

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

TSB-A-11(12)S
Sales Tax
April 8, 2011

STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO. S110112C

Petitioner, [REDACTED], asks whether the annual playing fees it charges members and non-members for the use of its golf course are subject to sales and use taxes. We conclude that the annual dues paid by Petitioner's members are subject to tax, because the members gain a proprietary interest in the Petitioner within the meaning of §527.11(b)(5) of the Sales and Use tax regulations. We also conclude that the subvention fee prospective members are required to pay is, itself, subject to tax pursuant to section of the Sales and Use tax regulations as an initiation fee (*See* §527.11(a)(2) of the Sales and Use Tax Regulations, and §1105(f)(2) and §1101(d)(7) of the Tax Law). However, the annual playing fees charged by Petitioner to non-members who use its golf course are exempt from tax, because the non-members do not obtain any proprietary interest or status in Petitioner under Petitioner's by-laws, and the charge is not a taxable admission under section §1105(f)(1) of the Tax Law because it is for access to a sporting facility to partake in sporting activities in which the patron is a participant.

Facts

Petitioner is a not-for-profit Fraternal Organization (but not one that operates under a lodge system for the purposes of §1105(f)(2)(ii)(A) of the Tax Law) that operates a golf course. In 2007, Petitioner adopted a new set of by-laws that changed the financial structure of the organization. Under the previous by-laws, anyone who paid the annual membership dues (playing fees) became an automatic member of the club. Along with this membership came the right to be on the Petitioner's Board of Directors and the right to vote on all club business, including election of officers and all financial matters.

The new bylaws give Petitioner's Directors the right to issue "subvention certificates" to members regardless of whether they use Petitioner's golf course. A subvention certificate confers various rights and benefits upon the holder, in particular a proportional share of Petitioner's assets if the Petitioner is dissolved. Petitioner describes the subventions in the following manner:

A subvention is a form of corporate financing. Essentially, a subvention is a type of interest with attributes of both equity and debt securities that enable the Club to accept from its members and non-members, money and/or property, but not services. Through subventions, the Club is able to raise and receive funds from public minded governmental and private agencies, public corporations, private companies, or individuals without incurring corporate debt. Subventions are particularly suitable to not-for-profit corporations, since profit from operational income would not be the basic motive of the corporation.

All members, and anyone seeking to become a member of Petitioner, are required to purchase at least one subvention, at a cost of \$1,000. Members of the public seeking to play on the course are not required to purchase a subvention or become a member of Petitioner. They simply pay a fee to use the course. The purchaser of a subvention is not required to pay any annual playing fees or to even

play golf at the Petitioner's course. Fifty percent of the current subvention holders pay the annual playing fee for access to the golf courses. The subvention certificates are not redeemable or transferable except through Petitioner's treasurer.

Petitioner's Board of Directors is authorized to provide for the periodic payment on the amount of the subvention held by each member. This payment, however, may not exceed two-thirds of the maximum interest rate authorized by the applicable provisions of the General Obligations Law of the State of New York. Petitioner's by-laws provide:

In the event of dissolution or final liquidation of the Club, all of the property and assets of the Club, after payment of its debts, will be distributed, as permitted by New York law or a court having jurisdiction, among the members in good standing in proportion to the number of Subvention Certificates owned by each.

This provision is intended to provide for the distribution of Petitioner's chief asset, the land under the playing area, which would be sold in the event of a dissolution or final liquidation. Also, upon the death of a member, any subvention certificates held by that member automatically pass to the surviving spouse. If the deceased member is not survived by a spouse, then a legatee or heir will have the right to acquire the deceased member's subvention certificates without the payment of any additional purchase price.

The holders of the subvention certificates are described by the by-laws as the "the voting members of the club." They are designated as "members" or collectively as "the membership." Along with membership comes the right to vote for members of the board of directors. While the day to day administration of Petitioner's affairs is vested in the Board of Directors, any changes to the Petitioner's by-laws require a two-thirds vote of the membership. Certain financial transactions require "the vote of at least eighty percent (80%) of all of the members entitled to vote." This includes the sale of any real property which contains the golf playing area, any amendment to the by-laws or articles of incorporation that "in any manner restricts the rights or privileges of the voting members [the subvention holders] of the club." In addition, any changes to the dissolution or liquidation provisions (Article 21.6 of the Petitioner's by-laws as quoted above) or any capital assessments required against the membership to cover operational deficits requires an 80% vote of the membership.

Petitioner also allows non-members to play golf at its facilities, both by paying for individual rounds or through the payment of annual playing fees. Petitioner places no restriction on the number of annual playing fees sold and does not restrict who may purchase them. As only holders of a subvention are members of the Petitioner, non-members paying annual fees have little influence over Petitioner's activities. Petitioner states that non-members who pay the annual playing fee will:

- a. Pay no initiation fee.
- b. Have no ownership rights in the club.
- c. Have no proprietary interests in the club.
- d. Have no control over the club's social functions, leagues or tournaments. The board of directors is not obligated to accept opinions or suggestions regarding club rules or policies from any non-member.

Non-members may elect to pay either annual playing fees or separate course fees to play on Petitioner's course.

Analysis

Tax Law §1105(f)(2) imposes sales tax on 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.” Tax Law §1101(c)(6) defines dues as any “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.” Sales and Use Tax Regulation §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.”

Petitioner, as a golf club, is an athletic club; the question is whether Petitioner is a club or organization for the purposes of §527.11(b)(5) of the Sales and Use Tax Regulations. Under the current by-laws, the terms “club membership” and “subvention holder” are synonymous. All members of the club must purchase a subvention certificate, and no one who plays golf at Petitioner’s facility who is not a holder of such a subvention certificate is considered a member. While Petitioner allows non-members to play at the course, they are afforded no membership privileges. The Petitioner’s by-laws make no provision for these users whatsoever. *Cf. Antlers Country Club, Inc.*, Tax Appeals Tribunal, (November 19, 1992) (Entity was not a “club” because both control and property interest of the club were held by the stockholders, who were not all members of the club).

The subvention certificates sold to the membership also confer the right to potentially receive periodic payments while held by the member (if such payments are approved by the board) and the holder is entitled to receive a proportional share of Petitioner’s assets if the club is liquidated and its property, including the playing course, is sold. These subvention certificates pass to the holder’s heirs upon death, and Petitioner’s by-laws place severe restrictions on the Board’s ability to alter the by-laws in terms of any significant financial matter. Indeed, any change to the by-laws that would restrict the rights or privileges of the voting members (the subvention holders) of the club requires a two-thirds vote of the membership. Any change which would affect the member’s interest in Petitioner’s assets upon dissolution or liquidation of the club requires an 80% vote of the membership. Therefore, notwithstanding Petitioner’s status as a not-for-profit corporation, the subvention certificates are being used to afford the members of the club a proprietary right within the meaning of §527.11(b)(5)(i) of the Sales and Use Tax Regulations. The dues paid by Petitioner’s members are therefore subject to sales tax pursuant to Tax Law §1105(f)(2). For the purposes of §527.11(b)(2)(i) of the Sales and Use Tax Regulations, the term “dues” would include any charge to the member for social or sports privileges or for their own use of the facilities, such as a greens fee. Moreover, because the subvention fee is a condition precedent to membership and a mandatory contribution required from any person seeking membership, it is an initiation fee pursuant to §1101(d)(7) of the Tax Law and is also subject to tax.

The annual playing fees and course fees charged to non-members are not club dues and are not subject to tax under §1105(f)(2) of the Tax Law. The annual playing fees and course fees charged to non-members are also not taxable admissions under §1105(f)(1) of the Tax Law, because the fees

constitute charges for a participatory sporting activity, and are specifically excluded from the tax imposed by that section.

DATED: April 8, 2011

/S/

DANIEL SMIRLOCK
Deputy Commissioner and Counsel

NOTE: An Advisory Opinion is issued at the request of a person or entity. It is limited to the facts set forth therein and is binding on the Department only with respect to the person or entity to whom it is issued and only if the person or entity fully and accurately describes all relevant facts. An Advisory Opinion is based on the law, regulations, and Department policies in effect as of the date the Opinion is issued or for the specific time period at issue in the Opinion.