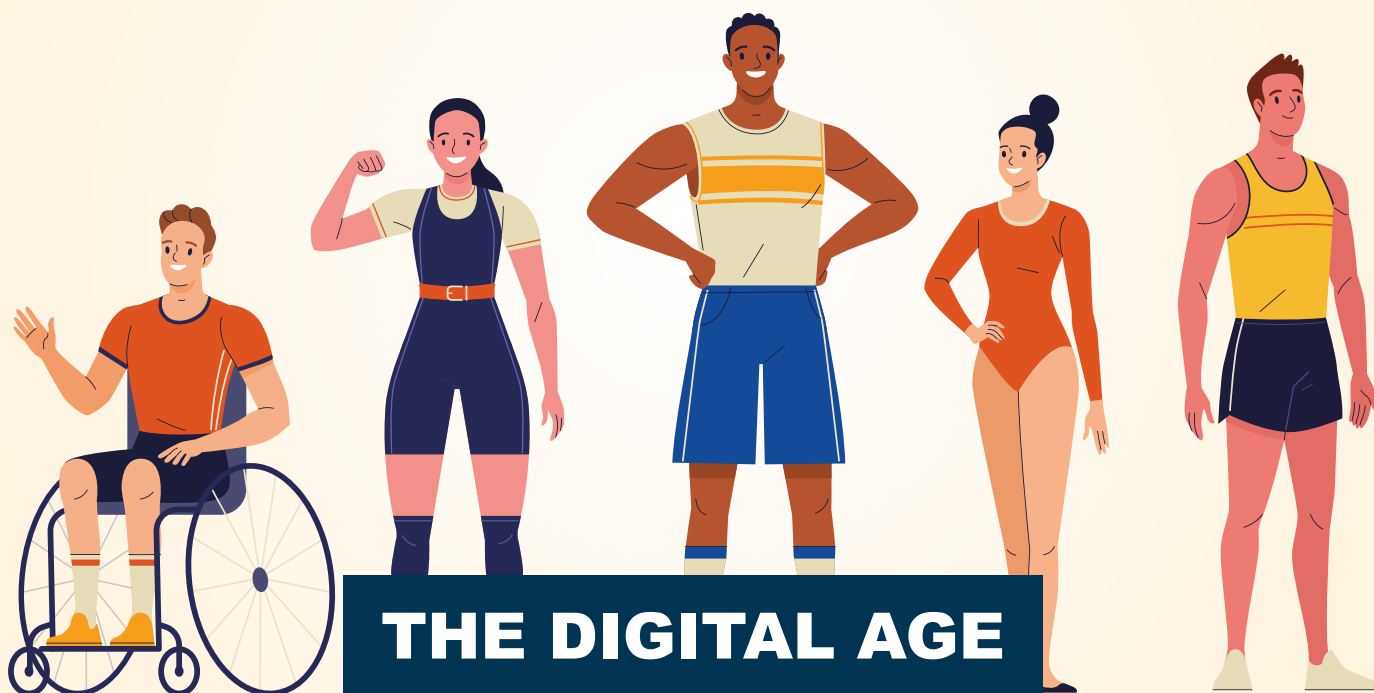


# SPORT STARS, INFLUENCERS & ENTERTAINERS TAX CONFERENCE:



Authored by: Yoshi Montgomery – ThoughtLeaders4

On 1st December 2022, ThoughtLeaders4 hosted its Sports Stars, Influencers & Entertainers Tax Conference for the Digital Age. This was a one-day event held at Gray's Inn, London, which is one of the four Inns of court in England and Wales. The history of Gray's Inn dates back at least 700 years to when the inn was described as a hostel being used by a learned society of lawyers. Today, Gray's Inn provides accommodation for legal practitioners, education opportunities for students and has several spaces available to hire. As Gray's Inn is a distinguished venue with a legal provenance, it was an obvious choice for a Thought Leaders 5 conference.

The conference was chaired by David Kilshaw who is the Managing Director and Head of Private Client Wealth Solutions at Rothschild & Co. Mr Kilshaw was a knowledgeable and lively chair who kept everyone engaged and

entertained throughout the sessions with a mix of humour and questions for the panellists. He began proceedings by asking the audience to put down their phones and pay attention to the speakers as it can be disappointing to look out into the crowd and see that your audience is not paying attention. You can imagine my chagrin given that my role for the day was to take notes on the conference, which I was doing on my phone.

***'My job is to help the professional services 'cogs' of my clients' lives turn smoothly. This often means coordinating and implementing the important, but sometimes mundane, aspects of my clients' lives, and doing this in a way***

***that is empathic to their worlds. This conference covered a really good range of technical topics relevant to the international lives of our sports professionals, artists and musicians, but also the softer side of client management. I appreciated this, as professional services and advice should be applied collaboratively, and in a way that connects to clients, to ensure that the best outcomes are reached and mistakes are not made'.***  
– Nic Arnold, Head of JTC Private Office UK

## Visiting Athletes and stars: Tax Issues for Entering and Leaving the UK



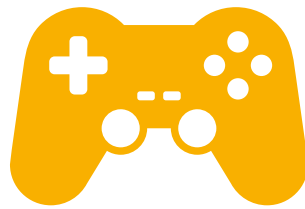
This presentation was given by Alex Jones, Partner at Rawlinson & Hunter who specialises in US/UK matters. Mr Jones's presentation covered several interesting points relating to how treaties and their encompassing definitions are interpreted.

Mr Jones began by asking the audience to remember the basics of tax when faced with professional athletes. In some cases, they may simply be employees of a company and nothing more for tax purposes. This should not be overlooked because the client is an entertainer.

Further to this point, there is no legal definition for entertainer or artist in US legislation. The OECD Model Tax Convention which acts as a handbook for countries applying bilateral tax conventions has definitions for these terms but in Mr Jones's experience, the US tends to ignore them. This may be a point of contention as one party tries to apply the law and another party argues that the law doesn't apply to them because they do not fit or accept the definition of an entertainer or artist. In the instance that a term does not have a legal definition, the natural use of the word should be applied. However, terms can be perambulatory, meaning they can their definition changes over time.

**Another point to consider is that UK legislation is literal: it says what it means and it means what it says. Conversely, US legislation means what Congress wants it to mean.**

In this case, one may need to consult Congress minutes from when a Bill was being debated to determine what was intended.



***In this digital age, it is also necessary to consider if people who play video games for a living, known as Esports athletes, should be classed as athletes and have their winnings taxed as such. Some have argued that Esports is a type of gambling but Mr Jones disagrees.***

He argues that the outcome of the game depends on the player's skill and knowledge rather than on luck. Additionally, Esports athletes are increasingly recruiting managers and coaches, and even training in dedicated Esports facilities much like a traditional sportsperson would. They are <https://www.graysinn.org.uk/app/uploads/2021/05/students.jpg> also competing in high stakes international tournaments which are professionally organised and have a sleek and polished presentation. This is a far cry from a recreational game one plays at home or a bit of one-off gambling for fun.

As ever, language is a living and evolving thing and legislation must evolve to reflect these changes. This is further compounded in a bilateral scenario where each government has a separate approach to how the law should be interpreted and implemented.



## Keynote: Inside the Mind of Entertainers, Musicians and Sportspeople

The keynote presentation was given by Stephen Daltrey, the founder of Stephan Daltrey Elite Coaching. Stephan Daltrey is trained in Client-Centred Therapy and Gestalt Psychotherapy. He has a Masters in coaching, 30 years of industry experience and over 10 000 hours of client contact.

While coaching and litigation are different professional fields, what a coach and a lawyer have in common, says Mr Daltrey, is that

***'our mutual aim [is to] build powerful, trust-based relationships that enable us to gain insight into the unique mind of our clients so we can empower them to make the best choices and decisions for themselves'.***

To this end, Mr Daltrey explained that both coaches and lawyers should show their clients empathy, acceptance and authenticity. Just as a tree needs soil, water and sunshine to grow, clients need empathy, acceptance and authenticity to feel safe discussing their issues and exploring the remedies. Additionally, according to the Client-Centred Model, the client does most of the work in coaching because each person is an expert on themselves. The coach or lawyer only acts as a facilitator to help their client determine what is right for them.

To create the ideal environment, begin by suspending your judgment of the client and focus on noticing what is going on with them, what is going on with you and what is going on around you. Ask open questions of your client and notice all their feedback including body language. Of course, all of this is easier said than done and it makes many hours of practice to master a skill; some say 10 000 hours.

The takeaway from this presentation was that understanding everyone's motivation rather than judging them by our beliefs is the key to establishing powerful, trust-based relationships with clients.

## Image Rights and IP Issues: A Play Book



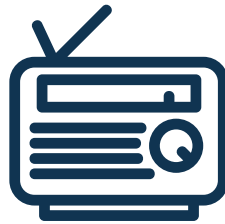
Following a refreshment break where I had a very nice lattice party with berry filling, it was time for a presentation on image rights and IP issues by Rupert Baldry KC, Barrister for Pump Court Tax Chambers. In this instance, 'image' refers to a person's goodwill or reputation rather than a specific depiction of them such as a photograph. Mr Baldry KC further went on to clarify that an image right is something an individual can exploit which is separate from their day job. This is the common understanding of image rights although there is no separate concept of 'image right' under English law although it is a much-discussed concept.

The key question tax advisors must ask themselves regarding image rights is, how do we differentiate between money earned from the day job and money earned for the ephemeral image? This is a complex question with many considerations including:

- Reputation isn't taxable but goodwill is.
- Goodwill is typically attached to a business, not an individual.
- The individual can operate as a sole trader and license their image to a company who exploits it.

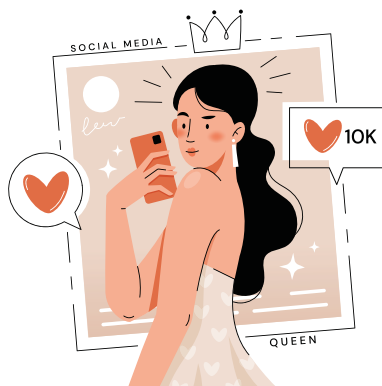
**While there is no specific legislation addressing image rights, if an individual feels their goodwill has been misappropriated or damaged, they can take legal action under the Tort of passing off.**

A good example of this is *Irvine v Talksport Ltd* [2003] EWCA Civ 423. Professional F1 Driver, Eddie Irvine had a photo of him doctored to appear as if he was listening to Talksport radio. The court ruled that Mr Irvine had exclusive right to his goodwill and that Talksport had misrepresented that goodwill. Furthermore, Talksport's actions had the potential to cause long-term damage to the market value of Mr Irvine's goodwill. The court ruled that Talksport had committed the tort of passing off.



There are two key takeaways from this session. Firstly, tax advisors must discern the difference between money earned from a day job and money earned from image rights. Secondly, there is no specific legislation to image rights although some elements of IP legislation may successfully address image rights.

## Tax Implications for Influencers and Social Media Stars



The following presentation by Thomas Chacko, Barrister at Pump Court Tax Chambers, also addressed the ambiguities of tax for present day celebrities with a focus on influencers and social media stars. Mr Chacko considered whether personal reputation and brand reputation can be separate concepts for internet celebrities whose careers revolve around the public following their day-to-day actions.

There are an increasing number of ways to make money from the internet. These include paid product placement in a post, pay-per-post when a brand pays an influencer to make a particular post endorsing their product, and subscriptions where consumers pay a fee to access exclusive content from the influencer.

***Tax advisors should first establish if their client's posts constitute a trade or a hobby.***

There are some instances where influencers post with the primary motivation of gaining attention. They may occasionally receive some payment or complimentary items, but this may not be their trade. In the matter of *Ransom v Higgs* [1974] 50TC1, Lord Wilberforce asserted that 'trade is a matter of degree, of frequency, of organisation, even of intention'. This guidance can help to establish if the client's online activities constitute a trade or a hobby.

***Another distinction to be considered is whether an expense is for business or for personal use.***

For example, in the case of *Christopher Huhtala v The Commissioners for HM Revenue and Customs*: [2011] UKUT 419 (TCC), Mr Huhtala argued that his boat and subsequent boating expenses were necessary business expenses for his work. He was writing a book about living on a boat in the south of France and living on a boat constituted research for his work. The court disagreed, finding that because Mr Huhtala already owned a boat prior to beginning work on this book, it was for personal rather than business benefit and its costs were not tax deductible.



This issue becomes more complex with social media stars who argue that their job requires them to be seen looking their best, wearing the latest fashions

and sporting the latest trends. While there is inherent personal benefit in these purchases, some social media stars will argue that they are portraying an online persona which is in fact separate to who they are as a private citizen.

The key issue visited by Mr Chacko is that the lines between personal and business brand are blurred. This is an evolving area of tax law which relies on several tests to satisfy if there is a distinction.

***‘Pump Court Tax Chambers made a very valuable contribution to the day and for me their analysis of key issues affecting the sports and entertainment industry were stand out. Rupert Baldry made light work of the complex issues relating to the taxation of image rights and explained the current case law and HMRC position with ease and insight. Thomas Chacko is clearly on top of the income and expenses issues for Influencers and his advice was very digestible’. – Liz Palmer, Partner, Head of Private Wealth, Howard Kennedy LLP***

## Crypto Asset and Digital Assets: Celebrity NFTs, Sports Tokens, Crypto



The next session was a panel discussion featuring Helen Siqin, Senior Manager at Andersen, Laura Knight, International and Crypto Tax Director and Ben Elliot, Barrister for Pump Court Tax Chambers. The panel began by defining a digital asset as anything that is stored digitally and can be used to realise value. Crypto is a form of digital asset and last year, Non-Fungible Tokens (NFTs) were the biggest form of digital asset.

Fungibility is an economic term that refers to the interchangeability of an item or the entirety of its parts to create a whole. For example, a £100 note can be exchanged for another £100. Both items have the same worth and perform the same function. Likewise, the £100 note could also be exchanged for two £50 notes or for 100 £100 coins. In both cases, the value and function of the money is the same.

An item is non-fungible if it is unique. For example, the value and function of the original Mona Lisa by Leonardo da Vinci is not equal or identical to a poster of the Mona Lisa. The original Mona Lisa is unique and cannot be exchanged or replicated. Likewise, an NFT is a unique digital asset.

***Due to the emergent nature of the NFT market, it is difficult to value or insure NFTs. However, the value of an NFT is not solely monetary. NFTs carry social value and convey a certain social status on their owner.***

According to Symbolic Interactionism which is a micro-sociological theory, humans attach meaning to different symbols. Individuals use these symbols to communicate something about themselves to others and this colours their social interactions. Brand logos, religious icons, regional accents, venues frequented and the assumptions we make of one another based on these signs are all examples of Symbolic Interactionism. At present, anything labelled ‘crypto’ is considered new, exciting and trendy. To own crypto currency is popularly perceived as a financial investment. To own an NFT for an artwork is seen as sign of culture.

The value of NFTs is also influenced by speculation. In financial terms, speculation refers to buying shares in the hopes that others will also buy these shares and drive the price up. If the speculation is correct, it creates a self-fulfilling prophecy where one investor sees another investor purchase these shares and follows suit believing the first investor had good reason for their purchase. Celebrities such as Paris Hilton, Reese Witherspoon and Snoop Dogg all own NFTs. As celebrities, they are pop culture influencers with a worldwide following. Their investment in NFTs has likely influenced buyers to follow suit with such numbers that it completed the self-fulfilling prophecy.



## Agents Fees and the Rule of the Game



The next presentation explored the issue of agents' fees in football when the agent represents both the club and an individual sportsperson. This presentation was delivered by Pete Hackleton, Partner at Saffery Champness.

Prior to 2008, agents could act on behalf of a player and a club to broker a deal. The Football Association (FA) argued this was a conflict of interest as the agent could not be acting in the best interest of both parties simultaneously. As such, the FA banned this practice. This ban was short-lived as the agents banded together to take the FA to court after which the FA relented and reversed this decision.

Association of Football Agents (AFA) spokesperson, Mel Stein, stated, "It is not in players' culture to pay agents, and having worked with them for 30 years I understand that mindset. If the agent helps to secure a deal for a club, then negotiates the player's salary package, why shouldn't he be paid by the club? There is no conflict of interest."<sup>1</sup>



From 2009 to 2017 onwards, an agent's contract requires them to state what their actions are and who they are providing services to. If an agent provided services for a club, this was considered a club cost, and the club

could recover VAT from this cost. If the agent was acting for a sportsperson, this was not considered a benefit in kind and resulted in a higher cost for the club. Finally, if the agent was acting on behalf of both parties, then both parties are taxed 50% for this service.

Between 2017-2021, it was common practice for the club to pay the agent's fees in full but for a percentage of this fee to be considered as being paid on behalf of the sportsperson who would then be taxed accordingly. During this time, if an agent was dually representing the club and the sportsperson, the fees payable were automatically assumed to be a 50/50 split between the two negotiating parties.

***In 2021, HMRC changed its position and issued new guidance as it felt the automatic 50/50 split could not accurately reflect the unique nature of each negotiation.***

In March 2021, HMRC issued guidance for clubs and sportspeople to keep records of initial discussions and final agreements in order to accurately calculate what percentage of the agent's service were directed to the club versus the sportsperson. Once this is established, the accurate amount of tax payable for each party can be calculated.

## Off-Payroll Rules, IR35 – The State of Play



The second panel of the day featured Adam Craggs, Partner at RPC, Robert Salter, Director at Blick Rothenberg and David Yates KC, Barrister for Pump Court Tax Chambers. This panel

covered the changes to IR35 legislation from its introduction in 1999 to recent court decisions.

Despite much talk of IR35, this is not a piece of legislation. IR35 stands for Inland Revenue 35 which was the number of a press release from the Chancellor in 1999 establishing a change in legislation relating to tax avoidance. Specifically, this legislation targeted individuals who labelled themselves as consultants rather than employees in order to pay reduced tax and national insurance.

***A significant update to this legislation was made in April 2021. From this time, public authorities and medium to large-sized clients are responsible for deciding the employment status of contractors. This stops individuals from policing their own IR35 obligations and puts this decision into the hands of a third party.***

Under these changes, the employer and HMRC ask themselves if the contact in question would be considered a contract for tax purposes were it not for the contract between the intermediary and the client. To determine this, HMRC recommend the use of the Check Employment Status for Tax (CEST) service.<sup>2</sup>

HMRC's interpretation was recently challenged in the Court of Appeal. In *HMRC vs Atholl House Productions Ltd* [2022] EWCA Civ 501, the Court of Appeal ruled that a freelancer's entire career should be considered when determining their employment status under IR35 legislation. This contrasts with HMRC's current approach which considers individual projects only. This decision potentially has further implications for HMRC's CEST service. It remains to be seen how HMRC will recalibrate their approach to IR35 following the Court of Appeal's decision.

<sup>1</sup> Conn, D 2009, 'Agents push for return to dual representation', *The Guardian*, 4 February, viewed 5 December 2022, <<https://www.theguardian.com/football/2009/feb/04/agents-premier-league-dual-representation>>

<sup>2</sup> Swanson, K and Reeve-Young S, 2021, 'The IR35 Reforms – introduction of the off-payroll working rules: 10 FAQs', Mayer Brown, 25 March, viewed 5 December 2022, <<https://www.mayerbrown.com/en/perspectives-events/publications/2021/03/the-ir35-reforms-introduction-of-the-off-payroll-working-rules-10-faqs>>

## Offside Drama and Disputes: Investigations and Crisis Management



The final panel of the day considered the merits of establishing rapport with HMRC if a client is under investigation. The panel consisted of Ben Elliott, Barrister for Pump Court Tax Chambers, Joe Burns, Associate Director at Grant Thornton and Morag Ofili, Senior Associate and Barrister for Harbottle & Lewis.

HMRC opened 270 inquiries into footballers in 2022 compared to 93 in 2021. This can partially be attributed to the wealth of information available

online about public figures. This can be a mix of information the individual has divulged via interviews and social media posts and articles written about them which may not always be accurate but are enough to draw HMRC's interest.

Tax advisors must first understand the nature of HMRC's enquiry because this will impact the approach the advisor takes and which branch of HMRC they deal with. Additionally, there is overlapping which means overlapping taxes such as VAT, employment tax and residency issues. Once the nature of the inquiry is understood, tax advisors should consider if their client will add value by being present in a face-to-face meeting with HMRC.

***Some clients may not understand or not be interested in their finances. If this is the case, they may not be an asset in a meeting with HMRC.***

The client may not make a good impression if they cannot follow the conversation or answer questions coherently. To avoid this scenario, it may be prudent for the tax advisor to first ask HMRC for an agenda for the meeting and to seek instruction from the client before representing them in a meeting.

If at all possible, try to establish rapport with HMRC by phone or face-to-face meeting. Sometimes, a matter can become entrenched through Email, while personal contact can foster a spirit of cooperation. Also, if a party is repeating themselves throughout these Emails, the subsequent value of each Email decreases. Tax advisors must be able to discern when open discussions with HMRC might be fruitful and when the matter has become entrenched.

