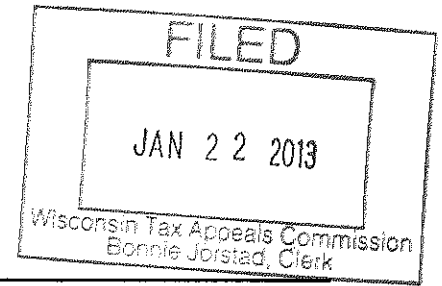


STATE OF WISCONSIN  
TAX APPEALS COMMISSION



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CELLAR DOOR NORTH CENTRAL, INC.,

DOCKET NO. 08-S-067

Petitioner,

vs.

RULING AND ORDER

WISCONSIN DEPARTMENT OF REVENUE,

Respondent.

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**ROGER W. LEGRAND, COMMISSIONER:**

This case comes before us on Summary Judgment motions filed by both parties. Petitioner, Cellar Door North Central, Inc. ("Cellar Door"), is represented by Attorney Kristina E. Somers of Reinhart Boerner Van Deuren S.C. Respondent, Wisconsin Department of Revenue, is represented by Attorney Julie A. Zimmer. Both parties have filed briefs in this matter and have filed a Partial Stipulation of Facts on October 24, 2011, as follows:

**STIPULATED FACTS<sup>1</sup>**

1. Petitioner, Cellar Door, was a Wisconsin corporation primarily engaged in the business of co-promoting or promoting concerts.
2. Cellar Door was audited by Respondent Wisconsin Department of Revenue ("Department") for the period January 1, 2001, through December 31, 2004 ("Audit Period").

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<sup>1</sup> All Stipulated Facts refer to the Audit Period unless specifically noted.

3. Cellar Door was a subsidiary of SFX Entertainment, Inc.

4. SFX Entertainment, Inc., was a subsidiary of Clear Channel Communications, Inc.

5. The Department timely issued an assessment to Cellar Door for the Audit Period in the amount of \$542,354.19 inclusive of a 25% penalty and interest as of December 29, 2006. (Partial Stipulation of Facts ("Stipulation"), Ex. A.)

6. Cellar Door filed a timely Petition for Redetermination to the Department. (Stipulation, Ex. B.)

7. The Resolution Unit of the Department issued a Notice of Action on or about March 10, 2008, denying Cellar Door's Petition for Redetermination. (Stipulation, Ex. C.)

8. Cellar Door filed a timely Petition for Review to the Commission on or about May 9, 2008. (Stipulation, Ex. D.)

9. The following additional documents were attached to the Partial Stipulation of Facts filed with the Commission:

- "User Agreement" and "Amendment to User Agreement" both between Ticketmaster-Wisconsin, Inc. ("Ticketmaster") and Cellar Door that were both dated September 8, 1993. Exhibit E.
- "Licensed User Agreement" between Ticketmaster Chicago, Inc. d/b/a Ticketmaster Wisconsin and The New Riverside Corporation dated October 24, 1995. Exhibit F.
- A letter agreement between SFX Entertainment, Inc. and Ticketmaster Corporation dated November 13, 1998. Exhibit G.
- "Box Office Management and Consulting Agreement" between New Riverside Corp. d/b/a Riverside Theatre

("Riverside Theatre") and Cellar Door dated October 1, 2001. Exhibit H.

- A letter agreement dated January 24, 2002, which amended the "Box Office Management and Consulting Agreement", entered into between New Riverside Corp. d/b/a Riverside Theatre and Cellar Door (Exhibit H). Exhibit I.
- "Co-Promotion Agreement" between Cellar Door and The Milwaukee Riverside Theatre dated February 4, 2002. Exhibit J.
- A lease agreement between Cellar Door and The Milwaukee Riverside Theatre, Inc. dated February 4, 2002. Exhibit K.

### SUPPLEMENTAL FACTS<sup>2</sup>

1. The sale of admissions upon which sales tax was assessed in the Department's Notice of Field Audit Action were for entertainment events held at the Riverside Theatre in Milwaukee during the Audit Period that were co-promoted by Cellar Door and the Riverside Theatre ("Events at Issue"). (Stipulation, Ex. A, Schedule 1; Zimmer Aff. ¶ 10, Ex. 9.)

2. The "Co-Promotion Agreement" between Cellar Door and the Riverside Theatre dated February 4, 2002, for an event held on February 19, 2002, is representative of the co-promotion agreement they had for each of the Events at Issue. (Stipulation, Ex. J; Zimmer Aff. ¶ 2, Ex. 1, Wright Dep., pp. 52-53.)

3. According to the "Co-Promotion Agreement" between Cellar Door and the Riverside Theatre, both parties jointly had the right to manage and control the presentation of an Event. (Stipulation, Ex. J, Sec. 2.01.)

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<sup>2</sup> These facts are gleaned from the Commission file, affidavits, and exhibits, as well as the Commission's reasoned inferences therefrom.

4. According to the "Co-Promotion Agreement" between Cellar Door and the Riverside Theatre, Cellar Door's individual responsibilities included "Ticketing." (Stipulation, Ex. J, Sec. 2.01.)

5. In print advertisements for the Events at Issue, purchasers were instructed to either "get tickets at SFX.com" or "get tickets at CC.com."<sup>3</sup> When purchasers went to SFX.com, they were directed to buy tickets for the concert through Ticketmaster. (Zimmer Aff. ¶ 8, Ex. 7; Zimmer Aff. ¶ 2, Ex. 1, Wright Dep., p. 22; Zimmer Aff. ¶ 3, Ex. 2, Shea Dep., pp. 20-21.)

6. According to the "Co-Promotion Agreement" between Cellar Door and the Riverside Theatre, the parties agreed to split the net revenue or the losses of the event 50-50. (Stipulation, Ex. J, Sec. 3.01; Wright Aff., Ex. A.)

7. As part of its responsibilities as co-promoter for the Events at Issue, Cellar Door would determine the nature of the event by negotiating the artist's contract and booking the artist into the Riverside Theatre. (Zimmer Aff. ¶ 9, Ex. 8; Zimmer Aff. ¶ 2, Ex. 1, Wright Dep., pp. 9-10; Zimmer Aff. ¶ 3, Ex. 2, Shea Dep., pp. 8.)

8. As part of its responsibilities as co-promoter for the Events at Issue, Cellar Door would set ticket prices and ticket scaling, which means it determined how many tickets are going to cost what price in which part of the venue. (Zimmer Aff. ¶ 2, Ex. 1, Wright Dep., pp. 9-11, Zimmer Aff. ¶ 3, Ex. 2, Shea Dep., p. 8; Zimmer Aff. ¶ 9, Ex. 8.)

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<sup>3</sup> CC.com was the website for Cellar Door's parent company, Clear Channel Communications, Inc.

9. Cellar Door entered into a "User Agreement" with Ticketmaster in 1993 because Cellar Door desired "to sell tickets for admission to each and all of the performances sponsored by [Cellar Door] with respect to which [Cellar Door] has authority to sell tickets to the public through the Ticketmaster System." (Stipulation, Ex. E, p. 1.)

10. Pursuant to its "User Agreement" with Ticketmaster, Cellar Door retained and authorized Ticketmaster to act as its exclusive agent "for the sale of all remote tickets (i.e., at outlets and by telephone)." (Stipulation, Ex. E, ¶ 2.)

11. Pursuant to its "User Agreement" with Ticketmaster, Cellar Door received the proceeds from the ticket sales for the Events at Issue. (Stipulation, Ex. E, ¶ 3(f).)

12. Cellar Door received the ticket sale proceeds from the 28 Events at Issue held from January 2001 to February 2002 via Client Disbursement Checks from Ticketmaster made out to "Cellar Door Productions." (Zimmer Aff. ¶ 5, Ex. 4; Stipulation, Ex. A, Schedule 1.)

13. On October 1, 2001, in addition to co-promoting events with the Riverside Theatre, Cellar Door and the Riverside Theatre signed a "Box Office Management and Consulting Agreement" because Cellar Door wanted to become more involved in the Riverside Theatre's operations in preparation to possibly take over the venue. (Stipulation, Ex. H; Zimmer Aff. ¶ 3, Ex. 2, Shea Dep., p. 14.)

14. Pursuant to the "Box Office Management and Consulting Agreement," Cellar Door controlled all management of the day-to-day box office operations of the Riverside Theatre. (Stipulation, Ex. H, ¶ 1(a).)

15. Upon assuming management of the Riverside Theatre's box office, Ticketmaster remitted the ticket sales proceeds for the Events at Issue via wire transfer to Cellar Door's bank account directly. (Zimmer Aff. ¶¶ 6-7, Exs. 5-6.)

16. Upon assuming management of the Riverside Theatre's box office, all of the people who worked in the Riverside Theatre's box office became employees of Cellar Door. (Zimmer Aff. ¶ 3, Ex. 2, Shea Dep., pp. 17-19.)

17. Upon assuming management of the Riverside Theatre's box office, Cellar Door's employees sold tickets to events at the Riverside Theatre, including the Events at Issue. (Zimmer Aff. ¶ 3, Ex. 2, Shea Dep., p. 20.)

18. Upon assuming management of the Riverside Theatre's box office, a Cellar Door employee would set up the events for sale through Ticketmaster pursuant to Cellar Door's "User Agreement" with Ticketmaster. (Stipulation, Ex. E, ¶ 2; Zimmer Aff. ¶ 3, Ex. 2, Shea Dep., pp. 19-20.)

19. Pursuant to the "Box Office Management and Consulting Agreement," Cellar Door could also provide consulting services in the areas of production, front of house, facility maintenance, general facility operations, and concessions. The Riverside Theatre did not take advantage of these consulting services. (Stipulation, Ex. H, ¶ 1(b); Zimmer Aff. ¶ 3, Ex. 2, Shea Dep., p. 23.)

20. Pursuant to the "Box Office Management and Consulting Agreement," Cellar Door would get \$10,000 per year, plus split the annual net revenue from the box office operations with the Riverside Theatre. This compensation was in addition to the 50-50 revenue split pursuant to the co-promotion agreements for the Events at Issue. (Stipulation, Ex. H, ¶ 2.)

21. Cellar Door's compensation or income pursuant to the "Box Office Management and Consulting Agreement" and the "Co-Promotion Agreement" was not assessed sales/use tax in the assessment at issue. (Stipulation, Ex. A.)

22. The price the purchaser paid for each ticket sold to the Events at Issue included the facility fees and service charges. Zimmer Aff. ¶ 2, Ex. 1, Wright Dep., p. 69; Zimmer Aff. ¶ 3, Ex. 2, Shea Dep., p. 25.)

23. According to the Settlement Sheets for each Event at Issue between co-promoters Cellar Door and the Riverside Theatre, prepared by Cellar Door, a portion of the revenue from the sale of admissions and concert merchandise sold at the Events at Issue was split 50-50. (Petitioner's Shea Aff., Ex. A.)

24. The Department issued a sales/use tax assessment to Petitioner's co-promoter Riverside Theatre that included items of sales tax on the sale of event merchandise and on the sale of admissions, which included facilities fees and service charge, to events co-promoted by Petitioner and the Riverside Theatre during taxable years 2001-2003. (Bink Aff. ¶ 2.)

25. The Riverside Theatre's assessment went delinquent and the Department has not collected any sales/use tax from the Riverside Theatre on items

that were assessed alternatively to Cellar Door. The Department has determined that the Riverside Theatre's sales tax liability is uncollectable. (Bink Aff. ¶¶ 3-5.)

### CONCLUSIONS OF LAW

1. Petitioner Cellar Door was a retailer providing the service of selling taxable admissions to the concert events at issue.

2. Petitioner Cellar Door was liable in the alternative with its co-promoter for the sales tax collected on the sale of admissions to the concert events at issue.

3. Petitioner Cellar Door was liable in the alternative with its co-promoter for the facility fees and service charges collected as part of the gross receipts for the ticket sales.

4. Petitioner Cellar Door was liable in the alternative with its co-promoter for the sales tax collected on the sale of merchandise sold at the concert events at issue.

5. Petitioner Cellar Door has not met its burden of proving the Department's sales/use tax assessment was incorrect.

### INTRODUCTION

This case concerns unpaid sales tax deriving from concert events held at the Riverside Theater in Milwaukee from January 1, 2001, through December 31, 2004. Petitioner, Cellar Door, and the New Riverside Corporation, d/b/a Riverside Theatre, were co-promoters of these events. Sales tax was collected for these events, but never remitted to the Department. The Department issued assessments to each of the co-



promoters for the sales tax on the admissions to those concert events. The Riverside Theatre's assessment went delinquent and the Department deems it uncollectible. The issue in this case is whether Cellar Door is liable for the sales tax under Section 77.52(2)(a)2 Wis. Stats. We hold that it is and grant summary judgment to the Department.

## WISCONSIN STATUTES

### **77.52 Imposition of retail sales tax.**

(2) For the privilege of selling, performing or furnishing the services described under par. (a) at retail in this state to consumers or users, a tax is imposed upon all persons selling, performing or furnishing the services at the rate of 5% of the gross receipts from the sale, performance or furnishing of the services.

(a) The tax imposed herein applies to the following types of services:

2. The sale of admissions to amusement, athletic, entertainment or recreational events or places except county fairs, the sale, rental or use of regular bingo cards, extra regular cards, special bingo cards and the sale of bingo supplies to players and the furnishing, for dues, fees or other considerations, the privilege of access to clubs or the privilege of having access to or the use of amusement, entertainment, athletic or recreational devices or facilities, including the sale or furnishing of use of recreational facilities on a periodic basis or other recreational rights, including but not limited to membership rights, vacation services and club memberships.

### **77.59 Deficiency and refund determinations.**

(9m) If the department determines that a liability exists under this subchapter and that the liability may be owed by more than one person, the department may assess the entire amount to each person, specifying that it is assessing in the alternative. If the department determines that a liability exists under this subchapter and that the liability may be for either sales taxes or use taxes, the department may make an

assessment for both taxes, specifying that it is assessing in the alternative.

## DECISION

This is a Motion for Summary Judgment by both parties. Summary judgment must be granted if the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. *Maynard v. Port Publications, Inc.*, 98 Wis. 2d 555, 558, 297 N.W.2d 500 (1980), citing Wis. Stat. § 802.08(2). A party moving for summary judgment has the burden to establish the absence of a genuine, that is, disputed, issue as to any material fact. *Kraemer Bros. v. United States Fire Ins. Co.*, 89 Wis. 2d 555, 565, 278 N.W.2d 857 (1979). Any evidentiary facts in an affidavit are to be taken as true unless contradicted by other opposing affidavits or proof. *Artmar, Inc. v. United Fire & Casualty Co.*, 34 Wis. 2d 181, 188, 148 N.W.2d 641, 644 (1967). The effect of counter-motions for summary judgment is an assertion by the parties that the facts are undisputed, that in effect the facts are stipulated, and that only issues of law are before the court. *Eichenseer v. Madison-Dane County Tavern League, Inc.*, 2008 WI 38, ¶4, 308 Wis. 2d 684, 748 N.W.2d 154.

Both parties stipulated to many of the facts and filed affidavits which pertained to many others. They both filed proposed Findings of Fact and Conclusions of Law. The only issue is whether Wis. Stat. § 77.52(2)(a)2 applies to Cellar Door. The

Commission believes that the case can be resolved under the summary judgment standard.

Wisconsin Statute § 77.52(2)(a)2 imposes a sales tax upon all persons selling admissions to entertainment events. The sale of admissions to the concerts at issue in the audit was clearly a taxable event, and in fact sales tax was collected, but not remitted to the Department. Pursuant to Wis. Stat. § 77.60(11), "[w]henever a person collects tax moneys imposed under s. 77.52. . . from a consumer, user or purchaser, the person receives those tax moneys as trust funds and state property." The Commission finds that the relevant facts are undisputed and that the case can be resolved under the summary judgment standard.

The evidence is clear in this case that Cellar Door sold admissions to the concerts in question. It did so in part through its agreement with the Ticketmaster system. Under the agreement, Cellar Door had the authority to sell tickets to the public through the Ticketmaster system. Ticketmaster was Cellar Door's exclusive agent for the sale of all remote tickets sold at outlets and by telephone. Cellar Door was paid the ticket sales proceeds for each event directly from Ticketmaster. Ticketmaster wrote a Client Disbursement Check to Cellar Door covering the events which took place from January 2001 to February 2002. For the remaining events held from February 2002 through December 2004, Cellar Door received the ticket sales proceeds via wire transfer from Ticketmaster directly into Cellar Door's bank account. In addition, Cellar Door took over the box office management of the events at Riverside Theatre by signing a "Box Office Management and Consulting Agreement" on October 1, 2001. Under this

agreement, all of the people who worked at the Riverside box office became employees of Cellar Door. These employees sold tickets to the events in question.

The evidence further shows that the agreement between Cellar Door and Riverside Theatre gave both parties the joint responsibility to manage and control the presentation of events, including ticketing. Cellar Door and Riverside split the net profits 50/50. There was no separate item for "concert promotion services." Cellar Door, through its agent Ticketmaster, sold the tickets and received the proceeds from the sales transactions. Although its co-promoter may also have been liable for paying the sales tax, it is clear that Cellar Door is liable for the sales tax on the admission tickets.

Petitioner argues that it should not be liable for the sales tax on the admissions because it provided "concert promotion services" and "concert promotion services" are not one of the enumerated services taxed under Wis. Stat. § 77.52(2)(a)2. As Petitioner points out, Wis. Stat. § 77.52(2)(a)2 is an imposition statute and tax liability cannot be imposed unless the activities taxed fit unambiguously within the clear and express language of the statute. *Leach v. Dep't. of Revenue*, Wis. Tax Rptr., (CCH) ¶ 400-772 (WTAC 2004).

This argument is without merit. The Commission finds that part of the "concert promotion services" provided by Cellar Door was the sale of admission to the concerts and the sale of merchandise at the concerts. Evidence that Ticketmaster sold tickets for Cellar Door and remitted the proceeds of the sales to Cellar Door clearly shows that Cellar Door was involved in the sale of admission tickets to the

concerts. The record also shows Cellar Door sold tickets through the box office. With respect to the merchandise sold at the concerts, the proceeds were included in the division of profits between Cellar Door and Riverside and thus Cellar Door was jointly and severally liable for the taxes on these sales. The conclusion is obvious that Cellar Door was properly assessed for these sales taxes. Cellar Door cannot avoid liability by creative wording. That would be tax avoidance by dictionary and clearly the law does not sanction such a result.

Cellar Door also argues that the Department cannot impose liability for unremitted sales tax to both Cellar Door and Riverside Theatre. However, Wis. Stat. § 77.59(9m) authorizes the Department to do exactly that and, therefore, it was proper under the statute to assess Cellar Door in the alternative for the sales tax on the admissions and the sale of merchandise.

In summary, this is a simple case. Cellar Door "co-promoted" concerts and other events with Riverside. The sales of admissions and the sales of merchandise at the concerts were clearly taxable. The tax on these sales was never remitted by either of the parties. Both parties were assessed by the Department. Neither has paid. As co-promoters, both are liable. Cellar Door has attempted to avoid liability for the tax by creatively describing its business as concert promotion and claiming that its concert promotion services did not include selling admissions to the concerts or selling merchandise at the concerts. We note that Cellar Door's own parent company disagrees; in its 2000 10-K report to the SEC, SFX outlines the various activities expected of a "promoter" as typically including selling tickets and notes that a primary source of


concert revenue is from the ticket sales. (Zimmer Supp. Aff. ¶ 2, Ex. 10, p. 3 ad p. 22.) The evidence is clear that Cellar Door through the box office and through Ticketmaster did sell admissions to the concerts and with Riverside did sell merchandise at the concerts. Cellar Door is therefore a retailer under Wis. Stat. § 77.51(13) who is liable under Wis. Stat. § 77.52(1) and (2). As a co-promoter, Cellar Door was properly assessed in the alternative under Wis. Stat. § 77.59(9m). The assessments against Cellar Door were proper and correct. Summary judgment is granted to the Department and Petitioner's appeal is dismissed.

Dated at Madison, Wisconsin, this 22<sup>th</sup> day of January, 2013.

**WISCONSIN TAX APPEALS COMMISSION**

  
Lorna Hemp Boll, Chair

  
Roger W. LeGrand, Commissioner

  
Thomas J. McAdams, Commissioner

ATTACHMENT: NOTICE OF APPEAL INFORMATION

WISCONSIN TAX APPEALS COMMISSION  
5005 University Avenue - Suite 110  
Madison, Wisconsin - 53705

**NOTICE OF APPEAL INFORMATION**

**NOTICE OF RIGHTS FOR REHEARING OR JUDICIAL REVIEW, THE TIMES ALLOWED  
FOR EACH, AND THE IDENTIFICATION OF THE PARTY TO BE NAMED AS  
RESPONDENT**

A taxpayer has two options after receiving a Commission final decision:

***Option 1: PETITION FOR REHEARING BEFORE THE COMMISSION***

The taxpayer has a right to petition for a rehearing of a final decision within 20 days of the service of this decision, as provided in Wis. Stat. § 227.49. The 20-day period commences the day after personal service on the taxpayer or on the date the Commission issued its original decision to the taxpayer. The petition for rehearing should be filed with the Tax Appeals Commission and served upon the other party (which usually is the Department of Revenue). The Petition for Rehearing can be served either in-person, by USPS, or by courier; however, the filing must arrive at the Commission within the 20-day timeframe of the order to be accepted. Alternatively, the taxpayer can appeal this decision directly to circuit court through the filing of a petition for judicial review. It is not necessary to petition for a rehearing first.

**AND/OR**

***Option 2: PETITION FOR JUDICIAL REVIEW***

Wis. Stat. § 227.53 provides for judicial review of a final decision. Several points about starting a case:

1. The petition must be filed in the appropriate county circuit court and served upon the Tax Appeals Commission either in-person, by certified mail, or by courier, and served upon the other party (which usually is the Department of Revenue) within 30 days of this decision if there has been no petition for rehearing, or within 30 days of service of the order that decides a timely petition for rehearing.
2. If a party files a late petition for rehearing, the 30-day period for judicial review starts on the date the Commission issued its original decision to the taxpayer.
3. The 30-day period starts the day after personal service or the day we mail the decision.
4. The petition for judicial review should name the other party (which is usually the Department of Revenue) as the Respondent, but not the Commission, which is not a party.

For more information about the other requirements for commencing an appeal to the circuit court, you may wish to contact the clerk of the appropriate circuit court or the Wisconsin Statutes. The website for the courts is <http://wicourts.gov>.

This notice is part of the decision and incorporated therein.