

IN THE OREGON TAX COURT  
MAGISTRATE DIVISION  
Income Tax

KEVIN L. RUSSELL and SUSAN RUSSELL,	)	
	)	
Plaintiffs,	)	TC-MD 060008D
	)	
v.	)	
	)	
DEPARTMENT OF REVENUE,	)	
State of Oregon,	)	
	)	
Defendant.	)	<b>DECISION</b>

This matter is before the court on the parties’ cross motions for summary judgment. At a case management conference held Wednesday, November 8, 2006, the parties agreed that the court should consider the following pleadings: Stipulation of Facts, filed May 16, 2006; Plaintiffs’ Motion for Summary Judgment, filed June 15, 2006, including Memorandum in Support of Plaintiffs’ Motion for Summary Judgment; Orlando Medina’s Affidavit in Support of Plaintiffs’ Motion for Summary Judgment and Affidavit of Susan Russell; Defendant’s Motion for Summary Judgment and Response to Plaintiffs’ Motion for Summary Judgment, filed July 17, 2006; and Plaintiffs’ Reply to Defendant’s Motion for Summary Judgment and Response to Plaintiffs’ Motion for Summary Judgment, filed July 31, 2006. The parties agreed that oral argument was not necessary.

I. STATEMENT OF FACTS

“Plaintiffs, Oregon residents, timely filed an Oregon Form 40 income tax return for tax year 2001 that indicated gambling winnings of \$107,231 and claimed gambling losses of that same amount.” (Stip Facts 1.) Plaintiff, Susan Russell (Russell), “was a compulsive gambler during tax year 2001,” frequenting “the following establishments: Spirit Mountain, Oregon;

Portland Area Video Poker Bars, Oregon; Lucky Eagle, Washington; Clearwater River, Idaho; Kamiah Casino, Idaho, Nez Pierce (*sic*) Casino.” (Russell Aff 2 and 4.) Russell “gambled on approximately 187 separate occasions”; she played until she “lost all the funds” that she withdrew from her home safe or automatic teller machines. (Russell Aff 6, 7, 8.)

Defendant requested that Plaintiffs submit documents to substantiate their claimed gambling winnings and losses. Plaintiffs submitted the following in response to Defendant’s request: “[A] letter dated September 29, 2004, accompanied by a schedule designated as a ‘summary’ of ‘2001 Gambling Expenses identified from Partial Records,’ and three Forms W-2G \*\*\* a document entitled ‘Listing of 2001 Gambling Losses,’ copies of credit card statements, bank statements, Ms. Russell’s Schedule C from Plaintiffs’ federal income tax return for 2001, and a calendar designated ‘2001 Gambling Days-For ‘Cash Taken’ Entries.’” (Stip Facts 3, 7.) Plaintiffs submitted a summary entitled “Amount of 2001 Gambling Expenses Identified from Partial Records” which totaled \$100,440. (Stip Facts Ex D 3/4.) That summary total was less than the total (\$112,022.86) reported in “Listing of 2001 Gambling Losses.” (Stip Facts Ex F 2/42-2/44.) The parties stipulate that “[n]one of the gambling that resulted in the claimed gambling losses took place using ‘key cards’ or ‘club cards’ provided by casinos. Key cards and club cards provide a record of coins put into a gambling machine (‘coin-in’), and coins the player receives from the machine (‘coin-out’).” (Stip Facts 5, 6.) Russell states that it was her “practice to net all winnings from a given day against all [her] losses for a given day because I did not account for each ‘coin-in’ and ‘coin-out’ transaction.” (Russell Aff at 9.)

The parties agree that “[t]he sole issue before this court is whether plaintiffs have presented adequate substantiation and record-keeping sufficient to allow the deduction of the claimed gambling losses” for tax year 2001. (Stip Fact 12.)

## II. ANALYSIS

For Oregon income tax purposes, the parties agree that “[g]ross income includes all income from whatever source derived, including gambling.” (Def’s Mot for Summ J and Resp to Ptf’s Mot for Summ J (Response) at 5, citing Internal Revenue Code (IRC) § 61 and *McClanahan v. United States*, 292 F2d 630, 631-632 (5 Cir 1961)). The parties agree that “Oregon has adopted the federal definition of taxable income, subject to exceptions not relevant to this case.” (*Id.*, citing ORS 316.048; Memo in Support of Ptf’s Mot for Summ J (Motion) at 2.) In computing taxable income, losses sustained during the taxable year on wagering transactions shall be allowed as a deduction by a taxpayer, but “only to the extent of the gains from such transactions.” IRC §165(d). On their filed federal income tax return, Plaintiffs limited their losses from gambling to their reported income from gambling. (Stip Facts Ex B 1-35, 3-35.)

A taxpayer has the burden of providing substantiation for deductions, which “are a matter of legislative grace.” *Hartsock v. Commissioner*, 2006-205, 2006 WL 2734238, citing *Schooler v. Commissioner*, 68 TC 867, 869 (1977); and *INDOPCO, Inc. v. Commissioner*, 503 US 79, 84, 112 S Ct 1039, 117 L Ed 2d 226 (1992). With respect to the reporting of gambling winnings and gambling losses, the Internal Revenue Service issued general guidelines in Revenue Procedure 77-29; 1977-2 CB 538. The Revenue Procedure outlines a taxpayer’s “responsibility for maintaining adequate records in support of winnings and losses”: *Id.*

“Under *Section 6001 of the Code*, taxpayers *must* keep records necessary to verify items reported on their income tax returns. Records supporting items on a tax return should be retained until the statute of limitations on that return expires\*\*\*

“An accurate diary or similar record regularly maintained by the taxpayer, supplemented by verifiable documentation will usually be acceptable evidence for substantiation of wagering winnings and losses. In general, the diary should contain at *least* the following information:

- 1) Date and type of specific wager or wagering activity;

- 2) Name of gambling establishment;
- 3) Address or location of gambling establishment;
- 4) Names(s) of other person(s) (if any) present with taxpayer at gambling establishment; and
- 5) Amount(s) won or lost.

“Verifiable documentation for gambling transactions includes but is not limited to Forms W-2G; Forms 5754, Statement by Person Receiving Gambling Winnings; wagering tickets, canceled checks, credit records, bank withdrawals, and statements of actual winnings or payment slips provided to the taxpayer by the gambling establishment.”

*Id.* (emphasis added.)

Plaintiffs allege that the documentation they submitted to substantiate their claimed gambling losses meets the general guidelines. In such cases, the taxpayer has the “burden of showing that he is entitled to a particular deduction.” *Betson v. Commissioner*, 802 F2d 365, 367 (9<sup>th</sup> Cir 1986). The Ninth Circuit Court of Appeals clearly stated that “[t]he question of the amount of [gambling] losses sustained by a taxpayer is a question of fact to be determined from the facts of each case, established by the taxpayer’s evidence, and the credibility of the taxpayer and supporting witnesses.” *Norgaard v. Commissioner*, 939 F2d 874, 878 (1991), citing *Green v. Commissioner*, 66 TC 538, 545-46 (1976) *acq.* 1980-2 CB 1.

Most important, “the credibility of the taxpayer is a *crucial* factor.” *Norgaard* at 878. (emphasis added). In this case, Russell appeared by affidavit; Plaintiffs did not testify. There was no testimony or affidavits from supporting witnesses. The court was denied the opportunity to conclude that Plaintiffs’ evidence was corroborated by “forthright, credible and candid testimony.” *Id.*, citing *Wolkomir v. Commissioner*, 40 TCM (CCH) 1078, 1079-1080 (1980). *See also Drews v. Commissioner*, 25 TC 1354, 1355 (1956) (allowing partial deduction based on taxpayer’s credible testimony concerning estimate of losses without records), *acq.*, 1956-2 CB 1;

and *Taormina v. Commissioner*, 35 TCM (CCH) 400, 402 (1976) (allowing estimated partial deduction based on losing tickets and taxpayer's credible testimony.)

The court now turns to the evidence offered by Plaintiffs to support their claimed losses. Russell states that she “kept concurrent records of [her] gambling activities which [she] summarized on an excel spreadsheet file entitled ‘Listing of 2001 Gambling Losses.’” (Russell Aff 6.) Her spreadsheet is supported by bank credit card statements noting cash withdrawals from automatic teller machines (ATM), cash-on-hand from her personal safe, and a 2001 calendar, noting gambling days. However, it lacks the information that should be found in a diary or log, including “name of gambling establishment,” “address or location of gambling establishment” and, most important, “amount(s) won or lost.” Rev Proc 77-29. Courts have questioned “the reliability of the self-serving and uncorroborated workpapers” produced to substantiate gambling losses. See *Hartsock*. Further, statements listing ATM credit card withdrawals prove that money was withdrawn, but do not prove that the money was spent and lost at a casino or other establishment offering gambling. Those statements in and of themselves are not sufficient to meet the IRS requirement of a diary or log. Defendant enumerated the many shortcomings of Russell's contemporaneous diary or log presented in the Listing of 2001 Gambling Losses. (Def's Mot for Summ J and Resp to Ptf's Mot for Summ J at 15-21.) Many of the discrepancies noted by Defendant might have been explained or clarified if Russell had testified. She did not.

Plaintiffs state that “[e]ven if Plaintiff's Records are Deemed Insufficient” the “Cohan Rule Provides Plaintiffs' (*sic*) with Relief.” (Ptf's Memo in Support of Ptf's Mot for Summ J at 8.) In *Norgaard*, the Ninth Circuit stated that “[i]n order to qualify for the estimation treatment under *Cohan*, the taxpayer must establish that he is entitled to some deduction.” *Norgaard* at 879, citing *Edelson v. Commissioner*, 829 F2d 828, 831 (9<sup>th</sup> Cir 1987). The Court went on to state that

“[h]ad the Norgaards provided a credible evidentiary basis from which the tax court could have estimated, first, their unquantified, unreported winnings, and second, their losses, they could have benefited from application of the rule of *Cohan*. \* \* \* However, the rule of *Cohan* cannot be applied in the presence of unquantified, unreported winnings unless both winnings and losses are estimated.” *Id.*

Russell avers in her affidavit that it was her “practice to net all winnings from a given day against all my losses for a given day.” (Russell Aff 9.) Plaintiffs’ Memorandum in Support of Plaintiffs’ Motion for Summary Judgment cites *Greenfeld v. Commissioner*, TC Memo 1966-83 in support of their request that the court accept Russell’s “daily netting of winnings and losses.” (Ptf’s Memo at 9.) In *Greenfeld*, the Tax Court accepted the taxpayer’s method of listing the “‘net’[of] the daily wins and losses” and entering “the result on master sheets which he kept for each month of the racing season.”<sup>1</sup> The Tax Court accepted the taxpayer’s method because the taxpayer “impressed” the court “with his candor and veracity in such a way as to lend credence to the substantial authenticity of his summary records” and he “supported his summary records with proof of his net worth.” *Id.* Once again, the taxpayer’s testimony was the “crucial factor.” *Norgaard* at 878. In the matter before the court, Russell’s testimony was in the form of an affidavit which precluded the court from having an opportunity to assess her “veracity.” *Id.*

On federal income tax returns, taxpayers are required to report gambling winnings as Other Income to arrive at adjusted gross income. Gambling losses are reported as itemized deductions on Schedule A, Other Miscellaneous Deductions. On their federal income tax return, Plaintiffs only listed as other income the gambling winnings reported on three W-2G forms issued

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<sup>1</sup> The tax law has changed since *Greenfeld* was decided. IRC § 68 limits the itemized deductions of certain taxpayers like Plaintiffs who report adjusted gross income above an applicable amount. (Stip Facts Ex B 3/35.) To net gambling winnings and gambling losses would understate either adjusted gross income or itemized deductions.

by the casinos. Each item, gambling winnings and gambling losses, must be separately reported. Based on Russell's affidavit, the court concludes that Russell received gambling winnings in addition to those reported on W-2G forms; however, the amounts of those winnings were not reported on Plaintiffs' tax returns nor quantified for the court. Given Russell's reported gambling winnings, it is highly unlikely that there were no gambling losses. However, the court concludes that the offered evidence does not fully support Plaintiffs' claimed gambling losses.

The *Norgaard* holding prevents the court from applying the rule of *Cohan* when "[n]either winnings nor losses can reasonably be estimated." *Id.* at 879. The court was presented with a list of credit card cash withdrawals and approximately 79 reported times that cash amounts of \$500 were taken to play "Video Poker" at "local taverns." (Stip Facts Ex F 2/42- 4/42.) From that information, it is unclear how the court is to estimate gambling winnings and gambling losses. For example, is the court to conclude that all cash withdrawals resulted in no winnings and only losses? Or, is the court to conclude that 20, 30 or 50 percent of the cash withdrawals resulted in winnings; if so, what is the amount of the winnings? The court does not find the evidence sufficient to answer the issues before it. Without additional evidence, the court cannot agree that the amounts listed, including ATM cash withdrawals, "cash taken" and Russell's self-employment income, were lost. Further, there is no evidence to support the claim that a \$15,800 credit line from an unidentified source was borrowed and then lost.

### III. CONCLUSION

After carefully reviewing the evidence and applicable law, the court concludes that Plaintiffs are not allowed a gambling loss deduction for tax year 2001 because there is no credible

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basis for determining Russell's gambling winnings and gambling losses. Now, therefore,

IT IS THE DECISION OF THIS COURT that Plaintiffs' appeal is denied.

Dated this \_\_\_\_\_ day of January 2007.

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JILL A. TANNER  
PRESIDING MAGISTRATE

***If you want to appeal this Decision, file a Complaint in the Regular Division of the Oregon Tax Court, by mailing to: 1163 State Street, Salem, OR 97301-2563; or by hand delivery to: Fourth Floor, 1241 State Street, Salem, OR.***

***Your Complaint must be submitted within 60 days after the date of the Decision or this Decision becomes final and cannot be changed.***

***This document was signed by Magistrate Jill A. Tanner on January 3, 2007. The Court filed and entered this document on January 3, 2007.***