STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
YOUNGSTOWN YACHT CLUB, INC.	:	DETERMINATION DTA NO. 813503
for Redetermination of a Deficiency/Revision of a Determination or for Refund 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 a petition for redetermination of a deficiency 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.

On October 16, 1995 and October 17, 1995, respectively, petitioner, represented by Hodgson Russ Andrews Woods & Goodyear (Christopher L. Doyle, Esq., of counsel), and the Division of Taxation and Finance, represented by Steven U. Teitelbaum, Esq. (Brian J. McCann, Esq., of counsel), agreed to waive a hearing and have the matter determined on submission of documents. All briefs and documents were due by March 1, 1996. The Division of Taxation filed documents on November 27, 1995. Petitioner filed its brief on January 5, 1996. The Division of Taxation filed its brief on February 9, 1996 and petitioner filed its reply brief on March 1, 1996, which date commenced the six-month period for issuance of this determination.

ISSUE

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

1. 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.

2. 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.

3. 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.

4. 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.

5. 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".

6. 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.

7. 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.

8. 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.

9. 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.

10. 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.

11. 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.

12. 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.

13. 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.

14. 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.

15. 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).

SUMMARY OF THE PARTIES' POSITIONS

16. 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 ambiguity in a statute imposing tax should be construed most strongly in favor of the taxpayer and against the government; that the Division's reliance on 20 NYCRR 527.11(b)(2)(i)(c) is an invalid

attempt to extend the scope of section 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. Department of Taxation and Finance (Sup. Ct. Monroe County, September 4, 1985) collaterally estops the Division from relitigating the mooring fee issue in this case.

17. The Division argues that under Tax Law § 1101(f), dues are defined broadly to include any charges for social or sports privileges or facilities in addition to the monthly or yearly fees that a club might charge to its members; that the decision in Matter of Racquet & Tennis Club v. State Tax Comm'n. (141 Misc2d 124, affd 146 AD2d 925) is determinative of the sailing tuition issue; that the regulations concerning mooring fees were rational and not promulgated in excess of authority; that the language in section 1105(f)(2) was similar to the language used in the Internal Revenue Code ("IRC") former sections 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. Department of Taxation and Finance has no precedential effect and does not collaterally estop the Division from taxing the mooring fees as dues.

CONCLUSIONS OF LAW

A. Tax Law § 1105(f)(2) provides that sales tax is imposed on dues paid to any social or athletic club. Tax Law § 1101(d)(6) defines "dues" as "any dues or membership fee including any assessment, irrespective of the purpose for which made, and any charges for social or sports privileges or facilities. . . ." In the regulations, the Division 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).

Petitioner argues that example 6 exceeds the Division's authority in promulgating regulations to interpret Tax Law § 1105(f)(2). It is a basic principle that 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 Commission, 70 NY2d 788, 791, 522 NYS2d 103). As noted by the Division, however, the language contained in Tax Law § 1101(d)(6) is identical to the language in Internal Revenue Code ("IRC") former § 4242 which defines "dues" for the purpose of imposing a federal excise tax. Because 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, cases construing federal laws, while not binding on the State courts, should be followed in the interests of uniformity and harmony (see, Matter of Merrick Estates Civic Association, Inc., 65 AD2d 806, 807; Rockefeller Center Luncheon Club, Inc. v. Schwartz, 43 Misc 2d 564, 566, citing In Re Rogers' Estate, 269 App. Div. 551, 56 NYS2d 289, aff'd 296 NY 70).

Here, the Federal caselaw 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 (United States v. Howe, 349 F2d 483 [9th Cir 1965]; Hawaii Yacht Club v. United States, 301 F Supp 1150; but see, Porter v. United States, 303 F2d 67 [5th Cir 1962]). In both Howe and Hawaii Yacht Club, the mooring fees were charged and billed on a monthly basis by the social or athletic club for the member's use of an assigned mooring space. In Howe, the amount of the charge depended on the size of the member's boat or location of the mooring facility. As in the present case, the mooring fees were in addition to the annual membership fees paid by all members and were charged only to those members who actually reserved and used the mooring facility. As noted in the U.S. Supreme Court's decision in White v. Winchester Club (315 US 32, 41), "[c]onsideration of the nature of club activity is a necessary preliminary to the formulation of a test of what constitutes a 'due or membership fee'".

Referring to the reasoning of the U.S. Supreme Court in White v. Winchester Country Club, the Howe and Hawaii Yacht Club Courts held that the mooring fees were dues because "docking and mooring facilities are considered to be a social, athletic, or sporting privileges or facilities, since they are so closely associated with the yachting and other aquatic activities for which the club was created as to partake of the nature of those activities" (United States v. Howe, supra at 489, Hawaii Yacht Club v. United States, supra at 1153).

In Porter v. United States (supra), the Court found that mooring fees were not dues or membership fees because in the facts of that case, the rental of the moorings were arranged and charged on a day-to-day basis at a daily rate. In making this determination, the Court referred to language in the U.S. Supreme Court decision in White v. Winchester Country Club (supra) wherein the Court stated that "payment for the right to repeated and general use of a common club facility for an appreciable period of time has that [fundamental notion of club activity] and amounts to a 'due or membership fee' if the payment is not fixed by each occasion of actual use" (id. at 41). The Porter Court concluded that because the payments in that case were fixed by each occasion of actual daily use of the facility, the payments were not dues or membership fees. In contrast to the situation in Porter, because the mooring payments in this case were fixed on a seasonal basis, they constitute dues or membership fees. Thus, there is no merit to petitioner's argument that the Division exceeded its authority in including example 6 in 20 NYCRR 527.11(b)(2)(i)(c).

Petitioner argues that the Division of Tax Appeals is not bound to follow the Federal caselaw and, in any event, the "application of the rule state [sic] in White v. Winchester normally would have resulted in a finding that the docking fees found taxable in Hawaii Yacht Club and Cohan were not subject to Federal excise tax on membership dues since they were for special and exclusive use by the member paying such docking fee" (Pet.'s Reply Brf., p.4). Petitioner appears to make the same argument that was rejected in both Hawaii Yacht Club v. United States (supra) and Cohan v. United States (198 F Supp 591). Petitioner relies, as did the plaintiff's in Hawaii Yacht and Cohan, on language from the White decision to argue that fees

paid by a member for special and exclusive use of club's facilities, as opposed to fees based on common usage of those facilities, do not constitute dues or membership fees. The issue in the U.S. Supreme Court decision in White was whether golfing privilege fees constituted dues or membership fees. In holding that the golfing fees were dues or membership fees, the White Court stated:

> "Consideration of the nature of club activity is a necessary preliminary to the formulation of a test of what constitutes a 'due or membership fee.' So far as finances go, the fundamental notion of Club activity is that operating expenses are shared without insistence upon equivalence between the proportion of an individual's contributions and the proportion of the benefits he receives. Thus, on the one hand, payment of the price of an individual dinner at the club dining room or of a single round of golf lacks the element of making common cause inherent in the idea of club activity. But, on the other hand, payment for the right to repeated and general use of a common club facility for an appreciable period of time has that element and amounts to a 'due or membership fee' if the payment is not fixed by each occasion of actual use."

Elaborating on the implication of the above-statement in the White decision, the Court in Cohan v. United States stated:

> "White does not say that the individual and exclusive use of a club facility exempts one from the tax. Only one golfer can occupy and use a tee or a green at one time. Only one club member can use one locker at one time and even in the case of a club facility used in common, for example a swimming pool, a user exclusively occupies that portion of the pool in which he is. All club facilities in the final analysis are used by individuals. It is in the ultimate fact that club members act in concert in the acquisition, ownership and management of club facilities and privileges and provide these facilities and privileges for use either to individual members as in the case of lockers or sailboats or boatwells or for use by groups of club members as in the case of a club's golf course or swimming pool that the rationale is found. The right to use a club facility or privilege sets the standard -- the actual use for more than 6 days makes the charge therefor taxable." (Id. at 600.)

Petitioner argues that these cases are distinguishable because in the present case, the club's mooring facilities are also offered to non-members as well as club members. This argument is not persuasive inasmuch as club members are given preference over non-members in the assignment of mooring space. Thus, by virtue of club membership, members are granted a preference or privilege not shared with non-members. As noted in Cohan v. United States (supra at 600-601), the purpose of imposing tax on membership dues or fees is to tax any payment for the privileges associated with club membership including the use of club facilities.

B. Petitioner argues that the Appellate Division decision in Matter of Breezy Point Surf Club, Inc. v. State Tax Commission (67 AD2d 760, 412 NYS2d 464) supports its position that payments for mooring facilities are not taxable as dues or membership fees. In Breezy Point, the Court held that club membership dues in a beach club did not include rental payments for cabanas, which were separately rented to members on a seasonal basis. The Court found that the rental payments for the cabanas constituted receipts from the rental of real estate which was not subject to tax under Tax Law § 1105; that there was a valid landlord and tenant relationship between the beach club and the members who elected to rent the cabanas; and that for all practical purposes the cabanas were bungalows or apartments the rentals of which were not subject to tax according to a Tax Bulletin of the Department of Taxation.

The Division argues that the decision in Breezy Point is limited to the facts in that case, specifically, to the rental of real estate where there is a landlord-tenant relationship. The Division notes that the arrangement between petitioner and its members utilizing the moorings does not amount to a lease of real property; that moorings are not permanent residential structures but merely weighted floats to which members fasten their boats; and therefore, Breezy Point is inapposite and of no benefit to petitioner's position. Petitioner argues that the Division's attempts to distinguish Breezy Point are meritless noting that just as the Court relied on the Division's statement in a Bulletin that the rental of real estate is not subject to sales tax, the Division stated in 20 NYCRR 527.6(b)(3), example 1, that charges by a marina for mooring a boat, as opposed to charges for storage, are not subject to tax.

As noted by the Division, the facts in Breezy Point are distinguishable. Moreover, there is no basis for applying the rationale from Breezy Point to the facts in this case. Under Tax Law § 1105(c)(4), receipts from storage services are specifically subject to sales tax. Example 1 of 20 NYCRR 527.6(b)(3) indicated that mooring services constituted parking or garaging services and not storage services subject to sales tax under section 1105(c)(4). In its Advisory Opinion, the Division relied on this example to exempt charges to non-members for mooring fees. However, the federal caselaw has specifically addressed the issue of the taxability of mooring

fees to club members as membership dues. Based on this caselaw, and because there is no reason to exclude mooring fees from the definition of membership dues on the basis that they are excluded from the definition of storage fees under Tax Law § 1105(c)(4), petitioner's reliance on Breezy Point is not persuasive.

C. Petitioner next argues that the Division is collaterally estopped from asserting that mooring fees constitute membership dues by the State Supreme Court decision in Rochester Yacht Club v. N.Y. State Department of Taxation and Finance (Supreme Court, Monroe County, Conway, J., September 4, 1985). Petitioner provided a copy of the order granting summary judgment in that case wherein the Supreme Court Judge stated that charges made to the members of the Yacht Club for docks and moorings constituted charges for the rental and lease of real property not subject to sales tax. There is no reported decision in this case nor does the order recite the facts or rationale for the court's finding that the docks and moorings constitute real property.

Collateral estoppel allows the determination of an issue of fact or law raised in a subsequent action by reference to a previous judgment on a different cause of action in which the same issue was necessarily raised and decided (Ryan v. New York Telephone Co., 62 NY2d 494, 500, 478 NYS2d 823). In this case the issue is whether the finding in Rochester Yacht Club, that payments for docking and mooring constitute payments for rental of real property not subject to sales tax under section 1105(f)(2), estops the Division from asserting that payments for moorings do not constitute payments for the rental of real property but instead constitute payments for membership dues. 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" (Staatsburg Water Co. v. Staatsburg Fire District, 72 NY2d 147, 531 NYS2d 876, 878). "[T]he burden rests upon the proponent of collateral estoppel to demonstrate the identicality and decisiveness of the issue, while the burden rests upon the opponent to establish the absence of a full and fair opportunity to litigate the issue in

prior action or proceeding" (Ryan v. New York Telephone Co., supra at 501). The apportionment of the burden in this manner recognizes that a moving party must make a prima facie showing of entitlement to summary determination while the burden rests on the opposing party to establish the necessity for a trial (id.).

In this case, one cannot determine whether there is an identity of issue inasmuch as petitioner has not demonstrated that the facts in Rochester Yacht Club were identical to the facts in the present case. In Rochester Yacht the court rested its determination on a finding that the payments for docks and moorings constituted payments for the rental of real property not subject to sales tax under section 1105(f)(2). Real property is defined in Real Property Law § 102(12) as land itself, above and under water, and structures erected upon or affixed to land including bridges and wharves and piers and the right to collect wharfage, cranage or dockage thereon. Making a finding that a structure should be included in the statutory definition of real property under section 102(12), necessarily turns to a large extent on the character of the particular structure, and the degree to which it is affixed to the land as indicated by the intention of the parties to permanently affix the structure to the land (Matter of Consolidated Edison Co. v. City ot New York, 44 NY2d 536, 730-731, 406 NYS2d 727).

In this case, it is clear from the terms of the permit petitioner obtained from the U.S. Army Corps of Engineers that petitioner installed the moorings annually, and therefore, they were not intended to be permanently affixed to the land, and that petitioner did not obtain any real property interests in the land to which the moorings were installed. Therefore, there is no basis to conclude that the right to collect mooring fees or that the moorings themselves constituted real property in this context. Inasmuch as the determination in Rochester Yacht Club may have rested on a different set of facts relating to the permanency of a dock or mooring or the right to collect dockage fees, petitioner has not shown an identity of facts or issue with the present case. Thus, the Division is not collaterally estopped from litigating the present case by the decision in Rochester Yacht Club.

D. The Division argues that the decision in Matter of Racquet & Tennis Club v. State Tax Commission (141 Misc2d 124, affd 146 AD2d 925) is determinative of the sailing tuition issue. In Racquet & Tennis Club, the court confirmed the Commission's decision 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 argues 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. Petitioner claims that the facts in the present case can be distinguished from the facts in Racquet & Tennis Club because in this case petitioner does not own or even rent the waters upon which its adult and junior sailing programs take place; that the waters are available to the general public and therefore the tuition cannot be construed as a charge for club facilities. Petitioner also contends that the sailing programs do not constitute a benefit or privilege to club members because the programs are also open to non-members.

As noted in the stipulated facts, preference is given to members or relatives of members over non-members in the enrollment in these sailing programs. Therefore, 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 of membership. Furthermore, petitioner's attempt to distinguish Racquet & Tennis Club on the basis that instructions take place on the waters, which are available to the general public, is not persuasive. Therefore, based on this caselaw, 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).

E. The petition of Youngstown Yacht Club is denied and the Notice of Determination, dated October 17, 1994, is sustained.

DATED: Troy, New York
August 15, 1996

/s/ Marilyn M. Faulkner
ADMINISTRATIVE LAW JUDGE