

VOLUME NO. 40

OPINION NO. 65

FEES - Recoupment of license fees;  
GAMBLING - Authority of municipality to adopt ordinance  
regulating gambling activity;  
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LICENSE FEES - Recoupment of;  
ORDINANCES - Authority of municipality to adopt  
ordinance regulating gambling activity;  
ORDINANCES - Recoupment of license fees;  
MONTANA CODE ANNOTATED - Sections 7-1-112(5),  
23-5-101(1), 23-5-104(1), 23-5-105, 23-5-108, 23-5-109,  
23-5-142, 23-5-301 to 23-5-332.

HELD: Municipalities are not required to refund any  
portion of prepaid annual license fees  
tendered in connection with the use or  
possession of electronic poker game machines  
for the period following issuance of the  
Montana Supreme Court's decision in Gallatin  
County v. D&R Music & Vending.

30 August 1984

Thomas P. Meissner  
City Attorney  
305 Watson  
Lewistown MT 59457

Dear Mr. Meissner:

You have requested my opinion concerning the following question:

In view of the recent Montana Supreme Court decision in Gallatin County v. D&R Music and Vending, does section 23-5-321(2), MCA, which specifies that annual license fees "shall be prorated," require the municipal licensing authority to pay back or refund that portion of the license fee for the period after which video poker machines are barred from use?

Your letter states that the City of Lewistown has enacted an ordinance pursuant to authority granted under section 23-5-321, MCA, of the Montana Card Games Act, that the ordinance imposes a license fee which is specified as nonrefundable, and that the ordinance uses a calendar year, rather than a July 1 to June 30 fiscal year, as the license period. License fees were accepted under the ordinance for electronic poker game machines. In some instances the fees were paid for all or a portion of 1984 without any express reservation of recoupment rights should the Card Games Act, §§ 23-5-301 to 332, MCA, be construed as not authorizing such games; in other instances licensees purported to reserve the right to seek a refund of prepaid fees for any period after the games were declared unlawful. The license fees were paid in late 1983 or early 1984 before the issuance of Gallatin County v. D&R Music & Vending, 41 St. Rptr. 224, 676 P.2d 779 (Feb. 3, 1984). A response to your question requires analysis of D&R Music & Vending's effect and common law principles governing recoupment of tax or license fee payments.

In D&R Music & Vending the Supreme Court held that: (1) Electronic poker games do not constitute "poker" as that term is used in the Card Games Act; (2) electronic poker machines are slot machines as defined in section 23-5-101(1), MCA; and (3) the Card Games Act does not authorize the playing of poker in which the house competes against a single player. The effect of D&R

Music & Vending was to render the use or possession of electronic poker machines unlawful and subject to criminal sanctions. See §§ 23-5-104(1), 23-5-105, 23-5-108, 23-5-109, MCA. Because the electronic poker games are a prohibited form of gambling, local governments have no authority to sanction the use or possession of the machines by ordinance. §§ 7-1-112(5), 23-5-142, MCA. Section 23-5-321, MCA, which permits counties and municipalities to adopt ordinances regulating games allowed under the Card Games Act, is thus inapplicable to a determination of whether a recoupment right exists here. Moreover, even if section 23-5-321, MCA, were applicable, it does not require refund of license fee payments under the circumstances here.

There are no Montana statutes dealing with the recoupment of license fee payments to municipalities. Consequently, any recoupment rights must be derived from common law. The generally accepted common law rule was recently restated in City of Rochester v. Chiarella, 58 N.Y.2d 316, 323, 461 N.Y.S.2d 244, 246-47, 448 N.E.2d 98, 100, cert. denied, 104 S. Ct. 102 (1983):

Generally, the voluntary payment of a tax or fee may not be recovered.... When a payment is made under a mistake of law, with actual or constructive knowledge of the facts, ... it is incumbent upon the taxpayer to demonstrate that payment was made involuntarily.... Payment of a tax under appropriate protest will ordinarily suffice to indicate the involuntary nature of the payment.... The failure to register a formal protest, however, will be excused in cases in which the payment is made under duress or coercion. The duress necessary to indicate involuntariness is present in circumstances where payment of a tax is necessary to avoid threatened interference with present liberty of person or immediate possession of property....

See, e.g., Manufacturer's Casualty Insurance v. Kansas City, 330 S.W.2d 263, 265-66 (Mo. Ct. App. 1959); Universal Film Exchanges v. Board of Finance and Revenue, 409 Pa. 180, 185 A.2d 542, 544-45 (1962), cert. denied, 372 U.S. 958 (1963); Isberian v. Village of Gurnee, 72 Ill. Dec. 78, 116 Ill. App. 3d 146, 452

N.E.2d 10, 14 (1983); Coca Cola Company v. Coble, 293 N.C. 565, 238 S.E.2d 780, 782 (1977); Occidental Life of California v. State, 92 N.M. 433, 589 P.2d 673 (1979); Apostol v. Anne Arundel County, 288 Md. 667, 421 A.2d 582, 585 (1980); see generally Annots., 64 A.L.R. 8 (1930), 84 A.L.R. 294 (1933), 80 A.L.R.2d 1040 (1961). Montana appears to follow the general rule. North Butte Mining v. Silver Bow County, 118 Mont. 618, 620, 169 P.2d 339, 340 (1946) ("[i]n the absence of a statute giving a right of recovery for taxes paid under mistake of law, the fact that the tax was paid under a mistake of law with knowledge of the facts is not itself a ground for allowing the maintenance of an action to recover it back"); First National Bank v. Sanders County, 85 Mont. 450, 465, 279 P. 247, 252 (1929) (tax payment voluntarily made under an illegal statute may not be recovered); First National Bank v. Beaverhead County, 88 Mont. 577, 294 P. 956 (1930). Importantly, an action to recover tax or license fee payments is equitable, and a "defendant may rely upon any defense which shows that in equity and good conscience the plaintiff is not entitled to recover in whole or in part...." Heileman Brewing Co. v. City of LaCrosse, 105 Wis. 2d 152, 312 N.W.2d 875, 880 (Ct. App. 1980).

The present question is, therefore, whether any of the license payments were made involuntarily. While admittedly the payments were required as a condition for possessing or using the electronic poker machines, licensees were under no compulsion to install the machines. As the court in Universal Film Exchanges v. Board of Finance and Revenue, 185 A.2d at 548, observed:

Few taxes or license fees would ever be collected if sanctions or penalties were not provided or imposed for nonpayment, and consequently most taxing and licensing acts have sanctions or penalties to enforce payments. To hold that such provisions amount in law to duress and compulsion would be to hold that all taxes and license fees in all such cases were paid under duress and compulsion.... [Emphasis in original.]

The reservation of recoupment rights made by some licensees did not render the payments involuntary. First, the payments were in fact voluntary. Unlike protests which have caused tax or license payments to be

viewed as involuntary in some cases, no challenge to the city's authority to assess the fee was made. See Restatement of Restitution § 75j (1937) ("[p]rotest means a statement by the taxpayer to the collecting officer that he makes payment unwillingly because he believes the tax is invalid"). The filing of a protest with a payment of taxes otherwise voluntarily made does not deprive the payment of its voluntary character. Southern Service Company v. Los Angeles County, 15 Cal. 2d 1, 97 P.2d 963, 968 (1940). Second, all payments were made with actual or constructive knowledge under the applicable ordinance that refunds were not available. A municipality may, absent statutory regulation to the contrary, require full, annual payment of a license fee without regard to whether the licensee intends, or is able, to use the benefits of the license for the entire year. Third, equitable considerations dictate that, when a licensee knew or should have known that the applicability of the Card Games Act to electronic poker games was disputed and pending before the Montana Supreme Court, recoupment should not be permitted. If concerned over the possibility of paying fees for a period in excess of that during which the machines might be utilized, a prudent licensee could have refrained from use or possession of the machines until their legality was conclusively established.

THEREFORE, IT IS MY OPINION:

Municipalities are not required to refund any portion of prepaid annual license fees tendered in connection with the use or possession of electronic poker game machines for the period following issuance of the Montana Supreme Court's decision in Gallatin County v. D&R Music & Vending.

Very truly yours,

MIKE GREELY  
Attorney General