STATE OF NEW YORK

TAX APPEALS TRIBUNAL

In the Matter of the Petition	:	
of	:	
FRANK M. GUGLIOTTA D/B/A PARKVIEW LODGE AND UPLAND GAME PRESERVE	:	DECISION DTA NO. 823157
for Revision of a Determination or for Refund of Sales and Use Taxes under Articles 28 and 29 of the Tax Law for the Periods December 1, 2001 through February 28, 2002, December 1, 2004 through February 28, 2005 and December 1, 2005 through February 28, 2006.	:	

Petitioner, Frank M. Gugliotta d/b/a Parkview Lodge and Upland Game Preserve, filed an exception to the determination of the Administrative Law Judge issued on December 30, 2010. Petitioner appeared by Hancock and Estabrook, LLP (Martin L. Fried, Esq., of counsel). The Division of Taxation appeared by Mark Volk, Esq. (Anita K. Luckina, Esq., of counsel).

Petitioner did not file a brief in support of its exception. The Division of Taxation filed a brief in opposition. Petitioner filed a letter brief in lieu of a formal brief in reply.

After reviewing the entire record in this matter, the Tax Appeals Tribunal renders the following decision.

ISSUES

I. Whether charges by a game preserve operator to hunters for game birds to be hunted on the preserve are properly construed as a sale of tangible personal property pursuant to Tax Law § 1105(a) or an admission charge to hunt on the preserve, a participatory sporting activity

specifically excepted from the sales tax on admission charges pursuant to Tax Law § 1105(f)(1).

II. Whether, if deemed a sale of tangible personal property, such sales are exempt from tax under Tax Law § 1115(a)(1) as food sold for human consumption.

III. Whether, if the subject charges are properly taxable, petitioner has established any facts or circumstances warranting the abatement of penalties imposed herein pursuant to Tax Law § 1145(a)(1)(i).

FINDINGS OF FACT

We find the facts as determined by the Administrative Law Judge except for finding of fact "6," of the Administrative Law Judge's determination. The Administrative Law Judge's findings of fact and the modified finding of fact are set forth below.

Petitioner, Frank M. Gugliotta, owns and operates a lodge and game preserve known as Parkview Lodge and Upland Game Preserve. The game preserve, licensed by the New York State Department of Environmental Conservation (DEC), offers, among other activities and services, game bird hunting of pheasant, chukar and quail within its confines.[1]

To participate in a game bird hunt, a hunter must direct the preserve to release birds about an hour before the hunt begins. The hunter then has a period of time (game bird hunts are scheduled for mornings and afternoons) to shoot the released game birds, as well as any other birds remaining on the preserve from a previous hunt.

Pricing for a game bird hunt is based solely on the number of birds released by the preserve. The hunter chooses the number of birds to be released, although the preserve requires the release of a minimum number per hunter. Hunters are charged a price per released bird. The

[1] Herein, we may refer to petitioner as either "the preserve" or "it."

minimum number and price vary depending upon the type of bird selected. Specifically, a pheasant hunt requires the release of at least 4 birds per hunter at $19.00 per bird, a chukar hunt requires a minimum of 5 birds per hunter at $12.00 per bird, and a quail hunt requires a minimum of 10 birds per hunter at $7.00 per bird.

Once released, there is no guarantee that the hunter will kill any of the birds. The birds may escape the preserve (there is no enclosure to contain the birds), or the hunter may lack the skill necessary to shoot them. Also, as noted, hunters are free to shoot any birds left over from a previous hunt. A hunter, therefore, may take more or fewer birds than are released without an addition to or diminution of the charge.

All of the game birds released for hunting are bred and raised on the preserve.

We modify finding of fact "6" of the Administrative Law Judge's determination to read as follows:

> The preserve is prohibited from selling live birds to the public (6 NYCRR § 174.2), and may sell live birds only to a DEC-licensed breeder or a DEC-licensed preserve operator (6 NYCRR § 174.3).[2]

The preserve offers season packages for game bird hunters at a slightly reduced cost per bird.

Following the hunt, most hunters clean their own harvested birds in a designated area provided by the preserve. The preserve provides a bird-cleaning service for an extra charge.

The preserve also has a taxidermy service available to hunters at an additional charge.

Hunters often eat their harvested and cleaned game birds.

No hunting license is required to hunt game birds on the preserve, and such hunting is not

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[2] We modify this fact to more accurately reflect the record.

limited to the regular New York State hunting seasons. A license is required to hunt game birds off the preserve. Birds that leave the preserve may be hunted with a license and subject to state regulations with respect to season and location.

The preserve also offers wild turkey and deer hunts. In contrast to the game bird hunts, petitioner does not release deer or turkeys onto the preserve and thus does not charge a per deer or per turkey amount for these hunts. Rather, petitioner lures native turkeys and deer onto the preserve. Turkey and deer hunts require appropriate New York state hunting licenses and are restricted to the regular New York State hunting seasons.

Following an audit of petitioner's business operations, the Division of Taxation (Division) concluded that per bird charges to game bird hunters as described herein were taxable sales of tangible personal property. Using petitioner's records, the Division totaled such payments in respect of the periods at issue and calculated tax due thereon. On February 25, 2008, the Division issued to petitioner a Notice of Determination for the periods December 1, 2001 through February 28, 2002, December 1, 2004 through February 28, 2005, and December 1, 2005 through February 28, 2006, which asserted $9,179.69 in additional tax due, plus penalty and interest. Petitioner does not contest the Division's audit methodology or its calculation of additional tax due. Rather, petitioner contends that its receipts in respect of the game birds are nontaxable.

In not charging sales tax on the per bird charges for game bird hunting, petitioner relied on letters from the Division to unrelated third parties in response to requests for advice.

One such letter, dated August 17, 1965, from Fred W. Tierney, Director, Sales Tax Bureau, provides in relevant part:

> This is in reply to your letter of August 9, 1965.
>
> Where the private shooting preserves provide game birds to restaurants and private individuals, as food, the sales are exempt from the sales tax.
>
> If a preserve operates on a membership-dues paying basis, it is considered an athletic club and the dues are taxable if in excess of $10.00 per year . . . .
>
> Where the preserve charges an admission fee in addition to a charge for birds taken, the admission fee is subject to tax, but the charge per bird is not.

A second letter, dated August 26, 1965, also from Mr. Tierney, "supplements" the August 17, 1965 letter by advising that "it is not necessary to secure Resale Certificates on your sales of game birds . . . ."

A third letter, dated December 22, 1971, from Kermit J. Smith, Chief, Audit Section, states, in relevant part, that "[t]here has been no change in the Bureau's position stated in our letter of August 17, 1965."

A fourth letter, bearing a 1991 date (the month and day are obscured on the copy in evidence), from Anthony M. Salerno of "Taxpayer Correspondence," provides, in relevant part:

> This is in reply to your recent letter concerning the sales tax status of the following:
>
> (1) The admission charge to a private bird shooting preserve - since the charge is for the use of sporting facilities where the patron is a participant - is not taxable.
>
> (2) The sale of cleaned, dead birds to restaurants or individuals is non-taxable as the sale of food that is for human consumption.
>
> (3) The charge for a bird that is made in addition to the charge for the admission to the shooting preserve will not be subject to the tax.

THE DETERMINATION OF THE ADMINISTRATIVE LAW JUDGE

The Administrative Law Judge observed the relevant statutes and construed the question presented as whether the charges at issue constituted a taxable sale of personal property or a non-

taxable admission charge for use of a sporting facility or activity in which the patron is to be a participant.

The Administrative Law Judge determined that petitioner's charges constituted sales of tangible personal property because the per-bird charge provided the right to direct the release of the game birds and the right to hunt on the preserve. The Administrative Law Judge also observed that when a single invoice charge includes taxable and non-taxable elements, the entire charge is subject to tax. The Administrative Law Judge also rejected petitioner's argument that the birds were exempt under Tax Law § 1115(a)(1) because petitioner failed to meet its burden of proving that the birds were sold as food for human consumption. Finally, the Administrative Law Judge cancelled penalties because petitioner reasonably relied upon the Division's advice to third parties on this matter.

ARGUMENTS ON EXCEPTION

Petitioner takes exception to the Administrative Law Judge's conclusion that its charges are taxable sales instead of admission charges to hunt on its preserve. Petitioner contends that the pricing method of the charges is not dispositive of a sale because patrons did not receive any of the birds, but only the license to conduct game bird hunts on its preserve. Furthermore, petitioner argues that the charges do not evidence a sale because there is no refund if patrons fail to take a bird and there is no extra charge if patrons take more birds than released. In the alternative, petitioner argues that the birds should be considered food because its patrons typically clean their kill for human consumption. It also argues that it reasonably relied upon advice given by the Division on this issue.

The Division contends that the Administrative Law Judge properly determined that the

subject charges constitute sales of tangible personal property. The Division contends that the charges constitute sales because they provide petitioner's patrons with rights to direct the release of game birds. In its brief, the Division notes that there must be a sale because of the direct relationship between the charged amount and the type and quantity of the released birds, as opposed to the type and quality of the admission. It is the Division's position that the existence of this direct relationship between the charges and the game birds can only reasonably lead to the conclusion that petitioner sold the birds. The Division also argues that the Administrative Law Judge properly disposed of petitioner's argument for exemption under Tax Law § 1115(a)(1) because petitioner has not proven either that the birds were suitable for human consumption or were sold as human food.

OPINION

The parties dispute no issues of fact. It is uncontroverted that petitioner operates a game farm and preserve where its patrons participate in hunts. It is accepted that hunting constitutes a sporting activity.[3] Rather, the parties present different interpretations of petitioner's charges, which utilize a pricing structure based on the quantity and type of bird released. The Division construes the charges as sales of tangible personal property because patrons direct the release of birds (Tax Law § 1105[a]; 20 NYCRR 526.7[e][4][iii]). Conversely, petitioner submits that the charges constitute an exempt admission fee because the charge is not for possession of birds, but the license to participate in game bird hunts (Tax Law §§ 1101[d][2]; 1105[f][1]).

Tax Law § 1105(a) imposes sales tax upon all retail sales within New York, except as

[3] The Division conceded this fact by not arguing this point either before the Administrative Law Judge or on exception.

otherwise provided. The Tax Law defines a "sale" as the transfer of title or possession, or license to use or consume that is supported by consideration (Tax Law § 1105[b][5]; 20 NYCRR 525.2[a][2]). It is a well-settled principle that "only transactions involving passage of title or of actual exclusive possession constitute sales" (***Matter of Darien Lake v. State Tax Commn.***, 118 AD2d 945, 946 [1986], ***affd*** 68 NY2d 603 [1986], ***citing Matter of Shanty Hollow Corp. v. State Tax Commn.***, 111 AD2d 968 [1985], ***lv denied*** 66 NY2d 603 [1985]). Further, rental agreements and licenses to use may meet the definition of a sale (***Matter of American Locker Co. v. Gallman***, 32 NY2d 175 [1973]; Tax Law § 1105[b][5]).

Tax Law § 1105(f)(1) exempts certain admission charges from sales tax, when the "charges to a patron [are] 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" (***compare Outdoor Amusement Bus. Assn. v. State Tax Commn.***, 84 AD2d 950 [1981], ***appeal dismissed*** 55 NY2 954 [1992] [holding carnival games not to be sporting activities]). The taxpayer bears the burden of demonstrating clear and unambiguous entitlement to the statutory exemption (***see Matter of Golub Serv. Sta. v. Tax Appeals Trib.***, 181 AD2d 216 [1992]), and must show that its interpretation of the law is not only plausible, but the only reasonable construction (***see Matter of Federal Deposit Ins. Corp. v. Commissioner of Taxation & Fin.***, 83 NY2d 44 [1993]).

The Tax Law defines the term "admission charges" as, "[t]he amount paid for admission, including any service charge and any charge for entertainment or amusement or for the use of the facilities therefor" (Tax Law § 1101[d][2]). Admission charges may include services inseparably connected to the patron's participation in the sporting activity (***see Matter of Shanty Hallow***, ***supra*** [holding lift tickets at a ski resort to be exempt]); however, incidental equipment

rentals that are severable from the sporting activity are properly subject to tax (***see Matter of Shanty Hallow***, supra [holding locker rentals at the ski resort taxable]; 20 NYCRR 527.10[d][4]).

We reverse the determination of the Administrative Law Judge.

We begin our analysis by examining the substance and circumstances surrounding the transaction, *to wit*, what petitioner sold and what its patrons purchased. It is the Division's position that,

> [t]he issue here is, simply, what is being sold. The answer is birds. (Division's Brief in Opposition, p. 2).

We find that the Division's position lacks factual support. Petitioner operates a game farm and preserve that offers game bird hunts. Patrons do not purchase birds, but the game bird hunts themselves. Contrary to the Division's argument, the form of the admission pricing does not change the substance of these transactions: petitioner sells and patrons purchase game bird hunts, not the birds themselves.[4] While the record shows that petitioner definitely provides hunts, patrons do not acquire possession, unless chance or the hunter's skill permits the capture of a game bird. Further, we find it fallacious to argue that petitioner sells and patrons intend to purchase birds because the parties concede that petitioner sells and patrons purchase game bird hunts.

Under these particular facts, we must construe the service of releasing birds as part of the admission charge to participate in the sport of game bird hunting (Tax Law §§ 1105[f][3]; 1101[d][2]). The release of game birds is "inseparably connected to petitioner's essential

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[4] We note that, in our view, petitioner's pricing structure reflects an attempt to conform to the advice provided by the Division to similarly situated taxpayers (***see*** Findings of Fact above).

business" of providing game bird hunts purchased by patrons (***EchoStar Satellite Corp. v. Tax Appeals Trib.*** 79 AD3d 1307, 1309 [2010] [holding satellite equipment as inseparable from satellite television service], ***citing Matter of Helmsley Enters. v. Tax Appeals Trib.***, 187 AD2d 64 [1993]). The service of releasing birds is such an integral part of participating in a game bird hunt that it "cannot reasonably be reckoned a separate service arising from a different transaction" (***Matter of Penfold v. State Tax Commn.***, 114 AD2d 696, 697 [1985]). Additionally, the subject release charges and the admission fees to hunt are indivisible because, standing alone, the sale of game birds is proscribed (6 NYCRR 174.3), and, without the release of birds, there can be no hunt. Accordingly, we find that the subject charges are exempt under Tax Law § 1105(f)(1) because the release of birds is a necessary service to participate in a game bird hunt.

We do not agree with the theory advanced by the Division supporting its interpretation of the subject transaction. While the exemption provided by Tax Law § 1105(f)(1) must be strictly construed against the taxpayer (***Matter of Marriott Family Rests. v. Tax Appeals Trib.***, 174 AD2d 805 [1991], ***lv denied*** 78 NY2d 863 [1991]), the interpretation should "not be so narrow and literal as to defeat its settled purpose" (***Matter of Grace v. State Tax Commn.***, 37 NY2d 193, 196 [1975]). Furthermore, the interpretation and regulations of the Division are entitled to deference unless shown to be irrational and inconsistent with the statute (***Matter of Slattery Assoc. v. Tully***, 79 AD2d 761 [1980], ***affd*** 54 NY2d 711 [1981]).

The Division's position narrows the definition of "admission charge" by dividing service and use charges that, together, form the activity to which the patron seeks admission (Tax Law § 1101[d][2]). In essence, the Division seeks a ruling permitting the disaggregation of a single

charge for a sporting activity into taxable and nontaxable components so that sales tax may be imposed upon the entire charge (***Matter of La Cascade Inc. v. State Tax Commn.***, 91 AD2d 784 [1982]; ***Matter of Artex Sys. v. Urbach***, 252 AD2d 750 [1998]). Under the Division's theory, it would be proper to impose sales tax on an admission charge to a swimming pool because the charge could be disaggregated into the entry fee to the property and a separate license to use the water to swim. The per-game fee at a bowling alley would be subject to tax because this fee could be construed as a combined charge for the rental of the lane and a separate license to use the pins for bowling. Herein, the Division seeks to impose sales tax on admission charges to a game bird hunt because the fee includes the service of releasing birds as well as the license to conduct and participate in the hunt. We find the Division's position to be legally unsustainable.

We reject the Division's narrow interpretation of the term "admission charge" as unreasonable. Tax Law § 1101(d)(2) specifically includes "any service charge" and any charge "for the use of facilities" within the term "admission fee." As such, we conclude that the Division's interpretation is erroneous because it seeks to change and restrict the term admission fee by segregating core components that are properly included in a single fee (***see Matter of Consolidated Edison v. State Tax Commn.*** 24 NY2d 114 [1969] [holding that legislative intent defeats a contrary agency interpretation]; Tax Law § 1101[d][2]). As it relates herein, we further find that the Division's interpretation of admission fees would nullify the exemption provided by Tax Law § 1105(f)(1) by imposing sales tax upon admission charges to sporting activities in which the patron is a participant (***Kahal Bnei v. Town of Fallsburg***, 78 NY2d 194 [1991] [holding that deference to an enforcement agency is improper when its position is contrary to statute]). Accordingly, we must also reject the Division's interpretation and application of Tax

Law § 1105(f)(1) as unreasonable because it subverts the clear meaning and legislative intent of the statute.

Despite our ruling on the subject transaction, we do not question the taxability of true rentals where the taxpayer acts as a vendor for goods or services separate from offering participation in a sporting activity. In those situations, a sale occurs because the substance of the transaction, typically a rental or a license to use, possesses an independent character apart from the definition of the sporting activity itself (***see*** 20 NYCRR 527.10[d][4][Ex. 6] [holding the rental of bowling shoes at a bowling alley subject to tax]). As such, the taxable components are readily severable from the nontaxable charge for participating in the sporting activity and are properly subject to tax (***see Matter of Shanty Hollow Corp***., ***supra*** [holding lockers and ski rentals by a skiing venue properly taxable, but lift tickets not taxable]; ***see also Matter of American Locker Corp.***, ***supra***; 20 NYCRR 527.10[d][4]).

We, however, are unpersuaded by the Division's attempt to analogize these facts to circumstances where a taxpayer rents out equipment for use in other sporting activities (***see Matter of Shanty Hollow Corp.***, ***supra***; 20 NYCRR 527.10[d][4]). As discussed above, we find it improper to sever the release of birds from fees to participate in a bird hunt because these elements are interdependent and form a single transaction. Petitioner's patrons received neither guaranteed possession nor any other rights to the birds beyond the release, which was necessary to enable the game bird hunt.[5] Accordingly, we reject this line of argument by the Division as applied to this matter.

[5] In our view, the facts herein do not reflect a separate and independent transfer of possession (rental of bowling shoes), but an element necessary to participate in the sporting activity itself (placement of bowling pins).

We have considered the Division's remaining arguments and find them to be lacking merit as they relate to this particular case.

Issues II and III are rendered moot by the foregoing.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of Frank M. Gugliotta d/b/a Parkview Lodge and Upland Game Preserve is granted;

2. The determination of the Administrative Law Judge is reversed;

3. The petition of Frank M. Gugliotta d/b/a Parkview Lodge and Upland Game Preserve is granted; and

4. The Notice of Determination dated February 25, 2008 is cancelled.

DATED:Troy, New York
August 18, 2011

/s/ James H. Tully, Jr.
James H. Tully, Jr.
President

/s/ Charles H. Nesbitt
Charles H. Nesbitt
Commissioner