

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
GENESEE YACHT CLUB, INC.	:	DETERMINATION
	:	DTA NO. 827668
for Revision of a Determination or for Refund of Sales	:	
and Use Taxes under Articles 28 and 29 of the Tax Law	:	
for the Periods December 1, 2012 through	:	
February 28, 2013 and December 1, 2013 through	:	
February 28, 2014	:	

Petitioner, Genesee Yacht Club, Inc., filed a petition for revision of a determination or for refund of sales and use taxes under articles 28 and 29 of the Tax Law for the periods December 1, 2012 through February 28, 2013 and December 1, 2013 through February 28, 2014.

A hearing was held before Kevin R. Law, Administrative Law Judge, on July 13, 2018, in Rochester, New York, with all briefs to be submitted by November 9, 2018, which date began the six-month period for issuance of this determination. Petitioners appeared by Patrick Pardyjak, Esq. The Division of Taxation appeared by Amanda Hiller, Esq. (Melanie Spaulding, Esq., of counsel).

ISSUE

Whether dock fees received by petitioner, a yacht club, from its members are dues within the meaning of Tax Law § 1105 (f) (2) such that they are subject to sales tax, or whether such fees are charges for the leasing or rental of real property and not subject to sales tax.

FINDINGS OF FACT¹

1. Petitioner, Genesee Yacht Club, Inc., is a New York not-for-profit corporation located partially within the city of Rochester, New York, and partially within the town of Irondequoit, New York. Petitioner is a social and athletic club owning water-adjacent land off of the Genesee River. Its stated purpose is to encourage yachting and sailing, to further the arts and sciences pertaining to seamanship, piloting, and navigation and to provide and maintain suitable clubhouse and dockage facilities for use of the members by cooperative effort and minimum expense.

2. Clubhouse facilities are made available to petitioner's members. All members are charged and pay yearly dues based upon their membership status.

3. Petitioner owns and maintains docks that may be leased by its members. The dues charged by petitioner do not entitle a member to use its docks, nor does petitioner require its members to own or dock a boat at its docks prior to or after being accepted as a member.

4. The docks and piers are solely within petitioner's property and are permanent structures, constructed of wood and steel and are immovably attached to pilings driven into the ground. There are separate docks for each boat.

5. Petitioner pays property taxes to the Town of Irondequoit and the City of Rochester. The tax bills indicate petitioner is assessed as a marina.

6. Only those members owning boats and who desire to lease a dock are given the exclusive use of such a dock and are billed a separate charge over and above the yearly dues charged to all its members.

¹The parties executed a stipulation of facts in connection with this matter. Such stipulated facts have been substantially incorporated into the findings of fact set forth herein.

7. Petitioner collects and remits sales tax on its membership dues, and prior to 2013, never charged sales tax on its dock rentals.

8. In October 2011, the Division of Taxation (Division) commenced an audit of petitioner for the period December 1, 2008 through August 31, 2011. During the course of this audit, the Division reviewed whether sales tax should have been collected and remitted on docking fees charged to its members. It was the Division's position that the fees charged to its members for docking or mooring were taxable and this position was communicated to petitioner in a letter dated May 4, 2012. Included with the May 4, 2012 letter were copies of 20 NYCRR 527.11; two advisory opinions that had addressed the issue of sales tax on mooring fees (TSB-A-94 [22]S and TSB-A-10 [36]S); the Tax Appeals Tribunal's December 11, 1997 decision in *Matter of Youngstown Yacht Club*; and a Technical Services Bureau Memorandum (TSB-M-83 [19]S). The letter further explained that the Division would not assess sales tax for the period under audit because petitioner had earnestly relied upon the order and judgment in *Rochester Yacht Club v Dept. of Taxation and Fin.* (Sup Ct Monroe County, September 4, 1985, Conway, J.), wherein the court held that the charges for the yacht club's docks and moorings constituted charges for leasing real property and were not subject to sales tax. While the Division did not assess tax for that period, it instructed petitioner that going forward it was required to collect and remit sales tax on its dock rentals. During the audit, petitioner conveyed its belief that it was unfair for its members to be taxed on dock rentals, while members of the Rochester Yacht Club are not similarly taxed.

9. Like petitioner, the Rochester Yacht Club is a New York not-for-profit corporation located partially within the city of Rochester, New York, and partially within the town of Irondequoit, New York, on the Genesee River. Its docks and piers are solely within its property

and are permanent structures, constructed of wood and steel and are immovably attached to pilings driven into the ground. There are separate docks for each boat. The Rochester Yacht Club is larger than petitioner and has paid employees, while petitioner does not.

10. On or about March 16, 2013, petitioner timely remitted sales tax due of \$4,390.53 collected on dock rentals for the period December 1, 2012 through February 28, 2013.

11. On or about March 13, 2014, petitioner requested a refund of the \$4,390.53 tax previously remitted referred to in finding of fact 10 (first refund request).

12. On or about January 20, 2015, petitioner requested a refund in the amount of \$4,633.96 for tax remitted on dock rentals for the period of December 1, 2013 to February 28, 2014 (second refund request).

13. The Division initially granted the first refund request, but then, by letter dated May 6, 2015, informed petitioner that this refund was incorrectly granted and requested that petitioner return the refund.

14. On May 19, 2015, the Division issued a refund claim determination notice formally denying the second refund request.

15. Subsequently, on June 17, 2015, the Division issued notice of determination L-043171192 asserting sales tax due for the period of December 1, 2012 through February 28, 2013 (the period of the first refund request) in the amount of \$4,413.92, plus interest.²

CONCLUSIONS OF LAW

A. Tax Law §1105 (f) (2) imposes sales tax on dues paid to any social or athletic club. Tax Law §1101 (d) (6) defines “dues” as “[a]ny dues or membership fee including any

²This notice has been full paid. The Division explained that this notice was issued to properly credit petitioner for paying back the first refund request.

assessment, irrespective of the purpose for which made, and any charges for social or sports privileges or facilities. . . .” The Division’s regulation at 20 NYCRR 527.11 sets forth examples of charges that are considered dues. Example 6 of the regulation provides as follows:

“Example 6: 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.”

Notwithstanding petitioner’s assertion that the dock fees charged to its members are rentals of real estate and not dues, the definition of dues in Tax Law § 1105 (f) (2) is very broad.

Petitioner’s argument is based upon the implication that real estate rentals and dues are mutually exclusive. Dock fees, regardless of whether they are deemed rentals or leases of realty, come within the definition of “dues” and squarely fall within the example given in the regulation (*see Matter of Youngstown Yacht Club*, Tax Appeals Tribunal, December 11, 1997).

B. Petitioner also asserts that the court’s decision in *Rochester Yacht Club* collaterally estops the Division from relitigating this issue in this case. As noted in the findings of fact, the court therein held that the charges for the yacht club’s docks and moorings constituted charges for leasing real property and were not subject to sales tax. The doctrine of collateral estoppel precludes a party from relitigating in a subsequent action an issue clearly raised in a prior action and decided against that party or those in privity with that party (*Matter of Choi v State of New York*, 74 NY2d 933, 937 [1989]; *Ryan v New York Tel. Co.*, 62 NY2d 494, 500 [1984]). In order to invoke this doctrine 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 must have been a full and fair opportunity to contest the prior decision (*Staatsburg Water Co. v Staatsburg Fire Dist.*,

72 NY2d 147, 153 [1988]; *Schwartz v Public Adm'r of County of Bronx*, 24 NY2d 65, 71 [1969]). The party seeking the benefit of collateral estoppel must meet the burden of showing the identity of the issues in the present litigation and the prior determination (*Kaufman v Eli Lilly & Co.*, 65 NY2d 449, 456 [1985]). In this case, petitioner has met its burden of showing identity of the issue with the *Rochester Yacht Club* matter. Both petitioner and the Rochester Yacht Club are New York not-for-profit corporations located partially within the city of Rochester, New York, and partially within the town of Irondequoit, New York, owning water adjacent property on the Genesee River. Both clubs' docks and piers are solely within their respective property and are permanent structures, constructed of wood and steel and are immovably attached to pilings driven into the ground and are separate for each boat. The only measurable differences between the clubs are that the Rochester Yacht Club is a larger club than petitioner and has paid employees, while petitioner does not. In addition, there is no indication that the Division did not have a full and fair opportunity to contest the court's order and judgment in *Rochester Yacht Club*. Nonetheless, the doctrine cannot apply to preclude the Division from asserting tax against petitioner, as collateral estoppel "cannot be invoked against a governmental agency to preclude it from performing its statutorily authorized duties or enforcing its laws, except in rare circumstances not present here" (*Holden's Haulers v Madison County Dept. of Solid Waste and Sanitation*, 9 AD3d 593, 594-595 (3rd Dept 2004) citing *New York State Med. Transporters Assn. v Perales*, 77 NY2d 126, 130 [1990]; *Matter of E.F.S. Ventures Corp. v Foster*, 71 NY2d 359, 369-370 [1988]). "[T]he doctrine of estoppel does not apply in tax cases unless 'unusual circumstances support a finding of manifest injustice'" (*Matter of Salh v Tax Appeals Tribunal*, 99 AD3d 1124, 1126 [3rd Dept 2012], *lv denied* 20 NY3d 863 [2013], quoting *Matter of Winners Garage, Inc. v Tax Appeals Trib.*, 89 AD3d 1166, 1168-1169

[2011], *lv denied* 18 NY3d 807 [2012]). Here, the Division did not assert tax during the first period under audit because of petitioner's reliance on *Rochester Yacht Club*, but directed petitioner to begin collecting tax prospectively. The Division further explained its position to petitioner with citations to the legal authority upon which it was relying. The *Rochester Yacht Club* case is an unreported case that cites no authority for its conclusion that the dock fees do not constitute dues for purposes of Tax Law § 1105 (f) (2). Accordingly, it is determined that collateral estoppel has no application herein, nor is it manifestly unjust for petitioner to be required to lawfully collect tax on dock fees charged to its members. Based upon the foregoing, it is concluded that the Division properly denied petitioner's claims for refund.

C. The petition of Genesee Yacht Club, Inc., is denied and the May 19, 2015 refund claim determination notice and the notice of determination dated June 17, 2015 are sustained.

DATED: Albany, New York
May 2, 2019

/s/ Kevin R. Law
ADMINISTRATIVE LAW JUDGE