

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

TSB-A-15(35)S
Sales Tax
March 23, 2015

STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION PETITION NO. S140407A

The Department of Taxation and Finance received a Petition for Advisory Opinion from [REDACTED], whose principal place of business is located at [REDACTED] (Petitioner). Petitioner asks whether membership fees for unlimited access to its facilities and charges for one-time participation in its facilities within New York City are subject to New York State and/or New York City local sales tax.

We conclude that Petitioner is not subject to New York State and local sales tax under either Tax Law § 1105(f)(1) or § 1105(f)(2), but Petitioner is subject to local sales tax imposed in New York City under New York City Administrative Code § 11-2002(a) because Petitioner's facilities qualify as weight control salons, health salons, or gymnasiums.

Facts

Petitioner is a licensed affiliate of a national company that provides accredited fitness training to individuals across the country. As a part of its affiliation, Petitioner is required to pay annual fees to its national company. Petitioner also provides its members with certified trainers, or coaches, who coach its members in a variety of fitness exercises.

Petitioner currently employs approximately 25 coaches. Its facilities consist of specialized exercise equipment, which includes, but is not limited to, Olympic lifting bars, gymnastic still rings or paralletes, pull-up bars, and other specialized exercise equipment designed for Petitioner's specific training and exercise programs. Petitioner's coaches coordinate approximately 450 training sessions a week at Petitioner's facilities. The number of members who partake in such training sessions is limited based upon the space available in each facility. Examples of Petitioner's training exercises include having members carry heavy objects over certain distances, run obstacle sprints, do pull-ups and partake in other like activities.

In order to train or exercise at Petitioner's facilities, individuals must complete a training course pertaining to Petitioner's specialized exercise techniques. This training consists of six small-group sessions with a coach that take place at Petitioner's facilities. Once the initial training is completed, individuals may pay a monthly or semi-annual fee to become a full-time member of Petitioner's facilities, or an individual may choose to pay a fee each time he or she participates in Petitioner's exercise activities. Members of Petitioner's facilities, however, do not control any activities of the Petitioner, do not partake in the control

or management of the Petitioner, and do not hold any proprietary interest in the Petitioner. Apart from granting members the ability to partake in training and exercise sessions, individual membership fees do not pay for any additional services such as spa treatments. Petitioner also does not sell any tangible personal property, such as workout clothing, at its facilities.

Once an individual is a member of Petitioner's facilities, the individual may partake in a variety of specialized exercises, which range in levels of skill and proficiency in order to tailor to an individual's specific needs. After an individual completes a training session or challenge or at one of Petitioner's facilities, his or her score and/or time is recorded and compared against other individuals who completed the same activity. Some members of Petitioner's facilities also partake in competition-level classes, where participants compete against teams from around the world in different regional competitions.

Analysis

Tax Law § 1105 imposes New York State and local sales tax on numerous enumerated sales, services and other items. *See* Tax Law § 1105. Specifically, Tax Law § 1105(f)(1) imposes a tax on the admission charges into or for the use of places of amusement and entertainment that are in excess of ten cents. However, admission charges to race tracks, boxing, sparring, wrestling matches, dramatic, choreographic or musical arts performances and admission to, or use of, facilities for sporting activities in which the patron is a participant are exempt from the sales tax.

Petitioner is not subject to sales tax under § 1105(f)(1) because Petitioner does not charge its members an admission fee to enter any of its facilities. Rather, Petitioner charges a membership fee in order for its members to use its exercise equipment and to engage in its exercise activities. Because the fee is not specifically for entrance to one of Petitioner's facilities, it is not covered by Tax Law § 1105(f)(i). *See* TSB-M-87(15)S; *See also*, TSB-A-2003(9)S. As a result, Petitioner is not subject to sales tax under § 1105(f)(1).

Secondly, Tax Law § 1105(f)(2) imposes tax on the dues and initiation fees paid to social or athletic clubs when such dues are in excess of ten dollars. The tax is imposed irrespective of the purpose for which the dues and fees are made and may be imposed on charges for social or sports privileges or facilities. 20 NYCRR § 527.11(b)(2). An athletic club is defined as any club or organization that has a material purpose to practice, participate or promote sports or athletics. 20 NYCRR § 527.11(b)(7)(i). Further, an athletic activity does not consist of exercise or calisthenics activities used solely for weight reduction purposes. 20 NYCRR § 527.11(b)(7)(ii). A club or organization is defined as any entity which is composed of persons associated for a common objective or common activities. 20 NYCRR § 527.11(b)(5). Significant factors used to determine whether an entity is a club or an organization for sales tax purposes include whether the organization's members control its organizational structure and whether members have a proprietary interest in the organization. Id.

In this case, Petitioner's members have no say in the Petitioner's organizational structure, and they have no proprietary interest in Petitioner. Thus, Petitioner's facilities are

not social and athletic clubs and the fees charged by Petitioner are not subject to sales tax under Tax Law § 1105(f)(2).

Petitioner, however, is subject to New York City local sales tax under Administrative Code § 11-2002(a), which imposes a sales tax upon the receipt of every sale of services offered by weight control salons, health salons or gymnasiums. In defining what constitutes weight control salons, health salons, or gymnasiums, the Tax Appeals Tribunal has held that a facility with the material purpose of providing exercise activity, calisthenics, and exercise equipment for health and weight reduction purposes is subject to sales tax as a health salon or gymnasium. *See Matter of Prospect Park Health and Racquet Associates*, TSB-D-97(30)S. Thus, a facility will be defined as a weight control salon or a gymnasium if its material purpose is directed at improving one's physical appearance or well-being. *Id.* Conversely, a facility will not be subject to local New York City sales tax if its material purpose is to provide its members with the opportunity to engage in participatory sporting activities. *Id.*

The services offered at Petitioner's facilities consist of a wide variety of exercise activities and exercise equipment. The variety of exercise equipment at Petitioner's facilities include, but is not limited to, gymnastic still rings, pull-up bars, Olympic lifting bars, and other weight lifting equipment. Further, members of Petitioner's facilities take part in a variety of exercise activities, such as running obstacle sprints or lifting and carrying weights over certain distances. The use of such equipment and participation in such activities emphasizes the improvement of one's fitness, appearance, and overall well-being, but does not consist of participatory sporting or athletic activities. *See* 20 NYCRR § 527.11(b)(7)(ii) (stating that an athletic activity does not consist of solely exercising or calisthenics solely for weight reduction purposes).

On Petitioner's website, Petitioner states that it offers its members the ability to participate in a "fitness regime" that aims at forging "a broad, general, and inclusive fitness." Further, Petitioner's offerings have been categorized as being "communal," in the respect that its members motivate and help each other in different types of workout techniques. In other words, its participants do not compete or participate in a sporting activity, but rather, they help each other improve their physical fitness. Petitioner's facilities foster the idea of group exercise and fitness – not competitive sport.

Unlike the facilities in *Prospect Park*, which included an Olympic-sized pool and places to play tennis, racquet ball, and squash, Petitioner's facilities consist solely of exercise equipment. *See Matter of Prospect Park Health and Racquet Associates, supra.* Petitioner's members use its facilities in order to exercise and improve upon their health and bodily appearance. They do not use Petitioner's facilities in order to participate and compete in sporting activities. *See* TSB-A-14(18)S. Even though certain participants at Petitioner's facilities may engage in competitive, athletic based competitions, the material purpose of Petitioner's facilities is to have its members engage in a fitness based regime. *See Matter of Prospect Park Health and Racquet Associates, supra.* Therefore, we conclude that Petitioner's facilities are weight control salons, health salons, or gymnasiums for purposes of New York City Administrative Code § 11- 2002(a).

In conclusion, the fees charged by Petitioner for use of its facilities in New York City are subject to New York City local sales tax under Administrative Code § 11-2002(a), but are not subject to New York State or local sales tax under either Tax Law § 1105(f)(1) or § 1105(f)(2).

DATED: March 23, 2015

/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.