

STATE OF NEW YORK  
DIVISION OF TAX APPEALS

---

In the Matter of the Petition	:	
of	:	
ANTLERS COUNTRY CLUB, INC.	:	DETERMINATION
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.	:	

---

Petitioner, Antlers Country Club, Inc., c/o Harold L. Bloch, C.P.A., Bollam, Sheedy, Torani & Co., 26 Computer Drive West, Albany, New York 12205, filed a petition 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.

A hearing was held before Arthur S. Bray, Administrative Law Judge, at the offices of the Division of Tax Appeals, 500 Federal Street, Troy, New York on February 5, 1991 at 1:45 P.M., with all briefs to be submitted by July 30, 1991. Petitioner filed its briefs on April 30, 1991 and July 30, 1991. The Division of Taxation filed its brief on July 16, 1991. 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).

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

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.

#### SUMMARY OF PETITIONER'S POSITION

It is petitioner's position that it is not a "club" within the meaning of Tax Law § 1105(f)(2) because petitioner's members do not control petitioner. Therefore, petitioner submits that its dues are not subject to sales tax. In support of this position, petitioner relies upon an Advisory Opinion pertaining to EverGreen County Club, Inc. (TSB-A-88[31]S) and upon the definition of a club and the examples set forth in 20 NYCRR 527.11(b)(5). Petitioner also asserts that a relatively small group of stockholders controlled petitioner.

#### CONCLUSIONS OF LAW

A. Initially, it is noted that petitioner's reliance upon an advisory opinion is misplaced. Tax Law § 171(24) provides that advisory opinions are not binding on the Division except with respect to the person to whom the opinion is rendered. Therefore, the advisory opinion may not be cited as precedent in this matter.

B. During the period in issue Tax Law § 1105(f)(2) imposed sales tax upon "[t]he 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...."

The term "club" is defined in the Commissioner's Regulations at 20 NYCRR 527.11(b)(5)

as follows:

"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." (Emphasis in original.)

C. In order to interpret the foregoing terminology, the Regulation set forth a series of examples. Examples 15 and 19 are pertinent herein and provide as follows:

"Example 15: A tennis 'club' which is owned by an individual provides tennis courts, showers, sauna and lockers. The 'club' sells season passes only, that are referred to as memberships, which are available to anyone on a first-come, first-served basis. This is not a club or organization."

"Example 19: Members of a 'club' maintain an advisory committee to make suggestions to the 'club' owner. The owner is not obligated to accept any of the suggestions. The members do not control any aspects of the 'club's activities; therefore, this is not a club or organization."

D. In their briefs, the parties have focused on the foregoing regulation and examples. It is petitioner's position that since it is not controlled by its membership it does not constitute a club within the meaning of Tax Law § 1105(f)(2). It is the Division's position that since 74% of the shareholders were members and since a high percentage of the members were shareholders, there was a proprietary interest in the club by the members. Lastly, it is the Division's position

that the examples set forth above are inapplicable since they refer to clubs owned by individuals and petitioner is a corporation.

E. It is concluded that petitioner's arguments are meritorious. Here, both the uncontradicted testimony and the documentary evidence establish that petitioner was not a club within the meaning of 20 NYCRR 527.11(b)(5).

Petitioner's by-laws establish that petitioner's activities were controlled by its stockholders and not by its members. Petitioner's stockholders selected petitioner's board of directors which, in turn, appointed petitioner's officers. In contrast, petitioner's members, as such, did not have any direct or indirect control over petitioner's social or athletic activities or management of the club or organization (see, 20 NYCRR 527.11[b][5][i]). Further, the proprietary interest in the club was held by the stockholders and not the members. Therefore, although most of the members were shareholders, the respective interests were not identical. This is an additional factor which inures to petitioner's benefit.

Lastly, the Division's attempt to distinguish examples 15 and 19 of 20 NYCRR 527.11(b)(5)(ii) on the basis that petitioner is a corporation is rejected. The significant point of each example is that the proprietary interest and the membership interest were not the same. In view of the fact that a significant percentage of petitioner's members were not stockholders, the same point is controlling here.

F. The petition of Antlers Country Club, Inc. is granted to the extent indicated in Conclusion of Law "E"; the notices of determination and demands for payment of sales and use taxes due, dated December 13, 1989, are to be modified accordingly; and the petition is, in all other respects, denied.

DATED: Troy, New York

ADMINISTRATIVE LAW JUDGE