STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:
of	:
ERNA POSPISCHIL	:DETERMINATION 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 a petition 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.

A hearing was held before Timothy J. Alston, Administrative Law Judge, at the offices of the Division of Tax Appeals, Riverfront Professional Tower, 500 Federal Street, Troy, New York, on May 2, 1995 at 1:15 P.M. Neither party filed a brief. May 2, 1995 thus commenced the six-month period for the issuance of this determination. Petitioner appeared pro se. The Division of Taxation appeared by Steven U. Teitelbaum, Esq. (David C. Gannon, Esq., of counsel).

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

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

[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).

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:
>
> "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.

SUMMARY OF PETITIONER'S POSITION

Petitioner contended that the application of the limitation on deductions pursuant to Tax Law § 615(f)(1)(A) was unfair and improper under the instant circumstances because she never received any actual income since she was always trying to get her money back. That is, although she had gross winnings (as indicated by her W-2G's), she was always in a net loss situation attempting to recover her losses.

CONCLUSIONS OF LAW

A. Tax Law § 612(a) defines New York adjusted gross income as Federal adjusted gross income with certain modifications not relevant herein. Federal adjusted gross income is defined as gross income less certain deductions not relevant herein

(Internal Revenue Code § 62). "Gross income" as defined in section 61 of the Internal Revenue Code includes gambling winnings (see, Bauman v. Commr., 65 TCM 2165). Accordingly, petitioner's gambling winnings of $270,150.00 were properly includible in her 1989 Federal and New York adjusted gross income.

B. Tax Law § 615(a) provides, generally, that the New York itemized deduction of a resident individual means the total amount of the individual's Federal itemized deductions (other than personal exemptions) as provided in the Internal Revenue Code for the taxable year with the modifications as specified in section 615.

C. Section 165(d) of the Internal Revenue Code permits the deduction from Federal adjusted gross income of losses from wagering transactions, but only to the extent of the gains from such transactions.

D. The modification referred to in section 615(a) relevant to the instant matter is set forth in section 615(f) of the Tax Law and provides that New York itemized deductions otherwise allowable shall be reduced by:

> "(1) An amount equal to the New York itemized deduction otherwise allowable under subsection (a) of this section, multiplied by a percentage, such percentage to be determined by multiplying, for taxable years beginning in nineteen hundred eighty-eight, ten percent, and for taxable years beginning after nineteen hundred eighty-eight, twenty-five percent, by a fraction,
>
> "(A) in the case of an unmarried individual or married individual filing a separate return, the numerator of which is the lesser of fifty thousand dollars or the excess of such individual's New York adjusted gross income over one hundred thousand dollars

and the denominator of which is fifty thousand dollars" (Tax Law § 615[f][1][A]).

E. As the foregoing statutory scheme indicates, 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.

F. There is no provision in the Tax Law exempting or otherwise removing gambling losses from the reduction calculations of Tax Law § 615(a). The statutory scheme thus clearly dictates the result asserted by the Division herein. Specifically, the Internal Revenue Code allows a deduction for gambling losses only to the extent of winnings (Internal Revenue Code § 165[d]); insofar as is relevant herein, the New York itemized deduction equals the Federal itemized deduction (Tax Law § 615[a]); 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]). Petitioner's contention must, therefore, be rejected.

G. The petition of Erna Pospischil is denied; the Notice of Deficiency dated August 8, 1991, as modified by the Conciliation Order dated August 18, 1994 (see, Finding of Fact "12") and by Finding of Fact "13", is sustained.

DATED: Troy, New York
October 12, 1995

/s/ Timothy J. Alston

ADMINISTRATIVE LAW JUDGE