

STATE OF WISCONSIN  
TAX APPEALS COMMISSION

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NEJA GROUP, LLC,

DOCKET NO. 08-S-64

Petitioner,

vs.

WISCONSIN DEPARTMENT OF REVENUE,

Respondent.

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**RULING AND ORDER**

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**ROGER W. LEGRAND, COMMISSIONER:**

This matter comes before the Commission on a Motion for Summary Judgment filed by the Respondent, Wisconsin Department of Revenue ("Department"), and a Cross-Motion for Summary Judgment filed by Petitioner, NEJA Group, LLC.

Petitioner, NEJA Group, LLC ("Petitioner"), is represented by Attorney Kristina E. Somers of Reinhart Boerner Van Deuren s.c. of Milwaukee, Wisconsin. Respondent is represented by Attorney Julie A. Zimmer of the Wisconsin Department of Revenue. Both parties have filed briefs, affidavits, proposed findings of fact, and conclusions of law.

## FACTS

### *Jurisdictional Facts*

1. By Notice of Field Audit Action dated May 6, 2007, the Department issued a sales and use tax assessment to Petitioner NEJA Group, LLC ("NEJA"), for the period January 1, 2001–December 31, 2004 ("Audit Period") in the total amount of \$489,219.70, including sales and use tax, regular interest, and penalty. Zimmer Aff. ¶ 2, Ex. 1, pp. 3 and 6.

2. NEJA timely petitioned the Department for a redetermination of its May 6, 2007 sales and use tax assessment by letter dated July 3, 2007. Zimmer Aff. ¶ 3, Ex. 2.

3. The Department denied NEJA's Petition for Redetermination by the Notices of Action dated March 3 and 10, 2008. Zimmer Aff. ¶ 4, Ex. 3.

4. The Wisconsin Tax Appeals Commission received NEJA's timely Petition for Review on May 2, 2008. Zimmer Aff. ¶ 5, Ex. 4.

### *Additional Facts*

5. During the Audit Period, NEJA operated the Alpine Valley Music Theater in East Troy, Wisconsin ("Alpine Valley"), and promoted live music shows at that venue. Zimmer Aff. ¶ 6, Ex. 5, Response to First Admissions Nos. 21-22.

6. NEJA was a subsidiary of SFX Entertainment, Inc. ("SFX"); and, SFX was a subsidiary of Clear Channel Communications, Inc. ("CCE"), during the Audit Period. Zimmer Aff. ¶ 8, Ex. 6, Response to First Interrogatories No. 10(a).

7. On November 13, 1998, SFX, "on behalf of itself and the SFX Affiliates (collectively, "SFX")," entered into a contract with Ticketmaster Corporation ("Ticketmaster") granting Ticketmaster:

the exclusive right during the term of this Agreement to sell, as SFX's agent, all Tickets made available generally to the public through any and all means, including but not limited to at Outlets and/or by Telephone Sales, for any Attraction scheduled or presented by SFX at any Facility; provided, however, that SFX shall have the right to conduct box office, season, subscription, affinity and club programs, box seats and group sales of Tickets, but may not use the services of any third party computerized or electronic ticketing service or entity to conduct such sales.

Zimmer Aff. ¶ 7, Ex. 7, Letter Agreement dated November 13, 1998, ¶ 2.

8. The November 13, 1998 contract with Ticketmaster ("Contract") applied to NEJA as an "SFX Affiliate." Zimmer Aff. ¶ 9, Ex. 8, Response to Second Admissions No. 8; Ex. 7, ¶ 1(j).

9. Ticketmaster was authorized to sell tickets to Alpine Valley events through its outlet locations, by telephone, and over the internet during the Audit Period. Zimmer Aff. ¶ 7, Ex. 7, ¶ 2 of the Contract; Zimmer Aff. ¶ 10, Ex. 10.

10. Tickets to Alpine Valley events could also be purchased from Alpine Valley's box office on show days only. Box office sales were processed using Ticketmaster (TM System) equipment. Zimmer Aff. ¶ 9, Ex. 8, Response to Second Admissions No. 5; Zimmer Aff. ¶ 9, Ex. 9, Response to Second Interrogatories No. 8.

11. The Contract with Ticketmaster was in effect during the entire Audit Period, as modified by the letter agreements of February 13, 2003, and February

21, 2003. Zimmer Aff. ¶ 6, Ex. 5, Response to First Admissions No. 42; Ex. 7, ¶ 3 of the Contract.

12. During the Audit Period, when customers purchased tickets to Alpine Valley events through Ticketmaster, the total sales price may have included certain additional charges added to the face value of the ticket depending on the transaction, such as a "customer convenience charge," a "handling fee," a "credit card fee," a "delivery fee," a "facility maintenance fee," and a "parking fee." Zimmer Aff. ¶ 6, Ex. 5, Response to First Admissions No. 27, and Ex. 6, Response to First Interrogatories No. 8.

13. NEJA determined the amount of the face value of the ticket, upon which sales tax was collected by Ticketmaster and remitted by NEJA. This is not at issue in this case. Zimmer Aff. ¶ 6, Ex. 5, Response to First Admissions No. 55, and Ex. 6, Response to First Interrogatories No. 17(a); Zimmer Aff. ¶ 9, Ex. 8, Response to Second Admissions No. 6.

14. NEJA determined the amount of the "facility maintenance fee" included in the total sales price charged to the customer, upon which sales tax was collected by Ticketmaster and remitted by NEJA. This is not at issue in this case. Zimmer Aff. ¶ 6, Ex. 5, Response to First Admissions Nos. 11, and Ex. 6, Response to First Interrogatories No. 17(b); Zimmer Aff. ¶ 9, Ex. 8, Response to Second Admissions No. 6.

15. NEJA determined the amount of any "parking fee" included in the total sales price charged to the customer, upon which sales tax was collected by

Ticketmaster and remitted by NEJA. This is not at issue in this case. Zimmer Aff. ¶ 6, Ex. 5, Response to First Admissions Nos. 12, and Ex. 6, Response to First Interrogatories No. 17(b); Zimmer Aff. ¶ 9, Ex. 8, Response to Second Admissions No. 6.

16. Ticketmaster determined the amount of any "delivery fee" included in the total sales price charged to the customer, but shared the revenue from delivery with SFX/CCE. The "delivery fees" are not at issue in this case. Zimmer Aff. ¶ 6, Ex. 6, Response to First Interrogatories No. 17(b); Zimmer Aff. ¶ 7, Ex. 7, Modifications to Letter Agreement dated February 13 and 21, 2003, ¶¶ 3 and 2 respectively.

17. Pursuant to the Contract and its modifications, both SFX and Ticketmaster determined the amount of the per-ticket "customer convenience charge" and the per-order "handling fee" ("Service Charges") that were included in the total sales price charged to the Alpine Valley customer. Zimmer Aff. ¶ 6, Ex. 6, Response to First Interrogatories No. 17(b); Zimmer Aff. ¶ 7, Ex. 7, ¶ 4 of the Contract; Zimmer Aff. ¶ 10, Ex. 10.

18. Pursuant to the Contract, SFX and Ticketmaster mutually agreed to the amount and timing of any increases to be made to the Service Charges over the term of the Contract. Zimmer Aff. ¶ 7, Ex. 7, ¶ 4 of the Contract.

19. SFX had the discretion to increase or decrease the "customer convenience charge" depending on the type of ticket purchased. Zimmer Aff. ¶ 7, Ex. 7, ¶ 9 of the Contract; Zimmer Aff. ¶ 12, Ex. 13.

20. An Alpine Valley customer purchasing tickets through Ticketmaster during the Audit Period had no option but to pay the Services Charges at issue. Zimmer Aff. ¶ 6, Ex. 5, Response to First Admissions Nos. 24(a), 25(g), 27.

21. During the Audit Period, NEJA did not pay sales tax on the amount of the Service Charges included in the total sales price charged to the customer for tickets to Alpine Valley events purchased through Ticketmaster. The sales tax on these Service Charges is at issue in this case. Zimmer Aff. ¶ 2, Ex. 1, pg. 3.

22. Pursuant to the Contract, SFX and Ticketmaster agreed to share the Service Charge revenue Ticketmaster collected "with respect to the services provided by both Ticketmaster and SFX "on all tickets" during the Audit Period, including those sold for Alpine Valley events. Zimmer Aff. ¶ 7, Ex. 7, ¶ 4 of the Contract.

23. Pursuant to their revenue sharing agreement, Ticketmaster retained approximately fifty percent (50%) of the Service Charges it collected from the sale of tickets to Alpine Valley and remitted the other 50% to SFX/CCE. Zimmer Aff. ¶ 6, Ex. 6, Response to First Interrogatories No. 3; Zimmer Aff. ¶ 11, Ex. 11.

24. SFX/CCE's 50% share of the Service Charges appeared as NEJA's revenue stream known as "Service Charge Rebates" on Alpine Valley Theater's Income Statements and as "S/C Rebates" on Alpine Valley's Forecast Summaries during the Audit Period. Zimmer Aff. ¶ 9, Ex. 9, Response to Second Interrogatories Nos. 11, 14(a); Zimmer Aff. ¶ 12, Ex. 12.

## CONCLUSIONS OF LAW

1. Petitioner has not met its burden of proving the Department's sales and use tax assessment was incorrect.
2. Petitioner was a retailer providing the taxable service of selling admissions to the Alpine Valley concert events at issue through its agent, Ticketmaster.
3. The Customer Convenience Charge and the Handling Fee included in the total sales price charged by Ticketmaster to an Alpine Valley customer were taxable as part of Petitioner's gross receipts from its sale of admissions.
4. Petitioner is liable for sales tax on 100% of the gross receipts from the sales of its admissions to Alpine Valley, regardless of the separate revenue sharing agreement it had with Ticketmaster.

## WISCONSIN STATUTES AND ADMINISTRATIVE CODE

### A. *Wisconsin Statutes (2001-02)*

#### **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 . . .

**77.51 Definitions.** Except where the context requires otherwise, the definitions given in this section govern the construction of terms in this subchapter.

...

(4) (a) Except as provided in par. (cm)<sup>1</sup>, "gross receipts" means the total amount of the sale, lease or rental price, as the case may be, from sales at retail of tangible personal property, or taxable services, valued in money, whether received in money or otherwise, without any deduction on account of the following:

1. The cost of the property sold;
2. The cost of the materials used, labor or service cost, interest paid, losses or any other expense;
3. The cost of transportation of the property prior to its sale to the purchaser;
4. Any tax included in or added to the purchase price,  
....

...

(c) "Gross receipts" includes:

1. All receipts, cash, credits and property except as provided in par. (b) 3.<sup>2</sup>
2. Any services that are a part of the sale of tangible personal property, including any fee, service charge, labor charge or other addition to the price charged a customer by the retailer which represents or is in lieu of a tip or gratuity.

...

(13) "Retailer" includes:

(a) Every seller who makes any sale of tangible personal property or taxable service.

...

(17) "Seller" includes every person selling, leasing or renting tangible personal property or selling, performing or furnishing services of a kind the gross receipts from the sale, lease, rental, performance or furnishing of which are required to be included in the measure of the sales tax.

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<sup>1</sup> Wis. Stat. § 77.51(4)(cm), relating to the portion of the sales price attributable to taxable goods if exempt food, food products or beverages are packaged with other goods by a person other than a retailer before a sale, is not relevant here.

<sup>2</sup> Wis. Stat. § 77.51(4)(b)3, relating to transactions in which an article of tangible personal property is traded toward the purchase of an article of greater value, is not relevant here.



B. *Wisconsin Administrative Code (Register July 2003)*

**Tax 11.32 "Gross receipts" and "sales price".**

- (1) GENERAL. The amount to which the sales and use tax rate is applied is "gross receipts" for sales tax and "sales price" for use tax. Both "gross receipts" and "sales price" mean the total amount of the sale, lease or rental from retail sales of tangible personal property or taxable services, valued in money, whether received in money or otherwise.
- (2) HANDLING AND SERVICE CHARGES. A retailer's gross receipts from charges for customer alterations, handling services, small orders, returned merchandise, restocking, split shipments and similar charges for services related to retail sales are included in gross receipts derived from the sale of taxable tangible personal property or taxable services.

**Tax 11.67 Service enterprises.**

- (2) RECEIPTS AND PURCHASES OF PERSONS PROVIDING SERVICES.
- (c) If there is a single charge for providing both taxable and nontaxable services, the entire charge is subject to the tax, unless it is determined by the department that another method, such as allocation or primary purpose of the transaction, more accurately reflects the tax. If the charges for taxable and nontaxable services are separately stated on an invoice, the tax applies only to the charge properly attributable to the taxable services, unless it is determined by the department that the primary purpose of the transaction method for computing the tax more accurately reflects the tax.

**ISSUE**

The issue in this case is whether sales tax is due on the service charges included in the total sales price charged to customers for tickets to Alpine Valley events purchased through Ticketmaster.

**ANALYSIS**

Under Wis. Stat. § 802.08(2), summary judgment must be granted if the pleadings, depositions, answers to interrogatories, and admissions on file together with

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.

In this case, the Department moved for summary judgment. Petitioner filed a cross-motion asking for summary judgment on its own behalf. Since both parties moved for summary judgment, the Commission expected that the parties would have submitted an agreed upon recital of facts. However, both parties filed their own proposed findings and conclusions. Petitioner specified objections to certain of the Department's proposed findings, and the Department objected to several of Petitioner's proposed findings.

The Commission adopts the Department's proposed findings of fact as they are established in the record. The Commission notes Petitioner's objections but feels that they are not material to any facts at issue. Petitioner argues that its objections should be considered by the Commission. The Commission finds that Petitioner's objections deal with interpretation and style. As such, they were considered in evaluating Respondent's arguments, but the Commission does not find them to be material to an issue in the case. The Commission finds that there is no dispute as to any material fact and that the case is appropriate for summary judgment.

Assessments made by the Department are presumed to be correct, and the Petitioner bears the burden to prove by clear and satisfactory evidence in what respects the Department erred in its determination. *Itsines v. Wisconsin Dep't of Revenue*, Wis. Tax Rptr. (CCH) ¶ 401-341 (WTAC 2010), citing *Edwin J. Puissant, Jr. v. Wis. Dep't of Revenue*, Wis. Tax Rptr. (CCH) ¶ 202-401 (WTAC 1984); Wis. Stat. § 77.59(1). "For the

purpose of the proper administration of this section and to prevent evasion of the sales tax it shall be presumed that all receipts are subject to the tax until the contrary is established. The burden of proving that a sale of tangible personal property or services is not a taxable sale at retail is upon the person who makes the sale . . . .” Wis. Stat. § 77.52(13). Testimony by interested parties that is not corroborated by other evidence will not overcome the presumption of correctness. *Dvorak v. Wis. Dep’t of Revenue*, Wis. Tax Rptr. (CCH) ¶ 400-600 (WTAC 2002).

In this case, Petitioner operated the Alpine Valley Music Theater in East Troy, Wisconsin, and promoted live music shows at that venue. It contracted with Ticketmaster to sell tickets to its shows. Under Wis. Stat. § 77.51(13)(c) (2001-02), both Petitioner and Ticketmaster were considered retailers; and as retailers, they were subject to sales tax under Wis. Stat. § 77.52(2)(2) which imposes a sales tax for the privilege of selling admissions to entertainment events. Ticketmaster acted as Petitioner’s ticketing agent; Petitioner granted Ticketmaster the exclusive right to sell tickets to its events.

The retail sales charged for the sale of admissions for entertainment events was 5% of the gross receipts from the sale, performance, or furnishing of the services.

Wis. Stat. § 77.51(4)(a) defines “gross receipts” as including:

- 1) all receipts, cash, credits
- 2) any services that are part of tangible personal property, including any fee, service charge, labor or addition to the price charged a customer by the retailer which represents or is in lieu of a tip or gratuity.

(emphasis added)

The service charges, in this case consisting of a handling fee and customer convenience charge, were part of the gross receipts from the sale. Wisconsin Administrative Rule Tax § 11.32(2) includes charges for “handling services” and “similar charges for services related to retail sales” in a retailer’s gross receipts derived from the sales of taxable services. The customer convenience charge at issue here is certainly a charge that relates to the retail sale of the taxable Alpine Valley admissions. The statutes and administrative rule make it perfectly clear that customer convenience charges and handling fees are part of the gross receipts from the sale of services which are subject to sales tax. The Department was correct in issuing its assessment on these customer convenience charges and handling fees.

To rebut the presumption that the assessment is correct, Petitioner argues that the customer convenience charges were not enumerated services subject to sales tax and that the customer convenience charges were not part of the gross receipts of taxable sales that were subject to sales tax.

It is clear that Wis. Stat. § 77.52 imposes sales tax on the gross receipts from the sale of admissions to amusement events. Gross receipts are defined in Wis. Stat. § 77.51(4) and Wisconsin Administrative Codes § 11.32(1) and (2). There is no ambiguity in the statutes. They do not limit taxability to admission price, but to the gross receipts from the sale of admissions which specifically includes handling and service charges. The Commission finds no basis in Petitioner's argument that customer convenience charges are different from handling and service charges. They are one and

the same thing, a dictionary distinction without legal significance. They are part of the gross receipts taxable under Wis. Stat. § 77.52(2).

The Commission also rejects Petitioner's argument that NEJA should not be responsible for Ticketmaster's additional customer convenience charges and service fees. Ticketmaster was the agent of NEJA for selling tickets to Alpine Valley shows. The extra charges Ticketmaster, as Petitioner's agent, included in the total price of the ticket, were part of the gross receipts from the sale of admissions. These service charges, tacked on to the face value of the admission ticket, were taxable. *See Cellar Door North Central, Inc. v. Dep't of Revenue*, Wis. Tax Rptr. (CCH) ¶ 401-686 (WTAC Jan. 22, 2013).

In conclusion, the Commission finds this to be a simple case. Wis. Stat. § 77.52(2) imposes sales tax on the gross receipts from the sale of admissions. The statutory and administrative rule definitions of gross receipts make it clear that additional charges such as handling fees and customer convenience charges which are part of the total sale price and are related to the sale are taxable. Petitioner is responsible for sales tax on the gross receipts from the sale of admissions to Alpine Valley events. The gross receipts include the handling fees and customer convenience charges tacked on to the face value of admissions by its agent Ticketmaster.

#### **ORDER**

1. Summary judgment is granted to Respondent.
2. Petition for Review in this matter is hereby dismissed.

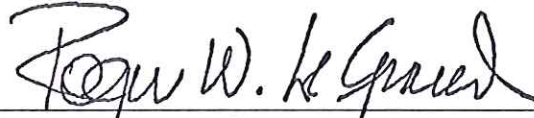
Dated at Madison, Wisconsin, this 13<sup>th</sup> day of January, 2014.

**WISCONSIN TAX APPEALS COMMISSION**



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Lorna Hemp Boll, Chair



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Roger L. LeGrand, 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.