SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 43

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FLYWHEEL SPORTS, INC.,

Plaintiff,

Index No. 155110/16

-against-

NEW YORK STATE DEPARTMENT OF TAXATION AND FINANCE and JERRY BOONE, the COMMISSIONER OF TAXATION AND FINANCE, in his official capacity,

Defendants.

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Robert R. Reed, J.:

This is a declaratory judgment action by plaintiff Flywheel Sports, Inc, a business which provides indoor cycling services. Plaintiff seeks an order declaring that § 11-2002 (a) of the Administrative Code of the City of New York does not apply to the indoor cycling sessions offered by plaintiff, because such sessions qualify for an exception to the statute which is afforded to facilities which offer participant sporting activities. Plaintiff moves, pursuant to CPLR 6301, for a preliminary injunction, restraining defendants from imposing sales tax on plaintiff's indoor cycling services, until resolution of this action.

Defendants New York State Department of Taxation and Finance and Jerry Boone, the Commissioner of Taxation and Finance, cross move to dismiss the complaint or, in the alternative to transfer

venue of this action to Albany County and, if necessary, to convert this action to a proceeding under Article 78 of the CPLR. For the reasons stated below, the cross motion is granted to the extent that this action is dismissed as premature and the remainder of the cross motion is denied as moot. The motion for a preliminary injunction is denied.

Background

The Administrative Code of the City of New York, § 11-2002 (a), imposes a requirement to collect sales tax on, among others, parties who operate health salons, gymnasiums, and similar establishments. However, the New York State Tax Department has recognized an exception to the statute for facilities which provide space for participatory sporting activities such as basketball, racquetball or volleyball. The Tax Department issues advisory opinions as to whether a party, or certain activities, fit within the exception.

In early 2015, auditors from New York State Tax Department began an audit of plaintiff for the period March 1, 2012, to February 28, 2015. According to defendants, plaintiff collects and remits sales tax for certain aspects of its business, but does not collect and remit sales tax for the fees it charges for the cycling

sessions at issue here.

In connection with the 2012-2015 audit of plaintiff, the Tax Department sent plaintiff a letter, dated April 13, 2016, which advised plaintiff that the fees charged by plaintiff for the cycling classes did not appear to come within the exemption for participatory sporting activities. As such, the letter recommended that plaintiff begin collecting and remitting such tax on a going-forward basis, without liability for taxes not collected during the audit period. The letter did not include an actual Notice of Determination.

According to defendants, this letter amounted to preliminary, non-final advice and the audit of plaintiff is ongoing. No final audit determination has been made and no Notice of Determination has been sent to plaintiff.

Plaintiff commenced the instant action in June, 2016, seeking an order declaring that § 11-2002 (a) does not apply to the indoor cycling sessions offered by plaintiff because its facilities qualify for the exception to the statute which is afforded to facilities which offer participant sporting activities. The complaint alleges that, although plaintiff's members ride stationary bicycles, the cycling sessions are competitive events because riders are able to compare their results to other riders

through a digital display. As such, the riders are racing against each other, despite being on stationary bicycles. Riders are also able to qualify for prizes from plaintiff, based on their results.

In addition to a declaratory judgment, plaintiff seeks a preliminary injunction restraining defendants from imposing sales tax on plaintiff's indoor cycling services, until resolution of this action.

Defendants argue that the instant action should be dismissed as premature because plaintiff has not yet exhausted its administrative remedies. Defendants state that, while the cycling classes at issue likely do not fall within the exception for participatory sporting activities, no final determination has been made on that issue by the Tax Department. Defendants note that plaintiff has not taken the steps of remitting the tax in question to the Tax Department and then seeking a refund on this basis. As such, defendants contend that this action is premature. Defendants further contend that once the dispute is ripe for judicial review under Article 78 of the CPLR, plaintiff must proceed in Albany County.

Discussion

New York Tax Law § 1212-A(a)(2) permits cities with over one

million residents to establish local taxes, including, relevant here, a tax on the sale of services by "weight control salons, health salons, gymnasiums....and similar establishments...." Pursuant to this authority, New York City imposes a sales tax of 4.5% on the sale of services by such establishments pursuant to Administrative Code § 11-2002(a).

As set forth above, the Tax Department has created an exception to the sales tax statute for facilities which provide their members with access to participatory sporting events such as basketball, volleyball and racquetball. The Tax Department determines, on a case by case basis, through advisory opinions, whether an establishment fits within the exception to the sales tax, based on what activities are offered at the facility. Any business which is ultimately required to collect sales taxes must file periodic tax returns with the Tax Department and remit any required payments. *See* Tax Law §§ 1136, 1137.

It is undisputed that defendants have advised plaintiff to begin collecting and remitting sales tax arising from the indoor cycling sessions, but have not yet made a final determination as to whether plaintiff is obligated to collect and remit such tax. The issue here, is whether this court may, at this point, determine whether plaintiff is subject to such sales tax, or whether

plaintiff must exhaust its remedies with the Tax Department before proceeding in this court. The court finds that an action for a declaratory judgment is inappropriate here and plaintiff must first exhaust its administrative remedies under the Tax Law.

In general, "[a]ctions by taxing officers can be reviewed only in the manner prescribed by statute." *Bankers Trust Corp. v New York City Dept. of Fin.*, 1 NY3d 315, 321 (2003), citations omitted. Where a statute states that the remedy provided in the statute constitutes the exclusive remedy available to a taxpayer, then declaratory relief is usually not available. *See CMSG Rest. Group, LLC v State of New York*, 145 AD3d 136, 141 (1st Dept 2016).

However, "[t]here are two exceptions to the exclusive remedy requirement: when a tax statute...is alleged to be unconstitutional, by its terms or application, or where the statute is attacked as wholly inapplicable." *Bankers Trust Corp.*, 1 NY3d at 321, internal quotation marks and citation omitted; see *CMSG Rest. Group, LLC v State of New York*, 145 AD3d at 141. "In these two circumstances, the invalidity or total inapplicability affects the entire statute, including the limitations and restrictions on the remedy provided in it." *Id.*, internal quotation marks and citation omitted. "To challenge a statute as wholly inapplicable, the taxpayer must allege that the agency had no jurisdiction over

it or the matter that was taxed." *Id.*

In cases, "[w]here [a] taxpayer claims that a tax statute is wholly inapplicable, it may bring a declaratory judgment action without exhausting administrative remedies." *GTE Spacenet Corp. v New York State Dept. of Taxation & Fin.*, 201 AD2d 429, 430 (1st Dept. 1994).

In the case at hand, it is undisputed that sections 1138 and 1139 of the Tax Law provide specific remedies for taxpayers in connection with both the determination of a tax, and refunds of taxes incorrectly collected. Such remedies include, among other things, a hearing before an administrative law judge and an administrative appeal.

Significantly, section 1140 of the Tax Law provides that the remedies set forth in sections 1138 and 1139 are the exclusive remedies available to taxpayers "for the review of tax liability imposed by this article..." Section 1140 further provides, in relevant part that "no determination or proposed determination of tax or determination on any application for refund shall be enjoined or reviewed by an action for declaratory judgment..." Instead, review is available only through a proceeding under CPLR Article 78. *Id.*

Based on the foregoing, it is clear that the remedies set

forth in the Tax Law are the exclusive remedies available to plaintiff here, absent a showing that the statute is unconstitutional, which plaintiff does not assert, or that it is wholly inapplicable to plaintiff.

Plaintiff contends that the statute is wholly inapplicable to it because the cycling sessions are competitive activities which fall within the exception to the sales tax set forth above. This is unpersuasive.

As noted above, in order to challenge the tax law as wholly inapplicable, plaintiff must allege that the Tax Department had no jurisdiction over it or the matter that was taxed. *Bankers Trust Corp.*, 1 NY3d at 315. Plaintiff can make no such showing here. The Tax Department indisputably has jurisdiction over the issue of whether plaintiff's business is subject to the collection and remittance of sales tax. Indeed, plaintiff already pays sales tax on other aspects of its business.

Whether plaintiff's cycling sessions are exempt from sales tax is clearly a matter for the Tax Department to determine on a factual basis. If plaintiff wishes to challenge any determination by the Tax Department, it must do so through the administrative process set forth in the statute. Once plaintiff exhausts its administrative remedies, it may proceed pursuant to Article 78 of

the CPLR. To permit plaintiff to proceed through a declaratory judgment action here, would result in this court determining plaintiff's tax status rather than the Tax Department making that determination, in the first instance. Such a result has no basis in the Tax Law.

Accordingly, it is

ORDERED that the motion by plaintiff Flywheel Sports, Inc. for a preliminary injunction is denied; and it is further

ORDERED that the motion by defendants New York State Department of Taxation and Finance and Jerry Boone, the Commissioner of Taxation and Finance to dismiss the complaint is granted and the complaint is dismissed.

DATED: June 14, 2018

ENTER:

J.S.C.

6/14/18