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

TSB-H-80 (156)S
Sales Tax
August 18, 1980

STATE OF NEW YORK
STATE TAX COMMISSION

ADVISORY OPINION PETITION # S800514B

On May 14, 1980, a Petition for Advisory Opinion was received from the Fox Wander West Neighborhood Association,.Inc., 1202 Troy-Schenectady Road, Latham, NY 12110.

The issue raised is whether or not certain assessments paid to a homeowners' association are subject to New York State and Saratoga County taxes on dues paid to a social or athletic club imposed under Article 28, and authorized under Article 29, of the Tax Law, respectively.

Petitioner, Fox Wander West Neighborhood Association, Inc., is a neighborhood association formed as a Type A corporation under the Not-For-Profit Corporation Law. Membership is automatic upon the purchase of a home or place of business within a real estate development known as "Luther Forest Subdivision #1." Members have the right to vote annually for the Board of Directors, which conducts the affairs of the Association. The Association owns and maintains certain common green areas, as well as a trail system. The trails are maintained for the use of residents, their families, guests and tenants, although it is anticipated that the right to use the trails will be leased to the Luther Forest Community Association, described as "the umbrella organization." The common areas are maintained for the use of the members, their families, guests and tenants, for recreation and related activities. It is anticipated that in the event pools, club houses and recreational facilities are built they will be profit making ventures, available on a fee basis to residents and the general public. An annual assessment is imposed upon the members to pay for maintenance of the common areas and the trails, for taxes, administrative costs, insurance and for the maintenance of a contingency fund.

Section 1105(f)(2) of the Tax Law imposes a 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 .... "The term "dues" is defined in section 1101(d)(6) of the Tax Law as including "...any assessment, irrespective of the purpose for which made .... "Section 1101(d)(13) of the Tax Law defines the term "social or athletic club" to mean any "... club or organization of which a material purpose or activity is social or athletic." The term "club or organization" is defined in the Sales and Use Tax Regulations as ". . .any entity which is composed of persons associated for a common objective or common activities." 20 NYCRR 527.11(b)(4) Since Petitioner fits the definition of club or organization, and since the annual assessments clearly constitute "dues" within the meaning of the Tax Law, the dispositive question is whether it is a social or athletic club or organization; that is, whether a material purpose or activity of the club or organization is social or athletic.

Section 1105(f)(2) has been held applicable to a homeowners' association as a "social club" where the same maintained a beach, a swimming pool and related facilities. Merrick Estates Civic Association, Inc. v. State Tax Commission,65 A.D.2d 669 (1978). In that case the transfer of home ownership included the transfer of membership, members were obligated to pay pro rata shares of the maintenance cost of the facilities, and use of the facilities was limited to association members. The Court there relied on Federal judicial decisions construing the Federal statutory provision on which section 1105(f)(2) was based, 26 U.S.C.A.4241.

The common green areas maintained by Petitioner are similar in function to the facilities involved in the Merrick Estates case. In both instances there is a recreational facility maintained for the use of the members of an organization where, whether by prearrangement or happenstance, such members may meet together for conversation or joint recreation. Thus, Petitioner is a club or organization one of the material purposes of which is social. It is therefore a social club or organization and the annual assessments paid by the members constitute dues as described in Section 1105(f)(2) of the Tax Law.

Petitioner urges that the present situation differs from that in Merrick Estates because in Merrick Estates the use of the facilities was limited to members only. The Offering Plan submitted by Petitioner in support of its petition contains a copy of a Declaration of Covenants, Conditions, Restrictions and Easements affecting the land conveyed to Petitioner. That Declaration provides in Article II, section I that the common areas "...are not dedicated hereby for use by the general public, but are dedicated for, the common use and enjoyment of the owners, and those delegated such use pursuant to the terms of this Declaration." The only such delegation expressly contemplated, in addition to that to family members, guests and tenants, is the leasing of the right to use the trails maintained by Petitioner to the Luther Forest Community Association. Thus, while the trail system may be made available for the use of certain non-members of the Association, the common areas are reserved for the use of Association members, their families, guests and tenants, and in this regard the state of facts herein is close to that in Merrick Estates.

It should be noted, further, that even if it were the case that to some limited extent non-members were permitted to utilize the facilities maintained by the Association, such fact in itself would not mandate a determination that the Association is not a social club. See in this regard Epstein v. United States, 357 F.2d 928, wherein the Court held, in construing the Federal statute referred to earlier, that an entity otherwise constituting a social club did not cease to be such simply because its facilities were not strictly limited to its members,". . . it being sufficient that the facilities were not open, without limit, to the general public."

Accordingly, assessments paid to Petitioner in accordance with the above would constitute dues paid to a social club and, if in excess of ten dollars per year, would be subject to the State tax imposed under section 1105(f)(2) of the Tax Law. Saratoga County, however, has elected not to impose a tax similar to that imposed under section 1105(f)(2) of the Tax Law, although it is authorized to do so under Article 29 of the Tax Law.

Dated: July 29, 1980

S/LOUIS ETLINGER
Deputy Director
Technical Services Bureau