STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
PROSPECT PARK HEALTH AND RACQUET ASSOCIATES AND PETER J. SFERRAZZA AND GEORGE HART, AS PARTNERS	:	
for Revision of a Determination or for Refund of Sales and Use Taxes under Articles 28 and 29 of the Tax Law for the Period December 1, 1987 through November 30, 1990.	:	DETERMINATION :DTA NOS. 811196 AND 811608
In the Matter of the Petition	:	
of	:	
ST. GEORGE HEALTH AND RACQUETBALL ASSOCIATES	:	
for Revision of a Determination or for Refund of Sales and Use Taxes under Articles 28 and 29 of the Tax Law for the Period June 1, 1988 through February 28, 1991.	:	

Petitioners Prospect Park Health and Racquet Associates and Peter J. Sferrazza and George Hart, as officers, 17 Eastern Parkway, Brooklyn, New York 11238, filed a petition for revision of a determination or for refund of sales and use taxes under Articles 28 and 29 of the Tax Law for the period December 1, 1987 through November 30, 1990.

Petitioner St. George Health and Racquetball Associates, 43 Clark Street, Brooklyn, New York 11201, filed a petition for revision of a determination or for refund of sales and use taxes under Articles 28 and 29 of the Tax Law for the period June 1, 1988 through February 28, 1991.

A consolidated hearing was held before Jean Corigliano, Administrative Law Judge, at the offices of the Division of Tax Appeals, 500 Federal Street, Troy, New York, on January 6, 1994 at 1:15 P.M. Briefs were filedby both parties. Petitioners filed a reply brief on May 20, 1994 which began the six-month statutory period for issuance of a determination. Petitioners appeared by James H. Tully, Jr., Esq. and Peter G. Barber, Esq. The Division of Taxation

appeared by William F. Collins, Esq. (Vera R. Johnson, Esq., of counsel).

ISSUES

I. Whether Prospect Park Health and Racquet Associates and Peter Sferrazza and George Hart, as partners, filed a timely petition.

II. Whether the Division of Taxation properly classified petitioners' facilities as "health salons" or "gymnasiums" subject to the New York City sales tax imposed on "every charge for the use of such facilities" pursuant to section 11-2002(h) of the New York City Administrative Code.

FINDINGS OF FACT

The Division of Taxation (the "Division") issued to petitioner Prospect Park Health and Racquet Associates ("Prospect Park") two notices of determination and demands for payment of sales and use taxes due dated June 20, 1991. One notice assessed tax due for the period December 1, 1987 through November 30, 1990 in the amount of $116,060.46, plus penalty and interest. The second notice assessed a penalty only in the amount of $11,606.06 for the same period. The Division issued identical notices to petitioner George Hart, as partner of Prospect Park Health and Racquet Associates, and to petitioner Peter Sferrazza, as partner of Prospect Park Health and Racquet Associates.

The Division issued a Conciliation Order dated June 26, 1992 sustaining the tax assessed against Prospect Park and the two partners but cancelling all penalties. Six notice numbers relating to the six notices issued to Prospect Park, George Hart and Peter Sferrazza are listed on the Conciliation Order.

Prospect Park filed a timely petition with the Division of Tax Appeals. The petition was signed by Marc Sferrazza. Attached to the petition were the following documents: a copy of the Conciliation Order referred to above with a cover letter signed by Steven Saskin, Conciliation Conferee; a copy of a Notice of Determination and Demand for Payment of Sales and Use Taxes Due issued to Peter Sferrazza assessing tax, penalty and interest; a copy of a Notice of Determination and Demand for Payment of Sales and Use Taxes Due issued to Peter

Sferrazza assessing penalty only; and a Memorandum in Support of Petition, submitted by Sussmane, Zapfel & Cohen, P.C. The first paragraph of the memorandum states the following:

> "Prospect Park Health and Racquet Associates ('Petitioner' or 'Prospect Park') is a New York limited partnership which commenced business operations in 1987 of a 26,000 square foot multiple-use participating sports facility in the Union Temple building at Grand Army Plaza, 17 Eastern Parkway, Brooklyn, New York. Petitioner is one of several affiliated participating sports facilities owned by Eastern Athletic Inc., a New York corporation, or its affiliates and predecessors ('Eastern Athletic')."

In its answer to the petition, the Division included the following allegations:

> "3. ALLEGES that the assessments issued against the partnership entity are not challenged by this petition, since the Notices of Determination issued thereto are neither listed nor attached to the petition. In any event, this petition would be improper as to the partnership, since it is not signed by a general partner or a person acting under a power on behalf of the partnership.
>
> "4. ALLEGES that this is an invalid petition as to Peter Sferrazza because it seeks to challenge the assessment against an individual partner, but the person who signed the petition is not acting pursuant to a filed power of attorney and is therefore without authority to act.
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> "WHEREFORE, the Department of Taxation and Finance respectfully requests that the petition herein be denied and that the assessment be sustained in full together with applicable interest and penalty thereon."

In his opening statement at the administrative hearing, petitioners' representative, James H. Tully, Jr., stated that he was unsure whether the signing of the petition by Marc Sferrazza was still an issue. He also stated that Marc Sferrazza would testify that he was a person with the authority to sign the petition for Prospect Park. The Division's representative, Vera R. Johnson, was given an opportunity to make an opening statement and declined, stating: "I have no opening statement" (tr., p. 12).

Marc Sferrazza was called as a witness and testified as follows:

> Mr. Tully: ". . . What was your position with Prospect Park Health and Racquet Club?"
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> Mr. Sferrazza: "I'm the general manager."
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> Mr. Tully: "Are you a stockholder?"
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> Mr. Sferrazza: "I hold 100 percent of the stock, which, in terms, is the general partner of Prospect Park Health and Racquet Club. However, at the time -- the period of the audit, I was 50 percent stockholder" (tr., pp. 13-14).

The Division's representative asked Mr. Sferrazza no questions regarding his authority to execute a petition on behalf of Prospect Park. Peter Sferrazza was also called to testify. Neither Mr. Tully nor Ms. Johnson addressed any questions to him regarding Marc Sferrazza's authority to act for Prospect Park or for its partners. George Hart was also present at the hearing but did not testify. Almost halfway through the hearing, the Administrative Law Judge asked Ms. Johnson to clarify the Division's position on the various legal issues which were raised by petitioners. In response, she stated, among other things, that the Division did not waive its objections to the validity of the petition as stated in the Division's answer. She offered no evidence regarding this issue and did not address it in her closing statement.

The Division issued to petitioner St. George Health and Racquetball Associates ("St. George") a Notice of Determination and Demand for Payment of Sales and Use Taxes Due dated March 16, 1992, asserting tax due in the amount of $242,861.32 for the period June 1, 1988 through February 28, 1991, plus penalty and interest. The Division issued to St. George a Conciliation Order dated October 30, 1992, sustaining the determination of tax due and cancelling all penalties.

Prospect Park and St. George are limited partnerships. They are a part of a larger group of companies affiliated with Eastern Athletic Clubs, Inc. In 1989, Prospect Park and St. George changed their names to Eastern Athletic Club for Sports at Prospect Park and Eastern Athletic Club for Sports at St. George, respectively.

Although Prospect Park and St. George refer to themselves as "clubs" and call the fees they charge for use of their facilities "membership" fees, neither of them is a membership club or "athletic club" as the latter term is used in Tax Law § 1105(f)(2) or New York City Administrative Code § 11-2002(f)(2). With this understanding, petitioners' terminology will be used in this determination.

The Division began an audit of Prospect Park in November 1990. Marc Sferrazza assisted in the audit, although he did not file a power of attorney with the Division. According to the Field Audit Report, a power of attorney was not filed because all audit work was done at

the taxpayer's office. Prospect Park was not registered as a sales tax vendor at the time of the audit.[1]

The auditor examined Prospect Park's records of recurring purchases and determined that they were adequate for audit purposes. Marc Sferrazza signed an Audit Method Election form on behalf of Prospect Park agreeing to allow the Division to use a test period audit to determine sales or use tax liability for recurring expense purchases. The Division determined additional taxes due on such purchases in the amount of $2,172.71. It also determined tax due of $1,287.00 in the area of fixed asset acquisitions. Petitioners have not disputed the Division's determination in these areas.

The Division examined Prospect Park's sales records. The auditor completed the Field Audit Report by checking a box next to the following statement: "Sales records were adequate and the Audit Election Method Agreement was not signed because: . . . SALES WERE DONE IN DETAIL." However, the auditor also indicated in her report that she requested sales invoices which were not provided. According to the auditor's work schedules, Prospect Park's sales records (apparently income statements) showed gross income for the years 1987 through 1990 of $3,027,144.00 and "membership income" of $2,815,024.30. The Division applied a tax rate of 4 percent to membership income to determine tax due of $112,600.75.

The Division's audit of St. George was conducted in a similar fashion. Again, the Field Audit Report states that St. George's purchase and sales records were adequate for audit purposes. It also indicates that an Audit Election Method form was signed for purposes of estimating taxable sales, but no agreement was offered in evidence and the work schedules indicate that a detailed audit was performed. The Division determined tax due of $1,315.75 on recurring expense purchases and $4,567.68 on fixed asset acquisitions. The auditor's

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[1]When asked whether Prospect Park was renting lockers or had any other transactions subject to sales tax under the Tax Law, the auditor replied: "No. We only picked up membership fees for the assessment" (tr., p. 112).

workpapers show that St. George's gross income was separated into three major categories: membership income, racquet sports, and sundry income. The 4 percent tax rate was imposed only on membership income of $5,924,447.50, resulting in tax due of $236,977.90. St. George challenged only that portion of the assessment which assesses tax on its membership income.

The disputed tax assessed against Prospect Park and St. George is imposed by Administrative Code § 11-2002(h) which imposes a tax on "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 establishments." The Division's conclusion that the membership income collected by Prospect Park and St. George is subject to that tax is based on the following: a visit the auditor made to St. George before the audit of either establishment began, observations of each facility made by the auditor during the audit, brochures and advertisements, and the auditor's personal impressions of the nature of the facilities and services offered.

The auditor testified that she initially visited St. George because she lived nearby and was interested in a membership. She stated that she "knew people who joined for fitness" (tr., p. 94). Her recollection of what occurred on that visit was rather weak. She stated that she was primarily interested in aerobics and was told that if she joined St. George she would be provided with a personal fitness plan on orientation. She saw a swimming pool, exercise equipment and lockers. During the course of the audit, she visited St. George a second time and visited Prospect Park once. She did not speak with employees of those establishments at that time. The auditor reviewed brochures provided to her by petitioners. From these, she determined that basic membership fees covered aerobics, the use of weight training and exercise equipment and use of the swimming pools. She also concluded that additional fees were charged for other services and activities. The auditor examined a newspaper advertisement which shows a woman in exercise clothing. The text of the advertisement states:

> "Take advantage of this offer and take advantage of the best Clubs in New York. With over a quarter million square feet, Eastern Athletic Clubs offer you true Cross-Training. If you want Aerobics, Weight Training, Tennis and Racquetball, of course you'll find them. You'll also find Full Court Basketball, an Olympic

Swimming Pool, Sports Shops, Albert Ciccarelli Salons and Spas, and a complete Events and Trips program. You may find that joining the best costs the least!"

The auditor telephoned the St. George on one occasion after the audit period and was told that an additional fee was charged for use of the racquetball courts. Based on her personal observations and the information she received from petitioners, the auditor concluded that Prospect Park and St. George are "health salons" or "gymnasiums" as that term is used in section 11-2002(h) of the Administrative Code. On audit, the Division did not assess sales tax on the separate income categorized as racquet sports. It was the auditor's understanding that separately itemized income from charges collected for use of the racquetball courts was not subject to the tax imposed by Administrative Code § 11-2002(h).

Petitioners claim that the membership fees collected by Prospect Park and St. George are excluded from taxation by Tax Law § 1105(f)(1) and Administrative Code § 11-2002(f)(1) which exclude charges for use of sports facilities where the patron is an active participant in the sport. Petitioners describe Prospect Park and St. George as "participant sports establishments".

St. George and Prospect Park operate very large athletic facilities. St. George occupies approximately 64,000 square feet on four floors. It began as a tennis and racquetball club and still has an extensive amount of space (approximately 15,000 square feet) dedicated to racquet sports. During the audit period, wallyball (a form of volleyball played on a racquetball court), golf and handball, racquetball, tennis and squash were played in the "racquetsports center". In the sports center, patrons could participate in volleyball, basketball, wall climbing, boxing and table tennis. The St. George also had a swimming pool and separate areas dedicated to Karate, pocket billiards, children's sports, T'ai Chi and other martial arts and a dance center. In addition to these sports facilities, St. George had exercise and conditioning areas which contained exercise equipment such as stationary bicycles, stair steppers and free weights. A dance and exercise schedule obtained by the auditor shows that the St. George conducted classes throughout the day in aerobics, toning and conditioning, and yoga. These classes were held primarily in the "Grand Salon". St. George leased a portion of its premises to separate entities which operated a health spa, the Albert Ciccarelli health salon, a sports shop and a cafe. These

facilities were operated by vendors unrelated to petitioners, and their businesses were not included in the audit.

Prospect Park operated a facility that was similar to St. George but much smaller. It had an Olympic-size swimming pool and a separate area dedicated to boxing. Like St. George, Prospect Park leased a portion of its premises to the Albert Ciccarelli salon and spa.

The parties offered in evidence a number of brochures and schedules which explain petitioners' membership rates, program schedules and special classes. Although these relate to periods after the audit period, Marc Sferrazza testified that the manner in which Prospect Park and St. George operated during the audit period was consistent with the information found in the brochures. One brochure is entitled "MEMBERSHIP RATES AND CLUB HOURS". It generally explains the fee structure of Prospect Park. It shows that members were required to pay an initiation fee and either an annual or monthly fee. The initiation fee for an individual membership was $350.00. The annual "Prime" rate for an individual was $600.00, and the "Non-Prime" rate was $480.00. A "Fitness Special" was available at an annual prime rate fee of $720.00 and non-prime rate fee of $600.00. According to Marc Sferrazza's testimony, this entitled a person to a certain number of sessions with a personal trainer as well as the other benefits of membership. Other special membership rates were available (e.g., family, corporate, senior). Nonmembers were required to pay a use fee of $25.00 per day. A guest accompanied by a member was required to pay a guest fee of $12.00 per day during prime time and $8.00 during other times.

Members of the clubs were allowed the use of all of the club's facilities. A brochure entitled "DANCE & EXERCISE PROGRAMS SUMMER 1991" contains a schedule of activities at St. George. It shows that St. George conducted a wide variety of exercise activities for its members, including aerobics, yoga, T'ai Chi, aquacize, and bikercize. All of these activities were available to members at no additional charge. Additional fees were charged for classes in ballroom dance, tap, and Afro-Cuban dance; an exercise and relaxation class designed to decrease back and neck pain; a support group for new mothers; and several other activities.

The vast majority of the classes and exercise activities were conducted without additional charges to the members.

Another brochure describes Adult Special Programs at St. George. Eastern Athletic Clubs sponsored the following competitive teams in regional leagues: men's softball, squash, table tennis, men's volleyball, women's volleyball, and wallyball. Members of the clubs paid an additional fee of about $100.00 per team to play on the teams which competed in these leagues. The fees were used for t-shirts, trophies and other expenses associated with league play. Tryouts were held for each sport in order to place players on suitable teams. The sports center schedule shows that the club's facilities were reserved for league and team activities, approximately 18 hours per week. During the rest of the time, the St. George Sports Center was used for basketball, volleyball and table tennis and members were free to participate in these activities without payment of any fee other than the membership rate. One could not be a member of a team without being a club member.

The Prospect Park brochure for Racquetsports and Wallyball for Fall 1993 shows that the club imposed a racquetball court booking fee of $16.00 per hour in prime time and $12.00 per hour in non-prime time. Guests of members were allowed to play racquetball if accompanied by a member, but they could not book a court. A guest fee was charged. A person could not be a guest more than four times per year.

To support its contention that Prospect Park and St. George are primarily participant-sports establishments, petitioners introduced the testimony of several of its members. The most prominent member to testify was Jose Torres, former commissioner and chairman of the New York State Athletic Commission and former light heavyweight boxing champion. Mr. Torres testified that he boxed, taught boxing and trained boxers at the St. George. Halina Pavel, captain of the women's volleyball team, testified that she goes to the St. George approximately three times per week to play volleyball. She stated that the St. George has organized volleyball teams (which apparently compete against each other), league play and pick-up games on Saturdays and Sundays. She testified that she did not consider the St. George to be a fitness

club. George Cassius, captain of the wallyball league, was enthusiastic about his sport. He noted that the St. George has had national championship wallyball teams in the men's, women's and coed divisions. Depending on the season, Mr. Cassius and others play wallyball at the St. George two to four times per week. He also testified that a member of the club who wanted to participate in wallyball could do so without joining a league or team.

Garrett Jones, the overall program director of St. George and Prospect Park, testified with regard to the operation of the clubs. He described two schedules which were placed in evidence: a pool schedule for Prospect Park and a 1989 basketball schedule for St. George. The pool schedule shows that the pool was open for lap swimming and free swimming for all but approximately one hour per day. Even special classes, e.g., aquacize and adult swim lessons, were held at the same time that the pool was being used for laps or free swim. The basketball schedule shows approximately six to seven hours per week of league play with the remainder of the time reserved for pick-up games and open play, primarily in basketball and volleyball.

Petitioners also offered the affidavit of Alan Zwirn, Sports Program Director for Eastern Athletic Clubs. In his affidavit, he states as follows:

> "6. All sports scheduling and programming is under my aegis and designed to offer members as diverse a pallet of participant- sports as possible. As Sports Program Director, I engage in coordination and support of all the participant sports which include basketball, boxing, martial art, fencing, flag-football, gymnastics, softball, table tennis, volleyball, racquetball, squash and wallyball.
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> "7. All of these sports are offered to all members for no additional charge to their basic membership fee.
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> "8. For leagues, lessons, clinics and tournaments, members do pay special charges. However, these charges are to pay for the expenses of trophies, uniforms, tee-shirts, referees, and instructors, and parties all used by the sports participants.
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> "9. These special charges are for specific items or personnel which are necessary to enhance the participation in the sports. The charges, with the exception of minimal charge (approximately 1% of total club income) for peak time racquetball play, are not for the use of participant-sports facilities."

George Pavel, a volleyball player and member of St. George, states in an affidavit that he pays no additional charges to participate in the various activities at the St. George, including

volleyball, wallyball, basketball, swimming, boxing, gymnastics and martial arts.

Petitioners offered the affidavits of several other persons familiar with the facilities and programs of Prospect Park and St. George, including: Kenneth K. Fisher, a member of the New York City Council; Betsy Gottbaum, former City Commissioner of Parks and Recreation; Michael O'Hara, President of Wallyball International, Inc.; and Andrew Deitel, Marketing Director for the Brooklyn Sports Foundation. Each of these affiants states that he or she considers Prospect Park and St. George to be athletic facilities which its members join in order to participate in sporting activities. Ms. Gottbaum states in her affidavit that both clubs offer exercise classes and training equipment but that their primary purpose is to "provide sports for its patrons to participate in." She also states that "it would have been highly unlikely that anyone would have joined either Eastern Athletics Clubs', St. George or Prospect Park, as a fitness only club." Several of petitioners' witnesses made a similar point -- a person with no interest in participant sports would be unlikely to join Prospect Park or St. George because fitness clubs offering more exercise equipment and classes, at lower fees, are widely available. The auditor testified that she did not join the St. George because it was too expensive.

Petitioners offered in evidence numerous newspaper articles about Prospect Park and St. George. Some of the articles contain reports of sports competitions; others describe programs being conducted; and still others might be described as human interest stories.

A schedule of income from special charges prepared by Marvin Feuer, the accountant for Eastern Athletic Clubs, supports Mr. Zwirn's statement that only a small portion of club income is from special charges. This chart shows income received by Prospect Park and St. George in 1990 as follows:

Sport	St. George	Prospect Park
Pool classes	$ 19,280.00	$16,569.00
Racquetsports	90,609.00	9,687.00
Ski Trips	78,813.00	4,046.00
Sports center (league and team fees)	27,006.00	4,627.00
Dance Classes	32,007.00	1,917.00
Rafting trips	3,160.00	-0-
Totals	$250,875.00	$36,846.00

Petitioners introduced a number of affidavits to support their contention that the State does not impose sales tax on fees charged by other establishments offering activities similar to those offered by Prospect Park and St. George. John McCarthy, Executive Director of IRSA, The Association of Quality Clubs, a trade organization of athletic and fitness clubs in the United States and abroad, states that he is personally familiar with St. George and Prospect Park. In his affidavit, he states that many racquetball and tennis facilities have a fee schedule similar to that of the Eastern Athletic Clubs which allows members to play unlimited open time with no additional charge or, alternatively, to play at a discounted rate. He also states that many of these clubs offer steam rooms, saunas and some exercise equipment for the use of their members. In his experience, New York City does not impose a sales tax on fees charged by these clubs. Jon Denley, a vice-president of a company that offers insurance to tennis, racquetball, sports clubs and health clubs, made similar statements in his affidavit.

Antoinette Giordano, an administrator for Eastern Athletic Clubs, executed an affidavit in which she stated that she personally contacted establishments offering activities similar to those offered by Eastern Athletic Clubs to ask whether they charge sales tax. The establishments she contacted stated that no tax was collected and that they were not required to collect sales tax. Among those contacted by Ms. Giordano were: Chelsea Billiards, Arthur Murray Dance, Midtown Golf Club, Jodi's Gym (a children gymnastics studio), Aim-Dojo Karate School, Royal Flamingo Swim Club, Mill Basin Racquet Club and Starrett Tennis Center.

As evidence that their interpretation of the Tax Law and Administrative Code is reasonable, petitioners offered letters written by Peter Sferrazza to the Division, inquiring about the tax status of charges for various activities, and the responses he received. In his letter of May 14, 1979, Mr. Sferrazza posed the following hypothetical.

A tennis or racquetball facility offers tennis courts, racquetball courts, saunas, steam rooms, exercise rooms, lockers, showers, a lounge, whirlpools, a babysitting room and vending machines. It provides towels to its members. There are various fee structures for players: a

seasonal fee to play at a certain time each week; a daily or hourly rate for courts when free; a discount card entitling the holder to reduced rates on seasonal or hourly rates. Mr. Sferrazza asked if sales tax was imposed on any of these charges.

In a letter dated August 3, 1979, the Division provided answers to Mr. Sferrazza's questions. Essentially, the letter states that no tax would be imposed under any of the circumstances described. In addition, the letter states:

> "The management introduces leagues and tournaments to generate player interest and court rentals. The programs are offered to players for a fee which pays for court rental, balls, trophies.
>
> "The introduction of leagues and tournaments would not change the tax status of the facility. The fees paid by the players are still tax exempt."

CONCLUSIONS OF LAW

A. In its brief, the Division asserts that the petition filed by Prospect Park may not be deemed to be a timely petition because Marc Sferrazza had no authority to act on behalf of Prospect Park in filing a petition.[2] If the petition is invalid for the reason the Division claims, the Division of Tax Appeals lacks subject matter jurisdiction and the petition must be dismissed (see, Matter of Buyrite Motors, Tax Appeals Tribunal, February 18, 1993).

In civil practice, subject matter jurisdiction is an affirmative defense for the defendant to raise by motion or answer (CPLR 3018[b]; 3211[a][2], [e]). Tax Law § 2006(5), governing motions to dismiss in the Division of Tax Appeals, requires that the provisions of CPLR 3211 be applied to such motions. Accordingly, it was proper for the Division to raise the matter of subject matter jurisdiction as a defense to the petition by motion pursuant to 20 NYCRR

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[2]Unlike the Division's answer, the brief makes no mention of whether the petition can be deemed to include Peter Sfarrazza and George Hart as petitioners. The petition identifies the petitioner as Prospect Park Health and Racquet Associates; however, the notice number on the petition corresponds to the notice number assigned to one of the notices of determination issued to Peter Sfarrazza and the two notices of determination attached to the petition were both issued to Peter Sfarrazza. The Conciliation Order attached to the petition lists the notice numbers of the notices issued to Prospect Park, George Hart and Peter Sfarrazza. The Division of Tax Appeals accepted the petition as a timely petition of all of the notices listed on the Conciliation Order.

3000.5(b) or by answer pursuant to 20 NYCRR 3000.4(a)(2)(ii). In either case, however, the Division bears the burden of going forward to establish those facts necessary to support its defense.

In his opening statement, petitioners' representative questioned whether the validity of the petition was still in issue. The Division's representative declined to give an opening statement, leaving the parties and the Administrative Law Judge uncertain of the Division's position on this issue. Nonetheless, Marc Sferrazza testified that during the audit period he was a 50 percent shareholder of a corporation which was the general partner of Prospect Park and, as such, had the authority to sign a petition on behalf of Prospect Park.[3] In the course of cross-examining Mr. Sferrazza, the Division's representative stated that the Division was not waiving its objection to the petition; however, she did not cross-examine Marc Sferrazza on this issue when given the opportunity to do so. Peter Sfarrazza and George Hart were present at the hearing, and the Division's representative addressed no questions to them regarding Marc Sferrazza's authority to act for the partnership. In short, the Division did nothing to challenge the credibility of Marc Sferrazza's testimony and did not place any evidence in the record to contradict his claim that he was an appropriate individual to sign a petition on behalf of Prospect Park. As a result, there is no evidence in the record to support the Division's claim that the petition is void as a matter of law (see, Matter of Pay TV of Greater New York, Tax Appeals Tribunal, July 14, 1994).

B. The primary issue to be resolved is whether the charges petitioners imposed for the use of their facilities are subject to the tax imposed under Administrative Code § 11-2002(h). Cities and counties in New York State are authorized to impose all of the taxes imposed by the State under article 28 of the Tax Law (Tax Law § 1210). Cities of one million or more are

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[3]In their reply brief, petitioners identified the corporation which they contend was the general partner of Prospect Park. As this information was offered after the record was closed to evidence, it was not included in the Findings of Fact and is not being considered here.

authorized to impose certain additional taxes not imposed by the State (Tax Law § 1212-A). Under the authority of these sections of the Tax Law, the City of New York adopted the two provisions which are in dispute here. Administrative Code § 11-2002 imposes a sales tax at the rate of 4 percent upon the receipts specified in subdivisions (f) and (h) of that section (among others).[4] The receipts upon which the tax is imposed are as follows:

> "(f)(1) 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 city of New York, except charges for admission to race tracks, boxing, sparring or wrestling matches or exhibitions which charges are taxed under the laws of the state of New York, or dramatic or musical arts performances, or motion picture theatres, and except such 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) The dues paid to any social or athletic club in the city of New York if the dues of an active annual member, exclusive of the initiation fee, 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, except that the tax shall not apply to a fraternal society, order or association operating under the lodge system or any fraternal association of students of a college or university. Where the tax on dues applies to any such social or athletic club, the tax shall be paid by all members thereof regardless of the amount of their dues, and shall be paid on all dues or initiation fees for a period commencing on or after August first, nineteen hundred sixty-five. In the case of a life membership, the tax shall be upon the annual amount paid by active annual members as dues, whether or not the life member paid for or was admitted to such membership prior to the imposition of the tax under this subchapter, and shall be paid annually by the person holding such life membership at the time for payment of dues by active annual members.
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> "(h) 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 . . ." (emphasis added).

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[4]Tax Law § 1105(f), which imposes a State tax, is identical to Administrative Code § 11-2002(f). Although references to Tax Law § 1105(f) are omitted except where necessary, it should be understood that any discussion of Administrative Code § 11-2002(f) applies equally to Tax Law § 1105(f), and vice versa.

The Division imposed a sales tax on petitioners' membership income pursuant to section 11-2002(h). Petitioners' claim that this income is not subject to taxation has several components. First, petitioners emphasize that Administrative Code § 11-2002(f)(1) contains an explicit exclusion for charges to a patron for use of facilities for sporting activities where the patron is to be an active participant in that sporting activity. Petitioners claim that all of the fees they collect for use of their facilities, including membership income, qualifies for that exclusion. Petitioners claim that imposing the tax on their membership fees under the authority of section 11-2002(h) would negate the exclusion provided for in section 11-2002(f)(1). To avoid this contradictory result, petitioners interpret the terms "health salons" and "gymnasiums" in such a way as to exclude sports facilities where the patrons are active participants. For the purposes of section 11-2002(h), petitioners would define "health salons" and "gymnasiums" to include those facilities which offer only physical fitness and exercise equipment and fitness activities, other than sports.

It is the Division's position that the terms "health salons" and "gymnasiums", as they are used in subdivision (h) of section 11-2002, includes facilities used for sports. The Division offers no reading of the statute which attempts to reconcile the exclusion found in subdivision (f) with the tax imposed under subdivision (h). It does argue, however, that:

> "[a] facility which offers sports training equipment, aerobics, weight equipment, rowing machines, shaking machines and other exercise equipment is subject to the 4% New York City Tax on the use of those facilities even if it also offers racquet ball etc." (Division's brief, p. 25).

The Division goes on to state that:

> "[if] there is a distinction between gymnasiums, health clubs and sports facilities, and petitioners are correct that participatory sports activities are excluded from the imposition of sales tax pursuant to administrative code §11-2002(h), where taxable and exempt items are sold as a single unit the total unit price is taxable" (Division's brief, p. 26).

C. Resolution of this dispute requires a proper construction of Administrative Code § 11-2002(h). I agree with petitioners that section 11-2002(h) cannot be interpreted properly without taking into account the exclusion for participatory sports facilities found in section 11-2002(f)(1). In construing a statute, all sections of the legislative enactment are to be read

together to determine the legislative intent and all parts of the statute must be harmonized with one another (Levine v. Bornstein, 4 NY2d 241, 173 NYS2d 599; McKinney's Cons Laws of NY, Book 1, Statutes §§ 97, 98). Applying this principle, it is fair to begin this analysis with an explication of Administrative Code § 11-2002(f)(1).

The case law supports petitioners' contention that Tax Law § 1105(f)(1) must be read broadly so as to include in the exclusionary clause any sports activity where the patron is an active participant as opposed to an observer. In Matter of Fairlands Amusements v. State Tax Commn. (66 NY2d 932, 498 NYS2d 796, revg 110 AD2d 952, 487 NYS2d 879 for reasons stated in the dissenting opinion below), the court found that the first portion of the statute is ambiguous, since it could be interpreted to mean only a physical space within which an amusement is provided or, referring to the definition of a place of amusement in Tax Law § 1101(d)(10), to a facility for amusement, such as a carnival ride. Applying the often-stated principle that exclusions from tax must be construed most strongly in favor of the taxpayer and against the government, the court held that the tax must be construed to apply only to the admission charge to enter the location where the facilities are found (id.).

In Matter of United Artists Theatre Circuit v. State Tax Commn. (52 NY2d 1013, 438 NYS2d 295), the court rejected the Commission's construction of section 1105(f)(1) -- that the exclusionary clause for admissions to motion picture theatres applies only to moving pictures -- as running counter to the legislative intent. The court held that it is the "place", a "motion picture theatre", and not the event which is determinative of whether the exclusionary clause is applicable.

These opinions demonstrate that the courts have consistently construed the language of Tax Law § 1105(f)(1) in favor of the taxpayer, confirming that the exceptions found in that provision are to be treated as exclusions from tax. The exception in issue here excludes from tax "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." The cases cited require that this clause be read broadly so as to include both charges for admissions to a place

where the patron goes to participate in a sport and charges for the use of specific sports facilities. Pursuant to this construction of the statute, petitioners' membership fees must be deemed subject to the exclusionary clause, since those fees were, in essence, charges for admission to a "place" where individuals could actively participate in any one of a number of sporting activities -- basketball, volleyball, wallyball, swimming, table tennis -- as well as charges for use of "facilities for sporting activities", such as racquetball courts, climbing walls, and punching bags. Petitioners did not forfeit the exception by also providing facilities for exercise and conditioning.

I reject the Division's contention that the membership income received by Prospect Park and St. George is not excepted from the tax imposed by Administrative Code § 11-2002(f)(1). This argument is based on two factors. First, the Division argues that petitioners' evidence of the activities which take place in their facilities is unreliable. In its brief, the Division states that the evidence offered by petitioners "is to a large extent immaterial, in part contradictory and at times incomplete or inaccurate" (Division's brief, p. 12). I do not agree. Petitioners offered a wide range of evidence -- from the testimony of its members to newspaper articles to affidavits from members of the community -- which establishes that they operated facilities which people paid to enter or to use in order to participate in various sports. In contrast, the auditor's testimony suggests that she had made up her mind that St. George and Prospect Park were primarily fitness clubs well before the audit began. This determination was based on her personal experience on a single visit to the St. George where her inquiries were confined to questions about fitness programs alone. Petitioners' evidence did not differ dramatically from the auditor's observations. The auditor testified that she saw racquetsports and basketball. She could not remember whether she saw people playing volleyball and stated she did not know the difference between squash and racquetball. Her testimony was brief, conclusory and lacking in any detail. It did not undermine the credibility of petitioners' witnesses or cause me to believe that petitioners painted a distorted picture of their activities.

The Division also claims that activities performed for fun and fitness, such as aerobics,

dance, jogging, gymnastics, and a boxing program, are not sports.[5] The Division's analysis is faulty because it relies on a

narrow definition of the term "sports", which is not supported by the statutory language. The first consideration in construing a statute is to ascertain and give effect to the Legislature's intent which is to be discerned from the language of the statute itself if possible (McKinney's Statutes Cons Laws of NY, Book 1, § 92). The two examples of sports facilities provided by the statute are bowling alleys and swimming pools. These examples demonstrate that the Legislature did not intend to limit the exclusion to competitive sporting activities, like basketball and tennis, as the Division suggests. In fact, the choice of bowling (which does not require strenuous physical exertion) and swimming (which can be a solitary activity done for fitness and exercise) as examples of sports activities demonstrates the Legislature's intention to include in the exclusionary clause a broad spectrum of physical activities.

Acceptance of the Division's definition of a sport would lead to inconsistent results which could not have been intended by the Legislature. For example, the Division contends that activities for improving physical health and fitness are not sports. One of the activities the Division places in this category is gymnastics. In a brochure describing a gymnastics class for children, petitioners state: "This class will teach

strength, flexibility, coordination and balance through use of gymnastics and apparatus."

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[5]In her brief, the Division's representative asks that the Administrative Law Judge take official notice of a newspaper article entitled "Women punching their way to fitness" which appeared in the Times Union, Friday, May 6, 1994. An Administrative Law Judge may take official notice of "all facts of which judicial notice could be taken and of other facts within the specialized knowledge of the agency" (State Administrative Procedure Act § 306[4]). Judicial notice is defined as "the knowledge which a judge will officially take of a fact, although no evidence to prove that fact has been introduced" (Richardson, Evidence § 8 [Prince 10th ed]). Judicial notice may be taken of all facts which are common knowledge (e.g., the location of the Empire State Building) (Richardson, Evidence § 9, supra). The contents of a particular newspaper article is not common knowledge and not a fact of which official notice may be taken.

According to the Division, this evidence shows that gymnastics is a fitness activity and not a sport. The problem with the Division's criteria is that it cannot be used to distinguish between sports and other physical activities. Using this criteria, the Division places gymnastics in the category of a fitness activity when practiced noncompetitively for fun and fitness, although it would undoubtedly be considered a sport if undertaken as a competitive activity. Any sport, including swimming and bowling, can be practiced in order to improve strength, coordination, flexibility and balance. The Legislature cannot have intended the participant's motive for engaging in a certain activity to be determinative of whether it is a sport. The Division's own regulations do not support its position here. In its regulations, the Division extends the benefit of the exclusion to "[a] ski resort's charge for lift tickets" (20 NYCRR 527.10[d][4], Example 7); an admission charge "for a stock car driver and his crew to enter a race" (20 NYCRR 527.10[d][4], Example 8); as well as "charges for use of bowling lanes and swimming pools" (20 NYCRR 527.10[d][4], Example 6). The regulation does not suggest that charges for use of a swimming pool are excluded from tax when the pool "is used for competitive swimming meets" but are not excluded when the pool is used for "aquacize activities" (Division's brief, p. 16). In short, the language of section 11-2002(f)(1) must be given the broadest possible construction so as to include in its ambit any sporting activity engaged in for fitness as well as recreation.

D. Having determined that petitioners' membership income is not subject to the tax imposed under Administrative Code § 11-2002(f)(1), I will now consider whether the same income may be subject to the tax imposed by Administrative Code § 11-2002(h). In determining whether a transaction is subject to taxation, the statute imposing the tax must be construed in favor of the taxpayer (Matter of Grace v. New York State Tax Commn., 37 NY2d 195, 371 NYS2d 715, 718, appeal denied 37 NY2d 708, 375 NYS2d 1027). In addition, every section of a statutory provision must be read together so as to avoid to conflict between the parts of the whole (Levine v. Bornstein, supra). The only way to construe section 11-2002(h), without rendering section 11-2002(f)(1) a nullity, is to define the terms "health salons",

"gymnasiums" and "similar establishments" to include only those establishments which provide activities directed at "the improvement of bodily appearance" (Petitioners' brief, p. 19) and not those which offer sports and athletic facilities.

In Matter of Delta Sonic Car Wash Systems (Tax Appeals Tribunal, November 14, 1991), the Tribunal provided a brief discussion of the proper way to construe the words of a statute where they appear in a list.

> "[W]e are also mindful that the words of a statute are not construed singly; rather, each is construed in connection with the other words of the context. Indeed, 'the meaning of a word . . . may be ascertained by a consideration of the company in which it is found and the meaning of the words which are associated with it' (Popkin v. Security Mut. Ins. Co. of New York, 48 AD2d 46, 367 NYS2d 492, 495; Statutes, §§ 234 and 239). This rule of statutory construction, 'noscitur a sociis,' is particularly applicable where the word at issue is part of a list of words used in the statute (Third Natl. Bank in Nashville v. Impac Ltd., 432 US 312)."

Here, the terms "health salons" and "gymnasiums" are listed with the terms "weight control salons, turkish and sauna baths and similar establishments." The same provision taxes receipts from "beauty, barbering, hair restoring, manicuring, pedicuring, electrolysis, massage services and similar services." All of these services and establishments are dedicated to physical appearance and well-being, rather than to sports or athletic activities. The only reasonable construction of the terms "health salons" and "gymnasiums" as used in Administrative Code § 11-2002(h) is that those terms include only facilities which provide exercise equipment, exercise activities and calisthenics solely for health or weight reduction purposes, as opposed to sports.

The Division takes a similar approach in defining "athletic clubs" for purposes of Administrative Code § 11-2002(f)(2), which imposes a tax on dues paid to social and athletic clubs. It is appropriate to look to this regulation for guidance here, since the tax on admission charges to places of amusement and the tax on dues paid to a social or athletic club are in the same section of the law. 20 NYCRR 527.11(b)(7) defines an athletic club as "any club or organization which has as a material purpose or activity the practice, participation in or promotion of any sports athletics" (emphasis added). 20 NYCRR 527.11(b)(7)(ii) provides as follows:

> "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 four percent 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."

This regulation indicates that a membership club which provides exercising or calisthenics solely for health or weight reduction is not subject to tax as an athletic club under Administrative Code § 11-2002(f)(2), but is subject to the tax imposed by Administrative Code § 11-2002(h). This determination rests on a similar analysis. I find that an establishment that has as a material purpose or activity the practice, participation in or promotion of any sports athletics is not subject to tax under Administrative Code § 11-2002(h). On the other hand, an establishment which merely provides exercise, calisthenics and exercise equipment solely for health or weight reduction is subject to tax as a health salon or gymnasium. Based on this construction of the statute and evidence establishing that Prospect Park and St. George had as a material purpose the practice, participation in and promotion of sports, I conclude that their receipts from membership income were not subject to tax.

Further support for construing the terms "health salons" and "gymnasiums" in such a way as to include only those facilities which offer fitness and exercise activities, without any participatory sports facilities, can be found in the enabling legislation which authorizes the City of New York to impose the taxes in issue. Tax Law § 1210(a)(1) states, among other things:

> "any local law enacted by a city of one million or more . . ., shall omit . . ., unless such city elects otherwise, . . . the exception provided in paragraph (1) of subdivision (f) of section eleven hundred five for 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" (see also, Tax Law § 1210[b][1] which authorizes cities of one million or more to eliminate the exception of section 1105[f][1]).

The City affirmatively elected to include the participatory sports exception of Tax Law § 1105(f)(1) in the Administrative Code and has never availed itself of the authority provided by section 1210(b)(1), even as it took advantage of the authority granted it by the State to impose tax on health salons and gymnasiums (Tax Law § 1212-A[b][1]).

E. I find untenable the Division's arguments for finding that Prospect Park and St. George are health salons or gymnasiums as those terms are used in Administrative Code § 11-2002(h). To support its position, the Division relies, in part, on section 621(2) of the New York State General Business Law which states:

> "2. 'Health club' as used in this article means any person, firm, corporation, partnership, unincorporated association, or other business enterprise offering instruction, training or assistance or the facilities for the preservation, maintenance, encouragement or development of physical fitness or well being. Such term shall include but shall not be limited to health spas, sports, tennis, racquet ball, platform tennis and health clubs, figure salons, health studios, gymnasiums, weight control studios, martial arts and self-defense schools or any other similar course of physical training" (emphasis added).

There are several reasons for finding this definition irrelevant to the task of construing Administrative Code § 11-2002(h). First, the definition of a health club found in the General Business Law, by its own terms, is confined to its use in article 30 of the General Business Law. In addition, the term "health club" as used in article 30 is not coterminous with the term "health salon" as used in section 11-2002(h) of the Administrative Code. The purpose of article 30 is to protect the public and encourage fair dealing and competition in the health club industry by "restricting false or misleading advertising, erroneous contract terms, harmful financial practices, and other unfair, deceptive and discriminatory practices which have been conducted by health club operators" (General Business Law § 620[2]). Given this intent, it is understandable that the term "health club" would be defined very broadly so as to include as many kinds of facilities as possible. However, it includes within its definition of a health club many facilities which are not subject to tax under any provision of the Administrative Code, including tennis and racquetball facilities. The fact that health salons are included within the aegis of a health club pursuant to General Business Law § 621(2) does not mean that the two terms are interchangeable for all purposes and at all times.

The Division's reliance on the dictionary definition of the term "gymnasium" gives rise to similar difficulties. The term "gymnasium" is defined as:

> "**1.a.** : a large room used for various indoor sports (as basketball, boxing, or volleyball) and usu. equipped with gymnastics apparatus **b.** : a building (as on a college campus) containing space and equipment for various indoor sports

> activities and usu. including spectator accommodations, locker and shower rooms, offices, classrooms, and a swimming pool" (Webster's Ninth New Collegiate Dictionary 544 [1987]).

If this dictionary definition were used to construe section 11-2002(h), the exclusion found at section 11-2002(f)(1) would disappear, since all indoor sports are played in large rooms or buildings. To give effect to the participatory sports exclusion found at Administrative Code § 11-2002(f)(1), the terms "health salons" and "gymnasiums" must be read narrowly so as to except charges to a patron for admission to, or use of, facilities for sporting activities in which such patron is to be a participant.

F. The Division's alternative argument is also rejected. The Division contends that where sports facilities and health salon or gymnasium facilities are offered by the same establishment, "it is reasonable for the Division to determine such establishment to be a health club and tax the entire unallocated amount charged as membership income" (Division's brief, p. 6; emphasis added). According to the Division, petitioners were such an establishment and were required to segregate their receipts from sporting activities from their receipts from fitness activities in order to claim the exclusion for participatory sports facilities of Administrative Code § 11-2002(f)(1). Since they did not prove the amount of their membership receipts attributable to sports activities, the entire amount was properly treated as taxable because "where taxable and exempt items are sold as a single unit the total unit price is taxable" (Division's brief, p. 26).

This argument is consistent with the Division's audit results. Apparently, the Division took the position on audit that racquetsport income was a charge for use of a facility for sporting activities where the patron was to be a participant, and, as such, that income was deemed to be exempt from tax pursuant to Administrative Code § 11-2002(f)(1). Membership income, however, was treated as a charge for use of a health salon or gymnasium and taxed pursuant to Administrative Code § 11-2002(h). Any sports facilities or activities provided to members without additional charge (e.g., a pick-up basketball game) were considered to be simply other kinds of fitness activities. The Division's position makes a confusion of both the facts and the law.

As noted above, the participatory sports exclusionary clause must be read to include both charges for admission to a place where the patron goes to participate in a sport as well as charges for use of specific sports facilities. Petitioners' membership fee, as well as its guest fees and nonmember use fees, were charges for admission to a place where individuals went to participate in sports. An individual had to pay a fee to enter the club. Once admitted, the individual had access to a wide range of sporting activities and sports equipment -- from a swimming pool to a punching bag. The member paid an additional charge for the use of particular facilities at particular times, for example, to play on a team or to book a racquetball court. However, one could not play on a team or book a court without first becoming a member. Accordingly, all of petitioners' charges -- membership fees, guest fees, court-booking fees -- were for admission to or use of facilities for sporting activities, and all of those charges were excluded from taxation by Administrative Code § 11-2002(f)(1).

The Division's legal theory incorrectly treats the exclusion of Administrative Code § 11-2002(f)(1) as if it were an exemption from the tax imposed by Administrative Code § 11-2002(h). By doing so, the Division creates a presumption that all of petitioners' charges were subject to tax under Administrative Code § 11-2002(h) and places the burden on petitioners to show which of their charges were "exempt" from tax, presumably because they were solely for the use of specific sports facilities as opposed to fitness facilities. This avoids the true issue, which is whether petitioners' sales receipts are subject to the tax imposed by Administrative Code § 11-2002(h). Where the issue is whether property, income, a transaction or event is subject to taxation, the statute levying the tax must be construed in favor of the taxpayer (Matter of Grace v. New York State Tax Commn., supra). Moreover, in construing a statutory provision, all sections of the statute are to be read together and harmonized with one another (Matter of Levine v. Bornstein, supra). Applying these principles of statutory construction, I have construed the terms "health salons" and "gymnasiums" as used in Administrative Code § 11-2002(h) to not include establishments where patrons pay a charge to participate in a sport, and I have found that petitioners' clubs were such establishments. This analysis does not

depend on the existence of an exemption from taxation. The Division has put forth no reading of the statute which would support its contention that the exclusionary clause of Administrative Code § 11-2002(f)(1) should be treated as an exemption from the tax imposed under Administrative Code § 11-2002(h).

G. Petitioners have not challenged the tax imposed on their recurring expense purchases or fixed asset acquisitions (see, Finding of Facts "11" and "13"). Therefore, the taxes assessed on these bases are sustained. By Conciliation Orders issued to Prospect Park, Peter Sfarrazza and George Hart on June 26, 1992 and to St. George on October 30, 1992, the penalties asserted have been cancelled.

H. The petition of Prospect Park Health and Racquet Associates and Peter Sfarrazza and George Hart, as partners, and the petition of St. George Health and Racquetball Associates are denied to the extent indicated in Conclusion of Law "G" but are granted in all other respects; the notices of determination issued to petitioners shall be modified accordingly.

DATED: Troy, New York
October 13, 1994

/s/ Jean Corigliano
ADMINISTRATIVE LAW JUDGE