

**STATE OF WISCONSIN  
TAX APPEALS COMMISSION**

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**DENNIS C. AND JACQUELINE S. MAHONEY,**

**DOCKET NO. 05-I-160**

Petitioners,

vs.

**DECISION AND ORDER**

**WISCONSIN DEPARTMENT OF REVENUE,**

Respondent.

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**DIANE E. NORMAN, ACTING CHAIRPERSON:**

The above-entitled matter comes before the Commission on stipulated facts. Petitioners, Dennis C. and Jacqueline S. Mahoney (“petitioners”), represent themselves. Respondent, Wisconsin Department of Revenue (“Department”), appears by Attorney John R. Evans. Both parties have filed briefs.

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

**STIPULATED FACTS**

As and for its Findings of Fact, the Commission adopts the Stipulation of Facts filed by the parties, making non-substantive changes and incorporating information from the exhibits but omitting references to specific exhibits.

1. Under date of December 21, 2004, the Department issued a Notice of Adjustment to Your Income Tax Return for 2003 (“the assessment”) to petitioners in the amount of \$2,336.44.

2. By letter dated February 18, 2005, petitioners filed a petition for redetermination with the Department objecting to the assessment.

3. By Notice of Action dated August 8, 2005, the Department informed petitioners that their petition for redetermination had been denied.

4. Petitioners filed a timely petition for review with the Commission on October 6, 2005.

5. Petitioners filed a Wisconsin income tax return for 2003 (“the year at issue”) with the Department which includes as a part thereof petitioners’ federal income tax returns for the year at issue.

6. During the year at issue, petitioner Dennis Mahoney engaged in gambling activities for all tax purposes. Jacqueline Mahoney is not involved in any factual dispute in this matter.

7. During the year at issue, Dennis Mahoney reported \$50,521 in gambling winnings and \$50,521 in gambling losses.

8. Dennis Mahoney filed petitioners’ Wisconsin income tax return for the year at issue as follows:

a. On petitioners’ federal income tax return, Dennis Mahoney reported his winnings from gambling activities as “other income” on line 21 of page 1 of petitioners’ Form 1040 and on the attached Statement 1. He reported his losses from gambling activities as “other miscellaneous deductions . . . gambling losses” on Schedule A, Itemized Deductions, line 27.

b. On petitioners’ Wisconsin income tax return, Dennis Mahoney reported his winnings from gambling activities as part of Line 1. “Federal

adjusted gross income” on Form 1, page 1. He reported his losses from gambling activities as “other subtractions (list).” (See Statement 1 on Form 1, page 1, line 11.)

9. Statement 1 referred to in paragraph 7 above is part of the Wisconsin income tax return for the year at issue.

### CONCLUSION OF LAW

Petitioners have failed to establish that Dennis Mahoney’s gambling losses should have been subtracted from their 2003 federal adjusted gross income pursuant to Wis. Stat. § 71.05(6)(b)5.

### OPINION

Under Wisconsin law, tax exemptions, deductions, and privileges are a matter of legislative grace and are to be strictly construed against the granting of the same. *Fall River Canning Co. v. Dep't of Taxation*, 3 Wis. 2d 632, 637, 89 N.W.2d 203 (1958). Furthermore, 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).

Petitioners have not demonstrated that they are entitled to a deduction for gambling losses, nor have they shown by clear and satisfactory evidence that the Department erred in its assessment against them.

**Wis. Stat. § 71.05(6)(b)5 does not allow gambling losses to be subtracted from federal adjusted gross income in calculating Wisconsin taxable income.**

Petitioners deducted Dennis Mahoney’s gambling losses on their federal income tax return as a miscellaneous itemized deduction. Petitioners have agreed that this deduction is not allowable for Wisconsin income tax purposes. As of January 1,

2000, the legislature chose to except from its itemized deduction credit the miscellaneous itemized deductions (which includes gambling losses) that a taxpayer may claim for federal income tax purposes under the I.R.C. See Laws of Wisconsin 1999, Act 9, § 1711.

Since Dennis Mahoney's gambling losses cannot be deducted as a miscellaneous itemized deduction for Wisconsin income tax purposes, petitioners contend that, in determining Wisconsin taxable income, such losses may be still subtracted from federal adjusted gross income under Wis. Stat. § 71.05(6)(b)5. This statute permits a taxpayer to subtract from his or her "federal adjusted gross income," which is the starting point for a determination of "Wisconsin adjusted gross income," Wis. Stat. § 71.01(13), "[a]ny amounts that are recoveries of federal itemized deductions for which no tax benefit was received for Wisconsin purposes."

Petitioners argue that Dennis Mahoney's gambling losses are "recoveries" as contemplated by § 71.05(6)(b)5. The Commission has already found that the plain meaning of Wis. Stat. § 71.05(6)(b)5 does not support this interpretation. *Daniel W. Dettwiler v. Dep't of Revenue*, 2005 WL 2453753, Wis. Tax Rptr. (CCH) ¶ 400-847 (WTAC 2006), *aff'd*, *Dettwiler v. Dep't of Revenue*, \_\_\_ N.W. 2d \_\_\_, 2007 WL 901539 (Wis. App.), 2007 WI App. 125. Under § 71.05(6)(b)5, the recovery amount must be "included in federal taxable or adjusted gross income." In other words, the taxpayer must already have recovered it, not simply be *seeking* to recover it. Petitioners' federal adjusted gross income does not include a recovery amount, as required by § 71.05(6)(b)5, because they have received no recovery amount to include.

The Internal Revenue Service also defined "recoveries" and this definition

does not include gambling losses for the current year. I.R.S. Publication 525 (2002), p. 18 states:

**Recoveries**

A recovery is a return of an amount you deducted or took a credit for in an earlier year. The most common recoveries are refunds, reimbursements, and rebates of deductions itemized on Schedule A (Form 1040). . . .

Viewed in this context, it is clear that § 71.05(6)(b)5 is designed to address a recovery amount received with respect to a prior tax year, not a recovery amount one is seeking for the same tax year during which the taxpayer took a federal deduction for that same item. There is nothing in the stipulated facts that indicate that petitioners received any such recovery amount in 2003.

For the reasons stated above, petitioners have failed to demonstrate that § 71.05(6)(b)5 allows a deduction for gambling losses and have failed to show that the Department's assessment was in error.

**IT IS ORDERED**

The Department's action on petitioners' petition for redetermination is affirmed.

Dated at Madison, Wisconsin, this 6th day of June, 2007.

**WISCONSIN TAX APPEALS COMMISSION**

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Diane E. Norman, Acting Chairperson

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David C. Swanson, Commissioner

ATTACHMENT: "NOTICE OF APPEAL INFORMATION"