

Sports image rights – countering tax evasion in the football industry

by Corinna Coors¹

I. Introduction

In the June issue 2015 of the *International Sports Law Journal*, I discussed the taxation of sports image rights in the UK, including the recent update of the Inland Revenue (HMRC) to their capital gains tax manual on the taxation of image rights.² The debate over more effective tax regulation for top-earning athletes has recently intensified, following media reports about tax evasion in the football industry and the potential abuse of image rights arrangements to reduce tax liabilities.³ According to the 2016/2017 report by the UK Public Accounts Committee, 43 players, including Manchester United's Wayne Rooney, 12 clubs and eight agents are currently the subject of open tax inquiries related to image rights agreements.⁴ In separate investigations, Cristiano Ronaldo and Jose Mourinho, have been targeted by Spanish and British tax authorities for allegedly moving more than £100 million in a tax avoidance scheme on the British Islands.⁵ This article provides an update on the status of recent efforts to reform the taxation of foreign domiciled persons and offshore trusts as at January 2017. The new rules may have implications on tax and image right structures commonly used by foreign wealthy footballers in or moving to the UK. While the proposals are a step in the right direction, it is recommended that existing and forthcoming tax rules must be enforced more effectively to reduce tax evasion in the sports and entertainment industry to a bearable minimum.

1. Background

The economic value of image rights of sport stars has increased tremendously over the last decades. License fees and royalties are a valuable source of income for many sports personalities and clubs in Europe.⁶ With USD\$32 million from endorsements alone, Cristiano Ronaldo topped the list of the *Forbes'* 2016 ranking of the athletes earning the most from endorsements. Ronaldo holds multiple endorsement deals, including a number of world famous companies, *Nike*, *Coca-Cola* and *Emirates*.⁷

Given the immense value of image rights, footballers and clubs often use complex image rights agreements to limit their overall tax liability. They can benefit from the current tax rules in the UK that allow image rights income to be treated as a separate revenue stream from the income earned from the players professional activities.⁸ It means that footballers are liable to pay UK tax on their income resulting from their player's contracts. At the same time they could set up a company to receive payments for their valuable image rights in an offshore tax haven, for example in Jersey or Guernsey in the English Channel, where tax could be paid at a much lower corporate rate.⁹

While these schemes are, generally, legal, other activities may be less legitimate and in some cases illegal. For example, in cases where the image of a footballer has no considerable commercial value, the club may still pay large sums to the image rights

company. Rather than paying for the commercial use of the image of the footballer, the club would effectively make disguised salary payments to the company to benefit from the lower corporate tax rate.¹⁰

In *Sports Club, Evelyn and Jocelyn plc v Inspector of Taxes 2000*¹¹, Her Majesty's Revenue and Customs (HMRC) had challenged such image rights arrangements entered into by the premier ship football club Arsenal and two of its players, Dennis Bergkamp and David Platt. Bergkamp had his own image rights company incorporated in the Dutch Antilles in 1991 and had assigned his image rights to the company. Platt also had an offshore image right company which contracted with another company. Both players signed employment contracts with Arsenal Football Club in 1995. Arsenal signed separate agreements with their image rights companies which provided Arsenal with the right to exploit the player's image rights in return for an agreed fee. This fee was seen by HMRC as earnings arising from the player's employment and therefore taxable. HMRC viewed the image rights arrangements as a "smokescreen" which had been created in an attempt to disguise salary payments as image rights payments. Bergkamp, Platt and Arsenal appealed against this ruling to the Special Commissioners claiming that the image rights agreements were separate genuine commercial agreements that could be enforced.

The Special Commissioners rejected the view of HMRC and held that the arrangements were not a "smokescreen". Payments made by Sports Club under the promotional agreement and the consultancy agreement were genuine commercial agreements which had independent and separate value over the employment contracts.¹² Since the decision in *Sports Club*, HMRC has often sought to scrutinise the offshore image rights agreements reached between players and clubs, insisting that these were simply "disguised remuneration".¹³ In 2009 HMRC informed many Premier League Clubs that it was examining image rights payments to players from 2005 to 2008. In 2012 HMRC reached settlements with 15 Premier League clubs in relation to image rights payments. In the same year Chelsea Football Club revealed a payment of £6.4million "in relation to an industry-wide investigation into the taxation of payments under image rights" in their public accounts.¹⁴ It has been reported that HMRC has since agreed with football clubs that image rights can only make up 20% at most of a player's total earnings.¹⁵

In summary, while HMRC has taken action to prevent the abuse of sports image rights arrangements, the recent report by the UK Public Accounts Committee suggests that not all football clubs are complying with their obligations to disclose their earnings under the settlement agreements.¹⁶ HMRC itself has come under fire for allegedly providing special customer relationship managers to wealthy sport stars while the amount of tax paid by this very wealthy group of individuals has actually fallen by £1 billion since the unit was set up in 2009.¹⁷ The report urges HMRC to be more transparent about its work and to deliver on its plans to counter aggressive tax avoidance schemes.¹⁸

2. How the UK might be affected by the UK's changes to non-dom tax rules

Offshore image rights agreements are often used by non-UK domiciled footballers.¹⁹ The UK's draft *Finance Bill 2017*²⁰ published in December 2016 brought some

changes to the tax rules of individuals not domiciled in the UK (non-doms). Eligibility for non-dom status essentially relies on showing that either the non-dom, their father or grandfather was born outside the UK.²¹ The proposed changes will come into effect from 6 April 2017 and will be legislated as part of the 2017 Finance Act.

Under current UK tax law, foreign domiciled athletes can be divided into athletes who are resident in the UK (resident non-doms) and those that are just visiting temporarily to compete (visiting non-doms). Resident non-doms are resident in the UK for lengthy periods (for example, foreign players, who play for a Premier League football club, like Arsenal's Mesut Özil or Manchester's Zlatan Ibrahimović) while visiting non-doms will only visit the UK to participate in certain events, for example the Olympics, the Wimbledon Tennis Championships, or various athletics meetings throughout the year.²² The new rules will effectively only affect the first group of athletes, UK resident non-doms.

a) Current tax incentives for resident non-doms

Most foreign players in the Premier League will typically be resident non-doms for UK tax purposes. They can currently legitimately avoid paying UK taxes by electing to be taxed on the "remittance basis".²³ Under these rules, the player would be liable to pay tax in full on any income or capital gains earned in the UK; however any non-UK income or gains would not be taxable under UK law unless it was brought ("remitted") back in the UK. The player can choose whether or not to be taxed on the remittance basis for every new tax year depending on his financial circumstances for that year.²⁴ He can enjoy the advantage of the remittance basis of taxation free of charge for the first six years of residency. After this time, there will be an annual remittance basis charge of £30,000 (rising to £60,000 if he has been resident for 12 out of the last 14 years and finally £90,000 if he has been resident for 17 out of the last 20 years).²⁵ In summary, the current non-dom rules are an attractive option for wealthy sport stars moving to the UK. For example, if Arsenal midfielder Mesut Özil, who will most likely be considered as resident non-dom for tax purposes, elects to pay an annual remittance charge after six years of residency, he can avoid paying tax on his global income and gains including any profits from endorsement deals outside the UK.

b) What is changing?

With effect from April 2017 the permanent non-dom status will end. Non-doms will be "deemed domiciled" once they have been resident in the UK for 15 of the past 20 years (the 15/20 rule). The objective is to create a fairer and competitive tax regime.²⁶ Once deemed UK domiciled, a foreign player will no longer be able to claim the remittance basis of tax, but will be required to pay UK tax on his personal foreign income and gains in the same way as UK-domiciled tax payers. The player can, however, preserve the attractive status as a non-dom for an extended period, if he leaves the UK for 6 or more consecutive tax years. In that event, the time-limit would begin afresh and the player could reclaim non-dom status for a further 15 years. The rules reflect the fact that some non-doms are internationally mobile and that they should be treated differently from those who are firmly based in the UK.²⁷ Given this tax incentive, it can be expected that many sport stars will seriously

consider the timing of their return to the UK as an important factor in their future tax planning.

In summary, under the new rules, foreign sport stars, like Özil, will still be able to avoid paying tax on their global income deriving from image rights deals outside the UK by electing to pay on the remittance basis as above. These particular changes will only affect Özil if he becomes deemed domiciled in the UK once he has been resident in the UK for more than 15 tax years.

3. Changes to anti-avoidance rules and offshore trusts

Further reforms to the taxation of non-doms concern the application of existing anti-avoidance rules that seek to prevent UK residents from moving income and capital into offshore structures. Over recent years, the government has taken several steps designed to counter the use of offshore structures for the purpose of tax avoidance. In 2014, the government introduced the system of accelerated payment notices, allowing HMRC to collect tax from participants in schemes disclosed under the Tax Disclosure rules with no right to appeal against such a notice.²⁸ In the same year the Promoters of Tax Avoidance Schemes (POTAS) regime was introduced to change the behaviour of promoters who engage in the promotion of aggressive tax avoidance schemes.²⁹ Essentially, promoters of failed tax avoidance schemes may be required to notify their customers that they are covered by the POTAS rules and they may be named publicly by HMRC. Additional anti-avoidance legislation, the Transfer of Assets Abroad (TAA) was included in Chapter 2, Part 13, Income Tax Act 2007 (ITA) to prevent UK resident taxpayers using foreign transfers to avoid their UK tax liabilities. Section 13 of the Taxation of Chargeable Gains Act 1992 (TCGA) specifically sets out how gains realised in offshore companies can be attributed to the individual who set up the structure.

The government has announced that these anti-avoidance rules will to a large extent not apply to gains and foreign income arising within a trust structure set up by a non-UK domiciled settlor before they were deemed UK. This exception will, however, apply only where no benefits are received by the individual or members of his family, and where no property has been added to the trust after he or she becomes deemed domiciled under these new rule changes.³⁰

The government has also announced the introduction of a package of arrangements to help non-doms adjust to the new regime in relation to the rebasing of foreign assets, cleansing of mixed funds and provisions for offshore trusts.³¹ It can therefore be expected that many sport stars who are due to lose their permanent non-dom status because they have lived in the UK for at least 15 years will set up new offshore trusts before the rules come into effect in April. These will remain outside the UK tax net so long as no money is paid in or out. Others may be extracting funds from their trust, restructuring their property holdings or considering whether to leave the UK. Therefore, if structured correctly, any income or gains arising on such assets can still be generated tax free.

II. Conclusion

Tax avoidance has consistently been on the top of the political agenda in the UK. In April thousands of wealthy foreign sport stars and individuals in the entertainment

industry are due to lose their permanent non-dom status and some tax advantages because they have lived in the UK for at least 15 years. The new proposed rules aim to strike a balance between the creation of a fairer tax system and the preservation and encouragement of economic activity in the UK. As a result, wealthy sport stars, who are considered to be major contributors to the UK economy, remain largely entitled to attractive, albeit time-limited, tax incentives. This raises the questions of whether tax incentives for non-doms bring actual net benefit to the UK at all. It is recommended that this should be assessed in a regular cost-benefit analysis and results should be publicised to allow people to see the effectiveness (or non-effectiveness) of tax incentives for non-doms in general.

In summary, the recent proposals passed by the UK government to make the rich pay their fair share of tax – although well-intentioned – are no more than a drop in the ocean. Firstly, the new rules provide for a generous transition period. Intermediaries, such as consultants, lawyers, financial and investment advisers will therefore have plenty of time to adjust their tax-planning, exploit new loopholes or shift profits of their clients to substantially reduce their tax liability. Secondly, the tax laws of a nation are only effective if they are properly enforced and interpreted. Many sport stars, however, might not feel affected by the type of trivial penalties and deterrents designed to make them comply with tax rules. According to the recent report by the UK Public Accounts Committee of the 850 penalties issued to the very wealthy since 2012, the average charge was only £10,500. Moreover, in the five years to 31 March 2016, only one case out of 72 fraud investigations resulted in a successful criminal prosecution.³² Indeed the figures suggest that the financial and reputational risks associated with tax avoidance, are outweighed by the financial rewards to them.³³ Thirdly, HRMC should be above suspicion of conflict of interest or the perception of bias at any stage of the tax proceedings process. The mere suggestion by the report that wealthy footballers are getting a special deal from HRMC may otherwise strongly undermine the taxpayer's confidence in a fair and functioning tax system.

¹ Associate Professor of Law at the University of West London.

² Corinna Coors, "Are sports image rights assets? A legal, economic and tax perspective." *The International Sports Law Journal* 15.1-2 (2015): 64-68.

³ Murad Ahmed and Vanessa Houlder, Football image rights payments back in focus after Mourinho report, 6 December 2016, available at: <https://www.ft.com/content/818950ba-bb87-11e6-8b45-b8b81dd5d080>

⁴ 36th Public Committee Report on Collecting tax from high net worth individuals 2016/2017 p.12, available at: <https://www.publications.parliament.uk/pa/cm201617/cmselect/cmpubacc/774/774.pdf> (All websites last accessed on 22 February 2017).

⁵ BBC online news: Football Leaks: Ronaldo and Mourinho accused of tax avoidance, available at: <http://www.bbc.co.uk/news/world-europe-38191470>

⁶ Ian Blackshaw, Sports Marketing Agreements: legal, fiscal and practical aspects, *T.M.C Asser Press* (2012), p. 253.

⁷ <http://www.forbes.com/profile/cristiano-ronaldo/>.

⁸ Rian Cloete (2012) The taxation of image rights, a comparative analysis, *De Jure* 2012. 45 Vol. 3, pp. 556-567, p. 559.

⁹ Aredhel Johnson, HMRC and image rights: clear as mud?, *Ent. L.R.* 2015, 26(1), pp. 3-5.

¹⁰ FATF OECD report on Money Laundering through the Football Sector 2009, p. 26, available at <http://www.fatf-gafi.org/media/fatf/documents/reports/ML%20through%20the%20Football%20Sector.pdf>

¹¹ *Sports Club v Inspector of Taxes* [2000] S.T.C. (S.C.D.) 443 (Sp Comm).

¹² *Id.*

¹³ Adam Craggs and Nicole Mellors, Getting physical - how the taxman is tackling image rights!, *Ent. L.R.* 2011, 22(6), 175-176 (175).

¹⁴ Paul Kelso, Premier League sides forced to pay back millions of pounds in tax after crackdown on image rights deals, 15 Feb 2012, available at: <http://www.telegraph.co.uk/sport/football/news/9082870/Premier-League-sides-forced-to-pay-back-millions-of-pounds-in-tax-after-crackdown-on-image-rights-deals.html>

¹⁵ *Supra*, note 4.

¹⁶ *Supra*, note 4, p.12.

¹⁷ *Supra*, note 4, p. 5.

¹⁸ *Supra*, note 4, p. 9.

¹⁹ Jon Elphick, How athletes will be affected by the UK's changes to "non-dom" tax rules, Published 13 October 2016, available at: <http://www.lawinsport.com/articles/item/how-athletes-will-be-affected-by-the-uk-s-changes-to-non-dom-tax-rules>.

²⁰ <https://www.gov.uk/government/publications/finance-bill-2017-draft-legislation-overview-documents/overview-of-legislation-in-draft>

²¹ Malcolm James Finney, Wealth Management Planning, The UK Tax principles, *Wiley* (2008) pp. 10, 11.

²² James E Gregory and Jennifer Wheeler, US/UK Tax Issues for Internationally Mobile Executives, 13 *Business Law International* (2012), pp. 279-305 (294).

²³ Chapter A1 of Part 14 of the Income Tax Act 2007.

²⁴ Elphick, *supra*, note 19.

²⁵ Income Tax Act 2007, Part 14 Income Tax Liability: Miscellaneous Rule, s809H.

²⁶ Reforms to the taxation of non-domiciles, response to further consultation, December 2016, available at https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/574450/non_doms_consultation_response_final.pdf, p.3

²⁷ Reforms to the taxation of non-domiciles, updated 19 August 2016, <https://www.gov.uk/government/consultations/reforms-to-the-taxation-of-non-domiciles/reforms-to-the-taxation-of-non-domiciles> .

²⁸ Finance Act 2014, Sec. 219.

²⁹ Part 5 of the Finance Act 2014.

³⁰ <https://www.gov.uk/government/publications/income-tax-inheritance-tax-and-capital-gains-tax-deemed-domicile-rule/income-tax-inheritance-tax-and-capital-gains-tax-deemed-domicile-rule>

³¹ *Id.*

³² *Supra*, note 4, p. 11.

³³ Strengthening Tax Avoidance, Sanctions and Deterrents – Discussion document, available at: [https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/546589/Strengthening Tax Avoidance Sanctions and Deterrents-discussion document.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/546589/Strengthening_Tax_Avoidance_Sanctions_and_Deterrents-discussion_document.pdf).
Sec. 2.10.