

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition	:	
of	:	
North Flushing Swim Club, Inc.	:	AFFIDAVIT OF MAILING
for Redetermination of a Deficiency or a Revision	:	
of a Determination or a Refund of Sales & Use Tax	:	
under Article 28 & 29 of the Tax Law for the	:	
Period 6/1/72-5/31/76.	:	

State of New York
County of Albany

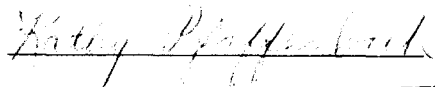
Jay Vredenburg, being duly sworn, deposes and says that he is an employee of the Department of Taxation and Finance, over 18 years of age, and that on the 29th day of December, 1982, he served the within notice of Decision by certified mail upon North Flushing Swim Club, Inc., the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

North Flushing Swim Club, Inc.
141-01 32nd Ave.
Flushing, NY 11354

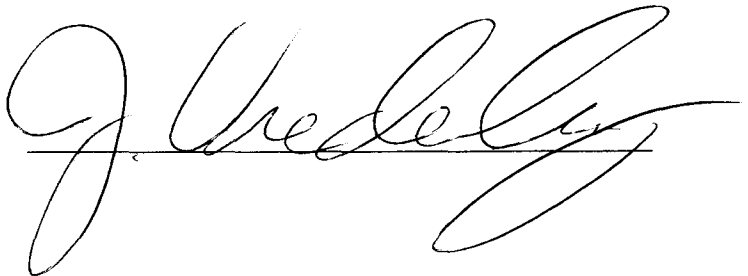
and by depositing same enclosed in a postpaid properly addressed wrapper in a (post office or official depository) under the exclusive care and custody of the United States Postal Service within the State of New York.

That deponent further says that the said addressee is the petitioner herein and that the address set forth on said wrapper is the last known address of the petitioner.

Sworn to before me this
29th day of December, 1982.



AUTHORIZED TO ADMINISTER
OATHS PURSUANT TO TAX LAW
SECTION 174



STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of :
North Flushing Swim Club, Inc. :
AFFIDAVIT OF MAILING
for Redetermination of a Deficiency or a Revision :
of a Determination or a Refund of Sales & Use Tax :
under Article 28 & 29 of the Tax Law for the :
Period 6/1/72-5/31/76. :
_____:

State of New York
County of Albany

Jay Vredenburg, being duly sworn, deposes and says that he is an employee of the Department of Taxation and Finance, over 18 years of age, and that on the 29th day of December, 1982, he served the within notice of Decision by certified mail upon Robert Oziel the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Robert Oziel
Seavey, Fingerit & Oziel
500 Fifth Ave.
New York, NY 10110

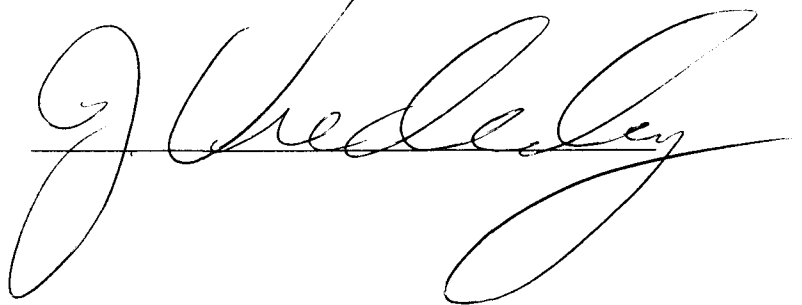
and by depositing same enclosed in a postpaid properly addressed wrapper in a (post office or official depository) under the exclusive care and custody of the United States Postal Service within the State of New York.

That deponent further says that the said addressee is the representative of the petitioner herein and that the address set forth on said wrapper is the last known address of the representative of the petitioner.

Sworn to before me this
29th day of December, 1982.

Holly Hufferbach

AUTHORIZED TO ADMINISTER
OATHS PURSUANT TO TAX LAW
SECTION 174



STATE OF NEW YORK
STATE TAX COMMISSION
ALBANY, NEW YORK 12227

December 29, 1982

North Flushing Swim Club, Inc.
141-01 32nd Ave.
Flushing, NY 11354

Gentlemen:

Please take notice of the Decision of the State Tax Commission enclosed herewith.

You have now exhausted your right of review at the administrative level. Pursuant to section(s) 1138 of the Tax Law, any proceeding in court to review an adverse decision by the State Tax Commission can only be instituted under Article 78 of the Civil Practice Laws and Rules, and must be commenced in the Supreme Court of the State of New York, Albany County, within 4 months from the date of this notice.

Inquiries concerning the computation of tax due or refund allowed in accordance with this decision may be addressed to:

NYS Dept. Taxation and Finance
Law Bureau - Litigation Unit
Albany, New York 12227
Phone # (518) 457-2070

Very truly yours,

STATE TAX COMMISSION

cc: Petitioner's Representative
Robert Oziel
Seavey, Fingerit & Oziel
500 Fifth Ave.
New York, NY 10110
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition
of
NORTH FLUSHING SWIM CLUB, INC. DECISION
for Revision of a Determination or for Refund
of Sales and Use Taxes under Articles 28 and 29 :
of the Tax Law for the Period June 1, 1972 :
through May 31, 1976. :

Petitioner, North Flushing Swim Club, Inc., 141-01 32nd Avenue, Flushing, New York 11354, filed a petition for revision of a determination or for refund of sales and use taxes under Articles 28 and 29 of the Tax Law for the period June 1, 1972 through May 31, 1976 (File No. 17424).

A formal hearing was commenced before Herbert Carr, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York on March 19, 1979 at 1:15 P.M. and continued to conclusion before James T. Prendergast, Hearing Officer, on July 20, 1979 at 10:45 A.M. Petitioner appeared by Robert Oziel, Esq. The Audit Division appeared by Peter Crotty, Esq. (Paul A. Lefebvre, Esq., and Samuel Freund, Esq., of counsel at the hearings of March 19, 1979 and July 20, 1979, respectively).

ISSUES

- I. Whether purchases of stock and administrative fees constitute initiation fees under Tax Law section 1101(d)(7).
- II. Whether maintenance fees and Associate Membership charges constitute dues under Tax Law section 1101(d)(6).
- III. Whether temporary loans constitute dues under Tax Law section 1101(d)(6).
- IV. Whether the payment of \$10.00 annual dues is taxable pursuant to Tax Law section 1105(f)(2).

V. Whether petitioner's receipts from guest books and passes constitute dues under Tax Law section 1101(d)(6).

VI. Whether work done on petitioner's swimming pool constitutes capital improvements or repairs under Tax Law section 1105(c)(5).

FINDINGS OF FACT

1. Petitioner filed New York State sales and use tax returns for the period June 1, 1972 through August 31, 1975 and March 1, 1976 through May 31, 1976.

2. The petitioner executed a Consent Extending Period of Limitation for Assessment of Sales and Use Taxes, Form ST-578, for the period June 1, 1972 through August 31, 1976, extending the period of limitation for assessment to March 20, 1977.

3. On November 10, 1976, the Audit Division issued a Notice of Determination and Demand for Payment of Sales and Use Taxes Due in the amount of \$127,804.85 which included \$90,506.89 in tax and \$37,297.96 in penalties and interest.

4. A subsequent audit of petitioner's books and records resulted in a reduction in the assessment of sales and use tax due to the amount of \$77,321.38.

5. Petitioner is a not-for-profit corporation organized under the laws of the State of New York for the purpose of owning and operating a swim club.

6. Petitioner has two types of members, stockholders and associates. In order to become a stockholder one must purchase one share of stock. The value of this stock has fluctuated from a par value of \$800.00 to a maximum value of \$1,600.00. Money received by petitioner above the par value for the increased value of the stock is deemed by petitioner an administrative fee. Petitioner has first option to reacquire this stock at a price of \$800.00 par value plus the lesser of (1) one half the difference between the increased value and the

\$800.00 par value of the stock or (2) four percent annual interest of the value of the stock when bought. If petitioner does not choose to exercise its option, a stockholder may sell the stock on the open market for whatever price he may receive. In addition to purchasing stock, a stockholder must pay \$10.00 annual dues in order to remain a permanent member of the corporation. The stockholder must also pay a maintenance fee in order to use petitioner's facilities. The amount of the maintenance fee is determined by petitioner's yearly operating cost and the size of the member's family using the facilities. Associate members must pay an annual charge to use petitioner's facilities. According to the petitioner's price list for 1976, the annual fee for associate members is greater than the maintenance fee payable by a stockholder. For example, the fee for a family of four for an associate member is \$515.00, while the maintenance fee for a stockholder family of four is \$230.00.

7. Petitioner has stipulated that no guest of a member could use the facilities without the possession of entrance tickets. Members are able to purchase from petitioner guest books which contain these tickets, at a price of \$15.00 per book.

8. During 1976, petitioner's swimming pool developed a crack. In order to cover this expense, petitioner asked its stockholder members to voluntarily lend it \$100.00, which all of them did. The petitioner's price list for 1976, however, provided that each new stockholder member must loan \$100.00 to petitioner. Petitioner was to pay back the \$100.00 loan, without interest, to each stockholder member when he sold his stock.

9. On February 10, 1976, petitioner entered into a contract with Roberto & Sons, Inc. which, according to the terms of the contract, would repair damage to petitioner's swimming pool and do other masonry work around the swimming

pool area. The Audit Division prepared a schedule of fixed assets which listed four items supplied by Roberto & Sons, Inc. to petitioner dated respectively March 1976, April 1976, May 1976, and June 1976. The Audit Division designated the first two items "C/I", or capital improvements. The remaining two items were not so designated.

10. During the period in question, petitioner sold used sports equipment and other equipment that it owned. Petitioner agrees that these items are taxable.

CONCLUSIONS OF LAW

A. That the receipts from the purchase of stock and the administrative fees constitute initiation fees under Tax Law section 1101(d)(7) as "(a)ny payment, contribution, or loan required as a condition precedent to membership, whether or not such payment, contribution or loan is evidenced by certificate of interest or indebtedness or a share of stock, and irrespective of the person or organization to whom paid, contributed or loaned."

B. That the maintenance fees and annual fees paid by associate members constitute dues under Tax Law section 1101(d)(6) as "any assessment, irrespective of the purpose for which made." Accordingly, such fees are subject to tax pursuant to Tax Law section 1105(f)(2).

C. That the temporary loans constitute dues under Tax Law section 1101(d)(6) and Matter of Port Jervis Country Club, Inc., State Tax Commission, September 28, 1979 as "any assessment irrespective of the purpose for which made." Accordingly the temporary loans are subject to tax pursuant to Tax Law section 1105(f)(2).

D. That while dues of an active annual member of a social or athletic club are taxable pursuant to Tax Law section 1105(f)(2) only if the dues are in

excess of \$10.00 a year and petitioner's annual stated dues are \$10.00, petitioner's receipt of maintenance fees and temporary loans constitute dues under that section. Therefore, petitioner's \$10.00 annual stated dues are also subject to tax under Tax Law section 1105(f)(2).

E. That petitioner's receipts from guest books and passes are dues under Tax Law section 1101(d)(6) as "including any charges for social and sports facilities," prior to the amendment effective September 1, 1973 which added the phrase "except charges for sports privileges or facilities offered to members' guests which would otherwise be exempt if paid directly by such guests." Therefore, petitioner's receipts for guest books and passes after September 1, 1973 are not subject to sales tax under Tax Law section 1101(d)(6) and Matter of LaFayette Country Club, Inc., State Tax Commission, December 30, 1978.

F. That Tax Law section 1105(c)(5) imposed a tax from receipts from the sale of services or maintaining, servicing or repairing real property and as such petitioner has not sustained its burden of proof of establishing the two challenged items constituted capital improvements rather than taxable repairs.

G. That penalty and interest in excess of the statutory minimum are cancelled.

H. That the petition of North Flushing Swim Club, Inc. is denied except as provided in Conclusions of Law "E" and "G" above, and the Notice of Determination and Demand issued November 10, 1976 is otherwise sustained.

DATED: Albany, New York

DEC 29 1982

STATE TAX COMMISSION

Robert A. Brubaker
PRESIDENT

Francis R. Kratz
COMMISSIONER

Mark J. Daulton
COMMISSIONER