STATE OF WISCONSIN

TAX APPEALS COMMISSION

CHRISTOPHER BLAHA AND CAROL KUBSCH, **DOCKET NO. 09-I-261**

Petitioners,

vs. **DECISION AND ORDER**

WISCONSIN DEPARTMENT OF REVENUE,

Respondent.

ROGER W. LEGRAND, COMMISSIONER:

This case comes before the Commission for decision after a trial was held in this matter in Madison, Wisconsin on September 29, 2010. The Petitioners, Christopher Blaha and Carol Kubsch of Kellnersville, Wisconsin, are *pro se* in this matter and have filed a post-trial brief. The Respondent in this matter (also referred to in this decision as "the Department") is represented in this matter by Attorney Julie A. Zimmer, of Madison, who has also filed a post-trial brief.

Based on the evidence received at trial, the Commission finds, concludes, and orders as follows:

FINDINGS OF FACTS

1. Petitioners Christopher Blaha and Carol Kubsch ("Petitioners") filed their 2007 Wisconsin income tax return, with attached federal Form 1040, with the Department on June 4, 2008 ("Original Return"), reporting $525,374 in Wisconsin taxable income on line 18 and $32,586 in underpayment or tax due on line 54.

Petitioners' Wisconsin taxable income included $473,075 in gambling winnings reported as "Other income" on federal Form 1040, line 21. (Transcript, Pgs. 21, 23; Exh. 1).

2. For federal purposes, Petitioners reported 2007 gambling losses in the amount of $473,075 as a Schedule A itemized deduction on their Original Return, and, in effect, offset their gambling winnings entirely, paying no federal tax on them. (Transcript, Pgs. 21-22; Exh. 1).

3. For Wisconsin purposes, Petitioners' 2007 gambling losses were not includable as part of their state itemized deduction credit, and thus they could not deduct those losses from the taxable income on their Original Return. (Transcript, Pg. 22; Exh. 1).

4. By Notice of Amount Due, dated June 13, 2008, the Department issued an assessment to Petitioners in the adjusted amount of $31,708.50, including tax and interest, based on the underpayment on their Original Return. (Transcript, Pgs. 23-24; Exh. 2).

5. On August 13, 2008, Petitioners filed an Amended 2007 Wisconsin income tax return, with attached Amended federal Form 1040X ("Amended Return"), this time reporting $44,475 in Wisconsin income on line 1 and $1,626 as an overpayment or refund on line 42. (Transcript, Pg. 24; Exh. 3).

6. On Petitioners' Amended Return, federal Schedule C, they reported $473,075 of gross receipts and $473,075 of cost of goods sold for Petitioner Carol Kubsch ("Ms. Kubsch") as part of her listed principal business or profession of "Gambling." Because the cost of goods sold offset the gross receipts, there were no net profits from

her purported gambling business included in Petitioners' taxable income for both federal and Wisconsin purposes. (Transcript, Pgs. 24-26; Exh. 3).

7. By letter dated November 20, 2008, the Department denied Petitioners' claim for refund based on their Amended Return because Ms. Kubsch did not "qualify to characterize her gambling losses on federal Schedule C." (Transcript 27-28; Exh. 4).

8. By letter dated January 13, 2009, Ms. Kubsch timely petitioned the Department for a redetermination of the refund denial. (Transcript, Pg. 28; Exh. 5).

9. By Notice dated November 4, 2009, the Department denied Petitioners' Petition for Redetermination stating that the "refund claim denial notice properly treated you as a hobby gambler in the year 2007." (Transcript, Pgs. 32-33; Exh. 6).

10. The Petitioners timely filed a Petition for Review with the Wisconsin Tax Appeals Commission on December 29, 2009 on the basis that the Internal Revenue Service ("IRS") had accepted their amended 2007 federal return. (Exh. 7).

11. The IRS processed Petitioners' amended 2007 federal income tax return as filed but did not make a determination that Ms. Kubsch met the qualifications to be a professional gambler. (Transcript, Pg. 34; Exh. D).

12. Ms. Kubsch has been gambling for 40 years. (Transcript, Pg. 62).

13. Ms. Kubsch enjoyed gambling and gambled on vacations with friends and family members. (Transcript, Pg. 63).

14. Ms. Kubsch testified that her slot machine play was a hobby and that she did not report her gambling winnings as business income prior to 2007. (Transcript, Pg. 64-65).

15. For each taxable year prior to 2007, Ms. Kubsch lost more than she won playing slot machines. (Transcript, Pg. 64-65).

16. During the period at issue, 2007, Ms. Kubsch's gambling activities were restricted to slot machine play.[1] (Transcript, Pg. 57).

17. During 2007, Ms. Kubsch lost significantly more than she won playing slot machines. (Transcript, Pgs. 65-66).

18. During 2007, Ms. Kubsch predominantly played the slots at Oneida Casino's two locations in Green Bay, Wisconsin. (Transcript, Pg. 45; Exh. A).

19. During 2007, Ms. Kubsch did not maintain regular hours at the casinos, but instead would gamble when it conveniently worked into her schedule for the week. (Transcript, Pgs. 60-61).

20. The total gross receipts reported by Petitioners on their Amended Return, federal Schedule C, matched the year-to-date total of Ms. Kubsch's W-2G wins from the Oneida Casinos. A W-2G is issued by the casino when a person wins a jackpot of $1,200 or more. (Transcript, Pgs. 126-127; Exh. B, Pgs. 3-6).

21. During 2007, Ms. Kubsch was issued a Player Card by the Oneida Casino that had the ability to track her wins and losses. However, Ms. Kubsch did not

[1] Ms. Kubsch also played the Wisconsin Lottery, but her Lottery play was not part of her gambling business and her Lottery winnings were not part of her reported gambling winnings. Tr. 128.

use her Player Card continuously to track her slot machine play during 2007 because she felt it gave the casino an advantage. (Transcript, Pgs. 51, 109, 121-122; Exh. B, Pgs. 1-2).

22. Ms. Kubsch's sources of income in 2007 included her husband's job at the foundry, stock dividends and sales, an inheritance, and a beauty salon she operated out of her home. (Transcript, Pgs. 60, 113).

23. Ms. Kubsch had not made a profit from her beauty salon business for at least eight years. (Transcript, Pg. 117; Exh. 11, Pg. 12).

24. Ms. Kubsch prepared no written business plan for her purported gambling business. (Transcript, Pg. 76).

25. Ms. Kubsch testified to several "business plans" she employed at various points throughout 2007: (a) Investing a set amount of money and gambling on certain days (Transcript, Pg. 59); (b) Playing the $10 slot machine (Transcript, Pgs. 70, 76-77; Exh. 8); (c) Playing three slot machines in a row (Transcript, Pgs. 70-71; Exh. 8); (d) Speaking to casino personnel (Transcript, Pg. 73); (e) Stopping play when the "hit rates" were down (Transcript, Pgs. 73-75); (f) Lowering the bet when the slot machine was in the "take cycle;" and, (g) Manipulating the computer's random number generator ("RNG") by changing how she bet (Transcript, Pgs. 77-78, 156).

26. Ms. Kubsch offered no books or gambling publications into evidence that she read in preparation to start her purported gambling business. (Transcript, Pgs. 80, 169).

27. Ms. Kubsch did not belong to any professional gambler associations in 2007. (Transcript, Pg. 86).

28. Ms. Kubsch consulted only casino personnel in contemplation of starting her purported gambling business. (Transcript, Pgs. 57, 86-88).

29. Ms. Kubsch prepared no written budget in contemplation of starting her purported gambling business. (Transcript, Pg. 88).

30. Ms. Kubsch did not maintain a separate checking account for her purported gambling business. (Transcript, Pgs. 115-116).

31. Ms. Kubsch presented a spreadsheet at trial that listed her purported gambling wins and losses for 2007. Ms. Kubsch testified, however, that the spreadsheet was not a contemporaneous record, was prepared by her accountant after 2007, and did not include an accurate total of all her wins and losses for the year. (Transcript, Pgs. 89-91; Exh. A).

32. During 2007, Ms. Kubsch calculated her gambling losses in part by totaling the amounts she withdrew from her bank account plus the cash advances taken from her six credit cards. However, Ms. Kubsch did not put into evidence any ATM receipts, bank statements or credit card statements from 2007. (Transcript, Pgs. 95-96; Exh. A).

33. Ms. Kubsch presented at trial a 2007 12-month calendar with her handwritten notations regarding her gambling activities on it ("Calendar"). Ms. Kubsch's testimony conflicted, however, as to whether the Calendar was made contemporaneously. (Transcript, Pgs. 55, 99-101; Exh. F, Pgs. 1-12).

34. Ms. Kubsch admitted at trial that the Calendar she presented as a trial exhibit had different notations on it than the Calendar she had previously submitted to the Department. (Transcript, Pgs. 97-99; Exhs. 9 and F, Pgs. 1-12).

35. Ms. Kubsch testified that the Calendar did not include all of her gambling sessions on it. (Transcript, Pgs. 101-102; Exh. F, Pgs. 1-12).

36. Ms. Kubsch testified that the Calendar did not keep track of her gambling losses. (Transcript, Pgs. 106-107; Exh. F, Pgs. 1-12).

37. Ms. Kubsch testified that the Calendar did not keep track of her profit. (Transcript, Pgs. 107-108; Exh. F, Pgs. 1-12).

38. Ms. Kubsch testified that the Calendar did not keep track of the amount of her wagers. (Transcript, Pgs. 108-109; Exh. F, Pgs. 1-12).

39. Ms. Kubsch testified that the Calendar did not keep track of her wins that were less than $1,200. (Transcript, Pg. 109; Exh. F, Pgs. 1-12).

40. Ms. Kubsch testified that the Calendar did not total the amount of her wins and losses at the end of the year. Ms. Kubsch did not know exactly how much she had won or lost gambling during 2007. (Transcript, Pgs. 109-110, 128; Exh. F, Pgs. 1-12).

41. Ms. Kubsch presented another calendar at trial that tracked her mileage. She testified that this calendar was used to keep mileage records for her salon business, not her purported gambling business. (Transcript, Pg. 113; Exh. F, Pgs. 13-24).

42. Ms. Kubsch testified that, generally, the payout percentage for slot machines is in the upper 90 percent range and that the house's advantage is about three percent over the long term. (Transcript, Pgs. 80-81, 170).

43. Ms. Kubsch testified that winning on slot machines in the short term requires luck. (Transcript, Pgs. 81-82).

44. Ms. Kubsch testified that slot machines are computers with computer disks and are programmed to be in the casino's favor. (Transcript, Pg. 85).

45. The Petitioners chose to have accountant Marion Thiel prepare and file their Original Return in 2008, even though Ms. Thiel had told Ms. Kubsch that she did not qualify as a professional gambler in 2007. (Transcript, Pgs. 133-134; Exh. 10).

46. Ms. Kubsch testified that it was her practice not to read over her tax returns prior to signing them and she did not review her Original Return in 2007 prior to signing it. (Transcript, Pg. 134).

47. Ms. Kubsch testified that after she was told the amount of tax due on Petitioners' Original Return in 2008, she did not prevent it from being filed. (Transcript, Pg. 136).

48. Ms. Kubsch testified that if there had not been a large amount of tax due on the Original Return, she would not have filed the Amended Return claiming to be a professional gambler in 2008. (Transcript, Pgs. 136-137).

49. Ms. Kubsch testified that if she had known in May 2007 that her gambling activity would result in a large tax bill, she would not have continued with it. (Transcript, Pg. 137).

50. JonMichael Rasmus ("Mr. Rasmus") testified for the Department. He has been employed by the Department of Revenue, Lottery Division, as a Senior Revenue Services Consultant for the last ten years. He is responsible for writing odds statements as the Lottery's resident mathematician and conducting game research and design. He has also researched and written policy for interactive gaming machines, such as slot machines. (Transcript, Pgs. 142-143).

51. Mr. Rasmus holds a Bachelor of Science degree in mathematics from the University of Wisconsin-Eau Claire, with an emphasis in applied physics. His courses included probability and statistics, survey design, and differential equations. (Transcript, Pgs. 144-145).

52. Mr. Rasmus is a mathematician specializing in gaming probability and statistics and testified that he is knowledgeable of how slot machines function and the prize structures they use. (Transcript, Pgs. 144-145).

53. Mr. Rasmus testified that most slot machines have a payout percentage in the 90's and this percentage is preprogrammed by the slot machine manufacturer. (Transcript, Pgs. 145-146).

54. Mr. Rasmus testified that there are no slot machines in production that have a payout percentage of 100% or more. (Transcript, Pg. 147).

55. Mr. Rasmus testified that there is no way a gambler can change a slot machine's preprogrammed payout percentage, there is no method a gambler could learn or skill they could acquire, and there is no way to play the slot machine that would change its payout percentage. (Transcript, Pgs. 146-147).

56. Mr. Rasmus testified that slot machines pick a winning outcome or payout randomly and there is no way to predict or influence that random outcome or payout. (Transcript, Pg. 148).

57. Mr. Rasmus testified that each pull of the arm or push of the button on a slot machine is an independent event with no connection with the prior event or the next event. (Transcript, Pg. 149).

58. Mr. Rasmus opined that there is no way for a gambler to identify or seek out a slot machine that is about to payout. (Transcript, Pg. 151).

59. Mr. Rasmus opined that there can be no expectation of profit playing slot machines over the long run. (Transcript, Pg. 149).

60. Mr. Rasmus opined as a gaming statistician and to a reasonable degree of certainty that no person can be a successful professional slot machine player. (Transcript, Pg. 159).

CONCLUSIONS OF LAW

1. Petitioners have failed to present clear and satisfactory evidence that the Department erred in disallowing the recharacterization of Ms. Kubsch's gambling losses as business losses, which were deductible from the federal adjusted gross income on Line 1 of Petitioners' 2007 Wisconsin income tax return.

2. Respondent presented clear and satisfactory evidence through the expert testimony of a gaming statistician that there is no reasonable expectation of profit over the long term because slot machines are pre-programmed in favor of the house and there is no fact or skill a gambler can acquire to change that.

DECISION AND ORDER

The issue in this case arose because Petitioners attempted to take their gambling losses as business deductions on their amended 2007 Wisconsin income tax return.

Petitioner Carol Kubsch had played slot machines at casinos for many years. In 2007, she reported $473,075 of gambling winnings as other income on her Federal tax return. (Transcript, Pgs. 21, 23, Exh. 1). She offset these winnings by taking the same amount as an itemized deduction on Schedule A of the Federal tax return. Under federal law, gambling losses may be taken as an itemized miscellaneous deduction. However, Wisconsin does not recognize gambling losses as an itemized deduction and thus, the $473,075 of winnings were included as part of petitioners' Wisconsin income for tax purposes. This resulted in the Department sending Petitioners an assessment of $31,708.50 based on the underpayment of their 2007 income taxes. After Petitioners received this assessment, they filed an amended 2007 tax return with an attached amended federal Form 1040X. The Form 1040X return included a Schedule C which listed Carol Kubsch's profession as gambling. On her Schedule C return, she reported the $473,075 as gross receipts and $473,075 as the cost of goods sold, thereby zeroing out any profit from her gambling activities. This amended Wisconsin income tax return provided a refund for Petitioners. The Department denied the refund claim, characterizing Carol Kubsch as a hobby gambler in the year 2007. Petitioners filed a Petition for Review with the Commission. The issues at trial were whether Carol Kubsch's gambling activities in 2007 were deductible

as ordinary and necessary business expenses under Section 162 of the Internal Revenue Code (I.R.C.), and if so, whether Petitioner could substantiate the amount she claimed as business expenses.

Wisconsin law on the tax treatment of gambling losses is summarized in the recent decision of the Wisconsin Tax Appeals Commission, *Grundahl v. Wisconsin Dep't of Revenue*, Wis. Tax Rptr. (CCH) ¶ 401-345 (WTAC 2010). Wisconsin does not recognize gambling losses as a miscellaneous itemized deduction. The only way gambling losses can be deducted from gambling winnings in Wisconsin is if the taxpayer is engaged in the trade or business of gambling. Wisconsin follows the Internal Revenue Code which does not define "trade" or "business" for purposes of deductibility under Section 162 of the Internal Revenue Code (I.R.C.). The United States Supreme Court in *Commissioner v. Groetzinger*, 480 U.S. 23, 35 (1987), provides some guidance regarding when gambling activities constitute a "trade" or "business:"

> "[I]f one's gambling activity is pursued full time, in good faith, and with regularity, to the production of income for a livelihood, and is not a mere hobby, it is a trade or business."

"[T]o be engaged in a "trade" or "business," the taxpayer must be involved in the activity with continuity and regularity and the taxpayer's primary purpose for engaging in the activity must be income or profit." *Id.*

The Wisconsin Tax Appeals Commission in *Calaway v. Dep't of Revenue*, Wis. Tax Rptr. (CCH) ¶ 400-856 (WTAC 2005), states:

> Guidance for determining whether an activity is engaged in for profit is provided in Treasury Regulations § 1.183-2. Deductions are not allowable under § 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*. 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*.

Treasury Regulations § 1.183-2(b) provides 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.

When gambling cases have come before the Wisconsin Tax Appeals Commission, the Commission has applied the nine factors of Treasury Regulations § 1.183-2(b), to the individual factors and circumstances of each case to determine whether an activity is engaged in for profit. The most recent cases have analyzed the nine factors and all have found against the taxpayer, but for different reasons.

In *Calaway v. Dep't of Revenue*, Wis. Tax Rptr. (CCH) ¶ 400-856 (WTAC 2005), the Commission concluded that Petitioner was not a professional gambler because he did not conduct his gambling activities in a businesslike manner, or in a way

which would support his subjective hope of earning a profit. In *Merlin and Ali Voss v. Dep't of Revenue,* Wis. Tax Rptr. (CCH) ¶ 401-028 (WTAC 2007), the Commission held that taxpayers failed to present clear and satisfactory evidence that the Department erred in rejecting Voss's characterization of their gambling and business losses.

In *Donna Ring v. Dep't of Revenue*, Wis. Tax Rptr. (CCH) ¶ 401-130 (WTAC 2008), the Commission found that the taxpayer was not a professional gambler, and that she had not provided evidence to overcome the presumption that the Department's assessment was correct. In *Ring*, the taxpayer had played slots and blackjack. After reviewing the relevant factors from the Treasury Regulations, the Commission said this about slots:

> Slot machines, which Petitioner testified constituted a significant portion of her gambling activities during the period in question, require no skill to play. The Commission has previously held that, as a matter of law, gambling in the form of playing slot machines cannot constitute a "trade" or "business." *Callaway, supra.*

In *Grundahl v. Wisconsin Dep't of Revenue*, Wis. Tax Rptr. (CCH) ¶ 401-345 (WTAC 2010), the Commission analyzed the nine factors, but reached a different conclusion about the professional gambler issue. Although this case involved slots, taxpayer testified that he played them in a certain way and introduced a book which verified that his method of playing could produce profits. Since this testimony was uncontroverted at trial, the Commission accepted that the taxpayer had obtained a low level of expertise for playing unique machines. Despite this, the Commission found against the taxpayer

because he was unable to provide substantiation for the expenses he claimed as deductions.

In summary, when a case comes to trial before the Wisconsin Tax Appeals Commission, the Commission determines the question of whether a petitioner is a professional gambler by applying the *Groetzinger* test as fleshed out by the nine factors of Treas. Reg. § 1-183-2(b). Prior to the trial in this case, the Commission sent a copy of the *Grundahl* decision to both parties and in deciding this case; we apply the nine factors of the Treasury Regulations to the individual facts addressed at trial.

1. Manner in Which the Taxpayer Carries On the Activity.

Treas. Reg. § 1.183-2(b)(1), notes: Carrying on an activity in a businesslike manner, maintaining complete and accurate books and records, conducting the activity in a manner substantially similar to comparable businesses which are profitable, and making changes in operations to adopt new techniques or abandon unprofitable methods suggest that a taxpayer conducted an activity for profit. Ms. Kubsch did not carry on her gambling activities in a businesslike manner. She did not maintain a complete and accurate book of records. She did not prepare a written business plan. She did not prepare a written budget. She did not maintain a separate checking account for her gambling activities. Although she was issued a player card by the Oneida Casino to keep track of her wins and losses, she did not use it continuously and so her statement of player card activity is incomplete. Ms. Kubsch's spreadsheet, which she presented at trial was not a contemporaneous record, but was prepared by an accountant after 2007, and was not therefore an accurate total of her wins and losses for

the year 2007. Ms. Kubsch could not substantiate the amount of goods sold (gambling losses) because she did not keep track of her wagers. This factor weighs for the Department.

2. The Expertise of the Taxpayer or the Taxpayer's Advisors.

Preparation for the activity by extensive study of its accepted business, economic, and scientific practices, or consultation with those who are expert therein, may indicate that a taxpayer has a profit objective. Treas. Reg. § 1.183-2(b)(2). A taxpayer's failure to obtain expertise in the economics of an activity indicates that he or she lacks a profit objective. *Burger v. Commissioner*, 809 F.2d 355, 359 (7th Cir. 1987).

Although Ms. Kubsch has gambled for forty years, she demonstrated no expertise in gambling. Ms. Kubsch's gambling activity was limited to playing slots. The Department's expert, Jon Michael Rasmus, provided credible testimony that all slot machines pay out at less than 100 percent of what the gambler puts in the machines over the long term. Ms. Kubsch provided no evidence that she had ever studied any books or gambling publications which would make her activities profitable. Ms. Kubsch testified about several strategies she employed while playing slots, but none of these in any way constituted an accepted business, economic, or scientific practice. In fact, Jon Michael Rasmus, an expert mathematician and gaming statistician, testified that to a reasonable degree of certainty, that no one could be a successful professional slot machine player. There is no skill involved. Ms. Kubsch presented no evidence to controvert this opinion.

In addition, Ms. Kubsch presented no evidence that she consulted with any business experts regarding her gambling business other than casino personnel and her accountant. Ms. Kubsch's accountant, in fact, told her that she wasn't a professional gambler and in fact prepared her original tax returns without filing a Schedule C. This factor favors the Department.

3. Taxpayer's Time and Effort.

The fact that a taxpayer devotes much time and effort to an activity, particularly if the activity does not have substantial personal or recreational aspects, may indicate that he or she has a profit objective. Treas. Reg. § 1.183-2(b)(3). A taxpayer's withdrawal from another occupation to devote most of his energies to the activity may also be evidence that the activity is engaged in for profit. *Id*.

The evidence showed that Ms. Kubsch did not devote substantial amounts of time to gambling. She filed a calendar which showed that she gambled about eight days per month, mostly on weekends. She did not give up her other profession to pursue gambling. This factor favors the Department.

4. Expectations that Assets Used in the Activity will Appreciate in Value.

There are no assets used in a gambling business other than money. Ms. Kubsch used the money she inherited to fuel her slot machine gambling. As there was no chance that slot machine play could produce profits in the long run, there could be no reasonable expectation that the inheritance would appreciate in value. This factor favors the Department.

5. Taxpayer's Success in Other Similar or Dissimilar Activities.

The evidence shows that Ms. Kubsch has been playing slot machines for forty years and has never made a profit. In the past eight years, her beauty salon has not shown a profit. This factor favors the Department.

6. Taxpayer's History of Income or Losses.

A history of substantial losses may indicate that the taxpayer did not conduct the activity for profit. Treas. Reg. § 1.183-2(b)(2).

In prior years, and on Petitioners' original 2007 federal income tax return, Ms. Kubsch reported her gambling winnings as "other income" on her federal income tax return and her gambling losses as a miscellaneous itemized deduction on federal Schedule A. Her winnings never exceeded her losses. In 2007, Ms. Kubsch testified that her losses were well over $100,000. This consistent history of losses indicates that Ms. Kubsch did not conduct her gambling activity for profit. This factor favors the Department.

7. Amounts of Occasional Profits, If Any.

Although Ms. Kubsch won some jackpots and had some successful days at the slots, there were never any profits in 2007, or any prior year. This factor favors the Department.

8. Financial Status of the Taxpayer.

Ms. Kubsch had a large inheritance, much of which was spent in her gambling activity. Mr. Blaha, the other Petitioner, reported income in 2007 from his job

at the foundry. There was also income generated from dividends and stock sales and from Ms. Kubsch's beauty salon. The Petitioners had substantial income from sources other than gambling to support themselves. This factor favors the Department.

9. Elements of Personal Pleasure.

The presence of recreational or personal motives in conducting an activity may indicate that the taxpayer is not conducting the activity for profit. Treas. Reg. 1-183-2(b)(9).

The evidence is that Ms. Kubsch has gambled for forty years. She has gambled on vacations, even in 2007. She gambled with friends and family. She clearly enjoyed gambling. This factor favors the Department.

In applying the nine factors of Treas. Reg. § 1-183-2(b)(9) to the evidence presented at trial, it is clear that Ms. Kubsch's gambling activities do not constitute a "trade" or "business." Her slot machine playing was not pursued full-time to the production of income for a livelihood. The Department was correct in labeling her gambling as a hobby.

The evidence presented in this case was in sharp contrast to the evidence in the *Grundahl* case. In *Grundahl*, most of the factors of Treas. Reg. § 1-183-2(b) favored Grundahl. In this case, none of them did. In *Grundahl*, the taxpayer presented two books which claimed that playing certain slot machines in a certain way could produce profits. Since there was no evidence presented to the contrary, the Commission accepted it as one of the factors favoring Grundahl's position. In this case, Respondent presented the expert testimony of a gaming statistician who testified that with respect

to slot machines, there can never be a profit over the long term because the machines are preprogrammed in a certain way and there is no skill which can be acquired to change that fact. Petitioner presented no evidence to contradict that testimony, and it weighed heavily in favor of the Department's position in analyzing several of the Treasury Regulation factors.

The Commission concludes that Ms. Kubsch's gambling activities were not engaged in for profit. She was not engaged in the trade, or business of gambling, and could not lawfully take deductions for her gambling losses under Section 162 of the Internal Revenue Code (I.R.C.). Since Petitioners' activities do not qualify for an ordinary and necessary business deduction, it is not necessary for the Commission to address the substantiation issue.

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. *Puissant v. Dep't of Revenue*, Wis. Tax Rptr. (CCH) ¶ 202-401 (WTAC 1984). The Department assessed the Petitioners $32,586 of tax based upon the underpayment of tax due on their 2007 Wisconsin Income Tax return. The Petitioners failed to provide evidence sufficient to show that the Department erred in its assessment.

IT IS ORDERED THAT

1. The Department's assessment is upheld.
2. The Petition for Review is dismissed.

Dated at Madison, Wisconsin, this 23rd day of August, 2011.

WISCONSIN TAX APPEALS COMMISSION

_____

Lorna Hemp Boll, Chair

_____

Roger W. Le Grand, Commissioner

_____

Thomas J. McAdams, Commissioner

ATTACHMENT: **"NOTICE OF APPEAL INFORMATION"**

THOMAS J. MCADAMS, COMMISSIONER:

I concur with the result reached in this matter. Unquestionably, the Petitioners in this case were not professional gamblers, as they failed all of the elements of the *Groetzinge*r test and the test in the Treasury Regulations. I write separately, however, to express my reservations about certain language that the Commission has used in several gambling cases, which states to the effect that slot players cannot *ever* be professional gamblers. Admittedly, past decisions of this Commission have stated or suggested that individuals who play slot machines cannot be professional gamblers because they have no mathematical chance of making money over the long term. I think it unwise, however, for the Commission to adopt this as a *per se* approach for several reasons.

First, to the best of my knowledge, no other jurisdiction in the United States has adopted such a rule. Largely for the sake of taxpayers, we usually strive to be

consistent with the federal courts and the federal courts clearly have not adopted this approach, as the cases cited in *Grundahl* demonstrate. Second, a *per se* rule leaves the possibility that a specific taxpayer who gambles for a living will be a professional for federal tax filing purposes, but not for Wisconsin filing purposes. While there are differences between federal law and Wisconsin law, I think that is a result that is hard to explain, given that the law we apply to these cases is entirely federal. Third, given the wide variety of gambling cases, fact patterns will emerge like those in *Grundahl* where it would clearly be unwise to use a *per se* approach. Fourth, for reasons that are unclear to me, we apparently are willing post hoc to assess the prospects for success for slot players, but we apparently do not do so for those who play other games.

Commissioner LeGrand's opinion cogently points out the substantial differences in the record between this case and the *Grundahl* case. In the latter, the testimony was uncontroverted that the Petitioner's gambling had a probability of success (backed up by two books written by experts) and the other evidence in the case was that the taxpayer made money each year. I think that distinction is appropriate. I write, however, to emphasize that I prefer that we continue to use a case-by-case approach, applying the test the United States Supreme Court used in *Groetzinger* and the Treasury Regulations, and going no further.

Respectfully submitted,

_____

Thomas J. McAdams, Commissioner