



**THE ATTORNEY GENERAL  
OF TEXAS**

**JIM MATTOX  
ATTORNEY GENERAL**

November 3, 1990

Honorable Hugh Parmer  
Chairman  
Committee on Intergovernmental Relations  
Texas State Senate  
P. O. Box 12068  
Austin, Texas 78711

LO-90-88

Dear Senator Parmer:

You ask a number of questions about gambling. Your first question is:

Currently, can a person, while in Texas, call another state to have a computer play lottery games (i.e. Lotto) or bingo games for them and pay by a 900 number or credit card?

A person commits an offense in Texas if he or she "makes a bet on the partial or final result of a game or contest or on the performance of a participant in a game or contest." Penal Code § 47.02(a)(1). A "bet" is "an agreement that, dependent on chance even though accompanied by some skill, one stands to win or lose something of value." Id. § 47.01(1). It appears from your question that a person who participates in the computer games you describe would be placing a bet for purposes of section 47.02(a)(1) of the Penal Code.

It is a defense to prosecution for placing a bet that:

(1) the actor engaged in gambling in a private place;

(2) no person received any economic benefit other than personal winnings; and

(3) except for the advantage of skill or luck, the risks of losing and the chances of winning were the same for all participants.

Id. § 47.02(b). In the situation you describe, the caller would either use a credit card or a 900-number. Those transactions would generate an economic benefit to a third party. Therefore, the second prong of the defense set out above would not be satisfied.

Your second question is:

Currently, can a person, while in Texas, legally participate in lottery games or bingo games in another state in any other way other than as described in question 1?

It is outside the scope of the opinion process to determine whether there is any imaginable way for a person to participate in an out-of-state lottery without leaving Texas.

Your third question is:

Currently, can retailers (a) sell lottery or bingo cards in Texas or (b) display automatic telephones in Texas for the purchase of lottery or bingo cards?

The sale of lottery tickets would be prohibited under section 47.03(a)(5) of the Penal Code, which prohibits the sale of a ticket designed to serve as evidence of participation in any lottery. See generally Penal Code § 47.01(6) (defining "lottery").

You also ask about the sale of bingo cards. Section 47.07 of the Penal Code prohibits the commercial transfer of gambling paraphernalia. "Gambling paraphernalia" is "any book, instrument, or apparatus by means of which bets have been or may be recorded or registered; any record, ticket, certificate, bill, slip, token, writing, scratch sheet, or other means of carrying on bookmaking, wagering pools, lotteries, numbers, policy, or similar games." Penal Code § 47.01(5). Whether the sale of bingo cards would constitute the commercial transfer of gambling paraphernalia would have to be determined on the facts of a particular case. See Morrison v. Habeeb, 246 S.W.2d 217 (Tex. Civ. App. - Galveston), rev'd on other grounds, 252 S.W.2d 148 (Tex. 1952) (fact that dice could be used as gambling paraphernalia insufficient to constitute dice as gambling paraphernalia per se). The sale of travel bingo cards at roadside convenience stores, for example, is not likely to constitute the commercial transfer of gambling

paraphernalia. The sale of bingo tickets for bingo games that would fall within the definition of "bingo" in the Bingo Enabling Act is governed by that act. V.T.C.S. art. 179d, § 2(2) (defining "bingo"); see also id. §§ 2(18), 11(o), 13b(a), 39(b)(3)-(4) (regarding distribution of bingo supplies); Penal Code § 47.10 (providing that it is a defense to prosecution for an offense under chapter 47 of the Penal Code that the conduct was authorized under the Bingo Enabling Act).

You also ask whether retailers may display automatic telephones in Texas for the purchase of lottery or bingo cards. Although you provide no details about the telephones in question, it is likely that providing such telephones would be in violation of section 47.05 of the Penal Code, which provides:

(a) A person commits an offense if, with the intent to further gambling, he knowingly communicates information as to bets, betting odds, or changes in betting odds or he knowingly provides, installs, or maintains equipment for the transmission or receipt of such information.

(b) An offense under this section is a felony of the third degree.

Your fourth question is:

Currently, can retailers advertise in Texas (a) lottery or bingo cards for sale in Texas or (b) automatic telephones for use in Texas for the purchase of lottery or bingo cards?

Subsection (5) of section 47.03(a) makes it an offense to promote any lottery or offer to sell a lottery ticket. Whether any particular activity constitutes the promotion of a lottery or an offer to sell a lottery ticket depends on the facts of a particular case. See e.g., Attorney General Opinion JM-341 (1985); see also V.T.C.S. art. 179d, § 39(b) (making it an offense to promote bingo unless permitted to do so by Bingo Enabling Act).

Your fifth and sixth questions are:

If any of the activities in questions 1 through 4 are already authorized, could the

Texas Legislature, without a constitutional amendment, levy taxes on any such activity?

If any of the activities in questions 1 through 4 are not currently authorized, could the Texas Legislature, without a constitutional amendment, authorize such activity and levy a tax on such activity?

Although we cannot give a definitive response to your general questions, we can provide some background in regard to the legal issues you raise.

Article III, section 47, of the Texas Constitution provides in subsection (a):

The Legislature shall pass laws prohibiting lotteries and gift enterprises in this State other than those authorized by Subsections (b) and (d) of this section.

Before section 47 was amended in 1980 to permit the legislature to authorize bingo games under certain circumstances, it provided:

The Legislature shall pass laws prohibiting the establishment of lotteries and gift enterprises in this State, as well as the sale of tickets in lotteries, gift enterprises or other evasions involving the lottery principal, established or existing in other States."

It is certainly possible that the 1980 amendment narrowed the range of activities that the legislature must prohibit in accordance with article III, section 47. If you would like this office to consider whether the substance of a specific provision of chapter 47 of the Penal Code is or is not mandated by article III, section 47, please bring the specific provision to our attention and we will address the scope of article III, section 47, in that context.

Your questions also raise the issue of taxation of illegal activities. We note in this regard that in 1898 the Texas Court of Criminal Appeals considered the validity of a legislative attempt to levy an occupation tax on persons operating a certain type of game. Barry v. State, 45 S.W. 571 (Tex. Crim. App. 1898). The court wrote:

However sweeping may be the taxing power of the legislature in this state, it is not broad enough to set at naught the plain provisions of the constitution. . . . The quotation from article 5049 above would indicate that the matters therein specified would constitute lotteries, they being simply matters of chance. This being true, the legislature would not be authorized to license or tax these games.

We have found no subsequent application or modification of that statement by either the Court of Criminal Appeals or the Texas Supreme Court. See also Grosso v. United States, 390 US 62 (1968); Marchetti v. United States, 390 US 39 (1968) (both holding that Fifth Amendment is valid defense for failure to register as gambler and pay related occupational and gambling excise taxes); United States v. Sullivan, 274 U.S. 259 (1927) (holding that Fifth Amendment is not valid defense to failure to file a tax return even if income is from illegal sources). Whether a particular tax measure would be valid under the Texas and United States Constitutions would depend on the nature of the particular measure. See generally Tax Code ch. 159 (tax on controlled substances).

Yours very truly,



Sarah Woelk, Chief  
Letter Opinion Section  
Opinion Committee

SW/lcd

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