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Internal Revenue Service (I.R.S.)

Technical Advice Memorandum

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Section 4401 -- Wagering Tax (Taxable v. Not Taxable)
4401.00-00 Wagering Tax (Taxable v. Not Taxable)

TR-32-240-91
NATIONAL OFFICE TECHNICAL ADVICE MEMORANDUM
District Director
Taxpayer's Name:
Taxpayer's Address:
Taxpayer's Identification No.:
Taxable Periods:
Conference Held:

ISSUES

1. Is the Taxpayer liable for wagering tax under section 4401 of the Internal Revenue Code for amounts wagered on pull-tabs sold in connection with bingo and casino operations?
2. Is the Taxpayer liable for wagering tax under section 4401 of the Code for amounts wagered on drawings held in connection with bingo operations?
3. Is the Taxpayer liable for the occupational tax imposed by section 4411 of the Code?

FACTS

The Taxpayer, an Indian tribal government, either individually or through a wholly owned tribal corporation, operates a bingo palace and a casino. As part of its gaming operations, the Taxpayer sells pull-tabs in both the bingo palace and the casino. The pull-tabs are sold from a specified area or by floor walkers. The employees who sell pull-tabs are employed solely for that purpose and may not operate any other gaming activity. Likewise, the employees of the bingo operation and the casino gaming tables may not sell pull-tabs.
In addition to the pull-tab operation, the Taxpayer operates a drawing for prizes as part of the bingo operation. During the period of the game (usually one or more weeks), each customer who purchases a bingo package receives a registration card that may be completed and dropped into a barrel. Drawings for various major prizes are held on a specified day. The only requirement for winning a prize is that the customer must be present to win. If a card is drawn and that person is not present, another card is drawn until there is a winner.

LAW AND ANALYSIS

Section 4401(a)(1) of the Code imposes on any wager authorized under the law of the State in which accepted an excise tax equal to 0.25 percent of the amount of such wager. Section 4401(a)(2) of the Code imposes on any wager not described in section 4401(a)(1) an excise tax equal to 2 percent of the amount wagered.
Section 4401(b) of the Code provides that in determining the amount of any wager for the purposes of this subchapter [subchapter A of chapter 35], all charges incident to the

placing of such wager shall be included; except that if the taxpayer establishes, in accordance with regulations prescribed by the Secretary, that an amount equal to the tax imposed by this subchapter has been collected as a separate charge from the person placing such wager, the amount so collected may be excluded.

Section 4401(c) of the Code provides that each person who is engaged in the business of accepting wagers shall be liable for and shall pay the tax under this subchapter on all wagers placed with him. Each person who conducts any wagering pool or lottery shall be liable for and shall pay the tax under this subchapter on all wagers placed in such pool or lottery. Any person required to register under section 4412 who receives wagers for or on behalf of another person without having registered under section 4412 the name and place of residence of such other person shall be liable for and shall pay the tax under this subchapter on all such wagers received by him.

Section 4402(3) of the Code provides that no tax shall be imposed by this subchapter on any wager placed in a sweepstakes, wagering pool, or lottery which is conducted by an agency of a State acting under authority of State law, but only if such wager is placed with the State agency conducting such sweepstakes, wagering pool, or lottery, or with its authorized employees or agents.

Section 4411(a) of the Code imposes a special tax of $500 per year to be paid by each person who is liable for the tax imposed under section 4401 or who is engaged in receiving wagers for or on behalf of any person so liable.

Section 4411(b) of the Code substitutes $50 for $500 in section 4411(a) in the case of--

(1) any person whose liability for tax under section 4401 is determined under paragraph (1) of section 4401(a), and

(2) any person who is engaged in receiving wagers only for or on behalf of persons described in paragraph (1).

Section 4421 of the Code provides--

(1) The term "wager" means--

(A) any wager with respect to a sports event or a contest placed with a person engaged in the business of accepting such wagers,

(B) any wager placed in a wagering pool with respect to a sports event or a contest, if such pool is conducted for profit, and

(C) any wager placed in a lottery conducted for profit.

(2) the term "lottery" includes the numbers game, policy, and similar types of wagering. The term does not include--

(A) any game of a type in which usually--

(i) the wagers are placed,

(ii) the winners are determined, and

(iii) the distribution of prizes or other property is made, in the presence of all persons placing wagers in such game.

Section 7871(a)(2) of the Code provides that an Indian tribal government shall be treated as a State, subject to subsection (b), for purposes of any exemption from, credit or refund of, or payment with respect to, an excise tax imposed by--

(A) chapter 31 (relating to tax on special fuels),

(B) chapter 32 (relating to manufacturers excise taxes),

(C) subchapter B of chapter 33 (relating to communications excise tax), or

(D) subchapter D of chapter 36 (relating to tax on use of certain highway vehicles).

Section 7871(b) of the Code provides that [section 7871(a)(2)] shall apply with respect to any transaction only if, in addition to any other requirement of [title 26] applicable to similar transactions involving a State or political subdivision thereof, the transaction involves the exercise of an essential governmental function of the Indian tribal government.

Revenue Ruling 57-258, 1957-1 C.B. 418, holds that a pull-tab game is essentially a form of punchboard that falls within the meaning of the term "lottery" and is subject to the wagering tax imposed by section 4401 of the Code.

The drawing conducted by the Taxpayer is not a game of a type in which usually the wagers are placed, the winners are determined, and the prizes are distributed in the

presence of all players. Therefore, the drawing is not a game of the type excluded from the definition of the term "lottery" and is subject to the wagering tax imposed by section 4401 of the Code.

The Taxpayer argues that Indian tribal governments are exempt from taxes under chapter 35 in the same manner as states and their political subdivisions are exempt. Section 7871(a)(2) of the Code does not include chapter 35 in its enumerated list of provisions for purposes of which Indian tribal governments are to be treated as states. The Taxpayer points to section 20(d) of the Indian Gaming Regulatory Act (IGRA), 25 U.S.C. Sec. 2719(d) (hereafter section 2719(d)), as exempting Indian tribal governments from taxation under chapter 35 of the Code.

Section 2719(d) states that the provisions of title 26 [the Internal Revenue Code] (including sections 1441, 3402(q), 6041, and 6050I and chapter 35 of such title) concerning the reporting and withholding of taxes with respect to the winnings from gaming or wagering operations shall apply to Indian gaming operations conducted pursuant to this chapter, or under a Tribal-State compact entered into under section 2710(d)(3) of this title that is in effect, in the same manner as such provisions apply to State gaming and wagering operations.

The Taxpayer argues that the reference to chapter 35 in section 2719(d) is essentially meaningless unless the provision is interpreted as exempting Indian tribal governments from the wagering tax. It reasons that since states are exempt from tax on lotteries, sweepstakes, and wagering pools, the states have no reporting or withholding requirements under chapter 35. Because states have no reporting or withholding requirements under chapter 35, neither do Indian tribal governments. Thus, a tribal government cannot be treated "in the same manner" as a state for purposes of chapter 35 reporting requirements without necessarily treating the tribal government in the same manner as a state for the underlying exemption from the liability for tax that triggers the reporting requirement.

The Taxpayer's argument fails to take into account that state governments are not totally exempt from wagering taxes. The exemption is limited to certain specific types of wagers, placed with specified state agencies. If a state agency enters into a wager that is not an exempt wager (for example, if a state agency accepts a wager on a sporting event that is not a parimutual wager), the state is liable for wagering tax and must abide by the recordkeeping and reporting requirements of the Code. Thus, an Indian tribal government that is required to report taxable wagers is treated in the same manner as a state that is required to report taxable wagers.

The Taxpayer's argument further fails because section 2719(d) actually imposes a reporting burden on Indian tribal governments. The Internal Revenue Code sections enumerated in section 2719(d) require states to report and withhold tax on winnings in excess of stated dollar amounts. Treating Indian tribal governments in the same manner as states for purposes of those sections requires the tribal governments to report and withhold tax on their customers' winnings from gaming activities. Concededly, the reference to chapter 35 is less clear because there are no specific requirements for reporting or for withholding of tax contained in chapter 35, other than requirements implicit in the registration requirements under section 4412. Thus, it can be argued that section 2719(d) is ambiguous and that extrinsic aids to construction must be used to determine the intent of Congress.

The Taxpayer maintains that if there is any doubt as to the proper construction of section 2719(d), it must be resolved in favor of the Indian tribal government. The Supreme Court has stated that it is a settled principal of statutory construction that statutes passed for the benefit of dependent Indian tribes are to be liberally construed, with doubtful expressions being resolved in favor of the Indians, Three Affiliated Tribes v. Wold Engineering, 467 U.S. 138, 149 (1984). In an attempt to construe the statute in a manner favorable to Indian tribal governments, the Taxpayer appears to read section 2719(d) as applying to any reporting requirement imposed under the Code with respect to gaming rather than only to withholding of tax and reporting of winnings from gaming. Such simply is not the case. One way to read the statutory reference to chapter 35 in a

manner favorable to the Indian tribal governments is to divide section 2719(d) at the first disjunctive and to separate parts of the parenthetical. This gives a reading somewhat as follows.

The provisions of title 26 (including sections 1441, 3402(q), 6041, and 6050I concerning the reporting and withholding of taxes with respect to the winnings from gaming or [(including chapter 35) concerning] wagering operations shall apply. . . .

This construction does allow an interpretation that section 2719(d) grants an exemption from taxes under chapter 35. We do not find that construction compelling. Such a reading ascribes too much meaning to the use of the disjunctive "or" in the descriptive phrase "gaming or wagering," particularly where section 2719(d) later refers to "gaming and wagering" operations. The grammatical object of the reporting and withholding requirements is "taxes with respect to winnings from gaming or wagering operations," with the phrase "gaming or wagering" being merely an adjectival phrase descriptive of the term "operations." As drafted, the term "operations" in section 2719(d) must be read with both adjectives, "gaming" and "wagering", even though a disjunctive is used, and the parenthetical reference to chapter 35 should not be read as applying only to "wagering operations" with the remaining references in the parenthetical applying only to "gaming." There is no basis for separating the parenthetical reference. Also, although the parenthetical reference in section 2719(d) should not be ignored, it is an unnecessary reference that is not controlling in interpreting section 2719(d). Without the parenthetical the meaning of section 2719(d) is clear:

[t]he provisions of title 26 . . . concerning the reporting and withholding of taxes with respect to the winnings from gaming or wagering operations shall apply. . . .

Should title 26 be amended to add or delete provisions concerning the reporting and withholding of taxes, the meaning of section 2719(d) would remain unchanged.

Further, we believe that the history of section 2719(d) does not support the Taxpayer's construction and, in fact, shows an opposite intent of Congress. Senate Rep. No. 446, 100th Cong, 2d Sess. (1988), details changes made by the Senate Committee on Indian Affairs to the text of S. 555, (the bill underlying IGRA). As originally introduced, section 20(d) of the bill read as follows:

(d) Provisions of the Internal Revenue Code of 1986, concerning the taxation and the reporting and withholding of taxes with respect to gambling or wagering operations shall apply to Indian gaming operations conducted pursuant to this Act the same as they apply to State operations.

Further, the "Section-by-Section Analysis" in S. Rep. No. 446 also indicates congressional intent by stating:

Sec. 20(a)-(d).--Sets forth policies with respect to lands acquired in trust after enactment of this act and applies the Internal Revenue Code to WINNINGS from Indian gaming operations. (emphasis added).

As originally introduced, section 20(d) would have granted Indian tribal governments the same wagering tax treatment as is afforded to states. The removal of the reference to taxation while retaining the reference to reporting and withholding requirements, along with the "Section-by-Section Analysis," strongly indicates that the language of section 20(d) of IGRA, as enacted, does not grant, and is not intended to grant, a wagering tax exemption to Indian tribal governments. Instead it merely imposes on them the same reporting and withholding requirements that are imposed on states.

CONCLUSION

1. The Taxpayer is liable for wagering tax under section 4401 of the Code for amounts wagered on pull-tabs sold in connection with bingo and casino operations.
2. The Taxpayer is liable for wagering tax under section 4401 of the Code for amounts wagered on drawings held in connection with bingo operations.
3. The Taxpayer is liable for the occupational tax imposed by section 4411 of the Code.

A copy of this technical advice memorandum is to be given to the Taxpayer. Section 6110(j)(3) of the Code provides that it may not be used or cited as precedent.

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