DEPARTMENT OF STATE REVENUE

01-20200212.ODR

Order Denying Refund: 01-20200212
Individual Income Tax
For the Tax Years 2016 and 2017

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 Order Denying Refund.

HOLDING

Out-of-State Couple failed to provide sufficient documentation permitting them to "net" their "per-session" gambling losses and gambling winnings on a "per-session" basis.

ISSUE

I. Individual Income Tax - Casual Gambler.

Authority: IC § 6-3-1-3.5; IC § 6-3-2-1; IC § 6-3-2-2; I.R.C. § 62; I.R.C. § 165; *Dept. of State Revenue v. Caterpillar, Inc.*, 15 N.E.3d 579 (Ind. 2014); *Wendt LLP v. Indiana Dep't of State Revenue*, 977 N.E.2d 480 (Ind. Tax Ct. 2012); *Scopelite v. Indiana Dep't of Local Gov't Fin.,* 939 N.E.2d 1138 (Ind. Tax Ct. 2010); *Shollenberger v. Commissioner*, 98 T.C.M. 667 (Tax Ct.2009); *Park v. CIR* 722 F.3d 384 (D.C. Cir. 2013); *Linzy v. Comm'r*, 106 T.C.M. (CCH) 320 (T.C. 2013); *Schooler v. Comm'r of Internal Revenue,* 68 T.C. 867 (1977); *Szkircsak v. Comm'r*, 40 T.C.M. (CCH) 208 (Tax Ct. 1980); I.R.S. Adv. Mem. 2008-011 (December 12, 2008).

Taxpayers protest the denial of their refund claim.

STATEMENT OF FACTS

Taxpayers are a couple ("Husband" and "Wife") and are residents of another state who visited an Indiana casino in 2016 and 2017. Taxpayers filed a claim for refund, claiming that as casual gamblers, they were entitled to use the "per-session" method outlined by the Internal Revenue Service ("IRS") to offset their Indiana income in the form of gambling winning with their gambling losses. The Indiana Department of Revenue ("Department"), denied Taxpayers' refund claim in full and determined they are not entitled to utilize the "net session method" of reporting income. Taxpayers protested the refund denial. The Department held an administrative hearing and this Order Denying Refund results. Additional facts will be provided as necessary.

I. Individual Income Tax - Casual Gambler.

DISCUSSION

During 2016 and 2017, Taxpayers visited a casino in Indiana, and recreationally played slot machines. Taxpayers had some wagering gains and some wagering losses. Taxpayers claim to record their wagering gains and/or losses on a "per-session" method, which included the amount of money designated to play and the amount of money remaining after the visit. Pursuant to Indiana tax withholding requirements the Indiana casino withheld income tax on Taxpayers' qualifying wagering gains and issued W-2G forms.

The Department notes that, "[W]hen [courts] examine a statute that an agency is 'charged with enforcing. . .[courts] defer to the agency's reasonable interpretation of [the] statute even over an equally reasonable interpretation by another party.'" *Dept. of State Revenue v. Caterpillar, Inc.,* 15 N.E.3d 579, 583 (Ind. 2014). Thus, all interpretations of Indiana tax law contained within this decision, as well as the preceding audit, shall be entitled to deference. Poorly developed and non-cogent arguments are subject to waiver. *Scopelite v. Indiana Dep't of Local Gov't Fin.*, 939 N.E.2d 1138, 1145 (Ind. Tax Ct. 2010); *Wendt LLP v. Indiana Dep't of State Revenue*, 977 N.E.2d 480, 486 n.9 (Ind. Tax Ct. 2012).

Indiana imposes a tax "upon the adjusted gross income of every resident person, and on that part of the adjusted gross income derived from sources within Indiana of every nonresident person." IC § 6-3-2-1(a). IC § 6-3-2-2(a) specifically outlines what is income derived from Indiana sources and subject to Indiana income tax. For Indiana income tax purposes, the presumption is that taxpayers file their federal income tax returns as required pursuant to the Internal Revenue Code (IRC). In computing what is considered a taxpayer's Indiana income tax, IC § 6-3-1-3.5(a) refers to the IRC IC § 6-3-1-3.5(a) states that - with certain modifications specific to Indiana law - I.R.C. § 62 defines "adjusted gross income" for Indiana taxpayers.

When discussing the options available to casual gamblers, the federal Tax Court in *Shollenberger v. Comm'r*, 98 T.C.M. (CCH) 667 (T.C. 2009) explained:

> The Code mandates, however, that casual gamblers be treated differently from taxpayers who are in the trade or business of gambling. In particular, gambling losses incurred in a trade or business of gambling are allowable in computing adjusted gross income pursuant to section 62(a)(1). Gambling losses incurred other than in the trade or business of gambling are allowable, if at all, as itemized deductions in calculating taxable income.

Therefore, casual gamblers are treated in a specific manner as provided by the IRC.

A federal circuit court later explained in *Park v. CIR,* 722 F.3d 384, 386 (D.C. Cir. 2013):

> The IRS has persuasively interpreted the term "gains" in Section 165(d) to allow U.S. citizens to measure gains on a per-session basis. The IRS stated that "gain or loss may be calculated over *a series* of separate plays or wagers." Memorandum AM2008-11, Office of Chief Counsel, Internal Revenue Service 4 (2008) (emphasis added). In the IRS's words: "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" her net gains. Because gain or loss may be calculated over *a series* of wagers, a "taxpayer who plays the slot machines[ ] recognizes a wagering gain or loss at the time she redeems her tokens." Therefore, U.S. citizens do not "treat every play or wager as a taxable event." **The result is that U.S. citizens can measure their gambling winnings and losses on a per-*session* basis.**

(Emphasis added) *(Emphasis in original).*

Therefore, under *Schollenberger* and *Park*, U.S. citizens who are casual gamblers can use the per-session method to measure their gambling winnings and losses.

I.R.C. § 165(d) provides the following:

> Losses from wagering transactions shall be allowed only to the extent of the gains from such transactions. For purposes of the preceding sentence, in the case of taxable years beginning after December 31, 2017, and before January 1, 2026, the term "losses from wagering transactions" includes any deduction otherwise allowable under this chapter incurred in carrying on any wagering transaction.

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.
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> 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.
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> 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).
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> 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).
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> 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.

(Internal citations omitted).

Taxpayers submitted documentation, including copies of the W-2Gs issued by the casino, a verifiable statement from the casino, summaries of visits from the casino, and copies of their IT-40Xs. However, Taxpayer failed to provide a personal log for the years at issue.

Sec. 1.6001-1(a) of the Income Tax Regulations, requires Taxpayers to keep contemporaneous records to establish the amount of gross income, deductions, credits, or other matters required to be shown by such person in any return.

Schooler v. Comm'r of Internal Revenue, 68 T.C. 867, 870-71 (1977) provides some guidance:

> . . .Yet, section 1.6001–1(a), Income Tax Regs., imposes on all taxpayers the duty of maintaining 'permanent books of account or records * * * as are sufficient to establish the amount of gross income, deductions, credits, or other matters required to be shown by such person in any return of such tax or information'. . .. There is no indication that the petitioner or other taxpayers engaged in wagering transactions could not maintain comparable records, such as a daily diary setting forth all the wagering transactions. Deductions for other purposes are not allowable unless substantiated by adequate records. E.g., sec. 1.170–1(a)(3)(iii), Income Tax Regs. *Id* at 871.

In addition, *Szkircsak v. Comm'r*, provides the following:

> While there is no ironclad rule to establish conclusively losses from gambling, we believe, absent mitigating circumstances, taxpayers should at least offer a fairly contemporaneous record of their wagering transactions. See, for example, Green v. Commissioner, supra.[2] A mere summary of losses prepared at the end of the year, rather than during the normal course of a taxpayer's business and unsupported by records of original entry, is inadequate for tax purposes. *Szkircsak v. Comm'r*, 40 T.C.M. (CCH) 208, at *3 (Tax Ct. 1980).

Lastly, *Linzy v. Comm'r*, provides the following:

> In the case of gambling winnings and losses taxpayers can substantiate their income and deductions by [*12] maintaining a contemporaneous log, *see Schooler v. Commissioner,* 68 T.C. 867, 871, 1977 WL 3726 (1977), or by consistently using a player's card which monitors gambling activity. *Linzy v. Comm'r*, 106 T.C.M.

(CCH) 320, at *5 (T.C. 2013).

Upon review, the Department determines that Taxpayers were permitted to report the wagering gains and losses on a "per-session" basis pursuant to IC § 6-3-1-3.5(a), I.R.C. § 165(d), and IRS AM 2008-2011 and the reasoning provided under *Shollenberger* and *Park*. However, Taxpayers failed to provide sufficient required documentation to support their protest, specifically a personal diary or log, as required in Income Tax Regs. 1.6001–1(a) and described in *Linzy v. Comm'r*. *Schooler v. Commissioner*, and *Szkircsak v. Comm'r*. Therefore, Taxpayers have not established that they have satisfied the requirements to use the per-session method for casual gamblers.

FINDING

Taxpayers' protest is denied.

September 15, 2020

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An html version of this document.