
OFFICE OF THE ATTORNEY GENERAL
Official Opinion No. 2012-1

OFFICIAL OPINION 2012-1

Honorable Luke Kenley
State House
200 West Washington Street
Indianapolis, Indiana 46204

RE: Taxation of Set Aside Amounts under Slot Machine Wagering Tax Law

Dear Senator Kenley,

By letter of February 1, 2012, you posed a question with respect to the "Racino Law", which was passed by the General Assembly in 2007 and authorizes additional gambling in the form of electronic gaming devices, including slot machines, at horse race tracks (also known as "racinos"). The Racino Law requires racinos to set aside an amount equal to 15% of each prior month's adjusted gross receipts received from slot machine wagering (hereinafter "set aside" or "set aside amounts"). Ind. Code § 4-35-7-12. The set aside amounts are deposited into funds managed by the Indiana Horse Racing Commission. *Id.* Indiana's slot machine wagering tax, Ind. Code § 4-35-8-1, imposes a graduated tax on the adjusted gross receipts a racino receives from slot machine wagering. Your question is:

Whether set aside amounts under Ind. Code § 4-35-7-12 are subject to the graduated wagering tax (*i.e.*, the slot machine wagering tax) under Ind. Code § 4-35-8-1?

Brief Answer

The plain language of the Racino Law and relevant evidence of legislative intent make it clear that the General Assembly intended that set aside amounts under Ind. Code § 4-35-7-12 shall be subject to the slot machine wagering tax under Ind. Code § 4-35-8-1.

Legal Analysis

Gambling in Indiana is a heavily regulated industry that exists only as a matter of legislative grace. Prior to 1988, Indiana's Constitution prohibited gambling, specifically lotteries. Ind. Const. Art. XV, § 8 (repealed Nov. 8, 1988). However, the constitutional ban had been broadly interpreted by Indiana courts to cover other forms of gambling as well, such as pari-mutuel betting at horse races. *See, e.g., State v. Nixon*, 384 N.E.2d 152, 161 (Ind. 1979). In 1988, Indiana voters repealed the State's constitutional ban on lotteries. After the repeal, the General Assembly legalized pari-mutuel betting on live horse races. Pub. L. 341-1989(ss), § 2 (codified as amended at Ind. Code § 4-31-1-1 *et seq.*). In 1992, the legislation was amended to authorize off-track betting facilities. Pub. L. 24-1992, § 18 (codified as amended at Ind. Code § 4-31-5.5-1 *et seq.*). In 2007, slot machines were authorized at the State's only two horse race tracks. Pub. L. 233-2007, § 21 (codified as amended at Ind. Code § 4-35-1-1 *et seq.*). *See also* Ind. Code § 4-31-5-1(c) (limiting permits for horse race tracks to two only).

A study prepared by Indiana's Legislative Services Agency ("LSA") in August 2009 shows that in fiscal year 2009, Indiana's two racinos accounted for \$110.9 million in tax revenue, or 13% of the total \$881 million in gaming-related tax revenue for 2009. *See* Ind. LSA, *Ind. Gaming Tax Revenue*, 7 (prepared for the Gaming Study Comm., Aug. 24, 2009). In 2009, the total adjusted gross receipts from slot machine wagering at the racinos was \$383,164,277, and the total 15% set aside was \$57,474,642. *Id.* at 36–37. Applying the top 35% marginal rate to the total set-aside amount, I.C. § 4-35-8-1(a)(3), reveals that the slot machine wagering tax received from the set-aside amounts for 2009 was \$23,616,125. Thus, there is a significant fiscal impact associated with your question.

Indiana imposes "[a] graduated slot machine wagering tax... on one hundred percent (100%) of the adjusted gross receipts received... from wagering on gambling games authorized by this article" (hereinafter "slot machine wagering tax"). I.C. § 4-35-8-1(a). The term *adjusted gross receipts* is defined in relevant part as:

- (1) the total of all cash and property (including checks received by a licensee, whether collected or not) received by a licensee from gambling games; minus
- (2) the total of:

- (A) all cash paid out to patrons as winnings for gambling games; and
- (B) uncollectible gambling game receivables, not to exceed the lesser of:
 - (i) a reasonable provision for uncollectible patron checks received from gambling games; or
 - (ii) two percent (2%) of the total of all sums, including checks, whether collected or not, less the amount paid out to patrons as winnings for gambling games.

Ind. Code § 4-35-2-2. The only amounts permitted by law to be subtracted from a racino's adjusted gross receipts are those amounts enumerated under Ind. Code § 4-35-2-2(2).

Your question refers to set aside amounts by racinos under Ind. Code § 4-35-7-12 (the "set aside statute"). The set aside statute in relevant part requires racinos to set aside for gaming related purposes fifteen percent (15%) of the adjusted gross receipts of the slot machine wagering from the previous month at the licensee's racetrack. I.C. § 4-35-7-12(b).

To answer whether the amount under the set aside statute, Ind. Code § 4-35-7-12, is subject to the graduated wagering tax under Ind. Code § 4-35-8-1, it is proper to look at the plain language of the relevant statutes and consider such language in its ordinary and usual sense. Ind. Code § 1-1-4-1(1). *Adams v. State*, 960 N.E.2d 793, 798 (Ind. 2012); *N. Miami Educ. Ass'n v. N. Miami Community Schools*, 746 N.E.2d 380, 381 (Ind. Ct. App. 2001). If a statute is clear and unambiguous, courts do not apply any rules of construction other than giving effect to the plain and ordinary meaning of the language. *Adams*, 960 N.E.2d at 798; *Sloan v. State*, 947 N.E.2d 917, 922 (Ind. 2011). "In giving the statutory language its plain and ordinary meaning... we should not so construe a statute as to willfully and unnecessarily narrow or emasculate its provisions." Ind. State Highway Comm'n v. Ind. Civil Rights Comm'n, 424 N.E.2d 1024, 1033 (Ind. Ct. App. 1981) (omission in original) (quoting *White v. White*, 338 N.E.2d 749, 754 (Ind. Ct. App. 1975)).

The General Assembly amended Ind. Code § 4-35-8-1(a) in 2011 to provide that the "graduated slot machine wagering tax is imposed. . . on one hundred percent (100%) of the adjusted gross receipts received before July 1, 2012, and on ninety-nine percent (99%) of the adjusted gross receipts received after June 30, 2012, from wagering on gambling games[.]" See Pub. L. 172-2011, § 10, effective July 1, 2011. Unless the legislature expressly excluded the set aside amounts, then the legislature's intent to subject such amounts to the adjusted gross wagering tax under Ind. Code § 4-35-8-1 is clear and unambiguous. Although there are exclusions from the adjusted gross wagering tax enumerated under Ind. Code § 4-35-8-1(2), none of those exclusions includes the set aside amounts under Ind. Code § 4-35-7-12. The phrase "all cash and property. . . received by a licensee from gambling games" in Ind. Code § 4-35-2-2 (definition of *adjusted gross receipts*) means exactly what it states: one hundred percent (100%) of cash and property received by the licensee before July 1, 2011, from the applicable gambling games, and ninety-nine percent (99%) of cash and property received by the licensee after June 30, 2011, from the applicable gambling games. Thus, the set aside amounts are subject to the adjusted gross wagering tax under the applicable rate.¹

The Indiana General Assembly's creation of a study committee to review, among other things, slot machine wagering tax issues, serves to indicate legislative intent to subject the set aside amounts to the slot machine wagering tax. In 2009, the General Assembly established the Gaming Study Committee. Pub. L. 182-2009(ss) §490(b) (H.E.A. 1001-2009). The Gaming Study Committee was instructed to review, among other things, "Issues related to [racinos]... including... **double taxation, amounts paid to horsemen's associations, bonds, slot machines**, and satellite locations." Pub. L. 182-2009(ss) §490(d)(14). Additionally, a study prepared on behalf of the Gaming Study Committee by LSA in September 2009 states that the racinos' effective tax rate is "[b]ased on... the state and local slot machine wagering taxes for racinos;... required payments by racinos into the state Gaming Integrity Fund and state Breed Development Funds; required payments by racinos to horsemen's associations; and required purse supplements by racinos." See LSA, *Gaming Taxes Follow-up: Effective Gaming Tax Rates*, 10 (Sept. 14, 2009). The "required payments" are the set aside amounts. This acknowledgment indicates that the General Assembly intended to subject the set aside amounts to the slot machine wagering tax.

The 2009 Annual Report of the Gaming Study Committee also provides evidence that the General Assembly intended the set aside amounts to be subject to the slot machine wagering tax. The Committee observed that the effective tax rate on racinos was higher than the effective tax rate on casinos within the Midwest in general because the tax rate included the "required payments" or set aside amounts generated by racinos. See LSA, *Annual Report of the Gaming Study Comm.* 7 (Dec. 2009). The Committee observed that "inclusion of slot machine revenue set aside for the horse racing industry and included in the calculation of the racino's adjusted gross receipts for purposes of the wagering tax" made it more difficult for Indiana's racinos to compete with neighboring states' casinos. *Id.* at 11. The Gaming Study Committee's observations demonstrate that the General Assembly believed the set aside amounts were subject to the slot machine wagering tax.²

The racinos, like the General Assembly, believed that the set aside amounts were subject to the slot machine wagering tax. On August 24, 2009, the Gaming Study Committee heard testimony on racino finances, and on September 14, 2009, the Committee heard testimony on effective gaming tax rates and local distributions of gaming revenue. See LSA, *Annual Report of the Gaming Study Comm.*, 2 (Dec. 2009). The Gaming Study Committee's summary of testimony shows that the racinos presented the Committee with a request for legislation that would "[d]educt[] from the calculation of adjusted gross receipts for the required payments for horse racing purposes.... *Id.* at 5. This testimony demonstrates that the racinos believed that their adjusted gross receipts included the set aside amounts.

As explained above, the plain language of the slot machine wagering tax indicates that the legislature intended for the tax to be applied to set aside amounts. In my view no ambiguity exists.

Conclusion

A racino's adjusted gross receipts received from slot machine wagering are subject to the slot machine wagering tax under Ind. Code § 4-35-8-1 with no deduction for the set aside amounts under Ind. Code § 4-35-7-12.

Sincerely,

Gregory F. Zoeller
Attorney General

¹Prior to 2011, Ind. Code § 4-35-8-1(a) provided that "A graduated slot machine s wagering tax is imposed . . . on the adjusted gross receipts received . . . from wagering on gambling games[.]" The legislature could have defined "received" in Ind. Code § 4-35-2-2's definition of "adjusted gross receipts" to exclude set aside amounts, but it chose not to do so, either at that time or at the time the slot machine wagering tax statute was amended in 2011 by House Enrolled Act 1004 (Pub. L. 172-2011). Sen. Luke Kenley, who was a member of the Gaming Study Committee in 2009, was a conferee for House Enrolled Act 1004 (Pub. L. 172-2011).

²It should also be noted that the Gaming Study Committee in 2009 was comprised of the chairs of the Senate Appropriations, House Ways & Means, Senate Public Policy, and House Public Policy committees, including Rep. Trent Van Haften, who was the original author of and conference committee chair for House Enrolled Act 1835 (Pub. L. 233-2007), which imposed the slot machine wagering tax.

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