CITATION: VAOPGCPREC 17-89
Vet. Aff. Op. Gen. Couns. Prec. 17-89

DATE: 9-29-89

TEXT:

QUESTIONS PRESENTED:

(a) May gambling losses be deducted from income for purposes of income computation under the improved-pension program?

(b) In particular, do gambling winnings constitute "business, farm or professional income" under 38 C.F.R. § 3.271(c), so as to permit a deduction from such income of gambling losses sustained in generating it?

COMMENTS:

1. The veteran has contested attempts at recovery of an overpayment created when the veteran's improved-pension award was retroactively adjusted to reflect income from gambling winnings. The veteran argues that the gambling winnings should not be considered income because gambling losses exceeded the gambling winnings during the relevant period.

2. Under section 503(a) of title 38, United States Code, "all payments of any kind or from any source", with the exception of categories of income listed in that section, are required to be included in determining annual income for pension purposes. The implementing regulation, appearing at 38 C.F.R. § 3.271(a), provides that, in computing income for purposes of the improved- pension program, payments of any kind from any source shall be counted as income during the 12-month annualization period in which received, unless specifically excluded under 38 C.F.R. § 3.272. Neither gambling winnings nor losses are mentioned in either section 503 or its implementing regulations. However, 38 C.F.R. § 3.271(c)(1) provides that gross business, farm, or professional income should be "reduced by the necessary operating expenses such as cost of goods sold, or expenditures for rent, taxes, and upkeep, or costs of repairs or replacements." Subsection (c)(3) provides that " a loss sustained in operating a business, profession, farm, or from investments, may not be deducted from income derived from any other source."

3. The first issue to be considered in this matter is what is to be considered gambling income. In other words, at what point in time has a gambler experienced a gain which must be considered in calculating annual income under

38 U.S.C. § 503(a)? This appears to be an issue of first impression in the pension program.

4. The issue of what constitutes a gain for the purpose of calculating gross income from gambling under the Internal Revenue Code was discussed in Winkler v. United States, 230 F.2d 766 (1st Cir.1956), which dealt with a professional bookmaker who failed to file a tax return. In that case, the Court of Appeals for the First Circuit addressed 1934 changes in the Internal Revenue Code with respect to the treatment of gambling winnings and losses. Under the previous rule, losses up to the amount of gambling winnings were considered an exclusion from gross income. As amended, the law required gambling losses to be treated as a deduction, only to the extent of gambling winnings. 230 F.2d at 775. The Court noted that the new rule did not resolve the issue of what constitutes gross income:

To summarize briefly, we think that it is perhaps conceivable that Congress could, in its discretion, deny to a professional gambler the right to deduct from his total net winnings on winning races the total of his net losses on losing races in calculating the amount of his gross income. But we believe that Congress is without power to deny the professional gambler the right to offset his winnings on each race with his losses in that same race before coming to a "gain" of the type which constitutes gross income under § 22 of the Code. In other words, the appropriate unit for calculating his "gains" under § 22 may or may not be the net result over the yearly operation, but in any event it cannot be a unit which encompasses anything less than the total of his net profits (winning bets less losing bets) on every race. 230 F.2d at 776.

Without resolving the issue further, the First Circuit found that a gambler would have no gain at all if his winnings in a particular race did not exceed his losses in that same race.

5. This opinion suggests that the determination of what constitutes gambling income could range from the net result of the gambler's operations over a year to his net profits from a single gambling transaction, such as a horse race. To resolve this issue, we must look at the statute and regulations applicable to the pension program.

6. Pursuant to 38 U.S.C. § 503(a), all payments are required to be considered in determining annual income, unless specifically excluded. Gambling losses are not listed as an exclusion. Nonetheless, we consider the terms of the statute general enough to provide the Department some latitude in income determination. This latitude is exemplified by 38 C.F.R. § 3.271(c)(1), which is not authorized by a specific statutory exclusion, but rather was issued under the Department's inherent authority to define payments constituting income.

7. Regulations implementing 38 U.S.C. § 503(a), at 38 C.F.R. § 3.271(c), allow

business, farm, or professional income to be reduced by necessary operating expenses. The regulation goes on to provide those losses sustained (including losses from investments) may not be deducted from income derived from another source. By implication, investment losses may be deducted from investment gains. While for purposes of the Internal Revenue Code, gambling activity must be pursued on a full-time basis to be considered a trade or business, see Commissioner v. Groetzinger, 480 U.S. 23, 35 (1987), tax-law interpretations are not controlling for VA purposes due to the differing terms and objectives of those statutes. See Op. G.C. 3-85 (9-16-85). In our view, section 3.271(c) bears a less restrictive reading, i.e., that business, farm, professional, and analogous activities need not be engaged in on a full-time basis before accompanying costs or losses associated with generation of income may be considered.

8. Further, we can see no equitable basis for distinguishing between losses incurred in gambling and those incurred through investments. Cf. Groetzinger, 480 U.S. at 33-34, 34 n. 12 (analogizing full-time gamblers with traders in stocks and bonds). In both cases, the risk of loss is inherent in the nature of the activity, the objective generally being to derive a net gain over a series of transactions. In either case, it would be patently unfair and unrealistic to require that gains be tallied and reported, while ignoring losses necessarily associated with the activity in question. Thus, to avoid inequitable results, and in keeping with VA policy of administering the law under a broad interpretation, section 3.271(c) may reasonably be interpreted as applying generally to activities in which gains must necessarily be offset by associated losses in order to determine true income.

9. Accordingly, we conclude that gambling income may be considered as falling within the purview of the section 3.271(c) exception, whether or not gambling is engaged in as a full-time profession, and that gambling losses are deductible from income derived from the same source, i.e., gambling, to the extend of gains from that source. We leave to the Board of Veterans Appeals' (BVA) discretion the application of these principles to the facts of the instant case.

10. As a final matter, we note that in the instant case the veteran's pension award was discontinued retroactively to the beginning of the 1985 calendar year. However, according to documentation submitted by the veteran, he won $2,212.10 on September 27, 1985; $660.10 on November 2, 1985; and $1,517.30 on November 11, 1985. (Statement of the Case, November 21, 1986, page 4). Under 38 U.S.C. § 3012(b)(4)(A) and 38 C.F.R. § 3.660(a)(2), when reduction or discontinuance of a pension award is required because of an increase in income, the reduction or discontinuance is required to be made effective at the end of the month in which the increase occurred. See also 38 C.F.R. § 3.273(c) (Nonrecurring income is added to the annual income rate for a 12-month period commencing on the effective date on which the income is countable.) These provisions were discussed in recent published and non-published General Counsel opinions to the BVA Chairman. (O.G.C. Prec. 6-89

(3-8-89); Undigested Opinion, 2-17-89 (8-25 Income)). It does not appear that these provisions were followed in the instant case. Accordingly, to the extent that this issue is of significance in view of the above conclusions, we refer for the Board's consideration in accordance with these provisions whether the overpayment at issue was computed using the correct effective date for counting the claimant's gambling income.

HELD:

Under 38 U.S.C. § 503(a) and implementing regulations at 38 C.F.R. § 3.271(a), payments of any kind from any source are counted as income for improved-pension purposes unless otherwise excluded. As a general rule, gains from gambling must be considered as income. However, in determining gambling income for pension-computation purposes, gambling losses may be deducted from gambling winnings under 38 C.F.R. § 3.271(c), which allows certain forms of income to be reduced by losses incurred in generating that income.

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