CASES

DETERMINED BY THE

EXCHEQUER COURT OF CANADA

AT FIRST INSTANCE

AND

IN THE EXERCISE OF ITS APPELLATE JURISDICTION

BETWEEN:

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

1951

Oct. 2 & 4
Dec. 11

AND

WILLIAM S. WALKER ..... RESPONDENT;

AND BETWEEN:

WILLIAM S. WALKER ..... APPELLANT;

AND

THE MINISTER OF NATIONAL REVENUE ..... RESPONDENT.

Revenue—Income—Income tax—Practice—Date of service of notice of appeal—Service effected by mailing notice within time limit set by the Act—Income Tax Act, S. of C. 1948, c. 52, s. 55(1) and s. 89(2)—Taxpayer betting on horse races—Whether betting activities carried on as a hobby or for profit—Taxpayer liable for tax—"From a trade or commercial or financial or other business or calling".

Taxpayer contends that certain income upon which he was assessed income tax was derived from bets won on horse races and therefore not taxable. The Court found that the evidence to support his contention was insufficient. He also contends and the Court found that he had $10,000 in cash in his safety deposit box on the 1st day of January, 1941, the first of the taxation years under review, and that such sum could not be income received during those years.

Held: That service of a notice of appeal under s. 89(2) of the Income Tax Act, Statutes of 1948, c. 52, is effected when the notice of appeal is sent by registered mail on a date within the time limit established by s. 55(1) of the Act.

1951

MINISTER OF NATIONAL REVENUE v. WALKER

2. That the date of service of the notice of appeal is the date on which it was sent pursuant to s. 89(2) of the Income Tax Act.

3. That the onus is on the taxpayer to show exactly what he received from betting and to discharge that onus there should be satisfactory corroboration of his own testimony.

4. That if the taxpayer engaged in his betting activities with the intention of making profits out of them rather than as a hobby or for amusement his winnings would be assessable for income tax as having been directly or indirectly received "from a trade or commercial or financial or other business or calling . . .".

APPEAL under the Income Tax Act.

The appeal was heard before the Honourable Mr. Justice Hyndman, Deputy Judge of the Court, at Edmonton.

Eldon D. Foote for William S. Walker.

Arnold F. Moir and *F. J. Cross* for the Minister of National Revenue.

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

HYNDMAN, D.J. now (December 11, 1951) delivered the following judgment:

These two appeals were heard together. The appeal of the Minister (No. (1) above) is from a decision of the Income Tax Appeal Board which allowed the appeal of the respondent Walker. The second appeal (No. (2) above) is by the taxpayer from an assessment by the Minister.

In regard to the appeal from the Tax Appeal Board, counsel for the respondent in his pleadings objected to the jurisdiction of the Court, and moved that the appeal be dismissed, on the ground that the service of the notice of appeal by the Minister was too late.

Section 55(1) of the Income Tax Act reads as follows:

55(1) The Minister or the taxpayer, may, within 120 days from the day on which the Registrar of the Income Tax Appeal Board mails the decision on an appeal under section 54 to the Minister and the taxpayer, appeal to the Exchequer Court of Canada.

Section 89(2) of the said Act reads as follows:

89(2) A notice of appeal should be served upon the Minister by being sent by registered mail to the Deputy Minister of National Revenue for Taxation at Ottawa and may be served upon the taxpayer either personally or by being sent to him at his last known address by registered mail.

The facts with respect to this objection are that the notice of appeal by the Minister was sent by registered mail addressed to the taxpayer at Winterburn, Alberta, on the 22nd September, 1950, exactly on the 120th day from the date on which the Registrar of the Income Tax Appeal Board mailed a decision on the appeal to the Minister. It was submitted that in law the 120th day should have been the day when the taxpayer in the ordinary course of mail would have received it. If that is the law, then the notice was out of time as it would likely have taken at least three days from the date of mailing before its receipt by the taxpayer in Alberta, which would then have been about three days late. As there is no rule of the Court, or provision in the Act covering this precise point, it was argued that the practice in England is to be followed, (see, Sec. 36 of the Exchequer Court Act, R.S.C. 1927, c. 34, as amended by Statutes of Canada, 1928, c. 23, s. 4) which provides that where service is made by registered post, the time at which the document so posted would be delivered in the ordinary course of post shall be considered as the time of service. See Annual Practice, 1928, at p. 1446.

However, one must examine carefully the language of section 89(2) above set out. The wording is, "may be served upon the taxpayer either personally or by being "sent" to him at his last known address by registered mail." My interpretation of this wording is that it is not the receipt of the notice by the taxpayer which is important, but its "being sent"; and the date on which it was "sent," should be regarded as the date of service.

If I am right in this interpretation of section 89(2), then the service was in time, and this objection fails.

The issues on the appeal from the Appeal Board, that is for the years 1946 and 1947, are similar to those on the appeal by the taxpayer from the assessment by the Minister for the years 1941 to 1945, inclusive, and the evidence and the points raised apply equally in both cases.

The taxpayer set up the further objection that the case was *res judicata* so far as the findings of fact by the Appeal Board were concerned. However, it has been held in this Court that an appeal from the Tax Appeal Board is a trial *de novo,* and consequently this Court must find the facts in the same manner as did the Board. The Board found

1951

MINISTER OF NATIONAL REVENUE v. WALKER

Hyndman, D.J.

as a fact, and this is the main issue to be determined, that the sum of $17,863 shown in the net worth statement of the taxpayer were moneys made in betting at the race course, and, not being a part of the taxpayer's business or calling, are not taxable; and also the further fact that the taxpayer had $10,000 in his safety deposit box on the 1st January, 1941, which therefore could not have been profits in the subsequent years.

The facts and circumstances of the case are substantially as follows: the appellant came to Alberta from Scotland in 1906 and is seventy-two years of age. His education ended at the fifth grade in school, and he claims to know practically nothing of bookkeeping. His principal occupation is farming a few miles west of Edmonton, Alberta. His farm consists of about 560 acres, and of these, with the help of his son, he cultivates about 400. The largest part of his revenue he states is from grain. He also keeps some milk cows and hogs. His wife is an invalid, and he employs a housekeeper, and in the heavy season engages hired help. He states that the racing season does not interfere with his farm operations, as it takes place in the interval between putting in the crops and the harvest.

For about ten years or more the taxpayer has regularly attended the horse races during the racing season at Edmonton, Calgary, and sometimes at Saskatoon and Regina, the periods taken up being about six weeks. He states that he is an enthusiast with respect to horse racing, and that it is his hobby. He spends about twenty-three days at the Edmonton races, twenty days at Calgary, Saskatoon six days and Regina six days. In all, when he attends all events, therefore, about fifty-three days in the year. He also has an interest in at least three horses and possibly five, and races them under the name of Burrows and Walker. Mrs. Burrows was the owner of some of these horses and gave him a third interest in them in consideration of his taking care of them between seasons. One horse, Silent Flame, made $2,600 the first year and this money was divided as follows: one-half to the trainer, and the balance divided between Mrs. Burrows and Walker in equal shares. It is not very clear what other moneys were made with the horses, but he claims that actually very little, if any, was made when all expenses were paid,

and made no returns with regard to this particular business. He did his betting through the Pari-Mutuels and testified that each night he would make a memo on the program of the day, or pieces of paper, in his hotel, as to his winnings for the day; take them all home at the end of the racing period, and at the conclusion of the racing season would enter in his little black book, Exhibit 3, the exact amount of his winnings for the year. None of these memos were produced as he states he did not keep them, the only entries being the year's earnings shown in said Exhibit 3.

Examination of Exhibit 3 would make it appear that all these entries might or could well have been made at the same time. They are the only entries in the book. It is not the kind of corroboration which one would or should expect in a matter of this character. It may or may not be correct, but for my part I feel that I cannot be satisfied with it. They are really not original entries at all in the true sense, but merely the total of the figures gathered from alleged original entries.

Several witnesses testified that Walker was habitually at the races and betting on nearly every race, and some of them saw him actually winning, and with money in his hands. But of course they could not say how much he might have won or lost. He no doubt did win many times and he probably lost many times. Stress was laid on the fact that he was known as "Lucky Walker", but that is hardly acceptable evidence as to the extent of his winnings. In order to satisfy any Court that these large amounts were the result of betting, I think much more satisfactory evidence should be required. If any definite amount could have been established, then, subject to what I shall say later, credit might be given him therefor, but in the absence of such proof it is impossible to say what that amount should be, and as the responsibility is on the taxpayer to show exactly what part of these items are from betting, and what from his regular business of farming, his appeal in that respect must fail. In reality, the only evidence on this point is the taxpayer's own word. More satisfactory corroboration I think should be required in such circumstances than that adduced at the trial.

As to whether or not the taxpayer's operations on the race courses amounted to the carrying on of a business or calling, and assuming the fact that he did make said moneys

1951

MINISTER OF NATIONAL REVENUE v. WALKER

Hyndman, D.J.

in betting, such sums are taxable, on the authorities I am left in some doubt. The crucial point seems to be, was he betting as a hobby, or for pure amusement, or was he systematically carrying on with a view to making money?

There are many decisions on this subject in the English, Australian and New Zealand courts gathered in Gordon's Digest of Income Tax cases. I deduce from an examination of these decisions that each case must depend on its own particular facts, the important feature being whether or not there was an intention on the bettor's part to make profit, and not as a form of amusement or hobby. Although in view of my finding above it is not necessary to decide this latter point, nevertheless when it is considered that the taxpayer did have an interest in several race horses; had the benefit of inside information from jockeys and other interested persons on the probable outcome of races, which he admits he had due to the fact that he was running some horses which he owned or had an interest in; and the further fact that for ten years or more he systematically attended all the races in sometimes four different cities and bet on most of the events, one is almost driven to the conclusion that this set of facts constitutes a business or calling within the meaning of the tax Acts, and the moneys made thereby would therefore be taxable. There does not seem to be any doubt that money made on casual bets made for pure amusement, or a hobby, are not assessable. Where to draw the line is the difficulty, but should I be compelled to make a decision on this aspect of the case, I think I would have to find on the facts and circumstances of the case that such winnings are assessable to tax.

In *Partridge* v. *Mallandaine,* (1), Lord Denman said:

> The words in 5 & 6 Vict. c. 35, s. 100, Sched. D, second case, are "professions, employments, or vocations." I am not disposed to put so limited a construction on the word "employment" as that suggested in argument. I do not think that employment means only where one man is set to work by others to earn money; a man may employ himself so as to earn profits in many ways. But the word "vocation" is analogous to "calling" a word of wide signification, meaning the way in which a man passes his life. The appellants attend races, make bets, and earn profits. Is it to be said that, under these circumstances, they are not to be assessed to the income tax, although every year they may have bets paid which put a thousand pounds into their pockets . . . I think that the case comes within the word "vocation," and therefore the Commissioners were right.

(1) (1887) 18 Q.B.D. 276 at 277.

The words in our Act are "from a trade or commercial or financial or other business or 'calling,' directly or indirectly received by a person from any office or employment or from any profession or 'calling' etc. etc." It will be noted that Lord Denman says " 'vocation' is analogous to 'calling.' "

Other decisions which might be referred to are found in Gordon's Digest, e.g., *Trautwein* v. *Federal Commissioners of Taxation,* (1); *Jones* v. *Federal Commissioner of Taxation,* (2).

In the *Jones* case where there was a conspicuous absence of system, and the element of sport, excitement and amusement were the main attractions, the decision was that Jones was not engaged in betting as a business. Evatt, J. said: "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."

It is notorious that many people, usually well off, who keep and run horses as a sideline, for excitement or amusement, lose money which they know or believe they can afford to lose. In the present case, I do not think that in Walker's circumstances he could reasonably believe he could afford to lose much money on a hobby of this kind, from which I infer that his intention in embarking on this business was to make profits out of it. If that was his intention, then I think it can be said he was engaged in a scheme other than a hobby, or for amusement, and any winnings would be assessable to tax. This, then disposes of the item of $17,863.

As to whether or not the taxpayer had $10,000 or more in his safety deposit box on the 1st of January, 1941, whilst the evidence is not very satisfactory, I am inclined to give him the benefit of the doubt, and to hold that he had.

With the greatest deference to the learned member of the Tax Appeal Board, I feel compelled to conclude that the appeal from the Board with respect to the $17,863

(1) (1936) 56 C.L.R. 196. (2) (1932) 2 Aus. Tax Dec. 16.

1951

MINISTER OF NATIONAL REVENUE v. WALKER

Hyndman, D.J.

ought to be allowed; but agree with them as to the findings regarding the above mentioned $10,000 item, and the appeal of the Minister in this respect is dismissed. The assessment will therefore be adjusted accordingly for the years 1946 and 1947.

The appeal of the taxpayer with respect to the years 1941 to 1945, inclusive, with regard to the item of $17,863, is dismissed, but allowed as to the $10,000 item above mentioned, and the assessment will also be adjusted accordingly.

As the Minister is successful in the major part of both appeals, and the taxpayer successful in the less important item in dispute, I think the best disposition of costs is to allow one half the taxable costs to the Minister, and no costs to the taxpayer.

Judgment accordingly.