**THE STATE OF NEW HAMPSHIRE**

**HILLSBOROUGH, SS.**
**SOUTHERN DISTRICT**

**SUPERIOR COURT**
**No. 2011-CV-0529**

Kenneth Brown

v.

New Hampshire Department of Revenue Administration

**ORDER ON CROSS-MOTIONS FOR SUMMARY JUDGMENT**

The petitioner, Kenneth Brown, has brought this action appealing an administrative decision of the respondent, the New Hampshire Department of Revenue Administration ("the State"). In the underlying hearing, the petitioner challenged the constitutionality of the now-repealed Gambling Winnings Tax ("GWT"), and renews that argument here. Currently pending before the court are the parties' cross-motions for summary judgment. On September 17, 2012, the court conducted a hearing on this matter. The petitioner appeared pro se, and the State was represented by counsel. For the reasons set forth herein, the court finds and rules as follows.

Background

The relevant facts are not disputed. Effective July 1, 2009, the General Court instituted the GWT, codified at RSA 77:38, *et seq.* (Supp. 2010) (repealed effective May 23, 2011), which imposed a tax of ten percent on gambling winnings. The tax applied to winnings of New Hampshire residents anywhere derived and to gambling winnings of non-residents derived in New Hampshire. RSA 77:39. The statute defines gambling winnings as "winnings from lotteries and games of chance including, but not limited to, bingo, slot machines, keno, poker tournaments and other gambling winnings subject to federal income tax withholdings." RSA 77:38, III. The tax is imposed on gross winnings

(figured after deduction of the cost of the wager that resulted in a win), but does not allow a "set-off" or reduction for gambling losses accumulated over the tax year. In addition, the statute does not impose a minimum winning requirement—all winnings, however small, are subject to the tax. In 2011, the GWT was repealed effective May 23, 2011. The repeal was not made retroactive, and, therefore, winnings received in the years 2009 and 2010 are subject to tax.

The petitioner concedes that he is a recreational gambler, not a professional one; in other words, his gambling is not a trade or business in which he engages as a means of financial support. Between July 1 and December 31, 2009, he made four visits to the Mohegan Sun Casino in Connecticut. During that period, he was assessed and paid taxes on his winnings of $5,300. During the following year, he made a total of eight visits, and paid a GWT of $8,525. The petitioner filed timely requests with the State seeking refunds for those tax years, arguing that the tax was unconstitutional under part II, article 5 of the New Hampshire Constitution and the 14th Amendment to the United States Constitution. The State denied his refund requests, and the petitioner appealed to a hearings officer. The officer denied the petitioner's request, finding that she did not have the authority to decide his constitutional argument. He now timely appeals the hearings officer's decision.

Standard of Review

In ruling on cross-motions for summary judgment, the court considers "the evidence in the light most favorable to each party in its capacity as the nonmoving party and, if no genuine issue of material fact exists, [the court] determine[s] whether the moving party is entitled to judgment as a matter of law." N.H. Ass'n of Counties v. Comm'r, N.H. Dep't of Health & Human Servs., 156 N.H. 10, 14 (2007). Where, as

here, the sole issue is the constitutionality of a statute, the court reviews the decision of the hearings officer de novo. RSA 21-J:28-b, IV (2012); see also N.H. Ass'n of Counties v. State, 158 N.H. 284, 288 (2009) (the court "review[s] the constitutionality of [ ] statutes de novo"). "In reviewing a legislative act, [the court] presume[s] it to be constitutional and will not declare it invalid except upon inescapable grounds." N.H. Ass'n of Counties, 158 N.H. at 288 (citation omitted). "In other words, [the court] will not hold a statute to be unconstitutional unless a clear and substantial conflict exists between it and the constitution." Id.

## Analysis

The petitioner assails the constitutionality of the GWT on four separate grounds. He asserts that the GWT, as applied to him, is not: (1) proportional; (2) equal in treatment of similarly situated taxpayers; (3) equal in valuation; or (4) reasonable and just. The court will examine each of these bases in turn.

### I. Proportionality

Part I, Article 12 of the New Hampshire Constitution establishes that "every member of the community has a right to be protected by it, in the enjoyment of his life, liberty, and property; he is therefore bound to contribute his share in the expense of such protection." "This article requires that a given class of taxable property be taxed at a uniform rate, and that taxes must be not merely proportional, but in due proportion, so that each individual's just share, and no more, shall fall upon him." Smith v. N.H. Dep't of Revenue Admin., 141 N.H. 681, 685-686 (1997) (citations and quotations omitted). "This provision literally imposes a requirement of proportionality of a taxpayer's portion of the public expense [ ] according to the amount of his taxable estate, and requires that similarly situated taxpayers be treated the same." Id. at 686 (citations and quotations

omitted).

The petitioner argues that the GWT is not proportional in that it affects recreational gamblers differently. Specifically, he argues that "[a] large number of people within [the class of gamblers] are practically excluded from the tax simply because their winnings cannot be documented." (Pet'r's Mot. at 6.) He asserts that because the GWT "creates no mechanism to document" wins over $1,200,[1] "there would be no way for the State to prove such winnings occurred." (Id.) Thus, he claims that the tax only affects "that small percentage of gambling winners who happen to win more than $1,200 from any one result." (Id.) In essence, the petitioner argues that many gamblers, including himself, do not pay tax on wins under $1,200—even though it is legally due—because these wins do not trigger mandatory reporting. He contends two classes of gamblers are created: those with wins over $1,200, which require mandatory reporting under federal law, and those with wins under $1,200, which do not require mandatory reporting. The petitioner asserts that the former class must pay the GWT, while the latter class often fails to pay it.

This argument is unconvincing. On its face, the GWT applies to all gambling winnings, regardless of amount:

> A tax of 10 percent is imposed on:
> (a) Gambling winnings of New Hampshire residents from anywhere derived.
> (b) Gambling winnings of nonresidents of New Hampshire derived from New Hampshire entities.

RSA 77:39, I. The statute also provides that the GWT applies to "income that is received from gambling winnings during the calendar year," which includes "all winnings as evidenced by federal tax withholding form W-2G." RSA 77:40. Along these lines,

[1] Federal law requires that one-time wins of over $1,200 trigger mandatory withholding and reporting on Form W-2G for federal income tax purposes. The GWT is assessed, in part, based on this form.

the GWT is a self-reporting tax for winnings under $1,200, and every taxpayer is required by law to "[k]eep such records as may be necessary to determine the amount of his or her liability under [the GWT]." RSA 77:49, I(a). Although some taxpayers may choose to violate the law and not report their winnings, it does not follow that the GWT creates two classes of gambling winners. Indeed, by the petitioner's logic, nearly all taxes would be unconstitutional as there are inevitably those that cheat or fail to pay what is owed under any tax. In sum, the court concludes that the tax is proportional, as it affects all gambling winners equally. Every dollar of winning—whether in a sum over or under $1,200—is subject to the same tax of ten percent.

The petitioner further argues that the GWT acts disproportionately because it "failed to account for the 'cost' of one's gambling winnings." (Pet'r's Mot. at 6.) He argues that the GWT is disproportional because it is not a net tax—that is, he should be able to deduct the amount of his gambling losses when calculating his yearly GWT. Addressing a comparable argument, the Illinois Appeal Court commented that such a claim, in essence, that "gambling winnings do not reasonably constitute income to the extent offset by losses," is not so much a proportionality attack, as it is "an attack on the basic concept of income." Byrd v. Hamer, 943 N.E.2d 115, 135 (Ill. App. Ct. 2011).

Under the GWT statute and administrative rules, each gambling bet is defined as a distinct event. Thus, the measure of taxable income is the total winnings on a single bet reduced by the cost of that single bet. See N.H. Admin. Rules, Rev. 3102.01(b)(2). This classification, which results in taxation on gross income, is well within the legislature's purview. See N. Country Envtl. Servs. v. State, 157 N.H. 15, 19 (2008) ("The legislature has broad authority to classify types of property for taxation so long as the classification is sufficiently inclusive to constitute a distinctive class."); Opinion of the

Justices, 123 N.H. 296, 300 (1983) (explaining that gross income without allowing for any deductions would be a proper and constitutional taxation class); Smith, 141 N.H. at 687 ("[A]s to the selection of proper subjects of taxation and the proportion of the tax that shall be laid on each subject, the authority of the legislature is, without question, supreme.") (citation omitted). Here, the classification of all gambling winnings as the taxable base—without regard to losses—is sufficiently definitive enough to pass constitutional muster. In fact, the federal government has similarly defined gambling winnings as such. See, e.g., McClanahan v. United States, 292 F.2d 630, 631 (5th Cir. 1961) ("This Court has long since held that gambling winnings . . . are includable in gross income and that gambling losses, to the extent permitted by statute, are deductions.") (emphasis added).

Moreover, the State is under no constitutional obligation to allow deductions for losses, but instead may choose to do so if they operate "on a uniform basis." Opinion of the Justices, 123 N.H. at 300 (citation omitted). The mere fact that the federal government allows offsets for gambling losses does not require the State to follow suit. Income tax deductions in the federal arena are a matter of "legislative grace," INDOPCO, Inc. v. Comm'r, 503 U.S. 79, 84 (1992) and not constitutional right. Simply because Congress has chosen to allow taxpayers to deduct gambling losses to offset gambling wins for federal income tax purposes does not equate to a constitutional requirement to do so. The petitioner has cited no authority—nor can the court find any—for the proposition that the State must offer the same deductions as the federal government. See Byrd, 943 N.E.2d 115 (finding Illinois statute's elimination of "any deduction for losses incurred in casual gambling" to be constitutional despite federal law to contrary). Lastly, because the petitioner is admittedly a casual or amateur gambler,

there is no "danger of creating . . . a tax upon occupations." Opinion of the Justices, 111 N.H. 131, 135 (1975). What is taxed under the statute at issue is a discretionary activity engaged in for pleasure during which any recreational gambler may ultimately suffer great losses. Each gambler can assess the impact of the winnings tax on his overall annual out of pocket financial investment in entertainment as he must do when luck is not with him.

In sum, in order to be proportional, "all subjects of taxation within a given class shall be taxed at a uniform rate." Id. at 134. The court concludes that the ten percent uniform tax on all gambling winnings is proportional. That is—all gambling winners pay the same ad valorem rate of ten cents per every dollar won in any given wager. The court also concludes that the legislature acted within constitutional bounds by not allowing a deduction for gambling losses. See Byrd, 943 N.E.2d 115 (rejecting equal protection and uniformity challenge to an Illinois GWT which did not allow a casual gambler to offset his winnings by his enormous losses).

II. Equal in Treatment of Similarly Situated Taxpayers

The petitioner next argues that the GWT treats "similar taxpayers differently," and that "inequality arises between gambling winners who achieve their gambling wins in different increments." (Pet'r's Mot. at 7.) This argument simply recasts the proportionality argument. As stated above, the GWT statute does not create two classes of gambling winners. All winners must pay ten percent, regardless of the amount of their win. The petitioner's attempt to analogize the facts in Eyers Woolen Co. v. Gilsum, 84 N.H. 1 (1929) is unavailing. In that case, the court held unconstitutional a special tax exemption for a new woolen mill, the only mill to which the exemption applied, "because [the law] lack[ed] the essential element of equality. The constitutional

flaw was that "[the tax] applie[d] to one taxpayer only." Id. at 16. Here, the GWT applies broadly to all gambling winners of a wager. It does not tax only a single winner or a single type of winner, and with one exception not relevant to the issue at bar, it does not exempt any person or persons from taxation. In sum, the court concludes that the GWT treats similarly situated taxpayers equally.

III. Equal Treatment in Valuation

The petitioner next argues that the GWT "does not assess the 'true value' of the taxable win" because it does not allow for deductions of gambling losses. (Pet'r's Mot. at 8.) The court is not persuaded that there is any disparity in the manner of valuation. The property being taxed are winnings on each wager. Money has a clear and obvious value: the dollar amount of the winnings. The petitioner relies on Nash Family Inv. Props. v. Town of Hudson, 147 N.H. 233, 237 (2001) to support his argument. However, the property being taxed in Nash was real estate, a very different type of property than money. The court in Nash recognized a problem because the valuation process utilized did not take into account important characteristics that impacted the value of the real property taxed, such as "frontage, shape, wetlands, zoning or topography." Unlike real property, here the dollars won by each gambler on a wager are valued the same. There is not therefore a comparable concern in its valuation. Put simply, "a dollar is a dollar." (State's Mot. at 9.)

IV. Reasonable and Just

The petitioner's final argument, and perhaps his fundamental complaint about the GWT tax, is that it is "neither[] reasonable nor just to tax [his] winnings" in the manner the statute allows, one, because they occurred from a few 'large' wins rather than from numerous small wins," (Pet'r's Mot. at 9.) and two, because he is not allowed to deduct

his gambling total annual gambling losses from his annual gains. However, the supreme court has made it clear that Part II, Articles 5 and 6 allow the legislature to define the scope of property subject to tax if that classification is supported by "just reasons." Cagan's, Inc.. v. N.H. Dep't Revenue Admin., 126 N.H. 239, 245 (1985). "A just reason is the equivalent of a rational basis." Id. The petitioner argues there is no rational basis to tax gross gambling income without a deduction for losses.

In response, the State argues that gambling is a "social evil," and thus, the General Court had rational reasons for not allowing deductions and for taxing wins per wager. The court agrees that a majority of the legislature could conclude that gambling "presents a social problem, [and is an activity] properly coming under the exercise and jurisdiction of the police power of the State[,]." Ratti v. Hinsdale Raceway, 109 N.H. 270, 272 (1969). The supreme court has previously approved of other taxes based on consideration of the social value of the property being taxed. See Opinion of the Justices, 97 N.H. 543, 545 (1951) (permitting tax on cigarettes). See also Eby v. State, Merrimack Cty. Super. Ct., No. 217-2010-CV-300 (Oct. 20, 2011) (Order, McNamara, J.) (the superior court stated that "gambling could rationally be perceived as a social evil by the Legislature and the [c]ourt cannot say that [the] 10 percent tax, or even, in effect, a higher tax by refusing to allow losses to be set off against winnings, violates the New Hampshire Constitution.").

In fact, the court takes note of the ongoing political debate of our time as to whether gambling should be legalized in New Hampshire, which raises questions of social policy and finance. Here, Mr. Brown chose to engage in an expensive hobby. The winnings tax, which he and other recreational gamblers must shoulder, are arguably rationally related to what some perceive to be negative societal impacts

consequent to the activity. As discussed above, the winnings tax like the losses occasioned from unlucky bets are part of the cost of the entertainment.

Finally, the petitioner's other arguments are unpersuasive. He asserts that the tax is unreasonable and unjust because it was repealed "just 22 months after it became law." (Pet'r's Mot. at 9.). Standing alone, a legislative decision to repeal an act does not factor into the constitutional analysis. The legislature has broad powers to enact legislation, which later may prove to be ineffective, harsh, or inoperable; simply because that legislation is later repealed does not render it unconstitutional.

The petitioner also points to the statement of Senator D'Allesandro, who stated that "[the legislature] [was not] thinking rationally" by passing the bill, and that the tax was "unconscionable." (Id.) While these statements may demonstrate that the GWT was ill-designed or perhaps even unwise in at least one legislator's opinion, it is not within the court's province to strike down laws for these reasons. Petition of Boston & Maine Corp., 109 N.H. 324, 325 (1969) ("[C]ourts are not concerned with whether a statute is wise, reasonable, or expedient."); Opinion of the Justices, 111 N.H. 136, 143 (1971) ("As is always the case with legislative enactments, the wisdom of the measure proposed is for the legislature, and not within the prerogative of the justices to determine."). Rather, the court's duty is to ensure that the law meets constitutional requirements. Petition of Boston & Maine Corp., 109 N.H. at 325-26. After considering all of the petitioner's arguments, the court concludes that it does.

For all of the above reasons, the petitioner's motion for summary judgment is

DENIED; the State's cross-motion is GRANTED.

So ordered.

Date: November 13, 2012

Diane M. Nicolosi,
Presiding Justice