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TEXAS LOTTERY COMMISSION

Anthony J. Sadberry, *Executive Director*

Philip D. Sanderson, *Charitable Bingo Operations Director*

CERTIFIED MAIL NO. 7004 1350 0000 5061 8785
RETURN RECEIPT REQUESTED

BAO # 2008-0907-0001

December 21, 2007

Ms. Jan Sutter
1833 Max Road
Pearland, Texas 77581

Re: Bingo Advisory Opinion No. 2008-0907-0001

Dear Ms. Sutter:

This advisory opinion responds to your request received on November 1, 2007. Below are your questions followed by our answers.

Question 1:

Is it permissible for the VFW-Pearland post to give the Ladies Auxiliary the 35% required charitable distribution and have them write a check back to the Post for that amount to put back into the Post's general fund and used for general operating expenses?

ANSWER:

Section 2001.455 of the Bingo Enabling Act (Act) (Tex. Occ. Code Ch. 2001) provides:

A person given bingo proceeds for a charitable purpose may not use the donation:

...

- (2) for a purpose that would not constitute a charitable purpose if the activity were conducted by the donor organization.

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Furthermore, Section 2001.454 (b) provides:

Except as otherwise provided by law, the net proceeds derived from bingo . . . are dedicated to the charitable purposes of the organization only if directed to a cause, deed or activity that is consistent with the federal tax exemption the organization obtained under 16 U.S.C. Section 501 and under which the organization qualifies as a nonprofit organization as defined by Section 2001.002.

Charitable Bingo Administrative Rule 16 TAC § 402.502 describes the type of information an organization must maintain to identify its charitable purpose and to substantiate its charitable distributions. In addition, subsection (e) of the rule provides in pertinent part:

(e) A use of net proceeds, which would not be considered as a cause, deed, or activity dedicated to the charitable purposes of the organization and not consistent with the 26 U.S.C. Section 501 tax exemption of the organization or the purposes or objective for which the organization qualifies as an authorized organization, are any use of proceeds which:

- (2) has no documentation to substantiate the use of net proceeds; or
- (3) does not further the organization's cause, deed or activity consistent with the federal tax exempt application or other written purposes furnished to the commission that are consistent with the organization's tax exemption.

Thus, if the VFW Pearland Post did not maintain records to substantiate the use of proceeds, or if it could not directly put the proceeds into its general fund to further its cause, deed or activity consistent with its tax exempt purpose, then the VFW-Pearland Post could not give the Ladies Auxiliary the 35% required charitable distribution and have them write a check back to the Post for that amount to put back into the Post's general fund and used for general operating expenses.

Question 2:

Are sweepstakes machines legal?

ANSWER:

Section 2001.059(a) of the Act provides:

A person may request from the commission an advisory opinion regarding compliance with this chapter and the rules of the commission.

Consistent with the statute cited above, a request for an advisory opinion must relate to compliance with the Act or the Commission's rules. Neither the Act nor the Commission's rules address the legality of sweepstakes machines. Because your second question does not relate to the Act or rules, it does not fall within the statutory parameters established for advisory opinion requests. Therefore, the question of whether

sweepstakes machines are legal is not a proper subject for an advisory opinion under the Act.

However, Section 2001.416 prohibits conducting or allowing during a bingo occasion all games of chance except bingo, a raffle, and an amusement machine that is not a gambling device. Attorney General Opinion JC-0449 (2002) addressed the meaning of "game of chance" and stated:

Thus, the commonly understood meaning of a "game of chance" is a game whose outcome is determined by chance rather than skill.

Application of the definition of game of chance depends on characteristics of the particular sweepstakes machines in question. Furthermore, a determination of whether there is a violation of Section 2001.416 could be made only after review of all relevant facts gathered during an investigation.

SUMMARY

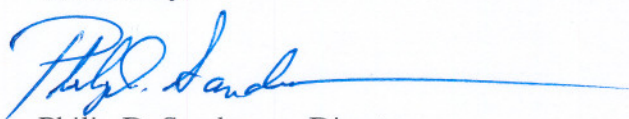
If the organization did not maintain records to substantiate the use of proceeds or if the distribution did not further the organization's cause, deed or activity consistent with its tax exempt purpose, then the distribution would not be an allowable charitable distribution of proceeds derived from the conduct of bingo. Because neither the Act nor the Commission's rules address the legality of sweepstakes machines, the question of whether sweepstakes machines are legal is not a proper subject for an advisory opinion under the Act. A determination of whether there is a violation of Section 2001.416 could be made only after careful review of all pertinent facts gathered during an investigation.

This advisory opinion cannot be construed as a tax ruling or otherwise interpretive of the Internal Revenue Code. The information provided is completely limited to the context of the Bingo Enabling Act and the Charitable Bingo Administrative Rules.

This advisory opinion is based on the laws, rules and regulations in effect at the time of its issuance. All of the information provided herein is subject to change in law.

This opinion is purely advisory in nature and is limited to the particular questions at issue and to the facts presented in the request. Therefore, this opinion must not be relied upon as a previous determination regarding any conduct which is not substantially consistent with the opinions and facts stated in the request.

Yours truly,



Philip D. Sanderson, Director
Charitable Bingo Operations Division

cc: James A. Cox, Jr., Chairman
C. Tom Clowe, Jr., Commissioner
David J. Schenck, Commissioner
Anthony J. Sadberry, Executive Director
Kimberly L. Kiplin, General Counsel