

Sales Tax Determinations
**BUREAU OF LAW
MEMORANDUM**

Empire State Bldg. Co. *A. Z*

TO: Commissioners Murphy, Macduff and Conlon
FROM: Martin Schapiro, Hearing Officer
SUBJECT: Empire State Building Co.

Applications for hearing on refund of
sales taxes paid for periods commencing
August 1, 1965 and ending August 31, 1966

A hearing in the above matter was held before me at the New York City office on December 16, 1966. The appearances and exhibits are as indicated in the stenographic minutes of the record.

The issue herein is whether or not sales taxes were properly imposed on admissions to the Empire State Building Observatory. The facts, more fully set forth in the proposed determination, disclose that the taxpayer is the operator of the Empire State Building Observatory located therein; that admission tickets to the Observatory are sold to the public ranging from 60¢ to \$1.50 per person; that such tickets entitle the ticket holder to be admitted to an enclosed area on the 86th floor and one on the 102nd floor on both of which floors observatories are located entitling the holder to obtain a panoramic view of the surrounding metropolitan area and countryside. Moreover, on the 86th floor, there are provided for the benefit of the ticket holders coin-operated voice recording machines, picture booths, souvenir stands and coin-operated food and drink dispensing machines.

Section 1105(f)(1) provides for the imposition of a 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, . . ."; section 1101(d)(2) defines admission charge as "The amount paid for admission, including any service charge and any charge for entertainment or amusement or for the use of facilities therefor."; section 1101(d)(10) defines a place of amusement as "Any place where any facilities for entertainment, amusement, or sports are provided."

Such provisions of the Tax Law were to some extent modeled after the provisions of the New York City Amusement Tax (Sections G46-1.0, G46-2.0 of the New York City Administrative Code) enacted pursuant to the State Enabling Act authorizing the City of New York to impose a local tax on admissions to places of amusement (Chapter 278 of the Laws of 1947). The differences

between both the City Code and the State Tax Law are readily apparent upon examining the definition of "place of amusement." The definition contained in the prior New York City Law defines "place of amusement" as "Any theater of any kind, concert hall, opera house, other place where a performance is given, fair, exhibition, circus, golf course, athletic field, sporting arena, gymnasium, bowling alley, shooting gallery, swimming pool, bathing beach, skating rink, billiard, pool or ping pong tables and other similar places, or facilities of entertainment or amusement, including amusement devices, merry-go-rounds, miniature trains, ferris wheels, and other devices, whether or not such devices are contained in an enclosure." (Section 446-1.0(4), emphasis supplied).

The taxpayer urges that the provisions of the Tax Law covered fewer taxable situations than the City Amusement Tax Law; that since the New York City Comptroller had ruled (ruling of April 13, 1956) that the Observatory is not a place of amusement, it could not be so within the more limited definition set forth in Article 28 of the Tax Law. First, it is to be noted that the April 13, 1956 ruling of the Comptroller superseded an earlier ruling dated August 10, 1954 which held to the contrary; that the reason for such change of opinion could not be ascertained and that it is equally likely that the prior ruling holding that a tax was due on admissions to the Observatory correctly interpreted the provisions of the Administrative Code. In any event, a comparison of the language in the City Administrative Code and the Sales Tax Law discloses that whereas the words "place of amusement" in the Code referred to either certain types of enumerated places, or facilities having certain qualifications, the Sales Tax Law broadened the definition by eliminating any restrictive definition as to the type of facilities. Under the State Law a place of amusement does not necessarily have to be a place where "a performance is given . . .," as enumerated in the City Code. Thus, the taxpayer's argument that there must be a requirement that those in control of its operations provide a presentation, performance or device and that the Empire State Observatory merely provides a platform and not the view which is already in existence, may have some bearing in interpreting the City Code. The giving of a performance or the providing of devices, however, are not requirements under State Law.

In any event, the Observatory Tower on the 102nd floor is a facility enabling the taxpayer to view the entire countryside. Moreover, the picture booth, the coin-operated voice recording machines and the various food and drink dispensing machines are all facilities for the amusement of the patrons.

The taxpayer contends further that the Observatory is not a place of amusement since the view the visitor sees is neither amusing nor entertaining but edifying and educational. The dictionary definitions provided by the taxpayer in his memorandum, however, seem to indicate that the definition of amusement or entertainment does not preclude edification or education but that such amusement or entertainment is a "pleasurable occupation of the senses". The fact that such entertainment may be educational is seen in the definition of place of amusement as "Any theater, . . . concert hall, opera house . . ." found in the New York City Administrative Code.

The proposed determination, therefore, denies the application for refund and holds that the Empire State Building Observatory is a place of amusement in this State, that the admission charge is for entertainment or amusement and that facilities for entertainment or amusement are provided. If you agree, kindly sign one original and three copies and return the same together with the entire file to the Law Bureau for disposition.

/s/

MARTIN SCHAPIRO

Hearing Officer

MS:am *MS*
Enc.

3-21-67

March 17, 1967

STATE OF NEW YORK
STATE TAX COMMISSION

IN THE MATTER OF THE APPLICATIONS
OF

EMPIRE STATE BUILDING CO.

FOR REFUND OF SALES TAXES PAID PURSUANT
TO ARTICLES 28 AND 29 OF THE TAX LAW AND
NEW YORK CITY LOCAL LAW NO. 73 OF 1965,
AS AMENDED, FOR THE PERIOD COMMENCING
AUGUST 1, 1965 AND ENDING AUGUST 31, 1965,
AND FOR THE QUARTERLY PERIODS ENDING
NOVEMBER 30, 1965, FEBRUARY 28, 1966,
MAY 31, 1966, AND AUGUST 31, 1966

Empire State Building Company, having filed applications for refund of sales taxes paid pursuant to the provisions of Articles 28 and 29 of the Tax Law and New York City Local Law No. 73 of 1965, as amended, for the period commencing August 1, 1965 and ending August 31, 1965, and for the quarterly periods ending November 30, 1965, February 28, 1966, May 31, 1966, and August 31, 1966, and a hearing having been held thereon on December 16, 1966 before Martin Schapiro, Hearing Officer of the Department of Taxation and Finance, at 80 Centre Street, New York, New York, and the taxpayer having appeared by Counsel, and the matter having been duly examined and considered,

The State Tax Commission hereby finds:

(1) That the taxpayer, a partnership, is the operator of the Empire State Building, a well-known landmark situated in New York City, and the operator of the Empire State Building Observatory located in such building; that during the periods involved the taxpayer charged admission to the Observatory at prices of \$1.50 for each adult, \$.75 for each child or at special group prices of \$.60 per child from the age of 5 through

11 years, \$.75 per student from the age 12 to 18 years and \$1.20 per adult; that no sales taxes were collected on such admissions.

(2) That, however, the taxpayer filed New York State and local sales and use tax returns for the periods commencing August 1, 1965 and ending May 31, 1966 paying thereon the amount of \$85,114.67 as and for New York State and New York City sales taxes which amount represents 5 per cent of the admission charges to the Empire State Building Observatory reported on the returns, together with additional interest from the due date of the returns to the dates of filing of such returns; that in addition thereto the taxpayer filed a New York State and local sales tax return for the period commencing June 1, 1966 and ending August 1, 1966 and paid as and for New York State and New York City sales taxes the amount of \$43,880.85 which amount represents 5 per cent of the admission charges to the Observatory reported on the return; that the taxpayer seeks a refund of the above amounts.

(3) That the Empire State Building is 102 stories high; that on the first and second floors of such building there are cultural and educational displays which are open to all visitors of the Empire State Building without charge; that in addition thereto there are located on the 86th and 102nd floors of the building, areas which are set aside for the observation of a panoramic view of the surrounding metropolitan area and countryside for many miles; that such areas contain observatories for such viewing and are designated by the taxpayer and known by the public as the Empire State Building Observatory; that in order to be admitted to such areas on each of the floors, an admission ticket must be purchased at rates already specified in Finding No. 1 above; that such ticket

admits the ticket holder to both observatories, and no admission to either observatory, with rare exceptions, is permitted to persons who have not purchased the tickets.

(4) That the ticket holders are guided to an elevator at which point a portion of the tickets are collected, before the ticket holders are permitted to enter another elevator going to the observatory on the 86th floor. The observatory on the 86th floor consists of a large enclosure surrounded by windows out of which the ticket holder can view the surrounding metropolitan area and countryside. The ticket holders may also proceed through exits on to an outside terrace surrounding the enclosure which terrace is protected by a parapet wall and railing to obtain a less obstructed view, and for even a better view the ticket holder has available 10¢ coin-operated binoculars.

(5) That in addition to the facilities for observation of the surrounding metropolitan area and countryside, additional facilities for the amusement of the ticket holders are provided, which include a coin-operated voice recording machine, a photograph booth where the ticket holder can have his picture taken against a mural sky line, a souvenir stand from which souvenirs and other articles of a similar sort can be purchased and coin-operated food and drink dispensing vending machines; that all of the aforesaid additional facilities which are operated by a concessionaire, the ABC Vending Corporation, are only available to ticket holders who have paid the admission charge.

(6) That from the 86th floor the ticket holders then enter into a special elevator arriving at the observatory located on the 102nd floor; that the observatory is specially

constructed by being completely surrounded by windows in order to provide and facilitate an unobstructed view of the surrounding metropolitan area and countryside.

(7) That people purchase admissions to the Observatory in order to enjoy a panoramic view of the surrounding area, although they may also be motivated by a desire to educate themselves, to enrich themselves culturally or by other motives such as the pleasure of telephoning from the top of the Empire State Building (see page 48 of the minutes).

(8) That section 1105(f)(1) of the Tax Law provides for the imposition of a 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 . . ."; section 1101(d)(2) of the Tax Law defines admission charge as "the amount paid for admission, including any service charge and any charge for entertainment or amusement or for the use of facilities therefor."; section 1101(d)(10) of the Tax Law defines a place of amusement as "any place where any facilities for entertainment, amusement, or sports are provided."; that such definitions are also contained in the New York City Local Law No. 73 of 1965, as amended.

Upon all the foregoing facts herein, the State Tax Commission hereby

DETERMINES:

(A) That facilities located on the 102nd floor of the Empire State Building have been provided by the taxpayer for the unobstructed observation of the surrounding metropolitan area and countryside; that additional facilities for a relatively unobstructed panoramic view have also been provided on the 86th floor; that in addition further facilities on the latter floor have been provided for other diversified amusements as set forth in Finding of fact No. 4.

(B) That the areas on the 86th and 102nd floors which comprise the Empire State Building Observatory constitute places of amusement in this State and that the admission charge is charged for the use of such places of amusement in the City and State of New York.

(C) That the amounts paid for admission to the Empire State Building Observatory are charges for entertainment or amusement.

(D) That accordingly, New York State and New York City taxes at the combined rate of 5 per cent (New York State 2 per cent tax and New York City 3 per cent tax) were lawfully due and owing on such admission charges and taxpayer was required to collect the New York State and New York City sales taxes on such admission charges in the amounts set forth in section 525.1(a)(4) of the regulations of the State Tax Commission: (20 NYC RR 525.1(a)(4)).

(E) That the taxpayer's application for refund of the amounts paid by it as and for New York State and New York City sales taxes and interest thereon is hereby denied.

DATED: Albany, New York this 23rd day of March , 1967.

STATE TAX COMMISSION

/s/ JOSEPH H. MURPHY
President

/s/ JAMES R. MACDUFF
Commissioner

/s/ WALTER MACLYN CONLON
Commissioner