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ORIGINAL

IN THE HIGH COURT OF AUSTRALIA

HELTON

V.

THE COMMISSIONER OF TAXATION OF THE COMMONWEALTH OF AUSTRALIA

REASONS FOR JUDGMENT

Judgment delivered at Sydney

on Wednesday, 19th August 1959

W. M. HOUSTON, Govt. Print., Melb.

C.1978/55

HELTON

v.

THE COMMISSIONER OF TAXATION OF THE COMMONWEALTH OF AUSTRALIA

ORDER

Appeal dismissed with costs.

HELTON

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THE COMMONWEALTH OF AUSTRALIA.

JUDGMENT TAYLOR J.

HELTON

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COMMISSIONER OF TAXATION OF THE COMMONWEALTH OF AUSTRALIA

In his return of income for the year ended 30th June 1954 the appellant disclosed an assessable income of £3,173. 0. 2. This was the aggregate of amounts said to have been received by him by way of rent (£754), dividends (£7. 7. 9) and an item of income described as winning bets (£2,411.12. 5). The gross amount of winning bets shown in the statement accompanying the return was £11,494. 3. 5 but £9,082. 11. 4 of this amount was claimed by the appellant to be non-taxable. Apparently the difference, £2,411, was intended to represent profits made by the taxpayer as a starting price bookmaker but it seems to include also the proceeds of some winning bets made by him in the roll of "punter". In assessing the appellant to income tax the respondent added the sum of £9,082 to the appellant's assessable income and then allowed as an additional deduction the amount of £3,408. This latter amount represented a number of items of expenditure which were specified in the statement but not claimed as deductions. They were one-half of the appellant's telephone account (£18.15.8), fodder for race horses (£296.18. 3), losing bets (£3,008.13. 8), betting commissions (£70) and nomination fees for his race horses (£22.10. 0). The appellant objected to the assessment on the ground that the sum of £9,082 represented the proceeds of winning bets and that such bets were not made in the course of any business activity or activities conducted by him. The amount in question, it was said, was "the result of a profitable pastime only". His objection was disallowed and a subsequent appeal to a Board of Review was dismissed. This so-called appeal is now brought to this Court pursuant to s. 196 of

the Income Tax and Social Services Contribution Assessment Act 1936-1954.

During the relevant income year the appellant was a starting price bookmaker and for some eight or ten years prior to July 1953 he had also carried on business as a registered bookmaker. On the 30th July in that year, however, he wrote to the Secretary of the Downs and South-Western District Racing Association intimating that he did not desire registration as a bookmaker for the current year as he had obtained from the Queensland Turf Club a permit to train his own race horses. It appears that at this time he owned two race horses but only one, "Wise Investment", was in training. In these circumstances he asked that his pending application for a current bookmaker's licence be held "till further notice". In April of the following year he abandoned his trainer's permit and, having secured a bookmaker's licence on the following day, he recommenced fielding during May 1954.

In seeking to set aside the assessment it was necessary for the appellant, in the circumstances of the case, to establish that the amount in question, namely, £9,082 accrued to him from winning bets and, further, that the bets in question were not made as part of a business activity in which he was engaged. So stated these issues appeared to raise for decision questions of fact and the objection was taken on behalf of the respondent that the appeal was not competent. Counsel for the respondent indicated that the Board of Review had dealt with the matter on the assumption that the amount in question had been derived from winning bets and it had dismissed the taxpayer's appeal on the ground that the proper inference was that he was engaged in betting as a business activity. He contended that in relation to this second issue questions of law would arise and, influenced to some extent by the note of the decision in Holt v. The Federal Commissioner of Taxation (3 A.L.J. 68), I allowed

the matter to proceed. Having now heard the evidence in the case I am satisfied that the only questions which arose before the Board of Review and which arise here are questions of fact. There is no dispute that betting may constitute a business activity and there is no question that profits derived from betting as a business activity constitutes assessable income. Nor is there any question whether the conclusion is open upon the evidence that the appellant so carried on his betting activities. It was for him to displace the assessment by showing affirmatively that the amount in dispute represented the proceeds of winning bets and then by proceeding to establish by evidence that the bets in question did not constitute part of his business activities in relation to horse racing. In my view, no questions of law were involved in the determination of these issues and although questions may have arisen concerning the proper inference to be drawn from the proved facts this does not mean that any question of law was, or is, involved. Accordingly, the appeal should, in my opinion, be dismissed on the ground that it is incompetent.

In these circumstances it is unnecessary that I should go further and attempt to deal with the facts of the case. But having formed a view upon examination of facts I feel that I should not dispose of the case without expressing it. As already appears the Board of Review was prepared, to dispose of the matter on the assumption, but without so finding, that the amount claimed by the appellant to be non-taxable represented the proceeds of winning bets. In view of the evidence before me, however, I am not prepared to make any such assumption. The amount claimed by the taxpayer to be non-taxable was £9,082 but in seeking to substantiate his claim he focussed attention upon three occasions. He claimed to have won a total sum of £8,500 between the 7th September and the 31st October 1953. He says that on the 7th September 1953 he won £3,500 on his own horse, "Wise Investment", and that on the 31st October 1953

he won £2,600 on a horse called "Gresford" and on the same day £2,400 on a horse called "Kevmar". A sum of £3,500 was, in fact, paid into his bank account with the Commercial Banking Co. of Sydney Ltd. at Brisbane on the 7th September 1953 and two sums, £2,600 and £2,400, were paid into the same account on November 2nd of the same year. He was unable to give any evidence concerning the difference between the sum of £8,500 and £9,082 and ultimately his counsel abandoned any claim with respect to this balance. The initial question therefore is whether the appellant did, in fact, win these three sums of money in the manner deposed to by him.

I think it is probable that the appellant won some money when his horse "Wise Investment" won on the 7th September 1953 and it is by no means unlikely that he also won some money on the other two named horses. But I am far from satisfied that his wins were as great as he claims. It is true that he was supported by the evidence of two witnesses who claimed to have placed some part of his wagers on those occasions but I cannot help but feel that if he had won the amounts which he claimed to have won more convincing evidence would have been available.

The appellant's business activities as a bookmaker had kept him closely associated with horse racing for a number of years and it is quite apparent from the evidence that he constantly kept considerable amounts of cash on hand for the purposes of his business. He says that he kept a cash bank of four to five hundred pounds; this, he said, was sufficient accommodation both for his starting price and race course betting. But he kept no books of account, he did not systematically pay his winnings either as a bookmaker or punter into either of his bank accounts and he had no records which would enable him to say what income he had received during the relevant period or during earlier years or to enable him to distinguish between bookmaking profits

and winning bets if any. He claims that his bookmaking business was not profitable but between the 31st December 1951 and the 3rd February 1953 eleven deposits totalling £8,150 found their way into his Brisbane bank account. He has no recollection whatever of the source of any of the sums which made up this amount except that the sum of £1,000 which was deposited on the 5th December 1952 for the purpose of securing the issue of a letter of credit a few days later must have been "the thousand pounds I had bookmaking". He could not really bring to mind that he had had a thousand pounds in cash at any time but that was "the only place it could have come from". It was, I should think, also the only place from which, substantially, the balance of the £8,150 could have come. The appellant maintains that his bookmaking business was not profitable but I do not accept this evidence. Nor do I think that when he relinquished his bookmaker's licence in July 1953 he was prepared to continue in business as a starting price bookmaker and thereby expose himself and his son to penalties for breaches of the law for inconsiderable profits. He was in the business for the purpose of making profits - not sacrifices - and it is beyond question that he frequently had on hand much larger sums of cash than he was disposed to admit. But after the 3rd February 1953 nothing was paid into his Brisbane account until the 29th July 1953. And after the 10th February 1953 only one sum, namely £3,000, was paid into his Quilpie Account until November 1953. This sum of £3,000 was, he said, borrowed so that he might draw a cheque to deposit in connection with negotiations for the acquisition of a parcel of Crown land. His negotiations were unsuccessful and the amount was repaid by cheque some days later. I have no doubt that the appellant made substantial profits from his bookmaking activities during the first half of 1953 and it is more than probable that when he relinquished his bookmaker's licence in July of that year he was holding

substantial cash reserves. I should be inclined to think that some part of them found their way into his account at a later stage in the form of betting wins. But whether or not an affirmative conclusion to this effect should be reached upon the evidence I am far from satisfied that on the three occasions in question the appellant won a total sum of £8,500. It may well be that he won some money on each of these occasions and they may have provided opportunities for exaggerating the amount won. However that may be, I do not accept the evidence that the amounts in question were won by the appellant in the manner in which he and the two other witnesses who gave evidence deposed.

In perspective the case presented by the appellant was entirely unsatisfactory. As already appears he had no records relating to his bookmaking activities, he was either quite unable or quite unwilling to indicate the source of large sums of money which found their way into his Brisbane Bank account, his assertion that his bookmaking activities were not profitable was clearly false and on many points his evidence was confused and inconsistent. In the circumstances and particularly in view of the fact that winning bets of this magnitude were quite unusual for him it is impossible to rely upon his evidence as to the source of the amount in question. Nor does the fact that his evidence was, to some extent, corroborated by that of his brother and of the witness Roderick assist me. The appellant's brother said that he placed bets on "Kevmar" and "Gresford" which returned a total profit of £700 and Roderick testified that the bets placed by him on the three horses returned a profit of £2,750. But even if they did place some bets for the appellant I gravely doubt whether, at this stage, or at the time when the matters were before the Board of Review, they could have recalled, as they professed to do, the details of the individual bets, the prices obtained and, in the case of Roderick, the

names of the bookmakers with whom he dealt. Nor do I believe that Roderick has any honest recollection of the details of the bet which he claimed to have seen the appellant make with the bookmaker Flanagan. His evidence and that of the appellant's brother struck me as well rehearsed parts of a story rather than the product of honest recollection. In all the circumstances I would, if the appeal were competent, feel bound to hold that the appellant had not established that the amount in question, or any identifiable part of it, accrued to him from winning bets. That being so, it would have been unnecessary for me to go further, if the appeal were competent, and consider whether or not the amount in question formed part of the proceeds of the appellant's business activities.