

Letter of Findings: 01-20160459P
Individual Income Tax
For the Years 2013, 2014, and 2015

NOTICE: IC § 6-8.1-3-3.5 and IC § 4-22-7-7 require the publication of this document in the Indiana Register. This document provides the general public with information about the Department's official position concerning a specific set of facts and issues. This document is effective on its date of publication and remains in effect until the date it is superseded or deleted by the publication of another document in the Indiana Register. The "Holding" section of this document is provided for the convenience of the reader and is not part of the analysis contained in this Letter of Findings.

HOLDING

Out-of-State Individuals were permitted to "net" their "per session" gambling losses and gambling winnings on a "per session" basis in determining the amount of "other income" on their Indiana income tax returns. However, Individuals were required to produce detailed supplementary casino documentation in order to justify their claim.

ISSUE

I. Individual Income Tax - Gambling Income.

Authority: IC § 6-3-1-3.5; IC § 6-3-2-2; IC § 6-8.1-5-1(c); Indiana Dep't of State Revenue v. Rent-A-Center East, Inc., 963 N.E.2d 463 (Ind. 2012); Lafayette Square Amoco, Inc. v. Indiana Dep't of State Revenue, 867 N.E.2d 289 (Ind. Tax Ct. 2007); I.R.C. § 165; I.R.C. § 6110; Rev. Rul. 54-339, 1954-2 C.B. 89; I.R.S. Adv. Mem. 2008-011 (December 12, 2008); I.R.S. Tech. Adv. Mem. 8123015 (February 27, 1981).

Taxpayers argue that they are entitled to calculate their gambling income by "netting" their session winnings and losses on a "per session" basis.

STATEMENT OF FACTS

Taxpayers are out-of-state residents who report their income to Indiana. The Indiana Department of Revenue ("Department") reviewed Taxpayers' income tax returns. That review resulted in a proposed assessment of additional Indiana individual income tax. Taxpayers disagreed with the assessment and submitted a protest to that effect. An administrative hearing was conducted during which Taxpayers' representative explained the basis for the protest. This Letter of Findings results.

I. Individual Income Tax - Gambling Income.

DISCUSSION

The issue is whether Taxpayers are permitted to "net" their "per session" gambling winnings and losses when reporting "other income" on their Indiana income tax returns. In other words, are Taxpayers permitted to report only their "per session" net gambling winnings - as opposed to each individual winning transaction - in determining their adjusted gross income?

As with any proposed assessment of Indiana tax, it is the Taxpayers' responsibility to establish that the tax assessment is incorrect. As stated in IC § 6-8.1-5-1(c), "The notice of proposed assessment is prima facie evidence that the department's claim for the unpaid tax is valid. The burden of proving that the proposed assessment is wrong rests with the person against whom the proposed assessment is made." Indiana Dep't of State Revenue v. Rent-A-Center East, Inc., 963 N.E.2d 463, 466 (Ind. 2012); Lafayette Square Amoco, Inc. v. Indiana Dep't of State Revenue, 867 N.E.2d 289, 292 (Ind. Tax Ct. 2007).

In general, IC § 6-3-1-3.5(a) provides that federal adjusted gross income is the starting for determining Indiana adjusted gross income for individuals. For nonresidents, IC § 6-3-2-2(a) provides that income derived from Indiana sources is subject to Indiana income tax.

For federal income tax purposes, "Losses from wagering transactions shall be allowed to the extent of the gains from such transactions." I.R.C. § 165(d). "For Federal income tax purposes, all wagering gains must be included

in gross income. Losses therefrom, by a taxpayer who is not in the trade or business of gambling, are not deductible in determining adjusted gross income because such losses do not come within the provisions of section 22(n) [now I.R.C. § 62] of the Internal Revenue Code. Nor are the losses deductible from adjusted gross income in determining net income where the taxpayer has elected to use the standard deduction." Rev. Rul. 54-339, 1954-2 C.B. 89. The effect of this federal tax treatment is that Indiana does not permit a deduction for wagering losses except for professional gamblers.

Within the definition of "wagering gains," the measure of the gains included in income has been disputed within both the Department and the Internal Revenue Service. For instance, a player enters a casino and wagers \$10,000 on a slot machine in one day. The player has three wins, one for \$10,000, one for \$5,000, and one for \$3,000. Each time the wager is \$20. The question is then whether the player's income is the \$18,000 gross winnings less the \$60 wagers resulting in wins as an offset—in other words, \$17,940—or the income is the \$8,000 net "per session" profit.

In 1981, the Internal Revenue Service issued I.R.S. Tech. Adv. Mem. 8123015 (February 27, 1981). In that TAM, an individual wagered \$2 on the results of jai-alai matches. His wagers were structured so that he entered up to 315 combinations of wagers each day. Under one approach, if he bought 200 tickets but only one ticket won for \$500, he would report \$498 (\$500-\$2) income and \$398 (199 losing tickets times \$2) losses. Based on this method, his income totaled \$91,000, while his losing tickets cost \$98,000.

A second method was suggested as well. Under the second method, his \$500 winnings would be netted against the \$400 total tickets purchased on that day for \$100 income and no losses. Based on the alternative method, his income totaled \$22,000, while his losses totaled \$29,000.

The 1981 memorandum reasoned that each ticket constituted a separate wager for purposes of I.R.C. § 165(d) and I.R.C. § 3402(q) (relating to withholding on gambling winnings). Thus, the individual had income of \$91,000 for federal income tax purposes.

Nonetheless, Taxpayers rely on I.R.S. Adv. Mem. 2008-011 (December 12, 2008). The document cited is a Chief Counsel Memorandum which may not be cited as precedent pursuant to I.R.C. § 6110(k)(3). In the memorandum, an example was proposed with a taxpayer who played slot machines; the taxpayer was not a professional gambler. In the fact scenario presented, the taxpayer had some winning days (e.g., she entered with \$100 and left with \$500) and some losing days (e.g., she entered with \$100 and left with nothing). The issue was whether the taxpayer had to count each winning machine pull (less wager on the pull) as income or whether the taxpayer could net winnings and losses each day in determining the taxpayer's income. The 2008 memorandum concluded that netting upon redemption of tokens or money was appropriate in the scenario presented.

Nevertheless, the reasoning stated in the 2008 IRS memorandum—that aggregating winnings and losses occurring in a particular period, then including the net winnings (winnings minus losses whenever winnings exceed losses) as income—is the proper measure for determining wagering gains for federal income tax purposes—is persuasive for the reasons stated here. Further, as a matter of recordkeeping by taxpayers, a "per session" netting approach is a less cumbersome recordkeeping requirement—for instance, keeping a log reflecting one session entry as opposed to potentially hundreds of individual entries—and a recordkeeping requirement more consistent with the reality of actual wagering behavior. The treatment of wagering income is determinative regardless of the withholding and reporting requirements under state and federal law.

Taxpayers have provided detailed spreadsheets specifying their "per session" wagering, winnings, and losses. Among other details, the spreadsheets lists the date/year of each session, the state in which the wagers were made, the amount of per session winnings, the amount of per session losses, the difference between that sessions winnings and losses, the total lost during each session, the amount won each session, the name of the casino in which the gambling sessions occurred, the total "reportable income," and the amount "withheld" by the casino for each session.

As casual gamblers, the IRS requires additional documentation; the IRS requires; (1) casino "cash out slips;" (2) casino "player card activity;" (3) casino "cash-out sheets;" (4) casino "payout slips," (5) individual, personal gambling activity "diaries." See IRS Publications 17 and 529.

FINDING

Taxpayers' protest is sustained subject to submission within 90 days of the date of this Letter of Findings the documentation required by this written decision. Upon review of that documentation, the Department's Audit

Division will determine if Taxpayers' calculations are correct.

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