

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of
Raquet & Tennis Club :

AFFIDAVIT OF MAILING

for Redetermination of a Deficiency or Revision :
of a Determination or Refund of Sales & Use Tax
under Article(s) 28 & 29 of the Tax Law for the :
Period 3/1/81-2/29/84.
:

State of New York :

ss.:

County of Albany :

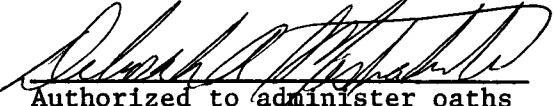
David Parchuck/Janet M. Snay, being duly sworn, deposes and says that he/she is an employee of the State Tax Commission, that he/she is over 18 years of age, and that on the 13th day of March, 1987, he/she served the within notice of Decision by certified mail upon Raquet & Tennis Club the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

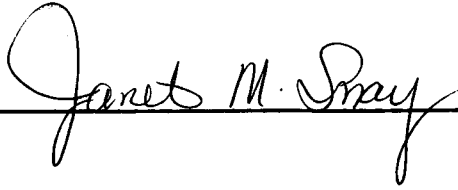
Raquet & Tennis Club
370 Park Avenue
New York, NY 10022

and by depositing same enclosed in a postpaid properly addressed wrapper in a post office 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
13th day of March, 1987.


Authorized to administer oaths
pursuant to Tax Law section 174



STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition
of

Raquet & Tennis Club

:

:

AFFIDAVIT OF MAILING

for Redetermination of a Deficiency or Revision :
of a Determination or Refund of Sales & Use Tax
under Article(s) 28 & 29 of the Tax Law for the :
Period 3/1/81-2/29/84.

:

State of New York :

ss.:

County of Albany :

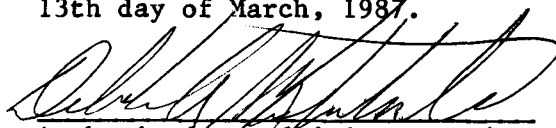
David Parchuck/Janet M. Snay, being duly sworn, deposes and says that he/she is an employee of the State Tax Commission, that he/she is over 18 years of age, and that on the 13th day of March, 1987, he served the within notice of Decision by certified mail upon Jeffrey L. Coploff, the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

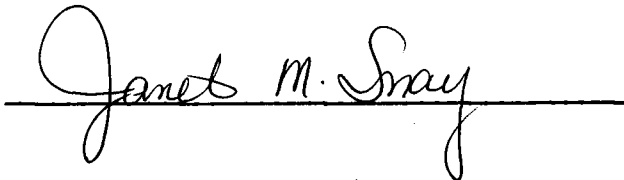
Jeffrey L. Coploff
Richards, O'Neil & Allegaert
885 3rd Ave., 7th Fl.
New York, NY 10022

and by depositing same enclosed in a postpaid properly addressed wrapper in a post office 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
13th day of March, 1987.


Authorized to administer oaths
pursuant to Tax Law section 174



STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of
Raquet & Tennis Club :

AFFIDAVIT OF MAILING

for Redetermination of a Deficiency or Revision :
of a Determination or Refund of Sales & Use Tax :
under Article(s) 28 & 29 of the Tax Law for the :
Period 3/1/81-2/29/84. :

State of New York :
ss.:
County of Albany :

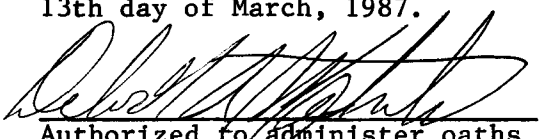
David Parchuck/Janet M. Snay, being duly sworn, deposes and says that he/she is an employee of the State Tax Commission, that he/she is over 18 years of age, and that on the 13th day of March, 1987, he served the within notice of Decision by certified mail upon Lawrence Morgan, the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

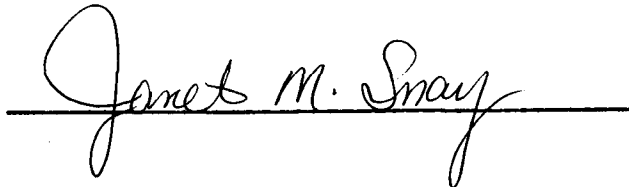
Lawrence Morgan
Pannel, Kerr & Forster
420 Lexington Ave.
New York, NY 10170

and by depositing same enclosed in a postpaid properly addressed wrapper in a post office 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
13th day of March, 1987.


Authorized to administer oaths
pursuant to Tax Law section 174



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

March 13, 1987

Raquet & Tennis Club
370 Park Avenue
New York, NY 10022

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, a proceeding in court to review an adverse decision by the State Tax Commission may be instituted only under Article 78 of the Civil Practice Law 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
Audit Evaluation Bureau
Assessment Review Unit
Building #9, State Campus
Albany, New York 12227
Phone # (518) 457-2086

Very truly yours,

STATE TAX COMMISSION

cc: Taxing Bureau's Representative

Petitioner's Representative:
Jeffrey L. Coploff
Richards, O'Neil & Allegaert
885 3rd Ave., 7th Fl.
New York, NY 10022

AND

Lawrence Morgan
Pannel, Kerr & Forster
420 Lexington Ave.
New York, NY 10170

STATE OF NEW YORK

STATE TAX COMMISSION

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.	:	

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, raquets¹ 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

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.

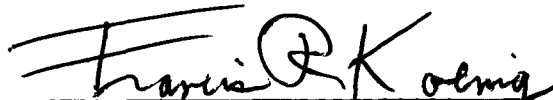
E. That the petition of Raquet & Tennis Club is hereby denied and the Notice of Determination and Demand for Payment of Sales and Use Taxes Due dated March 20, 1985 is sustained.

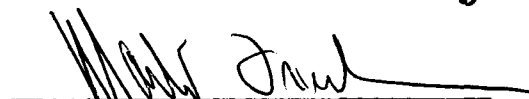
DATED: Albany, New York

STATE TAX COMMISSION

MAR 13 1987


PRESIDENT


COMMISSIONER


COMMISSIONER