

COMMISSIONER v. GROETZINGER  
SUPREME COURT OF THE UNITED  
STATES  
480 U.S. 23  
February 24, 1987, Decided

JUSTICE BLACKMUN delivered the opinion of the Court. **The issue in this case is whether a full-time gambler who makes wagers solely for his own account is engaged in a "trade or business," within the meaning of §§ 162(a) and 62(1) of the Internal Revenue Code of 1954, [\*\*\*\*].**

Respondent Robert P. Groetzinger had worked for 20 years in sales and market research for an Illinois manufacturer when his position was terminated in February 1978. **During the remainder of that year, respondent busied himself with parimutuel wagering, primarily on greyhound races. He gambled at tracks in Florida and Colorado.** He went to the track 6 days a week for 48 weeks in 1978. He spent a substantial amount of time studying racing forms, programs, and other materials. **He devoted from 60 to 80 hours each week to these gambling-related endeavors.** He never placed bets on behalf of any other person, or sold tips, or collected commissions for placing bets, or functioned as a bookmaker. **He gambled solely for his own account. He had no other profession or type of employment.**<sup>1</sup>

**Respondent kept a detailed accounting of his wagers and every day noted his winnings and losses in a record book. In 1978, he had gross winnings of \$70,000, but he bet \$72,032; he thus realized a net gambling loss for the year of \$2,032.**

Respondent received \$6,498 in income from other sources in 1978. This came from

<sup>1</sup> The Tax Court put it this way: "It is not disputed that petitioner during 1978 was engaged fulltime in parimutuel wagering on dog races, had no other employment during that period, gambled solely for his own account, and devoted an extraordinary amount of time and effort to his gambling with a view to earning a living from such activity." 82 T. C. 793, 795 (1984).

interest, dividends, capital gains, and salary earned before his job was terminated.

On the federal income tax return he filed for the calendar year 1978 respondent reported as income only the \$6,498 realized from nongambling sources. He did not report any gambling winnings or deduct any gambling losses. [\*\*\*\*] He did not itemize deductions. Instead, he computed his tax liability from the tax tables.

Upon audit, the Commissioner of Internal Revenue determined that respondent's \$70,000 in gambling winnings were to be included in his gross income and that, pursuant to § 165(d) of the Code, 26 U. S. C. § 165(d), a deduction was to be allowed for his gambling losses to the extent of these gambling gains. But the Commissioner further determined that, **under the law as it was in 1978**, a portion of respondent's \$70,000 gambling-loss deduction was an item of tax preference and operated to subject him to the minimum tax under § 56(a) of the Code, 26 U. S. C. § 56(a) (1976 ed.). [\*\*\*\*]

Respondent sought redetermination of the deficiency in the United States Tax Court. **That court, in a reviewed decision, with only two judges dissenting, held that respondent was**

**in the trade or business of gambling, and that, as a consequence, no part of his gambling losses constituted an item of tax preference in determining any minimum tax for 1978.** 82 T. C. 793 (1984). **In so ruling, the court adhered to its earlier court-reviewed decision in *Ditunno v. Commissioner*, 80 T. C. 362 (1983).** The court in *Ditunno*, *id.*, at 371, had overruled *Gentile v. Commissioner*, 65 T. C. 1 (1975), a case where it had rejected the Commissioner's contention (contrary to his position here) that a full-time gambler was in a trade or business and therefore was subject to self-employment tax. The United States Court of Appeals for the Seventh Circuit affirmed. 771 F.2d 269 (1985). Because of a conflict

**The Tax Court and 7<sup>th</sup> Circuit considered gambling to be a trade or business for this taxpayer.**

**The Circuits, however, were split on the issue.**

on the issue among Courts of Appeals,<sup>2</sup> we granted certiorari. 475 U.S. 1080 (1986).

II The phrase "trade or business" has been in § 162(a) and in that section's predecessors for many years. Indeed, the phrase is common in the Code,

The phrase "trade or business" is very common, but not clearly defined. The Court defines it in this case for purposes of sections 162 and 62.

for it appears in over 50 sections and 800 subsections and in hundreds of places in proposed and final income tax regulations. The slightly longer phrases, "carrying on a trade or business" and "engaging in a trade or business," themselves are used no less than 60 times in the Code. The concept thus has a well-known and almost constant presence on our tax-law terrain. **Despite this, the Code has never contained a definition of the words "trade or business" for general application, and no regulation has been issued expounding its meaning for all purposes.**<sup>3</sup> Neither

This "time and labor" language is important. It is reminiscent of "labor and industry" language used in family law for determination of "marital assets" or "community property."

Ultimately, however, the Court defines "trade or business" more narrowly than is typical for family law definitions of "labor and industry."

has a broadly applicable authoritative judicial definition emerged.<sup>4</sup> **Our task in this case is to ascertain the meaning of the phrase as it appears in the sections of the Code with which we are here concerned.**<sup>5</sup>

In one of its early tax cases, *Flint v. Stone Tracy Co.*, 220 U.S. 107 (1911), the Court was concerned with the Corporation Tax imposed by § 38 of the Tariff Act of 1909, ch. 6, 36 Stat. 112-117, and the status of being engaged in business. It said: "'Business' is a very comprehensive term and embraces everything about which a person can be employed." 220 U.S., at 171. It embraced the Bouvier Dictionary definition: "That which occupies the time, attention and labor of men for the purpose of

a livelihood or profit." *Ibid.* See also *Helvering v. Horst*, 311 U.S. 112, 118 (1940). And Justice Frankfurter has observed that "we assume that Congress uses common words in their popular meaning, as used in the common speech of men." Frankfurter, *Some Reflections on the Reading of Statutes*, 47 *Colum. L. Rev.* 527, 536 (1947).

With these general comments as significant background, we turn to pertinent cases decided here. *Snyder v. Commissioner*, 295 U.S. 134 (1935), had to do with margin trading and capital gains,

term to include "the performance of the functions of a public office").

<sup>4</sup> Judge Friendly some time ago observed that "the courts have properly assumed that the term includes all means of gaining a livelihood by work, even those which would scarcely be so characterized in common speech." *Trent v. Commissioner*, 291 F.2d 669, 671 (CA2 1961).

<sup>5</sup> We caution that in this opinion our interpretation of the phrase "trade or business" is confined to the specific sections of the Code at issue here. We do not purport to construe the phrase where it appears in other places.

<sup>2</sup> Compare *Nipper v. Commissioner*, 746 F.2d 813 (CA11 1984), aff'g, without opinion, 47 TCM 136, para. 83,644 P-H Memo TC (1983), and the Seventh Circuit's decision in the present case, with *Gajewski v. Commissioner*, 723 F.2d 1062 (CA2 1983), cert. denied, 469 U.S. 818 (1984); *Estate of Cull v. Commissioner*, 746 F.2d 1148 (CA6 1984), cert. denied, 472 U.S. 1007 (1985); and *Noto v. United States*, 770 F.2d 1073 (CA3 1985), aff'g, without opinion, 598 F.Supp. 440 (NJ 1984).

Despite the interim reversals by the Second and Sixth Circuits in *Gajewski* and *Cull*, supra, the Tax Court has adhered to its position that a full-time gambler is engaged in a trade or business. See, e.g., *Meredith v. Commissioner*, 49 TCM 318, para. 84,651 P-H Memo TC (1984); *Barrish v. Commissioner*, 49 TCM 115, para. 84,602 P-H Memo TC (1984). It has drawn no distinction between the gambler and the active market trader. See also *Baxter v. United States*, 633 F.Supp. 912 (Nev. 1986).

<sup>3</sup> Some sections of the Code, however, do define the term for limited purposes. See § 355(b)(2), 26 U.S.C. § 355(b)(2) (distribution of stock of controlled corporation); §§ 502(b) and 513(b), 26 U.S.C. §§ 502(b) and 513(b) (exempt organizations); and § 7701(a)(26), 26 U.S.C. § 7701(a)(26) (defining the

and held, in that context, that an investor, seeking merely to increase his holdings, was not engaged in a trade or business. Justice Brandeis, in his opinion for the Court, noted that the Board of Tax Appeals theretofore had ruled that a taxpayer who devoted the major portion of his time to transactions on the stock exchange for the purpose of making a livelihood could treat losses incurred as having been sustained in the course of a trade or business. He went on to observe that no facts were adduced in Snyder to show that the taxpayer "might properly be characterized as a 'trader on an exchange who makes a living in buying and selling securities.'" *Id.*, at 139. These observations, thus, are dicta, but, by their use, the Court appears to have drawn a distinction between an active trader and an investor.

In *Deputy v. Du Pont*, 308 U.S. 488 (1940), the Court was concerned with what were "ordinary and necessary" expenses of a taxpayer's trade or business, within the meaning of § 23(a) of the Revenue Act of 1928, 45 Stat. 799. In ascertaining whether carrying charges on short sales of stock were deductible as ordinary and necessary expenses of the taxpayer's business, the Court assumed that the activities of the taxpayer in conserving and enhancing his estate constituted a trade or business, but nevertheless disallowed the claimed deductions because they were not "ordinary" or "necessary." 308 U.S., at 493-497. [\*\*\*\*]

Next came *Higgins v. Commissioner*, 312 U.S. 212 (1941). There the Court, in a bare and brief unanimous opinion, ruled that salaries and other expenses incident to looking after one's own investments in bonds and stocks were not deductible under § 23(a) of the Revenue Act of 1932, 47 Stat. 179, as expenses paid or incurred in carrying on a trade or business. While surely cutting back on Flint's broad approach, the Court seemed to do little more than announce that since 1918 "the present form [of the statute] was fixed and has so continued"; that "[no] regulation has ever been promulgated which interprets the meaning of 'carrying on a business'"; [\*\*\*\*] The opinion, therefore -- although devoid of analysis and not setting forth what elements, if any, in addition to profit motive and

regularity, were required to render an activity a trade or business -- must stand for the propositions that full-time market activity in managing and preserving one's own estate is not embraced within the phrase "carrying on a business," and that salaries and other expenses incident to the operation are not deductible as having been paid or incurred in a trade or business.<sup>6</sup> See also *United States v. Gilmore*, 372 U.S. 39, 44-45 (1963); *Whipple v. Commissioner*, 373 U.S. 193 (1963). [\*\*\*\*]

Less than three months later, the Court considered the issue of the deductibility, as business expenses, of estate and trust fees. In unanimous opinions issued the same day and written by Justice Black, the Court ruled that **the efforts of an estate or trust in asset conservation and maintenance did not constitute a trade or business.** *City Bank Farmers Trust Co. v. Helvering*, 313 U.S. 121 (1941); *United States v. Pyne*, 313 U.S. 127 (1941). [\*\*\*\*]

From these observations and decisions, we conclude (1) that, to be sure, the statutory words are broad and comprehensive (Flint); (2) that, however, **expenses incident to caring for one's own investments, even though that endeavor is full time, are not deductible as paid or incurred in carrying on a trade or business** (Higgins; *City Bank' Pyne*); (3) **that the opposite conclusion may follow for an active trader (Snyder)**; (4) that Justice Frankfurter's attempted gloss upon the decision in *Du Pont* was not adopted by the Court in that case; (5) that the Court, indeed, later characterized it as an "adumbration" (Snow); and (6) that the Frankfurter observation, specifically or by implication, never has been accepted as law by a majority opinion of the Court, and more than once has been totally ignored. We must regard the Frankfurter gloss

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<sup>6</sup> See, however, § 212 of the 1954 Code, 26 U. S. C. § 212. This section has its roots in § 23(a)(2) of the 1939 Code, as added by § 121 of the Revenue Act of 1942, 56 Stat. 819. It allows as a deduction all the ordinary and necessary expenses paid or incurred "for the management, conservation, or maintenance of property held for the production of income," and thus overcame the specific ruling in Higgins that expenses of that kind were not deductible. The statutory change, of course, does not read directly on the term "trade or business." Obviously, though, Congress sought to overcome Higgins and achieved that end.

merely as a two-Justice pronouncement in a passing moment and, while entitled to respect, as never having achieved the status of a Court ruling. **One also must acknowledge that Higgins, with its stress on examining the facts in each case, affords no readily helpful standard, in the usual sense, with which to decide the present case and others similar to it.** The Court's cases, thus, give us results, but little general guidance.

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The issue this case presents has "been around" for a long time and, as indicated above, has not met with consistent treatment in the Tax Court itself or in the Federal Courts of Appeals. The Seventh Circuit, in the present case, said the issue "has proven to be most difficult and troublesome over the years." 771 F.2d, at 271. The difficulty has not been ameliorated by the persistent absence of an all-purpose definition, by statute or regulation, of the

**The Court suggests that Congress deliberately refrains from defining trade or business so as to avoid confusion. Why?**

phrase "trade or business" which so frequently appears in the Code. Of course, **this very frequency well may be the explanation for**

**legislative and administrative reluctance to take a position as to one use that might affect, with confusion, so many others.**

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**Fairness supports considering gambling a trade or business when it is full-time.**

**But, the Court sarcastically suggests, fairness does not abound in tax law.**

If a taxpayer, as Groetzinger is stipulated to have done in 1978, devotes his full-time activity to gambling, and it is his

intended livelihood source, **it would seem that basic concepts of fairness (if there be much of that in the income tax law) demand that his activity be regarded as a trade or business just as any other readily accepted activity, such as being a retail store proprietor or, to come closer**

categorically, as being a casino operator or as being an active trader on the exchanges.

It is argued, however, that a full-time gambler is not offering goods or his services, within the line of demarcation that Justice Frankfurter would have drawn in *Du Pont*. Respondent replies that he indeed is supplying goods and services, not only to himself but, as well, to the gambling market; thus, he says, he comes within the Frankfurter test even if that were to be imposed as the proper measure. "It takes two to gamble." Brief for Respondent 3. Surely, one who clearly satisfies the Frankfurter adumbration usually is in a trade or business. But does it necessarily follow that one who does not satisfy the Frankfurter adumbration is not in a trade or business? One might well feel that a full-time gambler ought to qualify as much as a full-time trader,<sup>7</sup> as Justice Brandeis in *Snyder* implied and as courts have held.<sup>8</sup> The Commissioner, indeed, accepts the trader result. Tr. of Oral Arg. 17. **In any event, while the offering of goods and services usually would qualify the activity as a trade or business, this factor, it seems to us, is not an absolute prerequisite.**

**Offering "goods and services" is sufficient, generally, to support a finding of trade or business. But, it is not a prerequisite.**

[\*\*\*\*]It might

assist now and then, when the answer is obvious and positive, but it surely is capable of breeding litigation over the meaning of "goods," the meaning of "services," or the meaning of "holding one's self out." And we suspect that -- apart from gambling -- almost every activity would satisfy the gloss.<sup>9</sup> A

<sup>7</sup> "It takes a buyer to make a seller and it takes an opposing gambler to make a bet." Boyle, What is a Trade or Business?, 39 Tax Lawyer 737, 763 (1986).

<sup>8</sup> *Levin v. United States*, 220 Ct. Cl. 197, 205, 597 F.2d 760, 765 (1979); *Commissioner v. Nubar*, 185 F.2d 584, 588 (CA4 1950), cert. denied, 341 U.S. 925 (1951); *Fuld v. Commissioner*, 139 F.2d 465, 468-469 (CA2 1943). See also *Moller v. United States*, 721 F.2d 810 (CA Fed. 1983), cert. denied, 467 U.S. 1251 (1984); *Purvis v. Commissioner*, 530 F.2d 1332, 1334 (CA9 1976).

<sup>9</sup> Each of the three cases in conflict with the Seventh Circuit's decision in the present case, see n. 5, supra,

test that everyone passes is not a test at all. We therefore now formally reject the Frankfurter gloss which the Court has never adopted anyway.

Of course, not every income-producing and profit-making endeavor constitutes a trade or business. The income tax law, almost from the beginning, has distinguished between a business or trade, on the one hand, and "transactions entered into for profit but not connected with . . . business or trade," on the other. See Revenue Act of 1916, § 5(a), Fifth, 39 Stat. 759. Congress "distinguished the broad range of income or profit producing activities from those satisfying the narrow category of trade or business." *Whipple v. Commissioner*, 373 U.S., at 197. We accept the fact that to be engaged in a trade or business, the taxpayer must be involved in the activity with continuity and regularity and that the taxpayer's primary purpose for engaging in the activity must be for income or profit. A sporadic activity, a hobby, or an amusement diversion does not qualify. [\*\*\*\*]

We do not overrule or cut back on the Court's holding in *Higgins* when we conclude that if one's gambling activity is pursued full time, in good faith, and with regularity, to the production of income for a livelihood, and is not a mere hobby, it is a trade or business within the meaning of the statutes with which we are here concerned. Respondent Groetzinger satisfied that test in 1978. Constant and large-scale effort on his part was made. Skill was required and was applied. He did what he did for a

was a gambler's case and adopted the Frankfurter gloss. Because the same courts, in cases not involving gamblers, have not referred to the Frankfurter gloss, see *Bessenyey v. Commissioner*, 379 F.2d 252 (CA2), cert. denied, 389 U.S. 931 (1967); *Gestrich v. Commissioner*, 681 F.2d 805 (CA3 1982), affg, without opinion, 74 T. C. 525 (1980), *Main Line Distributors, Inc. v. Commissioner*, 321 F.2d 562 (CA6 1963), it would appear that these courts in effect were creating a special class of, and with special rules for, the full-time gambler. We find no warrant for this in the Code.

livelihood, though with a less-than-successful result. This was not a hobby or a passing fancy or an occasional bet for amusement. We therefore adhere to the general position of the *Higgins* Court, taken 46 years ago, that resolution of this issue "requires an examination of the facts in each case." 312 U.S., at 217. [\*\*\*\*] But the difficulty rests in the Code's wide

The Court continues the "facts and circumstances" test and refuses to provide an all encompassing definition of "trade or business."

utilization in various contexts of the term "trade or business," in the absence of an all-purpose definition by statute or regulation, and in our concern that an attempt judicially to formulate and impose a test for all situations would be counterproductive, unhelpful, and even somewhat precarious for the overall integrity of the Code. We leave repair or revision, if any be needed, which we doubt, to the Congress where we feel, at this late date, the ultimate responsibility rests. Cf. *Flood v. Kuhn*, 407 U.S. 258, 269-285 (1972).<sup>10</sup>

"Continuity" and "regularity" are important factors, as is a primary purpose of income or profit.  
  
"Sporadic" activities do not qualify.

The judgment of the Court of Appeals is affirmed.

It is so ordered.

DISSENTBY: WHITE

DISSENT: JUSTICE WHITE, with whom THE CHIEF JUSTICE and JUSTICE SCALIA join, dissenting.

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<sup>10</sup> It is possible, of course, that our conclusion here may subject the gambler to self-employment tax, see §§ 1401-1403 of the Code, and therefore may not be an unmixed blessing for him. Federal taxes, however, rest where Congress has placed them.