DWIGHT F. PROVITT 5464 West Shale Valley Drive Montgomery, AL 36108,	§	STATE OF ALABAMA DEPARTMENT OF REVENUE ADMINISTRATIVE LAW DIVISION
Taxpayer,	§	DOCKET NO. INC. 03-240
v.	§	
STATE OF ALABAMA DEPARTMENT OF REVENUE.	§	

OPINION AND PRELIMINARY ORDER

The Revenue Department assessed 2001 Alabama income tax against Dwight F. Provitt ("Taxpayer"). The Taxpayer appealed to the Administrative Law Division pursuant to Code of Ala. 1975, §40-2A-7(b)(5)a. A hearing was conducted on July 24, 2003. The Taxpayer attended the hearing. Assistant Counsel Gwendolyn Garner represented the Department.

The Taxpayer filed a 2001 Alabama income tax return on which he reported gambling income of $43,479 and gambling losses of $40,505. The Department disallowed the gambling losses because the Taxpayer failed to provide sufficient records to verify the losses. The Taxpayer appealed.

The deductibility of gambling losses was addressed in *Winston Shirley v. State of Alabama*, Inc. 96-153 (Admin. Law Div. 5/9/96), as follows:

> Gambling losses can be deducted, but only up to the amount of gambling winnings. Code of Ala. 1975, §40-18-15(7) and Department Reg. 810-3-.17-.01(1)(a)(12). See also, 26 U.S.C. §165(d).
>
> As with all deductions, the burden is on the taxpayer to prove gambling losses. Donovan v. Commissioner, 359 F.2d 64 (1966); Betson v. Commissioner, 802 F.2d 365 (9th Cir. 1986). Whether a taxpayer has adequately established his gambling losses is a question of fact in each case. As stated in Norgaard v. Commissioner, 939 F.2d 874 (9th Cir. 1991):

> The question of the amount of losses sustained by a taxpayer is a question of fact to be determined from the facts of each case, established by the taxpayer's evidence, and the credibility of the taxpayer and supporting witnesses. *Green v. Commissioner*, 66 T.C. 538, 545-46 (1976) *acq.* 1980-2 C.B. 1. The credibility of the taxpayer is a crucial factor. *See Mack v. Commissioner*, 429 F.2d 182, 184 (6th Cir. 1970) (that the tax court allowed some deduction based on the taxpayer's net worth method of proof "was a testament to the persuasiveness and seeming integrity of these taxpayers"). In some cases, courts have found losing tickets or other records and corroborating testimony by the taxpayer insufficient to establish that the taxpayer suffered deductible losses. However, in other cases, the tax court has allowed the taxpayer to deduct some or all of their losses on the basis of their losing tickets and credible corroboration by the taxpayer.
>
> Norgaard, at page 878.
>
> * * *
>
> Losing tickets are in some cases sufficient to verify claimed losses, but only if the tickets are supported by the believable, direct testimony of the taxpayer. See generally, Norgaard, supra, footnote 3, at page 878. For example, in Wolkomir v. Commissioner (40 TCM 1078 (1980)), which is cited in the above footnote, the claimed losses were allowed based on the "forthright, credible, and candid testimony of the taxpayer."

Shirley, Inc. 96-153 at 3-5.

The Taxpayer in this case gambled regularly at Victoryland in Macon County, Alabama during the year in issue. He testified at the July 24 hearing concerning the types of races he bet on, and how he generally wagered. His testimony was forthright and credible.

The Taxpayer presented the Department with a computer printout of his daily gambling losses prepared by his tax preparer. The Taxpayer testified that he kept a contemporaneous log of his gambling winnings and losses during the year, and that his tax preparer used the log to prepare his return. Unfortunately, the Taxpayer did not keep the log. He also testified that he maintained his losing tickets, but that the Department rejected

his log as insufficient without looking at his tickets.

The Taxpayer presented the tickets to the Administrative Law Division after the July 24 hearing. A sample review of the hundreds of tickets submitted shows that the amount of the losing tickets match exactly the daily losses shown on the Taxpayer's computer log.

The Taxpayer faces a problem, however, because he only reported his winnings shown on the W2-Gs issued by Victoryland. W2-Gs are issued only when at least $600 is won on a race. Consequently, it is almost certain that the Taxpayer won less than $600 on some races that he failed to report on his return.

A similar situation arose in *State of Alabama v. Shirley Givens Johnson*, Inc. 90-126 (Admin. Law Div. 1/3/91). In that case, the taxpayer failed to report payouts under $500 (the W-2G limit at the time). The Department recognized that the taxpayer had some losses, and consequently allowed her 50 percent of her claimed losses.

The Taxpayer in this case failed to retain his contemporaneously maintained log showing the amounts he won and lost. He did, however, provide tickets that match exactly the log prepared by his tax preparer. As indicated, his testimony at the July 24 hearing concerning his gambling activities was forthright and credible. Under the circumstances, the Taxpayer should also be allowed the same 50 percent of his claimed losses as allowed in the *Johnson* case. The Department is directed to recompute the Taxpayer's 2001 liability accordingly. A Final Order will then be entered.

The Taxpayer is on notice that any gambling losses claimed in the future must be fully supported by a contemporaneously maintained log showing each race bet on, the amount wagered, and the amount won or lost. The log must be supported by the racing program for the day, if applicable, and all losing tickets must match the bets made by the

Taxpayer.

This Opinion and Preliminary Order is not an appealable Order. The Final Order, when entered, may be appealed to circuit court within 30 days pursuant to Code of Ala. 1975, §40-2A-9(g).

Entered July 29, 2003.