

New York State Department of Taxation and Finance
Taxpayer Services Division
Technical Services Bureau

TSB-A-96 (92) S
Sales Tax
December 30, 1996

STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO.S960325A

On March 25, 1996, a Petition for Advisory Opinion was received from WANY Sports, Inc., 800 Lexington Avenue, New York, New York 10021.

The issue raised by Petitioner, WANY Sports, Inc., is whether it is subject to sales tax under Section 1105 (f)(2) of the Tax Law, on monies collected from members to fund its operations.

Petitioner' makes the following submission of facts.

Petitioner was incorporated in 1981 and is a Type A corporation, as described in Section 201(b) of the Not-for-Profit Corporation Law of New York State, established under Section 402 of the Not-for-Profit Corporation Law. Petitioner's certificate of incorporation provides that its purpose is "[t]o provide for the mutual assistance, enjoyment, entertainment and improvement of its members socially and physically by encouraging them in participation of such forms of athletics, physical recreation and athletic competition." The organization is exempt from Federal income taxation under Section 501(c)(7) of the Internal Revenue Code.

Petitioner currently operates annual softball, volleyball, and table tennis leagues. The number of teams in each league may vary each year; usually each league contains between six and sixteen teams. Annually, an average of about 350 people participate in these sports leagues.

In accordance with its By-Laws, Petitioner is governed by a Board of Executives comprising a President, Vice President, Treasurer, Secretary, Special Projects Coordinator, Public Relations Director, and General Board members whose numbers may vary. The Board of Executives carries out the following activities:

- a) arranges for playing venues for the leagues;
- b) arranges for umpires, referees, and other officials, as needed, to oversee each sporting event;
- c) devises playing schedules for each league and team;
- d) collects monies from teams;
- e) expends monies received for such operational expenses as field permits, gym space, payment of officials, trophies, and other items incidental to the conducting of the sports leagues;
- f) conducts all financial and administrative business of the organization; and
- g) sets policy, as needed, to further the purposes of the organization.

Under the By-Laws, the Board of Executives alone has purview over all decisions affecting the governance, management, operation, and control of Petitioner's organization. Each team must pay a league fee which is used by the Board of Executives toward funding the costs of playing space,

officials, trophies, and other incidental expenses; the final amount of the league fee is set by the Board of Executives.

The teams and their player-participants are not involved to any extent in the governance, management, or control of Petitioner's operations, and decisions about the operations of programs and the organization are made solely by the Board. Membership or participation in leagues is completely open. Teams and players do not nominate or elect members of the Board of Executives; the Board is self-perpetuated, i.e., it is nominated and elected by its own Board members.

The membership of Petitioner's organization, which is open and non-exclusive, does not possess any proprietary rights or interests in the activities and management of the organization. Petitioner does not directly own the athletic facilities used by its participants. Petitioner's participants or members have no voice or interest in the management of its organization, which is carried out by a distinct Board of Executives.

Section 1105(f)(2)(i) of the Tax Law imposes sales tax on:

The dues paid to any social or athletic club in this state if the dues of an active annual member, exclusive of the initiation fee, are in excess of ten dollars per year, and on the initiation fee alone, regardless of the amount of dues, if such initiation fee is in excess of ten dollars. Where the tax on dues applies to any such social or athletic club, the tax shall be paid by all members, other than honorary members, thereof regardless of the amount of their dues, and shall be paid on all dues or initiation fees for a period commencing on or after August first, nineteen hundred sixty-five. In the case of a life membership, the tax shall be upon the amount paid as life membership dues, however, a life member, other than an honorary member, paying an annual sales tax, based on the dues of an active annual member, shall continue such payments until the total amount of such tax paid is equal to the amount of tax that would have otherwise been due had the tax been imposed at the time such paid life membership has been purchased and at the then applicable rate.

Section 1101(d) of the Tax Law defines "dues" and "social or athletic club" for purposes of imposition of sales tax under section 1105(f)(2) of the Tax Law as follows:

(6) Dues. Any dues or membership fee including any assessment, irrespective of the purpose for which made, and any charges for social or sports privileges or facilities except charges for sports privileges or facilities offered to members' guests which would otherwise be exempt if paid directly by such guests.

(13) Social or athletic club. Any club or organization of which a material purpose or activity is social or athletic.

Section 527.11(b)(5) of the Sales and Use Tax Regulations defines "club or organization", in part, as follows:

Club or organization. (i) The phrase club or organization means any entity which is composed of persons associated for a common objective or common activities. Whether the organization is a membership corporation or association or business corporation or other legal type of organization is not relevant. Significant factors, any one of which may indicate that an entity is a club or organization, are: an organizational structure under which the membership controls social or athletic activities, tournaments, dances, elections, committees, participation in the selection of members and management of the club or organization, or possession by the members of a proprietary interest in the organization. The organizational structure may be formal or informal.

(ii) A club or organization does not exist merely because a business entity:

(a) charges for the use of facilities on an annual or seasonal basis.

* * *

(d) offers tournaments, leagues and social activities which are controlled solely by the management.

In this case, Petitioner was organized as a Type A corporation, as described in Section 201(b) of the Not-for-Profit Corporation Law of New York State, established under Section 402 of the Not-for-Profit Corporation Law. A Type A not-for-profit corporation may be formed for any lawful non-business purpose including, but not limited to, any one or more of the following non-pecuniary purposes: civic, patriotic, political, social, fraternal, athletic, agricultural, horticultural, animal husbandry, and for a professional, commercial, industrial, trade or service association. Section 1105(f)(2) of the Tax Law is only applicable to social or athletic clubs.

Brierwood Village, Inc., Adv Op Comm T&F, February 13, 1989, TSB-A-89(6)5S, concluded that since (1) the membership of the club possessed no proprietary rights therein and had no control over its activities or management and (2) membership in the club was not exclusive, with members being appointed and accepted from a waiting list maintained by Petitioner, the subject club was not a "social or athletic club" within the meaning of section 1105(f)(2) of the Tax Law. Annual membership "fees" or "dues" were thus not subject to the imposition of sales tax.

Accordingly, pursuant to Section 1105(f)(2) of the Tax Law and Section 527.11(b)(5) of the Sales and Use Tax Regulations, since membership in Petitioner is not exclusive, members possess no proprietary interest and have no control over its activities or management, Petitioner is not

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a social or athletic club. Therefore, league fees paid to Petitioner by teams are not subject to State and local sales taxes.

DATED: December 30, 1996

/s/
JOHN W. BARTLETT
Deputy Director
Technical Services Bureau

NOTE: The opinions expressed in Advisory Opinions
are limited to the facts set forth therein.