

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

TSB-A-13(7)S
Sales Tax
February 25, 2013

STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO. S120103B

On January 3, 2012 the Department of Taxation and Finance received a Petition for Advisory Opinion from [REDACTED]. Petitioner asks whether she is required to collect sales tax in any of the circumstances listed in the petition where she renders services as a professional trapeze artist. We conclude that the Petitioner is required to collect sales tax only when she performs directly for the public and charges an admission.

Facts

Petitioner states that she is a trapeze artist who performs aerial skills under the following circumstances:

1. When hired as an independent contractor by dance schools or not-for-profit organizations to “instruct beginning and intermediate aerial skills.”
2. When hired to perform at functions by event planners that are themselves hired by individuals or companies to plan functions, such as parties and conventions.
3. When hired to perform aerial skills directly by people hosting private parties.
4. When hired by aerial groups as a subcontractor performer.
5. When hired by other aerial groups who charge admissions to perform for the public.
6. When the Petitioner performs directly for the public and charges an admission.

Analysis

Section 1105 of the Tax Law imposes sales tax on receipts from certain enumerated services (Tax Law §1105(c)). The services provided by the Petitioner as described in paragraphs one through five above are not among the taxable services enumerated in §1105(c) of the Tax Law. Therefore Petitioner is not required to collect sales tax for the payment she receives for providing these services.

The remaining issue is whether the Petitioner is required to collect sales tax when she collects an admission charge from members of the general public who come to see her perform aerial skills as described in paragraph six above.

Section 1105(f)(1) of the Tax Law imposes sales tax on “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 for admission to race tracks, boxing, sparring or wrestling matches or exhibitions which charges are taxed under any other law of this state, or dramatic or musical arts performances, or live circus 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.” Section 1101(d)(2) of the Tax Law defines “admission charge” as the amount paid for admission, including any service charge and any charge for entertainment or amusement or for the use of the facilities therefore. Section 1101(d)(10) defines “place of amusement” as any place where any facilities for entertainment, amusement, or sports are provided.

Section 1101(d)(5) defines “dramatic or musical arts admission charge” as any admission charge paid for admission to a theatre, opera house, concert hall or other hall or place of assembly for a live dramatic, choreographic or musical performance. Tax regulation §527.10(d)(2) provides that live dramatic and musical arts performances do not include variety shows, magic shows, circuses, animal acts, ice shows, aquatic shows and similar performances. A circus is a unique form of entertainment with multiple acts consisting primarily of feats of physical skill, strength and daring, interspersed with clowns for comic relief and sometimes trained animals. *Ringling Bros. and Barnum & Bailey Combined Shows, Inc. v. New York State Tax Commission and The City of New York*, 1978 WL 25633 at *3 (N.Y. Sup.); *aff’d*, 1980 WL 102278 (N.Y.A.D. 1 Dept.); TSB-A-98(1)S .

All amusement charges of any type mentioned in subdivision (f) of section 1105 of the Tax Law shall be presumed to be subject to tax until the contrary is established. The burden of proving that any amusement charge is not taxable shall be upon the person required to collect the tax (Tax Law §1132(c)(1)). We conclude, based upon the facts provided, that the aerial performances for which the Petitioner charges the admission described in paragraph six above do not constitute either a live dramatic and musical arts performance or a circus and clearly do not fall within the remaining exception set forth in Section 1105(f)(1) of the Tax Law. Rather, it appears that her trapeze act is similar in nature to the other acts described in Section 527.10(d)(2) of the Sales and Use Tax Regulations. Accordingly, if Petitioner charges admission exceeding ten cents to attend her aerial performances, those charges are subject to sales tax under Section 1105(f)(1) of the Tax Law.

DATED: February 25, 2013

/S/

DEBORAH R. LIEBMAN
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.