STATE OF WISCONSIN

TAX APPEALS COMMISSION

DONNA S. RING, **DOCKET NO. 06-I-084**

Petitioner,

vs. **DECISION AND ORDER**

WISCONSIN DEPARTMENT OF REVENUE,

Respondent.

DAVID C. SWANSON, COMMISSIONER:

This matter comes before the Commission following a hearing held on November 7, 2007 before Commissioner Diane E. Norman.[1] In this matter, petitioner Donna S. Ring appears *pro se*, and respondent, the Wisconsin Department of Revenue (the "Department"), is represented by Attorney Sheree Robertson. At the hearing, the Commission received and entered into evidence petitioner's exhibit A and the Department's exhibits 1 through 15 and 17, and petitioner and Ms. Marilyn Getlinger, a Department Auditor, provided sworn testimony. At the conclusion of the hearing, the parties agreed to file post-hearing briefs. Petitioner filed a brief on January 7, 2008, respondent filed a response brief on February 29, 2008, and petitioner filed a reply brief on April 4, 2008. Having considered the sworn testimony and the parties' exhibits and briefs, the Commission finds, concludes, decides and orders as follows:

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[1] Commissioner Norman has since left the Commission. In reaching this decision, the Commission consulted with former Commissioner Norman regarding her impressions of the witnesses and the testimony they presented at the hearing.

FINDINGS OF FACT

1. In an Office Audit Worksheet and Notice of Amount Due dated September 19, 2005, the Department issued an income tax assessment to Ms. Ring for the years 2001, 2002 and 2003 (the "period at issue") in the total amount of $23,043.39, including tax and interest (the "assessment"). The assessment was based primarily on the Department's determination that petitioner was not a professional gambler during the period at issue and its disallowance of gambling losses claimed by petitioner on Schedule C of her federal income tax return for each year at issue, which resulted in adjustments to her reported income. (Dept. Ex. 1.)

2. By letter dated October 12, 2005, petitioner's former representative filed with the Department a petition for redetermination of the assessment. The petition for redetermination stated that petitioner's gambling losses "significantly exceeded any gambling winnings" during the years at issue, that she was "forced to file bankruptcy as a result of her losses," and that she had a "gambling problem" at the time due to the deaths of loved ones during this period. (Dept. Ex. 2.)

3. By Notice of Action dated March 13, 2006, the Department denied the petition for redetermination. (Dept. Ex. 3.)

4. On March 23, 2006, petitioner's former representative filed a timely petition for review of this matter with the Commission.

5. Petitioner filed a Wisconsin income tax return for each of the years at issue with an attached copy of her Form 1040 U.S. Individual Income Tax Return for each respective year. On Schedule C of her federal return for each year at issue,

petitioner reported her principal business or profession as "professional gambler." (Dept. Ex. 6, 7 and 8.)

6. On line 1 of her 2001 Schedule C, petitioner reported receipts from gambling in the amount of $180,000 and cost of goods sold on line 4 in the same amount described as "gambling losses limited to income," resulting in a reported zero net profit from this activity. (Dept. Ex. 6.)

7. On line 1 of her 2002 Schedule C, petitioner reported receipts from gambling in the amount of $65,350 and cost of goods sold on line 4 in the same amount described as "gambling losses limited to income," resulting in a reported zero net profit from this activity. (Dept. Ex. 7.)

8. On line 1 of her 2003 Schedule C, petitioner reported receipts from gambling in the amount of $3,700 and cost of goods sold on line 4 in the same amount described as "gambling losses limited to income," resulting in a reported zero net profit from this activity. (Dept. Ex. 8.)

9. Following an audit of petitioner's 2001 federal income tax return, the Internal Revenue Service ("IRS") disallowed petitioner's treatment of her gambling as a trade or business and reclassified related income as miscellaneous gambling income. The IRS adjusted her reported income for 2001 by increasing it in the amount of $180,000, but also allowed petitioner's claimed gambling losses offsetting this income, so that petitioner owed only $227 in additional federal income tax following the adjustment. Petitioner executed an agreement with the IRS to the changes to her 2001 return, but included a note stating that she did not totally agree but was unwilling to

contest the changes. (Dept. Ex. 9 and 10.) The IRS notified the Department of these changes, which gave rise to the Department's audit in this matter. (Dept. Ex. 11; Tr. at 105-107.)

10. Petitioner was not employed by an outside employer during the period at issue, and had been unemployed since 1998. (Tr. at 41-42.)

11. On her 2002 tax return, petitioner reported income from social security benefits on her homestead credit claim. (Tr. at 113, 115-116; Dept. Ex. 14.)

12. Due to petitioner's financial problems, her daughter became her "protective payee" to receive and manage petitioner's social security disability payments. (Tr. at 92-93.)

13. Petitioner gambled almost exclusively at the Ho-Chunk Casino in Wisconsin Dells, Wisconsin. (Tr. at 66-67.)

14. Petitioner testified that she maintained a diary showing her gains and losses from gambling for 2001 and 2002, and she submitted a copy of the diary to the Department and the Commission. (Tr. at 15-16; Dept. Ex. 15.)

15. Petitioner testified that she maintained a diary showing her gains and losses from gambling for 2003, but was unable to locate a copy of that diary. (Tr. at 15-16; Dept. Ex. 15.)

16. Petitioner testified that she prepared the diary of her 2001 and 2002 gambling gains and losses contemporaneously with her activities during that period, and that she provided the diary to her accountant to help prepare her tax returns for those years. (Tr. at 81-82.)

17. Petitioner's diary for 2001 and 2002 provides a record of her total daily gambling gains and losses, but does not identify her specific gains and losses from slot machines and blackjack. (Tr. at 85-86; Dept. Ex. 10.)

18. During the Department's audit of petitioner, Department Auditor Marilyn Getlinger concluded that petitioner's diary of her gambling gains and losses during 2001-2002 did not appear to have been prepared contemporaneously, but rather appeared to list cash withdrawals from bank accounts and credit card charges, and thus did not satisfy the gambling diary requirement, in her expert opinion. (Tr. at 111.)

19. Petitioner testified that she did not maintain a separate account for her gambling activities. (Tr. at 68-69.)

20. Petitioner testified that she funded her gambling activities with the proceeds from settlements in two lawsuits and credit card charges during the period at issue. (Tr. at 69-71.)

21. Petitioner testified that she also played the lottery during the period at issue, but did not maintain any records of her lottery winnings and losses. (Tr. at 75-76.)

22. To improve her profits from gambling, petitioner testified that she would change her gambling methods by going to the casino at different times of the day, playing different slot machines, varying her bets, and sometimes playing blackjack before the slot machines. Petitioner testified that she also used other methods, but did not describe them. (Tr. at 76-77; Dept. Ex. 15.)

23. Petitioner's efforts to improve her skills at blackjack consisted of

learning from dealers and other players, playing computer-based gambling games at home and reading unnamed books and magazines on gambling, which she stated she no longer had in her possession. Petitioner stated that she attempted to learn how to count cards while playing blackjack, but did not state that she was successful. (Dept. Ex. 17.)

24. Petitioner testified that she played in two or three blackjack tournaments during the period at issue, but did not win any money. (Tr. at 90.)

25. Petitioner testified that she gambled as a way to deal with stress in her life during at least part of 2001, which was caused by the deaths of loved ones between March and August, 2001. (Tr. at 66.)

26. Regarding her reasons for gambling, petitioner testified: "It was like an escape from reality for a while. It was a place where I had been before where I had made some money and I knew all the people at the casino. I knew the staff. They were helpful to me." (Tr. at 93-94.)

CONCLUSION OF LAW

Petitioner has failed to satisfy her burden of proof in this matter.

DECISION

Assessments made by the Department are presumed to be correct, and the burden is on the petitioner to prove by clear and satisfactory evidence in what respects the Department erred in its determination. *Edwin J. Puissant, Jr. v. Wis. Dep't of Revenue*, Wis. Tax Rptr. (CCH) ¶ 202-401 (WTAC 1984); Wis. Stat. § 77.59(1). Tax exemptions, deductions, and privileges are matters of legislative grace and will be strictly construed

against the taxpayer. *Fall River Canning Co. v. Dep't of Taxation*, 3 Wis. 2d 632, 637, 89 N.W.2d 203 (1958).

The dispute in this matter focuses on the Department's denial of petitioner's claim that her gambling constituted a trade or business during the period at issue. Instead, the Department recharacterized petitioner's gambling as a hobby or entertainment activity and disallowed her deductions of her claimed losses from gambling as business expenses. Beginning January 1, 2000, gambling losses, which are allowed as a federal miscellaneous itemized deduction, are no longer allowed in computing the Wisconsin itemized deduction credit. The only way gambling losses can be deducted from gambling winnings in Wisconsin is if the taxpayer is engaged in the trade or business of gambling. *See, Calaway v. Wis. Dep't of Revenue*, Wis. Tax Rptr. (CCH) ¶ 400-856 (WTAC Nov. 10, 2005); *Voss v. Wis. Dep't of Revenue*, Wis. Tax Rptr. (CCH) ¶ 401-028 (WTAC Jul. 12, 2007).

Subject to certain exceptions, Wisconsin otherwise generally follows federal law in income tax matters, and Section 162 of the Internal Revenue Code (the "Code") allows deductions for all "ordinary and necessary expenses paid or incurred during the taxable year in carrying on any trade or business." The Code does not define "trade or business" for purposes of Section 162, but the U.S. Supreme Court addressed this question in *Commissioner v. Groetzinger*, 480 U.S. 23 (1987), which also concerned the tax treatment of gambling as a trade or business.

In *Groetzinger*, the Court held that "if 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." *Id*. at 35. However, "not 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.*

Further guidance for determining whether an activity is engaged in for profit is provided in applicable Treasury Regulations, which state that deductions are not allowable under Code § 162 for activities that 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," and in 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.* To assist in that inquiry, Treasury Regulations § 1.183-2(b) provides a non-exhaustive list of factors to consider, which includes: (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.

A. Treas. Reg. § 1.183-2(b)

The Commission has followed *Groetzinger* and Treas. Reg. § 1.183-2 in a number of prior cases, including *Calaway* and *Voss*, *supra*. In determining whether an activity was a trade or business engaged in for profit, the Commission first examines the factors set forth in 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 suggest that a taxpayer conducted an activity for profit. Treas. Reg. § 1.183-2(b)(1). Petitioner did not carry on her gambling activities in a businesslike manner. Petitioner's records are at best incomplete, and her 2001-2002 diary of gains and losses does not show petitioner's wagers or the different games played on any particular date.

Nor were the specific gambling activities petitioner engaged in conducted in a businesslike manner. Slot machines, which petitioner testified constituted a significant portion of her gambling activities during the period in question, require no skill to play. The Commission has previously held that, as a matter of law, gambling in the form of playing slot machines cannot constitute a trade or business. *Calaway, supra.* Petitioner's other main gambling activity involved playing blackjack, but petitioner

presented no evidence showing that she engaged in strategies to maximize or earn a profit.

The statements included in petitioner's petition for redetermination and her testimony support a different interpretation of her gambling activities. That document refers to petitioner's "gambling problem" which resulted in her filing for bankruptcy in 2002. Due to petitioner's financial situation, her daughter became her "protective payee." Petitioner testified that gambling provided her with a form of escape from her problems. These statements suggest that petitioner suffered from a harmful addiction, not that she pursued gambling 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 her gambling, other than individuals she met while gambling. While petitioner stated she read some materials on gambling, she did not provide any specifics regarding the materials read or how much time she devoted to such endeavors, nor was she able to provide any such materials to the Department when requested, or to the Commission. Petitioner did not belong to any professional organizations that might

have assisted her in her gambling endeavors. In addition, petitioner's gambling activities in playing slot machines involved no skill, since they are purely a game of chance.

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, the record reflects that she spent a great deal of time gambling. 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 pursuing one's business. Petitioner's own petition for redetermination refers to her "gambling problem." Thus, this factor does not strongly support one position or the other.

Furthermore, the record does not show that petitioner made a substantial effort to improve her chances of making a profit. Petitioner's efforts to improve her skills at blackjack consisted of learning from dealers and other players, playing

computer-based gambling games at home and reading unidentified books and magazines on gambling, which she stated she no longer had in her possession. Petitioner stated that she attempted to learn how to count cards while playing blackjack, but did not state that she was successful. Overall, the record contains little evidence that petitioner made a significant effort to improve her skills at gambling.

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

Petitioner did not own any assets specifically for her gambling activities. Consequently, this factor provides no assistance in analyzing this case.

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 other similar or dissimilar activities. This factor therefore supports the Department's position.

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's tax returns reported substantial losses from gambling in each year at issue, more than offsetting any income from gambling she received in those years. In 2001 alone, petitioner lost approximately $180,000 gambling. As a result of her gambling losses, petitioner filed for bankruptcy in 2002.

7. Amount of Occasional Profits, If Any

Petitioner occasionally won money while gambling, resulting in the gambling receipts reported on her tax returns. However, petitioner did not show an overall profit from gambling in any year at issue.

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 her 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). Again, petitioner's own statements and petition for redetermination indicate that she pursued gambling as entertainment or to escape her problems.

In sum, our analysis of the nine factors set forth in Treas. Reg. § 1.183-2(b) leads us to reject petitioner's argument that she was a professional gambler. Petitioner emphasizes her investment of time in gambling, but that factor cuts both ways in this matter due to evidence that suggests she had a gambling problem. Taken together, the nine factors indicate that petitioner did not conduct her gambling activities in a way that suggests petitioner engaged in this activity as a trade or business, as required

under Section 162 of the Code.

B. Groetzinger and Other Case Law

Petitioner relies primarily on *Groetzinger, supra,* to support her contention that she engaged in the trade or business of professional gambling. In *Groetzinger*, 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 "[c]onstant and large-scale effort on his part was made. Skill was required and was applied." *Id*. at 36.

As noted above, petitioner made few records of her gambling activities. She maintained no records of her lottery winnings and losses and either lost or did not maintain a record of her gains and losses from 2003. The diary of her winnings and losses for 2001-2002 does not record the types of wagers made or games played on any date. Nor does the record establish that petitioner engaged in any significant amount of study of her gambling activities or applied any significant skill to those activities. *Groetzinger* is therefore distinguishable.

In support of her case, petitioner cites *Estelle Busch v. Comm'r of Revenue*, Minn. Tax Rptr. (CCH) ¶ 203-214, 713 N.W.2d 337 (Minn. 2006). However, that case

involved very different facts. For example, in *Busch*, the IRS had previously determined that the taxpayer's gambling constituted a trade or business. Here, petitioner has conceded to the IRS determination that her gambling was not a trade or business during 2001. In addition, *Busch* involved the application of the Minnesota alternative minimum tax, which is sufficiently different from applicable Wisconsin tax law that the analysis provided in *Busch* is not very helpful in this case. More on point are recent decisions of the Commission in cases very similar to this case, particularly the Commission's decisions in *Calaway* and *Voss*, *supra*, which support the Department's position in this matter.

In this case, petitioner has provided insufficient evidence documenting her claimed pursuit of gambling as a trade or business. Absent sufficient evidence to the contrary, the Commission must presume that the assessment is correct. For the reasons discussed herein,

IT IS ORDERED

The Department's action on the petitioner's petition for redetermination in this matter is affirmed.

Dated at Madison, Wisconsin, this 2nd day of October, 2008.

WISCONSIN TAX APPEALS COMMISSION

David C. Swanson, Chairperson

Roger W. Le Grand, Commissioner

Thomas McAdams, Commissioner

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