

Reproduced with permission from Daily Tax Report, 132 DTR K-2, 7/10/13. Copyright © 2013 by The Bureau of National Affairs, Inc. (800-372-1033) <http://www.bna.com>

Gaming

Foreign Gamblers Hit Jackpot: Losses Can Be Deducted, Appeals Court Says

The U.S. Court of Appeals for the District of Columbia Circuit overruled the U.S. Tax Court July 9, concluding that gambling winnings and losses incurred by nonresident aliens should be calculated on a per-session basis, the same method used for U.S. citizens (*Park v. Commissioner*, D.C. Cir., No. 12-01058, 7/9/13).

Bradley Polizzano, a tax and gaming attorney in New York, told BNA July 9 that the court's ruling "is significant."

According to Polizzano, the court's ruling in *Park* "essentially requires U.S. casino operators to make the Form 1042-S [Foreign Person's U.S. Source Income Subject to Withholding] reporting and withholding determinations for slot machine play when the nonresident player seeks to cash out tokens or redeem a ticket."

Gambling Winnings. Sang Park, a native of South Korea, won more than \$430,000 in 2006 and more than \$100,000 in 2007 playing slot machines during visits to California. In both years, however, his losses exceeded his winnings.

Nevertheless, the Internal Revenue Service asserted that because Park was a nonresident alien, his gambling winnings should be calculated on a per-bet basis, rather than a per-session basis.

The U.S. Tax Court agreed with IRS, finding that Park's gambling winnings were taxable under tax code Section 871 and that no deductions were permitted for gambling losses (114 DTR K-3, 6/14/11).

Interpretation of 'Gains.' Judge Brett M. Kavanaugh, writing for the court, reversed the Tax Court's decision, dismissing IRS's argument that the term "gains" as

used in Section 871 implied a per-bet approach to calculating tax liability for nonresident aliens.

Noting that the term also appears in tax code Section 165(d), which applies to U.S. citizens, Kavanaugh pointed to IRS's interpretation of the term in a 2008 memorandum where it concluded "that U.S. citizens can measure their gambling winnings and losses on a per-session basis" (240 DTR K-4, 12/15/08).

Kavanaugh highlighted the fact that "[n]othing in the IRS's Section 165(d) ruling on 'gains' turned on the fact that the gamblers were U.S. citizens."

Rather, Kavanaugh said, "[w]hether a gambler is a U.S. citizen or a nonresident alien, it makes little sense—as the IRS itself explained in the Section 165(d) context—to measure gambling winnings on casino games such as slots on a per-bet rather than per-session basis."

Case Remanded. Kavanaugh remanded the case back to the Tax Court to analyze Park's liability under a per-session analysis.

Meanwhile, Polizzano told BNA that the court's decision did not provide a lot of clarity for other gambling activities.

"Unfortunately, the decision does not attempt to further define what a gaming 'session' means beyond slot machine play. There is little court precedent for what a gambling 'session' is for other games, such as poker," Polizzano said.

Kavanaugh was joined by Circuit Judge David S. Tatel and Senior Circuit Judge David B. Sentelle.

Park was represented by Denis M. McDevitt and Drew M. Bouchard. IRS was represented by John A. Dudeck Jr. of the Department of Justice and Richard Farber.

By ALEXANDER RIPPS

Text of the decision is in TaxCore.