Rel: June 30, 2022

SUPREME COURT OF ALABAMA

OCTOBER TERM, 2021-2022

1200841

Alabama Department of Revenue

v.

Greenetrack, Inc.

Appeal from Greene Circuit Court
(CV-19-900056)

MITCHELL, Justice.

In 2003, the Legislature and the citizens of Greene County voted to allow nonprofit organizations in that county to operate bingo games for fundraising purposes. Greenetrack, Inc. ("Greenetrack"), which is not a

nonprofit organization, almost immediately began offering live and electronic bingo games at its gambling facility.[1] From 2004 to 2008, Greenetrack reaped vast profits under the guise that its whole casino-style bingo operation -- premises, employees, and some 1,500 electronic bingo machines running nonstop -- was constantly being leased and operated by a revolving slate of local nonprofit organizations, whose nominal role earned them a tiny fraction of the bingo proceeds.

Eventually, the Alabama Department of Revenue ("the Department") audited Greenetrack, found that its bingo activities were illegal, and concluded that it owed over $76 million in unpaid taxes and interest. Following a decade of litigation, the Alabama Tax Tribunal voided the assessed taxes on the threshold ground that Greenetrack's bingo business (regardless of its legality) was tax-immune under a statute governing Greenetrack's status as a licensed operator of dog

[1]Our use of the term "electronic bingo" in this opinion should not be construed as an acknowledgment by this Court that the "electronic bingo games" offered at Greenetrack's facility amounted to "that game 'commonly or traditionally known as bingo,' " which has been authorized by Amendment No. 743 to the Alabama Constitution of 1901 (Local Amendments, Greene County, §1, Ala. Const. 1901 (Off. Recomp.)). State v. Greenetrack, Inc., 154 So. 3d 940, 959 (Ala. 2014) (quoting Barber v. Cornerstone Cmty. Outreach, Inc., 42 So. 3d 65, 86 (Ala. 2009)).

races. The Department appealed that judgment to the Greene Circuit Court, which adopted the Tax Tribunal's reasoning and ruled for Greenetrack on the same narrow ground. We reject the statutory analysis underpinning those judgments, and, because the Department was entitled to summary judgment on the other issues it argued below, we reverse the circuit court's judgment and render judgment for the Department.

Facts and Procedural History

Greenetrack owns a gambling facility in Eutaw. Before 2004, Greenetrack's gambling offerings were limited to pari-mutuel wagering on live and simulcast dog and horse races.[2] To understand Greenetrack's activities and the disputed issues before us, we first provide some background about the legal frameworks governing pari-mutuel wagering and bingo in Greene County.

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[2]Pari-mutuel wagering is the method of betting on races in which the total amount of the wagers is aggregated and, after the deduction of a commission for management, distributed among the bettors who chose the winning contestant or the top several contestants (as in the common "win/place/show" system). See, e.g., § 45-32-150.13, Ala. Code 1975 (Local Laws, Greene County); Opinion of the Justices No. 205, 287 Ala. 334, 335, 251 So. 2d 751, 753 (1971); Utah State Fair Ass'n v. Green, 68 Utah 251, 263-64, 249 P. 1016, 1019 (1926).

In 1975, the Legislature adopted Act No. 376, Ala. Acts 1975 ("the racing act"),[3] which became law after the voters of Greene County approved it in a referendum; as amended, it is now codified at §§ 45-32-150 through 45-32-150.23, Ala. Code 1975 (Local Laws, Greene County). The racing act created the Greene County Racing Commission ("the Commission") and invested it with regulatory, licensing, and supervisory authority over pari-mutuel wagering on dog races in Greene County. Greenetrack has been the sole licensee of the Commission since obtaining its facility in 1995.

Among its other provisions, the racing act provides that licensees must pay the Commission (1) a license fee of up to $1,000 a year, see § 45-32-150.08; (2) a 4 percent tax on "the total contributions to all pari-mutuel pools conducted or made on any race track licensed under [the racing act]," § 45-32-150.13; and (3) an admission tax of "15 percent of the established admissions price or ten cents ($.10), whichever sum is greater." Id.; see also § 45-32-150.14 (applying the same admission tax

[3]In their briefs, the parties generally refer to this law as "the 1975 Act." But the Legislature has called it "the racing act" in another statute dealing with dog racing in Greene County, see § 45-32-151, Ala. Code 1975 (Local Laws, Greene County), and we do the same here.

to free passes). The racing act then provides that "[t]he license fees, commissions, and excise taxes imposed herein shall be in lieu of all license, excise, and occupational taxes to the State of Alabama, or any county, city, town, or other political subdivision thereof." § 45-32-150.15. This tax exemption, as described below, is the basis on which the lower tribunals resolved this case.

Legal bingo did not come to Greene County for almost 30 years after the enactment of the racing act. Traditionally, Alabama law prohibited all forms of legal lotteries, including bingo. See Opinion of the Justices No. 373, 795 So. 2d 630, 634 (Ala. 2001); Art. IV, § 65, Ala. Const. 1901 (Off. Recomp.). But, since 1980, local constitutional amendments have allowed certain legal bingo games on a county-by-county basis. In 2003, the Legislature approved, and the voters of Greene County ratified, Amendment No. 743 to the Alabama Constitution of 1901, which provides that "[b]ingo games for prizes or money may be operated by a nonprofit organization in Greene County." Local Amendments, Greene County, §1, Ala. Const. 1901 (Off. Recomp.). Among its provisions, Amendment No. 743 requires the Greene County Sheriff to "promulgate rules and regulations for the licensing, permitting, and operation of bingo games

within the county" and to "insure compliance" with a list of specific requirements for the conduct of bingo games. Id.

Greenetrack began offering live and electronic bingo immediately after Amendment No. 743 took effect.[4] In short order, Greenetrack's facility was primarily a bingo facility and Greenetrack began deriving more than half its income from bingo. By the time of the Department's audit, Greenetrack was offering multiple live bingo sessions every day and had more than 1,500 electronic bingo machines operating nonstop.

As a for-profit corporation, Greenetrack was ineligible to operate legal bingo games under Amendment No. 743. So Greenetrack developed a system in which the bingo games at its facility would be "operated" -- at least on paper -- by various nonprofit organizations holding bingo licenses issued by the Greene County Sheriff. Those organizations included a number of volunteer fire departments and miscellaneous local charities, but the large majority were Greene County public schools and

[4]The description of Greenetrack's bingo business in the following paragraphs is based on the Department's statement of undisputed material facts in its cross-motion for summary judgment and the materials on which that statement was based, i.e., the Department's final audit report and associated exhibits. We explain in the analysis section below why the Department's factual account and the materials on which it relied must be taken as undisputed at this stage.

school-related associations, especially student clubs. To use just one year and one school as an example, in 2004 the organizations "operating" bingo games at Greenetrack's facility included not only Greene County High School itself, but also the high school's Athletic Booster Club, Scholars Bowl Team, Band Booster Club, Math Team, Choir, Junior Reserve Officers' Training Corp, Library Club, Future Homemakers of America, Future Business Leaders of America, National Honors Society, Parent-Teacher Association, and Student Government Association.

The system worked like this: Greenetrack and each participating nonprofit organization entered into a "Lease Agreement," under which the nonprofit organization purportedly "leased" Greenetrack's facility, employees, and bingo equipment for the purpose of "operating" bingo games one or more days each month. For this privilege, the nonprofit organization was required to pay Greenetrack: (1) "Rent" of $250 per month; (2) a variable "Employee Leasing Fee" equal to 112% of each leased employee's total payroll;[5] and (3), most importantly, a variable

[5]The Lease Agreement described the leased employees' duties, and the division of control over them between Greenetrack and the nonprofit organization, as follows:

"Equipment Leasing Fee" defined to equal the bingo gross receipts minus the Rent, the Employee Leasing Fee, and an amount called the "Monthly Bingo Charity Earnings." This last amount was defined as follows:

> "Bingo Charity Earnings. The 'Bingo Charity Earnings' shall be the amount collected through operation of the bingo games and shall equal the cash sum of Four Thousand Eight Hundred Fifty Dollars ($4,850) for each day that Equipment is utilized to operate bingo games on the Leased Premises. Within Fourteen (14) calendar days following the end of the applicable calendar month, Lessee shall collect for each day in which the Lessee operates Bingo an amount equal to (x) the Bingo Charity Earnings divided by (y) the total number of licensees operating bingo that day. The Monthly Bingo Charity Earnings shall mean the Bingo Charity Earnings multiplied by the total number of days in the month that the

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> "Lessor [Greenetrack] reserves the ultimate right of direction and control over Leased Persons assigned to Lessee's location and shall retain responsibility for hiring, disciplining and terminating individuals assigned to the positions requested by Lessee provided that Lessee shall cooperate with and assist Lessor in facilitating the same. However, Lessee shall retain such sufficient direction and control over Leased Persons as is necessary to operate and conduct its bingo games and operations and without which Lessee would be unable to conduct its business, discharge any fiduciary responsibility which it may have, or comply with any applicable licensure, regulatory or statutory requirement of Lessee's bingo operations. It is currently contemplated by the parties that Lessee will require employees to perform the Lessee's daily operation of the bingo games including selection and management of the games and as employees on a part-time basis to manage the Gross Receipts and remit payments due by Licensee hereunder and to provide Lessee with any monies earned."

> Equipment was utilized to operate bingo games on the Leased Premises."

Thus, in effect, each nonprofit organization was entitled to a payout of $4,850 in "Bingo Charity Earnings" for each day that it was the only licensed nonprofit organization "leasing" Greenetrack's bingo operations.

Notably, this sum did not vary with the amount of money Greenetrack actually took in from bingo on any given day. Instead, each day's bingo earnings in excess of $4,850 stayed with Greenetrack, as part of its combined Rent, Employee Leasing Fee, and Equipment Leasing Fee. The result was that Greenetrack kept the overwhelming majority of what its bingo operations brought in. In 2007, the year for which Greenetrack produced the best records, the nonprofit organizations received a total of $1,770,309.45 out of nearly $69 million that Greenetrack netted from electronic bingo alone.[6]

As quoted above, each nonprofit organization's Monthly Bingo Charity Earnings was nominally a function of how many days it "operated" bingo at Greenetrack's facility in any given month. But the

[6]Under the letter of the Lease Agreement, the total Bingo Charity Earnings in a non-leap year should equal $1,770,250 ($4,850 per day times 365 days in a year). The 2007 figure exceeds that amount by $59.45, a trivial variance of about one three-hundredth of one percent.

Lease Agreement did not specify how many days were available to each "lessee," nor did it establish a method to allocate days among the scores of "lessees" with which Greenetrack entered into identical agreements. Greenetrack allocated proceeds by using a monthly "charity placement table," assigning nonprofit organizations in groups of about 30 to each month and dividing each month's total Monthly Bingo Charity Earnings (the number of days in the month times $4,850) pro rata among them. For example, if there were 30 days in a month and 30 nonprofit organizations assigned to that month (as was the case in April 2007), each nonprofit organization would receive $4,850 that month.

In 2008, the Department opened an audit into Greenetrack's tax compliance from January 1, 2004, through December 31, 2008. The Department issued a final audit report in 2009 and final assessments of sales tax and consumer-use tax in 2011. For clarity, we explain separately the nature of the two taxes and how the Department determined that Greenetrack was liable for each of them.

Alabama law levies a 4 percent sales tax on the gross receipts of all "places of amusement or entertainment." § 40-23-2(2), Ala. Code 1975. But an exemption exists for "[t]he gross receipts derived from all bingo

games and operations which are conducted in compliance with validly enacted legislation authorizing the conduct of such games and operations." § 40-23-4(a)(44), Ala. Code 1975. Accordingly, a major focus of the Department's audit was whether Greenetrack's bingo operations were conducted in compliance with Amendment No. 743, the relevant local law. The Department concluded that Greenetrack had violated Amendment No. 743 in a number of ways (described in more detail below), making its gross receipts from bingo subject to sales tax.

Additionally, Alabama law levies an excise tax "on the storage, use or other consumption in this state of tangible personal property ... purchased at retail on or after October 1, 1965, for storage, use or other consumption in this state at the rate of four percent of the sales price of such property …." § 40-23-61(a), Ala. Code 1975. Although Greenetrack believed that § 45-32-150.15 -- the tax exemption from the racing act -- shielded it from this tax on all of its purchased property, the Department maintained that the exemption applied only to purchases related to pari-mutuel wagering. Thus, the Department concluded that Greenetrack owed unpaid consumer-use tax on purchased property related to its bingo operations.

For both taxes, the documents Greenetrack provided the Department were insufficient for an exact calculation of the amounts owed, forcing the Department to make use of estimates. Based on the available information, the Department estimated Greenetrack's taxable gross receipts from bingo at $162,548,346.56 for 2004, $214,563,817.46 for 2005, $261,767,857.30 for 2006, $458,093,750.27 for 2007, and $449,111,519.87 for 2008. These figures resulted in a final assessment of sales tax in the amount of $61,843,411.56 for 2004 through 2008, plus $13,667,926.61 in interest, for a total of $75,511,338.17. The final assessment of consumer-use tax charged $594,868.68 in tax due for 2004 through 2008, plus $151,423.33 in interest, for a total of $746,292.01.[7]

The litigation that followed got off on the wrong foot. Greenetrack filed challenges to the final assessments in both the Department's Administrative Law Division and the Greene Circuit Court, resulting in four years of confusion over the appropriate forum. Eventually, in 2015, the circuit court dismissed Greenetrack's challenge in that forum, and

[7]The details of the Department's calculations and estimates are largely irrelevant to the disputed issues; the minor exceptions are discussed below in the analysis section.

the parties agreed to proceed before the Alabama Tax Tribunal. See State Dep't of Revenue v. Coca-Cola Refreshments, U.S.A., Inc., 248 So. 3d 18, 20 n.2 (Ala. Civ. App. 2017) (explaining that, in 2014, the Legislature abolished the Department's Administrative Law Division and replaced it with the Alabama Tax Tribunal, "an executive-branch agency independent of the department"); see also § 40-2B-2(g)(1), Ala. Code 1975 ("The Alabama Tax Tribunal shall have jurisdiction to hear and determine all appeals pending before the Department of Revenue's Administrative Law Division on October 1, 2014 ….").

In late 2016, the parties advised the Tax Tribunal that they had conducted some "informal" discovery in the form of depositions and were contemplating additional discovery "if necessary." The parties also floated the idea of jointly submitting certain threshold legal issues to be resolved before an evidentiary hearing, but they were unable to agree on a set of questions, and the Department ultimately took the position that all factual and legal questions should be resolved in a single hearing. But at Greenetrack's suggestion, the Tax Tribunal ordered the parties to brief the threshold issue of "whether [Greenetrack] was exempt from the sales and use taxes that are the subject of the final assessments." After

briefing and a hearing, the Tax Tribunal concluded that Greenetrack was exempt from the assessed taxes under the plain language of § 45-32-150.15. The Tax Tribunal read that provision to confer what it called an "entity-based exemption," meaning one that applies to Greenetrack as an entity and not only certain activities.

The Department timely filed a notice of appeal from the Tax Tribunal's judgment in the circuit court. See § 40-2B-2(m)(2), Ala. Code 1975. At the parties' joint request, the circuit court invited cross-motions for summary judgment, which, when filed, revealed the parties' divergent understandings of the issues before the court. In its cross-motion, Greenetrack argued solely that the circuit court should uphold the legal basis on which the Tax Tribunal had ruled (that Greenetrack was tax exempt under the racing act). By contrast, in its cross-motion, the Department pressed for summary judgment on the full range of factual and legal issues in the case, including Greenetrack's noncompliance with Amendment No. 743 and the accuracy of the tax calculations in the final assessments. Greenetrack's response to the Department's cross-motion argued that its compliance with Amendment No. 743 was not ripe for determination because the Tax Tribunal had not addressed the issue and

discovery was not yet complete; Greenetrack also made a handful of objections to the Department's tax calculations.

The circuit court granted Greenetrack's cross-motion and denied the Department's. The circuit court adopted the same rationale as the Tax Tribunal -- that the racing act categorically exempted Greenetrack from the assessed sales and consumer-use taxes -- and did not address any of the other issues raised in the parties' cross-motions. The Department timely appealed to this Court.

Standard of Review

"We review the trial court's grant or denial of a summary-judgment motion de novo, and we use the same standard used by the trial court to determine whether the evidence presented to the trial court presents a genuine issue of material fact." Smith v. State Farm Mut. Auto. Ins. Co., 952 So. 2d 342, 346 (Ala. 2006). The circuit court's review of the Tax Tribunal's judgment was also de novo, with the burden resting on the Department to show that the judgment was incorrect. § 40-2B-2(m)(4). On appeal of a final assessment of tax, "the final assessment [is] prima facie correct, and the burden of proof [is] on the taxpayer to prove the assessment is incorrect." § 40-2A-7(b)(5)c.3, Ala. Code 1975.

Analysis

At a high level, this case involves four seemingly straightforward questions: (1) Did Greenetrack owe sales tax on its bingo gross receipts? (2) If so, should the Department's estimate of the amount owed be upheld? (3) Did Greenetrack owe consumer-use tax on purchased property related to its bingo operations? (4) If so, should the Department's estimate of the amount owed be upheld?

That all sounds simple enough. But the reality, as the parties' briefs show, is an intricate web of issues, subissues, and sub-subissues, with ample arguments in the alternative on both sides. This complexity is due in part to the structure of the issues themselves and in part to how the parties have handled this controversy over its now 11 years of litigation. This has been one of those unusual cases in which each level of review, rather than winnowing and focusing the issues, has served only to spawn new issues, and new layers of argument about the old ones.

The lower tribunals' interpretation of the racing act's tax exemption -- which, if correct, disposes of the entire case -- saved them from having to consider any other issues. But, for reasons explained below, we are unable to agree that Greenetrack's status as a dog-racing licensee under

the racing act exempts it from all taxes on business unrelated to pari-mutuel wagering on dog racing. And that holding opens up the many issues the lower tribunals never considered.

To blaze a trail through this thicket, we divide our analysis into two parts. First, we explain why the circuit court should have denied Greenetrack's cross-motion for summary judgment; second, we explain why it should have granted the Department's.

A. Greenetrack's Cross-Motion

1. The Tax Exemption Under the Racing Act

We begin by considering whether, as the Tax Tribunal and the circuit court held, the racing act categorically exempted Greenetrack from sales and consumer-use taxes. The Department argues both that the racing act never granted such a sweeping exemption and that, even if it did, the Legislature put an end to that exemption in 1986. See Act No. 1986-647, Ala. Acts 1986, codified at § 40-11-5, Ala. Code 1975. The parties dispute whether the Department forfeited the latter position by not raising it in the Tax Tribunal before appealing to the circuit court. We may sidestep that forfeiture issue because -- even ignoring the 1986

act -- it is clear that the racing act does not confer the extraordinary exemption the lower tribunals found in it.

As always, "[t]he fundamental rule of construction is to ascertain and effectuate the intent of the Legislature as expressed in the statute." League of Women Voters v. Renfro, 292 Ala. 128, 131, 290 So. 2d 167, 169 (1974). "To discern the legislative intent, the Court must first look to the language of the statute. If, giving the statutory language its plain and ordinary meaning, we conclude that the language is unambiguous, there is no room for judicial construction." City of Bessemer v. McClain, 957 So. 2d 1061, 1074 (Ala. 2006). That said, if a literal reading of the statute "would produce an absurd and unjust result that is clearly inconsistent with the purpose and policy of the statute, such a construction is to be avoided." Id. at 1075. The parties further acknowledge that, under this Court's precedents, "tax-exemption clauses are to be construed most strongly against the party or person paying the tax," though not "so strictly construed as to defeat or destroy the intent and purpose of the statute containing the exemption clause." Ex parte Exxon Mobil Corp., 926 So. 2d 303, 309 (Ala. 2005).

As outlined above, the racing act imposes certain fees and taxes on licensees of the Commission but provides that those fees and taxes "shall be in lieu of all license, excise, and occupational taxes to the State of Alabama, or any county, city, town, or other political subdivision thereof." § 45-32-150.15. The Department contends that this exemption does not extend to activities that, like Greenetrack's bingo operations, are unrelated to licensed dog-racing activities under the racing act. It observes that the 4 percent sales tax the racing act imposes on the total amount of pari-mutuel wagers a licensee handles ("the handle"), see § 45-32-150.13, is equal to the general 4 percent sales tax on gross receipts of places of amusement, suggesting that the exemption exists primarily to prevent double taxation on licensed races.

By contrast, Greenetrack argues, and the lower tribunals held, that the text of § 45-32-150.15 unambiguously exempts licensees from all license, excise, and occupational taxes, even on unrelated activities. As Greenetrack sees it, this "entity-based" reading flows not only from the Legislature's use of the word "all," but also from its use of the phrase "in lieu of," which, according to Greenetrack, this Court long ago interpreted

as expressing the broadest possible intent to exempt from taxation. See Mobile & Spring Hill R.R. v. Kennerly, 74 Ala. 566, 572 (1883).

Greenetrack's textual arguments exaggerate the supposed clarity of the entity-based reading, as may be seen by considering two related features of the text. The first is the phrase "in lieu of," the ordinary meaning of which is "in the place of" or "instead of." Lieu, Webster's Ninth New Collegiate Dictionary 689 (9th ed. 1985). Thus, at its root, "in lieu of" expresses the idea of substitution or replacement. And that idea is (at the very least) a more natural fit with the Department's understanding of the exemption than Greenetrack's. It makes perfect intuitive sense to think of the racing act's 4 percent sales tax on the handle (paid to the Commission) as a substitute or replacement for the general 4 percent sales tax on places of amusement (paid to the State), which would apply to the handle were it not for § 45-32-150.15. It is far less intuitive to think of the fees and taxes that a licensee owes the Commission under the racing act as somehow substituting for, or taking the place of, taxes that the licensee might owe on unrelated activities under other generally applicable tax laws.

The second feature to consider is the text's silence on a key question. There is no doubt that the racing act's "license fees, commissions and excise taxes" are "in lieu of all [other] license, excise, and occupational taxes" -- but license, excise, and occupational taxes on what? Greenetrack's answer is "on the licensee as an entity"; the Department's answer is "on the licensee's activities as a licensee." Either answer may be right, but, plainly, neither is explicit in the text. And, contrary to Greenetrack's arguments, the word "all" does not answer the question. It simply moves it back: all taxes on what?

This point becomes clearer when we contrast it with a case on which Greenetrack relies. In Mobile & Spring Hill Railroad, a railroad company's charter provided that the company was subject to an annual tax to be imposed by the City of Mobile and that "'said tax shall be in full and in lieu of all taxation by said city on such railway, its rolling-stock, equipments and appendages.'" 74 Ala. at 572 (emphasis added). Regarding that language, this Court said that "[t]here could not have been employed words more clearly indicating the legislative intent to subject the railway of the corporation, its rolling-stock and appendages, to the mode and rate of taxation prescribed, excluding all other municipal

taxation." Id. (emphasis added). Notably, the charter's language (and that of this Court in analyzing it) expressly specified not only that the referenced tax was "in lieu of all" other taxation but also that the subject matter or scope of the taxation controlled. Greenetrack notices that § 45-32-150.15 is similar to the railroad charter in the former respect, while ignoring that it is dissimilar in the latter.

None of this (so far) necessarily means that the lower tribunals were wrong to hold Greenetrack's bingo activities tax-exempt. But it does mean that they too hastily concluded that the plain text of § 45-32-150.15 settled the question. Indeed, and strikingly, both the Tax Tribunal and the circuit court read § 45-32-150.15 in isolation from the rest of the racing act -- a fundamentally misguided approach. See, e.g., LEAD Educ. Found. v. Alabama Educ. Ass'n, 290 So. 3d 778, 788 (Ala. 2019) ("'"[T]he rule is well recognized that in the construction of a statute, the legislative intent is to be determined from a consideration of the whole act with reference to the subject matter to which it applies and the particular topic under which the language in question is found. The intent so deduced from the whole will prevail over that of a particular part considered separately."'" (citations omitted)); Bean Dredging, L.L.C. v. Alabama

Dep't of Revenue, 855 So. 2d 513, 517 (Ala. 2003) ("When interpreting a statute, this Court must read the statute as a whole because statutory language depends on context ...."); Opinion of the Justices No. 153, 264 Ala. 176, 180, 85 So. 2d 391, 394 (1956) ("[I]n determining the legislative intent in a bill we must look to the entire bill and not to isolated phrases or clauses in the bill."). And when we view § 45-32-150.15 in light of the rest of the act of which it is part, the untenability of Greenetrack's reading becomes clear.

From beginning to end, the racing act is concerned with one thing: pari-mutuel wagering on dog racing in Greene County. This limited focus thoroughly pervades the racing act's provisions. It is evident in the sections that create and organize the Commission and define the qualifications and powers of its members.[8] It is evident in the sections governing the Commission's licensing and supervisory powers and the

[8]See, e.g., § 45-32-150.01(b) (providing that a member must not be "financially interested in any race track or race meeting licensed by the commission, nor shall he or she race dogs in any race meeting licensed by the commission"); § 45-32-150.03 (giving the treasurer of the Commission the authority and duty to "collect all of the license fees, taxes, and monies provided in [the racing act]" and to "supervise, check, and audit the operation of the pari-mutuel wagering pools and the conduct and distribution thereof").

requirements for license applications.[9] It is evident in the provisions regulating the conduct of races[10] and in those that define the Commission's powers to make additional regulations.[11] It is evident in

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[9]See § 45-32-150.08 (regulating applications "to the racing commission for a permit or license to conduct race meetings and racing under [the racing act]"); § 45-32-150.09 ("The commission may suspend or revoke the license of any licensee conducting a race meeting, upon the willful violation of any of the provisions of [the racing act], or any rule or regulation promulgated by the commission ...."); § 45-32-150.10 ("The commission may at any time require the removal of any employee or official employed by any licensee hereunder whenever it has reason to believe that such employee or official is guilty of any improper practice in connection with racing ...."); § 45-32-150.11 ("The commission shall have the power to grant, refuse, suspend, or withdraw licenses to all persons connected with race tracks, including gate keepers, announcers, ushers, starters, official, drivers, dog owners, agents, trainers, grooms, stable foremen, exercise boys, veterinarians, valets, sellers of racing forms or bulletins, and attendants in connection with the wagering machines ...."); see also §§ 45-32-150.05(3) and -150.18.

[10]See § 45-32-150.06 (limiting the maximum number of racing days in a year); § 45-32-150.07 (prohibiting races on Sunday and limiting the employment or attendance at races of those under 18); § 45-32-150.12(c) (providing specific rules for the conduct of races on which there is pari-mutuel wagering, including requiring a veterinarian and prohibiting the sale of pari-mutuel tickets to the visibly inebriated).

[11]See § 45-32-150.05(5) (requiring the Commission "[t]o make uniform rules and regulations governing the holding, conducting, and operating of all race tracks, race meetings, and races held in the county"); § 45-32-150.12(a) ("The commission shall make rules governing, permitting, and regulating the wagering on dog races ... by ... pari-mutuel wagering ....").

the sections that define criminal offenses.[12] It is evident in the particular fees and taxes the racing act imposes: "a license fee set by the commission," § 45-32-150.08; a tax on "the total contributions to all pari-mutuel pools conducted or made on any race track licensed under [the racing act]," § 45-32-150.13; and an "admission tax." Id. And it is evident in how the Legislature phrased the question to be submitted to the Greene County electorate in a referendum:

> "'Do you favor the creation of the Greene County Racing Commission to regulate licensing and supervision of greyhound racing and wagering thereon as provided in Act No. [375] approved [September 19], 1975?'"

Act No. 376, § 24, Ala. Acts 1975. In short, every material provision of the racing act speaks to its limited focus on the single and narrow subject matter of dog-race gambling in Greene County.

Against this background, to adopt Greenetrack's understanding of § 45-32-150.15 would mean wrenching that provision far from its natural context, both semantic and pragmatic. See generally Thomas R. Lee &

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[12]See § 45-32-150.12(b) (punishing the purchase of pari-mutuel tickets for others); § 45-32-150.17 (punishing holding or wagering on unlicensed dog races and violating "any provision" of the racing act "for which a penalty is not expressly provided"); § 45-32-150.19 (punishing the manipulation of race outcomes); § 45-32-150.20 (punishing the illegal transmission or communication of racing information).

Stephen C. Mouritsen, Judging Ordinary Meaning, 127 Yale L.J. 788, 816-24 (2018). The tax exemption is an incident of licensure by the Commission.[13] The Commission has no purpose and no competence except to "carry out [the racing act]." § 45-32-150.05; see also § 45-32-150 (vesting the Commission "with the powers and duties specified in [the racing act], and all other powers necessary and proper to enable it to execute fully and effectually the purposes of [the racing act]"). And, as we have seen, the racing act speaks only to pari-mutuel wagering on dog racing in Greene County. With all this in mind, the idea that § 45-32-150.15 reaches so far beyond that narrow subject matter that it grants licensees of the Commission a sweeping entity-based exemption from taxes on any and all activities they undertake -- even activities completely unconnected to dog racing -- is simply not plausible. The text of § 45-32-150.15 alone certainly does not compel such a reading, and,

[13]This is a striking illustration of the importance of context. The bare text of § 45-32-150.15 -- "[t]he license fees, commissions, and excise taxes imposed herein shall be in lieu of all license, excise, and occupational taxes to the State of Alabama, or any county, city, town, or other political subdivision thereof" -- does not even specify the taxpayers to whom it applies. It is only by understanding § 45-32-150.15 in light of the rest of the racing act and the regulatory framework it creates that the reader can infer the connection between licensure and the exemption in the first place.

when the entire statutory scheme is considered, it quickly becomes evident that Greenetrack's position is not tenable.

Further, as the Department argues, Greenetrack's understanding of the exemption would lead to "an absurd and unjust result." City of Bessemer, 957 So. 2d at 1075. Under Greenetrack's theory, any business that secured a racing license from the Commission -- a grocery store, a car dealership, a Walmart store -- would be exempt from any and all license, excise, and occupational taxes except a modest license fee, a 4 percent tax on the handle, and a small tax on admissions to its racetrack. And this would be true no matter how minuscule a fraction of the licensee's business activities and income pari-mutuel wagering on dog racing accounted for.

Obviously, the economic value of such a blanket exemption would be enormous. Not only would the licensee be allowed to retain significant sums that would otherwise go to the public revenue, it could use its tax savings to drive down prices and cripple competitors. Is it plausible that the Legislature intended to vest the Commission, a body created solely to oversee gambling on dog races in a single county, with the power to grant such immense tax and competitive advantages? Would a reasonable

reader of the racing act, considering it as a whole and in light of its subject matter, impute that intention to the Legislature? In our judgment, these questions answer themselves.

Indeed, the absurdity of Greenetrack's theory goes even further than the Department argues. Under the racing act, an applicant for a license need not be a business; it can just as well be a natural person. See §§ 45-32-150.05(3)(a), -150.06, and -150.08. Thus, Greenetrack's reading would allow not only business entities but also private individuals -- provided they were fortunate and well-connected enough to procure a racing license -- to obtain personal exemptions from many generally applicable taxes. Just to give one example, under Greenetrack's view, an individual who held a license from the Commission could legally avoid the $.28 per gallon excise tax on gasoline every time he or she went to the pump. See §§ 40-17-325(a)(1) and -370(c), Ala. Code 1975. And this favorable treatment would apply at gas stations anywhere in the State. Again, it simply is not plausible that the Legislature empowered the Commission to grant individuals a blanket exemption from generally applicable tax laws on matters so unrelated to the Commission's sole area of competence. And, to return to a textual

point from earlier, it is difficult to see any sense in which the limited fees and taxes that the licensee paid to the Commission would be "in lieu of" -- a substitute or replacement for -- the avoided gas tax.

In sum, we reject the lower tribunals' reading of § 45-32-150.15, and we hold that the racing act did not exempt Greenetrack's bingo operations from any taxes that otherwise apply.

2. Retroactivity

Relying on McCullar v. Universal Underwriters Life Insurance Co., 687 So. 2d 156 (Ala. 1996), Greenetrack contends that we should apply any holding rejecting its sweeping interpretation of the tax exemption prospectively only. In reply, the Department suggests that such a course is beyond this Court's power, see Cline v. Ashland, Inc., 970 So. 2d 755, 758-59 (Ala. 2007) (See, J., concurring specially), though it does not expressly ask us to overrule McCullar. Instead, it argues that Greenetrack is not entitled to a prospective-only ruling even under the McCullar framework. We agree.

In McCullar, this Court favorably quoted the United States Supreme Court's discussion of the factors that should be considered when deciding whether to apply a judicial decision prospectively:

> "'First, the decision to be applied nonretroactively must establish a new principle of law, either by overruling clear past precedent on which litigants may have relied … or by deciding an issue of first impression whose resolution was not clearly foreshadowed. Second, it has been stressed that "we must weigh the merits and demerits in each case by looking to the prior history of the rule in question, its purpose and effect, and whether retrospective operation will further or retard its operation." Finally, we have weighed the inequity imposed by retroactive application, for "[w]here a decision of this Court could produce substantial inequitable results if applied retroactively, there is ample basis in our cases for avoiding the 'injustice or hardship' by a holding of nonretroactivity."'"

687 So. 2d at 165 (quoting Chevron Oil Co. v. Huson, 404 U.S. 97, 106-07 (1971)) (internal citations omitted). On the first factor, Greenetrack asserts that no court has ever considered whether the racing act grants an entity-based exemption. Greenetrack thus concedes that there was no "clear past precedent on which [it] may have relied," Chevron Oil, 404 U.S. at 106, so it can rely only on the issue's first-impression status. But it has never been thought that every holding on a question of first impression calls for prospective-only treatment. Thus, although the first Chevron Oil factor may not necessarily rule out prospective-only application here, it does not materially support that approach either. Cf. McCullar, 687 So. 2d at 165-66 (holding that, in the absence of contrary

past precedent, the mere fact that the issue was one of first impression weighed against a prospective-only application).

The second factor weighs strongly against granting a retroactivity exemption, as was the case in McCullar. See id. at 166. The purpose of the general tax laws under which the Department assessed Greenetrack is to raise revenue for the State in an impartial and evenhanded manner. And the purpose of § 45-32-150.15 is to protect Commission licensees from taxation on pari-mutuel wagering on dog races outside the racing act's regulatory framework. Giving Greenetrack a free pass for taxes on its activities unrelated to dog racing would undermine the first purpose and do nothing to further the second.

Finally, on the third factor, Greenetrack cannot claim unfair surprise or hardship at our rejection of its reading of § 45-32-150.15. As we have shown, the entity-based theory is not the most reasonable reading of the tax exemption, not least because of the absurd results to which it leads. Whenever a party acts on a dubious understanding of relevant law, it assumes the risk that a court will disagree with it and that it will have to face the consequences. Greenetrack additionally points to the large amounts at stake as a reason for prospective-only

application, but it would be very odd to hold that the more money a party has unlawfully withheld from the State the more that party is entitled to a single-use get-out-of-tax-free card. Further, Greenetrack's protests fall on particularly deaf ears because -- as explained in more detail below -- Greenetrack's bingo operations clearly evince a willful attempt to circumvent the law. The inequity of rewarding Greenetrack for its adherence to a legal position that was always dubious at best would far exceed any unfairness in requiring it to pay taxes the Department rightfully assessed.

In conclusion, the racing act does not shield Greenetrack from the assessed taxes, nor should Greenetrack be immunized from the natural effects of that holding. It follows that the circuit court should have denied Greenetrack's cross-motion for summary judgment.

B. The Department's Cross-Motion

Our holdings so far -- that the racing act's tax exemption does not apply to the assessed taxes and that this holding should govern the case at hand -- mean that Greenetrack owed consumer-use tax on purchased property related to its bingo operations. But the taxability of Greenetrack's gross receipts from bingo still depends on the independent

issue of whether Greenetrack's bingo operations complied with Amendment No. 743. See § 40-23-4(a)(44). And whether the Department's estimates of the amounts owed should be upheld depends on still further questions. In its cross-motion below, the Department pressed for summary judgment on all of these issues, and it argues now that summary judgment should have been given to it.

First, though, we must address Greenetrack's threshold objection to the scope of the Department's cross-motion. The Department appealed from the Tax Tribunal to the circuit court under § 40-2B-2(m), Ala. Code 1975, which provides, in relevant part:

> "The appeal to circuit court from a final or other appealable order issued by the Alabama Tax Tribunal shall be a trial de novo, except that the order shall be presumed prima facie correct and the burden shall be on the appealing party to prove otherwise. The circuit court shall hear the case by its own rules and shall decide all questions of fact and law. The administrative record and transcript shall be transmitted to the reviewing court as provided herein and shall be admitted into evidence in the trial de novo, subject to the rights of either party to object to any testimony or evidence in the administrative record or transcript. With the consent of all parties, judicial review may be on the administrative record and transcript. The circuit court shall affirm, modify, or reverse the order of the Alabama Tax Tribunal, with or without remanding the case for further hearing, as justice may require."

Greenetrack contends that the circuit court's review was limited to the sole issue decided by the Tax Tribunal -- the effect of the racing act -- and that the Department exceeded the scope of the appeal by moving for summary judgment on the other issues. We disagree. Section 40-2B-2(m)(4) commands the circuit court to conduct "a trial de novo," to "hear the case by its own rules," and to "decide all questions of fact and law." As held by an unbroken line of authority in this state, a trial de novo means a new trial "as if no trial had ever been had, and just as if it had originated in the circuit court." Louisville & Nashville R.R. v. Lancaster, 121 Ala. 471, 473, 25 So. 733, 735 (1899); see also, e.g., Ex parte Sorsby, 12 So. 3d 139, 146 (Ala. 2007); Ball v. Jones, 272 Ala. 305, 309, 132 So. 2d 120, 122 (1961). Further, it is clear under § 40-2B-2(m)(4) that the circuit court may receive evidence outside the administrative record and has broad discretion to decide the whole case "with or without" any remand "as justice may require." In short, the text of § 40-2B-2(m)(4) rules out any suggestion that the circuit court sat only to review the precise ground on which the Tax Tribunal ruled. Thus, the Department did not exceed the scope of its appeal under § 40-2B-2(m) by seeking summary judgment on other "questions of fact and law." And those

questions are properly before us now. See Lynd v. Marshall Cnty. Pediatrics, P.C., 263 So. 3d 1041, 1052 (Ala. 2018) ("'Where cross-motions for a summary judgment are filed in the trial court, the party whose motion was not granted is entitled to have that motion reviewed on an appeal from the grant of the opponent's motion ....'" (citation omitted)).[14]

We explain first why the Department merited summary judgment on the issue of Greenetrack's noncompliance with Amendment No. 743, then why the Department merited summary judgment upholding the amounts of the final tax assessments.

1. Greenetrack's Noncompliance with Amendment No. 743

[14]Of course, it would be within our discretion to simply reverse the circuit court's grant of Greenetrack's cross-motion and remand the case for the circuit court to decide in the first instance the remaining issues raised in the Department's cross-motion. See generally § 12-22-70, Ala. Code 1975 ("The appellate court may, upon the reversal of any judgment or decree, remand the same for further proceedings or enter such judgment or decree as the court below should have entered or rendered, when the record enables it to do so."). But whether the Department's cross-motion entitled it to summary judgment (in whole or in part) is a question of law based on the existing record that we can answer ourselves. As explained below, it is not a difficult question, and this case has lasted far too long as it is. Thus, in the interest of judicial economy, we proceed to decide the remaining issues and to render the judgment the circuit court should have entered.

Under the familiar summary-judgment framework, the movant must show "that no genuine issue of material fact exists and that the movant is entitled to judgment as a matter of law." Blue Cross & Blue Shield of Alabama v. Hodurski, 899 So. 2d 949, 952 (Ala. 2004). "When the movant makes a prima facie showing that those two conditions have been satisfied, the burden then shifts to the nonmovant to present substantial evidence creating a genuine issue of material fact." Id. "If the nonmovant fails to meet this burden, then a summary judgment must be entered in favor of the movant." Beam v. Tramco, Inc., 655 So. 2d 979, 980 (Ala. 1995).

Rule 56(c)(1), Ala. R. Civ. P., explains how both a summary-judgment motion and the opposition to such a motion must be supported:

> "The motion shall be supported by a narrative summary of what the movant contends to be the undisputed material facts; that narrative summary may be set forth in the motion or may be attached as an exhibit. The narrative summary shall be supported by specific references to pleadings, portions of discovery materials, or affidavits and may include citations to legal authority. Any supporting documents that are not on file shall be attached as exhibits. If the opposing party contends that material facts are in dispute, that party shall file and serve a statement in opposition supported in the same manner as is provided herein for a summary of undisputed material facts."

In its cross-motion, the Department set forth what it contended to be the undisputed material facts, supporting its contentions with references to exhibits in the administrative record. The Department also argued, based on its narrative summary of the facts, that Greenetrack's bingo operations violated Amendment No. 743 as a matter of law. As set out below, the Department met its initial burden of making a prima facie showing that it was entitled to summary judgment, thus shifting the burden to Greenetrack to establish the existence of a genuine issue of material fact that would make summary judgment inappropriate.[15]

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[15]In its brief in this Court, Greenetrack argues for the first time that the Department's factual account was based on unsworn and unauthenticated documents that could not properly be considered on summary judgment. We need not consider the merits of this objection because the proper forum in which to raise it was the circuit court. As this Court has consistently held, a party challenging the admissibility of the opposing party's summary-judgment evidence must move to strike the challenged evidence in the trial court. See, e.g., Ware v. Deutsche Bank Nat'l Trust Co., 75 So. 3d 1163, 1171 (Ala. 2011); SSC Selma Operating Co. v. Gordon, 56 So. 3d 598, 602-03 (Ala. 2010); Morris v. Young, 585 So. 2d 1374, 1377 (Ala. 1991); Berry Mountain Min. Co. v. American Res. Ins. Co., 541 So. 2d 4, 5 (Ala. 1989); Perry v. Mobile Cnty., 533 So. 2d 602, 604-05 (Ala. 1988). "Failure to do so waives any objection on appeal and allows this Court to consider the defective evidence." Chatham v. CSX Transp., Inc., 613 So. 2d 341, 344 (Ala. 1993). Here, the Department's cross-motion made clear that the Department was relying on the audit report and other exhibits in the administrative record as competent evidence supporting its factual account. Not only did Greenetrack not move to strike the Department's evidence, it failed to

In its response, Greenetrack did not contest the Department's factual account but, instead, argued in effect that it should not have to do so. Greenetrack conclusorily asserted that its compliance with Amendment No. 743 was not ripe for determination because the relevant facts "ha[d] not been fully developed or proven, no evidentiary hearing ha[d] ever been conducted ..., and no facts ha[d] been stipulated to." It then emphasized, at some length, that the Tax Tribunal had not considered the Amendment No. 743 issue, which we have already explained was no obstacle to the Department seeking summary judgment. Last, Greenetrack stated that it "reserve[d] the right," at some later time, "to present evidence refuting the Department's contentions regarding the operation of bingo and its compliance with Amendment 743 ... and to fully brief and argue the legal issues raised in conjunction with the same."

Put simply, Greenetrack's view that it could wait to make an argument addressing Amendment No. 743 is mistaken. Once a summary-judgment motion has been made and supported, Rule 56 offers

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raise any evidentiary objection. Accordingly, we treat the audit report and other exhibits as competent evidence.

the nonmovant only two ways of responding to the movant's factual showing. First, if the nonmovant "contends that material facts are in dispute," it must "file and serve a statement in opposition supported in the same manner as is provided ... for a summary of undisputed material facts," which means that its statement must "be supported by specific references to" relevant factual material. Rule 56(c)(1). Importantly, in showing that substantial evidence supports the existence of a genuine issue of material fact, the nonmovant "may not rest upon the mere allegations or denials of [its] pleading" but, instead, "must set forth specific facts showing that there is a genuine issue for trial." Rule 56(e).

Second, if the nonmovant does not wish to accede to the movant's version of the facts but needs further discovery to present the "facts essential to justify [its] opposition," the nonmovant may submit an affidavit explaining its need, and "the court may deny the motion for summary judgment or may order a continuance," as appropriate. Rule 56(f). Rule 56 thus acknowledges that, when discovery is incomplete, a movant's assertions about what facts are undisputed may sometimes be premature. But it puts the burden on the nonmovant to show it. See Hope v. Brannan, 557 So. 2d 1208, 1212-13 (Ala. 1989) ("[T]he burden of

showing that the discovery is crucial is upon the nonmoving party. ... A party seeking the shelter of Rule 56(f) must offer an affidavit explaining to the court why he is unable to make the substantive response required by Rule 56(e)."); Committee Comments to August 1, 1992, Amendment to Rule 56(c) and Rule 56(f) ("[The nonmovant's] affidavit should state with specificity why the opposing evidence is not presently available and should state, as specifically as possible, what future actions are contemplated to discover and present the opposing evidence."). Absent that showing, "[t]he mere pendency of discovery does not bar summary judgment." Hope, 557 So. 2d at 1212.

Here, Greenetrack did not contest the Department's factual account or set forth specific facts showing a genuine issue for trial -- as required by Rule 56(c)(1) and (e) -- nor did it attempt the showing required by Rule 56(f). At bottom, Greenetrack rested on a blanket pleading-style denial of the Department's factual showing, coupled with an appeal to the mere pendency of discovery. Neither component of the response had any weight on its own, and zero plus zero equals zero.

Because the Department's cross-motion was properly supported and Greenetrack failed to point to substantial evidence to contest the

Department's factual showing, we "must consider [the Department's] evidence uncontroverted, with no genuine issue of material fact existing." Huntsville Golf Dev., Inc. v. Ratcliff, Inc., 646 So. 2d 1334, 1336 (Ala. 1994). That leaves the question whether -- on the facts shown -- Greenetrack violated Amendment No. 743 as a matter of law.

As stated earlier, Amendment No. 743 creates a local exception to Alabama law's general prohibition against lotteries (including bingo). As relevant here, it provides:

> "Bingo games for prizes or money may be operated by a nonprofit organization in Greene County. The sheriff shall promulgate rules and regulations for the licensing, permitting, and operation of bingo games within the county. The sheriff shall insure compliance with such rules or regulations and all of the following:
>
> "....
>
> "(2) Bingo games shall be operated exclusively on the premises owned or leased by the nonprofit organization operating the bingo game. Such location shall be specified in the application of the nonprofit organization.
>
> "(3) A nonprofit organization may not enter into any contract with any individual, firm, association, or corporation to have the individual or entity operate bingo games or concessions on behalf of the nonprofit organization. A nonprofit organization may not pay consulting fees to any individual or entity for any services performed in

> relation to the operation or conduct of a bingo game.
>
> "(4) A nonprofit organization may not lend its name or allow its identity to be used by another person or entity in the operating, promoting, or advertising of a bingo game in which the nonprofit organization is not directly and solely operating the bingo game.
>
> "(5) All equipment shall be stamped or clearly marked in letters no less than one-half inch in height and one-fourth inch in width (except for the letter 'I') with the name of the nonprofit organization using the equipment. A nonprofit organization or other person or entity may not use equipment marked with the name of another nonprofit organization.
>
> "....
>
> "(8) A nonprofit organization shall display its bingo license conspicuously at the location where the bingo game is conducted."

Local Amendments, Greene County, §1, Ala. Const. 1901 (Off. Recomp.).

The Department argues that Greenetrack entered into contracts to operate bingo games on behalf of its nonprofit "lessees," thus violating paragraph (3), and that Greenetrack, not the nonprofit organizations, "operated" the bingo games at Greenetrack's facility, thus violating paragraphs (2) and (4). (Although the Department presents these arguments in two separate subsections of its brief, they largely boil down

to the common question of who really "operated" the bingo games.) The Department also argues that Greenetrack did not mark bingo equipment with the names of nonprofit organizations or display those organizations' bingo licenses, thus violating paragraphs (5) and (8). Greenetrack offers no response to these arguments.

For simplicity's sake, we pass over the theory based on the alleged violation of paragraphs (5) and (8). The unrebutted facts bear out the dispositive conclusion that Greenetrack, not the nonprofit organizations, "operate[d]" the bingo games at its facility in violation of Amendment No. 743. To avoid missing the forest for the trees, we review the whole picture before discussing specific provisions of Amendment No. 743.

As a for-profit corporation, Greenetrack had no way to operate legal bingo games under Amendment No. 743. The "lease" system between it and the nonprofit organizations was a transparent attempt to evade that restraint. For the low cost of $4,850 a day, Greenetrack was able to use the nonprofit organizations' licenses as a fig leaf for its own illegal -- but extremely profitable -- bingo activities. Although Greenetrack purported to be a "lessor" of facilities, employees, and equipment, the substance of the Lease Agreement pierces that illusion. Its contrived fee structure

ensured that Greenetrack kept the vast majority of the bingo revenue, in particular through the elastic Equipment Leasing Fee. No matter whether Greenetrack's bingo operations in a given month brought in $500,000, $5 million, or $50 million, its Equipment Leasing Fee for that month was -- by mathematical definition -- whatever was left over after the Rent, the Employee Leasing Fee, and the nonprofit organizations' fixed Monthly Bingo Charity Earnings of at most $4,850 per day. Of course, such monthly fluctuations in bingo revenue did not change the "leased" equipment itself, which makes it obvious that the so-called "Equipment Leasing Fee" was nothing of the kind. It was simply a formula designed to obscure that the bingo games were primarily and overwhelmingly for the benefit of Greenetrack and not for the benefit of the nonprofit organizations, which received only a small cut of Greenetrack's vast profits in exchange for letting it hide behind their licenses.

The true nature of Greenetrack's supposed "leases" is equally apparent on the operational side. Under the Lease Agreement, Greenetrack employees "perform[ed] the … daily operation of the bingo games," and Greenetrack retained "ultimate ... direction and control"

over them in doing so. Greenetrack maintained the bingo equipment, collected wagers, and handled payouts. If there was any evidence that the nonprofit organizations exercised any control at all over Greenetrack's employees or any aspect of the bingo games, there might be a triable issue whether the nonprofit organizations, rather than Greenetrack, "operated" the bingo games. But there is none.[16]

It is thus clear that Greenetrack's bingo operations did not comply with Amendment No. 743, and in such a fundamental way -- the operation of bingo games for profit -- that it is easy to tag the violation to specific provisions of Amendment No. 743. Among the numbered

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[16]To be sure, the Lease Agreement stated that every nonprofit organization had "sufficient direction and control over Leased Persons as is necessary to operate and conduct its bingo games and operations and without which Lessee would be unable to conduct its business, discharge any fiduciary responsibility which it may have, or comply with any applicable licensure, regulatory or statutory requirement of Lessee's bingo operations." But this verbiage shows all the hallmarks of an empty recital. It was included simply as a proviso to Greenetrack's "ultimate right of direction and control" over its employees, and, in substance, it said nothing more than "notwithstanding Greenetrack's ultimate direction and control, the Lessee has whatever direction or control as is necessary for this Agreement to be legal." The Lease Agreement might as well have said: "Greenetrack, through its employees, will operate the bingo games, but this will not violate Amendment No. 743." In the absence of evidence that the nonprofit organizations actually exercised any control over the operation of the bingo games, the above language does not raise any genuine issue of material fact.

paragraphs, Greenetrack's violations of paragraphs (3) and (4) are the most glaring. Contrary to paragraph (3), Greenetrack and the nonprofit organizations "enter[ed] into ... contracts" for Greenetrack to "operate bingo games ... on behalf of the nonprofit organization[s]." And, contrary to paragraph (4), the nonprofit organizations let Greenetrack use their "name[s]" and "identit[ies]" in operating bingo games that were not -- by any possible stretch of language -- "directly and solely operat[ed]" by the nonprofit organizations themselves. Indeed, that was the whole point of the "leases."

One last note on this issue. In evaluating the Department's cross-motion for summary judgment, we naturally must view the evidence in the light that is most favorable to Greenetrack and draw all reasonable inferences in its favor. Capital All. Ins. Co. v. Thorough-Clean, Inc., 639 So. 2d 1349, 1350 (Ala. 1994). One might be concerned that, in viewing Greenetrack's "lease" system as a transparent attempt to avoid the clear prohibitions of Amendment No. 743, we have neglected that essential rule in our analysis. We have not. As explained above, the facts are undisputed because of Greenetrack's failure to properly oppose the Department's factual showing. See Huntsville Golf, 646 So. 2d at 1336.

And the only reasonable inference the undisputed facts permit is that Greenetrack's "lease" system was no more than an attempt to cloak an illegal for-profit bingo operation with a veneer of legality based on the nonprofit organizations' nominal participation.

The Department's cross-motion and Greenetrack's response established that Greenetrack's bingo operations did not comply with Amendment No. 743. Accordingly, Greenetrack's bingo gross receipts were subject to sales tax.

2. The Amounts of the Final Assessments

Last, we address whether the Department is entitled to summary judgment upholding the amounts of the taxes assessed. The first disputed issue is a pure question of law. As stated earlier, the 4 percent sales tax applies to a place of amusement's "gross receipts." § 40-23-2(2). The Department equated "gross receipts" with the total wagers on Greenetrack's bingo games, and Greenetrack has never contested that decision. But it has asserted throughout this litigation, including in its response to the Department's cross-motion and in its brief in this Court, that the taxable total wagers or gross receipts should not include "credits" won and then immediately wagered again by players at electronic bingo

machines. The Department attempted to account for such won-and-replayed credits in its estimates of Greenetrack's total taxable wagers.

To bring the issue into focus, consider an example. Suppose that the cost to play one game of electronic bingo at Greenetrack is $1. A player feeds a $1 bill into a machine, plays one game, and wins $10. The way the machine works, it does not immediately pay out $10 (or the equivalent in tokens or vouchers); instead, the machine registers internally that the player has won a $10 "credit." At this point, the player has two choices. He can "cash out," which means having the machine print a voucher that he can redeem for the cash value of his credit balance (here, $10). Or, without cashing out, he can spend his credits to play additional games of electronic bingo on the same machine.

Now suppose that the player spends his $10 in credits to play 10 more games, all of which he loses. In total, he has now played 11 games of electronic bingo by spending $1 that he walked in with and $10 in credits that he won in his first game. The question is whether the $10 in credits count toward Greenetrack's gross receipts. The Department says they should -- each time the player started a game, he spent $1, and there is no relevant distinction between the $1 that came out of his wallet and

the $10 that came out of his balance of credits on the machine. Greenetrack, by contrast, argues that the $10 in credits should be excluded and its gross receipts limited to the $1 that the player fed into the machine.

The Department is clearly correct. As relevant here, "gross receipts" means "all receipts actual and accrued, ... without any deductions on account of losses." § 40-23-1(a)(8), Ala. Code 1975. In the above hypothetical, Greenetrack accrued $1 each of the 11 times the player started a game of electronic bingo. (Greenetrack also lost $10 on the first game, but losses, by definition, do not affect gross receipts.) The critical fact is that once the player won the first game and accrued his $10, those winnings were his to do with as he pleased. If he chose to spend some or all of his credit balance on additional games, as opposed to printing his voucher and redeeming it, he was giving Greenetrack <u>his</u> money each time he paid for another game. That this payment took place "within the machine" -- with the player spending out of his credit balance instead of reaching into his wallet for another physical $1 bill -- is irrelevant to the substance of the transaction.

We acknowledge that, in a 2011 opinion, the Department's Administrative Law Division excluded won-and-replayed electronic bingo credits from gross receipts. See Walker Cnty. Entm't, LLC v. State Department of Revenue, Docket No. S. 10-379, May 29, 2011 (Ala. Dep't of Revenue Admin. Law Div. 2011) (second opinion and preliminary order).[17] But we are not bound by that decision and, for the reasons already given, disagree with its analysis. The Department's Administrative Law Division erroneously reasoned that, "[i]f a customer won and received credits on a machine, and then used the credits to continue playing, those plays or bets using the credits would not result in additional gross receipts to the [bingo operator] because the [bingo operator] received nothing as a result." Id. (emphasis added). We disagree. What a bingo operator "receives" each time a customer pays for a new game out of his credit balance is a reduction in the customer's

[17]Greenetrack also asserts that its position is supported by two out-of-state decisions cited in Walker County Entertainment. See Fraternal Order of Police v. South Carolina Dep't of Revenue, 332 S.C. 496, 506 S.E.2d 495 (1998); South Robert St. Bus. Men's Town Soc. Club v. Commissioner of Taxation, Docket No. 1572, June 21, 1972 (Minn. Tax. Ct. 1972). But neither of those decisions addressed this "credits" question at all. They did, however, both hold that payouts to winning players are not deductible from bingo operators' gross receipts, a principle that undermines rather than helps Greenetrack's argument.

credit balance, i.e, the money the customer is owed. In terms of value given and received, there simply is no difference between a $1 bill that the customer feeds into a machine and a $1 credit that he spends out of his still-to-be-cashed winnings banked in the machine. The Department was right as a matter of law to include won-and-replayed credits in its estimates of Greenetrack's gross receipts.

All that is left is the factual accuracy of the amounts assessed. In its cross-motion, the Department cited and summarized its audit report's narrative of how Greenetrack failed to produce many documents that the Department requested during the audit and how the Department estimated the taxes due based on the information available to it. And it explained that, as a matter of law, the Department is permitted to make estimates based on the best available information when a taxpayer fails to produce the records needed for an exact calculation. See § 40-2A-7(b)(1)a, Ala. Code 1975. Thus, the Department made a prima facie showing that summary judgment was proper, shifting the burden to Greenetrack to raise a triable fact issue or to show, under Rule 56(f), that more discovery was needed.

As with the Amendment No. 743 issue, Greenetrack did neither. It asserted that the estimated payout rate of 85 percent, which formed part of the Department's calculations of the estimated total taxable wagers, was arbitrary and capricious and "directly contrary to information provided to the Department." But Greenetrack failed to produce or cite any factual material undermining the estimate. Greenetrack also blamed the Department for the breakdown of the document-production process during the audit and asserted a general objection to the Department's consumer-use tax calculations. Yet Greenetrack produced no affidavits or other evidence supporting its version of events, nor did it identify any articulable flaw (e.g., the inclusion of specific nontaxable assets or a faulty methodological assumption) in how the Department had estimated Greenetrack's consumer-use tax liability.[18] Here, too, Greenetrack failed to produce substantial evidence showing a genuine

[18]Greenetrack did cite the administrative record once, to show that it leased rather than purchased electronic bingo machines at its facility, but it did not show where (if anywhere) the Department wrongly included leased machines in its calculations of the consumer-use tax due. Thus, this lone citation to the administrative record did not establish a genuine issue of material fact.

issue of material fact, entitling the Department to summary judgment. Beam, 655 So. 2d at 980.

Conclusion

Greenetrack's status as a licensee under the racing act did not immunize it from taxes on unrelated business. On the Department's unrebutted showing, Greenetrack's bingo operations did not comply with Amendment No. 743. And Greenetrack failed to raise any genuine issue of material fact to challenge the amounts of the assessed taxes. We, therefore, reverse the summary judgment in favor of Greenetrack and render a judgment for the Department upholding the final assessments.

REVERSED AND JUDGMENT RENDERED.

Parker, C.J., and Bolin, Shaw, Bryan, and Stewart, JJ., concur.

Wise and Sellers, JJ., concur in the result.