

The taxation of image rights: A comparative analysis

Rian Cloete

BLC, LLB (UP), LLD (Unisa)

Professor and Head of the Department of Procedural Law, University of Pretoria

OPSOMMING

Die belasting van die reg op die openbare beeld: 'n Vergelykende ontleding

Sport het vandag 'n industrie geword en dit het gelei tot die kommersialisering van regte op die openbare beeld wat binne die konsep van persoonlikheidsregte en in die konteks van die *actio iniuriarum* erkenning geniet en as regtens beskermbare belang beskou word. Die daaropvolgende toename in sportlui se waarde en inkomste het onvermydelik die belastinggaarder se belangstelling gewek. Dit het sportlui genoodsaak om belastingadvies te bekom en het 'n aantal belastingbeperkingskemas tot gevolg gehad. Een van hierdie skemas is om 'n sportman se verskaffing van promosiedienste van sy lewering van spelersdienste te skei. Talle sportlui het met die oog op hul regte op die openbare beeld persoonlike maatskappye gestig wat bepaal hoe hierdie regte oorgedra of gelisensieer kan word en sodoende absolute beheer uitoefen oor die kommersiële ontginning van die sportman se regte op sy beeld. Die doel van sodanige skeiding is om die sportman se belastinglas te verlig deur belastingaanspreeklikheid op grond van vergoeding vir promosiedienste te vermy. Die inkomste wat verkry word uit die ontginning van regte op die openbare beeld sal deel van die maatskappy se winste vorm. Die maatskappy sal dan op sodanige winste belas word en die sportman sal 'n dividend van die maatskappy ontvang. Die regspraak is egter of die belastinggaarder so 'n skema sal toelaat. Daar moet ook vasgestel word of die inkomste verkry uit die gebruik van 'n sportman se regte op die openbare beeld as van 'n kapitale aard beskou kan word wat as 'n kapitaalwinst aan minder belasting onderhewig is en of dit as bruto inkomste ingevolge die Inkomstebelastingwet geklassifiseer moet word. Hierdie belastingkwessies is nog nie omvattend in Suid-Afrika aangespreek nie. Ten einde 'n beter begrip te verkry van die verwickeldhede wat met die belasting van inkomste uit die gebruik van regte op die openbare beeld gepaardgaan, word die benadering in die Verenigde Koninkryk geëvalueer weens die ooreenkomste tussen ons regstelsels in hierdie verband.

1 Introduction

Sport has become an industry today and the image rights of sportspersons have immense commercial value. These image rights are sought after by companies who wish to exploit them in order to enhance brand image, create brand awareness and promote the sale of their products. Individual sportspersons are therefore treated as commodities and are commercialised. There is no better example than David Beckham who earns more off the field of play than on it and has become

an international brand in his own right.¹ This added a fiscal dimension concerning the taxation of image rights. Image rights payments are always taxed more favourably than salary payments and clubs are therefore disguising salary as image rights payments. The circumstances of each individual sportsperson shall determine the legality of any tax mitigation scheme or structure. The first issue to be addressed is whether a sportsperson has an image right in its own right, and secondly whether one can separate the commercial value of his image rights from his playing skills and services.²

2 Image Rights

The term “image rights” means the ability of a sportsperson to exclusively control the commercial use of his name, physical/pictorial image, reputation, identity, voice, personality, signature, initials or nickname in advertisements, marketing and all other forms of media.³ Image rights can also be defined as “any rights that a player has vested in him as an individual person. These rights have value because they can be licensed to a third party for commercial exploitation in the marketplace”.⁴ Image rights are known in the United Kingdom as “rights of privacy”, in the United States as “rights of publicity” and as “rights of personality” in Continental Europe. South African law, however, does not recognise a “right of publicity” and there is also no specific legislative protection available apart from protection against the infringement of a trade mark or copyright.⁵ One must therefore seek protection in the common law (for example under unfair competition) or in the Constitution (for example the right of privacy).⁶ For purposes of this article I shall refer to image rights in its widest sense and only analyse the

-
- 1 Blackshaw “Protecting sports image rights in Europe” May 2005 *Bus L Int* 270 270-273; Gardiner *et al Sports Law* (2006) 53-54; Blackshaw “Protecting and exploiting Sports Image Rights” 2005 3-4 *ISLJ* 42 42-43; Blackshaw *Sports Marketing Agreements: Legal, Fiscal and Practical Aspects* (2012) 379-384.
 - 2 Wentworth “Salary and image rights payments to football players” 2010 4 *WSLR* 3; Gardiner *et al* 443.
 - 3 Cloete *et al Introduction to Sports Law in South Africa* (2005) 176.
 - 4 See Barton, Le Mintier & Tattersall “Player’s wages: Can football control the ‘prune juice’ effect?” in *International Studies in Sport: Selected Essays 2000/2001* (eds Lanfranchi & Probst) (2003) 73-79; Gelder “Image is everything: an analysis of the legal protection of the image of sports athletes” 2005 *ISLJ* 25 25-37; Bray “Image rights: Understanding the matrix of rights” 2003 4 *WSLR* 2.
 - 5 Cloete *et al* 177.
 - 6 For a comprehensive discussion of the protection of image rights see Louw “South Africa” in *International Encyclopaedia of Laws* (ed Hendrickx) (2009) 433-455.

extent to which sportspersons have the right to control the commercial use and economic value attached to their identity.⁷

3 Ownership and Protection of Image Rights

Despite the lack of express (and clear) provisions in most commercial contracts dealing with the ownership of sports image rights, the majority of the sports industry believe that sportspersons should have control over their image rights and the commercial exploitation thereof.⁸ It is the right of sportspersons to commercially exploit their own names and likeness for their own financial benefit.

The protection of image rights in Europe varies from country to country. In the United Kingdom there is no specific law protecting image rights.⁹ In *Elvisly Yours v Elvis Presley Enterprises*¹⁰ Laddie J found that a personality can only take legal action “if the reproduction or use of [his or her] likeness results in the infringement of some recognised legal right which [he or she] does own”. In order to protect their image rights, celebrity sportspersons need to rely on laws such as trademark, copyright, the doctrine of passing off or even breach of commercial confidentiality.¹¹ In Continental Europe we find a legal right of personality which is often safeguarded and protected under the constitution of that particular country. Image rights then become fundamental human rights and the commercial use thereof can be controlled and exploited.¹²

South African law recognises a number of personality rights and a different common law approach is followed where a person’s identity is violated for commercial gain. In *O’Keeffe v Argus Printing and Publishing Co Ltd*¹³ Watermeyer J held that the use of a person’s image rights without her consent constitutes a violation of that person’s identity and further found liability for injury to the person’s *dignitas* with the *actio*

7 See Louw “Suggestions for the Protection of Star Athletes and Other Famous Persons against Unauthorised Celebrity Merchandising in South Africa” 2007 *SA Merc LJ* 272; Blackshaw 2005 *Bus L Int* 270 274; Blackshaw 2005 3-4 *ISLJ* 42 43.

8 See “Looking after their image” 2003 (July) *Sport Business Int* 17.

9 Blackshaw “The importance of IP rights in sport” 2008 3-4 *ISLJ* 146 148; Boyd “Does English law recognise the concept of an image or personality right?” 2002 *Ent LR* 1.

10 [1997] RPC 543 548. The recognition of a “character right” was also rejected by the Court of Appeal in *Elvis Presley Enterprises Inc v Sid Shaw Elvisly Yours* [1999] RPC 567.

11 See *Douglas v Hello Limited* [2001] 2 WLR 992; *Irvine v Talksport Ltd* [2003] EWCA Civ 423. See also Blackshaw 2005 *Bus L Int* 270 279, 282; Blackshaw 2005 3-4 *ISLJ* 42 45; Baldwin “Image rights and offshore tax planning” 2003 3 *WSLR* 1; Wentworth 2010 4 *WSLR* 3.

12 See the matter of *Kahn v Electronic Arts GmbH*, unreported 25 April 2003. See also Blackshaw 2005 *Bus L Int* 270 281; Blackshaw 2005 3-4 *ISLJ* 42 47.

13 1954 3 SA 244 (C).

iniuriarum.¹⁴ The commercial exploitation of image rights was also considered by the Supreme Court of Appeal in *Grütter v Lombard*.¹⁵ Nugent JA held that privacy is only one of a variety of interests that enjoy recognition in the concept of personality rights in the context of the *actio iniuriarum* and are worthy of protection.¹⁶ A sportsperson has a proprietary interest in his identity and an infringement of such personality right caused by unlawful commercial exploitation can lead to economic loss.¹⁷ The personality right is distinct from the sportsperson and forms an immaterial asset in the estate of the sportsperson which can be traded.¹⁸

Image rights are therefore considered legally protectable property and are mostly contractually regulated by sport bodies by means of specific provisions in standard players' contracts. The standard clause in sport contracts usually stipulates that the player assigns the use and enjoyment of his image rights (identity) to the club for which he plays. The player and club may, however, agree that the player keeps control of his image rights and the commercial exploitation thereof.

4 Taxation of Image Rights

The commercialisation of image rights and the subsequent increase in sportspersons' value and income inevitably attracted the interest of the taxman. It became necessary for sportspersons to seek tax advice which resulted in a number of tax mitigation schemes. One of these schemes is to separate a sportsperson's provision of promotional services from his provision of playing services. Many sportspersons have established personal image rights companies which determine how the image rights may be assigned or licensed and therefore exercise absolute control over the commercial exploitation of the sportspersons' image rights. The purpose of such separation is to reduce the tax burden on the sportsperson by avoiding income tax liability on the payments for promotional services. Income derived from the exploitation of image rights will form part of the company profits. The company will then be taxed on such profits and the sportsperson will receive a dividend from the company. The legal question, however, is whether the taxman will allow such a scheme. It must also be established whether the income

14 See also Cornelius "Image Rights" in *Handbook on International Sports Law* (eds Nafziger & Ross) (2011) 507; Louw *International Encyclopaedia of Laws* 435.

15 2007 4 SA 89 (SCA). See Cornelius 508; Louw *International Encyclopaedia of Laws* 435-437.

16 It was also held in *Wells v Atoll Media (Pty) Ltd* [2009] ZAWCHC 173 par 49 by Davis J that the unauthorised use of an individual's attributes with a commercial value "constitutes an unjustifiable invasion of the personal rights of the individual, including the person's dignity and privacy".

17 *Fichard Ltd v The Friend Newspaper Ltd* 1916 AD 1; *Bredell v Pienaar* 1924 CPD 203; *Coxton Ltd v Reeva Forman (Pty) Ltd* 1990 3 SA 547 (A). See also Louw *International Encyclopaedia of Laws* 435.

18 See the discussion in Cornelius 509.

derived from the use of a sportsperson's image rights can be regarded as capital in nature and subject to lesser tax as a capital gain, or whether it should be classified as gross income in terms of the Income Tax Act.¹⁹ These taxation issues have not been comprehensively dealt with in South Africa. In order to establish a better understanding of the intricacies associated with the taxation of income derived from the use of image rights, the approach taken in the United Kingdom is evaluated because of the similarities between our legal systems in this regard.

4 1 The Position in the United Kingdom

The tax position in the United Kingdom of sportspersons resident and domiciled in the United Kingdom and employed by a club is as follows: The sportsperson must pay income tax on the payment made by the club to the sportsperson for his playing services which is employment income. The club must therefore account for income tax and is also responsible for the sportsperson's National Insurance Contributions (NICs) under the UK PAYE system.²⁰ Most sportspersons are taxed at the highest income tax rate of 50% (the rate has increased from 40% since 6 April 2010) and employer NICs add to the cost of the sportsperson's salary package paid by the club. Unsurprisingly, schemes to avoid such taxes have become very tempting, but are mostly seen as artificial and a sham. The use of a service company between the sportsperson and the club is judged to be artificial because the sportsperson remains an employee.²¹ It is, however, also possible for a sportsperson to provide promotional services to his club and to third parties. The income generated through promotional services and the exploitation of the image rights of the sportsperson is not always connected with his employment by the club. An intermediary company may then be used for tax mitigation purposes.²² Image rights are, however, deemed to be capital assets for tax purposes.

4 1 1 Case Law

In the UK case of *Sports Club, Evelyn and Jocelyn v Inspector of Taxes*,²³ Arsenal Football Club made payments to offshore companies in respect of the club's commercial exploitation of the image rights of two of their players, Dennis Bergkamp and David Platt. Bergkamp had his own image

19 58 of 1962. See also Benjamin "Image rights: Image rights and offshore tax planning" 2003 3 *WSLR* 1.

20 See Lewis & Taylor *Sport: Law and Practice* (2008) 1194; Anderson *Modern Sports Law* (2010) 302-303; Blackshaw *Sports Marketing Agreements* 379-380.

21 This arrangement is commonly known as "IR 35" or the "Intermediaries" legislation under the provisions contained in Ch 8 Pt 2 Income Tax (Earnings and Pensions) Act 2003.

22 See Lewis & Taylor 1195.

23 [2000] STC (SCD) 443. See Blackshaw *Sports Marketing Agreements* 266, 380-383; Anderson 303-304; Wentworth 2010 4 *WSLR* 4; Blackshaw 2005 *Bus L Int* 270 283; Blackshaw 2005 3-4 *ISLJ* 42 47; Louw *International Encyclopaedia of Laws* 432.

rights company (incorporated in the Dutch Antilles in 1991) and had assigned his image rights to the company. The company sub-licensed the rights to an intermediary company which was owned by Bergkamp's agent. The intermediary company sub-licensed the rights to his club and to Reebok. Platt also had an offshore image rights company which contracted with third parties. The company was wound up in 1995 and he set up a new image rights company in the UK with him and his wife as directors and shareholders. He subsequently assigned the right to exploit his image rights to that company.²⁴

Both players signed playing (employment) contracts with Arsenal Football Club in 1995. Arsenal also signed separate agreements with their image rights companies. The companies granted Arsenal the right to exploit the players' image rights in return for an agreed fee. This fee was seen by the Inland Revenue as income from the players' employment and subject to the normal deductions for income tax. They viewed the agreements as a smokescreen and took the view that the payments were rewards for the players acting as or becoming employees.²⁵ Bergkamp, Platt and Arsenal appealed against this ruling to the Special Commissioners where the players argued that the exploitation of their image rights was separate from the playing services they provided to Arsenal and that the agreements had independent commercial value.²⁶

The Special Commissioners concluded that the payments were not emoluments of the players' employment by Arsenal in terms of section 19 of the Income and Corporation Taxes Act 1988.²⁷ These payments were classified as capital sums and therefore non-taxable as income. The tax office thus departed from the notion that image rights are not recognised in that they considered image rights to be capital assets. The Special Commissioners held that the image rights agreements had independent and separate value over and above the playing services agreements.

In a recent matter Her Majesty's Revenue and Customs (HMRC) was of the view that there was no proper basis for the payment of the image rights sums and that they were, in effect, shams. In reality they were just

24 See Blackshaw 2008 3-4 *ISLJ* 146 147; Gardiner *et al* 443.

25 Par 87.

26 Par 83.

27 "We note that the promotional agreements and the consultancy agreement were contracts for full consideration and so would be excluded from tax under section 19 for that reason alone. Also, we find that the payments under those agreements were made in return for promotional rights and consultancy services respectively and were not made 'in reference to' the playing of games which was the service rendered by each player by virtue of his player's agreement with [Arsenal]. Neither were the payments under the promotional and consultancy agreements a reward by [Arsenal] for their services of the players; they were paid by [Arsenal] for the promotional rights and the consultancy services respectively." [2000] STC (SCD) 443 par 100.

part of the remuneration. Accordingly, the HMRC was entitled to claim PAYE and NIC on those sums. In the subsequent case of *HMRC v Portsmouth City Football Club Limited*,²⁸ Mann J stated:

[t]hat a club is entitled to pay, and a player is entitled to receive, payments for his image rights, that is to say for use of his image in publicity and other material. Where those payments are properly made the club is not obliged to account for PAYE or NIC in respect of them. A club is also entitled to pay, and a player is entitled to agree, the payment of sums to a discretionary trust for his benefit or the benefit of his family. Where such payments are made PAYE and NIC are not paid when the payment is made; they are paid later when the moneys are applied for the benefit of the employee.

4 1 2 Intermediary Companies (IR 35)

New legislation was introduced on 6 April 2000 to prevent employees from using personal service companies to avoid liability for income tax and NIC. This is where a worker provides services through an intermediary and is treated as an employee of the client for tax purposes. The fees paid to the intermediary company is deemed to be salary paid to the worker and employment income tax and employee NICs are payable.

It is uncertain whether the IR 35/intermediaries legislation applies to an image right company. According to Lewis and Taylor²⁹ one must determine whether “the promotional services were provided under a contract directly between the sportsperson and the club”. If that is determined, the sportsperson is regarded as an employee liable for income tax. It is, however, possible to avoid the application of IR 35 if the sportsperson can show that there is a genuine arrangement regarding his playing services and his promotional services. The first step is to use an image rights company in order to transfer the sportsperson’s image rights to such a company. The sportsperson would then enter into an agreement with the image rights company to perform promotional services. The image rights company would then enter into agreements with his club and other third parties for the exploitation of his image rights and promotional services. All earnings derived from these activities accrue to the image rights company. The income derived through this agreement is not regarded as income from the sportsperson’s employment. Employment income tax and NIC legislation does not apply and results in huge tax savings for both player and club.

The second important arrangement is the contract between the player and the club. This contract must only refer to playing services and not promotional services. The promotional services are provided for in a separate contract between the image rights company and the club as discussed above. If a finding can be made that the image rights company

28 [2010] EWHC 2013 (Ch) par 19.

29 See Lewis & Taylor 1200.

is indeed a sham, the sportsperson can be regarded as an employee under IR 35. However, the transfer of the image rights to the image rights company is a disposal of an asset and subject to a capital gains tax charge. The capital gains tax liability is based on fair market value, the length of the agreement and the celebrity status of the player. Once calculated, certain contingencies such as early retirement, risk of injury and loss of form resulting in varying income levels are applied. The player should avoid receiving a salary from the intermediary company, because that would make him liable for employment income tax and NICs. The company should rather pay the corporation tax due on profits each year (between 10% and 30%) and pay dividends to the player. The player (as a shareholder in the company) will then pay income tax at an effective rate of 25% on his dividend income.³⁰

4 1 3 Managed Service Companies

The Finance Act 2007 makes provision for the taxation of individuals whose services are provided through managed service companies. MSCs are managed by scheme providers who provide the services of an individual to a client. The individual is a shareholder and employee, but exercises no control over the company and is not responsible for any administration.

Scheme providers must be involved in the MSC and meet certain criteria: They must –

- (1) benefit financially from the individual's services to the company;
- (2) influence the provision of those services;
- (3) influence the way in which payments are made;
- (4) influence the finances of the company; or
- (5) provide an undertaking to make good a tax or NIC liability.

If these new rules on MSCs apply to image rights companies, the tax advantages as discussed above would no longer benefit sportspersons. Sportspersons must therefore make sure that their image rights companies do not constitute MSCs.³¹

4 1 4 Non-UK Domiciled Sportspersons

Overseas sportspersons and teams are increasingly refusing to participate in sporting events in the UK due to its harsh tax regime which applies to sport.³² The recent increase in the income tax rate to 50% and

30 *Ibid* 1196.

31 *Ibid* 1202.

32 Baldwin "Tax: International sport shuns the UK because of Tax" 2012 8 *WSLR* 1 2; Baldwin "The Budget: impact on sport and athletes earnings" 2009 6 *WSLR* 11.

the HMRC's view taken in the *Agassi*³³ matter worsened the situation.³⁴

In *Agassi v Robinson (Inspector of Taxes)*,³⁵ the Court of Appeal extended the scope of UK income tax for overseas sportspersons participating in the UK. The court held that Agassi was liable to pay UK income tax on endorsement income paid by his sponsors (Nike and Head) to his personal image rights company.³⁶ Foreign sportspersons face the same UK taxes which British nationals face and there are no tax incentives.³⁷

Sportspersons resident outside the UK pay tax on what they earn in the UK and a share of endorsement and sponsorship income, even if this income is earned through an offshore image rights company.³⁸ The result is that many sportspersons paid more UK income tax than the actual prize money they may have won. Non-UK domiciled sportspersons are usually exempt from paying UK tax on income and capital gains arising abroad. Therefore, the fee paid by a foreign sportsperson's club for the use of his image rights to an offshore company can be exempted from UK taxes.

4 2 The Position in South Africa

Sportspersons in South Africa contribute mainly to the fiscus in the form of normal tax levied in terms of the Income Tax Act.³⁹ Provisions for the determination of the amount of tax payable by sportspersons are scattered throughout the Act and induced the South African Revenue Services (SARS) to publish a *Draft guide on the taxation of professional sports clubs and players*⁴⁰ to present a consolidated view of the taxation of professional sports players in South Africa. However, this guide is not meant to be used as a legal reference and is not a binding general ruling.⁴¹

33 *Agassi v Robinson (Inspector of Taxes)* [2006] UKHL 23.

34 Guernsey has recently become the first jurisdiction in the world to introduce specific image rights legislation with very attractive tax provisions. See Blackshaw *Sports Marketing Agreements* 283.

35 [2006] UKHL 23.

36 Baldwin "Tax issues facing sports stars performing in the UK" 2006 5 *WSLR* 1; Baldwin "The taxation of overseas sports stars performing in the UK" 2004 11 *WSLR* 5.

37 France and Spain have also begun to impose less favourable tax regimes. France has repealed legislation which allowed clubs to treat 30% of a sportsperson's income as for image rights and the law allowing foreign players in Spain to pay tax at 24% if they earned over £600,000 per annum were amended. See further Sanchez "Changes to taxation: impact on professional sport" 2010 2 *WSLR* 8.

38 See *Agassi v Robinson (Inspector of Taxes)* [2006] UKHL 23; Wright "Agassi tax case deals potential blow to image rights tax structures" 2004 *SLAP* 6 6-7.

39 See also Louw *International Encyclopaedia of Laws* 143-144.

40 Date of issue: Nov 2010.

41 It is not issued in accordance with s 76P Income Tax Act 58 of 1962.

Since 1 January 2001⁴² the method of determining whether sportspersons are liable for normal tax in South Africa is residence-based and any sportsperson who qualifies as a “resident”⁴³ is liable for normal tax on their worldwide “gross income”⁴⁴ which includes all benefits (cash as well as payments in kind) received. In the case of image rights payments received from a club that uses the image of a sportsperson for commercial exploitation purposes, it can either be seen as remuneration for employee’s tax purposes or even possibly as intellectual property for purposes of royalties’ withholding tax. In *ITC 1735*⁴⁵ a leading golf professional entered into an agreement with Sun International who agreed to pay him US \$100,000 in consideration for the right:

[t]o exploit the golfer’s intellectual property ... including the utilisation of his likeness, biographical material, his presence at promotional events and media conferences and repeat television/video utilisation of his participation in the Tournament ...⁴⁶

Goldblatt J held that the payment made was income in the ordinary sense of the word and could not be considered as of a capital nature. He further held that the payment in issue was not a royalty⁴⁷ since the player’s name, likeness and biographical details are not creative effort and are accordingly of an entirely different nature to patents, designs or copyright. Image rights payments therefore form part of the sportsperson’s gross income and will be included in his taxable income.

The issue of double taxation must also be addressed when a local sportsperson earns foreign income.⁴⁸ The sportsperson is liable to pay tax on the foreign income in the country where it was earned and as a taxpayer in South Africa. The problem with double taxation has been recognised by SARS and numerous double taxation agreements (DTA)⁴⁹ with various countries have been concluded as a result. The main objective of a DTA is to avoid double taxation and section 6*quat* specifically provides for the claiming of foreign taxes paid by a

42 Revenue Laws Amendment Act 59 of 2000.

43 See for a definition of “residence”: *Robinson v COT* 1917 TPD 542; *Cohen v CIR* 1946 AD 174; *CIR v Kuttel* 1992 3 SA 242 (A).

44 See the definition of “gross income” in s 1 Income Tax Act. See further *Van Heerden v The State* 73 SATC 7 where the definition of “gross income” was explained in detail.

45 64 SATC 455.

46 456.

47 If it was found to be a royalty payment, it would have been exempted from South African tax as he was subject to tax in the United Kingdom in respect thereof in terms of art 11 DTA United Kingdom/South Africa.

48 In *Retief Goosen v Commissioner of Internal Revenue* USA Tax Court 136 TC No 27 filed 9 June 20110609 the Tax Court ruled that Goosen could not benefit under either the 1975 or 2001 USA/UK tax treaty because of his Lichtenstein bank account which were used for his non-UK income. His royalty income was allocated as being from a USA source and must be taxed in the USA.

49 See the SARS website www.sars.gov.za (accessed 2012-11-12) for a full list of the double tax agreements.

sportsperson as a credit against his South African tax liability.⁵⁰ These agreements usually provide that one of the countries shall have full taxing rights in respect of the income.⁵¹

The attention of SARS has forced sportspersons to seek specialist tax advice and undoubtedly resulted in a number of tax mitigation schemes. A popular scheme is to separate a sportsperson's image rights from his playing services. The credit worthiness of such a scheme depends on the value placed on the player's image and whether the sum paid for the image rights is a true and accurate reflection of his worth. The value attributable to image rights must be proportionate to the player's on-field value. Therefore, the image rights payments must be a true reflection of the player's profile, exposure and corresponding off the field value. The following scenarios illustrate the possible tax liability where image rights payments have been separated from payment for playing services in respect of payments made to the player (Table A), to an image rights company (Table B) and to an offshore company (Table C):

Table A: Salary and image rights payment to player

Salary	R'000	Image rights	R'000
Receipt	20	Receipt	80
Less 40 % tax	(8)	Less 40 % tax	(32)
Net income	12	Net income	48

Total net income = R60,000.00

Table B: Salary payment to player and image rights payment to image rights company

Salary (player)	R'000	Image rights (company)	R'000
Receipt	20	Receipt	80
Less 40 % tax	(8)	Less 28 % Company tax	(22.40)
Net income	12	Income	57.60
		Less 15 % Dividends tax	(8.64)
		Net income	48.96

Total net income = R60,960.00

50 See *Interpretation Note No 18 (Issue 2) – 31 March 2009 Income Tax: Section 6quat: Rebate or deduction for foreign taxes on income*.

51 The relevant provisions of the double taxation agreement between the United Kingdom and South Africa is discussed in detail in *ITC 1735 64 SATC 455*.

Table C: Salary payment to player and image rights payment to offshore image rights company

Salary (player)	R'000	Image rights (offshore company)	R'000
Receipt	20	Receipt	80
Less 40% tax	(8)	Less 10% Corporate tax	(8)
Net income	12	Income	72
		Less 0% Dividends tax	(0.00)
		Net income	72

Total net income = R84,000.00

It is clear from the above that tax mitigation schemes make a huge difference on the total net income of sportspersons and it is no surprise that these schemes are attracting the attention of the taxman.

5 Conclusion

Image rights are valuable commodities, but the commercial exploitation thereof throughout the world has become more difficult due to the different interpretations given to image rights.⁵² Image rights are not uniformly treated and some harmonisation is required to provide a level playing field for the legal treatment and taxation of image rights.⁵³ Proper thought and attention are required before entering into any image rights arrangement.⁵⁴ Playing services must be separated from promotional services, payments for these services must be distinguished, the image of the sportsperson must have commercial value, the club needs to show that it is actively exploiting the image rights, and image rights payments must be appropriate and reasonable in relation to the commercial value of the image rights. Compliance with these criteria should result in a sensible and legal tax avoidance structure and benefit both sportsperson and club. Poor structuring of these agreements often results in tax authorities viewing these schemes as a sham and challenges the tax treatment of image rights companies.⁵⁵ The unfortunate result is that the taxation of international sportspersons at the current high tax rate is alienating them and has a negative impact on the quality of sports events.⁵⁶

⁵² See Cornelius 517.

⁵³ Blackshaw 2005 *Bus L Int* 270 284; Blackshaw 2005 3-4 *ISLJ* 42 49.

⁵⁴ Gardiner *et al* 443.

⁵⁵ Wentworth 2010 4 *WSLR* 7.

⁵⁶ Baldwin "Time to reform sport's tax structure" 2005 6 *WSLR* 3.