CYPRESS LAKES GOLF & COUNTRY CLUB, INC. 1311 E. SIXTH STREET MUSCLE SHOALS, AL 35661,	§	STATE OF ALABAMA DEPARTMENT OF REVENUE ADMINISTRATIVE LAW DIVISION
Taxpayer,	§	DOCKET NO. S. 06-174
v.	§	
STATE OF ALABAMA DEPARTMENT OF REVENUE.	§	

OPINION AND PRELIMINARY ORDER

The Revenue Department assessed Cypress Lakes Golf & Country Club, Inc. ("Taxpayer") for State sales tax for October 1995 through January 1998, and State use tax and City of Muscle Shoals tax for February 1995 through January 1998. The Taxpayer appealed to the Administrative Law Division pursuant to Code of Ala. 1975, §40-2A-7(b)(5)a. A hearing was conducted on July 12, 2006. Ron Wiese represented the Taxpayer. Assistant Counsel Wade Hope represented the Department.

ISSUE

Code of Ala. 1975, §40-23-2(2) levies a "sales tax" on the gross receipts derived from places of amusement, entertainment, etc. that are open to the public. The issue in this case is whether a private country club owes the gross receipts tax on otherwise non-taxable initiation fees, monthly dues, etc. paid by its private club members because the club's golf course is open to the public.

FACTS

The Taxpayer operates a private golf and county club in Muscle Shoals, Alabama. The club's members pay an initiation fee and monthly dues, which allows them to use the club's golf course, tennis courts, swimming pool, etc. Members may invite guests, who

must pay a greens fee to play on the club's golf course.

The club's golf course is also open to the public. The public pays a greens fee that is slightly more than the fee paid by the guests of members. Public play represented between 15 and 20 percent of the total play on the course during the period in issue. The Taxpayer charged sales tax on the greens fees paid by the public and also by the guests of members.

The Department audited the Taxpayer for sales and use tax in 1998. The Department examiner informed the Taxpayer during the audit that private country clubs were not required to pay sales tax on initiation fees, monthly dues, and greens and cart rental fees. The Taxpayer had paid tax on those receipts from May 1995 through October 1996 (and through January 1998 concerning the cart fees). It consequently petitioned the Department in March 1998 for a refund of those amounts.

The Department denied the refund petition by letter dated April 18, 1999.[1] The Taxpayer failed to appeal the denied refund either to circuit court or to the Administrative Law Division, as allowed at Code of Ala. 1975, §40-2A-7(c)(5).

The Department entered preliminary assessments of State sales and Muscle Shoals tax against the Taxpayer for the periods in issue on April 23, 1999. It also entered a State use tax preliminary assessment against the Taxpayer on May 11, 1999.

The sales tax assessments included sales tax on the Taxpayer's total gross receipts, including its private club initiation fees and dues, because the examiner determined that the Taxpayer was operating a public golf course. As discussed below, Dept. Reg. 810-6-1-

[1] The refund petition was actually deemed denied by operation of law in September 1998, six months after it was filed. Code of Ala. 1975, §40-2A-7(c)(3).

.125.01 specifies that if a country club operates a golf course that is open to the public, its entire gross receipts are subject to tax. The Department assessed the Taxpayer for use tax because the Taxpayer had purchased items for use at the club on which sales or use tax had not been paid.

The Taxpayer timely petitioned for a review of the preliminary assessments in May 1999. The petition requested an informal conference. The Department responded in writing on July 20, 1999. The response failed, however, to address the Taxpayer's concerns. Consequently, the Taxpayer wrote the Department on August 19, 1999 and raised various issues/questions. It also suggested that "a conference might be more appropriate than a judicial review." Unfortunately, the Department took no further action concerning the audit/assessments until it entered the final assessments in issue on December 22, 2005.

The Taxpayer argues that it has been denied due process because the Department, without cause, failed to enter the final assessments in issue until over five and one-half years after the preliminary assessments were entered. It also contends that the Department failed to comply with the Alabama Taxpayer Bill of Rights, Code of Ala. 1975, §40-2A-1 et seq., because it failed to conduct an informal conference concerning the preliminary assessments, as required by Code of Ala. 1975, §40-2A-7(b)(4)a.

The Taxpayer concedes that its golf course is open to the public, and that sales tax is owed on greens fees paid by the public, including fees paid by guests of members. It contends, however, that the fact that its golf course is open to the public should not make it liable for tax on the initiation fees and dues paid by its private club members. It argues that other allegedly "private" country clubs in Alabama also allow the public to play, and that if

those clubs are not required to pay tax on non-member greens fees, it also should not be required to pay tax on those receipts. The Taxpayer asserts that in fairness, all greens fees paid to play golf in Alabama should be taxed the same.

ANALYSIS

Section 40-23-2(2) levies a four percent tax on the gross receipts derived from public places of amusement, entertainment, etc. It is undisputed that the receipts from purely public golf courses are taxable. See generally, *State, Dept. of Revenue v. Teague*, 441 So.2d 914 (Ala. Civ. App. 1983); *Rigdon, Inc. v. State of Alabama*, S. 02-337 (Admin. Law Div. 10/30/2002). This case presents a harder issue – does a private country club owe sales tax on the otherwise non-taxable initiation fees and monthly dues paid by its private club members because its golf course is open to the public.

In *State of Alabama v. Craft Development Corporation*, S. 91-142 (Admin. Law Div. 10/22/1991), the issue was whether monthly membership dues paid by private club members at Craft were subject to the gross receipts sales tax. The Department claimed that the dues were taxable because Craft's golf course was open to the public.[2] The Administrative Law Division disagreed, holding that allowing the public limited access to the golf course did not cause the gross receipts derived from the private club members to be taxable.

> The fact that the Taxpayer's membership dues and green fees are commingled in a common fund does not alter the separate and distinct sources from which the different proceeds are derived. A taxpayer's gross proceeds derived from a non-taxable private source are not tainted because another activity engaged in by the taxpayer is subject to the public amusement tax. Only the gross receipts derived from "such (public)

[2] The Department also argued that Craft's private club initiation fees were taxable. However, those fees were not in issue in the case.

business" should be taxed.

Craft Development, Order on Rehearing at 1.

The Department promulgated Reg. 810-6-1-.125.01 shortly after *Craft* was decided. That regulation defines a public golf course as one that "allows the public to use one or more of its facilities for a fee." The regulation provides that if a course is deemed to be public, tax is due on all gross receipts, including initiation fees, membership dues, etc. An otherwise private course will not be deemed a public course, however, if it only allows guests of members to play, "whether or not accompanied by the member." Reg. 810-6-1-.125.01(1)(b).

The Department examiner applied the above regulation in this case and taxed the Taxpayer's total gross receipts because the Taxpayer's course is open to the public. I agree, as does the Taxpayer, that the greens fees paid by the public to play the Taxpayer's course are taxable. I disagree, however, that allowing the public to play the course causes the initiation fees and monthly dues paid by the Taxpayer's private club members to become taxable.

The sales tax levied at §40-23-2(2) is on the receipts derived from places of public entertainment, amusement, etc. Fees and dues paid by members to belong to a private club are not derived from places of public amusement, and thus are not subject to the tax. Those non-taxable receipts do not become taxable because the club also derives receipts from a taxable source, i.e., greens fees paid by the public. As previously stated, "[a] taxpayer's gross proceeds derived from a non-taxable private source are not tainted because another activity engaged in by the taxpayer is subject to the public amusement tax. Only the gross receipts derived from 'such (public) business' should be taxed." *Craft*

Development, Order on Rehearing at 1.

The above rationale is supported by the holding in *State of Alabama v. Garrison*, S. 86-108 (Admin. Law Div. 11/16/86). The taxpayer in *Garrison* was a registered PGA golf professional that operated a public golf recreation center. He also gave private golf lessons. The Department assessed the taxpayer on his golf lesson fees. The Administrative Law Division held that the private lessons were not subject to the public amusement tax.

> The tax is levied upon the privilege of operating a place of amusement, and applies to the gross proceeds derived from charges for specific entertainment activities carried on therein, such as the green fees charged at public golf courses, admission fees charged at various sporting events, etc. However, the fact that a portion of a business may be subject to the public amusement or entertainment sales tax does not mean that every activity carried on by the Taxpayer is also subject to the tax. Only if the specific activity or event to be taxed constitutes a public amusement or entertainment, or is directly related to or constitutes an integral part thereof, should it be subject to tax. Thus, although the Taxpayer's business does include several taxable activities, the golf lessons, which are a professional service and are not provided for entertainment or amusement within the purview of (§40-23-2(2)), would not be taxable. The golf lessons are separate and distinct from the Taxpayer's golf amusement center.

Garrison at 2.

The above holding is further supported by the rule of statutory construction that a tax levy, such as §40-23-2(2), must be narrowly construed against the Department. *Alabama Farm Bureau Mutual Cas. Ins. Co. v. City of Hartselle*, 460 So.2d 1219 (Ala. 1984). The gross receipts sales tax levied at §40-23-2(2) thus should not be broadly construed to apply to receipts derived from a private source or activity. Dept. Reg. 810-6-1-.125.01, to the extent it taxes private club initiation fees and membership dues, is rejected as contrary to the statute. *Ex parte City of Florence*, 417 So.2d 191 (1982). (A regulation must be consistent with and cannot expand the scope of a statute. "A regulation . . . which operates

to create a rule out of harmony with the statute, is a mere nullity." *Ex parte City of Florence*, 417 So.2d at 194, 195, quoting *Lynch v. Tilden Produce Co.*, 44 S.Ct. 488 (1924).)[3]

[3] As discussed, Reg. 810-6-1-.125.01 also provides that greens fees paid by guests at private clubs are not taxable. The Taxpayer's representative contends that the above rule puts the Taxpayer at a competitive disadvantage because many so-called private clubs in Alabama allow non-members to play tax-free, even if they are not formally invited by a club member. He supported that claim with evidence that he and other non-members were allowed to play at several private clubs in Alabama without being formally invited beforehand. No tax was charged. The Administrative Law Division has also heard evidence that to maintain its status as a private club for tax purposes, at least one club in Alabama randomly assigns a club member as a sponsor or host for a non-member that wants to play the course. See, *Rigdon*, *supra*.

I find no substantive difference between a non-member that is invited to play at a private club and a person that is "invited" to play at a public course. In both cases, the course owner is allowing a member of the public to play the course for a price. Consequently, in both cases the greens fee paid by the non-member should be subject to the gross receipts tax. Taxing all greens fees paid at both public and private clubs would also eliminate the need for determining if and when a golf course is public versus private. True private clubs would not be required to strictly monitor the non-members that played, and public courses would no longer be allowed to "game" the system, i.e., assign members as hosts of non-members, etc., to retain their private club exemption. As previously stated in *Rigdon*:

> A green fee paid by a nonmember at a private golf course is an admission fee to play the course. I see no rational distinction for purposes of the (gross receipts tax) between a green fee paid by a nonmember at a private club course and a green fee paid by the same individual at a public course. In either case, the course is a "place . . . where an admission fee is charged" for entertainment, or at least amusement, depending on the skill of the golfer. Consequently, a reasonable interpretation of the statute would require that green fees paid to play any golf course in Alabama are taxable. Initiation fees and monthly dues paid by private club members would still not be subject to the tax, see *Craft Development*, *infra*, and, of course, private club members do not pay green fees to play their home course. The above interpretation follows the language of the statute, would fairly tax all green fees alike, and would eliminate the problem of having to determine if a golf course is "open to the public."

Rigdon at 8, n. 2.

(continued)

Concerning the use tax in issue, the Taxpayer only contends that it should not be required to pay use tax if some of the sellers had already paid tax on the items. The Department examiner explained, however, that she assessed the Taxpayer for use tax only if the vendor was not licensed to collect and/or remit the tax to the State and/or the City of Muscle Shoals. The use tax assessed by the examiner is due to be affirmed.

The Department is directed to recompute the Taxpayer's State and City of Muscle Shoals sales tax liabilities by removing the Taxpayer's initiation fees, monthly dues, and other private club receipts from the taxable measure. It should then notify the Administrative Law Division of the adjusted amounts due. It should also explain why the months in the assessments that are outside of the three year statute of limitations are not time-barred.[4]

As recommended by the Department at the July 12 hearing, the matter is also being submitted to the Department's Taxpayer Advocate to determine what portion of the interest that has accrued since 1999 should be abated because of undue Department delay. Code of Ala. 1975, §40-2A-4(b)(1)c. The Taxpayer Advocate's determination will be incorporated into the Final Order.

Notwithstanding the above, Reg. 810-6-1-.125.01 clearly specifies that greens fees paid by guests at private clubs are not taxable. Consequently, unless and until the Department amends its regulation, those receipts cannot be taxed.

[4] Code of Ala. 1975, §40-2A-7(b)(2) allows the Department three years from the due date of the return to enter a preliminary assessment for additional tax due. The State sales tax and Muscle Shoals preliminary assessments were for October 1995 through January 1998 and February 1995 through January 1998, respectively, and were entered on April 23, 1999. The State use tax preliminary assessment was for February 1995 through January 1998, and was entered on May 11, 1999. All three assessments include months that are clearly outside of the general three year statute.

This Opinion and Preliminary Order is not an appealable Order. The Final Order, when entered, may be appealed to circuit court within 30 days pursuant to Code of Ala. 1975, §40-2A-9(g).

Entered January 11, 2007.

_____
BILL THOMPSON
Chief Administrative Law Judge

bt:dr
cc: J. Wade Hope, Esq.
R. R. Wiese
Myra Houser
Joe Cowen
Henry Mixon