

STATE OF NEW YORK

TAX APPEALS TRIBUNAL

In the Matter of the Petition	:	
of	:	
BUFFALO BILLS, INC.	:	DECISION for
Revision of a Determination or for Refund of	:	
Sales and Use Taxes under Articles 28 and 29 of	:	
Tax Law for the Period June 1, 1981 through	:	
February 29, 1984.	:	

Petitioner, Buffalo Bills, Inc., 1 Bills Drive, Orchard Park, New York 14127, filed an exception to the determination of the Administrative Law Judge issued on September 11, 1987 with respect to its petition for revision of a determination or for refund of sales and use taxes under Articles 28 and 29 of the Tax Law for the period June 1, 1981 through February 29, 1984 (File No. 801879). Petitioner appeared by Robshaw, Abramowitz & Tobia, P.C. (Vincent A. Tobia, Esq. of counsel). The Division of Taxation appeared by William F. Collins, Esq. (Deborah Dwyer, Esq. of counsel). County of Erie, State of New York, appeared by Judith A. Avent, Esq. (James L. Tuppen, Esq. of counsel).

Only petitioner, Buffalo Bills, Inc., filed a brief on exception. Oral argument at the request of the petitioner was heard on June 9, 1988.

After reviewing the entire record in this matter, the Tax Appeals Tribunal renders the following decision.

ISSUES

I. Whether a certain per capita charge on tickets for admission to football games played by petitioner's Buffalo Bills football team at Rich County Stadium was properly subject to sales tax.

II. If so, whether certain tickets, sold and reported for sales tax purposes prior to the audit period, were properly included in the assessment herein.

FINDINGS OF FACT

We find the facts as stated in the determination of the Administrative Law Judge and such facts are incorporated herein except that we modify findings of fact "4", "14" and "16" as indicated below.

On December 20, 1984, following an audit, the Division of Taxation issued to petitioner, Buffalo Bills, Inc., a Notice of Determination and Demand for Payment of Sales and Use Taxes Due for the period June 1, 1981 through February 29, 1984 asserting tax due of \$28,211.07, plus interest.

By letter dated February 24, 1986, the County of Erie, State of New York, sought leave to participate in the present proceedings. The Tax Appeals Bureau subsequently granted the County's request. It should be noted that the County did not claim responsibility for the deficiency at issue herein, but rather participated pursuant to its obligations under the terms of its stadium lease with petitioner. It should be further noted that the County, like petitioner, contended that the amount in dispute, a 25 cent charge per ticket, was not properly subject to tax.

Petitioner is and was at all times relevant herein a member of the National Football League and owner of the professional football team known as the "Buffalo Bills".

Finding of fact "4" of the Administrative Law Judge's determination is modified to read as follows:

The New York State Legislature by Laws of 1968, chapter 252 authorized Erie County to construct and finance a sports stadium.

On September 23, 1971 the Erie County Legislature adopted the necessary bond resolution authorizing the construction of the stadium, appropriating \$23,500,000 to finance the cost of the construction; authorizing the issuance of a \$23,500,000 Serial Bond of the County to finance the appropriation and prescribing the plan of financing for the project. The plan provided:

"It is expected that the County will receive rentals, fees and other revenues for the use of such stadium as authorized pursuant to Chapter 252 of the Laws of the State of New York, 1968, and the amounts of such rentals, fees and other revenues shall be budgeted as an offset to the taxes thus to be levied." (Emphasis added.)

On October 15, 1971, Buffalo Bills Division of Highwood Services, Inc. (predecessor to petitioner herein), entered into an Agreement of Lease ("Lease") with the County of Erie for the lease of the County's Stadium ("Stadium"), known as Rich County Stadium, in the Town of Orchard Park, New York. The Lease was authorized by the State of New York pursuant to Laws of 1968 (ch 252, § 1) and was ratified by the County.

The Lease was in full force and effect during the period at issue.

Article V, Section 6 of the Lease provides that petitioner shall "collect and pay" to the County a "per capita charge of 25 cents to be charged against each ticket sold which is construed to be a tax but which will be paid to Lessor [the County] in any event and without reference to its nature." Pursuant to this provision, petitioner charged and collected 25 cents per ticket during the period at issue and paid this amount over to the County. This 25 cent charge was at all times separately designated "County Charge" on the face of each ticket. Each ticket also separately listed amounts designated "Price" and "Tax". Petitioner did not charge or collect sales tax on the "County Charge", but did charge and collect sales tax (the amount designated "Tax") on the portion of the purchase price designated "Price".

On audit, the Division determined that the 25 cent charge was properly subject to tax and calculated the deficiency at issue herein based upon this determination. Specifically, the amount of tax asserted due herein represents the sales tax on the 25 cent charge per ticket sold for

Buffalo Bills home games played August through November 1981, August through December 1982, and August through December 1983.

Of the tickets for the 1981 games, 302,280 were sold and fully paid for prior to the beginning of the audit period. Petitioner reported and remitted sales tax with respect to the "Price" component of the total price of these tickets prior to the commencement of the period set forth in the notice of determination.

At all times during the audit period, petitioner timely reported and remitted sales tax with respect to this "Price" component of the total ticket price.

The Lease between petitioner and the County sets forth, in Article V thereof, terms of rental between the parties. Article V, Section 1 provides for payment by petitioner of amounts equal to certain percentages of gross ticket sales as determined by a formula set forth in the Lease. The Lease defines "gross ticket sales" as follows:

"'Gross Ticket Sales' shall mean the gross amount of revenue received by Lessee [petitioner] from admissions or the rights to admissions to or for such home games wherein the Lessee [petitioner] is a participant, less the 250 per capita head charge referred to in Article V and less all admission, head or sales taxes which now apply or may become applicable."

Section 2 of Article V provides for a "minimum rental" payable to the County of \$500,000.00 per lease year. Article V, Section 4 sets forth the manner of determining "minimum rental", to wit:

"[B]y adding all rental paid to County pursuant to this agreement, including percentage rental of ticket sales, per capita charge, concessions, parking, and any other rental paid by Lessee [petitioner] to Lessor [County]".

Article V, Section 7 of the Lease limits the County's maximum receipts under the Lease to 90% of the Total Debt Service in each year during the first ten years of the Lease and,

subsequently, to no more than the total cost of Total Debt Service and structural repairs and replacements.

"Total Debt Service" is defined in the Lease as "the amount of money necessary to retire the Stadium bonds by payment toward reduction of the principal plus interest payments on the Stadium bonds."

Finding of fact "14" of the Administrative Law Judge's determination is modified to read as follows:

Chapter 699 of the Laws of 1974, which amended Laws of 1968 (ch 252) declared that: "The financing, construction, operation, leasing and use of a stadium and all purposes authorized by this act are governmental and public purposes of the County of Erie."

Stadiums in which professional football teams play home games are ordinarily owned by municipalities or arms of the State government.

Finding of fact "16" of the Administrative Law Judge's determination is hereby modified as follows:

The per capita charge was included in the Lease at the insistence of the County. The purpose of the charge was to enable the County to recoup a portion of its bond money from members of the public making use of and benefitting from the Stadium.

At all times relevant herein petitioner was required to file its sales tax returns on a monthly basis. Petitioner timely filed all such returns.

Petitioner, by its officers, executed two consents which collectively extended the period of limitation for assessment of sales and use taxes for the period June 1, 1981 through November 30, 1981 until March 20, 1985.

OPINION

The Division asserts that the 25 cent per capita charge is part of the admission charge to the football game, is imposed by the petitioner and is subject to sales tax pursuant to Tax Law section 1105(f)(1).

The petitioner argues in the alternative:

- (a) The 25 cent per capita charge collected by petitioner on behalf of the County and paid over to the County pursuant to the Lease is an excise tax, and therefore is not included in the amount of admission charges or receipts so that no sales tax is due and owing on that amount;
- (b) Alternatively, the 25 cent per capita charge collected by petitioner on behalf of the County and paid over to the County pursuant to the Lease is a user charge imposed by the County and as such is exempt from sales tax pursuant to section 1116(a) of the Tax Law;
- (c) 20 NYCRR 527.10(e)(1) (which was amended effective December 27, 1982) misinterprets section 1116(a) of the Tax Law. The regulation, prior to its amendment, accurately interpreted the statute, and under that regulation, the 25 cent charge was exempt from sales tax as an amusement charge by a municipality;
- (d) The amendment to 20 NYCRR 527.10(e)(1), if a correct interpretation of section 1116(a) of the Tax Law, may not be retroactively applied, and therefore, no sales tax can be charged upon the 25 cent charge collected prior to December 27, 1982, the effective date of the amendment to the regulation.

The Administrative Law Judge determined that the 25 cent per capita charge was not a County excise tax or a County imposed admission charge, but was an admission charge imposed by the petitioner as part of the total admission charge paid by ticket purchasers for the right to enter the stadium and was thus subject to tax under Tax Law section 1105(f)(1).

We reverse the determination of the Administrative Law Judge and conclude that the per capita charge is a County imposed admission charge and is exempt from tax. The regulation adopted by the Division, to the extent it would require a different result, is incorrect.

We deal first with whether the per capita charge is a tax. We conclude it is not. The authority to levy taxes must come specifically and clearly from the State Legislature (Roosevelt Raceway, Inc. v. Nassau County, 18 NY2d 30, not denied 18 NY2d 720, appeal dismissed 385 US 453). We find no such authority, either general or special, authorizing Erie County to impose such a tax.

We deal next with whether the per capita charge is a charge imposed by the County. We conclude it is.

The charge here is imposed on each person admitted into the stadium. It is imposed by the action of the County (i.e., Bond resolution and lease) pursuant to the authority granted the County by the Legislature (i.e., L 1968, ch 252) to raise revenues to finance the cost of the stadium. Indeed, it would require an overly narrow interpretation of that authority to conclude that the County could not prescribe "fees" or "charges" in addition to rental revenues, to defray the cost of construction and maintenance of the stadium. Nothing in the legislation compels such a result.

In addition to finding that the County was authorized to impose this admission fee, we find that it in fact exercised this authority. The exercise is evidenced by the provision of the lease which requires the petitioner to "collect and pay to [the County] a per capita charge of 25 cents to be charged against each ticket sold." Further, the lease's exclusion of the 25 cent fee from the definition of petitioner's gross ticket sales, indicates that the fee was imposed by the County, not by the petitioner. The fact that the County exercised its authority to impose the admission fee in

the lease provisions does not alter the essential nature of the per capita charge as one imposed by the County.

Finally, the separate statement of the 25 cent fee on each ticket, designated the "County Charge" supports the conclusion that the fee was imposed by the County and merely collected by the petitioner.

Accordingly, we conclude that consistent with its authority, the County imposed the 25 cent admission charge and that this charge was merely collected by the petitioner on behalf of the County and paid over to the County by the petitioner separate and apart from the rent paid by the petitioner for the stadium.

We deal next with whether this County imposed admission charge is exempt from tax. We conclude it is.

Tax Law section 1105(f)(1) imposes a tax upon "Any admission charge where such admission charge is in excess of ten cents to or for the use of any place of amusement in the state . . ." with certain exceptions not here relevant.

"Place of amusement" is defined at 20 NYCRR 527.10(b)(3) as "[a]ny place where any facilities for entertainment, amusement, or sports are provided." Rich Stadium is and was at all times relevant herein such a "place of amusement."

Tax Law section 1101(d)(3) defines amusement charge as "Any admission charge, dues or charge of roof garden, cabaret or other similar place." (Emphasis added.)

Tax Law section 1101(d)(2) defines the term admission charge as "The amount paid for admission, including any service charge and any charge for entertainment or amusement or for the use of facilities therefor."

Tax Law section 1116(a) provides in relevant part that "Except as otherwise provided in this section, any sale or amusement charge by or to. . (1) The state of New York, or any of its agencies, . . . or political subdivisions where it is the purchaser, user or consumer, or where it is a vendor of services or property of a kind not ordinarily sold by private persons;" (emphasis added) shall be exempt from tax.

Erie County is a political subdivision of the State of New York. Stadiums in which professional football teams play home games are ordinarily owned by municipalities or arms of the State government. Rich Stadium is owned by Erie County. Thus, if the condition that a service provided by the State or its political subdivisions is only exempt where "of a kind not ordinarily sold by private persons" applies to an admission charge, such condition is satisfied on these facts.

Accordingly, unless there is an exception in the other provisions of section 1116 to the opening phrase of the section, the charge is exempt. We find nothing in the remaining portions of section 1116 which in any way limits the exemption in section 1116(a) or that would lead us to conclude that the charge is taxable.

The only provision which is arguably relevant is paragraph (1) of subdivision (d) of section 1116 which provides:

“ . . . any admissions all of the proceeds of which inure exclusively to the benefit of the following organizations shall not be subject to any of the taxes imposed under subdivision (f) of section eleven hundred five. . .”

The list of organizations does not include those in section 1116(a)(1), (2) or (3), notably a political subdivision such as Erie County; however, it is not apparent that the language of section

1116(d)(1) is in limitation of, or an exception to, the exemption granted in section 1116(a) for admission charges by such organizations.

Thus, we conclude the separately stated 25 cent per capita charge imposed by the County is exempt from tax pursuant to section 1116(a)(1) of the Tax Law.

We next deal with the application of the regulation adopted by the Division in 1982.

The stated purpose of the regulation was "To clarify that admission charges by organizations described in section 1116(a)(1), (2) and (3) are subject to Sales Tax in some circumstances and to conform section 527.10(e)(2)(i) to the terms of section 1116(d)(1)(a) of the Tax Law." (Notice of proposed agency action, NYS Register/October 6, 1982.)

Prior to the 1982 change, the regulations, 20 NYCRR 527.10(e)(1), of the Division mirrored the provisions of section 1116 providing:

"(e) Exempt admissions. (1) Any amusement charge by or to any organization described in section 1116(a) of the Tax Law is exempt from tax." (Emphasis added.)

20 NYCRR 527(e)(2)(i) provided:

"(2)(i) Except for admissions to the events listed in paragraph (ii), any charge by a person other than an organization described in section 1116(a) of the Tax Law is exempt if all the proceeds inure exclusively to the benefit [of specifically listed organizations]."

In short, prior to the 1982 change, the regulations exempted any sales or amusement charge by or to the State of New York or its political subdivisions.

The 1982 change deleted the language relating to sales or amusement charges "by" the State or its political subdivisions and in effect conditioned any exemption for admission charges on the requirement that all of the proceeds inure exclusively to the benefit of certain specified

organizations¹. The organizations specified do not include the State or its political subdivisions. Thus, under the amended regulation an admission charge by the State or its political subdivisions where all of the proceeds inure exclusively to the benefit of the State or political subdivisions is not exempt from tax.

While the stated purpose of the regulations is one of clarification, the effect of the regulation, if interpreted as the Division asserts, is to severely circumscribe the exemption provided for in section 1116(a). We find no authority granted to the Division to achieve this result. Accordingly, we conclude that, notwithstanding the regulation, the petitioner can still rely on the explicit wording of section 1116(a)(1) of the statute which exempts the admission charge at issue.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of petitioner, Buffalo Bills, Inc., is granted;
2. The determination of the Administrative Law Judge is reversed; and

¹The text of the amendments proposed to the regulation reads as follows:

"(e) Exempt admissions. (1) Any amusement charge [by or] to any organization described in section 1116(a) of the Tax Law is exempt where such an organization is the purchaser."

"(2)(i) Except for admissions to the events listed in paragraph (ii), any charge by any person [other than] including an organization described in section 1116(a) of the Tax Law is exempt if all of the proceeds inure exclusively to the benefit of the following organizations. . ."

3. The petition of Buffalo Bills, Inc. is granted and the Division of Taxation is directed to cancel the Notice of Determination and Demand for Payment of Sales and Use Taxes Due issued on December 20, 1984.

Dated: Albany, New York
DEC 08 1988

John P. Dugan
President

Francis R. Koenig
Commissioner