

STATE OF NEW YORK

TAX APPEALS TRIBUNAL

In the Matter of the Petition :

of :

**VOLUNTEER AND EXEMPT
FIREMEN'S BENEVOLENT ASSOCIATION
OF FREEPORT, NEW YORK** :

DECISION
DTA NO. 816208

for Redetermination of Exempt Organization Status
under Articles 28 and 29 of the Tax Law. :

Petitioner Volunteer and Exempt Firemen's Benevolent Association of Freeport, New York, P.O. Box 350, Freeport, New York 11520, filed an exception to the determination of the Administrative Law Judge issued on March 4, 1999. Petitioner appeared by Donald R. Lohr, Esq. The Division of Taxation appeared by Barbara G. Billet, Esq. (Peter T. Gumaer, Esq., of counsel).

Petitioner filed a brief in support of its exception. The Division of Taxation filed a brief in opposition and petitioner filed a reply brief. Oral argument was not requested.

After reviewing the entire record in this matter, the Tax Appeals Tribunal renders the following decision.

ISSUE

Whether the Division of Taxation properly denied petitioner's application for an exempt organization certificate.

FINDINGS OF FACT

We find the facts as determined by the Administrative Law Judge. These facts are set forth below.

Petitioner, Volunteer and Exempt Firemen's Benevolent Association of Freeport, New York, was created as a membership corporation by special act of the New York State Legislature on April 26, 1963 pursuant to Laws of 1963 (ch 819) ("charter"). Petitioner's charter sets forth its purposes as follows:

The purposes of such corporation shall be the maintenance of suitable headquarters for, and the promotion of fraternal intercourse among the members of such corporation, the relief, aid and assistance of such members and their families who are disabled or indigent, and the promotion of the welfare of the volunteer fire service within the Freeport village fire district and territory provided with fire protection by contract with such village fire district. (L 1963, ch 819, § 3.)

Petitioner's by-laws provide a list of petitioner's purposes which is similar in all respects to that contained in the charter except that the by-laws state that petitioner has been organized for the "relief, aid and assistance of *volunteer and exempt firemen who provide volunteer fire service within the Freeport village fire district and territory provided with fire protection by contract with such village fire district*, and their families who are disabled or indigent" (italics added).¹

Eligibility for membership in petitioner is restricted to the following persons:

All persons who are now or have been, or who hereafter shall be volunteer members of the Freeport village fire district, fire department, or of any fire corporation in such fire district, and all persons resident in such village fire district or in territory provided with fire protection by contract with such village fire district who

¹According to Article 8 of petitioner's by-laws, if there are any conflicts between the by-laws and the charter, the charter controls.

are exempt volunteer firemen as defined by section two hundred of the general municipal law shall be eligible to membership in [petitioner]. (By-laws, Article 3, § 1.)

Persons who meet the eligibility requirements may become members of petitioner by completing an application for membership and paying an initiation fee of \$10. Petitioner also requires an annual dues payment of \$10 from its members. Failure to pay dues may result in expulsion. In addition, petitioner's by-laws state that a person eligible for membership who does not exercise that right within one year of becoming eligible shall be subject to an initiation fee equal to \$20 multiplied by the number of years such person has been a member of the Freeport fire department.

Pursuant to its charter, petitioner is the authorized recipient of its share of tax money collected pursuant to Insurance Law §§ 9104 and 9105 (former §§ 553 and 554), which impose a tax on fire insurance premiums for policies written by foreign and alien insurers. This "fire department tax" is distributed to petitioner by the Insurance Department. Petitioner's charter directs that such tax money "shall only be used for the care and relief of disabled or indigent volunteer and exempt volunteer firemen and their families" (L 1963, ch 819, § 7).

The control and dispersal of fire department tax funds distributed to petitioner is granted under the charter and the by-laws to a board of trustees consisting of petitioner's president, vice president, secretary, treasurer and one other member having the title of trustee. Petitioner's by-laws require that such officers be members in good standing of petitioner for five consecutive years.

Petitioner requires prospective recipients of assistance to complete detailed applications in order to establish eligibility for such assistance. Applicants filing under disabled status must also

submit a doctor's certification identifying the disability and the course of treatment. Applicants must also provide documentation to establish qualification for assistance. In accordance with the by-laws, members of petitioner's board of trustees investigate applicants for assistance. Also in accordance with the by-laws, final decisions on assistance and relief are made by majority vote of the board.

Article 6 of petitioner's by-laws provides the following definitions "for the purposes of construction of the charter and by-laws of this association":

disabled - impaired, incapacitated, or unable, as a result of illness, disease, disorder, other pathological condition or injury, to discharge any normal physical or mental function, whether permanently or temporarily and whether totally or partially, and requiring therapeutic, corrective, rehabilitative or other prescribed treatment or the use of prescribed medication or device or devices.

indigent - characterized as lacking the economic means of subsistence or the necessities of life.

family - members of the immediate family, namely, members of the household who are supported in excess of 50% by the said volunteer or exempt fireman and are related by blood, adoption or marriage. (Italics added.)

The assistance and relief provided by petitioner consists of grants of money and provision of medical devices and equipment.

The annual membership meeting of petitioner is held in April of each year. Regular membership meetings are also held in January and October of each year.

The by-laws provide that regular meetings of the board of trustees are to be held monthly.

Petitioner submitted into evidence its statements of income and expenses for its fiscal years ended March 31, 1995 and March 31, 1996. The statements itemize income and expenses

with respect to a “benevolent fund” and an “operating fund.” For the year ended March 31, 1995, petitioner’s statement indicates that petitioner’s benevolent fund, which had a balance of \$699,697 as of April 1, 1994, had income totaling \$89,142, comprised of “New York State Fire Department Tax” of \$72,550 and interest of \$16,592. The statement indicates total disbursements from the benevolent fund of \$105,110. This amount was comprised largely of “benefits to members” which totaled \$86,005. Other disbursements from the benevolent fund included meeting and office expenses (approximately \$10,000), accounting and legal fees (approximately \$2,800), officers’ pay (\$3,750), and optical plan (\$1,669). The statement further indicates that the benevolent fund balance as of March 31, 1995 was \$683,729.

Petitioner’s operating fund had a balance of \$5,425 as of April 1, 1994 and receipts, comprised of dues, totaling \$4,402. Disbursements from the operating account included meeting expenses (\$4,080) and office expenses (\$1,404) and totaled \$5,485. Petitioner’s operating fund balance at the close of the fiscal year ended March 31, 1994 was \$4,342.

For the year ended March 31, 1996, petitioner’s statement of income and expenses indicates that petitioner’s benevolent fund had a balance of \$758,716 “as of 1995”.² The benevolent fund had income of \$103,343 for this year which was comprised of \$78,798 in New York State Fire Department Tax and \$24,545 in interest. The benevolent fund had total disbursements of \$112,702. The largest disbursement item was benefits to members in the amount of \$76,773. Other disbursements from the benevolent fund were accounting and legal fees (\$25,496), meeting and office expenses (approximately \$6,000) and expense reimbursement

² There is no evidence in the record explaining the difference between the benevolent fund balance as of the close of the fiscal year ended March 31, 1995 (*see*, above) and this figure.

(\$3,375). The income and expense statement indicates that the benevolent fund's balance at the close of the fiscal year ended March 31, 1996 was \$749,357.

The 1996 statement of income and expenses indicates that the operating fund balance as of April 1, 1995 was \$4,342 and that the operating fund had receipts, consisting of dues, totaling \$5,169 during the year ended March 31, 1996. Disbursements from the operating fund during this year amounted to \$1,618. Such disbursements consisted of meeting and office expenses (approximately \$400), legal (\$350), members benefits (\$825) and bank service charge (\$46). The operating fund balance at the close of this fiscal year was \$7,893.

Benevolent fund disbursements designated "benefits to members" represent fire department tax monies paid to indigent or disabled volunteer firemen and their families.

Petitioner also submitted statements of financial condition for the fiscal years ended March 31, 1995 and 1996. These statements indicate that the benevolent fund balance was held in several bank accounts and certificates of deposit, an annuity and a government fund.

Petitioner also submitted copies of its newsletter dated October 1996, January 1997, and April 1997. Each of these newsletters gives notice to members of the next meeting of the association. The newsletters submitted also give notice of proposed changes in the by-laws, and upcoming events in the association, such as the induction of life members.³ The newsletter also brings members up to date on the health of members and retired members, injuries suffered by members fighting fires, deaths of members, and greetings from and updates on the lives of retired members. The October 1996 newsletter asks members to inform the association and the board of

³ Petitioner's by-laws define a life member as any member attaining 68 years of age.

personal matters which may be of interest to the board such as weddings, births of children, illness, hospitalizations or accidents.

The newsletters also apprise members of other activities of the association. Specifically, the October 1996 newsletter refers to petitioner's snow removal program whereby members clear snow from the walks of elderly and disabled members. The newsletter encouraged members to help with this program. The January and April 1997 newsletters provide information regarding petitioner's vision care plan.

Petitioner has been granted an exemption from Federal income tax by the Internal Revenue Service under section 501(c)(4) of the Internal Revenue Code as a social welfare organization.

Petitioner filed an Application for an Exempt Organization Certificate (Form ST-119.2) dated September 9, 1996. Petitioner claimed exempt status on its application under Tax Law § 1116(a)(4) as a charitable organization.

Petitioner subsequently submitted additional documentation in support of its application in response to a Division of Taxation ("Division") request. A letter to petitioner dated May 27, 1997 from the Division's Exempt Organizations Unit stated:

The Tax Law exempts New York State governmental entities, such as your organization, from the payment of sales and use taxes on their purchases.

Tax exemption numbers are not issued to governmental entities. In order to make tax free purchases, your organization must present vendors with its official purchase order. You may present a copy of this letter along with your purchase order to any vendor who requests a tax exemption number or an Exempt Organization Certification, Form ST-119.1.

NOTICE TO VENDORS

This letter is not an exemption document. You are not required to collect tax from the above organization, if they present you with their governmental purchase order. **A governmental purchase order is the only evidence you need to substantiate an exempt sale to a governmental purchaser.** (Emphasis in original.)

The Division offered no explanation for the May 27, 1997 letter.

By letter dated August 5, 1997 and addressed to petitioner's representative, the Division denied petitioner's application. The Division's letter of denial indicated its position that petitioner was neither organized nor operated exclusively for charitable purposes. Specifically, the denial letter stated that petitioner failed to meet the "organizational test" because:

1. The stated purposes specified in section 3 of Chapter 819 of your client's Certificate of Incorporation [sic] are not exclusively charitable within the . . . definition of that term [as set forth in the Division's regulations] as the purposes of your client's organization are for "the promotion of fraternal intercourse among the members of such corporation, the relief, aid and assistance of such members and their families who are disabled or indigent, and the promotion of the welfare of the volunteer fire service within the Freeport village fire district and territory provided with fire protection by contract with such village fire district.

2. Your Certificate of Incorporation fails to dedicate the assets of the corporation to an exempt purpose, upon dissolution.

Regarding the "operational test," the denial letter stated:

Your client's organization does not meet the operational test for exemption. The information presented discloses that, although some of the corporation's activities may be charitable in nature, it is primarily operated to provide assistance and relief benefits to its members. This serves a private rather than a public charitable purpose. As a result, the net earnings of the corporation inure to the benefit of members/private individuals which is prohibited under the statute.

Further, the Federal information available to this office shows that your client's corporation has received exemption from

Federal income tax under section 501(c)(4) of the Internal Revenue Code, as a social welfare organization, rather than under section 501(c)(3), as a charitable organization, which is identical to the Sales Tax Law.

THE DETERMINATION OF THE ADMINISTRATIVE LAW JUDGE

The Administrative Law Judge concluded that petitioner was neither organized nor operated exclusively for charitable purposes as required by Tax Law § 1116(a) and the regulations at 20 NYCRR 529.7(c)(3). The Administrative Law Judge noted that all statutes and regulations authorizing exemptions from taxation are strictly and narrowly construed and that if petitioner herein was to prevail, it was required to meet both the organizational and operational tests.

The organizational test found in the regulations at 20 NYCRR 529.7(c) provides that the organizing documents must limit the purposes of such organization to one or more exempt purposes and not empower the organization to participate, other than an insubstantial part of its activities, in activities which are not in furtherance of one or more exempt purposes. Further, the regulations provide that the organization will not be considered organized exclusively for one or more exempt purposes if the purposes for which such organization is created are broader than the purposes specified in Tax Law § 1116(a)(4), and even if the purposes for which the organization is created are no broader than those set forth in the statute, if the organization is empowered to carry on activities which are not in furtherance of one or more exempt purposes it will not pass muster under the organization test. Finally, the organization test requires that the assets of the organization be dedicated to an exempt purpose on dissolution.

The Administrative Law Judge examined petitioner's charter and by-laws and concluded that the provisions of these documents did not support exempt charitable organization status. Specifically, the Administrative Law Judge found that the following purposes listed in the charter and by-laws fell outside the meaning of charitable as defined in the regulations, conferring no public benefit:

- a) The maintenance of suitable headquarters for members;
- b) The promotion of fraternal intercourse among members;
- c) The promotion of the welfare of the volunteer fire service within the Freeport fire district.

The Administrative Law Judge noted that there appears to be no restriction on any activities falling within these categories and no explanation of these categories exists in the record. Further, petitioner has failed to show that it was authorized to engage in these activities other than as an insubstantial part of its overall activities (*citing* 20 NYCRR 529.7[c][1][i]).

Although petitioner argued to the Administrative Law Judge that its reliance on the operation of law to properly dispose of its assets on dissolution was proper, since the Not-For-Profit Corporations Law provides that, upon court approval, the assets of a corporation will be distributed to an organization engaged in activities substantially similar to those of the dissolved corporation, the Administrative Law Judge was not persuaded. The Administrative Law Judge noted that since it was concluded that some of petitioner's purposes stated in the charter and by-laws were nonexempt, the dissolution by operation of law would permit distribution of assets to corporations with similar provisions. Therefore, the requirement that the assets be dedicated to an exempt purpose was not satisfied (20 NYCRR 529.7[c][3]).

The Administrative Law Judge concluded that petitioner did not meet the operational test set forth in Tax Law § 1116(a)(4) and 20 NYCRR 529.7(d)(2). This test requires that the organization be operated exclusively for one or more exempt purposes. If more than an insubstantial part of an organization's activities are not in furtherance of an exempt purpose, it must fail the operational test. Although the Administrative Law Judge conceded that petitioner's activities in connection with its relief, aid and assistance of volunteer and exempt firemen were in furtherance of an exempt purpose, petitioner did not demonstrate that almost all of its activities were in furtherance of this purpose. After examining petitioner's expenses for the fiscal year ended March 31, 1996, the Administrative Law Judge stated that about 33% of petitioner's expenses were incurred in connection with nonexempt expenses. Since this was more than an insubstantial part of petitioner's activities not in furtherance of an exempt purpose, the Administrative Law Judge concluded that petitioner had not met the operational test.

With regard to petitioner's argument that a previous letter from the Division which referred to petitioner as a governmental entity granted it de facto exempt status, the Administrative Law Judge held that the letter never granted petitioner's application for exempt organization status. In addition, the Judge found no indication in the record that the letter was ever relied upon by petitioner to its detriment. Therefore, the letter was not considered relevant to the instant issue.

ARGUMENTS ON EXCEPTION

Petitioner argues that it has met the organizational test of Tax Law § 1116(a)(4) and the regulations since its charter limits the use of tax funds to exclusively charitable purposes as that term is defined in 20 NYCRR 529.7(e)(1)(ii). In addition, petitioner argues that the benefits are

distributed to volunteer and exempt volunteer firemen and their families regardless of membership in the organization.

Petitioner contends that the Administrative Law Judge has misconstrued the financial documents submitted by the Division without any foundation or explanation. Petitioner maintains that the financial documents reveal that the tax funds and interest and income earned thereon comprise in excess of 95% of the funds of petitioner. Further, petitioner claims that the financial information shows that almost all of the assets are necessarily dedicated to and restricted by the charitable purposes enunciated in the charter and by-laws.

With regard to the issue of distribution of the assets on dissolution, petitioner argues that since it believes it has met the organizational test, the assets would be distributed by operation of law to a substantially similar organization which would be qualified to receive the tax fund benefits and which could only disburse said tax monies for the care and relief of disabled or indigent volunteer or exempt volunteer firemen and their families.

Petitioner also believes it has met the operational test as set forth in the law and regulations because the legislation creating it controls all of its activities and requires that the tax monies be used in the relief, aid and assistance of disabled or indigent volunteer and exempt volunteer firemen and their families.

Petitioner notes that the Statements of Financial Condition as of May 31, 1995 and 1996 and the Statements of Income and Expenses for the same period were misread by the Administrative Law Judge. Petitioner contends that the financial reports support its position and cites several Opinions of the Comptroller where expenses incurred were found to directly relate

to the care and relief of disabled or indigent volunteer and exempt volunteer firemen and their families.

Petitioner also takes issue with the Division's argument that it only provides benefits to members, stating that membership in its organization is not a prerequisite to receipt of benefits, consistent with its charter and by-laws. Petitioners states that any member of the community who is a disabled or indigent volunteer or exempt volunteer fireman or member of their family is eligible to receive benefits and membership in the organization is irrelevant and, in fact, may not be a factor in granting relief, aid and assistance benefits.

OPINION

We affirm the determination of the Administrative Law Judge based solely on petitioner's failure to meet the requirements of the organizational test as set forth in Tax Law § 1116(a)(4) and the regulations at 20 NYCRR 529.7(c).

Petitioner was created by Chapter 819 of the Laws of 1963 for four specific purposes:

- a) maintaining suitable headquarters;
- b) promoting fraternal intercourse among members;
- c) relieving, aiding and assisting members and their families who are disabled or indigent;
- d) promoting the welfare of the volunteer fire service within Freeport, New York village fire district.

Petitioner has established that purpose "c" was an exempt, charitable purpose, whereby fire department tax funds received by petitioner are dispersed to indigent and disabled volunteer firemen. Further, the funds received by petitioner from the State of New York were earmarked for the exclusive purpose of care and relief of such individuals, not only members (*see*, L 1963, ch 819, § 7).

However, it is the nature of the other purposes, stated in both the charter and by-laws, which is problematic. They cannot be considered charitable as defined in the regulations specifically because they confer no apparent public benefit. “Charitable” includes “relief of the poor, distressed or underprivileged; . . . lessening the burdens of government; and promotion of social welfare by organizations designed to accomplish any of the above purposes” (20 NYCRR 529.7[e][1][ii]). Maintaining a headquarters, promoting fraternal intercourse among members and promoting the welfare of volunteer fire service are not designed to accomplish the purposes delineated in the definition of “charitable.”

Unlike the restriction on the distribution of tax funds found in the charter, there are no restrictions on the use of funds consistent with the other three purposes. And even though we do not place the same emphasis on the percentages of monies disbursed by petitioner as the Administrative Law Judge, we do note that petitioner was well aware of the difference between the Benevolent Fund and the Operating Fund and accounted for the difference, indicative of both the public and private nature of the corporation. In addition, although petitioner argues that all the expenses listed were directly related to an exempt purpose, there is no supporting proof in the record of such a claim. For this reason we believe petitioner has failed to show that (1) its organizing documents limited the purposes of the organization to one or more exempt purposes and (2) it did not have the authority (power) to participate in activities which were not in furtherance of an exempt purpose (20 NYCRR 529.7[c][1][i]).

It also follows that, even though petitioner was correct that it had a de facto provision for disposition of assets on dissolution in Not-for-Profit Corporation Law § 1005, disposition of assets by operation of law may be made to organizations engaged in similar activities, including

the nonexempt activities. Therefore, because there are three nonexempt purposes stated in the charter and by-laws, petitioner's provision for disposition of assets on dissolution by operation of law fails the test set forth in 20 NYCRR 529.7(c)(3).

We also find that petitioner has failed to meet the operational test set forth in 20 NYCRR 529.7(d) in that it has not demonstrated that "almost all of its activities accomplish one or more exempt purposes specified in section 1116(a)(4)," to wit, that its purposes are charitable. The Statements of Income and Expenses and Statements of Financial Condition are not dispositive of the issue because the nature of the disbursements (other than disbursements of benefits) under the Benevolent Fund cannot be discerned. Disbursements from the Operating Fund, which are charges against dues revenue, are also unclear as to purpose. Petitioner's failure to offer an explanation of the disbursements through substantiating documentation or sworn testimony undermines its attempt to characterize them as "charitable" in nature in its legal arguments. Without proof, we cannot conclude that all the disbursements were in furtherance of an exempt purpose.

Statutes and regulations authorizing exemptions from taxation, such as Tax Law § 1116(a)(4), are to be strictly and narrowly construed (*see, Matter of International Bar Assn. v. Tax Appeals Tribunal*, 210 AD2d 819, 620 NYS2d 582, *lv denied* 85 NY2d 806, 627 NYS2d 323). In order to qualify for the exemption, petitioner bears the burden of clearly proving its entitlement to the exemption sought (*see, 20 NYCRR 3000.10[d][4]; Matter of Grace v. New York State Tax Commn.*, 37 NY2d 193, 371 NYS2d 715, *lv denied* 37 NY2d 708, 375 NYS2d 1027). To establish entitlement to exempt organization status, petitioner was required to meet

both an organizational and an operational test (*see*, 20 NYCRR 529.7[b][2]). Based on the analysis above, we believe petitioner has failed to do so.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of Volunteer and Exempt Firemen's Benevolent Association of Freeport, New York is denied;
2. The determination of the Administrative Law Judge is affirmed;
3. The petition of Volunteer and Exempt Firemen's Benevolent Association of Freeport, New York is denied; and
4. The Division of Taxation's denial, dated August 5, 1997, of petitioner's application for an exempt organization certificate is sustained.

DATED: Troy, New York
March 16, 2000

/s/Donald C. DeWitt

Donald C. DeWitt
President

/s/Carroll R. Jenkins

Carroll R. Jenkins
Commissioner

/s/Joseph W. Pinto, Jr.

Joseph W. Pinto, Jr.
Commissioner