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Turning gambling silver into tax gold?

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Turning gambling silver into tax gold?

Abstract

This paper is on the topic of gambling winnings and how silver (coin/money) can sometimes, if the correct set of circumstances exist, be turned into tax gold (tax payable to the Australian Tax Office).

This is a topical issue due to some recent publicity in Australia about the so called Punters' Club and their reported annual profit of \$50 million gained from some \$2 billion worth of bets placed annually and how the Australian Tax Office (ATO) is looking to tax the 19 identified members of this 'club' on their respective share of these winnings. These club members are of course choosing to 'gamble' against the ATO that they should not be taxed.

The paper looks at the various approaches taken by Australian courts over the last century to the issue of whether gambling wins are assessable and highlights that of critical importance to the resolution of this issue is whether the gambling activities are carried on in the form of a business activity in a systematic and organised manner and whether the gambling activities involve a significant element of skill as opposed to mere random outcomes.

The paper also considers the approaches to gambling cases taken in other similar tax law jurisdictions to Australia, such as the United Kingdom, Canada and New Zealand, in order to reveal common threads applicable to judgments across these different jurisdictions.

Based on the principles of case law identified, the paper also considers the likely 'chances' of the Punters' Club's success in its arguments against the ATO.

Keywords

Taxation of gambling winnings, gambling business, gambling hobby

TURNING GAMBLING SILVER INTO TAX GOLD?

‘Captain and Kings in the ships hold. They came to collect. Silver and Gold’. U2- Silver & Gold (1989)

JOHN TRETOLA*

This paper is on the topic of gambling winnings and how silver (coin/money) can sometimes, if the correct set of circumstances exist, be turned into tax gold (tax payable to the Australian Tax Office).

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1 INTRODUCTION¹

This paper reviews Australian and overseas cases on the topic of how gambling winnings ‘silver’ can be turned into tax ‘gold’ (tax payable to the revenue authorities) within certain circumstances.

This is a topical issue due to recent publicity in Australia of the ‘Punters’ Club’ and their reported annual profit of \$50 million gained from some \$2 billion worth of bets placed annually (Herald Sun, 7 July 2012). The Australian Tax Office (‘ATO’) has attempted to tax the 19 identified members of this ‘club’ on their respective share of these winnings. These club members are choosing to ‘gamble’ against the ATO in court arguing that they should not be taxed.

This issue raises the question of the correct tax treatment of gambling winnings and the approach taken by courts in Australia in cases such as *Braykovich v Federal Commissioner of Taxation* (1989) 89 ALR 408 (‘Full Federal Court’) and *Evans v Federal Commissioner of Taxation* (1989) 20 ATR 922 and others. These cases have approached the issue of whether the gambling activities are carried on in the form of a business activity and as such, whether gambling takes place in a systematic and organised manner. The cases also consider whether gambling activities involve a significant element of skill as opposed to mere random outcomes.

This paper considers the approaches to gambling cases taken in other similar tax law jurisdictions to Australia, such as the United Kingdom, Canada and New Zealand, in order to reveal common threads applicable to judgments across these different jurisdictions.

Based on the principles of case law adopted by the Australian courts, this paper will consider the likely ‘chances’ of the Punters’ Club’s success in its arguments against the ATO.

2 PROLOGUE

Sir Ernest Castle, King Edward VII’s private banker, once wrote,

When I was young people called me a gambler. As the scale of my operations increased I became known as a speculator. Now I am known as a banker. But I have been doing the same thing all the time.²

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¹ This paper was presented at the 25th Australasian Tax Teachers’ Conference in Auckland in January 2013. All references to legislation in this article are to the *Income Tax Assessment Act 1997* (Cth) unless otherwise stated.

² David Grant, *On a Roll. A History of Gambling & Lotteries in New Zealand* (Victoria University Press, 1994) p7.

The dilemma expressed by Sir Ernest Castle about whether gambling is a professional skill is an ongoing and unresolved issue. The Oxford Compact Dictionary defines to gamble as, 'to play games of chance for money'.³

In Australia, New Zealand and Canada gambling winnings are not generally subject to taxation, with the exception of winnings derived from the operation of a business of gambling. In the United Kingdom, gambling winnings are subject to taxation if the winnings arise from a vocation, trade or profession in gambling.

Courts across these differing tax jurisdictions emphasise the importance of systemic organisation in betting operations, as an essential pre-requisite before the proceeds of any gambling activity can give rise to any assessable income.

Punters' Club Tax Cases

This group of 19 members came to the attention of the ATO in mid-2012 as it was reported (*Herald Sun*, July 7 2012) that this group was making a reported \$50 million profit from \$2 billion of bets placed annually. The success of the Punters' Club resulted in the ATO arguing that the club (through its individual members) was liable to some \$900 million in unpaid tax.

The ATO audited the 2006 tax returns of these club members, as it was revealed within the financial year the club had a turnover in excess of \$2.4 billion. To date, three of these Punters' club members have vowed to fight this claim alongside Tasmanian gambler David Walsh contesting his \$37 million tax bill after his 2004, 2005 and 2006 assessments were amended. Another Tasmanian gambler, poker player George Mamacas and former Tasmanian Zeljko Ranogajec, have also launched legal action against their amended assessments.

3 GAMBLING WILL BE A BUSINESS WHERE THERE IS SYSTEMATIC BETTING, THE TAXPAYER HAS PARTICULAR SKILL AND KNOWLEDGE AND THERE IS LARGE SCALE AND ORGANISED BETTING OPERATIONS

Australia

In the early case of *Vandenberg v Federal Commissioner of Taxation (NSW) (1933) 50 WN (NSW) 238* the Supreme Court of NSW Halse Rogers J held that bets made over a lengthy period by a registered bookmaker that a particular horse would win its races were income, despite these gambling wins not being connected to the bookmaking business.

Halse Rogers J stated:

Whether or not betting transactions are carried on in such a way that they may be regarded as a business, is always a question of fact. But when we have...the bookmaking business...whose sole source of income is...a racecourse activity; and when it is found he not only fields, but uses his knowledge of racing, in general, and whatever information he is able to obtain because of his constant association with racecourses...and when we have such a man systematically indulging in a course of betting on a large scale...I think the proper inference to draw is that betting to him was a business.⁴

A few years later, the High Court considered the issue again in the case of *Trautwein v Federal Commissioner of Taxation* [1936] ALR 425 High Court (Latham CJ, Starke J, Dixon J and Evatt J). The case involved a taxpayer who had established a stud farm for the purpose of breeding racehorses. The taxpayer also owned several racehorses, some of which he had paid large sums to purchase. The taxpayer regularly attended race meetings, raced his own horses and devoted a substantial amount of time to the activity.

The taxpayer bet frequently, systematically and heavily on his own horses and other people's horses using valuable racing information acquired from various stakeholders. The taxpayer used this information to carefully select the races on which he would bet.

Evatt J ruled in this case, that the taxpayer was carrying on a business of gambling due to the substantial amount of time and organising effort devoted to race horsing. Due to the large and organised scale of the taxpayer operations, Evatt J ruled that a horse racing business was also being carried on and that the taxpayer's operations were more analogous to those of a bookmaker, than those of a mere punter.⁵

Evatt J also noted that in determining whether the taxpayer's betting was a trade or business, the facts of the particular case must be taken into account.⁶ His Honour concluded that, based on the facts of this case, that the

³ The Oxford Compact English Dictionary (Oxford University Press, 2nd ed, 2003) 453.

⁴ (1933) W.N. (NSW) 238,239.

⁵ (1936) 56 CLR 196,206-207.

⁶ (1936) 56 CLR 196 at ,205.

element of sport, pastime or amusement did not dominate nor was it the main factor in the betting transactions. The taxpayer was held to be using their skill and knowledge of the horse racing industry and had a systematic strategy in place to maximise their returns and minimise their losses and, as such, a business of gambling was found.

This was followed by Menzies J in the High Court in *Prince v Federal Commissioner of Taxation* (1959) 33 ALJR 172 where the taxpayer had been a registered bookmaker until 1949 and from that time he gambled regularly and heavily, often betting on horses at three meetings a day and some 90 meetings a year. The taxpayer also kept detailed records which informed the taxpayer as to what his progress position was after each race.

Menzies J concluded that the taxpayer was a racehorse owner and a 'gambler in a big way'. This conclusion was not because he loved horses, not because he enjoyed taking a chance, not because he was addicted to betting but rather, because, as a matter of business 'he turned his wide knowledge, his experience and his ability to make a living out of horses'.⁷

Menzies J therefore ruled that the taxpayer was carrying on a business of gambling from 1949 due to his systematically conducted operation. The taxpayer's activities indicated that the bets made were a tactical operation, rather than a gamble, and that the betting was not a mere pleasurable pastime but a business operation.

Menzies J also concluded that the taxpayer's activities as a punter and as a racehorse owner went hand in hand.⁸

United Kingdom

The UK provisions of Schedule D of the *Income Tax Act 1918* (UK) refer to the 'profits or gains accruing ...from any trade, profession, employment, or vocation'. This requires an analysis of the so called 'badges of trade' to determine if the 'trade' is a vocation or trade or profession. Proceeds from a vocation or trade or profession are assessable as income.

Jessel MR in *Ericksen v Lasf*⁹ commented that:

There is not, I think, any principle of law which lays down what carrying on trade is. There are a multitude of things which together make up the carrying on of trade...

These factors are essentially the same as those discussed later in this paper in *Australian Tax Ruling TR 97/11*, and operate in much the same way requiring a weighing up of whether or not a trade, vocation or business is being carried on.

Partridge v Mallandaine (1886) 18 QBD 276

In this case it was established that professional bookmakers accepting bets on racehorses are taxable on the profits of what has been held to be their vocation of bookmaking.

Canada

According to the *Income Tax* (R.S.C., 1985, c. 1 (5th Supp.)), there are two principal statutory bases for taxing gambling gains in Canada. The first and most widely considered is to regard gambling gains as income from a business under Part I, division B, subdivision B. The second possible basis is to treat gambling gains as an 'unenumerated source' of income under paragraph 3(a) of the *Income Tax Act* (R.S.C., 1985, c. 1 (5th Supp.)). This second basis has received little consideration from Canadian courts and it appears very unlikely that gambling gains could ever be subject to taxation in Canada under this provision.

Canada uses an almost identical definition of 'business' to that used in Australia (and other Commonwealth countries). The Canadian definition of 'business' for taxation purposes is found in subsection 248(1) of the *Income Tax Act* (R.S.C., 1985, c. 1 (5th Supp.)) and reads as follows:

Business includes a profession, calling, trade, manufacture or undertaking of any kind whatever and an adventure or concern in the nature of trade but does not include an office of employment.

J Badame v MNR (1951) 3 Tax ABC 226- Tax Appeal Board

In this case, the taxpayer had at any one time up to 18 horses which he raised and raced for a living. He bet on his own and other horses and spent almost all of his time at racetracks. Monet C found that the taxpayer's activities amounted to a business and he stated:

⁷ (1959) 12 ATD 45,65.

⁸ (1959) 12 ATD 45 at,63.

⁹ (1881) 8 QB 414,416.

There is all the difference in the world between the ordinary bettor on horse races, even if this be his only occupation- like it was in the *Graham v Green* case- and the present appellant, whose betting activities were so organised as to form an integral part of his business or occupation.¹⁰

Significantly, the gains from betting were held taxable because the taxpayer had access to inside information.

Peter J Belawski v MNR (1954) 11 Tax ABC 299- Tax Appeal Board

This is the most recent case to date in which a Canadian court has found a taxpayer to be liable to tax on their gambling winnings. This case involved a taxpayer who played cards and dice profitably over a number of years and made profits of between \$4,095 and \$9,082 per year over a four year period (1946-1950).

Monet C of the Tax Appeal Court stated:

With the evidence adduced, I am satisfied that even though the gambling activities of the appellant did not constitute his sole business or occupation during the years under review, nevertheless these activities amounted to the carrying on of a business the profits of which were taxable.¹¹

Although the judgment was brief, it can be speculated that the reason for the decision was based on the taxpayer having generated a considerable and growing stream of profit from his gambling activities. These activities suggested that 'it would not be unreasonable to conclude that the taxpayer was devoting a lot of time, organisation and skill to his gambling activities'.¹²

New Zealand

Gambling winnings are not generally subject to taxation in New Zealand, unless there is a business of gambling being carried on and the proceeds result from this business.

Duggan v Commissioner of I.R. (NZ) 73 ATC 6001- Supreme Court of NZ-Cooke J

The taxpayer in this case was a wool and skin buyer who also bet heavily and frequently attended race meetings. The taxpayer had adopted some sort of betting system which was 'remarkably consistent in its success'. Accordingly, Cooke J held that this was an exceptional case in which the betting winnings would be taxable as a business under s88 (1) (a) of the *Land and Income Tax Act 1954* (NZ) and where betting losses, should they occur, would also be deductible under that Act.¹³

4 GAMBLING BASED ON THE TAXPAYER'S SPECIAL SKILLS OR KNOWLEDGE ALONE MAY BE A BUSINESS

Australia

Stone v Commissioner of Taxation [2002] FCA 1492 (29 November 2002)

Whilst not a case on gambling as such, this case analyses the principle as to whether the taxpayer has utilised their particular skill or training in a systematic way to derive gain. Accordingly, Hill J found that the taxpayer, an Olympic javelin thrower and professional athlete, was assessable on prize money won and certain other grants received as she was able to utilise and employ her special skills to derive these rewards.

New Zealand

Z. v Commissioner of Taxes (1948) 5 M.C.D. 652

The taxpayer was, or had been, a racehorse owner and also a bookmaker's agent. It was held that the betting profits were taxable due to the taxpayer's special and more sophisticated knowledge of racing horses.

¹⁰ (1951) 3 Tax ABC 226, 231.

¹¹ (1954) 11 Tax ABC 299,300.

¹² Benjamin Alerie, 'The Taxation of Winnings from Poker and Other Gambling Activities in Canada' (2011) 54(9) *Canadian Tax Journal* (2011)731-63, 742.

¹³ 73 ATC 6001, 6005-6.

Commissioner of Taxes (NZ) v McFarlane (1952) Vol. 71 NZLR 349-New Zealand Supreme Court and Court of Appeal

The majority of the Court of Appeal held that a professional jockey was found to be carrying on a betting business under section 2 of the *Land & Income Tax Act 1923*(NZ).

The facts revealed that the taxpayer bet somewhat cautiously and systematically after studying the form of each horse and from relying on information supplied to him by owners, trainers and other jockeys. Consequently, the taxpayer gained special knowledge of each horse's ability and condition.

As such, the taxpayer was not held to be a mere punter, but rather, someone whose betting was associated with the business of horse racing or a vocation connected to it. Although the taxpayer's bets were not always successful, there were more successes than losses and this overall success flowed partly from the skilful exercise of his vocation as the betting was shrewd and calculated.¹⁴

Hay J stated that it was, 'necessary to bear in mind the nature of the taxpayer's profession and that his skill and special knowledge are material factors and in exercising that skill he is acting in a professional capacity'¹⁵

5 GAMBLING THAT IS CONDUCTED WITHOUT SYSTEM AND ORGANISATION IS NOT A BUSINESS

Australia

Evans v Federal Commissioner of Taxation (1989) 89 ATC 4540 Federal Court (Hill J)

The taxpayer operated a small wallpaper business, a hotel in Sydney and owned a block of units. The taxpayer also owned a stallion for breeding purposes, and together with his then girlfriend, had an interest in 13 racehorses. After recording taxable income figures of less than \$10,000, for each of the income years 1977 to 1979 he was subject to an audit by the ATO which treated his gambling winnings as income.

Even though the taxpayer gambled frequently in large volumes and it was apparent that the taxpayer funded his lifestyle with his gambling winnings, Hill J concluded that the taxpayer's betting activities lacked the system and organisation essential for them to be characterised as a business.

The taxpayer did regularly attend race meetings but he bet exclusively through the TAB (and not bookmakers), did not subscribe to any information sources and bet according to his mood betting predominantly on riskier type bets (quinellas and trifectas) and he did not keep records of his accounts.

Hill J observed that gambling is more likely to be a business where it is associated with some other business such as that of bookmaking, breeding or training horses.¹⁶ His Honour went on to say that there had been no decisions of a court in this country or the United Kingdom where it had been held that a mere punter was carrying on a business.

His Honour also concluded that the taxpayer did not spend large amounts of time studying form, did not subscribe to any tipping or information services, had no source of income such as trainers, made no attempt to work out combinations of bets designed to minimise risks to the taxpayer, made no use of technology such as computers and did not go about calculating odds to ensure his bet received the best odds. In addition, the taxpayer had no allocated capital with which to conduct his activity and his gambling was not undertaken in accordance with any pre-formulated plan, but rather as the mood took him.

For all of the above mentioned reasons, Hill J concluded that the taxpayer was not carrying on business as a professional gambler. His Honour went on to say that the taxpayer's activities were in, 'volume and extent sufficient to characterise him as being addicted...to gambling but they lack the system and organisation essential if they are to be characterised as a business'.¹⁷ In addition, his Honour ruled that the taxpayer's ownership of racehorses did not amount to a business.¹⁸

Babka v Commissioner of Taxation (1989) 89 ALR 373 Federal Court (Hill J)

The taxpayer in this case had devoted approximately half of his time, after he retired from employment in the public service at the age of 51, on gambling activities for the next four years until 1983 (after which he ceased attending race meetings on medical advice following a heart attack).

¹⁴ (1952) Vol. 71 NZLR 349, 356.

¹⁵ (1952) Vol. 71 NZLR 349, 364.

¹⁶ 89 ATC 4,540, 4,555.

¹⁷ 89 ATC 4,540, 4,557.

¹⁸ 89 ATC 4,540, 4,541.

The taxpayer never owned a horse nor did he join a syndicate. The taxpayer had no business premises and he did not use a computer to analyse results and neither did he subscribe to a betting information service. The taxpayer did not bet on credit nor bet with any particular bookmaker and instead the taxpayer placed bets with the on-course totalisator or the TAB.

The taxpayer kept no cash books, journals or accounting records apart from his racing notebooks. The race notebooks the taxpayer kept showed the newspaper odds given on each individual horse, the on-course movements in odds, the amounts and types of bets placed and the results achieved and cumulative position of the outcome of betting on each race meeting. The taxpayer admitted to not having any real system of betting, instead relying on his intuition and experience based on form and odds.

Hill J gave some useful guidance in this case on the likelihood of gambling activities constituting a business stating:

I propose to proceed on the assumption that mere punting may constitute a business although the intrusion of chance into the activity as a predominant ingredient at least in the outcome of the race itself does suggest to me that it will be a rare case where a court will conclude that the activity is a business.¹⁹

Hill J ruled that no gambling business was being carried on, as there was no system and organisation which is the hallmark of a business²⁰ and that the hope of gain by the taxpayer was similar to that of someone buying lottery tickets.²¹

Even though the taxpayer appeared to be a quite successful gambler with betting income of close to \$1.5m during 1979-1982 and although the taxpayer did regularly place a large volume of bets, his Honour could not conclude that a business was being carried on. The taxpayer's activities were not so considerable, systematic and organised that they could be seen to exceed those of a keen follower of the turf.²²

Whilst the taxpayer adopted strategies to reduce his odds and hence exposure to risk, the facts revealed that the taxpayer did not follow any real system in his betting and that his betting was haphazard without any real organisation.²³

The books kept by the taxpayer recorded his betting activities, but they were not kept for the purpose of providing a financial record of the activities. The books did not include incidental expenditure on items such as fares, meals and entrance fees and the like.²⁴

Hill J also made the point that just because the taxpayer may not have any other activity other than gambling, as they may be retired, as in this case, this does not by itself turn a pastime into a business.²⁵

Brajkovich v Federal Commissioner of Taxation (1989) 89 ALR 408 (Pincus, French and Gummow JJ) ***Full Federal Court***

The Full Federal Court handed down its decision in this case on 8 November 1989 and dismissed the appeal of the taxpayer. Mr Brajkovich was a life insurance salesman, real estate agent and property developer. In 1979, at only 36 years of age, the taxpayer had accumulated sufficient wealth (approximately \$1 million) to enable him to retire from most of his business activities. In February 1980 he ceased to occupy business premises and employ staff, although he did not end his real estate activities completely.

At the end of 1979, the taxpayer dissolved his real estate partnership and from then on until 1982 he gambled frequently and in very large sums as he attended horse-racing meetings two or three times a week betting mostly on credit. He also gambled on card games, football and two-up.

The taxpayer did not keep formal records of his gambling activities other than his cheque stubs. The taxpayer owned a number of racehorses (which varied between 8 and 20), but the evidence revealed that he was not very interested in participating as an owner. His main purpose in keeping these horses was to obtain information to assist him with his gambling. The taxpayer did not seek to claim his training expenses as a tax deduction.²⁶

¹⁹ 89 ATC 4,963 at 4,969.

²⁰ 89 ATC 4,963 at 4,970.

²¹ 89 ATC 4,963 at 4,969.

²² 89 ATC 4,963 at 4,971.

²³ 89 ATC 4,963 at 4,966.

²⁴ 89 ATC 4,963 at 4,971.

²⁵ 89 ATC 4,963, 4,971.

²⁶ The losses were initially claimed in the income tax returns for the Brajkovich Trading Trust as the taxpayer had indicated he was carrying on a business of trade in horses. When these claims were disallowed by the ATO the applicant did not contest these disallowed claims.

When the taxpayer won on gambling he did not deposit the winnings into a bank account, but rather used the winnings for further gambling or to pay off gambling debts. By November of 1982, the taxpayer claimed to have lost close to \$950,000 (equating to an average weekly gambling loss of more than \$6,000). Consequently, he scaled down his gambling activities and argued that his gambling was purely for recreational purposes.

The taxpayer had claimed his gambling losses over his 'gambling period' (from 1979 to November 1982) as deductions for the income years 1980 to 1983. However, the Commissioner disallowed the deductions on the basis that he was not carrying on a business of gambling.

These deductions for gambling losses were only made after the taxpayer lodged amended assessments after he was issued with default assessments under section 167 of the *Income Tax Assessment Act* 1997 (Cth). The assessments were issued after the taxpayer had failed initially to furnish any return of income for the years ended 30 June 1980, 1981 and 1982.

Jenkinson J of the Federal Court had disallowed the taxpayer's appeal from the Commissioner's decision on the basis that the taxpayer was not carrying on a business of gambling.²⁷ His Honour had reservations of accepting the taxpayer's evidence about his gambling losses as it was confused and unreliable and the amounts quoted by the taxpayer were only the amounts that the taxpayer drew cheques for to pay his gambling creditors.²⁸

The only records kept by the taxpayer with respect to his gambling activities were cheque butts and race books. The taxpayer admitted keeping his records in an untidy fashion and that some records were likely lost in being moved from place to place and of the possibility of a small fire.²⁹

Whilst Jenkinson J accepted the taxpayer was heavily involved in betting and strongly desired to make a substantial financial success of gambling, his Honour determined that the desire for success had nothing to do with the desire to derive income to afford him a living.³⁰

His Honour ruled that:

It was, as I find, the desire to be free, at least for a time, of the disciplined effort of conducting the (real estate) business in which he had been engaged, and the desire to experience the excitement which he thought he would derive from successful gambling...that led the applicant to embark on his gambling activities.³¹

Jenkinson J also had serious doubts that the taxpayer ever expected to make a profit from gambling in the long run. Jenkinson J held that all the facts pointed to the taxpayer not conducting a business of gambling but rather the activities suggested, 'an unrestrained indulgence of an appetite for gambling as a source of emotional and, perhaps, intellectual satisfaction'.³²

The Full Federal Court, per Pincus, French and Gummow JJ, also disallowed the appeal on the basis that the taxpayer was not carrying on a business of gambling as he did not carry out his betting in a systematic, organised or business-like way and as the taxpayer did not have an intention of profit in his activities.

The Full Federal Court held that whilst the taxpayer had a passion for gambling on a large scale the fact that he indulged in this passion did not make his involvement a business. The Court also observed that gambling which involves a significant element of skill is more likely to have tax consequences than gambling on merely random events.

There was no amount shown for winnings in the largest loss year (1981) and the Full Court noted that the lack of reliable records kept by the taxpayer throws light upon the question as to whether the appellant treated his gambling as a business. Therefore, it was not possible to have any confidence in even the rough accuracy of the figures put forward by the taxpayer.³³

²⁷ Ibid.

²⁸ Ibid.

²⁹ 89 ATC 5,227, 5,230. No doubt, some records could also have been eaten by mice or stolen by thieves or perhaps taken by aliens on a quick intergalactic visit to the taxpayer's home.

³⁰ 88 ATC 4,557 (Jenkinson J).

³¹ 88 ATC 4,457, 4,465.

³² 88 ATC 4,457, 4,468.

³³ Ibid.

The Court went on to explain that the relevant criteria³⁴ to apply to determine whether a gambling business is being carried on include:

1. Whether the betting is conducted in a systematic, organised and business-like way;
2. The scale of the activity (for example- the size of the wins and losses);
3. Whether the betting is related to, or part of, other activities of a businesslike character (such as breeding horses);
4. The motivation of the gambler (is it to make a profit or is the activity undertaken principally for pleasure?);
5. Whether the form of betting chosen is likely to reward skill or judgment or depends purely on chance; and
6. Whether the gambling activity in question is of a kind which is ordinarily thought of as a hobby or pastime.

In applying these criteria to the taxpayer, it was clear that he was not carrying on a gambling business as his operations lacked any organisation, relied on chance and were undertaken with no real prospect of profit. Any profit motive that did exist was present only in a theoretical way and, 'any such motive must have been based on mere self-delusion'.³⁵

Canada

C.G.Chapman v MNR [1971] Tax ABC 81- Tax Appeal Board

The taxpayer owned and published a horse racing magazine entitled *The Canadian Sportsman* and was also the owner of one racehorse. The Canadian Revenue Minister took the position that the gains from gambling on horse racing should be taxable as the income from a business, as the gains were integral to his publishing and racing business. The Tax Appeal Board rejected those arguments finding that the taxpayer and their betting activities was not sufficiently organised to be in the business of gambling.

Balanko v MNR 81 DTC 887 (TRB) - Tax Review Board

The taxpayer made moderate gains from gambling playing cards and horse racing. For most of the period under review, the taxpayer did not have any other source of income and only obtained a casual job towards the end of the review period.

Despite the fact that the taxpayer had no other consistent occupation, except for gambling over the review period and was clearly a skilled and frequent poker player, the Tax Review Board held that the gambling gains were not taxable.

There can be no doubt that the Appellant freely indulged his inordinate passion for gambling, but I cannot conclude that in doing so he carried on a business....the presence of the intention to win or make money in gambling, which is there in all who gamble, does not lead to the conclusion that all who gamble, or even who gamble frequently, are carrying on a business...There is a total absence of any evidence here which indicates the presence of any organised system for the minimisation or management of risk. This lack of system distinguishes the Appellant, an intemperate gambler, from the professional gambler.³⁶

Le Blanc v The Queen 2006 TCC 680- Tax Court of Canada

In this case, the taxpayers were brothers who were each assessed on amounts ranging from \$418,178 to \$875,874 per year over 4 years as their 'profits' from different sports lotteries in Ontario and Quebec. The taxpayers had no other source of income over the relevant tax periods other than these lottery winnings and as Bowman CJ observed:³⁷

(They) led unusual lives. They spent their time playing lottery games or watching sports on television. They also played ping pong and sat around the house drinking beer and eating pizza. Despite their

³⁴ 88 ATC 4,457, 5,233.

³⁵ 89 ATC 5,227,5,233.

³⁶ 81 DTC 887 (TRB),888.

³⁷ 2006 TCC 680,11.

winnings, they lived cheaply and spent very little on material goods. Their winnings were all ploughed back into the lottery games.

Despite wagering heavily over the relevant period, the brothers only lost around 90% as much as they gained and won consistently over the period. Even with this unusual outcome (since generally nearly all gamblers inevitably lose in the long run) Bowman CJ held that their winnings were not taxable. His Honour stated as follows:³⁸

Compulsive gamblers, whether they play lotteries or gaming tables may spend a lot of time and money gambling and they certainly do so with a view to winning. People who go to the racetrack devote time and money to this pastime and after a while they may develop a degree of expertise, or at least persuade themselves that they do. Traditionally, however, their gains are not taxed and, more importantly, their losses are not deductible.

Bowman CJ went on to explain why he did not find a business of gambling and relied heavily on concluding that the Le Blanc brothers had no system in place to minimise losses or to maximise gains.

This conclusion was somewhat at odds (pardon the pun) with the facts as the taxpayers did use a computer program to come up with combinations of long shots. The taxpayers varied their pattern of betting to bet heavily in some weeks and not at all in others. This pattern suggests to some commentators that the taxpayers did have a system in place.³⁹

Arguably, there can be no doubt the Le Blanc brothers did use system and organisation in the placing of their bets through their computer program and that these bets were placed in a calculated way to maximise winnings and minimise losses. Australian courts, in cases such as *Trautwein*⁴⁰ and *Prince*⁴¹, have consistently stated that the presence of a systematic and organised approach to gambling is a critical factor in a finding that a business of gambling is being carried on.

6 GAMBLING THAT IS CARRIED ON FOR EXCITEMENT AND ENJOYMENT AND NOT FOR PROFIT IS NOT A BUSINESS.

Australia

Jones v Federal Commissioner of Taxation (1932) 6 ALJR 201 –High Court (Evatt J)

The taxpayer was a grazier that acquired no business premises associated with his gambling activities, had no proprietary interest in any race horses, was not a trainer of racehorses nor did he hedge his bets in any way and he made substantial losses by betting on horses.

The taxpayer did not keep accurate records and even though he claimed he had developed a system to win on his bets, a system which relied on getting ‘the very best information’⁴², he almost always lost. Evatt J found in this case that, ‘the element of sport, excitement and amusement was the main attraction’.⁴³

Evatt J also stated that:

The appellant acquired and developed a bad habit which he was in a 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.⁴⁴

Martin v Federal Commissioner of Taxation (1952) 10 ATD 37 - (Webb J) High Court

The taxpayer was a hotelkeeper and became a farmer. The taxpayer kept thorough records of his wins and losses over a period of two years while he bred and raced racehorses. The taxpayer did not keep racing stables, but he did employ several trainers, from whom he obtained information for betting purposes. He employed a man to make bets for him, so that he could gain better odds.

³⁸ 2006 TCC 680,29.

³⁹ Benjamin Alerie, ‘The Taxation of Winnings from Poker and Other Gambling Activities in Canada’ (2011) 59(4) *Canadian Tax Journal* 731-63, 752.

⁴⁰ (1936) 56 CLR 196,206-207.

⁴¹ (1959) 12 ATD 45,63.

⁴² (1932) 2 ATD 16,17.

⁴³ (1932) 2 ATD 16,18.

⁴⁴ (1932) 2 ATD 16,19.

Webb J heard the matter on appeal from the Commissioner's decision to include the gambling winnings in the taxpayer's assessable income. Webb J stated that in determining whether a business of gambling is being undertaken that:

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.⁴⁵

His Honour ruled that a business of gambling was being undertaken due to the considerable time spent on racing and betting operations and the systematic methods used by the taxpayer.

On appeal to the Full High Court in *Martin v Federal Commissioner of Taxation* (1953) 90 CLR 470, Williams ACJ. and Kitto and Taylor JJ stated that:⁴⁶

The definition of income from personal exertion⁴⁷ 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 organised 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.

However, largely because the taxpayer only bet on one racecourse and only on ordinary racing days with an average of one bet per race, the High Court ruled that he was not carrying on a gambling business. The betting activities were viewed as nothing more than of someone who derives, 'pleasure from betting on the racecourse and racing under their own colours'.⁴⁸ Therefore, the profits were not classified as assessable income of taxpayer.

***Shepherd v Federal Commissioner of Taxation* (1975) 26 FLR 385- NSW Supreme Court (Rath J)**

The taxpayer in this case owned and raced various racehorses. However, on the facts of the case, neither her prize-money nor her betting wins were found to be the product of a business, despite the obvious passion the taxpayer had for horses. The horse-racing was held to be a pastime and the betting activities were not in the nature of a business.

It was relevant to this conclusion that the taxpayer did not keep any records of her racing or wagering activities. Although she was successful, in that she regularly banked her winnings, these winnings were used to purchase various other racehorses and brood mares over a period of time.⁴⁹

The taxpayer was held to be a 'keen follower of the turf, but that the turf was not her business',⁵⁰ even though she was someone who 'had a passion for horses'⁵¹ and so someone who took much pleasure in betting on her own horses. Consequently, the gambling and racing activities she engaged in were not done in the nature of a business as they were not, 'considerable and systematic and organised'.⁵²

United Kingdom

***Graham v Green* (1925) 2 KB 37 (Rowlatt J)**

In this case, the taxpayer's sole means of livelihood consisted of backing horses at starting price from his private residence.

Rowlatt J stated in this case:⁵³

Now we come to betting, pure and simple...It has been settled that a bookmaker carries on a taxable vocation. What is a 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

⁴⁵ (1952) 90 CLR 470,474.

⁴⁶ (1952) 90 CLR 470,479.

⁴⁷ As stated in section 6(1) of the *Income Tax Assessment Act 1936* (Cth).

⁴⁸ (1953) 90 CLR 470,481.

⁴⁹ 75 ATC 4,244,4,246.

⁵⁰ 75 ATC 4,244,4,253.

⁵¹ Ibid.

⁵² 75 ATC 4,244, 4,253.

⁵³ (1925) 9 TC 309, 313-14.

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 that expression, are in his favour, he makes a profit. That seems to me to be organising an effort.

Now we come to the other side, the man who bets with the bookmaker, and that is this case. These are mere bets...I do not think he could be said to organise his effort in the same way as a bookmaker organises his...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 today and he plays tomorrow and 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.

Rowlatt J referred to a bet as involving a 'mere irrational agreement'.⁵⁴ Unless the practice of betting fell within the definition of a 'vocation or trade or profession in gambling',⁵⁵ then the taxpayer's bets were not profit or gains.

Whilst this approach seems to suggest the same approach as applied in Australian cases, as Bowen CJ has observed, in *Federal Commissioner of Taxation v Harris* (1980) 30 ALR 10 that:

The English cases, while containing observations which are useful on the nature of income generally, have to be used with caution because they depend in the main upon applying particular provisions of the English legislation which do not find a place in the Australian legislation.⁵⁶

In particular, the UK provisions of Schedule D of the *Income Tax Act 1918* (UK) refer to the 'profits or gains accruing ...from any trade, profession, employment, or vocation'.

Canada

Chorney v MNR 77 DTC 168 (TRB) - Tax Review Board

The taxpayer made gains from betting on horses, regularly attended race meetings (three or four days a week) and bet amounts of \$200 to \$1,000 per race. Nevertheless, the Tax Review Board, per Cardin C, held that the taxpayer 'bet on horses for the thrill and pleasure he derived from such activities, and which was, for him, a form of recreation'.⁵⁷ The gambling activity was held as a hobby and pastime, as it was a recreational pursuit only. Of relevance to this conclusion was that the taxpayer had a service station business from which he derived his regular income.

Epel v The Queen 2003 TCC 707- Tax Court of Canada

Mr Epel was a recent Russian immigrant who operated a shoe repair business who also gambled at private establishments four or five times a week and won an average \$300 to \$400 per day. Despite this extraordinary winning sequence, the court found that Epel's gambling gains were not taxable.

Campbell J, of the Tax Court of Canada, justified her decision with the following reasoning:

...The wins appear to be largely beginner's luck, which were sustained over a lengthy period of time rather than wins based on any type of system or background knowledge of the game...He therefore used gambling as his entertainment. It was a hobby from which he derived pleasure.⁵⁸

Cohen v The Queen 2011 TCC 262- Tax Court of Canada

The Tax Court of Canada ruled in this the most recent Canadian case on the assessability of gambling winnings that losses sustained from poker playing were not tax-deductible as on the facts of the case, poker did not constitute a business of the taxpayer.

Despite this outcome, the Tax Court of Canada reaffirmed the position that Canadian courts will uphold that gambling winnings are taxable when the gambling activities themselves are sufficiently serious to amount to a 'business'. However, it is worth noting that there has not been a single Canadian decision in the last 58 years that has

⁵⁴ (1925) 2 KB 37, 42.

⁵⁵ Rowlatt J was applying the UK legislation and in particular Schedule D of the *Income Tax Act 1918* (UK), which brought to taxation annual profits or gains accruing from 'any trade ...profession, employment or vocation'.

⁵⁶ *Commissioner of Taxation v Harris* (1980) 30 ALR 10, 4,242.

⁵⁷ 77 DTC 168 (TRB), 170.

⁵⁸ 2003 TCC 707,27-28.

found gains from either card playing or betting on horses to be taxable as income from a professional gambling business.

New Zealand

A. v Commissioner of Taxes (1950) 7 M.C.D. 26

The taxpayer was a butcher's assistant and it was held that the betting profits were not assessable to tax, as the gambling activities were undertaken for pleasure only and the gambling operations lacked any system or organisation.

7 SUMMARY OF AUSTRALIAN POSITION ON PROCEEDS FROM GAMBLING PURSUANT TO THE AUSTRALIAN TAXATION OFFICE-INCOME TAX RULING TR 97/11

Subsection 6(1) of the *Income Tax Assessment Act 1936* (Cth), defines a 'business' as including "any profession, trade, employment, vocation or calling but does not include occupation as an employee". Apart from ruling out the activities performed by employees as not being a business, this definition is not overly helpful in deciding whether a particular activity constitutes a business or not.

Consequently, the ATO has released Income Tax Ruling TR 97/11 which, whilst not directly on the issue of a professional gambling business, provides guidance on the possible existence of a primary production business. Nevertheless, the ruling sets out the indicia the ATO would expect for a business activity to be carried on.

The Ruling does highlight the obvious point that it is not possible to lay down any conclusive test of whether a business is or is not being carried on, but the relevant indicia outlined can provide some general guidance.

The relevant indicia, which have been largely derived from the various court cases including some of those mentioned in this paper, are set out in paragraph 13 of the Ruling as follows:⁵⁹

- The nature of the activity as to whether it has a significant commercial purpose or character;
- Whether the taxpayer has more than just an intention to engage in business;
- Whether the taxpayer has a profit-making intention;
- Whether there is a prospect of the taxpayer making a profit from the activity;
- Whether there is repetition and regularity in the activity;
- Whether the activity was organised and systematic and whether a business plan exists; and
- The size and scale of the activity.

Therefore, it seems what is relevant is that the activity be carried out in a business-like way, with a view to a profit and that there should be repetition, continuity and a system of organisation in the activity.

8 SUMMARY OF CANADIAN POSITION ON PROCEEDS FROM GAMBLING

Alerie argues that Canadian cases suggest there are three principal ways for gambling gains to amount to income from a business:

1. The taxpayer has access to inside information that allows him or her to make substantial profits from bets and the betting is carried on in a systematic and organised fashion;
2. The taxpayer demonstrates a cultivated physical skill that gives him or her significant betting advantage over his or her opponents; and
3. The taxpayer is a bookmaker, casino operator, or other provider of gambling opportunities.⁶⁰

I respectfully suggest that Alerie has overlooked the importance of organisation and system into these factors. Earlier Canadian cases such as *J Badame*⁶¹ and *Peter J Belawski*⁶² have placed much importance on this factor in reaching a conclusion that a business of gambling was being carried on

⁵⁹ TR 97/11, para 13.

⁶⁰ Benjamin Alerie, 'The Taxation of Winnings from Poker and Other Gambling Activities in Canada' (2011) 59:4 *Canadian Tax Journal* (2011) 731-63, 744.

⁶¹ *J Badame v MNR* (1951) 3 Tax ABC 226.

⁶² *Peter J Belawski v MNR* (1954) 11 Tax ABC 299.

The issue of organisation and system are of course key factors in Australian decisions such as *Vandenberg*,⁶³ *Trautwein*⁶⁴ and *Martin*⁶⁵ and *Prince*,⁶⁶ which led the courts to conclude that a business of gambling was being carried on.

The most recent Canadian case on gambling, the *Le Blanc* decision,⁶⁷ is the case with the strongest set of facts in favour of the revenue authorities, as the taxpayers did not have any outside employment, bet heavily using a computer program and were able to win regularly over the longer term. The outcome in this decision, combined with the fact that there has not been a reported case that has found gambling winnings from sports betting, card playing or horse race wagering taxable for many years, suggests that Canadian courts will be very unlikely to consider gambling gains as giving rise to income from a business.

9 SUMMARY OF UNITED KINGDOM POSITION ON PROCEEDS FROM GAMBLING

The United Kingdom position rests upon whether the taxpayer's dominant object in gambling was entertainment or whether the activities were sufficiently organised to amount to a commercial activity. Upon the satisfaction of these elements the facts will give rise to a vocation or trade or profession in gambling.

10 SUMMARY OF NEW ZEALAND POSITION ON PROCEEDS FROM GAMBLING

Whilst there have been very few cases finding that a punter was carrying on a business of gambling in New Zealand, there have been some dicta in cases (*Commr. of Taxes (N.Z.) v MacFarlane* (1952) NZLR 349,383 and *Duggan v Commr. of I.R. (NZ)* 73 ATC 6001) that support the principle that a punter could be carrying on a professional gambling business if their activities are sufficiently systematic and organised. Upon the satisfaction of these elements, the proceeds of that business would constitute assessable income.

11 SUMMARY OF THE MAIN PRINCIPLES FROM THE ABOVE CASES FOR AUSTRALIA, UNITED KINGDOM, CANADA AND NEW ZEALAND TO SUGGEST A BUSINESS OF GAMBLING WITH THE PROCEEDS ASSESSABLE

There is much overlap in the Australian decisions and the decisions of cases on gambling winnings being assessable in other similar tax law jurisdictions, such as the United Kingdom, Canada and New Zealand.

Of course, care is needed when applying these cases, as although there is overlap between these jurisdictions, the legislative provisions are not identical.

The following is a summary of the main principles gleaned from these cases (and which are also consistent with the ATO Tax Ruling TR 97/11):

A Systematic, organised and business-like betting that rewards skill or judgment is more likely to constitute a business of gambling rather than betting that depends purely on chance

This first principle is by far and away the most important and critical factor. Where the taxpayer adopts a systematic strategy to place their bets to lessen or exclude the element of chance and thereby minimises their risks (as was found in the Australian cases of *Martin*⁶⁸ and *Prince*⁶⁹ and *Trautwein*⁷⁰), then it is more likely that the activities would amount to a business of gambling. Consequently, the profits would be assessable⁷¹ and losses would also be deductible.⁷²

Cases from other jurisdictions like Canada (*J Badame v MNR*⁷³ and *Peter J Belawski v MNR*⁷⁴) and New Zealand (*Commissioner of Taxes (NZ) v McFarlane*)⁷⁵, take a similar approach where the betting activities were so organised as to form an integral part of the taxpayer's business. Consequently, proceeds from that activity are likely to be

⁶³ (1933) 50 W.N. (NSW) 238.

⁶⁴ (1936) 56 CLR 196.

⁶⁵ (1953) 90 CLR 470.

⁶⁶ (1959) 12 ATD 45.

⁶⁷ (1959) 12 ATD 45.

⁶⁸ (1953) 90 CLR 470.

⁶⁹ (1959) 12 ATD 45.

⁷⁰ (1936) 56 CLR 196.

⁷¹ Under section 6-5 of the *Income Tax Assessment Act 1997* (Cth).

⁷² Under section 8-1 of the *Income Tax Assessment Act 1997* (Cth).

⁷³ (1951) 3 Tax ABC 226.

⁷⁴ (1954) 11 Tax ABC 299.

⁷⁵ (1952) Vol. 71 NZLR 349.

assessable. These cases, along with the *Stone*⁷⁶ decision, suggest that if the taxpayer utilises their particular skills and knowledge and adopts a systematic strategy to maximise returns and minimise losses, the activity being carried on is more likely to be like a business. Consequently, the proceeds of that activity are likely to then be assessable.

On the other hand, gambling wins from betting without any system that is undertaken more for the thrill and pleasure and addiction of gambling, rather than for the prospect of any real gain, are consistently treated as non-assessable.

The Australian case law (*Braykovich*,⁷⁷ *Evans*,⁷⁸ *Babka*,⁷⁹ *Shepherd*,⁸⁰ *Martin*,⁸¹ and *Jones*⁸²) has consistently treated haphazard random betting operations, based more on intuition rather than systematic research, as non-assessable. Losses are consequently not deductible as no business was carried on.

The English case of *Graham v Green*⁸³ and the Canadian cases of *C.G. Chapman v MNR*,⁸⁴ *Epel v The Queen*,⁸⁵ *Le Blanc v The Queen*,⁸⁶ and *Cohen v The Queen*,⁸⁷ although being based on different legislative provisions, also support the proposition that where the gambling is undertaken for fun and enjoyment, more so than for profit and gain, then the gambling winnings involved are not assessable.

B For an activity of punting to be a business activity it would be necessary that it be undertaken for the purpose of profit rather than for pleasure

This point was made by Hill J in *Evans*, where his Honour noted that for the gambling to be a business it must be undertaken for the purpose of profit rather than for pleasure or upon satisfaction of addiction that is so often present in betting.⁸⁸

F.B. Adam J made this same point in the New Zealand case of *McFarlane* where he stated that:

Where income is in fact derived from betting activities which are engaged in, not with the motive of making casual gains or merely for sport or amusement but with the motive of making an income they are likely to form part of the assessable income of the taxpayer.⁸⁹

Where the taxpayer is addicted to gambling, or is a keen follower of turf then it is very unlikely that their gambling activities will constitute a business of gambling. This is indicated by the Australian cases such as *Shepherd*,⁹⁰ *Martin*⁹¹ and *Jones*.⁹²

The English case of *Graham v Green*⁹³ and the Canadian cases of *Chorney v MNR*⁹⁴ and *Balanko v MNR*,⁹⁵ also give great weight to this criterion, that where the taxpayer was gambling for fun and enjoyment more so than for profit and gain, any gambling winnings would not be assessable.

C Large volume of betting wins and losses and size of capital employed

Where the volume and size of bets is large, then it is more likely that a business of gambling is being carried on. This is affirmed in the *Prince*⁹⁶ and *Trautwein*⁹⁷ cases.

⁷⁶ [2002] FCA 1492.

⁷⁷ 89 ATC 5,227.

⁷⁸ 89 ATC 4,540.

⁷⁹ 89 ATC 4,963.

⁸⁰ 75 ATC 4,244,4,253.

⁸¹ (1953) 90 CLR 470.

⁸² (1932) 2 ATD 16.

⁸³ (1925) 2 KB 37.

⁸⁴ [1971] Tax ABC 81.

⁸⁵ 2003 TCC 707.

⁸⁶ 2006 TCC 680.

⁸⁷ 2011 TCC 262.

⁸⁸ 89 ATC 4,540,4,557.

⁸⁹ (1952) Vol. 71 NZLR 349,383.

⁹⁰ 75 ATC 4,244,4,253.

⁹¹ (1953) 90 CLR 470,481.

⁹² 1932) 2 ATD 16,17.

⁹³ (1925) 2 KB 37.

⁹⁴ 77 DTC 168 (TRB).

⁹⁵ 81 DTC 887.

⁹⁶ (1959) 12 ATD 45.

⁹⁷ (1936) 56 CLR 196.

Although large volumes and sizes of bets were evident in Australian cases, such as *Brajkovich*⁹⁸ and *Evans*⁹⁹ and the Canadian cases of *Epel*¹⁰⁰ and *Le Blanc*,¹⁰¹ this fact alone was not enough to make the activities a gambling business.

Conversely, where small scale and irregular betting is taking place, it is almost impossible for a business of gambling to be found, as was seen in the *Martin*¹⁰² case.

D Gambling activities which arise out of a vocation directly associated with horse racing or gambling are much more likely to be in the nature of a business

The Australian cases of *Vandenberg*¹⁰³ and *Trautwein*¹⁰⁴ are authority for the proposition that professional bookmakers, or those whose betting operations, are analogous to those of a bookmaker accepting bets on horses are undoubtedly always taxable on the profits of their vocation. The Canadian case of *J Badame*¹⁰⁵ and the English case of *Partridge v Mallandaine*¹⁰⁶ also support this view.

Betting wins by horse trainers¹⁰⁷ or by horse owners¹⁰⁸ are also almost always assessable as part of the proceeds of the business of horse training or owning.

5 Thorough detailed record keeping versus poor record keeping

Keeping thorough detailed and organised records to record the position of the taxpayer, from day to day and week to week, were all factors leading to a finding that a gambling business was being carried on in the *Prince*¹⁰⁹ and *Trautwein*¹¹⁰ cases.

The lack of adequate records was a major factor against a finding that a business of gambling was being carried on in the *Shepherd*¹¹¹ and *Brajkovich* cases.¹¹² In *Brajkovich*, this was coupled with the fact that the taxpayer was found to be an unreliable witness.¹¹³

6 The test to determine whether a business of gambling is carried on is largely objective

This principle is as true for gambling businesses as it is true for any kind of business.

Lord Buckmaster in *J. & R. O'Kane & Co. v I.R. Commissioners* stated:¹¹⁴

‘The intention of a man cannot be considered as determining what it is that his acts amount to’.

Nevertheless, as Hill J stated in *Evans*:¹¹⁵

‘The subjective purposes and intentions of the person carrying on a business will have relevance whether the activity is some more normal activity such as breeding cattle’.

7 No one factor is decisive, the indicators must be looked at in combination and as a whole and so each case is ultimately to be decided on its own facts

Webb J stated in *Martin*¹¹⁶ that whether a business is being carried on depends upon the ‘large and general impression gained’. This implies that in determining whether a business is being carried on, there must be a weighing up all of the relevant indicators.

⁹⁸ 89 ATC 5,227.

⁹⁹ 89 ATC 4,540.

¹⁰⁰ 2003 TCC 707.

¹⁰¹ 2006 TCC 680.

¹⁰² (1953) 90 CLR 470.

¹⁰³ (1933) 50 W.N. (NSW) 238.

¹⁰⁴ (1936) 56 CLR 196.

¹⁰⁵ (1951) 3 Tax ABC 226.

¹⁰⁶ (1886) 18 QBD 276.

¹⁰⁷ *Holt v F.C. of T* (1929) 3 ALJ 68.

¹⁰⁸ *Knight v Commissioner of Taxation* (1928) 28 NSW S.R. 523.

¹⁰⁹ (1959) 12 ATD 45.

¹¹⁰ (1936) 56 CLR 196.

¹¹¹ 75 ATC 4,245

¹¹² 89 ATC 5,227.

¹¹³ *Ibid* at 5,229.

¹¹⁴ (1919-1922) 12 T.C. 303, 307.

¹¹⁵ 89 ATC 4,540,4,556.

¹¹⁶ (1953) 90 CLR 470,474.

No one single factor is of itself decisive, although systematic and organised betting is a critical and necessary pre-requisite for a gambling business to be found. Hill J made the point in *Evans* where he stated that ‘there is no one factor that is decisive of whether a particular activity constitutes a business’.¹¹⁷

Evatt J in *Trautwein*, succinctly summarised the legal position in these gambling cases, by noting that this is a question that has to be decided on the facts of the particular case.¹¹⁸ This was followed by Hill J in *Evans*¹¹⁹ and Rath J in *Shepherd’s case*.¹²⁰

Cases in other jurisdictions such as New Zealand (*McFarlane*¹²¹ and *Duggan*¹²²) and in the UK (*Graham v Green*¹²³) and in Canada (*Epel*,¹²⁴ *Le Blanc*¹²⁵ and *Cohen*¹²⁶ are the best and most recent examples), all also make this point.

12 WHAT CHANCE FOR THE PUNTERS’ CLUB CASES?

Although the full set of facts of these so called Punters’ Club cases have not as yet been disclosed, based on an understanding of the volume of betting and amount of capital used, the accurate and detailed records kept and also the systematic and organised nature of the betting using highly sophisticated mathematical techniques, which have resulted in large scale profits over a consistent period suggests, in light of the principles examined in this paper, that the chances of the punters success against the Tax Office are very slim.

It seems a reasonable inference from the available facts, that the gambling winnings from such organised and systematic activities satisfy much of the indicia of activities from the carrying on of a gambling business. Consequently, the punters’ winnings will be classified as assessable income.

In the context of poker play, it would appear that only in rare cases where the taxpayer can establish, by a long track record of success, that they possess clearly superior skill and dedication should the taxpayers be treated as a professional poker player. In which case, their winnings are then taxable.¹²⁷

This is consistent with the principle adopted by the Federal Court in the more recent case of *Stone v Commissioner of Taxation*,¹²⁸ which found that where a taxpayer utilises their special and peculiar skills to obtain a gain or reward, then this gain or reward will form part of assessable income.

It is suggested that, based on available facts, the taxpayers in the Punters’ Club cases due to their clear demonstration of their superior skills and regular success based on their systematic and organised approach, should be taxable on their gambling winnings.

Of course, as with all things in tax, it is always a matter of the facts and as the full factual circumstances of each of these cases has not been revealed, it may be reasonably open to a trial judge to rule that no business of gambling is being carried on.

13 CONCLUSION

The analysis of the various Australian cases and cases from other similar tax law jurisdictions such as the United Kingdom, Canada and New Zealand discussed in this paper, suggest a strong consistency in the indicia that must be satisfied for a business of gambling to be found. In applying these indicia, it is very unlikely that a business of gambling will ever be found for the overwhelming majority of taxpayers.

This fact is as true as it was in the last century, when betting on horse racing was the more likely form of gambling, where this issue of the assessability of gambling winnings was sometimes in doubt as it is today. Where online gambling abounds, particularly in the form of online poker gambling, this issue also raises consideration of assessment.¹²⁹

¹¹⁷ 89 ATC 4,540,4,555.

¹¹⁸ (1936) 56 CLR 196,205.

¹¹⁹ 89 ATC 4,540,4,557.

¹²⁰ 75 ATC 4,244,4,253.

¹²¹ (1952) Vol. 71 NZLR 349.

¹²² 73 ATC 6001.

¹²³ (1925) 2 KB 37.

¹²⁴ 2003 TCC 707.

¹²⁵ 2006 TCC 680.

¹²⁶ 2011 TCC 262.

¹²⁷ Benjamin Alerie, ‘The Taxation of Winnings from Poker and Other Gambling Activities in Canada’ (2011) 59:4 *Canadian Tax Journal* 731-63, 762.

¹²⁸ [2002] FCA 1492.

¹²⁹ Benjamin Alerie, ‘The Taxation of Winnings from Poker and Other Gambling Activities in Canada’ (2011) 59:4 *Canadian Tax Journal* (2011) 731-63,758-761.

Nevertheless, in exceptional cases such as the facts found in the cases of *Trautwein*¹³⁰ or *Prince*¹³¹ or *J Badame*¹³² or *McFarlane*,¹³³ then the courts in Australia, Canada and New Zealand are prepared to treat gambling activities as a business. Consequently, the gambling winnings are treated as assessable income and would allow the gambling losses as allowable deductions.

Courts across these different tax jurisdictions have emphasised, above all else, the importance of the factor of system and organisation in the betting operations as an essential pre-requisite before the proceeds of any gambling activity can give rise to any assessable income. When this requisite level of system and organisation are present and gambling rewards the skill and judgment of the taxpayer, then where there is large scale betting with detailed record keeping it is possible for a business of gambling from punting operations to be found.

Ultimately, whether a business of gambling is being carried depends upon the facts of the particular case, which will always be variable much like the outcomes in any gambling contest. Until a definitive court judgment resolves this issue, there will always be some doubt as to what the correct legal outcome should be. With the history of jurisprudence in Australia on this issue of the assessability of gambling winnings, it is hoped that the decisions in these so called Punters' Club tax cases will provide further definitive court judgments to further clarify this area of law.

Coin toss anyone?

¹³⁰ (1936) 56 CLR 196.

¹³¹ (1959) 12 ATD 45.

¹³² (1951) 3 Tax ABC 226.

¹³³ (1952) Vol. 71 NZLR 349.