

New York State Department of Taxation and Finance  
**Office of Counsel**  
**Advisory Opinion Unit**

TSB-A-08(58)S  
Sales Tax  
October 8, 2008

STATE OF NEW YORK  
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO. S080708A

The Department received a petition for an advisory opinion from Stephen R. Buschel (hereafter “Petitioner”) on July 8, 2008. Petitioner provided additional information relating to the Petition on August 29<sup>th</sup> and September 23<sup>rd</sup>, 2008. Petitioner asks whether annual payments to a country club for a Membership Eligibility Certificate are dues subject to sales and use taxes. Because possession of a Membership Eligibility Certificate is a condition precedent to membership in the club, Petitioner’s payments to the club for that certificate constitute initiation fees subject to New York State and local sales taxes, even though the payments are not dues and do not entitle Petitioner to membership privileges in the club. Compensating use taxes do not apply to club dues or initiation fees.

**Facts**

Petitioner resides in the “Windmill Farm” area of Armonk, New York. Residents of the Windmill Farm area are entitled to apply for membership in the Windmill Club, a social club in Armonk, Westchester County, New York (hereafter, the “Club”). According to Petitioner, before a resident can become a member of the Club and use its facilities, the resident must obtain a valid “Membership Eligibility Certificate” (hereafter, “MEC”). A resident must make an annual payment to maintain his or her MEC. The annual MEC payment is in excess of \$10.00 per year. If an MEC holder does not join the Club membership and pay regular dues, the resident is not allowed access to club property (except where he or she is a guest of a dues-paying club member). The Club’s annual dues for members are also greater than \$10.00 per year. Petitioner has made annual payments to the Club for an MEC but has not joined the Club, does not pay dues, and has no rights of a member. Petitioner has not paid any entrance fees or special fees under Article 2, section 5 of the Club’s By-Laws or house charges under section 7 of Article 2 of the By-Laws. The Club has collected sales tax on Petitioner’s annual payments for his MEC. Petitioner asserts that those MEC payments are not subject to sales tax as social club dues because mere possession of the MEC does not entitle Petitioner to any rights of membership in the Club.

Petitioner submitted a copy of the Club’s By-Laws with his petition. Article 1, Section 1, of the By-Laws provides that any Windmill Farm owner or resident is eligible for membership in the Club if he or she possesses an MEC in good standing. Section 2 of Article 1 of the By-Laws provides that every MEC holder in good standing will remain in good standing subject to the terms and conditions of the By-Laws and that the annual price of the MEC will be set by the Club’s Board of Governors. The annual MEC offering price is a pro-rated share of the Club’s non-operating expenses, including insurance, real estate taxes, and various maintenance and administrative expenses. Any Windmill Farm owner or resident who purchases an MEC is entitled to become a Club member by paying the current initiation fees, annual dues, and Capital Maintenance Program fees. A Windmill Farm owner who purchases an MEC and who subsequently sells his or her home is entitled to transfer his or her MEC to the new owner/resident of the home. The new owner/resident is then entitled to become a Club member by paying the prevailing initiation fee, annual dues, and Capital Maintenance Program fees. If a Windmill Farm owner or resident has not purchased an MEC, he or she may still become a Club member by paying a membership surcharge, in addition to the current initiation fees, annual dues, and Capital Maintenance Program fees. Although a person who holds only an MEC is not entitled to Club membership or privileges, the MEC holder is entitled to share in the joint ownership of the Club’s property, such as the lake, building, grounds, and all other property. Also, the MEC holder, though not a Club

member, is entitled to distributions if the Club sells any of its assets. An MEC holder cannot vote or take any action at any Club meeting unless the person is also a member of the Club in good standing.

Section 4 of Article 1 of the By-Laws, entitled "Election to Membership," provides that an applicant for membership must submit a written application to the Club President or Secretary, together with payment of the entrance fee and dues when payable. Section 9 of Article 1 provides Club membership cannot be assigned, transferred, sold, or conveyed.

Section 2 of Article 2 of the By-Laws provides that a member who pays dues will be entitled to full membership in the Club. Section 5 of Article 2 provides that the Board of Governors can require that persons also pay entrance fees and special fees as a condition to admission to membership. Section 7 of Article 2 allows the Board of Governors to establish a minimum house charge fee to be paid by every member. Section 7 also provides that the member's failure to pay that minimum fee is treated as the failure to pay dues. Under Article 1, section 12, members who fail to pay their dues, house charges, and other fees will initially be suspended from membership, and then expelled if non-payment continues for three months after suspension for non-payment.

### **Issue**

Petitioner asks whether his annual payments to the Windmill Club for a Membership Eligibility Certificate constitute dues of a social club subject to state and local sales and use taxes.

### **Analysis**

Section 1105(f)(2) of the Tax Law, as relevant here, imposes the state's four percent sales tax on 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 the initiation fee is in excess of ten dollars. Where the tax on dues applies to any such social or athletic club, the tax must be paid by all members of the club, other than honorary members, regardless of the amount of their dues, and must be paid on all dues or initiation fees for a period commencing on or after August first, nineteen hundred sixty-five. "Social or athletic club" means any club or organization of which a material purpose or activity is social or athletic. "Dues" means any dues or membership fee including any assessment, regardless of the purpose for which it is made, and any charges for social or sports privileges or facilities, except charges for sports privileges or facilities offered to members' guests which would otherwise be exempt if paid directly by such guests. "Active annual member" is a member who is not a life member but who enjoys full club privileges as distinguished from the privileges enjoyed by a person holding a nonresident membership, an associate membership, or other partial or restricted membership. "Initiation fee" means any payment, contribution, or loan, required as a condition precedent to membership, whether or not that payment, contribution, or loan is evidenced by a certificate of interest or indebtedness or share of stock, and regardless of the person or organization to whom it is paid, contributed or loaned. See Tax Law 1101(d). Section 1109 of the Tax Law imposes an identical 3/8 % rate of state sales tax on dues and initiation fees paid to social and athletic clubs located in the area of the Metropolitan Commuter Transportation District (MCTD), which includes Westchester County. Pursuant to the authority of section 1210(a)(1) of the Tax Law, Westchester County imposes an identical 3% sales tax on dues and initiation fees paid to social and athletic clubs located in the county. The Tax Law does not impose or authorize any state or local compensating use tax on club dues or initiation fees.

Petitioner states that the Club is a social club. The By-Laws petitioner submitted with the Petition do not state the Club's purposes but suggest it is a social and/or athletic club.

Petitioner's annual payment to the Club for his MEC is not a payment of dues, since Petitioner is not a member of the Club and the payment is not made for membership or privileges at the Club or for use of the Club's facilities. However, Petitioner's payment for the MEC does constitute an initiation fee, since it is a payment required as a condition precedent to Club membership under Article 1 of the Club's By-Laws. As an initiation fee paid to a social or athletic club in an amount in excess of \$10.00, Petitioner's payment for the MEC is subject to the state's 4% sales tax imposed by section 1105(f)(2). Likewise, it is subject to the 3/8% rate of state tax imposed in the MCTD, since the Club is located in the MCTD, and also to Westchester County's 3% rate of tax.

The foregoing analysis and conclusions assume, based on petitioner's assertion, that the Club is a social or athletic club. If it is not a social or athletic club, the conclusions would differ.

DATED: October 8, 2008

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Jonathan Pessen  
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NOTE: An Advisory Opinion is issued at the request of a person or entity. It is limited to the facts set forth therein and is binding on the Department only with respect to the person or entity to whom it is issued and only if the person or entity fully and accurately describes all relevant facts. An Advisory Opinion is based on the law, regulations, and Department policies in effect as of the date the Opinion is issued or for the specific time period at issue in the Opinion.