STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
ALFRED AND DEBRA KAYATA	:	DETERMINATION 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 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 years 2006, 2007 and 2008.

A hearing was held before Dennis M. Galliher, Administrative Law Judge, in New York, New York, on April 22, 2015 at 10:30 a.m., with all briefs due by August 21, 2015, which date began the six-month period for the issuance of this determination. Petitioners appeared by the 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 B. Ostwald, Esq., of counsel).

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 or to petitioners 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

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 Return). 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 (per 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."

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

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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.

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. 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 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.

[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)

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 W2-G (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.
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> 2) $34.00-an increase to the amount of petitioner's reported capital gain dividends.
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> 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)
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> 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).
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> 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).
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> 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

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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.

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:

"**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

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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).

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 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
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> 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)."

CONCLUSIONS OF LAW

A. "Gross income," as defined in section 61 of the Internal Revenue Code, includes gambling winnings (***see Bauman v. Commissioner***, 65 TCM 2165 [1993]). Federal adjusted gross income is defined as gross income less certain deductions not relevant herein (***see*** IRC § 62). Pursuant to Tax Law § 612(a), the New York 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." Petitioner has conceded that he was a "statutory resident" of New York, and that he was properly subject to tax, as such, on his income from all sources. Hence, petitioner's gambling winnings are properly included in his New York adjusted gross income for the years at issue. The questions presented herein are how is such gambling income properly reported, and to what extent may such income be reduced by gambling losses incurred for each of such years.

B. 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.
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> (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,
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> * * *
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> (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;
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> * * *
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> (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)

C. Gambling activities are, in most instances, considered a casual activity, an amusement or a hobby, and are treated as such for tax purposes. Thus, a casual or recreational gambler reports gambling winnings in gross income and carries the same through to (federal) adjusted

gross income (IRC §§ 61, 62). In turn, and as to a casual or recreational gambler, the income based on such reported winnings may be reduced or offset by a miscellaneous itemized deduction for gambling losses, but only to the extent of such gambling winnings, and associated expenses are not deductible (***see*** IRC §§ 183, 262).

D. Notwithstanding the foregoing, gambling activities that are pursued full time, in good faith and with regularity, to make income for a living, and not merely as a hobby may be considered a trade or business (***see Commissioner v. Groetzinger***, 480 US 23, 35-36 [1987]). As such, a professional gambler who is engaged in the trade or business of gambling may report gambling winnings as gross receipts, and is allowed to offset losses and expenses of gambling against such receipts on Schedule C. IRC § 162(a) allows a deduction for all ordinary and necessary expenses paid or incurred in carrying on a trade or business for profit. At the same time, IRC § 165(d) specifies that deductible losses from wagering transactions are limited to the gains from such transactions. In addition, professional gamblers may also deduct, under IRC § 162(a), ordinary and necessary business expenses (as distinguished from losses from wagering transactions) incurred in the conduct of their trade or business of gambling in further reduction of, and potentially in excess of gross receipts from, gambling winnings (***see Matter of Mayo***, 136 TC 81 [2011]; ***IRS Action on Decision*** 2011-06 [IRS acquiescence to Court's ruling in ***Mayo***]).

E. Under the foregoing, a professional gambler engaged in the trade or business of gambling reports his gambling winnings, his gambling losses to the extent of such winnings, and his ordinary and necessary (gambling) trade or business expenses on Schedule C, so as to arrive at net profit (or loss) from gambling, and carries such result, as business income (or loss), to Form 1040. Accordingly, the deductions for gambling losses and expenses (if any) as so reported via Schedule C are commonly referred to as "above the line" deductions and are used in arriving

at "gross income." In contrast, the gambling losses of a casual or recreational gambler who is not engaged in gambling as a trade or business are allowable only to the extent of gambling winnings, without any deduction or allowance for any additional business expenses, and are reported as a miscellaneous itemized deduction on Schedule A (commonly referred to as a "below the line" deduction). For federal purposes, where gambling losses equal or exceed gambling winnings (whether reported as business expenses [cost of goods sold] or as a miscellaneous itemized deduction), such losses simply offset gambling winnings, and the net tax result is essentially the same (***see*** Finding of Fact 23). For New York purposes, however, where gambling losses are reported as itemized deductions, such losses (to the extent of gambling winnings) are further limited by the reduction factor under Tax Law § 615(f). Hence, for a New York resident there exists a strong incentive to report gambling activities as resulting from the conduct of a trade or business so as to avoid the impact of Tax Law § 615(f).

F. This matter involves the treatment of petitioner's gambling winnings (income) and losses, with respect to which petitioner raises two issues.

First, and if petitioner's gambling winnings and losses are not derived from the conduct of a trade or business and thus are properly reported, respectively, as other income and miscellaneous itemized deductions, petitioner maintains that the itemized deduction limitation provisions of Tax Law § 615(f) present due process and equal protection violations. Petitioner premises this argument on the concept of federal and state tax conformity, maintaining that New York's reduction of his itemized deduction amount so as to be less than that allowable at the federal level constitutes a taking of property without due process, and results in a significantly greater tax liability for him as compared to similarly situated taxpayers. Second, petitioner maintains that he was in fact engaged in the trade or business of gambling as a professional, such

that his gambling winnings and losses are properly reported, respectively, as business gross receipts and expenses on Schedule C rather than as other income and itemized deductions on Schedule A. Accordingly, petitioner argues that as Schedule C business expenses, his gambling losses are not subject to the itemized deduction limitation under Tax Law § 615(f), but rather are fully allowable in reduction of his gambling winnings (to the extent thereof), hence leaving as reportable only his trade or business net profit or loss from gambling. In this case, and as reported on his amended returns for the years at issue, after offsetting gambling winnings by *claimed* gambling losses on Schedule C, petitioner would have net taxable gambling income (net profit per Schedule C) for the years at issue in the amounts of $400.00, $600.00 and $400.00, respectively (***see*** Finding of Fact 10).

G. As an initial matter, petitioner alleges that the Division and its counsel conceded his status as a professional gambler at conference (***see*** Finding of Fact 12), such that the Division is precluded from contesting such status herein is rejected. Petitioner appears to premise this allegation upon the Division's receipt of petitioners' amended returns, at conference, *for filing*. Petitioners' allegation is rejected. Receiving petitioners' amended returns, at conference, *for filing* does not represent the Division's acquiescence to the position set forth on the amended returns. In fact, petitioners' allegation that the Division conceded in this respect is entirely at odds with the issuance of a Conciliation Order sustaining the Division's Notice of Deficiency as issued. Moreover, the Bureau of Conciliation and Mediation Services is established within the Division of Taxation and is responsible "for providing conciliation conferences" (Tax Law § 170[3-a][a]). Such conferences are provided at the sole option of the taxpayer, are not quasi-judicial in nature and are not governed by "procedures substantially similar to those used in a court of law" (***Ryan v. New York Telephone Co.***, 62 NY2d 494, 499 [1984]). The conciliation

conference is not an "adjudicatory proceeding" as defined in Article 3 of the State Administrative Procedure Act (SAPA). Specifically, the conciliation conference process does not comply with record requirements for adjudicatory proceedings under SAPA § 302 (conciliation conferences are neither electronically nor stenographically recorded) and conciliation orders do not comply with requirements for decisions, determinations, and orders under SAPA § 307 (conciliation orders contain neither findings of fact nor conclusions of law). The conciliation conference process is, in essence, a settlement forum (***see*** 20 NYCRR 4000.5[c][1][I]), and discussions and proposed adjustments made at conciliation conferences are in the nature of settlement negotiations and may not be considered as precedent or be given any force or effect in any subsequent administrative proceeding (Tax Law § 170[3-a][f]; ***see Matter of Petak v. Tax Appeals Tribunal,*** 217 AD2d 807 [1995]; ***Matter of Sandrich, Inc.***, Tax Appeals Tribunal, April 15, 1993). The Conciliation Order in this case notes that "$22,604.00 has been applied to the assessment." It appears this sum was included with the amended returns when they were submitted, at conference, for filing and consideration. There is no apparent dispute, regardless of the outcome herein, that petitioner is entitled to receive credit for such amount remitted.

H. Petitioner's first substantive argument, that the itemized deduction of gambling losses (to the extent of gambling winnings) is not subject to the itemized deduction reduction provisions of Tax Law § 615(f), has been specifically addressed and rejected. In fact, not only has the substance of this claim been rejected, but so have previous constitutional challenges to such provisions and their application, as in this case (***see Matter of Karlsberg***, Tax Appeals Tribunal, March 1, 2010, ***confirmed***, 85 AD2d 1347 [2011]). Hence, the Division's audit determination of petitioner's liability for the years in issue was correct and will be upheld, unless petitioner can establish that he was engaged in business or trade as a professional gambler, whereby his income,

losses and expenses incurred in connection therewith are properly reported on Schedule C (and are not subject to limitation under Tax Law § 615[f]).

I. Neither Congress nor the IRS has explicitly defined what constitutes a "trade or business" under IRC § 871 and, similarly, there is no precise or settled definition of the term "professional gambler." Rather, the question of whether one is a professional gambler engaged in such activity as a trade or business for profit is properly determined based on a review of all of the surrounding facts and circumstances, and in particular upon consideration of the nine factors set forth in Treas Reg § 1.183-2[b] (***see Commissioner v. Groetzinger***; ***see also Myers v. Commissioner***, 2007 WL 4117442, TC Summ Opn 2007-194 [November 19, 2007]). In resolving this factual question, greater weight is given to the objective facts than to the taxpayer's statements of intention (***see Meyers v. Commissioner***).

J. The nine factors set forth in the regulations to help determine whether a taxpayer has engaged in an activity with the reasonable expectation of realizing a profit are as follows:

(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) 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, that are earned,
(8) the financial status of the taxpayer, and
(9) elements of personal pleasure or recreation (Treas Reg § 1.183-2[b]).

The factors listed above are intended as guidelines and are nonexclusive. Accordingly, no single factor or combination of factors is conclusive in indicating a profit objective (***see Ranciato v. Commissioner***, 52 F3d 23 [2d Cir 1995]). Additionally, as stated by the court in ***Metz v. Commissioner***, "[w]hile we organize our analysis by the nine factors listed in the regulation [citation omitted] we don't use a reasonable-person standard or substitute our own

business judgment for what the [taxpayers] could have done better. Our focus is instead on the [taxpayers'] subjective intent and we use the factors to establish that intent" (***Metz v. Commissioner***, TC Memo 2015-54 [2015], ***citing Wolf v. Commissioner***, 4 F3d 709 [9th Cir 1993]).

K. The factors enumerated above, as applied in turn to petitioner's claim, are as follows:

1) The Manner in Which the Taxpayer Carries on the Activity:

The first factor considers whether the taxpayer engaged in the activity in a businesslike manner (Treas Reg § 1.183-2[b][1]). In determining whether the taxpayer conducted the activity in a businesslike manner, the courts have considered whether accurate books were kept, whether the activity was conducted in a manner similar to other comparable businesses and whether changes were attempted in order to make a profit (***Dodge v. Commissioner***, TC Memo 1998-89 [1998], ***affd*** 188 F3d 507 [6th Cir 1999]). A review of the record does not bear out that petitioner conducted his gambling activities in a businesslike manner. Petitioner claims to have maintained contemporaneous and detailed records, including tracking his gambling activities on calendars he kept at his home. No such records, including calendars, were provided in evidence. Rather, petitioner relied upon the summary information provided by some of the venues at which he gambled, based upon his use of his gambler's card, and upon certain forms W2-G concerning those winnings with respect to which petitioner was subjected to withholding taxes. Petitioner did not establish or maintain separate bank accounts for his gambling activities. In addition, a professional gambler may be entitled to deduct substantiated ordinary and necessary non-wagering expenses (such as transportation, table fees, the deductible portion of meals, business related educational costs and the like), as business expenses against which gambling winnings may be offset, and to include substantiated non-wagering benefits ("comps" or "perks" for meals,

drinks, lodging and the like) as business income against which gambling losses may offset (***see Matter of Mayo***). There is no claim or evidence that, aside from wagering winnings and losses, petitioner tracked any other such gambling related business expenses or gains. Rather, petitioner stated that the same were not significant enough to warrant the time and effort to do so (***see*** Finding of Fact 18). This manner of recording and reporting his gambling activities does not support the claim that petitioner was engaged in a trade or business.

Another factor courts consider in determining if an activity is conducted in a businesslike manner is whether a taxpayer made changes in operating methods and adopted new techniques (***see Metz v. Commissioner***; ***Annuzzi v. Commissioner***, TC Memo 2014-233 [2014]; Treas Reg § 1.183-2[b][1]). Petitioner 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 (***see*** Finding of Fact 16). While petitioner stated his aim was to figure out how the machines were programmed to pay out, there is no claim or evidence that petitioner has taken any programming courses or otherwise studied the programming of machine-based games of chance in any manner beyond his own gambling activities with such machines. Essentially, petitioner employed the same techniques notwithstanding an unbroken pattern where his annual and overall losses exceeded his annual and overall winnings. Thus, although he no doubt desired to improve his odds of winning, petitioner's manner of conduct does not bear out any increased likelihood of doing so.

2) Expertise of the Taxpayers or their Advisors:

A taxpayer's "consultation with those who are expert" in a particular activity may indicate a profit motive (Treas Reg § 1.183-2[b][2]). As noted above, there is no claim or evidence that petitioner has taken any programming courses or otherwise studied the

programming of machine-based games of chance which are his preferred gambling activities. There is no evidence that petitioner engaged in any consultations or sought the advice of anyone held out as an expert in gambling matters, or took any courses on gambling strategies or attended any related educational seminars (***see*** Finding of Fact 19). In sum, the record reflects nothing in the way of seeking or obtaining new information or suggested strategies beyond many hours spent at gambling venues coupled with some ancillary reading and watching televised gambling.

3) The Time and Effort Expended in Carrying on the Activity:

Employing substantial time and effort to an activity may be indicative of a profit motive (Treas Reg § 1.183-2[b][3]; ***see Annuzzi v. Commissioner***). Petitioner works full-time (35 to 40 hours per week) as a chiropractor, and admits it is the fruits of this labor that provide him with the wherewithall to gamble as he does. Petitioner did spend considerable time gambling "every weekend," and might well be described as a serious and committed gambler. He also played scratch-off lottery games during the week. At the same time, he had no set hours for conducting his gambling activities, but rather the same depended entirely upon whether or not petitioner was successful, based upon the amount of bankroll he carried with him each time he gambled, and how much he won or lost on any given weekend (***see*** Finding of Fact 16). In sum, the time spent gambling was a direct function of his available cash, coupled with his financial result in light thereof, during any given gambling period.

4) Expectation that Assets May Appreciate:

Since the "asset" involved was cash, this factor is essentially irrelevant to the present matter, noting only that it is doubtless the aim of every gambler to win more than they place at risk in a wager, such that the asset placed at risk (the cash) would, hopefully, increase (or "appreciate").

5) Taxpayer's Success in Other Activities:

Petitioner's primary trade or business is as a chiropractor. There is no evidence that any skills or aptitudes from this business would be applicable or were applied by petitioner to the pursuit of his gambling activities, or that his capabilities as a chiropractor were of benefit in such gambling activities.

6) The Taxpayer's History of Income or Loss:

A history of substantial losses may indicate that one is not conducting gambling activities for profit. Unlike petitioner's chiropractic practice, his annual (and overall) losses from gambling have always exceeded his winnings from gambling, such that gambling has never been a profitable undertaking for petitioner (***see*** Finding of Fact 16). The record discloses that petitioner's overall gambling losses are not only substantial in general but are substantial in comparison to his winnings.

7) Amount of Occasional Profit:

"A taxpayer's derivation of some profits from an otherwise money-losing venture may support the existence of a profit motive" (***Annuzzi v. Commissioner*** at 12). The Regulation provides that "an opportunity to earn a substantial ultimate profit in a highly speculative venture is ordinarily sufficient to indicate that the activity is engaged in for profit even though losses or only occasional small profits are actually generated" (Treas Reg § 1.183-2[b][7]). Petitioner, presumably like every gambler, desires to win (i.e., make a profit) from his gambling endeavors. Nonetheless, and as noted above, although petitioner gambled significant amounts of money and

sometimes won more than he lost during an episode of gambling, his outcome for the relevant measuring period (i.e., annually) has always been a net loss.[7]

8) The Financial Status of the Taxpayer:

The Treasury Regulations provide that an indication of a profit motive may be discerned when a taxpayer does not have substantial income or capital from sources unrelated to the activity (Treas Reg § 1.183-2[b][8]).

> "the existence of independent sources of wealth for the taxpayers will not automatically gainsay an otherwise proved actual and honest capitalistic motivation underlying a mercantile activity which in fact failed to yield economic gains for the taxpayers, especially if, as here, the taxpayers suffered actual out of pocket monetary losses in that undertaking, rather than mere paper losses manufactured to shelter unrelated income" (***Holmes v. Commissioner***, 184 F3d 536 [6th Cir 1999], ***citing Ranciato v. Commissioner***, 52 F3d 23 [2d Cir 1995]).

Petitioner did have substantial income from his chiropractic practice, which in fact allowed for him to gamble as he did, to endure the pattern of ongoing net annual losses from gambling, and to continue to gamble. Unlike the taxpayer in ***Groetzinger***, who gambled 60 to 80 hours per week for 48 weeks per year and had no other employment, petitioner was employed in his chiropractic practice full time, and gambled mainly after he had finished his work week as a chiropractor. Petitioner's actual livelihood was not focused on, or derived from, his gambling activities. Rather, such gambling activities were admittedly dependent for their continuation

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[7] 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 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), leaves the clear implication that such amended reporting to show a profit simply reflects a thinly veiled effort to establish one factor in support of petitioner's claim of being a professional gambler.

upon petitioner's continued success as a chiropractor (***see*** Finding of Fact 17). Simply put, petitioner is financially able to gamble as he does for whatever reasons move him to do so.

9) Elements of Personal Pleasure or Recreation:

The Treasury Regulations provide that the presence of recreational or personal pleasure may suggest that the activity may not be engaged in for profit (Treas Reg § 1.183-2[b][9]). Notwithstanding his avowed distaste for gambling (***see*** Finding of Fact 19), petitioner continues to gamble in the same manner under which he has consistently been unsuccessful overall. While petitioner states he is intently focused on gambling when he is so engaged, he also received and enjoyed various benefits or perks typically afforded to any frequent casino visitor who engages in gambling, especially those whose gambling involves significant and substantial sums of money.

L. In addition to the foregoing factors and analysis, it is particularly noteworthy that petitioner only commenced reporting his gambling activities under the status of being a professional gambler engaged in a trade or business as such, *after* being subjected to the impact of Tax Law § 615(f) as the result of the Division's audit. As noted, petitioner's amended filings reflected a tiny amount of net profit for each year, and were accompanied by the statement that his claim of professional status was based on "the amount of winnings" (***see*** Finding of Fact 10). This statement gives no acknowledgment to the amount of losses that consistently accompanied and exceeded such winnings (***see*** Finding of Fact 16). Further, the limitation on itemized deductions imposed by the reduction factor under Tax Law § 615(f), applicable to New York resident taxpayers, provided a strong incentive for petitioner to report his gambling activities as a professional.[8] Finally, petitioner strenuously asserted that the Tax Court's September 8, 2014

[8] There is no such strong incentive for federal (or New Jersey) reporting purposes, since neither imposes an itemized deduction limitation impacting gambling losses akin to Tax Law § 615(f). Hence, under the facts of this case, whether petitioner reported his gambling activities as a casual gambler as opposed to a professional gambler

Order and Decision confirmed his claim of being a professional gambler (***see*** Finding of Fact 22 at note 5). This assertion is rejected as inaccurate and unsupported. First, the federal proceedings involved an IRS audit and concerned a year (2011) subsequent to those at issue herein, and thus would have minimal if any relevance or value as to the subject years. More to the point, the Tax Court's Order and Decision merely confirms the bare terms upon which the parties settled the case for the amount of additional tax asserted by the IRS coupled with abatement of the penalty asserted. There is absolutely no affirmative indication that the Court, or the IRS, in any manner acceded to petitioner's position that he was a professional gambler (***see*** Findings of Fact 21 through 26).

M. With all of the above factors considered, the weight of the evidence clearly does not support petitioner's amended reporting position that he was engaged in gambling as a trade or business. Rather, such claim is properly viewed as a reporting position, taken only to mitigate the impact of Tax Law § 615(f) and, as such, is rejected.

N. The petition of Alfred and Debra Kayata is hereby denied and the Division's Notice of Deficiency, dated July 7, 2011, is sustained.

DATED: Albany, New York
February 11, 2016

/s/ Dennis M. Galliher
ADMINISTRATIVE LAW JUDGE

(aside from the accuracy of such reporting) would have little if any actual tax liability impact for federal (or New Jersey) purposes.