# INTERNATIONAL SPORTSPLAYERS: DEALING WITH PLAYERS COMING TO THE UNITED KINGDOM

## Explanation

The United Kingdom ("UK") attracts sportsplayers on two separate bases: first, a "long term basis" – say on contracts for one year or more a typical example being a Premier League footballer; secondly on a "short term basis" – such as a tennis player coming for the Wimbledon fortnight.

The UK tax authorities (Her Majesty's Revenue & Customs – "HMRC") have hardened against sportsplayers here on either basis. The purpose of this article is to describe how the UK tax system operates in practice in respect of these two bases and to show how to avoid triggering unnecessary overpayments of tax.

## New rules of residence

A new statutory residence test was introduced with effect from 6th April 2013. These rules are lengthy and can be found at FA 2013 Schedule 45. The rationale is the rules should produce certainty, unlike the previous position governed by common law (*practice by reference to case law precedent*) where there was no statutory definition of residence. The new *statutory* residence test, by contrast, has been to introduce a *codified* system, including a clear description of residence, which is intended to be conclusive.

The new test produces immediate benefits. For example, I recently advised a footballer who was leaving the UK to play abroad. His transfer took place during one summer, in the UK tax year which runs from 6th April to the following 5th April.

The footballer, when he left the UK, was therefore part the way through the UK tax year but he would not become resident in his new jurisdiction until the 1st January 2014 where the calendar year was the tax year. So there was a gap during which he was neither UK resident nor resident in his "destination country". Accordingly, he disposed of his image rights tax free in this interim period, where there was no tax charge in either jurisdiction. The point the writer is making is that the new UK residence rules have introduced a statutory "split year" rule which clarifies the position; split year treatment before was *concessionary* only. See *R v. HMIT ex parte Fulford Dobson* (60 TC 168).

**Long term basis**

Let us now consider a footballer from outside the UK who has signed up for an English Premier League football team. Typically, he will sign a contract for three years and he will settle in the UK taking accommodation in the UK and probably moving his family here too. There will be little doubt, of course, that he will be resident in the UK for tax purposes as soon as he arrives here.

*Check timing*

Perhaps we had better just pause here because, on reflection, the position is not so simple. The writer has experience of footballers arriving in the United Kingdom without having completed the various tax steps they should have done. For example, perhaps they have not assigned their image rights abroad. Advisers who are in this situation should check whether, therefore, the particular individual has definitely arrived in the UK. This is a question of fact and cannot be contrived: a footballer has either arrived or he has not. Nevertheless, usually, footballers are required to undertake medicals and it may be that their taking up a position in the UK is *conditional* upon a satisfactory medical test. Consequently, a footballer may not have *formally* arrived here for the time being. This was certainly a possibility under the common law test which had application prior to 6th April 2013. Also, of course, the new statutory residence test, in addition to having a split year rule, also has a specific day count and therefore it may be possible to argue that an individual does not become UK resident for a little while. This again will be a question of fact and will be more difficult for footballers who arrive in the summer or winter transfer windows because there will still be many days left in the tax year. But, for others, an arrival near the end of a UK tax year may mean that an individual does not become resident for that year.

*Domicile*

Having looked briefly at tax residence, perhaps more important is the

concept of domicile. Typically, a footballer coming to the UK will retain his foreign domicile even though he becomes UK tax resident. The concept of domicile is key in UK tax law and foreign domiciliaries (such as foreign footballers) have a great tax advantage over their local counterparts. With the exception of inheritance tax where, in addition to the general law, there is a codified ("deemed") law, all relevant taxes (including income tax and capital gains tax) are subject to the general law of domicile. An individual, broadly speaking, acquires a domicile of origin when he is born. Under UK law, if he is born to married parents, his domicile of origin will be that of his father. Otherwise, it will be the domicile of his mother. Let us assume that an Italian footballer with an Italian domicile of origin arrives in the United Kingdom. He will quickly acquire a UK residence but his Italian domicile will remain. To the extent that he has income which arises outside the UK and/or capital gains which arise outside the UK, he will not pay UK income tax or UK capital gains tax in respect of that income or those capital gains tax unless and until he "remits" money representing the income or the capital gains into the UK. The rules are complicated and advisers would need to have regard to the Income Tax Act 2007, Part 14, starting to read at s.809A, but the key to the planning in this area, where possible, is to ensure that our Italian footballer retains his foreign domicile entitling him to utilise the remittance basis. When he subsequently leaves the UK then, from a UK point of view, the relevant income and gains could be paid to him abroad, UK tax-free, even if they have been earnt whilst he was playing football in the UK provided that they do not relate *directly* to his playing career.

It is this ability to claim the remittance basis which explains why so much structuring for foreign sportsplayers is on the basis of splitting out foreign income and foreign gains into one vehicle and keeping them separate from UK income and UK gains. This enables the remittance basis to apply.

*Image rights*

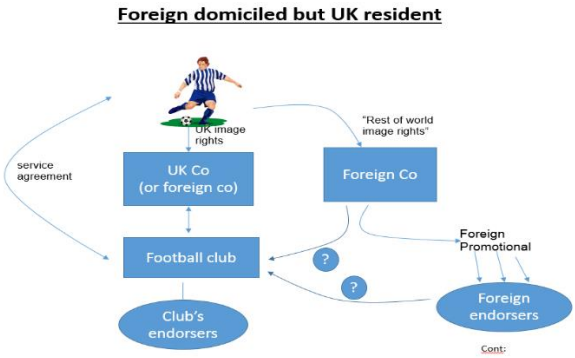
The area where "splitting" which has most application is in the area of image rights. This is because when image rights are first disposed of by the footballer (and acquired by an image rights company) there will typically be a capital event and if that produces a capital gain then it will be important (from a UK point of view) that the transaction takes place abroad and all the consideration remains abroad. Equally, to the extent that these are *foreign* image rights (non-UK image rights) it will be important that any royalty income arises abroad and stays abroad.

HMRC have, in the last two or three years, undertaken extensive investigations of most UK Premier League football clubs to ensure the amounts stated paid to footballers for their image rights are not "disguised salary payments". In the writer's experience HMRC have been reasonably successful in arguing that 40% to 60% of the amounts paid for image rights by a UK Premier League football club to footballers arriving in the UK are, in fact, salary and therefore taxed as income. It is to be noted that even after HMRC have reached agreement with a club they will still investigate the player himself in relation to the same arrangement.

*Typical structure*

This therefore brings us to a typical structure in relation to a foreign footballer. In the writer's experience this sort of structure is not easy to implement because when a footballer is negotiating with his club, everything moves quickly and the ideal requirements of the structure are overlooked.

**Figure 1 – a typical structure – foreign domiciled UK resident footballer**




**Explanation**

Here a foreign-domiciled footballer has arrived and become UK resident. Previously he set up two separate companies to acquire his image rights: one for UK image rights and the other for the rest of the world image rights. Typically, when he enters into his service agreement with the football club, the two companies will also enter into image rights arrangements with the football club. Obviously, in most situations, the football club will want both his UK image rights and his foreign image rights. To the extent that they acquire his foreign image rights then the position will be that royalties that are paid into the football

club from foreign sponsors will automatically become UK-situs payments and therefore difficult to protect from UK tax. Accordingly, the writer has sought to see whether it is possible for football clubs to have overseas subsidiaries dealing with overseas activities on the basis, foreign endorsers can contract directly with the football club's foreign subsidiary. In the structure plan above, the writer has shown this possibility with question marks. Typically, however, the position is that if the footballer has enough "clout" he will already have his own overseas endorsers which he can keep outside the UK element of the structure (and not involve the club). Anyway, it can be seen that in a perfect world the footballer's rest of the world image rights are retained abroad and the foreign endorsers make the payments abroad into the foreign company and the amounts are then not remitted into the UK.

*Points to observe*

There are some more points to be mindful of, as follows.

*Avoid a single agreement*

Often there is one single agreement with the club relating to both UK and foreign image rights so all of the foreign rights become UK situs rights, which means that the benefits of remittance planning may be lost.

*Watch trading*

The next question is whether the structure means, as an unintended

consequence, that the footballer becomes *a trader* in the United Kingdom. We will see that in the main relevant tax case (*Sports Club*) the footballers there avoided this problem by careful structuring and were not held to be traders themselves, but were passive receipients of image rights.

*Three pieces of tax legislation*

Finally, there are three particular pieces of UK tax legislation which we will need to look at in relation to structures for players who become UK resident. These are:-

- s.720 TIA 2007 (*transfer of assets abroad*)
- s.776 ITA 2007 (*sale of occupation income*)
- s.809AZA ITA 2007 (*transfer of income streams*).

We will revert to these shortly.

*Creating the structure*

At the outset the footballer's advisers should make sure that any disposals of image rights into companies take place before he becomes UK tax resident.

The footballer will split his image rights into UK image rights which go into one company and rest of the world rights which go into another. The next step is to sign up with the football club pursuant to the standard English Football

Association contract. That has provisions relating to image rights and therefore it may be necessary to check carefully, particularly in relation to high profile footballers, how image rights are meant to pass or be withheld. It may be necessary to vary the standard terms of the contract.

After that, there will be negotiations between the image rights company on the one hand and the football club on the other by which the football club may pay a lump sum for the various image rights. To the extent that there are two separate companies, one for UK image rights and one for abroad, one would expect there to be two separate payments.

*The Sports Club case*

The principal UK case in relation to image rights is *Sports Club plc v. Inspector of Taxes* [2000] STC (SCD) 443. Although this case is anonymised, the index in Tolley's Tax Cases 2011 shows the players to be Denis Bergkamp and David Platt, and it has relevance to them when they joined Arsenal in the mid-1990s.

*What are image rights?*

Before we look at the case, nevertheless, we need a definition of image rights. A typical clause in an image rights contract will be by reference to the following issues:- name; likeness; image; photograph; signature; initials; reputation; and personal characteristics.

Nevertheless, the law is developing and certainly from a UK standpoint is still to be properly tested in relation to their treatment as a matter of UK tax law.

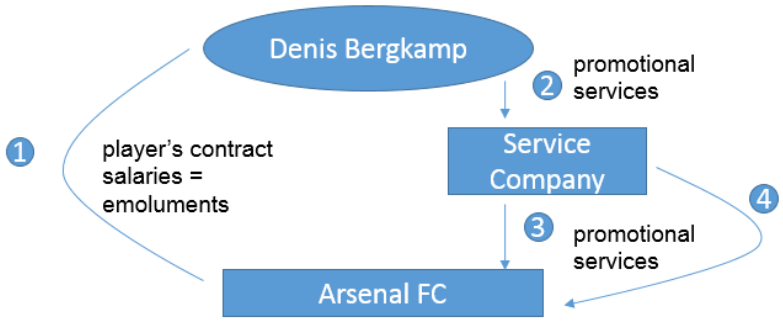
In the *Sports Club* case, which is admittedly some years ago, the judges decided to avoid using the expression "image rights agreements". Indeed, at paragraph 8 of the decision we find the following:-

> "8. During the hearing, and in the documents, the promotional agreements were sometimes referred to as "image rights agreements". As it was agreed that in England there is no property in a person's image we do not find the expression "image rights agreement" as being sufficiently descriptive of the contents of the agreement in issue in this appeal. As the agreements concern promotion, publicity, marketing and advertising we refer to them as promotional agreements except where the context requires a reference to image rights."

Nevertheless, in a later case Eddie Irvine, the motor racing driver, sued Talksport, a UK radio company (*Irvine & Another v. Talksport Limited* [2003] BCD 140302770 (CA)). This was on the basis that Talksport had used his image without permission and had made it look as if he was listening to and endorsing the station. The UK court protected his right to capitalise on his reputation by exploiting his image right. Therefore, this is an indication, since the *Sports Club* case, that the notion of image rights is developing and recognised as a legal matter.

*Back to Sports Club*

The following diagram is based on the *Sports Club* case:




The questions which arose were in relation to the arrangements shown at (3) and (4).

The first question was whether the payments at (3) and (4) were wages.

Next, the question was whether they were instead some sort of benefit in kind.

And finally, the question was whether they amounted to some sort of payment of pension or retirement benefits.

The court held that the so-called promotional and consultancy agreements were for full consideration and therefore not wages.

They were not benefits in kind as the payments did not arise by reason of employment: they arose by reference to the separate commercial contracts to provide commercial consultancy services. Anyway, no benefit was provided since actual consideration was given for the payments and if anything the

benefits were provided *back* to the company in question, rather than being received. As to whether they were pension payments or payments in relation to retirement benefit schemes it was held that they simply were not. This case is accordingly helpful.

In addition, although the judges were reluctant to try and identify specific image rights, they did say the following:-

> "Image rights [are] (1) the ability to make money out of contracting with companies to do things for them and (2) [are] an opportunity to make money out of the fact that one [is] very well known." (paragraph 78)

Care was taken, in the structure, to allow Denis Bergkamp to be contracted to assist in helping with the image rights as part of the arrangement. See (3) and (4) above. The writer makes this point because often HMRC will contend that a footballer simply assists with his image rights not by reference to any particular contractual term but as a trader in the UK. This "brings" the receipts into UK tax as trading income.

*Transfer of assets abroad legislation*

We now look at the first of the three main tax areas highlighted above which HMRC will typically investigate when looking at a foreign footballer (or some other athlete) who becomes UK resident and has overseas income and gains.

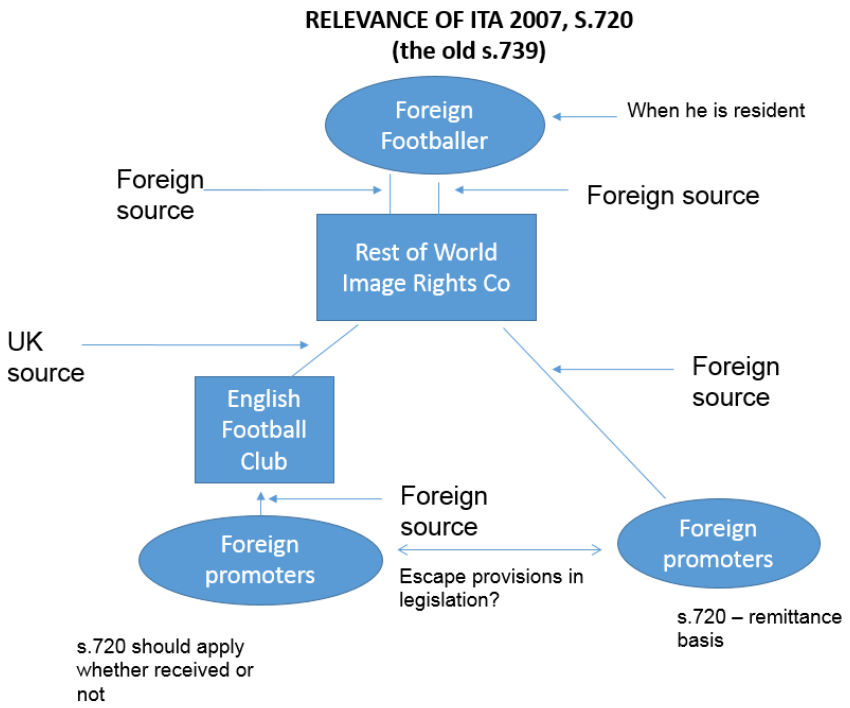
*ITA 2007 s.720 (transfer of assets abroad)*

This and the following sections should be carefully considered by readers. They can be described as being long standing anti-avoidance provision bringing overseas income into charge in the hands of UK residents. Subject to what follows, if there is foreign income and an individual has a (widely) defined power to enjoy that income in any circumstances whatsoever, he will be taxed on that income, whether he gets it or not unless:-

(a) "the escape provisions" apply; or

(b) the income is foreign and the individual is non-domiciled.

I now set out a relevant structure in relation to this problem:-

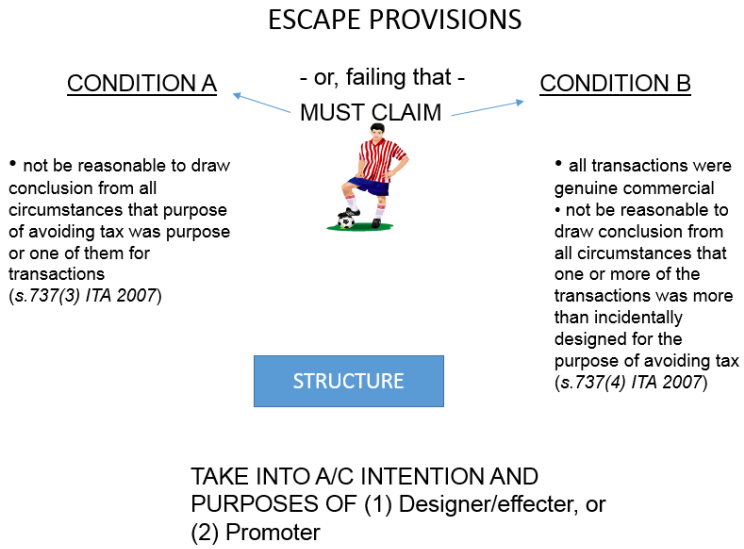


The left hand side of the diagram is looking at a typical situation where the footballer has some UK-source income and on the right hand side it is looking at a separate situation where the only income is foreign source.

Dealing with the left hand side of the diagram, we see that we are automatically within problems because we have UK-source income and (looking at the relevant test within the legislation itself) we can see that the individual is entitled to the income which arises to that side of the structure because he has (to use the technical expression) a "power to enjoy" the income.

If we look at the right hand side of the diagram we see that this individual has his own standalone foreign endorsement arrangements and these do not at any time produce income which comes into the United Kingdom. On this basis, a non-domiciled individual will not be subject to s.720 tax except and until money representing that foreign source royalty income is paid to him within the UK. In other words, he is on the remittance basis.

The next diagram shows how the escape provisions operate.




Again, these are complicated and probably only of relevance (missing out a lot) if there is UK source income somewhere in the structure which the (non-domiciled) individual does not receive in the UK. The individual must satisfy either Condition A or Condition B within the legislation. Condition A is that it would not be reasonable to draw the conclusion from all circumstances that the purpose of avoiding tax was the purpose or one of the purposes of the transactions (ITA 2007 s.737(3)). Alternatively, Condition B is that all the transactions were genuinely commercial and it would not be reasonable to draw the conclusion from all the circumstances that one or more of the transactions was more than incidentally designed for the purpose of avoiding tax (ITA 2007 s.737(4)). In relation to all of these things one has to take into account the intention and the purpose of the designer and the promoter.

A commercial transaction must be effected:-

(a) in the course of a trade or business and for its purposes, or

(b) with a view to setting up or commencing a trade or business and for its purposes.

The transaction must not be:-

(a) on "non-commercial/non arm's length" terms; or

(b) a transaction that arm's length persons would not have done.

So you can see that the escape provisions are difficult, but by no means impossible, to achieve. The writer is aware that there are image rights agencies that are based in tax havens. It may be possible to successfully argue that the particular sportsplayer has used these image rights experts not because they are based in a tax haven but because (as can be demonstrated) they are amongst the best image rights agents in the world: so the escape provisions apply.

*Sale of occupation income*

The position in relation to the sale of occupation income rules (our next piece of tax legislation) is as follows. The first point to observe is the legislation is found in ITA 2007 Part 13 Chapter 4, starting to read at s.773. It came about, apparently, in the 1960s successful pop groups were selling their future income for a capital sum to take the income outside the extraordinarily high rates of tax which the UK authorities then imposed. To stop this, the rules (which are preserved in s.773 etc.) are, broadly speaking, that if an individual receives a

capital sum (which has a specific meaning) and (summarising) the reality is that this is in respect of income then the capital sum will be taxed as income.

The starting point (see s.773) is that income is only treated as arising under the anti-avoidance provisions if:-

(a) transactions are effected or arrangements made to exploit the earning capacity of an individual in an occupation; and

(b) the main object or one of the main objects of the transactions or arrangements is the avoidance or reduction of liability to income tax.

In the situation under review, it may be argued that image rights arrangements are entirely commercial: it makes sense for limited liability to be given to footballers in respect of image rights and it makes sense for one-off payments to be made in respect of those rights. On that basis, it may be possible successfully to argue that the sales of occupation income rules do not apply in the first place: no tax avoidance. Nevertheless, this is an area which needs careful consideration.

*Transfer of income streams*

The final attack which HMRC have begun to implement is pursuant to the UK transfer of income streams rules found in ITA 2007 s.809AZA.

These apply where a person who is within the charge to income tax transfers a right to relevant receipts but it does not apply where the recipient also receives the asset itself from which the receipts emanate. In other words, you are only caught if you are really shifting the right to income from you to another person. If you transfer the apparatus by which that income can be earned as well, then you are not taxed.

This is why care must be taken to ensure that when the image rights are sold they are sold "lock, stock and barrel" and it is not the case that just the income is transferred. But this needs care too.

**Short term basis**

The position concerning short term basis sportsplayers (such as golfers in the UK for the British Open) is different from the above. The background is that in the 1980s foreign sportsplayers and foreign entertainers would come to the UK for one-off events such as tennis tournaments or rock concerts. Under the then law, the individual was not obliged to pay income tax for that year only in the following year by reference to the so-called preceding year basis. So, missing a lot out, in year 2 the tax would be computed by reference to the income earnt in year 1. This of course produced problems because often the tennis player or the rock band were not in the UK in Year 2. In addition, there were issues as to whether there really was a trade being carried on in the UK. Accordingly, new legislation provided, together with regulations, that in these circumstances the individual was treated as trading in the UK on what was called a "current year

basis". In other words, if, let us say, a tennis player came to the UK then any money that he made in the UK in relation to that visit would be taxed on him once and for all.

What has happened since that time is that there has been an extraordinary growth in earnings not directly related to the playing of the sport or the provision of a rock concert but by reference to sponsorship income. If you take what is called the "Agassi problem" you find that a tennis player may earn a good amount of winnings in a year but will earn significantly more by reference to worldwide endorsements. The question then arises as to how much of those worldwide endorsements should be treated as subject to UK tax for the (short) period in which the individual plays tennis or performs the rock concert or plays golf in the UK.

The legislation is scattered but can be found principally in ITTOIA 2005 s.13, ITA 2007 s.965 and the Income Tax (Entertainers and Sportsmen) Regulations 1987. By reference to ITTOIA 2005 s.13 the visiting performer must be performing a *relevant activity* in the UK. We will come back to the definition of "relevant activity" in a minute because it is crucial.

The second point is that he must then receive a payment which is connected with the relevant activity.

When you then look at ITA 2007 Part 15 Chapter 8 starting to read at s.965 you see how to compute the individual's income tax in these circumstances. The

position (missing out a great deal) is that initially the *whole* of the individual's worldwide income is subject to UK tax for the year in question. This brings you to the regulations (Income Tax (Entertainers and Sportsmen) Regulations 1987/530) which applies a just and reasonable approach to that global figure to reduce it to a fair amount representing UK related endorsements. Perhaps we can put some figures on this. Assume that a golfer earns £1m. from a royalty company for worldwide performances and then he comes to the UK for a golf tournament. How much of that £1m. is attributed to his UK activities? You need to look at the just and reasonable test within the regulations. But in addition you must be satisfied (or at least HMRC must be satisfied) that the monies that are earnt from the performance of a *relevant activity*. This is where the difficulty arises. A great many advisers say that you should not be caught if all that you are doing is passive. So, if your royalty rights emanate from just having your photograph taken, or something like that, then the argument (with which HMRC do not agree) is that that passive activity should fall out of charge altogether: it is not a relevant activity.

The second point is that whatever is left within charge (and let us say, in our example, the whole of the £1m. earned from worldwide appearances stays in charge *potentially* – it is all active) you then have to decide what proportion of that £1m. is subject to tax in the UK – i.e. how much relates "specifically" to the time in the UK.

Until the turn of the century the UK authorities were relatively helpful. They would take a figure such as £1m. and would apportion it by reference to the number of days spent in the UK divided by the number of days in a year, less about seven weeks for holiday. So, typically, if you were here for thirty days you would pay tax of $^{30}/_{330}$ x £1m. Now, however, HMRC are much more aggressive.

In other words, what will happen will be that they will look at the quality of your time in the UK. This was particularly unfair, in the writer's opinion, in relation to Andre Agassi whom the writer represented in the House of Lords. He was here in the UK for the Wimbledon fortnight and the Queen's tournament and not much more. This represented a small number of days in the UK out of the total numbers of days in the year. Nevertheless, the UK Inland Revenue successfully taxed him on about a quarter of his worldwide income on the basis, amongst other things, that the Wimbledon tournament was important. At that time, as the case shows, Agassi was sponsored by Nike. This meant that even though Nike's income in the UK represented 2% only of its worldwide sales, nevertheless Agassi was taxed on 25% of his worldwide Nike income. HMRC's approach in this area remains, frankly, scandalous.

To deal with the "Agassi" problem, the planning must be for the sportsplayer, who is a short term visitor to the UK, to enter into <u>two</u> separate endorsement contracts if at all possible. One should cover UK performances and the other should cover the rest of the world. On this basis, the endorser could limit the amount of payments representing the UK to an appropriate amount (say

2% in the Nike equivalent) and then there would be strong arguments for saying to HMRC that they could look no further than those amounts.

## Conclusion

Great care must be taken by reference to the taxation of sportsplayers whether they are in the UK on a long term basis or a short term basis. This article, however, intends to be nothing more than a general overview. Anybody seeking to tax plan or advise individuals coming to the UK on any basis must stake specific advice and not rely on this article.

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