

Memorandum of Decision: 01-20191499R
Individual Income Tax
For the Years 2016, 2017, and 2018

NOTICE: IC § 4-22-7-7 permits the publication of this document in the Indiana Register. The publication of this document provides the general public with information about the Indiana Department of Revenue's official position concerning a specific set of facts and issues. The "Holding" section of this document is provided for the convenience of the reader and is not part of the analysis contained in this determination.

HOLDING

Out-of-State Individuals provided sufficient documentation permitting them to "net" their "per session" gambling losses and gambling winnings on a "per session" basis in determining the amount of "income" reported on their Indiana income tax returns for 2016, 2017, and 2018.

ISSUE

I. Individual Income Tax - Refund.

Authority: IC § 6-8.1-9-1; [45 IAC 15-9-2](#); *UACC Midwest, Inc. v. Indiana Dep't of State Revenue*, 629 N.E.2d 1295 (Ind. Tax Ct. 1994); I.R.S. Adv. Mem. 2008-011 (December 12, 2008); Letter of Findings 01-20130575 (March 21, 2014); Letter of Findings 01-20160451 (November 18, 2016); Letter of Findings 01-20160695R (May 23, 2017); Letter of Findings 01-20190085 (March 29, 2019).

Taxpayers, casual gamblers, protest the Department's partial refund denial for the 2018 tax year.

STATEMENT OF FACTS

Taxpayers are individuals who reside in Ohio. During 2016, 2017, and 2018, Taxpayers visited various casinos in Indiana, and played slot machines recreationally. For each casino visit, Taxpayers had some wagering gains and also had some wagering losses. Also, for each casino visit, Taxpayers recorded their wagering gains and/or losses on a "per session" (usually per day/per visit) method, which includes the amount of money they designated to play and the amount of money remaining before they leave for each casino visit. Pursuant to Indiana tax withholding requirements, the Indiana casinos withheld income tax on Taxpayers' wagering gains, if any, and issued W-2G forms.

In 2019, Taxpayers timely filed their Indiana Part-Year or Full-Year Nonresident Individual Income Tax Return ("IT-40PNR"), claiming that they were entitled to an approximately \$25,000 refund for the tax years at issue on the income tax withheld by the Indiana casinos on their wagering gains.

Upon reviewing Taxpayers' returns, the Indiana Department of Revenue ("Department") granted a partial refund each year.

Taxpayers protested the assessment. A phone hearing was held. This final determination ensues. Additional facts will be provided as necessary.

I. Individual Income Tax - Refund.

DISCUSSION

The Department reduced Taxpayers' refund claim for the 2016, 2017 and 2018 tax years on the ground that Taxpayers were not professional gamblers and could not claim gambling losses in calculating their Indiana income tax.

Taxpayers protested the partial denial of refund, claiming that as casual gamblers, they were entitled to use the "per session" method outlined by the Internal Revenue Service ("IRS") in its Chief Counsel Attorney Memorandum AM2008-011 (Dec. 12, 2008), *2008 WL 5203844* ("IRS AM 2008-011") pursuant to various final determinations issued by the Department, including Letter of Findings 01-20130575 (March 21, 2014), 20140528 Ind. Reg. 045140150NRA; Letter of Findings 01-20160451 (November 18, 2016), 20170125 Ind. Reg. 045170013NRA;

Letter of Findings 01-20160695R (May 23, 2017), 20170726 Ind. Reg. 045170315NRA; Letter of Findings 01-20190085 (March 29, 2019), 20190529 Ind. Reg. 045190275NRA (collectively, "Department's Final Determinations").

In general, if a taxpayer believes that he or she has overpaid the tax, the taxpayer is required to timely file a claim for a refund with the Department. Specifically, IC § 6-8.1-9-1(a), in relevant part, states:

If a person has paid more tax than the person determines is legally due for a particular taxable period, the person may file a claim for a refund with the department. Except as provided in subsections (j) and (k), in order to obtain the refund, the person must file the claim with the department within three (3) years after the later of the following:

- (1) The due date of the return.
- (2) The date of payment.

For purposes of this section, the due date for a return filed for the state gross retail or use tax, the gasoline tax, the special fuel tax, the motor carrier fuel tax, the oil inspection fee, or the petroleum severance tax is the end of the calendar year which contains the taxable period for which the return is filed. The claim must set forth the amount of the refund to which the person is entitled and the reasons that the person is entitled to the refund.

[45 IAC 15-9-2](#) further explains, in relevant part, that:

(b) The department has no legal method of generating a claim for refund. A claim for refund can only be initiated pursuant to [IC 6-8.1-9-1](#).

...

(d) When filing a claim for refund with the department the taxpayer's claim shall set forth:

- (1) the amount of refund claimed;
- (2) a sufficiently detailed explanation of the basis of the claim such that the department may determine its correctness;
- (3) the tax period for which the overpayment is claimed; and
- (4) the year and date the overpayment was made.

The claim for refund shall be filed on a form prescribed by the department.

Thus, when taxpayers determine they overpaid tax, for example in a situation like this, the taxpayers must file their income tax return stating the overpayment as prescribed by the Department in order to claim a refund. IC § 6-8.1-9-1(a); [45 IAC 15-9-2](#); *UACC Midwest, Inc. v. Indiana Dep't of State Revenue*, 629 N.E.2d 1295, 1298 (Ind. Tax Ct. 1994). The taxpayers also must clearly state "the amount of the refund," "detailed explanation of the basis of the claim such that the department may determine its correctness," "the tax period for which the overpayment is claimed," and "the year and date of the overpayment." [45 IAC 15-9-2](#).

IC § 6-8.1-9-1(b), in relevant part, further states that:

After considering the claim and all evidence relevant to the claim, the department shall issue a decision on the claim, stating the part, if any, of the refund allowed and containing a statement of the reasons for any part of the refund that is denied. The department shall mail a copy of the decision to the person who filed the claim. If the person disagrees with a part of the decision on the claim, the person may file a protest and request a hearing with the department

In this instance, upon initial review of Taxpayers' 2018 filing, the Department reduced the refund amount claimed by Taxpayers on the ground that Taxpayers were not professional gamblers.

Taxpayers referenced IRS AM 2008-011 and the Department's Final Determinations to support their protest. Specifically, the IRS addressed the issue of whether a casual gambler who, during a tax year, (a) visited a casino to play slot machines on ten (10) occasions and (b) for each visit, committed only \$100 to play, is allowed to calculate her wagering gains and/or losses based on a "per session" basis (upon redemption of her tokens), as opposed to "per play" basis, for individual income tax purposes. The IRS AM 2008-011, in relevant part, explains:

A key question in interpreting [I.R.C.] § 165(d) is the significance of the term "transactions." The statute refers to gains and losses in terms of wagering transactions. Some would contend that transaction means every single play in a game of chance or every wager made. Under that reading, a taxpayer would have to calculate the gain or loss on every transaction separately and treat every play or wager as a taxable event.

The gambler would also have to trace and recompute the basis through all transactions to calculate the result of each play or wager. Courts considering that reading have found it unduly burdensome and unreasonable. Moreover, the statute uses the plural term "transactions" implying that gain or loss may be calculated over a series of separate plays or wagers.

The better view is that a casual gambler, such as the taxpayer who plays the slot machines, recognizes a wagering gain or loss at the time she redeems her tokens. We think that the fluctuating wins and losses left in play are not accessions to wealth until the taxpayer redeems her tokens and can definitively calculate the amount above or below basis (the wager) realized. For example, a casual gambler who enters a casino with \$100 and redeems his or her tokens for \$300 after playing the slot machines has a wagering gain of \$200 (\$300 - \$100). This is true even though the taxpayer may have had \$1,000 in winning spins and \$700 in losing spins during the course of play. Likewise, a casual gambler who enters a casino with \$100 and loses the entire amount after playing the slot machines has a wagering loss of \$100, even though the casual gambler may have had winning spins of \$1,000 and losing spins of \$1,100 during the course of play.

Calculating the Taxpayer's Gains and Losses

Under the facts presented, the taxpayer purchased and subsequently lost \$100 worth of tokens on five separate occasions. As a result, the taxpayer sustained \$500 of wagering losses (\$100 x 5). The taxpayer also sustained losses on two other occasions, when the taxpayer redeemed tokens in an amount less than the \$100 (basis) of tokens originally purchased. The loss is the basis of the bet (\$100 in tokens) minus the amount of the tokens eventually redeemed. Therefore, on the day the taxpayer redeemed \$20 worth of tokens, the taxpayer incurred an \$80 wagering loss (\$100-\$20). On the day the taxpayer redeemed \$70 worth of tokens, the taxpayer incurred a \$30 wagering loss (\$100-\$70).

On three occasions, the taxpayer redeemed tokens in an amount greater than the \$100 of tokens originally purchased. The amount redeemed less the \$100 basis of the wager constitutes a wagering gain. On the day the taxpayer redeemed \$150 worth of tokens, the taxpayer had a \$50 wagering gain (\$150-\$100). On the day the taxpayer redeemed \$200 worth of tokens, the taxpayer had a \$100 wagering gain (\$200-\$100). And on the day the taxpayer redeemed \$300 worth of tokens, the taxpayer had a \$200 wagering gain (\$300-\$100).

For the year, the taxpayer had total wagering gains of \$350 (\$50 + \$100 + \$200) and total wagering losses of \$610, (\$500 from losing the entire basis of \$100 on five occasions + \$80 and \$30 from two other occasions). The taxpayer's wagering losses exceeded her wagering gains for the taxable year by \$260 (\$610 - \$350). The taxpayer must report the \$350 of wagering gains as gross income under § 61. However, under § 165(d), the taxpayer may deduct only \$350 of the \$610 wagering losses. The taxpayer may not carry over the excess wagering losses to offset wagering gains in another taxable year or offset non-wagering income.

A casual gambler who elects to itemize deductions may deduct wagering losses, up to wagering gains, on Form 1040, Schedule A. In this case, the taxpayer may deduct only \$350 of her \$610 of wagering losses as an itemized deduction. A casual gambler who takes the standard deduction rather than electing to itemize may not deduct any wagering losses.

IRS AM 2008-011. (Internal citations omitted).

Throughout the protest process, Taxpayers further submitted additional documentation, including a copy of verifiable statement from the casino and a copy of their log for 2018. Taxpayers thus claimed that they were entitled to additional refund of the tax withheld on their wagering gains pursuant to the "per session" method outlined in IRS AM 2008-011 and that the Department erred in denying their refund.

Upon review, the Department is prepared to agree that Taxpayers were permitted to report their wagering gains on a "per session" (per day or per visit) basis in determining their Indiana adjusted gross income pursuant to the Department's Final Determinations and IRS AM 2008-011. For each session, Taxpayers' wagering gain is subject to Indiana income tax; however, Taxpayers are not allowed to claim any losses, if any, to reduce their gain in their 2016, 2017 and 2018 Indiana IT-40NPR returns or to carry over the losses to a different taxable year for state income tax purposes. Taxpayers' protest is sustained pending the Department's further review of their supporting documentation - the casino statements, Taxpayers' 2018 log, and W-2Gs - in determining the amount of refund.

FINDING

Taxpayers' protest is sustained pending the Department's further review of Taxpayers' supporting documentation

in determining the amount of the refund. Taxpayers are permitted to report their wagering gains on a "per session" method pursuant to IRS AM 2008-011. For each session, Taxpayers' wagering gain (under per session method) is subject to Indiana income tax; however, for each session, Taxpayers are not allowed to claim any losses (under per session method), if any, to reduce their gains in their 2016, 2017, and 2018 Indiana IT-40NPR returns. Taxpayers are also not allowed to carry over the losses, if any, to a different taxable year to reduce their state income tax liability.

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