

**New York State Department of Taxation and Finance  
Office of Counsel**

TSB-A-17(16)S  
Sales Tax  
August 2, 2017

STATE OF NEW YORK  
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION      PETITION NO. S150420E

The Department of Taxation and Finance received a Petition for an Advisory Opinion from [REDACTED] (“Petitioner”). Petitioner asks for an opinion regarding the “[a]pplicability of sales tax on independent trainers by a gym.” We conclude that the New York City local sales tax applies to all charges by a gym for the use of its facilities, including such charges made to independent trainers.

**Facts**

Petitioner provides personal training services to clients in New York City. These services are provided by Petitioner at various independently-owned facilities in the City. Petitioner has entered into an “Independent Trainer Agreement” (Agreement) with at least one gym. Pursuant to this Agreement, Petitioner pays in advance for a set amount of time at the facility (i.e., a set number of hours) during which time Petitioner is provided with the “rental use of equipment and space” there. Specifically, the Agreement gives Petitioner access to “shared gym space,” including the use of showers, towels and “basic utilities.” Petitioner, however, is required to provide its own phone service while at the facility, and it is responsible for, among other things, the setting of its own schedule and the billing of its clients. According to Petitioner, the facility does not charge Petitioner’s clients to use the facility while training with Petitioner. However, the facility is collecting New York City local sales tax from Petitioner on the fee that Petitioner pays to the facility pursuant to the Agreement.

Petitioner provides little information about the facility at issue, but the facility’s website indicates that it operates at multiple locations in the City, that it is a personal fitness training studio, and that it has state of the art exercise equipment. In addition, the facility advertises an expertise in weight loss/gain, total body conditioning, rehabilitation, strength and conditioning, flexibility, bone density, posture, blood flow, and advice regarding life style changes to maintain health and wellness. Information obtained from the facility’s website and confirmed by Petitioner reflects that the facility generally provides users with access to exercise equipment, such as weights and cardiovascular machines, and there is no indication that it offers participatory sports or has athletic facilities.

## Analysis

As authorized by Tax Law § 1212-A(a)(2), New York City Administrative Code § 11-2002 (a) provides in relevant part:

There are hereby imposed and there shall be paid sales taxes at the rate of four and one-half percent on receipts from . . . 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 . . . . [Emphasis added.]

Petitioner initially contends that it should not be charged sales tax because “[i]ndependent trainers are not mentioned in [the] NY tax code.” However, whether or not independent trainers are mentioned in the Tax Law is not relevant to whether charges paid by them are subject to sales tax. Rather, the sales tax being collected from Petitioner in this matter is a tax resulting from a charge imposed on it by a facility, the appropriateness of which turns on whether the charge is one for the use of a “weight control salon, health salon, gymnasium . . . [or] similar establishment” for purposes of Tax Law § 1212-A(a)(2) and New York City Administrative Code § 11-2002(a). In this regard, the Tax Appeals Tribunal has determined that such establishments are those that “provide activities directed at the improvement of bodily appearance and not those which offer participatory sports and athletic facilities.” *See Matter of Prospect Park Health and Racquet Associates*, Tax Appeals Tribunal, July 22, 1997; Tax Bulletin, *Health and Fitness Clubs* (TB-ST-329). Some examples of participatory sports are swimming and racquetball. *See, e.g.*, TSB-A-14(18)S.

As noted above, there is nothing to suggest that the facility at issue offers participatory sports or athletic facilities to users. Rather, the facility appears to be one squarely directed “at the improvement of bodily appearance,” which is precisely what the Administrative Code § 11-2002(a) sales tax pertains to. Accordingly, any charges for the use of that facility are properly subject to New York City sales tax.

Petitioner, however, suggests that what it is being charged by the facility is not a charge for the use of that facility, but is rather a charge for the rental of real property. However, Petitioner’s Agreement with the facility does not give it the right to the exclusive use of any specific part of the facility’s space. Rather, it provides Petitioner with the “rental use of equipment and space” on a per hour basis, and the space being “rented” is actually “shared gym space.” The agreement, therefore, simply gives Petitioner the right to use the facility and its equipment for a certain number of hours, and does not convey an interest in real property to Petitioner. *See, e.g.*, 20 NYCRR 527.6(b)(2) (distinguishing between a lease of real property and the provision of a storage service by noting that “under a lease, the tenant contracts for a certain amount of footage in a specific location” [and] the

tenant has unlimited control of access to the space”). Accordingly, the fee the facility is charging Petitioner in this case is for the use of the facility, and it is subject to tax under New York City Administrative Code §11-2002(a).

DATED: August 2, 2017

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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.