

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

TSB-A-92 (34)S
Sales Tax
April 16, 1992

STATE OF NEW YORK

COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO. S911002A

On October 2, 1991, a Petition for Advisory Opinion was received from Windsor Square Homes Association, 130 Linden Oaks Drive, Suite A, Rochester, New York 14625.

The issue raised by Petitioner, Windsor Square Homes Association, is whether the charges for energy sources and services used by Petitioner to maintain common areas in a residential housing development are subject to sales and compensating use taxes.

Petitioner is an organization of homeowners which is the vehicle to provide for the orderly management and maintenance of common areas and facilities belonging to 136 homeowners. Petitioner was incorporated on August 24, 1970 pursuant to the Membership Corporation Law of the State of New York.

One of the purposes of the Petitioner is "To own, operate, maintain, preserve and provide architectural control on a non-profit basis, the resident lots and common areas of the Windsor Square development exclusively for the benefit of its members." It is further noted that, ". . .the corporation shall not conduct or carry on any activities not permitted to be conducted or carried on by an organization exempt under Section 501(c)(7) of the Internal Revenue Code. . ."

The Declaration of Covenants, Conditions and Restrictions under which the Petitioner must operate limits members of the Petitioner to those who are owners of a lot and states that, "Membership shall be appurtenant to and may not be separated from ownership of the lot." Further, Section 1, Article VIII of the Covenants states in part, "Said property is hereby restricted to residential dwellings for residential use." Section 5 of that same Article states in part, "No business activities or any kind whatever shall be conducted in any building or in any portion of said Property."

The Covenants of Petitioner define the "Common Area" to mean "all real property and improvements thereon owned by the Association for the common use and enjoyment of the owners." The common area includes all streets and private drives, pedestrian malls, play areas, clubhouse and other recreational facilities including the swimming pool and related equipment. The right and easement of enjoyment to the common area is appurtenant to and passes with the title to every homeowner. The common area is an extension of the homeowner's held in common.

Section 527.13 of the Sales Tax Regulations provides, in part, as follows:

§527.13 Certain energy sources and services

(a) Reduction in rate

(1) Section 1105-A of the Tax Law provides for a reduction in the four-percent statewide sales tax rate imposed under sections 1105(a) and 1105(b) of the Tax Law and in the four-percent statewide compensating use tax rate imposed under section 1110(a) of the Tax Law, as set forth in subdivision (c) of this section, on the receipts from every sale, other than for resale, used for residential purposes of:

- (i) fuel oil (except diesel motor fuel);
- (ii) coal;
- (iii) wood (for heating purposes only);
- (iv) propane (except when sold in containers of less than 100 pounds);
- (v) natural gas;
- (vi) steam; and
- (vii) gas, electric and steam services.

For purposes of this regulation, the term energy sources is used to describe the above mentioned tangible personal property and services.

* * *

(d) Definition

(1) The term residential purposes means any use of a structure or part of a structure as a place of abode, maintained by or for a person, whether or not owned by such person, on other than a temporary or transient basis with the exclusion of accommodations subject to tax under subdivision (e) of section 1105 of the Tax law.

(2) The term nonresidential purposes means any use other than for residential purposes, as defined in paragraph (1) of this subdivision, including any use in the conduct of a trade, business or profession, whether such trade, business or profession is carried on by the owner of the structure or some other person.

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(3) The term common area means any area of the premises of a structure used without distinction for both residential and nonresidential purposes.

(e) Certification and allocation

(1) Purchases of energy sources used exclusively for residential purposes shall receive the reduced tax rate without the necessity of certification. (emphasis added)

In the Matter of Merrick Estates Civic Association, Inc. v. State Tax Commission, 65 AD2d 669 the Court held that where residents of a particular residential section formed a corporation in order to construct a community swimming pool and related facilities, where membership was limited to homeowners living in defined residential sections, that the use of the facilities was deemed "social" and, thus, sales tax could be imposed upon dues paid to a social club. (emphasis added)

Moreover, in Stratford RP, Inc., Adv Op Comm T&F, October 29, 1987, TSB-A-87(40)S the Commissioner advised that common areas, such as tennis courts, recreational areas, roadways and parking areas owned by the Stratford Green Homeowners Association were held to be used for social and athletic purposes. (emphasis added)

In the instant case all the common areas which includes the streets and private drives, pedestrian malls, play areas, clubhouse, swimming pools and other recreational facilities and related equipment maintained by Petitioner are used for social and athletic, rather than residential purposes. Merrick Estates Civic Association, Inc. v. State Tax Commission, supra, and Stratford RP, Inc., supra. Therefore, pursuant to Section 527.13 of the Sales and Use Tax Regulations a reduction in the four-percent statewide sales tax rate provided by Section 1105-A of the Tax Law for structures used exclusively for residential purposes does not apply to the charges for energy sources and services used by Petitioner in connection with the aforesaid common area facilities and related equipment.

DATED: April 16, 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.