

IN THE GEORGIA TAX TRIBUNAL
STATE OF GEORGIA



FILED
GA. TAX TRIBUNAL

JAN 14 2020

Yvonne Bouras
Yvonne Bouras
Tax Tribunal Administrator

FUNVESTMENT GROUP, LLC

Petitioner,

v.

DAVID M. CURRY,
In his Official Capacity as
Commissioner of the GEORGIA
DEPARTMENT OF REVENUE,

Respondent.

DOCKET NO. 1828906

**ORDER GRANTING PETITIONER'S MOTION FOR SUMMARY JUDGMENT AND
DENYING RESPONDENT'S MOTION FOR SUMMARY JUDGMENT**

This case is before the Tribunal on the parties' cross-motions for summary judgment. On July 12, 2019, Respondent David Curry, Commissioner of the Georgia Department of Revenue ("Department") filed a Motion for Summary Judgment ("Department's Motion"). On July 15, 2019, Petitioner Funvestment Group, LLC ("Funvestment") filed a Motion for Summary Judgment ("Funvestment's Motion"). On August 13, 2019, Funvestment filed its Response to the Department's Motion for Summary Judgment. On August 14, 2019, the Department filed its Response to Funvestment's Motion for Summary Judgment. On August 15, 2019, Funvestment filed its Request for Oral Argument on all pending motions for summary judgment. On September 12, 2019, the Department filed its Reply Brief in Further Support of its Motion for Summary Judgment. A hearing on these motions was held on October 11, 2019. Mr. Les A. Schneider, Esq. and Mr. Thomas L. Walker, Esq. appeared on behalf of Funvestment. Ms. Lynn Chen, Esq. appeared on behalf of the Department. On November 14, 2019, Funvestment filed its Post Hearing Brief, and the Department filed its Supplemental Brief in Further Support of Its Motion for

Summary Judgment. On November 25, 2019, Funvestment filed its Reply to the Department's Supplemental Brief in Further Support of Its Motion for Summary Judgment, and the Department filed its Letter Reply Brief to Funvestment's Reply to the Department's Supplemental Brief in Further Support of Its Motion for Summary Judgment.

Having read and considered the relevant briefs, and listened to the arguments of both parties, Funvestment's Motion is hereby **GRANTED**, the Department's Motion is **DENIED**, and judgment is entered in favor of Funvestment.

UNDISPUTED MATERIAL FACTS

1.

Funvestment operates a business where children learn about driving safety using a computer lab equipped with thirty touch screen computers and simulators and driving miniature vehicles on an indoor track. SMF¹ ¶ 4; JSF ¶s 4-5; JSF² Exhibit L, bates p. DOR 00086. In addition, Funvestment offers an arcade room with bona fide coin operated amusement machines ("COAM"), party rooms for group events, and a restaurant. SMF ¶ 5; JSF ¶ 5; JSF Exhibit L, bates p. DOR 00086. Funvestment only charges customers for playing the machines and purchasing meals, tangible personal property and party packages. SMF ¶ 11; JSF ¶s 6-7; JSF Exhibit C, bates p. DOR 00005.

2.

The sole transactions at issue in this matter are for the following items which Funvestment leased from Tiny Towne International, LLC ("Tiny Towne International") and which the Georgia Lottery Corporation requires COAM location licenses, master licenses and stickers which are to

¹ Petitioner's Statement of Undisputed Material Facts as to Which There Exists No Genuine Issue to be Tried.

² Joint Stipulation of Facts.

be affixed to the machines.³ SMF ¶s 6, 13, 16; table provided in JSF Exhibit N, bates p. DOR:00097; JSF ¶ 13; JSF ¶ 16; JSF Exhibit I, bates pp. DOR 00040-00043; JSF Exhibit D, bates pp. DOR 00016, 00018-00020; JSF Exhibit H bates pp. DOR 00033-00034, 00036-00038; JSF ¶ 23. The Department identified these items in the Work Paper issued by Auditor Chesy Thomas on January 26, 2018: **(1)** tokens with a proposed assessment of \$90.39 (p. 6, ln. 30); **(2)** arcade game with a proposed assessment of \$1,481.58 (p. 8, ln. 12); **(3)** card readers with a proposed assessment of \$31.09 (p. 8, ln. 2); **(4)** computer equipment with a proposed assessment of \$71.34 (p. 9, ln. 24); **(5)** computer equipment with a proposed assessment of \$2,849.70 (p. 9, ln. 23); **(6)** computer equipment with a proposed assessment of \$585.84 (p. 9, ln. 22); **(7)** arcade game with a proposed assessment of \$6,395.04 (p. 9, ln. 25); **(8)** printer with a proposed assessment of \$241.20 (p. 9, ln. 28); **(9)** printer with a proposed assessment of \$236.40 (p. 9, ln. 27); **(10)** Cyclades with a proposed assessment of \$20.48 (p. 9, ln. 26); **(11)** Cybernet with a proposed assessment of \$936.00 (p. 10, ln, 17); **(12)** Cybernet with a proposed assessment of \$3,266.70 (p. 10, ln. 16); **(13)** Cybernet with a proposed assessment of \$1,666.26 (p. 10, ln. 15); **(14)** Cybernet with a proposed assessment of \$66.90 (p. 10, ln. 18); **(15)** Cybernet with a proposed assessment of \$93.60 (p. 10, ln. 21); **(16)** Cybernet with a proposed assessment of \$10.92 (p. 10, ln. 20); and **(17)** Cybernet with a proposed assessment of \$6.36 (p. 10, ln. 19). SMF ¶s 13-14; table provided at JSF Exhibit N, bates p. DOR: 00097; JSF ¶ 13; JSF ¶ 14; JSF Exhibit D, bates pp. DOR 00016, 00018-00020; JSF Exhibit H bates pp. DOR 00033-00034.

³ A location license is required by the owner of the business where the COAMs are available for play by the public. A master license is required of the owner of the games which are leased to the location owner. Each machine available for play by the public is required to have a sticker affixed to the machine which is evidence that the requisite fee has been paid. Similarly, the location license and master license also evidence that the requisite fees have been paid. O.C.G.A. § 50-27-71.

3.

Funvestment leases all the arcade games, cars, train, computer equipment, and printers at issue in this case from Tiny Towne International pursuant to a Location Rental Agreement. SMF ¶s 9, 16-17; JSF ¶ 8; JSF Exhibit I; JSF Exhibit K, bates p. DOR: 00060; JSF Exhibit N, bates p. DOR: 00097; JSF ¶ 16; JSF Exhibit I, bates pp. DOR 00040-00043; JSF Exhibit D, bates pp. DOR 00016, 00018-00020; JSF Exhibit H bates pp. DOR 00033-00034, 00036-00038; JSF ¶ 17; JSF Exhibit I, bates pp. DOR: 00040-00041. And, Tiny Towne International purchased all the items at issue in this case for the sole purpose of leasing them to Funvestment. SMF ¶ 15; JSF ¶ 15; JSF Exhibit D, bates pp. DOR 00016, 00018-00020; JSF Exhibit H bates pp. DOR 00033-00034. Pursuant to the Location Rental Agreement, Funvestment pays Tiny Towne International ten percent of the total gross revenue from the machines after deductions for state master license, state sticker fees and refunds and ten percent of other gross income generated by Funvestment's business. SMF ¶s 10, 17; JSF ¶ 11; JSF Exhibit I, bates p. DOR: 00040; JSF ¶ 17; JSF Exhibit I, bates pp. DOR: 00040-00041. Funvestment has paid a total of \$184,340.87 to Tiny Towne International to lease the equipment at issue in this case for the period from November 7, 2014, to April 6, 2016. SMF ¶ 18; JSF Exhibit K, bates p. DOR:00060. JSF ¶ 20.

4.

Funvestment and Tiny Towne International had the required Class A COAM licenses and stickers from the Georgia Lottery Corporation, COAM Division during the audit period⁴ to present. SMF ¶s 6-7, 18; table provided in JSF Exhibit N, bates p. DOR:00097; JSF ¶ 19; JSF Exhibit K, bates p. DOR:00060; JSF ¶ 20; JSF ¶ 23. Each year since 2014, Funvestment has paid funds to the Georgia Lottery Corporation for the location licenses for operating the equipment at issue in

⁴ May 14, 2014, to March 31, 2016.

this case and for being a location owner. For the period from 2014 through 2016, Funvestment paid \$3,925 to the Georgia Lottery Corporation to purchase the location license to operate the machines it leased from Tiny Towne International. SMF ¶ 20; JSF Exhibit K, bates p. DOR:00080; JSF ¶ 22. And, each year since 2014, Tiny Towne International has paid funds to the Georgia Lottery for the master license and stickers for owning the equipment at issue in this matter. For the period from 2014 through 2016, Tiny Towne International paid \$10,500 to the Georgia Lottery Corporation to purchase the master license and to place decals on each of the machines it leased to Funvestment. SMF ¶ 19; JSF Exhibit K, bates p. DOR:00079; JSF ¶ 21.

5.

In May 2016, during a routine audit for the audit period, the auditor found that use tax on some office supplies, arcade games and other items was not paid. SMF ¶ 21; JSF ¶ 24; JSF Exhibit L, bates p. DOR: 00089. Following the audit, the Department issued a Proposed Assessment in the amount of \$20,244.22, penalty in the amount of \$5,061.06, and interest in the amount of \$5,774.34. SMF ¶ 22; JSF ¶ 25; JSF Exhibit O. The Proposed Assessment also included a credit for over-remitted tax on the purchase of certain grocery items that were later resold to customers as part of taxable retail sale. SMF ¶ 23; JSF ¶ 26; JSF Exhibit C, bates p. DOR: 00006.

6.

The parties agree that the charges for customer's operation of the COAMs are not subject to sales and use tax, and the Department did not assess additional tax on those transactions. SMF ¶ 24; JSF ¶ 27; JSF Exhibit C, bates p. DOR: 00005; JSF Exhibit D, bates pp. DOR: 00010-00021.

7.

Funvestment appealed the Proposed Assessment to the Department and it conducted a conference with Funvestment on July 14, 2017. SMF ¶s 25-26; JSF ¶ 28; JSF Exhibits C and H;

JSF ¶ 29; JSF Exhibit C, bates p. DOR: 00005. Following the conference, the Department issued a letter ruling on January 24, 2018, finding that it applied the credit allowed for over-remitted tax at an erroneous rate and ordered the auditors adjust the assessment accordingly. SMF ¶ 27; JSF ¶ 30; JSF Exhibit C, bates pp. DOR: 00005, 00008-00009. Subsequent to the Department's protest ruling, the Department issued an Official Assessment and Demand for Payment to assess tax in the amount of \$19,585.47 and interest in the amount of \$6,327.53. SMF ¶ 28; JSF ¶ 33; JSF Exhibit B.

8.

Funvestment appealed the Official Assessment and Demand for Payment to the Georgia Tax Tribunal on February 13, 2018, contending that O.C.G.A. §§ 48-8-3(43) and 48-8-3(42) exempted it from paying the \$18,049.80 sales and use tax on the items at issue in its petition along with the corresponding interest of \$5,831.40. SMF ¶ 29; JSF ¶ 34; Exhibit A.

CONCLUSIONS OF LAW

I. Standard of Review.

9.

To prevail on a motion for summary judgment, the moving party must demonstrate that there is no genuine issue as to any material fact as to each element of its claim and that the undisputed facts, when viewed in the light most favorable to the nonmoving party, warrant judgment as a matter of law. O.C.G.A. § 9-11-56(c); see also Lau's Corp., Inc. v. Haskins, 261 Ga. 491, 491 (1991); Scholastic Book Clubs, Inc. v. Comm'r, 2017-2 Ga. Tax Tribunal, Feb. 14, 2017. The Rules of the Georgia Tax Tribunal likewise provide that “[a] party may move, based on supporting affidavits or other probative evidence, for summary judgment in its favor on any of the issues being adjudicated on the basis that there is no genuine issue of material fact for trial.”

Ga. Comp. R & Regs. 616-1-3-.19(a).

II. O.C.G.A. § 48-8-3(43) Exempts Funvestment From Paying Sales Tax On Its Lease Payments To Tiny Towne International.

10.

O.C.G.A. § 48-8-3(43) provides that,

The sales and use taxes levied or imposed by this article shall not apply to . . . [g]ross revenues generated from all bona fide coin operated amusement machines which vend or dispense music or are operated for skill, amusement, entertainment, or pleasure which are in commercial use and are provided to the public for play which will require a permit fee under Chapter 27 of Title 50.

11.

Funvestment qualified for the exemption because it meets each of the elements of O.C.G.A. § 48-8-3(43). First, the Georgia Lottery Corporation requires location and master licenses for the items at issue in this matter. Second, Funvestment placed the COAMs into commercial use for the public to play. Third, the COAMs are operated for skill, amusement, entertainment, or pleasure. Finally, Funvestment and Tiny Towne International obtained the required location and master licenses and, collectively, they have paid \$14,425 to the Georgia Lottery Corporation for the location licenses, master license and stickers.

A. The Plain Language Of O.C.G.A. § 48-8-3(43) Includes Revenue From Lease Payments In The Exemption.

12.

O.C.G.A. § 1-3-1(b) dictates, “In all interpretations of statutes, the ordinary signification shall be applied to all words, except words of art or words connected with a particular trade or subject matter, which shall have the signification attached to them by experts in such trade or with reference to such subject matter.” Moreover, the Georgia Supreme Court has held, “A statute draws its meaning, of course, from its text . . .” Chan v. Ellis, 296 Ga. 838, 839, 770 S.E.2d 851

(2015). And, the Georgia Supreme Court has held that the text of a statute must be read “in its most natural and reasonable way, as an ordinary speaker of the English language would.” FDIC v. Loudermilk, 295 Ga. 579, 588, 761 S.E.2d 332 (2014). Further, the Georgia Supreme Court has stated, “When we consider the meaning of a statute, we must presume that the General Assembly meant what it said and said what it meant.” Deal v. Coleman, 294 Ga. 170, 172, 751 S.E.2d 337 (2013).

13.

The Supreme Court of Georgia has further stated that the meaning given by the words of the statute takes precedence over the presumption given to tax exemptions. Specifically, the Court has stated,

It is true that tax exemptions are to be strictly construed against the taxpayer and doubts resolved in favor of taxability. However, this should not impinge on the other rule that a statute is to be construed in accordance with its real intent and meaning and not so strictly as to defeat the legislative purpose.

Amoena Corp. v. Strickland, 248 Ga. 496, 499, 283 S.E.2d 894, 897 (1981). And, the Georgia Supreme Court has held, “the ‘golden rule’ of statutory construction, [] requires us to follow the literal language of the statute ‘unless it produces contradiction, absurdity or such an inconvenience as to insure that the legislature meant something else.’” TELECOM*USA v. Collins, 260 Ga. 362, 363, 393 S.E.2d 235 (1990).

14.

Finally, the Georgia Supreme Court has also long held that, “it is a cardinal rule . . . that exemption from taxation will be strictly construed in favor of the public . . .” City of Columbus v. Muscogee Mfg. Co., 165 Ga. 259, 140 S.E. 860, 861 (1927) (emphasis added); see also Lowry v. McDuffie, 269 Ga. 202, 204, 496 S.E.2d 727, 730 (1998). To resolve the apparently contradictory presumptions – one which favors taxation and the other that construes exemptions

in favor of the public - the Georgia Supreme Court has held that courts interpret a statute in favor of taxation over exemption in cases of ambiguity. Georgia Department of Revenue v. Owens Corning, 283 Ga. 489, 490, 660 S.E.2d 719, 721 (2008). However, where a statute is unambiguous, exemption from taxation will be strictly construed in favor of the public.

15.

“[G]ross revenues” is not a term of art and has its ordinary signification in statutory interpretation. Black’s Law Dictionary (11th ed. 2019) defines revenue as “Income from any and all sources; gross income or gross receipts.” The Merriam Webster Dictionary defines “gross” as “consisting of an overall total exclusive of deductions” and “revenue” as “the total income produced by a given source.” Thus, “gross revenue” is “the overall total income produced by a given source exclusive of deductions.”

16.

The presumption that exemption from taxation will be strictly construed in favor of the public applies to O.C.G.A. § 48-8-3(43) because the exemption statute is unambiguous. The General Assembly unambiguously exempted all gross revenues generated from COAMs for sales and use tax purposes.

17.

Reading O.C.G.A. § 48-8-3(43) in its most natural and reasonable way, as an ordinary speaker of the English language would, and applying the ordinary signification to all words requires the finding that the term “[g]ross revenues generated from all bona fide coin operated amusement machines” includes revenues generated from lease payments, assuming: (1) that the Georgia Lottery Corporation requires location and master licenses for the items at issue, (2) that the COAMs were placed into commercial use for the public to play, and (3) that the requisite

location and master licenses were actually obtained. As a result, O.C.G.A. § 48-8-3(43) exempts Funvestment, which is in compliance with all statutory requirements imposed by this code section, from paying sales and use tax on its lease payments to Tiny Towne International.

B. The Exemption Set Forth In O.C.G.A. § 48-8-3(43) Has No Language Limiting It To The Revenue Generated From Playing COAMs.

18.

The Georgia Supreme Court has held, “In the absence of words of limitation, words in a statute should be given their ordinary and everyday meaning. Risser v. City of Thomasville, 248 Ga. 866, 286 S.E.2d 727, 728 (1982); see also Six Flags Over Ga. II v. Kull, 276 Ga. 210, 211, 576 S.E.2d 880, 881 (2003).

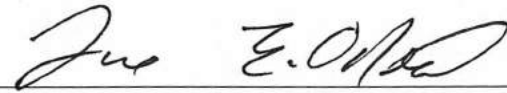
19.

Nowhere in the plain language does O.C.G.A. § 48-8-3(43) limit the sales and use tax exemption to the transaction of playing COAMs. The ordinary and everyday meaning of “gross revenues” does not limit it to any particular source of revenue. Moreover, no regulation exists which excludes lease payments from the term “gross revenues” for sales and use tax purposes. As the statute reads, the exemption applies to all gross revenue, including gross revenue from the COAMs used to make lease payments.

CONCLUSION

For all the foregoing reasons, Funvestment’s Motion is hereby **GRANTED**, the Department’s Motion is **DENIED**, and judgment is entered in favor of Funvestment. The official assessment and demand for payment dated January 26, 2018, is hereby **REVERSED** as requested in Funvestment’s petition. Funvestment does not owe the \$18,049.80 sales and use tax for the items listed in the table provided at JSF Exhibit N, bates p. DOR: 00097 and does not owe the \$6,327.53 interest.

SO ORDERED this 14 day of JAN, 2020.



HONORABLE LAWRENCE E. O'NEAL, JR.
CHIEF JUDGE
GEORGIA TAX TRIBUNAL