



Taxing Matters

A whistle-stop tour of the taxation of international sports and rock stars with Patrick Way KC

Alexis

Hello, and welcome to Taxing Matters, your one stop audio shop for all things tax brought to you by RPC.

My name is Alexis Armitage and I will be your guide as we explore the sometimes hostile and ever-changing landscape that is the world of tax law and tax disputes. Taxing Matters brings you a roadmap to guide you and your business through this labyrinth.

In case any of you miss any crucial information or just want some bedtime reading, there is a full transcript of this and indeed every episode of Taxing Matters on our website at www.rpc.co.uk/taxingmatters.

I am delighted to be joined today by Patrick Way KC, who is one of the founders of Field Court Tax Chambers. Patrick has strong advocacy and advisory practices. He has successfully represented clients at all levels of the UK court system and has acted for both the taxpayer and HMRC alike in cases where the tax at stake may run into billions of pounds. He has also advised on some of the biggest UK takeovers.

Patrick's clients include major corporates as well as famous celebrities, charities, wealthy individuals and businesses of all types whom he has advised in relation to virtually every form of UK tax.

Today, Patrick and I are going to be doing a whistle-stop tour of the taxation of international sports and rock stars. So let's get started. Welcome Patrick and thank you for joining me today.

Patrick

Thank you very much, it's a pleasure to be here!

Alexis

Diving straight into music copyright then!

Many rock musicians are selling their rights, in respect of recordings and publishing rights, how are these receipts usually treated by HMRC for tax purposes?

Patrick

It's interesting, isn't it? I'm beginning to feel my age, actually, because all these rockstars are the ones I grew up with and now they are all selling out, which I take personally by the way, but anyway, there we are!

The only thing that's quite good is I actually know the songs they are doing. So, when you get the list of all the property rights, you know them – so it's quite interesting to see.

What I think is weird though is, if I was to step back and say do I think selling all the songs that you have written – 600 songs that you have written – would that be “capital” or “income”? I would guess “capital” because it's the “stuff” from which you make your money. But it's not, it's income. There are cases on this – there's quite a few cases that say this – and what they really say is that “...if you have created the copyright yourself ...” so, if you're the songwriter then “...everything that comes from that is ‘income’, including if you sell them. Whereas, if you inherit them, you will find that it becomes ‘capital’”.

I've got a case on, at the moment. Quite a famous rock band – where some of the band members, I'm pleased to say, are still alive and one, unfortunately, is not alive – and the three band members who are alive, they are going to suffer income tax in relation to their receipts, whereas the children of the one who has died will get a capital gain.

The analogy I think is a bit like property developing. If you are a property builder and you build lots and lots of houses you can see that, when you sell the houses, they are going to be “income”. If you then retire and sell all 30, they are still going to be “income”. What is odd is I have had a case where HMRC, funnily enough – in this exact area, copyright – tried to argue the opposite. So, they tried to say, against what the case law is, that if you sell all your copyrights in one fell swoop, that is “capital” and they cited the John Lewis case, but in the end that case collapsed.

So, I think the real message is – it's a bit unfair, isn't it? You're coming to the end of your time, you've put all this effort into music and you're going to have to pay top rate of 45% tax. Quite difficult to avoid it, there are some quite clever contracts that were drafted years and years ago that seem to get round it, but be careful – that's the message. So, the short answer it's income by and large.

Alexis	So, in terms of playing concerts in the UK, or appearing in sporting events in the UK, how is the star's worldwide sponsorship income and other worldwide income taxed in the UK?
Patrick	<p>I'm not getting off to a good start because, again, if I hadn't thought about this, I'd have got this wrong – as well!</p> <p>What I think is very difficult is that when you have an international sports person, or an international rockstar, and they come over here and perform one concert, or two, up here in the Olympic games, then the deal for HMRC is to try and work out how much of their worldwide sponsorship income should be taxed in the UK.</p> <p>I did a case for Andre Agassi, the tennis player – so I can mention that. In all the reports you can see that he was being sponsored by Nike – to use their tennis rackets and so on – and so, the question is how much of his worldwide income, when he played at Wimbledon, would be taxed here. Nike products were selling an extra 2% in the UK, but HMRC wanted to tax Agassi on 25% of his worldwide income on the basis that there were four grand slam events and Wimbledon accounts for a quarter of them.</p> <p>The case went all the way to the House of Lords, and we lost – for very dull reasons – but it is a real issue, therefore, that sport stars, in particular, when they come over here, they are running the risk of having to pay a large amount of tax. The worst examples I've seen are golfers who come to play in the UK. Typically, it's a four-day tournament, they might miss the cut, so they might not get through into the third day, they then get paid nothing but, because they've spent two days here, a proportion of their worldwide income – even though they earn nothing in the UK, will be taxable.</p> <p>The absolute worst example is a marathon runner, she ran in the London marathon and let's say, I'm making this up, came 20th. I'm making this up and let's say she got £20,000. Then did the Sydney marathon and she won it – again I'm making this up – and let's say she got £1,000,000. So, what HMRC said is, "...well, you've done two marathons, the total amount that you earned was £1,020,000, we think half of that relates to the UK". So, it's very difficult. There are lots and lots of regulations, or regulations and so on, to deal with it.</p> <p>The real thing you need to look at with sports people is, what you're trying to do is work out how many days you are in the UK compared with how many days you are running or being a sports person abroad. So, you have to just do a fraction and what you want is you want as many days abroad. So if you're a tennis player in the denominator you want to have a lot of practice days. There are 365 days in a year, you try and get 330 days and you say to the revenue, "my client is playing tennis or practicing for 330 days a year and they are in the UK in Wimbledon for 14 days". So 14 over 330 looks a lot better than 1 over 4. But that is not easy.</p> <p>It all stems back to, back in about 1986 with music, a different way of taxing, people were taxed in the preceding year basis, so you arrived in year one and then you "cleared-off" Very hard to catch you. Now what happens is the sponsor, or the promoter, has to pay withholding tax and then it's all worked out. That's where we are.</p> <p>The key to it is just being aware that if you are acting for an international sports person, they come here for one day, they may have to pay a lot of tax – and I should have said that we've had to pass, in this country, regulations to deal with that. So, the 2012 Olympics there was a whole raft of legislation so that all those athletes did not pay tax on their worldwide income, just for doing three jumps and the long jump.</p>
Alexis	Quite complicated, sounds quite fact specific as well, to each individual's circumstances.
Patrick	Yeah, definitely. Definitely!
Alexis	So, turning to IR35, where are we after the Kaye Adams/Atholl House case?
Patrick	<p>Yes, it's an interesting case, isn't it? I expect people have seen it in the press and I expect people, therefore, know a little bit about it, but IR35 is shorthand for one of the Inland Revenue press releases, when they announced that, if you are really an employee and you decide that you want to get into a relationship with a third party and, therefore, what you do is you set up your own company and the company contracts with you, you become an employee of your company – but that company then works for the end user, typically here the BBC.</p> <p>The reason people like to do it is because, from the broadcaster's point of view, there should be income tax advantages – because you are not having to pay income tax as you go along – but the big benefit would be from the end user's position, like, typically the BBC, because the BBC don't have to pay employer's national insurance.</p> <p>I think it's a bit tough because when you look at it, when you get involved in these, and this is public knowledge, it's the BBC and ITV who've pushed these arrangements because they can save a lot of money. The broadcasters then get stuck with these arrangements, the BBC – perfectly frank – walk away from them and these broadcasters are left having to pick up pretty big bills in relation to the tax cases and HMRC are very keen to push these cases because there's been a whole raft of them for broadcasters.</p> <p>Kaye Adams, which is one of the most "egregious", to use that word, egregious ones, but her case went backwards and forwards, I think it may even have gone to the Court of Appeal but it went all the way up and</p>

then it came back down again, there was a real threat that it was going to still carry on and bounce back up to the upper tribunal, but I think HMRC had been embarrassed into dropping it.

The real issue is whether in your relationship as a broadcaster via a company you are still to be treated as an employee of the BBC and we all know that is down to things like “control”, who controls your life? I would say it’s quite difficult for a broadcaster to say they were in control. You have to be there at 9 o’clock in the morning to do a 10 o’clock performance. What about financial risk? That’s another big one, who has got a financial risk? Again, you can see that is quite difficult for broadcasters. Who supplies the equipment? You can see that is quite difficult. But some have won on the basis that they have got lots of different occupations, so, they may be doing BBC, ITV, Sky and these things which help. Some have also won because they have been able to show they have got such a major personality that supersedes the employment. But where we are is we’re in a mess because we have got lots of cases.

I think the Gary Lineker case is going to the upper tribunal this year and I think the Adrian Chiles case is as well. Gary Lineker is very odd. He should win easily because his case fell apart because of particular circumstances relating to his structure which involved partnership which, I think, aren’t replicated. But it is a mess, and you get the impression HMRC are really after these people and I think Kaye Adams would say that, she incurred a huge amount of expense and emotional energy – and it’s not right - and it’s all because of the legislation is odd and needs clarifying.

Alexis Kaye Adams, I’m sure everyone has read this, when HMRC basically said they weren’t going to appeal they didn’t really say, “...oh well it’s because she has quite rightfully won ...”.

Patrick It was something really weaselly, wasn’t it?

Alexis Yeah!

Patrick They didn’t retire gracefully, let’s put it like that!

Alexis Exactly!

Now turning to image rights contracts, what is HMRC’s latest position on this?

Patrick Again, this is another interesting topic. Typically, you’ve got footballers. For a long, long-time footballers have been able to say not only do they play football, but they have a valuable image which can be used in advertising or sponsorship and so on. What people have tried to do is to separate the two things. So, they’ve separated out their employment contract and playing football, on the one hand and then they’ve had, separately, an image rights agreement. Where those footballers, as a lot of them, are domiciled abroad, then they’ve tried to separate out foreign image rights income from UK image rights income and then they’ve tried to organise that their foreign image rights are paid abroad and kept abroad – which, everybody that does tax knows all about this – you’re talking about the remittance basis. HMRC have got pretty fed up with this. With a change of personnel they have launched a new attack on these things. So, what you’re trying to say is, “...well, my footballer...”, who let’s say is from Italy, “he’s got a very big following in Italy, when he goes to Italy in the summer, he might do Italian adverts and so on and the money from those adverts should not come into the UK tax net unless they are omitted”. What HMRC are now saying: “... well, that’s just nonsense. Your Italian footballer ...” who let’s say plays for Arsenal, I’m making this up obviously, “when he plays for Arsenal, that’s the real crux of the matter, so, everything that has to do with his being a footballer – including image rights income – must be to do with playing for Arsenal and, therefore,” they say, “...the image rights income has a source”. In other words, its prominence, is not in Italy as I’ve just said but it’s in the UK premier league. So, what they are saying is all of your foreign source income, as I would describe it, is actually UK source income and, therefore, they are saying that it is taxed immediately. Can’t get the benefit of the remittance basis – and they also say that it is caught by the transfer of assets abroad rules and you try and argue “commerciality” – which, I think, is quite a good argument – but HMRC say if there is any kind of a trust involved then they think that rules out the chance of having it as a “commercial arrangement” because they say in a “commercial arrangement” you never have a trust. So, I’m seeing people moving towards just having an overseas company and no trust and then arguing well it’s perfectly commercial to have two separate companies, one doing overseas income from image rights and one doing onshore and see how that goes. But, for the first time, what is quite interesting is, they are now beginning to talk about settling again.

We have had about two or three years where they were not settled and they are also talking about ADR. So, I’ve got an ADR coming up next month, which is unusual, because it’s quite technical and how are you going to have a dispute resolution on a technical matter? But, we had spoken to the very good mediator and she is confident, although she’s an HMRC official, that we can still get ADR to operate. So, we’ll see how that goes.

So, fundamentally, there is a change of attitude, it’s much more difficult. There are about 30 senior premier league players who are subject to this. Whether anybody will go to court I am not sure. Hopefully some will.

Patrick	But you can imagine that players don't want the publicity, so it's not good for their – ha-ha – “image” – that's the whole point.
Alexis	<i>Absolutely, absolutely. That's really interesting. Thank you.</i>
Patrick	The only other thing that is sort of, “hot” is agent's fees. But that's such a hot-topic I think I'm going to let one of your colleague's, Michelle do it. But it is very interesting – and just to tee it up for her – the issue is if you are an agent, rather oddly, when your player is getting transferred you might be paid by the club who buys the player and you might get paid by the player themselves. So, the issue is how much does the player pay of that and how much is taxed. Anyway, as I've said, that's for Michelle, that's just to tee it up for her!
Alexis	<i>Brilliant, thank you so much Patrick! That's definitely given us some food for thought and I think the takeaway message for rock stars and sports stars is get some tax advice on all of these issues because it's pretty tricky! Unfortunately, that's all we've got time for in this month's episode. As Patrick said, watch out for the follow on to this episode where I'll be discussing the popular topic of agent fees with RPC's very own Michelle Sloane. As ever a big thank you goes to Inciter Productions and Andrew Waterson for the production, music and sound editing of this episode. A full transcript of this episode together with our references can be found on our website www.rpc.co.uk/taxingmatters. If you have any questions for me or for Andrew or any topics you would like us to cover in a future episode, please do email us on taxingmatters@rpc.co.uk. We would love to hear from you. If you like Taxing Matters why not try RPC's other podcast offering, Insurance Covered which looks at the inner workings of the insurance industry hosted by the brilliant Peter Mansfield and available on Apple podcast, Spotify and our website. If you like this episode please take a moment to rate, review and subscribe and remember to tell a colleague about us. Thank you all for listening and talk to you again soon.</i>



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