
State of South Carolina
Department of Revenue
301 Gervais Street, P. O. Box 125, Columbia, South Carolina 29214

SC INFORMATION LETTER #97-12

SUBJECT: ADMINISTRATIVE PRONOUNCEMENT
Declaratory Ruling - Video Game Machines Act

DATE: April 17, 1997

SUPERSEDES: All previous documents and any oral directives in conflict herewith.

REFERENCE: S. C. Code Ann. Section 1-23-150 (1976)

AUTHORITY: S.C. Code Ann. Section 12-4-320 (Supp. 1996)
SC Revenue Procedure #94-1

SCOPE: An Information Letter is a document issued for the purpose of disseminating general information or information concerning an administrative pronouncement.

Information Letters issued to disseminate general information have no precedential value and do not represent the official position of the Department. Information Letters designated as administrative pronouncements are official advisory opinions of the Department.

INTRODUCTION:

This Information Letter is a declaratory ruling written in response to a request for a declaratory ruling (copy attached) under SC Code Section 1-23-150. Section 1-23-150 provides that “[a]ny person may petition an agency in writing for a declaratory ruling as to the applicability of any regulation of the agency or the authority of the agency to promulgate a particular regulation.” Since the request was written with numbered paragraphs, this response will be made to each numbered paragraph.

PARAGRAPH BY PARAGRAPH RESPONSE TO REQUEST:

Paragraph 1. This paragraph does not ask a question or request any information, so no response is required.

Paragraph 2. This paragraph does not ask a question or request any information, so no response is required. We would ask, however, that if you believe enforcement of regulations has been inconsistent, that you report that inconsistency to Davis Brown at

(803) 737-4767 of the Department. We want to assure that all of the officers enforcing these provisions are properly trained and eliminate any inconsistencies that might inadvertently occur as soon as possible.

Paragraphs 3 and 4. These paragraphs do not ask a question or request any information, so no response is required.

Paragraph 5. This paragraph requests a declaratory ruling as to the applicability of South Carolina Regulation 117-190 (R117-190) and the authority of the Department to promulgate it. The specific questions regarding applicability in Paragraph 8 will be answered below.

R117-190 defines “single place” or “premises” and is applicable to the Video Game Machines Act found in Article 12, Chapter 21 of Title 12.

The statutory authority for promulgating it is contained in SC Code Sections 12-4-320(1), 12-21-10, 12-21-2798, and 12-21-2810.

Paragraph 6. This paragraph requests a declaratory ruling as to the constitutionality of R117-190; specifically, as to whether it is vague or over broad or violates the due process or equal protection clauses of the constitution of the United States or State of South Carolina in that it, among other things, fails to give sufficient notice as to what constitutes a violation.

As (1) this is not a request for a declaratory ruling as to the applicability of any regulation of the agency or the authority of the agency to promulgate a particular regulation, and (2) declaring a law or regulation unconstitutional is not one of the powers granted the Department of Revenue, no response is required. Declaring laws and regulations unconstitutional is a judicial function.

“An administrative agency has only such powers as have been conferred upon it by law and must act within the granted authority for an authorized purpose. It may not validly act in excess of its powers, nor has it any discretion as to the recognition of or obedience to a statute. The agency must obey a law found upon the statute books until in a proper proceeding its constitutionality is judicially passed upon.” (Emphasis added and internal quotes eliminated.) *South Carolina Tax Commission v. South Carolina Tax Board of Review*, 299 S.E.2d 489 (1983) quoting from 2 Am.Jur.2d, *Adm. Law*, '188, p. 21.

Therefore it is not appropriate or permissible for us to rule on the constitutionality of this regulation or any regulation or statute. The regulation was adopted in accordance with the procedures in Article 1, Chapter 23, Title 1 of the SC Code. Pursuant to that procedure

the Tax Commissioners, three state officials appointed by the Governor and confirmed by the Senate, solicited comments and held a public hearing. Finally, the General Assembly passed a joint resolution in 1995, Senate Bill 687, which states:

Be it enacted by the General Assembly of the State of South Carolina:

Regulations approved

SECTION 1. The regulations of the Department of Revenue relating to video game machines, designated as Regulation Document Number 1827, and submitted to the General Assembly pursuant to the provisions of Article 1, Chapter 23, Title 1 of the 1976 Code, are approved.

Time effective

SECTION 2. This joint resolution takes effect upon approval by the Governor.

The Governor approved this joint resolution on June 7, 1995, and it was published in the State Register on June 23, 1995. It is not within the purview of the Department of Revenue to overrule the Tax Commissioners serving as hearing officers (a judicial function), the General Assembly and the Governor, all of whom considered and passed upon the regulation. We presume they found it constitutional since they approved it.

Having said that, we would add that we believe the regulation to be constitutional. Two Administrative Law Judge Division decisions and one Circuit Court case have held these regulations to be valid. *AAA Entertainment Corporation, et al. v. S.C. Department of Revenue*, No. 96-CP-07-1595 affirming Docket No. 96-ALJ-17-0122-CC; and *S.C. Department of Revenue v. William Scurry*, Docket No. 96-ALJ-17-0543-CC. Further, the regulation was enforced and therefore must have been considered valid in *S.C. Department of Revenue v. Mickey Stacks*, Docket No. 95-ALJ-17-0742-CC.

The major thrust of your argument appears to be that the regulation violates the due process clauses of the federal and state constitutions because it is vague. It is hard to reconcile that opinion with the United States District Court for the District of South Carolina's decision in *Reyalt et al. v. S.C. Tax Commission, S.C. Coin Operators Association and The Mims Amusement Company*, C/A Nos. 6:93-1491-3 and 6:93-1493-3 (November 15, 1993). In that case, the Court found "as a matter of law that the terms: 'single place,' 'establishment,' 'location,' and 'premises' are sufficiently definite and susceptible of a common and ordinary meaning to provide a person of ordinary intelligence a reasonable notice of the proscribed conduct." It is difficult to see how a regulation which defines words and phrases more precisely could be void for vagueness when the statute itself is not.

Paragraph 7. This paragraph requests a ruling as to whether the remedies, including the penalties for violations of R117-190 constitute a “tax,” and if so, whether or not the procedures outlined in SC Code Section 12-58-10, et seq. are applicable to taxpayer complaints regarding the actions of the Department of Revenue’s agents in the enforcement of these regulations.

This question does not request a declaratory ruling as to the applicability of any regulation or the authority of the agency to promulgate it. It asks about the applicability of SC Code Section 12-58-10, et seq. (The Taxpayer Bill of Rights) and perhaps other statutes. That being said, we regard the penalty provisions in the Video Game Machines Act as regulatory, an exercise of the State’s police powers. On the other hand the South Carolina Revenue Procedures Act, in general, and SC Code Section 12-60-30, in particular, make it clear that for Chapters 60 (the South Carolina Revenue Procedures Act) and 54 (collection and enforcement) of Title 12, these penalties are treated the same as taxes are treated. Although arguably not covered, we have no objection to extending to all persons with whom we deal the rights contained in the South Carolina Taxpayers’ Bill of Rights, Chapter 58 of Title 12 of the SC Code when they deal with the Department.

Paragraph 8. This subparagraph requests a ruling as to whether under R117-190 an employee must be physically present in each room:

- (a) even when such a room is closed;
- (b) even when such room is not occupied by players;
- (c) even when the machines in the room are not operable;
- (d) whether employees may leave temporarily when instructed to by agency representatives, law enforcement officials or Revenue Agents, or to accompany players to pay-out stations or to the restroom; or
- (e) whether this requirement means that there must be sufficient employees present in the building to man/staff each room.

Noting that a “single place or premises” may be composed of many rooms, we will answer your questions following what we presume to be your assumption, that the phrase “each room,” means each “single place or premises.”

We follow the decision of Judge Bates in *S.C. Department of Revenue v. Mickey Stacks*, Docket No. 95-ALJ-17-0742-CC. Following that decision:

- (a) An employee does not need to be physically present in a room which is closed;
- (b) An employee must be physically present in a room which customers can enter and operate machines, even if there are no customers in the room at the moment;
- (c) An employee does not need to be physically present in a room when the machines in the room are not operable;
- (d) An employee must be physically present in a room which customers can enter and operate machines. If an employee temporarily leaves the room, whether or not instructed to do so by agency representatives, law enforcement officials or Revenue Agents, or to accompany players to pay-out stations or to the restroom, the operator of the location must immediately either replace the employee with another, close the game room from public access, or render the video game machines in that room inoperable.
- (e) Each game room where customers are able to enter and operate machines, but which does not have a separate employee working within its confines is not operating in compliance with SC Code Section 12-21-2804(A). Each game room which has a separate employee working within its confines is in compliance with the employee requirement of the single place or premises regulation and SC Code Section 12-21-2804(A). Each game room is considered separately. It is not a matter of subtracting the total number of employees from the total number of game rooms. This conclusion does not mean that there cannot be other violations; *e.g.* two or more rooms may constitute one single place or premises and therefore be in violation of SC Code Section 12-21-2804(A).