STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

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JOHN'S ISLAND CLUB, INC., )
                          )
     Petitioner,          )
                          )
vs.                       )   CASE NO. 95-1179RX
                          )
DEPARTMENT OF REVENUE,    )
                          )
     Respondent.          )
__________________________)
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FINAL ORDER

Pursuant to notice, the above matter was heard before the Division of Administrative Hearings, by its assigned Hearing Officer, Donald R. Alexander, on April 10, 1995, in Tallahassee, Florida.

APPEARANCES

For Petitioner: Richard A. Lotspeich, Esquire
Post Office Box 271
Tallahassee, Florida 32302-0271

For Respondent: James F. McAuley, Esquire
Lisa M. Raleigh, Esquire
Department of Legal Affairs
The Capitol, Tax Section
Tallahassee, Florida 32399-1050

STATEMENT OF THE ISSUE

The issue is whether existing Rule 12A-1.005(5)(d)1.b., Florida Administrative Code, is an invalid exercise of delegated legislative authority as alleged by petitioner.

PRELIMINARY STATEMENT

This case began on March 10, 1995, when petitioner, John's Island Club, Inc., filed a petition challenging the validity of Rule 12A-1.005(5)(d)1.b., Florida Administrative Code, a rule administered by respondent, Department of Revenue. As grounds, petitioner generally alleged that the rule constitutes an invalid exercise of delegated legislative authority because the agency exceeded its rulemaking authority and the rule conflicts with the law implemented. After being reviewed for legal sufficiency, the petition was assigned to the undersigned Hearing Officer on March 14, 1995.

By notice of hearing dated March 15, 1995, the final hearing was scheduled on April 10, 1995, in Tallahassee, Florida. At final hearing, petitioner presented the testimony of Wayne Miller, its business manager; Andrea Thurn, a certified public accountant and accepted as an expert in tax accounting; Melton H. McKown, III, a Department of Revenue tax audit specialist supervisor; and

Kathy Henley, a Department of Revenue assistant bureau chief in the division of ad valorem tax. Also, it offered petitioner's exhibits 1-8. All exhibits were received in evidence. Respondent presented the testimony of Melton H. McKown, III, and Kathy Henley. Also, it offered respondent's exhibit 1 which was received in evidence.

The transcript of hearing was filed on April 14, 1995. Proposed findings of fact and conclusions of law were filed by the parties on May 17, 1995. A ruling on each proposed findings has been made in the Appendix attached to this Final Order.

FINDINGS OF FACT

Based upon all of the evidence, the following findings of fact are determined:

A. Background

1. Petitioner, John's Island Club, Inc. (petitioner or the club), is a not-for-profit corporation which owns and operates a private country club facility in the John's Island residential development in Indian River County, Florida. It provides a variety of recreational facilities to its members. Among the amenities are three golf courses, nineteen tennis courts, a tennis building, a beach club, a club house, a swimming pool, and dining facilities.

2. Respondent, Department of Revenue (DOR), is a statutorily created agency charged with the administration of the state revenue laws, including Chapter 212, Florida Statutes, and rules promulgated thereunder. As a result of an amendment made in 1991 to Subsection 212.02(1), Florida Statutes, DOR is authorized by law to impose an admissions tax on "dues and fees" paid to private membership clubs providing recreational facilities. As a private membership club, petitioner is subject to this tax.

3. Beginning on July 1, 1994, petitioner made an assessment on each member to raise capital for the purpose of repairing and replacing many of its physical facilities. During the six month period ending December 31, 1994, $10,441,897 was collected from the members and made available to the club. Rule 12A-1.005(d)1.b., Florida Administrative Code, which was adopted by DOR in December 1991 to implement the admissions tax on dues and fees, imposes a tax on "(a)ny periodic assessment (additional paid-in capital) required to be paid by members of an equity or non-equity club for capital improvements." Under the authority of that rule, DOR required that petitioner pay the applicable sales tax on the assessment collected through December 31, 1994, or $730,932.79, and that it continue to pay the tax as other similar assessments are made in the future.

4. Claiming that the rule exceeds DOR's grant of rulemaking authority, and it modifies, enlarges, and contravenes the law implemented, petitioner filed a petition for administrative determination of invalidity of existing rule. DOR denies all allegations and asks that the validity of its rule be upheld.

B. The Club and the Assessment

a. The composition of the club

5. The club began operation in 1969 but was purchased by its members in 1986. It is an equity private membership club but issues no stock.

6. The club has two types of memberships: golf and sports social. Currently, the cost of a golf equity membership is $85,000 while the cost of a sports social membership is $30,000. After payment of these fees, the member receives a membership certificate, which represents his or her equity ownership interest in the club. At the present time, there are 1125 golf memberships and 257 sports social memberships. Of the 1125 golf memberships, the original developer still owns 67.

7. In addition to having to purchase a membership, members must also pay annual dues. A golf member pays $4,875 in annual dues while a sports social member pays $2,760 in annual dues. A sales tax is also collected on these dues. The dues are used to cover operating expenses such as insurance, administrative costs, staff salaries, and maintenance costs. In addition, members pay fees for additional services such as golf cart use, golf bag storage, locker room use, and golf and tennis lessons.

8. When a member decides to resign or retire from the club, he or she may resell the membership to the club (but not a third party) and receive the greater of (a) the initial amount paid by the retiring member, or (b) 80 percent of the current membership cost (with the remaining 20 percent retained by the club in a separate capital improvement account).

b. The assessment

9. In 1992, the club began studying the feasibility of repairing and replacing many of its physical facilities. The total cost of the proposed work was set at $16,372,000. By majority vote taken in the spring of 1994, the members decided to raise capital for the work by imposing a capital assessment on each current member. It was agreed that the capital contribution would be $12,000 from each golf member and $11,150 from each sports social member. However, the payment of the capital contribution was not intended to, and did not result in any, decrease in the dues which members were required to pay for the use of the club's facilities. A failure to pay the assessment would result in suspension from the club.

10. Three different options were made available to the members for the manner of payment of the capital contribution. The options included (a) a single payment, (b) payment over a three-year period, or (c) payment of interest only until such time as the member either sold the membership or left the club. After making payment in full, the member would be issued a certificate of capital contribution. It is noted that the developer was required to pay the capital contribution for his 67 golf memberships. Further, any person joining the club after the imposition of the assessment would likewise be required to pay the assessment.

11. Beginning in July 1994, the club began collecting the capital contribution from its members. From July through December 1994, some $10,441,897 was collected. A total sales tax of $730,932.79 has been paid on those collections. Shortly thereafter, petitioner opted to file this rule challenge.

C. The Rule and its Origin

12. Rule 12A-1.005(5)(d)1.b. provides as follows:

> (d)1. Effective July 1, 1991, the following
> fees paid to private clubs or membership clubs

> as a condition precedent to, in conjunction with, or for the use of the club's recreational or physical fitness facilities are subject to tax.
>
> * * *
>
> b. Any periodic assessments (additional paid in capital) required to be paid by members of an equity or non equity club for capital improvements or other operating costs, unless the periodic assessment meets the criteria of a refundable deposit as provided in sub-subparagraph 2.e. below.
>
> * * *
>
> Under the terms of the rule, the capital contribution assessed by the club does not qualify as a refundable deposit. This is because any difference between the amount collected by the club upon the sale of a membership to a new member, and the amount which was paid to the retiring member, is retained by the club.

13. Because Rule 12A-1.005, Florida Administrative Code, covers a wide array of items subject to taxation, the DOR cites Sections 212.17(6), 212.18(2), and 213.06(1), Florida Statutes, as the specific authority for adopting the rule, and Sections 212.02(1), 212.031, 212.04, 212.08(6) and (7), 240.533(4)(c), and 616.260, Florida Statutes, as the law implemented. There is no dispute between the parties, however, that in adopting sub-subparagraph 1.b., which contains the challenged language, the agency was relying principally on Subsection 212.02(1), Florida Statutes, as the law being implemented. That subsection defines the term "admissions" for sales tax purposes. Although the parties did not specifically say so, DOR relies on Section 212.17(6), Florida Statutes, as its source of authority for adopting the rule. That subsection authorizes DOR to "make, prescribe and publish reasonable rules and regulations not inconsistent with this chapter . . . for the enforcement of the provisions of this chapter and the collection of revenue hereunder."

14. For the purpose of assisting DOR in administering the Florida Revenue Act of 1949, which imposes a sales and use tax on various transactions, Section 212.02, Florida Statutes, provides definitions of various terms used in the chapter, including the term "admissions." Prior to the 1991 legislative session, subsection 212.02(1) read in pertinent part as follows:

> (1) The term "admissions" means and includes . . . all dues . . . paid to private clubs and membership clubs providing recreational or physical fitness facilities, including, but not limited to, golf, tennis, swimming, yachting, boating, athletic, exercise, and fitness facilities.

15. During the 1991 legislative session, the definition of the term "admissions" was expanded by the addition of the following underscored language:

> (1) The term "admissions" means and includes . . . all dues and fees . . . paid to private clubs and membership clubs providing recreational or physical fitness facilities, including, but

not limited to, golf, tennis, swimming, yachting, boating, athletic, excercise, and fitness facilities.

Thus, the legislature added the term "fees" to the term "dues" for those amounts "paid to any private clubs and membership clubs" which would be subject to the admissions tax.

16. Prior to the above change in substantive law, rule 12A-1.005(5), as it then existed, provided that dues paid to athletic clubs which provided recreational facilities were taxable. However, subparagraph (5)(c) of the rule also provided that

> (c) Capital contributions or assessments to an organization by its members are not taxable as charges for admissions when they are in the nature of payments made by the member of his or her share of capital costs, not charges for admission to use the organization's recreational or physical fitness facilities or equipment, and when they are clearly shown as capital contributions on the organization's records. Contributions and assessments will be considered taxable when their payment results in a decrease in periodic dues or user fees required of the payor to use the organization's recreational or physical fitness facilities or equipment.

Therefore, capital contributions were not taxable unless they resulted in decreased dues. That is to say, if a club levied an assessment on members and concurrently lowered its monthly dues, the assessment would be deemed to be taxable and in contravention of the rule. Thus, the effect of the rule was to prevent a club from renaming "dues" as "capital contributions" or "assessments" in order to avoid paying a tax on the dues.

17. After the change in substantive law, the DOR staff began preparing numerous drafts of an amendment to its rule to comply with the new statutory language. At one stage of the drafting process, a DOR staffer recommended that, because the legislature had not provided a definition of the term "fee," the DOR should adopt a rule which provided that capital contributions be "not taxable if assessed under an equitable membership."

18. Relying on what it says is the legislative intent, the DOR eventually proposed, and later adopted, the rule in its present form. In doing so, the DOR relied upon the terms "capitalization fees" and "capital facility fees" which are found in certain legislative history documents pertaining to the new legislation.

D. Legislative History of the Law Implemented

19. Although a number of bills related to the subject of a sales tax on admissions, the bill enacted into law was identified as Committee Substitute for House Bill 2523 (CS/HB 2523). The legislative history of the various bills relating to this subject has been received in evidence and considered by the undersigned.

20. In early 1991, the House and Senate considered bills which addressed amendments to the sales tax on admissions. The first time the issue was addressed was at a meeting on February 21, 1991, of the Subcommittee on Sales Tax of the House Committee on Finance and Taxation. The discussion at the meeting indicated that the intent of the bill was to close a loophole that allowed physical fitness facilities to change their pricing structure to charge a higher initiation fee, which was not taxable, and thereby reduce their monthly dues, which were taxable, so as to reduce the revenue below that originally anticipated by this tax on admissions.

21. This is corroborated by the bill analysis of the proposed committee bill that was offered, PCB FT 91-3A, which summarized the problem and solution as follows:

> Section 212.02(1), F. S. was amended during the 1990 Legislative Session to include in the definition of admissions those "dues" of "membership clubs" providing "physical fitness" facilities. Some clubs have attempted to avoid the tax (on dues) by shifting a substantial portion of the members' payments from "dues" to "initiation fees."
>
> Section 212.02(1), F. S., is amended to include "fees" as well as "dues" in the definition of admissions. All fees, including initiation fees and capitalization fees, paid to private clubs and membership clubs providing recreational or physical fitness facilities would be subject to the sales tax on admissions.

22. It is unclear, but likely, that PCB FT 91-3A became House Bill 2417 (HB 2417). The bill analysis and economic impact statement on HB 2417, which was prepared by the House Committee on Appropriations, contained identical language to that in the bill analysis on PCB FT 91-3A.

23. At the same time, the Senate was considering Senate Bill 1128, which later became Committee Substitute for Senate Bill 1128 (CS/SB 1128). On March 14, 1991, a staff analysis and economic impact statement on CS/SB 1128 was prepared by the Senate Committee on Finance, Taxation and Claims. It provided that:

> Section 212.02(1), Florida Statutes, defines "admissions" for sales and use tax purposes. Monthly fees of clubs with major facilities such as tennis courts, a swimming pool or a golf course have always been subject to the sales tax. During the 1990 Legislative Session this statute was amended to include dues on membership clubs providing physical fitness facilities, and not having these other major facilities.
>
> According to the DOR, such clubs have attempted to avoid payment of this tax by shifting a substantial portion of the members payments from dues to initiation fees which are not taxed.

Accordingly, the purpose of the proposed statutory amendment was "to include initiation fees as well as dues in the definition of admissions."

24. HB 2417 was passed by the House on April 17, 1991, and was sent to the Senate, where it was referred to the Committee on Finance, Taxation and Claims. HB 2417 died in that Committee. CS/SB 1128 was passed by the Senate on April 4, 1991, and was sent to the House, where it died in messages.

25. A separate bill, Committee Substitute for House Bill 2523, which addressed similar issues to those addressed in HB 2417 and CS/SB 1128, was passed by the House on April 4, 1991, and was sent to the Senate where it was passed with amendments. The Bill was then returned to the House where further amendments were adopted. The Bill was again sent to the Senate with a request for the Senate to concur with the House amendments. The Senate refused to concur and the Bill was sent to a conference committee.

26. The conference committee on finance and taxation met on April 19, 1991. The entirety of the discussion of the committee on this issue is as follows:

Senator Jenne: The - - going down to number 21, admissions, initiation fees. The House includes capitalization fees.

Representative Abrams: Which is this?

Mr. Weiss: The Senate bill just states initiation fees are additionally included. The House bill, I believe, says that it's just all fees, which would include whether they called them initiation fees or capital facility fees or whatever.

Representative Abrams: Because we are using something other than initiation - -

Mr. Weiss: It's a fee that is going to be included.

Representative Abrams: Yes, they were using - - they were breaking down categories of fees to avoid the tax, I think is what the deal was there. That gets us how much?

Senator Jenne: Okay, well, it doesn't matter, because you can do it.

Representative Abrams: Okay, good.

Although the terms "capital facility fees" and "capitalization fees" were used during the discussion, contrary to DOR's assertion, it is far from clear that the intent of the amendment was to make taxable all capital contributions and assessments paid by members of private clubs providing recreational facilities. When placed in context with the prior debate before the committees and their staff analyses, it is much more likely that the intent was to close a loophole then used by physical fitness clubs who were renaming dues as fees in order to avoid taxes.

27. The report of the conference committee was received by both houses on April 30, and CS/HB 2523 was passed by both houses the same day. The conference committee report for the bill contains only the following language describing the sales tax on admissions/initiation fees:

> Includes all recreational or physical fitness facility fees in the definition as admissions.

The official conference committee report contains no reference to the terms "capitalization fees" or "capital facility fees." Neither does it make reference to the terms "assessment" or "paid in capital," which are the terms used by DOR in its rule.

28. In the final bill analysis and economic impact statement prepared by the House Committee on Finance and Taxation for CS/HB 2523 on June 12, 1991, or 43 days after the bill was passed, the analysis states that subsection 212.02(1) was amended to include:

> "fees" as well as "dues" in the definition of admissions. All fees, including initiation fees and capitalization fees, paid to private clubs and membership clubs providing recreational or physical fitness facilities would be subject to the sales tax on admissions . . . This amendment should also limit further attempts to avoid taxation by renaming the fees collected from members.

The staff analysis was obviously not available to members of the House or Senate when they voted on the bill on April 30, 1991.

29. Although the final bill analysis used the term "capitalization fees," no where in any of the legislative history is there evidence of any legislative consideration of what was actually meant by that term. This is also true of the term "capital facility fees" which surfaced on one occasion prior to the passage of the bill.

E. Capitalization Fees and Their Significance

30. The sole basis for the DOR including the tax on assessments for capital improvements was the appearance in the legislative history of the terms "capitalization fees" and "capital facility fees." Neither term has any meaning to tax accountants. However, the accounting witnesses for both parties agreed that, from an accounting perspective, the phrase "capital facilities" would be understood to be assets having a life longer than one year.

31. A capital contribution is typically a one time payment for the purchase of assets. It does not entitle the member to use the club. It is an equity transaction, not an income transaction, and it represents an intent to make an investment to improve the value of the membership assets separate and apart from the payment of annual expenses for the receipt of some service.

32. "Dues" are a member's contribution to the operating costs of a club. They are assessed over an annual period and they are recurring. They also

represent the payment that a member pays for admission to the organization. A capital contribution paid by a member of an equity membership club is not "dues."

33. "Fees" as applied to a club are user charges. They are voluntary so that a member can decide whether or not to incur the charge based on whether the member uses the particular service to which it relates. A capital contribution is not a "fee."

CONCLUSIONS OF LAW

34. The Division of Administrative Hearings has jurisdiction over the subject matter and the parties hereto pursuant to Sections 120.56 and 120.57(1), Florida Statutes.

35. As the party challenging the rule, petitioner has the burden of proving by a preponderance of the evidence that the challenged rule is an invalid exercise of delegated legislative authority. Agrico Chemical Company v. Dept. of Environmental Regulation, 365 So.2d 759, 763 (Fla. 1st DCA 1978).

36. Subsection 120.52(8), Florida Statutes, defines an invalid exercise of delegated legislative authority as follows:

> Invalid exercise of delegated legislative authority means action which goes beyond the powers, functions, and duties delegated by the legislature.

The same statute goes on to provide in pertinent part that a proposed rule is invalid if:

> * * *
> (b) The agency has exceeded its grant of rule-making authority, citation to which is required by s. 120.54(7);
> (c) The rule enlarges, modifies, or contravenes the specific provisions of law implemented, citation to which is required by s. 120.54(7);
> * * *

37. As grounds for invalidating the rule, petitioner contends that the rule is an invalid exercise of delegated legislative authority because it exceeds the DOR's rulemaking authority in Subsection 212.17(6), Florida Statutes, and the rule enlarges, modifies and contravenes the provisions of Sections 212.02(1) and 212.04, Florida Statutes.

38. Section 212.04, Florida Statutes, imposes a six percent sales tax on admissions. More specifically, subsection (1)(a) thereof provides that:

> (a) It is hereby declared to be the legislative intent that every person is exercising a taxable privilege who sells or receives anything of value by way of admissions.

Subsection 212.02(1), Florida Statutes, defines the term "admissions" in relevant part as follows:

> (1) The term "admissions" means and includes . . . all dues and fees paid to any private clubs and membership clubs providing recreational or physical fitness facilities . . .

Therefore, the two statutes, when read together, clearly authorize an admissions tax on "dues and fees" paid to private membership clubs providing recreational facilities.

39. Following the legislature's amendment of the definition of "admissions," which added the phrase "and fees" after the word "dues," the DOR promulgated an amendment to Rule 12A-1.005(5)(d)1.b., Florida Administrative Code, with the intention of implementing the legislative intent of the statutory amendment. As amended, the challenged rule makes the following "fees" paid to private clubs or membership clubs as a condition precedent to their use of the club's recreational or physical fitness facilities subject to tax:

> b. Any periodic assessments (additional paid in capital) required to be paid by members of an equity or non equity club for capital improvements or other operating costs, unless the periodic assessment meets the criteria of a refundable deposit as provided in sub-subparagraph 2.e. below.

40. The terms "dues" and "fees" are not defined by statute, and the statute does not specifically authorize an admissions tax on any type of "assessment" or any form of "paid in capital." Thus, in order for the rule to be valid, the terms "assessment" and "paid in capital" must be included within the meaning of the term "dues and fees."

41. Petitioner contends that its position must be upheld for two reasons. First, it argues that when the words "dues," "fees" and "assessment" are given their plain and ordinary meaning, it is clear that each has a separate and distinct meaning, and that in no way can dues or fees be reasonably construed to include an assessment. Second, even if one looks beyond the usual and ordinary meaning of the terms and examines the legislative intent, the legislature simply intended to close a loophole used by health fitness clubs, and it did not intend to impose a tax on a private membership club's capital contribution.

42. In its proposed final order, DOR first contends that its construction of the term "fees" as being inclusive of a capital contribution or assessment is reasonable, and under the well-established principle that an agency's construction of a statute is entitled to great deference, its interpretation should not be overturned unless shown to be clearly erroneous or unreasonable. Second, DOR suggests that the legislative intent supports the premise that the term "fees" is an inclusive term for a variety of charges, including the capital contribution assessed by petitioner.

43. Because a taxing statute forms the source of authority for the rule, several broad principles are applicable. First, statutes imposing taxes must be clear and specific. Thus, a taxing statute may not be construed to impose a tax unless its terms definitely so provide. See, e. g., State v. Green, 101 So.2d 805, 808 (Fla. 1958). Second, statutes conferring the authority to impose taxes must be strictly construed against the taxing power, and any ambiguity in the provisions of the statute should be resolved in favor of the taxpayer. Maas Brothers, Inc. v. Dickinson, 195 So.2d 193, 198 (Fla. 1967). Accordingly, if taxing statutes are drawn so that the legislative intent is in doubt, they must

be construed most strongly against the government and liberally in favor of the taxpayer. See, e. g., The Department of Revenue v. Brookwood Associates, Ltd., 324 So.2d 184, 187 (Fla. 1st DCA 1976). Therefore, where a taxing statute is susceptible to two meanings, that meaning most favorable to the taxpayer must be adopted. Walgreen Drug Stores Co. v. Lee, 28 So.2d 535, 536 (Fla. 1946).

44. Because the words "dues" and "fees" are not defined by statute, and are words of common usage, both parties urge that they be construed in their plain and ordinary sense. See Humana, Inc. v. Department of Banking and Finance, 603 So.2d 672, 673 (Fla. 1st DCA 1992)(in absence of an express statutory definition, a word of common useage should be accorded its common and ordinary meaning). Standard dictionary definitions are reliable sources for plain and ordinary language definitions. Sims v. State, 510 So.2d 1045, 1047 (Fla. 1st DCA 1987). However, "where the agency urges a construction based on common, ordinary meanings, this mitigates, if it does not entirely eliminate, the rule calling upon the court to accord 'great deference' to the agency's interpretation of the statute." Schoettle v. Dept. of Administration, 513 So.2d 1299, 1301 (Fla. 1st DCA 1987); State Dept. of Insurance v. Insurance Services Office, 434 So.2d 908, 912 n. 6 (Fla. 1st DCA 1978).

45. Although the parties have cited different sources for their dictionary definition of the term "fees," both sources define a "fee" as a "fixed charge." Webster's Tenth New Collegiate Dictionary at 426 (1993); American Heritage Dictionary, New College Edition (year and page number not cited by respondent). At the same time, the term "assessment" is defined in Webster's as "the act or an instance of assessing" while the term "assess" is defined as meaning "to impose (as a tax) according to an established rate" or "to subject to a tax, charge, or levy." Id. at 69. The word "dues" is defined in Black's Law Dictionary at 450 (5th Ed. 1976) as "certain payments; rates or taxes" and "(a)s applied to clubs or other membership organizations, refers to sums paid toward support and maintenance of same as a requisite to retain membership." Finally, the term "paid in capital" is defined in Black's as "money or property given to a corporation in exchange for the corporation's stock." Id. at 999.

46. From these definitions, it is clear that each term, "dues," "fees," "assessment" and "paid in capital," has a separate and distinct meaning. In no case is either the word "dues" or "fees" defined to include the terms "assessment" or "paid in capital."

47. Early case law, albeit from other jurisdictions, also recogizes the distinction between the terms. In Thompson v. Wyandach Club, 127 N.Y.S. 195, 200 (N. Y. 1911), the court held as follows:

> Every man experienced in business recognizes the meaning of "assessment" as distinguished from "fees" and "dues." Fees are the amount paid for a privilege. They are not an obligation as the payment is voluntary. Such is an initiation fee of a club. With reference to clubs and other membership corporations the meaning of the word "dues" is settled. It means the obligation into which the members enter to pay a sum to be fixed, usually by the by-laws, at recurring intervals for the maintenance of the organization. . . . An assessment . . . is different. It is not a fee. It is not dues. (Emphasis added)

In a later case, Garden City Golf Club v. Corwin, 57 F.2d 283, 286 (E.D.N.Y. 1932), the court agreed with this distinction and held that:

> It must be conceded that there is a difference between the term "dues" and the term "assessment." Dues refer to the stated amounts which the members must pay periodically for the continuing privilege of membership. . . . (A)n "assessment" by a club may be a specific demand or request by the club upon its membership, as a whole or as a class, for a certain sum of money; the proportion to be paid by each member being stated. (Emphasis added)

48. Under the foregoing principles, several conclusions of law can be drawn. First, DOR has asked that a construction of the word "fees" be based on its common, ordinary meaning. As such, the rule calling for DOR to be accorded "great deference" in its interpretation of a statute is mitigated, if not eliminated altogether. Schoettle at 1301. Second, the common, ordinary meaning of the term "fees" does not include an assessment, capital contribution or paid-in capital. Indeed, in the context of a private membership club, such as John's Island Club, the term "fees" is commonly understood to mean a fixed sum voluntarily paid towards support and maintenance of the club as a requisite to membership. Conversely, an assessment is an involuntary charge levied on each member for a special purpose, and not recurring on a regular basis as in the case of dues or fees. Third, the distinction between the terms "dues and fees" and "assessment" has been recognized in the few judicial cases addressing this issue. See, e. g., N. L. R. B. v. Food Fair Stores, Inc., 307 F.2d 3 (3rd Cir. 1962)(an "assessment" is a charge levied on each member in the nature of a tax or some other burden for a special purpose); Wyandach Club, supra; Garden City Golf Club, supra; Rainbow Falls Fish and Game Club, Inc. v. Clute, 29 N.Y.S.2d 948, 950 (1941)("fees" are voluntary payments for particular privileges). Therefore, respondent's contention that the word "fees" is inclusive of "any fixed charge for capital improvements" is rejected as being contrary to the plain and ordinary meaning of the term. Finally, given the principles governing taxing statutes described in paragraph 43, subsection 212.02(1) should be strictly construed against the taxing authority and in favor of the taxpayer. This is especially true here since DOR proposes to tax the investments made by the owners of the club for capital improvements, and for which the owners receive nothing of "value by way of admissions."

49. Next, by looking at the available legislative history regarding the 1991 amendment to subsection 212.02(1), it is much more likely that the legislature intended to close a loophole that was then used by physical fitness clubs to avoid paying taxes on members' dues. More specifically, some clubs were avoiding the tax on "dues" by shifting a part of the member's payments from "dues" and renaming them "initiation fees." This is evidenced by discussions in, and bill analyses prepared for, the House and Senate committees in February and March 1991, as more fully discussed in findings of fact 20 and 23. While admittedly a different numbered bill was finally passed by the legislature on April 30, 1991, it contained the same substantive amendment as did earlier versions of the legislation, and there is no clear indication that the legislature's original intent had changed.

50. Even if there is some doubt as to what the legislature intended, as

there may arguably be here, case law instructs us that if this occurs, the statute should be construed in a manner most favorable to the taxpayer. Green; Brookwood Associates; Walgreen Drug Stores, supra.

51. Finally, prior to the 1991 amendment, there was no loophole for renaming "dues" as "capital contributions" in order to avoid the tax on "dues." This is because such action was specifically prohibited by then existing Rule 12A-1.005(5)(c), Florida Administrative Code. Therefore, it may be presumed that when the legislature was considering amending subsection 212.02(1) to close a loophole, its purpose in doing so was not to include assessments and capital contributions within the term "fees."

52. In summary, DOR has adopted a rule which conflicts with the law implemented, namely, subsection 212.02(1), and thus it is an invalid exercise of delegated legislative authority. Because the rule is inconsistent with the provisions of chapter 212, it also exceeds the agency's rulemaking mandate in subsection 212.17(6) that it "make . . . rules and regulations not inconsistent with this chapter."

Based on the foregoing findings of fact and conclusions of law, it is

ORDERED that Rule 12A-1.005(5)(d)1.b., Florida Administra-tive Code, is determined to be an invalid exercise of delegated legislative authority on the grounds it exceeds the agency's rulemaking authority and conflicts with the law implemented.

DONE AND ORDERED this 15th day of June, 1995, in Tallahassee, Florida.

____

DONALD R. ALEXANDER
Hearing Officer
Division of Administrative Hearings
The DeSoto Building
1230 Apalachee Parkway
Tallahassee, Florida 32399-1550
(904) 488-9675

Filed with the Clerk of the
Division of Administrative Hearings
this 15th day of June, 1995.

APPENDIX TO FINAL ORDER

Petitioner:

1. Partially accepted in finding of fact 2.
2-3. Partially accepted in finding of fact 1.
4-5. Partially accepted in finding of fact 5.
6. Partially accepted in finding of fact 1.
7. Partially accepted in finding of fact 6.
8. Partially accepted in finding of fact 8.
9-10. Partially accepted in finding of fact 7.
11. Partially accepted in finding of fact 9.
12. Partially accepted in findings of fact 9 and 10.
13. Partially accepted in finding of fact 13.

14.   Partially accepted in findings of fact 6 and 10.
15.   Partially accepted in finding of fact 11.
16.   Partially accepted in finding of fact 9.
17.   Rejected as being unnecessary.
18.   Partially accepted in finding of fact 12.
19.   Partially accepted in findings of fact 13 and 15.
20.   Partially accepted in finding of fact 20.
21.   Partially accepted in finding of fact 21.
22.   Partially accepted in finding of fact 22.
23.   Partially accepted in finding of fact 23.
24-25. Partially accepted in finding of fact 24.
26.   Partially accepted in finding of fact 25.
27.   Partially accepted in finding of fact 26.
28-29. Partially accepted in finding of fact 27.
30-31. Partially accepted in finding of fact 28.
32.   Partially accepted in finding of fact 29.
33.   Partially accepted in finding of fact 2.
34.   Rejected as being unnecessary.
35.   Partially accepted in finding of fact 16.
36-44. Partially accepted in finding of fact 17.
45-46. Partially accepted in finding of fact 30.
47.   Partially accepted in finding of fact 31.
48.   Partially accepted in finding of fact 32.
49.   Partially accepted in finding of fact 33.

Respondent:

1.   Partially accepted in finding of fact 1.
2.   Partially accepted in findings of fact 5 and 6.
3.   Partially accepted in finding of fact 6.
4.   Partially accepted in finding of fact 7.
5.   Partially accepted in finding of fact 8.
6.   Partially accepted in finding of fact 9.
7.   Partially accepted in findings of fact 10 and 11.
8-9.   Partially accepted in finding of fact 9.
10.   Partially accepted in findings of fact 10 and 11.
11.   Partially accepted in finding of fact 2.
12-13. Partially accepted in finding of fact 15.
14.   Partially accepted in findings of fact 14 and 15.
15.   Partially accepted in finding of fact 19.
16-17. Partially accepted in finding of fact 26.
18.   Partially accepted in finding of fact 21.
19-20. Partially accepted in finding of fact 12.

NOTE: Where a proposed finding has been partially accepted, the remainder has been rejected as being unnecessary for a resolution of the issues, irrelevant, cumulative, subordinate, not supported by the evidence, or a conclusion of law.

COPIES FURNISHED:

V. Carroll Webb, Director
Joint Administrative Procedures Committee
Holland Building, Room 120
Tallahassee, Florida 32399-1300

Liz Cloud, Chief
Bureau of Laws and Administrative Code
The Capitol, Room 1802
Tallahassee, Florida 32399-0250

Richard A. Lotspeich, Esquire
Post Office Box 271
Tallahassee, Florida 32302-0271

James F. McAuley, Esquire
Lisa M. Raleigh, Esquire
Department of Legal Affairs
The Capitol, Tax Section
Tallahassee, Florida 32399-1050

NOTICE OF RIGHT TO SUBMIT EXCEPTIONS

A party who is adversely affected by this Final Order is entitled to judicial review pursuant to Section 120.68, Florida Statutes. Review proceedings are governed by the Florida Rules of Appellate Procedure. Such proceedings are commenced by filing one copy of a notice of appeal with the agency clerk of the Division of Administrative Hearings and a second copy, accompanied by filing fees prescribed by law, with the District Court of Appeal, First District, or with the district court of appeal in the appellate district where the party resides. The notice of appeal must be filed within 30 days of rendition of the order to be reviewed.

===
DISTRICT COURT OPINION
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IN THE DISTRICT COURT OF APPEAL
FIRST DISTRICT, STATE OF FLORIDA

DEPARTMENT OF REVENUE,

Appellant,

v.

JOHN'S ISLAND CLUB, INC.,

Appellee.
____________________________/

NOT FINAL UNTIL TIME EXPIRES TO FILE MOTION FOR REHEARING AND DISPOSITION THEREOF IF FILED.

CASE NO. 95-2652
DOAH CASE NO. 95-1179RX

Opinion filed March 27, 1996.

An appeal from an order of Division of Abdministrative Hearings.

Robert A. Butterworth, Attorney General, and James McAuley, Assistant Attorney General, Tallahassee, for Appellant.

Richard A. Lotspeich, John T. Lavia, III, and Fred McCormack, of Landers & Parsons, Tallahassee, for Appellee.

BARFIELD, J.

The Department of Revenue (DOR) appeals a final order determining Rule 12A-1.005(5)(d)1.b., Florida Administrative Code, to be an invalid exercise of delegated legislative authority. We affirm.

In 1949, the legislature first imposed a tax on "admissions." Prior to 1990, the definition of "admissions" included "all dues paid to private clubs providing recreational facilities." The definition of "admissions" was amended during the 1990 legislative session to include in the definition those "dues" of membership clubs providing physical fitness facilities. In 1991, the legislature again amended the definition of "admissions" by inserting "and fees." The definition, as amended, provided:

> (1) The term "admissions" means and includes the net sum of money after deduction of any federal taxes for admitting a person or vehicle or persons to any place of amusement, sport, or recreation or for the privilege of entering or staying in any place of amusement, sport, or recreation, including, but not limited to, all dues and fees paid to private clubs and membership clubs providing recreational or physical fitness facilities. .

Prior to the above change in substantive law, rule 12A- 1, .005 (5) provided that dues paid to athletic clubs which provided recreational facilities were taxable. However, sub-paragraph (5)(c) of the rule also provided that:

> Capital contributions or assessments to an organization by its members are not taxable as charges for admissions when they are in the nature of payments made by the member of his or her share of capital costs, not charges for admission to use the organization's recreational or physical fitness facilities or equipment, and when they are clearly shown as capital contributions on the organization's records. Contributions and assessments will be considered taxable when their payment results in a decrease in periodic dues or user fees required of the payor to use the organization's recreational or physical fitness facilities or equipment.

After the substantive amendment to section 212.02(1), DOR adopted rule 12A-1.005(5)(d)1.b., which provides:

> (d)1. Effective July 1, 1991, the following fees paid to private clubs or membership clubs as a condition precedent to, in conjunction with, or for the use of the club's recreational or physical fitness facilities are subject to tax.
> b. Any periodic assessments (additional paid in capital) required to be paid by members of an equity or non equity club for capital improvements or other operating costs, unless the periodic assessment meets the criteria of a refundable deposit as provided in sub-subparagraph 2.e. below.

John's Island Club, Inc. (club) is a not-for-profit corporation which owns and operates a country club facility, providing recreational facilities to its members. Each member must purchase a membership. The cost of the membership is not subject to sales tax. A member who resigns is entitled to return of the greater of: (a) the initial amount paid or (b) 80 percent of the current membership cost. In addition to the membership charge, members pay annual dues. Beginning on July 1, 1994, the club made an assessment on each member to raise capital for the purpose of repairing and replacing many of its physical facilities. Any person joining the club after the imposition of the assessment would also be required to pay the assessment. The value of the contribution decreased in value 10 percent each year. If a member retained membership privileges for a period of ten years, the contribution had no redemptive value. A member who resigned earlier would receive a portion of the contribution in return. The club paid sales tax on the contributions pursuant to rule 12A-1.005(5)(d)1.b.

The club filed a petition challenging the validity of rule 12A-1.005(5)(d)1.b. The club argued the rule exceeded DOR's grant of rulemaking authority, and modified, enlarged, and contravened the law implemented. DOR asserted that the rule implemented the legislative intent, specifically relying upon the terms "capitalization fees" and "capital facility fees" which are found in certain' legislative history documents pertaining to the new legislation.

When reviewing a hearing officer's determination arising out of a section 120.56 quasi-judicial rule challenge proceeding, the appellate court's standard of review is whether the hearing officer's findings are supported by competent, substantial evidence. Adam Smith Enterprises, Inc. v. Department of Environmental Regulation, 553 So.2d 1260 (Fla. 1st DCA 1989). The hearing officer's findings in the present case are supported by competent, substantial evidence. We agree with the hearing officer that the rule is an invalid exercise of delegated legislative authority.

DOR correctly asserts that the legislative history supports the unmistakable intention of the legislature to prevent evasion of the tax imposed on dues. As noted by the hearing officer, a February 21, 1991, discussion of the Subcommittee on Sales Tax of the House Committee on Finance and Taxation indicated that the intent of the amendment was to close a loophole that allowed physical fitness facilities to change their pricing structure to charge a higher initiation fee, which was not taxable, and thereby reduce their monthly dues, which were taxable. The result was a reduction of revenue below that originally anticipated by the amendment taxing dues of physical fitness facilities.

DOR argues that the terms "capitalization fees" and "capital facility fees" are also used throughout the legislative history and that the hearing officer gave, no effect to use of the terms. DOR emphasizes a discussion of the conference committee on finance and taxation which occurred on April 19, 1991. The entirety of the discussion of the committee on this issue is as follows:

> Senator Jenne: The - - going down to number 21, admissions, initiation fees. The House includes capitalization fees.
>
> Representative Abrams: Which is this?
>
> Mr. Weiss: The Senate bill just states initial fees are additionally included. The House bill, I believe, says that it's just all fees, which would include whether they called them initiation fees or capital facility fees or whatever.
>
> Representative Abrams: Because we are using something other than initiation
>
> Mr. Weiss: It's a fee that is going to be included.
>
> Representative Abrams: Yes, they were using - - they were breaking down categories of fees to avoid the tax, I think is what the deal was there. That gets us how much?
>
> Senator Jenne: Okay, well, it doesn't matter, because you can do it.
>
> Representative Abrams: Okay, good.

As noted by the hearing officer, although the terms "capital facility fees" and "capitalization fees" were used during the discussion, it is far from clear that the intent of the amendment was to make taxable all capital contributions and assessments paid by members of private clubs providing recreational facilities. As noted above, the various discussions contained in the legislative history indicate the intent of the amendment was to close a loophole then used by physical fitness clubs who were renaming dues as fees in order to avoid taxes. There is no indication in the legislative history that the ,legislature intended to make taxable a completely different type of transaction which up until that point had been specifically excluded from taxation by rule.

We agree with the hearing officer that additional paid in capital does not fall within the generally understood definition of "dues" or "fees" as applied to a club. The terms "dues" and "fees" are not defined by statute, and the statute does not specifically authorize an admissions tax on any type of paid in capital. In the absence of clearer legislative consideration of what was meant by the terms "capitalization fees" and "capital facility fees", we conclude the hearing officer correctly determined that the rule at issue was inconsistent with the provisions of chapter 212.

Not only does the absence of clear legislative intent inure to the benefit of the taxpayer, but the position of DOR is contrary to accepted principles of

accounting from which common understanding of terms such as "capitalization" may be derived as clearly disclosed in the record of these proceedings. Accordingly, the order on appeal is affirmed.

KAHN, J., CONCURS. ALLEN, J., CONCURS IN RESULT WITH OPINION.

ALLEN , J., concurring in result.

I agree with the result reached by the majority. I do so because of the generally understood meaning of the term "fees." Even if a strained interpretation of the term might arguably encompass the contributions to capital involved herein, I would be dissuaded from accepting such interpretation by the canons of statutory construction which counsel that a strained interpretation of a statute should not be adopted over a more reasonable interpretation, and that an ambiguous tax statute is to be construed in favor of the taxpayer.

I do not join in the majority's reliance upon tidbits of legislative history to discern "legislative intent." In my view, the law means what its text most appropriately conveys, and we should content ourselves with reading it rather than psychoanalyzing a few of the many who enacted it. See Bank One Chicago N.A. v. Midwest Bank & Trust Co., 9 Fla. L. Weekly Fed. 5362, 5366 (U.S. Jan. 17, 1996)(Scalia, J., concurring in part) United States v. Public Util. Comm'n of Cal., 345 U.S. 295, 319 (1953)(Jackson, J., concurring).

MANDATE
From
DISTRICT COURT OF APPEAL OF FLORIDA
FIRST DISTRICT

To the Honorable Donald R. Alexander, Hearing Officer
Division of Administrative Hearings

WHEREAS, in that certain cause filed in this Court styled:

JOHN'S ISLAND CLUB, INC.

v. CASE NO. 95-2652
DOAH CASE NO. 95-1179RX

DEPARTMENT OF REVENUE

The attached opinion was rendered on March 27, 1996.

YOU ARE HEREBY COMMANDED that further proceedings be had in accordance with said opinion, the rules of this Court and the laws of the State of Florida.

WITNESS the Honorable E. Earle Zehmer

Chief Judge of the District Court of Appeal of Florida, First District and the Seal of said court at Tallahassee, the Capitol, on this 12th day of April, 1996.

(seal) Jon S. Wheeler
Clerk, District Court of Appeal of Florida,
First District