Image rights

Employment Tax



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Jon Elphick looks at a recent case, *Hull City Tigers v HMRC*, concerning image rights

Key Points

What is the issue?

The recent decision of the First-tier Tribunal (FTT) case *Hull City AFC (Tigers) Limited v HMRC* [2019] UKFTT 227 (the Hull case) provides the latest example of HMRC's stance against image rights arrangements, especially in relation to the UK football industry.

What does it mean to me?

The FTT decision in *Hull v HMRC* should be seen as a positive aid to tax advisers and sports clubs alike. The decision, when read as a whole, provides useful guidance to

both individuals and clubs (or other third parties) on how to set up and maintain image rights arrangements effectively.

What can I take away?

When added to professional guidance, this enables a robust approach to image rights planning under the current legislation and guidance, and importantly, enables the avoidance of the many pitfalls that poor (or non-existent) structuring can present.

The recent decision of the First-tier Tribunal (FTT) case *Hull City AFC (Tigers) Limited v HMRC* [2019] UKFTT 227 (the *Hull* case) provides the latest example of HMRC's stance against image rights arrangements, especially in relation to the UK football industry.

Case background

The *Hull* case concerns an international footballer, Geovanni Gomez, who signed for Hull (then a Premier League team) in July 2008. As part of his contractual obligations with Hull, Geovanni signed a standard 'Premier League contract' to confirm his employment terms, including his remuneration.

In November 2008, a second arrangement was entered into between Hull and Joniere Ltd, a British Virgin Islands incorporated company. This agreement provided Hull with the right to exploit Geovanni's non-UK image rights commercially. In return, Hull paid an annual fee of (almost exactly) 25% of Geovanni's annual salary.

Image rights in football

The use of image rights contracts within the UK football industry has increased rapidly since the 1990s, when the renowned *Evelyn* and *Jocelyn* had the legitimacy of their arrangements with *Sports Club* tested in the case *Sports Club & Ors v HM Inspector of Taxes* (2000) Sp C 253. In this case, the taxpayers successfully appealed against a Notice of Determination issued by HMRC, assessing the 'image rights' income as 'other employment emoluments', thereby legitimising the use of image rights contracts.

This led to the widespread use of image rights contracts. By the mid to late 2000s, HMRC had cracked down on their use, and was in the process of undertaking wholesale enquiries into the top football clubs in the UK. These enquiries resulted in substantial settlements from many clubs, which conceded that in the best case image rights payments had been significantly overvalued, and in the worst case had been made with little to no ability to undertake any monetisation of the players off the playing field.

When Geovanni signed for Hull in 2008, HMRC was experiencing success in its enquiries into a number of football clubs. This led to HMRC agreeing a ‘framework’ with the Premier League (on behalf of its member clubs), whereby HMRC would agree image rights payments could be paid, providing certain substance requirements were met by both clubs and players. Perhaps significantly, it is understood from the FTT decision that Hull had been the only club not to pre-agree these parameters with HMRC.

The case

Having reviewed the facts, HMRC took the position that payments made to Joniere Ltd simply constituted the employment earnings of Geovanni, rather than payments to exploit his image rights. Subsequently, it issued Hull with three Directions under the Income Tax (Pay As You Earn) Regulations 2003 Reg 80, and three Directions under the Social Security Contributions (Transfer of Functions) Act 1999 s 8 (one each for the 2008/09, 2009/ 10 and 2010/11 tax years), assessing the club to income tax and national insurance contributions (NICs) on the payments made. It argued that the substance of the arrangements was more important than the legal form.

Hull countered that the arrangements were genuine payments made to Joniere Ltd in respect of the right to use Geovanni’s non-UK image. Hull City argued that, as a result, it had no responsibility to deduct income tax and NICs from the payments, nor should it be subject to employers’ NICs.

The FTT accepted that the image rights arrangements between Hull and Joniere did grant genuine rights. However, the tribunal also agreed with HMRC’s approach that the substance of the arrangements should be considered, rather than their legal form. In reviewing the substance of Hull’s arrangements with Geovanni and Joniere, the FTT outlined the notable facts upon which its decision was determined:

- Hull was not able to demonstrate that it had the necessary experience, resources or ability to exploit the commercial opportunities arising from the rights acquired from Geovanni.
- Prior to entering into the arrangements with Joniere Ltd, Hull had not undertaken any due diligence to determine, at a very basic level, whether the company actually owned Geovanni's image rights.
- Hull could not provide any evidence that it had attempted to determine the commercial value of those rights (or in fact, whether there was any value to the rights at all).

The FTT also noted that once the image rights were acquired, Hull offered to increase the sum payable to Joniere without any contractual obligation to do so, and coincidentally around the same time a contract renewal was being offered to Geovanni in respect of his football contract. It also noted that having obtained the rights, Hull never actually commercially exploited Geovanni's image rights throughout the term of the agreement.

Perhaps unsurprisingly, the tribunal judge concluded that, based on the facts presented, the payments made to Joniere were not intended to secure the right to exploit Geovanni's image rights, but were instead intended to secure Geovanni's services as a professional footballer.

The current playing field

Whilst the FTT decision in this case is not surprising, it can be argued that the findings of the FTT, combined with HMRC's update of its internal manuals, provide a very useful guide to practitioners on how image rights arrangements may be structured.

In this author's opinion, the key component of any image rights structuring has always been the 'commerciality' of any arrangements. Simply put, the individual (whether a sports star, actor, musician or any other person with a public profile) must be able to demonstrate that they have something to sell (i.e. their image, public appeal, personal brand, etc.), and the exploiter of the image rights, such as football clubs, must be able to demonstrate that they are monetising the images they acquire in a manner that goes over and above the standard requirements of the individual's employment terms.

These sentiments feature heavily in HMRC's Employment Income Manual (EIM00731 onwards) and Capital Gains Manual (CG68410 onwards) as updated in August 2017. When taken into the context of the FTT findings, it is reasonable to suggest that where commercial substance can clearly be demonstrated, and the terms of that substance is commensurate with the level of activity and level of value derived by the player, then a legitimate image rights arrangement could exist.

Taking a football club as an example (but note that this would have relevance to any third party business exploiting image rights), the following questions should be considered, among others, before entering into an image rights arrangement:

- Firstly, does the individual actually have an 'image right'? Have they previously undertaken any activity outside of their normal sporting career, whether in the UK or abroad, that would create a separate 'right' that could be exploited?
- Is the individual's image relevant to the club? In other words, does the player's nationality, age, social profile, etc. fit within the club's brand, geographic reach and the demographic of fans it has or wants to attract?
- What is obtaining the right to exploit that person's image worth to a club? Can the club forecast the monetisation of the image right to demonstrate what it thinks it stands to gain from any image rights arrangement? Similarly, what is it prepared to pay for the use of the image right in order to secure that potential additional revenue?
- Does the club need to enter a separate agreement, or does it already hold the right to exploit that person's image through existing contractual (i.e. employment) arrangements?
- Does the club have the capacity to monetise the individual's image in terms of experience, resources and ability?

Analysis of the commercial potential of an image rights arrangement is important, but this decision outlines the importance of ongoing analysis. It is not sufficient to be able to explain how a business 'could have' exploited a person's image. It is important for a club to be able to demonstrate an ongoing intention, or at the very least, attempt to monetise the image right.

The preparation and ongoing review of business plans, periodic renegotiation or termination of existing arrangements are essential to demonstrate that a club understands any ongoing changes to its business environment. It is accepted that a club can make a bad decision, but a club needs to be able to demonstrate that it will

adapt to changing circumstances, rather than retain arrangements or obtain new ones that have no relevance to the club’s current commercial plans.

Parting thoughts

The FTT decision in *Hull vs HMRC* should be seen as a positive aid to tax advisers and sports clubs alike. The decision, when read as a whole, provides useful guidance to both individuals and clubs (or other third parties) on how to set up and maintain image rights arrangements effectively. When added to professional guidance, this enables a robust approach to image rights planning under the current legislation and guidance, and importantly, enables the avoidance of the many pitfalls that poor (or non-existent) structuring can present.

Of parting interest, the author notes that HMRC only investigated the liability of the football club in this case. Many other recent high-profile cases in both the UK and more notably Spain scrutinised the players themselves, and having correct image rights arrangements is equally essential for club and player.