

DECISION OF MUNICIPAL TAX HEARING OFFICER

June 14, 2012

Taxpayer
Taxpayer's Address

Taxpayer
MTHO #682

Dear Taxpayer:

We have reviewed the evidence presented by *Taxpayer* and the City of Tucson (Tax Collector or City) at the hearing on February 27, 2012 and in post hearing memoranda. The review period covered was September 1, 2007 through July 31, 2011. Taxpayer's protest, Tax Collector's response, and our findings and ruling follow.

Taxpayer's Protest

Taxpayer operates a night club and hosts musical artists almost every night. A few times a week Taxpayer collects a cover charge for people to listen and watch the musicians. The money collected goes to the artists after paying any sound engineers. The musicians are artist that write their own music and consider the performance as much a part of the artistic statement as the music itself. The City's brochure and the tax code state that Fine Art and Musical Art performances are exempt from sales tax. Taxpayer does not benefit financially from having artists perform. Taxpayer actually loses money on the effort.

Tax Collector's Response

Taxpayer operates as a night club and frequently has live entertainment. The patrons pay a door charge to enter the club. Taxpayer is taxable on the door charge under the amusement classification because Taxpayer is a business charging admission for exhibition, amusement or entertainment. Taxpayer's income from the door charge is not exempt as income from the sale of art. The exemption for the sale of fine art is under the retail classification, not under the amusement classification. Also, Taxpayer is not entitled to a deduction for the amount paid to the bands. No deduction is allowed under the tax code for expenses of any kind.

Discussion

Taxpayer operates a night club and hosts live musical acts. At times Taxpayer collects a cover charge. Taxpayer did not included the cover charge in its taxable receipts during the audit period. The Tax Collector audited Taxpayer and considered the cover charge taxable under the amusement classification. Taxpayer protested arguing that the cover charge is exempt because the sale of the musical performance is exempt as the sale of fine art. The musicians perform their own music and are not cover bands performing music written by others. Taxpayer also states that it does not benefit financially from having the artists perform because the cover charge is paid to the musician after paying for a sound engineer if one was required.

The Tax Collector contends that Taxpayer is taxable under the amusement classification because it charges an admission for entertainment. Amusements are subject to the City privilege tax under Tucson City Code (TCC) § 19-410. By hosting live musical acts and charging a door fee for people to listen and watch the musicians, Taxpayer is conducting a concert and charging admission for entertainment. Taxpayer is therefore subject to the City privilege tax under the amusement classification for the live musical acts.¹

Is Taxpayer's Activity Exempt as the Sale of Fine Art?

Taxpayer relies on an exemption for the sale of fine art from the privilege tax under the retail classification. Taxpayer contends that the City's brochure recognizes that musical art performances are not subject to the privilege tax. Taxpayer's amusement activities are not exempt under the retail exemption for the sale of fine art.

First, the exemption for the sale of fine art is an exemption from the privilege tax that would otherwise be imposed under the retail classification. The exemption does not apply to the other taxable classifications, such as amusements. In hosting musical acts, Taxpayer does not sell tangible personal property at retail. Taxpayer is presenting entertainment.

Second, even if the exemption for fine art under TCC § 19-465(20) applied, the exemption only applies to the sale of art creations by the original artist. Here, Taxpayer is not the original artist.

Were the Cover Charges Includable in Taxpayer's Gross Receipts?

Taxpayer requested corrections to the audit for two categories of musical events Taxpayer contends were incorrectly included in the assessment. Taxpayer contends that it has no part in shows produced by outside promoters. Taxpayer only provides the room. Taxpayer also hosts nonprofit organizations for charity benefits. Donations collected at benefit shows are retained in whole by the charity. Donations by the public are given directly to the charity which retains the donation.

The door or cover charges at issue were included in Taxpayer's daily sales sheets. The Tucson City Code provides a presumption that all gross income is subject to the tax until the contrary is established by the taxpayer. Here the amounts were included in Taxpayer's records. Taxpayer did not provide evidence that it was acting as an agent and collected the cover charge for others. Taxpayer's daily sales sheets did not clearly identify the nature of the cover charges. Therefore, based on the record, Taxpayer has not established that the cover charges are not subject to the City privilege tax.

Based on the forgoing, the City's privilege tax assessment to Taxpayer was proper.

Findings of Fact

1. Taxpayer operates a night club and hosts musical artists almost every night.
2. A few times a week Taxpayer collects a cover charge for people to listen and watch the musicians.
3. Taxpayer did not pay a City privilege tax on the cover charge.

¹ Taxpayer is also taxable under the restaurant classification for operating the night club. The Tax Collector made an insignificant adjustment to Taxpayer's restaurant income and that adjustment is not at issue here.

4. The Tax Collector conducted an audit assessment of Taxpayer for the period September 1, 2007 through July 31, 2011 and issued an assessment.
5. The assessment included the cover charge in Taxpayer's gross income subject to tax under the amusement classification.
6. Taxpayer timely protested the assessment stating that Fine Art and Musical Art performances are exempt from sales tax. The money collected goes to the artists. The musicians are artist that write their own music and consider the performance as much a part of the artistic statement as the music itself.
7. Taxpayer submitted a copy of the City's brochure addressing retail sales.
8. The brochure provides in part that a one of a kind art creation such as a painting, sculpture or music piece that is aesthetic only and sold by the original artist is not taxed under the retail privilege tax.
9. Taxpayer also submitted copies of Plush Daily Sheet for fifteen specific dates and requested corrections to the audit.
10. Taxpayer contends that the musical events were either presented by outside promoters or were held in connection with a charitable event and,
 - a. Taxpayer has no part in shows produced by outside promoters. Taxpayer provides the room and charges a fee on which it pays the rental tax.
 - b. Taxpayer hosts many nonprofit organizations for charity benefits. Donations collected at benefit shows are retained in whole by the charity. Donations by the public are given directly to the charity. Taxpayer donates the room and the bands pay for free.
11. The door cover charges for the fifteen events were listed on Taxpayer's Daily Sheet.
12. The auditor arrived at the monthly income from door or cover charges from Taxpayer's daily sales sheets.

Conclusions of Law

1. TCC § 19-410(a) imposes the City privilege tax, measured by gross income, on the business activity of conducting various amusement activities, including concerts and any other business charging admission for exhibition, amusement or entertainment.
2. Taxpayer is engaged in amusement when it hosts musical acts it its night club.
3. TCC § 19-400(c) provides that it shall be presumed that all gross income is subject to the tax until the contrary is established by the taxpayer.
4. TCC § 19-400(d) provides that all exemptions, deductions and credits set for in the article shall be limited to the specific activity or transaction described and not extended to include any other activity or transaction subject to the tax.
5. The privilege tax is measured by a Taxpayer's gross income from its business activity. TCC §§ 19-400(a) and 19-410(a).
6. Gross income includes the total amount of the value proceeding or accruing from the sale of property and the providing of a service. TCC § 19-200(a)(1).

7. TCC § 19-465(20) exempts sales of paintings, sculptures or similar works of fine art, provided that such works of fine art are sold by the original artist.
8. TCC § 19-465 provides exemptions from the tax imposed by TCC § 19-460.
9. TCC § 19-460 imposes the privilege tax on the sale of tangible personal property at retail.
10. The exemptions provided by TCC § 19-465 only apply to the retail classification and do not apply to other classifications, including the amusement classification. TCC § 19-400(d) and TCC § 19-465.
11. The cover charges at issue were reported in Taxpayer's books and records.
12. Taxpayer has not presented evidence that it was acting as an agent and collected the cover charge for others.
13. Taxpayer has not established that the cover charge is not subject to the City privilege tax.
14. The City's privilege tax assessment to Taxpayer for the period September 1, 2007 through July 31, 2011 was proper.

Ruling

Taxpayer's protest of an assessment made by the City of Tucson for the period September 1, 2007 through July 31, 2011 is denied.

The Tax Collector's Notice of Assessment to Taxpayer for the period September 1, 2007 through July 31, 2011 is upheld.

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

Sincerely,

Hearing Officer

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c: ***Tax Audit Administrator***
Municipal Tax Hearing Office