

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

TSB-A-92 (79) S
Sales Tax
November 13, 1992

STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO. S920820A

On August 20, 1992, a Petition for Advisory Opinion was received from Pattison, Koskey, Rath & Florio P.C., 45 Five Mile Woods Road, Suite 1, Catskill, New York 12414.

The issues raised by Petitioner, Pattison, Koskey, Rath & Florio P.C., are as follows:

1. Whether a homeowners association which has a relatively small recreational facility in comparison to its entire operations which accounts for less than 2% of its annual expenses, can separate the portion of the dues which funds such facility from dues used to fund other operations when determining the dues subject to sales tax.
2. Whether dues paid to a homeowners association which has no sports or recreational facilities are subject to sales tax.
3. Whether dues paid to a separate corporation to be created by a homeowners association to operate the sports and recreational facilities, would be treated separately from dues collected by the association for non-sports and non-recreational activities when determining the sales tax liability, regardless of whether membership in the recreational corporation by association members is required or optional.

Petitioner represents several clients that are real estate developers in New York State. In issue "1", Petitioner's client has created a homeowners association, incorporated under the Not-for-Profit Corporation Law, to own, develop and operate the common property. The common property is made up of land and related improvements, roadways, parking areas, landscaping, a lake, tennis courts, a pool and a beach. The expenses incurred in connection with the recreational area, in comparison to the entire operations of the association, represents less than 2% of its annual expenses. Membership in the association is mandatory and is limited to persons buying a real estate parcel within the development. Moreover, the right to vote is automatically granted with the purchase of a parcel within the development.

In issue "2", Petitioner's client proposes to create a homeowners association, to be incorporated under the Not-for-Profit Corporation Law, to own, develop and operate the common property. The common property will have no sports or recreational facilities and will consist of roadways, parking areas and landscaping. Membership in the association will be mandatory and will be limited to persons buying a real estate parcel within the development.

In issue "3", Petitioner's client proposes to create a homeowners association, to be incorporated under the Not-for-Profit Corporation Law, to own, develop and operate the common property consisting of the roadways, parking areas and landscaping. In addition, Petitioner's client proposes to create a separate corporation to own, develop and operate the sports and recreational facilities. Membership in both corporations will be limited to persons buying a real estate parcel within the development. Moreover, membership in both corporations will be mandatory for all real estate owners in the development.

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 ...

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, where membership was limited to homeowners living in defined residential sections, that the use of the facilities was deemed "social" and, thus, sales tax could be imposed upon dues paid to a social club. (emphasis added)

With respect to issue "1", pursuant to Section 1105(f)(2) of the Tax Law and Merrick Estates Civic Association, Inc. v. State Tax Commission, supra, the association created by Petitioner's client falls within the ambit of a social or athletic club. Accordingly, assessments paid by the members would constitute dues paid to a social or athletic club. Furthermore, since membership in the association is sold as a single unit and is mandatory for all homeowners residing in the development and cannot be purchased separately as an option, the entire assessment paid by members for membership in the association is subject to sales tax.

Concerning issue "2", pursuant to Section 1105(f)(2) of the Tax Law, only dues paid to a social or athletic club is subject to sales tax. Since the common property of the homeowner's association will not have any sports or recreational facilities, the dues paid by members for membership in the association will not be subject to sales tax.

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Regarding issue "3", since membership in the recreational corporation will be able to be purchased separately from the membership in the homeowner's association, the corporations will be treated separately and independent of each other and only the membership in the recreational corporation will be subject to the tax imposed by Section 1105(f)(2) of the Tax Law. This is so regardless of whether membership in the recreational corporation is mandatory or optional for association members.

DATED: November 13, 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.