

New York State Department of Taxation and Finance
Office of Counsel
Advisory Opinion Unit

TSB-A-13(28)S
Sales Tax
September 9, 2013

STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO. S120705B

The Department of Taxation and Finance received a Petition for Advisory Opinion from [REDACTED] (Petitioner). Petitioner asks whether the fee it collects from customers for its travel programs, which includes the right to stay at hotels outside of New York, take a cruise, and receive certain discounts in regard to other hotel stays outside New York, is subject to tax, and whether the New York residency status of the customer would make any difference. We conclude that, because no part of the fees are paid for occupancies occurring in New York, or any other item subject to New York sales and use tax, the fees would not be taxable regardless of the customer's residency status for sales tax purposes.

Facts

Petitioner, a limited liability company doing business in New York, solicits individuals ("Customers") by telephone to become members of a travel program. In connection with the program, each Customer enters into a "Membership Purchase Agreement" with Petitioner, under which the Customer agrees to pay approximately \$4,000 to the Petitioner. Payment of that sum entitles the Customer to be a member for two years. Within the two year period, the Customer is entitled, at no additional charge, to (1) three one-week vacations at certain hotels and resorts (collectively, the "Hotels") in many States but not New York; and (2) a seven-night cruise (the "Cruise"). The Cruise to which a member is entitled under the program is sold by national cruise lines and is to destination(s) chosen by the cruise line and preannounced to the public. The cruise ship remains under the control of the cruise ship's captain and crew at all times during the cruises. In addition to these benefits, the Customer is entitled to book up to nine additional weeks at Hotels within the two year period at a heavily discounted price for each of the nine weeks. The hotels in question are outside New York. Petitioner states that, while it subcontracts the travel reservations and related responsibilities to Company B, as discussed below, Petitioner remains liable under its membership purchase agreement with Customers. The Membership Purchase Agreement bars the customer from reselling any benefits under the agreement.

Company B is a Hotel distribution company that has access to numerous Hotels throughout the United States and is not affiliated with Petitioner. Petitioner pays \$1,850 for each agreement to Company B in exchange for Company B assuming all of the responsibilities in connection with the acceptance and maintenance of reservations, cancellations, customer complaints, and all other services related to the travel club. Petitioner is not a party to and has no liability in connection with the contracts Company B enters into with hotels and cruise lines to fulfill its duties under its contract with Petitioner. Similarly, while Petitioner sub-contracts the travel reservations and related responsibilities to Company B, Petitioner remains legally liable

under the original Customer Contract for those services. Of the \$1,850, Petitioner and Company B have agreed that \$350 is attributable to 50% of the cost of the Cruise (with Company B incurring the other \$350). As part of the parties' agreement, Company B agrees to have an exclusive relationship with Petitioner. This exclusive relationship is necessary to ensure that Hotel rooms will always be available to Customers.

After enrolling in the travel program, a Customer books all reservations with Company B. Specifically, a Customer will either call Company B (or access Company B's internet platform) to reserve the Cruise, the three one-week vacations and the nine additional weeks at Hotels. The Customer provides all payments for the nine weeks of Hotel reservations directly to Company B.

Analysis

The sales tax on the rent from a hotel room occupancy in Tax Law § 1105(e)(1) applies only where the occupancy occurs in New York. Whether the occupant is a New York resident is not relevant. Here, the facts indicate that a membership sold by Petitioner entitles a member to a week-long cruise, three weeks of hotel stays, and the right to purchase at a discount nine additional weeks of hotel stays. As described herein, the Cruise provided to members is not subject to sales and use tax (*see* TSB-A-98[46]S). None of the hotel stays would occur in New York. Accordingly, Petitioner's sales of memberships as described herein are not subject to sales and use tax.

Petitioner's membership fees are also not dues of a social or athletic club, and thus, are not taxable under section 1105(f)(2), because Petitioner's members do not possess any proprietary interest in Petitioner, control any social or athletic activities, or participate in the selection of members or club management (*see* 20 NYCRR § 527.11[b][5]; TSB-A-08[12]S).

DATED: September 9, 2013

/S/

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Deputy Counsel

NOTE: An Advisory Opinion is issued at the request of a person or entity. It is limited to the facts set forth therein and is binding on the Department only with respect to the person or entity to whom it is issued and only if the person or entity fully and accurately describes all relevant facts. An Advisory Opinion is based on the law, regulations, and Department policies in effect as of the date the Opinion is issued or for the specific time period at issue in the Opinion. The information provided in this document does not cover every situation and is not intended to replace the law or change its meaning.