

STATE OF NEW YORK

STATE TAX COMMISSION

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In the Matter of the Petition	:	
of	:	
RAQUET & TENNIS CLUB	:	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 March 1, 1981	:	
through February 29, 1984.	:	

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Petitioner, Raquet & Tennis Club, 370 Park Avenue, New York, New York 10022, 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 March 1, 1981 through February 29, 1984 (File No. 61881).

A hearing was held before Dennis M. Galliher, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on August 5, 1986 at 9:15 A.M., with all briefs to be submitted by September 26, 1986. Petitioner appeared by Richards, O'Neil & Allegaert, Esqs. (Jeffrey L. Coploff, Esq., of counsel), and by Pannel, Kerr & Forster (Lawrence Morgan, CPA). The Audit Division appeared by John P. Dugan, Esq. (Patricia L. Brumbaugh, Esq., of counsel).

#### ISSUES

I. Whether the Audit Division's imposition of tax on certain fees for sports instruction collected by petitioner on behalf of its professional sports instructors was proper.

II. Whether the Audit Division's method of computing the tax **on** the above-noted fees was proper.

FINDINGS OF FACT

1. On March 20, 1985, the Audit Division issued to petitioner, Raquet & Tennis Club, a Notice of Determination and Demand for Payment of Sales and Use Taxes Due for the period March 1, 1981 through February 29, 1984, in the amount of \$8,133.86, plus interest. Validated consents, previously executed **on** petitioner's behalf, allowed assessment for the period in question to be made at any time on or before March 20, 1985.

2. Petitioner operates a private club located in midtown Manhattan having social as well as athletic facilities and activities, including a restaurant and bar, and a library as well as tennis, **raquets**<sup>1</sup> and squash facilities.

3. The aforementioned assessment results from a field audit of petitioner's business operations. More specifically, the assessment represents sales tax on fees for athletic lessons, primarily squash lessons, given at petitioner's premises by various professionals.

4. Petitioner has approximately 2000 members, of whom about 450 actively participate in sports activities. Petitioner allows professional squash, tennis and raquets instructors to offer lessons at the facilities. When a club member wants to take a lesson, the member telephones the club and sets a lesson time with the given professional he desires the lesson from in accordance with the professional's time availability and the skill level of the member and the professional. The member then takes the lesson, and the fee for the lesson appears on the member's monthly statement of charges from the club. No cash is exchanged between the professionals and the members. In fact, **all** club members' charges

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1 Raquets **is** an old English game, similar to squash, played against four walls with a hard ball.

are accumulated and billed via monthly statements, and cash **is** not otherwise exchanged at the club.

5. Petitioner, by its games committee, determines which professionals will be hired and allowed to give lessons at the club, and also sets the fee structure for lessons. The head professional in each sport is also allowed to operate a sporting goods shop at the club, selling sports apparel and equipment. Billings are, again, handled through the monthly statements.

6. The lesson fees and other club charges are collected, as noted, by the petitioner through the members' monthly statements, and the petitioner then pays over such amounts as are collected for lesson fees to the professionals. Payment to the professionals is made by check, and petitioner deducts or withholds amounts from such checks for income and social security taxes and for insurance benefits provided to the professionals.

7. The amount of tax on sports lessons, as **is** at issue herein, was computed as follows:

- a. The auditor requested of petitioner (through its comptroller) records concerning the amounts of sports instruction fees collected during the audit period, and was shown ledger account number 99 into which were lumped lesson fees and gratuities paid to waiters for private parties.
- b. Petitioner's comptroller also furnished the auditor, in connection with the above request, information for the year 1983 showing that **of** the \$136,000.00 total collected during 1983 in account number 99, \$39,000.00 represented sports instruction fees and \$97,000.00 represented waiters' gratuities. **No** other records were furnished with respect to the breakdown of amounts in account number 99.
- c. The auditor calculated the respective percentages for sports instruction fees (28.68%) and waiter's gratuities (71.32%), and applied such percentages to the quarterly totals in account number 99 to arrive at the dollar amount of sports instruction fees for each quarterly period encompassed within the audit period. Sales tax was then calculated on such quarterly amounts, was assessed and remains at issue.

8. It is not disputed that petitioner maintained complete, accurate and adequate books and records. In connection with his examination of the sports instruction fees, the auditor requested records, as noted, and also offered and was prepared to do a detailed examination of all records. However, petitioner's comptroller furnished only the ledger account number 99 and the breakdown information for 1983 as described, and as utilized by the auditor in computing the assessment.

9. The auditor's uncontroverted testimony at the hearing was that petitioner's comptroller supplied only the aforementioned information, did not contest the use of the noted percentages to calculate the assessment, and advised the auditor that the 1983 percentages were representative **of** the entire audit period. In sum, at the time of the audit, petitioner agreed to the method of calculation and did not dispute the accuracy of the result, but rather contested only whether the sports instruction fees were properly subject to tax. However, at hearing, petitioner's counsel asserted that given the existence of complete and accurate books and records, the method of calculating the assessment was impermissible.

10. Finally, with respect to the sports instruction fees, petitioner asserts that it acts merely as a conduit between the members and the professionals where members have decided to take sports lessons as are available at the club. Petitioner maintains, thus, that the fees in question are not dues and are not subject to tax.

#### CONCLUSIONS OF LAW

A. That Tax law §1101(d)(6) defines "dues" as follows:

'Any dues or membership fee including any assessment, irrespective of the purpose for which made, and any charges for social **or** sports privileges or facilities, except charges for sports privileges or

facilities offered to members' guests which would otherwise be exempt if paid directly by such guests."

B. That petitioner is an athletic club within the meaning and intent of Tax Law §1105(f)(2). As such, its membership dues and initiation fees are subject to tax pursuant to §1105(f)(2).

C. That the fees for sports instruction lessons as billed by petitioner to **its** members herein constitute additional dues subject to tax pursuant to Tax Law §1105(f)(2) (Matter of Buffalo Skating Club, Inc., State Tax Commn., January 11, 1980).


D. That notwithstanding the existence of complete and accurate books and records, a taxpayer may consent to the calculation and assessment of tax based on tests or samples and projections therefrom. Here, petitioner consented to the calculation method used and, in fact, even encouraged its use by the nature of the records and information presented to the auditor. Accordingly, petitioner's assertion that the audit method was inappropriate in the face of complete books and records is rejected.

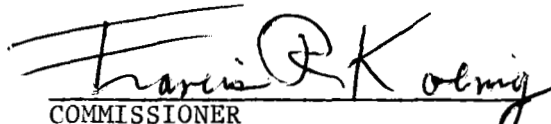
E. That the petition of Raquet & Tennis Club is hereby denied and the Notice of Determination and Demand for Payment **of** Sales and Use Taxes Due dated March 20, 1985 **is** sustained.


DATED: Albany, New York

MAR 13 1987

STATE TAX COMMISSION

  
PRESIDENT

  
COMMISSIONER

  
COMMISSIONER