

Final Order Denying Refund: 01-20221046; 01-20231719
Individual Adjusted Gross Income Tax
For the Years 2020 and 2021

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HOLDING

Out-of-State Individual was unable to establish that he was entitled to offset his Indiana gambling winnings against his gambling losses as ordinary and necessary business expenses; the Department determined that Individual was a recreational and not a professional gambler under the federal "hobby income" regulation.

ISSUE

I. Indiana Adjusted Gross Income Tax - Professional Gambler Status.

Authority: [IC 6-3-1-3.5](#); [IC 6-8.1-5-1](#); [45 IAC 3.1-1-1](#); I.R.C. § 62; I.R.C. § 165; I.R.C. § 183; Treas. § Reg. 1.183-2; Rev. Rul. 54-339, 1954-2 C.B. 89; *Commissioner v. Groetzinger*, 480 U.S. 23 (1987); *Dept. of State Revenue v. Caterpillar, Inc.*, 15 N.E.3d 579 (Ind. 2014); *Popovich v. Indiana Dept. of State Revenue*, 52 N.E.3d 73 (Ind. Tax Ct. 2016); *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 Revenue*, 867 N.E.2d 289 (Ind. Tax Ct. 2007); *Ferguson v. C.I.R.*, T.C. Summ. Op. 2007-30, 2007 WL 610059 (2007); *Busch v. Commissioner of Revenue*, 713 N.W.2d 337 (Minn. 2006); *Golanty v. Commissioner*, 72 T.C. 411 (1979).

STATEMENT OF FACTS

Taxpayer is an out-of-state resident who filed 2020 and 2021 Part-Year or Full-Year Nonresident Individual Income Tax Returns (IT-40PNR). On those returns, Taxpayer reported the state tax withheld on his behalf by Indiana casinos and reported the amount of Indiana income tax. The Indiana Department of Revenue ("Department") reviewed the returns and the accompanying W2-G returns ("Certain Gambling Winnings") issued by Indiana casinos reporting Taxpayer's winnings during the years at issue. The Department determined that Taxpayer had not correctly calculated Taxpayer's Indiana source income. The Department's review resulted in an assessment of additional Indiana income tax.

Taxpayer disagreed with the Department's assessment and submitted a protest to that effect. An administrative hearing was conducted by telephone during which Taxpayer's representative explained the basis for the protest. This Final Order Denying Refund results.

I. Indiana Adjusted Gross Income Tax - Professional Gambler Status.

DISCUSSION

The issue is whether Taxpayer has met his burden of establishing that the assessment was wrong. Doing so requires that Taxpayer establish that he correctly reported his gambling winnings and expenses.

A. Reporting Indiana Gambling Winnings and Losses.

[IC 6-3-1-3.5](#) states as follows, "When used in [IC 6-3](#), the term 'adjusted gross income' shall mean the following: (a) In the case of all individuals 'adjusted gross income' (as defined in Section 62 of the Internal Revenue Code) . . ." Thereafter, the statute specifies addbacks and deductions, particular to Indiana, which modify the federal adjusted gross income amount. The Department's regulation concisely restates the formulary principal. [45 IAC 3.1-1-1](#) defines individual adjusted gross income as follows:

For individuals, "Adjusted Gross Income" is "Adjusted Gross Income" as defined in Internal Revenue Code § 62 modified as follows:

- (1) Begin with gross income as defined in section 61 of the Internal Revenue Code.

- (2) Subtract any deductions allowed by section 62 of the Internal Revenue Code.
- (3) Make all modifications required by [IC 6-3-1-3.5\(a\)](#).

Both the statute, [IC 6-3-1-3.5](#), and the accompanying regulation, [45 IAC 3.1-1-1](#), require that an Indiana taxpayer employ the Federal adjusted gross income calculation, as determined under I.R.C. § 62, as the starting point for determining the taxpayer's Indiana adjusted gross income.

I.R.C. § 62 states that, "For purposes of this subtitle, the term 'adjusted gross income' means, in the case of an individual, gross income minus the following deductions....." The deductions specified under I.R.C. § 62 contain no provision permitting an individual to deduct gambling losses from his or her gross income. However, the federal law does permit the deduction of gambling losses to the extent of a taxpayer's gains from similar transactions. I.R.C. § 165(d).

[Professional Gambling] expense deductions are above-the-line deductions made pursuant to the provisions of the Internal Revenue Code and the related U.S. Treasury Regulations in determining federal adjusted gross income. *Popovich v. Indiana Dept. of State Revenue*, 52 N.E.3d 73, 79 (Ind. Tax Ct. 2016).

B. "Professional" Gamblers and Recreational Gamblers.

Tax reporting by a professional gambler is different from that of a recreational gambler. A recreational gambler can report losses only to the extent of gains from gambling activity. The recreational gambler reports winnings as part of adjusted gross income and may report losses only if deductions are itemized. The professional gambler is not required to report losses as an itemized deduction. Instead, losses and gains are reported on Schedule C. The net gain or loss is then reported on Form 1040 prior to arriving at adjusted gross income as an above-the-line deduction. This typically causes the professional gambler's adjusted gross income to be lower than that of the recreational gambler because the professional gambler is able to deduct "necessary and ordinary" business expenses from gambling gains.

Determining whether a taxpayer is a professional gambler - is engaged in a "trade or business" - or whether the taxpayer is simply a recreational gambler is determined under I.R.C. § 183 which are the "hobby loss" rules.

For federal income tax purposes, "Losses from wagering transactions shall be allowed only 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 as such losses do not come within the provisions of section 22(n) [now I.R.C. § 62] of the Internal Revenue Code.....Nor are such 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.

Treas. Reg. § 1.183-2 provides a "non-exhaustive list of factors to be *weighed* when determining whether a taxpayer was engaged in gambling with the objective of making a profit." *Popovich*, 52 N.E.3d at 79 (*emphasis in original*). Treas. Reg. § 1.183-2(b). The regulation's factors include:

- The manner in which the taxpayer carries on the activity including whether the taxpayer carries on the activity in a "businesslike manner" and maintains complete and accurate books;
- The expertise of the taxpayer including whether the taxpayer prepares for gambling "by extensive study";
- The time and effort spent by the taxpayer in carrying on the activity;
- The expectation that the money spent gambling may result in profit;
- The success of the taxpayer in carrying on the gambling activity;
- The taxpayer's history of gambling winnings and losses;
- The amount of any profits from gambling;
- The financial status of the taxpayer. Does the taxpayer have "income or capital from sources other than the [gambling] activity";
- The relative elements of "personal pleasure or recreation" attributable to the gambling activity. See also *Popovich*, 52 N.E.3d at 79.

Taxpayer argues that he is entitled to claim professional gambling status, but the Department disagrees and concludes that he has engaged in gambling as a recreational "hobby."

C. Taxpayer's Burden of Establishing that the Department's Decision was Wrong.

As with any assessment, it is Taxpayer's responsibility to establish that this particular 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 making his or her case, each taxpayer is required to provide documentation explaining and supporting his or her challenge that the Department's position is wrong. Further, "[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, informed and reasonable interpretations of Indiana tax law contained within this decision, as well as the preceding audit, are entitled to deference.

D. Taxpayer's Arguments.

Taxpayer maintains that he "he has already established his professional gambler status with the Indiana Department of Revenue in the same issue for 2017 and 2018" and has "also been accepted [as] a professional gambler with the Internal Revenue Service." In considering Taxpayer's professional gambler status, Taxpayer asks the Department to consider the following.

- Other than professionally-managed investment income, [Taxpayer] has no other earned income from any source other than that from gambling.
- [Taxpayer] devotes his full-time efforts and time to gambling and no other business activity.
- [Taxpayer] plays slot machines regularly and continuously in various states and [did] so employing a "system" of insuring that his slot machine winnings exceed losses.

Taxpayer explains that he has developed "a systematic method of playing certain specific slot machines that he believes will allow him to consistently win jackpots in amounts greater than the total of his wagers and other gambling expenses." Taxpayer explains the system which allows him to make a living by playing casino slot machines.

- Taxpayer systematically plays "high denomination" slot machines.
- Taxpayer has found that these "high denomination" machines "return a higher percentage of the total bet to the players of the machines."
- By analyzing the bets, losings, and winnings, Taxpayer is able to determine the optimum strategy and timing for betting on the interconnected "high denomination" slot machines.
- Taxpayer acknowledges that "even with the most favorable machines the [casino] still returns to the players of such machines only 90-95[percent] of the total amount bet" but that his system permits him "to overcome the unfavorable odds" and "turn the odds with respect to him in his favor" by playing machines that are "likely to be 'loose' at that point of time."

E. Analysis and Conclusion.

Taxpayer has not provided a written business plan or developed a business strategy which could be used to support his assertion that he could earn a living playing Indiana slot machines. The Department does not agree that Taxpayer's slot machine strategy constitutes a "business" plan.

The Department is in no position to analyze or verify Taxpayer's detailed plan to assure himself of overcoming the house advantage "baked into" the slot machines' computer programming. However, the Department does take note of the fact that, despite wagering over \$180,000,000 since 2017, he has yet to establish that his overall "winnings" exceed overall losses. This history and these results would tend to undercut Taxpayer's assertion that his gambling strategy provides him a built-in, reliable method of beating casinos at their own game.

Further, Taxpayer has provided no evidence that he maintained his own gambling records other than relying on the casinos' statements to track his gains/losses and gambling activities. Presumably, someone in the business of professional gambling would maintain documentation such as airline or other travel documentation, a gambling log or diary, hotel charges, cash credit card advances, bank withdrawals, casino statements, programs, or any upfront expenses attributable to the development of Taxpayer's gaming strategy. It is not unreasonable to assume that a taxpayer engaged in a professional activity intended to provide that person with a living would likely keep his or her own business records.

Taxpayer's primary argument is that he *intended* to make a profit. However, any such a profit intention must be

genuine, actual, if not reasonable. *Busch v. Commissioner of Revenue*, 713 N.W.2d 337 (Minn. 2006). Whether a taxpayer has an honest and objective intent is redetermined on a year-to-year basis. *Golanty v. Commissioner*, 72 T.C. 411, 425 (1979).

The Department questions whether it is possible to have an actual and honest intention to make a profit playing casino slot machines or that one can realistically rely on slot machines to maintain his livelihood. In determining whether a petitioner established an honest and actual intention to make a profit playing casino video poker machines, the United State Tax Court explained in *Ferguson v. C.I.R.*, T.C. Summ. Op. 2007-30, 2007 WL 610059 (Feb. 28, 2007).

We are additionally unconvinced that petitioner's gambling activity meets the standard for being a trade or business because we are not persuaded that an individual who gambles against a machine that is programmed by a casino can have, as his or her primary purpose, income or profit. After all, such a machine is on the floor to make money for the casino and is not there to provide income or profit for the casino's patrons. For most individuals, gambling against a machine that is programmed to make money for the casino constitutes what the Supreme Court in *Commissioner v. Groetzinger*, 480 U.S. 23 (1987), characterized as a sporadic activity, hobby, or amusement diversion. For other individuals, gambling against such a machine may become a habit or an addiction. In neither scenario is it a trade or business with the participant's primary purpose being income or profit.

Taxpayer has not met his burden under [IC 6-8.1-5-1\(c\)](#) of establishing that the Department's assessment was wrong. Instead, the Department agrees with the Tax Court's conclusion in *Ferguson* that an "individual who gambles against a machine that is programmed by a casino can have, as his or her primary purpose, income or profit."

After weighing the relevant factors set out in the federal regulation Treas. Reg. § 1.183-2(b), the Department must decline to sustain Taxpayer's protest.

FINDING

Taxpayer's protest is respectfully denied.

November 15, 2023

Finding Replaces: New

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