



United States Tax Court

Washington, DC 20217

SUSAN E. MERCIER & JAMES H. MERCIER,

Petitioners

v.

COMMISSIONER OF INTERNAL
REVENUE,

Respondent

Docket No. 7499-22S

ORDER OF SERVICE OF TRANSCRIPT

Pursuant to Rule 152(b), Tax Court Rules of Practice and Procedure, it is hereby

ORDERED that the Clerk of the Court shall transmit herewith to petitioner and to the Commissioner a copy of the pages of the transcript of the trial in this case before the undersigned judge at the Las Vegas, Nevada trial session containing the Court's oral findings of fact and opinion rendered at the trial session at which the case was heard. In accordance with the oral findings of fact and opinion, decision will be entered under Rule 155 in due course.

(Signed) Eunkyong Choi
Special Trial Judge

Served 06/06/23

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IN THE UNITED STATES TAX COURT

In the Matter of:

SUSAN E. MERCIER & JAMES H.
MERCIER,

Petitioners,

v.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

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) Docket No. 7499-22S
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Pages: 1 through 11

Place: Las Vegas, Nevada

Date: March 8, 2023



IN THE UNITED STATES TAX COURT

In the Matter of:

SUSAN E. MERCIER & JAMES H.
MERCIER,

Petitioners,

v.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

Docket No. 7499-22S

Foley Federal Building & U.S. Cthse.
300 Las Vegas Boulevard, South
Room 4-400, 4th Floor
Las Vegas, Nevada 89101

March 8, 2023

The above-entitled matter came on for bench opinion,
pursuant to notice at 9:38 a.m.

BEFORE: HONORABLE EUNKYONG CHOI
Special Trial Judge

APPEARANCES:

For the Petitioners:

No Appearance

For the Respondent:

No Appearance



P R O C E E D I N G S

(9:38 a.m.)

THE CLERK: Recalling from the calendar, docket
number 7499-22S, Susan E. Mercier and James H. Mercier.

(Whereupon, a bench opinion was rendered.)



1 Bench Opinion by Judge Eunkyong Choi

2 March 8, 2023

3 Susan E. Mercier & James H. Mercier v. Commissioner of
4 Internal Revenue

5 Docket No. 7499-22S

6 THE COURT: This Court has decided to render
7 oral findings of fact and opinion in this case, and the
8 following represents the Court's oral findings of fact and
9 opinion. The oral findings of fact and opinion shall not
10 be relied upon as precedent in any other case. This case
11 is a small tax case subject to the provisions of section
12 7463 and Rules 170 through 174. The oral findings of fact
13 and opinion are made pursuant to the authority granted by
14 section 7459(b) of the Internal Revenue Code and Tax Court
15 Rule 152. Rule references in this opinion are to the Tax
16 Court Rules of Practice and Procedure and section
17 references are to the Internal Revenue Code in effect at
18 all relevant times.

19 This is a tax deficiency redetermination case.
20 Petitioners challenged the Notice of Deficiency dated
21 January 3rd, 2022, in which Respondent determined a
22 deficiency in Petitioner's Federal income tax for taxable
23 year 2019. The deficiency stems from unreported income
24 from gambling winnings and other income from Form 1099.

25 Trial in this case was conducted during the



1 Court's Las Vegas, Nevada, trial session on March 7th,
2 2023. Petitioners represented themselves. Inga
3 Plucinski-Holbrook represented Respondent. The Court
4 admitted into evidence the parties' Stipulation of Facts
5 along with the tax exhibits and also admitted into
6 evidence Exhibit 500-P, except pages 40 through 47, 501-P,
7 502-P, 504-P, 505-P, 506-P, 509-P, 510-P, and 511-P for
8 Petitioners. On the evidence before us, and using the
9 burden of proof principles explained below, the Court
10 finds the following facts.

11 FINDINGS OF FACT

12 Petitioners resided in Nevada at the time they
13 filed the petition in this case. In 2019, Ms. Mercier was
14 employed at a Nevada charter school and Mr. Mercier
15 operated an appliance repair business. During the year,
16 Petitioners spent time gambling at several Nevada casinos.
17 Petitioners gamble only on days when they earn extra
18 players card, points, or receive some other advantage.

19 They play only video poker machines with the
20 best odds of winning. When playing, they employ a
21 strategy they developed in 2016. The strategy was based
22 on statistical information about video poker. Both
23 Petitioners have extensive knowledge of video poker.
24 Based on the foregoing, Petitioners consider themselves
25 professional gamblers.



1 Petitioners did not keep their own written
2 record of their gambling activity for tax year 2019.
3 Instead, they relied on casinos electronic records, which
4 track a gambler's activity so long as the gambler uses
5 their player card while gambling. Petitioners always used
6 their player cards when gambling because of the benefits
7 they received from using them such as free play and
8 increased points for playing.

9 Ms. Mercier is an accountant. She prepared
10 Petitioners' 2019 tax return. She initially included the
11 gambling winnings from the Form W-2G in the return, but
12 later decided not to include the winnings when she noticed
13 that doing so increased the amount of tax due from
14 Petitioners, which she believed to be in error. It was
15 her understanding that because Petitioners had a net
16 gambling loss, the gambling winnings reported in the Forms
17 W-2G were not taxable.

18 Petitioners' tax for taxable year 2019 increased
19 when Ms. Mercier included the income from Forms W-2G in
20 the return because she reported the gambling losses on
21 Schedule A, which resulted in lower itemized deductions
22 than the standard deduction. Petitioners, therefore,
23 chose not to report the income from Form W-2G in the 2019
24 return and took the standard deduction instead of
25 itemizing their deductions.



Petitioners believe the law regarding the deduction of gambling losses is unfair. They do not believe they should be required to pay taxes on their gambling winnings when they had a net loss for the year. Petitioners also believed their rights as taxpayers were violated in that Respondent had not kept them informed, and that the taxpayer advocate was not available to assist them with their case due to a backlog caused by the COVID-19 pandemic.

10 OPINION

11 Generally, the Commissioner's determinations in
12 a Notice of Deficiency are presumed correct and the
13 taxpayer bears the burden of proving those determinations
14 erroneous. Rule 142(a)(1); Welch v. Helvering, 290 U.S.
15 111, 115 (1933). In unreported income cases such as this,
16 Respondent must establish some evidentiary foundation
17 connecting the taxpayer with the income producing activity
18 or demonstrating that the taxpayer actually received
19 unreported income. See Weimerskirch v. Commissioner, 596
20 F.2d 358, 361 through 362 (9th Cir. 1979), reversing 67
21 T.C. 679 (1977); see also, Edwards v. Commissioner, 680
22 F.2d 1268, 1270 through 1271 (9th Cir. 1982), holding that
23 the Commissioner's assertion of a deficiency is
24 presumptively correct once some substantive evidence is
25 introduced demonstrating that the taxpayer received

1 unreported income.

2 The requisite evidentiary foundation is minimal
3 and need not include direct evidence. See Banister v.
4 Commissioner, T.C. Memo. 2008-201, aff'd, 418 F. App'x 637
5 (9th Cir. 2011). If Respondent introduces some evidence
6 that the taxpayer received unreported income, the burden
7 shifts to the taxpayer who must establish by a
8 preponderance of the evidence that the deficiency was
9 arbitrary or erroneous. See Hardy v. Commissioner, 181
10 F.3d 1002, 1004 (9th Cir. 1999), aff'g T.C. Memo. 1997-97.

11 Petitioners stipulated to having received
12 \$19,612 of gambling winnings for taxable year 2019, which
13 is \$4,000 more than proposed in the Notice of Deficiency
14 based on documentation they provided to Respondent. The
15 issue in this case is not whether Petitioners received the
16 gambling winnings. Instead, the issue is whether they may
17 deduct their gambling losses on Schedule C, as would
18 professional gamblers, or must deduct losses as an
19 itemized deduction on Schedule A, as would casual
20 gamblers.

21 Deductions are a matter of legislative grace,
22 and the taxpayer generally bears the burden of proving
23 entitlement to any deduction claimed. INDOPCO, Inc. v.
24 Commissioner, 503 U.S. 79, 84 (1992); New Colonial Ice Co.
25 v. Helvering, 292 U.S. 435, 440 (1934). A taxpayer



1 claiming a deduction on Federal income tax return must
2 demonstrate that the deduction is allowable pursuant to
3 some statutory provision and must further substantiate
4 that expense to which the deduction relates has been paid
5 or incurred. Section 6001; Hradesky v. Commissioner, 65
6 T.C. 87, 89-90 (1975), aff'd per curiam, 540 F.2d 821 (5th
7 Cir. 1976); Menneguzzo v. Commissioner, 43 T.C. 824, 831-
8 832 (1965); section 1.6001-1(a) income tax regs.

9 Generally, deductions are allowed only for
10 activities that are conducted with the motive of making a
11 profit. See section 183. Gambling activity may be
12 considered a trade or a business if it is conducted with
13 continuity, regularity, and for the primary purpose of
14 earning a profit. Commissioner v. Groetzinger, 480 U.S.
15 23, 35, 107 S.Ct. 980, 987, 994 L.Ed 225 (1987).

16 A nine-factor test is used to determine whether
17 gambling activity was for the primary purpose of earning a
18 profit. See Treasury Reg. section 1.183-2(b). The
19 factors include: (1) whether the activity was carried out
20 in a business-like manner. Example, the taxpayer kept
21 records; (2) the taxpayer's expertise; (3) the time and
22 effort the taxpayer spent gambling; (4) the expectation
23 that assets used in the activity may increase in value;
24 (5) the taxpayer's success in nongambling activity; (6)
25 the taxpayer's history of winnings and losses; (7) the

1 amount of the occasional profits from gambling; (8) the
2 taxpayer's financial status; and (9) the presence of
3 elements of personal pleasure or recreation.

4 It should be noted that the regulation further
5 provides that no one factor is determinative in making
6 this determination. In addition, it is not intended that
7 the factors described are to be taken into account in
8 making the determination, or that a determination is to be
9 made on the basis that the number of factors, whether or
10 not listed in this paragraph, indicating a lack of profit
11 objective, exceeds the number of factors indicating a
12 profit objective or vice versa. Id.

13 We find that although Petitioners are serious
14 about gambling, they were not professional gamblers.
15 Petitioners are both sophisticated in that they are an
16 accountant and a previous business owner. Petitioner wife
17 acknowledged that as an accountant, she would advise a
18 taxpayer operating a business to keep records. Petitioner
19 husband acknowledged that for his appliance repair
20 business, he did keep records.

21 Petitioners did not personally keep track of
22 their gambling activity in 2019 choosing, instead, to rely
23 on third-party information from casinos, even though they
24 further acknowledge that the casinos record may be
25 incomplete, as only jackpot winnings, not smaller

1 winnings, are reported. Petitioners also did not keep a
2 separate bank account to manage gambling winnings and
3 expenses, but used their personal account, which is
4 further evidence of the casual nature of their gambling.

5 Further, in previous years, Petitioners reported
6 gambling losses on Schedule A as would a casual gambler,
7 as they began to do for taxable year 2019. According to
8 Petitioners, they did not know then that their gambling
9 activity could be reported as business activity. But as
10 evidenced by the Schedule C Ms. Mercier prepared for Mr.
11 Mercier's appliance repair business, Petitioners were
12 aware that business activities were to be reported on
13 Schedule C.

14 Nevertheless, Petitioners did not attempt to
15 offset their gambling winnings with their gambling losses
16 on Schedule C until after receiving Respondent's Notice of
17 Deficiency for taxable year 2019.

18 Accordingly, the Notice of Deficiency in this
19 case is sustained. This concludes the Court's oral
20 findings of fact and opinion in this case. A decision
21 will be entered under Rule 155.

22 (Whereupon, at 9:57 a.m., the above-entitled
23 matter was concluded.)

24

25



CERTIFICATE OF TRANSCRIBER AND PROOFREADER

CASE NAME: Susan E. Mercier & James H. Mercier v.
Commissioner

DOCKET NO.: 7499-22S

We, the undersigned, do hereby certify that the foregoing pages, numbers 1 through 11 inclusive, are the true, accurate and complete transcript prepared from the verbal recording made by electronic recording by Troy Ray on March 8, 2023 before the United States Tax Court at its session in Las Vegas, NV, in accordance with the applicable provisions of the current verbatim reporting contract of the Court and have verified the accuracy of the transcript by comparing the typewritten transcript against the verbal recording.



Susan Patterson, CDLT-174

3/18/23

Transcriber

Date



Katie Peterson, CDLT-289

3/18/23

Proofreader

Date

