

**Office of Chief Counsel
Internal Revenue Service
memorandum**

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from: Senior Technician Reviewer, Branch 5
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subject: W-2G Question

This Chief Counsel Advice responds to your request for assistance. This advice may not be used or cited as precedent.

Issues:

1. Under § 6041 of the Internal Revenue Code and § 7.6041-1(a) of the Income Tax Regulations, is a casino required to issue a Form W-2G to an individual who wins a slot machine jackpot or has winnings from a table game if the individual is enrolled in State Commission's Voluntary Exclusion Program (VEP)?
2. Are the winnings includible in the VEP participant's gross income?

Conclusions:

1. A casino is not required to issue a Form W-2G to a VEP participant who wins a slot machine jackpot or has winnings from a table game if the jackpot or winnings are not paid to the VEP participant.

2. A VEP participant is not required to include a jackpot or winnings from a State casino in gross income, except to the extent that an amount is paid to the VEP participant.

Facts:

Pursuant to State Administrative Code, State Commission has established a VEP as a means of treating gambling addiction. A VEP participant enters into a written contract with State pursuant to which the individual voluntarily agrees to not enter a State casino. Under the terms of the contract and as described in the State Administrative Code, a VEP participant who nevertheless enters a State casino agrees to surrender any jackpot or thing of value won as a result of a wager made at the casino. Winnings not payable to the individual are paid to the State Commission for use by the state to fight gambling addiction. An individual can elect to be in State's VEP for a period of one year, five years, or for life. If an individual elects either one or five years, the individual must affirmatively request to be removed from the program after the elected term expires. An individual may not request removal from the VEP if they elect lifetime enrollment.

When an individual enrolls in the VEP their name and a description are taken and entered into a list of enrolled members. That list is then made available to the casinos in State. If a VEP participant is found in a State casino they may be arrested for trespass. If a VEP participant nevertheless enters a State casino, makes a winning wager, and then tries to claim the winnings they will be informed that their name is on the VEP participant list and they will not be paid any winnings.

Specifically, if an individual wins a slot machine jackpot of \$1,200 or more, the machine stops and a slot technician comes to the machine to verify the prize. After verification, the slot technician obtains the individual's personal information to complete a Form W-2G. If the individual is a VEP participant, the individual is informed that under the terms of the VEP agreement the individual will not be paid and he or she is escorted from the casino. If the individual is not a VEP participant, a Form W-2G is completed and the individual is paid.

In addition, if an individual wins reportable gambling winnings at a table game and seeks to cash in chips at a cashier, the cashier asks the individual for identification to complete a Form W-2G and consults the VEP participant list before making payment. If the individual's name is on the VEP participant list, the individual is informed that under the terms of the VEP agreement the individual will not be paid and he or she is escorted from the casino. If the individual is not a VEP participant, a Form W-2G is completed and the individual is paid.

Law and Analysis:**Issue 1**

Section 6041 provides, in general, that all persons engaged in a trade or business and making payment in the course of such trade or business to another person, of rent, salaries, wages, premiums, annuities, compensations, remunerations, emoluments, or other fixed or determinable gains, profits, and income, of \$600 or more in any taxable year, shall make a true and accurate return to the Secretary, under such regulations and in such form and manner and to such extent as may be prescribed by the Secretary, setting forth the amount for such gains, profits, and income, and the name and address of the recipient of such payment.

Section 7.6041-1(a) provides that every person engaged in a trade or business who, in the course of the trade or business, makes a payment of winnings of \$1,200 or more from a slot machine shall make an information return with respect to such payment.

The obligation to file an information return reporting slot machine winnings with respect to an individual requires payment of the winnings to the individual. In this case, a State casino is not required to make a payment of slot machine winnings to individuals enrolled in the State's VEP. Accordingly, to the extent that no payment is made to the VEP participant, a State casino is not required to file an information return under § 6041 with respect to the VEP participant.

Under § 31.3406(g)-2(d)(3) of the Employment Tax Regulations, a gambling winning (other than a winning from bingo, keno, or slot machines) is a reportable gambling winning only if the amount paid with respect to the wager is \$600 or more and if the proceeds are at least 300 times as large as the amount wagered. See also Rev. Proc. 2007-57, 2007-36 I.R.B. 547 (requiring reporting of payments of winnings of more than \$5,000 to winners at a poker tournament).

Similar to slot machine winnings, the obligation to file an information return reporting table game winnings with respect to an individual requires a payment of the winnings to the individual. In this case, a State casino is not required to make a payment of table game winnings to individuals enrolled in the State's VEP. Accordingly, to the extent that no payment is made to the VEP participant, a State casino is not required to file an information return under § 6041 with respect to the VEP participant.

We emphasize that, to the extent any jackpot or winnings are paid to a VEP participant, information reporting under § 6041 is required as prescribed under the normal rules of that section.

Issue 2

Section 61(a) provides that, except as otherwise provided, gross income includes all income from whatever source derived. The definition is construed broadly and extends to all undeniable accessions to wealth, clearly realized, over which the taxpayer has complete dominion. Commissioner v. Glenshaw Glass Co., 348 U.S. 426, 431 (1955). Gross income includes gambling winnings. See, e.g., Hamilton v. Commissioner, T.C. Memo 2004-161.

Under the anticipatory assignment of income doctrine a taxpayer may realize income even though no amount is actually paid to the taxpayer. In the seminal case of Lucas v. Earl, 281 U.S. 111, (1930), the Supreme Court announced what has been called “the first principle of income taxation: that income must be taxed to him who earns it.” Commissioner v. Culbertson, 337 U.S. 733, 739-740 (1949). In Earl, the taxpayer and his spouse entered into an agreement under which all earnings and other property, then owned and thereafter acquired by either spouse, were to be held by both spouses equally as joint tenants with right of survivorship. Mr. Earl claimed that, pursuant to the arrangement, only one-half of his salary and fees was taxable to him. The Court found that “however skillfully devised” an arrangement might be, an individual may not assign income that he earns to another taxpayer to shift the incidence of income tax. Thus, the Court held that Mr. Earl was taxable on the entirety of his salary.

The assignment of income doctrine announced in Lucas v. Earl and applied in subsequent cases effectively prohibits attempts by taxpayers to shift the tax liability for income earned by the taxpayer’s own efforts. However, in certain circumstances, the assignment of income doctrine does not apply where the taxpayer disclaims, waives, renounces or otherwise abandons any and all interests in the right to receive the income before it is earned and the taxpayer does not direct, or retain the ability to direct, the disposition of the income after it is earned and payable.

For example, in Commissioner v. Giannini, 129 F.2d 638 (9th Cir. 1942), the taxpayer was a corporate officer who did not receive compensation income for several years. In early 1927, the corporation’s Board of Directors resolved that they would pay the taxpayer a percentage of the corporation’s profits each year. After paying a percentage to the taxpayer in the first half of 1927, the taxpayer informed the Board that he did not wish to receive any future payments. Instead, he asked that the corporation use the money for a worthwhile purpose. In response to this request, the Board

adopted a resolution under which they established a Foundation of Agricultural Economics at the University of California in the name of the taxpayer. The Service argued that, under the assignment of income doctrine, any amounts paid to the Foundation were taxable income of the taxpayer. The court, however, held that because the taxpayer never received payment, nor did the taxpayer direct the use of the money, the taxpayer was not required to include amounts paid to the Foundation in income. The court noted that there was substantial evidence to support the finding of the Board of Tax Appeals “that the taxpayer did not receive the money, and that he did not direct its disposition. All that he did was to unqualifiedly refuse to accept any further compensation for his services with the suggestion that the money be used for some worthwhile purpose. So far as the taxpayer was concerned, the corporation could have kept the money.” Id. at 641.

We conclude that a State VEP participant resembles the taxpayer described in Giannini. By participating in the State VEP the gambler is repudiating his or her right to any of the winnings before any of the winnings are earned or paid. The fact that the winnings are surrendered to the State Commission is of no consequence because the participant is not directing the payment of the winnings to another person. Rather, pursuant to state law and as reflected in the terms of the State VEP agreement entered into before the winnings are realized, the renounced winnings must be paid to the State Commission.

Accordingly, a State VEP participant is not required to include a jackpot or winnings from a State casino in gross income, except to the extent that an amount is paid to the VEP participant.

Please call Andrew Braden at (202) 317-7006 if you have any further questions concerning this memorandum.