Do gambling wins constitute taxable income for child maintenance purposes?

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Family analysis: Martin Henley, barrister at Great James Street Chambers and counsel for the appellant in Hakki, explains the issues in the case and advises practitioners to always check the detail of any Child Support Agency (CSA) assessment to ensure that non-taxable income, especially gambling income, is not included in the assessment.

Original news

Hakki v Secretary of State for Work and Pensions [2014] EWCA Civ 530, [2014] All ER (D) 05 (May)

The Upper Tribunal (Administrative Appeals Chamber) (UT) found that the claimant professional gambler was obliged to pay child support maintenance on the First-tier Tribunal's (Social Security) factual findings that he was 'gainfully employed' as a 'self-employed earner'. The claimant appealed. The Court of Appeal, Civil Division, in allowing the appeal, held that, on the facts, it could not be said that the claimant had had a sufficient organisation in his poker playing to make it amount to a trade or a business. However, it noted the Secretary of State's comment that there might be a way to compel him to make such contribution by making a 'departure direction'.

What issues did this case raise?

Are the tax and social security regimes aligned in their treatment of self-employed earners? In other words, is the definition of self-employed earner for the purposes of the child support regulations wider than that within the tax acts? In particular is a gambler whose sole means of support is the playing of poker be said to be involved in a 'trade, business, profession or vocation' for the purposes of social security and child support? (As had been found by the UT in the decision under appeal.)

If the definitions are aligned, then should the Court of Appeal follow the 89-year-old High Court authority of *Graham v Green* [1925] 2 KB 37, [1925] All ER Rep 690 or should they overturn or distinguish it? *Graham v Green* had ruled that gambling was not amenable to being a 'trade, adventure, profession or vocation' except where there was an organised seeking of emoluments such as a bookmaker or a casino type business. Its authority had never been challenged in the Court of Appeal and it was open to the court to overrule it. However, government policy for the last 89 years had been predicated on the principle that gambling per se was not taxable or subject to national insurance contributions as earnings from self-employment.

The respondent, Mrs Blair, had then sought to persuade the Court of Appeal that the degree of organisation that Mr Hakki had exhibited in his poker playing was in any event an organised seeking of emoluments. Mr Hakki and the Secretary of State for the Department for Work and Pensions (SSDWP) were of the view that on the authority of *Graham v Green* Mr Hakki's poker playing fell far short of that. This was ultimately a position with which the Court of Appeal concurred.

What is the significance of the judgment? What does it tell us about the scope of 'earnings' in the context of child support proceedings?

The original judgment of the UT had potentially some very serious and widespread unintended consequences. The judge in the UT had clearly only intended that his judgment should be confined to the system of child support and in particular the old regulations known as the MASC regulations (Child Support (Maintenance Assessments and Special Cases) Regulations 1992, SI 1992/1815).

The MASC regulations however relied for the definition of self-employed earner on the Social Security Contributions and Benefits Act 1992 (SSCBA 1992). In coming to his decision the UT judge had as a matter of statutory construction widened the meaning of 'trade, business, profession, office holder or vocation' in SSCBA 1992, s 122 and by so doing had departed from *Graham v Green* and widened the meaning of 'gainful employment'.

Had the appeal failed then there was a real risk that potentially millions of gamblers might have been sucked into having to mandatorily pay class 2 national insurance contributions (NICs) as self-employed earners and as a consequence those same gamblers would then have become entitled to pension and other social security benefits on their gambling. It was contended by the SSDWP that there could potentially be a huge resources requirement in the event that they had to enforce a new national insurance regime.

Further, if the Court of Appeal overturned *Graham v Green* in its entirety, which they had the power to do, then all gambling winnings could have been taxable as earnings from self-employment and all gambling losses could be capable of offset against other non-gambling earnings from self-employment. Given that most punters lose long term and the winners are bookmakers and casinos, whose earnings are already taxed the potential loss to the exchequer could have been many millions and possibly even billions of pounds.

It is therefore unsurprising that, while not a party to the proceedings, HMRC's officers were present at the hearing advising counsel for the SSDWP.

Although it was not stated in court, nor did it form any part of the SSDWP's case, the government may well have had to legislate urgently in the event of the appeal failing.

With regard to the scope of 'earnings' in the child support context the status quo has been maintained. Earnings means the same in a tax context as it does in a social security context. Therefore the general rule of thumb is that if it is not taxable then it is not income for the purposes of child support. However, there are some exceptions. As the Court of Appeal stated in the judgment of Longmore LJ there are provisions for the making of assessments based on the disparity between income and lifestyle.

These apart though, it is as we were.

What are the implications for lawyers and their clients? What should they do next?

Practitioners advising should always check the detail of any CSA assessment and ensure that non-taxable income, especially gambling income, is not included in the assessment.

This also goes beyond CSA assessments and applies to any contributions payable or benefits due under SSCBA 1992. Income from gambling unless in the course of work as a bookmaker or gambling club or casino, whether online or not is not income from gainful employment and should not form part of any assessment or benefit.

It is our understanding that there had been a decision, based on the *Hakki* case, relating to a defendant who had to pay class 2 NICs on his gambling income. That defendant had failed to appeal to the Court of Appeal even though he had the permission of the UT to do so. So practitioners must be aware that their clients may have been wrongly assessed in any of the areas covered by SSCBA 1992.

How does this decision fit in with other developments in this area of law? What are your predictions for future developments?

The judgment preserves the status quo and finally settles that *Graham v Green* is good law and that the income tax and national insurance positions are the same with regard to SSCBA 1992.

It must be remembered that the CSA system is one based upon income and that it is designed so that the absent parent contributes to the upkeep of their child from that income. There are of course other provisions such as the Children Act 1989, Sch 1 were an absent parent's capital position can be taken into account when ordering maintenance for the benefit of a child.

Any further observations you wish to add?

Mr Hakki has perhaps unfairly been represented as someone that has refused to help support his children. It should be borne in mind that his children are now in their twenties and that because of the time this has taken to come to court the Court of Appeal's decision is essentially dealing with an historic set of circumstances.

Mr Hakki has maintained that he had always supported his children and that this informal contribution has never been recognised.

Martin Henley principally practices in the area of administrative and public law with an emphasis on extradition. He appears regularly in the High Court on extradition appeals and has many reported cases. Apart from extradition matters Martin frequently appears in the family and criminal courts, especially where there are allegations involving harm to children

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