Basilius v. ROP, 1 ROP Intrm. 417 (1987)

POLYCARP BASILIUS dba
KOROR AMUSEMENT,
Plaintiff/Appellee,

v.

REPUBLIC OF PALAU, AND
MINISTER OF JUSTICE
THOMAS O. REMENGESAU,
Defendants/Appellants,

and

DANNY KINTOL
dba TOWN and COUNTRY
MUSIC AND AMUSEMENT,
Intervenor/Respondent.

CIVIL APPEAL NO. 83-85
Civil Action No. 13-85

Supreme Court, Appellate Division
Republic of Palau

Opinion
Decided: July 22, 1987

Counsel for Appellee: Carlos H. Salii

Counsel for Appellants: Eric A. Basse

Counsel for Respondent: Kevin N. Kirk

BEFORE: MAMORU NAKAMURA, Chief Justice; ARTHUR NGIRAKLSONG, Associate Justice; EDWARD C. KING,[1] Associate Justice.

NGIRAKLSONG, Justice:

[1]The Honorable Edward C. King is the Chief Justice of the Supreme Court of the Federated States of Micronesia.

⊥418 BACKGROUND

The issue in this case is whether the playing of video poker machines is playing poker within the meaning of the anti-gambling statute.

The Republic of Palau, relying on the anti-gambling statute, 17 PNC § 1601, seized certain poker machines as contraband evidence of illegal gambling in April of 1985. This action challenging the seizure was brought in the Trial Court by Polycarp Basilius, owner and distributor of some of these video poker machines. Danny Kintol, another owner of such machines, joined the action as an intervenor and raised substantially the same factual allegations as did Basilius. Basilius and Kintol sought a declaratory judgment on whether the use or operation of these poker machines is prohibited by the anti-gambling statute.

Messrs. Basilius and Kintol contend that since video poker and blackjack machines are specifically taxed as amusement devises under 40 PNC § 1420, this effectively licenses them and removes them from the prohibitions of the anti-gambling statute. Finally, they argue that the anti-gambling statute when read with the taxing statute, 40 PNC § 1420, constitutes an unconstitutional "trap for the unwary", which does not give fair notice of prohibited conduct.

⊥419 The trial court agreed with Messrs. Basilius and Kintol, holding that the playing of video machines which simulate poker or blackjack is permissible because of the taxing statute, 40 PNC § 1420. The government appeals . .

LEGAL ANALYSIS

The anti-gambling statute upon which the government seized these video poker machines states as follows:

> Gambling. Except as herein specified, all forms of gambling shall be prohibited in the Palau District.
>
> (a) Any games for the purpose of raising funds for a worth cause or for entertainment, sponsored by any school, church organization, social public gathering or non-profit organization shall be permitted.
>
> (b) Under no circumstances shall gambling or betting for money or other stakes be allowed in the following games: Poker, blackjack, dice, hanafuda, or slot machines of any kind.
>
> (c) Any person violating this Section shall be guilty of misdemeanor and, upon conviction thereof, shall be fined not more than one hundred dollars (100.00), or imprisoned for not more than six (6) months, or both.

(17 PNC§ 1601) (emphasis supplied). All forms of gambling are prohibited. Specifically mentioned are poker, blackjack and slot machines of any kind. The only exception in the statute

allows gambling for charitable purposes. However, the statute is clear that, even with a charitable intention, betting for money or other stakes is prohibited when the games are poker, blackjack or slot machines.

⊥420 The statute, 17 PNC § 1601, does not state directly whether the playing of video machines which stimulate poker and blackjack is to be regarded as gambling. Nor do previous decisions of this court discuss the issue. We therefore look to decisions in other jurisdictions applying similar statutes to seek guidance for our development of principles to be applied in Palau.

We find that courts in other jurisdictions have concluded that video and other machines should be regarded as gambling devices when three conditions are met: (1) There must be consideration; (2) Something of value must be offered; [2] and (3) There must be an element of uncontrollable chance involved. *See*, for example, *Games Management, Inc. v. Owens* , 662 P.2d 260 (Kansas 1983): 38 Am. Jur. 2d Gambling, sections 1-3 (1981). We consider these standards suitable for application in Palau.

⊥421 Applying these requirements to video poker machines, we find that these machines are "gambling devices". When a customer deposits coin in the machines, that constitutes a consideration. When a customer gets a certain winning poker hands, he gets coins pouring into a tray directly or credits redeemable at the counter. Either direct payoffs or redeemable credits constitutes "value". Finally, when a customer places a money in the machine, punches some buttons to simulate the playing of poker, discards simulated playing cards and selects replacements, the customer is wagering that an uncertain event would occur. This satisfies that element of "uncontrollable chance".

Although the anti-gambling statute does not specifically mention video poker or blackjack machines, we hold that playing the "gambling devices" described herein which simulate poker or blackjack constitutes playing poker or blackjack within the purview of the anti-gambling statute. The playing of any such gambling devices, which provide either direct payoffs or redeemable credits, violates the anti-gambling ⊥422 statue. "Under any other construction the law would be a farce and the prohibition of the law constantly thwarted by some new game, new invention or new devices." *See, e.g., Pepple v. Fredrick*, 128 P.2d 752, 757 (Idaho, 1942).

We hold that "free games" are not "something of value" and that playing poker or blackjack on machines which only offer free game is not "gambling" within the meaning of 17 PNC § 1601. Supra at 4, footnote.

We now consider the effect, if any, of the taxing statute, 40 PNC § 1420, which provides in part:

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[2] It has been held that if the winner receives direct payoffs of money from the machine, or can convert, or redeem a winning score into money elsewhere within the establishment, this value requirement is met. *Pepple v. Fredrick*, 128 P.2d 752 (Idaho, 1942). However, it has been held that "free game" awards are not sufficient to constitute "something of value." *Games Management, Inc. v. Owens*, 662 P.2d 260, 263 (Kansas 1983).

> Amusement Devices Tax: Every person who, at any time during the tax year, owns a coin-activated amusement device shall, within 30 days from the effective dates of this code or within 30 days of its purchase, and thereafter on an annual basis payable on or before the thirty-first day of January, pay to the Director a tax of $500 for each device that simulates the playing of any card game such as poker or blackjack. For all other types of coin-activated amusement device, a tax of $200 shall be payable on the same basis.

The trial court held that the payment of taxes pursuant to the above taxing statute sanctions the maintenance, operation and the playing of these video poker machines that simulate the playing of poker or blackjack. We do not agree.

⊥423 We base our decision on line of cases stating that payment of taxes on, or licensing of, a gambling machine or device, furnishes no defense or justification for its operation in violation of anti-gambling statute. In *Lewis v. United States* , 348 U.S. 419, 75 S.Ct. 415 (1855), the United States Supreme Court held that the Federal Government may tax what the Federal Government also forbids. (See also *United States v. Statoff* , 60 U.S. 477, 43 S.Ct. 197 and *State v. Joyland Club*, 220 P.2d 988 (Mont. 1930).

The rationale for this proposition has been varied. 118 A.L.R. 827. One reason is that to refuse to tax an illegal activity would tend to defeat . . . [the] policy which forbids games of chance and hazard . . .” *Id.* at 828. Taxing an illegal activity is also a showing of disapproval of the activity rather than approbation. *Casmus v. Lee*, 183 So. 185-Ala. (1938) at 187.

Another argument for taxing illegal activity is that the government should not decline to derive revenue from such sources. If the government shows its disinclination to tax obnoxious business, then the government should decline to receive fines for criminal offenses. 118 A.L.R., *supra*, at 829.

The Committee on Ways and Means of the Senate, First Olbiil Era Kelulau, reported out HB No. 0218-8 HD 9, SD3 on April 24, 1984. That bill became RPPL 1-63, (also known as the ⊥424 “Unified Tax Act”), which later was codified as 40 PNC§ 1001, *et seq*. The intent of this law from legislative history is to “reform and unify the national tax law”. Senate’s Standing Committee Report No. 370 states one of the reasons for this act:

> For far too long many potential sources for tax revenues have not been taxed at all. All possible sources of tax revenue should be taxed to broaden this Republic’s tax base and more equitably spread the tax burden.

(Emphasis Supplied). From this, we conclude that the intent of 40 PNC § 1001, *et seq.*, which includes tax on “amusement devices”, among others, is to generate revenue from all sources. No protection or special treatment for illegal gambling was mentioned and none was statutorily given.

Holding as we do that the same legislative body may tax what it forbids, we necessarily hold that there does not exist repugnancy between the anti-gambling statute and the taxing statute. We do not agree that the taxing statute repeals, at least, certain provisions of the anti-gambling statute by implication.

Finally, we dismiss appellees' contention that the anti-gambling statute is unconstitutionally vague. We believe this contention is without merit. It is clear to this Court that the playing of poker or blackjack by the gambling devices herein constitutes gambling prohibited by the anti-gambling statute.

⊥425 hereby reversed and the case remanded for proceeding consistent with the opinion and holding herein.