

STATE OF WISCONSIN
TAX APPEALS COMMISSION

THOMAS AND SUZANNE HOINACKI,

DOCKET NO. 09-I-071

Petitioners,

vs.

DECISION AND ORDER

WISCONSIN DEPARTMENT OF REVENUE,

Respondent.

ROGER W. LEGRAND, COMMISSIONER:

This case comes before the Commission for decision after a hearing was held in Madison, Wisconsin on January 14, 2010. The Petitioners, Mr. Thomas and Mrs. Suzanne Hoinacki of Waupun, Wisconsin, appeared in person and are represented in this matter by Attorney J. E. Nugent. The Respondent (herein, the "Department") is represented in this matter by Attorney Sheree Robertson. At the hearing, both parties agreed to the admission of an executed partial stipulation of facts ("Stip.") and Exhibits 1 through 7 and 12. Both parties also filed post-hearing briefs.

Based on the entire record in this matter, the Commission finds, concludes, decides and orders as follows:

FINDINGS OF FACT

1. The Petitioners are residents of the State of Wisconsin and were residents of Wisconsin during the years 2004-2007. (Stip. ¶ 1).

2. The Petitioners jointly filed a 2004 Wisconsin individual income tax return with a copy of their 2004 federal income tax return and federal Schedule C attached thereto. The 2004 federal Schedule C showed tournament fishing as a business or profession of Mr. Hoinacki and reported \$1,500 in gross receipts and a loss in the amount of \$15,083 from this activity. (Stip. ¶ 2 and Exhibit 4).

3. The Petitioners jointly filed a 2005 Wisconsin individual income tax return with a copy of their 2005 federal income tax return and federal Schedule C attached thereto. The 2005 federal Schedule C showed tournament fishing as a business or profession of Mr. Hoinacki and reported \$913 in gross receipts and a loss in the amount of \$10,712 from this activity. (Stip. ¶ 3 and Exhibit 5).

4. The Petitioners jointly filed a 2006 Wisconsin individual income tax return with a copy of their 2006 federal income tax return and federal Schedule C attached thereto. The 2006 federal Schedule C showed tournament fishing as a business or profession of Mr. Hoinacki and reported \$2,414 in gross receipts and a loss in the amount of \$8,776 from this activity. (Stip. ¶ 4 and Exhibit 6).

5. The Petitioners jointly filed a 2007 Wisconsin individual income tax return with a copy of their 2007 federal income tax return and federal Schedule C attached thereto. The 2007 federal Schedule C showed tournament fishing as a business or profession of Mr. Hoinacki and reported \$3,413 in gross receipts and a loss in the amount of \$6,671 from this activity. (Stip. ¶ 5 and Exhibit 7).

6. The Department audited the Petitioners' 2004-2007 Wisconsin individual income tax returns and disallowed the losses claimed for the tournament

fishing activity because it determined that this activity was not engaged in for profit. The Department issued to the Petitioners a Notice of Amount Due and Office Audit Worksheet dated August 25, 2008 for additional income tax plus interest in the total amount of \$3,990.43 for the tax years 2004 through 2007 (the “years at issue”).¹ (Stip. ¶ 6 and Exhibit 1).

7. The Petitioners filed a petition for redetermination with the Department. (Stip. ¶ 7 and Exhibit 2).

8. The Department denied the Petitioners’ petition for redetermination and issued to them its Notice of Action letter dated March 3, 2009. (Stip. ¶ 8 and Exhibit 3).

9. On April 23, 2009, the Petitioners filed a petition for review with the Commission via certified mail.

10. Petitioner Thomas Hoinacki has worked as an employee for construction businesses in the construction profession for the past 34 years. (Tr. 25-26 and 53-54). During the years at issue, Mr. Hoinacki was employed full-time and worked approximately 40 hours per week and was paid wages. (Exhibits 4-7 and Tr. 55-57). The wages from his construction employment were used to support his family. (Tr. 56-57). In April 2009, he began operating his own construction business. (Tr. 26-28 and 54-55).

¹ Prior to the hearing, the parties agreed to adjustments related to certain unreported taxable wages received and withholding tax paid as part of a wage settlement for 2007 for Mr. Hoinacki. (Stip. ¶ 9 and Exhibit 12). Thus, the only issue before the Commission is the deductibility of the tournament fishing losses and expenses claimed by the Petitioners for the years at issue.

11. Mr. Hoinacki generally worked in construction on weekdays, fished in tournaments held on weekends, and took additional days off from his construction jobs for tournaments. (Tr. 56.)

12. As a child, Mr. Hoinacki began fishing with his father. He has fished on the Rock River, which flows through the City of Waupun, and the Fox River. (Tr. 28).

13. In 1989, Mr. Hoinacki entered his first fishing tournament, which was held on Lake Winnebago in Wisconsin. (Tr. 28). Mr. Hoinacki testified that since 1990, he has competed in the Masters Walleye Circuit (a/k/a Cabela's Masters Walleye Circuit) (hereinafter, "MWC"). (Tr. 32). Some of the MWC fishing tournaments were located on the Illinois River, Mississippi River, Lake Winnebago, Lake Erie, Saginaw Bay, Bay de Noc, and Green Bay. (Tr. 32-33). Since there are numerous MWC fishing tournaments held around the country, the circuit is divided into divisions: the eastern division, the western division, and the central division. (Tr. 33). Mr. Hoinacki testified that he entered fishing tournaments in the central division because he did not want to travel too far from home. (Tr. 33).

14. Mr. Hoinacki testified also that his tournament fishing season begins in March and ends in September. (Tr. 74-75).

15. In April 2003, Mr. Hoinacki purchased a Ranger boat for \$45,786, which he used in his tournament fishing activity. (Exhibit 23, Answer to Interrogatory No. 2(c); Tr. 39 and 66). The organizers of MWC do not require that anglers use a

particular brand or model boat when competing in one of its tournaments and do not require that the boat be insured. (Tr. 115-116).

16. Mr. Hoinacki testified that he “pre-fished”² the bodies of water in which the tournaments were held to find the best places on the lakes to catch fish. (Tr. 37-38). Mr. Hoinacki testified that his wife, Petitioner Suzanne Hoinacki, and children were in the Ranger boat with him when he pre-fished. (Tr. 84-85; Petitioners’ Brief at 4). He also testified that he and his wife own a cottage on Lake Poygan, west of Oshkosh, Wisconsin, where he has taken his boat to pre-fish. (Tr. 40 and 84).

17. When pre-fishing, Mr. Hoinacki did not use a global positioning system (“GPS”), depth finder or underwater camera to assess fishing conditions. (Tr. 67-74.)

18. Mr. Hoinacki entered and competed in MWC’s 2004 Oshkosh, Wisconsin – Lake Winnebago Tournament by paying the entry fee required. (Exhibit 16 and Tr. 99 and 109-110). His co-angler in MWC’s tournaments was Mrs. Hoinacki’s uncle. (Exhibit 16 and Tr. 44). At the conclusion of the tournament, Mr. Hoinacki’s and his co-angler’s team was ranked 207 out of 220. (Exhibit 16 and Tr. 110). He and his co-angler also entered and competed in the 2004 Prairie du Chien, Wisconsin – Championship sponsored by MWC, where their team was ranked 29 of about 42 teams. (Exhibit 16 and Tr. 110). Mr. Hoinacki and his co-angler paid a fee to enter and compete in the 2005 MWC fishing tournament in Green Bay, where their team was ranked 165

² As used at the hearing and herein, the term “pre-fish” means fishing at a tournament location prior to the tournament in order to find the best spots for fishing.

out of about 176 teams. (Exhibit 16 and Tr. 99 and 110). Mr. Hoinacki and his co-angler paid a fee to enter and compete in the 2005 MWC fishing tournament in Lake Winnebago, where their team was ranked 79 out of about 217 teams. (Exhibit 16 and Tr. 99 and 110). Mr. Hoinacki was not invited to compete in the 2005 and 2006 World Walleye Championship Finals because he did not qualify to compete. (Tr. 111-112).

19. Mr. Hoinacki prepared and submitted a list of tournaments in which he completed for the years at issue. (Exhibit 23.) The exhibit lists the number of tournaments entered, the locations of the tournaments, and the entry fees.

20. Mr. Hoinacki testified that most of the fishing tournaments that he competed in were held over 1 or 2 days; however, he also testified that there are tournaments held over 3 days. (Tr. 37 and 76). He competed in tournament fishing on weekends. (Tr. 75-76).

21. Mr. Hoinacki testified that Mrs. Hoinacki's uncle taught him how to tournament fish and that Mrs. Hoinacki's uncle also learned a lot from him. (Tr. 45). He further testified that he learned tournament fishing by fishing and he did not take any courses in tournament fishing. (Tr. 60-61).

22. The Petitioners had a personal checking account and their wages were deposited into that account. (Tr. 82). Mr. Hoinacki never had a separate checking account for his tournament fishing activity and used the funds in his personal checking account to pay for the expenses incurred in his tournament fishing activity. (Tr. 81-82).

23. Mr. Hoinacki testified that the receipts he reported from tournament fishing could not support his family, could not pay for his mortgages, nor even pay for his fishing tournament expenses. (Tr. 60, 83).

24. Mr. Hoinacki did not consult with a financial advisor or accountant to determine whether his tournament fishing activity could be profitable. (Tr. 77).

25. Mr. Hoinacki reported losses and did not make a profit from tournament fishing for a number of years prior to the years at issue. (Tr. 78-79).

26. Mr. Hoinacki did not have a business plan for his tournament fishing activity. (Exhibit 23, Answer to Interrogatory No. 4(d); Tr. 79-81).

27. Mr. Hoinacki did not maintain any accounting books for his tournament fishing activity. (Tr. 85).

28. Mr. Hoinacki did not have any sponsors for his tournament fishing activity. (Tr. 89).

29. Anglers are nationally ranked; however, Mr. Hoinacki does not know if he was ranked during the years 2004 through 2007. (Tr. 90-91).

30. Mr. Hoinacki testified that he enjoys fishing and that even if he did not enter and compete in fishing tournaments, he would probably continue to fish. (Tr. 61-62).

31. The expenses that Mr. Hoinacki incurred in his tournament fishing activity were substantially greater than the gross receipts that he reported on the federal Schedule C's attached to his Wisconsin income tax returns for the years at issue. (Exhibits 4-7).

32. As of 2008, Mr. Hoinacki had never made a profit from his tournament fishing activity. (Exhibits 4-8; Tr. 78 and 130-131).

33. Dr. Andrew Fayram of the Wisconsin Department of Natural Resources (“DNR”) testified regarding the DNR’s regulation of fishing tournaments. A permit for tournament fishing is required if 20 or more boats, 100 or more anglers or more than \$10,000 of prize money is at stake. (Tr. 17). Permit applications for tournament fishing have increased from 300 to 400 in the early 2000’s to 657 in 2009. (Tr. 18).

34. In 2009, the DNR issued an administrative rule that limited the expansion of tournament fishing activity. (Tr. 18-19).

35. Ms. Kristine Houtman is the Director of Marketing for North American Media Group (“NAMG”), which runs the MWC’s fishing tournaments. Ms. Houtman testified that MWC’s fishing tournaments are open to the general public and that no skill is required to participate in these fishing tournaments. (Tr. 101-104).

36. The MWC’s annual fishing tournament is held in October and anglers had to be invited to compete. Mr. Hoinacki was invited to compete in 2004, but not in 2005 and 2006. (Tr. 111.)

ISSUE

Was Mr. Hoinacki engaged in a trade or business, as defined under Section 162 of the Internal Revenue Code, when he participated in weekend fishing tournaments during the years 2004 through 2007?

CONCLUSION OF LAW

The Petitioners have not met their burden of proving that Mr. Hoinacki was engaged in tournament fishing as a trade or business under the IRC and Wisconsin law during the years at issue.

APPLICABLE LAW

Assessments made by the Department are presumed to be correct, and the burden is upon the Petitioners to prove by clear and satisfactory evidence in what respects the Department erred in its determination. *Edwin J. Puissant, Jr. v. Dep't of Revenue*, Wis. Tax Rptr. (CCH) ¶202-401 (WTAC 1984); *Dep't of Taxation v. O. H. Kindt Manufacturing Co.*, 13 Wis. 2d 258 (1961); *Woller v. Dep't of Taxation*, 35 Wis. 2d 227 (1967). Since the issue in this case involves the legitimacy of a deduction, the Petitioners also have the burden of proving their entitlement to the deduction. Deductions are matters of legislative grace and as such are strictly construed against granting the same. *Hall Chevrolet Co., Inc. v. Dep't of Revenue*, 81 Wis. 2d 477, 484, 260 N.W.2d 706 (1978); and *Comet Co. v. Dep't of Taxation*, 243 Wis. 117 (1943).

For income tax purposes, Wisconsin generally follows federal law, and the parties agree that Section 162 of the Internal Revenue Code ("IRC") governs this case. IRC Section 162 allows a deduction for all ordinary and necessary expenses incurred by a taxpayer in carrying on a trade or business. Under Section 162, the taxpayer must demonstrate a profit objective for the activities in order to deduct associated expenses. *Lamb v. Comm'r*, 71 TCM 2665 (April 1, 1996). The required profit objective is to be determined on the basis of all the factual objectives of each case. *Hirsch v. Comm'r*, 63-1 USTC ¶9371, 315 F.2d 731, 737 (9th Cir. 1963).

IRC Section 183(a) provides the general rule that if an individual engages in an activity and such an activity is not engaged in for profit, then no deduction attributable to the activity is allowed. Guidance for determining whether an activity is engaged in for profit is provided in Treasury Regulations § 1.183-2. Consistent with prior cases addressing similar questions, we analyze Mr. Hoinacki's fishing tournament activities under the criteria provided in these regulations.

Deductions are not allowable under Section 162 for activities which are "carried on primarily as a sport, hobby or for recreation." Treas. Reg. § 1.183-2(a). "The determination whether an activity is engaged in for profit is to be made by reference to objective standards, taking into account all of the facts and circumstances of each case." *Id.* Although a reasonable expectation of a profit is not required, the taxpayer's profit objective must be actual and honest. *Dreicer v. Comm'r*, 665 F.2d 1292 (D.C. Cir. 1981); Treas. Reg. § 1.183-2(a). Whether a taxpayer has an actual and honest profit objective is a question of fact to be answered from all of the relevant facts and circumstances. *Hastings v. Comm'r*, T.C. Memo. 2002-310; Treas. Reg. § 1.183-2(a). Further, "[i]n determining whether an activity is engaged in for profit, greater weight is given to objective facts than to the taxpayer's mere statement of his intent." *Id.*

Regulation § 1.183-2(b) states as follows:

b) Relevant factors. In determining whether an activity is engaged in for profit, all facts and circumstances with respect to the activity are to be taken into account. No one factor is determinative in making this determination. In addition, it is not intended that only the factors described in this paragraph are to be taken into account in making the determination, or that a determination is to be made on the

basis that the number of factors (whether or not listed in this paragraph) indicating a lack of profit objective exceeds the number of factors indicating a profit objective, or vice versa .

...

Regulation § 1.183-2(b) goes on to provide a non-exhaustive list of factors to consider when determining whether an activity is engaged in for profit: (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) the 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, which are earned; (8) the financial status of the taxpayer; and (9) elements of personal pleasure or recreation. Treas. Reg. § 1.183-2(b).

DISCUSSION

On Schedule C of their 2004 through 2007 federal income tax returns, the Petitioners claimed that Mr. Hoinacki was engaged in the business of tournament fishing and deducted his related expenses and losses.³ The Department audited these returns and disallowed the Petitioners' claimed losses on the grounds that Mr. Hoinacki did not engage in tournament fishing for profit. The Petitioners appealed, and the Commission held the hearing in this matter discussed above.

The parties agree that the nine factors listed in Treasury Regulation § 1.183-2(b) should be applied to the facts in this case. Not all factors are applicable in

³ Based on his testimony at the hearing, it is our understanding that only Mr. Hoinacki was engaged in tournament fishing, although Mrs. Hoinacki often accompanied him to the tournaments.

every case and no single factor, nor even the existence of a majority of factors favoring or disfavoring the existence of a profit objective, is controlling. *Abramson v. Comm'r*, 86 T.C. 360, 371 (1986); Treas. Reg. § 1.183-2(b).

Over the last few years, the U.S. Tax Court has considered a number of cases involving facts very similar to the facts at issue in this case and their interpretation under Regulation § 1.183-2(b). See, e.g., *Lowe v. Comm'r*, T.C. Memo 2010-129; *Culberson v. Comm'r*, T.C. Summ. Op. 2009-8; *Hill v. Comm'r*, T.C. Summ. Op. 2006-120; *Peacock v. Comm'r*, T.C. Memo 2002-122. In each of these cases, the IRS denied deductions claimed by taxpayers of losses incurred in tournament fishing activities, and in each case the Tax Court upheld the denial of the deductions on the grounds that the taxpayers' activities had not been engaged in for profit according to the factors provided in Regulation § 1.183-2(b). *Id.* After applying the nine factors to the facts in this case, we similarly conclude that Mr. Hoinacki's tournament fishing activity was not engaged in for profit during the years at issue.

1. *Manner in which the taxpayer carries on the activity.*

According to standard business practices, Mr. Hoinacki did not conduct his tournament fishing in a businesslike manner. He did not maintain complete and accurate books and records. He made no attempt to analyze the costs and risks associated with tournament fishing. He had no business plan to determine whether and when his tournament fishing could be profitable. He did not have a separate business account to pay for his expenses, and instead used his personal checking account. He did not have a sponsor, and apparently did not attempt to find one.

Finally, there was no evidence that Mr. Hoinacki changed operating procedures, adopted new techniques, or abandoned unprofitable methods in a manner consistent with an intent to improve the profitability of this activity. *See, Giles v. Commissioner*, T.C. Memo 2005-28. All of these facts indicate that his tournament fishing activity was a hobby or pastime, not a serious business for profit.

2. *The expertise of the taxpayer or his advisor.*

Mr. Hoinacki has been fishing since he was a child and obtained his expertise through experience. However, there was no evidence that he ever took a course or attempted to increase his skills as a tournament fisherman. He testified that he fished with Mrs. Hoinacki's uncle, but never employed an advisor. He entered tournaments open to the public which did not require a level of skill to compete in. This evidence points to a recreational interest in fishing, not a serious attempt to make tournament fishing profitable.

3. *Time and effort expended by the taxpayer in carrying on the activity.*

Mr. Hoinacki entered fishing tournaments from March to September of the years 2004 to 2007. They were held for one, two, or three days. At times, he took a day or two before the tournament to pre-fish the tourney site. The evidence is unclear as to how many tournaments he entered from 2004 to 2007, but Exhibit 22 indicates approximately 8 to 11 tournaments per year. Mr. Hoinacki clearly dedicated a significant amount of time and effort towards tournament fishing. This factor favors the Petitioners.

4. *Expectation that assets used in the activity may appreciate in value.*

The only significant assets used in this activity by Mr. Hoinacki were his fishing boat and equipment, and there is no evidence of any expectation that any of these assets would appreciate in value. Rather, Mr. Hoinacki took substantial depreciation deductions as business expenses on the Petitioners' Schedule C's for the years at issue. Furthermore, the value of the fishing boat appears to have greatly exceeded Mr. Hoinacki's ability to earn a profit from this activity, indicating that this was his hobby, not a trade or business.

5. *The success of the taxpayer in carrying on other similar or dissimilar activities.*

During the years at issue, Mr. Hoinacki had not engaged in running any other business, although he subsequently started a construction business in 2009. Mr. Hoinacki has been successful in the construction industry, where he has been steadily employed. The evidence indicates that Mr. Hoinacki is a skilled fisherman, but there is little evidence that he has been successful in tournament fishing, particularly as a trade or business. For example, Mr. Hoinacki never had a sponsor during the years at issue. This factor favors the Department.

6. *The taxpayer's history of income and losses with respect to the activity.*

Mr. Hoinacki has entered fishing tournaments since 1989, but has never made a profit from this activity. (Tr. 28, 78-79, 130-131.) Mr. Hoinacki reported significant losses for each of the years at issue. For 2004, Mr. Hoinacki reported income of \$1,500 and a loss of \$15,083. For 2005, Mr. Hoinacki reported income of \$913 and a loss of \$10,712. For 2006, Mr. Hoinacki reported income of \$2,414 and a loss of \$8,776.

For 2007, Mr. Hoinacki reported income of \$3,413 and a loss of \$6,671. This history of repeated losses indicates that Mr. Hoinacki was not engaged in the activity for the purpose of making a profit.

7. *The amount of occasional profits which are earned.*

Mr. Hoinacki never earned any profits from tournament fishing. Instead, he incurred significant losses in each year at issue. As noted above, this factor leads to the conclusion that his tournament fishing was not engaged in for profit.

8. *The financial status of the taxpayers.*

The evidence shows that Mr. and Mrs. Hoinacki derived nearly all of their income during the years at issue from their full-time occupations in construction and as a beautician, respectively. Tournament fishing generated little income and substantial expenses, which the Petitioners reported as net business losses. There was no evidence that Mr. Hoinacki ever intended to make tournament fishing his full-time occupation.

9. *The presence of elements of personal pleasure or recreation.*

Fishing can be a commercial activity, a competitive sport or a recreational activity, depending on the circumstances. Mr. Hoinacki clearly loves fishing. He has fished since he was a child, fished with his family, and fished where he owned a cottage on Lake Poygan. While he participated in tournaments, there was virtually no evidence that Mr. Hoinacki engaged in fishing for commercial or business purposes. Instead, the evidence indicates that his participation in tournament fishing was largely for recreational purposes. This evidence leads to the conclusion that Mr. Hoinacki's tournament fishing activity was a hobby, not a business for profit.

After reviewing all the facts and circumstances presented in the trial and applying the nine Regulation factors, the Commission concludes that Mr. Hoinacki's tournament fishing activity was not engaged in for profit and thus Mr. Hoinacki is not entitled to deduct the losses from his tournament fishing activity for the years 2004 through 2007. The evidence shows that tournament fishing was mainly a recreational pastime that Mr. Hoinacki engaged in for personal pleasure. Mr. Hoinacki incurred considerable expenses by participating in this activity, but derived little income. He engaged in the activity only on weekends for five months during the year, all the while holding down a full-time job that provided income for his family's support. Mr. Hoinacki kept no business records, had no business plan, consulted with no financial advisors, did no profit analysis, and did not even keep a business checkbook.

The Petitioners had the burden of proving the Department's assessment to be incorrect and that the deductions at issue constituted deductible trade or business expenses under IRC § 162. Based on the record before us, we conclude that the Petitioners failed to prove that Mr. Hoinacki's fishing tournament activity constituted a business engaged in for profit. Rather, the evidence shows that Mr. Hoinacki's activity was recreational and in the nature of a hobby. Therefore, we affirm the Department's action in this matter.

ORDER

The Department's action on the Petitioners' Petition for Redetermination is affirmed.

Dated at Madison, Wisconsin, this 22nd day of October, 2010.

WISCONSIN TAX APPEALS COMMISSION

David C. Swanson, Chairperson

Roger W. Le Grand, Commissioner

Thomas J. McAdams, Commissioner

ATTACHMENT: "NOTICE OF APPEAL INFORMATION"