

FILED

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Wisconsin Tax Appeals Commission
Nicole Allee - Legal Assistant

STATE OF WISCONSIN
TAX APPEALS COMMISSION

DANIEL & DEBRA SCHEIDER,

Petitioners,

DOCKET NO. 20-I-120

v.

WISCONSIN DEPARTMENT OF REVENUE,

Respondent.

RULING AND ORDER

ELIZABETH KESSLER, CHAIR:

This matter appears before the Commission based on a Motion for Summary Judgment filed by the Wisconsin Department of Revenue (the "Department"). The Department asked the Commission to uphold the Department's assessment of Petitioners' income tax liability for the 2018 tax year based on changes to the federal tax treatment of gambling income which were also adopted by Wisconsin. Specifically, § 11050 of Public Law 115-97, also known as the "Tax Cuts and Jobs Act of 2017," amended the Internal Revenue Code § 165(d) to limit losses attributable to business expenses incurred in carrying on any wagering transaction to the amount gained from wagering transactions. This change in federal law is reflected in Wis. Stat. § 71.02, which relies upon provisions found at Wis. Stat. § 71.01(6)(L).

Petitioners Daniel and Debra Scheider represented themselves. Attorney

Kelly Altschul represented the Department. Both parties filed arguments in support of their positions, along with documentary evidence related to their arguments.

FACTS

1. Petitioners were residents of Wisconsin for the entire 2018 tax year and filed their 2018 Federal and Wisconsin individual tax returns as full-year Wisconsin residents. (Affidavit of Carrie Kloss, ¶ 7, "Kloss Aff.")

2. On July 10, 2019, Respondent issued a Notice of Amount Due to Petitioners for tax year 2018. (Kloss Aff. ¶ 2)

3. Petitioners filed a Petition for Redetermination, appealing the July 2019 Notice, with the Department on or about August 6, 2019. (Kloss Aff. ¶ 3)

4. On February 12, 2020, Respondent issued a Notice of Action denying Petitioners' Petition for Redetermination. (Kloss Aff. ¶ 5)

5. On April 10, 2020, Petitioners filed an Appeal of the Notice of Action with the Wisconsin Tax Appeals Commission. (Commission file)

6. Petitioners were each a 50% partner in the partnership Slot Jokers, which was located in Wisconsin and listed Petitioners' home address as the partnership's address. (Kloss Aff. ¶¶ 8-9)

7. During 2018 Slot Jokers' activity consisted solely of Daniel and Debra Scheider placing wagers on slot machines at casinos. (Kloss Aff. ¶ 10, Ex. H)

8. For the limited purpose of resolving this dispute, the Department has stipulated that Daniel and Debra Scheider were professional gamblers for the 2018 tax year. (Kloss Aff. ¶ 21)

9. The partnership Slot Jokers reported Wisconsin Sales of \$44,657.00 in 2018. This was equal to the Total Company Sales and Gross Income, indicating that all sales and income earned in 2018 were in Wisconsin. (Kloss Aff. ¶ 11)

10. Slot Jokers was formed for the sole purpose of professional gambling and that was the only activity engaged in by the partnership entity. (Kloss Aff. ¶ 10, Ex. H, p. 2)

11. For the 2018 tax year, the partnership Slot Jokers reported 26 U.S.C. Sec. 162(a) business deductions to income including “documented betting losses” of \$44,657.00 as well as other business expenses totaling \$40,706.00, for a total of \$85,363.00 in deductions from the partnership income. (Kloss Aff. ¶¶ 12 -13, Ex. G)

12. For the 2018 tax year, the partnership Slot Jokers reported an ordinary business income loss of \$40,706.00. It issued two K-1 forms which evenly split the losses between Daniel and Debra Scheider, its two equal partners. (Kloss Aff. ¶ 15, Ex. G)

13. For the 2018 tax year, Daniel and Debra Scheider reported W-2 wage income of \$166,816.00 and \$90,400.00 in IRA distributions, separate from the income and losses associated with Slot Jokers. (Kloss Aff. ¶ 16, Ex. F)

14. For the 2018 tax year, Daniel and Debra Scheider reported their combined partnership losses of \$40,706.00 on Schedule E of their IRS form 1040. They did not report any part of their gambling or wagering income on Schedule C of IRS form 1040. (Kloss Aff. ¶ 18, Ex. F)

15. For the 2018 tax year, Daniel and Debra Scheider reported their Federal Adjusted Gross Income as \$211,975.00. This was listed on both their IRS 1040 and Wisconsin Form 1 tax filings. (Kloss Aff. ¶¶ 18-19, Ex. F)

APPLICABLE LAW

Federal Tax Code

26 I.R.C. . § 165 - Losses

A. General Rule

There shall be allowed as a deduction any loss sustained during the taxable year and not compensated for by insurance or otherwise.

...

D. Wagering Losses

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.

IRS Guidance

IRS Publication 525 (2018)

Gambling winnings. You must include your gambling winnings in your income on Schedule 1 (Form 1040), line 21. If you itemize your deductions on Schedule A (Form 1040), you can deduct gambling losses you had during the year, but only up to the amount of your winnings. If you're in the trade or business of gambling, use Schedule C (Form 1040).

IRS Form W-2G "Instructions to Winner" (2018)

Generally, report all gambling winnings on the "Other income" line of Form 1040. You can deduct gambling losses as an itemized deduction, but you cannot deduct more than your winnings. Keep an accurate record of your winnings and losses, and be able to prove those amounts with receipts, tickets, statements, or similar items that you have saved. For additional information, see Pub. 529, Miscellaneous Deductions, and Pub. 525, Taxable and Nontaxable Income.

Wisconsin Statutes

Wis. Stat. § 71.01 Definitions

...

(6)(L)

1. For taxable years beginning after December 31, 2017, and before January 1, 2021, for individuals and fiduciaries, except fiduciaries of nuclear decommissioning trust or reserve funds, "Internal Revenue Code" means the federal Internal Revenue Code as amended to December 31, 2017, except as provided in subds. 2. and 3. and s. 71.98, and subject to subd. 4. (emphasis added).

2. For purposes of this paragraph, "Internal Revenue Code" does not include the following provisions of federal public laws for taxable years beginning after December 31, 2017¹: [none applicable]

...

3. For purposes of this paragraph, "Internal Revenue Code" does not include amendments to the federal Internal Revenue Code, including provisions of federal public laws that directly or indirectly affect the Internal Revenue Code, enacted after December 31, 2017, except that "Internal Revenue Code" includes sections² [none applicable]

...

4. For purposes of this paragraph, the provisions of federal public laws that directly or indirectly affect the Internal Revenue Code, as defined in this paragraph, apply for Wisconsin purposes at the same time as for federal purposes, except as follows:³ [none applicable]

...

Wis. Stat. § 71.02 Imposition of tax.

1. For the purpose of raising revenue for the state and the counties, cities, villages and towns, **there shall be assessed, levied,**

¹ The section at issue in this case, 11050 of P.L. 115-97, is not referenced in the list.

² See *infra*. note 1.

³ See *infra*. note 1.

collected and paid a tax on all net incomes of individuals and fiduciaries, except fiduciaries of nuclear decommissioning trust or reserve funds subject to the tax under s. 71.23 (2), by every natural person residing within the state or by his or her personal representative in case of death, and trusts resident within the state; by every nonresident natural person and trust of this state, upon such income as is derived from property located or business transacted within the state including, but not limited by enumeration, **income derived from a limited partner's distributive share of partnership income**, income derived from a limited liability company member's distributive share of limited liability company income, income derived from a covenant not to compete to the extent that the covenant was based on a Wisconsin-based activity, the state lottery under ch. 565, any multijurisdictional lottery under ch. 565 if the winning lottery ticket or lottery share was purchased from a retailer, as defined in s. 565.01 (6), located in this state or from the department, **winnings from a casino or bingo hall that is located in this state** and that is operated by a Native American tribe or band and pari-mutuel wager winnings or purses under ch. 562, and also by every nonresident natural person upon such income as is derived from the performance of personal services within the state, except as exempted under s. 71.05 (1) to (3). Every natural person domiciled in the state shall be deemed to be residing within the state for the purposes of determining liability for income taxes and surtaxes. A single-owner entity that is disregarded as a separate entity under section 7701 of the Internal Revenue Code is disregarded as a separate entity under this chapter, and its owner is subject to the tax on the entity's income. (emphasis added).

SUMMARY JUDGMENT STANDARD

A motion for summary judgment will be granted if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. Wis. Stat. § 802.08(2). The party moving

for summary judgment has the burden "to establish the absence of a genuine, that is, disputed, issue as to any material fact." *Kraemer Bros., Inc. v. United States Fire Ins. Co.*, 89 Wis. 2d 555, 565, 278 N.W.2d 857 (1979).

In this case, neither party has disputed the amount of Petitioners' wagering income or losses, nor the details of the expenses associated with the business of gambling. The Department has, only for the purposes of settling this specific legal dispute, stipulated to the Petitioners' claim that they are in the trade or business of gambling. There being no genuine issue of material fact, only a question of law, this matter is ripe for summary judgment.

ANALYSIS

As noted at the top of this Ruling and Order, the issue on which we are ruling is a narrow one, limited exclusively to the 2018 tax year, and to the question of whether or not business expenses related to gambling activities were appropriately deducted in excess of the winnings associated with those gambling activities.

Based upon their pleadings and related filings, it appears that Petitioners may be anticipating a broader ruling. However, they did not file a Cross-Motion for Summary Judgment or otherwise request relief that can be granted beyond the request to have the Department's 2018 assessment overturned. They made many assertions which, although they may be important to them personally, are not relevant to the legal issue addressed here. The Commission has read and considered all of the materials submitted, but we will not address claims or issues beyond the scope of the Department's Motion for Summary Judgment.

Although Wis. Stat. § 71.01(6)(L) includes a large volume of references to federal Public Law publications related to 2017 revisions of the Internal Revenue Code, the only item germane to this analysis is Wis. Stat. § 71.01(6)(L)1, which reads, in relevant part, “For taxable years beginning after December 31, 2017... ‘Internal Revenue Code’ means the federal Internal Revenue Code as amended to December 31, 2017, except as provided in subds. 2. and 3. and s. 71.98.” In other words, beginning after December 31, 2017, when Wisconsin law refers to the Internal Revenue Code, it refers to the version of the code as amended effective December 31, 2017⁴.

Wis. Stat. §§ 71.01(6)(L)2 and 3 provide a long list of specific exceptions to that reference, none of which refer to § 11050 of P.L. 115-97 (the Tax Cut and Jobs Act) - the amendment to 26 I.R.C. § 165(d) which is at issue here. That section was amended, effective December 31, 2017, to clarify that losses from wagering transactions could be allowed only to the extent of the gains from such transactions, and from after December 31, 2017 to before January 1, 2026, such losses included “any deduction otherwise allowable under this chapter.” Deductions under Chapter 26 include both losses directly from wagering transactions and also ordinary business expenses.

Petitioners argued that because they have created a business partnership, 26 I.R.C. § 165(d) does not apply. They are mistaken for several reasons. First, the language of the statute is not ambiguous. “Losses from wagering transactions shall be allowed only to the extent of the gains from such transactions.” The term “losses from wagering

⁴ This provision is slated to sunset after December 31, 2025, however, that has no relevance to this dispute.

transactions” was defined, effective after December 31, 2017, to include “any deduction otherwise allowable under this chapter incurred in carrying on any wagering transaction.” In other words, whether those deductions otherwise allowable under Chapter 26 are incurred by an individual engaged in business or a legally recognized business entity does not make a difference.

Second, tax law treats gambling differently than other trades or businesses. It has done so for many years, and, as noted in *Valenti v. Commissioner*, T.C. Memo 1994-483, “there is certainly ample basis for singling out gambling for treatment different from that available to other trades or businesses.”⁵

Third, § 11015 of P.L. 115-97 and the subsequent enactment of Wis. Stat. § 71.01(6)(L)1 changed the extent to which expenses could be deducted for those in the business of gambling. Petitioners correctly cite *Mayo v. Commissioner*, 136 T.C. 81 (2011) in which the Tax Court held the limitation on deducting gambling losses does not apply to ordinary and necessary business expenses incurred with the trade or business of gambling. However, that holding in *Mayo* was superseded by the federal and state statutory law changes discussed above. Therefore, while the general rule at 26 I.R.C. § 165 (a) states “[t]here shall be allowed as a deduction any loss sustained during the taxable year and not compensated for by insurance or otherwise,” the specific rule applicable to gambling at 26 I.R.C. § 165 (d) states “[l]osses from wagering transactions shall be allowed only to the extent of the gains from such transactions.”

⁵ *Valenti v. Commissioner*, T.C. Memo, 1994-483, page 4.

The IRS guidance for tax filers who generated income, or both generated income and incurred losses from gambling, instructed such tax filers on how to report both winnings generated and losses incurred through wagering activities. Each person who wins at least \$600 from a particular casino receives a W-2G form that states, under "Instructions for Winners," that tax filers should: "Generally, report all gambling winnings on the "Other income" line of Form 1040. You can deduct gambling losses as an itemized deduction, but you cannot deduct more than your winnings." (IRS Form W-2G (2018))

This guidance is further explained in IRS Publication 525, *Taxable and Nontaxable Income (2018)*, which includes details about how tax filers are to provide that information on the Form 1040, distinguishing the requirements for someone who is "in the trade or business of gambling" from other gamblers. Those "professional" gamblers are instructed to report gambling winnings and gambling losses on Schedule C, while others with gambling income, or income and losses, can use Schedule A to itemize, or can simply include their winnings on Schedule 1 (Form 1040). As Petitioners indicated they are in the business of gambling, they should have reported their income and losses for that wagering activity on Schedule C.

There is no question as to whether or not Petitioners are subject to Wisconsin income tax under Wis. Stat. § 71.02. The income at issue comes from "winnings from a casino or bingo hall that is located in this state." That remains true whether or not it was income "derived from a limited partner's distributive share of a limited partnership," which is taxable, or "net incomes of individuals," which are also taxable. The only issue

is whether or not Petitioners could deduct losses related to their gambling activities that were greater than their winnings. Under federal and state law applicable to the 2018 tax year, they could not.

CONCLUSIONS OF LAW

1. There is no genuine issue of material fact, therefore the matter is ripe for summary judgment.

2. For the 2018 tax year, under Wis. Stat. § 71.02 and Wis. Stat. § 71.01(6)(L), Petitioners, whom the department has stipulated are in the business of gambling for the purposes of this appeal, may deduct losses from wagering transactions and the business of gambling only to the extent of their gains from such transactions.

ORDER

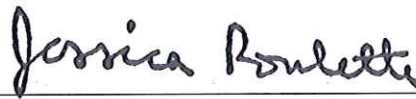
The Department's Motion for Summary Judgment is granted and the assessment is upheld.

Dated at Madison, Wisconsin, this 15th day of April, 2024.

WISCONSIN TAX APPEALS COMMISSION



Elizabeth Kessler, Chair



Jessica Roulette, Commissioner



Kenneth P. Adler, Commissioner

ATTACHMENT: **NOTICE OF APPEAL INFORMATION**