



May 23, 2017

TAX: Sales and Use Tax

TAA NUMBER: 17A-011

ISSUE: Whether the “profit split” paid by the Concessionaire to the Taxpayer from sales tax that occurred at the 2015 Music Festival was subject to sales tax.

STATUTE CITES: Sections 212.02 and 212.031, Florida Statutes (F.S.)
Rule 12A-1.070, Florida Administrative Code, (F.A.C.)

QUESTION: Was the “profit split” paid by the Concessionaire to the Taxpayer from sales tax that occurred at the 2015 Music Festival subject to sales tax?

ANSWER – Based on the Facts Below: The 2015 Agreement was a license to use real property granted to a food and beverage concessionaire at a publicly owned recreational facility. The “profit split” paid by the Concessionaire to the Taxpayer from sales that occurred at the 2015 Music Festival was exempt pursuant to s. 212.031(1)(a)10., F.S.

XX

Re: Technical Assistance Advise ment 17A-011
Sales and Use Tax– Concessionaire Lease/License
Sections 212.02 and 212.031, Florida Statutes (F.S.)
Rule 12A-1.070, Florida Administrative Code, (F.A.C.)
XX (the Taxpayer)

Dear XX:

This is in response to your letter dated August 30, 2016, requesting this Department’s issuance of a Technical Assistance Advise ment (“TAA”) pursuant to section 213.22, F.S., and Rule Chapter 12-11, F.A.C. An examination of your letter has established you have complied with the statutory and regulatory requirements for issuance of a TAA. Therefore, the Department is hereby granting your request for a TAA.

Facts

Your letter dated August 30, 2016, provides that following in part:

. . . Taxpayer’s principal business is putting on the XX Music Festival (“Festival”).

. . . [Festival] is a multi-day, multi-stage music festival taking place on XX beach (“City Beach”), featuring some of the biggest names in country, rock and roots music. [Festival] brings like-minded fans together for an unforgettable beach weekend experience that pairs music with

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meaning to raise awareness for marine conservation. [Festival] works hand in hand with the XX (“Foundation”) to increase public awareness about the issues impacting the world’s oceans and to support scientific research, education and ocean conservation initiatives.

. . . It is our position that the taxpayer has overpaid sales tax to the Florida Department of Revenue since the inception of [Festival] in 2013.

. . . Sales that occur during the weekend of the festival include alcoholic beverages, non-alcoholic beverages, food, merchandise, etc. Alcoholic beverage sales are the largest portion of sales during the festival and the main issue at hand. A master concessionaire ([the Concessionaire]) is used to run the various bars and is the point of sale contact with the customers. The [Concessionaire] collects and remits sales tax on the alcoholic sales.

. . . The key issue for the taxpayer is the profit split from the alcohol sales between the taxpayer and [Concessionaire]. This transaction was originally treated as commercial rent and taxed accordingly.

* * *

On February 15, 2017, in response to the Department’s request for supporting documentation, you provided the following via e-mail:

- A copy of a “2015 Concessions Agreement” between the Taxpayer and XX (“Concessionaire”), executed April 9, 2015;
- A copy of the 2015 [Festival] Concessions Recap; and

The 2015 Concessions Agreement with Concessionaire provides the following in part:

1. [The Taxpayer] hereby grants and leases unto [Concessionaire] certain rights, privileges, and space during the 2015 [Festival] (herein after called “Festival”) to be held April 11 & 12, 2015 at XX (the “Premises”) at which [the Taxpayer] chooses to contract with [Concessionaire] to conduct, operate, and sell upon the Premises, herein after designated by Grantor, such business and articles that are exhibited below.
2. Privileges granted under this contract give [Concessionaire] permission to conduct or sell beverages including beer, wine, liquor, soft beverages, and water on the Premises. . . .
3. The use of premises or space granted to [Concessionaire] under this contract is described as follows: trailers, vehicles, food trucks, and tents. Said trailers and tents to be located on such part of the [the Taxpayer’s] premises and will be designated by [the Taxpayer]. . . .
15. In exchange for the exclusive rights to the sale or giveaway of all beverage consumables to the general public, [Concessionaire] agrees to the following terms:

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. . . e) [Concessionaire] agrees to remit 40% of the gross-net water sales. . . . Beverage commissions for [Festival] will be paid out at 50% of total gross-net beverage revenue earned at the conclusion of Festival with any additional commission owed to be paid within five (5) business days of the conclusion of [Festival] according to the percentages within each of the following tier levels:

<u>Gross-Net Beverage Revenue</u>	<u>% Paid to Promoter</u>
\$0 to \$1,100,000	50%
\$1,100,001 to \$1,500,000	53%
\$1,500,001+	55%

* * *

A “Public Meeting Notice,” obtained from the City’s website, XX, provides the following regarding the Festival, in part:

. . . [T]he [Festival] returns to the sands of [the Beach] April 11 – 12 with multiple award-winning recording and performing artists

Please be aware that the sidewalk and parking lots extending [through] . . . XX Park will be closed at various points beginning April 1 through April 16 for [Festival]. . . .

The “Public Meeting Notice” includes a map that identifies the “Event Site” to be in the middle of XX Park.

Information regarding XX Park obtained from the same website provides the following in part:

Park Facilities and Amenities

- Boat Ramp — non-motorized
- Grills
- Picnic Tables
- Outdoor Showers
- Restrooms
- Basketball Full Court
- Playground
- Volleyball Court

* * *

In an e-mail dated May 9, 2017, the Taxpayer confirmed that “all bars, stages, beer stands, etc., take place on publicly owned property.” The Taxpayer also confirmed that it rents the festival area from the City of XX and has entered into an agreement with the Concessionaire to sell alcoholic beverages, food, water, and concert merchandise at the Festival.

Requested Advisement

You request an advisement that provides the “publicly owned recreational facility exemption” provided in s. 212.031(1)(a)10., F.S., is applicable to the agreement between the Taxpayer and the Concessionaire and that payment of the “profit split” between the Taxpayer and Concessionaire is not subject to sales tax. The response will address the Taxability of the “profit split” paid by the Concessionaire to the Taxpayer from sales tax occurred at the 2015 Music Festival.¹

Applicable Authority and Discussion

Section 212.031, F.S., imposes sales tax on the privilege of engaging in the leasing of or the granting of a license to use, real property for any purpose, unless specifically exempt. A “license” to use real property is defined in s. 212.02(10)(i), F.S., as “. . . the granting of a privilege to use or occupy a building or a parcel of real property for any purpose.” Section 212.031(1)(c), F.S., provides that “[f]or the exercise of such privilege, a tax is levied in an amount equal to 6 percent of and on the total rent or license fee charged for such real property by the person charging or collecting the rental or license fee.” The “total rent or license fee charged” is defined to include “payments for the granting of a privilege to use or occupy real property for any purpose and shall include base rent, percentage rents, or similar charges.”

The guiding principles are that, to constitute a payment of rent, the payment must be required by the lease or license as a condition of occupancy of the property, and the payment must benefit the landlord. A payment is considered to be in exchange for the right to occupy real property if a failure to make such payment results in the loss of the right to occupy.

Section 212.031(1)(a)10., F.S., provides an exemption for real property leased, subleased, licensed, or rented to a person providing food and drink concessionaire services within the premises of a convention hall, exhibition hall, auditorium, stadium, theater, arena, civic center, performing arts center, or publicly owned recreational facility. The cited exemption presupposes the existence of a “recreational facility,” and it exempts only that portion of the premises within such facility that is leased or licensed to a person providing food and drink concessionaire services.

Rule 12A-1.070, F.A.C., is the Department’s administrative rule implementing the provisions of s. 212.031, F.S. Subparagraph (1)(b)3. of the rule provides in part:

For purposes of this rule, the term “retail concessionaire,” which may be either a lessee or licensee, shall mean any person who makes sales of food or drink directly to the general public within the premises of a . . . publicly owned . . . recreational facility

No definition of “recreational facility” is provided by statute. Thus, it is necessary to look to look to principles of statutory construction. Words of common usage, when used in a statute, should be construed in their plain and ordinary sense. Pederson v. Green, 105 So.2d 1 (Fla. 1958).

¹ All parties agree that sales tax is due on the sale of alcoholic beverages, food, water, and merchandise sold by the Concessionaire.

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The word “recreation” is defined in Webster’s New Twentieth Century Dictionary, Unabridged, Second Edition, 1968, as follows:

1. refreshment in body or mind, as after work, by some form of play, amusement, or relaxation.
2. Any form of play, amusement or relaxation used for this purpose, as games, sports, hobbies, reading, walking, etc.

The word “facility” is defined in The Random House Dictionary of the English Language, The Unabridged Edition, as “something designed, built, installed, etc., to serve a specific function affording a convenience or service. . . .”

The festival is held at XXX which is owned by the City. The facilities provided by the City at XX Park include grills, tables, showers, public restrooms. XX Park falls within the plain and ordinary meaning of “recreational facility,” as it is established to be used for “play, amusement, or relaxation” to the City’s residents and guests. The Agreement provides that the Taxpayer “grants and leases . . . space” to the Concessionaire in order to sell beer, wine, liquor, soft beverages, and water during the music festival. In exchange, the Concessionaire pays the Taxpayer a percentage of the “gross-net beverage revenue” received during the festival.

Conclusions

The 2015 Agreement was a license to use real property granted to a food and beverage concessionaire at a publicly owned recreational facility. The “profit split” paid by the Concessionaire to the Taxpayer from sales that occurred at the 2015 Music Festival was exempt pursuant to s. 212.031(1)(a)10., F.S.

This response constitutes a Technical Assistance Advisement under section 213.22, F.S., which is binding on the Department only under the facts and circumstances described in the request for this advice as specified in section 213.22, F.S. Our response is predicated on those facts and the specific situation summarized above. You are advised that subsequent statutory or administrative rule changes, or judicial interpretations of the statutes or rules, upon which this advice is based, may subject similar future transactions to a different treatment than that expressed in this response.

You are further advised that this response, your request and related backup documents are public records under Chapter 119, F.S., and are subject to disclosure to the public under the conditions of section 213.22, F.S. Confidential information must be deleted before public disclosure. In an effort to protect confidentiality, we request you provide the undersigned with an edited copy of your request for Technical Assistance Advisement, the backup material, and this response, deleting names, addresses, and any other details which might lead to identification of the taxpayer.

Your response should be received by the Department within 15 days of the date of this letter.

Sincerely,

Brinton Hevey

Technical Assistance Advise ment

Tax Law Specialist
Technical Assistance and Dispute Resolution
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