

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

TSB-A-94 (6.1)S
Sales Tax
April 17, 1995

STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

MODIFIED ADVISORY OPINION PETITION NO. S931118A

On November 18, 1993, a Petition for Advisory Opinion was received from Shaker Commons Condominium Owners, Inc., 343-A Watervliet-Shaker Road, Watervliet, New York 12189.

The issues raised by Petitioner, Shaker Commons Condominium Owners, Inc., were:

1. Whether the portion of the dues paid by members of Petitioner to fund operating expenses and capital improvements are subject to sales tax.
2. Whether dues paid by members of Petitioner will be subject to sales tax if use of its swimming pool and tennis courts are made available to non-association members, regardless of whether a fee is charged.
3. Whether dues paid to a separate corporation to be created to operate the pool and tennis facilities will be treated separately from dues collected by Petitioner for operation and maintenance of non-recreational facilities for purposes of imposing sales tax.

On March 7, 1994, an Advisory Opinion in response to the Petition was issued. Upon a further review of the matter, the aforementioned Advisory Opinion is modified as hereinafter set forth.

Petitioner is an association of owners which own units in a ninety-eight unit condominium community located in Colonie, New York. Petitioner's condominium community is set on 12.87 acres and comprises twenty-four 4-unit residential buildings, one 2-unit residential building, parking lot space for 175 cars, two tennis courts, a kidney shaped in ground swimming pool with a lifeguard, one mailhouse, and an office building with 708 square feet of leasable space.

The purpose of Petitioner is to provide for the maintenance and repair of buildings and grounds, to establish and collect assessments, to pay common expenses, and to administer the rules and regulations governing resident conduct. Membership in Petitioner is mandatory and restricted to unit owners in the condominium community. Petitioner is governed by a Board of Directors who are elected by the members annually.

The annual operating budget for Petitioner for the fiscal year ending 1994 totals approximately \$111,720. The budgeted cost for operation of the swimming pool is \$4,020, broken down as follows:

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|-----------------------|---------|
| Lifeguard Wages | \$2,520 |
| Chemicals and repairs | \$1,100 |
| Permit fees and misc. | \$ 400 |

The lifeguards are employees of a managing agent and are billed at an hourly rate, plus applicable sales tax. Purchases from pool service vendors for chemicals, supplies and repairs are also billed with applicable sales tax. There are no expenses budgeted for the operation of the two tennis courts.

The balance of Petitioner's expenses are comprised of management, lawn care services, garbage removal, building maintenance, electric and water utility, office, accountant and capital improvement expenses. The office building is leased to the managing agent for \$4,000 annually and is, therefore, unavailable to the residents for social or recreational purposes.

Section 1105(f)(2) of the Tax Law imposes sales tax upon the following:

(2) 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...

Section 527.11(b)(5) of the Sales and Use Tax Regulations provides, in part, 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". (emphasis added)

Section 527.11(b)(7) of the Sales and Use Tax Regulations provides, in part, as follows:

(7) Athletic club. (i) An athletic club is any club or organization which has a material purpose or activity the practice, participation in or promotion of any sports or athletics.

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Example 30: An association owns land on which it provides tennis courts and bathing beaches, with equipment and attendants and parking lots for members and their guests, gives parties for members and guests, provides water to the land of its members and maintains private roads. Only the owners of property in the vicinity of the association's land, may be members of the association. The association is an athletic club as the use of its facilities is restricted to members and a material purpose of it is providing sports privileges and facilities.

Example 31: Each purchaser of a lot or condominium within a real estate subdivision automatically becomes a member of an association which operates a pool, tennis courts and nature trails within the subdivision. The association assesses each owner an annual charge to provide funds for the operation of these facilities. The association has the right to limit the number of guests of members and to charge reasonable fees for the use of the facilities. The association is an athletic club as it has a material purpose or providing sports privileges and facilities. The fact that membership is automatic upon purchase of real property has no effect on the association's status as a club. (emphasis added)

In the Matter of Merrick Estates Civic Association, Inc. v. State Tax Commission, 65 AD2d 669, the Court held that where residents of a particular residential section formed a corporation in order to construct a community swimming pool and related facilities and where membership was limited to homeowners living in defined residential sections, the use of the facilities was deemed "social" and, thus, sales tax should be imposed upon dues paid to the association. (emphasis added)

With respect to issue "1", pursuant to section 1105(f)(2) of the Tax Law sections 527.11(b)(5) and 527.11(b)(7) of the Sales and Use Tax Regulations, and Merrick Estates Civic Association, Inc., supra, a portion of Petitioner's activities falls within the ambit of a social or athletic club since it provides swimming pool and tennis court facilities. Accordingly, a reasonable portion of the

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assessments paid by the members would constitute dues paid to a social or athletic club. Since membership in Petitioner is sold as a single unit and is mandatory for all residents of Shaker Commons Condominiums and cannot be purchased separately as an option, a reasonable portion of the assessment paid by members in Petitioner allocable to the social and athletic facilities is subject to sales tax.

Concerning issue "2", pursuant to section 1105(f)(2) of the Tax Law, Sections 527.11(b)(5) and 527.11(b)(7) of the Sales and Use Tax Regulations, Merrick Estates Civic Association, Inc., supra, although use of Petitioner's facilities may be available to non-association members, since membership in Petitioner is restricted to persons residing in Shaker Common Condominiums and Petitioner conducts social and athletic activities, a reasonable portion of the dues paid by members for membership in Petitioner will be subject to sales tax as dues paid to a social or athletic club.

Regarding issue "3", since membership in the separate corporation will be able to be purchased separately from the membership in Petitioner, the corporations will be treated separately and independent of each other and only the dues paid for membership in the separate corporation operating the swimming pool and tennis court facilities will be subject to the sales tax imposed by Section 1105(f)(2) of the Tax Law. This is so regardless of whether membership in the separate corporation is mandatory or optional for Petitioner's members. It is noted however, that in view of the answers to issues "2" and "3", it is not necessary for separate companies to be formed in order to determine the portion of the assessments which are used to fund the recreational facilities.

DATED: April 17, 1995

/s/
PAUL B. COBURN
Deputy Director
Taxpayer Services Division

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