

00-014  
Response August 29, 2000

## **FIRST REQUEST LETTER**

April 25, 2000

HAND DELIVERED

Re: Request for Advisory Opinion on the Treatment of Refundable Membership  
Deposits for Sales Tax Purposes in Utah

Dear NAME:

This firm represents OWNER, LLC, an STATE limited liability company ("Owner"), which is in the process of planning and developing a golf course, club house and related facilities in COUNTY County to be known as the CLUB ("the Club"). It is anticipated that the organization of the Club will be patterned after the CLUB, another private golf club developed by an affiliate of the Owner in CITY, STATE. Under this plan of organization, each member will pay a refundable deposit ("Deposit") to the Club as a condition of membership in the Club. Because the use of such Deposits may present novel issues under Utah law, we write to request an Advisory Opinion, pursuant to Utah Admin. R. 861-1A-16 and 34, as to whether the Deposits will be subject to sales tax under Utah Code Ann. 59-12-101, *et. seq.*

Each member of the Club will be obligated to enter into a membership agreement and pay a Deposit to the Club as a condition of membership. Upon payment of the Deposit and acceptance as a member in the Club, the member is issued a revocable license to use the golf course, pool, clubhouse and other Club facilities upon the payment of dues and other charges of the Club. The Deposit will not cover regular dues, fees or other charges for use of the Club facilities, which will be assessed to members and their guests and family based upon a schedule established from time to time by the Owner.

Each Deposit shall be refunded to the member, without interest, thirty years after the member enters into a membership agreement. If a member resigns from the Club prior to the end of the thirty-year term of the Deposit, that owner's Deposit will be returned to the resigning member upon the reissuance of the membership to a new member.

The Owner has the right at any time, with the approval of a majority of the Club members, to convert the Club to a member-owned and controlled club. In that event, each member will be given the option of converting his or her membership to an equity membership. Those who choose not to become equity members will still be entitled to a refund of their Deposit after thirty years. For those members who elect to convert to

equity membership, the Deposit will be credited toward the purchase of that membership, and the Owner will be relieved of its obligation to return the Deposit.

We believe that, under the proposed membership plan, Deposits should not be subject to sales tax. In Utah, sales tax is charged on "admission or user fees for ... golf, golf driving ranges, ... sports activities, or any other ... athletic activity." Utah Code Ann. 59-12-103(1)(f). Utah law also provides that "admission or user fees" do not include annual membership dues to private organizations. Utah Code Ann. 59-12-102(1)(b). However, this exemption has been interpreted to apply only to those dues paid by members who, directly or indirectly, establish the level of dues. Utah Admin. R. 865-19S-33. An Advisory Opinion issued by the Utah State Tax Commission on December 7, 1997 further clarifies the rule by stating that the sale of club memberships will not be subject to sales tax in either of the following two situations: (1) the club has an organizational structure that allows members to share internal operational control of the club; or (2) members own a proprietary interest in the club, its facilities or other assets. It is anticipated that, ultimately, the Club will become member-owned and that most, if not all, of the members will convert their memberships to equity memberships.

While this appears to be an issue that has not been addressed before in Utah, other states have taken a position, both legislatively and in the courts, regarding the taxability of refundable membership deposits. States that have considered similar membership deposit plans have generally exempted such deposits from sales tax. See e.g., Fla. Admin. Code Ann. 12A-1-005(5)(d)2.e. ("Refundable deposits advanced to an organization when the organization is obligated to repay the deposit and the deposit is reflected as a liability in the organization's books and records" are not "fees" subject to tax on admissions); Old Warson Country Club v. Director of Revenue, 933 S.W.2d 400, 404 (Mo. 1996) (members entitled to refundable deposit "stands in the relationship of a creditor of the club and the charge is in the nature of a loan"); Furniture Lease Co. V. Tidwell, 495 S.W.2d 535, 536 (Tenn. 1973) (refundable deposits are not taxable unless they are applied by the taxpayer to satisfy a delinquent obligation of the depositor, thereby making the deposits non-refundable).

Moreover, the exemption of refundable deposits for sales tax purposes is consistent with IRS treatment of similar plans for income tax purposes. See Internal Revenue Service Technical Advice Memorandum (issued August 29, 1997), 1997 WL532369 (I.R.S.) which provides that 30-year refundable membership deposits are not taxable as income when received by the club developer, because such deposits are loans to the club developer, even if they do not accrue interest.

Under the foregoing analysis, the proposed Deposits are not subject to sales tax because they are more akin to interest-free loans than "admission or user fees for ... golf, golf driving ranges, ... sports activities, or any other ... athletic activity." Utah Code Ann. 59-12-103(1)(f). The Deposits represent genuine liabilities of the Club to its members, rather than admission or user fees. Each member will have his or her Deposit repaid by the Club, either in cash or by applying the Deposit to the purchase of an equity membership, at a later date. The Deposits are not applied toward dues, fees and

charges for the use of club facilities, which must be separately paid by the member. Finally, it is expected that most of the memberships will ultimately be converted to equity memberships, the purchase of which is exempt from sales tax under existing Utah law. Each Deposit, then, is either a loan from the member to the Club, or the partial prepayment of an equity membership purchase. Neither characterization results in a transaction which is subject to sales tax.

For these reasons, we respectfully request that the Tax Commission issue an Advisory Opinion that the Deposits are not subject to sales tax. The COURSE golf course is presently under construction, and the Owner will begin selling memberships early this summer. Consequently, because time is of the essence, we request that this request be subject to expedited review.

Please feel free to contact me should any additional information be needed regarding these issues, or if there are any questions regarding the information presented in this letter. Thank you for your assistance and consideration.

Very truly yours,

## **SECOND REQUEST LETTER**

RE: Supplemental Information Relating to the Treatment of Refundable  
Membership Deposits for Sales Tax Purpose in Utah

Dear NAME:

By letter dated April 25, 2000, we requested an advisory opinion from the Tax Commission on whether refundable membership deposits ("Refundable Deposits") to the CLUB (the "Club") are subject to sales tax under Utah law. Since then, we have learned more information that is relevant to this issue, and which we thought might be helpful to the Commission in its consideration of these issues.

The Club has now established its fee structure, and has determined that members of the Club will pay a yearly fee of \$4,800 (the "Annual Dues") for the privilege of using the Club's golf course and other facilities (clubhouse, locker room and pool). This does not include any food or other tangible benefits. In substance, members will pay \$4,800 per year for unlimited golf privileges at the CLUB. If a member brings a guest to play golf at the Club, a guest fee of \$75.00 per round ("Guest Fee") is charged. The club members are not involved in setting these fees.

We believe that the Annual Dues and Guest Fees, rather than the Refundable Deposits, should be considered to be the taxable "admission or user fees" for golfing at the Club. We reach this conclusions for several reasons.

First, simply put, since members and their guests can't be admitted or use the Club facilities without paying their Annual Dues and applicable Guest Fees, the Annual Dues and Guest Fees logically represent the admission or user fees for golfing at the Club. Although all members must pay the one-time Refundable Deposits described in our April 25 letter, Annual Dues must be paid every year (beginning with the first year of membership) in order for a member to gain admission to the golf course. Payment of the refundable deposit does not entitle a member to utilize the golf course or any of the other facilities of the Club. Payment of the Annual Dues is the "key to the gate" of the golf course each year.

Second, from an accounting standpoint, the Club must meet its annual operating costs from the Annual Dues, Guest Fees and other ongoing revenue it collects (food and beverage sales, pro shop sales, etc.) without including any of the Refundable Deposits. The Refundable Deposits will not be used to supplement the Annual Dues and Guest Fees in operating the Club.

Third, the Annual Dues and Guest Fees are set at rates comparable to the admission and user fees charged by other high-end golf courses in the State of Utah which are open to the public. For example, the golf course at PLACE, in COUNTY County, charges \$\$\$\$\$ per round on Monday through Thursday, and \$\$\$\$\$ on Saturday. PLACE also offers an annual pass, which permits unlimited access to the golf course for \$\$\$\$\$ per year. Because the Annual Dues and Guest Fees constitute the full admission or user fees for the COURSE, it would, necessarily, be improper to charge sales tax on the Refundable Deposits.

For these reasons, and the further reasons provided in our April 25, 2000 letter, we respectfully request that the Tax Commission issue an Advisory Opinion that the Refundable Deposits are not subject to sales tax. We would have no objection to the Opinion further stating that sales tax will be charged on Annual Dues and Guest Fees, as the Club is presently organized.

Please feel free to contact me should any further information be helpful, or if there are any questions regarding the information presented in this letter. Thank you for your assistance and consideration.

Very truly yours,

## **RESPONSE LETTER**

August 29, 2000

RE: Advisory Opinion Request Regarding Refundable Membership Deposits

Dear NAME,

You have requested the Tax Commission to issue an advisory opinion

concerning the refundable deposits to be received by CLUB ( the Club ) from its members and have asked whether these deposits will be considered a taxable admission or user fee for purposes of Utah 's sales and use tax.

You state that each member must pay this refundable deposit as a condition of membership, which entitles the member to a revocable license to use the Club facilities. The refundable deposit does not cover regular dues, fees or other charges for use of the Club facilities, which will be charged separately. You also state that these refundable deposits shall be refunded to the members, without interest, thirty years after each member enters into the membership agreement. However, a member may be entitled to the refundable deposit earlier, if he or she resigns from the Club prior to the end of the thirty year term and if the membership is reissued to a new member.

You have also stated that the Club will charge each member a \$\$\$\$\$ yearly fee for the privilege of using the Club 's golf course and other facilities. This fee entitles a member to unlimited golf privileges at the Club. In addition, the Club will charge any member 's guest a fee of \$\$\$\$\$ per round of golf. You assert that the Club 's fees are comparable to the fees charged at the PLACE golf course, which are \$\$\$\$\$ for an annual pass allowing for unlimited access to the golf course and a one-round charge of \$\$\$\$\$ to \$\$\$\$\$, depending on the day.

At issue is whether or not the refundable deposit is considered an admission or user fee subject to sales tax. Utah Code Ann. 59-12-103(1)(f) imposes a sales tax on the purchaser for the amount paid or charged for an admission or user fees for . . . golf, golf driving ranges, . . . sports activities, or any other . . . recreation, . . . or athletic activity[.] Sections (A) of Utah Admin. Rule R865-19S-33 ( Rule 33") further provides that admission means the right or privilege to enter into a place. Utah Code Ann. 59-12-101(1) provides that "admission or user fees" includes season passes, but does not include annual membership dues to private organizations. However, Section (B) of Rule 33 limits annual membership dues paid to a private organization to only include those dues paid by members who, directly or indirectly, establish the level of the dues.

The taxability of club membership fees has been addressed in *Utah State Tax Commission Advisory Opinion 97-069*. In that opinion, the Tax Commission stated that whether club membership fees were taxable or nontaxable depended upon whether the fees were associated with an equity or nonequity membership. The opinion explained that 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.

In *Advisory Opinion 97-069*, the Tax Commission concluded that nontaxable memberships could 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.

You contend, however, that regardless of whether a club is member-owned or member-controlled, a refundable deposit should not be considered a taxable admission or user fee. In support, you provide evidence that jurisdictions other than Utah do not consider refundable deposits to be taxable admission or user fees. We agree with your argument, but only if there is evidence that the fee is refundable and if the person paying the deposit is also charged other reasonable fees to use, in this case, the Club's golf course. You state that the deposit required to become a member of the Club is refundable. In addition, each member must pay an annual \$\$\$\$ fee before receiving unlimited use of the golf course. This amount appears to be a reasonable fee, given the fact that PLACE charges an annual fee of \$\$\$\$ for unlimited use of its golf course. Accordingly, the refundable deposit charged by the Club before one may become a member is not considered a taxable admission, and the Club is not required to collect and remit sales tax on this refundable deposit.

Of course, the Club is required to collect and remit sales tax on all taxable sales and admissions, which include the annual fee charged each member for use of the Club facilities and golf course, the individual fee charged all guests for one round of golf, and any nonrefundable initiation fees. Please contact us if you have any other questions.

For the Commission,

Marc B. Johnson  
Commissioner