Federal Court Cour fédérale

Date: 20130829

Docket: T-987-12

Citation: 2013 FC 916

Ottawa, Ontario, August 29, 2013

PRESENT: The Honourable Mr. Justice Russell

BETWEEN:

PETER RADONJIC

Applicant

and

CANADA REVENUE AGENCY

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

INTRODUCTION

[1] This is an application for judicial review pursuant to subsection 18.1 of the *Federal Courts Act*, RSC, 1985, F-7 of a decision [Decision] of the Canada Revenue Agency [CRA] dated 16 April 2012 to deny the Applicant's T1 Adjustment Requests for the 2004 to 2007 taxation years.

BACKGROUND

[2] The Applicant is a 37-year-old man living in Coquitlam, British Columbia. He is a lifelong game and sport player, and in mid-2003 took up playing poker.

[3] The Applicant began playing online poker, and in early 2004 began making significant winnings. In the spring of 2004, when filing his 2003 tax return, the Applicant asked his accountant whether or not his online poker winnings were taxable or not.

[4] The accountant did some research, and provided the Applicant with CRA's Interpretation Bulletin IT-334R2 titled "Miscellaneous Receipts". The relevant portion provides as follows:

> Gambling Profits
>
> 10. Profits derived from bookmaking or from the operation of any gambling establishment (carried on legally or otherwise) constitute income from a business. In addition, an individual may be subject to tax on income derived from gambling itself, if the gambling activities constitute carrying on the business of gambling; see the decision of *MNR v. Morden*, (1961) CTC 484, 61 DTC 1266 (Ex. Ct.). The issue of whether or not an individual's activities are such that he or she can be considered to be carrying on a gambling business is a question of fact that can be determined only by an examination of all of the circumstances and the taxpayer's entire course of conduct. Although no one factor may be conclusive, the following criteria should be considered in making the determination:
>
> (a) the degree of organization that is present in the pursuit of this activity by the taxpayer,
>
> (b) the existence of special knowledge or inside information that enables the taxpayer to reduce the element of chance,
>
> (c) the taxpayer's intention to gamble for pleasure as compared with any intention to gamble for profit as a means of gaining a livelihood, and

> (d) the extent of the taxpayer's gambling activities, including the number and frequency of bets.
>
> It is clear from various decisions of the courts that earnings from illegal operations or illicit businesses, such as illegal gambling and fraudulent business schemes, are not exempt from tax. (See for example, the decisions in *The Queen v. Poynton*, (1972) CTC 411, 72 DTC 6329 (Ont. C.A.) and *MNR v. Eldridge*, (1964) CTC 545, 64 DTC 5338 (Ex. Ct.).)

[5] The Applicant understood IT-334R2 to mean that as long as he was working at a conventional job his gambling winnings and losses were not taxable. At this time, the Applicant was doing research on a contract basis for the federal government.

[6] In May, 2004, the Applicant stopping accepting contract work as he thought he could make money playing online poker. When filing his tax return for 2004, he decided that to be "safe" he would include his gambling winnings as income on his tax return. The Applicant thought that it would be better to pay taxes on the money right away rather than risk facing a large tax bill in the future should the CRA decide his winnings were taxable. Should it become clear in the future that his winnings were not taxable he would be able to file to get his money back. The Applicant also wanted to have declared income so that he could apply for a mortgage.

[7] The Applicant continued to declare his poker winnings for the years 2004, 2005, 2006 and 2007. After discussion with other poker players, the Applicant became aware that CRA Interpretation Bulletins are not legally binding and that court judgments are the binding legal authorities on the taxability of gambling winnings. In the Applicant's view, the jurisprudence states that poker winnings are not taxable, and so he filed Adjustments to the CRA for the years 2004 to 2007, requesting that the income tax he had paid be returned to him.

[8] The Applicant was audited by the CRA in spring, 2011. On 8 July 2011, the CRA wrote to the Applicant saying that it intended to deny his adjustment requests (Exhibit 7, Applicant's Record). On 8 August 2011, the Applicant replied, explaining his personal background and his view that the case law suggests that gambling winnings from poker are not taxable (Exhibit 8, Applicant's Record).

[9] On 6 October 2011, the CRA wrote to the Applicant maintaining its position (Exhibit 9, Applicant's Record). On 5 November 2011, the Applicant wrote to the Director, Tax Services, requesting a second review (Exhibit 10, Applicant's Record).

[10] On 16 April 2012, the CRA maintained its position in denying the Applicant's adjustment requests.

DECISION UNDER REVIEW

[11] The Decision under review is the letter from the CRA dated 16 April 2012, signed by the Assistant Director, Audit Division (Director).

[12] In the letter, the Director explains that the Minister does not always appeal a court decision if the facts are unique and it is not seen as precedent setting. Section 18.28 of the *Tax Court of Canada Act*, RSC 1985, c T-2, also states that lower dollar amount decisions have no precedential value in any other appeal.

[13] The Director explains that whether or not a taxpayer is running a business is a question of fact that must be determined in each individual case. In addition, each taxation year stands on its own. Relevant factors in determining if a taxpayer is running a business include hours spent, the

degree of personal expertise and overall commitment. In some of the cases relied upon by the Applicant, the Court concludes that the taxpayer was not involved in a business, but it does not automatically flow that all winnings from gambling are not taxable.

[14] The Director points out that the Applicant voluntarily reported to the CRA that he was engaged in a business and that he earned income from it. Nothing has come to the Minister's attention to suggest that this was incorrect, and the Applicant also advised his bank that he was a professional gambler.

[15] In conclusion, the Director states that the CRA still believes that during the years 2004 through 2007 the Applicant was involved in a gambling profession or business, and that his winnings were taxable income. Thus, there would be no adjustments of the Applicant's income for these years.

ISSUES

[16] The Applicant raises the following issue:

a) Was the Minister's decision to consider the Applicant's poker winnings "taxable income" reasonable?

STANDARD OF REVIEW

[17] The Supreme Court of Canada in *Dunsmuir v New Brunswick*, 2008 SCC 9 held that a standard of review analysis need not be conducted in every instance. Instead, where the standard of review applicable to a particular question before the court is well-settled by past jurisprudence, the

reviewing court may adopt that standard of review. Only where this search proves fruitless must the reviewing court undertake a consideration of the four factors comprising the standard of review analysis.

[18] Subsection 152(4.2) of *Income Tax Act*, RSC 1985, c 1 [ITA] is the section that allows the Minister to conduct a reassessment outside of the normal 3-year period, but within ten years of the taxation years in question. As the Respondent points out, the Minister is granted a broad discretion under this provision, and the standard of review applicable to the Decision is reasonableness (*Caine v Canada Revenue Agency*, 2011 FC 11; *Hoffman v Canada*, 2010 FCA 310).

[19] When reviewing a decision on the standard of reasonableness, the analysis will be concerned with "the existence of justification, transparency and intelligibility within the decision-making process [and also with] whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law." See *Dunsmuir*, above, at paragraph 47, and *Canada (Minister of Citizenship and Immigration) v Khosa*, 2009 SCC 12 at paragraph 59. Put another way, the Court should intervene only if the Decision was unreasonable in the sense that it falls outside the "range of possible, acceptable outcomes which are defensible in respect of the facts and law."

STATUTORY PROVISIONS

[20] The following provisions of the ITA are applicable:

Income	**Revenu**
9. (1) Subject to this Part, a taxpayer's income for a	**9.** (1) Sous réserve des autres dispositions de la présente

taxation year from a business or property is the taxpayer's profit from that business or property for the year.

partie, le revenu qu'un contribuable tire d'une entreprise ou d'un bien pour une année d'imposition est le bénéfice qu'il en tire pour cette année.

[…]

[…]

Reassessment with taxpayer's consent

Nouvelle cotisation et nouvelle détermination

152 (4.2) Notwithstanding subsections (4), (4.1) and (5), for the purpose of determining, at any time after the end of the normal reassessment period of a taxpayer who is an individual (other than a trust) or a testamentary trust in respect of a taxation year, the amount of any refund to which the taxpayer is entitled at that time for the year, or a reduction of an amount payable under this Part by the taxpayer for the year, the Minister may, if the taxpayer makes an application for that determination on or before the day that is ten calendar years after the end of that taxation year,

152 (4.2) Malgré les paragraphes (4), (4.1) et (5), pour déterminer, à un moment donné après la fin de la période normale de nouvelle cotisation applicable à un contribuable — particulier, autre qu'une fiducie, ou fiducie testamentaire — pour une année d'imposition le remboursement auquel le contribuable a droit à ce moment pour l'année ou la réduction d'un montant payable par le contribuable pour l'année en vertu de la présente partie, le ministre peut, si le contribuable demande pareille détermination au plus tard le jour qui suit de dix années civiles la fin de cette année d'imposition, à la fois :

(a) reassess tax, interest or penalties payable under this Part by the taxpayer in respect of that year; and

a) établir de nouvelles cotisations concernant l'impôt, les intérêts ou les pénalités payables par le contribuable pour l'année en vertu de la présente partie;

(b) redetermine the amount, if any, deemed by subsection 120(2) or (2.2), 122.5(3),

b) déterminer de nouveau l'impôt qui est réputé, par les paragraphes 120(2) ou (2.2),

122.51(2), 122.7(2) or (3), 127.1(1), 127.41(3) or 210.2(3) or (4) to be paid on account of the taxpayer's tax payable under this Part for the year or deemed by subsection 122.61(1) to be an overpayment on account of the taxpayer's liability under this Part for the year.	122.5(3), 122.51(2), 122.7(2) ou (3), 127.1(1), 127.41(3) ou 210.2(3) ou (4), avoir été payé au titre de l'impôt payable par le contribuable en vertu de la présente partie pour l'année ou qui est réputé, par le paragraphe 122.61(1), être un paiement en trop au titre des sommes dont le contribuable est redevable en vertu de la présente partie pour l'année.

ARGUMENTS

The Applicant

[21] The Applicant says that he is essentially being punished for being a responsible citizen and for having faith in the system.

[22] He points out that in the context of online poker, the entity acting in a business-like manner is the business that is running the games for the players. The Applicant primarily played "Texas Hold 'Em", where two or more players play against each other. What one player wins the other player(s) must lose. From the pot of money won, the business running the game [House] collects a specified amount. This is how the House generates its revenue – the winner takes the pot minus the fee taken by the House.

[23] Since the fee taken by the House ensures the House a "reasonable expectation of profit," there can be no "reasonable expectation of profit" for the players, as this set-up guarantees that the players lose money collectively. Thus, it is the House, not the players, that is acting in a "business-

like manner." The Minister cannot wait to see the outcome of the game, and then determine that the winner was acting in a "business-like manner" – this has been recognized by the Courts on multiple occasions.

[24] The Applicant submits that there is no case law that supports the CRA's position. In fact, professional gambling has been held not to constitute a business venture in cases much more extreme than the Applicant's. For example, in *Leblanc v Canada*, 2006 TCC 680 [*Leblanc*], the individual made millions of dollars gambling over several taxation years with a clear scheme for profit-making, including hiring 15 helpers and negotiating business deals with retailers.

[25] Serious poker players have also been denied the deduction of losses from poker playing. In the decision of *Cohen v Canada*, 2011 TCC 262 [*Cohen*], the facts of which are very similar to this case, the CRA took the opposite position it is taking in this case in order to deny declared expenses, arguing that an online poker player is an amateur. The case law, when viewed as a whole, establishes that gamblers are not considered to be pursuing a "business."

[26] The Applicant says that the CRA has now taken a contradictory position, and has put forward illogical arguments. The Minister says that the Applicant had a "system" to win at poker, yet does not elaborate on what the "system" was or how this supposed "system" guaranteed that the Applicant would win. There can be no "system" in poker without insider knowledge, as an opponent is always free to take whatever action they want in response to a player attempting to apply a system. The CRA is taking the position that "hindsight is 20/20," and this sort of results-

orientated approach has already been dismissed by Chief Justice Donald Bowman at paragraph 42 of *Leblanc*:

> I shall deal with the last point first. If I understand it correctly it is this: since you won it proves you must have had a system and therefore a business. If you had lost it would have proved you had no system and therefore no business and you could not have deducted your losses. This contention is about as classic an exposition as I have ever seen of the logical fallacy *post hoc ergo propter hoc*. It is true, they won, but to say they won because they had a system has no basis in the evidence at all. They won in spite of having no system. If one is looking for a pattern it is that they bet massively and recklessly and in those games where they could, they bet on long shots. Certainly it meant that if they won they won big, but the converse is that if they lost they lost big and given the astronomical odds against winning, their chances of losing were far greater than their chances of winning.

[27] This point was reiterated in *Eugène Bélec v Her Majesty the Queen*, (1994) 95 DTC 121:

> It would be equally unacceptable to permit the Minister to disallow the deduction for losses at the beginning of a business's activities on the assumption that there was no reasonable expectation of profit, and then, after the business succeeded, to demand part of the profits as taxes by saying to the taxpayer 'The fact that you lost money when you began the business proves that you did not have a reasonable expectation of profit, but as soon as you earn some money, it proves that you have now such an expectation.

[28] The Minister said that the Applicant's records were evidence that he was acting in a business-like manner, and that he had to produce records to prove that the money he won actually came from gambling and not a taxable source. This catch-22 was elaborated on by Ben Alarie in "The Taxation of Winnings from Poker and Other Gambling Activities in Canada," *Canadian Tax Journal*, (2011) 59:4 at 747, in an analysis of *Alex Markowitz v Minister of National Revenue*, (1964) 64 DTC 397, where a gambler had to prove his winnings came from gambling and not a taxable source:

> …It is possible, though speculative, that the Tax Appeal Board was not fond of the form of reasoning used by the tax authorities—namely, that in the absence of detailed records you lose, because you cannot rebut the presumption of a taxable source; and in the presence of detailed records you lose, because you were so well organized that your activities must be regarded as amounting to a business.

[29] In addition to taking a position that is illogical, the CRA's position is contrary to its own documents and records. For example, in the letter to the Applicant from the CRA dated 3 May 2011, the Applicant is instructed to gather all relevant documents for an audit. The letter lists 24 different types of documents that a business might produce, and states that the list "should not be considered exhaustive." The Applicant's gambling as was produced documents in only about 5 of the categories, most of which were personal documents such as "personal banking records," "purchase documents for real estate," and "credit card statements." The other categories which captured the Applicant's gambling were broad, catch-all categories such as "the representative's working documents" and "other documents used in producing financial statements." The Applicant points out that his gambling activities did not produce any documents that the CRA itself would put in any of the 19 other categories of business records produced by typical businesses.

[30] The CRA also stated in its own publication, *Income Tax Technical News*, No 41, 23 December 2009, that "While the pursuit of profit test is meaningful in other cases, it is not a meaningful test to apply to a gambling activity. Gambling is anomalous because no one gambles for any reason other than in pursuit of profit." It goes on to say:

> Usually the frequency and systematic nature of an activity would be indicative of a "business." The traditional common-law definition of business is "anything which occupies the time and attention and labour of a man for the purpose of profit."

> "Such a definition would usually be unexceptionable when one is talking about a commercial activity. If applied literally and mechanically it would include the activities of a person who consistently and regularly placed bets on horses, or played the lotteries or the gaming tables. It would mean that the gambling activities in every case that I have cited would be a business, yet we know that this is not so. Gambling-even regular, frequent and systematic gambling-is something that by its nature is not generally regarded as a commercial activity except under very exceptional circumstances."
>
> There are some exceptional cases, which are noted in *Leblanc*, where gambling activities have been held to be taxable; however, these relate to taxpayers who applied inside information, knowledge and skill to their activities (for example, in *Luprypa v. The Queen*, a pool player who in cold sobriety would challenge inebriated pool players to a game of pool was held to be taxable on his winnings) and can therefore be clearly distinguished from the facts in *Leblanc*.

[31] Notwithstanding the foregoing, the CRA said in the letter dated 8 July 2011 that the Applicant was acting in a business-like manner because he was gambling in "pursuit of profit and [that] was not a personal endeavour." The Applicant submits that the CRA contradicted itself by suggesting (with no evidentiary support other than the fact that the Applicant was winning at gambling) that the Applicant had a "system" and therefore his winnings were taxable income, when its own publication says that even "systematic gambling" is not generally regarded as a commercial activity.

[32] Furthermore, the Applicant states that the CRA made numerous incorrect or false statements throughout the process, including the following statements of the CRA auditor, Mr. Truong Cao in the letter to the Applicant dated 8 July 2011 (Respondent's Record, pages 44-46):

- Mr. Cao noted: "You stated you won 55% of the time, which showed that there is a reasonable expectation of winning more than losing or to profit at the end of the

day." The Applicant submits that this is a logical fallacy, and that this statement and statistic is irrelevant because measuring winning and losing in this manner is not meaningful when wins and losses vary in monetary size.

- Mr. Cao noted: "You played online poker at your home office using multiple screens (up to 10 monitors) at once, which demonstrated a systemic way of increasing your poker winnings and minimizing the risk of losses." The Applicant states that he was simply trying to explain that it was possible to play multiple tables of virtual poker simultaneously, but that he did not actually sit at a desk with ten monitors on it – this statement demonstrates a complete misunderstanding of the situation.
- Mr. Cao noted: "The Applicant attended a seminar on the taxation of poker winnings." The Applicant says that this is completely untrue, and he never attended such a seminar.
- Mr. Cao noted: "Furthermore, you even set-up a paypal account in order to receive your winning paid out [*sic*]." The Applicant points out that this online set-up is required before one can even start gambling online, and that every single person participating in online gambling requires some kind of account similar to paypal in order to access real money.

[33] The CRA suggests in its audit of the Applicant (Respondent's Record, pages 59-63) that the facts of this case resemble those in *Luprypa v Canada*, [1997] TCJ No 469 [*Luprypa*], where a billiards player would play pool against drunken people for money, while ignoring the *Cohen* decision which explicitly considered whether the winnings of an online poker player were taxable. It

is disingenuous for the CRA to take this position, and it is clear evidence that the Decision is unreasonable.

[34] In conclusion, the Applicant reiterates that when it comes to online gambling, the only party acting in a business-like manner is the House. The CRA has contradicted itself, and demonstrated a complete misunderstanding of the case law. The Decision is unreasonable, and the Applicant requests that the CRA accept his adjustment requests.

The Respondent

[35] The Respondent submits that the Minister's decision-making process was reasonable, and that all of the Applicant's submissions were considered. The decision was in the realm of reasonable outcomes; whether an individual is involved in a business is a case-by-case determination, based on the specific facts of each case (*Stewart v Canada*, 2002 SCC 46 [*Stewart*]).

[36] It is not a rule of tax law that gambling income is not taxable. Gambling can be a business if it is undertaken in a sufficiently commercial manner. As the Supreme Court of Canada explained in paragraphs 54-55 of *Stewart*, the determination of whether a source of income comes from a business involves a consideration of the following factors:

- The profit and loss experienced in past years;
- The taxpayer's training;
- The taxpayer's intended course of action; and
- The capability of the venture to show a profit.

[37] The Respondent submits that the Minister considered the above factors in making the Decision, and that the Applicant's record shows no evidence of a failure by the Minister to observe any principles of procedural fairness. Nor does the evidence show that the Minister based the Decision on irrelevant facts or erred in law, or failed to follow the CRA's procedural guidelines.

[38] The Respondent asserts that the Applicant is suggesting that it is the taxability of his poker income that is the issue in this proceeding; however, the issue before this Court is actually whether the Minister's decision not to adjust the returns was reasonable.

[39] The jurisprudence cited by the Applicant can be distinguished on the facts of this case. In particular, in *Cohen*, the Court held that the taxpayer did not conduct his venture in such a manner to constitute a business because:

- He was a lawyer in a law firm, which was his main source of income;
- He did not make a profit and did not win most of the time;
- He was not calculated or disciplined; and
- He failed to manage his risks and abandoned his alleged gambling strategy after three months, and the whole venture after one year.

[40] The Respondent submits that the present case is more similar to the decision in *Luprypa*, where it was determined that the applicant's activities constituted a taxable source of income. The circumstances in *Luprypa* included:

- The applicant carefully managed the risks inherent in gambling;

- The applicant was a skilled pool player;
- The applicant played pool on a regular basis;
- The applicant intentionally played against inebriated opponents;
- The applicant won most of the time he played;
- The applicant was calculated and disciplined in his approach to gambling; and
- The applicant's gambling activities were his primary source of income.

[41] The Respondent points out that the Applicant admits that he claimed expenses against his poker income, that it was his only source of income in some years, and that he used his poker winnings to qualify for and secure a mortgage on his home. The frequency and systematic nature in which the Applicant played poker, as evidenced by his affidavit, indicates that his predominant intention was to make a profit from the activity, which was carried out in a business-like manner.

[42] Although the Applicant asserts that many of the facts relied on by the Minister were incorrect or false, in the absence of cross-examination, the evidence of Ms. Ralla is uncontested. The Applicant is asking this Court to reweigh the evidence, which the Court cannot do on a judicial review application.

ANALYSIS

[43] The material facts in this case are not significantly in dispute and the parties agree on the principles of judicial review that the Court should apply. The disagreement is over the result when the law is applied to the facts.

[44] Gambling cases can be difficult to assess, but the jurisprudence is clear that whether an individual is involved in a business depends upon the specific facts of each case and there is no authority or principle which says that the fruits of gambling cannot be taxable. It all depends in each case upon whether the gambling is conducted in a sufficiently commercial manner, and that assessment requires an examination of a wide range of factors, such as occurred in this case. See *Stewart v Canada*, [2002] 2 SCR 645, 2002 SCC 46 at paragraph 52; *Cohen*, above; and *Belawski v Canada (Minister of Natural Revenue)*, 1954 CarswellNat 152, 11 Tax ABC 299 (TAB) at paragraph 3.

[45] The scope and nature of relief afforded by subsection 152(4.2) of the Act was comprehensively analyzed by the Federal Court of Appeal in *Canada (Attorney General) v Abraham*, 2012 FCA 266 at paragraphs 26 to 29:

> Subsection 152(4.2) of the *Income Tax Act* does not give the respondents an entitlement to relief. Instead, it only gives them a right to ask the Minister to exercise his discretion to reassess after the expiration of the normal reassessment period.
>
> It must be recalled that under subsection 152(8) of the *Income Tax Act*, in the absence of a reassessment following a timely objection or a successful appeal, an assessment is final and binding. Later, the taxpayer may discover an error in the assessment, but it is too late - the taxpayer has no entitlement to have the error corrected. Rather, recourse is to be had under subsection 152(4.2) of the *Income Tax Act* - a request, not for an entitlement, but for an exercise of discretion. There is nothing in subsection 152(4.2) that requires the Minister to exercise his discretion in favour of the taxpayer if the taxpayer would be entitled to a tax benefit if he or she claimed within the regular reassessment period. In the words of this Court in *Lanno v. Canada (Customs and Revenue Agency)*, 2005 FCA 153 at paragraph 6, "[t]he granting of relief is discretionary, and cannot be claimed as of right."

> In *Armstrong v. Canada*, 2006 FCA 119 at paragraph 29, this Court has held that the discretionary assessment of the Minister under subsection 152(4.2) is a broad one - whether a reassessment is warranted or appropriate in the circumstances.
>
> Parsing the subsection into two parts, a legal part and a discretionary part, as the respondents urge transforms the decision under subsection 152(4.2) from a single one of broad discretion into a two-part decision, one of legal entitlement and one of discretion. That is contrary to the above analysis and the thrust of this Court's decisions in *Armstrong* and *Lanno*.

[46] In the present case, the Applicant says that the Decision of the Minister denying his request to amend his 2004, 2005, 2006 and 2007 taxation years to remove the poker earnings that he had himself reported as income is unreasonable for a variety of reasons. These can be summarized as follows:

a. The Minister got some of the facts wrong;

b. The Minister relied upon logical fallacies that have been examined and rejected by the courts in previous cases;

c. The Minister did not understand how on-line poker is played;

d. The Minister was inconsistent with the result in the *Cohen* case;

e. The Minister has made an inappropriate analogy between the Applicant's situation and the *Luprypa* case;

f. The Minister pre-judged the situation by deciding that his winnings from poker were taxable, and then looked for ways to justify this decision;

g. The Minister relied upon irrelevant and extraneous considerations such as the Applicant's use of his winnings to support a mortgage and his setting up a payment system;

h. The Minister overlooked the fact that the Applicant's record keeping was not done to support the business, but to ensure he could prove the source of the money he won from playing poker;

i. The Minister fails to explain what system the Applicant had set up and was using to play poker;

j. The Minister failed to acknowledge and take into account that all gamblers intend to minimize losses and to maximize winnings;

k. There was nothing exceptional in the Applicant's case that would set him apart from the usual amateur poker player who is engaged in a personal endeavour and not a business.

[47] The Applicant's choice to represent himself before me of the judicial review hearing placed him at no disadvantage. He is highly articulate, well-organized and well-versed in the jurisprudence applicable to his case.

[48] Having reviewed the record submitted with this application and having heard the parties, I conclude that the Minister fully considered all of the Applicant's submissions and that there is no evidence of procedural unfairness or bad faith on the part of the Minister. The Minister communicated her proposals to the Applicant before making the Decision, offering him the opportunity to present further information, which was considered before coming to the final Decision. The Decision was made in good faith and was communicated to the Applicant in an intelligible and transparent manner. The sole issue before me is whether the Applicant has established that the Minister's decision under subsection 152(4.2) of the Act not to adjust his returns

for 2004, 2005, 2006 and 2007 was an unreasonable exercise of her discretion that falls outside of the range posited in paragraph 47 of *Dunsmuir*.

[49] The Minister's Decision is based upon a combination of factors. The record shows that there was no one factor that was decisive and that it was a combination of all of the facts that led to the conclusion the Applicant had been running a business for the taxation years in question. If I examine and assess all of the factors at play in this case, I might well agree with the Applicant that, in my opinion, he was not running a business at the material times and was engaged in a personal endeavour. However, that is not the role of the reviewing Court. In order to intervene at this stage, I must conclude that the Minister's Decision, when read as a whole, lacks justification, transparency and intelligibility, or falls outside the range of possible, acceptable outcomes which are defensible in respect of the facts and law.

[50] I recognize that it was the Applicant who first declared his poker winnings to be taxable income, and he paid tax on them and claimed deductions. He now says that CRA should not have agreed with him back in 2004, 2005, 2006 and 2007. Had the Applicant made an appeal to the Tax Court he might have succeeded. As the Federal Court of Appeal pointed out in *Abraham*, above, he now has "no entitlement to have the error corrected." Recourse under subsection 152(4.2) of the Act is a request for an exercise of discretion and there is "nothing in subsection 152 (4.2) that requires the Minister to exercise [her] discretion in favour of the taxpayer if the taxpayer would be entitled to a tax benefit if he or she claimed within the regular re-assessment period."

[51] Notwithstanding these caveats, upon reviewing the record as a whole, I have to conclude that the Applicant has made his case. The Minister's exercise of her discretion under subsection 152(4.2) of the Act in this case lacks intelligibility and justification and, in my view, falls outside the range of possible, acceptable outcomes which are defensible in respect of the facts and law.

[52] I say this for the following reasons:

(a) The Minister in this case relied upon the fact of winning and, in effect, conducted the kind of retrospective assessment warned against by Justice Bowman in *Leblanc*, above, as part of the assessment of reasonable expectation of profit;

(b) The Minister concludes that the Applicant had a "system" but does not provide any meaningful explanation of what this system might be. It looks as though the Applicant's simply playing online poker on his computer on an intense and regular basis over an extended period of time is equated with a system. This is bolstered by the *Leblanc* fallacy that, because he happened to win more than he lost during the three years in question, he must have had a system. I see no evidence of the Applicant applying a system in a way that would make this conclusion by the Minister intelligible or reasonable.

(c) The Minister's reliance upon *Luprypa*, above, is misplaced and unreasonable. I see no analogy between a skilful pool player who systematically applied his skills to make money from inebriated opponents and anything the Applicant did in this case where, essentially, his winnings were dependent upon chance, even though he had studied, practised and improved his skills in a way that most amateur poker players

do. Everyone who competes in online poker wants to win and will attempt to narrow the odds in their favour in any way they can. But this does not mean they have devised a system if they do win; chance remains the predominant factor in whether they win or lose, as it did on the facts of this case;

(d) The method of payment used was no indicator of a "system" or a reasonable expectation of profits. Everyone who wants to pay has to set up some kind of payment system, so this cannot be an indication of running a business. Paypal accounts are used in a variety of contexts where payment is required online;

(e) The Applicant's cutting back on other work and income while he won at poker is also no indicator of a system or running a business with a reasonable expectation of profit. A large gambling win could result in the winner quitting work entirely, but that would not mean he or she had been running a business. The luxury of being able to work less is one of the fruits of successful gambling, just as having to work more may be one of the results of unsuccessful gambling. Chance dictates the outcome in either case;

(f) The use of winnings to finance a mortgage is no indication of running a business. Winnings can be used in a constructive way. The gambler is not obliged to play until he or she loses, and the use of winnings in this case was no indicator of a system or a business that was being run with a reasonable expectation of profit;

(g) There is no indication that the monitors or other equipment which the Applicant used to gamble in this case were anything special or that the Applicant had made capital investments for the purpose of running a business or earning a profit;

(h) The Applicant's record keeping was minimal and entirely consistent with the need to prove the source of funds for tax purposes. They were not business records in any meaningful way, and did not even correlate to CRA's own criteria.

[53] There are other points of concern but, generally speaking, I think this is enough to conclude that there was nothing in the Applicant's case to set him apart from the usual enthusiastic and ever-hopeful poker player engaged in a personal endeavour. The factors relied upon by the Minister to conclude otherwise render the Decision unreasonable within the meaning of paragraph 47 of *Dunsmuir*.

JUDGMENT

THIS COURT'S JUDGMENT is that

1. The application is granted. The Decision is quashed and set aside and returned for reconsideration in accordance with these Reasons.

2. The Respondent shall pay the Applicant's costs in this application in the amount of $1,550.00 to cover the cost of tax advice, Court fees, photocopying and income loss to be at the hearing, together with post-judgment interest until paid.

"James Russell"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-987-12
STYLE OF CAUSE:	PETER RADONJIC and CANADA REVENUE AGENCY
PLACE OF HEARING:	Vancouver, British Columbia
DATE OF HEARING:	July 8, 2013
REASONS FOR JUDGMENT AND JUDGMENT:	RUSSELL J.
DATED:	August 29, 2013

APPEARANCES:

Peter Radonjic	FOR THE APPLICANT (ON HIS OWN BEHALF)
Zachary Froese Pavanjit Mahil Pandher	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Peter Radonjic Coquitlam, British Columbia	FOR THE APPLICANT (ON HIS OWN BEHALF)
William F. Pentney Deputy Attorney General of Canada Vancouver, British Columbia	FOR THE RESPONDENT