

STATE OF NEW YORK
STATE TAX COMMISSION
ALBANY, NEW YORK 12227

February 11, 1983

Roof Health Club, Inc.
Sheraton Atlantic Hotel
Broadway and 34th Street
New York, NY 10001

Gentlemen:

Please take notice of the Decision of the State Tax Commission enclosed herewith.

You have now exhausted your right of review at the administrative level. Pursuant to section(s) 1138 of the Tax Law, any proceeding in court to review an adverse decision by the State Tax Commission can only be instituted under Article 78 of the Civil Practice Laws and Rules, and must be commenced in the Supreme Court of the State of New York, Albany County, within 4 months from the date of this notice.

Inquiries concerning the computation of tax due or refund allowed in accordance with this decision may be addressed to:

NYS Dept. Taxation and Finance
Law Bureau - Litigation Unit
Albany, New York 12227
Phone # (518) 457-2070

Very truly yours,

STATE TAX COMMISSION

cc: Petitioner's Representative
Sidney Eagle
Eagle & Fein
363 7th Ave.
New York, NY 10001
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition
of

Roof Health Club, Inc.

:

: AFFIDAVIT OF MAILING

for Redetermination of a Deficiency or a Revision :
of a Determination or a Refund of Sales & Use Tax
under Article 28 & 29 of the Tax Law for the Period:
12/1/71 - 8/31/74.

State of New York
County of Albany

David Parchuck, being duly sworn, deposes and says that he is an employee of the Department of Taxation and Finance, over 18 years of age, and that on the 11th day of February, 1983, he served the within notice of Decision by certified mail upon Roof Health Club, Inc., the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Roof Health Club, Inc.
Sheraton Atlantic Hotel
Broadway and 34th Street
New York, NY 10001

and by depositing same enclosed in a postpaid properly addressed wrapper in a (post office or official depository) under the exclusive care and custody of the United States Postal Service within the State of New York.

That deponent further says that the said addressee is the petitioner herein and that the address set forth on said wrapper is the last known address of the petitioner.

Sworn to before me this
11th day of February, 1983.

David Parchuck

David A. Haglund

**AUTHORIZED TO ADMINISTER
OATHS PURSUANT TO TAX LAW
SECTION 174**

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of :
Roof Health Club, Inc. : AFFIDAVIT OF MAILING

for Redetermination of a Deficiency or a Revision :
of a Determination or a Refund of Sales & Use Tax :
under Article 28 & 29 of the Tax Law for the :
Period 12/1/71 - 8/31/74.

State of New York
County of Albany

David Parchuck, being duly sworn, deposes and says that he is an employee of the Department of Taxation and Finance, over 18 years of age, and that on the 11th day of February, 1983, he served the within notice of Decision by certified mail upon Sidney Eagle the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Sidney Eagle
Eagle & Fein
363 7th Ave.
New York, NY 10001

and by depositing same enclosed in a postpaid properly addressed wrapper in a (post office or official depository) under the exclusive care and custody of the United States Postal Service within the State of New York.

That deponent further says that the said addressee is the representative of the petitioner herein and that the address set forth on said wrapper is the last known address of the representative of the petitioner.

Sworn to before me this
11th day of February, 1983.

David Parchuck

Annice A. Hagelund

AUTHORIZED TO ADMINISTER
OATHS PURSUANT TO TAX LAW
SECTION 174

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of :
ROOF HEALTH CLUB, 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 Periods December 1, 1971 :
through August 31, 1974. :

Petitioner, Roof Health Club, Inc., Sheraton Atlantic Hotel, Broadway and 34th Street, New York, New York 10001, 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 periods December 1, 1971 through August 31, 1974 (File No. 17754).

A formal hearing was held before Julius Braun, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on January 18, 1978, and was continued before Solomon Sies, Hearing Officer, on June 23, 1978, at the same location. Petitioner appeared by Eagle & Fein, Esqs. (Sidney Eagle, Esq., of counsel). The Audit Division appeared by Peter Crotty, Esq. (James Morris, Esq., of counsel).

ISSUE

I. Whether membership dues paid to petitioner for use of its facilities constituted taxable dues paid to an athletic club or nontaxable dues paid to a health club.

II. Whether petitioner is entitled to a refund or credit of sales tax it collected and remitted to the state on its membership dues.

FINDINGS OF FACT

1. Petitioner, Roof Health Club, Inc., (Health Club) timely filed New York State sales and use tax returns for the periods December 1, 1971 through August 31, 1974.

2. On March 17, 1975, petitioner filed with the Audit Division an Application for Credit or Refund of State and Local Sales or Use Tax for the period at issue herein in the amount of \$68,984.74.

3. Petitioner is a domestic corporation organized under the laws of the State of New York. It operates a "health club" atop the Sheraton Atlantic Hotel, Broadway and 34th Street, New York, New York. The facilities consist of fully equipped gymnasium, swimming pool, steam room, outdoor and indoor solaria, handball and paddleball courts, golf cages, a TV lounge and a coffee shop.

4. Petitioner contends that it is a health club rather than an athletic club and as such its membership dues are not subject to sales tax. Petitioner, further contends that it is entitled to a refund because it had mistakenly collected sales tax on these dues and remitted such tax to the State.

5. Members in the club paid an annual membership fee of \$300.00. Only members were allowed to use the facilities of the club.

6. At the hearing petitioner submitted photostatic copies of eight (8) checks in varying amounts totaling \$215.00. The checks were dated in March 1978 with a notation "sales tax refund" on the face thereof. No evidence was presented as to the periods for which these alleged refund checks were issued, or that they were in fact refunds of sales tax collected during the periods in issue.

CONCLUSIONS OF LAW

A. That section 1105(f)(2) of the Tax Law imposes sales tax upon dues in excess of \$10.00 paid for membership in an athletic club. Section 527.11(b)(6)(i) of 20 NYCRR defines an athletic club as any club which has, as material purpose or activity, the practice, participation or promotion of any sports or athletics. Although these regulations were not yet in effect during the tax periods at issue herein, they do correctly express the law as it existed during that period. See: Arner vs. Rogan, 27 AFTR 1092 (USDC Cal., 1940).

B. That petitioner's health club had as a material purpose the practice of athletics, in that it provided facilities such as handball and paddleball courts, golf cages and a swimming pool. Such facilities are by their very nature designed to be used for athletic purposes rather than solely for exercise and health reasons. Therefore since petitioner's health club was in fact an athletic club, membership dues were properly subject to sales tax and petitioner is not entitled to a refund.

C. That even if petitioner had succeeded in establishing that it was operating a health club it has failed to satisfy its burden of proof in showing that the sales tax collected was in fact refunded to its members. Section 1139(a) of the Tax Law requires such a showing before petitioner would be entitled to a refund from the State Tax Commission.

D. That petitioner's Application for Credit or Refund of State and Local Sales or Use Tax is denied.


DATED: Albany, New York

FEB 11 1983

STATE TAX COMMISSION


ACTING PRESIDENT


COMMISSIONER


COMMISSIONER

P 389 758 561
RECEIPT FOR CERTIFIED MAIL

NO INSURANCE COVERAGE PROVIDED—
 NOT FOR INTERNATIONAL MAIL

(See Reverse)

Sent to <i>Post Search Club Inc.</i>	
Street and No. <i>1000 Atlantic Blvd.</i>	
P.O. State and ZIP Code <i>Brooklyn NY 11201</i>	
Postage	\$ <i>1.00</i>
Certified Fee	
Special Delivery Fee	
Restricted Delivery Fee	
Return Receipt Showing to whom and Date Delivered	
Return Receipt Showing to whom, Date, and Address of Delivery	
TOTAL Postage and Fees	\$
Postmark or Date	

PS Form 3800, Feb. 1982

P 389 758 562
RECEIPT FOR CERTIFIED MAIL

NO INSURANCE COVERAGE PROVIDED—
 NOT FOR INTERNATIONAL MAIL

(See Reverse)

Sent to <i>Sydney Eagle</i>	
Street and No. <i>Code & Fin</i>	
P.O. State and ZIP Code <i>503 7th Ave.</i>	
Postage	\$ <i>1.00</i>
Certified Fee	
Special Delivery Fee	
Restricted Delivery Fee	
Return Receipt Showing to whom and Date Delivered	
Return Receipt Showing to whom, Date, and Address of Delivery	
TOTAL Postage and Fees	\$
Postmark or Date	

PS Form 3800, Feb. 1982