

STATE OF NEW YORK  
TAX APPEALS TRIBUNAL

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In the Matter of the Petition	:	
of	:	
<b>ANTLERS COUNTRY CLUB, INC.</b>	:	DECISION
for Revision of a Determination or for Refund	:	DTA No. 807805
of Sales and Use Taxes under Articles 28 and 29	:	
of the Tax Law for the Period June 1, 1986	:	
through May 31, 1989.	:	

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The Division of Taxation filed an exception to the determination of the Administrative Law Judge issued on February 6, 1992 with respect to the petition of Antlers Country Club, Inc., c/o Harold L. Bloch, C.P.A., Bollam, Sheedy, Torani & Co., 26 Computer Drive West, Albany, New York 12205 for revision of a determination or for refund of sales and use taxes under Articles 28 and 29 of the Tax Law for the period June 1, 1986 through May 31, 1989. Petitioner appeared by Bollam, Sheedy, Torani & Co. (Harold L. Bloch, C.P.A.). The Division of Taxation appeared by William F. Collins, Esq. (Mark F. Volk, Esq., of counsel).

The Division of Taxation filed a brief in support of its exception. Petitioner filed a brief in response. Petitioner's request for oral argument was denied.

After reviewing the entire record in this matter, the Tax Appeals Tribunal renders the following decision.

***ISSUE***

Whether the fees paid by petitioner's members were subject to sales tax pursuant to Tax Law § 1105(f)(2) as dues paid to a social or athletic club.

***FINDINGS OF FACT***

We find the facts as determined by the Administrative Law Judge. These facts are set forth below.

During the period in issue, petitioner, Antlers Country Club, Inc., was a country club which provided its patrons with social events, golf, tennis and swimming.

On the basis of a field audit of petitioner's sales tax returns, the Division of Taxation ("Division") issued to petitioner two notices of determination and demands for payment of sales and use taxes due dated December 13, 1989. One notice assessed sales and use taxes for the period June 1, 1986 through May 31, 1989 in the amount of \$26,478.01 plus penalty of \$6,509.06 and interest of \$5,636.20 for a total amount due of \$38,623.27. The remaining notice assessed an omnibus penalty for the period December 1, 1986 through May 31, 1989 in the amount of \$2,374.76.

In the course of the audit, the auditor was advised by petitioner's bookkeeper that each member of the club was required to purchase a share of stock in the corporation. Later, the auditor discerned from a comparison of petitioner's stockholder and membership lists that, in 1989, 74 percent of petitioner's stockholders were also club members. The auditor also determined that, in 1989, 88 percent of the members were stockholders.

The foregoing findings led the Division to conclude that petitioner's membership dues were subject to tax. As a result, the Division determined that sales tax was due in the amount of \$25,028.06. Further, after a detailed review of petitioner's acquisitions, the Division found that tax was due on petitioner's purchases of fixed assets, fixtures and equipment in the amount of \$1,449.95. The Division's assessment of the omnibus penalty was based on its finding that the omission of tax was greater than 25 percent of the audited tax due for the periods ending in February and May of 1987, 1988 and 1989.

Petitioner was organized as a corporation in 1981. At this time there were approximately ten organizers five of whom were substantial shareholders. During the period in issue, 101

shares, representing approximately 27 percent of the shares issued and outstanding, were owned by six individual shareholders.

Under petitioner's by-laws, the business of the corporation is managed by petitioner's board of directors which is elected at an annual meeting of shareholders. The corporation's officers are elected by the board of directors. The corporation's by-laws do not give petitioner's members, as such, any authority with respect to petitioner's activities.

The only annual meetings held by petitioner are of its shareholders. Petitioner has never held a meeting of its membership.

Petitioner's promotional literature lists a range of membership fees from \$105.00 per year to \$3,000.00 per year depending upon whether the patron was seeking a single, family or corporate membership and depending upon the type of activity in which the member wished to participate. The promotional literature does not request that potential patrons become a stockholder of petitioner in order to become a member.

During the period in issue, approximately 26 to 30 percent of petitioner's members did not own stock in petitioner.

Individuals purchased stock in petitioner as a long-term investment.

In accordance with subdivision 1 of section 307 of the State Administrative Procedure Act, petitioner's proposed Findings of Fact have generally been accepted and incorporated herein. It is noted that portions of proposed finding of fact 1 have not been accepted because the documentary evidence is not sufficiently clear to support the entire proposed finding of fact.

### ***OPINION***

The Administrative Law Judge held that petitioner was not a club within the meaning of 20 NYCRR 527.11(b)(5) and, therefore, fees paid by petitioner's members were not subject to sales tax pursuant to Tax Law § 1105(f)(2). The Administrative Law Judge found that the proprietary interest in the club was held by petitioner's stockholders, not by the club members and, further, that petitioner's activities were controlled by its stockholders, not by its members. While the Administrative Law Judge found that most of the members were shareholders, he

also determined that the respective interests were not identical; a significant percentage of petitioner's members were not stockholders and a number of stockholders were not members. As a result, the Administrative Law Judge granted the petition and cancelled the notices of determination.

In its exception, the Division asserts that since a large percentage of petitioner's members were stockholders, the members have a proprietary interest in petitioner and control the activities of petitioner through their stock ownership. The Division argues that under these facts petitioner is a club under Tax Law § 1105(f)(2) and 20 NYCRR 527.11(b)(5)(i) and its dues are subject to sales tax as dues paid to a social or athletic club.

In response, petitioner asserts that the club members do not have a proprietary interest in petitioner and do not control petitioner's activities. In support of its position, petitioner points to its by-laws which do not give the club members authority over any of petitioner's activities but which give all such authority to a Board of Directors elected by the shareholders. In addition, petitioner asserts that while the Division's auditor testified that he was told by petitioner's bookkeeper that members were required to purchase shares in petitioner as a condition of membership, there was no other evidence to support the Division's contention. Petitioner argues that the club's promotional material introduced at the hearing which made no mention of such a requirement, and the significant number of nonmember shareholders and nonshareholder members refutes the Division's assertion that share ownership was a membership requirement.

We uphold the determination of the Administrative Law Judge for the reasons stated in his determination. The Division on exception has made the same arguments it made below. These arguments have been fully and correctly discussed in the Administrative Law Judge's determination.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of the Division of Taxation is denied;
2. The determination of the Administrative Law Judge is upheld;

3. The petition of Antlers Country Club, Inc. is granted; and
4. The notices of determination dated December 13, 1989 issued to petitioner Antlers Country Club, Inc. are cancelled.

DATED: Troy, New York  
November 19, 1992

/s/John P. Dugan  
John P. Dugan  
President

/s/Francis R. Koenig  
Francis R. Koenig  
Commissioner

/s/Maria T. Jones  
Maria T. Jones  
Commissioner