New York State Department of Taxation and Finance
Office of Tax Policy Analysis
Technical Services Division

TSB-A-03(36)S
Sales Tax
September 3, 2003

STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION PETITION NO.S021003B

On October 3, 2002, the Department of Taxation and Finance received a Petition for Advisory Opinion from Pleasantville Country Club, Inc., 110 Nannahagen Road, Pleasantville, NY 10570.

The issues raised by Petitioner, Pleasantville Country Club, Inc., are:

1) Whether the monthly maintenance charges and assessments paid by Petitioner's members are subject to sales tax.

2) Whether Petitioner is obligated to collect sales tax on the annual/monthly fees collected from nonresident golfers.

3) Whether Petitioner is obligated to collect sales tax on guest fees and fees paid by golf leagues.

Petitioner submitted the following facts as the basis for this Advisory Opinion.

Petitioner is located in Pleasantville, New York within the Town of Mt. Pleasant. It is governed by its Declaration of Covenants and Restrictions (the "Declaration") which was approved by the Village of Pleasantville, was filed with Westchester County and governs the legal rights of Petitioner's homeowner members vis a vis each other and the Village of Pleasantville. Petitioner is also governed by its Articles of Incorporation ("Articles") and its By-Laws.

The Declaration provides, in part:

> Article I.(h) "Member" shall mean and refer to each holder of a membership interest in the Association, as such interest is set forth in Article III.
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> * * *
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> Article II. Section 1. Property. The real property which is and shall be held, transferred, sold, conveyed and occupied subject to this Declaration is all that certain plot, piece or parcel of land situate, lying and being south of the intersection of Nannahagen Road and Ashland Avenue, Pleasantville, New York, being more particularly bounded and described in Schedule A annexed hereto, including, without limitation, all of the Lots and the Golf Club Lot.

> Article III. The Association shall have one class of membership interest. The owner of each dwelling unit on the Property subject to this Declaration shall be a Member. . . .
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> Article II, Section 1 of the By-Laws provides, in part:
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> Memberships shall consist of the 72 Home Owners (such 72 memberships being referred to herein as "Memberships" . . . There shall be no Members other than Home Owners. . . .

There are 72 shares of common stock of Petitioner outstanding. Each share is owned by an owner of one of the 72 dwelling units. There are no other shares of stock or ownership interests outstanding. Shares cannot be transferred separately from home ownership. Homeowners (members) pay monthly maintenance charges that cover all expenses, such as exterior painting of their homes, roof maintenance and replacements, gardening of private lawns, and maintenance (including gardening) of common grounds (e.g., roads, individual driveways, tennis court and swimming pool).

Petitioner owns a golf course. Homeowners do not pay greens fees and do not pay annual fees for playing golf. Only approximately one-third of the homeowners use the golf course. The non-golfing homeowners pay the same charges as golfing homeowners. Petitioner permits nonresident golfers to play golf. For the privilege of playing golf and in lieu of paying greens fees, each nonresident golfer pays either a monthly or an annual fee ranging from $600 for a child to $3,550 for a husband and wife. The right of a nonresident golfer, which is established by contract between Petitioner and the nonresident golfer, is solely to play golf for one golf season, provided he or she follows the rules established by Petitioner. The contract is in the form of a membership application and refers to the applicant as a prospective member. Having paid his or her annual fee, in addition to a one time initiation fee, the nonresident golfer does not pay greens fees to play golf. The nonresident golfers are accepted on a first-come, first-served basis and the number accepted is limited only by the size of Petitioner's facilities. Petitioner currently collects sales tax on the annual fee charged to nonresident golfers. The Declaration does not make any reference to nonresident golfers.

The financial burdens carried by homeowners are quite different in nature from those carried by nonresident golfers. Nonresident golfers, unlike homeowners, are not responsible for the financial viability of Petitioner as they are not financially responsible for any of the expenses incurred. Nonresident golfers only pay the fee specified by the Board of Directors. This difference in the nature and also in the amount of the financial burden is attested to, among other things, by the distribution of the increases in the financial burden over the years. While the average annual maintenance cost of a homeowner rose by 58.8% between 1998 and 2002 (from $3,800 to $6,035), the annual fee for a nonresident individual golfer rose only by 14.3% (from $2,188 to $2,500), and for a husband and wife by only 12.7% (from $3,150 to $3,550). Also, while Petitioner's total amount of nonresident golfing fee income rose by only a negligible 1.5% in the four-year period

between 1998 and 2002, total homeowners maintenance income rose by 58.8%. The annual fiscal short fall is made up by the homeowners while nonresident golfers only pay their annual fees regardless of the overall financial needs of the enterprise.

A restaurant is located in the clubhouse on the property of Petitioner. Petitioner has elected to lease this restaurant to an unrelated entity. There are no requirements for the members or the nonresident golfers to spend a minimum monetary amount at the restaurant. The restaurant is open to the general public for lunch and is also used for catered events.

As members of Petitioner, homeowners have significant rights such as the right to vote at meetings and to elect the Board of Directors, and the right to use the common areas owned by Petitioner, such as its tennis courts and pool. The nonresident golfers have none of these rights. Nonresident golfers do not serve on the Board of Directors.

The only persons who have the rights granted to members by the Declaration are the 72 homeowners. The only persons who are subject to the obligations imposed upon members by the Declaration are the 72 homeowners.

Petitioner occasionally charges guest fees for a single round of golf for both guests of homeowners and for guests of nonresident golfers. Guests of homeowners include members of their families who do not reside at the dwelling unit of the homeowner.

Initially the homeowners organization and the golf club were established as two separate corporations. Subsequently it was decided that the two corporations should be merged into one entity (Petitioner). The corporation merger did not give the nonresident golfers any interest in Petitioner.

Applicable Law and Regulations

Section 1101(d) of the Tax Law provides, in part:

> When used in this article for purposes of the tax imposed under subdivision (f) of section eleven hundred five, the following terms shall mean:
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> * * *
>
> (6) Dues. 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.
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> * * *

(13) Social or athletic club. Any club or organization of which a material purpose or activity is social or athletic.

Section 1105(f) of the Tax Law imposes sales tax, in part, on:

(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 state . . . except charges to a patron for admission to, or use of, facilities for sporting activities in which such patron is to be a participant. . . .(Emphasis added)

(2)(i) The dues paid to any social or athletic club in this state if the dues of an active annual member, exclusive of the initiation fee, are in excess of ten dollars per year, and on the initiation fee alone, regardless of the amount of dues, if such initiation fee is in excess of ten dollars. Where the tax on dues applies to any such social or athletic club, the tax shall be paid by all members, other than honorary members, thereof regardless of the amount of their dues, and shall be paid on all dues or initiation fees for a period commencing on or after August first, nineteen hundred sixty-five. . . .

(ii) Dues and initiation fees paid to the following shall not be subject to the tax imposed by this paragraph:

* * *

(C) A homeowners association. For purposes of this subparagraph, a homeowners association is an association (including a cooperative housing or apartment corporation) (I) the membership of which is comprised exclusively of owners or residents of residential dwelling units, including owners of units in a condominium, and including shareholders in a cooperative housing or apartment corporation, where such units are located in a defined geographical area such as a housing development or subdivision and (II) which operates social or athletic facilities located in such area for use (whether or not exclusive) by such owners or residents.

Section 1137(a) of the Tax Law provides, in part:

Every person required to file a return under the preceding section whose total taxable receipts, amusement charges and rents are subject to the tax imposed pursuant to subdivisions (a), (c), (d), (e) and (f) of section eleven hundred five of this article shall, at the time of filing such return, pay to the tax commission the total of the following:

* * *

(iii) All moneys collected by such person, purportedly as tax imposed by this article or pursuant to article twenty-nine, with respect to any receipt, amusement charge or rent not subject to tax, and all moneys collected with respect to any receipt, amusement charge or rent subject to tax, purportedly in accordance with a schedule prescribed by the tax commission but actually in excess of the amount stated in such schedule as the amount to be collected.

Section 1139(a) of the Tax Law provides, in part:

In the manner provided in this section the tax commission shall refund or credit any tax, penalty or interest erroneously, illegally or unconstitutionally collected or paid if application therefor shall be filed with the tax commission (i) in the case of tax paid by the applicant to a person required to collect tax, within three years after the date when the tax was payable by such person to the tax commission as provided in section eleven hundred thirty-seven, or (ii) in the case of a tax, penalty or interest paid by the applicant to the tax commission, within three years after the date when such amount was payable under this article . . . Such application shall be in such form as the tax commission shall prescribe. No refund or credit shall be made to any person of tax which he collected from a customer until he shall first establish to the satisfaction of the tax commission, under such regulations as it may prescribe, that he has repaid such tax to the customer. . . . (Emphasis added)

Section 527.10(d)(4) of the Sales and Use Tax Regulations provides, in part:

Charges to a patron to or for the use of sporting facilities or activities in which the patron is to be a participant are excluded from tax.

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:

Definitions. As used in this section, the following terms shall mean:

(1) Active annual member. A member who is not a life member but who enjoys full club privileges, as distinguished from the privileges enjoyed by a person holding a nonresident membership, an associate membership, or other partial or restricted membership.

(2) Dues. (i) The term dues includes:
(a) any dues or membership fee;
(b) any assessment, irrespective of the purpose for which made; and
(c) any charge for social or sports privileges or facilities.

* * *

(ii) Dues do not include any charge for sports privileges or facilities paid by a member for his guest when such charge if paid directly by the guest would be exempt.

* * *

(5) Club or organization.

(i) The phrase club or organization means any entity which is composed of persons associated for a common objective or common activities. Whether the organization is a membership corporation or association or business corporation or other legal type of organization is not relevant. Significant factors, any one of which may indicate that an entity is a club or organization, are: an organizational structure under which the membership controls social or athletic activities, tournaments, dances, elections, committees, participation in the selection of members and management of the club or organization, or possession by the members of a proprietary interest in the organization. The organizational structure may be formal or informal. (Emphasis supplied)

(ii) A club or organization does not exist merely because a business entity:

(a) charges for the use of facilities on an annual or seasonal basis, even if an annual or season pass is the only method of sale and provided such passes are sold on a first-come, first-served basis;

(b) restricts the size of the membership solely because of the physical size of the facility. Any other type of restriction may be viewed as an attempt at exclusivity;

(c) uses the word club or member as a marketing device;

(d) offers tournaments, leagues and social activities which are controlled solely by the management.

* * *

(6) Social club. A social club is any club or organization which has a material purpose or activity of arranging periodic dances, dinners, meetings or other functions affording its members an opportunity of congregating for social interrelationship.

* * *

(7) Athletic club. (i) An athletic club is any club or organization which has as a material purpose or activity the practice, participation in or promotion of any sports or athletics.

Technical Services Bureau Memorandum entitled Dues Paid to Homeowners Associations and Certain Other Organizations, November 30, 1995, TSB-M-95(12)S provides, in part:

> Effective December 1, 1995, an amendment to the Tax Law provides an exclusion from sales tax, under certain conditions, for dues and initiation fees paid to homeowners associations that provide social or athletic facilities to members. The exclusion from tax also applies to dues and initiation fees paid to cooperative housing corporations, condominium associations and cooperative apartment corporations.
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> For ease of reference, where the term "homeowners associations" appears in this memorandum, it also includes cooperative housing corporations, condominium associations and cooperative apartment corporations.
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> To qualify for the exclusion, the homeowners associations must meet the following conditions:
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> - The membership of the homeowners associations must consist exclusively of owners or residents of residential dwelling units. For condominium associations, this means that all the members must be owners of condominium units. In instances involving cooperative housing corporations and cooperative apartment corporations, the members must all be shareholders.
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> - The residential dwelling units must all be within a defined geographical area such as a building, a group of buildings, a housing development or subdivision.
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> - The social or athletic facilities must be within the defined geographical area of the residential units.
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> - The social or athletic facilities must be for use by the members of the homeowners associations. However, use of the facilities does not have to be limited to only members of the associations.

Opinion

Petitioner is a corporation established to own, operate and maintain common facilities for the benefit of its members and to establish, maintain and conduct a golf club. Initially two separate

corporations were established; one for the homeowners organization and one for the golf club. The two were subsequently merged into one corporation (Petitioner). This Advisory Opinion only addresses Petitioner's operations after the merger. Petitioner is governed by its Declaration of Covenants and Restrictions (the "Declaration") which defines a member as the owner of a dwelling unit on the property subject to the Declaration. There are 72 shares of common stock of Petitioner outstanding. Each share is owned by an owner of one of the 72 dwelling units. There are no other shares of stock or ownership interests outstanding. Shares cannot be transferred separately from home ownership. The Declaration does not refer to nonresident golfers in any form.

Petitioner generates income from two main sources. The majority of its income is from the monthly maintenance charges paid by the 72 homeowners (members). The second main source of income is from the fees collected from the nonresident golfers. Petitioner also receives less substantial income from several other sources: the lease of the restaurant; guest fees; golf leagues and tournaments. Homeowners pay monthly maintenance charges (assessments) that cover all expenses to maintain homes, common areas and the golf course. Homeowners do not pay a fee to use the golf course. Not all the homeowners use the golf course. The members who use the golf course pay the same monthly maintenance fee as the members who do not use the golf course. Petitioner permits nonresident golfers to play golf.

Section 1105(f)(2)(ii)(C) of the Tax Law provides an exclusion from sales tax, under certain conditions, for dues and initiation fees paid to homeowners associations that provide social or athletic facilities to members. To qualify for the exclusion, the membership of the association must consist exclusively of owners or residents of residential dwelling units, the residential dwelling units must all be within a defined geographical area such as a building, a group of buildings, a housing development or subdivision, the social or athletic facilities must be within the defined geographical area of the residential units and the social or athletic facilities must be for use by the members of the homeowners association. However, use of the facilities does not have to be limited to only members of the association. See TSB-M-95(12)S, supra.

Petitioner is a member owned corporation which operates for the benefit of the 72 homeowners. Petitioner also owns and operates a golf course. The Declaration provides that only homeowners may be members. Homeowners have significant rights as members of Petitioner, such as the right to vote at meetings and to elect the Board of Directors, and the right to use the common areas owned by Petitioner, such as its tennis courts and pool. The nonresident golfers have none of these rights. A nonresident golfer for either a monthly or an annual fee is provided the right solely to play golf for one golf season provided he or she follows the rules established by Petitioner. The nonresident golfers are accepted on a first-come, first-served basis and the number accepted is limited only by the size of Petitioner's facilities. The nonresident golfers enter into a contract with Petitioner annually and pay a one time new member fee with the amount of the annual fee established at various levels; for a single adult, husband/wife, child, etc. The contract is called a membership application and refers to the applicant as a prospective member. However, based on the fact that a nonresident golfer is only entitled to play golf for this fee and does not acquire any of the rights of homeowners or the ability to serve on the Board of Directors, the nonresident golfers

in fact have not become members of Petitioner's association. Under these circumstances the term "member" has been used only as a marketing device. The nonresident golfer is paying a fee to play golf, only receiving in effect a season pass to play golf. See Technical Services Bureau Memorandum entitled Dues For Membership in Social or Athletic Clubs, July 15, 1983, TSB-M-83(19)S.

Since the members of Petitioner are exclusively the 72 homeowners who own residential units, and have use of the social and athletic facilities, in a defined geographic area, Petitioner qualifies for the exclusion provided for homeowners associations in section 1105(f)(2) of the Tax Law. See TSB-M-95(12)S, supra. Dues or fees paid by homeowners to a homeowners association for maintenance and upkeep of the association's property (e.g., common areas) are also not subject to the tax imposed under section 1105(c)(5) of the Tax Law on the services of maintaining, servicing or repairing real property. See Matter of Locy Development, Inc., Dec Tx App Trib, May 14, 1991, TSB-D-91(40)S. Therefore, dues, fees and monthly maintenance charges and assessments paid to Petitioner by the homeowners, including any portion of fees paid for the use of athletic facilities, are not subject to sales tax.

Since nonresident golfers do not become members of Petitioner's golf club, the monthly or annual fees paid by them are for admission to, or use of, facilities for sporting activities in which such nonresident is to be a participant. Such fees paid for participating sporting activities are not subject to sales tax. See section 1105(f)(1) of the Tax Law and section 527.10(d)(4) of the Sales and Use Tax Regulations.

Petitioner charges a guest fee for both guests of homeowners and for guests of nonresident golfers. Guests of homeowners include members of their families who do not reside at the dwelling unit of the homeowner. Petitioner also charges fees to golf leagues and fees for golf tournaments. These are occasional fees and cover greens fees for a single round of golf. These fees are paid for admission to, or use of, facilities for sporting activities in which such guest, league or tournament player is to be a participant, and are not subject to sales tax. See section 1105(f)(1) of the Tax Law and section 527.11(b)(2)(ii) of the Sales and Use Tax Regulations.

Though Petitioner has been collecting sales tax on the amount charged to nonresident golfers, these charges are for admission to or for the use of, facilities for sporting activities in which such nonresident is to be a participant and are not subject to sales tax. However, section 1137 of the Tax Law requires that a registered vendor pay to the Department of Taxation and Finance all moneys collected by such person, purportedly as tax imposed by article 28 of the Tax Law, with respect to any receipts, amusement charges, etc. not subject to tax. Accordingly, any moneys collected by Petitioner, purportedly as sales tax, are required to be remitted to the Department of Taxation and Finance at the time of filing Petitioner's sales and use tax returns. However, a customer who has paid sales tax which was collected by Petitioner in error may file a claim for refund within three years after the date when the tax was payable by Petitioner to the Department of Taxation and Finance if he or she can substantiate the payment of the tax. A refund or credit may be claimed by Petitioner of tax which it collected from a customer if Petitioner can establish that it has repaid such

tax to the customer. Petitioner's refund must be claimed within three years after the date when the tax was payable by Petitioner to the Department of Taxation and Finance. See section 1139(a) of the Tax Law.

DATED: September 3, 2003

/s/
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NOTE: The opinions expressed in Advisory Opinions are limited to the facts set forth therein.