Opinion No. 61-86

September 13, 1961

BY: OPINION OF EARL E. HARTLEY, Attorney General Oliver E. Payne, Assistant Attorney General

TO: Mr. Richard H. Folmar, Assistant Director, New Mexico Legislative Council, State Capitol Building, Santa Fe, New Mexico

QUESTION

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1. How are the proceeds from coin-operated music devices to be taxed under the Emergency School Tax Act?

CONCLUSION

1. See analysis.

OPINION

ANALYSIS

A difference of opinion on school tax liability has developed between Navajo Amusement Corporation and the Bureau of Revenue giving rise to this opinion request. Navajo owns coin-operated music devices (juke boxes) which it places on location in various business establishments. The Bureau of Revenue takes the position that Navajo is taxable under the Emergency School Tax Act at the rate of two percent of the entire proceeds of its music devices without any deduction for the amount paid to location owners. It is the Bureau's further position that in addition, the location owner must pay two percent of the money he receives from Navajo in school taxes. Navajo, on the other hand, contends that the business is conducted as a joint venture with the location owner, and that a **total** of two percent is all that is due, with it liable for payment on its share of the proceeds and the location owner liable for payment on his share of the proceeds.

The question presented requires an examination of various provisions in the Emergency School Tax Act as well as consideration of the contractual arrangements between the coin-machine owner and the proprietors of the businesses wherein the machines are located.

Section 72-16-4.8, N.M.S.A., 1953 Compilation (P.S.) provides that "the tax shall be computed at an amount equal to **two percent of the gross receipts of the business**

of every person engaging or continuing in the business of conducting any amusement enterprise including . . . location businesses." (Emphasis added).

Section 72-16-2 (L), N.M.S.A., 1953 Compilation (P.S.) provides that

"'Location business' means game machines or devices of any character whether or not any element of skill is required in their operation, and includes marble games, pin games, reel games and any other game or device involving skill or chance."

Section 72-16-2 (A), N.M.S.A., 1953 Compilation (P.S.) provides that the terms "person or company as used in the Act includes any individual, estate, trust receiver, business trust, corporation, firm, co-partnership, **joint venture,** association, or **any other group acting as a unit..** . ." (Emphasis added).

If the business is in fact conducted as a joint venture, a total of two percent of the gross receipts is due from the joint adventurers in school taxes.

The contractual arrangement between the parties, designated as a Joint Venture Agreement, is as follows:

1. The proprietor of the business is to furnish the electricity to operate the machine.

2. The proprietor is to supervise the operation and protection of the machine.

3. The proprietor is to make monetary change for those desiring to play the machine.

4. The machine owner is to make the necessary repairs, furnish parts and records, and assist in supervising the operation of the equipment.

5. The machine owner is to remove the moneys from the machines at periodic intervals, normally in the presence of the proprietor or his agent.

6. The proceeds are to be equally divided between the machine owner and the proprietor.

In view of this method of operation, we are of the opinion that the business is conducted as a joint venture.

In order to constitute a joint venture the parties must combine their property, money, efforts, skill or knowledge in some common undertaking, and the contributions of the respective parties need not be equal or of the same character, but there must be some contribution by each joint venturer of something promotive of the enterprise. **Williams** v. **McDaniel,** 119 F. Supp. 247; **Stearns** v. **Williams,** Idaho, 240 P. 2d. 833; **Brooks** v. **Brooks,** 357 Mo. 343, 208 S.W. 2d. 279. We have such a situation here.

In reaching our conclusion, we have studied the various court decisions in other states dealing with similar questions, and we find the fact situation in the case of **Birmingham Vending Co.** v. **State,** 251 Ala. 584, 38 So. 2d. 876, almost identical with that which is presented here.

In the Birmingham case a two percent excise tax based on gross receipts was levied on every person, firm, or corporation engaged in the business of operating musical devices.

The musical devices in question were coin-operated as they are here. The owners of the machines furnished them to cafes, lunchrooms, taverns and the like, by agreement with the proprietors of such places. Title to the machines remained in the original owners. The machines were constructed in such a fashion that the insertion of a coin was all that was required to make them function. The records were furnished by the machine owner but the type of records and specific selections requested by the proprietors were furnished whenever possible.

There was never any particular space assigned to the machine owners in the proprietor's place of business; the proprietors could, and often did, move the machines from one place to another within the business establishment.

The proceeds were divided on the basis of a formula which took volume of business into consideration. The machine owners kept the keys and opened and counted the money in the presence of the proprietor or his agent. Division of the money was made at that time. There were never any debits and credits subsisting between them.

The proprietors supplied the electricity for the operation of the machines and they could permit the playing of the machines during whatever time of day or night they considered proper. The proprietors could control the volume, loudness or softness, by the use of a devise on the machines.

The court held that these factual circumstances constituted the machine owners and the proprietors joint venturers in the business of operating the musical devices, and as such, they were controlled as to tax liability on the principles applicable to that type of business enterprise.

The court said that under their joint venture they constituted themselves "a person, firm or corporation", pointing out that the pertinent statute defined person as any group or combination acting as a unit. Section 72-16-2, supra, defines person in the same way.

In reaching its conclusion the court distinguished the situation where the owner rents space from the storekeeper and the latter does not supervise the operation of the machines nor contribute anything but floor space. And see **Stevens Enterprises** v. **Stone,** Miss., 85 So. 2d. 451.

Not only is the fact pattern presented in the case at hand notably similar to that in the Birmingham case, but also the statutes being construed are strikingly similar.

In the light of such recent (1949), and we believe well-reasoned, authority, we conclude, as stated earlier, that the business in question is being conducted as a joint venture. See also **Oklahoma Tax Commission** v. **Allcott,** Okl., 154 P. 2d. 973. This being the case, a two percent school tax is due on the gross receipts received from the coin-operated machines.

This brings us to a corollary issue implicit in the question presented, namely, who is responsible for paying the tax, and how, as a matter of mechanics, should payment be made to the state?

It is our opinion that the joint venturers, that is, the machine owner and the location owner, are jointly and severally liable for the total two percent tax. We so conclude because the rights, duties and responsibilities of joint venturers are governed, in general, by rules similar to those governing the rights, duties and liabilities of partners, except as limited by the fact that the scope of a joint venture is narrower. **Rae** v. **Cameron,** 112 Mont. 159, 114 P. 2d. 1060; **Eblen** v. **Eblen,** Wyo., 234 P. 2d. 434.

It is our suggestion that the machine owners, at the time of removing and counting the proceeds, take therefrom the two percent due the state and be responsible for forwarding the same to the Bureau of Revenue. While there is nothing that prohibits joint venturers from separately paying what might be called their pro rata share of the taxes due, still since the tax obligation is both joint and several, it is to the interest of all concerned to delegate the duty of making payment to the machine owner.