STATE OF WISCONSIN

TAX APPEALS COMMISSION

THOMAS CALAWAY
1537 Ravine Drive
Green Bay, WI 54313,

Petitioner,

vs.

WISCONSIN DEPARTMENT OF REVENUE
P.O. Box 8907
Madison, WI 53708-8907,

Respondent.

DOCKET NOS. 03-I-169, 03-I-170, and 03-I-171

DECISION AND ORDER

JENNIFER E. NASHOLD, COMMISSIONER:

These matters came before the Commission for a hearing on January 11, 2005. Petitioner, Thomas Calaway, appeared in person and by Attorney Eric C. Hansen of Nelson & Schmeling. Respondent, Wisconsin Department of Revenue (Department), appeared by Attorney John R. Evans. The parties presented testimony, evidence, a partial stipulation of facts, and post-hearing briefs.

Having considered the entire record before it, the Commission finds, decides, concludes, and orders as follows:

STIPULATED FACTS

Jurisdictional Facts

1. By notice dated March 18, 2002, petitioner was issued an assessment by the Department for the year 1994 in the amount of $19,960.46 (Docket No. 03-I-169).

2. By notice dated March 25, 2002, petitioner was issued an assessment by the Department for the year 1995 in the amount of $30,509.32 (Docket No. 03-I-170).

3. By notice dated April 1, 2002, petitioner was issued an assessment by the Department for the year 1996 in the amount of $122,054.96 (Docket No. 03-I-171).

4. By letter dated April 26, 2002, petitioner filed a petition for redetermination of the assessments for years 1994-1996 ("the period under review") with the Department.

5. On April 14, 2003, the Department issued notices of action denying each petition for redetermination for the period under review.

Other Stipulated Facts

6. Petitioner was a Wisconsin resident during the period under review.

7. Petitioner was audited by the Internal Revenue Service (IRS) and reached a settlement with the IRS. For the year 1996, the IRS audit settlement had casino tabulations indicating that petitioner had the following winnings:

CASINO	WINNINGS
Caesars Palace	$2,263,225
MGM Grand	$900,600
Victoria Partners a/k/a Monte Carlo	$63,500
Caesars Atlantic City a/k/a Boardwalk Regency	$187,100
Caesars Atlantic City a/k/a Boardwalk Regency	$233,500
Trump's Castle	$51,000
Trump's Castle	$28,100
Oneida	$1,500
Adamar	$2,000
Tropicana	$18,000

Las Vegas Hilton	$46,000
TOTAL	$3,794,525

8. For 1996, the IRS settlement had casino tabulations indicating that petitioner had the following losses:

CASINO	LOSSES
Caesars Palace	$2,181,325
Caesars Palace	$86,100
MGM Grand	$1,152,300
MGM Grand	$62,000
Taj Mahal	$58,400
Caesars Atlantic City	$181,800
Trump's Castle	$48,000
TOTAL	$3,769,925

9. For 1996, the IRS settlement resulted in petitioner reporting $24,600 more winnings than losses from gambling.

10. For 1995, the IRS audit computed petitioner's gambling losses in excess of gambling winnings to be $190,214 (gambling winnings $889,250 - gambling losses $1,079,464).

11. For 1995, the IRS audit allowed an itemized deduction for gambling losses in the amount of $889,250, with losses limited to the amount of gambling winnings.

12. For 1994, the IRS audit computed gambling losses in excess of gambling winnings to be $127,400 (gambling winnings $553,875 - gambling losses $681,275).

13. For 1994, the IRS audit allowed an itemized deduction for gambling losses in the amount of $553,875, with losses limited to the amount of gambling winnings.

14. During the three years under review, petitioner was 21, 22, and 23

years old, respectively.

15. Petitioner was awarded a high school diploma in June of 1991 and attended college until he was 21 years old.

16. Petitioner did not take any college courses on gambling while attending college.

17. Petitioner began gambling at the Oneida Casino in Green Bay, Wisconsin, in 1992.

18. During the period under review, petitioner was fully compensated by the casinos for various flights on Northwest Airlines and jet charters on Scott Air. He was not flown to or from his home in Green Bay, Wisconsin, in a casino-owned aircraft at anytime. His lifetime totals from the MGM Grand, Inc., show total complimentary items ("comps") of $90,277 and airfare of $65,540.

19. The records from the IRS and casinos show activity on petitioner's behalf on the following dates in 1996:

Caesars Las Vegas
January 2
April 26
June 2
June 9
July 9
August 5
November 4

Caesars Atlantic City
May 7
September 28
October 21
November 17
December 13-14
December 20-21

MGM Grand Las Vegas
January 5-7
January 12
February 9
April 25-27
June 6-8
June 17
July 11-12
July 25
August 22
November 7-10
December 2-8
December 16
December 31

Trump Taj Mahal, NJ
April 20
June 1

Trump Castle, NJ
June 1
November 17-18
December 13-14

Trump Indiana
August 26

Adamar of NJ
June 1
December 13-14

Little Six, MN
August 1

OTHER MATERIAL FACTS

20. Petitioner testified that the 1996 dates listed in Finding of Fact 19 represent dates he played slot machines for which federal W-2G forms were generated on his winnings, and do not represent all of the dates he gambled in 1996.

21. Petitioner testified that at the slot machines in Las Vegas, no records are generated for a player unless a player hits a jackpot generating over $1,200

in winnings.

22. All of the W-2G reportings are for petitioner's slot machine play, and not for his table play.

23. For tax year 1994, petitioner reported federal adjusted gross income of $3,661 on Line 1 of his Wisconsin income tax return. Federal Schedule C (Profit or Loss From Business), attached to petitioner's Wisconsin return, reports business income of $553,875 and business losses in the same amount. These amounts are for petitioner's gambling winnings and losses, respectively. Therefore, the federal adjusted gross income reported on Line 31 of petitioner's federal tax return and Line 1 of his Wisconsin tax return for 1994 did not include any income from gambling winnings.

24. For tax year 1995, petitioner reported federal adjusted gross income in the amount of $1,440 on Line 1 of his Wisconsin income tax return. Federal Schedule C, attached to petitioner's Wisconsin return, reports business income of $889,250 and business losses in the same amount. These amounts are for petitioner's gambling winnings and losses, respectively. As a result, the federal adjusted gross income reported on Line 31 of petitioner's federal tax return and Line 1 of his Wisconsin tax return for 1995 did not include any income from gambling winnings.

25. For tax year 1996, petitioner reported a federal adjusted gross income of $25,905 on Line 1 of his Wisconsin income tax return. Federal Schedule C, attached to petitioner's Wisconsin return, reports business income in the amount of $2,292,025 and business losses in the amount of $2,267,425. These amounts are for petitioner's gambling winnings and losses, respectively. Petitioner reported the amount of $24,600, the difference between his gambling winnings and losses, as business income

on Line 12 of his 1996 federal return, and included that amount on Line 31 of his federal return and Line 1 of his Wisconsin return for 1996.

26. Petitioner testified that in 1994, his gambling consisted of 10 percent slot machines and 90 percent blackjack. In 1995, petitioner played approximately 35 percent slot machines, a little roulette, and the rest blackjack. In 1996, petitioner played about 40 percent slot machines, and the remaining 60 percent was split evenly between roulette and blackjack.

27. Petitioner testified that from December 1993 through August 1997, when he was not gambling in other states, he gambled at the Oneida Casino in Green Bay, Wisconsin, five to six times per week, three to ten hours per day.

28. Petitioner testified that he gambled approximately 600 hours per year in Las Vegas alone during the period under review.

29. Petitioner was given a "player's card" from some of the out-of-state casinos, which, when used, tracks how much coin goes in and out of a slot machine for purposes of "player's club" privileges. It could also be presented at the tables to track table play.

30. Petitioner did not have records for every hand of blackjack played in Las Vegas, and the casinos did not keep track of every hand played.

31. Petitioner had no records of his roulette playing.

32. Petitioner stated that for some of the years at issue, he called the out-of-state casinos he had been to and requested a form, which he sent back to them, requesting that they send him the "year-end information."

33. Petitioner did not keep any records of his gambling activities at

Oneida. Petitioner testified that he only played slots twice at Oneida. Oneida did not have player's cards. Aside from petitioner's testimony, the only other substantiation in the record of petitioner's gambling activities at Oneida is a letter from an Oneida table games shift supervisor, which states that from 1994 through 1996, the supervisor observed petitioner playing blackjack approximately four to five times per week and that petitioner "used the basic strategy rules of Blackjack to his advantage while he played." (Exh. J.)

34. Petitioner did not report his winnings from Oneida on any tax return.

35. When questioned during cross-examination about his failure to report winnings from Oneida, petitioner stated his belief that table games were not taxable, because an individual could win $5,000 at a table without having to fill out a W-2G and a person only had to report winnings if he or she "ended up at the end of the year making [$]100,000." (Tr. p. 61, L. 2-3.)

36. Between 1992-1994, petitioner sold $70,000 to $80,000 worth of stock which he used for gambling.

37. After all or nearly all of the $70,000 to $80,000 was spent in gambling, petitioner borrowed money from family members.

38. Petitioner filed for bankruptcy on September 14, 1999. Petitioner's bankruptcy petition lists total liabilities in the amount of $2,816,235.87 and assets in the amount of $201,020.

39. In addition to debts owed casinos and banking institutions, petitioner's bankruptcy petition lists the following loan amounts during the period

under review:

LENDER	AMOUNT	YEARS
Thomas, Sr., and Sandra Calaway	$632,600	1992-97
Catherine Calaway/Schounard	$225,000	1994-98
Catherine Paulson Trust	$452,715 (total)	1995-96
Gerald Calaway	$30,000	1994-97
Jonette Calaway	$80,000	1994-97
Sonya Calaway	$75,000	1994-97
Rolf Calaway	$40,000	1994-97

40. During the period under review, most of the capital used for petitioner's gambling activities came from his family.

41. Thomas Calaway, Sr., petitioner's father, testified that he loaned money to petitioner as many as 50 times. There were no loan applications, payment schedules or security for the loans.

42. Catherine Calaway/Schounard, petitioner's sister, testified that she loaned petitioner $225,000 for gambling between 1994 and 1998. She received no security, collateral or promissory notes for the loans, nor did she receive any regular payments on the loans.

43. In written deposition responses introduced into evidence, both Jonette and Sonya Calaway stated that they received no loan application, payment schedule or regular payments on loans they made to petitioner.

44. Ms. Schounard accompanied petitioner on gambling outings to Las Vegas and Atlantic City approximately every other month and, occasionally, to Oneida.

45. Petitioner testified that all of the amounts he received from family members were used to pay off some accrued liabilities and to fund additional gambling.

46. Catherine Paulson is petitioner's grandmother and was the co-trustee of the Catherine Paulson Trust account, along with Banc One. She was also the

grantor of the Trust.

47. One of the checks issued from the Catherine Paulson Trust in August of 1995 was to cover a check in the amount of $160,000 which petitioner had issued for a gambling debt. Petitioner did not have sufficient funds to cover the check.

48. Petitioner testified that he hoped to support himself over the long run in gambling.

49. The only strategy petitioner employed in playing slot machines was to switch to playing larger denomination slot machines, which have a higher pay-out rate than the lower denomination machines. Otherwise, no strategy was involved in petitioner's slot machine play; he simply placed a coin into the machine and hit a button.

50. The only strategy petitioner employed in playing roulette was to "play[] a section of the wheel," that is, play eight numbers next to each other on approximately a quarter of the 38-number wheel.[1] (Tr. p. 75, L. 3.)

51. Petitioner used basic strategy for blackjack and did not count cards. He played primarily at tables which used six decks of cards.

52. Petitioner's only efforts to improve profitability or decrease losses in gambling were "changing the mix of the gambling activities between blackjack, slot machines and roulette" (Exh. 6, p. 1) and playing higher-denomination slot machines.

53. Petitioner was not involved in any professional clubs, trade groups or other organizations, except the player's clubs at various casinos to benefit from the comps that became available for his level of gambling activity.

[1] There are 38 numbers on the "double zero" roulette game.

54. Petitioner did not have a bank account for gambling activity which was separate from his personal finances.

55. When questioned in discovery what research and investigation petitioner engaged in prior to his gambling activities to ascertain the potential for profitability, petitioner responded that he "learned various playing strategies for [his] gambling activities and read several gambling books to learn more about the various strategies in the gambling activities." (Ex. 6, p. 2.)

56. When asked to produce "all books, manuals, guidelines, journals and other publications subscribed to or used during the period" under review, petitioner responded that "such documents are not in my possession or available at this time." (Ex. 6, p. 3.)

57. Petitioner did not have any reports from consultants for his gambling activities.

58. Petitioner did not have any daily logs for his gambling activities.

59. Other than the Schedule C prepared for his federal tax return for the period under review, petitioner did not have any financial statements, profit and loss statements, accounting statements or other business records on a weekly, monthly, quarterly or yearly basis for the period.

60. Petitioner took no courses on gambling.

61. Dr. Robert C. Hannum[2] testified that there is an expected value or

[2] Dr. Hannum is an expert in gambling and a professor of statistics and computer science at the University of Denver at Denver, Colorado. Dr. Hannum has taught, published extensively, and been on the national media regarding the subject of gambling. He has also conducted seminars for casino executives.

return, either positive or negative, associated with every wager, and that the expected value or return refers to a mathematical concept rather than to a particular gambler's subjective expectation.

62. Dr. Hannum stated that the return percentage on slot machines is less than 100 percent, and that, therefore, there can be no positive expected value over the long run in slot machines.

63. Dr. Hannum testified that in the game of blackjack, there can be no positive expected value over the long run, unless the player is counting cards. He stated that playing a basic strategy of blackjack without counting cards would produce a negative expected value in the long run, even if an individual plays under a perfect application of basic blackjack strategy on a six-deck game.

64. Dr. Hannum stated that in the long run, on the double zero roulette wheel, the expected value over the long run is 5.3 percent negative to the player; on the single zero wheel, the expected value is 2.7 percent negative to the player; and that, short of cheating, there is nothing a player can do about those statistics. Dr. Hannum listened to petitioner's strategy of playing eight consecutive numbers on the wheel and testified that, mathematically, there could be no long-term expectation of profit or gain in playing that way.

65. In an Amended Criminal Complaint filed on August 3, 1999 by the Las Vegas Township of Clark County, Nevada, petitioner was charged with 22 counts of drawing and passing a check without sufficient funds, with checks ranging in amount from $10,000 to $75,000. The offenses were alleged to have occurred in June and August of 1997.

66. Petitioner had no other employment during the period under review.

67. Petitioner testified that he sometimes enjoyed his gambling activities.

68. In addition to the comps of $90,277 and airfare of $65,540 from MGM Grand, Inc., petitioner received comps from other casinos.

69. Petitioner testified that when he arrived at a casino, there was a casino host who would "take care" of him. (Tr. p. 28, L. 17.)

70. Petitioner quit gambling in 1997.

CONCLUSIONS OF LAW

1. Petitioner has failed to present clear and satisfactory evidence that the Department erred in rejecting petitioner's characterization of his gambling losses as business losses which were deductible from the federal adjusted gross income on Line 1 of his Wisconsin income tax returns.

2. Petitioner has not established that the assessments in these cases violated his constitutional rights.

OPINION

Assessments made by the Department are presumed to be correct, and the burden is upon the petitioner to prove by clear and satisfactory evidence in what respects the Department erred in its determination. *Edwin J. Puissant, Jr. v. Dep't of Revenue,* Wis. Tax Rptr. (CCH) ¶202-401 (WTAC 1984). Tax exemptions, deductions, and privileges are matters of legislative grace and will be strictly construed against the taxpayer. *Hall Chevrolet Co., Inc. v. Dep't of Revenue*, 81 Wis. 2d 477, 484, 260 N.W.2d 706

(1978). Petitioner has failed to meet his burden of establishing that the Department erred and that he was entitled to a deduction of his gambling losses.

PETITIONER HAS NOT SHOWN THAT THE DEPARTMENT ERRED IN REJECTING PETITIONER'S CHARACTERIZATION OF HIS GAMBLING ACTIVITIES AS A TRADE OR BUSINESS.

Section 162 of the Internal Revenue Code (I.R.C.) allows deductions for "all the ordinary and necessary expenses paid or incurred during the taxable year in carrying on any trade or business." The I.R.C. does not define trade or business for purposes of Section 162. However, the United States Supreme Court has provided some guidance. "[I]f one's gambling activity is pursued full time, in good faith, and with regularity, to the production of income for a livelihood, and is not a mere hobby, it is a trade or business." *Commissioner v. Groetzinger*, 480 U.S. 23, 35 (1987). "[N]ot every income-producing and profit-making endeavor constitutes a trade or business. The income tax law, almost from the beginning, has distinguished between a business or trade, on the one hand, and 'transactions entered into for profit but not connected with . . . business or trade,' on the other." *Id*. (Citation omitted.) "[T]o be engaged in a trade or business, the taxpayer must be involved in the activity with continuity and regularity and[] the taxpayer's primary purpose for engaging in the activity must be for income or profit." *Id*.

Guidance for determining whether an activity is engaged in for profit is provided in Treasury Regulations § 1.183-2. Deductions are not allowable under § 162 for activities which are "carried on primarily as a sport, hobby or for recreation." Treas. Reg. § 1.183-2(a). "The determination whether an activity is engaged in for profit is to be made by reference to objective standards, taking into account all of the facts and

circumstances of each case." *Id*. Further, "[i]n determining whether an activity is engaged in for profit, greater weight is given to objective facts than to the taxpayer's mere statement of his intent." *Id*.

Treasury Regulations § 1.183-2(b) provides a non-exhaustive list of factors to consider when determining whether an activity is engaged in for profit: (1) the manner in which the taxpayer carries on the activity; (2) the expertise of the taxpayer or his advisors; (3) the time and effort expended by the taxpayer in carrying on the activity; (4) the expectation that assets used in the activity may appreciate in value; (5) the success of the taxpayer in carrying on other similar or dissimilar activities; (6) the taxpayer's history of income or losses with respect to the activity; (7) the amount of occasional profits, if any, which are earned; (8) the financial status of the taxpayer; and (9) elements of personal pleasure or recreation.

Treasury Reg. § 1.183-2(b) and the *Groetzinger* analysis have been previously employed by the Commission in determining whether an activity was a trade or business engaged in for profit. *Ivan Kevo v. Dep't of Revenue*, Wis. Tax Rptr. (CCH) ¶ 400-439 (WTAC 1999). The Commission first examines the factors set forth in Treas. Reg. § 1.183-2(b).

Treas. Reg. § 1.183-2(b).

1. Manner in Which the Taxpayer Carries On the Activity

Carrying on an activity in a businesslike manner, maintaining complete and accurate books and records, conducting the activity in a manner substantially similar to comparable businesses which are profitable, and making changes in

operations to adopt new techniques or abandon unprofitable methods suggests that a taxpayer conducted an activity for profit. Treas. Reg. § 1.183-2(b)(1).

Petitioner did not carry on his gambling activities in a businesslike manner. Petitioner would have no records at all if it were not for the casinos tracking him, either through their IRS reporting requirements, which do not require them to report all winnings, or through petitioner's use of his player's cards, which petitioner did not always use. The W-2G's generated in these cases are only for petitioner's slot machine play. Moreover, petitioner had no records at all from Oneida, where he stated he gambled five to six times per week and three to ten hours per day when he was not at casinos in other states. Thus, he has no records to substantiate either his winnings or amounts spent at one of the locations where he claims to have conducted a substantial portion of his time gambling. Similarly, petitioner admitted that he did not keep track of every hand played at the casinos, or even record his overall winnings and losses at any time, much less on a regular and consistent basis.

Nor were the specific gambling activities petitioner engaged in conducted in a businesslike manner. Slot machines — which petitioner testified constituted 10 percent of his gambling activities in 1994, 35 percent in 1995, and 40 percent in 1996 — involved no skill other than pressing a button. Regarding blackjack — which petitioner testified constituted 90 percent of his gambling activities in 1994, 60 percent in 1995, and 30 percent in 1996 — petitioner did not present any evidence that he engaged in any strategies to maximize or even earn a profit. Rather, he stated only that he played basic strategy and did not count cards, which Dr. Hannum testified would produce a negative value in the long run, even if petitioner had played under a perfect application

of basic blackjack strategy. With respect to roulette — which petitioner played only a little in 1995 and 30 percent of the time he gambled in 1996 — petitioner's only strategy was to bet on a block of eight numbers covering one-fourth of the wheel. He presented no evidence that such an approach was sound, successful or based on research or other reliable information. Dr. Hannum testified that, from a mathematical perspective, petitioner's method of roulette play would produce a negative return over the long run.

Petitioner's funding for his gambling activities was likewise not conducted in a businesslike manner. After spending his own money, he proceeded to spend money lent to him primarily by family members, for which no promissory note, interest or payment plan was generated. Petitioner did not keep a separate bank account for his gambling activities.

In fact, petitioner has not demonstrated that any aspect of his gambling activities was conducted in a businesslike manner.

2. The Expertise of the Taxpayer or the Taxpayer's Advisors

Preparation for the activity by extensive study of its accepted business, economic, and scientific practices, or consultation with those who are expert therein, may indicate that a taxpayer has a profit objective. Treas. Reg. § 1.183-2(b)(2). A taxpayer's failure to obtain expertise in the economics of an activity indicates that he or she lacks a profit objective. *Burger v. Commissioner*, 809 F. 2d 355, 359 (Ct. App. 7th Cir. 1987).

The record does not indicate that petitioner had any advisors with respect to his gambling activity. While petitioner stated he read some materials on gambling, he did not provide any specifics regarding the materials read or how much time he

devoted to such endeavors, nor was he able to provide those materials to the Department when they were requested. Petitioner did not belong to any professional organizations which might have assisted him in his gambling endeavors. In addition, petitioner's gambling activities, particularly his slot machine play, involved minimal strategy or skill.

3. Taxpayer's Time and Effort

The fact that a taxpayer devotes much time and effort to an activity, particularly if the activity does not have substantial personal or recreational aspects, may indicate that he or she has a profit objective. Treas. Reg. § 1.183-2(b)(3). A taxpayer's withdrawal from another occupation to devote most of his energies to the activity may also be evidence that the activity is engaged in for profit. *Id.*

Petitioner did not withdraw from any other occupation in order to pursue gambling. Further, gambling typically has a recreational component for those who engage in it. These facts cut against a claim that petitioner's gambling activity constituted a trade or business.

In petitioner's favor, however, the record reflects that he spent a great deal of time gambling. Undoubtedly, devotion of a substantial amount of time makes it more likely that one is engaged in the trade or business of gambling than it would be if such a time commitment were absent. However, unlike most other trades or businesses, for many people gambling has an addictive component which may make the expenditure of a significant amount of time gambling a symptom of addiction rather

than a sign that one is zealously pursuing one's business.[3] Moreover, petitioner had no records at all from Oneida, where he claimed to have acquired the majority of his gambling hours. Thus, this factor does not strongly support one position or the other.

With regard to petitioner's effort, which presumably is something distinct from his time, the record does not show that substantial effort was made to improve his chances of making a profit. Petitioner's efforts consisted of reading some unquantified amount of some unspecified materials on gambling, altering the percentage of time devoted to each of the three games he played, and playing larger denominations on slot machines. However, the record contains no indication that petitioner made any other efforts to determine whether any of his gambling methods were likely to yield a profit.

4. Expectation that Assets Used in the Activity Will Appreciate in Value

This factor is inapplicable, as petitioner did not have assets which he used in his gambling activities.

5. Taxpayer's Success in Other Similar or Dissimilar Activities

"The fact that the taxpayer has engaged in similar activities in the past and converted them from unprofitable to profitable enterprises may indicate that he is engaged in the present activity for profit, even though the activity is presently unprofitable." Treas. Reg. § 1.183-2(b)(5). Petitioner has not demonstrated success in any other activities. Application of this factor therefore supports the Department's position.

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[3] In his Reply Brief, petitioner states that in 1997, his "ability to continue funding his gambling activities collapsed, he incurred substantial debt at the casinos, received counseling on his gambling activities, and discontinued his gambling." (Reply Brief, p. 4). In addition, petitioner was charged in 1999 with multiple counts of issuing checks with insufficient funds in 1997. These facts, which occurred just after the period under review, support a characterization of petitioner's gambling as the symptom of a problem which petitioner ultimately addressed.

6. Taxpayer's History of Income or Losses

A history of substantial losses may indicate that the taxpayer did not conduct the activity for profit. Treas. Reg. § 1.183-2(b)(6).

Petitioner stipulated with the Internal Revenue Service that he had losses of $127,400 in 1994 and $190,214 in 1995, and had gains in the amount of $24,600 for 1996. These are amounts agreed to for settlement purposes and are based on incomplete records, but they indicate that petitioner's losses far exceeded his gains.

7. Amount of Occasional Profits, If Any

Petitioner's lack of bookkeeping makes inquiry into this factor difficult. However, petitioner stipulated with the IRS that he had gains in the amount of $24,600 for 1996.

8. Financial Status of the Taxpayer

Substantial income from sources other than the activity, especially if the losses from the activity generate large tax benefits, may indicate that the taxpayer does not intend to conduct the activity for profit. Treas. Reg. § 1.183-2(b)(8). Very limited income was generated by petitioner from sources other than gambling during the years under review. That petitioner made no attempt to offset any other income with gambling losses supports his position.

9. Elements of Personal Pleasure

The presence of recreational or personal motives in conducting an activity may indicate that the taxpayer is not conducting the activity for profit. Treas. Reg. § 1.183-2(b)(9).

Petitioner testified that he sometimes enjoyed his gambling activities. It is also reasonable to infer that he enjoyed the chartered jets and airfare provided by casinos and the more than $90,000 in other comps they provided him. Another factor indicating a recreational aspect is that his sister accompanied him on many of his trips to casinos.

On balance, application of the nine factors set forth in Treas. Reg. § 1.183-2(b) undermines petitioner's argument that he was a professional gambler. Petitioner emphasizes his investment of time in gambling. This is not surprising, as it is one of the few factors arguably operating in his favor. However, that factor is somewhat ambiguous due to the unique character of gambling and the aspects of petitioner's behavior that suggest he had a gambling problem. Even if the time factor were free from ambiguity, however, it does not outweigh the other factors which show that petitioner was not conducting his gambling activities in a businesslike manner or in a way that would support his subjective hope of earning a profit.

Groetzinger and Other Case Law

Petitioner relies on a series of cases to support his position that he was in the trade or business of professional gambling. The cases he relies on, however, are more valuable for their contrast rather than their similarity to the instant case.

First among these cases is *Groetzinger*, in which the United States Supreme Court determined that Mr. Groetzinger was a professional gambler in parimutuel wagering, primarily on greyhound races. Mr. Groetzinger spent 48 weeks gambling during the year at issue. *Groetzinger*, 480 U.S. at 24. He "spent a substantial amount of time studying racing forms, programs, and other materials" and "devoted from 60 to 80

hours each week to these gambling-related endeavors." *Id*. Mr. Groetzinger "kept a detailed accounting of his wagers and every day noted his winnings and losses in a record book." *Id*. at 25. In holding that Mr. Groetzinger was engaged in the trade or business of gambling, the Court noted that "[c]onstant and large-scale effort on his part was made. Skill was required and was applied." *Id*. at 36.

Petitioner had no records from Oneida and kept no records of his gambling activities from elsewhere, other than those provided by the casinos, which, by petitioner's own admission, did not include all of his actual play. Nor does the record establish that petitioner engaged in any significant amount of study of his gambling activities or applied any significant skill to those activities. Moreover, there is no indication in the *Groetzinger* decision that parimutuel wagering on greyhound races was, from a statistical perspective, a losing proposition for Mr. Groetzinger; whereas here, Dr. Hannum testified that from a statistical perspective, slot machine play was inherently a losing proposition for the player in the long run, as were petitioner's methods of play in blackjack and roulette. *Groetzinger* is therefore distinguishable.

Rusnak v. Commissioner, T.C. Memo 1987-249, also relied upon by petitioner, is similarly distinguishable. In *Rusnak*, the taxpayer's primary place of gambling was a certain horse racing track which had a racing season of 200 days. The taxpayer attended the track approximately 175 days per year and spent about 35 hours per week there. When that race track was not open, he attended a different track with a different racing season. He went to the track early in the morning to watch the horses and to talk to owners and trainers in order to better estimate their abilities. He bought daily racing forms each day and studied them every evening. He kept a log showing

his winnings and losses. The log indicated wins and losses on an average of three or four days per week during the racing season, although for a few weeks there was little activity and for other weeks activity is shown on six days per week. The taxpayer sometimes went to the track but did not place bets because there were no horses he liked. In addition to his log, the taxpayer kept programs and tickets as records. From 1970 to 1981, the taxpayer owned race horses. He also visited casinos in Atlantic City and bought lottery tickets in every state between Ohio and New Jersey.

In *Regan v. Commissioner*, T.C. Memo 1987-512, the taxpayer played jai alai games in Tampa, Florida, from January through June and in Ocala, Florida, from July through December. The games were five days per week in Tampa and four days per week in Ocala. The taxpayer attended games every day, and had rented apartments in Tampa and Gainesville for the respective seasons. The taxpayer made money each of the three years at issue. Moreover, unlike in the instant cases, in *Regan* the IRS "d[id] not argue that the facts of this case [were] distinguishable from the facts of *Groetzinger*."

Also inapposite is *Bathalter v. Commissioner*, T.C. Memo 1987-530. In *Bathalter*, the Tax Court held that the taxpayer was in the trade or business of gambling on harness horse races. Prior to the tax year at issue, 1979, the taxpayer had spent twelve years as a "casual gambler" on horse races. During 1979, the taxpayer generally went to race tracks six days per week and spent approximately 250 days out of the year handicapping races and physically going to the race tracks and betting. For each day Bathalter attended the races, he typically spent five to six hours before going to the track doing research of the horses scheduled to run. He usually arrived one hour before the first race and watched the warm-ups, noting on a card file any changes in the

soundness of the horses as compared to his notes on that horse from a previous week and also noting any changes in equipment. He maintained statistics on the horse races. Based on the foregoing information, the taxpayer picked the horses to bet on. At the end of each race, the taxpayer recorded the amount bet and the amount received on his racing program. In 1979, he made a profit of $2,725.11. The *Bathalter* Court concluded that the facts of the case were indistinguishable from those in *Groetzinger*.

In *Ditunno v. Commissioner*, 80 T.C. 362 (1983), the taxpayer gambled on horse races. At the time of trial, he had gambled regularly for about four or five years. The taxpayer went to the race track six days per week, year-round. He left for the track at 10:00 each morning, arriving at the track before the races started at 1:00 p.m. The race lasted until 4:30 p.m., and the taxpayer remained at the track until the races were completed. The taxpayer studied racing forms to decide on which races to bet. He did not bet on every race, concentrating instead on the doubles and trifectas. The taxpayer "studied papers and racing forms before he placed his bets, and concentrated on certain types of tickets." *Id*. at 372.

The cases described above differ substantially from petitioner's circumstances. The taxpayers in those cases not only spent very significant amounts of time gambling, but, unlike petitioner in the instant cases, they generally engaged in methodical study of their activities, kept records, and applied skill and strategy. In addition, with the exception of *Regan*, which involved jai alai, the cases above involved either horse or dog racing. Unlike in the instant cases, there was no evidence in those cases that, from a statistical perspective, such gambling activities would result in a negative expectation of return in the long run.

Petitioner cites only two cases involving slot machines. However, these cases, *Praytor v. Commissioner*, T.C. Memo 2000-282, and *Kochevar v. Commissioner*, T.C. Memo 1995-607, do not assist petitioner. In those cases, the IRS, for whatever reason, conceded that the taxpayers were engaged in the trade or business of gambling. The Court therefore did not have to address that issue, but instead focused on other issues.

Based on the foregoing, petitioner has not demonstrated that he was in the trade or business of gambling during the period under review.

PETITIONER HAS NOT ESTABLISHED THAT THE DEPARTMENT'S ASSESSMENT VIOLATES HIS CONSTITUTIONAL RIGHTS.

Petitioner's constitutional claims are difficult to discern. Although he mentions equal protection and due process violations, he does not develop these arguments or engage in any substantive analysis of applicable equal protection or due process law. He does not inform the Commission whether he is making a facial challenge to a statute, and if so, which one, or whether his argument is that the Department's application of certain provisions to him violates equal protection or due process. Petitioner does not state which category of individuals is being treated differently from another category, a prerequisite to an equal protection claim, nor does he state what due process was denied him. Without such information from petitioner, it is impossible to analyze any equal protection or due process claim.

Petitioner's primary constitutional claim appears to be that, pursuant to Article VIII, § 1 of the Wisconsin Constitution[4], income tax may only be levied against actual "incomes," and that, in the instant case, the Department "is assessing an income

[4] Article VIII, § 1 of the Wisconsin Constitution states, in relevant part: "Taxes may also be imposed on incomes, privileges and occupations . . . and reasonable exemptions may be provided."

tax when there is no income and assessing an income tax when there is no gain or profit." (Petitioner's Brief, p. 22). He asserts that taxing his winnings as income and not allowing him to deduct the losses equal to those winnings is equivalent to taxing him when there is no income. Petitioner's argument ignores the fact that gambling losses are deductible only if a person is engaged in the trade or business of gambling. *See Kevo*, *supra*. The issue in these cases is whether petitioner proved that he was engaged in the trade or business of gambling. He did not.

Moreover, if petitioner's constitutional arguments were accepted, gambling losses would have to be deductible for everyone, regardless of whether they are engaged in the trade or business of gambling, lest there be a violation of Article VIII of the Constitution. Petitioner provides no support for his position that the word "income" in our state constitution must be defined as income net of gambling losses, regardless of whether or not one's gambling activity constitutes a trade or business. This interpretation is also contrary to the United States Supreme Court's analysis in *Groetzinger* and our analysis in *Kevo*.

Accordingly, the Commission rejects petitioner's constitutional claims.

IT IS ORDERED

That the Department's action on petitioner's petition for redetermination for each year under review is affirmed.

Dated at Madison, Wisconsin, this 10th day of November, 2005.

WISCONSIN TAX APPEALS COMMISSION

_____
Jennifer E. Nashold, Commissioner

_____
Diane E. Norman, Commissioner

_____
David C. Swanson, Commissioner

ATTACHMENT: **"NOTICE OF APPEAL INFORMATION"**