



This Week in State Tax (TWIST)

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Pennsylvania: Fees Charged to Platform Sellers Taxable as SaaS

The Pennsylvania Board of Finance and Revenue often releases dozens of decisions on a single day; one relatively recent decision includes some interesting issues for marketplace facilitators. The taxpayer at issue was a ticketing and marketing platform that allowed event organizers (termed “creators”) to list, advertise, and sell admissions to their events live and virtual events. The taxpayer received service fees from the creators for the use of the platform, and payment processing fees in the event a creator elected to have the taxpayer process ticket payments. The Board was asked to determine two primary issues. One was the taxability of the service and payment processing fees charged to creators who were selling admissions to their events via the platform. The second issue was the taxability of the tickets for access to the live and virtual events. The Statement of the Case noted several times that the taxpayer had not kept good records and was not particularly responsive to the auditor’s requests for such.

With respect to the taxability of the service and payment processing fees, the Board agreed with the Department of Revenue and concluded that the taxpayer was providing taxable SaaS. Although customers did not receive control or possession of the software, a sale at retail includes “the grant of a license to use or consume whether such transfer be absolute or conditional and by whatsoever means the same shall have been effected.” The taxpayer’s terms of service supported this conclusion; they granted users a limited right to use its services to, among other things, “create event registration, Organizer profile, and other webpages to promote, market, manage, track, and collect sales proceeds for an event.” The facts indicated that the taxpayer was also paid a percentage of the sales initiated through its platform; the taxability of these commissions did not appear to be an issue in the dispute.

The second issue was the taxability of the ticket sales. Notably, tickets for admissions to live events are not taxable under Pennsylvania law. However, the Department’s position on audit appeared to be that because certain customers who purchased tickets to live events received some type of tangible personal property, those ticket purchases were taxable. Although not specifically addressed in the decision, in a hearing on the matter the taxpayer’s counsel noted that the taxpayer had no way of knowing in all instances whether tangible property was provided at the live event, and the tangible property that was provided might be de minimis. However, the taxpayer’s records did not clearly identify the transactions that did provide customers with tangible property along with access to the live events. Due to the inadequacy of the taxpayer’s records, the Department applied an estimated error rate to determine the taxable transactions. The Board concluded that the Department’s use of alternative methodologies to determine an error rate for the ticket sales to live events was appropriate given the lack of records and the fact that the taxpayer bore the burden of proving that the Department’s methods were not valid.

The Department had also concluded that when the taxpayer sold tickets to online or virtual events, those tickets were taxable as SaaS or (as noted at the hearing) digital goods. The taxpayer argued that imposing sales tax on access to online events, but generally not taxing tickets to live events, violated the Internet Tax Freedom Act in violation of the Supremacy Clause of the U.S. Constitution. The Board declined to address this challenge, noting that it was not empowered to decide whether a Pennsylvania statute was unconstitutional. The Board did agree to abate penalties. The decision has been appealed to Commonwealth Court. Please contact [Sarah McGahan](#) with questions on In re Eventbrite, Inc.

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