

IN THE SUPREME COURT OF PENNSYLVANIA

SANDS BETHWORKS GAMING, LLC :

Petitioner, :

v. :

Docket No.: 216 MM 2017

PENNSYLVANIA DEPARTMENT OF
REVENUE; C. DANIEL HASSELL IN HIS
OFFICIAL CAPACITY AS SECRETARY OF
THE PENNSYLVANIA DEPARTMENT OF
REVENUE; and THE PENNSYLVANIA
GAMING CONTROL BOARD

Respondents. :

**PETITIONER’S APPLICATION FOR SPECIAL RELIEF IN THE
NATURE OF A PRELIMINARY INJUNCTION; APPLICATION FOR
EXPEDITED HEARING SCHEDULE**

Pursuant to 4 Pa. C.S. § 1904 and Rule 1531(a) of the Pennsylvania Rules of Civil Procedure, Petitioner Sands Bethworks Gaming, LLC (“Sands” or the “Petitioner”), by counsel, hereby moves for special relief in the form of a preliminary injunction to provide the following emergency and temporary relief:

- Pending final resolution of this action, enjoin the Respondents from collecting the newly imposed “Supplemental Daily Assessment” under the Pennsylvania Race Horse Development and Gaming Act, 4 Pa. C.S. § 1101 *et seq.*, as amended (2017) (the “Amended Act”);

- Pending final resolution of this action, enjoin the Respondents from distributing the proceeds of the “Supplemental Daily Assessment” from the “Casino Marketing and Capital Development Account” to other casinos under the Amended Act;
- Alternatively, allow the Petitioner to deposit its payment of the Supplemental Daily Assessment into an escrow account pending the resolution of this litigation, with the deposits to be returned to the Petitioner if it succeeds in this litigation; and
- Set an expedited briefing and hearing schedule on the merits of Petitioner’s Verified Petition for Review.

In support of its application, Sands hereby incorporates the Verified Petition for Review it filed on December 28, 2017. Sands further states the following:

BACKGROUND

1. As set forth in detail in the Petition for Review, filed on December 28, 2017, the Amended Act establishes a new tax scheme that went into effect on January 1, 2018. The tax scheme violates the Uniformity Clause of the Pennsylvania Constitution, the Special Laws Clause of the Pennsylvania Constitution, and the equal protection and due process guarantees of the Constitution of the United States. In this action, Sands seeks a permanent

injunction to enjoin collection of this unconstitutional tax and distribution of the tax proceeds to other casinos under the Amended Act.

2. Because the proceeds of the challenged tax scheme are directly and entirely passed on to private casinos through a restricted and discreet account, the requested preliminary injunction enjoining the Tax Scheme would have no effect on the state or municipal revenues or budgets nor would it otherwise affect the public interest.

3. **The challenged legislation:** The Amended Act taxes casinos based on their daily slot machine revenues through a newly imposed “Supplemental Daily Assessment” (“Supplemental Assessment”). 4 Pa. C.S. §§ 1407(C.1), 1407.1, 1408(C.1). The Amended Act requires that the Supplemental Assessment be paid into a new, restricted fund called the “Casino Marketing and Capital Development Account” (“CMCD Account”). The Act then requires the Pennsylvania Gaming Control Board (“Gaming Board”) to redistribute the Supplemental Assessment receipts from the CMCD Account back to a subset of the same casinos paying the tax. For purpose of this application, the Amended Act’s framework of requiring payment of the Supplemental Assessment into the CMCD Account and then distributing it to certain recipients out of that fund is referred to as the “Tax Scheme.”

4. **The Tax Scheme:** The Supplemental Assessment and CMCD Account create a patently non-uniform tax. The payouts from the CMCD Account function as a variable tax credit for the recipients that result in impermissibly variable tax rates. The amount that each casino must get credited from the CMCD Account—*i.e.*, from the very taxes that they paid into the fund—is unconstitutionally based on the casinos’ revenue. Some casinos receive higher payouts from the CMCD Account than others, in amounts that depend on the casino’s annual slot revenues. Casinos with higher revenues, like the Petitioner, are not eligible for any payouts from the CMCD Account at all. The Amended Act thus imposes a higher net tax rate on high-revenue casinos compared with other casinos. In addition, there is no public purpose for the payouts, which fund casino marketing and capital improvements to the recipients’ commercial gambling operations.

5. **The Amended Act violates the Uniformity Clause of the Pennsylvania Constitution:** The Tax Scheme flatly violates the Uniformity Clause of the Pennsylvania Constitution, which forbids taxing businesses at different rates based on their size and revenue. Pa. Const. Art. VIII § 1. The Uniformity Clause provides that “[a]ll taxes shall be uniform, upon the same class of subjects, within the territorial limits of the authority levying the tax, and shall be levied and collected under general laws.” *Id.* The Tax Scheme is patently *not*

uniform. Through its taxation and redistribution framework, the Tax Scheme places a varying and non-uniform net tax rate on the daily receipts that casinos generate from their businesses based only on the casino's annual slot revenue levels. These casinos are in the same class of taxpayers. The Tax Scheme's variable net tax rates, based only on casino revenue levels, are invalid under the Uniformity Clause.

6. **The Tax Scheme serves no public purpose.** The Tax Scheme serves no purpose except to finance the restricted CMCD Account, which is used exclusively to redistribute tax proceeds to other casinos for their own private use.

7. **The Tax Scheme Violates the Special Law Clause of the Pennsylvania Constitution.** The Pennsylvania Constitution prohibits special laws. It provides, “[t]he General Assembly shall pass no local or special law in any case which has been or can be provided for by general law.” Pa. Const. Art. III, § 32. It prohibits taxes that are “levied for a special local purpose” where only a “portion of the public is specially benefited,” *Allegheny County v. Monzo*, 500 A.2d 1096, 1105 (Pa. 1985), and where the “benefit received and the burden imposed [are] palpably disproportionate.” *Id.* at 1102. The Tax Scheme is specifically designed to redistribute tax revenue from certain casinos (like Sands) to other casinos. This redistribution is just the kind of non-public special law that

the Pennsylvania Constitution prohibits. It benefits only a small group and at grossly disproportionate amounts.

8. **The Tax Scheme Violates the Federal Constitution.** For largely the same reasons, the Tax Scheme violates the equal protection and constitutes a taking without due process under the Fourteenth Amendment to the Constitution of the United States. *See Mount Airy #1, LLC v. Pennsylvania Dep't of Revenue*, 154 A.3d 268, 273 (Pa. 2016); *Monzo*, 500 A.2d at 1102 (holding that a special tax that disproportionately benefits a portion of the public is “a taking without due process under the Fourteenth Amendment of the United States Constitution” and “an arbitrary form of classification in violation of equal protection”).

Part One

Interim Injunctive Relief

9. The Amended Act gives this Court exclusive jurisdiction to hear this challenge and also authorizes this Court “to take such action as it deems appropriate, consistent with the Supreme Court retaining jurisdiction over such a matter, to find facts or to expedite a final judgment in connection with such a challenge or request for declaratory relief.” 4 Pa. C.S. § 1904. The Court has jurisdiction under that provision to issue the requested preliminary injunction.

10. Pursuant to Pennsylvania Rule of Appellate Procedure 1532(a), this Court may order special relief, including a preliminary or special injunction, “in

the interests of justice and consistent with the usages and principles of law.” The factors for a preliminary injunction are that: (a) the injunction is necessary to prevent immediate and irreparable harm that cannot be adequately compensated by damages; (b) greater injury would result from refusing an injunction than from granting it, and, concomitantly, that issuance of an injunction will not substantially harm other interested parties in the proceedings; (c) a preliminary injunction will properly restore the parties to their status as it existed immediately prior to the alleged wrongful conduct; (d) the activity it seeks to restrain is actionable, its right to relief is clear and the wrong is manifest, or, in other words, that it is likely to prevail on the merits; (e) the injunction it seeks is reasonably suited to abate the offending activity; and (f) a preliminary injunction will not adversely affect the public interest. *Warehime v. Warehime*, 860 A.2d 41 (Pa. 2004); *see Allegheny Cty. v. Com.*, 544 A.2d 1305, 1307 (Pa. 1988). Each of those elements is met here and a preliminary injunction requiring an immediate stay of the Tax Scheme is warranted.

A. Irreparable Harm

11. The Supplemental Assessment imposes a plainly unconstitutional and non-uniform tax on Sands. The sole purpose of the Supplemental Assessment is to redistribute the assessment proceeds from higher-revenue casinos to lower-revenue casinos to fund the lower-revenue casinos’ private marketing and capital

improvement activities through the CMCD Account. The Supplemental Assessment is based on *daily* slot machine revenues. For every day that this unconstitutional and discriminatory tax is assessed, Sands will suffer irreparable harm.

12. The impact of this unlawful Tax Scheme will affect Sands' financial and operational condition. Beginning January 1, 2018, the Supplemental Assessment is assessed and remitted daily. Based on its projected revenues, Sands will be required annually to pay a Supplemental Assessment of approximately \$1.5 million into the CMCD Account.

13. Although the payment of the Supplemental Assessment is monetary in nature, this Court has held in two similar cases that a refund for the payment of unconstitutionally imposed taxes was not available. *See Mount Airy #1, LLC v. Pennsylvania Dep't of Revenue*, 154 A.3d 268, 380 n.11 (Pa. 2016) (denying the petitioner's request for a refund of unconstitutional gaming tax because "a decision of this Court invalidating a tax statute takes effect as of the date of the decision and is not to be applied retroactively") (quoting *Oz Gas, Ltd. v. Warren Area Sch. Dist.*, 938 A.2d 274, 285 (2007)); *see also Nextel Commc'ns of Mid-Atl., Inc. v. Commonwealth, Dep't of Revenue*, 171 A.3d 682, 705 (Pa. 2017) (same). The monetary harm to Sands will be irreparable if Sands is not eligible for a refund of any unconstitutional tax payments made while this case is pending. The requested

preliminary injunction, which seeks to stay the imposition of the tax or, alternatively, to permit Sands to pay the Supplemental Assessment into an escrow account, is necessary to protect Sands from payment of unconstitutional taxes without the likelihood of a refund.

14. The distribution of the Supplemental Assessment proceeds to other private casinos through the CMCD Account will provide an unfair and unconstitutional advantage to Sands' competitors. The CMCD Account payouts will allow Sands' competitors to operate their casinos at a lower effective tax rate than Sands and to spend the redistributed Supplemental Assessment proceeds on marketing and capital improvements to attract Sands' customers. A stay of the disbursement of CMCD Account funds is necessary to prevent irreparable harm to Sands' competitive standing in the marketplace.

B. No Greater Injury

15. The balance of harms weighs wholly in favor of a preliminary injunction enjoining the Tax Scheme. Sands will be concretely and irreparably harmed by the payment of the unconstitutional tax. By contrast, the Supplemental Assessment serves no identifiable public purpose. The only consequence of granting the requested injunctive relief would be to deprive certain private casinos of discriminatory distributions from the CMCD Account during the pendency of this litigation.

C. Status Quo

16. The requested injunctive relief preserves the status quo. The Supplemental Assessment and CMCD Account are newly established by the Amended Act. The Tax Scheme went into effect on January 1, 2018. Because the proceeds of the Supplemental Assessment are directly and entirely passed to private casinos, a preliminary injunction enjoining the Tax Scheme would have no effect on the state or municipal revenues or budgets. An immediate stay of the Supplemental Assessment and distributions from the CMCD Account would preserve the remainder of the Amended Act's tax rates and structure.

D. Likelihood of Success

17. Petitioner is likely to prevail on the merits of its underlying claim by establishing that the Tax Scheme violates the Pennsylvania Constitution and federal due process and equal protection guarantees.

18. The Tax Scheme is a clear violation of Pennsylvania's Uniformity Clause because it imposes a non-uniform effective tax rate on daily slot receipts that vary based on the casinos' annual slot revenue levels. Just last year, this Court struck down two similar variable-rate taxes as violations of the Uniformity Clause. *Nextel*, 171 A.3d at 689-701; *Mount Airy*, 154 A.3d at 272-79. The invalidation of the Tax Scheme follows directly from *Nextel* and *Mount Airy*.

19. The Tax Scheme presents an even clearer constitutional violation than the tax provisions struck down in *Nextel* and *Mount Airy*. In those cases, the invalidated taxes were paid into the general treasury or used to fund municipal budgets. See *Nextel*, 171 A.3d at 703-704; *Mount Airy*, 154 A.3d at 277-78. By contrast, this Tax Scheme does not even purport to serve any public purpose or to augment state or municipal revenues. Instead, the Amended Act requires the entirety of the Supplemental Assessment to be paid into the restricted CMCD Account, which has the sole function of redistributing those same proceeds to other private casinos. The Tax Scheme’s obvious lack of public purpose invalidates it from the start.

20. The Special Law provision of the Pennsylvania Constitution also prohibits the Tax Scheme, which is a tax “levied for a special local purpose” where only a “portion of the public”—a handful of private casinos—are “specially benefited.” *Allegheny County v. Monzo*, 500 A.2d 1096, 1105 (Pa. 1985), and where the “benefit received and the burden imposed [are] palpably disproportionate,” *id.* at 1102. The Tax Scheme is specifically designed to redistribute tax revenue from certain casinos (like Sands) to other casinos. This redistribution is just the kind of non-public special law that the Pennsylvania Constitution prohibits.

21. For similar reasons, the Tax Scheme violates the guarantees of equal protection and due process under the Fourteenth Amendment to the Constitution of the United States. *See Monzo*, 500 A.2d at 1102 (holding that a special tax that disproportionately benefits a portion of the public is “a taking without due process under the Fourteenth Amendment of the United States Constitution” and “an arbitrary form of classification in violation of equal protection”).

E. A Preliminary Injunction Is Appropriate

22. The requested injunctive relief is appropriate and well-suited to prevent irreparable harm to Sands. The constitutional harm would be abated by a preliminary injunction ordering an immediate stay of Sands’ obligation to pay the Supplemental Assessment and by an order that enjoins any payouts from the CMCD Account.

F. No Adverse Effect on the Public Interest

23. The Tax Scheme serves only to redistribute the Supplemental Assessment proceeds from higher-revenue to lower-revenue private casinos. The public will not be affected in any way by a preliminary injunction that stays its operation.¹

¹ Petitioner will also provide any injunction bond required by the Court under Rule 1531(b) of the Pennsylvania Rules of Civil Procedure.

Timing of Preliminary Injunction

24. Sands respectfully requests that the Court grant its request for a preliminary injunction to immediately enjoin the collection of the Supplemental Assessment, or alternatively, to allow Sands to pay the Supplemental Assessment into an escrow account while this litigation is pending. Pa. Rule Civ. P. 1531.

25. The requested injunctive relief presents only a question of law. All material facts are undisputed. As such, there is no need for any evidentiary hearing.

26. Accordingly, Sands respectfully requests that this Court grant its request for a preliminary injunction and, if necessary, schedule a hearing, of this application within **ten days** or at the earliest possible date. Pa. Rule Civ. P. 1531(a).

Part Two

Expedited Briefing On The Merits of the Main Petition

27. Sands further respectfully requests that this Court establish an expedited briefing schedule on the merits of the petition for review. The petition raises purely legal issues regarding the constitutionality of the Tax Scheme, 4 Pa. C.S. §§ 1407(C.1), 1407.1, 1408(C.1), that should be decided in an expeditious

fashion. There should be full agreement on all material facts alleged in the Petition.

5. Sands respectfully submits that the interests of all parties will be best served by a schedule that permits time for (i) orderly and thoughtful briefing, argument, and decision; and (ii) timely implementation of the Court's decision.

Accordingly, Petitioner respectfully requests that this Honorable Court set an expedited schedule, which will permit argument and a final decision on the Petition for Review during this term:

Respondents' Preliminary Objections (if any): January 30, 2018

Petitioner's Brief/Response to Preliminary Objections: February 9, 2018

Respondents' Brief: March 1, 2018

Petitioner's Reply (if necessary): March 8, 2018

Oral Argument: April 2018 Session

WHEREFORE, for the foregoing reasons and those incorporated in the Petition for Review, Petitioners respectfully request that this Court grant its Application for Special Relief in the Nature of a Preliminary Injunction and enter an order Pending final resolution of this action that, (1) enjoins the Respondents from collecting the "Supplemental Daily Assessment" under Amended Act; (2) enjoins the Respondents from distributing the proceeds of the Supplemental Assessment from the CMCD Account to other casinos under the Amended Act; or

alternatively, (3) allows the Petitioner to deposit its payment of the Supplemental Assessment into an escrow account pending the resolution of this litigation, with the deposits to be returned to the Petitioner if it succeeds in this litigation;

FURTHERMORE, Petitioners request that this Court set a schedule for expedited consideration of the merits of the Petition for Review in accordance with the briefing schedule set forth above.

Dated: January 16, 2018

Respectfully submitted,

By: /s/ Adam A. DeSipio

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