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2017

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Mehta, Pranith Kashavprasad (2017) The tax treatment of images rights of professional sportspersons in South Africa, University of the Witwatersrand, Johannesburg, <http://hdl.handle.net/10539/26684>

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SCHOOL OF ACCOUNTANCY

University of the Witwatersrand, Johannesburg

THE TAX TREATMENT OF IMAGE RIGHTS OF PROFESSIONAL SPORTSPERSONS IN SOUTH AFRICA

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A research report submitted to the Faculty of Commerce, Law and Management, University of the Witwatersrand, Johannesburg, in partial fulfilment of the requirements for the degree of Master of Commerce (specialising in Taxation)

Johannesburg, 2017

ABSTRACT

The tax treatment of image rights has been thrust into the spotlight by the recent tax controversies involving high profile professional footballers in Spain (Badcock: 2017). The discussion has gathered pace in South Africa due to the release of the latest version of the South African Revenue Service *Draft Guide on the Taxation of Professional Sports Clubs and Players (2016)*. This research report examines and compares South Africa's approach to the tax treatment of image rights in terms of South African legislation and case law with selected other countries, being the United Kingdom and the United States of America. A critical analysis shows that South Africa's lack of specific legislation relating to image rights may be the reason for the approach taken by the South African Revenue Service. The report further examines whether South Africa has failed to implement international best practices and concludes with recommendations for an alternative approach going forward.

Key Words: Capital Asset; Capital Gains Tax; Copyright; Disposal; Double Taxation Agreement; Employees' Tax; Goodwill; Gross Income; Image Licensing Agreements; Image Rights; Ordinarily Resident; Personal Service Provider; Privacy Rights; Publicity Rights; Remuneration; Restraint of Trade Payments; Revenue; Royalties; South Africa; Tax Avoidance; Tax Evasion; Trademark; United Kingdom; United States of America; Withholding Tax.

DECLARATION

I declare that this research report is my own unaided work. It is submitted for the degree of Master of Commerce in the University of the Witwatersrand, Johannesburg. It has not been submitted before for any other degree or examination in any other university.

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Pranith Kashavprasad Mehta

26 March 2018

For my wife, Amisha, and parents, Kishore and Rekha, with sincere thanks for their love and encouragement during the writing of this research report.

ACKNOWLEDGEMENTS

The author wishes to acknowledge the assistance of Ari Lambropolous, Kaizer Chiefs Football Club, Michael Murphy, the Premier Soccer League, the instruction of Prof. Alwyn de Koker, Prof. Maeve Kolitz and Roy Blumenthal. The author is particularly grateful for the contribution of Ernie Lai King and Rekha Mehta, without whom this report would not have been possible.

TABLE OF CONTENTS

1. Introduction
    (a) Background
    (b) Significance and Scope
    (c) The Research Problem
        (i) Statement of the Problem
        (ii) The Sub-Problems
    (d) Research Methodology
2. What is an Image Right?
3. The United State of America's Tax Treatment of Image Rights
4. The United Kingdom's Tax Treatment of Image Rights
5. South Africa's Tax Treatment of Image Rights
6. A Comparison of the Tax Treatment of Image Rights
7. Conclusion
8. References
    (a) Books
    (b) Law Journals
    (c) Specialised Reports (South Africa)
    (d) Online Resources
    (e) Statutes
    (f) Cases

CHAPTER OUTLINE

Chapter 1: Introduction

The introduction will provide a background to the topic, the significance and scope of the research, the research problem and sub-problems, and the methodology.

Chapter 2: What is an Image Right?

This chapter will discuss the concept of image rights and how they relate to professional sportspersons.

The concept of image rights in the United States of America is clearly defined as rights of publicity (Haelean Laboratories v. Topps Chewing Gum, Inc., (2d Cir. 1953)) intended to protect the value of a person's image (Helling, AE: 2005). It is submitted that American professional sportspersons are afforded greater protection against unauthorized exploitation of their image than their South African counterparts due to legislation like The Lanham Act (also known as the Trademark Act of 1946) and the recognition of rights of publicity.

The United Kingdom, like South Africa, does not expressly recognise image rights in its legislation and similarly, British professional sportspersons rely on common law and the writings of legal scholars and authors to adequately prevent unauthorised exploitation of their images (Cloete, 2012: 558).

In South African law an image right is not expressly recognized (Cloete, 2005: 177). South African professional sportspersons would therefore rely on common law, the Constitution of the Republic of South Africa 108 of 1996 (the 'South African Constitution') and other persuasive but not binding sources of law, like the writings of scholars and international law (van der Merwe, CG and du Plessis, JE, 2004: 36), in trying to protect against the unauthorised exploitation of their images.

Chapter 3: The United States of America’s Tax Treatment of Image Rights

This chapter will analyse the tax treatment of image rights in the United States of America by studying case law and legislation, like the Internal Revenue Service’s *Publication 525: Taxable and Nontaxable Income* (2016).

In doing so, the capital versus revenue argument and employee's tax will be analysed with reference to the image rights of professional sportspersons in the selected countries.

Chapter 4: The United Kingdom's Tax Treatment of Image Rights

This chapter will analyse the tax treatment of image rights in the United Kingdom by studying case law and legislation, like the Her Majesty's Revenue & Customs Capital Gains Manual (2016), the United Kingdom's Income Tax Act of 2007.

In doing so, the capital versus revenue argument and employee's tax will be analysed with reference to the image rights of professional sportspersons in the selected countries.

Chapter 5: South Africa's Tax Treatment of Image Rights

This chapter will analyse South Africa's tax treatment of South African professional sportsperson's image rights by examining case law, like *Income Tax Case* 1735 (64 SATC 455), as well as the *SARS Draft Guide*.

The chapter will also evaluate 'gross income', as defined in s 1 of the Income Tax Act 58 of 1962 (the 'Income Tax Act'), in terms of the capital versus revenue argument, and employees' tax, with reference to the Fourth Schedule to the Income Tax Act.

Chapter 6: A Comparison of the Tax Treatment of Image Rights

A comparison will be drawn between how South Africa treats the taxation of image rights and how the United Kingdom and the United States of America treat the taxation of image rights.

This chapter will conclude with recommendations on how, if at all, South Africa's tax treatment of image rights may be revised based on the comparisons drawn with how the United Kingdom and the United States of America treat the taxation of image rights.

Chapter 7: Conclusion

The conclusion will summarise the findings of the research and propose areas requiring further research.

INTRODUCTION

Background

An image right is the ability of an individual to exclusively control the commercial use of, amongst others, his or her name, image and reputation in relation to advertising, marketing and endorsements (Cloete, 2005:176). Image rights can thus be considered a commercial asset, with value that can be exploited, and the misappropriation of that right may lead to economic loss for the holder (Gelder: 25).

The recent trend of high profile tax investigations in Spain - Lionel Messi, Angel Di Maria, Javier Mascherano, Cristiano Ronaldo and Jose Mourinho - has brought the tax treatment of the image rights of professional sportspersons back into the spotlight (Badcock: 2017). Spain's Supreme Court handed down judgment against star footballer Lionel Messi (Castillo and Martin: 2017). The Argentina and Barcelona footballer's case centered around tax avoidance relating to the disposal of the player's image rights (Erb: 2017). Angel Di Maria and Javier Mascherano have both pleaded guilty to the non-disclosure of image rights income, whereas the investigations into Cristiano Ronaldo and Jose Mourinho are still on-going (Badcock: 2017).

South Africa, like the United Kingdom, does not expressly recognize the concept of image rights (Cloete, 2005: 177). Further, South Africa has a 'hybrid' or 'mixed' legal system, part of which includes a common law system inherited from English law (Du Bois: 2007). In certain South African cases, cognisance is taken of English case law and English legal principles, for example *Society of Lloyds v Price; Society of Lloyd's v Lee* (327/05) [2006] ZASCA 88; [2006] SCA 87 (RSA) (1 June 2006) (at 23-4). Therefore, it may be useful to draw a comparison between the United Kingdom's tax treatment of image rights and South Africa's tax treatment of image rights in this analysis.

Unlike South Africa, where image rights laws are derived from another right such as the right to privacy or the right to dignity (Cloete, 2012: 556), the United States of America specifically recognises image rights in the form of the right to publicity and such image rights are well protected in terms of The Lanham Act (also known as the Trademark Act of 1946) which governs trademarks, service marks, and unfair competition (Schlegelmilch: 2016). Seeing as the United States of America already has established a right to publicity, it would be useful in the discussion of the taxation of image rights in South Africa to draw a comparison between the United States of America's tax treatment of image rights and South Africa's tax treatment of image rights.

In a case heard by the Income Tax Court, *Income Tax Case* 1735 (64 SATC 455), the court held (at 459) that an image right payment received by a professional sportsperson was income in the hands of that professional sportsperson and rejected the notion that an image right receipt is a capital receipt. The lack of recognition of image rights in South Africa, however, may lead to great confusion in future, in how South African courts deal with image rights issues that may come before the court. The issue is further exasperated by the publication of the South African Revenue Service *Draft Guide on the Taxation of Professional Sports Clubs and Players (2016)* ('*SARS Draft Guide*'). According to the *SARS Draft Guide* (at 29), image rights are personal rights vested in the professional sportsperson that cannot be separated from that professional sportsperson, and therefore the image rights cannot be disposed of to another person, resulting in all image rights payments received by professional sportspersons being taxed as revenue as opposed to capital. It may be argued that the lack of explicit image rights legislation in South Africa is one of the reasons behind SARS' approach to taxing image rights.

Given the lack of explicit legislation pertaining to image rights in South African legislation, the publication of the *SARS Draft Guide* and the recent public interest surrounding tax avoidance using image rights by certain high profile professional footballers, the time is ripe to investigate how the South African Revenue Service's approach to the tax treatment of image rights of professional sportspersons compares to other jurisdictions.

Significance and Scope

The concept of an image right is not catered for in South African legislation. Due to South Africa's very recent re-emergence into the international sporting arena, until now the idea that a South African sportsperson had a valuable asset, their image rights, which was capable of being exploited for financial gain, was unheard of. As a result, SARS and the South African sports fraternity were not overly concerned with image rights and the taxation thereof. However the international popularity of South African sportspersons and the vast commercial repercussions of such popularity have thrust the tax treatment of image rights into the spotlight. Although SARS have made a valiant attempt to address these issues by publishing the SARS Draft Guide, the taxation of image rights is still unclear and this report intends to shed some light in terms of the international best practice.

The Research Problem

<u>The Statement of the Problem</u>

What lessons could South Africa learn from a comparison of the South African tax treatment of image rights with that of the United Kingdom and the United States of America?

The Sub-problems

(a) What is an image right?

(b) What is South Africa's approach to the tax treatment of image rights?

(c) How do the United Kingdom and the United States of America treat the taxation of image rights?

(d) How does the tax treatment of image rights in South Africa compare to that in the United Kingdom and the United States of America?

(e) What are the lessons that could be learned by South Africa?

Research Methodology

This research report will employ a qualitative approach.

The report will analyse image rights and its tax treatment using sources of research such as books, law journals, specialised government reports, online resources, legislation, and case law.

The report will make a comparison between South Africa tax treatment of image rights and that of selected other countries by researching the legislation, case law, and law journals of each of the selected countries.

WHAT IS AN IMAGE RIGHT?

Background

Image rights can be described as any right that a player has vested in him as an individual person which has value because they can be licenced to a third party for commercial exploitation in the marketplace (Barton et al: 73-79). Image rights are these rights inherent in the individual which may be exploited for gain and are capable of being sold to third parties. Image rights have been interpreted differently by different countries which make commercial exploitation difficult (Cornelius: 517). It is known as 'rights of privacy' in the United Kingdom, 'rights of publicity' in the United States of America and 'rights of personality' in continental Europe. South Africa, however, does not recognize the concept of image rights and we have no specific legislation protecting such rights, other than by way of property rights via trademark and copyright, unfair competition and passing off under the common law, and the right to privacy in terms of the South African Constitution (Cloete:2005,177).

An image right is inherent in all, however only those individuals whose image has a monetary value in the marketplace have this right practically (Schlegelmilch: 102). In *Memphis development Foundation v Factor etc. Inc* (at 956-957), it was stated that the famous have the exclusive legal right to profit from the commercial use of their name and personality. It has been compared with the claim for dilution of a trade mark which will only benefit a celebrity whose mark has acquired distinctiveness (Selz et al: 2009). Both private individuals and professional sportspersons enjoy the same right to control the commercial value of their likeness, however, a celebrity’s likeness is used to endorse products and if this image is misappropriated, it would lead to a greater monetary loss to him. The private individual would rather use the rights of privacy as opposed to publicity (Lapter: 251).

The right to privacy is generally limited to those who did not put themselves in the public eye, that is, private individuals, as celebrities thrive on public interest. Thus, it was the main reason to develop the right of publicity. Celebrities are best suited to protect their images as they have most interest in doing so through publicity rights. Further, if celebrities did not have the right to protect the commercial value of their images, they would lose the incentive to excel in their fields, which will negatively impact the economy. They are forced to accept responsibility for every decision which affects their income generating potential (Lapter: 252). Madow (1993) states that fame is often acquired by luck, public scandal or even by criminal or immoral conduct, compared with Lapter’s more acceptable view that celebrities’ fame is 'fruits of their labour' as they put considerable

effort in honing their craft and acquire fame for excelling at it. Thus, it is similar to the 17th century economist John Locke's labour theory, that one owns property by the exertion of labour, and that if a person works hard, he is entitled to decide who benefits from the proceeds of his labour. It has been used to influence the justification of intellectual property rights. Another theory justifying the existence of publicity rights is the unjust enrichment theory which supported the idea that one should not obtain an unfair benefit from, or at the expense of another. It is submitted that this theory is more equitable in its application as it is not limited to celebrities but applies to everyone (Helling: 21).

The worldwide growth of sports can be directly attributed to the explosion of sport on television. This has led to the greater marketability of sportsmen's image rights. The sports broadcasting and advertising industries spend an inordinate amount of money on obtaining the sole right to broadcast sport on television (Louw, 2007: 273). The development of the English Premier League in 1992 was the impetus that pushed the football television rights fees into billions of pounds. From 1986 to 2001 it increased from GBP 6.3 million for a two year period to GBP 1 billion over 3 years. BskyB and Setana Sports television channels have apparently paid GBP 1.76 billion for the exclusive rights to screen live matches of the English Premier League in Britain for the next 3 years (Louw, 2007: 274). The Indian sports and media agency Nimbus Communications Limited, agreed to pay the Board of Control for Cricket in India $612 million for the global media rights to all domestic and international cricket played in India until 2010. This was the largest commercial deal in the history of cricket (Louw, 2007: 294).

Sport and its related industries is now recognised as an important sector of the economy, generating more than a quarter of all consumer spending and more than 10% of total employment in the United Kingdom and more than GBP 20 billion in foreign revenue (Gratton and Taylor: 3). The potential for commercially exploiting the sports arena was not lost to big business and sports stars as well as the media. Advertising revenue for flighting commercials during premier sporting events reached astronomical heights. The costs of airing an advertisement during the American Football Super Bowl watched by an estimated 131.7 million in 2002 was $75 000 per second (Nielsen Monitor-Plus).

Sponsorship is the investment in a sporting activity by a company, where that company, the sponsor, has a right to advertising (Louw, 2007: 278). Merchandising usually involves the use of a name or logo or trademark relating to a famous sports star, club or organisation on corporate products. Endorsements by a sports star is when he indicates to the public that he approves of a product or service and encourages its use (Cloete, 2005: 175).

Marketers and big business realised the value of the association of their merchandise with popular sports stars and their trademarks. The main sources of income for players in commercial exploitation of these image rights are from sponsorship merchandising or licensing and endorsements. This led to sportsperson's image rights being recognised as an important commercial entity (Louw: 278).

The sports industry's great influence and impact on society is mainly due to the fact that it has become a lucrative business. Media hype together with rapid globalization with increase cross border interaction in the sports field has made the sports industry more than just a recreational entity but a commercial colossus. Whilst the public fascination has been fed by the constant bombardment in the media it has opened up a new and very important source of revenue for the celebrity. Often sports personalities earn twice as much from endorsement of products and services than from exercising their skills, for which they are famous. (Gardiner: 44). The price paid by a sports club for the right to exploit a player's image rights is only a portion of what that players image right is actually worth to the club. Real Madrid Club de Futbol, a Spanish football club, paid around $10 million for a 90% share of the right to exploit Zinedine Zidane's name and image. Real Madrid, however, earned $26 million from the sale of Zidane branded Madrid shirts, in just the first year of his contact with Real Madrid (Helling: 2).

Given the monetary value that the image right holds for the professional athlete, that athlete would wish to protect it from exploitation by others. Sports professionals' careers are uncertain and often short lived, dependent not only on their physical stamina but the mechanics of the game. The life span of a professional sports person generally ranges between the ages of twenty years up until thirty five years, in extreme circumstances up until the age of forty years. Given the short career of a professional sportsperson it is understandable that they would wish to secure their financial future by entering into endorsement contracts, whilst they are still able to play the game and benefit from their potential to exploit the image rights. The protection sought is to ensure that their goodwill is also protected. Once the public loses respect for the personality, everything related to this image will lose its commercial value and potential to generate revenue for the celebrity. Therefore, there is a need for the law to prevent others from exploiting a person's image without compensating that person (Helling: 2).

The United States of America

In the United States of America there are two options for an individual to protect their image rights. One would be to use the federal statute regulating trademarks through the Trademark Act of 1946 (also known as the Lanham Act) or the state right of publicity laws. The right of publicity is a branch of the privacy tort. A tort is a civil law remedy available to an individual who has been harmed by the wrongful acts of another The term right of publicity was coined by the United States Court of Appeals when it was distinguished from other privacy claims in 1953 (Solomon:1204).

The right of privacy protected individuals from the public disclosure of private facts which would cause emotional distress. It did not protect any proprietary value from the disclosure of private facts (Martuccelli:109,112). Therefore the right of publicity developed to fill this lacuna. The right of privacy can be divided into four categories: intrusion in a person's private affairs; public disclosure of private facts; publicity which brings false light onto a person; and appropriation of a person's name or likeness. The fourth category focuses on the economic interest which is infringed (Helling: 8).

In *O'Brian v Pabst Sales Co*., 124 F. 2d 167 (5th Cir. 1941), the court was unable to apply the right of privacy where the plaintiff was a celebrity as his motive was not to be 'left alone' but rather to protect his image rights so that he may exploit them himself. In this case, a beer company used the photograph of a well-known football player in its advertising and marketing campaign without the express permission to do so. The court held (at 170) that the plaintiff, the football player, could not support his claim under the right of privacy as he was not a private person and in different circumstances would have sought to gain from the publicity.

The purpose of the claims in both the Lanham Act and the state right of publicity claims were different and required different elements to be proved by the plaintiff (Schlegelmilch: 104).

The Lanham Act was enacted with a view to protecting consumers from misrepresentation and protecting trademark owners from being mistakenly associated with a particular product. In order to rely on the Lanham Act, the plaintiff was required to prove that consumers mistakenly believed that they were associated with or endorsed the defendant's product. Despite the narrow scope of the Lanham Act, it has been relied upon in the past to protect a celebrity's image (*Carson v Here's Johnny Portable Toilets Inc*., 698F. 2d 851 (6th Cir 1983), *Waits v Frito-Lay, Inc. and Tracy-Locke, Inc.* 978 F.2d 1093 (9th Cir. 1992) , and *Abdul-Jabbar v Gen. Motors Corp*., 85F. 3d 407 (9th Cir 1996)). Celebrity's had no other option than to rely on the Lanham Act as there was no federal right of publicity laws.

In the result, the Lanham Act provides the subject matter jurisdiction needed to do so in the case of celebrities wishing to bring an action in federal court. If the Lanham Act did not provide the relief sought, the matter would be referred to state courts ((Johansson: 2010) as referred to by Schlegelmilch (2016: 105)).

A plaintiff seeking to protect his likeness under the Lanham Act could claim for false endorsement or could claim for infringement of an unregistered trademark (Johansson: 79). Different courts apply different tests in evaluating a false endorsement claim. The United States Court of Appeals for the Ninth Circuit, California uses a slightly modified likelihood of confusion test, where the focus is to measure consumer reaction rather than just protecting the celebrity's identity (Solomon: 1214).

For the infringement of an unregistered trademark claim, the plaintiff has to prove ownership of a valid, legally protectable trademark and the use of a similar mark by the defendant that would lead to confusion as to the origin of the goods (Johansson: 79). Given the difficulty in proving the elements of an infringement of an unregistered trademark make it the least popular of the Lanham Act claims (Schlegelmilch: 106). Courts have also increased the scope of the protection provided by the Lanham Act to include protection for commercial parties as well as consumers against unfair competition (*Waits v Frito-Lay, Inc. and Tracy-Locke, Inc*. 978 F.2d 1093 (9th Cir. 1992)). Celebrities have also succeeded in protecting their publicity rights in terms of the Lanham Act (Solomon: 1207). In *Waits v Frito-Lay Inc*., the court held (at 1106) the defendant misrepresented the plaintiff's association with its product by using an imitation of the plaintiff's distinctive voice in an admitted parody of his song.

In *Abdul-Jabbar v GMC*, 85 F.3d 407, 413 (9th Cir. 1996), the court agreed (at 411-413) that a celebrity has the right to control the commercial use of his name as it was likely to make consumers believe that he was endorsing or associated with the defendant's products. The court further confirmed that the Lanham Act could protect the plaintiff's commercial interests. In *Carson v Here's Johnny Portable Toilets, Inc*., the court (at 834) denied the unfair competition claim under the Lanham Act as the plaintiff failed to show a likelihood of confusion amongst consumers. Although the plaintiff lost in the Lanham Act claim, he won in his state right of publicity claim, as he did not need to prove consumer confusion. Generally, the state common laws and statutes provide a stronger protection for the right of publicity claim in the US (Schlegelmilch: 107; *Cardtoons v. Major League Baseball Players Association*, 95 F.3d 959, 967 (10th Cir. 1996).

The right of publicity is based on privacy rights and was influenced by laws on defamation, trademark, copyright, misappropriation and false advertising (McCarthy (2004) as referred to by Helling: 5). The right of privacy which was not originally part of

the Constitution of the Unites States of America 1787, however, through several amendments, most notably the First, Third, Fourth, Fifth, Ninth and Fourteenth, it now forms part of the U.S. Constitution (Griswold v Connecticut, 381 U.S. 479, 484, 499 (1965); Helling: 5).

Nimmer (at 203) recognised the need for another basis for the right of publicity other than that based on the right of privacy, which was a personal right and therefore not assignable. The right of publicity was formed to protect the commercial value of an individual and could be assigned, shared similarities with privacy, trademark and unfair competition law. Prosser supported Nimmer's opinion and what became known as Prosser's four torts (as mentioned earlier) were accepted by the courts and the right of publicity was recognised as a right completely separate from the right of privacy (Helling: 11).

The right of publicity was first recognised by the courts in *Haelan Laboratories Inc. v Topps Chewing Gum Inc*., 202F (2nd Cir. 1953). In this case the plaintiff had the exclusive right to use pictures of a well-known baseball player. The plaintiff sued the defendant for using the picture of the baseball player, during the existence of a contract between the plaintiff and the baseball player. The court held (at 866-868) that the defendant violated the plaintiff's interest in the player's right of publicity and for the first time recognised the player's right in the publicity value of his photograph (image). The courts recognised that, in this instance, professional sportspersons had the right to grant the exclusive privilege of publishing their images to another party. Given that the right of privacy could not serve as a basis for the claim, the court acknowledged that there was a right of publicity which could be used to support the plaintiff's claim. The right of publicity protected an individual from unauthorised commercial use of his identity and also the possibility of transferring that right to another person. Thus the court made a clear distinction between the right of privacy and the right of publicity.

Although federal courts as well as the Supreme Court often hear right of publicity cases (see *Zachini v Scripps-Howard Broadcasting Co*., 433 U.S. 562, 569 [1977]), the right of publicity is usually found in state laws. Most states either have statute or common law doctrine which can be a basis for the right of publicity claim. The other states recognise the right to privacy which covers appropriation of one's name or likeness (Gilson and LaLonde: 2013). Federal courts will only hear a right of publicity claim if it has diversity or supplemental jurisdiction (diversity jurisdiction is a form of subject matter jurisdiction in civil cases where the amount is over USD75 000 and the parties are citizens of different states or non-American citizens, whereas supplemental jurisdiction is the right which federal courts have to hear additional claims which are substantially related to the original claim) (*Carson v Here's Johnny Portable Toilets, Inc* at 831-833). If the Federal Lanham

Act claim fails then the remaining claim will be referred to state courts as the federal court will lose its supplemental jurisdiction (*Brown v. Electronic Arts, Inc.* (9th Cir.2013) as referred to by Schlegelmilch: 108).

The state right of publicity claims exist to 'protect an individual's right to remuneration and prevent misappropriation and unjust enrichment from the theft of good will' whilst the Lanham Act claims were created to prevent consumer confusion (Gilson and LaLonde: 53). Although state right of publicity claims vary in scope from state to state, they have the same elements (Lapter: 272). Often the common law right of publicity and the state right of publicity statute have similar wording, that is, the elements of the common law right of publicity are identical to a state's codified statute. When this happens, the codified statute does not supersede or replace the common law cause of action (*Newcombe v Adolf Coors Co*. 157 F. 3d 686, 691-92 (9th Cir 1997)) Thus, a celebrity may bring both claims at once (Schlegelmilch: 108). The courts also expanded the protection available under the right of publicity by including not only the name and likeness of an individual but anything that was identifiable with that person (Left: 334-338).

In the case of *Motschenbacher v R J Reynolds Tobacco Company* 498 F. 2d 821 (9th Cir. 1974), the plaintiff, a famous race car driver sued the tobacco company for infringing his right of publicity in their television advertisement. The commercial used a picture of a race car and its driver, creating the impression that the driver and car were sponsored by the tobacco company. Though the plaintiff's car and face were used, they had been modified and unrecognisable and no name was presented in the advertisement. However, there were a few distinctive markings on the car visible in the picture. The court held (at 827) that as the markings were peculiar to the plaintiff's car it could be inferred that the car belonged to the plaintiff and that he was driving. The court therefore found that there was infringement. The court appeared to have seen the car as an extension of the driver's identity. The courts are constantly redefining the outer limits of the right of publicity by case law as seen in the case above (Left: 334-338).

All states do not follow the same rules, 42 states recognise the right of publicity, the right of publicity forms part of only 35 state's common law, and only 18 states' statutes incorporate the right of publicity. There is also uncertainty about how and when the right of publicity will be applied Thus there is a need for a uniform federal law right of publicity (Solomon: 1202, 1205; Helling: 13).

Another issue relating to image rights is whether the right of publicity can be assigned or descended, that is, passed on to the heirs of the holder of the right on his death. If the right of publicity is derived from the right of privacy, then as a personal right, it ceases at the death of the person. It will not be assigned or descended (Helling: 23). If the right of

publicity is a pure property right as is commonly considered, then it can be assigned and descended (Klink: 363, 385). It is important to consider whether the individual must have exploited his identity before his descendants have a right of publicity cause of action. If the right has been established and exploited by the individual as a property right, then the descendants shall enjoy all the benefits and protection the celebrity would have enjoyed (Klink: 350).

The United Kingdom

The United Kingdom was a member of the European Union until its decision on 23 June 2016 to leave the European Union, in terms of the Brexit referendum. The decision to leave the European Union is only effective from 29 March 2019 (Hunt and Wheeler: 2018). Therefore we look at developments in the European Union as they apply to the United Kingdom. Most counties in Continental Europe, whilst acknowledging that privacy rights are not assignable nor descendible, recognised the need for protection of the commercial value of a person's persona (Helling: 28,31). The majority of the European Union countries have ratified the European Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, 213 U.N.T.S. 221 ('the ECHR'). Through the Human Rights Act 1998 (Designated Derogation) Order 2001, the ECHR was incorporated directly into English law. All English legislation must be in accordance with ECHR, and English courts must take cognisance of the judgements of the European Courts of Human Rights (sections 2 and 3 of the Human Rights Act 1998 (Designated Derogation) Order 2001). Article 8 of the ECHR provides for the right in respect of privacy and family life. There should be no interference from any public authority with the exercise of this right, except in regards to national security, public safety, and public health. This was extended to include the nations' duty to protect privacy rights between private parties (through its courts). It was considered the 'indirect horizontal effect' of applying the articles of ECHR (Cardonsky: 393,404).

Article 10 of the EHCR provides the right of freedom of expression. The courts must balance these conflicting rights by interpreting the laws so that basic human rights are not infringed. Thus the courts, in applying the rights of the Human Rights Act 1998 and the ECHR, would establish a right of privacy in the United Kingdom on a case by case basis (Stallard: 585).

In terms of the Directive 95/46/EC of the European Parliament and the Council of 24 October 1995 ('Data Protection Directive'), all member countries of the European Union are required to enact laws to protect people from having private information about them gathered and distributed without their permission. This includes any information relating to an identified or identifiable natural person. Thus a person whose image has been transmitted electronically, which could constitute 'personal data' and since the Data Protection Directive provides a cause of action to anyone whose name, image or other characteristics has been collected, processed and used for commercial purposes through an electronic transmission, would have a claim under the Data Protection Directive (Bryniczka 171,193).

However, there are limitations in the Data Protection Directive itself, which limit its applicability. In terms of Article 3 of the Data Protection Directive, the rule which establishes the right of privacy for citizens of European Union countries, does not apply to non-automatic data processing. Non-automatic data processing is the processing of data by hand and does not enjoy the protection of the Data Protection Directive. A sportspersons name, image and other characteristics may also be collected and processed by hand and used for commercial purposes thereby infringing the sportspersons right to privacy. More importantly, it is difficult to identify a general homogenous right within the European Union as different countries apply the Articles of the Data Protection Directive differently (Helling: 29,30).

The United Kingdom does not recognise any specific right of publicity and there is no specific law protecting image rights (Lapter: 278). Before the enactment of the ECHR, no specific right of privacy had been recognised in the United Kingdom, but the courts have extended and developed other existing laws to protect various aspects of an individual's image and personality rights. One of the reasons why the United Kingdom has not developed a separate right of privacy has been its historical tradition of protecting freedom of speech and freedom of information, which has to be balanced with any other right which might be in conflict with it (Fedtke: 133,153). In the absence of a specific right of publicity in the United Kingdom, sportspersons wishing to protect their image and likeness may choose from several legal routes, such as using the related laws in the United Kingdom that are not always a 'good fit' to protect the right of publicity. Whilst some celebrities and sportspersons have had limited success, they do not provide a comprehensive solution (Lapter: 279).

The United Kingdom's Press Complaints Commission and its code of practice provide some protection to the property and privacy rights of people in their identity (Helling: 31). In 1996, Molson Beers used a 'look alike' of French football star Eric Cantona in its advertisements. Cantona complained to the Advertising Standards Authority that the advertisement 'distressed and exploited him'. His complaint was upheld, and the advertisements were withdrawn (Stallard: 574). As the Press Complaints Commission and its code of practice are only self-regulatory, their decisions cannot be appealed, and they lack the force of law (Fedtke: 195). However under section 63 of the British Code of Advertising, Sales Promotion and Direct Marketing, sanctions are applied for non-compliance, such as the refusal of access to advertising space or revocation of recognition from the relevant professional bodies. If the misleading advert is still not removed, the Director General of Fair Trading may seek an injunction from the courts as a last resort (Stallard: 574). It would appear that they provide a fairly effective and inexpensive alternate dispute resolution platform for issues relating to the press.

In 1998, the British Parliament promulgated new legislation in the Data Protection Act of 1998, which complies with the Article of the European Union Data Protection Directive. The ECHR was incorporated into British law through the Human Rights Act 1998 (Designated Derogation) Order 2001, which introduced the right to privacy for the first time in the United Kingdom, albeit indirectly through pre-existing torts. The available remedies are passing off, malicious falsehood, false endorsement, defamation, libel, breach of confidence and the claim of infringement of one of the intellectual property rights. However, by having to stretch existing torts to fit privacy rights cause of action, creates uncertainty in its application. It is not always possible to find a tort wide enough to cover the many different ways that privacy rights are infringed and identity misappropriated (Helling: 32).

It is submitted that the wording of the Copyright, Designs and Patents Act of 1988 has limited application in publicity rights actions. An individual may only protect his likeness if it is fixed in a photograph or film which the individual has commissioned. Where a celebrity owns the copyright in a photograph or film, the law only prevents an infringement from copying all or a 'substantial' part of it (section 16 (3)(a) of the Copyright, Designs and Patents Act of 1998).

In the case of *Bauman v Fussell* (1953) [1978] RPC 485 CA, an artist created a painting based on a copyrighted photograph. The court held (at 485,486) that the painting was not 'substantially' similar to the photograph as the artist had creatively infused originality into it, and that there was no infringement. As measuring infringement can be an extremely subjective determination, the judges have great discretion in determining whether an infringement has occurred (Rainen: 216,217). This again leads to uncertainty in its outcome. Although commissioned videos and photographs are not usually exploited, the Copyright, Designs and Patents Act of 1988 may be more applicable to those who had authorised works exploited on the internet (Rainen: 197,218).

Historically, copyright law in the United Kingdom did not provide any protection to a person’s name. In *Du Boulay v Du Boulay* (1869) LR 2 PC 430, the court stated that there was no absolute right of a person to a name. In a more recent case, *Re Elvis Presley Trademarks, Inc*. (1997) R.P.D. & T.M. 543 (ch) (Eng), Laddie J held (at 543) that there was no copyright in a name. Elvis Presley did not own his name and the enterprise could not prevent its use by third parties. Since the United Kingdom has no protection for the right of publicity, the courts reluctance to apply the provisions of copyright legislation more broadly is damaging to celebrities and sportsperson (Schlegelmilch: 112).

Should celebrities and sportspersons hope to avail of the protection provided under the Trademarks Act of 1994, they need to register their names, which are required to be

distinctive to be registered (section 1(1) of the Trademarks Act of 1994). Since trademark rights are only enforceable against identical or similar goods, it only provides protection against direct competitors (section 3 of the Trademarks Act of 1994). In *Re Elvis Presley Trademarks, Inc*. (1997) R.P.D. & T.M. 543 (ch) (Eng), the court refused to register the name 'Elvis Presley' as it was so commonly known, that it possessed no distinctive quality to distinguish it. Under the Trademarks Act of 1994, it is almost impossible for a celebrity or sportsperson to register their name, since the more famous the name is, the less distinctive it is (being so commonly known). Since it only provides protection against direct competitors, it would not be capable of being used to protect publicity rights (Schlegelmilch: 113).

As opposed to copyright and trademarks law, the common law tort of passing off provides celebrities and sportspersons somewhat better protection (Schlegelmilch: 113). It provides protection for unregistered trademarks which do not qualify for copyright or registered design protection. The United Kingdom tort of passing off is similar to the concept of unfair competition and trademark infringement in the United States of America (Rainen: 222).

In the case of *Erven Warnink BV v Townend & Sons Ltd* [1979] AC 731, the court set out the required criteria for a passing off claim. The plaintiff needs to prove misrepresentation. The misrepresentation must be attributed to a trader, in the course of trade, to prospective customers calculated to injure another. The misrepresentation must have caused the actual damage. The celebrity or sportsperson has to prove that they had goodwill attached to the goods, that the defendant misrepresented them and that they suffered damages as a result. Previously, the courts required that the misrepresentation resulted in consumer confusion, and for this to be possible there has to be a common field of activity. In the case *Lyngstand & Others v Anabas products and another* (1977) FSR 62 (Eng), the court refused to find for the plaintiff (the world famous musical band ABBA) and prevent the defendant from printing the plaintiff's pictures on shirts, mugs and other memorabilia. The court confirmed that there will be no confusion on the part of the public that the plaintiff, ABBA, was selling the shirts and other memorabilia, when they were not in the business of selling shirts. Without consumer confusion, the court was not willing to protect the defendant in its image and likeness.

In the recent case of *Fenty v Arcadia Group Brands Ltd (t/a Topshop)* [2013] EWHC 2310 (Ch) (England, High Court, 31 July 2013), a clothing company was held liable for printing shirts with the plaintiff, international pop star, Rihanna's face on it without her permission. The court however, went on to state that there was no free standing general right allowing them to control the reproduction of their image in the United Kingdom. It is submitted that the British courts are reluctant to prevent traders in different industries and trading in

different products from using the same name, as was the case in *Lyngstand & Others v Anabas products and Another* (1977) FSR 62 (Eng), where the plaintiff did not market the same goods as the defendant and therefore could not establish loss of goodwill. It is submitted that the requirement of the existence of goodwill and the likelihood of consumer confusion makes an action for passing off lengthy and more costly than an action for trademark infringement (Stallard: 578).

In the case of *Cantona v Cantona French Wine Ltd*, the plaintiff, French soccer star Eric Cantona, brought an action against the defendant who had associated themselves with Cantona, and his football club Manchester United Football Club. The defendant had registered companies with Cantona's name and their products were advertised in the sports pages of the local newspapers. Phrases associated with Cantona were used in advertisements as well as the use of his jersey number "7" being imprinted on the product being marketed, bottles of wine. The defendants agreed to change the company name and end any association with Cantona, settling the matter before trial. Despite the obvious association with Cantona, it is not certain whether the plaintiff would have succeeded in his passing off action, as he would have had to prove that the majority of the public believed that he endorsed the product, which would be difficult (Stallard: 571).

In *Irvine and Another v Talksport Ltd* [2002] EWHC 367 (Ch), the plaintiff, Eddie Irvine, a famous F1 race car driver in the United Kingdom, filed a lawsuit against a radio station that used his likeness in an advertisement. The court found (at 73) that the defendant misrepresented that the plaintiff was endorsing or was associated with the station in some way and awarded compensation to the value of his purported endorsement fees. In this decision, the court expanded the scope of a passing-off claim. It held that passing off can occur simply by the unlicensed use of someone's reputation or goodwill (Helling: 35). Therefore passing off may also encompass false endorsement. By modifying the elements of the tort of passing off to adapt it to new causes of action, the courts will probably provide remedies for more cases of likeness appropriation (Schlegelmilch: 115). This brings it closer to the American right of publicity claim. In society today celebrities and sportspersons often exploit the value of their persona outside their current field of activity (Bryniczka: 183).

In order to bring a claim for defamation or malicious falsehood, the plaintiff must prove that the conduct of the defendant: caused harm to the plaintiff's trade; is contrary to the known attributes of the plaintiff; is derogatory to the plaintiff's image; or is harmful to the plaintiff's reputation. The Defamation Act of 1952 and the Defamation Act 1996 modified the common law basis of the law of slander and libel (Stallard: 572). In *Trolley v J.S. Fry and Sons Ltd*, [1931] All ER131, the plaintiff, a well-known amateur golfer, brought a defamation action against the manufacturers of a chocolate bar that bore his image, on

the basis that the advertisement implied that he had prostituted his amateur status by accepting money for his endorsement. He succeeded in his claim. In order to be considered defamatory, the plaintiff has to prove exploitation and the circumstances must be false and personally damaging. Thus this right is limited to extreme cases (Stallard: 573).

In the United Kingdom image exploitation, when included in the terms of a contract, has been protected by the courts. In the case of *Douglas v Hello! Ltd* [2005] EWCA Civ 595, the plaintiff sued the defendant for the unauthorised publication of their wedding pictures. The court found for the plaintiff on the basis that the unauthorised publication of the pictures was a breach of confidence and privacy. The defendant was aware that another magazine had been contracted to take the official wedding photographs. Whilst the court was prepared to extend the existing breach of confidence and passing off claims, its application was limited by the courts stating that the plaintiff must intend to profit commercially by using or publishing that information. This, however, still falls short of providing celebrities the right to control the reproduction of their likeness altogether. The law of breach of confidence has evolved to protect image rights where there has been unjustifiable publication of private information or breach of privacy, and also in the context of the economic exploitation of image rights (Schlegelmilch: 117).

The statutory intellectual property rights, copyright and trademarks are territorial in their scope and effect. A statutory United Kingdom right can only be infringed by an act committed in the United Kingdom, irrespective of where the defendant is domiciled. In contrast, the torts of passing off and breach of confidence are not territorially limited. In the case of *Alfred Dunhill Ltd. v Sunoptic SA* [1979] FSR 337, the English courts granted the plaintiff, Alfred Dunhill, a tobacco manufacturer, an injunction valid in both the United Kingdom and Switzerland against the defendant, a Swiss sunglasses manufacturer, to prevent it from using the name 'Dunhill' as part of its trademark (Stallard: 582).

The Private International Law (Miscellaneous Provisions) Act of 1995 abolished the 'double actionability' rule. Previously, in order to obtain an injunction with extra territorial effect the plaintiff in United Kingdom would have to show that the act committed in a foreign country would be actionable as a tort if it had been committed in the United Kingdom and in the foreign country where it was committed. In relation to tort proceedings, an exception to the general rule that irrespective of nationality, a defendant must be sued in the country of his domicile. However, in respect of torts, an infringer can be sued in the country where the damage was suffered or the infringing act occurred. Proceedings for validity of registered rights, such as trademarks, must be brought in the country of origin. However, the courts are prepared to try actions for infringement or foreign intellectual property rights, where either party resides in the United Kingdom.

Another instance where British courts will assert jurisdiction is if the damage was sustained in United Kingdom (Stallard: 584).

The courts in the United Kingdom have refused to treat image rights as property which can be owned and transferred. Although a general protection of image rights is not recognised in the United Kingdom, the sports industry commercially appear to treat it as an intangible asset (Coors: 2016). This was illustrated by the recent case of *Proactive Sports Management Ltd v Rooney & Others* [2011] EWCA Civ1444. The High court's ruling that an image rights agreement between Wayne Rooney, an English football star, and an image rights company was unreasonable restraint of trade and unenforceable, was upheld by the Court of Appeal. The Court of Appeal confirmed that Rooney was primarily a football player and his image rights were auxiliary to the service provided as a professional footballer. This ruling was significant as it confirmed that a contract for the exploitation of image rights or any other activity, auxiliary to his main occupation, may constitute restraint of trade (Coors: 2016).

Whilst English law does not provide a specific cause of action for the infringement of image rights, the common law remedies will evolve further due to the growing commercialisation of image rights (Coors: 2016).

A welcome development in the Bailiwick of Guernsey, a small British island in the English Channel, was the introduction of a statutory image right that is able to be registered under the Image Rights (Bailiwick of Guernsey) Ordinance, 2012. This statutory image rights created a recognised, defined image right for the first time. The registered image right is published in Guernsey's register of personalities and images. The proprietor of the registered personality obtains a legal property right similar to a trademark which is capable of being assigned and licensed.

The Image Rights (Bailiwick of Guernsey) Ordinance, 2012 applies to natural persons, legal persons, groups, as well as fictional characters, that is, the creator who is generally the proprietor of the characters' personality and its rights. It also accommodates the registration of image rights of individuals who have been dead for up to one hundred years. The rights are valid for ten years and may be renewed for further ten year periods. Where images of a professional sportsperson have been registered, it lasts for three years and may be re-registered for a further three year period. The application for registration may be rejected, if the image rights are considered confusingly similar to other images or where there already exists a right in relation to the personality or image (Hansard Trust: 2017).

Unauthorised users of a registered image right can be sued in a Guernsey court and a reciprocal legal arrangement, entered into between the government of the United

Kingdom and the Bailiwick of Guernsey, allows the judgement of a Guernsey court to be enforced in the United Kingdom (Goodman: 2013).

The efficiency of the system and its enforceability in other jurisdictions is yet to be treated by the English courts in a high-profile case. It is submitted that although the Image Rights (Bailiwick of Guernsey) Ordinance, 2012 has not been tested, it does provide a solution to professional sportsperson or celebrities who were denied registration of their name and likeness as a trademark due to lack of distinctiveness. It also provides a vehicle for the registration of names and likenesses of those who have died up to one hundred years ago, thus providing a basis for beneficiaries and estates to inherit those image rights.

South Africa

The phenomenal growth of sport as an entertainment industry has led to a need for protection against ambush marketing via intellectual property laws and common law (Louw: 273,276). Historically the source of statutory protection in South Africa has been predominantly through the Trademarks Act 194 of 1993 and the Copyright Act 98 of 1978, which was considered inadequate to counter the unscrupulous exploitation or the abuse of a trade mark in relation to an event for commercial gain by third parties. Therefore, in the run up to the ICC Cricket World Cup of 2003 held in South Africa, the Merchandise Marks Amendment Act 61 of 2002 (the 'Merchandise Marks Amendment Act') was passed. South Africa was considered a world leader in legislative protection in this field at the time, and the Merchandise Marks Amendment Act had been used as a model by other countries. In fact, certain sections of the ICC Cricket World Cup West Indies 2007 Act 28 of 2006, passed by the Parliament of the Republic of Trinidad and Tobago in November 2006, contains almost identical wording to South Africa's Merchandise Marks Amendment Act (Louw: 276).

Given the great strides made in the protection against the unauthorised use of sports teams' logos, colours and branding, it is rather surprising that more has not been done to protect the unauthorised use of individual sportsperson's image. South African law does not recognise a right of publicity and there is no specific legal protection except that against infringement of a trademark or copyright. Therefore, sportspersons wishing to protect their image rights have to resort to the common law and the use of unfair competition or the right to privacy enshrined in the South Africa Constitution. However, in terms of South African legislation, a number of personality rights are recognised and where a person’s identity is violated for commercial gain a different common law approach has been followed (Cloete,2012: 558,560). Our courts have pronounced on some of these rights in recent judgements thereby giving validity to them.

In the case of *O’Keeffe v Argus Printing and Publishing Company Ltd* [1954] 3 SA 244 (C), the court found that the unauthorised use of a person’s image rights was a violation of that person’s identity and further found that the action under *actio iniuriarum* (which is a general action for damages) is available where a person’s right to dignity has been infringed. The plaintiff must prove that the act complained of is wrongful, intentional and violated one or other real right related to personality (*R v Umfaan* [1908] TS 62 at 66).

In the Supreme Court of Appeal case of *Grütter v Lombard and Another* (628/05) [2007] ZASCA 2, the court considered the commercial exploitation of image rights and found that

privacy is only one of the rights of a variety that enjoy recognition in the concept of personality rights, in the context of the *actio iniuriarum*, and are worthy of protection.

In the case of *Wells v Atoll Media (Pty) Ltd* [2009] ZA WCHC173 (at 49), the court held that the unauthorised use of an individual's attributes with a commercial value constitutes an unjustifiable invasion of the personal rights of the individual including the person's dignity and privacy rights.

A sportsperson's proprietary interest in his identity has been recognised in several other judgements. (see *G.A. Fichardt Ltd. v The Friend Newspapers Ltd* [1916] AD 1; *Bredell v Pienaar* [1924] C.P.D. 203; *Caxton Ltd. and Others v Reeva Forman (Pty) Ltd*. *and Another* (393/88) [1990] ZASCA 47; 1990 (3) SA 547 (AD)). The infringement of this personality right by unlawful commercial exploitation may lead to economic loss, thus, image rights have been recognised as legally protectable property which may be contractually assigned (Cloete, 2012: 558). Further, personality rights are distinct from the sportsperson and forms an immaterial asset in his estate capable of being traded (Cornelius: 509). The common law actions based on unlawful competition like passing off and misrepresentation have also provided protection and in certain circumstances they may be combined (Louw: 276). However, in *Payen Components SA Ltd v Bovic CC and Others* [1995] (4) SA 441 (A), Schultz JA (at 454) warned against the use of actions based in unlawful competition as a 'catch all' remedy. The action should be based on the relevant statute which provided protection to specific intellectual property. He further states that the courts should not allow the blurring of these two branches of the law of unlawful competition. Unlawful competition should not be used as an alternative to trademarks, copyrights, design or passing off action. This *obiter dictum* would suggest that if the remedy sought does not fit into the existing category of torts then the action should not be allowed (Louw, 2007: 276).

It would appear that courts are recognising the need for South Africa to provide specific protection for image rights through legislation in the same way that the Merchandise Marks Amendment Act, the Safety at Sports and Recreational Events Act 2 of 2010, and the 2010 FIFA World Cup South Africa Special Measures Act 12 of 2006 were enacted to reinforce the existing ambush marketing controls (Louw, 2007: 276).

In South Africa, exploitation of professional sportspersons' image rights have developed significantly with well-known local footballers, cricketers and rugby players appearing in television, print and radio adverts for a wide range of products. Elite South African sports stars are able to command large sums in terms of endorsement contracts for the use of their images in advertising. The most famous examples include South African cricket icon,

AB de Villiers, who's face features on limited edition Lay's large crisp bags and also appears in a Lay's television commercial (The Pundits: 2015).

Often advertisers use images of well-known sportspersons without their consent. The infringed sportspersons, or their managers, use threats of litigation to stop the unauthorised exploitation of their image rights but rarely follow through. Although South African courts have had very few cases specifically relating to the unlawful or unauthorised appropriation of sportsperson's image rights, there are several grounds of protection found in the South African common law and the right to privacy protection in terms of the South African Constitution (Louw: 281,282).

Protection against infringement of the personality rights recognised in South African law is achieved through the common law right to privacy and law of defamation. South Africa follows the Roman Law approach of a general action for damages in terms of the *Aquilian* action – the *actio legis Acquiliae* (Louw: 282). The plaintiff needs to prove that all five elements of delict exist to prove delictual liability. The elements include conduct on the part of the defendant, either by commission or omission where there was a legal duty to act; the defendant's conduct was unlawful and the plaintiff's legal right has been violated by such unlawful conduct; fault on the part of the defendant, either negligently or with intent; the plaintiff must have suffered damage; and there must be a causal connection between the conduct of the defendant and the damage suffered by the plaintiff (van Heerden & Neethling: 66).

South African common law also protects the plaintiff who has not suffered any patrimonial damages, but where his recognised personality rights have been affected. As per Innes J. in *R v Umfaan* [1908] TS 62 (at 66), it is achievable through *crimen injuria* where liability is based on the unlawful and intentional impairing of the dignity or privacy of another person.

The unlawful infringement of a person's 'good name' is protected by the common law of defamation. Defamation comprises the intentional publication of false words or conduct about a person that prejudices his name or reputation. In *O'Keeffe v Argus Printing and Publishing Co. Ltd* [1954] 3 SA 244(C), the court stated that *dignitas* includes more than dignity, encompassing all the interests relating to the personality which is protected by the *actio iniuriarum*. Thus in terms of South Africa common law, sportspersons may protect the infringement of their personality rights caused by the unauthorised exploitation of their image rights by relying on defamation (Louw: 283).

Where privacy rights have been infringed, the sportsperson may have an action under the common law or by virtue of a violation of the right of privacy enshrined in section 14 of the South African Constitution.

Under the common law, infringement could occur if a person's privacy is unlawfully intruded upon or there is an unlawful disclosure of a person's private facts. In *Financial Mail (Pty) Ltd. and Others v Sage Holdings Ltd. and Another* (612/90) [1993] ZASCA 3; 1993 (2) SA 451 (AD), the court held (at 464) that unlawfulness is judged on the basis of contemporary *boni mores* and sense of justice of the community. In *O'Keeffe v Argus Printing and Publishing Company Ltd* [1954] 3 SA 244 (C), it was specifically mentioned that the unauthorised publication of a person's photograph as part of an advertisement constitutes infringement of the common law right to privacy. In the case of *Greeff en Andere v Protection 4U h/a Protect International en Andere* [2012] (6) SA 392 (GNP), the Pretoria High Court ruled that the commercial distribution of a DVD showing the 2003 infamous Springbok training camp would violate the privacy and dignity of the players concerned as well as infringe copyright in the material which vested in SA Rugby (Pty) Ltd, and therefore granted a final interdict against the defendant.

Whilst the sportsperson's privacy or personality rights are protected, we would like to establish whether South African law provides for a remedy for patrimonial loss suffered by the plaintiff by the unlawful conduct of the defendant and whether a proprietary interest and property rights, which may be infringed, would be recognised.

As South African law does not recognise any specific proprietary interest in the image, voice and likeness of sportspersons, protection of their patrimonial value in these aspects of their persona must be found in other areas of our law, such as copyright law or trademark law (Louw: 284). In order to avail of the existing copyright protection laws, the likeness or image must be reduced to material form and any unlawful conduct violating such copyright laws must consist of a reproduction in material form. Further, the work must have been original and the violation must be of a substantial part of the original work. In other words, it must be a creation by the owner of sufficient independent skill, effort and labour to warrant protection (Louw: 285). Therefore, a sportsperson's name would not qualify for protection under the Copyright Act 98 of 1978. Usually for copyright to subsist in a photograph of a professional sportsperson, the ownership of that copyright must also vest in him, as copyright vests in the person responsible for the composition of the photograph or the person who commissioned it (section 1(1) and section 21 (1)(c) of the Copyright Act 98 of 1978).

In order to obtain protection under the Trademarks Act 194 of 1993, a trademark must be registered with the Companies and Intellectual Properties Registration Office ('CIPRO'). Apart from the intensive administrative burden involved in registering a trademark with CIPRO, the other problem with registering a trademark is that it will not denote the trademark origin and may only be descriptive of the nature of the goods. Thus proving the likelihood of confusion amongst the public will be difficult (Louw, 2007: 285).

In celebrity merchandising, the consumer is only concerned that the goods or merchandise are associated with the image of a celebrity and not with who produced the goods. In the absence of recognition of personality rights with a commercial component, there would be no protection of patrimonial loss by the unlawful unauthorised 'personality merchandising' (Louw, 2007: 285). As regards protection of a name from unauthorised commercial exploitation, in *Moroka Swallows Football Club Limited v The Birds Football Club and Others* [1987] (2) SA 511 (W), Stegman J stated (at 531) that the mere fact that a person made a name famous, does not give him the right of property in the name and in the absence of any statutory prohibition, there is no reason why an entrepreneur should not gain a benefit from associating his goods and services with a famous name. This finding was followed by the case of *South African Football Association v Stanton Woodrush (Pty) Ltd t/a Stan Smidt & Sons and Another* (5/2002) [2002] ZASCA 142; [2003] 1 All SA 274 (SCA), where Harms JA held (at 321) that the term ‘character merchandising’ did not add to South African law and that legal protection is based on the existing copyright, trademarks and unlawful competition laws. The South African courts view character merchandising as belonging to the delict of unlawful competition and passing off. The courts have recognized the practise of character merchandising in *Federation Internationale de Football Association (FIFA) and others v Bartlett and Others* 1994 (4) SA 722. (T) (at 736), but failed to provide a distinct remedy based on a legally protected property right in the case of celebrity merchandising (Louw, 2007: 287).

An action of passing off will be available to a sportsperson where, for example, the image of a sportsperson has been unlawfully used to create the impression that the sportsperson has endorsed the goods or services in question or by misrepresenting that the goods or services are associated with the sportsperson or that his image was licensed by him to promote such goods and services (Louw, 2007: 287). South African litigants have departed from the English law of passing off where there was a requirement of a 'common field of activity' between the parties which has now been dropped. In *Capital Estate and General Agencies (Pty) Ltd v Holiday Inns Inc* [1977] (2) SA 916 (A), Rabie JA (at 929) stated that the question as to the reasonable likelihood of confusion between the products or businesses of the parties to a passing off action is one of fact and the absence of a common field of activity is only a factor in determining the likelihood of confusion. If both plaintiff and defendant have the same trade or profession there is a greater chance of confusion as to whose product it is.

An objection to the use of unlawful competition, or passing off, in the traditional form of this action, is that the sportsperson would be denied a remedy without a 'common field of activity'. Another objection, in the extended form of this action, is that the sportsperson will have to prove that the misrepresentation by the defendant caused damage to his

promotional goodwill which will be difficult to prove in the absence of a common field of activity (Louw: 288). However, the most fundamental problem is that the proprietary interest being protected is that of goodwill that is related to a business. The law does not recognise stand-alone goodwill or goodwill inherent in a sportsman's person. Therefore if the sportsperson is not involved in any business he may not be able to protect his goodwill (Louw: 289).

A passing off action only provides the plaintiff with a right to prevent his image being used by others and thereby indicating an association with the plaintiff (Terry: 204,239). Essentially the complaint is not misrepresentation but misappropriation resulting in the plaintiff having lost a commercial opportunity to exploit his character or reputation himself (Louw, 2007: 289).

Currently South African law does not provide a suitable remedy for infringement of image rights which lead to patrimonial loss. It is submitted that this will only become possible if recognition of a standalone image right exists in South Africa. According to Louw, the basis of a standalone image right already exists in South African common law. Standalone image rights may stem from the recognition of a proprietary interest and a corresponding property in the commercially valuable persona of celebrities, including sportspersons, who are vulnerable to unauthorised exploitation (Louw: 1996).

In *Athans v Canadian Adventure Camps Ltd* [1977] CanLII 1255, 17 OR (2d) 425, 80 DLR (3d) 583, a Canadian case which recognised misappropriation of personality (a common law tort) which is identical to the American right of publicity, the plaintiff claimed damages for passing off and the wrongful appropriation of his personality. The plaintiff was a professional water-skier who commercially exploited his image through endorsement contracts. The defendant published a graphic representation of a figure identifiable as the plaintiff and allegedly reproduced from a photograph of him. The publication was a brochure advertising the water-skiing programme for children at a summer camp. The court held that the use of the drawings were unlikely to give rise to confusion between the plaintiff's and the defendant's business on a balance of probability. It was not probable that those who would have read the brochure would associate the defendant's business and the plaintiff. Therefore, the action of passing off failed. However, with regards to the claim for misappropriation of the plaintiff's personality, the court found in favour of the plaintiff on the basis that the defendant's use of the plaintiff's image for its commercial advantage without authority infringed the plaintiff's exclusive right to market his personality.

According to Louw, should a case with similar facts come before a South African court, the same outcome is highly likely. Challis's comments on the traditional approach to the

protection of image rights in other jurisdictions rings true for South Africa. In jurisdictions which recognise image rights, the law develops in two ways: first, the development of an actionable right to privacy and second, the development of an economic right which the celebrity may exploit commercially. These privacy and publicity rights are usually set in the context of existing intellectual property rights like copy rights, trademarks and defamation which may also protect personal information amongst other rights (Challis: 1; Louw, 2007: 290).

In *Grütter v Lombard and Another* (628/05) [2007] ZASCA 2, the plaintiff and the defendant were practising as attorneys under the name 'Grutter and Lombard' until the plaintiff terminated the partnership. The defendant however continued to use the original name of the partnership. To resolve the issue, the matter went to the Supreme Court of Appeal. The plainitff did not claim that he had the exclusive right to the name 'Grutter' nor did he claim passing off. Instead he claimed that it was well known that the name 'Grutter' referred to him directly and that he did not want to be associated with the firm anymore. The court found that the matter rested on the violation of the right to privacy and expanded on it further by stating that it is merely a part of the concept of personality rights, and that a person’s protection of their identity against exploitation cannot therefore be separated from his right of privacy. The court found that the plaintiff was entitled to protection as identity is that 'uniqueness' that identifies one individual from another, and it manifests in different forms, such as personality, character and name. An individual has an interest in his identity and any unauthorised use violates the person’s right to decide who has access to his image and likeness. Thus the court established the principle that every individual’s right to identity which, if violated, infringes a personality right which is recognised by South African law.

We have witnessed South African law develop and expand to accommodate the growing commercial reality in line with its re-emergence into the international sports arena. This is reflected by the enactment of the Merchandise Marks Amendment Act, to name just one. It is submitted that South African law will continue to grow and expand.

THE UNITED STATES OF AMERICA'S TAX TREATMENT OF IMAGE RIGHTS

Professional sportspersons are considered amongst the most high-income earners in the world due to the commercialisation action of their image rights. The income generated from exploitation of their image rights, which is considered ancillary, is often more than the income earned from playing the sport, which is considered the primary source of income for sportspersons (Cloete, 2012: 556). Whilst professional sportspersons' income is derived from several different sources, such as employment income, endorsement income or sponsorship income, it may also be derived from different jurisdictions. They are obliged to play in different states or countries within the course of a single tax year and are therefore subjected to taxation in various tax jurisdictions with differing tax regimes during a tax year. The United States of America host numerous prestigious sporting events attracting some of the best professional athletes in the world. The National Basketball Association, better known as the 'NBA', Major League Baseball, and the US Open, which happens to be the name of the tennis championship as well as one of the four major golf championships, are a few of the sporting events held in America (Shekar and Chhabra: 2012).

All American citizens are taxed on their worldwide income. Where a professional sportsperson, who is deemed a citizen of America, competes in international tournaments held in any other country, any income earned by the professional sportsperson from that other country is taxed in America. Further, a non-resident of the United States of America may be classified a resident for tax purposes (Williamson: 2017). The test to determine American residency status is the 'substantial presence test'. In terms of the 'substantial presence test', a professional sportsperson will be regarded an American tax resident if that professional sportsperson is present in the United States of America on at least 31 days during a calendar year, and that sportsperson was present in the United States of America for an aggregate at least 183 days during the current calendar year as well as the two preceding calendar years (section 7701(3)(A) of the Internal Revenue Code). Conversely, if a sportsperson is present in the United States of America for less than 183 days during the calendar year, has a close connection with a foreign country, and has a tax domicile in that country, he will not be considered an American resident (section 7701(3)(B) of the Internal Revenue Code).

In the United States of America, professional sportspersons pay both the federal tax, which is applicable to all American residents, as well as state tax, which is paid by all residents of that particular state in addition to the federal taxes. Sportspersons who travel to states within the United States of America to compete in professional sports events,

other than the state in which they reside, are required to pay additional states taxes in those states. The additional states taxes are colloquially referred to as "jock tax" (Williamson: 2017). Professional sportspersons file taxes in each of the states that they played in, as they are deemed to have earned an income in that state. The complications arise as every state has a different approach to determine what portion of a sportspersons income to tax. Similarly, every state taxes the various sporting codes differently (Packard: 2017). In an attempt to simplify the quantification of the tax payable by sportspersons and iron out the controversies regarding the additional tax burden that the imposition of the jock tax created, the Federation of Tax Administrators (FTA) Task Force was founded in 1992. The FTA Task Force attempts to balance the interests of the state and the professional sportspersons so that there is a uniform system of taxation in each state.

As the various states in America have different methods and rates of taxes, it is advantageous for an American professional sportsperson to be domiciled in a state that has a lower tax rate. This makes the question of domicile a critical one. There are several requirements to establishing domicile in a particular state, such as having a permanent residence (owning a house), registering as a voter, and joining a religious organisation in that state. The above indicates a strong connection with the state. Further, a sportsperson must spend the off-season period in their domicile. Some states also require a sportsperson to spend at least 183 days in their domiciles in any given year. This is known as the 'statutory residency rule' (Packard: 2017).

Federal Taxes

A professional sportsperson’s taxable income is calculated as: gross income less adjusted gross income deductions. Taxable income will be subject to a tax rate on a sliding scale with the maximum tax rate of 39.6%. The final amount of taxes payable by professional sportspersons may be reduced by credits and prepayments (section1 of the Internal Revenue Code).

According to the provisions of section 61 of the Internal Revenue Code, 'gross income' is defined as 'all income from whatever source derived including, but not limited to, compensation for services, fees, royalties, commissions, and dividends'. Although this definition is vague and not comprehensive, a professional sportsperson will include in their gross income: wages, signing bonuses, endorsements, royalties, license fees, and personal appearance fees (Ekmekjian: 231). Thus, all endorsement income received by a professional sportsperson is considered gross income.

Tax on employment income is levied at source. The employer is required to withhold or deduct tax from the professional sportsperson’s employment income. An employee is anyone who performs services for an organisation, if the organisation can control what will

be done and how it will be done. An employee is hired to do a specific job for remuneration (sections 3401-3510 of the Internal Revenue Code).

Professional sportspersons are able to assign or transfer their image rights to a third party. In most cases they set up an image rights company or an image rights trust that exploits the sportsperson's image rights on his behalf. If the sportsperson has registered a copyright or trademark over his image, he will receive consideration from the image rights company for the transfer of the registered copyright or trademark.

In the case of a transfer of a trademark, under section 1253 of the Internal Revenue Code, any amounts received from such transfer will be treated as 'amounts received or accrued from the sale or other disposition of property which is not a capital asset'. Therefore, when a professional sportsperson transfers the trademark (his image rights) to the image rights company he will be liable for ordinary income tax. Further, the image rights company will be entitled to a corresponding deduction under section 162(a) of the Internal Revenue Code.

In terms of section 1221 of the Internal Revenue Code, the term 'capital asset' means any property held by a taxpayer but shall not include 'copyright'. Therefore, when a professional sportsperson transfers the copyright (his image rights) to the image rights company he will be liable for ordinary income tax. It follows that the image rights company will be entitled to a corresponding deduction under section 162(a) of the Internal Revenue Code.

In *Sierra Club v Commissioner of Internal Revenue*, T.C. Memo 1999-86 (March 23, 1999), the term 'royalties' was described as ' payments for the use of valuable intangible property rights'. Further, in terms of sections 1.61-8 of the Code of Federal Regulations, the definition of 'royalties' includes receipts from copyright and trademark. Therefore each amount received by the image rights company for the exploitation of a sportsperson's image rights will be regarded as 'royalties', which forms gross income, and will be taxed as ordinary income.

In an Income Tax Court case, the court concluded that the right of publicity, or an image right, was not property and the income from its sale is taxable as ordinary income and not capital gain (*Miller v Commissioner for Internal Revenue*, 35 T.C. 631 (1961)). The decision was upheld in the Court of Appeals for the 2nd Circuit.

With income earned by sportspersons growing and with it their income tax liability, sportspersons are looking at ways to ease this heavy tax burden. One of the ways that this is done is through the deferment of income. Many sportspersons who are team players of major leagues participate in the qualified pension plan offered by the team. This

allows the sportspersons to delay receipt of taxable income. It also allows the income which is placed in a trust for sportspersons and their beneficiaries to earn income on a tax-free basis until it is distributed (Baker: 302). The qualified plans may be defined benefit plans based on the expected amount on retirement and the employer makes a regular contribution to meet the requirements of the employee's retirement. They can also be defined contribution plans which focus on the amount the employer contributes to the plan. Individual sportspersons who are not members of a team may be part of a qualified plan called a "Keogh Plan" or an "HR-10" (section 415 of the Internal Revenue Code).

Where a team player would prefer to have his own plan, he may create a corporation and become an employee of the corporation. His corporation will "loan out" his services to the professional sports team for which he will play. However, some league collective bargaining agreements preclude them from contracting with such corporations. These loans out corporations do not appear to be widely used.

An advantage of the loan out corporation is that medical costs incurred by the employee (professional sportsperson) of the loan out corporation are fully deductible, whereas deductions for medical expenses are only allowed to a professional sportsperson in his individual capacity if they exceed 7.5% of adjusted gross income in terms of section 213(a) of the Internal Revenue Code. Group term life insurance premiums, health and disability, as well as accident insurance premiums are all deductible by the corporation.

The other tax advantage is that the loan-out corporation uses a fiscal year ending as 31 January and the employee, or professional sportsperson, is on a calendar year basis which allows the employee/sportspersons to delay reporting the income. The salary and any other income received by the corporation during year one from the loan-out of the sportsperson's services could be paid at the end of the corporation's year, which is 31 January of year two. If the sportsperson is on a lower tax bracket in year two, not having had income in year one, he will benefit. The other benefit is the time value of money. As a team member, the sportspersons salary is subject to a withholding tax known as employees' tax. However, when the team pays the loan-out corporation for the sportsperson's services in terms of a contract, no tax is withheld. All the tax will be withheld at the end of the loan-out corporation year rather than the entire year. Thus the sportsperson will have more funds during the year for investment (Baker: 305).

Professional sportspersons may also establish a "Rabbi Trust", which is an irrevocable grantor trust. Funds are contributed by the employer and are held in the trust until the employee/sportsperson retires. The contributions to the trust are tax deferred, that is, the sportspersons income paid into the trust is not taxed until retirement. This is treated as a pre-taxed contribution, therefore the employer's current tax liability is reduced. The funds

may not be accessed until retirement nor be rolled over into a qualified retirement plan. The assets of the trust remain subject to claims by creditors. Once placed in trust, monies cannot be revoked by the employer. It is generally established by employers to retain valuable staff and could similarly be used by prominent sports teams to placate iconic sportspersons. (Baker: 305; Tax & Business Insights: 2011).

The Internal Revenue Code does not explicitly set out all expenses that are deductible from gross income unless there is a ruling against it. There are two types of deductions: where 100% of the expenses incurred are allowed dollar for dollar; and where only a percentage of the expenses are deducted from taxable income. Taxable income is gross income less the adjusted gross income deductions allowed by the Internal Revenue Code (Williamson: 2017).

A professional sportsperson is entitled to deduct any business expenses that are ordinary and necessary, and are incurred while carrying on a trade or business (section 162 of Internal Revenue Code). Capital expenditure is not allowed as a business expense deduction. The Internal Revenue Code does not define 'trade' or 'business' but it is rather a matter of fact that in order to be in a trade or business, a sportsperson must be engaged in a profit-making activity with the intent to make a profit (Internal Revenue Service *Publication 535: Business Expenses* (2015)). It is submitted that the commercial exploitation of a professional sportsperson's image rights would be considered a profit-making activity. In the context of the analysis of the taxation of a sportsperson's image rights receipts, business expenses would be those that are ordinary and necessary for the sportsperson to perform on the playing field.

In terms of section 274 of the Internal Revenue Code, union dues would be considered a deductible business expense as it is a requirement for a professional sportsperson to be part of their sports league unions. Agents' fees would also be a deductible business expense as agents are necessary for the proper functioning of a professional sportsperson in relation to negotiating their performance contract as well as image rights contracts. Physical conditioning expenses for the maintenance of a sportsperson's physical fitness are considered a deductible business expense. This includes personal fitness trainer fees, club memberships, training equipment costs, green fees, and nutritional supplements are all allowed as deductions. Club membership, training equipment and green fees must relate to the activity that the sportsperson is involved in (Pogroszewski and Smoker: 447). Social or recreational club membership fees are not deductible, the exception being professional affiliation membership fees, which are deductible. In order for nutritional supplements to qualify as a deduction, they must be prescribed by a medical practitioner as treatment for a medical condition diagnosed by a

physician (Internal Revenue Service *Publication 502: Medical and Dental Expenses* (2016c)).

When professional sportspersons transgress league or competition rules they are subject to a fine by the league or by the team that they are contracted by. Since they are obliged to pay the fine in order to perform as per their contract, American courts have considered such fines as an ordinary and necessary in the sports business and allowed as a deduction (Pogroszewski and Smoker: 455.

Travel expenses incurred by professional sportspersons whilst performing as per their contract are considered deductible. These must be substantiated and include the cost of food, transportation and lodging, unless paid for by their contracting team (Pogroszewski and Smoker: 456).

It is submitted that these deductions may be apportioned between expenses incurred in the production of their salaries, wages and professional services income, and expenses incurred in the development and marketing of image rights income.

Most professional sportspersons' adjusted gross income is above the threshold in terms of the itemised deduction limitation. The threshold adjusted gross income amount is $311 300 if the sportsperson is married, filing jointly or widow/widower; $285 350 if he is the head of a household; $259 400 if he is single; or $ 155 650 if married but filing a separate return. Since the majority of sportspersons are high income earners, they would be above the threshold and liable to federal income tax and subject to limitations of the itemised deductions allowed (sections 161-198 of the Internal Revenue Code).

States Taxes

In addition to the federal income tax, all American citizens are required to pay taxes on income earned in their state of residence. Professional sportspersons are subject to tax on income earned in every state that they have competed in or played in, as American states have the constitutional powers to tax individuals for income earned in that state. State income tax rates vary from 0% to 13.3% on a graduated scale, depending on the income level of the individual. New Jersey's maximum rate of taxation is 8.97% for example, whereas Pennsylvania is 3.07% and Ohio is 4.997%. There are two methods by which a professional sportsperson's income is allocated between the different states in which he has competed in for that tax year of assessment, being the "games played" method or the "duty days" method. (Williamson: 2017).

The "games played" method calculates the taxable income received by a professional sportsperson in a particular state by apportioning it based on the ratio of the number of

games played in that state to the total number of games that were played by that sportsperson for that tax year of assessment (Krasney: 402). The number of pre-season, regular season and post season games played by a professional sportsperson is taken into consideration when calculating his taxable income for a particular state. However, the non-income generating activities undertaken by professional sportspersons, such as attending practices, meetings, all-star appearances or friendly matches, and conferences are not considered when calculating their taxable income for a particular state (Williamson: 2017).

The "duty days" method uses the ratio of the number of days a sportsperson is present in a particular state to the total number of days that he is required to work in terms of his service and performance contract. This includes practice days as well as meeting days (Krasney: 401). The "duty days" method takes into account all the sportsperson's contractual obligations, which includes off-season days, camps, instructional leagues, all-star or friendly games, team-imposed training activities and promotional events, and has been adopted by a majority of the states. The activities must be initiated by the team and take place in the team facilities to be included in the total number of duty days. Travel days, on which contract related activities take place, are also allocated to the state where the activity takes place. Where no activity takes place on a travel day, it will not be allocated to any one state but added to the total number of duty days for apportioning purposes (Williamson: 2017).

A signing-on bonus is an amount of money paid to a professional sportsperson at the inception of their employment with a sports team or sports franchise. A signing-on bonus is a form of an incentive for the sportsperson to contract with that sports team rather than any other sports team. The revenue generated by a sports team from an individual sportsperson's image rights exploitation is significant and sports teams are able to recoup the signing-on bonus in a matter of months from the exploitation of that sportspersons' image rights. It is therefore possible for a professional sportsperson to apportion the singing-on fee received between image rights receipts and professional services income. Both the image rights receipts as well as the professional services income will fall under the definition of 'gross income' for federal tax purposes and will be taxed equally. However for state tax purposes, such image rights receipts will only be taxed as income in that sportsperson's domiciled state and not apportioned in terms of the "games played" method or the "duty days method". The signing-on bonus must be structured in a way that it is not classified as a 'reporting bonus'. To avoid it being considered as a reporting bonus, it must not be contingent on the sportsperson providing any service to the sports team, and it should be separate from the contractual salary received by the sportsperson. Image rights payments could be contractually agreed by the parties to fall outside the

sportsperson salary structure. It follows that the income tax payable in the individual states that a professional sportsperson visits in a tax year of assessment will be reduced (Williamson: 2017).

The interplay between the taxes payable to the state in which the sportsperson is resident and the taxes payable to the other states that the sportsperson visits during the tax year, whilst not exactly a "double tax", can be harsh on a professional sportsperson. To alleviate this burden, some states provide a tax credit to their residents for taxes that have been paid to other states (Pogroszewski, 2009. 408). This credit is limited to the tax rate of the resident state, irrespective of the actual amount paid to the other state (Williamson: 2017). If a sportsperson is resident in Chicago (where the state income tax rate is 4.95%) and he has competed in California (where the state income tax rate is 13.3%) that sportsperson is required to pay income tax at a rate of 13.3% to the state of California. As he is domiciled in Chicago, he will also be required to pay income tax on that income in Chicago at a rate of 4.95%, resulting in a tax rate of 18.25%. However, in terms of the tax credit, Chicago will allow that sportsperson a tax credit on the amount in question for a maximum amount of 4.95%. Thus the sportsperson is only required to pay income tax to the state of California at 13.3% and in this way, the sportsperson is provided relief from "double tax" (Scarboro: 2017).

Certain states conclude "reciprocity agreements" between themselves which is similar to the double taxation agreements entered into by sovereign countries. A "reciprocity agreement" is an agreement, between two states, setting out which one of the contracting states has exclusive taxing rights in certain situations (Packard: 2017). An example of a "reciprocity agreement" is where the state of Pennsylvania and Ohio have entered into an agreement which sets out that a resident of Pennsylvania earning an income in Ohio is required to only pay income taxes in Ohio. In terms of that agreement, a professional sportsperson, resident is Pennsylvania, who competed in a sporting event in Ohio is only taxable in Ohio and thus exempt from paying income taxes in Pennsylvania (Moreno: 2017)

Taxation of foreign sportspersons in the United States of America

Where a foreign professional sportsperson competes in a sports event on American soil and earns taxable income as a result, he will be subject to tax in both the United States of America as well as the country in which that foreign sportsperson is domiciled. To prevent this inequitable double taxation of the same income, many countries have concluded bilateral double taxation agreements, or double taxation treaties, with the United States of America. The double taxation agreements specify which contracting country has taxing rights over the income of the sportsperson, and, if both countries have taxing rights, which

country has priority. The double taxation agreements may set down different directions for different types of income, and may also agree to exempt some income or gains from tax or allow a set-off of tax paid in one contracting country against tax due in the other contracting country. Most of these treaties or agreements contain a "saving clause" which prevents a professional sportsperson from either contracting country from using the provisions of the double taxation treaty from avoiding American source income tax.

The United States of America is a member of the Organisation for Economic Cooperation and Development (the 'OECD'). The OECD is a forum where the governments of 34 democracies with market economies work with each other, as well as with more than 70 non-member economies to promote economic growth, prosperity, and sustainable development. The OECD provides a setting for 'reflection and discussion, based on policy research and analysis, that helps governments shape policy that may lead to a formal agreement among member governments or be acted on in domestic or other international fora' (USOECD: 2018).

Article 17 of the OECD Model Tax Convention on Income and on Capital (the OECD Model Tax Convention), a model for countries concluding bilateral tax conventions, deals with the taxation of entertainers and sportspersons. In terms of Article 17(1) of the OECD Model Tax Convention, the country in which a non-resident sportsperson performs an activity is allowed to tax the income derived from these activities. Thus, income is taxed at source. Article 17(2) of the OECD Model Tax Convention provides that where income is received by a third person for any activities performed by a sportsperson, that third person will be liable for taxes in the country in which the activities were performed.

In terms of Internal Revenue Service Ruling 81-178, 1981-2 C.B. 135: Unrelated Income, income generated from a professional person’s name, photograph, likeness or facsimile signature are all royalties and subject to taxation as such. However, the ruling also holds that where the agreements are concerned with endorsing products and services and requires personal appearance by the professional sportspersons it is considered personal services agreements and payments received are considered compensation for personal services and not royalties under section 512(b)(2) of the Internal Revenue.

The other issue relevant to the taxation of image rights of sportspersons is whether retainer fees and ranking and placement bonuses are income from personal services or royalties or both. This depends on whether a sponsor has retained the sportsperson to perform personal services, or to use his name and likeness independently of any meaningful personal services. In terms of the Internal Revenue Service *Memorandum AM2009-05: U.S. Source Retainer Fees and Ranking and Placement Bonuses Derived by Professional Golf and Tennis Players from On-Court Endorsement Contracts (2009)* (the

'Internal Revenue Service Memorandum'), the retainer fees would be considered personal services and therefore taxed as gross income. Where the sportsperson is able to establish that the sponsor retained him to use his image rights on a standalone basis, such as advertisements to market a product, a portion of the retainer fees may be considered royalties and may be aligned to his trade or business in the United States of America.

Ranking and placement bonuses paid to sportspersons pursuant to on-court endorsement contracts are considered income from personal services under the Internal Revenue Code. The on-court endorsement contract typically requires the players to wear apparel and use equipment displaying the sponsor's logo during the sports related activity. Therefore the retainer fee is payment for using and wearing the sponsor's products, making promotional appearances, photo shoots and allowing the sponsor the use of the professional sportsperson's image rights for advertisements and promotional purposes (The Internal Revenue Service Memorandum).

The off-court endorsement contract is for global marketing. Generally, the contract stipulates that the license to use the sportspersons image rights is royalty free or that no additional compensation is paid for such right. The package will include a retainer fee as a base plus bonuses. However, both on-court and off-court contracts may provide for the sportsperson's signature line of products in exchange for a portion of the revenue from sale of the products. Usually the endorsement contract also provides for a placement bonus in addition to the retainer fee, that is, for a particular placement in a specific tournament (The Internal Revenue Service Memorandum).

A payment must relate to the use of a valuable right to be considered royalty for example name, photograph, likeness or facsimile signature (Internal Revenue Service *Publication 598: Tax on Unrelated Business Income of Exempt Organizations* (2017))

There are two cases that support the concept that income from on-court contracts are characterised as royalty. The first is the series of unrelated business income tax ('UBIT') judgments referred to as the "UBIT decisions". The issue before the courts was how to characterise the fees. The courts held that the UBIT agreement gave rise to royalties as the agreement was for the use of the name of the organisation and not any service it provided. The court, referencing *Oregon State University Alumni Association, Inc. v Commissioner Of Internal Revenue Service*; CA 9th Cir., No. 96-70565, No. 96-70953 (October 4, 1999), went on to state that the service provided was *de minimus*, only to protect the value of the intangible good name or reputation which was being licensed.

The second is the case of *Kramer v Commissioner of Internal Revenue*, 80 T.C. 768 (1983), which related to whether royalty income qualified as earned income and subject to

the maximum tax on earned income. Kramer, a retired professional tennis player contracted with Wilson, a tennis racquets manufacturer, for a signature line of racquet equipment bearing his name. He was required to promote the products and received a percentage of the net income from its sales. The court held (at 782) that 70% of the royalties Kramer received were compensation for the image rights and 30% was compensation for personal services from promoting the Wilson products.

In the case of *Retief Goosen v Internal Revenue Service* 136 T.C. No. 21 (2011), the petitioner, Mr Retief Goosen, was a professional golfer resident in the United Kingdom who entered into endorsement agreements with sponsors Acushnet, TaylorMade, Izod, Upper Deck, Electronic Arts and Rolex. The endorsement agreement was for the use of his image rights for promotional purposes internationally. He also agreed to perform certain service for the sponsors. When petitioner filed his American federal income tax returns for the 2002 and 2003 tax years of assessment, he allocated 50% of the endorsement fees and bonuses from Acushnet, TaylorMade and Izod to personal service income and 50% to royalty income. He allocated 100% of the endorsement fees from Upper Deck, Electronic Arts and Rolex to royalty income, and 7% of the total endorsement income was allocated to American sourced income. The respondent, the Internal Revenue Service, countered that 100% of the Acushnet, TaylorMade and Izod endorsement fees and bonuses were for personal services income and that the petitioner was required to apportion a larger percentage of the total endorsement income to American sourced income.

The court identified three issues to be decided. Should endorsement fees and bonuses be considered solely personal service income or solely royalty income or part of each? Is any income attributed to royalty income, from sources within the United States of America? Does the petitioner, a British resident, benefit from the Convention between the Government of the United States of America and the Government of the United Kingdom of Great Britain and Northern Ireland for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with respect to Taxes on Income and on Capital Gains, July 24, 2001 (the 'US-UK double taxation agreement')?

The petitioner was an internationally renowned golfer who won the US Open amongst other prestigious tournaments. He employed IMG, an international management company, to represent him and manage his career and finances. IMG advised him to contract with two entities ESP and ETO. All income from endorsements was directed to either a bank account for British sourced income or a separate bank account for non-British sourced income in Liechtenstein, which was at that time considered a tax haven. The petitioner received a fixed annual salary and a bonus from ESP and ETO after deduction of all expenses. IMG assured the petitioner that all British sourced income

would be repatriated to the United Kingdom. This arrangement was approved by the British tax authorities, being the Her Majesty's Revenue & Customs (the 'HMRC').

IMG arranged several endorsement deals which gave the sponsors the right to use the petitioner's image rights to promote their products for a specified period. The value of an endorsement is based not only on the success of the petitioner's performance but also on his demeanour on and off the courts. The endorsement agreements with TaylorMade, Izod and Acushnet required the petitioner to use their products during tournaments. In addition, the TaylorMade agreement required him to provide two service days for commercials and other promotional materials as well as six personal appearance days to promote their products at golf events and also to test and examine their golf products. TaylorMade paid the petitioner $400 000, of which $300 000 was attributed to non-British sourced income and $100 000 was attributed to British sourced income. Contractually he was required to play in a certain number of golf tournaments. Failure to do so would result in the income amount being pro-rated. ETO and ESP as employers would receive a tournament bonus if the petitioner won and achieved a specified ranking on the world golf rankings. Taylormade included a morality clause in the image rights agreement, that is, they had the right to terminate the contract if the petitioner conducted himself in an immoral or indecent manner.

The endorsement agreement with Acushnet was to promote Titleist golf balls and gloves. The petitioner agreed to take part in public relations and promotional activities for four days. He also was to develop and test Acushnet golf products. He attributed 25% of the endorsement fees and bonus to British sourced income and 75% to non-British sourced income.

The Rolex agreement was purely for the petitioner's image rights, used to promote Rolex worldwide. 25% of the annual Rolex endorsement fee of $50 000 was allocated British sourced income and 75% to non-British sourced income.

The petitioner licensed his image rights to Upper Deck for production and promotion of their golf trading cards. He also agreed to sign a specified number of trading cards per year and provide to them specified articles of clothing and equipment which he used during practice or golf tournaments. The agreement included both a morality and illegality clause, allowing Upper Deck the right to terminate the contract should the petitioner break the law or conduct himself in an immoral manner.

The petitioner, through ETO and ESP, licensed his image rights to Electronic Arts for use in their software products.

The petitioner's allocation of income was apportioned on the number of days he played in the United States of America over the total number of days that he played golf in that tax year of assessment.

The parties agreed that the petitioner's competing in American hosted golf tournaments constituted 'carrying on of a trade or business' in United States of America. The source of the income had to be determined and also whether it was effectively connected with his playing in the United States of America. Non-resident aliens are only taxed in America if they engage in an American trade or receive American sourced income (section 864 (b) of the Internal Revenue Code).

The court confirmed the *Haelan Laboratories, Inc. v. Topps Chewing Gum, Inc*, 202 F.2d 866 (2d Cir. 1953) findings that Image rights payments could be characterised as royalties, as the person has an ownership interest in the right. The respondent disagreed that the payment was for the right to use his image stating that it was for performing some personal service and, in terms of the tax assessment that was issued to the petitioner, pro-rated the income from image rights use as *de minimis*. The court found (at 561) that the endorsement fee received was, in fact, for the right to use the petitioner's image, which was highly valued by the sponsor and not *de minimis*. Therefore the income should be allocated partly to royalty income and partly to personal services income. As was decided in *Kramer v Commissioner of Internal Revenue*, 80 T.C. 768 (1983), the court examined all the surrounding facts and circumstances.

In determining the source of the royalty income, the court considered whether the contract stated how the income should be allocated and whether there is a significant basis for allocating the income between American and foreign services. The court confirmed that a sufficient basis existed as the petitioner proved that he had property rights of significant value outside the United States of America. Royalty income is generally sourced where the image rights property is used or where the right of use of the image right was granted (sections 861 (a)(4) and 862 (a)(4) of the Internal Revenue Code).

In establishing whether the American sourced income was effectively connected with an American trade, the court found (at 559) that the petitioner's golf playing was the effective connection. A non-resident alien will be subject to the same tax rates as an American resident where the American sourced income is effectively connected with an American trade. The petitioner did not have an office or place of business in the Unites States of America, therefore he was not subject to American tax on his non-American sourced income.

The petitioner's playing in golf tournaments was material to him receiving income for the use of his image rights, therefore this income was connected to an American trade, and

he was subject to the graduated tax rates applicable to American residents. The off-course endorsement agreements did not depend on whether he played golf or not, neither did it require him to be present in the United States of America. This income was therefore not effectively connected with an American trade and a flat 30% withholding tax was imposed on the petitioner, as a non- resident alien, on his gross American sourced royalties (sections 881(a), and 871(a)(1) of the Internal Revenue Code; section 1.864-4(c)(3) of the Code of Federal Regulations).

The purpose of the US-UK double taxation agreement was to avoid uncoordinated taxation of an individuals' income by two different countries, avoid double taxation, and prevent fiscal evasion (Article 1(7) of the US-UK double taxation agreement). The petitioner was unable to show that the endorsement income was remitted to the United Kingdom, which would have subjected him to taxation in the United Kingdom, thus he was not eligible to benefit from the provisions of the US-UK double taxation agreement.

The court found (at 569) that the petitioner received 50% royalties and 50% personal service income from the on-course endorsements; 50% of the royalty income from on-course endorsements and the Rolex agreement were American sourced income; 92% of the royalty income from the Upper Deck endorsement agreement was American sourced income; and 70% of royalty income from Electronic Arts was American sourced income.

In the case of *Sergio Garcia v Commissioner of Internal Revenue*, 140 T.C. No. 6 (March 14, 2013), the petitioner, a professional golfer and resident of Switzerland, entered into an endorsement agreement with a sponsor, Taylormade. The petitioner's personality and athletic image made him one of the most marketable golfers in the world. His personal brand is made up of these attributes together with his golf skills. The petitioner entered into a 7-year endorsement agreement with TaylorMade where he would be TaylorMade's 'global icon' and TaylorMade intended to build their brand around him. In terms of the agreement he would use and wear TaylorMade and associated brands golf products, and TaylorMade acquired the right to all his image rights to promote their products. The agreement was a "head to toe" agreement, where the petitioner was obliged to use specific products like golf shoes to golf caps. At that time TaylorMade was trying to redefine and focus its brand as one related to high performance golf products. As part of the endorsement deal they exploited his image rights without paying royalties each time they used his image rights. The petitioner was obliged to perform personal services for 12 days each year as well as undertake to behave in a moral and decent manner and generally promote goodwill towards the TaylorMade brand. The petitioner would incur various penalties if he failed to fulfil his obligations under the endorsement agreement. For example, if he failed to play in 20 professional golf events per year, his base remuneration would be reduced pro-rata.

If the petitioner's ranking dropped significantly, the contract would be renegotiated and if no agreement is reached after 30 days, TaylorMade could terminate his agreement. The original endorsement agreement did not specify the percentage allocated to image rights and personal services.

During the lifetime of the contract, the petitioner failed to use Maxifli balls and TaylorMade was obliged to drop the advertising campaign around the petitioner's use of Maxifli golf balls. The contract was amended with less favourable terms for the petitioner. Whilst the petitioner was still bound by his endorsement contract, he incorporated a golf equipment company, Long Drive in Switzerland. The petitioner also incorporated Even Par in United States of America.

The petitioner filed non-resident alien income tax returns for 2003 and 2004 tax years of assessments, reporting a portion of his personal service payments as his American sourced income effectively connected with the conduct of a trade within the United States of America. He did not report any royalty payments received by Even Par.

The respondent, the Internal Revenue Service, determined that there were deficiencies in the tax returns and issued an assessment to the petitioner. In the petitioner's objection to the assessment, he argued that the allocation of 85% to royalties and 15% to personal service payments should be respected as it was a product of an arm's length negotiation between two unrelated parties with adverse tax interests. Adverse tax interests deter allocations which lack economic reality (*Langdon v Commissioner of Inland Revenue*, 59 F. 168 (8th Cir. 2003)). The court, however, found (at 151) this allocation was not aligned to the economic reality of the endorsement agreement.

The court echoed the ruling in the *Haelan Laboratories, Inc. v. Topps Chewing Gum, Inc,* 202 F.2d 866 (2d Cir. 1953) case, and characterised image rights payments as royalties because a person has an ownership interest in the right. In determining the nature of endorsement fees and bonus payments, the court considered the intention of the sponsors and the petitioner taking, as well as all the facts, including terms of the agreement (*Retief Goosen v Internal Revenue Service* 136 T.C. No. 21 (2011) at 560). The court then cited *Kramer v Commissioner of Internal Revenue*, 80 T.C. 768 (1983) where there was a 70/30 income split between royalties and personal services. The facts of the *Kramer* case were different, so the court relied on the *Goosen* case, as the facts were similar, and it was more recent.

In the *Goosen* case, Retief Goosen had won major tournaments, ranked highly on world golf and PGA Tours, and the sponsor valued his image and paid substantial amount for his image rights. Therefore a 50/50 split on endorsement income was arrived at. In the present case, TaylorMade had made the petitioner the centrepiece of their marketing

efforts and the brand was built around him. He was their only 'global icon' during this period. These factors led to the endorsement income being weighted more heavily towards image rights than in the *Goosen* case. The facts in this case indicate that the sponsors did not place much value on the petitioner's personal service, therefore the court found (at 157,163) that 65% of the endorsement fees should be allocated to royalties and 35% to personal service compensation.

Since the petitioner was a resident of Switzerland, the court held that the Convention between the United States of America and the Swiss Confederation for the Avoidance of Double Taxation with respect to Taxes on Income, October 2,1996 (the 'US-Swiss double taxation agreement') applied to him. In terms of Article 12(1) of the US-Swiss double taxation agreement, royalties derived and owned by a resident of a contracting country will only be taxed in that country. Article 12(2) of the US-Swiss double taxation agreement defines royalties as payments received in consideration for the right to use any copyright and it also includes gains from the alienation of such right contingent upon productivity, use or disposition of it. The petitioner argued that payments from TaylorMade for use of his image rights are royalties as defined in Article 12(2) of the US-Swiss double taxation agreement and therefore taxable only in Switzerland as per Article 12(1) of the US-Swiss double taxation agreement. The respondent contended that image rights payments are governed by Article 17(1) of the US-Swiss double taxation agreement, which provides that income derived by a sportsperson, of a contracting country, from his personal activities in the other contracting country may be taxed in that other contracting country. There the respondent contended that the petitioner was required to be taxed in the United States of America.

The Department of the Treasury *Technical Explanation of the Convention Between the USA and the Swiss confederation for the Avoidance of Double Taxation with Respect to Taxes on Income* was considered useful in interpreting the US-Swiss double taxation agreement (see *Kolovrat v Oregon*, 366 U.S. 187, 194 (1961)). It stated that the controlling factor is whether the income is attributable to the performance itself or other activities or property rights. Article 17 of the US-Swiss double taxation agreement applies to all income connected with a performance, such as appearance fees, prize money and a share of sale receipts. Income derived from any source other than actual performance, such as royalties and product endorsements, is not covered by Article 17 the US-Swiss double taxation agreement but by Article 12 the US-Swiss double taxation agreement. The court found (at 161) that even though the petitioner's golf play and personal services performed in the United States of America have some connection to his American image rights, income from the sale of these image rights is not predominately attributable to his performance in America. Image rights, as defined by Article 12(2) of the US-Swiss double

taxation agreement, are a separate intangible which generated royalties. Thus the image rights payments from TaylorMade was royalty income and not taxable in the United States of America under Article 12(1) of the US-Swiss double taxation agreement.

The petitioner, in his pre-trial memorandum, had agreed that he was subject to American taxes on his American sourced personal services income, which was exempt from Swiss income tax in terms of Swiss domestic and treaty law, and was therefore precluded from raising the issue in court.

THE UNITED KINGDOM'S TAX TREATMENT OF IMAGE RIGHTS

In terms of section 1 of the Income Tax Act 2007, a professional sportsperson who is resident and domiciled in the United Kingdom is taxed on his worldwide income and capital gains. Non-residents are only liable to income tax on income derived from property situated in the United Kingdom and any employment duties that are performed in the United Kingdom. Thus the residence and domicile status of a professional sportsperson will affect his British tax liability.

In terms of section 15 of the Income Tax (Earnings and Pensions) Act 2003, an individual who is resident, ordinarily resident or domiciled in the United Kingdom is taxed on the full amount of their general earnings. As there is no statutory definition of a 'resident', we look at the HMRC guidelines which are largely based on the findings of British courts.

In order to determine who is a resident of the United Kingdom for tax purposes three statutory tests are used, namely the Automatic Overseas Test, the Automatic United Kingdom Residence Test and the Sufficient Ties Test (schedule 45 of the Finance Act 2013 and HMRC *Guidance Note: Statutory Residence Test* (2016)).

In terms of the Automatic Overseas Test, a professional sportsperson will be considered a non-British resident: if he is resident in the United Kingdom for one or more years throughout the previous three years but spent less than 16 days in the United Kingdom in the relevant tax year; if he has not been a resident in the United Kingdom throughout the previous three tax years and has spent less than 46 days in the United Kingdom in the relevant tax year; or if he spends less than 91 days in United Kingdom in the relevant tax year and works for less than 31 days in the United Kingdom in the relevant tax year.

In terms of the Automatic United Kingdom Residence Test, a professional sportsperson will be considered a United Kingdom resident: if he spends 183 days or more in the United Kingdom in the relevant tax year; if he has a home in the United Kingdom for at least 91 consecutive days and spends at least 30 days in that home in the relevant tax year; or if he works full time in the United Kingdom.

In terms of the Sufficient Ties Test, a professional sportsperson will be considered a United Kingdom resident: if he has family (spouse or children) that are British residents; if he has accommodation continuously available to him; if he does more than three hours of work per day for more than 40 days in the United Kingdom in the relevant year; and if he has spent more than 90 days in United Kingdom in the last two years.

According to the HMRC *Guidance Note: Residence, Domicile and the Remittance Basis* (2011), a professional sportsperson is deemed to be "ordinarily resident" if he is settled in the United Kingdom for a continued period of time; if being in the United Kingdom forms part of his regular and habitual lifestyle for the time being; if he came to the United Kingdom voluntarily (for work or formal employment); and he has permanent residence (owns a home or has a long-term lease).

If a professional sportspersons was born in the United Kingdom and the United Kingdom is the place their father considered his permanent home at the time of their birth, then the sportsperson will considered to be 'domiciled' in the United Kingdom. Professional sportspersons who are United Kingdom domiciled at birth will not be able to claim that they are not domiciled for tax purposes while they are living in the United Kingdom. A person may only have one domicile at any given moment (HMRC *Guidance Note: Residence, Domicile and the Remittance Basis*).

Taxation of resident sportspersons in the United Kingdom

A professional sportsperson who is resident or ordinarily resident, but not domiciled in the United Kingdom, will be liable to tax on his worldwide income on receipt unless that income is chargeable overseas earnings and he has claimed the remittance basis of taxation. The remittance basis is where non-British income is only taxed when it is remitted to the United Kingdom, that is, when the income is received in a British bank account. Where a professional sportsperson has received income from a British non-resident for activities performed wholly outside the United Kingdom, he will only be assessed to tax on that portion of the income remitted to the United Kingdom (if he claimed the remittance basis of taxation).

If a professional sportsperson is resident but not ordinarily resident in the United Kingdom and receives British sourced income (income in respect of activities carried out in United Kingdom), he will be taxed on the full amount of that income. Where that sportsperson has earned both foreign income (non-British sourced income that was paid into a non-British banking account) and British sourced income, the income may be split between the number of days worked in United Kingdom and number of days worked abroad (HMRC *Guidance Note: Residence, Domicile and the Remittance Basis*).

Income Tax

A United Kingdom resident taxpayer is entitled to a personal tax allowance of £11 500 which is tax free. United Kingdom resident taxpayers who earn more than £123 000 per annum, and non-British residents are not entitled to this allowance (HMRC *Policy Paper: Tax and Tax Credit Rates and Thresholds for 2017-18* (2016)).

In terms of section 7 of the Income Tax (Earnings and Pensions) Act 2003, 'income' is defined as the payments a person receives as a holder of an office or employment and is charged to tax as employment income. Under section 62 of the Income Tax (Earnings and Pensions) Act 2003, 'earnings' are defined as any salary, wages or fees, gratuities, other profit or incidental benefit of any kind obtained by an employee, or emoluments of the employment. Earnings may be received in money or money's worth and includes bonuses, commissions, tips, overtime pay and extra money earnings of any kind. For National Insurance Contribution ('NIC') purposes, earnings include any remuneration or profit derived from employment (section 3(1) of the Social Security Contributions and Benefits Act 1992).

Benefits in kind must represent money's worth, that is, of direct monetary value to the employee or which is capable of being converted into money (section 62(3) of the Income Tax (Earnings and Pensions) Act 2003). According to decided cases a benefit is taxable as earnings if it is capable of being turned into money in the employees hands or it consists of discharge of a debt (HMRC *Employment Income Manual* at EIM00540,EIM00570)

In the case of *Wilkinson v Rogerson* (1960) 39 TC 344, an employer commissioned a garment for an employee. The tax authorities assessed the price paid by the employer for the garment as earnings from employment and chargeable to tax. The court held that the amount which was chargeable was the second hand value of the garment. In other words, the amount the employee would have in his hand if he were to sell it and not the amount paid by the employer.

In *Weight v Salmon* (1935) 19 TC 174, the taxpayer, a managing director of a limited company, was entitled to a fixed salary in terms of his employment and options to buy company shares at face value. That is less than market value because of his service to the company. He was assessed to tax for the difference between face value and market value of the shares. He appealed as he had not sold the shares and had not made a profit and therefore it could not be considered earnings. The court found against the taxpayer on the basis that the shares themselves were emoluments and therefore he was liable to tax on the difference.

In terms of section 62 of the Income Tax (Earnings and Pensions) Act 2003, a benefit could be turned into money by surrendering it. In *Heaton v Bell* [1969] 46 TC 211, the company provided the use of a car to an employee, with the cost of such use being deducted from his wages by the company. Thus if he did not use the car, his wages will increase. It was held that the use of the car was emolument and assessable to tax.

Similarly, it would apply to an employee who is provided with living accommodation by his employer. Where an employer pays an employee's debt to a third party, it will have a direct monetary value to the employee as the employee will not have to pay the debt himself and therefore it will be considered money's worth and taxed as earnings (section 119 of the Income Tax (Earnings and Pensions) Act 2003).

A payment need not be remuneration or reward for services for it to be treated as 'income' or 'earnings' (HMRC *Employment Income Manual* at EIM00610). Payments made for the sole purpose of inducing a prospective employee to enter into a contract of employment would be considered earnings. Thus signing-on fees received by professional sportsperson would be considered earnings for income tax purpose (HMRC Employment Income Manual at EIM64160). In *Shilton v Wilmshurst* [1990] STC 55, 64 TC 78, Peter Shilton, an England international goalkeeper, received a sum of money from Nottingham Forest Football Club (his current employer) as an inducement to sign a contract with Southampton Football Club (his future employer). Lord Templeton stated that emoluments from employment mean an emolument from being or becoming an employee and therefore held that the payment was employment income.

However, in *Jarrold v Boustead* [1964] 3 All ER 76, 80, 41 TC 701, 729, the signing-on fee paid by a Rugby League club to a Rugby Union player was held to be for the permanent loss of the player's amateur status. It was not considered earnings from employment but compensation for permanent loss of amateur status. Payment to someone for the surrender of a personal asset or a valuable right, such as loss of a player's status, unconnected with their employment is not profit from employment and may be taxed as a capital gain (HMRC *Capital Gains Manual* at CG12940).

In the High Court case of *Hochstrasser v Mayes* (1959) 38 TC 673, Upjohn J held that a payment 'must be in the nature of a reward for service past, present and future' to be profit from employment. In *Bray v Best* (61TC704), Lord Oliver confirmed that employment income or earnings was not anything more than a payment arising from the existence of an employer-employee relationship.

It is therefore submitted that taxable earnings may be received in terms of a contract of employment or from a payment from a person other than an employer, such as voluntary payments like tips to a hairdresser.

A professional sportsperson who is resident and domiciled in the United Kingdom and is employed by a professional sports club or sports team must pay United Kingdom income tax on the payment received from the sports club for his playing services, as employment income. This income is taxed as emoluments (section 7(3)(a) and section 62 of the Income Tax (Earnings and Pensions) Act 2003). A professional sportsperson is taxed at

source on emoluments from the sports club. The sports club, as employer, is obliged to withhold the relevant employee tax on a "pay-as-you-earn" basis. The sports club will be responsible for the sportsperson's NIC under the United Kingdom's employee's tax system (Cloete, 2007: 560). Most professional sportspersons, being high income earners, are taxed at the highest marginal tax rate for individuals of 45% on earnings over £150 000 as well as 2% NIC (HMRC *Policy Paper: Tax and Tax Credit Rates and Thresholds for 2017-18* (2016)). Where the sportsperson is not an employee of a club, but is self-employed, he is taxed on income from the provision of playing services which is reflected on the individual sportsperson's self-assessment tax returns.

British resident sportspersons will pay British income tax on their earnings whether they arise in the United Kingdom or abroad. In the case of earnings from a foreign source, the sportsperson may offset the foreign tax paid by him, against the tax due in the United Kingdom on that income so that there is no double taxation on the same income. This may be done in terms of a double taxation agreement between the United Kingdom and the country in which the income was sourced. Where there is no double taxation agreement with the foreign country where the sports person is taxed, and that sportsperson is also liable to tax in the United Kingdom for the same income, the HMRC allows foreign tax credit relief on income only up to the extent of the United Kingdom tax charged on that foreign income. The British resident sportsperson may claim the lesser of the foreign tax paid or allowed by the relevant double taxation agreement and the United Kingdom tax due (HMRC *Guidance Note: Calculating Foreign Tax Credit Relief on income* (2017)).

Apart from income received for professional or playing services, a professional sportsperson also receives a second stream of income which he receives for promotional services. Although the promotional services or "off the pitch" earnings are considered secondary earnings, they sometimes amount to more than the amounts derived from playing the sport. If both the income streams were to be taxed together as employment income it would create a hefty tax burden on the sportsperson. As a result, several schemes to restructure professional sportspersons' remuneration package were devised with a view to reduce taxation (Cloete, 2007: 556). With the formation of the English FA Premier League in 1992, television broadcasting rights in the United Kingdom and globally grew exponentially and so did the commercial value of sports person's image rights. During footballing icon David Beckham's four years with Real Madrid Club de Futbol, their merchandising profits increased by 137% (Hackleton: 2016).

Professional sportsperson have been known to make use of an intermediary, company also known as a personal service company, whereby the sportsperson is treated as an employee of the intermediary company through which he provides his services to the

sports club, in an attempt to mitigate taxes. In this scenario, the sports club will pay the intermediary company for the sportsperson's playing services and the sportsperson in turn will earn a salary from the intermediary company. The intermediary company is entitled to deduct a range of expenses in the production of income that the individual sportsperson would not be entitled to in his personal capacity, hence reducing the total taxable income in the hands of the sportsperson. Also the sports club would not be required to deduct NIC. However, new legislation was introduced in 2000 to prevent sportspersons using an intermediary company to avoid payment of income tax and NIC. In terms of Chapter 8 of the Income Tax (Earnings and Pensions) Act 2003, the fees paid to the intermediary company are deemed to be employment income to the sportsperson and subject to both income tax and employee NIC (Cloete, 2012: 562).

In an attempt to circumvent the application of Chapter 8 of the Income Tax (Earnings and Pensions) Act 2003, professional sportspersons began transferring their image rights to an image rights company for commercial exploitation. By establishing an image rights company to which a professional sportsperson's "image rights" are assigned, a sportsperson may mitigate their tax liabilities as the promotional services (endorsement income) is separated from playing services (employment income). The image rights company will usually exercise control over the commercial exploitation of the sportsperson's image rights. Thus their income tax liability for the promotional services is removed, and their overall income tax liability reduced. A sportsperson may retain control of the company, directly or indirectly, by holding a directorship or holding an interest in the company's issued share capital. In this way the sportsperson may be entitled to earn a salary or dividends respectively, which are subject to taxation in the United Kingdom (Cloete, 2012: 559).

The mechanics of the image rights company is as follows: a sportsperson after establishing a separate image rights company, transfers his image rights to this company; the sportsperson then enters into a contractual agreement with the image rights company to perform promotional services; the image rights company then enters into an agreement with the sports club and other entities (sports brands like Nike or Adidas) to exploit the sportsperson's image rights (Cloete, 2012: 562). All endorsement and promotional income will be considered profits earned by the image rights company and not from the sportsperson's employment. Therefore the sports club will not have to withhold employees'' tax from that portion of the sportsperson's salary, nor will the sports club be liable for employer's NIC at 13.8% on payments to the image rights company. The image rights company, which may deduct expenses from gross profits, will be liable for corporation tax on its profits at 20% (Geey: 2015).

In *Sports Club, Evelyn and Jocelyn v Inspector of Taxes* [2000] STC (SCD) 443, the court had to decide whether a scheme entered into between Arsenal Football Club and two high profile football players, Dennis Bergkamp and David Platt, resulted in the receipt of taxable employment income. Both football players were world class players of international standing, transferred from prestigious European football. Bergkamp was domiciled abroad. Both Bergkamp and Platt had pre-existing arrangements regarding exploitation of their image rights through their respective image rights company.

Bergkamp had his own image rights company, to which he had assigned his image rights, incorporated in the Dutch Antilles in 1991. It was also responsible for investing his earnings from the sale of his image rights. This image rights company sub-licenced the rights to an intermediary company which was owned by Bergkamp's agent. The intermediary company then sub licenced the rights to both his former club and Reebok, a major sports company. The image rights company agreed to pay to Antilles the royalties received by it. Reebok also entered into a separate agreement with Bergkamp in terms of which he undertook certain promotional services for Reebok. Subsequently Bergkamp joined Arsenal Football Club in 1995.

Platt also had his own image rights company which contracted with third parties. After winding up the company in 1995, he set up a new image rights company in the United Kingdom. He and his wife were directors and shareholders of this United Kingdom image rights company, to which he assigned the right to exploit his image. He also derived income from a wide range of other businesses, all based on promotional agreements between the player and the image rights company, in terms of which he agreed to provide promotional services to the image rights company.

Arsenal Football Club had not entered into any such promotional agreements previously with any player. Both Bergkamp and Platt signed contracts with Arsenal in 1995 and Arsenal signed separate agreements with the players' respective image rights companies. In 1996, Arsenal also signed a separate consultancy agreement with Bergkamp's image rights company. The consultancy fee was retained by the image rights company in full and not passed on to Antilles for Bergkamp. As the HMRC did not agree that the payments made by Arsenal under these arrangements were not emoluments to Bergkamp, Arsenal withheld employees' tax from the payments to the image rights company.

The HMRC considered the payment by Arsenal to the two image rights companies as a "smoke screen", believing that they were actually rewards for the players joining Arsenal. Arsenal, Bergkamp and Platt appealed against this ruling to the Special Commissioners of the Income Tax Tribunal. The players argued that the exploitation of their image rights

was separate from the playing services they provided to Arsenal and that the agreements had independent commercial value. The Special Commissioners in the preamble to their decision explicitly stated (at 446) that it was agreed in England there was no property in a person’s image and therefore the expression 'image rights agreement' is not descriptive of the contents of the agreements. As these agreements refer to promotion, publicity, marketing and advertising, they would refer to them as promotional agreements except where the context requires a reference to image rights.

The Special Commissioners had to consider whether payments made for promotional services, by the club to Bergkamp and Platt, were earnings from employment and liable to employment income tax and if not earnings then were they benefits in kind and therefore earnings from employment. They questioned whether the promotional agreements had independent value or was a smoke screen for additional remuneration and whether the payments were emoluments from employment.

The Special Commissioners held (at 455,457) that although the club did not recoup the amounts paid for the promotional agreements from exploitation of the players' image rights, at the time that they entered into the agreement, they expected to make a profit from it, therefore the promotional agreements were genuine commercial agreements which the parties could enforce. The club had in fact obtained a negative value in that it was able to control the activities of the players and restrict time away from playing activities. The promotional agreements between Arsenal and the players had an independent value (having considered the fact that both players were established world class players capable of earning substantially from commercial contracts).

In view of the services which were provided, the consultancy agreement was capable of, and did have, an independent value. They further found (at 458) that the promotional agreements relating to Bergkamp and Platt were not a "smoke screen" for the payment of additional remuneration. The Special Commissioners found (at 459) that since the promotional and consultancy agreements were not emoluments from their employment, Bergkamp and Platt were not subject to income tax under Schedule E in terms of section 19 of Income Tax Act in each case. The Special Commissioners held (at 462) that the payments under the promotional agreements were not benefits in kind within the meaning of the legislation and therefore should not be treated as earnings relating to the employment of Bergkamp and Platt.

Therefore the court departed from the traditional concept of not recognising 'image rights' by declaring that image rights were capital assets and therefore not taxable as income (Cloete, 2012: 561).

In a subsequent case of *HMRC v Portsmouth City Football Club Ltd* (2010) EWHC 2013 (Ch), Mann J stated (at paragraph 19) that a club was entitled to pay and a player was entitled to receive payments for his image rights, that is, the right to use his image in publicity and other material. Where these payments were properly made, the club is not obliged to deduct employee's tax and NIC in respect of the image rights payments. He went on to state further that a club is entitled to pay and a player in entitled to agree that payments are made to a discretionary trust for the benefit of the player or his family and, in respect of such payments employees' tax and NIC are not paid when the payment is made, but when the monies are applied for the benefit of the employee. In other words the sportsperson will only be subject to income tax when he receives a distribution from the trust as a beneficiary.

Capital Gains Tax

The HMRC *Capital Gains Manual* (2016) sets out the HMRC's position regarding image rights and its view on what constitutes an image right for tax purposes and whether it can be licenced to a third party.

The HMRC Capital Gains Manual (at CG68405) states that 'all forms of property' are assets for capital gains tax purposes. Property is something that is capable of being owned and has a value that can be realised. English law does not recognise a stand-alone 'image right' as there is no legal process to protect intellectual property rights which specifically identify an image or personality. Although an individual may have a legal right to privacy, as discussed earlier, that right is merely a personal right and not capable of transfer or disposal. Therefore it is not considered 'property' for capital gains tax purposes. Whether an item of intangible property, like an image right, is an asset in terms of section 21 of the Taxation of Chargeable Gains Act 1992, is normally determined by reference to the holder's legal rights to protect his ownership of the item in British courts. As an image right cannot be protected under legal process in the UK, it cannot be an asset under section 21 of the Taxation of Chargeable Gains Act 1992.

An image right, as a bundle of rights, is capable of being protected, and hence considered an asset, if it consists of a contractual right, a registered trademark, copyright, or goodwill.

The registering of a trade mark does not itself create a valuable intangible asset in the hands of a professional sportsperson. It is the use made of that asset that contributes to the value attached to it. It is common for a professional sportsman's name, signature, nickname or caricature to be registered as a trade mark (at CG68405).

Contractual rights are the rights (and obligations) contractually agreed to by a professional sportsperson. An endorsement contract to endorse a particular brand of

clothing or sports equipment is an example of a contractual right belonging to a sportsperson. Careful consideration is needed when attaching a value to contractual rights. The net value of the contractual right to income from that endorsement contract might be greatly reduced (in some cases to nothing) by the value to be placed on the cost of the reciprocal obligations placed on the sportsperson in terms of the endorsement contract (at CG68430).

Copyright is a property right which protects the economic interests of the holder in relation to original works created by them. The holder of the copyright has the exclusive right to do certain acts in respect of the work in question which would otherwise be restricted, such as the replication, transfer, assignment or license of the copyright. Individually, any transactions involving copyright will be taxed as income receipts, however, in exceptional circumstances a transaction may give rise to capital gains tax (at CG68250). In terms of section 37 of the Taxation of Chargeable Gains Act 1992, a charge to income tax takes priority over a charge to capital gains tax. Therefore, depending on the circumstances, any transactions undertaken by a professional sportsperson exclusively relating to copyright may result in income tax liability rather than capital gains tax.

Goodwill is a personal property and its ownership can be transferred by assignment, but it cannot be assigned 'in gross', that is, separate from the business to which it relates. An assignment in gross is invalid and the assignee acquires no rights from such an "assignment". If the business lies in the person of the sportsman and an assignment to a third party purports to separate the goodwill in the sportsperson, this will be considered an 'assignment in gross'. However, if the sportsperson has developed a business based on 'organised and planned exploitation of their image' by way of endorsements, personal appearances and maybe through contracts for sponsorship, copyright and so on, that business would be considered to have established goodwill of some value. If this existing business is transferred with its goodwill as a going concern then it will be a valid assignment or transfer and not an assignment in gross (at CG68420).

A professional sportsperson will generally assign the bundle of rights (trademark, copyright, goodwill and contractual rights) to a third party, usually an image rights company, who then exploits the rights that have been assigned to it, by licensing the right to use an aspect of the sportsperson’s image in return for royalty payments (at CG68420). This generally takes the form of a licensing arrangement, where licences are usually used to transfer a right for a limited time, territory or nature, rather than an outright assignment.

The grant of a licence, in terms of a licensing arrangement, may be considered a part disposal of an asset under section 21(2)(b) of the Taxation of Chargeable Gains Act 1992 in the hands of the licensor (the professional sportsperson). For capital gains purpose, the

disposal of an asset may include a part disposal of a physical part of the asset or an interest or right in only a part of the asset. The asset may be disposed of by a sale or by creating a right over it. Where the part sold is a fraction, the allowable expenditure may be apportioned accordingly. If it is part disposal of an asset for a limited period, the whole unencumbered asset may be disposed of at the end of that period and cost will be apportioned to the first and subsequent disposals (at CG12730). Accordingly, where a professional sportsperson grants an image rights company the right to exploit his image for a limited period, the granting of that right by the sportsperson will result in a part disposal of the asset (bundle of rights) in his hand and will therefore be subject to capital gains tax at a rate of between 10% and 20% on only a portion of that right (HMRC *Guidance Note: Capital Gains Tax Rates and Annual Tax-Free Allowances* (2017)).

An outright assignment or grant of a licence may be a deemed disposal under section 22 of the Taxation of Chargeable Gains Act 1992. In terms of section 22(1)(d) of the Taxation of Chargeable Gains Act 1992, a disposal of an asset by the owner is deemed to have taken place where a capital sum is derived from the assets, even though no asset is acquired by the person who pays the capital sum. The section specifically refers to 'capital sums received as consideration for use or exploitation of assets'. Any part of the receipt considered for income tax purposes is not capital sum for the purpose of section 22 of the Taxation of Chargeable Gains Act 1992. Therefore, when the professional sportsperson transfers his image rights (bundle of intellectual property rights) to an image rights company on an outright basis, that transfer or assignment is deemed a disposal of that asset and will be subject to capital gains tax at a rate of between 10% and 20% on the entire value of the right (HMRC *Guidance Note: Capital Gains Tax Rates and Annual Tax-Free Allowances* (2017)).

When valuing the bundle of rights equating to the "image rights", one must distinguish between an active element and a passive element. The active element for a professional sportsperson would be where a sportsperson appears for a photo shoot. A number of images will be created from this photograph which is owned by the endorser under licence from the image rights company. The creation of a number of images from the original will be the passive activity which requires nothing to be done by the sportsperson. Each activity will have its own value depending on the facts and circumstances of each case (Huxtable: 2015).

A professional sportsperson that assigned the "image rights" to the image rights company is often employed by the company and may be paid a salary by the company (taxed as employment income at a maximum rate of 45%) or may receive dividends (taxed at between 7.5% to 38.1% for any dividend received in excess of £5 000) from the image

rights company profits (HMRC *Policy Paper: Tax and Tax Credit Rates and Thresholds for 2017-18* (2016).

A professional sportsperson, by grouping the relevant rights to service each territory separately (one for the United Kingdom and one for the rest of the world), would be able to divide the total image rights and isolate different income streams from different jurisdictions for tax purposes (Huxtable: 2015).

Royalties

According to the HMRC *Employment Income Manual* (2018), royalty or any other form of income derived from intellectual property, including registered and unregistered trademarks, will be treated as a payment received for the right to use the intangible property ("image rights" of a sportsperson). Further, royalties specifically exclude payment for services rendered (playing services of the sportsperson) (at EIM00736). In terms of section 579(2) of the Income Tax (Trading and Other Income) Act 2005, royalties from intellectual property is taxed as income in the hands of the licensor. The definition of 'intellectual property' under section 579(2) of the Income Tax (Trading and Other Income) Act 2005 encompasses the bundle of rights referred to as "image rights" of the sportsperson. Royalties must be reported in the sportsperson's annual tax returns as 'miscellaneous income' and is classified as business income. Business income refers to income from a trade or business and that there must be a nexus between the income and the business. Where the royalty payment is received through an agent or intermediary, the agent must report the gross amount of the royalty payment that is received before any deductions (Her Majesty's *Revenue & Customs Guidance Note: Deduction of Income Tax at Source: Royalties* (2016)).

Taxation of foreign sportspersons in the United Kingdom

Foreign sportspersons (British non-residents) will pay British income tax on the portion of their earnings which relate to British sourced income, that is, income derived from activities carried out in the United Kingdom as well as profits from business activities which are conducted in the United Kingdom. The collection of domestic tax on income of non-resident sportspersons results in extra-territorial taxation of sportspersons playing in the United Kingdom (Elphick: 2016).

Foreign professional sportspersons competing in the United Kingdom are liable to pay United Kingdom tax on earnings linked to those competitive appearances. The person making the payment to the sportsperson is required to deduct tax at source (in advance) and pay it to the HMRC if those payments are more than the United Kingdom personal tax allowance. This deduction is known as withholding tax and is deducted at the basic rate of

income tax. The deduction is considered as a payment on account by the foreign sportsperson to the HMRC and may be used as payment towards his final tax bill in the United Kingdom. Certain foreign sportspersons are able to make an application to the HMRC in order to reduce the rate of withholding tax so that the amount withheld is closer to the amount expected to be paid by the foreign sportsperson in his final tax bill. However, if that sportsperson in unsure of what his final earnings may be (if the income earned is dependent on his final position in that tournament), then he may not apply for a reduced withholding tax rate. Non-resident or foreign professional sportspersons are exempt from NIC (HMRC *Guidance Note: Pay Tax in the UK as a Foreign Entertainer or Sportsperson* (2018)).

Foreign sportspersons will be taxed on a proportion of their earnings from worldwide sporting activities based on the amount of time spent in the United Kingdom. Professional sportspersons' earnings include performance income, appearance fees, bonuses for British performances, exhibition income, box office percentage, broadcasting and media fees, tournament winnings, prize money, venue merchandising income, transfer of assets and sponsorship and endorsement monies (HMRC *Guidance Note: Non-resident Entertainers and Sportspersons* (2017)). Therefore a portion of a foreign sportsperson's endorsement and sponsorship income will be chargeable to tax in the United Kingdom. The amount of income taxable in the United Kingdom will depend on the precise wording of the endorsement or sponsorship contract, and the amount of time that the sportsperson spent performing, competing and training in the United Kingdom. The calculation is subject to approval from the HMRC and the foreign sportsperson must provide the HMRC with supporting evidence, such as endorsement contracts, sponsorship agreements, competition agreements, training diaries, and practise and competition schedules.

There are two methods by which a foreign sportsperson may calculate the amount of endorsement income to be attributed to the United Kingdom for income tax purposes, namely the Relevant Performance Days method and the Relevant Performance and Training Days method.

In terms of the Relevant Performance Days method, any day on which a foreign sportsperson participates in a sporting competition, performs a training session in public (football practice open to the public) or the conducting of public events for sponsors and endorsees (autograph signing or photo shoots) is considered a relevant performance day. A foreign sportsperson must calculate the percentage of relevant performance days conducted in the United Kingdom against his total worldwide performance days in a tax year, and apply this percentage to his total worldwide income.

In terms of the Relevant Performance and Training Days method, in addition to the relevant performance days a foreign sportsperson must account for his relevant training days, which include any day on which a foreign sportsperson spends at least three hours on physical activity that should contribute towards the performance of his particular sport. Relevant training days include specific sporting code practices as well as general fitness, but exclude days on which the sportsperson is travelling, resting, injured or doing non-physical training such as psychology and physiotherapy. A foreign sportsperson must calculate the percentage of relevant performance and training days conducted in the United Kingdom against his total worldwide performance and training days in a tax year, and apply this percentage to his total worldwide income (HMRC *Guidance Note: Pay Tax in the UK as a Foreign Entertainer or Sportsperson* (2018)).

Expenses that are wholly and exclusively incurred in connection with a foreign sportsperson's performance in the United Kingdom may be deducted from their income before tax is calculated. Expenses deductions are usually allowed for food and drink; fees or commission to managers and agents; travel within the United Kingdom; air fares directly to and from the foreign sportsperson's home country for a sporting event or performance in the United Kingdom; accommodation; support staff; or the use of training facilities. However, expenses for medical treatment, personal security or entertaining are usually not allowed. Any expenses incurred by a foreign sportsperson that covers both British and worldwide activities, will be apportioned between British appearances and worldwide appearances on a just and reasonable basis. If a foreign sportsperson's endorsement and sponsorship duties are linked with his sporting activities, the HMRC will match or divide the expenses according to the different income streams (HMRC *Guidance Note: Pay Tax in the UK as a Foreign Entertainer or Sportsperson* (2018)).

Foreign professional sportspersons are not entitled to deduct taxes payable in their home countries when arriving at their British taxable income. Depending on the country, they may be entitled to a tax credit in their home country for taxes paid in the United Kingdom. Certain income streams may be subject to a reduced (sometimes to nil) withholding tax if the United Kingdom has entered into a double tax treaty with the home country of the foreign sportsperson (HMRC Guidance Note: *Non-resident Entertainers and Sportspersons* (2017)).

Section 577(2) of the Income Tax (Trading and Other Income) Act 2005, provides that income arising to a foreign sportsperson is chargeable to income tax in the United Kingdom only if it is derived from a source in the United Kingdom. In terms of section 906 of the Income Tax Act 2007, where royalties arise from a source within the United Kingdom, the royalty payments are subject to deductions at source at 20%, unless the United Kingdom has explicitly given up its taxing rights under an international agreement

or a double tax agreement. There need not be any direct connection with the United Kingdom and the foreign sportsperson need not be present in the United Kingdom for the withholding taxes to be deducted. Endorsement fees paid to a foreign sportsperson for the use of particular equipment in a tournament held in the United Kingdom will be considered sufficient nexus. If the person paying royalties to a professional sportsperson or his image rights company (organisers of the sporting event or the sports manufacturer) fails to deduct the withholding tax on the royalties, they will have to pay the tax from their own funds (HMRC *Guidance Note: Pay Tax in the UK as a Foreign Entertainer or Sportsperson* (2018)).

In terms of the OECD Model Tax Convention, cross border royalty payments are taxable only in the country of residence of the beneficial owner of the royalties. Where payment is made to a British non-resident sportsperson, the articles of the double taxation agreement between the United Kingdom and the home country of the foreign sportsperson (Article 12 of the OECD Model Tax Convention) will be used to determine whether the payment is one where the ability to deduct a withholding tax lies with the United Kingdom or the other country. Where the person paying the royalties reasonably believes that the foreign sportsperson is exempt in terms of the relevant double taxation agreement, the duty to deduct at source is modified in terms of sections 911 and 914 of the Income Tax Act 2007. Section 911 of the Income Tax Act 2007 allows for the reduction of withholding taxes in line with the relevant double taxation agreement, Section 914 of the Income Tax Act 2007 effectively exempts the withholding of taxes on royalty payments. Where the person paying the royalties and the recipient are connected parties, the recipient (the foreign sportsperson or his image rights company) will not be entitled to rely on the provisions of the double taxation agreement in terms of section 917A of the Income Tax Act 2007. Certain anti-abuse provisions within the relevant double taxation agreement will also be taken into account when deciding whether treaty benefits are applicable.

In the case of *Agassi v Robinson (Inspector of Taxes)* [2006] UKHL, the appellant was Andre Agassi, a professional tennis player once ranked number one in the world, who is not a resident nor domiciled in the United Kingdom and never has been. The appellant owned and controlled a company, Agassi Enterprises Inc, which contracted with manufacturers of sports clothing and equipment. In terms of that contract, the appellant endorsed the products in return for payment to Agassi Enterprises Inc. In the year 1998-1999 the appellant played in British tennis tournaments, including Wimbledon, and received payment from two sports equipment and clothing manufacturers, Nike Inc. and Head Sport AG. Neither of the companies were resident in the United Kingdom nor did they carry out any trade or business in the United Kingdom and the payments made to the appellant were not made in the United Kingdom. The appellant's success as a

professional in the United Kingdom tennis tournaments was the only connection that any of the parties had to the United Kingdom.

The appellant was assessed to tax in the United Kingdom on the payments from Nike and Head and appealed the decision to the Special Commissioners of the Income Tax Tribunal. The assessment was in terms of section 108 of the Taxes Management Act 1970, which imposed a charge to tax on 'profits or gains of any person, whether or not resident in the United Kingdom from any trade…carried on in the United Kingdom'.

The appellant relied on the principle of the interpretation of statutes that it should generally be presumed that a statute is not intended to have extra-territorial effect. However, the court of appeal interpreted the statute to include non-resident, non-domiciled individuals who carried on any trade, vocation or profession in the United Kingdom. The court thereby extended the scope of British income tax to overseas sportspersons participating in the United Kingdom. The majority of the House of Lords found (at 16) that payments to the appellant's personal rights company, Agassi Enterprises Inc., under the sponsorship contracts with Nike Inc. and Head were assessable to tax under United Kingdom tax law.

The view taken by the HMRC and the court in the *Agassi v Robinson (Inspector of Taxes)* [2006] UKHL case, coupled with the fact that foreign professional sportspersons (non-resident and non-domiciled) competing in the United Kingdom are subject to the same taxation as British residents, with no tax incentives to attract them to compete in sporting events held on British soil, has led to several foreign sportspersons and sports teams refusing to participate in British sporting events. Famously, former Wimbledon champion Rafael Nadal refused to participate in the Queens Club Tournament held in the United Kingdom. Similarly, triple Olympic champion and 100m World Record holder Usain Bolt also refused to appear in British held athletics events (Trotman: 2012).

Due to the fact that sportspersons resident outside the United Kingdom are liable to taxation on their earnings in the United Kingdom as well as a share of endorsement and sponsorship income, even if it is earned through an off-shore image rights company, many foreign sportspersons end up paying more in British income taxes than the actual prize money received for their participation in the British sporting event (Cloete, 2012: 564).

Several organisers of international sporting events have made representations to the United Kingdom government to provide tax exemptions for those major sports events that generate millions of pounds for the British economy. In response, and in acknowledgement that in order to attract high profile sportspersons to major sporting events in the United Kingdom tax incentives were necessary, the government of the

United Kingdom have exempted British non-resident sportspersons from United Kingdom tax on any income connected with their performance in the United Kingdom in relation to specific events. Special legislation was promulgated in the form of the London Olympic and Para-Olympic Games Tax Regulations 2010, where all income received from performing in the event or taking part in any promotion of the games is exempted from United Kingdom tax (Shekar and Chhabra: 2012).

Anti-avoidance measures

As royalties paid to an image rights company are taxed more favourably than salaries paid directly to a professional sportsperson, some sports clubs have camouflaged remuneration to sportspersons so it is taxed as image rights payments and in doing so ensuring that their tax liability is reduced (Cloete, 2012: 559). Where a sportsperson has no 'image' to exploit, the HMRC considers it a sham transaction as there is no commercial justification for such a deal. An example of such a transaction is where the remuneration package of a reserve goalkeeper in a second division football club, without a valuable image, is structured so that a large percentage of his remuneration is allocated to image rights payments. In deciding whether an image rights company is viable as a vehicle for reducing a sportsperson’s tax liability, the sports club must consider the value of that sportsperson’s performance on the field and the amount that the club can expect to generate from the exploitation of that sportsperson’s image rights (Geey: 2015).

Although the HMRC have recognised that these image rights contracts are legitimate commercial contracts if structured properly, the potential for abuse of these image rights arrangements has led the United Kingdom government as well as the HMRC to relook at the regulations with a view to reform the taxation of foreign domiciled sportspersons, and offshore trusts that are established by United Kingdom resident sports persons (Coors: 2016).

In 2009, the HMRC informed many of the football clubs from the English Premier League that it would examine the payments made to footballers in respect of image rights for the period 2005 to 2008. As a result of this audit, in 2012, HMRC reached settlements with 15 English Premier League clubs. Public accounts of Chelsea Football Club revealed a payment of £6.7 million in relation to the investigation by HMRC into taxation of image rights payments (Coors: 2016). Since then, the HMRC is reported to have reached an agreement with the football clubs of the English Premier League. The agreement contains a two-stage restriction on the amount of image rights payments payable by the individual football clubs. Stage 1 provides that image rights payments to image rights companies will be capped at 15% of the total commercial income generated by that football club in a tax year. Stage 2 provides that image rights payments to a footballer will be capped at a

maximum of 20% of the total earnings of that player in a tax year. A football club or a football player may formally request, by way of a motivation, should it wish to deviate from the Stage1 and Stage 2 caps (House of Commons Committee of Public Accounts: 12).

Once a club agrees to the deal with the HMRC, in order to demonstrate that it is compliant with the Stage 1 cap, that football club must provide an annual summary of all image rights payments, as well as overall calculation as per the clubs accounts. The football club must also demonstrate that the image rights are being exploited in accordance with the football player's contract with that football club (Hackleton: 2016).

Guernsey

In terms of the Image Rights (Bailiwick of Guernsey) Ordinance, 2012 which came into effect in December 2013, Guernsey is the only jurisdiction in the world to introduce legislation which allows the registration of image rights as an intellectual property right, specifically for its protection and exploitation, internationally. It allows celebrities and professional sportspersons to exploit the commercial value of their rights and have thereby created a fully accepted asset class. It is similar to trademark registration but applicable to a much wider range of goods and services, thus appealing to brand owners, including professional footballers. The image rights being registered must be distinctive and have an actual or potential value that can be protected (Hansard Trust: 2017). Thus a professional sportsperson's image right may be recognised as an "image right", and income derived from this registered image right will not be taxed as income in the hands of the professional sportsperson.

SOUTH AFRICA'S TAX TREATMENT OF IMAGE RIGHTS

Historically, South Africa's income tax system was source-based. However, from 1 July 1997, South African residents became taxable on their worldwide income, such as income received or accrued from foreign investments. South Africa completed the move from a source-based system of taxation to a residence basis of taxation in respect of all income with effect from 1 January 2001. Thus all residents are now taxed on their worldwide income and no longer just on income from a source within or deemed to be within South Africa. All persons who are not residents, however, are still subject to tax in South Africa on South African sourced income (SARS *Tax Brochure for Non-Residents* (2012): 9)

Resident

A key enquiry in determining the normal tax liability of a professional sportsperson in South Africa, requires establishing whether that sportsperson is a 'resident' as defined in section 1 of the Income Tax Act 58 of 1962. The ordinarily resident test and the physical presence test is utilised to determine if a person is South African tax resident (SARS *Guide on the Residence Basis of Taxation for Individuals* (2009): 1,2).

Although the term 'ordinarily resident' is not defined in the Income Tax Act 58 of 1962, the courts have interpreted the concept to mean the country to which a person would naturally and as a matter of course return from his wanderings. In *Cohen v CIR* [1946] AD 174, 13 SATC 362, the courts referred to the concept as a person's usual or principal residence and it would be described more aptly, in comparison to other countries as the person's real home.

In *ITC 1170* [1971] 34 SATC 76, it was pointed out by the court that the question whether a taxpayer may be regarded as being ordinarily resident at a particular place during a particular period is one of degree, and one is entitled to look at the taxpayer's mode of life beyond the particular period under consideration.

SARS *Income Tax Interpretation Note Number 3* (2002) additionally provides that the concept 'ordinarily resident' refers to: living in a place with some degree of continuity, apart from accidental or temporary absence. If it is part of a person's ordinary regular course of life to live in a particular place with a degree of permanence, he/she must be regarded as ordinarily resident (*Levene v Inland Revenue Commissioner* [1928] ALL ER Rep. 746 (HL)); the place where his/her permanent place of abode was, where his/her belongings were stored, which he/she left for temporary absence and to which he/she regularly returned after such absences (*H v COT* [1960] 2 SA 695 (SR); 23 SATC 292); a

residence which is settled and certain and not temporary and casual (*Soldier v COT* [1943] SR); a residence where he/she normally resides, apart from temporary/occasional absences (*CIR v Kuttel* [1992] (3) SA 242 (A), 54 SATC 298).

Therefore, in order to be regarded as 'ordinarily resident', a professional sportsperson should have the requisite state of mind. In order to prove the intention of becoming ordinarily resident in South Africa, steps and processes indicative of achieving this goal must be manifest.

The physical presence test is time-based and is only applicable to a natural person who was not at any stage during the relevant tax year ordinarily resident in South Africa. It is based on the number of days during which a natural person is physically present in South Africa. The physical presence test must be performed annually in order to determine whether the professional sportsperson concerned is a resident for the tax year under consideration. The sportsperson must be physically present in South Africa for a period or periods exceeding: 91 days in aggregate during the tax year under consideration; 91 days in aggregate during each of the five tax years preceding the tax year under consideration; and 915 days in aggregate during the above five preceding tax years. The sportsperson must meet all three requirements before he will be regarded as a South African resident (SARS *Guide on the Residence Basis of Taxation for Individuals* (2009): 2,3).

Earnings from services rendered

The definition of 'gross income' in terms of section 1 of the Income Tax Act, 58 of 1962 includes any payments in cash or kind, received or accrued to a resident irrespective of where it was earned. Paragraph (c) of the definition of gross income expands the scope to include amounts received for services rendered or to be rendered as well as voluntary awards and any amount received in respect of employment.

The final income tax payable by a sportsperson is only calculated once the total taxable income earned by that sportsperson for the full year of assessment has been determined at the end of the year of assessment when that sportsperson’s income tax return has been processed and a final assessment has been issued (SARS Guide on Income Tax and the Individual (2017): 1,9).

It therefore follows that a professional sportsperson will include in his taxable income, all income from employment (remuneration) such as salaries, wages, bonuses, overtime, fringe benefits, as well as income from royalties, and income from a business or trade.

The term 'remuneration' is defined in paragraph 1 of the Fourth Schedule to the Income Tax Act 58 of 1962 as 'any amount of income which is paid or is payable to any person by

way of any salary, leave pay, wage, overtime pay, bonus, gratuity, commission…whether in cash or otherwise and whether or not in respect of services rendered…but not including…any amount paid or payable in respect of services rendered or to be rendered by any person…in the course of any trade carried on by him independently of the person by whom such amount is paid or payable and of the person to whom such services have been or are to be rendered'. (underlining added)

The proviso to the definition of 'remuneration' contains statutory tests which, if met, override the factual position and deems a sportsperson not to carry on a trade independently for employees' tax purposes.

The statutory tests provide that a sportsperson is deemed not to carry on an independent trade, and therefore amounts earned by that sportsperson will be deemed remuneration if: the services are required to be performed primarily at the premises of the person by whom the amount is paid, or to whom such services are rendered; and the person rendering the services is subject to the control or supervision of any other person as to the manner in which the person's services will be performed, or the hours of that person's work (SARS *Income Tax Interpretation Note Number 76* (2014): 10,11).

According to the SARS *External Guide for Employers in respect of Fringe Benefits* (2018), a voluntary benefit contemplated in the Seventh Schedule to the Income tax Act 58 of 1962, which includes accommodation, travel, meals, right to use an asset, medical aid contributions and pension fund contributions, will be deemed 'remuneration' and taxable as income. It follows that an employer will be required to determine the cash equivalent of the value of any taxable benefit.

Therefore employers (sports clubs) are required to withhold employee's tax from the remuneration, including fringe benefits, of employees (professional sportspersons) and pay it over to SARS on a monthly basis. Employees' tax is also referred to as pay-as-you-earn tax or PAYE. The tax is withheld when remuneration is paid or becomes payable to the employees, for example, on a daily, weekly, fortnightly or monthly basis.

Employees' tax is therefore a withholding tax on employment income and will be offset against the employee's final income tax liability for the applicable year of assessment. Commission, travel allowances and non-standard employment (part-time employment) income are also subject to employees' tax regardless of the amount received (SARS *Guide on Income Tax and the Individual* (2017): 1,9).

Payment in kind must also be included in a professional sportsperson's 'gross income'. When including such payments in his taxable income, a sportsperson must reduce it to its cash value. In *Commissioner for Inland Revenue v Delfos* [1933] AD 242, 6 SATC 92, the

Appellate Division held that the amount must be money or money's worth. If it cannot be converted to money or value in monetary terms, it will not be considered gross income. It need not be capable of being sold but be capable of being valued in monetary terms.

In *Commissioner for Inland Revenue v Butcher Brothers (Pty) Ltd* (1945) AD 301, 13 SATC 21, the terms of a lease agreement required the lessee to erect new buildings to a certain value which would become the property of the lessor at the end of the term of the lease, without any compensation being paid. The taxpayer objected to and appealed the Commissioners assessment. The Commissioner had assessed him to tax to the amount equal in value to the improvements that the taxpayer was entitled to. The Appellate Division held that as the lessor was only entitled to the improvements at the end of the lease term, which was so far in the future that it was not possible to provide a value and thus there was no amount for tax purposes.

In the Supreme Court of Appeal in *Commissioner, SARS v Brummeria Renaissance (Pty) Ltd* [2007] (6) SA 601 (SCA), 69 SATC 205, the court held that the market value of the goods or services must be determined objectively and the ability to turn it into money is only one of the factors to consider in determining the market value of such a receipt or accrual. In *South Atlantic Jazz Festival (Pty) Ltd v Commissioner for the South African Revenue Service* [2015] ZAWCHC 8, the court found that the market value of goods and services provided by the sponsor will be the same in value as the services provided by the club 'in the absence of any contrary indication'.

If payment in kind is received from an employer, then that employer (sports club) will be required to reduce that payment into money's worth and deduct employee's tax from that amount. It follows that if payment in kind is received from someone other than an employer (sponsor), then there is no obligation on that person to withhold employee's tax, and a sportsperson receiving such payment will reduce that payment into money's worth and include it as gross income in his annual tax return.

The tax treatment of image rights are determined by provisions in the sportsperson's employment contract with the sports club for which he plays, which usually stipulates that the use of the image right is assigned to the sports club, to the extent they are used to promote the club and team. These arrangements may be varied by agreement with the club and there is no universal "one size fits all" template.

The sportsperson may himself commercially exploit his residue image rights (outside of those secured by the employment contract) by using an agent and/or establishing a personal image rights company. In this way he has control of the assignment and licensing as well as the revenue generated from the residue image rights.

Besides the fixed term employment contract, professional sportspersons are free to enter into an agreement with the sports club as opposed to an outside third party whereby he transfers his residue image rights to the club for a fee which in the hands of the sportsperson should be considered 'gross income'. It is submitted that SARS' regards payment for the residue image rights as also comprising 'remuneration ' could lead to disputes with professional sportsperson and sports teams in the area of employees' tax.

Where the sportsperson has transferred his residue image rights to an image rights company, the image rights company will receive payments for the exploitation of the rights, which will form part of company profits. The image rights company will be taxed on the profits at company rates (28%) which are a lower rate than personal income tax (45%). If the sportsperson is employed by the image rights company he will be subject to the employee income tax on that remuneration received from the image rights company. Where the sportsperson is a shareholder of the image rights company, he may receive dividends which will be subject to dividends tax (taxed at a rate of 20%) (Cloete, 2012: 559).

A complication may arise in the tax implications of an image rights company, which could be deemed to be a 'personal services provider', as defined.

An 'employee' is defined under paragraph 1 of the Fourth Schedule to the Income Tax Act, 58 of 1962 as any person (other than a company) who receives any remuneration or to whom any remuneration accrues or any personal service provider. Any 'personal services provider', is also included in the definition of employee under paragraph (d) of the definition.

More importantly, the exclusion from the definition of 'remuneration' being 'any amount paid or payable in respect of services rendered or to be rendered by any person…in the course of any trade carried on by him independently of the person by whom such amount is paid or payable and of the person to whom such services have been or are to be rendered' does not apply to payments to a 'personal services provider'. In other words, payments to a 'personal services provider' comprise 'remuneration', from which employees' tax must be deducted and paid over to SARS.

A 'personal service provider' is defined under paragraph 1 of the Fourth Schedule to the Income Tax Act, 58 of 1962 as a company or trust where any service rendered on behalf of the entity to its client is rendered personally by any person who is a connected person in relation to such entity and: the person would have been regarded as an employee of the client, if the service was not rendered through an entity; the person or entity rendering the service must perform such service mainly at the premises of the client and such person or entity is subject to the control or supervision of such client as to the manner in

which the duties are performed; or more than eighty per cent of the income derived from services rendered is received from one client or associated person in relation to the client.

A 'personal service provider' will be subject to tax at the rate of 33%, as opposed to the normal corporate tax rate (currently 28%). A trust, if it is a 'personal service provider', will remain taxable at normal trust rates of 45% and not the rates applicable to special trusts. Any company or trust that fits the definition of a 'personal service provider' and which is in receipt of 'remuneration' as defined in the Fourth Schedule is subject to the deduction of employees' tax (SARS *Income Tax Interpretation Note Number 35* (2010): 4,9)

The image rights company may license the rights to other third parties as well as the sports club for exploitation in the marketplace, through endorsement contracts for third parties' products and services and other promotional services with corporate sponsors. The image rights company will then receive royalty payments in terms of the licensing agreement (Cloete, 2012: 559).

The legislature does not provide a definition of 'royalty' for income tax purposes. It is submitted that the 'gross income' definition in section 1 of the Income Tax Act, 58 of 1962, contains wording that amounts to a royalty. Paragraph (g)(iii) of the 'gross income' definition brings into income amounts received or accrued 'for the use or right of use of any patent as defined in the Patents Act, 1978 (Act No. 57 of 1978), or any design as defined in the Designs Act, 1993 (Act No. 195 of 1993), or any trade mark as defined in the Trade Marks Act, 1993 (Act No. 194 of 1993), or any copyright as defined in the Copyright Act, 1978 (Act No. 98 of 1978), or any model, pattern, plan, formula or process or any other property or right of a similar nature'. A royalty will therefore be treated as 'gross income' for income tax purposes. Professional sportspersons who receive income in the form of a royalty will be liable to income tax in the year of assessment in which it was received.

Where a sports club (employer) contracts with a sportsperson for the exclusive right to exploit that sportsperson's residue image rights, that sportsperson does not have the right to exploit those residue image rights for personal gain throughout the duration of the image rights contract. Further, where a sportsperson disposes of his image rights (via assignment or transfer) to an image rights company, it may be considered analogous to a restraint of trade payment. It is submitted that when a sportsperson disposes of his image rights he alienates an essential part of his ability to generate additional income. In such a case, the income received by the sportsperson in terms of the image rights may be deemed to be a restraint of trade payment. A restraint of trade may be enforced by an employer which entails the employer placing certain limitations on the employee's freedom of employment thus rendering that employee ineligible to trade within the same

industry in which he currently plies his trade in (*Sunshine Records (Pty) Ltd v Frohling and Others* [1990] (4) SA 782 (A)).

Paragraph (cA) of the definition of 'gross income' includes any amount received by or accrued to any person who is a natural person, a personal service company, or a personal service trust as compensation for any restraint of trade imposed on such person.

The effect of paragraph (cA) is to specifically include restraint of trade payments received or accrued in the definition of 'gross income', irrespective of whether it is a receipt or accrual of a capital nature or not. Therefore, a payment in respect of a restraint of trade will be taxable in full if it was received by or accrued to a person defined in paragraph (cA) and all such payments received or accrued is subject to employees' tax deductions (SARS *Income Tax Interpretation Note Number 7* (2002): 2,4).

Restraint of trade payments made to companies and trusts that are not defined as personal service companies or trusts do not form part of 'gross income', provided the receipt or accrual is of a capital nature SARS *Income Tax Interpretation Note Number 7* (2002): 2). Therefore should a professional sportsperson argue that the payments relating to his image rights, received by him in his individual capacity, are in fact restraint of trade payments, that sportsperson will nevertheless be required to include the payments in his 'gross income' and the sports club will be required to deduct employees' tax. However, it is submitted that, should the image rights company receive the restraint of trade payment, and that image rights company is not a personal services provider, the payment could be regarded as being of a capital nature and taxed as such (at 22.4% for a company and 18% for a trust).

Image Rights – Capital or Revenue?

It is submitted that the distinction between capital and revenue is central to the taxation of image rights. As there is no statutory test to determine whether the accrual or receipt of image rights payments is capital or revenue in nature, one must turn to court decisions for guidance. However, it is submitted that there is a paucity of South Africa case law dealing specifically with the characterisation of image rights, thus we look at the various other court decisions where the courts were called upon to decide what constituted revenue and what constituted capital. South African courts have considered the issue of whether an amount is capital or revenue in several cases and have interpreted the concepts widely or restrictively depending on the facts of each case

In *Commissioner for Inland Revenue v Visser* [1937] TPD 77, 8 SATC 271, Maritz J confirmed (at 276) that the economic meaning of 'capital' and 'income' is mutually exclusive. The tests enunciated in a large number of decided cases in defining income

and capital is neither prescriptive nor comprehensive. They are merely guidelines and each case has to be decided on its own facts. Profits from the disposal of the taxpayer's assets may be either capital or income depending on the circumstances. Where a capital asset is disposed of at a profit, then the entire proceeds would remain capital. If the asset was realised in the ordinary course of the taxpayer's business or 'if it resulted from the productive use of capital to earn it', then the profits will be income.

Innes J stated in *Commissioner of Taxes v Booysens Estates Ltd*. (1918, A.D. 576) that 'income considered in relation to capital is revenue derived from capital productively employed'.

In the case of *CIR v Pick 'n Pay Employee Share Purchase Trust* 1992 (4) SA 39 (A) (54 SATC 271), the court developed the "profit making scheme" test. In terms of the background of the case, a trust was formed to provide shares to employees of Pick 'n Pay. The trust acquired shares at market value from the company and on-sold them to the employees on a continuous basis. Although it was not the trust's intention to make a profit from these transactions, as it had to sell the shares to the employees at a certain price, being market value on the date of sale, it did however make a profit. The court had to decide on whether the resultant profit was of a capital nature. By a majority decision, the court held (at 46) that the scheme of the trust was not to make a profit but to enable employees of Pick 'n Pay to acquire a shareholding in Pick 'n Pay without a capital outlay and at advantageous terms of payment. The decision was reached by the majority of the court interrogating whether the taxpayer objectively conducted a business and secondly whether the objective of the taxpayer was to make a profit. The first question is objectively determined whilst the second is purely subjective. The court held (at 11) that the profits were of a capital nature as the intention of the company that created the trust was not to operate to make a profit but the making of the profit was entirely 'fortuitous', or an incidental by-product.

The 'receipts or accruals bear the imprint of revenue if they are not fortuitous, but designedly sought for and worked for' (Meyerowitz and Spiro: 299). In applying this test one must consider the objectives of the taxpayer and 'what its purpose was or dominant purpose was'.

The court in *Visser v CIR* SATC 271 developed another test, using the analogy of the "fruit and the tree". Where an amount represents income from the disposal of an income producing asset, the amount will be of a capital nature. However, it is not of a capital nature where it represents the fruit of the tree. It was held (at 276) that 'income' is what 'capital' produces or put another way, the income is the "fruit" or interest and the capital is the "tree" or the principle. The distinction may be a useful guide when considering income

tax issues, but it is difficult to apply. What is considered a tree or the principal in the hands of one individual will be fruit or the interest in another's hand. Law journals, for example, would be considered a capital asset (tree) in the hands of a lawyer but will be considered a trade asset (fruit) in the hands of book shop. Thus in principle it is easy to see that the tree represents capital and the fruit represents income, but it is not always easy to determine when an amount represents the tree or when it represents the fruit (Olivier: 173).

In *BP Southern Africa (Pty) Ltd v CSARS* [2007] 69 SATC 79, the court considered the nature of expenditure and what would be allowable deductions. Payment made for the right to operate a business under a certain name was considered to be of a capital nature by the court *a quo*. The matter went on appeal where the Supreme Court of Appeal overturned the lower court's decision and held that the amount was not of a capital nature as it was 'more closely connected to the taxpayers income earning activities', meaning the fruit, rather than the 'income earning structure', the tree.

Amounts realised from the disposal of "fixed capital" is considered of a capital nature, but if the payment is from the disposal of a "floating capital" it is not considered to be of a capital nature (Olivier: 174). In order to better understand the distinction between fixed capital and floating capital, we look at the definition arrived at by the courts in decided cases. In *Commissioner for Inland Revenue v George Forest Timber Co Ltd* [1924] AD 516, it was held (at 23,24) that capital may be fixed or floating. The floating capital is used up and disappears in the course of production but fixed capital which produces fresh wealth, through the production process, remains intact. However, certain types of fixed assets, like depreciating assets, do need replacing from time to time. Machinery and equipment which wears out is an example of a depreciating asset and is not considered floating capital. According to Mason, J in *Stephen v Commissioner for Inland Revenue* [1919] WLD 1 32 SATC 54 (at 50) the two phrases have a meaning in both accountancy and in economics. For a trader, ordinary merchandise is floating capital which disappears as its being disposed or sold and the amount realised for it will be considered part of the ordinary revenue of the business. It could never have been intended that amounts received by a merchant, in the course of or as a result of trading, not to be part of his gross income.

In *Natal Estates Ltd v Secretary for Inland Revenue* [1975] (4) SA 177 (A), the taxpayer company purchased land for sugar cane farming in 1921. The company utilised the land for this purpose up until 1963. The company then decided to develop some of its farmland into townships. Consulting engineers, architects and town planners, were appointed to develop the townships and the company then sold the plots at a large profit. Inland Revenue considered the profits taxable in the hands of the company. The taxpayer,

however, argued that it was simply disposing of a capital asset to its best advantage. The court held (at 220) that the test to be applied was one of degree, which could be decided by considering all the relevant facts. 'In deciding whether a case is one of realizing a capital asset or of carrying on a business or embarking upon a scheme of selling land for profit, one must think one's way through all of the particular facts of each case. Important considerations include, inter alia, the intention of the owner, both at the time of buying the land and when selling it (for his intention may have changed in the interim); the objects of the owner, if a company; the activities of the owner in relation to his land up to the time of deciding to sell it in whole or in part; the light which such activities throw on the owner's ipse dixit as to intention; where the owner subdivides the land, the planning, extent, duration, nature, degree, organization and marketing operations of the enterprise; and the relationship of all this to the ordinary commercial concept of carrying on a business or embarking on a scheme for profit. Those considerations are not individually decisive and the list is not exhaustive. From the totality of the facts one enquires whether it can be said that the owner had crossed the Rubicon and gone over to the business, or embarked upon a scheme, of selling such land for profit, using the land as his stock-in-trade'. In applying this test, the court concluded that the scale and size of the development indicated that the company acquired the property as trading stock and had embarked on a profit making scheme by cutting up the land and selling off plots of land. It was considered that the profits made were income from trading and therefore taxable as gross income.

In trying to determine the intention of the taxpayer in the case of *Commissioner for Inland Revenue v Stott* [1928] AD 252, the court held (at 263) that the main reason why the property was originally acquired, or the intention of the taxpayer, is conclusive as to the nature of the payment received from the sale of the property unless there are other intervening factors which show that it was sold in pursuing a profit making scheme. The change of intention in itself, to dispose of an asset which had, up to that point, been held as a capital investment, does not make the ensuing profit liable to tax. The court goes on to state that 'something more is required to change the character of the asset' and make the proceeds gross income. It was further held that every person 'who invests his surplus funds in land or stock or any other asset is entitled to realise such asset to best advantage and to accommodate the asset to the exigencies of the market in which he is selling. The fact that he does so cannot alter what is an investment of capital into a trade or business for earning profits.'

In the case of *John Bell and Co (Pty) Ltd v Secretary for Inland Revenue* [1976] (4) SA 415 (A) (at 103), the court held (at 103) that a mere change of intention to dispose of an asset formerly held as a capital asset could not transform the proceeds from the subsequent sale of the asset into revenue. 'Something more is required in order to

metamorphose the character of the asset and so render its proceeds gross income'. As something additional had not taken place in order to change the character of the assets, the court held that the asset remained a capital asset, and the proceeds from the disposal were thus capital in nature.

In the case of *Californian Copper Syndicate v Internal Revenue* [1904] Sc (Court of Session) LR 691, the court stated (at 694) that it was settled law that if an investment is realised at a profit, that profit is not liable to income tax unless it was done as an act of really carrying on of a business. The proceeds from the sale of this type of property is usually considered a capital receipt and not liable to tax as trading profits.

In *Elandsheuwel Farming (Edms) Bpk v SBI* 1978 (1) SA 101 (A), 39 SATC 163, the court stated (at 181) that what is of great importance and is often decisive in these instances is the intention of the taxpayer at the time of acquiring the asset and at the time of disposing of same. Some of the other significant factors to be considered are: the actual activities of the taxpayer in relation to the asset in question and the manner in which it was disposed of; and the taxpayers other business operations and in the case of a company the objects of the company as stated in its memorandum of association.

The Supreme Court of Appeal in *Commissioner for the South African Revenue Service v Capstone 556 (Pty) Ltd* (20844/2014) [2016] ZASCA 2 (9 February 2016), had to decide whether the sale of shares by the taxpayer, Capstone 556 (Pty) Ltd, constituted revenue or was capital in nature.

Profurn, a company listed on the Johannesburg Stock Exchange, got into financial difficulties therefore First Rand and Steinhoff, two of its largest creditors, proposed a business rescue plan. As a result of the business rescue plan, a special purpose vehicle (Capstone 556 (Pty) Ltd) was incorporated and a number of financing transactions were concluded. A Memorandum of Understanding, that reflected what the parties had agreed upon as well as the agreements to be entered into to effect the business rescue plan, was signed by the taxpayer.

The taxpayer acquired shares in a company called JD Group Ltd as a result of the business rescue plans. After some time, the taxpayer sold the shares in JD Group Ltd, which realised a substantial profit. The taxpayer claimed the profits from the sale of the shares as taxable capital.

SARS taxed the proceeds from the sale of shares as ordinary income. In the Tax Court the taxation of the receipts as revenue was confirmed. The taxpayer then took the Tax Court decision to the High Court on appeal, where it was held that the proceeds were capital in nature. SARS then challenged these findings in the Supreme Court of Appeal.

In a thorough examination of the law, van der Merwe AJA, confirmed (at 24) the principle that any gain made by 'an operation of business in carrying out a scheme for profit-making' is considered income. Where the taxpayer might have had a mixed purpose in acquiring the asset, the dominant factor which induced the taxpayer to purchase the asset is to be determined. Accordingly not every asset acquired with a view to making a profit may be considered as revenue. The court referred to *Samril Investments (Pty) Ltd v Commissioner, South African Revenue Service* [2003] (1) SA 658 (SCA), where the court found that every receipt or accrual from the sale of a capital asset and 'designedly sought for with a view to the making of a profit', cannot automatically be considered to be revenue. Each case must be decided on its own facts.

van der Merwe AJA, thus found that the mere intention to profit is not conclusive. The taxpayer's use of his resources and skills to generate profits should, usually but not always, be of an on-going nature. The distinction between capital and revenue is often so blurred that the taxpayer is required to adduce evidence as to his intention when he first acquired the asset and at the time that he disposed of the asset. The taxpayer bears the onus of proof on the balance of probability about his intentions. In determining the reason for entering into the transaction, the sole concern is the aim of the taxpayer which is a question of fact to be determined by taking into consideration all the surrounding facts and circumstances.

The court relied on the evidence relating to the purpose of the parties and the credibility of the witness, which was considered of paramount importance, in arriving at a decision. The court found (at 52) that the sole purpose of acquiring the shares was to rescue the business with a long term investment of capital and the shares were not purchased as trading stock for resale at a profit.

In the case of *Stander v Commissioner for Inland Revenue*, 1997 (3) SA 617 (C) (59 SATC 212), the taxpayer was employed as a secretary cum bookkeeper by Frank Vos Motors which was a franchisee of Delta, a motor manufacturer and dealership. In recognition of his meticulous report writing for his employer (the reports were supplied to Delta) he received an award for excellence in financial management from Delta. The award was an overseas trip for two valued at R14 000. The taxpayer was not allowed to take the award in cash nor transfer it to anyone else. When the taxpayer and his wife return from the trip, he submitted his tax returns. Inland Revenue issued a revised assessment in which the value of the prize of R14 000 was assessed to tax as gross income. The taxpayer objected but it was disallowed. He then appealed to the Cape Special Court for Hearing Income Tax Appeals where his appeal was dismissed. The matter was then taken to the full bench of the Cape Provincial Division. The court noted that the taxpayer's employment with Frank Vos Motors was *sine qua non* to his receiving

the award. This however did not provide the causal link between his services to his employer, Frank Vos Motors, and him receiving the award. He had not sought the prize by entering a competition nor did he expect anything from Delta for his work for Frank Vos Motors. He had merely performed his normal duties for which he was remunerated by his employer. His performance which Delta considered excellent was what made him eligible for the prize.

The court had to decide whether the award was within the definition of gross income in terms of section 1 of the Income Tax Act 58 f 1962. It was common cause that the award was of a 'fortuitous nature', like an ordinary donation and, as it was of a capital nature, it did not fall within the ambit of 'gross income'. It was held that if the taxpayer could be assessed to tax, it would only be in terms of paragraph (c) of the definition of 'gross income' in section 1 of the Income Tax Act 58 of 1962. In order for it fall within this definition, the taxpayer must have received 'an amount which would include a voluntary award which would be in respect of services rendered or by virtue of an employment'. The court held (at 219) that the taxpayer, having gone on the trip, had not received any 'property' on which a monetary value could be placed in his hands. The trip was not a right which could be turned into money and it had no value in the taxpayer's hands. It was further held (at 220) that the trip was not in respect of services rendered as the taxpayer had rendered no services to the franchise dealer, Delta, but to his employer, Frank Vos Motors. Therefore the prize was not subject to tax and did not form part of taxpayer's gross income.

It would appear from the precedents set out in the cases above that our courts will take into consideration the surrounding facts, including the intention of the parties (the sportsperson, the sports club, and where applicable, the image rights company) and the circumstances under which the image rights payment was made when determining whether that amount is considered capital or revenue in the hands of the professional sportsperson and where applicable, the image rights company.

Substance over form (Anti-avoidance)

The sharp increase in a sportsperson's income, predominantly through endorsements and promotion of products and services, has led to several tax mitigation schemes entered into by sportspersons (Cloete, 2012: 559).

Professional sportspersons may establish an image rights company and separate the income received by virtue of employment (playing services) from that of income received from image rights (promotional services). This is done contractually between the sportsperson, the image rights company and the sports club. In order that the separation of promotional services from playing services are not considered as a scheme to avoid

taxation and accepted as a regular business arrangement, it is important that the sportsperson's profile as a player on the field and the value placed on his image is determined accurately. The value attributed to image rights must be proportionate to the sports persons on field value. (Cloete, 2012: 558). Clearly the sports person's skill and performance on field will have an impact on public perception of him and his popularity. It will either enhance or minimize the value of his image for companies who are willing to pay for its exploitation, for promotion of their goods and services.

SARS may seek to attack the proposed arrangements in terms of the common law doctrine of '*plus valet quod agitur quam quod simulate concipitur'*, also known as the "substance over form" doctrine, which translates 'what is actually done, is more important than that what seems to have been done'.

The application of the substance over form principle involves a consideration as to whether a transaction is in fact what it purports to be (the "form"), or whether it is a disguised transaction (the "substance"), and allows courts 'not to be deceived by the form of a transaction, but to render aside the veil in which the transaction is wrapped and examine its true nature and substance' (*Erf 3183/1 Ladysmith (Pty) Ltd v CIR* 1996 (3) SA 942 (A)).

South African courts determine the true nature of a transaction on the basis of the genuine intentions of the parties. If the parties to a transaction or transactions have a genuine intention to enter into the agreements and conclude on the basis of those intentions such that the written contracts accurately reflect their intentions, there is no dishonesty or simulation and there is no secret or tacit agreement or understanding which is at odds with the ostensible agreements, the contract must be interpreted by the court according to its tenor. Accordingly, in order to find an agreement to be simulated, there has to be a dishonesty (definitely ascertainable) to dress up and disguise the real intentions, so as to purport to the world, something which it is not (*Zandberg v Van Zyl* 1910 AD 302).

It is submitted that the question of whether simulation exists is a question of fact and no general rule can be laid down. All circumstances must be taken into account to ascertain the actual intentions of the parties. It is necessary to address the question whether the image rights arrangement (or any part thereof) does not serve a true commercial purpose, but is only for the purpose of achieving an object that allows the evasion of tax. South African courts considering this question will have regard to all the terms of the contracts, the surrounding circumstances and the intention of the parties in an endeavour to determine the true or real effect of the contracts.

As was stated by Watermayer JA in *Commissioner of Customs and Excise v Randles, Brothers and Hudson Ltd* 1941 AD 369 (at 395), a transaction is not necessarily a disguised transaction if it is devised for the purpose of avoiding a liability for tax. 'A transaction devised for that purpose, if the parties honestly intend it to have effect according to its tenor, is interpreted by the Courts according to its tenor, and then the only question is whether, so interpreted, it falls within or without the…tax'. Therefore provided there is nothing in the contracts themselves or in the surrounding circumstances which indicate an intention other than that suggested by the formal agreements it will not be possible in my view to apply the substance over form principles to the image rights arrangement.

The judgment in the *South African Revenue Services v NWK Limited* 2011 (2) SA 67 (SCA) case cast doubt on whether the "dishonesty" requirement had ceased to form part of our law in relation to "simulated transactions". Lewis JA expounded that if 'the purpose of the transaction is only to achieve an object that allows the evasion of tax or of a peremptory law, only then it will be regarded as simulated. And the mere fact that parties do perform in terms of the contract does not show that it is not simulated: the charade of performance is generally meant to give credence to their simulation.'

However, the Supreme Court of Appeal in the *Roshcon (Pty) Ltd v Anchor Auto Body Builders CC and Others* 2014 (4) SA 319 (SCA) and the *CSARS v Bosch* – 394/2014 [2014] ZASCA 171 cases have held that dishonesty remains a requirement in order for a determination to be made that a transaction is simulated. In the *Bosch* case, Wallis JA confirmed (at 40) that the 'submission [by the Commissioner] involved a misunderstanding of the judgment in *NWK* was pointed out in *Roshcon*. There I stressed that simulation is a question of the genuineness of the transaction under consideration. If it is genuine then it is not simulated, and if it is simulated then it is a dishonest transaction. The true position is that 'the court examines the transaction as a whole, including all surrounding circumstances, any unusual features of the transaction and the manner in which the parties intend to implement it, before determining in any particular case whether a transaction is simulated. Among these features will be the income tax consequences of the transaction. Tax evasion is of course impermissible and therefore, if a transaction is simulated, it may amount to tax evasion. But there is nothing impermissible about arranging one's affairs so as to minimise one's tax liability, in other words, in tax avoidance. If the revenue authorities regard any particular form of tax avoidance as undesirable they are free to amend the Act, as occurs annually, to close anything they regard as a loophole.'

Therefore it is submitted that, as long as the parties to the image rights arrangement, being the sportsperson, the sports club and the image rights company, intend the

consequences of the contracts entered into to give effect to that arrangement and do not intend there to be terms other than those set out in the contracts or some other unexpressed understanding, then the arrangement should not be seen to be simulated.

SARS Draft Guide

The South African Revenue Service ('SARS') recognizes that the professional sports industry is one of the fastest growing industries globally, with professional sportspersons earning revenue from diverse sources and often from different parts of the world. SARS recognises the need to explain the South African tax implications for both professional sportspersons as well as professional sports clubs. Therefore it published the SARS Draft Guide (SARS Draft Guide: 1) for public comment.

The SARS Draft Guide is a consolidation of the current South African tax legislation and how it applies to professional sportspersons and sports clubs in South Africa, as SARS interprets the position. It is a general guide and not an official publication, thus it is not binding and may not be used as authority in the same way a South African taxpayer is able to rely on a binding general ruling in accordance with Chapter 7 of the Tax Administration Act 28 of 2011. Although not binding, it is a starting point to remedy the lack of clarity and uncertainty regarding the taxation of South African professional sportspersons (Yazicioglu: 19).

The Income Tax Act 58 of 1962, or any other South African legislation for that matter, does not define an image right and does not specifically set out how an image right should be characterised for tax purposes. According to SARS, image rights are personal rights vested in the sportsman’s person and cannot be separated from the sportsperson, disposed of or sold to another person. (SARS Draft Guide: 29). SARS referred to *Income Tax Case* 1735 (64 SATC 455), where it was found that the payment received by the Appellant, for the use of his name and reputation to publicise the tournament, 'was not of a capital nature', and the monies formed part of his 'gross income', as defined in section 1 of the Income Tax Act 58 of 1962.

A professional sportsperson, in his capacity as employee of the sports club, receives a salary from the sports club for the provision of playing services. Naturally, as with any other form of salary paid in terms of an employer-employee relationship, the professional sportsperson’s salary is subject to employees’ tax in terms of the Fourth Schedule to the Income Tax Act 58 of 1962. The sports club is required to deduct employees’ tax from such remuneration (also referred to as pay-as-you-earn or PAYE), which it then pays over to SARS. It is SARS’ view, however, that the payments received by a professional sportsperson from a sports club in relation to his image rights should also be taxed as

remuneration for employees' tax purposes, as an employer-employee relationship exists between the club and the sports person (SARS Draft Guide: 29,30).

Payments for licencing agreements which involve the commercial exploitation of a sportsperson's image, endorsement fees and appearance fees will be treated as remuneration and thus forms part of the sportsperson's 'gross income' and is therefore taxable as income in the hands of the sportsperson. Although SARS does not recognise that a sportsperson has the ability to dispose of his image rights, in practice professional sportspersons in South Africa have "disposed of" their image rights which are either controlled by a third party image rights company or the sportspersons' agent. It is SARS' contention that employees' tax must be deducted from image rights payments irrespective of whether they are payments made to agents, companies owned by agents or to the players themselves (SARS Draft Guide: 30).

There must be an employer-employee relationship in order that employees' tax is deducted from gross receipts or accruals. In terms of paragraph 2(1) of the Fourth Schedule to the Income Tax Act, 58 of 1962, there are three requirements which must be met to qualify for this deduction at source. There must be remuneration for services performed or to be performed; there must be an employer; and there must be an employee. This excludes sportspersons who are not contracted to a sports club, like tennis players and golfers who are not employees of a sports club but independent contractors. The payment received by independent sportspersons from playing in sport tournaments, via independent contracts with the tournament organisers, also constitutes 'gross income' and subject to income tax in the hands of that independent sportsperson. Since there is no employer-employee relationship between the tournament organiser and the independent sports player, the receipt will not be considered 'remuneration' and is not subject to employees' tax. The independent sportsperson may deduct relevant expenditure incurred in the production of income which is laid out for the purposes of trade and is not of a capital nature (SARS Draft Guide: 26,27)

Professional sportspersons often receive payments in kind from sponsorship agreements in terms of which goods, services and funding is provided by the sponsor directly to the sportsperson in exchange for specific advertising and promotional services to the sponsor. The goods provided by the sponsor to the sportsperson include equipment, travel and transport, and clothing. A sponsor may specifically identify certain individual sportspersons for their marketability and valuable image. Since there is no employer-employee relationship between the sponsor and sportsperson, the sponsor does not withhold taxes from amounts paid to professional sports persons. The sportsperson must disclose all amounts received including the market value of the goods or services received from the sponsors in their personal income tax returns. Where the sponsor pays

the club in terms of a sponsorship contract, and the club pays a portion of the receipts to the sports person, the club is obliged to deduct employee's tax. Both cash and the market value of the goods and services received in a sponsorship arrangement will constitute gross income and subject to income tax in the hands of the sportsperson (SARS Draft Guide: 30,31).

An image rights company or a trust is considered to be a 'personal services provider' as defined in paragraph 1 of Fourth Schedule of the Income Tax Act, 58 of 1962, where a sportsperson, as a connected person to the image rights company or trust, provides services on behalf of that image rights company or trust. Any payment received by such image rights company is considered 'gross income' and is taxable as income tax. That image rights company is also considered an employee and subject to employees' tax (SARS Draft Guide: 3).

Foreign professional sportspersons

All foreign professional sportspersons who are not residents of South Africa (non-residents) are subject to tax in South Africa on their income from a source within South Africa (SARS *Tax Brochure for Non-Residents* (2012): 9).

Withholding tax for foreign professional sportspersons

Foreign sportspersons are taxed on earnings derived from 'specified activity' exercised in South Africa. The term 'specified activity' is defined under section 47A(b) of the Income Tax Act, 58 of 1962, as 'any personal activity exercised in the Republic or to be exercised by a person as an entertainer or sportsperson, whether alone or with any other person or persons'.

In terms of sections 47A to 47K of the Income Tax Act, 58 of 1962, earnings of a foreign sportsperson are subject to withholding tax at a flat rate of 15%, which is a final tax. Generally the foreign sportsperson is liable to pay the withholding tax, however, if a South African resident (tournament organiser) who is liable to pay the foreign sportsperson fails to deduct the withholding tax from payment to the foreign sportsperson, that resident will be personally liable to SARS for the withholding tax amount. This withholding tax must be deducted from image rights payments made to the foreign sportsperson for promotional activities as well as payments made to the foreign sportsperson from his playing services or professional services. The deduction of the withholding tax is subject to any reduction or exemption provided by the relevant double taxation agreement between South Africa and the home country of the foreign sportsperson.

Foreign sportspersons who are employed by South African resident employers, or who are physically present in South Africa for more than 183 days in total in a 12 month period will be subject to the normal tax on income from a South African source (SARS Draft Guide: 58).

Double taxation agreements

The South African government in terms of section 108(1) of the Income Tax Act, 58 of 1962, enters into double taxation agreements with other countries for purposes of the avoidance of double taxation and the prevention of fiscal evasion with respect to taxes on income. Double taxation agreements do not create taxing rights, but merely allows for the allocation of taxing rights between the two countries. The Income Tax Act, 58 of 1962, is the only legal instrument which may impose income tax in South Africa (Costa and Stack: 2014)

Double taxation agreements can either be comprehensive in covering several different types of income or restricted to cover only special types of income. Double taxation agreements provide relief from double taxation through the regulation of taxing rights. This is done through the agreement which will state how a contracting country will impose tax on income derived by residents of the other country. Depending on the actual agreement between the two countries, a double taxation agreement may reduce the withholding tax levied on specific types of income by a contracting country or even completely exempt certain persons from withholding tax levied on specific types of income. It is therefore pertinent for foreign sportspersons to accurately determine the type of income that they will receive from tournament organisers in return for the right to exploit their image during such tournaments (Mosupa: 2003)

Royalties

Royalty income includes income derived from the use, right of use or the grant of permission to use intellectual property such as patent rights, trademarks, and images, in South Africa (section 49A of the Income Tax Act, 58 of 1962). Historically, the source of royalty income was determined to be the place where the originator of the patent, trademark, copyright or image right applied his wits and labour (SARS *Tax Brochure for Non-Residents* (2012): 28).

As from the years of assessment commencing on or after 1 January 2012, the determination of the source of royalties will be based on the residence of the party paying the royalties (tournament organiser or sports equipment company). Therefore any focus on the party creating, devising or developing intellectual property (foreign sportsperson) is therefore removed. The source of the royalty payments will be deemed to be South Africa:

if the person paying the royalties is a South African resident; or where the intellectual property or image right will be used or applied in South Africa (SARS *Tax Brochure for Non-Residents* (2012): 28,29).

In the case of foreign sportspersons, royalty payments received for the use, or right of use of intellectual property (image rights) in South Africa, are subject to a final withholding tax of 15%, or such rate as determined in a relevant double taxation agreement (section 49B, read together with section 49E, of the Income Tax Act, 58 of 1962).

The withholding tax is levied on the gross amount of the royalty payment and is regarded as a final tax. No deductions are allowed against royalty income (SARS *Tax Brochure for Non-Residents* (2012): 29).

The person who incurs the liability to pay a royalty amount to a foreign sportsperson or who receives payment of such royalty on behalf of that foreign sportsperson must pay the withholding tax to SARS by the last day of the month following the month during which the liability is incurred or the royalty payment is received (section 49F of the Income Tax Act, 58 of 1962).

In *Income Tax Case* 1735 (64 SATC 455), the appellant, Nick Faldo, was a leading professional golfer and a resident of the United Kingdom. He competed in the Nedbank Million Dollar Golf Challenge in Sun City, South Africa. He contracted with Sun International (SA) Ltd, the organisers of the tournament, that he would receive a royalty payment of $100 000 in exchange for the right to exploit his "intellectual property" which included the right to use his likeness and biographical material and expect his presence at promotional events and media conferences and the use of video material of the tournament itself, to promote the tournament.

The appellant was assessed to tax for the full amount of $100 000 by SARS as income earned whilst in South Africa. He objected on the grounds that the payment was capital in nature and not part of his gross income as it had not been intended as payment for services rendered and therefore not income. He further protested that, in terms of section 35, read with section 9(1)(b) or (bA), of the Income Tax Act 58 of 1962, he ought to be taxed on only 30% of the amount as the balance should be apportioned to royalty payments for use of intellectual property, which was not taxable in South Africa in terms of Article 11 of the New Convention between the Government of the Republic of South Africa and the Government of the United Kingdom of Great Britain and Northern Ireland for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with respect to Taxes on Income and on Capital Gains, 31 January 2003 (the South Africa-United Kingdom Convention).

SARS rejected the appellant's objection, which was then appealed in terms of section 83 of the Income Tax Act, 58 of 1962. According to the appellant, the payment received by him was for the use of his intellectual property rights and not intended or worked for, but was a 'purely fortuitous' by-product of his agreeing to compete in the tournament and therefore capital in nature. Second, the payment was in respect of restraint of trade because he was not to participate in any other event for the duration of this tournament. If the payment was deemed to be a restraint of trade payment it would have to be taxed as capital and not income. Third, if the payment made to him was deemed to be part of his gross income, then it was income in terms of section 9(1)(b) of the Income Tax Act, 58 of 1962, as the right which he gave to Sun International were property or rights of a similar nature to patent, design or copyright referred to in section 9(1)(b) of the Income Tax Act, 58 of 1962. Finally, as the payment was royalty as per Article 11 of the South Africa-United Kingdom Convention, he was exempt from taxation in South Africa and only liable to taxation in United Kingdom.

The court held (at 459) that the payment was for the right to use the golfer's name, likeness and biographical material and for participating in promotional events and conferences. The money was therefore income in the ordinary sense and not capital. As the appellant agreed that his name and reputation, be used to promote the tournament, it was not fortuitous that he was paid the $100 000. By the use of his assets, that is, the applicant's name and reputation, he did not dispose of them and continued to have the assets after the tournament. The payment was therefore not capital but income which a professional golfer may expect to earn for taking part in a tournament that traded on the reputation of the participants. Thus it was part of his 'gross income' in terms of section1 of the Income Tax Act, 58 of 1962.

The restraint of trade argument failed since there was no evidence that the payment related to the appellant's undertaking that he was not to participate in any other event. Thus he failed to prove that payment was capital in nature.

The court rejected the argument (at 460) that if the payment formed part of his gross income, it was from use of his copyright in terms of section 9(1)(b) of the Income Tax Act, 58 of 1962, as they were similar to those which he had allowed the organisers to use. As there was no creative effort by the appellant in his name, likeness and biographical material, they were not similar to the rights listed in section 9(1)(b) of the Income Tax Act, 58 of 1962. Thus the full payment was taxable as 'gross income' in the hands of the appellant.

The Court considered (at 460) whether the payment fell within the ambit of Article 11 of the South Africa-United Kingdom Convention. Article 11 states that the payment of

royalties in one contracting country to a resident of the other contracting country will be exempt from taxation in the first contracting country. Article 13 states that income derived from professional services by a resident of one contracting country is subject to tax in that country unless he has a fixed base from which he conducts his activities in the other contracting country. In that case the part of the income which can be attributed to that fixed base will be taxed in the other contracting country. In terms of Article 15, income derived from the personal activities of entertainers and athletes may be taxed in the country where the activities were exercised.

The court found (at 462) that the payment was not royalties in terms of Article 11(2)(a) of the South Africa-United Kingdom Convention. The court stated that since the Income Tax Act, 58 of 1962 does not define copyright, the general meaning was the right which vests in a qualified author of an original work which enables him to prevent unauthorised copying of it. The author is not restricted to only the creator of the work but also includes the person responsible for the creation of the copyright work. The work must be created with skill and effort of the creator. The court found that the appellant did not provide any evidence that any of the items over which he alleged to have copyright were created by his skill or effort. He further failed to provide evidence that he was subject to tax in United Kingdom. Thus the payment did not fall within the terms of article 11 of the South Africa-United Kingdom Convention.

The Court considered (at 463) whether the payment was in respect of professional services and therefore fell within ambit of per Article 13 of the South Africa-United Kingdom Convention. It held that the appellant was not a professional publicist, as he only participated in promotional activity and did not provide professional services. Thus Article 15 of the South Africa-United Kingdom Convention did not apply to the services of the appellant (the court based their decision on the definition of professional by Black's Law Dictionary (7ed) as a person who belongs to a learned profession or whose occupation requires a high level of training or proficiency).

The respondent (SARS) applied Article 15 of the South Africa-United Kingdom Convention to the payment received and taxed the appellant accordingly. The appellant objected on the basis that a golfer is not an athlete as defined by the Concise Oxford Dictionary, which provides that an athlete is a competitor or skilled performer in physical exercises. The respondent argued that according to the Heritage Dictionary, an athlete is one who takes part in competitive sport, which the court found (at 464) corresponds to the modern ordinary meaning of an athlete and further, did not believe that the parties to the South Africa-United Kingdom Convention intended the meaning to be so impractical and limited. The court agreed that the appellant was correctly taxed in terms of Article 15 of the South Africa-United Kingdom Convention. This, however, was irrelevant as the

appellant was liable to tax in terms of the definition of 'gross income' under section 1 of the Income Tax Act, 58 of 1962 and as he failed to prove that he was liable to income tax in United Kingdom he was unable to rely on the South Africa-United Kingdom Convention.

A COMPARISON OF THE TAX TREATMENT OF IMAGE RIGHTS

The legal determination of an image right varies between the three countries being assessed. South Africa, like the United Kingdom, does not expressly recognise the concept of the right of publicity nor a sportsperson's right to protection from unauthorised use of their image or likeness. There is no specific statutory protection for the commercial exploitation of intellectual property rights which identify different aspects of a sportsperson's image or personality. The United Kingdom provides limited protection of personality rights through the common law tort of the right to privacy and a slightly wider protection through the common law tort of passing off. South African courts have attempted to provide protection to professional sportspersons through the common law principle of unfair competition. South Africa provides some protection against the infringement of registered trademarks and copyright, however, the statutory requirements is restrictive. The United States of America, however, recognise the inherent right of every sportsperson to control the commercial exploitation of their identity. Professional sportspersons in the United States of America have two options to protect their likeness from commercial exploitation. First, through its federal statutes regulating trademarks (the Lanham Act) which protects consumers from misrepresentations and misperception that a sportsperson endorses a product or service. Second, through the state "right of publicity" laws. Both of these provide protection in different areas so that where a claim for right of publicity is brought before the courts, if the Lanham Act is not applicable then the common law tort of right to privacy will cover the action.

The distinction between the different countries' approaches to image rights is important – South Africa and the United Kingdom recognises a negative right, that is, others are not permitted to infringe on that right. Whereas the United States of America recognises a positive right, being an intangible asset to be used like a trademark. This distinction shapes the commerciality of an image right in the hands of a professional sportsperson and as a result shapes the tax treatment as well.

Similarities

All three countries implement a tax regime based on a resident sportsperson's worldwide income. The receipt of income from employment, playing services and royalties from image rights are all treated as either gross income or earnings and taxable as such. Employees' tax or PAYE is deducted at source from income received from the sportsperson's employer in terms of an employer-employee relationship. Foreign sportspersons are taxed on a source basis in all three countries, and similarly rely on the

OECD Model Tax Convention when interpreting double taxation agreements between itself and the home country of the foreign sportsperson.

Differences

While the United States of America have a dual taxing regime (federal and state), South Africa and the United Kingdom have a single state taxing regime. This has a great impact on American professional sportspersons as they are required to pay "jock tax" in addition to the federal tax. Since both image rights payment and employment income are taxed as earnings in the United States of America, a sportsperson must pay a percentage of their total annual taxable income to the state in which they competed at a sports event or tournament.

Both the HMRC and SARS have promulgated legislation in order to deal with tax avoidance schemes involving personal service providers or personal service companies. Should a professional sportsperson make use of a personal service company to mitigate his tax liabilities (company tax rates are lower than individual tax rates), the British and South African tax authorities will deem any payment to that personal service company to be a payment to the sportsperson and the individual tax rate as well employees' tax will be payable on such payment. In the United States of America, however, no such distinction is made. Professional sportspersons are perfectly entitled to make us of a company or trust as a conduit in which image rights payments as well as employment income is received. That sportsperson will only be taxed in his personal capacity to the extent that he receives a distribution from the trust or a payment from the company.

Employees' tax is withheld on any image rights payments made to a sportsperson by a sports team in South Africa. Any payment made by a sports team (employer) to a professional sportsperson (employee) is automatically considered 'remuneration' by SARS. In the United States of America and the United Kingdom employees' tax is not automatically deducted from image rights payments made by a sports team to a professional sportsperson. Whether employees' tax is withheld is dependent on whether that image rights payment is made as a result of an employer-employee relationship. This determination is based on the factual position with emphasis placed on the terms and the wording of the employment contract or image rights agreement between the professional sportsperson and the sports team.

The biggest variance in the treatment of image rights amongst the three countries lies in the ability to assign, transfer or dispose of a sportsperson's image rights. As an image right is a positive right capable of identification, registration and protection in the United States of America, the Internal Revenue Service acknowledges that an image right has the capacity to be transferred, assigned and disposed of by a professional sportsperson.

Further, any proceeds received from the transfer, assignment or disposal will be taxed as income and not capital in the hands of the sportsperson. In the United Kingdom, the legislature does not recognise the concept of an image right, and is regarded as a negative right which is only capable of being protected if it is infringed. The HMRC is of the view that a professional sportsperson does not have the ability to transfer, assign or dispose of a stand-alone image right. The HMRC does however acknowledge that an image right which comprises a bundle of rights, which include goodwill, trademark, copyright and the right of passing-off, has the capacity of being transferred, assigned and disposed of. The disposal of the bundle of rights is subject to capital gains tax, however, any licensing payments received from the exploitation of that bundle of rights will be taxed as income. In South Africa, the tax authorities reject the notion that a professional sportsperson has the capacity to transfer, assign or dispose of his image rights. SARS are of the view that an image right is a personal right that vests in the sportsperson and cannot be separated from that sportsperson, and all payments received in connection with a sportsperson's image rights is considered income in his hands.

The final divergence between the three countries' tax treatment of image rights is in relation its treatment of foreign sportspersons. In the United States of America, with reference to the Retief Goosen and Sergio Garcia cases, foreign sportspersons are able to separate their income between the two income streams (promotional services and playing services). This has an impact on the foreign sportsperson's tax liability in the United States of America, as the relevant double taxation agreement between the foreign sportsperson's home country and the United States of America allows for reduced withholding tax rates on royalty payments derived from image rights and promotional services. Similarly in the United Kingdom a distinction is made between income generated by a foreign sportsperson from image rights or promotional services as opposed to playing services. Therefore a foreign sportsperson is able to rely upon the relevant double taxation agreement between his home country and the United Kingdom for reduced withholding tax rates on royalty payments. South Africa courts, with reference to the Nick Faldo case, do not acknowledge the concept of an image right and therefore reject the notion that a foreign sportsperson is able to separate the two income streams. All payments made to the foreign sportsperson for his appearance at a sports tournament in South Africa will be taxed as gross income and therefore will not be able to rely upon the relevant double taxation agreement between his home country and South Africa.

CONCLUSION

South Africa's gradual ostracism from the international sport arena began in the 1950s, and only ended in 1991 upon the release of Nelson Mandela from prison. As a result of the embargo, South African sports suffered tremendously from both a sporting perspective as well as an economic or commercial perspective (Emmett: 2013). It is submitted that the lack of fully developed image right laws and the taxation thereof is a direct consequence of South Africa's isolation from international sport. The lack of exposure to international sport led to a dearth of brand marketing, team sponsorships, and media coverage and broadcasting rights. Hence the legislature and SARS would have had no reason to develop specific image rights laws in South Africa.

It is submitted that sport and entertainment play an important role in the morale and psyche of a nation. And whilst South Africa recognises the commercial substance and economic reality in the modern world of professional sport, it must do more to join the international trend to keep its sport industry globally competitive, which will also stimulate the South African economy with spin-off benefits in media, marketing, attraction and enhancement of skills and athletes that will assist in growing the South African tax base. In order to achieve this result the following steps are proposed:

First, specific image rights legislation should be enacted in South Africa. Such legislation should ultimately define an image right and the asset class to which it belongs. The proposed new legislation should also provide parameters for the commercial use of image rights and confirm the methods of protection against the unauthorised use of image rights. In this regard it is submitted that South Africa should enact legislation similar to the United State of America's Lanham Act or the Bailiwick of Guernsey's Image Right Ordinance 2012, where an image right may be registered by a professional sportsperson where that sportsperson is able to prove that his image is distinct and has commercial value. The proposed image right legislation should closely follow the principles of trademark law, and be treated as property, as per the existing Trade Marks Act 194 of 1993.

Second, the existing tax legislation in South Africa should be adapted or expanded to cater for the proposed legally recognised image rights. If image rights are recognised as property, then a professional sportsperson, being the holder of an image right, will have the ability to transfer, assign or dispose of such image rights. In terms of the 'fruit and tree' principle established in the *Visser v CIR* SATC 271 case, the image right is the 'tree' and the royalties or image rights payments are the 'fruit'. In terms of the fixed capital versus floating capital concept defined in the *Commissioner for Inland Revenue v George Forest Timber Co Ltd* [1924] AD 516 case, the image right is fixed capital as it is not a

diminishing asset and its value is not reduced with each use. Therefore an image right should be treated as a capital asset in the hands of the professional sportsperson. Accordingly any disposal of an image right by a professional sportsperson should be treated in terms of the capital gains tax provisions set out in section 26A and the Eighth Schedule to the Income Tax Act 58 of 1962.

Third, in the instance where a professional sportsperson assigns or licenses his image rights to a third party, whether it is an image rights company or the sports club that he is contracted to, the image rights payments, royalties or license fees received in relation to the exploitation of those image rights will form part of the 'gross income' of that sportsperson or his image rights company. However, employees' tax should not be deductible on such payments. As explained in SARS *Interpretation Note No. 17* (2010), the deduction of employees' tax is dependent on three elements, namely, an employer, an employee and the payment of remuneration. All three elements are defined in the Fourth Schedule. Employees' tax cannot be charged where one or more of these three elements are not present. If, for example, an 'employee' is removed from the equation, the person paying the remuneration has no responsibility to deduct employees' tax. Similarly, if the term 'remuneration' is removed from the equation, no employees' tax liability arises.

Fourth, there should be commercial justification for the separation of payments relating to the performance of the duties of employment and that of promotional services. Ideally the professional sportsperson should enter into two separate contracts with the sports club, a standard employment contract and an image rights contract. Should it not be possible to enter into two separate contracts, there should be a distinction between the terms of employment and the terms relating to the sportsperson's image rights, each reflecting commercial reality.

Fifth, where image right payments are made by the sports club to the professional sportsperson in terms of an image rights contract separate from the standard employment contract, such image rights payment to a professional sportsperson should not reflect as 'remuneration' (in terms of the source codes reflected on the IRP5 Certificates) to allow the professional sportsperson to claim direct expenditure incurred in terms of the image rights income received.

Sixth, foreign professional sportspersons (South African non-residents) should entitled to differentiate between income earned in South Africa from professional or playing services and income earned from image rights payments. If image rights were legally recognised in South Africa, the courts findings in *Income Tax Case* 1735 (64 SATC 455) would be set aside. The interpretation of British and American courts in *Agassi v Robinson (Inspector of Taxes)* [2006] UKHL 23, and *Retief Goosen v Internal Revenue Service* 136 T.C. No.

21 (2011) and *Sergio Garcia v Commissioner of Internal Revenue*, 140 T.C. No. 6 (March 14, 2013) should be followed by South African courts. Income earned in South Africa should be equitably apportioned between playing services and image rights payments. Image rights payments will be deemed to be royalties and subject to a reduced tax rate in terms of the relevant double taxation agreement between South Africa and the home country of the professional sportsperson in question. Failure to do so would ensure that South African sports tournaments will not entice the highest ranking international sports stars. This will in turn result in a loss of revenue for the South African sports tournament and the South African economy at large, as the premium international sports stars draws larger crowds, positively impacts on the country's tourism, brand and marketing revenue, and broadcasting revenue.

Finally, clarity of tax policy in this area will greatly reduce disputes and managerial time in resolving them to the benefit of the taxpayer (professional sportsperson) and SARS. As long as image rights, and the taxation thereof, is not regulated by specific tax legislation in South Africa, it will be difficult for SARS to hold professional sportspersons and sports clubs to account for their taxes and will need to rely on the individual sportsperson and sports club to accurately and honestly identify the tax consequences in their annual tax returns. Further, the enactment of specific image rights legislation and the expansion of the existing taxation laws will provide South African sportspersons and sports clubs certainty in its tax treatment and should have a positive effect on the sportspersons' and sports clubs' reporting in their annual tax returns.

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6.5 **Statutes**

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- Income Tax Act 58 of 1962
- Merchandise Marks Amendment Act 61 of 2002
- Safety at Sports and Recreational Events Act 2 of 2010
- Tax Administration Act 28 of 2011
- Trade Marks Act 194 of 1993
- 2010 FIFA World Cup South Africa Special Measures Act 12 of 2006
- New Convention between the Government of the Republic of South Africa and the Government of the United Kingdom of Great Britain and Northern Ireland for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with respect to Taxes on Income and on Capital Gains, 31 January 2003

United Kingdom

- British Code of Advertising, Sales Promotion and Direct Marketing
- Copyright, Designs and Patents Act of 1988
- Data Protection Act of 1998

- Defamation Act of 1952
- Defamation Act of 1996
- Finance Act of 2013
- Human Rights Act 1998 (Designated Derogation) Order 2001
- Income Tax Act of 2007
- Income Tax (Earnings and Pensions) Act of 2003
- Income Tax (Trading and Other Income) Act of 2005
- Private International Law (Miscellaneous Provisions) Act of 1995
- Social Security Contributions and Benefits Act of 1992
- Taxation of Chargeable Gains Act of 1992
- Taxes Management Act of 1970
- Trade Marks Act of 1994

The United States of America

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- Constitution of the United States of America 1787
- Convention between the United States of America and the Swiss Confederation for the Avoidance of Double Taxation with respect to Taxes on Income, October 2,1996
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- Internal Revenue Code of 1986
- Trademark Act of 1946

Other

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- *Californian Copper Syndicate v Internal Revenue* [1904] Sc (Court of Session) LR 691
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- *Caxton Ltd. and Others v Reeva Forman (Pty) Ltd.* and Another (393/88) [1990] ZASCA 47; 1990 (3) SA 547 (AD)
- *CIR v Kuttel* [1992] (3) SA 242 (A), 54 SATC 298
- *CIR v Pick 'n Pay Employee Share Purchase Trust* 1992 (4) SA 39 (A) (54 SATC 271)
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- *Commissioner of Customs and Excise v Randles, Brothers and Hudson Ltd* 1941 AD 369
- *Commissioner for Inland Revenue v Butcher Brothers (Pty) Ltd* (1945) AD 301, 13 SATC 21
- *Commissioner for Inland Revenue v George Forest Timber Co Ltd* [1924] AD 516
- *Commissioner for Inland Revenue v Delfos* [1933] AD 242, 6 SATC 92
- *Commissioner for Inland Revenue v Stott* [1928] AD 252
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- *Commissioner for the South African Revenue Service v Capstone 556 (Pty) Ltd* (20844/2014) [2016] ZASCA 2 (9 February 2016)
- *Commissioner, SARS v Brummeria Renaissance (Pty) Ltd* [2007] (6) SA 601 (SCA), 69 SATC 205
- *Commissioner of Taxes v Booysens Estates Ltd*. (1918, A.D. 576)
- *CSARS v Bosch* – 394/2014 [2014] ZASCA 171
- *Elandsheuwel Farming (Edms) Bpk v Sekretaris van Binnelandse Inkomste* [1978] (1) SA 101 (A), 39 SATC 163
- *Erf 3183/1 Ladysmith (Pty) Ltd v CIR* 1996 (3) SA 942 (A)
- *Federation Internationale de Football Association (FIFA) and others v Bartlett and Others* 1994 (4) SA 722. (T)
- *Financial Mail (Pty) Ltd. and Others v Sage Holdings Ltd. and Another* (612/90) [1993] ZASCA 3; 1993 (2) SA 451 (AD)
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- *Grütter v Lombard and Another* (628/05) [2007] ZASCA 2
- *H v COT* [1960] 2 SA 695 (SR); 23 SATC 292
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- *ITC 1170* [1971] 34 SATC 76
- *John Bell and Co (Pty) Ltd v Secretary for Inland Revenue* [1976] (4) SA 415 (A)
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- *Moroka Swallows Football Club Limited v The Birds Football Club and Others* [1987] (2) SA 511 (W) at 531E-G
- *Natal Estates Ltd v Secretary for Inland Revenue* [1975] (4) SA 177 (A)
- *O'Keeffe v Argus Printing and Publishing Co. Ltd* [1954] 3 SA 244(C)
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- *Society of Lloyds v Price; Society of Lloyd's v Lee* (327/05) [2006] ZASCA 88; [2006] SCA 87 (RSA)
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- *Douglas v Hello! Ltd* [2005] EWCA Civ 595
- *Du Boulay v Du Boulay* (1869) LR 2 PC 430
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- *Heaton v Bell* [1969] 46 TC 211
- *HMRC v Portsmouth City Football Club Ltd* (2010) EWHC 2013 (Ch)
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- *Irvine and Another v Talksport Ltd* [2002] EWHC 367 (Ch)
- *Jarrold v Boustead* [1964] 3 All ER 76, 80, 41 TC 701, 729
- *Levene v Inland Revenue Commissioner* [1928] ALL ER Rep. 746 (HL)
- *Lyngstad v Anabas products and Another* [1977] FSR 62 (Eng)
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- *Shilton v Wilmshurst* [1990] STC 55, 64 TC 78
- *Sports Club, Evelyn and Jocelyn v Inspector of Taxes* [2000] STC (SCD) 443
- *Trolley v J.S. Fry and Sons Ltd*, [1931] All ER131
- *Weight v Salmon* (1935) 19 TC 174
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- *Abdul-Jabbar v GMC* 85 F. 3d 407, 413-414 (9th Cir.1996)
- *Brown v. Electronic Arts, Inc* (9th Cir.2013)

- *Cardtoons LLC v Major League Baseball Players' Association,* 95 F. 3d 959 (10th Cir. 1996)
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- *Eick v Perk Dog Food Co.,* 347 Ill. App. 293, 106 N.E. 2d 742 (1952)
- *Estate of Andrews v United States*, 804 F. Supp. 820 (E.D. Va. 1992)
- *Griswold v Connecticut,* 381 U.S. 479 (1965)
- *Haelan Laboratories, Inc. v. Topps Chewing Gum, Inc,* 202 F.2d 866 (2d Cir. 1953)
- *Kolovrat v Oregon*, 366 U.S. 187, 194 (1961)
- *Kramer v Commissioner of Internal Revenue*, 80 T.C. 768 (1983)
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- *Sierra Club v Commissioner of Internal Revenue,* T.C. Memo 1999-86 (March 23, 1999)

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