



**Image Rights Payments: The Taxation of Resident Sportspersons**

By

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## **Abstract**

The Sport industry has developed over the years and now can even form part of the entertainment industry. Sportspersons have become celebrities in their own right and their image rights are treated as commodities. The image rights of famous sportspersons are commercial products exploited by sports clubs and enterprises in promoting their brands through merchandising and endorsement deals. As a result, sportspersons earn income from the use of their image in promotional activities.

The Income Tax Act No.58 of 1962 does not provide specific rules for the taxation of image rights payments and the Guide on the Taxation of Professional Sports Clubs and Players (the 2018 Guide) issued by the South African Revenue Service is not legally binding. Therefore, the income tax treatment of image rights payments is a subject of different interpretations and a cause for uncertainty. The capital or revenue nature (classification) of income from the sale or exploitation of image rights is unclear.

The aim of this study was to determine the income tax classification of income derived by rugby, cricket and football players from the commercial exploitation of their image rights. The inquiry considered the regulations prescribed by the sport regulatory bodies, legislation, case law, literature and the section of the 2018 Guide which deals with image rights. A brief comparative study was also conducted to assess the tax position in the United Kingdom and United States of America.

It was found that the South African law does not currently recognise an image right as a separable asset of an individual. Income emanates from the productive employment of an image right in lieu of its disposal therefore will form part of a sportspersons' gross income.

The 2018 Guide also does not sufficiently address the income tax implications of the sale or exploitation of image rights. There is, therefore, a need for a legislative framework and a revised Guide to cater for the taxation of image rights payments.

## Abbreviations

CAF	Confédération Africaine de Football
CIPC	Companies and Intellectual Property Commission
CIR	Commissioner for Inland Revenue
COT	Commissioner of Taxes
CSA	Cricket South Africa
CSARS	Commissioner for South African Revenue Service
FIFA	Fédération Internationale de Football Association
HMRC	Her Majesty's Revenue and Customs
IAS	International Accounting Standard
IASB	International Accounting Standards Board
IFRS	International Financial Reporting Standards
IRC	Image rights company
IRS	Internal Revenue Service
ITA	Income Tax Act No.58 of 1962
ITC	Income Tax Case
MOU	Memorandum of Understanding
NIC	National Insurance Contribution
NPO	Non-Profit Organisation
NSL	National Soccer League
OECD	Organisation for Economic Co-operation and Development
PAYE	Pay As You Earn
PBO	Public Benefit Organisation
PSL	Premier Soccer League
SACA	South African Cricketers' Association
SAFA	South African Football Association
SAICA	South African Institute of Chartered Accountants
SAREO	South African Rugby Employers Organisation
SARPA	South African Rugby Player's Association
SARS	South African Revenue Services
SARU	South African Rugby Union

SBI	Sekretaris van Binnelandse Inkomste
SCA	Supreme Court of Appeal
SIR	Secretary for Inland Revenue
TAA	Tax Administration Act No. 28 of 2011
TV	Television
UK	United Kingdom
USA	United States of America
WIPO	World International Property Organisation

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## Chapter 1: Introduction

### 1.1. Historical background of image rights in sport

The second half of the twentieth century was marked by an unprecedented growth in the entertainment industry; not only as far as theatre, film, music and fashion was concerned, but also sport.<sup>1</sup> Sport is now firmly part of the worldwide entertainment industry.<sup>2</sup>

The growth and access to sport has created exposure for sportspersons and they have become celebrities in their own right.<sup>3</sup> Sportspersons have become increasingly aware of the commercial value of their image rights and they do exploit their fame by entering into endorsement and merchandising deals.<sup>4</sup> Images and physical attributes of sportspersons have suddenly become commodities.<sup>5</sup> Sportspersons' images and attributes are commodified through advertising and marketing of products and services.

The commodification of sportspersons' images has become prominent in recent years, however, it is not a new concept. The World Intellectual Property Organisation (WIPO) reports that former English soccer player, Kevin Keegan was the first sports personality in 1977 to actively enter into what was then known as a "face contract" for what was essentially his image right.<sup>6</sup> In essence, the deal demonstrated the player's notoriety beyond the pitch and his ability to sell merchandise.<sup>7</sup>

The commercial exploitation of sportspersons' attributes is also not new in South Africa but is still emerging. The emergence is attributable to the commercialisation of sport and the fame associated with sportspersons globally which has resulted, in a now recognised concept. Football followers would be familiar with the '*Jomo Sono King Soccer Boots*'. The soccer boots bear the term '*Jomo Sono King*' and are a product of an endorsement deal between Puma South Africa and football legend Ephraim

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<sup>1</sup> Cornelius, S. 2011. Image rights. In *Handbook on international sports law*. Nafziger, J. A. R. & Ross, S. F. Eds. Cheltenham, UK: Edward Elgar. p. 497.

<sup>2</sup> Blackshaw, I. 2012. *Sports marketing agreements: legal, fiscal and practical aspects*. The Hague: T.M.C. Asser. p. 254.

<sup>3</sup> *Ibid.* p. 255.

<sup>4</sup> Cloete, R. Ed. 2005. *Introduction to sports law in South Africa*. Durban: LexisNexis Butterworths. p 175.

<sup>5</sup> *Supra cite* note 1.

<sup>6</sup> World Intellectual Property Organisation. 2015. *Can you protect your image like your brand?* Available: [https://www.wipo.int/wipo\\_magazine/en/2015/02/article\\_0008.html](https://www.wipo.int/wipo_magazine/en/2015/02/article_0008.html) [2019, March 16].

<sup>7</sup> *Ibid.*

Matsilele Sono – affectionately known as *Jomo Sono*. The endorsement deal was entered into during the legend’s playing days.<sup>8</sup> This is one example which serves to illustrate how a sportsperson’s image rights can be commercially exploited.

Cloete argues that the commercialisation of image rights and the subsequent increase in sportspersons’ value and income inevitably attracted the interest of the taxman.<sup>9</sup> Sportspersons’ images are used as a mechanism of marketing in order to influence consumer behaviour and ultimately promote product sales.

The interest shown by the revenue authorities is justifiable due to the commercial element associated with the image right practice. The advertisers obtain benefit by increased sales of products and sportsperson benefit through a fee or royalty.<sup>10</sup> The benefits obtained by both parties are of a commercial nature. This study is concerned with the income tax classification of the benefit received by or accrued to or in favour of a sportsperson.

As noted above, the commercial exploitation of sportspersons’ image rights is a recognised concept. Notwithstanding this, the South African Institute of Chartered Accountants (SAICA) recognises that tax issues in the sports industry have generally lagged behind other industries because of the paucity of the quantum of litigation, academic scholarship and legislative action devoted to it.<sup>11</sup>

Consequently, South African income tax literature is limited with regard to commercial exploitation of sportspersons’ image rights. Section 1.2 below indicates the South African Revenue Services’ (SARS) current position of taxing image rights’ payments.

## **1.2. Taxing of sportspersons’ image rights payments in South Africa**

Resident sportspersons are taxed under normal tax provisions prescribed in section 5 of the Income Tax Act (ITA).<sup>12</sup> The SARS issued a Guide on the Taxation of

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<sup>8</sup> Kick Off. 2008. *Puma will stand side-by-side with Jomo*. Available: <http://www.kickoff.com/news/3184/puma-will-stand-side-by-side-with-jomo>. [2019, February 13]

<sup>9</sup> Cloete, R. 2012. *The taxation of image rights: a comparative analysis*. 45(3). p. 559.

<sup>10</sup> Cloete, R. Ed. 2005. *Introduction to sports law in South Africa*. Durban: LexisNexis Butterworths. p 175.

<sup>11</sup> South African Institute of Chartered Accountants. 2013. *Entertainers and sportspersons*. Available: [https://www.saica.co.za/integritax/2013/2190.\\_Entertainers\\_and\\_sports\\_persons.htm](https://www.saica.co.za/integritax/2013/2190._Entertainers_and_sports_persons.htm) [2019, March 17].

<sup>12</sup> Income Tax Act No. 58 of 1962.

Professional Sports Clubs and Players (the 2018 Guide).<sup>13</sup> The purpose of the Guide is to provide a guideline on the income tax implications for professional sports clubs and players in South Africa. The present study considers income tax implications for sportspersons in respect of image rights' payments.

The relevant section of the 2018 Guide provides that, payments made to a sportsperson for the right to use the sportsperson's "image" rights will be included in the sportsperson's gross income. The Guide further states that, should such a payment be made to a sportsperson by the club to whom the sportsperson is contracted, such payments will constitute "remuneration" for employees' tax purposes.<sup>14</sup>

The Guide is not an "official publication" or a general binding ruling as envisaged in the Tax Administration Act No. 28 of 2011 (the TAA) and it does not create practice generally prevailing in terms of section 5 of the TAA. Moreover, the inferences made in the Guide are not supported by authoritative case law since the issue has not been a subject of a higher court and there are no specific tax rules or provisions that deal specifically with image rights payments. As a result, it is a matter that is open to different interpretations and is therefore a cause for much uncertainty.

### **1.3. Research problem**

The problem area identified is the current uncertainty with regard to the classification of income earned by sportspersons from the commercial exploitation of their image rights. The 2018 Guide serves as a good foundation to address uncertainty. However, the Guide does not delve into the precise technical and legal detail that is often associated with tax and therefore could not be used as legal reference.<sup>15</sup> Notwithstanding that a Guide is not a legal binding document, it is necessary to consider whether the inferences made therein are in accordance with the ITA and relevant case law.

The critical element of classifying income between revenue or capital nature has not been sufficiently dealt with in the 2018 Guide. Moreover, the Guide does not

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<sup>13</sup> South African Revenue Service. 2018. *Guide on the Taxation of Professional Sports Clubs and Players*. Available: <http://www.sars.gov.za/AllDocs/OpsDocs/Guides/LAPD-Gen-G08%20-%20Guide%20on%20the%20Taxation%20of%20Professional%20Sports%20Clubs%20and%20Playe rs.pdf> [2019, February 4].

<sup>14</sup> *Ibid.* p. 35.

<sup>15</sup> *Supra* cite note 13. p. ii.

demonstrate which tests or guidelines that have been laid down by the courts were applied or should be applied to ascertain the nature of income earned from the commercial exploitation of image rights.

Moreover, the relevant sport codes are governed by rules and regulations. It is therefore necessary to consider income tax implications in conjunction with the regulations prescribed by the regulatory bodies in respect of image rights. The income tax treatment of image rights payments may diverge depending on whether an image is exploited by a sport club or national sport association or an enterprise. The income tax consequences may also vary when a facet of an image that is exploited is recognised as property right under intellectual property law.

#### **1.4. Research objectives and motivation for study**

##### **1.4.1. Research objectives**

This study seeks to investigate the classification of image rights for income tax purposes. The primary focus being the nature of amounts earned by rugby, cricket and football players from the commercial exploitation of their image rights in promotional activities. Moreover, to explore the income tax implications arising from the protection of image rights under intellectual property law. The study is conducted through an analysis of the legislation, case law and literature relating to the classification of income and considers the relevant section of the 2018 Guide. The study also seeks to raise perspectives that have not been explored in this area and to contribute to the body of knowledge that should be considered to develop a legal income tax framework for taxing image rights payments.

##### **1.4.2. Motivation for study**

The public is exposed to advertisements through billboards, TV commercials and other forms of media. There is a notable number of sportspersons taking part in promotional activities through their image rights. It follows that it is necessary to consider and determine the classification of image rights payments in the hands of sportspersons.

The inexistence of a legal tax framework in this regard leaves a gap in our tax system. The study justifies the need for a legal tax framework that addresses the classification of image right payments in the hands of sportspersons. A study on this topic is relevant due to the uncertainty that currently exists.

### **1.5. Research questions**

The primary research question formulated to approach and guide this study is as follows:

What is the nature of payments received by or accrued to or in favour of rugby, cricket and football players from the commercial exploitation of their image rights in promotional activities?

To address the primary question, the following sub-questions are formulated:

- a) Does the payment made to sportspersons satisfy the requirements of gross income as defined in section 1 of the ITA?
- b) To the extent that an image right payment is considered to be income of a revenue nature, should the income be characterised as remuneration, business income, royalty fee, services or other income?

### **1.6. Research Method**

A legal interpretative research will be adopted to conduct the study. A doctrinal research which provides a systematic exposition of the rules governing a particular legal category, analyses the relationship between rules, explains areas of difficulty and, perhaps, predicts future developments, will be applied. The research consists of a review and analysis of case laws, legislation and existing literature. Due to the nature of the study, a qualitative research method will be applied to address the research questions.

Due to limited domestic literature in this area, the income tax perspective of the United Kingdom (UK) and United States of America (USA) has been considered for the purpose of comparative analysis. These countries are selected on the basis that they apply a residence-based tax system, have a capital gains tax and the availability of literature in respect of image rights payments as well as case law. The comparative study will be utilised to determine whether the income tax treatment of image rights by these countries could be considered in South Africa.

The research data will be obtained through an internet search. The data includes legislation, case law, academic journals, website articles and textbooks that are available in the public domain.

### **1.7. Limitation of scope**

The study is limited to the classification of receipts or accruals in favour of resident rugby, cricket and football players, in respect of their image rights commercially exploited only in South Africa.

Income tax implications for sports clubs, national sport associations, enterprises and sport regulatory bodies are not considered. Save for, how the sport regulating bodies provides for the accounting of image rights in standard player contracts, collective agreements and, or memorandum of understanding (MOU).

### **1.8. Structure of the dissertation**

Chapter 1 provides a brief historical background of image rights in sport and presents the research topic. The chapter also outlines the research problem, the research objectives and motivation for the study, the research questions, the research method adopted and limitation of scope. It also provides a brief overview of the chapters and structure of the dissertation.

Chapter 2 provides an overview of the image rights concept, its association with advertising and the definitions of key terms. The chapter further indicates how sport clubs, national sports associations and third-party enterprises commercially exploit image rights. Moreover, this chapter considers how image rights are regulated.

Chapter 3 considers the recognition and protection of image rights in South African law. The chapter further seeks to establish how image rights should be classified in terms of the accounting and income tax provisions.

Chapter 4 presents an analysis of the legislation and relevant case law for the classification of income earned by sportspersons from the commercial exploitation of their image rights.

Chapter 5 firstly conducts a critical review of the 2018 Guide and examines the characterisation of income between remuneration, business income, royalty income, services or other income. Secondly, the chapter explores the practice of safeguarding image rights under intellectual property law and analyses the income tax consequences from the subsequent commercial exploitation thereof.

Chapter 6 provides a UK and USA perspective in respect of the practice and taxation of image rights payments.

Chapter 7 concludes the study and provides a summary of findings and recommendations.

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## Chapter 2: The concept of image rights and regulations

### 2.1. Introduction

Prior to determining the classification of image payments for income tax purposes, it is important to explain the concept of image rights and to define the key terms. Moreover, it is also necessary to demonstrate how image rights are associated with advertising in and outside of sport. The image rights regulations prescribed by sport governing bodies in their contractual agreements are also presented in this chapter. Above all, this chapter seeks to manifest how image rights are commercially exploited in advertising. It is critical to draw a distinction between the modes under which image rights are commercially exploited in order to determine appropriate classification of receipts or accruals in favour of sportspersons for income tax purposes.

### 2.2. Understanding image rights and defining key terms

#### 2.2.1. Image rights

International and domestic literature and case law are considered in this chapter in order to present the concept of image rights. The integration is attributable to the fact that the concept is still emerging in South Africa and, as a result, the literature is limited.

“Image” is defined as a representation of the external form of a person or thing in art, a visible impression obtained by a camera or other devices or displayed on a computer or video screen, semblance or likeness.<sup>16</sup> The dictionary meaning only refers to the visual physical attributes of a person. Scholars in the field of sports law have expressed that the term “indicia” is appropriate to include non-physical aspects of an individual such as likeness, voice and nickname within the term “image”.<sup>17</sup> In this study, the term “image” is used in relation to both physical and non-physical attributes of sportspersons.

Image right is defined as:<sup>18</sup>

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<sup>16</sup> “Image”. Stevenson, A. Ed. 2010. Oxford Dictionary of English. 3<sup>rd</sup>ed. Oxford: University Press. Available:

[http://www.oxfordreference.com.ezproxy.uct.ac.za/view/10.1093/acref/9780199571123.001.0001/m\\_e\\_n\\_gb0400680?rskey=1Fm1J8&result=1](http://www.oxfordreference.com.ezproxy.uct.ac.za/view/10.1093/acref/9780199571123.001.0001/m_e_n_gb0400680?rskey=1Fm1J8&result=1) [2019, February 16].

<sup>17</sup> Harrington, D. & White, N. 2005. United Kingdom. In *Sports Image Rights in Europe*. Blackshaw, I.S. & Siekmann, R.C.R, Eds. The Hague: T.M.C. Asser Press. 315 – 343.

<sup>18</sup> Cloete, R. Ed. 2005. *Introduction to Sports Law in South Africa*. Durban: Lexis Nexis Butterworths. p.176.

“The ability of an individual to exclusively control the commercial use of his name, physical/pictorial image, reputation, identity, voice, personality, signature, initials or nickname in advertisements, marketing and all other forms of media. The sportsperson on the other hand, often earns a substantial fee or royalty that is paid for the privilege of allowing his name to be used for promotional activities.”

WIPO indicates that, the right to one’s own image is the ability to decide when, how and by whom one’s physically recognisable features (image, voice and name) can be captured, reproduced or published.<sup>19</sup>

It can be deduced from these definitions that an image right is concerned with individuals’ right to identity and the exclusive right over the use of personal identity for commercial purposes.

### 2.2.2. Resident

The South African income tax system is residence-based. The residence of a sportsperson is important for this discussion. The ITA provides that a ‘resident’:<sup>20</sup>

“means as any—

- (a) natural person who is—
  - (i) ordinarily resident in the Republic; or
  - (ii) not at any time during the relevant year of assessment ordinarily resident in the Republic, if that person was physically present in the Republic—
    - (aa) for a period or periods exceeding 91 days in aggregate during the relevant year of assessment, as well as for a period or periods exceeding 91 days in aggregate during each of the five years of assessment preceding such year of assessment; and
    - (bb) for a period or periods exceeding 915 days in aggregate during those five preceding years of assessment,”

The term ‘ordinary resident’ is not defined in the ITA. However, it was established in *Cohen v CIR*<sup>21</sup> that a person’s ordinary residence would be the country to which he

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<sup>19</sup> World International Property Organisation. 2015. *The Role of IP for Athletes and Image Rights*. Available: [https://www.wipo.int/edocs/mdocs/mdocs/en/wipo\\_reg\\_ip\\_sport\\_sin\\_14/wipo\\_reg\\_ip\\_sport\\_sin\\_14\\_t\\_11.pdf](https://www.wipo.int/edocs/mdocs/mdocs/en/wipo_reg_ip_sport_sin_14/wipo_reg_ip_sport_sin_14_t_11.pdf) [2019, March 20].

<sup>20</sup> Section 1(1) of Income Tax Act No. 58 of 1962.

<sup>21</sup> (1946) 13 SATC 362 AD 174 at para 371.

would naturally and as a matter of course return from his wanderings. This formulation was confirmed in *CIR v KutteP*<sup>22</sup> where the court held that, a person is ordinarily resident where he has his usual or principal residence that is what may be described as his real home.

It is submitted that the sportspersons covered in this study are those that fall within the definition and criterion test above.

### **2.2.3. Sportsperson**

A sportsperson is defined in section 47A of the ITA as follows:<sup>23</sup>

“entertainer or sportsperson” includes any person who for reward—

- (i) performs any activity as a theatre, motion picture, radio or television artiste or a musician;
- (ii) takes part in any type of sport; or
- (iii) takes part in any other activity which is usually regarded as of an entertainment character”

Professional sportspersons who participate in a team sport generally contract with professional sports clubs. Sportspersons get rewarded for their services rendered to the clubs.

‘Sport’ is defined as “an activity involving physical exertion and skill in which an individual or team competes against another or others for entertainment”.<sup>24</sup> It is submitted that rugby, cricket and football fall within the ambit of sport in the ordinary dictionary meaning. It follows that players participating in these sporting codes are regarded as sportspersons as defined in section 47A of the ITA.

### **2.3. The commercialisation of sportspersons’ image rights**

Sport has transformed from a recreational activity to an industry on its own. The transformation is not confined to the physical act of performing but the commercialisation of sport is now part of the ‘game’. In the modern era, clubs do not rely on the traditional sale of tickets to generate income. Television broadcasting

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<sup>22</sup> (1992) 54 SATC 298 (3) SA 242(A) at para 36.

<sup>23</sup> No. 58 of 1962.

<sup>24</sup> “Sport”. Stevenson, A. Ed. 2010. Oxford Dictionary of English. 3<sup>rd</sup>ed. Oxford: University Press. Available: [http://www.oxfordreference.com.ezproxy.uct.ac.za/view/10.1093/acref/9780199571123.001.0001/m\\_e\\_n\\_gb0803330?rskey=dEGoqU&result=2](http://www.oxfordreference.com.ezproxy.uct.ac.za/view/10.1093/acref/9780199571123.001.0001/m_e_n_gb0803330?rskey=dEGoqU&result=2) [2019, February 13].

rights, merchandise and sponsorships are means by which the clubs earn income. Television broadcasting rights do not only generate income for clubs but also create exposure for players and enhance their public profile.

The leading stars use their public profiles to generate *income*<sup>25</sup>, apart from their professional career by availing their image rights for commercial exploitation. The main sources of income for players and athletes in the exploitation of their image rights are sponsorship, merchandising or licensing and endorsements.<sup>26</sup>

Image rights are sought after by companies who wish to exploit them in order to promote their brand image, create brand awareness and promote the sale of their products.<sup>27</sup> Wolohan reports that for most high profile athletes, endorsing products or lending their name to them, has become more lucrative than their professional playing contracts.<sup>28</sup> Haynes states that, the elite of the world's footballers, the superstars of the game, are now traded on this intangible value with the capture of their so-called "image rights" central to any contractual negotiations between player, agents, club and national federation.<sup>29</sup> In fact, the commercial exploitation of the image rights of famous sportspersons is big business.<sup>30</sup>

The advertising world took notice of the popularity enjoyed by the stars and realised the value of associating merchandise or trademarks with superstars.<sup>31</sup> The famous sportspersons appearing in promotional activities are recognisable by the public and it is mainly for this reason that enterprises associate with them in order to reach a vast audience. Sportsperson's likeness can influence consumer's interest in the product or service. Cloete argues that, the association of the name of a famous sportsperson with a product can increase product sales.<sup>32</sup>

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<sup>25</sup> The word is used in its general meaning, not within the context of the Income Tax Act.

<sup>26</sup> Louw, A. 2012. *Sports law in South Africa*. 2nd ed. Alphen aan de Rijn: Kluwer Law International. p. 464.

<sup>27</sup> Cloete, R. 2012. *The taxation of image rights: A comparative analysis*. 45(3). p. 556.

<sup>28</sup> Wolohan, J. 2005. United States. In *Sports Image Rights in Europe*. Blackshaw, I.S. & Siekmann, R.C.R, Eds. The Hague: T.M.C. Asser Press. p. 345.

<sup>29</sup> Haynes, R. 2007. Footballers' Image Rights in the New Media Age. *European Sport Management Quarterly*, 7(4):361–374.

<sup>30</sup> Colantuoni & Novazio. 2011. Intellectual property rights in sports: a comparative analysis of the USA, UK, and Italy. In *Handbook on international sports law*. Nafziger, J.A.R. & Ross, S.F. Nafziger, J.A.R. & Ross, S.F, Eds. Cheltenham, UK: Edward Elgar. 429 – 459.

<sup>31</sup> Cornelius, S. 2011. Image rights. In *Handbook on international sports law*. Nafziger, J. A. R. & Ross, S. F. Eds. Cheltenham, UK: Edward Elgar. p. 497.

<sup>32</sup> Cloete, R. Ed. 2005. *Introduction to Sports Law in South Africa*. Durban: Lexis Nexis Butterworths. p. 176.

The commercial element attached to the exploitation of image rights, raises a question whether every sportsperson has an image that is worthy or capable of commercial exploitation. Considering that images are typically exploited for the purpose of increasing sales, it is probable that promoters would seek to exploit images of the most famous or recognisable sportspersons. However, this may not invariably be the case when images are exploited by a sport club or national sport association in a team or group context.

This present study does not intend to design a test which establishes the value that could be derived in advertising based on the fame or lack thereof of a sportsperson. However, it is trite that high profile stars are most likely to catch a buyer's attention.

Sportspersons develop their profiles over a period of time through performance on the pitch, philanthropic initiatives and maintaining a good image in public. The athlete possesses an earning capacity which is greatly enhanced by his or her fame.<sup>33</sup> For instance, a player may not be famous at the time of contracting to a club, but through performance and determination draws admiration from the public.

This study submits that all sportspersons have image rights that are capable of being commercially exploited, but it is mostly the images of the leading and famous sportspersons that are mainly commercialised.

#### **2.4. The role of sportspersons' image rights in advertising**

Sportspersons attributes are utilised as advertising mechanisms to draw consumer's attention to the product or service and make it stand out.

Billboards, merchandise bearing the names of sportspersons, television and radio commercials are some of the various forms where sportspersons' image rights are commercially exploited. The use of a sportsperson's attributes in these forms of advertising is commonly known as sponsorship, merchandising or licensing and endorsements.

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<sup>33</sup> Louw, A.M. 2007. Suggestions for the protection of star athletes and other famous persons against unauthorised celebrity merchandising in South African law. *South African Mercantile Law Journal*. 19(3):272-301.

According to Cloete, many sportspersons earn more from their promotional activities than what they may earn on the sports field itself.<sup>34</sup> This illustrates the significance of image rights not only for the promoters but for sportspersons as well. The promotional activities through which sportspersons' image rights are exploited are detailed below.

#### **2.4.1. Endorsements**

Endorsement refers to an activity when someone...tells the relevant public that he approves of the product or service or is happy to be associated with it and adds his name as an encouragement to members of the relevant public to buy or use the service or product.<sup>35</sup>

The essence of endorsement agreements is that the individual sportsman or sporting team is giving its name to, and advising the public that it accepts, the particular product that it is endorsing.<sup>36</sup> An endorsement agreement generally cedes the responsibility of promoting a product or service to a sportsperson in exchange for payment.

The association of brands with sportspersons is an active practice in South Africa. The notable endorsements deals which illustrate how images are exploited in endorsements includes, *inter alia*: Bernard Parker<sup>37</sup> who was selected as brand ambassador for Clear Active,<sup>38</sup> and, South African cricketer Kagiso Rabada who signed an endorsement deal with luxury watchmaker -Tag Heuer.<sup>39</sup> Parker endorsed the product in a video graphic commercial while Rabada endorsed the watch brand through a social media (*Twitter*) post.

#### **2.4.2. Merchandising**

Merchandising involves exploiting images, themes or articles which have become famous.<sup>40</sup> It commonly refers to the use of the name, logo, trademarks and other

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<sup>34</sup> Cloete, R. Ed. 2005. *Introduction to sports law in South Africa*. Durban: LexisNexis Butterworths. p. 176 -176.

<sup>35</sup> *Irvine and another v Talksport Ltd* [2002] 2 All ER 414. p. 418.

<sup>36</sup> *Supra* cite note 34.

<sup>37</sup> Bernard Parker plays for Kaizer Chiefs and is a South African International football player.

<sup>38</sup> Coetzee G. 2013. *Clere Active strikes with Parker*. Available: <https://yoursport.co.za/clere-active-strikes-with-parker/> [2019, March 06].

<sup>39</sup> Sports Industry Group. 2018. *Kagiso Rabada Bowled over with Tag Heuer Deal*. Available: <http://www.sportindustry.co.za/news/kagiso-rabada-bowled-over-tag-heuer-deal> [2019, March 06].

<sup>40</sup> *Supra* cite note 34.

properties relating to the sportsperson, club or organisation unconnected to the core business.<sup>41</sup>

Like endorsement, merchandising consists of commercial exploitation of a sportsperson's image right in an activity that is unrelated to the player's professional career. Save for, when the image right is exploited by a sport club or national sport association in a team context in connection with the player's professional service.

Like all other forms of promotions, merchandising agreements are mainly conducted with the intention of attracting a customer's attention to the product or brand.

Cloete indicate that, in turn, sportspersons often earn a substantial fee or royalty that is paid for the privilege of allowing his name to be used for promotional purposes.<sup>42</sup>

In merchandising, the sportspersons' image rights are exploited as follows:

- Football player selected as a brand ambassador and partake in the brand's TV commercial.<sup>43</sup>
- A rugby player appearing in a television commercial advertising a satellite TV service.<sup>44</sup>

As stated above, sportspersons' image rights are also exploited in merchandising by the clubs that they are contracted to. Sports clubs exploit sportspersons' image rights through the advertising and sale of merchandise which bear the names, image and other attributes of the players. The merchandise may consist of replica shirts, scarfs, magazines, etc. The merchandise is mainly acquired by fans as a form of expressing their affiliation and support for the clubs.<sup>45</sup>

### **2.4.3. Sponsorships**

Gardiner<sup>46</sup> defines sponsorship as:

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<sup>41</sup> Gelder, P. 2005. Image is Everything: An Analysis of the Legal Protection of the Image of Sports Athletes Sport image rights in Spain. *The International Sports Law Journal*. (1-2): 25 -35.

<sup>42</sup> Cloete, R. Ed. 2005. *Introduction to sports law in South Africa*. Durban: LexisNexis Butterworths. p 176.

<sup>43</sup> SA's Khune named Kiwi African ambassador. 2010. Available: <https://www.bizcommunity.africa/Article/410/82/53663.html> [2019, March 10].

<sup>44</sup> *Free and proud: Openview launches a brand-new TVC*. 2018. Available: <https://www.bizcommunity.com/Article/196/66/184795.html> [2019, March 10].

<sup>45</sup> Murray, R. Shimizu, C. O'Reilly, N. & Foster, G. 2015. Merchandise sales rank in professional sport: Purchase drivers and implications for National Hockey League clubs. *Sport, Business and Management*. 5(4):307-324.

<sup>46</sup> Gardiner, S. 2001. *Sports law*. 2nd ed. London: Cavendish Pub. p. 486.

“A commercial arrangement, whereby a sponsor pays a certain sum of money (the sponsorship fee) and/or provides certain products, services or other facilities (value in kind) to the sponsored party, in return for which the sponsor can promote the image of the sponsor and sale of the sponsor’s products and/or services.”

In essence, a sportsperson is paid for associating with or using a particular asset, apparel, brand or product and the sponsor would obtain exposure through this undertaking.

One of the sponsorship deals which has been conducted in South African sport was between *Huawei* and five rugby provincial unions. The deal entailed rugby players and management being handed the latest gadget by the tech company.<sup>47</sup>

The above forms of advertising using the sportspersons’ identity or fame are interrelated. However, it is submitted that for the purpose of this study, sponsorship has distinct income tax implications which falls outside the scope of this study. This study is therefore only concerned with the income tax treatment of receipts or accruals from endorsement and merchandising deals.

## **2.5. Regulation of image rights in sport**

### **2.5.1. Law of contract**

The law of contract plays a fundamental part in sports law.<sup>48</sup> Contracts provide a practical form of regulating mutual interactions in sport. The vast majority of obligations that occur within the context of sports are of a contractual nature.<sup>49</sup> These include amongst others, transfer of players, broadcasting rights, endorsements and merchandising deals.

Louw argues that in the absence of specific statutory protection or recognised proprietary protection for image rights under common law, image rights are currently mainly regulated contractually by means of specific provisions in standard player contracts.<sup>50</sup>

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<sup>47</sup> Western Province Rugby. n.d. *Huawei scores rugby’s big five*. Available: <http://wprugby.com/huawei-scores-rugbys-big-five/> [2019, March 10].

<sup>48</sup> Cloete, R. Ed. 2005. *Introduction to sports law in South Africa*. Durban: LexisNexis Butterworths. p. 17.

<sup>49</sup> *Ibid.*

<sup>50</sup> Louw, A. 2012. *Sports law in South Africa*. 2nd ed. Alphen aan de Rijn: Kluwer Law International. p. 467.

The standard clause in sports contracts typically stipulates that the player assigns the use and enjoyment of his image rights (identity) to the club for which he plays.<sup>51</sup> However, the parties may agree that the player keeps control of his image rights and the commercial exploitation thereof.<sup>52</sup> The image rights regulations in the three sporting codes that are the subject of this study are detailed below.

## **2.6. Sport governing bodies' regulations on image rights**

### **2.6.1. Image rights regulations in Rugby**

The South African Rugby Employers Organisation (SAREO), Provinces (unions/clubs) and the South African Rugby Player's Association (SARPA) signed the Collective Agreement<sup>53</sup> which regulates the terms and conditions of contracts applicable to rugby players.

Paragraph 1.13 of the Collective Agreement provides that a "contracted player" means a rugby player who has concluded a Player Contract with a Province. Paragraph 1 of the Standard Player Contract<sup>54</sup> also refers to the relationship between a player and a Province.

Paragraph 7 of the standard player contract draws the player's attention to Part E, clause 29 and 30 of the Collective Agreement. The relevant clauses provide:

#### **"Players Collective Commercial Rights**

It is recorded that the Players Trust and SARU [South African Rugby Union] have concluded an agreement under which SARU has acquired the Players' Collective Commercial Rights of all Contracted Players who have transferred their Players' Collective Commercial Rights to the Players Trust. It is further noted that in terms of such an agreement, the Players Trust has granted to SARU the right to use such Players Collective Commercial Rights which enables SARU to grant the Players Collective Commercial Rights to the Provinces.

In order to qualify for a payment in respect of an appearance, Players had to at least have played 1(one) Springbok test match and/or 21 (twenty) Super Rugby

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<sup>51</sup> Cloete, R. 2012. *The taxation of image rights: a comparative analysis*. 45(3). p. 559.

<sup>52</sup> *Ibid*.

<sup>53</sup> *Collective Agreement*. 2018. Available:

<http://images.supersport.com/content/Official%20signed%20CBA%202018.pdf> [2019, March 15].

<sup>54</sup> *Standard Player Contract*. 2016. Available:

<http://images.supersport.com/content/2StandardPlayer.pdf> [2019, March 15].

or Pro14 matches; and/or be part of an official Super Rugby or Pro14 squad of a Franchise on the date of appearance.”

Players’ Collective Commercial Rights refers to the use of the Players Attributes in a team context and appearance by players in a team context (Para 1.41 of the Collective Agreement).

Player Attributes refers to the rights which such a player owns and enjoys in respect of his attributes including, but not limited to, the right to the use of his name, nickname, image, likeness, signature, voice, and biographical information.

Appearance refers to an appearance for the purpose of marketing, advertising and/or promoting the game of rugby, the Province, its teams and/or squads, and/or competitions or tournament in which the Province participates (Para 1.5 provides).

Clause 29 of the Collective Agreement only relates to the exploitation of a player’s attributes in a team context. The image rights that are exploited in a team context are under the custodian of SARU or the Province.

Clause 30.1 of the Collective Agreement allow players to enter into agreements or arrangement under which their attributes are commercially exploited in endorsing, promoting or marketing by third parties. On the basis that the players obtain prior written consent from the Province and the Province’s involvement is limited to the granting of consent.

### **2.6.2. Image rights regulations in Cricket**

In professional cricket, the critical matters such as standard contracts, player remuneration, benefits, and most importantly the grant of commercial rights are regulated by the MOU.<sup>55</sup> The MOU is a collective agreement signed by Cricket South Africa (CSA), the South African Cricketers’ Association (SACA) and Franchises (Clubs) which extend for a period of four years. In cricket, image rights fall under the concept of player’s commercial rights.

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<sup>55</sup> *South African Cricketers’ Association*. Available: <http://saca.org.za/cricket/mou-nocs/> [2019, March 13].

SACA made proposals in respect of exploitation of player's commercial rights in the 1<sup>st</sup> May 2006 to 30 April 2010 MOU.<sup>56</sup> Paragraph 13 of the executive summary of SACA's proposals for the MOU<sup>57</sup> indicate the significance of CSA obtaining the grant of player attributes and appearances in order to maximise revenues for sponsor programme and event sponsors.<sup>58</sup>

The inclusion of player's commercial rights in the SACA Services and Benefits 2016/2017 Player's Guide (Player's Guide) could be the result of the proposals made for the 1<sup>st</sup> May 2006 to 30 April 2010 MOU. The Player's Guide<sup>59</sup> provides:

“SACA makes a number of commercial rights payments to players who have signed over their commercial rights to SACA's Players Trusts. The grant of rights agreements allows the player Trusts to license the Player's Appearances, Attributes (e.g. name, image, voice and signature) and Content in a team context and thereby generate commercial revenues which are in turn paid out to players. As soon as you are contracted to CSA or a Franchise you become eligible for payments. Semi-professional contracted players may be eligible if they play Franchise matches.”

National team player's image rights are signed to the South African National Cricket Team Trust (National Trust).<sup>60</sup> Franchise player's image rights are signed to the South African Professional Cricketers' Trust (all Player Trust).<sup>61</sup> The trusts act as intermediaries in licensing player's image rights to Franchises and national team (CSA). The relationship between the player and club is discussed in Chapter 5.

### **2.6.3. Image rights regulations in Football**

The Fédération Internationale de Football Association (FIFA) is the highest regulating body in football. South African Football Association (SAFA) and Confédération Africaine de Football (CAF) are FIFA members.

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<sup>56</sup> South African Cricketers' Association. *Executive Summary of SACA's Proposal for the MOU*. Available: [http://webfactory.co.za/portfolio/saca/docs/saca\\_mou\\_exec\\_summary.pdf](http://webfactory.co.za/portfolio/saca/docs/saca_mou_exec_summary.pdf) [2019, March 13].

<sup>57</sup> The MOU is not available in the public domain since it is a confidential document.

<sup>58</sup> *Supra* cite note 56.

<sup>59</sup> *South African Cricketers' Association Services and Benefits 2016 / 2017 Player's Guide*. Available: <http://saca.org.za/wp-content/uploads/2016/10/16.17-SACA-Services-and-Benefits-Players-Guide-FINAL-161024.pdf> [2019, March 10].

<sup>60</sup> South African Cricketers' Association. n.d. *About SACA*. Available: <http://webfactory.co.za/portfolio/saca/about.htm#trusts> [2019, March 10].

<sup>61</sup> *Ibid.*

The National Soccer League (NSL) which trade as the Premier Soccer League (PSL) has a responsibility to promote, organise, control and administer professional soccer in South Africa.<sup>62</sup> NSL oversee professional football under the rules and regulations prescribed by SAFA. Professional football players contract with football clubs that are affiliated to NSL.

NSL, SAFA and CAF do not publish standard player contracts and player's image rights are not covered in their rules and regulations or constitution. Paragraphs 22.1 of the NSL Rules suggest that when NSL, SAFA and CAF are silent on a matter, it shall be dealt with in accordance with the rules prescribed by FIFA.<sup>63</sup> Consequently, the image rights regulation prescribed by FIFA is considered for this study.

FIFA issued a circular<sup>64</sup> that prescribe the minimum requirements that should be contained in a professional football player's contract. The federation encourages its members that requirements should be regulated and agreed as a minimum by contracting parties, but parties have the latitude to agree on final wording. The circular provides that, the Club and the player have to agree on how the player's image rights are exploited, if applicable.<sup>65</sup> Moreover, as a recommendation and principle the individual player may exploit his right by himself (if not conflicting with clubs' sponsors/partners) whilst the Club may exploit the Player's image right as part of a group and/or the whole squad.<sup>66</sup>

The overriding factors deduced from the above regulations can be summarised as follows:

- By virtue of contracting with a club, the players transfer or licence the right to commercially exploit their images in a team or group context to a club.
- The national team trust and all player trusts act as intermediaries in holding image rights of rugby and cricket players. The sport clubs and national

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<sup>62</sup> Louw, A. 2012. *Sports law in South Africa*. 2nd ed. Alphen aan de Rijn: Kluwer Law International. p. 228.

<sup>63</sup> National Soccer League. 2012. *National Soccer League Rules*. Available: [http://images.supersport.com/NSL\\_Rules\\_as\\_at\\_1\\_August\\_2012.pdf](http://images.supersport.com/NSL_Rules_as_at_1_August_2012.pdf) [2019, March 16].

<sup>64</sup> Fédération Internationale de Football Association. 2008. *Professional Football Player Contract Minimum Requirements (Circular 1171/2008)*. Available: <https://www.fifa.com/mm/document/affederation/administration/97/29/01/circularno.1171-professionalfootballplayercontractminimumrequirements.pdf>. [2019, March 14].

<sup>65</sup> *Ibid.*

<sup>66</sup> *Ibid.*

associations make image rights payments to the trusts and the trusts then distribute payments to the players. The trusts act as custodians of image rights and have no authority to retain payments due to players.

- The players can exploit their image rights in an individual capacity with third parties by entering into endorsement and merchandising agreements, with the club's consent. This is only to the extent that the endorsement or merchandising agreement is not in direct competition with the club and does not bring the sport into disrepute.

## **2.7. Conclusion**

This chapter considered the image right concept in advertising and regulations prescribed by sport governing bodies. It is evident that there is an essential commercial aspect associated with the exploitation of image rights. It is therefore important that sportspersons, practitioners, sports clubs, revenue authority and other relevant stakeholders are cognisant of the income tax implications. It is also worth noting that the income tax consequences may vary depending on whether an image right is exploited by a sport club, national sport association or an enterprise.

There is no universal factor which directs what should be stipulated in an image right agreement or clause. This means that what is contained in an image right agreement of one player may be different to that of another player. This study considers the regulations stipulated by the relevant sport governing bodies vis-à-vis image rights as a fundamental basis to examine income tax implications.

The following chapter considers the legal recognition and protection of image rights together with classification in terms of accounting and income tax provisions.

## Chapter 3: Classification of image rights

### 3.1. Introduction

The previous chapter, *inter alia*, outlined the forms under which players' image rights are commercially exploited and the commercial aspect of associating a product or brand with a famous sportsperson. It has been established that image rights have immense commercial value<sup>67</sup> and are a source of income<sup>68</sup> for players.

This chapter attempts to establish whether sportspersons' image rights can be classified as assets. The discussion examines how the elements of image rights can apply to the definition of an "asset" as envisaged in the accounting and income tax provisions. However, the chapter commences by demonstrating how the South African law recognises and provides for the protection of image rights, if at all.

### 3.2. Legal recognition and protection of image rights

The South African law does not currently recognise image rights as a commercially exploitable and legally protectable property.<sup>69</sup> The law does not recognise any specific proprietary interest and property rights in personal attributes such as image, likeness, voice or other aspects of persona. However, the law recognises that every person possesses a number of personality rights.<sup>70</sup>

Personality rights are mainly natural rights which every man is free to enjoy.<sup>71</sup> They include, *inter alia*, a right to life, physical integrity, bodily freedom, reputation, dignity, privacy, identity and feelings.<sup>72</sup> Some of these rights have been embodied in the South African Constitution and they include a right to human dignity<sup>73</sup>, right to life<sup>74</sup> and right

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<sup>67</sup> Cloete, R. 2012. *The taxation of image rights: A comparative analysis*. p. 556.

<sup>68</sup> Louw, A. 2012. *Sports law in South Africa*. 2nd ed. Alphen aan de Rijn: Kluwer Law International. p. 464.

<sup>69</sup> Louw, A. 2012. *Sports law in South Africa*. 2nd ed. Alphen aan de Rijn: Kluwer Law International. p. 467.

<sup>70</sup> *Ibid.* p. 468.

<sup>71</sup> *Rex v Umfaan* (1908) TS 62 at page 66.

<sup>72</sup> Neethling, J. 2005. Personality rights: a comparative overview. *The Comparative and International Law Journal of Southern Africa*. 38(2). p. 215.

<sup>73</sup> Section 10 of the Constitution of the Republic of South Africa, 1996. Everyone has inherent dignity and the right to have their dignity respected and protected.

<sup>74</sup> Section 11 of the Constitution of the Republic of South Africa, 1996. Everyone has the right to life.

to privacy<sup>75</sup>. For the purposes of the present study an image right falls within the ambit of common law right to privacy, right to identity and constitutional right to privacy.

Since image rights are not recognised by any statute, there is no legislative provision which provides for the general protection and enforceability of image rights as a proprietary right similar to a trademark or any other intellectual property. However, image rights are protected against misappropriation<sup>76</sup> in terms of common law of delict and constitutional right to privacy.<sup>77</sup> The common law protection is available under the law of personality<sup>78</sup> in terms of right to privacy<sup>79</sup> and right to identity<sup>80</sup> within the wider concept of *dignitas*.<sup>81</sup>

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<sup>75</sup> Section 14 the Constitution of the Republic of South Africa, 1996. Everyone has the right to privacy, which includes the right not to have—

- (a) their person or home searched;
- (b) their property searched;
- (c) their possessions seized; or
- (d) the privacy of their communications infringed.

<sup>76</sup> Where such use infringes the privacy of the athlete an action for breach of privacy would be available either under the common law or by virtue of the constitutional protection afforded to the right of privacy in the Bill of Rights. Under the common law, an infringement of the right of privacy would occur where there is an unlawful intrusion on someone's personal privacy or where there is an unlawful disclosure of private facts about a person. The unlawfulness is judged in the light of the contemporary *boni mores* and sense of justice of the community. While the second of these examples (the disclosure of private facts) would normally not apply in cases of unauthorized celebrity merchandising of the name, likeness or other aspects of the persona, it has been held specifically that publishing a person's photograph as part of an advertisement without that person's consent would constitute infringement of the common-law right to privacy; see Louw, A.M. 2007. Suggestions for the protection of star athletes and other famous persons against unauthorised celebrity merchandising in South African law. *South African Mercantile Law Journal*. 19(3):275-301.

<sup>77</sup> Louw, A. 2012. *Sports law in South Africa*. 2<sup>nd</sup> ed. Alphen aan de Rijn: Kluwer Law International. p. 468. Section 14 the Constitution of the Republic of South Africa, 1996.

<sup>78</sup> The law of personality can be defined as the legal forms aimed at protecting an individual's personality, including the rules and principles which deal with the recognition, definition and protection of the various personality rights. See Neethling, J., Potgieter, J.M. & Visser, P.J. 2005. *Neethling's law of personality*. 2<sup>nd</sup> ed. Durban: LexisNexis Butterworths. p. 3.

<sup>79</sup> The right to privacy as a personality right is protected under common law of delict. See Neethling, J., Potgieter, J.M. & Visser, P.J. 2005. *Neethling's law of personality*. 2<sup>nd</sup> ed. Durban: LexisNexis Butterworths. p. 39. Neethling *et al* define 'privacy' as an individual condition of life characterised by seclusion from the public and publicity. This condition embraces all those personal facts which the person concerned has himself determined to be excluded from the knowledge of outsiders and in respect of which he has the will that they be kept private.

<sup>80</sup> Identity as an interest of personality is a person's uniqueness or individuality which identifies or individualises him as a particular person and thus distinguishes him from others, see Neethling, J., Potgieter, J.M. & Visser, P.J. 2005. *Neethling's law of personality*. 2<sup>nd</sup> ed. Durban: LexisNexis Butterworths. p. 36.

<sup>81</sup> In *Kumalo v Cycle Lab (Pty) Ltd* (2011) JOL 27372 (GSJ) it was determined that the right to identity is infringed by the falsification of a person's true image or identity, but infringement of identity may also, although not necessarily, be accompanied by an infringement of privacy. It was held that the unauthorised publication of the applicant's photograph constituted infringement of personality rights. In *W v Atoll Media (Pty) Ltd* (2010) 4 All SA 548 (WCC) at para 49, it was held that the appropriation of a person's image or likeness for the commercial benefit or advantage of another may well call for legal

### 3.3. Classification of image rights: Accounting

Taxable income is ascertained in the manner prescribed by the ITA and in no other form.<sup>82</sup> The accounting records can be used as a starting point of determining the normal tax liability and adjustments to be made in accordance with the ITA provisions.

The accounting records are notably important in the determination of normal tax liability. It is thus necessary to provide an overview of how image rights shall be classified and recognised in terms of the accounting principles. If this is established, it will provide a broader perspective for income tax classification.

The accounting treatment of image rights is discussed from the perspective of the image right assignees (promoters). This is done to ascertain how these parties could account for image rights in their financial statements upon concluding image rights agreements with sportspersons.

Sport clubs prepare their financial statements in terms of the International Financial Reporting Standards (IFRS).<sup>83</sup> The enterprises which commercially exploit players' images rights are mostly corporate entities that are also required to comply with IFRS, accounting principles and practice. It is for this reason that the discussion is conducted according to the provisions of IFRS.

In order to limit the accounting discussion, this study assumes that a sport club, national sport association and an enterprise qualify as an "entity" as envisaged in IFRS.

#### 3.3.1. Asset

The International Accounting Standards Board<sup>84</sup> (IASB) (2018) defines an asset as "a present economic resource controlled by the entity as a result of past events. An economic resource is a right that has the potential to produce economic benefits."

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intervention in order to protect the individual concerned... when the photograph is employed, [...] for the benefit of a magazine sold to make profit, it constitutes an unjustifiable invasion of the personal rights of the individual, including the person's dignity and privacy.

<sup>82</sup> *Pyott Ltd v CIR* (1945) 13 SATC 121 at page 127.

<sup>83</sup> PricewaterhouseCoopers Inc. *South African Rugby Union Consolidated Financial Statements for the year ended 31 December 2017*. Available:

[http://images.supersport.com/content/SA\\_Rugby\\_Annual\\_Report\\_2017.pdf](http://images.supersport.com/content/SA_Rugby_Annual_Report_2017.pdf) [2019, May 01].

<sup>84</sup> International Accounting Standards Board. 2018. *Conceptual framework for financial reporting: including IFRS practice statement 1 management commentary, IFRS practice statement 2 making materiality judgements, and amendments to references to the conceptual framework in IFRS standards*. London: IFRS Foundation. p. A26. The IASB is responsible for the development, publication and approving interpretation of the IFRS Standards, including the IFRS for SMEs Standard.

The conclusion of image right agreements raises rights for both parties. The assignee acquires a right to commercially exploit a player's image, whereas the player acquires a right to compensation in return for the use of an image.

The image of a famous sportsperson has a potential to produce economic benefit through its use in advertisement as a mean to attract consumers to a particular product or service. This study has established that the use of a famous sportsperson's attribute in an advertisement has the potential to increase sales. The increase in sales is the economic benefit that is potentially produced from the use of an image by the assignee.

### **Control**

Image right agreements essentially effect the cession of the right to control the commercial exploitation of an image from a sportsperson to an assignee. The assignee acquires the right to use the image and can restrain other parties from using it in promotions by a restraint clause in the contract. The monopolistic right obtained by the assignee over a sportsperson's image right exert some control as the promoter has the right to decide how to apply the sportsperson's image in advertising and can restrain other parties from using it in similar activities.

### **Past event**

The signing of an image right agreement by the respective parties is the event in which the control of an image right bequeaths from the player to the assignee. The right to use a player's attributes in promotional activity is established at this event.

### **Recognition criteria**

An asset is recognised when it is probable that the future economic benefits will flow to the entity and the asset has a cost or value that can be measured reliably.<sup>85</sup>

As previously stated, the image of a famous sportsperson has an ability to produce economic benefits for an assignee (promoter) in the form of sales.

The economic benefit which is likely to be derived from the use of a sportsperson's image cannot be pre-determined. However, the potential return of benefit can be

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<sup>85</sup> International Accounting Standards Board. 2011. *A Guide through International Financial Reporting Standards (IFRSs)*. London: IFRS Foundation. p. A39.

based on the estimate by considering factors such as the influence of the player's fame, likeness and reputation. It is therefore probable that the use of a player's image can bring economic benefits to the club, federation or an enterprise.

The compensation paid by the image right assignee is the cost at which the image right shall be reliably measured.

It is submitted that an image right satisfies the elements of the definition of an "asset" and the recognition criteria. Consequently, it is possible that an image right can be considered to be an asset.

### **3.3.2. Intangible asset**

An image right does not have physical substance, therefore for it to be recognised as an asset in the financial statements it has to satisfy the requirements of an "intangible asset" as stipulated in International Accounting Standard (IAS) 38.

Intangible asset<sup>86</sup> is described as "an identifiable non-monetary asset without physical substance".

#### **Identifiable**

Intangible asset is identifiable<sup>87</sup> when it:

- Is separable i.e. capable of being separated or divided from the entity and sold, transferred, licensed, rented, or exchanged, either individually or together with a related contract or,
- Arises from contractual or other legal rights, regardless of whether those rights are transferable or separable from the entity or from other rights and obligations.

An image right certainly satisfies the second requirement as it arises from the contractual rights contained in the image right agreement. It follows that an image right is identifiable.

#### **Recognition criteria**

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<sup>86</sup> International Accounting Standards Board. 2018. *The annotated IFRS Standards: Part A2*. London: IFRS Foundation. Page A 1519.

<sup>87</sup> *Ibid* at page A1521.

An intangible asset is recognised if it is probable that the future economic benefits that are attributable to the asset will flow to the entity and the cost of the asset can be measured reliably.<sup>88</sup> As discussed above, it is probable that economic benefits will flow to the entity when images of famous sportspersons are used to advertise. Image right can be measured reliably at the value paid by the assignee to obtain the right to exploit a player's image.

It follows that an image right satisfies the definition and recognition criteria of an intangible asset. Based on this brief accounting exposition, it is submitted that image right can be considered an asset and an intangible asset, respectively. However, each transaction has to be evaluated on its own facts and merits. It is therefore possible that in some instances the requirements may not be satisfied.

Other aspects of an asset and intangible asset such as the useful life of an image right, amortisation and de-recognition fall outside the scope of the above elementary exposition.

### **3.4. Classification of image right: Income tax**

Stiglingh *et al*<sup>89</sup> indicates that as a general rule, the principal Act (ITA) takes precedence over the Eighth Schedule of the ITA. A reference is made to the Eighth Schedule in this section solely for the purpose of determining whether an image right can be classified as an asset for income tax purposes. The following discussion does not override the general income tax rules.<sup>90</sup>

Para 1 of the Eighth Schedule to the ITA provides that an "asset" includes:

- (a) property of whatever nature, whether movable or immovable, corporeal or incorporeal, excluding any currency, but including any coin made mainly from gold or platinum; and
- (b) a right or interest of whatever nature to or in such property.

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<sup>88</sup> *Ibid* at page A1523.

<sup>89</sup> Stiglingh, M., Koekemoer, A.D., Van Heerden, L., Wilcocks, J.S., de Swardt, R.D., van der Zwan, P. 2017. *SILKE: South African Income Tax*. 20<sup>th</sup> ed. Durban: LexisNexis. p. 535.

<sup>90</sup> If an asset falls to be dealt with under the Eighth Schedule and the general income tax provisions, the legislation provides for adjustments when an asset is disposed. For example, wear and tear allowances on a capital asset are deducted from the base cost of the asset for capital gains tax purposes. The same applies to trading stock (a revenue asset) which will be dealt with in terms of section 22 of the ITA and therefore has to be taken into account in calculating any capital gain: revenue income deducted from proceeds and opening stock deducted from base cost would render a nil capital gain to ensure no double counting.

It is clear from the above that for something to be considered an asset it has to be property or a right to or in such property. The classification of an image right is evaluated in terms of this framework.

Image right is essentially the exclusive right that a sportsperson has over the commercial exploitation of personal identity. An image right agreement provides for the transfer, grant, licencing or assignment of the right to a club, or an enterprise, not the corporeal or incorporeal image *per se*.

As discussed in Chapter 2, the term “image” is used in the present study to refer to physical and non-physical attributes of a sportsperson. Therefore, it is not necessary to determine whether image is a moveable, immovable, corporeal, or an incorporeal asset as the discussion is concerned with the classification of the right to such image and not with the image itself.

The word “property” is not defined in the ITA. In the Estate Duty Act, property is defined as “any right in or to property, movable or immovable, corporeal or incorporeal.”<sup>91</sup>

In *CIR v Estate CP Crewe & Another*<sup>92</sup>, Watermeyer CJ remarked as follows:

“[P]roperty is all rights vested in him which have a pecuniary or economic value. Such rights can conveniently be referred to as proprietary rights and they include jura in rem, real rights such as rights of ownership in both immovable and movable property, and also jura in personam such as debts and rights of action.”

Image is vested in a sportsperson as an aspect of personality property<sup>93</sup> which inherently come into existence at the beginning of legal personality<sup>94</sup>. In view of the definition of property formulated by Watermeyer CJ, in *Estate CP Crewe case supra*, an image right would be regarded as property if it has a pecuniary or economic value and is a real or personal right.

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<sup>91</sup> Section 3(2) of the Estate Duty Act No.45 of 1955.

<sup>92</sup> (1943) 2 SATC 344 at 352.

<sup>93</sup> Heaton, J. 2012. *The South African Law of Persons*. 4<sup>th</sup> ed. Durban: LexisNexis. p. 4.

<sup>94</sup> *Ibid.* at p. 12.

### 3.4.1. Pecuniary or economic value

Economic value is the value of an asset calculated according to its ability to produce income in the future.<sup>95</sup> It represents the maximum amount that the user is willing to pay for the asset.<sup>96</sup>

It follows that the economic value of a famous sportsperson's image is its ability to generate sales through its potential to encourage purchase and consumption of the product or service.<sup>97</sup> The economic benefits are the sales which are directly attributable to the use of a sportsperson's image to promote a product or service.

Image right acquires real value when a player has developed a public profile and the image can be applied in attention economy.<sup>98</sup> It has been established that a sportsperson's image has the potential to derive revenue for the club or the promoter.<sup>99</sup>

The amount that the assignee is willing to pay for the image right is generally a subject of contractual negotiations between the parties. The amount or value for the image right is determined by considering factors such as the exclusive and non-exclusive use of the right, personality risk, contract renewal, reputational risk and marketing longevity.<sup>100</sup>

### 3.4.2. Real and personal right

A real right (*jus in rem*) is a right in a thing, which is enforceable against all persons, or against the whole world.<sup>101</sup> The rights emanating from an image right agreement are only enforceable by the contracting parties. It follows that image right does not give rise to real rights.

A personal right (*jus in personam*) is a right in or against a particular person or group of persons.<sup>102</sup> The contracting parties to the image right agreement have rights against

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<sup>95</sup> *The Cambridge Dictionary* [online]. Available:

<https://dictionary.cambridge.org/dictionary/english/economic-value> [2019, May 05].

<sup>96</sup> Investopedia. Available: <https://www.investopedia.com/terms/e/economic-value.asp> [2019, April 14].

<sup>97</sup> Coors, C. 2015. Are sports image rights assets? A legal, economic and tax perspective. *The International Sports Law Journal*. 15(1):64-68.

<sup>98</sup> In this study, attention economy is the ability or capacity of a sportsperson's image to attract attention.

<sup>99</sup> Refer to the discussion at para 3.4.

<sup>100</sup> King, K. n.d. *Image Rights: Valuable Intellectual Property*. Available:

[http://www.valuationconsulting.com/documents/content/files/Image%20Rights\\_web.pdf](http://www.valuationconsulting.com/documents/content/files/Image%20Rights_web.pdf) [2019, April 26].

<sup>101</sup> South African Revenue Service. 2018. *Comprehensive Guide to Capital Gains Tax* (Issue 7). p. 46

<sup>102</sup> *Ibid.* p. 47.

each other. A sportsperson has a right to claim delivery of compensation and the promoter has a right to claim performance or an act.

The court accepted in *ITC 1735*<sup>103</sup> that an attribute of a sportsperson is considered as an asset for income tax purposes. Image right is a sportsperson's personal right attached by means of legal personality. It is apparent that an image right satisfies the requirements of an asset and could be classified as such.

### **3.5. Conclusion**

It is evident that the South African law does not currently recognise image rights as some form of property. Notwithstanding this, the law protects image rights against unauthorised use in promotional activities.

It has been established that in terms of the accounting provisions an image right could be classified as an asset and intangible asset, respectively. Similarly, an image right could be regarded as an asset for income tax purposes. However, each case has to be evaluated on its own objective facts and merits. The classification of an image right for income tax purposes is discussed further in Chapter 4 in the process of determining the nature of receipts or accruals generated in favour of sportspersons from the commercial exploitation of their image rights.

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<sup>103</sup> (2002) 64 SATC 455 at para 10.3.

## Chapter 4: Analysis of the legislation and case law

### 4.1. Introduction

This chapter seeks to investigate whether the income earned by sportspersons from the commercial exploitation of their image rights shall be included in gross income or it is income of a capital nature. This examination is conducted through the analysis of the relevant legislation and case law which relate to the classification of income. In light of the conclusion reached in Chapter 3 about the classification of an image right as an asset, this chapter elaborates on this aspect in the test to determine the nature of income. Since there is no specific legal tax framework that regulates the taxing of income from exploitation of image rights, a sportsperson can seek to discharge the onus of proving that income shall be taxed at a lower rate.<sup>104</sup> The potential arguments which may be raised by sportspersons will also be considered.

### 4.2. Gross income

Section 5 of the ITA provides that income tax is levied on the taxable income received by or accrued to a person. The starting point for determining a person's taxable income is to establish whether a receipt or accrual is gross income or not. The definition of gross income lays a foundation of the income tax system.

Gross income is defined in section 1 of the ITA as follows:

“in relation to any year or period of assessment, means -

- (i) in the case of any resident, the total amount, in cash or otherwise, received by or accrued to or in favour of such resident;...
- during such year or period of assessment, excluding receipts or accruals of a capital nature...”

The definition also extends to specifically include receipts or accruals regardless of whether they are of a capital nature or not in terms of paragraph (a) to (n).

In order for a receipt or an accrual to be included in gross income and subject to income tax, the following components must be present:

- the total amount, in cash or otherwise,

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<sup>104</sup> When the income generated from the commercial exploitation of an image right is found to be of a capital nature it will be subjected to capital gains tax and only a fraction will be included in taxable income in terms of section 26A of the Income Tax Act No. 58 of 1962. In contrast, when the income is of a revenue nature it is subjected to normal tax in full.

- received by or accrued to or in favour of,
- during such year or period of assessment, and
- excluding receipts or accruals of a capital nature.

The above components of gross income are not defined in the ITA, save for the “year of assessment”. The courts have been called upon to interpret the meaning of the undefined components. The principles and guidelines laid down by the courts are applied to determine the nature of income earned by sportspersons from the commercial exploitation of their image rights.

#### **4.3. The total amount, in cash or otherwise**

A receipt or accrual is included in gross income if it is an amount in cash or otherwise. The term "amount" is given a wider meaning which does not only include money, but the value of every form of property<sup>105</sup> earned by the taxpayer, whether corporeal or incorporeal, which has a money value.<sup>106</sup>

In *CIR v Delfos*<sup>107</sup> and *Stander v CIR*<sup>108</sup>, the Provincial court divisions respectively concluded that tax is assessed on receipts or accruals that have monetary value and that if something is not money's worth or cannot be turned into money, it is not to be regarded as income. The findings made by the courts in the foregoing cases are contrary to the earlier decision of *WH Lategan v CIR*<sup>109</sup>.

In the context of the present study, the findings of the *Delfos* and *Stander* cases *supra* appear to suggest that if a sportsperson is compensated for the use of an image right in any form other than money, the value of property received is not considered to be an amount and shall not be included in gross income. It is submitted that if these findings were to be accepted in the present study, this will result to an anomaly as it not a requirement that the compensation for exploitation of image rights should only be in a form of money. Therefore, sportspersons may be compensated in money or in any other form of property.

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<sup>105</sup> See para 3.4 for the discussion of property.

<sup>106</sup> *WH Lategan v CIR* (1926) 2 SATC 16 at page 19 – 20.

<sup>107</sup> (1933) 6 SATC 92 at page 99.

<sup>108</sup> *Stander v CIR* (1997) 59 SATC 212. Per Friedman JP: “Having gone on the trip he had not received any ‘property’ on which a monetary value could be placed in his hands. He was no more able to turn it into money or money's worth after accepting the award, than he was at the time when the donation was still at the executory stage.”

<sup>109</sup> *Supra* cite note 106.

However, the decisions of *Delfos* and *Stander* were rejected by the court in the case of *CSARS v Brummeria Renaissance (Pty) Ltd and Others*<sup>110</sup>. In this case, the respondent carried on business as a developer of retirement villages. The respondent obtained interest-free loans from the potential occupants. The loans were then utilised to finance the construction of units in the retirement village.

Interest-free loans granted to the respondent by the potential occupants were considered to be a *quid pro quo* for the life-right to occupy the residential units. However, the Commissioner assessed the respondent and included the value representing the amount equal to the right to use interest-free loans in gross income. The court held that “the question whether a receipt or accrual in a form other than money has a money value is the primary question and the question whether such receipt or accrual can be turned into money is but one of the ways in which it can be determined whether or not this is the case; in other words, it does not follow that if a receipt or accrual cannot be turned into money, it has no money value. The test is objective, not subjective...The question cannot be whether an individual taxpayer is in a position to turn a receipt or accrual into money. If that were the law, the right to live in a house rent-free, or to drive a motor vehicle without paying for it, for example, could be rendered tax-free by the simple expedient of limiting the right to exercise such benefit to the recipient – which manifestly is not the case.”<sup>111</sup>

It is apparent from this case that a receipt or accrual does not need to be money or capable of being turned into money for it be classified as an amount. However, the court did not provide a guideline for valuing the right to an interest-free loan. This omission has been criticised by Emslie *et al*<sup>112</sup>. The authors consider that in the absence of any quantified amount having been shown to have been received by or accrued by virtue of the use of an interest-free loan, there is indeed no ‘amount’ accruing to a taxpayer. This study does not extend into the valuation of interest free loans.

It is submitted that in cases whereby sportspersons are compensated for the right to use their images in advertising by property or in any other form other than cash, the

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<sup>110</sup> (2007) 69 SATC 205.

<sup>111</sup> *Ibid* at page 214.

<sup>112</sup> Emslie, T & Davis, D. 2011. *Cumulative Supplement to Income Tax Cases & Materials*. 3<sup>rd</sup> ed. Cape Town: The Taxpayer. p. 15.

amount can be ascertained<sup>113</sup> by determining the value that could be obtained for that particular property if it was to be sold under a reasonable method in an open market at the date when the recipient becomes entitled to the property.<sup>114</sup> For example, a sportsperson may be awarded a motor vehicle when he or she is appointed as a brand ambassador of a motor vehicle brand. The amount to be considered as the income of a sportsperson is the open market value of the motor vehicle.

The regulations prescribed by the sport bodies do not explicitly provide that players should only be compensated in money. As such, the parties can reach an agreement that a player is compensated for exploitation of image rights in any form other than money. By way of example, in a merchandising initiative, a player could be granted a club's merchandise for free, the value of the merchandise granted is the 'amount' as envisaged in the definition of gross income.

It follows that any form of property or money received by or accrued to a sportsperson from exploitation of an image constitutes an *amount* which shall be included in gross income if all the requirements have been satisfied.

#### **4.4. Received by or accrued to or in favour of**

An accrual is likely to precede receipt, or the events may coincide. An amount is included in the gross income at the earlier of receipt or accrual, not both when it accrues and when it is received.<sup>115</sup> The Commissioner does not have a right to elect in which year the amount shall be included in gross income.<sup>116</sup>

- **Received by**

In *Geldenhuys v CIR*<sup>117</sup>, the appellant was a usufructuary of an estate which included a flock of sheep. The children held the bare dominium of the sheep. The appellant decided to sell the sheep after obtaining the children's consent. The court had to decide whether the proceeds from sale of sheep were received in favour of the usufructuary or the children (heirs). The court held that the words 'received by' must mean received by the taxpayer on his or her own behalf for own benefit. It was found

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<sup>113</sup> *CIR v Butcher Bros (Pty) Ltd* (1945) 13 SATC 21 at page 38.

<sup>114</sup> *Lace Proprietary Mines Ltd v CIR* (1938) 9 SATC 349 at page 362.

<sup>115</sup> *CIR v Delfos* (1933) 6 SATC 92 at page 113.

<sup>116</sup> *SIR v Silverglen Investments (Pty) Ltd* (1947) 30 SATC 199 at page 207.

<sup>117</sup> (1947) 14 SATC 419.

that the proceeds were not received by the appellant for own benefit but for the benefit of the heirs as they had a bare dominium in the flock of sheep.

As previously discussed, the image rights of rugby and cricket players that are exploited in a team or group context are administered by the respective player trusts.<sup>118</sup> The player trusts are responsible for receiving payments from the clubs on behalf of the players and pay over the amounts to the qualifying players.<sup>119</sup>

The arrangement between the player trusts and the players should be substantially constructed in such a form that the player trusts assume the functionality of an agent as opposed to a principal.

It became apparent in *CIR v Witwatersrand Association of Racing Clubs* (1960) 23 SATC 380, that the functions of a party to an arrangement shall be clearly articulated and executed. In this case, the taxpayer organised and held a horse racing event to raise funds for the benefit of two charities. The taxpayer accordingly derived proceeds from the horse race event and paid the proceeds over to the respective charities. However, the Commissioner included the proceeds in the gross income of the taxpayer. The court had to determine whether the proceeds were received for the benefit of the taxpayer considering that the taxpayer had fulfilled the obligation of paying the proceeds over to the charity organisations. The court held that the taxpayer was entitled to the proceeds and that the moral obligation to pay proceeds to the charities did not discharge the taxpayer from the beneficial character of the receipt. The court's decision emphasises that the functions of the intermediaries, which would be the player trusts in the present study, should be clearly articulated and executed in a form that a trust does not attain beneficial ownership of the amount.

It is submitted that based on the regulations relating to the image rights of rugby and cricket players exploited in a team or group context, the amount received by the player trusts is not received for their own benefit. The amount shall be considered in the assessment of the players and not that of the player trusts provided that the agreements are structured as aforementioned.

- **Accrued to**

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<sup>118</sup> Refer to discussion at para 2.6.1 and 2.6.2.

<sup>119</sup> Refer to discussion at para 2.6.1 and 2.6.2 about the qualifying criteria.

In *WH Lategan v CIR*<sup>120</sup>, it was held that an amount accrues when a taxpayer becomes entitled to the right to claim the amount. It was established in *CIR v Peoples Store (Walvis Bay) (Pty) Ltd*<sup>121</sup> case that no more is required for an accrual other than that a taxpayer becomes entitled to an amount.

The concept of entitlement was given a wider meaning in *Mooi v SIR* (1972) 34 SATC 1. In this case, the appellant was granted an option to acquire shares in a company. The option was only exercisable six months after the construction of the mine and provided that the appellant was still in the company's employ. The construction of the mine was completed on 01 March 1966 and the option became exercisable on 01 September 1966.

However, the taxpayer decided to exercise the option a month after (01 October 1966) it became exercisable. The Commissioner assessed the taxpayer at the difference of the market value of shares at the date when the option became exercisable (01 September 1966) and the option price at the date when the option was accepted. It was argued on behalf of the appellant that accrual took place at the date when the option was accepted, and the assessment should have been calculated at the value when the option was accepted (17 July 1973). It was held that the right to exercise the option accrued to the appellant at the time when the conditions attached were fulfilled.

In the context of the present study, the time of accrual is when the parties satisfy the terms and conditions pertaining to an image right agreement. The amount will be assessed when a sportsperson becomes unconditionally entitled to an amount based on the particular facts of each agreement.

#### **4.5. During such year or period of assessment**

Section 1 of the ITA provides that the 'year of assessment' means any year or other period in respect of which any tax or duty leviable under this Act is chargeable, and any reference in this Act to any year of assessment ending the last day of February. With regard to image right payments, the amount shall be considered in the assessment of a sportsperson if it so received or accrued during the year of assessment ending on the last day of February. In the case where the payment is

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<sup>120</sup> (1926) 2 SATC 16 at page 20.

<sup>121</sup> (1990) 52 SATC 9 at page 22.

received by a trust on behalf of a sportsperson in one year, but only paid to the sportsperson in a later year it accrues to the sportsperson in year one.<sup>122</sup>

#### **4.6. Excluding receipts or accruals of a capital nature**

The income earned by the sportsperson from the commercial exploitation of image rights can either be considered to be income of a revenue or capital nature. It is not possible to have income, which is neither revenue nor capital. In delivering the judgment of the Appellate Division in *Pyott Ltd v CIR*<sup>123</sup>, Davis AJA stated as follows:

“I do not understand how this £9,000 could be ... ‘non-capital’, and yet ‘not income’. This is a half-way house of which I have no knowledge.”

The ITA contains no definition of “receipts or accruals of a capital nature”. The tests and guidelines laid down by the courts have to be studied to obtain the meaning of the phrase.

The courts have deliberated extensively on the issue of classification of the income between revenue and capital nature. However, there is still no single infallible test<sup>124</sup> which has been formulated to settle the matter. Notwithstanding the plethora of tests and guidelines laid down by the courts, sound commercial and good sense remains the most useful tool<sup>125</sup> to determine the nature of income.

Stiglingh *et al* submit that “the enquiry as to whether an amount is of an income or a capital nature is a question of fact, which has to be decided on the merits of each case. Although the court will consider the guidelines which have been laid down in earlier decisions, it will have regard to the totality of the relevant facts and circumstances of each case.”<sup>126</sup>

It follows that the classification of income emanating from the commercial exploitation of image right shall be determined on the objective factors such as the regulations prescribed by the sport bodies and the forms in which the player’s image rights are commercially exploited.

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<sup>122</sup> Refer to discussion at para 4.4.

<sup>123</sup> (1944) 13 SATC 121 at page 126.

<sup>124</sup> *CIR v Pick 'N Pay Employee Share Purchase Trust* (1992) 54 SATC 271(A) at page 279.

<sup>125</sup> *ITC 1450* (1988) 51 SATC 70(N) at page 76.

<sup>126</sup> Stiglingh, M., Koekemoer, A.D., Van Heerden, L., Wilcocks, J.S., de Swardt, R.D., van der Zwan, P. 2017. *SILKE: South African Income Tax*. 20th ed. Durban: LexisNexis. p. 43.

#### 4.6.1. Nature of the asset

As previously concluded, image right is classifiable as an asset for income tax purposes. Similar to other rights, the transfer, grant and assignment or licencing of image rights has income tax consequences. The amount received by or accruing to a sportsperson will be included in gross income if it is of a revenue nature. Whereas, if it is of a capital nature it will be subject to capital gains tax in terms of the Eighth Schedule to the ITA and a fraction included in taxable income in terms of section 26A of the ITA.

In *CIR v Visser*<sup>127</sup> Judge Maritz stated the following:

“If we take the economic meaning of ‘capital’ and ‘income’, the one excludes the other. ‘Income’ is what ‘capital’ produces, or is something in the nature of interest or fruit as opposed to principal or tree. This economical distinction is a useful guide in matters of income tax, but its application is very often a matter of great difficulty, for what is principal or tree in the hands of one man may be interest or fruit in the hands of another.”

The relationship between income<sup>128</sup> and capital is metaphorical akin to the fruit and tree analogy. However, this analogy can be competently applied in the present study once it has been established whether an image right is or not considered to be a capital asset for income tax purposes. This will enable a broader perspective for the classification of income.

The term “capital” is not defined in the ITA. Therefore, the meaning of the word is sought from the judicial decisions.

In *SIR v Watermeyer*<sup>129</sup>, it was held that “capital” need not necessarily consist of money: a working man’s sole capital may be his capacity to work, and his earnings are his income.” It is evident that capital is not only money or something with a physical substance. For example, a sportsperson’s ability to perform and exercise his or her profession at the highest level is capital if it brings real value.

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<sup>127</sup> (1937) TPD 77 at page 81.

<sup>128</sup> Section 1 of the Income Tax Act No. 58 of 1962: “Income” is the amount remaining of the gross income of any person for any year or period of assessment after deducting therefrom any amounts exempt from normal tax.

<sup>129</sup> (1965) 4 All SA 359(a) at page 362.

It was confirmed in *Smith v SIR*<sup>130</sup> that personal attributes and abilities are recognisable as capital assets. Steyn CJ stated as follows:

“It is not an uncommon thing to describe personal attributes, faculties or qualifications conferring or enhancing the capacity to earn income, as capital asset... the word “capital” has to be given its ordinary meaning. Broadly speaking and for present purposes, it may be said to connote money and every form of property used or capable of being used in the production of income or wealth. Such a commercial or business sense is the sense in which one expects it to be used in the context here in question, and it is to capital in that sense that, for the purposes of sec. 11 (2) (b) bis at any rate, expenditure is to be related in order to determine whether or not it is expenditure of a capital nature.”<sup>131</sup>

It is evident from the above two cases that something does not need to have a physical substance to constitute a capital asset for income tax purposes.

An image is an inherent aspect of a sportsperson’s personality property<sup>132</sup> attained at the beginning of legal personality.<sup>133</sup> This personality property is legally protected in terms of the common law of personality rights and constitutional right to privacy.<sup>134</sup>

Image right is essentially a sportsperson’s exclusive right to control and decide by whom and when personal attributes can be commercially exploited. This exclusive legal right can be transferred, granted, assigned or licenced to a club, association or an enterprise through conclusion of an image right agreement.

In *Stellenbosch Farmers’ Winery Ltd v CSARS*<sup>135</sup> case, the taxpayer (South African subsidiary) obtained exclusive right to distribute alcohol in South Africa and other territories from its UK based parent company. The appellant and parent company agreed to an early termination of the distribution agreement. As a result, the appellant was paid an early termination fee. The Commissioner assessed the appellant and included the termination fee in gross income.

The taxpayer objected and appealed against the Commissioner’s assessment. The appellant contended that the distribution right is a capital asset and that the termination

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<sup>130</sup> (1968) (2) SA 480.

<sup>131</sup> *Ibid* at page 102.

<sup>132</sup> Heaton, J. 2012. *The South African Law of Persons*. 4<sup>th</sup> ed. Durban: LexisNexis. p. 4

<sup>133</sup> *Ibid*. p.12.

<sup>134</sup> Refer to discussion at para 3.2.

<sup>135</sup> (2012) 74 SATC 235.

fee was of a capital nature. The Supreme Court of Appeal (SCA) upheld the appellant's contention and affirmed the court *a quo's* finding that an exclusive right to control the distribution of products is a capital asset.

It is submitted that the exclusive control held by a sportsperson over the commercial use of personal identity is a capital asset for income tax purpose based on its ability to add value when it is employed in advertising and produce income for a sportsperson.

#### **4.6.2. Income tax transaction**

The process of image right exploitation together with the regulations was discussed in Chapter 2. The relevant provisions can be summarised as follows:

- The SARU acquires the collective commercial rights of all contracted players who have transferred their commercial rights to the Players Trust.<sup>136</sup>
- The SACA makes commercial rights payments to players who have signed over their commercial rights to SACA Player Trusts. The Player Trusts licence commercial rights to the respective clubs to be exploited in a team or group context.<sup>137</sup>
- The football players may exploit image rights in an individual capacity whilst a club may exploit a player's image right in a team context.<sup>138</sup>

The fundamental terms used in the regulations to conduct the exploitation of image right are "transfer", "grant", "assignment" and "licence". The meaning of these terms is pivotal to the income tax implications but the doctrine of substance over form prevails.<sup>139</sup> Significant value is placed on the real substance of the transaction, not the form (words applied) of the transaction.

#### **4.6.3. Substance over form**

The substance of the image rights agreements can be examined through determination of whether a transfer, grant, assignment or licencing of an image right constitute a sale. The common law provides that a sale transaction must satisfy the requirements of the transfer of ownership.

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<sup>136</sup> Refer to para. 2.6.1.

<sup>137</sup> Refer to para. 2.6.2.

<sup>138</sup> Refer to para. 2.6.3.

<sup>139</sup> *CSARS v NWK Ltd* (2010) 73 SATC 55 at page 71.

Ownership is a bundle of "incidents of ownership" which includes *inter alia*, the right to possess, use and manage the income and the capital including the right to alienate, liberate, waste, consume and destroy the asset.<sup>140</sup>

In *Zandberg v van Zyl*<sup>141</sup>, Solomon JA stated that:

"[T]he object which a purchaser of anything has in view is to acquire the dominium in that thing... seeing that Mrs. Van Zyl had no means except the wagon, and that she was indebted to Mrs. Zandberg in the sum of £100 so that the return of the document was really a matter of small moment; and the same may be said of the endorsement upon it. On the whole, though, I must confess that I feel some difficulty, I find it easier to hold that these were mere matters of form than to come to the alternative conclusion that there was a genuine sale, coupled with conditions of such a nature as to deprive the purchaser of practically all the benefits of ownership, and under circumstances of so suspicious a nature as those that were present in this case."

A dominium is an essential element in a contract of sale. If dominium does not change hands, an agreement cannot be classified as that of a sale.

It is submitted that the substance of the image rights regulations and standard player contracts outlined in Chapter 2 do not provide for a change of ownership of an image right from a sportsperson to a promoter.

An image right agreement does not deprive the sportsperson of nearly all benefits to possess and use the image right and manage the income emanating from the exploitation thereof. Furthermore, a club or an enterprise does not assume the ownership and risks associated with the player's image right. For example, in a case whereby another party without consent uses a player's image, the player has the duty to seek legal remedy and protection, not the club, association or enterprise which exploit a player's image right. The club, association or enterprise does not assume risk of this nature.<sup>142</sup>

Furthermore, in *Kumalo*<sup>143</sup> case *supra* the court held that:

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<sup>140</sup> Sibanda & Zantwijk Patent Attorneys. 2007. *IP assignments - is mere signature and recordal of assignment required?* Available: <https://snz.co.za/articles/structured-finance/ip-assignments-is-mere-signature-and-recordal-of-assignment-required/> [2019, May 22].

<sup>141</sup> (1910) AD 302 at page 318 – 319.

<sup>142</sup> Refer to the discussion at para 2.6.

<sup>143</sup> *Kumalo v Cycle Lab (Pty) Ltd* (2011) JOL 27372 (GSJ) at page 14.

“Personality rights are inseparably bound up with one's personality. They do not exist independently of the human personality and are incapable of being transferred. There is a fundamental distinction between personality rights and intellectual or immaterial property rights which are capable of being transferred and have a separate legal existence.”

It follows that regardless of concluding an agreement to transfer an image right to a promoter, a sportsperson retains nearly all the rights associated with inherent personality rights. An image right agreement typically provides for the transfer of the right to use image in advertising for a specific period, not for the transfer of image itself.

The change of ownership was also considered by the SCA in *BP Southern Africa (Pty) Ltd v CSARS* (2007) JOL 19430 (SCA). In this case, the court had to *inter alia*, determine whether the appellant (BP SA) acquired ownership of the licenced marks and licenced marketing *indicia* in exchange for royalty fees paid to its UK based parent company (BP UK). The Commissioner disallowed the royalty fees claimed by the appellant on the premise that the expenditure was of a capital nature. In deciding on the nature of the expenditure, the court examined the true nature of the agreement which provided that the parent company remained the rightful owner of the licensed marks and licensed marketing *indicia* and that upon termination of the agreement, BP SA would no longer be entitled to use the marks and *indicia*.

The court held that the annual royalty fees paid by the appellant were in consideration for the use of the licensed marks and the licensed marketing *indicia*. The purpose of the royalty payments was to procure the right to use, not to acquire ownership of intellectual property from the sole and rightful owner. Ownership of intellectual property remained with BP UK throughout the period of the agreement. Upon termination of the agreement, BP SA would automatically cease to have the right to use intellectual property. The court's *ratio decidendi* was that the expenditure neither created nor preserved any capital asset in the hands of the taxpayer (BP SA).

It is clear from the above that an image right agreement does not constitute a contract of sale since a sportsperson does not relinquish ownership. Therefore, the test to be applied to ascertain the nature of income should consider that the sportsperson

remains the sole and rightful holder of an image right since it is an inseparable personal right.

#### 4.6.4. The test applied to image rights

The question of whether income is of a revenue or capital nature does not only arise when there is a disposal of an asset. This study has established that, an image right is an inherent personality right which cannot be disposed by a sportsperson. Therefore, it is not necessary to consider the intention<sup>144</sup> of a sportsperson with regard to the transfer, assignment, grant or licensing of an image right.

In *COT v Booysen's Estates, Ltd.*<sup>145</sup> Judge Wessels remarked as follows:

“It is true that there is no definite test that can always be applied in order to determine whether a gain or profit is income or not, but it may safely be asserted that the revenue or profit which is derived from a thing without its changing owners is rather to be considered as income than as capital. On the other hand, the profit which is derived from a thing when it changes owners is rather of the nature of capital than of income.”

Innes CJ affirmed in *Booyesen's supra* that “income considered in relation to capital is revenue derived from capital productively employed... we have to enquire whether profit has resulted from the productive use of capital employed to earn it, or whether it has resulted from the realisation of capital at an enhanced value. In the former case it falls within the definition of income... in the latter it remains capital.”<sup>146</sup>

The test formulated in *Booyesen's case supra* was affirmed in the *Lace Proprietary Mines Ltd v CIR*<sup>147</sup> case. Stratford CJ accepted that a profit emanating from the productive use of capital is not an accrual of a capital nature.

The enquiry on the substance of image rights regulations and the classification of an image right as a personal right reveal that image rights agreements typically provides for a licensing of a right to use a sportsperson's image in advertising for a specific period of time, not for the disposal of the right. It follows that the income is generated from the productive employment of image rights rather than disposal at an enhanced value.

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<sup>144</sup> *Elandsheuwel Farming (Pty) Ltd v SIB* (1978) 39 SATC 163 at para 182.

<sup>145</sup> (1918) 32 SATC 10 at page 15 – 16.

<sup>146</sup> *Ibid* at page 25.

<sup>147</sup> (1938) 9 SATC 349 at page 358.

In applying the principles from the *Booyesen's Estates* and *Lace Proprietary Mines* cases *supra*, it is submitted that the income received by or accrued to or in favour of sportspersons from the commercial exploitation of image rights is of a revenue nature. By application of the *fruit and tree* analogy from the *Visser* case *supra*, an image right can be likened to a tree and income to a fruit.

It is therefore submitted that the amount derived from the commercial exploitation of image rights satisfy the requirements of the gross income definition. The amount should be included in the sportspersons' taxable income in terms of section 1 of the ITA definition of "gross income".

#### **4.7. Case law on the transfer of similar incorporeal assets**

In *ITC 1738* (2000) 65 SATC 37, the court had to consider whether 'initial franchise fees' received by the taxpayer were of a revenue or capital nature. The appellant granted the right to exploit its identifications and know-hows to various dealers. The Commissioner assessed the taxpayer and included the initial franchise fees in gross income.

The appellant contended that initial franchise fees were of a capital nature on the basis that identifications and know-how are capital assets and the transfer of the right to use sterilised such assets. The court held that "the capital assets at all times vested in appellant. Appellant received payments from the franchisees for the right to make temporary use thereof... the assets in question were productively used by appellant to earn income. It did not part with the assets as such. The receipts in question are accordingly of a revenue nature".<sup>148</sup>

Inasmuch this case considered the transfer of recognised intellectual property, the court's *ratio decidendi* was to the effect that the appellant did not dispose of the intellectual properties but merely assigned the right to use. It is submitted that a similar approach should apply to the classification of image right payments.

In *ITC 1735* (2002) 64 SATC 455, a UK based golfer participated in a golf tournament held in South Africa. The golfer entered into an agreement with the tournament promoters. In terms of the agreement, the golfer was required to transfer the right to exploit his name, likeness, biographical material, conduct interviews and participate in

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<sup>148</sup> *Ibid* at page 42.

pre-tournament promotional events in exchange for a fee. The Commissioner assessed the taxpayer and included the fee in gross income.

The taxpayer contended that the fee was of a capital nature as it was received in exchange for the use of his name, likeness and biographical material and was not intended and worked for, but purely fortuitous and a by-product of participating in the tournament. In the alternative, the taxpayer contended that the payment was for a restraint of trade as he contractually undertook to exclusively participate in the tournament. The court held that the fee was income that a professional golfer would expect to earn for participating in a golf tournament which traded on the reputation of the participants and cannot be considered of a capital nature. The court indicated that the golfer allowed his name and reputation to be used to publicise the golf tournament and it cannot be said that it was purely fortuitous. It was held further that by allowing his name and reputation to be used, the golfer did not dispose of such assets. The golfer continued to possess them post the tournament and the receipt of the fee. Consequently, the fee was found to be of a revenue nature. It is apparent that a sportsperson does not discharge the ownership of image right by merely allowing it to be commercially exploited in promotional activities. The income is a product of a capital asset productively employed.

#### **4.8. Burden of proof**

Notwithstanding the finding that income is of a revenue nature, a sportsperson may attempt to discharge the onus of proving that the income should not be included in gross income.<sup>149</sup> A sportsperson may, *inter alia*, posit that a capital asset is renounced during the effective period of the image right contract. It may be also be argued that the payment is received or accrued for the sterilisation of a capital asset, therefore it is a restraint of trade payment.

The first point of contention could only succeed when it can be discharged that a sportsperson relinquishes image right ownership in favour of an assignee. In the light of previous discussion which concludes that an image right is an inherent personality right which cannot be disposed by a sportsperson; it is unlikely that the first contention would be accepted by the Commissioner or by the courts.<sup>150</sup>

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<sup>149</sup> Section 102 of the Tax Administration Act No. 28 of 2011.

<sup>150</sup> Refer to discussion at para 4.6.

The possible contention that an amount constitutes a restraint of trade has to be evaluated on the objective facts pertaining to image rights. The facts available to this study are the regulations prescribed by the sport governing bodies, standard player contracts and MOUs.

The ITA does not provide a meaning for the term “restraint of trade”. The courts have laid down principles and guidelines which aid to identify agreements that constitutes restraint of trade.

In *Taeuber and Corssen (Pty) Ltd v SIR* (1975) 37 SATC 129, the appellant carried on business as an agent and a distributor of certain products belonging to a German company (BASF). The appellant acted as the latter’s sole agent and representative in South Africa. Upon expiry of the agreement, the supplier invoked a clause which provided that the appellant shall not sell or assist in the sale of any products which competes with that of BASF for a period of two years. The appellant was then compensated by the supplier for the invocation of this clause. The Secretary assessed the appellant and included the compensation in gross income. The appellant filed an appeal to the Appellant Division after the disallowance of the objection.

The court found that the compensation was of a capital nature and held that “what the parties intended... was a payment of a sum of money to restrain the appellant, for a period of two years, from earning income by the sale of all products competing with those of BASF... part of appellant’s income-producing structure which had sold only BASF products was not only permanently prevented from selling BASF products by the termination of the agreement, but also effectively closed for two years to the extent that it was prevented, for that period, from *selling all* such products as would compete with the BASF products, and the amount payable in terms of clause X(2) was intended to be, and must be construed as, compensation for this closure.”<sup>151</sup>

A restraint of trade was considered at the instance of an individual in *ITC 1338* (1980) 43 SATC 171(T). In this case, the company was concerned about the poaching of its senior executives. Consequently, it entered into an agreement with an executive. The agreement provided that for a period of two years post termination of employment with the company, the executive would be restricted from rendering services to any person

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<sup>151</sup> *Taeuber and Corssen (Pty) Ltd v SIR* (1975) 37 SATC 129 at page 40.

(entity) which competes with the company. It was held that a person's right to trade freely is an incorporeal asset and if he is paid for a restriction upon that right, whether partial or complete, he is being paid compensation for the loss or sterilization of the asset.

The element of restraint deduced from the rules and regulations outlined in Chapter 2 provide to the extent that a player shall not use an image to promote a competing club or use it in manner that brings the sport into disrepute.<sup>152</sup> This provision can only be regarded as a restraint of trade if it is reasonable, enforceable and not contrary to the public policy,<sup>153</sup> protect legal recognisable proprietary interest and not merely seek to exclude or eliminate competition.<sup>154</sup>

A restraint cause or provision would be considered to be a restraint of trade if it protects the proprietary interest of the image right assignee<sup>155</sup> and to the extent that such property includes goodwill, confidential trade secrets and know how.<sup>156</sup>

It is submitted that a sport club, national sport association, or an enterprise (assignee) that exploits a sportsperson's image rights do not have any proprietary interest in the image of a sportsperson.

The element of restraint in the image rights agreements regulations do not extend further than the common law duty not to compete or to cause harm to the promoter (assignee). It is submitted that the bare covenant not to compete<sup>157</sup> is not a valid restraint of trade. Therefore, the compensation received by or accrued to sportspersons for the exploitation of image rights should not be classified as a restraint of trade payment.

The validity of restraint of trade has to be evaluated on the facts of each transaction. If it is found that the restraint clause is a valid restraint of trade, the compensation shall be considered as a payment for the sterilisation of a sportsperson's capital asset.

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<sup>152</sup> See the overriding principles discussed in para 2.6.3.

<sup>153</sup> *Magna Alloys and Research (SA) (Pty) Ltd v Ellis* (1984) 2 All SA 583 (A). Per Rabie CJ at page 602: "It is a principle of our law that agreements that are against the public interest cannot be enforced, and so one could say that an agreement that curbs someone's trade freedom against the public interest, and therefore unenforceable, is, if the circumstances of the particular case are such that the court considers that enforcement of the agreement would harm public interest."

<sup>154</sup> *Automotive Tooling Systems (Pty) Ltd v SJ Wilkens* (2006) 128 (RSA) at para 8.

<sup>155</sup> *Super Safes (Pty) Ltd and Others v Voulgarides and Others* (1975) 1 All SA 50 (W) at page 53.

<sup>156</sup> *Reeves and Another v Marfield Insurance Brokers CC and Another* [1996] (3) SA 766 (SCA) at para 18.

<sup>157</sup> *Super Safes (Pty) Ltd and Others v Voulgarides and Others* (1975) 1 All SA 50 (W) at page 53.

Therefore, the amount would be of a capital nature, but it would be specifically included in gross income under para (cB) if there is an employment relationship<sup>158</sup> between a sportsperson and the image right assignee. If there is no employment relationship, the amount would be subject to capital gains tax.

#### **4.9. Conclusion**

It has been established that income emanating from the commercial exploitation of sportspersons' image rights meets the requirements of gross income. The income arises from the productive employment of image rights, not from disposal. The income has been found to be of a revenue nature.

Image right is an inherent personality right. It is a capital asset which is incapable of being disposed by a sportsperson as it is inherently bound to personality.

The restraint provisions drawn from the image right regulations do not extend further than the duty not to compete. It has been established that such provisions do not amount to restraint of trade. However, each transaction has to be evaluated on its own facts to ascertain the substance of restraint.

The following chapter provides a review of the 2018 Guide and considers the characterisation of income and the association of image rights with intellectual property law.

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<sup>158</sup> The relationship between the parties is discussed in Chapter 5.

## **Chapter 5: Critical review of the 2018 Guide**

### **5.1. Introduction**

In 2018, the SARS issued a Guide on the taxation of professional sports clubs and players. The 2018 Guide (“Guide”) deals with, amongst other things, the income tax implications on image rights payments (refer to Annexure A). This chapter conducts a critical review of the relevant section of the Guide with the purpose of assessing the propriety of the inferences made. The chapter also considers whether the 2018 Guide accords with the regulations prescribed by the sport regulatory bodies and the various forms in which image rights are commercially exploited. A holistic approach will be adopted to consider other critical aspects that are not specifically dealt with in the Guide such as the characterisation of income and the income tax consequences associated with the protection of image rights in terms of intellectual property law and the subsequent commercial exploitation thereof.

### **5.2. Review of the Guide**

The Guide states that image right payments refer to the payments that a player receives from an enterprise that uses such player’s image for advertising purposes. The statement only refers to an enterprise, therefore appears to disregard that image rights are also commercially exploited by sports clubs and national sport associations (federations) in a group or team context.<sup>159</sup> However, the word ‘enterprise’ does not necessarily exclude sport clubs, but the position may differ with regard to national sport associations. National sport associations are generally associations of persons which are established for the administration and development of sport. These organisations are classified as either non-profit organisations (NPOs) or Public Benefit Organisations (PBOs).<sup>160</sup>

The Oxford English Dictionary defines an “enterprise” as a commercial or industrial undertaking; a firm, a company, a business.<sup>161</sup> The Organisation for Economic Co-operation and Development (OECD) provides that enterprise applies to carrying on of

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<sup>159</sup> Refer to para 4.6.3.

<sup>160</sup> See South African Football Association Statutes. 2017. Available: <https://www.safa.net/wp-content/uploads/2018/07/1.-SAFA-Statutes-Approved-on-21-Oct-17.pdf> [2019, July 15] at page 9; Cricket South Africa Integrated Report 2016/17. Available: <https://ipublish.cc/wp/csa/wp-content/uploads/sites/4/2014/12/2016-2017-Annual-Integrated-Report.pdf> [2019, July 15].

<sup>161</sup> Oxford English Dictionary (online). Available: <https://www-oed-com.ezproxy.uct.ac.za/view/Entry/62843?rskey=HXiBq2&result=1#eid> [2019, July 15].

any business.<sup>162</sup> Contrastingly, the activities conducted by national associations do not constitute carrying on a business with a profit motive hence they are considered as NPOs or PBOs. It is clear that the Guide may have disregarded the fact that image rights payments can also be made by national sport association which are not classified as enterprises.

The Guide further states that image rights are essentially personal rights that are vested in the player as an individual person. The Guide continues to indicate that these rights cannot be separated from the sportsperson, and consequently, cannot be disposed of or 'sold' to another person. This study has established that an image right is an aspect of a person's personality property embodied in the concept of personality rights. As a result, a person may not transfer ownership of an image right.<sup>163</sup> The assertion made in the Guide is therefore consistent with the findings in this study and therefore appropriate.

The Guide concludes by indicating that payments made to a sportsperson for the right to use the sportsperson's image right will be included in the sportsperson's gross income (Own emphasis). It is clear that the Guide holds that is the right to use that is transferred and not the image itself. This is consistent with the conclusion made in Chapter 4. However, the Guide does not sufficiently address the classification of income, as it does not guide the reader about the test applied or that should be applied to determine the nature of income.<sup>164</sup> In its current form, the Guide does not go far enough in its attempt to reduce uncertainty about the classification of income.

### **5.3. Characterisation of income**

The Guide does not provide guidelines as to how the income should be characterised, save for when a payment is made by a sport club. The characterisation of income is critical since income is subject to tax based on its character.<sup>165</sup> The following section

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<sup>162</sup> OECD. 2014. *Model Tax Convention on Income and on Capital: Condensed version*. OECD Publishing; for the purposes of income tax, carrying on a business is similar to carrying on a trade. Notwithstanding that, an enterprise does not necessarily have to make profit to be classified as a carrying on a trade, but there must be real hope to make a profit based on the reasonable possibility (*ITC 1292 (1979) 41 SATC 163*). It submitted that the activities carried on by the sports clubs depict an element of trade but not those conducted by the national sports associations.

<sup>163</sup> Refer to para 4.6.3 above.

<sup>164</sup> The Guide merely concludes that image rights payments should be included in the sportsperson's gross income by referring to *ITC 1735* as support.

<sup>165</sup> The character of income determines under which para of the definition of gross income should an amount be included in taxable income and also the type of expenses that may be deducted against

examines whether the income should be characterised as remuneration, business income, royalty income, service or other income.

### 5.3.1. Remuneration

In terms of the regulations prescribed by the rugby<sup>166</sup>, cricket<sup>167</sup> and football<sup>168</sup> bodies, an affiliation between a professional sportsperson and a sport club is formulated by a contract of employment. Therefore, a professional sportsperson and a sport club qualify as an employee<sup>169</sup> and employer,<sup>170</sup> respectively as envisaged in para 1 of the Fourth Schedule to the ITA.

In terms of para 1 of the Fourth Schedule to the ITA, any amount of income which is paid or is payable to any person by way of any salary, leave pay, wage, overtime pay, bonus, gratuity, commission, fee, emolument, pension, superannuation allowance, retiring allowance or stipend, whether in cash or otherwise and whether or not in respect of services rendered is classified as a 'remuneration'.<sup>171</sup> The remuneration is a product of an employment relationship between an employee and employer.

It follows that when an employer (sport club) makes an image right payment to an employee (sportsperson) the income should be characterised as remuneration. This is by virtue of the employment relationship regardless of whether a sportsperson is or not required to perform any form of service (i.e. act or pose for a television commercial

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such income. For example, when the income is characterised as remuneration, only expenses which are sufficiently connected to the realisation of employment income may be deducted against the income.

<sup>166</sup> "Player contract" means a contract of employment between a Province and a player. In relation to rugby, a "player" means is any person rendering rugby playing services to a Province in return for remuneration; See the 2018 Rugby Collective agreement at page 3-4.

<sup>167</sup> Professional cricket players are contracted as employees of their respective unions or clubs; See Louw, A. 2012. *Sports law in South Africa*. 2nd ed. Alphen aan de Rijn: Kluwer Law International. p 230.

<sup>168</sup> A contracted player is a professional player who has entered into a written contract of employment with a club. Every club employing a professional player must have a written contract with the player; See 2012 National Soccer League Rules, para 1.8 and 37.1 at page 1 and 47.

<sup>169</sup> "employee" means—(a) any person (other than a company) who receives any remuneration or to whom any remuneration accrues; (b) any person who receives any remuneration or to whom any remuneration accrues by reason of any service rendered by such person to or on behalf of a labour broker; See Para 1 of the Fourth Schedule of the Income Tax Act No. 58 of 1962.

<sup>170</sup> "employer" means any person (excluding any person not acting as a principal, but including any person acting in a fiduciary capacity or in his capacity as a trustee in an insolvent estate, an executor or an administrator of a benefit fund, pension fund, pension preservation fund, provident fund, provident preservation fund, retirement annuity fund or any other fund) who pays or is liable to pay to any person any amount by way of remuneration, and any person responsible for the payment of any amount by way of remuneration to any person under the provisions of any law or out of public funds (including the funds of any provincial council or any administration or undertaking of the State) or out of funds voted by Parliament or a provincial council; See Para 1 of the Fourth Schedule of the Income Tax Act No. 58 of 1962.

<sup>171</sup> Para 1 of the Fourth Schedule of the Income Tax Act No. 58 of 1962.

advertisement). In this regard the sport clubs would be required to withhold employees' tax on image rights payments and pay it over to SARS within the prescribed period.

### 5.3.2. Business income

The income earned by sportspersons who participate in a team sport and employed by clubs would not be characterised as business income since sportspersons are not considered to be carrying on a business but are employees. The income may however be characterised as business income when a sportsperson has registered a facet of an image as a trademark<sup>172</sup> and such trademark is held in an 'image rights company'.<sup>173</sup> In this case, the income would accrue to the company and it would form part of the company's business income.<sup>174</sup>

### 5.3.3. Royalty

In *ITC 1735 supra*, the court found that the income earned by a golfer is not a royalty fee since a player's name, likeness, biographical details are not of a creative effort.<sup>175</sup> For the purpose of withholding tax, a 'royalty' is defined as an amount that is received or accrues in respect of the use or right of use of or permission to use any intellectual property as defined in section 23I of the ITA.<sup>176</sup>

An image right does not form part of the identified properties contained in the definition of intellectual property.<sup>177</sup> In *CSARS v SA Silicone Products (Pty) Ltd*<sup>178</sup> the majority judgement interpreted the term 'property or right of a similar nature' and is encapsulated as follows:

"The expression, properly interpreted, requires... that any property which is similar in nature shall possess fundamental characteristics common to those possessed by the specifically identified properties; minor or superficial similarities will not of themselves

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<sup>172</sup> Refer to para 5.4 below.

<sup>173</sup> See discussion of the UK and US perspective in Chapter 6.

<sup>174</sup> Cloete, R. 2012. *The taxation of image rights: A comparative analysis*. 45(3). p. 559.

<sup>175</sup> (2002) 64 SATC 455 at para 12.

<sup>176</sup> Section 49A of the Income Tax Act No.58 of 1962.

<sup>177</sup> "intellectual property" means any—

(a) patent as defined in the Patents Act including any application for a patent in terms of that Act;

(b) design as defined in the Designs Act;

(c) trade mark as defined in the Trade Marks Act;

(d) copyright as defined in the Copyright Act;

(e) patent, design, trade mark or copyright defined or described in any similar law to that in paragraph

(a), (b), (c) or (d) of a country other than the Republic;

(f) property or right of a similar nature to that in paragraph (a), (b), (c), (d) or (e); and

(g) knowledge connected to the use of such patent, design, trade mark, copyright, property or right.

<sup>178</sup> (2004) 66 SATC 131.

suffice...The common natures of the identified properties,... embrace their intellectual origins, *i.e.* their derivation from a creative mind, their potential for commercial exploitation, the fact that the law regards such exploitation as creating a justifiable monopoly which is available only to the creator of the property or persons to whom the creator transfers his rights according to law and that the law accords the rights and protection of ownership to such property.”<sup>179</sup>

It is clear from the above that an image right is not property or right of a similar nature. It follows that income generated from the commercial exploitation of an image right should not be characterised as a royalty. However, the income could be characterised as a royalty when a facet of an image that is commercially exploited has been protected in terms of the intellectual property statutes.<sup>180</sup>

#### **5.3.4. Service or other income**

The image rights contract provisions may require sportspersons to make appearances, act or pose in advertisement which promotes the enterprise’s goods or services. These acts can be considered as services rendered in an activity unrelated to sport. In this regard, the income would not be characterised as remuneration since there would be no employment relationship between a sportsperson and an enterprise. It submitted that when an image is commercially exploited by an enterprise, the income should be characterised as income from services. Moreover, there is also no employment relationship between a sportsperson and a national sport association.<sup>181</sup> It is submitted that when a national sport association commercially exploits a player’s image right, the income should also be characterised as services income.

When a sportsperson is not required by an association or enterprise to perform any form of service in the process of image right exploitation, the income may be generally characterised as other income.

#### **5.4. Intellectual property**

Intellectual property is a product of intellect, skill, labour which includes inventions, designs, names, symbols, literary and artistic works. These products can be protected

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<sup>179</sup> Ibid at page 139.

<sup>180</sup> Refer to para 5.4 below.

<sup>181</sup> See World Intellectual Property Organisation. 2015. The Role of IP for Athletes and Image Rights. Available: [https://www.wipo.int/edocs/mdocs/mdocs/en/wipo\\_reg\\_ip\\_sport\\_sin\\_14/wipo\\_reg\\_ip\\_sport\\_sin\\_14\\_t\\_11.pdf](https://www.wipo.int/edocs/mdocs/mdocs/en/wipo_reg_ip_sport_sin_14/wipo_reg_ip_sport_sin_14_t_11.pdf) [2019, July 27].

by the provisions of the intellectual property statutes. The relevant statutes for this study are the Trade Marks Act 194 of 1993 (“the Trade Marks Act”) and Copyright Act 98 of 1978 (“the Copyright Act”).

The development of sport into an entertainment industry has led to the use of intellectual property law by sportspersons as a means to safeguard their names, name, likeness and other aspects of persona.<sup>182</sup> It has become common for sports stars to protect their insignias under the intellectual property statutory provisions. Global super stars such as Usain Bolt<sup>183</sup> and Lionel Messi<sup>184</sup> are amongst many who have registered their insignias as trademarks.

Locally, former players Naas Botha and Jacques Kallis are some of the sport personalities who have registered their names as trademarks.<sup>185</sup> In addition to the trademark law, sportspersons are also able to apply the copyright law provisions to protect their images, although its application is limited since it is designed to protect creative works.

The purpose of the following section is to outline how sportspersons can obtain proprietary interest on their aspect of identity (image) and the income tax consequences emanating from the subsequent commercial exploitation thereof.

#### **5.4.1. Trademark**

A trademark is defined as:

“a mark used or proposed to be used by a person in relation to goods or services for the purpose of distinguishing the goods or services in relation to which the mark is used or proposed to be used from the same kind of goods or services connected in the course of trade with any other person.”<sup>186</sup>

A ‘mark’ is any sign capable of being represented graphically, including a device, name, signature, word, letter, numeral, shape, configuration, pattern, ornamentation, colour or container for goods or any combination of the aforementioned.<sup>187</sup> Whereas

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<sup>182</sup> Sport stars are considered to be celebrities and their images are valuable assets in the world of advertising, refer to para 2.4.

<sup>183</sup> The sport star registered the phrase “Bolt to the World” which symbolises his signature victory pose.

<sup>184</sup> The footballer registered the term “LEO MESS1” which is basically a combination of his name and squad shirt number.

<sup>185</sup> Cloete, R. Ed. 2005. *Introduction to sports law in South Africa*. Durban: LexisNexis Butterworths. p 177.

<sup>186</sup> Section 2(1) of the Trade Marks Act No. 194 OF 1993.

<sup>187</sup> *Ibid*.

a 'sign' is a mark, symbol, or device that has some special significance, or distinguishes the person or thing on which it is put.<sup>188</sup> The terms can be used interchangeably as one includes the other.

The purpose of a trademark is to distinguish goods or services of a person or an enterprise from those of the others. The registration of a mark or sign as a trademark indicates an intention to use it as a tool of trade. By a successful registration of a trademark, the holder gains an exclusive right to use the registered mark or sign in a specific class or classes of goods or services.<sup>189</sup> Sportspersons are able to protect image rights by registering qualifying facets of image (name, signature, nickname and other aspects of persona) with the Companies and Intellectual Property Commission (CIPC) when such aspect of image is used or intended to be used for trade, it is capable of visual representation<sup>190</sup>, distinguishing the goods or services of a sportsperson from another person.<sup>191</sup>

#### **5.4.2. Copyright**

The Copyright Act does not contain a definition of a 'copyright', however the Act indicates the works in which a copyright may vest.<sup>192</sup> The copyright law vests an exclusive right in the author<sup>193</sup> of an eligible work<sup>194</sup>. Moreover, prevents others from copying the works.<sup>195</sup>

The mere qualification of a work as a subject of a copyright does not render it inevitably protected by the copyright law. However, the work must be original<sup>196</sup> and reduced to a material form.<sup>197</sup> Therefore, in order for sportspersons to secure protection of image

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<sup>188</sup> The Oxford English Dictionary [online]. Available: <https://www-oed-com.ezproxy.uct.ac.za/view/Entry/179512?rskey=O93U4t&result=1#eid> [2019, June 30].

<sup>189</sup> The Nice Agreement Concerning the International Classification of Goods and Services for the Purposes of the Registration of Marks of 1957.

<sup>190</sup> See definition of a 'mark' and a 'sign' above.

<sup>191</sup> Section 9(1) of the Trade Marks Act No. 194 of 1993.

<sup>192</sup> Between section 6 and section 11B of the Copyright Act, it is provided that a copyright vests in literary or music work, artistic works, cinematograph film, sound recording, broadcast and programme.

<sup>193</sup> Section 1 of the Copyright Act defines an "author" in relation to the nature of the work.

<sup>194</sup> Section 2 of the Copyright Act states the items which qualify as eligible work.

<sup>195</sup> Ramsden, P.A. 2011. *A guide to intellectual property law*. Claremont, South Africa: Juta. p. 1.

<sup>196</sup> Section 2(1) of the Copyright Act 98 of 1978. A work is original when the author applied own skill, knowledge and labour in the creation of the work.

<sup>197</sup> Section 2(2) of the Copyright Act 98 of 1978, a work shall not be eligible for copyright unless it has been written down, recorded, represented in digital data or signals or otherwise reduced to a material form. Section (2A) Copyright Act 98 of 1978, a broadcast or a programme-carrying signal shall not be eligible for copyright until, in the case of a broadcast, it has been broadcast and, in the case of a programme carrying signal, it has been transmitted by a satellite.

rights in terms of the copyright law, that facet of image must be original and reduced to a material form. When the work satisfies the requirements of the copyright law, the copyright will subsist automatically in the player's creation (work), no formal procedure of registration is required.<sup>198</sup>

The subsisting of a copyright in a sportsperson's facet of image can best be illustrated by an example.

*Player A* exercises skill and labour in the commissioning and producing a sound recording<sup>199</sup> which contains personal voice and such recording can be saved in a computer program. *Player A* is therefore regarded as a creator or an author of the sound recording. The copyright will subsist in *Player A's* sound recording, consequently the player secures proprietary interest in the sound recording. Then no third party may broadcast, transmit or play such recording without *Player A's* consent and the grant of permission could be done in exchange for a fee.<sup>200</sup>

The protection of a facet of an image in terms of the trademark or copyright law creates a proprietary right (immaterial asset) which is distinct from the individual<sup>201</sup> and can be alienated.<sup>202</sup> The proprietary right exists independently of the sportsperson's personality rights and are enforced separately.<sup>203</sup> The proprietary right generated by the registration of a trademark or subsisting of a copyright can be disposed or licensed to sports clubs, national associations and enterprises for use in promotional activities. The following section examines the income tax treatment of income generated from a disposal and licensing of the property right. The discussion is confined to the revenue

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<sup>198</sup> Louw, A. 2012. *Sports law in South Africa*. 2nd ed. Alphen aan de Rijn: Kluwer Law International. p. 454.

<sup>199</sup> Section 2(1)(e) of the Copyright Act. Sound recording which contains the voice of a sportsperson is a facet of image and an eligible work in terms of section 2 of the Copyright Act; a voice recording is one of the facets of image provided by Cloete in the definition of image rights, refer to para 2.2.1.

<sup>200</sup> Section 9A of the Copyright Act 98 of 1978.

<sup>201</sup> Louw, A. 2012. *Sports law in South Africa*. 2nd ed. Alphen aan de Rijn: Kluwer Law International. p. 464 – 491 and Cornelius, S. 2011. Image rights. In *Handbook on international sports law*. Nafziger, J. A. R. & Ross, S. F. Eds. Cheltenham, UK: Edward Elgar. p. 497 – 517.

<sup>202</sup> Ramsden, P.A. 2011. *A guide to intellectual property law*. Claremont, South Africa: Juta. p. 1.

<sup>203</sup> A facet of an image which has been recognised in terms of the copyright or trademark law is not attached to a sportsperson's personality right. The recognition of an aspect of image in terms of the intellectual property statutes creates a property right which is disposable. Contrasting to an aspect of image which has not been safeguarded in terms of the legislation and is thus a personal right which attaches to a sportsperson due to legal personality.

versus capital component of the gross income<sup>204</sup> definition since the other components discussed in Chapter 4 remain constant.

### 5.5. Disposal of a trademark or a copyright

A sportsperson would be considered to have disposed a trademark or a copyright when the risks and rewards associated therewith are transferred to another party.

The courts have laid down a number of tests to determine the nature of income generated from the disposal of an asset. The dominant test is the intention of a taxpayer which was formulated in *CIR v Stott*<sup>205</sup>. In this case, the court had to determine the nature of income derived from the sale of land. Wessels JA remarked as follows:

“...intention was an important factor and unless some other factor intervened to show that when the article was sold it was sold in pursuance of a scheme of profit – making, it was conclusive in determining whether it was capital or gross income.”<sup>206</sup>

In the dissenting judgment of *Elandsheuwel Farming (Edms) Bpk v SBI*<sup>207</sup>, Corbett JA indicated when the intention of the taxpayer should be considered by stating the following:

“...the intention of the taxpayer, both at the time of acquiring the asset and at the time of its sale, is of great, and sometimes decisive, importance. Other significant factors include, inter alia, the actual activities of the taxpayer in relation to the asset in question, the manner of its realization, the taxpayer's other business operations (if any).”<sup>208</sup>

It is clear that the intention behind the acquisition of an asset is an important factor and the intention is considered throughout the period of holding that asset.<sup>209</sup> However, there may be a change of intention during the period of holding an asset.

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<sup>204</sup> Gross income is defined in section 1 of the ITA as follows: “in relation to any year or period of assessment, means – (i) in the case of any resident, the total amount, in cash or otherwise, received by or accrued to or in favour of such resident;... during such year or period of assessment.

<sup>205</sup> (1928) 3 SATC 253.

<sup>206</sup> *Ibid* at page 262.

<sup>207</sup> (1978) 39 SATC 163.

<sup>208</sup> *Ibid* at page 181.

<sup>209</sup> The intention is derived from the taxpayer's own evidence (*ipse dexit*) or reasons for acquiring the asset. However, the taxpayer's *ipse dexit* is not decisive where there are other objective factors which intervene to conflict the taxpayer's *ipse dexit*, if there are other objective factors the courts place minimal emphasis on the taxpayer's evidence.

In *Natal Estates Ltd v SIR* it was decided that from the totality of facts one enquires [has to enquire] whether it can be said that the owner had crossed the Rubicon and gone over to the business, or embarked upon a scheme, of selling such land for profit, using the land as his stock-in-trade.<sup>210</sup> In *John Bell & Co (Pty) Ltd v SIR* the court held that the mere change of intention to dispose of the asset is not sufficient to indicate a change of intention, something more is required to metamorphose the character of the asset and so render its proceeds gross income.<sup>211</sup>

The income earned from the disposal of an asset which was acquired for keeps (i.e. hold as investment) and where there has been no change of intention to metamorphose its character is considered to be of a capital nature. However, when an asset is disposed in an operation of a business of carrying out a scheme of profit-making, the income is considered to be of a revenue nature.<sup>212</sup>

In *CIR v Visser*<sup>213</sup> the court described income as a product of capital or something in the nature of the fruit as opposed to a tree. In other words, income is what capital produces.<sup>214</sup> It follows that when a sportsperson disposes a trademark or copyright (immaterial asset) which is held for the purpose of producing income (i.e. the tree), the income would be of a capital nature. However, when the income represents the fruit, it is of a revenue nature.<sup>215</sup>

In relation to sportspersons, the intention behind the creation of an immaterial asset (proprietary right) would typically be to protect an image right against misappropriation and possibly earn income from its application in promotional activities. It is submitted that when an immaterial asset is created for this purpose and where there is no subsequent change of intention, the income generated from its sale would be of a capital nature and be subject to capital gains tax implications. Conversely, when an immaterial asset (proprietary right) is disposed in an operation of a business in a scheme of profit-making it is likely to be of a revenue nature and included in the

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<sup>210</sup> (1975) 37 SATC 193 at page 220.

<sup>211</sup> (1976) 38 SATC 87 at page 103.

<sup>212</sup> *Overseas Trust Corporation Ltd v CIR* (1926) 2 SATC 71 at page 75. It was held that “where ‘a gain is made by an operation of business in carrying out a scheme for profit making,’ then it was revenue derived from capital productively employed, and must be income.”

<sup>213</sup> (1937) TPD 77 at page 81.

<sup>214</sup> The test is not universal as what is capital in the hands of one taxpayer may be revenue in the hands of another. For example, fixed property is regarded as an investment in the hands of an investor whereas it is trading stock in the hands of a property dealer.

<sup>215</sup> The nature of income produced by the tree (capital) is discussed in para 5.7 below.

sportsperson's gross income which is subject to normal tax. The outcome would depend on the specific facts and merits of each case.

## 5.6. Capital gains tax

When it is shown that the income generated from the disposal of an immaterial asset is of a capital nature, the income is not completely disregarded but considered under the provisions of the Eighth Schedule to the ITA. When a trademark or copyright is disposed at a profit, the profit will be subject to capital gains tax, and when at a loss, the capital loss will be set off against other capital profits.<sup>216</sup>

The capital gains tax is imposed when there is a disposal of an asset for proceeds that exceeds the base cost.<sup>217</sup> The excess amount is regarded as a capital gain.<sup>218</sup> The taxable portion of capital gain is included in taxable income in terms of section 26A of the ITA and is subject to normal tax. Therefore, capital gains tax is not a separate tax but forms part of income tax.

The main components of capital gains tax are; asset<sup>219</sup>, disposal<sup>220</sup>, proceeds<sup>221</sup> and base cost<sup>222</sup>. The definition of an "asset" is sufficiently wide to include trademarks and copyrights developed by the protection of a sportsperson's aspect image as discussed in para 5.4.

When a sportsperson disposes or transfers ownership of a trademark or copyright to any party, the transaction is classified as a disposal as envisaged in para 11 of the Eighth Schedule to the ITA.

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<sup>216</sup> Haupt, P. 2014. *Notes on South African Income Tax*. 3<sup>rd</sup> ed. Roggebaai South Africa: H & H Publications. p. 693.

<sup>217</sup> Olivier, L. 2012. *Capital versus revenue: some guidance: Notes*. 45(1):172-177.

<sup>218</sup> Para 3 of the Eighth Schedule to the Income Tax Act No. 58 of 1962.

<sup>219</sup> Para 1 of the Eighth Schedule - "asset" includes—(a) property of whatever nature, whether movable or immovable, corporeal or incorporeal, excluding any currency, but including any coin made mainly from gold or platinum; and (b) a right or interest of whatever nature to or in such property.

<sup>220</sup> Para 11 of the Eighth Schedule – "disposal" is any event, act, forbearance or operation of law which results in the creation, variation, transfer or extinction of an asset, and includes, *inter alia*, the sale or transfer of ownership of an asset.

<sup>221</sup> Para 35(1) of the Eighth Schedule – "proceeds" from the disposal of an asset by a person are equal to the amount received by or accrued to, or which is treated as having been received by, or accrued to or in favour of, that person in respect of that disposal.

<sup>222</sup> Para 20(1) of the Eighth Schedule – "base cost" is the sum of — (a) the expenditure actually incurred in respect of the cost of acquisition or creation of that asset; (b) the expenditure actually incurred in respect of the valuation of the asset for the purpose of determining a capital gain or capital loss in respect of the asset; and other amounts directly incurred in relation to the acquisition or disposal of an asset.

The consideration received by or accrued to or in favour of a sportsperson whether in cash or otherwise<sup>223</sup> from the disposal of a trademark or copyright qualify as proceeds for capital gains tax purposes.

The expenditure incurred by sportspersons for the registration, creation and valuation of a trademark or copyright will form part of the base cost in terms of para 20(1) of the Eighth Schedule. However, expenditure that has been allowed as a deduction in the determination of a taxpayer's taxable income would be excluded from a base cost of an asset in terms of para 20(3) of the Eighth Schedule.

### **5.7. The licensing of a trademark or a copyright**

The sportspersons may opt for the licensing of the right to use trademark or copyright in lieu of an outright disposal. In this case, the risks and rewards associated with the ownership of the assets remains with the holder.<sup>224</sup> A licensee only obtains the right to use the proprietary right for a determined a period in exchange for a fee.

In *COT v Booysen supra* the court formulated a test of determining the nature of income where there is no change of ownership. Wessels J stated:

“...but it may safely be asserted that the revenue or profit which is derived from a thing without its changing owners is rather to be considered as income than as capital. On the other hand, the profit which is derived from a thing when it changes owners is rather of the nature of capital than of income.”<sup>225</sup>

It was further held in the same case that income considered in relation to capital is revenue derived from capital productively employed.<sup>226</sup> It follows that when a sportsperson licenses the right to use the proprietary right, the income is considered to be from the productive employment of capital and included in gross income. The income should be characterised as a royalty<sup>227</sup> and included in taxable income in terms of para g(iii) of the definition of gross income.

### **5.8. Conclusion**

The Guide provides as follows; an image right cannot be separated from an individual, image rights payments forms part of the sportsperson's gross income and the income

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<sup>223</sup> See para 4.3.

<sup>224</sup> Refer to para 4.6.4 about the change of ownership.

<sup>225</sup> (1918) 32 SATC 10 at page 15 – 16.

<sup>226</sup> *Ibid* at page 25.

<sup>227</sup> See discussion at para 5.3.3.

is characterised as remuneration when the payment is made by a sport club. These observations are consistent with what has been established in this study. However, the Guide is not sufficiently comprehensive, and it fails to guide a reader about the test that was or should be applied to determine the nature of income. Therefore, the Guide does not go as far in an attempt to reduce uncertainty concerning the income tax treatment of image rights payments and the critical aspect of the characterisation of income. In addition to this, the Guide does not consider the income tax consequences emanating from the recognition and protection of a facet of image in terms of the trademark or copyright law.

It has been established that when an image right is commercially exploited by parties which do not have employment relationships with sportspersons, income should be characterised as services or other income. If the facet of image commercially exploited is protected under the trademark or copyright law, the income generated therefrom should be characterised as a royalty and when such right is held in an 'image rights company' the income should be considered as business income.

The following chapter conducts a comparative review for the purpose of assessing international best practice.

## Chapter 6: International perspective

### 6.1. Introduction

The concept of commercial exploitation of image rights is still emerging in South Africa. It is therefore necessary to compare the practice and income tax treatment with other jurisdictions wherein the concept is firmly established to assess international best practice. This chapter aims to explore the practice of commercial exploitation of resident sportspersons' image rights and income tax implications thereof in the UK and USA. Due to the limited nature of the study, the following analysis does not delve into details about the income tax system of the aforementioned jurisdictions.

### 6.2. United Kingdom

#### Recognition and protection of image rights

The UK intellectual property law does not recognise an image right as a separate standalone right.<sup>228</sup> The concept of image rights includes various intellectual property rights such as contractual rights, trademarks, goodwill or copyrights.<sup>229</sup>

In the UK there is no specific law that provides for general legal protection of personality (image rights).<sup>230</sup> However, a person's image is protected against unauthorised use in terms of the common law tort of passing off.<sup>231</sup> In addition to this, Coors argues that in the absence of statutory protection of image rights, craftily drafted image rights agreements can be an effective way of protecting image rights.<sup>232</sup>

#### Taxation of sportspersons

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<sup>228</sup> Offer, K. 2018. The Taxation of Image Rights. *International Tax Specialist Group Global Tax Journal*. 1(1): 26 – 31.

<sup>229</sup> Her Majesty's Revenue and Customs. 2014. *Employment Income Manual*. Available: <https://www.gov.uk/hmrc-internal-manuals/employment-income-manual/eim00732> [2019, August 10].

<sup>230</sup> Blackshaw, I, S. 2012. *Sports marketing agreements: legal, fiscal and practical aspects*. The Hague: T.M.C. Asser. p. 380.

<sup>231</sup> In *Irvine v Talksport* (2003) 2 All ER 881 (CA), it was found that the manipulation of the claimant's photograph to appear as if he was holding a portable radio created a false impression that he endorsed a radio station and as a result could confuse the public. The court found that the claimant's photograph is protected against unauthorised exploitation in terms of common law tort of passing off; in order for a party to succeed in the claim based on the common law of passing off – firstly, at the time when misappropriation of an image took place, the claimant should have already acquired some measure of fame and, secondly, the conduct complained of must be of such a nature that it would create an impression. See Cornelius, S. 2011. Image rights. In *Handbook on international sports law*. Nafziger, J. A. R. & Ross, S. F. Eds. Cheltenham, UK: Edward Elgar. p. 501.

<sup>232</sup> Coors, C. 2015. Are sports image rights assets? A legal, economic and tax perspective. *The International Sports Law Journal*. 15(1): 64-68.

## General

In the UK, resident<sup>233</sup> sportspersons are subject to tax on their worldwide income and capital gains. In terms of section 7 of the Income Tax (Earnings and Pensions) Act 2003, income includes earnings from employment and secondary earnings (i.e. rental income, endorsement income etc.). As employees of sports clubs, sportspersons are required to pay employees' tax and National Insurance Contributions (NICs) on their employment income in terms of the PAYE system.<sup>234</sup> The secondary earnings are subject to normal income tax at progressive graduate tax rates.

### Income tax treatment of image rights payments

The sportspersons typically execute the commercial exploitation of image rights by launching an image rights company (IRC).<sup>235</sup> This arrangement works as follows: a sportsperson transfers an image right to the IRC, and then enters into an agreement to perform promotional service for the IRC, and the IRC then licences the sportsperson's image right to third parties in return for payments.<sup>236</sup>

The arrangements which involve the use of IRC to exploit image rights have been scrutinised by Her Majesty's Revenue and Customs (HMRC). HMRC consider the use of IRCs as a technique designed to reduce tax liability.<sup>237</sup> In *Sports Club, Evelyn and Joycelyn v HM Inspector of Taxes*<sup>238</sup>, the Inland Revenue (now HMRC) challenged image rights agreements concluded by Arsenal Football Club and two IRCs which held image rights of its two contracted players. The club secured the rights to commercially exploit the players' images from their respective companies in return for fees. The Inland Revenue argued that fees paid to the IRCs were made in pursuant of the players employment contracts therefore should be classified as employment income

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<sup>233</sup> See Schedule 45, Part 1, of the Finance Act 2013. Schedule 45 sets out the rules for determining whether individuals are residents or non-residents in the UK. The basic rules provides that an individual is a resident in the UK for a tax year if the automatic residence test is met for that year, or the sufficient ties test is met for that year and if neither of these tests are met for that year, an individual is not resident in the UK for that year.

<sup>234</sup> Cloete, R. 2012. The taxation of image rights: a comparative analysis. 45(3). p. 560

<sup>235</sup> Harrington, D. & White, N. 2005. United Kingdom. In *Sports Image Rights in Europe*. Blackshaw, I.S. & Siekmann, R.C. R, Eds. The Hague: T.M.C. Asser Press. 315 – 343. p. 335.

<sup>236</sup> *Supra* cite note 233 at page 562.

<sup>237</sup> If the payment for the use of image accrues to the IRC, the amount is subject to tax at corporation tax at 19%, whereas if it accrues to high earning sportsperson it could be taxed at the higher tax rate of 46%. Furthermore, when a player's image right is held in an IRC, the payment for the right to use image made by a sport club does not attract employees' tax and NIC.

<sup>238</sup> (2000) STC (SCD) 443.

(emoluments) and be subject to employees' tax and NIC. The revenue authority considered the arrangements to be a 'smokescreen' designed to disguise employment income as image rights payments and therefore reduce tax liability.<sup>239</sup> The tax tribunal held that the image rights agreements were genuine commercial arrangements with an independent value and separate from employment. The tax tribunal concluded that the fees were not subject to employees' tax and NICs. The tribunal's decision has been seen as a watershed as the revenue authority has departed from the notion of not recognising image rights to currently recognise image rights as capital assets for tax purposes.<sup>240</sup>

In *HMRC v Portsmouth City Football Club Ltd*<sup>241</sup> the court dismissed HMRC's contention that there was no proper basis for image rights payments, and that they were, in effect shams. The court held that a club is entitled pay, and a player is entitled to receive image rights payments for use of image in publicity and other material. Moreover, when a payment is properly made for an image right, the club is not obliged to account for employees' tax and NIC.

### **HMRC's Guidelines**

In August 2017, HMRC published guidelines for tax on payments for the use of image rights.<sup>242</sup> The guidelines are not considered to be binding law but advances HMRC's position on the interpretation of law. The Guide provides that image rights payments can be taxable in three different ways. Firstly, payments made to a self-employed individual are taxable as professional income. Secondly, payments to employees for employment duties must be taxed as earnings subject to PAYE and not as payments for the use of image rights. Thirdly, where image rights payments are made to the company, the company will pay UK Corporation Tax on its profits. Where the individual (sports person) is a director or shareholder of that company, they may receive a financial reward, such as salary or dividends and this income would be subject to tax

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<sup>239</sup> If the image right fee is regarded as employment income in the hands of a sports person it could be subject to tax at a higher tax rate of 46%, whereas if it is genuinely accruing to the image rights companies it is subject to tax at a lower corporate tax rate at 19% and the club is not required to withhold employees tax and NIC.

<sup>240</sup> Cloete, R. 2012. The taxation of image rights: a comparative analysis. 45(3). p. 561.

<sup>241</sup> (2010) EWHC 2013 (Ch) at para 19 and 88.

<sup>242</sup> Her Majesty's Revenue and Customs. 2017. *Tax on payments for use of image rights*. Available: <https://www.gov.uk/guidance/tax-on-payments-for-use-of-image-rights> [2019, August 10].

under normal provisions. The guide then refers to HMRC Employment Income Manual for further details on the taxation of image rights payments.

The HMRC Employment Income Manual indicate that HMRC accepts that when an image right arrangement has an independent value and is commercially justifiable, the payment for the use of sportsperson's image will not be considered to be employment income.<sup>243</sup> The Guide then considers the deduction of tax at source and goes further to provide that in terms of section 579(2) of the Income Tax (Trading and Other Income) Act ("ITTOIA") 2005 some or all rights that make up image rights are likely to meet the definition of intellectual property (at EIM00736). As a result, the payment for an image right which has an independent value in a genuine commercial arrangement should be classified as a royalty or other income earned from intellectual property. The party that makes the image right payment may be required to withhold income tax at source under Part 15 of the Income Tax Act 2007.

The Capital Gains Manual includes commentary on the assignment or licensing of image rights to third parties. The Guide indicates that the asset assigned or licenced in an image right agreement is likely to be goodwill<sup>244</sup> (at CG68420). It further provides that the transfer of image rights to IRCs is achievable by a licensing arrangement, rather than an outright assignment (at CG68425). The licensing of an image right to an IRC is a part disposal<sup>245</sup> in terms of section 21(2)(b) Taxation of Chargeable Gains Act 1992 (at CG12730). It follows that a transfer of an image right by a sportsperson to an IRC is a disposal of a capital asset for capital gains tax purposes.

It is clear that when an image right has an independent value and the arrangement is commercially justifiable, the payment for the use of the right is separable from employment income. Moreover, the income earned by the IRC or sportspersons (when there is no use of IRC) is characterised as royalty or other income from intellectual

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<sup>243</sup> Her Majesty's Revenue and Customs. 2014. *Employment Income Manual*. Available: <https://www.gov.uk/hmrc-internal-manuals/employment-income-manual/eim00735> [2019, August 10].

<sup>244</sup> Goodwill is a personal property and its ownership can be transferred by assignment, but it cannot be assigned "in gross" - separate from the business to which it relates. An assignment in gross is invalid and the assignee acquires no rights from such a purported assignment. However, the determination of whether an assignment is in gross is conducted on the facts of each individual case; See Her Majesty's Revenue and Customs. 2016. *Capital Gains Manual* at CG 68420.

<sup>245</sup> For capital gains purposes a 'disposal' includes a 'part- disposal', which may be the disposal of a physical part of the asset, or an interest or right in or over the whole or part of the asset; See Her Majesty's Revenue and Customs. 2016. *Capital Gains Manual* at CG12730.

property and is subject to tax as such. The IRC can attribute income to a sportsperson as dividends, salary, director's fee, etc. subject to the status of the relationship between a sportsperson and the IRC.

### 6.3. United States of America

#### Recognition and protection of image rights

In the US image rights are known as publicity rights<sup>246</sup> recognised under the concept of right of publicity.<sup>247</sup> Right of publicity is defined as an inherent right that every human being has to control the commercial use of his or her identity.<sup>248</sup>

The right of publicity is recognised differently by various States. Dreyer reports that in some States the right is recognised in terms of common law while it forms part of statutory provisions in other States.<sup>249</sup> Image rights therefore find protection in terms of the common law right of publicity<sup>250</sup> and statutory right of publicity<sup>251</sup> depending on the position of the concerned State.

#### Taxation of sportspersons

##### General

The US taxes its citizens and residents on their worldwide income and gains regardless of the source. An individual is considered as a US tax resident if is lawfully

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<sup>246</sup> Blackshaw, I, S. 2012. *Sports marketing agreements: legal, fiscal and practical aspects*. The Hague: T.M.C. Asser. p. 265.

<sup>247</sup> The rights general purpose is to first, recognise the economic value of an individual's identity. Secondly, the publicity right is an incentive for creativity, encouraging the production of entertaining and intellectual works. Finally, the right prevents unjust enrichment of those who usurp the identity of another. See Wolohan, J. 2005. United States. In *Sports Image Rights in Europe*. Blackshaw, I.S. & Siekmann, R.C.R, Eds. The Hague: T.M.C. Asser Press. p. 352.

<sup>248</sup> Dreyer, A. 2011. Recent sports-related issues in US intellectual property law. In *Handbook on international sports law*. Nafziger, J. A. R. & Ross, S. F. Eds. Cheltenham, UK: Edward Elgar. p. 468 – 469. The right of publicity is not recognised by federal law, but it is determined by state law typically from courts decisions. The term 'right of publicity' has its origin from the case of *Haelan Laboratories Inc v Topps Chewing Gum Inc*, 202 F 2d 866 (2d Cir. 1953) where it was recognised that a man has a right in the publicity value of his photograph.

<sup>249</sup> *Ibid*.

<sup>250</sup> Wolohan, J. 2005. United States. In *Sports Image Rights in Europe*. Blackshaw, I.S. & Siekmann, R.C.R, Eds. The Hague: T.M.C. Asser Press. p. 354 -356. In order to establish a course of action for common law misappropriation, the courts have generally held that an individual must demonstrate that the defendant used the plaintiff's identity; the appropriation of plaintiff name, or likeness provided the defendant some advantage, commercially or otherwise; lack of consent and resulting injury. The terms 'right of publicity' and 'common law misappropriation' are used interchangeably.

<sup>251</sup> *Ibid*. p. 356 - 358. The statutory cause of action is available when a plaintiff can show that another knowingly used his or her name,... photograph, or likeness, in any manner, on or in products, merchandise, or goods, or for the purpose of advertising or selling, or soliciting purchase of, products, merchandise, goods, or services, without prior consent.

admitted for permanent residence, meets the substantial residence test or has made an election for residence.<sup>252</sup>

In terms of section 61 of the Internal Revenue Code of 1986, 'gross income' includes all income from whatever source derived. It is submitted that the 'gross income' definition is sufficiently wide to include income earned by sportspersons from the commercial exploitation of their image rights. Such income may be subject to tax under federal tax as well as state tax provisions.<sup>253</sup>

### **Income tax treatment of image rights payments**

An image right (publicity right) of a famous person is a property right (similar to a trademark) which could be licensed or transferred.<sup>254</sup> According to a licensing agreement, a licensor grants the right to use but retains the title. The transfer of an image right is not regarded as a sale or exchange of capital asset.<sup>255</sup> Therefore, the gain realised from the transfer of an image right is subject to tax as ordinary income, not as capital gain.<sup>256</sup>

In the USA, sportspersons typically execute the exploitation of image rights through structures such as IRC or trusts or in an individual personal capacity. The income generated from the use of a sportsperson's image is characterised as a royalty.<sup>257</sup>

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<sup>252</sup> Section 7701(b) Internal Revenue Code of 1986.

<sup>253</sup> Federal income tax is levied by the Inland Revenue Service on the taxable income of individuals, corporations, trusts, and other legal entities at the progressive tax rate. The tax collected is credited to the country's government account. The taxpayers may also be subject to tax in their resident states and the tax collected in this regard is credited to the account of the individual state.

<sup>254</sup> Dreyer, A. 2011. Recent sports-related issues in US intellectual property law. In *Handbook on international sports law*. Nafziger, J. A. R. & Ross, S. F. Eds. Cheltenham, UK: Edward Elgar. p. 468 – 469; *Cepeda v Swift & Co*, 415 F.2d 1205 (8th Cir.1969), per Judge Mehaffy: "The propriety of summary judgment by the court on issues involving interpretation of the contract is not challenged by either party. Such use of a summary judgment is desirable where, as here, the contract is unambiguous..., nor is it a matter of dispute that plaintiff has a valuable property right in his name, photograph and image and that he may sell these property rights.

<sup>255</sup> Section 1253 (a) on the Internal Revenue Code provides that as a general rule a transfer of a franchise, trademark, or trade name shall not be treated as a sale or exchange of a capital asset if the transferor retains any significant power, right, or continuing interest with respect to the subject matter of the franchise, trademark, or trade name. It is submitted that this is applicable to publicity rights as the sportspersons do not entirely discharge interest in their image rights but retains some of degree of interest or control to *inter alia*, negotiate for commercial exploitation with other parties when an endorsement agreement expires or contracts with another club.

<sup>256</sup> Section 1253 (c) of the Internal Revenue Code provides that amounts received or accrued on account of a transfer, sale, or other disposition of a franchise, trademark, or trade name which are contingent on the productivity, use, or disposition of the franchise, trademark, or trade name transferred shall be treated as amounts received or accrued from the sale or other disposition of property which is not a capital asset.

<sup>257</sup> Internal Revenue Service Revenue Ruling 81-178, 1984-2 C.B. 135, 13. Payments for use of valuable rights are classified as royalties for federal tax purposes.

However, this may not always be the case since some image rights agreements constitute compound elements known as 'on-course' and 'off-course' endorsement contracts.<sup>258</sup>

In *Goosen v CIR*<sup>259</sup> the court had to determine whether 'on-course' endorsement fees received by a UK resident golfer from worldwide endorsement agreements were royalties or personal service income. The golfer participated in various golf tournaments that were held in the US, as a result the Internal Revenue Service (IRS) sought to tax the income earned by the sports person while performing in the US. According to the specifics of the agreements, the golfer was required to wear and use the companies' (licensee's) products while playing golf ('on-course' endorsement) and make appearances and pose for the companies' television commercials ('off-course' endorsement) in exchange for endorsement fees. The IRS accepted that the 'off-course' endorsement fees were royalties. The contentious issue was the 'on-course' endorsement fees of which the sports person characterised as 50% royalty income and 50% personal service income. The IRS argued against the equal allocation of income on the basis that the sponsors paid the sports person primarily to perform personal service. The respondent also argued that any income received for the use of the golfer's name and likeness is de minimis.

The court found that endorsement fees could not be wholly attributed to the golfer's image or personal service. It was held that that participation in the golf tournament was material to receiving income and therefore upheld the sports person's equal apportionment of income between royalty and personal service.

In *Sergio Garcia v CIR*,<sup>260</sup> Garcia a Swiss tax resident golfer had signed an endorsement deal with a company that manufactures golf equipment and accessories. The company secured the right to use the sports person's image in advertising ('off-course' endorsement) and as part of the agreement the golfer was required to wear and use the company's products while playing ('on-course' endorsement) in exchange for endorsement fees. The company and the golfer agreed that 85% of the

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<sup>258</sup> An 'on-course' endorsement contract generally relates to an agreement in which a sports person is required to display an entity's name or logo on the apparel or equipment while performing a sport. While an 'off-course' endorsement contract relates to the use of the player's identity in advertising in an activity unrelated to sport or off the playing course. This can take place in the form of acting in commercial advertisement, sale of merchandise depicting a sports person's name etc.

<sup>259</sup> (2011) 136 T.C. 547.

<sup>260</sup> (2013) 140 T.C. 141.

endorsement fee is attributable to an image right ('off-course') and 15% to personal service. The IRS argued against this apportionment of income and asserted that a greater portion of the income was for personal service. The court considered expert evidence and the earlier judgement of *Goosen supra*. The court determined that the equal apportionment of income decided in *Goosen case supra* was not appropriate in this case since Garcia was a global icon, therefore his image was more valuable than Goosen's. The court found that the endorsement fees should be apportioned at 65% royalty income and 35% personal service income.

It is evident that in the US, the income generated from the commercial exploitation of an image right 'off-course' is classified as a royalty from the use of a valuable right (intangible asset). However, when an image right is commercially exploited through participation in a sport activity, the income could be apportioned between royalty income and personal service income based on the particular facts of each contract.

#### **6.4. Comparative analysis**

The UK law recognises an image right as a form of intellectual property.<sup>261</sup> Similarly, in the USA an image right (publicity right) is considered to be a valuable property right similar to trademark.<sup>262</sup> Conversely, the SA law does not recognise any proprietary interest in a person's name, likeness or any aspects of persona.<sup>263</sup> However, this study has concluded that an image right could be considered as a capital asset for income tax purposes.<sup>264</sup>

The South African law considers an image right to be a personal right, therefore it cannot be disposed or transferred to structures such as IRCs or trusts.<sup>265</sup> In both the UK and USA, sportspersons are able transfer their image rights and commercially exploit through structures (IRC/trusts). The transfer of an image right to an IRC is regarded as a disposal of a capital asset in the UK whereas it is not considered a disposal of capital asset in the USA. Therefore, the amount realised from the *transfer*

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<sup>261</sup> Refer to para 6.2.

<sup>262</sup> Refer to para 6.3.

<sup>263</sup> Refer to para 3.2.

<sup>264</sup> Refer para to 4.6.1.

<sup>265</sup> See para 4.6.3; a transfer is only possible when a facet of an image has been registered as a trademark or a copyright has subsisted in a sportsperson's original work. In this the registration of a trademark or subsisting of a copyright creates a separate proprietary interest or right.

of image right to a structure (IRC/trust) is subject to CGT in the UK whilst in the USA it is taxed as ordinary income.

The income generated from the genuine commercial exploitation (licensing) of a sportsperson's image is characterised as royalty income in both the UK and USA. However, when a contract consists of compound elements, the income may be apportioned between royalty income, personal service income and or employment income subject to the facts of each case. In South Africa, SARS posit that image right payments made by sports club are characterised as remuneration. This study has also established that in terms of the current domestic laws when an image right is commercially exploited by an enterprise or federation the income may be characterised as income from services or other income.

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## Chapter 7: Conclusion

The aim of this study has been to determine the nature of income earned by rugby, cricket and football players from the commercial exploitation of their image rights. Furthermore, to assess the propriety of the 2018 Guide, particularly the section dealing with the income tax implications on image rights, and to consider income tax consequences emanating from the protection of images under intellectual property legislation.

To achieve the research objective, it was necessary to define key terms, demonstrate what constitutes image rights, outline how image rights are commercially exploited and present the regulations stipulated by the relevant sport governing bodies vis-à-vis image rights (Chapter 2).

Chapter 3 discussed the legal recognition and protection of image rights together with classification in respect of accounting and income tax provisions. The South African law does not recognise image rights as protectable property rights. However, an image right is regarded a personal right possessed by every individual. Notwithstanding the statutory non-recognition, image rights are protected against misappropriation in terms of common law of delict within the doctrine of personality rights and the constitutional right to privacy.

In respect of the classification, image rights satisfy the accounting definition and recognition requirements of an asset and intangible asset, respectively. An image right can be recognised as an asset in the financial records of the assignee (sports club, national sport association or an enterprise) during the period when the assignee has control over the right to apply the sportsperson's image in pursuance of economic benefits in the form of sales. Similarly, in respect of income tax provisions an image right is classifiable as an asset under para 1 of the Eighth Schedule since image rights of famous sportspersons have pecuniary value and an image right contract raises personal rights for contracting parties.

In Chapter 4, an analysis of the legislation and case law was conducted to determine whether image rights payments satisfy the requirements of the gross income definition. To achieve this, the study assessed if an image right is a capital asset separable from an individual. An image right satisfies the test of a capital asset and should accordingly be recognised as such. However, since an image right is a personal right that exists

due to legal personality it cannot be disposed or separated from an individual. Therefore, regardless of the terms (transfer, license, assignment or dispose) used in an image right agreement or clause, in substance the agreement does not amount to a contract of sale. Since ownership of an image right cannot be transferred from a sportsperson to a sport club, national sport association or an enterprise, an image right agreement would typically provide for the licensing of a right to use an image in advertising for a specific period in a defined assignment.

Image rights payments are products of the productive employment of sportspersons' images (capital assets) in promotional activities. The amounts received by, accrued to, or in favour of sportspersons in respect of image rights satisfy the requirements of the "gross income" definition as envisaged in section 1 of the ITA. The income generated is classified as income of a revenue nature and should be included in the sportspersons' gross income.

The prospect of recognising image rights payments as restraint of trade payments was examined. It was determined that restraints of trade are specifically designed to protect proprietary interests such as goodwill, confidential trade secrets and know how. In the context of the present study, image rights payments are either made by sport clubs, national sport associations or enterprises. None of the respective parties who make image rights' payments possesses proprietary interest in a sportsperson's image right. Moreover, the restraint provisions stipulated in the image rights regulations prescribed by sport governing bodies do not extend further than the common law duty not to compete or cause harm (bare covenant not to compete). Sportspersons are able to conclude other image rights agreements if such agreements do not cause harm or a direct competition to an existing agreement. A sportsperson's asset is therefore not sterilised by concluding an image right agreement. Image rights payments are therefore not considered as restraint of trade payments.

As discussed in Chapter 5, the 2018 Guide is consistent with the findings of this study with regard to the classification of income generated from commercial exploitation of image rights. However, the following deficiencies were noted in the 2018 Guide:

- It does not guide the reader about the precedential test or guideline laid down by the courts that was applied or should be applied to determine the nature of income.

- It overlooks the fact that image rights payments are also made by national sport associations.
- It lacks discussion on the characterisation of income, save for when a payment is made by a sport club.
- It lacks guidance on the income tax consequences when a facet of image exploited is protected under the intellectual property law.

Since the 2018 Guide is not sufficiently comprehensive on the aspect of image rights, it fails to alleviate uncertainty about the classification of income generated from the commercial exploitation of image rights. However, the 2018 Guide serves as a good foundation in a quest to bring certainty on the image rights phenomenon. Based on the findings of this study and the deficiencies identified in the 2018 Guide, it is suggested that the legislation should be explicit on the issue of image rights. The legislators can formulate and include a definition of image right in the income tax legislation. Furthermore, the SARS should release a document in a form of a revised Guide or Interpretation Note to provide clarity and incorporate factors such as the various ways in which image rights are exploited, the regulations prescribed by sports bodies, the characterisation of income and the use of intellectual property statutes to protect image rights and the implications from the subsequent exploitation thereof.

In Chapter 6 an international perspective was presented with the focus on the image rights practice and income tax treatment in the UK and USA. In these two jurisdictions image rights are regarded as disposable proprietary rights. Hence, sportspersons can utilise structures such as IRC or trusts to execute the commercial exploitation of their image rights. This is contrary to the position in South Africa wherein image rights are classified as non-disposable or inseparable personal rights. It is therefore not practical to align the South African income tax treatment of image rights with that of the UK or USA. It is clear that further study is necessary to determine whether image rights could be recognised as some form of proprietary right before adoption of the UK or US practice. The South African practice can only be comparable with these jurisdictions when a sportsperson has protected an image right under either the trademark or copyright law.

## Annexure A: Extract of the Guide

### Introduction

South African sports players are, like their overseas counterparts, enjoying the benefit of being able to exploit other commercial opportunities such as image licensing agreements, celebrity endorsements and appearance fees. Image licensing agreements involve the commercial exploitation of a player's image, such as the use of the player's name, photograph, reputation, voice, signature, initials or nickname. Image rights are the legal rights associated with using the image of a sportsperson in marketing or promotional activities. Image rights payments refer to the payments that a player receives from an enterprise that uses such player's image for advertising purposes.

### Income tax implications

Talented sportspersons receive sums of money to appear in, amongst others, television and print advertisements, as well as appearances at social gatherings. The sportsperson's participation is usually intended to promote the sale of a product or products, or an event, owing to the perception or "image" that the public has of the sportsperson.

Image rights are essentially personal rights that are vested in the player as an individual person. These rights cannot be separated from the sportsperson, and consequently, cannot be disposed of or "sold" to another person. Further, "a sportsperson has a proprietary interest in his identity and an infringement of such personality right caused by unlawful commercial exploitation can lead to economic loss."

The Tax Court was called upon in *ITC 1735* to decide whether a payment made to a famous golfer for the right to use his name, likeness and biographical material for promotional purposes was of a revenue or capital nature. The court held that:

"The appellant by allowing his name and reputation to be used did not dispose of such assets and continued to possess them after the tournament and after he received the agreed consideration for allowing them to be used for publicizing the Tournament. In our opinion there can be no doubt that the payment was not of a capital nature and was the type of income that a professional golfer would expect to earn for participating in a golf tournament that traded on the reputation of the participants. Accordingly the monies received formed part of his "gross income" as defined in s 1 of the (Income Tax) Act."

It is clear therefore that payments made to a sportsperson for the right to use the sportsperson's "image" rights will be included in the sportsperson's gross income and will be taxable as such.

Should such a payment be made to a sportsperson by the club to whom the sportsperson is contracted, such payments will constitute "remuneration" for employees' tax purposes. Since the amount paid to the sportsperson for the exploitation of the sportsperson's "image" rights is in these circumstances paid by an "employer" (the club) to an "employee" (the sportsperson) as contemplated in the Fourth Schedule to the Act, the club is obliged to withhold employees' tax and the amount paid for the use of the sportsperson's "image" rights must be disclosed on the sportsperson's IRP5.

The same treatment will apply to endorsement fees and appearance fees, as all three are of a revenue nature and therefore taxable.

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