[HIGH COURT OF AUSTRALIA.]

LANGFORD . . . . . APPELLANT;

AND

FEDERAL COMMISSIONER OF TAXATION RESPONDENT.

H. C. OF A. 1954.

BRISBANE, *Aug.* 2-6; *Oct.* 28.

Webb J.

Income Tax (Cth.)—Assessable income—"Proceeds of any business carried on by taxpayer"—Taxpayer successively licensed bookmaker, hotel manager and hotel proprietor—Bets placed for licensed bookmakers and on own behalf—Personal liability of taxpayer to settle all bets—Business of "punting"—Pastime—Income Tax and Social Services Contribution Assessment Act 1936-1951 (*No.* 27 *of* 1936—*No.* 44 *of* 1951), *ss.* 6, 25, 26.

In determining whether a taxpayer has carried on a business of betting, the fact that he has had substantial winnings over a period of years is not conclusive.

L., who for a short period previously had been a licensed bookmaker, became an hotel manager and hotel proprietor. In each of several successive years following he had considerable betting winnings. Throughout this period, L. had placed bets with certain bookmakers for others as well as himself, and in all cases took the responsibility of settling with those bookmakers, who knew only L. in these transactions. There were about twenty-five such bookmakers in different towns in North Queensland and L. had beforehand to make arrangements with them, with the co-operation of other bookmakers who knew L. to be trustworthy, to accept the bets, which were usually made by telephone. The people for whom L. placed bets included a turf commission agent and a licensed bookmaker, both of whom were personal friends of L. L., however, did not receive commission from any of the persons for whom he placed bets, including these two, and he performed the service free of charge in order to obtain information that bets were being made in large amounts by those closely connected with the horses. Although L. had kept a full record of his betting transactions and for settling purposes adopted a method suggested by a bookmaker, he had not employed a staff to collect betting data, and had no scheme to ensure that whatever might be the racing results he would not stand to lose. L. attended race meetings only occasionally and during the relevant period was continuously engaged in his occupation

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as hotel-keeper. The Commissioner of Taxation claimed that L.'s betting winnings over these years were earnings of a business of betting and, therefore, constituted assessable income in each of the respective years of income.

Held, that L. had not carried on a business of betting.

Martin v. *Federal Commissioner of Taxation* (1953) 90 C.L.R. 470, followed.

APPEAL under the *Income Tax and Social Services Contribution Assessment Act* 1936-1951.

These were six appeals by a taxpayer Albert Lionel Langford against the disallowance by the Federal Commissioner of Taxation of objections to an assessment and amended assessments of income tax. Five appeals were in respect of amended assessments for the years ended 30th June 1947 to 1951 inclusive, and the sixth was in respect of the assessment for the year ended 30th June 1952.

In assessing the taxpayer to income tax for the year ended 30th June 1952, the Commissioner of Taxation included the moneys won by him from betting 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 five years so as to include moneys won by betting as part of the taxpayer's assessable income. The taxpayer lodged objections to the assessment and amended assessments on the grounds (*inter alia*): "6. That the commissioner is wrong in assessing to me as income the nett receipts or any monies received by me from the backing of race horses. 7. That I carry on the business of hotel-keeper and do not carry on the business of professional backer of horses or 'punter' or bookmaker or bookmaker's agent and have not carried on the business of bookmaker since I relinquished my bookmaker's license in 1947. 8. That I have not at any time since relinquishing my bookmaker's license considered my racing activities as a business but purely as a recreation or pastime".

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

The facts are sufficiently set out in the judgment.

N. H. Bowen Q.C. (with him *F. G. Connolly*), for the appellant. The taxpayer was not carrying on a business of betting. The three classic tests of business activity, profit, regularity, and volume, are not applicable to punting. All three were present in *Martin* v. *Federal Commissioner of Taxation* (1). The important but not conclusive factors are whether the taxpayer had another occupation,

(1) (1953) 90 C.L.R. 470.

what proportion of time was spent on betting, what proportion of his assets was involved, and whether the taxpayer was connected with racing as an owner, breeder, trainer, bookmaker or jockey. There is nothing in the evidence to suggest that this was more than a pastime or hobby which was highly successful. It is admitted there was not a full and true disclosure for the year ended 30th June 1947. In respect of the other years there has been full and true disclosure.

[WEBB J. That question arises only if I am against you on the betting question.]

Yes.

C. G. Wanstall, for the respondent. There was not a true and full disclosure of all material facts. The mere noting on the return that the taxpayer won a certain amount which is not taxable is not a sufficient disclosure to meet the requirements of s. 170 (2). If any fact is not disclosed which the Court considers material in forming an opinion as to the nature of these winnings, there has not been a full and true disclosure : *Scottish Australian Mining Co. Ltd.* v. *Federal Commissioner of Taxation* (1) ; *Australasian Jam Co. Pty. Ltd.* v. *Federal Commissioner of Taxation* (2) ; *Martin* v. *Federal Commissioner of Taxation* (3). In any event the assessments with the exception of that for the year ended 30th June 1947 are amendable under s. 170 (3) in that the commissioner is correcting a mistake of fact that the taxpayer is merely a punting hobbyist.

[WEBB J. Is it not a mistake of opinion ? His Honour referred to *Leeder* v. *Ellis* (4) ; *Federal Commissioner of Taxation* v. *Westgarth* (5).]

That case is distinguishable : *Federal Commissioner of Taxation* v. *Hayden* (6). In relation to the year ended 30th June 1947 where the income assessed is greater than the amount of earnings and winnings disclosed I rely solely on s. 170 (2). On the evidence there was a business of betting. There was a consistent course of conduct in backing the horses which he also backed for the turf commission agents. His wide organization facilitated the placing of his own bets as well as those for the turf commission agents. The appellant kept meticulous records of both types of bets and found it necessary to introduce a settling sheet. There is no element

(1) (1950) 81 C.L.R. 188, at pp. 197-198.
(2) (1953) 88 C.L.R. 23, at p. 33.
(3) (1953) 90 C.L.R. 470, at pp. 475, 481.
(4) (1953) A.C. 52 ; (1952) 86 C.L.R. 64.
(5) (1950) 81 C.L.R. 396.
(6) (1944) 7 A.T.D. 440 ; 18 A.L.J. 203.

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of relaxation in his betting activities which were a strain on him. The betting was massive in volume and regular in operation: *Martin* v. *Federal Commissioner of Taxation* (1); *Graham* v. *Green* (2); *Trautwein* v. *Federal Commissioner of Taxation* (3).

N. H. Bowen Q.C., in reply.

Cur. adv. vult.

Oct. 28.

The following written judgment was delivered by:—

WEBB J. These are six appeals against the disallowance of objections to an assessment and re-assessments of income tax. Five are in respect of re-assessments for the years ended 30th June 1947 to 1951 inclusive, and the sixth is in respect of the assessment for the year ended 30th June 1952. During these six years the appellant taxpayer was successively licensed bookmaker, hotel manager and hotel proprietor at Mackay in North Queensland. He was a licensed bookmaker from May 1946 to March 1947, when he became manager and licensee of an hotel, and as such could not carry on the business of bookmaking.

In his return of income for each of the six years he disclosed winnings from betting on racehorses, but not as assessable income, except such winnings as were the proceeds of "hedging" bets made while he was a licensed bookmaker. It is a practice of bookmakers to make "hedging" bets when they consider they are too heavily loaded with bets on particular horses. This practice is incidental to bookmaking, and the winnings from such bets are ordinarily returned as assessable income. However, it was contended by the commissioner that all winnings from betting should have been included in the returns as assessable income because, so he claimed, they were earnings of a business of betting carried on even after the taxpayer had ceased to be a licensed bookmaker. This contention was based on the admitted fact that throughout the six years the taxpayer had placed bets with bookmakers for others as well as for himself, and in all cases took the responsibility of settling with those bookmakers, who knew only the taxpayer in these transactions. There were about twenty-five such bookmakers in different towns in North Queensland, and the taxpayer had beforehand to make arrangements with them, with the co-operation of other bookmakers who knew the taxpayer to be trustworthy, to accept the bets which usually were made through the telephone. The extent of the taxpayer's operation is indicated by the telephone

(1) (1953) 90 C.L.R. 470.
(2) (1925) 2 K.B. 37.
(3) (1936) 56 C.L.R. 196, at pp. 206, 207.

fees paid by him for calls, which ranged from £104 to £484 annually. However, the taxpayer did not receive any commission from the persons for whom he placed bets, although one, Mrs. Abrahams, was a turf commission agent, who received commission from her clients at the rate of one shilling for each pound of the stake, and another a bookmaker, Kerrish. Mrs. Abrahams carried on business in Brisbane where she was employed by southern bookmakers and others to place bets on horses racing in the southern capitals, in which there were about seventy race days in the year and about twenty-one races on each day. When Mrs. Abrahams was not able to place satisfactorily all these bets herself, she sought the taxpayer's assistance and he gave it, without commission, because she, like Kerrish, was his personal friend, and because the fact that bets were being made through her in large amounts indicated that the bets were being made for those connected with, or " close to " the horses, and so was valuable information for the taxpayer as a " punter ".

The experienced " punter " appears to follow what is called in betting circles " the right money ", and Mrs. Abrahams, and perhaps Kerrish, had that money. At all events that appears to have been the taxpayer's opinion, seeing that he not only placed bets for Mrs. Abrahams and Kerrish but also put his own money on the same horses, with the result that he won considerable amounts in each of the six years. His net winnings were :—

1946-47	.. ..	£880
1947-48	.. ..	£1,649
1948-49	.. ..	£235
1949-50	.. ..	£2,113
1950-51	.. ..	£2,704
1951-52	.. ..	£9,018

The extra income tax on these winnings claimed by the commissioner is about £16,000, including £6,000 provisional tax.

This success, achieved as it was with an initial fund of only £500, may seem incredible ; but the commissioner does not appear seriously to question it to any substantial extent. Indeed, in Australia, where there is so much betting on horse races, both on and away from racecourses, it is to be expected that some " punters " will be successful, a few in large amounts, and fewer still in large amounts over extended periods, and that the operations of very successful " punters " will receive the commissioner's close attention where the magnitude of those operations, or the system or organization or methods employed, or other features, suggest to him the carrying on of a business of " punting ".

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In this case Mr. *Wanstall* submitted for the commissioner that the betting business that the taxpayer began as a licensed bookmaker continued throughout the six years with modifications which still left it a betting business. The commissioner even sees in isolated transactions recorded in the taxpayer's books something that seems to him to reveal that, even after the taxpayer ceased to be a licensed bookmaker, he still operated as a bookmaker. But the commissioner relies not only on those transactions, but also on the admitted fact that the taxpayer throughout the six years regularly, and after making the arrangements with bookmakers in North Queensland to accept all his bets, placed bets with them not only on his own account but also as the agent for others who were in the business of turf commission agent or bookmaker, and that his reward for his services as such agent was not a mere shilling for each pound of the stake money, but the valuable information he received in his capacity as agent which enabled him to make winning bets with his own money consistently during six years. The commissioner also relied on the fact that the taxpayer kept full records of his betting transactions and for settling purposes went so far as to adopt a method suggested by a bookmaker. However, it seems to me that any strength this argument possesses is due mainly to the fact that the taxpayer laid the foundation of his success as a " punter " during his operations as a licensed bookmaker. I think it is more correct to find that the taxpayer gave up his business as a bookmaker to qualify as an hotel manager and licensee, but that he continued " punting " along the same lines as before, because he was so successful, and from early manhood had been addicted to betting. So viewed, the facts do not disclose the continuation of a business of betting, but in a modified form. Actually the commissioner did not take the contrary view until the taxpayer had made his return for the sixth year, when the magnitude and success of his " punting " induced the commissioner to assess his winnings for that year as from a business of betting and to re-assess his tax for the preceding five years on the basis that his winnings in those years were also from such a business.

In my opinion the fact that the taxpayer was for a brief period a licensed bookmaker is by no means conclusive. Nor is much weight to be given to the isolated entries to which reference has been made as suggesting to the commissioner that the taxpayer on two occasions acted as an unlicensed bookmaker. The winnings sought to be taxed were not to any appreciable extent or at all from " hedging " bets covering these isolated transactions, even if

the commissioner has placed the right construction on these transactions, which I am not prepared to find to be the case. There were also other entries in which the bookmaker's term, " backed back ", was used; but it is clear enough, as the commissioner's investigating officer conceded, that in the context in which it occurs this expression could not have been used to describe " hedging " bets. It conveyed at most that the taxpayer had shared bets already taken by him with Mrs. Abrahams and others who had commissioned him to " back " the same horses.

If then the winnings in question were from a business and so taxable, it must be for reasons other than the taxpayer's operations as a bookmaker. These reasons, if they exist, must be found in the extent of the taxpayer's " punting ", or in the system or organization or methods employed by him. Now if the taxpayer had employed a staff to collect betting data, or if, like a bookmaker, he had a scheme to ensure that whatever might be the racing results he would stand to gain, or not to lose at all events, it could well be that this would constitute a business of " punting ". Mr. *Bowen* for the taxpayer conceded as much. But this taxpayer did not have such a staff or scheme. To subscribe to a newspaper that suggests possible winners is not to have a scheme or system, even if the newspaper's suggestions are acted upon. So too obtaining information from a turf commission agent and acting on it is not to have a scheme or system.

There remains for consideration the arrangements made by the taxpayer with bookmakers to accept bets over the telephone, including his personal liability to them for payment of *all* losing bets placed by him, whether for others or for himself, and the magnitude of his betting. As to this arrangement with and his personal liability to those bookmakers, they were made and undertaken in the first place for the purposes of Mrs. Abrahams' business. Indeed it may be said to have been an extension of her business in North Queensland that the taxpayer was conducting. But here we are concerned not with what the taxpayer did for her, but with what he did for himself. It is true that in the sixth year his personal " punting " greatly exceeded hers. Of a total of £94,000 staked in that year, £88,000 belonged to him. But the arrangement with other bookmakers was still on Mrs. Abrahams' account. So regarded it does not follow that because she was in the business of turf commission agent and he acted for her as an undisclosed principal in making arrangements with bookmakers, his own personal " punting " with those bookmakers was also in the nature of a business.

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Lastly as to the magnitude of his " punting ", neither the large amounts staked (*Jones* v. *Federal Commissioner of Taxation* (1)) nor the large amounts won (*Graham* v. *Green* (2)) are a safe guide on the question whether " punting " amounts to a business, or is merely a hobby or pastime. And that is the case even where the " punter " does nothing but bet, as in *Graham* v. *Green* (2). Here the taxpayer spent only a few hours a week placing bets, and gave the rest of his time to his hotel work or business.

Reference was made during argument to *Hines* v. *Federal Commissioner of Taxation* (3) in which this Court appeared to suggest the possibility that a business of " punting " might be found when there was in fact nothing more to warrant that finding than heavy winnings over a period of years and the commissioner did not contend there was such a business; and to the contrary view expressed by this Court, then differently constituted, in *Martin* v. *Federal Commissioner of Taxation* (4) where there were not merely heavy winnings during some years but also racing and betting activities that might have appeared to place *Martin's Case* (4) in the same category as *Trautwein* v. *Federal Commissioner of Taxation* (5) where *Evatt* J. found there was a business of betting. In *Martin's Case* (4) the Court referred to the decision in *Trautwein's Case* (5) as turning on its own facts, and proceeded to apply the decision in *Graham* v. *Green* (2) where, however, there was nothing more than successful " punting " over a period by a man who, as already stated, did nothing else, but who employed no system or organization. Neither in *Hines' Case* (3) nor in *Martin's Case* (4) did this Court state any test for determining whether there was a business of " punting " . That could not have been expected in this type of case, in which the facts if not of infinite variety still vary considerably, and as to the effect of which it may be said : *quot homines tot sententiae*. However, one gets the impression, rightly or wrongly, that their Honours in *Martin's Case* (4) were influenced by the reasons given by *Rowlatt* J. in *Graham* v. *Green* (2) against too readily concluding that particular " punting " activities amount to a business. At all events, but for this attitude of the Court in *Martin's Case* (4), I might be inclined to act on what appears to me to be suggestions conveyed by the Court earlier in *Hines' Case* (3) and find that this taxpayer's " punting " amounted to a business; but in view of *Martin's Case* (4) and the application given to *Graham* v. *Green* (2) the appeals should, in my opinion, be allowed,

(1) (1932) 2 A.T.D. 16; 6 A.L.J. 201.
(2) (1925) 2 K.B. 37.
(3) (1952) 9 A.T.D. 413.
(4) (1953) 90 C.L.R. 470.
(5) (1936) 56 C.L.R. 196.

the re-assessments for the first five years set aside, and the original assessments restored, and the assessment for the sixth year varied by excluding therefrom the taxpayer's winnings from " punting ". The commissioner should pay the taxpayer's costs of the appeals.

The appeals are allowed, the re-assessments for the years ended 30th June 1947 to 1951 inclusive set aside and the original assessments restored, and the assessment for the year ended 30th June 1952 varied by excluding therefrom the appellant taxpayer's winnings from betting.

The respondent commissioner will pay to the appellant his costs of the appeals.

Solicitors for the appellant, *Leonard Power & Power*, Brisbane.

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

W. J. C.