

**New York State Department of Taxation and Finance
Office of Counsel**

TSB-A-20(4)S
Sales Tax
May 19, 2020

STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

The Department of Taxation and Finance received a Petition for an Advisory Opinion from [REDACTED] (“Petitioner” or “Club”). Petitioner asks whether amounts it collects from a new class of “limited members” that do not have a proprietary interest in the Club or voting rights are subject to sales tax. We conclude that such amounts constitute dues paid to a social or athletic club and are subject to New York State and local sales tax under Tax Law § 1105(f)(2)(i).

Facts

Petitioner is a not-for-profit corporation that is wholly owned and operated by members. According to its bylaws, the Club operates “as a private social club for the enjoyment of [m]embers and their families and to promote social and sports activities among [its] [m]embers.” Petitioner operates a number of facilities, including a golf course, tennis courts, dining facilities, and a swimming pool. With respect to membership, Petitioner’s bylaws provide for three types of members: “Regular Family Golf Members” (Golf Members), “Family Tennis Members” (Tennis Members), and “Limited Members.” The rights and privileges of both Golf Members and Tennis Members – whose numbers are limited to 231 and 50, respectively - are largely provided for in Petitioner’s bylaws, and include the right to equity in the Club’s property and assets (i.e. a proprietary interest in Petitioner), as well as the right to vote, hold office, and to serve on Petitioner’s Board of Governors (“Board”), which is the Club’s governing body. By contrast, the rights and privileges of “Limited Members” are not explicitly set forth in Petitioner’s bylaws. Rather, the bylaws empower the Board to create such “additional classes of [m]embers” from time-to-time, and to determine the rights and privileges of these members.

Petitioner indicates that, historically, all classes of membership have included both an equity interest in the Club and the ability to participate in the Club’s governance (i.e., an ability to vote). In addition, Petitioner notes that all dues and other charges of the Club have been subject to sales tax pursuant to Tax Law § 1105(f)(2). However, on October 1, 2015, Petitioner’s Board created a new “limited membership” class that is open to people 70 years of age and older, and which is charged 70% of what a Golf Member is charged. According to Petitioner, individuals in this new class have “similar rights to the use of the Club as . . . Golf Members,” but lack the right to vote at the Club or share in the equity of the Club should it ever be liquidated or dissolved. In addition, unlike other club members, these new “limited members” are not required to make charitable contributions, are not subject to minimum food usage charges, and are not subject to operating and capital assessments.

It is assumed for purposes of this opinion that Petitioner's Golf Members enjoy full club privileges, and that their dues are greater than ten dollars per year.

Analysis

Tax Law § 1105(f)(2)(i) imposes a sales tax on dues paid to any social or athletic club in New York if the dues of an active annual member, exclusive of an initiation fee, exceed ten dollars per year. *See* N.Y. Tax Law § 1105(f)(2). An "active annual member" is a member who is not a life member but who enjoys full club privileges, as opposed to a member that holds a partial or restricted membership. *See* N.Y. Tax Law § 1101(d)(1). The term "Dues" includes any membership fee paid to a social or athletic club. *See* Tax Law § 1101(d)(6); 20 NYCRR 527.11(b)(2). A "**social or athletic club**" is any club or organization of which a material purpose or activity is social or athletic. *See* Tax Law § 1101(d)(13). A "club or organization" is an entity composed of persons associated for a common objective or common activities. *See* 20 NYCRR 527.11(b)(5)(i). Significant factors, any one of which may indicate that an entity is a "club or organization," include 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 possession by the members of a proprietary interest in the organization. *See id.* *See also* TSB-M-83(19)S.

As noted above, Petitioner is a member-owned and operated not-for-profit corporation. In addition, Petitioner's bylaws make clear that its purpose is to be a "private social club for the enjoyment of Members," and it operates a number of sports-related and/or social facilities, including a golf course, tennis courts, dining facilities and a swimming pool. It is clear, therefore, that Petitioner is a "social or athletic club" for Tax Law § 1105(f)(2)(i) purposes.

It is well settled that, where sales tax pursuant to Tax Law § 1105(f)(2)(i) applies to the dues of an active annual member of a social or athletic club, such tax also applies to all dues and initiation fees paid by all members of such club. *See* Tax Law § 1105(f)(2)(i); 20 NYCRR 527.11(a)(3). In TSB-A-15(4)S, for example, it was found that where the dues of "active annual members" were in excess of \$10 per year, the dues of all classes of membership, including those members who paid less than ten dollars per year, and charges paid by members who did not have full club privileges, were subject to sales tax pursuant to Tax Law § 1105(f)(2)(i). Thus, any charges paid by Petitioner's new "limited membership" members are dues subject to sales tax pursuant to Tax Law § 1105(f)(2)(i). *See* Tax Law § 1101(d)(6); 20 NYCRR 527.11(a)(3) & (b)(2).

Petitioner, however, contends that its new "limited members" are not "members" of its Club because they do not have an ownership or governance interest in it. While ownership and/or governance interest by individuals is, as noted above, one of the factors considered when assessing whether an entity is a social or athletic club for Tax Law § 1105(f)(2)(i) purposes, no such requirement exists for one to be a "member" of such club. In TSB-A-85(9)S, for example, even though the social or athletic club at issue was not owned or controlled by the individuals who used it, the individuals associated with it were considered "members," and the fees charged

to these individuals – to the extent that any class of “member” was charged more than ten dollars per year – were deemed to be taxable. Likewise, in TSB-A-83(48)S, fees collected by a social or athletic club from individuals were deemed to be subject to sales tax even though the individuals charged the fee lacked membership control over, or a proprietary interest in, the club. Thus, the lack of an ownership or governance interest in a social or athletic club is not determinative of whether one is a “member” of such club.

Petitioner, however, points to TSB-A-11(12)S in support of its contention that charges made to its new class of “limited members” should not be subject to sales tax. In TSB-A-11(12)S, the Department determined that charges to non-members of a club for use of its golf course were exempt from sales tax because “the non-members do not obtain any proprietary interest or status in [the club] under[its] by-laws.” However, TSB-A-11(12)S does not address what constitutes “membership” in a social or athletic club for Tax Law § 1105(f)(2) purposes. Further, and more significantly, TSB-A-11(12)S reflects that the individuals deemed “non-members” in that decision did not fit into any class of membership provided for in the petitioner’s bylaws, and further were afforded “no membership privileges” by the club at issue. By contrast, Petitioner’s new class of “limited members” is a class of membership that is contemplated by its bylaws, and the members of this class have club usage rights that are “similar” to the rights of Golf Members. Accordingly, we find that individuals in Petitioner’s new “limited membership” class are “members” of Petitioner, and that their payments to it are dues (i.e., charges for social or sports privileges or facilities) subject to sales tax pursuant to Tax Law § 1105(f)(2)(i). *See* 20 NYRCC 527.11(a)(3).

DATED: May 19, 2020

/S/

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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. The information provided in this document does not cover every situation and is not intended to replace the law or change its meaning.