

UPDATE ON THE NEW HAMPSHIRE GAMBLING TAX

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AUGUST 12, 2011

GAMBLING TAX BACKGROUND INFORMATION

During the 2009 Session of the General Court, the Legislature enacted the law authorizing the taxation of gambling winnings within the Taxation of Incomes statute (RSA 77:38 through 50). *See Chapter 144, Laws of 2009 Sections 249 - 253.* The provisions imposed a 10% tax on the receipt of gross gambling winnings from any source derived (no reductions for gambling losses) of all New Hampshire residents and also imposed the same tax on any non-resident individual for winnings received from a New Hampshire entity.

The law also does not provide a credit for taxes that the New Hampshire resident paid to another state if the individual won the money outside of New Hampshire. The result is that the winnings became subject to double taxation at the state level in addition to being taxed at the Federal level.

The provisions were effective July 1, 2009 and applied to any winnings received on or after July 1, 2009. Individuals who won money prior to July 1, 2009 but received annuity payments subsequent to June 30, 2009 were taxable on the amount of their annuity payment.

There was no monetary exemption from the tax, even minimal winnings from lottery tickets were included. The tax return for a calendar year, filed with the New Hampshire Department of Revenue Administration ("DRA") was due on or before the 15th day of the fourth month following the end of the taxable period. The law required that the Lottery Commission and the Racing & Charitable Gaming Commission withhold the tax and remit the money to the DRA. The regular penalties and interest provisions applied to the tax.

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The law, RSA 77:41, was amended in 2010 to provide an exemption from the tax for gambling winnings that were won prior to January 1, 1999 for which the winner was receiving annuity payments. *See Chapter 371, Laws of 2010.* The exemption was effective for payments received on or after June 23, 2010. The DRA indicated that any annuity payments relating to pre-January 1, 1999 winnings that were received between July 1, 2009 and July 22, 2010 were subject to the tax. Such payments received after July 22, 2010 would no longer be subject to the tax.

During the 2011 Session of the General Court, the Legislature enacted a repeal of the gambling tax. *See Chapter 47, Laws of 2011.* The effective date of the repeal provision was May 23, 2011. The statutory language did not repeal the tax on a retroactive basis so any winnings received prior to May 23rd were subject to the tax (other than annuity payments for winnings that occurred before January 1, 1999).

The DRA drafted its Administrative Rules, Rev 3100, on the Gambling Tax and they became effective on April 2, 2010. On May 18, 2011, the DRA released Technical Information Release, *TIR 2011-001*, advising taxpayers and tax practitioners about the repeal. The DRA also released a series of *Frequently Asked Questions and Answers* relating to the tax.

For an individual who is a professional gambler, there is also a risk of double taxation if the individual is considered a business organization. The Business Profits Tax deduction for income subject to RSA 77, which would protect against double taxation of interest and dividends, does not cover gambling winnings because the term “taxable income” in RSA 77:3, I is “...income received from interest and dividends during the tax year...”.

CONSTITUTIONAL CHALLENGE

On May 20, 2010, Devine, Millimet & Branch Professional Association filed a Petition for Declaratory Judgment, Permanent Injunction, Class Action Certification And Tax Refunds (the “Lawsuit”) in Merrimack County Superior Court (the “Court”)(Docket Number 217-2010-CV-00300) on behalf of Dean T. Leighton (Mr. Leighton), Leighton Family Enterprises, LLC (the “LLC”) Leonard Willey (“Mr. Willey”) and all others similarly situated (the “Class”) against the State of New Hampshire. The Lawsuit claims that the Gambling Tax violates both the New Hampshire and Federal Constitutions. The remedy sought in the Lawsuit is to have the tax declared unconstitutional, bar the State from collecting the tax, order refunds of any tax paid as well as order the State to pay interest, costs and attorney’s fees associated with challenging the tax.

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Since the exemption for pre-1999 annuity winners was enacted, the amount withheld on an annuity payment to the LLC was refunded with interest. As a result Mr. Leighton and the LLC are no longer petitioners in the Lawsuit. A new petitioner, David P. Eby ("Mr. Eby"), was substituted for Mr. Leighton and the LLC. The Lawsuit now lists Mr. Eby, Mr. Willey and the Class as the petitioners. Information on the status of this matter can be obtained from Devine, Millimet & Branch, PA.

DEPARTMENT OF REVENUE ENFORCEMENT ACTIVITY

The DRA has begun the enforcement activities for this tax in the form of assessments against individuals. The DRA's position is that the tax applies to all winnings, including annuity payments received prior to May 23, 2011, other than what was exempted by Chapter 371. They will not apply the Chapter 371 exemption retroactively. In other words, any such winner who received an annuity payment between July 1, 2009 and June 23, 2010 is still subject to the 10% Gambling Tax. The assessments include tax, interest and penalties. A number of taxpayers received the Notices of Assessment and have filed timely appeals with the DRA Hearing Officer under *RSA 21-J:28-b* and *Rev 200*.

After submitting the appeal request, some practitioners with Powers of Attorney have been contacted by the DRA Audit Division to discuss settlement where the taxpayer would pay the tax and interest and the DRA would abate the penalties. Correspondence from the Audit Division also mentions that the taxpayer would agree to withdraw their appeal and without the withdrawal the DRA would move forward with the hearings process. A letter from the Audit Division signed by a Division employee denying a request for the reversal of the tax, interest and penalties is not the final determination from the Department. The taxpayer is entitled to a hearing and after the hearing should receive a Hearing Order (an "Order") from the DRA's Hearing Officer, Denise Daniel. An Order, if adverse to the taxpayer, can then be appealed to the Superior Court or the Board of Tax & Land Appeals.

Taxpayers who receive Notices of Assessment from the DRA have the right to appeal the assessment to the DRA Hearings Officer within 60 days of the assessment date. The 60 day requirement is a statutory deadline that cannot be extended by the DRA and if missed by the taxpayer prevents the taxpayer from appealing the assessment to the courts or from seeking a refund of the tax payment.

After an appeal has been filed with the DRA, a taxpayer may request that their appeal be held in abeyance pending the resolution of the Lawsuit. If that request is granted then the case will be put on hold and the taxpayer will not be required to pay the assessment to the DRA until the Court or the New Hampshire

Supreme Court issues a ruling on the constitutionality of the Gambling Tax. We have been advised by the Office of the Attorney General that the DRA will agree to the stay of any appeal timely filed with the Hearing Officer. If the Lawsuit is successful, the assessment against taxpayers should be reversed without the need for a hearing. If the Lawsuit fails, then each taxpayer will have the opportunity to move forward with their individual appeal and may be successful in getting some of their assessment, such as penalties, reversed if there was **reasonable cause** for not filing a timely return or paying the tax when due.

CONCLUSION

Taxpayers who receive Notices of Assessment from the DRA should protect their appeal rights by filing Petitions for Redetermination with the DRA's Hearing Officer under RSA 21-J:28-b within 60 days of the date on the Notice of Assessment. The appeal of an assessment does not require that the tax be paid but the unpaid tax would continue to accrue interest until the matter is resolved and the payment is made if the additional tax liability is upheld.

We are available to assist taxpayers and practitioners with any appeal of Gambling Tax assessments or to provide answers to questions regarding the status of the Lawsuit and how they are included within the Class.

The Devine, Millimet & Branch State & Local Tax Practice offers this free periodic E-Mail Alert service to provide information on recent tax developments in statutory, regulatory and case law, and decisions. If you have any questions about this e-mail, or if you know of anyone else who may be interested in receiving these alerts, please send us an e-mail at taxenews@devinemillimet.com. Previous issues of the State Tax E-News, can be obtained at <http://www.dmb.com/news-and-events/newsletters.asp>.