

October 2007

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Recommended Citation

Cassidy, Julie and Sykes, Andrew (2007) "'Isn't Sport Taxing?' The Taxation of Sports Professionals Post-Agassi," *Revenue Law Journal*: Vol. 17 : Iss. 1 , Article 1.

Available at: <http://epublications.bond.edu.au/rlj/vol17/iss1/1>

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'Isn't Sport Taxing?' The Taxation of Sports Professionals Post-Agassi

Abstract

In *Agassi v Robinson* (Her Majesty's Inspector of Taxes), a majority of the House of Lords found that payments under two sponsorship contracts between a company owned and controlled by Mr Andre Agassi, (Agassi Enterprises Inc) and Nike Inc and Head Sport AG were assessable under UK tax law. This was so despite (i) none of the parties to the contracts was resident, nor domiciled, in the United Kingdom and (ii) none of the payer companies conducted business, directly or indirectly, through branches/agencies in the United Kingdom. The article considers whether the Australian Taxation Office could similarly assess non-resident sports-persons, like Mr Agassi, personally, and/or entities they control, on payments made under sponsorship agreements with a company such as Nike Inc. While the preferable view is that such payments are not sourced in Australia, Australian source rules are so ill defined that there is some basis for asserting such payments are sourced in Australia.

Keywords

sport. tax, agassi

'ISN'T SPORT TAXING?' THE TAXATION OF SPORTS PROFESSIONALS POST-AGASSI

JULIE CASSIDY* AND ANDREW SYKES**

In *Agassi v Robinson (Her Majesty's Inspector of Taxes)*, a majority of the House of Lords found that payments under two sponsorship contracts between a company owned and controlled by Mr Andre Agassi, (Agassi Enterprises Inc) and Nike Inc and Head Sport AG were assessable under UK tax law. This was so despite (i) none of the parties to the contracts was resident, nor domiciled, in the United Kingdom and (ii) none of the payer companies conducted business, directly or indirectly, through branches/agencies in the United Kingdom. The article considers whether the Australian Taxation Office could similarly assess non-resident sports-persons, like Mr Agassi, personally, and/or entities they control, on payments made under sponsorship agreements with a company such as Nike Inc. While the preferable view is that such payments are not sourced in Australia, Australian source rules are so ill defined that there is some basis for asserting such payments are sourced in Australia.

1 INTRODUCTION

The taxation of our sporting heroes has always been controversial. In Australia, under ss 6-5(2) and (3) and 6-10(4) and (5) of the *Income Tax Assessment Act 1997* (Cth) (*ITAA 1997*) the taxation of such persons depends upon their residency and the source of the person's income. Leaving aside the application of double tax agreements ('DTAs'), discussed below, the Australian tax regime only taxes income derived by Australian residents or Australian sourced income derived by non-residents: ss 6-5(2) and (3) and 6-10(4) and (5) *ITAA 1997*. That Australian residents are assessed on both Australian and foreign sourced income may provide one of the reasons that Australian high earning sports persons, and perhaps others, have at times sought to relinquish their Australian residency to take up residency in low tax nations.

Within this basic framework this article considers the decision in *Agassi v Robinson (Her Majesty's Inspector of Taxes)*¹ ('*Agassi*'). A majority of the House of Lords found that payments under two sponsorship contracts between a company owned and controlled by Mr Andre Agassi, Agassi Enterprises Inc ('Agassi Inc'), and Nike Inc

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¹ *Agassi v Her Majesty's Inspector of Taxes* [2006] UKHL 23.

TAXING SPORTS PROFESSIONALS

and Head Sport AG respectively, were assessable under United Kingdom tax law. This was so despite (i) none of the parties to the contracts being resident, nor domiciled in the United Kingdom and (ii) the fact that none of the payer companies conducted business, directly, or indirectly through branches/agencies, in the United Kingdom.² Further, no payments were made in the United Kingdom.³ The only connection any of the parties had to the United Kingdom was Mr Agassi's success, as a professional tennis player, at United Kingdom tennis tournaments, in particular The All England Lawn Tennis Club's Wimbledon Tennis Championship ('Wimbledon'). This case has, of course, obvious implications for other international athletes, including Australian residents such as Mr Leyton Hewitt. In this regard it is relevant to note that the initial hearing before the Special Commissioners involved an appeal by not only Mr Andre Agassi, but also a female tennis player also resident in the United States and a male tennis player resident in South Africa.⁴

This article considers whether the Australian Taxation Office (ATO) could similarly assess non-resident players, like Mr Agassi personally, and/or entities they control, such as Agassi Inc, on payments made under sponsorship agreements with a company such as Nike Inc. While the preferable view is that such payments are not sourced in Australia, Australian source rules are so ill defined that there is some basis for asserting such payments are sourced in Australia. It will also be suggested that the decision in *Agassi* was largely based on 'special statutory provisions' in the United Kingdom⁵ that do not have an exact parallel in Australia. Nevertheless, it will be asserted that there are some parallels with Sub-div 12-FB of the *Taxation Administration Act 1953* ('TAA') and the ambiguity of these provisions means that the reasoning in *Agassi* could be applied in Australia.

Finally, importantly, a major omission in the House of Lords *Agassi* decision was its failure to consider the relevant double taxation agreement ('DTA'). As discussed below, DTAs effectively prevail over domestic source and residence rules.⁶ The

² *Agassi v Her Majesty's Inspector of Taxes* [2006] UKHL 23, [4] and [6]. Cf 'UK tax – tennis star liable to tax on endorsement contract *Robinson (Her Majesty's Inspector of Taxes) v Agassi*' (2006) 128 *Thomson Tax and Accounting Insight* 2. Note, the judgments do not specifically consider the residency of Agassi Inc. However, it is clear it was not incorporated in the United Kingdom and did not carry on business in that country.

³ *Agassi v Her Majesty's Inspector of Taxes* [2006] UKHL 23, [6].

⁴ *Set, Duce and Ball v Her Majesty's Inspector of Taxes* [2003] UKSC SPC00373 (29 July 2003). The decision was anonymised.

⁵ Eric Tomsett, 'United Kingdom: Foreign Entertainers Taxable on Payments Between Foreign Companies' [June 2006] *World Tax Advisor* 29, 30.

⁶ Section 4 *International Tax Agreements Act 1953* incorporates its terms into the *ITAA 1936* and the *ITAA 1997* and thereby prevails over the latter statutes. The Articles of DTAs will

(2007)17 REVENUE LJ

reason for this omission is unclear. It may stem from the finding at the initial hearing before the Special Commissioners that the relevant DTAs did not prevent the United Kingdom taxing the subject income.⁷ This is, however, an unlikely cause for the omission, as a subsequent House of Lords' review of the decision⁸ would have surely involved an express, detailed assessment of the impact of the DTA's. Thus the House of Lords' oversight is inexplicable. To this end the article concludes with a discussion of the relevant double taxation agreement⁹ between Australia and the United States in light of the *Agassi* case.

2 TAXING OUR SPORTING HEROES

The discussion below concerns professional athletes, as opposed to those who merely participating in a sport. Thus while the ordinary meaning of 'sport' includes 'an athletic pastime undertaken for pleasure or recreation ... a pursuit which is intended to do no more than provide diversion or amusement to both participants and onlookers,' professional sport is specifically sports 'associated with those who made their principal pursuit the playing of sport for reward'.¹⁰

While salary payments made to professional sportspersons are uncontrovertibly assessable as 'ordinary income' under s 6-5 *ITAA 1997* and its predecessor, s 25(1) *Income Tax Assessment Act 1936* (Cth) ('*ITAA*'), the courts have at times been loathe to find less regular receipts to be assessable income. This has been facilitated to some extent by judicially developed indicia of ordinary income. In addition to asserting that once-off payments are less likely to be ordinary income,¹¹ the courts have drawn a distinction between payments that are earned, as opposed to being given personal

not override Part IVA of the *ITAA 1936* that contains the Australian general anti-tax avoidance provisions.

⁷ *Set, Duce and Ball v Her Majesty's Inspector of Taxes* [2003] UKSC SPC00373 (29 July 2003) at [40] and [41].

⁸ Similarly, the High Court made no reference to the DTAs in *Agassi v Her Majesty's Inspector of Taxes* [2004] EWCA 487 (Ch).

⁹ *Convention between the Government of Australia and the Government of the United States of America for the avoidance of double taxation and the prevention of fiscal evasion with respect to taxes on income*, 6 Aug 1982, 1983 ATS No 16. Schedule 2 of the *International Tax Agreements Act 1953* contains the double tax agreement between Australia and the US ('*Australia - US DTA*'). Schedule 2A contains the Protocol amending the Australia - US DTA ('*Australian - US Protocol*').

¹⁰ *Commissioner of Taxation v Stone* (2005) 215 ALR 61, [11]-[12].

¹¹ *C of T (Vic) v Phillips* (1936) 55 CLR 144; *FCT v Dixon* (1952) 86 CLR 540; *Keily v FCT* (1983) 83 ATC 4248; *FCT v Blake* (1984) 84 ATC 4661; *Case 1/2000* (2000) 2000 ATC 101, 124, 126-7.

TAXING SPORTS PROFESSIONALS

qualities.¹² This has allowed the courts, particularly the English courts, to conclude that certain payments to sporting heroes were not ordinary income.

Thus in *Seymour v Reed*¹³ a committee of a cricket club organised a benefit match for the taxpayer, a professional cricket player, whom they employed. The proceeds of the match were invested in a trust to provide the taxpayer with some future income. Ultimately, these funds, and further sums donated by the public, were paid to the taxpayer. The funds were held to be not assessable, as they were characterised as a mere gift or present for the taxpayer's personal attributes, rather than remuneration.¹⁴ 'Its purpose is not to encourage the cricketer to further exertions, but to express the gratitude of his employers and of the cricket loving public for what he has already done and their appreciation of his personal qualities.'¹⁵ Similarly, payments to the revered professional football (soccer) player Mr Bobby Moore were held to be non-assessable in *Moore v Griffiths*.¹⁶ The taxpayer was selected to play in the World Cup series and was paid for these matches by the Football Association, through his club. In addition to these payments, the Association had resolved to pay the English team a bonus of £22,000 if the team won the World Cup. The English team won the World Cup and the taxpayer received his share of the bonus. A bath salts manufacturer had also resolved prior to the series that it would give three awards to players in the series. The taxpayer received £500 for best player in the series and £250 for best player in the English team. None of the payments were held to constitute assessable income. The payment from the Association was held to be a 'testimonial or accolade' for the taxpayer's participation in an exceptional event. Similarly, the payments from the bath salts manufacturer were held not to be remuneration, but rather to publicise its own products.

Today, however, the Australian courts would more readily find these receipts to be assessable. As testimonial matches have become more common, the proceeds could be seen as a normal incident of the taxpayer's employment.¹⁷ Even if not income according to ordinary concepts, such testimonial payments would constitute statutory income, eligible termination payments, assessable under ss 27A-27J ITAA. Similarly, the decision in *Moore v Griffiths*¹⁸ would not be followed, in light of the

¹² *C of T (Vic) v Phillips* (1936) 55 CLR 144; *FCT v Dixon* (1952) 86 CLR 540; *Keily v FCT* (1983) 83 ATC 4248; *FCT v Blake* (1984) 84 ATC 4661; *Case 1/2000* (2000) 2000 ATC 101, 124 and 126-7.

¹³ [1927] AC 554.

¹⁴ [1927] AC 554, 560.

¹⁵ [1927] AC 554, 559-60.

¹⁶ [1972] 3 All ER 399.

¹⁷ *Case A14* (1969) 69 ATC 80; *FCT v Woite* (1982) 82 ATC 4578; *Case R107* (1984) 84 ATC 717.

¹⁸ [1972] 3 All ER 399.

(2007)17 REVENUE LJ

contrary decision in *Kelly v FCT*.¹⁹ The taxpayer was/is a famous professional Australian rules footballer. At the beginning of the 1978 season, a Perth television station announced that it would award \$20,000 to the player who won the 'Sandover Medal'. This medal was awarded to the best and fairest player for the season in the Western Australian Football League. The taxpayer won the medal and was paid the \$20,000. The payment was held to be ordinary income even though the television station, rather than the taxpayer's employer made the payment. The Court held there was a direct nexus between the prize and the taxpayer's employment as a football player:²⁰

[The payment was a] clearly recognisable and recognised incident of the appellant's employment as a footballer with the club ... In fact, because of the pursuit by him of such employment, ie the playing of football to the best of his skill and ability in each of the matches played by him, he secured the necessary votes of umpires to win the Sandover Medal and, as a consequence, the \$20,000 payment which it was known would flow from such a win.

The controversial nature of taxing sporting persons recently came to the fore again in *Stone v FCT*.²¹ This case has particular relevance to the assessability of the sporting endorsement payments in the *Agassi* case. The taxpayer was a senior constable in the Queensland Police Service and also competed nationally and internationally in women's javelin throwing events. She was a professional athlete. The courts had to consider the assessability of number of receipts, including prize money from athletic competitions, government grants and allowances and payments under a sporting endorsement contract. In regard to the latter, 'in October 1995, ASICS a manufacturer of sports clothing agreed to supply her with footwear, apparel and accessories. In return, [she] agreed to make some personal appearances and to wear ASICS goods in training and competition unless obliged to wear the national team uniform'.²² Ultimately the taxpayer conceded that the sponsorship payments were assessable, but argued that the other payments were from the pursuit of a mere sport, not a business, and thus were not assessable.

The Full Federal Court had concluded that the taxpayer was not conducting a business and thus the subject prize money, government grants and allowances were not assessable. This finding was overruled by the High Court. The High Court concluded that there was a commercial aspect to the taxpayer's activities and she was conducting a business, not merely pursuing a sport.²³ While the High Court accepted

¹⁹ (1985) 85 ATC 4283.

²⁰ (1985) 85 ATC 4283, 4287-8.

²¹ (2003) 2003 ATC 4584; (2005) 2005 ATC 4234.

²² (2005) 2005 ATC 4234.

²³ (2005) 2005 ATC 4234, [47] and [50].

TAXING SPORTS PROFESSIONALS

that the taxpayer did not seek to maximise her receipts from prize money by only attending the most lucrative competitions, applying the reasoning in *Kelly v FCT*,²⁴ the Court held that the prize moneys and increased grants flowed directly from the successful pursuit of her business activities.²⁵ Whether the receipts were assessable was determined on the basis of whether persons had ‘turned their talent to account for money’,²⁶ rather than whether they considered themselves to be a professional or not.²⁷

Relevantly, Gleeson CJ, Gummow, Hayne and Heydon JJ noted:²⁸

Once it is accepted, as the taxpayer did, that the sums paid by sponsors to her, in cash or kind, formed part of her assessable income, the conclusion that she had turned her sporting ability to account for money is inevitable. The sponsorship agreements cannot be put into a separate category marked “business”, with other receipts being put into a category marked “sport”. Nor can some receipts be distinguished from others on the basis that the activity producing a receipt was not an activity in the course of carrying on what otherwise was to be identified as a business. Agreeing to provide services to or for a sponsor in return for payment was to make a commercial agreement. What the taxpayer received from her sponsors were fees for the services she provided. ... [T]he sponsorship arrangements show ... the taxpayer made those arrangements to assist her pursuit of athletic activities [and] was able to make them because of her pursuit of those activities. ... [T]he sponsorship agreements cannot be segregated from other aspects of her athletic activities.

Thus, while the High Court did not have to specifically consider the assessability of the payments under the sponsorship agreement, it is clear they would have held them to be assessable even without the taxpayer’s concession on the point.²⁹ In regard to the latter point, it should be noted that ATO *Taxation Ruling 1999/17 Income tax: sportspeople – receipts and other benefits obtained from involvement in sport* at [72]-[75] specifically identifies payments under sponsorship contracts as assessable income.³⁰

From this discussion it is clear that the payments under the Nike Inc and Head Sport AG sponsorship agreements in the *Agassi* case would constitute ordinary income in

²⁴ (1985) 85 ATC 4283.

²⁵ (2005) 2005 ATC 4234, [50].

²⁶ Commissioner of Taxation v Stone [2005] HCA 21, 50.

²⁷ Peter Moran and Jeff Tyler, ‘Sponsorship means business: High Court finding’ (2005) May *Focus AAR*.

²⁸ (2005) 2005 ATC 4234, [50]-[51].

²⁹ Cf A Carey, ‘Athlete’s Income all taxable – Commissioner Wins Again in High Court: Case Note: Commissioner of Taxation v Stone’ (2005) 34 *Aust Tax Rev* 118, 120.

³⁰ See also B Clark et al, *Taxation and Sport in Australia* (Sydney, The Federation Press, 2000), 66.

(2007)17 REVENUE LJ

Australia and would be assessable under s 6-5 *ITAA 1997* if the residency and/or source requirements under s 6-5(2) and (3) *ITAA 1997* are met.

3 RESIDENCY OF MR AGASSI AND AGASSI INC

As noted above, Australian residents must include in their assessable income all ordinary and statutory income no matter its source, while non-residents are only assessed on Australian sourced income: ss 6-5(2) and (3), 6-10(4) and (5) *ITAA 1997*. Reiterating such, under s 23(r) *ITAA* income derived by non-residents from sources wholly outside Australia is exempt from tax.³¹ Thus if an athlete such as Mr Agassi, or his company Agassi Inc, was resident in Australia, the issue of the source of the sponsorship payments would not be relevant under, *inter alia*, s 6-5(2) *ITAA 1997*.³² The question of residency is only cursorily considered, as both Mr Agassi and his company Agassi Inc are clearly not resident in Australia. This discussion is, however, relevant to the 'bigger picture' regarding the general assessability of payments to professional athletes, whether resident or non-resident.

(i) Definition of resident individuals

Section 995-1 *ITAA 1997* defines an Australian resident as a person who is a resident of Australia for the purposes of *ITTA*. Section 6(1)(a) *ITAA* defines 'resident' as a person who resides in Australia. The definition continues by specifically stating that this will include:

- * a person whose domicile is in Australia, unless the Commissioner is satisfied that the person's permanent place of abode is outside Australia;
- * a person who has been in Australia, continuously or intermittently, for more than half a year unless the Commissioner is satisfied that the person's usual place of abode is outside Australia and that the person does not intend to take up residence in Australia; or
- * a member of a superannuation scheme established by deed under the *Superannuation Act 1990*, an eligible employee for the purposes of the *Superannuation Act 1976* or spouse or child under 16 years of such a person.

It is these notions, rather than nationality or citizenship, that are the keystones to determining residence. 'Non-resident' is defined in s 6(1) as a 'person who is not a resident of Australia.' Hence the terms 'resident' and 'non-resident' are mutually

³¹ See also s 11-15 *ITAA 1997*.

³² Cf B Clark, *Taxation and Sport in Australia* (Sydney, The Federation Press, 2000) 140.

TAXING SPORTS PROFESSIONALS

exclusive and, in combination, exhaustive. A person must be either a resident or a non-resident.³³

In determining the residency of an individual, the courts begin by considering the common law definition of residence.³⁴ An often-quoted explanation of residence according to ordinary concepts is found in *Levene v CIR*:³⁵

My Lords, the word 'reside' is a familiar English word and is defined in the Oxford English Dictionary as meaning 'to dwell permanently or for considerable time, to have one's settled or usual abode, to live in or at a particular place'.

Relevant factors when applying this test include the extent of the taxpayer's physical presence in the country, the frequency and duration of visits to the country, the location of family and business ties and the nationality of the taxpayer.³⁶ Clearly, in light of these factors, Mr Agassi resides in the United States, not Australia. He physically resides in Nevada with his spouse and two young children.

If the taxpayer is not clearly ordinarily resident in Australia, the inclusionary limbs of s 6(1)(a) *ITAA* need to be considered. With respect to the first of these, it will be recalled that a person whose domicile is Australian is treated as a resident of Australia unless his or her permanent place of abode is outside Australia. A person's domicile is based on the legal relationship that person has with a particular place. Every person is considered in law as having a domicile and only one domicile at a time.³⁷ Domicile is a technical legal concept and embraces different types of domicile. The two main forms of domicile are domicile of origin and domicile of choice. Domicile of origin is acquired by implication of law at birth. It involves an adoption of either the child's father's or mother's domicile.³⁸ A person's domicile of origin continues until a domicile of choice is adopted.³⁹ A person's domicile of choice is the place where the person has his or her fixed and permanent home to which they intend to return whenever absent. Hence, to acquire a domicile of choice the person

³³ *FTC v Applegate* (1979) 79 ATC 4307; *FCT v Jenkins* (1982) 82 ATC 4098; *Case T28* (1986) 86 ATC 276.

³⁴ In para 11 *Taxation Ruling TR 98/17*, replacing *IT Ruling 2607*, the Commissioner has stated that the definition of resident in s 6(1) *ITAA* embodies the common law definition of residence.

³⁵ [1928] AC 217, 222. See also *CIR v Lysaught* [1928] AC 234, 249-250; *FCT v Miller* (1946) 73 CLR 93, 97-98; *Tanumihardjo v FCT* (1997) 97 ATC 4817, 4822; *Taxation Ruling TR 98/17*, [14].

³⁶ *Shand v FCT* (2003) ATC 208; *IT Ruling 2650*; J Cassidy, *Concise Income Tax* (3rd ed, The Federation Press, 2004) 154.

³⁷ *Udny v Udny* (1869) LR 1 Sc & Div 307.

³⁸ *Udny v Udny* (1869) LR 1 Sc & Div 307; *Henderson v Henderson* [1965] 1 All ER 179, 180-181.

³⁹ A person can acquire a domicile of choice provided he or she is of sound mind and either married or over the age of 17 years: s 8 *Domicile Act 1982* (Cth).

(2007)17 REVENUE LJ

must take up residence in the new country with the intention of making it his or her home indefinitely.⁴⁰ Mr Agassi's domicile of origin is the United States and he has not adopted a domicile of choice in Australia. Moreover, in any case, his permanent place of abode⁴¹ is outside Australia within s 6(1)(a) *ITAA*.

The second inclusionary limb of s 6(1)(a) *ITAA* is known as the '183 day' rule. Under this limb the taxpayer will be considered a resident of Australia if that person has been in Australia, continuously or intermittently, for more than half a year,⁴² unless the Commissioner is satisfied that the person's usual place of abode is outside Australia and that person does not intend to take up residence in Australia. While Mr Agassi spends time in Australia, his visits do not amount to 183 days. Moreover, his usual place of abode⁴³ is outside Australia within s 6(1)(a) *ITAA*.

Finally, Mr Agassi does not meet the 'superannuation' test. This test applies to a person who is a member of a superannuation scheme established by deed under the *Superannuation Act 1990*, an eligible employee for the purposes of the *Superannuation Act 1976* or spouse or child under 16 years of such a person who is a resident of Australia.

Mr Agassi is not an Australian resident. In this regard it should be recalled that in the *Agassi* case he was also found not to be a resident of the United Kingdom not domiciled there.⁴⁴ He is resident in the United States of America.

(ii) Definition of resident companies

Section 6(1)(b) *ITAA* provides that an Australian resident company is a company:

- * incorporated in Australia;
- * that carries on business in Australia and has its central management and control in Australia; or
- * that carries on business in Australia and its voting power is controlled by shareholders resident in Australia.

⁴⁰ Section 10 *Domicile Act 1982* (Cth); *Haque v Haque (No.1)* (1962) 108 CLR 230, 248.

⁴¹ See further *FCT v Applegate* (1979) 79 ATC 4307; *IT Ruling 2607*, *IT Ruling 2650* and *IT Ruling 2681*.

⁴² The numerical aspect of the test is strictly imposed. In *Wilkie v FCT* (1952) 1 All ER 92 the Court held it was not enough that the taxpayer had spent 182 days and 20 hours in the United Kingdom.

⁴³ See further *Case S19* (1985) 85 ATC 223.

⁴⁴ *Agassi v Her Majesty's Inspector of Taxes* [2006] UKHL 23 (17 May 2006) at [4].

TAXING SPORTS PROFESSIONALS

Under the above definition, a company can have more than one residence.⁴⁵ This would occur when the central management and control of the company is divided between two or more countries or where two residency tests are satisfied.⁴⁶ Thus where a company was incorporated in Australia, but its central management and control lies elsewhere, the company may be treated as resident in both Australia and that other country. In such a situation the potential for double taxation is averted through the operation of DTAs between the 'competing' countries. These agreements will usually include a clause allocating the company a particular residency in such cases.

Under the first limb of s 6(1)(b) *ITAA*, if the company was incorporated in Australia, that will suffice for it to attract Australian residency, regardless of where the company's central management and control is located. Agassi Inc was incorporated in the United States, not in Australia. In regard to the second limb of s 6(1)(b) *ITAA*, Agassi Inc does not carry on business in Australia and central management and control is in the United States of America, not Australia.⁴⁷

Under the third limb of s 6(1)(b) *ITAA* a company will be resident in Australia if:

- * it is carrying on business in Australia; and
- * its voting power is controlled by shareholders who are resident in Australia.

A resident of the United States, Mr Agassi, controls Agassi Inc. This limb could be relevant in a given case, if, for example, an Australian resident, such as Mr Leyton Hewitt, controlled a company that otherwise was not resident in Australia. Ultimately, Agassi Inc is not a resident Australian company.

4 SOURCE

Once it is determined that neither Mr Agassi, nor his company Agassi Inc, are resident in Australia, only Australian sourced receipts will be assessable income: ss 6-5(3), 6-10(5) *ITAA 1997*. In particular, if sourced in the United States, the payments under the sponsorship agreements will not be assessable under s 6-5(3)(a) *ITAA 1997*. 'Australian source' is defined in s 995-1(1) of the *ITAA 1997*. This unhelpfully

⁴⁵ *Swedish Central Rwy Co Ltd v Thompson* [1925] AC 495, 510 and 505; *Unit Construction Co Ltd v Bullock* [1960] AC 351, 360-1, 367, 369 and 372; *Koitaki Para Rubber Estates v FCT* (1940-1941) 64 CLR 15, 18 and 21; *Koitaki Para Rubber Estates v FCT* (1940-1941) 64 CLR 241, 244, 248, 249 and 250-1.

⁴⁶ *Swedish Central Rwy Co Ltd v Thompson* [1925] AC 495, 501; *Koitaki Para Rubber Estates Ltd v FCT* (1940-1941) 64 CLR 15, 18; 64 CLR 241.

⁴⁷ Nike Inc, *Nikebiz: the inside story – company overview* (2006) Nikebiz.com <<http://www.nike.com/nikebiz/nikebiz.jhtml?page=3&item=facts>> at 19 July 2006.

(2007)17 REVENUE LJ

provides that it is 'income derived from a source in Australia'. Thus it is necessary to refer to the common law notions of 'source'.⁴⁸ The leading statement as to the meaning of 'source' is that of Isaacs J's in *Nathan v FCT*:⁴⁹

The word 'source' is not a legal concept, but something that a practical man would regard as a real source of income. Legal concepts must, of course, enter into the question when we have to consider to whom a given source belongs. But the ascertainment of the actual source of a given income is a practical, hard matter of fact.

Such a practical analysis necessarily requires a consideration of all the surrounding circumstances and identifying if a sufficient connection exists between the subject payments to the taxing Nation. Applying this test, a 'practical man' would regard the payments under sponsorship contracts between a United States resident and two United States companies that are paid into the recipient's United States bank account, as sourced in the United States. A 'practical man' would not consider the proceeds from the sponsorship agreements to have an Australian source, merely because of the presence and performance of Mr Agassi at the Australian Open Tennis Championship. At first glance the sponsorship payments would, therefore, not be assessable in Australia. There is, however, further Australian jurisprudence that might suggest otherwise.

(i) Source of payments for services and incidental payments

In Australia there is no definitive test for determining the source of services income and other incidental payments. While the courts have asserted that the source of such income will generally be the place where the personal exertion giving rise to that payment took place,⁵⁰ even in the leading case *FCT v French*⁵¹ different views were expressed by various members of the court. This case can be best understood in its factual context. The taxpayer was a resident of New South Wales, where he was employed as an engineer by a company incorporated in New South Wales. He had no written contract of service. The taxpayer spent two to three weeks a year in New Zealand, acting as an inspecting engineer for his employer. The salary for this period, £110, was paid as usual into his Sydney bank account. The taxpayer asserted that this

⁴⁸ Cf B Clark, 'Robert Mitchum 17- Australian Taxation Office 0: The Taxation of International Athletes' (1998) *Bond Law Review* 129.

⁴⁹ *Nathan v FCT* (1918) 25 CLR 183, 189-90.

⁵⁰ *C of T (NSW) v Cam & Sons Ltd* (1936) 36 SR (NSW) 544; *FCT v French* (1957) 98 CLR 398; *Gilder v FCT* (1991) 91 ATC 5062, 5066. The principles applied in English decisions relating to income derived from trade or business activities also require that most significance be attached to the place where the activity takes place: *Bennett v Marshall* (1938) 1 KB 591.

⁵¹ (1957) 98 CLR 398.

TAXING SPORTS PROFESSIONALS

amount was exempt from tax under former s 23(q) *ITAA* as the income was sourced outside Australia and was subject to tax in New Zealand, though it was under the New Zealand tax-free threshold.

A majority of the High Court agreed. Taylor J noted that while the possible 'source of an employee's remuneration [is] either the locus of the contract of service, or, the place where remuneration is payable thereunder, or, the place where the services are performed which give rise to the right to remuneration ... in the absence of special circumstances, this third element should be chosen.'⁵² Williams J (with whom Dixon CJ agreed) also believed that the source of personal exertion income 'must be the place where these duties are performed and ... where these duties are performed in more than one place the income is derived from more than one source ... and there should be apportionment' between the relevant countries.⁵³ This principle extended to any 'emoluments of any office or employment of profit held by the taxpayer', including income from property.⁵⁴

Kitto and McTiernan JJ, however, believed that the place where the exertion took place would not always determine the source of the income, suggesting that the locus of the contract or the place where the payments were made may also determine the source of personal exertion income.⁵⁵ Particularly pertinent to the discussion below, Kitto J added that where 'remuneration [is] payable independently of the actual performance of service' the locus of that obligation could provide the source of the payments.⁵⁶ The locus of the obligation, Kitto J suggested, might coincide with where the employee normally performs services or the site of the employer's place of business.⁵⁷ As the employer's obligation to pay might stem from the employee's contract of employment, the locus of the contract might determine the source of the payments.⁵⁸

This divergence of thought was noted in *FCT v Mitchum*⁵⁹ where the court asserted there was no 'hard and fast' rule for determining the source of personal exertion income. The Court asserted there is:⁶⁰

⁵² (1957) 98 CLR 398, 422.

⁵³ (1957) 98 CLR 398, 411.

⁵⁴ (1957) 98 CLR 398, 414-15.

⁵⁵ (1957) 98 CLR 398, 407-8 and 417. See also *C of T (NSW) v Cam & Sons Ltd* (1936) 36 SR(NSW) 544, 548.

⁵⁶ (1957) 98 CLR 398 at 417 - 18. This approach was applied in *Case X78* (1990) 90 ATC 571, as there was no relevant continuing employment to which the subject payments pertained.

⁵⁷ (1957) 98 CLR 398, 418.

⁵⁸ (1957) 98 CLR 398, 418.

⁵⁹ (1965) 113 CLR 401.

⁶⁰ (1965) 113 CLR 401, 406, 407 and 408.

(2007)17 REVENUE LJ

no rule of law which would compel the adoption of a particular conclusion where the facts themselves leave room for more than one view. ... The conclusion as to the source of income for the purpose of the Act is a conclusion of fact ... there are no presumptions and no rules of law which require that the question be resolved in any particular sense. ... I do not feel compelled or persuaded by the decision of the court in *French's Case* to hold that in every case where work forms the consideration for wages and salary paid, the source of the income constituted by the wages or salary is in the place where the work is done.

In light of such principles, what is the source of the payments under the Agassi sponsorship contracts? There are a number of possibilities. If the majority view in *French's case* is applied it is possible to say, in accordance with the *Agassi* case, discussed below, that some of the payments have an Australian source. The ATO could assert that the sponsorship payments relate in part to performances in Australia, namely appearances at the Australian Open Tennis Championship.

In regard to such an argument, it is undeniable that Mr Agassi would be assessed on his actual prize winnings from a tennis tournament such as the Australian Open Championship, no matter the duration of his stay in Australia.⁶¹ Thus, as Mr Agassi is a professional athlete, Hamilton asserts:⁶²

In the case of this class of personal service income, income tax may be levied by the source country irrespective of the duration of the stay on a pure source basis. The country in which the activities are performed, whatever the length of the visit, has the right to tax.

However, in regard to the sponsorship payments, the connection with Australia is quite indirect and arguably a more direct connection with services performed in Australia is required before a payment will be sourced in Australia.⁶³ Thus it would be erroneous to source Mr Agassi's sponsorship earnings in Australia merely on the basis of an amorphous connection with him playing tennis at the Australian Open Championship.

To the contrary, there is a strong argument that the Nike Inc and Head Sport AG sponsorships have no real connection to Australia and are purely sourced in the United States. The sponsorship payments have no nexus with the Australian Open Championship but rather are dependent upon Mr Agassi's long-standing⁶⁴ worldwide career. Where a payment is linked to performances in a multitude of

⁶¹ Hamilton R et al, *Guidebook to Australian International Taxation* (7th ed, 2001) 6-26.

⁶² Hamilton R et al, *Guidebook to Australian International Taxation* (7th ed, 2001) 6-26.

⁶³ Cf L Burns, 'Australia: Taxation of Non-Resident Entertainers and Athletes' (2000) 22 *Tax Management International Forum*.

⁶⁴ Beginning in 1986: <<http://www.agassiopen.com>> at 18 September 2006.

TAXING SPORTS PROFESSIONALS

places, in this case tennis tournaments around the world, source is best determined by one of the above alternative tests such as locus of the contract.

Entwined with this submission is that fact that the main reason why payments are made under sponsorship agreements is not the services that a person such as Mr Agassi might provide by playing tennis, but rather the reputation of such an athlete as a world famous tennis player.⁶⁵ This is exemplified by the fact that injured sportspersons continue to accrue their sponsorship payments, even though they are unable to play. Similarly, professional sportspersons continue to accrue their sponsorship payments even though they are suffering a 'slump in form' and are playing poorly. Ultimately, sponsorship payments are for reputation and reputation does not have a distinct source. In turn, as Lloyd-Pugh and McMahon assert, 'due to the difficulty in putting a geographical source on reputation, place of contract is the best indicator of source.'⁶⁶ This accords with Kitto J's view, quoted above, that where 'remuneration [is] payable independently of the actual performance of service' the locus of that obligation could provide the source of the payments.⁶⁷ Under this view the source of the income in the *Agassi* case is clearly the United States, as this is the locus of the sponsorship contract. It will be seen below that this view arguably accords with the relevant *Australian – US DTA*⁶⁸ and under Australian law a construction that is consistent with an international treaty must be preferred.⁶⁹

5 AGASSI V ROBINSON

It is useful to consider the *Agassi* decision and its potential impact on Australian taxation law. As noted above, a majority⁷⁰ of the House of Lords found that payments

⁶⁵ T Lloyd-Pugh and J McMahon, 'Taxation in Australia of Non-Resident Athletes: Maurice Greene and the Olympic Games: Can the ATO Catch the Fastest Man in the World?' (2002) 12 *Revenue Law Journal* 128, 130.

⁶⁶ Tegan Lloyd-Pugh and Jane McMahon, 'Taxation in Australia of Non-Resident Athletes: Maurice Greene and the Olympic Games: Can the ATO Catch the Fastest Man in the World?' (2002) 12 *Revenue Law Journal* 128, 130.

⁶⁷ (1957) 98 CLR 398, 417 - 418. This approach was applied in *Case X78* (1990) 90 ATC 571, as there was no relevant continuing employment to which the subject payments pertained.

⁶⁸ *Convention between the Government of Australia and the Government of the United States of America for the avoidance of double taxation and the prevention of fiscal evasion with respect to taxes on income*, Aug 6 1982, 1983 ATS No 16. Schedule 2 of the International Tax Agreements Act 1953 contains the double tax agreement between Australia and the US ('*Australia - US DTA*'). Schedule 2A contains the Protocol amending the Australia - US DTA ('*Australian - US Protocol*').

⁶⁹ *Polites v The Commonwealth* 70 CLR 60, 69 per Latham J.

⁷⁰ Lord Scott and Lord Mance (with whom Lord Nicholls and Lord Hope agreed); Lord Walker dissenting.

(2007)17 REVENUE LJ

under two sponsorship contracts between Agassi Inc and Nike Inc and Head Sport AG respectively were assessable under United Kingdom tax laws, despite none of the parties being resident in the United Kingdom, nor trading in the United Kingdom.⁷¹ Agassi Inc in turn paid these receipts to Mr Agassi. While the focus of the case was on the withholding tax obligations of the payer, despite this conduit, the court ultimately held that Mr Agassi could be taxed on the payments in his individual capacity.⁷² As noted above, the only connection with the United Kingdom was Mr Agassi's participation in certain United Kingdom tennis championships, in particular Wimbledon.

The decision was largely based on 'special statutory provisions in the UK'⁷³. More specifically, the decision turned on the court broadly interpreting ss 555 and 556 of the *Income and Corporation Taxes Act 1988* ('ICTA 1988'). Sections 555 and 556 ICTA 1988 apply to international entertainers and sportsperson who are not residents in the United Kingdom. The provisions effectively allow such persons to be assessed on the profits or gains arising from any commercial activity carried out by them (or through a branch, agency or permanent establishment) in the United Kingdom. To satisfy the relevant nexus the only prerequisite is that that the payment 'has a connection of the prescribed kind with the relevant activity'.⁷⁴ The 'connection' is defined as a payment or transfer made for, or in respect of, or which in any way derives either directly or indirectly from the performance of the relevant activity has a connection of the prescribed kind with the relevant activity.⁷⁵ The person paying the money is obliged to deduct income tax from this amount and account for such to the relevant taxation authorities: s 555(2).

At the initial hearing, in an anonymised decision, the Special Commissioners found that ss 555 and 556 applied to the subject payments under the sponsorship contracts.⁷⁶ The Special Commissioners found that '[p]laying at Wimbledon (and similar activities in the United Kingdom) is ... in our view a relevant activity.'⁷⁷ The payments under the sponsorship agreements were in turn found to 'have a

⁷¹ *Agassi v Her Majesty's Inspector of Taxes* [2006] UKHL 23 (17 May 2006) at [4] and [6]. Cf 'UK tax – tennis star liable to tax on endorsement contract *Robinson* (*Her Majesty's Inspector of Taxes*) v *Agassi*' (2006) 128 *Thomson Tax and Accounting Insight* 2.

⁷² It was held that subject to s 555(6) ICTA 1988, Mr Agassi would be assessed on the proceeds from contracts entered into by Agassi Inc.

⁷³ Eric Tomsett 'United Kingdom: Foreign Entertainers Taxable on Payments Between Foreign Companies' [June 2006] *World Tax Advisor* 29, 30.

⁷⁴ Section 556(1) ICTA 1988.

⁷⁵ Reg 3(2) Income Tax (Entertainers and Sportsmen) Regulations 1987.

⁷⁶ *Set, Duce and Ball v Her Majesty's Inspector of Taxes* [2003] UKSC SPC00373 (29 July 2003).

⁷⁷ *Ibid*, [29].

TAXING SPORTS PROFESSIONALS

connection of a prescribed kind with that activity ... They are in respect of, or derived directly or indirectly, from playing at Wimbledon since the amounts are connected with playing generally, and therefore with playing in the United Kingdom either directly, in the bonus for performance at Wimbledon, or indirectly in that performance at Wimbledon affects his ATP ranking.⁷⁸ This finding was reaffirmed on appeal to the High Court, the court affirming that the legislation applied irrespective of whether the parties had a tax presence in the United Kingdom.⁷⁹

On appeal, the Inspector of Taxes argued that the prescribed connection with the relevant activity was Mr Agassi playing at the Wimbledon, while fulfilling the sponsorship contracts, and as a result deriving income from Nike Inc and Head Sport AG. It was contended that if the relevant sections did not apply to a foreign payer, foreign sportspersons could avoid tax by ensuring that any money was paid by a foreign company with no trading presence in the United Kingdom. Mr Agassi's counsel argued that Nike Inc and Head Sport AG were foreign companies with no trading presence in the United Kingdom and that under the extra-territoriality principle expressed in *Clark v Oceanic Contractors Inc*⁸⁰ Parliament would not have intended the relevant provisions to extend to payments made by foreign companies to foreign companies/ foreign residents.

Ultimately, a majority of the House of Lords disagreed with the latter submission, holding that Mr Agassi's presence at Wimbledon provided a sufficient connection to the United Kingdom.⁸¹ There were essentially four reasons why the House of Lords rejected the taxpayer's submission. First, the majority justices asserted that s 555 simply makes no reference to the tax presence of the payer as being relevant to its operation. As Lord Scott asserted, under a literal interpretation of s 555 *ICTA 1988* the test is:⁸²

- Has a payment been made to whatever person, not being a payment of such a kind as has been prescribed: s 555(6) *ICTA 1988*;
- If 'yes', then has the payment got a connection of a prescribed kind with the relevant activity?
- If 'yes', then the income is assessable.

Echoing this approach, Lord Mance held that if read literally, s 555(2) 'applies to any person who makes a payment of a prescribed kind in connection with an activity ...

⁷⁸ *Ibid.*

⁷⁹ *Agassi v Her Majesty's Inspector of Taxes* [2004] EWCA 487 (Ch) at [16].

⁸⁰ [1983] 2 AC 130.

⁸¹ *Agassi v Her Majesty's Inspector of Taxes* [2006] UKHL 23, [14] and [17].

⁸² *Ibid.*, [17].

(2007)17 REVENUE LJ

within the United Kingdom.⁸³ Thus on a literal interpretation the legislation there is no need for the payer to be have subjected themselves to the United Kingdom tax jurisdiction.

In regard to the first basis for the majority judgment, a plain reading of s 555 does not need to make reference to the tax presence of the payer (nor payee for that matter) in order for the extra-territoriality principle to apply. To reiterate the foundation of this principle, it is useful to quote a leading United Kingdom statement in *Ex parte Blain*,⁸⁴ which was cited in the majority judgment in *Agassi*.⁸⁵ As James LJ explained in *Ex parte Blain*,⁸⁶ this is a 'broad, general, universal, principle, that English legislation, unless the contrary is expressly enacted or so plainly implied as to make it the duty of an English court to give effect to an English statute, is applicable only to English subjects or to foreigners who by coming into this country, whether for a long or short time, have made themselves during that time subject to English jurisdiction.'⁸⁷ This passage has also been adopted in Australia.⁸⁸ Only express language or an extremely clear implication can rebut the principle of extra-territoriality.⁸⁹ Thus, the absence of express language in s 555 regarding the tax presence of the payer or an otherwise clear indication that it was intended to extend to persons with no trading presence in the United Kingdom, dictates a construction contrary to that adopted by the majority justices. As pointed out by Lord Walker in his dissenting judgment, the legislation in question was passed only a few years after the House of Lords handed down the *Clark v Oceanic Contractors Inc*⁹⁰ that upheld the extra-territoriality principle. Yet Parliament chose not to expressly state in s 555 that it was to apply to transactions where the payer had no tax presence in the United Kingdom.⁹¹ To assert that Parliament intended s 555 to apply to payments by foreign payers to foreign contractual parties is illogical, unless it was based on drafting incompetence. Such is not suggested in the majority judgments.

⁸³ *Agassi v Her Majesty's Inspector of Taxes* [2006] UKHL 23, [14].

⁸⁴ *Ex parte Blain* (1879) 12 Ch D 522, 526.

⁸⁵ *Agassi v Her Majesty's Inspector of Taxes* [2006] UKHL 23 per Lord Scott at [16] and Lord Walker at [20].

⁸⁶ *Ex parte Blain* (1879) 12 Ch D 522, 526.

⁸⁷ Cited with approval in *Clark (Inspector of Taxes) v Oceanic Contractors Inc* [1983] 2 AC 130, 144 (Lord Scarman) and 151 (Lord Wilberforce).

⁸⁸ See, eg, *Morgan v White* (1912) 15 CLR 1, 5 per Barton J.

⁸⁹ *Ex parte Blain* (1879) 12 Ch D 522, 526.

⁹⁰ [1983] 2 AC 130.

⁹¹ *Agassi v Her Majesty's Inspector of Taxes* [2006] UKHL 23, [20] (Lord Walker).

TAXING SPORTS PROFESSIONALS

The second basis for the majority decision was that the extra-territoriality principle was merely a rule of construction. Thus Lord Scott⁹² quoted *Clark v Oceanic Contractors Inc*⁹³ where it was stated that ‘the principle is a rule of construction only’ and that ‘British tax liability has never been exclusively limited to British subjects and foreigners resident within the jurisdiction’.⁹⁴ Thus Hedley states, the *Agassi* case was really concerned with ‘the construction of tax law and the UK’s right to tax payments outside the UK.’⁹⁵ In turn it may be asked, what right does the United Kingdom have to tax payments made outside the United Kingdom and pursuant to a contract between two non-residents? It is contended none. According to the majority Justices, s 555 permits the United Kingdom tax authorities to tax foreign residents on ‘foreign income’ simply because it was indirectly connected to an activity that has a commercial presence in the United Kingdom.⁹⁶ As Lord Walker asserted in his dissent, ‘to put it at the lowest, it is not to my mind glaringly obvious that United Kingdom tax ought to be paid in respect of a non-resident sportsman’s merchandising income received overseas from a manufacturer which is not resident (and has no tax presence) in the United Kingdom.’⁹⁷ Disregarding the principle of extra-territoriality is dangerous as gives a domestic government considerable power over entities that may be wholly outside the Nation’s territory. Such power has the potential to cause serious disruption to international commerce constitutes an affront to such fiscal sovereignty of other Nations.⁹⁸

While technically Lord Scott is correct in asserting that the extra-territoriality principle is a rule of construction and there is no principle of public international law preventing a Nation from taxing income sourced beyond its territorial limits,⁹⁹ the extra-territoriality principle is well entrenched in taxation law and should not have been readily rejected by the court. While it is only a rule of construction used to discover parliamentary intent, it is a very instructive tool in the interpretation of provisions that are silent on an issue of territorial application, such as s 555. Lord Justice Buxton in his Supreme Court of Judicature judgment found that although the principle is only a rule of construction, it is a ‘critical’ one where it is being suggested that a

⁹² *Agassi v Her Majesty’s Inspector of Taxes* [2006] UKHL 23, [16].

⁹³ [1983] 2 AC 130, 145.

⁹⁴ *Agassi v Her Majesty’s Inspector of Taxes* [2006] UKHL 23, [16].

⁹⁵ Julian Hedley, Head of Tax at Tenon Media.

<<http://www.taxationweb.co.uk/businessstax/news.php?id=350>> at 18 September 2006.

⁹⁶ *Agassi v Her Majesty’s Inspector of Taxes* [2006] UKHL 23 at [14]. Cf Eric Tomsett ‘United Kingdom: Foreign Entertainers Taxable on Payments Between Foreign Companies’ [June 2006] *World Tax Advisor* 29, 30.

⁹⁷ *Agassi v Her Majesty’s Inspector of Taxes* [2006] UKHL 23, [28].

⁹⁸ *Winans v AG (No 2)* [1910] AC 27.

⁹⁹ *Ibid.*

(2007)17 REVENUE LJ

provision imposes a charge on a non-resident 'irrespective' of their connection with the United Kingdom.¹⁰⁰

In addition to the recognition of other nations' fiscal sovereignty, the extra-territoriality principle is based upon practicalities; that is, the inherent difficulties involved in taxing persons outside the taxing Nation's jurisdiction. There is no obligation for one Nation to recognise and enforce another Nation's taxation laws.¹⁰¹ Thus, in the *Agassi* scenario, the United States is not obliged to enforce any United Kingdom taxation laws. Taxation laws that purport to reach beyond the Nations' territorial borders can only be effectuated through withholding taxes, such as s 555, but also they can only be effectively enforced where the payer has a presence in the taxing Nation. Lord Mance noted this in his majority judgment:¹⁰²

[I]t seems to me to be far-reaching and anomalous ... to treat section 555(2) as imposing on a foreign payer having no presence here penal obligations to make and account for deductions in respect of payment it makes. This is all the more so when the payment itself may, as here, be made abroad and be made to a company rather than to the relevant sportsman or entertainer. Any such obligations, if they existed, would quite likely be unknown to and *almost certainly be incapable of being enforced against the foreign payer*.

Lord Mance nevertheless interpreted s 555 in a manner that placed a withholding tax obligation on the foreign payer and upheld the Inspector of Taxes' appeal.¹⁰³

A third basis for the majority decision found in Lord Scott's judgment is an implication that the construction suggested by the taxpayer would be inequitable.¹⁰⁴ It is well established that a taxation system should be fair and equitable amongst taxpayers.¹⁰⁵ In turn, two types of equity are traditional recognised. First, horizontal equity exists where people in the same or similar position are treated equally. Under this form of equity a taxation system should not allow persons with the same or similar amounts of 'income' to be taxed differently. Vertical equity requires persons in different positions to be treated differently. Translated to the taxation context, vertical equity requires higher income earners to bear a greater portion of the tax burden than lower income earners. Lord Scott implied that if the taxation of a tennis

¹⁰⁰ *Agassi v Her Majesty's Inspector of Taxes* [2004] EWCA Civ 1518 per Buxton LJ, [13].

¹⁰¹ *Planche v Fletcher* (1779) 99 ER 164, 165.

¹⁰² *Agassi v Her Majesty's Inspector of Taxes* [2006] UKHL 23 per Lord Mance at [30] (emphasis added).

¹⁰³ Cf I Murray-Jones, 'UK tax – tennis star liable to tax on endorsement contract: *Robinson (Her Majesty's Inspector of Taxes) v. Agassi*' (2006) 128 *Thomson Tax and Accounting Insight* 2.

¹⁰⁴ *Agassi v Her Majesty's Inspector of Taxes* [2006] UKHL 23 at [17].

¹⁰⁵ See further Adam Smith, *The Wealth of Nations*, Bk V, ch II; Taxation Review Committee ('Asprey Committee') *Full Report* (AGPS, 1975) at 12-17.

TAXING SPORTS PROFESSIONALS

player or their endorsement company hinges on the locality of the payer then like parties would not be treated alike.¹⁰⁶ Why should one tennis player have to pay tax and another tennis player deriving the same or more income not have to pay tax merely because the latter player was paid by a foreign payer? Thus Lord Scott asserted that Mr Agassi should not be treated differently 'simply by ensuring that the potentially taxable payments were made by foreign entities with no residence or trading presence' in the United Kingdom.¹⁰⁷

This observation does not support the majority's broad construction of s 555 for two reasons. First, this argument is wholly focused on a perceived inequity in regards the person receiving the payment. Yet it is perfectly clear that s 555 is concerned with placing an obligation on the payer, not the payee. If the focus is shifted to the fairness of s 555 in regards to the payer, it is contended that placing a withholding tax obligation on a foreign payer with respect to a foreign contract with another non-resident is simply unfair. As noted above, even Lord Mance noted this inequity in the course of his majority judgment:¹⁰⁸

[I]t seems to me to be far-reaching and anomalous ... to treat section 555(2) as imposing on a foreign payer having no presence here penal obligations to make and account for deductions in respect of payment it makes. This is all the more so when the payment itself may, as here, be made abroad and be made to a company rather than to the relevant sportsman or entertainer. Any such obligations, if they existed, would quite likely be unknown to ... the foreign payer.

Yet, as noted above, Lord Mance nevertheless interpreted s 555 in a manner that placed a withholding tax obligation on the foreign payer.¹⁰⁹ Similarly, Lord Walker in his dissent observed that if the Tax Authority's argument was accepted then the court must believe that:

Parliament must have intended that such a manufacturer (which might not be a large multinational, but a small company trading only in Taiwan or Thailand) would be in breach of its statutory duty, and exposed to penalties for breaching United Kingdom regulations of which it might have no knowledge.

Lord Walker did not accept that this was Parliament's intent and rejected the majority justices' construction of s 555. The majority justices clearly failed to rationally consider the fairness of the obligations imposed on the payer. Accordingly,

¹⁰⁶ *Agassi v Her Majesty's Inspector of Taxes* [2006] UKHL 23, [17].

¹⁰⁷ *Ibid* [17].

¹⁰⁸ *Ibid* [30].

¹⁰⁹ Cf I Murray-Jones, 'UK tax – tennis star liable to tax on endorsement contract: *Robinson (Her Majesty's Inspector of Taxes) v. Agassi*' (2006) 128 *Thompson Tax and Accounting Insight* 2.

(2007)17 REVENUE LJ

the majority justices were wrong to assert that the fact that Nike Inc and Head Sport AG were foreign corporations who did not operate in the United Kingdom was 'irrelevant' to the issue of whether s 555 applied.¹¹⁰

Second, as to the House of Lord's suggestion that the taxpayer's construction would be inequitable,¹¹¹ it is equally inequitable to assess the recipient of such payments when they have not subjected themselves to a tax jurisdiction. The reality is that Mr Agassi had no real connection with the United Kingdom and fairness and equity therefore suggests he should not pay tax in that jurisdiction. The majority justices' construction allows the United Kingdom tax authorities to tax foreign residents on 'foreign income'. They concluded that ss 555(2) and 556(2) applied to Mr Agassi on the basis that the relevant connection with the United Kingdom was satisfied upon his mere competing in Wimbledon.¹¹² Ultimately, this decision effectively deems income that is only indirectly connected to an activity in the United Kingdom to have a United Kingdom source. That is not only unfair, but also ludicrous.

The fourth basis for the majority judgment was a concern that an alternative interpretation would promote tax avoidance. As Lord Scott asserted, 'the whole point of s 555 ... is to subject foreign entertainers or sportsmen to a charge to tax on profits or gains obtained in connection with their commercial activities in the United Kingdom.'¹¹³ A broad construction of s 555(2) was said to be necessary to promote this object of targeting international entertainers performing in the United Kingdom. Specifically, in light of this objective, the majority concluded that Parliament could not have intended the extra-territoriality principle would apply that limited the scope of the sections in the manner suggested by the taxpayer. Both Lord Scott and Lord Mance added that if the taxpayer's argument was upheld, the provisions could be avoided simply by ensuring that any potentially taxable payments were made by foreign entities with no residence or trading presence in the United Kingdom.¹¹⁴ Moreover, the majority justices were concerned that if the extra-territoriality principle were to apply, then international athletes and entertainers could avoid tax altogether.¹¹⁵ This could occur if one State failed to tax the athlete on payments under a contract and another State, here the United Kingdom, was unable to tax the individual because it was outside its territorial authority. Invoking the principle of extra-territoriality in this case would, therefore, inadvertently expand the scope of tax

¹¹⁰ *Agassi v Her Majesty's Inspector of Taxes* [2006] UKHL 23 per Lord Scott at [17].

¹¹¹ *Ibid* [17].

¹¹² *Ibid* [14]. Cf Eric Tomsett 'United Kingdom: Foreign Entertainers Taxable on Payments Between Foreign Companies' [June 2006] *World Tax Advisor* 29, 30.

¹¹³ *Agassi v Her Majesty's Inspector of Taxes* [2006] UKHL 23, [17].

¹¹⁴ *Ibid* [15], [17] and [32].

¹¹⁵ *Ibid* [17].

TAXING SPORTS PROFESSIONALS

avoidance by foreign residents and ultimately render tax liability voluntary.¹¹⁶ This was perceived as an absurd and frustrating result, which had to be avoided at all costs.

Lord Walker in his dissent, however, provides a telling example of how truly absurd the majority view is:¹¹⁷

If a relatively unknown tennis player from (say) Thailand receives £5000 for playing in tournaments in the United Kingdom, it is fair that he or she should be taxed on this. ... It is not so obvious that the player should also have to pay United Kingdom tax on merchandising income paid overseas in respect of products which (because of the player's relatively modest fame) may be marketed only in his or her own country. ... To put it at the lowest it is not glaringly obvious that United Kingdom tax ought to be paid in respect of a non-resident sportsman's merchandising income received overseas from a manufacturer which is not resident (and has no tax presence) in the United Kingdom.

A further absurdity would arise if other Nations followed the United Kingdom lead on the taxation of non-residents. It would mean that professional athletes that follow the circuit in their field would be taxed under a multitude of jurisdictions for payments under a single contract that would otherwise be perceived as sourced in one Nation, often their Nation of residence. Apart from the administrative aspect of filing taxation returns in each jurisdiction, this would also involve complex questions of apportionment. Notably, the apportionment of the sponsorship payments was not addressed in the *Agassi* case. The Special Commissioners' briefly considered the possibilities in regard to apportioning on the basis of playing days, but ultimately left the matter open.¹¹⁸ Undoubtedly these complexities will lead to professional sportspersons shunning the United Kingdom and any other Nations that attempts to adopt a similar taxation position. Ultimately, this policy decision may have a large negative impact on the conduct of international sporting events.¹¹⁹

Even if the construction suggested by taxpayer created a loophole in s 555 for foreign taxpayers who received payments from foreign payers, it was not for the courts to reject the extra-territoriality principle as a means of closing such a loophole. As noted above, this legislation was passed only 5 years after *Clark v Oceanic Contractors Inc*¹²⁰ and thus the legislature would/should have known the full effects of the drafting of

¹¹⁶ *Ibid* [17].

¹¹⁷ *Agassi (Respondent) v Robinson (Her Majesty's Inspector of Taxes) (Appellant)* [2006] UKHL 23 at [27]-[28].

¹¹⁸ *Set, Duce and Ball v Her Majesty's Inspector of Taxes* [2003] UKSC SPC00373 (29 July 2003).

¹¹⁹ 24Dash.com, *Is Agassi tax ruling game, set and match for UK as a sporting destination?* (2006) <http://www.24dash.com/content/press_releases/viewPressRelease.php?releaseID=4060&nvID=42&itemID=221> at 6 July 2006.

¹²⁰ [1983] 2 AC 130.

(2007)17 REVENUE LJ

this provision. It was not up to the court to invent a legislative intent, contrary to existing principles of statutory interpretation, even if a provision seems to contain a loophole.¹²¹ Perhaps most importantly on this point, ultimately, contrary to the majority view, it may be doubted that this case was really concerned with promoting the effectiveness of anti-tax avoidance provisions, but rather was to facilitate a mechanism to derive revenue from perceived wealthy foreign persons. To this end the authors agree with Hedley that the *Agassi* case 'did not involve any kind of tax avoidance' but instead concerned taxing 'payments outside the UK.'¹²² The case was truly concerned with extending the United Kingdom's 'taxation net' by attributing a United Kingdom source to payments that lacked such a connection with the taxing Nation.

6 IMPACT ON AUSTRALIAN LAW

In light of such criticism of the majority justices' judgments, it is necessary to consider the possible impact of the *Agassi* decision in Australia. In this regard there are two aspects. First, could the reasoning in *Agassi* case readily apply and extend existing Australian taxation jurisprudence on the meaning of source. Second, does Australia have comparable 'special statutory provisions [as] in the UK'.¹²³

In regard to the first issue, as discussed above, the reasoning in the *Agassi* case does accord to some extent with the majority justices approach in *FCT v French*.¹²⁴ Fundamentally, the principle in both the *Agassi* case and the majority view in *FCT v French*¹²⁵ is that the place where the individual performs activities becomes the place where that individual shall be taxed. However, as discussed above, the majority justice's approach in *FCT v French*¹²⁶ has not been accepted by the Australian courts as binding law. It is still necessary to consider the circumstances of the case from a practical view. As previously discussed, income paid by a foreign company to a foreign recipient under a foreign contract would not to be seen as sourced in Australia. Thus, ultimately the *Agassi* case is incompatible with the core principles

¹²¹ 24Dash.com, *Is Agassi tax ruling game, set and match for UK as a sporting destination?* (2006) <http://www.24dash.com/content/press_releases/viewPressRelease.php?releaseID=4060&navID=42&itemID=221> at 6 July 2006.

¹²² Julian Hedley, Head of Tax at Tenon Media, <<http://www.taxationweb.co.uk/businessstax/news.php?id=350>> at 18 September 2006.

¹²³ Eric Tomsett, 'United Kingdom: Foreign Entertainers Taxable on Payments Between Foreign Companies' [June 2006] *World Tax Advisor* 29, 30.

¹²⁴ (1957) 98 CLR 398.

¹²⁵ (1957) 98 CLR 398.

¹²⁶ *Ibid.*

TAXING SPORTS PROFESSIONALS

stated in *Nathan v FCT*¹²⁷ and *FCT v Mitchum*.¹²⁸ They indicate that source in Australia must be determined on a discretionary, case-by-case basis, rather than being dictated by a fixed rule whereby mere presence in the jurisdiction suffices. As discussed above, Australian common law source rules would require consideration be given to the fact that the locus of the contracts was the United States, two United States companies paid Mr Agassi and such payments were paid into his American bank account. All these factors would indicate a United States' source, contrary to the *Agassi* case.

Most importantly, as will be apparent from the above discussion of the *Agassi* decision, the case was not really concerned with extending judicial notions of 'source'. As noted above, the House of Lords decision was one based largely on statutory interpretation. It relied on specific statutory provisions and left the common law position on the 'source' of income in relation to foreign residents largely undisturbed. The court was only concerned if the payment was connected to an activity within the United Kingdom within the *ICTA*. Thus, while using the majority Justices' approach it could arguably be established that there is a connection between the payment of the Nike Inc and Head Sport AG sponsorship monies and tournament performances in Australia, this does not mean that the tennis tournaments are the 'source' of the sponsorship monies under Australian law. A connection with an activity in a jurisdiction necessitates a looser nexus than source and thus the mere fact these payments were held to be assessable in the United Kingdom does not mean they will be held to be sourced in Australia.

In regard to the second issue, Australia does not have a direct equivalent for either ss 555 and 556 *ICTA 1988*. In Australia, Sub-div 12-FB of the *TAA* is the nearest equivalent to the United Kingdom provisions generally and s 555 specifically. Under s 12-315:

An entity (the payer) that carries on an enterprise must withhold an amount from a payment it makes to another entity ... in the course or furtherance of the enterprise if:

- (a) the entity receiving payment is an entity within s 12-315(2), which includes a foreign resident;
- (b) the payment is of a kind set out in the regulations; and
- (c) the payment is not a dividend, interest, royalty, departing superannuation payment, natural resource payment or mining payment;¹²⁹ and

¹²⁷ *Nathan v FCT* (1918) 25 CLR 183, 189-90.

¹²⁸ (1965) 113 CLR 401.

¹²⁹ The exclusion of a royalty under s 12-315 (1)(c)(iii) *TAA* is relevant to the discussion below.

(2007)17 REVENUE LJ

(d) the entity receiving the payment is not covered by an exemption.¹³⁰

Particularly relevant to the facts in *Agassi*, under s 12-317 where an intermediary receives a payment for a foreign recipient that meets the requirements in s 12-315 a withholding tax obligation is imposed, but only if the intermediary is a person in Australia: s 12-317(1)(a).

Under s 12-315 the payer must have made the payment 'in the course or furtherance of' an 'enterprise'. 'Enterprise' is given the meaning set out in s 9-20 *A New Tax System (Goods and Services Tax) Act 1999* ('GST Act')¹³¹ and applies to the TAA by virtue of s 9-20(4) *GST Act*. Section 9-20(1) defines enterprise as, *inter alia*, an activity done in the form of business, in the nature of trade or regular activities involving leases, licences etc. Nike Inc and Head Sport AG are of course conducting businesses and, utilising the phrase commonly used in United Kingdom taxation law, involved in activities in the nature of trade. Moreover, the execution of sponsorship contracts is an activity in furtherance of such business and trade. The latter point, and the requirement of a payment of a kind set out in the regulations, is confirmed in reg 44B(1) of the *Taxation Administration Regulations 1976* (Cth). This expressly includes as examples of 'prescribed' payments that satisfy s 12-315(1)(b) TAA sporting 'endorsements fees', 'promotional fees' and 'sponsorship'.

The term 'enterprise' should, however, be understood as an 'enterprise carried on in Australia'¹³² for five reasons. First, as noted above, the definition of 'enterprise' is taken from the *GST Act*. The definition of enterprise should, therefore, be considered in the light of the broader framework of the *GST Act*. The *GST Act* only applies to persons who make a taxable supply in the course of an enterprise and that supply has a sufficient connection with Australia: s 9-5 *GST Act*. Effectively this means that the supply must be made in Australia, or be an import or an export from Australia. Thus while the *GST Act* does not require the person conducting the enterprise to be an Australian resident, the supply, and in turn the enterprise, must have some connection with Australia. As noted above, in the *Agassi* case all payments were made into Mr Agassi's bank account in the United States and neither Nike Inc or Sport Head AG conducted business in the foreign jurisdiction. Using the *GST Act* framework, there would be no taxable supply in the course of an enterprise in the *Agassi* case that would be sufficiently connected with Australia. Accordingly, s 12-315 TAA should be read in terms of an enterprise conducted in Australia and thus not extend to the facts in the *Agassi* case.

¹³⁰ See also s 12-319 TAA.

¹³¹ Section 9-20 *GST Act*.

¹³² Ian Murray-Jones, 'UK tax – tennis star liable to tax on endorsement contract: *Robinson (Her Majesty's Inspector of Taxes) v. Agassi*' (2006) 128 *Thomson Tax and Accounting Insight* 2, 4.

TAXING SPORTS PROFESSIONALS

Second, the withholding tax obligation imposed by s 12-315 should be read in light of the withholding tax obligation in s 12-317. As noted above, the latter provision only applies to intermediaries who are persons in Australia. While it may be contended that the express mention of 'a person in Australia' in s 12-317 and the failure to include a similar express provision in s 12-315 indicates that Parliament intended the latter to extend to foreign payers, the preferable view is that both are intended to be confined to Australian persons. The need for the phrase 'a person in Australia' in s 12-317 stems from the absence otherwise in that section of any requirement that the recipient have a connection with Australia. By contrast, such an additional reference was probably perceived as unnecessary in regard to s 12-315 as the payer under that section must be conducting an enterprise, which in turn would be construed as an enterprise in Australia.

Third, as s 12-315 imposes a withholding tax obligation on the entity conducting the enterprise, logic dictates that, as with s 12-317, the withholding tax obligation was only intended to apply to persons within the Australian jurisdiction. As discussed above, from a practical point of view, the imposition of a withholding tax obligation on a person who has no presence in Australia would be unenforceable. Only if the entity is conducting an enterprise in Australia would Australian taxation authorities have any ability to require that person to remit the withheld tax.

Fourth, this view is supported by ATO *Draft Taxation Ruling TR 2006/D3 'Income tax: withholding on payments to foreign residents for works and related activities.'* The Draft Ruling outlines a number of examples of withholding tax obligations under Sub-div 12-FB. None of these examples include a payer who has a permanent presence outside Australia. Further, when the locality of the payer is specifically detailed, it is stated that they have a permanent presence in Australia.¹³³ Thus, there is no indication that the legislature intended that the term 'enterprise' should have extra-territorial meaning. To the contrary it appears the payment must occur in Australia through a payer conducting an enterprise who has a permanent presence in Australia. Again, Nike Inc and Head Sport AG cannot be described as carrying on an 'enterprise' in Australia.

Finally, the extra-territoriality principle dictates that s 12-315 should be construed as only applying a payer that is conducting an enterprise in Australia. There is no express statement, nor necessary implication in s 12-315 rebutting the presumption. Thus while due to the broad definition of 'enterprise' it is not necessary that Nike Inc or Sport Head AG be a resident Australian corporation, it is contended that they

¹³³ *Draft Taxation Ruling TR 2006/D3 'Income tax: withholding on payments to foreign residents for works and related activities.'*

(2007)17 REVENUE LJ

must still have some permanent presence here that can be described as an 'enterprise' activity.

If, to the contrary, an Australian court were to treat the extra-territorial principle in a manner similar to that adopted by the majority justices in *Agassi's case*, the interpretation of 'enterprise' could become expansive and include enterprises outside Australia. The legislation could include cases where the only connection with Australia is, for example, Mr Agassi and his sponsor benefiting from the prestige of the Australian Open Championship. If this approach were adopted, the exemptions specified in ss 12-315(1)(c) and (d) would become extremely important. Section 12-315(1)(c)(iii) could be particularly relevant as it excludes royalties. In a given case sponsorship agreements may be structured in the form of a royalties agreement. While this is a relatively unexplored area in Australian taxation law, there is an important United States precedent, *Kramer v Commissioner*.¹³⁴

In *Kramer v Commissioner*¹³⁵ the issue of royalties and sponsorship contracts was considered. Mr Jack Kramer, a famous tennis player, had a sponsorship contract with the tennis goods company, Wilson Inc. The contract gave Mr Kramer 2.5% of racquet sales for the 'Kramer Racquet' made by Wilson Inc. In return Mr Kramer allowed his name to be on the racquet and promoted Wilson Inc tennis products. Although the contract did not specify that Mr Kramer had to continue playing tennis during the term of the contract, it did give Wilson Inc the right to terminate the contract if Mr Kramer became 'incapacitated'.¹³⁶ The court decided that 70% of Mr Kramer's income from the contract was classified as 'royalties' and 30% 'personal services income'.¹³⁷ The classification of income as royalties secured Mr Kramer a tax advantage under the relevant United States tax legislation. This case could be useful for Mr Agassi and other foreign professional sportspeople if Australian court were to adopt the reasoning of the majority justices in the *Agassi* case. This would in turn require a consideration of whether the sponsorship income, or a part thereof, could be classified as royalties.

In regard to the general reference to exemptions in s 12-315(1)(d), under s 12-319(1)(a) the Commissioner may exempt a foreign recipient from withholding tax obligations where the Commissioner is satisfied that the taxpayer has an established history of compliance with their tax obligations and is likely to continue to comply with those

¹³⁴ *Kramer v Commissioner of Inland Revenue* (1987) 89 TC 1081, cited in John J Coneys, Jr 'To Tax or Not To Tax: Is a Non-Resident Tennis Player's Endorsement Income Subject to Taxation in the United States?' (1999) 9 *Fordham Intell Prop Media & Ent LJ* 885, 889.

¹³⁵ *Ibid.*

¹³⁶ *Ibid.*, 892-4.

¹³⁷ *Ibid.*, 894.

TAXING SPORTS PROFESSIONALS

obligations in the future. Interestingly, s 12-319 does not specifically identify as a relevant consideration that the foreign recipient is not liable to pay tax in Australia as a consequence of a relevant DTA. This accords with Treasury's view that the existence of a relevant DTA does not negate the obligation to withhold tax under Sub-div 12-FB of the TAA. Rather, where a DTA dictates that the country of residence is to have the sole right to tax the income, the foreign recipient can apply to the Commissioner under the PAYG Foreign Resident Withholding Variation ('FRWV') form to vary the rate of the withholding tax to nil. This procedure technically leaves the withholding tax obligation intact, while recognising that ultimately the payment is not assessable in Australia as a consequence of the relevant DTA.

7 DOUBLE TAX TREATIES

The final point to consider in regard to the impact of the *Agassi* case in Australia is the relevant DTA. As noted above, for some unexplainable reason, the House of Lords did not consider the relevant DTA between the United States and the United Kingdom.¹³⁸ At the initial hearing before the Special Commissioners the impact of the relevant DTAs was cursorily dismissed, the Special Commissioner's simply asserting that the DTAs did not prevent the United Kingdom taxing the subject income.¹³⁹ The DTAs were not considered on appeal by either the High Court or the House of Lords.

The discussion below focuses on the impact of the relevant United States and Australia DTA¹⁴⁰ were the *Agassi* case followed in Australia. The relevant DTA is *Convention between the Government of Australia and the Government of the United States of America for the avoidance of double taxation and the prevention of fiscal evasion with respect to taxes on income, Aug 6 1982, 1983 ATS No 16*. In turn, Schedule 2 of the *International Tax Agreements Act 1953* contains the double tax agreement between Australia and the US ('Australia - US DTA'). Schedule 2A contains the Protocol amending the Australia - US DTA ('Australian - US Protocol'). The *Australian - US DTA* and the *Australia - US Protocol* operate to avoid the double taxation of income received by Australian and US residents. As noted above, by virtue of s 4(2) *International Tax Agreements Act 1953* (Cth), the *Australia - US DTA*¹⁴¹ overrides domestic source rules.¹⁴² It will be seen that it is not

¹³⁸ Cf Ian Murray-Jones, 'UK tax – tennis star liable to tax on endorsement contract: *Robinson (Her Majesty's Inspector of Taxes) v. Agassi*' (2006) 128 *Thomson Tax and Accounting Insight* 2, 4.

¹³⁹ *Set, Duce and Ball v Her Majesty's Inspector of Taxes* [2003] UKSC SPC00373 (29 July 2003) at [40] and [41].

¹⁴⁰ *Convention between the Government of Australia and the Government of the United States of America for the avoidance of double taxation and the prevention of fiscal evasion with respect to taxes of income, 16 ATS 1983* (entered into force 31 October 1983).

¹⁴¹ *Convention between the Government of Australia and the Government of the United States of America for the avoidance of double taxation and the prevention of fiscal evasion with respect to taxes of income, 16 ATS 1983* (entered into force 31 October 1983).

(2007)17 REVENUE LJ

entirely clear whether the *Australia – US DTA* would allow Australia to assess Mr Agassi's sponsorship payments.

(i) Taxation of individuals

Under Article 14 of the *Australia – US DTA*¹⁴³ it is agreed that if a resident of the United States offers independent personal services (ie not as an employee), in Australia they will not be taxed in Australia unless they have a 'fixed base regularly available' to them in Australia 'for the purpose of performing' their activities. Thus, the general position declared by the agreement is that when a person with no fixed base in Australia offers 'independent' personal services, they shall only be taxed in their Nation of residence.¹⁴⁴ Consequently, even if Mr Agassi was considered to have offered his personal services in Australia under the Nike Inc and Head Sport AG agreements because of his participation in the Australian Open Championship, he could not be taxed in Australia as he has no fixed base in Australia. Under Article 14 the sponsorship payments would be assessed in the United States.

However, Article 14 is subject to Article 17: Art 17(1). Under Article 17 sportspeople and entertainers are treated separately from other people offering personal services.¹⁴⁵ Article 17(1) states that income derived by athletes from their personal activities 'may be taxed in the Contracting State in which [the relevant] activities are exercised...' As Clark and Miller point out, there is little guidance on the meaning of 'income derived from personal activities as an athlete' and in many countries 'nothing has been stated' on the point.¹⁴⁶ However, Clark and Miller suggest that the relevant income for Article 17 purposes is simply income related to sport¹⁴⁷ and even under the narrowest definition of Article 17 that they suggest¹⁴⁸ sponsorship contracts would be included. Clark has similarly remarked on the uncertainty of this provision, noting that there are two approaches to interpreting income under Article 17; a narrow approach and a wide approach.¹⁴⁹ The narrow approaches focuses on the connection with actual performance of the athlete, while the wide approach covers all

¹⁴² J Cassidy, *Concise Income Tax* (3rd ed, Sydney, The Federation Press, 2004) 135; ss 4(2), 6(1) and Sch 2 *International Tax Agreements Act 1953* (Cth).

¹⁴³ This echoes Articles 14 and 15 of the OECD Model Double Taxation Convention on Income and Capital.

¹⁴⁴ Braedon C Clark and Leslie G Miller, *Taxation and Sport in Australia* (2000) 16.

¹⁴⁵ *Ibid* 166.

¹⁴⁶ *Ibid* 171.

¹⁴⁷ *Ibid* 170.

¹⁴⁸ *Ibid* 171.

¹⁴⁹ Braedon Clark, 'Robert Mitchum 17- Australian Taxation Officer 0: The Taxation of International Athletes' (1998) *Bond Law Review* 134.

TAXING SPORTS PROFESSIONALS

normal activities of an athlete.¹⁵⁰ Subject to the above discussion as to the source of reputation, if the relevant activities in the *Agassi* case were playing at the particular tennis championship, either approach would include the proceeds under the sponsorship agreements. In the case of the Australian Open Championship, the activity would have occurred in Australia and the relevant taxing State would be Australia. However, as stated above, it is suggested that under the sponsorship agreements the relevant activities are not performances at specific tennis tournaments, but rather reputation generally, and thus Article 17(1) should not subject Mr Agassi to the Australian taxation system.

While Article 17 prima facie makes a foreigner's income subject to Australian taxation, it only applies where the income 'derived' from their personal activities in the contracting state exceeds US\$10,000. There are two aspects to this qualification that may be relevant to the *Agassi* case. First, it may be that Article 17(1) requires the income be 'derived' in Australia. Under s 6-5(4) *ITAA 1997* ordinary income is derived 'as soon as it is applied or dealt with in any way on your behalf or as you direct'. Similarly, under s 6-10(3) *ITAA 1997* income is statutory income 'as soon as it is applied or dealt with in any way on your behalf or as you direct'. Thus under Australian taxation law, income can be derived actually (when received) or constructively (when applied for the taxpayer's benefit). As the payments in the *Agassi* case were made under contracts locus in the United States and paid into Mr Agassi's account in the United States it is contended they were not derived in Australia. Effectively for the same reasons detailed above that indicate that Mr Agassi's income is not 'sourced' in Australia, it is also contended that it is not 'derived' in Australia. It should be noted that if Article 17 is interpreted this way, the treatment of foreign entertainers is brought back into line with the general rule stated in Article 14.

Second, even if it is not necessary that the income be derived in the contracting state, Article 17(1) will only apply if US\$10,000 or more is related to the personal activities in the contracting state. Article 17(1) could only apply if a sufficient percentage of the sponsorship payments can be tied to the Australian Open Tennis championship. Again leaving aside the argument that the payments are entirely tied to reputation, not performances at particular tennis championships, it would be necessary to show that once apportioned amongst other activities, particular tennis tournaments, that the relevant amount attributable to the Australian Open Championship exceeded the threshold. Such apportionment could prove to be a difficult and complex task.

¹⁵⁰ Tegan Lloyd-Pugh and Jane McMahon, 'Taxation in Australia of Non-Resident Athletes: Maurice Greene and the Olympic Games: Can the ATO Catch the Fastest Man in the World' (2002) 12 *Revenue Law Journal* 134 and 135.

(2007)17 REVENUE LJ

(ii) Taxation of companies

There are a number of Articles in the Australia – US DTA relevant to the taxation of companies. First, under Article 7(1) a foreign corporation, such as Agassi Inc, will only be assessed on their business profits in Australia where they conduct an enterprise in Australia and they do so through a permanent establishment in Australia. As Agassi Inc is not conducting an enterprise in Australia and has no permanent establishment in Australia the ATO would prima facie have no right to tax it on its business income, including the sponsorship earnings. The business profits would be assessed in the United States. Note, even if Article 7(1) applies, only that income attributable to that permanent establishment can be assessed: Art 7(2).

Article 17(2) specifically deals with the scenario where an intermediary receives the income of an entertainer. It provides that:

Where income in respect of activities exercised by an entertainer in his capacity as such accrues not to the entertainer but to another person, that income may be taxed in the Contracting State in which the activities of the entertainer are exercised.

Importantly, under Article 3 the definition of a ‘person’ includes a company, thereby bringing Agassi Inc within the ambit of this provision. Thus the assessability of the sponsorship agreement payments that accrued to Agassi Inc would be determined by the same arguments detailed above in regard to Article 17(1).

8 CONCLUSION

The above discussion indicates that the applicability of the *Agassi* case in the Australian jurisdiction is a matter of speculation. While the majority Justices’ approach has been criticised, there is some Australian jurisprudence that might be used to integrate it into Australian taxation law. Moreover, the relevant DTA does not provide the guidance that might have been expected on the issue of the taxation of a foreign resident on seemingly foreign income. Taxation commentators will have to wait and see if the ATO takes up the United Kingdom taxation authority’s lead and similarly seek to assess professional international athletes on sponsorship income.