

*Funvestment Group, LLC v. Crittenden*, 317 Ga. 288 (2023).<sup>1</sup>

Decided by the Supreme Court of Georgia on September 19, 2023.<sup>2</sup>

**Counsel for Funvestment Group, LLC, Appellant:** Wimberly Lawson Seckel Schneider & Stine, Les A. Schneider, Paul Oliver, Thomas L. Walker.<sup>3</sup>

**Counsel for Crittenden, Appellee:** Christopher M. Carr, Attorney General, Logan B. Winkles, Julie A. Jacobs, Deputy Attorneys General, Ronald J. Stay, Senior Assistant Attorney General, Melody Chapman, Paul R Draper, Assistant Attorneys General, Stephan J. Petrany, Solicitor-General, Ross W. Bergethon, Deputy Solicitor-General.<sup>4</sup> Balch & Bingham, Patrick N. Silloway, J. Mitchell Fucetola; Robbins Alloy Belinfante; Bradley Arant Boulton Cummings, Christopher S. Anulewicz, amici curiae.<sup>5</sup>

**Before** Hon. Shawn Ellen LaGrua, Hon. Nels S.D. Peterson, Presiding Justice, Hon. Michael P. Boggs, Chief Justice, Hon. Sarah Hawkins Warren, Hon. Charles J. Bethel, Hon. John J. Ellington, Hon. Carla Wong McMillian, Hon. Verda M. Colvin, Hon Andrew A. Pinson.<sup>6</sup> Opinion authored by Hon. J. LaGrua.<sup>7</sup> All Justices concur except Hon. J. Colvin and Hon Andrew A. Pinson, disqualified.<sup>8</sup>

#### KEY ISSUES PRESENTED

*Funvestment Group, LLC v. Crittenden* answers the question about whether lease revenues generated from coin operated amusement machines (“COAM”) should be exempt from taxation under *O.C.G.A. §48-8-3 (43)*.<sup>9</sup> *O.C.G.A. §48-8-3 (43)* reads in part that “[g]ross revenues generated from bona fide coin operated amusement machines” are exempt from sales and use

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<sup>1</sup> *Funvestment Group, LLC v. Crittenden*, 317 Ga. 288 (2023).

<sup>2</sup> *Id.*

<sup>3</sup> *Id.*

<sup>4</sup> *Id.*

<sup>5</sup> *Id.*

<sup>6</sup> *Funvestment Group, LLC*, 317 Ga. 288 (2023).

<sup>7</sup> *Id.*

<sup>8</sup> *Id.*

<sup>9</sup> *Id.*

taxes.<sup>10</sup> However, the Georgia Department of Revenue (“GDOR”) claimed the statute only provided for exemption of revenues generated by a participation transaction with the machines and not the revenue generated from the lease.<sup>11</sup> This case allowed the Georgia Supreme Court to determine whether the lease revenues of COAMs would fall under the tax exempt statute.<sup>12</sup>

#### PROCEDURAL HISTORY & POSTURE

In May 2016, the GDOR prepared an assessment for which Funvestment, LLC (“Funvestment”) to collect the value of unpaid taxes on the lease revenues generated from the COAMs Funvestment leased from Tiny Towne International, Inc. (“Tiny Towne”).<sup>13</sup> Funvestment appealed the assessment to the GDOR, and after a hearing, the GDOR issued a decision claiming the lease revenue fell outside of the scope of the statute because they were not transactional.<sup>14</sup> Funvestment then appealed the decision to the Georgia Tax Tribunal who agreed with Funvestment’s statute interpretation, and ruled that the lease revenues in question were exempt under *O.C.G.A. § 48-8-3 (43)*.<sup>15</sup> The GDOR then appealed to the Fulton County Superior Court which reversed the Tax Tribunal’s decision holding revenues generated from the lease of COAMs are not expressly within the statute.<sup>16</sup> Funvestment then appealed to the Georgia Court of Appeals, who agreed with the Fulton County Superior Court, holding “(1) the statute required that ‘the contemplated gross revenues’ be ‘generated from’ the playing of the actual COAMs, and (2) Funvestment’s position failed to accord with ‘well-settled standards for reviewing taxation statutes.’”<sup>17</sup> Finally, the Court of Appeals stated that “because the leases do not constitute remuneration for vending or dispensing music or public play, the exemption clearly applies only to the money inserted into the COAMs for play; not leases of the COAMs

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<sup>10</sup> O.C.G.A. §48-8-3 (43).

<sup>11</sup> *Funvestment Group, LLC*, 317 Ga. at 289.

<sup>12</sup> *Id.*

<sup>13</sup> *Id.*

<sup>14</sup> *Id.*

<sup>15</sup> *Funvestment Group, LLC*, 317 Ga. at 289.

<sup>16</sup> *Id.*

<sup>17</sup> *Id.*

themselves.”<sup>18</sup> The Supreme Court of Georgia granted certiorari to resolve the issue.<sup>19</sup>

### SUBSTANTIVE FACTS

In Norcross, Georgia, Funvestment operates an amusement facility which contains COAMs within its arcade and other event spaces.<sup>20</sup> Tiny Towne owns the COAMs contained within Funvestment’s facility; therefore, Funvestment leases the COAMs from Tiny Towne.<sup>21</sup> Funvestment agreed to pay Tiny Towne 10% of all revenue generated from the COAMs, less any costs for the state master license, sticker fees, and refunds, plus 10% of other gross income generated by Funvestment’s business.<sup>22</sup> Generally, Tiny Towne would be subject to remit the proper amount of state sales and use taxes under *O.C.G.A. §48-8-30 (d) (1)* which were generated from the lease revenues, but Tiny Towne did not remit any taxes to the GDOR citing an exemption within *O.C.G.A. §48-8-3 (43)*.<sup>23</sup>

### LEGAL ANALYSIS LEADING TO THE COURT’S DISPOSITION

#### *A. Prior Relevant Law*

COAMs are defined by statute as

... every machine of any kind or character used by the public to provide amusement or entertainment whose operation requires the payment of or the insertion of a coin, bill, other money, token, ticket, card, or similar object and the result of whose operation depends in whole or in part upon the skill of the player, whether or not it affords an award to a successful player pursuant to subsections (b) through

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<sup>18</sup> *Funvestment Group, LLC v. Crittenden*, 364 Ga. App. 447, 449 (2022).

<sup>19</sup> *Funvestment Group, LLC*, 317 Ga. 288 (2023) at 290.

<sup>20</sup> *Id.* at 288.

<sup>21</sup> *Id.*

<sup>22</sup> *Id.*

<sup>23</sup> *O.C.G.A. §48-8-30 (d) (1); O.C.G.A. §48-8-3 (43); Funvestment Group, LLC*, 317 Ga. at 288.

(g) of Code Section 16-12-35, and which can be legally shipped interstate according to federal law.<sup>24</sup>

The Georgia legislature lists common examples of what is included within the definition. These include COAMs often found at arcades, billiards rooms, and jukeboxes, and the COAMs are broken down into Class A and Class B machines.<sup>25</sup> The main difference between Class A and Class B machines is that Class A machines do not afford the player with cash prizes or allow them to carry over points won on one play to another, whereas Class B machines are designed to do both.<sup>26</sup> The legislature also lists things not included in the definition, such as COAMs similar to those found at laundromats, vending machines, pay phones, and even gumball machines.<sup>27</sup> The COAM industry is carefully regulated by the Georgia Lottery Corporation which, by legislation, requires that “location owners, like Funvestment, and COAM owners, like Tiny Towne, are required to pay an annual license fee.”<sup>28</sup> Under sales and use tax legislation “[e]very person to whom personal property in the state is leased or rented shall be liable for a tax on the lease or rental[.]”<sup>29</sup> Thus, Funvestment’s payment to Tiny Towne for the lease of the COAMs would generally be subject to a tax unless there is an “exemption or exception.”<sup>30</sup> The Georgia General Assembly has created an exception for such instances when stating ““The sales and use taxes levied or imposed by this article shall not apply to: . . . [g]ross revenues generated from all bona fide coin operated amusement machines[.]””<sup>31</sup>

*B. Changes, Modifications, Clarifications, & Extensions to Georgia Law Made in Funvestment Group, LLC v. Crittenden*

The Court will afford the statute “its plain and ordinary meaning,” and will read the statute in the “most natural and reasonable way, as an

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<sup>24</sup> O.C.G.A. §50-27-70 (b) (2) (A).

<sup>25</sup> O.C.G.A. §50-27-70 (b) (2) (A) (i-xxv); O.C.G.A. §50-27-70 (b) (2) (A).

<sup>26</sup> O.C.G.A. §50-27-70 (b) (3); O.C.G.A. §50-27-70 (b) (4).

<sup>27</sup> O.C.G.A. §50-27-70 (b) (2) (B) (i-xii).

<sup>28</sup> *Funvestment Group, LLC*, 317 Ga. at 291.

<sup>29</sup> O.C.G.A. § 48-8-30 (d)(1).

<sup>30</sup> *Funvestment Group, LLC*, 317 Ga. at 292.

<sup>31</sup> *Id.* at 293; O.C.G.A. § 48-8-3 (43).

ordinary speaker of the English language would.”<sup>32</sup> In doing so, the Court concludes “that, by its plain terms,” the statute exception “covers revenues generated from the lease of COAMs as well.”<sup>33</sup> Reasoning that revenue relating to COAMs is not just the money inserted into the machine because since the statute has been enacted, revenue meant “all income produced by a given source.”<sup>34</sup> Additionally, the statute is phrased in such a way as to contain “no word[s] of limitation[] restricting the manner in which COAMs generate these revenue, and there are no contextual limitations provided elsewhere . . . [in] the Georgia Public Revenue Code, or statutes regulating COAMs.”<sup>35</sup> Therefore, lease payments made from Funvestment to Tiny Towne, which is considered income for Tiny Towne, “are exempt from sales and use tax.”<sup>36</sup>

#### IMPACT UPON GEORGIA TAX LAW PRACTICES

Remember a time when a group of friends would head to the arcade on a Saturday night to test their chances at winning the big-ticket items? COAMs found inside these arcades are considered to be Class A COAMs, and with the rise in gaming consoles in the home, storefront arcades have been on the decline in recent years.<sup>37</sup> Ease of in-home gaming coupled with the high costs of entry has declined the business of the arcades that once provided amusement to many.<sup>38</sup> As an example, a single Golden Tee PGA Tour Deluxe Class A COAM sells for almost \$7,000.00.<sup>39</sup> However, this holding makes owning and operating Class A COAMs more economical now more than ever because the Court has interpreted the statute to mean all proceeds, including the lease revenues, from the use of a COAM to be non-

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<sup>32</sup> Bell v. Hargrove, 313 Ga. 30, 32 (2021).

<sup>33</sup> *Funvestment Group, LLC*, 317 Ga. at 294.

<sup>34</sup> *Id.*

<sup>35</sup> *Id.*

<sup>36</sup> *Id.* at 295.

<sup>37</sup> *Arcade, Food and Entertainment Complexes in the US*, IBISWorld, <https://www.ibisworld.com/united-states/market-research-reports/arcade-food-entertainment-complexes-industry/#IndustryStatisticsAndTrends> (last visited Apr. 21, 2024).

<sup>38</sup> *Id.*

<sup>39</sup> *Golden Tee PGA Tour Home Edition - Deluxe*, The Pinball Company, <https://www.thepinballcompany.com/product/golden-tee-pga-tour-home-edition-deluxe/> (last visited Apr. 21, 2024).

taxable.<sup>40</sup> Therefore, the downstream savings effect from lessor to lessee could result in significant decreases in rental costs for lessees of COAMs and subsequently be able to maintain a small market share of what is being taken over by personal gaming consoles in the home.

As an illustration, creating two companies, one to own and lease the COAMs (Company A), and one to operate the COAMs in a store front (Company B), Company A could lease the machines to Company B for a substantial lease payment that is nearly equivalent to Company A's revenue. Company B, under the same ownership would be able to generate all non-taxable income via the lease payments.

While the COAMs in the case are Class A, the biggest shift this holding could create is within the Class B space, which involves slot machines.<sup>41</sup> There are only 9,000 COAM licenses granted each year to those who apply.<sup>42</sup> All in all, if the COAM industry gets to the point of generating so much non-taxable revenue that the Georgia Department of Revenue feels as though taxing COAMs proceeds would add a significant amount to the budget, the General Assembly will likely change the legislation and make the revenues from both transactions and leases taxable.

**Prepared by:** *Turner Lee Smith*

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<sup>40</sup> O.C.G.A. § 48-8-30 (d)(1); *Funvestment Group, LLC*, 317 Ga. at 294.

<sup>41</sup> COAM Regulatory and Licensing Information, YOUTUBE (June 5, 2018), <https://www.youtube.com/watch?v=fho4CwPS9AQ>.

<sup>42</sup> *Id.*