STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
RAYMOND AND HORTENSE MARAGH	:	DETERMINATION DTA NO. 830290
for Redetermination of a Deficiency or for Refund of New York State Personal Income Tax under Article 22 of the Tax Law for the Years 2007, 2008, 2009 and 2011.	:	

Petitioners, Raymond and Hortense Maragh, filed a petition for redetermination of a deficiency or for refund of New York State personal income tax under article 22 of the Tax Law for the years 2007, 2008, 2009 and 2011.

A formal hearing by videoconference was held before Donna M. Gardiner, Supervising Administrative Law Judge, on August 3, 2023, with the final brief to be submitted by November 22, 2023, which date commenced the six-month period for the issuance of this determination. Petitioners appeared pro se. The Division of Taxation appeared by Amanda Hiller, Esq. (Peter B. Ostwald, Esq., of counsel).

ISSUE

Whether petitioners have sustained their burden of proof to establish entitlement to a refund of personal income taxes paid for the years 2007, 2008, 2009 and 2011.[1]

FINDINGS OF FACT

1. Petitioners, Raymond and Hortense Maragh, late filed New York State resident income tax returns, forms IT-201, for each of the years 2007, 2008, 2009 and 2011 (returns).

[1] Although the petition included protests for the years 2013 and 2014, petitioners no longer contest those years.

2. Petitioners filed their 2007 return on October 1, 2012. On line 18, petitioners reported federal adjusted gross income in the amount of $1,298,948.00. Petitioners reported $1,190,949.00 in gambling losses as both a New York subtraction on line 31 of the return and also as part of its itemized deductions claimed on line 34 of the return. On March 13, 2013, the Division issued to petitioners a notice and demand for payment of tax due (notice and demand), assessment number L-039130214, in the amount of $87,319.90, plus interest for the year 2007. The notice and demand informed petitioners that the Division of Taxation (Division) audited their 2007 return and disallowed the New York subtraction in the amount of $1,190,949.00. The Division disallowed the reported subtraction based on its determination that gambling losses do not qualify as a New York subtraction. Additionally, the Division disallowed the itemized deduction for gambling losses and asked for proof for the claimed losses. No penalty was imposed.

3. Petitioners filed their 2008 return on October 1, 2012. On line 18, petitioners reported federal adjusted gross income in the amount of $1,448,034.00. Petitioners reported $1,309,535.00 in gambling losses as both a New York subtraction on line 31 of the return and also as part of its itemized deductions claimed on line 34 of the return. On March 13, 2013, the Division issued to petitioners a notice and demand, assessment number L-039126605, in the amount of $93,097.40, plus interest and penalty. The penalty assessed was for a late-filed return. The notice and demand informed petitioners that the Division audited their 2008 return and disallowed the New York subtraction in the amount of $1,309,535.00. The Division determined that gambling losses do not qualify as a New York subtraction. Additionally, the Division disallowed the itemized deduction for gambling losses and asked for proof for the claimed losses.

4. Petitioners filed their 2009 return on December 4, 2012. On line 18, petitioners reported federal adjusted gross income in the amount of $398,297.00. Petitioners reported $270,092.00 in gambling losses as both a New York subtraction on line 31 of the return and also as part of its itemized deductions claimed on line 34 of the return. On January 15, 2016, the Division issued to petitioners a notice and demand, assessment number L-044254196, in the amount of $9,089.77, plus interest and penalties. The penalties assessed were for a late-filed return and for late payment of the taxes due. The notice and demand informed petitioners that the Division audited their 2009 return and disallowed the New York subtraction in the amount of $270,092.00. The Division determined that gambling losses do not qualify as a New York subtraction. Additionally, the Division adjusted the itemized deduction to an amount of $223,106.00, which reflects that a portion of the gambling losses was allowed.

5. Petitioners filed their 2011 return on May 1, 2017. The Division reviewed their 2011 return and determined that the amount of reported itemized deductions was too high. On line 18, petitioners reported federal adjusted gross income in the amount of $1,132,769.00. Petitioners reported itemized deductions in the amount of $980,686.00, of which $945,293.00 represented claimed gambling losses. The Division determined that, since petitioners' adjusted gross income was over $1 million, the itemized deductions were limited to 50% of any charitable contributions claimed that year. Petitioners reported charitable contributions in the amount of $2,500.00. In recomputing petitioners' return, the Division used the standard deduction for petitioners, filing as married on a joint return, in the amount of $15,000.00. On August 23, 2017, the Division issued to petitioners a notice and demand, assessment number L-046966108, in the amount of $95,909.75, plus interest and penalties. The penalties assessed were for a late-filed return and for late payment of the taxes due.

6. On July 10, 2018, the outstanding liabilities were satisfied as a result of a collection action brought by the Division.

7. Petitioners filed requests for conciliation conference (requests) with the Division's Bureau of Conciliation and Mediation Services for a refund of the taxes paid. By conciliation orders, CMS. No. 000316138 and No. 000316163, dated December 11, 2020, the requests were denied.

8. On January 26, 2021, petitioners filed a timely petition with the Division of Tax Appeals in protest of the conciliation orders.

9. The Division did not present any witnesses nor an affidavit by the auditor. The notices and demands issued for the years 2007 through 2009 originated from the Audit Division-Income/Franchise Desk-AG15. The Division failed to provide any explanation as to the basis for issuing notices and demands rather than notices of deficiency for these years. For 2009, the Division allowed a portion of the gambling losses, yet the Division failed to elaborate on its decision to accept some of these losses in 2009, but not for 2007 and 2008. At the hearing, the Division incredulously represented that its Processing and Civil Enforcement Units utilized the late-filed returns to issue the notices and demands, despite its own evidence to the contrary.

10. Petitioners are not professional gamblers.

11. Petitioners introduced into evidence a one-page computer printout purported to be a W-2G Recap from the Internal Revenue Service (IRS) for each of the years 2007 and 2008. These statements do not reflect any gambling losses.

12. For 2009 and 2011, petitioners introduced a summary page, for each year, created by Mr. Maragh, that lists all the winnings earned from those years. The pages behind the summary page are numerous W-2G statements, for recipients of certain gambling winnings, from

casinos in Connecticut, New Jersey and Nevada, that represent winnings to petitioners over that particular year. For 2011, there is a W-2G statement reflecting winnings issued by the New York State Lottery. There are no documents that address the amounts of losses that were incurred.

13. Mr. Maragh testified that he feels that the assessments from New York State are excessive given the hardships that petitioners have endured as a result of their gambling. Mr. Maragh stated that they had to sell their home in order to satisfy the lien placed on it by the Division for the outstanding tax liabilities.

CONCLUSIONS OF LAW

A. It is well settled that a determination of the Division contained in a notice of deficiency is entitled to a presumption of correctness and a petitioner bears the burden of demonstrating by clear and convincing evidence that the proposed assessment, or the method used to arrive at the assessment, is improper or erroneous (***Matter of Gilmartin v Tax Appeals Trib.***, 31 AD3d 1008, 1010 [3d Dept 2006]; ***Matter of Leogrande v Tax Appeals Trib.***, 187 AD2d 768, 769 [3d Dept 1992], ***lv denied*** 81 NY2d 704 [1993]; ***Matter of Scarpulla v State Tax Commn***, 120 AD2d 842, 843 [3d Dept 1986]; ***see also*** Tax Law § 689 [e]).

B. In this case, however, the Division did not issue notices of deficiency for any of the years. Focusing on 2007 through 2009, petitioners were issued notices and demands. There has been no assertion that any mathematical or clerical errors were made that would result in the issuance of notices and demands in the first instance (***see*** Tax Law § 681 [d]). The Tax Law explicitly states that a notice and demand does not confer hearing rights upon a petitioner (***see*** Tax Law § 173-a [2]).

However, the outstanding tax liabilities were satisfied from the collection action brought by the Division. Thereafter, petitioners filed requests for conciliation conference at BCMS. This proceeding was commenced from a protest of the conciliation orders. Therefore, the Division of Tax Appeals has jurisdiction over the petition filed in this matter.

C. Tax Law § 683 (a) requires that "any tax . . . shall be assessed within three years after the return was filed." The three years in which to make an assessment is measured from the date on which the return was either due or was filed, whichever is later (***see Matter of Gorski***, Tax Appeals Tribunal, November 17, 2022). In this case, petitioners filed their 2009 return on December 4, 2012. The Division had three years, or until December 4, 2015, to issue an assessment to petitioners. The notice and demand was issued on January 15, 2016. Accordingly, the three-year period within which to assess petitioners had expired and, thus, the notice and demand issued for 2009 is invalid.

D. Tax Law § 689 (e) states that petitioners bear the burden of proof to demonstrate that they are entitled to a refund for the remaining years 2007, 2008 and 2011.

The starting point for determining New York personal income tax liability is a taxpayer's federal adjusted gross income (***see*** Tax Law § 612 [a]). Gross income includes all income from whatever source derived and includes gambling winnings (***see*** Internal Revenue Code [IRC] [26 USC] § 61 [a]; ***see also Matter of Karlsberg***, Tax Appeals Tribunal, March 1, 2010, ***confirmed*** 85 AD3d 1347 [3d Dept 2011], ***appeal dismissed*** 17 NY3d 900 [2011]). In this case, there is no dispute that petitioners properly reported their gambling winnings.

The issue is whether petitioners are entitled to their claimed losses. Petitioners have simply failed to sustain their burden of proof. As set forth in finding of fact 11, the documents submitted by petitioners establish their winnings, but there are no documents supporting the

extent of their losses. In fact, petitioners reported their losses for 2007 and 2008 on line 31 of their returns as a New York subtraction. Clearly, gambling losses are not among the list of allowable New York subtractions set forth in Tax Law § 612 (c).

E. For 2011, petitioners reported a gambling loss in the amount of $945,293.00, on line g of the New York State itemized deduction worksheet. Line g is for other miscellaneous deductions that were reported on line 28 of federal schedule A (schedule A is not in the record). This resulted in a calculation of itemized deductions in the amount of $980,686.00, as reported on line 34 of the 2011 return.

Tax Law 615 (g) (1) addresses the New York itemized deduction of a resident individual, in pertinent part, as follows:

> "With respect to an individual whose New York adjusted gross income is over one million dollars and no more than ten million dollars, the New York itemized deduction shall be an amount equal to fifty percent of any charitable contribution deduction allowed under section one hundred seventy of the internal revenue code for taxable years beginning after two thousand nine and before two thousand sixteen."

In 2011, petitioners reported New York adjusted gross income in the amount of $1,132,769.00. Therefore, pursuant to Tax Law § 615 (g) (1), their itemized deductions were limited to 50% of their charitable contributions for the year. They reported charitable contributions in the amount of $2,500.00 and, thus, their itemized deductions were capped at $1,250.00. The Division recomputed petitioners' return by allowing them the standard deduction in the amount of $15,000.00, for those taxpayers married filing a joint return. Petitioners have not established any error by the Division in its re-computation of their 2011 return.

F. The petition of Raymond and Hortense Maragh is granted to the extent indicated in conclusion of law C, but is otherwise denied. The Division of Taxation is directed to issue a refund in the amount of $9,089.77, plus interest and penalties, for the year 2009, but the remainder of the refund claim is denied.

DATED: Albany, New York
May 16, 2024

/s/ Donna M. Gardiner
SUPERVISING ADMINISTRATIVE LAW JUDGE