

New York State Department of Taxation and Finance
Office of Tax Policy Analysis
Technical Services Division

TSB-A-00(26)S
Sales Tax
May 31, 2000

STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO. S000120B

On January 20, 2000, the Department of Taxation and Finance received a Petition for Advisory Opinion from Pontius Realty, Inc., c/o The Sports Club Inc., 11100 Santa Monica Blvd., West Los Angeles, California 90025. Petitioner, Pontius Realty, Inc., provided additional information with respect to the Petition on February 25, 2000.

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

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

Petitioner and its subsidiaries operate or will operate health related clubs in New York City. The facility at 330 East 61st Street (the East 61st Facility) which Petitioner plans to open in June of 2000 provides a variety of participant sporting activities. The East 61st Facility has tennis, squash, volley ball and basketball courts, as well as cycling, running, boxing, martial arts, dancing facilities and a rock climbing wall. In addition, the East 61st Facility offers traditional training facilities such as weight lifting equipment, aerobics, stepping and rowing machines, saunas and spas along with personal training, nutritional counseling and cardiovascular conditioning. Also, the East 61st Facility offers lessons at its clubs for sports such as tennis, squash, boxing and martial arts and organizes tournaments and league play in various sports.

Petitioner also operates a facility located at 630 Fifth Avenue (the Rockefeller Center Facility). The Rockefeller Center Facility does not provide the participant sporting activities available at the East 61st Facility, but offers only traditional training facilities such as weight lifting equipment, aerobics, stepping machines, saunas and spas along with personal training, nutritional counseling and cardiovascular conditioning.

Petitioner charges three levels of membership fees for the use of its facilities. Petitioner submitted copies of rate cards with respect to each facility described above which describes the different levels of membership as follows.

The Health Membership is for use of the specific facility. With respect to the East 61st Facility such membership is described as "Use of all Club facilities with the exception of Racquet Sports. Single Club usage." The Health Membership for the Rockefeller Center Facility is described as "Use of all Club facilities. Single Club usage."

TSB-A-00(26)S
Sales Tax
May 31, 2000

In addition, each of Petitioner's facilities described above offers Executive Memberships and Bicoastal Memberships which allow the member to use all facilities operated by Petitioner, including the East 61st Facility.

Petitioner's members do not control any social or athletic activities, selection of members or club management, nor possess any proprietary interest in Petitioner. The number of members is restricted solely because of the physical size of the individual facilities.

Applicable Law and 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 subdivisions (b) and (d) of this section, shall be identical to the taxes imposed by sections 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 1212-A(a)(2) of the Tax Law authorizes the City of New York to impose a local sales tax on "beauty, barbering, hair restoring, manicuring, pedicuring, electrolysis, 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;" such tax to be administered and collected by the Commissioner of Taxation and Finance.

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

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:

(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.

(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.

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TSB-A-00(26)S
Sales Tax
May 31, 2000

(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

With respect to the East 61st Facility, 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 for any of its three membership levels, therefore, are not subject to the tax on admission charges under Section 1105(f)(1) of the Tax Law. See New York Health and Racquet Club, Adv Op Comm T&F, May 19, 1999, TSB-A-99(26)S. Petitioner's membership charges for the Rockefeller Center Facility, for any of its three membership levels, are also not subject to tax under Section 1105(f)(1). See Donald B. Schwartz, Adv Op St Tx Comm, May 14, 1987, TSB-A-87(21)S. Petitioner's charges for membership in any of its facilities would be subject to sales tax under Section 1105(f)(2) of the Tax Law if such facilities constituted an athletic club as defined in paragraphs (5) and (7) of Section 527.11 of the Sales and Use Tax Regulations.

With respect to both the East 61st Facility and the Rockefeller Center Facility, members do not control any social or athletic activities, selection of members or club management, or possess any proprietary interest in Petitioner. The number of members is restricted solely because of the physical size of the individual facilities. Therefore, these facilities are not athletic clubs 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 for any of its three membership levels are not subject to tax as dues to an athletic club under Section 1105(f)(2) of the Tax Law.

Since Petitioner provides a variety of sporting activities and facilities to its members at the East 61st Street Facility, such facility is not a weight control salon, gymnasium or other establishment described in Section 11-2002(h) of the Administrative Code of the City of New York. Petitioner's charges, therefore, for membership and use of the East 61st Street Facility, for any of the three membership levels, are not for services provided by, or use of facilities in, weight control salons, gymnasiums or a similar establishment described in such Section 11-2002(h) and are thus not subject to that tax. See Town Sports International and Subsidiaries, Adv Op Comm T&F, July 1, 1998, TSB-A-98(42)S and New York Health and Racquet Club, *supra*. Since the Executive Membership and Bicoastal Membership fees cover the usage of the East 61st Street Facility, as well as Petitioner's other facilities, such membership fees collected by the Rockefeller Center Facility are similarly not subject to the tax imposed by Section 11-2002(h) of the New York City Administrative Code.

TSB-A-00(26)S
Sales Tax
May 31, 2000

The Rockefeller Center Facility only offers traditional training facilities such as weight lifting equipment, aerobics, stepping machines, saunas and spas along with personal training, nutritional counseling and cardiovascular conditioning. This facility, therefore, is a weight control salon, gymnasium or similar establishment as described in Section 11-2002(h) of the New York City Administrative Code. See Section 527.11(b)(7)(ii) of the Sales and Use Tax Regulations. Therefore, the Health Memberships offered by the Rockefeller Center Facility which limit members to the use of such facility are subject to the tax imposed by Section 11-2002(h) of the New York City Administrative Code.

DATED: May 31, 2000

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

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