

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

TSB-A-83(38)S
Sales Tax
September 16, 1983

STATE OF NEW YORK
STATE TAX COMMISSION

ADVISORY OPINION

PETITION NO. S830411A

On April 11, 1983 a Petition for Advisory Opinion was received from Unique Racquetball and Health Clubs, Inc., 55 Jericho Turnpike, Jericho, New York 11753.

The issues raised by Petitioner are:

1. Whether Petitioner is a "club or organization" as defined in Section 527.11(b)(5) of the New York State Sales and Use Tax Regulations;
2. Whether Petitioner is or was required to collect New York State sales tax on membership fees under Sections 527.10 and 527.11 of such Regulations, or under any provision of the Tax Law;
3. Whether collections of sales tax (which have been held in escrow by Petitioner) from current and former members may, in lieu of being refunded to such members, be allowed as a credit toward the cost of court playing time or future membership fees; and
4. Whether charges for court playing time and fees for non-members are subject to sales tax under Section 527.10(d)(4) of such Regulations.

Petitioner is a privately held corporation which owns and operates four racquetball clubs, with locations in Nassau and Suffolk Counties. Petitioner generally charges its members an annual membership fee of approximately \$60.00. Petitioner has collected sales tax on membership fees since the inception of Petitioner's business in 1979, and such funds are presently held in an escrow account.

Membership in Petitioner's club entitles the individual to reserve court playing time and to use the club's exercise equipment and other recreational equipment. Membership is open to all and is on a first-come, first-served basis. Members may also participate in racquetball leagues, tournaments and exercise classes. A non-member can obtain entry into the club and enjoy the same privileges as a member. However, there is imposed upon such non-member a \$4.00 guest fee which can later be credited towards membership.

Court playing time for members and non-members is available on a first-come, first-served basis. Members can reserve court playing time one week in advance. Court playing time for any individual is restricted only by the physical capacity of the club's facilities.

League and tournaments may be established by members and non-members, participants in leagues or tournaments purchasing "blocks" of court playing time. Such leagues and tournaments are operated at the sole discretion of the club. Thus, club management establishes rules for the

leagues and tournaments, retains authority to cancel leagues and tournaments established by members, and has sole discretion as to matching contestants and judging the outcome of the tournaments.

Members have neither a proprietary interest in the club nor do they participate in the selection of members or management of the club. Management is not obligated to accept opinions or suggestions of members regarding club policies.

Petitioner contends that it is not a club or organization because the membership does not control athletic activities, tournaments or social activities of the club, does not participate in the selection of members, management, or committees of the club, and does not possess a proprietary interest in the organization.

Petitioner contends, finally, that the membership dues which were erroneously collected since the club's inception, and which are currently held in an escrow account, should be returned in the form of a credit towards the cost of court playing time or future membership fees.

Section 1105(f) of the Tax Law imposes taxes on:

"(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 to a patron for admission to, or use of, facilities for sporting activities in which such patron is to be a participant

(2) The dues paid to any social or athletic club in this state if the dues of an active annual member, exclusive of the initiation fee, are in excess of ten dollars per year "

Section 1101(d)(13) of the Tax Law defines the term "social or athletic club" to mean "Any club or organization of which a material purpose or activity is social or athletic."

Section 527.11(b)(5) of the Sales and Use Tax Regulations provides, in relevant part, as follows:

(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-serve 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.

Inasmuch as the membership has no proprietary interest in the club, and does not control the management of the club, membership selection, or tournaments or other social or athletic activities at the club, Petitioner is not a "social or athletic club" within the meaning of section 1105(f)(2) of the Tax Law. The dues paid to Petitioner are accordingly not subject to tax under such provision. Nor are they be subject to tax under section 1105(f)(1), because of that provision's exclusion of charges for participant sports activities. Such exclusion would also apply to the fees paid by non-members.

Section 1137 of the Tax Law requires that registered vendors, into which category Petitioner falls, pay to the State Tax Commission, inter alia, "all moneys collected by such person, purportedly as tax imposed by this article with respect to any receipt, amusement charge . . . not subject to tax"

Accordingly, any money collected by Petitioner purportedly as sales tax should have been remitted to the State Tax Commission at the time of filing of Petitioner's sales and use tax returns. They should be so remitted at the present time. Claims for refund may be filed by the individuals who paid the tax. Petitioner's suggested method of returning the erroneously collected tax money by granting a credit against playing time or future membership fees is not consistent with the applicable statutory provisions.

DATED: August 30, 1983

s/FRANK J. PUCCIA
Director
Technical Services Bureau