1976 *Present :* **Samerawickrame, J., Udalagama, J. and Sharvananda, J.**

B. P. MEDONZA, Appellant

and

THE COMMISSIONER OF INLAND REVENUE, Respondent

S. C. 2/1970—Inland Revenue Board of Review Appeal 348

Income Tax Ordinance (Cap. 242), section 6(1)—Profits tax—Winnings by betting on horse races—Betting activities amounting to a business—Whether winnings taxable—Profits Tax Act (Cap. 243), section 2.

Where betting on horse races is organized and carried on systematically as a business, winnings from such betting are taxable under the provisions of the Income Tax Ordinance and the Profits Tax Act, No. 5 of 1948.

Cases referred to :

Ceylon Tea Propaganda Board v. Commissioner of Inland Revenue, 67 N.L.R. 1.
Commissioner of Income Tax v. Shaw Wallace & Co., 59 Indian Appeals 206.
Graham v. Green, 133 L.T. 367.
Cooper v. Stubbs, 133 L.T. 590.
Down v. Campston, (1937) 2 All E.R. 475.
Burdge v. Pyne, (1969) 1 All E.R. 467.
Commissioner of Inland Revenue v. Indra Son, (1940) Allahabad 154.
Jalal Sahib v. Commissioner of Income Tax, (1961) A.I.R. 20.
Jones v. Federal Commissioner of Taxation, 2 A.T.D. 16.
Vandenberg v. Commissioner of Taxation, 2 A.T.D. 343.
Trautwein v. Federal Commissioner of Taxation, 56 C.L.R. 196.
Commissioner of Income Tax v. Mc. Farlene, 5 A.I.T.R, 264,
Walles v. Commissioner of Income Tax, 38 N.L.R. 325.
Ram Iswara v. Commissioner of Inland Revenue, 65 N.L.R. 393.
Morrison v. Commissioner for Inland Revenue, (1950).

CASE STATED for the opinion of the Supreme Court on application made by the assessee-appellant.

H. W. Jayewardene, Q.C., with *L. C. Seneviratne, R. D. C. de Silva, D. C. Amerasinghe* and *J. C. Ratwatte* for the appellant.

S. Pasupati, Solicitor-General, with *G. P. S. de Silva*, Senior State Counsel, and *D. Premaratne*, State Counsel, for the respondent.

Cur. adv. vult.

December 20, 1976. SAMERAWICKRAME, J.

Assessment of income tax for the years 1955/56, 1956/57 and 1957/58 and assessments of profits tax for the years 1955 and 1956 were disputed by the assessee on the ground that the assessments included sums of money won by betting on horse racing, which sums were not assessable to tax as income under the Income Tax Ordinance and not assessable to tax as profits under the Profits Tax Act.

Originally the assessments were based on discrepancies found on an inquiry into the capital position of the assessee. The authorised representative of the assessee took up the position that the apparent discrepancies were actually race winnings and that they were not taxable. The tax authorities did not accept the position that the race winnings were not taxable. At the appeal before the Deputy Commissioner of Income Tax the matter in dispute was formulated—

> Are the admitted discrepancies which were actually betting winnings taxable ?

In other words, are the above amounts which are winnings from gambling on horse racing taxable. The Deputy Commissioner upheld the assessments and the assessee appealed to the Board of Review.

The order of the Board made by the Chairman contained the following findings :—

> " For reasons given above I hold that the sum of Rs. 190,900, Rs. 210,559 and Rs. 16,917 gains made by assessee during years 1955/56, 1956/57 and 1957/58 respectively are not profits of a casual and non-recurring nature and are income derived by him placing bets on horse racing as a business and are taxable under section 6 sub-section 1 (1) and (*h*).
>
> I also hold that the sums of Rs. 190,900 and Rs. 210,559 are profits derived by the assessee from a business during the years 1955 and 1956 respectively and are taxable under section 2 of Act No. 5 of 1948. "

On application made by the assessee a case has been stated for the opinion of this Court on the following questions :—

(i) Whether winnings from betting on horse races are taxable under the provisions of the Income Tax Ordinance (Cap. 242) or the Profits Tax Act, No. 5 of 1948 ?

(ii) Whether the betting on horse races during the relevant years by the appellant-assessee constituted a vocation of the said appellant ?

(iii) Do the bets placed by the appellant-assessee during the relevant years of assessment on horse racing constitute a " business " of the appellant within the meaning of the said terms in section 6 (1) (*a*) of the Income Tax Ordinance (Cap. 242) ?

(iv) Were the winnings of the appellant-assessee from bets placed by him on horse races during the relevant years income taxable under provisions of section 6 (1) (*h*) of the Income Tax Ordinance (Cap. 242) ?

(v) Do the winnings of the appellant-assessee from bets on horse races during the years 1955 and 1956 constitute profits derived by the assessee from a business within the meaning of the said terms in section 2 of the Profits Tax Act, No. 5 of 1948 ?

(vi) Has the Board of Review misdirected itself in law in coming to a finding that on the evidence of the appellant-assessee led at the inquiry before the Deputy Commissioner, the appellant-assessee was carrying on a business of betting on horse racing ?

Under the Income Tax Ordinance tax is payable on the profits or income of every person. In terms of section 6(1) profits and income or profits or income mean *inter alia* :—

(*a*) the profits from any trade, business, profession, or vocation for however short a period carried on or exercised.

Winnings from bets, as bets, have been held not to be a profit or gain within the meaning of an income tax provision. In *Graham v. Green,* 133 L.T. p. 367 at 368, Rowlatt, J. said :—

> " In the course of my judgment I said that a mere receipt by finding an object of value, or a mere gift, was not a profit or gain, and I do not feel much doubt about that. I further said that the winning of a bet did not result in a profit or gain. Until I am corrected, I think I was right in that. Whether it is a gift, or whether it is a finding, there is nothing of which there is a profit. There is no increment, no service, but merely the picking up of something either by the will of the person who possessed it before or because there is no person to oppose that picking up.
>
> In considering the question of a bet, it seems to me that the position is substantially the same. What is a bet ? A bet is merely an irrational agreement that one person should pay another person something on the happening of an event. A agrees to pay B something if C's horse runs more quickly than D's. There is no relevance at all between the event and the acquisition of property. The event does not really produce it at all ; it rests, as I say, on a mere irrational agreement."

On the above reasoning with which I respectfully agree, winnings from bets, as bets, are not profits or gains within the meaning of section 6(1) (*a*) as in the case of bets there is no relevance at all between the event and the acquisition of gain. This provision was considered in *Ceylon Tea Propaganda Board v. Commissioner of Inland Revenue,* 67 N.L.R. p. 1. The Tea Propaganda Board is an institution established by the Tea Propaganda Ordinance, Chapter 169. By section 8 of the Ordinance it was provided that a special export duty was to be levied on the export of tea from Ceylon the proceeds of which duty was to

be paid over to the Board by the Principal Collector of Customs. H. N. G. Fernando, J. said at p. 4 :—

> "Having regard to the language and form of section 6, the proper contention would appear to be that those proceeds are not within the meaning of the section *profits from* any trade or business. Sub-section (1) contains a comprehensive definition of the terms "profits and income", "profits", and "income", giving to each of them the same meaning. Accordingly, each such term, when used in any provision of the Ordinance other than the definition itself, bears that comprehensive meaning, even though that meaning may be wider than or different from the ordinary meaning of the term. But in my opinion, the word "profits", when it occurs in paragraph (*a*) of the definition section 6(1), bears only its ordinary meaning, namely "advantage, benefit, pecuniary gain, or excess of returns over outlay" (Concise Oxford Dictionary), and the question therefore is whether the proceeds of the duty can be regarded as an advantage or pecuniary gain *from* the business carried on by the Board. No doubt the Board does carry on a business, namely that of tea propaganda, and may incidentally carry on some other business or some trade, and the proceeds of the duty are received and utilised *for the purpose of* carrying on the business. But these proceeds are not properly profits *from* the business, because they are not earned or produced in the course of or as a result of the business which is carried on."

This position is supported by the view expressed by the Privy Council in respect of an analagous provision in the Indian Income Tax Act in *Commissioner of Income Tax v. Shaw Wallace & Co.*, 59 Indian Appeals, 206 at 213. Sir George Lowndes who delivered the judgment stated :—

> "The claim of the taxing authorities is that the sum in question is chargeable under head (iv) business. By s. 2, sub-s. 4, business "Includes any trade, commerce or manufacture, or any adventure or concern in the nature of trade, commerce or manufacture." The words used are no doubt wide, but underlying each of them is the fundamental idea of the continuous exercise of an activity. Under s. 10 the tax is to be payable by an assessee under the head business "in respect of the profits or gains of any business *carried on by him*". Again, their Lordships think, the same central idea : the words italicized are an essential constituent of that which is to produce the taxable income; it is to be the profit earned by a process of production."

There is the further question, whether assuming that the winnings from bets themselves are not profits or gains, the aggregate of the assessee's winnings as the result of his sustained and continuous actions are the profits or gains or vocation or business carried on by him. In *Graham v. Green,* Rowlatt, J. said :—

> " But then there is a doubt that, if you set on foot an organised seeking after emoluments, which are not in themselves profits, you may create, by way of a trade, or an adventure, or a vocation, a subject-matter which does bear fruit in the shape of profits or gains. Really a different conception arises, a conception of a trade or vocation which differs in its nature, in my judgment, from the individual acts which go to build it up, just as a bundle differs from its odd sticks. You may say, I think, without an abuse of language, that there is something organic about the whole which does not exist in its separate parts. "

He later said :—

> " As I have said, there is no doubt that one can create a trade by making an organised effort to obtain emoluments, which are not in themselves taxable as profits, and the most familiar instance of all, of course, is a trade which has for its object the securing of a capital increment. A person who buys an object which subsequently turns out to be more valuable, and then sells it, does not thereby make a profit or gain. But he can organise himself to do that in a commercial and mercantile way, and the profits which emerge are taxable profits, not of the transactions but of the trade. In the same way, he may carry on the same trade or part of the trade by selling things which he has not got and buy them when the price has fallen. That is a capital accretion, only the operations are reversed. He sells first and buys afterwards. In that way he may make losses or he may make profits. If he makes losses, the losses cannot be said to be the results of the individual acts, they are the results of the trade as a whole. The following test may be applied : A person may organise an effort to find things. He may start a salvage or exploring undertaking and he may make profits. The profits are not the profits of the findings, they are the profits of the adventure as a whole. Applying the corresponding test : He may make a loss. It cannot be said that the loss was due to the failure to find. The loss was due to the trade. That tests it very well, because it shows the difference between the trade as an organism and the individual acts."

Having said that, he turns to the man who places the bet and said :—

> " Now we come to the other side, the man who bets with the bookmaker, and that is this case. These are mere bets each time when he puts on his money, at whatever may be the starting price. I do not think he could be said to organise his effort in the same way as a bookmaker organises his. I do not think the subject-matter from his point of view is susceptible of it. 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 to-day, and he plays tomorrow and he plays the next day and he is skilful on each 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 separations 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. It is extremely difficult to express, but it seems to me that people would say he is addicted to betting, and could not say that his vocation is betting. The subject is involved in great difficulty of language, which I think represents great difficulty of thought. There is no tax on a habit. I do not think " habitual " or even " systematic " fully describes what is essential in the phrase " trade, adventure, profession, or vocation. "

In the same year in which *Graham v. Green* was decided, that is in 1925, two Judges of the Court of Appeal expressly reserved their opinion on the question whether betting transactions may not result in profits which are assessable to tax. In *Cooper v. Stubbs*, 133 L.T. at 590, Warrington, L.J. said :—

> " I desire to reserve for consideration when, if at all, it ever comes before this court, the question of whether or not betting transactions which produce a revenue to the person who engages in them may not result in profits which are assessable to tax. That question, when it arises, will have to be decided on the facts of the particular case, but I think, so far as I am concerned, I should like to reserve that for consideration when the question arises."

At page 592, Lord Justice Atkin said :—

> " Like my brother Warrington, I wish to reserve the question of what the position would be if these transactions had turned out to be bets, but if the bets had proved to be as continuous as these particular bets were, I express no opinion about it. I suppose the matter may someday arise in the courts."

No case has arisen in England in which the view expressed by Rowlatt, J. in *Graham v. Green* fell to be considered by the Court of Appeal.

In *Down v. Compston,* (1937) 2 A.E.R. 475, liability for winning on bets made on private games of golf was considered. The head-note of the case reads :—

> " The respondent, a professional golfer, had in addition to his other activities, for a number of years habitually engaged in private games of golf for bets of varying amounts. The respondent was assessed under Sched. D. to include, *inter alia,* the balance of gains over losses arising out of the bets made on such games, on the ground that the winnings could not accurately be called mere betting receipts, but were profits arising out of his vocation as a professional golfer :— *Held* : the respondent's winnings did not arise from his employment or vocation, and they were not analogous to gratuities for services rendered, nor was there any organisation to support the view that the respondent was carrying on a business of betting. The assessment ought, therefore, to be discharged."

In the case of *Burdge v. Pyne,* (1969) 1 A.E.R. 467, it was found that the taxpayer was carrying on the business of a club : on the club premises he habitually played the game of Three-Card brag with other members of the club ; and in the main he was invariably successful. It was held that there was no reason to think that that particular activity on the part of the club proprietor is not an activity in the course of carrying on the business of a club and consequently winning from that activity fell into the receipts of the club for the purpose of ascertaining the profits from its business.

The dictum of Rowlatt, J. to the effect that betting can in no circumstances constitute a business and that winnings from betting cannot amount to gains chargeable to tax has not been approved in decisions in other jurisdictions. In *Commissioner of Inland Revenue v. Indra Son,* (1940) Allahabad 154, a full Bench dealt with a money lender who was owning three horses and

betted on them. He incurred a loss of Rs. 7,354 on his betting and a loss of Rs. 610 running his horses. He claimed a total deduction of Rs. 8,154 in the computation of his income. The majority of the Bench held that he was not carrying on the business of racing but all three Judges expressly stated that they could not agree with the dictum of Rowlatt, J. Braund, J. said :—

> " In this case, the assessee was, as far as we can tell, a man well able to afford the pleasure both of keeping race horses and of betting. I think that in India, as in England, men of means take a pride in possessing racehorses and in exhibiting their horses, and themselves, on racecourses. And the instinct to gamble is not the perquisite alone of a man of business. Prima facie, I think that, where the only facts known are that a well-to-do man owns and runs three horses and bets on them and other horses, he does so for his pleasure even though that pleasure costs him Rs. 7,000 odd in a year. And nonetheless is this so by reason of the fact that he makes a note in his books of account what his pleasure cost him. Many men of method do that. And, indeed, one cannot dismiss from one's mind the possibility that such entries may be made for the very purpose of raising a claim such as the assessee is now making. Though I express this view, I do not desire it to be thought that, in my opinion, there are no circumstances in which a man can ever be said to be an owner of racehorses, or a gambler, as a business proposition. I think that that would be going much too far. I think that it may well be that there are cases in which by the scale on which he conducts his racing or his gambling (whether on horses or in other ways), by the commercial methods adopted, by his declared intention or by the absence of any other means of livelihood, he may make it clear that his object is to make a 'business' of it. With great respect to that learned Judge, I am doubtful whether the decision of Rowlatt, J. in (1925) 2 K.B. 37 really faces the fact that however irrational it may be, gambling in some form is, nevertheless, for some people a means of livelihood. In (1925) 2 K.B. 753 at pp. 769 and 776 the English Court of Appeal, notwithstanding that (1925) 2 K.B. 37 was cited to them, expressly guarded themselves from deciding the question whether betting transactions which produce a revenue to the person who engages in them may not result in profits which are assessable to tax. I do not myself think that (1925) 2 K.B. 37 is necessarily an authority which ought to be relied upon in India in a matter arising under the Income Tax Act."

In *Jalal Sahib v. Commissioner of Income Tax*, (1961) A.I.R. p. 20 at p. 26, Rajagopalan, J. cited the dictum of Braund, J. with approval and went on to say :—

> " We are in respectful agreement with these observations of Braund, J. To adopt the words of Braund, J. where the only facts known are that a well-to-do man like the assessee owns horses and bets on them and other horses the prima facie view should be that he does so for his pleasure, even though that pleasure brought him substantial sums of money. Obviously it is not the ultimate success or failure from a pecuniary point of view that really decides whether a given set of activities constituted the business of a person. If the racing and betting activities of the assessee constituted his business, it would continue to be his business whether he made profits or sustained losses in any given year or even over a series of years.
>
> The amount won or lost in a given period again may not be a relevant factor in deciding whether it was his business. The activities organised on normally accepted commercial lines constitute the essence of any business ; and, as we have pointed out, there was no evidence of that at all in the case of the assessee. There was nothing to rebut what Braund, J. held should be a prima facie view of such racing activities, that a person of comparative affluence and means undertakes them for his pleasure. To that must be added the further factor to which we have already adverted, the very nature of a bet, with something wholly irrational about its results as pointed out by Rowlatt, J. Again we have to guard curselves against being understood to say that gambling could never be organised on a commercial basis and could never constitute a business."

In *Jones v. Federal Commissioner of Taxation*, 2 A.T.D. p. 16, Evatt, J. said :—

> " I am prepared to assume in the appellant's favour despite the reasoning of Rowlatt, J. in *Graham v. Green* that there is nothing in the operations of betting with, i.e. against a bookmaker which forbids the inference that a person may be engaged in such operation by way of trade or business."

Later in his judgment, he analyses the operation and bets of the assessee and said :—

"The appellant said in evidence that in July 1927, he commenced betting 'as a business' but in my view, he is endeavouring to colour, and even to rationalize, his course of conduct, in the light of the point raised with the commissioner by his taxation advisers. He acquired no property in connection with betting at races, he had no business premises, he had no proprietary interest in any horse, he was not a trainer of horses, he kept no books and no records of his wins or losses, he had no bank account of his own at all, let alone any business account, he never hedged in any of his betting transactions, he did not set aside or determine upon any amount of capital outlay for the purpose of 'investment' in his supposed business, he never banked his winnings, he was not a member of any recognized club associated with racing and the trades incident thereto, and the only person he employed was one man for a short time to attend Tattersalls Club and pay his bookmakers upon settling day. With one or two exceptions, the appellant cannot remember the names of the horses upon whose success he wagered large sums of money. When he first claimed the betting losses by way of deduction he stated that his losses were £ 6,500 for the relevant year. In point of fact they were much greater, in amount. In order to prepare a detailed statement, extensive researches had to be undertaken at the public library in order to find out in respect of what meetings the cheques were paid to the bookmakers. When he originally came to reside at Sydney, the appellant was greatly interested in school sport and I think that when he commenced to devote attention to racing upon a large scale, the element of sport, excitement and amusement was the main attraction. He was an obstinate man. When he lost, he betted more heavily and lost more and more. Instead of ceasing to wager, he kept it up until it become first a practice, and then something akin to a mania. Hope and obstinacy always triumphed over bitter experience. He would have been completely ruined financially, but for the intervention of his brother, and the stopping of his cheques. All that I have said can best be summed up by saying that, during the relevant period, 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."

In *Vandenberg v. Commissioner of Taxation*, 2 A. T. D. 343, the assessee was registered as a bookmaker on racecourses controlled by the Associated Racing Clubs. He punted on courses controlled by the Australian Jockey Club on which he did not function as a bookmaker. The question for decision was whether his winnings in bets as a punter on the latter courses were liable to tax. Halse Rodgers, J. said :—

> "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 and it seems to me that where we have as the foundation fact or basic fact, if one may so call it, the bookmaking business carried on by the appellant whose sole source of income is, in any event, a racecourse activity, and when it is found that 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 not failing to recognise that the racecourses on which he fielded were not the same as those at which he betted ; when we have such a man systematically indulging in a course of betting on a large scale and intermixing without record the proceeds of his betting with those of his bookmaking, I think that the proper inference to draw is that betting with him was a business. It may be that he never considered it as a business but in actual fact it was just as important a matter to him apparently on the figures as his bookmaking business itself."

In *Trautwein v. Federal Commissioner of Taxation*, 56 C.L.R. 196, Evatt, J. considered the case of a owner of a hotel business who also raced racehorses and betted on horse races. He said at p. 206 :—

> "In my opinion the present taxpayer occupies a very different position to that of the taxpayer in Jones' Case. From a long time antecedent to the seven years under review, he had become interested in racing and interested from the point of view of money-making. He had begun to devote a substantial amount of time trouble and organizing effort to acquire what he could from the sport. He established a stud farm for the purpose of breeding race horses. He raced his own horses and horses under lease sometimes operating to a very considerable extent. In these racing activities, he used the names of other persons so as to obtain better financial results. He betted frequently and systematically. He attended races regularly over all the years. He carefully selected the races on which he would bet and acquired valuable racing information from his trainers and others. He paid

large sums of money in the purchase of horses in order to race them. He used agents both to better him and to settle for him. He used to bet in large sums of money, putting as much as £ 1,000 on a single race. From the years 1915 to 1923 he claimed deductions in his returns in respect of betting losses. It is contended that for him racing was merely a pastime and an amusement and he was, of course, active in the hotel trade. I have no doubt that he obtained enjoyment and amusement and sport from his racing activities especially when he was sucessful with his horses or in his bets. But it is not possible to find that the element of sport or pastime or amusement either dominated or was the main factor in these transactions. On the contrary, trying to look at the matter over a long period of time and having special regard to his employment and organization of all the means of money making that are associated with the sport of racing including prize money, betting on his own horses, and betting on other persons' horses, I reach the conclusion that, throughout the relevant period, his betting transactions were part and parcel of the carrying on of a horse-racing business by him, such business including systematic betting on his own horses and also those of other persons. It is true that, under the statute law of New South Wales, a contract by way of wagering is void. But of course this does not mean that the law treats such transactions as never having taken place but only means that the policy of the legislature is to prevent the courts of the land from being invoked for the purpose of directly enforcing wagering transactions.

The present case is quite distinguishable from that of Jones. Jones had no horses of his own nor did he ever lease any horses. He was not associated with racing at all except as a "punter". His period of betting was extremely limited in point of time and the element of sport, excitement and amusement rather than that of organised effort was supreme. But the case of the present taxpayer is much more analogous to that of the bookmaker himself than to that of the mere punter at starting price who was being considered by Rowlatt, J. in Green's Case."

In *Commissioner of Income Tax v. McFarlane,* 5 A.I.T.R. 264, the assessee was a jockey and it was held that his gains were from betting activities so organised with his vocation as to form part

and parcel of it. This was the basis of the decision but Adams, J. went on to express the view in regard to the liability to tax of a punter on winnings from bets. At p. 279 Adams, J. said :—

> "The Court is not called upon to determine whether or in what circumstances a mere punter may be chargeable with income tax in respect of his profits or gains, or whether a jockey, or any other person engaged in racing activities, is chargeable only if his transactions are "organised" in some way or amount to a "business" connected with his calling or are "associated" with the vocation as part and parcel thereof. These are matters which have not as yet, so far as I am aware, been decided or discussed by any appellate Court, except perhaps in South Africa. Even the decision in *Trautwein v. Federal Commissioner of Taxation,* though a decision of the High Court of Australia, is a decision of a single Judge exercising the original jurisdiction of that Court, and subject to appeal to the same Court in its appellate jurisdiction (Income Tax Assessment Act, 1922, s. 50, sub-section 8, and s. 51, sub-section 8 ; Gunn's Commonwealth Income Tax Law and Practice (3rd ed.) paras. (2154)—(2176).)Sitting in this Court, I am not prepared to accept as binding on general questions any of the decisions which have been cited. I doubt, with respect, whether *Down v. Compston,* or even *Graham v. Green,* should be followed in New Zealand ; and this doubt does not rest entirely on differences between English legislation and our own. I suspect that, in some of the decisions, undue emphasis may have been put on "organisation", or on the necessity for finding something in the nature of a "business." It may well be that the true distinction is between betting for sport or pastime and betting for the purpose of producing an income. It seems clear that gambling for sport or pastime does not produce taxable income ; but the idea that, whether betting is indulged in as a means of producing an income, the profits or gains derived therefrom are not to be taxed except under special conditions not applicable to other forms of income is not one that should be lightly accepted."

I do not think that the true distinction is between betting for sport and betting for gain. If a person is betting merely for sport that will certainly exclude the betting activities amounting to a business, vide *Walles v. Commissioner of Income Tax,* 38 N.L.R. 325. But the fact that his motive is that of gain will not suffice to render his net receipts the profits of a business. As indicated earlier, there is no such relevance between the event and the acquisition of gain that one can say that there is a profit earned by a process of production. Adams, J. however does not say the

true distinction is between betting for sport and betting for gain but betting for sport or pastime and betting for the purpose of producing an income.

Where the event does in fact produce gain as in the blocking out of land and the selling of blocks at an aggregate sum very much in excess of the purchase price, the motive of making a gain at the time of the purchase may render the transaction an adventure in the nature of trade and its proceeds taxable, vide *Ram Iswara v. Commissioner of Inland Revenue,* 65 N.L.R. 393.

Mr. Jayewardene submitted that it was only where betting activities were shown to be part of a business of a jockey or trainer or an owner of race horses that it was considered a business and that it was common ground that the bets taken by the assessee on his own horses were few and inconsiderable in comparison with bets placed by him on other horses and that it was so set out in paragraph 18 of the case stated. He also relied on a passage in Gunn's Commonwealth Income Tax Laws and Practice. That passage has been cited in 5 A.I.T.R. at p. 273 and reads :—

> "It is impossible to state any invariable rule for deciding whether or not betting winnings are assessable income. The facts of each case require examination and the decision must rest on the particular facts. It can, however, be said with truth that only where the taxpayer carries on a business or vocation directly associated with horse-racing, such as an owner, lessee, breeder, trainer, bookmaker, commission agent, or jockey, that betting has been held to be a business. In that event, the taxpayer is assessable in respect of winning bets, prize money, etc. and is entitled to a deduction of losing bets. It does not follow, however, that in every case where a taxpayer is identified with racecourse activities, such as those mentioned above, his winnings from betting are liable to tax and that his losses are deductible."

It appears to me that betting activities can be shown to be so organised and systematic as to amount to a business more readily where they are part of the activities of a jockey, trainer or

owner or horse races, as such than when they stand alone. It does not follow that in principle the nature of betting transactions are such that they cannot, taken by themselves, constitute a business. This particular point was decided in South Africa in the case of *Morrison v. Commissioner for Inland Revenue,* (1950) 2 S. A. p. 449 at 457. Schreiner, J. A. said :—

> "But it was open to Mr. Brink to argue, as he did that betting is in its nature so unlike ordinary forms of business that it falls outside the scope of the kinds of "trade" envisaged by the Income Tax Acts, and accordingly, that, however integrally they might be linked with the appellant's racing business, his betting activities could not legally be treated as a source of "gross income". What is won on a bet, he argued, is a fortuitous gain, and he instanced other examples. In so far as they are fortuitous in the sense that they are not designedly sought for and worked for by the taxpayer, it may be assumed that the receipts of the kind referred to would not be taxable, but the same result would not necessarily follow if the taxpayer obtained any such receipt by his planned efforts. Ventures to discover and retrieve supposedly buried treasure or the precious contents of some vessel, wrecked long ago upon our coasts, might well, if successful, bring the finder within reach of the Income Tax Acts."

After having referred to the cases of *Graham v. Green, Cooper v. Stubbs* and *Trautwein v. Federal Commissioner of Taxation,* he proceeded to say :—

> "I do not think that a hard and fast line can be drawn between the case of the bookmaker and that of the punter. It may be true that the system commonly employed by bookmakers is more businesslike than that ordinarily used by punters and it may be that the bookmaker's control over the odds he will give makes his activities less speculative. But an inefficient bookmaker may presumbly run risks comparable with those of a careful punter, and once it is conceded that a bookmaker may be taxed on his

> gains, it becomes difficult to exclude the systematic punter from liability on the ground of what Rowlatt, J. called the "Irrationality" of a bet."

It would appear that the balance of betting gains and losses is assessable to tax where it appears that the betting is organized and carried on systematically on business or commercial lines.

Before coming to the facts of this case it may be desirable to point out that where betting activities constitute a business the consequence is not only that gains arising from them are taxable but that equally the losses arising from them are deductible from other income. Many of the decisions deal with claims for deductions.

The assessee gave evidence. In considering his testimony it is necessary to keep in mind that in racing parlance the term "investment", "return", "profits" are used in a metaphorical sense to refer indiscriminately to the amount of any bet, to the amount of winnings from it and excess of winnings over the amount of the bet, respectively. No admission can therefore be implied from the use of such terms. Again, when a punter says he fancies a horse or that such and such a horse is his fancy, he conveys that that horse is his informed choice as the probable or likely winner.

The assessee had been a member of the Ceylon Turf Club for very many years and he took a keen interest in racing. He had been a gentleman rider. He had owned two race horses at different times.

Towards the beginning of his evidence the assessee said—

"*Q.* Have you regularly attended races ?
A. Yes all races.
Q. Races in Colombo ?
A. Yes.
Q. Where else ?
A. In India, Galle and Nuwara Eliya."

and in cross-examination he said—

"Every month I bet—practically everyday." ; though he later qualified these statements slightly there is no doubt that he assiduously attended race meetings and betted thereat.

In the course of his evidence the assessee said :

"Sometimes I study the previous form and track work of a horse. That is how I select them. My annual betting may be over a million rupees. It is not done according to whims and fancies. I take a fancy to a horse and I back it. I know its form ; I study it. Sometimes you hear from friends whether this horse is good or that is good, and you back it. Sometimes I get tips and watch the gallops. I decide which horse will come first."

Later in his evidence, the assessee said : "Generally when I place a bet I expect to win. I do not do it for the fun of it. At times we place a sentimental bet but that is not a business bet. My normal betting is a little more serious than just a casual bet."

He also said later that his normal betting was based on form.

According to his further evidence, he followed reports of racing in India and England that appeared in the newspapers. In regard to local races there were publications like the 'Racing Guide', 'Racing News', 'Trespasser Racing Guide' and different programmes. The bookmaker gave them free without payment to him since he was a regular customer. It was the normal practice for his trainer to come and tell him that such and such horse is good to be backed. Even so he normally used his own discretion, though he added, that he did not slight the opinion of the trainer. He sometimes went to the gallops before the race meet "just to find out which horse has a better chance."

The assessee had arrangements with several bookmakers to place bets on credit with them and he received a commission or rebate of between 22 per cent to 25 per cent of the amount of the bets placed by him. Once he staked an aggregate sum of Rs. 41,300 with five different bookmakers on the same horse on the same day. Explaining his procedure with the bookmaker he said that the bets were recorded on chits generally in the bookmaker's or collector's handwriting. He said further "I know when the chit is brought to me that these are the bets placed by me. I work on them. I hardly pay cash even to the collector.

I would not say 'never' but apart from one in a hundred or thousand I do not pay cash. It is done entirely on credit. I settle my account sometimes in a week and sometimes the bookmaker may be having a running account."

He has not kept an account of his winnings and losses but some years prior to the relevant period he had been advised to preserve the chits as he may be called upon to prove his earnings. He thereafter kept his betting chits in a drawer. From these chits his Accountants had, with some difficulty, prepared the accounts which he had submitted. At the relevant time he had a separate Bank account in his wife's name in which he placed all his winnings. Money credited to that account was only from race winnings. When he lost he drew money from that account and paid. He also drew from that account for the purpose of making certain investments.

The assessee was not otherwise actively occupied in any kind of position or any kind of employment. He did not even engage in any other kind of betting or any other kind of speculation of this nature. His gains from betting far exceeded his aggregate income from other sources.

It may be possible to take separately this or that act done by the assessee in relation to his betting activity and say that that is what most punters would do but his acts taken cumulatively present a different picture. A punter may go to the gallops, study form and place his bets with a bookmaker and receive his winnings, or pay his losses due on them a day or two after the race meeting. But the average punter does not place bets involving as large a sum as a million rupees a year or maintain a separate Bank account exclusively for his betting activity or have credit facilities with a number of bookmakers or have a running account with them or travel to India to attend race meetings or receive a gain of approximately four lakhs of rupees in two years.

Where the evidentiary material discloses the facts which I have set out, it is not possible for this Court to hold that there is no evidence to support a finding that the assessee's betting

activities amount to to a business. In point of fact the evidence amply supports such a finding.

The order of the Board states: "The systematic and continuous way the assessee had taken bets, the time and labour he had put into them, the facilities he had built around himself to place these bets and deposit the winnings clearly indicate that betting was a vocation and his dominant intention was to gain money."

I should myself prefer not to call betting a vocation of the assessee but rather the carrying on of a business, but substantially the finding of the Board is correct.

Section 2 of the Profits Tax Act, Chapter 243 reads:—

> "This Act applies to every person who derives any profits or income from any business, the term "business" for this purpose being deemed to include—
>
> (*a*) any trade or gainful undertaking of any nature or description whatsoever;
>
> (*b*) in the case of a registered company of which the functions consist wholly or mainly in the holding of such property or investments; and
>
> (c) the practice or pursuit or conduct of any profession, vocation, art, craft or skilled occupation of any description, with a view to earning remuneration, fee or pecuniary reward,
>
> irrespective of any break in the continuity of his business or the length of time devoted by him thereto. The profits or income derived by any person from any such business as aforesaid is hereinafter referred to as his "taxable profits or income" for the purposes of this Act."

This provision is even wider than section 6(1) (*a*) of the Income Tax Ordinance and would clearly apply to the assessee's gains from betting which clearly amounted to his carrying on a business.

There is one further matter to which I should refer. Section 6(1) (*h*) of the Income Tax Ordinance reads :—

> " income from any other source whatsoever, not including profits of a casual and non-recurring nature. "

By reason of the term of the provision—income from *any other* source—profits and income which fall under seciton 6(1) (*a*) do not fall under this provision.

I hold that :—

(*a*) winnings from betting on horse races constituting a business are taxable under the provisions of the Income Tax Ordinance and Profits Tax Act, No. 5 of 1948 ;

In view of this finding, it is not necessary in the circumstances of this case to make any finding whether winnings from bets merely as bets also would be taxable under these enactments.

(*b*) the betting on horse-races during the relevant years by the appellant-assessee constituted a business carried on by him rather than a vocation of his ;

(*c*) the bets placed by the appellant-assessee during the relevant years of assessment on horse-racing constituted a business of the appellant within the meaning of section 6(1) (*a*) of the Income Tax Ordinance, Chapter 242 ;

(*d*) as the winnings of the appellant-assessee from bets placed by him from horse-races during the relevant years constituted profits of a business and were therefore taxable under section 6 (1) (*a*), they are not taxable under the provisions of 6(1) (*h*) of the Income Tax Ordinance ;

(*e*) the winnings of the appellant-assessee from bets on horse-races during the years 1955 and 1956 constitute profits derived by the assessee from a business within the meaning of section 2 of the Profits Tax Act, No. 5 of 1948 ;

(*f*) the Board of Review has not misdirected itself in law in coming to a finding that on the evidence of the appellant-assessee led at the inquiry before the Deputy Commissioner, the appellant-assessee was carrying on a business of betting on horse-racing.

The assessee-appellant will pay to the respondent the sum of Rs. 1,050 as costs.

UDALAGAMA, J.—I agree.

SHARVANANDA, J.—I agree.

Appeal dismissed.