“TURNING GAMBLING SILVER INTO TAX GOLD?”

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

Introduction
This paper is on the topic of gambling winnings and how silver (coin/money) can be turned into tax gold (tax payable to the Australian Tax Office) in certain cases if certain circumstances are met.

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 (Herald Sun, 7 July 2012) 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.

This issue raises the correct tax treatment of gambling winnings and the approach taken by courts in Australia who have to date followed the approach in the Australian landmark gambling tax case of Brajkovich v FC of T 89 ATC 5227 (Full Federal Court). This case approached the issue of whether the gambling activities are carried on in the form of a business activity and as such in a systematic and organised manner and also as to whether the gambling activity involves a significant element of skill as opposed to mere random outcomes.

I then compare the approach taken in the Brajkovich case with decisions in other gambling cases such as Evans v FC of T 89 ATC 4540 and other cases to see if there has been any consistency in the approach taken by the courts and then to comment on what I think the ‘chances’ of the Punters’ Club being successful in its arguments against the ATO.

1 All references to legislation in this article are to the Income Tax Assessment Act 1997 unless otherwise stated.
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

The dilemma expressed by Sir Ernest Castle as to what really is the difference between gambling and something more is an ongoing not completely resolved issue. The Concise Oxford Dictionary defines gambling as playing games of chance for money. In Australia, New Zealand and the United Kingdom, gambling winnings are not subject to taxation except that if the winnings are derived from the operation of a business of gambling in Australia or in New Zealand or in the United Kingdom from a vocation or trade or profession in gambling, then the winnings will be subject to income taxation.

**Punters Club tax cases**

This group of 19 members have recently come to the attention of the ATO as it has been reported (Herald Sun, July 7 2012) that this group makes a reported $50 million profit from $2 billion of bets placed annually. The success of this so called Punters’ Club has resulted in the ATO arguing that the club (through its individual members) is liable to some $900 million in unpaid tax.

The ATO has audited the 2006 returns of these club members as it has been revealed that the club in that year had a turnover in excess of $2.4 billion. To date, three of these Punters’ club members have vowed to fight this claim with 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 has also launched legal action against his amended assessments and so too has another former Tasmanian, Zeljko Ranogajec.

**Brajkovich v Federal Commissioner of Taxation ATC 1989 5,227- 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.

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The taxpayer 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 and 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 and 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 and 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.  

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) and from that time on he scaled down his gambling activities and argued that his gambling was for 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 inclusive but the Commissioner disallowed the deductions on the basis that he was not carrying on a business of gambling.

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3 Although these 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.
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 as he had failed initially to furnish any return of income for the years ended 30 June 1980, 1981 and 1982.

The facts revealed that the taxpayer retained his involvement in property development through his family trust, the Brajkovich Trading Trust, and that for the period from 1 July 1979 to 30 June 1983, the trust’s trading net profit was $721,011.\(^4\)

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\(^5\) as his Honour had reservations about accepting the taxpayer’s evidence about his gambling losses, as this evidence was regarded as confused and unreliable, as the amounts quoted by the taxpayer ($943,750) were only the amounts that the taxpayer drew cheques for to pay his gambling creditors.\(^6\)

The only records kept by the taxpayer with respect to his gambling activities were cheque butts and race books and 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.\(^7\)

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.\(^8\)

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”\(^9\).

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\(^4\) 88 ATC 4,457 at 4,466.  
\(^5\) 88 ATC 4,457.  
\(^6\) 88 ATC 4,457 at 4,460.  
\(^7\) 88 ATC 4,457 at 4,461. 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.  
\(^8\) 88 ATC 4,457 at 4,465.  
\(^9\) 88 ATC 4,457 at 4,465.
Jenkinson J also had serious doubts that the taxpayer ever expected to make a profit from gambling in the long run and that all the facts pointed to the taxpayer not conducting a business of gambling but rather what was done suggested “an unrestrained indulgence of an appetite for gambling as a source of emotional and, perhaps, intellectual satisfaction.”

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. The Full Federal Court noted that it was not possible on the evidence to have any confidence in even the rough accuracy of the figures put forward.

The Court went on to explain that the following are the relevant criteria to apply to determine whether a gambling business is being carried on:

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);

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10 88 ATC 4,457 at 4,468.
11 89 ATC 5,230.
12 89 ATC 5,230.
13 89 ATC 5,227 at 5,233.
5. Whether the form of betting chosen is likely to reward skill or judgment or depends purely on chance;
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”.¹⁴

**Evans v F.C. of T. 89 ATC 4,540 - Federal Court (Hill J)**
The taxpayer operated a small wallpaper business and 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 investigation by the ATO which treated his gambling winnings as income.

Even though the taxpayer gambled frequently in large volumes and even though 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.¹⁵ 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.

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¹⁴ 89 ATC 5,227 at 5,233.
¹⁵ 89 ATC 4,540 at 4,555.
Although in this case the taxpayer had placed a considerable volume of bets regularly over a number of years with bets made of varying size and even though the taxpayer invested a large amount of his time on his gambling activities, Hill J concluded that the taxpayer was not a professional punter as the taxpayer lacked the critical element of system or organisation.

His Honour also concluded that the taxpayer did not spend large amounts of time studying form, the taxpayer 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 undertaken not 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 and 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”.

In addition, his Honour ruled that the taxpayer’s ownership of racehorses did not amount to a business.

*Babka v Commissioner of Taxation 89 ATC 4,963 - 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).

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.

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16 89 ATC 4,540 at 4,557.
17 89 ATC 4,540 at 4,541
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 when he stated:

“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”.

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

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 and systematic and organised that they could be seen to exceed those of a keen follower of the turf.

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.

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18 89 ATC 4,963 at 4,969.
19 89 ATC 4,963 at 4,970.
20 89 ATC 4,963 at 4,969.
21 89 ATC 4,963 at 4,971.
22 89 ATC 4,963 at 4,966.
The books kept by the taxpayer did detail his betting activities but they were not kept for the purpose of providing a financial record of the activities and so they did not include incidental expenditure on items such as fares, meals and entrance fees and the like.\(^{23}\)

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.\(^{24}\)

**Shepherd v F.C. of T. 75 ATC 4,244- NSW Supreme Court (Rath J)**

The taxpayer in this case owned and raced various racehorses but on the facts of the case neither her prize-money nor her betting wins were found to be the product of a business. This was the finding 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 and although she was apparently 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.

The taxpayer was held to be a “keen follower of the turf”\(^{25}\) who took much pleasure in betting on her own horses. However, the gambling and even the racing activities she engaged her were not done in the nature of a business as they were not “considerable and systematic and organised”.\(^{26}\)

**Prince v F.C. of T. (1959) 12 ATD 45- High Court (Menzies J)**

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 ninety meetings a year. The taxpayer also kept detailed records which informed the taxpayer as to what his progress position was after each race.

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\(^{23}\) 89 ATC 4,963 at 4,971.

\(^{24}\) 89 ATC 4,963 at 4,971.

\(^{25}\) 75 ATC 4,244 at 4,253.

\(^{26}\) 75 ATC 4,244 at 4,250.
After considering all the evidence, Menzies J concluded that the taxpayer was a racehorse owner and gambler in a big way not because he loved horses, not because he enjoyed taking a chance, not because he was addicted to betting but because, as a matter of business “he turned his wide knowledge, his experience and his ability to make a living out of horses”.  

Menzies J therefore ruled that the taxpayer was carrying on a business of gambling from 1949 due to his systematically conducted operation which 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.

**Martin v F.C. of T (1953) 90 CLR 470- High Court (Webb J) and then Full High Court**

The taxpayer was a hotelkeeper and then a farmer. The taxpayer kept thorough records of his wins and losses and in two of the relevant years 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 even employed a man to make bets for him so that he could gain better odds.

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.”

His Honour ruled that a business of gambling was being undertaken due to the considerable time spent on racing and betting operations, the very large proportion of the taxpayer’s assets and income applied for that purpose and the systematic methods used by the taxpayer.

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27 (1959) 12 ATD 45 at 65.
28 (1959) 12 ATD 45 at 63.
29 (1952) 90 CLR 470 at 474.
On appeal to the Full High Court, Williams A.C.J. and Kitto and Taylor JJ stated that:\(^{30}\):

“The definition of income from personal exertion\(^{31}\) 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 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 then only on ordinary racing days and as he averaged only one bet per race, the Full 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 racehorses and racing under their own colours.\(^{32}\)

**Trautwein v F.C. of T. (1936) 56 CLR 196- High Court (Evatt J)**

The taxpayer established a stud farm for the purpose of breeding racehorses and the taxpayer owned several race horses, some of which he had paid large sums to purchase. The taxpayer regularly attended race meetings and raced his own horses and devoted a substantial amount of time to the activity. The taxpayer bet frequently and systematically and heavily on his own horses and other people’s horses using valuable racing information acquired from trainers and others and he 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 acquiring what the taxpayer could from the sport.

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\(^{30}\) (1953) 90 CLR 470 at 479.

\(^{31}\) As stated in section 6(1) of the *Income Tax Assessment Act* 1936.

\(^{32}\) (1953) 90 CLR 470 at 481.
Due to the large and organised scale of the taxpayer operations, Evatt J ruled that a horse racing business was being carried on and that the taxpayer’s operations were more analogous to those of a bookmaker than those of a mere punter.\(^{33}\)

Evatt J also noted that in determining whether the betting was a trade or vocation that the question will have to be decided on the facts of the particular case.\(^{34}\)

His Honour therefore concluded that, based on the facts of this case, that the element of sport or pastime or amusement did not dominate nor was it the main factor in the betting transactions.

**Vandenberg v C. Of T. (NSW) (1933) 50 W.N. (NSW) 238- Supreme Court of NSW (Halse Rogers J)**

This case concerned bets made over a lengthy period by a registered bookmaker that a particular horse would win and therefore the gambling wins not directly connected with a bookmaking business were held to be income.

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”. \(^{35}\)

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\(^{33}\) (1936) 56 CLR 196 at pp. 206-207.

\(^{34}\) (1936) 56 CLR 196 at 205.

\(^{35}\) (1933) W.N. (NSW) 238 at 239.
**Jones v F.C. of T. (1932) 2 ATD 16 –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 anyway 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, the system being revealed as getting “the very best information”\(^{36}\), he almost always lost.

Evatt J found in this case that “the element of sport, excitement and amusement was the main attraction”.\(^{37}\) Evatt J also stated that:

\[\begin{align*}
\text{"The appellant acquired and developed a bad habit which he was in a special position to gratify. I do not think that the gratification of this habit was a carrying on of any business on his part, despite his many bets and his heavy losses."}^{38}
\end{align*}\]

**What the ATO thinks-Taxation Ruling TR 97/11**

Section 6(1) of the *Income Tax Assessment Act* 1936 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 Taxation Ruling TR 97/11 which whilst not directly on the issue of a professional gambling business, being instead about the possible existence of a primary production business, nevertheless sets out the indicia the ATO would expect for any business activity to be carried on as against a non-assessable activity of a hobby or pastime.

The Ruling does highlight the 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.

\(^{36}\) (1932) 2 ATD 16 at 17.

\(^{37}\) (1932) 2 ATD 16 at 18.

\(^{38}\) (1932) 2 ATD 16 at 19.
The relevant indicia (which have been largely derived from the various court cases including some of those mentioned in this paper) are:

- 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.

**Principles applied in other jurisdictions**

**United States of America**

Any gambling winnings are subject to taxation in the United States and so no help can be obtained from that jurisdiction on this issue. 39

**New Zealand**

Gambling winnings are not generally subject to taxation in New Zealand although there are dicta in some New Zealand cases (*Commr. of Taxes (N.Z.) v MacFarlane* (1952) NZLR 349 at 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.

Notwithstanding this, section CW60 of the *Income Tax Act* (NZ) 2007 provides that stake or prize money for a dog race, horse race or trotting race is exempt income in New Zealand if it is paid by a club that is licensed to use the totalisator under the *Racing Act* (NZ) 2003.

Taxation Review Authority of New Zealand Decision 002/2008 involved the application of section CB9(c) of the *Income Tax Act* (NZ) 1994 (now replaced by section CW60 of the *Income Tax Act* (NZ) 2007) and confirmed that a share of the stake monies received by a company were exempt from taxation in New Zealand.

39 Per Hill J in *Evans v F.C. of T.* 89 ATC 4,540 at 4,557.
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 he frequently attended race meetings and who 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 and where betting losses, should they occur, would also be deductible under that Act.40

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 within the meaning under section 2 of the *Land & Income Tax Act 1923*. Due to the organisation and system in the taxpayer’s betting operations it was held that a betting business was being carried on the profits of this ‘business’ were assessable under s79(1)(a) of the *Land and Income Tax Act 1923*.

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 through whom he 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.41

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”.42

40 73 ATC 6001 at 6005-6.
41 (1952) Vol. 71 NZLR 349 at 356.
42 (1952) Vol. 71 NZLR 349 at 364.
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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 and as such it was held that the betting profits were taxable.

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.

South Africa

Morrison v Commissioner for Inland Revenue (1950) 16 S.Af. Tax Cases 377 - Appellate Division of the Supreme Court of South Africa
Schreiner JA made the point that “no hard and fast line can be drawn between the case of the bookmaker and that of the punter and that no rule exists that a bookmaker’s activities constitute the carrying on of a trade or business whilst those of a punter do not”.

United Kingdom

Graham v Green (1925) 2 KB 37 per 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 referred to a bet as involving a mere irrational agreement and that unless the practice of betting fell within the definition of a ‘vocation or trade or profession in gambling’ then his Lordship stated that “all you can say of that man, in the fair use of the English language, is that he is addicted to betting”. His Lordship therefore concluded in this case that the taxpayer’s bets were not profit or gains.

Whilst this approach seems to suggest the same approach as that applied in Australian cases, which have focused on whether the gambling activities do constitute a business, as Bowen CJ has observed, in F.C. of T v Harris that:

44 (1925) 2 KB 37 at 42.
45 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.
46 (1925) 2 KB 37 at 41.
“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”.47

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”.

**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.

**Lessons learned from the above cases**

1. **No one factor is decisive and the indicators must be looked at in combination and as a whole.**

   As Webb J stated in *Martin* 48 whether a business is being carried on depends upon the “large and general impression gained” which implies that in determining whether a business is being carried on there is a process required of weighing up all of the relevant indicators.

   Hill J also made this point in *Evans* where he stated that “there is no one factor that is decisive of whether a particular activity constitutes a business.” 49

2. **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* (1919-1922) 12 T.C. 303 at p. 307 stated:

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

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47 *F.C. of T v Harris* 80 ATC 4,238 at 4,242.
48 (1953) 90 CLR 470 at 474.
49 89 ATC 4,540 at 4,555.
Nevertheless as Hill J stated in *Evans*\(^{50}\):

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

3. **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 obvious point was made by Hill 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 the satisfaction of addiction that is so often present in betting.\(^ {51}\)

F.B. Adam J made this same point in *McFarlane’s case* 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”.\(^ {52}\)

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 as cases such as *Shepherd*\(^{53}\); *Martin*\(^ {54}\) and *Jones*\(^ {55}\) clearly indicate.

4. **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**

The case law (*Brajkovich; Evans; Babka; Martin* and *Jones*) has consistently treated haphazard random betting operations based more on intuition rather than research as non-assessable (and losses consequently not deductible) being more for the thrill and pleasure and addiction of gambling and that therefore no business was being carried on.

\(^ {50}\) 89 ATC 4,540 at 4,556.
\(^ {51}\) 89 ATC 4,540 at 4,557.
\(^ {52}\) (1952) Vol. 71 NZLR 349 at 383.
\(^ {53}\) 75 ATC 4,244 at 4,253.
\(^ {54}\) (1953) 90 CLR 470 at 481.
\(^ {55}\) (1932) 2 ATD 16 at 17.
Where, on the other hand, the taxpayer adopts a systematic strategy to place their bets to lessen or exclude the element of chance and thereby to minimise their risks (as was found in cases such as *Prince, Trautwein* and *McFarlane*) then it is more likely that the activities would amount to a business of gambling and so the profits would be assessable and losses would be deductible.

5. **Thorough detailed record keeping versus poor record keeping**
   
The lack of adequate records and the unreliability of the witness were major factors against a finding that a business of gambling was being carried on as was seen in the *Brajkovich case*.

   Keeping thorough detailed 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* and *Trautwein cases*.

6. **Large volume of betting wins and losses and size of capital employed**
   
   Where the betting activities are small scale and irregular it is almost impossible for a business of gambling to be found (as was seen in the *Martin case*).

   Conversely when the volume of punting and size of bets is large then it is more likely that a business of gambling is being carried on (as was seen in the *Prince* and *Trautwein cases*). Although large volumes and sizes of bets were evident in cases such as *Brajkovich* and *Evans*, this fact alone was not enough to make the activities a gambling business.

7. **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.**

   *Partridge v Mallandaine* and *Vandenberge* are authority for the proposition that professional bookmakers, or those who’s betting operations are analogous to those of a bookmaker (*Trautwein*), accepting bets on horses are undoubtedly always taxable on the profits of what has been held to be their vocation.
Betting wins by horse trainers\textsuperscript{56} or by horse owners\textsuperscript{57} are also almost always going to be assessable as part of the proceeds of the business of horse training or owning.

8. Each case is ultimately decided on its own facts

His Honour Evatt J in \textit{Trautwein} succinctly summarised the legal position in these ‘gambling’ cases by noting that it is always a question that has to be decided on the facts of the particular case.

It should also be made clear that none of the above factors about systematic and organised betting, keeping adequate records and using a large amount of capital and a high volume of transactions, are of themselves determinative.

Hill J also acknowledged this point in \textit{Evans} where his Honour stated that “which it is will depend on the facts of the case”. Rath J also made this point in \textit{Shepherd} where he stated that there is a “need to analyse the facts of the case before me to determine the application of the principles in Martin’s case”.\textsuperscript{58}

Cases in other jurisdictions such as New Zealand \textit{(McFarlane}\textsuperscript{59} and \textit{Duggan}\textsuperscript{60}) and in the UK \textit{(Graham v Green}\textsuperscript{61}) and in South Africa \textit{(Morrison}\textsuperscript{62}) all also make this point.

\textbf{What chance for the Punters Club cases?}

Based on 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 to me, in light of the principles examined in this paper, that the chances of the punters beating the Tax Office are Buckley’s and none.

\textsuperscript{56} \textit{Holt v F.C. of T} (1929) 3 ALJ 68.
\textsuperscript{57} \textit{Knight v Commissioner of Taxation} (1928) 28 NSW S.R. 523.
\textsuperscript{58} 75 ATC 4,244 at 4,253.
\textsuperscript{59} (1952) Vol. 71 NZLR 349.
\textsuperscript{60} 73 ATC 6001.
\textsuperscript{61} (1925) 2 KB 37.
\textsuperscript{62} (1950) 16 S.Af. Tax Cases 377.
It appears to me that the gambling winnings from such organised and systematic activities have much of the indicia of activities from the carrying on of a business and so the gambling winnings will form part of the assessable income of each of the taxpayer’s concerned.

Of course, as with all things in tax, it is always a matter of the facts and as I am not privy to the full factual circumstances of each of these cases, as the matters are only now appearing before the courts, it may also be reasonably open to each trial judge to rule that no business of gambling is being carried on.

**Conclusion**

The analysis of the various Australian and other cases in this paper does suggest a strong consistency in the indicia that should be present for a business of gambling to be found and that in applying these indicia it is very unlikely that a business of gambling will ever be found.

Nevertheless, in exceptional cases such as the facts found in the cases of *Trautwein* or *Prince* or *McFarlane* then the courts in both Australia and New Zealand are prepared to treat gambling activities as a business and so treat the gambling winnings as assessable income and would allow the gambling losses as allowable deductions.

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. Coin toss anyone?

**John Tretola (December 2012)**

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