DECISION OF MUNICIPAL TAX HEARING OFFICER

January 7, 2013

Taxpayer's Representative
Address to Taxpayer's Representative

Taxpayer
MTHO #737

Dear Taxpayer's Representative:

We have reviewed the evidence and arguments presented by ***Taxpayer*** and the City of Chandler (Tax Collector or City) at the hearing on November 28, 2012. The review period covered was October 1, 1991 through March 31, 2012. Taxpayer's protest, Tax Collector's response, and our findings and ruling follow.

Taxpayer's Protest

Taxpayer is a sanctioning body for ***Motor Bike*** races throughout the country. Taxpayer sanctions races at a track in the City. The property where the track is located is owned by the ***Big Utility Company (BUC)***. Taxpayer leases or licenses the property from ***BUC*** and pays tax to ***BUC***. Taxpayer has an oral agreement with ***2 Assistants (2A)*** to operate the track on behalf of Taxpayer. The City assessed Taxpayer for licensing the property to ***2A***. Taxpayer does not license the property to ***2A***. Taxpayer is not subject to the City privilege tax.

Tax Collector's Response

The City assessed privilege taxes against Taxpayer licensing real property to ***2A***. Taxpayer has a separate entity on the property and Taxpayer receives consideration. A license is an agreement for the use of real property. The definition of "license for use" in the City code is broad enough to encompass Taxpayer's activities. By allowing ***2A*** access to the facility, Taxpayer is licensing real property within the meaning of the City code. Therefore, Taxpayer is taxable under Chandler Tax Code (CTC) § 62-445.

Discussion

Taxpayer sanctions ***Motor Bike races*** throughout the country, including at a track in the City. The property where the track is located is owned by ***BUC***. ***BUC*** leases or licenses the property to Taxpayer. ***2A*** conduct races at the track under an oral agreement with Taxpayer. Taxpayer and ***2A*** also have a separate written sanction agreement that relates to the operation of the track facility and the operation of the races. The Tax Collector issued an assessment that considered Taxpayer to be in the business of licensing real property for use.

Taxpayer first argues that its business is not the licensing of real property for use. Taxpayer simply entered into an operating agreement with ***2A*** for ***2A*** to operate the tack for Taxpayer's benefit. Taxpayer does not receive any income for its activity.

Taxpayer sanctions races both at tracks owned by the operator and at tracks leased by Taxpayer from the owner. Taxpayer has a sanction agreement with each track operator to run ***Motor Bike races*** whether the track is owned by the operator or is leased by Taxpayer and Taxpayer has a verbal agreement with the operator. In each instance the sanctioning agreement and manner of operating the races and charging fees appear to be the same.

The sanction agreements generally provide that the operator will run the facility in a safe manner, provide race results in a timely manner, provide some insurance, agree to not run any races on the track for any other sanctioning body and contain a one year no compete clause. Taxpayer uses the same form though some operators may make changes to the form.

Taxpayer has a verbal agreement with ***2A*** relating to the use of the track. We have to therefore rely on the conduct of the parties to determine whether a verbal license agreement exists. Here, Taxpayer's arrangement with the ***2A*** appears similar or the same as Taxpayer's arrangement with other operators who own their own track and in which Taxpayer has no interest. Both are subject to the same or similar sanction agreements and reporting requirements. Other than the 30 national events held out-of-state, Taxpayer does not actually conduct or operate any events, including one's held in the City.

The code defines a license for use as an agreement for the use of the owner's property where the agreement does not qualify as a sale, lease or rental agreement. Here, the verbal agreement described by Taxpayer does not qualify as a sale, lease or rental. But Taxpayer does allow ***2A*** to operate Taxpayer sanctioned ***Motor Bike races*** on the property. That is a licensed use.

The fact that Taxpayer limits ***2As'*** activity or when ***2A*** may operate is not inconsistent with a license. First, Taxpayer's limitations on ***2A*** appears to be more a function of the sanction agreement. Other track operators use their own property to run sanctioned races. The sanction agreement limits those operators to running races on their track that are sanctioned by Taxpayer.

Second, courts have found a license agreement even where limitations were placed on a licensee's activity on the property. For example, in *Wenner v. Dayton-Hudson Corp.* 123 Ariz. 203, 598 P.2d 1022 (App. 1979), a department store owner entered into agreements with other retailers to maintain certain departments within its stores such as the beauty salon and the shoe department. The agreement gave the retailer the exclusive right to operate a particular type of department within the store, and the retailer was allowed to conduct only that type of business within the store. The retailer had no right to exclusive possession of any part of the building, the space was not specifically delineated and could be changed from time to time at the licensor's discretion. The retailer only had access to the store when the store was open to the public and could only conduct business at such times as the store was open. The court held the agreement to be a license.[1]

Similarly, the Arizona Court of Appeals in *County of La Paz v. Yakima Compost Company, Inc,* 224 Ariz. 590, 233 P.3d 1169 (App. 2010) said that a "license" is an authority or permission to do a particular act or series of acts upon the land of another without possessing any interest or estate in such land. In that case the agreement allowed a sewage sludge processor to use county landfill property for drying sludge for three years. The agreement did not give the processor a right of exclusive possession of land. The agreement was held to be a license.

Taxpayer received income subject to the privilege tax. Taxpayer is liable for expenses related to the property such as payments to ***BUC*** and utilities. Taxpayer is reimbursed for those expenses by ***2A***. Under the code income includes reimbursements for expenses such as property taxes, repairs, maintenance, insurance and other services that may normally be provided by a landlord in connection with the lease.

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[1] The question in *Wenner v. Dayton-Hudson Corp.* was whether the agreement was a lease or a license.

Taxpayer argues that it could have structured the arrangement differently and made ***2A*** employees in which case there would be no questions of a lease to ***2A***. Taxpayer however prefers to have an independent contractor relationship with the operators of the tracks. The relationship between Taxpayer and the track operator appears similar whether or not the operator owns the facility. Taxpayers are free to use whatever form of business they choose, but in choosing a form they must accept its advantages and disadvantages. *Higgins* v. *Smith***,** 308 U.S. 473 (1940).

Taxpayer did not provide records for all months of the audit period. A part of the assessment was thus estimated on income information for months where records were provided. CTC §§ 62-545(b) and 62-555(e) authorize the Tax Collector to determine the correct tax by estimating Taxpayer's income on a reasonable basis. It was reasonable for the Tax Collector to base his estimate on Taxpayer's history for months where records were provided. It is Taxpayer's responsibility to prove that the Tax Collector's estimate is not reasonable and correct. Taxpayer did not provide information to show that the Tax Collector's estimate was not reasonable.

Finally, Taxpayer argued that ***BUC*** charged Taxpayer an amount for tax payable by ***BUC*** to the City on ***BUC's*** lease or license to the property. Taxpayer contends that the City is thus being paid sales tax on the same rental obligation twice. CTC § 62-445 taxes a license to the final license. Our holding is that under the code Taxpayer is licensing the property to ***2A***, the final licensee, and is therefore subject to the privilege tax. Any impact this decision has on Taxpayer's agreement with ***BUC*** is not before us.

Findings of Fact

1. ***Taxpayer***, is in the business of sanctioning bicycle races.
2. Taxpayer is the rules body for ***Motor Bike races***.
3. Taxpayer sanctions over 15,000 races per year at over 370 different tracks.
4. One of the tracks is located in the City.
5. The property where the track is located is owned by ***BUC.***
6. In the past, the property where the track is located was leased by ***BUC*** to a different entity.
7. Taxpayer sanctioned races at the track when it was leased by the other entity.
8. At that time there were a number of different sanctioning bodies.
9. The other entity changed to a different sanctioning body and Taxpayer lost the sanctioning rights to the track.
10. Taxpayer wanted the sanctioning rights so when the opportunity arose, Taxpayer leased or licensed the track from ***BUC***.[2]
11. Taxpayer pays rent or license fee to ***BUC***.
12. ***BUC*** charges Taxpayer an amount for City privilege tax.
13. Taxpayer generally does not lease the tracks where the races are held, but does in some instances.
14. Taxpayer has an oral agreement with ***2A*** to be the track operator.

[2] A copy of the agreement between Taxpayer and SRP was not included in the record.

15. The basic terms of the verbal agreement are to run a ***Motor Bike race*** program and pay the expenses that Taxpayer pays.

16. Taxpayer testified that **2A** do not use the property for any purpose but at the direction of Taxpayer to operate the track to run sanctioned races.

17. Track operators charge a membership fee on behalf of Taxpayer and individual race fees.

18. ***2A*** operate the track and sell ***Taxpayer*** memberships on behalf of Taxpayer.

19. The arrangement is that ***2A*** retain the race fees they collect after deducting the expenses associated with the track such as utility expenses and the rental obligation to ***BUC***.

20. Taxpayer sends an invoice to ***2A*** for the rental payments to ***BUC***, state privilege tax payable under the amusement classification and other track related expenses incurred by Taxpayer.

21. Taxpayer pays the expenses associated with the track to assure that the expenses are paid and that they do not lose control of the track.

22. The utilities are in the name of and are billed to Taxpayer.

23. ***2A*** have full access to the property for the purpose of operating Taxpayer sanctioned ***Motor Bike races*** for ***Taxpayer*** participants.

24. Approvals are needed for ***2A*** to run a race. ***2A*** have always raced on Friday and Sunday so that is what is required.

25. A schedule is presented by ***2A*** to Taxpayer.

26. Taxpayer does not own any tracks. Taxpayer does hold the leases on some tracks similar to its arrangement with the track in the City.

27. Taxpayer and ***2A*** entered into a written sanction agreement. The agreement is basically the same for all track operators.

28. The sanction agreement generally provides that the operator will run the facility in a safe manner, report all of the races in a timely manner, provide some insurance, will not run any races on the track that are not sanctioned by Taxpayer and will not compete for one year. [3]

29. Taxpayer uses the same sanction agreement form though some track operators may make changes to the standard agreement.

30. As a sanctioning body, Taxpayer provides the support and service to 383 tracks around the country. Taxpayer also provides membership services to 70,000 members. Member of ***Taxpayer*** get a magazine, secondary health insurance and the ability to race at any of the member tracks.

31. Taxpayer provides a five million dollar liability policy for each sanctioned track and the program and support to run races at the tracks.

32. The track operator completes a tack operator reporting form for each event. The form reports event information such as amount of funds received, number of riders and number of races.

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[3] A copy of the sanction agreement was not included in the record.

33. All track operators complete the same form whether or not the operator owned the facility or was operating under a different arrangement.

34. Taxpayer can use the track for its purposes, such as photo shoot.

35. Taxpayer testified it can terminate its relationship with ***2A*** immediately.

36. Taxpayer runs 30 events per year, which are the national series where Taxpayer actually operates the race.

37. The races at the facility located in the City are local races not operated by Taxpayer.

38. The national series events are not held at the facility in the City.

39. The track operator does not charge an admission or spectator fee.

40. For the months Taxpayer provided records the gross income included in the assessment was calculated on the amounts Taxpayer billed ***2A*** to reimburse Taxpayer's expenses.

41. For months Taxpayer did not provide records, the Tax Collector estimated gross receipts based on the income for months when records were provided.

42. Taxpayer did not present evidence relating to its gross receipts for the months where no records were provided.

Conclusions of Law

1. CTC § 62-445 imposes the city privilege tax on the business activity of renting, leasing or licensing for use real property located in the city to the final licensee.

2. CTC § 62-100 defines "Licensing (for Use)" as any agreement between the user ("licensee") and the owner or the owner's agent ("licensor") for the use of the licensor's property whereby the licensor receives consideration, where such agreement does not qualify as a "sale" or "lease" or "rental" agreement.

3. The verbal agreement between Taxpayer and ***2A*** allows ***2A*** access to and use of the property to run ***Motor Bike races*** sanctioned by Taxpayer.

4. Allowing ***2A*** access and use of the property for a particular purpose is a license within the meaning of CTC § 62-100

5. A licensor may restrict a licensee's use of the property. *See, Wenner v. Dayton-Hudson Corp., supra; County of La Paz v. Yakima Compost Company, Inc, supra.*

6. The amount of the tax is measured by the income Taxpayer receives from the business activity. CTC § 62-445(a).

7. Taxable income from the business activity of leasing or renting real property includes payments by the tenant for property taxes, repairs, maintenance, insurance and other services that may normally be provided by a landlord in connection with the lease. CTC § 62-445(a)(1).

8. Taxpayer has not provided the required records for the entire audit period showing Taxpayer's income attributable to its activities in the City.

9. The Tax Collector was authorized to estimate Taxpayer's income to determine the correct tax. CTC § 62-555(e).

10. The Tax Collector's estimate is required to be made on a reasonable basis. CTC § 62-545(b).

11. The Tax Collector's estimate based on Taxpayer's past tax history was reasonable.

12. It is the responsibility of the taxpayer to prove that the Tax Collector's estimate is not reasonable and correct. CTC § 62-545(b).

13. Taxpayer did not prove that the Tax Collector's estimate of gross receipts was not reasonable and correct.

14. Taxpayers are free to use whatever form of business they choose, but in choosing a form they must accept its advantages and disadvantages. *Higgins* v. *Smith***,** 308 U.S. 473 (1940).

15. A business may, but is not required to, pass the cost of the tax onto its customers.

16. The Tax Collector's assessment issued to Taxpayer was proper.

17. Taxpayer's protest that its activity is not taxable under CTC § 62-445 is denied.

Ruling

It is therefore ordered that Taxpayer's protest to the City's audit assessment for the period October 1, 1991 through March 31, 2012 is denied.

The Tax Collector's assessment is affirmed.

Taxpayer has timely rights of appeal to the Arizona Tax Court pursuant to Model City Tax Code Section –575.

Sincerely,

Hearing Officer

HO/7100.doc/10/03

c: ***Chandler Tax Audit Supervisor***
Municipal Tax Hearing Office