

Review

Taxation & Benefits



Disguised Remuneration – the Effect on Image Rights Payments

Over the last eleven months, much attention has been given to the rules on disguised remuneration which were announced by HM Revenue & Customs (HMRC) in December 2010. Whilst we were all expecting the Government to legislate against the use of Employee Benefit Trusts (EBTs) and Employer Funded Retirement Benefit Schemes (EFRBS) as methods of remunerating employees, the widely drafted disguised remuneration rules (which are now part of the employment tax legislation) took many people by surprise.

The disguised remuneration rules are lengthy and complex but, broadly speaking, if third party arrangements are used to provide for what is in substance a reward or recognition, or a loan, in connection with an employee's current, former, or future employment, an income tax charge arises.

The new legislation, which has widely been regarded as using a hammer to crack a nut, does not specifically deal with payments to image rights companies. However, as the legislation applies to any "arrangement" that is "concerned (wholly or partly) with the provision of, rewards or recognition or loans in connection with" an individual's employment, there is potential for any payment made to any entity in respect of an employee to fall foul of the new rules. Falling foul of the new rules results in the employer being required to operate PAYE and account for NICs on the payment. One question therefore being asked is whether the disguised remuneration rules cover image rights.

HMRC'S APPROACH

The Special Commissioners' judgment in the *Sports Club* case is the leading English authority on image rights. Since that decision, which found that the payments made by the relevant football club under the image rights agreements were not employment payments (and therefore were not chargeable to income tax), HMRC has pursued a more direct route, particularly in football and rugby union. Wherever HMRC is aware of an image rights structure in a particular sport, it is likely that HMRC has sought to review the documentation surrounding the associated payment.

Some have suggested that HMRC intends to use the disguised remuneration rules as a further tool to challenge image rights structures or otherwise put pressure on clubs to account for PAYE and NICs on image rights payments. In light of such possibility, both clubs and players need to bear the disguised remuneration rules in mind when assigning image rights and drafting documentation that implements image rights structures.

OUR VIEW

Generally, a sports club will only enter into an image rights agreement with an individual or an individual's company if that individual is an employee of the club. However, as has always been the case when considering image rights, the key test is whether the payment is made in connection with the employment. Image rights are a valuable asset and will be a registerable right in some jurisdictions shortly. HMRC has accepted that some elements of payments made to image rights companies (or individuals in respect of image rights) are not employment-related remuneration. In our view, image rights, and payments in respect of the use of such image rights, are not, in themselves, threatened by the new rules – now, it is even more important to be certain of the extent to which the arrangement is not in connection with employment.

Even before the introduction of the disguised remuneration rules, employment income legislation imputed a charge on “earnings” which, in relation to an employment, means any “salary, wages or fee”. Image rights payments have therefore already been at risk if indeed the payments were in relation to employment. In our view the disguised remuneration rules do not materially extend the existing rule and therefore, provided a payment is neither in relation to an employment nor “otherwise concerned” with the provision of rewards in connection with an employment, it should still fall outside the scope of PAYE and NIC.

The new legislation does not contain any provisions which automatically and in all circumstances treat arrangements in respect of persons who happen to be employees to be in connection with the employment. The question of whether an image rights payment is made “in connection with” the employment will turn on its own facts and is very similar to the tests used to establish whether image rights payments were employment income even before the introduction of the disguised remuneration rules. It is always important to ensure that the assignment to an image rights company takes place validly, that a club secures both positive opportunities and negative restrictions in its agreement with the image rights company, that a club values the asset that it is to acquire and that, once the asset is licensed to the club, the club actively seeks to exploit that asset.

Squire Sanders Hammonds’ Sports & Entertainment and Taxation & Benefits teams are experienced in drafting image rights documentation for both Premier League football clubs and clubs and players in rugby union. Squire Sanders has also assisted with the establishment of an image rights structure so as to minimise both clubs’ and players’ tax and national insurance liabilities. The new disguised remuneration rules act as a reminder to ensure that care is given to the implementation of the image rights structure and the surrounding documentation. If you are in any doubt as to the applicability of the new disguised remuneration rules to your image rights payments or structure, please do not hesitate to contact any of the individuals named in this alert.

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