

OFFICE OF TAX APPEALS
STATE OF CALIFORNIA

In the Matter of the Appeal of:
J. GABRICH

) OTA Case Number 21037408
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)
)

OPINION

Representing the Parties:

For Appellant:

R. Todd Luoma, Attorney

For Respondent:

Carolyn S. Kuduk, Tax Counsel III

For Office of Tax Appeals:

Tom Hudson, Tax Counsel III

A. LONG, Administrative Law Judge: Pursuant to Revenue and Taxation Code (R&TC) section 19045, J. Gabrich (appellant) appeals from the action of respondent Franchise Tax Board (FTB) proposing additional tax of \$139,888 for the 2012 tax year and \$273,263 for the 2013 tax year, plus applicable interest.

Appellant waived the right to an oral hearing; therefore, the matter is being decided based on the written record.

ISSUE

Whether appellant has shown that he is entitled to additional gambling losses.

FACTUAL FINDINGS

1. Appellant’s 2012 income tax return reports gambling winnings of \$1,561,882 that were offset by gambling losses in the same amount. Two Forms W-2G (Certain Gambling Winnings) were attached to the return, reporting the following: gambling winnings of \$1,483,998 from Spa Resort Casino,¹ and gambling winnings of \$77,884 from Morongo Casino Resort & Spa (Morongo Casino).

¹ Documents provided indicate that Spa Resort Casino is also Agua Caliente/Spa Resort Casino.

2. Appellant's 2013 income tax return reported gambling winnings of \$2,623,862 that were offset by gambling losses in the same amount. Five Forms W-2G were attached to appellant's tax return, reporting the following: gambling winnings of \$9,564 from Morongo Casino; \$2,573,276 from Spa Resort Casino; \$32,318 from Pechanga Resort and Casino; \$3,119 from Wynn Las Vegas; and \$5,585 from Viejas Casino.
3. FTB examined appellant's 2012 and 2013 tax returns and issued a Notice of Proposed Assessment (NPA) for each tax year that disallowed appellant's claimed gambling losses.²
4. Appellant protested the NPAs. According to FTB, appellant provided bank statements detailing ATM withdrawals from casinos and other locations. Based on this documentation,³ FTB subsequently allowed gambling losses of \$461,385 for 2012 and \$469,706 for 2013.
5. On February 9, 2021, FTB issued Notices of Action for 2012 and 2013 based on its revised determination that reduced appellant's disallowed gambling losses. For 2012, FTB proposed additional tax of \$139,888; for 2013, FTB proposed additional tax of \$273,263. Appellant filed this timely appeal.

DISCUSSION

Income tax deductions are a matter of legislative grace, and a taxpayer who claims a deduction has the burden of proving by competent evidence that he or she is entitled to it. (*Appeal of Vardell*, 2020-OTA-190P.) To support a deduction, the taxpayer must establish by credible evidence, other than mere assertions, that the deduction claimed falls within the scope of a statute authorizing the deduction. (*Appeal of Dandridge*, 2019-OTA-458P.) FTB's denials of claimed deductions are presumed correct. (*Appeal of Janke* (80-SBE-059) 1980 WL 4988.) Unsupported assertions cannot satisfy a taxpayer's burden of proof. (*Appeal of Vardell, supra.*)

Gross income includes all income from whatever source derived, including gambling winnings. (Internal Revenue Code (IRC), § 61(a); R&TC, § 17071.) A taxpayer may deduct

² Each NPA also includes a proposed assessment related to like-kind exchanges. FTB has since withdrawn those assessments, so they are not discussed in this Opinion.

³ Documentation of the ATM withdrawals is not in the record.

gambling losses but “only to the extent of the gains from such transactions.” (IRC, § 165(d);⁴ Treas. Reg. § 1.165-10.) “The question of the amount of [gambling] losses sustained by a taxpayer is a question of fact to be determined from the facts of each case, established by the taxpayer’s evidence, and the credibility of the taxpayer and supporting witnesses.” (*Norgaard v. Commissioner* (9th Cir. 1991) 939 F.2d 874, 878.)

In Revenue Procedure 77-29, 1977-2 C.B. 538, the IRS provides guidance to assist taxpayers in establishing their gambling gains and deductible gambling losses. It states that taxpayers should regularly maintain an accurate diary or similar record, supplemented by verifiable documentation, to substantiate wagering winnings and losses. According to Revenue Procedure 77-29, such a diary should contain at least the following information: (1) the date and type of specific wager or wagering activity; (2) the name of the gambling establishment; (3) the address or location of the gambling establishment; (3) the names of other person(s) (if any) present with the taxpayer at the gambling establishment; and (4) the amount(s) won or lost. Revenue Procedure 77-29 also states that verifiable documentation for gambling transactions includes but is not limited to Forms W-2G, Forms 5754 (Statement by Person Receiving Gambling Winnings), wagering tickets, canceled checks, credit records, bank withdrawals, and statements of actual winnings or payment slips provided to the taxpayer by the gambling establishment.

If a taxpayer establishes that a deductible expense has been incurred but the taxpayer is unable to substantiate the precise amount, the amount of the deductible expense may be estimated if there is an evidentiary basis for doing so, bearing heavily against the taxpayer whose inexactitude is of his or her own making. (*Cohan v. Commissioner* (2d Cir. 1930) 39 F.2d 540, 543-544.) This is known as the *Cohan* rule. When applying the *Cohan* rule, a court may consider evidence of a taxpayer’s lifestyle or financial position to approximate unsubstantiated gambling losses. (See *Doffin v. Commissioner*, T.C. Memo. 1991-114.) However, the taxpayer must produce sufficient evidence to corroborate his or her statements and provide a satisfactory basis for the estimation. (See *Schooler v. Commissioner* (1977) 68 T.C. 867; *Jones v. Commissioner*, T.C. Memo. 2011-77 [holding that the taxpayer did not provide sufficient evidence to corroborate his statements and thus the court would not apply the *Cohan* rule].)

⁴ R&TC section 17201(a) incorporates by reference IRC section 165, except as otherwise provided.

Here, there is no dispute that appellant's gambling winnings totaled \$1,561,882 for 2012 and \$2,623,862 for 2013, as reported on appellant's tax returns and as corroborated by Forms W-2G. Based on evidence appellant provided during protest, FTB has allowed deductible gambling expenses of \$461,385 for 2012 and \$469,706 for 2013. Appellant has not provided a diary supplemented with verifiable documentation, as specified in Revenue Procedure 77-29, so we consider the other types of evidence appellant provided.

Appellant provides two letters from Agua Caliente Casino/Spa Resort Casino. The letter dated July 5, 2013, states, "Your recorded net Loss is \$323,456.91 for the year 2012." The 2013 letter also includes a disclaimer stating the following: "Please be aware that the tracking system used by us to arrive at this amount is dependent upon your use of your Agua Caliente Casino/Spa Resort Casino Player Club card. Therefore, when you do not use your Agua Caliente Casino/Spa Resort Casino Player Club card, we are unable to account for your gaming activity." The letter dated December 29, 2017, states that appellant's net loss was \$304,562.15 for 2013 and includes a similar disclaimer.

An eleven-page spreadsheet from Spa Resort Casino entitled "W-2G (945) Winnings for Taxable Year 2012" shows winnings of \$1,689,222, but no losses. Each figure in both the "Amount" column and the "Total" column is at least \$1,200.⁵

Appellant provides two spreadsheets from Morongo Casino for 2012: "Daily Gaming Activity" reporting jackpots of \$82,592 and a net win of \$9,803; and "W-2G Report for Tax Year 2012" reporting winnings of \$87,866. Appellant also provides two spreadsheets from Morongo Casino for 2013: "Daily Gaming Activity" reporting jackpots of \$11,644 and a net loss of \$8,280; and "W-2G Report for Tax Year 2013" reporting winnings of \$11,644.

Appellant argues that the spreadsheets and the letters reporting net losses show that he must have played \$2,012,679⁶ at Spa Resort Casino to have a net loss of \$323,456.91 for 2012. Similarly, appellant argues that he must have played \$2,877,838⁷ at Spa Resort Casino to have a

⁵ Casinos are required to issue Forms W-2G reporting slot machine jackpots of \$1,200 or more. (See Temp. Treas. Reg. § 7.6041-1; Rev. Proc. 77-29, 1977-2 C.B. 538.) Therefore, there may be additional winnings during the tax year of less than \$1,200 that are not reflected on the spreadsheet or on Forms W-2G.

⁶ \$1,689,222 reported on the 2012 spreadsheet + \$323,457 (rounded) net loss reported in the Spa Resort Casino letter for 2013.

⁷ \$ 2,573,276 reported on Form W-2G + \$304,562 (rounded) net loss reported in the Spa Resort Casino letter for 2013.

net loss of \$304,562.15 for 2013. Although it is a virtual certainty that appellant placed many losing bets during his years of gambling, there is nothing in the record that would allow us to make an estimate of appellant's gambling losses greater than what FTB has already allowed. (See *Rios v. Commissioner*, T.C. Memo. 2012-128.) The spreadsheets and net loss figures, on one hand, and Forms W-2G, on the other, cannot be reconciled. For example, the Spa Resort Casino spreadsheet reports total winnings of \$1,689,222 and the corresponding Form W-2G reports winnings of \$1,483,998, a difference of \$205,224 that is left unexplained.⁸ Moreover, the letter from Spa Report Casino reporting a net loss of \$323,456.91 disclaims that this figure is only an estimate. Therefore, there is no basis for us to determine any additional losses based on the evidence provided.

Appellant has already received the benefit of the *Cohan* rule from FTB, which estimated appellant's gambling losses to be \$461,385 for 2012 and \$469,706 for 2013, based on ATM withdrawals. However, appellant's additional evidence does not show that he is entitled to additional losses that exceed FTB's estimates or show that his losses exceeded his gains. Accordingly, appellant has failed to show error in FTB's proposed assessment of tax.

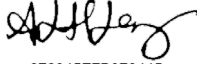
⁸ No spreadsheet from Spa Resort Casino was provided for the 2013 tax year, and the winnings from the spreadsheets from Morongo Casino also do not match the winnings reported on Forms W-2G for 2012 and 2013.

HOLDING

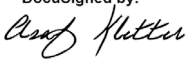
Appellant has not shown that he is entitled to additional gambling losses.

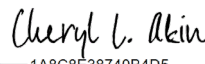
DISPOSITION

FTB’s actions are sustained.

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Andrea L.H. Long
Administrative Law Judge

We concur:

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D17AEDDCAAB045B...
Asaf Kletter
Administrative Law Judge

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Cheryl L. Akin
Administrative Law Judge

Date Issued: 5/26/2022