S T A T E O F T E N N E S S E E
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Opinion No. 00-098

Application of Amusement Tax to Event Sponsored by Firefighters Through Independent Contractor

QUESTION

Are the proceeds derived from admissions to entertainment events sponsored by a charitable firefighters association subject to amusement tax, when the event is conducted through a separate for-profit organization under the stated contractual terms?

OPINION

Yes. Under the contract in question, the admission charges are subject to the sales tax on amusements under Tenn. Code Ann. § 67-6-212(a) and are not exempt under Tenn. Code Ann. § 67-6-330(a)(7).

ANALYSIS

This Office has been requested to address the taxability of admissions to amusements sponsored by Nashville Fire Fighters Union Local 763, a charitable organization under 26 U.S.C. §501(c), and produced through FireCo, LLC, a Tennessee for-profit corporation, pursuant to a contract dated October 26, 1998. The contract essentially provides that FireCo shall "arrange for appropriate entertainers and artists, concert hall facilities and staff, shall provide admission tickets, advertising, and such other services, facilities, and personnel as are reasonably required to promote and produce each event, and shall market each event to the public." While the contract specifies that the event is "under the direction and control and with the approval of " the firefighters union, the primary responsibilities for putting on the show fall clearly upon FireCo. For the first event in each calendar year, the firefighters receive the first $10,000, FireCo receives the next $10,000, and any additional profits are divided 50-50. For the second event in each calendar year, the same arrangement pertains, except the stated amounts are raised to $15,000.

Tenn. Code Ann. § 67-6-212(a)(2) imposes the sales tax on "[s]ales of tickets, fees or other charges made for admission to or voluntary contributions made to places of amusement, sports, entertainment, exhibition, display or other recreational events or activities . . . ." Tenn. Code Ann. § 67-6-330(a)(7), however, exempts from this tax

> [g]ross proceeds derived from admissions to amusement or recreational activities conducted, produced, or provided by . . . [o]rganizations which have received and currently hold a determination of exemption from the internal revenue service pursuant to 26 U.S.C. §501(c) . . . provided, that this exemption shall not apply unless such entities, societies, associations or organizations promote, produce and control the entire production or function . . . .

Thus, in order for the instant charges to be exempt from tax, the firefighters union must "promote, produce and control the entire production . . . ."

The courts have recently addressed a very similar arrangement in *Gehl Corporation v. Johnson*, 991 S.W.2d 246 (Tenn. App. 1998). In that case, the Gehl Corporation contracted with several firefighter associations to promote benefit concerts. In applying the "promote, produce and control" standard of Tenn. Code Ann. § 67-6-330(a)(7), the courts looked to agency principles and reasoned that if Gehl was an agent of the firefighters no tax would be due.

The Court of Appeals concluded, however, that Gehl was an independent contractor and not an agent, and that the amusement tax was thus due. In doing so, it relied upon case precedents and well-established principles of agency law. *E.g.*, *Nidiffer v. Clinchfield Railroad Co.*, 600 S.W.2d 242 (Tenn. App. 1980); *Jack Daniel Distillery v. Jackson*, 740 S.W.2d 413 (Tenn. 1987). It found "no evidence of the control required for Gehl to be considered an agent" of the firefighters. 991 S.W.2d at 250.

The instant contract appears to provide for the firefighters union a greater degree of control than did the *Gehl* contract. The firefighters have retained the specific rights to approve the selection and terms of engagement of entertainers, the dates and locations of events, and the selection of an event coordinator. But in the final analysis, the instant arrangement clearly is not an agency relationship, even though the contract refers to FireCo as "Agent" and the firefighters union as "Producer." While the firefighters union has some control and a great interest in the final product, it nevertheless relies on the skill and expertise of FireCo in putting on the event. Governing case law makes clear that while an independent contractor may operate within a framework of controls and specifications, it remains free to use its own experience, initiative, and ideas in achieving the ultimate objectives. *United States v. Boyd*, 211 Tenn. 139, 159, 363 S.W.2d 193, 202 (1962). Such is the nature of the instant relationship.

It is clear that the labels used in such a contract are not determinative, and that use of the terms "Agent" and "Producer" in the contract "does not make them such in law. The surrounding facts and circumstances determine the relationship." *Boyd*, 211 Tenn. at 155. Thus referring to FireCo in the instant contract as "Agent" does not render it an agent. This is particularly true because the substantive provisions of the contract specifically and boldly negate an agency

relationship. Paragraph 8 of the contract in question ("Relationship of the Parties") declares,

> Agent [FireCo] and Event coordinator and their respective subcontractors, servants, agents, and employees are independent contractors with respect to the Producer [the firefighters union] and they are not, nor shall they become, agents or employees of the Producer, and nothing in this Agreement shall be construed to the contrary.

Indeed, the existence of this provision would make it difficult for the firefighters to argue that the arrangement might be considered an agency relationship.

Consequently, it is the opinion of this Office that under the contract in question, the firefighters union does not "promote, produce and control the entire production or function" within the meaning of § 67-6-330(a)(7), since the firefighters use an independent contractor to arrange and direct the events. Thus the amusement tax does apply to proceeds derived from sales of tickets to the events.

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