

TAX AND THE GAMBLING MAN



There was plenty of coverage over the recent Betfair betting error but what of the tax position, asks **Julie Butler**

Essentially betting is 'tax-free' in the UK – the professional gambler is outside the scope of tax. This is confirmed in HMRC's *Business Income Manual* (BIM), para 22015.

The basic position is that betting and gambling, as such, do not constitute trading. This is not a new precedent either. Rowlatt J said in *Graham v Green* (1925) 9 TC 309: 'A bet is merely an irrational agreement that one person should pay another person on the happening of an event.'

This decision has stood the test of time. In an Australian case, *Evans v FCT* (1989) 20 ATC 4540, Hill J said: 'There has been no decision of a court in Australia nor, so far as I am aware, in the United Kingdom where it has been held that a mere punter was carrying on a business.

So is a sophisticated online gambler a 'mere punter'? An organised activity to make profits out of the gambling public will normally amount to trading.

Although over time new forms of games of chance have evolved, these principles remain the same. The taxpayer placing a spread bet is not normally carrying on a trade (see BIM 22020 for exceptions). The professional gambler is not taxable on the profits, nor does he or she receive tax relief for losses. But, the bookmaker organising the spread bet is taxable on his or her profits.

The section on betting and gambling in the HMRC manuals contains some useful guidance based on relevant cases:

- what is a bet – BIM 22016;
- the professional gambler – BIM 22017;
- organised activity – BIM 22018;
- element of existing trade – BIM 22019;
- spread betting – BIM 22020.

PROFESSIONAL PUNTERS

Is an on-line professional gambler still just operating a system by habit or are they trading? Provided that the 'pro-punter' is not carrying on



IRELAND

The Irish Tax Office does not have the same BIMs as the UK. However, there is nothing on the Irish Revenue website stating that professional gamblers are taxable in Ireland.



UK

The principles of *Down v Compston* [1937] 21TC60 and *Burdge v Pyne* [1968] 45TC320 (see BIM22019) apply equally here. To be taxable, the spread betting wins must come not merely from an opportunity

presented by a trade, they must arise from the carrying on of that trade. Whether or not a particular spread bet is taxable will depend on the terms of the contract and the economic substance of what is done.



CANADA

A recent Canadian case on the subject is *Le Blanc v The Queen* 2006 TCC 680. The case concerned two brothers who engaged in playing sports lotteries on a massive scale from their living room. They moved house so they could participate in two lottery regions and employed several people to place their bets for them. They placed CAD\$50m (£31.7m)

in high-risk bets over four years and made a profit of CAD\$5m.

The Canadian court held that, despite the fact that the brothers employed a very systematic and methodical approach to their frequent gambling, there was no reasonable prospect of profiting from their venture and, therefore, it could not be regarded as a trade. The

brothers were 'compulsive gamblers who continually tried their luck at a game of chance'.

The judge, Bowman CJ, pointed out that, if the proceeds of gambling are taxable, that would imply that losses should be deductible. The judge suggested that these matters were in the realm of parliament and not for the courts to decide.



AUSTRALIA

A recent decision by the Australian Tax Office (ATO) has cast doubt on whether the profits of spread betting are free from income tax.

Spread betting involves placing a bet with a licensed bookmaker that a stock or commodity will rise or fall in value. It does not involve the purchase of the stock or commodity but is a 'wagering contract'. The profits of spread betting (if any) are gambling winnings and are exempt from income tax.

On 12 March 2010, the ATO published *Interpretive Decision 2010/56*, in which it determined that the proceeds

of spread betting were taxable income. The ATO emphasised that, in Australia, spread betting is governed by a separate statutory regime from other gambling activities.

The ATO stated that 'transacting with financial spread betting is closer to the skill end of the chance-to-skill spectrum and the commercial end of the private/recreation-to-commercial spectrum than a bet on horse racing. The winnings tend to be rewards for skill and judgment rather than purely betting on chance.'

The taxpayer, the ATO found, was engaged in a taxable business.

an organised activity to make profits out of the gambling public, it is considered this will not amount to trading.

The horse involved in the betting error in the Christmas Hurdle on 28 December 2011 at Leopardstown was *Voler la Vedette*. The technical problem was caused by a bet that was placed by a customer trading by API or Application Programming Interface using an automated program (a bot). The APIs are known as robots, hence the use of the word bot. The odds offered by the exchanges are distorted by emotion and this can be exploited by the API. The question is whether this is a trade?

Many people consider that there are actually two types of professional gamblers – the pure gambler who still uses a system (knowledge, form, etc) and the gamblers who use bots or APIs. And for some, once the bot is introduced, it becomes a taxable trade and the professional gambler should be taxable.

However, there is no definitive tax decision and the interpretation of the rules varies across geographic jurisdictions.

FUTURE LEGISLATION

Will there be future legislation that brings gambling profits into the scope of taxation or will the bots that caused the Betfair technical problem be an area of professional gambling that parliament brings into the scope of tax?

There has been nothing to indicate that this is under review despite the advent of very sophisticated techniques to make substantial profits from gambling.

At present HMRC remains firmly of the view that those who engage purely in a gambling activity are not taxable on the profits. It would be hard to draft legislation which applies only to those who are very successful in this field, but conceivably some defined categories could be brought in to charge to tax.



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