

Applications of the Federal Gambling Stamp Tax Law

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Recommended Citation

DePaul College of Law, *Applications of the Federal Gambling Stamp Tax Law*, 8 DePaul L. Rev. 362 (1959)
Available at: <http://via.library.depaul.edu/law-review/vol8/iss2/7>

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Justice Schaefer calls for the same reasoning to be used in the states. This writer's purpose as stated initially was to bring the entire problem of *forum non conveniens* into clear focus. Prognostication as to the future use of the doctrine is left to the reader.

APPLICATIONS OF THE FEDERAL GAMBLING STAMP TAX LAW

Spurred by the Kefauver Crime Investigating Committee, Congress, in the Revenue Act of 1951, enacted two tax laws on gambling. The first tax, aimed at the bookmaker and lottery operator, is a ten per cent excise on all wagers concerning sporting events or lotteries. The second law imposes a special \$50 per year occupational stamp tax on such persons.

When purchasing the occupational gambling tax stamp the person must register with the Director of Internal Revenue and give certain information including: (1) name and place of business (2) each place of business where his gambling activity is carried on, and the names and places of residence of persons engaged in receiving wagers for him or on his behalf and (3) the name and place of residence of each for whom he is receiving wagers. The required information is made available for public inspection,¹ which means available for the state police or the FBI. But the payment of the tax does not exempt any person from criminal prosecution for violations of federal or state laws prohibiting such gambling activities.² A fine of \$1000 to \$5000 is provided for failure to pay either the wagering tax or failure to purchase the \$50 tax stamp.³ In addition, wilful violations are punishable by a fine up to \$10,000 and imprisonment up to five years.⁴

Even though Congressional committees defended the tax as a revenue producing measure⁵ there is little dispute as to the real purpose of these taxes—to discourage gambling and to facilitate the enforcement of state criminal laws against gambling. It is obvious that from a practical standpoint a tax which is designed to end the activity with respect to which it is imposed cannot be said to be for the purpose of collecting revenue. However, in a somewhat similar situation in 1919, the Supreme Court upheld a one dollar per year tax upon narcotic dealers though there were elaborate ancillary provisions as to registration requirements and records.⁶

CONSTITUTIONALITY OF THE TAX

The federal gambling tax law places the professional gambler in a dilemma. If he buys the tax stamp and provides the information required he will

¹ Internal Revenue Code §§ 3292, 3275.

³ Internal Revenue Code § 3294(a).

² Internal Revenue Code § 3297.

⁴ Internal Revenue Code § 3294(c).

⁵ H.R. Rep. No. 586 82d Cong. 1st Sess. 54-55 (1951); Sen. Rep. No. 781, 82d Cong. 1st Sess. 112-113 (1951). At that time annual revenue from the tax was estimated at \$400,000,000, but has only run about 1% of this figure.

⁶ *United States v. Doremus*, 249 U.S. 86 (1919).

be subject to prosecution as a violator of state anti-gambling laws. On the other hand, if he refuses to register, the sanctions of the federal statute become operative. In short, he is damned if he does and damned if he does not. It is not surprising then, that the bookmaker and lottery operator immediately contested the constitutionality of the occupational tax stamp in the federal courts.

The principal line of attack has been that the tax constitutes an invasion by the Federal Government of the police powers reserved to the states by the Tenth Amendment to the Federal Constitution. The taxpayer has also claimed that the informational requirements of the federal wagering tax necessitated disclosure of incriminating facts which contravened the Fifth Amendment.

The tax was upheld by the United States Supreme Court in *United States v. Kabriger*,⁷ decided in 1953. The decision arose on appeal from a district court's ruling that the provisions contravened the Tenth Amendment in that Congress was attempting to regulate the purely state matter of gambling under the guise of a taxing statute. In reversing this decision the Supreme Court held the occupational tax was a valid revenue measure; that its ancillary registration requirements were reasonable provisions to facilitate the collection of the tax; and that the information required in registering was not a denial of the privilege against self-incrimination by the Fifth Amendment.

The Supreme Court in resolving the Fifth Amendment problem pointed out that the privilege has relation only to past acts, not to future acts that may or may not be committed. The Court reasoned that if the defendant wished to take wagers subject to excise taxes he must pay the tax and register. In doing so he is not compelled to confess to acts already committed, but is merely informed by statute that in order to engage in the business of wagering in the future he must fulfill certain conditions. In supporting its stand on the gambling tax the majority through Justice Reed said:

From the beginning of our government the courts have sustained taxes although imposed with the collateral intent of effecting ulterior ends which, considered apart, were beyond the constitutional power of the lawmakers to realize by legislation directly addressed to their accomplishment.⁸

An interesting side light on the *Kabriger* case occurred two years later when Kabriger appealed his conviction. The court of appeals directed his

⁷ 345 U.S. 22 (1953).

⁸ *United States v. Kabriger*, 345 U.S. 22 (1953). Also see: *United States v. Sanchez*, 340 U.S. 42 (1950); *Sonzinsky v. United States*, 300 U.S. 506 (1937); *Magnano v. Hamilton*, 292 U.S. 40 (1934); *Nigro v. United States*, 276 U.S. 332 (1928); *Hampton v. United States*, 276 U.S. 394 (1928); *United States v. Doremus*, 249 U.S. 86 (1919); *McCray v. United States*, 195 U.S. 27 (1904); *Veazie Bank v. Fenno*, 8 Wall. 533 (1869); *License Tax Cases*, 5 Wall. 462 (1866).

acquittal. The court found that the trial court had convicted Kahriger of *wilful* violations of the statute. This could not stand, the court asserted, because he had failed to register in fear that he might incriminate himself by answering some of the questions appearing on the registration form. At the outset Kahriger had attempted to pay the tax but payment had been refused unless he first register. The appellate court stated that while the Supreme Court in 1953 had rejected the Fifth Amendment self-incrimination argument, three justices had dissented. Under these circumstances, the court reasoned, "it cannot be said that Kahriger's attitude was unreasonable and therefore his refusal to register for the tax was not wilful."⁹

This acquittal of Kahriger of course does not affect the constitutionality of the federal gambling tax nor does it give any gambler in the future a valid defense. The acquittal stands alone, applicable only to the special circumstances surrounding Kahriger, in that he was the first to question the validity of the law.

SUPPLEMENTARY STATE LEGISLATION

After the *Kahriger* case some states passed supplementary legislation using the federal gambling tax stamp as a basis of state prosecution. Florida, for instance, passed a statute¹⁰ in 1953 which made the mere purchase and possession of the gambling stamp *prima facie* evidence of violation of the Florida gambling laws. The following year Florida sought to enjoin, as a nuisance, an alleged lottery and bookmaking business. The state's only evidence was the fact that the defendants had purchased a Federal Wagering Occupational Tax Stamp and had paid the tax of ten per cent on their gross income from gambling. But the state made no mention of the above statute and the Florida court held that the mere purchase and possession of a gambling tax stamp is not sufficient evidence to establish the maintenance of a gambling house.¹¹ If the state had used the statute making possession of the tax stamp *prima facie* evidence, its logical application would have resulted in a conviction. However, it is probable that the prosecution refrained from mentioning the statute in anticipation of the case which only a few months later held the Florida statute unconstitutional.¹²

After these two Florida holdings the natural question arose: What weight should be placed upon the purchase and possession of the tax stamp as evidence of gambling? At the time of the Florida decision there were only four other cases in which the gambling tax stamp had been used as evidence of violation of gambling laws. An Alabama case¹³ had held

⁹ *United States v. Kahriger*, 210 F.2d 565 (1954). ¹⁰ Fla. Stat. (1953) § 849.051.

¹¹ *Boynton v. State*, 75 So.2d 211 (Fla., 1954).

¹² *Jefferson v. Sweat*, 76 So.2d 494 (Fla., 1954).

¹³ *Griggs v. State*, 37 Ala. App. 605, 73 So.2d 382 (1954).

that a statute providing that the possession of a gambling tax stamp was prima facie evidence of violation of state gambling laws was constitutional. But the Florida decisions in declaring such a statute unconstitutional disregarded this Alabama opinion.

There were also two Tennessee cases at the time of the Florida decisions. One, decided in 1954, used as evidence, in addition to the gambling stamp, the testimony of officers, defendant's confession, and wagering tax returns.¹⁴ The other Tennessee case,¹⁵ and a more significant one, concerned a Chattanooga city ordinance making it unlawful to possess a federal gambling stamp. The ordinance was held constitutional. The court however emphasized the fact that it was a civil proceeding for violation of a city ordinance.

An ordinance of this type held constitutional in Tennessee seems to conflict with the federal wagering act.¹⁶ It appears to penalize one for obeying the federal law. For instance, there are situations where one might be in possession of a wagering tax stamp without having violated other state or local gambling laws and also without any intent to gamble in the state in the future. One might pay the tax and get the stamp in Tennessee intending to go to Nevada. Or a philatelist, in pursuit of his hobby, might acquire a wagering stamp for his collection.

The fourth case in existence at the time Florida held its prima facie statute unconstitutional was an earlier Florida decision of 1953 which arose prior to the passage of the Florida statute making the federal gambling tax stamp prima facie evidence of gambling. The court held the federal gambling tax stamp not sufficient in itself to show that the holder was a gambler.¹⁷

The Florida decisions and surrounding circumstances including the above four cases made a situation similar to the Federal Liquor License cases 60 years ago. The situation at that time involved the duty of the accused to pay the special federal tax as a liquor dealer and obtain a federal license. Such license then was admissible in evidence to show the maintenance of a state liquor nuisance. The probative value of such evidence was determined in connection with all the other evidence in the case and in the absence of a statute making possession of a license prima facie evidence of guilt the mere issuance of such a license was not sufficient to sustain a conviction.¹⁸

To summarize this anomalous situation, Florida first held that possession

¹⁴ *Acklen v. State*, 267 S.W.2d 101 (Tenn., 1954).

¹⁵ *Deitch v. Chattanooga*, 195 Tenn. 245, 258 S.W.2d 776 (1953).

¹⁶ *Moline*, Illinois has such an ordinance.

¹⁷ *Rodriguez v. Culbreath* 66 So.2d 58 (Fla., 1953).

¹⁸ *Appling v. State*, 88 Ark. 393, 114 S.W. 927 (1908); *Peyton v. State*, 83 Ark. 102, 102 S.W. 1110 (1907); *Liles v. State*, 43 Ark. 95 (1884).

of a federal gambling tax stamp is not enough to sustain a conviction of violating state gambling laws. Then the Florida legislature passed a statute making the mere possession of the federal tax stamp *prima facie* evidence of gambling. But, shortly thereafter the state prosecuted a gambler without mentioning the state statute and the gambler was absolved. In a subsequent case the Florida *prima facie* statute was declared unconstitutional by the Florida Supreme Court. These cases certainly are in strong agreement against such *prima facie* statutes. But Alabama had already said such a statute was constitutional and Tennessee upheld the same idea in the form of a city ordinance.

Then, in 1955, the Florida Supreme Court unequivocally reiterated its former position that the mere purchase and possession of a gambling tax stamp was insufficient to convict on a lottery law violation:

[T]he payment of the tax by the defendant does not establish even *prima facie*, the operation of a lottery. This, coupled with the absence of any direct testimony that there had even been lottery operation in Orange County, makes the State's case fall short of establishing the *corpus delicti*. . . .¹⁹

RECENT FEDERAL INTERPRETATION

The federal wagering tax stamp was questioned once again on constitutional grounds by a gambler in the District of Columbia when convicted for failing to buy the stamp.²⁰ Here the United States Supreme Court asserted that nothing in the Constitution prevents Congress from levying a tax on the business of accepting wagers in the District of Columbia even though another federal statute makes it a felony. Defendant argued that the conviction in the *Kabriger* case upholding the constitutionality of the taxing statute involved a state (Pennsylvania) gambling law. The Court here held it did not make any difference if the gambling law making such activity a felony was state or federal. Once again there were violent dissents. Frankfurter repeated in essence his dissent in *Kabriger* stating: "[F]or here we are concerned with a spurious use of the taxing power as a means of facilitating prosecution of federal offenses."²¹ Black, also dissenting, indicated that "by paying the tax petitioner would be compelled to supply evidence useful to convict him of a felony therefore against the Fifth Amendment."²² Black's statement was countered by the fact that registration is voluntary under the occupational tax statute.

Since the constitutional provisions have been resolved, the bulk of prosecutions under the federal taxing act never get beyond the district courts. However, periodically, cases find their way into the courts of appeals. All have resulted in convictions.²³

¹⁹ *Rowe v. State*, 84 So.2d 709 (Fla., 1955).

²¹ *Ibid.*, at 425.

²⁰ *Lewis v. United States*, 348 U.S. 419 (1955).

²² *Ibid.*, at 424.

²³ E.g. *Hodges v. United States*, 223 F.2d 140 (C.A. 5th, 1955); *Cagnina v. United States*, 223 F.2d 149 (C.A. 5th, 1955); *Sagonias v. United States*, 223 F.2d 146 (C.A. 5th,

A minor interpretation of the stamp tax occurred in 1955.²⁴ Defendant was convicted for failure to register and pay a gambler's stamp tax. But here the defendant was not actually a "gambler," but what is known as a "pick up man." In gambling parlance where a lottery is operated the "writer" is the person who has the dealings with the gambling public, i.e., he is the newspaper stand operator who takes the dollar and gives a stub. The "banker" is the principal for whom the wagers are accepted, i.e., the boss. The "pick up man" runs between the boss and the newsstand operator. The Court of Appeals of the 5th Circuit held that the pick up man was subject to the special wagering tax.

We think the employee who collected the wagers and delivered them to the principal was as much a part of the business and as much involved in the acceptance of the wagers as the persons who physically received them from the patrons and was "engaged in receiving wagers" in the sense contemplated by the statute.²⁵

This decision was based on a treasury regulation relating to the wagering tax statute purporting to include the pick up man among those subject to the wagering tax.²⁶

However, two years later in 1957, the Supreme Court completely reversed this case thereby nullifying the effect of the Treasury Regulation. Here the Supreme Court pointed out that the wagering statute applied to persons "engaged in receiving wagers" and it quoted with approval the court of appeals' reasoning that there was a "very real difference between a wager and a record of a wagering transaction. It is the banking record and not the wager which the pick-up man receives from the writer and transmits to the banker. The pick up man no more receives wagers than a messenger, who carries records of customer transactions from a branch bank to a central office, receives deposits." Justice Burton dissenting stated: "Registration of the pick up man aids the Government in tracking these gambling operations to their headquarters and is essential to the enforcement of the excise tax. Since the 'receiving wagers' phrase in the registration provisions includes the pick up man, it must have the same meaning in the identical provisions imposing the occupational tax."²⁷

1955) *Ippolito v. United States*, 223 F.2d 154 (C.A. 5th, 1955) *Contreras v. United States*, 223 F.2d 149 (C.A. 5th, 1955); *Sagonias v. United States*, 223 F.2d 146 (C.A. 5th, 1955); *Ippolito v. United States*, 223 F.2d 154 (C.A. 5th, 1955); *Contreras v. United States*, 213 F.2d 96 (C.A. 5th, 1954); *Sulli v. United States*, 213 F.2d 100 (C.A. 5th, 1954);

²⁴ *Sagonias v. United States*, 223 F.2d 146 (C.A. 5th, 1955).

²⁵ *Ibid.*, at 148.

²⁶ Trea. Reg. 132 § 325.41, ex. 2 reads as follows: B operates a numbers game. He has an arrangement with 10 persons, who are employed in various capacities, such as bootblacks, elevator operators, news dealers, etc., to receive wagers from the public on his behalf. B also employs a person to collect from his agents the wagers received on his behalf. B, his 10 agents, and the employee who collects the wagers received on his behalf are each liable for the special tax.

²⁷ *United States v. Calamaro*, 354 U.S. 351, 361 (1957).

CONCLUSION

The eight year history of the federal gambling tax had a shaky start but was bolstered firmly by *Kabriger*, upholding its constitutionality. Then a few states passed statutes providing that the mere possession of such a stamp was prima facie evidence of gambling sufficient for a conviction. After Florida's prima facie statute was declared unconstitutional by the Florida Supreme Court the cases thereafter, both in Florida and in other states, used the wagering tax stamp to support other evidence of gambling. However, at least one city ordinance has been upheld where mere possession of the tax stamp was a violation.²⁸ Even though the tax stamp and prosecutions relating to its possession still extract venomous dissenting opinions on constitutional grounds, it is firmly entrenched in our tax law. Certainly, drastic changes are not imminent from court interpretation, so any change will have to come from Congress.

Right or wrong, both the Congress and the courts have applied a Machiavellian principle to suppress gambling under the guise of a revenue measure. This method recalls the thoughts of Alexander Hamilton in Federalist #12 where, after pointing out the revenues which could be derived from a national tax on liquor, he added:

That article would well bear this rate of duty; and if it should tend to diminish the consumption of it, such an effect would be equally favorable to the agriculture, to the economy, to the morals and to the health of society.

²⁸ *Deitch v. Chattanooga*, 195 Tenn. 245, 258 S.W.2d 776 (1953).

THE RIGHT OF PRIVACY IN ILLINOIS: ITS GROWTH AND PROBABLE DEVELOPMENT

Since the recognition of the right of privacy¹ is very recent in Illinois, only a handful of cases have been decided bearing on the subject. With the exception of one class of cases (involving the right of privacy in regard to the return and distribution of fingerprints and photographs of arrested persons), the Illinois decisions involve the invasions of privacy by printed items, rather than movies,² radio and television programs³ and harassment by debt collectors.⁴ Due to the lack of sufficient coverage of the subject by

¹ The right of privacy is the right of the individual to be let alone or to lead a secluded life, or to be free from unwarranted publicity, or to live without unwarranted interference by the public about matters with which the public is not necessarily concerned. *Schmuckler v. Ohio Bell Tel. Co.*, 116 N.E.2d 819 (Court Common Pleas Ohio 1953.)

² *Melvin v. Reid*, 112 Cal. App. 285, 297 Pac. 91 (1931).

³ *Smith v. National Broadcasting Co.*, 138 Cal. App.2d 807, 292 P.2d 600 (1956).

⁴ *Housh v. Peth*, 99 Ohio App. 26, 135 N.E.2d 440 (1955). There the defendant in attempting to collect a debt telephoned the plaintiff every day at home, for three