

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition	:	
	:	
of	:	
	:	
DARIEN LAKE FUN COUNTRY, INC.	:	DECISION
	:	
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 November 30,	:	
1977 through February 28, 1981.	:	

Petitioner, Darien Lake Fun Country, Inc., 9993 Allegany Road, Corfu, New York 14036, 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 November 30, 1977 through February 28, 1981 (File No. 45472).

A formal hearing was held before Daniel J. Ranalli, Hearing Officer, at the offices of the State Tax Commission, Building 9, State Office Campus, Albany, New York, on May 1, 1984 at 9:15 A.M., with all briefs to be submitted by June 5, 1984. Petitioner appeared by Kavinsky & Cook, Esqs. (Samuel L. Shapiro, Esq., of counsel). The Audit Division appeared by John P. Dugan, Esq. (Lawrence A. Newman, Esq., of counsel).

ISSUES

I. Whether the purchase of amusement rides by petitioner for use by its customers in petitioner's amusement park, were purchases for resale as such and thus not subject to sales and use tax.

II. Whether certain amusements provided by petitioner qualified as sporting activities in which petitioner's customers participated thus excluding the admission charge for such activities from sales and use tax.

FINDINGS OF FACT

1. On July 20, 1983, the Audit Division issued a Notice of Determination and Demand for Payment of Sales and Use Taxes Due against petitioner, Darien Lake Fun Country, Inc. (formerly Snyders Darien Corp.), in the amount of \$259,924.00 plus interest of \$97,156.55 for a total due of \$357,080.55 for the period September 1, 1977 through November 30, 1980.¹

2. Petitioner operates a theme park and camping facility on approximately 1200 acres of land located in Genesee County between Buffalo and Rochester, New York. In 1977, the park featured facilities for picnicking and camping, paddle boats, a skateboard track and a petting zoo. In 1978 petitioner began to expand its operation by adding several small amusement rides. By 1979, petitioner had added more rides and a water slide and had developed a policy of selling an all-day ride pass which allowed customers unlimited admission to the water slide and most of the other rides at the park. In 1980, additional rides were added. Petitioner both purchased and entered into lease agreements for the various amusement rides employed at the park.

3. Petitioner sells two types of tickets to its customers, one, known as an admission charge, entitles the customer to enter the park and partake of the non-ride attractions such as stage shows, roving bands and other such entertainment. The second type of ticket is known as a pay one price ticket. This ticket allows customers unlimited admission to most of the rides as well as the other attractions at the park. The rides are the traditional carnival type rides

1 At the hearing, petitioner and the Audit Division moved to amend the pleadings to include the sales tax quarters through the period ended February 28, 1981; however, the notice included only the quarters through November 30, 1980 and no other notices were offered in evidence.

such as the ferris wheel, roller coaster, merry-go-round and other such amusement rides.

4. Petitioner did not pay sales tax on the amounts paid for the purchase or lease of the amusement rides employed at the park. On audit, the Audit Division determined that sales tax was due on such purchases as sales at retail. Petitioner maintains that the purchase or lease of the rides was a purchase for resale since it, in effect, sells the rides to its customers by allowing its customers to ride them.

5. Petitioner also raised an issue involving tax charged to customers on the admission price to certain rides and attractions. Not all rides were included in the pay one price ticket. In particular the skateboard track, paddle boats, miniature golf, and, prior to 1980, the water slide had separate admission charges. Petitioner did not charge sales tax on the ticket price of these amusements maintaining that they were facilities for sporting activities the admission to which is not subject to tax. The Audit Division determined that they were not sporting activities and were, therefore, subject to tax.

The skateboard track was a competition level track which was used by petitioner's customers and on which petitioner sometimes held tournaments and other competitions. The track was also used for roller skating. The paddle boats were used by customers on petitioner's two small lakes located in the park. The water slide consisted of a series of slides of different heights and inclinations requiring various levels of skill to participate and terminating in a swimming pool. Petitioner also maintained a raft ride which was a multiple level slide similar to the water slide except that participants used rubber inner tubes. Each of these activities involved substantial physical exercise on the part of the participants.

6. According to the audit workpapers, the total sales from the customer participation activities were as follows:

Water Slide	\$182,226.00
Raft Ride	42,452.00
Skateboard Track	38,244.00
Paddleboats	11,320.00
Golf	<u>1,505.00</u>
Total	\$275,747.00

CONCLUSIONS OF LAW

A. That section 1105(a) of the Tax Law imposes a tax on the "receipts from every retail sale of tangible personal property, except as otherwise provided in [Article 28 of the Tax Law]." A retail sale is defined, in part, in section 1101(b)(4)(i)(A) as a "sale of tangible personal property to any person for any purpose, other than...for resale as such or as a physical component part of tangible personal property..."

B. That section 1105(f)(1) of the Tax Law imposes the sales tax on

"Any admission charge where such admission charge is in excess of ten cents to or for the use of any place of amusement in the state, except charges for admission to race tracks, boxing, sparring or wrestling matches or exhibitions which charges are taxed under any other law of this state, or dramatic or musical arts performances, or motion picture theaters, and except charges to a patron for admission to, or use of, facilities for sporting activities in which such patron is to be a participant, such as bowling alleys and swimming pools."

C. That petitioner's charge to its customers for riding on the amusement rides is an admission charge under section 1105(f)(1) rather than a retail sale of tangible personal property under section 1105(a). There is no transfer of title or possession of the ride; petitioner allows its customers on the ride for the duration of the ride only. The customers have no dominion and control over the ferris wheel gondolas or the roller coaster cars. Since there is no sale of the rides to the customers there can be no purchase for resale by

petitioner. Petitioner's reliance on Burger King, Inc. v. State Tax Commission, 51 N.Y.2d 614, is misplaced in that in Burger King there was an actual physical transfer of tangible personal property to the customers as part of the selling price of the food. There was no such transfer in the instant case, therefore, petitioner's purchase or lease of the amusement rides were purchases at retail not purchases for resale and subject to tax as such.

D. That the receipts from admission to the skateboard track, the paddle boats, the miniature golf course, the water slide and the raft ride were not subject to tax as admissions under section 1105(f)(1) of the Tax Law. Each of the aforesaid activities involves participation in a sporting activity involving substantial physical exercise. (Matter of Green Meadow Stables, Inc., State Tax Commission, December 10, 1976). In each of the amusements the customer must actively participate in the activity unlike a ferris wheel or roller coaster ride where the customer is a passive participant. Moreover, the water slide and raft ride are essentially very elaborate swimming pools. Therefore the receipts from such admission charges as enumerated in Finding of Fact "6" are not subject to tax and the tax thereon is cancelled.

E. That the petition of Darien Lake Fun Country, Inc. is granted to the extent indicated in Conclusion of Law "D"; that the Audit Division is directed to modify the Notice of Determination and Demand for Payment of Sales and Use Taxes Due issued July 20, 1983 accordingly; and that, except as so granted, the petition is in all other respects denied.

DATED: Albany, New York

MAR 01 1985

STATE TAX COMMISSION

Roderick W. Chen
PRESIDENT

Francis R. Koening
COMMISSIONER

Mark J. Smith
COMMISSIONER