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This Essay examines the taxation of crickets in the context of Indian law. It examines the concept of non-resident "star" companies created by Indian cricketers as a mechanism to avoid the taxation of their global income in India.

Keywords

cricket, India, tax

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Essay

Is Cricket Taxing? The Taxation of Cricket Players in India

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Abstract

This Essay examines the taxation of crickets in the context of Indian law. It examines the concept of non-resident "star" companies created by Indian cricketers as a mechanism to avoid the taxation of their global income in India.

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INTRODUCTION: EATING CRICKET, SLEEPING CRICKET BUT DEFINITELY TAXING CRICKET

Usain Bolt cancelling his run and the European Football Union threatening to move its Final out of London[1] are some recent examples of sportspersons basing professional choices solely on issues re-

[1]*The Taxation of Athletes in the UK*, HARBOTTLE & LEWIS, http://www.harbottle.com/hnl/pages/hnl09_eb_view/9117.php (last visited May 21, 2014).

lated to taxation.[2] Cricket in India is no different, and today though a resident Indian cricketer will be taxed on the profits and gains of his profession under section 28 of the Indian Income Tax Act, 1961 (hereinafter "ITA"), there are numerous ways by which he may reduce or even eliminate such tax liability.

I. HIT WICKET!

A. Argument

This Essay studies the creation of non-resident "star" companies by resident Indian cricketers as a means to avoid taxation of their global income in India. The Essay argues that the current computation regime and the anti-avoidance mechanisms as envisaged under the ITA and the Direct Tax Code, 2010 (hereinafter "DTC") fail to tackle the issue of taxation of star companies comprehensively enough and hence the Essay proposes the introduction of a separate tax provision for this purpose.

B. Scope, Methodology & Limitations

This Essay does not examine taxation issues related to non-resident cricketers who might come and play in India. Further, the Essay does not analyze the implications of Article 17 of the Organization for Economic Cooperation and Development Model Law (hereinafter the "OECD Model Law") for taxing athletes, nor does it address bilateral and multilateral treaties that seek to avoid the double taxation of athletes. The researcher is limited by the non-

[2] Mike Warburton, *Stupid Agassi Tax Rule Prevents Usain Bolt From Running*, TELEGRAPH (July 13, 2010, 11:37 AM), http://www.telegraph.co.uk/finance/personalfinance/consumertips/tax/7887331/Stupid-Agassi-tax-rule-prevents-Usain-Bolt-from-running.html.

availability of information and empirical data on how specific resident Indian cricketers actually plan their tax structures.

III. THE INCORPORATED CRICKETER: UNDERSTANDING THE "STAR" COMPANY STRUCTURE

Contemporary Indian cricketers, now mobile and global in their activities, don't want to be taxed on their cross border earnings and employ the device of an interposed company to stand between them and their income so as to minimize their tax burden in India. Under such a "star" company model, an Indian cricketer sets up a company in a very low tax country and enters into an employment contract with that company.[3] Consequently all agreements with endorsers, sports authorities and other types of sponsors are concluded with the company rather than the cricketer himself, thereby enabling the cricketer to plan how he receives income from the company in tax efficient ways.[4]

The star company structure is attractive not only because it may directly help reduce the applicable tax rate on the cricketer but also because income can be saved in the company without distribution, thereby ending up in a tax deferral.[5] The cricketer may pay tax only on the nominal salary he draws from the star company, or his performance income may be converted into dividend income, which may be taxed more favorably under the Indian system. Further, the star company structure may enable the

[3] MICHAEL LANG ET AL., TAXATION OF ARTISTES AND SPORTSMEN IN INTERNATIONAL TAX LAW 251 (2008).

[4] Bret M. Kanis, Comment, *The Utility of Personal Service Corporations for Athletes*, 22 PEPP. L. REV 629, 632 (1995).

[5] DICK MOLENAAR, TAXATION OF INTERNATIONALLY PERFORMING ARTISTES 6 (2006).

cricketer to claim large corporate deductions for expenses such as accident relief and insurance.[6]

There is no fixed star company model and the biggest challenge faced by Revenue authorities lies in being able to establish the existence of such a corporation. The cricketer could be the majority or the sole shareholder of the star company, or could also only be a beneficiary without ownership. Under the "loan out" model for instance, the cricketer's services would be "lent out" for an event on the company's behalf and thus effective management and control might still be deemed to rest with the cricketer.[7] By way of analogy for example, in *Gordon Sumner v. The Queen*, Sumner unsuccessfully sought to escape tax in Canada by establishing his company in a low tax jurisdiction and only drawing a nominal percentage of its profit.[8] Similarly, in the *X AG* case, a Swiss company contracted with third parties on behalf of certain non-Swiss entertainers in return for a modest commission.[9] The Swiss Court held that the contracts with the company were mere "shams," aimed at avoiding foreign withholding tax that the entertainers would have otherwise had to pay.[10]

Yet, in many cases the star company may genuinely fulfill a larger role of acting like an "organizer" for cricket in general, being responsible for ar-

[6] LANG ET AL., *supra* note 3, at 250.

[7] Andrew D. Appleby, *Levelling the Playing Field: A Separate Tax Regime for International Athletes*, 36 BROOK. J. INT'L L. 605, 609 (2011).

[8] Gordon Sumner v. The Queen, [2000] 2 C.T.C. 2359 (Can. Tax. Ct.).

[9] Bundesgericht [BGer] [Federal Supreme Court] April 27, 1990, 116 Entscheidungen des schweizerischen Bundesgerichts (Amtliche Sammlung) [BGE] Ia 81 (Switz.).

[10] *Id.*

rangements other than only the hire of the cricketer. In such cases, since business relations by third parties conducted with the company are explicitly at an arm's length from the cricketer, it may not be possible for Revenue authorities to attribute the earnings of the company to that of the cricketer for the purposes of taxation.[11]

It is in this backdrop that Revenue authorities world over have often tried to apply the "look through the company" approach when taxing athletes and have held, for example in *Agassi v. Robinson*, that payments made to an athlete's service company shall be characterized and taxed as if such payments were made to the athlete himself.[12]

IV. DROPPED CATCH! AVOIDANCE DUE TO A COMPUTATION PROBLEM

Under the current ITA regime a resident Indian cricketer would be taxed on all his income under section 28 if he plays cricket with regularity, or under section 56 if the game is played only as a hobby. Seen in an "ease of computation" perspective however, it is proposed that without a residuary provision such as section 56, the all-encompassing nature of section 28 by itself is likely to create difficulties in the specific context of taxing professional Indian cricketers.

Unlike Article 17 of the OECD Model Law which specifically takes into account the various nuances of a sportsperson's income, including individual player liability for his star company,[13] in the ab-

[11] LANG ET AL., *supra* note 3, at 251.
[12] Agassi v. Robinson, [2006] UKHL 23 (U.K.).
[13] OECD Model Tax Convention art. 17(2), Jan. 28, 2003, *available at* http://www.oecd.org/dataoecd/52/34/1914467.pdf (last visited May 21, 2014).

sence of a distinct charging head for cricketer income in the ITA, the nature of the cricketer's economic activities being so dissimilar to that of any other profession, makes tax avoidance a real possibility. Not only does a cricketer receive prize money, match fees, gifts, endorsement income and other types of bonus earnings,[14] the number of matches he plays and the manner in which his schedule operates is necessarily different from any other business activity ordinarily captured under section 28.

Even though it might be argued that the residuary charging of section 56 technically covers all the forms of a cricketer's earnings, from a policy perspective such heavy reliance on the residuary provision is perhaps undesirable in the long run. Having said this, unfortunately section 28 by itself proves inadequate because it can only be invoked if it can be established that all the cricketer's earnings accrue to him only by virtue of him being a star in his cricket profession, thereby also making his allied income attributable to his professional income under "profits and gains of any profession" in section 28.

V. OVER THE BOUNDARY! ANTI-AVOIDANCE UNDER SECTIONS 93 AND 61

Explanation (b) to section 93(3) of the ITA, supported by case law, says that a corporate entity incorporated outside India shall be treated as if it were a non-resident, and therefore the resident transferor (the cricketer) may be responsible for taxes assessed on transferred assets, such as income

[14] *See generally* Carole C. Berry, *Taxation of U.S. Athletes Playing in Foreign Countries,* 13 MARQ. SPORTS L. REV. 1 (2002).

from the company.[15]

In the star company framework, where the resident Indian cricketer sets up a company outside India, which consequently enters into its own transactions with third parties, and only employs the cricketer, there is technically no transfer for the purposes of section 93. Yet, it may be argued that since the resident Indian cricketer ought to have been the one to contract with the third parties, and if section 93(4)(a) is given its widest interpretation, since "asset" includes "property rights of any kind" and "transfer" includes "the creation of those rights," Revenue authorities may take the view that the transfer of the "right to contract with third parties" (for endorsements, etc.) by the Indian cricketer to his non-resident star company itself amounts to a transfer which invokes section 93. This is because, for instance, if the resident cricketer is the exclusive employee of his star company, he is in fact giving up his right to contract for playing cricket and earning endorsement fees in favor of his non-resident company.

In the context of section 61,[16] transfers through settlements or arrangements made by the resident cricketer to his star company will be taxable in his hands, if it can be proved that the transfer was revocable in nature. Though such an inference can ultimately only be drawn by an examination of the terms and conditions of a particular contract between the cricketer and his company, in a general sense, cases where the cricketer transfers his earnings to

[15] Kadar Mohideen v. CIT, A.I.R. 1960 (Mad.) 302 (India); Chidambaram Chettiar v. CIT, (1966) 2 S.C.R. 761 (India); *see also* NANI PALKHIVALA ET AL., 2 THE LAW AND PRACTICE OF INCOME TAX 1543 (9th ed. 2004).

[16] VINOD K. SINGHANIA & KAPIL SINGHANIA, TAXMANN'S DIRECT TAXES: LAW AND PRACTICE 560 (38th ed. 2007).

the company with a right to revoke the same at any time would be covered by section 61, though transfers with a right to re-transfer the earnings back at a different value or under certain new terms, would perhaps not invoke section 61.

VI. SUBSTITUTE FIELDER: IS THE DTC "CFC" STRUCTURE MORE EFFECTIVE?

Under the proposed DTC,[17] a controlled foreign corporation ("CFC") is a company that has been incorporated in a low tax jurisdiction, but is controlled by an Indian resident, who will have to pay tax in India.[18] Unlike section 93 of the ITA, the CFC model taxes the resident controlling the CFC on the passive income earned and even taxes undistributed dividends as the "deemed dividends" of the CFC.

CFC liability hinges on being able to establish that the resident in India controls the company by holding no less than fifty percent of the voting power or income. Further, control is also proved if the resident "exercises a dominant influence on the company" due to a special contractual relationship.[19] Thus, with such a wide construction given to the term "control," it is proposed that in the context of resident In-

[17] Shyamal Mukherjee, *Regulations on Controlled Foreign Corporations: Are We Ready?*, BUS. STANDARD (Jun. 21, 2010, 12:56 AM), *available at* http://www.business-standard.com/article/economy-policy/regulations-on-controlled-foreign-corporations-are-we-ready-110062100065_1.html.

[18] Avantika Govil, *Introduction of the Controlled Foreign Corporations Regime in India: Necessity and Limitations*, Indian Legal Space (Jul. 14, 2010, 8:53 PM), *available at* http://indianlegalspace.blogspot.com/2010/07/introduction-of-controlled-foreign.html.

[19] The Direct Taxes Code, No. 110, Acts of Parliament, 2010, Twentieth Schedule, cl. 5(b)(iii), p. 286, *available at* http://www.finmin.nic.in/dtcode/index.asp.

dian cricketers, the CFC model appears likely to bring more star company situations within the tax net. Not only can Revenue authorities pierce the veil of the company in cases where cricketers cross the fifty percent marker, but they may also do so if other factors cumulatively establish that the cricketer exerts a "dominating influence." Yet, given the conceptualization of control, perhaps this provision too may not be sufficient to cover all the techniques that may be employed by the Indian cricketer in his efforts to evade tax. For example, where the resident Indian cricketer is the sole beneficiary of a trust without meeting the statutory thresholds of the CFC's definition of owner, income received by him from the company would continue to go scot-free.

A CFC has interestingly been defined as one that "is not engaged in any active trade or business."[20] This creates uncertainty in the context of taxing star companies of cricketers, because unlike a holding company that is passively earning dividends, the star company is actively entering into all sorts of contracts on behalf of the cricketer. Though a restrictive definition has been provided for the term "active trade," it is proposed that entering into contracts on behalf of the cricketer could legitimately fall within its definition that reads, "[The CFC] actively participates in commercial or financial undertakings through employees or other personnel in the economic life of the territory of which it is resident." This could thereby enable the cricketer to successfully argue that his company is not a CFC for tax purposes.[21]

[20] *Id.* at cl. 5(a)(iv), p. 286.
[21] *Id.* at cl. 5(e)(i), p. 287.

CONCLUSION: RELAYING THE PITCH TOWARDS A SPECIFIC CHARGING PROVISION FOR CRICKETERS IN INDIA

It is evident, both from a computation and anti-avoidance perspective, that the taxation of resident Indian cricketers requires specific categorization. Whilst an all-encompassing charging provision like section 28 is unlikely to cover all forms of the cricketer's economic activity, sections 93, 61 and the CFC model also have their limitations.

Recognizing that resident Indian cricketers are scarce and possess a significant amount of bargaining power, signals the urgent need to create a distinct charging head for their taxation. This provision must be inclusive and yet comprehensive enough to embrace the various sources of income that cricketers may accrue.

The law must also explicitly recognize and tax different models of the star company structure. The researcher submits that the law must seek to distinguish between companies that genuinely do more than just act as a sham for cricketers from those which are created only for tax avoidance purposes. Unless it can be established that there is some substance to the star company in as much as it is performing a function the resident Indian cricketer could not otherwise do, such as professional management or organizational activities by an independent group of persons trained in the field, the star company must be seen only as method of diverting the cricketer's stream of income. In cases of such diversion, a separate tax provision must enable Revenue authorities to pierce the company's veil based on the specific facts of each case, irrespective of a transfer being established under section 93, or the fulfillment of the specified formal thresholds of the CFC.