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## Taxation of Non-Resident Entertainers and Sportsmen: The United Kingdom's Definition of Performance Income and How it Ought to be Measured

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# TAXATION OF NON-RESIDENT ENTERTAINERS AND SPORTSMEN: THE UNITED KINGDOM'S DEFINITION OF PERFORMANCE INCOME AND HOW IT OUGHT TO BE MEASURED

## I. INTRODUCTION

Track and field star Usain Bolt recently boycotted a race in the United Kingdom<sup>1</sup> because of the severe income tax implications that would result from his performance.<sup>2</sup> The United Kingdom's current interpretation of their taxing statute was established by a line of cases involving tennis star Andre Agassi and his company, Agassi Enterprises, Inc.<sup>3</sup> While the effect of the statute is substantial for many sportsmen and entertainers,<sup>4</sup> athletes who compete less frequently and derive substantial income from endorsements incur proportionally greater tax liability.<sup>5</sup>

This Note analyzes the U.K. approach to taxation of income earned for U.K. performances by foreign entertainers and athletes and agrees that the country of performance is the dispositive factor in determining which country is entitled to collect income tax on the endorsement income attributable to the performance. In Part II, this Note discusses the background of the relevant U.K. tax law. It reviews the U.K. court decisions in *Agassi v. Robinson*<sup>6</sup> that led to the taxation of non-resident entertainers and athletes on endorsement contracts with companies that have no tax presence in the United Kingdom. Then, this Note discusses the

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1. The official name of the United Kingdom is the United Kingdom of Great Britain and Northern Ireland. *Background Note: United Kingdom*, UNITED STATES DEPARTMENT OF STATE, BUREAU OF EUROPEAN AND EURASIAN AFFAIRS (Mar. 22, 2012), <http://www.state.gov/r/pa/ei/bgn/3846.htm>.

2. Jonathan Liew, *Usain Bolt Confirms He Will Miss London Grand Prix Due to Britain's Tax Laws*, TELEGRAPH (July 12, 2010), <http://www.telegraph.co.uk/sport/othersports/athletics/7886111/Usain-Bolt-confirms-he-will-miss-London-Grand-Prix-due-to-Britains-tax-laws.html>.

3. See Pete Hackleton, *Analysis—Taxation of Sportspeople in the UK*, TAX J. (Feb. 22, 2010), <http://taxjournal.com/tj/node/20030>.

4. See *id.*

5. *Id.* (“The impact was even more marked for a marathon runner who may only compete twice in a typical year. . . . [B]ased on worldwide competition days the denominator in the fraction would be 2. This means that if they raced in the London Marathon, half of all endorsement deals would be subject to UK tax. . . .”).

6. *Agassi v. Robinson* (Inspector of Taxes), [2006] UKHL 23, [4] (appeal taken from Eng.) (U.K.); *Agassi v. Robinson* (Inspector of Taxes), [2004] EWCA (Civ) 1518, [2] (Eng.); *Agassi v. Robinson* (Inspector of Taxes), [2004] EWHC (Ch) 487, [3] (Eng.).

U.K. acceptance of the substance-over-form tax doctrine<sup>7</sup> after *Agassi*. In Part III, this Note evaluates the applicability of other sources of relevant international tax law, including the Organization for Economic Cooperation and Development (“OECD”) and the United Kingdom—United States Bilateral Double Taxation Agreement.<sup>8</sup> In Part IV, this Note recommends a definition for “performance income” within the OECD Model Tax Convention on Capital and Investment.<sup>9</sup> By working through the different possible types of compensation for the same service, this Note arrives at a definition consistent with income tax theory. The resulting definition parallels the same definition upheld by the U.K. courts. This Note also chooses a means for calculating the amount of income tax a country should charge from a performer’s overall endorsement contract. Finally, the Note concludes in Part V.

## II. BACKGROUND: U.K. TAX LAW

The United Kingdom’s governmental structure is a constitutional monarchy<sup>10</sup> that divides power into an executive branch, a legislative branch,<sup>11</sup> and a judicial branch.<sup>12</sup> The United Kingdom’s legislative branch

7. The substance over form doctrine in the United States is well developed. *See Old Colony Trust Co. v. Comm’r*, 279 U.S. 716, 729 (1929) (“The discharge by a third person of an obligation to him is equivalent to receipt by the person taxed.”).

8. *See* Convention for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income and on Capital Gains, with Exchange of Notes, U.K.-U.S., July 24, 2001, T.I.A.S. 13161, 2224 U.N.T.S. 247 [hereinafter Double Taxation Agreement].

9. ORGANISATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT (“OECD”), MODEL TAX CONVENTION ON INCOME AND ON CAPITAL: CONDENSED VERSION (2010), available at <http://browse.oecdbookshop.org/oecd/pdfs/browseit/2310081E.PDF>.

10. UNITED STATES DEPARTMENT OF STATE, BUREAU OF EUROPEAN AND EURASIAN AFFAIRS, *supra* note 1. In the United Kingdom’s constitutional monarchy the Monarch is a king or queen who acts as the head of state, separate from political parties. *The Queen and the UK: The Role of the Monarchy: What Is Constitutional Monarchy?*, THE ROYAL HOUSEHOLD, <http://www.royal.gov.uk/MonarchUK/HowtheMonarchyworks/Whatisconstitutionalmonarchy.aspx> (last visited Mar. 22, 2012). Another name for a Monarch is a Sovereign. *Id.* “The Sovereign/Monarch governs according to the constitution—that is, according to rules, rather than according to his or her own free will.” *Id.*

11. The legislative branch consists of a bicameral Parliament made up of the House of Lords and the House of Commons. *The World Factbook: United Kingdom, Government*, CENTRAL INTELLIGENCE AGENCY (July 9, 2012), <https://www.cia.gov/library/publications/the-world-factbook/geos/uk.html>.

12. UNITED STATES DEPARTMENT OF STATE, BUREAU OF EUROPEAN AND EURASIAN AFFAIRS, *supra* note 1. The judicial branch consists of magistrates’ courts, county courts, high courts, appellate courts, the House of Lords, and a Supreme Court. *Id.* The United Kingdom established a Supreme Court in October 2009. CENTRAL INTELLIGENCE AGENCY, *supra* note 11. The Supreme Court assumed jurisdiction for appeals previously bestowed to the House of Lords. *Id.* However, the Supreme Court’s Justices are all also members of the House of Lords. *See Biographies of the Justices*, THE SUPREME COURT, <http://www.supremecourt.gov.uk/about/biographies.html> (last visited Jan. 17, 2011).

first imposed an income tax in 1799.<sup>13</sup> The enforcement branch, HM Revenue & Customs (“HMRC”), is responsible for collecting and administering the income tax.<sup>14</sup> Prior to 2005, Inland Revenue served as the tax enforcement branch.<sup>15</sup> The U.K. tribunals and courts interpret and apply the tax law to taxpayers when taxpayers dispute the Inland Revenue’s contentions of improper tax payments.<sup>16</sup> Before 2009, decisions of the Inland Revenue or HMRC were first heard by the High Court’s Chancery Division.<sup>17</sup> Appeals of the High Court’s decisions were heard in the Court of Appeal.<sup>18</sup> Before 2009, the Appellate Committee of the House of Lords was the last court of appeal.<sup>19</sup> Since 2009, the Supreme Court is the highest court in the United Kingdom.<sup>20</sup>

This Part discusses the *Agassi* case including the initial dispute with the Inland Revenue, the High Court decision, the Court of Appeal’s decision, and the House of Lords’ decision. It then discusses the application of the substance-over-form tax doctrine in the United Kingdom after *Agassi*.

#### A. *Agassi Case Background*

Andre Agassi, a famous tennis player, competed in numerous tournaments worldwide.<sup>21</sup> As a result of his fame in tennis, Agassi obtained endorsements from sporting goods manufacturers Nike, Inc. and

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13. *A Tax to Beat Napoleon*, HM REVENUE & CUSTOMS, <http://www.hmrc.gov.uk/history/taxhis1.htm> (last visited July 31 2012). Income tax rates in the United Kingdom follow a progressive scale. See *Income Tax Rates and Allowances*, HM REVENUE & CUSTOMS, <http://www.hmrc.gov.uk/rates/it.htm> (last visited Mar. 22, 2012). A progressive scale prescribes higher rates of tax on additional income as income increases. See G. Cassel, *The Theory of Progressive Taxation*, 11 ECON. J. 481, 485 (1901). The fundamental goal of the progressive rate is apportioning the burden of raising the government’s revenue equally according to ability to pay. *Id.* at 482. The scale imposes a top rate of fifty percent for those who have more than 150,000 British Pounds of taxable income in the 2010–2011 taxable year. See *Compliance: Section 1—General Information*, HM REVENUES & CUSTOMS, [http://www.hmrc.gov.uk/compliance/section\\_1.htm](http://www.hmrc.gov.uk/compliance/section_1.htm) (last visited Mar. 22, 2012).

14. *About Us*, HM REVENUE & CUSTOMS, <http://www.hmrc.gov.uk/menus/aboutmenu.htm> (last visited July 31, 2012).

15. *See id.*

16. *The Tax Tribunal*, PINSET MASONS (Aug. 2011), <http://www.out-law.com/en/topics/tax/tax-litigation--disputes-/the-tax-tribunal/>.

17. *See id.* Now appeals of the HRMC’s decisions are heard in the Tax Tribunal. *Id.* Appeals of that tribunal’s decisions are heard in the Upper Tribunal. *Id.* Further appeals must be filed in the Court of Appeal, and, lastly, the Supreme Court. *Id.*

18. *Id.*

19. *See Significance to the UK*, THE SUPREME COURT, <http://www.supremecourt.gov.uk/about/significance-to-the-uk.html> (last visited July 31, 2012).

20. *Id.*

21. *Agassi v. Robinson* (Inspector of Taxes), [2006] UKHL 23, [4] (appeal taken from Eng.) (U.K.).

Head Sports AG.<sup>22</sup> He directed payments from those endorsement contracts to his own closely held company, Agassi Enterprises, Inc.<sup>23</sup> Agassi filed a tax return in the United Kingdom for the 1998–99 tax years.<sup>24</sup> He was an American resident during those years.<sup>25</sup> Neither Nike nor Head Sports maintained a tax presence in the United Kingdom during those years.<sup>26</sup> The Inland Revenue<sup>27</sup> issued Agassi a closure notice<sup>28</sup> in the amount of £ 27,520.40.<sup>29</sup> Agassi appealed to the Special Commissioners.<sup>30</sup> The Special Commissioners dismissed his appeal.<sup>31</sup>

### B. The U.K. Courts' Decisions

The *Agassi* case was heard by the High Court, the Court of Appeal, and the House of Lords, with each court identifying the issues differently and providing a unique analysis.

22. *Agassi v. Robinson (Inspector of Taxes)*, [2004] EWCA (Civ) 1518, [2] (Eng.). Agassi was an American citizen. *Id.*

23. *See id.*

24. *Agassi v. Robinson (Inspector of Taxes)*, [2004] EWHC (Ch) 487, [3] (Eng.). The tax year for individual taxpayers ends on April 5. *Completing Your Tax Return (Individuals and Directors)*, DIRECTGOV, [http://www.direct.gov.uk/en/MoneyTaxAndBenefits/Taxes/SelfAssessmentYourTaxReturn/Completingtaxreturnsandkeepingrecords/DG\\_10013600](http://www.direct.gov.uk/en/MoneyTaxAndBenefits/Taxes/SelfAssessmentYourTaxReturn/Completingtaxreturnsandkeepingrecords/DG_10013600) (last visited Apr. 23, 2012). U.K. corporations may pay tax according to their own, specific fiscal year. *Introduction to Corporate Tax, What You Need to do for Corporation Tax and When You Need to Do It*, HM REVENUE & CUSTOMS, <http://www.hmrc.gov.uk/ct/getting-started/intro.htm#2> (last visited July 31, 2012).

25. *Agassi*, [2004] EWCA 1518, ¶ 2 (“During the relevant tax years [Agassi] was a resident of the [United States].”).

26. *See id.*

27. Inland Revenue was the department of the United Kingdom’s executive branch responsible for direct taxation such as income tax. *See About Us*, HM REVENUE & CUSTOMS, <http://www.hmrc.gov.uk/menus/aboutmenu.htm> (last visited Mar. 22, 2012). Inland Revenue was one of the United Kingdom’s precursors to the modern-day Her Majesty’s Revenues and Customs (“HMRC”). *Id.* HMRC was formed on April 18, 2005 as a result of Inland Revenue and HM Customs and Excise Departments merging. *Id.*

28. A closure notice is a letter from the government’s tax collection branch informing the taxpayer that the inquiry (e.g. audit) into the taxpayer’s compliance with the tax laws has been completed. *See Compliance: Section 1—General Information*, HM REVENUES & CUSTOMS, [http://www.hmrc.gov.uk/compliance/section\\_1.htm](http://www.hmrc.gov.uk/compliance/section_1.htm) (last visited Mar. 22, 2012).

29. *Agassi*, [2004] EWHC 487, [5].

30. “The Special Commissioners of Income Tax was a separate tribunal of qualified lawyers who heard more complex cases.” *See* GENERAL COMMISSIONER OF INCOME TAX, *supra* note 13. Section 4 of the Tax Management Act of 1970 established the jurisdiction of the tribunal. *Special Commissioners of Income Tax, Statistics*, ADMIN. JUST. & TRIBUNAL COUNCIL, <http://www.ajtc.gov.uk/stats/219.htm> (last visited Mar. 22, 2012) (citing Taxes Management Act § 4 (1970)). The Special Commissioners tribunal dissolved on April 1, 2009 when the tax court appeal system restructured in accordance with the 2007 Tribunals Courts and Enforcement Act. *See* Bramwell, *General and Special Commissioners, Farewell*, TAX ADVISOR, Sept. 2008, at 15 (citing the Tribunals Courts and Enforcement Act (2007)). The tax appeals system in the United Kingdom now follows a different structure. *See id.*

31. *Agassi v. Robinson (Inspector of Taxes)*, [2004] EWHC (Ch) 487, [5].

### 1. *The High Court's Decision*

Agassi appealed that dismissal to Justice Lightman of the High Court of Justice (Chancery Division).<sup>32</sup> The Court found that the issue in the appeal was whether Agassi's endorsement-contract income, which was paid and received by non-U.K. companies with no U.K. tax presence, was subject to the United Kingdom's Income and Corporation Taxes Act 1988<sup>33</sup> ("1988 Act").<sup>34</sup> Both Agassi and Inland Revenue, the U.K. tax enforcement agency, agreed that the issue was resolved by the interaction of §§ 555<sup>35</sup> and 556<sup>36</sup> of the 1988 Act.<sup>37</sup> The parties disagreed, however, how to apply these laws.

32. The High Court of Justice is the court of first instance for "higher level civil disputes." See *HM Courts & Tribunals Service*, JUSTICE.GOV.UK, <http://www.justice.gov.uk/courts/rcj-rolls-building/rcj> (last visited July 30, 2012). The High Court of Justice has three divisions: the Queen's Bench Division, the Chancery Division, and the Family Division. *Id.* "The Chancery Division of the High Court undertakes civil work of many kinds, in particular business and property related disputes and including some specialist work such as companies, competition, insolvency and patents and other intellectual property." HM COURTS SERVICE, CHANCERY GUIDE 2009, <http://www.justice.gov.uk/courts/rcj-rolls-building/chancery-division> (last updated May 18, 2011). Tax matters also fall within the jurisdiction of the Chancery Division. JOHN F. AVERY JONES, COURTS AND TAX TREATY LAW 35 (Guglielmo Maisto ed., IBDF 2007) ("[T]he Chancery Division . . . includes tax among many other subjects in its jurisdiction . . .").

33. Income and Corporation Taxes Act, 1988, c. 1 (Eng.).

34. Agassi, [2004] EWHC (Ch) 487, ¶ 1 ("The issue of law raised on this appeal is whether Mr Agassi can be assessed to income tax under section 556 of the Income and Corporation Taxes Act 1988 . . . in respect of payments connected with his activities here as a sportsman made by foreign companies with no tax presence in the United Kingdom to the foreign company with no tax presence here which Mr Agassi owns.").

35. See Income and Corporation Taxes Act, 1988, c. 3, § 555, stating in relevant part:

Payment of tax

(1) Where a person who is an entertainer or sportsman of a prescribed description performs an activity of a prescribed description in the United Kingdom ("a relevant activity"), this Chapter shall apply if he is not resident in the United Kingdom in the year of assessment in which the relevant activity is performed.

(2) Where a payment is made (to whatever person) and it has a connection of a prescribed kind with the relevant activity, the person by whom it is made shall on making it deduct out of it a sum representing income tax and shall account to the Board for the sum.

(3) Where a transfer is made (to whatever person) and it has a connection of a prescribed kind with the relevant activity, the person by whom it is made shall account to the Board for a sum representing income tax. . . .

(6) This section shall not apply to payments or transfers of such a kind as may be prescribed.

. . . .

(8) Where in accordance with subsections (2) to (7) above a person pays a sum to the Board, they shall treat it as having been paid on account of a liability of another person to income tax or corporation tax; and the liability and the other person shall be such as are found in accordance with prescribed rules. . . .

36. See Income and Corporation Taxes Act, 1988, c. 3, § 556.

Activity treated as a trade etc and attribution of income

The parties and the High Court relied on the Income Tax (Entertainers and Sportsmen) Regulations 1987<sup>38</sup> (“1987 Regulations”) in their analysis.<sup>39</sup> Regulation 3(2)<sup>40</sup> of the 1987 Regulations provides that any payment made in consideration “of performance of the relevant activity” has a sufficient connection to link §§ 555 and 556 of the 1988 Act.<sup>41</sup> The High Court went on to analyze Regulation 6 of the 1987 Regulations<sup>42</sup> for a definition of “relevant activity.”<sup>43</sup> A “relevant activity” is “any activity in the United Kingdom by an entertainer . . . as an entertainer or in connection with a commercial occasion . . . .”<sup>44</sup>

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(1) Where a payment is made (to whatever person) and it has a connection of the prescribed kind with the relevant activity, the activity shall be treated for the purpose of the Tax Acts as performed in the course of a trade, profession or vocation exercised by the entertainer or sportsman within the United Kingdom, to the extent that (apart from this subsection) it would not be so treated.

(2) Where a payment is made to a person who fulfils a prescribed description but is not the entertainer or sportsman and the payment has a connection of the prescribed kind with the relevant activity-

(a) the entertainer or sportsman shall be treated for the purposes of the Tax Acts as the person to whom the payment is made; and

(b) the payment shall be treated for those purposes as made to him in the course of a trade, profession or vocation exercised by him within the United Kingdom (whether or not he would be treated as exercising such a trade, profession or vocation apart from this paragraph). . . .

. . . .

(5) This section shall not apply unless the payment or transfer is one to which section 555(2) or (3) applies, and subsections (2) and (3) above shall not apply in such circumstances as may be prescribed.

*Id.*

37. *Agassi v. Robinson (Inspector of Taxes)*, [2004] EWHC (Ch) 487, [10].

38. Income Tax (Entertainers and Sportsmen) Regulations, 1987, 530 (U.K.).

39. *See Agassi*, [2004] EWHC 487, ¶ 9.

40. Income Tax (Entertainers and Sportsmen) Regulations, 1987, 530, art. 3, ¶ 2 (U.K.) (“[A] payment or transfer made for, [or] in respect of, or which in any way derives either directly or indirectly from the performance of the relevant activity has a connection of the prescribed kind with the relevant activity. . . .”).

41. *See Agassi*, [2004] EWHC 487, ¶ 9.

42. Income Tax (Entertainers and Sportsmen) Regulations, 1987, 530, art. 6, ¶ 1-2 (U.K.). The regulation reads:

(1) Subject to this regulation, any activity performed in the United Kingdom by an entertainer (whether alone or involving others) of any of the descriptions in paragraph (2) is an activity of a prescribed description (‘relevant activity’) for the purposes of paragraph 1 of Schedule 11, that Schedule and these Regulations;

(2) a relevant activity to which paragraph (1) refers is an activity performed in the United Kingdom by an entertainer in his character as an entertainer on or in connection with a commercial occasion or event . . . .

*Id.*

43. *See Agassi v. Robinson (Inspector of Taxes)*, [2004] EWHC (Ch) 487, [9].

44. *Id.*

The two parties disagreed about the nature of the interaction of §§ 555 and 556 in the 1988 Act.<sup>45</sup> Agassi first argued that § 556(5)<sup>46</sup> precludes the application of § 556 generally unless § 555(2)<sup>47</sup> also applies.<sup>48</sup> He then argued that § 555(2) could not apply to payments from Nike or Head Sports because neither company maintained a tax presence in the United Kingdom.<sup>49</sup> Agassi concluded, as a result, that the endorsement payments he received from Nike and Head Sports were outside the scope of the 1988 Act.<sup>50</sup> The High Court agreed with Agassi that he would not be liable for U.K. income tax unless Nike and Head Sports were obligated to withhold such tax from their payments to Agassi Enterprises by § 555(2).<sup>51</sup> The High Court disagreed, however, with Agassi's contention that his endorsements fell outside the scope of § 555(2) because Head Sports and Nike were foreign companies.<sup>52</sup>

Agassi's position relied on the proposition that U.K. legislation presumably follows the territoriality principle.<sup>53</sup> The territoriality principle requires clear evidence of intent before any statute should be given extra-territorial effect.<sup>54</sup> The principle is limited, however; it only governs matters of statutory construction and is not a limitation on the legislature's ability to tax.<sup>55</sup> Agassi argued that § 555(2) neither expressly nor plainly

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45. *See id.* ¶¶ 11–12.

46. Income and Corporation Taxes Act, 1988, c. 3, § 556(5).

47. *Id.*, c. 3, § 555(2).

48. Agassi, [2004] EWHC 487, ¶ 11.

49. Agassi v. Robinson (Inspector of Taxes), [2004] EWHC (Ch) 487, [11].

50. *Id.*

51. *Id.* ¶ 12 (“Section 556(5) provides that Section 556 shall not apply to a payment unless it is a payment to which section 555(2) applies.”).

52. *Id.*

53. *See id.* (citing *Clark v. Oceanic Contractors Inc.*, [1983] 2 A.C. 130 (H.L.) (Lord Wilberforce). The territoriality principle was applied to income tax in *Colquhoun v. Brooks*. *See* Agassi, [2004] EWHC 487, ¶ 12 (citing *Clark v. Oceanic Contractors* (1983) 2 A.C. 130 (H.L.) (quoting *Colquhoun v. Brooks*, (1889) 14 App. Cas. 493, 504)). The principle is particularly relevant in the United Kingdom because of the relatively broad-ranging tax rules. DICK MOLENAAR, *TAXATION OF INTERNATIONAL PERFORMING ARTISTES: THE PROBLEMS WITH ARTICLE 17* 116 (2006).

54. The territoriality principle is the

broad, general, universal principle that English legislation, unless the contrary is expressly enacted or so plainly implied as to make it the duty of an English court to give effect to an English statute, is applicable only to English subjects or to foreigners who by coming into this country, whether for a long or short time, have made themselves during that time subject to English jurisdiction . . . .

Agassi, [2004] EWHC 487 ¶ 12 (quoting *Ex parte Blain* (1879) 12 Ch.D. 522 at 526).

55. Agassi v. Robinson (Inspector of Taxes), [2006] UKHL 23 [16] (U.K.) (“Lord Scarman noted also that ‘the principle is a rule of construction only’ and that ‘British tax liability has never been exclusively limited to British subjects and foreigners resident within the jurisdiction.’” (quoting *Clark v. Oceanic Contractors Inc.* (1983) 2 AC 130 (H.L.)).



implied intent by Parliament for the statute to have extra-territorial effect by requiring non-resident corporations to withhold tax.<sup>56</sup>

The High Court disagreed.<sup>57</sup> Relying heavily on the context in which § 555(2) was passed,<sup>58</sup> the Court held that Parliament had a clear intent to tax Agassi's endorsement income.<sup>59</sup> Notably, the High Court expressed doubt that the legislature would pass the tax with the understanding that taxpayers could avoid taxation merely by channeling payments through companies with no tax presence in the United Kingdom.<sup>60</sup>

## 2. *The Court of Appeal's Decision*

Agassi appealed the High Court's decision to the Court of Appeal, which reversed the High Court decision.<sup>61</sup> The Court of Appeal addressed the issues as being (1) whether Agassi Enterprises could be declared a "relevant person" and thus taxed, and (2) whether Nike and Head Sports were obligated to withhold tax on payments made to Agassi Enterprises.<sup>62</sup> The Court of Appeal classified the issues as "a series of questions . . . of statutory construction."<sup>63</sup> The Court specified three principles that it felt were most instructive in determining the meaning of

56. See *Agassi v. Robinson (Inspector of Taxes)*, [2004] EWHC (Ch) 487, [12].

57. See *id.* ¶ 16 ("[I]n the case of sections 555 and 556 the plain and obvious intention of the legislature was to impose an obligation on the person making the tax irrespective of his presence here.").

58. *Id.* ¶ 15 ("The context in this case, as it appears to me, is critical."). The Court labeled the context as:

(a) legislation imposing a charge for income tax on non residents carrying on entertainment and sporting activities . . . [in the United Kingdom] irrespective of the connection of the person making the payment with the UK; and (b) legislation which intends by sections 555 and 556 to extend the ambit of the . . . [tax] and prevent avoidance and evasion.

*Id.*

59. *Id.* ¶ 16 ("[T]he plain and obvious intention of the legislature was to impose an obligation on the person making the payment irrespective of his tax presence here.").

60. *Id.* ¶ 15 ("[I]t would be absurd to attribute to the legislature the intention that liability could in any and all cases be avoided by the simple expedient of channelling the payment through a foreign company with no tax presence here. If this were the case, the tax would effectively become voluntary.").

61. *Agassi v. Robinson (Inspector of Taxes)*, [2004] EWCA (Civ) 1518, [33-38]. The Court of Appeal separates appellate cases into Civil and Criminal Divisions. *Court of Appeal*, HM COURTS SERVICE, <http://www.justice.gov.uk/courts/rcj-rolls-building/court-of-appeal> (last visited July 31, 2012). "The Court of Appeal is the highest court within the Senior Courts, which also includes the High Court and Crown Court." *Id.* The Civil Division heard Agassi's appeal. See *Agassi*, [2004] EWCA (Civ) 1518.

62. *Agassi*, [2004] EWCA (Civ) 1518, ¶ 14 ("The issue is whether section 556(5) excluded the characterisation of AE Inc. as a relevant person under section 556(2) because section 555(2) did not require Nike and Head to make deductions from payments made to AE Inc.").

63. *Id.*

the statute.<sup>64</sup> First, the Court stated that the legislative purpose should guide the meaning of the individual words in the statute.<sup>65</sup> Second, the Court declared meanings that detract from the statutory purpose ought to be avoided.<sup>66</sup> Finally, the Court highlighted a special rule of construction for taxing statutes: tax liability ought to be avoided unless the statute contains “clear words” imposing the tax.<sup>67</sup>

After addressing and quickly dismissing Inland Revenue’s arguments regarding the purpose of § 556(5) and the reach of § 555(2), the Court focused on the issue of the purpose of Schedule 11 to the Finance Act 1986.<sup>68</sup> Agassi and the Inland Revenue agreed the purpose of Schedule 11 was to allow the United Kingdom to tax entertainers and sportsmen, despite the brevity of their stay within the United Kingdom and their lack of a United Kingdom tax presence.<sup>69</sup> Before the statute, the United Kingdom encountered difficulty assessing or collecting a tax on performing entertainers and sportsmen, thereby lending support to the statutory purpose of extending the tax.<sup>70</sup> The Inland Revenue additionally argued that Parliament intended to include additional payments such as endorsements.<sup>71</sup> The Court discounted the Inland Revenue’s logic on the grounds that extending the range of payments taxable to entertainers and sportsmen alone, and not extending it to all traders, lacked “good reason”<sup>72</sup> and was an unsupported notion since the expansion of tax liability to other professions had not been pursued by Parliament.<sup>73</sup>

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64. *Id.*

65. *Id.* (“[T]he meaning adopted should be that which advances the overall purpose of the legislation.”).

66. *Agassi v. Robinson (Inspector of Taxes)*, [2004] EWCA (Civ) 1518, [14] (“[R]esults that would lead to absurdity or to frustration of the objective of the legislation should be avoided.”).

67. *Id.* (“[A]lthough the same general principles of construction apply to taxing Acts as to any other legislation, a subject is only to be taxed on clear words. . . .” (citing *Ramsay v. IRC* (1982) 557 A.C. 577 (Wilberforce, J.))).

68. Finance Act, 1986, c. 41, sched. 11 (U.K.); *see also* *Agassi*, [2004] EWCA (Civ) 1518, ¶ 20.

69. *Agassi*, [2004] EWCA (Civ) 1518, ¶ 20.

70. *Id.* ¶ 22.

71. *See id.* ¶ 20 (“It is clear that the intention of Parliament was to extend the range of payments to sportsmen and entertainers which were to be treated as deriving from a trade, profession or vocation and as a consequence taxable . . . .” (quoting Inland Revenue’s skeleton)).

72. *Agassi v. Robinson (Inspector of Taxes)*, [2004] EWCA (Civ) 1518, [22] (“[T]here is no good reason why that objective is only sought to be achieved in the particular case of entertainers and sportsmen. All other traders . . . remain free to channel payments to them through a wholly-owned company . . . [and thereby avoid] section 18.”).

73. *Id.* ¶ 23 (“Parliament has had ample opportunity, over the last 150 years, to amend section 18 or its predecessors to introduce into it provisions tracking what is now in section 556(2). It has not done so.”).

Unlike the High Court, the Court of Appeal closely scrutinized the question of whether the territoriality principle applied.<sup>74</sup> Inland Revenue argued that applying the territoriality principle called for the Court to change the plain meaning of the statute.<sup>75</sup> The Court of Appeal rejected Inland Revenue's characterization.<sup>76</sup> Instead, the Court declared the territoriality principle is a general rule that presumably applies to a statute unless the opposing party rebuts the presumption with a justification for disregarding it.<sup>77</sup>

The Court held that the territoriality principle clearly applies to an Act of Parliament that either charges or imposes a duty to collect tax.<sup>78</sup> The Court of Appeal drew from Lord Scarman's discussion in *Clark v. Oceanic Contractors*,<sup>79</sup> a 1983 House of Lords decision setting the precedent that enforceability is a key concern in construing a tax statute.<sup>80</sup> The Court also discounted the High Court's rationale for comparing § 18 and § 555(2) of the 1988 Act given the fact that the sections impose obligations on different types of parties.<sup>81</sup> Finally, the Court held that because § 555(2) imposes a penal burden, the statute must be given its most lenient reasonable interpretation.<sup>82</sup>

In a unanimous decision, the Court of Appeal overturned the judgment of the High Court, holding he owed no tax for the endorsement income payments made by Nike and Head Sports.<sup>83</sup>

74. *Id.* ¶ 24.

75. *Id.* ¶ 26 (“[I]t is not correct to argue, as did the Revenue before us, that to apply the territorial principle involves writing in words, or departing from the plain wording of the statute.”).

76. *See id.*

77. *See id.* “[T]he principle is inherent in any Act of Parliament, and it is for those who seek to say that it does not apply to demonstrate good reason for its exclusion.” *Id.* “[T]he framers and promoters of the tax legislation must be taken to know very well the high authority and long standing of cases, including tax cases, on the territorial principle.” *Id.* Upon establishing the territorial principle applies, the operation of a statute is limited. *See id.*

78. *Id.* ¶ 27. The Court placed emphasis on the similarity of the issues between *Clark v. Oceanic Contractors*, [1983] 2 A.C. 130 (H.L.), and the instant case. *See id.*

79. *Clark v. Oceanic Contractors*, [1983] 2 A.C. 130 (H.L.).

80. *See Agassi v. Robinson (Inspector of Taxes)*, [2004] EWCA (Civ) 1518, [27-28]. “Lord Scarman regarded enforceability as importantly relevant to the prior question, of whether the statutory obligation was intended to apply at all.” *Id.* ¶ 28.

81. *Id.* ¶ 29. Section 18 imposes an obligation on payment receivers as opposed to the obligation imposed on payers by section 555(2). *Id.* “The territoriality principle necessarily has no relevance to the payer envisaged by section 18, because section 18 imposes no obligation on him.” *Id.*

82. *Id.* ¶ 30 (citing *Clark v. Oceanic Contractors* [1983] 2 A.C. 130 (H.L.)) (quoting *Tuck v. Priester* [1887] 19 Q.B.D. 638).

83. *See Agassi*, [2004] EWCA 1518 ¶¶ 36–38.

### 3. *The House of Lords' Decision*

The House of Lords took yet another approach to the *Agassi* case. Lord Scott of Foscote of the House of Lords characterized the issues in the case as the statutory construction of § 555 and 556 and whether the territoriality principle should apply to § 555(2).<sup>84</sup> He identified four problems he believed the Finance Act 1986 was designed to correct: (1) the amount of time spent in the United Kingdom needed to carry on a “trade, profession or vocation”;<sup>85</sup> (2) the taxability of endorsement income;<sup>86</sup> (3) the application of section 18 of the 1988 Act<sup>87</sup> to foreign companies held by entertainers or sportsmen;<sup>88</sup> and (4) the proper method of collection from entertainers and sportsmen.<sup>89</sup>

A majority of the House of Lords held in favor of the Internal Revenue. Lord Scott of Foscote identified three main reasons for his opining that *Agassi Enterprises* was liable for tax.<sup>90</sup> First, if taxation of entertainers and sportsmen could be avoided based on the fact that neither party maintained a tax presence in the United Kingdom, the tax would be essentially voluntary.<sup>91</sup> Second, § 566 may only be avoided through § 556(5) if the payment is not of the prescribed type, regardless of the payer’s identity<sup>92</sup> Finally, because the purpose of §§ 555–558 was to tax the income earned by non-resident athletes for their U.K. performances, the non-resident status of the payer cannot be a legislatively intended limitation on the tax.<sup>93</sup> Lord Mance<sup>94</sup> also approved of the Inland Revenue’s position that

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84. *Agassi v. Robinson (Inspector of Taxes)*, [2006] UKHL 23, [3] (appeal taken from Eng.) (U.K.).

85. The United Kingdom’s limitations on the taxation of sportspersons in instances where the sportsperson’s compensation failed to meet the “trade, profession, or vocation” requirement because of its infrequent nature was a dominant concern. *Id.* ¶ 9.

86. *Id.* (“[W]ould income arising from commercial endorsements, e.g., wearing Nike tennis shoes and playing with a Head tennis racquet, be regarded as part of the profits or gains of carrying on the trade, profession or vocation?”).

87. Section 108 of the 1970 Act became section 18 of the 1988 Act. *See id.* ¶ 11.

88. *Id.* ¶ 9.

89. *Id.* (“[C]ollection of the tax from a foreign entertainer or sportsman, whose visits to this country might be sporadic and who would often have no assets in this country, was not always practicable.”).

90. *Agassi v. Robinson (Inspector of Taxes)*, [2006] UKHL 23, [17] (U.K.).

91. *Id.* (“[I]f Mr Agassi is right, the ease with which the tax liability imposed by section 556 could be avoided . . . would render payment of the tax to all intents voluntary. That cannot, in my opinion, have been Parliament’s intention.”).

92. *Id.* (“The identity of the payer is, in my opinion, as a matter of construction of section 555(2), irrelevant to the question.”).

93. *Id.*

94. Lord Mance currently serves as a Justice of the Supreme Court of the United Kingdom. *See THE SUPREME COURT*, *supra* note 12.

the 1988 Act was designed to expand liability for tax to non-resident entertainers and sportsmen.<sup>95</sup> Both Lord Nicholls of Birkenhead and Lord Hope of Craighead<sup>96</sup> agreed with the opinions of Lord Scott of Foscote and Lord Mance and also elected to allow the Inland Revenue's appeal.<sup>97</sup>

Lord Walker of Gestingthorpe dissented,<sup>98</sup> finding the majority's result irreconcilable with the previous decision in *Clark v. Oceanic Contractors*.<sup>99</sup> He felt the evidence failed to justify extraterritorial enforcement of the statutory penalty<sup>100</sup> and advocated dismissing the appeal.<sup>101</sup>

The Inland Revenue prevailed and Agassi was held liable for the tax related to his income from his U.K. performances.

### C. *Post- Agassi Law: A Substance-over-Form Approach in the United Kingdom*

The third primary argument advanced by Lord Scott of Foscote in the House of Lords' decision focused on the underlying rationale behind the

95. *Agassi v. Robinson (Inspector of Taxes)*, [2006] UKHL 23, [34] (U.K.). “[I]t would be incongruous if a primary tax charge for payment in respect of a United Kingdom activity depended on whether the payment was or was not made by a person present here.” *Id.* Lord Mance doubted the legislation actually contemplated the factual circumstances presented by *Agassi*. *Id.* ¶ 29. He responded by endeavoring to resolve the case “in a manner which is faithful to and makes best sense of the general legislative scheme.” *Id.* Lord Mance also acknowledged the applicability of the territoriality principle to § 555(2). *Id.* ¶ 30. However, his Lordship supported Lord Scott of Foscote’s analysis of § 556(5) as being unaffected by any territorial limitation in § 555(2). *Id.* ¶ 33.

96. Lord Hope of Craighead serves as the Deputy President of The Supreme Court of the United Kingdom. See THE SUPREME COURT, *supra* note 12.

97. *Agassi*, [2006] UKHL 23 ¶¶ 1–2.

98. *Id.* ¶ 19. Lord Walker of Gestingthorpe viewed the appeal as turning “on whether . . . [the territorial principle] is ousted by a sufficient indication that in this case Parliament did intend section 555(2) . . . to apply to a payment made by a person neither resident nor having any tax presence in the United Kingdom.” *Id.* ¶ 20. Lord Walker of Gestingthorpe first noted the close proximity between *Oceanic* and the passage of the Finance Act 1986 for the proposition that reading the two inconsistently is illogical. *Id.* ¶ 21. Conceding that the Finance Act 1986 did more than institute a new collection method for entertainers and sportsmen, his Lordship pointed out that the change in the collection mechanism was in the most prominent position in the legislation. *Id.* ¶¶ 22–24. Last, his Lordship argued that even if the intention was to tax economic activity in the United Kingdom, the inclusion of endorsement income in the realm of economic activity is relatively new and certainly not compelled by history. *Id.* ¶¶ 25–27.

99. *Id.* ¶ 21 (“[I]t is said that Parliament must be taken to have intended, by the relevant provisions in the Finance Act 1986, to have produced much the same effect as in *Clark v. Oceanic Contractors Inc.*, but without the element of any tax presence which was decisive in that case.”).

100. *Id.* ¶ 28 (“[I]t is not to my mind glaringly obvious that United Kingdom tax ought to be paid in respect of a non-resident sportsman’s merchandising income received overseas from a manufacturer which is not resident (and has no tax presence) in the United Kingdom.”).

101. *Agassi v. Robinson (Inspector of Taxes)*, [2006] UKHL 23, [28] (U.K.).

enactment of §§ 555–558.<sup>102</sup> The United Kingdom has progressed toward a substance-over-form approach regarding some taxes such as for those regarding financial instruments.<sup>103</sup> The high potential for tax avoidance with formalistic approaches may have contributed to the change.<sup>104</sup> The United Kingdom’s lack of a strong substance-over-form tradition in taxing statutes might have encouraged the courts to find that § 555(2) imposed a burden on non-resident corporations to withhold tax. The House of Lords made clear that absent such a finding, a tax could be channeled through a non-resident company, rendering taxes determined by the taxpayer’s residence voluntary. Under a substance-over-form approach, however, the United Kingdom could still assess tax if the channeling of the payment was determined to be a purely formal transaction to shield the nature of the payment by a company with a United Kingdom tax-presence.

It is unclear whether the House of Lords would decide that the purpose of §§ 555–558 independently justifies imposition of income tax on a non-resident sportsperson’s endorsements. The taxing statute’s legislative purpose is a component in the substance-over-form taxation doctrine.<sup>105</sup> The House of Lords’ focus on legislative intent is an additional signal that the substance-over-form taxation doctrine may be gaining traction in the U.K.

### III. INTERNATIONAL TAX MODELS AND INTERNATIONAL AGREEMENTS

Apart from the United Kingdom’s own taxing statutes, multilateral and bilateral international agreements also may govern the amount of income tax attributable to non-resident artists and athletes. The agreements apply both to income that is directly related to a performance as well as that income which is indirectly related to a performance.

This Part evaluates the significance of other international tax law to the *Agassi* case. Significant sources of international tax law include the OECD

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102. *Id.* ¶ 17.

103. ANTTI LAUKKANEN, *TAXATION OF INVESTMENT DERIVATIVES* 144 (2007).

104. *Id.* (“[T]ax avoidance opportunities are easier to abolish with substance over form than form over substance, as financial engineers may otherwise easily take advantage of inflexible formal law interpretations. . . .”).

105. J. Bruce Donaldson, *When Substance-over-Form Argument is Available to the Taxpayer*, 48 *MARQ. L. REV.* 41, 41 (1964) (“[T]he doctrine of substance-over-form . . . is a search for the essential reality, seeking to uncover the economic substance in order to allow the tax burden to fall with the exact weight which Congress intended.”).

Model Tax Convention of Income and Capital<sup>106</sup> (“Convention”), and the United Kingdom—United States Bilateral Double Taxation Agreement.<sup>107</sup>

### A. *The OECD Model Tax Convention on Income and Capital*

The Convention provides a model for international taxation relevant to the issues set forth in *Agassi*.<sup>108</sup> The OECD has thirty-four member countries, including the United Kingdom and the United States.<sup>109</sup> Taxation of artists<sup>110</sup> and sportsmen<sup>111</sup> is governed by Article 17 of the Convention.<sup>112</sup> Article 17 formed a substantial basis for Parliament’s

106. ORGANISATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT, *supra* note 9.

107. Double Taxation Agreement, *supra* note 8.

108. ORGANISATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT, *supra* note 9. The membership to the OECD is reserved for developed countries that have well-established policies and contribute to the global economy. See *OECD Enlargement*, OECD, [http://www.oecd.org/document/42/0,3746,en\\_2649\\_201185\\_38598698\\_1\\_1\\_1\\_1,00.html](http://www.oecd.org/document/42/0,3746,en_2649_201185_38598698_1_1_1_1,00.html) (last visited Apr. 23, 2012). The United Nations has also established a Model Tax Convention primarily intended for developing countries that are not members of the OECD. UNITED NATIONS, UNITED NATIONS MODEL DOUBLE TAXATION CONVENTION BETWEEN DEVELOPED AND DEVELOPING COUNTRIES, at vi (2010), <http://unpan1.un.org/intradoc/groups/public/documents/un/unpan002084.pdf>. The thinking is that this convention will reduce double taxation and, thus, create a more favorable climate for investment. *Id.* (“The growth of investment flows from developed to developing countries depends to a large extent on what has been referred to as the international investment climate. The prevention or elimination of international double taxation . . . constitutes a significant component of such a climate.”). “Tax reform has been a significant part of economic development projects and structural adjustment programs for developing and transition countries since World War II.” Miranda Stewart, *Global Trajectories of Tax Reform: The Discourse of Tax Reform in Developing and Transition Countries*, 44 HARV. INT’L L.J. 139, 141 (2003). One might wonder, however, if the coordination of taxation in the manner prescribed by the convention might result in too harsh of a tax burden to create a favorable investment environment. Consistent rules are good. Extremely lax rules might be even better. Developing nations who adopt the UN Model Tax Convention might still compete against developed nations and one another on tax rates, instead of tax language.

109. *Id.* at 2. “The OECD member countries are Australia, Austria, Belgium, Canada, Chile, the Czech Republic, Denmark, Finland, France, Germany, Greece, Hungary, Iceland, Ireland, Italy, Japan, Korea, Luxembourg, Mexico, the Netherlands, New Zealand, Norway, Poland, Portugal, the Slovak Republic, Slovenia, Spain, Sweden, Switzerland, Turkey, the United Kingdom, and the United States.” *Id.*

110. “It is not possible to give a precise definition of ‘artiste’, but paragraph 1 [of Article 17] includes examples of persons who would be regarded as such. These examples should not be considered as exhaustive.” *Id.* at 271, ¶ 3.

111. *Id.* ¶ 5 (“Whilst no precise definition is given of the term ‘sportsmen’ it is not restricted to participants in traditional athletic events (e.g. runners, jumpers, swimmers). It also covers, for example, golfers, jockeys, footballers, cricketers and tennis players, as well as racing drivers.”).

112. *Id.* at 32, art. 17.

1. Notwithstanding the provisions of articles 7 and 15, income derived by a resident of a Contracting State as an entertainer, such as a theatre, motion picture, radio or television artiste, or a musician, or as a sportsman, from his personal activities as such exercised in the other Contracting State, may be taxed in that other State.

2. Where income in respect of personal activities exercised by an entertainer or a sportsman in his capacity as such accrues not to the entertainer or sportsman himself but to another person,

approach to the taxation of artists and athletes at dispute in Agassi's appeals.<sup>113</sup> In the wake of the United Kingdom's *Agassi* ruling, the OECD Commentary to Article 17 now provides that member states may tax non-resident performers' worldwide sponsorship or endorsement income.<sup>114</sup> The definition of "performance income," however, is ambiguous and undefined.<sup>115</sup> Additionally, individual member states are not required to agree to every provision.<sup>116</sup> As a result, the Convention is not uniformly applied.

### B. International Agreements

Bilateral tax treaties form another base of tax law the U.K. courts might consider. These treaties aim to decrease double taxation and clarify tax rules to facilitate commerce.<sup>117</sup> Avoiding double-taxation is important in

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that income may, notwithstanding the provisions of articles 7 and 15, be taxed in the Contracting State in which the activities of the entertainer or sportsman are exercised.

*Id.*

113. See *Agassi v. Robinson* (Inspector of Taxes), [2006] UKHL 23, [22] (U.K.).

The provisions introduced by the Finance Act 1986 were not simply a collection mechanism. They made substantial changes in the way in which non-resident entertainers and sportsmen were to be charged, in line with what was permitted by Article 17 of the (1977) OECD Model Tax Convention on Income and Capital.

*Id.*

114. ORGANISATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT, *supra* note 9, at 272, ¶ 9 ("Article 17 will apply to advertising or sponsorship income, etc. which is related directly or indirectly to performances or appearances in a given State. Similar income which could not be attributed to such performances would fall under the standard rules of Article 7 or Article 15, as appropriate.").

115. *Id.* at 272, ¶ 10 ("The Article says nothing about how the income in question is to be computed."); see also MOLENAAR, *supra* note 53 ("Altogether, it needs to be concluded that a better and more unambiguous definition of 'performance income' is needed.").

116. See ORGANISATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT, *supra* note 9. For example, the United States reserved the right to impose a minimum on the amount of income earned by an artiste or sportsman for paragraph one of Article 17 to apply. *Id.* at 275, ¶ 20. Additionally, the United States, Switzerland, and Canada believe that paragraph two of Article 17 should only apply if the corporation is held by the performer, as opposed to when a management company or legal entity such as a performing troupe earns the income. *Id.* at 273, 275, ¶ 16.

117. UNITED NATIONS, *supra* note 108, at vi.

Broadly, the general objectives of bilateral tax conventions may today be seen to include the full protection of taxpayers against double taxation (whether direct or indirect) and the prevention of the discouragement which taxation may provide for the free flow of international trade and investment and the transfer of technology. They also aim to prevent discrimination between taxpayers in the international field, and to provide a reasonable element of legal and fiscal certainty as a framework within which international operations can be carried on.

*Id.*



order to facilitate the free flow of sporting events and entertainment.<sup>118</sup> The United Kingdom is a party to international agreements that pertain to taxation, including agreements with the United States and under its obligations as a member of the European Union.

The United States and the United Kingdom have established a Double Taxation Agreement (“DTA”) since the close of the 1998/1999 tax year.<sup>119</sup> Article 16 of the DTA governs “Entertainers and Sportsmen.”<sup>120</sup> The plain language of the agreement is unclear on the issue of Agassi’s tax liability for his endorsements.<sup>121</sup> The substantial similarities between Article 16 of the DTA and Article 17 of the OECD Model Tax Convention<sup>122</sup> suggest that the provisions should be, and more than likely will be, construed consistently by courts.

#### IV. PROPOSED SOLUTION TO THE POST-AGASSI AMBIGUITY: DEFINING A UNIFORM SYSTEM OF ARTIST’S INCOME COMPUTATION UNDER THE OECD ARTICLE 17

The importance of defining a uniform system of income computation is clear: without such a definition, the aims of international treaties and agreements with respect to establishing a coherent tax regime for non-resident artists and athletes are unattainable.<sup>123</sup> The intended benefits for developing nations are similarly stymied.<sup>124</sup> With the goal of developing a

118. Jeffrey Dunlop, Comment, *Taxing the International Athlete: Working Toward Free Trade in the Americas Through a Multilateral Tax Treaty*, 27 NW. J. INT’L L. & BUS. 227, 231 (2006) (citing JOSEPH ISENBERGH, INTERNATIONAL DOUBLE TAXATION: U.S. TAXATION OF FOREIGN PERSONS AND FOREIGN INCOME 3 (1996)). While major events such as Wimbledon, the World Cup, and the Olympics are not going to suffer, smaller events may not be able to attract top talent or may move to countries that offer a favorable tax situation for major participants.

119. See Double Taxation Agreement, *supra* note 8.

120. *Id.* art. 16.

121. *Id.* The issue is whether the “Income derived by a resident of a Contracting State . . . as a sportsman, from his personal activities as such exercised in the other Contracting State . . .” includes some portion of the income Agassi received under his endorsement contracts. *Id.* Under a “but for” test it is evident that Agassi could not have commanded an equal endorsement contract if he stipulated that he would not agree to play or appear in the United Kingdom. However, even if some such endorsement income is attributable to his performance in the United Kingdom, the DTA does not prescribe a formula to apportion the tax. *See id.*

122. Compare Double Taxation Convention, *supra* note 8, art. 16, with ORGANISATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT, *supra* note 9, at 32, art. 17.

123. MOLENAAR, *supra* note 53.

124. Without a uniform system of tax computation, the goal of creating an investment friendly climate is arguably frustrated. A disjointed international system might favor developing nations, who could compete for performing events by granting especially favorable tax conditions.

consistent system in mind, this Note assigns the first right to tax income to a particular country in each hypothetical situation.<sup>125</sup>

*A. Determining the Scope of Income: To Include Indirectly Related Income or Not?*

The first issue is what should be the scope of a performer's income within the meaning of Article 17. The performer's income is generally divisible into three categories: compensation for the performance, sponsors' compensation directly related to a performance, and sponsors' compensation indirectly related to a performance.<sup>126</sup> Compensation for a specific performance should always be taxable in the country the performance takes place in.<sup>127</sup>

Sponsorship income directly related to a performance might be from a company with a tax presence in the country of performance or from a company without such a tax presence.<sup>128</sup> If the sponsoring company has a tax presence in the performance country, it is logical to allow that country to levy a full income tax on that sponsorship amount.<sup>129</sup> If the sponsoring company lacks a tax presence in the performance country, the answer is

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125. The goal in assigning a country the income tax from a performance is to achieve parity for performances with what would be expected if the same amount of income was given as compensation for services in the country. While assignment to multiple countries might be theoretically appealing because multiple nations can receive income—as opposed to an all or nothing rule—such a system might be administratively impractical. The normative argument of whether splitting income is optimal, however, is beyond the scope of this Note.

126. ORGANISATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT, *supra* note 9, at 272, ¶ 9. A fourth type of payment is payment received in the event of a cancelled performance. *Id.* Such payments fall “outside the scope of Article 17. . . .” *Id.*

127. This is where the nexus between the country of performance and the performer is the greatest. Analogously, most individuals are required to pay income tax in the country where they work, regardless of their citizenship. *See* Double Taxation Convention, *supra* note 8, arts. 14, 16; ORGANISATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT, *supra* note 9, at 32, art. 17. This system is traditionally uncomplicated and easy to administer. Furthermore, the tax presence of the paying entity is almost assured to have a tax presence in the country of performance, alleviating hardship concerns.

128. This type of income could include one-time payments or special payments for sponsorship at particular performance enumerated in a broad sponsorship agreement. Analyzing complex agreements, however, would be administratively impractical and hard to effectively enforce. There would be a strong temptation to game the tax rates by proscribing large payments in low-tax countries. Single performance contracts decrease this risk, but do not eliminate it.

129. In this case, the only other country who might claim the tax is the performer's nation of residence. The nexus between the performer's sponsorship income and the performer's nation of residence is attenuated. The core of the transaction results from the performer's talents and the performance country's resources.

not so clear.<sup>130</sup> The resident country of the performer and company may also assert a claim to the income tax.<sup>131</sup> Assignment of the income tax to the country of performance still makes sense, however, because the performer and company are availing themselves of the performance country's benefits by entering into a sponsorship agreement directly related to a performance in that country.<sup>132</sup>

Sponsorship income unrelated to a specific performance, such as sponsorship income earned from a worldwide endorsement contract, could be assigned to the performance country, consistent with sponsorship income directly related to a performance.<sup>133</sup> Conversely, one might view the relationship between the performer's income and the performance country as too attenuated or uncertain to hold dispositive.<sup>134</sup> Arguably, the right to tax the income could be given to a separate country with a link to the entire sponsorship contract.<sup>135</sup> The two remaining options under that rationale would be to assign the right to tax the income in the sponsoring company's country of residence or the performer's country of residence.<sup>136</sup> Assuming there is a reasonable method of calculating the tax, the most

130. Universal allowance of such a tax would be equitable in the sense that the nexus between the country and the performer's sponsorship income is strong. The tax would, however, necessarily impose a burden on either the performer or company, one of which must pay tax in a foreign country.

131. The company's home country might assert that there are substantial benefits the country provides the company and, but for those benefits the company would not be in the same position to pay the performer. The performer's home country might assert that as a citizen of their country, all proceeds the performer makes should be solely taxable by them.

132. Here, assignment of the income to the performer's native country is subject to the same benefits and problems as when the sponsoring company has a tax presence in the performance country. The sponsoring company's native country has a more removed interest in the income than the performance country because traditionally income tax is paid by the individuals earning income in a country, not the company paying wages.

133. One might view the indirect nature of the performer's earnings simply as a matter of ambiguity relating to the amount of payment. So viewed, there is a strong rationale for assigning the entire performer's income to the performance country, as was done under the previous two type of income.

134. Such an approach would reduce administrative and compliance costs. The approach, however, would do so at the expense of theoretical consistency in the tax distribution among nations.

135. This link would take secondary status in every other situation.

136. The sponsoring company's country of residence has some claim to tax because the performer gains income from an entity with a firm nexus to such country. The performer's country of residence has an even stronger claim to the money, based on the performer's obligations as a citizen. Neither claim is subordinate to the right of the performance country, but the amount the performance country deserves is unclear. Cf. ORGANISATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT, *supra* note 9, art. 17. The factual situation in Agassi was particularly contentious because his Nike contract represented a sponsorship deal by an American company to an American. The United Kingdom asserted a right to tax some of the money, but the measurement is unclear in indirect relation cases.

principled assignment of the right to tax is in the performance country because that is the country where the performance actually occurs.<sup>137</sup>

The definition of indirect income raises even more problems. If performer's sponsorship income is the result of previous performances where is the line drawn?<sup>138</sup> The definition of indirect income might be over-inclusive in some cases if the value of the sponsorship with no performances would be high.<sup>139</sup>

### *B. Measuring the Income Within Scope*

Assuming a workable definition of indirectly related income, there are still significant measurement problems in determining the amount of such income generated by a particular performance. The first problem in assigning value to particular performances is determining whether all performances produce equal sponsorship income.<sup>140</sup> Second, some performances might even be net-monetary losses over the long term.<sup>141</sup>

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137. If the host nation's event is indirectly responsible for the income the performer receives, the amount of the income should be the focus. Sponsorship income indirectly related to the performance only differs from directly related income in the certainty of the amount. However, doubts about the true amount also exist when sponsorship income is directly related to a performance because of the potential for abuse. *See supra* note 132.

138. One potential answer, as the United Kingdom held in the Agassi case, would be to calculate the income derived from performances based on a taxable year. *See Agassi v. Robinson* (Inspector of Taxes), [2004] EWHC (Ch) 487, [3] (Eng.).

139. Consider if an already famous person (royalty or otherwise) played a tournament a year as a professional tennis player. Her overall endorsement contracts would not be attributable to the number of performances in the performance country to the same extent as a player whose endorsement contract was entirely based off of tennis skill, yet the player would risk being taxed as if the entirety of the contract was derived from their performance.

140. If the United Kingdom, acting as the performance country, assessed the same weight to Wimbledon as the Queen's Club pre-Wimbledon tournament the result would assign dramatically inappropriate values to both performances. As the number of performances increases, the average will devalue the Wimbledon performance. This devaluation might be deemed palatable, however, because it tends to disadvantage nations with the largest and most successful tournaments. Developing nations are inadvertently subsidized. The flip-side is that nations with established tournaments are not given fair value for what they have. The practical result of such a system might be to put downward pressure on the quality of all tournaments.

141. A poor performance at a tournament might appear to result in a measurement problem. In fact, the poor performance that is indirectly related to a sponsorship agreement is equally valuable as one that is directly related. The event, itself, still represented an increase in the income of the performer even if the performer's future ability to earn sponsorship money decreased. All that said, there is still the possibility that some individual performance triggers a substantial decrease in a performer's future sponsorship dollars. Interestingly, the risk of a negative performance hurting a person's overall monetary worth is probably higher for very important performances that would command more dollars in a directly related sponsorship agreement.

Third, some performers derive much of their sponsorship income from a country where they never perform.<sup>142</sup>

Multiple alternatives which might resolve these problems exist. One solution could be to average the sponsorship income that is indirectly related to a performance. Assigning different performances different weights according to the sponsorship value might be accomplished with historical data.<sup>143</sup> The extremely varied nature of the different types of performers and their relative sponsorship values would present a problem in administrating and calculating income taxes under such a system.<sup>144</sup>

Another potential system would be a voluntary system in which individuals and companies could estimate the values of their sponsorship in each particular country.<sup>145</sup> A voluntary system, however, has obvious problems because of the desire for low tax rates. Some of the concerns about a completely voluntary system could be somewhat mitigated by a system requiring performers to file income tax returns detailing their best estimate of the sponsorship income attributable to each country and auditing suspicious returns.<sup>146</sup> Such a system, however, would still be prone to abuse and the prospect of multiple international tax audits would likely prove costly for both performer and performance country.

142. See *Agassi v. Robinson*, [2006] UKHL 23, [27].

If a relatively unknown tennis player . . . [earns income] for playing in tournaments in the United Kingdom, it is fair that he or she should be taxed on this . . . It is not so obvious that the player should also have to pay United Kingdom tax on merchandising income paid overseas in respect of products which (because of the player's relatively modest fame) may be marketed only in his or her own country.

*Id.*

143. A historical system would, naturally, be backwards-looking and such a system would drag behind the current values of sponsorships with might change from year to year. Moreover, data on individual tournament might be hard to find. It might also vary by performer based upon their nationality, the number of times they have won a specific tournament or a specific type of tournament, or other similar characteristics.

144. One could imagine a low-level tennis star who derives most of his sponsorship income playing in his hometown tournament. The tennis star might be responsible for paying a substantial majority of their tax to a country they participated in a major tournament, however.

145. Voluntary systems have the highest potential to accurately state correct values. The people with the best information about what the negotiated value for sponsorships in particular countries would be worth have the responsibility to report the information. The problem is that such a rule is cost prohibitive if done correctly, and results in uncheckable tax fraud in practice.

146. Adding enforcement to the voluntary system retains the best parts of that system and promises decreased abuse, but the costs would likely be prohibitively high. Moreover such a system would require large scale compliance among the taxing authorities from almost every jurisdiction to work. The incentive to cheat would also be present for countries who might welcome and attempt to legitimize taxpayer claims when it maximized revenue.

Yet another option might be a system which groups and tiers specific performance events to reflect the relative value of the sponsorship.<sup>147</sup> Such a system might reflect a healthy balance between income-approximation accuracy and administrative and compliance convenience. One patent downside on the tier system is that it might be difficult to agree on tiers unless they reflected objective criteria.

#### V. CONCLUSION

Agassi's appellate journey through the U.K. court system is particularly instructive with respect to the United Kingdom's prior and current court structure. The cases also provide informative takes on the status of the substance-over-form tax doctrine in the United Kingdom.

In addition to the United Kingdom's own law, there is an evolving set of materials such as treaties, model treaties, and bilateral agreements between nations that may also prove instructive in international taxation matters. In the case of a non-resident performer's tax, virtually all of the relevant materials use language substantially similarly to the language found in the U.K. statutes that governed *Agassi*. The leading treaty, the OECD Model Tax Convention on Income and Capital, appears to have adopted the rule regarding taxation of non-resident performers developed from *Agassi* in the commentary of the treaty.<sup>148</sup> As a result, OECD member countries may subject non-resident performers to their income tax regardless of whether the performer's sponsorship income from the performance in the nation was made on a direct, per-performance basis or an indirect basis, such as a yearly worldwide sponsorship agreement.<sup>149</sup>

The result reached in *Agassi* and the subsequent amendments to the comments of the OECD Model Tax Convention make sense as a matter of tax theory. There is a coherent basis for charging income tax on all persons earning income in a country regardless of their residency. That basis remains if the income earned is imputed into a long-term or comprehensive contract.

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147. In the case of tennis, tournaments might be tiered into Grand Slam Events, the Davis Cup, and various other divisions based on the size of the tournament or exhibition. Instead of a raw percentage, different tiers of events would receive relative weights. Such a system would alleviate the burden in playing in an event such as a charity exhibition in a high income tax country.

148. ORGANISATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT, *supra* note 9; *see also* discussion in *supra* notes 108, 114.

149. The non-OECD nations could also use the same interpretation for the provision in the UN Model Tax Treaty that are modeled after the OECD Model Tax Convention on Income and Capital.

Specific information as to the amount of true compensation resulting from the performer's sponsorships in the country may be hard to infer. If there were a clear link to the performance country, then indirectly related sponsorship agreements would be equal to directly related sponsorship agreements.<sup>150</sup> In the case of indirectly related sponsorship income, precisely measuring the correct amount of income is virtually impossible under an easy-to-follow system designed to be administratively practicable for enforcing countries.<sup>151</sup> Calculations resulting from compromise do exist, however, and the benefit they provide in correctly specifying which country should levy income tax outweighs their negative effects.

The current rule in the United Kingdom of summing total performance sponsorship income and then apportioning that income among the nations in which the performances took place based strictly on total performances is an effective solution. In the future, a tiered system where more important events command a higher percentage of tax might also be a feasible alternative.

*Alan Simpson\**

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150. Direct agreements explicitly specify payment for sponsorship at a specific performance or in connection with the performances in a specific country.

151. Due to the highly varied nature of performer's and companies sponsoring performers, any detailed evaluation of performers' income tax returns would require extensive effort by numerous parties. The method of dividing the sponsorship income according to performances is reasonably enforceable, but it lacks accuracy in terms of estimating the true value provided by the performance in each host nation.

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