

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petitions	:	
of	:	
SOULCYCLE, INC.	:	DETERMINATION
for Revision of Determinations or for Refund of	:	DTA NOS. 827698
Sales and Use Taxes under Articles 28 and 29 of the	:	AND 827699
Tax Law for the Period December 1, 2015 through	:	
January 31, 2016.	:	

Petitioner, SoulCycle, Inc., filed petitions for revision of determinations or for refund of sales and use taxes under articles 28 and 29 of the Tax Law for the period December 1, 2015 through January 31, 2016.

A hearing was held before Barbara J. Russo, Administrative Law Judge, in New York, New York, on March 20, 2018, at 10:30 A.M., with all briefs to be submitted by November 30, 2018, which date commenced the six-month period for issuance of this determination. Petitioner appeared by Hutton and Solomon, LLP (Kenneth I. Moore, Esq., of counsel) and Clayman & Rosenberg, LLP (Brian Linder, Esq., of counsel). The Division of Taxation appeared by Amanda Hiller, Esq. (M. Greg Jones, Esq., of counsel).

ISSUE

Whether the Division of Taxation properly denied the refund claim of SoulCycle, Inc., for New York City sales tax paid for the period December 1, 2015 through January 31, 2016.

FINDINGS OF FACT

1. Petitioner, SoulCycle, Inc., operates facilities in New York City and elsewhere, with its headquarters located in New York, New York.¹ Petitioner provides instructor-led indoor cycling classes for a fee. Customers can purchase individual class sessions or a package of multiple sessions. The cost of an individual session during the period at issue was generally \$34.00.²

2. Each class includes approximately 35 to 40 minutes of stationary bicycle riding led by an instructor with music, 5 to 8 minutes of upper body strength exercises using hand weights, and a 3 minute cool-down stretch. The instructor tells the riders when to adjust the resistance on the bicycles and what riding position to take, but does not go around the class and correct riders' positions. The stationary bikes do not measure power, speed, cadence or distance.

3. Petitioner filed form ST-809, "New York State and Local Sales and Use Tax Return for Part-Quarterly [sic] (Monthly) Filers" for the period December 1, 2015 through December 31, 2015, reporting taxable sales and services of \$5,799,178.00 and sales tax due of \$286,000.00.

4. Petitioner filed form ST-809 for the period January 1, 2016 through January 31, 2016, reporting taxable sales and services of \$6,306,559.00 and sales tax due of \$305,000.00.

5. Petitioner filed applications for credit or refund of sales or use tax for the period December 1, 2015 through December 31, 2015 (December refund request), and January 1, 2016 through January 31, 2016 (January refund request), seeking refunds in the amount of \$228,221.00 and \$254,714.00, respectively.

¹ Only sales at the New York City locations are at issue here.

² The price may be higher or lower depending on certain discounts or concierge services.

6. In response to petitioner's December and January refund requests, the Division of Taxation (Division) sent two letters, each dated March 29, 2016, requesting that petitioner provide proof that sales tax was charged and repaid to its customers.

7. On May 5 and 6, 2016, the Division sent additional correspondence regarding the January and December refund requests, respectively, indicating that it had not received the information requested in its March 29, 2016 letters. The correspondence further indicated that a conference call was held with petitioner's representatives on April 13, 2016, at which time the Division requested an explanation as to how petitioner's calculation of net taxable sales/services and total net sales and use tax was determined, along with all workpapers to substantiate the calculation. The correspondence requested that petitioner provide the information within 15 days.

8. Petitioner provided a spreadsheet for January 2016 with New York City locations listing revenue and tax accrual (4.5%) for "series sales" and "GL Account" summary.

9. The Division reviewed the information provided, determined that petitioner was a health and fitness facility required to collect and remit New York City sales tax, and denied petitioner's refund claims for December 2015 and January 2016.

10. The Division issued a refund claim determination notice dated June 1, 2016, denying petitioner's refund claim for December 1, 2015 through December 31, 2015 (2015 refund denial). The 2015 refund denial states:

"Section 1212-A(a)(2) of the Tax Law authorizes the City of New York to impose a local sales tax at the same uniform rate, but at a rate not to exceed four per centum, on 'beauty, barbering, hair restoring, manicuring, pedicuring, electrolysis, massage service and similar services, and every sale of services by weight control salons, health salons, gymnasiums, turkish and sauna bath and similar establishments and every charge for the use of such facilities but excluding services rendered by a physician, osteopath, dentist, nurse, physiotherapist,

chiropractor, podiatrist, optometrist, ophthalmic dispenser or a person performing similar services licensed under title VIII of the education law;’ such tax to be administered and collected by the Commissioner of Taxation and Finance.

Section 527.11(b) of the Sales and Use Tax Regulations provides, in part, the following definitions of terms that are contained in section 1105(f)(2) of the Tax Law:

(ii) Athletic activities does not include exercising or calisthenics solely for health or weight reduction purposes, as contrasted to sports. An establishment that merely provide steam baths, saunas, rowing machines, shaking machines and other exercise equipment shall not be considered an athletic club. However, there is a four-percent local sales tax in the city of New York on every sale of services by weight control salons, health salons, gymnasiums, turkish baths, sauna baths and similar establishments, and on every charge for the use of such facilities.

Based on a review of your information provided, the use of stationary bikes does not constitute a participatory sport and thus, [sic] subject to the New York City local tax on use of this facility.”

11. The Division issued a refund claim determination notice dated June 7, 2016, denying petitioner’s refund claim for January 1, 2016 through January 31, 2016 (2016 refund denial).

The 2016 refund denial stated the same basis for denial as the 2015 refund denial.

SUMMARY OF PETITIONER’S POSITION

12. Petitioner argues that its sales are not subject to sales tax under the New York City Administrative Code, contending that its sales fall under the exclusion from tax for charges to a patron for admission to, or use of, facilities for sporting activities in which such patron is to be a participant pursuant to Tax Law § 1105 (f) (1). Petitioner further argues that it did not collect local sales tax from its patrons from December 1, 2015 through January 31, 2016, but remitted local sales tax to the Division for that period and is entitled to a refund.

CONCLUSIONS OF LAW

A. New York City Administrative Code § 11-2002 imposes a special sales tax at the rate of four and one-half percent on receipts from:

“every sale of services by weight control salons, health salons, gymnasiums, turkish and sauna bath and similar establishments and every charge for the use of such facilities . . . excluding services rendered by a physician, osteopath, dentist, nurse, physiotherapist, chiropractor, podiatrist, optometrist, ophthalmic dispenser or a person performing similar services licensed under title eight of the education law . . . and excluding such services when performed on pets and other animals . . .” (New York City Administrative Code § 11-2002 [a]).

Section 11-2002 further provides that:

“[t]he provisions of articles twenty-eight and twenty-nine of the tax law relating or applicable to the taxes imposed by this section, including the applicable definitions, transitional provisions, limitations, special provisions, exemptions, exclusions, refunds, credits and administrative provisions, so far as those provisions can be made applicable to the taxes imposed by this section, shall apply to the taxes imposed by this section with the same force and effect as if those provisions had been incorporated in full into this section and had expressly referred to the taxes imposed by this section, except to the extent that any provision of article twenty-eight or twenty-nine of the tax law is either inconsistent with or not relevant to the taxes imposed by this section” (New York City Administrative Code § 11-2002 [d]).

Petitioner argues that pursuant to New York City Administrative Code § 11-2002 (d), an exclusion provided for in Tax Law § 1105 (f) (1) applies to the tax imposed by New York City Administrative Code § 11-2002 (a). Tax Law § 1105 (f) (1), which imposes a sales tax on certain admission charges, provides as follows:

“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 or combative sports which charges are taxed under any other law of this state, or dramatic or musical arts performances, or live circus 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*” (emphasis added).

Petitioner argues that the foregoing exception in Tax Law § 1105 (f) (1) for sporting activities in which the patron is a participant applies to the special sales tax imposed by New York City Administrative Code § 11-2002 (a), and claims that “[t]o date, New York City has not adopted a local law omitting the exception for participatory sporting activities.”

B. Contrary to petitioner’s argument, New York City Administrative Code § 11-2001 specifically omits the exception set forth in Tax Law § 1105 (f) (1), providing in relevant part as follows:

“Imposition of general sales and compensating use taxes.

(a) There are hereby imposed and there shall be paid all of the sales and compensating use taxes described in article twenty-eight of the tax law as authorized by subdivision (a) of section twelve hundred ten of the tax law, at the rate of four and one-half percent, provided that the taxes described in paragraph six of subdivision © of section eleven hundred five of the tax law shall be imposed and paid at the rate of six percent.

(b) Notwithstanding any contrary provision of this section or other law, this section . . .

(3) does not omit from the tax described in paragraph one of subdivision (f) of section eleven hundred five of the tax law 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” (New York City Administrative Code § 11-2001, emphasis added).

C. There is no exclusion from the special sales tax imposed by New York City Administrative Code § 11-2002 for participatory sports. The exclusion set forth in Tax Law § 1105 (f) (1), which is specifically omitted for purposes of the New York Administrative Code, applies to admission charges for state tax purposes. The exclusion does not apply to the city special sales tax, which is imposed on “receipts from every sale of the services . . . by health salons, gymnasiums . . . and similar establishments and every charge for the use of such facilities” (New York City Administrative Code § 11-2002). The special sales tax imposed by New

York City Administrative Code § 11-2002 is separate and distinct from that on admission charges under Tax Law § 1105 (f) (1). Indeed, if petitioner’s argument that its charges to patrons are the type intended by Tax Law § 1105 (f) (1) was accepted, then such charges would be taxable as admission charges under New York City Administrative Code § 11-2001, which specifically omits the participatory sports exclusion. Yet, in its reply brief, petitioner argues that the fees at issue are not admission charges and “since these fees are not subject to the tax on admissions to places of amusement, any exclusions or exemptions from such tax are irrelevant.” Petitioner’s attempt to benefit from an exclusion on admission charges while simultaneously claiming that its fees are not admission charges is nonsensical and hereby rejected.

D. The legislative history of New York City Administrative Code §§ 11-2001 and 11-2002 further clarifies that the participatory sports exclusion does not apply to the special sales tax. In 2008, New York City Administrative Code former § 11-2002 was repealed and replaced by the current New York City Administrative Code §§ 11-2001 and 11-2002.

Prior to the 2008 amendment, New York City Administrative Code former § 11-2002 imposed a sales tax at the rate of four percent upon the receipts (among others) specified in subdivisions (f) and (h) of that section:

“(f)(1) 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 city of New York, except charges for admission to race tracks, boxing, sparring or wrestling matches or exhibitions which charges are taxed under the laws of the state of New York, or dramatic or musical arts performances, or motion picture theaters, and *except such 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*

* * *

(h) Receipts from beauty, barbering, hair restoring, manicuring, pedicuring, electrolysis, massage services and similar services, . . . and gymnasiums, turkish

and sauna bath and similar establishments and every charge for the use of such facilities, whether or not any tangible personal property is transferred in conjunction therewith . . .” (New York City Administrative Code former § 11-2002, emphasis added).

The 2008 amendment, effective August 1, 2008: a) imposed general sales and use tax as set forth in New York City Administrative Code § 11-2001, and included language therein specifically omitting the participatory sports exclusion therefrom, and b) created the special sales tax as set forth in New York City Administrative Code § 11-2002. The elimination of the participatory sports exclusion previously set forth in former § 11-2002 (f), coupled with the language specifically omitting such exclusion from § 11-2001, is clear evidence that the exclusion set forth in Tax Law § 1105 (f) (1) does not apply to the sales at issue here (*see* conclusion of law C). As a result of the amendment, there is no longer a participatory sports exclusion for New York City sales tax purposes.

E. Petitioner relies on *Matter of Prospect Park Health and Racquet Assoc.* (Tax Appeals Tribunal, July 22, 1997), as well as a number of advisory opinions which predate the amendment to support its argument. In reviewing New York City Administrative Code former § 11-2002 (f) (1) and (h), the Tribunal determined that the participatory sports exclusion contained in former § 11-2002 (f) (1) applied to charges to a patron for admission to, or use of facilities for sporting activities in which such patron was a participant. However, since New York City Administrative Code former § 11-2002 was repealed subsequent to *Matter of Prospect Park Health and Racquet Assoc.*, and replaced with the current §§ 11-2001 and 11-2002, which removed the participatory sports exclusion from sales for purposes of the New York City tax, that case is no longer controlling.

F. The petition of Soul Cycle, Inc., is denied, and the refund claim determination notices dated June 1, 2016 and June 7, 2016, are sustained.

DATED: Albany, New York
May 23, 2019

/s/ Barbara J. Russo
ADMINISTRATIVE LAW JUDGE