

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

TSB-A-92 (24)S  
Sales Tax  
March 16, 1992

STATE OF NEW YORK

COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO. S911211E

On December 11, 1991, a Petition for Advisory Opinion was received from Ocean Bay Park Hotel Owners, Inc., D/B/A Ocean Watch Beach Club, 1 East Main Street, Bay Shore, New York 11706.

The issues raised by Petitioner, Ocean Bay Park Hotel Owners, Inc., D/B/A Ocean Watch Beach Club, are as follows:

1. Whether Petitioner will be a social or athletic club within the meaning of Section 1105(f)(2) of the Tax Law and whether dues and initiation fees paid by Petitioner's members will be subject to New York State and local sales tax.

2. Whether the business operations of Petitioner will fall within the definition of a hotel, as provided under Section 1101(c)(1) of the Tax Law, and thereby become subject to the imposition of New York State and local sales tax under Section 1105(e) of the Tax Law.

Petitioner is a New York corporation which owns a beach club (the "club") located at Fire Island, New York that will be operated on a members-only basis. The club consists of four one-story cabins (the "cabins"), four two-story buildings (the "buildings"), a swimming pool and access to certain beachfront property. Presently, there are a total of four residential units in the cabins and a total of 40 residential units in the buildings. It is anticipated that Petitioner will expand certain units situated in the buildings which will reduce the total number of units in the buildings to 36.

The cabins and the buildings are permanent structures constructed of sheetrock and wood. The units in the four cabins contain approximately 600 square of space and are divided into separate rooms, including two bedrooms, a living room, a kitchen and a bath facility. The units in the buildings range in size from approximately 225 square feet to approximately 300 square feet and consist of either single rooms containing sleeping, kitchen and bath facilities or larger living space with separate bedroom, living room, kitchen and bath areas. All of the units have electrical power and plumbing and all fully furnished. Each unit at the club has a separate entrance way and has its own deck.

Petitioner proposes to sell a maximum of approximately 1,000 private memberships in the club. Club memberships will be offered to the general public on a first-come, first-served basis. The size of the membership will be so limited solely because of the physical size of the club. Membership in the club will entitle a member to occupy a unit for minimum of seven nights a year ("annual use period") for a period of twenty years. The occupancy of each unit will be limited to a single family. It is anticipated that the club will operate for approximately 26 weeks each year,

TSB-A-92 (24)S  
Sales Tax  
March 16, 1992

commencing on or about May 1, 1992. In addition to a right to occupy a unit during an annual use period, a club member will also have the right to use the club's outdoor swimming pool and beach areas during such period.

Applicants for membership in the club will pay a one-time initiation fee of approximately \$5,900 and will also pay annual membership dues of approximately \$230. The annual membership dues may be increased by an amount not to exceed the prior year's percentage increase in the consumer price index for all urban consumers, as reported by the U.S. Department of Labor, Bureau of Labor Statistics. As a condition to membership in the club, each prospective member will be required to enter into a written Membership Agreement which will set forth the members rights and obligations with respect to the club.

Memberships in the club will be divided into three categories, based upon the following seasonal designations: standard, prime and holiday. The annual use period for the purchaser of a standard membership in the club will consist of weeks 18-20 and 36-43 of each year. The annual use period for the purchaser of a prime membership in the club will consist of weeks 21-35 of each year, exclusive of Memorial day, Fourth of July and Labor Day weeks. Finally, the annual use period for the purchaser of a holiday membership will consist of all 26 weeks of anticipated operation of the club, including weeks 21, 26 and 35 of each year.

Members will be entitled to reserve their annual use period each year by sending a written request to the club therefore during the period commencing February 1 and ending thirty days prior to the reservation date requested. All such reservations will be honored on a first-come, first-served basis, subject to availability.

At the beginning of a members' annual use period, the club will furnish the member's unit with clean linens and towels. However, during each period, no housekeeping or other maid services will be provided to a member with respect to his unit. In addition, the club will not plan or conduct any social or athletic events or other common activities for its members.

A member will be entitled to resell his membership in the club for an amount equal to his initiation fee plus reasonable selling expenses. However, the club will not repurchase the membership from the member, sell the membership for such member, locate a buyer for the member, or provide a list of prospective buyers to such member.

Members of the club will not have any proprietary interest in the club and they will not participate in either the selection of new members or management of the club. The management of the club will not be obligated to accept opinions or suggestions of members regarding club policies and/or rules.

The club has arranged with Interval International, Inc. ("Interval"), an exchange organization, to make exchange services available to its members on an optional basis. Under this arrangement, upon payment by a club member of all membership fees to Interval, such member will have the right to exchange his annual use period at the club for equal time at another club or resort associated with Interval.

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., D/B/A Brierwood Golf & Country Club, Adv Op Comm T&F, February 13, 1989, TSB-A-89(6)S, the Commissioner advised that inasmuch as (1) the membership of Petitioner's club possess no proprietary rights therein and have no control over its activities or management and (2) membership in the club is not exclusive, with members being appointed and accepted from a waiting list maintained by Petitioner, the subject club is not a "social or athletic

club" within the meaning of section 1105(f)(2) of the Tax Law. Annual membership "fees" or "dues" are thus not subject to tax imposed under the statutory provision.

Section 1105(e) of the Tax Law imposes sales tax on the rent for every occupancy of a room or rooms in a hotel in this state, except that the tax shall not be imposed upon (1) a permanent resident, or (2) where the rent is not more than at the rate of two dollars per day.

Section 1101(c)(1) of the Tax Law defines the term "hotel" to mean:

(1) Hotel. A building or portion of it which is regularly used and kept open as such for the lodging of guests. The term "hotel" includes an apartment hotel, a motel, boarding house or club, whether or not meals are served.

Section 527.9(e)(5) of the Sales and Use Tax Regulations provides that:

A lessor of bungalows, who rents bungalows which are furnished living units limited to a single-family occupancy, is not the operator of a hotel. Therefore, the rents for the occupancy of such bungalows are not taxable, provided:

(i) no maid, food or other common hotel services, such as entertainment or planned activities, are provided by the lessor; and

(ii) the rental is for at least one week.

The furnishing of linen by the lessor with the rental of a bungalow, without the service of changing the linen, does not alter the nontaxable status of the rental charges. (emphasis added)

Concerning issue 1, 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 will not be exclusive, members will not possess proprietary interest in Petitioner and will not have control over its activities or management, and membership will be restricted solely because of physical size of the facilities, Petitioner will not be deemed a social and athletic club. Accordingly, dues paid by members will not be subject to sales and use taxes.

Regarding issue 2, pursuant to Section 527.9(e)(5) of the Sales and Use Tax Regulations, Petitioner's rental of residential units in cabins and buildings to its members will constitute the rental of real property and will not be deemed the occupancy of a hotel pursuant to Sections

TSB-A-92 (24)S  
Sales Tax  
March 16, 1992

1101(c)(1) and 1105(e) of the Tax Law. Therefore, since such charges for the units will represent charges for the rental of real property, such charges will not be subject to sales and use taxes.

DATED: March 16, 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.