

04-1087
Sales/Tourism Tax
Signed 06/08/2007

BEFORE THE UTAH STATE TAX COMMISSION

| | | |
|----------------------|---|--------------------------------|
| PETITIONER, |) | FINDINGS OF FACT, |
| |) | CONCLUSIONS OF LAW, |
| Petitioner, |) | AND FINAL DECISION |
| |) | |
| |) | |
| v. |) | Appeal No. 04-1087 |
| |) | |
| AUDITING DIVISION OF |) | Account No. ##### |
| THE UTAH STATE TAX |) | |
| COMMISSION, |) | Tax Type: Sales/Tourism Tax |
| |) | Tax Year: 11/2000 – 09/2003 |
| |) | |
| Respondent. |) | Judge: Robinson |

Presiding:

Commissioner Marc Johnson
R. Spencer Robinson, Administrative Law Judge

Appearances:

For Petitioner: PETITIONER REPRESENTATIVE, Attorney at Law
For Respondent: RESPONDENT REPRESENTATIVE, Assistant Attorney General

STATEMENT OF THE CASE

This matter came before the Utah State Tax Commission for a Formal Hearing on November 21, 2006. Petitioner challenged an audit done by Respondent on both sales tax and tourism (restaurant) tax. Respondent assessed Petitioner \$\$\$\$\$ in sales tax and \$\$\$\$\$ in tourism tax, plus interest. Both parties focused their evidence and arguments on the applicability of sales tax under 59-12-103 to the \$\$\$\$\$ fee charged by Petitioner to applicants wishing to become members. Because neither party presented evidence or argument regarding the tourism tax (59-12-601 et. seq.) portion of the audit, the portion of the audit dealing with tourism tax is sustained. Based upon the evidence and testimony presented at the hearing, and evidence in the public record, the Tax Commission hereby makes its:

FINDINGS OF FACT

1. The tax in question is sales tax.

Appeal No. 04-1087

2. The period in question is 11/2000 – 09/2003.

3. Petitioner is licensed by the State of Utah as a private club, as defined in §32A-1-105 (10). It is regulated by the Department of Alcoholic Beverage Control. It was originally incorporated as COMPANY A, a non-profit corporation on October 14, 1980. According to the Utah Department of Commerce website, the Articles of Incorporation were amended on June 8, 1995. The amendment changed the name from COMPANY A, to PETITIONER. No other amendments are noted.

4. OWNER 1 testified Petitioner ceased to operate as a non-profit corporation in 1988, but that it did not amend its Articles of Incorporation to reflect that change. The current data on file with the Utah Department of Commerce still lists it as a non-profit.

5. Article IV of the 1980 Articles of Incorporation is captioned “Membership.” It states,

“The corporation shall have a single class of membership which shall be for an annual period, renewable according to the By Laws and House Rules; each membership shall be evidenced by an appropriate membership card, which shall not be assignable or transferable, a careful record of which shall be maintained by the Club; shall be subject to the fees, dues, assessments, and qualifications set forth in the applicable laws and regulations of the State of Utah respecting alcoholic beverages and the By Laws and House Rules; each member shall be a voting member with one vote each and upon dissolution or sale of the Club such voting member shall share equally in the equity; and each member shall be subject to assessment for obligations of the Club.”

6. During the audit period, there were two equity owners, OWNER 1 and OWNER 2. There is no evidence any other persons shared “equally in the equity.” Petitioner proffered no evidence showing that, during the audit period, any type of member had a vote.

7. One must be a member, or the guest of a member, in order to enter. Guests of members are not assessed a fee in order to enter under ordinary circumstances. An additional fee was charged for some events. In such cases, it applied equally to members and their guests.

8. Under the law applicable during the audit, only members, guests, and visitors could enter. Members could authorize guests and visitors. Visitors were assessed a \$\$\$\$ fee for

Appeal No. 04-1087

a visitor card. There were no permanent members, not even the owners. Members had no ownership interest.

9. One became a visitor by applying. There was a \$\$\$\$ application fee. The fee was mandated by §32A-5-107. OWNER 1 testified he would not charge the fee if it were not mandated.

10. Under the law in effect at the time, \$1 of the \$\$\$\$ fee was to be sent to the Alcoholic Beverage Control Commission. Current law does not require payment of a \$1 fee to ABC.

11. OWNER 1 testified Petitioner retained \$\$\$\$ of the fee to process the applications, and sent \$1 to ABC as required. Petitioner provided no documents regarding collection of the fees or what was done with them.

12. Application and payment of the fee made one a visitor for two weeks. Visitors could enter and use the premises as often as they wished during this two-week period without payment of additional application or membership fees. Like members, they could bring guests with them. Guests of visitors paid no application or membership fee to enter and use the premises.

13. OWNER 1 testified that every two weeks Petitioner reviewed membership applications, and approved new memberships or voided memberships. During the period covered by the audit, there would have been approximately 72 of these meetings.

14. Petitioner provided documents (Petitioner's Exhibit 5, which he said were randomly selected) for eight meetings during the audit period where new members were approved and other memberships were voided, or one-ninth of the meetings that should have been held during the audit period.

Appeal No. 04-1087

15. According to OWNER 1, memberships cost an additional \$\$\$\$ per year, for a total of \$\$\$\$\$. Spouse cards cost \$\$\$\$\$. OWNER 1 said when Petitioner approved applicants for membership it applied the \$\$\$\$ fee assessed to visitors to the cost of memberships. OWNER 1 said Petitioner issued refunds to applicants not approved as full members. Petitioner did not provide documentation showing either crediting or refunding of the application fee had been done.

16. Membership ranged from ##### to ##### members at any given time.

17. Petitioner sells alcoholic beverages and food to its members, visitors, and their guests.¹ It collects and remits sales tax on these transactions. Pool tables and video games are available, and may be used for a fee. Petitioner collects and remits sales tax on these transactions.

18. Petitioner holds fashion shows. Occasionally, live music is provided. A cover charge is sometimes assessed when live music is available. On such occasions, sales tax is collected and remitted on the cover charge.

19. Members, visitors, and guests pay sales tax on the above noted transactions, or other similar transactions that may take place, on the same basis.

20. The Division conducted an audit of Petitioner. Petitioner provided a balance sheet to the auditors. It identifies an item called "member door" as income. Membership fees are not listed in a separate category, nor are they broken down by type, such as application fee or visitor fee. There is no indication whether the \$1 fee for the Alcoholic Beverage Control Commission was included in the calculation of member door.

21. Another document Petitioner provided to the auditors, Form "E," a Utah Division of Alcoholic Beverage Control Private Club License Renewal form for 2004-2005, lists

¹ Respondent's Exhibit 4, a printed copy of information from Petitioner's website, details the offerings of Petitioner.

Appeal No. 04-1087

dollar amounts for each month of 2003 in four categories: food; 3.2% beer; liquor; and, membership. The dollar amounts listed as membership for each month of 2003 on Form "E" match the dollar amounts listed as "member door" for each month on the 2003 balance sheet Petitioner provided to the auditors.

22. The balance sheet lists member door as income. Form "E" lists membership under sales and includes it with food, beer, and liquor in total sales. Petitioner pays tax on the other three items listed under sales on Form "E."

APPLICABLE LAW

R861-1A-28. Evidence in Adjudicative Proceedings Pursuant to Utah Code Ann. Sections 59-1-210, 76-8-502, 76-8-503, 63-46b-8.

A. Except as otherwise stated in this rule, formal proceedings shall be conducted in accordance with the Utah Rules of Evidence, and the degree of proof in a hearing before the commission shall be the same as in a judicial proceeding in the state courts of Utah.

Utah Code Ann. §59-1-604. Burden of proof -- Decision of court.

In proceedings of the district court under this part and on appeal therefrom, a preponderance of the evidence shall suffice to sustain the burden of proof. The burden of proof shall fall upon the parties seeking affirmative relief and the burden of going forward with the evidence shall shift as in other civil litigation. The district court shall render its decision in writing, including therein a concise statement of the facts found by the court and the conclusions of law reached by the court. The court may affirm, reverse, modify, or remand any order of the commission, and shall grant other relief, invoke such other remedies, and issue such orders, in accordance with its decision, as appropriate.

Utah Code Ann. §59-12-102. Definitions.

As used in this chapter:

- (1) (a) "Admission or user fees" includes season passes.
- (b) "Admission or user fees" does not include annual membership dues to private organizations.

Utah Code Ann. §59-12-103. Sales and use tax base – Rates – Effective dates – Use of sales and use tax revenues [Effective until July 1, 2006].

(1) A tax is imposed on the purchaser as provides in this part for amounts paid or charged for the following transactions:

.....

(f) except as provided in Section 59-12-104, amounts paid or charged as admission or user fees for theaters, movies, operas, museums, planetariums, shows of any type or nature, exhibitions, concerts, carnivals, amusement parks, amusement rides, circuses, menageries, fairs, races, contests, sporting events, dances, boxing matches, wrestling matches, closed circuit television broadcasts, billiard parlors, pool parlors, bowling lanes, golf, miniature golf, golf driving ranges, batting cages, skating rinks, ski lifts, ski runs, ski trails, snowmobile trails, tennis courts, swimming pools, water slides, river runs, jeep tours, boat tours, scenic cruises, horseback rides, sports activities, or any other amusement, entertainment, recreation, exhibition, cultural, or athletic activity;

R865-19S-33. Admissions and User Fees Pursuant to Utah Code Ann. §§59-12-102 and 59-12-103.

A. "Admission" means the right or privilege to enter into a place. Admission includes the amount paid for the right to use a reserved seat or any seat in an auditorium, theater, circus, stadium, schoolhouse, meeting house, or gymnasium to view any type of entertainment. Admission also includes the right to use a table at a night club, hotel, or roof garden whether such charge is designated as a cover charge, minimum charge, or any such similar charge.

1. This applies whether the charge made for the use of the seat, table, or similar accommodation is combined with an admission charge to form a single charge, or is separate and distinct from an admission charge, or is the sole charge.

B. "Annual membership dues paid to a private organization" includes only those dues paid by members who, directly or indirectly, establish the level of the dues.

C. "Season passes" include amounts paid to participate in specific activities, once annual membership dues have been paid.

D. If the original admission charge carries the right to remain in a place, or to use a seat or table, or other similar accommodation for a limited time only, and an additional charge is made for an extension of such time, the extra charge is paid for admission within the meaning of the law. Where a person or

organization acquires the sole right to use any place or the right to dispose of all of the admissions to any place for one or more occasions, the amount paid is not subject to the tax on admissions. Such a transaction constitutes a rental of the entire place and if the person or organization in turn sells admissions, sales tax applies to amounts paid for such admissions.

E. Annual membership dues may be paid in installments during the year.

F. Amounts paid for the following activities are not admissions or user fees:

1. lessons, public or private;
2. sign up for amateur athletics if the activity is sponsored by a state governmental entity, or a nonprofit corporation or organization, the primary purpose of which, as stated in the corporation's or organization's articles or bylaws, is the sponsoring, promoting, and encouraging of amateur athletics;
3. sign up for participation in school activities. Sign up for participation in school activities excludes attendance as a spectator at school activities.

G. If amounts charged for activities listed in F. are billed along with admissions or user fees, the amounts not subject to the sales tax must be listed separately on the invoice in order to remain untaxed.

Utah Code Ann. §32A-5-107. Operational restrictions. (In effect in 2000)

Each corporation or association granted a private club liquor license and its employees, officers, managing agent, and members shall comply with the following conditions and requirements. Failure to comply may result in a suspension or revocation of the license or other disciplinary action taken against individual employees or management personnel.

(1) Each private club shall hold regular meetings as required by its articles or bylaws and conduct its business through regularly elected officers. Within ten days following the election of any officer, the department shall be notified in writing of the officer's name, address, and office to which the officer has been elected, and the term of that office.

(2) Each private club may admit members only on written application signed by the applicant, following investigation and approval of the governing body. Admissions shall be recorded in the official minutes of a regular meeting of the governing body and the application, whether approved or disapproved, shall be filed as a part of the official records of the licensee. An applicant may not be accorded the privileges of a member until a quorum of the governing body has formally voted upon and approved the applicant as a member. An applicant may not be admitted to membership until seven days after the application is submitted.

(3) Each private club shall maintain a current and complete membership record showing the date of application of each proposed member, the

member's address, the date of admission following application, and the date initiation fees and dues were assessed and paid. The record shall also show the serial number of the membership card issued to each member. A current record shall also be kept indicating when members were dropped or resigned.

(4) Each private club shall establish in the club bylaws initial fees and monthly dues, as established by commission rules, which are collected from all members.

(5) Each private club may allow guests or visitors to use the premises only when previously authorized by a member. A member is responsible for all services extended to guests and visitors. If the guest or visitor is a member of the same fraternal organization as the private club liquor licensee, no previous authorization is required.

(6) Each private club shall limit the issuance of visitor cards for a period not to exceed two weeks and assess and collect a fee from each visitor of not less than \$5 for each two-week period the visitor card is issued. One dollar of every visitor card fee shall be remitted quarterly to the department for the administration of this title. A current record of the issuance of each card shall be maintained and shall contain the name of the member sponsoring the visitor.

(7) A private club may not sell alcoholic beverages to any person other than a member, guest, or visitor who holds a valid visitor card issued under Subsection (6).

Alcoholic Beverage Control Commission Rule R81-5-14. Membership Fees and Monthly Dues.

(1) Authority. This rule is pursuant to the commission's powers and duties under 32A-1-107 to act as a general policymaking body on the subject of alcoholic beverage control and to set policy by written rules that prescribe the conduct and management of any premises upon which alcoholic beverages may be sold, consumed, served, or stored.

(2) Purpose. This rule furthers the intent of 32A-5-107(1) through (7) that private clubs operate in a manner that preserves the concept that private clubs are private and not open to the general public.

(3) Application of Rule.

(a) Each private club shall establish in its by-laws membership application fees and monthly membership dues in amounts determined by the club. However, the application fees shall not be less than \$4, and the monthly dues may not be less than one dollar per month.

DISCUSSION

The audit found the \$\$\$\$ fee collected by Petitioner from visitors was subject to sales tax. Petitioner has the burden of proving the \$\$\$\$ fee collected from visitors is not subject to sales tax.

Petitioner contends it is not covered by §59-12-103 (1)(f). Petitioner points out that private clubs are not listed in §59-12-103 (1)(f), and states it is not the same type of business as those listed. Petitioner argues because taxing statutes must be strictly construed, and because private clubs are not listed, the Legislature did not intend admissions to them to be taxed.

This argument is not persuasive, because of the phrase “or any other amusement, entertainment, recreation, exhibition, cultural, or athletic activity;” which appears at the end of subsection (f). This makes it clear the Legislature did not intend the list to be exhaustive. Even if one makes the assumption the list was exhaustive, OWNER 1’s testimony and Respondent’s Exhibit 4 resolve this against Petitioner.

Respondent’s Exhibit 4 is a copy of information PETITIONER provides about itself on its website. According to the website, PETITIONER has ##### square feet. {THREE SENTENCES QUOTED FROM WEBSITE REMOVED}

{WHOLE PARAGRAPH QUOTED FROM WEBSITE REMOVED}

Utah Code Ann. §59-12-103 (1)(f) includes shows of any type or nature (PETITIONER offers fashion shows, per OWNER 1), concerts (see a great musical act), dances (PETITIONER touts its dance floor and DJ), billiard parlors and pool parlors (PETITIONER has pool tables and advertises itself as a billiards club), sports activities (PETITIONER offers itself to those looking for a sports bar), and entertainment (PETITIONER offers Foosball, Pinball, and video games to keep you entertained). It is a place of “amusement, entertainment, recreation, exhibition, cultural or athletic activity” described in the statute.

Appeal No. 04-1087

The remaining question is whether the \$\$\$\$ fee charged for a temporary visitor card is an admission or user fee subject to sales tax. The Commission finds that it is.

Utah Code Ann. § 32A-5-107(5)(2000) provides that “[e]ach private club may allow guests or visitors *to use the premises* only when previously authorized by a member.” [Emphasis added.]

Utah Code Ann. § 32A-5-107(6)(2000) provides that “[e]ach private club shall limit the issuance of visitor cards for a period not to exceed two weeks and collect a fee from each visitor of not less than \$\$\$\$ for each two-week period the visitor card is issued. One dollar of every visitor card fee shall be remitted quarterly to the department for the administration of this title.”

It is clear from the statutory language that the \$\$\$\$ fee for a visitor card is a charge for the right to “use the premises” for a two week period. As noted above, the activities conducted at the PETITIONER are “amusements, entertainment, and recreation” within the meaning of Utah Code Ann. § 59-12-103. The fact that there are additional activities conducted there, for which additional charges are imposed, and on which sales tax is collected and remitted, does not change this result.²

Petitioner argued that if the \$\$\$\$ fee were subject to sales tax, the \$1 remitted to ABC should not be taxed. Petitioner argued it was required to collect and remit the fee, which it said it did. In essence, Petitioner argued it was a conduit for the fee.

The \$\$\$\$ fee was the consideration paid by the visitor for the use of the premises. The sales tax is imposed on the consideration paid by the visitor for the visitor card, not on any net amount retained by the club. Had the Legislature intended to impose a separate tax on the visitor, it could have done so. The \$\$\$\$ fee is subject to sales tax.

² For future years, the statute is even more clear. Utah Code Ann. § 32A-5-107(6)(2006) provides that “[e]ach private club may, in its discretion, issue visitor cards to allow individuals *to enter and use the club premises* on a temporary basis” under certain conditions, including that “a fee of not less than \$4 shall be assessed for each visitor card issued.” [Emphasis added]

Appeal No. 04-1087

Petitioner argues membership application fees are not “amounts paid or charged as admission or user fees” under §59-12-102(1)(b), which states, “Admission or user fees’ does not include annual membership dues to private organizations.” The statute does not define annual membership dues paid to a private organization.

R895-19S-33 (B) clarifies. It states, “Annual membership dues paid to a private organization includes only those dues paid by members who, directly or indirectly, establish the level of the dues.” However, it is not necessary to determine whether R895-19S-33 is applicable. The audit focused on the payment of the \$\$\$\$ fee. Payment of that fee allowed use of the premises for two weeks. It is not an annual membership.

Petitioner provided no documentary evidence it refunded the \$\$\$\$ application fee to those not approved for membership. Petitioner provided no documentary evidence showing the application fee was credited to annual memberships. Petitioner provided no breakdown for annual memberships as opposed to visitor cards in “member door” or “membership” in Respondent’s Exhibits 2 and 3 respectively. Petitioner provided no documentary evidence showing the amount it collected for each annual membership. Petitioner provided no evidence showing the source of any of the amounts listed as “member door” in Respondent’s Exhibit 2, or listed as “membership” in Respondent’s Exhibit 3. Petitioner has not met its burden of proof.

DECISION AND ORDER

Based upon the foregoing, the Tax Commission sustains the sales tax portion of the audit. As Petitioner presented no evidence challenging the tourism tax portion of the audit, it is also sustained.

DATED this ____ day of _____, 2007.

R. Spencer Robinson
Administrative Law Judge

Appeal No. 04-1087

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 _____, 2007.

Pam Hendrickson
Commission Chair

R. Bruce Johnson
Commissioner

Marc B. Johnson
Commissioner

D'Arcy Dixon Pignanelli
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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