THE TAX IMPLICATIONS OF NON-RESIDENT SPORTSPERSONS PERFORMING AND EARNING AN INCOME IN SOUTH AFRICA

A thesis submitted in partial fulfillment of the requirements for the degree of

MASTERS IN COMMERCE (TAXATION)

of

RHODES UNIVERSITY

by

JACQUES WESSELS

December 2007

Abstract

As the number of non-resident sportspersons competing in South Africa increases so does the need to tax them more effectively. It was for this reason that the South African legislature decided to insert Part IIIA into the Income Tax Act which regulates the taxation of non-resident sportspersons in South Africa. The new tax on foreign sportspersons, which came into effect during August 2006, is a withholding tax placing the onus upon the organizer of the event to withhold the tax portion of the payment to the non-resident sportsperson and pay it over to the revenue services. The rate of taxation has been set at 15 percent on all amounts received by or accruing to a foreign sportsperson.

The question which the research addressed is whether this new tax will prove to be an effective tax, both from the point of view of its equity and the administration of the tax.

In order to determine the impact of the new tax, it was compared to similar taxes implemented in the United Kingdom and Australia and also to other withholding taxes levied in South Africa. The new tax was also measured against a theoretical model for effectiveness, compared to the pre-August 2006 situation and to the taxation of resident sportsmen and women, using hypothetical examples.

The major shortcomings of the new withholding tax are the uncertainty with regard to the intention of the legislature on matters such as the taxation of capital income versus revenue income, the question whether payments to support staff are included in the ambit of the new tax, the taxation of the award of assets in lieu of cash payments and the definition of a resident. A further area of concern is that the rate of taxation of 15 percent appears to be too low and creates horizontal inequity between the taxation of resident and nonresident sportspersons.

The new tax on non-resident sportspersons may have its shortcomings but, depending upon the administrative and support structures put in place to deal with it, will be an effective tax. The rate at which the tax is levied could result in a less tax being collected than before but, with the reduced administrative cost of tax collection, the *effective/statutory* ratio of the tax could well be much higher than it was. This is a new tax in South Africa and certain initial problems are inevitable and will undoubtedly be solved as the administrators gain experience and as the case law governing this tax develops.

Key Words

Taxation
Sportspersons
Non-residents
Withholding Tax

Table of Contents

CHAPTER 1: INTRODUCTION

1.1 Context

With the increase in the extent of professional sport in South Africa and in the number of foreign professional sportspersons arriving to compete here, the revenue produced by the sporting industry is increasing each year. Furthermore, as the revenue and income produced by professional sports increases, so does the demand for effective collection of taxes from this sphere of business.

The income tax due by resident sportspersons is calculated by applying the general income tax provisions of the Income Tax Act, 58 of 1962 (hereinafter referred to as the Income Tax Act) and appears to be relatively effectively administered by the Commissioner for the South African Revenue Services. The problem that arises, however, is the administration and effectiveness of tax collections from non-resident sportspersons visiting South Africa. Up to August 2006, their tax was calculated in terms of the usual non-resident rules. These rules provide that persons who are not residents as defined in the Income Tax Act are taxed solely on their income that is derived from a source within or deemed to be from within the Republic (Jordaan, Kolitz, Stein and Stiglingh, 2005). They were required to submit annual tax returns and, in the same manner as residents, were assessed on their taxable income earned from a South African source.

The tax liabilities of non-resident sportspersons in South Africa are often further governed by double tax agreements between South Africa and the country of their residence. The Organization for Economic Co-operation and Development (OECD) model treaty specifically refers to the collection of taxes from non-resident sportspersons in article 17 thereof. In terms of this article, the taxes of a sportsperson are to be levied in the country where their sporting activities are exercised. In the circumstances where there are no double tax agreements in place between South Africa and the country of the taxpayer's residence, a

measure of unilateral tax relief similar to that granted in South Africa by section 6*quat* of the Income Tax Act applies in most countries. In terms of this section a rebate is available against South African tax to the extent of any foreign tax paid in respect of the same income or subject matter (Huxham & Haupt, 2007). This relief in terms of section 6*quat* is only applicable to the income of South African residents which is also subject to foreign taxation. A similar, or some other relief measure, is available in most countries.

The Explanatory Memorandum on the Revenue Laws Amendment Bill (2005: 35) reveals that:

> It is an internationally accepted practice that foreign entertainers and sportspersons are liable for income tax in the specific countries in which they perform. South Africa's ability to collect this tax is not as effective as it should be due to numerous practical constraints. One of the main contributors to these constraints is the short period of time for which the non-resident entertainer or sportsperson is physically present in the country. Any failure by South Africa to collect this tax is, in effect, an erosion of its tax base in favour of the countries of residence of the visiting entertainers or sportspersons. These countries are likely to impose tax on the income of the visiting entertainers or sportspersons without the need to give credit for the tax that should have been paid in South Africa.

Further complications also arise from the need to determine whether a sportsperson is a resident or a non-resident, as defined in the Income Tax Act and related court decisions, which are fairly complex in their interpretation of residency. Residency, for tax purposes, has no link to citizenship and is based on two principles (in terms of the definition of "resident" in section 1 of the Income Tax Act): whether a person is "ordinarily resident" in South Africa, or the number of days a person is physically present in South Africa. International sportsmen and women may have homes in several countries and determining where they are "ordinarily resident" may be very complex matter. It is also relatively easy to circumvent the "days present" test. This tends to blur the distinction between resident and non-resident sportspersons.

It is as a result of these constraints and complications that in his 2005 Budget Speech Finance Minister, Trevor Manuel, proposed that all income earned in South Africa by non-resident sportspersons and entertainers would be subject to a withholding tax. This proposal was included in the Revenue Laws Amendment Bill of 2005 and later inserted as Part III A of the Income Tax Act by the Revenue Laws Amendment Act No. 31 of 2005. Section 47K of the Income Tax Act requires the organizer of the sporting event to inform the Revenue Services of the proposed sporting event within fourteen days of signing the deal. The event organizer is then required to withhold fifteen percent of the foreign sportsperson's payments that are due to him or her, as a final withholding tax to be submitted to the Revenue Authorities in terms of section 47D. One of the implications of this being a final tax is that the taxpayer will not be required to file an income tax return. In the event of there being no organizer for the sporting event, section 47C places the onus upon the sportsperson who earned the income to furnish the Commissioner with the amount of tax which is leviable under Part IIIA of the Income Tax Act. Where there is no organizer of a sporting event, it would appear that the problem of tax collection may still exist. The relatively easy means of payment and low rate at which the withholding tax is levied, may help to combat the problem of non-compliance, however.

The effectiveness of a tax can be measured against certain criteria (Williams, 2001). These measures are briefly set out below:

1) Equity and fairness

   Two schools of thought define this principle. The first states that tax will be fair or equitable if the tax is levied proportionately to a person's ability to pay the tax. The second school of thought is that, if it is levied against those people who benefit from the expenses incurred by the State, it will fair and equitable.

2) Certainty

   This measure determines whether the tax is clear and easy to understand.

3) Efficiency

   This measure can either measure political or administrative efficiency. Political efficiency is obtained when the tax does not cause resentment between taxpayers. Administrative efficiency is achieved when for each rand that is collected only a small portion thereof is spent on administering and collecting the tax.

4) Neutrality

   A neutral system is one where the tax impact on the economy is minimal.

5) Flexibility

   This criterion would be present when the rates of tax can be easily modified to account for the fluctuations in the economic cycles.

The effectiveness or ineffectiveness of the withholding tax is the subject of the research, and it was measured against these criteria. An analysis was made of other withholding taxes implemented by the South African Revenue Services (referred to as SARS) to attempt to gauge the effectiveness of the tax on foreign sportspersons. A comparison was also made between the South African withholding tax and that of other international jurisdictions, specifically Australia and the United Kingdom, which have been used as the basis of our system.

With the withholding tax being a final tax and being calculated on all the amounts received by or accrued to the taxpayer, the research also endeavours to compare the effective tax implications of a non-resident sportsperson being taxed under the new legislation with a non-resident sportsperson being taxed in terms of the previous legislation. The difference is that with the withholding tax, the rate of fifteen percent is applied to the entire amount received without taking into

account any deductions or exemptions, whereas in the previous system the rate at which the sportsperson was taxed was calculated by using a sliding scale up to a marginal rate of forty percent on his or her "taxable income" as defined in section 1 of the Income Tax Act. This calculation of "taxable income" would then take into account the deduction of allowable expenditure and other tax allowances.

1.2 Goal of the research

The main focus of the research was to analyse the new withholding tax for foreign sportspersons and compare the tax effect with the previous tax provisions, compare the tax applying to foreign sportspersons and local sportspersons and assess whether it is likely to be an effective and practical method of collecting and administering such taxes.

1.3 Research methodology

The general tax rules contained in the Income Tax Act, relating to the taxation of foreign sportspersons earning income in South Africa, previously and presently in force were analysed, as well as the effect of double tax agreements. The opinions of various authors, academics and professionals were also analyzed, including related court decisions.

The research also uses hypothetical examples aimed at illustrating the difference between the new dispensation and the old, residence based method of calculating tax liabilities of foreign sportspersons.

In order to measure the effectiveness the new withholding tax it was assessed using a theoretical framework for effectiveness and compared with the models used in Australia and the United Kingdom.

As the literature-based and tax collection data are in the public domain there are no ethical considerations that need to be taken into account.

1.4 Overview of the research

Chapter 2 sets out the provisions of the Income Tax Act as they applied to both local and foreign sportspersons prior to August 2006 and also the provisions of the new tax on foreign sportspersons. The chapter also briefly discusses the provisions of section 6quat and certain double tax agreements entered into by South Africa.

Chapter 3 proceeds to compare the new tax in South Africa to the tax on foreign sportspersons in the United Kingdom and Australia. A comparison is also made with certain other withholding taxes implemented by the South African Revenue Services. This chapter also attempts to identify any possible problem areas with the new tax on non-resident sportspersons.

Chapter 4 measures the relative effectiveness of the new tax on foreign sportspersons, against the criteria of the theoretical model for effectiveness. Hypothetical examples are also used to illustrate the difference between the taxation of the income of foreign sportspersons in terms of the new tax in comparison with the old, pre-August 2006, tax rules and also in comparison with local sportspersons.

In the concluding chapter a summary of the research findings is set out together certain recommendations relating to the new tax. Possible further fields of research are also identified. A brief overview of the new legislation relating to the taxation of sports clubs is given, as well as the concessions to be granted with regard to the 2010 FIFA World Cup that is to be held in South Africa.

CHAPTER 2: THE LEGISLATION

2.1. Introduction

In order to understand the situation with regard to the taxation of sportspersons prior to August 2006 and how it relates to the new legislation introduced, this chapter will discuss the provisions of the Income Tax Act as they previously applied to both resident and non-resident sportspersons, the double tax agreements entered into between South Africa and certain other countries and section 6*quat* of the Income Tax Act, as well as the provisions of the new tax on foreign sportspersons.

2.2. The situation prior to August 2006

Prior to the introduction of the withholding tax all sportspersons, whether they were resident or not, were taxed in terms of the normal rules relating to residents and non-residents as set out in the Income Tax Act. These rules of taxation are set out below.

2.2.1. Gross income

The starting point of any tax calculation is the determination of a taxpayer's "gross income". Section 1 of the Income Tax Act defines "gross income" as follows:

> Gross Income, in relation to any year or period of assessment, means-
>
> (i) in the case of a resident, the total amount, in cash or otherwise, received by or accrued to or in favour of such resident; or
>
> (ii) in the case of any person other than a resident, the total amount, in cash or otherwise, received by or accrued to or in favour of such person from a source within or deemed to be within the Republic,
>
> during such year or period of assessment, excluding receipts or accruals of a capital nature...

Once "gross income" has been defined certain adjustments are made in order to establish a taxpayer's final taxable income. These adjustments are the deduction of exempt income (sections 10 and 10A of the Income Tax Act), the deduction of certain deductions and allowances (sections 11-19 and 23 of the Income Tax Act respectively) and the addition of taxable gains in terms of capital gains tax legislation (section 26A and Schedule 8 of the Income Tax Act).

The various elements of the "gross income" definition are discussed in further detail below.

a) Total amount:

In the case of *Lategan v CIR* 1926 CPD 203, 2 SATC 16, the court held that the term "amount" included "not only money, but the value of every form of property earned by the taxpayer, whether corporeal or incorporeal, which has a money value". It was further confirmed in the case of *CIR v People's Stores (Walvis Bay) (Pty) Ltd* 1990 (2) SA 353 (A), 52 SATC 9 that the amount must either consist of money or of property that that the taxpayer can turn into money. Sportsmen and women are often the recipients of equipment and sports clothing. The value of these items must therefore, in terms of the above cases, be included in their gross income.

b) In cash or otherwise:

In terms of this second element the amount received or accrued must be in the form of cash or otherwise. The amount received therefore does not have to have an ascertainable monetary value as long as it can be converted into money or have money's worth (Williams, 2001). This principal was confirmed in the case of *CIR v Delfos*, 1993 AD 242, 6 SATC 92.

c) Received by or accrued to

As opposed to the first two criteria this element relates mainly to the period or tax year in which the "gross income" arises (Huxham & Haupt, 2007). As is evident from the "gross income" definition in the Income Tax Act the amount

will be included if it is either received by or accrued to the taxpayer. This does not give the taxpayer the option to select the time which is most convenient for him or her to include the amount in his or her "gross income". In the case of *SIR v Silverglen Investments (Pty) Ltd*, 1969(1) SA 365(A), 30 SATC 199 the court held that the amount is to be assessed by the Receiver of Revenue during the year that it is either received or accrued, hence the earlier of the two. The court did, however, determine that taxpayers who work on a cash basis only, may continue to do so.

The court, in the case of *Geldenhuys v CIR*, 1947(3) SA 256 (C), 14 SATC 419, held that the words "received by" meant "received by the taxpayer on his own behalf for his own benefit". It must be pointed out however that not every physical receipt of money or money's worth is regarded as having been received by the taxpayer for the purposes of "gross income". This was confirmed in *CIR v Genn & Co (Pty) Ltd*, 1955 (3) SA 293 (A), 20 SATC 113, where borrowed money, even though it was physically received, did not qualify as a receipt for these purposes, since the moment it was received an obligation was created to refund the money. A distinction must, however, be drawn between the situation referred to above and the situation where a taxpayer fraudulently charges a customer more than he is entitled to. In this case the amount received would fall within his "gross income" as it would have been received by virtue of a contract (Huxham & Haupt, 2007). In the sporting world this could possibly occur when a sportsperson is not entitled to partake in any professional sporting events in a certain country as a result of visa constraints, but continues to do so illegally. The income earned as a result would be included in his "gross income". The receipt of funds for match fixing and illegal activities is discussed below.

The term "accrued to" was defined in the case of *Lategan v CIR* as meaning entitled to. This definition was extended in the case of *Ochberg v CIR* 1933

CPD 256, 6 SATC 1, where the court stated that this entitlement had to be unconditional prior to the amount falling within the "gross income" definition.

The taxpayer is also obliged to include the full value of any amount that he has become entitled to during a certain tax year in gross income even though the amount will only become payable during a future period. Therefore the taxpayer will not be entitled to discount any future payments to determine their present value when calculating his gross income (Williams, 2001).

d) Capital Receipts

This component of the gross income definition relates to the exclusion of receipts and accruals of a capital nature. The Income Tax Act does, however, specifically include certain capital receipts and accruals in the definition of gross income. As is the case with most of the elements of the gross income definition the Income Tax Act does not give guidance in defining the meaning of "receipts and accruals of a capital nature" and, as a result, one has to turn to judicial precedent for assistance.

All receipts must be categorized as either a receipts of a capital or revenue nature but, as was pointed out in the case of *Tuck v CIR*, 1988(3) SA 819 (A), 50 SATC 98, a single receipt may have elements of both an income and capital nature (Jordaan et al,2005). In *CIR v Visser* 1937 TPD 77, 8 SATC 271, the relationship between capital and income was likened to that of the relationship between a tree and fruit, where the former was related to the capital and the latter the income. It must, however, be pointed out that this is an over-simplified analogy as "trees" are not in all circumstances the capital (Williams, 2001).

In the majority of cases it is reasonably obvious whether a receipt or an accrual is of a capital or revenue nature. The problem, however, arises in certain instances, where the distinction is not straight forward. The most

important test used by the courts in determining whether or not a receipt or accrual is of a capital nature, is that of intention. The court will seek to establish the taxpayer's subjective intention, taking into consideration certain objective factors in order to establish the taxpayer's true intention (Jordaan et al, 2005). The onus of proof in terms of section 82 of the Income Tax Act is upon the taxpayer to prove that a receipt or accrual is of a capital nature and therefore not taxable (Huxham & Haupt, 2007). The question whether the receipt of prizes or betting gains by sportspersons amounts to a capital or revenue is discussed in further detail below.

As the research problem and the type of income likely to be earned by sportspersons does not require it, further discussion of receipts and accruals of a capital nature will not be dealt with in this thesis. Certain of the specific inclusions set out in paragraphs (a) to (n) of the gross income definition are listed below and will be discussed in further detail in the paragraphs to follow. The amounts relating to these inclusions would form part of the taxpayer's gross income despite the fact that they may be of a capital nature. These inclusions are:

- Annuities
- Payments for services rendered
- Restraint of trade payments
- Lump sum benefits, arising from variation of office
- Pension, provident, and retirement annuity fund benefits in terms of the Second Schedule
- Pension and provident fund surpluses
- Know-how payments
- Fringe benefits.

At this point certain types of income that could be earned by a sportsperson will be discussed briefly and the tax implications of each will be analyzed.

a) Salaries and wages

Any salary or wage that is received or receivable by an employee falls within the definition of "remuneration" in terms of the Fourth Schedule of the Income Tax Act. In terms of this Schedule employees' tax is to be withheld by the employer from any remuneration received or receivable by the employee and is to be paid over to the South African Revenue Services (Jordaan et al, 2005). Should a non-resident receive remuneration from a source within the Republic the non-resident would also be subject to the deduction of employees' tax in the same manner as a resident employee would (Jordaan et al, 2005).

b) Match fees and incentives

Any match fees received would be included in the taxpayer's gross income. This is as a result of paragraph (c) of the gross income definition in section 1 of the Income Tax Act. In terms of this paragraph, should the match fee not qualify in terms of the general definition of gross income, it would nevertheless be included in the sportsperson's gross income solely for the reason that it is received in respect of services rendered. The fact that the amount could be of a capital nature is made irrelevant by paragraph (c) of the definition (Huxham & Haupt, 2007).

c) Sponsorships and endorsements

Any sponsorships or endorsements received by sportspersons would be included within the sportsperson's gross income, once again, in terms of paragraph (c) of the gross income definition as mentioned above. This is as a result of the sponsorship or endorsement agreement, in most cases, being drafted or concluded on the understanding that the sportsperson is to perform the specified activity in order to receive a benefit under the agreement.

The receipt of sporting equipment from a sponsor could be included in a sportsperson's taxable income. The fact that paragraph (c) does not exclude capital receipts from the gross income would seem to indicate that the receipts of these goods would be included in the gross income. The fact that the goods are not received from the sportsperson's employer would indicate that the receipt could not fall within the fringe benefits as set out in the Seventh Schedule of the Income Tax Act. Should it be found that the receipt of these goods falls outside the scope of paragraph (c), they might very well be included in terms of the general definition of gross income as set out in section 1.

The case of *Lace Proprietary Mines Ltd v CIR*, 1938 AD, 9 SATC 349 gives an indication as to how the taxable benefit will be determined should the sportsperson received receive sporting equipment from his or her sponsor. In the case in question one company disposed of certain rights to another company for £250,000. This amount was paid by the allotment of 1,000,000 shares of the nominal value of 5s in the purchasing company. At the time of the transaction the market value of the shares were 12s per share. The question that was asked was what amount was to be included in the taxpayer's income? Was it the £250,000 agreed upon as a purchase price, or was it the 1,000,000 shares at 5s per share, or finally was it the shares at 12s per share? The court held that the true consideration was the 1,000,000 shares at market value, 12s per share, and not the £250,000 or 1,000,000 shares at 5s per share.

As is clear from the above case the value that would be placed on any non-cash asset received or accrued to a sportsperson as "income is the open market value thereof on the date of acquisition (accrual) of the asset" (Jordaan et al, 2005: 13).

d) Appearance fees

Should a sportsperson be paid for appearing at an event either for just being there or as a guest speaker he or she would be required to include the amount in

gross income in a similar fashion as would be the case with match fees, that is in terms of paragraph (c) of the gross income definition, if it does not qualify in terms of the general definition of gross income in section 1.

Based upon the case of *Lace Proprietary Mines* discussed above, should a sportsperson receive free accommodation at a luxury hotel purely for participating in an event or for attending a function, the market value of the accommodation would be included within his or her gross income in a similar manner as any other form of payment.

e) Prizes

The taxation of the receipt of prize money or winnings by a sportsperson is largely dependant upon whether the amount is classified as a receipt or accrual of a capital or revenue nature. In order to determine this, the intention of the taxpayer with regard to this receipt is of paramount importance. Should the sportsperson be an amateur sportsman or woman who only partakes in the sport as a hobby then any prize money received would be classified as being of a capital nature and not be included in the sportsperson's gross income. However, should the sportsperson be a professional and then proceeds to win a tournament or competition the amount would be deemed to be of a revenue nature. This would be because it can only be assumed that the taxpayer's intention in competing would be to win a prize, therefore a scheme for profit making, and would be closely connected with his or her income producing activities.

f) Sports betting

The taxation of any funds received by a taxpayer, whether he or she is a sportsperson or not, in respect of betting income or gambling is once again dependent on whether it is classified as being of a capital or revenue nature. In

practice the South African Revenue Services (SARS) includes betting gains in gross income if betting activities are carried on systematically. However, if the betting is merely a pastime or used as a means of entertainment, SARS generally does not tax the individual. SARS have also in practice decided that bookmakers are liable for normal tax if the betting forms part and parcel of their business (Jordaan et al, 2005).

g) Match fixing and illegal activities

The receipt of funds by a sportsperson for illegal activities would be largely dependent upon the nature of the activity in determining whether the amount would be taxable. In the case of *CIR v Delagoa Bay Cigarette Company*, 32 SATC 47, 1918 TPD 391 it was stated that the legality of the income is irrelevant in determining the tax liability on the income in question. The key element in determining whether the amount received can be included in the taxpayer's income is whether the amount was received "on his own behalf or for his own benefit" (Jordaan et al, 2005: 14). Having taken the above into account, funds received in circumstances such as match fixing or other illegal activities, would be included in the sportsperson's gross income. A true life example would be the moneys received by Hansie Cronje from the bookies for giving match information to them. These funds would have been included in his taxable income even though his actions were illegal.

The question of taxability of illegal income is an area in the South African tax law which is still uncertain (Goldswain, 2005).

2.2.2. Residence

Since January 2001 South Africa has used a residence-based income tax system. The general effect of using a residence-based system of taxation is that South African residents will be taxed on their worldwide income. Non-residents

will, however, only be taxed on the income from a South African source or a source deemed to be within South Africa.

The effect of this would be that sportspersons who have places of residence in more than one country would be taxed in South Africa on their global income earned if they are classified as South African residents or alternatively, if they are not classified as South African residents, on the income from a South African source or deemed South African source. Therefore it would be irrelevant where the sportsperson lives, if he or she is a South African resident he or she will be taxed in terms of South African law on all their income. However should a taxpayer settle and create their residence in a tax haven then they will only be taxed in South Africa on the income from a South African source, subject however to any double tax agreements between the countries.

Section 1 of the Income Tax Act defines the term "resident" in relation to a natural person as follows:

Any 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-

a. for a period 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

b. for a period or periods exceeding 915 days in aggregate during such five preceding years of assessment:

in which case that person will be a resident with effect from the first day of the relevant year of assessment.

Provided that-

(A) a day shall include part of a day, but shall not include any day that a person is in transit through the Republic between two places outside the Republic and that person does not formally enter the Republic through a 'port of entry' as contemplated in section 9(1) of the Immigration Act 2002

(Act No. 13 of 2002), or at any other place in the case of a person authorized by the Minister of Home Affairs in terms of section 13(2)(c) of that Act; and

(B) where a person who is a resident in terms of this subparagraph is physically outside the Republic for a continuous period of at least 330 full days immediately after the day on which such person ceases to be physically present in the Republic, such person shall be deemed not to have been resident from the day on which such person ceased to be physically present in the Republic;

but does not include any person who is deemed to be exclusively a resident of another country for the purposes of the application of any agreement entered into between the governments of the Republic and that other country for the avoidance of double taxation.

Based on the above definition it is clear that there are two ways in which an individual can be a resident of the Republic: either by being ordinarily resident or in terms of the physical presence test.

A subjective test will be applied in determining whether an individual is "ordinarily resident". In the case of *Cohen v CIR* 1946 AD 174, 13 SATC 362, the court defined the words "ordinarily resident" as follows:

> His ordinary residence would be the country to which he would naturally and as a matter of course return from his wanderings; as contrasted with other lands it might be called his usual or principal residence and it would be described more aptly than other countries as his real home.

Being "ordinarily resident" is a question of fact that will need to be determined in each case (Williams, 2001). The Commissioner has set out certain factors that should be taken into account when determining whether a taxpayer is "ordinarily resident". Interpretation Note No. 3, which assists taxpayers in understanding certain terminology in the Tax Act and also assists in setting out the legislature's intention at the time of drafting the provisions, lists the following factors:

- Most fixed and settled place of residence

- Habitual abode, that is, present habits and mode of life
- Place of business and personal interest
- Status of the individual in the country, that is, immigrant, work permits, periods, conditions, etc.
- Location of personal belongings
- Nationality
- Family and social relations
- Political, cultural or other activities
- Application for permanent residence
- Period abroad, purpose and nature of visits
- Frequency and reasons of the visits.

A natural person who does not qualify as being "ordinarily resident" in South Africa can nevertheless be "resident" if he or she complies with the requirements of the "physical presence" test. This test will apply only to persons who are not "ordinarily resident" within the Republic during the current year of assessment but were physically present within South Africa -

(i) for a period or periods exceeding 91 days in aggregate during the current year of assessment; and

(ii) for a period or periods exceeding 91 days in aggregate during each of the five years of assessment preceding the current year of assessment; and

(iii) for a period or periods exceeding 915 days in aggregate during the five years of assessment preceding the current year of assessment.

It is important to note that the 91 and 915 days referred to in the Income Tax Act do not have to run continuously.

An individual who is a resident as a result of the physical presence test will become a resident from the first day of the year of assessment that the requirements are met. However, a person will be deemed not to be a resident (if he is a resident in terms of the physical presence test) if he is physically outside

the country for a continuous period of at least 330 full days immediately after the day he ceases to be physically present in South Africa. The person concerned will then be deemed not to be a resident from the day that he stopped being physically present in the Republic (Huxham & Haupt, 2007).

2.2.3. Source

The "gross income" definition in section 1 of the Income Tax Act clearly states that gross income includes, in the case of non-residents, the total amount, in cash or otherwise, received by or accrued to or in favour of such person from a *source* within or deemed to be within the Republic.

As is clear from the above taxpayers who are not residents as defined in the Income Tax Act are subject to tax on their income that is derived from a source within or deemed to be within South Africa. The word "source", as with many phrases in the Income Tax Act, is not defined in the Income Tax Act and therefore guidance as to the meaning of the word has been provided by the courts. In the case of *CIR v Lever Bros & Unilever Ltd* 1946 AD 441, 14 SATC 1, the court stated that by the word "source" is meant "the originating cause" and that solving the problem would involve an inquiry into two matters:

1. What is the originating cause of the income?
2. Is the originating cause within South Africa?

As there is no apportionment of source in South African law it is necessary to determine the dominant or main cause in order to determine in which country the source of the income lies (Jordaan et al, 2005). The court in ITC 1104 (1967) 29 SATC 46, has further confirmed that in the case of services rendered the source of the income earned would be the services themselves. Not taking into account the provisions of double tax agreements, the source of income of non-residents participating and earning an income from sport in the Republic would be South Africa. The place of payment or the place where the contract of employment was concluded would become irrelevant (Williams, 2001). Therefore should an

Australian cricket professional conclude a contract in Australia to assist a South African cricket franchise for a period of time and he renders his services within South Africa he would be deemed to be earning an income from a South African source regardless of the fact that he signed and concluded his contract with the franchise in Australia. Double tax agreements do, however, as a general rule, entitle the country in which the sportsman or woman is participating to tax the non-resident sportsperson in that country.

In addition to the normal source rules set out above section 9 of the Income Tax Act deems certain types of income to be from a South African source. This section is not relevant for the purposes of this research.

It is important to remember that the concept of "source" is only relevant in so far as determining the taxable income of non-residents. The relevance of the term "source" could also further be limited by double tax agreements which could be in existence between the Republic and the country of the taxpayer's residence. Once these double tax agreements have been ratified the provisions are, in terms of section 108, as effective as if they have been incorporated into the Income Tax Act. (Huxham & Haupt, 2007). As a result of this the double tax agreements take precedence over national source rules.

2.2.4. Exempt income

The Income Tax Act defines "income" in section 1 as "gross income" less any amounts which are exempt from normal tax. Therefore the amounts that are exempt from normal tax do not form part of a taxpayer's taxable income (Williams, 2001).

The most important exemptions are set out in sections 10 and 10A of the Income Tax Act.

It is important to note that payments made out of income which is exempt in the hands of the payer (for example a sports club) do not remain exempt in the hands of the person who receives such a payment.

It should also be noted that if an amount does not form part of income as defined (gross income, less exempt income), no expenses relating to such income may be claimed in terms of section 11(a). This section will be discussed below.

Exemptions are divided into partial and absolute exemptions. Partial exemptions only apply to particular receipts and accruals because of the nature of the income whereas absolute exemptions apply to all receipts and accruals of an entity because of the nature of the entity (Jordaan et al, 2005). The new tax exemption in relation to the income of non-resident sportspersons is discussed below.

2.2.5. Deductions

The next step in calculating the taxpayer's taxable income is to deduct from income (gross income, less exempt income) all amounts allowed as tax deductions in terms of the Income Tax Act.

Most of the deductions are set out in sections 11 to 18A and section 23 of the Income Tax Act. Section 11(a) read together with section 23(g) set out what is known as the "general deduction formula" in terms of which most deductions are allowed. The remainder of section 11 and through to section 18A contain the majority of the specific deductions.

The preamble to section 11 reads as follows:

> For the purpose of determining the taxable income derived by any person from *carrying on any trade*, there shall be allowed as deductions from the income of such person so derived ... (own emphasis)

As is evident from this introduction no person may claim any deduction in terms of section 11 unless they are carrying on a trade.

The term "trade" is defined in section 1 and can be summarized as follows:

> 'Trade' includes every profession, trade, business, employment, calling, occupation or venture, including the letting of any property and the use of, or the grant of permission to use any patent, or any design or any trade mark, or any copyright, or any other property which is of a similar nature.

It is obvious that the term trade covers a very wide spectrum of activities, but that there are certain activities that fall outside the scope of the definition. Of these activities which appear to fall outside the meaning of trade would be the earning of "passive" income such as pensions and investments made in various securities (Huxham & Haupt, 2007). It also seems to be clear that a professional sportsperson would be carrying on a trade and any income earned would fall within the definition of "gross income" and any expenses would be incurred in respect of a trade.

General deduction formula

The general deduction formula is set out in section 11(a), which sets out the positive test, and section 23(g), which stipulates what may not be deducted.

The general deduction formula can be broken down into the following elements:

- Expenditure and losses

  There seems to be uncertainty as to whether there is actually any difference between expenditure and losses. In the case of *Joffe & Co (Pty) Ltd v CIR*, 1946 AD 157, 13 SATC 354, the court stated that possibly losses were of an involuntary nature.

  Whether or not there is any difference between the two terms does not seem to be a significant problem (Huxham & Haupt, 2007).

- Actually incurred;

The Income Tax Act used the words 'actually incurred' and not 'necessarily incurred'. Therefore provided the expense has been incurred, whether or not it was necessary, would suffice for this element of the general deduction formula (Jordaan et al, 2005).

The case of *Caltex Oil (SA) (Pty) Ltd v SIR* 1975 (1) SA 665 (A), 37 SATC 1, the court held that for expenditure to have been actually incurred does not require it to be actually paid during the year of assessment, but means all expenditure for which a liability has been incurred during the year, whether the liability has been discharged during that year or not. This point was further emphasized in the case of *Edgars Stores Ltd v CIR* 1988 (3) SA 876 (A), 50 SATC 81, where it was held that taxpayer had to have an unconditional obligation to pay and that, in that case, the amount was therefore not deductible.

- During the year of assessment;

Any deductions in terms of section 11(a) are made in the tax year that the expense was 'incurred', irrespective of when the expense was actually paid (Williams, 2001).

- In the production of income;

The next requirement in order to qualify for a deduction is that the "expenditure or loss" must have been incurred "in the production of income". Hence, any expenditure incurred in the production of exempt income will not qualify as a deduction under the general deduction formula (Williams, 2001).

The *Port Elizabeth Electric Tramway Co Ltd v CIR*, 1936 CPD 241, 8 SATC 13, sets out two questions that need to be asked when determining

whether an expense is "in the production of income". The first question is what gave rise to the expense? The follow-up question is then, is this action closely connected with the income earning activities of the taxpayer (Jordaan et al, 2005)?

The final point regarding this element is that the expense does not need to relate to the production of actual income. This was confirmed in the case of *Sub-Nigel Ltd v CIR*, 1948 (4) SA 580 (A), 15 SATC 381, where the court held that all that was required was that the expenditure was incurred for the purpose of producing income and the mere fact that an income was not produced did not prevent the expense from being deducted (Huxham & Haupt, 2007).

- Excluding expenditure and losses of a capital nature;

In order to qualify as a deduction in terms of the general deduction formula the expense or loss should not be of a capital nature. Once again, the Income Tax Act does not define the meaning of the term and as a result there are a number of judicial decisions defining the meaning. No standard rule has been formulated and one is required to consider each set of facts in order to determine whether the expenditure or loss is of a capital nature (Jordaan et al, 2005).

Over the years the courts have developed a number of tests to indicate whether expenses are of a capital or revenue nature. These tests should not be seen as hard and fast principles. This was emphasized in the judgment of Watermeyer CJ in the case of *New State Areas Ltd v CIR*, 1946 AD 610, 14 SATC 155:

> The conclusion to be drawn from all these cases seems to be that the nature of each transaction must be enquired into in order to determine whether the expenditure attached to it is capital or revenue expenditure. Its true nature is a matter of fact and the purpose of the expenditure is an important factor; if it

> is incurred for the purpose of acquiring a capital asset for the business it is capital expenditure even if it is paid in annual installments; if, on the other hand, it is in truth no more than part of the cost incidental to the performance of the income producing operations as distinguished from the equipment of the income producing machine; then it is a revenue expenditure even if it is paid in a lump sum.

The various tests applied by the courts to assist in determining whether an expense is of a capital or revenue nature will now be briefly discussed.

The first test is to determine whether the expense has a close connection to the income producing structure or a close connection to the income generating operations. This is a test that should hold out in most cases. This test was applied in *New State Areas Ltd v CIR*. The question to be asked in this test is: Was the purpose of the expenditure in order to create or enhance or improve the taxpayer's income earning structure? If the answer is positive, then the expenditure is of a capital nature and not deductible.

The second criterion that the courts use in determining the deductibility of an expense is the distinction between fixed and floating capital. In *New State Areas Ltd v CIR* Watermeyer CJ made a distinction between two types of capital expenses, floating and fixed capital expenses. Floating capital expenses were held to be deductible whereas fixed capital expenses were held to be non-deductible (Jordaan et al, 2005). In the case of *CIR v George Forest Timber Company Ltd*, 1924 AD 516, 1 SATC 20, the distinction between the two types of capital expense was held to be that floating capital expenses were consumed and disappeared in the process of production, whilst fixed capital expenses produced fresh wealth whilst remaining intact (Williams, 2001).

The next test, the once-and-for-all test, is not in itself a criterion for characterizing an expense as being of a capital or revenue nature but can be used as a relatively accurate indicator. The test, in brief, as set out in the case of *Vallambrosa Rubber Co Ltd V Farmer*, 1965(2) SA 551 (A), 27 SATC 61, states that if an expense is recurring or periodic then it is of a revenue nature, while a non-recurring expense is of a capital nature (Williams, 2001).

The fourth test used by the courts as a criterion for determining the nature of an expense is the "enduring benefit test" (Williams, 2001: 299). The test states that if an expense brings about an asset or advantage for the enduring benefit of a trade then the expense ought to be of a capital nature. A problem with this test is what 'enduring' means. Would it mean eternity or would ten years suffice? Once again the deciding factor is a subjective one. Depending on the nature of the asset, the enterprise and the benefit, the degree of permanence required would differ (*CIR v African Oxygen Ltd* 1963 (1) SA 681 (A), 25 SATC 67). Once again this test is "not an exhaustive definition but only a useful guide" (Williams, 2001: 299).

These are the four main tests that the courts would apply in determining the nature of an expense. As has been pointed out above, each case would need to be decided on its own set of facts in order to accurately determine the nature of the expense.

- If amounts are incurred as a deduction against income derived from a trade, they must, either in part or in full, constitute moneys that are laid out or expended for the purpose of a trade.

Section 23(g) of the Income Tax Act sets out the negative portion of the general deduction formula. This should be read together with section 11(a)

when the deductibility of an amount is being determined. Section 23(g) prohibits the deduction of any expenses or losses derived from trade, to the extent that they were not laid out or expended for the purposes of trade (Jordaan et al, 2005).

A central issue in determining the deductibility of an expense in terms of section 23(g) is the purpose with which the expense was incurred. If the taxpayer's purpose in incurring the expense is for reasons of commercial expediency or in order to facilitate the carrying on of the taxpayer's trade then, irrespective of whether the taxpayer expects to make a profit or not, the requirements of section 23(g) would be met (Williams, 2001).

In addition to the provisions of section 23(g) the remainder of section 23 sets out a list of prohibited deductions. Some of the sub-sections more appropriate to sportspersons' earnings are:

- Private maintenance expenses (section 23(a));
- Domestic or private expenses (section 23(b));
- Expenses incurred to produce exempt income (section 23(f)).

Special deductions

In addition to the deductions allowed in terms of the general deduction formula, sub-sections 11(bA) to 11(w) set out certain special deductions. Section 11(x) also brings within the ambit of the section all other deductions allowed in terms of any other provision in Part 1 of the Income Tax Act.

The purpose of these special deductions is not to restrict deductions but to permit deductions that would not ordinarily fall within the scope of the general deduction formula because they are of a capital nature or because they cannot satisfy the restrictive test that expenditure must be incurred in the production of income (Jordaan et al, 2005).

Section 23B provides that an amount may only be deducted once should it qualify under more than one provision of the Income Tax Act. The section furthermore sets out that should a deduction qualify in terms of the general deduction formula and under a special deduction then the amount must be deducted in terms of the special deduction even though it might limit the amount deducted (Huxham & Haupt, 2007).

2.2.6. Capital allowances and recoupment

The general deduction formula as set out above specifically excludes expenses of a capital nature. The Income Tax Act does,however,include special provisions in terms of which certain capital allowances can be deducted. These capital allowances are essentially a write off of the cost of a capital asset over a certain period of time (Huxham & Haupt, 2007).

Save for the wear and tear allowance discussed below, these allowances will not be discussed any further.

A number of possible expenses incurred by a sportsperson will now be discussed together with the deductibility of these expenses from the taxpayer's gross income.

a) Travel and accommodation

If these expenses are incurred in the production of income then they would be classified as being deductible. It is however contended that any expenses incurred in travelling from one's place of residence to place of business are not permitted as a deduction as they private expenses and prohibited in terms of section 23(b) of the Income Tax Act (Jordaan et al, 2005).

It is also held that where these expenses are incurred for both private and business purposes that the business portion of the expense of may be claimed as a deduction in terms of section 23(g) (Jordaan et al, 2005).

It therefore seems that if the sportsperson is travelling to a certain destination to compete that those expenses and also the accommodation expenses would be deductible. The uncertainty lies with the deductibility of the expenses of the sportsperson that are incurred in travelling from the hotel or accommodation to the place of the competition. Would the hotel be considered to be his or her "home" while in South Africa? Based on this, it appears that the cost would not be deductible.

b) Insurance

Insurance premiums in respect of loss of or damage to assets have generally been permitted as deductions under section 11(a) of the Income Tax Act. This has even been the case where the assets insured are of a capital nature. The reason for this is that the premiums are considered to be of a revenue nature in that they are recurring expenses and closely linked to the taxpayer's income earning structure. Premiums in respect of the insurance of the sportsperson's loss of profits are also deductible (Williams 2001). Therefore any premiums in respect of a policy paying out in the event of the sportsperson getting injured or not being able to participate in a competition would be deductible.

Insurance premiums where the taxpayer is insuring his own life are not deductible as they classified as private or domestic expenses. Specific "key-man" policies are specifically governed by section 11(w) of the Income Tax Act and will not be discussed further.

c) Payments to support staff

Any payments to support staff would be deductible if they are incurred in the production of income. Therefore any salary paid to a manager, trainer or physiotherapist would be deductible from the sportsperson's income. The only concern which could possibly arise is in the case where the Commissioner is of the opinion that the amount paid is excessive and in this case only the

portion that actually relates to the trade, hence the reasonable amount, would be deductible.

A further situation that may occur is that the sportsperson may give, for example, the support staff in his employ certain goods or equipment or give them free tickets to an event. In these circumstances the provisions of Seventh Schedule of the Income Tax Act, dealing with fringe benefits, would come into force. These benefits given to the support staff would be deductible from the sportsperson's income to the extent that there was cost incurred in providing the fringe benefit. Therefore should the sportsperson be given the free tickets and they are then given to the support staff, there would be no tax deduction for the benefit given (Huxham & Haupt, 2007).

In the case where the relationship between the sportsperson and the support staff is not classified as an employer-employee relationship the expenses of the sportsperson will be deductible in so far as they are regarded as being part of his or her income producing activities.

d) Equipment

The question relating to the deductibility of the expenses incurred in connection with the purchase of sporting equipment really revolves around the issue of whether the expense was of a capital or a revenue nature. Despite the various tests set out above each case will need to be evaluated on its own set of facts and circumstances. The purchase of different types of equipment can be treated in a substantially different manner, depending on the circumstances in each case. For instance the purchase of table tennis balls may very well be classified as a deductible expense whereas the purchase of a racing car will be classified as a non-deductible capital expenditure.

In the circumstances where the expenses are not permitted as a deduction as a result of their capital nature the Income Tax Act contains certain sections in terms of which so-called capital allowances may be deducted (Huxham & Haupt, 2007).

Section 11(e) of the Income Tax Act makes provision for a taxpayer to deduct from his or her income an amount that the Commissioner may feel is reasonable representing the amount by which the value of the equipment has diminished as a result of wear and tear. This allowance would also be available to the taxpayer in the situation where he or she has not paid for the asset, where for instance the asset was donated to or was obtained under a sponsorship deal by the sportsperson. In these circumstances the taxpayer will have to place a reasonable value on these assets for the purpose of calculating the wear and tear allowance (Jordaan et al, 2005). SARS goes further in Practice Note 19 by stating that small tools or equipment may be deducted in their entirety during the year of their acquisition. The Practice Note states that a small tool is an asset that does not cost more than R5,000 and does not form part of a set (Jordaan et al, 2005).

A further allowance that is permitted, in terms of section 11(d) of the Income Tax Act, is that of the cost of repairing business assets. In order to qualify as a deduction in terms of section 11(d) there must have been an expenditure that actually occurred during the year of assessment for the purpose of repairing the equipment used by the taxpayer for the purposes of his or her trade. The Income Tax Act gives no definition for the term "repair". It must, however, be noted that a repair is different from a renewal or an improvement. The former refers to a reconstruction of the entirety and the latter refers to the creation of a better asset (Huxham & Haupt, 2007). An example of a repair would be a racing car driver replacing or fixing a broken fender whereas the addition of a technologically advanced rear wing onto the

car where the existing wing has nothing wrong with it would not be classified as a repair.

e) Medical expenses

Section 18 of the Income Tax Act allows a taxpayer who is a natural person to deduct from his income certain qualifying medical expenses:

- Contributions to a qualifying medical aid scheme
- Amounts that are paid to doctors, dentists, physiotherapists, etcetera, for professional services rendered
- Amounts paid to a hospital or nursing home for confinement or illness
- Amounts paid to a pharmacist for medication obtained by means of prescription
- Payments made outside the Republic in respect of medical services or medicines.

Any amount claimed as a deduction must be reduced by the amount received or recovered from the medical aid to which the taxpayer belongs (Huxham & Haupt, 2007).

There are certain limitations to the deductions which may be claimed for medical expenses.

- If the taxpayer is over 65 years old there is no limit.
- For taxpayers under the age of 65 there are two limits:
    - Where there is a handicapped family member as defined in section 18(3): in this instance if the taxpayer, spouse, child or stepchild is handicapped then there is no limit to the amount that the taxpayer may deduct.
    - Where there is no handicapped family member: in this case the deduction is available for monthly medical aid deductions up to R530 for the taxpayer, plus R530 for the first dependant and R320 for each additional dependant, less any employer contributions that are not considered to be a fringe benefit. The

deduction is also available for any qualifying medical expenses to the extent that they exceed 7.5 percent of the taxpayer's taxable income for the year of assessment, before this deduction (section 18 of the Income Tax Act).

f) Fines

The deduction of expenses relating to the payment of fines by a sportsperson can be a contentious issue. The reason for this statement is that certain fines imposed on sportsmen and women are not the result of any illegal activity on their part. An example of this is the captain of a cricket team being fined for a slow-over rate during a test match. The tax treatment of this type of fine should be very different to the treatment of a fine imposed because the sportsperson used illegal performance enhancing drugs.

The general rule implemented by SARS is not to allow the deduction of fines attached to the unlawful acts of the taxpayer. This has been confirmed by section 23(o) of the Income Tax Act which prohibits the deduction of any expenditure incurred

> which constitutes a fine charged or penalty imposed as a result of an unlawful activity carried out in the Republic or in any other country if that activity would be unlawful had it been carried out in the Republic.

The reasoning behind this is that SARS are of the opinion that by allowing the fine as a deduction from the taxpayer's income would frustrate the legislative intent and allow the punishment to be diminished (Jordaan et al, 2005). This principle was confirmed in the case of ITC 1490 (1990), 53 SATC 99. Whether it was actually SARS's intention to prevent the deduction of fines which are in actual fact part of the taxpayer's income producing activities and not illegal *per se* is doubtful.

An example of sportspersons' fines that would fall within the ambit of section 23(o) as mentioned above would be those set out in section 15 of Prevention and Combating of Corrupt Procedures Act 12 of 2004. In terms of this Act any person who gives or receives any gratification in return for engaging in an act which undermines the integrity of any sporting event or influencing the run of play or outcome of a sporting event, is guilty of an offence. Similarly, the person who does not report the act to the relevant sporting body or police station is also guilty of an offence. Finally, the individual who carries into effect the scheme which undermines the sporting code in question will also be guilty of the offence of corrupt activities relating to sporting events. The penalties imposed in terms of section 26 include both fines and prison sentences. Should a sportsperson be found guilty of an offence under this Act and be penalized by a fine, the fine would not be deductible from his or her gross income for tax purposes.

g) Donations

Donations would as a general rule not qualify as a deduction from the sportsperson's income tax as a result of the capital nature thereof. Donations would also generally attract donations tax, which is levied in terms of sections 54 to 64 of the Income Tax Act and which will not be covered in this thesis.

An individual is, however, permitted in terms of section 18A to deduct any donation made to a public benefit organization or an organization as set out in Part II of the Ninth Schedule. This deduction is, however, limited to 10 percent of the taxable income of the individual before any deduction in terms of this section and the deduction of medical expenses discussed above (section 18A of the Income Tax Act).

A situation that could arise in the sporting sphere is that a sportsperson donates all or part of his or her prize money or fee to a charity or organization. This would often be the case where a sportsperson is granted a benefit year

by the sporting code in question. In these cases the income received would generally fall within the sportsperson's gross income. In the case of *CIR v The Witwatersrand Association of Racing Clubs,* 1960(3) SA 291(a), *23 SATC 380* the court held that any amount received by the taxpayer which he or she is obliged to remit to another person is nevertheless received by the taxpayer and should be included in his or her gross income. The fact that the sportsperson disposes of these funds a minute after they have been received by him or her will not result in the sportsperson avoiding the amount being included in his or her gross income.

There are limited circumstances where sportspersons can antecedently divest themselves of the income before it accrues. This was confirmed in the Transkei case of *Moodie v CIR, Transkei and Another, 55 SATC 164,* 1993(2) SA 501 (TKA). The South African case of *CIR v Cape Consumers (Pty) Ltd, 61 SATC 91* also confirmed that this was possible. In this case the taxpayer never received the funds for its own benefit but for the benefit of its buyers and accordingly there was no prior receipt or accrual.

Therefore it is vital that should sportspersons wish to divest themselves of the income that they are intending to donate, they should ensure that a contract is drawn up stating that all the proceeds would be for the account of the entity to whom the funds are being donated to and that the sportsperson is merely acting as an agent of that entity.

h) Losses – theft of equipment

In the situation where a sportsperson suffers a loss as a result of the theft of any of his or her sporting equipment no deduction will be allowed as the loss will be classified as being of a capital nature (Jordaan et al, 2005).

Section 11(o) provides the sportsperson with the election to claim an allowance in respect of the disposal of depreciable capital assets. In terms of

this section an allowance is claimable in respect of assets that qualify for a wear and tear allowance under section 11(e) and that have been sold, lost or destroyed during the year of assessment. The allowance, which is at the election of the taxpayer, would be the difference between the cost of the asset to the taxpayer less the amount received for the disposal of the asset and also any allowance, such as the section 11(e) allowance, granted in respect of the asset during the current year and any previous year of assessment.

A problem with the application of the section 11(o) allowance to professional sportspersons is that in most instances they would not have purchased the assets or equipment and hence the cost to them would have been zero, as they would probably have been sponsored.

i) Legal expenses

Sportspersons are very likely to incur legal expenses during their careers with regard to either some form of legal action instituted or defended or for the legal costs of drafting a contract, to give two examples. Should the expenses in question qualify as a deduction in terms of the general deduction formula then they can be deducted under section 11(a) as being in the production of income. There may be certain cases where legal expenses are not deductible under section 11(a) but may be deductible under section 11(c).

The section 11 (c) deduction relates to any legal expenses that have actually been incurred in respect of a claim, action, dispute or action at law that are incurred in the course of the ordinary operations in the carrying on the trade. These expenses, to be deductible, may however not be of a capital nature.

No legal expenses incurred which are of a capital nature will be deductible, under either sub-sections 11(a) or (c). Legal expenses incurred with the aim of obtaining an enduring benefit for the sportsperson would be classified as a

capital expense and therefore not deductible. It is therefore important to draw a distinction between legal expenses which are incurred in the creation of a right to receive income, which will not be deductible, and expenditure that is incurred in the actual earning of the income, which would be deductible (Jordaan et al, 2005).

2.2.7. Summary

Prior to August 2006 all sportspersons were taxed in terms of the general provisions of the Income Tax Act as set out above. The difference in the taxation of a resident and a non-resident sportsperson was that non-residents were only taxed on only their income from a South African or deemed South African source whereas residents were taxed on their world-wide income. Other than this, both residents and non-residents were taxed in terms of the same basic taxation principles.

2.3. Section 6*quat*

This section of the Income Tax Act would apply where no bilateral tax relief in terms of a double tax agreement applies (or where the taxpayer elects to use it) and is aimed at providing unilateral relief against double taxation, by allowing as a rebate against South African tax, any foreign tax paid in respect of the same income. This rebate is, however, limited to the South African tax arising from the foreign income (Huxham & Haupt, 2007). Section 6*quat* is further limited to South African residents only. A foreign sportsperson becoming resident in terms of the "days present" test could claim this rebate.

The rebate is deductible from the South African tax that would otherwise be payable. It applies when the resident's income includes, amongst others, any income received by or accrued to him from a source in a country other than South Africa and that is not deemed to be from a source within the Republic (Jordaan et al, 2005). In terms of section 6*quat* (1A) the rebate is equal to the sum of foreign taxes payable by the South African resident. These foreign taxes

must be proven to be payable, without any right of recovery, to any sphere of government of any country other than the Republic. The amount on which these taxes are calculated must also relate to an amount which is included in the resident taxpayer's South African income (Jordaan et al, 2005).

In terms of section 6*quat* (1B) the maximum amount available for the rebate is limited to an amount that bears to the total normal tax payable the same ratio as the total taxable income from foreign countries bears to the total taxable income.

Where the sum of the taxes payable to the foreign government exceeds the rebate, the excess may be carried forward to the following year and is deemed to be taxes paid to a foreign government in that year and can then claimed as a rebate (Huxham & Haupt, 2007). These excesses may be carried forward for a maximum period of seven years (Huxham & Haupt, 2007).

A basic example illustrates this section: Mr Smith is a South African resident. During the tax period in question his South African taxable income amounted to R200 000. Mr Smith also received a further R100 000 of income from a foreign country. He paid R40 000 tax in the foreign country on the income earned there. Mr Smith's South African tax would be computed as follows:

Income:		
SA Income		R200,000
Foreign Income		R100,000
Total Income		R300,000
Tax on R300,000 (South Africa)		R79,000
Section 6*quat* rebate:		
Foreign tax	R40,000	
Limited to 100/300 x R79,000	R26,333	
Less: s6*quat* rebate		(R26,333)

Less: primary rebate (s6)	(R7,200)
South African Tax	R45,467

The tax rates that are used are those applying for the year of assessment ending February 2007.

R13 667 (R40 000 – R26 333) would be carried forward to the following tax year as the balance of the foreign tax paid but not claimed under section 6*quat.*

Subsection (2) of section 6*quat* states that the taxpayer cannot use this rebate in addition to any relief granted in terms of a double tax agreement. The taxpayer is further entitled to make a choice as to whether he would like to rely upon relief in terms of section 6quat or whether he would like to rely on a double tax agreement. Interpretation Note no. 18 (31 March 2003) further states that should the taxpayer fail to make an election the provisions of section 6*quat* will be applicable (Huxham & Haupt, 2007).

Non-residents would have to rely on the provisions of a double tax agreement, where there is one, or on a unilateral relief provision provided in their own country of residence, similar to the section 6*quat* provision in South Africa, as discussed above.

2.4. Double tax agreements

Double tax agreements are entered into between two countries to prevent, mitigate or discontinue the levying under the laws of South Africa and those of the other country, of taxes relating to the same income, profits, gains or donations and also to assist with the rendering of reciprocal assistance in the administration and collection of taxes in terms of the laws of the Republic or of the other country in question (section 108(1) of the Income Tax Act). Double taxation is often caused by the two countries having different bases of taxation. These bases of taxation are divided into two types; residence based tax and

source based tax. In South Africa a taxpayer is taxed on his or her world wide income, therefore the residence based method of taxation is applied. The result of this is that an individual could be resident in another country that relies upon the residence based method and earns income from rentals on a property in South Africa. The effect of this would be that the taxpayer would pay tax in the foreign country as a result of his residence and also in the Republic as a result of the source of the income being in South Africa. The "days present" test could also result in a taxpayer being taxed on the same income in both the country in which he or she is ordinarily resident and in the Republic of South Africa.

There are generally two types of relief from double tax. Firstly, there is unilateral relief, where a country will grant tax relief to the taxpayer for the tax that he has already paid, as in the case of section 6*quat* discussed above. The second method of relief is that of bilateral relief. In this case the two countries enter into a double tax agreement to provide relief from double tax (Jordaan et al, 2005). The authority to enter into double tax agreements to regulate the taxation of income, profits, gain and donations which may be taxable in both countries is given to the National Executive by section 108 of the Income Tax Act.

Most of the agreements entered into by South Africa are based on the model convention of the Organization for Economic Co-operation and Development (herein after referred to as the OECD) (Huxham & Haupt, 2007). Articles one to five of the OECD model cover the general information and definitions of the double tax agreement. Issues such as the persons and taxes covered by the agreement and also the definitions of a person, residence and permanent establishment are covered here. The agreement then deals with the treatment of various types of income. The most relevant article in the OECD model for the purposes of this thesis is article 17, which states:

1. ...income derived by a resident of a Contracting State as an entertainer, such as a theatre, motion picture, radio or television artiste, or a musician, or as a

sportsman, from his personal activities as such exercised in the other Contracting State, may be taxed in that other State.

2. Where income in respect of personal activities exercised by an entertainer or sportsman in his capacity as such accrues not to the entertainer or sportsman himself but to another person, that income may be taxed in the Contracting State in which the activities of the entertainer or sportsman are exercised.

As is clear from this, the country in which the sportsperson engages in sporting activities is the country which may impose the tax. South Africa, however, does not have agreements with all countries.

2.5. The new tax on foreign sportspersons

As a result of impracticalities involved in collecting taxes due by non-resident sportspersons, the Minister of Finance announced in his 2005 Budget Speech that all income earned by non-resident sportspersons in South Africa would be subject to a 15 percent withholding tax. This proposal was included in the Revenue Laws Amendment Bill of 2005 and thereafter inserted as Part IIIA of the Income Tax Act by the Revenue Laws Amendment Act 31 of 2005. This section came into operation from the beginning of August 2006. The new tax on foreign entertainers and sportspersons is discussed in further detail below.

The term "entertainer or sportsperson" is defined in section 47A as any person who for reward:

a) performs any activity as a theatre, motion picture, radio or television artist or a musician;
b) takes part in any type of sport; or
c) takes part in any activity which is usually regarded as of an entertainment character. [own emphasis]

2.5.1. Imposition of the tax

Section 47B states that a taxpayer who is not a resident of the Republic must pay "the tax on non-resident sportspersons and entertainers" in respect of any amount received or accrued for any specified activity that is exercised or that is to be exercised by that person. The term "specified activity" is also defined in section 47A as any personal activity exercised in the Republic or to be exercised by a person as an entertainer or sportsperson, whether alone or with any other person [own emphasis]. Therefore any foreign sportsperson who performs within South Africa must pay a tax on any amount received for performing in the Republic, whether in an individual capacity or as a member of a team.

The impact of the phrases emphasised in these definitions is that:

- Persons engaging in sporting activities for amusement or as a hobby would be excluded from the provisions of the sections by virtue of the fact that the activity must be engaged in "for reward". There must therefore have been an intention to obtain some form of reward.

- To be subject to the provisions of the withholding tax, a person must take part in any type of sport. This appears to exclude the activities of support staff who do not take part in the sporting event itself. In addition, the "specified activity" to which the tax applies is a personal activity exercised by the person as a sportsperson; therefore not a person participating in a sporting event as a member of the support team of a sportsperson.

The tax applies in respect of any amount received by or accrued to any person who is not resident in the Republic in respect of any specified activity.

The word "amount' is not defined and it would appear to be subject to the judicial decisions relating to the term "amount" in the definition of "gross Income" in section 1 of the Income Tax Act – that is, amounts in cash or otherwise, provided

a monetary value can be attributed to the goods or services received by the sportsperson. This means that the new tax is applicable to all receipts, including money and the value of every form of property earned by the sportsperson, as long as it has a monetary value (*Lategan v CIR)*. This would include the value of any asset (for example, sports equipment or clothing) received by the sportsperson.

The onus would be on the person organising the event in respect of the award of an amount in a form other than cash, to assign a value to the award in order to calculate the tax owing and to pay it over to the Revenue services. The tax is recoverable from the sportsperson in terms of section 47D. The sportsperson would have to repay the tax to the event organiser in cash, which may pose a cash-flow problem.

The use of the words "received by" or "accrued to" may also give rise to certain problems. The tax may be payable when the amount accrues, before it is actually paid to the sportsperson. The organiser of the event may have to pay the tax due before the end of the month following the month in which it was "deducted" (section 47E). If the tax is payable on accrual, it has not yet been deducted. It would appear that the organiser of the event would have to pay the tax on behalf of the sportsperson out of his or her own resources.

The Income Tax Act excludes from the ambit of the withholding tax any person who, in the ordinary course of events, qualifies as a non-resident, but is employed by an employer who is resident in the Republic and the person is physically present within South Africa for a period or periods exceeding 183 full days in aggregate during any twelve month period commencing or ending in the year of assessment during which the activity in question is exercised. Therefore, should a South African squash club employ a British coach for a season and the season is longer than six months, or more specifically 183 days, then the coach

would be taxed in terms of the normal tax rules as discussed earlier and not in terms of the new withholding tax on non-resident sportspersons and entertainers.

Section 47B(1) provides that the sportsperson is a "taxpayer" for the purposes of the withholding tax. Where the organiser of the event does not withhold the tax, or where there is no organiser of the event, the sportsperson is liable to pay the tax. Section 47B(2) provides that the tax is a "final tax". This implies that the taxpayer (sportsperson) would not submit a return of income for the purpose of assessment (although he or she would have to submit a return in terms of section 69). The taxpayer (or the resident organiser of the event) is required to submit a return in terms of section 47F, but this is not for the purpose of assessment by the Commissioner. The possible effect of this is that, if the sportsperson wishes to dispute the value placed by the organiser of the event on an award in the form other than cash, he or she cannot object or appeal in terms of section 81 of the Income Tax Act. Section 77(3) of the Income Tax Act provides for a notice of assessment to be issued by the Commissioner to the taxpayer. An "assessment" is defined in section 1 of the Income Tax Act as "the determination by the Commissioner, by way of notice of assessment . . . –

(a) of an amount upon which any tax leviable under this Act is chargeable; or

(b) of the amount of such tax . . ."

As no notice of assessment is given to the sportsperson and the tax is a final tax, no objection can be lodged.

The tax on foreign entertainers and sportspersons is levied at a rate of 15 percent on all the amounts received by or accrued to the taxpayer. The tax of 15 percent will also be applicable on all amounts received by or accrued to the taxpayer. This would mean that the taxpayer will not be given the opportunity to deduct any expenses from these amounts prior to the levying of tax thereon.

2.5.2. Liability for payment of tax

The foreign sportsperson would be required to pay the tax to the Commissioner within thirty days of receipt or accrual of the amount earned by him. The taxpayer will not, however, be liable for the payment of the tax should the tax be withheld or deducted from the amount paid to him in terms of section 47D.

The Income Tax Act places an obligation on a resident who is liable to pay the amount to the foreign sportsperson to withhold or deduct from the amount paid to the foreigner such amount equivalent to the tax due by such non-resident sportsperson. In these circumstances the taxpayer is, however, deemed to have received this amount withheld or deducted.

The resident is, in terms of section 47E, required to pay the amount withheld or deducted on behalf of the foreign sportsperson to South African Revenue Services before the end of the month following the month during which the amount was deducted. Together with this payment the resident is required to submit a return in a form and containing any information as required by the Commissioner.

A further instance where the foreign sportsperson would not be liable for the tax is in the circumstances where the tax has been recovered from the organizing resident. Section 47G states that a resident is personally liable for the payment of the tax if the resident either failed to deduct or withhold the amount required from the payment to the non-resident, or if the amount was deducted by the resident but was not paid over to the Commissioner.

For example, should Tiger Woods enter and win a golf tournament in South Africa, the amount taxed in terms of the new tax on foreign entertainers and sportspersons would be fifteen percent of the amount received or accrued to him. If the amount accruing to Tiger Woods is R1 million, then the withholding tax would amount to R150 000. If the tournament is organized by a non-resident then

the obligation and liability would lie primarily with Mr Woods and he would be required to pay the amount over to the Revenue Authorities within thirty days after the amount had been received by or accrued to him. However, should the amount payable be the liability of a South African resident (possibly the organizer of the event) then there would be an obligation on the resident to withhold the tax and pay it over to the Commissioner by the month following the month that the amount was withheld or deducted. The resident would also then only have paid an amount of R850 000 over to Mr Woods. It is important to note that the tax is calculated on the million Rand and not on the million Rand less any deductions.

The taxpayer or foreign sportsperson may not recover from the resident organizer any amount that has been paid over to the Commissioner on his behalf in terms of section 47E. The resident may however recover from the sportsperson any amount paid over to the Commissioner for which the sportsperson was liable.

2.5.3 Notification to the Commissioner

The South African resident who is responsible for founding, organizing or facilitating the sporting activity in South Africa and who will be rewarded, either directly or indirectly, for the founding, organizing or facilitating, must inform the Commissioner of this activity.

This notification, in terms of section 47K, must be given to the Commissioner within fourteen days after the agreement relating to the founding, organizing or facilitating of the activity has been concluded. This resident may also need to supply the Commissioner with any details relating to the activity and agreement as may be required by the authorities.

2.5.4 Other matters

Section 47I provides for the applicability of the provisions of the Income Tax Act under Chapter III, to the withholding tax. This includes:

- Section 75, which provides for penalties on default, including in respect of any person who . . .
    - (aC) fails to deduct or with hold and amount of tax on foreign . . . sportspersons or pay any amount deducted or withheld over as contemplated in sections 47D and 47E; or
    - (aD) fails to inform the Commissioner of any specified activity . . .

- Section 75A relating to the publishing of names of offenders also applies in respect of the tax on foreign sportspersons.

- Section 76, which provides for additional tax in the case of default, applies to the tax on foreign sportspersons, as do sections 78 and 79, which make provision for estimated and additional assessments.

- Sections 80A to 80L, which provide for the general anti-avoidance rules.

- Section 89, which provides for the payment of interest on the late payment of any tax due.

- Section 104 which provides for penalties and offences in relation to persons who, with intent, evades or assists any person to evade assessment or taxation.

<u>An agent of a sportsperson</u>

Section 95 subjects a representative taxpayer in all respects to the same duties, responsibilities and liabilities, as if the income to which he is entitled in his representative capacity was received by or accrued to him beneficially. A "representative taxpayer" as defined in section 1 of the Income Tax Act includes

the agent of any person. The withholding tax would therefore also apply where a non-resident sportsperson has an agent who is resident within the Republic.

2.5.4 Exemption

One further amendment to the Income Tax Act was made by the insertion of paragraph (*l*A) into section 10 of the Income Tax Act. This amendment exempts from normal tax any amount that is received by or accrued to a non-resident sportsperson or entertainer if the amount is subject to the tax on non-resident sportspersons and entertainers provided for in Part IIIA of the Income Tax Act.

2.6 Conclusion

This chapter has discussed the income tax provisions relating to the taxation of sportspersons, both in respect of residents and non-residents. The tax regime prior to the introduction of the new tax on non-resident sportspersons and entertainers as well as the new provisions, were discussed.

The taxation of resident sportspersons has remained unchanged and they are still taxed in terms of the normal rules of taxation. The taxation of foreign sportspersons has, however, changed quite substantially as a result of the coming into effect of the new Part IIIA of the Income Tax Act. A further consideration that has been discussed above and that should always remain in the forefront of any taxpayer's mind is the effect of double tax agreements and section 6*quat* of the Income Tax Act.

In the next chapter the tax implications for foreign sportspersons in South Africa as discussed above will be compared to the provisions that apply in Australia and the United Kingdom. The withholding tax will also be compared to other withholding taxes levied by the South African Revenue Services.

CHAPTER 3: THE TAXATION OF SPORTSPERSONS IN THE UNITED KINGDOM AND AUSTRALIA

3.1. Introduction

The previous chapter provided a detailed discussion of the South African tax provisions relating to sport and sportspersons, including the new tax applying to foreign sportspersons.

In an attempt to identify whether the new sections 47A to 47K of the Income Tax Act are reasonable and appropriate pieces of legislation this chapter will discuss and compare the provisions relating to the taxation of non-resident sportspersons in the jurisdictions of the United Kingdom and Australia with the position within the Republic. The chapter will also compare the withholding tax on foreign sportspersons with other withholding taxes levied by the South African Revenue Services, in an attempt to identify any consistencies or inconsistencies with regard to the levying of withholding taxes. This chapter will further attempt to identify any possible problem areas surrounding the tax on non-resident sportspersons after having taken into account the tax in the various other jurisdictions and other withholding taxes.

3.2. Foreign jurisdictions

3.2.1. The position in the United Kingdom

3.2.1.1. Overview

During 1987 the revenue authorities in the United Kingdom stated (section 555 of the Income and Corporation Taxes Act 1988(c.1)) that any person who is situated within the United Kingdom (the payer) is required to:

- Deduct income tax at the basic rate from all payments made to the non-resident sportsperson (the payee). These payments include those made by the payer either directly to the payee or to a company controlled by the payee. The Revenue Authority also has the discretion to withhold the tax

in certain circumstances calculated at a lower rate than usual (Broke, Tiley, Hubbard, and Wolf, 1997).

- If the payment is made in terms an asset that is transferred to the payee the payer is to determine the cash value the asset. Once this has been done the payer is to treat that amount as the net sum from which tax has already been deducted, and account for the tax due on the grossed up figures (Broke, Tiley, Hubbard, and Wolf, 1997).
- Then finally the payer is to send to the Revenue a return of payments made to the payees within a return period, together with payment of any tax deductible within 14 days of the end of the return period. The return periods referred to end on 30 June, 30 September, 31 December and 5 April (AT6.603 – Non-Resident Entertainers: and Sportsmen).

3.2.1.2. Foreign Entertainer's Unit

In 1987 the Foreign Entertainers Unit (hereinafter referred to as the FEU) was set up to administer the special scheme for taxing non-resident sportspersons and entertainers who are self employed or have their income routed through any of the following:

- A personal service company
- A settlement
- A person under the control of the entertainer
- A person located in a low tax territory
- A person who passes on the income to the sportsperson after commission and expenses.

The Unit is involved with in all aspects of non-resident sports stars' liability arising from activities in the United Kingdom, other than straight-forward employment cases.

The FEU monitor and administer the withholding tax on payments to foreign sportspersons as set out above. It is also the FEU who can decide whether

the withholding tax rate applicable to a set of facts should be reduced or be at a zero rate. The FEU reviews the position at the end of each year to determine whether a repayment or an assessment is needed to be made as appropriate.

As result of approximately twenty years of existence the FEU has built up a mass of experience and an extensive working knowledge of the sporting world. Whilst most of this expertise is focused towards the non-resident cases, it does occasionally give advice and help in connection with resident sportspersons (AP2140 – Schedule D: Preliminary: Non-Resident Professional Entertainers and Sportsmen).

3.2.1.3. The withholding tax

The tax on foreign entertainers and sportspersons in the United Kingdom is governed by sections 555 to 558 of the Income and Corporation Taxes Act 1988(c.1).

The general principle of the deduction at source scheme (the withholding tax) is set out in section 555(1) of the Income and Corporation Taxes Act. In this it confirms that the tax applies in the cases where an individual, who is a sportsperson, performs a relevant activity in the UK and that individual is not a resident of the UK in the year of assessment in which the activity is performed.

This section also places no obligation to withhold tax if the sportsperson is a resident in the UK in the year during which the activity was performed even if the sportsperson was a non-resident during the year in which the payment was actually made.

A sportsperson in this context refers to any individual who performs in his character as a sportsperson in any kind of activity or sport. The term "sport" in

this section refers to and includes any activity of a physical kind performed by such an individual which is or may be made available to the public or any section of the public, whether for payment or not. The use of the phrase, "in his character" seems to limit the scope of this nearly all encompassing provision. It is thought that the purpose of this phrase is to distinguish activities of an individual which are purely in his private capacity. Therefore should a sportsman or woman be on holiday and takes part in an activity merely incidental to his enjoyment of his holiday and not for remuneration or reward, then it would seem to fall outside the scope of the scheme (Broke, Tiley, Hubbard, and Wolf, 1997).

A commercial occasion or event in terms of this scheme includes any occasion or event –

a) For which an entertainer or sportsperson might receive or become entitled to receive anything by way of cash or any other form of property; or

b) Which is designed to promote commercial sales or activity by advertising, the endorsement of goods or services, sponsoring, or promotional means of any kind (Broke, Tiley, Hubbard, and Wolf, 1997).

Taking the above into account it is evident that the scope of activities covered by the scheme is very far reaching.

In terms of section 557(1) any person who makes a payment or transfer which has a connection of the required kind with the relevant activity of the sportsperson is required to deduct out of the amount a sum representing income tax which must get paid over to the Revenue. For a payment to have this required or prescribed connection it must be made in respect of the performance of the relevant activity, whether it is derived either directly or indirectly. Therefore the withholding tax would apply to both direct remuneration in the form of prize money and to associated income in the form of sponsorship or endorsements.

It is important to note that section 557(4) includes within the deduction scheme the transfer of assets as well as actual payments made.

An exclusion from this scheme has been provided if there is already a deduction at source under another provision of the Tax Acts, whether the tax is actually payable or not. An example would be in the case of employees' tax (such as PAYE) being withheld from payments made to the payee.

A further exclusion from this scheme is provided when a payment is made to resident who is not connected with or an associate of the sportsperson and the payment is in respect of services provided ancillary to the performance of the relevant activity. This amount must however be an amount that would be regarded as being reasonable in an arms-length transaction. An example of this would be hiring of the sports arena or the provision of security, for example (Broke, Tiley, Hubbard, and Wolf, 1997).

The ancillary income which is covered by this scheme is also very widely defined. An example of ancillary income which would be regarded as having direct connection with the sportsperson's UK appearance would be endorsement fees paid to an American tennis player by an American Company for using certain equipment at a tennis tournament in the UK. There would however be a problem with enforcing the withholding tax on the foreign company, unless it has a permanent establishment, place of business or tax presence within the UK. In these circumstances, should the foreign company not be required to deduct at source, the tennis player would still be liable for the income received whilst performing within the UK (*Agassi v Robinson* (Her Majesty's Inspector of Taxes) [2006] UKHL 23).

The rate at which tax is to be deducted is generally the equivalent of the basic rate of income tax for the year of assessment in which the payment or

transfer took place. The deduction is calculated by applying the rate to the full amount of the payment or, in the case where payment is made in kind, to the grossed up value after the transfer. The net value of the transfer is the cost at which it was transferred (that is the cost incurred in providing and transferring it) less so much of the cost that has been borne by the sportsperson or entertainer. In other words the asset cost to the provider would be the net amount of the payment (Broke, Tiley, Hubbard, and Wolf, 1997).

3.2.1.4. The Agassi Case

The United Kingdom House of Lords gave a judgment in the case of *Agassi v Robinson* (Her Majesty's Inspector of Taxes) [2006] UKHL 23 (hereinafter referred to as the Agassi Case) against the US tennis star in relation to tax payments due on sponsorship and endorsement payments.

The facts of this case are briefly as follows: The appeal related to the tax year of 1998/99 when Agassi, who had never been resident or domiciled in the UK, played a number of tennis tournaments in the UK. Agassi owns and controls Agassi Enterprises Inc (hereinafter referred to Agassi Inc) whose business includes the entering into of contracts with manufacturers of sports clothing and equipment. In terms of these contracts Agassi would advertise the goods and Agassi Inc would be paid.

The appeal in question related to contracts with the American brands Nike and Head, which had no UK presence. The payments in terms of these contracts were also not made within the UK. These payments were however made in connection with a "relevant activity" of a "prescribed kind" performed by Agassi within the UK. In Agassi's tax return no tax was paid in relation to the receipt of funds by Agassi Inc in relation to Agassi's activities (Goodall, 2006).

The view of the court is concisely set out in the judgment given by Lord Mance:

> In short, there is no incongruity about a primary tax charge being levied on a sportsman or entertainer who performs an activity within the United Kingdom and receives or is treated as receiving a payment from whatever source for the activity. But it would be incongruous if a primary tax charge for payment in respect of a United Kingdom activity depended on whether the payment was or was not made by a person not present. The position regarding the liability of the payer of such a payment to make and account for deductions in respect of the basic rate of such tax is quite different. It may, and in my view probably would, be incongruous if a payer without any United Kingdom presence were to be treated as under any liability to make and account for such a deduction. But this conclusion should have and in my view has no bearing on the primary liability of the sportsman or entertainer to pay both the basic and any higher rate tax due in respect of the payment.

In terms of the above decision and the UK legislation the fact that the payment was made to an entity is irrelevant in so far as the amount being taxed in the name of Agassi. Any funds paid to an entity as a result of the sportsperson's activities in the United Kingdom would be deemed to have been paid to the sportsperson.

The case further pointed out that any funds paid by a non-resident company to a non-resident sportsperson as a result of a "relevant activity" of a "prescribed kind" being performed by the sportsperson would not render the sportsperson exempt from tax. The court merely decided that the withholding tax would not apply to the foreign payer but that the foreign sportsman would be personally liable.

Julian Hedley, head of tax at Tenon Media, held that this case set a dangerous precedent in that it extended the UK tax law and the UK's rights to tax payments arising outside the UK (Goodall, 2006).

3.2.2. The Australian position

3.2.2.1. Which payments are subject to the withholding tax?

The Australian Government brought into effect the withholding tax on payments made to foreign residents for sporting activities from 1 April 2004. The withholding provisions set out below will, however, not apply if the non-resident is engaged as an employee of the payer.

The payer is required to withhold amounts from the payments made to foreign residents for sports activities. Sports activities include, but are not limited to, the following activities:

- Individual sports such as golf, tennis, squash or cycling, or
- Team sports where the team members are not employees of the payer (for example cricket, rugby league, soccer or netball).

As is evident from the above the withholding tax does not only apply to payments made to individuals. The activities are not limited to the payments to the actual sportspersons, but may include the activities of various support staff associated with the sporting industry, such as:

- Coach
- Bodyguard
- Doctor
- Physiotherapist
- Sports psychologist
- Etc.

There may be situations where the payer will be making payments to an agent as opposed to the actual sportsperson. In these cases the payer will still be required to withhold the tax as though the payments were being made directly to the foreign resident. This would apply even if the agent is an Australian resident. If an Australian resident agent receives a payment on behalf of a foreign resident and an amount has not been withheld from the

payment then the burden would fall upon the agent to withhold the amount from the payment (Australian Taxation Office, 2004).

3.2.2.2. Australian Business Number

Prior to discussing the detail of the obligations under the withholding tax the Australian Business Number will be discussed. The Australian Business Number Act of 1999 was passed and it introduced a single business identifier for all businesses known as the Australian Business Number (hereinafter referred to as the ABN). The intention of government was that eventually the ABN would be the only number needed for any business dealings with the government.

Not everybody is entitled to an ABN. To be entitled to this number the taxpayer must fall into one of the following categories:

- A company registered under the Corporations Law in Australia
- A government entity
- An entity carrying on an enterprise in Australia.

It is the last of the three classes mentioned above that broadens the scope of qualifications to register for an ABN. An "entity" has been defined as:

> An individual, a body corporate, a corporation sole, a body politic, a partnership, an unincorporated association or body of persons, a trust, a superannuation fund, or a trustee of a trust or superannuation fund.

Further to the above definition the meaning of "enterprise" is also given as including various activities, but does not include hobbies. Activities that are carried out in the form of a business or as an adventure or concern in the nature of trade would, amongst others, qualify as an enterprise. Some activities which would not be included in an enterprise are, for example, activities carried as an employee or as a private recreational pursuit or hobby.

These definitions appear to extend the qualifications to virtually any individual who carries on his or her activities in the form of a business as long as they are not employees. Therefore it seems as if most professional sportspersons who are not contracted as employees would qualify to register for an ABN.

There are various reasons for registering for an ABN. Some of these reasons are for tax reporting purposes, for income tax concessions for charities and deductible gift recipients and for general government purposes (Information and Background about the Australian Business Number (ABN), 2006).

3.2.2.3. Obligations of the payer

In the Australian tax system the payer will be required to register for the pay-as-you-go (hereinafter referred to as PAYG) withholding tax. Under the PAYG withholding system the payer will be required to withhold amounts from payments and send these amounts to the Tax Office.

Where the foreign resident has supplied an ABN number the payer is required to withhold:

a) If the payment is made to a foreign resident entity, the company tax, which is currently 30 percent;

b) If the payment is made to an individual foreign resident, the marginal rates for non-residents. These marginal rates for non-residents vary from 29 cents per Australian Dollar to 45 cents per Australian Dollar. These non-resident rates also start from Aus$0.00 whereas the resident rates only apply from earnings in excess of Aus$6,000 (Individual Income Tax Rates, 2006).

Where the foreign resident does not supply the payer with an ABN number the payer is required to withhold 48.5 percent of the payments made to them. There are however some situations where the taxpayer does not need to supply the payer with an ABN number, including when the income received is exempt income for the payee.

Should the payments be made in a foreign currency the amount paid will need to be converted into an Australian Dollar equivalent at the time of the payment. The amount required to be withheld will then be calculated on the Australian Dollar amount.

The Australian tax system grants the foreign payee the option to apply for an amended rate of withholding tax. This option to seek a variation is given to a foreign resident when the required rate of withholding is either higher or lower than the expected actual tax payable on their Australian taxable income. A payee will also be required to apply for a variation if they will not be required to pay tax in Australia either as a result of the operation of a double tax agreement, or where the income is exempt under Australian law. The Tax Office will then forward a notice to the payer informing them of the new rate of withholding.

Therefore, until the payer receives notification of the variation, they are to either withhold at the company or foreign individual marginal rate if the taxpayer has submitted an ABN number or, if no ABN number has been submitted, to withhold at 48.5 percent.

The Tax Office requires different reports and treatment in respect of payments to non-residents where they supplied an ABN number and where no ABN number was supplied.

The case where an ABN number has been supplied will be discussed first. The payer is obliged to let the payee have what is called a payment summary which includes all the details of the gross payments made and the amounts withheld from these payments. It provides all the information that the payee requires to complete their tax return. This payment summary is to be given to each payee. A payee may ask at any time during the financial year for this document and the payer is required to supply them with one within 14 days of

their request. If the payee has never asked for a payment summary or the last summary provided did not cover all the payments then the payer is required to supply the payee with the said document by 14 July following the end of the financial year.

The payer is also required to report to the Tax Office on amounts withheld. The method of reporting and paying over the withheld amounts depends on whether the payer has been classified as a small, medium or large withholder. Depending on the amount of funds withheld during the year the payer will be classified into one of these categories. Amounts can also be paid over to the Tax Office in a number of ways, including electronically, by cheque or by taking a payment advice to the post office and paying by cash. The payer is also required to submit to the Tax Office an annual report detailing all payments and amounts withheld from foreign residents during the past financial year.

In the situation where no ABN number was supplied to the payer the payer is required to let the payee have their payment summary at the same time as the net amount is paid, or as soon thereafter as is reasonably or practically possible. At the end of the financial year the payer is also required to independently report to the Tax Office on all amounts withheld because the payee never provided an ABN number (Australian Taxation Office, 2004).

3.2.3. Overview of the jurisdictions

Having analyzed the implications and applications of the withholding taxes on non-resident sportspersons in the jurisdictions of South Africa, the United Kingdom and also Australia a comparison between the jurisdictions will be discussed briefly.

The legislation and principles behind the legislation in question are all very similar in nature, yet there are certain elements in the legislation in each

jurisdiction which would benefit the others. This section will discuss mainly the similarities and some key differences between the jurisdictions with the main focus being on any possible improvements to the South African legislation.

The first point which was noted was that all three countries take their withholding taxes from the amount that was actually paid or accrued to the sportsperson. No opportunity is given to the payee to deduct any expenses incurred from the amount that is being withheld and paid to the authorities. In South Africa this withholding tax is a final tax which is not the case in the other two jurisdictions.

The possible reason why the tax appears to be a final tax only in the Republic could be linked to the rate at which the tax withheld is calculated. In South Africa the withholding tax is calculated at 15 percent of the amount received or accrued to the sportsperson. This is in comparison with the standard rates for individuals ranging up to a marginal rate of 40 percent and for companies at 29 percent. This reduced rate of 15 percent could possibly have been arrived at after the Revenue or the legislature took the average deductions into account and subtracted these from the marginal rate. The rates in Australia and the UK are calculated in terms of more general rules and at substantially higher rates. In the UK section 555(4) of the Income and Corporation Taxes Act clearly states that the rate applicable will be equal to the "basic rate of income tax for the year". Australia also use a more standard rate depending whether the taxpayer has an ABN number or not but in both cases the rates are substantially higher than the 15 percent used in South Africa.

Having taken the above into consideration, the UK and Australia both give the taxpayer or sportsperson the opportunity to apply for a reduced rate. In the UK the taxpayer can apply to the Foreign Entertainers Unit to reduce the rate to zero. The FEU would then assess the set of facts and decide whether the withholding tax rate should be reduced or changed to a zero percent rate. In the Australian

tax system the non-resident payee is given the option to apply for an amended rate of withholding as is discussed in 3.2.2.3 above.

No specific provision is made in the jurisdictions of South Africa and Australia for dealing with the transfer of assets as opposed to cash to the payee. The Income and Corporation Taxes Act in the United Kingdom specifically identifies this. In terms of this Act the basic rate of tax is to be applied against the grossed up value of the transfer, which is the cost incurred in transferring and providing the asset less so much of the costs that have been borne by the sportsperson. This principle is not expressly stated in the legislation of the Republic or Australia but does seem to be the fairest and most logical manner of deciding on the amount on which the tax is to be calculated. The South African authorities would probably rely on the case law relating to the valuation of an asset in a form other than cash, in recognition of the decision in *Lategan v CIR 1926 CPD 203, 2 SATC 16* in determining the value of the asset, which stated that an "amount" is anything that has a monetary value.

The South African legislation only makes provision for the situation when the payment is made directly to a foreign sportsperson. This then, as opposed to the Australian regulations, does not include payments to support staff such as coaches or doctors, etc. In the Australian jurisdiction the withholding tax applies to payments to persons if they are intrinsically involved in the activities of the sportsperson and comply with all the requirements set out in the relevant Acts. Whether these circumstances would be included within the ancillary income referred to in the United Kingdom is uncertain; however it does seem as if similar payments to assistants like managers or physiotherapists would be included within the withholding scheme.

The application of the withholding taxes is clearly set out in the legislation applying in all three countries. It does not, however, apply to the situation where the payment is made to a sportsperson who is paid in the capacity of an

employee of the payer. In South Africa, as would seem to be the case in the other jurisdictions, this situation would be treated under the standard rules of tax relating to employees, for which pay-as-you-earn (PAYE) would be deducted and paid over to SARS.

In the case where a payment is made to a sportsperson who falls within the ambit of this legislation and the payer is a non-resident of the country in question then, in terms of the South African legislation, the sportsperson would be liable to pay the tax to the authorities and not the payer. Therefore no withholding tax would be applicable. This also applies in the United Kingdom as seen in the Agassi case, which was discussed above, where the foreign company's payments to Agassi were held to be taxable despite the fact that the foreign company was not required to withhold the tax. The point of concern in this case was that neither the taxpayer nor the companies that made the payments were UK residents and also the fact the contracts were never concluded within the UK and that the payments were all made outside the UK. The only activity that related to the UK was that the payments related to activities performed within the UK.

The rules regulating the actual methods and dates of payments to the various tax offices differ from jurisdiction to jurisdiction. The Australian position is possibly the most advanced as a result of their well developed system of withholding tax which includes more than merely tax on non-resident sportspersons. In Australia the withholders are classified into either small, medium or large withholders and the method and frequency of payments are determined in accordance therewith. For example, small withholders, withholders who withhold less than Aus$ 25,000 a year, would pay over amounts withheld to the tax office on a quarterly basis whereas large withholders, who withhold more than Aus$ 1 million a year, must pay withheld amounts over to the tax office electronically. Small and medium withholders can pay funds over to the tax office either by means of an electronic

transfer, a cheque or money order or by paying cash at any post-office. Large withholders however have to pay by means of electronic transfer.

The South African system is simpler. It has one standard rate and a standard rule for all foreign sportspersons and withholders. The non-resident sportsperson is required to pay the Commissioner the tax within 30 days of receipt or accrual of the amount earned by him. Should the amount be withheld then the organizer is required to pay the Commissioner before end of the month following the month during which the amount was deducted or withheld.

The regulations governing the reporting of the transactions also differ substantially amongst the various countries. In the United Kingdom the payer is required to send to the Revenue authorities a return of payments made to the payees within a return period, together with payment of any tax deductible within 14 days of the end of the return periods as discussed above.

Once again the Australian system seems to be the most advanced when it comes to reporting on withholding taxes. Their regulations depend on whether the taxpayer has registered for an ABN number. But, in summary, the payer is required to supply the taxpayer with a payment summary within 14 days from the date of being requested one by the taxpayer. Also should the payment summary not include all the amounts withheld the payer is required to let the taxpayer have a complete payment summary by 14 July after the financial year in question. Where the payee has no ABN number the payer is to supply them with a payment summary together with each net payment made or as soon thereafter as is reasonably possible. The payer is also required to report to the Tax Office on amounts withheld during the year. These reporting requirements are, however, driven by whether the withholder is classified as a small, medium or large withholder.

In terms of the South African legislation the resident payer or withholder is required to give notification to the Commissioner of the activity within 14 days of concluding the agreement to organize or facilitate the activity in question. The payer or organizer is also required to submit a return to the Commissioner containing any information required together with the payment of the withholding tax to SARS. There is no requirement that any return of payment and the tax deducted should be given to the payee. The onus would therefore be on the payee to obtain this.

Taking the reporting requirements into account the differences are not that significant; however the South African legislation's requirement of informing the Commissioner prior to the activity would most certainly be advantageous in ensuring tax that is collected effectively.

3.3. Withholding taxes levied by SARS

The use and implementation of withholding taxes by the Revenue Services in relation to transactions entered into with foreign or non-resident taxpayers seems to becoming more widespread. This is possibly as a result of SARS's endeavor to increase its tax base and the effectiveness of its tax collections from foreign taxpayers.

Section 35 of the Income Tax Act is possibly the most well-known withholding tax in the Income Tax Act. The section deals with the taxation of non-residents on royalty payments received by them and effectively provides for a 12 percent withholding tax on such royalty income (Huxham & Haupt, 2007). This tax, as is the case with the tax on non-resident sportspersons, is a final tax and the recipient of the royalty income may therefore not claim any deductions against the amounts of the royalties received (Jordaan et al, 2005).

In terms of section 35(1) the receipts and accruals that are subject to this withholding tax are amounts that are received or accrued for the use or right to

use in the Republic of any patent, design, trademark, copyright model, pattern, plan, formula or process or any property of a similar nature or any motion picture film, video tape or disc wheresoever such property was produced or made or right to use was granted.

It is also important to note that the provisions of the section discussed above also apply to payments for the imparting or undertaking to impart scientific, technical, industrial or commercial knowledge or information for use in the Republic including the rendering of assistance in connection with the application of such knowledge (Huxham & Haupt, 2007).

The above information seems to indicate that the withholding tax on royalty payments applies to royalties that are deemed to be from a South African source because the property or the knowledge is to be used in South Africa (Jordaan et al, 2005).

The proviso to section 35(1) the Income Tax Act states that the amounts received by or accrued to the following persons will not be subject to the withholding tax:

a) A company that is not a resident if the royalty is derived from any trade carried on through a branch or agency in the Republic and such an amount is subject to tax in the Republic;

b) A person (other than a person whose place of residence is in a neighbouring country) in respect of the use in any printed publication of any copyright, other than for advertising purposes in connection with motion picture films or for television.

A further element which cannot be ignored when dealing with non-residents, is the implication of any double tax agreements entered into between South Africa and the country in which the recipient of the royalty is a resident. An example of such an agreement is the agreement between the Republic and the Netherlands.

In this agreement it provides that royalties arising in one of the states and being paid to a resident of the other state may only be taxed in the country of which the recipient is a resident, unless the recipient has a permanent establishment in the state in which the royalty arises and the right or property giving rise to the royalty is effectively connected to that permanent establishment (Jordaan et al, 2005).

The onus is placed upon the person who incurs the liability to pay the royalty to the non-resident or who receives the payment on behalf of the foreigner to pay the required tax over to the Revenue Authorities within 14 days of the end of the month during which the liability was incurred (Huxham & Haupt, 2007).

The amount to be paid over to the Commissioner is to be calculated at a rate of 12 percent of the gross royalty received. As a result of this payment being regarded as a final tax section 10(1)(l) of the Income Tax Act provides for an exemption from normal tax in respect of any income that is subject to the section 35 withholding tax (Jordaan et al, 2005).

Should the recipient have an address outside of the Republic it will be deemed, until proven otherwise, that he or she is a non-resident and that the payments of royalties will be subject to section 35 (Jordaan et al, 2005).

The payer in these circumstances is entitled to deduct from the amount that was to be paid to the non-resident any amount that was required to be withheld and paid over to the Commissioner in terms of section 35. Should the full amount have been paid over to the non-resident and the payer was still liable for withholding tax he or she could recover the amount paid over to the Commissioner from the non-resident. Section 35(2) further states that the non-resident has no claim against the funds withheld by the payer and is deemed to have received the amount that has been deducted or withheld.

A further withholding tax was proposed by the South African Revenue Services during 2004 to withhold tax on payments made by purchasers of immovable property to sellers not resident in South Africa (which has come into force on 1 September 2007).

In terms of this proposal, which was set out in the Revenue Laws Amendment Bill 2004, the purchasers of immovable property from non-resident sellers would be required to withhold a certain portion of the proceeds due to the non-residents. An obligation would also be placed upon the conveyancers and estate agents to inform the purchasers of this withholding tax should the sellers not be South African residents (Temkin, 2004).

Having taken the above into account, in particular the section 35 withholding tax, there does not seem to be any material difference between the withholding taxes with regard to structure and implementation. SARS seems to have based the workings of the withholding taxes on a standard set of rules or policies.

The only significant difference which could be identified between the royalty and foreign sportspersons withholding taxes is the deeming provision in section 35(2)(a)(ii) which states that should the recipient of the royalty payment have an address outside the Republic they will be deemed to be a non-resident. This is not the case with the withholding tax on non-resident sportspersons and could quite possibly strengthen its application. This will be discussed in further detail below.

3.4. Possible problem areas with withholding tax

The following are issues which are possible omissions in the legislation relating to foreign sportspersons and entertainers, which were not covered or considered by the legislature at the time of promulgating the amendments to the Income Tax Act.

3.4.1 Capital v Revenue

Section 47B (1) of the Income Tax Act reads as follows:

> There must be levied and paid for the benefit of the National Revenue a tax, to be known as the tax on non-resident entertainers and sportspersons, in respect of any amount received by or accrued to any person who is not a resident in respect of any specified activity exercised or to be exercised by that person or any other person who is not a resident.

As is evident from the above excerpt from the Income Tax Act there is no mention of whether the amount received by or accrued to the taxpayer is required to be of a capital or revenue nature. In contrast with the gross income definition in section 1 of the Income Tax Act this section does not expressly exclude receipts and accruals of a capital nature. It was probably the legislature's intention to include all receipts and accruals of both capital and revenue nature as the term "amount" has not been qualified in any way. This would mean that all amounts would be taxed at the same rate, irrespective of their underlying nature.

The implication of this possible omission in the Income Tax Act is that a person travelling to South Africa on holiday could partake in a sporting event merely as a hobby or pastime and should they win any prizes or awards they could fall within the ambit of the section in question.

A distinction might also need to be drawn between the situation where the sportsperson partakes in sport as a "hobby" and where this is done in the course of his or her trade or where they are involved in a scheme for profit making. The distinction between a trade and a hobby is mainly that in the case of a hobby the taxpayer is pursuing the activity for amusement and any profit is purely incidental to the sportsperson's purpose (*Stephan v CIR 1919 WLD 1, 32 SATC 54*). To draw this distinction between a trade and a hobby is not always clear cut, as can be seen from the case discussed below. This distinction will probably not have any impact on the taxpayer's taxable income under the tax on foreign

sportspersons, as no distinction has been made between amateur and professional sportspersons.

In order to illustrate receipts which might not fall within a taxpayer's income should capital receipts and accruals be excluded, reference will be made to the recent Australian Full Federal Court case of *Stone v Federal Commissioner of Taxes*, 2003 ATC 4584 (hereinafter referred to as the Stone case). In this case an Olympic javelin thrower received prize money and grants for her javelin throwing and argued that these funds were not to be included in her taxable income. Her argument was based on the fact that she had a full-time career as a police officer and that she never competed on the basis of winning prize money but to gain competitive experience. She further stated that she did not throw javelins for money and would have done it for nothing and for the honour of winning her Australian colours (Healy, 2005: 153).

The Australian court found, based on their definition of income, that the amounts were taxable. The term income in the Australian legislation is decided in accordance with the ordinary concepts and usages of mankind and if the funds had the character of income (PricewaterhouseCoopers, 2005).

The difference in the decision, if any, should this case have been heard in South Africa would revolve around the definition and understanding of the term "income". The basic position within the Republic was given in the case of *George Forest Timber* Case where it was stated that whatever a person receives in the way of his trade, business or profession is income. The courts then held that a single transaction could also qualify as being within the ambit of income for the purposes of taxation. This was also the decision in the case of *Elandsheuwel Farming (Edms) Bpk v SBI*, 1978 (1) SA 101 (A), 39 SATC 163, where it was held that an amount could be classified as income if the taxpayer had been engaged in a scheme of profit-making. Therefore, if the *Stone* case had been heard in South Africa the courts would need to ask the question whether she was

engaged in a scheme for profit making and, as was confirmed in the case in question, she was not as she was merely competing for the honour of representing her country. She was thus not motivated by the prospect of a profit (PricewaterhouseCoopers, 2005).

Therefore, it appears that where the Australian courts found that the all the amounts received by the taxpayer were included in her taxable income, the situation in South Africa could have been substantially different. It appears on the face of it that the courts would not necessarily have found that all the amounts received by Stone were received in a scheme of profit making and would hence have been excluded from her taxable income. There might, however, very well have been amounts which could have been included in terms of paragraph (c) of the gross income definition which specifically includes amounts derived from services rendered in the taxpayer's taxable income.

It therefore appears that until the courts have ruled otherwise or the legislation is amended to clarify this, all amounts received by or accrued to a non-resident sportsperson in South Africa will be included and taxed at a rate of 15 percent whether the amounts are of a capital or revenue nature. This submission is also based on the fact that a sportsperson is defined (in section 47A of the Income Tax Act) as any person who, for reward, takes part in any type of sport. "Reward" would include both capital and revenue amounts.

3.4.2 Residence

Section 47B (3) of the Income Tax Act deals with residence of the sportsperson and clearly states that this section does not apply to a non-resident, where that person is either an employee of an employer who is a resident or to a person who is physically present in the Republic for a period of 183 full days in aggregate during any 12 month period commencing during the year of assessment in which the activity is exercised.

This section seems to indicate that where a person does not qualify as a resident in terms of the definition of residence set out in section 1 of the Income Tax Act, who is therefore a non-resident, but is in South Africa for a period exceeding six months the provisions of sections 47A to 47K would not apply to them. If a taxpayer does not comply with the residency provisions as set out in section 1, and is therefore treated as a non-resident, but has been in the Republic for a period longer than 183 days during the year of assessment, then the taxpayer would be treated in accordance with the normal tax rules relating to non-residents as was the position prior to the new tax on foreign sportspersons. The circumstances would be similar should the provisions of sections 47A to 47K not apply as a result of the taxpayer being employed by a South African resident.

This provision in the legislation seems to open up to the non-resident sportspersons the opportunity to manipulate their presence in the Republic to such a degree that they are not classified as residents but also so that they are not subject to the tax on foreign sportspersons. They would therefore be taxed in terms of the general non-resident rules which applies only to income from a source or deemed source within South Africa.

An example of such a situation could be the case where a foreign cricket team tours South Africa for 184 days. As this is more than 183 days it would not fall within the ambit of sections 47A to 47K and the cricketers would also not be South African residents. Should their match fees and endorsements be in terms of contracts concluded with their sponsors and cricket bodies in the foreign country it could quite easily be argued that this income has its originating cause in the foreign country and therefore does not have its source in South Africa. This would result in the South African Revenue Service losing the tax on the income of the foreign sportsperson. The cricketers may also avoid paying tax in their country of residence. Had this been provided for in terms of sections 47A to 47K, the foreign cricketers would have been liable to pay tax in South Africa even if the amounts were not being paid by resident organizers. This submission does

not take into account the possibility of there being double tax agreements in place.

A possible solution to this problem could be to use the terminology as set out in section 35(2)(a)(ii) of the Income Tax Act, as discussed above, which states that should the taxpayer have an address outside the Republic they will be deemed to be a non-resident. This, together with the residence definition in section 1 of the Income Tax Act, would remove any uncertainty as to the residence of the taxpayer and would place the onus on the taxpayer to establish their residency, should they so wish.

The final comment with regard to residency relates to the residence of the payer. In the circumstances where the payer is a non-resident, section 47C places the onus upon the sportsperson to pay the 15 percent tax over to the Commissioner within 30 days after the amount has been received by or has accrued to him. The fact that there is no payer to withhold the tax in terms of section 47D means that the concerns of the legislature relating to the collection of tax when the foreign taxpayer does not spend sufficient time in the country are not addressed, as the taxpayer is possibly still only in the Republic for a short period of time.

3.4.3. Payments to support staff and assistants

Payments against which the taxation of non-resident sportspersons applies are limited to payments made to foreign sportspersons performing a specified activity in South Africa. Whether this tax applies to payments made to the non-resident support staff of the sportsperson is uncertain. These persons may be subject to the normal rules relating to non-residents earning gross income from a source in South Africa. In the Australian jurisdiction these payments are expressly included, as their withholding tax includes the activities of various support staff associated with the entertainment or sporting activities (Australian Tax Office, 2004: 3). In order to identify whether payments to support staff of non-resident sportspersons should be included in the South African tax on foreign

sportspersons or whether the normal tax rules relating to non-residents should apply, the definition of the terms "sportsperson" and "specified activity" need to be amended to ensure that the matter is clarified.

These two terms ("sportsperson" and "specified activity") are specifically defined in section 47A of the Income Tax Act. The term "specified activity" merely refers to any activity performed by the sportsperson within the Republic. The issue therefore hinges on whether the support staff could be included in the term "sportsperson"?

The definition of a "sportsperson" includes a person who takes part in any type of sporting activity; or takes part in other activity which is usually regarded as being of an entertainment character. If the support staff are to be included within the meaning of "sportsperson" it would need to fall within the second part of the definition. The issue would be to determine whether the activities of, for example, a bodyguard or a coach, could be classified as being an activity which is generally regarding as being of a sporting nature? On the face of it, it would appear not to be too much of a problem to include such persons and their activities in the definition, as being part of the sporting environment.

Therefore, if payments to these support staff are deemed to be for activities relating to sport, it can be assumed that payments to non-resident support staff would be included within the ambit of the tax on non-resident sportspersons. Whether this was in actual fact the intention of the legislature, remains to be seen.

3.4.4 Transfer of assets in lieu of payment

As has been pointed out above South African legislation does not deal expressly in sections 47A to 47K with the situation where payment to a foreign sportsperson is made by the handing over of an asset as opposed to the payment in cash. Section 47B(1) states that the tax of non-resident

sportspersons is only "in respect of any amount received by or accrued to any person".

It would therefore be presumed that the judicial definitions set out in determining the meaning of the phrase "total amount" in the gross income definition in section 1 of the Income Tax Act would be applied to this section. The fact that the payment was not actually made in money does not render the receipt not taxable, as the *Delfos* case stated that as long as the receipt can be turned into money or has a money value it will qualify as an amount. The actual amount that would be included into the taxpayer's gross income would be the open market value of the asset at the date of acquisition or accrual of the asset (Jordaan et al, 2005: 13). In terms of the *Delfos* case the value of the asset would need to be established by the Commissioner.

Whether the courts or the Commissioner would apply the same principles relating to gross income to the tax on non-resident sportspersons is uncertain but it would seem to be the most reasonable thing to do. The United Kingdom has a provision in their Income and Corporation Taxes Act which deals expressly with the taxation of the transfer of assets to non-resident sportspersons in lieu of actual payment. Whether South Africa needs to go this far can be questioned, but some form of certainty as to the manner of handling these types of situation is clearly necessary.

If the market value of the asset is the "amount" to which sections 47A to 47K applies, the organizer of the sporting event would have to value the asset, pay the tax to the Revenue Authorities and recover it from the sportsperson, as it cannot be withheld. This may give rise to liquidity problems on the part of the sportsperson and, possibly, problems with the recovery of the tax on the part of the payer.

3.4.5 Structure for administering the tax

The final problem that South Africa may experience with regard to the imposition and enforcement of the new sections 47A to 47K of the Income Tax Act will be the inexperience of the authorities and advisors in question who will be administering this section. It will only be after a number of years of enforcing this piece of legislation that a real understanding will be obtained as to how this legislation will be administered by SARS.

The United Kingdom has put in place a structure called the Foreign Entertainers Unit which attends to the administration of their (similar) legislation. South Africa, which has a specific group of individuals administering this legislation, does unfortunately not have the benefit of approximately twenty years of experience that the FEU has and it does also not have the structured role within the revenue authority, as is the case with the FEU.

Taking this into account, as well as the success of the United Kingdom system, the South African legislature should put in place a more formal structure for the administration and implementation of this tax. This would also have the effect of having a single point of call for any queries or questions regarding this tax.

3.5 Conclusion

This chapter has discussed the tax implications for foreign sportspersons in the jurisdictions of the United Kingdom and Australia and has compared their tax legislation to that applicable in South Africa. The various jurisdictions appeared to be very similar in principle, with only a few minor variations between the three countries.

The chapter then discussed certain other withholding taxes applied by the South African Revenue Service and analyzed what could have been adopted from these taxes into the new withholding tax for foreign sportspersons.

Various issues and potential problems that the new tax on non-resident sportspersons may give rise to in South Africa were also discussed and analyzed.

Chapter four will proceed to measure the relative effectiveness of the withholding tax, against the criteria of the theoretical model of effectiveness. Hypothetical examples will also be used to compare the impact on sportspersons of the old legislation compared to the new rules.

CHAPTER 4: THE EFFECTIVENESS OF THE WITHHOLDING TAX

4.1 Introduction

Chapter three compared the South African withholding tax on foreign sportspersons with the principles applied in the United Kingdom and Australia. The comparison indicated that the tax in the various jurisdictions was similar in nature. The comparison also indicated certain improvements that could be made to the South African legislation and certain shortcomings of the tax in question. This chapter will endeavor to measure the relative effectiveness of the new tax on foreign sportspersons, against the criteria of the theoretical model for effectiveness. Hypothetical examples will also be used to indicate the difference between the taxation of the income of foreign sportspersons in terms of the new tax in comparison with the old, pre-August 2006, tax rules and also in comparison to local sportspersons, to establish the horizontal equity of the taxes imposed on foreign and local sportspersons.

4.2 Theoretical model for effectiveness

The efficacy of a tax can be determined at two stages: firstly, when the legislature is drafting the legislation, and secondly when it is looked at in terms of the administration or collection of the tax in question.

There are generally five criteria that South African Revenue Services (SARS) or the legislature require or consider when drafting a new tax. These measures are set out below (Williams, 2001):

1) Equity or fairness

There are generally two schools of thought as to how this criterion is to be applied or interpreted. The first school of thought is of the opinion that a tax would be fair if it is determined based on a person's ability to pay. In terms of this policy all people in a similar economic position should be treated equally and that those people with greater means should pay more tax than those of

lesser means. This system is a lot more difficult to implement than it appears, as it raises the question how "degrees of means" or well-being would be determined? Should this calculation take into account the well being of a household or only an individual, should age, gender or number of dependants, for example, be taken into account? There are too many variables for this on its own to be a plausible criterion.

The second school of thought believes that a tax would be fair if it is based upon consumption. In terms of this principle, the tax would be fair if it is levied against the persons who benefit from certain goods or services that are provided. For instance, the telephone service should be funded by subscribers to the service. This principle too could cause many problems if it is applied in isolation.

2) Certainty

This element deals with the requirement that the tax must be clear and easy to understand. This criterion is not achieved by the legislature using technical and complex language, which is unfortunately often the case.

3) Neutrality

A tax can be classified as being neutral if the effect on the economic behavior is minimal. Therefore the granting of financial incentives to certain sectors of the economy or certain classes of person or types of expenditure would result in a tax distorting the economic behaviour, thereby affecting the neutrality.

4) Flexibility

This element would be met if the tax rate can be easily modified to take into account any fluctuations in the economic cycles.

5) Efficiency

The efficiency of a tax can be either political or administrative. A politically efficient tax is one that does not cause resentment among taxpayers and is not overly visible. An administratively efficient tax would be one where for each Rand that is raised only a small portion is spent on collecting or administering the tax. A further contribution to administrative efficiency would be the number of persons liable for a tax. The more people that are required to perform the less efficient the tax would be. Therefore a tax paid by each employer would be more efficient than a tax paid by each employee.

It is important to mention that these factors are all inter-related and could very well be mutually exclusive. For instance, in order for a tax to be certain and clear it might possibly not be fair or equitable (Williams, 2001).

To expand on the interpretation of the effective administration of a tax, which was alluded to above, it can further be measured "by comparing the statutory tax rates with effective tax yields" (Schaefer & Turley, 2001: 1). This method of determining the effectiveness of a tax is one that is commonly used in measuring tax or fiscal capacity in federal states (Schaefer & Turley, 2001).

The difference between statutory and effective tax rates can be explained by briefly looking at a definition of each. Statutory tax rates are the rates that the taxpayers are required to pay by law whereas effective tax rates are the actually realized average tax rates. Therefore an effective tax is a tax where the tax rate that is actually realized is closely linked to the rate required by law. The difference between the two rates is often a result of elements such as tax deferrals, write-offs, exemptions and arrears. Corruption and bribery is also an important contributor to ineffective tax administration. As these payments are made directly to public officials in return for various services and favours they are not revealed in the government fiscal accounts. This has the effect of the fiscus not recording these "unofficial" taxes paid thereby

increasing the rift between the statutory and effective taxes (Schaefer & Turley, 2001).

The effective tax rate can be simply calculated by dividing the actual tax payments during a period by the gross tax base. Therefore if "e" represents the effective tax rate, "T" the actual payments made and "Y" the gross tax payments and then:

$e = T/Y$

Then in order to calculate the wedge between the statutory and the realized average tax rate and thereby measure the effectiveness of the tax administration, the effective/statutory ratio is used. In this calculation "t" denotes the statutory tax rate applied to gross income.

Effective/Statutory ratio = $e/t = T/tY$

Therefore, in terms of this calculation the effective/statutory ratio is the actual tax payments made divided by the amount of tax payments that would be expected to be paid in a perfect world (the gross tax base times the statutory tax rate).

A ratio that is close to one represents a situation where the tax is effectively administered in that the actual tax rate is very close to the statutory tax rate. Where the ratio is well below one then it would indicate that the administration is less effectively administered as the effective yield falls short of what the application of the statutory rate would yield (Schaefer & Turley, 2001).

By comparing the effective tax rates with the statutory tax rates a good idea can be gained as to the administrative capacity of a tax system. One of the reasons why tax administration often lags behind is because "market-oriented

fiscal institutions (tax administration, treasury) do not develop overnight" (Schaefer & Turley, 2001: 19). When the regulators introduce a new tax it comes into effect on a specific date and often at short notice. This speedy action by the regulators does not assist the tax administrators, as they are required to put in place systems and personnel to monitor and administer the new tax and this takes time. New taxes also require the taxpayers or general public that are impacted by this new tax to develop a new state of mind and behaviour in order to comply satisfactorily with the tax.

4.3 Measuring the tax on foreign sportspersons against the models for effectiveness

The efficacy of new tax on foreign sportspersons will now be measured against the theoretical model set out above.

Equity or fairness

With regard to the first criteria mentioned above the new tax does appear to be fair and equitable from a foreign sportsperson's point of view. As the tax is levied at a flat rate it does not give any individual preferential treatment. There have, however, been concerns raised by local entertainers that the new tax favours foreign performers. The concern was raised by Dawn Lindberg of the Theatre Managements of SA who stated that foreign performers were taxed at a lower rate than their local counterparts (Temkin: 2005a). Whether this concern is well founded is uncertain, as the new tax is a final tax on the gross amount received whereas the local artists and sportspersons are permitted to claim deductions from their taxable income. The example in 4.4 below illustrates the contrast between the withholding tax applying to foreign sportspersons and the normal tax applying to South African residents.

Where the tax appears to fail the test of equity is between foreign and local sportspersons. The ease with which successful sportspersons can "engineer"

their place of residence may also influence South African sportspersons to emigrate. The example in 4.4 illustrates the lack of equity.

Certainty

The second criterion, certainty, requires the tax to be clear and easy to understand. The tax on foreign sportspersons is very clear and easy to understand as it is a flat rate taxed at 15 percent on the amount received by the sportsperson. The problems of uncertainty in relation to the term "amount" and what represents a sporting activity, introduce a measure of uncertainty.

Neutrality

The impact of the tax on foreign sportspersons on the country's macro-economic variables will be minimal. The tax is levied against non-residents only and will only impact the economy if it results in the non-resident sportspersons and entertainers avoiding South Africa because of an onerous tax legislation. As the tax is based upon the well-entrenched United Kingdom and Australian tax systems this is unlikely to be the case. The new withholding tax is also unlikely to have a meaningful impact on fiscal collections as any loss in tax revenue due to a decrease in the effective rate of tax will probably be off-set by capturing more visiting sportspersons in the tax net.

Flexibility

As the tax is a once-off tax or final tax that is levied against the income of a non-resident sportsperson when he or she receives or is entitled to receive such amount, amending the tax rate would not effect the administration of the tax at all. Should the tax rate change the amount withheld will simply need to be amended. Therefore the tax appears to be very flexible.

Efficiency

The final criteria in establishing the effectiveness of a tax is that of its efficiency. Prior to discussing the administrative efficiency of the tax a brief analysis of the

political efficiency will be made. The tax does not appear to be politically impractical or inefficient, as it is not excessively visible and should not cause any resentment amongst the majority of (sportsperson) taxpayers. As was mentioned earlier there were some concerns that the local counterparts of the foreign sportspersons and entertainers were feeling that they had been discriminated against, in view of the fact that the foreigners were only paying tax at 15 percent. Should there be some animosity that has developed, whether unfounded or not, between local sportspersons and their foreign equivalents the tax could possibly be seen as not being politically efficient. The lack of equity could give rise to the lack of political efficiency. This aspect is illustrated in the example in 4.4 below.

The difficulty in determining the administrative effectiveness of the tax on foreign sportspersons is that according to SARS there are no statistics on the collection of this tax. The first figures will only be available after August 2007. An analysis of the administrative effectiveness can however be made on a theoretical basis.

The effectiveness of this tax depends largely on the South African organizers of the events involving the foreign sportspersons. Should these organizers timeously inform the authorities of the events and also withhold the taxes as required by the Income Tax Act, it would go a long way towards achieving the administrative effectiveness of the tax.

The problems which could arise and impact the effective/statutory ratio, which indicates the difference between the effective and the statutory rates of tax collection, are dependant upon the local organizers carrying out their duties in terms of the Income Tax Act responsibly. As the tax is a final tax and a relatively simple tax to calculate there would be no deferments or exemptions to deter the effectiveness. A concern could possibly arise when the payer of the amounts due to the foreign sportsperson or the organizer of the event is a non-resident and the sportsperson is personally liable for the tax. The concern in this instance is that the taxpayer is only in the Republic for a short period of time and to monitor the

payment of these taxes could be a challenge for the regulators. Possibly these circumstances would arise in the minority of cases and local persons would be involved in the process more often than not.

In order for the local organizers to assist in ensuring that this new tax is administered effectively a serious information dissemination drive would be required by the revenue authorities to ensure that these organizers are aware of the new tax and the duties imposed upon them.

One further concern that could impact upon the effectiveness of the new tax is the requirement of SARS having sufficient staff available and suitably trained to administer the new tax effectively. SARS would require these individuals to inform and assist sportspersons and organizers with regard to the new tax and also to monitor and administer the actual tax collection process. Should this not be adequately provided for, the wedge between the actual and statutory tax would also be increased.

The cost of administering the tax under the old dispensation is likely to have been far higher than it will be under the new dispensation, as collections will, to a great extent, be made by organizers of events at no cost to SARS.

In conclusion, from the information available, the new tax on foreign sportspersons appears to be an effective tax. This is however largely dependent upon the local organizers and payers performing their functions adequately. A more accurate assessment would, however, be possible once SARS releases statistics on the collection of the tax.

4.4 Hypothetical example

In this paragraph a hypothetical example will be used to illustrate the difference between the application of the tax on foreign sportspersons before and after

August 2006 and also to illustrate the lack of equity of the new withholding tax between local and foreign sportspersons.

Mr A is a professional golfer. Despite being an Australian resident he also has certain business interests in South Africa, including investment property earning him monthly rental income and he also earns interest income from funds he has deposited in a South African bank account. Mr A has recently spent two weeks in South Africa competing in a local golf tournament which he won. These were the only two weeks that he spent in the Republic during the year of assessment.

An extract of Mr A's income and expenditure (expressed in Rand) for the 2007 year of assessment is as follows:

Income:

	R
• Endorsements from his sponsor (Note (a))	200,000
• Winnings from Golf Tournament	1,000,000
• Golf equipment received from sponsor (cost price)	100,000
• Income from "illegal" activities (Note (b))	500,000
• Appearance fees for a public appearance	130,000
• Income from a sport shop Mr A owns in SA	540,000
• South African interest income	50,000
• Dividends (South African listed companies)	20,000
• Rental income from SA property	460,000
Total income	3,000,000

Expenses:

	R
• Hotel accommodation in SA	20,000
• Travel expenses to SA from Australia	60,000
• Travel expenses from hotel to golf course	5,000

• Insurance against injury	5,000
• Payment to manager	110,000
• Entry fees to tournament	20,000
• Medical expenses (physiotherapist)	1,000
• Fine paid for unreasonably slowing play	10,000
• Loss from theft of golf club	4,000
• Maintenance of SA investment property	45,000
• Expenses of running sport shop	300,000
Total expenses	580,000

Notes:

a) The foreign sponsor paid the amounts and donated the equipment while Mr A was in South Africa, in terms of a contract entered into in Australia because of his reputation and sporting successes achieved mainly in Australia, America and European countries.

b) Mr A's income from illegal activities relates to funds he received from a South African bookmaker after providing the bookmaker with information about the club he intends to use from the first tee.

The tax implications of the above example will be discussed below; firstly as they would have been applied prior to the new tax on foreign sportspersons, therefore prior to August 2006, and thereafter as Mr A would be taxed at present, after the implementation of the tax on foreign sportspersons. A further comparison will then be made between the tax implications, assuming that these particulars had applied to both resident and non-resident sportspersons. Tax rates for the year ending 28 February 2007 are used.

4.4.1 Prior to August 2006

Prior to August 2006 the tax calculation in respect of the income and expenses of a foreign sportsperson in South Africa was made in terms of the normal rules of taxation relating to non-residents. These calculations would also further be

subject to any double tax agreements entered into between South Africa and Australia, which in this example will not be taken into account.

In order for any amounts accruing to a non-resident to be taxed within South Africa, the amounts need to be either from a South African source or a deemed South African source.

Tax Calculation:

		R
Winnings from tournament		1,000,000
"Illegal" activities		500,000
Appearance fees		130,000
Shop sales		540,000
Interest income		50,000
Dividends		20,000
Rental income		460,000
Gross income		2,700,000
Less: Exempt income		36,500
Dividends	20,000	
Interest	16,500	
Less: Deductions		571,000
Hotel accommodation	20,000	
Travel expenses to SA	60,000	
Insurance	5,000	
Payment to manager	110,000	
Entry fee	20,000	
Fine	10,000	
Shop expenses	300,000	
Maintenance	45,000	

Taxable income		2,091,500
Normal tax payable		793,600
On 400,000	117,000	
On 1,691,500 x 40%	676,600	
Less: Primary rebate		7,200
Normal tax liability		786,400

Notes:

1) Endorsements were not included in Mr A's taxable income as the contract with the foreign sponsor would have been concluded abroad and it would have been in respect of his reputation and sports success abroad and not related to any activities performed in South Africa. As the source cannot be located in South Africa, this income would not be from a South Africa source and therefore not included in his taxable income.
2) Goods received from the foreign sponsor are also excluded from his taxable income for the same reason as mentioned in 1 above. If these goods and endorsements were paid as a result of Mr A's activities in SA only or mainly as a result of this then the amounts would both have been included in the taxable income in terms of paragraph (c) of the gross income definition.
3) Income from illegal activities, such as match fixing, would be included in Mr A's taxable income.
4) Appearance fees are included in terms of paragraph (c) of the gross income definition.
5) All dividends from a South African company are exempt in terms of section 10(1)(k)(i).
6) Interest income earned by individuals under the age of 65 have an exempt portion of R16,500 in terms of section 10(1)(i)(xv). As Mr A carries on business in South Africa, the interest exemption in terms of section

10(1)(h), applying to interest earned in South Africa by non-residents, does not apply.

7) Travel expenses incurred in travelling from the hotel to the golf course are not permitted as they are classified as a private expense (section 23(b)).
8) Medical expenses are permitted as a deduction from an individual's taxable income in terms of section 18. This deduction is however restricted in the case of under 65's who do not have a handicapped family member, to the amount in excess of 7.5 percent of the taxpayer's taxable income for the year of assessment, before this deduction. The amount of R1,000 actually incurred was less than the amount so calculated and therefore no part of amount was permitted as a deduction.
9) Fines for slow play are permitted as the action is not, in fact, illegal and the expense is part and parcel of the taxpayer's normal income-producing activities.
10) The loss arising from the theft of the golf club is not permitted as a deduction as it is an expense of a capital nature. As he has not been claiming a wear-and-tear allowance in terms of section 11(e) or any other section, section 11(o) cannot apply.
11) Maintenance of the property is permitted in terms of section 11(d).

4.4.2 Subsequent to August 2006

After August 2006 the taxation of non-resident sportspersons in South Africa is governed by sections 47A to 47K of the Income Tax Act. The income and expenditure falling outside the scope of this section is still to be governed by the general non-resident rules of taxation applicable in South Africa. It is clear that Mr A is not resident or deemed to be resident in South Africa (refer to the discussion in chapter 2).

Calculation

Tax on foreign sportspersons:

R

Winning of golf tournament	1,000,000
Appearance fee for public appearance	130,000
	1,130,000
Final tax at 15 percent	169,500

It is uncertain whether the amounts received in respect of match-fixing or other "illegal" sporting activities would be subject to the withholding tax. In order to be subject to the withholding tax, the amount would have to fall within the ambit of the definition of a "specified activity" – a personal activity exercised by a sportsperson in the Republic.

Further tax due by Mr A:

		R
Winning of golf tournament		1,000,000
Appearance fee for public appearance		130,000
Illegal activities		500,000
Shop sales		540,000
Interest income		50,000
Dividends		20,000
Rental income		460,000
Gross income		2,700,000
Less: Exempt income		1,166,500
Dividends (s10(1)(k)(i))	20,000	
Interest (s10(1)(i(xv))	16,500	
Income relating to tax on foreign Sportspersons (s11(IA))	1,130,000	
Less: Deductions		345,000
Shop expenses	300,000	
Maintenance	45,000	
Taxable income		1,188,500

Normal tax payable		432,400
On 400,000	117,000	
On 788,500 x 40%`	315,400	
Less: Primary rebate		7,200
Normal tax liability		425,200

Total tax paid by Mr A:	
Normal tax liability	425,200
Tax on foreign sportspersons	169,500
	594,700

Notes:

1) The tax on foreign sportspersons is to be paid over to SARS by the local organizers of the events. Therefore the amount received by Mr A would be the net amount after the tax has been withheld by the local organizer. Mr A would not be required to submit a tax return to SARS as this is a final tax. Section 10(1)(IA) exempts the amounts from income tax which are subject to sections 47A to 47K.
2) The endorsements and goods received from sponsors are excluded from Mr A's South African tax for the same reasons given in Notes 1 and 2 of 4.4.1.
3) In terms of the calculation of the normal tax liability the expenses relating to the tax on foreign sportspersons cannot be deducted from the gross income.
4) The normal tax payable will require Mr A to submit a tax return.

4.4.3 Comparison of the tax liability post versus prior August 2006

Having discussed the above hypothetical example it is clear that the tax due prior to August 2006 is substantially more than the tax due after August 2006. The difference of R192,100 is to a large degree a result of the reduced rate of tax

which applies to the tax on foreign sportspersons. The calculations above are based on Mr A's income and expenditure, which extends beyond his sporting income only.

In an attempt to indicate the difference based purely on Mr A's income from his sporting and related activities a brief comparison of the figures will be made as if these are the only incomes and expenses of Mr A.

	Prior Aug-06	Post Aug-06
	R	R
Income		
Winnings from tournament	1,000,000	1,000,000
Appearance fee for public appearance	130,000	130,000
Total income	1,130,000	1,130,000
Deductions		
Accommodation	20,000	
Travel expenses to SA	60,000	
Insurance	5,000	
Payment to manager	110,000	
Entry fee	20,000	
Fine	10,000	
Total expenses	225,000	
Taxable income	905,000	1,130,000
Tax rates applicable		15%
On R400 000	117 000	
On R505 000 x 40%	202 000	
	319 000	
Less: Rebate	7 200	

	311 800	
Tax due	311,800	169,500

The tax rates applicable before and after August 2006 to income of a foreign sportsperson from a related activity is, as can be seen above, substantially different. The situation with regard to the new tax on foreign sportspersons is a final tax calculated at 15 percent of the gross amount received without taking any deductions into account.

The position prior to August 2006 was very different. The rate that applied was the standard tax rate which was calculated on a sliding scale varying from zero to 40 percent depending on the amount of the taxable income. More often than not the rate applicable was the maximum marginal rate of 40 percent which is applicable to all amounts in excess of the amount at which the rate applies (in 2007 applied on an annual taxable income of R400,000).

The difference between the two rates applicable is substantial. The intention of the legislature in determining the amount of the withholding tax, being 15 percent, seems to have been to take the average of the possible expenses that the sportsperson could claim as deductions and from this to calculate an average percent of a sportsperson's expense/income ratio. SARS confirmed this in the Explanatory Memorandum on the Revenue Laws Amendment Bill of 2005 by stating that the reduced rate is in order to compensate for the inability of the taxpayer to claim deductions. The corresponding tax in both the United Kingdom and Australia applies their standard rates of tax applicable to non-residents, as was discussed in chapter 3.

The calculation of the tax on foreign sportspersons after the introduction of the new sections 47A to 47K of the Income Tax Act also appears to be a lot simpler than prior to August 2006. The only concern or complication that could arise is the determination of which expenses can be utilized as deductions against a

foreign taxpayer's income from a South African source, other than income from a specific activity as defined in section 47A. This could arise in circumstances such as the example above where certain expenses might need to be apportioned between the income relating to the tax on foreign sportspersons and other income due to the taxpayer from a local source or deemed local source, in order to correctly calculate the tax due on South African source income.

The loss of revenue caused by the lesser amount of tax that appears will be collectible under the new system should be weighed up against the decreased cost of collecting and enforcing compliance with the tax. A comparison between the *effective/statutory ratio's* of both post and prior August 2006 would also indicate the value of the new tax. These statistics, which have not yet been released by SARS, would assist the discussion about the comparison of the two tax systems.

A counter argument against the imposition of the tax as a result of the Revenue Authorities' fears that the foreign sportspersons may leave the Republic after their performance without paying their taxes, is that most of the sportspersons are high profile individuals who earn large amounts and are unlikely to evade tax. The reputational risk linked to the publicity involved should they evade the payment of their taxes would far outweigh the benefit of the tax evasion.

4.4.4 Comparison of the tax liability of a South African resident and non-resident post August 2006

The horizontal equity of the tax on sportspersons will now be analyzed comparing the taxation of local and foreign sportspersons, after August 2006. The income and expenditure of a local sportsperson will now be assessed assuming that he or she has similar income and expenses to that of the foreign sportsperson as set out above and this will be compared to the tax payable by a foreign sportsperson as calculated in 4.4.2 above.

Tax calculation

		R
Endorsements		200,000
Winnings		1,000,000
Sponsored equipment		100,000
Illegal activities		500,000
Appearance fees		130,000
Shop sales		540,000
Interest income		50,000
Dividends		20,000
Rental income		460,000
Gross income		3,000,000
Less: Exempt income		36,500
Dividends	20,000	
Interest	16,500	
Less: Deductions		511,000
Hotel accommodation	20,000	
Insurance	5,000	
Payment to manager	110,000	
Entry fee	20,000	
Fine	10,000	
Maintenance	45,000	
Shop expenses	300,000	
Taxable income		2,452,500
Normal tax payable		938,000
On 400,000	117,000	
On 2,052,500 x 40%	821,200	
Less: Primary rebate		7,200
Normal tax liability		930,800

Notes:

1) As South African residents are taxed on their worldwide income all the income listed is included in the sportsperson's gross income. See also notes under 4.4.1 above.
2) Expenses agree with the expenses as set out in 4.4.1 above save for the travel expense from Australia to South Africa.

A comparison between the tax payable in the above example and the tax payable by a non-resident sportsperson as set out in 4.4.2 above indicates a substantial difference. The local sportsperson would pay R336,100 more tax than his or foreign counterpart (R930 800 – R594 700). The tax (at 40%) on the travel expense of R60 000 incurred in travelling from Australia, would only account for R24 000 of the difference.

In an attempt to show a truer reflection of the difference in tax payable by resident and non-resident sportsperson a similar exercise to the one done in 4.4.3 will be done, by comparing the tax payable purely on the taxpayer's sporting and related activities as if these are the only incomes and expenses of Mr A.

	Resident	Non-resident
	R	R
Income		
Endorsements	200,000	
Winnings	1,000,000	1,000,000
Sponsored equipment	100,000	
Illegal activities	500,000	
Appearance fees	130,000	130,000
Gross income	1,930,000	1,130,000

Deductions		
Hotel accommodation	20,000	
Insurance	5,000	
Payment to manager	110,000	
Entry fee	20,000	
Fine	10,000	
	165,000	
Taxable income	1,765,000	1,130,000
Tax rates		15%
On R400 000	117 000	
On R1 365 000 x 40%	546 000	
	663,000	
Less: Rebate	7 200	
Tax due	655 800	169,500

This example clearly illustrates that the new tax on foreign sportspersons is not equitable on a horizontal level between South African and foreign sportspersons. The local sportsperson will, in the example, be paying an amount of R486,300 more than his or her foreign counterpart. This difference could very well result in dissatisfaction on the part of local sports stars.

4.5 Conclusion

This chapter discussed a theoretical model for the effectiveness of a tax. It also compared the new tax on foreign sportspersons implemented by SARS since August 2006 with the situation as it was before. A hypothetical example was also used to illustrate the difference in the rates and administration of the tax on foreign sportspersons before and after August 2006.

There appear to be three conclusions that can be made from this chapter. Firstly, the new tax, based purely on theoretical information as there was no data available from SARS, appears to be a very effective tax.

Secondly, in determining the tax payable by a non-resident sportsperson, who also has further business interests in South Africa, it will be vitally important to draw a distinction between the income and expenses that fall within the ambit of the new Part IIIA of the Income Tax Act and those that do not. The impact of this distinction is that all the income subject to the tax on foreign sportspersons will be exempt from normal tax and also the expenses relating to the new tax cannot be claimed as a deduction from the normal gross income. The difficulty arises where certain expenses relate to both the sporting income and the "other" income of the taxpayer, as it is uncertain whether this will be permitted to be apportioned by SARS. Section 23(g) may not be of assistance as both types of income may be "trade" income. The apportionment of expenses has not been provided for in the Income Tax Act or sanctioned by the courts.

Finally, as was evident from the example above the new tax has an average statutory tax rate of significantly less than the average rate would have been had the normal non-resident taxation rules have been applied. It is mentioned above that possibly the expense ratio is too high or that the tax rate of 15 percent is too low. A mitigating factor for SARS is surely that the effective tax rate would be a lot higher for the new tax and therefore resulting in the *effective/statutory ratio* being closer to one for the new tax on foreign sportspersons if it should be compared to the pre-August 2006 position. Therefore, in a perfect world the fiscus would receive less funds using the new tax. However, as the administration of the new tax is more effective, the actual tax collected should be more after August 2006 (or at least equal to it) in comparison to the situation when the normal non-resident rules applied.

A concern was also raised about the fairness or horizontal equity of the new tax, when a comparison is made between the taxes paid by local sportspersons in comparison with their foreign counterparts.

The next chapter sets out the conclusions arising from the research. Any potential gaps in the new legislation and also some possible improvements relating to the tax will be discussed. Other related fields or topics that could be relevant, but that would require further research, will also be identified.

CHAPTER 5: CONCLUSIONS

5.1. Introduction

In this, the concluding chapter, a summary of the research findings is set out. Potential gaps in the new legislation governing non-resident sportspersons and also some possible improvements relating to the tax will be discussed. Further related fields or topics that could require research will also be identified as well as certain problems experienced in carrying out the research.

In order to give a complete overview of the taxation of sport and sportspersons in South Africa the new legislation regarding sports clubs will be discussed and also the concessions granted with regard to the 2010 FIFA World Cup that is to be held in South Africa.

5.2. Overview of the new tax

Prior to August 2006 foreign sportspersons were taxed on income earned in South Africa in terms of the normal rules relating to non-resident taxpayers. In terms of these rules non-residents were only taxed on their income which was from a South African source or deemed to be from a South African source.

A proposal made by the Minister of Finance in his Budget Speech of 2005 to tax all income earned in the Republic by non-resident sportspersons at a flat rate of 15 percent has been included as Part IIIA of the Income Tax Act by the Revenue Laws Amendment Act No. 31 of 2005.

In order to summarize the new tax on foreign sportspersons and compare the tax to similar taxes imposed in the foreign jurisdictions discussed, as well as the situation prior to August 2006 a summary table is set out below:

	SA Prior Aug 2006	SA Post Aug 2006	UK Position	Aus Position
Date tax came into effect	Not applicable	August 2006	1987	1 April 2004
Taxable amount	Normal income tax rules applicable to non-residents: therefore amounts from South African or deemed South African source.	Gross amount actually paid or accrued to the sportsperson	Gross amount actually paid or accrued to the sportsperson	Gross amount actually paid or accrued to the sportsperson
Deductions permitted prior to calculating taxation due	All standard deductions as per the Income Tax Act.	None	None	None
Tax Rate	Normal tax rates.	15%	Basic rate of income tax for the year	Various rates depending on whether the non-resident has supplied an ABN number.
Transfer of assets in lieu of payment	Value attributed would be open market value on the date of acquisition thereof.	No specific provisions	Value attributed would be net asset cost to payer.	No specific provisions
Payments to support staff included in tax?	Not applicable	No specific provision	Uncertain whether this would fall within definition of "ancillary income".	Specifically included, if intrinsically involved.
Employees excluded from tax?	Not applicable	Yes	Yes	Yes

Opportunity to apply for a reduced rate	No	No	Yes	Yes
Withholding Tax	No	Yes	Yes	Yes
Onus to pay	Sportsperson	The payer of the amount to either the non-resident sportsperson or a person or entity on his or her behalf, failing which the foreign sportsperson is liable.	The payer of the amount to either the non-resident sportsperson or a person or entity on his or her behalf.	The payer of the amount to either the non-resident sportsperson or a person or entity on his or her behalf.
Dates of Payment	In terms of normal rules relating to the payment of income tax.	If withheld, before the end of the month following the month during which the amount was withheld. If not withheld, within 30 days of receipt.	Within 14 days of the end of the return periods.	Various methods and time frames apply depending on whether the withholder has been classified as a small, medium or large withholder.
Notification of event	Not applicable	Within 14 days of concluding agreement to arrange event.	None mentioned	None mentioned

The situation with regard to the taxation of resident sportspersons has remained unchanged and they are still taxed in terms of the normal rules of taxation.

5.3. Shortcomings of and recommendations relating to the Tax on Foreign Sportspersons

The new tax on foreign sportspersons has a number of shortcomings which have been identified in the earlier chapters. A brief overview of these shortcomings

and possible recommendations to South African Revenue Services (SARS) to limit the effect of the shortcomings will now be discussed.

The first contentious issue when the new taxed is analyzed is the fact that the tax is charged at a rate of 15 percent as opposed to the usual sliding scale up to a marginal rate of 40 percent. As has been indicated in chapter 4 this rate may be too low. A possible solution to this would be to have a final tax of 20 percent or possibly more appropriately, the normal tax rates to apply and the taxpayer be given the option to apply for a reduction in either the rate of tax or the tax paid or withheld, as is the case in both the United Kingdom and Australia. However, when the effectiveness of the new tax levied at the rate of 15 percent is taken into account, there might well be less tax collected, but if the administration of the collection of the tax is more efficient and the *effective/statutory ratio* is closer to one than it was previously, the reduced tax per capita might well not be such a problem.

The second shortcoming or uncertainty of the tax relates to whether the new tax applies to all income or only to receipts or accruals of a revenue nature. The Income Tax Act does not in any way distinguish between capital and revenue receipts or accruals in relation to the calculation of this tax.

The transfer of assets in lieu of payment is expressly included in the United Kingdom legislation. The transfer of an asset in lieu of payment would be taken into account when calculating the new tax on foreign sportsperson in the Republic. Uncertainty does, however, exist in relation to how the amount is to be calculated. The fact that the award of assets will be taxed also creates further problems. The organizer of the event will have to value the asset, pay the tax over to the Revenue authorities and recover the amount from the sportsperson. This may involve cash flow problems for both. The sportsperson would also have no way of contesting the valuation of the asset as it appears that there is no assessment against which objection can be lodged.

A further uncertainty surrounding the application of the tax is whether payments by organizers of an event to non-resident support staff of the sportsman or woman, such as coaches or managers, would be included within the ambit of the tax. The Australian legislation expressly includes these payments as their withholding tax includes the activities of various support staff associated with the entertainment or sporting activities (Withholding from Payments to Foreign Residents for Entertainment or Sports Activities, 2004). The inclusion of these persons in the South African environment would depend largely upon the definition of the term "sportsperson". The definition includes a person who takes part in any type of sporting activity (section 47A of the Income Tax Act). Based upon this, the amounts accrued to non-resident support staff could very well be excluded from the ambit of the tax. Whether this was the intention of the legislature and whether the section will be interpreted in this manner remains to be seen.

The difference in the determination of residence or more specifically non-residence in terms of the new tax and the general tax principles could very well lead to uncertainty and opens up the opportunity to sportspersons to endeavor to manipulate their countries of residence. The tax implications of non-residents either being present in the Republic for periods exceeding 183 days and those sportspersons actually employed by a resident, and therefore not falling within the ambit of the tax, would not seem to be a real concern as these taxpayers were not the true "target market" of the legislature when they drafted this legislation. These individuals will either have the tax collected by way of the normal employees' tax or they would spend sufficient time within the Republic for the administrators to collect the tax from them.

The ability to manipulate residence is, however, a concern and could very well be combated should the approach as set out in section 35(2)(a)(ii) of the Income Tax Act be followed in terms of which, should the taxpayer have an address

outside the Republic, he or she will be deemed to be a non-resident. This provision, read with the general residence rules as set out in section 1 of the Income Tax Act would go a long way to addressing the problem.

Determining the tax payable by sportspersons if they have other financial ventures within the Republic can be challenging when certain expenses are incurred that relate to both the sporting activities of the taxpayers and their other ventures. The difficulty arises as a result of the fact that the taxpayer is not permitted to deduct expenses from the sporting income but is allowed to deduct expenses from income earned in another venture. The Revenue authorities need to clarify how these expenses are to be apportioned.

Finally, the success of the new tax on foreign sportspersons is very reliant upon the administration and support structures that are in place. The United Kingdom have in place the Foreign Entertainers Unit which has years of experience and expertise in administering this tax. For South Africa to follow the success of the United Kingdom model will require a number of years of experience by the SARS team appointed to administer this tax.

5.4. Taxation of amateur sporting associations

In terms of a new section 30A inserted into the Income Tax Act by the Revenue Laws Amendment Act, No 20 of 2006, recreational clubs will no longer be afforded almost complete exemption from income tax.

SARS are of the opinion that sporting clubs are claiming exemptions, whether they are supplying facilities to their members or to the general public (Explanatory Memorandum in the Revenue Laws Amendment Bill, 2006). It is as a result of this that SARS has decided to amend the legislation. SARS also intends to bring the taxation of these clubs into line with the system applicable to public benefit organizations (hereinafter referred to as PBO's), in that should the

trading activities of the PBO fall outside of their philanthropic objectives then the revenue generated will be subject to normal tax (Crosby, 2006).

In terms of the new section 10(1) (cO) of the Income Tax Act, which came into effect from 1 April 2007, a sporting association will have to separate exempt income from taxable income. Included in the income that will be classified as being exempt in terms of the above section will be:

i) Membership fees and subscriptions.
ii) Payments by members for the use of social and recreational facilities provided by the club.
iii) Proceeds from fundraising activities of an occasional nature undertaken with unpaid voluntary assistance.
iv) Other receipts and accruals that do not exceed the greater of:
    - 5 percent of membership fees received or;
    - R50 000.

From the above, it appears that any receipts or accruals from members would be exempt from normal tax and any other receipts or accruals, whether from investment opportunities or from non-members, would be exempt to the extent of the greater of 5 percent of membership fees received or R50 000. All other income would be taxable at the rate of 29 percent.

Any expenditure that is incurred in the production of the exempt income cannot be deducted from the income that will be taxable by SARS (section 23(f) of the Income Tax Act). Therefore any payment made by the club to a sportsperson would possibly not be deductible. This would be the case where the payment or expense is classified as being incurred as being in the production of exempt income, or more specifically the income is expressly exempted as set out above.

SARS will also apply paragraph 65B of the Eighth Schedule of the Income Tax Act to capital gains on the disposal of recreational club property. In terms of this

paragraph the base cost will be rolled over should the proceeds that are received from the disposal be reinvested in another recreational club direct asset. The property sold must also have been used mainly for the provision of social and recreational facilities, amenities and services (Du Plessis, 2007).

In order for a club to qualify for exempt status it is required to apply to SARS's Tax Exemption Unit for an exemption certificate. Together with the application, the club is to forward a copy of the club's constitution and comply with a number of other requirements to the satisfaction of the Commissioner prior to the exemption status being granted (Du Plessis, 2007).

The main issue with regard to this new legislation is the onus placed on the club to qualify for the registration of the exempt status. Once the club has been granted the exempt status, the receipts and accruals from members would be exempt and all other receipts would be exempt, but only to a limited amount. Therefore the difficulty for clubs will be the monitoring of whether the receipts are from a member or non-member, and the different taxation implications with regard hereto. This would require a far more sophisticated accounting system than most clubs have. The additional expense involved and the tax imposed on the non-exempt activities could result in financial difficulties for the majority of sporting clubs.

5.5. 2010 FIFA World Cup Tax Dispensation

As part of the South African bid to host the FIFA World Cup football in 2010, FIFA requires the South African government to make certain tax concessions and put in place guarantees before hosting the event. These concessions would apply to both the World Cup and also the FIFA Confederations Cup in 2009. The concessions will apply for the period commencing one week before the event starts and end after the closing ceremony (Temkin, 2007).

These guarantees and concessions are given effect to in sections 89 and 106 of the Revenue Laws Amendment Act No. 20 of 2006 and also Schedules 1 and 2 of the said Act.

Part II of Schedule 1 applies to FIFA, the FIFA subsidiaries and all participating National Associations (other than the South African Football Association). In terms of this paragraph the entities referred to are exempt from all taxes, duties, levies and other taxes administered by the Commissioner. These entities are also not required to register as an employer with the Commissioner and as a result are not required to withhold or deduct any employees' tax from their employees. Despite not having to withhold any employees' tax the employer is required to supply the Commissioner with a list of its employees who are residents of the Republic. These employees will then be deemed to be provisional taxpayers. The entities are, however, required to comply with regulations regarding the Skills Development Levy and the Unemployment Insurance Fund.

Act 20 of 2006 makes provision for what is called a "tax-free bubble", wherein the profits on goods sold or services rendered will not be subject to any form of Income Tax, and Value Added Tax (VAT) will be applied at a zero rate. Any expenses incurred in the production of this exempt income will also therefore not be permitted as a deduction (Explanatory Memorandum to the Revenue Laws Amendment Bill, 2006, 46).

In terms of Part III of Schedule 1 of the said Act, the goods must be of a semi-durable or consumable nature. The services on the other hand have to be intrinsic to the staging of the Championship, enjoyed or partially utilized at a Championship site, and paid for by individual members of the general public, FIFA or the Local Organizing Committee. These concessions also only apply to the sale of goods or the supply of services on a Championship site as defined in Act 20 of 2006.

Paragraph 6 of Part III discussed above applies to any entity which is:

- a Commercial Affiliate,
- a Licensee,
- the Host Broadcaster, a Broadcaster or a Broadcasting Rights Agency,
- a Merchandising Partner,
- a FIFA Designated Service Provider,
- a Concession Operator,
- a Hospitality Service Provider, or
- The nominated FIFA flagship store operator.

These entities are all defined in the Schedule to the said Act.

Part IV then proceeds to discuss the concessions relating to certain individuals listed in the Act, including but not limited to, members of the FIFA delegation, a Championship referee and a media representative. This section does not, however, include any officials of the South African Football Association, members of a team or any directors or staff of the Local Organizing Committee. In terms of paragraph 10 of the schedule any receipt or accrual of an individual listed is excluded from his or her "gross income" in so far as the receipt or accrual is in connection with the Championship. This would result in the excluded parties referred to being taxed in terms of the normal rules of taxation.

A further concession is granted with regard to import duty as contemplated in the Customs and Excise Act, 91 of 1964. This is discussed in Part VI of the schedule.

There is uncertainty as to how these concessions will be used and what effect they will have on the economy. There is a school of thought that is of the opinion that concessions such as these would be bad for the South African economy as they would lead to an unequal allocation of resources (Temkin, 2007).

5.6. Possible further areas of research

Further research could be done on the effectiveness of the withholding tax once SARS have released statistics relating to the tax. These will only be available at some time after August 2007.

There also exists an opportunity to do further research in the sporting field around the new legislation governing the taxation of amateur sporting clubs which was recently inserted into the Income Tax Act as section 30A by Revenue Laws Amendment Act, 20 of 2006.

A further development in the taxation and sporting field which could provide an opportunity for further research is the requirement by FIFA for the South African government to make certain tax concessions and to put in place guarantees before the hosting of the 2010 World Cup and the FIFA Confederations Cup in 2009. These guarantees and concessions are given effect to in sections 89 and 106 of the Revenue Laws Amendment Act 20 of 2006 and also Schedules 1 and 2 of the said Act.

5.7. Conclusion

In conclusion, the new tax on foreign sportspersons appears to be a tax that should be relatively simple to administer and also be an effective one if the local organizers are aware of their roles and perform the duties imposed on them by the Act adequately. In order for this to be the case the roll-out of the tax to all taxpayers and more specifically resident event organizers, is of the utmost importance.

The administration of the tax should also improve as the understanding of the new piece of legislation becomes clearer and as the intentions of the legislature become more apparent by means of either interpretation by courts of law or possible future SARS Interpretation Notes. It is also vital that the individuals within the revenue department dealing with the taxation of foreign sportspersons

and entertainers gain experience, which can only be obtained over time, as was the case with the United Kingdom's FEU.

As a result of the tax on foreign sportspersons and entertainers being a new tax there is not a great deal of literature available on this topic. SARS have also indicated that they are not permitted to release any statistics on the tax until the tax has been in force for at least a year. These have been the major hindrances in carrying out the research for this thesis.

List of References:

AP2140 – Schedule D: Preliminary: Non-Resident Professional Entertainers and Sportsmen. [On-line] Available: http://www.hmrc.gov.uk/manuals/apmanual/AP2140.htm [Accessed 25 May 2006]

AT6.603 – Non-Resident Entertainers: and Sportsmen. [On-line] Available: http://www.hmrc.gov.uk/manuals/atmanual/AT6.603.htm [Accessed 3 June 2006]

Australian Tax Office. (2004) **Withholding From Payments to Foreign Residents for Entertainment or Sports Activities.** Canbera [Accessed 16 May 2006]

Crosby, H. (2006) **SARS New Tax Strikes a Blow to Recreational Sport at Club Level.** [On-line]. Available: http://www.deneysreitz.co.za/news/item/sars_new_tax_strikes_a_blow_to_recreational_sport_at_club_level,1128.html [Accessed 28 March 2007]

Du Plessis, L. (2007) **Tax on Recreational Clubs: Do they have a Sporting Chance?** [On-line]. Available: http://www.accountancysa.org.za/resources/ShowItemArticle.asp?ArticleId=1081&issue=734 [Accessed 20 March 2007]

Goldswain, G. K. (2005) **Masters Degree in Commerce (Taxation) Module 1** Retrieved: Pretoria: University of South Africa

Goodall, A. (2006) **Agassi's Lords Defeat 'Sets Dangerous Tax Precedent'** [On-line] Available: www.taxationweb.co.uk/news/print_news.php?id=350 [Accessed 12 February 2007]

Healy, D. (2005, 3rd ed.) **Sport and the Law.** Sydney: University of New South Wales Press Ltd.

Huxham, K. & Haupt, P. (2007, 26th ed.) **Notes on South African Income Tax.** Roggebaai: H & H Publications.

Individual Income Tax Rates. (2006) [On-line]. Available: http://www.ato.gov.au/individuals/content.asp?doc=/content/12333.htm&pc=001/002/046/002/002&mnu=1045&mfp=001/002&st=&cy=1 [Accessed 24 February 2007]

Information and Background about the Australian Business Number (ABN). (2006) [On-line]. Available: http://www.ato.gov.au/print.asp?doc=/content/34020.htm [Accessed 24 February 2007]

Jordaan, K. Kolitz, M.A., Stein, M.L. & Stiglingh, M. (2005) **Silke on South African Income Tax.** Durban: LexisNexis-Butterworths.

National Treasury. (2006) **Explanatory Memorandum on the Revenue Laws Amendment Bill, 2006** [Accessed 28 March 2006]

OECD Articles of the Model Convention With Respect to Taxes on Income and on Capital. [On-line]. Available: http://www.oecd.org/LongAbstract/0,2546,en_2649_201185_35363841_1_1_1_1,00.html [Accessed 23 May 2006]

PricewaterhouseCoopers (2005) **1350. For the Love (or Money) of the Game?** [On-line] Available: http://www.saica.co.za/integritax/1350_For_the_love_or_money_of_the_game_.htm [Accessed 10 April 2006]

Schaefer, M. E. & Turley, G. (2001) **Effective Versus Statutory Taxation: Measuring Effective Tax Administration in Transition Economies.** European Bank for Reconstruction and Development.

Broke, A. V. B. Tiley, J. Hubbard, A. & Wolf, J (1997) **Simon's Direct Tax Service.** United Kingdom: LexisNexis-Butterworths.

Temkin, S. (2004) **SARS Plans Withholding Tax For Nonresident Sellers.** [On-line] Avaliable: www.etaxes.co.za/articleprint.asp?articleid=1120 [Accessed 13 June 2006]

Temkin, S. (2005a) **Tax Change Favours Foreign Performers.** [On-line]. Available: http://www.etaxes.co.za/articleprint.asp?articleid=1264 [Accessed 23 May 2006]

Temkin, S. (2005b) **SARS Tightens Up On Foreign Entertainers' Pay.** [On-line]. Available: http://www.etaxes.co.za/articleprint.asp?articleid=1309 [Accessed 23 May 2006]

Temkin, S. (2007) **SARS Content that World Cup is a Taxing Affair.** [On-line] Available: http://etaxes.co.za/articleprint.asp?articleid=1714 [Accessed 20 March 2007]

The Budget Speech 2005 by Minister of Finance Trevor A Manuel. [On-line]. Available: http//www.info.gov.za/speeches/2005/05022316151001.htm [Accessed 16 May 2006]

Williams, R.C. (2001, 3rd ed.) **Income Tax and Capital Gains Tax in South Africa Law & Practice.** Durban: LexisNexis-Butterworths.

Legislation

South Africa

Revenue Laws Amendment Act No. 31 of 2005, Part IIIA

Revenue Laws Amendment Act No. 20 of 2006

Revenue Laws Amendment Act No. 33 of 2006

South Africa Income Tax Act No. 58 of 1962

Prevention and Combating of Corrupt Activities Act No. 12 of 2004

United Kingdom

Income and Corporation Taxes Act 1988 (c.1)

Australia

Australian Business Number Act of 1999

Court Decisions

1. Agassi v Robinson (her Majesty's Inspector of Taxes) [2006] UKHL 23
2. Caltex Oil (SA) (Pty) Ltd v SIR 1975 (1) SA 665 (A), 37 SATC 1
3. CIR v African Oxygen Ltd 1963 (1) SA 681 (A), 25 SATC 67
4. CIR v Cape Consumers (Pty) Ltd, 61 SATC 91
5. CIR v Delfos, 1993 AD 242, 6 SATC 92
6. CIR v Delgoa Bay Cigarette Company, 32 SATC 47, 1918 TPD 391
7. CIR v Genn & Co (Pty) Ltd, 1955 (3) SA 293 (A), 20 SATC 113
8. CIR v George Forest Timber Company Ltd, 1924 AD 516, 1 SATC 20
9. CIR v Lever Bros 1946 AD 441, 14 SATC 1
10. CIR v People's Stores (Walvis Bay) (Pty) Ltd 1990 (2) SA 353 (A), 52 SATC 9

11. CIR v The Witwatersrand Association of Racing Clubs, 1960(3) SA 291(a), 23 SATC 380
12. CIR v Visser 1937 TPD 77, 8 SATC 271
13. Cohen v CIR 1946 AD 174, 13 SATC 362
14. Edgars Stores Ltd v CIR 1988 (3) SA 876 (A), 50 SATC 81
15. Geldenhuys v CIR, 1947(3) SA 256 (C), 14 SATC 419
16. ITC 1104 (1967) 29 SATC 46
17. ITC 1490 (1990), 53 SATC 99
18. ITC 1624 (1997) 59 SATC 373
19. Joffe & Co (Pty) Ltd v CIR, 1946 AD 157, 13 SATC 354
20. Lace Proprietary Mines Ltd v CIR, 1938 AD, 9 SATC 349
21. Lategan v CIR 1926 CPD 203, 2 SATC 16
22. Moodie v CIR, Transkei and Another, 55 SATC 164, 1993(2) SA 501 (TKA)
23. New State Areas Ltd v CIR, 1946 AD 610, 14 SATC 155
24. Ochberg v CIR 1933 CPD 256, 6 SATC 1
25. Port Elizabeth Tramway Co Ltd v CIR, 1936 CPD 241, 8 SATC 13
26. SIR v Silverglen Investments (Pty) Ltd, 1969(1) SA 365(A), 30 SATC 199
27. Stephan v CIR 1919 WLD 1, 32 SATC 54
28. Stone v Federal Commissioner of Taxes, 2003 ATC 4584
29. Sub-Nigel Ltd v CIR, 1948 (4) SA 580 (A), 15 SATC 381
30. Tuck v CIR, 1988(3) SA 819 (A), 50 SATC 98
31. Vallambrosa Rubber Co Ltd V Farmer, 1965(2) SA 551 (A), 27 SATC 61