Larry's Tax Law

One Big Beautiful Bill Act, H.R. 1 - 119th Congress (2025-2026): Part III - Gambling / Code Section 165(d)

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In this third installment of my multi-part series on the One Big Beautiful Bill Act (the "Act"), I discuss a provision of the Act that may not impact a large segment of the population, but which is interesting and worthy of coverage.

Section 70114 of the Act only impacts gamblers. It amends Code Section 165(d).

Background

Over the years, I authored numerous articles about the taxation of gambling. In 1987, I authored a lengthy law review article, *The Evolution of the Phrase Trade or Business: Flint v. Stone Trace Company to Commissioner v. Groetzinger - An Analysis with Respect to the Full-Time Gambler and the Investor, 23 Gonzaga Law Review 513 (*1987/1988). In that article, I examined, in part, whether a full-time gambler, for tax purposes, is in the trade or business of gambling. If the answer to that question is yes, two results follow (one result that is good and one result that is not so good): **(1)** the gambler is able to deduct under Section 162 of the Code all of the ordinary, necessary and reasonable expenses incurred in carrying on the business; and **(2)** the net income of the gambler, if any, is subject to self-employment tax under Section 1401 of the Code.

In 2014, on this blog, I provided a discussion about the taxation of a full-time gambler. In that article, I provided some updates and additional insights on that topic.

A brief overview of the applicable law is necessary for this discussion. Code Section 162(a) generally allows a deduction for "all the ordinary and necessary expenses paid or incurred during the taxable year in carrying on any trade or business". Code Section 165(d), originally enacted as Section 23(g) of the Revenue Act of 1934, however, provides that "[l]osses from wagering transactions shall be allowed only to the extent of the gains from such transactions."

In *Mayo v. Commissioner*, 136 TC 81 (2011), the U.S. Tax Court was presented with several interesting legal issues, including: (1) whether a taxpayer that is in the trade or business of

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gambling may deduct losses from gambling without regard to Code Section 165(d) [in other words, does Code Section 165(d) apply to a taxpayer who is in the trade or business of gambling]; and (2) whether Code Section 165(d) limits the deductibility of losses of a taxpayer who is in the trade or business of gambling to the amount of his or her wagers, or if he or she can include his or her business expenses [in other words does Code Section 165(d) prevent a taxpayer who is in the trade or business of gambling from deducting losses in excess of winnings that are attributable to business expenses].

On the first question, the Tax Court ruled that Code Section 165(d) applies to all gamblers, including gamblers who are engaged in the trade or business of gambling. So, wagering losses in excess of winnings are not deductible for all gamblers.

On the second question, the court ruled, while the wagering losses of a taxpayer engaged in the trade or business of gambling are limited to his or her winnings under Code Section 165(d), his or her deductible business expenses, excluding the direct costs of wagers, are not subject to that limitation. So, as long as the expenses are ordinary, necessary and reasonable as required by Code Section 162, they are deductible even if they create a loss for the taxpayer beyond the amounts wagered and are not otherwise limited by another section of the Code. This ruling opened the door for professional gamblers to deduct their costs of travel, meals and research (e.g., handicapping data) related to their gambling activities under Code Section 162(a), even though the expenses cause the taxpayer to generate a loss from the business in excess of the amount wagered. Gambling losses under Code Section 165(d), however, remained limited to gambling winnings.

Tax Cuts and Jobs Act ("TCJA")

Effective for tax years beginning after December 31, 2017, the definition of “losses from wagering transactions” under Code Section 165(d) was expanded to include any deduction otherwise allowable under Chapter 1 of the Code incurred in carrying on any wagering transaction. In effect, the TCJA overruled the *Mayo* decision, which had allowed professional gamblers (i.e., taxpayers in the trade or business of gambling) to claim business expenses related to gambling even if the deduction created a loss in excess of amounts wagered. That is no longer the case after the TCJA. Section 165(d), however, was scheduled to sunset at the end of 2025. If allowed to sunset, the law would revert to the *Mayo* decision.

Section 70114 of the Act

The Act amends Code Section 165(d) in two (2) ways:

1. It makes the TCJA amendment to Code Section 165(d) a so-called permanent provision of the Code. Therefore, it will not expire at the end of 2025.

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2. It adds a new twist to the law by further limiting the deductibility of losses from gambling to 90%.

Section 70114 of the Act provides in part:

"For purposes of losses from wagering transactions, the amount allowed as a deduction for any taxable year ... shall be equal to 90 percent of the amount of such losses during such taxable year, and shall be allowed only to the extent of the gains from such transactions during such taxable year." ..... For purposes of this paragraph the term losses from wagering transactions includes any deduction otherwise allowable under this chapter incurred in carrying on any wagering transaction."

Section 70114 of the Act applies to taxable years beginning after December 31, 2025.

The Joint Committee on Taxation estimates that this provision of the Act will generate more than $1.1 billion in additional tax revenue over eight years.

There does not appear to be any strong tax policy that drove lawmakers to pass this provision. Many commentators believe the sole impetus of the change to the Code is revenue generation.

Section 70114 of the Act has lawmakers from states such as Nevada, where gambling is a significant economic driver for the state, lobbying to get this provision of the Act repealed.

Gambling experts say that this change in our federal tax laws will severely penalize professional gamblers who already have razor-thin profit margins. It is asserted that gambling professionals, like poker players who generally eke out relatively small profits but wager large amounts during the tax year, will be driven out of business.

Additionally, many opponents of this change to the Code assert that it will lead to increased tax non-compliance (misreporting of gambling activities) by gamblers. Given the IRS Form 1099 requirements to which casinos and other gambling facilities are subject, this argument does not seem to be a strong reason in favor of repeal.

A better reason for repeal is simple and straightforward: fairness and equity. Put another way, gamblers should not be treated adversely solely because of their trade or business.

Representative Dina Titus [D] from Nevada introduced a bill in the House to repeal Section 70114 of the Act. Time will tell whether there is sufficient momentum to reverse course.

The following examples illustrate how this new law may play out:

EXAMPLE 1: Joe is in the trade or business of gambling. In 2026, he wins $10M but his wagering losses were $11M. As a result of the Act, Joe will have $100,000 of net income arising from his gambling business [$10M of income less 90% of losses or $9.9M = $100,000]. The result is that Joe has a tax bill but no cash

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(profits) from the business to pay the taxes.

EXAMPLE 2: Same facts as Example 1, but on top of his wagering losses, Joe had ordinary, necessary and reasonable business expenses of $200,000. Accordingly, Joe sustained an actual out-of-pocket loss of $1.2M for the tax year [$10M of income less gambling losses and expenses totaling $11.2M = a loss of $1.2M], but because of the Act, his losses cannot exceed his gambling income. So, in the end, Joe had no tax loss to report on his federal income tax return. Prior to the Act, Joe would have been able, under old Section 165(d) and the *Mayo* decision, to claim a $200,000 loss [while his losses from wagering would be limited to his winnings, he would have been allowed to deduct the $200,000 he incurred in allowable business expenses. Now that business expenses go into the definition of gambling losses, Joe is denied that deduction].

EXAMPLE 3: Same facts as Example 1, but Joe's wagering income is $10M and his wagering losses and business expenses combined are $10M. Joe had a break-even year. However, under Code Section 165(d), as amended by the Act, Joe has $1,000,000 of taxable income. Same result as Example 1 [$10M less 90% of $10M = $1,000,000].

EXAMPLE 4: Same facts as Example 1, but Joe is in the trade or business of plumbing, and his income of $10M and expenses of $11M are derived from his trade or business. Joe will have a $1M business loss [$10M less $11M in expenses = $1M loss], which he may potentially use to offset other current income or carry over to future tax years. The only difference between Example 1 and this example is Joe's given trade or business.

Conclusion

Section 70114 is an interesting provision of the Act. Its potential results in application do not appear to be fair or equitable. Time will tell whether lobbyists are successful in their efforts to repeal this so-called permanent provision of the Act.

Stay tuned for more installments in my multi-part series on the One Big Beautiful Bill Act.

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