

STATE OF NEW YORK
TAX APPEALS TRIBUNAL

In the Matter of the Petition	:	
of	:	
YOUNGSTOWN YACHT CLUB, INC.	:	DECISION
	:	DTA No. 813503
for Redetermination of a Deficiency/Revision	:	
of a Determination or for Refund of Sales and	:	
Use Taxes under Articles 28 and 29 of the Tax	:	
Law for the Period June 1, 1987 through	:	
August 31, 1993.	:	

Petitioner Youngstown Yacht Club, Inc., Water Street, Youngstown, New York 14174, filed an exception to the determination of the Administrative Law Judge issued on August 15, 1996. Petitioner appeared by Hodgson Russ Andrews Woods & Goodyear, LLP (Christopher L. Doyle, Esq., of counsel). The Division of Taxation appeared by Steven U. Teitelbaum, Esq. (Brian J. McCann, Esq., of counsel).

Petitioner did not file a brief on exception, but elected to rely on its brief below. The Division of Taxation filed a brief in opposition, and petitioner filed a letter brief in reply. Oral argument at petitioner's request was heard on June 12, 1997.

After reviewing the entire record in this matter, the Tax Appeals Tribunal renders the following decision.

ISSUES

I. Whether mooring fees received by petitioner, a social or athletic club, from its members are "dues" subject to sales tax pursuant to Tax Law § 1105(f)(2).

II. Whether junior and adult sailing tuition payments received by petitioner from its members are "dues" subject to sales tax pursuant to Tax Law § 1105(f)(2).

FINDINGS OF FACT

We find the facts as determined by the Administrative Law Judge. These facts are set forth below.

Petitioner and the Division of Taxation ("Division") signed a Stipulation of Facts, dated in October of 1995. The stipulated facts have been incorporated into the following findings of fact.

Petitioner, Youngstown Yacht Club, Inc., is a private club owning real property adjacent to the Niagara River in Youngstown, New York. It is a "social or athletic club" as that term is construed in Tax Law § 1105(f)(2) and was formed to promote the sport of sailing.

In furtherance of its purposes, petitioner provides a junior sailing program and an adult sailing program for the instruction of sailing techniques, on-the-water safety, seamanship, and in the case of the junior sailing program, sailboat racing.

The junior and adult sailing programs are open to the public, although preference is given to relatives of petitioner's members. Most, but not all, students in the junior and adult sailing programs are relatives of petitioner's members. Petitioner charges tuition to students in its junior and adult sailing programs.

Also in furtherance of petitioner's purposes, petitioner maintains, pursuant to permits issued by the US Army Corps of Engineers, two mooring areas in the general vicinity of petitioner's property. The parties submitted into the record a copy of the permit allowing petitioner to maintain the mooring areas. In that permit the Youngstown Yacht Club is authorized to install annually 140 moorings in certain designated areas. The permit also provides that any violation of the terms of the permit may result in "modification, suspension or revocation" of the permit. The permit further notes that the "permit does not convey any property rights, either in real estate or material, or any exclusive privileges".

A mooring is a place in the water where a boat is moored. The moorings include a steel weight attached by chain and/or rope to a mooring float. The steel weight, chain and/or rope and float assemblies are removed before every winter and replaced every spring. Petitioner does not provide utility services (e.g. water, natural gas, electrical) with the mooring.

Each winter petitioner sends mooring applications to prior mooring holders. The parties submitted into the record a copy of a representative mooring application from 1987. Upon

receipt of all the mooring applications, petitioner assigns each applying boat owner a particular mooring depending on the length and weight of the applicant's boat and (where practical) the number of years the applicant has held a mooring. Once assigned, the mooring is the applicant's for the full season.

Petitioner may provide moorings to boat owners who are members of petitioner and boat owners who are not members. However, preference is given to boat owners who are members. Petitioner charges non-members mooring fees equivalent to the fees paid by club members for the moorings.

Petitioner's members pay dues. The amount of the dues a member pays depends on the member's age and location of residence, but does not depend on whether the member pays mooring fees or junior or adult sailing tuition. In fact, many members do not own a boat, and therefore, do not pay mooring fees, and many members own a boat but do not utilize petitioner's mooring facilities, and therefore, are not required to pay mooring fees. Mooring fees and junior and adult sailing tuition are paid only by those members to whom such services are provided. The mooring fees and tuition are independent and in addition to dues paid by all members. Payment of dues by a member entitles that member to use some of petitioner's facilities and to attend some of the activities sponsored by petitioner.

The Audit Division of the New York State Department of Taxation and Finance performed a sales and use tax audit of petitioner for the period June 1, 1987 through August 31, 1993. As a result of the audit, the Division determined that petitioner underpaid sales and use tax with respect to a variety of transactions including, among others, sales tax on mooring fees and junior and adult sailing tuition.

In connection with the audit, petitioner requested an Advisory Opinion regarding the issues of whether petitioner is required to collect and remit sales tax on the mooring fees and junior and adult sailing tuition received by petitioner.

On or about May 6, 1994, the Division issued an Advisory Opinion stating that petitioner was not required to collect sales tax on the mooring fees and junior and adult sailing tuition

received from non-members but is required to collect sales tax on the fees and tuition received from its members. Relying on 20 NYCRR 527.6, the Division determined that mooring fees are not taxable. The Division also determined that because sailing instruction are considered to be educational and participation in a sport, the tuition charges to non-members were not subject to sales or use tax. However, the Division determined that the charges to members for mooring facilities and for sailing instruction are considered charges for dues and that under the regulations (20 NYCRR 527.11[b][b] and [c]) dues paid to a social or athletic club are taxable.

The Division issued to petitioner a Notice of Determination, dated October 17, 1994, indicating sales tax due in the amount of \$37,347.29, plus interest in the amount of \$12,090.07, for the total amount of \$49,427.34. Of this amount, \$30,878.61 represents mooring fees that petitioner received from club members and \$6,468.68 represents the junior and adult sailing tuition that petitioner received from club members. The Division did not tax fees and tuition received from non-members.

Petitioner filed a petition, dated January 13, 1995, asserting that the Commissioner erred in determining that it was required to collect sales tax on mooring rental fees and junior and adult sailing tuition.

The Division filed an answer, dated March 27, 1995, alleging that payments made by petitioner's members for mooring fees and sailing instruction tuition constitute dues within the meaning of Tax Law § 1105(f)(2) and 20 NYCRR 527.11(2)(b) and (c).

THE DETERMINATION OF THE ADMINISTRATIVE LAW JUDGE

Initially, the Administrative Law Judge noted that Tax Law § 1105(f)(2) imposes a sales tax on dues paid to any social or athletic club. "Dues" include "[a]ny dues or membership fee including any assessment, irrespective of the purpose for which made, and any charges for social or sports privileges or facilities . . ." (Tax Law § 1101[d][6]). The Administrative Law Judge noted that the Division's regulation sets forth examples of charges that are considered dues within the meaning of the statute. Example 6 provides as follows:

"A club organized and operated for the promotion of yachting and other aquatic sports, which is a social and athletic club, owns and

maintains docking and mooring facilities for the use of its members. The club makes a charge to each member using its facilities. The amount of the charge depends upon the size of the member's boat and the location of the docking and mooring facilities used. The charges made by the club for these facilities constitute taxable dues or membership fees" (20 NYCRR 527.11[b][2][i][c]).

The Administrative Law Judge rejected petitioner's argument that the Division's regulation is an invalid attempt to extend the scope of Tax Law § 1105(f)(2).

While the Division cannot create rules or regulations that are inconsistent or out of harmony with the statute (*Matter of McNulty v. New York State Tax Commn.*, 70 NY2d 788, 791, 522 NYS2d 103), the Administrative Law Judge pointed out that the language contained in Tax Law § 1101(d)(6) is identical to the language in Internal Revenue Code ("IRC") former § 4242 which defined "dues" for the purpose of imposing a Federal excise tax.

The Administrative Law Judge noted that Federal case law, like the Division's regulation, has interpreted the term "dues" to include mooring fees paid by some members, separate from the annual membership fees paid by all members, to a yachting club for the use of moorings (*citing, United States v. Howe*, 349 F2d 483, 65-2 USTC ¶ 15,651; *Hawaii Yacht Club v. United States*, 301 F Supp 1150, 69-1 USTC ¶ 15,885; *cf., Porter v. United States*, 303 F2d 67, 62-1 USTC ¶ 15,411). The Administrative Law Judge observed that it is the legislative and judicial policy of the State of New York to administer taxing statutes in a manner consistent with Federal tax laws on which they are patterned.

The Administrative Law Judge rejected petitioner's argument that the cited Federal cases, supra, are distinguishable because the mooring facilities in this case are offered to non-members as well as club members. The Administrative Law Judge pointed out that club members in the instant matter are given a preference over non-members in the assignment of mooring space. This preference, the Administrative Law Judge concluded, constitutes a privilege associated with club membership which is not shared with non-members. Accordingly, the Administrative Law Judge concluded the mooring fees constitute club dues subject to sales tax.

The Administrative Law Judge also rejected petitioner's argument that the decision in *Matter of Breezy Point Surf Club v. State Tax Commn.* (67 AD2d 760, 412 NYS2d 464, *affd*

48 NY2d 776, 423 NYS2d 921) supports its claim that payments for mooring facilities are not taxable as dues or membership fees. The Administrative Law Judge pointed out that in **Breezy Point** the Court held that rental payments for cabanas constituted the rental of real property and were not club dues subject to tax under Tax Law § 1105.

The Administrative Law Judge concluded that petitioner's reliance on **Breezy Point** is without merit, since unlike **Breezy Point**, the facts here do not involve the imposition of tax on fees charged for rental of real property.

The Administrative Law Judge next rejected petitioner's argument that the Division is collaterally estopped from asserting that mooring fees constitute membership dues based on the State Supreme Court decision in **Rochester Yacht Club v. New York State Dept. of Taxation & Fin.** (Supreme Court, Monroe County, Conway, J., September 4, 1985). In that case, the Court held, based on the facts presented there, that docks and moorings are real property and that charges for moorings constituted the rental of real property not subject to sales tax. The Administrative Law Judge pointed out that the decision in **Rochester Yacht** was unreported, and that the Court's order does not recite the facts or rationale for its finding that the docks and moorings constituted real property. The Administrative Law Judge concluded that in order to apply the doctrine of collateral estoppel or issue preclusion, there must be "an identity of issue which has necessarily been decided in the prior action and is decisive of the present action, and [there was] a full and fair opportunity to contest the decision now said to be controlling" (*citing, Staatsburg Water Co. v. Staatsburg Fire Dist.*, 72 NY2d 147, 531 NYS2d 876, 878).

The Administrative Law Judge further concluded that petitioner had not met its burden of showing that there is an identity of issue, i.e., petitioner failed to demonstrate that the facts in **Rochester Yacht** and the facts here are identical.

Finally, the Administrative Law Judge addressed the issue of whether fees charged as tuition for sailing lessons were subject to tax. The Division argued that the decision in **Matter of Racquet & Tennis Club v. State Tax Commn.** (141 Misc 2d 124, 537 NYS2d 98, *affd* 146 AD2d 925, 536 NYS2d 998) is dispositive of this issue. In **Racquet & Tennis Club**, the Court

held that fees charged to club members for racquets, tennis or squash lessons given by professional sports instructors at the club constituted dues or membership fees subject to sales tax. Petitioner claimed that the tuition paid for sailing instructions does not meet the definition of "dues" because the tuition does not constitute a charge for access to petitioner's "facilities" nor a charge for a social or sports privilege. In *Racquet & Tennis Club*, the lessons were given on the premises. In this case, petitioner asserted that the adult and junior sailing lessons are given on the river, which petitioner does not own or even rent. Petitioner also argued, as it did with mooring fees, that the sailing programs do not constitute a benefit or privilege to club members because the programs are also open to non-members.

The Administrative Law Judge noted that, as with mooring fees, petitioner grants a preference to members or relatives of members over non-members in the enrollment in these sailing programs. Therefore, the Administrative Law Judge concluded even though not all enrollees in these programs are members or relatives of members, nonetheless they are given a preference that non-members do not enjoy. This preference constitutes a benefit or privilege associated with club membership. Accordingly, the Administrative Law Judge rejected petitioner's attempt to distinguish *Racquet & Tennis Club* and concluded that junior and adult sailing tuition received from members constitutes membership dues as a charge for "social or sports privileges or facilities" within the meaning of Tax Law § 1101(d)(6).

ARGUMENTS ON EXCEPTION

Petitioner does not take exception to the findings of fact of the Administrative Law Judge, but does take exception to all of her conclusions of law. Each of petitioner's arguments raised on exception were also raised below.

Petitioner argues that mooring fees and sailing tuition are not dues within the meaning of Tax Law § 1105(f)(2); that the rules of statutory construction require that a statute imposing tax should be construed most strongly in favor of the taxpayer and against the government; that the Division's regulation regarding taxation of mooring fees (20 NYCRR 527.11[b][2][i][c]) is an invalid attempt to extend the scope of Tax Law § 1105(f)(2) beyond the boundaries intended by

the Legislature; that the term "dues" does not include all payments made by a member to a social or athletic club or any charge for social or sports privileges or facilities; that the sailing tuition fees do not constitute charges for access to petitioner's facilities nor do they constitute charges for social or athletic privileges; and that the Court's decision in ***Rochester Yacht Club v. New York State Dept. of Taxation & Fin.*** (*supra*) collaterally estops the Division from relitigating the mooring fee issue in this case.

The Division argues that under Tax Law § 1101(d)(6), dues are defined broadly to include any charges or assessments for social or sports privileges or facilities that a club might charge to its members; that the decision in ***Matter of Racquet & Tennis Club v. State Tax Commn.*** (*supra*) is dispositive of the sailing tuition issue; that the regulations concerning mooring fees are rational and not promulgated in excess of authority; that the language in Tax Law § 1105(f)(2) was similar to the language used in IRC former §§ 4241 and 4242; that the Federal regulations, like the State regulations, view charges for docking or mooring facilities as examples of taxable dues; that the Federal courts have held that mooring fees are dues within the meaning of IRC § 4242; and that the Supreme Court decision in ***Rochester Yacht Club v. New York State Dept. of Taxation & Fin.*** (*supra*) has no precedential effect and does not collaterally estop the Division from taxing the mooring fees as dues.

OPINION

We affirm the determination of the Administrative Law Judge. We find that the Administrative Law Judge correctly addressed all of the issues raised by the parties. After reviewing the entire record, we conclude that petitioner has not directed us to any authority which provides a basis for modifying the Administrative Law Judge's determination in any respect. As a result, we affirm the determination based on the reasoning stated therein.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of Youngstown Yacht Club, Inc. is denied;
2. The determination of the Administrative Law Judge is in all respects affirmed;

3. The petition of Youngstown Yacht Club, Inc. is denied; and
4. The Notice of Determination, dated October 17, 1994, is sustained.

DATED: Troy, New York
December 11, 1997

Donald C. DeWitt
President

Carroll R. Jenkins
Commissioner

Joseph W. Pinto, Jr.
Commissioner