or other legal type of organization is not relevant. 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. The organizational structure may be formal or informal. (Emphasis supplied)

(ii) A *club* or *organization* does not exist merely because a business entity:

(a) charges for the use of facilities on an annual or seasonal basis, even if an annual or season pass is the only method of sale and provided such passes are sold on a first-come, first-served basis;

(b) restricts the size of the membership solely because of the physical size of the facility. Any other type of restriction may be viewed as an attempt at exclusivity;

(c) uses the word *club* or *member* as a marketing device;

(d) offers tournaments, leagues and social activities which are controlled solely by the management.

* * *

(7) *Athletic club.* (i) An *athletic club* is any club or organization which has as a material purpose or activity the practice, participation in or promotion of any sports or athletics.

* * *

(ii) *Athletic activities* does not include exercising or calisthenics solely for health or weight reduction purposes, as contrasted to sports. An establishment that merely provides steam baths, saunas, rowing machines, shaking machines and other exercise equipment shall not be considered an athletic club. However, there is a four-percent local sales tax in the city of New York on every sale of services by weight control salons, health salons, gymnasiums, Turkish baths, sauna baths and similar establishments, and on every charge for the use of such facilities.

Opinion

Petitioner's charges to its patrons entitle them to use facilities for sporting activities in which the patron is to be a participant. Petitioner's charges, therefore, are not subject to the tax on admission charges under Section 1105(f)(1) of the Tax Law. Petitioner's charges would be subject to sales tax under Section 1105(f)(2) of the Tax Law if Petitioner operated an athletic club as defined in paragraphs (5) and (7) of section 527.11 of the Sales and Use Tax Regulations.

Petitioner's members do not control any social or athletic activities, selection of members or club management, or possess any proprietary interest in Petitioner. Therefore, Petitioner is not operating an athletic club as defined in paragraphs (5) and (7) of section 527.11 of the Sales and Use Tax Regulations. Accordingly, Petitioner's charges to its members are not subject to tax as dues of an athletic club under Section 1105(f)(2) of the Tax Law.

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Petitioner's facilities are not weight control salons, gymnasiums or similar establishments described in Section 11-2002(h) of the Administrative Code of the City of New York. Therefore, Petitioner's charges to its members are not subject to the tax imposed by Section 11-2002(h).

Accordingly, membership charges for the use of Petitioner's facilities are not subject to any of the taxes imposed under Sections 1105(f) and 1107 of the Tax Law or Section 11-2002(h) of the New York City Administrative Code.

DATED: July 1, 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.