

**AN INTERNATIONAL TAX
PERSPECTIVE
ON THE
TAXATION OF ATHLETES,
SPORTSMEN AND
ENTERTAINERS IN KENYA**

A. INTRODUCTION

Many at times, the thrilling performances of athletes, sports personalities and entertainers propel them to the limelight. The ecstasy of watching one's countrymen break world records in the world of athletics or favorite footballers dribble and shake the nets in the stadia or the treasured musicians pulling unfathomable crowds in shows come with an underlying complex web of taxation policies.

These policies have far reaching implications on the financial landscape of these celebrated individuals as well as the fiscal jurisdictions represented by these personalities. A journey through the dynamic realm where talent meets fiscal responsibility is worth taking moreso with the current public discourse on this subject in Kenya.

B. Right to tax

The common revenue streams for athletes, sportsmen and entertainers are: salaries, agency earnings, winnings, image rights income and incomes from investments made by these sportsmen. These revenue streams have varied taxation modalities in different jurisdictions. Considering that the athletes' revenue is sourced from different tax jurisdictions and are paid to them directly or to their agents domiciled in varied jurisdictions, we shall delve into this subject from an international taxation angle.

International taxation is mostly governed by bilateral and multilateral statutes formulated in compliance with regional and global model conventions such as the United Nations Model Tax Treaty (UN model), United States Model Tax Treaty (US model) and the Organisation for Economic Cooperation and Development (OECD) Model Tax Treaty (OECD model).

The right of any jurisdiction to tax any income is determined by the presence of a taxation nexus. There are three main nexuses in taxation, that is, economic, physical and affiliate nexus.

An economic nexus is created when a person undertakes substantial economic activity in a tax jurisdiction (source of income).

A physical nexus is created when a person is domiciled in a tax jurisdiction for a period of time as guided by the applicable tax laws (residence).

An affiliate nexus is created when a branch, subsidiary or an agent of a person has a substantial economic presence in a tax jurisdiction.

For individuals, there are two major systems of taxation, that is, the residence-based and citizen-based systems. Kenya among other countries operates a residence-based taxation system while the United States of America (USA) operates a citizen-based system.

For a residence-based system, taxation of a person is determined by the period of time that a person is physically present in a jurisdiction over a specified fiscal time while for a citizen-based system, taxation is determined by the citizenship of a person regardless of where the person is physically present.

C. Incidence of Double Taxation

By virtue of the sports personalities and entertainers creating taxation nexus in varied jurisdictions, double taxation may ensue. Several jurisdictions have attempted to mitigate the challenge of double taxation through local tax laws as well as ratification of bilateral and multilateral tax treaties which provide avenues for avoiding double taxation.

Most tax treaties that Kenya is party of are guided by the OECD model tax convention. The OECD model tax convention provides for taxation of artists and sportsmen under Article 17. Article 17 of the OECD provides that the jurisdiction from which the artists and sportsmen derive income has the taxing rights over the specific incomes regardless of whether the income is paid directly to the artists and sportsmen or to proxies or agents or any other person in any other jurisdiction.

D. Double Taxation Avoidance

Primarily, income is subject to tax at the source. However, considering the residence-based and citizen-based system of taxation which are mostly applied on worldwide income, it implies that the same income would otherwise be subject to taxation more than once in different jurisdictions. This challenge is addressed under Article 23A and Article 23B of the OECD model tax convention either through the exemption method or the credit method.

1. Exemption Method

Under the exemption method, the jurisdiction with taxing rights on the basis of residence or citizenship shall allow as a deduction from the taxable income of that resident/citizen an amount equal to the taxable income whose tax was accounted for and paid in the other jurisdiction. The tax attributable to the income whose tax is paid in the source jurisdiction shall not exceed that part of the tax payable in the residence jurisdiction as computed before the deduction is given.

Kenyan Perspective

In Kenya, this mechanism is captured under Section 41 of the Income Tax Act, where, for the case of athletes, sportsmen and entertainers, the athletes are allowed to deduct an amount equal to the tax remitted in the source jurisdiction when computing the tax payable in Kenya. This is mainly applicable in circumstances where there is no Double Taxation Avoidance Agreement between Kenya and the income's source jurisdiction.

For instance, if an athlete earns by participating in a marathon in a country with no ratified Double Taxation Avoidance Agreement with Kenya and the payer in that country withholds taxes, when the Kenyan Athlete is declaring his/her income in Kenya, he/she will be allowed to deduct any taxes paid in that other country from the total income. This reduces the taxable income in Kenya.

2. Credit Method

With the credit method, the jurisdiction with taxing rights on the basis of residence or citizenship shall allow as a deduction from the tax payable on the income of that resident, an amount equal to the income tax paid in the income's source jurisdiction.

Kenyan Perspective

In Kenya, this is captured under Section 42 of the Income Tax Act, where, for the case of athletes, sportsmen and entertainers they are allowed to claim tax credits equal to the taxes paid in the income's source jurisdiction.

This is capped at the amount of tax payable in Kenya for the specific income such that utilization of such credits may not result in a tax refund position. In case the rate of tax in the income's source jurisdiction is lower than the rate of tax in Kenya, the athletes, performers and entertainers will have to pay the difference in Kenya.

For instance, if an athlete earns by participating in a marathon in a country with a ratified Double Taxation Avoidance Agreement with Kenya and the payer in that country withholds taxes, when the Kenyan Athlete is declaring his/her income in Kenya, the athlete will be allowed to claim any taxes paid in that other jurisdiction as a tax credit against the tax payable in Kenya hence reducing the tax payable. However, note that the allowable portion of the credits is capped at the applicable tax rate in Kenya and to an extent that the same will not result in a tax refundable position for the respective athletes.

E. Tax planning/structuring opportunities

There exist opportunities for tax planning and optimization through strategies such as structuring income, deducting eligible expenses as well as combing for and utilizing tax saving opportunities as per the provisions contained in several bilaterally as well as multilaterally ratified tax treaties.

The above notwithstanding, it should be noted that the OECD model tax convention provides for anti-treaty shopping and anti-base erosion and profit shifting by clearly discouraging formation of shell companies in jurisdictions with existing double tax avoidance agreements for the sake of receiving incomes in order to enjoy tax incentives provided under those agreements or by shifting profits to jurisdictions with lower tax rates.

For the avoidance of doubt, in circumstances where the persons involved can substantially demonstrate that there is an economic activity played by the companies formed regardless of where they are formed, then the anti-treaty shopping mechanisms and the anti-base erosion and profit shifting will not hinder such strategies.

F. Tax controversies among athletes and musicians

Some of the renowned footballers such as **Leonel Messi** and **Christiano Ronaldo** and musicians such as **Shakira Isabel Mebarak Ripoll** have found themselves on locker heads with tax authorities of various jurisdictions upon the authorities determining that there existed a nexus for those jurisdictions to tax income earned by this persons by virtue of the economic activity generating the income being in the specific jurisdictions or by virtue of the taxable persons being domiciled in the specific jurisdictions.

The income the subject of dispute for **Leonel Messi** and **Christiano Ronaldo** were on image rights income.

As a matter of fact, Spain's Supreme Court found Messi to be guilty of tax evasion for allocating the image rights income to shell offshore companies incorporated in tax havens in Belize and Uruguay hence evading tax in Spain.

According to the Spanish tax authority, the income attributed to the companies in the tax havens for **Messi and Ronaldo** were earned in Spain considering that the sportsmen were playing for Spanish teams.

The main point of divergence between the tax authority and the sportsmen was that the authority claimed that the companies to which the image rights income were allocated did not undertake any substantial economic activities in their respective jurisdictions of residence to warrant the portion of income allocated to them.

In the case of **Shakira**, the Spanish tax authorities, claimed that she primarily lived (was domiciled) in Spain during the period subject to the dispute with her then-boyfriend and their family. She only traveled abroad periodically due to professional commitments. The general rule in Spain was, for each year if one resided (domiciled in Spain), then one owed tax. Being domiciled in this case was defined as being present in the tax jurisdiction for more than half a year during a tax period.

This implied that one had to keep a reliable record of the number of days spent in a tax jurisdiction in order to determine the jurisdiction with the taxing rights and claim the tax credits where applicable depending on the applicable laws in the relevant jurisdictions.

From the above case studies, it is evident that in circumstances where sportsmen, athletes and entertainers have not planned/structured their taxes deliberately and properly, they run a risk of prosecution on grounds of tax evasion which is injurious to their brand and their fiscal position.

G. Conclusion

In conclusion, the taxation landscape for athletes, sportsmen, and entertainers in Kenya and globally presents both challenges and opportunities in equal measure. With Kenya's prominence in athletics, understanding the tax implications thereof is paramount for all players in this sector.

Kenya's tax regime for athletes, sportsmen, and entertainers encompasses various elements, including income tax, withholding tax, and value-added tax (VAT) based on the various taxation nexuses established by both resident persons and non-resident persons in equal measure. Income derived from athletics, sports and entertainment activities in Kenya and internationally, is subject to taxation, with specific provisions for residency status and source of income premised on international conventions and local tax laws.

Navigation of these tax regimes needs proper scrutiny of various factors including but not limited to residence status of the sports persons involved, contractual agreements with affiliated and independent entities, endorsement deals and image rights and royalty income.

Further, it is worth noting that the interpretation and application of tax treaties as well has a significant impact on the tax obligations of athletes, sportsmen and entertainers with international earnings. Compliance with tax laws need not be downplayed in order to avoid penalties and legal repercussions. This speaks to the need to seek for professional advice from tax experts and legal advisors in order for the players in these industries to optimize their tax positions while ensuring full adherence to legal requirements.

LET'S TALK

For more information or professional advisory and compliance with regards to taxation of athletes, sportsmen and entertainers or for assistance on any other tax matter kindly contact your regular Taxwise Africa Analyst or the contacts below



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