

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

TSB-A-95 (44)S
Sales Tax
November 14, 1995

STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO. S950629A

On June 29, 1995, a Petition for Advisory Opinion was received from Anchorage Yacht Club Condominium, 410 East Shore Rd., Lindenhurst, New York 11757.

The issues raised by Petitioner, Anchorage Yacht Club Condominium, are:

1. Whether Petitioner can segregate its operations and charge sales tax only on income from members that is specifically used to operate the tennis courts and swimming pool.
2. Whether Petitioner must create a separate corporation to operate its tennis courts and swimming pool.
3. Whether common charges paid by members to fund other operating expenses and capital improvements are subject to sales and use taxes.

Petitioner is a condominium association. The facilities in the condominium include roads, boat slips, tennis courts, swimming pool and an office. Common charges are collected from the members of the association to operate all the facilities. The swimming pool and tennis court maintenance costs make up approximately 5% of the total budgeted expenses.

The introduction of Petitioner's Condominium Offering Plan states, in part, as follows:

Purpose of the Plan

Anchorage Associates (the "Sponsor") presents this Offering Plan (the "Plan") for the condominium ownership of the premises known as 401 East Shore Road, Lindenhurst, New York (the "property") under the provisions of the Condominium Act.

The purpose of this Plan is to set forth all of the material terms of the offer to establish the Property as a condominium and to sell 460 Slip Units therein.

* * *

Interest in the Property to be Submitted to Condominium Act

A condominium will be created and established by submitting fee title to the Property to the provisions of the Condominium Act . . . in accordance with the

Declaration and By-laws set forth in Part II of the Plan. The Condominium will be known as The Anchorage Yacht Club Condominium and will be subject to the Condominium Act and all laws regulating condominiums.

* * *

Offer of Sale of Condominium Units

The Sponsor hereby offers for sale 460 Slip Units on the terms and conditions set forth in the plan.

* * *

Features of Condominium Ownership

The ownership of a Slip Unit is similar in many respects to the ownership of a parcel of ocean front property. Each Slip Unit Owner owns fee title to his Slip Unit and is entitled to the exclusive possession thereof.

* * *

Each Slip Unit Owner also owns in common with other Unit Owners an undivided interest in the Common Elements known as his Common Interest. The Common Elements, as described in "Description of the Property" . . . and in the Declaration . . . include portions of the Land, the central and appurtenant installations for services such as power, the outdoor pool, two outdoor tennis courts, the snack bar kiosk, and the common bathroom facilities . . .

* * *

The Sponsor will make application to divide the Property into separate tax lots for each Unit and its Common Interest, which will then be taxed as a separate tax lot for real estate tax purposes. Once a separate tax lot is established for a Unit, a Unit Owner will then be responsible for the payment of the real estate taxes on his, but not any of real estate taxes of any other Unit Owner. The amount of the tax assessed against any Unit will depend upon various factors affecting value, including but not limited to square footage, location, purchase price and other factors taken into consideration by the taxing authorities.

Definitions

"Board" means the Board of Managers of the Condominium.

* * *

"Common Charges" means any charges assessed by the Board of Managers against any Unit Owner.

"Common Expenses" means all cost and expenses incurred or paid generally by the Board in connection with the operation of the Condominium which, pursuant to the Plan, the Declaration and By-laws, are to be paid by the Unit Owners in proportion to their Common Interest. . . .

The By-laws of Petitioner state, in pertinent part, as follows:

* * *

Article II

Board of Managers

Section 1. Number and Term of Office. As more particularly set forth in these By-laws and the Declaration, the affairs of the Condominium shall be governed by a board of managers of the Condominium (the "Board of Managers"). The Board of Managers shall be composed of five (5) members. Until the first meeting of the Unit Owners, the members of the Board of Managers shall consist of five (5) persons appointed by the Declarant. Each member of the Board of Managers shall serve for a term of one (1) year or until their respective successors shall have been duly elected.

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Article III

Unit Owners

Section 1. Annual Meetings. Within forty-five (45) days after the date Declarant conveys title to the first Unit pursuant to the Condominium Offering Plan proposed by the Declarant for the Property (the "Plan"), the first meeting of Unit Owners shall be held. At such meeting, the incumbent Board of Managers shall resign and a new Board shall be elected by the Unit Owners as provided in the By-laws. Thereafter, annual meetings shall be held. . . .At such meeting the Unit Owners shall elect members of the Board of Managers to fill vacancies or to succeed retiring members of the Board of Managers as provided in Article II of these By-laws and shall also transact such other business of the Condominium as may properly come before the meeting.

Section 1105(f) of the Tax Law, effective December 1, 1995, provides, in pertinent part, for the imposition of sales tax upon the following:

* * *

(2)(i) 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. Where the tax on dues applies to any such social or athletic club, the tax shall be paid by all members, other than honorary members, thereof regardless of the amount of their dues, and shall be paid on all dues or initiation fees for a period commencing on or after August first, nineteen hundred sixty-five. In the case of a life membership, the tax shall be upon the amount paid as life membership dues, however, a life member, other than an honorary member, paying an annual sales tax, based on the dues of an active annual member, shall continue such payments until the total amount of such tax paid is equal to the amount

of tax that would have otherwise been due had the tax been imposed at the time such paid life membership has been purchased and at the then applicable rate.

(ii) Dues and initiation fees paid to the following shall not be subject to the tax imposed by this paragraph:

(A) A fraternal society, order or association operating under the lodge system;

(B) Any fraternal association of students of a college or university;

(C) A homeowners association. For purposes of this subparagraph, a homeowners association is an association (including a cooperative housing or apartment corporation) (I) the membership of which is comprised exclusively of owners or residents of residential dwelling units, including owners of units in a condominium, and including shareholders in a cooperative housing or apartment corporation, where such units are located in a defined geographical area such as a housing development or subdivision and (II) which operates social or athletic facilities located in such area for use (whether or not exclusive) by such owners or residents. (emphasis added)

Section 527.11(b)(5) of the Sales and Use Tax Regulations provides that:

(5) 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 organization 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.

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

(7) Athletic club. (i) An athletic club is any club or organization which has as a material purpose or activity the practice, participation in or promotion of any sports or athletics.

In the instant case, Petitioner is a condominium association consisting of boat slip owners in a condominium. The facilities in the condominium include roads, boat slips, tennis courts, swimming pool and an office. Common charges are collected from the members of the association to operate all the facilities. The swimming pool and tennis court maintenance costs make up approximately 5% of the total budgeted expenses.

Accordingly, with respect to issue "1", pursuant to Section 1105(f)(2) of the Tax Law and Sections 527.11(b)(5) and 527.11(b)(7) of the Sales and Use Tax Regulations a portion of Petitioner's activities falls within the ambit of a social or athletic club since it provides swimming pool and tennis court facilities. It is noted that since Petitioner's membership does not consist of residents of residential dwelling units it does not fall within the exemption afforded to dues collected by homeowners associations provided by Section 1105(f)(2)(ii)(C) of the Tax Law. Therefore, a reasonable portion of the assessment paid by the members would constitute dues paid to a social or athletic club. However, since common charges are collected from all members as a single unit to operate all the facilities, only a reasonable portion of the assessments paid by the members in Petitioner allocable to the social and athletic facilities are subject to sales tax. Shaker Common Condominium Owners, Inc., Adv Op Comm T&F, April 17, 1995, TSB-A-94(6.1)S.

With respect to issues "2" and "3", in view of the answer to issue "1", it is not necessary to form a separate corporation and only a reasonable portion of the assessments paid by the members in Petitioner allocable to the social and athletic facilities are subject to sales tax. Shaker Common Condominium Owners, Inc., Adv Op Comm T&F, April 17, 1995, TSB-A-94(6.1)S.

DATED: November 14, 1995

s/PAUL B. COBURN
Deputy Director
Taxpayer Services Division

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