STATE OF NEW YORK

TAX APPEALS TRIBUNAL

In the Matter of the Petition	:	
of	:	
ALFRED AND DEBRA KAYATA	:	DECISION DTA NO. 825935
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 Years 2006, 2007 and 2008.	:	

Petitioners, Alfred and Debra Kayata, filed an exception to the determination of the Administrative Law Judge issued on February 11, 2016. Petitioners appeared by Kridel Law Group (James A. Kridel, Jr. Esq. and Anne L. Heldman, Esq,, of counsel). The Division of Taxation appeared by Amanda Hiller, Esq. (Peter Ostwald, Esq., of counsel).

Petitioners filed a brief in support of their exception. The Division of Taxation filed a brief in opposition. Petitioners filed a reply brief. Oral argument was heard in New York, New York on June 22, 2017, which date began the six-month period for issuance of this decision.

After reviewing the entire record in this matter, the Tax Appeals Tribunal renders the following decision.

ISSUES[1]

I. Whether petitioner Alfred Kayata is engaged in the trade or business of being a professional gambler, such that he is not limited to reporting his gambling winnings as "other

[1] Petitioner Debra Kayata's name appears herein by virtue of the fact that she filed joint personal income tax returns with her husband, petitioner Alfred Kayata, for the years at issue. While both Mr. and Mrs. Kayata are petitioners herein, the matter pertains only to the proper reporting of Alfred Kayata's claimed gambling winnings and losses. Unless otherwise specified or made necessary by context, references to petitioner herein shall mean petitioner Alfred Kayata.

income" and gambling losses (to the extent of such gambling winnings) as a miscellaneous itemized deduction on schedule A, but instead may report the results of his gambling activities on schedule C (profit or loss from business [sole proprietorship]).

II. Whether, if petitioner is not engaged in business as a professional gambler, the reduction to his New York itemized deduction under Tax Law § 615 (f) is properly applicable, as in this case, where petitioner's adjusted gross income triggering the reduction resulted in part from gambling winnings and where his actual gambling losses exceeded his gambling winnings.

FINDINGS OF FACT

We find the facts as determined by the Administrative Law Judge except for finding of fact 12, which we have modified to more fully reflect the record. As so modified, these facts are set forth below.

1. Petitioner Alfred Kayata became licensed as a chiropractor in 1990, and he has practiced as such, full time, since that date. Petitioner, together with his sister and brother-in-law, operate Carol Gardens Chiropractic located in Brooklyn, New York. For the years at issue (and for other years), petitioner filed federal schedule C with respect to his work as a chiropractor, and reported his income and expenses thereon. Petitioner reported net profit from his work as a chiropractor in the amounts of $201,657.00, $235,418.00, and $255,352.00 for the years 2006, 2007, and 2008, respectively. This aspect of his tax filings for the years at issue is not in question in this matter.

2. In 1995, petitioners purchased a home in Ocean City, New Jersey. They also rented and maintained an apartment located in Brooklyn, New York. For approximately two years preceding the purchase of their New Jersey home, and thereafter, petitioners lived in the Brooklyn apartment with Alfred Kayata's grandmother and provided care for her. Petitioners

moved to their New Jersey home after her passing in 2005, but continued to maintain the apartment in Brooklyn.

3. Petitioners filed form IT-201 (New York State and City resident income tax return) for years prior to and including 2005, as residents of New York State and City.

4. For each of the years 2006, 2007, and 2008 (the years at issue), petitioners filed form 1040 (U.S. individual income tax teturn). As relevant herein, petitioners reported "Other Income," at line 21 of such returns, in the amounts of $992,000.00 (2006), $946,950.00 (2007) and $752,675.00 (2008), respectively. Petitioners identified this income as "gambling winnings." In turn, and for each of the years at issue, petitioners reported at schedule A, line 27, a miscellaneous itemized deduction equal to the respective amounts of other income listed above, describing such amounts as "gambling losses to extent of winnings."

5. Petitioners claimed that they had changed their domicile from New York to New Jersey as of 2006, and for each of the years at issue they initially filed form IT-203 (nonresident and part-year resident income tax return), as nonresidents of New York State and City. Petitioners reported the net profit from Alfred Kayata's work as a chiropractor as New York source income. In contrast, and as claimed nonresidents of New York, petitioners did not report his gambling winnings as income on their New York returns. They did, however, report (or carry over) their claimed federal itemized deduction amounts for New York purposes, and applied the New York itemized deduction limitation adjustment thereto (pursuant to Tax Law § 615 [f]).

6. In October of 2008, the Division of Taxation (Division) commenced an audit of petitioners' tax returns for the years at issue, specifically concerning petitioners' claimed change of domicile and resident status to New Jersey, and also seeking substantiation of the amount of

petitioners' claimed miscellaneous itemized deduction based on gambling losses for each of such years.

7. The Division's audit was completed on or about June 23, 2011. As a consequence of its audit, the Division concluded that petitioners had changed their domicile to New Jersey, as claimed. However, the Division also concluded that petitioners remained properly subject to tax as "statutory" residents of New York State and City, upon the undisputed basis that they maintained a permanent place of abode (the Brooklyn apartment) and spent more than 183 days of the year in New York State and City. As a consequence, the reported federal "other income" based on gambling winnings was included in petitioners' New York adjusted gross income. The audit report further made clear that petitioner had substantiated the dollar amounts of his gambling losses as reported and deducted to the extent of his gambling winnings. Finally, the audit report noted that petitioner's itemized deduction amounts for each of such years, including therein his reported gambling losses, were subject to the limitation adjustment of Tax Law § 615 (f) and were thus properly subject to a 50% reduction for New York purposes.

8. Petitioner did not, and does not, dispute the audit conclusion that he was properly subject to tax as a statutory resident for the years at issue, or that his gambling winnings were properly reportable as New York income. However, petitioner disagreed with the application of the limitation provision to his claimed itemized deduction amounts, arguing that the doctrine of federal conformity prohibits New York from limiting the itemized deduction of gambling losses to an amount less than that allowed under the Internal Revenue Code (IRC). Petitioner also pointed out that Division publication 140-W does not specifically state that the New York State limitation on itemized deductions based upon adjusted gross income applies to gambling losses.

9. On July 7, 2011, the Division issued to petitioners a notice of deficiency

(L-036335570-9) asserting additional New York State and New York City personal income tax for the years at issue in the amount of $176,654.00, plus penalties (Tax Law § 685 [b] [1], [2]) and interest. This notice was premised upon subjecting petitioners to tax as residents of New York, upon including petitioner's gambling winnings as income subject to New York taxes, and upon applying the itemized deduction limitation calculation under Tax Law § 615 (f), thereby reducing petitioners' claimed itemized deduction amount, as described, for each of the years at issue.

10. After the completion of the Division's audit, petitioners prepared amended federal, New York State and City, and New Jersey personal income tax returns for the years at issue. On these amended returns, petitioners set forth the claim that Alfred Kayata was a professional gambler entitled to report his gambling activities as a trade or business on schedule C. As such, petitioner reported "gross receipts" in the amounts of $992,400.00, $947,550.00, and $753,075.00 for the years 2006, 2007 and 2008, respectively.[2] In turn, he reduced such reported gross receipts by reported "cost of goods sold" ("other costs"), in the respective amounts of $992,000.00, $946,950.00 and $752,675.00 for such years. Petitioner reported no other receipts, costs or expenses on the schedule C forms, and thus reported a net profit from gambling activities for the years in issue in the respective amounts of $400.00, $600.00 and $400.00.[3] Petitioner, by his then accountant, included the following statement in explanation:

> "Gambling winnings and loses [sic] are on Schedule C instead of other income for gambling winnings and misc. exp. for gambling losses. Considered a professional gambler."

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[2] These are the same amounts previously reported as "other income" (***see*** finding of fact 4).

[3] These other costs amounts are *slightly less* than the miscellaneous itemized deduction amounts reported initially for the years in issue (***see*** finding of fact 4), thus resulting in the *very small* net profit reported on schedule C from gambling activities.

11. Petitioner challenged the Division's notice of deficiency by filing a request for a conciliation conference with the Division's Bureau of Conciliation and Mediation Services (BCMS). A conciliation conference was held on February 8, 2012. Petitioners brought the foregoing amended returns, including the schedule Cs thereto, to the conciliation conference for submission so as to set forth their claim that Alfred Kayata was a professional gambler.

12. The amended returns were received for filing, and were discussed at the conciliation conference. Petitioner alleges that the Division conceded, at such conference, that he was a professional gambler entitled to report his gambling activities on schedule C and, as such, avoid being subject to the itemized deduction limitation under Tax Law § 615 (f). Contrary to petitioner's allegation, however, on September 27, 2013, BCMS issued a conciliation order (CMS No. 248306) sustaining the notice of deficiency as issued. The conciliation order also states that "[p]ayment of $22,604.00 has been applied to the assessment." This proceeding ensued.

13. Petitioner works full time as a chiropractor at his office in Brooklyn, New York on Monday through Thursday from 9:00 a.m. to 7:00 p.m., and on Friday from 9:00 a.m. to noon. In addition, petitioner spends a significant number of hours per week engaged in gambling activities. Petitioner purchases lottery scratch-off tickets during the week, and gambles every weekend, stating candidly in testimony that "I'm a gambler," and that he "is a 'fanatic' about gambling."

14. In support of his claim of being engaged in the trade or business of being a professional gambler, petitioner noted that his home in Ocean City, New Jersey, is located

approximately eight miles, and less than ten minutes, from Atlantic City, New Jersey. Petitioner gambles primarily in Atlantic City, although he sometimes gambles when on cruises, or at other gambling venues in other locations. Petitioner started gambling at casinos when he turned 18 years old, and the extent of his gambling grew from that point.

15. Petitioner's usual routine is to leave his Brooklyn chiropractic office on Friday at noon, go home and take a short nap, and then go to the casinos in Atlantic City. Petitioner typically arrives at a casino at 5:00 or 6:00 p.m. on Friday.

16. Petitioner has no "set" hours per week when he gambles, but rather the amount of time spent gambling depends on his success or lack thereof. Thus, petitioner gambles "straight through" from the time he arrives and begins playing, until he either has lost the amount of money he brought with him (his "bankroll") or won enough to leave ("hit it big"). Petitioner's bankroll varies, but his minimum bankroll is never less than $5,000.00 and sometimes is more than $50,000.00. Petitioner stated his belief that a bigger bankroll gives him a better chance of winning. Petitioner did not specify a dollar amount that would qualify as "hitting it big" or "winning enough," but rather indicated that the same would be measured in relation to the size of his initial bankroll. Petitioner has occasionally won large amounts (up to or in excess of $100,000.00) and has lost large amounts. While petitioner thus gambles significant amounts, and focuses on the fact that he has at times won large amounts, he also admitted, in testimony, that his annual gambling losses have always exceeded his annual gambling winnings.[4] Petitioner

[4] Petitioner's stated amounts won, amounts lost, and net result for the years at issue were as follows:

YEAR	AMOUNTS WON	AMOUNTS LOST	NET WINNINGS (LOSSES)
2006	$973,892.00	($1,050,314.00)	($76,422.00)
2007	$626,642.94	($943,668.85)	($317,025.91)
2008	$482,322.35	($689,549.57)	($207,227.22)

pointed out that he and his wife do not have children, mortgages or other large debts, and that the income from his chiropractic practice leaves him in a financial position where he can afford to gamble as he does.

17. Petitioner primarily plays slot machines and video poker, with "Texas Hold 'Em" as his favored game. He also sometimes plays craps, baccarat and blackjack. When petitioner arrives at a casino, he looks for information by observing various machines and gaming tables that are being played. He asks casino employees and other gamblers (casino patrons) questions about various machines or gaming tables, including whether there has been a long period of play with no significant payout on particular machines or tables. Petitioner's general strategy is to find and play machines or tables that have been played a lot but have not paid out. He tries to avoid machines or tables that have not been played much, or have had a recent significant payout. If, after a period of play, petitioner is not winning at a given casino, he will leave and go to a different casino.

18. Petitioner stated that he is well known at the Atlantic City gambling establishments, and that he is routinely given various "comps" or "perks," including valet parking and always being moved to the front of the line at casino restaurants. He has a "gambler's card" and the casinos use this card to track petitioner's gambling activities in their facilities so as to record his winnings and losses. Petitioner receives from some of the casinos form W-2G (certain gambling winnings) setting forth his gambling winnings that have been subjected to tax withholding as required. Petitioner also stated that he uses a calendar at home on which he writes his wins and losses from gambling. Aside from winnings and losses, petitioner did not track any other gambling related expenses, including transportation, meals, educational costs, and the like, stating that the same were not significant enough to warrant the time and effort to track.

19. Petitioner is never accompanied by his wife or by other companions including friends when he is gambling. He stated that he does not want other people near him, or watching him or talking to him while he is gambling. He does not drink while he is gambling, claiming that this would interfere with his focus, and only takes a drink to calm down and go to sleep after gambling. Petitioner states that he goes to the casinos and gambles to make money. He claims that he "hates" gambling, and that gambling is stressful to him and does not provide fun or entertainment. Petitioner described his slot machine, and especially his video poker machine, gambling activities as "testing the waters" to see if he can consistently "make money someday" so as to be able to retire (presumably from his chiropractic practice) with another source of income. In this regard, petitioner noted that he is trying to "figure out the code," meaning to "figure out how the machines are programmed to pay out." Petitioner reads books and magazines on gambling, and watches gambling on television, but does not attend gambling educational courses or seminars. Petitioner does not enter gambling tournaments, but will play in tournaments "for free" if and when invited.

20. Petitioner offered the testimony of Barry Horowitz, a certified public accountant with extensive tax credentials and experience. He stated the proposition that New York is a so-called "piggyback" state, by which its personal income tax follows or conforms with the federal income tax, unless there is a specific deviation therefrom. Mr. Horowitz stated that because petitioner filed a schedule C with his amended federal returns, claiming thereby that his gambling activities constituted a trade or business, he was obliged to likewise file a schedule C in the same manner at the New York State level. He pointed out that a consequence of this filing is that the itemized deduction limitation under Tax Law § 615 (f) would not apply.

21. Petitioners' 2011 federal and New York returns were filed under the reporting position that Alfred Kayata was engaged in the trade or business of being a professional gambler.

Accordingly, petitioner filed a schedule C, reporting his gambling winnings in the amount of $1,407,220.00 as gross receipts and his gambling losses in the same amount (i.e., to the extent of such winnings) as cost of goods sold, leaving a net profit of zero from gambling.

22. Petitioner's 2011 federal return was audited by the Internal Revenue Service (IRS).[5] As the result of its audit, the IRS made the following changes to petitioner's return as filed:

> "1) $2,019.00-an increase over the amount of petitioner's gross receipts reported from his chiropractic practice.
>
> 2) $34.00-an increase to the amount of petitioner's reported capital gain dividends.
>
> 3) $1,350.00-an increase to petitioner's reported miscellaneous income based on form 1099-Misc, as reported to the IRS by a Limited Liability Company (RIH Acquisitions MJ, LLC)
>
> 4) $1,407,220.00-a miscellaneous adjustment by which petitioner's gambling winnings, reported on schedule C, were moved by the IRS so as to be reported as other income at form 1040, line 21 (i.e., not as trade or business gross receipts).
>
> 5) ($26.00)-an increase to the amount of deductible self-employment tax owed by petitioner (i.e., in effect, a decrease to the amount of self employment tax due).
>
> 6) ($1,407,220.00)-an adjustment by which petitioner's gambling losses (to the extent of gambling winnings), reported on schedule C, were moved so as to be reported as a miscellaneous itemized deduction on form 1040 at schedule A, line 27 (i.e., not as cost of goods sold)."

23. The net impact of the foregoing audit changes was a $3,376.00 net increase to petitioners' reported taxable income and a resulting tax deficiency in the amount of $1,231.00. On February 24, 2014, the IRS issued to petitioners a notice of deficiency asserting additional federal income tax due for 2011 in the amount of $1,231.00, plus a negligence penalty. As is particularly relevant herein, the explanation portion of the notice provided as follows:

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[5] This federal audit concerned a year (2011) subsequent to those at issue herein. However, facts concerning this audit and its conclusion are included in order to set forth and, in turn, address petitioner's contention, strenuously advanced at hearing and by brief, that the United States Tax Court issued a decision in favor of and ratifying petitioner's claim that he was a professional gambler entitled to report the results of his gambling winnings and losses on schedule C, rather than as gambling income (other income) and as a miscellaneous itemized deduction (gambling losses) on form 1040 and schedule A thereto.

"**Gambling losses on schedule C**

Gambling winnings and any related expenses/gambling losses can only be reported on schedule C, profit or loss from business, when gambling activity is pursued full time for the production of income for livelihood. We have disallowed the expenses/gambling losses claimed on schedule C and adjusted your self-employment tax accordingly. Gambling losses that are no greater than the amount of your reported gambling winnings can be claimed as an itemized deduction on schedule A."[6]

24. On May 27, 2014, petitioner challenged the IRS notice of deficiency by filing a petition with the United States Tax Court, asserting in relevant part that he is a professional gambler and may report his income and expenses on schedule C although limiting his expenses to those of losses. Petitioner further stated that he "expends more time in the pursuit of gambling and earns more revenue in pursuit thereof then [sic] in his other business interests." Petitioner elected to have his case conducted under the Tax Court's small tax case procedures.

25. The case was assigned Docket Number 12005-14 "S." On June 27, 2014, the IRS filed its answer to the petition stating, as relevant hereto, at Item 5, that the IRS "Admits that petitioners *allege* that Alfred D. Kayata is a professional gambler *but denies petitioners have substantiated this allegation.* Denies that the Commissioner erred (emphasis added)."

26. By a letter dated July 31, 2014, the IRS confirmed that the parties reached agreement on the case, and explained that the IRS attorney assigned to the matter would provide the required stipulation and decision document for signature in order to close the matter with the Tax Court. The parties' agreement and stipulation, encompassed in the Court's Order dated as

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[6] The audit change by which petitioner's gambling activities, as reported on schedule C and carried to form 1040, line 12, were moved by the IRS so as to be reported on form 1040, line 21 (other income) and schedule A, line 27 (miscellaneous itemized deduction), reflects the IRS position that petitioner was not a professional gambler, as claimed, and a consequent repositioning of his reported gambling activities to reflect the same. The net tax liability result for *federal income tax* purposes (save for the impact on self-employment tax) would be the same under either manner of reporting, since petitioner's gambling winnings were entirely offset by and to the extent of his gambling losses and since there is no federal provision that parallels the New York itemized deduction limitation (reduction) provision of Tax Law § 615 (f).

entered on September 8, 2014, reflects that the case was settled for the full amount of additional tax determined on audit by the IRS and upon waiver of the negligence penalty, as follows:

> "Pursuant to the agreement of the parties in this case, it is
>
> ORDERED AND DECIDED: That there is a deficiency in income tax due from petitioners for the taxable year 2011 in the amount of $1,231.00; and that there is no penalty due from petitioners for the taxable year 2011, under the provisions of I.R.C. § 6662(a)."

THE DETERMINATION OF THE ADMINISTRATIVE LAW JUDGE

The Administrative Law Judge began his determination by reviewing the Internal Revenue Code (IRC) and Tax Law treatment of gambling winnings and losses. He concluded that "gross income" as defined in IRC (26 USCA) § 61 includes gambling winnings. He determined that petitioners had conceded that they were statutory residents of New York and, thus, they were properly subject to tax on income from all sources. Therefore, the total amount of Mr. Kayata's gambling winnings was properly included in his New York adjusted gross income for the years at issue.

The Administrative Law Judge described the different treatment of gambling winnings and losses for casual or recreational gamblers as opposed to those who are engaged in gambling as a trade or business. Professional gamblers who are engaged in the trade or business of gambling may report their gambling winnings, gambling losses to the extent of such winnings and their ordinary and necessary expenses related to the gambling trade or business on schedule C, so as to arrive at a net profit or loss from gambling, and carry such result, as business income or loss, to form 1040. Accordingly, the deductions for gambling losses and expenses (if any) as reported on schedule C are commonly referred to as "above the line" deductions and are used in arriving at gross income IRC [26 USCA] § 162 [a]; IRC [26 USCA] §165 [d]; ***see Mayo v***

Commissioner, 136 TC 81 [2011]). Casual or recreational gamblers, on the other hand, must report their winnings in gross income and carry the same through to federal adjusted gross income. Gambling losses are allowable to the extent of gambling winnings and are reported as miscellaneous itemized deductions on schedule A, and are commonly referred to as "below the line" deductions. No deduction or allowance is allowed for any additional expenses incurred by the casual gambler (IRC [26 USCA] §§ 183, 262).

The Administrative Law Judge explained that the question of whether one is a professional gambler engaged in such activity as a trade or business for profit is properly determined based upon a review of all the surrounding facts and circumstances and, in particular, upon consideration of the nine factors set forth in Treas Reg (26 CFR) § 1.183-2 (b) (***see Commissioner v Groetzinger***, 480 US 23, 35-36 [1987]). The Administrative Law Judge reviewed the nine factors and went on to thoroughly apply each of them to Mr. Kayata's claim to determine his subjective intent. With all the factors considered, the Administrative Law Judge determined that there was insufficient evidence to support Mr. Kayata's claim and amended reporting position that he engaged in gambling as a trade or business.

The Administrative Law Judge found that petitioners' itemized deductions for gambling losses were properly subject to the provisions of Tax Law § 615 (f) and that the constitutionality of that statute and its application has been upheld by the courts (***see Matter of Karlsberg***, Tax Appeals Tribunal, March 1, 2010, ***confirmed*** 85 AD2d 1347 [3d Dept 2011]).

The Administrative Law Judge rejected Mr. Kayata's claim that the Division conceded his status as a professional gambler and determined that the Division did not acquiesce to the positions set forth on the amended returns when they were received for filing at the conciliation conference. He agreed that petitioners are entitled to a credit in the sum of $22,604.00, which

amount was included with the amended returns that were submitted for filing at the conference. The Administrative Law Judge also rejected Mr. Kayata's argument that the Tax Court's September 8, 2014 order and decision confirmed his claim of being a professional gambler. He thus denied the petition and sustained the Division's notice of deficiency.

SUMMARY OF ARGUMENTS ON EXCEPTION

On exception, petitioners argue that gambling winnings are not "accessions to wealth," that they do not constitute receipts or take into account a "return of capital" and, therefore, do not constitute "income" as defined in IRC (26 USCA) § 61 (a) (3). Petitioners take the position that they have no gains and no gross income to report with respect to Mr. Kayata's gambling activity.

Petitioners further claim, based upon ***Commissioner v Groetzinger*** and the nine factors set forth in Treas Reg (26 CFR) § 1.183-2 (b), that Mr. Kayata is a professional gambler. As such, he is permitted to net his gambling winnings and losses on schedule C. Petitioners argue that Tax Law § 615 (f), therefore, is irrelevant since New York adjusted gross income is based upon petitioners' federal adjusted gross income pursuant to Tax Law § 612 (a) and when they filed amended returns, they reported gambling winnings and losses on schedule C. They argue that the doctrine of federal conformity requires New York to follow the federal statute, and any ambiguity in statutory construction must be resolved in their favor. Petitioners also argue in relation to a 2011 IRS tax audit, that the Tax Court adjudicated the issue of whether Mr. Kayata was a professional gambler, which decision must be respected and followed by New York.

Petitioners claim that the Division's audit only determined residency status and is devoid of any facts or analysis regarding whether petitioner is a professional gambler. They argue that the Division has presented no evidence to rebut petitioners' position that Mr. Kayata is a professional gambler and should, therefore, be permitted to file on schedule C.

Petitioners further assert that the conciliation conferee and the Division's auditor made statements at the conciliation conference conceding that Mr. Kayata was a professional gambler and was entitled to report gambling winnings and losses on schedule C. Petitioners also complain that the conciliation order states in error that $22,604.00 was to be applied to the assessment, when petitioners intended that money to cover the tax due on the amended returns.

The Division argues that the determination made in the notice of deficiency is presumed correct and that petitioners bear the burden of proof to show that the determination is in error. It contends that the Administrative Law Judge correctly determined that Mr. Kayata is a recreational gambler and he was not engaged in the trade or business of professional gambling. The Division asserts that gross income, as defined in IRC [26 USCA] § 61, includes gambling winnings and that petitioner's gambling winnings, therefore, are properly included in his New York adjusted gross income for the years at issue. The Division contends that petitioner's winnings must be reduced by a miscellaneous itemized deduction on schedule A ("below the line") for gambling losses. The Division further contends that petitioners' itemized deduction for gambling losses must be limited by the reduction factor under Tax Law § 615 (f).

The Division asserts that it is not bound by a federal determination of petitioners' income and may conduct its own examination and reach its own determination. Likewise, the Division asserts that it is not bound by the IRS's failure to audit or its acceptance of returns "as filed." Furthermore, the Division argues that the Tax Court's September 8, 2014 order and decision settling a 2011 IRS tax audit does not support Mr. Kayata's claim that he is a professional gambler.

The Division contends that petitioners' amended returns that show a small net profit from gambling are inconsistent with Mr. Kayata's admission that his annual gambling losses have

always exceeded his annual gambling winnings. It asserts that petitioners' initial manner of reporting, the timing of Mr. Kayata's subsequent claim of being a professional gambler, the amended submissions showing a small profit, and the incentive to avoid the result flowing from the application of Tax Law § 615 (f), indicate that such amended reporting position simply reflects a thinly veiled effort to establish one factor in support of Mr. Kayata's claim of being a professional gambler.

OPINION

1. Burden of Proof

Pursuant to Tax Law § 681 (a), where the Division examines a return and determines that there is a deficiency of income tax, it may issue a notice of deficiency to the taxpayer. Such a determination requires only a rational basis (***see e.g. Matter of Estate of Gucci***, Tax Appeals Tribunal, July 10, 1997 citing ***Matter of Atlantic & Hudson Ltd. Partnership***, Tax Appeals Tribunal, January 30, 1992). The taxpayer bears the burden of proving that the deficiency is erroneous (***see Matter of Gilmartin v Tax Appeals Trib.***, 31 AD3d 1008 [3d Dept 2006]; Tax Law 689 [e]).

With respect to the instant matter, the original intention of the Division's audit was to review petitioners' residency and claimed itemized deductions. The Division determined after its audit that petitioners were, indeed, New York statutory residents and, therefore, were required to report their income from all sources, including Mr. Kayata's gambling winnings that had not been previously reported in New York. For the purposes of computing the correct amount of New York tax, the Division accepted the amount of income and losses reported by petitioners, and the manner in which they reported on their initially filed federal tax returns for 2006, 2007, and 2008. Mr. Kayata's gambling winnings and losses were reflected in petitioners' federal

returns as miscellaneous income and itemized deductions on schedule A, respectively. Petitioners' original returns thus supplied the rational basis for the notice of deficiency.

After the notice of deficiency was issued, however, petitioners received new tax advice and changed their reporting position in amended federal, New York and New Jersey tax returns that were filed in 2012. Petitioners' new position is that Mr. Kayata was a professional gambler and his gambling winnings and losses should have been reported on schedule C and carried to his state return as business income or loss. Of course, the audit did not address that issue because the assertion and reporting position were not put forward until the time of the conciliation conference, well after the audit was completed and the notice of deficiency had been issued. Clearly, the rational basis for the issuance of the notice of deficiency is unaffected by petitioners' subsequent change of position.

Having found that there was a rational basis for the issuance of the notice of deficiency, petitioners bear the burden of establishing, by clear and convincing evidence, that Mr. Kayata is a professional gambler and that the Division's notice of deficiency was incorrect (***see Matter of Gilmartin v Tax Appeals Trib.***).

2. Gambling Winnings and Losses

At the federal level, calculating taxable income requires calculations of both gross income and adjusted gross income. Gross income includes all income from whatever source derived and includes gambling winnings (IRC [26 USCA] § 61 [a]; ***McClanahan v United States of America***, 292 F2d 630 [1961], ***cert denied*** 368 US 913 [1961]; ***Bon Viso v Commissioner***, TC Memo 2017-154, ***LaPlante v Commissioner***, TC Memo 2009-226; ***Lutz v Commissioner***, TC Memo 2002-89). Federal adjusted gross income is defined as gross income minus certain deductions known as above the line deductions that are not relevant here (IRC [26

USCA] § 62 [a]).

In New York, the adjusted gross income of a resident individual (the starting point for determining New York taxable income) "means his federal adjusted gross income as defined in the laws of the United States for the taxable year, with the modifications specified in this section" (Tax Law § 612 [a]). Petitioners have conceded that they were "statutory residents" of New York during the years at issue and that they were properly subject to tax, as such, on their income from all sources. Hence, Mr. Kayata's gambling winnings are properly included in his New York adjusted gross income for the years at issue. The questions presented are how such gambling winnings should be properly reported, and to what extent such winnings may be reduced by gambling losses incurred for each of the years at issue.

Petitioners initially argue that Mr. Kayata's gambling winnings are not accessions to wealth and, therefore, do not constitute income as defined in IRC (26 USCA) § 61 (a) (3). They contend that they never realized the income on which they are being taxed and that it is "phantom income." They claim that Mr. Kayata may not have been able to cash out with more than a few thousand dollars after any particular gambling session and, because his losses exceeded his gains, there was no recognition of income at the end of the year.[7]

The IRC does not set forth specific rules for determining income and losses for gambling activity except that section 165 (d) provides that "losses from wagering transactions shall be allowed only to the extent of the gains from such transactions" (IRC [26 USCA] § 165 [d]; ***Boneparte v Commissioner***, TC Memo 2017-193). Recognizing the practical difficulty of tracking gambling wagers, the IRS has interpreted the term "gains" in IRC (26 USCA) § 165 (d)

[7] It is noted that this assertion conflicts with Mr. Kayata's own testimony in which he stated that there are times that he could walk out of a casino with $150,000 in winnings (Tr p 61 line 2).

to require gain or loss "to be calculated over a series of separate plays or wagers" on a per-session basis (***Park v Commissioner***, 722 F3d 384 [DC Cir 2013]; quoting Memorandum AM2008–11, Office of Chief Counsel, Internal Revenue Service 4 [2008]). "In the IRS's words: 'We think that the fluctuating wins and losses left in play are not accessions to wealth until the taxpayer redeems her tokens and can definitively calculate' her net gains" (***Park v Commissioner*** 722 F3d at 386; ***Shollenberger v Commissioner***, TC Memo 2009-306; ***see Commissioner v Glenshaw***, 348 US 426 [1955]).

Insofar as petitioners are concerned, they realized gains constituting gross income when Mr. Kayata redeemed his tokens or cashed-in his chips at the end of a session of play (***Shollenberger v Commissioner***; IRC [26 USCA] § 165 [d]; Treas Reg [26 CFR] § 1.165-10). Gross income, of course, does not include the return of capital, which is an exclusion from gross receipts and which constitutionally may not be taxed (***Eisner v Macomber***, 252 US 189 [1920]; ***Doyle v Mitchell Brothers Co.*** 247 US 179 [1918]; ***Sullenger v Commissioner***, 11 TC 1076 [1948]; ***see*** 1 Mertens, Law of Federal Income Taxation, sections 5.06, 5.10 [1985]). It is a taxpayer's obligation to track his or her wagers and winnings and to keep accurate records of the same (IRC [26 USCA] § 6001). Here, petitioners have not substantiated their claim that they never realized the gambling income attributed to them.

3. Trade or business

The IRC mandates that casual gamblers be treated differently from taxpayers who are in the trade or business of gambling. Taxpayers engaged in the trade or business of gambling may deduct their gambling losses and other necessary business expenses against their gambling winnings on schedule C and report the same as business income or loss "above the line" in arriving at adjusted gross income on form 1040 (***see*** IRC [26 USCA] § 62 [a] [1]; ***Merkin v***

Commissioner TC Memo 2008-146; ***Bon Viso v Commissioner***; ***LaPlante v Commissioner***). Section 165 (d) is applied by comparing the gains from wagering transactions for the year with the losses from wagering transactions for the year (IRC [26 USCA] § 165 [d]; Treas Reg [26 CFR] § 1.165-10). If the gains exceed the losses, then there is a deduction equal to the losses. If the losses exceed the gains, then the deduction is equal to the gains. The deduction is an above the line deduction under IRC (26 USCA) § 62 (a) (***see e.g.***, ***Schollenberger v Commissioner***; ***LaPlante v Commissioner; Merkin v Commissioner***).

Casual or recreational gamblers, on the other hand, must report their winnings in gross income and carry the same through to federal adjusted gross income. Gambling losses are allowable to the extent of gambling winnings and are reported as miscellaneous itemized deductions on schedule A, and are commonly referred to as "below the line" deductions. (***see Bon Viso v Commissioner***; ***see Lutz v Commissioner***, TC Memo 2002-89 (slot machine winnings); ***Hochman v Commissioner***, TC Memo 1986-24 (horse race winnings). As such, the casual gambler's losses do not reduce adjusted gross income. Further, no deduction or allowance is allowed for any additional expenses incurred by the casual gambler (IRC [26 USCA] §§ 183, 262; Treas Reg [26 CFR] § 1.165-10; ***Boneparte v Commissioner***). For New York purposes, the gambling losses of a casual or recreational gambler are further limited by the reduction factor under Tax Law § 615 (f). Hence, as the Administrative Law Judge noted, a New York resident would have a strong incentive to report gambling activities as resulting from the conduct of a trade or business to avoid the impact of Tax Law § 615 (f). Irrespective of whether the taxpayer is a professional or a casual gambler, "[L]osses from wagering transactions shall be allowed only to the extent of the gains from such transactions" (IRC [26 USCA] § 165 (d); Treas Reg [26 CFR] § 1.165-10).

Thus, to determine the manner in which Mr. Kayata's gambling losses must be reported for New York tax purposes, it is necessary to determine whether he may be considered a professional gambler in the trade or business, or a casual or recreational gambler. Even though the phrase "engaging in (or carrying on) a trade of business" appears in many places throughout the IRC, the Code has never contained a definition of the words "trade or business" for general application and no regulation has been issued to clarify its meaning for all purposes (***Commissioner v Groetzinger***). The question of whether one is a professional gambler engaged in such activity as a trade or business "requires an examination of the facts in each case" (***Commissioner v Groetzinger***, citing ***Higgins v Commissioner***, 312 US 212, 217 [1941]). 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" (***Commissioner v Groetzinger***, 480 US at 35). To be considered a professional gambler, the taxpayer must engage in gambling for profit (IRC [26 USCA] §§ 183 [a], [b] and [c]; Treas Reg [26 CFR] § 1.183-2 [a]; ***Commissioner v Groetzinger***).

The IRC provides the following list of nine factors to be considered in determining profit motive for the purposes of IRC (26 USCA) § 183 and the regulations thereunder (IRC [26 USCA] § 183; Treas Reg [26 CFR] § 1.183-2 [b]: (1) manner in which the taxpayer carries on the activity; (2) the expertise of the taxpayer or his advisers; (3) the time and effort expended by the taxpayer in carrying on the activity; (4) expectation that assets used in 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 (***see e.g. Hendricks v Commissioner***, 32 F3d 94, 98

[4th Cir 1994]; ***Boneparte v Commissioner***). These factors are not exclusive, and no one factor is dispositive (Treas Reg [26 CFR] § 1.183-2 [b]; ***Hendricks v Commissioner***, 32 F3d at 98). As explained below, we find that Mr. Kayata was not a professional gambler for the years 2006, 2007 and 2008.

(1) Manner in which the taxpayer carries on the activity.

The manner in which the taxpayer carries on an activity may indicate a profit motive if the taxpayer acts in a "businesslike manner and maintains complete and accurate books and records," conducts the activity "in a manner substantially similar" to profitable activities of a similar nature, or attempts to improve the activity's profitability by adopting new operating methods and techniques and abandoning unprofitable methods (Treas Reg [26 CFR] § 1.183-2 [b] [1]). If a gambler kept detailed records of the gambling activity, such records might support the gambler's argument that he or she had a profit motive. A gambler might keep records to test the success of a particular technique.

The only records Mr. Kayata claims to have maintained were his gross wins and losses that he wrote on a calendar after each day of gambling. No such records or calendars, however, were provided in evidence. He maintained no records regarding the amount of capital with which he started each gambling session or the amount of his individual wagers. He did not record the amount of time played or the number of hours played. He did not track the time spent, wagers made, or winnings and losses on slot machines versus table games. He did not keep a separate bank account for his gambling activity. Instead, Mr. Kayata relied upon the summary information provided by some of the gambling venues, based upon the use of his gambler's card when using the slot machines, and upon certain forms W2-G concerning those winnings with respect to which petitioner was subjected to withholding taxes. Likewise, Mr. Kayata provided

no evidence that he tracked any non-wagering gambling related business expenses or any non-wagering benefits ("comps" for meals, drinks, etc.) as business income against which gambling losses may be offset (***see Mayo v Commissioner***). Rather, Mr. Kayata stated that the same were not significant enough to warrant the time or effort to do so (***see*** finding of fact 18).

Other factors to consider would be a change in operating methods, adoption of new techniques or abandonment of unprofitable methods in a manner consistent with an intent to improve profitability to indicate a profit motive and a business-like manner (***see Metz v Commissioner***, TC Memo 2015-54; ***Annuzzi v Commissioner***, TC Memo 2014-233). Other than moving to a different casino when losing, Mr. Kayata did not change his operating methods, adopt new techniques or abandon unprofitable methods to improve his profitability. He maintained his self-described "simple strategy" of playing the same types of machines in a consistent manner, notwithstanding the consistent result of gambling losses in excess of gambling winnings. Thus, although he no doubt desired to improve the odds of winning, petitioner's manner of conduct does not bear out an "intent to improve profitability" (Treas Reg [26 CFR] § 1.183–2 [b] [1]). The lack of complete records and the manner in which Mr. Kayata carried on his gambling activities do not support the claim that he was engaged in a trade or business (***see Dodge v Commissioner***, TC Memo 1998-89, ***affd*** 188 F3d 507 [6th Cir 1999]).

(2) The expertise of the taxpayer or his advisors.

Preparation for an activity by extensive study of its accepted business, economic and scientific practices, or consultation with industry experts, may indicate a profit motive where the taxpayer carries on the activity in accordance with such practices (Treas Reg [26 CFR] § 1.183-2 [b] [2]; ***Engdahl v Commissioner***, 72 TC 659, 668 [1979]). Efforts to gain experience and a willingness to follow expert advice may also indicate a profit motive (***Dworshak v***

Commissioner, TC Memo 2004-249).

Mr. Kayata has gambled for more than 30 years and considers himself a slot machine and gambling expert. He regularly had informal conversations with casino employees about the payout history of certain machines and spoke with and watched other gamblers to understand the payout patterns of slot machines. He testified to having read many books on gambling and watches gambling on television. This circumstantial evidence notwithstanding, Mr. Kayata produced no substantive proof that he consulted with experts, attended courses or educational seminars on gambling, generally, or on the operation of slot machines.

Mr. Kayata's testimony that he desires to "make money someday," "figure out the code" and "become a multi-millionaire" (Tr pp 46-49, 102) is credible. The mere fact that he desires to win and has tried to learn how to win at slot machines and table games, however, does not necessarily suggest that he played these games to make a profit. Such behavior is also consistent with playing the games for recreation or, alternatively, trying to limit losses (***see Boneparte v Commissioner***). We are not persuaded that Mr. Kayata's preparations, study practices, and consultations with casino workers and fellow gamblers demonstrate that he objectively and honestly intended to make a profit from his gambling activities (***see Free-Pacheco v United States***, 117 Fed Cl 228 [2014]).

(3) The time and effort expended by the taxpayer in carrying on the activity.

The fact that the taxpayer devotes much of his personal time and effort to carrying on an activity, particularly if the activity does not have substantial personal or recreational aspects, may indicate an intention to derive a profit (Treas Reg [26 CFR] § 1.183-2 [b] [3]; ***see Annuzzi v Commissioner***). Mr. Kayata testified that he works 43 hours a week (9:00 am to 7:00 pm Monday to Thursday and 9:00 am to 12:00 noon on Friday) at his chiropractic business in

Brooklyn, New York. His gambling would begin on Friday evening and last two to three days until he returned to his chiropractic business. He has no set hours for gambling, but sometimes doesn't sleep and gambles continuously for days. He testified that he spends 40 to 50 hours a week gambling on average and, some weeks, spends more time gambling than at his chiropractic business. The time spent gambling was a direct function of his available cash, coupled with his gambling success during any given gambling period. He may have quit gambling early, if he won big. Notwithstanding the purported long hours of gambling (Mr. Kayata submitted no records or other evidence to support his testimony), Mr. Kayata's primary activity was working full-time as a chiropractor. Although he gambled frequently, he gambled only after working the full week in his chiropractic business, which was his livelihood (***cf. Groetzinger*** [where the taxpayer had no other employment, spent six days a week at the racetrack for 48 weeks in 1978, and devoted from 60 to 80 hours each week to gambling-related activities]; ***see Merkin v Commissioner***).

(4) Expectation that assets used in activity may appreciate in value.

This factor is not applicable, as Mr. Kayata's gambling does not involve holding assets.

(5) The success of the taxpayer in carrying on other similar or dissimilar activities.

Previous experience in similar activities and successful conversion of unprofitable to profitable enterprises may indicate a profit motive (Treas Reg [26 CFR] § 1.183-2 [b] [5]). There is no direct evidence of such activity in this proceeding. Mr. Kayata's profession is that of a chiropractor and, apparently, he has a successful practice. While the professional aspects of practicing as a chiropractor are not obviously helpful to a gambler, the aspects of operating a successful business could be useful. That said, there is little evidence that Mr. Kayata transferred any of the management or recordkeeping skills that he might have applied or gained in his chiropractic business to his purported gambling business.

(6) The taxpayer's history of income or losses with respect to the activity.

A series of years of net income would be a strong indication that the activity is engaged in for profit. Year after year of losses, however, may indicate a lack of profit motive (Treas Reg [26 CFR] § 1.183-2 [b] [6]). Mr. Kayata has a history of gambling losses. Nothing in the record indicates that he has ever profited from gambling. He had net wagering losses of $76,422.00 in 2006, $317,025.91 in 2007, and $207,227.22 in 2008. Mr. Kayata's overall gambling losses are not only substantial in general, but are substantial in comparison to his winnings and indicate a lack of profit motive.

(7) The amount of occasional profits, if any, which are earned.

The amount of profits earned in relation to the amount of losses incurred and the amount of the investment may indicate a profit motive (Treas Reg [26 CFR] § 1.183–2 [b] [7]). Earning of substantial profits, even if the profits are sporadic, generally indicates a profit motive if the taxpayer's investment or losses are relatively small (***id.***). The mere opportunity to earn a substantial profit may also indicate a profit motive (***id.***). In contrast, an occasional small profit generally indicates a lack of profit motive if the taxpayer's investment or losses are relatively large (***id.***). Mr. Kayata provided no evidence of individual gains and losses to demonstrate any sporadic profits. The record shows that Mr. Kayata lost money gambling each year under review and he testified that his annual gambling losses have always exceeded his annual gambling winnings. As the Administrative Law Judge noted, Mr. Kayata, presumably like every gambler, desires to win (i.e., make a profit) from his gambling activity. Nonetheless, although he gambled significant amounts of money and testified to sometimes having big gains during a gambling session, his outcome on an annual basis has always been a net loss.[8]

[8] Petitioner admitted that his annual gambling losses have always exceeded his annual gambling winnings (***see*** finding of fact 16). This statement would appear inconsistent with his amended returns for each of the years at issue, on which petitioner reports a net profit from gambling (***see*** finding of fact 10). In fact, the reported amounts of net profit are minuscule in comparison to the amounts reported as gross receipts and cost of goods sold, and are the direct result of very slight reductions in the amounts of gambling losses previously reported on petitioner's returns as

(8) The financial status of the taxpayer.

Having substantial income or capital from other sources may indicate that the activity in question is not engaged in for profit, especially where losses from the activity generate substantial tax benefits or where there are recreational elements involved (Treas Reg [26 CFR] § 1.183–2 [b] [8]).

Mr. Kayata had substantial income from his chiropractic practice. He reported net profit from his work as a chiropractor in the amounts of $201,657.00, $235,418.00, and $255,352.00 for the years 2006, 2007, and 2008, respectively. That income, admittedly, allowed him to gamble as he did and endure the pattern of ongoing net annual losses from gambling. Simply put, petitioner is financially able to gamble as he does for whatever reasons move him to do so (***see Moore v Commissioner***, TC Memo 2011-173 [holding that taxpayer's financial status did not indicate profit motive when he derived bulk of income from employment outside of gambling]; ***see Merkin v Commissioner***).

(9) Elements of personal pleasure or recreation.

The presence of personal or recreational elements in an activity may indicate the absence of a profit motive (Treas Reg [26 CFR] § 1.183-2 [b] [9]). The mere presence of a personal or recreational aspect, however, does not necessarily preclude a profit motive (***id.***). Notwithstanding Mr. Kayata's avowed distaste for the activity, his continued gambling while sustaining significant annual net losses indicates that Mr. Kayata's interest in gambling involved elements of personal pleasure and recreation. He has been gambling for more than 30 years, since he was 18 years old. His testimony indicates that he enjoys the perks and recognition of a frequent gambler. Like the

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initially filed (***see*** finding of fact 10). A taxpayer is *obligated* to report all income. In contrast, while he is *entitled* to claim any legitimately deductible amounts in reduction of such income, he is *not obligated* to do so. Coupling petitioner's initial manner of filing, the timing of his subsequent claim of being a professional gambler, the accompanying submission of amended returns each showing a tiny profit, and the incentive to claim such professional gambler status as a means of avoiding the arguably harsh result flowing from the application of Tax Law § 615 (f), it appears that such amended reporting to show a profit simply reflects an effort to establish one factor in support of petitioner's claim of being a professional gambler.

taxpayer in ***Merkin v Commissioner***, his stated intention was to "figure out a way to make money someday where I could retire and rely on another source of income. So I'm actually testing the waters here to try to figure out another way to make income with my gambling experiences" (Tr p 102, line 15).

Considering all the facts and circumstances in this case, petitioners have failed to put forward sufficient proof to objectively demonstrate that Mr. Kayata's gambling activities during the years at issue were engaged in for profit such that he may deduct his gambling losses and expenses as if he was pursuing a trade or business. Mr. Kayata, therefore, must follow the methods of properly reporting gambling winnings and losses as a casual or recreational gambler.

4. Tax Law § 615

Tax Law § 615 pertains to itemized deductions. Tax Law § 615 (a) provides, in applicable part, that the "New York itemized deduction of a resident individual means the total amount of his deductions from federal adjusted gross income, other than federal deductions for personal exemptions, as provided in the laws of the United States for the taxable year, with the modifications specified in this section, *except as provided for under subsections (f) and (g) of this section* (emphasis added)."

Tax Law § 615 (f) is a reduction or limitation provision, and states the following:

> (f) Except as provided under subsection (g) of this section, the New York itemized deduction otherwise allowable under this section shall be reduced by the sum of the amounts determined under paragraphs one and two of this subsection.
>
> (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,
>
> * * *
>
> (B) in the case of a married individual filing a joint return or a surviving spouse, the numerator of which is the lesser of fifty thousand dollars or the excess

> of such individual's New York adjusted gross income over two hundred thousand dollars and the denominator of which is fifty thousand dollars;
>
> * * *
>
> (2) An amount equal to the New York itemized deduction of an individual 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, the numerator of which is the lesser of fifty thousand dollars or the excess of such individual's New York adjusted gross income over four hundred seventy-five thousand dollars and the denominator of which is fifty thousand dollars."

The application of this section is explained in section 115.5 of the Division's regulations (***see*** 20 NYCRR 115.5).

Notwithstanding petitioners' arguments to the contrary, and having already determined that Mr. Kayata's gambling winnings and losses are properly reportable as other income and miscellaneous itemized deductions, respectively, we find no merit to the petitioners' contention that Tax Law § 615 (f) does not apply to them (***see Matter of Karlsberg***, Tax Appeals Tribunal, March 1, 2010, ***confirmed***, 85 AD3d 1347 [3d Dept 2011], ***appeal dismissed*** 17 NY3d 900 [2011]).

Further, we are unpersuaded by petitioners' argument that the doctrine of federal conformity is applicable to New York's treatment of the itemized deduction for gambling losses. "Pursuant to the doctrine of federal conformity, courts [should] adopt, whenever reasonable and practical, the [f]ederal construction of substantially similar tax provisions, particularly where the state statute is modeled on [the] federal law" (***Matter of Astoria Fin. Corp. v Tax Appeals Trib. of State of N.Y.***, 63 AD3d 1316, 1319 [3d Dept 2009] [internal quotation marks and citations omitted]; ***accord Matter of Marx v Bragalini*****,** 6 NY2d 322, 333 [1959]; ***Matter of Delese v Tax Appeals Trib. of State of N.Y.***, 3 AD3d 612, 613 [3d Dept 2004], ***appeal dismissed*** 2 NY3d 793 [2004]; ***see also*** Tax Law § 607). While Tax Law § 615 (a) adopts, in part, federal law regarding

itemized deductions, it also explicitly sets forth a specific exception "as provided for under subsections (f) and (g) of this section." Tax Law § 615 (f) reduces the amount allowed for *all* itemized deductions based on the adjusted gross income of the taxpayer. Unlike the federal law that excepts certain items from its reduction of itemized deductions, including gambling losses (***see*** IRC [26 USCA] § 68 [c] [3]), New York does not except any itemized deductions from its reduction provisions (***see*** Tax Law § 615 [f], [g]). On this narrow issue, New York tax law is not substantially similar to federal tax law, and there is no requirement that we "strain" to construe the statutes as substantially similar (***Matter of CoData Corp. v Commissioner of Taxation & Fin.***, 163 AD2d 755, 756 [3d Dept 1990]).

Further, we find no merit to petitioners' arguments that Tax Law § 615 (f) is unconstitutional. First, we do not have jurisdiction to address the constitutionality of a statute on its face (***see Matter of Unger***, Tax Appeals Tribunal, March 24, 1994; ***see also Matter of Toothaker***, Tax Appeals Tribunal, September 9, 1993; ***Matter of Fourth Day Enters.***, Tax Appeals Tribunal, October 27, 1988). Second, we find no merit to petitioners' equal protection claim that Tax Law § 615 (f) results in a greater tax liability for them as compared to other similarly situated taxpayers. "[T]he equal protection clause does not prevent State Legislatures from drawing lines that treat one class of individuals or entities differently from others unless the difference in treatment is palpably arbitrary or amounts to an invidious discrimination" (***Karlsberg v Tax Appeals Trib. of State of N.Y.***, 85 AD3d 1347 [3d Dept 2011], ***appealed dismissed*** 17 NY3d 900 [2011], quoting ***Trump v Chu***, 65 NY2d 20, 25 [1985], ***appeal dismissed*** 474 US 915 [1985] [internal quotation marks omitted]; ***see Brady v State of New York***, 80 NY2d 596, 604, 605 [1992], ***cert denied*** 509 US 905 [1993]; ***Matter of Long Is. Light. Co. v State Tax Commn.***, 45 NY2d 529, 535 [1978]). Petitioners have made no such showing here. Taxpayers in the same

category of adjusted gross income are equally subject to the same reduction for all their itemized deductions in New York. As for petitioners' position compared to lower category earners, their higher tax burden is the acceptable result of a generally progressive or graduated tax system (***see generally Brady v State of New York***, 80 NY2d at 596); ***Matter of Karlsberg***).

Finally, petitioners erroneously contend that the order and decision of the Tax Court, dated September 8, 2014, confirmed Mr. Kayata's claim of being a professional gambler and that the Division is bound by its terms. First, the Division is not bound by a federal determination of petitioners' income and may conduct its own examination and reach its own determination (***Matter of Checho***, State Tax Commission, August 4, 1982; ***Matter of Dufton***, Tax Appeals Tribunal, April 5, 1995; ***see also*** 20 NYCRR 159.4). Moreover, the federal proceedings involved an IRS audit with respect to the 2011 tax year. It would have minimal, if any, relevance or value to the subject years. Lastly, the Tax Court's order and decision merely confirmed the bare terms upon which the parties settled the case. There is no indication that the Tax Court or the IRS in any manner agreed with petitioners' position that Mr. Kayata was engaged in a trade or business as a professional gambler.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of Alfred and Debra Kayata is denied;
2. The determination of the Administrative Law Judge is affirmed;
3. The petition of Alfred and Debra Kayata is denied; and
4. The notice of deficiency, dated July 7, 2011, is sustained.

DATED: Albany, New York
December 21, 2017

/s/ Roberta Moseley Nero
Roberta Moseley Nero
President

/s/ Dierdre K. Scozzafava
Dierdre K. Scozzafava
Commissioner

/s/ Anthony Giardina
Anthony Giardina
Commissioner