This Week in State Tax (TWIST)

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Indiana: State high court holds wagering taxes paid to other states not subject to addback

The Indiana Supreme Court recently addressed whether a multistate gaming company was required to add back wagering taxes paid to other states in computing its Indiana corporate adjusted gross income tax base. The taxpayer, a casino operator with gambling operations spanning several jurisdictions, deducted both state income taxes and wagering excise taxes on its federal returns. Under Indiana law, a taxpayer must add back “any deduction or deductions allowed or allowable pursuant to Section 63 of the Internal Revenue Code for taxes based on or measured by income and levied at the state level by any state of the United States.” The taxpayer added back the state apportioned income tax deductions on its Indiana return, but not the unapportioned wagering taxes. On audit, the Department of State Revenue required the taxpayer to add back the wagering taxes under the addback statute and issued additional assessments. After the taxpayer’s administrative protest was denied, the Indiana Tax Court agreed with the Department that the wagering taxes fall within the scope of the addback provision. The taxpayer appealed.

Before the Indiana Supreme Court, the taxpayer argued that the addback statute applies only to apportioned net income taxes. Under this approach, wagering taxes, which are measured by gross income and imposed on the privilege of conducting gaming activity, are properly deductible as ordinary and necessary business expenses. The Department argued that the addback statute covers gross income taxes, excise taxes, and unapportioned taxes, if those taxes are calculated with some reference to revenue. The court rejected both arguments. Instead, it interpreted the statute as covering two categories of levies: direct income taxes that are “based on” income; and taxes that function as the equivalent of income taxes (i.e., “measured by income”). In the court’s view, this includes gross income taxes, net income taxes, and some excise taxes that are calculated like income taxes. The court contrasted those levies with unapportioned excise taxes (including the wagering taxes at issue), which are imposed on discrete intrastate transactions or privileges, are not subject to constitutional apportionment, and do not operate as substitutes for a net income tax. Those wagering taxes, the court concluded, are properly classified as ordinary business expenses rather than taxes based on or measured by income for Indiana addback purposes.

Please contact Gianluca Pitetti or Ryan Dahlkamp with questions about *PENN Entertainment Inc. v. Department of State Revenue*.