

Title: TAX – EXEMPT ORGANIZATIONS AND GAMING

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References: IRS Publication 3079

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TAX – EXEMPT ORGANIZATIONS AND GAMING

GAMING IMPACT ON TAX – EXEMPT STATUS OF FLORIDA ELKS LODGES:

Our lodges are qualified as non-profit 501-(C)-(8) Fraternal Organizations under the Internal Revenue Code subject to enforcement by the IRS. The IRS position on gaming activities, as follows, is contained in IRS Publication 3079 (Rev 8 – 2013 and 10 – 2018) Catalog #25706L.

“Gaming is no different than the conduct of any other trade or business carried on for profit. Though the activity may generate funds to pay expenses associated with the conduct of exempt activities, gaming itself does not further the exempt purposes of most types of organizations.”

“Fraternal organizations may engage in gaming involving only members without jeopardizing their exempt status.”

“Gaming open to the general public does not further the exempt purposes of . . . fraternal organizations. 501(C) (8). . . organizations whose primary activity is public gaming jeopardize their exempt status and the gaming income may also be subject to the tax on unrelated business income.”

The IRS gives some idea of their thinking on the materiality of gaming receipts from non-members as a percentage of total receipts in it’s guidelines for 501-(C)-(7) Social Clubs. “Section 501 (C) (7) social clubs endanger their exempt status when receipts from nonmembers—including those from gaming activities—exceed a certain amount. A social club may receive no more than 35% of its gross annual receipts (including investment income) from sources outside of its membership. Within that 35%, no more than 15% of gross receipts can come from the public’s use of club facilities or services. If those limits are exceeded, the club’s exempt status may be in jeopardy.”

“The IRS determines whether an organization is conducting a “substantial” unrelated activity by examining all of the facts and circumstances. There is no “bright-line” or numerical test prescribed by the Code. The IRS will consider the dollars raised by and spent on an unrelated activity as well as the time and other resources devoted to it in making the determination of substantiality.”

GAMING AND UNRELATED BUSINESS INCOME:

“An exempt organization is not taxed on income from an activity that is substantially related to its exempt purposes even if that activity is a trade or business. However, if an exempt organization regularly carries on a trade or business that is not substantially related to its exempt purpose, except that the trade or business provides funds to carry out that purpose, income from such an unrelated trade or business may be subject to tax. . . Gaming is often considered unrelated to exempt purposes.”

“The following three conditions must be met before an activity may be classified as an unrelated trade or business:”

- One, “the activity must be considered a trade or business.”
- Two, “the activity must be regularly carried on; and”
- Three, “the activity must not be substantially related to the organization’s exempt purpose. (The fact that the activity generates income for the organization to spend on its charitable programs does **not** make the activity related to the organization’s exempt purpose.)”

Most Florida Elks Lodges meet all 3 of these conditions for the reasons next described.

Regarding One: Gaming generates income and is thus considered “trade or business” by the IRS.

Regarding Two: “Gaming is considered “regularly carried on” if it is conducted with a frequency and continuity similar to comparable activities of a non-exempt organization and if pursued in a manner similar to commercial gaming activities.” Bingo, Queen of Hearts, Texas Hold ‘Em are normally scheduled weekly events and pull-tab machines are available when the social quarters are open in most Florida Lodges. “Gaming that occurs weekly is considered to be regularly carried on” by the IRS.

Regarding Three: “Gaming is generally not an exempt activity” per the IRS and obviously not a major purpose for the existence of the BPOE nationwide.

Even if a gaming activity meets the three conditions above, there are some other UBI exceptions that may apply. These include:

- “Certain bingo games;”
- “Activities conducted with substantially all volunteer labor;”

“Gaming does not generate taxable income when it actually furthers the exempt purposes for which an organization exists.” ENF, HATF, Hoop Shoot, scholarships, lodge youth and veterans’ committee raffles, drawings and other gaming programs that benefit Elk exempt related purposes.

Regarding bingo and bingo pull tabs the IRS says:

“Because of the statutory bingo exclusion, an exempt organization may conduct games meeting the exclusion to raise funds, and the activity will not generate unrelated business income subject to taxation.”

“Instant Bingo,” and similar pull-tab or scratch-off games do not qualify. In these games, a player places a wager by purchasing a card containing pre-printed numbers or a pattern covered by tabs or film. By uncovering the numbers or pattern, the player discovers whether the card is a winner. Unlike bingo meeting the exclusion, the winners of these games are pre-determined.”

If a lodge follows all of the provisions contained in Florida Statute 849.0931 (elsewhere published in this website), you should avoid unrelated business income subject to taxation of open to the public bingo and instant bingo pull tab activities.

REGARDING THE IRS VOLUNTEER LABOR RULE EXCEPTION:

Gaming “will **not** be considered an unrelated trade or business—and the income earned from it will not be taxed—if **substantially all** of the work is performed by volunteers. Although “substantially all” is not defined in this context, an unofficial guideline borrowed from other areas of exempt organization law is 85%. That is, if at least 85% of the work (as measured by the number of hours worked), absent other factors, is carried on by people who work without pay and no more than 15% of the work is carried on by people who are compensated.”

“Compensation is interpreted broadly and may include payments to bartenders, waitresses, snack bar staff, maintenance workers, security, and other workers, as well as the tips such workers receive from patrons at the gaming session. A worker who obtains goods or services at a reduced price in return for his services may be considered to be compensated.”

“Compensation may also include non-monetary benefits such as free drinks or food if such items are more than a mere gratuity and are intended to be compensation for the workers’ services. On the other hand, a worker who receives merely insignificant monetary or non-monetary benefits is considered a volunteer, not a compensated worker. Determining whether a benefit is insignificant requires consideration not only of the value of the benefit but also:

- The quantity and quality of the work performed:
- The cost to the organization of providing the benefit;
- And
- The connection between the benefit received and the performance of services.”

“Compensation includes tips. If tipping is allowed, the exception for volunteer labor may not apply.”

“Tips paid to a worker in cash, checks or other cash equivalent (including charged tips) of more than \$20 in a calendar month while working for any one employer are also wages subject to employment taxes.”

“A volunteer” is “someone who works for your organization for no compensation, either monetary or non-monetary. Note that volunteers can be either employees or independent contractors under the common law test.”

“Exempt organizations often want to recognize and thank their volunteers, and often do so with awards or gifts. In general, if these are non-cash items of nominal value, such as turkeys or hams around the holidays, they would not constitute taxable wages.”

IRS RECORD KEEPING:

Caution: "If you intend to rely on the volunteer labor exclusion to exclude gaming from unrelated trade or business, you should maintain accurate records reflecting the number of hours worked" for every function or event.

Every time gaming receipts from any source are turned in to the Secretary's Office, a detailed report should accompany the turn in regarding money received and disbursed, details of hours spent, type of work performed, i.e. each bingo, Queen of Hearts, Texas Hold 'Em session, periodic pull tab machine clearing, etc. No paid employee, to include the Lodge Secretary and Treasurer should be involved in the pre turn-in process unless acting as a volunteer during the session. Vouchers, approved by the lodge, should clearly indicate the purpose of each check to substantiate its validity as a bona fide offset to gaming receipts for U.B.I. purposes.

Most Florida Elks will have gross annual receipts in excess of \$50,000 and are required to file annually Form 990 with the IRS and most likely Part III, Schedule G. The information required on Schedule G is a good indication of what daily reports that accompany cash receipts should look like.

Schedule G information includes:

- "Gross receipts include all amounts wagered in games, not just the net proceeds after winning wagers have been paid out."
- "Gross revenues from bingo, pull-tabs/instant bingo, and other types of gaming;"
- "Cash and non-cash prizes paid for each type of gaming;"
- "... other direct gaming expenses;"
- "Percentage of your organization's games operated in your own facilities and in outside facilities;"
- "Percentage of volunteer labor for each type of gaming;"
- "Amount of mandatory charitable distributions from gaming proceeds required under state law, or the amount of proceeds spent on your organization's own exempt activities;"
- "Names and addresses of the gaming manager and the person who prepares your gaming/special events books and records;"
- "Information about third parties with which your organization has contracts to receive gaming revenue."

REPORTING WINNINGS AND WITHHOLDING INCOME TAX:

Chapter 6 of IRS Publication 3079 (Rev 8 – 2013) illustrates how various levels of gaming winnings must be reported to the IRS (normally on Form W2-G) and levels where Federal Income Tax must be withheld and reported. Levels most likely affecting Florida Lodges are \$600 or at least 300 times the wager, \$1,200 and \$5,000. Generally speaking, these are key IRS guidelines regarding fraternal organizations:

- You must issue W-2G Forms to pull-tab and raffle ticket winners for over \$600.
- You must issue W-2G Forms for bingo and slot machine winners for over \$1,200.
- For all winners over \$5,000 i.e. Queen of Hearts, you must withhold federal income taxes of 24% from each payment.

If you cannot locate the information needed on reporting and/or withholding income tax on a particular situation, it is suggested that you contact the lodge's outside CPA firm for a ruling in writing.

EDITOR'S NOTE: AVOIDING RISKS

Risk of losing our tax exempt status or incurring taxes on UBI from gaming and other activities can be avoided if all Elk members uphold the obligation they assumed when accepted as a member. That is, to obey the statutes, rules and regulations within the BPOE and the laws within the USA. This includes having lodges open only to bona fide members and their guests and allowing only members to pay for food, drinks, other goods and services and gaming activities sponsored by your lodge as provided by IRS, ABT and other national, state and local laws, rules, and regulations.

Submitted by:

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