[HIGH COURT OF AUSTRALIA.]

MARTIN . . . . . APPELLANT,
APPELLANT,

AND

FEDERAL COMMISSIONER OF TAXATION . RESPONDENT.
RESPONDENT,

H. C. OF A. 1952-1953.

1952, BRISBANE, *June* 24, 25; SYDNEY, *July* 29.

Webb J.

1953. BRISBANE, *Aug.* 3, 4; SYDNEY, *Sept.* 9.

Williams A.C.J., Kitto and Taylor JJ.

Income Tax (Cth.)—Assessable income—"Proceeds of any business carried on by taxpayer"—Horse racing and betting—Business—Hotel keeper—Farmer—Pursuit of pastime—Income Tax Assessment Act 1936-1946 (*No.* 27 *of* 1936—*No.* 6 *of* 1946), *ss.* 6, 25, 26.

A taxpayer, during the year ended 30th June 1944 and part of the year ending 30th June 1945 carried on business as an hotel keeper. In the year 1945 he sold his business and carried on farming for the remainder of that financial year and during the year ended 30th June 1946. Over these three years he had a considerable number of bets on racehorses and kept records of the result of each such bet, furnishing his tax agent with particulars from time to time for entry in his books of account. For the year ended 30th June 1944 his credit balance from betting was £2,389; for the year ended 30th June 1945 it was £4,674 and for the year ended 30th June 1946, £1,864. In all he made 602 bets of which 275 were winning bets and the money staked ranged from £4,687 to £10,352. His largest bet was £500 to £40 on one of his own horses. He made use of a betting system, placed the bets himself, but sometimes got a friend to lay bets for him, when he was occupied in the saddling paddock. Only one race-course was frequented by him on ordinary racing days and he had no more than one bet on each race. Otherwise his time was spent in conducting the hotel and farming business. For one period of nine months after he acquired the hotel he did not attend race-meetings, because he was devoting all his time to his new business. He raced and bred his own horses, owned blood stock and engaged trainers to train them. He was successful in his racing, his expenses for the year ended 30th June 1945 being £186 9s. 0d. and the prize money £91 2s. 0d., and for the year ended 30th June 1946 his racing and stud expenses being £652 1s. 2d. and the prize money £950 14s. 8d.

The Commissioner of Taxation claimed to assess the taxpayer to income tax on the moneys won by betting on the ground that they were the proceeds of a business carried on by the taxpayer.

Held, that the taxpayer's racing and betting transactions during the period under review, were the normal and usual activities of a person who derived pleasure from betting on a race-course and racing under his own colours and did not constitute a business the proceeds from which were assessable income.

Decision of *Webb* J. reversed.

APPEALS from *Webb* J.

These were three appeals by a taxpayer George Evelyn Martin from the decision of *Webb* J. dismissing his appeals from assessments to income tax in respect of the years ending 30th June 1944, 30th June 1945 and 30th June 1946. The taxpayer had won moneys during those years from betting on racehorses. These transactions were set out in a balance sheet submitted to the Commissioner of Taxation with his returns of income for these years. In assessing the taxpayer for the year ending 30th June 1946, the commissioner included the moneys so won as assessable income on the ground that they were the proceeds of a business carried on by the taxpayer. The commissioner issued amended assessments in respect of the previous two years so as to include moneys won by betting in those years as part of his assessable income.

The taxpayer lodged objections to the assessments and in the case of the two amended assessments disputed the right of the commissioner to issue them on the ground that the amount of moneys won had been disclosed by the balance sheets furnished with the returns.

The taxpayer's objections to the assessments were disallowed and at his request were treated as appeals and forwarded to the High Court. *Webb* J. heard the appeals.

O. North, for the appellant.

L. Brown, for the respondent.

The following written judgment was delivered by :— July 29.

WEBB J. These are appeals from assessments of income tax in respect of each of the income years ended 30th June 1944, 1945 and 1946. The same questions arise on each appeal, namely (1) whether the income in question was derived from winning bets on racehorses ; and if so, (2) whether it was the result of carrying on the business of racing or betting or both.

The appellant taxpayer had been successively a carpenter, works foreman and a cafe proprietor before the income years in question ; but during the whole of the first income year and for nine months of the second year he was a hotel keeper at Ipswich and then

H. C. OF A. 1952-1953.

MARTIN v. FEDERAL COMMISSIONER OF TAXATION.

Webb J.

became a farmer near Brisbane and later near Toowoomba. He sold his cafe for about £1,300 in March 1943 and a few months later bought the hotel for £1,400. The balance of his capital was then about £1,000.

In each of the three income years he included in his return certain sums as being the proceeds of winning bets, not however as assessable income, but as capital receipts. For the first two years the respondent commissioner appears to have accepted these returns as being correct, as he assessed on the basis of the returns. But after learning of a conviction of the taxpayer for the offence of selling wine for more than the price fixed by law, he decided to amend the assessments for the first two years by treating the alleged proceeds from betting as assessable income. In one year the taxpayer won £925 as prize money for horse races ; but this prize money does not appear to have been treated by the commissioner as assessable income. This may suggest that the commissioner regarded these alleged betting proceeds as having really been derived from the sale of liquor.

The betting wins claimed by the taxpayer totalled £8,928 for the three years in question, being £2,389, £4,675 and £1,864 for the years ended 30th June 1944, 1945 and 1946 respectively. During those years the taxpayer claimed to have made 602 bets, including 275 winning bets. He said that he had no betting transactions between 18th August 1943 and 9th February 1944 ; but he claimed to have won at 23 race-meetings out of 29, and to have won 41 bets out of 77, between 9th February and 30th June 1944. He also claimed to have won at 35 out of 55 race-meetings, and to have won 123 bets out of 265, during the year ended 30th June 1945 ; and to have won at 24 out of 44 race-meetings, and to have made 111 winning bets out of 268, for the year ended 30th June 1946. He further claimed that money staked by him during the three income years ranged from £4,687 to £10,352.

During the year 1944 and thereafter the taxpayer purchased several racehorses. One called " Nitram " was bought for £892 and won six races. Another, " Halo Girl " was bought for £100 and won three races. She was bought for breeding purposes also. Three other racehorses were bought for prices not stated. One, " Staffon ", won five races, and each of the other two won a race. The income tax return for one year disclosed £950 prize money.

The taxpayer did not keep racing stables ; but he employed several trainers, from whom he obtained information for betting purposes. He also employed a man to make bets for him, so that he might get longer odds.

From one bookmaker, Elborne, the taxpayer won £1,000 in two bets on " Nitram ", one in November 1945 and the other in January 1946. Elborne was called as a witness by the taxpayer and produced his betting-book showing that two such bets were made; but to find that taxpayer was the person who made those bets I have to accept Elborne's and the taxpayer's evidence as to that, and I do so because no suggestion was made that Elborne was not telling the truth. The taxpayer called another bookmaker, Creighton, who said he had made bets with him, but did not say that any bet was won by the taxpayer. At the time when the bets were made with Elborne and Creighton the taxpayer was a farmer.

In January 1946 the taxpayer paid £157 for the service of mares with a view to breeding " a horse capable of carrying my colours ", as he put it.

The books of account kept by the taxpayer, first as a hotel keeper and later as a farmer, were written up by one, Michel, a registered tax agent. Michel was called by the taxpayer and said that the books of account were written up from information supplied by the taxpayer. The tickets for winning bets would have been handed back to the bookmakers in return for the amounts won. As to winning bets then Michel had to rely on what the taxpayer told him. Taxpayer said he recorded all his bets in race books; but that those books were burnt from time to time.

If the taxpayer's betting and racing operations were as extensive as he claimed, then I think he carried on the business of betting on racehorses during the first income year in question and the business of horse racing and betting on horse races during the remaining two years. I base this view mainly on the considerable amount of time spent by him on racing and betting operations, the very large proportion of his assets and income applied to them, and the systematic methods employed by him, which were, I think, really directed more to making profit than deriving pleasure. The taxpayer's hotel was a small one as the price he paid for it suggests. His wine quota was only £7 a month. He claims he made a loss on the farm of over £500 in the last three income years. It is not always easy to conclude that an individual carries on the business of racing or betting when at the same time he has another business which ordinarily would be a full-time occupation. On the one hand it might well be that a man of considerable means could give as much time to racing and betting as the taxpayer did, without being properly found to be carrying on the business of racing or betting. On the other hand, while it is true that in some peculiar circumstances a man might indulge in racing or betting even

H. C. OF A. 1952-1953.

MARTIN v. FEDERAL COMMISSIONER OF TAXATION.

Webb J.

beyond his means merely for pleasure, it is more likely to be for profit where his betting or racing transactions are so heavy as to be out of proportion to his assets or income and are systematically conducted, as in this case. However, there is no single factor or group of factors that points to a betting or racing business in any case in which it appears. Many factors might be common to the activities of two individuals, and yet, because of the presence of other factors, a different conclusion might properly be reached in respect of those persons by the same court. The test is both subjective and objective : it is made by regarding the nature and extent of the activities under review, as well as the purpose of the individual engaging in them, and, as counsel for the taxpayer put it, the determination is eventually based on the large or general impression gained.

So far I have assumed that the taxpayer was as busy and as successful on the racecourses as he claimed. But he impressed me unfavourably during his cross-examination more particularly on the nature of the evidence he gave at his trial for selling wine above the fixed price. Because of this, and in the face of certain entries in his books of account, and for other reasons hereafter appearing, I am not prepared to accept his evidence as to the extent of his purchases and sales of liquor. I think it is more likely than not that much of his income which he attributed to betting wins was the proceeds of sales of liquor beyond his quotas. He said he purchased from one, Boroneo, " one big cask of wine " containing about sixty gallons for about £100. This was outside his quota for wine. I am satisfied that he made that purchase on 19th October 1943, as his books show. But his books also show that about two months after paying this £100, i.e. on 18th December 1943, he paid Boroneo a deposit of £12 10s. 0d. on " casks ". On having his attention drawn to this latter entry he said that he might have been lax in paying Boroneo's account. Michel could throw no further light on the matter beyond suggesting that £12 10s. 0d. might have been a payment for the " casks ". Again the taxpayer did not put the proceeds of his extra-quota sales through the cash register, and gave no satisfactory explanation why he did not do so. Further, he said he put receipts from accommodation in the hotel through the cash register ; but that he did not keep a separate account of the receipts from accommodation because the amounts were small. However during a substantial period he had many American soldiers staying at the hotel at week-ends and charged eight shillings to ten shillings for bed and breakfast.

As I find that the taxpayer did not make a full and true disclosure of all the material facts necessary for his assessment, because he did not state that he was carrying on the business of racing or betting, or state facts from which that would have appeared, I hold that the commissioner was at liberty to amend the assessments. See s. 170 (2) (*b*) of the *Income Tax Assessment Act* 1936-1942. It is not material that the assessments were made because the commissioner may have thought that the money alleged to have been won at betting was really the proceeds of liquor sales. It was sufficient that there was in fact not such a full and true disclosure as aforesaid.

Then as regards all three assessments the burden was on the taxpayer to prove that they were excessive. See s. 190 (*b*) of the *Income Tax Assessment Act* 1936-1942. This burden he has failed to discharge in respect of any of the three income years.

The commissioner imposed additional tax in accordance with his authority so to do under s. 226, and I see no ground for interfering with this action, or for making any definite recommendation to him in relation to such additional tax, as submitted by counsel for the appellant taxpayer. The commissioner might have felt convinced, as was probably the case, that some of the income claimed to have been won at betting was really the proceeds of sales of liquor, and so have been reluctant to remit any part of the additional tax in respect of that income. However he might well see fit to forego additional tax as to the balance of such income. The whole of such income is taxable, as I have found, but for the purpose of the additional tax, the commissioner is at liberty to make his own findings as to how much income was from liquor sales, and how much from betting. The taxpayer did win £1,000 from Elborne and the commissioner might see fit to remit additional tax attributable to this £1,000.

The appeals are dismissed and the assessments confirmed. The appellant taxpayer will pay the commissioner his costs of the appeals.

From this decision the appellant appealed to the Full Court of the High Court.

N. H. Bowen Q.C. (with him *O. North*), for the appellant. There was full disclosure by the appellant of his betting and racing transactions, which would enable the commissioner to make a proper assessment. The amended assessments are invalid. *Income Tax Assessment Act* 1936-1946, s. 170 (3): *McEvoy* v. *Federal*

H. C. OF A. 1952-1953.

MARTIN v. FEDERAL COMMISSIONER OF TAXATION.

Commissioner of Taxation (1); *Federal Commissioner of Taxation* v. *Hines* (2); *Federal Commissioner of Taxation* v. *Westgarth* (3); *Scottish Australian Mining Co. Ltd.* v. *Federal Commissioner of Taxation* (4). The taxpayer was not carrying on a business of betting. The position is that he attended races, but had another business, his hotel. He was addicted to racing and betting, but his transactions were not organized on anything like the scale necessary to make it a business even though he was successful in the three years: *McFarlane* v. *Commissioner of Taxation* (5); *Trautwein* v. *Federal Commissioner of Taxation* (6); *Graham* v. *Green* (7).

L. Brown, for the respondent. On the evidence betting on race-horses was a business. The appellant's idea in going to races and betting consistently according to a system was to make gain. The magnitude and regularity of his betting should be taken into consideration; also the fact that he raced his own horses would show that he indulged in racing more for profit than for pleasure. It is a question of fact and the finding of the judge of first instance should not be disturbed: *Federal Commissioner of Taxation* v. *Hines* (2); *Trautwein* v. *Federal Commissioner of Taxation* (6); *Graham* v. *Green* (7); *Knight* v. *Commissioner of Taxation* (*N.S.W.*) (8); *Vandenberg* v. *Commissioner of Taxation* (*N.S.W.*) (9); *Smith* v. *Anderson* (10); *Rolls* v. *Miller* (11). The appellant did not make full disclosure. He should have informed the commissioner of the number of times he went to the races, of the dates and of the amounts he won on each occasion or some such facts. The mere statement of the total won and lost is not a true disclosure of the material facts. They would not put the commissioner in a position to know whether or not the moneys received were taxable income or not.

N. H. Bowen Q.C., in reply. This court is in as good a position as the trial judge to determine any question of fact. The magnitude of the transaction is not relevant, since if the taxpayer is winning it has its effect naturally on the turnover.

Cur. adv. vult.

(1) (1950) 9 A.T.D. 206.
(2) (1952) 9 A.T.D. 413.
(3) (1950) 81 C.L.R. 396.
(4) (1950) 81 C.L.R. 188.
(5) (1952) 9 A.T.D. 344.
(6) (1936) 56 C.L.R. 196.
(7) (1925) 2 K.B. 37.
(8) (1928) 28 S.R. (N.S.W.) 523; 45 W.N. 109.
(9) (1933) 50 W.N. (N.S.W.) 238; 2 A.T.D. 343.
(10) (1880) 15 Ch.D. 247, at p. 258.
(11) (1884) 27 Ch. D. 71, at p. 88.

THE COURT delivered the following written judgment :—

These are three appeals by a taxpayer, G. E. Martin, from orders of *Webb* J. dismissing his appeals from assessments in respect of his income derived during the years ending 30th June 1944, 1945 and 1946. The first two assessments are amended assessments, the third assessment is an original assessment. The original assessments for the first two years were amended by the respondent so as to include in the taxpayer's assessable income gains which the taxpayer had made from betting or racing. In the third assessment similar gains were included in his assessable income. The taxpayer is not by occupation a bookmaker or trainer or jockey. During the whole of the year ending 30th June 1944 he was carrying on the business of a small hotel-keeper in the Metropole Hotel, Ipswich, Queensland. He continued to carry on this business till the end of March 1945 when he sold the business and bought a farm. He was still carrying on the farming business at the end of the third year. During the whole of the three years the taxpayer employed a registered tax agent, W. E. Michel, to keep his books of account and prepare his income tax returns. He gave Michel particulars of his wins and losses from betting from time to time from his betting-books, and Michel entered these particulars in the taxpayer's books of account. His betting was confined almost entirely to one racecourse, Albion Park, Brisbane. Michel prepared balance sheets of the taxpayer's affairs which were sent to the respondent with his income tax returns, and the balance sheet for each year showed as part of the taxpayer's capital account under the heading " betting transactions " the total amount of winning bets, losing bets and the balance. For the year ending 30th June 1944, the figures were : winning bets £3,538 5s. 0d., losing bets £1,149 : credit balance £2,389 5s. 0d. For the year ending 30th June 1945 : winning bets £7,513 10s. 0d., losing bets £2,839 : credit balance £4,674 10s. 0d. For the year ending 30th June 1946 : winning bets £4,429 10s. 0d, losing bets £2,565 0s. 0d. : credit balance £1,864 10s. 0d. The total credit balance for the three years was £8,928 5s. 0d. In the last two years the taxpayer also indulged in the luxury of racing and breeding racehorses and owned blood stock and his capital account in these years showed entries of prize moneys and racing and stud expenses. Over the two years the taxpayer was also successful in his racing, his expenses for the year ending 30th June 1945 being £186 9s. 0d. and the prize money £91 2s. 0d. and for the year ending 30th June 1946 his racing and stud expenses being £652 1s. 2d. and the prize money £950 14s. 8d. The respondent included these items of income and expenditure in the adjustments he made in the amended

H. C. OF A. 1952-1953.

MARTIN v. FEDERAL COMMISSIONER OF TAXATION.

Williams A.C.J. Kitto J. Taylor J.

assessment for the year ending 30th June 1945 and in the original assessment for the year ending 30th June 1946.

The taxpayer gave evidence about his betting transactions during the three years. This evidence was summed up by *Webb* J. as follows :—" During those years the taxpayer claimed to have made 602 bets, including 275 winning bets. He said that he had no betting transactions between 18th August 1943 and 9th February 1944 ; but he claimed to have won at 23 race meetings out of 29, and to have won 41 bets out of 77, between 9th February and 30th June 1944. He also claimed to have won at 35 out of 55 race meetings, and to have won 123 bets out of 265, during the year ended 30th June 1945 ; and to have won at 24 out of 44 race meetings, and to have made 111 winning bets out of 268, for the year ended 30th June 1946. He further claimed that money staked by him during the three income years ranged from £4,687 to £10,352 ". Referring to horse racing his Honour said : " During the year 1944 and thereafter the taxpayer purchased several racehorses. One called ' Nitram ' was bought for £892 and won six races. Another, ' Halo Girl ' was bought for £100 and won three races. She was bought for breeding purposes also. Three other racehorses were bought for prices not stated. One, ' Staffon ', won five races, and each of the other two won a race. The income tax return for one year disclosed £950 prize money. The taxpayer did not keep racing stables ; but he employed several trainers, from whom he obtained information for betting purposes. He also employed a man to make bets for him, so that he might get longer odds ". Later his Honour said : " If the taxpayer's betting and racing operations were as extensive as he claimed, then I think he carried on the business of betting on racehorses during the first income year in question and the business of horse racing and betting on horse races during the remaining two years. I base this view mainly on the considerable amount of time spent by him on racing and betting operations, the very large proportion of his assets and income applied to them, and the systematic methods employed by him, which were, I think, really directed more to making profit than deriving pleasure ".

In the evidence of Michel and of the taxpayer it was disclosed that the business of the taxpayer at the Metropole Hotel was not confined to legitimate trading. He was also engaged in purchasing wine which he was selling above the fixed price and his Honour formed the impression that a large proportion of the gains he made from these transactions had been attributed to winning bets. This could only have occurred whilst he was running the

hotel and Michel's evidence was that the whole of the profits from these sales was disclosed in the taxpayer's books of account and included in his assessable income. We asked counsel for the respondent whether he claimed that any portion of the gains attributed to betting were profits made from this trading and were informed that this was not suggested and that the only issue for our decision was whether upon the evidence the appellant's transactions in betting over the relevant periods constituted a business.

The definition of income from personal exertion includes the proceeds of a business carried on by the taxpayer, but the pursuit of a pastime, however vigorous the pursuit may be, does not usually amount to carrying on a business and gains or losses made in such a pursuit are not usually considered to be assessable income or allowable deductions in computing the taxable income of a taxpayer. The onus, if the case is one in which onus assumes any importance, is on the appellant to satisfy the Court that the extent to which he indulged in betting and racing and breeding racehorses was not so considerable and systematic and organized that it could be said to exceed the activities of a keen follower of the turf and amount to the carrying on of a business. But no question of onus appears to us really to arise. It is simply a question of the right conclusion to draw from the whole of the evidence. Although the issue is one of fact there is no conflict of evidence and the case is one of those cases where the court of appeal is in as good a position to reach a conclusion as the judge below: "many, perhaps most cases, turn on inferences from facts which are not in doubt, or on documents: in all such cases the appellate Court is in as good a position to decide as the trial judge", per Lord *Wright* in *Powell* v. *Streatham Manor Nursing Home* (1). *Webb* J. held that the taxpayer was carrying on a business of racing and betting because of (1) the considerable amount of time spent by him in racing and betting operations; (2) the very large proportion of his assets and income applied by him for that purpose; and (3) the systematic methods employed by him which were, his Honour thought, really directed more to making profit than pursuing pleasure. With all respect to his Honour the evidence does not appear to us to justify these conclusions. In fact, the taxpayer frequented one race-course and then only on ordinary racing days. If the number of bets he made appears at first sight to have been large, they do not seem to add up to more than about one bet on each race and therefore not to point to more than a normal propensity of racegoers who bet as a pastime. The taxpayer could

(1) (1935) A.C. 243, at p. 267.

H. C. OF A. 1952-1953.

MARTIN v. FEDERAL COMMISSIONER OF TAXATION.

Williams A.C.J. Kitto J. Taylor J.

afford this indulgence since he was, on the evidence, so successful. He said that he never ventured much over £100 on any race and that the biggest bet he ever won was £500 to £40 on one of his own horses. He said that he stayed away from the races for the first nine months after he purchased the hotel, for he was then in a new job and had to concentrate on that until he had control of it. Cross-examined as to system he said :—

"What amount did you wager on horses ?—It depends—I had a little system. I bet on my pocket. I found out from experience and I was always a man who wanted to win if it was possible. If I wanted to win a tenner on a horse and the horse was 5/1 I would lay £10 to £2 on my horse. If that lost that meant I had to get £12 back and if the next horse was 3/1 I would bet £4 on the horse to win £12. If it lost I would bet on the next horse to win £12 and when it won I put it back in my pocket.

You were trying to be systematic ?—I do not know, I was trying to be systematic to bet successfully. If a person goes to the races with £50 and puts £40 on the first race and loses and then puts £2 on a horse that wins, he is still losing.

You said you financed your bets at the races ?—Yes, that is what I explained.

When you were at the races betting did you hedge on bets, if a horse was leading ?—I tried that, but never made a success of it.

You did try it ?—Yes.

Did you ever lay off ?—I think I did but I cannot pin-point the occasion. I have heard trainers with their horses going for a photo finish laying each other £25 in case they missed the verdict.

Did you have any other persons placing bets for you at any time ?—A friend of mine, Col. Watkins, sometimes helped me.

Did you go to the races with him ?—Yes, we were great friends.

And you got him to put bets on for you ?—Yes, sometimes when I went into the saddling paddock.

Was that part of your idea, so people would not know you were backing your horses ?—No, he tried to get the best price while I was in the saddling paddock, I might be giving instructions to a jockey.

Did you devote a considerable amount of time to studying race form ?—Not a considerable amount, but in my spare time.

Did you read up the papers ?—Yes, Sydney, Melbourne and even North Queensland.

Did you have various trainers ?—Yes, Teddy Tanwin was the first and L. Waldron in Toowoomba. I named a horse after him and spelt it backwards. It was Nordlaw.

You had another trainer named Harley ?—Yes, Dave Harley. And Mr. Tedman ?—Yes, he trained "Appropriate" for me.

Did you get information from these trainers ?—Yes, I discussed form with them.

Have you backed horses as a result of information from one of these trainers ?—Yes.

If the horse won would you give him a present afterwards ?—I did on one occasion only. It is marvellous the bad information you can get from trainers".

So it appears that the taxpayer, like many other persons who find pleasure in betting and even more pleasure in winning, used a system which he believed would bring him out on the credit side in the long run, that he sometimes got a friend who accompanied him to the races to lay his bets for him when he was himself occupied in the saddling paddock, and that he engaged trainers from time to time to train his racehorses. But we do not consider this evidence to be symptomatic of a business of betting or racing. It illustrates the normal and usual activities and nothing more of persons who derive pleasure from betting on the racecourse and racing under their own colours. In our opinion the present facts fall short of the facts which were insufficient to persuade *Rowlatt* J. in *Graham* v. *Green* (1) that the taxpayer there was carrying on a vocation of betting. His Lordship said: "I think all you can say of that man, in the fair use of the English language, is that he is addicted to betting" (2). We were referred to the decision of *Evatt* J. in *Trautwein* v. *Federal Commissioner of Taxation* (3), but we do not consider it to be more than a decision on the particular facts of that case.

In the case of the two amended assessments the further point was taken that the appellant, by disclosing his racing and betting wins and losses and expenses in the balance sheets as part of his capital account, had made a full and true disclosure to the respondent of all the material facts necessary for the respondent to determine whether to take these gains and losses into the calculation of the appellant's taxable income and that these amended assessments were invalid under the provisions of s. 170 (3) of the *Income Tax Assessment Act* 1936-1946. In the circumstances it is unnecessary to decide this point but we must not be taken to regard it with any favour.

For these reasons we must allow the three appeals with costs, set aside the orders of *Webb* J. and in lieu thereof order that the

(1) (1925) 2 K.B. 37.
(2) (1925) 2 K.B., at p. 42.
(3) (1936) 56 C.L.R. 196.

H. C. OF A. 1952-1953.

MARTIN v. FEDERAL COMMISSIONER OF TAXATION.

two amended assessments be set aside. Once the items in dispute have been excluded from the calculation of the appellant's taxable income for the year ending 30th June 1946 the appellant is left with no taxable income for that year so that the original assessment must also be set aside. The respondent must pay the costs of the proceedings before *Webb* J.

Appeals allowed with costs. Orders of Webb J. set aside. In lieu thereof order that the amendments to the two earlier assessments and the third assessment under appeal be set aside. Respondent commissioner to pay costs of proceedings before Webb. J.

Solicitors for the appellant, *Casey & Williams*, by *Leonard Power & Power*, Brisbane.

Solicitor for the respondent, *D. D. Bell*, Commonwealth Crown Solicitor.

B. J. J.