

Management Advisory 2007 – 1

To: Dwight E. Brock, Clerk of Courts
From: Anthony C. Fernandez, Internal Audit Manager
Through: Crystal Kinzel, Finance Director
CC: Barry Williams, Parks & Recreation Director
Marilyn Matthes, Library Director
Robert Zachary, County Attorney
Ronald Dortch, Senior Internal Auditor (Auditor In-Charge)
Audit File
Date: September 27, 2007
Re: Collection of Sales Tax on Concessionaire Contracts

Collection of Sales Tax on Concessionaire Contracts

BACKGROUND

The Internal Audit Department routinely reviews Florida County websites and published audit reports to identify audit issues that may impact Collier County. A Hernando County audit report dated November 19, 1997 titled Park User Fees & Commercial Concession Commissions uncovered the erroneous collection of sales tax on rent/license fee payments the county receives from vendors providing food and drink concessionaire services at county-owned recreational facilities. The audit report cited Florida Statute 212.031(1)(a) and 212.031(1)(a)10 as the basis for its audit finding. F.S. 212.031(1)(a) states "...every person is exercising a taxable privilege who engages in the business of renting, leasing, letting, or granting a license for the use of any real property...". F.S. 212.031(1)(a)10 allows for an exemption from sales tax if "... such property is leased, subleased, licensed, or rented to a person providing food and drink concessionaire services within the premises of a ... publicly owned recreational facility...".

In addition, a Technical Assistance Advisement (TAA #01A-025) issued by the Florida Department of Revenue (DOR) on May 17th, 2001 confirmed that rent/lease payments for the right to provide food and drink concessionaire services at publicly owned recreational facilities are exempt from sales tax. For example, the TAA determined the vendor's rent/lease payment for a vendor managing a tennis center and offering food

and drink vending machines and light refreshments at special events is subject to state sales tax. On the other hand, the rent/lease payment from a vendor operating a snack bar located within a county beach park that is selling food, non-alcoholic beverages, and other items appropriate to a beach environment is exempt from sales tax.

The intent of this review was to determine whether Collier County is complying with the sales tax exemption articulated in Florida Statute 212.031(1)(a)10, and, if not, to determine the amount of sales tax erroneously paid that can be refunded to the concessionaires per DOR regulations. In addition, another objective was to determine whether concessionaire lease agreements are consistent with Florida Statutes.

This was a limited scope engagement in which we focused our objectives strictly on identifying and resolving, if necessary, any statutory compliance issues.

ANALYSIS

Internal Audit's analysis included identifying all vendors providing food and drink concessionaire services at recreation facilities owned by Collier County; reviewing the concessionaire contracts to determine if the vendor is required to add sales tax to the rent/license fee payments; and reviewing the Clerk of Courts financial system (SAP) and vendor payment documentation to determine if Collier County collected sales tax on the rent/license fee payments.

Internal Audit identified seven (7) concessionaire contracts (both in effect and expired) with five (5) different vendors providing food and drink concessionaire services at Parks & Recreation and Library facilities:

- Cool Concessions, Inc. (Caxambas Pass Marina & Tigertail Beach)
- Day-Star Unlimited, Inc. d/b/a Cabana Dan's (Vanderbilt Beach)
- Recreational Facilities of America, Inc. (Barefoot Beach & Tigertail Beach)
- That's Amore' in Napoli, Inc. (Golden Gate Aquatic Center)
- Paradise Consultant's, Inc. (Orange Blossom Library)

These vendors are required by contract to pay Collier County either a flat fee or a percentage of gross receipts, whichever is greater (e.g. \$500 or 12% of monthly gross receipts). This amount constitutes the vendor's monthly lease payment. Each contract requires the vendor to pay 6.00% sales tax on the monthly lease payment. Review of the Clerk of Court's financial system (SAP) and vendor payment documentation confirmed that Collier County has been collecting sales tax on these payments, with the funds remitted to DOR on a monthly basis.

Per Florida Statute 212.031(1)(a)10 and TAA #01A-025, Internal Audit concluded that these rent/license fee payments are exempt from sales tax and requested a Technical Assistance Advisement (TAA) to confirm its position. Based on the concessionaire contracts and supporting documentation submitted for review, DOR issued TAA #07A-002 on February 19, 2007 in which it agreed with Internal Audit's position that these vendors rent/license fee payments are exempt from sales tax. TAA #07A-002 is attached as Exhibit I.

RESULTS

Based on Internal Audit's analysis, the Clerk's Finance Department filed a refund application with DOR on November 1, 2006 in the amount of \$14,187.70. DOR has reviewed the refund application and subsequently adjusted the refund amount. Per DOR guidelines, the recovery period for sales tax payments is limited to three (3) years from the date the refund application was filed. As a result, DOR reduced the refund amount to \$12,296.94, which covers sales tax collected on the rent/lease payments from November 2003 through October 2006. See the following schedule for a listing of vendors and refund amounts.

Concessionaire	Collier County Facility	Contract Status	Total Sales Tax Collected
1) Cool Concessions, Inc.	Caxambas Pass Marina Tigertail Beach	Terminated Terminated	\$4,011.08
2) Day-Star Unlimited Inc. d/b/a Cabana Dan's	Vanderbilt Beach	Current	\$3,810.70
3) Recreational Facilities of America, Inc.	Barefoot Beach Tigertail Beach	Current Current	\$2,038.97 \$343.74
4) That's Amore' in Napoli, Inc.	Golden Gate Aquatic	Current	\$1,636.45
5) Paradise Consultants, Inc.	Orange Blossom Library	Terminated	\$456.00

TOTAL = \$12,296.94

Also, DOR guidelines require the County to provide proof that the sales tax has been refunded to the vendors before the County is reimbursed. The Board of County Commissioners during its regular meeting on September 25, 2007, approved the refund to the vendors. The Clerk's Finance Department issued refund checks to each vendor, provided documentation to DOR, and is awaiting reimbursement. Lastly, the Clerk's Finance Department has consulted with Collier County's Legal Department and determined that the concessionaire lease agreements do not need to be amended.

**Exhibit I: Technical Assistance Advisory #07A-002
Concessionaire Services at Publicly Owned Recreational Facilities
Sales and Use Tax**



General Tax Administration
Child Support Enforcement
Property Tax Administration
Administrative Services
Information Services

February 19, 2007

Crystal K. Kinzel
Finance Director
Collier County Clerk of the Circuit Court
3301 Tamiami Trail East
P.O. Box 413044
Naples, Florida 34101-3044

Re: Technical Assistance Advisement 07A-002
Collier County ("County")
Concessionaire Services at Publicly Owned Recreational Facilities
Sales and Use Tax
Section 212.031, Florida Statutes ("F.S.")

Dear Ms. Kinzel:

This response is in reply to your letter dated December 19, 2006, requesting the Department's issuance of a Technical Assistance Advisement ("TAA") pursuant to Section 213.22, F.S., and Rule Chapter 12-11, F.A.C., regarding the Department's position on the issue of the exemption found in Section 212.031(1)(a)10., F.S. An examination of your letter has established that you have complied with the statutory and regulatory requirements for issuance of a TAA. Therefore, the Department is hereby granting your request for issuance of a TAA.

Along with your letter, you provided us with a copy of "concession agreements" between County and food and drink concessionaires operating at County-owned: beaches; aquatic center; and a library.

ISSUE

Is the consideration paid to County by persons providing food and drink concessionaire services within the premises of publicly owned recreational facilities exempt from Florida sales tax by Section 212.031(1)(a)10., F.S.?

RECEIVED
FEB 21 2007
FINANCE DEPT

FACTS

County has entered into "concession agreements" with various persons who provide food and drink concessionaire services at County owned facilities. The facilities include beaches ("Tigertail Beach," "Vanderbilt Beach," and "Barefoot Beach"), an aquatic center ("Golden Gate Aquatic Center") and a library (the "Orange Blossom Library"). Each of the facilities is owned by County.

Your letter of December 19, 2006, provides, in part:

* * *

The lease agreement with each concessionaire contains a "Scope", "Consideration", and "Use of Facility" section. The "Scope" section states *that the County grants the limited right for the concessionaire to operate at a designated location.* Furthermore, the section defines the services to be provided by the concessionaire, including *the sale of food and/or beverages.* The "Consideration" section states that *the concessionaire shall remit to the County, a percentage of the total gross revenue of the concessionaire's business, including the sale of food, beverage and sundry concession operation as follows: a flat fee or percentage of gross receipts (except sales tax) whichever is greater. The applicable Florida State Sales Tax on payments to the County shall be added to the concessionaire's payment and forwarded to the County as part of said payments. Said payments shall be tendered to the County by the 15th of each month for the preceding month.* The "Use of Facility" section states that *the facility is for the use of the public for recreational and other public purposes.*
[italics in original]

* * *

REQUESTED ADVISEMENT

Your letter of December 19, 2006, provides that County "... is requesting a Technical Assistance Advisement regarding the sales tax exemption for rental/license fees assessed on concessionaire contracts operating at publicly owned recreational facilities."

APPLICABLE STATUTES AND RULES

Section 212.031, F.S., provides in part:

(1)(a) It is declared to be the legislative intent that every person is exercising a taxable privilege who engages in the business of renting, leasing, letting, or granting a license for the use of any real property unless such property is:

* * *

10. 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, publicly owned recreational facility, or any business operated under a permit issued pursuant to chapter 550. ...

* * *

DISCUSSION

The issue presented in your request is whether the consideration received by County from concessionaires providing food and drink services at County owned recreational facilities is exempt from Florida sales tax.

Persons engaging in the business of renting, leasing, letting, or granting licenses for the use of any real property are exercising a taxable privilege. *See* Section 212.031, F.S. An exemption from the tax otherwise imposed for this privilege involves property that is leased, subleased, licensed or rented to persons providing food and drink concessionaire services within the premises of a publicly owned recreational facility. *See* Section 212.031(1)(a)10., F.S. "Exemptions to taxing statutes are special favors granted by the Legislature and are to be strictly construed against the taxpayer." State ex rel. Szabo Food Services, Inc. v. Dickinson, 286 So. 2d 529, 530 (Fla. 1973).

Because no definition of "recreational facility" is provided by statute, it is necessary 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).

The word "recreation" is defined in Merriam-Webster's Collegiate Dictionary (Tenth Edition, 1999) as meaning:

... refreshment of strength and spirits after work; *also*: a means of refreshment or diversion: HOBBY – **recreational** ... *adj*

Merriam-Webster's defines the word "facility" as meaning:

... something (as a hospital) that is built, installed, or established to serve a particular purpose. Id.

We also note that no definition of the word "concessionaire" is provided by statute. Merriam-Webster's Collegiate Dictionary (Tenth Edition, 1999) defines "concessionaire" as meaning:

[T]he owner or operator of a concession; *esp*: one that operates a refreshment stand at a recreational center.

County's beaches, aquatic centers and libraries all fall within the plain and ordinary meaning of "recreational facility," as each is a place built, installed or established to serve

the purposes of refreshing strength and spirit and for providing diversion. The beaches, aquatic center and library are publicly owned (i.e., owned by County). The persons granted the right to provide food and drinks at these facilities are concessionaires.

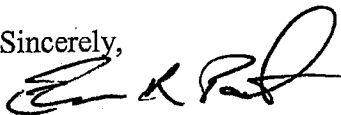
CONCLUSION

The consideration paid by the concessionaires to County, at County-owned beaches (specifically, "Tigertail Beach," "Vanderbilt Beach," and "Barefoot Beach"), aquatic center ("Golden Gate Aquatic Center") and library (the "Orange Blossom Library") is not subject to Florida sales tax (otherwise imposed by Section 212.031, F.S.) because the "concession agreements" fall within the scope of the exemption found at Section 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 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,



Eric R. Peate
Senior Attorney
Technical Assistance and Dispute Resolution
(850) 922-4714

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