

Special Commissioners' Decisions*/Special Commissioners' Decisions 2000/Sports Club plc and others v Inspector of Taxes - [2000] STC (SCD) 443

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Sports Club plc and others v Inspector of Taxes

SPECIAL COMMISSIONERS:

A N BRICE AND T H K EVERETT

10, 11, 12, 14 APRIL, 8 JUNE 2000

Emoluments from office or employment – Receipts 'from' office or employment – Payments made in return for acting as or being an employee and for no other reason – Sports players providing services under employment contracts – Separate agreements relating to commercial activities of sports players between employer of sports players and other companies – Whether payments under separate agreements emoluments from employment of sports players – Whether tax deductible by employer under PAYE from payments under separate agreements – Income and Corporation Taxes Act 1988, ss 19, 203.

Emoluments from office or employment – Benefit to director or higher paid employee – Benefits in kind – Sports players providing services under employment contracts – Separate agreements relating to commercial activities of sports players between employer of sports players and other companies – Whether payments under separate agreements benefits in kind paid by reason of employment of sports players – Income and Corporation Taxes Act 1988, s 154.

Pension schemes – Retirement benefit schemes – Charge to tax in certain cases – Promotional agreement relating to commercial activity of sports player between employer of sports player and other company – Receipts from promotional agreement paid to offshore company – Offshore company investing funds to be available by agreement to sports player on his expected retirement date – Whether payments made by employer under promotional agreement made pursuant to retirement benefits scheme with a view to the provision of pension benefits – Income and Corporation Taxes Act 1988, s 595.

Sports Club plc (Sports) was the employer of E and J who were world class players of international standing. In October 1991 E entered into a licence agreement with an offshore company by which E granted the offshore company the right to negotiate and enter into agreements concerning the exploitation of his image and personality. The net royalties were invested and at the termination of the agreement, at the date when E expected to retire, would be made available to E. E described the money held for him by the offshore company as his pension fund. The offshore company entered into a sub-licence agreement with the company of E's agent, Y. In June 1995 E transferred to Sports and signed a player's agreement in standard form providing for a basic wage and bonuses. In April 1996 a promotional agreement licensing Sports to exploit and use the image of E was entered into under which Sports agreed to pay Y's company an annual fee (which by virtue of the sub-licence agreement was to be paid to the offshore company). On the same

day, Sports and Y's company entered into a consultancy agreement under which Sports engaged Y's company to provide services which included enabling Sports to secure the maximum exploitation of the rights granted under the promotional agreement. J and Sports entered into a player's agreement in standard form in July 1995. In December 1995 J entered into a contract of employment with a commencement date in August 1995 with JPL, a company owned by J and J's wife. The contract provided that J would act as the physical representative of the company's intellectual property. In April 1996 JPL entered into a promotional agreement with Sports which granted Sports the right to use and exploit J's image in specified ways. Moneys paid to JPL by Sports under the promotional agreement were in part paid to J by way of salary and in part retained by JPL. The Revenue issued a notice of determination in April 1997 which showed estimated amounts of tax due from Sports as the employer of E and J and taxed certain amounts of

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income of E and J as 'other emoluments'. Sports, E and J appealed. The Revenue contended: (i) that the agreements had no independent value but had been created to provide a colourable reason for the transmission of money to the players in addition to their salaries and the payments made by Sports under the agreements were emoluments from the employment of E and J chargeable under s 19^a of the Income and Corporation Taxes 1988 and therefore that Sports should have deducted income tax under s 203^b of the 1988 Act; (ii) that, alternatively, for the same reasons, the payments were benefits in kind within s 154^c of the 1988 Act and so treated as emoluments of employment; (iii) that, alternatively, in relation to E only, the payments under the promotional agreement were paid by Sports pursuant to a retirement benefits scheme with a view to the provision of pension benefits for E within the meaning of s 595^d of the 1988 Act.

- a* Section 19, so far as material, is set out at p 455 *gh*, post
- b* Section 203, so far as material, is set out at p 460 *de*, post
- c* Section 154, so far as material, is set out at p 460 *j* to p 461 *b*, post
- d* Section 595, so far as material, is set out at p 462 *ef*, post

Held – (1) The promotional agreements and the consultancy agreement were contracts for full consideration and so would be excluded from tax under s 19 for that reason alone. The payments under those agreements were made in return for promotional rights and consultancy services respectively and not in reference to the playing of games which was the service rendered by each player by virtue of his player's agreement with Sports. Accordingly, the payments under the agreements were not emoluments from the employment of E or J under s 19 and it followed that Sports should not have deducted tax from the payments under s 203 (see paras 100 and 101, post).

(2) The words 'by reason of his employment' in s 154(1)(a) were wider than the words 'emoluments from the employment' in s 19. However, in the instant case, the payments under the agreements were not made by

Sports 'by reason of the employment' of either E or J. The payments were paid 'by reason of' the separate commercial contracts. No benefit was provided to either E or J. 'Benefit' in s 154(2) excluded anything provided in return for good consideration under a separate commercial contract. Even if benefits had been provided, they were not provided to E or J but to Y's company and JPL respectively (see paras 114, 115 and 116, post).

(3) The sums paid by Sports under E's promotional agreement were not paid '*pursuant to* a retirement benefits scheme'. They were paid *pursuant to* the promotional agreement and in return Sports received the rights under the agreement. It was of no concern to Sports what was done with the payments by Y's company. Nor were the sums paid '*with a view to the provision of* any relevant benefits' but were paid *with a view to the provision of* rights under the promotional agreement (see para 126, post).

Accordingly, the taxpayers' appeals would be allowed.

Notes

For emoluments chargeable under Sch E, see Simon's Direct Tax Service E4.401.

For PAYE, see *ibid*, E4.902.

For benefits in kind, see *ibid*, E4.611.

For retirement provision, see *ibid*, E7.205.

For the Income and Corporation Taxes Act 1988, ss 19, 154, 203, 595, see *ibid*, Part G1.

Cases referred to in decision

Black Nominees Ltd v Nicol (Inspector of Taxes) [1975] STC 372, 50 TC 229.

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Brumby (Inspector of Taxes) v Milner [1976] STC 534, [1976] 1 WLR 1096, [1976] 3 All ER 636, 51 TC 583, HL.

Hochstrasser (Inspector of Taxes) v Mayes [1960] AC 376, [1959] 3 All ER 817, 38 TC 673, HL.

Newstead (Inspector of Taxes) v Frost [1980] STC 123, [1980] 1 WLR 135, [1980] 1 All ER 363, 53 TC 525, HL.

Pritchard (Inspector of Taxes) v Arundale [1972] Ch 229, [1971] 3 All ER 1011, 47 TC 680.

Rendell v Went (Inspector of Taxes) [1964] 1 WLR 650, [1964] 2 All ER 464, 41 TC 641, HL.

Routh v Webster (1847) 10 Beav 561, 50 ER 698.

Walter v Ashton [1902] 2 Ch 282.

Wicks v Firth (Inspector of Taxes) [1982] STC 76, [1982] Ch 355, [1982] 2 All ER 9, 56 TC 318, CA; *rvsd* [1983] STC 25, [1983] 2 AC 214, [1983] 1 All ER 151, 56 TC 318, HL.

1. Sports Club plc (Sports) appeals against a notice of determination dated 18 April 1997 which showed estimated amounts of tax due from Sports as the employer of Evelyn and Jocelyn. Evelyn and Jocelyn appeal against parts of assessments which taxed certain income as 'other emoluments'.

2. Section 19 of the Income and Corporation Taxes Act 1988 (the 1988 Act) provides that tax under Sch E shall be charged in respect of any employment on emoluments therefrom. Section 203 provides that, on the making of any payment of income assessable to income tax under Sch E, income tax shall be deducted by the person making the payment. Section 154 provides that there is to be treated as emoluments of an employment certain benefits provided to an employee by reason of his employment. Section 595 provides that a sum paid by an employer pursuant to a retirements benefits scheme with a view to the provision of pension benefits for an employee is deemed to be income assessable to tax under Sch E. The relevant parts of these sections are set out in full later in this decision.

3. Evelyn and Jocelyn (the players) each entered into service agreements (the players' agreements) with Sports. It was agreed that the salaries paid under the players' agreements were emoluments of the employments. Both players also entered into promotional agreements with companies under which they agreed to provide promotional services to the companies. Sports entered into agreements with both companies under which the companies agreed to supply to Sports certain promotional services of the players in return for fees paid by Sports to the companies. Sports also entered into a separate agreement with the company which provided the promotional services of Evelyn for the supply of consultancy services to Sports for which Sports paid a separate fee to that company.

4. The issues for determination in Evelyn's appeal were: (1) whether the payments made by Sports under the promotional agreement and the consultancy agreement were emoluments from the employment of Evelyn and so chargeable to income tax by virtue of s 19; or (2) if the payments were not chargeable under s 19, whether they were benefits in kind within the meaning of s 154 and so treated as emoluments of the employment; or (3) if the payments under the promotional agreement were not chargeable to income tax under either ss 19 or 154, whether they were paid by Sports pursuant to a retirement benefits scheme with a view to the provision of pension benefits for Evelyn within the meaning of s 595.

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5. The issues for determination in Jocelyn's appeal were: (1) whether the payments made by Sports under the promotional agreement were emoluments from the employment of Jocelyn and so chargeable to income tax by virtue of s 19; or (2) if they were not, whether the payments were benefits in kind within the meaning of s 154 and so treated as emoluments of the employment.

6. The issue for determination in Sports' appeal was whether, if the payments were emoluments from the employments within the meaning of s 19, Sports should have deducted income tax from the payments under s 203.

7. The parties requested a decision in principle leaving the amounts of the assessments to be determined later.

8. During the hearing, and in the documents, the promotional agreements were sometimes referred to as 'image rights agreements'. As it was agreed that in England there is no property in a person's image we do not find the expression 'image rights agreement' as being sufficiently descriptive of the contents of the agreements in issue in this appeal. As the agreements concerned promotion, publicity, marketing and advertising we refer to them as promotional agreements except where the context requires a reference to image rights.

9. Two agreed bundles of documents were produced by the parties.

10. Oral evidence was given on behalf of the appellants by six witnesses each of whom had put his evidence in writing in the form of a witness statement. The witnesses were: Evelyn, one of the appellants in the appeal; Mr Andrew Croker who in 1995 was a senior international vice-president at International Management Group (IMG), a company which managed and marketed sporting personalities including racing drivers, tennis players, and golfers. In 1995, at the time of the events in issue in this appeal, IMG managed about five players such as Evelyn and Jocelyn but that figure increased in later years and is now about 55; X, the vice-chairman of Sports; who is also an executive director and is principally responsible for the transfer of players to and from Sports and for the commercial and marketing side of Sports' business; Y, an internationally licensed agent who for the last five years has carried on business through a company which is resident in Gouda, the Netherlands. Y has been an agent for over 20 years and is currently vice-president of the International Association of Agents. The company represents about 50 players including Evelyn; Jocelyn, one of the appellants in the appeal; and Z, who in 1995 carried on business on his own account, including as a sports agent, through his company. At all material times Z represented Jocelyn.

11. From the evidence before us we find the following facts.

Evelyn and his promotional agreements

12. Evelyn is a world-class player of international standing. He is domiciled abroad.

13. In about 1990, Evelyn retained Y as his agent. In evidence which we accept Evelyn said that he had never had any obligation to pay, and had never paid, Y to act as his agent. He thought that any club he was going to would do that.

14. Y not only represents the interests of Evelyn as a player but also seeks to secure the best commercial use of Evelyn's promotional activities. Y gave evidence, which we accept, that he not only advises players and represents them in negotiations relating to their professional contracts with clubs but he also advises them in relation to other commercial opportunities, including the exploitation of their images. Leading players with a national or international reputation can command fees for personal appearances, interviews with the media, and the personal endorsement of products relating to their particular sport. The most

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valuable endorsement is that of footwear. In evidence which we accept Y said that image rights contracts had been entered into with foreign clubs and that all the players in Evelyn's first club team had image rights contracts.

15. In addition, Y's company has made consultancy agreements with a number of sporting clubs each of which clubs employs a player which his company represents as agent. Such a consultancy service was also provided to a leading South American club, and to a Dutch club, neither of which clubs employed any player which his company represented. Under these consultancy agreements his company monitors a player on a regular basis and assists the club in resolving or avoiding contractual or personal problems.

16. In December 1990 Evelyn entered into an agreement, called the basic framework agreement, with Y's company. In evidence which we accept Evelyn and Y said that the agreement merely confirmed Evelyn's existing relationship with Y's company. The agreement had never been enforced and no payments were ever made under it. By the mid-1990s both Evelyn and Y's company regarded it as ceasing to exist. That was confirmed by letter of 16 September 1997.

17. Originally Evelyn participated in a pension scheme which took about half his salary and which would provide a pension for him at the age of 40. As his earnings increased the amount of the contributions became unattractive. In 1991 Evelyn was 22 years old and was earning high fees which he did not need but he did wish to exploit his 'abilities off the playing surface' so as to provide for his future after he stopped playing. Accordingly, on 9 October 1991 Evelyn entered into an agreement (the principal licence agreement) with a company registered in Curacao in the Netherlands Antilles (Antilles). Antilles was a company managed by the IMG Bank and was responsible for arranging the sound investment of Evelyn's earnings from the sale of his image rights.

18. Under the principal licence agreement Evelyn granted Antilles the exclusive right to negotiate and enter into agreements throughout the world concerning the exploitation of his image and personality. Antilles undertook 'to investigate actively and effectively any possibility for the commercial exploitation of Evelyn's name and personality'. It was agreed that the royalties received by Antilles as a result of entering into such arrangements would, after deduction of a fee for Antilles of a maximum of 5%, be invested by Antilles. At the termination of the agreement all the funds would be made available to Evelyn. The agreement was for a period of 15 years expiring on 9 October 2006 (when Evelyn will be 36 years old) with a power to renew. Antilles sent to Evelyn quarterly statements showing the amounts of revenue and royalties received, the amount of its fees, and the cumulative total of the funds held. Evelyn described the money held for him by Antilles as his pension fund for when he retired.

19. With Evelyn's approval, on 14 October 1991 Antilles entered into an agreement (the sub-licence agreement) with Y's company under which Antilles sub-licensed to Y's company the European rights under the principal licence agreement. The sub-licence agreement recited that Antilles was entitled to conclude contracts concerning Evelyn such as advertising, promotion and marketing and that those rights could cover copyright relating to photo series; videos and film portraits; design rights relating to logos; rights to trade names; trademark rights; and the right to exploit the name, reputation, image, voice, personality, and initials of Evelyn in respect of advertisements, marketing and other commercial rights in the media. Y's company agreed to pay to Antilles the royalties received by Y's company subject to deduction of its own remuneration which was on a sliding scale between 5% and 5.5%.

20. In 1992 Evelyn went to play for a club in Southern Europe. On 12 February 1992 Y's company entered into an agreement with that club under which Y's company licensed the image of Evelyn subject to certain

conditions. The term of the agreement was from 1 July 1993 to 1 July 1996. A number of matters were
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 excluded from the licence including a photobook, a video film and 'the shoes of the player'.

21. In July 1993 Y's company secured a contract with Reebok International Ltd (Reebok) and entered into an agreement (the Reebok licence agreement) under which Y's company granted to Reebok during the term of the agreement the exclusive right and licence to use the image rights of Evelyn in connection with the production, advertisement, manufacture, promotion, publicising, marketing, sale and distribution of 'company products'; 'company products' were defined as footwear, apparel, accessories and other merchandise as manufactured or sold by Reebok. Reebok was to pay a basic fee each year, plus royalties, subject to an annual limit. The agreement was for the term from 1 August 1993 to 31 July 1996.

22. Also in July 1993 Reebok entered into a separate agreement with Evelyn (the Reebok services agreement) under which Evelyn agreed to render his services for the production of advertising, promotion, public relations, marketing and sales materials at the request of Reebok and to make personal appearances at various promotional and marketing events for a total of 12 days. Reebok agreed to pay Evelyn an annual sum and expenses and also bonuses for specified events.

1995—Sports recruits Evelyn

23. At the end of the 1994–95 season X, with the then manager of Sports, was concerned to strengthen the Sports First Team Squad with players having a world or international reputation. In particular X wished to attract Evelyn to play for Sports. In June 1995 X heard from a leading English agent who knew Y, that Evelyn might wish to move. On the following day X spoke to the secretary of Evelyn's club confirming his interest in Evelyn and later confirmed this by facsimile message.

24. Subsequently there was a meeting in London attended by the managing director of Sports, X, Y and the English agent. X was told that Evelyn was paid a salary by his club and that separate payments were under a contract for 'image rights'. Also, Evelyn had a valuable contract with Reebok for footwear which had three years to run. Y said that he was looking for three contracts with Sports; one would be the usual player's contract; one would be an 'image rights' contract and the third would be a management contract. (The 'management contract' subsequently became the consultancy agreement.) Separate figures for salary, image rights and management were discussed.

25. As far as salary was concerned, X gave evidence which we accept that Sports had a pay ceiling, although more would be paid if a player was worth more.

26. As far as the image rights contract was concerned, X was always looking for opportunities to increase the revenue of Sports because gate receipts do not support Sports' salaries and other operating costs. In 1995 Sports had not previously contracted to acquire the image rights of any of its players but X knew that this was happening in major clubs in Germany, Spain and Italy. Later the same day X telephoned Mr Croker and asked for advice about the sums payable for 'image rights'. Mr Croker took advice internally and telephoned X later to say that IMG had acted for a world-class player who, in 1993, was able to make a large sum of money for his 'image' promoting chocolates, coffee and footwear. Mr Croker thought that, in June 1995, a figure of between £A and £B for exploiting a key player's image rights would be about right. He also said that 'image rights' had a value in their negative aspect inasmuch as the person who held the image rights could control the use of them and so could ensure that a player devoted his time to sporting activities.

27. As far as the management contract was concerned, this was to be with Y's company for services to be rendered by it to Sports. The services to be provided would ensure that Evelyn 'functioned to the optimum both on and off the field'. He was not English and would be living and playing in a foreign country so there would

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be changes in his life for which he would need a mentor of his own nationality which Sports could not provide. A similar arrangement had been made between Y's company and Evelyn's previous club. X could not recall that Sports had entered into a similar agreement in respect of any other of its players.

28. Later Y and X agreed, subject to the approval of the board of directors of Sports, that Evelyn's annual salary should be £A+; in addition a sum of £C would be paid for Evelyn's image rights; and a further sum of £D would be paid to Y's company for management or consultancy services which they would provide to Sports.

29. On 19 June 1995 there was a meeting of the board of directors of Sports which had been convened to discuss the possible acquisition of Evelyn from his then club. It was reported that Evelyn's earnings there were equivalent to £X pa net and that he was available for a total package costing £X+ per year. It was agreed that Evelyn would receive an annual salary of £Y; that a further annual sum would be paid for Evelyn's 'image rights'; and that a further sum of £Z would be paid to Y's company for services to be rendered to Sports. X reported that the advice of IMG was that not less than £V could be derived from the sale of the image on a worldwide basis. One director said that Sports would be departing from its previous principle by paying such sums in respect of one individual but the view of the meeting was that every effort should be made to conclude the transaction.

30. On 19 June 1995 Y's company sent to X copies of a number of agreements including the principal licence agreement, the sub-licence agreement, and the two Reebok agreements.

Sports' agreements concerning Evelyn

31. On 20 June 1995 there was a series of meetings lasting most of the day at Sports' premises at the end of which the transfer of Evelyn to Sports was completed. During those meetings the consultancy agreement was discussed and a representative of Evelyn's previous club said that they had found Y's assistance to be very beneficial and he had helped them to get the very best out of Evelyn; it would be advisable for there to be continuity of these arrangements when Evelyn moved to Sports.

32. On 20 June 1995 Evelyn signed an agreement with Sports (the player's agreement) in standard form. The agreement was for the term of four years at a basic wage of £R per week with extra bonuses in specified circumstances. Under cl 7(b) the player agreed to make himself available for community and public relations involvement as requested by Sports' management at reasonable times during the period of the contract (eg 2-3 hours per week). Clause 13 provided that Evelyn should permit Sports to photograph him as a member of a squad of players provided that such photographs were for use only as the official photographs of Sports.

33. Also on 20 June 1995 the secretary of Sports, signed a memorandum on the notepaper of Sports saying that Evelyn had agreed to the transfer of his registration to Sports and had entered into a player's agreement with Sports. It was understood that Sports would as soon as possible enter into two agreements for four years from 19 June 1995 with Y's company. The two agreements were: an image agreement giving Sports the right to exploit the image of Evelyn at an annual fee of £C; and a consultancy agreement under which Y's company would provide consultancy and other services to Sports at an annual fee of £Z.

34. On 27 June 1995 Mr Croker wrote to X about the marketing of Evelyn and asked for information about the rights held by Sports and about any 'existing deals'. This information was forwarded to Mr Croker by the solicitors acting for Sports, on 11 August 1995. On 14 August 1995 Mr Croker wrote to X to say that although IMG would respond to approaches they were not geared up to 'aggressively pursue commercial opportunities'. At about this time X and Mr

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Croker had a discussion about the method of exploiting the image rights of Evelyn and Mr Croker's advice was to let Evelyn settle in with the team before seeking contracts for the use of his image. In evidence which we accept Mr Croker said that in 1995 IMG was mainly concerned with tennis or golf players and that IMG did not then have the resources or the people to go out and find deals for Evelyn.

35. Meanwhile, on 5 July 1995 Sports' solicitors wrote to representatives of Y's company asking for translations of, and information about, the basic framework agreement of 7 December 1990; the principal licence agreement of 9 October 1991; the sub-licence agreement of 14 October 1991; and 'image rights' generally. The letter recorded that two separate agreements would be entered into, one to deal with the 'image rights' and the other for consultancy services. Thereafter there was detailed correspondence between the representatives of Y's company and Sports' solicitors about the principal licence agreement of 9 October 1991; the sub-licence agreement of 14 October 1991; the cancellation of the agreement with Evelyn's previous club of 12 February 1992; the two agreements to be entered into with Sports (the promotional agreement and the consultancy agreement) and the possibility of a tax retention agreement.

36. The correspondence makes it clear that Sports' solicitors were concerned to ensure that Sports obtained all the promotional rights which it was paying for. In particular, on 12 July 1995 the agreement of 12 February 1992 between Y's company and Evelyn's previous club was terminated. The latter agreed to pay the former a sum by way of compensation. On 12 October 1995 the sub-licence agreement of 14 October 1991 between Antilles and Y's company was varied by letter so that the rights sub-licensed were worldwide rights rather than just European rights. And on 26 February 1996 the Reebok agreements of July 1993 were varied by letter so that they related only to footwear and not to other company products.

37. On 22 April 1996 Y's company and Sports entered into a licence agreement (Evelyn's promotional agreement) for the image of Evelyn. The agreement was until 30 June 1999 or the earlier transfer of Evelyn to another club. Y's company granted Sports the exclusive right to exploit and use the image of Evelyn throughout the world except in respect of certain excluded rights. Sports agreed to pay Y's company a fee of £C per year. (By virtue of the sub-licence agreement of 14 October 1991 the fees received by Y's company from Sports were paid to Antilles after the deduction of the 5.5% due to Y's company. By virtue of the principal licence agreement of 9 October 1991 the moneys received by Antilles were to be made available to Evelyn on 9 October 2006 after deduction of the fees due to Antilles.)

38. Also on 22 April 1996 Sports and Y's company entered into an agreement (the consultancy agreement) under which Sports engaged Y's company to provide certain consultancy services to Sports as agreed from time to time up to a maximum of 440 hours in each 12-month period. The term of the agreement was from 20 June 1995 to 30 June 1999 or the earlier termination of the player's agreement of 20 June 1995. The consultancy services included: enabling the player to function and perform as well as possible; doing everything to enable Sports to secure the maximum exploitation of the rights granted under the promotional agreement; liaising with Evelyn's National Sports Association whenever Evelyn was required for international duty so as to minimise the time he was away from Sports; assisting with any difficulties or problems which Sports might have with Evelyn; acting as a scout for Sports in evaluating players from Evelyn's country; and liaising with clubs in that country to secure friendly matches for Sports. The consultancy agreement recognised that Evelyn needed Y's help on a number of occasions. Sports agreed to pay a fee of £D pa to

Y's company. In evidence which we accept Y said that that fee belonged entirely to his company and no part of it was paid to Evelyn. Thus the payments made under the consultancy agreement remained with
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Y's company and were not passed on to Antilles and so were not made available to Evelyn.

39. Also on 22 April 1996 Sports and Y's company entered into an agreement (the tax retention agreement). This recorded that, if the Revenue did not agree that the payments under the promotional agreement and the consultancy agreement were not emoluments of the employment of Evelyn then the payments made under the agreements would be reduced by an amount 'equivalent to that which would be deductible under the PAYE Regulations' were they to apply. The Revenue did not agree that the payments under the agreements were not emoluments of the employment of Evelyn and so the retentions were made.

The exploitation of Evelyn's promotional agreement and the consultancy agreement

40. Initially there was little active marketing of Evelyn's image rights by Sports. One reason for this was that Mr Croker had advised that active marketing should be held back until Evelyn had settled in at Sports. However, we saw a number of invoices indicating that Evelyn took part in certain BBC programmes. There was also a contract on 1 August 1997 with a German manufacturer and other contracts with Chapa Chips, the BBC, Air Music and Media Live Events Ltd. X gave evidence which we accept that Sports has sold more replica shirts bearing the name Evelyn than any other name. However, Sports also sells shirts bearing the names of other players in respect of whom Sports does not have image rights contracts. X accepted in evidence that since 1995 Sports had received about 4% of the sum paid to Y's company under the terms of the promotional agreement in return for the exploitation of the image rights of Evelyn. However, on the Friday before the hearing of this appeal Sports received an offer through Y for the internet rights of Evelyn for a signing-up fee of £Q and a 0.5% equity in an internet company which it was intended to float.

41. As far as the implementation of the consultancy agreement is concerned, X gave evidence which we accept that he spoke to Y on the telephone from time to time and they had meetings every two or three months. The specific consultancy services supplied by Y's company to Sports included: arranging for Evelyn not to play in an international match when he was needed by Sports; giving assistance with Evelyn's particular phobia; ensuring that Evelyn turned up for photoshoots or promotions; providing information about foreign football players generally; arranging the loan of a Sports player to a foreign football club; providing information on television deals in Evelyn's home country; making introductions to the team manager of another team in whose players Sports were interested; and finding a team which borrowed one of Sports' foreign players; the team paid Sports a considerable sum for the benefit of borrowing the player and Sports also saved double that sum as it did not have to pay the player's salary.

Jocelyn and his promotional agreements

42. Jocelyn is also a world-class player of international standing. He was born in 1966.

43. Since 1989 Jocelyn has been represented by Z and his company. Z advises Jocelyn as a player and also advises Jocelyn how best to exploit his commercial opportunities. Z is not paid by Jocelyn but he receives a percentage of the commercial contracts.

44. During the time that he was Jocelyn's representative Z negotiated contracts relating to Jocelyn's image for larger sums of money with a number of companies including Arrow (footwear); EA Sports (computer

games); Mizuno (sports clothing and later footwear); Cadbury's (confectionery); McDonalds (fast food); Gillette (stationery); RCB (publishing); Sondico (sports equipment); Tic Tac (confectionery); and Foster Menswear (clothing). Both the Mizuno and the McDonalds contracts were each worth over £D pa. The Arrow and Cadbury's

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contracts were negotiated before Jocelyn went abroad. The Mizuno contract replaced the Arrow contract when Jocelyn was abroad. Most of the contracts were for one or two years and the only two contracts which were still extant when Jocelyn moved to Sports were those with Mizuno and McDonalds. Since 1995 Z has negotiated contracts relating to the image rights of three other England international players for very large sums of money.

45. In or about 1991 Jocelyn entered into image rights arrangements with a Jersey company. We received very little evidence about the arrangements with that company. However, it did not enter into any image licences with any of Jocelyn's clubs. It entered into contracts with at least one manufacturer relating to the endorsement or promotion of its products.

46. On 10 May 1995 a film company engaged Jocelyn to act as a contributor to a proposed series of television programmes entitled 'Peak Performance'. In the event Jocelyn was unable to contribute to these programmes but other Sports players did.

1995—Sports recruits Jocelyn

47. On 10 June 1995 Z wrote to the manager of Sports, and mentioned Jocelyn. On 11 June Z sat next to X at an international match. Z mentioned that Jocelyn could be ready for a career move. On 14 June X telephoned Z to say that he was definitely interested in Jocelyn. Discussions between X and Z followed during which Jocelyn's image rights were discussed. Z gave evidence which we accept that in any deal which he negotiates he looks to achieve a total figure for his client which could be made up in a number of ways including basic salary and image rights. X gave evidence which we accept that Jocelyn's salary could not exceed Sports' pay ceiling. However, as Jocelyn's image rights were of value Sports was willing to pay extra for them.

48. On 19 June 1995 X and Z discussed the value of Jocelyn's image rights and X was told that Jocelyn had arrangements with Mizuno Corp worth over £D for sports equipment and footwear from 1991 to 2000; with MacDonalds restaurant for fast foods from 1995 to 1998; with Richard Cohen Books for an undefined period; and with Jaguar for motor vehicles for a minimum period of 13 months to August 1996. Z said that Jocelyn could achieve about £D x 2 pa from exploiting his image. On the same day Z wrote to X about the extent of the promotional rights available for Jocelyn.

49. Early in July X, Sports' manager and Z flew to Genoa to discuss a possible transfer with Jocelyn. On Sunday 9 July 1995 in discussions Z was informed that Jocelyn would be paid a salary of just under £Y pa. Z wanted more than that for Jocelyn and considered what else Jocelyn had which was marketable. Later a higher figure was agreed between X and Z and accepted by Jocelyn when he joined them following his talks with Sports' manager. In evidence which we accept Jocelyn said that in order to get this figure an element of image rights had to be included.

50. On 10 July 1995 Z wrote in manuscript a memorandum headed: 'Jocelyn-Basic Image Rights Package - £M p.a.' The 'basic image rights package' was stated to include: 12 personal appearances; two photoshoots with Jocelyn wearing any clothing brand officially supplied to Sports; three club promotional activities; two

club advertising campaigns; up to three speeches of a sporting or motivational nature for the club or their sponsors; unlimited rights for the club to produce merchandising, subject to minimum pre-agreed quality standards being applied; two in-house publications each year featuring Jocelyn; two videos each year with Jocelyn presenting, coaching or instructing; four brief meetings each year with club sponsors after matches; and general support to the Sports Marketing and Commercial Departments. Each item was separately valued and the total estimated value of all these items amounted to £5 pa with television costing more. This memorandum was agreed and signed by X and Jocelyn on 11 July 1995.

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51. On 12 July 1995 Z wrote to X about the arrangements for Jocelyn to join Sports. He indicated that Jocelyn's existing offshore image rights company would be wound up and a new United Kingdom company would be formed that week. The new company would enter into two agreements. The first would be a promotional agreement with Sports and the second would be a joint venture agreement with Sports and Jocelyn for ten specified product areas. Under both agreements Z's company was to receive 15% commission. Sports' solicitors were instructed to prepare these two agreements.

52. The new company mentioned by Z was Jocelyn Promotions Ltd (JPL). It was incorporated in July 1995 and has a paid-up share capital of £11,000 consisting of 8,500 ordinary shares of £1 each (held by Jocelyn) and 2,500 A ordinary shares of £1 each (held by Jocelyn's wife). Jocelyn is the director of the company and his wife is the company secretary.

53. Later that same month the Jersey company, Jocelyn and JPL entered into an assignment which recited that the Jersey company was in summary winding up and that its assets were held in trust for Jocelyn. Included in the assets of the Jersey company was a contract with Jocelyn and Mizuno (the Mizuno contract). The Jersey company assigned to JPL the benefit and the burden of the Mizuno contract; Jocelyn undertook to perform the duties laid on him by the Mizuno contract and to charge JPL not more than 90% of the fees due under that contract. JPL agreed to issue Jocelyn with 4,000 of its £1 fully paid ordinary shares.

54. On the same day Jocelyn entered into an agreement with JPL (Jocelyn's promotional agreement) under which Jocelyn granted to JPL the exclusive right to exploit his name, image, signature, and voice throughout the world for the period of 15 years. In consideration of the grant of such rights JPL agreed to issue 5,000 £1 ordinary shares credited as fully paid to Jocelyn.

Sports' agreements concerning Jocelyn

55. On 17 July 1995 Jocelyn and Sports entered into an agreement (Jocelyn's player's agreement) in standard form. The agreement was until 30 June 1999 at a basic wage with extra bonuses in specified circumstances.

56. Some time before 25 July 1995 Mr Croker was informed that Sports required his advice not only about the exploitation of the image rights of Evelyn but also about those of Jocelyn. On 25 July 1995 Mr Croker asked for copies of the relevant contracts so that he could evaluate the position to see if there was a potential role for his company. On 25 July 1995 Z wrote to Sports' solicitors about the benefits which Sports could derive from the moneys to be paid for Jocelyn's image rights. The letter said:

'Please understand that we agreed this method of remunerating Jocelyn because of X's insistence that the Club should not break its existing pay policy. Even now, we would prefer it if this were replaced by a simple signing on fee instead. If it has to stay as an Image rights deal

then we need to decide whether you want it paid to Jocelyn as an "individual" or a Jocelyn associated company, in which case other aspects will need to be considered, including VAT.'

57. Sent with the letter of 25 July 1995 were some values of the elements of the image rights package mentioned in the memorandum of 10 July 1995.

58. The letter which Sports' solicitors wrote to Mr Croker on 11 August 1995 about Evelyn also contained information about Jocelyn's image rights agreements and enclosed a draft sub-licence agreement between JPL and Sports for the basic image of Jocelyn and also an extract from a proposed joint venture agreement. Mr Croker's letter to X of 14 August 1995 concluded that as far as Jocelyn was concerned IMG 'could not do anything worthwhile'.

59. On 6 December 1995 Jocelyn entered into a contract of employment with JPL with a commencement date of 31 August 1995. The contract provided that

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the company would employ Jocelyn who agreed to act as the physical representative of the company's intellectual property. The agreement was signed by Jocelyn and by his wife on behalf of the company.

60. On 22 April 1996 JPL entered into an agreement (Jocelyn's promotional agreement) with Sports which was described as a 'sub-licence agreement for basic image of Jocelyn'. 'The image' was defined as the image and personality of Jocelyn including his name, his image, his signature, and his voice. The agreement was from 17 July 1995 to 30 June 1999 or the earlier termination of Jocelyn's service agreement. Under the agreement JPL granted to Sports the right to use and exploit the image throughout the world in the specific ways mentioned in the Schedule. The Schedule to the agreement was in terms very similar to the memorandum of 10 July 1995. The licence fee was stated with value added tax (VAT) in addition. Moneys paid to JPL by Sports under the sub-licence agreement have in part been paid to Jocelyn by way of salary under the agreement of 6 December 1995 and have in part been retained.

61. Also on 22 April 1996 Sports, Jocelyn and JPL entered into a tax retention agreement. This recorded that, if the Revenue did not agree that the payments under the sub-licence agreement were not emoluments of the employment of Jocelyn, then the payments under the promotional agreement would be reduced by an amount 'equivalent to that which would be deductible under the PAYE Regulations' were they to apply. The Revenue did not agree that the payments under the sub-licence agreement were not emoluments of the employment of Jocelyn and so the retentions were made. However, JPL reported the gross income for corporation tax purposes.

62. In his letter to X of 12 July Z had said that JPL would enter into two agreements, namely Jocelyn's promotional agreement and a joint venture agreement. For the purposes of the joint venture agreement SA Ltd (SAL) was incorporated in November 1995. It had an authorised capital of £1,000 divided into 510 A shares of £1 each and 490 B shares of £1 each. On 5 February 1996 50 A shares were allotted to Sports and 48 B shares were allotted to JPL. On 22 April 1996 Sports, JPL and SAL entered into a joint venture agreement. Sports agreed to provide services and facilities to SAL and JPL granted to SAL the licence to exploit the image of Jocelyn throughout the world in relation to products and services which were not the subject of Jocelyn's promotional agreement. The products and services included in the joint venture agreement were items such as clothing, watches, soft drinks, games, and confectionery. The fees receivable under the joint venture agreement were to be allocated between Sports and JPL according to the terms of a formula contained in the agreement. The Revenue did not argue that any payments under the joint venture agreement were the emoluments of Jocelyn and so the joint venture agreement was not in

issue in the appeal.

63. Also on 22 April 1996 Z's company entered into an agency agreement with SAL under which SAL appointed Z's company to be its exclusive agent for the promotion and marketing of the rights relating to the image of Jocelyn granted under the joint venture agreement. SAL agreed to pay Z's company a commission on all fees paid to SAL.

64. Thus Jocelyn's image rights were exploited in three separate ways. First, by Sports in respect of the specified rights licensed to them in Jocelyn's promotional agreement of 22 April 1996. Secondly, by SAL in respect of the 12 items licensed to them in the joint venture agreement of 22 April 1996. And thirdly by JPL in respect of matters not included in those two agreements.

The exploitation of Jocelyn's promotional rights

65. The promotional rights acquired by Sports under Jocelyn's promotional agreement were not fully exploited. The main reason was that Jocelyn suffered an injury. He was out of Sports' first team for several weeks. He was out of action

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again soon afterwards for a knee operation and, as a result, missed ten games during the 1995–96 season. He was then out of the England team also. It was estimated that in eight-and-a-half months Jocelyn did 241 hours of work for Sports under his promotional agreement.

66. As far as the joint venture company was concerned, some payments were made in 1996 to SAL for posters and photographs and for a radio commercial made by Jocelyn. However, because of his injuries Jocelyn's marketability declined and Z was unable to secure any new commercial contracts relating to Jocelyn for the joint venture company

67. Jocelyn retired in 1998 when all his agreements with Sports were terminated.

Conclusions on exploitation generally

68. Other than the agreements with Evelyn and Jocelyn, Sports has not entered into any other promotional agreements in respect of any other players.

69. In the event Sports has not recouped from the exploitation of the players' images the moneys which it has paid under the promotional agreements. However, we find on the evidence before us that when Sports entered into the promotional agreements they expected to exploit those rights and to make money from them. Further, Sports obtained the negative value of the agreements inasmuch as they were able to control the activities of the players.

70. We consider first the s 19 issues which apply to both players. We then consider the s 203 issue which applies only to Sports. Next, we consider the s 154 issues which apply to both players. And, finally, we consider the s 595 issue which applies only to Evelyn.

(1) The s 19 issues—Were the payments emoluments from the employments?

71. The s 19 issues are: (1) whether the payments made by Sports under Evelyn's promotional agreement and the consultancy agreement were emoluments from the employment of Evelyn and so chargeable to income tax under Sch E by virtue of s 19; and (2) whether the payments made by Sports under Jocelyn's promotional agreement were emoluments from the employment of Jocelyn and so chargeable to income tax under Sch E by virtue of s 19.

72. Section 19(1) of the 1988 Act provides:

'The Schedule referred to as Schedule E is as follows—

SCHEDULE E

1 Tax under this Schedule shall be charged in respect of any office or employment on emoluments therefrom which fall under one or more than one of the following Cases—

Case I: any emoluments for any year of assessment in which the person holding the office or employment is resident and ordinarily resident in the United Kingdom ...'

73. The relevant parts of s 131(1) provide:

'Tax under Case I, II or III of Schedule E shall ... be chargeable on the full amount of the emoluments falling under that Case ... and the expression "emoluments" shall include all salaries, fees, wages, perquisites and profits whatsoever.'

74. The arguments of the parties on the s 19 issues raised four questions which we have identified as: (a) did the promotional agreements have independent values? (b) Did the consultancy agreement have an independent value? (c) Were the

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promotional agreements a 'smokescreen' for additional remuneration? And (d) Were the payments under the agreements emoluments *from* the employments?

(a) Did the promotional agreements have an independent value?

75. For the appellants their counsel accepted that English law, unlike some other legal systems, did not provide perfect protection for images but there were practical protections. He referred to para 15 of the Independent Television Corporation's Code of Advertising Standards and Practice which provided that usually individual living persons should not be portrayed or referred to in advertisements without their permission. He also referred to para 13 of the British Codes of Advertising and Sales Promotion which provided that advertisers were urged to obtain written permission in advance if they portrayed or referred to individuals in any advertisements. He also cited *Routh v Webster* (1847) 10 Beav 561 and *Walter v Ashton* [1902] 2 Ch 282. In any event, he argued that image rights had a practical value because an image could not be used in an advertisement without at least co-operation.

76. For the Revenue their counsel argued that the promotional agreements were created so as to create a colourable reason for the transmission of money to the players and it was unreal to take the documents at face value as if they were genuine commercial deals.

77. In considering this question we start by considering the authorities cited to us. In *Routh v Webster* an injunction was granted to a plaintiff whose name had been used in a published prospectus without his authority as the trustee of a proposed company and in whose name an account had been opened at the company's bank; the injunction was granted because the plaintiff was exposed to some risk by the unauthorised use of his name as he had the responsibility of the money at the bank. In *Walter v Ashton* an injunction was granted to the proprietors of *The Times* newspaper to prevent the advertisement of cycles in a way which led the public to believe that *The Times* was the vendor or partners in the sale. Again, the reason for granting the injunction was that *The Times* was exposed to some risk and liability by the unauthorised use of its name. In both authorities there was a commercial risk to the plaintiff and that appears to be the reason why the injunctions were granted. That factor is not present in respect of Evelyn's and Jocelyn's promotional agreements.

78. We have already mentioned that we do not consider that the name 'image rights agreements' adequately describes the promotional agreements at issue in this appeal. We wish to adopt the definition of the respondent's counsel that image rights were the ability to make money out of contracting with companies to do things for them and were an opportunity to make money out of the fact that one was very well known. We also adopt his suggestion that what in practice Sports was getting from the promotional agreements was a series of contractual obligations both positive and negative; positive in the sense that the player would, if called upon to do so, do certain things like endorsing products or going to photoshoots and negative in the sense that he could not undertake such activities for others. Again we accept the suggestion of the respondent's counsel that the promotional agreements were for the personal endorsement of products and the like.

79. In our view the promotional agreements were agreements to provide promotional services. They were genuine commercial agreements which the parties could seek to enforce.

80. In deciding whether these agreements had an independent value we have been greatly assisted by the evidence of Z and Y. Z in particular was an impressive witness. He gave evidence that commercial organisations are prepared to pay substantial sums to top players for the right to use their images in association with their products. Z produced in evidence a copy of a document prepared by his

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company, in 1998; this was an amended version of a document originally produced in 1994.

81. Pausing there we find that both Evelyn and Jocelyn were 'established stars' as categorised in Z's company's document and therefore capable of earning very substantial sums each year from commercial contracts.

82. Y gave evidence which we accept that image rights contracts are not out of the ordinary for players of the calibre of Evelyn. Some well-known foreign clubs also had image contracts for players.

83. In the light of that evidence we find that the promotional agreements such as were entered into between Sports and the players were capable of having, and did have, an independent value.

(b) Did the consultancy agreement have an independent value?

84. For the Revenue their counsel argued that the obligations under the consultancy agreement were minimal and the payments to Y's company were inextricably linked to the employment of Evelyn.

85. We have already found as facts that consultancy agreements were entered into by Y's company with Evelyn's previous club, with other clubs whose teams included players for whom Y's company acted as agent; and with at least two clubs where Y's company acted for no player. The consultancy agreement of 22 April 1996 between Y's company and Sports listed the services to be provided to Sports by Y's company and we accept the evidence of X and Z that services were so supplied.

86. Accordingly, we find that the consultancy agreement was capable of having, and did have, an independent value.

(c) Were the promotional agreements a 'smokescreen' for additional remuneration?

87. For the Revenue their counsel argued that the promotional agreements were entered into because Sports had a pay ceiling and the promotional agreements were a means of paying Evelyn and Jocelyn sums additional to their salaries. He argued that Sports was not interested in the image rights of the players and only entered into the promotional contracts in order to obtain the players who were not available without them. Accordingly, the payments under the promotional agreements were a smokescreen or window dressing for what were payments of emoluments to the players. The payments made pursuant to those agreements were in reality rewards for the players acting or becoming employees. In that sense the agreements were shams. He accepted that the parties meant the contracts to be real and that they meant real sums of money to pass under them and real activities to take place under them. He also accepted that the parties could have sued on the obligations in the contracts. Nevertheless he argued that the agreements were entered into for the purpose of concealing the real purpose of the transaction which was to pay additional remuneration to the players. Sports was not in the business of exploiting image rights and would not do so independently of employing the players. There was no proper valuation of the image rights available to Sports and the rights were never properly marketed.

88. We have some difficulty with this argument. If it is accepted that the promotional agreements were real, and that the parties intended activities to be performed under them in return for payments, and that the parties could have sued on the agreements, then no authority was cited to us to support the view that those realities could be ignored for income tax purposes. However, as arguments were put to us we express our views.

89. We have already found that the promotional agreements were capable of having, and did have, independent values. In order to decide whether they were used as a smokescreen for the payment of additional remuneration we have considered the arguments relating to each player separately.

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90. As far as Evelyn is concerned, the arrangements with Y's company and Antilles were in place many years before Evelyn joined Sports. Also, his previous club had a promotional agreement with Y's company. At the very first meeting on 15 June 1995, when Evelyn's transfer to Sports was discussed, Y made it clear that he was looking for three contracts, namely the usual player's contract, the promotional agreement and the consultancy agreement. X took advice from Mr Croker about the value of 'image rights' as Sports had not entered into such an agreement previously. Mr Croker quoted a range of sums. Accordingly, we do not agree that Sports did not obtain a valuation of the image rights. Also, their solicitors on behalf of Sports

undertook considerable work to ensure that Sports acquired the rights which it was paying for. We accept that the rights were not adequately exploited by Sports but we have found that when Sports entered into Evelyn's promotional agreement it expected to exploit the rights and make money from them.

91. Accordingly, we find that the promotional agreement relating to Evelyn was not a 'smokescreen' for the payment of additional remuneration.

92. Dealing specifically with Jocelyn, the respondent's counsel argued that the agreement of 9 July 1995 was that Jocelyn would be paid an amount which would have exceeded Sports' pay policy. Also, Z's letter of 25 July 1995 to the solicitors acting for Sports showed that the payments under the promotional agreement were really remuneration for Jocelyn. The evidence was that Z wanted more for Jocelyn than permitted under Sports' pay ceiling and that meant that the salary had to be limited and the balance had to be made up in some way. The total package was a method of remunerating Jocelyn.

93. A number of factors favour the argument of the respondent's counsel. Before joining Sports Jocelyn had an agreement with his Jersey company about which we received very little evidence. However, that company had not entered into any promotional agreements with any of the clubs for which Jocelyn played whilst abroad. Also, the Jersey company was wound up and replaced by JPL for the specific purpose of entering into the promotional agreement with Sports. Finally, Z's letter of 25 July 1995 referred to the promotional agreement as 'this method of remunerating Jocelyn'.

94. On the other hand there are a number of factors which point the other way. Before Jocelyn joined Sports Z had been able to conclude a number of promotional contracts relating to Jocelyn's image which shows that Jocelyn's 'image rights' had a substantial value before he joined Sports. Also, the subject of a separate contract for 'image rights' was discussed by X and Z on 19 June 1995 which was at a very early stage of the negotiations and before any round figure had been agreed. Later, on 9 July 1995, at the discussions in Genoa, a round figure was mentioned but the very next day Z wrote out the 'Basic Image Rights Package' which indicated that Sports would get 'image rights' worth £E for a payment of £E-£F. Accordingly, we do not agree that there was no proper valuation of the 'image rights'. We accept that the promotional agreement was not properly exploited but that is explained by Jocelyn's injuries.

95. Having considered all the evidence we find that the promotional agreement relating to Jocelyn was not a 'smokescreen' for the payment of additional remuneration.

(d) Were the payments emoluments from the employments?

96. For the appellants their counsel argued that the question was whether the payments made under the promotional agreements and the consultancy agreement were emoluments *from* the employment of Evelyn and Jocelyn within the meaning of s 19 of the 1988 Act. He distinguished *Brumby (Inspector of Taxes) v Milner* [1976] STC 534, [1976] 1 WLR 1096 where the payments were very close to the employment whereas in the present appeal the payments were made for something

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quite distinct from the employments. He relied upon *Pritchard (Inspector of Taxes) v Arundale* [1972] Ch 229 at 236, 47 TC 680 at 685 and *Newstead (Inspector of Taxes) v Frost* [1980] STC 123, [1980] 1 WLR 135. He also cited *Black Nominees Ltd v Nicol (Inspector of Taxes)* [1975] STC 372 as authority for the view that where a person has given certain rights to a company which then exploits those rights the source of the moneys arising to the exploiting company is the contracts it makes with third parties and not anything else.

97. He went on to argue that the payments under the promotional agreements were not made as part of the reward for being an employee. The moneys were paid to Y's company (and not to Evelyn) and to JPL (and not to Jocelyn) because those companies had the right to exploit the images of the players and so those rights were the source of the moneys. The source of the payments was the trade or business of Y's company or JPL and so could not be taxed under Sch E. The payments under the agreements were not paid to the players; such payments were not due to them and did not belong to them; and such payments were not paid under any contract of employment with Sports or at all. It followed that the payments under the promotional agreements and the consultancy agreement were not emoluments from the employments of the players. Further, it was relevant that the promotional arrangements were first entered into at a time when both players were working and resident outside the United Kingdom and were not United Kingdom taxpayers. It was also relevant that JPL was a United Kingdom company paying corporation tax on the fees received by it from Sports and using those fees to pay salaries and dividends which were themselves taxed.

98. For the Revenue their counsel argued that the payments made under the promotional agreements and the consultancy agreement were emoluments from the players' employments within the meaning of s 19. He argued that Sports wished to employ the players and in order to do so had to provide sufficient sums of money acceptable to them by way of remuneration. Although those sums were divided into three parts for Evelyn, and into two parts for Jocelyn, all the parts were paid directly to or at the direction of the players as a reward for their acting as players for the club.

99. Of the authorities cited to us we have been most assisted by *Pritchard (Inspector of Taxes) v Arundale*. There the taxpayer agreed to serve a company as joint managing director on condition that a stake in the shareholding of the company was provided to him. The service agreement provided that, in consideration of the taxpayer undertaking to serve the company, the holder of the shares would transfer a number of the shares to the taxpayer. Megarry J ([1972] Ch 229 at 236, 47 TC 680 at 685) referred to the judgment of Viscount Simonds in *Hochstrasser (Inspector of Taxes) v Mayes* [1960] AC 376 at 387–388, 38 TC 673 at 705 where he affirmed the approach of Upjohn J that the question whether or not a particular payment was or was not a profit from the employment had to be answered in the light of the particular facts of each case. He continued:

“Disregarding entirely contracts for full consideration in money or money's' worth and personal presents, in my judgment not every payment made to an employee is necessarily made to him as a profit arising from his employment. Indeed, in my judgment, the authorities show that to be a profit arising from the employment the payment must be made in reference to the services the employee renders by virtue of his office, and it must be something in the nature of a reward for services ...”

100. We note that the promotional agreements and the consultancy agreement were contracts for full consideration and so would be excluded from tax under s 19 for that reason alone. Also, we find that the payments under those agreements were made in return for promotional rights and consultancy services respectively and were not made 'in reference to' the playing of games which was the service rendered

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by each player by virtue of his player's agreement with Sports. Neither were the payments under the promotional and consultancy agreements a reward paid by Sports for the services of the players; they were paid by Sports for the promotional rights and the consultancy services respectively.

101. Having considered all the relevant evidence we find, in the light of the particular facts of this appeal, that the payments made by Sports under the promotional agreements and the consultancy agreement were not emoluments from the employment of Evelyn or Jocelyn.

Conclusions

102. Our conclusions on the s 19 issues are: (1) that the payments made by Sports under Evelyn's promotional agreement and the consultancy agreement were not emoluments from the employment of Evelyn and so were not chargeable to income tax under Sch E by virtue of s 19; and (2) that the payments made by Sports under Jocelyn's promotional agreement were not emoluments from the employment of Jocelyn and so were not chargeable to income tax under Sch E by virtue of s 19.

(2) The s 203 issue—Should Sports have deducted tax from the payments?

103. The s 203 issue is whether, if the payments were emoluments from the employments within the meaning of s 19, Sports should have deducted tax from the payments under s 203.

104. The relevant parts of s 203 of the 1988 Act provide:

'On the making of any payment of ... any income assessable to income tax under Schedule E, income tax shall, subject to and in accordance with regulations made by the Board under this section, be deducted or repaid by the person making the payment ...'

105. The regulations made by the Board under s 203 are the Income Tax (Employments) Regulations 1993, SI 1993/744 (the 1993 regulations). The notice of 18 April 1997 against which Sports appeals was made under reg 49 of those regulations.

106. The parties agreed that, if the payments were emoluments under s 19, then Sports should have deducted income tax from such payments under s 203 of the 1988 Act and the 1993 regulations.

107. However, as we have found that the payments were not emoluments from the employments under s 19 then Sports should not have deducted tax from the payments under s 203.

(3) The s 154 issues—Were the payments benefits in kind?

108. The s 154 issues are: (1) whether the payments under Evelyn's promotional agreement and the consultancy agreement were benefits in kind within the meaning of s 154 and so treated as emoluments of the employment of Evelyn; and (2) whether the payments under Jocelyn's promotional agreement were benefits in kind within the meaning of s 154 and so treated as emoluments of the employment of Jocelyn.

109. Part V of the 1988 Act contains provisions relating to the Sch E charge. Chapter II (ss 153 to 168G) contains provisions relating to employees earning £8,500 or more and directors. A group of sections in Chap II (ss 154 to 165) is headed 'Benefits in kind'. Section 154 contains the general charging provision for benefits in kind. The relevant parts of s 154 provide:

'(1) Subject to section 163, where in any year a person is employed in employment to which this Chapter applies and—

(a) by reason of his employment there is provided for him, or for others

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being members of his family or household, any benefit to which this section applies; and

(b) the cost of providing the benefit is not (apart from this section) chargeable to tax as his income,

there is to be treated as emoluments of the employment, and accordingly chargeable to income tax under Schedule E, an amount equal to whatever is the cash equivalent of the benefit.

(2) The benefits to which this section applies are accommodation (other than living accommodation), entertainment, domestic or other services, and other benefits and facilities of whatsoever nature (whether or not similar to any of those mentioned above in this subsection) ...

(3) For the purposes of this section ... the persons providing a benefit are those at whose cost the provision is made.'

110. Section 168 contains interpretative provisions and s 168(3) provides:

'For the purposes of this Chapter—... (b) all such provision as is mentioned in this Chapter which is made for an employee, or for members of his family or household, by his employer, are deemed to be ... made for him by reason of his employment ...'

111. Counsel for the appellants argued that s 154 did not apply. There were no benefits to Evelyn, or to Jocelyn or to the latter's wife from the payments made by Sports under the promotional agreements and the consultancy agreement because the payments were made to Y's company or to JPL under bona fide commercial contracts. Also the payments were not paid 'by reason of employment' within the meaning of s 154(1)(a) because they did not come from the employment and there were separate and distinct sources. Further, there was no benefit within the meaning of s 154(2). He distinguished *Rendell v Went (Inspector of Taxes)* [1964] 1 WLR 650, 41 TC 641 where the money went directly to benefit the director. As far as the consultancy agreement was concerned the services rendered under it were rendered to Sports and there was no benefit to Evelyn.

112. Counsel for the Revenue argued that a benefit was provided to an employee for the purposes of s 154 even though the motive or purpose of the employer was self-interest and he cited *Rendell v Went (Inspector of Taxes)*. He also cited *Wicks v Firth (Inspector of Taxes)* [1982] STC 76, [1982] Ch 355. In particular, he argued that the consultancy agreement provided a benefit to Evelyn because the practical reality was that the consultancy agreement was brought into existence to disguise the fact that Sports was paying the cost of Evelyn having his own agent.

113. We have not found the authorities cited to us to be directly relevant to the facts in this appeal. In *Rendell v Went (Inspector of Taxes)* [1964] 1 WLR 650, 41 TC 641 a company paid the legal costs of a director who was charged with causing death by dangerous driving while driving a company motor car in the course of his duties. In that appeal the taxpayer accepted that he had received a benefit and the main argument centred on the amount. In this appeal the taxpayers deny that they have received any benefits. In *Wicks v Firth (Inspector of Taxes)* [1982] STC 76, [1982] Ch 355 the issue was whether scholarships

provided to the children of employees by a trust fund established by the employer were provided 'at the cost' of the employer and that is not the issue in this appeal.

114. We have therefore approached this issue by starting with the words of the legislation. First, we accept that the words 'by reason of his employment' in s 154(1)(a) are wider than the words 'emoluments from the employment' in s 19. However, we find on the facts of this appeal that the payments under the promotional agreements and the consultancy agreement were not made by Sports 'by reason of the employment' of either Evelyn or Jocelyn. The payments made under the promotional agreements were paid 'by reason of' the separate

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commercial contracts to provide promotional services and not by reason of the employments to play for the club. The payments under the consultancy agreement were paid 'by reason of' the separate commercial contract to provide consultancy services and not by reason of the employment to play for the club.

115. Next we do not consider that any benefit was provided to either Evelyn or Jocelyn. In our view the expression 'benefit' in s 154(2) must exclude anything provided in return for good consideration under a separate commercial contract.

116. Finally, even if benefits were provided they were not provided to Evelyn or Jocelyn but were provided to Y's company and JPL respectively. No authority was cited to us to indicate that we could lift the corporate veil and consider the ultimate destination of the payments. Even if we had been able to do that, then at least as far as the consultancy agreement is concerned the ultimate destination of the payments was Y's company; no part of those payments were made available to Evelyn.

117. Our conclusions on the s 154 issues are: (1) that the payments under Evelyn's promotional agreement and the consultancy agreement were not benefits in kind within the meaning of s 154 and so should not be treated as emoluments of the employment of Evelyn; and (2) that the payments under Jocelyn's promotional agreement were not benefits in kind within the meaning of s 154 and so should not be treated as emoluments of the employment of Jocelyn.

(4) The s 595 issue—Were the payments pension benefits?

118. The s 595 issue applies only to Evelyn and is whether the payments under his promotional agreement were made pursuant to a retirement benefit scheme with a view to the provision of pension benefits for Evelyn within the meaning of s 595.

119. The relevant parts of s 595 of the 1988 Act provide:

'(1) Subject to the provisions of this Chapter, where, pursuant to a retirement benefits scheme, the employer in any year of assessment pays a sum with a view to the provision of any relevant benefits for any employee of that employer, then ... (a) the sum paid, if not otherwise chargeable to income tax as income of the employee, shall be deemed for all purposes of the Income Tax Acts to be income of that employee for that year of assessment and assessable to tax under Schedule E ...'

120. The relevant parts of s 611 provide:

'(1) In this Chapter "retirement benefits scheme" means, subject to the provisions of this section, a scheme for the provision of benefits consisting of or including relevant benefits, but does not include any national scheme providing such benefits.

(2) References in this Chapter to a scheme include references to a deed, agreement, series of agreements, or other arrangements providing for relevant benefits notwithstanding that it relates or they relate only to—(a) a small number of employees, or to a single employee ...'

121. The relevant parts of s 612 provide:

'(1) In this Chapter, except where the context otherwise requires—

... "relevant benefits" means any pension, lump sum, gratuity or other like benefit given or to be given on retirement or on death, or in anticipation of retirement, or, in connection with past service, after retirement or death ...'

122. Counsel for the appellant argued that Sports were paying for promotional rights and were paying in the present and not for something to be given to Evelyn

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on retirement or death. They were providing the money to Y's company and not to Evelyn and they were not providing the money with a view to the provision of pension benefits. Also they were not paying the money pursuant to a retirement benefit schemes. Any retirement benefit fund was not provided by Sports.

123. Counsel for the Revenue argued that the effect of the promotional agreement was that a large sum of money each year went from Sports to Y's company and then to Antilles and became available to Evelyn in the year 2006 which was when he anticipated retiring. Copies of all the relevant agreements had been provided to Sports and they knew of their contents. Accordingly, the payments made by Sports under Evelyn's promotional agreement were made 'with a view to the provision of relevant benefits' within the meaning of s 595.

124. This issue was only raised at the end of the third day of the hearing and, in our view, was not fully argued.

125. We have already found as facts that by virtue of the sub-licence agreement of 14 October 1991 the fees received by Y's company from Sports were paid to Antilles after the deduction of the 5.5% due to Y's company. By virtue of the principal licence agreement of 9 October 1991 the moneys received by Antilles were to be made available to Evelyn on 9 October 2006 after deduction of the fees due to Antilles. Also Evelyn expected to retire some time around 2006. Evelyn also described the money held for him by Antilles as his pension fund for when he retired.

126. In the light of those facts we now consider the words of s 595. First we do not agree that the sums paid by Sports under Evelyn's promotional agreement were paid '*pursuant to a retirement benefits scheme* [emphasis added]'. They were paid *pursuant to the promotional agreement* and in return for them Sports received the rights under the agreement. It was of no concern to Sports what was done with the payments by Y's company. Also we do not agree that the sums were paid '*with a view to the provision of any relevant benefits* [emphasis added]'. They were paid *with a view to the provision of rights under the promotional*

agreement.

127. We conclude that the payments made under Evelyn's promotional agreement were not made pursuant to a retirement benefits scheme with a view to the provision of pension benefits for Evelyn within the meaning of s 595.

128. Our decisions on the issues for determination in Evelyn's appeal are: (1) that the payments made by Sports under the promotional agreement and the consultancy agreement were not emoluments from the employment of Evelyn and so were not chargeable to income tax by virtue of s 19; (2) that the payments were not benefits in kind within the meaning of s 154 and so should not be treated as emoluments of the employment; and (3) that the payments under the promotional agreement were not paid by Sports pursuant to a retirement benefit scheme with a view to the provision of pension benefits for Evelyn within the meaning of s 595.

129. Accordingly, Evelyn's appeal is allowed.

130. Our decisions on the issues for determination in Jocelyn's appeal are: (1) that the payments made by Sports under Jocelyn's promotional agreement were not emoluments from the employment of Jocelyn and so were not chargeable to income tax by virtue of s 19; and (2) that such payments were not benefits in kind within the meaning of s 154 and so should not be treated as emoluments of the employment.

131. Accordingly, Jocelyn's appeal is allowed.

132. Our decision on the issue for determination in Sports' appeal is that as the payments were not emoluments from the employments within the meaning of s 19, Sports should not have deducted income tax from the payments under s 203.

133. Accordingly, Sports' appeal is allowed.

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134. As requested by the parties this is a decision in principle. If it is not possible for the amounts of the assessments to be agreed then any party has liberty to apply for a further hearing at which the amounts of the assessments will be determined.