

APPEAL # : 11-100
TAX TYPE: Sales and Use Tax
TAX YEAR: 2007-2010
DATE SIGNED: 2/15/2012
COMMISSIONERS: R.JOHNSON, M.JOHNSON, AND M.CRAGUN
EXCUSED/RECUSED: D.PIGNANELLI

BEFORE THE UTAH STATE TAX COMMISSION

TAXPAYER, Petitioner, v. AUDITING DIVISION OF THE UTAH STATE TAX COMMISSION, Respondent.	ORDER DENYING RESPONDENT'S MOTION FOR SUMMARY JUDGMENT AND GRANTING PETITIONER'S CROSS- MOTION FOR SUMMARY JUDGMENT Appeal No. 11-100 Account No. ##### Tax Type: Sales and Use Audit Period: 04/01/07 – 02/28/10 Judge: Chapman
---	---

Presiding:

R. Bruce Johnson, Commission Chair
Marc B. Johnson, Commissioner
Kerry R. Chapman, Administrative Law Judge

Appearances:

For Petitioner: PETITIONER'S REP-1, Attorney
 PETITIONER'S REP-2, Attorney
For Respondent: RESPONDENT'S REP-1, Assistant Attorney General

STATEMENT OF THE CASE

On September 7, 2011, Auditing Division (“Division”) submitted a Motion for Summary Judgment and a Memorandum in Support of its Motion for Summary Judgment (Division’s “Motion”). In the Division’s Motion, it asks the Commission to find that annual membership dues paid by members of TAXPAYER (“taxpayer” or “TAXPAYER”) are subject to sales and use taxation. TAXPAYER'S facilities include a golf course, tennis courts, and a clubhouse, among other facilities described later in greater detail (referred to as “Club Facilities”).

Appeal No. 11-100

The Division contends that TAXPAYER'S annual membership dues are taxable “admission or user fees” because TAXPAYER'S “members do not establish the level of the dues, share internal operational control or own a proprietary interest or equity” in TAXPAYER'S Club Facilities or assets. The Division contends that absent such circumstances, TAXPAYER'S annual membership dues are subject to taxation pursuant to requirements set forth in Utah Code Ann. §59-12-102(3)(b), Utah Admin. Rule R865-19S-33(B) (“Rule 33”) and USTC Private Letter Ruling 97-069 (Dec. 1, 1997) (“PLR 97-069”).

Section 59-12-102(3)(b) provides that “‘Admission or user fees’ does not include annual membership dues to private organizations.” Rule 33(B) limits “annual membership dues paid to a private organization” to “only those dues paid by members who, directly or indirectly, establish the level of the dues.” In PLR 97-069, the Commission concluded that “[Rule 33(B)], as written, is too limiting to address the various arrangements that may comprise nontaxable membership agreements” and found that “[n]ontaxable memberships may be evidenced by either of the following factors:”

1. The club has an organizational structure under which the membership shares internal operational control of the club, as demonstrated by membership participation in operational decisions, such as selecting officers and committees; setting club dues; or controlling social, athletic, recreational and other club activities.
2. Members own a proprietary interest (equity) in the club or its facilities or other assets.

The Division contends that TAXPAYER'S annual membership dues are taxable because none of the circumstances set forth in Rule 33(B) and PLR 97-069 exist in this case.

On DATE, TAXPAYER submitted its Cross-Motion for Summary Judgment and a Memorandum in Opposition to Respondent's Motion for Summary Judgment and in Support of its Cross-Motion for Summary Judgment (TAXPAYER'S “Motion”). In TAXPAYER'S Motion, it asks the Commission to find that the annual membership dues paid by its members are not taxable admission or user fees.

TAXPAYER contends that its annual membership fees do not constitute “admission or user fees” under the plain language of Section 59-12-102(3)(b) and are, therefore, not subject to taxation. TAXPAYER argues that under this statute, its annual membership fees are nontaxable if it, TAXPAYER, is a “private organization.” TAXPAYER asserts that it is a private organization because it is neither a governmental entity nor an entity that is open to the public. Because TAXPAYER is a private organization, it asserts that Section 59-12-102(3)(b) clearly provides that its annual membership dues are not taxable and that any additional requirements set forth in Rule 33(B) or PLR 97-069 are improper.

In the alternative, TAXPAYER contends that its annual dues are nontaxable because it meets the first requirement set forth in PLR 97-069. Specifically, TAXPAYER contends that the facts show that its “membership shares internal operational control of the club, as demonstrated by membership participation in operational decisions[.]”

On DATE, the Division submitted its Memorandum in Opposition of Petitioner’s Motion for Summary Judgment and Reply to Petitioner’s Memorandum in Opposition to Respondent’s Motion for Summary Judgment. On DATE, TAXPAYER submitted its Memorandum in Reply to Respondent’s Memorandum in Opposition to Petitioner’s Cross Motion for Summary Judgment.

STATEMENT OF UNDISPUTED FACTS

1. On DATE, the Division issued a Statutory Notice – Sales and Use Tax (“Statutory Notice”) to the taxpayer, in which it imposed additional sales and use tax in the amount of \$\$\$\$\$. It also imposed interest (calculated through DATE) in the amount of \$\$\$\$\$, for a total assessment of \$\$\$\$\$.

2. The taxpayer agrees with the Statutory Notice, with the exception of the taxes that the Division imposed on the TAXPAYER'S annual membership dues as shown on Schedule 1 of the notice. The amount of taxes at issue, as shown on Schedule 1, is \$\$\$\$\$, plus any applicable interest.

3. TAXPAYER is a for-profit limited liability company formed to own, develop, and operate the Club Facilities.

4. TAXPAYER'S Club Facilities include or will include an 18-hole championship golf course, a driving range, a short game area with practice bunkers and a practice putting green, a 9-hole par-three golf course, two tennis courts, a member's ski clubhouse, and a member's ski-in, ski-out restaurant/bar and lounge.

5. TAXPAYER offers Club memberships to purchasers of lots in one of its Designated Communities, which include the COMMUNITY-1, COMMUNITY-2, and COMMUNITY-3 communities. A purchaser of a lot in one of these communities may obtain a TAXPAYER Club membership by paying a deposit that TAXPAYER will refund without interest after 30 years. The amount of the deposit required for basic and golf memberships during the audit period was \$\$\$\$\$. TAXPAYER has used the deposits to construct the Club Facilities.

6. Club members are given admission to and use of the Club Facilities after payment of annual membership dues, as well as other fees and charges for use of the Club Facilities. By the end of 2009, there were ##### basic and golf members. The only amounts at issue in this appeal are members' annual membership dues.

7. The TAXPAYER Club Membership Plan ("Plan") states, on page 17, that "a membership in the Club does not provide or grant a member, or anyone who has access to the Club Facilities through such member's membership any equity or ownership interest or any other property interest in the Club, the Company or any of the Club Facilities or any additional Club property." It also states, on page 17, that "a membership in the Club is not an investment in the Club, the company, or the Club Facilities."

8.The TAXPAYER Club Membership Application and Agreement (“Agreement”) states that “in addition, I [applicant] hereby acknowledge that if approved for Club Membership, such Membership is a non-voting, non-transferable, non-equity Membership and constitutes a nonexclusive revocable license to use the facilities of the Club and does not confer upon me any ownership interest, or confer upon me any vested or prescriptive right or easement, in or to use the Club Facilities nor any right to participate in the management or control of the Club Facilities.”

9.The Plan, on page 15, states that a “membership in the Club may, at Company’s option, be deemed automatically resigned upon the closing of the sale by the member of that member’s residence or home site in the TAXPAYER Designated Community for which the membership to the Club is held.”

10.In the future, TAXPAYER may convert and even expects to convert existing memberships into equity memberships, giving its members ownership of the Club Facilities.

11.The Plan, on pages 11 and 12, states that the “amount of the required Membership Deposit will be determined by the Company [TAXPAYER], from time to time, in its sole discretion.”

12.The Plan, on page 13, states that the “Club will determine the amount of dues, fees and charges to be payable by members each year. . . . The amount of dues, fees and other charges is subject to change from time to time by the Club, subject to the limits on the increases to the dues set forth in this Plan.”

13.The Plan, on page 19, states that “the Club will appoint an advisory board of governors comprised of members whose purpose includes fostering good relations between the members and the Club, providing the Club with input on programs, plans and activities of the Club, and suggestions regarding the Club’s policies and rules and regulations. . . . The Board of Governors shall have no duty or power to negotiate or otherwise act on behalf of the Club, the Company, its management or the members

Appeal No. 11-100

of the Club, and shall serve only in an advisory capacity. The management of the Club will have the final authority on all matters concerning the Club Facilities and the members of the Club.”

14.The Club has appointed a Board of Governors comprised of Club members and has met with and taken input and suggestions from the board.

15.TAXPAYER has utilized various methods of soliciting member input on significant decisions related to Club operations, including: informal and direct meetings with TAXPAYER Club managers, member surveys, feedback through an Internet website accessible only to Club members, email, printed comment cards available at all Club Facilities and provided with all meal service, and interaction with Club staff.

16.TAXPAYER Club officers are on all of the homeowner’s association boards within each TAXPAYER Designated Community and receive active commentary from Club members at board meetings.

17.The TAXPAYER club member website typically has over ##### sessions with about ##### unique page hits per month.

18.At various times, TAXPAYER has implemented member-originated suggestions, input or ideas. In response to member input, TAXPAYER has made changes to Club operations, including: modifying the golf course at a cost of hundreds of thousands of dollars, replacing the golf course irrigation system at substantial cost, purchasing pull carts for members who wish to walk the golf course, adding complimentary weekly boot camp, spin cycling, circuit training, and yoga classes at the Club’s exercise facilities, implementing an extended family guest rate program, changing dining furniture and kitchen design to accommodate member requests, extending swimming pool and exercise facility hours,

and scaling back planned membership dues for some years. In addition, TAXPAYER officers have met with members to discuss plans for new facilities and to receive comments and suggestions.

APPLICABLE LAW

1. Rule 56(c) of the Utah Rules of Civil Procedure provides that summary judgment shall be rendered “if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.”

2. Facts and inferences to be drawn by the Commission in a summary judgment proceeding must be viewed in the light most favorable to the party opposing the summary judgment. *See Broadwater v. Old Republic Sur.*, 854 P.2d 527 (Utah 1993).

3. Utah Code Ann. §59-12-103(1)(f) provides that “[a] tax is imposed on the purchaser as provided in this part for amounts paid or charged for the following transactions: . . . (f) . . . amounts paid or charged as admission or user fees”

4. UCA §59-12-102(3) defines “admission or users fees,” as follows:

- (a) "Admission or user fees" includes season passes.
- (b) "Admission or user fees" does not include annual membership dues to private organizations.

5. Utah Admin. Rule R865-19S-33¹ (“Rule 33”) was adopted to provide guidance concerning “admission or user fees,” as follows in pertinent part:

¹ Rule 33 was amended subsequent to the audit period at issue in this appeal, at which time the rule’s sections were renumbered. The portions of the rule applicable to this appeal were not substantively changed.

....
(B) "Annual membership dues paid to a private organization" includes only those dues paid by members who, directly or indirectly, establish the level of the dues.
(C) "Season passes" include amounts paid to participate in specific activities, once annual membership dues have been paid.
....

6. USTC Private Letter Ruling 97-069 (December 1, 1997) ("PLR 97-069") provides, as follows in pertinent part:

....
In distinguishing between taxable and nontaxable club membership fees, we have generally relied on the distinction between "equity" and "nonequity" memberships. When an equity member pays membership dues, that member is purchasing some proprietary or ownership interest in the club or its facilities or some level of control over a private organization. Nonequity members have no interest in the assets of the club, nor do they have control over club operations. They pay dues only as a condition of, or in conjunction with, the use of the club's recreational facilities. Unlike the membership dues of equity members, the membership dues paid by nonequity members can only be viewed as admissions within the meaning of the sales tax law.

The distinction between equity and nonequity memberships is reflected in Utah Administrative Rule R865-19S-33, which states that "[a]nnual membership dues paid to a private organization" includes only those dues paid by members who, directly or indirectly, establish the level of dues." In considering your question, we have concluded that the rule, as written, is too limiting to address the various arrangements that may comprise nontaxable membership agreements. Nontaxable memberships may be evidenced by either of the following factors:

1. The club has an organizational structure under which the membership shares internal operational control of the club, as demonstrated by membership participation in operational decisions, such as selecting officers and committees; setting club dues; or controlling social, athletic, recreational and other club activities.

2. Members own a proprietary interest (equity) in the club or its facilities or other assets.
....

DISCUSSION

There is no genuine issue as to a material fact that would preclude the Commission from answering the legal question before it. The legal question is whether TAXPAYER'S annual membership dues are subject to sales and use taxation. Section 59-12-102(3)(b) provides that "Admission or user

fees' does not include annual membership dues to private organizations.” There is no question that the transactions at issue are “annual membership dues.” Also, sufficient undisputed facts exist for the Commission to determine whether TAXPAYER is a “private organization.” Finally, sufficient undisputed facts exist for the Commission to determine whether TAXPAYER'S annual membership dues are more similar to the nontaxable “annual membership dues to private organizations,” as set forth in Section 59-12-102(3)(b), Rule 33(B) and PLR 97-069, or to the taxable “season passes,” as set forth in Section 59-12-102(3)(a) and Rule 33(C).

TAXPAYER contends that Section 59-12-102(3)(b) clearly establishes that its annual membership dues are not taxable if it is a “private organization.” TAXPAYER contends that it is a “private organization” because it is not only an “organization,” but also because it is a “private” entity. Although the term “private organization” is not defined in the tax code, “organization” is defined elsewhere by statute as follows:

- (y) “Organization” means a person other than an individual.
- (aa) “Person” means an individual, corporation, business trust, estate, trust, partnership, limited liability company, association, joint venture, government, governmental subdivision, agency, instrumentality, public corporation, or any other legal or commercial entity.

UCA §70A-1a-201(2)(y), (aa). It is undisputed that TAXPAYER is a limited liability company. Because TAXPAYER is a legal person other than an individual, it argues that it is an “organization” as a matter of law.

TAXPAYER also contends that it is a “private” organization as the term “private” is commonly understood. TAXPAYER states that the plain and ordinary meaning of “private” is non-public or non-governmental. In *Barnard v. Utah State Bar*, 804 P.2d 526 (Utah 1991), the Utah Supreme Court concluded that the Utah State Bar was a “private organization,” as opposed to a state agency or

governmental organization, for purposes of the Utah Archives and Records Services and Information Practices Act and the Utah Public and Private Writings Act. Furthermore, Black's Law Dictionary defines "private" as: "Affecting or belonging to private individuals, as distinct from the public generally. Not official; not clothed with office." For these reasons, TAXPAYER contends that the commonly understood meaning of "private" is non-governmental or non-public.

TAXPAYER is indisputably a non-government organization. Furthermore, the Club is a private club that is not open to the public. Membership in the TAXPAYER Club is by membership invitation only and requires an application, which may be rejected, and is primarily limited to purchasers of property within TAXPAYER Designated Communities. All memberships are non-transferrable, and the sale of a member's property in the Designated TAXPAYER Communities or termination of the member's special relationship with the Club results in termination of membership. Cumulatively, these various limitations on membership demonstrate that TAXPAYER Club membership is not open to the general public. For these reasons, TAXPAYER appears to be a non-public organization. If TAXPAYER is neither a governmental nor a public entity, it has a strong argument that it is a "private organization" for purposes of Section 59-12-102(3)(b) on its face.

The Division argues that TAXPAYER'S annual membership fees are taxable under the provisions of Rule 33(B) and PLR 97-069. Accordingly, the Commission will consider those arguments as well, and determine whether TAXPAYER'S annual membership dues are taxable under the rule or the letter ruling.

The Commission has never defined the term "private organization" for purposes of Section 59-12-102(3)(b). Instead, the Commission has interpreted the term "annual membership dues paid to a private organization" in an attempt to distinguish these nontaxable transactions from taxable transactions for "season passes" under Section 59-12-102(3)(a). "Season passes" are taxable, whether paid to a private

organization or to a public organization. Furthermore, “season passes,” in some instances, can involve payments for a season that is annual in nature instead of a shorter term. Because the Section 59-12-102(3) terms have certain commonalities, the Commission has tried to distinguish them in Rule 33 and in PLR 97-069.

In Rule 33(B), the Commission determined that “annual membership dues paid to a private organization” includes “dues paid by members who, directly or indirectly, establish the level of the dues.”² In PLR 97-069, the Commission recognized that in addition to the circumstances described in Rule 33(B), additional circumstances would also qualify as nontaxable “annual membership dues paid to a private organization.” In this ruling, the Commission described two more sets of circumstances that would qualify as nontaxable “annual membership dues paid to a private organization.” Specifically, the Commission determined in PLR 97-069 that annual membership dues would also be nontaxable if “the membership shares internal operational control of the club, as demonstrated by membership participation in operational decisions”³ or if the members owned an equity interest in the club.

The Commission, however, does not believe that the three sets of circumstances set forth in Rule 33(B) and PLR 97-069 are an exhaustive list of those circumstances that are more similar to nontaxable “annual membership dues to private organizations” than to taxable “season passes.” Accordingly, the

² Although TAXPAYER itself clearly makes the final decision on the level of its annual membership dues, it is also clear that TAXPAYER'S members give substantial input on the amounts of their dues and other fees. As a result, it is arguable that TAXPAYER'S members *indirectly* establish the level of their annual membership dues. However, the Commission need not make this determination, given its final decision and the reasoning behind it, as later explained.

³ Because TAXPAYER'S members give substantial input on various operations of the Club and because TAXPAYER has changed Club operations to reflect the members' suggestions on a number of occasions, it is also arguable that TAXPAYER'S “membership shares internal operational control of the club, as demonstrated by membership participation in operational decisions[.]” Again, however, the Commission need not make this determination, given its final decision and the reasoning behind it, as later explained.

Commission must analyze the facts that exist in this case to determine whether TAXPAYER'S annual membership dues are taxable or nontaxable.

In this case, TAXPAYER'S members make a substantial deposit of \$\$\$\$\$ to become members of the Club. Although the deposit does not currently result in a member owning an equity interest in the Club, the \$\$\$\$\$ deposit will not be refunded for 30 years and does not accrue interest. In addition, it is anticipated that the memberships will be converted to equity memberships in the future. Moreover, membership is not open to the public and is limited primarily, if not solely, to persons who own property in one of TAXPAYER'S Designated Communities. "Season passes,"⁴ such as season passes sold by ski resorts and sports entities, are often sold to the general public and without the purchasers having to make substantial deposits in order to purchase the passes.

In addition, TAXPAYER has appointed a Board of Governors comprised of Club members and has met with and taken input and suggestions from the board. TAXPAYER has also utilized various methods of soliciting member input on significant decisions related to Club operations, as set forth in Undisputed Fact #15. Furthermore, TAXPAYER has implemented numerous member-originated suggestions, input or ideas, as set forth in Undisputed Fact #18. TAXPAYER'S members are substantially involved with the Club and its operations, and TAXPAYER makes many operational decisions in response to its members' suggestions and participation.

When the substantial amount of member participation in Club decisions is considered in concert with the substantial financial commitment required to obtain a membership and with the Club membership not being open to the public, the circumstances in this case appear equivalent to the

⁴ The Commission recognizes that "season passes" is defined in Rule 33(C) to "include amounts paid to participate in specific activities, once annual membership dues have been paid." Again, the Commission does not believe that the circumstances described in Rule 33(C) are an exhaustive list. Accordingly, other circumstances may also qualify as taxable "season passes."

Appeal No. 11-100

circumstances described as “annual membership dues paid to a private organization” in Rule 33(B) and PLR 97-069. For these reasons, the annual membership dues at issue are better described as nontaxable “annual membership dues to private organizations” than as taxable “season passes.” Accordingly, the Commission finds that TAXPAYER'S annual membership dues are not subject to taxation.⁵

Kerry R. Chapman
Administrative Law Judge

⁵ The Commission's ruling in this case may initially seem inconsistent with statements made in Private Letter Ruling 00-014 (Aug. 29, 2000) (“PLR 00-014”). In PLR 00-014, the Commission stated that “whether club membership fees were taxable or nontaxable depended upon whether the fees were associated with an equity or nonequity membership.” However, that ruling specifically involved the taxability of the deposit paid to become a member of a private golf club, not the annual membership dues. Accordingly, statements in the ruling concerning annual membership dues were non-binding dicta. In addition, little or no information was known about the deposits that members paid to become members, about who could become members, or about member participation in the operations of the golf club. Had this information been known, perhaps the Commission would have made different statements concerning the annual membership dues.

DECISION AND ORDER

Based upon the foregoing, the Commission finds that the annual membership dues paid by TAXPAYER'S members are not subject to sales and use tax. Accordingly, the Commission orders the Division to remove from its assessment the portion identified as Schedule 1 of the Statutory Notice.

DATED this _____ day of _____, 2012.

R. Bruce Johnson
Commission Chair

Marc B. Johnson
Commissioner

D'Arcy Dixon Pignanelli
Commissioner

Michael J. Cragun
Commissioner

Notice of Appeal Rights: You have twenty (20) days after the date of this order to file a Request for Reconsideration with the Tax Commission Appeals Unit pursuant to Utah Code Ann. §63G-4-302. A Request for Reconsideration must allege newly discovered evidence or a mistake of law or fact. If you do not file a Request for Reconsideration with the Commission, this order constitutes final agency action. You have thirty (30) days after the date of this order to pursue judicial review of this order in accordance with Utah Code Ann. §§59-1-601 et seq. and 63G-4-401 et seq.

KRC/11-100.osj