

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

TSB-A-98-(7)S
Sales Tax

STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO. S950307A

On March 7, 1995, a Petition for Advisory Opinion was received from Spectacor Management Group, 51 South Pearl Street, Albany, New York 12205.

The issue raised by Petitioner, Spectacor Management Group, is whether certain charges for a private enclosed suite at the Albany County Civic Center are subject to the tax on admissions imposed under section 1105(f)(1) of the Tax Law.

Petitioner submits the following statement of facts.

The Albany County Civic Center ("the Civic Center") has hosted athletic, musical and dramatic events, circuses, ice shows, trade shows and high school and college graduations. Petitioner manages the Civic Center for Albany County ("the County") pursuant to a management contract. Seating in the Civic Center includes private enclosed suites. The County and Petitioner have entered into agreements with individuals, corporations and other entities for the lease of private enclosed suites and for advertising services. Suiteholders were offered three different options for acquiring the lease and advertising services, "Agreement A," "Agreement B" and "Agreement C".

Agreement A. Agreement A was for a period of five years, commencing on September 1, 1989 and ending on August 31, 1994. Agreement A provided that the suiteholder pay to the County \$20,000 annually during the term of the Agreement for the rental of a specific suite. A suiteholder was entitled to the sole and exclusive use of the Suite during all events held in the Civic Center. No other person or entity was permitted to use the suite for any purpose at any time during the term of Agreement A without the suiteholder's consent. Upon expiration of the term, the suiteholder had no right or interest in the suite.

During the term of Agreement A, a suiteholder received sixteen (16) tickets and four (4) reserved parking places in the adjoining parking garage for:

1. All regular season and playoff games of the Albany Patroons played at the Civic Center;
2. All regular season games played by another professional sports franchise at the Civic Center if such franchise were secured as a tenant;
3. Twenty (20) other events which were chosen by the suiteholder. If another sports franchise were not secured, a credit equivalent to the value of the sport franchise's tickets was provided to the suiteholder and could be used toward the purchase of other special event tickets.

A suiteholder also had the right of first refusal to purchase at comparable prices suite tickets for all other events and sports playoffs. A "comparable" price ticket was defined in Agreement A as the equivalent of the ticket price for seats directly in front of the suite for the particular event in question.

Agreement A also provided that a suite holder pay to the County during the five-year term \$30,000 annually for "advertising within the Civic Center." Advertising consisted of the following:

1. A 3 foot by 3 foot illuminated diorama with the Suiteholder's name and logo prominently displayed in the Civic Center. The County reserved the right to approve a diorama for form and style and to select a location.

2. A commemorative plaque containing the suiteholder's name located at the main entrance.

3. Listing of suiteholders in all operator-prepared event programs except when in conflict with the sponsored event.

4. Recognition of the suiteholder during all events on an electronic message board which is part of a centrally located scoreboard.

5. Preference on other advertising packages in the Civic Center.

Agreement B. Agreement B was for a term of three years, commencing on September 1, 1992 and ending on August 31, 1995. Agreement B provides that the suiteholder pay to the County \$16,000 annually during the term of the Agreement for the rental of a specific suite. A suiteholder is entitled to the sole and exclusive use of the suite during all events held in the Civic Center.

A suiteholder received (16) tickets and four (4) parking places in the adjoining parking garage for each event held at the Civic Center.

Agreement B also provides that a suiteholder pay to the County during the three-year term \$24,000 annually "for advertising within the Civic Center." Advertising consisted of the following:

1. A 3 foot by 3 foot illuminated diorama with the suiteholder's name and logo prominently displayed in the Civic Center. The County reserved the right to approve a diorama for form and style and to select a location.

2. A commemorative plaque containing the suiteholder's name located at the main entrance.

3. Listing of suiteholders in all operated-prepared event programs except when in conflict with the sponsored event.

4. Recognition of the suiteholder during all events on an electronic message board which is part of a centrally located scoreboard.

5. Preference on other advertising packages in the Civic Center.

Agreement C. Agreement C was for a term of three years, commencing on September 1, 1992 and ending on August 31, 1995. Agreement C provides that the suiteholder pay to the County during the three-year term \$10,000 annually for the rental of a specific suite. A suiteholder is entitled to the sole and exclusive

use of the suite during any event for which the suiteholder purchases at least one ticket. A suiteholder or a guest of a suiteholder is not entitled to use of the suite unless a ticket is purchased. The price of such tickets is the price set for the seats in the row directly in front of the suite.

The County retained the right to sublease the suite to another person or entity for any event where the suiteholder fails to purchase at least one event ticket 48 hours in advance of the event, without obtaining the consent of the suiteholder.

Agreement C also provides that a suiteholder pay to the County during the three-year term \$15,000 annually "for advertising within the Civic Center." Advertising consisted of the following:

1. A 3 foot by 3 foot illuminated diorama with the suiteholder's name and logo prominently displayed in the Civic Center. The County reserved the right to approve a diorama for form and style and to select a location.

2. A commemorative plaque containing the suiteholder's name located at the main entrance.

3. Listing of suiteholders in all operator-prepared event programs except when in conflict with the sponsored event.

4. Recognition of the suiteholder during all events on an electronic message board which is part of a centrally located scoreboard.

5. Preference on other advertising packages in the Civic Center.

Many of the advertising services provided for in the Agreements were available to non-suiteholders. In addition, advertising via the electronic scoreboard was sold to non-suiteholders, usually as part of an advertising packaging that consisted of dioramas, signs and scoreboard messages. Advertising in the Knickerbocker Arena Magazine also was sold to non-suiteholders.

Section 3.03(C) of the management contract between Petitioner and Albany County provides that Petitioner "Negotiate licenses, sublicenses, use agreements, bookings, and advertising agreements for the said Facility. Such licenses, use agreements, bookings, advertising agreements and any other agreements pertaining to the use, operation and occupancy of the Facility will be executed by Spectacor Management in its own name. . . ." (Emphasis supplied)

The license agreement for the use of the Civic Center is entered into by Petitioner and the licensee, not Albany County. Section 14 of the agreement provides in part,

14. Licensee acknowledges that [sic] importance of a prompt and accurate accounting of gross ticket sales for purposes of allocating funds to Licensor, Licensee and others at the settlement for any events to be produced hereunder. Licensee also acknowledges that errors in ticketing may cause significant disruptions of any such event(s) and expose the parties to potential liability. Licensee

agrees that to enhance ticket sales for each event covered by this license, the manner of distribution and sale of tickets must be controlled. For the foregoing reason, this license does not grant or convey any right or privilege to distribute or sell tickets to any event in the Arena and/or Exhibition Hall, which right shall remain solely that of Licensor except as expressly herein set forth. To these ends, Licensor and Licensee agree as follows:

(a) Licensor shall act as the custodial of all revenues for the sale of tickets and shall not release such monies to Licensee until time of settlement, at which time Licensor shall provide Licensee with all monies due it, if any, after deduction of rent and expenses.

(b) Admission to events shall be by ticket only. All tickets shall be priced at prices mutually agreed upon from time to time between the parties. Licensor shall retain, for its own use, complimentary tickets in the highest price category numbering one (1%) percent of the total available tickets for sale.

* * *

Applicable Law and Regulations

Section 1101(d)(2) of the Tax Law defines the term admission charge as "The amount paid for admission, including any service charge and any charge for entertainment or amusement or for the use of facilities therefor."

Section 1105(f)(1) of the Tax Law imposes a tax upon :

Any admission charge where such admission charge is in excess of ten cents to or for the use of any place of amusement in this state, except charges for admission to race tracks, boxing, sparing or wrestling matches or exhibitions which charges are taxed under any other law of this state, or dramatic or musical arts 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 a similar box or seat is sold for each performance or exhibition at which the box or seat is used or reserved by the holder, licensee or lessee, and shall be paid by the holder, licensee or lessee. (Emphasis supplied)

Sections 527.10(b)(3) and (4) of the Sales and Use Tax Regulations provide the following definitions:

(3) *Place of amusement.* Any place where any facilities for entertainment, amusement, or sports are provided. Such places include without limitation (i) a theater of any kind, concert hall,

opera house, or other place where a performance is given; (ii) fairground or exhibition hall or grounds, (iii) golf course, athletic field, sporting, gymnasium, bowling alley, shooting gallery, swimming pool, bathing beach, skating rink, tennis court, handball court, billiard hall or other place for athletic exhibits;

* * *

(4) The following definitions apply to all taxes imposed under subdivision (f) of section 1105 of the Tax Law, the regulations for which appear in this Part, and in sections 527.11 and 527.12 of this Part.

(i) *Amusement charge.* Any admission charge, dues or charge of a roof garden, cabaret or other similar place.

(ii) *Patron.* Any person who pays an amusement charge or who is admitted without payment and who is required to pay the tax imposed under subdivision (f) of section 1105 of the Tax Law.

(iii) *Lessor.* Any person who is the owner, licensee, or lessee of any place of amusement which he leases, subleases or grants a license to use to other persons who make amusement charges or admission charges.

(iv) *Recipient.* Any person who collects or receives or is under a duty to collect an amusement charge.

Section 527.10(c)(2) of the Sales and Use Tax Regulations provides:

The tax imposed with respect to the permanent use or possession of a box or seat or a lease or a license other than a season ticket, of a box or seat is computed on the amount for which a similar box or seat is sold for each performance or exhibition at which the box or seat is used or reserved for an event which is subject to tax.

Opinion

The Civic Center is a place of amusement as defined in section 1101 of the Tax Law, "[A]ny place where facilities for entertainment, amusement, or sports are provided." The Civic Center is used by professional sports teams, entertainers of all kinds, circuses, home shows, and for a variety of other uses.

Section 1105(f)(1) of the Tax Law imposes tax on admissions "[f]or any person having the permanent use of a box or seat or a lease or a license, . . . for the use of a box or seat at a place of amusement. . . ." Section 527.10(c)(2) of the Sales and Use Tax Regulations provides that the tax imposed with respect to the permanent use or possession of a box or seat or a lease or a license other than a season ticket, of a box or seat is computed on the amount for which a similar box or seat is sold for each performance or exhibition at which the box or seat is used or reserved for an event which is subject to tax.

The sales tax on admissions was derived from the Federal Tax on admissions imposed pursuant to the Internal Revenue Code of 1938 and 1954. The Federal regulations relating to the Federal tax on admission charges to a place of amusement disregarded the amounts paid for the lease of boxes or seats and interpreted the measure of tax to be based on the amount for which a similar box or seat is sold for each performance or exhibition at which the box or seat is used or reserved or could be used by or for the lessee or holder. The tax was not on those amounts actually paid for a particular box or seat. It was based on the amount that would be paid at the established price for a comparable seat, for admission to all performances given (whether or not the lessee purchased tickets to attend). In addition, the 1955 Federal regulations provided that in the case where there is no comparable box for which single occasion admission charges were sold, the tax was to be computed by determining the amount for which a single box seat, similar to the "leased" box, located in the same part of the place of amusement is sold. If there were no similarly located boxes, the tax was to be computed by determining the amount the nearest single seat in the same part of the place of amusement is sold.

The Management Contract between the County and Petitioner provides that Petitioner and not the County controls the use of the facility. Section 3.03 of this contract provides that, "Such licenses, use agreements, bookings, advertising agreements and any other agreements pertaining to the use, operation and occupancy of the Facility will be executed by Spectacor Management in its own name." Petitioner's typical contract with entertainers, etc. provides that, "Licensor [Petitioner] shall act as the custodial of all revenues for the sale of tickets. . ."

The tax is not based upon the lease arrangements, to which the County of Albany is a party, but upon the admissions to taxable events where the seats are used or reserved. Petitioner is responsible for the event admissions. Petitioner is the recipient of amusement charges at the Civic Center and it is required to collect sales tax on taxable admissions there, including the tax to be collected on the use of the suites. The sales tax is not due until the box or seat is "used or reserved." Where the agreement to lease a box or seat includes taxable admissions which are reserved by the lessee at the inception of the lease the tax is due at such time. However, where the taxable admissions are unknown at the inception of the lease, the sales tax is not due until the time that the lessee reserves or uses the box or seat for particular events. The amount subject to tax for each event, may be calculated by multiplying the price of the nearest single seat in the same part of the arena by the number of seats in the suite being used or reserved.

Agreements A and B were for a right to use a corporate suite and to receive certain advertising services. No taxable use of any property occurs under these contracts except under certain circumstances (when the box or seat is used or reserved for a taxable event). Thus, suite rentals under Agreements A and B are

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subject to sales tax based upon the admission charges to certain taxable events for which the suites are used or reserved, as described above. Since advertising is excluded from the sales tax imposed under section 1105 (c)(1) of the Tax Law, payments for advertising services under these agreements are not subject to sales tax.

Suite rentals under Agreement C are not subject to sales tax. Under Agreement C, a suiteholder is not entitled to use a suite for a particular event unless it purchases a ticket. The price of these tickets is the price set for the seats in the row directly in front of the rented suite. Sales tax is due on suiteholders' purchase of tickets to those events which are subject to the Section 1105(f)(1) tax on admissions. Payments for advertising services under Agreement C are not subject to sales tax.

DATED: February 25, 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.