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OFFICE OF THE ATTORNEY GENERAL

CHARLIE CONDON
ATTORNEY GENERAL

June 22, 2001

Edwin C. Haskell, III, Esquire
Assistant County Attorney, Spartanburg County
218 East Henry Street
Spartanburg, South Carolina 29306

Re: Your Letter of March 2, 2001
S.C. Code Ann. §12-21-2720(D)

Dear Mr. Haskell:

In your above referenced letter, you request an opinion from this Office as to the following question:

> Under South Carolina Law, is Spartanburg County required to grant a pro-rata refund of county video poker license fees for the period of July 1, 2000, the date the operation of video poker machines became illegal in South Carolina, to June 30, 2001, the license expiration date?

By way of background, you indicate that "Spartanburg County has recently received a request for a pro-rata refund of certain video poker license fees which were imposed pursuant to §12-21-2720(D), Code of Laws of South Carolina, 1976, as amended. The claim for pro-rata refund is for the period of July 1, 2000, to June 30, 2001, and is based upon video poker machines being declared illegal as of July 1, 2000, and the licenses in issue having a June 30, 2001, expiration date. The entire amount of the Spartanburg County video poker license fee is paid at the beginning of the license period." You have researched the issue and, while recognizing the existence of an argument to the contrary, have indicated that "it would appear that there is no legal authority which would require Spartanburg County to refund the county video license fees in question."

South Carolina Code Ann. §12-21-2720(A) provides, in pertinent part, that

> Every person who maintains for use or permits the use of, on a place or premises occupied by him, [a video poker machine] shall apply for and procure from the South Carolina Department of Revenue a license effective for two years for the privilege of making use of the machine in South Carolina and shall pay for the license a tax of ... four thousand dollars for each [video poker] machine...

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Permit Letter

Subsection (D) of §12-21-2720 provides that "[a] county may by ordinance impose a license fee on [video poker] machines licensed pursuant to subsection (A)(3) of this section located in an unincorporated area of the county in an amount not exceeding ten percent of three thousand six hundred dollars of the license fee imposed pursuant to subsection (A) for the equivalent license period. "

As you noted, the General Assembly, in Part VI, Section 23(D) of Act No. 125 of 1999 provided that "if [the provision making video poker machines unlawful] takes effect, the South Carolina Department of Revenue, upon application, shall refund any person holding a license for the operation of video game machines, on a pro rata basis, the portion of any license fee previously paid to the department for licenses that extend beyond June 30, 2000." The General Assembly did not, however, make such a provision for the license fees imposed by counties pursuant to §12-21-2720(D).

In your request, you provided the general law that you have relied on in making your assessment in this matter. The following is a brief synopsis of that law:

> "There is no fundamental right to gamble." The South Carolina Department of Revenue and Taxation v. Rosemary Coin Machines, Inc., 331 S.C. 234, 500 S.E.2d 176 (S.C. App. 1998) (reversed on other grounds); See also Army Navy Bingo, Garrison No. 2196 v. Plowden, 281 S.C. 226, 314 S.E.2d 339 (1984). A "property owner operating in a highly regulated field [such as video poker industry] cannot assert a reasonable expectation that governmental regulation will not be altered to his detriment ... [w]here [as in the video poker industry] the regulatory climate renders an owner's investment-backed expectations unreasonable, ..." the making of video poker machine possession illegal will not result in an unconstitutional taking. Westside Quick Shop, Inc. v. Stewart, 341 S.C. 297, 534 S.E.2d 270 (2000). A license "is a permit, good as against existing laws, but subject to further legislative and constitutional control or withdrawal." Stone v. Mississippi, 101 U.S. 814, 25 L.Ed. 1079 (1879). "A license is merely a permit or privilege to do what otherwise would be unlawful, and is not a contract between the authority, federal, state, or municipal granting it and the person to whom it is granted; neither is it property or a property right, nor does it create a vested right; nor is it taxation." Heslep v. State Highway Department of South Carolina, 171 S.C. 186, 171 S.E. 913 (1933). A license is "subject to withdrawal at will ... [t]he licensee has in legal effect nothing more than a license to enjoy the privilege on the terms named for the specified time, unless it is sooner abrogated by the sovereign power of the State ... [and] ... [t]his is the general rule notwithstanding the expenditure of money by the licensee in reliance thereon ..." South Carolina Department of Revenue and Taxation v. Rosemary Coin Machines, Inc., supra. "The license confers no property right. It is a permit issued

pursuant to the State's police power." Army Navy Bingo, Garrison No. 2196 v. Plowden, supra.

The case law listed above clearly supports your initial position that there is an absence of authority requiring the return of the license fees collected by Spartanburg County pursuant to §12-21-2720. Further supporting such a position is the common law in the area of refunds for illegally or mistakenly collected taxes and fees. Generally, the voluntary payment of a tax or fee made pursuant to an assessment later declared illegal may not be recovered. City of Rochester v. Chiarella, 448 N.E.2d 98 (N.Y. App. 1983). This general proposition has also been stated this way: "[t]he general rule...is that in the absence of a statute to the contrary, a person who has paid a license fee or tax which is illegal or in excess of the sum which might lawfully be exacted cannot recover back the amount paid or the illegal excess, if the payment was made voluntarily with full knowledge of the facts, although it was made in good faith, through a mistake or in ignorance of the law, unless the recovery is permitted by an agreement entered into at the time the payment was made." Manufacturer's Casualty Ins. Co. v. Kansas City, 330 S.W.2d 263 (Mo. App. 1959). See also Vytar Assoc. v. Mayor and Alderman of the City of Annapolis, 483 A.2d 1263 (Md. App. 1984) (Common-law rule is that in the absence of statute authorizing refund, taxes, fees or other governmental charges voluntarily paid under mistake of law cannot be recovered back); Coca-Cola Company v. Coble, 234 S.E.2d 477 (N.C. App. 1977) (Generally, voluntary payment of tax is not recoverable even if tax unconstitutional); Universal Film Exchanges, Inc. v. Board of Finance and Revenue, 185 A.2d 542 (Pa. 1962) (In absence of statute, state need not allow recovery of taxes or other moneys voluntarily, but erroneously paid); Bray v. Department of State, 341 N.W.2d 92 (Mich. 1983) (State not liable to uninsured motorist for refund of uninsured motor vehicle registration fee following enactment of mandatory insurance act midway through registration year).

I have found no authority which would indicate that the general rule of law concerning the refunds in question is not applicable in South Carolina. In fact, the General Assembly's including in Act 125 of 1999 a pro rata refund provision for the license fees collected by the Department of Revenue would seem to indicate that the lawmakers were aware of the general rule as well. It would further seem logical to assume that, had the General Assembly intended to allow for a similar refund of fees collected by counties pursuant to §12-21-2720(D), they would have specifically included such in the legislation. See Crowder v. Carroll, 251 S.C. 192, 161 S.E.2d 235 (1968) (any legislation which is in derogation of the common law must be strictly construed and not extended in application beyond the clear legislative intent).

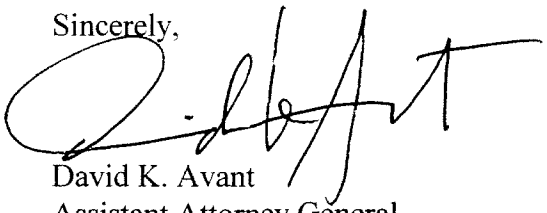
Moreover, there is additional authority which would indicate that those persons purchasing the two-year license after July 2, 1999, are entitled to no refund of the fee. Act 125 of 1999, calling for the referendum which could have ultimately lead to the outlawing of video poker, became effective on July 2, 1999. "The continuing legality of [video poker] therefore became completely speculative" at that time and there could be no "reasonable expectation" that the licenses would remain viable for the entire two-year period. Mibbs v. South Carolina Department of Revenue, 337 S.C. 601, 524 S.E.2d 626 (1999). While Mibbs does not change the status of those purchasing

licenses prior to July 2, 1999, it clearly works against those persons seeking a refund for licenses issued after that date (particularly those who purchased licenses after October 14, 1999 when the Supreme Court issued its ruling leading to the banning of video poker all together).

As there appears to be no statutory authority for a refund of the license fee in question, it is my opinion that Spartanburg County is not "required to grant a pro-rata refund of county video poker license fees for the period of July 1, 2000, the date the operation of video poker machines became illegal in South Carolina, to June 30, 2001, the license expiration date." This opinion is also based on the assumption that the fees were paid voluntarily by the licensees and that there was no independent agreement for a refund between Spartanburg County and the licensees.

This letter is an informal opinion only. It has been written by a designated Assistant Attorney General and represents the position of the undersigned attorney as to the specific question asked. It has not, however, been personally scrutinized by the Attorney General and not officially published in the manner of a formal opinion.

Sincerely,



David K. Avant
Assistant Attorney General

DKA/an