
BETWEEN:

THE MINISTER OF NATIONAL REVENUE ..... APPELLANT;

AND

HARRY EDGAR MORDEN .....RESPONDENT.

1960
Oct. 11, 12, 13

1961
Sept. 27

Revenue—Income—Income tax—Betting—When winnings subject to income tax—The Income Tax Act, R.S.C. 1952, ss. 3, 4 and 127(1)(e).

The respondent, a hotel proprietor, in the years 1949 to 1953 inclusive, won substantial sums by betting on card games and sporting events. The Minister in reassessing the respondent added these sums to the taxpayer's declared income. The latter's appeal from the assessment was allowed by the Income Tax Appeal Board. On an appeal by the Minister to this Court

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Held: That to be taxable under the *Income Tax Act* a gambling gain must be derived from the carrying on of a "business" within the meaning of that term as defined by s. 127(1)(*e*) of that Act.

2. That as there was no evidence that the taxpayer, during the years in question in relation to his betting, had conducted an enterprise of a commercial character, or had organized these activities as to make them a business, calling or vocation, the appeal should be dismissed. *Down v. Compston* (1937) 21 T.C. 60, *Jones v. Federal Commissioner of Taxation* [1932] 2 A.T.D. 16 and *Lala Indra Sin, In re,* [1940] 8 I.T.R. 187 at 218, followed. *Partridge v. Mallandaine* (1886) 18 Q.B.D. 276, *Graham v. Green* (1925) 9 T.C. 309, referred to. *M.N.R. v. Walker,* [1952] Ex. C.R. 1, distinguished.

APPEAL under the *Income Tax Act.*

The appeal was heard before the Honourable Mr. Justice Cameron at Sarnia.

J. L. Lunney and *J. A. Gamble* for appellant.

W. A. Donohue, Q.C. for respondent.

The facts and questions of law raised are stated in the reasons for judgment.

CAMERON J. now (September 27, 1961) delivered the following judgment:

The Minister of National Revenue appeals from a decision of the Income Tax Appeal Board dated October 26, 1956[1] which allowed the respondent's appeals from re-assessments made upon him for the taxation years 1949, 1951, 1952 and 1953. In the re-assessments, all dated September 13, 1954, the Minister added to the declared income of the respondent the following amounts:

1949	$ 1,500.00
1951 (reduced by the Minister's Notification from $10,250.00)	10,000.00
1952	860.00
1953	1,500.00

The re-assessments indicated that the amounts so added were in relation to net gains from gambling activities. In Part B of the Minister's Notice of Appeal, it is alleged merely that these amounts were properly taken into account in computing the respondent's income for the years in question, that for the year 1953 being under the provisions of ss. 3 and 4 of *The Income Tax Act* and the

[1] 16 Tax A.B.C. 81; 56 D.T.C. 513.

others being under the provisions of the same sections of the 1948 *Income Tax Act*. The reply to the Notice of Appeal is merely a denial of these allegations.

The sections so referred to were as follows:

3. The income of a taxpayer for a taxation year for the purposes of this Part is his income for the year from all sources inside or outside Canada and, without restricting the generality of the foregoing, includes income for the year from all

(*a*) businesses,

(*b*) property, and

(*c*) offices and employments.

4. Subject to the other provisions of this Part, income for a taxation year from a business or property is the profit therefrom for the year.

* * *

127. (1) In this Act,

(*e*) "business" includes a profession, calling, trade, manufacture or undertaking of any kind whatsoever and includes an adventure or concern in the nature of trade but does not include an office or employment;

Although the Minister is the appellant, the onus of proving the assessments to be erroneous is on the taxpayer-respondent (*M.N.R. v. Simpson's Ltd.*[1]).

In 1935 the respondent acquired the Morden Hotel in Sarnia, Ontario, and operated it thereafter until 1957, when it was sold. He was assisted in the operation of that hotel, first by his son who died in 1952, and thereafter by a manager. His own evidence makes it abundantly clear that for a very considerable period of time the operation of the hotel was not his only, or possibly even his main, business interest. From about 1942 to 1948 he was the owner of a racing stable, having at times as many as twelve horses. A very substantial portion of his time was directed to training and racing these horses at many tracks in Canada and the United States and it is clear that throughout that period he was continuously placing bets on his own and other horses, paying a good deal of attention to racing information, attending the races, and gambling on horse races in a large way. For a long period of time he appears to have been an inveterate gambler, placing bets not only on horse races, but on a variety of card games and sporting events. He was a member of the Omega Club in Toronto where betting for heavy stakes was at least permitted and

[1] [1953] Ex. C.R. 93

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in which he participated. No records of his betting gains or losses was kept at any time. In 1948 he disposed of all his horses and, with the exception of one horse which he owned for a short time about 1952, has owned no race horses since that date.

His gambling activities up to the year 1948 were so extensively organized and occupied so much of his time and attention that, had they continued throughout the years in question, any net gain therefrom might possibly have been income from a business within the definition of "business" contained in s. 127(1)(*e*). It is submitted, however, that from 1949 to 1955, a period which includes all the taxation years in question, his gambling activities were only occasional and amounted to nothing more than indulging in a hobby or recreation, and that therefore his net income therefrom was not taxable.

The first question that arises is whether the respondent has established that the amounts added to his declared income were derived from gambling. As I have noted, the re-assessments all indicate that they were made on the basis that such was the case. There is no suggestion that he had any source of income other than from his hotel business and gambling or that his income from the operation of the hotel was incorrect. While the respondent and his witnesses in many cases were not clear as to dates and amounts of gambling gains and losses, I am satisfied (after taking into consideration the fact that the events occurred from seven to eleven years before the hearing of the appeal) that the evidence is sufficient to establish that the amounts so added represented, in fact, the net gain from gambling activities for the respective years in question. The respondent stated that to the best of his knowledge the amounts were correct and there is no evidence to deny it.

The remaining question is whether such gains are part of the respondent's taxable income.

Professional bookmakers accepting bets on race horses are taxable on the profits of what has been held to be their vocation (see *Partridge v. Mallandaine*[1].) I think it would follow, also, that persons who make gains by organizing their efforts in the way that a bookmaker does are deriving income which is taxable.

[1] (1886) 18 Q.B.D. 276.

In the well-known case of *Graham v. Green*[1], Rowlatt J. pointed out the distinction between the position of a bookmaker and the individual who bets with a bookmaker. In that case, the appellant for many years made substantial gains by betting on horses from his private residence with bookmakers at starting prices only. It was proven that that was his main, if not his sole, means of livelihood. Rowlatt J., in holding that his winnings were not profits or gains assessable to tax, said that a winning bet was substantially in the same position as a gift or finding. At p. 313 ff. he said:

> Now we come to betting, pure and simple. (I do not mean to say that mercantile bargains are tainted with the element of gambling.) It has been settled that a bookmaker carries on a taxable vocation. What is the bookmaker's system? He knows that there are a great many people who are willing to back horses and that they will back horses with anybody who holds himself out to give reasonable odds as a bookmaker. By calculating the odds in the case of various horses over a long period of time and quoting them so that on the whole the aggregate odds, if I may use the expression, are in his favour, he makes a profit. That seems to me to be organising an effort in the same way that a person organises an effort if he sets out to buy himself things with a view to securing a profit by the difference in what I may call their capital value in individual cases.
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> Now we come to the other side, the man who bets with the bookmaker, and that is this case. These are mere bets. Each time he puts on his money, at whatever may be the starting price. I do not think he could be said to organise his effort in the same way as a bookmaker organises his. I do not think the subject matter from his point of view is susceptible of it. In effect all he is doing is just what a man does who is a skilful player at cards, who plays every day. He plays to-day and he plays to-morrow and he plays the next day and he is skilful on each of the three days, more skilful on the whole than the people with whom he plays, and he wins. But I do not think that you can find, in his case, any conception arising in which his individual operations can be said to be merged in the way that particular operations are merged in the conception of a trade. I think all you can say of that man, in the fair use of the English language, is that he is addicted to betting. It is extremely difficult to express, but it seems to me that people would say he is addicted to betting, and could not say that his vocation is betting. The subject is involved in great difficulty of language, which I think represents great difficulty of thought. There is no tax on a habit. I do not think "habitual" or even "systematic" fully describes what is essential in the phrase "trade, adventure, profession or vocation." All I can say is that in my judgment the income which this gentleman succeeded in making is not profits or gains, and that the appeal must be allowed, with costs.

In a later case, *Down v. Compston*[2], Lawrence J. decided that the respondent, a professional golfer who for a period of ten years habitually engaged in private game of golf for bets of varying amounts (and as often as three or four

[1] 9 T.C. 309.
[2] 21 T.C. 61.

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times a week) and made net profits from such bets up to £1,000 a year, was not assessable to tax in respect thereof. He held that the winnings did not arise from his employment or vocation and that he was not carrying on a business of betting. He found that there was no more organization in that case than there was in the case of *Graham v. Green* (*supra*).

In *M. N. R. v. Walker*[1], the taxpayer was a farmer actively engaged in farming. He also owned race horses and for a period of ten years regularly attended race horse meetings at a number of race tracks, spending about six weeks in each year at such meetings. He was assessed on a net worth basis, but claimed that in part his net worth had increased by reason of winnings from race horse betting. Hyndman, D. J. came to the conclusion that the taxpayer had not successfully established that he had won the amounts he claimed from horse race betting, but that even if he had, he had probably embarked on a business to make profits from betting on horse races.

In *Jones v. Federal Commissioner of Taxation*[2], where there appears to have been a conspicuous absence of system, and the element of sport, excitement and amusement were the main attractions, Evatt J. decided that Jones was not engaged in business, summing up his view as follows:

> All that I have said can best be summed up by saying that, during the relevant period, the appellant acquired and developed a bad habit which he was in the special position to gratify. I do not think that the gratification of this habit was a carrying on of any business on his part, despite his many bets and his heavy losses.

To be taxable, a gambling gain must be derived from carrying on a "business" as that term has been defined in s. 127(1)(*e*) (*supra*). Casual winnings from bets made in a friendly game of bridge or poker or from bets occasionally placed at the race track are, in my view, clearly not subject to tax. As stated by Hyndman, D.J. in the *Walker* case, each case must depend on its own particular facts. A reasonable test in such matters seems to be that stated in *Lala Indra Sen, In re*[3], where Braund, J. said at p. 218:

> If there is one test which is, as I think, more valuable than another, it is to try to see what is the man's own dominant object—whether it was to conduct an enterprise of a commercial character or whether it was primarily to entertain himself.

[1] [1952] Ex. C.R. 1. [2] [1932] 2 A.T.D. 16.
[3] [1940] 8 I.T.R. (Ind.) 187.

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In the present case, I find no evidence that the respondent during the years in question in relation to his betting activities conducted an enterprise of a commercial character or had so organized these activities as to make them a business calling or vocation. After he sold his horses in 1948, he lost practically all interest in horse racing and placed only an occasional bet on such races on the few occasions when he attended the tracks at Detroit. True, he was an inveterate gambler and was prepared to place a bet on the outcome of baseball, hockey and football matches, and on card games, whether he was a player or merely placed side bets. His main winnings were on the few occasions when he attended the Grey Cup football play-offs in Toronto, where he placed bets on the game and also played cards for substantial stakes with friends or acquaintances at the Omega Club, at the hotel, or at the homes of his friends, or placed side bets on other card players. In Sarnia he was accustomed to playing card games for small stakes on Wednesday afternoons with friends who gathered in the basement of a nearby store. While his bets were high at times and his gains substantial, I can find no evidence that his operations amounted to a calling or the carrying on of a business. Gambling was in his blood and it provided him with the excitement which he craved. It was his hobby. In the words of Rowlatt, J. in the *Graham* case (*supra*), "he was addicted to gambling" and it was his hobby, but for the years in question it was not his vocation, calling or business.

While there is evidence that in 1955 and thereafter he regained his interest in horse racing and indulged more frequently in placing bets thereon, I cannot see that that has any bearing on the facts as I have found them to be for the taxation years in question.

For these reasons, the appeal will be dismissed and the decision of the Income Tax Appeal Board affirmed. The respondent is entitled to his costs after taxation.

Judgment accordingly.

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