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TEXAS LOTTERY COMMISSION

Gary Grief, *Executive Director*

Philip D. Sanderson, *Charitable Bingo Operations Director*

February 3, 2011

Mr. Jeffrey L. Minch, President
Littlefield Corporation
2501 N. Lamar Blvd.
Austin, TX 78705

Re: Bingo Advisory Opinion Request No. BAO 2011-0125-0004

Dear Mr. Minch:

By letter of January 21, 2011 you requested a Bingo Advisory Opinion based on the following scenario and questions.

Scenario:

A charity, a Texas corporation under the provisions of the Texas Non-Profit Corporation Act, applies for and receives a bingo conductor's license from the TLC Charitable Operations Division and conducts bingo pursuant to the license.

The licensed conductor fails to maintain its eligibility to conduct business in Texas by violating the Texas Non-Profit Corporation Act's reporting requirements.

The Office of the Secretary of State issues a notice of Involuntary Dissolution and finds, among other things:

"That the corporation forfeited its right to conduct affairs in this state "

Questions:

1. Can an authorized organization which has been involuntarily dissolved by the Office of the Secretary of State --- thereby having forfeited its right to conduct any business in the State of Texas --- lawfully apply for, renew or hold a license to conduct bingo in accordance with the Bingo Enabling Act?

Answer: Under Occupations Code §2001.002(19) a nonprofit organization may be either an unincorporated association or a nonprofit corporation, as long as it has been held to be tax exempt by the IRS. Therefore, a licensed authorized organization that has been involuntarily dissolved by the Office of the Secretary of State may hold a license, but it will

not be granted a new or renewed license unless it either reinstates, or provides proof of IRS tax exempt status in other than the corporate form. See discussion below.

2. Can an authorized organization that has been involuntarily dissolved by the Office of the Secretary of State --- thereby having forfeited its right to conduct any business in the State of Texas ---lawfully conduct bingo in accordance with the Bingo Enabling Act?

Answer: **Yes. See discussion below.**

3. Can the TLC CBOD lawfully issue a license or a license renewal to an authorized organization if the entity has been involuntarily dissolved by action of the Office of the Secretary of State?

Answer: The Texas Lottery Commission (TLC) may lawfully issue a license or a license renewal to an authorized organization that has been involuntarily dissolved if the authorized organization provides proof that the IRS has granted tax exempt status to the entity in its present form at the time of the application. See discussion below.

4. Can the TLC CBOD allow an authorized organization to continue to conduct bingo after the TLC CBOD has ascertained that the Secretary of State has involuntarily dissolved the corporate status of the authorized organization or charity conductor?

Answer: A licensed authorized organization that has been involuntarily dissolved by the Office of the Secretary of State may hold a license, but it will not be granted a new or renewed license unless it either reinstates or provides proof of IRS tax exempt status in other than the corporate form. See discussion below

5. Is the conduct of bingo by an authorized organization that has been dissolved by the Secretary of State pursuant to the Texas Non-Profit Corporation act a violation of the Bingo Enabling Act?

Answer: No. An authorized organization which has not had its tax exempt status revoked by the IRS is not in violation of the Bingo Enabling Act by reason of forfeiture of the right to conduct business or of its corporate existence. See discussion below.

And, if so, what provision? **Not Applicable.**

And, if so, subject to what penalty? **Not Applicable.**

6. If an authorized organization has been found to have conducted bingo unlawfully or without the benefit of a valid license after having been involuntarily dissolved by the Office of the Secretary of State pursuant to the Texas Non-Profit Corporation Act, can the authorized organization keep the proceeds of charitable bingo which it has received during the period after its involuntary dissolution?

Answer: We believe that this question presumes that the organization would be operated unlawfully or that their license would have been invalidated because of the forfeiture. Since the presumption fails, the question need not be answered. See discussion below.

Discussion:

Article 1396-1 was the Texas Non-profit Corporation Act (Act). The Act was repealed when the Texas Business Organization Code (Code) was enacted, but was continued in effect, for the purposes of applying to those corporations that did not sooner elect to come under the Code, until the Code became mandatorily applicable to all corporations on January 1, 2010. On January 1, 2010 all corporations became mandatorily subject to the Business Organizations Code. (For the purposes of this discussion, you might be interested in knowing that the corporation under your scenario would be treated essentially the same under either law.)

The Charitable Bingo Enabling Act (Bingo Act) does not require that a Nonprofit Organization be incorporated. The Bingo Act defines nonprofit organization as "an unincorporated association or a nonprofit corporation."¹ The essential requirement is that it be tax exempt by the IRS under §501(c) of the Internal Revenue Code.

When a corporation fails to comply with a statutory requirement, such as paying taxes, or filing reports, the Code provides mechanisms to force compliance; the mechanism most frequently used is twofold. Notice of the delinquency is sent to the registered agent at the registered office. Upon continued failure to comply, the Secretary of State will forfeit the corporation's right to do business in the state² and send further notice.³ The Code specifies the consequences of the

¹ Occupations Code 2001.002, §19

(19) "Nonprofit organization" means an unincorporated association or a corporation that is incorporated or holds a certificate of authority under the Texas Non-Profit Corporation Act (Article 1396-1.01 et seq., Vernon's Texas Civil Statutes). The organization:

- (A) may not distribute any of its income to its members, officers, or governing body, other than as reasonable compensation for services; and
- (B) must have obtained tax exempt status under Section 501(c), Internal Revenue Code of 1986.

² Texas Business Organizations Code

Sec. 22.360. FAILURE TO FILE REPORT.

- (a) A domestic or foreign corporation that fails to file a report under Sections 22.357 and 22.359 when the report is due forfeits the corporation's right to conduct affairs in this state.
- (b) The forfeiture takes effect, without judicial action, when the secretary of state enters on the record of the corporation kept in the office of the secretary of state:
 - (1) the words "right to conduct affairs forfeited"; and
 - (2) the date of forfeiture.

³ Texas Business Organizations Code

Sec. 22.361. NOTICE OF FORFEITURE. Notice of forfeiture under Section 22. 360 shall be mailed to the corporation's registered agent at the registered office or to the corporation at:

- (1) the address of the principal place of business of the corporation as it appears in the certificate of formation;
- (2) the last known address of the corporation as it appears on record in the office of the secretary of state; or

forfeiture of the right to do business.⁴ The corporation may not bring a suit, and a successor or assignee may not bring a suit on a claim having belonged to the corporation. This forfeiture does not invalidate contracts or prevent the corporation from defending a suit. At this juncture the corporate entity still exists, with limitations, and the corporation may revive its right to conduct business by complying with the filing or reporting requirement.⁵

However, upon still continued failure to comply, the Secretary will involuntarily terminate the corporate status.⁶ When the law provides that the corporate existence is forfeited, it arguably removes the attributes of the corporate form, which might include the limitation of liability of the officers or directors. However, some case law indicates that forfeiture of a corporate charter for failure to pay franchise taxes does not extinguish the corporation as a legal entity as long as there is a statutory right to reinstatement. *In re: ABZ Ins. Services Inc.* Bkrcty N.D. Texas 2000, 245 B.R. 255. Since there is no time limit for reinstatement under the Tax Code or under §22.365

(3) any other known place of business of the corporation.

⁴Texas Business Organizations Code

Sec. 22.362. EFFECT OF FORFEITURE.

- (a) Unless the right of the corporation to conduct affairs in this state is revived under Section 22.363:
 - (1) the corporation may not maintain an action, suit, or proceeding in a court of this state; and
 - (2) a successor or assignee of the corporation may not maintain an action, suit, or proceeding in a court of this state on a right, claim, or demand arising from the conduct of affairs by the corporation in this state.
- (b) This section does not affect the right of an assignee of the corporation as:
 - (1) the holder in due course of a negotiable promissory note, check, or bill of exchange; or
 - (2) the bona fide purchaser for value of a warehouse receipt, stock certificate, or other instrument negotiable by law.
- (c) The forfeiture of the right to conduct affairs in this state does not:
 - (1) impair the validity of a contract or act of the corporation; or
 - (2) prevent the corporation from defending an action, suit, or proceeding in a court of this state.

⁵ Texas Business Organizations Code

Sec. 22.363. REVIVAL OF RIGHT TO CONDUCT AFFAIRS.

- (a) A corporation may be relieved from a forfeiture under Section 22.360 by filing the required report, accompanied by the revival fee, not later than the 120th day after the date of mailing of the notice of forfeiture under Section 22.361.
- (b) If a corporation complies with Subsection (a), the secretary of state shall:
 - (1) revive the right of the corporation to conduct affairs in this state;
 - (2) cancel the words regarding the forfeiture on the record of the corporation; and
 - (3) endorse on that record the word "revived" and the date of revival.

⁶Texas Business Organizations Code

Sec. 22.364. FAILURE TO REVIVE; TERMINATION OR REVOCATION.

- (a) The failure of a corporation that has forfeited its right to conduct affairs in this state to revive that right under Section 22.363 is grounds for:
 - (1) the involuntary termination of the domestic corporation; or
 - (2) the revocation of the foreign corporation's registration to transact business in this state.
- (b) The termination or revocation takes effect, without judicial action, when the secretary of state enters on the record of the corporation filed in the office of the secretary of state the word "forfeited" and the date of forfeiture and cites this chapter as authority for that forfeiture.

BOC, there is arguably always a statutory right to reinstatement. Other case law construing similar Tax Code provisions suggests that the entity continues as a *de facto* entity (*McGown v. Kittel* (Civ. App. 1972) 480 SW2d 47, ref. n.r.e. and that the SOS's reinstatement operates retroactively (*Hinkel v. Adams* (App. 6 Dist. 2002) 74 SW3d 189).

Regardless, cases cited under chapter 171 of the Tax Code hold with the general theme that the role of tax statutes providing for forfeiture of corporate rights and existence was not to punish but to rehabilitate; to coerce the responsible parties to make the corporate filing and pay the corporate taxes. We think this is equally applicable to the forfeiture requirements for corporate reports. Therefore, the Code provides that the corporation may, even after corporate forfeiture, reinstate its corporate existence, by fully complying with its delinquency, filing and paying all taxes and fees and making all reports it would have paid and made had it not been forfeited.⁷ Upon full compliance, the forfeiture of corporate existence will be "set aside."

Summary

Under Occupations Code §2001.002(19) a nonprofit organization may be either an unincorporated association or a nonprofit corporation, as long as it has been held to be tax exempt by the IRS and has not had its tax exempt status revoked. It is not in violation of the Bingo Enabling Act merely by reason of forfeiture of the right to conduct business or of its corporate existence. Therefore, a licensed authorized organization that has been involuntarily dissolved by the Office of the Secretary of State may hold an existing license, but it will not be granted a new or renewed license unless it either reinstates, or provides proof of IRS tax exempt status in its then existing form.

⁷ Texas Business Organizations Code
Sec. 22.365. REINSTATEMENT.

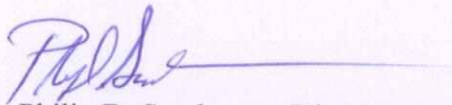
- (a) A corporation that is terminated or the registration of which has been revoked as provided by Section 22.364 may be relieved of the termination or revocation by filing the report required by Section 22.357, accompanied by the filing fee for the report, if the corporation has paid:
- (1) all fees, taxes, penalties, and interest due and accruing before the termination or revocation; and
 - (2) an amount equal to the total taxes from the date of termination or revocation to the date of reinstatement that would have been payable if the corporation had not been terminated or had its registration revoked.
- (b) When the report is filed and the filing fee is paid to the secretary of state, the secretary of state shall:
- (1) reinstate the certificate of formation or registration without judicial action;
 - (2) cancel the word "forfeited" on the record; and
 - (3) endorse on the record kept in the secretary's office relating to the corporation the words "set aside" and the date of the reinstatement.
- (c) If a termination or revocation is set aside under this section, the corporation shall determine from the secretary of state whether the name of the corporation is available. If the name of the corporation is not available at the time of reinstatement, the corporation shall amend its corporate name under this code.

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February 2, 2011
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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,

A handwritten signature in blue ink, appearing to read "Philip D. Sanderson", followed by a horizontal line.

Philip D. Sanderson, Director
Charitable Bingo Operations Division

cc: Mary Ann Williamson, Chairman
J. Winston Krause, Commissioner
Gary Grief, Executive Director
Kimberly L. Kiplin, General Counsel