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UNITED STATES DISTRICT COURT
DISTRICT OF ALASKA
By ..... Deputy

UNITED STATES DISTRICT COURT

DISTRICT OF ALASKA

ALASKA CHIROPRACTIC SOCIETY; ALASKA DANCE THEATER; ALASKA STATE HOMEBUILDERS; ALPINE ALTERNATIVES, INC.; ANCHORAGE HOME BUILDERS ASSOCIATION; ANCHORAGE SHRINE CLUB; ANCHORAGE SHRINE TEMPLE; JOHN BLOMFIELD d/b/a JOHN BLOMFIELD FUND RAISING CONCEPTS; BOYS AND GIRLS CLUB OF GREATER ANCHORAGE; CONGREGATION BETH SHALOM; EAST ANCHORAGE FOOTBALL; FAIRBANKS MIDNIGHT SUN LIONS INTERNATIONAL; JAMES HARMAN d/b/a RIPPIE WORLD; PETER D. KRAEMER; LADIES ORIENTAL SHRINE OF NORTH AMERICA (WAHEED COURT NO. 81); MATANUSKA-SUSITNA VALLEY HUMANE SOCIETY, INC.; JOHN POWERS, RUTH SHANNON d/b/a EMERALD ISLE PULLTABS; JAMES STEWART d/b/a RIPPIE WORLD; and WASILLA AREA SENIORS, Plaintiffs and Counterclaim Defendants, vs. UNITED STATES OF AMERICA, Defendant and Counterclaimant.	Case No. A96-128 CV (JWS) **ORDER FROM CHAMBERS** (Re: Motion for Summary Judgment - Docket 15; Motion for Summary Judgment - Docket 17)

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INTRODUCTION

Plaintiffs are fourteen organizations which claim tax-exempt status pursuant to 26 U.S.C. § 501(c)[1] and five businesses involved in pull-tab sales in Alaska. Each plaintiff has paid at least a portion of the excise tax imposed by 26 U.S.C. § 4401 on state-authorized wagers and sued for a tax refund. Defendant United States has counterclaimed against sixteen of the nineteen plaintiffs[2] for additional taxes assessed under 26 U.S.C. §§ 4401 - 4424 and certain additions to those taxes. This court has jurisdiction over the controversy pursuant to 28 U.S.C. §§ 1340 and 1346(a)(1), and 26 U.S.C. § 7402.

At Docket 15, plaintiffs move for summary judgment asking the court to rule that "pull-tab games are games in which the wagers are placed, winners determined and the distribution of prizes is made, in the presence of all persons placing wagers in the game; and/or the pull-tab games are conducted by the permittees, not the operators." At Docket 17, defendant cross-moves for summary judgment, establishing that plaintiffs are liable to pay taxes imposed pursuant to 26 U.S.C. §§ 4401- 4424. Oral argument was heard January 31, 1997.

BACKGROUND

Plaintiffs are divided into two groups. The first group consists of fifteen plaintiffs who claim tax-exempt status and which hold permits issued by the state of Alaska to conduct pull-tab games ("the permittees"). The second group consists of five plaintiffs who do not hold their own permits, but sell pull-tab tickets on behalf of the permittees ("the operators"). None of the operators belong to any of the permittee organizations. Each permittee has contracted with an operator concerning the operation of the game. Pull-tabs are manufactured in series, and the series are sold to operators and permittees. Each series includes at least 500 pull-tab tickets. The ticket manufacturer prints each ticket in the series with a wining or losing combination of

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[1]Defendant admits that thirteen of the fourteen are tax exempt, but denies that plaintiff East Anchorage Football is a tax-exempt organization under 26 U.S.C. § 501(c)(3).

[2]Plaintiff has filed no counterclaim against Alaska State Homebuilders Association, Anchorage Shrine Temple, or Ladies Oriental Shrine of North America.

symbols. Winning tickets are randomly distributed throughout the series. Each ticket in a series bears the same serial number.

A representative series of tickets goes by the name "Hares and Turtles." That series contains 2,399 tickets, each with three pull-tabs. Tickets sell for 50 cents each, so the entire series of 2,399 tickets sells for $1,199.50. To learn if a ticket is a winner, the player pulls each tab on the tickets he or she has purchased to reveal combinations of hares and turtles. Only 4 tickets in a series contain the winning combination of 3 hares. Each winning ticket entitles the purchaser to receive $100. There are 174 other winning tickets in each series paying lesser amounts, such that the total paid out on all the winning tickets in a series is $740.

Operators or permittees purchase a series of pull-tabs from a licensed manufacturer or distributor. The operators then sell the pull-tabs from the operators' premises, one or several at a time, to individual purchasers. After purchasing a ticket, a player usually pulls the tab immediately to see if he or she has won. Players, however, are not required to pull the tabs immediately. If the player immediately pulls a winning tab, the operator makes an instant payout. If the player pulls the tab at a later time, the ticket may still be presented to the seller, and, if presented before the series has been sold out, the ticket will be honored.

The federal government imposes an excise tax of 0.25 percent on any wager authorized by state law. 26 U.S.C. § 4401(a)(1). In addition, persons liable to pay the wagering tax are also liable to pay a special annual "occupational" tax of $50. 26 U.S.C. § 4411(b). Each person who engages in the business of accepting wagers is liable for and must pay the taxes. 26 U.S.C. § 4401(c). In addition, each person who conducts a lottery or wagering pool is liable for and must pay the taxes. *Id.*

The IRS assessed the taxes against plaintiffs, and each paid all or a portion of the tax assessed against it. After filing refund claims with the IRS, which were denied, plaintiffs filed their pending complaint for refunds in this court, and defendant filed counterclaims seeking judgment for the amount assessed, but not paid, with respect to those plaintiffs that had not fully paid the taxes assessed.

DISCUSSION

For purposes of the excise tax in question, a wager includes, "any wager placed in a lottery conducted for profit." 26 U.S.C. § 4421(1)(C). A lottery "includes the numbers game, policy, and similar types of wagering, [but] does not include, (A) any game of a type in which usually (I) the wagers are placed, (ii) the winners are determined, and (iii) the distribution of prizes or other property is made, in the presence of all persons placing wagers in such game, and (B) any drawing conducted by an organization exempt from tax under sections 501 and 521, if no part of the net proceeds derived from such drawing inures to the benefit of any private shareholder or individual." 26 U.S.C. § 4421(c)(2)

Plaintiffs argue that pull-tab gaming does not constitute a "lottery conducted for profit" as defined by 26 U.S.C. § 4421, because it falls within the exclusions identified in 26 U.S.C. § 4421(2)(A). Alternatively, plaintiffs argue that pull-tab games are conducted by the permittees, not the operators, and therefore fall within the exclusion provisions of 26 U.S.C. § 4421(2)(B). Finally, plaintiffs were understood by the court to have taken the position at oral argument that if pull-tab games are not excluded, then the tax may not be imposed on the permittees, because if the second exclusion is not applicable, it can only be because the permittees do not conduct the games.

A. § 4421(2)(A)

Congress has indicated that the term "lottery" should be broadly construed to limit opportunities for avoidance. H.R. Rep. No. 586, 82nd Cong., 1st Sess. 1951, *reprinted in* 1951 U.S.C.C.A.N. 1781, 1839-0. Among those games which Congress intended to fall within the scope of exclusion were

> card games such as draw poker, stud poker, and black jack, roulette games, dice games, such as craps, bingo games, and the gambling wheels frequently encountered at country fairs and charity bazaars. On the other hand, punchboards would not normally be excluded under this definition.

Id. Although Congress did not mention the pull-tab game, it is similar to a punchboard game. In the punchboard game, there is a single board rather than individual cards, but the play is essentially indistinguishable from the pull-tab game. A player selects one of the numbered spots

on the board and pays to uncover or "punch" the selection just as the pull-tab player selects a card and pays to uncover the hidden symbols on the card. As in pull-tab gaming, punchboard prizes are paid immediately. *See generally* John Scarne, Scarne's New Complete Guide To Gambling. It will be seen that the punchboard is analogous to the series of cards sold in the pull-tab game. Just as the winning numbers on a punchboard are determined at the time it is manufactured, so, too, are the winning cards in a pull-tab series established in advance when they are printed. AS 05.15.690(35)[3].

In *Lloyd v. Robinson*, 110 F. Supp. 540 (D. Montana 1952), the taxpayer argued that a play on a punchboard--that is the purchase of a single "punch"--was a complete game. The Montana court held that the entire punchboard was the game by observing, "that the operator on the one hand has a continuing wager of his prizes, and that this wager is accepted on the other hand by all those who might play the board during its life, and that it follows that the winners are not determined and the prizes are not distributed in the presence of all persons who have placed wagers in the game." *Id.* at 542. The situation with pull-tabs is precisely analogous.

Another game which is very similar to the pull-tab game is instant bingo, a game which was addressed by the court in *Julius M. Israel Lodge of B'nai B'rith No. 2113 v. Commissioner*, 98 F.3d 190 (5th Cir. 1996). There, the court examined whether instant bingo fell within the exception to the unrelated business taxable income provision of 26 U.S.C. § 511. Under 26 U.S.C. § 513(f), proceeds from bingo games conducted by exempt organizations are excluded from the unrelated business income tax where the games are "(A) of a type in which usually (I) the wagers are placed, (ii) the winners are determined, and (iii) the distribution of prizes or other property is made in the presence of all persons placing wagers in such game." 26 U.S.C. § 513(f)(2).[4] The game of instant bingo requires only that the player purchase a prepackaged

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[3]Plaintiffs argue that the definition in the state statute supports their argument, but the court does not read the statute to help plaintiffs. Rather, by making it clear that the winner is determined by symbols designated "in advance" (when the series is printed), the statute supports application of the analysis in *Lloyd v. Robinson*, 110 F. Supp. 540 (D. Montana 1952) and *Julius M. Israel Lodge of B'nai B'rith No. 2113 v. Commissioner*, 98 F.3d 190 (5th Cir. 1996) discussed in the text following this footnote.

[4]It will be noted that the language is identical to the language used in the statutory provision at issue in the case at bar. "The normal rule of statutory construction assumes that '[I]dentical words used in different parts of the same act are intended to have the same meaning.'" *Sorenson v. Secretary of Treasury*, 475 U.S.

card from a series of cards. The player then removes pull-tabs from the card which reveal preprinted numbers on the front of the card. If these preprinted numbers match the preprinted winning arrangement indicated on the reverse side of the card, the player has a winning card. *Israel*, 98 F.3d at 192-193.

The *Israel* court found that instant bingo was for all practical purposes a lottery, because the distribution of prizes did not occur in the presence of all persons placing wagers in the game. *Id.* at 193. The court reasoned that the winners in instant bingo "are determined at the time the deck of cards is manufactured, and thus the winners are already predetermined outside the presence of <u>any</u> persons placing wagers in such game." *Id.* The court reasoned that the winning of the game is entirely independent of any external events, and the cards have already been vested with independent significance "much as they are in any other instant-win lottery game under any other name." *Id.*

Like instant bingo, pull-tabs involve only the player's purchase of a preprinted card from a series of cards containing concealed numbers or symbols. The winning combination is revealed when the player removes the three pull-tabs from the card. Just as in instant bingo, the winners may be said to be determined at the time the deck of cards is manufactured, and are, therefore, already predetermined outside the presence of any persons placing wagers in such game.

The reasoning in *Israel* and *Lloyd* is persuasive. Plaintiffs try to escape it by arguing that pull-tab games are like wheels of chance, which are not considered lotteries. Plaintiffs reason that just as a player places a bet on a wheel coming up a certain number, the pull-tab player places a bet that the card he or she draws from the series will contain the winning combination. Because the player may immediately determine if the card is a winner, plaintiffs argue that each individual card constitutes a game. In effect, plaintiffs offer the notion that *Israel* and *Lloyd* overlook the role of the player whose act in selecting a card is what determines if he or she wins. After all, he might have selected any of several cards. This criticism of the reasoning in *Israel* and *Lloyd* is not enough to establish that pull-tab cards are like wheels of fortune and so within the exclusion. The reason is that each spin of the wheel of chance is independent of all prior spins. The odds of

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851, 860, 106 S. Ct. 1600, 1606, *quoting Helvering v. Stockholms Enskilda Bank*, 293 U.S. 84, 87, 55 S. Ct. 50, 51 (1934).

winning on a particular spin are not affected by prior spins, so the game is truly played with a single spin. That is not the case in pull-tab gaming, where a player's choice of cards is necessarily limited by the choices made by all prior players. The purchase of a pull-tab card is not a separate independent game. Like the selection of an available punchboard number, it is a step in a serries of interrelated events, all of which play a role in determining whether the particular card or spot purchased will be a winner.

The court may also look for guidance to pertinent revenue rulings from the IRS, because they are entitled to deference and generally may be relied upon "unless unreasonable or inconsistent with the provisions of the Internal Revenue Code." *Walt Disney Inc. v. Commissioner*, 4 F.3d 735, 740 (9th Cir. 1993) (quoting *Salmon, Inc. v. United States*, 976 F.2d 837, 841 (2d Cir. 1992)). In Rev. Rul. 57-258, 1957-1 C.B. 418, the IRS held that pull-tabs are a form of punchboard and, therefore, a lottery. In light of case law discussed above and this court's analysis of plaintiff's argument, it is clear that Revenue Ruling 57-258 is neither unreasonable, nor inconsistent with prevailing law.

B. § 4421(2)(B)

Plaintiffs contend that pull-tab games are conducted by the permittees through their duly authorized agents, the operators, just as they would be if conducted by an employee of the permittee. Plaintiffs support this position by citing several Alaska statutes which permit operators to sell pull tabs "on behalf of a municipality or qualified organization." AS § 05.15.100(c); *see also* AS § 05.15.188(a) (permittees authorized to contract with a vendor to sell pull-tabs on behalf of the permittee); AS § 05.15.115(a) (permittee may enter into a contract with a licensed operator to conduct on behalf of the municipality or qualified organization those activities permitted under the authority of the permit). However, it is the federal statute which identifies the persons who are liable for the tax which is controlling.

Revenue Ruling 69-21, 1969-1 C.B. 290 addressed the situation where an organization exempt under § 501(c)(4) purchased a baseball pool. The organization retained the prior owner as general manager to have exclusive control over its operation. The IRS held that the exemption provided by § 4421(B) did not apply, partly because it was not conducted by the exempt

organization. It stated that there is a basic distinction between mere sponsorship of an activity and actually conducting the activity. "Conduct" denotes supervision and control, as distinguished from lending the name of an organization to the activity or endorsing it. The ruling is neither unreasonable nor inconsistent with the statute, and the court relies upon it. *Walt Disney Inc. v. Commissioner, supra.*

Representative contracts between the permittees and the operators were submitted for the court's examination. The contracts place responsibility for conducting the games in the hands of the operators, not the permitttes. For example, James Harman's contract with permittee Waheed Court # 82 L.O.S.N.A. stipulates that the "Operator will conduct pull tab games for the Permittee according to the terms of this contract . . . ." Dkt. 16, Ex. D The operator may use a business name of his choosing, and the pull-tab games will be conducted at the designated "Rippie World" locations in Anchorage. *Id.* The operator will pay for the cost of the pull tabs and all labor, furniture, equipment, advertising, utilities and services, real property taxes, personal property taxes, premiums for public liability insurance, and all other expenses for each location. *Id.* The contract specifies that the operator makes no representations or guarantees whatsoever concerning the dates of pull-tab gaming or the revenues to be generated for any permittee. *Id.* Nothing in the contract gives the permittee any supervision or control over conduct of the pull-tab games. Although different in format and in some details, the other representative contracts are similar in that they all provide that the operator will conduct the pull-tab games and provide for no supervision or control over the conduct of the games by the permittess.

At most, the contracts establish that the pull-tab games are being conducted for the benefit of the permittees, rather than by the permittees. If Congress had intended to make any drawing conducted <u>on behalf</u> of an organization exempt from tax, it is reasonable to assume it would have said so. Indeed, in view of the language used in other sections of the statute, the failure to include an exclusion for drawings conducted on behalf of permittees is persuasive evidence that Congress did not intend to do so. *Compare* 26 U.S.C. §§ 4401(c) and 4412 which expressly employ the "on behalf of" concept in so many words *with* 26 U.S.C.§ 4421(2)(B) where the phrase is omitted.

It is this court's conclusion that the pull-tab games are conducted by the operators, not by the permittees. Because the games are not conducted by the exempt organization, the exclusion in 26 U.S.C. § 4421(2)(B) does not apply.[5]

C. Who is Liable

The defendant takes the position that, "For each wagering tax due, judgment should be entered against both the tax exempt organization and the operator, so as to ensure that the United States will be able to collect the tax from at least (and at most) one party." Docket 17 at p. 24. The relevant statutory language indicates that to be liable for the excise tax on wagers a person must be either "engaged in the business of accepting wagers" or be one "who conducts [a] wagering pool or lottery." For the reasons expressed in section B. above, the court has already concluded that the operators, not the permitttees, conduct the lottery. It follows that the operators are liable to pay the tax, but that the permittees are not liable unless they are "engaged in the business of accepting wagers."

The permittees are engaged in businesses other than the business of accepting wagers--that is to say, the permittees exist for some purpose which gives them tax-exempt status and it must be this purpose which is their principal business. However, it is possible for an entity to be engaged in more than one business. Thus, an organization that exists primarily to advance a charitable cause might still engage in the business of accepting wagers in order to raise funds with which to advance that cause. After examining the arguments made by the parties, the court concludes that this issue has not been adequately addressed to allow the court to determine the issue.

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[5]Plaintiffs argue that the operators are actually "agents" of the permittees and so the pull-tab games are really conducted by the permittees through their agents. The court regards this argument as a "red herring". The tax is imposed on the wager, 26 U.S.C. section 4401(a), and as to lotteries the persons liable for the tax are those who conduct lotteries. 26 U.S.C. section 4401(c). Because it is the wagers received from the players which give rise to the tax, it is eminently sensible to make the person who receives the wagers the person who is liable for the tax. There is nothing in the representative contracts which calls for the operator to pass the wagers themselves to the permittees. To the contrary, the operator retains the wagers and pays expenses from it. Whatever liability the permittee might have for the acts of the operator in other contexts, the tax statute clearly imposes the tax liability on the person who actually conducts the lottery.

CONCLUSION

For the foregoing reasons, the motion at Docket 15 is **DENIED**, and the motion at Docket 17 is **GRANTED IN PART**, such that the operators are declared liable for the wagering and occupational taxes, **BUT ALSO DENIED IN PART** as to the liability of the permittees which cannot be determined on the basis of the record and arguments presently before the court .

DATED this 18th day of February 1997 at Anchorage, Alaska.

JOHN W. SEDWICK
UNITED STATES DISTRICT COURT

A96-0128--CV (JWS)

T. YERBICH, LL.M.
R. BUNDY (US-ATTNY)

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UNITED STATES DISTRICT COURT
DISTRICT OF ALASKA
By _____ Deputy

UNITED STATES DISTRICT COURT

DISTRICT OF ALASKA

ALASKA CHIROPRACTIC SOCIETY; ALASKA DANCE THEATER; ALASKA STATE HOMEBUILDERS; ALPINE ALTERNATIVES, INC.; ANCHORAGE HOME BUILDERS ASSOCIATION; ANCHORAGE SHRINE CLUB; ANCHORAGE SHRINE TEMPLE; JOHN BLOMFIELD d/b/a JOHN BLOMFIELD FUND RAISING CONCEPTS; BOYS AND GIRLS CLUB OF GREATER ANCHORAGE; CONGREGATION BETH SHALOM; EAST ANCHORAGE FOOTBALL; FAIRBANKS MIDNIGHT SUN LIONS INTERNATIONAL; JAMES HARMAN d/b/a RIPPIE WORLD; PETER D. KRAEMER; LADIES ORIENTAL SHRINE OF NORTH AMERICA (WAHEED COURT NO. 81); MATANUSKA-SUSITNA VALLEY HUMANE SOCIETY, INC.; JOHN POWERS, RUTH SHANNON d/b/a EMERALD ISLE PULLTABS; JAMES STEWART d/b/a RIPPIE WORLD; and WASILLA AREA SENIORS, Plaintiffs and Counterclaim Defendants, vs. UNITED STATES OF AMERICA, Defendant and Counterclaimant.	Case No. A96-128 CV (JWS) **ORDER FROM CHAMBERS** (Re: Motion for Summary Judgment - Docket 29; Cross Motion for Summary Judgment - Docket 30)

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INTRODUCTION

At docket 29, defendant United States ("Government") moves for summary judgment pursuant to Rule 56, contending that those of the plaintiffs who are charitable organizations holding annual permits issued by the State of Alaska pursuant to AS 05.15.020, .100, which grant the privilege of conducting pull-tab games ("Permittees"), are jointly liable with the organizations with whom they have contracted to actually operate the pull-tab games ("Operators") for the wagering and occupational taxes ("Taxes") imposed by federal law.[1] Liability for the Taxes is predicated on either "engag[ing] in the business of accepting wagers" or "conduct[ing] any wagering pool or lottery." 26 U.S.C. § 4401(c). At docket 30, plaintiffs cross move for summary judgment asserting that the Permittees are not "engaged in the business of accepting wagers." Id. Oral argument was heard July 11, 1997.

In connection with earlier motion practice, this court held that the Operators are liable to pay the Taxes, because they conduct the pull-tab games. Finding that the Permittees did not conduct the games, the court observed that the Permittees would not be liable to pay the Taxes unless they were engaged in the business of accepting wagers. The court then opined that while the Permittees obviously were primarily engaged in businesses other than the business of accepting wagers, that "it is possible for an entity to be engaged in more than one business. Thus, an organization that exists primarily to advance a charitable cause might still engage in the business of accepting wagers in order to raise funds with which to advance that cause." (Dkt. 24, p. 9).[2]

Although the Government's original motion for summary judgment stated at the outset that the Permittees and the Operators were both in the business of accepting wagers (Dkt. 17, p. 2), the Government did not actually present any argument to support that proposition; instead, the Government focused on establishing that the pull-tab games were conducted by the Operators,

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[1]26 U.S.C. § 4401(a)(1) imposes a tax on "any wager . . . equal to 0.25 percent of the amount of such wager"; and 26 U.S.C. § 4411(b) imposes an annual tax on persons liable under § 4401(a)(1) or on persons who receive wagers on their behalf.

[2]A similar observation was made in a Congressional report relating to the law which imposes the Taxes: "[F]or example, an individual may be primarily engaged as a salesman, and also, for the purposes of this tax, be engaged in the business of accepting wagers." H.R. Rep. No. 586, 82nd Cong., 1st Sess, reprinted in 1951 U.S.C.C.A.N. 1781, 1839.

(Dkt. 17, pp. 3-24). Similarly, plaintiffs focused their briefing on an argument that the Operators did not conduct the pull-tab games. Not surprisingly, in addressing the Government's request that the Permittees be held jointly liable to pay the Taxes, the court found that the parties had not adequately briefed the question whether Permittees were engaged in the business of accepting wagers.[3]

STANDARD OF REVIEW

Rule 56 of the Federal Rules of Civil Procedure provides that summary judgment should be granted if there is no genuine dispute as to material facts and if the moving party is entitled to judgment as a matter of law. The moving party has the burden of showing that there is no genuine dispute as to material fact. Celotex Corp. v. Catrett, 477 U.S. 317 (1986). The moving party need not present evidence; it need only point out the lack of any genuine dispute as to material fact. Id. at 323-25.

Once the moving party has met this burden, the non-moving party must set forth evidence of specific facts showing the existence of a genuine issue for trial. Id.; Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248-49 (1986). The non-moving party may not rest upon mere allegations or denials, but must show that there is sufficient material evidence supporting the claimed factual dispute to require a fact-finder to resolve the parties' differing versions of the truth at trial. Id. at 248. A "scintilla" of evidence is not enough to create a genuine issue of material fact. Id. at 252. Nor do "mere allegations and speculation . . . create a factual dispute for purposes of summary judgment."

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[3]Order at docket 24, p. 9. In its original briefing, the Government did, in an almost offhand manner, say that once given Operator liability for the Taxes, the Permittees would be jointly and severally liable, but did not explain why in any detail. (Dkt. 17, pp.22 - 23). The parties' latest motions represent their effort to remedy the omission the first time around. The Government's focus is on the proposition that the Permittees are engaged in the business of accepting wagers, because they are involved in a joint venture with the Operators. While the Permittees oppose this argument on the merits, their first response is that the Government is really advancing the same argument it presented in its initial motion; so this court should treat it as an untimely motion for reconsideration. The Court disagrees. In its orginal motion, the Government did cite Woodard v. Campbell, 134 F. Supp. 258 (S.D. Ind. 1955), aff'd, 235 F.2d 268 (7th Cir. 1956), which held that two parties were joint venturers in the conduct of a lottery, but the Government certainly did not develop the argument in its briefing. Indeed, it was the court's concern that neither party had taken the opportunity to focus on the reasons why the Permittees should or should not be jointly liable with the Operators which resulted in the court's refusal to rule on that issue in its order deciding the original motions.

Nelson v. Pima Community College, 83 F.3d 1075, 1081-82 (9th Cir. 1996) (*citing* Witherow v. Paff, 52 F.3d 264, 266 (9th Cir. 1995)).

There is no genuine issue of material fact when the relevant evidence in the record, taken as a whole, indicates that a reasonable fact-finder could not return a verdict for the non-moving party. Anderson, 477 U.S. at 248; Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp., 475 U.S. 574, 587 (1986).

In the case at bar, the parties have filed stipulated facts. Each party argues that, given the facts, it is entitled to judgment as a matter of law. The court agrees that there are no material facts in dispute.

DISCUSSION

The remaining issue in this case is whether the Permittees are "engaged in the business of accepting wagers." The government argues that the Permittees and Operators are joint venturers in the pull-tab gaming business and, therefore, the Permittees are jointly liable for the Taxes. The court looks to state law to determine if a relationship is, in fact, a joint venture. Nelson v. Serwold, 687 F.2d 278, 282 (9th Cir. 1982). The concept of joint ventures has evaded exact definition, but certain elements are commonly considered indicative that a joint venture exists; they include:

(a) a contribution by the parties of money, property, effort, knowledge, skill or other asset to a common undertaking;

(b) a joint property interest in the subject matter of the venture;

(c) a right of mutual control or management of the enterprise;

(d) expectation of profit, or presence of "adventure," as it is sometimes called;

(e) a right to participate in profits;

(f) most usually, limitation of the objective to a single undertaking or ad hoc enterprise.

Basel v. Westwood Trawlers, Inc., 869 P.2d 1185, 1191 (Alaska 1994). The analysis of joint venture relationships is fact intensive and the existence of any one of the essential elements by itself does not create a joint venture. 48A C.J.S. *Joint Ventures* § 10.

Some of the elements of a joint venture are present. Both Permittees and Operators contributed to the endeavor--the Permittees contributed the permits, the Operators contributed business locations, labor, and general operating requirements. Both entered agreements between themselves with the expectation of financial gain. The agreements contemplated a single undertaking, operation of pull-tab games.

There is no evidence of a joint property interest (the Permittees owned the permits, the Operators owned the right to use the pull-tab parlor locations). However, sole ownership by one of the venturers does not preclude a finding that a joint venture relationship exists. 2 Samual Williston, *Williston on the Law of Contracts*, § 318A (3d ed. 1959).

The right to control and the right to participate in the profits are very important elements in determining if a joint venture relationship exists. Basel v. Westwood Trawlers, Inc., 869 P.2d at 1190-91, especially nn.10 and 12.[4] There is no evidence of mutual control of the pull-tab business' operations. As the Government put it in its original motion: "Even if we assume the operators are in some sense, acting on behalf of the permittees, they are not subject to the permittees' control. To the extent the representative contracts allow any discretion on the part of either permittees or operators, the contracts confer control upon the operators." (Dkt. 17, p. 20)

In Basel v. Westward Trawlers, Inc., the Alaska court found no obligation to share in the profits or losses where fixed fees established in the parties' agreements were unrelated to the profits or losses of the business activity. There, Taiyo, a fish-processing firm, paid an agreed fixed price to the fish-catchers, and a broker, Westward/Steuart, was paid a fixed percentage of the gross amount which Taiyo paid to the fish-catchers. What the fish-catchers and the broker were paid was independent of the amount of profit or loss Taiyo might experience upon sale of the processed fish.

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[4]Other courts have also held that mutual control and the right to participate in the profits are critical: Herst v. Chark, 579 N.E.2d 990, 992 (Ill. App. 1 Dist. 1991) ("[p]ossibly the most important criterion of a joint venture is joint control and management of the property used in accomplishing its aims"); Romberger v. VFW Post 1881, 918 P.2d 993 (Wyo. 1996) ("[j]oint ventures may be inferred from the conduct of the parties . . . but always include a promise to share in both the profits and losses occasioned by the endeavor . . . . Additionally, each party must have 'an equal voice in control and direction of the undertaking'" (citations omitted)); In re PCH Associates, 949 F.2d 585 (2nd Cir. 1991) (applying Pennsylvania law--"[l]ack of even minimal control over the day-to-day operations . . . is inconsistent with joint venture status").

In the instant case, reasonable expenses are first subtracted from the Operators' gross receipts,[5] and the Operators are then required to pay a minimum percentage of the adjusted gross income to the Permittees. Like the fixed price and percentage fee paid by Taiyo in Basel, the required payment from the Operators to the Permittees is unrelated to the profits or losses of the Operators, because the Operators are solely liable for any expenses above the statutory amount.

Taking into account the several factors which should be considered, the court concludes that the Permittees are not joint venturers with the Operators, as the joint venture concept is ordinarily applied at common law. The fact that the Permittees have no control over the Operators' activities and the absence of any right to share in the profits outweighs the presence of joint contributions, a single objective, and the mutual expectation of financial gain. It follows that the Permittees are not in the business of accepting wagers on the grounds that they are common law joint venturers with the Operators.

Although the court has been unable to elicit significant briefing touching upon other aspects of the question whether the Permittees are engaged in the business of accepting wagers, two rounds of briefing have provided opportunity enough. The court does find that the Permittees are engaged in the business of accepting wagers, based upon the structure of AS 05.15, which authorizes charitable gaming in Alaska.

Perusal of AS 05.15 shows that the entire scheme of charitable gaming in Alaska is erected upon the premise that qualified applicants (charities or local governments) will be authorized to accept wagers of certain types (such as those placed in a pull-tab game) from which they will derive some financial benefit. The statute also contemplates that the gaming business will typically be conducted by persons like the Operators here, rather than the charitable entities like the Permittees. However, the conduct of gaming activities by an operator requires that an applicant first seek state sanction for the acceptance of wagers in the form of a permit. In such a scheme it is irrational to say that those in the position of the Permittees are not engaged in the business of accepting wagers. It is only to obtain the ability to accept wagers that such entities apply for a state permit to begin with. Subsequently contracting with another to operate the pull-tab parlor, "ice pool" or other wagering

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[5]Prior to January 1, 1994, expenses were limited to 85 percent of the adjusted gross income; expenses are now limited to 70 percent of the adjusted gross income. AS 05.15.160.

scheme does not erase the fact that they sought and obtained an authorization to accept wagers. Having done so, they are in the business of accepting wagers. Put in different language, it is illogical to say that an entity whose effort in obtaining a permit is absolutely necessary under state law in order for wagers to be accepted, and whose effort is voluntarily provided in exchange for the expectation of pecuniary advantage from the acceptance of wagers, is not engaged in the business of accepting wagers.

Another way to look at the Alaska statutory scheme for charitable gaming, a scheme which clearly envisions that there will ordinarily be two entities involved--the charity and the operator, is that the statute itself makes the charity and the operator joint venturers. It literally provides for a connection between them aimed at one common objective, the acceptance of wagers. Each is a component of the overall enterprise the statute sanctions.

While this court does not believe that the charities and the operators are joint venturers in terms of the principles of common law applied in cases like Basel in order to determine who will be liable for one actor's tortious behavior, that does not mean the court must turn a blind eye on the very essence of the statutory scheme Alaska has created and pursuant to which the wagers are accepted. Thus, for purpose of accepting wagers, although not for other purposes, this court concludes that the Permittees and Operators are joint venturers in the business of accepting wagers.

CONCLUSION

For the reasons set forth above, the motion at docket 29 is **GRANTED**, and the motion at docket 30 is **DENIED**.

DATED at Anchorage, Alaska, this 18th day of July 1997.

JOHN W. SEDWICK
UNITED STATES DISTRICT COURT

A96-0128--CV (JWS)

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ATTORNEY FOR PLAINTIFFS

LODGED
OCT 15 1997
FILED
OCT 24 1997
UNITED STATES DISTRICT COURT
DISTRICT OF ALASKA
By _____ Deputy

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ALASKA

ALASKA CHIROPRACTIC SOCIETY; ALASKA DANCE THEATER; ALASKA STATE HOMEBUILDERS; ALPINE ALTERNATIVES, INC. ANCHORAGE HOMEBUILDERS ASSOCIATION; ANCHORAGE SHRINE CLUB; ANCHORAGE SHRINE TEMPLE; JOHN BLOMFIELD d/b/a JOHN BLOMFIELD FUND RAISING CONCEPTS; BOYS AND GIRLS CLUB OF GREATER ANCHORAGE; CONGREGATION BETH SHALOM; EAST ANCHORAGE FOOTBALL; FAIRBANKS MIDNIGHT SUN LIONS INTERNATIONAL; JAMES HARMAN d/b/a RIPPIE WORLD; PETER D. KRAEMER; LADIES ORIENTAL SHRINE OF NORTH AMERICA (WAHEED COURT NO. 81); MATANUSKA-SUSITNA VALLEY HUMANE SOCIETY, INC.; JOHN POWERS, RUTH SHANNON d/b/a EMERALD ISLE PULLTABS; JAMES STEWART d/b/a RIPPIE WORLD; and WASILLA AREA SENIORS Plaintiffs vs UNITED STATES OF AMERICA Defendant	**Case No. A-96-128 CV(JWS)** **FINAL JUDGMENT**

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The court having entered its prior orders holding that Plaintiffs Alaska Chiropractic Society, Alaska Dance Theater, Alaska State Homebuilders, Alpine Alternatives, Inc., Anchorage Homebuilders Association, Anchorage Shrine Club, Anchorage Shrine Temple, John Blomfield d/b/a John Blomfield Fund Raising Concepts, Boys and Girls Club of Greater Anchorage, Congregation Beth Shalom, East Anchorage Football, Fairbanks Midnight Sun International, James Harman and James Stewart d/b/a Rippie World, Peter Kraemer, Ladies Oriental Shrine of North America (Waheed Court No. 81), Matanuska-Susitna Valley Humane Society, John Powers, and Ruth Shannon d/b/a Emerald Isle Pulltabs are jointly and severally liable for the Taxes on Wagering imposed by chapter 35, subtitle D, title 26 United States Code [26 U.S.C. §§ 4401, *et seq.*].

IT IS ORDERED, ADJUDGED AND DECREED THAT:

The Complaint be, and the same hereby is, dismissed in its entirety, with prejudice, and

the United States recover on its counterclaim the following amounts for wagering excise tax and statutory additions through August 15, 1997:

1. From Alaska Chiropractic Society and James Harman and James Stewart d/b/a Rippie World, jointly and severally, the sum of $8,886.07 for the tax years ending December 31, 1990, December 31, 1991 and December 31, 1992.
2. From Alaska Dance Theater, Inc. the sum of $2,960.05 for the tax years ending December 31, 1990 and December 31, 1991.
3. From Alpine Alternatives the sum of $2,558.36 for the tax years ending December 31, 1990 and December 31, 1991
4. From Anchorage Homebuilders Association and James Harmon and James Stewart d/b/a Rippie World, jointly and severally, the sum of $2,825.52 for the tax years ending December 31, 1991 and December 31, 1992.
5. From Boys and Girls Club of Greater Anchorage the sum of $1,552.83 for the tax year ending December 31, 1992.
6. From Congregation Beth Shalom and James Harmon and James Stewart d/b/a Rippie World, jointly and severally, the sum of $7,304.22 for tax years ending December 31, 1990, December 31, 1991, and December 31, 1992.

7. From East Anchorage Football and James Harmon and James Stewart d/b/a Rippie World, jointly and severally, the sum of $4,167.66 for tax years ending December 31, 1990 and December 31, 1991.

8. From Fairbanks Midnight Sun International and Ruth Shannon d/b/a Emerald Isle Pull-Tabs, jointly and severally, the sum of $3,627.68 for the tax year ending December 31, 1990.

9. Matanuska-Susitna Valley Humane Society and James Harmon and James Stewart d/b/a Rippie World, jointly and severally, the sum of $7,902.80 for the tax years ending December 31, 1990, December 31, 1991, and December 31, 1992.

10. From James Harmon and James Stewart d/b/a Rippie World the sum of $46,780.26 for tax years ending December 31, 1990, December 31, 1991, and December 31, 1992.

11. From Ruth Shannon d/b/a Emerald Isle Pull-Tabs the sum of $6,492.64 for tax years ending December 31, 1990 and December 31, 1991.

Each party to bear its own costs and fees..

Penalties as provided by 26 U.S.C. § 6651(a)(3), not to exceed 25%, will continue to accrue from and after August 15, 1997 until paid.

Interest is due on the foregoing sums at the rate specified by 26 U.S.C. §§ 6621(a)(2) and 6622 from August 15, 1997, until the date of entry of this judgment, and at the rate specified in 28 U.S.C. § 1961(c)(2) and 26 U.S.C. §§ 6621(a)(2) and 6622 from the date of entry of this judgment until paid.

Dated: October 24, 1997

JOHN W. SEDWICK
U.S. District Judge

APPROVED FOR ENTRY:

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