

**OFFICE OF TAX APPEALS**  
**STATE OF CALIFORNIA**

In the Matter of the Appeal of:  <b>CITY TOWER CLUB 2200, LLC,</b> <b>dba TOWER CLUB</b>	) OTA Case No. 18093832 ) CDTFA Case ID: 951190 ) CDTFA Acct. No. 102-063359 ) ) Date Issued: August 26, 2019 )
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**OPINION**

Representing the Parties:

For Appellant:	Robert B. Lopez Paul R. Gienger
For Respondent:	Jarrett Noble, Tax Counsel III
For Office of Tax Appeals (OTA):	Deborah Cumins, Business Taxes Specialist III

J. ANGEJA, Administrative Law Judge: Pursuant to California Revenue and Taxation Code (R&TC) section 6561, appellant City Tower Club 2200, LLC, dba Tower Club (appellant) appeals a decision issued by respondent California Department of Tax and Fee Administration (CDTFA)<sup>1</sup> denying appellant’s timely petition for redetermination of a Notice of Determination (NOD), which assessed sales tax of \$97,886.72 and applicable interest, for the period July 1, 2012, through February 15, 2015.

Office of Tax Appeals Administrative Law Judges Michael F. Geary, Sara A. Hosey, and Jeffrey G. Angeja, held an oral hearing for this matter in Fresno, California, on July 18, 2019. At the conclusion of the hearing, the record was closed and this matter was submitted for decision.

**ISSUE**

Whether appellant’s membership fees constitute gross receipts subject to sales tax.

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<sup>1</sup> Sales taxes were formerly administered by the State Board of Equalization. In 2017, functions of the board relevant to this case were transferred to CDTFA. (Gov. Code, § 15570.22; Stats. 2017, ch. 16, § 5.) Foresee of reference, when referring to acts or events that occurred before July 1, 2017, “CDTFA” shall refer to the board; and when referring to acts or events that occurred on or after July 1, 2017, “CDTFA” shall refer to CDTFA.

## FACTUAL FINDINGS

1. Appellant, a California limited liability company, operated Tower Club (or the club), a members-only facility located in Oxnard, California, from April 2011, until it was sold on or about February 15, 2015. The club consisted of a restaurant, bar, lounge and banquet facility located on the top floor of a high-rise building.<sup>2</sup>
2. Appellant's members paid monthly membership fees of \$90 - \$100 per month, and appellant required its members to purchase a minimum amount of food and drinks of \$120 per quarter.
3. During the audit period, appellant had revenue from only two sources, the sale of food and drinks and membership fees, which represented \$2,911,563 and \$1,231,139, respectively, for the audit period, with a total revenue of \$4,142,702. Thus, appellant derived 70 percent of its revenue from the sale of food and beverages.
4. Appellant did not collect sales tax reimbursement from its members or remit or report tax in connection with its membership fees.
5. CDTFA determined that the membership fees were charged in connection with anticipated sales of tangible personal property (i.e., food and drinks) and were subject to sales tax. Accordingly, CDTFA issued an NOD that proposed tax of \$97,886.72, plus applicable interest, based on a deficiency measure of \$1,231,141.<sup>3</sup>
6. On May 11, 2016, appellant filed a timely petition for redetermination, arguing that the membership fees are not subject to tax because the fees were related to the sale of services rather than to the anticipated sale of tangible personal property.
7. On August 31, 2018, CDTFA issued a Decision concluding that the membership fees represented taxable gross receipts. This timely appeal followed.

## DISCUSSION

California imposes sales tax on a retailer's retail sales in this state of tangible personal property, measured by the retailer's gross receipts, unless the sale is specifically exempt or

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<sup>2</sup> Members also had access to minimal athletic facilities, consisting of a gym/spa area (measuring approximately 12 feet square) on the same floor, and a tennis court, which was located next door. However, appellant's on-line marketing <[www.towercluboxnard.com](http://www.towercluboxnard.com)>, its social media reviews on TripAdvisor.com and Yelp.com, and its argument at the hearing focused exclusively on the dining and drinking facilities, with barely a mention of the athletic facilities.

<sup>3</sup> The minimal \$2 difference represents a difference between recorded and reported taxable sales.

excluded from tax by statute. (R&TC, § 6051.) All of a retailer's gross receipts are presumed subject to tax unless the retailer can prove otherwise. (R&TC, § 6091.)

California Code of Regulations, title 18, section (Regulation) 1584(a)(1) provides that membership fees related to the anticipated sale of tangible personal property are includible in taxable gross receipts when the retailer sells its products only to members and the membership fee exceeds a nominal amount. Here, it is undisputed that the membership fees exceeded a nominal amount, and that appellant sold food and drinks only to its members and their guests.

The remaining question is whether the membership fees related to anticipated sales of tangible personal property. CDTFA asserts that the true object of membership in the club was the ability to dine and drink at the upscale restaurant and bar, and thus CDTFA concludes that the membership fees do relate to the anticipated sale of tangible personal property. Appellant disagrees, arguing that the fees were related to the sale of intangible services. Appellant asserts that members joined the club primarily to meet and greet important people, and to dine, socialize, and network with high-profile individuals from the community. Moreover, appellant states that, in addition to the aforementioned gym, spa, and tennis court, the club offered use of a helipad on the roof of the building, reciprocal club privileges to tower clubs located nationally and abroad, and planning services for events held at the club. Further, appellant stated that it held multiple events at the club each year, including wine tasting, holiday dinners, themed parties, cooking classes, and guest speakers, and that it organized off-site trips for its members to various events.<sup>4</sup>

First, appellant's primary argument (i.e., that it provides the service of allowing its members to dine and socialize with high-profile individuals) essentially describes the core function of any restaurant, and thus demonstrates that the membership fees were charged in anticipation of food and beverage sales in the restaurant. Second, in contrast to appellant's operations, other businesses that charge membership fees such as country clubs typically provide not only a restaurant but also athletic facilities such as swimming pools, tennis courts, and/or

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<sup>4</sup> On appeal, appellant also raised various issues that relate to equity. For instance, appellant asserted that CDTFA should not have proceeded with the audit after it was notified that the business had been sold and the ownership entity had been dissolved, since there was no business to produce funds for any liability established by audit. Appellant also asserts that the question of whether club membership benefits are intangible or tangible should be debated at the industry level and not as an action against a single licensee. Likewise, appellant argues that sales tax should not be assessed in this case but that all private clubs should be notified of the application of tax to membership fees and that there should be an implementation date in the future on which the tax would begin to be applied. None of these issues is germane to the issue before us, which is to establish, based on relevant statutes and regulations, whether adjustments are warranted to the NOD. Accordingly, we decline to further address these equitable issues.

golf courses, and a significant portion of the membership fees charged at such country clubs relate to the use and maintenance of the athletic facilities. Here, appellant has provided no evidence that its members actually used the athletic facilities, which appear to be incidental when compared to the restaurant. Appellant also has not provided evidence regarding the amount of membership fees, if any, used to offset the cost of maintaining or providing services in connection with the athletic facilities. Accordingly, we conclude that the membership fees related to the anticipated sale of tangible personal property and are therefore subject to tax. (Cal. Code Regs., tit. 18, § 1584(a)(1).)

Alternatively, appellant argues that the intent of Regulation 1584 is to prevent businesses from collecting membership fees with the understanding that members can purchase goods at a discount, which appellant did not do. Appellant asserts that its members and their guests paid full market value for the food and beverages purchased at its restaurant, noting that CDTFA concluded that the markups reflected in appellant's records appeared reasonable for the size, type, and location of the business.<sup>5</sup>

Appellant's alternative argument is not supported by the regulation. Regulation 1584(a)(1) states:

**(a) APPLICATION OF TAX.**

(1) IN GENERAL. Membership fees related to the anticipated retail sale of tangible personal property are includible in taxable gross receipts when either

(A) the retailer sells its products only to members and the membership fee exceeds a nominal amount,

*or*

(B) regardless of the amount of the membership fee, the retailer sells its products for a lower price to a person who has paid the membership fee than to a person who has not paid the fee.

Appellant's membership fees meet both conditions established under subparagraph (A) and are therefore subject to tax. Under that subparagraph, there is no mention of whether the members who pay fees exceeding a nominal amount will be purchasing goods at a discount. Accordingly, we reject appellant's alternate argument, and we conclude that appellant's membership fees are subject to sales tax.

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<sup>5</sup> In its initial review, CDTFA used recorded taxable sales and recorded cost of goods sold to compute markups of 210.61 and 299.62 percent for food and bar sales, respectively, which CDTFA considered reasonable for the size, type, and location of the business.

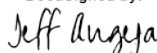
HOLDING

Appellant's membership fees were related to the anticipated sale of tangible personal property and are subject to sales tax.

DISPOSITION

CDTFA's action in denying appellant's petition is sustained.

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Jeffrey G. Angeja  
Administrative Law Judge

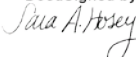
We concur:

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Michael F. Geary  
Administrative Law Judge

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Sara A. Hosey  
Administrative Law Judge