Sports Law & Taxation

CONTENTS

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EDITORIAL

It is with much pleasure that we welcome readers to the June 2022 edition (citation: *SLT 2022/3*) of our ground-breaking journal *Sports Law and Taxation (SLT)* and on-line database www.sportslawandtaxation.com.

Apart from death, tax is one of the other certainties in life and, in view of the fact, that sport, despite the global economic crisis, continues to be big business, worth more than 3% of world trade, we thought that we would devote most of this Editorial to this important subject of tax and sport. In fact, to the need for sportspersons, as high earners, to mitigate its effects, as far as legally possible, through tax planning. So, we invited Kevin Offer, a leading expert and regular contributor to SLT and Partner at Hardwick and Morris, LLP, London, UK, to provide some insights into this complex and fascinating matter. His comments now follow.

The importance of tax planning for sportspersons
Sportspersons in recent years have come under increasing scrutiny from tax authorities. For example, Sky News reported in 2020 that the UK tax authorities (HMRC) were specifically focusing investigations on young professional footballers, who may not be receiving clear tax advice, but have created structures involving their image rights or sponsorship income that, in the view of the tax authorities, amount to tax evasion, which is a criminal offence. On the other hand, tax avoidance, that is arranging one's personal and business affairs in such a way as to mitigate the tax effects, is quite legitimate. A number of cases have also been brought by the Spanish tax authorities against footballers and entertainers in recent years plus other cases around the world. These cases invite the question as to whether the individuals received proper tax planning advice on their personal and business affairs.

Tax authority information
As the world has become more automated, so has the way tax authorities operate. For example, the UK tax authorities use a computer algorithm known as "Connect" to identify areas, such as sport, and individuals whom they consider are at high risk of under declaring income. The main areas of interest include individuals with multiple properties, overseas assets and complex planning in place. This is likely to apply to many successful sportspeople.
The algorithm will look at information available to HMRC and compare it to identify potential errors or omissions on and from tax returns. A typical flag may arise where there is a significant difference between amounts declared in consecutive tax years. This may be due to increased/decreased earnings that can arise during a sportsperson's career but, without any obvious reason, any discrepancies may indicate potential use of tax avoidance schemes, complex planning or errors on the tax returns.
Other areas that the algorithm takes into account include purchases of high value assets, such as real estate or cars, large amounts of money being transferred into and out of UK bank accounts, use of credit cards in the UK and border agency data. Media exposure will also be taken into account so posts on social media should be carefully considered.
A report of a football transfer or new contract is likely to engender an expectation of a signing fee or increased earnings creating an expectation of an entry on a tax return.
As indicated above, tax authorities will also have access to data collected at borders. Information is also received from other countries under automatic information exchange agreements. Again, if the information does not appear on a tax return, algorithms are likely to mark the return for checking.
With all this information available to tax authorities, it is important that sportspersons ensure that their affairs are in order and will stand up to scrutiny. Part of this process will be taking expert tax advice to ensure that they do not suffer any unexpected tax charges. However, any tax planning that is overly aggressive or is not in the spirit of tax legislation should be avoided. Even if such planning is legal, it is likely that the effect on personal reputation will be negative, due to press articles and public opinion that highlights "moral" obligations to pay a "fair share" of tax.

Dealing with tax authorities

Successful sportspersons are likely to be classified as "High Net Worth Individuals" (HNWIs). This being due to the levels of income that they can command, the value of the assets they can amass and the complexity of their affairs. As a result, tax authorities regard sportspersons as having a high risk that there is something incorrect (however minor) with their tax affairs and are more likely to be the subject of a tax enquiry.
When an enquiry is opened, it is essential that a sportsperson is properly represented. An expert adviser will ensure that matters are dealt with promptly and that all relevant information is provided. In addition, however, the adviser will ensure that the tax authority is not provided with information that may be irrelevant to the enquiry.
The adviser dealing with an enquiry is likely to be the person completing the local tax returns. However, for international sportspersons, it will be necessary to have a number of other advisers in other jurisdictions. It is, therefore, important that a sportsperson engages with an adviser that can either source advice in other countries

or will be able to work with other advisers to ensure that the advice given is tax efficient across all jurisdictions. There have been cases where overseas jurisdictions request information from an individual, who is tax resident in another country, using agreements for mutual assistance. The key point, however, is that the information requested must relate to a specific individual's tax liability. It is, therefore, important that advice is taken as to the relevance and legality of the request, as well as the best way to respond to any request.

Information requests

As mentioned above, a tax authority may request information from persons outside the country. This raises the question of whether the tax authority has the power to request such information. This point was considered by the courts in the UK. See Tony Michael Jimenez v. FTT [2019] EWCA Civ 51. Jimenez had been resident in the UK for a number of years before moving to Cyprus and then to Dubai. The UK tax authorities issued an information request notice (Schedule 36, Finance Act 2008) to Jimenez in Dubai requesting information for the ten-year period from 2004 to 2014. Jimenez appealed against the notice, as he was not resident in the UK and on the basis that HMRC were limited to issuing information notices to UK taxpayers resident in the UK. The Court confirmed that the notice related to UK resident individuals and that, if HMRC required information relating to individuals who were overseas, then they should use their existing tax cooperation agreements with other countries. HMRC appealed this decision in the Court of Appeal. In the Court of Appeal, LJ Patten said that, in his view, it would make sense to align HMRC powers with the scope of the relevant taxes. For example, non-UK resident individuals can still be subject to UK income tax and capital gains tax. Restricting HMRC's ability to request information from non-resident individuals in relation to their UK tax position would undermine HMRC's authority for checking a taxpayer's tax position. The notice may be issued to a "UK taxpayer" and there is no legislative reference to their residence status.
This case demonstrates that, if a sportsperson or one of their supporting team, are served with a notice from a tax authority in another country it should not be ignored. The request should be reviewed carefully by a tax adviser, who will check the notice was correctly served and that the information is reasonably required, relevant to the person's tax position and in their power or possession to obtain. The person receiving the notice should not respond without taking advice as, once a document has been seen by a tax authority, it cannot be unseen.
With the implementation of the Common Reporting Standard, it is more likely that individuals, who were previously resident in one country, may be issued with information notices to check their residence position and tax calculations in relation to their overseas assets. It is, therefore, important that any move of residence is carefully planned and there should be no assumption that matters will be closed if a sportspersons is no longer resident in a country or was only resident in that country for a short period of time.
For example, suppose an international footballer became UK tax resident in 2020 due to a one season loan period at an English Premier League club. After taking advice, the player set up an image rights structure overseas but, due to inaccurate advice, his UK address was provided as the location of the management of the company. In 2021, the player returned to his home club in Spain and ceased to be UK tax resident. That player and/or his advisers may now receive enquiries about his structure from the UK tax authorities in relation to the period of residence. With proper tax planning this enquiry would have been avoided.

Tax avoidance schemes

There have been a number of high-profile athletes who have been reported in newspapers around the world for not paying their "fair share" of tax. Most of these reports arise from their tax planning being regarded as participation in tax avoidance schemes. Tax authorities regard such arrangements as "aggressive avoidance" on the basis that they are designed to "artificially" reduce a person's tax liability. Examples of tax avoidance schemes include investments in films that create a high level of deductions and the use of loans from trusts. Most of these arrangements are perfectly legal and the main risk of investing in such schemes is the potential damage to reputation as a result of adverse press reports. When taking advice it is, therefore, important that the tax advice includes an explanation of the risk to reputation as well as the technical aspects.
Where a sportsperson has entered into a tax avoidance scheme, it is worth reviewing the arrangements to ensure that the tax planning is still effective. As personal circumstances, tax law and public attitude to tax arrangements of HNWI's change, it is important that tax planning is not a one-off event but is an ongoing exercise.

DAC6 - Directive on Administrative Cooperation

The impact of the host of EU tax disclosure rules in recent years should not be ignored. It is important that tax planning considers these directives as they are far reaching and can apply to sportspersons.
DAC6 broadly requires the disclosure of any cross-border arrangements, including those that have a "potential tax effect", even if the arrangements were not planned with tax avoidance in mind or where one of the benefits of the arrangement is a tax advantage, again even if this was not the aim or one of the aims of the arrangement. When specific hallmarks are identified, any tax planning will need to be reported to the relevant tax authority by the intermediary or tax adviser. This puts significant pressure on intermediaries to determine whether the transaction falls within the rules and ensuring the correct information is disclosed within the relevant time limits. The benefit of clear advice cannot be underestimated.
For sportspersons, DAC6 will need to be considered when tax planning involves overseas trusts or companies to protect assets in countries other than the one in which the sportsperson is resident. Any intermediary who

"designs, markets, organises or makes available for implementation or manages the implementation" of the "cross-border arrangement" is required to make the disclosure. This can mean that a number of advisers may have an obligation to make a disclosure. It would, therefore, be important for advisers to communicate and agree the disclosure to be made to meet these obligations and minimise future queries on the transaction.

Reputational risks

I have already mentioned the importance of tax planning giving consideration to non-tax issues such as reputational risks. Many tax authorities have the power to publish details of whom they consider to be deliberate defaulters, but the media are happy to publish large reports about tax planning arrangements whether they are legal or not. It is, therefore, important that advice is undertaken both for the risk of a challenge to the tax position of the proposed transactions and to reputation from a successful challenge or press speculation. Reputational damage can have a huge impact on a sportsperson's income. When the "Paradise Papers" came to light a few years ago, a number of high-profile celebrities and footballers were named as holding overseas assets in tax havens to avoid paying a "fair" amount of tax. Walkers Crisps, for whom Gary Lineker is an ambassador, became aware of the situation almost immediately. The company stood by Gary Lineker, but not every footballer will be so lucky. Advisers, therefore, need to ensure that tax enquiries and investigations are dealt with promptly and in full to ensure that the full mitigation of penalties is given and that sportspersons are not publicly named.

Plan in advance

I have so far highlighted what can go wrong and why it is, therefore, important to obtain full tax advice. The conclusion must be that careful planning in advance is advisable to reduce the risk of challenges. And avoid adverse publicity. Any advance planning should consider the full facts and circumstances of the individual sportsperson. This should include:

- reviewing the rules for determining tax residence in any jurisdiction in which the sportsperson spends significant time. This may be time spent training, performing and personal time. The rules can be complicated, and it is important to plan carefully to avoid becoming resident and incurring unexpected tax charges that may be avoided.
- reviewing tax legislation for countries in which a sportsperson will "work". This can include time spent training and appearances as well as actual performance.
- reviewing the application of double tax treaties between countries where a sportsperson "works" and their country of residence. The impact of art. 17 of the OECD Model Treaty can mean tax charges may arise on payments that arise in another country if they can be linked to a performance in the UK. The application of art. 17 can be complicated, and it is, therefore, important that careful planning takes place.
- In light of the above, it is important that a sportsperson is well advised by someone with the right knowledge and experience. There is often a temptation to take advice from friends and family due to trust issues but developing a close relationship with trusted, professional advisers will ensure planning covers all necessary areas.
- lastly, it is important for the sportsperson to take responsibility for his/her affairs. The obligation to comply with tax and other legislation lies with the sportsperson. That does not mean that the sportsperson must become an expert, but an awareness of the need for careful planning and appointment of professional advisers will help prevent any unexpected events.

Conclusions

There has been an increase in high-profile tax cases involving sportspersons in recent years. We have seen Cristiano Ronaldo, Lionel Messi, Sandro Rosell, Carlo Ancelotti and Neymar da Silva Santos Júnior in the media relating to their tax affairs in Spain. In October 2020, the homes of German football association officials were searched (see www.dw.com/en/german-football-association-offices-searched-in-tax-fraud-investigation/a-55182705) on suspicion of tax evasion. Such cases have become political with governments taking a hard line and looking to make examples out of high-profile figures. Data exchange means that countries now have access to more information than ever before and will be used to raise taxes as economies around the world continue to suffer after the coronavirus pandemic and other economic problems. Tax and other planning for sportspersons will be even more crucial to ensure that they meet their obligations, and, as far as possible, maximise their after-tax income and also protect their reputations.

So far the comments on tax planning by Kevin Offer. Much food for thought indeed!

Summer 2022 football transfer window

We now turn our focus on football and report on the £ 1.9 billion record spend by English Premier League clubs in the summer 2022 transfer window, which ended on 1 September 2022 at 11 p.m. BST. The Deloitte Sports Business Group reports in its Press Release of 2 September 2022:

- Premier League clubs' gross spend of £ 1.9 billion is 67% higher than the previous summer transfer window (£ 1.1 billion), and 34% higher than the previous record (summer 2017: £ 1.4 billion);
- gross spend was so high among Premier League clubs this summer (£ 1.92 billion) that, before this season's January transfer window has taken place, the 2022-2023 season already has the highest transfer spend since the two-window season began, exceeding the previous record by 3% (2017-18: £ 1.86 billion);
- Premier League clubs' net transfer spend surpassed £ 1 billion for the first time ever;
- net spend among Premier League clubs constituted 18% of their estimated revenue for the 2022-2023 season, an increase on the previous summer (10%) and the pre-pandemic average (2017-2019 three-year average: 14%);

- gross spend increased on the previous summer in all of Europe's "big five" leagues individually, with their overall gross spend increasing by 52% (2022: 4.5 billion; 2021: 3.0 billion);
- Premier League clubs were responsible for 49% of collective gross spend across the "big five" (Premier League: 2.2 billion; Serie A: 749.2 million; Ligue 1: 558.0 millon; La Liga: 505.7 million; Bundesliga: 484.1 million);
- championship clubs' gross spend more than doubled on the previous summer but was still some way off pre-COVID levels (2022: £ 86.0 million; 2021: £ 35.1 million; 2017-2019 three-year average: £ 169.4 million);
- Premier League clubs purchased a total of 19 players from Football League clubs compared to just 6 in summer 2021.

Premier League clubs' gross transfer spend totalled £1.9bn in the summer 2022 window, the highest spend ever recorded in a single transfer window by a margin of £ 487.8 million, according to Deloitte's Sports Business Group. The previous record was set in the 2017 summer transfer window, when clubs spent £ 1.4 billion. In 2021, Premier League clubs spent £ 1.1 billion during the summer window. With the January transfer window still to come, the 2022-2023 season already has the highest transfer spend since the two-window season began (£ 1.92 billion), narrowly ahead of 2017-2018 (£ 1.86 billion). For more information, log onto www2.deloitte.com/uk/en/pages/press-releases/articles/records-smashed-in-transfer-window-deloitte-reports-highest-ever-premier-league-spend.html.

Articles in this issue

We now turn our attention to a couple of the interesting articles that you will find in this issue. We highlight one on on-line gaming and gambling in Gibraltar, a British Overseas Territory on the tip of Europe, which, despite its size - a population of some 32,000 and an area of 6.8 km2 – seems to be punching against its weight, so to speak, when it comes to the regulation of gaming and gambling in sport. As the authors, Ian Felice and James Noguera of the leading Gibraltar law firm, Hassans, point out in their introduction:

"Gibraltar continues to flourish as a contemporary common law jurisdiction, boasting a progressive offering for many sectors and industries, and which, together with its consistently modern governing environment, have allowed it to assemble the foundations of a stable economy built on, inter alia, financial services, including gaming and fintech. The development of online gaming and gambling in Gibraltar can arguably be seen as one of the most impressive jurisdictional success stories in recent memory. Despite its size and more limited allocation and availability of resources, Gibraltar has been at the forefront of the development of the gaming industry from its inception in the early 1990s. A globally recognised innovator in this space, Gibraltar has been nothing short of a hub for many recognised industry players, ranging from established large gaming "B2B" and "B2C" operators to lucratively funded and well established start-ups, including, but not limited to, Entain, 888casino, BetVictor, Betfred, William Hill, Mansion, Pragmatic Play, and, most recently, DAZN Bet. Arguably, the secret in attracting such high calibre "blue-chip" players in the gaming and gambling market has been Gibraltar's ability to create a robust legislative framework, which has been capable of providing a balance between the commercial realities of the sector, an effective streamlined licensing regime, and simultaneously also ensuring high standards of transparency, oversight and the adoption of best market practices in line with international standards. Summarily, and pursuant to the Gambling Act 2005 ("the Act"), the regulation of all licensed gambling activity falls within the remit of the Gambling Commissioner, who is appointed by the Minister responsible for gaming, and whose office extends to the role of the Licensing Authority (as defined in the Act) and is required to ensure that licensees conduct themselves in conformity with the terms of their licences and the Act. Although, strictly speaking, both the Minister responsible for gaming and the Gambling Commissioner are distinct in law, both offices work closely together, leveraging synergies for the better of all licensees, stakeholders and the jurisdiction's international standing as a whole. Historically, the Gambling Commissioner, together with HM Government of Gibraltar, have adopted a very open and transparent approach, engaging in clear and direct communication with all licensees in monitoring their activity and always ensuring full compliance. The Act, further reinforced by strict anti-money laundering legislation and codes of practice, the latter of which are issued from time to time, regulates an extensive cohort of remote and non-remote gaming activities, and is underpinned by a comprehensive criteria and application process for the provision of licences. Summarily, the application process requires licensees to demonstrate, inter alia, sound business planning, adequate working financial resources, a demonstrable track record of integrity and compliance, and proportionate substance in making an economical contribution to Gibraltar. Subject to the quality of prospective licensees' applications, licences are generally granted within a two-to-six-month timeframe. In truth, the regulatory framework in Gibraltar is one which can be considered business friendly, striking a fundamental sense of equilibrium between competing interests, such as applicants' desires to secure swift access to the marketplace, but simultaneously ensuring effective scrutiny and protection of the integrity of that same market. The result is simply a framework in a jurisdiction which provides political stability, and a strong commitment to transparency and the rule of law."

As you will read in the course of their article, the authors chart the growth and regulation of the sports gaming and gambling industry in Gibraltar and its future development and point out that:

"As innovation in the gaming space continues to be forthcoming, Gibraltar remains confident of its regulatory capabilities, including the commencement of the recent consultation process in the gaming sector, which will further modernise its offering in this space and maintain its position as a market leader. Undoubtedly, Gibraltar's track record suggests that it is not a jurisdiction that is likely to rest on its laurels, particularly in the aftermath of brexit; Gibraltar

remains hungry and ambitious to identify new opportunities and enter emerging markets, as most recently witnessed in the fintech and digital asset industry, the adoption and growth of which can be considered to have exhibited many of the themes and patterns seen in the development of gaming, including, most recently, in the world of sport."

And conclude as follows:

"Ultimately, irrespective of their ambitions for further integration into the sports world, provided all fintech firms operate within the safe harbours of a robust and commerce friendly regulatory framework, such as Gibraltar's, the industry has the ability to leverage blockchain technology to drive business growth in sport, and many other areas."

On the sports tax side, we would mention, in particular, a very interesting article on the ***taxation of NFTs*** (non-fungible tokens) in the UK by Kevin Offer, who has also contributed on tax planning to this *Editorial*. As he notes from the outset of his analysis of the UK tax situation:

"The popularity of cryptocurrencies and NFTs has increased in recent years with some NFT sales commanding significant amounts. These have tended to be more in the areas of art and entertainment, although the large amounts that can be raised by issuing NFTs has attracted interest from sport. Ownership of an NFT is usually assumed to mean that the owner holds an underlying asset, similar to a digital certificate of title or stamp of authenticity. A record of ownership can be found on the blockchain with the digital asset stored on a server owned by a host platform. Effectively, the NFT consists of a signpost pointing to the digital asset. The exact nature and value of an NFT is, therefore, unclear. This leads to the legal status in the UK also being uncertain. In addition, it is often unclear as to what rights are granted by an NFT. Would, for example, the NFT include any copyright ownership? Some NFTs will include a right to a royalty to the original seller every time there is an onward sale, so perhaps copyright is retained by the sportsperson? NFTs allow for owners to hold a fraction of the overall asset allowing for these fractions to be traded. Where this is permitted then, from a UK perspective, the NFT may constitute a security leading to a need to be regulated under the UK Financial Conduct Authority. The tax treatment of NFTs in the UK is equally uncertain. To date, there has been no HMRC guidance on the UK tax treatment of NFTs. It is generally assumed that, in a similar way to cryptocurrencies. they would be treated as a taxable asset for capital gains tax and inheritance tax purposes. However, in some circumstances, the sale of the NFT may give rise to an income tax charge."

He concludes as follows:

"The growth of NFTs and the large amounts that can be generated by them has led to a need for clear guidance on how these assets will be treated for tax purposes.

Whilst the general view in the UK is that they are assets on which capital gains tax will be due on a profit on disposal (unless the seller is undertaking a trading activity) there remain large areas of uncertainty.

The global nature of the NFT market also demands an international approach to taxation. The sums generated from issuing NFTs can be very large and the uncertainty, both in the UK and in other jurisdictions, is likely to lead to differing tax treatments and potential double taxation.

It is, therefore, hoped that the UK tax authorities and the Government will consider not just the position in the UK but the effects of taxation in other countries. What is certain is that the sums that can be generated and the demand from fans will mean NFTs are here to stay for a while."

As you will see from the *Table of Contents* of this issue, we include a wide range of other sports law and sports tax articles, which will also engage and inform our readers' attention and also provide them with many things to consider and ponder.

As always, we would welcome and value your contributions in the form of articles and topical case notes and commentaries for our journal and also for posting on the *SLT* dedicated website www.sportslawandtaxation.com which has an increasing-wide footprint!.

So, now read on and enjoy the September 2022 edition of *SLT*.

Dr. Rijkele Betten *(Managing Editor)*
Prof. Dr. Ian S. Blackshaw *(Consulting Editor)*

September 2022

The persistent headache of concussion[1]
Rugby union

1 This article is based on a dissertation prepared by the first author in partial fulfilment of the requirements for the LLB degree at the university of Pretoria, prepared under the supervision of the second author.

BY JOEL BOSHOFF[1] AND STEVE CORNELIUS[2]

Introduction

Human beings are not very well adapted at absorbing shocks to their brains.

When one looks at a woodpecker, it is amazing that, despite slamming its head into a tree at a rate of 22 times per second, its brain is not completely shaken to mush, and its beak broken in two. A woodpecker has four major adaptions that aid it in its purpose of boring out trees; namely, spongy bones that absorb low frequency vibrations, space between the brain and skull for cerebrospinal fluid so as to reduce the transmission of vibrations through the cranium, a beak that is incredibly strong and, lastly, the hyoid bone that serves to evenly distribute loads from vibration.3

But humans are not woodpeckers – we are extremely vulnerable to brain damage through concussive forces.

Injury rates in rugby union

The game of rugby union is a notoriously dangerous one. Inherent in its participation is the very serious risk that players may injure themselves, with injuries such as broken bones and concussions being commonplace. A study undertaken by Brooks et al into the prevalence of rugby injuries in English premiership club games revealed the injury rate amongst players to be as high as 91 injuries per 1,000 playing hours.[4] This means that clubs can, in any given season, expect to lose, on average, 18% of their players to serious injury. Insofar as the incidence of concussions in rugby is concerned, West et al shed some surprising light on the trends present in match-concussion incidence and return-to-play time. In a 16-season prospective cohort study, they found the incidence of concussions to be at 4.3/1000 player match hours.[5] However, from the 2009-2010 season until 2018-2019, they found that the rate of concussions had increased to 20.9/1000 player match hours. This data is surprising, considering that awareness around traumatic brain injuries has only increased, yet that has not yielded a reduction in concussion incidence.

A recent study at the University of Durham by Hind et al has compared 83 retired professional rugby players from both rugby union and rugby league with 106 amateur rugby players and 65 non-contact athletes of the same age.[6] To begin with, the research revealed that the professional rugby players suffered more concussion during their career, than the other groups. It is not surprising, then, that they are more likely to develop mental health issues later in life, when compared with amateur players or athletes in non-contact sports. There was a strong association between head injuries and the onset of mental health issues later in life. The study also concluded that players, who suffered multiple head injuries during their careers, are more at risk of developing depression, anxiety and sleep disruption. Players who suffered five or more head injuries during their careers have a 50% chance of developing depression and an almost 66% chance of developing irritability and anger management issues.

The results of the study are hardly surprising. Over the past 40 years, there has been a concerted effort on the part of rugby authorities to speed up the game and make it more attractive for spectators. The impact of this effort can be clearly seen when one compares statistics from the various

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3 Paul Marks, "Woodpecker's head inspires shock absorbers", in: *New Scientist*, 4 February 2011, available at www.newscientist.com/article/dn20088-woodpeckers-head-inspires-shock-absorbers/#:~:text=A%20shock%20absorber%20inspired%20by,avoids%20brain%20damage%20was%20unclear (accessed 25 September 2022).

4 Brooks et al, "Epidemiology of injuries in English professional rugby union", in: *British Journal of Sports Medicine*, 39 (2005), p. 757-766.

5 West *et al*, "Trends in match concussions incidence and return-to-play-time in male professional Rugby Union: A 16-season prospective cohort study", in: *Brain Injury*, 35:10 (2021), p. 1235-1244.

6 Hind *et al*, "Mental Health and Wellbeing of Retired Elite and Amateur Rugby Players and Non-contact Athletes and Associations with Sports-Related Concussion: The UK Rugby Health Project", in: *Sports Medicine*, 2022, p. 1419.

rugby union world cup tournaments.[7] In 1987, there were an average of 32 scrums and 45 lineouts per match. As a result, the ball was in play for an average of 28 minutes per match. In 1995, the ball was in play for an average of 25 minutes per match. At the 2019 event, the average number of scrums per match was only 14 and there were on average only 25 lineouts per match. The ball was in play for an average of 34 minutes per match. This is a 33% increase in active play time. At the same time, the average number of penalties at scrum time, increased from 2.9 per match in 1987, to 3.7 in 2019. Whilst this could be attributable to stricter refereeing at scrum time and other law changes, it is still concerning that the number of scrums decreased by half, whilst the number of penalties increased by almost one third.

The increase in the average time that the ball was in play, meant that the physical demands on players have also increased significantly. In 1987, a team on average carried the ball 86 times, made 48 tackles and there were 25 rucks. By 2019, the average number of ball carries had increased to 115, 129 tackles were made and there were 82 rucks. The average tackle success rate also increased from 70% to 84%. This suggests that the intensity of tackles also significantly increased between 1987 and 2019. Furthermore, the average number of times players offloaded the ball decreased from 30 in 1987, to 15 in 2019. This means that players were more inclined to carry the ball into contact, than to pass it to a teammate.

If one takes all of this into account, it is hardly surprising that professional players have significantly higher injury rates and are at higher risk of long term physical and mental health issues. The efforts to make the game more attractive come at a cost, which is ultimately borne by the professional players who sacrifice their bodies and wellbeing for our entertainment.

It was, therefore, not surprising when media recently announced that Ryan Jones, the former Welsh and British Lions international player was instituting action against World Rugby, the Welsh Rugby Football Union and the English Rugby Union.[8] Jones represented Wales in 75 tests and played three tests for the British Lions.

The 41-year-old was diagnosed with early onset dementia and was diagnosed with probably chronic traumatic encephalopathy. He suffers from short-term memory loss and depression. Jones is not the only former player of his age, who is now facing an uncertain future. Another former Welsh player, Alix Popham (40), as well as former England player Steve Thompson (42) and five other players have also been diagnosed with early onset dementia and short-term memory loss.

When one considers that the prevalence of early onset dementia in the general population group for people aged 40 to 44 years, ranges from 11.9 to 17 per 100,000 people,[9] the occurrence of early onset dementia in eight former rugby players in their early forties, who all played international rugby around the same time, should be of catastrophic concern.

Liability of clubs and governing bodies

Due to the fact that the risk of injury is so high in rugby union, there is a lot that governing bodies cannot do in the sport to mitigate risk and ensure 100% safety for their players without taking the very essence out of the sport. In *R v. Davies*,[10] Tuckey LJ maintained that duty holders that have chosen to partake in a regulatory regime, such as those present in rugby, accept that this entails that a duty exists to ensure a safety standard. Furthermore, he states that:

"Where an enforcing authority can show that this has not been achieved, it is not unjustifiable to ask the duty holder to show that it was not reasonably practicable for him to have done more than he did to prevent or avoid it."

Thus, it is clear that a standard is present against which the conduct of supervisory bodies can be measured and held accountable. In *Nabozny v. Barnhill*[11] the court reasoned that, where a safety rule is contained in a set of rules, the onus is on the players to refrain from conduct outlawed by the safety rule. Similarly, there are rules and regulations governing the way that teams are to practice, and injured players be rehabilitated that are the duty of the various unions to follow, in order to minimize the risk of long-term player injury. Hence, the onus is on them to ensure that these are maintained to the highest standard, if not, they may attract liability in the form of a failure to take reasonable steps to avoid harm and will be guilty of acting negligently towards their players.

It is true that, under the law of torts or delict, there is no general rule that no one acts wrongfully if they omit to take positive steps to prevent harm to another.[12] Placing such a duty on every member of society would be too onerous and would open up the courtroom doors to a frequency of litigation that is undesirable. The only gateway through which liability can flow in these instances is where a legal duty or duty of care exists. Taking the nature of the game into account, and the power

7 McCormick, "Revolutionising rugby – A statistical analysis on how the game has evolved", in: *Stats Perform*, available at www.statsperform.com/resource/revolutionising-rugby-a-statistical-analysis-on-how-the-game-has-evolved (accessed 25 September 2022).

8 PA Media, "Case against rugby union governing bodies on dementia destined for court", in: *The Guardian*, 25 July 2022, available at www.theguardian.com/sport/2022/jul/25/case-against-rugby-union-governing-bodies-on-dementia-destined-for-courts (accessed 25 September 2022).

9 Vieira *et al*, "Epidemiology of early-onset dementia: a review of literature", in: *Clinical Practice and Epidemiology in Mental Health*, 9(1), June 2013, p. 88, available at www.researchgate.net/publication/251235484_Epidemiology_of_early-onset_dementia_A_review_of_the_literature (accessed 25 September 2022).

10 2002 All ER (D) 275.

11 (1975) App 212.

12 Neethling *et al*, *Law of Delict* (2015), p. 58.

which unions can exercise to regulate it, it is in the best interests of the public that a duty is placed on unions to be held liable towards their players. Furthermore, unions can reasonably foresee the possibility of their players incurring future harm and must, accordingly, protect against it in order to preserve their well-being.

Further cementing the need for unions to be held liable for the safety of their players is the presence of a special relationship between these two parties, namely the contractual relationship between them. This relationship indicates a legal duty that exists between the two parties. Firstly, the players must undertake to play the game according to the rules, and to honour the terms of their agreement with whichever professional rugby club or union that they represent.

Secondly, the club or union is obliged also to honour the contract between them and their players, as well as to take all necessary steps to prevent harm to their players. In a practical application, this looks like ensuring that post-injury, the correct care and testing is afforded to the player who needs it. One thing that became apparent in litigation surrounding concussion in the United States is the fact that there was a much stronger case for finding governing bodies delictually liable for negligence, where evidence of prior concussions where the player concerned had second impact-syndrome.[13] This syndrome arises where players suffer a traumatic brain injury and are subsequently rushed back into playing again before proper healing can take place. Any subsequent damage is then exacerbated and could be fatal. Hence, there is a pressure on unions to ensure that the requisite rest periods and monitoring are observed so as not to expose players to any undue risk of serious brain injury. This pressure also derives from the fact that there is a notable linkage between repeated head injuries and long-term neurological sequelae.[14]

Concussion litigation in the United States

Both American football and rugby union are incredibly physical sports, with both exhibiting a very high rate of concussion. Therefore, in both the rugby and American football arena, player safety is of paramount importance, and can pose a serious threat to governing bodies if not handled correctly. This much was seen in the fact that the National Football League settled a class action suit brought by its players in 2012 for an amount of US$ 765 million. Hence, if governing bodies in rugby do not take the concussion question seriously, it could result in massive financial loss which is, of course, in its best interests to avoid. The lessons from the football litigation has much value to offer the rugby world.

Furthermore, given the fact that professional sports require much higher standards, both in terms of the level at which players must perform, and the level of medical care required to keep the players on the field, the standard of care must shift to a higher level than would otherwise be expected. As such, NFL litigation can indicate the content of the standard of care that is owed to professional sports people in terms of that relationship, and under those conditions.

The case against the NFL was certainly not the only lawsuit of its kind to be filed in the United States. Foundational to the success of any claim is determination of the standard of care that was expected at the time when the cause of action arose, as well as a finding that those responsible failed to adhere to that standard of care.

In Plevretes v. La Salle University,[15] the plaintiff suffered a head collision during a football game in 2005. Subsequent to this collision, the plaintiff suffered a subdural haematoma which left him in a coma, and ultimately resulted in him having to undergo life-saving brain surgery.[16] The plaintiff alleged that he was a victim of second impact syndrome, a phenomenon where a player experiences repeated concussions in a relatively short space of time, thus leaving the brain especially vulnerable to damage.[17] He argued that that there was negligence on the part of the University, its head athletic trainer and nurse practitioner, as these parties prematurely returned Plevretes to play. If the correct protocols had been in place, this would not have occurred.[18] The tort of negligence is based on a four-part enquiry:[19] Firstly, the defendant owed a duty of care to the plaintiff, secondly, the defendant failed to exercise reasonable care in executing that duty, thirdly, the failure caused harm to the plaintiff and lastly, the failure to exercise care is the proximate cause of the harm.[20] Due to the imprecise nature of diagnostic testing at the time, and the alleged lack of self-reporting by Plevretes, it was hard to establish that the negligence of the coaching staff was the proximate cause of Plevretes's injury.[21] Nonetheless, La Salle ultimately settled the suit for US$ 7.5 million, thus leaving some uncertainty as to how the courts will interpret the application of the law to the incidence of concussions in football players.

A case against Olivet Nazarene University involved the unprecedented diagnosis of chronic traumatic encephalopathy in a living person. Nathaniel Seth Irvin

13 S. Pachman and A. Lamba, "Legal Aspects of Concussion: The ever-evolving standard of care", in: *Journal of Athletic Training* (2017), p. 52.

14 C. Miller *et al*, "Concussion-Reporting Behaviour in Rugby: A National Survey of Rugby Union Players in the United States", in: *Orthopaedic Journal of Sports Medicine* 9(1) (2021), available at https://journals.sagepub.com/doi/10.1177/2325967120972141 (accessed 25 September 2022).

15 *Plevretes v. La Salle University* (2007) 07 E.D. Pa 5186

16 *Ibid*.

17 S. Pachman and A. Lamba, "Legal Aspects of Concussion: The ever-evolving standard of care", in: *Journal of Athletic Training* (2017), p. 52.

18 *Ibid*.

19 S. Pachman and A. Lamba, "Legal Aspects of Concussion: The ever-evolving standard of care", in: *Journal of Athletic Training* (2017), p. 186.

20 *Ibid*.

21 *Ibid*.

suffered from multiple concussions in the period between 1986 and 1989 while playing football at Olivet Nazarene University. He instituted a claim against the university in 2015. Such a delay would usually be barred by the statute of limitations, but he claimed that he did not know sooner that his symptoms could be linked to his collegiate football career.[22] One problem with such historic claims is that the standard of care applicable would have to be judged as it was at the time of when the cause of action arose. Hence, it would prove difficult for plaintiffs to prove that coaching and medical staff, at that time, failed to meet the requisite duty of care. If it became possible, although scientifically unlikely, to diagnose chronic traumatic encephalopathy before death, the volume of litigants entering the court room doors would no doubt increase, perhaps paving the way for an increase in class action lawsuits on this subject matter.[23]

In Sheely v. The National Collegiate Athletic Association[24] the player collapsed during a preseason drill conducted at Frostburg State University. Sheely subsequently passed away as a result of the injuries he sustained. The plaintiffs in this case alleged that Sheely's death was a consequence of second-impact-syndrome and thus negligence was present on the part of the NCAA and Frostburg's athletics trainers.[25] However, the plaintiffs failed to point to a decisive first impact, with the defendants arguing that Sheely failed to adequately alert them to his injuries. Thus, it was impossible for the staff involved to diagnose a concussion, and it, therefore, could not be said that they acted negligently. An interesting point made by Pachman and Lamba[26] is that, although the case was eventually settled, the joinder of the NCAA as a defendant was somewhat tenuous.[27] It would be easier to establish the proximity of the negligence on the part of a party closer involved in the proceedings that led to the cause of action, such as one of the ATs or coaches.[28] The NCAA, as a supervisory body, is somewhat removed from the incidents that gave rise to Sheely's death, thus, it would be harder to establish negligence on their part for lack of a causal connection to the death, unless one could show that there was a failure on the part of the NCAA to impose rules that would promote player welfare.

Conclusion

Whilst none of these cases gave a clear precedent on the matter, a clear pattern can be seen developing where colleges in the USA are being held to account for failing to introduce more measures aimed at managing head injuries in players. The fact that these cases have mostly been settled is an indication that the relevant stakeholders are acknowledging a duty on their part and this will certainly play towards the establishment of a general duty of care towards players who engage in contact sports, such as football, where the risk of head trauma is significant. It also means that rugby clubs and governing bodies should take note of these developments and, rather than defend these types of cases, they may be well-advised to rather establish a solidarity fund, which can be used to support former players who suffer from long-term health issues as a result of repeated concussions on the field of play. In addition, rugby authorities should also take more decisive steps to protect players from repeated concussions. This could include better overall player management, but it would also involve steps to slow down the game and reduce the number of impacts that could potentially cause harm. This last aspect is one that will most likely meet with resistance from rugby authorities as it would, in their minds, detract from the spectacle of rugby as a spectator sport. In the end, the rugby authorities should ask themselves whether an attractive game is worth the mental wellbeing and lives of its players.

22 S. Pachman and A. Lamba, "Legal Aspects of Concussion: The ever-evolving standard of care", in: *Journal of Athletic Training* (2017), p. 188.

23 *Ibid.*

24 *Sheely v. National Collegiate Athletic Association* (2013) 77 Md Cir Ct 7.

25 *Ibid.*

26 S. Pachman and A. Lamba, "Legal Aspects of Concussion: The ever-evolving standard of care", in: *Journal of Athletic Training* (2017), p. 188.

27 *Ibid.*

28 *Ibid.*

Settling sports disputes by "med-arb"

BY PROF. DR. IAN BLACKSHAW[1]

Introduction

Sport is big business, worth more than 3% of world trade, and around 2.12% of the combined GNP (around € 280 billion) of the 27 member states of the European Union (EU), with a total population of around 450 million. Around 5.7 million people are employed, directly and indirectly, in sport in the EU, that is, 2.72% of EU employment. So, there is much to play for, in financial as well as sporting terms, in Europe and the rest of the world. Not surprisingly, therefore, sports disputes are on the increase.

However, the sporting world prefers not to "wash its dirty linen in public" but to settle disputes "within the family of sport". And so the question naturally arises: how best to settle them? By traditional or modern means? Through the courts or by alternative dispute resolution ("ADR")?

ADR, which may be defined as any process that leads to the resolution of a dispute through the agreement of the parties without the use of a judge, has become very popular over the years amongst companies, sportspersons and organisations around the world, including the International Olympic Committee, which established the Court of Arbitration for Sport ("CAS") in 1983 to settle sports disputes "within the Olympic family".[2]

Extra-judicial settlement of various kinds of disputes through ADR methods has developed because the courts – and, indeed, traditional arbitrations like those conducted through the International Chamber of Commerce in Paris, France – are often slow; procedurally complex, technical and inflexible; and quite expensive.

Apart from that, arbitration, which is designed to avoid litigation, often, in practice, results in litigation; and, because the outcomes of judicial proceedings are generally unpredictable, litigation is, therefore, something of a lottery!

Added to which, judges are not always au fait with the background to certain kinds of disputes, especially those involving highly technical matters. This is particularly true when it comes to sports disputes, in view of the special characteristics and dynamics of sport, as recognised by the European Commission in its *White Paper on Sport*.[3] Not least, the need for swift results where sporting deadlines are often in play - particularly recognised by the EU and referred to as the *"specificity of sport"*.[4]

And, it should be added here, that the EU also promotes the use of ADR, especially mediation, for the settlement of all kinds of "cross-border" disputes within the current 27 member states and has issued a directive on this subject.[5]

Also, by many courts around the world as mentioned below.

Settling sports disputes extra-judicially

In England, there is a long-established legal tradition that the courts do not generally intervene in sports disputes. They prefer to leave matters to be settled by the sports bodies themselves, considering them to be, in the words of Vice Chancellor Megarry, in the case of McInnes v. Onslow-Fane *"far better fitted to judge than courts"*.[6]

And, Lord Denning, the former swashbuckling Master of the Rolls, went further and expressed the point in the following succinct and characteristic way in *Enderby Town Football Club Ltd v. Football Association Ltd*:

"justice can often be done in domestic tribunals better by a good layman than a bad lawyer".[7]

However, the English courts will intervene when there has been a breach of the rules of natural justice: Revie v. Football Association.[8]

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2 See B. Foucher, *"La Conciliation comme Mode de Reglement des Conflits Sportifis en Droit Francais"* (2000), Paper presented at the Court of Arbitration for Sport Symposium on Mediation in Lausanne, Switzerland, 4 November 2000.

3 See European Commission "White Paper on Sport" (COM(2007) 391 final), published on 11 July, 2007.

4 Art. 165 of the Treaty on the Functioning of the European Union.

5 See Directive 2008/52/EC of the European Parliament and of the Council of 21 May 2008 on certain aspects of mediation in civil and commercial matters: Official Journal L 136, 24/05/2008, p. 0003-0008.

6 See [1978] 1 WLR 1520, p. 1535.

7 See [1971] 1 Ch 591, p. 605.

8 See *The Times*, 19 December 1979.

And also in cases of "restraint of trade", where livelihoods are at stake: *Greig v. Insole*.[9]

A similar legal situation exists in the United States: see *Harding v. United States Figure Skating Association*.[10].

And also in Canada: see *McCaig v. Canadian Yachting Association & Canadian Olympic Association*.[11]

In Harding, the Federal District Court made the following observations:

"The courts should rightly hesitate before intervening in disciplinary hearings held by private associations [...] *Intervention is appropriate only in the most extraordinary circumstances, where the association has clearly breached its own rules, that breach will imminently result in serious and irreparable harm to the plaintiff, and the plaintiff has exhausted all internal remedies. Even then, injunctive relief is limited to correcting the breach of the rules. The court should not intervene in the merits of the underlying dispute."*

In *McCaig*, the judge made the following pertinent remarks about the role of the courts in the resolution of sports disputes:

"[...] *the bodies which heard the appeals were experienced and knowledgeable in the sport of sailing, and fully aware of the selection process. The appeal bodies determined that the selection criteria had been met [... and] as persons knowledgeable in the sport* [...] *I would be reluctant to substitute my opinion for those who know the sport and knew the nature of the problem."*

In the USA, courts have recognized that non-interference doctrines designed for purely voluntary private associations may not be fully applicable to dominant sports sanctioning organizations. In several cases, courts have suggested that more careful judicial review is appropriate when college athletes, who have no choice but to abide by the rules of a national collegiate athletic association or individual collegiate conferences, challenge decisions as inconsistent with basic process or with the organization's own rules.[12]

However, if there is a collective bargaining agreement in place, then the collective agreement takes precedence. The case of *NFL Management Council v. NFL Players Ass'n* involved a review of the NFL Commissioner's suspension of New England Patriots Quarterback Tom Brady over "Deflategate". The Commissioner's power was established through the collective bargaining agreement between the players and the union. In reviewing the commissioner's (essentially arbitral) decision pursuant to collective bargaining agreement, the United States Court of Appeals for the Second Circuit pointed out that:

"our task is simply to ensure that the arbitrator was "even arguable construing or applying the contract and acting within the scope of his authority" and did not "ignore the plain language of the contract"."

A similar judicial favouring of ADR, including mediation, is also developing in other parts of the world.

As sport is a global phenomenon, sports disputes are an increasingly common occurrence throughout the world and solutions for resolving them need to be found quickly, informally, effectively and inexpensively. In other words, generally speaking, there is a widespread need to settle disputes outside the courts' system.

It should be added, however, that ADR is not a panacea for all ills and is not appropriate in cases where, for example, injunctive relief to resolve the dispute or a legal precedent is required. Or even publicity may be appropriate to set an example. In such cases, the courts are the most appropriate forum for settling disputes.

"Med-arb"

One form of ADR, which is particularly suited to the settlement of sports disputes, is "med-arb" – a combination of mediation to identify the issues in dispute and, if not successful, which, generally, it is in 85% of suitable cases, and arbitration finally to settle them. For example, the CAS offers this kind of dispute resolution method, which is the subject of this article.

Mediation enjoys the following main advantages:

- it is quick – it can be arranged within days or weeks, rather than months or years as in the case of litigation and can also be conducted in a very short time[13];
- it is less expensive – quick settlements save management time and legal costs;
- it is confidential – adverse publicity is avoided and unwanted parties, such as competitors or journalists, are not present;
- it covers wider issues, interest and needs – underlying issues and hidden agendas are exposed making creative solutions possible to satisfy the needs of all the parties.
- it is informal – a commonsense and straightforward negotiation results;
- it allows the parties to retain control – the parties make the decisions rather than control being handed over to a judge or an arbitrator;
- it is entirely "without prejudice" – the parties have nothing to lose, their rights are not affected by the mediation, thus litigation can be commenced or continued if the mediation fails to produce an agreed settlement.

9 See [1978] 3 All ER 449.

10 See [1994] 851 F Supp. 1476.

11 See [1996] Case 90-01-96624.

12 See, for example, Gulf South Conference v. Boyd, 369 So2d 553 (Ala. 1979); and *California State Univ., Hayward v. Nat'l Collegiate Athletic Ass'n*, 121 Cal Rptr 85 (Cal. App. 1975).

13 For example, the Richie Woodhall/Frank Warren dispute, which was settled within 72 hours.

As Sam Passow, head of research at CEDR (Centre for Effective Dispute Resolution), has put it in a report[14]:

"[...] mediation differs from other alternative dispute resolution methods, such as arbitration, because the outcome or solution is not imposed. It has to be concluded voluntarily by the parties on either side. The mediator facilitates by evaluating the dispute and proposing solutions, but does not make a judgment as happens in an arbitration or independent expert determination. This means the parties own the outcome, it is their problem but also their solution, therefore they are more likely to get an outcome that they can live with."

However, it should be pointed out that mediation will only be successful, if the parties are willing to settle their dispute amicably and make compromises.

For example, in one case, in which mediation was proposed to settle a dispute between two rugby football clubs, the captain of one them remarked that *"if the Queen of England herself were to come and mediate, it would not make any difference at all!"* Obviously, in that case, with that attitude, mediation would never work!

Furthermore, resort to settle disputes by mediation rather than in the courts may also be viewed, in some quarters, as a sign of a weak case, but this may not, in fact, necessarily be so!

"Med-arb" references

It is important to include an express reference to "med-arb" as part of "dispute resolution clauses" in sports agreements. Of course, it is possible, at the time a dispute arises, to refer the dispute to resolution by "med-arb", but this, as ADR is a consensual process, requires the consent of the parties, which is not always forthcoming. One party may wish to settle by "med-arb", whilst the other may not agree to do so. No consensus, no mediation.

The standard CAS "med-arb" reference clause reads as follows:

"Any dispute, any controversy or claim arising under, out of or relating to this contract and any subsequent of or in relation to this contract, including, but not limited to, its formation, validity, binding effect, interpretation, breach or termination, as well as non-contractual claims shall be submitted to mediation in accordance with the CAS Mediation Rules.

If, and to the extent that, any such dispute has not been settled within 90 days of the commencement of the mediation, or if, before the expiration of the said period, either party fails to participate or continue to participate in the mediation, the dispute shall, upon the filing of a Request for Arbitration by either party, be referred to and finally settled by CAS arbitration pursuant to the Code of Sports-related Arbitration. When the circumstances so require, the mediator may, at his own discretion or at the request of a party, seek an extension of the time limit from the CAS President."

It may be pointed out that the 90 days' period, referred to in the clause, may, in practice, be shortened to, say, 30 days, as mediations, generally, are completed one way or another in a relatively short period of time.

If it is necessary to finally invoke arbitration to settle the dispute, where mediation is not successful, the question then arises, in practice, who will be the arbitrator? Will it be the mediator?

Who will be the arbitrator?

Can – indeed, should – the arbitrator be the mediator? There are pros and cons for this.

In the first place, what do the CAS Mediation Rules provide on this matter?

The latest version of the CAS Mediation Rules ("Rules") dates from 1 January 2016. Interestingly, the role of the mediator is defined in art. 9 of the Rules as follows:

"The mediator shall promote the settlement of the issues in dispute in any manner that she/he believes to be appropriate. To achieve this, the mediator will:

a identify the issues in dispute;
b facilitate discussion of the issues by the parties;
c propose solutions.

However, the mediator may not impose a solution of the dispute on either party."

In the event that the mediation is not successful, which, as previously mentioned, is not generally the case, art. 13 of the Rules (*"Failure to Settle"*) deals with this situation as follows:

"The parties may have recourse to arbitration when a dispute has not been resolved by mediation, provided that an arbitration agreement or clause exists between the parties.

The arbitration clause may be included in the mediation agreement. In such a case, the expedited procedure provided for under article R44, paragraph 4 of the Code of Sports-related Arbitration may be applied.

In the event of a failure to resolve a dispute by mediation, the mediator shall not accept an appointment as an arbitrator in any arbitral proceedings concerning the parties involved in the same dispute. However, if all parties have explicitly agreed so in writing once the mediation is terminated, it is possible for the mediator to subsequently act as arbitrator for the same dispute and issue an arbitral award in accordance with the CAS Arbitration Rules ("Med-Arb procedure"). Such mediator can only act as an arbitrator if she/he is also on the list of CAS Arbitrators."

14 Kelly Parsons, Hands across the table. See CEDR website at www.cedr.com.

As will be seen from the above provisions, if the parties expressly agree in writing, they may choose the mediator to be the arbitrator in the subsequent proceedings.

But, should they do so? As mentioned above, there are pros and cons regarding this.

Perhaps the most important point in favour of appointing the mediator as the arbitrator is the fact that she/he is already familiar with the case and the issues. But, as the old adage aptly puts it: *"familiarity breeds contempt"*.

In other words, the mediator, although endeavouring to be independent and unbiased throughout the process, may possibly have formed some views in favour of one of the parties in the dispute. Under the Rules, the mediator may propose solutions for settling the disputes between the parties. In other words, she/he may be prejudiced.

To avoid that situation, it may not be a good idea to appoint the mediator as the arbitrator, but to appoint someone else who comes to the case entirely fresh and without any such predilections or preconceptions of the case.

In any event, the author of this article would not be willing to be appointed the arbitrator, having acted as the mediator in the same proceedings, on professional grounds. In particular, in order to avoid having to defend any future legal challenges of bias that may be raised by the unsuccessful party in the subsequent arbitral proceedings.

However, it must be said, that circumstances alter cases!

Conclusions

Mediation is proving to be a useful form of ADR to resolve sports-related disputes. Indeed, the courts generally favour mediation in appropriate cases.

Combined with arbitration, namely, "med-arb", is also proving to be an attractive and effective way of resolving disputes, including sports-related ones.

Such a procedure is not a waste of time or money, because mediation, if not successful, at least is able to define the issues that form the basis of the dispute, leaving arbitration to finally settle them.

The "med-arb" dispute resolution procedure offered by CAS can be a timely and effective one, in practice!

Gibraltar:

Gaming blueprint for fintech and the interplay with the world of sport

BY IAN FELICE[1] AND JAMES NOGUERA[2]

Introduction

The evening of 12 July 2016 saw the titans of Scottish football, Celtic F.C., lose the first leg of the second qualifying round of the UEFA Champions League by a single goal to nil to Gibraltar league champions, Lincoln Red Imps F.C. A little over six years on, it is still considered by many as the biggest shock in recent memory of European football. In truth, we often fall into the trap of automatically ruling out the possibility that a smaller, less favoured or significant participant may, on any given occasion, pleasantly surprise us, and seemingly triumph as the underdog.

Paradoxically, most of us enjoy nothing better than an underdog story, specifically in the world of sport, which is marked by such memorable instances, such as the 1974 "Rumble in the Jungle", which saw the late-great Muhammad Ali beat George Foreman for the World Heavyweight Championship. Although arguably without relying on the rope-a-dope tactics intelligently used by Ali on that occasion, in the context of regulation, Gibraltar has since the 1990s similarly, against all odds, established itself as a regulatory market leader ahead of many competing jurisdictions in the context of online gaming. Even more remarkable is that, despite being considered across the globe as a minnow amongst larger jurisdictions, Gibraltar is arguably reliving the historical success story in online gaming and has also recently pioneered the regulation of the fintech (Financial Technology) and digital asset space, which collectively has influenced the promotion and development of many commercial opportunities in both local and international sport.

Despite a mere population of 32,000 people and a total area of circa 6.8 square kilometres, Gibraltar's jurisdictional successes should not necessarily come as a surprise to many who are *au fait* with its storied trajectory of historical fortitude and overcoming challenges to changes in its *status quo*. A British Overseas Territory located at the southern tip of the Iberian Peninsula and connected to the European continent by a land frontier with Spain, Gibraltar has demonstrated an abundance of resilience in the face of numerous adversities dating back several hundred years. Notwithstanding more recent challenges, posed by brexit and the COVID-19 pandemic, Gibraltar continues to flourish as a contemporary common law jurisdiction, boasting a progressive offering for many sectors and industries, and which, together with its consistently modern governing environment, have allowed it to assemble the foundations of a stable economy built on, inter alia, financial services, including gaming and fintech.

Online gaming and gambling

The development of online gaming and gambling in Gibraltar can arguably be seen as one of the most impressive jurisdictional success stories in recent memory. Despite its size and more limited allocation and availability of resources, Gibraltar has been at the forefront of the development of the gaming industry from its inception in the early 1990s. A globally recognised innovator in this space, Gibraltar has been nothing short of a hub for many recognised industry players, ranging from established large gaming "B2B" and "B2C" operators to lucratively funded and well established start-ups, including, but not limited to, Entain, 888casino, BetVictor, Betfred, William Hill, Mansion, Pragmatic Play, and, most recently, DAZN Bet. Arguably, the secret in attracting such high calibre "blue-chip" players in the gaming and gambling market has been Gibraltar's ability to create a robust legislative framework, which has been capable of providing a balance between the commercial realities of the sector, an effective streamlined licensing regime, and simultaneously also ensuring high standards of transparency, oversight and the adoption of best market practices in line with international standards.

Summarily, and pursuant to the Gambling Act 2005 ("the Act"), the regulation of all licensed gambling activity falls within the remit of the Gambling Commissioner, who is appointed by the Minister responsible for gaming, and whose office extends to the role of the Licensing Authority (as defined in the Act) and is required to ensure that licensees conduct themselves in conformity with the terms of their licences and the Act. Although, strictly speaking, both the Minister responsible for gaming and the Gambling Commissioner are distinct in law, both offices work closely

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together, leveraging synergies for the better of all licensees, stakeholders and the jurisdiction's international standing as a whole. Historically, the Gambling Commissioner, together with HM Government of Gibraltar, have adopted a very open and transparent approach, engaging in clear and direct communication with all licensees in monitoring their activity and always ensuring full compliance.

The Act, further reinforced by strict anti-money laundering legislation and codes of practice, the latter of which are issued from time to time, regulates an extensive cohort of remote and non-remote gaming activities, and is underpinned by a comprehensive criteria and application process for the provision of licences. Summarily, the application process requires licensees to demonstrate, *inter alia*, sound business planning, adequate working financial resources, a demonstrable track record of integrity and compliance, and proportionate substance in making an economical contribution to Gibraltar. Subject to the quality of prospective licensees' applications, licences are generally granted within a two-to-six-month timeframe. In truth, the regulatory framework in Gibraltar is one which can be considered business friendly, striking a fundamental sense of equilibrium between competing interests, such as applicants' desires to secure swift access to the marketplace, but simultaneously ensuring effective scrutiny and protection of the integrity of that same market. The result is simply a framework in a jurisdiction which provides political stability, and a strong commitment to transparency and the rule of law.

Notwithstanding the foregoing, the road to ensuring consistent and uninterrupted regulatory excellence is not immune from changes to the *status quo*. Such variables do require jurisdictions (however successful in the past) to reform and modernise their legal frameworks. Specific to the gaming industry in Gibraltar, HM Government of Gibraltar is currently undertaking a consultation process within the industry to engage with stakeholders, with a view to modernising Gibraltar's current regulatory offering, to ensure that it meets the contemporary demands of the continuously developing gaming space. The consultation is intended to be the first step of a process, which is expected to conclude with the introduction of new legislation, and which will formalise and codify the best market practices that have been implemented in Gibraltar over recent years. In substance, Gibraltar not only continues to innovate, but simultaneously ensures that ESG (Environmental Social and Governance) and corporate social responsibility initiatives continue to remain firmly on the Rock's gaming agenda. The consultation and intended reform of the Act is deemed to be one which will assist Gibraltar in firmly transitioning into a new modernised era of digital gaming, providing further safeguards for consumers, and promote safer responsible gambling, together with maintaining Gibraltar's jurisdictional reputation, all aspects of which can be considered to be aligned with the commercial exigencies of gaming operators, particularly in the context of the interplay between betting and sport.

In addition to serving as a benchmark of jurisdictional and regulatory excellence, Gibraltar's development as a regulatory hub for gaming has also served to further enhance the natural synergy between sports promotion and betting. Underpinned by the regulatory framework offered by the Rock since the 1990s, together with additional commercial factors which go beyond the scope of this article, gaming companies have, in recent years, dominated sponsorship and promotion in sport, with many operators in Gibraltar adopting headline strategic partnerships with numerous significant players in the sporting world. Notable examples relevant to the Rock include:

- Betvictor's recent front-shirt-sponsorship deal with Fulham F.C.;
- Bwin's similar sponsorship deal with European footballing giants Real Madrid C.F. and A.C. Milan in the early 2000s;
- William Hill's 2009 three-year sponsorship partnership with Gibraltar's Costa del Sol neighbour, Malaga C.F.; and
- Gibraltar's very own Mansion Group's sponsorship of Tottenham F.C.

Interestingly, and in accordance with Gibraltar being the first jurisdiction in the world to "emerge" from COVID-19 following the swift administration of its vaccination programme, the Rock played host to the "Rumble on the Rock", which saw the long-awaited heavyweight re-match between Dillian Whyte and Alexander Povetkin take place in Gibraltar in March 2021. Unsurprisingly, one of the event's lead sponsors was one of Gibraltar's very own licensed operators, Betfred.

Undoubtedly, the historical association with sports has provided betting companies with a large platform to seek to achieve, *inter alia*, increased brand visibility, revenue, market share and, ultimately, consumer awareness. In truth, despite attempts and movements intended to ban or prohibit betting from having commercial access to sporting brands, gaming companies continue to position themselves and remain at the forefront of the worldwide viewership offered by sports, capitalising on the largescale trust, credibility and affinity professional sports teams and athletes enjoy with their loyal following. Albeit in a different guise, it may not be far from the truth to claim that gaming companies have effectively stepped into the giant shoes of the tobacco and large alcoholic beverage companies, which once stood where betting and gaming stands today. The interplay between betting and sports appears to be one which is here to stay, with increased innovation in technology on the horizon, as can be seen in DAZN Bet's recent launch of its new beta product to gain insight from DAZN's own streaming service customer base, which is intended to provide a fresh impulse to the betting market.

As innovation in the gaming space continues to be forthcoming, Gibraltar remains confident of its regulatory capabilities, including the commencement of the recent consultation process in the gaming sector, which will further modernise its offering in this space and maintain its position as a market leader. Undoubtedly, Gibraltar's track record suggests that it is not a jurisdiction that is likely to rest on its laurels, particularly in the aftermath

of brexit; Gibraltar remains hungry and ambitious to identify new opportunities and enter emerging markets, as most recently witnessed in the fintech and digital asset industry, the adoption and growth of which can be considered to have exhibited many of the themes and patterns seen in the development of gaming, including, most recently, in the world of sport.

In only the last few years, phrases such as *"cryptocurrency", "DeFi", "Web 3.0", "metaverse", "stable coin",* and *"NFTs"* have (almost overnight) each proved to be a novel development in the continuously emerging fintech and digital asset industry. Comparable to that of a new phenomenon, the fintech and digital asset space has, through its unique technological blockchain offering, essentially revolutionised many aspects of mainstream finance, disrupting traditional norms and providing a new alternative for consumers and stakeholders highlighted by transparency and decentralisation. In truth, and largely in part due to the technological wonder and rapid pace with which the industry continues to develop, the potential for further adoption and use cases is unknown, as the sky truly appears to be the limit for this space. Although noting that the particulars and detail of what blockchain technology (as well as each of the foregoing terms) are, is beyond the scope of this article, the primary takeaway is Gibraltar's commitment to supporting this space, and arguably becoming the first jurisdiction in the world to provide stakeholders with regulatory certainty and substance. It would appear that fortune does indeed favour the bold, as circa five years on from the introduction of the initial legislation, Gibraltar has, similarly as was the case with gaming, witnessed tremendous growth in this sector, with world industry leaders such as Binance, eToroX, CEX.IO, amongst others, all establishing a presence in Gibraltar.

Pioneering the way in the regulation of the fintech and the digital asset industry, 1 January 2018 saw Gibraltar's ground-breaking Financial Services (Distributed Ledger Technology Providers) Regulations 2017 ("the Regulations"), come into force. Without question, and in the wake of brexit, this proved to be a watershed moment for both the jurisdiction and the industry, with a principles-based driven regulatory framework designed to strike a balance between consumer protection and jurisdictional reputation on the one hand, and commerce, innovation and business development of a new industry on the other. The Regulations were seen to be the touchstone by which the Gibraltar Financial Services Commission ("the GFSC"), would in accordance with ten core principles, ranging from honesty and integrity, risk management, to customer care and market integrity, be able to award licences to businesses and firms considered to be using distributed ledger technology, whether in the case of blockchain technology or otherwise, in or from Gibraltar or storing or transmitting value belonging to others. The inherent flexibility of the principle-based Regulations would permit the GFSC to consider applicants on a discretionary case-by-case basis, and fundamentally provide a robust framework, which could effectively scrutinise applicants, and equally safeguard Gibraltar's reputation as a trusted and stable global business hub, without stifling the innovation and progress of rapidly evolving technology; noting that, since the introduction of the Regulations, Gibraltar has enacted further anti-money laundering legislation in accordance with FATF (Financial Action Task Force) recommendations on virtual assets, and the GFSC has published applicable regulatory guidance notes from time to time.

Overall, the swiftness in Gibraltar's approach and ability to regulate such a novel and consistently growing space is indicative of the jurisdiction's ability to anticipate, scrutinise and adapt to global market trends and developments. The reality is that, in line with Gibraltar's regulatory offering in the fintech and digital assets sector, specifically the legal, fiscal and regulatory environment on offer, Gibraltar is, similar to gaming, nothing less than a "gold standard" benchmark, whose approach to regulation can encourage further growth and adoption in this space, as can already be seen with its interplay with sport.

Although admittedly still in its infancy, the fintech and digital asset space, largely through its offering of blockchain technology, continues to become increasingly adopted in sport. Similar to gaming and betting companies, fintech firms are increasingly being seen as strategic sponsorship partners, as is the case with Gibraltar's very own Damex. io's front-of-shirt sponsorship of Lincoln Red Imps F.C., or Binance for football teams, such as S.S. Lazio, or influential athletes, such as Cristiano Ronaldo. In truth, there is plenty of scope and almost seemingly endless potential for further adoption of this industry in sport, including:

- sports teams developing their own cryptocurrencies in order for fans to purchase tickets, merchandise and have access to other rewards and benefits' programmes;
- payment of professional athletes' salaries using cryptocurrencies;
- using blockchain technology for professional athletes to offer investors opportunities to invest and/or purchase sports imaging rights and any associated intellectual property, or alternatively allow athletes access to liquidity to sell future revenue rights to fans and investors worldwide; and
- the use of digital marketplaces for professional sports teams and athletes to sell and issue NFTs (summarily meaning non-fungible tokens in the form of cryptographic assets with unique identification codes).

Conclusions

Ultimately, irrespective of their ambitions for further integration into the sports world, provided all fintech firms operate within the safe harbours of a robust and commerce friendly regulatory framework, such as Gibraltar's, the industry has the ability to leverage blockchain technology to drive business growth in sport, and many other areas.

Whilst this may be considered to be a bold prediction, Gibraltar's history and experience can rely on the blueprint showcasing the development of the gaming sector as a close comparative to what a strong and

comprehensive regulatory framework can offer both an industry and also the jurisdiction itself.

Despite its size, and the impressive feats it has achieved in the many faces of historical adversities, it is unquestionably the case that Gibraltar still has many great things to achieve, and, whilst it still has a long way to go, better and more prosperous days are still ahead for this underdog story, recalling the words of Winston Churchill:

> *"Victory will never be found by taking the path of least resistance."*

English football:

Intermediary fees and HMRC

Background, enquiries and best practice[1]

BY OLIVER SADLER[2] AND DAVID BENTHAM[3]

Introduction

As is perhaps to be expected, media coverage surrounding the football intermediary market tends to focus on the sensationalist, with the attention typically directed at on one or both of:

- the most high-profile players, their representatives and clubs, the relationships that exist between them and the ecosystem in which they operate; or
- the level of fees received by intermediaries (individually or collectively), whether on any particular deal(s) or across the industry as a whole based on figures published by The Football Association ("The FA"), the intermediary fees paid by professional football clubs in England in the period commencing 2 February 2021 and ending 31 January 2022 amounted to £ 272 million.

However, there is significantly less coverage or explanation of the underlying contractual and regulatory structure, which underpins these intermediary arrangements, the services provided by intermediaries in practice or the nuances of the associated financial structures and terms. Unsurprisingly, however, in the context of the sums involved, these arrangements do not escape the attention of HMRC. In recent years, HMRC scrutiny of intermediary payments has been increasingly prevalent across the industry, both in respect of challenges to historic transactions/existing contracts and seeking to influence behaviours and best practice for future industry approaches.

Centrefield has advised clients across the full spectrum of stakeholders in connection with the legal and contractual framework underpinning these intermediary arrangements, including in the context of HMRC scrutiny; Centrefield does not, however, provide tax advice and its input is in respect of the legal and contractual position, including the regulatory position and industry practice on football transactions.

Based on that experience, in this article we explore:

- the background to dual representation;
- HMRC position and approach in practice;
- dealing with enquiries;
- good practice in new transactions; and
- the potential impact of the proposed new FIFA Football Agent Regulations (FFAR).

Background

Once registered with The FA, intermediaries are able to perform *"intermediary activity"* (as defined in The FA Regulations on Working with Intermediaries ("the Regulations")) in England, pursuant to which they perform services for a player and/or club client in relation to employment contract matters. Whilst such arrangements can include an intermediary acting solely for a selling club on the disposal of a player, solely for a club on the acquisition of/contract renewal for a player, or solely for a player on a playing contract (whether a first contract or an extension), this article focuses on the main area which attracts HMRC scrutiny, namely "dual representation" in relation to player contracts. The regulatory position applicable for non-playing staff, such as managers/head coaches, is currently different, although that is set to change with the implementation of FFAR (see later), and is, therefore, outside the scope of this article. Similarly, the position is also different in relation to some loan deals, where a player joins another club on a temporary basis, and so such arrangements are also beyond the scope of this article.

1 *Disclaimer*: please note that the information contained in this article is intended as a general review of the subjects/topics featured and is for information purposes only. It is not intended as specific legal advice, nor does Centrefield provide any tax advice.

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In order to perform intermediary activity, an intermediary must have a written representation contract in place with the relevant client (whether a player or a club) which, amongst other things (pursuant to obligatory provisions prescribed by the Regulations), must include the remuneration due from the client to the intermediary in respect of the relevant services. Such representation contract must also be lodged with The FA.

In short, dual representation, which is expressly permitted pursuant to and in accordance with the Regulations and as a matter of law, provides that, with the informed consent of the parties, an intermediary can, in relation to a move to a new club or a contract renewal at an existing club, act for, provide services to and be remunerated by or on behalf of both their player client ("player services") and also the relevant club acquiring the player/renewing the player's contract, both in respect of the acquisition or renewal itself and in relation to the management of the club/player relationship during the contract ("club services").

This distinction between player services and club services is the very essence of dual representation. From a financial perspective, a club makes payment directly to the intermediary on its own behalf in relation to the sums attributable to club services (subject to HMRC scrutiny of such payments, as referred to below). However, the position is more complex in relation to player services.

As a starting point, the representation contract between the player and intermediary sets out the basis on which the latter will represent and provide services to the former ("representation contract") and includes a commission rate (often 5%) referable to the player's remuneration which falls due from the player to the intermediary; current regulatory requirements dictate that this can be based on guaranteed sums only and not on any contingent payments, such as appearances fees, performance bonuses or similar.

However, in practice, and typically in the mind of the intermediary and player, at the time of entering into the representation contract, it is common industry practice for the representation contract to be varied by virtue of a dual representation arrangement at the time of a transaction with a club, including the applicable intermediary fees being determined at the relevant time and with the relevant club agreeing to pay intermediary fees for player services to the intermediary on behalf of the player, as a taxable benefit, which varies/supersedes the financial terms set out in the representation contract.

Further, representation contracts are frequently drafted to reference expressly the possibility of dual representation, with an acknowledgement from the player that the intermediary will also be entitled to act for the relevant club(s) on any transaction(s), which occur during the term of the representation contract, and which is subsequently re-confirmed in the transaction documentation.

English football

The distinction between player services and club services and the respective payments made by clubs, on behalf of the players as a taxable benefit in respect of player services, and in its own regard in respect of club services, therefore becomes key and of significant interest to HMRC, especially in light of the value of the market and the prevalence of dual representation.

HMRC challenge

On an employment contract being negotiated between a player and a club (whether on a transfer to a new club or a contract renewal at the player's existing club), the mechanics of the arrangements and associated documentation are that:

a the services set out in the representation contract are provided by the intermediary to the player and are incorporated into the transaction documentation by reference to the representation contract, with the necessary amendments to other elements of the representation contract, in particular, a waiver of the exclusivity and amendment to the initial commission rate;
b the services/value, which have been and/or are to be provided by the intermediary to the club, are agreed and set out in the relevant documentation; and
c the parties agree the payments to be made by the club to the intermediary:

    1 on behalf of the player (as a taxable benefit) for the relevant player services, which, where applicable, varies the commission rate set out in the representation contract, and
    2 on behalf of the club in its own right in respect of the services/value provided to the club.

The above structure is usually, but not exclusively, achieved by virtue of a tripartite representation contract between the player, intermediary and club and, regardless of the structure adopted, the applicable documentation is required to be lodged with The FA, with the principle of dual representation in general terms being permitted and accepted by The FA.

The primary basis of the HMRC challenge to dual representation arrangements is that, in certain scenarios, the services/value provided to a club and the related payment made for purported club services are not reflective of the role of the intermediary and are, in reality, a payment made on behalf of the player for services rendered to the player, with the effect of artificially and incorrectly reducing the player's tax liability. HMRC, therefore, contends that there is an outstanding tax liability owed by the player in respect of some or all of those sums purportedly paid for club services, and which have not been submitted as a taxable benefit on the player's P11D return, as well as consequential employers' national insurance and VAT implications for the club.

In the authors' experience, HMRC will typically contend that the player is liable for tax on an amount equal to that which corresponds to the commission rate set out in the representation contract and, where the actual sum payable for player services is lower than the commission rate in the representation contract, in circumstances where a separate payment for club services arises on the same transaction, HMRC is likely to allege that the player should be liable for tax arising from the difference between the amount actually paid for player services and the amount payable based on the application of the commission rate set out in the representation contract.

The HMRC's current position and approach on this issue, including its key risks indicators in relation to payments that should properly be taxable on the player, are set out in its guidance *Employment Income Manual*, published in March 2021, in the following sections:

- EIM01150 - Football clubs: payments to intermediaries[4]
- EIM01151 - Football clubs: payments to intermediaries: indicators of risk[5]
- EIM01152 - Football clubs: payments to intermediaries: retention of records[6]

Dealing with enquiries

There are various complex legal, regulatory and commercial issues and arguments arising in respect of dual representation and the HMRC approach to such intermediary fees, including in relation to:

- the contractual status of the representation contract and variation to the same, including the parties' intentions at the time of entering into the representation contract and whether any liability of the player to the intermediary pursuant to the representation contract actually crystallises;
- the challenge with seeking to calculate the value of club services by reference to the position in the representation contract, which should not logically have a bearing on the value of cub cervices, rather than on an independent and standalone basis;
- the difficulty in establishing a basis on which to value player and/or club services, with typical time-based or similar charging models which are used in many professional service industries not being applicable in this context and the industry instead focussing on the value attributable to, and ascertained from, the relevant services, particularly in view of the capital/asset value of players, as illustrated by the increasing level of transfer fees and the value of on-pitch performance, including in relation to prize money for success/retaining league status, commercial and broadcasting revenue and fan engagement/revenue;
- the regulatory framework, which dictates that a written representation contract, including the remuneration provision, is required to be entered into and lodged at the time of being entered into, irrespective of the parties' intentions and often without knowledge of the details of potential future club contracts in respect of which their terms will be relevant;
- comparing a dual representation arrangement with an analogous scenario where separate intermediaries act for each of the player and club; in that scenario, the same challenges would be unlikely to arise despite the same values being attributed to the same services and taking into account that the player's intermediary is likely to be uniquely placed to assist and provide value to a club, given their relationship with the player and the "gateway" to the player that they can provide to the club; and
- legitimate expectation, based on the HMRC approach and policing of dual representation arrangements over many years.

Ultimately the HMRC position, the player's likely response and the substantive outcome of the particular enquiry will depend upon the specific facts and circumstances associated with the relevant transaction and related payments. Having advised a range of stakeholders, including players, intermediaries, clubs and representative bodies, on the handling (and successful resolution) of HMRC enquiries in relation to intermediary fees, the authors' experience is that, aside from technical legal arguments, a fundamental means of resolving enquiries is to provide HMRC with a clear rationale and justification for the value of the club services payments made, in light of and notwithstanding the fact that the player services fees on the same transaction are lower than the commission rate set out in the representation rontract, often through the provision of contemporaneous records, which demonstrate the relevant club services and associated value.

New transactions – good practice

Whilst there is no single step that can be taken in relation to intermediary arrangements, in order to provide an absolute shield to HMRC scrutiny, there are various steps that stakeholders can consider adopting in order to seek to ensure that their transactions accord with good practice in this area and to seek to justify robustly their approach in the event of subsequent scrutiny.

In light of the HMRC approach to dual representation in recent years on the basis set out above, there is an apparent increase in the number of clubs, players and agents seeking to ensure that an amount equal to the commission rate set out in the representation contract is paid as player services prior to any club services payment being made. At this stage, the two most likely consequences arising out of this approach are:

- the player/intermediary seeking additional remuneration for the player as a means of contributing to/covering the player's tax liability which arises from this level of player services fee; and/or

4 Available at www.gov.uk/hmrc-internal-manuals/employment-income-manual/eim01150 (accessed 27 September 2022).

5 Available at www.gov.uk/hmrc-internal-manuals/employment-income-manual/eim01151 (accessed 27 September 2022).

6 Available at www.gov.uk/hmrc-internal-manuals/employment-income-manual/eim01152 (accessed 27 September 2022).

- intermediary fees increasing, with intermediaries seeking a club services payment on top of and in addition to a player services fee equating to that set out in the representation contract.

In any event, and whether or not an amount equal to the underlying commission rate is paid for player services, but especially in cases where this is not the case and the amount paid for player services equates to a lower figure, it is imperative that the player services and club services and each associated payment accurately reflect the commercial reality of the transaction and that the relevant club, intermediary and player maintain contemporaneous evidence and records to demonstrate and justify the same.

In addition to retaining copies of relevant correspondence, Centrefield has assisted stakeholders in:

- structuring transactions in light of and with regard to the commercial, contractual and regulatory considerations, all in the context of HMRC's approach;
- producing bespoke tripartite representation contracts, fully and accurately reflecting the differing player services and club services provided, the associated remuneration and the impact/relevance of the representation contract; and
- producing internal policies, frameworks and documentation through which appropriate contemporaneous evidence can be recorded and maintained which assist in demonstrating the commercial basis upon which intermediaries are engaged, perform services and are remunerated.

In this regard, the specific considerations should, by their very nature, be specific and considered on a case-by-case basis but may typically include matters relating to the role of/value provided by the intermediary in respect of club services in the following areas:

- assisting on the player's exit from their former club (in the event of a transfer) and the associated value, including in relation to their availability, contractual status and assistance in obtaining agreement from another club to the relevant transaction and/or more favourable terms for the new club (for example, the transfer fee);
- resolving any specific barriers to progressing/concluding the deal;
- facilitating mutual agreement on contractual terms for the player, including seeking a compromise on the player's demands and moving towards the club's position (on the full range of provisions potentially included in a player's contract);
- taking into account and securing the transaction in the context of alternative options available to the player;
- "selling" the club's on-pitch project to the player, both generically and in respect of the player's specific role, career aspirations and so on; and/or
- assisting in addressing personal concerns/matters for the player, such as relocation, language barriers, family arrangements and so on, in each case with reference to the value obtained by the club from such services and the associated outcomes, whether in respect of on-pitch performance and/or the financial aspects of the transaction (for example, savings on the transfer fee, the transfer fee with reference to the market value of the player, savings on the player's package and so on.

FFAR

Finally, it is noted that, at the time of writing, the authors' understanding is that the new FFAR, marking the most significant sea-change in the regulation of intermediary activity since the significant relaxation of FIFA's regulation of the industry in 2015, are likely to be published towards the end of 2022, with its implementation scheduled for spring 2023 (at the earliest).

The final provisions and associated impact of the FFAR remain to be seen and, more widely, FFAR proposes various things for all stakeholders to consider, including representation contracts being entered into by individual intermediaries, rather than corporate entities, which is permitted currently, save in respect of minors, the extension of scope to football staff other than players, the remuneration which can be taken into account in calculating commission, the position in relation to commercial rights/activity and similar.

A key change relevant to the subject matter of this article, however, is the likely inclusion in the FFAR of specific caps on the fees payable for intermediary activity, in a dual representation scenario, currently being proposed as being limited to 3% for player services and 3% for club services. Whilst the legality and enforceability of caps of this nature may well be challenged by some of the affected stakeholders, particularly by intermediaries, who would see their earnings on any particular transaction "capped", if implemented, these proposed changes will potentially limit the impact and ongoing relevance of some of the above issues, given the much more prescriptive approach to intermediary fees that would result. In practice, however, the authors' view is that it may be that this is more of a case of moving rather than resolving the issue, with related issues likely to arise by virtue of new approaches and structures being adopted in response to FFAR. In this regard, it may be that HMRC finds itself in a new battleground with the relevant stakeholders.

USA:

How college athletes can commercialize their name, image and likeness (NIL)

BY CONSTANTINOS MASSONOS[1]

Introduction

The right to publicity, which is a right widely protected by law in the USA, gives any individual the exclusive right to license the use of any distinct aspect of their identity for commercial promotion.

Through the use of this right, athletes who were traditionally paid just to compete in their respective sports, could create an extra revenue stream through licensing the use of their name, image and likeness ("NIL") for commercial purposes. Nowadays the development and commercial exploitation of an athlete's brand has become an integral part of their career, allowing them to monetize their on-field success in the long term, even after their playing days are over.

The National Collegiate Athletic Association ("NCAA") is a USA based association which was initially developed, early in the 20th century, to protect the welfare of college athletes and the viability of college sports. A hundred years later, the association developed in such a scale to have almost half a million student-athletes from 1100 different schools competing in its leagues.

Until recently, college athletes competing in the NCAA not only competed in their sports without receiving any financial compensation, other than scholarships, but were also prohibited to benefit financially from licensing the commercial use of their image rights. In June 2021, after years of different legal battles, the US Supreme Court unanimously ruled (9-0) in favor of Division I college athletes that the limits on education-related benefits, set by the NCAA, could not be legally enforced, thus allowing NCAA college athletes to benefit from their name, image and likeness.

NIL commercialization

The right to commercialize their NIL creates a vast number of opportunities for college athletes to start building and capitalizing on their brand

A number of sports-related organizations have even launched NIL programs aimed towards college athletes. The World Wrestling Entertainment Inc. (WWE) has developed a program called "Next In Line", in order to help athletes develop their brand by training them in brand building, media training, communications, live event promotion, creative writing and community relations.

The commercialization of college athletes' NIL starts with the identification of the athletes' target market, which mainly consists of their social media fanbase. Therefore, developing a solid social media fanbase is the first step towards the commercialization of an athlete's NIL. At their current life phase, college athletes appeal more to younger people and are seen as free, young and fearless with a drive to succeed in making their dream come true. A well-crafted brand building strategy, based on the above life phase and adjustable to the evolving life phases of the athlete can transform them into a local, national or even global brand, which can be leveraged to sell, be endorsed and create more revenue streams.

The strategic building of the athlete's brand must also be based on the personal values that the athlete can bring into the marketplace in order to differentiate them from the rest of the athletes. Some athletes might simply be popular because of their athletic performance, but other components can also influence the audience, such as an appealing appearance, the athletes' values and beliefs, or a marketable lifestyle.

A thorough analysis of the athlete's personal brand, as well as an analysis of the athlete's fanbase, can be quite revealing and can give the athlete a direction as to where to look for sponsors. Such an analysis can reveal suitable industries or products, or even specific companies that align with the athlete's characteristics, resulting in a successful match for the athlete in terms of endorsements or sponsorships.

1 This article was contributed to the Blog on the Sports Financial Literacy Academy, Nicosia, Cyprus. For more information, log onto www.moneysmartathlete.com (accessed 28 September 2022).

Specific actions

We set out below a few simple steps that you need to take as a college athlete in order to commercialize successfully your athletic brand.

Think about your competitive advantages

What makes you stand out from other professional athletes? Athletes can no longer rely solely on their talent to provide the all-important competitive edge; an athletic brand that stands out among the rest involves more of the athlete's personality: their passions, interests and life outside of sports. Indeed, studies suggest that sports fans put more emphasis on character-focused stories about individual athletes, relating to their personal life and attributes, rather than on performance-focused stories. Authenticity is vital when it comes to building a strong brand; when the brand that you have built is a true reflection of who you are, your unique traits will define your brand and this is what will set you apart.

Determine your audience

Do you know who your audience is and how to communicate with them? This is important so that your brand portrays the most marketable version of yourself. You have to know what your target audience likes, believes in and holds in high esteem, where to find them and how to get them to buy-in to what is being sold. Equally, you have to think about businesses reaching out to professional athletes to promote their products or services and how they go about deciding who to recruit for this purpose: a strong athletic brand can convince the business that it is "that" particular athlete that they need to hire.

Consider the public's perception of you as a person and as an athlete; this is your brand's core

The fans' decision to invest in an athletic brand, whether it is to purchase memorabilia of a specific athlete, watch a game on TV or buy tickets to the game, rests on this perception. In turn, this perception is based on an athlete's sport performance, as well as character in real life. Take Roger Federer, for example, who has time and again said: *"It is nice to be important, but it's more important to be nice"*, a phrase which perfectly sums up his public image. This ethos is key to his reputation as one of the most admired athletes in the world. The 20-time grand slam champion has received, for 2017-2018, a net income of US$ 77.2 million with US$ 65 million being from endorsements and appearance fees. Notably, his off-court earnings from marketers are higher than any other athlete's.

Use social media strategies to promote your athletic brand

Through social media, athletes are able to build their personal brand, become known and develop brand equity. Social media is not only a way to promote oneself, but also a means to promote a sponsor's products and services. Therefore, by having a strong social media presence, athletes create lucrative financial opportunities through sponsorships and endorsements.

Choose the right social media outlets

Depending upon the target audience that you want to reach, you have to choose the most suitable social media outlets through which you will do that. For example, if your target audience consists of teenagers, then Instagram is a more appropriate social media platform than Twitter or LinkedIn.

Decide on the content of your social media posts

You want to develop a certain public image and you want to express your beliefs and opinions through social media. You need to choose carefully the type of content that you will be sharing with your fans in order to achieve that. You also have to make sure to post original content: your own text, pictures and videos are more likely to gain attention than sharing someone else's content.

Look into industries that invest in sports advertising

When creating their personal marketing strategy, athletes should be aware of the prevailing sports advertising trends as well as the top industries that invest in the sponsorship of athletes. Knowing where the money is, can be quite beneficial for athletes so that they gear their efforts towards that direction. There are a number of industries that invest big in brand ambassadors from the sports sector and these include the beverage industry, the auto industry, sportswear brands, and watchmakers.

Conclusion

It is obvious from the above, that any college athlete can strategically utilize their unique qualities and characteristics in order to build a signature brand that can be monetized in various ways, including product endorsements, attracting sponsorships, merchandising or by just appearing at events.

Carefully building a long-term plan, can help college athletes maximize the benefits from the commercial use of their sports brand.

Loan of football players

Part four: Tax implications in Germany

BY CARSTEN SCHLOTTER[1] AND PHILIPP DIFFRING[2]

Introduction

This article provides an overview of the tax implications surrounding the loan of football players in Germany. In particular, we deal with the requirements for unlimited tax liability and the different groups of cases when a player is loaned to and loaned out from German clubs. In addition, we also focus on obligations to withhold tax, both with regard to the salary paid to the player and to loan fees paid to a foreign club.

However, this article provides only an overview of standard cases of loaning players and cannot replace a tax review in specific cases.

Requirements for unlimited income tax liability in Germany

In Germany, unlimited income tax liability can arise from the moment a person moves to Germany.[3] The unlimited income tax liability can also end from the moment the person leaves Germany.

The taxpayer is assessed for the year in which he or she moves to or leaves Germany. In this assessment period (in principle the calendar year), the worldwide income principle applies to the period when the tax liability was unlimited. For the rest of the year, income subject to limited tax liability[4] is included in the standard assessment. If unlimited income tax liability is established during a given year, any income sourced from abroad that was not subject to unlimited or limited income tax liability during the assessment period is taken into account for determining the tax rate.[5] Income sourced from abroad must, therefore, also be declared only for progression purposes.

In the present case, this means that a player is considered a tax resident from the moment he or she:

- maintains a home or apartment in Germany for personal use with the intention to keep it and use it on a regular basis; or
- has a habitual abode in Germany, that is, the player is physically present in Germany for a consecutive period of more than six months or with the intention to stay for that period. Short interruptions, such as weekend trips away, vacation or business travel, do not rule out a habitual abode.

When determining residence, nationality is not a criterion. If a player does not continue to maintain a house, apartment or habitual abode in his or her previous state of residence, the player ceases to be a resident of that state upon leaving it. If the player intends to set up a habitual abode in Germany, he or she is a resident of Germany upon arriving. It is possible for a player to be tax resident in both states. The residence status of an individual will then be determined by the tie-breaker rule of a tax treaty.[6] Since residence in Germany can be established during the tax year, this also applies to residence under treaty law.

Taxation of wage payments in inbound cases

Variant 1: the remuneration of the player who is subject to unlimited tax liability continues to be paid by the foreign club which has loaned out the player

In variant 1, a foreign club pays a player's salary when he or she has been taken on loan by a German club. We assume that the player resides exclusively in Germany whilst on loan.

Given that the employment relationship with the foreign club loaning the player out is suspended or no longer exists, salary payments from a third party are allocated to the employment relationship in Germany. This is because the player is bound only by the instructions of the "new" club for as long as the loan period exists and receives payment for this activity. The player receives income from employment and is subject to unlimited tax liability.[7] Germany has

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3 Sec. 2 (7) sentence 3 of the German Income Tax Act ("ITA").

4 Sec. 49 ITA.

5 Sec. 32b (1) no. 2 ITA (progression clause).

6 art. 4 Double Tax Treaty ("DTT").

7 Sec. 19 ITA.

the right to tax this income under treaty law[8] because the payments are deemed to be remuneration for an activity.

Variant 2: the remuneration of a player subject to unlimited tax liability is paid by the German club receiving the player on loan

In variant 2, a German club bringing in a loan player pays the loaned player's salary. We assume that the player resides exclusively in Germany whilst on loan. In this case, the salary is subject to unlimited tax liability. Germany has the right to tax the salary.[9]

Variant 3: taxation without incurring unlimited tax liability in Germany

The salary of a player, who is not considered tax resident in Germany, can be subject to a limited tax liability in Germany. Regardless of whether the salary is paid by the German club taking a player on loan or the foreign club loaning the player out, it gives rise to a limited tax liability in Germany, insofar as the salary is paid for taking part in matches in Germany. However, if the salary is paid for a player's activities abroad, it is not subject to limited tax liability. This corresponds to the allocation of taxation rights to the state in which the activity takes place.[10]

Taxation of wage payments when the player is loaned out

Variant 1: taxation in the event of continued unlimited income tax liability in Germany

Due to unlimited income tax liability in Germany, in principle, the player must pay tax on all income in Germany. However, even in this case, the right of taxation under the relevant DTT is regularly assigned to the state in which the activities are carried out and not to the state of residence.[11] Germany, therefore, has no right of taxation for wage payments resulting from sporting activities abroad.

Variant 2: the remuneration of the player subject to limited income tax liability continues to be paid by the German club loaning the player out

In variant 2, a German club loans a player to a club abroad but still pays the salary. Throughout the loan, we assume that the player is resident only in the country in which the "new" club is based, that is, he or she no longer has a residence in Germany. From a German perspective, the income is not subject to limited income tax liability in Germany, as long as all of the player's matches take place outside Germany. The payments are classed as salary from a third party and, therefore, attributed to the employment relationship abroad.

Variant 3: the remuneration of the player with limited income tax liability is paid by the foreign club receiving the loan player

In variant 3, the player resident in the same country of the "new" club gets paid by the foreign club which has taken the player on loan and with which the player has also concluded an employment contract for the duration of the loan. A limited income tax liability arises in Germany only to the extent that the salary is paid for participation in games that take place in Germany.[12] However, if the salary is paid for a player's activities abroad, it is not subject to limited income tax liability in Germany.

Tax deductions for wage payments and social security implications

If wage payments are made by a domestic employer to a player with limited or unlimited income tax liability in Germany, the domestic employer must generally withhold wage tax.[13] In the case where a player joins a club on loan, the German club receiving the player may even be obliged to withhold wage tax if the player's wage is not paid by the club itself but by the foreign club loaning the player out.[14] In the case of persons subject to limited income tax liability, this wage tax deduction takes precedence over the obligation to withhold tax.[15]

In addition to withholding wage tax, the domestic employer must also regularly deduct social security contributions from wages. In order to be subject to compulsory social insurance contributions in Germany, one must work in Germany. Such an obligation, therefore, regularly arises when a player is loaned to a German club and ends when the player leaves. However, due to social security agreements, it may be possible that social security contributions continue to be payable only in the country where the player worked before the loan.

Obligation to deduct tax on payments of loan fees to a foreign club

Income generated from the provision of the opportunity to contractually engage a professional athlete as such in Germany on the basis of a loan agreement is subject to German withholding tax as domestic income.[16] This does not apply only if the total income of the club that loans the player to a German club does not exceed € 10,000. Therefore, a German club is obliged to make a tax deduction of 15% plus solidarity surcharge when paying a loan fee to the foreign club. It has not been conclusively clarified whether remuneration paid to players' agents who assist in player loans is also subject to withholding tax. The better reasons speak against this view.

8 Art. 17 (1) OECD MTC.

9 *Ibid.*

10 *Ibid.*

11 *Ibid.*

12 Sec. 49 (1) no. 4 (a) ITA.

13 Sec. 38 ITA.

14 Sec. 38 (1) sentence 3 ITA.

15 In accordance with Sec. 50a (1) no. 1 ITA.

16 Secs. 49 (1) no. 2 (g), 50a (1) no. 3 ITA.

Under German tax law, only payments to the club that loans the player are subject to withholding tax, but not payments for final transfers. Depending on the structure of the contract, complex delimitation issues may arise in this respect.

According to most double taxation agreements, however, Germany has no right of taxation for this income. Remuneration for the clubs loaning the player is regularly not covered by art. 12 of the DTT, but by art. 7 of the DTT. Under German tax law, relief under a DTT can only be taken into account by a foreign loaning club if the loaning club submits an official exemption certificate to the German club before payment of the remuneration. The foreign loaning club must apply for this exemption certificate from the German Federal Tax Office in a special exemption procedure. If an exemption certificate is not available at the time of payment of the remuneration, the party liable for the remuneration must withhold the withholding tax and pay it to the Federal Tax Office. The tax is paid for the account of the loaning club. The loaning club shall, therefore, receive a tax certificate from the payment debtor. Based on this tax certificate, the loaning club can submit a refund application to the Federal Tax Office based on the DTT.

Loan of football players

Part five: Swiss tax considerations

BY MARCEL MEIER[1]

Introduction

What do Kevin De Bruyne, Toni Kroos and David Alaba have in common?

Not only are they among the best football players in the world today, but they were also transferred on a loan basis at the very beginning of their football career. Such temporary transfers of football players are motivated by different reasons. On the one hand, from the point of view of the loanee club, the main advantages are:

- cutting down or deferring staff and transfer costs (as opposed to more expensive permanent transfers of players);
- testing the player prior to a permanent (definitive) engagement;
- reducing financial risks in the event of serious injuries of the player due to the fixed-term employment relationship; and
- the short-term upgrading of the team in a difficult period of the season.

On the other hand, a football club may have young talents who are not yet ready to play in its first team. Hence, this club may be interested in temporarily transferring these players to other clubs for training purposes. Indeed, the young talents should evolve by getting playing time with the loanee club in competition games (often in a lower league) and subsequently:

- may return to the loaning club as better players;
- may generate a higher transfer fee in the event of a permanent transfer to the loanee club or a third club.

Furthermore, the loaning club usually generates some income and/or achieves a reduction of its staff costs for players who do not yet make their breakthrough. From the perspective of the player, a temporary transfer is mainly the opportunity to:

- evolve in competition games, (not only in trainings and friendly matches);
- relaunch their football career (with the club or the national team); and
- increase its own visibility and market value which may also impact advertising opportunities.

This article is the Swiss country report and forms Part five of a series relating to loans of footballers. In particular, *Part one* dealt with the general legal and contractual framework and shows that the European clubs exploit increasingly the loan market due to a number of economic and regulatory considerations, more specifically:

- profit and sustainability rules;
- player trading models; and
- macroeconomic factors of the football business[2].

The purpose of this article is to outline mainly the Swiss tax considerations in the event of loans of football players[3] to a Swiss club from a foreign club (inbound transfer) and vice versa (outbound transfer). Since the foreign leagues, such as the English Premier League, LaLiga, the Serie A and the Bundesliga, are generally more competitive leagues compared to the Swiss Super League, young talents of foreign football clubs may have a better chance to get playing time and to evolve in competition matches in Switzerland.

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2 T. Simpson & M. Bennett, "Loan of football players, Part one: general legal and contractual framework", in: *Sports, Law and Taxation* (formerly *GSLTR*) 2022/21, p. 42-44.

3 First of all, it is important to note that a loan of a player is not a loan in the legal sense. Indeed, apart from the highly regulated staff leasing or temporary/permanent placement of staff in Switzerland, lending under Swiss commercial law includes:
– loan of an object for use (*Gebrauchsleihe*), and
– loan of a sum of money or other fungible objects (*Darlehen*).
Hence, an object and not an individual is loaned from the lender to the borrower. Based on the foregoing, it could be considered using a new terminology for loans of footballers (and other athletes of team sports). In particular, if several football clubs are held by the same owner, a loan from one club of the group to another club of the group could be considered as "*secondment*" which is the usual terminology of multinational companies in the event of international mobility programs for talents or top managers. An alternative would be to use the term "*temporary transfer*" of players (as opposed to permanent transfer). This proposal would be consistent with the new FIFA regulations concerning the loan of players in international football which were adopted in March 2022 and stipulate that the maximum loan duration is one year.

Accordingly, in an international context, Swiss football clubs are typically loanee clubs, which is the focus of the present article.

In Swiss law, there are no specific rules applicable to temporary transfers of football players. Therefore, the usual rules of Swiss tax law, social security law,[4] employment law and immigration law have to be taken into account to assess the Swiss position of football players and the clubs involved.

Moreover, the Swiss Football Association has published a number of regulations (mainly competition rules which cover permanent national transfers (section 4 of chapter 4), temporary national transfers (section 5 of chapter 4) and international transfers (section 6 of chapter 4)[5] as well as some standard contracts (mainly employment contract for non-amateur players, general contract terms to the standard employment contract and key documents for agents)[6].

Swiss tax domicile or residence

Arrivers

Domestic tax law

Under Swiss domestic tax law, players establish their tax domicile in Switzerland if they reside there with the intent of permanently staying.[7] In a nutshell, players must have their center of vital interests in Switzerland, taking into account all the relevant circumstances (personal, social and economic analysis on a generally long-term basis). Moreover, players are considered as Swiss tax resident based on Swiss domestic tax law if they stay in Switzerland at least:

- 30 days and engage in a gainful activity on Swiss territory, or
- 90 days without performing any gainful activities on Swiss territory, regardless of temporary short interruptions[8].

The Swiss tax liability starts retroactively as from the first day of residence if either the 30-day or the 90-day test is met.

International tax law

If players are domiciled or resident based on the respective domestic tax law, both in Switzerland and in another state, their tax status will be assessed in accordance with the so-called tie-breaker rules of an applicable double taxation convention (typically art. 4 para. 2 if it follows the OECD Model Tax Convention on Income and on Capital ("OECD Model")). In the absence of such a convention, only Swiss domestic tax law applies, which could result in an effective double taxation of income and/or assets (that is, taxation in Switzerland and abroad).

To avoid effective double taxation issues, the Swiss tax domicile or residence has to be recognized by both the foreign and the Swiss tax authorities (state of origin and state of destination). Hence, it is standard practice for a Swiss tax advisor to collaborate with the foreign tax advisor of the relevant individuals who move to Switzerland.

Particularity: family taxation system

Based on the current Swiss tax law, individual taxation applies to single persons and unmarried couples only. Married couples and same-sex couples in a registered partnership are taxed jointly (family taxation system[9] as opposed to other jurisdictions, such as the UK).

The football business is very fast-moving. Thus, players may change clubs frequently which also results in (sometimes immediate) changes of their tax domicile or residence. In practice, it happens that the spouse and children do not move together with the player to the country where the new club (employer) of the player is based. The main reasons are usually the education of the children (schools) and the personal/social relationships of the spouse and children. The foregoing has an important impact on the assessment of the tax residence of the player under the tie-breaker rules of an applicable double taxation convention.

For instance, if the temporary transfer to a Swiss football club is of a short duration (for example, 6 months), the tax residence of the player would generally remain abroad (family place) by reason of the tie-breaker rules of an applicable double taxation convention. In this scenario, only the Swiss employment income of the player would be subject to Swiss income taxation (limited tax liability due to work on Swiss territory)[10] and Swiss social security. Moreover, no subsequent ordinary tax assessment (*nachträgliche ordentliche Veranlagung*) would take place.

By contrast, if the temporary transfer to a Swiss football club is stipulated for a longer period and thus the spouse and children of the player also move to Switzerland,

4 This analysis depends mainly on:
– the liability within the scope of the old-age and survivors' insurance and the invalidity insurance (first pillar of the Swiss system), and
– the existence and application of social security conventions in an international context.

5 *Wettspielreglement und Spielregeln*, available at https://org.football.ch/dokumente/wettspielreglement-und-spielregeln.aspx (accessed 28 September 2022).

6 *Nichtamateure und Vermittler*, available at https://org.football.ch/dokumente/nichtamateure-und-vermittler.aspx (accessed 28 September 2022).

7 Art. 3 para. 2 of the Swiss Federal Law on the Direct Federal Tax (*Bundesgesetz über die direkte Bundessteuer* ("DTL")) and art. 3 para. 2 of the Swiss Federal Law on the Harmonization of Cantonal Direct Taxes (*Bundesgesetz über die Harmonisierung der direkten Steuern der Kantone und Gemeinden* ("THL")).

8 Art. 3 para. 3 DTL and art. 3 para. 1 THL.

9 The family taxation system is currently under review and discussion. A popular initiative on the introduction of the individual taxation system was submitted. The Swiss population may have to vote on this system change (likely in 2024).

10 Art. 5 para. 1 lit. a DTL; art. 91 DTL; art. 4 para. 2 lit. a THL; see also Circular Letter No. 45 of the Swiss Federal Tax Administration regarding taxation at source of earned income of employees published on 12 June 2019, section 5.1.

the tax residence of the player would generally be Switzerland. The related Swiss tax consequences are outlined below in the section Tax consequences.

Tax consequences
The Swiss tax duty begins upon the date on which the player establishes a tax domicile or tax residence in Switzerland. Players who establish their tax domicile or tax residence in Switzerland become subject to Swiss taxation (at federal, cantonal and communal levels) on the basis of their personal affiliations. Accordingly, they are subject to a generally unlimited Swiss tax liability. This tax liability captures worldwide income and assets, apart from business operations, permanent establishments and real estate located abroad.[11]

On this basis, Swiss tax resident players must declare their total income in their Swiss tax return, even though their income may also be subject to taxation at source abroad. The Swiss tax treatment of such income (that is, analysis whether part of taxable basis or only impact on applicable tax rate and international allocation of certain deductions) depends on the specific rules of the double taxation convention concluded between Switzerland and the state of performance.[12] In the event of an applicable double taxation convention which attributes the taxing rights to the foreign state,[13] such income is generally exempt from taxation in Switzerland (exemption with progression).

Moreover, in the event of resident players who are neither Swiss nationals nor hold a C permit (so-called settlement permit or permanent residence permit),[14] the Swiss loanee club has to apply monthly income tax at source deductions. In addition, a subsequent ordinary tax assessment is mandatory for Swiss tax resident players if:

- their gross income exceeds CHF 120,000; or
- they have a taxable wealth; or
- they own Swiss real estate; or
- they have other income which was not subject to taxation at source.

This procedure means that a complete Swiss tax return has to be filed with the competent cantonal tax administration. Accordingly, the players concerned have to declare their worldwide income and assets (including foreign real estate) in their Swiss tax return. The wage withholding tax paid by the Swiss club is credited against their final Swiss tax burden assessed based on the tax return.

For instance, if a player signs a 6-month fixed-term employment contract, arrives in Switzerland after the end of the foreign season on 1 July, plays the first half of the new season with the loanee club of the Swiss Super League in Switzerland and then leaves Switzerland on 31 December, the relevant Swiss tax duties apply to the period from 1 July to 31 December (split tax year). Under the assumption of a subsequent ordinary tax assessment, the player is required to submit a Swiss tax return, which covers income and wealth tax for the arrival year. Wealth tax (at cantonal and communal levels) is computed based on the net assets held by the player on 31 December and then adjusted on a *pro rata temporis* basis for the period of the year for which the player was Swiss tax resident (in the present example 50%). If the conditions of the subsequent ordinary tax assessment are not met, only wage withholding tax would be levied and paid by the Swiss loanee club.

Leavers

Broadly speaking, football players should be regarded as non-Swiss resident for tax purposes from the date of their effective departure from Switzerland if:

- they no longer live in Switzerland, and
- they are able to demonstrate that they have established their tax domicile or residence abroad.

The comments on the family taxation system in the section *Particularity: family taxation system* above apply *mutatis mutandis* in the event of departure from Switzerland. Furthermore, the tie-breaker rules of an applicable double taxation convention may result in Swiss tax resident married players with family remaining subject to taxation in Switzerland, apart from employment income of the player earned in the other state where the loanee club (new temporary employer) is based.

Under Swiss domestic tax law, unlimited tax liabilities (personal affiliations) should cease to apply to players if they no longer intend to stay in Switzerland; undertake less than 30 days of gainful activity (excluding temporary interruptions from the day count); and spend less than 90 days in Switzerland without gainful activity (again excluding temporary interruptions).[15] Following the departure from Switzerland, it is recommended to avoid trips back to Switzerland for at least a month. This is to limit the risk of the Swiss tax authorities to refute that the departure was genuine, and as a result continue to treat the player as a Swiss tax resident. In addition, Swiss tax law generally does not provide for an exit taxation (contrary to, for instance, Germany). Moreover, for the purpose of the 30- and 90-day tests the day count starts from the date players effectively leave

11 Art. 6 para. 1 DTL.

12 See decision of Swiss Federal Supreme Court (*Bundesgericht*) of 6 May 2008, 2C_276/2007, consideration 3.2.

13 Art. 15 (1) and 17 OECD Model.

14 In general, foreign nationals obtain the Swiss settlement permit after 5 or 10 years of residence in Switzerland. Specifically, certain EU/EFTA nationals (Austria, Belgium, Denmark, Finland, France, Germany, Greece, Ireland, Italy, Luxembourg, The Netherlands, Portugal, Spain, Sweden, Iceland, Liechtenstein and Norway) are granted settlement permits after a 5-year regular and uninterrupted residence in Switzerland. Other EU nationals or third-country nationals (e.g., UK, USA and Canada) may also be granted settlement permits after 5 years of residence, but subject to certain additional conditions.

15 In the event of Swiss real estate ownership, limited tax liabilities continue to apply following departure from Switzerland.

Switzerland. If this date is part way through the year, the players are only regarded as Swiss resident for the portion of the year spent in Switzerland (split tax year).

For instance, if a player leaves Switzerland after the end of the season on 1 July, the relevant Swiss tax duties apply only to the period from 1 January until 30 June. Under the assumption of a subsequent ordinary tax assessment, the player is required to submit a Swiss tax return, which covers income and wealth tax for the departure year. Wealth tax (at cantonal and communal levels) is computed based on the net assets held by the player on the date of departure and then adjusted on a *pro rata temporis* basis for the period of the year for which the player was Swiss tax resident (in the present example 50%). If the conditions of the subsequent ordinary tax assessment are not met, only wage withholding tax would be levied and paid by the Swiss loanee club.

Inbound transfer

Preliminary remarks

In attributing taxing rights to Switzerland or abroad, it is first essential to assess the tax residence of the player (if necessary, by applying the tie-breaker rules of an applicable double taxation convention) and to then qualify the income which the player receives. For this section, it is assumed that::

- the player is tax resident in Switzerland;[16] and
- a double taxation convention applies.

In international football, the issue arises then whether the player receives income from employment based on art' 15 (1) of the OECD Model, income as a sportsperson pursuant to art. 17 (1) of the OECD Model or other income, such as a payment for a non-competition clause, or the like, based on art. 21 (1) of the OECD Model. Depending on this analysis, the application of double taxation conventions may overrule the Swiss domestic analysis and assign the taxing rights to the foreign state (that is, negative effect on Swiss taxation).

Basic scenario: payments made by Swiss club to player

When the player is temporarily transferred to a Swiss club from a foreign club, they are generally considered as tax resident in Switzerland from the date of the establishment of their Swiss tax residence, regardless of the commencement of the employment contract starting date.

Payments made by the Swiss club (loanee club) to the player for the Swiss duties, such as basic salary and bonuses,[17] are subject to Swiss income taxation and Swiss social security.

Usually, players transferred to a Swiss club are neither Swiss nationals nor hold a C permit (settlement permit). Hence, the Swiss club has to levy monthly wage withholding tax and to pay the taxes directly to the competent cantonal tax administration. Moreover, if the conditions are met, a subsequent ordinary tax assessment takes place (see the section Tax consequences above).

Some other scenarios

Payments made by foreign club to player
When the player is temporarily transferred to a Swiss club (loanee club) and, following establishment of the Swiss tax residence, continues to be paid directly by the foreign club (loaning club), the basic salary and the bonuses are subject to Swiss income taxation and social security to the extent that these payments relate to duties performed by the player for the Swiss club (loanee club).

The foregoing is also applicable if the Swiss club (loanee club) makes a payment directly to the foreign club (loaning club) which means that the former ultimately bears the (total or partial) wage costs for the player during the loan period.

Payments made partially by Swiss club and partially by foreign club to player
It may happen that a player is temporarily transferred to a Swiss club and is partially paid by the Swiss club (loanee club) and the foreign club (loaning club). For instance, a player who earns € 25,000 per month with a foreign club is loaned to a Swiss club which pays € 15,000[18] per month to the player. To avoid a reduction of employment income for the player during the loan period, the foreign club continues to pay the difference of € 10,000 per month to the player.

In this case, the total income of € 25,000 is subject to Swiss income taxation and social security should these payments exclusively relate to duties performed by the player for the Swiss club (loanee club).

Loan fees paid to foreign club
In addition to the wages for the player, the Swiss club (loanee club) may pay a loan fee to the foreign club (loaning club) in return for the temporary transfer of the player. It is assumed that the player does not benefit from this payment. Such a loan fee generally qualifies as commercially justified expense and thus may reduce the net profit or increase the net loss of the Swiss club.

16 If the player remains tax resident outside Switzerland, it is necessary to refer to an applicable double taxation convention. As a rule, the Swiss taxation of the payments of the Swiss club would be confirmed if the applicable convention follows arti. 15 (1) of the OECD Model. In other words, Switzerland would have the primary taxing rights regarding the salary and bonus payments of the Swiss club. This means that wage withholding tax applies, but no subsequent ordinary tax assessment takes place.

17 For instance, for appearances in competition games, for every point the team gains during competition games in which the player participates, for every win that the team achieves or for goals of the player in competition games.

18 Or equivalent amount in CHF.

Outbound transfer

Preliminary remarks

As for the inbound transfer, it is first essential to assess the tax residence of the player (if necessary, by applying the tie-breaker rules of an applicable double taxation convention) and to then qualify the income which the player receives. For this section, it is assumed that:

- the player remains tax resident in Switzerland[19], as the spouse and children of the player continue to be resident in Switzerland (scenario of short loan period); and
- a double taxation convention applies.

Basic scenario: payments made by foreign club to player

According to Swiss domestic tax law, the salary and bonuses paid by the foreign club (loanee club) would generally be subject to Swiss income taxation. However, if these payments exclusively relate to duties performed by the player for the foreign club (loanee club) outside Switzerland (for example, in Italy or France), they are exempt from income taxation in Switzerland based on art. 15 (1) of the OECD Model, but they are taken into account to assess the applicable Swiss income tax rate (so-called exemption with progression). There is no credit available in Switzerland for the foreign tax suffered on the foreign payments made by the foreign club. Summarized, based on art. 15 (1) in conjunction with art. 23 A of the OECD Model Switzerland has to waive its right to tax these payments, since the taxing right for employment income is attributed to the foreign state.

Some other scenarios

Payments made by Swiss club to player
When the player is temporarily transferred to a foreign club (loanee club) and continues to be paid by the Swiss club (loaning club), the basic salary and the bonuses should generally be exempt from Swiss income taxation and social security, to the extent that these payments relate to duties performed by the player for the foreign club (loanee club) abroad (outside Switzerland). The foregoing could however be controversial depending on:

- the application of a double taxation convention;
- the effective foreign income taxation; and
- the duration of the loan period.[20]

If the Swiss income tax exemption is approved, the relevant payments would have to be taken into account to assess the applicable Swiss income tax rate (so-called exemption with progression).

Payments made partially by foreign club and partially by Swiss club to player
As mentioned above, it is not excluded that a player is temporarily transferred to a foreign club and is partially paid by the Swiss club (loanee club) and the foreign club (loaning club). If these payments exclusively relate to duties performed by the player for the foreign club (loanee club) outside Switzerland, they are exempt from income taxation in Switzerland, but they are taken into account to assess the applicable Swiss income tax rate (see the sections *Basic scenario* and *Some other scenarios* above).

Loan fees paid to Swiss club
In addition to the wages for the player, the foreign club (loanee club) may pay a loan fee to the Swiss club (loaning club) in return for the temporary transfer. It is assumed that the player does not benefit from this payment. Such a loan fee is generally part of the corporate proceeds and thus may increase the net profit or reduce the net loss of the Swiss club.

Other issues

Agent fees

It is standard practice that football players rely on agents to help them negotiate contracts, choose clubs and maximize their income. Due to the limited nature of player transfers on a loan basis, the issue of agent fees may be less important compared to permanent transfers of football players.
In any case, it is necessary to assess whether the agent works for the player or the club (by taking into account the contractual arrangements and the economic reality) and to what extent agent fees paid by the clubs involved could qualify as a benefit in kind of the player. Such a benefit would generally be considered as employment income of the player. The international taxation principles outlined above would apply mutatis mutandis.

Swiss residence permits

Dual system
Switzerland has a dual system regarding the issuance of residence permits for foreign citizens. On the one hand, citizens of EU/EFTA member states have an easy access to the Swiss employment market on the terms and conditions of the Agreement on the Free Movement of Persons concluded between Switzerland and the EU. On the other hand, there is only a limited number of permits available for foreign citizens of non-EU/EFTA states, including the UK.[21] The issuance of such permits is subject to restrictive requirements whose fulfilment may be controversial in practice.

Players of EU/EFTA member states
Players who are citizens of EU/EFTA member states do not need a residence permit to take up employment

19 In the event of a recognized departure from Switzerland and a foreign tax residence of the player (for example, young player without family), both the Swiss taxation (apart from taxes for ongoing Swiss real estate ownership) and the Swiss social security obligations would generally cease to apply (see also the section *Leavers* above).

20 In particular, if:
– the loan period (stay) abroad is less than 183 days; and
– the other cumulative conditions of art. 15 (2) of the OECD Model are also met, income taxation in the residence state would be admissible.

21 Actually, there is a specific quota for UK nationals which has been stipulated as part of the post-brexit agreement concluded between Switzerland and the UK.

with a Swiss club for a period of up to three months per calendar year. Such employment requires, however, the electronic notification of the short-term stay. The relevant online notification form must be filed by the club with the competent authority no later than the day before starting work with the players.

If the gainful employment (loan period) with the Swiss club lasts longer than three months per calendar year, it is subject to issuance of a residence permit for the player. Residence permits are issued upon submission of proof of employment, in particular the employment contract concluded between the players and the Swiss club. The period of validity of the relevant Swiss residence permit depends on the duration of employment of the player.

Typically, the loan duration in international football may be a period between three months and one year (limited period of time). Hence, the players qualify as short-term residents in Switzerland and, in the case of EU/EFTA citizenship, are entitled to L EU/EFTA permits, whose period of validity matches the duration of the employment contract with the Swiss club.

Players of non-EU/EFTA member states, including the UK
The admission of players, who are citizens of non-EU/EFTA member states, including UK, is subject to the Federal Act on Foreign Nationals and Integration (in particular, art. 23 FNIA on personal requirements) and the related implementing regulations.[22] This Act governs the entry and exit, residence and family reunification of third-country nationals in Switzerland.

As mentioned above, players who are temporarily transferred to a Swiss club usually qualify as short-term residents in Switzerland. Thus, these players may be granted an L permit. Furthermore, permits are only issued by the competent authorities if the Swiss club plays in one of the two top leagues in Swiss football (that is, Super League and Challenge League). Hence, the admission of third-country nationals as members or for training of teams of lower leagues (1st–5th league) is excluded in Switzerland.[23]

In addition, following discussions between the State Secretariat for Migration and the Swiss Football League, the permit requirements for young players aged between 18 and 21 were clarified. The players have to provide evidence on their active practice in football during the last three years and their participation during at least one year in the professional national championships at the highest level (first team) with regular appearances'[24]

22 In particular, instructions and explanations, foreigners' section (directives on FNIA), chapter 4: residence with gainful employment, updated version of 1 November 2021 (Instructions).

23 Instructions, section 4.7.11, p. 74-77 and appendix on professional athletes.

24 See also decision of the Swiss Federal Administrative Court C-4813/2013 of 27 June 2014 (FC Basel 1893 AG) as well as decision C4642/2007 of 7 December 2007.

Advertising, merchandising and/or sponsoring

Swiss domestic tax law does not provide for a specific Swiss tax liability if foreign tax resident football players appear in Switzerland (for example, Champions League matches or games with the national team) and in return receive income from a foreign based debtor (for example, Adidas) in relation to advertising, merchandising and/or sponsoring of their gainful activity.[25]

However, if a football player is Swiss tax resident and plays in the Swiss Super League, such commercial income would generally be subject to Swiss income taxation and social security, unless a personal company (legal entity) of the player owns the relevant rights and, on this basis, receives the payments directly from the foreign based debtor.

Deferred payments from previous foreign club

Under Swiss domestic tax law, income is subject to taxation at the time of its realization. The compensation of players is fiscally realized or earned (firm right) if and at the point in time when it is freely disposable (either *de facto* or *de jure*) for the players.

In practice, football players may receive deferred payments (for example, dispute settlement) from foreign clubs after becoming Swiss tax resident. Hence, it is necessary to assess whether the income is realized (earned) before or after the establishment of the Swiss tax residence. In the former case, the player should declare a receivable against the foreign club (firm right; unconditional claim) in the Swiss tax return for wealth tax purposes. This means that the effective payment of the foreign club to the player would be a settlement of a loan and thus should be exempt from Swiss income taxation. In the latter case, if there is a clear and exclusive link of the payment to previous work for the foreign club outside Switzerland (principle of causality), the relevant income should be exempt from Swiss income taxation, based on art. 15 (1) in conjunction with art. 23 A of the OECD Model, but has to be declared in the Swiss tax return of the player for income tax rate purposes (so-called exemption with progression).

Conclusions

Swiss football clubs are usually loanee clubs, since the foreign leagues are generally more competitive leagues compared to the Swiss Super League.

The Swiss treatment of football players, who are temporarily transferred to a Swiss football club (inbound transfer) or vice versa (outbound transfer), follows the usual rules of Swiss tax law, social security law, employment law and immigration law.

As always with a transfer of football players across borders, it is standard practice for a Swiss tax advisor to collaborate with a foreign tax advisor to avoid effective double taxation issues, mainly analysis of tax residence and attribution of taxing rights regarding

25 As opposed to the UK; see Agassi v. HMRC [2006] UKHL 23.

employment income and other income, by taking into account applicable double taxation conventions.

As the football business is very fast-moving, players may change clubs frequently which also results in (sometimes immediate) changes of their tax domicile or residence. The foregoing may result in increased tax compliance risks both for the clubs and players in multiple jurisdictions.

Loan of football players

Part six: Legal and tax implications in Spain

BY MARÍA CHICOTE[1] AND JUAN ALFONSO PRIETO HUANG[2]

Introduction

FIFA has published its third edition of the *International Transfer Snapshot*[3] which offers an overview of all international transfers covered during the period comprised between 1 June 2022 and 1 September 2022 ("the Report").

While the industry is still recovering from the disruptions caused by the COVID-19 pandemic, the Report shows that during the 2022 mid-registration period a total of 9,717 international transfers were completed.[4]

The results of the Report reveal that a quarter (25%) of the international transfers related to loans (12.5% loans – 12.5% return from loan).

In summary, these operations, which are a common feature of the football industry, involve a large number of transfers (almost 2,500 only during the 2022 mid-registration period).

In this scenario, this comment is aimed at describing briefly the legal and tax implications of temporary transfers in Spain.

Temporary transfers agreements: legal considerations

International federative framework of the temporary transfers

As is generally known, FIFA regulates international transfers[5] of professional players by the *Regulations on the Status and Transfer of Players* ("the Regulations").

In that connection, recently FIFA has implemented in art. 10 of the Regulations new loan rules which came into effect since 1 July 2022.[6]

The purpose of revising the loan system was to pursue legitimate objectives such as *"developing young players, promoting competitive balance and preventing the hoarding of players"*.[7]

Spanish legal framework of the temporary transfers

In Spain, the main national labour legislation (*Ley del Estatuto de los Trabajadores* - Statute of Workers Rights) considers the employment of professional athletes as a special working relationship.[8]

For these purposes, it was enacted the *Real Decreto 1006/1985 por el que se regula la relación laboral especial de los Deportistas Profesionales*[9] ("Real Decreto 1006/1985") which regulates the distinctive characteristics of the professional athletes.

Additionally, the own Real Decreto 1006/1985 provides that in order to procure its fullest virtuality the norm should be completed by a collective bargaining agreement,[10] which is expressly recognized by the Ley del

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3 Available at https://digitalhub.fifa.com/m/5d58d603a7d5dadc/original/International-Transfer-Snapshot-September-2022.pdf (accessed 29 September 2022).

4 The Report underlines that another 417 transfers were still pending at the time of its publication.

5 Between clubs belonging to different national associations.

6 In this regard, see the FIFA Circular no. 1796 dated 3 May 2022, available at https://digitalhub.fifa.com/m/638759b485a01b4d/original/Circular-1796_Amendments-to-the-RSTP-concerning-new-loan-regulations_EN.pdf (accessed 29 September 2022).

7 As explained in the FIFA Circular no. 1796 dated 3 May 2022.

8 Art. 2.1 d) of *Ley del Estatuto de los Trabajadores*.

9 Royal Decree 1006/1985 *which governs the special labour relation concerning Professional Sportsmen.*

10 Indeed, the preamble of Real Decreto 1006/1985 states that: "[...] *the basic aim has been to transfer the greatest possible number of ordinary employment law criteria to the scope of this special relationship, without prejudice to the peculiarities derived from practising sports; consequently,* ***the rule has been interpreted as a legal instrument which, in order to deploy its total potentiality, should be completed with CBAs, as a characteristic source of employment law"***. (Emphasis added.).

Estatuto de los Trabajadores as a source of labor law.[11]

In this sense, Spanish employment laws have enshrined the principle of regulatory hierarchy, whereby the collective bargaining agreements will apply with preference over an employment contract if the outcome is more favourable for the worker.[12]

In this scenario, the temporary transfer of professional football players is expressly regulated by the Real Decreto 1006/1985 and the collective bargaining agreement of the professional football activity ("the CBA") with the following prescriptions.

Express consent of the footballer:

a art. 11.1 of the Real Decreto 1006/1985:

"During the term of a contract, the clubs or sporting entities may temporarily cede to others the services of a professional athlete, with the express consent of the professional athlete."

b art. 15.1 of the CBA:

"During the term of a contract, the Club/SAD may temporarily cede to other Club/SAD the services of a professional footballer, provided that the player accepts expressly said temporary transfer, in which in all case it shall be specified the concrete identity of the transferee Club/SAD, as well as the teams which conform the structure of the transferee Club/SAD."

Term of the loan:

a art. 11.3 of the Real Decreto 1006/1985:

"In the transfer agreement, the duration of the agreement shall be expressly indicated, which may not exceed the time that the professional athlete's contract with the club or entity of origin is in effect."

b art. 15.2 and 15.3 of the CBA:

"In no case the temporary transfer may exceed the remaining term of the contract of said footballer with the transferor Club/SAD.

The temporary transfer shall be in writing, in which it shall be specified the conditions and duration of the transfer."

Subrogation of rights and obligations:

a art. 11.3 of the Real Decreto 1006/1985:

"The transferee shall be subrogated to the rights and obligations of the transferor, both jointly and severally responding to the performance of the work and social security obligations."

b art. 15.3 of the CBA:

"The transferee shall be subrogated to the rights and obligations of the transferor. In the event that only it is stated the temporary transfer, it shall be understood that the transferee shall be subrogated to the rights and obligations of the transferor. In any event, both Clubs/SAD shall be jointly and severally responsible for the work and social security obligations."

Bonus payment to the footballer:

a art. 11.4 of the Real Decreto 1006/1985:

"If the cession takes place by economic consideration, the sportsman shall be entitled to receive the amount agreed upon in individual or collective agreement, which shall not be less than 15 per 100 gross of the quantity stipulated. In the case of the reciprocal transfer of sportspersons, each of them shall be entitled, at least, to the club of provenance, to an amount equivalent to a monthly payment of their remuneration plus one twelfth of the quality and quantity of work received over the last year."

b art. 16 of the CBA:

"In the event that the temporary transfer is done through economic consideration agreed between the transferor and transferee, the professional footballer shall be entitled to receive, at least, the fifteen percent (15%) of the agreed price, which shall be paid by the transferee Club/SAD in the moment of acceptance by the footballer of the transfer. In the event that there is no sum agreed, the player shall be entitled to receive, at least, the sum which derives from divide into twelve the total remuneration perceived from the Club/SAD in the previous season, multiplied by the one and a half percent (1.5%)."

Furthermore, it should be noted that Reglamento General (General Regulation) of the Royal Spanish Football Federation also covers the loan transfers in art. 158 and 159 which are in line with the FIFA Regulations and the Spanish provisions.

Temporary transfer with purchase option

During the last years, it has emerged a sub-modality of loan transfers: loan agreements which include a compulsory purchase clause for the transferee club.

Normally, the compulsory purchase clause is enforceable upon the initial loan period has elapsed,

11 Art. 3.1 b) of *Ley del Estatuto de los Trabajadores*.

12 Indeed, one of the sources of an employment relationship, according to art. 3.1.c) of the Workers Statute, is the parties' intent, manifested in an employment contract, as well as CBAs, pursuant to art. 3.1.b), and one of the principles structuring the sources of the Employment Law is the prevalence of the most favourable rule or most beneficial term; this is why section 3 established that in no case may less favourable terms be established in an employment contract, to the worker's detriment, or which are contrary to the law and CBAs; the binding nature of the foregoing is established, in addition to art. 82.3 of the Statute, in art. 37.1 of the Spanish Constitution; this is why it may be affirmed that a CBA will absolutely prevail over an employment contract, unless the latter foresees more favourable terms for a worker than in the former.

the loan transfer becoming a permanent deal.

This kind of transfers have arisen as a result of the implementation of new mandatory rules of financial nature which impose on the clubs economic restrictions in order to prevent higher expenditure than the income that they generate *(Financial Fair Play Regulations)*.

At the present date, in the eyes of FIFA the compulsory purchase clause is not expressly forbidden, provided that all the provisions and formal requirements of the FIFA Regulations are met.

Similarly, Real Decreto 1006/1985 and the CBA also do not prohibit the use of this legal mechanism.

Notwithstanding the foregoing, it should be emphasised that the consent of the player to this legal transaction always will be a key element to its validity and execution.

Temporary transfers agreements: tax ramifications

The purpose of this part of the article is a brief approach to the main tax implications in Spain derived from the player's loans.

The first point to review in an international player loan is the duration of the loan period (checking if affects to one or two tax years) and the agreed form of the salary payment between the loaning club and the loanee club. Taking this into account is essential to determine the tax residence and consequently the final taxation.

Tax residence of players on inbound and outbound loans: the perspective of Spain

Under the Spanish domestic law, an individual is considered as a resident of Spain for tax purposes when any of the following requirements are met:[13]

– remains more than 183 days, during the calendar year, in Spanish territory (to determine this period of stay in Spanish territory sporadic absences will be computed, unless the taxpayer proves his fiscal residence in another country. In the case of countries or territories considered as a tax haven, the Tax Administration may require proof of permanence in 183 days in the calendar year.[14] To determine the period of permanence referred to in the previous paragraph, temporary stays in Spain that are a consequence of the obligations entered in cultural or humanitarian collaboration agreements, free of charge, with the Spanish Public Administrations will not be computed);
– has the main base or centre of his activities or economic activities, directly or indirectly, in Spain, for example, the base for his economic or professional activities is in Spain; or
– has dependent not legally separated husband/spouse and underage children who are usually resident in Spain and are not legally separated even though one may spend less than 183 days per year in Spain.

In the light of above, if any of the conditions is fulfilled, the individual is regarded as a tax resident in Spain for the whole year (there is no split-year), being subject to taxation of the worldwide income. In this case, the taxpayer will be taxed under the general scheme.15 Instead, if none of the previous circumstances is met, non-resident status is confirmed.

If once realized the residence test according to the Spanish law, the player is regarded as tax resident in Spain but, in turn, he/she is also considered resident for tax purposes, under the domestic perspective, in the state of the loaning/loanee club, the player will be a "dual resident". In such cases, the tax residence shall be settled based on the tie breaker rule laid down by the Double Tax Treaty ("DTT") between Spain and that other country of residence, if applicable.16

Spanish tax regulations have a different tax treatment for the individuals, depending on his/her tax residence.

– If an individual is considered as resident for tax purposes in Spain, he/she must pay taxes on his/her worldwide income, regardless of where it is generated, at progressive rates, that may vary from 45.5% to 54%, depending on the region where the taxpayer habitually lives, and according to the regulations in force. Also, the individual must pay taxes on his worldwide wealth17.

– However, if an individual is considered as non-resident for tax purposes in Spain, he/she must pay taxes solely on the Spanish source income that he/she receives, at fixed rates that generally may vary from

13 Art. 9 of Law 35/2006, of 28 November [2006], on the Individuals Income Tax and partial amendment of the Laws regulating Corporation Tax, Non-Resident's income tax and Wealth Tax, hereinafter PITL.

14 Special anti-avoidance rules are established for tax havens, the called "fiscal quarantine": Spanish nationals who accredit their new fiscal residence in a country or territory labelled as a tax haven will not lose their status as taxpayers for Personal Income Tax Return, both during the tax period in which the change of residence occurs and for the next four tax periods.

15 It is appropriate to indicate in this point that since 2015 the sportspeople were excluded from the scope of the "inpatriates regime".

16 It is beyond the scope of this article, a specific analysis of the "tie-breaker rules" stated in the DTTs entered into by Spain, but most of them generally establish the following criteria to determine the state of residence:
– permanent home available;
– personal and economic relations (centre of vital interests);
– habitual dwelling;
– nationality.

17 The Wealth Tax has been fully ceded to the autonomous communities and each of them can regulate the tax as they see fit. For example, Madrid and Andalucía have stated a 100% tax exemption.

19% to 24%[18] (certain exemptions may be applicable according to Spanish regulations, or a lower tax rate depending on the DTT that may be applicable). Also, the individual must pay taxes only on the assets located or the rights exercisable in Spain.[19]

Before concluding this part of the article, the tax implications related to the fee agreed with the intermediary deserve special mention. Although usually (but not in all cases) the agent represents or acts on behalf of the player, it is common that is the club who pays the agent on behalf of the player for the rendered services. According to the Spanish Tax Authorities' current standpoint, if the services provided by the agent are for the benefit of the player, the player is the one who should pay for the services rendered. Therefore, if the club paid fees to the agent on account of the player, the payment that this agent has received should be taxable as employment income of the player (as a benefit in kind) and, consequently, be fully taxable under the Personal Income Tax Return ("PITR") of the player (including the eventual VAT paid by the club to the agent).

Potential tax situations in a player loan transfer

From tax view, any international transfer implies necessarily realizing a case-by-case analysis to check the whole circumstances that affect the player and the transfer itself, but especially in the case of the loans, both "inbound loans" or "outbound loans". This is due to the temporary nature of the loans and the form of payment of the player's salary. In this context, there are several possibilities to bear in mind when making an in-depth analysis. For example, it is not the same that the player arrives to Spain in the winter transfer window (that is, January 2023) loaned until the end of the football season in June 2023, as the loan is made in the summer transfer market (that is, July 2022) and the loan period until June 2023. The Spanish tax ramifications of hypothetical loan transfers are analysed below.

"Inbound loans"[20]

Factual situation:

- player of a foreign Club is loaned to a Spanish Club in August 2022;
- the loan period is until final of 2022-2023 season;
- the remuneration agreed is gross;
- the *"main base or centre of the activities or economic activities"* of the player is in the country of the loaning club.

In principle, for the 2022 tax year,[21] the player will be considered as a Spanish non-tax resident, as he does not meet any of the conditions (i.e., not having spent more than 183 days in Spain in the 2022 tax year and Spain not being the main centre of his economic activities[22]).

Firstly, it will be necessary to check if a DTT has been signed by Spain and the country of residence. If so, the provisions therein must be reviewed to determine whether Spain is entitled to tax this income or not. Generally, most of the DTTs ratified by Spain are based on the rule contained in art. 17 of the OECD Model. Pursuant to art. 17 of the OECD Model, the state in which the activities of a non-resident entertainer or sportsperson are performed is allowed to tax the income derived from these activities. So, Spain may tax the income according to its domestic law. Under Spanish domestic law, the income obtained from performances carried out in Spanish territory by an artist or sportsperson will be subject to taxation.

Based on the above, when a salary is paid, wholly or partly, by the Spanish loanee club, the club would apply the withholding tax only on the part of the employment income sourced in Spain. So, the loanee club will be required to deduct the "non-resident" income tax from the player's salary (19% or 24%[23]) and then the tax will be paid to the Spanish Tax Authorities by the club. Taking this into account, the player will not have to fulfil any tax return on this income. However, if the DTT limits the tax charged (what is not habitual in the clause relating to employment-dependent services), the taxpayer is entitled to claim the difference between the withholding tax applied by the Spanish loanee club and the tax rate stated in the DTT. If a part of the player's remuneration is paid by the loaning club, this portion of income would not be taxable in Spain.

In principle, for the 2023 tax year, according to the duration of the loan, the player should be regarded as a non-resident in Spain for tax purposes and the Spanish loanee club applied the non-resident withholding tax, as indicated above. It is worth noting that if the period of loan is extended during the 2023-2024 season and the player became a Spanish tax resident for 2023 tax year, the resident player will be taxed in Spain on his worldwide income, and he must fulfil the PITR and pay the difference between the withholding applied on the salary income (19% or 24%) and the final tax rate (45.5%-52%).

18 The general rate is 24%, but for residents in other EU member states or the European Economic Area ("EEA") countries with which there is an effective exchange of tax information the rate is 19%.

19 The non-residents in Spain have the possibility of applying the Wealth Tax regulations of the autonomous community where the greatest value of their assets and rights are located.

20 When a football player is loaned from a foreign loaning club to a Spanish loanee club.

21 The tax year is a calendar year in Spain.

22 In a real case, it would be necessary to examine where the player's *"main base or centre of the activities or economic activities"* is located in order to have a complete analysis of residence, but, for this example, it will be considered that it is located in the country of the loaning club.

23 Please note that the tax rate is 19% for residents of the European Union (EU) or the European Economic Area (EEA), and 24% for taxpayer residents outside the EU or EEA.

"Outbound loans"[24]

Factual situation:

– player of a Spanish Club is loaned to a foreign club in August 2022.
– the loan period is until final of 2022-2023 season.
– the remuneration agreed is gross.
– the *"main base or centre of the activities or economic activities"* of the player is Spain.

In this scenario, in principle, the player will be regarded as a Spanish tax resident for 2022 because he has spent more than 183 days in Spain. So, he will be subject to taxation in Spain on his worldwide income, regardless of where the income is earned or received. Consequently, if the loanee club pays any part of the player's salary, the player should include this in his Spanish PITR. Such income is also likely to be taxable in the country of residence under art. 17 of the OECD Model.

In the case that the Spanish loaning club pays a portion or the whole remuneration of the player, such income will be subject to withholding tax as a resident in Spain applied by the loaning club. In the moment of submission of the PITR, the player is entitled to:

– *apply the deduction contained in article 7 p) of PITL*. Income from work received for work effectively carried out abroad is exempt (up to a maximum limit of € 60,100 per year) when the following requirements are met:

  • the work is carried out for a company or entity not resident in Spain or a permanent establishment located abroad; and
  • in the territory in which the work is carried out, a tax of an identical or analogous nature to that of PITR is applied and it is not a country or territory classified by regulations as a tax haven.[25]

In accordance with this article, the player will be exempt from taxation on the remuneration paid by the loanee club up to a maximum limit of € 60,100.[26]

– *apply the deduction contained in art. 80 of PITL ("Deduction for international double taxation on income earned and taxed abroad")*. This deduction permits to claim the tax credit for the taxes paid in the country of the loanee club. In these cases, the lesser of the following two amounts shall be deducted:

  • the effective amount of the amount paid abroad by reason of a tax of an identical or analogous nature to PITR or to Non-Resident Income Tax because of obtaining such income; or
  • the result of applying the average effective tax rate to the part of the taxable income taxed abroad.

In principle, for the 2023 tax year, according to the duration of the loan, the player should be regarded as a resident in Spain for tax purposes and the Spanish loaning club should apply the withholding tax on the portion of the remuneration paid to the player, as indicated above. It is worth noting that if the period of loan is extended during the 2023-2024 season and the player became a Spanish non-resident for the 2023 tax year, the player will be entitled to request a refund of the tax withheld that exceeds the non-resident taxation (that is, 19%). To be able to claim this refund it will be essential to provide with it a tax residence certificate issued by the country of residence.

Conclusions

From a legal point of view, temporary transfers in Spain are expressly regulated in Real Decreto 1006/1985 and the collective bargaining agreement of the professional football activity.

These existing legal acts set out minimum and basic requirements, such as the express consent of the player, duration, obligations and rights of the parties and a bonus payment in favour of the footballer.

From a tax perspective, as indicated above, it will be essential to realize a deep analysis of all the circumstances that affect the loan (duration, form of the payment, personal situation of the player, etc.) in order to determinate the tax residence of the player, and, as a consequence, subject him/her to taxation in the involved countries correctly and apply the corresponding deductions, if any.

In the light of the above, the coordination between local tax advisors of the country of the loanee club and of the loaning club is basic for the better and more effective taxation of the taxpayer.

24 When a football player is loaned from a Spanish loaning club to a foreign loanee club.

25 This requirement is fulfilled when the country or territory in which the work is carried out has signed with Spain an agreement to avoid double international taxation containing an exchange of information clause. For all other countries (with which there is no convention), an identical or similar tax must be in place.

26 It may be necessary to remember that there are some limitations in the deduction of the tax credit abroad when the exemption is applied by the taxpayer.

Non-fungible tokens in sport

Part 1: general framework

BY KEVIN OFFER[1]

Introduction

The explosion of non-fungible tokens ("NFTs") onto the market in recent years has been phenomenal. It seems as if anything can be turned into NFTs and sold for huge sums of money. However, as in the past with other new products, the legal and tax issues surrounding NFTs have failed to keep up with their development.

Background

The origins of NFTs can be traced back to the gaming world. Individual characters were allowed to be developed and traded, even allowing for the same character to be available in different platforms. This led to the ability to own a character that could be traded as well as used within a game.

Fast forward and that ability to own a digital asset has led to sales of NFTs that have far greater rights attached to them. The offer to "own" a piece of history in the form of a clip or to give rights to make decisions or receive future benefits are all now part of the NFT world.

One such piece of history arose in the form of a flying volley by Johan Cruijff in a game for Barcelona against Atletico Madrid in December 1973. The NFT was sold for US$ 693,000 on 29 July 2022. Whether this sale by Barcelona will assist them in their financial difficulties only time will tell but, with prices this high, it is easy to see why football clubs would be interested in exploring the sale of NFTs.

Football is no stranger to NFTs and has suffered as well as profited from their sale. As with any product that can command a high value and is targeted at sports fans, there will be many who will be drawn into the world of NFTs and exploited in the hope that they may, one day, see their NFT become valuable. The use of global sports stars, such as Lionel Messi and Neymar at Paris Saint-Germain, and Andy Murray, wearing advertising on their shirts for NFT and crypto companies just reinforces the belief that NFTs are the place to invest. There are, however, many reports already of such projects losing value. The Bored Ape Yacht Club is one example where a series of 6,000 cartoon monkeys in soccer kits were produced. This had to be quickly rolled back when it transpired that the project did not have the rights to use any of the club trademarks. This led to the price collapsing to around 10% of the original purchase price and a number of football players distancing themselves after previously supporting the project.

Setbacks such as this have failed to stop the spread of NFTs, particularly in football, where Serie A in Italy and La Liga in Spain have each signed agreements to sell NFTs of clips from games. The English FA is also looking for partners for NFT projects for its national teams.

One interesting development in the UK involves the lower division team Crawley Town. The club is owned by a crypto-funded American consortium and has issued NFTs to fans that give rights over the squad. This resulted in the signing of Jayden Davis after fans and NFT holders voted that the team needed to be strengthened in midfield. This does seem similar to the crowdfunding that resulted in the purchase of the non-league club Ebbsfleet Utd a few years back. Whether the Crawley Town project will end up with similar problems as occurred at Ebbsfleet remains to be seen.

Contractual structure

NFTs are unique cryptographic tokens stored on a blockchain. The NFT is capable of representing ownership of goods or rights. Each token provides non-disputable evidence of authenticity and ownership of an asset and, therefore, can be said to be unique. The NFTs function like a cryptocurrency but are linked to a digital asset. These assets can include digital artworks, video clips, and so on. They are also being used to provide evidence of the ownership of physical assets and rights to services.

Ownership of the NFT does not generally result in ownership of copyright in the asset it represents. It is more like the ownership of a print with the copyright retained by the creator. The exact legal position is, however, unclear which has led to uncertainty in the way NFTs should be treated for legal and tax purposes. Guidance from governments and tax authorities around the world is long overdue.

In the absence of clearly law and guidance, there are a number of areas that need to be considered from a legal position as follows.

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– *Copyright*
As indicated above, the purchase of an NFT does not result in the copyright relating to the asset automatically transferring to the purchaser. The creator can retain the right to copy, distribute, modify, and publicly display or perform the art.

– *Privacy and data protection*
NFTs that contain personal information might violate data protection laws if they do not allow for personal data to be deleted.

– *Property law*
Property law is usually determined by the location of an asset. However, this is often not clear for NFTs and the nature of the NFT itself can lead to differing views on its location and what it represents.

– *Money laundering and security*
The high values of NFT purchases and the use of cryptocurrencies has raised concerns about money laundering. Concerns have also been raised about the security from hacking into what can be a highly valuable asset.

– *Regulatory*
As NFTs are not securities, they are, therefore, not subject to securities regulations in many countries.

– *Taxation*
The law has been slow to catch up with NFTs and taxation, This has been caused by the difficulty in determining the situs of NFTs for tax purposes. There has been no published guidance on tax treatment. The position on death is also uncertain with estate taxes and how the NFT may be passed to a descendant being uncertain.

Taxation of NFTs

As NFTs have developed, they have extended into the offering of more tangible benefits.

This is particularly the case in sport with NFT projects providing rights to "meet and greet" events with sportspersons, match tickets, access to exclusive content, and so on. These types of rights attaching to NFTs lead to their own additional issues, such as how would a payment for match tickets or a meet and greet be taxed? In the absence of any legislation which allows for the taxation of NFTs in any other way, it would seem that payment for these rights would fall under the rules relating to performance?

Any guidance on the taxation of NFTs is very limited. Most countries appear to regard NFTs in the same way as cryptocurrencies, so would tax any capital gain on a disposal of the NFT. However, where the NFT is created by a sportsperson, club or within an image rights company, the sale of the NFT is likely to be part of a trading activity and, therefore, taxed as trading income. Different countries may, however, have different views.

NFTs held at the time of death are likely to be within the scope of estate taxes. With uncertainty over the situs of the NFT, however, it may be difficult to be certain of where estate taxes will need to be paid.

Sales taxes, such as VAT, are also likely to apply to NFTs. Again, however, the situs of the NFT or underlying assets, at the time of the transaction, can be critical in determining where sales tax or VAT is due.

Conclusions

The only certainty with NFTs, at the present time, is that the tax and legal position is unclear.

It is to be hoped that governments will address the position but, after the coronavirus pandemic and economic pressures around the world, it is also hoped that any decisions are not undertaken in the interests of raising as much revenue as possible without taking into account the impact of cross-border transactions.

Until then, with the rise of NFTs and interest in them, it is important to consider the ways that countries are currently treating NFTs.

This journal will, therefore, publish a number of articles over the coming issues which will consider the position within individual countries.

If you wish to contribute or have any comments on these articles, please get in touch with the managing editor, dr. Rijkele Betten, e-mail: betten@xs4all.nl.

Non-fungible tokens in sport

Part 2: UK country report and tax analysis

BY KEVIN OFFER[1]

Introduction

This article forms part of a series relating to non-fungible tokens ("NFTs") in sport. Part 1[2] consisted of the general legal framework and the later parts will analyse the tax position in various countries arising from player loans. This Part 2 considers the UK position.

Comments on the general framework

The popularity of cryptocurrencies and NFTs has increased in recent years with some NFT sales commanding significant amounts. These have tended to be more in the areas of art and entertainment, although the large amounts that can be raised by issuing NFTs has attracted interest from sport.

Ownership of an NFT is usually assumed to mean that the owner holds an underlying asset, similar to a digital certificate of title or stamp of authenticity. A record of ownership can be found on the blockchain with the digital asset stored on a server owned by a host platform. Effectively, the NFT consists of a signpost pointing to the digital asset. The exact nature and value of an NFT is, therefore, unclear. This leads to the legal status in the UK also being uncertain.

In addition, it is often unclear as to what rights are granted by an NFT. Would, for example, the NFT include any copyright ownership? Some NFTs will include a right to a royalty to the original seller every time there is an onward sale, so perhaps copyright is retained by the sportsperson?

NFTs allow for owners to hold a fraction of the overall asset allowing for these fractions to be traded. Where this is permitted then, from a UK perspective, the NFT may constitute a security leading to a need to be regulated under the UK Financial Conduct Authority.

The tax treatment of NFTs in the UK is equally uncertain. To date, there has been no HMRC guidance on the UK tax treatment of NFTs. It is generally assumed that, in a similar way to cryptocurrencies. they would be treated as a taxable asset for capital gains tax and inheritance tax purposes. However, in some circumstances, the sale of the NFT may give rise to an income tax charge.

One area of UK tax law that is of particular significance is the *"situs"* or location of the NFT for tax purposes. This is of great importance for a UK resident but not domiciled individual who may claim the remittance basis of taxation and not, therefore, pay tax on a disposal of an NFT or inheritance tax on non-UK assets. HMRC (the UK Tax Authority) have expressed the view that bitcoin and similar fungible tokens will be located where the beneficial owner of the token is resident. It would, therefore, seem reasonable to assume that their view would be the same for NFTs representing digital assets. However, what would be the position if the NFT represents a physical underlying asset or includes rights, such as the ability to purchase discounted merchandise or the right to tickets where the location of these assets/rights can be identified? The tax position will, therefore, need to be considered based on the individual facts and we may need to look at NFTs as a bundle of rights in a similar way to image rights in the UK.

Applying the current tax law in the UK and considering the use of NFTs in sport, the tax ramifications, at the present time, would appear to be as follows.

Tax ramifications

In the absence of any, the tax position of a sportsperson or team will follow normal employment income rules for the UK.

Tax position of the producer of the NFT

The tax position of the producer of the NFT should be fairly straightforward in most cases. Where a sportsperson or club wishes to create an NFT to sell to fans, they are likely to contract with businesses in order to assist in developing the NFT. As these businesses are providing a service to the sportsperson or club, any payment made to the developer would be part of their normal business income and subject to tax as normal trading activity.

In addition, as a service is provided, the payment is likely to be subject to VAT (service tax).

If the NFT is created by a developer outside the UK, tax in

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2 Also in this edition of SLT.

the country of the developer will need to be considered.

If the developer is acting for a club in the UK, the service is likely to be subject to UK VAT under the reverse charge procedure. If the service is provided to an individual sportsperson, the same VAT reverse charge procedure is likely to arise, as that sportsperson will be receiving the service as part of their business activities. However, if the sportsperson receives the service in an image rights or other company outside the UK, no VAT will arise.

Tax position of a sportsperson or team

Having created an NFT, the UK position is that the NFT is located in the jurisdiction in which the owner is located. For an individual sportsperson resident in the UK or a UK based club this is likely to mean the NFT is located in the UK. For an individual sportsperson, who has an image rights structure outside the UK, the location of the NFT could, however, be located in the jurisdiction in which that company is located. This will be crucial for any non-domiciled individual who may wish to make use of the remittance basis.

When an NFT is sold by a sportsperson or team in the UK, the amounts generated are likely to be regarded as trading income. This is because the sale of the NFT has been undertaken as part of the sporting business activities. Where the business activities of a sportsperson are undertaken through a company, the amounts raised will be part of the profits of that company. If the company is located outside the UK, no UK tax would arise, unless the company is managed and controlled within the UK. This can mean that the company may be regarded as trading in the UK if the sale of the NFTs is to UK fans but, as the position of HMRC is likely to be that the NFTs are located in the country in which the owner is resident, this would require some presence of the company in the UK which is unlikely to be the case.

As HMRC are likely to follow the treatment for cryptocurrencies and regard the location of the NFT's to be in the jurisdiction that the owner is located, it is unlikely that consideration will need to be given as to the location of any server on which the NFT may be saved. It will be more critical to identify the residence of the sportsperson/team/company that is selling the NFT to determine whether UK tax should be charged on a sale.

As has been indicated above, the residence of the owner of the NFT is likely to determine where tax should be paid on a sale to a fan or investor. However, depending on the nature of the NFT, other factors may need to be considered.

Suppose a footballer, who plays for a club in La Liga in Spain, creates an NFT through his endorsement company, also located in Spain. The NFT consists of footage of a celebration after a goal scored in a game played in the UK. As the footballer and his company are resident in Spain, it may be thought that Spanish tax arises. However, as the goal was scored in a game played in the UK, would there be a withholding tax due on the payment to the footballer's company? It would seem that the underlying asset, which is the subject of the NFT, is a performance in the UK and so, under art. 17 of the OECD Model Tax Treaty, it would then follow that tax would be due in the UK. If the Spanish tax authorities take a different view of the nature of the NFT and treat it purely as a digital asset, would they grant a credit for the tax withheld in the UK?

For a second example, consider an NFT created by a Formula 1 motor racing driver resident outside the UK. The NFT gives a right to acquire merchandise at a reduced cost and also gives a right to attend a "meet and greet" event when the driver is racing in any country within the Formula 1 series. The NFT is available to a number of people in different jurisdictions around the world. What is the tax position here? Following on from UK case law, and the application of art. 17 by HMRC, the default position would seem to be that any payment for the NFT could be linked with the meet and greet event in the UK and, therefore, UK tax should be due on the total full amount received for the various sales of the share of the NFT. It would, therefore, be advisable to approach HMRC and agree a reduced rate based on appearances in the UK. The next question, however, is who would deduct and pay this tax over to HMRC? If the NFTs are sold to individual fans, they are unlikely to know of this requirement or deal with it. The obligation is, therefore, likely to pass to the auction house or similar who arranges the sales. What happens in the unlikely event there is no auction house? Unfortunately, in the absence of any guidance from the UK tax authorities, the uncertainties will continue.

Tax position of a purchaser of an NFT

The individual fan or investor acquiring the NFT is considered to own an asset so far as the UK are concerned. This asset, in HMRC's view, is located where the owner is resident. There is, however, an alternative view that regards the situs of the NFT as the location where the "key" to allow access and transfer is located. This may lead to a change in situs of the NFT, but it is unlikely that HMRC would agree at present.

If the NFT is sold on in the future, as HMRC regard the NFT as being an asset, the disposal will give rise to capital gains tax on any increase in value of the NFT. However, if the NFT is owned by someone who trades in NFTs or similar assets, the disposal is likely to be regarded as part of the trading activity of that person and taxed as income.

There may also be some complications depending on the underlying assets and specific rights that may be attached to them. For example, if the fan who acquired the NFT relating to the motor racing driver in the example above, what is the effect of an onward sale? As the driver will not receive any further income, the position is likely to be a simple sale of an asset. However, consider the following example.

Suppose that a tennis player provides an NFT that includes a right to access a meet and greet. In addition, the NFT has been structured in such a way that the tennis player receives a royalty for any future onward sale. Any onward sale is likely to be regarded in the UK as a disposal of an asset by the owner, but how would the royalty be taxed? It could be argued that it is just additional income of the

player and, therefore, taxed as a royalty receipt. That may give rise to consideration of whether the payment would be subject to withholding tax and falls within the royalty article of a double tax treaty. Alternatively, however, the tennis player will be receiving a payment that, in part, arises from the disposal of the right to attend the meet and greet. If that event were to be in the UK would the payment be linked to a UK performance and, therefore, liable to withholding tax again?

Other issues

The UK tax and other authorities have been largely silent on the treatment of NFTs. They are, however, clearly aware of what they are and how they can be seized as demonstrated earlier this year as part of a suspected fraud case.[3] It is, therefore, hoped that some guidance may be forthcoming soon.

Conclusions

The growth of NFTs and the large amounts that can be generated by them has led to a need for clear guidance on how these assets will be treated for tax purposes.

Whilst the general view in the UK is that they are assets on which capital gains tax will be due on a profit on disposal (unless the seller is undertaking a trading activity) there remain large areas of uncertainty.

The global nature of the NFT market also demands an international approach to taxation. The sums generated from issuing NFTs can be very large and the uncertainty, both in the UK and in other jurisdictions, is likely to lead to differing tax treatments and potential double taxation.

It is, therefore, hoped that the UK tax authorities and the government will consider not just the position in the UK but the effects of taxation in other countries. What is certain is that the sums that can be generated and the demand from fans will mean NFTs are here to stay for a while.

3 "HMRC's NFT seizure "a warning" to investors and tax cheats", in: *Financial Times*, 14 February 2022.