

THE LOCAL HOTEL OCCUPANCY TAX AND THE ARTS

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The Texas Legislature expressly recognized the arts as an authorized recipient of revenues from local communities to promote tourism and the convention and hotel industry in those communities. Specifically, the legislation in adopting the local hotel occupancy tax (“HOT”) provided in part that revenue from the tax may be used for the encouragement, promotion, improvement and application of the arts ...¹ The statute enables a municipality by ordinance to impose a tax on a person who pays for the use of a hotel room.² The rate of the tax is determined by the municipality, subject to certain maximum rates.³ The tax is collected by the hotel and remitted to the municipality, and the municipality is statutorily afforded the rights and remedies relating to tax collection.⁴ The municipality is entitled to permit a hotel to retain not more than one percent (1%) of the amount collected for the costs in collecting the tax.⁵

LOCAL CONTROL

The State Legislature correctly realized that local determination was the only effective and appropriate method for determining the rate of tax and the distribution of that tax among the authorized recipients. The rate of the tax and the amount remitted to the arts vary from local jurisdiction to local jurisdiction. It is interesting to note that Houston and San Antonio have the highest rates and elect to fund the arts exclusively through HOT. Other jurisdictions have lesser rates and fund local arts through a combination of HOT and general tax revenues. Dallas elects to utilize exclusively general tax revenues.

The local elected officials of each of the local jurisdictions have chosen diverse paths for funding of the arts. That diversity of decision is also apparent in communities with varying levels of tourism and varying levels of art facilities and events.

Two other factors should be noted in addressing local administration of the tax. First, and most significantly, hotel room rates may vary dramatically from community to community. The second factor, particularly relating to conventions, are the transportation costs to the particular city. In administering HOT, local municipalities must consider each of the costs of transportation, the cost of rooms, and the HOT rate to understand the competitive position of their community in seeking tourism and convention business.

It is apparent that municipalities in Texas have evidenced the appropriateness and necessity of administering HOT in their particular communities at the local level.

DELEGATED AUTHORITY

The statute expressly permits the governing body of a municipality by contract to delegate to any person or private organization the management or supervision of programs and activities funded with HOT.⁶ The governing body must approve in writing in advance the annual budget of the person to which it delegates the functions and require that person to make periodic reports to the governing body listing the expenditures made. A separate account must be maintained for the HOT proceeds. A fiduciary duty is created between the municipality and its delegate.

The delegate must maintain complete and accurate financial records of each expenditure of HOT, which records are available for public inspection.

Certain jurisdictions in Texas have taken advantage of the right of delegation for administration of HOT and those delegates have been empowered with the statutory rights and obligations provided in the statute. No party other than a municipality or its contractual delegate has authority to administer HOT.

USE OF TAX REVENUE

The statute specifically provides that the revenue from HOT may be used only to promote tourism and the convention and hotel industry. HOT revenue may be used only for six (6) defined purposes.⁷ The arts are expressly one of the six permitted recipients and the full statutory definition for the arts is attached.⁸ Revenue derived from the tax must be expended in the manner directly enhancing the promotion of tourism and the convention and hotel industry. Revenue may be spent for day-to-day operations and other administrative costs to the extent those costs are incurred directly in the promotion and servicing expenditures authorized. The Legislature chose not to establish objective tests for the direct enhancing and promoting of tourism and the convention and hotel industry, but again left that determination to the local municipalities. The Attorney General of the State of Texas, in interpreting the statute, provided “It is for the city’s governing body to determine in the first instance whether a proposed expenditure is among the permissible uses ... and will directly enhance and promote tourism and the convention and hotel industry.”⁹

Although the allocation of HOT revenue is generally within the discretion of the municipality, the statute provides for maximum allocations by percentage for certain expenditures based upon size of the municipality, location of the municipality or costs of room. Allocation to the arts may not exceed 19.30% of HOT revenue collected by a municipality having a population of more than 1.6 million persons, or the amount of tax received by the municipality at the rate of 1% of the cost of a room, whichever is greater. Allocation to the arts may not exceed 15% of HOT revenue collected by a municipality having a population of less than 1.6 million persons, or the amount of tax received by the municipality at the rate of 1% of the cost of a room, whichever is greater.¹⁰ A 15% allocation ceiling also applies to certain border counties.¹¹

EVENTS AND FACILITIES

The statute in addressing expenditures for the arts suggests that the expenditures should relate to the presentation, performance, execution and exhibition of major art forms.¹² It is clear from the language of the statute, and evident from the participation of the arts in communities, that the presentation of art may take many forms. Certainly a traditional art museum is a facility that clearly serves as an attraction to tourists and conventions. Art facilities have accordingly traditionally been recognized as directly satisfying the standard for sanctioned expenditures. On the other end of the spectrum, there are many art events, such as festivals, which may have no facility at all other than a public park or other open space, which again clearly directly benefit tourism. Finally, performing arts appear in a variety of forms and venues creating an artistic environment conducive to tourism and the hotel industry. It is self-evident that, in determining expenditures for the arts, local communities must be aware of the benefits of permanent facilities, events without physical facilities, and many combinations of events and facilities. That breadth of expenditure has been recognized historically by local jurisdictions of Texas.

The municipalities in Texas today have recognized that the artistic community creates an intrinsic tourism value and that preservation of that artistic community leads to a reasonable expectation that continued funding will likely have direct impact on tourism and the hotel industry. Although statistics of attendance may quantify to a limited extent the direct benefit for certain facilities or events, the intangible benefits

are less subject to quantification and render any attempts to objectify the results immaterial. An event held in a performing arts venue or museum would be evidence of a likelihood to attract tourists. There does not appear to be support for the proposition that if an entity does not market its events outside of the city or in some other way promote notice of the events to guests of a hotel, that the events or facility will not promote tourism and hotel activity.

The State Legislature correctly identified the local authorities as the appropriate entities to evaluate the benefits of events and facilities for their municipalities.

STANDARD OF USE

As described above, revenue derived from HOT must be expended in a manner directly enhancing and promoting tourism and the convention and hotel industry.¹³ It should be noted that each of the six authorized recipients are held to at least the same standard as that of the arts.

LIST OF ACTIVITIES

The State Legislature acknowledged the inadequacy of objective reporting in the administration of the standard, and again allowed the local representatives to determine appropriate reporting on a subjective basis.

A municipality or any entity that spends revenues derived from HOT is required, before making the expenditure, to specify in a list each scheduled activity, program or event funded in whole or in part by HOT.¹⁴ Importantly, each city decides upon the format in which it will request the information be provided. In many jurisdictions, the format even within the city itself may vary. The variety of art recipients again indicates the necessity for flexibility with regard to this aspect of the statute. As noted above, the facilities may vary from a large art museum with a permanent collection to a small theatre with individual performance artists. The goal of this provision should be to secure for each municipality an understanding of the scope of the art facilities and events enhancing the reputation of the community and facilitating the tourist and hotel industries.

As noted above, only the municipality and its contractual delegate are authorized to administer HOT and it is those entities alone that should determine the reporting obligations of the recipients.

CONCLUSION

The arts strongly support HOT. The Legislature correctly identified the arts as one of the significant assets of a community in enhancing the tourism, convention and hotel industries. The statute correctly leaves to the local governing bodies the right to administer the tax, including establishing the rate, administering the collection of the tax and allocating the tax receipts. Contractual delegates are expressly permitted to act on behalf of the municipalities. The Attorney General has confirmed the vesting of the authority in the municipalities. Required reporting should continue to be determined by the municipalities or their delegates. The municipalities or their delegates should continue to evaluate and recognize the intrinsic value the arts have and will continue to have in the vitality of our Texas communities.

¹ Tex. Tax Code Ann. (Vern. Sup. 2004) (“Code”) §351.101(a)(4)

² Code §351.002(a)

³ Code §351.003

⁴ Code §351.004

⁵ Code §351.005

⁶ Code §351.101(c)

⁷ Code §351.101(a)(1)-(6)

⁸ Code §351.101(4) “...the encouragement, promotion, improvement, and application of the arts, including instrumental and vocal music, dance, drama, folk art, creative writing, architecture, design and allied fields, painting, sculpture, photography, graphic and craft arts, motion pictures, radio, television, tape and sound recording, and other arts related to the presentation, performance, execution, and exhibition of these major art forms;”

⁹ Tex. Atty. Gen. Opinion No. GA-0124, Nov. 18, 2003

¹⁰ Code §351.103(c)

¹¹ Code §351.1035(c)

¹² Code §351.101(4)

¹³ Code §351.101(b)

¹⁴ Code §351.108