

worldsportslawreport

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Tax relief for payments to agents

Television presenters, Richard Madeley and Judy Finnigan, recently managed to claim tax relief for money paid to agents after proving they were 'theatrical artists'. The case highlights anomalies with how the UK taxation system applies to sports people, argues Richard Baldwin, a tax consultant, individual member of the CCPR and recently retired partner, Deloitte & Touche LLP. He says that although it is unlikely that a sports person's claim for relief as a 'theatrical artist' would be successful, lobbying from the sports industry could result in a change in the law.

Tax relief for agent fees

A recent tax case concerning the tax deductibility of agent fees has highlighted much of what is wrong with the UK tax system as it applies to sport (Madeley & Another v Revenue & Customs – 206 – UKSPC SPC00547 - 8 June 2006). The tax system generally is complex, unfair and contains anomalies which are very often created through lobbying by special interest groups. Professional sports people are often maligned for their high earnings, but contribute so much, not only in creating a feeling of well-being in the event of UK success, but also in economic terms. They make a substantial contribution to the Exchequer each year with the wages of professionals, managers, coaches and employees in English professional football alone contributing around £500 million per annum in payments of Pay As You Earn (PAYE) and National Insurance Contributions to HM Government (source Deloitte Annual Review of Football Finance – June 2006).

Love them or hate them, much of the high earnings and therefore the fiscal contribution of professional sports people is due to the success of their agents. Somewhat surprisingly, however, employed players in the team sports of cricket, rugby union and football cannot get tax relief for the payments they make to their agents to secure the lucrative club contracts which give rise to their high earnings. This is all of the more surprising since certain employed entertainers can get tax relief for their agent's fees. The recent case I refer to concerned what types of entertainers qualified for such relief and contained a number of references to sport.

The 'Richard and Judy' case

Earlier in May this year, Richard

Madeley and his wife Judy Finnigan, the well known television presenters who presented ITV's morning magazine programme, *This Morning* from 1993 until 2001, had their appeal heard before the Special Commissioners against Her Majesty's Revenue & Customs' (HMRC) decision that fees payable to their agent were not tax deductible. Richard and Judy were taxed as employees of Granada TV between 1993/1994 to 2001/2002. They claimed to have deducted the fees they paid to their agent for various services rendered by the agent; the claims being under Section 201A Taxes Act 1988 and under the general and strict rule for expenses allowable under Schedule E (then) contained in Section 198 Taxes Act 1988. In all years, HMRC disallowed the claims under both provisions.

As regards the latter provision, the general rule for employees is that expenses are only deductible from employment income under Section 198 if they are "wholly, exclusively and necessarily incurred in the performance" of their duties. Payments to an agency are not incurred during the performance of the employee's duties, once they have secured employment. Payments are usually made to an agent to create and secure the employment contract in the first place. The case principally concerned the appellants' claim to relief under the alternative provision of Section 201A. This Section grants relief to certain categories of entertainer paying fees to a licensed employment agency; the relief being up to 17.5% of the entertainer's earnings charged to tax in the relevant tax year provided certain conditions are fulfilled. These conditions were agreed to have been fulfilled by HMRC with the exception of whether Richard and Judy were in

a qualifying employment to which the section applied. Such an employment was defined as: 'Employment as an actor, singer, musician, dancer or theatrical artist'.

The question for the Special Commissioner to determine was whether Richard and Judy were 'theatrical artists'. Evidence was given by Richard and Judy and their agent which distinguished them from new readers and producers of current affairs programmes and this evidence demonstrated that they were entertainers falling within the definition of theatrical artists.

The Special Commissioner found the case difficult, wavering in both directions in considering whether to find for Richard and Judy or HMRC. In the event, he found for Richard and Judy, his decision containing extensive references to the background to the legislation and debates in Parliament together with quotes from Government as to the purpose of the legislation. It remains to be seen whether the decision will be reversed but the principal is clear, employed entertainers falling within the definition can get relief for payments to their agent.

Implications for sportspeople

The case and the Special Commissioner's comments in his decision raises some interesting points regarding sportspeople:

Self employed sportspeople can obtain relief for agents fees where they are wholly and exclusively (but not necessarily) incurred for the purposes of the sports person's taxable professional activity.

Individuals whose talents are not primarily theatrical but are employed to perform in a theatrical setting can get relief. Thus a sports personality appearing in a pantomime can get relief for agent's fees incurred to

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secure that employment.

It is clear from the Commissioner's judgment that the section was enacted by the Government of the day due to intense lobbying by the Equity Union on behalf of the acting profession.

The Commissioner further said that: "If an artist is performing on television, in a club or even in the street and the performance can be described as 'theatrical' the fact that the performer may never have set foot in a theatre is irrelevant".

Whilst it may be argued that some of the recent players performances at the World Cup in Germany could be described as 'theatrical' given their intent either to secure a penalty or to get another player sent off, in my view such an argument is unlikely to succeed with HMRC.

Current taxation reliefs for agent fees

Sports people who are self employed will usually be involved in the individual sports of golf, tennis, athletics, etc. They should have no difficulty in getting relief for payments to their agents for managing their affairs including organising participation in tournaments, sponsorship and endorsements. Such expenditure should satisfy the "wholly and exclusively" trade test. Further, professional sports people often have their own personal service companies, which again should obtain relief against trading income for agent fees which satisfy the "wholly and exclusively" trade test. However, employed sports people, contracted to clubs in team sports, cannot get relief for agent fees against their employment income even though the agent is responsible for securing valuable employment contracts. But why cannot such individuals be self employed? Generally under the

individual sport's regulations, players in such team sports will have to contract directly with their team/dub rather than using their own personal service company. They will therefore become employees of the team/dub.

Rather perversely, any non-club/team source of income may attract relief for an agent's fees incurred in securing the income; e.g. either because it emanates from a separate self employed profession, or because such income is contracted through a personal service company. The more successful sportspeople can take advantage of these alternative routes for relief, but unfortunately the journeyman or squad player is left at a disadvantage because fees for negotiating or re-negotiating his club contract are not deductible.

What does the future hold for agent fees?

Sportsmen and women could seek to challenge HMRC's interpretation of Section 201A and argue that they were "theatrical artists". I fear such an approach would be fiercely contested and I don't believe it has any realistic chance of success. The more successful sportspeople that are in a position to do so may be able to mitigate the cost of agent fees to the extent that these are incurred by their personal service company or in pursuance of self employed commercial income. But what of the rest?

It seems to me that given the unfair treatment of employed sportspeople compared with entertainers and self employed sportspeople, an approach should be made to HM Government to change the law. There is further the anomaly that a sports person can get relief for agent fees paid in a different capacity; e.g. for appearing in a pantomime. This is

specifically accepted by HMRC in their Guidance Notes. If individuals in team sports were able to contract through their personal service company, then this might provide the appropriate flexibility to obtain relief for agent fees. But this would interfere with the way in which sports wish to run themselves and regulate their participants. The acting profession succeeded in achieving change by lobbying hard, so why should not sport argue strongly with Government that the existing Section 201A which benefits actors should be extended to sports people? This might mean that sports agents have to suffer more regulation by being exposed to a licensing procedure, but this might be a good thing for sport.

Current HMRC position

Currently, HMRC have been assessing a portion of agent fees paid by football clubs on behalf of employed players. A significant amount of time and effort has been spent by both HMRC and the clubs themselves in agreeing the taxable benefits. Accurate benefits will in future have to be reported on forms P11D for the players who will then suffer tax on the benefit they have received from the agent's services paid for by the club. Changing the law to provide relief for employed sports people would avoid this issue and create a level playing field. The Exchequer cost of changing the law in this way is unlikely to be significant (estimated at less than £5 million per annum) and would also save significant time and effort by both HMRC and professional sports

clubs. It would correct both a sense of unfairness and the existing anomalies; it should be seriously considered.

This recent tax case was once again highlighted as an unsatisfactory tax system as it applies to sport.

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