

New York State Department of Taxation and Finance
Office of Counsel
Advisory Opinion Unit

TSB-A-09(17)S
Sales Tax
April 21, 2009

STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO. S090202A

██████████ (“Petitioner”) is the owner/operator of a golf course and country club. A petition received on February 2, 2009 requests an advisory opinion about whether Petitioner’s membership dues or any other membership fees or charges, such as stock purchase, assessments, initiation fees and minimums paid by its members, are subject to sales tax.

Facts

Petitioner provides its members with the use of a golf course, clubhouse, restaurant and bar. All members have full access to all facilities of Petitioner, with no priority of use to Petitioner’s stockholders. Petitioner accepts membership from the general public on a first-come, first-served basis, with the only restriction based solely on the size of the facility. Membership is available on an annual basis. Individuals are offered equity ownership upon admission at a set fee of \$2,500. This set fee is redeemable upon surrender of stock ownership. Individuals can choose to be non-equity members for a payment of a non-refundable fee of \$300.

Petitioner is owned by 262 stockholders, of whom 226 are members (205 full members and 21 social members) and 36 are non-members. Petitioner has 287 members, of whom 61 are not stockholders. While the majority of stockholders are members and the majority of members are stockholders, an individual does not have to be a stockholder in order to be a member. Stockholders can also be non-members as a result of withdrawal or transfer of stock certificates to non-members.

The stockholders vote on major decisions, while the day-to-day operations of Petitioner are managed by a Board of Directors. Non-stockholders do not have voting rights. Members may manage and run tournaments, leagues, and committees under the supervision of the Board of Directors. The Board consists of nine members who are elected by the stockholders, and only stockholders can be directors. The Board is governed by the by-laws of Petitioner.

Opinion

Tax Law §1105(f)(2) imposes sales tax on “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.” Tax Law §1101(d)(6) defines dues as “[a]ny dues or membership fee including any assessment, irrespective of the purpose for which made, and any charges for social or sports privileges or facilities....” Sales and Use Tax Regulation section 527.11(b)(5) defines a club or organization as “any entity which is composed of persons associated for a common objective or common activities.... 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.”

In Antlers Country Club, Inc., Tax Appeals Tribunal, November 19, 1992, the Tribunal held that, because members of the Antlers Country Club held no proprietary rights and had no control over its activities or management, the dues paid by its members were not subject to sales tax pursuant to Tax Law §1105(f)(2). In Antlers, the Tribunal recognized that mere membership does not automatically confer an ownership interest on an individual. Antlers club members could not cast their votes on business decisions or vote in the selection of the board of directors. Only Antlers stockholders could elect the Board of Directors, but even then, the stockholders themselves did not deal with the operations of the club. That authority rested solely with the Board of Directors. The Tribunal held that even though most Antlers members were also stockholders (88%) and most Antlers stockholders were also members (74%), these facts were not persuasive since the respective interests were not identical. Antlers, *supra*. The Tribunal found that the Antlers members could not exercise direct or indirect control of the social or athletic activities or management of the club and that its promotional literature did not request that a potential patron become a stockholder in order to become a member.¹ *Id.*

In the present case, membership in Petitioner by itself does not carry with it any proprietary rights and membership is only restricted based on the size of the facility. However, the members do, in fact, have the ability to exercise direct control over Petitioner’s social and/or athletic activities. Members manage and run tournaments, leagues and committees. These types of activities are specifically set forth in the Sales Tax Regulations as “significant factors, any one of which may indicate that an entity is a club or organization.” 20 NYCRR 527.11(b)(5).

Even when done under the “supervision” of the Board of Directors, we understand the facts to state that members can make decisions regarding the tournaments, leagues and committees they “manage and run,” without having to obtain the prior approval of the Board for every decision. In addition, nothing in Petitioner’s by-laws appears to place limits on participation in the managing and running of tournaments, leagues, and committees for those members who hold no proprietary rights. This type of membership control over Petitioner’s social and athletic activities satisfies the criteria of a “social or athletic club,” within the meaning of Tax Law §1105(f)(2) and NYCRR 527.11(b)(5).

We also find nothing in the by-laws that prevents a member from participating as an officer of Petitioner by being selected by the Board of Directors as a Secretary and/or Treasurer. As described in the by-laws, individuals holding these two officer positions are not required to be directors or even stockholders.

¹ While not definitive (since Petitioner has some members that are not stockholders), we note that Petitioner’s promotional material facilitates and, in our view, encourages potential club facilities users to become stockholders, rather than mere members. This apparent “push” towards ownership may also distinguish the facts from those in Antlers. In this regard, we note that Petitioner’s promotional materials state: “If you are interested in becoming a member of [Petitioner], you will be required to complete a membership package consisting of: an Application, a Purchase Plan Agreement, a Subscription and Buy Back Agreement” (emphasis added). The required Purchase Plan and Subscription and Buy Back Agreements pertain to stock purchases. In addition, Petitioner only posts on its website prices for membership dues for the upcoming season which set forth the price “with purchase of stock.” There is no web posting of membership prices for non-equity memberships. Indeed, as Petitioner itself notes, 226 of its 287 members are stockholders.

