

OPINIONS
OF THE LORDS OF APPEAL
FOR JUDGMENT IN THE CAUSE

Agassi (Respondent)

v.

Robinson (Her Majesty’s Inspector of Taxes) (Appellant)

Appellate Committee

Lord Nicholls of Birkenhead
Lord Hope of Craighead
Lord Scott of Foscote
Lord Walker of Gestingthorpe
Lord Mance

Counsel

Appellants:

Timothy Brennan QC
Bruce Carr

(Instructed by Her Majesty’s Revenue and
Customs Solicitors Office)

Respondents:

Patrick Way
Nicola Shaw

(Instructed by Sharpe Pritchard)

Hearing date:

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ON

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HOUSE OF LORDS

**OPINIONS OF THE LORDS OF APPEAL FOR JUDGMENT
IN THE CAUSE**

**Agassi (Respondent) v. Robinson (Her Majesty's Inspector of Taxes)
(Appellant)**

[2006] UKHL 23

LORD NICHOLLS OF BIRKENHEAD

My Lords,

1. I have had the advantage of reading in draft the speeches of my noble and learned friends Lord Scott of Foscote and Lord Mance. For the reasons they give, with which I agree, I would allow this appeal.

LORD HOPE OF CRAIGHEAD

My Lords,

2. I have had the advantage of reading in draft the speeches of my noble and learned friends Lord Scott of Foscote and Lord Mance. I agree with them, and for the reasons they give I would allow the appeal.

LORD SCOTT OF FOSCOTE

My Lords,

Introduction

3. The Income and Corporation Taxes Act 1988 (“the 1988 Act”), sections 555 to 558, and the Income Tax (Entertainers and Sportsmen) Regulations 1987 (SI 1987/530) (the 1987 Regulations) make provision for the taxation of entertainers and sportsmen who are not resident in the United Kingdom in respect of their profits or gains arising from commercial activity carried out by them within the United Kingdom. The relevant statutory provisions were first enacted in the Finance Act 1986, section 44, and Schedule 11 to that Act under which the 1987 Regulations were made. The 1988 Act is a consolidating Act and the relevant provisions in the 1986 Act and its Schedule 11 became sections 555 to 558 in the 1988 Act. The 1987 Regulations continue to have effect as if made under the 1988 Act (see Interpretation Act 1978 section 17(2)(b)). This tax appeal raises a point of construction of sections 555 and 556 and, in particular, the question whether section 555(2) should be given its literal effect or a limited effect so as to exclude from its scope persons who neither reside or carry on any trade in the United Kingdom. The well-known principle of statutory construction that it should generally be presumed that a statute is not intended to have extra-territorial effect is relied on by the taxpayer, Mr Andre Agassi. The Special Commissioners, however, declined to give section 555(2) the limited effect contended for and, on appeal, Lightman J agreed with them. But the Court of Appeal disagreed and the issue of construction must be resolved by your Lordships.

The facts

4. The relevant facts are not in dispute and can be shortly stated. The taxpayer, Mr Agassi, is a very well known professional tennis player. He is neither resident nor domiciled in the United Kingdom and never has been. In the tax year relevant to this appeal, 1998/1999, Mr Agassi played in United Kingdom tennis tournaments, including Wimbledon.

5. Mr Agassi owns and controls a company, Agassi Enterprises Inc. (Agassi Inc.), whose business includes entering into contracts with manufacturers of sports clothing and equipment under which Mr Agassi sponsors or advertises the manufacturers' products in return for payments made to Agassi Inc. Two contracts relevant to this appeal were entered into. One was a contract with Nike Inc. ('Nike') dated 1 January 1995: the other was a contract with Head Sport AG ('Head') dated 1 January 1999. Pursuant to these contracts Agassi Inc. received payments during the 1998/1999 tax year.

6. Neither Nike nor Head was resident in the United Kingdom in the 1998/1999 tax year, nor did either company carry on any trade in the United Kingdom, whether through a branch or agency or a permanent establishment. Nor were their payments to Agassi Inc. made in the United Kingdom. The payments were, however, payments that had a connection of a "prescribed kind" (see Regulation 3 of the 1987 Regulations) with a "relevant activity" (see Regulation 6) performed by Mr Agassi in the United Kingdom.

7. Mr Agassi submitted a self-assessment tax return for the 1998/1999 tax year which showed certain receipts from Nike and Head but the Inspector of Taxes issued a closure notice (see section 28A(5) of the Taxes Management Act 1970) based on additional payments said to have been received by Agassi Inc. from Nike and Head. The closure notice gave rise to a notice of amendment of Mr Agassi's self-assessment tax return proposing the addition of an income tax charge of £27,500 odd. Mr Agassi appealed against the notice and the proceedings to which I have already referred followed.

The statutory provisions

8. In order to understand the submissions about section 555 and 556 that have been made to your Lordships it is necessary to refer to the problems about the tax treatment of foreign entertainers and sportsmen that led to the enactment of the relevant provisions of the Finance Act 1986. There were a number of perceived problems in applying to foreign entertainers and sportsmen the charging provisions of section 108 of the 1970 Act (which became section 18(1)(a)(iii) of the 1988 Act). Section 108 imposed a Schedule D charge to tax on the profits or gains of any person, whether or not resident in the United Kingdom, from any trade, profession or vocation carried on in the United Kingdom.

9. The first problem related to the concept of carrying on a trade, profession or vocation. Was a person who made only single or infrequent visits to this country, eg, playing in, say, two tennis tournaments, carrying on a trade, profession or vocation in this country? Second, would income arising from commercial endorsements, eg wearing Nike tennis shoes and playing with a Head tennis racquet, be regarded as part of the profits or gains of carrying on the trade, profession or vocation? Third, the section 108 charge only applied to the person carrying on the trade, profession or vocation. Would payments made to a foreign company, albeit controlled by the person exercising the trade, profession or vocation, be caught by the charge? And, fourth, collection of the tax from a foreign entertainer or sportsman, whose visits to this country might be sporadic and who would often have no assets in this country, was not always practicable. This was particularly so because the basis of assessment was the preceding year basis. These were the problems that were addressed in the 1986 Act by provisions that became, on consolidation, sections 555 and 556 of the 1988 Act.

10. It is convenient at this point to set out in full sections 555 and 556 of the 1988 Act.

“555.? (1) Where a person who is an entertainer or sportsman of a prescribed description performs an activity of a prescribed description in the United Kingdom (‘a relevant activity’), this Chapter shall apply if he is not resident in the United Kingdom in the year of assessment in which the relevant activity is performed.

(2) Where a payment is made (to whatever person) and it has a connection of a prescribed kind with the relevant activity, the person by whom it is made shall on making it deduct out of it a sum representing income tax and shall account to the Board for the sum.

(3) Where a transfer is made (to whatever person) and it has a connection of a prescribed kind with the relevant activity, the person by whom it is made shall account to the Board for a sum representing income tax.

(4) The sums mentioned in subsections (2) and (3) above shall be such as are calculated in accordance with prescribed rules but shall in no case exceed the relevant proportion of the payment concerned or of the value of what is transferred, as the case may be; and ‘relevant proportion’ here means a proportion equal to the basic rate

of income tax for the year of assessment in which the payment or, as the case may be, the transfer is made.

(5) In this Chapter?

(a) references to a payment include references to a payment by way of loan of money; and

(b) references to a transfer do not include references to a transfer of money but, subject to that, include references to a temporary transfer (as by way of loan) and to a transfer of a right (whether or not a right to receive money).

(6) This section shall not apply to payments or transfers of such a kind as may be prescribed.

(7) Regulations may?

(a) make provision enabling the Board to serve notices requiring persons who make payments or transfers to which subsection (2) or (3) above applies to furnish to the Board particulars of a prescribed kind in respect of payments or transfers;

(b) make provision requiring persons who make payments or transfers to which subsection (2) or (3) above applies to make, at prescribed times and for prescribed periods, returns to the Board containing prescribed information about payments or transfers and the income tax for which those persons are accountable in respect of them;

(c) make provision for the collection and recovery of such income tax, provision for assessments and claims to be made in respect of it, and provision for the payment of interest on it;

(d) adapt, or modify the effect of, any enactment relating to income tax for the purpose of making any such provision as is mentioned in paragraphs (a) to (c) above.

(8) Where in accordance with subsections (2) to (7) above a person pays a sum to the Board, they shall treat it as having been paid on account of a liability of another person to income tax or corporation tax; and the liability and the other person shall be such as are found in accordance with prescribed rules.

(9) Where the sum exceeds the liability concerned, the Board shall pay such of the sum as is appropriate to the other person mentioned in subsection (8) above.

(10) Where no liability is found as mentioned in subsection (8) above, the Board shall pay the sum to the

person to whom the payment or transfer to which subsection (2) or (3) above applies, and which gave rise to the payment of the sum concerned to the Board, was made.

(11) In construing references to a sum in subsections (8) to (10) above, anything representing interest shall be ignored.

556.? (1) Where a payment is made (to whatever person) and it has a connection of the prescribed kind with the relevant activity, the activity shall be treated for the purposes of the Tax Acts as performed in the course of a trade, profession or vocation exercised by the entertainer or sportsman within the United Kingdom, to the extent that (apart from this subsection) it would not be so treated.

This subsection shall not apply where the relevant activity is performed in the course of an office or employment.

(2) Where a payment is made to a person who fulfils a prescribed description but is not the entertainer or sportsman and the payment has a connection of the prescribed kind with the relevant activity?

(a) the entertainer or sportsman shall be treated for the purposes of the Tax Acts as the person to whom the payment is made; and

(b) the payment shall be treated for those purposes as made to him in the course of a trade, profession or vocation exercised by him within the United Kingdom (whether or not he would be treated as exercising such a trade, profession or vocation apart from this paragraph).

(3) Regulations may provide?

(a) for the deduction, in computing any [profits] of the entertainer or sportsman arising from the payment, of expenses incurred by other persons in relation to the payment;

(b) that any liability to tax (whether of the entertainer or sportsman or of another person) which would, apart from subsection (2) above, arise in relation to the payment shall not arise or shall arise only to a prescribed extent(b).

(4) References in this section to a payment include references to a transfer.

(5) This section shall not apply unless the payment or transfer is one to which section 555(2) or (3) applies, and

subsections (2) and (3) above shall not apply in such circumstances as may be prescribed.”

11. Section 44 of the 1986 Act simply said that “Schedule 11 to this Act (which relates to non-resident entertainers and sportsmen) shall have effect”. The problem of collecting the tax charged by section 108 of the 1970 Act (now section 18(1)(a)(iii) of the 1988 Act) was addressed by paragraph 8(1) of the Schedule (section 557(1) of the 1988 Act) which altered the basis of assessment from a preceding year basis to a current year basis, and paragraph 2(1) (section 555(2) of the 1988 Act) which required a person making a payment which had “a connection of a prescribed kind with the relevant activity” to deduct a sum representing income tax and account to the Inland Revenue for the sum. This requirement for the payer to deduct tax and account for it to the Revenue applied whether the payment were made to the entertainer/sportsman direct or to a company controlled by the entertainer/sportsman. Paragraph 2 contained various consequential provisions including, in sub-paragraph (7), a provision (now section 555(6) of the 1988 Act) that said

“This paragraph shall not apply to payments or transfers of such a kind as may be prescribed.”

12. The problem about the scale of activities that could constitute the conduct of a trade, profession or vocation was addressed by paragraph 6(1) and (4) of the Schedule (section 556(1) of the 1988 Act) and the problem about payments to companies owned and controlled by the entertainer or sportsman was dealt with by paragraph 7 of the Schedule (section 556(2) of the 1988 Act). Paragraph 6 and paragraph 7 each had a sub-paragraph (6(2) and 7(4)) which said that the paragraph was not to apply unless the payment was one to which paragraph 2 applied. These provisions became, on consolidation, the first part of section 556(5). And paragraph 7 had a sub-paragraph which said that the paragraph was not to apply “in such circumstances as may be prescribed”. This became, on consolidation, the second part of section 556(5).

13. Leaving aside for the moment the effect of section 556(5), it is common ground that the payments by Nike and Head to Agassi Inc. that led to the closure notice and to the proposed amendment of Mr Agassi’s self-assessment return were payments caught by section 556(2). Subject to subsection (5), therefore, it is agreed that Mr Agassi would be properly chargeable to tax on the Nike and Head payments to Agassi

Inc. But sub-section (5) says that section 556 shall not apply unless the payment is one to which section 555(2) applies. So the issue is whether or not, for the purposes of section 556(5), section 555(2) applies to the payments made by Nike and Head to Agassi Inc.

14. If the language of section 555(2) is read literally, the sub-section clearly applies to those payments. The payments have certainly been made and they have a connection of the prescribed kind with the relevant activity. None of that is in dispute. But if section 555(2) does apply to the payments, Nike and Head were thereby placed under a statutory obligation to deduct income tax from the payments and account to the Revenue for the deducted sum. This, says counsel for Mr Agassi, cannot be right. Nike and Head are foreign companies with, in the tax year 1998/1999, no trading presence in the United Kingdom. It is therefore to be presumed that Parliament did not intend them to be caught by the tax collection provisions imposed by the sub-section and by regulation 9 of the 1987 Regulations. Regulation 9 requires a section 555(2) payer to make quarterly tax returns to the Inland Revenue and to respond to requests by the Revenue for particulars of the payments that have been made. The penal enforcement provisions of the Taxes Management Act 1970 are applicable. Parliament, so the argument goes, cannot have intended to subject foreign individuals and companies with no residence or trading presence in this country to these liabilities.

15. The Revenue, on the other hand, point to the consequential incongruities if these arguments are right. It would mean that foreign entertainers and sportsmen, who earn money from commercial sponsorship contracts connected with their professional activities in this country, can avoid liability to tax on this money simply by ensuring that the money is paid by a foreign company with no trading presence or assets in this country.

16. Counsel for Mr Agassi relies very heavily on well-known authorities such as *Ex p Blain* (1879) 12 Ch.D.522 and, more recently, *Clark (Inspector of Taxes) v Oceanic Contractors Inc* [1983] 2 AC 130. In *Ex parte Blain* James LJ referred at p 526 to the

“... broad, general, universal principle that English legislation, unless the contrary is expressly enacted or so plainly implied as to make it the duty of an English court to give effect to an English statute, is applicable only to English subjects or to foreigners who by coming into this

country, whether for a long or short time, have made themselves during that time subject to English jurisdiction ...”

And in the *Oceanic Contractors* case, Lord Scarman, having cited the above passage with approval repeated, at p 145, the same principle. But Lord Scarman noted also that “the principle is a rule of construction only” and that “British tax liability has never been exclusively limited to British subjects and foreigners resident within the jurisdiction”. And Lord Wilberforce, at p 152, referred to the “territorial principle” as being “really a rule of construction of statutes expressed in general terms”. The question to be asked, said Lord Wilberforce, is “who ... is within the legislative grasp, or intendment, of the statute under consideration?”

Conclusions

17. My Lords, I have come to the clear conclusion in the present case that the legislative intendment in relation to sections 555 and 556, and their statutory predecessors in the 1986 Act, was that foreign entertainers and sportsmen who, or whose controlled companies, receive payments in connection with their commercial activities in the United Kingdom should be subject to the section 18(1)(a)(iii) charge to tax and that the territorial principle cannot be implied so as to limit the effect of the clear language of section 555(2). My reasons, expressed in no particular order of importance, are as follows:

- (1) I am impressed by the Revenue’s point that, if Mr Agassi is right, the ease with which the tax liability imposed by section 556 could be avoided simply by ensuring that the potentially taxable payments were made by foreign entities with no residence or trading presence in this country would render payment of the tax to all intents voluntary. That cannot, in my opinion, have been Parliament’s intention.
- (2) The disapplication of section 556 envisaged by sub-section (5) requires, in my opinion, attention to the nature and status of the payment, not to the identity of the payer. In order to know whether for section 556(5) purposes the payment is one to which section 555(2) applies, two, and in my opinion only two, questions need to be asked. First, has a payment been made (to whatever person), not being a payment “of such kind as [has been] prescribed” (section 555(6))? If the answer is “yes”, then, second, has the payment “a

connection of a prescribed kind with the relevant activity”? If the answer to this question, too, is “yes” then, in my opinion, for section 556(5) purposes, the payment is one to which section 555(2) applies. The identity of the payer is, in my opinion, as a matter of construction of section 555(2), irrelevant to the question.

- (3) To imply into section 555(2) a limitation by reference to the foreign status of the payer would, in my opinion, be impermissible. The whole point of sections 555 to 558 is to subject foreign entertainers or sportsmen to a charge to tax on profits on gains obtained in connection with their commercial activities in the United Kingdom. Payments to foreign companies controlled by them are to be treated as payments to them. The infrequent or sporadic nature of their commercial activities and presence in the United Kingdom and the difficulty of collecting from them the section 556 tax on their profits and gains from those activities was one of the reasons why the new collection regime was introduced under the 1988 Act. To read into the statutory provisions a limitation preventing the collection regime from applying where the payer is a foreign entity with no UK presence and thereby relieving the foreign entertainer/sportsman from the charge to tax cannot, in my opinion, possibly be justified on the basis of a presumed legislative intention. I would hold that on the true construction of these sections the territorial limitation cannot be implied and that the statutory language should be given its natural meaning.

18. Accordingly, I would allow this appeal with costs here and below.

LORD WALKER OF GESTINGTHORPE

My Lords,

19. I have the misfortune to differ from your Lordships as to the disposal of this appeal. I have found it a difficult case, and I have hesitated whether to carry my doubts to the point of dissent. But I have in the end formed the definite view that this appeal should be dismissed. I will set out my reasons as briefly as possible.

20. In my opinion the appeal turns on whether or not the well-settled presumption against a statute being construed as having extra-territorial effect (see *Ex parte Blain* (1879) 12 Ch D 22) is ousted by a sufficient indication that in this case Parliament did intend section 555 (2) of the Income and Corporation Taxes Act 1988 (“ICTA 1988”) and its associated provisions (re-enacting provisions originally introduced by section 44 of and Schedule 11 to the Finance Act 1986) to apply to a payment made by a person neither resident nor having any tax presence in the United Kingdom. The Revenue’s alternative submission (based on the language of section 556 (5) of ICTA 1988) seems to me over-subtle and insubstantial.

21. When Parliament first enacted these provisions this House had only recently made its important decision in *Clark v Oceanic Contractors Inc* [1983] 2 AC 130. The House was divided as to the result, but it appears that had it not been for the “tax presence” point the Revenue would have lost the appeal (Lord Scarman did not accept the Revenue’s alternative argument, though Lord Wilberforce and Lord Roskill found it attractive). Lord Edmund-Davies and Lord Lowry, who dissented, both saw it as a strong thing to give extra-territorial effect to a taxing statute containing penal provisions (that is, penalties for non-compliance with its requirements): see Lord Edmund-Davies at p155 D-G and Lord Lowry at p158 F-G. Lord Scarman, who was in the majority, recognised that the Revenue’s position had “far-reaching and anomalous consequences:” see at p146 E-G. Yet it is said that Parliament must be taken to have intended, by the relevant provisions in the Finance Act 1986, to have produced much the same effect as in *Clark v Oceanic Contractors Inc*, but without the element of any tax presence which was decisive in that case.

22. Before your Lordships Mr Brennan QC (for the Revenue) made some points which I can readily accept. The provisions introduced by the Finance Act 1986 were not simply a collection mechanism. They made substantial changes in the way in which non-resident entertainers and sportsmen were to be charged, in line with what was permitted by Article 17 of the (1977) OECD Model Tax Convention on Income and Capital:

“Artistes and Athletes

1. Notwithstanding the provisions of Articles 14 and 15, income derived by a resident of a Contracting State as an entertainer, such as a theatre, motion picture, radio or television artiste, or a musician, or as an athlete, from his

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

2. Where income in respect of personal activities exercised by an entertainer or an athlete in his capacity as such accrues not to the entertainer or athlete himself but to another person, that income may, notwithstanding the provisions of Articles 7, 14 and 15, be taxed in the Contracting State in which the activities of the entertainer or athlete are exercised.”

Mr Brennan was right in saying that in this context Buxton LJ’s observations about merchant bankers or bricklayers were not apposite.

23. The changes made were, in brief, as follows:

- (1) The charge on a non-resident trader under Case 1 of Schedule D (which depends on the existence of “a trade . . . exercised in the United Kingdom”: see now ICTA 1988 section 18(1)) was extended (in the case of an entertainer or sportsman meeting the prescribed conditions) by what is now section 556 (1) of ICTA 1988 so as to apply to what was aptly referred to by Mr Brennan as a “deemed trade” in the United Kingdom.
- (2) The charge was also widened, in the same type of case, to catch payments made to a person other than the entertainer or sportsman so as to make it a “deemed receipt”: section 556 (2).
- (3) The basis of assessment was changed to a current year basis: section 557 (1).
- (4) There was a machinery for collection of basic rate tax by deduction at source: section 555 (2), which is at the heart of this appeal.

24. Mr Brennan put the collection mechanism last in his list of changes, but the fact is that in the legislation it is put in the most prominent position, and the charging provisions in section 556 and the timing provisions in section 557 are all routed through the collection mechanism so as to apply only when it applies: see sections 556 (5) and 557 (5). Mr Brennan argued that the collection mechanism was a tail which should not be allowed to wag the dog, but he was driven to accept that the dog seems to come on stage tail first.

25. Mr Brennan submitted that it was incredible that Parliament should have intended to make the substance of the new tax charges depend on the reach of the machinery for collecting basic-rate tax by deduction; or that it should have been intended, in establishing that

machinery, to draw a distinction between a resident and a non-resident payer. The fundamental statutory purpose, he argued, was to tax economic activity which takes place in the United Kingdom.

26. I have no difficulty with this last submission, but to my mind it does not necessarily lead to the conclusion for which the Revenue contends. I think it is important to bear in mind that these provisions were first introduced twenty years ago, and the facts of economic life for entertainers and sportsmen may have changed during that time. In the 1980s the main mischief, for the Revenue, may have been the ability of an international musician, golfer or tennis player to arrive and spend a fortnight performing in the United Kingdom, collect his or her share of the gate money (or prize money or attendance money derived from the gate) and depart with the money tax-free. What is now section 555(2) compelled the promoters of the concert, or of the golf or tennis tournament (very probably United Kingdom residents, or at the very least, persons with a tax presence in the United Kingdom) to deduct basic rate tax, whether making a payment to the performer personally or to a person connected with the performer. That may have been seen as the principal target, especially as royalties for sound recordings (an important source of income for a successful musician) have always been excluded from the deduction machinery (see Regulation 3(3)(c) of the Income Tax (Entertainers and Sportsmen) Regulations 1987, SI1987 No. 530).

27. It is clear from Mr Agassi's tax computations that his merchandising income (from allowing his name to be used on products which he endorses) far exceeds his income from prize money. But that may not have been true of the generality of entertainers and sportsmen in the 1980s, and it may not be true, even today, of sportsmen whose talent and achievements, although in demand on international circuits, are not as wholly exceptional as those of Mr Agassi. If a relatively unknown tennis player from (say) Taiwan or Thailand receives £5,000 for playing in tournaments in the United Kingdom, it is fair that he or she should be taxed on this. It is income derived from economic activity in the United Kingdom, and the collection mechanism for deduction at source, which binds the United Kingdom tournament organisers, ensures that at least basic-rate tax is paid. It is not so obvious that the player should also have to pay United Kingdom tax on merchandising income paid overseas in respect of products which (because of the player's relatively modest fame) may be marketed only in his or her own country.

28. To put it at the lowest, it is not to my mind glaringly obvious that United Kingdom tax ought to be paid in respect of a non-resident sportsman's merchandising income received overseas from a manufacturer which is not resident (and has no tax presence) in the United Kingdom. But on the Revenue's case it is unthinkable that Parliament should have had any other intention. On the Revenue's case Parliament must have intended that such a manufacturer (which might not be a large multinational, but a small company trading only in Taiwan or Thailand) would be in breach of its statutory duty, and exposed to penalties for breaching United Kingdom regulations of which it might have no knowledge. I am not persuaded that Parliament must have had that intention in enacting the Finance Act 1986 (only a few years after this House had considered the matter so thoroughly in *Clark v Oceanic Contractors Inc* [1983] 2 AC 130). For my part, I would dismiss this appeal.

LORD MANCE

My Lords,

29. I have had the benefit of reading in draft the judgments prepared in this matter by my noble and learned friends Lord Scott of Foscote and Lord Walker of Gestingthorpe. It seems to me improbable that the legislature had expressly in mind the problem with which the House is now faced. We have to address it in a manner which is faithful to and makes best sense of the general legislative scheme.

30. I see great force in the taxpayer's submission that the collection machinery introduced by section 555(2) of the Income and Corporation Taxes Act 1988 must be read as subject to an implied territorial limitation. I say this having regard to the approach taken and to similar considerations to those mentioned by this House in *Clark v. Oceanic Contractors Inc*. [1983] 2 AC 130. True, the language of section 555(2) is on its face general. Literally read, it applies to any person who makes a payment of a prescribed kind in connection with an activity of a prescribed kind performed by an entertainer or sportsman within the United Kingdom. But it seems to me to be far-reaching and anomalous – to adopt words used by Lord Scarman at p.146F in the different context of PAYE under Schedule E in *Clark v. Oceanic Contractors Inc*. - to treat section 555(2) as imposing on a foreign payer having no presence here penal obligations to make and account for deductions in respect of

the payment it makes. This is all the more so when the payment itself may, as here, be made abroad and be made to a company rather than to the relevant sportsman or entertainer. Any such obligations, if they existed, would quite likely be unknown to and almost certainly be incapable in practice of being enforced against the foreign payer.

31. But that does not to my mind mean that the Revenue's appeal fails. The primary basis upon which the Revenue puts its appeal is that it does not matter whether section 555(2) contains any implied territorial limitation (see e.g. paragraph 23 of its summary submissions). Chapter III of the 1988 Act, containing sections 555 to 557 and consolidating Schedule 11 of the Finance Act 1986, was intended not just to provide improved collection machinery but also to expand the ambit of the basic tax charge under Schedule D imposed by what became section 18(1)(a)(iii) of the 1988 Act. The expansion was to cater for the first three problematic aspects identified by Lord Scott in his paragraph 9. The primary liability for the basic and expanded tax charge rests on the sportsman or entertainer to whom the payment is or is to be treated as being made: see section 18(1)(a)(iii) and sections 555(1) and 556(1) and (2).

32. The legislation could not sensibly have meant or provided that the taxpayer could avoid his expanded liability by the simple means of arranging for any payment to be made to him or his company by a person not present in the United Kingdom. Even if (which I doubt) the possibility of payments in respect of United Kingdom sporting or entertainment activities by persons with no United Kingdom presence is a quite new phenomenon, we must still ask ourselves whether that means that any implied territorial limitation, which should sensibly be read into section 555(2) to cater for that phenomenon, should also sensibly be read as carrying through into the primary tax charge imposed by sections 555(1) and 556(1) and (2).

33. The argument that it does have this anomalous effect is based on the provisions of section 556(5). But point (2) made by Lord Scott in his paragraph 17 answers that argument completely in a manner with which I wholly agree. To recapitulate it in my own words, the second part of section 556(5) gives rise to no issue, since it simply provides for the possibility that the Treasury might wish to make regulations excluding, from the extended tax charge provided by section 556(1) or (2), payments which have a connection with the relevant activity of a kind prescribed as mentioned in section 555(2) and which would otherwise fall within the extended charge. The purpose of the first part of section

556(5) is also easily explicable as being to limit the application of section 556 to payments or transfers with a connection with a relevant activity of a kind prescribed under section 555(2). It is true that section 556(1) and (2) would anyway have been limited to such payments, since they contain similar wording, referring back by implication to the concept of “a prescribed kind with the relevant activity” in section 555(2). But it is in section 555(2) that that concept is first introduced, and duplication or tautology is also nothing new in statutory language. I find it far more implausible to suppose that the legislature had it in mind in section 556(6) to limit the scope of section 556(1) and (2) by reference not simply to the kind of payment, but also by reference to an implied territorial limitation which the courts might (and in my view probably would) read into section 555(2) regarding the type of payer who should sensibly be treated as under the duty imposed by section 555(2) to make and account for deductions. An implied limitation read into section 555(2) for the benefit of overseas payers should not be treated as having an anomalous windfall effect with regard to the primary taxpayer.

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

35. I note that the effect of this analysis (a distinction between the charge to tax on the taxpayer and the liability of the third party payer to make and account for deductions at the basic rate) is similar to that which the House of Lords in *Clark v. Oceanic Contractors Inc.* [1983] 2 AC 130 accepted would occur under Schedule E, in circumstances where the payer was not present within the United Kingdom (cf p.147F and 148D-E per Lord Scarman).

36. For these reasons, I agree that the Revenue's appeal should be allowed with costs here and below.