

**BEFORE THE TAX COMMISSION OF THE STATE OF IDAHO**

In the Matter of the Protest of	)	
	)	DOCKET NO. 24205
[Redacted],,	)	
	)	
Petitioner.	)	DECISION
_____	)	

On February 2, 2011, the staff of the Sales, Use, and Miscellaneous Tax Audit Bureau (Bureau) of the Idaho State Tax Commission (Commission) issued a Notice of Deficiency Determination (Notice) to [Redacted] (taxpayer) proposing sales tax, use tax, penalty, and interest for taxable period July 1, 2007, through June 30, 2010, in the total amount of \$108,242. For the reasons that follow, the Commission upholds the audit findings.

On April 12, 2011, the taxpayer filed a timely appeal and petition for redetermination of the Notice stating that it disagreed with the segment of the assertion that held [Redacted] membership initiation deposits subject to Idaho sales tax. Upon request, on October 12, 2011, the Commission held a hearing with the taxpayer. The Commission corresponded with the taxpayer following the hearing and received two letters dated November 28, 2011, and January 16, 2012. The Commission, having attended the hearing and being advised of the contents of the letters and the audit file, hereby upholds the audit findings for the following reasons.

Background

[Redacted] is a [Redacted] [Redacted] located in Idaho. It was not fully developed at the time of the audit field work, but the [Redacted]. The liability issue of concern is a fee referred to as a “membership initiation deposit.” The auditor held this one-time payment made by [Redacted] members subject to sales tax as a charge for the use or privilege to use facilities for

the purpose of recreation. In the Notice there was liability associated with asset purchases, asset disposition, merchandise sales, and ordinary expenses related to the purchase of tangible personal property, but the taxpayer does not dispute this.

The following information is summarized from the taxpayer's Membership Plan, dated March 1, 2010. It is limited to what is referred to as [Redacted], defined collectively as the [Redacted]related amenities (Membership Plan, Page 1, II.3).

There are [Redacted]: [Redacted].

The various [Redacted]memberships are described as follows. The [Redacted] Membership is, or was, limited to owners of the original [Redacted] adjoining community. No [Redacted] are charged and members can [Redacted]. These members were assessed all of the fees provided for in the [Redacted] and annual dues may be waived subject to the discretion of the [Redacted]. The Commission has no knowledge that any amounts were waived.

[Redacted] are limited to those who [Redacted]. No [Redacted] fees are charged to these members, and [Redacted] can be reserved. These members are charged an MID and annual dues. Non-Resident Golf Members have the same privileges and incur the same liabilities as Resident Members, except that no real property ownership in the community is required. Should a Non-Resident [Redacted]Membership be recalled to make room for a Resident Membership, the MID would be returned without interest.

Business [Redacted] Members own either businesses or condominiums in the adjoining community. All dues and fees mentioned in the [Redacted] Documents apply to this membership. Additionally, Non-Resident Business [Redacted] Memberships are available to business owners physically located outside an area referred to as the [Redacted]. The MID, fees,

and dues described previously are applicable. There are no [Redacted] fees applicable to these categories of membership, and [Redacted] time reservations are accepted.

A [Redacted] Membership is available to eligible hotels and resorts for use of the [Redacted] by their guests. Reservations are taken and [Redacted] fees are required. There is no mention in the membership document of the up-front fees required to buy this category of membership.

The operator reserves the right to establish Annual Memberships that require a non-refundable MID and annual dues which allow for reserved [Redacted]. As of the date of the Membership Plan, this membership category had not been offered nor contemplated.

Finally, [Redacted] Memberships are available to adult children of those with specified membership categories, allowing [Redacted] club privileges for those who are too old to qualify under the parents' membership. The MID and other dues are required to be paid. The members acquire the rights and privileges of their parents (*Ibid.* Pages 8-15, V. B-H).

Aside from the exceptions noted previously, Membership Initiation Deposits are non-refundable if a member resigns within 30 years of initiation. They are refundable after 30 years' membership without interest. After 15 years, or following the acquisition of 300 full dues-paying memberships, the club operator reserves the right to convert the MIDs to equity. That is, the members may purchase the [Redacted] facilities by crediting MIDs toward the purchase price (*Ibid.* Page 17, V.O). The MIDs paid by some classes of membership are not given an equity conversion option, according to taxpayer correspondence dated January 16, 2012, but it is not clear from the correspondence to which memberships the taxpayer refers.

### Taxpayer's Protest

The taxpayer disagrees with the auditor's conclusion that MIDs constitute a taxable charge for the use or the privilege of using facilities for recreation. The taxpayer agrees with the auditor that annual dues and [Redacted] fees constitute a fee for the use of the [Redacted] facilities, but argues that MIDs are "a onetime payment which gives members the first right of refusal to purchase the club and convert to equity. The members receive contractual rights in consideration of initiation deposits." (Taxpayer's protest letter, April 12, 2011.)

The issue, states the taxpayer in the letter referenced above, is whether contractual rights to purchase the [Redacted] club constitutes an element of tangible personal property. The taxpayer concludes that tangible personal property, as defined in the Idaho Code, does not include intangible rights or other property rights, citing first a statute that defines tangible personal property for sales tax purposes, Idaho Code § 63-3616, and later a property tax statute that defines certain intangible personal property as exempt from taxation, Idaho Code § 63-602L. In the taxpayer's reasoning, resolution of the issue requires the allocation of required payments between the use of tangible personal property (i.e., [Redacted] fees) and the intangible (i.e., first right of refusal, contractual right) to purchase the [Redacted] facility. The taxpayer contends that annual dues are for [Redacted] privileges and the MIDs are not.

The taxpayer made additional arguments following the informal hearing. All of the taxpayer's arguments are best discussed in the context of the Commission's analysis and conclusion, which follows.

### Analysis and Conclusion

As noted by the taxpayer, the Idaho Sales Tax Act imposes a sales tax on the sale of tangible personal property (Idaho Code § 63-3612(1)). However, the sale of tangible personal

property is not at issue here. It is the use of, or the privilege of using, facilities for recreation (Idaho Code § 63-3612(2)(f)). These two sales transactions are distinctly different in definition. Had the taxable sale of tangible personal property been the only concern of the Sales Tax Act, there would have been no reason to enumerate additional taxable transactions found in Idaho Code § 63-3612, including (along with recreational facilities use), admissions, lodging, and the serving of food, to name a few.

Further, the taxpayer's reference to Idaho Code § 63-602L is misplaced. That statute states that certain intangibles are not subject to property tax. Sales tax, rather than property tax, is the issue.

Generally, there is no confusion over the amount subject to tax for the use of a recreational facility. A patron pays a fee and gets to play. In the present case, however, the fees cover privileges over extended periods of time. Recreational facilities requiring memberships often impose and label various one-time and periodic fees rather than charge one undifferentiated amount.

The sales price subject to tax is the consideration transferred, unless there are statutory exclusions (Idaho Code §§ 63-3612(1) and (2); 63-3613)). The Commission has consistently taken a *quid pro quo* view with separately listed amounts. That is, if recreation or its privilege cannot occur without the payment of the fee in question, that fee is reasoned to be for the use or privilege of using the facility for recreation, and it is part of the price subject to tax.

The Commission was challenged on this determination in the Idaho Supreme Court case, Crane Creek Country Club v. Idaho State Tax Commission (122 Idaho 880, 1992). There are significant similarities between Crane Creek and the instant case. In both, there are fees referred to as "initiation." Crane Creek Country Club charged \$6,000, and membership termination was

cause for the return of \$2,000 in “membership equity” (Crane Creek Country Club v. Idaho State Tax Commission, Fourth Judicial District Court, Case No. 91772/93554, December 26, 1990).

For both the Crane Creek Country Club and this taxpayer, non-payment of the initiation fee is grounds to refuse club privileges. There is no evidence that a membership in the taxpayer’s [Redacted] club will guarantee a purchase of real property, but there is a very clear understanding that nonpayment of the MID will prevent a person from acquiring playing privileges, including reserved [Redacted] [Redacted] and no [Redacted] fees.

In Crane Creek, the taxpayer argued that its charges were not for the use or privilege of using the golf facilities for recreation. [Redacted] argues that its initiation fee is a contractual right to purchase the golf club and is not for the use or privilege of using the golf facilities for recreation. However, Crane Creek discounts the reliance placed on the stated purpose:

....under the plain language of the statute the relevant inquiry in determining the taxability of the event is the *quid pro quo* between the remitter and the recipient, not the ultimate use to which the recipient applies the receipts. It is clear that what the Crane Creek member receives for their payment is the privilege to use the Crane Creek facilities..... (*Ibid.* Page 9)

The currently active or available (as of the Membership Plan date) memberships that allow reserved [Redacted] times and charge no [Redacted] fees all require a non-refundable Membership Initiation Deposit. Further, the taxpayer defines its memberships in the following categorical points:

- Memberships are being offered exclusively for the purpose of permitting Members to obtain recreational use of the Club Facilities based on the category of Membership
- Memberships should not be viewed or acquired as an investment
- No Member should expect to derive any economic profits from Membership (*Ibid.* Page 6, III.O, excerpted)

The Commission concludes that the Membership Initiation Deposits are paid for the use of the facilities for recreation and are therefore subject to sales tax.

Absent information to the contrary, the Commission finds the deficiency prepared by the Bureau to be a reasonably accurate representation of the taxpayer's sales and use tax liability for the period July 1, 2007, through June 30, 2010.

The Bureau added interest and penalty to the sales and use tax deficiency. The Commission reviewed those additions, found both to be appropriate per Idaho Code § 63-3045 and 63-3046, and has updated interest accordingly. Interest is calculated through May 15, 2012, and will continue to accrue at the rate set forth in Idaho Code § 63-3045(6) until paid.

THEREFORE, the Notice of Deficiency Determination dated February 2 2011, is hereby APPROVED, in accordance with the provisions of this decision, and is AFFIRMED and MADE FINAL.

IT IS ORDERED and THIS DOES ORDER that the taxpayer pays the following tax, penalty, and interest:

<u>TAX</u>	<u>PENALTY</u>	<u>INTEREST</u>	<u>TOTAL</u>
\$89,768	\$ 4,489	\$17,749	\$112,006

DEMAND for immediate payment of the foregoing amount is hereby made and given.

An explanation of the taxpayer's right to appeal this decision is enclosed.

DATED this \_\_\_\_\_ day of \_\_\_\_\_ 2012.

IDAHO STATE TAX COMMISSION

\_\_\_\_\_  
COMMISSIONER

**CERTIFICATE OF SERVICE**

I hereby certify that on this \_\_\_\_\_ day of \_\_\_\_\_ 2012, a copy of the within and foregoing DECISION was served by sending the same by United States mail, postage prepaid, in an envelope addressed to:

[Redacted]

Receipt No.  
  
\_\_\_\_\_