

BOARD OF EQUALIZATION  
STATE OF CALIFORNIA

In the Matter of the Appeal of: ) APPELLANTS'  
) EXHIBITS "G"  
) THROUGH "L"  
)  
JOHN KUNAK AND ) Case No. 740944  
)  
MARY FLEMING ) Date of Hearing:  
) August 5, 2014  
) 9:30 a.m.

STATE BOARD OF EQUALIZATION



Appeal Name: John Kunak & Mary Fleming

Case ID: 740944 ITEM # B4

Date: 8/5/14 Exhibit No: 8.3



FTB DEPT PUBLIC COMMENT

**EXHIBIT "G"**

CINCINNATI OH 45999-0049

In reply refer to: [REDACTED]  
Jan. 28, 2014 LTR 86C 0  
[REDACTED] 200812 30 0  
00000318  
BODC: SB

JOHN KUNAK & MARY E FLEMING  
[REDACTED]

010832

Taxpayer Identification Number: [REDACTED]  
Tax Period(s): Dec. 31, 2008  
Form: 1040

Dear Taxpayer:

Thank you for your inquiry of May 10, 2013.

We're sending your inquiry, dated May 10, 2013, to the office at the address at the end of this letter for the following reason(s):

We believe that office can best process your request and answer your questions.

If you need forms, schedules, or publications, you can obtain them by visiting the IRS website at [www.irs.gov](http://www.irs.gov) or by calling toll-free at 1-800-TAX-FORM (1-800-829-3676).

If you have questions, you can call us toll free at 1-866-897-0161.

If you prefer, you can write to us at the address at the top of the first page of this letter.

Whenever you write, include a copy of this letter and provide in the spaces below your telephone number with the hours we can reach you. Keep a copy of this letter for your records.

Telephone Number ( ) \_\_\_\_\_ Hours \_\_\_\_\_

We apologize for any inconvenience, and thank you for your cooperation.

A copy of this letter and any referenced enclosures have been forwarded to your authorized representative(s).

Jan. 28, 2014

LTR 86C 0

200812 30 0

00000319

JOHN KUNAK & MARY E FLEMING

Sincerely yours,

*Charlene Caudell*

Charlene Caudell, Operations Mgr.  
Field Support Operations

Jan. 28, 2014

LTR 86C 0

200812 30 0

00000320

JOHN KUNAK & MARY E FLEMING



To: Internal Revenue Service  
P.O. Box 9036 Stop 4440  
Ogden UT 84201

010832

**EXHIBIT "H"**

Date: 05/01/2014

Please refer to all checked boxes regarding your request for taxpayer(s) named below:  
**JOHN N KUNAK**

**Section 1— Unfulfilled or Partially Fulfilled Request**

- 1. We were unable to provide any of the items you requested.
- 2. We have enclosed the items you requested (or provided them to the 3rd party on line 5 of your request) except for those listed below.
  - Copy of Tax Return(s)/Form(s) for tax year(s):
  - Verification of Non-filing for tax year(s):
  - Return Transcript(s) for tax year(s):
  - Account Transcript(s) for tax year(s):
  - Record of Account Transcript(s) for tax year(s):
  - Form W-2, Form 1099 Series, Form 1098 series, or Form 5498 series transcript(s) for tax year(s):
  - Audit Report or CP2000 Notice:
  - Copy of Tax Return(s) for tax year(s) mailed to you previously.

Note: If your request was submitted through an IVES participant, the requested items we could fill will be sent directly to them.

**Section 2 — Payment-related Information**

- 3. You submitted Form 4506, 4506-T or 4506T-EZ with a payment. However, there are no fees for transcripts. We have forwarded your request to the Returns and Income Verification Services (RAIVS) team for processing.
- 4. We are returning your payment to you or your designated third party.
- 5. A refund will be issued in 4-6 weeks because:
  - Some or all of the products you requested were unavailable.
  - You overpaid.
  - There is no fee for some or all of the products you requested.
  - We could not consider your request.
- 6. The refund will be issued to the taxpayer. The box on line 9 of Form 4506 has no designation for the issuance of a refund to any one other than the taxpayer.
- 7. You must submit a newly-signed request with payment. The payment submitted with your initial request is in the process of being refunded and cannot be credited to a new request. You should receive the refund in 4-6 weeks.

**Section 3 — Unprocessable Request**

- 8. Your request was received either without a payment or with an insufficient payment. A fee of \$50 is required for each tax year requested.
- 9. A tax form number was not present on the request and/or the tax year(s) were not listed.
- 10. Your request was not signed and/or dated. Please complete a new Form 4506, Form 4506-T or Form 4506T-EZ.
- 11. Your request was received more than 120 days after you signed and dated it. Please complete a new Form 4506, Form 4506-T or Form 4506T-EZ.
- 12. You requested that information be sent to more than one third party. You must submit a separate Form 4506, 4506-T or 4506T-EZ for each third party recipient identified on line 5 of those forms.
- 13. We returned a copy of the request to the taxpayer explaining why we are unable to consider it. Disclosure laws do not permit us to provide you with this information. Please contact the taxpayer for details.
- 14. Lines 1 through 9 of Form 4506, 4506-T, or lines 1 through 6 on Form 4506T-EZ must be complete. Please refer to the highlighted area on your request and provide missing information.
- 15. The signature on your request is illegible. Please complete a new Form 4506, Form 4506-T or 4506T-EZ.
- 16. Electronic or stamped signatures are not acceptable. Please complete a new Form 4506, Form 4506-T or 4506T-EZ with an original signature.
- 17. Required entries on your request are illegible. Please complete a new Form 4506, 4506-T or 4506T-EZ.
- 18. We are unable to accept altered forms (e.g. white-out, line-thru). Please complete a new Form 4506, 4506-T or 4506T-EZ.
- 19. Individual tax information (e.g. Form 1040) and business tax information (e.g. Form 1065, Form 1120) must be requested on separate Forms 4506 or 4506-T.
- 20. Return transcripts are available only for the current tax year and three years prior. Return transcripts cannot be obtained for Form 1040X. You may be able to obtain an actual photocopy of Form 1040X or of some older returns (generally those filed in the last 7 years) for a \$50 fee for each tax period requested. Use Form 4506 (not 4506-T or 4506T-EZ) to request the photocopy.
- 21. You provided an Employer Identification Number (00-1234567), instead of a Social Security Number (000-00-1234) or Individual Taxpayer Identification Number (900-00-1234).
- 22. The taxpayer's information does not match our records, is incomplete, or missing. Please correct the item(s) checked below.
  - Name (Box 1a or 2a)
  - Social Security Number (Box 1b or 2b)
  - Address
- 23. Only one of the transcript request boxes may be marked on a Form 4506-T for an IVES request. Please resubmit your form indicating the product requested.
- 24. Some or all of the IVES participant information was not listed on line 5 of Form 4506-T or 4506T-EZ.

**Section 3 — Unprocessable Request (continued)**

- 25. For the IVES program, records of accounts are only available for Forms 1040, 1065 and 1120 series.
- 26. The taxpayer's address does not match our records. Please provide one of the following when you resubmit your request.
  - a. Photocopies of two pieces of identification bearing the taxpayer's signature, preferably a driver's license and social security card. NOTE: A credit card is not an acceptable form of identification.
  - b. An original notarized statement affirming the taxpayer's identity.
  - c. A signed and dated statement by the taxpayer with the following wording:  
"I certify under penalty of perjury under the laws of the United States of America that I am the taxpayer who filed the tax return(s) for tax year(s) \_\_\_\_\_"
- 27. We are unable to provide the information requested for tax year(s) \_\_\_\_\_. We are permitted to provide tax information for jointly filed tax year(s) only to the spouses who signed and filed the return(s).
- 28. You have not submitted an authorization that meets IRS guidelines for receiving the information you requested. To receive information about another taxpayer you must submit a valid authorization that is one of the following.
  - a. **Form 2848** (Power of Attorney) that specifies which tax forms or tax matters, tax years, and acts are authorized by the taxpayer.
  - b. **Form 8821** (Tax Information Authorization) that specifies which tax forms or tax matters and tax years are authorized by the taxpayer.
  - c. Certificate of Guardianship or other court document granting similar authorization.
- 29. The information required for the release of taxpayer information to a third party is incomplete. Please ensure that both the name and address of the third party appear on line 5 of Form 4506, 4506-T or 4506T-EZ.
- 30. To receive information about a deceased taxpayer, you must submit one of the items below specifically identifying you as having the authority to act on behalf of the estate. NOTE: The death of a taxpayer renders all previous certificates of guardianship and powers of attorney invalid.
  - a. Certificate of Guardianship over the estate.
  - b. Letters Testamentary.
  - c. A Will probated by the court.
  - d. Other court documents identifying you as the Personal Representative, granting similar authority, or otherwise establishing material interest.
- 31. The proof of authorization you provided did not cover all the requested items. To obtain the information you requested for Forms \_\_\_\_\_ for tax year(s) \_\_\_\_\_ you must provide an authorization for those items.
- 32. We have no record of receiving Forms \_\_\_\_\_ for tax year(s) \_\_\_\_\_ and cannot provide a copy.

**Section 4 — Copy of Tax Return(s)**

- 33. Tax returns are available for only a limited number of years. We no longer have the returns you requested for tax year(s) \_\_\_\_\_. These returns have been destroyed by authorization of the United States Congress.
- 34. In place of tax returns that have been destroyed, we are providing other tax account information.
- 35. We have no record of receiving a tax return for tax year(s) \_\_\_\_\_. However, the IRS prepared a substitute return for this tax year. You may request information about the substitute return under the Freedom of Information Act (FOIA). We have enclosed an information sheet (Notice 1356) on how to submit such a request. Please visit [www.irs.gov](http://www.irs.gov) for more information.
- 36. Tax return(s) for tax year(s) \_\_\_\_\_ are not available at this time. If your return(s) have been filed, please resubmit your request in 60 days.
- 37. Some or all of the tax returns you requested are not available.
  - In place of the unavailable photocopy for tax year(s) \_\_\_\_\_ we are providing return information free of charge.
  - Neither a tax return nor a return information is available for year(s) \_\_\_\_\_

**Section 5 — Verification of Nonfiling / Return Transcripts / Account Transcripts / Record of Account Transcripts**

- 38. We found no record of a tax return being filed for year(s) \_\_\_\_\_. Consider this a letter of Verification of Non-filing for those year(s) for taxpayer \_\_\_\_\_
- 39. A Verification of Non-filing for any year cannot be provided before June 15 of the following year. Please resubmit your request after that date.
- 40. We are unable to verify non-filing for tax year(s) \_\_\_\_\_ because a return was filed. Enclosed is a transcript of each return found.
- 41. Your request authorized the third party to receive only a Verification of Non-filing. Thus we could not provide the return transcripts to the third party.
- 42. Our records indicate you submitted an extension of time to file your return. Please resubmit your request 6 weeks after the date you file(d) your return (3 weeks if electronically filed).
- 43. We have no record of receiving Forms \_\_\_\_\_ for tax year(s) \_\_\_\_\_. We cannot provide a return transcript or record of account. If you recently filed your return, please wait 6 weeks before resubmitting a request (3 weeks if electronically filed).
- 44. Return transcripts and record of account transcripts for tax year(s) \_\_\_\_\_ are currently unavailable. If your return has been filed, please resubmit your request in 30 days.
- 45. Tax information for tax year(s) \_\_\_\_\_ is not available until \_\_\_\_\_

**Section 5 — Verification of Nonfiling / Return Transcripts / Account Transcripts / Record of Account Transcripts (continued)**

46. Since tax information is kept only for a limited number of years, the transcript(s) you requested are not available.
- Return transcripts or record of account transcripts are unavailable for tax year(s) \_\_\_\_\_
- Account transcript(s) are unavailable for tax year(s) \_\_\_\_\_

47. We are unable to provide tax information for year(s) \_\_\_\_\_ . We find no record of a return being filed.

**Section 6 — Form W-2, Form 1099 series, Form 1098 series, and Form 5498 series Transcripts**

48. We do not have Form W-2 as submitted by employers for tax years prior to \_\_\_\_\_. The Social Security Administration (SSA) can provide social security earnings information for older tax years. You may contact the SSA at 1-800-772-1213 or submit a written request and the required fee (for non-retirement requests) to:

Social Security Administration  
Division of Earnings Records Operations  
PO Box 33003  
Baltimore, MD 21290-3003

or you may request the earnings information from the employer who issued your Form(s) W-2.

49. We are unable to provide the Form W-2 information you requested. Please contact the SSA at the address mentioned in paragraph 48 to obtain your W-2 information.
50. Forms W-2, 1098, 1099, and 5498 for any year cannot be provided before August 1 of the following year. Please resubmit your request after that date.
51. We have no record of Form W-2, 1099, 1098, or 5498 for tax year(s) \_\_\_\_\_
52. We are unable to provide Form W-3 information. If you would like transcripts of Forms W-2, please complete and submit a new Form 4506-T. Alternately, you may request copies of Forms W-2 from the Social Security Administration. (See paragraph 48 for SSA contact information).
53. We found no record of a W-2 for the Social Security Number you provided for the following tax year(s) \_\_\_\_\_

54. We are unable to provide the Form W-2 information requested for the SSN you provided since neither that person nor an authorized delegate signed Form 4506-T. A request for Form W-2 information for both spouses must be signed by both spouses.

55. The Forms W-2, 1098, 1099, and 5498 for the year(s) \_\_\_\_\_ are temporarily unavailable. Please complete and return a new Form 4506-T in 30 days.

56. The Forms W-2, 1098, 1099, and 5498 for the year(s) \_\_\_\_\_ are temporarily unavailable. If we receive the information within the next \_\_\_\_\_ days we will send the information to you.

**Section 7 — Audit/CP 2000**

57. We are unable to provide your audit or CP 2000 information because:

- Audit or CP2000-related information for tax year(s) \_\_\_\_\_ has been destroyed.
- Currently we are unable to provide Audit/CP2000 information for tax year(s) 2008. Please allow four to six weeks before calling our Customer Service Area (see Section 9) to request your Audit Report or CP 2000 Notice (Summary of Proposed Changes).

58. The request for a copy of your Audit Report or CP2000 Notice (Summary of Proposed Changes) has been referred to the appropriate function. Please contact the Customer Service Area for additional information at the number listed in Section 9 below.

**Section 8 — Miscellaneous Information**

59. The remainder of your requested information will be provided within 2-4 weeks.
60. We are unable to provide Form 1096 information.
61. The IRS cannot provide state tax documents. Please contact your local state office.
62. Information sent to the address you provided for the third party was returned as undeliverable. Please contact the third party and provide the enclosed information.
63. We are unable to provide the requested information to a third party. Please contact the taxpayer for specific details.
64. We notified the third party listed on line 5 of your Form 4506, 4506-T or 4506T-EZ of our inability to consider your request. However, we are not permitted to disclose the reasons. The third party may contact you to obtain the information necessary to complete your request.
65. We are unable to locate a current address for the taxpayer. Since you are the third party identified on line 5 of Form 4506, 4506-T or 4506T-EZ, we are sending you this letter. Please contact the taxpayer to resubmit the request.
66. If you have questions about this letter and have applied for a loan, please take the letter and a copy of your Form 4506-T or 4506T-EZ request to your financial institution.
67. Your request has been referred to the \_\_\_\_\_ function. Please contact the Customer Service area at the number listed in Section 9 for additional information.

**Section 9 — Further Information**

If you have any questions about the information in this letter ONLY, please call the Return and Income Verification Services Team at

( 559 ) 456-5894 , or fax to ( 559 ) 456-7225

Please refer to # 1012769984

All other inquiries should be directed to our Customer Service Area. For questions concerning:

- Your individual return, please call 1-800-829-0922
- Your individual return with Schedules C, E, F, or Form 2106, please call 1-800-829-8374.
- Business returns, please call 1-800-829-0115.
- Returns with an international address, please call 1-215-516-2000 (not a toll free call).

Enclosures:

- Original or copy of request
- Envelope
- Blank forms
- Original taxpayer documents
- Notice 1356

**FAX TRANSMITTAL FORM**

DATE: 6/17/14

FAX # CALLED: \_\_\_\_\_

FAX TO: \_\_\_\_\_

NAME OF COMPANY: IRS

FAX FROM: \_\_\_\_\_ JOHN N. KUNAK

RE: \_\_\_\_\_

COMMENTS: \_\_\_\_\_

Number of pages sent including this page 4

**If you experience any problems receiving this FAX, please contact immediately.**

My FAX number for your reference: [REDACTED]

THANK YOU

**PLEASE NOTE:**

The information contained in this facsimile message is privileged and confidential and is intended only for the use of the individual named above and others who have been specifically authorized to receive it. If you are not the intended recipient, you are hereby notified that any dissemination, distribution or copying of this communication is strictly prohibited. If you have received this communication in error, please notify us immediately by telephone at:

RE: [REDACTED]

John Kunak

I received an IMF RAIVS Reject Checksheet dated 5/1/14 advising:

"1. We were unable to provide any of the items you requested."

and

"57. We are unable to provide your audit or CP 2000 information because: Currently we are unable to provide Audit (CP 2000) information for tax year(s) 2008.

Please allow four to six weeks before calling our Customer Service Area (see Section 9) to request your Audit Report or CP2000 Notice (Summary of Proposed Charges).

I am trying to confirm the accuracy of my "Account Transcript" dated 3-9-12 for 2008 documenting that information. I have enclosed

that 2 page document. Please provide any document prepared after 3-9-12 if changes were made after that date.

Please advise.

John Kunak

John Kunak

**Internal Revenue Service**  
 United States Department of the Treasury

This Product Contains Sensitive Taxpayer Data

Request Date: 03-09-2012  
 Response Date: 03-09-2012  
 Tracking Number: 100128316763

Account Transcript

FORM NUMBER: 1040

TAX PERIOD: Dec. 31, 2008

TAXPAYER IDENTIFICATION NUMBER:  
 SPOUSE TAXPAYER IDENTIFICATION NUMBER:

JOHN KUNAK & MARY E FLEMING

020249

~~ANY MINUS SIGN SHOWN BELOW SIGNIFIES A CREDIT AMOUNT~~

ACCOUNT BALANCE: 0.00  
 ACCRUED INTEREST: 0.00 AS OF: Mar. 26, 2012  
 ACCRUED PENALTY: 0.00 AS OF: Mar. 26, 2012

ACCOUNT BALANCE  
 PLUS ACCRUALS  
 (this is not a  
 payoff amount): 0.00

✕ INFORMATION FROM THE RETURN OR AS ADJUSTED ✕

EXEMPTIONS: 03  
 FILING STATUS: Married Filing Joint  
 ADJUSTED GROSS INCOME: 549,562.00  
 TAXABLE INCOME: 432,487.00  
 TAX PER RETURN: 11,551.00  
 SE TAXABLE INCOME TAXPAYER: 0.00  
 SE TAXABLE INCOME SPOUSE: 23,564.00  
 TOTAL SELF EMPLOYMENT TAX: 3,605.00

RETURN DUE DATE OR RETURN RECEIVED DATE (WHICHEVER IS LATER) Oct. 17, 2009  
 PROCESSING DATE Nov. 16, 2009

TRANSACTIONS				
CODE	EXPLANATION OF TRANSACTION	CYCLE	DATE	AMOUNT
150	Tax return filed 89221-298-95323-9	20094408	11-16-2009	\$11,551.00
806	W-2 or 1099 withholding		04-15-2009	-\$8,518.00
430	Estimated tax payment		04-14-2008	-\$500.00
430	Estimated tax payment		07-07-2008	-\$500.00
430	Estimated tax payment		12-29-2008	-\$1,000.00
460	Extension of time to file ext. Date 10-15-2009		04-15-2009	\$0.00
670	Payment		04-15-2009	-\$1,033.00
460	Extension of time to file ext. Date 10-15-2009		04-15-2009	\$0.00

420	Examination of tax return	03-11-2010	\$0.00
960	Appointed representative	02-01-2011	\$0.00
961	Removed appointed representative	01-16-2012	\$0.00
300	Additional tax assessed by examination 49247-453-30152-2	20120905 03-12-2012	\$0.00

This Product Contains Sensitive Taxpayer Data

HP Officejet Pro 8600 N911g Series

Fax Log for  
Law Offices of John Kunak  
16612570668  
Jun 17 2014 11:44AM

---

Last Transaction

Date	Time	Type	Station ID	Duration	Pages	Result
				Digital Fax		
Jun 17	11:42AM	Fax Sent	15594567225	1:13 N/A	4	OK

**Note:**

An image of page 1 will appear here only for faxes that are sent as Scan and Fax.

**EXHIBIT "I"**

OGDEN UT 84201-0049

In reply refer to: [REDACTED]  
May 20, 2014 LTR 86C 0  
[REDACTED] 200812 30 0  
00000345  
BODC: SB

JOHN KUNAK & MARY E FLEMING  
[REDACTED]



011260

Taxpayer Identification Number: [REDACTED]  
Tax Period(s): Dec. 31, 2008  
Form: 1040

Dear Taxpayer:

We're sending your claim, Form 1040X, to the Area Office for review. That office will contact you within 60 days.

If you have any questions, please contact the office where we've transferred your case by calling Doug Biggart at 602-636-9328 between the hours of 7:30 a.m. and 3:30 p.m. If the number is outside your local calling area, there will be a long-distance charge to you.

If you need forms, schedules, or publications, you can obtain them by visiting the IRS website at [www.irs.gov](http://www.irs.gov) or by calling toll-free at 1-800-TAX-FORM (1-800-829-3676).

Whenever you write, include a copy of this letter and provide in the spaces below your telephone number with the hours we can reach you. Keep a copy of this letter for your records.

Telephone Number ( ) \_\_\_\_\_ Hours \_\_\_\_\_

We apologize for any inconvenience, and thank you for your cooperation.

A copy of this letter and any referenced enclosures have been forwarded to your authorized representative(s).

May 20, 2014

LTR 86C 0

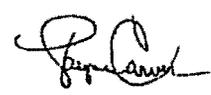
200812 30

0

00000346

JOHN KUNAK & MARY E FLEMING

Sincerely yours,



Layne Carver  
Operations Mgr., Exam SC Support

**EXHIBIT "J"**



**CIRCUIT COURT OF SOUTH DAKOTA  
SIXTH JUDICIAL CIRCUIT**

HUGHES COUNTY COURTHOUSE  
P.O. BOX 1238  
PIERRE, SOUTH DAKOTA 57501-1238

MARK BARNETT  
CIRCUIT COURT JUDGE  
Phone: (605) 773-4014  
Fax: (605) 773-6492  
Mark.Barnett@ujs.state.sd.us

LORI J. GRODE  
COURT REPORTER  
Phone: (605) 773-8227  
Lori.Grode@ujs.state.sd.us

KRISTI JONES  
SIXTH CIRCUIT LAW CLERK  
Kristi.Jones@ujs.state.sd.us

March 13, 2014

Sandra Hoglund Hanson  
Davenport, Evans, Hurwitz & Smith  
P.O. Box 1030  
Sioux Falls, SD 57101-1030

Jeromy J. Pankratz  
Assistant Attorney General  
1302 E. Highway 14, Suite 1  
Pierre, SD 57501

**Re: Hughes County Civ. No. 10-466: First Gold, Inc., Mineral Palace, LP,  
and Four Aces Gaming, LLC v. South Dakota Department of Revenue and  
Regulation.**

**MEMORANDUM**

First Gold, Inc., Mineral Palace, LP, and Four Aces Gaming, LLC ("Plaintiffs") brought suit against South Dakota Department of Revenue and Regulation ("Department") for declaratory relief and refunds of gaming taxes paid to the Department. Both the Department and Plaintiffs move for summary judgment. The parties in this case generally agree as to the underlying facts, and both parties have moved for summary judgment on the basis that the dispute only concerns an interpretation of law.

**BACKGROUND**

Plaintiffs are all licensed gaming establishments offering limited gaming to the public in Deadwood, South Dakota. To attract patrons, Plaintiffs offer "promotional play" or "free play." Generally, the promotional play allows players to play slot machines without using any of their own money. In order for a patron to

acquire promotional play, the patron must join the "player's club."<sup>1</sup> These clubs allow the players to accumulate "points" for playing. Each gaming establishment has their own rules for how their promotional play operates, but generally such play may only be used by the patron who joins the player's club and the promotional play credits have expiration dates. Patrons cannot buy promotional play, and none of the Plaintiffs sell the promotional play. Plaintiffs each run their promotional play as follows:

First Gold:

At First Gold, free play credits are stored on a computer server. Patrons with free play credits have players' accounts, and they may access the free play credits in their accounts by using their plastic card IDs and personally unique PIN numbers. Patrons with free play in their account may insert their cards into slot machines and play without using their own money. If a slot machine pays out while being operated with free play credits, the patron will win money. The free play credits in the players' account cannot be redeemed for cash, merchandise, or other promotional offers. First Gold does limit how many free play credits may be downloaded at a time, and the credits do expire.

Mineral Palace:

At Mineral Palace, free play is downloaded to a slot machine through a plastic card similar to a credit/debit card. Free play can also be used at the tables where a patron is given a special chip with which to play. This chip cannot be redeemed. If a slot machine or table pays out while being operated with free play, the patron will win money. The chips or free play cannot be redeemed for cash merchandise, or other promotional offers. This free play is limited and does expire.

Four Aces:

Four Aces gives patrons promotional play in the form of a paper slot or table game coupon. The coupon may be inserted into the slot machines, and the patron can play without using their own money. At the tables, patrons are allowed one free hand at a table of their choice using the free play coupon. The coupon is placed on the table in front of the player, and the hand is then played. If a slot machine or

---

<sup>1</sup> First Gold's club is called the "Gold Club," Mineral Palace's club is called the "Players Club," and Four Aces' club is called the "Cash Back Club."

table pays out while playing with free play, the patron will win money. This free play is limited and does expire.

Taxes on gaming revenues are collected by the Department pursuant to SDCL 42-7B. An eight percent (8%) gaming tax on the adjusted gross proceeds of gaming is permitted by SDCL 42-7B-28. Additionally, a one percent (1%) tax on the adjusted gross proceeds of gaming is allowed by SDCL 42-7B-28.1. The operative term in both statutes, "adjusted gross proceeds," is defined as,

"Adjusted gross proceeds," except in the case of the games of poker, gross proceeds less cash prizes. In games of poker, the term means any sums wagered in a poker hand which may be retained by the licensee as compensation which must be consistent with the minimum and maximum amount established by the South Dakota Commission on Gaming . . .

SDCL 42-7B-4(1). The South Dakota Commission on Gaming ("Commission") has also been granted authority under SDCL 42-7B-7<sup>2</sup> to adopt administrative rules to administer the laws on gaming taxes. In particular, the Commission has promulgated rules regarding promotional play on adjusted gross gaming proceeds which are found in ARSD, Art. 20:18. The Commission has issued the following relevant regulations in regards to promotional play:

Declaratory Ruling: The Commission on Gaming does hereby declare and determine that promotional money such as Cadillac Cash shall be counted for purposes of calculating gaming tax pursuant to SDCL 42-7B-28. The

---

<sup>2</sup> SDCL 42-7B-7 provides. "The commission may promulgate rules for the orderly transaction and conduct of its business and the substantive rules that it may determine proper concerning the issuance, revocation and suspension of gaming licensees, the division of machines or card games that may be placed in any building or retail business, the conduct and operation of limited card games and slot machines, and any other things necessary to carry out the purposes of this chapter. The commission may also promulgate rules necessary to administer complaints which may be received from the public and conduct such other investigations and inspections into the conduct of the games and the licensees and the maintenance of the equipment as the commission may deem necessary and proper. Rules of the commission shall be promulgated pursuant to chapter 1-26. License issuance, suspension, and revocation are contested cases within the meaning of chapter 1-26. The commission's rules may provide procedures for summary suspension of any license issued under this chapter and shall provide for subsequent contested case hearings before suspensions become final or a license is revoked. The commission may apply for injunctive or declaratory relief to enforce the provisions of this chapter and any rules promulgated thereunder. Action by the commission may not limit the authority of the state's attorney or attorney general from enforcing criminal actions."

Commission does further declare and determine that all of the promotional money shall be reported as gross revenue and/or adjusted gross proceeds irregardless of any jackpots attributable to the use of Cadillac Jack's promotional money. South Dakota Commission on Gaming Declaratory Ruling dated June 11, 2007.

20:18:20:02:01. Promotional items – Definition of specific wager. A licensee who engages in promotions to increase business and gaming at the licensee's business may not deduct payouts made pursuant to the promotion from adjusted gross income except for money, prizes, or tokens paid at face value directly to a patron as the result of a specific wager. A specific wager requires two or more persons to stake something of value on an event, the outcome of which is uncertain. If only one party risks something of value, there is no wager.

ARSD 20:18:20:02. Plaintiffs and the Department dispute whether promotional play should be included in the calculation of the adjusted gross proceeds which is subject to taxation under SDCL 42-7B-28-28.1.

The Department contends this issue is not one of first impression, but that the Gaming Commission already issued an administrative declaratory ruling on this exact issue in 2007, as cited *supra*. On May 7, 2007, BY Development, Inc., the owner of Cadillac Jack's Casino (not a party to this suit), filed a petition with the Commission requesting a declaratory judgment on whether their promotional play, "Cadillac Cash," should be counted in the calculation of gaming tax. A hearing was held before the Commission on May 17, 2007, and ruling and finding of facts and conclusions of law were issued on June 11, 2007. The Commission held that Cadillac Cash, as a promotional award, was not deductible when calculating the adjusted gross proceeds. Therefore, the Commission declared the Cadillac Cash must be counted in the statistical drop and in the calculation of gaming tax on adjusted gross proceeds.

In 2009, the Deadwood Gaming Association filed a petition with the Commission to amend the Commission's rules to eliminate free promotional play from the calculation of adjusted gross proceeds. At the time of this petition, all

three Plaintiffs were members of the Deadwood Gaming Association. The petition was denied on December 11, 2009.

Plaintiffs have been including promotional play in the calculation of their adjusted gross income and remitting game tax in accordance with this calculation, but have done so under protest. Mineral Palace first paid taxes under protest on October 12, 2010. First Gold first paid taxes under protest on April 14, 2011. According to the Department, there is no record of Four Aces paying taxes under protest. Additionally, the Department contends none of the Plaintiffs paid any tax under protest from 2003 until October 12, 2010. Plaintiffs have brought this action seeking a declaration that free play should not be included in the calculation of adjusted gross proceeds because free play is not a "wager" or a "bet" and is thus excluded from the gaming tax. Plaintiffs additionally seek a refund of the gaming taxes they have paid under protest. Both Plaintiffs and the Department have moved for summary judgment.

## ANALYSIS

### I. MOTION FOR SUMMARY JUDGMENT

Plaintiffs and the Department both move for summary judgment in their favor pursuant to S.D.C.L. § 15-6-56. S.D.C.L. § 15-6-56(c) states in pertinent part,

[t]he judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.

*Id.* The South Dakota Supreme Court has stated that "[s]ummary judgment is an extreme remedy, [and] is not intended as a substitute for a trial." *Id.* (quoting *Continental Grain Co. v. Heritage Bank*, 1996 SD 61, ¶ 17, 548 N.W.2d 507, 511). Additionally, "[a]ll reasonable inferences 'must be viewed in favor of the non-moving party.'" *Hahne v. Burr*, 2005 SD 108, ¶ 6, 705 N.W.2d 867, 870 (quoting *Northstream Invs., Inc. v. 1804 Country Store Co.*, 2005 SD 61, ¶ 11, 697 N.W.2d 762, 765). The burden is on the moving party to "clearly show an absence of any genuine issue of material fact and an entitlement to judgment as a matter of law." *Id.* at 871.

In their Motions for Summary Judgment, the parties generally agree to the underlying facts and that the issue in this case is purely a legal question, *i.e.* whether free play should be considered part of the adjusted gross proceeds of gaming which would be subject to taxation or not. Therefore, these motions for summary judgment require interpretation of the statutes and administrative rules concerning the gaming tax.

**A. Plaintiffs have not followed appropriate procedure for seeking a refund.**

However, prior to reaching the merits of the case, the Department argues summary judgment is not appropriate because Plaintiffs' declaratory judgment action is not authorized for refund action or retroactive relief. The Department alleges that Plaintiffs have not followed appropriate statutory procedure for seeking a refund, and thus are barred from having their motion for summary judgment granted. The Department cites to SDCL 10-27-2, which provides:

Any person against whom any tax is levied or who may be required to pay the tax, who pays the tax prior to the tax becoming delinquent and under protest to the treasurer authorized to collect the tax, giving notice at the time of payment of the reasons for such protest *may, at any time within thirty days thereafter, commence an action against such treasurer for the recovery of the tax in any court of competent jurisdiction.* If the court determines that the tax was wrongfully collected, in whole or in part, for any reason going to the merits of the tax, the court shall enter judgment accordingly, and such judgment shall be paid in preference to any other claim against the county, upon the final determination of the action. A pro rata share of the money so refunded shall be charged to the state and each taxing district which may have received any part of the tax. The right of appeal shall exist for both parties as in other civil actions.

(Emphasis added.) The Department argues that while Plaintiffs have "paid under protest," they have not commenced any actions against a treasurer within thirty days of such protestation, and therefore have failed to comply with statutory requirements and cannot recover a refund.

At oral argument, Plaintiffs represented that they were not seeking a refund through this action, but only asking this Court to declare the rights and responsibilities of the parties before they seek a refund. However, in their Prayer for Relief, Plaintiffs request an Order and Judgment “[d]eclaring that the Plaintiffs are entitled to seek a refund of the gaming tax paid as the result of the Defendant’s erroneous determination that free slot machine play is a wager.” Though they may not be specifically asking this Court to order a refund, Plaintiffs are asking this Court to declare they are entitled to seek a refund. Declaring they are entitled to seek a refund is, in essence, just a “back door” attempt at filing for a refund.

The process for seeking a refund is specifically addressed in SDCL 10-27-2, and Plaintiffs have not complied with those requirements. While Mineral Palace and First Gold have “paid under protest,” they have not brought any action against a treasurer within the required 30 days of such protest. The South Dakota Supreme Court has acknowledged the importance of complying with the statutes when attempting a refund.

The Legislature has recognized the potentially crippling effect untimely taxpayer refund requests could have on taxing districts. *Miner v. Clifton*, 30 S.D. 127, 137 N.W. 585, 586 (1912). As a result, the Legislature has in the past crafted narrow exceptions that permit a tax payer to obtain a refund in a manner that does not endanger the fiscal integrity of taxing districts. *Security Nat’l Bank v. Twinde*, 52 S.D. 352, 217 N.W. 542, 543 (1928) (citing Rev. Code 1919, § 6813) (additional citations omitted.)

*Tracfone Wireless, Inc. v. South Dakota Dept. of Revenue and Regulation*, 2010 S.D. 6, ¶ 20, 778 N.W.2d 130, 136-37. Reflecting this policy, the Court has further stated “[t]here are two *exclusive* methods by which an aggrieved taxpayer may seek recovery for alleged illegal taxes paid. They are the Refund and Abatement Statute, SDCL 10-18-4<sup>3</sup>, and the Protest and Suit Statute, SDCL 10-27-2.” *Lick v. Dahl*, 285 N.W.2d 594, 599 (S.D. 1979) (emphasis added.)

Under the Protest and Abatement statute at issue here, the legislature has written that an aggrieved party paying under protest should file suit against the treasurer. Such action has not been done here. There has been no notice to the entity that is responsible for collecting and spending funds that a refund is being

---

<sup>3</sup> SDCL 10-18-1 provides a remedy for an invalid assessment or tax on real property, and is not applicable in this case.

sought because no suit has been filed against the treasurer. Instead, Plaintiffs have chosen to sue the Department for a Declaration that they are entitled to such refund. This action does not comport with the principals behind the Refund and Abatement Statute, which attempts to support the entity collecting the tax to engage in financial stability and "sound fiscal planning." See *Pourier v. South Dakota Department of Revenue*, 2003 S.D. 21, ¶ 38, 658 NW.2d 395, 407. "States are permitted to impose reasonable procedural limitations upon the refund of an invalid tax." *Id.* Per the statute, Plaintiffs should have sought a refund by bring suit against the treasure.

**A. The plain meaning of the administrative rules requires promotional play to be part of the adjusted gross proceeds calculation.**

However, even if Plaintiffs are not required by procedure to first sue the treasure, a plain reading of the administrative regulations involved in this case prohibit the declaratory relief Plaintiffs seek.

The South Dakota Supreme Court has held that rules of statutory construction apply to administrative rules as well. *Hartpence v. Youth Forestry Camp*, 325 N.W.2d 292 (S.D. 1982). "The first rule is that the language expressed in the [administrative rule] is the paramount consideration. The second rule is that if the words or phrases in the [administrative rule] have plain meaning and effect, we should simply declare their meaning and not resort to statutory construction." *State v. Moss*, 2008 S.D. 64, ¶ 15, 754 N.W.2d 626, 631 (citing *Goetz v. State*, 2001 S.D. 138, ¶ 15, 636 N.W.2d 675, 681; *In re West Rive Elec. Ass'n, Inc.*, 2004 S.D. 11, ¶ 15, 675 N.W.2d 222, 226). "Words and phrases must be given their plain meaning and effect. When the language of [an administrative rule] is clear, certain and unambiguous, there is no reason for construction, and the Court's only function is to declare the meaning of the [administrative rule] as clearly expressed." *Id.* (citing *Goetz*, ¶ 16, 636 N.W.2d at 681.)

Prior to discussion on the merits, the term "free play" and "promotional award/play" must be analyzed. Plaintiffs contend free play and promotional award/play are two different terms, and therefore rules regarding promotional awards do not apply. (Plaintiffs' Br. at 10.) The Commission has defined "free play" as "in relation to *promotional items*, the use of a coupon that is issued to a patron by an establishment for play for which no bet is required." A.R.S.D. 20:18:01:01(11) (emphasis added). Using the term "promotional items" within the definition of free play is a signal that these two terms are synonymous, or at least are closely related.

Free play or promotional play both seem to be terms used to express play that is given to patrons, and this Court sees no distinction between the two.

As noted above, the pertinent statutes and administrative rules are contained in SDCL 47-7B and ARSD Art. 20:18. The South Dakota Department of Revenue is authorized to collect gaming taxes on the "adjusted gross proceeds" of gaming. SDCL 47-7B-28-28.1. ARSD 20:18:22:12 defines "gross revenue," as it pertains to slot machines, as:

[gross revenue] equals drop less fills to the machine, jackpot payouts, hand pay credit lockups, and vouchers issued . . . . The initial hopper load is not a fill and does not affect gross revenue. The difference between the initial hopper load and the total amount that is in the hopper at the end of each month must be adjusted accordingly as an addition to or subtraction from the gross revenue for that month.

Therefore, "gross revenue" is the money dropped into a slot machine minus its fills and its payouts to players. "Drop" is "[t]he total amount of money, chips, and tokens removed from the drop boxes." ARSD 10:18:01:01(8). The "drop" is the gross revenue of a slot machine; it is adjusted by subtracting its "fills" (tokens added to the slot machine by the casino) and payouts (vouchers, tokens, and hand credit payouts) to determine the "adjusted gross proceeds" for tax assessment. "Adjusted gross proceeds" is defined in the code as "gross proceeds less cash prizes." SDCL 47-7B-4(1). The adjusted gross proceeds is the amount that is taxed.

The Department contends that they are entitled to summary judgment because the legislature indicated that promotional play is not subject to deductions from the computation of gross gaming proceeds. Further, the Department argues the Commission has promulgated a rule that directly addresses the impact of promotional play on gross and adjusted gross revenues or proceeds. The Department cites ARSD 20:18:18:26, which provides:

Promotional and bonus systems are comprised of gaming devices that are configured to participate in electronically communicated promotional and bonus award payments from an approved host system. Bonus awards are based on a specific wager or specific event and are available to all patrons playing bonused slot machines. Payouts as a result of a bonus event are a deductible event in the

adjusted gross revenue calculations. *Promotional awards are additional features that entitle players to special promotional awards based on patrons play activity or awards gifted by the casino to guests. Promotional awards are not a deductible event in the adjusted gross revenue calculation.*

The Department argues that this language is clear and unambiguous – promotional play is not to be deducted from the adjusted gross revenue calculation. In looking at the language of 20:18:18:26, it is clear promotional awards are not deductible. This Court finds this rule is clear and unambiguous, and no interpretation is needed. See *Benson v. State*, 2006 S.D. 8, ¶ 71, 710 N.W.2d 131, 158 (“When the language in a statute is clear, certain and unambiguous, there is no reason for construction, and the Court’s only function is to declare the meaning of the statute as clearly expressed.” (citing *Martinmaas v. Engelmann*, 2000 S.D. 85, ¶ 49, 612 N.W.2d 600, 611)). Promotional awards are not to be deductible in the adjusted gross proceeds calculations.

**B. Even if the statute is ambiguous, promotional play is part of the adjusted gross proceeds calculation.**

However, Plaintiffs argue that the regulation is not clear and unambiguous. Plaintiffs argue that promotional play should not be calculated in the adjusted gross proceeds because promotional play, or free play, is not a “wager” as defined by the rules. In support of this argument, Plaintiffs cite ARSD 20:18:20:02:01, which provides,

Promotional items – Definition of specific wager. A licensee who engages in promotions to increase business and gaming at the licensee’s business may not deduct payouts made pursuant to the promotion from adjusted gross income except for money, prizes, or tokens paid at face value directly to a patron as the result of a specific wager. *A specific wager requires two or more persons to stake something of value on an event, the outcome of which is uncertain. If only one party risks something of value, there is no wager.*

(Emphasis added). Plaintiffs allege that a “wager” as defined by these rules does not occur when promotional play is used because nothing of value is being

exchanged, and therefore the prohibition against deducting promotional play in ARSD 20:18:18:26 does not apply.

In this argument, Plaintiffs completely ignore 20:18:18:26 which clearly says promotional play is not a deductible event. On its face, this rule is unambiguous and no interpretation is need. However, even if, *arguendo*, this rule is ambiguous and this Court is forced to resort to the rules of construction, promotional play is still not deductible from the adjusted gross proceeds which is subject to taxation.

First, even in looking to the rule Plaintiffs point to in 20:18:20:02:01, the general provision of that rule dictates that Plaintiff's "may not deduct payouts made pursuant to the promotion from adjusted gross income except for money, prizes, or tokens paid at face value directly to a patron as the result of a specific wager." (Emphasis added). This is another pronouncement by the Commission that promotional play should not be deducted.

Reading this rule in its entirety, Plaintiffs rely on the term "wager" in arguing that promotional play does not apply here because it is not a wager since patrons are not exchanging anything of value. However, the term "wager" is contained only in the exception to the general provision of 20:18:20:02:01. "Exceptions, as a general rule, should be strictly, but reasonably construed; they extend only so far as their language fairly warrants, and all doubts should be resolved in favor of the general provisions rather than the exceptions." *Olsen v. City of Spearfish*, 288 N.W.2d 497, 500 (S.D. 1980). Here, the term "as a result of a specific wager" applies narrowly to the exceptions of "money, prizes, and tokens" and does not affect the general provision that promotional play is not deductible.

To apply the term "wager" as Plaintiffs argue would render both 20:18:18:26 and 20:18:20:02:01 meaningless. See *Zubke v. Melrose Tp.*, 2007 S.D. 43, ¶ 14, 731 N.W.2d 918, 922 ("Furthermore '[w]e should not adopt an interpretation of a statute that renders the statute meaningless when the Legislature obviously passed it for a reason.'" (citing *Peterson, ex rel. Peterson v. Burns*, 2001 S.D. 126, ¶ 30, 635 N.W.2d 556, 567-68)). Instead, the rule of *in pari materia* requires that intent "must be determined from the statute as a whole, as well as enactments relating to the same subject." *State v. Plenty Horse*, 2007 S.D. 114, ¶ 5, 741 N.W.2d 763, 765. In reading these statutes as a whole, it is clear the Commission did not want promotional play to be deducted from the adjusted gross proceeds calculations.

Next, Plaintiffs argue 20:18:20:02:01 does not apply because free play is precluded from being part of the drop or gross revenue in the first place. Plaintiffs argue in order to be part of the "drop" or "gross revenue," there would have to be a "bet" or "wager" involving "money, chips, or tokens." (Plaintiffs' Br. at 9.) In this argument, Plaintiffs contend the free play does not have value, it cannot be sold, and cannot be transferred and therefore it is never part of the drop or gross revenue to begin with.

Apparently, however, the "free play" does have value. A free play token has the potential to be converted into a chip or token, which can then be converted into money. Certainly patrons see the value in the promotional play or they would not put them on the tables or in the slots. Further, it seems the gaming establishments using promotional play see value in it because it is being used as a tool to attract patrons. Some casinos award "points" for play and if a patron plays on a slow night, he or she gets double points towards free play, *i.e.* the free play becomes an inducement for the player to play with his own money. These promotional plays certainly seem to have value to both the customer who plays with them, and the casino which continues to use them to attract business. If it didn't work, it if didn't add value for the casino, the casino would not continue to give them out and pay taxes on them despite claiming it does not have value. *The value for the customers is in its potential to become money*, and its value for the casinos is in its possibility of enticing patrons to play, which also translates to money.

Finally, on June 11, 2007, the Commission made a similar ruling in regards to Cadillac Cash, a promotional system implemented by another Deadwood casino, Cadillac Jack's. Cadillac Cash is promotional money which is loaded onto a player's club card. (Declaratory Ruling FOF 3.) In order to play with the promotional money, a player must also insert a wager into the machine to activate the Cadillac Cash. (Id.) However, the player may play only the Cadillac Cash promotional money and cash out all of their own money without wagering any of it in the slot machine. (Id. FOF 4.) The Commission ruled that "Cadillac Cash is a promotional award pursuant to ARSD § 20:18:18:26. Furthermore, under this same rule, promotional awards are not a deductible event in the adjusted gross revenue calculations." (Id. COL 9.) Further, the Commission specifically found,

[S]ince no deduction is allowed in the calculation of adjusted gross revenue for any promotional award pursuant to ARSD § 20:18:18:26, the use of Cadillac Cash must be counted in the statistical drop and in the

calculation of gaming tax on adjusted gross proceeds under SDCL § 42-7B-28 and that all of the promotional money must be counted irregardless [sic] of amounts paid out in jackpots.

(Id. COL 10.) Thus, the Commission's position is clearly that promotional awards are not to be deducted from the adjusted gross revenue calculation.

Though not binding on this Court, a look at the Commission's decisions regarding this issue is helpful in determining the intent of these rules. At oral arguments, Plaintiffs conceded that the Commission is an "agency" for all intents and purposes. Accordingly, "an agency is usually given a reasonable range of informed discretion in the interpretation and application of its own rules when the language subject to construction is technical in nature or ambiguous, or when the agency interpretation is one of long standing." *Krsnak v. South Dakota Dept. of Environment and Natural Resources*, 2012 S.D.89, ¶ 16, 824 N.W.2d 429, 436 (citing *State v. Guerra*, 2009 S.D. 74, ¶ 32, 772 N.W.2d 907, 916). A simple scan of the administrative regulations on gaming, particularly including 20-18-15, reveals a mind boggling array of specialized rules well beyond the understanding of an ordinary circuit judge. The rule suggesting deference to agency interpretation is well founded here.

Further, since this ruling in 2007, it does not appear the legislature has taken any step to alter this interpretation by the Commission. The gaming industry is a highly regulated, specialized industry which garners legislative interest nearly every year. Presumably, the legislature knows the activities and rulings of the agencies, especially in an area which has a direct impact on the revenue to the state budget.

In *Sanford v. Sanford*, the Supreme Court gave credence to this presumption. 2005 S.D. 34, 694 N.W.2d 283. *Sanford* involved a dispute over a prenuptial agreement. In a prior ruling, *Connolly v. Connolly*, 270 N.W.2d 44 (S.D. 1978), the Court upheld the public policy that parties are permitted to enter into a valid support agreement in contemplation of divorce, but that the trial court has the ultimate authority to approve or reject such agreement. *Sanford*, ¶ 16, 694 N.W.2d 288. Twelve years after *Connolly*, the legislature adopted portions of the Uniform Premarital Agreement Act ("UPAA"). *Id.*, ¶17. However, the legislature did not adopt the portions of the UPAA relating to spousal support, specifically excluding enactments relating to prenuptial agreements addressed in *Connolly*. *Id.*, ¶ 18.

Therefore, the Court stated, "We presume the Legislature acts with knowledge of our judicial decisions." *Id.*, ¶ 19, 694 N.W.2d 289. "[W]e must presume when the Legislature adopted portions of the UPAA as SDCL 25-2-18, it proceeded with awareness of our severability analysis in *Connolly*, and did not act to change it." *Id.*, ¶20.

The same is true in this case – the legislature presumably knows of the Commission's ruling, and yet has not acted to change it. The decision on whether or not to include promotional play in the adjusted gross proceeds calculations has a significant impact on the revenue to the state budget. In the Cadillac Cash Decision, the Commission stated:

4. That the rules which Petitioner requests be promulgated and amended would impact the adjusted gross proceeds of gaming and would reduce the amount of gaming tax collected. The estimated range of the total loss in tax amounts to \$851, 557 to \$1,199,062.

6. The Commission further denies the Petition based upon their belief that any decision to reduce revenue to the State General Fund or to other municipalities and political subdivisions such as the City of Deadwood, the Department of Tourism, Lawrence County, Lawrence County School Districts and other municipalities in Lawrence County at a time when the State and other governmental entities are facing severe budget shortfalls amounts to a policy decision which should be made by the South Dakota Legislature and not the South Dakota Commission on Gaming.

(Denial of Deadwood Gaming Association's Petition of Amendment to Rules.) The Commission clearly stated their position on this matter and unequivocally asked the legislature to change this decision if it was contrary to public policy. In the wake of this decision by the Commission, the legislature has chosen not to act. This is an indication that the legislature felt no response was needed to the Commission's interpretation of the rules.

It is also noteworthy that Plaintiffs concede they were members of the Deadwood Gaming Association in 2009 when the Commission denied a petition

regarding the issue of free play, but have not referenced this Court to any effort to bring an appeal from the Commission's denial, nor any effort to seek legislative relief from the claimed error of interpretation. This Court is cautious to declare the meaning of a regulation or statute in this closely regulated and technical industry which has a direct impact on revenue, where the applicants have previously suffered one or two unfavorable interpretations from the Commission. Put in other words, the Court feels as though this action is an application for a fourth or fifth "bite at the apple." Cadillac Jack was bite one, and was not appealed. There was an unsuccessful petition in 2009 which was not appealed. There is an absence of any effort by the industry to seek legislative relief, and the legislature has not given any response to the Commission's rulings. And finally, this current action is yet another bite by Plaintiffs. These prior rulings are not viewed as binding or res judicata upon this Court, but they certainly are instructive on how the commission interprets its own technical rules.

#### CONCLUSION

In summary, this Court finds that Plaintiffs have not followed correct procedure in seeking a refund. Further, the administrative rules pertaining to promotional awards are clear, unambiguous, and no interpretation is needed. Promotional awards are not to be deducted from the adjusted gross proceeds calculation. Even if there is ambiguity in the language expressed in the rules, promotional awards are still not deductible based on the foregoing construction and analysis. For these reasons, this Court DENIES Plaintiffs' Motion for Summary Judgment, and GRANTS Summary Judgment in favor of the Department, Defendant.

Sincerely,

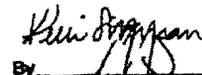


The Honorable Mark Barnett  
Circuit Court Judge

STATE OF SOUTH DAKOTA  
CIRCUIT COURT, HUGHES CO.

**FILED**

MAR 13 2014

By  Clerk  
Deputy

LAS VEGAS

July 30, 2014

To Whom It May Concern:

The Wynn Casino awards free play/promotional chips to invited guests who win casino tournaments.

On March 29, 2008, John Kunak was awarded \$150,000 in free play/promotional chips as the winner of our Bracket Blackjack Tournament held on March 29, 2008.

Sincerely,



Kyle Ruegg  
Director – Cage Operations

**\$75,000**  
**Triple Reel Deal**  
**SLOT TOURNAMENT**  
**JULY 16-18, 2010**

You've got three chances to win your share of three \$25,000 prize pools and three opportunities to take home Cash, "Tax-free" Promo Chips or Free Slot Play!!

The **STOCK COMP** FEE gets you into **ONE, TWO, or ALL THREE** tournaments — you decide!

Plus, we invite you to enjoy a **COMPLIMENTARY THREE-NIGHT** stay!

**WANT PLAY SLOTS?** Bring a friend to play for you!

Tournament Registration  
 from 4-8 p.m.

Ten drawings for \$100  
 in FREE Slot Play or  
 Tax-Free "Play Till You  
 Lose" Promo Chips

Tournament 1  
 PLUS Bonus Drawing 1

Tournament 2  
 PLUS Bonus Drawing 2

Prize Distribution for  
 Tournaments 1 and 2

Tournament 3  
 PLUS Bonus Drawing 3

Prize Distribution for  
 Tournament 3

For reservations to this three-in-one slot tournament,  
 call your Executive Host or Casino Marketing at

**800-777-5687**

or send an email to [mycasinores@goldennugget.com](mailto:mycasinores@goldennugget.com)

Golden Nugget reserves the right to change, modify or cancel this tournament without prior notice. Offer cannot be used in conjunction with or within 48 hours of any other event, tournament or promotion at the Golden Nugget. FREE Slot Play credits have no cash value, can be used only for play and cannot be cashed out. Golden Nugget promotional chip policies apply and cannot be used in Poker Room, Keno or Race & Sports Book. Participation is based on availability, casino qualifications and management discretion. The Golden Nugget reserves all rights to modify or revoke your offer based on your most recent casino play.



Las Vegas  
 E. Fremont St.  
 Las Vegas, NV 89101



C - 3711466  
 JOHN KUNAK



PRESORT  
 STANDARD  
 U.S. POSTAGE  
 PAID  
 GOLDEN NUGGET

**\$75,000**  
**Triple Reel Deal**  
**SLOT TOURNAMENT**  
**JULY 16-18, 2010**

You've got three chances to win your share of three \$25,000 prize pools and three opportunities to take home Cash, "Tax-free" Promo Chips or Free Slot Play!!

The **SI COMP** **TRY FEE** gets you into **ONE, TWO, or ALL THREE** tournaments — you decide!

Plus, we invite you to enjoy a **COMPLIMENTARY THREE-NIGHT** stay!

**WANT PLAY SLOTS?** Bring a friend to play for you!

Tournament Registration  
 from 4-8 p.m.

Ten drawings for \$100  
 in FREE Slot Play or  
 Tax-Free "Play Till You  
 Lose" Promo Chips

Tournament 1  
 PLUS Bonus Drawing 1

Tournament 2  
 PLUS Bonus Drawing 2

Prize Distribution for  
 Tournaments 1, and 2

Tournament 3  
 PLUS Bonus Drawing 3

Prize Distribution for  
 Tournament 3

For reservations to this three-in-one slot tournament,  
 call your Executive Host or Casino Marketing at

**800-777-5687**

or send an email to [mycasinores@goldennugget.com](mailto:mycasinores@goldennugget.com)

Golden Nugget reserves the right to change, modify or cancel this tournament without prior notice. Offer cannot be used in conjunction with or within 48 hours of any other event, tournament or promotion at the Golden Nugget. FREE Slot Play credits have no cash value, can be used only for play and cannot be cashed out. Golden Nugget promotional chip policies apply and cannot be used in Poker Room, Keno or Race & Sports Book. Participation is based on availability, casino qualifications and management discretion. The Golden Nugget reserves all rights to modify or revoke your offer based on your most recent casino play.



10 E. Fremont St.  
 Las Vegas, NV 89101



C - 3711466  
 JOHN KUNAK

PRESORT  
 STANDARD  
 U.S. POSTAGE  
 PAID  
 GOLDEN NUGGET