Received 4/25/2018 2:50:09 PM Supreme Court Middle District

Filed 4/25/2018 2:50:00 PM Supreme Court Middle District
216 MM 2017

# IN THE SUPREME COURT OF PENNSYLVANIA

No. 216 MM 2017

SANDS BETHWORKS GAMING, LLC

Petitioner,

v.

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.

## INTERVENOR'S SUPPLEMENTAL REPLY BRIEF IN SUPPORT OF PETITION FOR REVIEW IN THE NATURE OF A COMPLAINT SEEKING A DECLARATORY JUDGMENT AND INJUNCTIVE RELIEF

Mark S. Stewart, Esquire (Pa. I.D. 75958)
Kevin M. Skjoldal, Esquire (Pa. I.D. 200841)
Kristine E. Marsilio, Esquire (Pa. I.D. 316479)
ECKERT SEAMANS CHERIN & MELLOTT, LLC
213 Market Street, Eighth Floor
Harrisburg, PA 17101
Telephone: 717-237-6000
Fax: 717-237-6019
mstewart@eckertseamans.com
kskjoldal@eckertseamans.com
kmarsilio@eckertseamans.com

Date: April 25, 2018

Attorneys for Intervenors Greenwood Gaming and Entertainment, Inc., d/b/a Parx Casino

## TABLE OF CONTENTS

## TABLE OF AUTHORITIES

**Page(s)**

**Cases**



**Statutes**



**Other Authorities**



**Rules**

## I. INTRODUCTION

Greenwood Gaming and Entertainment, Inc. ("GGE") files this Intervenor's Supplemental Reply Brief to address certain arguments raised in the Respondents' Supplemental Brief filed on behalf of the 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 ("the Board") (collectively, "Respondents") in this proceeding. In their Supplemental Brief, Respondents raise several arguments challenging the positions taken by GGE in its Intervenor Brief, all of which lack merit.[1] Despite the Commission's Order limiting the content of Respondents' Supplemental Brief and Respondents' claim that its Supplemental Brief is limited to matters "not previously addressed by the Respondents," Respondents raise very few, new arguments in their Supplemental

[1] GGE filed an Application for Leave to Intervene in this proceeding on March 20, 2018 and filed an Intervenor Brief on the same date. GGE's intervention was still pending at the time Respondents filed their Brief in this matter. As such, Respondents did not specifically address any of GGE's arguments in their Brief. Rather, they indicated that should this Court grant GGE's intervention, the arguments advanced in their Brief should apply with equal force to any parallel claims brought by GGE. Respondent Brief at 6, FN 1. Intervenors filed a Reply Brief on April 10, 2018, at which time their Intervention was still pending, addressing the arguments advanced by Respondents, as if they applied to GGE's arguments. On April 12, 2018, this Court issued an Order, granting Intervenor's intervention and authoring Respondents "to file limited, supplemental briefing directly responsive to Intervenor's Brief in Support, so long as that supplemental briefing is not duplicative of Respondents' Brief in Opposition."

Brief.[2] Specifically, Respondents make a second, although equally unpersuasive, attempt to argue, among other things, that the relief sought by Sands exceeds this Court's original jurisdiction and that the challenged provisions of the Pennsylvania Race Horse Development and Gaming Act, 4 Pa.C.S. §§ 1101 *et seq* ("Gaming Act")[3] satisfy the requirements of the Uniformity Clause and the Special Law restrictions in the Pennsylvania Constitution. PA. Const. art. VIII, § 1; PA. Const. art. III, § 32. As was the case with Respondents' initial attempt to make these arguments, Respondents' contentions in their Supplemental Brief fail to obviate the constitutional defects in the tax scheme challenged in this action.

GGE thoroughly discussed its positions related to these issues in its Intervenor and Reply Briefs. Respondents' Supplemental Brief contains no new information that changes GGE's position on these issues. As discussed, the tax scheme violates the Special Law Clause of the Pennsylvania Constitution by treating Pennsylvania licensed gaming entities differently, granting special

---

[2] Additionally, many of the arguments raised in Respondents' Supplemental Brief are actually responsive to Intervenor's Reply Brief (as opposed to GGE's Main Brief). See e.g. Supplemental Brief at 4 (addressing the arguments raised in GGE's Reply Brief regarding Respondents' jurisdictional challenge); see also Supplemental Brief at 8, FN 2 (addressing the arguments raised by GGE in its Reply Brief related to the Uniformity Clause challenge); see also Supplemental Brief at 10-11 (addressing the arguments raised by GGE in its Reply Brief related to the Special Law restrictions challenge).

[3] The provisions of the Gaming Act under challenge before this Court are Sections 1407(c.1), 1407.1 and 1408(c.1) (the "tax scheme").

privileges in the form of automatic grants to certain casinos, at the expense of others. These classifications are based solely on levels of casino slot machine revenue, which levels were known to the General Assembly at the time of enactment, and not on geographic location or any other basis. Such classifications designed to grant privileges to one private company over another are exactly the kind of legislation the Special Law restrictions sought to protect against.

Additionally, the challenged provisions of the Gaming Act violate the Uniformity Clause. In determining a statute's compliance with the Uniformity Clause, it is necessary to look to the net effect of the tax rate. Here, the tax scheme created under the Gaming Act has the net effect of imposing disparate tax rates on Pennsylvania casinos based on their slot machine revenues.

This Court has the authority to restrain the implementation of the challenged provisions of the Gaming Act and refund the monies already paid into the CMCD Account. The Gaming Act gives this Court the authority to hear **any** challenge **or** render a declaratory judgment concerning the constitutionality of the Gaming Act. 4 Pa. C.S. § 1904. This Court is further authorized to take **any action it deems appropriate**, consistent with this Court retaining jurisdiction over such a matter, to expedite a final judgment in this proceeding. Id. Additionally, as Respondents have acknowledged, the circumstances in this case allow for the refund of monies

already paid into the CMCD Account, as the money deposited into the CMCD Account can only be spent on the very distributions challenged in this case, and no governmental entity would be burdened by the return of money in this proceeding. As such, return of the refunds already paid into the CMCD Account is appropriate in this case.

For the reasons discussed below and in the Intervenor Brief and Reply Brief, this Court should: (1) find that the challenged provisions of the tax scheme are unconstitutional; (2) issue a permanent injunction enjoining the distribution of any funds that may be paid into the restricted CMCD Account; and (3) order the return of any funds paid into the CMCD Account.

## II. SUPPLEMENTAL REPLY ARGUMENT FOR INTERVENOR – GGE

### A. The tax scheme in the Gaming Act violates the Special Law Restrictions of the Pennsylvania Constitution by granting special privileges in the form of automatic grants to certain casinos, at the expense of others.

Regarding the Special Law restrictions challenge, Respondents reiterate their argument that the law does not violate the Special Law restriction since any Category 1, 2, or 3 licensee is eligible for a grant under Section 1407.1(e)(1) of the Gaming Act. See Supplemental Brief at 9-10; see also Respondent Brief at 35-36. Respondents also address the arguments raised by GGE in its Intervenor Reply

Brief that the geographical provisions in the Gaming Act are not related to the provisions challenged in this case, arguing that the tax scheme can only be understood in relation to the Gaming Act's broader statutory authority and that the tax scheme operates as a "general law" by making grant money available to "any struggling facility, regardless of where it is located." Supplemental Brief at 10-11. Respondents also make the unfounded assertion that the General Assembly had no way of knowing which slot machine licensees would receive mandatory grants, because gross terminal revenues vary from year to year. Supplemental Brief at 11-12, FN 3.

First, as discussed by GGE in its Intervenor and Reply Briefs, no claim can be made that the law applies uniformly to all class members. It is evident that no monies will likely be available beyond the amounts needed for the automatic tax grants, if there is even enough to pay those monies in full, and that grant money will not be available in equal proportions to every licensed Pennsylvania Category 1, 2, and 3 casino.[4] See Intervenor Brief at 26; Intervenor Reply Brief at 7-8; Sands Brief at 11-13. Even Respondents have acknowledged that the CMCD Account is used to finance the marketing and capital development of "several"

---

[4] This fact also renders the Respondents' alleged safety net illusory. If all thirteen (13) Pennsylvania slot machine licensees qualified for automatic grants, the purported net would be full of holes, providing little if any material financial benefit and comprising nothing more than an illogical and circular redistribution of private company revenue.

(*i.e.*, not all) casinos in the Commonwealth. Respondent Brief at 36. Such classifications designed to grant privileges to one company over another – to pick winners and losers – are exactly the kind of legislation the Special Law restrictions sought to protect against.

As to Respondents' argument that the geographical restrictions in the Gaming Act somehow make the tax scheme at issue in this proceeding a "general law," such an argument is entirely illogical. There is nothing in the Gaming Act to prevent neighboring casinos from receiving automatic grants under the tax scheme at issue in this proceeding. Moreover, the purpose of the special law legislation "was to prevent the General Assembly from creating classifications in order to grant privileges to one person, one company or one county." Wings Field Preservation Associations, L.P. v. Comm., Dept. of Transp., 776 A.2d 311, 316 (Pa. Cmwlth. 2011) (emphasis added). Thus, even assuming that the few casinos that will receive automatic grant money are located in different areas of the Commonwealth, such a factor would be irrelevant, because the law does not apply uniformly to all Pennsylvania gaming entities and, instead, benefits only a few.

Regarding Respondents' assertion that the General Assembly had no way of knowing which slot machine licensees would receive mandatory grants, such a claim is entirely unfounded. Information regarding Pennsylvania casinos' GTR

and GTR history is regularly publicized by the Board, and available and maintained on the Board's website.[5] The fiscal year (FY) 2015-2016 GTR data would have been available on the Board's website at the time the General Assembly adopted the amendments to the Gaming Act.[6] The casinos that would have qualified for automatic grants based on the information available to the General Assembly at the time it passed the amendments to the Gaming Act are the same four casinos that would receive automatic grants based on the most-current FY 2016-2017 statistics and in the same amounts.[7] This information should be of

---

[5] The Pennsylvania Rules of Evidence allow a court to take judicial notice of an adjudicative fact that is not subject to reasonable dispute if it "is generally known within the trial court's territorial jurisdiction" or "can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned." Pa. R.E. 201. Information on the Board's website can be accurately and readily determined and cannot be reasonably questioned, so this Court can take judicial notice of said information. Current information related to Pennsylvania casinos' GTR is available at the following website: https://gamingcontrolboard.pa.gov/files/revenue/Gaming_Revenue_Monthly_Slots_FY20172018.pdf.

[6] The General Assembly adopted the amendments to the Gaming Act on October 30, 2017.

[7] Specifically, the Board's website shows that Presque Isle Downs and Mount Airy Casino Resort had total GTR of less than $150,000,000 during FYs 2015-2016 and 2016-2017. Additionally, Sugarhouse Casino in Philadelphia had GTR between $150,000,000 and $200,000,000 in both years. Additionally, Lady Luck Casino Nemacolin, a Category 3 casino, had GTR below $50,000,000 both years. https://gamingcontrolboard.pa.gov/files/revenue/Gaming_Revenue_Monthly_Slots_FY20172018.pdf.

no surprise, especially considering that the automatic grant qualifiers were well within the threshold for qualification in FY 2015-2016 and in light of the information regarding changes in casinos' GTR, also available on the Board's website.[8] As such, Respondents' claim that the General Assembly had "no way of knowing" which Pennsylvania casinos would qualify for automatic grants is entirely without merit.

GGE has demonstrated in its Intervenor and Reply Briefs that the tax scheme violates the Special Law Clause of the Pennsylvania Constitution by treating Pennsylvania licensed gaming entities differently, granting special privileges in the form of automatic grants to certain casinos, at the expense of others. Intervenor Brief at 13- 17; Reply Brief at 3-8. These classifications are based solely on levels of casino slot machine revenue, which levels were known to the General Assembly at the time of enactment, and not on geographic location or any other basis. Such classifications designed to grant privileges to one company over another are exactly the kind of legislation the Special Law restrictions sought to protect against.

---

https://gamingcontrolboard.pa.gov/files/revenue/Gaming_Revenue_Monthly_Slots_FY20152016.pdf

[8] See Id.

### B. The Gaming Act establishes a tax scheme that treats licensed gaming entities differently based upon their slot machine revenue in violation of the Uniformity Clause of the Pennsylvania Constitution.

In their Supplemental Brief, Respondents merely reiterate the same arguments raised in their initial Brief, wherein they mischaracterized the arguments advanced by Sands and GGE (*i.e.* the Uniformity Clause does not limit how taxes can be distributed, the distributions are not "tax credits," all Category 1-3 slot machine licensees benefit from the tax scheme). See Supplemental Brief at 9-12; see also Respondent Brief at 33-38. GGE has already responded to these arguments in full in its Intervenor Brief and Reply Brief and incorporates those arguments herein. See Intervenor Brief at 13-17; see also Reply Brief at 3-8. As discussed, here, the tax scheme created under the Gaming Act has the net effect of imposing disparate tax rates on Pennsylvania casinos based on their slot machine revenues in violation of the Uniformity Clause.

### C. This Court has the authority to restrain the enforcement of the challenged provisions of the Gaming Act and refund the monies already paid into the CMCD Account.

In their Supplemental Reply Brief, Respondents also make a second attempt to argue that this Court lacks original jurisdiction to entertain the Petitioner's request for relief. Supplemental Brief at 3-6. Respondents' second attempt to argue this point is equally unpersuasive. First, Respondents attempt to refute the

distinction raised by GGE in its Reply Brief between jurisdiction and the authority to grant a particular form of relief. Supplemental Brief at 4-5. In support of their argument, Respondents rely on 42 U.S.C. § 1983 (Civil Action for Deprivation of Rights) and this Court's decision in Mount Airy #1, LLC v. Pennsylvania Dep't of Revenue & Eileen McNulty, 154 A.3d 268, 276-77 (Pa. 2016) ("Mount Airy"). Id. Referring to the Mount Airy decision, Respondents state, "By holding that it lacked jurisdiction to entertain the petitioner's § 1983 claim while acknowledging that it could otherwise adjudicate an 'equal protection claim' falling within the parameters of § 1904, this Court necessarily held that its *jurisdiction* did not extend far enough to embrace certain *remedies* available under § 1983." Supplemental Brief at 5.

Respondents completely misstate this Court's holding in Mount Airy. In Mount Airy, this Court did not find that it lacked jurisdiction to award certain *remedies*. It specifically found that it lacked jurisdiction to adjudicate statutory Section 1983 claims. Mount Airy, 154 A.3d at 271 ("Although this Court has exclusive jurisdiction 'to hear any challenge to or to render a declaratory judgment concerning the constitutionality of the Gaming Act, we lack original jurisdiction over Mount Airy's Section 1983 claim.'"). Second, Respondents' reliance on 42 U.S.C. § 1983 and this Court's decision in Mount Airy are not applicable here.

Sands did not raise any Section 1983 claims, as the petitioner in Mount Airy did. The actions, here, were brought pursuant to the Court's authority under 4 Pa. C.S. § 1904. Finally, regardless of whether or not Respondents' challenge is classified as jurisdictional, Respondents have already acknowledged that this case is different from Mount Airy and other cases wherein the Court found that refunds were not appropriate in circumstances when a tax was found to be unconstitutional, and Respondents have agreed to provide full refunds if Petitioners prevail in this proceeding. See Respondent Brief at 21-22.

Next, Respondents argue that the General Assembly's decision to explicitly authorize "declaratory relief" in Section 1904 of the Gaming Act "implies that this Court lacks original jurisdiction to entertain requests for injunctive relief" because "the mention of a specific matter in a general statute implies the exclusion of others not mentioned." Supplemental Brief at 6. Section 1904, however, does not limit the Court's relief to declaratory relief. In fact, Section 1904 specifically gives this Court the authority "to hear **any** challenge to **or** to render a declaratory judgment" concerning the constitutionality of the Gaming Act. 4 Pa. C.S. § 1904. This Court is further authorized to take **any action it deems appropriate**, consistent with this Court retaining jurisdiction over such a matter, to expedite a final judgment in this proceeding. Id.

"Every statute shall be construed, if possible, to give effect to all its provisions." 1 Pa. C. S. § 1921(a). When construing a statute, a court's objective under 1 Pa.C.S. § 1921(a) is to ascertain and effectuate the legislative intent. In so doing, the court must begin with a presumption that the legislature did not intend any statutory language to exist as mere surplusage and must construe a statute so as to give effect to every word contained therein. First Union Nat'l Bank v. Portside Refrigerated Servs., 827 A.2d 1224, 1226 (Pa. Super. Ct. 2003); see also Altoona Hous. Auth. v. City of Altoona, 785 A.2d 1047, 1047 (Pa. Cmwlth. 2001).

If the General Assembly had intended to limit this Court's jurisdiction or authority to grant relief, the General Assembly would not have used the word "or" in describing this Court's authority, nor would the statute provide this Court with the authority to hear "any" challenge or to "take any action." Thus, giving effect to all of the words in Section 1904, it is clear that this Court has authority to "hear any challenge" and to "take any action it deems appropriate" with respect to relief in this proceeding. 4 Pa. C.S. § 1904. The Respondents' interpretation would render these phrases of Section 1904 mere surplusage contrary to the requirements of 1 Pa. Cons. Stat. § 1921(a).

GGE has further discussed why refunds are appropriate relief in this case in its Intervenor and Reply Briefs and incorporate those arguments herein. Intervenor Brief at 29-33; Reply Brief at 14-19.

## III. CONCLUSION

For the reasons set forth herein and in the Intervenor Brief and Reply Brief, GGE requests this Court to:

(1) Find that the challenged provisions of the Gaming Act are unconstitutional on their face and as applied;

(2) Issue a permanent injunction enjoining the distribution of any funds that may be paid into the restricted CMCD Account; and

(3) Order the return of any funds paid into the CMCD Account.

Respectfully Submitted,

*/s/ Mark S. Stewart*

Date: April 25, 2018

Mark S. Stewart, Esq. (I.D. 75958)
Kevin M. Skjoldal, Esq. (I.D. 200841)
Kristine E. Marsilio, Esq. (I.D. 316479)
Eckert Seamans Cherin & Mellott, LLC
213 Market Street, Eighth Floor
Harrisburg, PA 17101
Phone: 717.237.6000; Fax: 717.237.6019
mstewart@eckertseamans.com
kskjoldal@eckertseamans.com
kmarsilio@eckertseamans.com

Attorneys for Intervenors Greenwood Gaming and Entertainment, Inc., d/b/a Parx Casino

{L0755274.1}

CERTIFICATE OF COMPLIANCE WITH PA. R.A.P. 2135

I hereby certify that the foregoing Reply Brief complies with the word count limit in Pa.R.A.P. 2135 for a reply brief, and does not exceed 7,000 words based on the word count of the Microsoft Word processing system used to prepare the brief.

*/s/ Mark S. Stewart*
Mark S. Stewart, Esq.
Kevin M. Skjoldal, Esq.
Kristine E. Marsilio, Esq.

Date: April 25, 2018

Counsel for Intervenors Greenwood Gaming and Entertainment, Inc., d/b/a Parx Casino

CERTIFICATE OF COMPLIANCE

I hereby certify that this filing complies with the provisions of the *Public Access Policy of the Unified Judicial System of Pennsylvania: Case Records of the Appellate and Trial Courts* that require filing confidential information and documents differently than non-confidential information and documents.

*/s/ Mark S. Stewart*

Mark S. Stewart, Esq.
(I.D. No. 75958)
Kevin M. Skjoldal, Esq.
(I.D. No. 200841)
Kristine E. Marsilio, Esq.
(I.D. No. 316479)
ECKERT SEAMANS CHERIN & MELLOTT, LLC
213 Market Street, 8th Floor
Harrisburg, PA 17101
Telephone: 717.237.6000
Fax: 717.237.6019

Attorneys for Intervenors Greenwood Gaming and Entertainment, Inc., d/b/a Parx Casino

Date: April 25, 2018

## PROOF OF SERVICE

I hereby certify that I am this day serving two copies of the foregoing Supplemental Reply Brief upon the persons and in the manner indicated below, which service satisfies the requirements of Pa. R.A.P. 121:

Service by first class mail and
the Court's Electronic Filing System addressed as follows:

Timothy J. Lowry, Esquire
Ilana Eisenstein, Esquire
Adam A. DeSipio, Esquire
DLA PIPER LLP
1650 Market Street, Suite 4900
Philadelphia, PA 19103
Adam.desipio@dlapiper.com

John J. Hamill, Esquire
DLA Piper LLP
444 West Lake Street, Suite 900
Chicago, IL 60606-0089
John.hamill@dlpiper.com

R. Douglas Sherman, Esquire
Chief Counsel
PA Gaming Control Board
303 Walnut Street
Commonwealth Tower, 5th Fl.
Harrisburg, PA 17101-1803
rsherman@pa.gov

Karen M. Romano, Deputy
Attorney General
Office of Attorney General
Civil Litigation Section
15th Floor, Strawberry Square
Harrisburg, PA 17120
kromano@attorneygeneral.gov

Anthony T. Kovalchick, Esquire
Office of Attorney General
Manor Complex
564 Forbes Avenue
Pittsburgh, PA 15219
akovalchick@attorneygeneral.gov

*/s/ Mark S. Stewart*

Mark S. Stewart, Esq.
Kevin M. Skjoldal, Esq.
Kristine E. Marsilio, Esq.

Counsel for Intervenors Greenwood Gaming and Entertainment, Inc., d/b/a Parx Casino

Date: April 25, 2018