



TEXAS ALCOHOLIC BEVERAGE COMMISSION

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Dick Durbin, Administrator

June 21, 1993

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The Honorable Dan Morales
Attorney General
The State of Texas
Supreme Court Building
Austin, Texas 78711

MBJ
FILE # RD-00603-DM
ML-20849-93

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RD-603

Dear Mr. Morales:

The Bingo Enabling Act was amended in 1989 by adding Section 13(n), (o), and (p) to restrict the issuance of new commercial lessor's licenses and to grandfather existing lessor's licenses. New commercial lessor's licenses could be issued to lease to only one licensed authorized organization, either for their sole use and total control as their headquarters or for them to sublease to other licensed organizations, or be issued to a licensed authorized organization to lease to other licensed organizations.

This change led to the licensing of a number of halls under what we have termed "the tier system" where a person would be issued a commercial lessor's license to lease premises to a lessor/conductor, which would in turn hold licenses to conduct bingo on the premises and to sublease to other authorized organizations to conduct bingo there.

Two new situations have arisen in the past year. In the first of them, we have received sets of applications where hall B is rented without a commercial lessor's license to a licensed authorized organization which is conducting bingo at hall A. That organization then applies for a lessor's license to sublease to several organizations for those organizations to conduct bingo at hall B, while the sublessor continues to conduct bingo at hall A. (See attached Diagram I) Those licenses were issued under a long-standing interpretation of the law that an arm's length lease to someone who was not conducting bingo at that location did not require a commercial lessor's license.

In the second situation, a licensed commercial lessor leasing under the tier system has failed to renew his lessor's license to lease to a lessor/conductor which is conducting bingo at those leased premises, arguing that the Bingo Enabling Act, TEX. REV. CIV. STAT. ANN. art. 179d (Vernon Supp. 1993), does not require that he hold a commercial lessor's license. The question has led us to ask whether a lessor's license would be required to lease to a licensed authorized organization in either of these situations, that is, whether they were conducting bingo at the premises they wish to sublease or at some other premises.

A brief discussion of the history of the Bingo Enabling Act and the Bingo Regulation and Tax Rules as they relate to commercial lessors may be helpful.

As originally adopted in 1981, the Bingo Enabling Act, in Section 2(12) defined "Authorized commercial lessor" as "a person other than a licensee permitted to conduct bingo under this Act, who owns or is a lessee of premises that he offers for leasing to an authorized organization for the purpose of conducting bingo." Section 11(b) of the Act provided that "A person, other than a licensee under this Act, may not lease or otherwise make available for conducting bingo a hall or other premises for any consideration, direct or indirect."

In 1983, the Act was extensively amended. Section 2(12) was amended to define "Authorized commercial lessor" as "a person, including a licensee permitted to conduct bingo under this Act, who owns or is a lessee of premises on which bingo is or will be conducted and that he offers for leasing to an authorized organization." Section 11(b) was amended to provide that "A person, other than an authorized commercial lessor or except a person who leases or otherwise makes available a hall or other premises to an organization that has been issued a temporary license, may not lease or otherwise make available for conducting a bingo game subject to this Act a hall or other premises for any consideration, direct or indirect."

These 1983 amendments made three changes concerning commercial lessors. (1) They provided that no lessor's license was required in the case of a temporary license to conduct bingo. (2) They required that a licensed organization providing a hall to its auxiliary or other licensed organization would be required to obtain a lessor's license. This led to a large number of applications from veterans and fraternal organizations for licenses to lease to their auxiliaries. (3) They provided that a lessor's license is required in the case of a lease for other purposes if bingo will be conducted on the premises.

The Act was again extensively amended in 1989. The definition of "Authorized commercial lessor" in Section 2(12) was changed to "a person eligible for a commercial license to lease bingo premises under Section 13 of this Act." Section 11(b) was amended so that it now begins "A person other than a licensed authorized commercial lessor..." The provision was otherwise unchanged. Section 13 was amended to severely limit the issuance of lessor's licenses after June 10, 1989. Section 13(n) provides in part that "A commercial license to lease bingo premises to a licensed authorized organization may be issued only to:...(2) a person who leases premises to a single licensed authorized organization that subleases or will sublease the premises to one or more licensed authorized organizations to conduct bingo on the premises." (See attached Diagram II)

The same requirement is expressed from the perspective of the lessee organization by Bingo Regulation and Tax Rule 55.545(b), which provides, in part, as follows:

- (b) Bingo may be conducted by a licensed organization only on premises... which are:
 - (1) owned by the licensed organization;
 -

- (4) owned or leased by a licensed commercial lessor.

By an emergency rule issued July 11, 1989, almost immediately after the legislative change, Bingo Regulation and Tax Rule 55.547(b)(3)(C), which prohibited the issuance of more than one lessor's license for any one location, was amended to provide for an exception as required by Section 13(n)(1) and (2) of the Bingo Enabling Act. This clearly shows the comptroller's contemporary interpretation of the legislative change as requiring both lessors to be licensed in the usual tier system where all of the organizations were conducting bingo at the same hall. This has remained the commission's interpretation until the present date.

A District Judge in Austin, in a T.R.O. hearing indicated the Rule 55.548(b)(4), previously cited, might be satisfied by a lessor/conductor leasing to itself under its own lessor's license. However, it is a longstanding principle of real property law that a party cannot lease to itself. That a valid lease requires a transfer of the right to possess premises from one party to another is firmly established in Texas law. See, e.g., Vallejo v. Pioneer Oil Company, 744 S.W. 2d 12 (Tex. 1988); Brown v. Johnson, 12 S.W.2d 543 (Tex. Comm. App. 1929); see also 49 Tex. Jur. Landlord and Tenant §1 (1986 & Supp. 1992) ("[it] is one of the essentials of a valid leasing of premises that exclusive possession of the premises rightfully belonging to one party is transferred to another). If the comptroller, in adopting Rule 55.548 (b) intended to allow a lessor/conductor to satisfy the rule's requirements by leasing to itself, he could have eliminated subdivision (4) "owned or leased by a licensed commercial lessor" and changed subdivision (1) to "owned or leased by the licensed organization.

Two other provisions of the Bingo Enabling Act shed some light on this question. Section 12(a)(3) provides that an application for a license to conduct bingo must include "in case the applicant intends to lease premises for this purpose from other than an authorized organization, the name and address of the licensed commercial lessor of such premises" While this provision was obviously not amended in 1983 to correspond with the requirement that an authorized organization wishing to leave premises to another organization must obtain a commercial lessor's license, it certainly indicates a legislative intent that a person not licensed to conduct bingo must obtain a commercial lessor's license to lease premises to an organization wishing to conduct bingo at those premises.

Section 11a(a) of the Act provides as follows (emphasis added):

- (a) The rent charged by a licensed authorized commercial lessor to a licensed authorized organization to conduct bingo may not exceed \$600 for each bingo occasion conducted on the premises, unless the lessee licensed authorized organization subleases the premises to one or more other licensed authorized organizations to conduct bingo, in which event the rent charged by the authorized commercial lessor may not exceed \$600 for each day.

If the legislature in 1989 did not intend to require a person to obtain a lessor's license in that situation, why did it provide for a special rental limitation for that situation?

Section 36(a)(2) of the Act provides in part that a person commits an offense and

forfeits a license if the person fails to maintain records that fully and truly record all transactions connected with the leasing of premises to be used for the conduct of bingo. Taken together with the eligibility restrictions for a lessor's license in Section 13(g) of the Act and the Bingo Rental Tax imposed by Section 2B of the Act, these provisions show the enactment by the legislature of a comprehensive scheme of licensing, regulation, and taxation of bingo lessors.

A provision in House Bill 2771, which becomes effective September 1, 1993, deletes the existing language in Section 13(f) of the Act and substitutes the following:

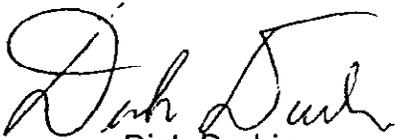
A person who leases premises on which bingo is conducted is not required to be a licensed commercial lessor unless the person leases directly to a licensed authorized organization.

We therefore ask the following questions:

- (1) Is a person who leases premises to an authorized organization for its sole use and total control required to hold a commercial lessor's license?
- (2) Is a person who leases premises to an authorized organization for it to conduct bingo on the premises and for it to also sublease to one or more other organizations to conduct bingo there required to hold a commercial lessor's license?
- (2) Is a person who leases premises to a licensed authorized organization conducting bingo at another location who subleases the rented premises to another authorized organization to conduct bingo required to hold a commercial lessor's license?

If you have any questions concerning this opinion request, please call Ms. Gayle Gordon at 206-3204.

Sincerely,



Dick Durbin
Administrator

DD/de
Attach.