

BG 13-01

Tax Type: Bingo/Charitable Games

Tax Issue: Revocation of Charitable Games Act License

**STATE OF ILLINOIS
DEPARTMENT OF REVENUE
OFFICE OF ADMINISTRATIVE HEARINGS
CHICAGO, ILLINOIS**

**THE DEPARTMENT OF REVENUE
OF THE STATE OF ILLINOIS**

v.

**ABC FOUNDATION,
Licensee**

**No. XXXX
License No. XXXX
NOTICE OF LICENSE
APPLICATION DENIAL**

**Ted Sherrod
Administrative Law Judge**

RECOMMENDATION FOR DISPOSITION

Appearances: Special Assistant Attorney General Paula Hunter on behalf of the Illinois Department of Revenue; Kevin Sommer of Sommer Law Office on behalf of ABC Foundation.

Synopsis:

This matter arose after ABC Foundation (“ABC Foundation”) protested the Illinois Department of Revenue’s denial of its request for renewal of its pull tabs license previously issued pursuant to the Illinois Pull Tabs and Jar Games Act (“Pull Tabs Act”), 230 **ILCS** 20/1 *et seq.* ABC Foundation claims that its renewal application should have been approved while the Department argues that this renewal was properly denied.

A hearing in this matter was held on May 21, 2013 during which the Department presented one witness and ABC Foundation presented three witnesses. Both parties also introduced documentary evidence which is included in the record. After considering the evidence adduced at hearing, it is recommended that this matter be resolved in favor of the Department.

In support of this recommendation, the following findings of fact and conclusions of law are made.

Findings of Fact:

1. ABC Foundation (“ABC Foundation”) is a not-for-profit charitable corporation having its headquarters in Anywhere, Illinois. Tr. p. 6; Licensee Exhibit (“Ex.”) 1.¹ The Internal Revenue Service has issued a determination letter to ABC Foundation granting ABC Foundation tax exempt status as a section 501(c)(3) corporation. Tr. pp. 6, 36.
2. ABC Foundation raises funds for scholarships, conducts bowling tournaments and awards scholarships based upon bowling skills and scholastic achievement to high school age teenagers attending school in the Anywhere area. Tr. pp. 36, 37, 39-41, 48, 60, 61, 65, 66.
3. ABC Foundation was incorporated in 1981 and has applied for and been granted a license to operate pull tab games every year since 1999. Tr. pp. 36, 49, 76; Licensee Ex. 1²
4. ABC Foundation’s corporate office is located at Anyplace, Illinois. Tr. p. 74; Licensee Ex. 1.
5. ABC Business (“ABC Business”) is a for profit corporation having its principal place of business at Anywhere, Illinois. Licensee Ex. 2. Its principal place of business consists of: 1) a bowling center which includes bowling lanes and a bowling concourse; and 2) a restaurant and bar named “XYZ Bar and Grill.” Tr. pp. 40, 41, 51, 53. Activities conducted at XYZ Bar and Grill include off track betting. Tr. p. 53; Department Ex. 2. John Doe, the President of ABC Business is also the President of ABC Foundation. Tr. pp. 35, 36, 51. Jane Plain,

¹ Pull Tabs Act regulation 86 Ill. Admin. Code, section 432.110 states that, in order to be eligible for a pull tabs license a licensee must be a not for profit corporation organized to conduct charitable endeavors; the record indicates that ABC Foundation meets these requirements.

²Pursuant to section 2 of the Pull Tabs Act, 230 ILCS 20/2, a pull tab license can be issued only on an annual basis; thus a pull tabs license holder must fill out and submit an application for renewal annually.

the Treasurer of ABC Business is also the Secretary of ABC Foundation. Tr. p. 74; Licensee Ex. 1.

6. On July 1, 1999, ABC Foundation entered into a lease agreement with ABC Business to lease space at ABC Business' bowling center and at XYZ Bar and Grill adjacent to the bowling center located at Anywhere, Illinois. Licensee Exhibit 2. The lease authorizes ABC Foundation to "conduct meetings, entertain members and guests, raise funds and otherwise engage in general activities and for no other purpose or purposes without the prior written consent of Landlord." *Id.*
7. ABC Foundation owns three pull tab machines, two of which it has placed at ABC Business' bowling center and one of which it has placed at XYZ Bar and Grill. Tr. pp. 40-42.
8. A majority of ABC Foundation's funding comes from its pull tab sales revenues generated at ABC Business' bowling center and at XYZ Bar and Grill. Tr. pp. 90, 91.
9. The pull tab machines dispense books of pull tab cards displaying a series of horizontal and vertical rows with numbers and symbols. Tr. p. 12. A pull tab holder holding a card with numbers and symbols appearing in certain pre-designated sequences qualifies for a cash prize. *Id.* Winners are paid from cash on hand generated by ABC Business' business operations with reimbursements from such payments being received by ABC Foundation. Department Ex.2; Licensee Ex. 1. Payments are made by ABC Business' employees. Tr. pp. 42, 43. Some, but not all, of the employees that redeem pull tab cards for cash prizes are members of ABC Foundation. Tr. p. 43.
10. ABC Foundation's financial arrangement with ABC Business includes a split of revenues received from pull tab sales from machines that are located at ABC Business' principal place of business. Department Ex. 2; Licensee Ex. 1. Pursuant to this revenue split, ABC

Business is reimbursed for winning payouts ABC Business has made from its own funds to pull tab card holders determined to qualify for prizes. *Id.* During the period April 1, 2011 through March 31, 2012, these reimbursements totaled \$216,347 and constituted nearly 90 percent of the gross revenues ABC Foundation generated from pull tab sales (\$248,014.16). Licensee Ex. 1. ABC Business also receives rental revenues of \$500 per month from ABC Foundation pursuant to its lease agreement with ABC Foundation. Licensee Ex. 2.

11. On May 7, 2012, ABC Foundation filed a PT-6 Pull Tabs Application for License indicating its intention to sell pub tabs at ABC Business bowling alley and at XYZ Bar and Grill at Anywhere, Illinois. Licensee Ex. 1. On June 7, 2012, the Department notified ABC Foundation that its license application was being denied. Department Ex. 1. The reasons given by the Department for this denial were that the applicant was selling pull-tabs at a location where it did not conduct its general activities, and that activities related to the sale of pull tabs were conducted by persons that were not members of ABC Foundation. *Id.* ABC Foundation has filed a notice of appeal contesting this determination. Tr. p. 5.

Conclusions of Law:

Section 4 of the Pull Tab and Jar Games Act (“Pull Tabs Act”), 230 ILCS 120/4 provides in relevant part as follows:

The conducting of pull tabs and jar games is subject to the following restrictions:

(2) No person except a bona fide member or employee of the sponsoring organization may participate in the management or operation of such pull tabs or jar games ...[.] ...

(6) Pull tabs and jar games shall be conducted only on the premises owned or occupied by licensed organizations and used by its members for general activities ... [.]

The same prohibitions are included in Section 432.160 of the Department's regulations concerning the Pull Tabs Act. See 86 Ill. Admin. Code, section 432.160(b)(1) and (d). In addition, section 6 of the Pull Tabs Act states in part as follows: "The Department of Revenue may, at its discretion, suspend or revoke any license if it finds that the licensee or any person connected therewith has violated or is violating this Act." 230 ILCS 20/6.

Section 5 of the Pull Tabs Act incorporates by reference sections 4 and 5 of the Retailers' Occupation Tax Act (35 ILCS 120/1 *et seq.*), which provide that the Department's determination is *prima facie* correct. 35 ILCS 120/4, 5. To establish the correctness of the Department's decision to deny ABC Foundation's renewal application, the Department's counsel introduced, under the certificate of the Director of Revenue, a copy of a letter issued to ABC Foundation to notify it that its renewal application was officially denied. Tr. p. 8; Department Ex. 1.

The Department's denial letter sets forth two – and only two – bases for the Department's decision. *Id.*³ First, the Department states that the renewal application is being denied because "[T]he premises indicated as to where the pull tabs will be sold does not meet qualifications per department regulations (Pull Tab and Jar Games Act 432.160(b)(1)) as being occupied for the organizations general activities." Second, the Department writes that the renewal application is also being denied because "department regulation (Pull Tab and Jar Games Act 432.160(d)) indicates that a bona-fide member or employee of the organization must be the one participating in the sale of pull tabs." *Id.* Once the Department establishes its *prima facie* case the burden shifts to the licensee to show, by a preponderance of the evidence, that the Department's determination is incorrect and that the licensee is eligible for the renewal of its license. See 5

³ I do not address other alleged violations of the Pull Tabs Act indicated in the Department's brief; these violations have not been asserted as reasons for the Department's denial of license renewal and therefore are not the basis for the proceeding before me. I also decline to address the issue whether the Department is barred from denying licensure by the doctrine of Judicial estoppel (see Licensee's brief, p. 2) since this issue is not enumerated in the pre-trial order governing the issues to be decided in this case.

ILCS 100/10-15 (standard of proof set forth in the Illinois Administrative Procedures Act). “A proposition proven by as preponderance of the evidence is one that has been found to be more probably true than not true.” Avery v. State Farm Mutual Automobile Insurance Co., 216 Ill. 2d 100, 191 (2005).

With respect to the Department’s finding that “[T]he premises indicated as to where the pull tabs will be sold does not meet qualifications per department regulations (Pull Tab and Jar Games Act 432.160(b)(1)) as being occupied for the organizations general activities” I find that the evidence presented by ABC Foundation is sufficient to meet its burden of showing by a preponderance of the evidence that its general activities are conducted on the premises where pull tabs are sold. The record indicates that the taxpayer sells pull tabs through machines located at a bowling center and inside a bar and restaurant owned by ABC Business (“ABC Business”) at Anywhere, Illinois. Tr. pp. 40-42. Section 4(6) of the Pull Tabs Act, 230 **ILCS** 20/4(6) provides that pull tab games must be conducted only on premises that are owned or occupied by licensed organizations and used by its members for general activities. The Department’s regulations at 86 Ill. Admin. Code, ch. I, section 432.160(b)(1) states, “[P]remises are ‘occupied’ by an organization when the organization is using the premises for its general activities in accordance with a contractual right to possess the premises on a regular basis.”

The record indicates that on July 1, 1999, ABC Foundation entered into a lease agreement with ABC Business pursuant to which ABC Foundation obtained the right to use the premises: “to conduct meetings, entertain members and guests, raise funds and otherwise engage in its general activities...[.]”. Accordingly, the lease entered into between ABC Business and ABC Foundation accorded ABC Foundation a contractual right to possess the premises and use it for purposes indicated in the lease without restriction. While these activities clearly included the

sale of pull tabs, the record plainly identifies significant other activities that were conducted by ABC Foundation on the leased premises regularly. These included hosting fundraisers, hosting and sponsoring bowling tournaments, and holding meetings to award scholarships. Tr. pp. 37, 41, 48, 61, 63, 67.

The Department contends that the requirements of section 4 of the Pull Tabs Act are met only when the premises where pull tabs are sold has as its primary function the conduct of the charitable organization licensee's activities, such as churches and American Legion halls. Tr. pp. 14-19; Department's brief pp. 7, 8. It contends that where the main use of a leased premises is for retailing, entertainment or some other purpose, its secondary use by a lessee does not constitute "occupancy" of the premises. *Id.*

As previously noted, section 4(6) of the Pull Tabs Act provides as follows:

(6) Pull tabs and jar games shall be conducted only on premises owned or occupied by licensed organizations and used by its members for general activities ... [.]
230 ILCS 20/4(6)

The term "occupied" is not further defined in section 4 of the Pull Tabs Act or by any other provision of this measure.

In construing a statute, the primary goal must be to ascertain and give effect to the legislature's intent, which is best indicated by the plain and ordinary meaning of the statute's language. Nowak v. City of Country Club Hills, 2011 IL 111838, ¶ 11. To determine the plain and ordinary meaning of the term "occupied" I have consulted The American Heritage Dictionary (3rd Ed., Houghton Mifflin Company, 1994) which defines the term "occupancy" as "the condition of being occupied." The term "occupancy" is defined in Black's Law Dictionary (Revised 4th Ed., West Publishing Co., 1968) to include a right of possession arising from a lease. See *Id.* at p. 1229 (" 'Possession' and 'occupancy,' when applied to land, are nearly

synonymous terms, and may exist through a tenancy.”). This definition of the term comports with the well understood meaning of this term as indicated by Illinois case law. Piller v. Metro Premium Co., et al, 332 Ill. App. 55, 59 (1st Dist. 1947); (“To show that defendant had permitted the Interstate Company to occupy the rented space, plaintiff had to show that defendant permitted the Interstate Company to possess it.”). The term “possession” is clearly broad enough to encompass temporary control over property having other dedicated uses. See Black’s Law Dictionary, *supra* at page 1325 which defines “possession” as “[T]he detention and control ...of anything which may be the subject of property, for one’s use and enjoyment, either as owner, or as the proprietor of a qualified right in it ...[.]”.

From the aforementioned foray into the world of lexicography, I conclude that the natural and ordinary significance of the term “occupied” as used in the context of section 4 of the Pull Tabs Act is broad enough to encompass both a primary use of property by a lessor for one purpose and a secondary use of property by a lessee or other proprietor of a right or interest in it for another. Consequently, I must reject the Department’s claim that this term, as used in section 4 of the Pull Tabs Act, does not include both a primary and a secondary use of the same property by different parties both having a right of possession or control over it. Since a frequent and continuous secondary use of the premises ABC Foundation leases from ABC Business to conduct meetings, fund raising gatherings and bowling events is demonstrated by the record before me, I conclude that the evidence supports a finding that ABC Foundation’s license should not be suspended based upon its failure to comply with section 4(6) of the Pull Tabs Act.

In its Notice of Application Denial, the Department also determined that the renewal application should be denied because “department regulation (Pull Tab and Jar Games Act 432.160(d)) indicates that a bona-fide member or employee of the organization must be the one

participating in the sale of pull tabs.” Department Ex. 1. The Department’s determination is based upon section 4(2) of the Pull Tabs Act which states that: “No person except a bona fide member or employee of the sponsoring organization may participate in the management or operation of such pull tabs or jar games ...[.]” As previously noted, the Department’s determination is *prima facie* correct pursuant to 35 ILCS 120/4, 5. The burden shifts to the licensee to show by a preponderance of the evidence that the Department’s determination is incorrect once the Department establishes its *prima facie* case. 5 ILCS 100/10-15.

The Department has previously stated that “Persons who redeem winning pull tab tickets from a cash bank at a charitable games event are considered to participate in the management or operation of the event.” See General Information Letter No. ST 97-0502-GIL (10/16/97) (construing a regulation under the Charitable Games Act, 230 ILCS 30/1 *et. seq.* that is identical to regulation 432.160(d)). The record in this case contains an admission by John Doe, the President of the ABC Business (Tr. p. 51) that bartenders employed by ABC Business who are not members or employees of ABC Foundation and have not volunteered to participate in ABC Foundation’s gaming activities have probably redeemed winning pull tab tickets. Tr. p. 43. This admission is consistent with additional admissions made by Jane Plain (“Jane Plain”), the treasurer of ABC Business (Tr. p. 74) that ABC Business “collects money, handles machines and makes the payouts to winners.” Department Ex. 2.

The record contains conflicting testimony by Jane Plain that the aforementioned admission that ABC Business made payouts to winners was not intended to imply that ABC Business employees that were not members of ABC Foundation were involved in such redemptions. Tr. pp. 86, 87. In light of testimony admitting that ABC Business employees that were not members of ABC Foundation likely participated in such redemptions, I do not find this

testimony to be credible. Moreover, the logical inference to be drawn from the assertion that ABC Business “collects money” and “makes payouts to winners” is that ABC Foundation delegated these functions to ABC Business and its employees, including employees who were not ABC Foundation members. I find support for this inference in the books and records of ABC Foundation which show that almost 90 percent of its gross revenues from pull tabs games were paid as reimbursements for prize payouts to ABC Business. Licensee Ex. 1. I do not find it credible that almost 90 percent of ABC Foundation’s pull tab cards had winning combinations of letters or numbers qualifying for cash prizes and therefore infer that a portion of these reimbursements were actually compensation to ABC Business for running ABC Foundation’s pull tabs games at ABC Business.

The foregoing admissions constitute clear evidence that ABC Foundation is in violation of section 4(2) of the Pull Tabs Act, 230 ILCS 20/4(2) which prohibits the involvement of any person that is not a member, volunteer or employee of a pull tabs licensee in the management or operation of pull tabs gaming conducted by a pull tabs licensee. In light of this evidence, I find that ABC Foundation has failed to rebut the *prima facie* correctness of the Department’s determination that licensure should be denied based upon a violation of section 4(2) of the Pull Tabs Act.

WHEREFORE, for the reasons stated above, it is my recommendation that the Department’s Notice of Application Denial denying licensure to ABC Foundation to conduct Pull Tab games be affirmed and finalized.

Ted Sherrod
Administrative Law Judge

Date: July 29, 2013