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riano de
veira
ano e Woiler
ogados, São Paolo
veira@sw.adv.br

Tax lawyers in the game and on stage: tax planning for athletes, sports leagues, entertainers and related persons

Co-Chairs
Rashad Wareh *Kozusko Harris Vetter Wareh, New York*
Stuart Hutchinson *Simpson Grierson, Auckland*

Speakers
Bernadette Accili *Paul Hastings, Milan*
Dick Molenaar *All Arts Tax Advisers, Rotterdam*
Diego Rodriguez *Garrigues, Barcelona*
Fred Feingold *Feingold & Alpert, New York*
Paddy Grafton Green *Michael Simkins, London*

This session was the first of the tax discussions during the Dubai Conference, taking place on 31 October 2011.

Diego Rodriguez and Bernadette Accili started by focusing on particular residence rules applicable in their jurisdictions, as well as commenting on some cases which illustrated the application of such rules.

Rodriguez pointed out that residency was the main criterion that almost all tax authorities in the world – with few exceptions – adopt as the test to make an individual subject to tax. In the international sports and entertainment environment, one of the first issues to be taken into account is the guidelines set out in the Organisation for Economic Co-operation and Development (OECD) Model Convention. The OECD Model Convention does not indicate where an individual is located for residence purposes, but refers firstly to the local regulations as the main rule for defining residence. Where two jurisdictions each consider an individual as their taxpayer, and their domestic regulations are not sufficient for determining residence, the OECD Model provides tie-breaker rules by electing the permanent home, the center of vital interest, the habitual abode, or nationality as rules for defining residence. Where these provisions still do not resolve the issue, mutual agreement between countries is available as a last resort.

Jurisdictions have different rules for defining residence. While some test residence by reference to the calendar year, others may assert residence by reference to different periods, typically between the date of arrival and the date of departure. This mismatch among domestic rules may allow opportunities. And some jurisdictions also set forth anti-abuse provisions, particularly where arrangements are implemented which attempt to move residence to a tax haven. Rodriguez mentioned the Arantxa Sanchez case, which provoked an amendment in the Spanish rules under which an individual would be considered to remain subject to Spanish tax for the next 40 years, in a case where the taxpayer moved his/her residence to a listed tax haven. Rodriguez also mentioned the Spanish rules designed to attract such professionals to Spain.

Finally, Rodriguez explained the Spanish regime for foreign immigrants, which was passed to attract talent and to encourage multinationals to locate their headquarters in Spain, provided that some conditions are complied with. Under this regime, such immigrants may opt to be taxed as if they were non-resident – resulting in taxation on Spanish source income and capital gains only, with no tax on their worldwide income. This regime does not impose requirements which could distinguish between upper/lower classes of employees. Dick Molenaar commented that in the Netherlands a similar regime distinguished between first and lower division football players, by granting specific tax deductions for first division football players. Rodriguez mentioned that a foreigner who was engaged through a personal service company could expect to have his entitlement to the beneficial regime for immigrants challenged.

Accili explained the application of statutory rules under the Italian framework, which

operate in a very formalistic way. Hence, an individual is considered to be an Italian taxpayer as of the moment the individual is registered at Resident Registration. In addition to this rule, in order to loosen this formalistic approach, Italian regulations accepted the domicile and residency (centre of vital interests) as criteria for defining tax residence. This may create some difficulties, since the domicile and residency definitions are included in the civil law, rather than in the tax code. This amendment was passed as a result of cases in which artists created their own companies. Tax authorities challenged the arrangement on the basis that the artist was not employed by his/her own company. Italian rules do not provide any specific regime to attract high-skills professionals. On the contrary, a three per cent 'solidarity contribution' on gross income exceeding €300,000 per annum has been introduced from 1 January 2011 to 31 December 2013.

This tax burden triggered some discussions and led to artists and other professionals moving their residence to other jurisdictions (for example, the motorcyclist Valentino Rossi has claimed UK tax residency). Under the UK rules, where an individual moves to the UK with the purpose of establishing residency, the individual will be considered a UK taxpayer as of the date of arrival. Fred Feingold mentioned that in a decided case on the question of whether an individual should be considered a US or Italian resident on the basis of US–Italy Double Taxation Treaty (DTT) provisions, the US tax authorities adopted a very pragmatic manner of approaching the case, by accepting that the presentation of Italian tax returns established that the individual was in fact an Italian taxpayer.

The group then considered some specific case studies. Feingold first looked at a US national. In such a case, US taxes are levied on worldwide income, of where the US citizen resides. This may be contrasted with non-US nationals who nonetheless spend time in the US. In US, they would be considered subject to tax on a worldwide income basis (ie, as if they were US residents), by reason of (i) having the right to stay and work in the US (via a green card); (ii) spending 183 days or more in the US during a given calendar year; or (iii) spending a total of 183 days or more during the previous three-year period, unless it has been shown that the individual is closely connected to another jurisdiction. However, where an individual is considered a taxpayer of another jurisdiction under DTT provisions which the US has entered into, this individual is not considered a US resident for tax purposes. In such a case, still, while applying the tie-breaker rules, the US would apply a similar provision as mentioned in the OECD Model Convention, by identifying any substantial place of business and vital interests. In most cases, the US reserves its right to tax former citizens, or former green-card holders.

Feingold went on to discuss the US Exit Tax. Firstly, an individual must be a long-term green card holder to be considered subject to such a levy. Mr Green commented that, in relation to those individuals who renounce US citizenship or expatriates who decide to give up their green card, the Exit Tax would not be creditable against UK tax in the event the individuals sold the assets in question after becoming UK resident.

Paddy Grafton Green discussed the UK's residency rules. The main rule is that an individual ceases to be a resident only if he leaves with the set intention of establishing his abode elsewhere. Added to that, the individual must be able to show that his presence abroad is not occasional. Under the proposed new UK statutory residence test, there will be three categories of individuals: he/she who is clearly a non-resident, by staying absent for at least three years, demonstrating being a full-time resident abroad with just occasional visits; he/she who is clearly resident in the UK, being someone who spend more than 183 days in the UK, whose only home is in the UK, or who holds more than one home, but all their homes are located in the UK; he/she whose residence position is less clear, where the test will be by reference to a number of 'connection factors'. These will differ depending on whether they are arrivers or leavers. This test is still being finalised, but it is supposed to come into effect on 6 April 2012. [Editor's note: since the date of the session, the intended introduction of the statutory residence test in the UK has been put back to 6 April 2013.]

It was noted that, quite apart from taxing by reference to residence, many jurisdictions seek to tax entertainers and sports stars on a proportion of their annual endorsement income by reference to the time they have spent in those jurisdictions. It is commonly required by sports governing bodies that such taxing rights be waived in relation to attendance at specific major events (such as the Olympic Games) as a condition of countries being granted the right to host

such events: such waivers are in place in the UK in relation to the 2012 Olympic Games in London.

Molenaar also commented on aspects of tax exemptions in respect of the Olympic Games. Some countries grant exemption to both bases of taxation (source and residence), but the Netherlands does not intend to do this in respect of the upcoming London Olympics since the current regime grants tax credits for the residence-based taxation rather than the more normal exemption regime. This led to a wider discussion of the application of Article 17 of the OECD Model Convention which, as it had evolved since 1963, especially with the 1987 and 1992 recommendations and reports, now permitted full taxation of sportsmen and artists' earnings by the source country on a gross basis (ie, not permitting any allowable deductions), even when those earnings were received by a party other than the sportsman or artist themselves. Typical the country of residence will allow credit for the tax levied by the source country, but practical problems can arise. In particular, for musicians, tax credit certificates are often issued in the name of bands or orchestras rather than individual players. Timing problems can arise, or more prosaically the certificate may be in a different language to that of the resident company whose tax authorities may not accept a translation (or be prepared to arrange one themselves). Whenever these problems are insurmountable, double taxation occurs.

There is some scope for applying EU law to assist in the case of European sportsmen and artistes. The European Court of Justice (ECJ) has granted two decisions favourable to the taxpayer. The later decision (*Scorpio*)[1] is clear that deductions should have been allowed by the source country, so tax should have been levied only on the profit element rather than the gross income. The EU responded with a directive requiring member states to allow deductions when taxing on a source basis. This directive was passed with amendments by Spain, by imposing taxation on the gross amount but allowing a claim for a refund taking account of deductions at the end of the relevant year. Italy, still, has not implemented the directive. The Netherlands does not tax sportsmen and artistes at source, since it did not consider that revenues collected from these situations were sufficient to justify the administrative costs. The OECD continues to review Article 17 and, whilst it is understood that the overriding principle is likely to be maintained, a *de minimis* limit for imposing source-based taxation may be recommended.

Finally, the panel referred to individual planning in connection with changing residency, to address the issue of exposure to estate or inheritance taxation or even net worth and income tax on assets. Rodriguez explained that Spain, for instance, has introduced a net worth tax on individuals who move to Spain for tax purposes with effect from 2011–2012. However, most OECD jurisdictions do not have net worth tax. Hence, before becoming a Spanish resident, proper planning must be considered, in order to prevent the net worth tax becoming an issue. However, there are difficulties in planning of this type for Anglo-Saxon individuals, since Spain does not recognise trusts and similar structures (instead generally looking to tax settlors). Accili explained that there is no wealth taxation in Italy, but inheritance tax and estate duties apply. In contrast to Spain, the tax authorities recognise trusts and similar structures.

Note

1 ECJ 3 October 2006, C-290/04