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ARIZONA ATTORNEY GENERAL  
March 1982

Mr. R. W. McAuley, Jr., Controller  
Arizona Veterans' Memorial Coliseum  
Post Office Box 6715  
Phoenix, Arizona 85005

Re: I82- 044 (R82-001)

Dear Mr. McAuley:

You recently requested our opinion on the question of whether the Arizona Veterans' Memorial Coliseum (AVMC) must pay "sales" taxes on its food concessions activities during the Arizona State Fair as well as at other times of the year. It is our understanding that these food concessions include the preparation and sale of food items such as hot dogs and popcorn, candy, ice cream and beverages such as soda pop and coffee. It is our opinion that AVMC's food concessions operations are subject to the Arizona transaction privilege ("sales") and affiliated taxes, based on the analysis and conclusions set forth in Ariz. Atty. Gen. Op. 182-043, a copy of which is attached.

Briefly, that opinion concludes that, through the enactment of Ch. 321, 1981 Ariz. Sess. Laws (1st Reg. Sess.), the Legislature intended to expand the general application of the state transaction privilege and affiliated tax codes to the state and any of its departments, offices, commissions, boards or agencies. If a state entity engages in any activities which, if they are conducted by a private business entity are taxable, the state entity's activities are also taxable.

Inasmuch as the food activities at AVMC appear to be conducted with the objective of gain, benefit or advantage to the state, the reasoning and rationale of Ariz. Atty. Gen. Op. 182-043 are applicable to AVMC with respect to its food concessions operating both during "State Fair" time and at other times during the year.

Mr. R. W. McAuley, Jr.  
March 25, 1982  
Page 2

A.R.S. § 42-1312 imposes the transaction privilege tax upon sales of "any tangible personal property whatever at retail . . . ." Although A.R.S. § 42-1312.A.12 exempts from the tax certain sales of food (e.g., grocery store sales), concession sales such as those conducted by AVMC would be taxable as a result of A.R.S. § 42-1381.4.g, which defines "food for consumption on the premises" as, among other things,

Food sold within the premises of theaters, movies, operas, shows of any type or nature, exhibitions, concerts, carnivals, circuses, amusement parks, fairs, races, contests, games, athletic events, rodeos, billiard and pool parlors, bowling alleys, public dances, dance halls, boxing, wrestling and other matches and any business which charges admission, entrance or cover fees for exhibition, amusement, entertainment or instruction.

A.R.S. § 42-1382 generally exempts various categories of sales of food, but specifically excludes from the exception the "sale of food for consumption on the premises" of the person selling the food.

In Moore v. Arthur Realty Corp., 95 Ariz. 70, 386 P.2d 795 (1963), it was held that the vending through machines of coffee, milk, ice cream, soft drinks and popcorn was taxable as a retail sale of tangible personal property under A.R.S. § 42-1312. The rationale of the Arthur Realty Corp. case, insofar as it upholds the taxability of such sales, coupled with the provisions of A.R.S. §§ 42-1381.4.g and 42-1382, establish the taxability of the AVMC food concession sales. The 2% rate under A.R.S. § 42-1312 is augmented by another 2% levy under A.R.S. § 42-1361.A, which provides, in pertinent part:

There is levied and shall be collected by the department of revenue a tax:

1. On the privilege of doing business in this state, measured by the amount or volume of business transacted by persons on account of their business activities, and in the amounts to be determined by the application, against values, gross proceeds of sales, or

Mr. R. W. McAuley, Jr.

March 25, 1982

Page 3

gross income, as the case may be, in accordance with the provisions and schedules as set forth in article 1 of this chapter, at rates equal to one hundred percent of the rates imposed in such article . . . .

AVMC's food concessions activities fall within the purview of both A.R.S. §§ 42-1312 and 42-1361.A.<sup>1/</sup>

You have expressed a concern that, if AVMC is itself liable for transaction privilege taxes on its food concessions activities, it should receive a credit for "taxes" it has paid on items purchased for its food concessions operations. The transaction privilege and affiliated taxes are imposed upon businesses rather than the customers of businesses. Arizona State Tax Commission v. Garrett Corporation, 79 Ariz. 389, 291 P.2d 208 (1956); State Tax Commission v. Quebedeaux Chevrolet, 71 Ariz. 280, 226 P.2d 549 (1951). The "tax" which a customer of a business pays is in reality the economic burden of the businessman's tax which is usually "passed on" by the business to the customer as a cost of the business pursuant to an express or, more frequently, an implied contract.

To the extent, however, that AVMC has paid the economic burden of its suppliers' transaction privilege taxes in the past, if the suppliers have paid their own taxes to the Arizona Department of Revenue, it may well be that they would be entitled to a refund. If, upon examination by the Department, such a refund were indicated, an arrangement could be made between AVMC's suppliers and AVMC to recognize entitlement to a credit. These procedures were outlined to you in a December 15, 1981 letter from the Assistant Director for Taxation of the Department of Revenue and may be pursued with the Department and your suppliers.

As for future purchases from your suppliers, because AVMC's food concession activities would be taxable under A.R.S.

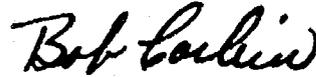
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1. The Legislature has, in the past, exempted certain activities at AVMC from the transaction privilege tax. See A.R.S. § 42-1314.c. However, the fact that A.R.S. § 42-1314.c exempts the AVMC from taxes imposed under A.R.S. § 42-1314 does insulate from taxation business activities occurring under A.R.S. § 42-1312.

Mr. R. W. McAuley, Jr.  
March 25, 1982  
Page 4

§ 42-1312 as a result of the preparation and sale of the food items previously purchased for subsequent resale, your suppliers would have no tax on such "sale for resale" or wholesale purchases. Thus, your suppliers would have no occasion to "pass on" the economic burdens of a nonexistent tax. Swift & Co. v. Arizona State Tax Commission, 105 Ariz. 226, 462 P.2d 775 (1969).

Sincerely,



BOB CORBIN  
Attorney General

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