

[J-79-2013] [MO: Baer, J.]
IN THE SUPREME COURT OF PENNSYLVANIA
MIDDLE DISTRICT

GREENWOOD GAMING AND ENTERTAINMENT, INC.,	:	No. 50 MAP 2012
	:	
Appellant	:	Appeal from the Order of the Commonwealth Court dated May 16, 2012 at No. 617 FR 2009, which Overruled the Exceptions and Entered Judgment in favor of the Commonwealth of PA, affirming the decision of the Board of Finance and Review dated October 21, 2009 at No. 0904037.
v.	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF REVENUE,	:	
	:	45 A.3d 455 (Pa. Cmwlth. 2012)
Appellee	:	
	:	ARGUED: October 15, 2013

DISSENTING OPINION

MR. CHIEF JUSTICE CASTILLE

DECIDED: April 28, 2014

I respectfully dissent from the able Majority Opinion because I cannot agree that, in defining the phrase “gross terminal revenue” vis-à-vis slot machines, the General Assembly intended to create a loophole for casinos whereby their discretionary general marketing and promotional costs – matters over which the Commonwealth has no control – may be passed on to the taxpayers.

At the heart of this matter lies the fact that Greenwood spent \$1.1 million in cash and non-cash awards - including vehicles, event tickets, and gift cards - to market and promote its business, and now seeks to offset those costs by claiming \$600,000 in the form of a tax credit. As noted by the Commonwealth Court below, these awards “were designed [by Greenwood] to improve the relationship between Greenwood and its

patrons, with the ultimate goal of encouraging patrons to frequent the casino more often, to increase his/her gaming activity, and to promote the casino” Greenwood Gaming and Entertainment, Inc. v. Commonwealth, 29 A.3d 1215, 1217 (Pa. Cmwlth. 2011). As aptly stated by the Majority here, Greenwood asks this Court to hold that Section 1103 of the Gaming Act, 4 Pa.C.S. § 1103 (Section 1103), allows for a substantial portion of such marketing and promotional costs to be credited as a pre-tax deduction from slot machine-related gross terminal revenue in calculating slot machine taxes due to the Commonwealth. In order to make the connection between these promotional costs and slot machine gross terminal revenue, Greenwood claims it limited these promotions to Greenwood patrons who either inserted their “Players Card” into a slot machine at some point, presented in person a postcard mailed to them by Greenwood with entries for selection by a random number generator, or simply were chosen as a specific patron targeted for “player development.” Id. The Commonwealth Court reasonably concluded that “the prizes awarded are more accurately described as resulting from one having a Players Card, not as resulting from simply playing a slot machine.” Greenwood Gaming and Entertainment, Inc., 29 A.3d at 1220. Thus, as noted by the Majority here, it is – to say the least – unclear as to whether these promotional awards can be described as related to actually playing slot machines. Maj. Op. at 25 (“to be deductible, the promotional awards must result from playing slot machines, and Greenwood is obligated to prove as much”).

Resolving this dispute first turns upon construction of the statutory phrase “as a result of playing a slot machine,” as employed in Section 1103’s definition of “gross terminal revenue.” Under Section 1103, gross terminal revenue is defined as the total of:

- (1) cash or cash equivalent wagers received by a slot machine minus the total of:

(i) Cash or cash equivalents paid out to players as a result of playing a slot machine, whether paid manually or paid out by the slot machine.

(ii) Cash or cash equivalents paid to purchase annuities to fund prizes payable to players over a period of time as a result of playing a slot machine.

(iii) Any personal property distributed to a player as a result of playing a slot machine. This does not include travel expenses, food, refreshments, lodging or services.

(2) cash received as entry fees for slot machine contests or slot machine tournaments.

4 Pa.C.S. § 1103. In other words, gross terminal revenue, a measurement of the collective revenue generated by a casino's employment of slot machines, is a dollar figure produced by a relatively simple mathematical equation, to wit: gross terminal revenue = (cash received by a slot machine - wager related costs of slot machine operation) + (entry fees for slot machine contests/tournaments). As the Majority Opinion concedes, "[t]he Commonwealth convincingly asserts that the promotional awards at issue, which are arguably unrelated to any specific act of playing a specific slot machine, are likewise not related to the purpose underlying the [gross terminal revenue] calculations." Maj. Op. at 23.

Thus, this Court is called upon to interpret the statutory definition of gross terminal revenue to determine whether marketing and promotional expenses in the form of awards and prizes should be subtracted from total wagers as the "result of playing a slot machine," for purposes of calculating taxes due to the Commonwealth on slot machine revenue, where the awards are, at best, only tangentially related to slot machines, have no impact on the wager related costs of slot machine operation, and are selectively issued, perhaps even at whim, by casinos for the sole purpose of

promoting their businesses. I am not persuaded that the General Assembly intended to have the Commonwealth's taxpayers foot these expenses.

As aptly stated in this Court's Majority Opinion, all statutory taxing provisions are to be strictly construed, and provisions imposing taxes are construed in favor of the taxpayer where there is **reasonable** doubt concerning the interpretation thereof. 1 Pa.C.S. § 1928(b)(3); Bundy v. Belin, 461 A.2d 197 (Pa. 1983). "Of equal importance [however,] is the presumption that the General Assembly does not intend a result that is absurd . . . or unreasonable." Triumph Hosiery Mills, Inc. v. Commonwealth, 364 A.2d 919, 921 (Pa. 1976) (citing 1 Pa.C.S.A. § 1922(1)). As noted in the Majority Opinion, the Commonwealth argues that interpreting gross terminal revenue in such a way as to allow the deduction of a promotional award from money otherwise taxable by the Commonwealth merely because a selected card holder had at one time played a slot machine produces an absurd result that, I believe, was not intended by the General Assembly.

In my view, the idea behind Section 1103 is that slot machine revenue consists of money gained from the operation of slot machines, minus actual **costs attributable** to operating the same. Paying out winnings, as addressed in Section 1103(1)(i) and (iii), are costs of operating slot machines. Paying for annuities to fund prizes payable over time, as addressed in Section 1103(1)(ii), is a cost of operating slot machines. Marketing and promotional awards, on the other hand, are not costs of operating slot machines, but simply a casino's costs of doing business which exist independent of slot machine revenue, and would exist even if the casino had no slot machines. Thus, I would affirm the Commonwealth Court's holding that "the allowable deductions are prizes that are won as a direct product of physical operation of a particular slot machine, not just because the patron played a slot machine at some point in time." Greenwood

Gaming and Entertainment, Inc., 29 A.3d at 1219. As the Commonwealth contends, it is nonsensical to deduct the costs of marketing and promotions from slot machine revenue where the recipients of the promotional “prizes” make no wagers at slot machines and, therefore, no contribution to gross terminal revenue to receive such prizes. I do not believe the General Assembly intended such an unreasonable result.

Again, marketing and promotional expenses are simply a cost of doing business, *i.e.*, business expenses, for casinos. As such these expenses are somewhat self-regulating in the sense that they eat into the casino’s profits. The more promotions cost, the less profit the casino makes. It is appropriate that the casino pays for all such expenses, and not the Commonwealth. The unintended effect of the Majority Opinion will be to encourage increased casino giveaways, subsidized by the taxpayers. Because I believe this result is contrary to legislative intent, I respectfully dissent.