

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

TSB-A-92 (28) S
Sales Tax
March 20, 1992

STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO. S920206A

On February 6, 1992, a Petition for Advisory Opinion was received from Kingbrook Development Corporation, P.O. Box 656, Yorkshire, New York 14173.

The issue raised by Petitioner, Kingbrook Development Corporation, is whether deposits and dues for memberships paid to Petitioner are subject to State and local sales taxes.

The Club at Kingbrook ("Kingbrook") consists of privately owned and operated recreational facilities being developed by Petitioner. The facilities are located within the Kingbrook Residential Community in Cattaraugus County, New York. When completed, the facilities will include various ski, golf, tennis, equestrian, health and fitness, swimming, and social facilities.

Membership in Kingbrook is open to the general public without restriction as to geographic area, income, race, religion, or any other qualification except that the total number of members shall be limited to 2,400. The restriction on total members exists solely because of the physical size of Kingbrook's facilities.

Membership in Kingbrook does not entitle any member to an equity or ownership interest in Kingbrook or its facilities. Management and operation of Kingbrook is vested in Petitioner. Petitioner has exclusive authority to accept members, set dues and charges, establish Rules and Regulations, and exercise control and management over Kingbrook.

Petitioner also has authority to annually appoint members to serve on a Board of Governors and certain recreational committees. The Board of Governors and recreational committees act as a liaison with Petitioner to discuss member programs. The Board of Governors and committee members have no duty or power to negotiate or otherwise act on behalf of Kingbrook's members and are limited to acting in a strictly advisory capacity.

Section 1105(f)(2) of the Tax Law imposes a 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. . ."

Section 527.11(b)(5) of the Sales and Use Tax Regulations defines the term "club or organization" as follows:

(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.

(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.

* * *

Example 18: A club owned by an individual which attempts to restrict its membership by geographic area, income, race, religion or any other means, is a "club or organization" However, a "club" owned by an individual which restricts its membership only because of the physical capacity of its facilities is not a club or organization.

In Brierwood Village, Inc., Adv Op Comm T&F, February 13, 1989, TSB-A-89(6)S, the Commissioner advised that inasmuch as (1) the membership of the club possessed no proprietary rights therein and had no control over its activities or management and (2) membership in the club was not exclusive, with members being appointed and accepted from a waiting list maintained by Petitioner, the subject club was not a "social or athletic club" within the meaning of Section 1105(f)(2) of the Tax Law. Annual membership "fees" or "dues" were thus not subject to the imposition of sales tax.

Accordingly, pursuant to Section 1105(f)(2) of the Tax Law, Section 527.11(b)(5) of the Sales and Use Tax Regulations and Brierwood Village, Inc., supra, since membership is not exclusive, members possess no proprietary interest in Petitioner and have no control over its activities or management, and the term "club" and "member" are used solely as a marketing device,

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Petitioner is not a social and athletic club and, therefore, membership deposits and dues paid by members are not subject to State and local sales taxes.

DATED: March 20, 1992

s/PAUL B. COBURN
Deputy Director
Taxpayer Services Division

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