

Keeping a clean sheet

Gary Ashford outlines the financial risks facing football clubs when it comes to signing big-name football players, particularly from overseas

The January football transfer window has now slammed shut, and some of us supporters will be pleased with our big new signings. But the financial fair play rules are now having a real impact, and clubs are having to think very carefully about their finances.

Those of us in the tax world will also think about financial issues and, in particular, associated tax issues and whether HMRC will police the area with a soft touch or rod of iron. Most likely, somewhere in between will be the answer.

It is worth reminding ourselves of some of the risk issues.

Residence

Given the worldwide status of the English Premier League as one of the best in the world, if not the best, players from all around the world are keen to play here. Many players are already in the UK and so will likely have resolved their residence status (often as non domiciliaries), but there will always be new players arriving.

Some of those players who arrived in January may or may not be UK resident in the year of arrival, and if resident will often secure split treatment. But it is always worth remembering that split year treatment is not guaranteed, although full-time working in the UK is one of the cases to secure split year treatment.

Some players will have played for UK clubs before transferring abroad and are now returning. In such cases the temporary non-resident rules could result in some very unattractive tax positions, in particular UK tax liabilities arising on disposals undertaken while abroad. This could be particularly relevant as we see a number of players who left for foreign shores, for example Saudi Arabia, and those moves have not worked out, and the players may well return. It could well drive onward foreign transfers, rather than a return to the UK.

Clearly, if the player is Resident Non-Domiciled (RND) it will be important to ensure a pre arrival capital review is undertaken; otherwise, if the player starts making remittances (for example from mixed funds) after arrival they could well be triggering many taxable remittances.

Double Tax Treaties may well help, but it is important to recognise that many treaties have been updated as a result of the work done by the OECD in the Base Erosion Profit Shifting (BEPS) programme, so it is very important to check that treaty protection, where being considered, is still available.

Football agents' fees

An area of contention is always that of agents' fees. Under the football regulations it is accepted that agents can represent both the player and club, but it is very important to appreciate that HMRC do not in general accept a 50/50 split.

HMRC expect detailed records to be maintained, as the role of the agent can result in very different tax positions. VAT issues also can arise where the split of income is incorrect.

Image rights planning for players

Another very contentious area is that of image rights. Many readers will be aware that the UK does not have specific laws around image rights and instead UK law is based around various other Intellectual Property laws – for example, to protect against passing off, copyright, trademarks, etc.. It is therefore important to undertake the appropriate analysis to ensure payments can be correctly attributed or even assigned to a separate legal entity.

Contractual arrangements are extremely important, particularly where non-resident entities are involved. It is also really important to consider whether UK anti avoidance such the Transfer of Assets Abroad (TOAA) rules could apply where a player is UK resident. In some cases, the income or gains of any offshore company might then be attributed to a UK resident beneficial owner, potentially the player.

Interest and penalties

It goes without saying that tax returns submitted to HMRC that are found to be incorrect will trigger the UK incorrect penalty regime, and either domestic penalties or the ones for offshore will apply.

Readers will be well aware of the raft of powers introduced by HMRC over the past decade or so to counter offshore tax non compliance.

Tax avoidance, evasion and fraud

HMRC also report that despite the many years and initiatives introduced to counter tax avoidance they still see cases of egregious avoidance planning, particularly linked to employment income.

Over the years we have seen cases where something regarded as a promoter of a tax idea as 'planning' is effectively avoidance by another name, but more worryingly amounted to tax evasion.

It is very important that those working around the football and wider sporting world recognise the risks. If anyone identifies tax evasion, whether it be by a player, club, agent or otherwise, consideration should be given to making an approach to HMRC for Code of Practice 9 protection.

Also, given the introduction of the Corporate Criminal Offence (CCO) [Failure to Prevent Facilitation of Tax Evasion] provisions introduced by the Criminal Finances Act of 2007, that where a club (for example) is involved in such matters, HMRC could easily look to start an investigation. Over the years, I have seen cases where proceeds of crime-type arguments were made by enforcement agencies around player contractual relationships, including image rights agreements, and this sort of investigation could clearly cross over into the CCO arena. Given the broad aspects of 'an associated person' within the CCO provisions, the behaviour of some – say an unscrupulous third party adviser such as an agent – could trigger an attack on the club itself.

Finally, the taxation of cross-border structuring has become ever more complex and with that complexity is tax risk. The various changes introduced by the OECD as part of the BEPS (Base Erosion and Profit Shifting) Actions are not just focused on the world of large corporates, particularly areas such as Substance and Treaty Abuse. The world of transfer pricing has also

significantly developed and we have already seen HMRC starting to open criminal investigations. It is very important that full consideration is given to this area, at least to determine whether there needs to be an adjustment or not.

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