New York State Department of Taxation and Finance
Taxpayer Services Division
Technical Services Bureau

TSB-A-87(40)S
Sales Tax
October 29, 1987

STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION PETITION NO. S870624B

On June 24, 1987, a Petition for Advisory Opinion was received from Stratford RP, INC., c/o Rush Properties, Inc., One Barstow Road, Great Neck, New York 11021.

The issue raised is whether monthly dues paid to a homeowners association, engaged in the management, maintenance and repair of the common areas within a real estate development, are subject to sales tax under Section 1105(f)(2) of the Tax Law.

Petitioner, a real estate developer, created the Stratford Green Homeowners Association ("Association") - incorporated under the Not-for-Profit Corporation Law of the State of New York - to own and operate the housing development's common property. Membership and the right to one vote is automatic for each owner of a lot within the community. The Board of Directors, elected by the members, is empowered to levy monthly assessments.

The Association's corporate by-laws define common property as "areas of land devoted to the common use and enjoyment of the members", restricting such use to the members and their families, tenants or guests. The by-laws provide for the proceeds from assessments to be "used to promote the recreation, enjoyment, health, safety and welfare of the members and other residents of the property as a community".

Petitioner describes the common area as land and improvements constructed thereon including roadways, parking area, landscaping, lawn sprinkler systems, storm drainage and a tennis court.

Since only a minor portion of the monthly dues are used to maintain the tennis court, Petitioner argues the association is not a social or athletic club because its material purpose is not to provide sports privileges and facilities.

The Tax Law (§1105[f][2]) imposes a tax on dues paid 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. The Tax Law (§1101[d][6]) defines the term "dues" as any dues or membership fee including any assessment, irrespective of the purpose for which made. The term "social or athletic club" is defined to mean any club or organization of which a material purpose or activity is social or athletic. Tax Law §1101(d)(13).

Section 527.11(b)(5) of the Sales and Use Tax Regulations explains further:

(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.

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

* * *

(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. (Emphasis added).

The Association clearly fits the definition of club or organization and, accordingly, the monthly assessments are considered dues within the meaning and intent of the Tax Law. Whether such dues are taxable is dependent on whether the Association is deemed a social or athletic club.

Section 1105(f)(2) of the Tax Law has been held applicable to homeowners associations as a "social club". Merrick Estates Civic Association v. State Tax Commission, 65 A.D.2d 669 (1978); Fox Wander West Neighborhood Association, State Tax Commission Advisory Opinion, July 29, 1980, TSB-H-80(156)S. In each case, home owners were obligated to become members of the association and pay a share of the common area maintenance cost. Use of the properties (including, in Merrick, a beach, swimming pool and related facilities, in Fox Wander common green areas and a trail system) was restricted to homeowners living in a defined residential section.

Furthermore, in the Merrick determination, the Court relied on U.S. v. McIntyre (253 F 2d 728) where it was held that an association was a "social club" for tax purposes because it maintained a non-public swimming pool available only to association members who, by prearrangement or happenstance, met there for social purposes.

Similarly, the common property here at issue is not intended for public use but to provide, in addition to the tennis court, areas where members may congregate for recreation and social activities. Thus, a material purpose of the homeowners association is social and athletic.

Consequently, assessments paid by the members constitute dues paid to a social or athletic club which, if in excess of ten dollars per year, are subject to State and local sales taxes.

DATED: October 29, 1987

s/ANDREW F. MARCHESE
Chief of Advisory Opinions

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