STATE OF NEW YORK

TAX APPEALS TRIBUNAL

In the Matter of the Petition	:	
of	:	
PROSPECT PARK HEALTH AND RACQUET ASSOCIATES AND PETER J. SFERRAZZA AND GEORGE HART, AS PARTNERS	:	
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 December 1, 1987 through November 30, 1990.	:	DECISION DTA NOS. 811196 AND 811608
In the Matter of the Petition	:	
of	:	
ST. GEORGE HEALTH AND RACQUETBALL ASSOCIATES	:	
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 June 1, 1988 through February 28, 1991.	:	

The Division of Taxation filed an exception to the determination of the Administrative Law Judge issued on October 13, 1994 with respect to the petitions of Prospect Park Health and Racquet Associates, 17 Eastern Parkway, Brooklyn, New York 11238, Peter J. Sferrazza, as partner, 3101 Boardwalk, Apt. 1612-1, Atlantic City, New Jersey 08401 and George Hart, as partner, 220 East 72nd Street, New York, New York 10021 and St. George Health and Racquetball Associates, 17 Eastern Parkway, Brooklyn, New York 11238. Petitioners appeared by Murphy, Burns, Barber & Murphy, LLP (Peter G. Barber, Esq., of counsel). The Division of Taxation appeared by Steven U. Teitelbaum, Esq. (Vera R. Johnson, Esq. and James Della Porta, Esq., of counsel).

An amicus curiae brief was filed by Corporation Counsel of the City of New York Paul A. Crotty, Esq. (Edward F. X. Hart, Esq. and Amy F. Nogid, Esq., of counsel).[1]

The Division of Taxation filed a brief in support of its exception and a reply brief. Petitioners filed a brief in opposition to the exception and a brief in response to the amicus brief. Oral argument was heard on January 23, 1997 in Troy, New York.

After reviewing the entire record in this matter, the Tax Appeals Tribunal renders the following decision. Commissioner Jenkins took no part in the consideration of this decision.

ISSUE

Whether the charges petitioners imposed for the use of their facilities are subject to the sales tax imposed pursuant to section 11-2002(h) of the New York City Administrative Code.

FINDINGS OF FACT

We find the facts as determined by the Administrative Law Judge. These facts are set forth below.

The Division of Taxation (the "Division") issued to petitioner Prospect Park Health and Racquet Associates ("Prospect Park") two notices of determination and demands for payment of sales and use taxes due dated June 20, 1991. One notice assessed tax due for the period December 1, 1987 through November 30, 1990 in the amount of $116,060.46, plus penalty and interest. The second notice assessed a penalty only in the amount of $11,606.06 for the same period. The Division issued identical notices to petitioner George Hart, as partner of Prospect Park Health and Racquet Associates, and to petitioner Peter Sferrazza, as partner of Prospect Park Health and Racquet Associates.

The Division issued a Conciliation Order dated June 26, 1992 sustaining the tax assessed against Prospect Park and the two partners but cancelling all penalties. Six notice numbers

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[1]The City of New York filed a motion with the Tax Appeals Tribunal for leave to submit an amicus curiae brief, which motion was granted.

relating to the six notices issued to Prospect Park, George Hart and Peter Sferrazza are listed on the Conciliation Order.

Prospect Park filed a timely petition with the Division of Tax Appeals. The petition was signed by Marc Sferrazza. Attached to the petition were the following documents: a copy of the Conciliation Order referred to above with a cover letter signed by Steven Saskin, Conciliation Conferee; a copy of a Notice of Determination and Demand for Payment of Sales and Use Taxes Due issued to Peter Sferrazza assessing tax, penalty and interest; a copy of a Notice of Determination and Demand for Payment of Sales and Use Taxes Due issued to Peter Sferrazza assessing penalty only; and a Memorandum in Support of Petition, submitted by Sussmane, Zapfel & Cohen, P.C. The first paragraph of the memorandum states the following:

> "Prospect Park Health and Racquet Associates ('Petitioner' or 'Prospect Park') is a New York limited partnership which commenced business operations in 1987 of a 26,000 square foot multiple-use participating sports facility in the Union Temple building at Grand Army Plaza, 17 Eastern Parkway, Brooklyn, New York. Petitioner is one of several affiliated participating sportsfacilities owned by Eastern Athletic Inc., a New York corporation, or its affiliates and predecessors ('Eastern Athletic')."

In its answer to the petition, the Division included the following allegations:

> "3. ALLEGES that the assessments issued against the partnership entity are not challenged by this petition, since the Notices of Determination issued thereto are neither listed nor attached to the petition. In any event, this petition would be improper as to the partnership, since it is not signed by a general partner or a person acting under a power on behalf of the partnership.
>
> "4. ALLEGES that this is an invalid petition as to Peter Sferrazza because it seeks to challenge the assessment against an individual partner, but the person who signed the petition is not acting pursuant to a filed power of attorney and is therefore without authority to act.
>
> "WHEREFORE, the Department of Taxation and Finance respectfully requests that the petition herein be denied and that the assessment be sustained in full together with applicable interest and penalty thereon."

In his opening statement at the administrative hearing, petitioners' representative, James H. Tully, Jr., stated that he was unsure whether the signing of the petition by Marc Sferrazza was still an issue. He also stated that Marc Sferrazza would testify that he was a person with the authority to sign the petition for Prospect Park. The Division's representative, Vera R. Johnson, was given an opportunity to make an opening statement and declined, stating: "I have no opening statement" (tr., p. 12).

Marc Sferrazza was called as a witness and testified as follows:

Mr. Tully: ". . . What was your position with Prospect Park Health and Racquet Club?"

Mr. Sferrazza: "I'm the general manager."

Mr. Tully: "Are you a stockholder?"

Mr. Sferrazza: "I hold 100 percent of the stock, which, in terms, is the general partner of Prospect Park Health and Racquet Club. However, at the time -- the period of the audit, I was 50 percent stockholder" (tr., pp. 13-14).

The Division's representative asked Mr. Sferrazza no questions regarding his authority to execute a petition on behalf of Prospect Park. Peter Sferrazza was also called to testify. Neither Mr. Tully nor Ms. Johnson addressed any questions to him regarding Marc Sferrazza's authority to act for Prospect Park or for its partners. George Hart was also present at the hearing but did not testify. Almost halfway through the hearing, the Administrative Law Judge asked Ms. Johnson to clarify the Division's position on the various legal issues which were raised by petitioners. In response, she stated, among other things, that the Division did not waive its objections to the validity of the petition as stated in the Division's answer. She offered no evidence regarding this issue and did not address it in her closing statement.

The Division issued to petitioner St. George Health and Racquetball Associates ("St. George") a Notice of Determination and Demand for Payment of Sales and Use Taxes Due dated March 16, 1992, asserting tax due in the amount of $242,861.32 for the period June 1, 1988 through February 28, 1991, plus penalty and interest. The Division issued to St. George a Conciliation Order dated October 30, 1992, sustaining the determination of tax due and cancelling all penalties.

Prospect Park and St. George are limited partnerships. They are a part of a larger group of companies affiliated with Eastern Athletic Clubs, Inc. In 1989, Prospect Park and St. George changed their names to Eastern Athletic Club for Sports at Prospect Park and Eastern Athletic Club for Sports at St. George, respectively.

Although Prospect Park and St. George refer to themselves as "clubs" and call the fees they charge for use of their facilities "membership" fees, neither of them is a membership club or "athletic club" as the latter term is used in Tax Law § 1105(f)(2) or New York City Administrative Code § 11-2002(f)(2). With this understanding, petitioners' terminology will be used in this determination.

The Division began an audit of Prospect Park in November 1990. Marc Sferrazza assisted in the audit, although he did not file a power of attorney with the Division. According to the Field Audit Report, a power of attorney was not filed because all audit work was done at the taxpayer's office. Prospect Park was not registered as a sales tax vendor at the time of the audit.[2]

The auditor examined Prospect Park's records of recurring purchases and determined that they were adequate for audit purposes. Marc Sferrazza signed an Audit Method Election form on behalf of Prospect Park agreeing to allow the Division to use a test period audit to determine sales or use tax liability for recurring expense purchases. The Division determined additional taxes due on such purchases in the amount of $2,172.71. It also determined tax due of $1,287.00 in the area of fixed asset acquisitions. Petitioners have not disputed the Division's determination in these areas.

The Division examined Prospect Park's sales records. The auditor completed the Field Audit Report by checking a box next to the following statement: "Sales records were adequate and the Audit Election Method Agreement was not signed because: . . . SALES WERE DONE IN DETAIL." However, the auditor also indicated in her report that she requested sales invoices which were not provided. According to the auditor's work schedules, Prospect Park's sales records (apparently income statements) showed gross income for the years 1987 through 1990 of

[2]When asked whether Prospect Park was renting lockers or had any other transactions subject to sales tax under the Tax Law, the auditor replied: "No. We only picked up membership fees for the assessment" (tr., p. 112).

$3,027,144.00 and "membership income" of $2,815,024.30. The Division applied a tax rate of 4 percent to membership income to determine tax due of $112,600.75.

The Division's audit of St. George was conducted in a similar fashion. Again, the Field Audit Report states that St. George's purchase and sales records were adequate for audit purposes. It also indicates that an Audit Election Method form was signed for purposes of estimating taxable sales, but no agreement was offered in evidence and the work schedules indicate that a detailed audit was performed. The Division determined tax due of $1,315.75 on recurring expense purchases and $4,567.68 on fixed asset acquisitions. The auditor's workpapers show that St. George's gross income was separated into three major categories: membership income, racquet sports, and sundry income. The 4 percent tax rate was imposed only on membership income of $5,924,447.50, resulting in tax due of $236,977.90. St. George challenged only that portion of the assessment which assesses tax on its membership income.

The disputed tax assessed against Prospect Park and St. George is imposed by Administrative Code § 11-2002(h) which imposes a tax on "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 establishments." The Division's conclusion that the membership income collected by Prospect Park and St. George is subject to that tax is based on the following: a visit the auditor made to St. George before the audit of either establishment began, observations of each facility made by the auditor during the audit, brochures and advertisements, and the auditor's personal impressions of the nature of the facilities and services offered.

The auditor testified that she initially visited St. George because she lived nearby and was interested in a membership. She stated that she "knew people who joined for fitness" (tr., p. 94). Her recollection of what occurred on that visit was rather weak. She stated that she was primarily interested in aerobics and was told that if she joined St. George she would be provided with a personal fitness plan on

orientation. She saw a swimming pool, exercise equipment and lockers. During the course of the audit, she visited St. George a second time and visited Prospect Park once. She did not speak with employees of those establishments at that time. The auditor reviewed brochures provided to her by petitioners. From these, she determined that basic membership fees covered aerobics, the use of weight training and exercise equipment and use of the swimming pools. She also concluded that additional fees were charged for other services and activities. The auditor examined a newspaper advertisement which shows a woman in exercise clothing. The text of the advertisement states:

> "Take advantage of this offer and take advantage of the best Clubs in New York. With over a quarter million square feet, Eastern Athletic Clubs offer you true Cross-Training. If you want Aerobics, Weight Training, Tennis and Racquetball, of course you'll find them. You'll also find Full Court Basketball, an Olympic Swimming Pool, Sports Shops, Albert Ciccarelli Salons and Spas, and a complete Events and Trips program. You may find that joining the best costs the least!"

The auditor telephoned the St. George on one occasion after the audit period and was told that an additional fee was charged for use of the racquetball courts. Based on her personal observations and the information she received from petitioners, the auditor concluded that Prospect Park and St. George are "health salons" or "gymnasiums" as that term is used in section 11-2002(h) of the Administrative Code. On audit, the Division did not assess sales tax on the separate income categorized as racquet sports. It was the auditor's understanding that separately itemized income from charges collected for use of the racquetball courts was not subject to the tax imposed by Administrative Code § 11-2002(h).

Petitioners claim that the membership fees collected by Prospect Park and St. George are excluded from taxation by Tax Law § 1105(f)(1) and Administrative Code § 11-2002(f)(1) which exclude charges for use of sports facilities where the patron is an active participant in the sport. Petitioners describe Prospect Park and St. George as "participant sports establishments".

St. George and Prospect Park operate very large athletic facilities. St. George occupies approximately 64,000 square feet on four floors. It began as a tennis and racquetball club and still has an extensive amount of space (approximately 15,000 square feet) dedicated to racquet

sports. During the audit period, wallyball (a form of volleyball played on a racquetball court), golf and handball, racquetball, tennis and squash were played in the "racquetsports center". In the sports center, patrons could participate in volleyball, basketball, wall climbing, boxing and table tennis. The St. George also had a swimming pool and separate areas dedicated to Karate, pocket billiards, children's sports, T'ai Chi and other martial arts and a dance center. In addition to these sports facilities, St. George had exercise and conditioning areas which contained exercise equipment such as stationary bicycles, stair steppers and free weights. A dance and exercise schedule obtained by the auditor shows that the St. George conducted classes throughout the day in aerobics, toning and conditioning, and yoga. These classes were held primarily in the "Grand Salon". St. George leased a portion of its premises to separate entities which operated a health spa, the Albert Ciccarelli health salon, a sports shop and a cafe. These facilities were operated by vendors unrelated to petitioners, and their businesses were not included in the audit.

Prospect Park operated a facility that was similar to St. George but much smaller. It had an Olympic-size swimming pool and a separate area dedicated to boxing. Like St. George, Prospect Park leased a portion of its premises to the Albert Ciccarelli salon and spa.

The parties offered in evidence a number of brochures and schedules which explain petitioners' membership rates, program schedules and special classes. Although these relate to periods after the audit period, Marc Sferrazza testified that the manner in which Prospect Park and St. George operated during the audit period was consistent with the information found in the brochures. One brochure is entitled "MEMBERSHIP RATES AND CLUB HOURS". It generally explains the fee structure of Prospect Park. It shows that members were required to pay an initiation fee and either an annual or monthly fee. The initiation fee for an individual membership was $350.00. The annual "Prime" rate for an individual was $600.00, and the "Non-Prime" rate was $480.00. A "Fitness Special" was available at an annual prime rate fee of $720.00 and non-prime rate fee of $600.00. According to Marc Sferrazza's testimony, this entitled a person to a certain number of sessions with a personal trainer as well as the other benefits of membership. Other special membership rates were available (e.g., family, corporate, senior). Nonmembers were required to pay a use fee of $25.00 per day. A guest accompanied

by a member was required to pay a guest fee of $12.00 per day during prime time and $8.00 during other times.

Members of the clubs were allowed the use of all of the club's facilities. A brochure entitled "DANCE & EXERCISE PROGRAMS SUMMER 1991" contains a schedule of activities at St. George. It shows that St. George conducted a wide variety of exercise activities for its members, including aerobics, yoga, T'ai Chi, aquacize, and bikercize. All of these activities were available to members at no additional charge. Additional fees were charged for classes in ballroom dance, tap, and Afro-Cuban dance; an exercise and relaxation class designed to decrease back and neck pain; a support group for new mothers; and several other activities. The vast majority of the classes and exercise activities were conducted without additional charges to the members.

Another brochure describes Adult Special Programs at St. George. Eastern Athletic Clubs sponsored the following competitive teams in regional leagues: men's softball, squash, table tennis, men's volleyball, women's volleyball, and wallyball. Members of the clubs paid an additional fee of about $100.00 per team to play on the teams which competed in these leagues. The fees were used for t-shirts, trophies and other expenses associated with league play. Tryouts were held for each sport in order to place players on suitable teams. The sports center schedule shows that the club's facilities were reserved for league and team activities, approximately 18 hours per week. During the rest of the time, the St. George Sports Center was used for basketball, volleyball and table tennis and members were free to participate in these activities without payment of any fee other than the membership rate. One could not be a member of a team without being a club member.

The Prospect Park brochure for Racquetsports and Wallyball for Fall 1993 shows that the club imposed a racquetball court booking fee of $16.00 per hour in prime time and $12.00 per hour in non-prime time. Guests of members were allowed to play racquetball if accompanied by a member, but they could not book a court. A guest fee was charged. A person could not be a guest more than four times per year.

To support its contention that Prospect Park and St. George are primarily participant-sports establishments, petitioners introduced the testimony of several of its members. The most

prominent member to testify was Jose Torres, former commissioner and chairman of the New York State Athletic Commission and former light heavyweight boxing champion. Mr. Torres testified that he boxed, taught boxing and trained boxers at the St. George. Halina Pavel, captain of the women's volleyball team, testified that she goes to the St. George approximately three times per week to play volleyball. She stated that the St. George has organized volleyball teams (which apparently compete against each other), league play and pick-up games on Saturdays and Sundays. She testified that she did not consider the St. George to be a fitness club. George Cassius, captain of the wallyball league, was enthusiastic about his sport. He noted that the St. George has had national championship wallyball teams in the men's, women's and coed divisions. Depending on the season, Mr. Cassius and others play wallyball at the St. George two to four times per week. He also testified that a member of the club who wanted to participate in wallyball could do so without joining a league or team.

Garrett Jones, the overall program director of St. George and Prospect Park, testified with regard to the operation of the clubs. He described two schedules which were placed in evidence: a pool schedule for Prospect Park and a 1989 basketball schedule for St. George. The pool schedule shows that the pool was open for lap swimming and free swimming for all but approximately one hour per day. Even special classes, e.g., aquacize and adult swim lessons, were held at the same time that the pool was being used for laps or free swim. The basketball schedule shows approximately six to seven hours per week of league play with the remainder of the time reserved for pick-up games and open play, primarily in basketball and volleyball.

Petitioners also offered the affidavit of Alan Zwirn, Sports Program Director for Eastern Athletic Clubs. In his affidavit, he states as follows:

> "6. All sports scheduling and programming is under my aegis and designed to offer members as diverse a pallet of participant- sports as possible. As Sports Program Director, I engage in coordination and support of all the participant sports which include basketball, boxing, martial art, fencing, flag-football, gymnastics, softball, table tennis, volleyball, racquetball, squash and wallyball.
>
> "7. All of these sports are offered to all members for no additional charge to their basic membership fee.

> "8. For leagues, lessons, clinics and tournaments, members do pay special charges. However, these charges are to pay for the expenses of trophies, uniforms, tee-shirts, referees, and instructors, and parties all used by the sports participants.
>
> "9. These special charges are for specific items or personnel which are necessary to enhance the participation in the sports. The charges, with the exception of minimal charge (approximately 1% of total club income) for peak time racquetball play, are not for the use of participant-sports facilities."

George Pavel, a volleyball player and member of St. George, states in an affidavit that he pays no additional charges to participate in the various activities at the St. George, including volleyball, wallyball, basketball, swimming, boxing, gymnastics and martial arts.

Petitioners offered the affidavits of several other persons familiar with the facilities and programs of Prospect Park and St. George, including: Kenneth K. Fisher, a member of the New York City Council; Betsy Gottbaum, former City Commissioner of Parks and Recreation; Michael O'Hara, President of Wallyball International, Inc.; and Andrew Deitel, Marketing Director for the Brooklyn Sports Foundation. Each of these affiants states that he or she considers Prospect Park and St. George to be athletic facilities which its members join in order to participate in sporting activities. Ms. Gottbaum states in her affidavit that both clubs offer exercise classes and training equipment but that their primary purpose is to "provide sports for its patrons to participate in." She also states that "it would have been highly unlikely that anyone would have joined either Eastern Athletics Clubs', St. George or Prospect Park, as a fitness only club." Several of petitioners' witnesses made a similar point -- a person with no interest in participant sports would be unlikely to join Prospect Park or St. George because fitness clubs offering more exercise equipment and classes, at lower fees, are widely available. The auditor testified that she did not join the St. George because it was too expensive.

Petitioners offered in evidence numerous newspaper articles about Prospect Park and St. George. Some of the articles contain reports of sports competitions; others describe programs being conducted; and still others might be described as human interest stories.

A schedule of income from special charges prepared by Marvin Feuer, the accountant for Eastern Athletic Clubs, supports Mr. Zwirn's statement that only a small portion of club income

is from special charges. This chart shows income received by Prospect Park and St. George in 1990 as follows:

Sport	St. George	Prospect Park
Pool classes	$ 19,280.00	$16,569.00
Racquetsports	90,609.00	9,687.00
Ski Trips	78,813.00	4,046.00
Sports center (league and team fees)	27,006.00	4,627.00
Dance Classes	32,007.00	1,917.00
Rafting trips	3,160.00	-0-
Totals	$250,875.00	$36,846.00

Petitioners introduced a number of affidavits to support their contention that the State does not impose sales tax on fees charged by other establishments offering activities similar to those offered by Prospect Park and St. George. John McCarthy, Executive Director of IRSA, The Association of Quality Clubs, a trade organization of athletic and fitness clubs in the United States and abroad, states that he is personally familiar with St. George and Prospect Park. In his affidavit, he states that many racquetball and tennis facilities have a fee schedule similar to that of the Eastern Athletic Clubs which allows members to play unlimited open time with no additional charge or, alternatively, to play at a discounted rate. He also states that many of these clubs offer steam rooms, saunas and some exercise equipment for the use of their members. In his experience, New York City does not impose a sales tax on fees charged by these clubs. Jon Denley, a vice-president of a company that offers insurance to tennis, racquetball, sports clubs and health clubs, made similar statements in his affidavit.

Antoinette Giordano, an administrator for Eastern Athletic Clubs, executed an affidavit in which she stated that she personally contacted establishments offering activities similar to those offered by Eastern Athletic Clubs to ask whether they charge sales tax. The establishments she contacted stated that no tax was collected and that they were not required to collect sales tax. Among those contacted by Ms. Giordano were: Chelsea Billiards, Arthur Murray Dance, Midtown Golf Club, Jodi's Gym (a children gymnastics studio), Aim-Dojo Karate School, Royal Flamingo Swim Club, Mill Basin Racquet Club and Starrett Tennis Center.

As evidence that their interpretation of the Tax Law and Administrative Code is reasonable, petitioners offered letters written by Peter Sferrazza to the Division, inquiring about the tax status of charges for various activities, and the responses he received. In his letter of May 14, 1979, Mr. Sferrazza posed the following hypothetical.

A tennis or racquetball facility offers tennis courts, racquetball courts, saunas, steam rooms, exercise rooms, lockers, showers, a lounge, whirlpools, a babysitting room and vending machines. It provides towels to its members. There are various fee structures for players: a seasonal fee to play at a certain time each week; a daily or hourly rate for courts when free; a discount card entitling the holder to reduced rates on seasonal or hourly rates. Mr. Sferrazza asked if sales tax was imposed on any of these charges.

In a letter dated August 3, 1979, the Division provided answers to Mr. Sferrazza's questions. Essentially, the letter states that no tax would be imposed under any of the circumstances described. In addition, the letter states:

> "The management introduces leagues and tournaments to generate player interest and court rentals. The programs are offered to players for a fee which pays for court rental, balls, trophies.
>
> "The introduction of leagues and tournaments would not change the tax status of the facility. The fees paid by the players are still tax exempt."

OPINION

New York City Administrative Code § 11-2002 imposes a sales tax at the rate of 4 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 theatres, 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 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, whether or not any tangible personal property is transferred in conjunction therewith . . ." (emphasis added).

In her determination, the Administrative Law Judge concluded that in construing a statute, all sections of the legislative enactment are to be read together to determine the legislative intent and all parts of the statute must be harmonized with one another. Therefore, section 11-2002(h) cannot be interpreted properly without taking into account the exclusion for participatory sports facilities found in section 11-2002(f)(1). Case law requires that this exclusion includes both charges for admissions to a place where the patron goes to participate in a sport and charges for the use of specific sports facilities. The Division did not subject the charges for use of specific sports facilities to tax. However, the Administrative Law Judge concluded that the section 11-2002(f)(1) exclusion also includes petitioners' membership fees since those fees were, in essence, charges for admission to a "place" where individuals could actively participate in any one of a number of sporting activities as well as charges for use of facilities for sporting activities.

The Administrative Law Judge noted that the City of New York affirmatively elected to include the participatory sports exclusion of Tax Law § 1105(f)(1) in its Administrative Code as well as to take advantage of the authority granted it by the State to impose sales tax on health salons and gymnasiums (Tax Law § 1212-A[b][1]). She concluded that the only way to interpret section 11-2002(h) without rendering section 11-2002(f)(1) a nullity was to narrowly construe the terms "health salons," "gymnasiums" and "similar establishments" in section 11-2002(h) so as to include only those establishments which provide activities directed at the improvement of bodily appearance and not those which offer participatory sports and athletic facilities. The Administrative Law Judge concluded that all of the services and establishments listed in section 11-2002(h) are dedicated to physical appearance and well-being, rather than to sports or athletic activities. Therefore, she concluded that the terms "health salons" and "gymnasiums" as used in Administrative Code § 11-2002(h) include only facilities which provide exercise equipment, exercise activities and calisthenics solely for health or weight reduction purposes, as opposed to sports.

Relying on the Division's regulations which define an "athletic club" for purposes of Administrative Code § 11-2002(f)(2) as "any club or organization which has as a material

purpose or activity the practice, participation in or promotion of any sports athletics" (20 NYCRR 527.11[b][7], emphasis added), the Administrative Law Judge concluded that an establishment that has as a material purpose or activity the practice, participation in or promotion of any sports athletics is not subject to tax under Administrative Code § 11-2002(h). On the other hand, an establishment which merely provides exercise, calisthenics and exercise equipment solely for health or weight reduction is subject to tax as a health salon or gymnasium. Based on this construction of the statute and evidence establishing that Prospect Park and St. George had as a material purpose the practice, participation in and promotion of sports, the Administrative Law Judge concluded that their receipts from membership income were not subject to tax.

The Administrative Law Judge rejected the Division's alternative argument that where sports facilities and health salon or gymnasium facilities are offered by the same establishment, petitioners were required to segregate their receipts from sporting activities from their receipts from fitness activities in order to claim the exclusion for participatory sports facilities. The Administrative Law Judge concluded that this theory incorrectly treats the exclusion of Administrative Code § 11-2002(f)(1) as if it were an exemption from the tax. As an exclusion from tax, it must be construed in favor of the taxpayer.

In its exception, the Division argues that the Administrative Law Judge incorrectly determined that the exception for participatory sports in section 11-2002(f)(1) applies equally to section 11-2002(h). The Division argues that there is no participatory sports exclusion applicable to section 11-2002(h). The Division states that "the fundamental point of the Division's case [is] that § 11-2002(f) is irrelevant to this matter" (Reply brief, p. 4 [footnote 2]). However, even if section 11-2002(f) were applicable, tax is properly imposed on charges for use of the health club facilities since petitioners did not allocate those charges between fitness and sports center fees. The Division argues that the City of New York enacted section 11-2002(h) based on the authority of Tax Law § 1212-A(b)(1). Since that section does not include a participatory sports exclusion, it was improper for the Administrative Law Judge to incorporate one. Further, the Division argues that section 11-2002(f)(1) imposes a tax on "admissions charges" while section 11-2002(h) imposes a tax on "receipts from every sale of services."

Thus, section 11-2002(h) is broader in scope than section 11-2002(f)(1). Further, these sections were enacted to tax different things. One was enacted to tax admissions charges which were also subject to tax under Tax Law § 1105(f) and the other was enacted to impose a tax for which there was no Article 28 equivalent. Thus, the Division asserts that the Administrative Law Judge's attempt to read these two disparate provisions together renders the provisions of Tax Law § 1212-A(c) meaningless. That section provides that a tax imposed pursuant to section 1212-A(a) or (b) may be imposed in addition to any other tax imposed by the City of New York and notwithstanding any inconsistent provision of law. The applicability of section 11-2002(h), argues the Division, is determined by the nature of the transaction at issue. The only issue, therefore, is whether or not the type of service provided or type of facility used falls within the provision of section 11-2002(h). It does not matter that these services are offered by a sports club.

In opposition, petitioners argue that the Administrative Law Judge correctly determined that the membership fees at issue are not taxable under two distinct legal bases: petitioners are not weight control salons, health salons, gymnasiums, turkish and sauna bath and similar establishments whose services are subject to tax under section 11-2002(h). Further, membership fees constitute charges for the use of participant sports establishments that are excluded from tax under section 11-2002(f)(1). Petitioners argue that section 11-2002(h) focuses upon the place and not the transaction for assessing tax in that it taxes every sale of services offered by specific establishments. The focal point, therefore, is whether or not petitioners are the types of establishments whose services are subject to tax under section 11-2002(h). The Division, they argue, fails to notice the context within which the word "gymnasium" is used in section 11-2002(h). In construing it with the remaining words in that section, it must include only those facilities which provide exercise equipment, activities and calisthenics solely for health or weight reduction purposes. Given the Division's own construction of section 11-2002(h) in its Publication 846 (that it relates to a facility primarily for the improvement of bodily health), it must only mean that when a facility is used primarily for participant sports, then it is not subject to tax under section 11-2002(h). Further, petitioners argue that any attempt to tax petitioners as a gymnasium would negate the exclusion from tax

accorded to participant sports establishments by section 11-2002(f)(1). Nor, argue petitioners, was there any need to allocate membership fees between fitness activities and sports activities.

The City of New York, appearing on the exception as amicus curiae, argues that the Administrative Law Judge's decision that two unrelated provisions in the City of New York's sales tax law must be read together is erroneous. Rather, these provisions are mutually exclusive because they were enacted pursuant to different enabling acts at different times; section 11-2002(h) permits no exemptions; and tax pursuant to that section may be imposed notwithstanding any inconsistent provision of law. By ignoring the Legislature's intent, the Administrative Law Judge has modified section 11-2002(h) by implication and has impermissibly extended an exemption provision. The City notes that the exemption of section 11-2002(f)(1) was not even extended to the tax on membership and initiation fees paid to social or athletic clubs pursuant to section 11-2002(f)(2). The City argues that admission charges, taxed pursuant to section 11-2002(f)(1), are for limited access to entertainment, amusement or sports events or use of said facilities. There is no element of services taxed pursuant to section 11-2002(f)(1). However, petitioners' members are entitled not only to admittance to their clubs but to the services they provide. The City urges that the sports athletics are part and parcel of an integrated group of services which are all properly taxable, although in this proceeding only the tax on membership income is at issue.

We affirm the determination of the Administrative Law Judge. The Division's argument, in essence, is that there is no need to reconcile sections 11-2002(f)(1) and 11-2002(h) because they were enacted pursuant to different legislative authorizations and at different times; the later-enacted section 11-2002(h) supercedes the exclusion from tax provided by section 11-2002(f)(1); and section 11-2002(h) subjects the charges by petitioners for the use of its facilities to tax. The Division is correct that a very broad reading of the term "gymnasium" in section 11-2002(h) (taxing 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") can clearly encompass the type of facility operated by petitioners. As a result, the parties have spent much energy arguing over the definition of a "gymnasium." We need not specifically define that term herein in order to resolve this matter. Rather, we agree with the

Administrative Law Judge that section 11-2002(h) must not be read so broadly as to render the exclusion (not exemption, as the City contends) in section 11-2002(f)(1) meaningless. As she stated:

> "[t]o give effect to the participatory sports exclusion found at Administrative Code § 11-2002(f)(1), the terms 'health salons' and 'gymnasiums' must be read narrowly so as to except charges to a patron for admission to, or use of, facilities for sporting activities in which such patron is to be a participant" (Determination, conclusion of law "E").

The Division has provided no authority for its argument that the City of New York purposely enacted an exclusion from taxation in section 11-2002(f)(1) and then, at the same time, added a contradictory subsection within the same statute to include in the tax base that which it had previously excluded. Nor do we find persuasive the City's argument that the participatory sports "exemption" of section 11-2002(f)(1) should not be extended to section 11-2002(h) since it was not even extended to the tax on membership and initiation dues paid to social or athletic clubs pursuant to section 11-2002(f)(2). It appears that the "dues" taxed by section 11-2002(f)(2) are a specific exception to the section 11-2002(f)(1) exclusion from taxation and (f)(2) does not serve to render the entire (f)(1) exclusion a nullity. Nor are we, as the Division argues, inserting the exclusionary language of section 11-2002(f)(1) in section 11-2002(h). Rather, we are adopting a construction of these two statutes which allows each to serve its intended purpose in the City of New York's sales tax structure. In this matter, the evidence in the record supports the conclusion by the Administrative Law Judge that "petitioners' membership fees . . . were, in essence, charges for admission to a 'place' where individuals could actively participate in any one of a number of sporting activities -- basketball, volleyball, wallyball, swimming, table tennis -- as well as charges for use of 'facilities for sporting activities,' such as racquetball courts, climbing walls and punching bags" (Determination, conclusion of law "C").

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of the Division of Taxation is denied;

2. The determination of the Administrative Law Judge is affirmed;

3. The petition of Prospect Park Health and Racquet Associates and Peter J. Sferrazza and George Hart, as partners, and the petition of St. George Health and Racquetball Associates are denied to the extent that the taxes assessed on their recurring expense purchases or fixed asset acquisitions are sustained, but the petitions are granted in all other respects; and

4. The notices of determination are to be modified in accordance with paragraph "3" above.

DATED: Troy, New York
July 22, 1997

/s/Donald C. DeWitt
Donald C. DeWitt
President

/s/Joseph W. Pinto, Jr.
Joseph W. Pinto, Jr.
Commissioner