03-0490
AUDIT
SIGNED 04-23-2005

BEFORE THE UTAH STATE TAX COMMISSION

PETITIONER.,	)	**FINDINGS OF FACT, CONCLUSIONS OF LAW, AND FINAL DECISION**
Petitioner,	)	
	)	Appeal No. 03-0490
v.	)	
	)	Account No. #####
AUDITING DIVISION OF THE	)	Tax Type: Tourism Tax (Restaurant)
UTAH STATE TAX COMMISSION,	)	Tax Periods: 09/01/99 - 05/31/02
	)	
Respondent.	)	Judge: Chapman

Presiding:
Kerry R. Chapman, Administrative Law Judge

Appearances:
For Petitioner: PETITIONER REP 1, COMPANY
PETITIONER REP 2, General Counsel, PETITIONER
For Respondent: RESPONDENT REP 1, Assistant Attorney General
RESPONDENT REP 2, from the Auditing Division
RESPONDENT REP 3, from the Auditing Division

STATEMENT OF THE CASE

This matter came before the Utah State Tax Commission for a Formal Hearing on August 17, 2004. Pursuant to Utah Code Ann. §59-12-209(2), Salt Lake County was afforded an opportunity to intervene, but did not do so. Based upon the evidence and testimony presented at the Formal Hearing, the Tax Commission hereby makes its:

FINDINGS OF FACT

1. The tax in question is the tourism, recreation, cultural, and convention facilities tax ("tourism tax").

2. Specifically at issue is the imposition of the tourism tax on sales of prepared foods and beverages that are sold by restaurants.

3. This matter is before the Tax Commission based upon an audit assessment imposed by Auditing Division (the "Division") for the taxable periods September 1, 1999 through May 31, 2002 not only for sales and use tax, but also tourism tax. The only issue before the Commission, however, is the tourism tax assessed on sales of food and beverages at certain locations in the (X) at FACILITY, in CITY, Utah.

4. The Division asserts that the sales at issue were made by a "restaurant" that is required to collect the tourism tax. The Petitioner asserts that the sales at issue were made by a "theater that sells food items" that is not required to collect the tax.

5. FACILITY is a commercial development in CITY, Utah that includes (PORTION REMOVED). The FACILITY website at (X) ("website") advertises the THEATER under the designation "(X)." At the THEATER, the Petitioner exhibits movies on (X) indoor theater screens. Under the designation " (X)," the website also advertises (X) "restaurants" located at FACILITY: (PORTION REMOVED)(Exhibit R-3).

6. (PARAGRAPH REMOVED)

7. The (X) is advertised on the website as including (PORTION REMOVED), in addition to a number of separately named locations at which food and beverages may be purchased, all but one of which is owned and operated by the Petitioner (Exhibit R-3).

8. In its audit assessment, the Division identifies the (X) locations on whose sales it assessed tourism tax to be (WORDS REMOVED) (Schedule 6, Page 9 of Exhibit R-1). The audit report information also indicates that sales made at the (WORDS REMOVED) locations were sometimes reported with the sales made at the (X) location.

9. (WORDS REMOVED) are also locations in the (X) that sell food and beverages. However, the Division did not assess the tourism tax on their sales. The Division determined that the (X) locations were part of a "theater that sells food items" and, as a result, its sales were not subject to the tourism tax. The (X) locations sell popcorn, candy, drinks, and hot dogs, in addition to other food items.

10. Because the (X) has a different owner and reports its sales on a different tax account, its sales are not at issue in this appeal.

11. The (X) webpage on the FACILITY website indicates that the (X) is located " (PORTION REMOVED) " (Exhibit R-3). It also indicates that moviegoers may purchase food and beverages from any of the locations in the (X) and carry their purchases with them into the theater to watch a movie. The (X) individual theater screens are located down various hallways that lead out from the (X) in the center of the building (Exhibit R-6). A customer must purchase a movie ticket to enter one of the hallways leading to the theaters.

12. (PARAGRAPH REMOVED)

13. Each of the locations selling food and beverages in the (X) also has an individual webpage under the website's "(X)" designation (Exhibit R-3).

14. A non-moviegoer may purchase food and beverages at all locations identified on the (X) webpage, including (X) separate locations identified as (X).

15. (PARAGRAPH REMOVED)

16. The Respondent submitted a page of a financial document it had received from the Petitioner for purposes of the audit (Exhibit R-5). The document provides some information concerning the Petitioner's revenues and costs during one month of the audit period, as well as year-to-date information. The document shows that the Petitioner separately accounts for the revenue generated by sales of admissions to the theaters (i.e., ticket sales), sales of admissions to the (WORDS REMOVED), and sales of food and beverages at each of its separately named (X) locations.

17. The Petitioner did not collect or remit tourism tax on any of its sales of food and beverages at the (X), asserting that these sales are made by a "theater that sells food items" and, as such, are not subject to the tourism tax.

18. The Division agreed with the Petitioner that the sales of food and beverages at the (X) locations are not subject to the tourism tax. However, the Division asserts that sales of food and beverages at the Petitioner's other locations in the (X) are sales by a "restaurant" or "restaurants" that are separate enterprises from the theater and, as a result, are subject to the tourism tax.

19. The Division contends that most of the (X) locations are a separate enterprise from the theater because the (X) is advertised as a destination separate from the theater and because it sells food not only to moviegoers, but to non-moviegoers as well.

20. The Petitioner submitted a menu showing the prices of items sold at (X), one of the locations in the (X) on which tourism tax was assessed. The menu shows that combination meals with a sandwich, fries, and small drink sell for prices ranging from $$$$$ to $$$$$. Beverages at (X) are priced at $$$$$ for a small, $$$$$ for a medium, and $$$$$ for a large (Exhibit P-1).

21. For comparison purposes, the Petitioner compiled the hours of operation of the (X) and those for (WORDS REMOVED). The (X)'s hours of operation are related to the times at which movies are shown at the THEATER, while the restaurants listed operate at somewhat different hours (Exhibit P-2).

22. Each separately named location in the (X) rings up its own sales, so that a customer wanting to purchase food and beverages from two differently named (X) locations must complete two separate transactions.

23. The Petitioner conducted a survey of customers purchasing food or beverages at the (X) on three separate days and submitted as evidence a summary of the survey results (Exhibits P-4 and P-6). In conducting the survey, the cashiers at the various (X) locations asked their customers whether they were attending a movie or, in same instances, what movie they were seeing. The employees conducted the survey on (THREE DATES LISTED). The Petitioner has compiled the customer's responses on its exhibits, which show that the percentage of (X) customers answering that they were not attending a movie was less than %%%%% of all customers on Wednesday, less than %%%%% on Friday, and less than %%%%% on Saturday. For the three days combined, the percentage of (X) customers who answered that they were non-moviegoers

was approximately %%%%%. However, on certain days and for certain separate locations in the (X), such as (X), the percentage of customers who answered that they were not attending a movie was %%%%% or more.

24. The Petitioner contends that other theaters with similar (X)s do not charge the tourism tax on their sales of food and beverages. The Petitioner submitted as evidence a sales receipt for (WORDS REMOVED) at the (X) location at the THEATER 2 at FACILITY 2. The Petitioner states that the FACILITY's theater manager purchased this food on June 18, 2003 without purchasing a movie ticket. The amount of tax charged was 6.6% of the total purchase price, which did not include a charge for the tourism tax (Exhibit P-3).

25. When the Petitioner completed and filed its Form TC-69, Utah State Business and Tax Registration Form, it represented on the form that its business was "movie theater, food/beverage and related concession sales." On the form, the Petitioner checked those boxes indicating that not only would it be making sales of goods or services from a place of business located in Utah, but that it also would be making sales of restaurant sales of prepared foods, tourism and/or short term (less than 30-days) rental or lease of motor vehicles (Exhibit R-2).

APPLICABLE LAW

1. For the audit period, Utah Code Ann. §59-12-603(1) provided for the imposition of a tourism tax, pertinent parts as follows:

> In addition to any other taxes, a county legislative body may, as provided in this part, impose a tourism, recreation, cultural, and convention tax as follows:
> . . .

> (b) a county legislative body of any county may impose a tax of not to exceed 1% of all sales of prepared foods and beverages that are sold by restaurants . . . .

2. For purposes of imposing the tourism tax, Utah Code Ann. §59-12-602(4) defines "restaurant" as follows:

> (a) "Restaurant" includes any coffee shop, cafeteria, luncheonette, soda fountain, or fast-food service where food is prepared for immediate consumption.
> (b) "Restaurant" does not include:
> (i) any retail establishment whose primary business or function is the sale of fuel or food items for off-premise, but not immediate, consumption; and
> (ii) a theater that sells food items, but not a dinner theater.

3. To administer the tourism tax, the Tax Commission adopted Utah Admin. Rule R865-12L-17 ("Rule 17"), which, during the audit period, provided in pertinent part as follows:

> A. "Restaurant" means any retail establishment, other than a theater, whose primary business is the sale of foods and beverages prepared for immediate consumption. . . .
> 1. Restaurant does not include any retail establishment whose primary business is the sale of fuel or food items for off-premise, but not immediate, consumption, totaling more than 50 percent of the revenues. In the case of a retail establishment with more than two lines of business, primary business means the line of business that generates the highest revenues when compared with the other lines of business.
> B. "Retail establishment" means a single outlet, whether or not at a fixed location, operated by a retailer or vendor. . . . A single retailer or vendor engaged in multiple lines of business at one location may be deemed to be operating multiple retail establishments if the lines of business are not commonly regarded as a single retail establishment or if there are other factors indicating that the lines of business should be treated separately. The operation of concession stands by stadium owners, performers, promoters, or others with a financial interest in ticket sales or admission charges to any

> event shall be considered a separate line of business constituting a retail establishment.
> C. "Primary business" means the source of more than 50 percent of the revenues of the retail establishment. . . .
> . . .
> E. "Theater" means an indoor or outdoor location for the presentation of movies, plays, or musicals.
> . . .

DISCUSSION AND CONCLUSIONS OF LAW

The Petitioner owns and operates the THEATER, a (X) movie theater, located at FACILITY in CITY, Salt Lake County, Utah. The theater is located in a large building in which the Petitioner also sells food and beverages at a number of separately named locations cumulatively advertised as the (X). At issue is whether the Petitioner's sales of food and beverages at the (X), other than those at the (X)'s (X) locations, are subject to the tourism tax.

Section 59-12-603(1)(b) provides that a county legislative body may impose a tourism tax not to exceed 1% on all sales of prepared foods and beverages that are sold by a restaurant. Section 59-12-602(4)(b)(ii) provides that, for purposes of Section 59-12-603, a "restaurant" does not include "a theater that sells food items, but not a dinner theater." The Division conducted an audit of the Petitioner and determined that only a portion of the sales made at the (X), specifically the sales made at the (X) locations, were sales by a theater and not subject to the tourism tax. The Division determined that the Petitioner's sales at its other (X) locations were not sales by a theater, but sales by a restaurant enterprise separate and distinct from the theater enterprise that are, as a result, subject to the tourism tax. The Petitioner

asserts that none of its sales at the (X) are subject to the tourism tax because they are all sales made by "a theater that sells food items."

Although Section 59-12-603 imposes the tourism tax on a "restaurant," not every enterprise that sells food and beverages is defined to be a restaurant. For purposes of the tourism tax, "restaurant" is defined in Section 59-12-602(4)(b) specifically *not* to include two types of establishments that sell food and beverages: i) any retail establishment whose primary business or function is the sale of fuel or food items for off-premise, but not immediate consumption; and ii) a theater that sells food items, but not a dinner theater. The (X) locations do not primarily sell fuel or food items for off-premise, but not immediate consumption. Accordingly, Subsection 602(4)(b)(i) is not at issue in this matter.

At issue, however, is whether the THEATER and all of the (X) locations at issue comprise a single retail enterprise that is a "theater that sells food items, but not a dinner theater." If so, the tourism tax would not apply to the Petitioner's sales of food and beverages at the (X). The Commission does not consider the THEATER and the (X) to be a single enterprise that is a "dinner theater," which, if it were, would be a "restaurant" pursuant to the Subsection 602(4)(b)(ii).[1] As shown by Exhibit R-5, approximately %%%%% of the revenues generated by the Petitioner at FACILITY are from sales at its (X) locations, while

1 In the 1987 Standard Industrial Classification Manual, of the federal Executive Office of the President, Office of Management and Budget, a "dinner theater" is classified as an "Eating Place" under SIC Code 5812. "Eating Places" are described as "[e]stablishments primarily engaged in the retail sale of prepared food and drinks . . ." In the 1997 North American Industry Classification System, of the federal Executive Office of the President, Office of Management and Budget, NAICS Code 711110 provides that establishments commonly known as "dinner theaters" are "engaged in producing live theatrical productions and in providing food and beverages for

approximately %%%%% of the revenues are from sales of movie tickets. Because the primary source of the Petitioner's revenues at FACILITY is from movie ticket sales, and not food and beverage sales, the Commission finds that the Petitioner is primarily engaged in sales of movie tickets, not food and beverages. In addition, the Petitioner does not produce live theatrical productions. For these reasons, the Commission finds that the Petitioner does not operate an enterprise at FACILITY classified as a "dinner theater," as described under either the SIC or NAICS Codes.

Section (E) of Rule 17 defines "theater" to mean "an indoor or outdoor location for the presentation of movies, plays, or musicals." Because the THEATER is an indoor location for the presentation of movies, it is undisputed that the Petitioner operates a "theater" at FACILITY. It is also undisputed that the Petitioner sells food items in the same building in which its motion picture theater is located. However, the Commission believes further analysis is necessary before determining whether the (X) locations are part of a single theater enterprise, as the Petitioner argues, or whether a portion of the (X) locations are a "restaurant" enterprise separate from the theater enterprise.

On first impression, it would appear that the (X) might be considered a restaurant or restaurants like those enterprises found at (X)s located in malls. Like a (X) at a mall, the (X) at FACILITY is comprised of a group of separately named food locations that serve various types of food and beverages to the general public. Whether at the (X) at FACILITY or a (X) at a mall, a customer may purchase food and beverages at any of the (X

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consumption on the premises."

) locations without first having to be a customer of the larger facility; i.e., without purchasing a movie ticket at the THEATER or shopping at the mall. Like a (X) at a mall, a customer wanting to purchase food from two separate locations must complete two separate transactions. In addition, the (X) is advertised by the Petitioner as an "event all its own" that can be enjoyed separately from the movie going experience. Exhibits P-4 and P-6 show, in fact, that non-moviegoers comprise as high as %%%%% of the weekday customers purchasing food and beverages at two of the (X) locations.

On the other hand, a motion picture theater has traditionally sold concession snacks, such as soft drinks, popcorn, and candy to its customers, usually from a concession location in the lobby of the theater. It is clear that the Legislature did not intend for sales of food and beverages at such "traditional" concession locations to be deemed a "restaurant' for purposes of the tourism tax. Over time, however, the venues at which movies have been shown have evolved from theaters with one or two screens to "(X)" theaters that can house dozens of screens and, specifically in this matter, (X) screens. For a motion picture theater to accommodate an exponential increase in its number of screens and associated moviegoers, it is reasonable to assume that the theater must also increase either the size or the number of its concession locations, or both. The Commission believes that even though the concession locations may be larger in size and number of locations to accommodate a "(X)" theater, the concession locations may, depending on the circumstances, still remain part of a single theater enterprise.

With the necessity for multiple and larger concession locations in a "(X)"

theater comes the opportunity for the theater to diversify the food and beverages it provides. For marketing purposes, it may also be advantageous for a "(X)" theater to advertise that it provides a moviegoer with more food and beverage choices than a competing theater and to segregate its multiple concession locations into distinct venues with different names.

The Commission must consider the evolution of the motion picture theater industry in context with the Utah statutes and regulations that were in effect during the audit period. In Section 59-12-602(4)(b)(ii), the Legislature has specified that the restaurant tax is not imposed on a "a theater that sells food items . . ." In its audit, the Division has attempted to divide the (X) locations into two distinct enterprises by delineating between the (X) locations that have a name clearly associated with the theater enterprise, and the other (X) locations without names associated with the theater. While this is one factor to consider in deciding whether all or a portion of the (X) is an enterprise separate from the theater, the Commission notes that Subsection 602(4)(b)(ii) was not written to provide that "a theater that sells popcorn, candy, hot dogs, and drinks" is not a restaurant. The statute itself places no restrictions on a theater and its concession facilities qualifying as a single enterprise based on the *type* of food items that are served.

Based on the evidence and testimony provided at the Formal Hearing, the Commission believes that all of the locations in the (X) at FACILITY should be considered the same enterprise, either as part of the theater enterprise or as a restaurant enterprise that is separate from the theater. All of the separately named locations in the (X), including the two main (X) locations, are advertised collectively as the "(X)" on the FACILITY website and

sell their food items to moviegoers and non-moviegoers like. All of the (X) locations are grouped together in the center of the THEATER. All of the locations primarily sell their food items to moviegoers.[2] A moviegoer purchasing food items from any (X) location may take that food into the movie on trays provided at the (X) that are specifically designed for placement on a theater seat. Exhibit P-2 shows that the (X), not just the (X) locations, operates at hours coordinated with times at which movies are shown at the THEATER. Although the Petitioner keeps a separate accounting of revenues generated by each of the (X) locations (Exhibit R-5), it does not appear that the Petitioner combines or segregates the revenue generated from the (X) locations with the revenue generated by ticket sales.
From these facts, the Commission is convinced that that the (X) locations and the Petitioner's other (X) locations are all part of the same enterprise.

Furthermore, the Commission is further convinced the (X) locations and the THEATER are operated as, and should be considered, a single retail enterprise. The (X) is located in the center of the theater complex and appears to be designed primarily to accommodate the THEATER customers. All businesses located in the building housing the THEATER either support or enhance the theater enterprise. No signage exists on the outside of the THEATER building separately advertising the (X) or any of the food and beverage

2 Although the Commission recognizes that the survey conducted by the Petitioner and summarized in Exhibits P-4 and P-6 may not have been conducted by a professional market research firm, the Commission believes the information provides credible evidence that a minimal percentage of the total number of (X) customers are non-moviegoers and that none of the (X) locations primarily sell food items to non-moviegoers. Neither party submitted evidence or testimony from which the Commission could conclude otherwise.

locations located inside the theater complex. All but a minimal percentage of the (X) customers are also attending a movie at the THEATER (Exhibits P-4 and P-6). Furthermore, the percentage of revenue produced by the sale of food items at the (X), including the (X) locations, is only %%%%% of the total revenue generated by the Petitioner (Exhibit R-5).[3] There is no evidence or testimony to suggest that the Petitioner's total food and beverage revenue as a percentage of its total revenue is atypical for a motion picture theater enterprise. Even the (X) location with the highest percentage of non-moviegoer customers, the (X) location, charges prices for beverages ($$$$$ for a small drink, as shown in Exhibit P-1) that is consistent with prices often charged by other motion picture theaters. It also appears that relatively few customers go to FACILITY for a meal and "(X)." The (X) accounts for less than %%%%% of total revenue.

Even though the Petitioner, when applying for a sales tax license, checked a box on the third page of the application form (Exhibit R-2) indicating that a portion of its sales would be subject to the tourism tax, the Commission finds this fact to have little, if any, impact on its decision. First, the person completing the form may have been unfamiliar with the law. Second, when the Petitioner was asked on the second page of the form to "[d]escribe in detail the specific nature of your business, product, and/or services," the Petitioner answered "MOVIE

3 Because the total revenue generated by food and beverage sales is not the primary source of revenue generate by the Petitioner at FACILITY, the Petitioner's entire operation would appear to qualify a "motion picture theater" enterprise as described in the SIC Codes and NAICS Codes. The Commission also notes that the percentage of total revenue generated by the "non-concession" (X) locations, as shown on Exhibit R-5, is barely half the revenue generated by the "concession" locations.

THEATER, FOOD/BEVERAGE AND RELATED CONCESSION SALES." Such a response appears to relate to a single motion picture theater enterprise.

Furthermore, the Commission does not believe that the issue before it relates to an exemption. Section 59-12-603(1)(b), which imposes the tourism tax in this matter, only imposes the tax on "restaurants." Section 59-12-602(4)(b)(ii) specifically provides that a "theater that sells food items" is not a "restaurant." Accordingly, an entity that qualifies as a "theater that sells food items" is never an entity to which the tourism tax applies and for which an exemption would be required. For these reasons, the Commission believes that Section 59-12-602(4) is a taxing statute that must be construed liberally in favor of the taxpayer. However, the Commission's decision in this matter is not dependent on it construing the statute in such a manner. Based on the evidence and testimony provided at the Formal Hearing, the Commission believes the (X) locations at issue are clearly part of a single retail enterprise that is a motion picture theater enterprise. The Commission would reach the same conclusion even if the statute were deemed an exemption and, consequently, strictly and narrowly construed.

In summary, the (X) appears to be a concession facility needed to serve the Petitioner's (X) motion picture theater enterprise. The Commission finds that the Petitioner's THEATER and its (X) locations are a single retail enterprise, as described in Section (B) of Rule 17(B), and that this enterprise is a "theater that sell food items" that is not a "restaurant" for purposes of the tourism tax. Accordingly, the Commission finds that none of the (X) locations at issue qualify as a "restaurant," as defined in Section 59-12-602, and that sales at these locations are not subject to the tourism tax. That portion of the Division's audit

that imposes tourism tax on sales made at (X) is reversed.

DECISION AND ORDER

Based upon the foregoing, the Commission finds that all of the Petitioner's sales of food and beverages at the (X) at FACILITY are sales made by a "theater that sells food" and, as a result, are not subject to the tourism tax. Accordingly, the Commission grants the Petitioner's appeal and orders that the Division's assessment of tourism tax, as identified on Schedule B of the March 3, 2003 Amended Utah Tax Audit Summary, be reversed.

DATED this _____ day of _____, 2005.

_____
Kerry R. Chapman
Administrative Law Judge

BY ORDER OF THE UTAH STATE TAX COMMISSION.

The Commission has reviewed this case and the undersigned concur in this decision.

DATED this _____ day of _____, 2005.

Pam Hendrickson
Commission Chair

R. Bruce Johnson
Commissioner

Palmer DePaulis
Commissioner

Marc B. Johnson
Commissioner

Notice of Appeal Rights: You have twenty (20) days after the date of this order to file a Request for Reconsideration with the Tax Commission Appeals Unit pursuant to Utah Code Ann. §63-46b-13. A Request for Reconsideration must allege newly discovered evidence or a mistake of law or fact. If you do not file a Request for Reconsideration with the Commission, this order constitutes final agency action. You have thirty (30) days after the date of this order to pursue judicial review of this order in accordance with Utah Code Ann. §§59-1-601 and 63-46b-13 et. seq.

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