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ZARIN AND THE TAX BENEFIT RULE: TAX MODELS FOR GAMBLING LOSSES AND THE FORGIVENESS OF GAMBLING DEBTS

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Zarin and the Tax Benefit Rule: Tax Models for Gambling Losses and the Forgiveness of Gambling Debts

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During 1979 and 1980, David Zarin lost over $3.4 million in chips gambling for most of his waking hours at the craps table at the Resorts International Casino in Atlantic City. Zarin received the chips on credit, however, in return for his markers to Resorts. In 1981, Zarin was able to settle his $3.4 million debt by paying Resorts only $500,000 in cash. The remaining $2.9 million of debt was forgiven.

In *Zarin v. Commissioner*,[1] the Internal Revenue Service argued that Zarin had $2.9 million of ordinary income in 1981 from cancellation of indebtedness. Losses from wagering transactions can be deducted only against gambling gains in the same taxable year.[2] Excess gambling losses can neither be deducted nor be carried over to other years. Thus, under the Service's theory, Zarin's $3.4 million gambling losses in 1979 and 1980 could not be netted against his $2.9 million cancellation of indebtedness income in 1981. The Tax Court agreed with the IRS,[3] but the majority of the Third Circuit reversed, holding that Zarin had no cancellation of indebtedness income in 1981.[4]

The Third Circuit, in ruling for Zarin, held that cancellation of debt would not lead to taxable income if the debt could be disputed.[5] That rationale, taken literally, could do considerable mischief. Professor Shaviro has written that Zarin should have won, but only if we reject the logical consequences of tax premises and rely instead on aesthetics and intuition.[6] That rationale could do considerable harm as well.

There is, however, a simple straightforward reason why Zarin should win: The 1981 forgiveness of his markers was a recovery of an expense

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1 916 F.2d 110 (3d Cir. 1990), rev'g 92 T.C. 1084 (1989).

2 IRC § 165(d).

3 92 T.C. 1084 (1989).

4 916 F.2d 110 (3d Cir. 1990).

5 Id. at 115.

6 Shaviro, The Man Who Lost Too Much: *Zarin v. Commissioner* and the Measurement of Taxable Consumption, 45 Tax L. Rev. 215 (1990).

for which Zarin had no prior tax benefit. Zarin has no income under the exclusionary, pro-taxpayer branch of the tax benefit rule.[7] That rationale fits the facts and leaves intact the fabric of existing law.

I. Forgiveness of Disputed Liabilities

The Third Circuit ruled that a taxpayer can avoid forgiveness income on disputed liabilities even if he borrowed cash. The court gave the following hypothetical:

> Thus, if a taxpayer took out a loan for $10,000, refused in good faith to pay the full $10,000 back, and then reached an agreement with the lender that he would pay back only $7,000 in full satisfaction of the debt, the transaction would be treated as if the initial loan was $7,000. When the taxpayer tenders the $7,000 payment, he will have been deemed to have paid the full amount of the initially disputed debt. Accordingly, there is no tax consequence to the taxpayer upon payment.[8]

What the court misses in its simple hypothetical is that the taxpayer who borrows $10,000 and returns only $7,000 ends up, when the dust settles, with $3,000. The $3,000 is an increase in the taxpayer's net worth, represents an ability to pay tax, is consumable or investable without repayment, or, in short, is what we ordinarily consider to be income. If $3,000 had been noncognizable when the $10,000 of loan proceeds was received, the taxpayer should have had $3,000 of taxable income at that time, since it was free and clear of repayment. The core rationale for making indebtedness discharge an income item is to capture the increase in wealth that arises from the nonpayment of the borrowed amounts.[9]

Doubts about what the debtor originally borrowed are a distinguishable case. Where an individual buys a secondhand car, giving the seller her promise to pay the $10,000 stated price, but the car has defects that lead the parties to reduce the amount owed to $7,000, we are comfortable treating the forgiveness of $3,000 debt as an adjustment in the price paid for the car and a recovery of basis.[10] The dispute raises doubt about what the borrower received so that we are willing to treat the borrower as having received only a $7,000 car. To anticipate the argument a bit,

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[7] IRC § 111.

[8] *Zarin*, 916 F.2d at 115.

[9] 1 B. Bittker & L. Lokken, Federal Taxation of Income, Estates and Gifts ¶ 6.4.1 (2d ed. 1989). The Third Circuit's decision was ably criticized, on much the same ground as in the text, by Sheppard, A Gambling Exception to Cancellation of Indebtedness, 49 Tax Notes 1516 (Dec. 31, 1990), and Shaviro, note 6, at 242, 255.

[10] Under § 108(e)(5), if a seller forgives purchase money debt, no discharge of indebtedness income results. However, the purchase price must be adjusted downward.

this essay argues that Zarin is appropriately treated like the taxpayer who received only $7,000. Under the Third Circuit's rationale, however, *Zarin* is like the taxpayer who received $10,000 cash without dispute and the court allows Zarin to retain the $3,000 of undisputed value without tax.

The court permits Zarin to avoid income only by reason of an inconsistency in its cognition of Zarin's debt, recognizing it in 1979 and 1980, but not in 1981. The debt appropriately was treated as a debt as a practical matter, whatever its enforceability, when Zarin received the proceeds.[11] Consistency requires that Zarin's markers be treated as debt, as a practical matter, when the proceeds were not repaid. The Supreme Court in *Tufts*[12] held, on the grounds of consistency, that nonrecourse liability inadequately secured by the collateral was included in the amount realized by the taxpayer when he disposed of the collateral. The inadequately secured nonrecourse liability in *Tufts* is less real than merely disputed debt: It is not rational for the putative debtor to pay it. Yet, once the taxpayer treated the debt as legitimate for the purpose of excluding borrowed cash or computing deductions, consistency required that the taxpayer treat the disappearance of the indebtedness as an income or gain item. If Zarin had received $3.4 million in cash, consumed it, and then repaid only $500,000 of his debt, he should have had $2.9 million of taxable income, no matter how faithfully he disputed the debt.

Although the Third Circuit's exemption applies only to liabilities that are disputed in good faith, in a litigious society that believes that equitable law must be fluid, bona fide disputes are not hard to create. Thus, the Third Circuit's resolution of the issue, broadly read, might swallow much of the forgiveness of indebtedness doctrine, even for cash borrowing, far beyond the relatively unimportant case of one compulsive gambler. The opinion may do even more mischief by becoming "substantial authority" for a taxpayer's failure to report cancellation of indebtedness[13] or by giving a taxpayer "a realistic possibility" of success so that his attorney can advise him not to report the cancellation of debt.[14]

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[11] Gambling debts are taxable income to a casino on the accrual method of taxation, for instance, even though they are not enforceable, because they are liabilities that are respected in practice. Rev. Rul. 83-106, 1983-2 C.B. 77 (despite absence of legal enforceability, taxpayer, based on its collection experience, has a reasonable expectancy that these obligations will be paid).

[12] Commissioner v. Tufts, 461 U.S. 300, 310 (1983) ("Unless the outstanding amount of the mortgage is deemed to be realized, the mortgagor effectively will have received untaxed income at the time the loan was extended.").

[13] Section 6662(d)(2)(B)(i) exempts a taxpayer from penalty for an understatement of tax if there was substantial authority for the reporting position.

[14] Section 6694(a)(1) exempts a tax return preparer from penalty for a position that is ultimately wrong, but has a realistic possibility of being sustained on the merits if challenged.

II. Intuition and Aethestics

Professor Shaviro argues that although Zarin had $3.4 million in consumption under normal tax premises, we ought to follow aesthetics or intuition in this case and not tax him. Zarin, Shaviro argues, should have expected that he would lose $3.4 million, gambling at the house limit for as many hours as he did. Accordingly, Shaviro concludes Zarin's consumption under an objective standard has to be viewed as $3.4 million.[15] Nevertheless, Shaviro would allow Zarin to win—"ultimately . . . on aesthetic grounds, [rather than as] a logically necessary consequence of basic income tax premises"[16]—because of the incongruity of claiming that Zarin "enjoyed" several million dollars of income by losing it at the craps table.[17]

Whatever the value of Professor Shaviro's perceptions about aesthetics or intuition, it is unfortunate that he abandons basic income tax premises and an objective standard of measuring consumption in favor of aesthetics and intuition. What is this aesthetics or intuition that is independent of basic tax premises? How do we enforce annual reporting if tax results vary with aesthetics independent of objective measures? The process of law, like the process of rational thought more generally, is a process of constructing rational models a priori and then applying them in competition with alternatives according to the function of the models and our needs.[18] If Professor Shaviro wants Zarin to win, he should construct a legal argument—a rational model—that is consistent with his intuition.

III. Tax Benefit Rule

Zarin has a perfectly sound argument under the tax benefit rule that is superior to the arguments made by his attorneys or Shaviro or the judges who ruled in his favor. The tax benefit argument, if adopted, does not threaten the integrity of the cancellation of indebtedness doctrine, nor basic income tax premises.

Under the exclusionary or pro-taxpayer branch of the tax benefit rule, a taxpayer may exclude the recovery of an expenditure from income, where the expenditure gave the taxpayer no prior tax benefit. The tax-

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15 Cf. Shaviro, note 6, at 250-51 (conceding that cost or fair market value of consumption may be the best measure, but nonetheless concluding that ex ante doubtfulness of repayment should be considered).

16 Id. at 252.

17 Shaviro's intuitional argument traces Judge Tannenwald's dissent in the Tax Court that it is wrong to tax Zarin on his losses, as opposed to his gains. Zarin v. Commissioner, 92 T.C. 1084, 1101 (1989) (Tannenwald, J., dissenting).

18 See, e.g., C. Lewis, Mind and the World Order x (1929) ("While the delineation of concepts is a priori, . . . the choice of conceptual system[ ] for . . . application is instrumental or pragmatic. . . .").

payer may be viewed as, in effect, having a basis in the expenditure,[19] which the taxpayer may use to shelter the recovery from tax, provided the expenditure did not previously generate a tax savings. The tax benefit rule is a part of our tax accounting rules which require us to look at transactions as a whole rather than as fragments segregated by separate tax years.

The forgiveness in 1981 of Zarin's markers is appropriately excluded under the tax benefit rule. The forgiveness was a positive receipt-like item, but it was a recovery of Zarin's $2.9 million loss in a prior year and not net gain from a new transaction. Viewing the transaction as a whole, Zarin had a net loss of only $500,000 once he settled payment for his markers, rather than a nonnettable $3.4 million loss in 1979 and 1980, and a $2.9 million gain in 1981. Whether steps are separate or part of a single transaction, under the tax benefit rule, is a question of fact for a fact finder,[20] but in *Zarin*, there was realistically only one transaction

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19 The exclusionary part of the tax benefit rule was developed to give a taxpayer what is, in effect, a recoverable basis in an item that is an expense and not property nor a capital expenditure. In Burnet v. Sanford & Brooks Co., 282 U.S. 359 (1931), the Supreme Court held that a taxpayer did not have any basis in an expense or loss item. The taxpayer there sought to exclude $176,000 recovered in a law suit under a dredging contract on the ground that the judgment was just a recovery of its expenses incurred in prior years. The prior expenses saved the taxpayer no tax because they exceeded taxable income and because there was, at the time, no provision for carryover of losses. The Supreme Court said that the judgment was at least "in a loose sense, . . . a return of expenditures made in performing the contract" id. at 363, but it held that the prior losses "were not capital investments, the cost of which . . . must first be restored from the proceeds before there is a . . . gain taxable as income." Id. at 364. Income, the court held, was to be computed separately for each accounting period, without need to hold the tax year open until the completion of the whole, multi-year transaction. Id. at 365. Subsequently, however, the Supreme Court excluded a recovery of a prior year's loss. Dobson v. Commissioner, 320 U.S. 489 (1943), rev'g sub nom. Harwick v. Commissioner, 133 F.2d 732 (8th Cir.), rev'g 46 B.T.A. 770 (1942) (taxpayer recovered prior losses because stock sold to him had not been registered). The opinion in the Supreme Court focused almost exclusively on the restricted standards of review that the circuit court should use in reviewing tax accounting decisions of the Board of Tax Appeals (320 U.S. at 507), but, by its holding, the Supreme Court reinstated the opinion of the Board of Tax Appeals that the recovery was return of capital rather than taxable income, so long as the earlier deduction of the loss on the sale of the stock had not offset any taxable income (see 45 B.T.A. at 774). In resurrecting the Board of Tax Appeals decision, the Supreme Court allowed its decision in *Sanford & Brooks* to be overruled, or at least distinguished, by the lower court, so as to allow tax-exempt recovery of some kinds of prior year losses.

In 1942, Congress enacted the predecessor of § 111, providing that a recovery of a bad debt or deducted tax would be excluded from income where the prior deduction did not reduce tax. Pub. L. No. 77-753, § 116, 56 Stat. 798, 812-13 (1942). The regulations under § 111 generalized the rule beyond bad debts and taxes by providing that the rule of exclusion applied "equally with respect to all other losses, expenditures, and accruals made the basis of deductions from gross income." Reg. § 1.111-1(a). In 1984, Congress conformed § 111. Deficit Reduction Act of 1984, Pub. L. No. 98-369, § 111, 98 Stat. 494. Thus, where a prior year's expense did not reduce taxes, a taxpayer can exclude a recovery—just as if it were a recovery of capital or basis—even if the original expense occurred in a prior tax year and was not what was ordinarily thought of as a capital expenditure or property.

20 *Dobson*, 320 U.S. at 502-03.

divided among the years, and we can properly understand it only by netting the parts. One could view Zarin as having a "basis" in the (lost) chips which remains intact because the 1979 and 1980 losses were nondeductible in those years.[21] The 1981 $2.9 million benefit was a partial recovery of his $3.4 million basis.[22] Both the basis and the tax benefit rules serve the same function: to prevent double tax for what are really the same dollars.[23] But it is not necessary to insist that Zarin had a basis in the chips, since the tax benefit principle extends the recovery idea beyond conventional basis doctrine.

The fact that the gain or receipt item came from forgiveness of Zarin's markers ties the 1981 receipt to the 1979 and 1980 losses of the chips acquired with the markers. The tax benefit rationale, however, should not be limited to indebtedness transactions. In a wonderful scene in the movie *Lost in America*, the hero loses his nest egg gambling in Las Vegas on his first night in the American heartland. He thereafter hilariously tries to convince the very polite manager that the casino should refund him all his losses for the goodwill or publicity value. If the hero had succeeded in obtaining a refund, against the odds, it would have been appropriate to exclude it from tax under the tax benefit rule, even if the losses and refunds crossed an annual accounting year. The cash refund and Zarin's forgiveness should be treated in the same way.[24] Forgiveness of indebtedness should be treated as an excludable recovery, accordingly, even if we view the forgiveness as tantamount to a cash-like receipt.

The statutory rules governing gambling losses should not prevent the application of the tax benefit rules to *Zarin*. There is no statutory carry-

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21 Section 108(e)(5) provides a purchase-money exception to forgiveness of indebtedness income in situations where a seller of property forgives the purchaser for debt that arose to buy the property. The best rationale for the exemption is that the forgiveness is a recovery of the buyer's investment in the property that reduces the buyer's basis, rather than yielding gain. In *Zarin*, the casino was plausibly selling property to Zarin, that is, the chips. Chips are property rather than cash equivalents in this case because they are not primary consumption, but rather are only a mechanism by which the gambler seeks gambling gains; they can only be spent in house. Section 108(e)(5), however, is not available except in a negotiation between the casino and Zarin. The result to Zarin should be the same whether or not the casino has assigned his note to another agency for collection. But, as noted in the text, the tax benefit rule gives expenses the equivalent of basis and the benefits of recovery of basis treatment. Thus, the § 108(e)(5) exemption is not needed.

22 See, e.g., Commissioner v. Pennroad Corp., 228 F.2d 329 (3d Cir. 1955) (judgment achieved because defendant forced the taxpayer to make bad investments was recovery of taxpayer's basis in the investments and not gain).

23 See J. Dodge, The Logic of Tax 20-33 (1989).

24 The Third Circuit relied heavily on Sobel, Inc. v. Commissioner, 40 B.T.A. 1263 (1939), a disputed liability case, which has facts much like the facts in *Dobson*, 320 U.S. 489, the leading tax benefit case. In both, the taxpayer bought stock and later sued the seller because the sale violated state stock registration law. Sobel bought the stock with debt, so that settlement reduced the debt; Dobson bought the stock with cash, so that the rescission gave him back cash. In both, the taxpayer had a tax-exempt receipt because there was a recovery of his investment.

over of net gambling losses from one year to future years.[25] Section 165(d) authorizes the deduction of gambling losses only against gambling gains from the same taxable year. Arguably, we should allow a carry-over of gambling losses: It is a Procrustean bed to expect taxpayers to complete all steps of their transactions within a single year; two gambling taxpayers who lose and then gain on successive nights for the same net gain or loss are identically situated, even if the loss and gain of one of the taxpayers straddles the end of a taxable year. It is plausibly sufficient that we prevent gambling losses from sheltering more productive activities from tax by allowing the carryover losses to be used only against future gambling gains.[26]

The denial of the carryover of gambling losses comes from the sanctity of annual accounting. Annual accounting principles are subject to exceptions for transactions that cross tax years, however, and the exceptions are part of the normal tax accounting rules that should apply to gambling. Application of the tax benefit rule to Zarin would not permit him to use his $3.4 million loss against gains from future bets. Zarin's forgiveness of indebtedness was part of the same transaction that caused the loss, however, so the parts of the transaction should be netted before computing gain (or loss). There was only a single set of underlying bets.

Section 111 excludes amounts attributable to a recovery of an amount *deducted* in a prior taxable year if the deduction did not save tax. It might thus be argued that the rule applies only to *allowable* deductions which produced no tax benefit, not *disallowed* deductions, such as gambling losses in excess of gambling gains for the year. But gambling losses are *deducted*, if the taxpayer can prove the losses,[27] provided the taxpayer has gambling gains for the year.[28] The fact that gambling losses can be deducted only against gambling gains is exactly the kind of problem at which the exclusionary branch of the tax benefit rule is aimed: to allow netting of gains against prior losses in exactly those cases where the taxpayer did not have income in the right prior year to offset those losses.

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[25] See, e.g., Offutt v. Commissioner, 16 T.C. 1214 (1951) (even taxpayer in the trade or business of gambling cannot carry over gambling losses).

[26] It can be argued that the denial of a deduction for lifetime gambling losses is an artifically harsh rule that arises from a moralistic disapproval of gambling. But a better rationale is that the denial of the deduction of permanent gambling losses is compatible with fundamental tax principles: In a revenue raising system, expenses and losses only need to be allowed to compute net income and to prevent fluctuating activities from being disadvantaged relative to those producing steady revenue. There is no law of symmetry that goes beyond those rules to require refunds. If I have a profit sharing agreement with my employer, for instance, I have not agreed to bear his losses. Thus, activities identified as permanent losers do not need to have the impact of their losses reduced by tax.

[27] See, e.g., Stein v. Commissioner, 322 F.2d 78, 82 (5th Cir. 1963) (taxpayer's records kept on cocktail napkins, match folders, soap wrappers, and cards were inadequate to prove gambling losses).

[28] IRC § 165(d).

If we view the receipt of chips as similar to the receipt of cash or as consumption, then Zarin should have both $2.9 million of forgiveness of debt and $3.4 million of undeductible losses. Professor Shaviro has argued that, at least under normal tax premises, Zarin had $3.4 million worth of consumption when he lost $3.4 million at the craps table. Under an objective administrable income tax system, Shaviro argues, a taxpayer's consumption has to be identified with the taxpayer's cost for the consumption, in part because Zarin gambled so much and at such high stakes, that he should have expected to lose his $3.4 million.[29]

If Shaviro were right that Zarin had $3.4 million worth of consumption from his losses, it would be wrong to apply the tax benefit rule to the forgiveness of Zarin's markers. Assume, for instance, a shareholder who borrows $3.4 million from his controlled corporation and spends the entire sum on parties, travel, and glorious entertainment. The corporation then forgives the $3.4 million debt, perhaps because of a good faith dispute as to whether the debt was made sufficiently binding in the first place. While some commentators have suggested that the tax benefit rule should apply to the recovery of consumption costs,[30] it would be wrong to apply it to the hypothetical. The forgiveness of the debt did not reduce the shareholder's consumption, so that it would be a mistake to treat the income as only the net, after-debt forgiveness.[31] In the transaction as a whole, the shareholder has received and consumed a dividend from his corporation.

Under a better model of what is going on, however, Zarin had a $3.4 million loss, not $3.4 million worth of consumption, from gambling in 1979 and 1980. Losses are not the point of gambling. We would not expect a casino to do especially well by announcing to prospective gamblers that here they can lose more and faster. Gamblers prefer winning to losing, even in their most debased state when they lose the ability to judge the chances of winning. Continued gambling in the face of losses can be plausibly explained by behavioral psychologists as a predictable

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29 Shaviro, note 6, at 223-35.

30 1 B. Bittker & L. Lokken, note 9, ¶ 5.7.2.

31 My colleague, Professor Dodge, would treat Zarin as if he made a "bargain purchase" of consumption, which is not usually a realization of taxable income. Dodge, *Zarin v. Commissioner*: Musings About Debt Cancellation and "Consumption" in an Income Tax Base, 45 Tax L. Rev. 677 (1990). In general, however, it would be a mistake to treat nonpayment of consumer credit, for instance, on one's Visa or Mastercard, as if the taxpayer just had a bargain purchase. The taxpayer should be taxed on his charged meals and other consumption, where the amount of the consumption is clear. As a matter of doctrine, basis should be reduced as the taxpayer consumes, even if the taxpayer is not entitled to deduct the costs. Epstein, The Consumption and Loss of Personal Property Under the Internal Revenue Code, 23 Stan. L. Rev. 454 (1971). Since the tax benefit rule is just a variety of basis analysis applied to nonproperty items, such basis reduction should be considered to be a "tax benefit," so that recovery is taxable.

pattern of response to an unpredictable schedule of rewards.[32] Even in the best of circumstances, moreover, ordinary people do a terrible job of dealing with probabilities; they make lots of mistakes that are not consistent and cannot be defended by reason.[33] Since animals continue responses even though the schedule of rewards gets very lean, and since people's judgment of probabilities are not very good, one does not need to assume that gamblers enjoy losses or get something out of them that explains gambling. The most realistic model of gambling is that it is winning, rather than losing, that is the reward. If winning is the point of gambling, then losses are properly netted against gain from gambling transactions and are not themselves items of consumption.

Section 165(d) is consistent with the model that Zarin had $500,000, rather than $3.4 million, in nondeductible gambling losses. Section 165(d) allows gambling losses in a single year to be deducted against gambling winnings, and the tax benefit rule treats multi-year transactions as if they occurred in a single year. The fact that IRC § 165(d) allows an offset of winning and losing is a recognition that gambling losses are an offset to gains, rather than consumption itself. Section 165(d) cannot be reasonably read as a pronouncement by Congress that gambling losses are consumption, even though they are offset by later recoveries. If the Code really viewed gambling losses as consumption, it would be a mistake to allow a taxpayer to net gambling losses, as it does, against gambling gains.[34] A gambling gain is the cash that the taxpayer carries away from the table to use for other consumption. If gambling losses were really pleasurable consumption per se, we should be taxing both the gambling winnings *and* the gambling losings. We would then be logically forced to tax both the losings and the winnings on a single night. The Code's denial of the deduction of excess gambling losses is certainly de-

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> 32 [T]he variable ratio schedule [for rewards given in rat and pigeon experiments] has its parallel in gambling. In a variable ratio schedule, reinforcement depends on making a number of responses, but the number varies in an unpredictable way. This schedule generates high rates of responding despite infrequent reinforcement. The slot machine pays off on a variable ratio schedule, and perhaps that accounts for some of the vigor and persistence of gambling despite frequent nonreinforcement.

Jenkins, Animal Learning and Behavior Theory, in The First Century of Experimental Psychology 222 (E. Hearst ed. 1979).

33 Lattimore, Witte & Baker, An Empirical Assessment of Alternative Models of Risky Decision Making (National Bureau of Economic Research Working Paper No. 2717, 1988) (subjects' behavior in experiments testing reaction to risks is least consistent with the model that subjects were weighing expected returns); Posner & Shulman, Cognitive Science, in The First Century of Experimental Psychology, note 32, at 388-89 (subjects overgeneralize from a few "representative" cases).

34 Section 183, governing hobby losses, shares the mistake criticized in the text by allowing hobby losses to be deducted against hobby income. But if the expenses of the hobby are truly consumption expenses incurred without regard to profit or business motives, the expenses should not be deductible under any circumstances even against cash income generated by the same hobby.

fensible,[35] but Zarin's nondeductible gambling losses were only $500,000, the net amount he ultimately ended up spending for his habit, and not the unnetted $3.4 million.

IV. Conclusion

Zarin should not be remembered for the proposition that a dispute will make forgiveness of indebtedness income disappear, or that we must renounce logical law in favor of aesthetics and intuitions. Rather, *Zarin* should be thought of as an example of the application of the tax benefit rule. Zarin had a recovery of his prior losses when he failed to pay for the chips gambled away in the prior years and the recovery was an exempt recovery of an item without prior tax benefit. Zarin's real loss from gambling was the cash paid after the markers were forgiven and not the unnetted millions involved in either part of the whole. Reasonable tax law does require some attention to doctrine to ensure that the models we create describe the situation. Far better to give doctrine the attention it deserves than to make our stated law nonsense or to reject law and logic in full.

[35] See note 26.