

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

TSB-A-05(9)S
Sales Tax
April 1, 2005

STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO.S030829A

On August 29, 2003, the Department of Taxation and Finance received a Petition for Advisory Opinion from The Core Club 55th Street LLC, 60 East 55th Street, New York, NY 10022. Petitioner, The Core Club 55th Street LLC, provided additional information pertaining to the Petition on November 20, 2003, January 5, 2004, and July 14, 2004.

The issues raised by Petitioner are:

- (1) Whether a loan to Petitioner's club by the founding members, secured by a five-year note payable with interest, is subject to New York State and local sales taxes.
- (2) Whether the refundable deposit paid by the founding members to join Petitioner's club is subject to New York State and local sales taxes.
- (3) Whether membership dues charged by Petitioner for use of its facility are subject to New York State and local sales taxes.
- (4) Whether amounts forfeited by members due to spending below a minimum expenditure for use of the facility's services and products are subject to New York State and local sales taxes.

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

Petitioner is proposing to open a health and fitness club in New York City. Petitioner will offer a variety of sport and fitness activities to Petitioner's members. Petitioner will provide the following activities: spinning (cycling), rowing, yoga, Pilates and martial arts. In addition, Petitioner will offer off-site golf, tennis, racquetball and equestrian activities. Petitioner will also offer traditional training facilities such as weightlifting equipment, aerobics, treadmills, life cycles, Nautilus machines, saunas and steam rooms along with personal training, nutritional counseling and spa services.

Petitioner will offer two levels of membership. Founding memberships will be offered for individuals who wish to lend Petitioner an amount of money secured by a five-year note payable with interest. Those members will have their dues waived for the period of the note. Petitioner states that the founding members will be required to recognize the amount of such waived dues as income. General memberships will be offered to individuals who will be charged a refundable deposit and monthly membership dues. The deposit will be refunded at the earlier of leaving the club or 30 years, and will not pay interest. The founding members, upon receiving full repayment of the notes, will not be required to pay a refundable deposit, but will be required to pay monthly membership dues.

Petitioner will operate a restaurant on the premises. Members will incur additional charges for the restaurant services. Petitioner will offer massage services, spa and beauty salon services, including pedicures and manicures, and salon products to members for an additional charge. A portion of members' dues will be allocated to a minimum expenditure level for use of the facility's services and products, (i.e., the massage services, restaurant services, salon services, and salon products). Founding members will have a similar minimum expenditure allocation for the facility's services and products, which will also be waived for the period of the note. Petitioner states that the founding members will be required to recognize the amount of such minimum expenditure allocation as income. Expenditures for salon services and products, massage services or restaurant service or any combination will be credited against the minimum expenditure level. The amount invoiced for services and products will include the applicable sales tax and the full amount of the invoice will be applied to meet the minimum expenditure amount. If a member uses services beyond the minimum expenditure required, the member will be separately billed for those additional services and products. If a member's use of services is below the allocated amount, the remaining balance is forfeited.

Petitioner's members will not control any social or athletic activities, nor will Petitioner's members participate in the selection of members or management of the facility. The members will not possess any proprietary interest in Petitioner. The number of members will be restricted solely because of the physical size of the facility.

Applicable law and regulations

Section 1101(d) of the Tax Law provides, in part:

When used in this article for purposes of the tax imposed under subdivision (f) of section eleven hundred five, the following terms shall mean:

* * *

(6) Dues. Any dues or membership fee including any assessment, irrespective of the purpose for which made, and any charges for social or sports privileges or facilities, except charges for sports privileges or facilities offered to members' guests which would otherwise be exempt if paid directly by such guests.

(7) Initiation fee. Any payment, contribution, or loan, required as a condition precedent to membership, whether or not such payment, contribution or loan is evidenced by a certificate of interest or indebtedness or share of stock, and irrespective of the person or organization to whom paid, contributed or loaned.

* * *

(13) Social or athletic club. Any club or organization of which a material purpose or activity is social or athletic.

Section 1105 of the Tax Law provides, in part:

Imposition of sales tax

On and after June first, nineteen hundred seventy-one, there is hereby imposed and there shall be paid a tax . . . upon:

(a) The receipts from every retail sale of tangible personal property, except as otherwise provided in this article.

* * *

(d)(i) The receipts from every sale of beer, wine or other alcoholic beverages or any other drink of any nature, or from every sale of food and drink of any nature or of food alone, when sold in or by restaurants, taverns or other establishments in this state, or by caterers, including in the amount of such receipts any cover, minimum, entertainment or other charge made to patrons or customers (except those receipts taxed pursuant to subdivision (f) of this section):

(1) in all instances where the sale is for consumption on the premises where sold;

* * *

(f)(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 1105(c) of the Tax Law imposes tax upon the receipts from every sale, except for resale, of certain enumerated services.

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 of this part, there is hereby imposed on such date, within the territorial limits of such city, and there shall be paid, additional taxes . . . which except as provided in subdivision (b) of this section, shall be identical to the taxes imposed by sections eleven hundred five and eleven hundred ten of this part. 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 1115(a) of the Tax Law provides, in part:

Receipts from the following shall be exempt from the tax on retail sales imposed under subdivision (a) of section eleven hundred five and the compensating use tax imposed under section eleven hundred ten:

(1) Food, food products, beverages, dietary foods and health supplements, sold for human consumption but not including (i) candy and confectionery, (ii) fruit drinks which contain less than seventy percent of natural fruit juice, (iii) soft drinks, sodas and beverages such as are ordinarily dispensed at soda fountains or in connection therewith (other than coffee, tea and cocoa) and (iv) beer, wine or other alcoholic beverages, all of which shall be subject to the retail sales and compensating use taxes, whether or not the item is sold in liquid form. The food and drink excluded from the exemption provided by this paragraph under subparagraphs (i), (ii) and (iii) of this paragraph shall be exempt under this paragraph when sold for seventy-five cents or less through any vending machine activated by the use of coin, currency, credit card or debit card. With the exception of the provision in this paragraph providing for an exemption for certain food or drink sold for seventy-five cents or less through vending machines, nothing herein shall be construed as exempting food or drink from the tax imposed under subdivision (d) of section eleven hundred five.

Section 1212-A(a)(2) of the Tax Law authorizes the City of New York to impose a local sales tax at the same uniform rate 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. . . but excluding services rendered by a physician, osteopath, dentist, nurse, physiotherapist, chiropractor, podiatrist, optometrist, ophthalmic dispenser or a person performing similar services licensed under title VIII of the education law. . .;" 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 on:

Receipts from 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, whether or not any tangible personal property is transferred in conjunction therewith; but excluding services rendered by a physician, osteopath, dentist, nurse, physiotherapist, chiropractor, podiatrist, optometrist, ophthalmic dispenser or a person performing similar services licensed under title VIII of the education law, as amended, and excluding such services when performed on pets and other animals.

Section 527.11(b) of the Sales and Use Tax Regulations provides, in part, the following definitions of 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 . . . 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 members do not control any social or athletic activities, do not participate in the 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 and its charges are not subject to tax as dues paid to an athletic club under section 1105(f)(2) of the Tax Law.

Petitioner's charges to its patrons entitle them to use facilities for activities which are dedicated to improving their physical well-being and overall fitness. Thus, the fees paid by the members for the use of Petitioner's facilities do not constitute admissions to a place of amusement. Petitioner's membership fees for use of the facility are not subject to the tax on admission charges under section 1105(f)(1) of the Tax Law.

It follows, therefore, that Petitioner's charges to its members for founding memberships, including the amount loaned as well as any monthly charges, and general memberships including the refundable deposit and monthly charges, are not subject to tax as admissions under section 1105(f)(1) of the Tax Law and are not subject to tax as dues under section 1105(f)(2) of the Tax Law.

Since a membership in Petitioner makes available a variety of sporting activities through use of off-site facilities (i.e., golf, tennis and racquetball) to its members, Petitioner is not a weight control salon, gymnasium or other establishment as described in section 11-2002(h) of the Administrative Code of the City of New York. Petitioner's charges to its members for monthly membership dues, founding member loans and general membership refundable deposits, therefore, are not for services provided by, or use of facilities in, weight control salons, gymnasiums or other establishments described in such section 11-2002(h) and are thus not subject to the tax imposed in New York City upon such entities and their services. See *New York Health and Racquet Club*, Adv Op Comm T & F, May 19, 1999, TSB-A-99(26)S; *Matter of Prospect Park Health and Racquet Associates and Peter J. Sferrazza and George Hart, as Partners*, Dec Tax App Trib, July 22, 1997, DTA No. 811196.

A portion of Petitioner's members' dues are allocated to a minimum expenditure level for use of the facility's salon and massage services, restaurant services and the purchase of salon products. Beauty, barbering, hair restoring, manicuring, pedicuring, electrolysis, and massage services are not included within the services taxed under section 1105(c) of the Tax Law.

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Beauty, barbering, hair restoring, manicuring, pedicuring, electrolysis, massage services and similar services are subject to the New York City sales tax provided for in section 1212-A of the Tax Law and section 11-2002(h) of the New York City Administrative Code. Therefore, Petitioner's charges to its members for these services are subject to the New York City sales tax. It should be noted, however, that where massage services are provided by a physiotherapist, chiropractor, podiatrist, osteopath, or any person authorized to practice medicine, licensed under Title VIII of the Education Law, the charges for such services are excluded from New York City sales tax when the services are medical in nature and are like the services usually provided by the professionals enumerated in section 1212-A of the Tax Law and section 11-2002(h) of the Administrative Code. See *Manhattan Athletic Club*, Adv Op Comm T&F, July 26, 2002, TSB-A-02(43)S.

Section 1105(d)(i) of the Tax Law imposes a sales tax on the receipts from:

every sale of beer, wine or other alcoholic beverages or any other drink of any nature, or from the sale of food and drink of any nature or of food alone, when sold in or by restaurants, taverns or other establishments in this state, or by caterers, *including* in the amount of such receipts any *cover, minimum*, entertainment or other charge made to patrons or customers. . . .

(1) in all instances where the sale is for consumption on the premises where sold.
(Emphasis added)

Petitioner's charges to its members for sales by its restaurant of food and drink, therefore, are subject to State and local sales taxes.

Petitioner's sales of vitamins and health supplements for off-premises consumption will not be subject to tax under section 1105(d) of the Tax Law. Such sales will qualify for exemption from the sales tax imposed by section 1105(a) of the Tax Law, pursuant to section 1115(a)(1).

Petitioner's retail sales of salon products are subject to State and local sales taxes under section 1105(a) of the Tax Law.

When tangible personal property composed of taxable and exempt items is sold as a single unit, the tax is collected on the total price. See section 527.1(b) of the Sales and Use Tax Regulations. The rule has been extended to sales of taxable and exempt services and sales of services with tangible personal property. See *PricewaterhouseCoopers LLP*, Adv Op Comm T&F, March 25, 2003, TSB-A-03(11)S; *Salomon & Leitgeb CPA's, LLP*, Adv Op Comm T&F, July 23, 1997, TSB-A-97(44)S. This rule will apply unless the charges for the taxable and exempt services or tangible personal property are separately stated and reasonable on the member's statement. Since the amount of members' dues allocated to a minimum expenditure level for use of the facility's services and purchase of products can be used to purchase taxable property or services, and the charge for such minimum expenditure does not appear to separately

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state charges for taxable and nontaxable items, the amount of members' dues allocated to a minimum expenditure level is subject to State and local sales tax at the applicable rate in New York City (currently 8 $\frac{5}{8}$ %). See *Costco Wholesale Corporation*, Adv Op Comm T&F, September 17, 1992, TSB-A-92(66)S; *Tan Tara Country Club, Inc.*, Adv Op Comm T&F, June 4, 1984, TSB-A-84(19)S; *Brierwood Village, Inc.*, Adv Op Comm T&F, February 13, 1989, TSB-A-89(6)S.

In the present case, Petitioner and the founding members entered into a transaction where the founding members' dues and minimum expenditure levels were waived in exchange for what was presumably a lower interest rate on the note. This arrangement yields the same result as if (1) Petitioner paid each founding member additional interest on his or her loan, which is consistent with Petitioner's statement that founding members are required to include this amount in income for federal income tax purposes; (2) each founding member paid the dues; and (3) Petitioner and each founding member offset the amounts due each other. Therefore, Petitioner must collect State and local taxes at the applicable rate in New York City (currently 8 $\frac{5}{8}$ %) from each founding member on the value of the minimum expenditure level which is waived.

The amount of the membership dues which are allocated for minimum expenditures for use of the facility's services and purchase of products are subject to State and local sales taxes at the time the dues are collected or in the case of the founding members at the time the dues which were waived would have been payable.

Accordingly, the loans, refundable deposits and membership dues (other than amounts allocated for minimum expenditures for use of the facility's services and purchase of products and forfeited upon failure to spend such minimum), are not subject to any of the taxes imposed under section 1105 or 1107 of the Tax Law or section 11-2002(h) of the New York City Administrative Code. Petitioner's receipts for massage and salon services are subject to the New York City sales tax provided for in section 1212-A of the Tax Law and section 11-2002(h) of the New York City Administrative Code if the massage services are not medical in nature as discussed above. Petitioner's receipts for salon products, restaurant charges and any portion of the minimum expenditure amount forfeited are subject to sales tax at the combined State and local (New York City) rate.

DATED: April 1, 2005

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