BEFORE THE STATE BOARD OF TAX APPEALS
STATE OF ARIZONA
Bank of America Tower
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MILL AVENUE MERCHANTS ASSOCIATION, Appellant, vs. ARIZONA DEPARTMENT OF REVENUE, Appellee.	Docket No. 1756-98-S **NOTICE OF DECISION: FINDINGS OF FACT AND CONCLUSIONS OF LAW**

The State Board of Tax Appeals, having considered all evidence and arguments presented, and having taken the matter under advisement, finds and concludes as follows:

FINDINGS OF FACT

Mill Avenue Merchants Association ("Appellant") is a business league engaged in fundraising activities and is exempt from income tax under § 501(c)(6) of the Internal Revenue Code ("IRC") and § 43-1201(5) of the Arizona Revised Statutes ("ARS"). Appellant's members are various merchants, restaurants and other businesses located in Tempe, Arizona. Appellant organizes a number of annual events the proceeds from which Appellant contributes to various non-profit organizations, including charitable, educational and civic organizations.

Appellant sells beer, wine, soda, T-shirts and other items at these events. Appellant collects gate fees and parking fees at one or more of its events. And Appellant makes various items (tables, chairs, tents, etc.) available to exhibitors for a fee.

The Arizona Department of Revenue (the "Department") assessed Appellant transaction privilege tax on these activities plus penalties and interest for the period of January 1, 1983 through May 31, 1993, under the restaurant, amusement, commercial lease, personal property rental and retail classifications.[1] Appellant protested the entire assessment to an Administrative Law Judge ("ALJ"). Prior to the hearing,

[1] *See* A.R.S. § 42-5074(B)(3) (formerly A.R.S. § 42-1310.14(B)(3)), A.R.S. § 42-5073(A) (formerly A.R.S. § 42-1310.13(A)), A.R.S. § 42-5069 (formerly A.R.S. § 42-1310.09), A.R.S. § 42-5071 (formerly A.R.S. § 42-1310.11), A.R.S. § 42-5061(A) (formerly A.R.S. § 42-1310.01(A)).

the Department abated the penalties. The ALJ denied the remaining protest. Appellant then protested to the Director of the Department, who found that Appellant is exempt from tax under the restaurant classification on its sales of beer, wine and soda, but otherwise affirmed the ALJ's decision. Appellant now timely appeals to this Board.

DISCUSSION

The issue before the Board is whether Appellant's fundraising activities are taxable under the amusement, personal property rental or retail classifications.[2] The additional assessment of tax is presumed correct and the taxpayer bears the burden of overcoming this presumption. *State Tax Comm'n v. Kieckhefer*, 67 Ariz. 102, 105, 191 P.2d 729, 732 (1948); *see also* A.A.C. R16-3-118 ("The burden of proof will be upon the appellant as to all issues of fact.").

Appellant primarily argues that the fundraising activities of a non-profit corporation cannot constitute business, and therefore Appellant is not subject to transaction privilege tax. *See, e.g., The Way International v. Limbach*, 552 N.E.2d 908 (Ohio 1990); *Akron Golf Charities Inc. v. Limbach*, 516 N.E.2d 222 (Ohio 1987). Appellant cites two Ohio cases that involve IRC § 501(c)(3) organizations. These cases are not persuasive because Appellant is not an IRC § 501(c)(3) organization, and the cases do not address "business" for Arizona transaction privilege tax purposes.

Arizona defines "business" for transaction privilege tax purposes as "all activities or acts, personal or corporate, engaged in or caused to be engaged in with the object of gain, benefit or advantage, either directly or indirectly, but not casual activities or sales." A.R.S. § 42-5001(1) (formerly A.R.S. § 42-1301(1)). The "gain," "benefit" or "advantage" of a business may be to the members instead of the entity itself. *See O'Neil v. United Producers & Consumers Cooperative*, 57 Ariz. 295, 113 P.2d 645 (1941); *State of Arizona v. Phoenix Lodge No. 708*, 216 Ariz. Adv. Rep. 92 (App. 1996); *Tempe Life Care Village v. City of Tempe*, 148 Ariz. 264, 714 P.2d 343 (App. 1985). Appellant states that its purpose includes the improvement of business and civic conditions in the Tempe area, as well as promotion of the common interests of its membership. Appellant's fundraising activities are not exclusively intended

[2] The Department concedes that Appellant's collection of parking fees is not taxable under the commercial lease classification, and therefore, not at issue.

to benefit charitable organizations. Appellant and its members derive a direct or indirect benefit, therefore the activities constitute business activities.

Next, Appellant argues that it is not engaged in business because its activities are casual in nature. Arizona courts have defined "casual" as "a happening without design and without being expected; coming without regularity; occasional . . . [i]t carries the idea of lack of continuity." *Trico Electric Cooperative v. State Tax Commission*, 79 Ariz. 293, 288 P.2d 782 (1955). The Board finds that the frequency and regularity of Appellant's activities constitute business rather than casual activities for the purpose of transaction privilege tax.

The Department assessed Appellant tax under the amusement classification on its gate fees. The amusement classification applies to any business charging admission or user fees for exhibition, amusement or entertainment. *See* A.R.S. § 42-5073(A). Appellant argues that it collects admission fees to certain events as agents of the city or county in which the events are held. The party asserting an agency relationship has the burden of proving it. *Salt River Valley Water Users' Ass'n v. Giglio*, 113 Ariz. 190, 549 P.2d 162 (1976); *Independent Gin Co., Inc. v. Parker*, 19 Ariz. App. 413, 508 P.2d 78 (1973). The facts of this case do not evidence an agency relationship. Therefore, Appellant is liable for tax assessed under the amusement classification.

The Department taxed Appellant under the personal property classification on items, such as tables, chairs, and tents, it makes available to exhibitors at its events. The personal property classification applies to the business of leasing or renting tangible property for consideration. *See* A.R.S. § 42-5071. Appellant argues that it does not rent the items at issue to exhibitors, but is merely a middleman or facilitator to bring together rental companies. Again, the facts do not evidence such a relationship. Therefore, Appellant is liable for tax assessed under the personal property classification.

Finally, Appellant argues that, as a charitable nonprofit organization, its sales of T-shirts and other items are exempt under the retail classification. *See* A.R.S. § 42-5061(A)(4) (formerly A.R.S. § 42-1310.01(A)(4)). This exemption applies to non-profit charitable organizations under IRC § 501(c)(3), not business leagues such as Appellant. *Id.* While Appellant claims that it meets the requirements of IRC § 501(c)(3), it chose not to organize as a § 501(c)(3) entity. A taxpayer is free to use whatever form it chooses, but in choosing a form it must accept its advantages and disadvantages. *Higgins v. Smith*, 308

U.S. 473 (1940). Accordingly, Appellant is liable for tax assessed under the retail classification.

The interest imposed represents a reasonable interest rate on the tax due and owing and is made part of the tax by statute, therefore, it may not be abated. *See* A.R.S. § 42-1123(B) (formerly A.R.S. § 42-134(B)); *see also Biles v. Robey*, 43 Ariz. 276, 30 P.2d 841 (1934).

CONCLUSIONS OF LAW

1. The fundraising activities of Appellant constitute business; therefore, Appellant is subject to transaction privilege tax. A.R.S. § 42-5001(1); *see also Trico Electric Cooperative v. State Tax Commission*, 79 Ariz. 293, 288 P.2d 782 (1955).

2. Appellant is liable for tax assessed under the amusement classification. *See* A.R.S. § 42-5073(A); *see also Salt River Valley Water Users' Ass'n v. Giglio*, 113 Ariz. 190, 549 P.2d 162 (1976); *Independent Gin Co., Inc. v. Parker*, 19 Ariz. App. 413, 508 P.2d 78 (1973).

3. Appellant is liable for tax assessed under the personal property classification. *See* A.R.S. § 42-5071.

4. Appellant is liable for tax assessed under the retail classification. *See* A.R.S. § 42-5061(A), *see also Higgins v. Smith*, 308 U.S. 473 (1940).

5. The interest imposed represents a reasonable interest rate on the tax due and owing and is made part of the tax by statute, therefore, it may not be abated. *See* A.R.S. § 42-1123(B); *see also Biles v. Robey*, 43 Ariz. 276, 30 P.2d 841 (1934).

ORDER

THEREFORE, IT IS HEREBY ORDERED that the appeal is denied, and the final order of the Department is affirmed.

This decision becomes final upon the expiration of thirty (30) days from receipt by the taxpayer, unless either the State or taxpayer brings an action in superior court as provided in A.R.S. § 42-1254 (formerly A.R.S. § 42-124).

DATED this 23rd day of February, 1999.

STATE BOARD OF TAX APPEALS

Stephen P. Linzer, Chairman

SPL:MAS
CERTIFIED

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