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INTERNATIONAL ASSOCIATION OF YOUNG LAWYERS

Income tax for professional athletes and artists - a cross border story

Tax Law Commission:

London, 1 – 5 September 2015

National Report of England and Wales

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1. General questions

a) Is there any special tax legislation applying to athletic/artistic performances completed by athletes/artists residing outside the country of performance? Please describe these tax regime(s) briefly.

Generally, there are no special tax reliefs in the UK for athletes, artists or entertainers (**'Performers'**).

The general UK tax rules for taxpayers apply to determine tax liability - i.e. the UK income tax system taxes on the income arising in the UK, regardless of where the recipient is resident, and taxes the worldwide income (and capital gains) of persons resident in the UK. Special rules apply to those who are resident but not domiciled in the UK.

There are additional withholding tax rules for non-UK resident Performers who perform in the UK. There are also certain tax exemptions in the UK for classical music performers and UK legislation has been introduced on an ad-hoc basis to provide tax exemptions in relation to particular sporting events held in the UK.

In addition, there are specific regulations that apply in relation to being employed by a company or working for the company owned by the Performer (see the answer to Question 4(c) in relation to 'image rights companies', below).

The rules greatly vary depending on whether a Performer is UK resident and/or UK domiciled.

(i) UK resident Performers

UK resident Performers will generally be subject to income tax on all worldwide income, including earnings and investment income, and to capital gains tax on any gains arising from the disposal of chargeable assets.

The UK's approach on tax varies depending on whether an individual is employed or self-employed. This is particularly important in relation to Performers because certain rules within the profession may dictate the way in which the individual pays tax. For example, the rules of the Premier and Football Leagues specify a standard form of employment contract for professionals that must be entered into by the athlete. Similarly, permanent members of a theatrical company are ordinarily considered to be employees.

UK resident performers performing overseas may find they are liable to tax in another country. In many cases, this would be deducted at the source under a withholding regime (similar to the UK's withholding tax regime – see below). Double taxation agreements tend to exclude Performers from any exemption from withholding tax regimes. However, there will usually be the opportunity for any overseas tax liability to be set off against the Performer's UK tax liability.

(ii) Non-UK resident Performers

The Income Tax (Trading and Other Income) Act 2005 (**'ITTOIA'**) provides special withholding tax rules which apply to non-UK resident Performers performing in the UK. Tax is deducted from payment under the special UK withholding tax rules, usually at a rate of 20%. Though ordinarily, carrying out the function of an overseas trade will not be sufficient to make the profits of the trade taxable in the UK, s13 of ITTOIA applies to 'visiting performers'. This states that any performance in the UK by a Performer should be treated as part of their trade, profession or vocation carried on in the UK. As a result, it is subject to UK income tax.

Furthermore, any income the Performer earns that is related to their UK performances is also subject to UK income tax. This sort of 'related' income is often quite difficult to quantify but in the case of a sportsperson, would typically include sponsorship income. Exactly how much UK income tax a Performer is liable to pay will depend on the precise wording of the contract and how much time they have spent performing and training in the UK. The calculation used must be approved by the UK tax authority, HMRC, and supported by evidence. HMRC recommends using either the Relevant Performance Days ('**RPD**') or Relevant Performance and Training Days ('**RPTD**') method for calculating the amount of tax due. So, a sportsperson would be taxed on a proportion of their

worldwide sponsorship income based on the number of days they spend playing or training in the UK, as a proportion of their total playing and training days. This tax treatment may be behind athletes' reluctance to come to the UK or to limit the number of days they spend here – for example, Rafa Nadal has chosen not play Queen's in the weeks before Wimbledon and Usain Bolt has declined invitations to race here on occasion as well.

It is possible to negotiate a lower deduction of withholding tax if it can be shown that the performer's final UK tax liability will be lower than the amount withheld automatically at source. This deduction of withholding tax can be arranged through the HMRC Foreign Entertainers Unit.

(iii) Non-UK domiciled (but UK resident) Performers

Though there are no special tax reliefs for Performers, there are special rules in the UK for resident but 'non-domiciled' individuals (**'Non-Doms'**), whose permanent home is outside the UK. The rules for establishing domicile for UK law purposes are complex, but, in short, an individual will be domiciled overseas if they or their parents are originally from a foreign jurisdiction and they do not intend to stay in the UK permanently or indefinintely. These rules provide tax benefits to foreign nationals taking up UK residence and so often apply to Performers coming to the UK to pursue an artistic or sports career and can be taken advantage of by such Non-Doms.

Non-Doms can elect to be taxed on a remittance basis, so that generally they do not have to pay UK tax on income and capital gains arising outside the UK, provided that the foreign source income or gains are not actually remitted to the UK.

(iv) Exceptions for certain sport events

Where there is a special political or economic desire to host a specific sporting event, legislation has, in the past, been enacted to provide tax exemptions in relation to such events, in order to encourage non-UK sportspersons to perform in the UK.

Examples included two UEFA Champions League finals at Wembley Stadium (2011 and 2013), for which non-UK resident footballers were exempted from income tax, as well as the London Olympic and Paralympic Games (2012) and the Glasgow Commonwealth Games (2014), for which non-UK resident athletes were exempted from certain taxes.

(v) Exceptions for non-UK resident classical music performers

Payments made to certain non-UK resident classical music performers can be made gross (i.e. without the withholding tax).

(vi) Theatre tax relief and film tax relief

UK legislation also provides tax relief for film and/or theatre production companies. The relief however is only available to the theatre/film companies and not the performers themselves.

b) If so, who is covered by the legislation (natural/legal persons?)

The tax regimes summarised above generally apply to individuals rather than companies. However, the withholding tax legislation applies to both natural and legal persons.

Furthermore, the rules in ITTOIA which provide that any performance by a Performer in the UK is treated as part of their trade carried on in the UK, applies regardless of whether the Performer contracts personally or through a company (s13(5) ITTOIA). In cases where the tax rules apply to a company, the income is treated as the Performer's income and not the company's income for corporation tax purposes (s1309(2) Corporation Tax Act 2009).

Even where the payments are made to the Performers by a non-UK company with no trading presence in the UK, the company is still statutorily obliged to deduct UK income tax from the payments to the Performer. This was established in the case of *Agassi v Robinson (2006)*, which involved the famous tennis champion, Andre Agassi, and held that two non-UK companies who made

payments to a non-UK company wholly owned by Agassi, still had an obligation to deduct and account for UK tax on those payments.

2. Commercial constellations

c) What are the tax implications when payment for an individual athlete's/artist's performance is made to a company owned by him?

Where personal service companies are used, the company will pay UK corporation tax on its profits after payments of remuneration have been made to the Performer for his/her employment related services (which would be taxable in the Performer's hands). In addition, or alternatively, income can be drawn from the company by the Performer, as shareholder in the company, in the form of dividends.

The dividends are taxable as investment income in the Performer's hands. If accumulated earnings are extracted on the winding-up of the company, they may be subject to capital gains tax rather than income tax. To the extent that the earnings are drawn during a tax year in which the Performer is not UK resident (for tax purposes), the earnings drawn may not be subject to UK tax (though UK tax may be clawed back if the Performer subsequently becomes UK resident again within a limited time period.

Image rights companies

Where a Performer has income from his promotional activities and image rights in addition to performance related income, Performers often choose to set up companies wholly owned by themselves (often referred to as 'image rights companies') in order to separate the provision of a Performer's promotional services and the provision of their performing services. This reduces the tax burden on the Performer because the income derived by the Performer in respect of his promotional activities should not be regarded as income from his employment.

[This is a complicated area of UK law. The status of the company will depend on the facts of each case and whether the owner is UK resident or not.]

Tax implications of using an Image rights company

The Performer provides 'promotional services' (e.g. personal appearances) through the company. These services are related to but not directly connected to his employment – thus are not technically viewed as employment income and are not taxed as such.

The employer is therefore able to pay the gross amount of the agreed fee to the image rights company; it does not have to deduct PAYE or employee NICs on the fee, nor does the employer itself have to pay employer NICs on the fee.

Furthermore, it may be possible to defer the payment of income to the Performer (and, therefore, the payment of tax). The money can be retained within the company and paid to the Performer at a time when the Performer is not otherwise earning or has become a non-UK resident (as mentioned above). The company, if it is UK based, will pay corporation tax at 20% on its profits after the payment of remuneration to the Performer.

The revenue may be extracted from the company via dividends. If a UK resident Performer receives dividends, he will be taxed at his hands at his marginal dividend rate (up to 37.5% for an additional rate taxpayer – *see below Table at Question 5(s) for further tax rates*). A non-UK resident may well not be liable to tax in this situation.

It is worth noting that there are anti-avoidance measures found in the Income Tax Act 2007, Part 13, in relation to 'Sales of Occupation Income' and 'Transfers of Income Streams', which one must be aware of in the above context.

d) Who is taxed on compensation for an athlete's/artist's performance, when it is paid to a company in which the athlete is employed?

Withholding taxes on earnings may be deducted from compensation paid to the company for the Performer's services (*please see Question 3(a) above*).

The company will pay corporation tax at 20% on its profits (after the payment for compensation/remuneration to the Performer). If the earnings are drawn from the company by the Performer while UK resident, further tax will be payable by the Performer.

e) Is the company's business as a whole of any relevance for the assessment of the questions above?

In relation to image rights companies, is it important that any image rights company set up is a genuine arrangement. Anti-avoidance measures have been introduced in order to target the abusive use of image rights / personal service companies.

Anti-avoidance measures

The amounts paid for the exploitation of the image rights and the provision of the promotional services should not be disguised salary but must be genuine payments made over and above salary, commensurate with the value of the image rights and promotional services being acquired. Accordingly, image rights companies will only tend to work for top-level / high-profile Performers who can truly be said to enjoy a celebrity status, separate and apart from their sports or artistic skills, that is of value to the marketplace.

There is further special anti-avoidance legislation (known as IR35) which relates to payments to intermediaries. In certain circumstances, this legislation may apply to image rights / personal service companies.

f) Is it relevant for the answers above whether the company conducts further activities or has more employees?

No (subject to the requirement that the use of the image rights company be for a genuine image rights business).

g) Would the answer be different if the compensation could be attributed to the performance of an athletic team or an artistic group?

No, winnings from a successful performance are still taxable income under UK tax law.

h) Is it of any fiscal significance if the international commitment extends to a longer period of time?

Yes, it is relevant to non-UK domiciled Performers. This is because, generally, non-UK domiciled individuals can claim the remittance basis of taxation and do not have to pay UK tax on income and capital gains arising abroad. However, there is an annual charge of £30,000 for non-UK domiciled Performers who have been UK resident for 7 out of the last 9 tax years. This rises to £60,000 if the individual has been UK resident for 12 out of the 14 preceding tax years and £90,000 for 17 out of 20 years.

Equally, the extension in time of an international commitment is also relevant if a Performer outside of the UK becomes non-UK resident (in accordance with the UK statutory residency test). If this situation arises, the Performer may no longer be subject to UK tax. It is for this reason that it can be desirable to make income payments to companies owned by the Performers and to defer drawing of the earnings until the Performer is non-resident in the UK, although these may be clawed back if he returns to the UK within a prescribed period.

i) <u>Income covered by the taxable base (income tax)</u>

j) What kind of income is covered by the special tax legislation?

UK tax law covers a whole range of income in relation to Performers. A number of these sources of income would not ordinarily be regarded as income subject to tax.

The most common sources of taxable income for Performers are:

- cash earnings, including bonuses;
- payments for the use of copyright;
- benefits in kind;
- competition prizes both in cash and in kind (though not always).
- appearance payments;
- a share in the pool of money or consideration in kind earned by team members, which is shared out;
- payments made for:
    - performance in exhibition matches and competitions;
    - sponsorship and endorsements;
    - promotions and personal appearances;
    - image rights;
    - writing and broadcasting;
    - royalties;
    - inducements
- joining and transfer fees;
- gifts to Performers for no consideration will have no tax consequences for an individual Performer if they are self-employed. If however, the Performer is an employee and the gift is made by reason of that employment (e.g. a footballer receives the use of a car from a local dealer), the gift is still viewed as income and taxable in the normal way; and
- prizes (normally taxable). However if a prize is unsolicited (e.g. an Oscar) there should be no tax liability. if a grant is made (e.g. from one of the sports councils to meet certain expenses), then it is unlikely that the income would be taxable.

k) Does the legislation limit the taxation to income from the sports/arts practice itself, or does it extend the taxable income to services performed in connection to sports or artistic events and assignments related to the athlete's/artist's sports career?

UK tax legislation extends to services performed in connection to sports or artistic events and assignment related to the Performer's sports career. Please see above.

l) Does the taxable income include compensation for performances, endorsements, the sale of merchandise, and royalty, or other income related events?

Yes, please see above.

m) Are signing bonuses included in the income covered by the special regulations?

Yes, please see above.

n) What is the regulations take on incentive bonuses based on personal or team performance?

Incentive bonuses are also viewed as income, as set out above.

o) Is endorsement income considered to be included in the compensation for the athletic/artistic performance and, if so, to what extent?

Yes, to the extent the endorsement income is attributable or related to UK activity. As set out above, the UK tax authority recommends calculating the amount of tax due using either the RPD or RPTD method of calculation (*please see answer to Question 3(a)*) .

p) Does the legislation limit the amount that an athlete/artist may receive from his employer in connection with assignment of image rights?

Only to the extent that the arrangement must be genuine and justifiable commercially and reflect the true commercial value of the promotional services performed or the image rights exploited. It must not be merely for tax saving purposes (*please see Question 4(e) above*).

q) What is the treatment your national legislation has for image rights in personal income tax?

Please see Question 4(c) above.

r) From a tax point of view are there any differences in the treatment of image rights between a resident athlete/artist and a non-resident athlete/artist in your country?

A UK-resident Performer's worldwide income is taxed unless they are a non-domiciled taxpayer and elect to be taxed on the remittance basis. See answer to Question 4(e) above re applicable anti-avoidance measures.

A non-resident Performer is taxed only on UK-sourced income and the proportion of his/her worldwide endorsement income proportionate to the amount of days spent performing in the UK during the UK tax year. Many foreign Performers coming to perform in the UK already have an established image rights company in an offshore location prior to becoming a UK resident. The UK tax authority is likely to insist that the employer or the recipient of the services (e.g. the sports club) levies withholding tax on payments to a non-UK company. This is very much fact-specific and will vary on a case-to-case basis.

3. Tax rates

s) What is the applicable tax rate?

Personal income tax

Basic rate 20%	£0 to £31,785 People with the standard Personal Allowance start paying this rate on income over £10,600
Higher rate 40%	£31,786 to £150,000 People with the standard Personal Allowance start paying this rate on income over £42,385. Personal allowance is progressively withdrawn for income over £100,000
Additional rate 45%	Over £150,000. No personal allowance available.
Dividend for higher rate taxpayers	32.5%
Dividend for additional rate taxpayers	37.5%

Companies (e.g. if a Performer has set up a personal service/image rights company)

The current rate of UK corporation tax is 20% after the payment of any remuneration to the Performer.

Income can be taken from the company in the form of dividends taxable as investment income. See rates above – subject to a tax credit for tax paid by the company.

t) Does the tax rate differ depending on the sport practiced?

Not generally. However:

- Racing (horses, greyhounds etc) is not considered a taxable activity. There is therefore no tax on prizes etc, but equally allowable deductions such as expenses do not apply (*please see answer to Question 5(w), below, for further information on expenses*).

- Amateur athletes, who do not make a profit from their performances and are merely reimbursed for their out-of-pocket expenses, are not taxable. The distinction between a hobby and a trade, profession or vocation subject to tax, is a question of fact and degree – it is not defined by the sport's rules.
- In relation to testimonial matches the UK tax authorities treat sports stars differently depending on the sport; this can affect the status of income.

u) And in the case of artistic performances, does it differ?

The tax rate does not differ.

v) Is the tax rate fixed or progressive?

The UK has progressive tax rates – please see Question 5(s) above.

w) Does the legislation allow for deduction of costs with regard to the athlete's/artist's tax?

The normal principles apply for the deductibility of expenses. Different rules apply for employed and self-employed Performers.

Performers who are employed pay tax on cash earnings, expenses reimbursed and benefits provided, subject to a claim for business expenses which are incurred 'wholly, exclusively and necessarily' in the performance of their employment duties.

If you receive expenses or income to cover both UK and non-UK activities, a fair proportion will be allocated for appearances / activity carried on in the UK.

For performers who are employed, the expenses test is very strict. For example, it would not prima facie include a Performer's expenditure on smart clothing to wear when attending the sports stadium or taking dietary supplements in order to comply with a Performer's employment contract (*Ansell v Brown, 2001*). The expenses must be 'wholly and exclusively' for the purposes of the Performer's trade.

The position for self-employed performers is slightly more relaxed. Nonetheless, care should still be taken with expenses that have a shared private and business purpose. For example, it has previously been held that a guitarist could not expense an operation on his thumb because he played the guitar as a hobby as well as professionally (*Prince v Mapp*).

Deductible business expenses are usually allowed for the following:

- production and pre-production costs;
- general subsistence ;
- fees or commission to managers and agents;
- UK travel as well as air fares to and from the UK to perform (if the performer returns directly to their home country);
- accommodation;
- support staff;
- use of training facilities;
- other expenses agreed with the tax authorities;
- cosmetics and wardrobes allowance may also be a deduction for certain entertainers; and
- agent's fees are permitted for actors, singers etc. However, this does not extend to sports stars. Care needs to be taken with the manner in which you are classified, as similar roles – such as a TV presenter and a newsreader – may be treated differently.

There are further reliefs and allowances which can be deducted from the aggregated taxable income to arrive at total income chargeable to tax. The main reliefs and allowances are:

- the basic personal allowance (currently at £10,600);

- interest relief on loans for the purchase of certain shares, i.e. those in a closed company (which might be the Performer's personal service company) where certain conditions are fulfilled; and
- payments to charity under the Gift Aid provisions.

x) Does the taxed income serve as a basis for social security contributions?

Yes, taxed income does serve as a basis for social security contributions. Social security contribution rates vary depending on the level of earnings as well as several other factors.

y) Who is responsible for the payment of tax?

The taxpayer is the Performer. However, please see the withholding obligations that are applicable to persons or entities paying the Performers (*see answer to Question 3(a)*).

4. Double taxation treaties

z) How is elimination of double taxation regarding athletes/artists generally implemented when there is a double taxation treaty? (exempt/credit/deduction)

Generally the double tax treaties which the UK has negotiated with foreign countries, do not provide relief for Performers.

The mechanism for elimination of double taxation depends on each treaty. Usually the position is that the UK provides a credit for foreign tax paid up to the amount of the tax payable in the UK.

aa) How Is the issue handled when a double taxation treaty does not exist?

Unilateral relief may be available for foreign tax. This is usually available by claiming Foreign Tax Credit Relief. This relief is provided by way of a credit against UK income, corporation or capital gains tax for foreign tax suffered on the same income or gain and there are certain conditions that need to be satisfied. This is only available where relief is not available under a double tax treaty.

bb) Is there a limit amount for the income to be taxed?

No income tax is charged on the first £10,600 of income received by a UK resident individual taxpayer, though this 'personal allowance' is not available for remittance basis claimants or individuals with income over £120,000 per year. Please see Question 5(s) above.

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May 2015