

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

TSB-A-92 (49)
Sales Tax
June 19, 1992

STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO. S920505B

On May 5, 1992, a Petition for Advisory Opinion was received from Bobby O'Brians, Inc., S-5324 Rogers Road, Hamburg, New York 14075.

The issue raised by Petitioner, Bobby O'Brians, Inc., is whether Bobby O'Brians, Inc. D/B/A Brierwood Golf & Country Club will be a club or organization as defined under Section 1105(f)(2) of the Tax Law and Section 527.11(b)(5) of the Sales and Use Tax Regulations and whether its "Dues and Initiation Fees" will be subject to State and local sales taxes.

Brierwood Village, Inc., (hereinafter "Brierwood") is presently the sole owner and operator of the Brierwood Country Club which provides its members the use of an eighteen hole golf course, tennis courts, outdoor swimming facilities, a clubhouse, and restaurant and bar facilities.

All regular general members are eligible to participate in the use of the golf course and golf tournaments. The tournaments are controlled by Brierwood and are subject to Brierwood's discretion.

The general members and social members are entitled to participate in all social gatherings, dances and other social functions which are completely sponsored and controlled by Brierwood.

Brierwood retains sole control and authority over the use of the golf course and full facilities. The membership does not have any control or rights over social functions or golf tournaments.

New members are appointed and accepted from a waiting list. Brierwood approves new applicants as members to fill vacancies in the membership. Members have no control over the acceptance of new members. The size of the membership is limited only because of the size of the facilities.

Club members do not have a proprietary interest in Brierwood and are not permitted by the owner to participate in either the selection of new members or management of the club. Brierwood is not obligated to accept opinions or suggestions from members regarding club policies and/or rules.

Members are charged a daily greens fee for guests.

Separate charges are made to members for lockers and club storage.

Members are required to charge a monthly minimum of \$45.00 per month for both food and beverage. In the event a member charges less than the minimum required amount for a month, the difference between the minimum required amount and the actual amount charged will be billed to the member.

Brierwood is a majority stockholder in Petitioner which is presently responsible for all food and beverage operations at the premises.

As part of a plan to centralize management the country club division and related assets of Brierwood will be contributed to Petitioner. Petitioner will be responsible for operating a food and beverage division and a country club division which will include golf, tennis and other recreational facilities. Petitioner will operate the country club division in the same manner as it is presently operated by Brierwood.

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 define the term "club" as:

. . .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. . .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. . .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 other means, is a club. 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.

Accordingly, inasmuch as (1) the membership of Petitioner's club will possess no proprietary rights therein and have no control over its activities or management and (2) membership in the club will not be exclusive, with members being appointed and accepted from a waiting list maintained by Petitioner, the subject club will not be a "social or athletic club" within the meaning of section 1105(f)(2) of the Tax Law. Annual membership "fees" or "dues" will thus not be subject to tax imposed under such statutory provision. Brierwood Village, Inc., Adv Op Comm of T&F, February 13, 1989, TSB-A-89(6)S.

Section 1105(c)(4) of the Tax Law imposes a sales tax on the service of storing all tangible personal property not held for sale in the regular course of business. Accordingly, Petitioner's charges to members for lockers and golf club storage will be subject to State and local sales taxes. Brierwood Village, Inc., *supra*.

Section 1105(d)(i) of the Tax Law imposes a sales tax on the receipts from "every sale of beer, wine or other alcoholic beverages or any other drink of any nature, or from the sale of food and drink of any nature or of food alone, when sold in or by restaurants, taverns or other establishments in this state, or by caterers, including in the amount of such receipts any cover, minimum, entertainment or other charge made to patrons or customers." Therefore, Petitioner's charges to its members for sales of food and drink, including any assessments made against a member for failure to meet the monthly minimum, will also be subject to State and local sales taxes. Brierwood Village, Inc., *supra*.

DATED: June 19, 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.