Insights: Publications

Chicago and Cook County Amusement Tax

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The Chicago and Cook County Amusement Tax can apply more broadly than taxpayers often anticipate. Specifically, the scope of the amusement tax has been expanded over the last few years to non-traditional amusements, including electronically transferred television shows, movies, videos, music, and games.

IMPOSITION OF THE AMUSEMENT TAX

Although the Chicago and Cook County amusement tax are imposed similarly on taxpayers, they are independently administered taxes that feature key differences. Both the Chicago Amusement Tax Ordinance ("Chicago Ordinance") and Cook County Amusement Tax Ordinance ("Cook County Ordinance") impose the tax "upon the patrons of every amusement" within the city or county, but require the owner, manager, or operator of the amusement to collect the tax from each patron and remit the tax to the Chicago Department of Finance ("Chicago Department") or the Cook County Department of Revenue ("Cook County Department").[1] Further, both Ordinances define "amusement" as "any exhibition, performance, presentation or show for entertainment purposes".[2]

Where the Chicago and Cook County Ordinances deviate, however, are the examples used to define "amusement", the rates of tax, and applicable exemptions. For example, although the Ordinances provide similar examples of qualifying amusements, including a motion picture show, athletic contest, or any theatrical, musical or spectacular performance, the Chicago Ordinance also includes "paid television programming" viewed within or outside the home.[3] In contrast, the County Ordinance does not include such language. Additionally, whereas the Chicago Ordinance imposes the amusement tax at a rate of 9 percent of the admission fees or other charges paid for the privilege to enter, witness, view or participate in the amusement, the County Ordinance imposes the tax at a rate of 3 percent (unless a lower rate applies, as addressed below).[4]

Further, the Chicago and Cook County Ordinances often exempt different activities. For example, although both Ordinances exempt admission fees to witness in person "live theatrical, live musical or other live cultural performances that take place in any auditorium, theater or other space"[5] with a certain limited capacity ("Small Venue Exemption"), the Ordinances include a different capacity limitation. Under the Chicago Ordinance, the Small Venue Exemption renders the amusement tax inapplicable where the maximum capacity of the venue, including all balconies and all sections, is not more than 1,500 persons.[6] In contrast, under the Cook County Ordinance, the Small Venue Exemption only applies where the venue has a capacity of not more than 750 persons.[7] Further, if the venue has a capacity of more than 750 persons, but fewer than 5,000 persons, the Cook County amusement tax applies at a rate of 1 percent rather than the general rate of 3 percent.[8] This serves as a notable example of where the Ordinances may appear to be substantially similar but in fact feature key differences. Additionally, whereas the City clarified in a 2004 Amusement Tax Ruling that "primarily educational" activities are not taxable amusements, Cook County has not released similar guidance.[9] The result is that depending on the nature of the activity, amusement tax may apply in one but not both jurisdictions.

IDENTIFYING TAXABLE "ADMISSION FEES"

A contested issue in applying the amusement tax in both Chicago and Cook County is the amount that compromises the taxable "admission fees or other charges paid for the privilege to enter, witness, view" such amusement.[10] For example, in 2014, the Illinois Court of Appeals held that under the Cook County Ordinance, for club seats and luxury suites to Chicago Bears home football games, "admission fees or other charges" include the amenities available to holders of club seat tickets and tangible personal property included in the luxury suite admission price, not just the value of the home seat games.[11] The Court determined that because a fan cannot witness a game from a club seat without paying the club privilege fee and annual licensing fee, it is not possible to separate the "other charges" from the fee paid to enter the stadium.[12] As a result, the Illinois Appellate Court determined the full price paid by club seat holders and luxury suite licensees is subject to the County's amusement tax. This decision may lead to efforts by the Chicago Department and Cook County Department to expand a taxpayer's taxable base beyond the mere value of a "seat". For example, both the County and the City have been aggressive in their application of the amusement tax to service fees despite clear language in the Ordinances that exempts separately stated optional charges.[13]

EXPANDING THE SCOPE TO ELECTRONICALLY TRANSFERRED AMUSEMENTS

The Chicago Department has recently become aggressive in its expansion of the scope of the Chicago Ordinance. In a 2015 Amusement Tax Ruling, the Chicago Department asserted that the amusement tax is imposed "not only [on] charges paid for the privilege to witness, view or participate in amusements in person but also charges paid for the privilege to witness, view or participate in amusements that are delivered electronically."[14] As a result, the Chicago Department intended to clarify that the Chicago amusement tax applies to fees or charges for the following if delivered in the City: (1) watching electronically delivered television shows, movies or videos; (2) listening to electronically delivered music; and (3) participating in games, on-line or otherwise.[15] Although treated with resistance by taxpayers[16], the implication is that the City Department has the authority to impose the amusement tax on users of streaming services such as Netflix and Spotify, and online gaming, such as PlayStation. Following the Mobile Telecommunication's Sourcing Conformity Act[17], the amusement tax applies to customers whose residential street address or primary business address is in Chicago, as reflected by their credit card billing address, zip code or other reliable information.[18]

Further, as explored briefly above, the Chicago Ordinance treats "paid television programming" as a taxable amusement.[19] "Paid television" means programming that can be viewed on a television or other screen, and is transmitted by cable, fiber optics, laser, microwave, radio, satellite or similar means to members of the public for consideration.[20] Additionally, an "owner" includes "any person operating a community antenna television system or wireless cable television system, or any other person receiving consideration from the patron for furnishing, transmitting, or otherwise providing access to paid television programming."[21]

In 2014, the Chicago Department began auditing and assessing amusement tax on a number of restaurants and bars located through the City who subscribed to paid satellite television programming and who did not collect the amusement tax[22]. In a move to clarify the application of the tax, in November 2016, the Chicago Department released an Informational Bulletin that provided additional information to business subscribers of satellite television regarding their obligation to collect and remit the Chicago amusement tax. As a result, bars, restaurants and any other businesses that subscribe to satellite television are required to remit the Chicago amusement tax on charges paid for satellite television services used in Chicago.

APPLICABILITY TO TICKET RESELLERS AND AGENTS

An area of uncertainty within both the Chicago and Cook County amusement tax is the potential applicability to ticket resellers and agents. The issue dates back to 2006 when the Chicago Department amended the Chicago Ordinance to require not only a “reseller” but also a “reseller's agent” to collect and remit amusement tax.[23] This amendment set the stage for the Chicago Department to attempt to collect the tax from StubHub as a reseller's agent. StubHub is an internet auction listing service that operates a “platform” where it charges buyers and sellers a fee to buy and sell ticket to various events.

On appeal to the Illinois Supreme Court, the Court entered a significant decision for online auctioneers, holding that municipalities may not require electronic intermediaries to collect and remit amusement taxes on resold tickets.[24] The basis of the Court's ruling is that although the Illinois Ticket Sale and Resale Act (the “Act”) [25] gives municipalities the authority to require sellers and resellers of tickets to collect the amusement tax, municipalities do not have the authority to require internet auction listing services, such as StubHub, to collect the tax.[26] Although both the Chicago and Cook County Ordinance still define an “operator” as a person who “sells or resells a ticket”, the *Stubhub* decision resulted in the removal of the term “reseller's agent” and “auctioneer” from the Chicago Ordinance.[27]

CONCLUSION

Although the Chicago and Cook County amusement tax are similarly imposed, there are notable differences between the applicability of the Chicago and Cook County Ordinances. These differences are particularly noteworthy with respect to potential exemptions and electronically transferred amusements. Accordingly, taxpayers should not assume that because the amusement tax applies in one locality, it applies in both Chicago and Cook County.

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[1] Municipal Code of Chicago (“M.C.C.”) §4-156-020(A), 4-146-030(A); Cook County Ordinance (“C.C.O.”) §74-392(a), 74-395(a).

[2] M.C.C. §4-156-010; C.C.O. §74-391.

[3] M.C.C. §4-156-010.

[4] M.C.C. §4-156-020; C.C.O. §74-392.

[5] The Chicago and Cook County Ordinance define “live theatrical, live musical or other live cultural performance” identically as a “live performance in any of the disciplines which are commonly regarded as part of the fine arts, such as live theater, music, opera, drama, comedy, ballet, modern or traditional dance, and book or poetry readings. The term does not include such amusements as athletic events, races, or performances conducted as adult entertainment cabarets.” M.C.C. §4-156-010; C.C.O. §74-391. In this regard, the Chicago Department and Cook County Department appear to play the role of an art critic, defining which activities qualify as “fine arts”. See a prior post exploring the issue in the context of disc jockeys.

[6] M.C.C. § 4-156-020(D).

[7] C.C.O. §74-392(d).

[8] C.C.O. §74-392(f)(1).

[9] Chicago Amusement Tax Ruling #1, §2.

[10] M.C.C. §4-156-020; C.C.O. §74-392.

[11] *Chi. Bears Football Club v. Cook County Dep't of Revenue*, 16 N.E.3d 827, 835 (2014).

[12] *Id*. at 834. In determining the full price paid by club seat ticket holders and luxury suite licensees is subject to the amusement tax, the Court affirmed the reasoning of the court in *Stasko v. City of Chicago*, 997 N.E.2d 975, 993 (2013) (holding that the Chicago Ordinance applied because purchasing the permanent seat license was a prerequisite to viewing the game).

[13] M.C.C. §4-156-020(H); C.C.O. §74-392(e)(3).

[14] Chicago Amusement Tax Ruling #5.

[15] Chicago Amusement Tax Ruling #5, §8.

[16] The Chicago amusement tax, as it applies to certain electronically delivered amusements, such as paid television, was challenged but held by the Cook County Circuit Court to be constitutional in *Labell v. City of Chicago*, Case No. 15 CH 13399 (Cook Cnty. Cir. Ct. May 24, 2018). In this application, the amusement tax is often derisively referred to as the " Cloud Tax" or the " Netflix Tax".

[17] 35 ILCS 638.

[18] Chicago Amusement Tax Ruling #5, §13.

[19] M.C.C. §4-156-010.

[20] *Id.*

[21] *Id.*

[22] For additional background regarding the Department's efforts to collect the Chicago amusement tax from satellite providers, *see* a prior post.

[23] Under the Chicago Ordinance, a reseller's agent is a "person who, for consideration, resells a ticket on behalf of the ticket's owner or assists the owner in reselling the ticket. The term includes but is not limited to an auctioneer, a broker or a seller of tickets for amusements, as those terms are used in 65 ILCS 5/11-42-1, and applies whether the ticket is resold by bidding, consignment or otherwise, and whether the ticket is resold in person, at a site on the Internet or otherwise." M.C.C. §4-156-010 (amended May 24, 2006).

[24] *City of Chicago v. Stubhub, Inc.*, 979 N.E.2d 844, 845 (2011).

[25] 720 ILCS 375/0.01 *et seq*. (2010).

[26] *Stubhub, Inc.*, 979 N.E.2d at 857.

[27] M.C.C. §4-156-010; C.C.O. §74-3

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