TAXATION RULING IT 2655

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I 1012874	**BETTING AND GAMBLING**	**25(1)** **51(1)**

OTHER RULINGS ON THIS TOPIC:

TITLE: INCOME TAX: BETTING AND GAMBLING - WHETHER TAXPAYER CARRYING ON BUSINESS OF BETTING OR GAMBLING

NOTE . Income Tax Rulings do not have the force of law.

. Each decision made by the Australian Taxation Office is made on the merits of each individual case having regard to any relevant Ruling.

PREAMBLE

This Ruling is issued in consequence of three decisions of the Federal Court of Australia reported as Evans v. F.C. of T. 89 ATC 4540; (1989) 20 ATR 922, Babka v. F.C. of T. 89 ATC 4963; (1989) 20 ATR 1251, and Brajkovich v. F.C. of T. 89 ATC 5227; (1989) 20 ATR 1570.

2. The issue in each of these cases was whether a taxpayer with no businesslike connection with the racing industry (e.g. as a trainer or breeder of horses) was carrying on a business of betting or gambling on races.

FACTS

3. In Evans, the Federal Court (Hill J) was prepared to assume that mere punting could constitute a business but decided that on the facts of that case the taxpayer was not carrying on a business. Hill J. stated that if a mere punter is to be held to be carrying on a business it will be because the relevant betting activities will be systematically conducted so as to get the most favourable odds obtainable. Volume of punting and size of bets of themselves are not, in his Honour's view, determinative of the outcome, although neither can be said to be irrelevant. Hill J said that what was lacking to characterise the taxpayer's gambling as a business was the element of system or organisation. The taxpayer did not maintain an office or employ any staff to assist him, he did not keep any records, he did not use a computer or subscribe to any tipping or information services and did not spend a lot of time studying form. In particular, his Honour said, the

taxpayer's preference for betting with the TAB or on course totalizator, rather than with bookmakers, and his tendency to invest in quinellas, trifectas and other exotic kinds of bets seemed "inconsistent with the money-making, systematic, businesslike character which is an essential ingredient in the carrying on of a business". The taxpayer's winnings were therefore not assessable.

4. In Babka, the Federal Court (Hill J) again proceeded on the assumption that mere punting may constitute a business but, as in Evans, found it unnecessary to reach a final conclusion on the matter because, even if betting activities are inherently capable in some circumstances of constituting a business, the facts of the case did not reveal the taxpayer to be carrying on any business at all. His winnings were therefore not assessable. The taxpayer did not follow any betting system but he did place bets in accordance with several guiding principles. Judgment and instinct both played a part in the taxpayer's selection of horses on which to bet as well as in his choice of the amount and type of bet placed. That was sufficient to negate the concept of system and organisation which is the hallmark of a business. The taxpayer's activities "could [not] be said to exceed those of a keen follower of the turf". Hill J indicated that today mere punting, particularly with the growth of modern technology such as computers, could be so organised, systematic and businesslike and so dedicated to profit-making as to constitute a business. However, his Honour went on to say that the intrusion of chance into the activity as a predominant ingredient at least in the outcome of the race itself suggests that it will be a rare case where a court will conclude that the activity is a business.

5. The Full Federal Court (Pincus, French and Gummow JJ) in Brajkovich stated that gambling, as ordinarily conducted by members of the gambling public, would seldom be a business even where large gains or losses are involved. In that case, the element of sport, excitement and amusement was the main attraction for the taxpayer and it could not be said that a business was being carried on. The Court said that the principal criteria for determining whether gambling constitutes a business include the following : whether the gambling is conducted in a systematic, organised and businesslike way; the volume and size of the gambling; whether the gambling is related to, or part of, other activities of a businesslike character e.g., breeding horses; and whether the gambler appears to engage in his or her activity principally for profit or principally for pleasure. On the basis of those criteria, the Full Court concluded that the taxpayer's gambling did not constitute a business and therefore the gambling losses he had incurred were not deductible. The evidence showed that he had from his youth a simple passion for gambling on a large scale and "merely indulging that, without more, is not engaging in a business". The Court added that gambling which involves a significant element of skill is more likely to have tax consequences than gambling on merely random events.

RULING

6. The Commissioner accepts that it is possible for a mere punter to be carrying on a business of betting or gambling but considers that it will be rare for a taxpayer with no connection with racing other than betting to be carrying on a business of betting or gambling.

7. Ultimately each case will depend on its own facts. There is no Australian case in which the winnings of a mere punter have been held to be assessable (or the losses deductible). As Hill J stated in Babka, although mere punting may constitute a business, "the intrusion of chance into the activity as a predominant ingredient" will generally preclude such a finding. If a taxpayer is involved in other business activities in the racing industry, it will be more likely that betting activities are of a business nature.

8. The criteria summarised in Brajkovich and the factors considered in Evans and Babka should be taken into account in determining whether a taxpayer is carrying on a business of betting or gambling.

COMMISSIONER OF TAXATION
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