ALABAMA TAX TRIBUNAL

GREENETRACK, INC.,	§	
Taxpayer,	§	DOCKET NO. S. 11-422-JP
v.	§	
STATE OF ALABAMA DEPARTMENT OF REVENUE.	§	

OPINION AND FINAL ORDER

Greenetrack, Inc. (Taxpayer), is the sole licensee of the Greene County Racing Commission. Through the years, there has been pari-mutuel wagering on horse and dog racing and wagering on bingo at the Taxpayer's facility in Greene County.

Following an audit, the Alabama Department of Revenue entered a final assessment of sales tax and a final assessment of consumer's use tax against the Taxpayer. The final assessment of sales tax totaled $75,511,338.17, including interest. The final assessment of consumer's use tax totaled $746,292.01, including interest. Both assessments covered the periods of January 2004 through December 2008, and both related solely to bingo operations at the Taxpayer's facility.

In the audit report, which was dated March 31, 2009, the examiners stated that "[t]he scope of this examination is to determine whether the bingo operation at Greenetrack is in fact legal under the above mentioned laws and rules [Ala. Code § 40-23-2(2); Ala. Admin. Code r. 810-6-1-.24; § 40-23-4(a)(43); and 26 U.S.C. § 501(c) and (d)]. If the bingo operation is not in compliance with Section 40-23-4(a)(43), Code of Alabama 1975, the operation is not legal and the gross receipts are subject to sales tax." The examiners continued by discussing the 2003 constitutional amendment –

Amendment 743 – that authorized the playing of bingo in Greene County, and the rules concerning the licensing and operation of those games. The examiners then stated the following:

> [I]t is evident that the nonprofit organizations have illegally entered into contracts with Greenetrack, Inc., a for-profit corporation, to operate the bingo facility. The nonprofit organizations receive only a token amount of the immense revenues generated by the bingo operation. Since the bingo operation at Greenetrack is not being operated in compliance with Amendment 743, the gross receipts derived from the bingo operation are subject to sales tax.
>
> . . .
>
> Basis for Assessment
>
> The basis for the assessment of tax due, results from an illegal operation of bingo at the Greenetrack facility. Greenetrack, Inc. owes sales tax on the total wagers derived from the bingo operation.

Concerning consumer's use tax, the examiners noted that the Taxpayer's controller stated that the Taxpayer is exempt from paying sales tax on its purchases, pursuant to "Act 376" (which refers to Act 1975-376). According to the examiners, "all purchases related to pari-mutuel wagering are exempt from sales and consumer use tax. However, the exemption does not include purchases related to the bingo operation." Thus, the examiners concluded that the Taxpayer owed use tax on its bingo-related purchases.

The Taxpayer appealed the final assessments, and it is represented by outside counsel. The Revenue Department is represented by the state's Office of the Attorney General.

Question Presented

Act 1975-376 imposed various license fees and taxes on licensees of the Greene County Racing Commission. However, § 16 of the Act stated that "[t]he license fees,

commissions, and excise taxes imposed herein shall be in lieu of all license, excise, and occupational taxes to the State of Alabama. . .”

The Taxpayer argues that the legislature, in § 16 of the Act, exempted the Taxpayer from the taxes assessed by the Revenue Department and, thus, that the assessments are void. The Revenue Department argues that § 16 applies only to dog racing at the Taxpayer’s facility and not to bingo and, thus, that the question is whether there has been compliance with Amendment 743 and subsequent rules regarding the operation of bingo games.

Because the Taxpayer raised a threshold argument; *i.e.*, that its tax exemption nullifies the assessments, the Tax Tribunal directed the parties to first brief that issue. After briefing, the Tax Tribunal conducted oral argument on the issue on September 20, 2018.

Therefore, the sole question that is currently before the Tax Tribunal is whether the legislature limited the application of § 16 to taxes that arise from racing activities.

Law

The Alabama legislature first levied a general sales tax in February 1937. *See* Acts 1936-1937, No. 126 (Ex. Sess.), p. 125. *See also Long v. Poulos*, 174 So. 230 (Ala. 1937), referring to the Act as the Sales Tax Revenue Act of February 1937. Unlike the general revenue act of 1935 (Act 1935-194), which taxed only specific types of businesses based on gross receipts, the February 1937 levy applied generally to those engaged in the “business of selling at retail any tangible personal property whatsoever. . .” Section 2(a).

The February 1937 levy also applied to those engaged “in the business of

conducting places of amusement and/or entertainment, . . . or any other place at which amusement or entertainment is offered to the public. . ." Section 2(c). Further, Section 2(d) constituted the state's first use tax, although that tax was addressed in more detail in Act 1939-67. *See Layne Central Co. v. Curry*, 8 So.2d 839, 841 (Ala. 1942) (stating that "Section 2(d), *supra*, was more than an isolated act of the legislature. It was set in the revenue law, as was the Use Tax Act of 1939, *supra*, to make a system which would work uniformly and equitably on all users and consumers of personal property in Alabama.").

In Act 1975-376, the Alabama legislature created the Greene County Racing Commission for the purpose of licensing and regulating racing within the county and wagering on that racing. Persons, associations, and corporations were authorized to apply annually to the Racing Commission for a racing license, subject to a license fee of no more than $1,000.

Also, the 1975 Act imposed two different taxes. First, licensees were required to pay the Racing Commission "four (4) percent of the total contributions to all pari-mutuel pools conducted or made on any race track licensed under this Act." Second, licensees were required to collect the greater of 15% of the admission price, or ten cents, from each person attending races and then remit that admission tax to the Racing Commission. However, in Section 16 of the 1975 Act, the legislature stated:

> The license fees, commissions, and excise taxes imposed herein shall be in lieu of all license, excise, and occupational taxes to the State of Alabama, or any county, city, town, or other political subdivision thereof.

(The Act was codified at Ala. Code §§ 45-32-150 through 45-32-150.22.)

Eleven years later, the legislature subjected dog race track licensees and

operators to certain other state and local taxes.

> Section 1. Effective upon the passage of this act, in addition to all other taxes heretofore or hereafter levied by local or general law, all licensees or operators of dog race tracks within this state are hereby required to pay, (1) income taxes levied by the state, (2) occupational taxes levied on wages by a municipality or county, (3) ad valorem taxes levied on any racing facility by the state, county or other local subdivision at the same rates as are applicable to other commercial property having comparable market value, (4) state and local sales taxes on merchandise, food or beverage, sold by operators or their concessionaires at racing events, and (5) all taxes and license fees imposed or related to the sale of alcoholic beverages.
>
> Section 2. This bill shall not apply retroactively nor shall any provision of this act be construed as affecting the local distribution of taxes of any existing dog race track.
>
> Section 3. We affirm the exemptions heretofore granted by local act and expressly declare that the intention of this legislation is that such exemptions were heretofore valid and remain valid until the effective date of this act.
>
> Section 4. There is no intent by this legislation to impose a general sales tax on admission to the track or to the handle and an exemption is hereby granted for such taxes.
>
> Section 5. This act shall become effective immediately upon its passage and approval by the Governor, or upon its otherwise becoming a law.

Act 1986-647. (The Act was codified at § 40-11-5.)

Then, in Act 1990-671, the legislature exempted the following gross receipts from the state's sales tax:

> The gross receipts derived from all bingo games and operations which are conducted in compliance with validly enacted legislation authorizing the conduct of such games and operations, and which comply with the distribution requirements of the applicable local laws; provided that the exemption from sales taxation granted by this subdivision shall apply only to gross receipts taxable under Section 40-23-2(2) of the Code of Alabama 1975. It is further provided that this exemption shall not apply to any gross receipts from the sale of tangible personal property, such as concessions, novelties, food, beverages, etc. "The exemption provided for

> in this section shall be limited to those games and operations by organizations which have qualified for exemption under the provisions of 26 U.S.C. § 501(c)(3), (4), (7), (8), (10), or (19)," or which are defined in 26 U.S.C. § 501(d).

In 2003, a constitutional amendment was proposed to legalize bingo games in Greene County for charitable or educational purposes. The proposal, which was embodied in Act 2003-433, directed the sheriff to adopt rules governing the operation of bingo games, but it also specified several requirements for the legal operation of such games. Voters ratified the proposal as Amendment 743. Shortly thereafter, the Sheriff of Greene County adopted rules to regulate the licensing and operation of bingo games.

Analysis

As stated, the parties disagree as to the scope of the exemption granted in § 16 of the 1975 Act. The Taxpayer argues that the exemption is limited only by the words used by the legislature in § 16 and in subsequent legislative enactments. The Revenue Department argues that the legislature intended for the exemption to apply only to the Taxpayer's dog-racing activities and not to its subsequent bingo operations.

The outcome is determined by long-standing principles. "The cardinal rule of statutory interpretation is to determine and give effect to the intent of the legislature as manifested in the language of the statute. *Gholston v. State*, 620 So.2d 719 (Ala. 1993). Absent a clearly expressed legislative intent to the contrary, the language of the statute is conclusive. Words must be given their natural, ordinary, commonly understood meaning, and where plain language is used, the court is bound to interpret that language to mean exactly what it says. *IMED Corp. v. Systems Engineering Associates Corp.*, 602 So.2d 344 (Ala. 1992)." *Ex parte State Dep't of Revenue*, 683 So.2d 980, 983 (Ala. 1996). Likewise, "[w]here the language of a statute is clear and

'there remains no room for judicial construction[,] . . . the clearly expressed intent of the legislature must be given effect.'" *Ex parte Univ. of South Alabama*, 761 So.2d 240, 243 (Ala. 1999) (citations omitted). Also, "[i]f the meaning of those terms [of the Act] is plain and unambiguous, we are not free to derive from them some different meaning." *Swindle v. Remington*, No. 1161044 (Ala., March 8, 2019). *See also Aloha Airlines, Inc. v. Dir. Of Taxation of Hawaii*, 464 U.S. 7, 12 (1983) (stating that, "when a federal statute unambiguously forbids the States to impose a particular kind of tax on an industry affecting interstate commerce, courts need not look beyond the plain language of the federal statute to determine whether a state statute that imposes such a tax is preempted. Thus, the Hawaii Supreme Court erred in failing to give effect to the plain meaning of [49 U.S.C] § 1513(a).")

Here, in § 16 of the 1975 Act, the Alabama legislature plainly stated that the fees, commissions, and taxes imposed on licensees "shall be in lieu of all license, excise, and occupational taxes to the State of Alabama, or any county, city, town, or other political subdivision thereof." It is undisputed that the fees, commissions, and taxes of the 1975 Act were imposed on the Taxpayer. It also is undisputed that the sales and use taxes at issue are a license tax and an excise tax, respectively. *See* § 40-23-2, levying "a privilege or license tax . . . in the amount to be determined by the application of rates against gross sales, or gross receipts. . ." *See also* § 40-23-61(a), stating that "[a]n excise tax is hereby imposed on the storage, use or other consumption in this state of tangible personal property. . ."

Thus, the focus is on the phrase "shall be in lieu of all." The word "shall," "[a]s used in statutes, contracts, or the like, . . . is generally imperative or mandatory."

Black's Law Dictionary, 5th Edition. The phrase "in lieu of" is defined as "[i]nstead of; in place of; in substitution of." *Id.* And the word "all" "[m]eans the whole of … [t]he whole number or sum of … [e]very member of individual component of …" *Id*.

Alabama's appellate courts have interpreted and applied the phrase "in lieu of" in accordance with its definition. In *Danny's, Inc. v. City of Muscle Shoals*, 620 So.2d 8 (Ala. Civ. App. 1992), the taxpayer challenged the imposition by two cities of a local tax on the sale of beer as violating the Alabama Uniform Beer Tax in § 28-3-190. In subparagraph (e) of § 190, the legislature provided:

> The tax herein levied is exclusive and shall be in lieu of all other or additional local taxes and licenses, county or municipal, imposed on or measured by the sale or volume of sale of beer; provided that nothing herein contained shall be construed to exempt the retail sales of beer from the levy of a tax on general retail sales by the county or municipality in the nature of, or in lieu of, a general sales tax.

The trial court had ruled that the local tax levies were not prohibited by § 28-3-190(e). In reversing, the Court of Civil Appeals stated the following:

> In construing legislative enactments, courts must ascertain and give effect to the legislative intent as expressed in the language of the acts. When the language utilized in a legislative enactment is plain and not susceptible to varying interpretations, courts must interpret the enactment to mean exactly what it says.
>
> We find no ambiguity in the prohibitive language of § 28-3-190(e). It provides that the Uniform Beer Tax is in "lieu of all other or additional local taxes and licenses" except for general sales taxes.

Danny's, Inc., 620 So.2d at 10 (citations omitted). Therefore, the appeals court invalidated the cities' ordinances which had imposed the local tax. *Id.*

Also, Alabama's Supreme Court considered the limitation that the legislature had placed on a municipality's authority to tax a railway company. *Mobile & Spring Hill Railroad Co. v. Kennerly*, 74 Ala. 566 (Ala. 1883). After authorizing the tax, the

legislature stated that "'. . . said tax shall be in full and in lieu of all taxation by said city on such railway, its rolling-stock, equipments and appendages.'" *Id.* In considering the legislature's limiting language, the court stated that "[t]here could not have been employed words more clearly indicating the legislative intent to subject the railway of the corporation, its rolling-stock and appendages, to the mode and rate of taxation prescribed, excluding all other municipal taxation." *Id.* Thus, the contrary ruling of the circuit court was reversed.

Here, the intent of the legislature is equally clear. Its express words in § 16 of the 1975 Act were that the fees, commissions, and taxes imposed on licensees "shall be in lieu of all license, excise, and occupational taxes to the State of Alabama" and any localities. The Taxpayer is a licensee and the taxes at issue are state license and excise taxes. Therefore, § 16, which has not been abrogated as to these taxes, nullifies the final assessments.

The Taxpayer argues that this outcome is supported by *Alabama Dep't of Revenue v. Nat'l Peanut Festival Ass'n, Inc.*, 11 So.3d 821 (Ala. Civ. App. 2008), and by legislative acts that were passed after the 1975 Act.

In *Nat'l Peanut Festival*, the court recognized that some legislative exemptions apply only to certain events or activities conducted by an entity, whereas other exemptions apply to the entity itself, without regard to its activities. Here, the Taxpayer argues that the legislature granted it an entity-based exemption and, therefore, the Revenue Department's argument that the exemption is limited to dog-racing activities is unsupported by the plain language of § 16. The Taxpayer is correct because, as discussed, § 16 substitutes the fees, commissions, and taxes imposed on licensees for

state and local taxes such as the ones at issue, without using limiting or activity-based language.

In Act 1986-647, § 1, the legislature subjected "all licensees or operators of dog race tracks within this state" to state income tax; county or city occupational tax; state, county, or other local ad valorem tax on racing facilities; "(4) state and local sales taxes on merchandise, food or beverage, sold by operators or their concessionaires at racing events, and (5) all taxes and license fees imposed or related to the sale of alcoholic beverages."

The Taxpayer's point is that the legislature, in 1986, would not have removed a sales-tax exemption (on sales of merchandise, food, and beverages) that did not exist in the first place; *i.e*., that had not been granted in § 16 of the 1975 Act. The Taxpayer's general premise is correct – the legislature would have no reason to remove a tax exemption that it had not granted. However, the Revenue Department's argument is that the exemption granted in § 16 of the 1975 Act is limited to dog-racing activities and does not extend to bingo. So, the Taxpayer's specific point regarding the 1986 Act is inapplicable. But there is language in the 1986 Act that supports the Taxpayer's position that the exemption in § 16 was not limited to dog-racing activities. In § 1(4) of Act 1986-647, which removed the exemption as to state and local sales tax on sales of merchandise, food, and beverages, the legislature limited that provision to sales "at racing events." As shown, however, that type of limiting language was not included in § 16 of the 1975 Act.

Also, in Act 1990-671, the gross receipts from bingo games and operations were exempted from Alabama's sales tax, if those games and operations were conducted in

compliance with certain laws. In so doing, the legislature stated "that the exemption from sales taxation granted by this subdivision shall apply only to gross receipts taxable under Section 40-23-2(2) of the Code of Alabama 1975." The Taxpayer argues that this proviso was an acknowledgment that some bingo receipts were not subject to the sales-tax levy because of provisions such as § 16 of the 1975 Act. In other words, there would have been no need for the legislature to state that the exemption in the 1990 Act applied only to bingo receipts that were subject to sales tax if all bingo receipts already were subject to sales tax.

The Taxpayer's point is supportive of its argument, but not conclusive. Obviously, the legislature meant something by the words it chose to use in the proviso in the 1990 Act. *See Millican v. McKinney*, 886 So.2d 841, 845 (Ala. Civ. App. 2003), stating that "'[i]t will not be presumed that the Legislature has employed 'meaningless words.'" So, it certainly is plausible that the legislature's proviso acknowledged that some bingo receipts were not taxable because of the existence of an entity-based exemption. Aside from that exception, the 1990 Act provided an activity-based exemption for those who operated bingo games in compliance with applicable laws.

As discussed, though, the issue is decided by the express words used by the legislature in § 16 of the 1975 Act. The Revenue Department argues, however, that § 16 and the subsequent acts were passed during a period when the Taxpayer operated solely as a racing facility and not as a "mega bingo parlor." According to the Revenue Department, the tax exemption that is relevant to the Taxpayer relating to bingo receipts arose from Amendment 743, which was adopted in 2003 and which established certain requirements for the legal operation of bingo in Greene County. The Revenue

Department claims that the Taxpayer is noncompliant with those requirements and thus is not exempt from sales or use tax on the bingo receipts. In short, the Revenue Department states:

> To rule with the taxpayer would in essence state that the intent of the legislature was to allow for operations such as Greenetrack to conduct a multi-million (if not billion) dollar operation completely tax-free even if it does not serve the charitable purpose for which [the] legislature created it. Had the taxpayer felt this result was so clear under statutory law, surely it would not have waited almost 10 years through several legal proceedings before making this outlandish argument when a simple exemption argument could have put the matter to rest years ago.

Department of Revenue's Response to Taxpayer's Brief, pp. 3-4.

First, the Taxpayer did not wait to assert its entity-based exemption. As stated near the beginning of this opinion, the Revenue Department's examiners noted that the Taxpayer's controller asserted an exemption pursuant to Act 1975-376 during the audit.

Second, if the outcome in this appeal seems "outlandish," the remedy rests with the legislative branch that enacted the law upon which this ruling is based. "This Court's role is not to displace the legislature by amending statutes to make them express what we think the legislature should have done. Nor is it this Court's role to assume the legislative prerogative to correct defective legislation or amend statutes." *Siegelman v. Chase Manhattan Bank (USA), Nat'l Assn*, 575 So.2d 1041, 1051 (Ala. 1991). Further, "we do not subscribe to the doctrine that the judiciary can or should usurp the legislative function in a republican form of government; and, where the statute is plain, we must leave the amendment of it to the *Legislature*." *Drake v. Pennsylvania Threshermen & Farmers' Mutual Casualty Ins. Co.*, 92 So.2d 11, 15 (Ala. 1957) (italics in original). "To apply a different policy would turn this Court into a legislative body, and doing that, of course, would be utterly inconsistent with the doctrine of separation of

powers." *Ex parte Birmingham Airport Authority*, No. 1170592 (Ala., September 28, 2018) (citations omitted).

Conclusion

The legislature exempted the Taxpayer from the taxes at issue. Thus, the final assessments are void. Judgment is entered accordingly.

This Final Order may be appealed to circuit court within 30 days, pursuant to Ala. Code § 40-2B-2(m).

Entered August 29, 2019.

/s/ *Jeff Patterson*
JEFF PATTERSON
Chief Judge
Alabama Tax Tribunal

jp:dr
cc: Mark Griffin, Esq.
Kyle Beckman, Esq.
Benjamin H. Albritton, Esq.
John Merrill Bolton, III, Esq.
G. David Johnston, Esq.
Charlanna W. Skaggs, Esq.