THE ATTORNEY GENERAL OF TEXAS

AUSTIN 11, TEXAS

PRICE DANIEL
ATTORNEY GENERAL

January 23, 1950

Hon. Robert S. Calvert
Comptroller of Public Accounts
Austin, Texas

Opinion No. V-986.

Re: Whether "owner" of coin-operated electric scoreboard is subject to occupation tax imposed on "owners" of certain coin-operated machines.

Dear Sir:

You have requested the opinion of this office as to whether the occupation tax imposed on the "owner" of coin-operated vending machines by Articles 7047a-2 to 7047a-18, V.C.S., would be applicable to owners of coin-operated electric scoreboards used in connection with shuffleboard games. From the file attached to your request we have gathered the following facts with regard to such scoreboards.

The Regal Electric Scoreboard is advertised as having the following features: "Wall mounting type - Hardwood cabinet . . . - 4 color silk screen panel- . . . Ace 10¢ coin chute - Full Anti-Cheat Protection - Large easily read figures . . . -All At a Price Which Will Be More Than Covered By Increased Returns From Your Shuffleboard." Owners of shuffleboard games are queried thus:

> "Why spend so much of your time keeping track of the play, and income, from your shuffleboard? A Regal scoring unit will act as an automatic collecting device and save you unlimited . . . time and trouble . . . eliminate misunderstandings over number of games played- . . . It will definitely increase your income from your shuffleboard."

The manufacturers of these machines contend that they are not coin-operated amusement devices inasmuch as they are not games and do not control the playing of shuffleboard but merely register the scores and supply the service of collection for the merchant in whose establishment shuffleboard is being played.

Article 7047a-3 provides that "Every 'Owner' as that term is hereinabove defined, who owns, controls, . . . or who permits to be exhibited or displayed . . . any 'coin-operated machines' as that term is defined herein, shall pay . . . an annual occupation tax."

Article 7047a-4 exempts from the tax levied by the Act "gas meters, pay telephones, pay toilets, and cigarette vending machines which are now subject to an occupation or gross receipts tax and 'service coin-operated machines' as that term is defined, . . ."

Article 7047a-2(c) provides as follows:

> "(c) The term 'coin-operated machine' as used herein shall mean and include every machine or device of any kind or character which is operated by or with coins, or metal slugs, tokens or checks, 'merchandise or music coin-operated machines' and 'skill or pleasure coin-operated machines' as those terms are hereinafter defined, shall be included in such terms."

The statutory definition of a "merchandise or music coin-operated machine" is clearly not applicable to the electric scoreboards here being considered.

Sections (e) and (f) of Article 7047a-2 read as follows:

> "(e) The term 'skill or pleasure coin-operated machines' as used herein shall mean and include every coin-operated machine of any kind or character whatsoever, when such machine or machines dispense or are used or are capable of being used or operated for amusement or pleasure or when such machines are operated for the purpose of dispensing or affording skill or pleasure, or for any other purpose other than the dispensing or vending of 'merchandise or music' or 'service' exclusively, as those terms are defined herein. The following are expressly included within said term: marble machines, marble table machines, marble shooting machines, miniature race track machines, miniature football machines, minature golf machines, miniature bowling machines, and all

> other coin-operated machines which dispense or afford skill or pleasure. Provided that every machine or device of any kind or character which dispenses or vends merchandise, commodities or confections or plays music in connection with or in addition to such games or dispensing of skill or pleasure shall be considered as skill or pleasure machines and taxed at the higher rate fixed for such machines.
>
> "(f) The term 'service coin-operated machines' shall mean and include pay toilets, pay telephones and all other machines or devices which dispense service only and not merchandise, music, skill or pleasure."

If the scoreboards do not come within the statutory definition of "service coin-operated machines" they must automatically be classified as "skill or pleasure coin-operated machines", and the "owner" thereof will therefore be liable for the occupation tax imposed by these articles.

House Bill 223, Acts 44th Leg., R.S. 1935, ch. 354, p.905, which attempted to impose an occupation tax on the "owner" of coin-operated vending machines, was held invalid in Sheppard v. Giebel, 110 S.W.2d 166 (Tex. Civ.App.1937). This Act, which we will hereinafter refer to as the original Act, was declared unconstitutional in toto by reason of the ambiguity of those provisions providing for payment of the tax. Other provisions of the statute were discussed by the court in the course of the opinion and because the exemption provisions of the original Act and the exemption provisions of our present statute are very similar, we will be guided by the court's construction thereof.

The original Act provided, in part, as follows:

> "Sec. 4. Gas meters, pay telephones, cigarette vending machines, pay toilets installed and used for sanitary purposes, and all machines engaged in vending a service are expressly exempt from the provisions of this Act.
>
> "Sec. 4a. The exemptions provided herein are recognized and made by reason of the

fact that gas meters, pay telephones and cigarette vending machines are now subject to the payment of an occupation tax under existing laws, and pay toilets being service vending machines, are not covered by the levy made hereby."

With regard to these provisions the court said:

". . . it is manifest that the only machines exempted in section 4 because deemed 'service vending machines' were pay toilets; the other exemptions named being excluded from the tax because they were already taxed under existing laws. While 'service vending machines' were exempt, the act nowhere undertook to define what should be deemed such machines, and the only type of machine named as falling within this class was pay toilets. In defining the classes of machines to be taxed in section 1a of the act, it is to be noted that 'service vending machines' are not mentioned as such. On the contrary, the act is limited to machines vending 'merchandise, commodities, confections, amusement, or pleasure.' It reasonably appears, therefore, that it was the legislative intent to include within the taxing act, other than machines vending some sort of commodity or merchandise, only machines designed to afford amusement or pleasure. Following this general definition were specifically named numerous machines coming within the terms of the act, the first one of which was a 'phonograph' operated by inserting a coin, slug, token, or check. Even if it be conceded, therefore, that the appellees' machines be considered service vending machines as contradistinguished from machines vending articles of merchandise, the fact that machines vending that character of service classed as amusement or pleasure were expressly included in the act, and, further, the specific inclusion of phonographs so operated, manifests a clear legislative intent that such machines were to be taxed and not exempted. Manifestly there is a clear and reasonable basis of classification in separating this class of vending machines from such service vending machines as pay toilets, pay telephones, etc.; and such reasonable basis of classification is

> sufficient to sustain the validity of the act.
>
> ". . .
>
> "We think that there can be no doubt that there is, because of the difference in the nature, manner of operation, and purpose, a reasonable basis for a difference of classification between the type of machines used merely for amusement and pleasure, such as those named in section 1a of the act, and those designed to serve the public health, convenience, and necessity, such as pay toilets. That being true, the act should not be stricken down for that reason."

It is noteworthy that the present act adds but one specific example, i.e., pay telephones, in its definition of "service coin-operated machines." (Those included in the "occupation tax" group in the original exemption provision are still given as examples of this class in the present statute.)

Thus we have little or no more by way of statutory definition of a "service" machine than had the court in the Giebel case. We are therefore inclined to adopt the view of the court that "service" machines are "those designed to serve the public health, convenience and necessity, such as pay toilets." We find no service of this character in coin-operated electric scoreboards. Indeed, it is apparent that the chief service is not for the convenience of the public but for the convenience of the "owner" of such machines. We further think that such service as is rendered the public by the electric scoreboards would be that character of service classed as amusement or pleasure and therefore within the statutory definition of a "skill or pleasure coin-operated machine". Surely the manufacturer of these machines would not permit the suggestion that they do not contribute to the pleasure of playing the game they are designed to score. When so used we think they become an integral part of the game, rendering immaterial the fact that the game could be played without them. We are therefore of the opinion that an "owner", as that term is defined in the Act, of one of these machines would be required to pay the occupation tax imposed by Articles 7047a-2 to 7047a-18, V.C.S.

SUMMARY

A coin-operated electric scoreboard used to score shuffleboard games is not a "service coin-operated machine"; and an "owner", as that term is defined by Article 7047a-2, V.C.S., must pay the occupation tax imposed by Articles 7047a-2 -- 7047a-18, V.C.S.

APPROVED:

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Yours very truly,

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