Case No. D55/87

Profits tax – betting wins – whether betting on horse races constituted the carrying on of a trade, profession or business – s 14 of the Inland Revenue Ordinance.

Panel: William Turnbull (chairman), Michael A Olesnicky and Yung Chu Kuen.

Date of hearing: 4 December 1987.
Date of decision: 21 January 1988.

The taxpayer, an ex-amateur jockey, derived substantial winnings from betting on horse races. He exerted considerable effort in obtaining information about horses. The Commissioner assessed him to profits tax on the basis that his activities constituted a trade or business. The taxpayer appealed.

Held:

The taxpayer was not carrying on a trade or business. Gambling can in certain circumstances constitute the carrying on of a trade or business. Here, however, the taxpayer's activities lacked the necessary degree of organization or associated activity which is required to convert a pastime or hobby into a business activity.

Appeal allowed.

Cases referred to:

Burdge v Pyne [1969] 1 WLR 364
Down v Compston [1937] 2 All ER 475
Graham v Green (1925) 9 TC 309
Income Tax Case No. 765 (1951) 19 SATC 198
Martin v FCT (1953) 5 AITR 548
Morrison v CIR (1950) 16 SATC 377

Mr Richard So Chau Chuen for the Commissioner of Inland Revenue.
Mr Wong Hin Lee for the taxpayer.

Decision:

This appeal relates to an interesting and important question of law and fact, namely, whether an individual can be assessed to Profits Tax on gains which arise from gambling activities. The Taxpayer appealed against a number of assessments levied on him for the years 1973/74 to 1978/79 inclusive for gains which the Taxpayer had made from horse racing betting which he had conducted during those years. The facts were not in dispute and can be summarised as follows:

1. Since 1971 and during the years in question the Taxpayer held various employments with various employers which included salesman, clerk, public relations and company directorships. Neither the Taxpayer nor the Inland Revenue Department were able to provide full particulars of the Taxpayer's various employments during the period from 1971.

2. The Taxpayer was fond of betting on horse racing. He was a member of the Royal Hong Kong Jockey Club and in the years in question the Taxpayer had made substantial gains from horse betting wins as follows:

Year of Assessment	Estimated Horse Racing Gains
1973/74	HK$300,000
1974/75	HK$300,000
1975/76	HK$350,000
1976/77	HK$250,000
1977/78	HK$135,127
1978/79	HK$350,000

3. The Taxpayer went to the race course for every race meeting and took with him approximately HK$5,000 each time. He used these moneys for gambling on the horses and deposited his winnings in his bank account on the day following the races.

4. The Taxpayer had started his interest in horse races as an amateur jockey in 1968 and went to Australia with some other amateur jockeys in 1969 for training. He returned to Hong Kong a few months after going to Australia because he decided that there was not much to be learnt in Australia. After his return to Hong Kong he ceased any activities as a jockey and did not own or train any race horses.

5. The Taxpayer commenced serious betting on horse races in about 1971. Prior to the 1976/77 racing season he did not keep records of his wins and losses. In 1976/77 he thought that he had lost money and decided to keep records but it would appear that his records may not have been accurate because he conceded as a fact that he had won money at the races during the season 1976/77.

6. The Taxpayer attributed his success at punting to a number of reasons which can be summarised as his experience as a jockey which enabled him to judge whether a

particular horse had been hard-ridden in a race and thereby better assess its true form; going to morning trackwork and thus being in a position to judge the day to day condition of the horses; associating with the racing fraternity and being friendly with top jockeys and trainers which allowed him to acquire tips from these informed sources; being a very close friend of one of Hong Kong's top racing tipsters whom he met every Saturday morning to discuss the day's race meeting and select the horses which they anticipated would win; reliance on his judgement when making his final selections; betting on long distance races where he selected horses which he considered to be stayers and eliminating short distance sprints which he considered to be too risky due to bad starts or obstructions which could adversely affect the performance of a horse; betting on a few races only at each particular race meeting; backing horses either out right or for a win and place as well as coupling this horse with another in the quinella; and following a jockey whom he believed was enjoying a winning period.

7. In one of the jobs which he held during the years in question he was employed in a travel service company but the real reason for being employed was to provide the owner of the travel business with racing tips based on his racing knowledge.

8. On occasions when he was successful the Taxpayer would entertain his racing associates so that he could maintain a close relationship with this circle of persons.

9. On occasions the Taxpayer would use third parties to place bets because he did not wish other people to see which horses he was backing.

10. Regardless of his skill and information, the Taxpayer accepted that luck was still the most important factor in his winning and he considered himself to be very lucky during the years in question.

11. Because the Taxpayer did not keep accurate records of his gambling activities, the gains which he made from horse racing were assessed on the basis of an assets betterment statement.

12. The Taxpayer did not operate from an office nor have any staff working for him and as mentioned above kept no complete or detailed accounting records of his racing activities.

13. The Taxpayer had no gambling activities other than betting on horses.

The question for this Board of Review to decide is whether or not on the foregoing facts the Taxpayer was correctly assessed to Profits Tax by the Commissioner on the gains which he made from betting on horses. Two questions arise. The first one is a question of law, namely, whether or not an individual can be liable to Profits Tax on winnings which derive from gambling. The second question is a question of fact, namely, whether on the facts of this case the Taxpayer was carrying on a business. Both counsel for the Taxpayer and the representative of the Commissioner were of great assistance to the

Board of Review in carefully arguing the legal merits of their respective cases. In the course of their submissions a number of decided cases and legal authorities were mentioned which included the following:

Graham v Green (1925) 9 TC 309
Down v. Compston [1937] 2 All ER 475
Australian Income Tax: Law and Practice Vol 1 paragraph 25/135 to paragraph 25/144
Stroud's Judicial Dictionary (5th Edition) pages 323 to 330
Martin v FCT (1953) 5 AITR 548
Morrison v CIR (1950) 16 SATC 377
Income Tax Case No. 765 (1951) 19 SATC 198

Counsel for the Taxpayer submitted that winning money from horse racing is not carrying on a trade profession or business within the meaning of Section 14 of the Inland Revenue Ordinance and that even if such activities could constitute the carrying on of a trade profession or business, the Taxpayer's activities in this case did not amount to such a course of conduct. He submitted that at the most all that the Taxpayer's activities showed was that he was fond of horse racing and did not have any organisation which could constitute carrying on a business. He pointed out that the Taxpayer had never owned any horses and was not a jockey. Other than being fond of racing and backing horses he had no connection with horse racing and his activities of gambling on horses could not be construed as constituting carrying on a business. He drew attention to a statement in the case of Graham v Green and said that it could be dangerous for the Commissioner to seek to tax horse racing winnings because most people who went gambling on horses lost money and did not win. He pointed out that if gambling on horses was to be held as carrying on business then losses could be deducted from what would otherwise be taxable business gains and this could be contrary to public policy.

The representative for the Commissioner submitted that the English cases should be disregarded because there was a fundamental difference between the tax law of the United Kingdom and that of Hong Kong. In Hong Kong any person carrying on business could be subject to Profits Tax and the word 'business' is very much wider than any provision in the United Kingdom tax law. The United Kingdom only charges to tax profits or income which arise from a vocation or trade or which are other annual profits or gains not charged under any other provision of the United Kingdom tax law (case VI of schedule D). The Commissioner's representative went on to rely on the Australian and South African cases which he said should be followed in Hong Kong because the provisions of Hong Kong tax law are similar to those of Australia and South Africa.

Having heard the submissions of both parties this Board of Review is of the opinion that there is no legal principle which says that gambling activities cannot constitute the carrying on of a business. However having reviewed the decided cases cited before the Board, it is clear that only in very few cases would the gambling activities of an individual comprise the carrying on of a business. There must generally be an element of skill as well

as pure chance or luck. Haphazard gambling or a mere lottery could not constitute the carrying on of a business as there would be no element of skill and it would be impossible to say on any objective test that the individual had a reasonable chance or prospect of making a profit.

However it is not sufficient simply for there to be a reasonable prospect of gaining money. In the case of gambling on horses and other similar forms of gambling the individual must also have some organisation or associated activity which is sufficient to convert a pastime, hobby or pursuit into a business activity. For example placing bets on horse races may be a legitimate part of the business of a breeder of horses or a professional horse race owner (see Burdge v Pyne [1969] 1 WLR 364). If betting on horses is not an activity which is part of another related business then it may still be possible for betting on horses to be a business but there must be some clear organisation of a business nature. For example the individual may employ other persons to assist him in his gambling business, and should keep accounting records, set aside working capital, acquire assets or equipment to be used in such business or otherwise carry on his activities in what can be generally described as a 'businesslike manner'. His gambling activities must go beyond the mere carrying on of a hobby pursuit or pastime and must have the inherent attributes of a business.

In the present case and on the facts before us we find that the Taxpayer was not carrying on a business of making money on horse racing. He had no business to which his horse race betting activities could be attributed. He was not a jockey or a trainer or a race horse owner or breeder and did not have any other associated business. He did not have any form of organisation which was 'businesslike. He did no more than many other keen and active punters who regularly attend race meetings, who study form closely, and gather their own information from various sources in the hope that they will be able to make money from horse racing.

Having decided on the facts before us that the Taxpayer was not carrying on business we accordingly find in favour of the Taxpayer and order that the six Profits Tax Assessments appealed against should be annulled.