

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

TSB-A-89 (21)S
Sales Tax
July 25, 1989

STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO. S881214A

On December 14, 1988, we received a Petition for Advisory Opinion from Joseph W. Burns, 127 Oxford Road, New Rochelle, New York 10804.

The issues raised are whether supplemental capital contributions paid in installments by members to a club are subject to sales tax pursuant to Section 1105(f)(2) of the Tax Law and in particular whether Petitioner's voluntary supplemental capital contribution is subject to said tax.

Petitioner is a member of the Wykagyl Country Club located in New Rochelle, New York. He joined the Club as a Regular member in March 1946 and was granted Senior member status in May 1980.

The Club launched a "revitalization program" designed to completely renovate, rejuvenate, and reinvigorate the Club into a completely modern establishment. The club members voted and approved a four-year \$1,800,000 modernization program embracing replacement and improvement projects from tee to green and from clubhouse to pool. Funding would be provided from a combination of increasing the capital contribution certificate, increasing the initiation fee, and assessing non-certificate holding members. This funding plan provides for all members, certificate holders and non-certificate holders alike, to contribute to the revitalization program. The funding package allows for an increase in the certificate by \$4,500 (collected over four years), an increase in the initiation fee to \$7,500, and an assessment on non-certificate holding members.

The Club's by-laws provide that: "... for current regular members, their certificates will be increased by \$4,500, payable over four years. They will be billed \$1,500 in February 1988 and \$1,000 in February '89, '90, '91 respectively." It has been the policy of the Club to refund the amount of a member's capital contribution certificate when he resigns or dies.

Petitioner, on the other hand, is not a Regular member, but a Senior member. The Club's policy toward Senior members is that all dues and assessments are frozen with respect to members who have attained Senior status. Therefore, the increase in the capital certificate and the assessment upon non-certificate holding members does not apply to those members who have attained Senior status.

Section 1105(f)(2) of the Tax Law imposes a tax on "[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..."

Section 1101(d)(6) of the Tax Law defines dues as "[a]ny dues or membership fee including any assessment, irrespective of the purpose for which made..."

Section 1101(d)(7) of the Tax Law defines initiation fee as "[a]ny payment, contribution or loan, required as a condition precedent to membership, whether or not such payment, contribution or loan is evidenced by a certificate of interest or indebtedness or share of stock, and irrespective of the person or organization to whom paid, contributed or loaned."

Section 527.11(b)(2)(i)(b) of the Sales and Use Tax Regulations provides that:

"(2) Dues. (i) The term dues includes:...

(b) any assessment, irrespective of the purpose for which made; and...

Example 4: A social club wishes to expand its clubhouse by adding a new dining room to it. In order to finance the construction, the club will assess each member \$100. The assessment is subject to tax as dues, regardless of the fact that the proceeds will be used for a capital improvement..."

Accordingly, non-voluntary capital contributions made by members to Wykagyl Country Club constitute dues within the meaning and intent of Section 1101(d)(6) of the Tax Law and are subject to tax when paid pursuant to Section 1105(f)(2) of the Tax Law.

The next issue to be considered is whether Petitioner's voluntary capital contribution made to Wykagyl Country Club is subject to sales tax.

The New York State sales tax is based on the former Federal Excise Tax that was imposed upon club dues pursuant to Section 4241 of the Internal Revenue Code of 1954 (Section 4241 was repealed by Pub. L. 89-44 on June 21, 1965).Section 4241 states:

(a) Rate. - There is hereby imposed -

(1) ... [a] tax equivalent to 20 percent of any amount paid as dues or membership fees to any social, athletic, or sporting club or organization, if the dues or fees of an active resident annual member are in excess of \$10 per year

Section 4242(b) of the Internal Revenue Code of 1954 defines initiation fees as "...any payment, contribution, or loan, required as a condition precedent to membership, whether or not any such payment, contribution, or loan is evidenced by a certificate of interest or indebtedness or share of stock, and irrespective of the person or organization to whom paid, contributed, or loaned."

Petitioner joined the club as a Regular member in March 1946, and was granted Senior member status in May 1980. The Club's by-Laws provide:

"Assessment. (A) The Board of Governors shall have the power to levy assessments on all members except Senior Regular members...".

The Board of Governors special Report to Members of the Wykagyl Country Club, dated December 22, 1987, reminded all members that Senior members had "all dues and assessments frozen at the time a member attains Senior status." Moreover, the report continued "...a group of Senior members led by Joe Burns plans to launch a campaign for voluntary participation from this group" in the funding for the revitalization program.

Therefore, Petitioner has voluntarily contributed to the revitalization program. As a Senior member, his membership dues and assessments are frozen.

"...an assessment, effectively calling on the membership to meet pro rata particular needs of the club, whether technically enforceable under state law or not, is the type of payment sought to be reached It is the effective call for a definite contribution or payment from the members which should be held to characterize as assessment, as distinguished from a voluntary contribution or gift." City Athletic Club v. United States, 242 F. 2d 43, 44 (1957).

"...obligatory payments like dues and lawful assessments are to be taxed. But invited assessments or contributions, the collection of which the club has no legal right to pursue, are not assessments within the act." Garden City Golf Club v. Corwin, 62 F. 2d 246, 248 (1932).

The general rule is that a payment is not regarded as compulsory unless made to relieve the person from a legally enforceable demand by the party to whom the money is due, and, unless the payment here sought to be taxed was to prevent the loss of membership, or some other privilege, it would not be within the language of the act. Pendennis v. United States, 20 F. Supp. 758, 759 (1937).

Petitioner who is a Senior member of the club was not subject to the assessment levied by the Board of Governors in raising revenue for the club's revitalization program. The membership or any other privilege entitled to Petitioner was not threatened if he refused to contribute. Moreover, the club had no legal right to pursue such contribution. Petitioner's contribution was clearly voluntary.

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Accordingly, Petitioner's voluntary contribution to the Wykagyl Country Club does not constitute an initiation fee or dues within the meaning and intent of Section 1101(d) of the Tax Law. Thus, Petitioner's voluntary contribution is not subject to sales tax pursuant to Section 1105(f)(2) of the Tax Law.

DATED: July 25, 1989

s/FRANK J. PUCCIA
Director
Technical Services Bureau

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