STATE OF NEW YORK

TAX APPEALS TRIBUNAL

In the Matter of the Petition	:	
of	:	
ERNA POSPISCHIL	:	DECISION DTA No. 812919
for Redetermination of a Deficiency or for Refund of New York State and New York City Personal Income Taxes under Article 22 of the Tax Law and the New York City Administrative Code for the Year 1989.	:	

Petitioner Erna Pospischil, 68-11 Fresh Pond Road, Ridgewood, New York 11385-5297, filed an exception to the determination of the Administrative Law Judge issued on October 12, 1995. Petitioner appeared pro se. The Division of Taxation appeared by Steven U. Teitelbaum, Esq. (David C. Gannon, Esq., of counsel).

Petitioner did not file a brief in support. The Division of Taxation declined to file a brief in opposition by letter received on January 16, 1996, which date began the six-month period for the issuance of this decision. Petitioner's request for oral argument was denied.

Commissioner Koenig delivered the decision of the Tax Appeals Tribunal. Commissioners Dugan and DeWitt concur.

ISSUE

Whether the reduction to the New York itemized deduction under Tax Law § 615(f) is properly applicable where the adjusted gross income triggering the reduction resulted from gambling winnings and where actual gambling losses exceeded gambling winnings.

FINDINGS OF FACT

We find the facts as determined by the Administrative Law Judge. These facts are set forth below.

In 1989, petitioner, Erna Pospischil, had gambling winnings of $270,150.00. This amount is evidenced by numerous Forms W-2G (Statement for Recipients of Certain Gambling Winnings) issued by Atlantic City, New Jersey casinos which list total winnings in that amount.

Also in 1989, petitioner sustained gambling losses in excess of her winnings. Petitioner estimated that such losses totalled approximately $330,000.00.

Petitioner testified that she was a compulsive gambler during 1989. She earned her winnings and sustained her losses playing slot machines in Atlantic City. Petitioner also testified that her gambling winnings existed only on paper as she consistently poured such winnings back into the slots in an effort to break even.

Petitioner timely filed her 1989 Federal and New York income tax returns. Petitioner's 1989 New York return (Form IT-201) indicated a filing status of single. Petitioner did not report her gambling winnings or losses on her 1989 New York return. Petitioner's 1989 Federal return is not in evidence. However, petitioner attached to both her Federal and State returns a statement which provided, in part:

> "Attached are copies of 'Certain Gambling Winnings' totaling $270,150. Please be advised that my gambling losses in Atlantic City were far in excess of this amount throughout 1989 . . . .
>
> * * *
>
> "Please accept this statement as evidence of gambling losses."

By a "Correction Notice" dated June 4, 1990, the Internal Revenue Service advised petitioner of the correction of an error on her 1989 return. This notice explained the correction as follows:

> "YOUR GAMBLING WINNINGS MUST BE INCLUDED IN YOUR TOTAL INCOME ON PAGE 1 OF YOUR 1040. LOSSES, UP TO YOUR AMOUNT OF WINNINGS, SHOULD BE DEDUCTED ON YOUR SCHEDULE A. WE HAVE ADJUSTED YOUR RETURN ACCORDINGLY."

On August 8, 1991, the Division of Taxation ("Division") issued to petitioner a Notice of Deficiency (Assessment identification number L-002198285-6) which asserted additional New

York State and New York City personal income tax due of $7,983.00, plus interest, for the year 1989.

The basis of the above deficiency was set forth in a letter to petitioner from the Division dated July 15, 1991 as follows:

"NY adjusted gross income[1]	283,341
*Itemized deductions	202,612
Balance	80,729
Exemptions	-0-
NY Taxable Income	80,729

	State	City	Total
Tax on above	5999	2,563	8,562.00
Prepayment	371.00	208.00	579.00
Tax due	5628	2,355	7,983.00

*For tax year 1989 itemized deductions is [sic] reduced if income is more than 100,000.00. The amount of reduction varies according to your filing status and income.

Itemized deductions per federal	270,201
Less: State & local taxes	51
Balance	270,150
Less 25%	67,538
Itemized deduction allowed	202,612"

Petitioner responded to the Division's July 15, 1991 letter with a letter dated July 19, 1991 which stated, in part:

> "My total deduction of $270,150. is solely gambling losses and let me again stress, they were actually far in excess of gambling tax forms received . . . . Line 44 [of Form IT-201] -- itemized deduction adjustment -- is not applicable since it is not a deduction but total losses, offsetting gambling tax forms."

The Division responded to petitioner's July 19, 1991 letter by a letter dated September 23, 1991 which provided, in part:

> "Based on the information we received, the assessment(s) is considered correct for the following reasons:

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[1] This New York adjusted gross income figure equals the sum of adjusted gross income as reported ($13,191.00) and petitioner's gambling winnings ($270,150.00).

> "Since the New York State Tax Law does not conform with the Internal Revenue Code dealing with itemized deductions, above assessment is sustained.
>
> "Beginning in tax year 1988, you are no longer able to claim all of your New York itemized deductions if your New York adjusted gross income is more than $100,000.00. The amount of reduction varies according to your filing status and income. In your case itemized deductions for the above tax year must be reduced by 25% to arrive at correct itemized deductions for New York State."

The Division subsequently responded to further correspondence from petitioner by letter dated November 20, 1991 which indicated that the Division considered the assessment against petitioner to be correct because "[t]he only way to account for gambling losses is in your itemized deductions."

The Division issued a "Notice of Assessment Resolution" dated July 6, 1992 in respect of assessment number L-002198285-6 which again set forth the Division's explanation for the assessment and which also indicated the imposition of penalties with the assessment.

On March 18, 1994, the Division's Bureau of Conciliation and Mediation Services ("BCMS") issued a Conciliation Order which adjusted the income tax deficiency herein to $7,478.93. The Conciliation Order also indicated the imposition of penalty with respect to the subject notice.

At hearing, the Division indicated that it did not seek to impose penalties in this matter and that the Conciliation Order should be modified accordingly.

OPINION

In the determination below, the Administrative Law Judge reviewed Tax Law § 612(a) which defines New York adjusted gross income as Federal adjusted gross income with certain modifications not relevant herein.

The Administrative Law Judge also reviewed section 61 of the Internal Revenue Code which defines "gross income" as including gambling winnings (see, Bauman v. Commr., 65 TCM 2165), thus holding that "petitioner's gambling winnings of $270,150.00 were properly includible in her 1989 Federal and New York adjusted gross income" (Determination, conclusion of law "A").

The Administrative Law Judge then reviewed Tax Law § 615 regarding itemized deductions, along with Internal Revenue Code § 165(d) relating to deductions for losses from wagering transactions, and held that:

> "where a taxpayer's New York adjusted gross income exceeds $100,000.00, the New York itemized deduction of that taxpayer is reduced by a specified amount. In petitioner's situation, with New York adjusted gross income of $283,341.00, section 615(f)(1)(A) requires that New York itemized deductions be reduced by 25%. The Division properly reduced petitioner's New York itemized deductions in accordance with this provision" (Determination, conclusion of law "E").

In rejecting petitioner's contention that the application of the limitation on deductions was unfair and improper in her circumstances since she never received any actual income due to always trying to get her money back, the Administrative Law Judge held that:

(1) "[t]here is no provision in the Tax Law exempting or otherwise removing gambling losses from the reduction calculations of Tax Law § 615(a)"; and

(2) "where New York adjusted gross income exceeds $100,000.00, the New York itemized deduction is reduced by a certain percentage (Tax Law § 615 [f])" (Determination, conclusion of law "F").

On exception, petitioner argues that she did not have gambling winnings but gambling "tax forms" totaling $270,150.00, as she personally sustained actual gambling losses of approximately $60,000.00.

Petitioner also argues that it was never income but money poured into the machine which came back to her in a tax form and, further, by putting gambling into the status of receiving tax forms, which has no resemblance to earned income, the law should not apply.

Petitioner further rejects the Division's method of accounting for gambling losses through the use of itemized deductions arguing that such a method is not valid. The correct way to account for gambling losses would be through the use of another schedule.

Petitioner also argues: (1) her income did not exceed $100,000.00 (only tax forms were generated), thus the itemized reduction cannot be applicable; (2) unlike an investor in the stock market who can claim a particular loss, she cannot claim any of her lost money on a future

return; (3) it is illegal and immoral for the Tax Law to be applied this way; and (4) there is no cap on the amount of money one can lose and, therefore, this deduction must be totally accepted.

The Division, while not filing a brief in opposition to petitioner's exception, advised that the Administrative Law Judge's determination fully addresses the issue presented.

We affirm the determination of the Administrative Law Judge.

The Administrative Law Judge correctly analyzed and weighed all the evidence presented in this case and correctly decided the relevant issue. We uphold the determination of the Administrative Law Judge for the reasons stated therein.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of Erna Pospischil is denied;

2. The determination of the Administrative Law Judge is affirmed;

3. The petition of Erna Pospischil is denied; and

4. The Notice of Deficiency dated August 8, 1991, as modified by the Conciliation Order dated March 18, 1994 and the cancellation of penalties at hearing as agreed to by the Division, is sustained.

DATED: Troy, New York
June 6, 1996

/s/John P. Dugan
John P. Dugan
President

/s/Francis R. Koenig
Francis R. Koenig
Commissioner

/s/Donald C. DeWitt
Donald C. DeWitt
Commissioner