**Opinion Letter**

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| **Letter Number:** | **O-2001-011** |

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| **Tax Type:** | **Kansas Retailers' Sales Tax** |
| **Brief Description:** | **Country club membership dues.** |
| **Keywords:** |  |
| **Approval Date:** | **02/22/2001** |

**Body:**

Office of Policy & Research

February 22, 2001

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RE: Your letter of February 19, 2001

Dear XXXXXX:

Thank you for your letter of February 12, 2001. You continue to assert that the department owes the XXX Country Club a sales tax refund because the club collects tax on membership dues and pays sales tax on it purchases. You state:

As members of a 501(c)7 non-profit club, we have been paying double sales tax. Federal tax law required members of 501(c)7 clubs to be final consumers of good and services provided. No member is to receive inurement of income. Member’s dues are assessed a sales tax, and their payments pay monthly bills of cost for goods and services. All billings also carrying a sales tax. Double sales taxes are being paid by our members.

We have two options. One, to omit sales taxes on dues. Two, to issue sales tax exemption numbers for all good and services paid for by the Club. The state cannot have a double sales tax from our members as consumers.

In my earlier letter, I advised you: “Double taxation occurs when the same person is taxed twice during the same taxing period for the same purpose. *Sales and Use Tax*, 68 Am.Jur.2d, Sec. 12 (1993).” Opinion Letter 2001-0010. In the case of your country club, the members who pay the dues and the incorporated club are two different and distinct entities. Accordingly, there can be no double taxation because the same person is not being taxed, the taxes are paid for different purposes (one tax is paid on membership dues while the other tax is paid on on purchases of tangible personal property), and the taxes are being paid at different times on different transactions. Accordingly, there is no “double taxation.”

You argue that your members have formed a separate legal corporation that qualifies under the Internal Revenue Code as a tax exemption 501(c)(7) organization. This acknowledges that the country club is a one person or legal entity, while is members are individually a separate person or separate legal entities. Having chosen this type of organization, you cannot claim the advantage of being a non-profit organization for purposes of state and federal income tax and then ignore the corporate form because it allows you to argue that your members are being double taxed for sales tax purposes since they pay tax on their dues and the club pays tax on its purchases.

In*Commissioner v. Nat’l Alfalfa Dehydration,* 417 U.S. 134, 149 (1974), the United States Supreme Court stated:

This court has observed repeatedly that, while a taxpayer is free to organize his affairs as he chooses, nevertheless, once having done so, he must accept the tax consequences of his choice, whether contemplated or not, *(citations omitted),* and may not enjoy the benefit of some other route he may have chosen to follow but did not. ‘To make the taxability of the transaction depend upon the determination of whether there existed an alternative form which the statute did not tax would create burden and uncertainty.’

Similarly, in *Pemco v. KDOR*, 258 Kan. 717 (1995), the Kansas Supreme Court stated:

A common theme in a number of decisions from other jurisdictions involving this issue is that a corporation, having chosen the legal form in which to exist and do business, should not be permitted to pierce its own corporate veil to gain a tax advantage. Illustrative is *Southern States Cooperative v. Dailey,* 167 W.Va. at 930-31, 280 S.E.2d 821, wherein the court stated:

"Moreover, Southern States and its cooperatives have made a conscious decision to do business in the corporate form with its attendant advantages. These advantages include the limitation of personal liability, the continuity of corporate existence, and the facilitation of business administration. [Citation omitted.] Having taken advantage of the benefits of incorporation, a corporation cannot decline to accept the liabilities of the corporate form in order to reduce the incidence of taxation. *Conway v. Jobin,* 115 N.H. 496, 345 A.2d 903 (1975); *Shelby County v. Barden,* 527 S.W.2d 124 (Tenn.1975); *Noble v. C.I.R.,* 368 F.2d 439 (9th Cir.1966). As was said in *Schenley Distillers Corp. v. United States,* 326 U.S. 432, 66 S.Ct. 247, 90 L.Ed. 181 (1945):

'While corporate entities may be disregarded where they are made the implement for avoiding a clear legislative purpose, they will not be disregarded where those in control have deliberately adopted the corporate form in order to secure its advantages and where no violence to the legislative purpose is done by treating the corporate entity as a separate legal person.' 326 U.S. at 437, 66 S.Ct. at 249, 90 L.Ed. at 184.

"Southern States has had the benefits of the corporate form and should not be allowed to disavow it to reduce the incidence of taxation. *Shelburne Sportswear Inc. v. City of Philadelphia,* 422 Pa. 199, 220 A.2d 798 (1966); *Bonnar-Vawter Inc. v. Johnson,* 157 Me. 380, 173 A.2d 141 (1961). The burden of taxation does not create a burden disproportionate to the benefits of incorporation and courts generally have been reluctant to disregard separate legal entities for the purpose of granting relief from taxation in such circumstances. *See, e.g., Moline Properties v. Commissioner of Internal Revenue,* 319 U.S. 436, 63 S.Ct. 1132, 87 L.Ed. 1499 (1943). Consequently we hold that Southern States and its affiliated cooperatives are each 'persons' as defined by W.Va.Code § 11-13-1, and as such the gross receipts from transfers between them are subject to the West Virginia business and occupation tax."

Here, your argue that the country club members incorporated the club. The legal act of incorporation created a new legal entity that allows the members to enjoy the benefits accorded under I.R.C. 501(c)(7). The corporate form provides members with benefits that they could not otherwise enjoy. Now, you are asking the department to ignore this corporation and treat it as if the members and the corporation are one and the same. That is, accept the argument that the members are being taxed twice --- once when the moneys are paid as dues and a second time when the same moneys are spent by the club on taxable purchases. This is a flawed legal analysis, as the case decisions quoted above shows and for the reasons stated in my earlier letter. As my earlier letter explained:

*Southwestern Bell* makes it clear that country clubs should pay sales tax when they purchase sand, grass seed, fertilizers, pool chemicals, lubricants, electricity, water, and other items that they consume in constructing, operating, and maintaining their facility. These charges are not exempted because the club later charges sales tax for the use of the club facilities in the form of dues, admission fees, and fees for participating in sports. A country club’s purchase of these items are taxable for the reasons stated in *Southwestern Bell--*-the country club is the final user of the item and no further transfer of title is contemplated. The others items are not “consumed” in the service provided for payment of dues, green fees, or admission fees any more than the poles, wire, and switching equipment were in *Southwestern Bell.*

This should make it clear that the club and its members are not being double taxed.

I understand that the country club has filed a refund request based upon your argument. Please note that our exchange of correspondence does not provide you with any appeal rights. Procedurally, the club will receive a denial of its refund request, either in part or in whole. **Once denied, the country club will have 60 days from the date of the denial to submit a written request for an informal conference with the secretary of revenue or secretary’s designee. The club must submit this written request for an informal conference or the department’s action will become final and the country club will have no further appeal rights.**If the club files this request, it can then pursue its claim of double taxation through the department, the Board of Tax Appeals, and the Kansas appellate courts, if it wishes to pursue this course.

Sincerely,

Thomas E. Hatten
Attorney/Policy & Research

cc: Shirley Sicilian, Tamara Crider, Mike Hale

**Date Composed: 02/23/2001 Date Modified: 10/10/2001**