GULF COAST ELKS LODGE 2782 2621 SOUTH JUNIPER STREET FOLEY, AL 36535-9237,	§	STATE OF ALABAMA DEPARTMENT OF REVENUE ADMINISTRATIVE LAW DIVISION
Taxpayer,	§	DOCKET NO. S. 13-137
v.	§	
STATE OF ALABAMA DEPARTMENT OF REVENUE.	§	

OPINION AND PRELIMINARY ORDER

The Revenue Department assessed Gulf Coast Elks Lodge 2782 ("Taxpayer") for State and local sales tax and State lodgings tax for December 2005 through December 2011. A hearing was conducted on May 16, 2013. John Crowley represented the Taxpayer. Assistant Counsel Duncan Crow represented the Department.

FACTS AND ISSUES

The Taxpayer is a 501(c)(8) organization located in Foley, Alabama. It operates a lounge and a full service restaurant at its facility in Foley. It also rents spaces in an RV park behind its facility.

The Department audited the Taxpayer for sales and lodgings tax for the period in issue. The audit initially involved only a three year period. The period was extended back to December 2005 because the Taxpayer had never filed lodgings tax returns, and had not filed sales tax returns before May 2011.

The Taxpayer concedes that it owes some of the State and local sales tax in issue. It argues, however, that the Department incorrectly assessed it on (1) receipts from arcade games, (2) receipts from parties, events, etc. held at its facility that were open to members only, and not the public, and (3) receipts from the rental of spaces in its RV park.

Concerning the arcade games, the Taxpayer and an unrelated company, Southland Enterprises, had an oral agreement or understanding during the audit period that Southland would put various coin-operated arcade games at the Taxpayer's facility in Foley. The Taxpayer periodically "robbed" or took the money out of the machines at the request of Southland. A Southland representative visited the Taxpayer's facility once a month and determined the dollar amount that the machines took in during the prior month. The Taxpayer then remitted to the representative 45 percent of the machine receipts. The Taxpayer retained the balance.

Concerning the receipts from the members only events or activities, the Taxpayer's Treasurer testified that the Taxpayer's facility is not open to the general public. It does have special functions, however, that are open to the public. Specifically, it has a fish fry every Friday night and bingo games every Tuesday night that are open to the public. It also has annual Mardi Gras parties that are open to the public.

Concerning the lodgings tax issue, the Taxpayer has 27 spaces in its RV park located behind its facility in Foley. It charged $20 a day, $100 a week, and $325 a month for the spaces during the audit period. Sewage and electricity hook-ups are provided without extra charge. The examiner did not tax those rentals that lasted for longer than 180 consecutive days because such rentals are excluded from the lodgings tax pursuant to Code of Ala. 1975, §40-16-1(b).

ANALYSIS

Issue (1) – The Arcade Games Gross Receipts.

The Department assessed the Taxpayer for its portion of the arcade gross receipts

because it removed the money from the machines and otherwise "had control of the machines. No contract was available for the audit period to indicate the division of monies or who was responsible for the taxes." Department's Audit Report at 4.

This issue is controlled by *State of Alabama v. W. G. Mack*, 411 So.2d 799 (Ala. Civ. App. 1982). The taxpayer in *Mack* owned game machines that it placed at various locations in Alabama. The taxpayer divided the receipts from the machines with the location owners, usually on a 50/50 percent basis.

The Department assessed the taxpayer on the total gross receipts derived from the machines, including the percentage 'commission" kept by the location owners. The taxpayer argued that he had properly paid tax on that portion of the receipts that he retained, and that the location owners had also paid sales tax on their percentage of the machine receipts.

The Court of Civil Appeals held that the taxpayer, as the owner of the machines, was liable for sales tax on the total receipts derived from the machines – "The Department contends, and we agree, that Mack is required by §40-23-2(2), Code 1975, to report the total gross receipts from his machines regardless of any commissions paid to the location owners." *Mack*, 411 So.2d at 803.

Pursuant to the holding in *Mack*, the owner of the machines in this case, Southland Enterprises, is 100 percent liable for the tax on the gross receipts derived from the machines. The fact that the parties did not have a written contract is irrelevant, as is the fact that the Taxpayer periodically robbed the machines at the request of Southland.[1]

[1] In such cases, the parties may also agree, either in writing or verbally, as to the party that

Issue (2) – The Events Gross Receipts.

The Taxpayer argues that only the receipts from events or activities that were open to the public should be subject to the §40-23-2(2) gross receipts tax. I agree. The Administrative Law Division has held on several occasions that when a private club or organization derives receipts from events for members only and also from events open to the public, only those receipts from the events open to the public are subject to the "public amusement" gross receipts tax levied at §40-23-2(2).

In *Cypress Lakes Golf & Country Club, Inc. v. State of Alabama*, Docket S. 06-174 (Admin. Law Div. O.P.O. 1/11/2007), the issue was whether initiation fees and monthly dues paid by members to belong to a country club were subject to the §40-23-2(2) gross receipts tax because the club's golf course was open to the public. The Division held that the dues and initiation fees were not derived from a place of public amusements, and thus were not taxable.

> The sales tax levied at §40-23-2(2) is on the receipts derived from places of public entertainment, amusement, etc. Fees and dues paid by members to belong to a private club are not derived from places of public amusement, and thus are not subject to the tax. Those non-taxable receipts do not become taxable because the club also derives receipts from a taxable source, i.e., greens fees paid by the public. As previously stated, "[a] taxpayer's gross proceeds derived from a non-taxable private source are not tainted because another activity engaged in by the taxpayer is subject to the public amusement tax. Only the gross receipts derived from 'such (public) business' should be taxed." *Craft Development*, Order on Rehearing at 1.

Cypress Lakes at 5 – 6.

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will be responsible for paying the tax on the machine receipts. But any such agreement, while binding between the parties, does not alter the fact that the machine owner is liable to the Department for the tax due.

The above rationale was applied in two other cases including "private" golf courses, *Rigdon, Inc. v. State of Alabama*, Docket S. 02-337 (Admin. Law Div. 20/30/2002) and *State of Alabama v. Craft Development Corp.*, Docket S. 91-142 (Admin. Law Div. 10/22/1991), and also in *State of Alabama v. Garrison*, Docket S. 86-108 (Admin. Law Div. 11/16/1986).

In *Garrison*, the taxpayer operated a public golf recreation center and also gave private golf lessons. The Administrative Law Division held that the private lessons were not subject to the §40-23-2(2) tax.

> The tax is levied upon the privilege of operating a place of amusement, and applies to the gross proceeds derived from charges for specific entertainment activities carried on therein, such as the green fees charged at public golf courses, admission fees charged at various sporting events, etc. However, the fact that a portion of a business may be subject to the public amusement or entertainment sales tax does not mean that every activity carried on by the Taxpayer is also subject to the tax. Only if the specific activity or event to be taxed constitutes a public amusement or entertainment, or is directly related to or constitutes an integral part thereof, should it be subject to tax. Thus, although the Taxpayer's business does include several taxable activities, the golf lessons, which are a professional service and are not provided for entertainment or amusement within the purview of (§40-23-2(2)), would not be taxable. The golf lessons are separate and distinct from the Taxpayer's golf amusement center.

Garrison at 2.

In this case, the Taxpayer admittedly conducted bingo games, fish fries, and Mardi Gras-related events that were open to the public. The receipts from those activities were subject to the §40-23-2(2) gross receipts tax. The admissions or door receipts paid by the members to attend the members only events were not subject to the tax. Although not entirely clear, it appears that the Taxpayer's books and records distinguished between the taxable and nontaxable receipts, as required by Alabama law, see generally, *Ala. Dept. of*

Revenue v. National Peanut Festival Ass'n., 51 So.3d 353 (Ala. Civ. App. 2010); *State v. Ludlum*, 384 So.2d 1089 (Ala. Civ. App.), cert denied 384 So.2d 1094 (Ala. 1980). Consequently, the nontaxable receipts should be deleted from the audit.

Issue (3) – The RV Park Receipts.

The Department cites Reg. 810-6-5-.13 in support of its claim that the gross receipts from the Taxpayer's rental of it RV spaces is subject to the lodgings tax levied at Code of Ala. 1975, §40-26-1 et seq. That regulation reads in relevant part as follows:

> (4) Except as noted, lodgings tax applies to all charges made for the use of rooms, lodgings, or other accommodations, including charges for personal property used or services furnished in the rooms, lodgings, or other accommodations, by every person who is engaged in the business of renting rooms or lodgings or furnishing accommodations to transients. The tax applies regardless of whether the person occupying such rooms or lodgings or receiving such accommodations is a resident or nonresident of the area in which such rooms or lodgings are located or in which such accommodations are furnished.
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> (5) The lodgings tax shall be collected by all persons engaged in the business of renting or furnishing rooms or other accommodations in any hotel, motel, rooming house, apartment house, lodge, inn, tourist cabin, tourist court, tourist home, camp, trailer court, marina, convention center, or any other place where rooms, apartments, cabins, sleeping accommodations, mobile home accommodations, recreational trailer parking accommodations, boat docking accommodations, or other accommodations are made available to travelers, tourists, or other transients.

As indicated in paragraph (5), the tax applies to "recreational trailer parking accommodations, . . . or other accommodations made available to travelers, tourists, or other transients." An "accommodation" is defined as "[r]oom and board; lodgings." American Heritage Dictionary 4th Ed. at 8. "Lodgings" is defined by the same source, at 813, as "[s]leeping accommodations. Furnished rooms in another's house rented for accommodations."

It is clear from the above that the §40-26-1 transient occupancy or lodgings tax is levied on the gross receipts derived from renting or furnishing a room or rooms to transients. It does not apply to RV parks such as the Taxpayer's that only rent out spaces on which customers can park their own accommodations, i.e., recreational vehicles. This is consistent with the language of the levy at §40-26-1, which imposes the tax upon "every person, firm, or corporation engaged in the business of furnishing any room or rooms, lodging, or accommodations. . . ." The Taxpayer accordingly is not liable for the lodgings tax in issue.

The Department is directed to recompute the sales tax due as indicated above. A Final Order will then be entered voiding the lodgings tax final assessment and reducing the State and local sales tax due.

This Opinion and Preliminary Order is not an appealable Order. The Final Order, when entered, may be appealed to circuit court within 30 days pursuant to Code of Ala. 1975, §40-2A-9(g).

Entered July 9, 2013.

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BILL THOMPSON
Chief Administrative Law Judge

bt:dr
cc: Duncan R. Crow, Esq.
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