



CITY OF WASILLA

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COUNCIL MEMORANDUM NO. 93-99

From: Mayor Stein
Date: October 20, 1993
Subject: Charitable Gaming Sales Tax

Attorney Deuser's September 28, 1993 memo lists options on the taxability of charitable gaming. Since the last council meeting, the Borough election has been certified and the proposed Borough sales tax did not pass. Wasilla is now in a position to make a decision on if and how to tax charitable gaming.

Earlier testimony to Council from Mat-Su Miners Baseball, Wasilla Area Seniors and others indicated acceptance of applying sales tax only to the "ideal net". the recent Dilley vs. Ketchikan Supreme Court decision included notes that the "ideal net" could be taxed. Balancing the highly discretionary nature of gambling "entertainment" spending against taxing of food spending makes a strong argument to tax gambling transactions.

Considering the above, the Administration respectfully suggests that Council ask Attorney Deuser to draft a sales tax ordinance amendment which would begin sales tax collection on the "ideal net" of charitable gaming transactions.

John C. Stein, Mayor

LAW OFFICE
OF
RICHARD DEUSER

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KRENIK BUILDING, PARKS HIGHWAY

MEMORANDUM

TO: Mayor John Stein
City of Wasilla

FROM: Richard Deuser, General Counsel

RE: Listing Of Options For Council To Choose
Regarding Taxability Of Charity Gaming Receipts

DATE: September 28, 1993

As discussed at the City Council meetings of August 22, 1993 and September 13, 1993 there are three choices available to the City Council following the Supreme Court decision in Dilley vs. Ketchikan. As you will recall, that Supreme Court decision invalidated the Ketchikan ordinance as to the validity of sales tax on pull-tab receipts. The rationale of the decision was premised upon the language of the Ketchikan ordinance which made the sales tax in Ketchikan inapplicable to intangibles. Similar language appears in the Wasilla City ordinance.

As a consequence of Dilley vs. Ketchikan, the City has administratively suspended sales tax collections on charitable gaming receipts effective September 1, 1993.

In responding to the Dilley decision, the City Council has three options.

First, the City may choose to re-draft the Wasilla sales tax so as to impose the sales tax on the selected intangible of charitable gaming receipts.

No action taken

Mayor John Stein
September 28, 1993
Page Two

Second, the City may choose to amend the sales tax language so as to impose the operation of the sales tax on the "ideal net" portion of the gaming transaction. Ideal net is a statutory term referring to the money remaining after subtracting the portion of the transaction attributable to the prize or award.

Third, the City could simply choose to not tax charitable gaming.

There are many policy considerations relating to each of the above three choices. This Memorandum will not attempt to canvas the policy considerations.

Upon receiving direction from the Council as to which option is preferred, technical drafting will be prepared and presented for adoption of an amending ordinance.

Please call if there are any questions.

Sincerely,

A handwritten signature in cursive script that reads "Richard Deuser".

Richard Deuser

RD:glm



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October 20, 1993

James Harman
Charitable Gaming Association of Alaska
P.O. Box 232091
Anchorage, AK 99523-2091

Re: **Gross-Receipts Taxes on Pull Tabs**

Dear Jim:

One or more local jurisdictions are considering gross-receipts taxes on the sale of pull tabs. Such a tax raises serious statutory and constitutional problems. This letter sets out in detail why a gross-receipts tax would be unlawful.

State Law Preemption

If a city ordinance substantially interferes with the effective functioning of a state statute or regulation or the underlying purpose of that statute or regulation, that ordinance is preempted (canceled) by state law. Liberati v. Bristol Bay, 584 P.2d 1115 at 1122 (Alaska 1978).

Pull-tab sales are heavily regulated. The state already levies a three-percent tax on pull-tab distributors. AS 05.15.184. Additionally, the level of state regulation over the proceeds payable to permittees, the use of proceeds, etc. indicate a strong and overriding state interest in almost every aspect of charitable gaming. See generally, AS 05.15.188, AS 05.15.150, AS 05.15.160.

A city tax has the potential to destroy the activity being taxed and eliminate all state tax revenue. Furthermore, a confiscatory local tax that has a chilling effect on the very existence of pull-tab operations essentially destroys an activity which is clearly authorized by state statute and regulations. A city simply doesn't have the power to destroy a state-created and regulated activity. A confiscatory gross sales tax is preempted by state law and could be successfully challenged in court. Simpson v. Municipality of Anchorage, 635 P.2d 1197 at 1200 (Alaska App. 1981).

Charities are Exempt from Taxation

Property used exclusively for non-profit charitable purposes is exempt from taxation under the Alaska Constitution, art. IX, § 4. A direct and specific sales tax levied

against the sale of pull tabs is a violation of the Alaska Constitution granting preferential tax-exempt status to charitable organizations.

In the recent case of Dilley v. Ketchikan, 1993 W.L. 273474 (Alaska S. Ct. July 23, 1993), a local tax on pull tabs was defeated because pull tabs are regarded as intangible property and the city of Ketchikan did not have the power under its charter to levy a tax against intangible property. The argument has been made that if a locality has the power to tax intangible property that it could tax pull tabs. Adding fuel to that argument is the case of City of Nome v. Catholic Bishop of Northern Alaska, 707 P.2d 870 (Alaska 1985). In that case, the Supreme Court held that where a charity used real estate for fund-raising purposes, the property lost its tax-exempt status and the municipality could levy and collect a general property tax. While these cases support the proposition that pull tabs can be taxed, they have not dealt squarely with the constitutional issue.

Pull tabs are not real estate, they are intangible property. The sale of pull tabs is not simply fund-raising. It is an activity that is specifically authorized by statute for tax-exempt organizations and every aspect of it is heavily regulated. Particularly, regulation of the activity extends to and covers what expenses are allowed and how the proceeds can be used. See, AS 05.15., generally. Consequently, unlike other fund-raising activities, the sale of pull tabs is, in and of itself, a non-profit charitable activity. The intangible property used, i.e., the pull tabs, are property used exclusively for non-profit charitable purposes. Accordingly, the Alaska Constitution exempts pull-tabs from taxation.

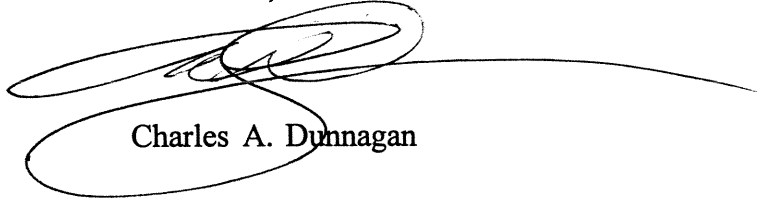
Conclusion

Any gross sales tax levied on the sale of pull tabs by a local governing body can be successfully challenged under either or both of two separate and distinct legal theories.

If you have any questions, please call.

Sincerely,

JERMAIN, DUNNAGAN & OWENS, P.C.



Charles A. Dunnagan