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# Taxation in Australia of Non-Resident Athletes : Maurice Green and the Olympic Games : Can the ATO Catch the Fastest Man in the World?

## **Abstract**

The taxation of international athletes competing in Australia depends largely on the source and character of income earned. The existence of tax treaties or Double Tax Agreements between Australia and an athlete's home country can also have an impact on an athlete's assessable income. Following Braedon Clark and Leslie Miller's *Taxation and Sport in Australia*, this article extends the scope to examine taxation of typical forms of income earned by international athletes competing in Australia, both in a non double tax agreement environment and in jurisdictions with double taxation agreements. Following the Sydney Olympics and Goodwill Games, the FIFA World Cup in Korea and the Commonwealth Games in Manchester, and with the Rugby World Cup in 2003, this discussion remains topical.

## **Keywords**

athletes, income tax, taxation and sport

**TAXATION IN AUSTRALIA OF NON-RESIDENT  
ATHLETES:  
MAURICE GREENE AND THE OLYMPIC GAMES: CAN  
THE ATO CATCH THE FASTEST MAN IN THE WORLD?**

*Tegan Lloyd-Pugh and Jane McMahon*

The taxation of international athletes competing in Australia depends largely on the source and character of income earned. The existence of tax treaties or Double Tax Agreements between Australia and an athlete's home country can also have an impact on an athlete's assessable income. Following Braedon Clark and Leslie Miller's *Taxation and Sport in Australia*, this article extends the scope to examine taxation of typical forms of income earned by international athletes competing in Australia, both in a non double tax agreement environment and in jurisdictions with double taxation agreements. Following the Sydney Olympics and Goodwill Games, the FIFA World Cup in Korea and the Commonwealth Games in Manchester, and with the Rugby World Cup in 2003, this discussion remains topical.

### **On Your Mark**

After the Goodwill Games and Olympic Games and other major sporting contests, many international athletes will have discovered the Australian Tax Office (ATO) hot on their tails to claim a portion of prize money and other income earned during their Australian stay.

Athletes' income in Australia is generally treated in the same way as income earned by other Australian residents. This means they are liable for tax in both the country where they earn income, and on any worldwide income in their country of residence.<sup>1</sup>

This article examines the taxation of non-resident or international athletes in Australia by discussing the tax treatment of typical forms of income, firstly, in a non-Double Taxation Agreement (non-DTA) environment (that is in a jurisdiction that does not offer protection from the taxation imposed by other

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1 Australia taxes residents on domestic and foreign source income and also non-residents on Australian source income: s 25(1)(a) and (b) ITAA 1936.

jurisdictions), and, secondly, in a jurisdiction with Double Taxation Agreements in place.

## Get Set

### Non-DTA environment – source and characterisation of income

In the absence of a tax treaty, athletes will be taxed under domestic tax laws, without the benefit of having prescribed withholding tax rates. According to Australia's domestic tax laws, assessable income is comprised of the taxpayer's ordinary<sup>2</sup> and statutory<sup>3</sup> income. Examples of assessable income include payments for providing services and other benefits, including prizes and awards from participating in a sport.<sup>4</sup>

Australia only taxes non-residents on Australian *source* income.<sup>5</sup> The *Income Tax Assessment Act 1936* (ITAA) does not comprehensively define 'source', so it is necessary to rely on judicial interpretation.<sup>6</sup> In determining source, the courts examine the facts and circumstances of each case, taking into account factors such as where the services are performed, the place of contract and the place of payment.

Income derived by athletes participating in competitions, such as the Sydney Olympic Games, is characterised as income from personal exertion. Generally, this means the source will be where the services are performed.<sup>7</sup> However, there is no rule of law to that effect. Therefore, in some cases, regard will be had to either the place of contract or place of payment.<sup>8</sup>

Applying these principles, let us predict the likely source of income earned by athletes.

### *Prize money*

Prize money will be sourced in Australia because there is a clear connection between the performance of services and the income received.

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2 Section 6-5(1) ITAA 1997.

3 Section 6-10(1) ITAA 1997.

4 *Taxation Ruling* 1999/17 (effective on 1 July 2000).

5 Section 25(1)(a) and (b) ITAA 1936.

6 Isaacs J stated in *Nathan v FCT* (1918) 25 CLR 183 that determining the source of income is a 'hard, practical matter of fact'. It is not a legal concept, but 'something which a practical man would regard as the real source of income'.

7 *Commissioner of Taxation (NSW) v Cam & Sons Ltd* (1936) SR (NSW) 544 at 547 per Jordan CJ.

8 *GCT v Mitchum* (1965) 113 CLR 401 at 407.

### ***Appearance fee***

Athletes are often paid appearance fees to induce them to appear in competitions. If the contract between the Australian organisers and the athletes are made outside Australia, and the fee is paid outside Australia, it could be argued that the fees do not have an Australian source.<sup>9</sup> The real source of the fee is not the service to be performed but the athlete's reputation as a professional sportsperson. Due to the difficulty in putting a geographical source on reputation, place of contract is the best indicator of source.

Further, it is possible to argue the athlete's fee for appearing at sporting events is earned in their capacity as independent contractors of their services, rather than as employees of a particular organisation. According to Dixon CJ in *Robertson v Federal Commissioner of Taxation*,<sup>10</sup> the place of contract and payment are particularly relevant factors where the worker is an independent contractor. If they are perceived as independent contractors, it is possible to source their income outside Australia.

### ***Consulting services***

Typical consulting services include providing advice and recommendations to tournament organisers on competition rules, preferred locations, and potential competitors.<sup>11</sup> To perform consulting services, the athlete does not necessarily have to be present in Australia. Further, the performance of consulting services indicates that an athlete is providing the services as an independent contractor, in which case the place of contract and place of payment will be relevant to determine source.<sup>12</sup> If the drafting does not specify where the services are to be performed, it is possible for athletes to keep the source outside Australia.<sup>13</sup>

Ordinarily, giving advice is characterised as providing a service. The Commissioner has ruled that the provision of services involves the use of a person's professional expertise to benefit the recipient of the services.<sup>14</sup> However, it is possible that any consideration received for giving advice will be

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9 L Burns, 'Australia: Taxation of Non-Resident Entertainers and Athletes' (2000) 22 *Tax Management International Forum* 3 at 4.

10 (1937) 1 AITR 152 at 159.

11 BC Clark and LG Miller, *Taxation and Sport in Australia* (Federation Press, 2000) 100.

12 Ibid.

13 Delaney T, 'International Entertainers: A Comparison of the Taxing Rules' (Dec1995/Jan1996) *CCH Journal of Australian Taxation* 52, at 53.

14 *Taxation Ruling* IT 2660.

characterised as royalty income.<sup>15</sup> For income tax purposes, a royalty is basically the supply of know-how, which involves the supply of pre-existing knowledge and experience that is secret.<sup>16</sup> If an athlete is imparting knowledge gained from other competitions, then it is possible for such advice to be classified as the supply of know-how. If the income is considered to be a royalty it will be subject to withholding tax at a rate of 30% of the gross amount of the royalty, or 10-15% under a tax treaty.<sup>17</sup>

Therefore, if the advice is characterised as the provision of services, it may be possible to source the income outside Australia. However, if characterised as a royalty, it will bear withholding tax in Australia.

### ***Product endorsement and sponsorship***

Product endorsements and sponsorship fees arise when an athlete lends their name to a product or appears in an advertisement promoting a product or sporting event. Such income will be characterised as personal exertion income, if the advertisement is completed while the athlete is in Australia. However, according to *Federal Commissioner of Taxation v Mitchum (Mitchum's case)* the fact the service is performed in Australia is not always decisive of the source of income. If the contract is completed and the fee is paid in another country, then, for the reasons described above in relation to the appearance fee, it may be argued that the fee does not have an Australian source. The result will depend on the weight given to the contributing factors, in light of the particular circumstances of the case.<sup>18</sup>

Again, the income derived from endorsements may be characterised as a royalty. This would be the case, for example, where the athlete's name appears on a product. In return, the manufacturer might agree to pay the athlete a certain amount of money for each item sold. The definition of royalty income under s 6(1) *ITAA 1936* includes consideration for the use of a 'trade-mark or other like property or right'. The use of an athlete's name is likely to be considered to be a trade mark so that any payment received will be a royalty and therefore subject to withholding tax.<sup>19</sup>

### ***Non-monetary prizes***

Non-monetary prizes, such as medals and trophies are generally not assessable income under Australian domestic law because they signify personal

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15 Burns, above n 9.

16 *Taxation Ruling* IT 2660.

17 Section 128B(2B) *ITAA 1936*.

18 Above n 8.

19 *Ibid.*

achievement.<sup>20</sup> However, other non-monetary prizes, for example motor vehicles, are taxable because they are seen to be an intrinsic form of remuneration (rather than the mere recognition of a personal achievement).<sup>21</sup>

### **DTA environment – impact of a Tax Treaty**

The Organisation for Economic Cooperation and Development (OECD) is an international conglomerate of 30 industrialised, market-economy countries striving for a number of economic and social policies, including the promotion of world trade. A serious impediment to world trade is the imposition of double taxation. In response, the OECD formulated a Model Double Tax Convention aiming to prevent the laws of countries conflicting. The Convention allocates taxing rights between the resident and source countries. Where there are competing taxing rights, the resident country is required to eliminate double taxation.

Athletes' mobility among international jurisdictions raises concerns about tax avoidance activities. In order to make an athlete's earnings taxable in the country of performance, the OECD implemented Article 17 to the Model Treaty, as set out below. Dealing exclusively with the area of 'Artistes and Sportsmen', it provides that those who are residents of a contracting state may be taxed in the other contracting state in which their personal activities are performed.

Article 17 expressly provides that it is to apply in priority to Article 14 (independent services) or 15 (dependent personal services) under which source country taxing rights may be excluded because of the short-term nature of the athlete's activities in Australia.<sup>22</sup>

#### **Article 17: Artistes and Sportsmen**

1. Notwithstanding the provisions of Articles 7 and 15, income derived by a resident of a Contracting State as an entertainer, such as theatre, motion picture, radio or television artiste, or a musician, or as a sportsman, from his personal activities as such exercised in the other Contracting State, may be taxed in that other State.
2. Where income in respect of personal activities exercised by an entertainer or a sportsman in his capacity as such accrues not to the entertainer or sportsman himself but to another person, that income may, notwithstanding the provisions of Articles 7 and 15, be

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20 *Taxation Ruling* 1999/97 (effective on 1 July 2000).

21 *Ibid.*

22 This article examines Article 17 in detail. It does not undertake a detailed examination of Articles 7, 12, 14, or 15. For more information on these provisions see Clark and Miller, above n 11.

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taxed in the Contracting State in which the activities of the entertainer or sportsman are exercised.

***To whom does Article 17 apply?***

The definition of ‘athlete’ under Article 17 has a broad scope. For example, ‘sportsmen’ are not restricted to participants in traditional athletic events. The commentary to the article recognises a long list of sports including billiards, snooker, chess and bridge tournaments, as well as more unconventional sports, such as motor racing.

***Professional v Pastime***

Article 17 only assesses income from personal activities undertaken in the taxpayer’s capacity as an athlete. Therefore, engagements performed in an unrelated field, such as medicine or accountancy would not be subject to taxation under this provision.

Money and other benefits received from the pursuit of a pastime or hobby are not assessable.<sup>23</sup> However, if the athlete’s activities have extended beyond being a mere hobby and have become a business, the normal proceeds of that business will be assessable income.<sup>24</sup> To determine whether activities constitute the carrying on a business, some critical questions to ask include:<sup>25</sup>

- Are the activities being carried out in a commercial manner?
- What is the size, scale, and profit involved?
- Is the taxpayer conducting the activities in a similar manner to others within the same profession?

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23 *Taxation Ruling*, above n 4.

24 *Case R96 84 ATC 637* dealt with the issue of whether a taxpayer’s entertainment activities constituted the carrying on of a business. The case concerned a public servant devoting 30 hours a week to composing and playing songs. The taxpayer spent between 10-20 hours per week composing and 20 hours rehearsing or performing. The Board was of the opinion that the taxpayer’s activities were undertaken on a continuous and repetitive basis, carried out without interruption throughout the period and organised in a businesslike manner. Although an absence of profits may create an impression that the activities lack sufficient commercial purpose, this factor will not necessarily be determinative. See Patterson C & Rodman S, ‘Taxation of Entertainers – Sing for your supper (and pay your tax)’ (1995) 7 (1) *CCH Journal of Australian Taxation* 47.

25 Clark and Miller, above n 11.

### ***Support Personnel***

An entourage can be expected wherever there is an international athlete. The difficulty arises with different tax treatment applying to these support personnel, for different types of income.

It seems clear that to fall under Article 17 a person must actually be an athlete. Prima facie, support personnel do not fall within its scope. Therefore, people such as agents, physiotherapists or masseuses would not fall within the ambit of the Article.<sup>26</sup> An interesting interpretation offered by Richard Citron is that an athlete is defined as someone who is paid and whose performance the public will eventually view.<sup>27</sup> Such an interpretation would justify the exclusion of back stage occupations of support personnel, as their performance will never be viewed.

### **To what income does Article 17 apply?**

Article 17 contains two important limitations:

1. It only applies to income from the person's personal activities as an athlete (ie, income from personal exertion); and
2. It only applies to income from activities carried out in Australia.<sup>28</sup>

Athletes must determine the income to which Article 17 applies, because it will affect their tax planning and compliance with taxation laws and treaties.<sup>29</sup> There are two possible interpretations as to what constitutes athletic income for the purposes of Article 17: a narrow meaning or wide meaning.<sup>30</sup>

The OECD Commentary on the OECD Model DTA favours a narrow interpretation, namely, that only income to the extent that it is directly connected with the actual performance is caught within the scope of Article 17.<sup>31</sup> All other income is subject to tax in accordance with the other articles of the treaty. Therefore, income derived from advertising and sponsorship in connection with the athlete's performance in Australia would be taxed under Article 17. However, income received from the provision of consulting services (ie advice) and endorsements would be characterised as income from a

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26 Delaney, above n 13, 57.

27 M J Finney and J Dixon (eds), *Tolley's International Tax Planning* (3rd ed, 1996) 24-03.

28 Burns, above n 9, 4.

29 Clark and Miller, above n 11.

30 Delaney, above n 13, 53.

31 *International Tax Agreements Act 1953* (Cth).

professional activity, because it is not directly related to the athlete's sporting talents.

If interpreted widely, Article 17 would apply to all the *normal* activities and tasks of an athlete.<sup>32</sup> Support for the wider interpretation arises where it may be difficult to separate the professional activities of an athlete from their personal activities.<sup>33</sup> Often payment for sponsorship and endorsement is made pursuant to one complex contract, which means all income is likely to be subject to Article 17. To avoid this, it is beneficial to draft separate contracts or to clearly separate amounts where payments are made pursuant to one contract.<sup>34</sup> Braedon Clark<sup>35</sup> suggests it should be activities from which the athlete or entertainer commonly derives income. This is comparable to the eligible income of a sportsperson listed in the income averaging provisions of the *ITAA 1936*, which includes income from endorsing products, advertisements, interviews or sports commentating and the like in the eligible income activities.<sup>36</sup>

The impact of a tax treaty on the typical income of an athlete is considered below.

### ***Prize money***

Clearly Article 17 will apply to any prize money earned by an athlete when competing in Australia. The income is directly related to their status as a professional athlete and derived from the exercise of those activities in Australia.

### ***Appearance fee***

It is likely that Article 17 will apply because the fee is a direct result of the athlete's activities exercised in Australia. However, as stated above, an appearance fee may not have an Australian source under domestic law if the contract is made and the fee paid outside Australia. The application of the relevant DTA becomes important here because it may apply to change the source rule for the purposes of Australian domestic tax law.<sup>37</sup> Article 17 allows Australia to tax income derived by persons from their personal activities as an athlete. Article 27(1)(a) of the United States/Australia DTA<sup>38</sup> provides that

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32 Clark and Miller, above n 11, 171.

33 Delaney, above n 13, 52.

34 Ibid.

35 Clark B, 'Robert Mitchum 17: Australian Taxation Office, the taxation of international athletes' (1998) 10 *Bond Law Review* 118.

36 Ibid.

37 Burns, above n 9, 5.

38 United States/Australia Double Taxation Agreement.

income derived by a resident of the United States, which under the treaty may be taxed in Australia, is treated for the purposes of domestic law as income sourced in Australia. This indicates that Article 17 will override the judicial source rule. Therefore under the DTA, the appearance fee is likely to be taxed in Australia.

### ***Consulting fees***

Obviously, Article 17 will not apply to consulting services exercised outside Australia. However, assuming the services are exercised in Australia, an issue arises as to whether it is income derived from the person's personal activities as an athlete? In the absence of a judicial ruling it is necessary to turn to other sources for the most likely result. Clark and Miller<sup>39</sup> suggest that Article 17 will not apply to such income because it is income derived from a professional activity rather than a sportsperson's personal activity as an athlete. This approach is based on the narrow interpretation of an athlete's income. If the wider interpretation is adopted, Article 17 will apply where there is a 'clear nexus' between an athlete's activities as a professional sportsperson and the consulting services provided.<sup>40</sup> In the absence of any legal authority, the result will depend on the individual circumstances.

It is submitted that different consulting services will be treated differently. For example, income derived from providing advice to organisers of the Goodwill Games on the rules of a sport would probably fall within Article 17, because it directly relates to the athlete's profession as a sportsperson. However, an athlete who provides advice on the design of an athletics track or advice on how to market an event is not relying on their skill and experience as an athlete but rather their professional skills. The provision of such advice is not within the normal range of a professional athlete's activities. If the income does not come under Article 17, then it will fall within the ambit of Article 14 (independent personal services). However, in the example of an athlete coming to Australia for the Goodwill Games, Australia would not have had the jurisdiction to tax under the Article because the athlete would not have had a fixed base in Australia.

### ***Product endorsement fees and sponsorship***

As stated above, if Article 17 is given a wide application it will apply to all of the normal activities of an athlete. An indication of the common activities of an athlete, provided by the income averaging provisions of the *ITAA 1936*, include:

- Endorsing a product;
- Appearing or participating in an advertisement;

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39 Clark and Miller above n 11, 100.

40 Burns, above n 9, 4.

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- Appearing or partaking in an interview;
- Services as a sporting commentator or any similar service.<sup>41</sup>

However, under the narrow view, there needs to be a direct relationship between the sponsorship and endorsement income and an athlete's performance in Australia.<sup>42</sup> The issues are the same as those discussed for consultancy fees above.

An athlete may be required to wear the organiser's clothing or appear in interviews promoting the event. It is possible that the use of the athlete's name will characterise the receipt as a royalty, rather than income from personal exertion. This will depend on the particular circumstances. If the contract between the athlete and organisers includes payment for the use of the athlete's name, it is likely to be a royalty payment. Article 17(5) of the United States/Australia DTA deems that a royalty is earned in the athlete's country of residence. Article 12 of the OECD Model DTA, dealing specifically with royalty payments, supports this.<sup>43</sup> So while the royalty will attract withholding tax<sup>44</sup> in Australia, it will be taxed elsewhere subject to a foreign tax credit for the tax already paid in Australia.<sup>45</sup> The benefit is that the withholding tax on royalties is often less than income tax on ordinary income. If the athlete's resident country is a low-tax jurisdiction, income will be taxed at a lower rate than the ATO imposes on income declared in Australia.<sup>46</sup> For example, the organisers of the Goodwill Games used Maurice Greene's name to advertise the event. Any payments would be for his personal exertion of appearing at the event. However, if the contract between the organisers and Maurice Greene included payment for the use of his name, then the character of the income may change to a royalty payment.

Athletes often earn substantially more income from the sale of merchandise than from personal exertion,<sup>47</sup> for example, selling their own brand of clothing or sporting equipment. The sale of such products is in the nature of a business operation and will be taxed under Article 7 as a business profit.<sup>48</sup> However, income will not fall under Article 7, unless the athlete has a permanent establishment in Australia. Generally, this means having a fixed place of

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41 Clark and Miller, above n 11,173.

42 Burns L, above n 9, 3.

43 Normally, royalties earned in a foreign country are assessed under Article 12 of the relevant DTA (eg, US/Aust DTA).

44 Under the Model Treaty and US/Aust treaty the withholding tax will not exceed 10%.

45 Article 12 of the OECD *Model Tax Convention on Income and Capital* (2000 Condensed Version).

46 Clark and Miller, above n 11, 175.

47 Clark B, above n 35, 127.

48 Clark and Miller, above n 11, 174.

business in the country. The selling of products by an athlete at a sporting competition would not constitute a fixed place of operation.<sup>49</sup>

### ***Non-monetary prizes***

The treatment of non-monetary prizes under the DTA is the same as under domestic law where there is no tax treaty in place, as discussed previously.

### **Loan out corporations**

One of the unique tax features of an athlete is their use of loan out corporations, which are utilised to maximise flexibility and minimise their tax obligations. In its simplest form, a loan out corporation consists of two contractual relationships. The first agreement is between the athlete and the company, for the athlete to provide their personal services to the company in exchange for valuable consideration. The second agreement is between that company and the producers, teams or agents that ordinarily contract with the athlete. Generally, the first contract offers a small remuneration to the performer, which is taxable at source (in the country of performance). The second contract charges the optimum fee, not subject to taxation as it is not sourced in the country of performance or competition. Under Australian domestic tax laws, it is difficult to source such income in Australia, because the contract is formed outside Australia and payment is made between two non-residents. While it may also be difficult to source the athlete's income (as opposed to the company's income) in Australia under the relevant DTA, Taxation Ruling IT 2323 suggests that in calculating the assessable income of an athlete who is paid an annual salary under Article 17(1), the amount should be apportioned between the time spent inside and outside of Australia.

The commonplace tax structure of a loan out corporation will need to be reconsidered in light of the amendment to Article 17.

### ***The introduction of paragraph 17(2)***

The second paragraph of Article 17 was introduced to counteract the effect of loan-out corporations, contracts and trusts that do not have a permanent establishment in the country of performance, where the performer's remuneration is paid to another person. Where the income could previously avoid taxation, the new paragraph catches such structures, allowing the portion of the income that cannot be taxed in the hands of the performer, to be taxable in the hands of the person receiving it. If a company is paid to provide the services of an athlete, that company is taxed in the country where the athlete performs their service. The effect is to make the place of performance of services the source rule of income for companies. Under Article 17(2), even if

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49 Delaney, above n 13, 54.

the money is paid out of the company in the form of bonuses, fees, dividends or distributions, the amount will still be taxed under Article 17.

The United States/Australia DTA restricts the application of Article 17(2) to situations where an athlete (or the relative of an athlete) *directly or indirectly* participates in the profits of the company to which *income has accrued*.<sup>50</sup> Therefore, an athlete could circumvent Article 17(2). An example can be taken from *Mitchum's* case.<sup>51</sup> The case involved Mandeville Films SA (a Swiss company) which loaned the services of Robert Mitchum, an entertainer, to Warner Brothers Pictures Inc ('Warner Bros') for US\$200,000. Warner Bros then loaned Mitchum's services to a subsidiary company of Warner Bros (Warner London) to shoot a film in Australia and London. Mandeville assigned the benefit of the loan out agreement to DRM productions (a US company unrelated to the taxpayer). Warner Bros paid DRM US \$200,000. DRM then paid Mitchum, in discharge of Mandeville's obligations to Mitchum under the contract of employment. In this case, if the income were taken to have accrued to DRM for the purposes of Article 17(2), then Article 17(2) would not be relevant, because the taxpayer did not participate in any of the profits of DRM.<sup>52</sup>

There has been a varied response to the introduction of Article 17(2). The United Kingdom has criticised its harsh approach, choosing to avoid the provision altogether. This means that, where a third party is paid, they are not taxed in the United Kingdom, only in their country of residence,<sup>53</sup> providing British resident athletes with flexibility in mitigating their taxation.

Other countries have expressed contempt for its wide application, making adaptations that may allow circumvention. Canada, Switzerland and the Netherlands have limited the application of Article 17(2) to those corporations where the performer or relative has a direct or indirect interest in the entity. Most DTAs fail to define 'relative' however the Netherlands have defined it in Article 17(3) as 'brother, sister, spouse, ancestor or descendant'. Braedon Clark submits that a similar interpretation would be made within other jurisdictions, subject to their domestic interpretation rules and the Vienna Convention on the Law of Treaties.<sup>54</sup> This interpretation is quite broad, allowing loan-out corporations to be controlled by an athlete's spouse or other relative. Therefore, athletes or entertainers in these countries possess greater freedom to arrange their contractual affairs through incorporating.

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50 Above n 36.

51 (1965) 113 CLR 401.

52 Burns, above n 9.

53 Clark and Miller, above n 11, 181.

54 Clark, above n 35, 130.

The majority of countries that have implemented this 'relative controlled entity test' are predominantly capital exporting countries with large international sporting companies, agents and production companies. Such countries, including the United States of America and Canada, use the test to preserve their interest in the taxation paid by these international sports, marketing and affiliated companies. Conversely, countries that have implemented the Model Convention Article 17(2) are mostly Asian countries with less pecuniary interest because they have fewer international sports stars and multinational sports marketing companies.<sup>55</sup>

### ***Further expansion of Article 17***

Due to the diversity in international taxation, some foreign governments have advanced policy objectives by extending, or limiting, the scope of Article 17.

### ***Extension of domestic law***

It is questionable whether Article 17(2) can be used to extend domestic legislation so that a source state can tax income in countries where it is not otherwise taxable under domestic legislation. For example, in situations involving a foreign loan-out corporation, the contract between the corporation and a promoter in a source state could be negotiated and signed, and payment made, outside the source state, so that the only activity occurring in the state is the performance of the employee of the loan out corporation. In such instances, it may be difficult for the source state to tax the loan out corporation in respect of fees paid under the contract, as it is arguable the income has no source in that state without a provision in its domestic legislation deeming the income to have a source therein. The source state could argue that Article 17(2) gives it the right to tax the amount paid to the loan out corporation.<sup>56</sup> The commentary to the OECD Model seems to suggest that the treaty provision can extend the domestic law of the resident state, to give it jurisdiction to tax certain income where it otherwise has no jurisdiction to do so under domestic law.<sup>57</sup>

### ***Public sponsorship***

Ordinarily, Article 17 will apply where the athlete is employed by a government and is deriving income from the government. Increasingly however, countries are considering it appropriate to exclude events supported by public funds, whereby the performer is not taxed in the country where the income is earned but instead in the country of residence. Some countries that have inserted variations of this provision include China, Fiji, Korea, Norway,

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55 Clark, above n 35, 134.

56 D Sandler, *Taxation of International Entertainers and Athletes: All the World's a Stage* (1995) 190.

57 Ibid 191.

Philippines, Thailand, Spain, Indonesia, Hungary and Poland. Article 17(4) of the Thai DTA is an example of such a provision:

the provisions of paragraphs 1 and 2 shall not apply to income derived from activities performed in a contracting state by entertainers if the visit to that contracting state is substantially supported by public funds of the other contracting state, including any political subdivision, local authority or authority or statutory body thereof.

The explanation behind the provision was that it was 'designed to facilitate cultural and sporting exchanges between the two countries'.<sup>58</sup> Perhaps a more accurate reflection of facilitating cultural exchange can be located in the Romanian DTA where Article 17(3) provides that;

income derived within the framework of a cultural or sports exchange program agreed to by the governments of the contracting states and carried out other than for the purpose of profit, shall be exempted from tax in the Contracting State in which these activities are exercised.

### ***De minimis exception***

The United States of America felt it necessary to limit the DTA's application to higher income athletes. Accordingly, Article 17(1) of the United States/Australia DTA contains a de minimis exemption of US\$10,000. This means that where gross receipts derived by an athlete from personal service in Australia do not exceed US\$10,000 (or the Australian equivalent) Article 17 will not apply. Taxation Ruling IT 2323 confirms that the term 'gross receipts' is to be distinguished from gross income. Gross receipts include all expenses reimbursed to the athlete and any expenses 'borne on his behalf'.<sup>59</sup> The preferred view, taken by the court in *Federal Commissioner of Taxation v Robinson*,<sup>60</sup> is that payments will be borne on behalf of an athlete if they are made substantially in the interests of the athlete. Taxation Ruling IT 2323 provides some clarification of the 'substantial interest' test, providing that expenses 'borne on behalf' of an athlete will include travelling expenses, accommodation, meals, payments to agents and other amounts paid to or borne on behalf of the athlete.<sup>61</sup>

Following *FCT v Robinson*, expenses borne by event organisers, such as airfares and accommodation will not be borne on behalf of the athletes. Rather they are expenses incurred in the substantial interests of the organisers - which is to have the athletes in a particular place at a particular time - and so

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58 *Income Tax (International Agreements) Amendment Bill (No 2) 1991*. Clark, above n 35, 129.

59 Above n 35.

60 (1992) 92 ATC 4424.

61 *Taxation Ruling IT 2323* (issued on 15 June 1986) para 9.

will be borne by the organisers. However, if, for example, Maurice Greene pays for transport and accommodation and is then reimbursed, the amount reimbursed will be included towards the de minimis limit.

Several commentators have suggested<sup>62</sup> that the US\$10,000 threshold is becoming increasingly arbitrary, and that it should be indexed to inflation to be useful as an exemption.<sup>63</sup> However, in instances such as the Olympic Games, where an athlete's visit is reasonably short, the threshold is arguably sufficient.

## GO

### Tax minimisation opportunities

A successful plan for the minimisation of an athlete's global taxation must carefully consider things such as the tax laws of the country in which the services are being performed, any applicable tax treaties, the athlete's nationality and their country of residence.<sup>64</sup> It is important to ensure foreign athletes do not inadvertently become statutory residents for tax purposes without being advised of the consequences of such a status. Where they are residents in more than one country, establishing a residency in a low-tax jurisdiction may minimise the home country taxation.<sup>65</sup>

Most of the income athletes are likely to receive is personal exertion income and the use of a business company for tax planning purposes is limited. In spite of this, there are several ways in which a sportsperson's income can be dealt with in a tax effective manner. These include applying the income averaging provisions,<sup>66</sup> salary packaging, negative gearing and using a company structure, together with timing income payments and expenses.<sup>67</sup>

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62 Burns, above n 9; Delaney, above n 13, 54.

63 Delaney, above n 13, 57.

64 Clark, above n 35, 132.

65 S Jeffrey, 'Pre-residency Tax Planning for the Foreign Entertainer, Athlete or other Talent' (1992) 12 *Loyola of Los Angeles Entertainment Law Journal* 324.

66 The 'income-averaging system' applies to certain classes of 'special professionals'. It is designed to prevent such taxpayers being pushed into higher tax brackets when their income is subject to fluctuation. The scheme operates by taxing remuneration in the country of performance, even where it accrues outside that country to a person other than the entertainer or athlete. The scheme will apply in any income year in which a special professional person was a resident of Australia at any time during the year and either had a taxable professional income for the year exceeding \$2,500, or was a resident at any time during a preceding income year and had a taxable professional income for that preceding year exceeding \$2,500. As cited in (2001) *Australian Master Tax Guide* 30.

67 L Joyce, 'Have a Free Kick' (1997) 32 *Taxation in Australia* 70 at 73.

While Article 7 exists for business profits, and there is an absence of a provision similar to Article 17(2) in international treaties, there is the potential to minimise taxation in a source state through the interposition of a foreign loan out corporation in a treaty state, whose treaty with the source state has no such provision.<sup>68</sup>

Careful drafting of contracts is required for a number of reasons. Firstly, contracts with Australian promoters should make provision for the promoter to withhold an amount appropriate to satisfy the tax liability, in accordance with the *ITAA 1936*. Secondly, provision should be made (where the performer is expected to be undertaking incidental activities) for income to be attributed to each appearance. Contracts should be reviewed to ensure maximum tax efficiency. The contract should address a number of issues including: the duration of the contract, the exact services to be rendered, where any products associated with those services are to be sold and by whom, copyright issues, which party is to bear which expenses, any commissions payable and to whom, and the exact nature and amount of the athlete's remuneration.<sup>69</sup> Finally, it can be beneficial not to specify a place where the services are to be rendered. This has the potential to enable taxpayers to keep the source of the income outside Australia and source the income in a non-DTA country such as a tax haven. In any event, it may be possible at least to argue for apportionment in accordance with the principle laid down in *Deputy Commissioner of Taxation (NSW) v Cam & Sons Ltd.*<sup>70</sup>

## Conclusion

Complex rules and regulations govern the tax treatment of income received by international athletes. Sensible tax planning requires that careful attention be paid not only to tax laws of the resident country, but also to the specific provisions of the applicable treaties.

Scope still exists for athletes operating in countries which do not have a DTA with Australia, to arrange their affairs to retain the source of that income outside of Australia. However, due to the introduction of Article 17(2), the reign has been tightened, and tax minimisation mechanisms such as loan out corporations, have become severely constricted.

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68 Sandler, above n 56, 237.

69 Finney and Dixon, above n 27, 24.72.

70 (1936) 36 SR (NSW) 544. In that case, the taxpayer employed 2 men to work on trawlers. Trawling was carried out in the open sea, both within and outside the territorial waters of NSW. As cited in Delaney, above n 13, 53.

Though taxation rulings and an expansion in definitions and case law have resulted in a clearer understanding of Article 17 and the intention of the contracting countries, its scope will largely depend on the interpretation it is given. If a narrow interpretation is taken, the personal services would be confined and incidental activities would not be considered to be generating an income from a demonstration of talent, and would therefore fall beyond the limits of the Article. If a wide interpretation is given, the ordinary tasks of the profession may be widened and items, such as the income from endorsements not directly affiliated with the activity, may be covered.

The concept of what will be caught, or will fall beyond the personal exertion of an athlete, will change over time. For instance, if all professional surfers become consultants to surfboard manufacturers, such activities may come within the normal realm of the athlete's ordinary activities.<sup>71</sup> Due to the diversity, there is no clear line drawn as to where the athlete stands in the international tax regime. Though the OECD Model Convention assists by structuring the process, several DTAs have adapted the Model Article to suit policy objectives of foreign governments.<sup>72</sup> Despite the Article, it remains difficult to categorise and list the effects and obligations for each athlete, as it will largely depend on the individual and the extent of their international travel commitments. The ambit of the athlete's 'ordinary' activities will remain precarious owing to the increasing salaries and corresponding to an increase in public accountability and public expectation. Because of the uncertainty, the Australian Tax Office has offered little clear direction. The ATO may finish behind Maurice Greene, if he is as clever as he is fast.<sup>73</sup>

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71 Clark and Miller, above n 11, 173.

72 Clark, above n 35, 128.

73 Clark, above n 35, 127.