

BAO 2004-0122-00004	Date Issued: 03/22/2004	View Request RQ 2004-0122-00004
Summary:	Pursuant to recent legislative changes, Texas Occupations Code §2001.218 provides that the lease of bingo supplies or equipment must be on terms of immediate payment or on terms requiring payment not later than the 30th day after the date of actual delivery.	

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BAO # 2004-0122-00004

March 22, 2004

Video King Gaming Systems *via registered mail*
d/b/a Power Bingo King
Attn: Mark Newton, Director of Regulatory Compliance
Unit 12-59 Scurfield Boulevard
Winnipeg, Manitoba, Canada R3Y 1V2

Re: Request for Advisory Opinion relating to Texas Occupations Code §2001.218

Dear Mr. Newton,

On January 22, 2004, the Texas Lottery Commission (the "Commission") received your email requesting an advisory opinion regarding Texas Occupations Code, Section 2001.218. Your email presents several questions^[1] to the Commission regarding the application of the prompt pay provisions in Section 2001.218 as it relates to the lease of card minding devices in Texas.

Below are the questions posed in your letter followed by the Commission's response.

1. The law states that accounts must be paid within 30 days of the date of delivery. With electronics you only have a single date of actual delivery which may be years in the past. We have a verbal OK that we can consider the date of invoice as the date of delivery. Our invoicing process to our distributors is done on a weekly flat rate basis, based on the number of units in the distributor's possession. So if a distributor is past due and we need to put them on a COD basis, do they have to pay for a week in advance based on our billing methodology or do they have to pay for the invoice prior to the following weeks billing?

ANSWER: During the 78th Legislative Regular Session, the Legislature passed and the Governor signed House Bill 2519 (“HB 2519”), which in part revised Texas Occupations Code, Section 2001.218(a). In particular, HB 2519 inserted the words “or lease,” so that the text of Section 2001.218 now reads as follows:

(a) Each sale or lease (emphasis added) of bingo supplies or equipment to a license holder under this chapter must be on terms of immediate payment or on terms requiring payment not later than the 30th day after the date of actual delivery.

(b) If a payment is not made when due, the seller shall immediately notify the commission. The commission shall notify all manufacturers and distributors licensed in this state of the default.

(c) In the event of a default, a person may not sell or transfer bingo equipment or supplies to the purchaser in default on terms other than immediate payment on delivery until otherwise authorized by the commission.

By adding the term “lease,” all the prompt payment requirements previously reserved for sales transactions apply to lease transactions.^[2]

Under Texas Occupations Code, Section 2001.218, a party may pay for the sale or lease of bingo equipment or supplies on terms requiring payment not later than the 30th day after the date of actual delivery. The term “actual delivery” is not defined in the Section 2001.218, neither is it defined by case law construing Section 2001.218.

Texas Occupations Code, Section 1.002 incorporates the Code Construction Act for the purpose of construing all the chapters contained within Texas Occupations Code.^[3] Thus, the Code Construction Act may be used to determine the meaning of the term “actual delivery” as it is used in Texas Occupations Code, Section 2001.218. According to Texas Government Code, Section 311.011,

(a) Words and phrases shall be read in context and construed according to the rules of grammar and common usage.

(b) Words and phrases that have acquired a technical or particular meaning, whether by legislative definition or otherwise, shall be construed accordingly.

“Actual delivery” is defined in Black’s Law Dictionary (7th Ed.) as, “[t]he act of giving real and immediate possession to the buyer or the buyer’s agent.” Yet, this definition is limited to the context of a sale transaction. Pursuant to Texas Government Code, Section 311.011(a), the term “actual delivery” may be construed such that if application of the statute was limited to sales transactions, then a plain reading would indicate that the date of actual delivery was the date the purchaser physically received the bingo supplies or equipment. However, in the context of a lease transaction, a plain reading of

the statute is not clear because the date the leasing party physically receives the bingo supplies or equipment may not correspond with the terms of the lease agreement with respect to use of such supplies or equipment and related payment.

Pursuant to Texas Government Code, Section 311.011(b), the term “actual delivery” may be construed in accordance with a technical or particular meaning. In conjunction with this request for advisory opinion, the Commission requested briefing by certain licensees and those involved in the bingo industry. The Commission received several briefs indicating that the term “actual delivery” means the date of invoice in a lease transaction. Thus, the term “actual delivery” has a technical or particular meaning.

The Commission’s construction or interpretation of the Bingo Enabling Act is entitled to serious consideration so long as it is reasonable and does not contradict the plain language of the statute.^[4] Based on the analysis above, it is not clear from a plain reading of the statute, the meaning of the term “actual delivery” in the context of a lease transaction. It is reasonable to construe a term in accordance with the Code Construction Act. Pursuant to Texas Government Code, Section 311.011(b), the Commission construes the meaning of the term “actual delivery” as the date of invoice for the lease of bingo equipment and supplies.

Texas Occupations Code, Section 2001.218(c) provides in pertinent part,

(c) In the event of a default, a person may not sell or transfer bingo equipment or supplies to the purchaser in default on terms other than immediate payment on delivery until otherwise authorized by the commission.

Thus, when a person becomes delinquent under a lease agreement for bingo equipment and supplies, that person may continue to lease bingo equipment and supplies only on terms of immediate payment on delivery, which in the context of a lease transaction means the date of invoice.

2. How do we handle disputed amounts? There are occasions when we make mistakes on the invoices and we have to investigate them. While the investigation is ongoing we do not expect our customer to remit payment for the questioned transactions. Would we be required to report these instances of non-payment if the dispute took more than 30 days to investigate?

ANSWER: The statute is silent as to how disputed amounts impact the prompt payment requirements. However, in accordance with Texas Occupations Code, Section 2001.218, some form of payment or consideration should be made.

3. If we have a customer who is late with payment and we want to

notify the state what format does the notification have to take? (verbal, mail, email, fax) Do we disclose the name of the distributor only? Do we include the dollar amount outstanding? Do we submit copies of invoices, etc.?

ANSWER: Texas Occupations Code, Section 2001.218(b) provides in pertinent part:

(b) If a payment is not made when due, the seller shall immediately notify the commission. The commission shall notify all manufacturers and distributors licensed in this state of the default.

The statute is silent as to what should be included in the notification. Likewise, there is no administrative rule which addresses this issue. However, as a practical matter, there is certain information which the Commission must know in order to comply with statutory requirements. The Commission has provided a notification form which may be filled out and submitted. In addition, a manufacturer or distributor may notify the Commission by providing the information in another format.

4. If a distributor is in default to us do we enforce COD immediately coincidentally with notification of the TLC or do we wait for the notification that the TLC puts out to all manufacturers and distributors? If we enforce it immediately it may take quite a period of time before our competitors are notified during which they do not have to enforce COD standards, thus providing a competitive advantage. So can you explain the process and timing of the notification procedures that TLC will be using?

ANSWER: Texas Occupations Code, Section 2001.218 provides in pertinent part:

(c) In the event of a default, a person may not sell or transfer bingo equipment or supplies to the purchaser in default on terms other than immediate payment on delivery until otherwise authorized by the commission.

As soon as it is determined that a purchaser is in default, bingo equipment or supplies should not be sold or otherwise transferred (including a lease) except on terms of immediate payment on delivery. The Delinquent Purchaser List is sent by electronic mail to all licensed manufacturers and distributors in Texas every Monday morning.

5. Outstanding debt: When the new act came into effect there were no provisions to deal with outstanding debt. The TLC allowed us to take until the end of the year to clear these up. If we have current accounts past due do we report the individuals now? Or do we report only if they are delinquent on invoices that they receive after Jan 1, 2004?

ANSWER: The effective date of HB 2519 was September 1, 2003. Thus, with respect to the leasing of bingo equipment and supplies, if any person is more than 30 days past due on a lease invoice subsequent to September 1, 2003, the Commission must be notified that those persons are in default.

6. How do we implement an "Immediate payment on delivery"[sic] system when we are talking about electronic downloads? We have the technological ability to stop the use of the devices in the halls but do we have the right to interfere with a charities operation to enforce payment from a distributor? We do not want to disrupt the operation of the electronics in the hall as that will directly affect the charities ability to raise money.

ANSWER: The statute is silent as to the cessation of services as it affects a third party, which in your example, may be a charity or another distributor. However, the parties may agree on how to implement immediate payment on delivery in the event it becomes necessary to do so under the provisions of Texas Occupations Code Section 2001.218.

7. What are the circumstances under which the TLC will remove the COD restriction?

ANSWER: Subsection (c) provides in pertinent part:

(c) In the event of a default, a person may not sell or transfer bingo equipment or supplies to the purchaser in default on terms other than immediate payment on delivery until otherwise authorized by the commission.

Based on this subsection, the Commission removes a purchaser from the Delinquent Purchaser List when a purchaser is no longer delinquent to any licensed manufacturer or distributor.

8. Once a distributor is in default, does the TLC need notification of when payments that cure such default are subsequently received?

ANSWER: The statute is silent, but as a practical matter, the Commission needs notification when a default has been cured.

9. If a distributor is on the COD only list because of electronic unit payment defaults, does that make them ineligible to be sold any other bingo products other than on COD terms?

ANSWER: Yes, Texas Occupations Code, Section 2001.218 (c) provides in pertinent part:

(c) In the event of a default, a person may not sell or transfer bingo equipment or supplies to the purchaser in default on terms other than immediate payment on delivery until otherwise authorized by the commission.

Thus, the terms of immediate payment apply to the purchaser or lessee who is in default. Until the purchaser or lessee is removed from the Delinquent Purchaser List by the Commission, no manufacturer or distributor may sell or otherwise transfer bingo equipment or supplies to that purchaser or lessee except on terms of immediate payment.

10. If a distributor is past due and if we receive payments in advance of future electronic usage, can these payments be applied to the oldest invoices on the account? The affect of doing this will cause the distributors account to not have the aging of the older invoices to become extremely stagnant while they pay additional monies to bring the account back under the 30 day terms.

ANSWER: How the seller applies payments is not controlled by the provisions of the Bingo Enabling Act. However, a purchaser shall remain on the Delinquent Purchaser List until all past due amounts have been paid and the purchaser is current on all amounts owing.

SUMMARY

Pursuant to recent legislative changes, Texas Occupations Code §2001.218 provides that the lease of bingo supplies or equipment must be on terms of immediate payment or on terms requiring payment not later than the 30th day after the date of actual delivery.

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,

William L. Atkins, Director
Charitable Bingo Operations Division

Cc: C. Tom Clowe, Jr., Chairman
James A. Cox, Jr., Commissioner
Rolando Olvera, Commissioner

Kimberly L. Kiplin, General Counsel

^[1] While the statute is silent regarding some of the issues raised in your request for advisory opinion, the parties may be able to address these issues by the terms of the parties' agreement to the extent such an agreement is not in conflict with the Bingo Enabling Act or Charitable Bingo administrative rules.

^[2] The phrase "or lease" was added to subsection (a) of the statute, but no changes were made to subsections (b) and (c) to incorporate the applicability of those provisions to lease transactions. The Commission received no briefing on this issue. However, pursuant to Texas Government Code, Section 311.021(2), (3), and (4), all of Section 2001.218 is construed as applicable to the lease of bingo equipment and supplies. Texas Government Code, Section 311.021 provides in pertinent part:

In enacting a statute, it is presumed that:

- (1) compliance with the constitutions of this state and the United States is intended;
- (2) the entire statute is intended to be effective;
- (3) a just and reasonable result is intended;
- (4) a result feasible of execution is intended; and
- (5) public interest is favored over any private interest.

^[3] See Texas Government Code, Section 1.002. "Chapter 311, Government Code (Code Construction Act), applies to the construction of each provision in this code except as otherwise expressly provided by this code."

^[4] See *Broadhurst v. Employees Retirement System of Texas*, 83 S.W.3d 320, 323 (Tex.App.—Austin 2002, pet. denied)(stating, "[a]n administrative agency's construction or interpretation of a statute, which the agency is charged with enforcing, is entitled to serious consideration by reviewing courts, so long as that construction is reasonable and does not contradict the plain language of the statute.