ET AND ANDRE AGASSI: WAS THE HOUSE OF LORDS WRONG TO TAX THEM BOTH?

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Abstract: The presumption of territoriality, that the United Kingdom Parliament does not intend statutes to apply to persons outside the UK unless expressly stated, applies to statutes generally and tax statutes in particular. However, when the taxpayer, Agassi, attempted to rely on this presumption in support of his case the House of Lords looked to the presumed intention of Parliament when it passed the Income and Corporation Taxes Act 1988 which contains special provision for non-resident entertainers and sportspeople. The House of Lords held that Parliament must be presumed to have intended non-resident companies to be liable to the special deduction scheme for entertainers and sportspeople, even though it acknowledged those liable would be unlikely to be aware of their liabilities and the potential penalties consequent on their failure to fulfil these obligations, and HMRC would find them, to all practicalities, unenforceable on those liable.

Keywords: Tax; Non-resident Entertainers and Sportspeople; Artiste Companies; Corporate Veil; Presumptions of Statutory Interpretation; Territoriality; Parliament’s Presumed Intention; Income and Corporation Taxes Act 1988.

Introduction

When the internationally renowned tennis player Andre Agassi announced his retirement from international tennis at Wimbledon in June this year, his decision probably had little to do with his recent defeat in the House of Lords by Her Majesty’s Revenue and Customs. This defeat cost him £27,500 in judgment, but considerably more in costs. Agassi had lost the first hearing in front of the Special Commissioners and the second in the High Court; he had won in the Court of Appeal, but lost in the House of Lords in front of five Law Lords, with Lord Walker of Gestingthorpe notably dissenting. It had been estimated that the Revenue stood to lose £500 Million if Agassi was successful, namely in consequent appeals involving other ‘stars’ for overpayment.¹

The House of Lords’ decision that the special provisions for non-resident entertainers and sportspeople has extra-territorial effect, has far ranging taxation implications for non-domestic companies and individuals paying royalties to entertainers and sportspeople for promotional or other work, any amount of which takes place in the UK, as they are now confirmed to be under a duty to deduct and account to HMRC.

¹ Lusher Adam, ‘Tax on stars is unfair says Agassi as £500 m battle goes to Lords’, Daily Telegraph (19/03/2006), www.telegraph.co.uk/news.
for a sum representing income tax\(^2\) on the amount paid, and are, consequently, subject to penalties if they fail in this duty. The decision also confirms that the non-resident companies that entertainers and sportspeople set up to receive payments for their services, usually referred to as ‘artiste companies’, will be responsible if this sum is not deducted, albeit, the individual cannot hide behind the corporate veil, which will be pierced to hold the individual personally liable.\(^3\)

1. The House of Lords’ Decision and its Effects:

In *Agassi v Robinson (Inspector of Taxes)*\(^4\) the House of Lords reversed the decision of the Court of Appeal.\(^5\)

Agassi, the tennis player, was neither resident, nor domiciled in the United Kingdom. As with many entertainers and sportspeople, he had legitimately set up a company,\(^6\) which entered into contracts and received payments from manufacturers of sports equipment and clothing that he sponsored or otherwise advertised, the company received payments from Nike Inc. and Head Sports AG during the 1998/1999 tax year. Neither of the latter companies was resident, nor carried on any trade in the UK, nor were the payments made within the UK. However it was agreed that the payments Agassi’s company had received were for a ‘relevant activity’ performed by Agassi in the UK, this includes any appearance connected with his sporting activity performed in the UK designed to promote commercial sales or activity by advertising, endorsing etc.,\(^7\) and as such were payments of the ‘prescribed kind’\(^8\) which made them liable to have tax deducted by virtue of the Income and Corporation Taxes Act 1988, s.555(2).\(^9\) The taxpayer submitted a self-assessment tax return for the relevant period, which showed some of these receipts, but the inspector of taxes claimed the additional charge to income tax of £27,500 based on the payments received by the taxpayer’s company from the other two companies.

Agassi appealed relying on the principle of ‘territoriality’, a presumption of statutory interpretation that statutes generally, and taxation statutes in particular, should not have extra-territorial effect. Applying this principle, Agassi’s submission was quite simple, namely as s.555(2) of the Income and Corporation Taxes Act 1988 (TA) imposes a duty on the payer to deduct tax from payments, with consequent penalties if they do not, it could not be presumed to apply to bodies outside the UK. The Special Commissioners declined to give effect to the territoriality principle with regard to s.555(2), and so limit its effect. In the High Court, Mr Justice Lightman, although acknowledging the obligations imposed by s.555(2) might prove unenforceable on extra-territorial bodies, agreed with the Special Commissioners, that the principle did not apply to s.555(2) so that the subsection extended to the activities of Head and Nike despite their lack of presence in the UK. Therefore, as Nike and Head should

\(^2\) Usually equivalent to base rate.
\(^3\) Income and Corporation Taxes Act 1988, referred to subsequently as ICTA, section 556(2).
\(^4\) [2006] UKHL 23; [2006] All ER (D) 240 (May).
\(^5\) Agassi v Robinson (Inspector of Taxes) [2005] STC 303,[2004] All ER (D) 322 (Nov).
\(^6\) Registered in the U.S.A.
\(^7\) The Income Tax (Entertainers and Sportsmen) Regulations, SI 1987/530, regulation 6(3).
\(^8\) The Income Tax (Entertainers and Sportsmen) Regulations, SI 1987/530, referred to subsequently as the Regulations, regulation 3.
\(^9\) The Income and Corporation Taxes Act 1988, ss.555 & 556.
have deducted the required amount from the payments to Agassi’s company, Agassi was liable to taxation on these payments.

However, the Court of Appeal unanimously\(^{10}\) held that the territoriality principle did apply to the provisions, stating that it would be wrong to impose such a duty on extra-territorial bodies with the possibility of consequent penalties if they did not comply.\(^{11}\) The House of Lords reversed this decision and held that the territoriality principle did not apply to these provisions. The Judgment was reached by looking to the intention of the legislature in drafting the provisions.\(^{12}\) Their Lordships held that however unlikely it was that extra-territorial bodies could be expected, or enforced, to deduct or account for this money, the provisions did impose a duty on these bodies to the effect that they faced penalties under English law if they did not comply. The extension of s.555(2) to these payments made Agassi liable under s.556(2) to account for the payments to his artiste company. The proportionality of imposing such a duty and consequent penalties on extra-territorial bodies was considered irrelevant.\(^{13}\)

2. History: Taxation of Entertainers and Sportspeople as a Special Category.

2.1. Double Taxation

The UK has double taxation conventions with over 100 countries in relation to income earned by the non-resident taxpayer in the UK. Most follow the model conventions of the Organisation for Economic Co-operation and Development (OECD). These agreements generally allow the taxpayer to be liable to tax in his country of residence and preclude him being ‘double’ taxed. However, almost all the double taxation conventions entered into by the UK in following the OECD recommendations\(^ {14}\) preclude treaty protection for entertainers and sportspeople and allowing for tax to be withheld at source on payments to non-resident entertainers and sportspeople.\(^ {15}\)

Why this particular group has been subject to such treatment is probably more to do with the frequently itinerant nature of their work, and the large amounts paid to them,

\(^{10}\) Buxton, Sedley and Jacob LJJ.

\(^{11}\) Agassi v Robinson (Inspector of Taxes) [2005] STC 303,[2004] All ER (D) 322 (Nov).

\(^{12}\) Mike Warburton discusses the readiness of their Lordships to look to the intention of Parliament in this matter in his article ‘More pressure on courts’ in the Times, 04/07/2006, comparing Agassi’s case with that of Richard Madeley and Judy Finnigan and the landmark case of Pepper (Inspector of Taxes) v Hart [1993] 1 All ER 42, HL.

\(^{13}\) The payer has to send a return on form FEU 1 to the collector of taxes for any relevant payment at the end of each quarterly period, ending on 30 June, 30 September, 31 December and 5 April in each tax year, when a payment is made. Returns must be made within 14 days after the end of the period. By virtue of regulation 9(5) HMRC has the normal enforcement powers to require submission of a return and, by regulation 14, interest and penalties may be due for late submission of returns or late payment of tax. Regulation 9 additionally provides that HMRC may require any person to provide information relating to payments subject to the deduction scheme. Failure to provide this information may make the person required subject to penalties e.g. initial £300 penalty and £60 each day. In addition regulation 9 and the Taxes Management Act 1970 s.98 provides a separate penalty not exceeding £3000 for fraudulently or negligently delivering incorrect information.

\(^{14}\) See OECD Committee on Fiscal Affairs report “Taxation of Entertainers, Artistes and Sportsmen (Issues in International Taxation No 2) 1987”.

\(^{15}\) The only double taxation agreements that the UK has which do not disapply treaty protection for entertainers and sportspeople are those with the Gambia (UK/Gambia Double Taxation Convention, SI 1980/1963) and the countries of the former USSR (UK/USSR Double Taxation Convention, SI 1986/224).
than any imputations on their collective honesty.\textsuperscript{16} The OECD Model Convention 2005 on Income and on Capital specifically deals with entertainers and sportspeople in Article 17.\textsuperscript{17} This provides:

“Artistes and sportsmen
1. Notwithstanding the provisions of Articles 7 and 15, income derived by a resident of a Contracting State as an entertainer...or as a sportsman, 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 a sportsman in his capacity as such accrues not to the entertainer or sportsman himself but to another person, that income may, notwithstanding the provisions of Articles 7 and 15, be taxed in the Contracting State in which the activities of the entertainer or sportsman are exercised.”

The commentary to the Model Convention states that the purpose of Article 17(2) is to prevent certain tax avoidance devices where remuneration is paid not to the entertainer or sportsman himself but to another person, for example a so-called artiste company.\textsuperscript{18}

The UK’s Double Taxation Convention with the USA,\textsuperscript{19} where Agassi’s company was resident, complies in most ways with the Model Convention and does not afford an exemption to entertainers and sportsmen.\textsuperscript{20} Therefore, any income earned by an American based entertainer or sportsperson by a relevant activity performed within the UK is subject to taxation within the UK.

2.2. Special Domestic Provisions

The UK taxation special measures for non-resident entertainers and sportspeople were contained in the \textit{Income and Corporation Taxes Act 1988 (ICTA) ss.555-558} and the \textit{Income Tax (Entertainers and Sportsmen) Regulations, SI 1987/530} (the Regulations).\textsuperscript{21} They were introduced as a consequence of the large concerts with consequent huge receipts for non-resident stars such as Michael Jackson in the mid-1980s. Although it is not suggested that Mr Jackson ever took advantage of the previous system, it was possible for stars to be paid large amounts that would only be subject to returns in the following year. The temptation for someone with no tax presence in the UK to fail to file a return was obvious if they had no immediate plans to return to the UK and had few UK-based assets.\textsuperscript{22}

Briefly, the provisions introduced a system of deduction of tax at source enforcing a duty for payment and account to the Revenue on the payer.\textsuperscript{23} This meant any

\begin{itemize}
\item[16] Although see associated text at note 17 for OECD justification.
\item[17] Based on Article 17 of the OECD Draft Convention amended by subsequent Models.
\item[18] Commentary on OECD Model Convention Article 17, at [11].
\item[20] Although the relevant provision is Article 16 and includes a $20,000 de minimis provision.
\item[21] The Income Tax (Entertainers and Sportsmen) Regulations, SI 1987/530, came into force 1\textsuperscript{st} May 1987: TA 1988 s.555(7).
\item[22] Julian Hedley, ‘Good Shot!’ Taxation 10 Feb 2005, 446.
\item[23] S.555(2) . The provisions also changed the basis of the year of assessment from a preceeding year basis to a current year basis: s. 557(1) TA 1988.
promoter or organiser had to deduct at source a sum representing the amount of tax and account for it on a quarterly basis to the Inland Revenue. The payer would then issue the payee with a certificate of deduction of taxation\(^\text{24}\) that could be used by the payee to claim tax credit in his domicile country.\(^\text{25}\)

The Regulations contain definitions of entertainer and other terms\(^\text{26}\) including, as previously stated, regulation 6(3) which provides that a relevant activity includes any activity performed in the UK designed to promote commercial sales or activity by advertising, endorsing etc. Payments made to a third party are subject to the withholding/deduction scheme if the third party is under the entertainer’s control;\(^\text{27}\) therefore, payments to Agassi’s company should, seemingly, have been subject to the scheme.\(^\text{28}\)

The issues central to the Agassi case arising from the Income and Corporation Taxes Act 1998\(^\text{8}\) were the interpretation of ss.555 and 556.

Section 555, Payment of tax, stated in subsections (2) and (3):

(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....

These subsections made Head and Nike responsible for deducting the tax due from the payments to Agassi’s company and liable to account to HMRC for the amount if they did not.

Section 556, Activity treated as a trade etc and attribution of income, stated in sections (1) and (2) that:

(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 purpose 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.
(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

\(^{24}\) On form FEU 2. The deduction scheme is administered by the Foreign Entertainers Unit at HMRC Birmingham; email: non-residents@hmrc.gov.uk

\(^{25}\) SI 1887/530 reg 12(5)

\(^{26}\) The Regulations, SI 1987/530, regulations 2(1), 6(1)&(2).

\(^{27}\) Ibid, regulation 7(2)(a).

\(^{28}\) Agassi v Robinson (Inspector of Taxes) [2005] STC 303,[2004] All ER (D) 322 (Nov) at [7] per Buxton LJ.
(whether or not he would be treated as exercising such a trade, profession or vocation apart from this paragraph)....

This meant that Agassi was treated as performing the activity for which the payments were made within the UK and so liable to tax on them. S.556(2) provides that even if the payments were made to a third party, such as an artiste company, the person who performed the activity would be considered to have been the recipient of the payment. If the deductions were not made and the payments were made to a third party under the sportsperson’s control then s.556(2) made the sportsperson liable.

Therefore, the law seemed quite straightforward in that as Agassi had performed his usual sporting activities in the UK and had been paid a fee for advertising and endorsing Head and Nike’s products whilst doing so his company and himself were liable to tax on the relevant proportion of the fee earned whilst performing these endorsements in the UK. Nike and Head should also have deducted the tax due.

The argument developed by Agassi to contradict this was in reliance on s.556(5):

(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."

Agassi’s submission relied on the presumption of territoriality, that a statute and particularly a taxation statute is presumed not to have effect outside the UK. The principle is founded on the belief that Parliament only intends to tax residents of the UK or those who have earned the funds in question in the UK. In this instance there was no question that Head or Nike were liable to taxation themselves for any activity in the UK. Therefore, Agassi contested, they were outside the intended scope of s.555(2) and (3). If this were the case then the exception in s.556(5) should be interpreted to exempt Agassi and his company from liability imposed by s.556.


3.1. Territoriality

Although Agassi’s artiste company was seemingly within the scheme the situation with regard to similar cases pre-Agassi was generally held to be: “A payment by one non-resident entity to another non-resident entity in respect of the services of an entertainer or sportsman to be performed in the UK is not normally within the tax deduction scheme provided that neither the payer not the payee has a permanent establishment, place of business or tax presence in the UK although the whole question of territoriality is a complex one.”

As previously stated, Agassi used this territorial argument submitting that s.555(2) could not apply to extra-territorial payers because of the principle of territoriality espoused by the House of Lords in Clark (Inspector of Taxes) v Oceanic

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29 www.lexisnexis.com:Simon’s Direct Tax Service, E5.802, Scope of the Tax Deduction Scheme in consideration of the judgment in Clark (Inspector of Taxes) v Oceanic Contractors Inc (Oceanic) [1983] 2 AC 130; STC 35
**Contractors Inc**\(^{30}\) (*Oceanic*), and because the provisions imposed penalties on extra-territorial bodies. His submissions developed that if the extra-territorial bodies were not caught by s.555(2) then s.556(2) would be disapplied by s.556(5), and he was not therefore liable to tax on those amounts.

### 3.2. The Special Commissioners and the High Court

The Special Commissioners and Lightman J, in the High Court did not agree that the territorial principle would apply to s.555(2).

Lightman J based his judgment on the comments of Lord Scarman in *Oceanic* namely “the territoriality principle is simply a rule of construction to be applied unless the contrary is expressly enacted or plainly to be implied.”

Lightman J concluded from this:\(^{31}\) “As it seems to me, in the case of sections 555 and 556, the plain and obvious intention of the legislature was to impose an obligation on the person making the payment irrespective of his tax presence here. Reading section 555(2) in the context of the legislation as a whole and of its evident purpose, the 1988 Act manifests the intention that section 555(2) shall impose liabilities and obligations on parties with no tax presence in the UK who make the connected payments and therefore in this case on Nike and Head, and accordingly section 556(5) affords Mr Agassi no escape route from liability. The liabilities imposed on Nike and Head may prove unenforceable, but that does not mean that section 555(2) does not apply to the payments in question. Section 555(2) applies to the payments and the duty is imposed on Nike and Head to pay. That is sufficient to trigger section 556. “

### 3.3. The Court of Appeal

Lord Justice Buxton delivered the Court of Appeal’s judgment, accepted that it was a general presumption of construction that a taxing statute did not have extra-territorial effect and that, therefore, s.555(2) could not apply to impose a collection obligation on extra-territorial bodies if they had no “tax presence” in the UK.\(^{32}\)

The Court relied on the territoriality principle espoused by the House of Lords in *Oceanic*,\(^{33}\) which concerned the obligation to collect PAYE imposed on employers by (as it was then) section 204(1) of the Income and Corporation Taxes Act 1970. In *Oceanic* the House was unanimous that the statement of James LJ in *Ex parte Blain*\(^{34}\) applied. James LJ had stated that there is a: "broad, general, universal principle that English legislation, unless the contrary is expressly enacted or so plainly implied as to make it the duty of and [sic] 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 a short time have made themselves during

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\(^{30}\) [1983] 2 AC 130; STC 35.

\(^{31}\) Agassi v Robinson (Inspector of Taxes) [2005] STC 303, [2004] All ER (D) 322 (Nov) at [13] per Buxton LJ.

\(^{32}\) Agassi v Robinson (Inspector of Taxes) [2005] STC 303, [2004] All ER (D) 322 (Nov) at [10] per Buxton LJ.

\(^{33}\) [1983] 2 AC 130; STC 35.

\(^{34}\) (1879) 12 Ch D 522, 526.
that time subject to English legislation...But if a foreigner remains abroad, if he has never come into this country at all, it seems to me impossible to imagine that the English legislature could ever have intended to make such a man subject to particular English legislation."

In reaching this decision James LJ specified his consideration of the legislature’s intentions. In Agassi the Court of Appeal also stated that it had considered the overall objective or “purpose” of the provisions in reaching its decision, noting that the 1988 Act was a consolidation statute and not designed to change the law. Buxton LJ stated that it was agreed the purpose of Schedule 11 to the Finance Act 1986 (which became ss.555 and 556 of the 1988 Act) was to introduce a scheme “in an attempt to counter difficulties experienced in collecting tax on their United Kingdom activities from entertainers and sportsmen who might have only a fleeting physical presence, and no tax presence at all, within this country.”

However, the Court did not accept the Revenue’s contention, accepted by Lightman J, that the purpose of the legislature had been to extend the liability to tax of the range of payments to entertainers and sportspersons, commenting that Parliament had had ample opportunity over the last 150 years to explicitly amend the relevant legislation to extend and incorporate such liability. Without this explicit intention within the legislation, Buxton LJ stated, it was still necessary to consider the territorial principle with regard to s.555(2) and whether it should be disapplied, commenting: “[I]t is not correct to argue, as did the Revenue before us, that to apply the territorial principle involves writing in words, or departing from the plain wording of the statute. Rather, the principle is inherent in any Act of Parliament, and it is for those who seek to say that it does not apply to demonstrate good reason for its exclusion.”

He continued quoting Lord Lowry from Oceanic. "I remind myself that the framers and promoters of the tax legislation must be taken to know very well the high authority and long standing of cases, including tax cases, on the territorial principle. That is the background against which to judge whether the legislature has made it clear that section 204(1) reaches the company in the present case. And, once the territorial principle is admitted to be relevant, it is not a question of how or to what extent one can qualify or cut down the operation of section 204(1), but of how and to what extent one can widen the operation of section 204(1) beyond the limited sphere of influence to which the principle has prima facie confined it.”

Buxton LJ continued: “[T]he principle is of particular strength in relation not only to legislation imposing a charge to tax but also in relation to legislation imposing a duty to collect or account for tax. Such was the legislation actually in issue in Oceanic. Such legislation, in the shape of section 555(2), is in issue in our case also. In that connexion Lord Scarman, at p146E-F, pointed to the difficulty of enforcing the liability against an employer, as it was in that case, outside the United Kingdom. His

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36 Ibid at [18].
37 Agassi v Robinson (Inspector of Taxes) [2005] STC 303, [2004] All ER (D) 322 (Nov) at [20].
38 Ibid at [26].
39 Ibid at [26], per Buxton LJ quoting Lord Lowry in Oceanic, 158 E-G.
40 Ibid at [27].
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Lordship regarded those considerations as very strong reasons why the legislation should not be construed as excluding the territorial principle."

Therefore, the Court noted that in drafting the legislation the territoriality principle was known, and of course Oceanic was decided only shortly before the 1988 Act was passed, thus, if they had considered the legislation to have extra-territorial effect, they would have realised the difficulties the obligations would impose on extra-territorial entities and specified accordingly. The legislation was more likely passed not considering circumstances similar to those in Agassi, but purely to apply in situations involving domestic payers with the money paid, at least at some point, being in or passing through the UK.

Lightman J had recognised that there might be great difficulty enforcing s.555(2) but held that unenforceability was irrelevant to the consideration of whether the obligation existed. However, Lord Scarman had commented in Oceanic that enforceability was "importantly relevant to the prior question, of whether the statutory obligation was intended to apply at all." 41 It is submitted that this logical approach must be correct, Parliament cannot be presumed to intend laws to be unenforceable, unfortunately this just happens and it is then the court's function to administer these laws with regard to practicality and fairness. Indeed Buxton LJ stated 42 that enforceability was as "pressing" a factor in the Agassi case and that Lightman J had not taken proper account of the weight of the collection obligation on the payer, which was not only burdensome but penal. 43

Similarly Lord Edmund Davies commented, in Oceanic, that the penal nature of the obligation together with the territorial principle prevented the extension of the section to persons outside the jurisdiction. 44 He cited the statement of principle of Lord Esher MR in Tuck v Priester: 45 "If there is a reasonable interpretation which will avoid the penalty in any particular case we must adopt that construction. If there are two reasonable constructions we must give the more lenient one. That is the settled rule for penal sections."

In Agassi, Buxton LJ could see no good reason why this reluctance to impose penalties on non-jurisdictional individuals should not hold good for s.555(2) 46 and therefore, the Court of Appeal decided in Agassi’s favour holding that the territorial principle must have been intended to apply to s.555(2) otherwise the draftsmen would have explicitly expressed a contrary intention. This was clearly the case as the Act was passed shortly after the Lords’ decision in Oceanic, the obligation to collect was virtually unenforceable, a factor “importantly relevant to the prior question of whether the statutory obligation was intended to apply at all”, and the penal nature of these obligations, which was a “pressing” factor. It is outside the scope of this article to consider the compatibility of the imposition of a tax obligation on non-residents,

41 Agassi v Robinson (Inspector of Taxes) [2005] STC 303,[2004] All ER (D) 322 (Nov) at [28] per Buxton LJ.
42 Ibid at [30].
43 Regulation 9(5) imposes the penalties provided by s.98 of the Taxes management Act 1970 to the obligation to provide returns.
44 Above note 30, 155 B-F.
45 (1887) 19 QBD, 638.
46 Agassi v Robinson (Inspector of Taxes) [2005] STC 303,[2004] All ER (D) 322 (Nov) at [30].
which they may not be conscious of, with the court's duty to interpret statutes in accordance with the European Convention of Human Rights.

3.4. The House of Lords

In overturning the decision of the Court of Appeal the House of Lords also considered the penal nature of the obligations imposed on extra-territorial individuals and the decision in Oceanic. Lord Scott, giving the majority judgment, noted, as had Lightman J, that Lord Scarman in Oceanic had also stated that, "the principle is a rule of construction only" and "British tax liability has never been exclusively limited to British subjects and foreigners resident within the jurisdiction", and that Lord Wilberforce had later 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?"

Lord Scott used these comments to justify disapplying the territorial principle to s.555(2) giving three reasons:

(1) That if Agassi were right then s.556 liability could be avoided easily if payments were made by foreign entities which would render payment of the tax to all extents voluntary. "That cannot, in my opinion, have been Parliament's intention."

(2) The disapplication of section 556 by sub-section (5) requires “attention to the nature and status of the payment, not to the identity of the payer.” Therefore, to decide if s.555(2) applied to a payment, two questions were 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) It was impermissible to imply into s.555(2) a limitation: “by reference to the foreign status of the payer. 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

47 Above note 30,145.
48 Above note 30,152.
on the true construction of these sections the territorial limitation cannot be implied and that the statutory language should be given its natural meaning.”

Lord Walker’s dissenting judgment was in common with most of the Court of Appeal’s judgment. He stated that he could not find a sufficient indication that Parliament had not desired the territorial principle to apply, 50 and that when Parliament had first enacted these provisions the House of Lords had only recently made its decision in Oceanic. 51 He laid great store in the arguments of Lord Edmund-Davies and Lord Lowry in Oceanic who “both saw it as a strong thing to give extra-territorial effect to a taxing statute containing penal provisions”. Lord Walker stated that Mr Brennan QC (for the Revenue) had highlighted the issues in the case but had listed the most central issue, the collection mechanism, last, as normally it was the least important and a mere appendage to the overall scheme. 52 Mr Brennan had stated that it was incredible that Parliament should have made liability to taxation dependant on the collection scheme; liability should purely be on whether the taxable activity had taken place in the UK. 53

Lord Walker accepted most of Mr Brennan’s submissions but disagreed on the purpose of the provisions stating that the provisions were twenty years old and had been introduced to combat the main mischief of an international star receiving payment in the UK and avoiding paying tax. S555(2) now dealt with this making the payers in the UK responsible for deducting the tax. Lord Walker stated that it was not to his 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.” 54

To illustrate the problems his Lordship gave the example of a small manufacturer in Taiwan or Thailand who would, if the revenue were correct, be under a statutory duty to collect tax on any sponsorship of a minor entertainer or sportsman who engaged in any relevant activity in the UK and would be liable to UK penalties if they breached this duty.

Lord Mance, although concurring in his judgment with the majority, agreed with Lord Walker that it was unlikely that the legislature had considered this particular set of circumstances and conceded that the concerns over imposing obligations with penalties did not sit well with the territoriality principle. 55 He continued, “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.”

50 Agassi v Robinson (Inspector of Taxes) [2006] UKHL 23; [2006] All ER (D) 240 (May). [20].
51 Ibid [21].
52 Ibid [24].
53 Ibid [25].
54 Agassi v Robinson (Inspector of Taxes) [2006] UKHL 23; [2006] All ER (D) 240 (May). [28].
55 Ibid [29].
He justified his agreement with the majority by stating that Parliament would not have allowed the taxpayer to avoid his liabilities so easily as to decide “if a primary tax charge depended on whether the payment was or was not made by a person present here”, and by interpreting s.556(5) as a discretionary provision for the Revenue to make Regulations excluding certain payments from the extended charge.\(^{56}\)

However, he continued: \(^{57}\) 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.”

Therefore Lord Mance considered it incongruous for extra-territorial individuals to be under this obligation (which might be unknown to them) with its consequent penalties but considered this irrelevant for determining whether the taxpayer was under a primary liability to tax.

The majority of the House of Lords therefore held that the territorial principle could not limit what they described as the clear language of s.555(2). If Agassi was right then the tax liability imposed by s.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 and thus make payment of the tax to all intents voluntary. Their Lordships did not believe this could have been Parliament’s intention.\(^{58}\)

**Conclusion**

The Court of Appeal based its decision on the fact that the territorial principle must have been intended to apply to s.555(2) otherwise the draftsmen would have explicitly expressed otherwise, especially as the Act was passed shortly after the Lords’ decision in Oceanic, the obligation to collect was virtually unenforceable, which was “importantly relevant to the prior question of whether the statutory obligation was intended to apply at all,” and the penal nature of the obligations must be considered a “pressing” factor.

The majority of the House of Lords decided that, although the deduction scheme may be unenforceable on extra-territorial individuals, and indeed they the majority of extra-territorial individuals and corporations would not be aware of their obligations and the possible penalties they would incur for non-compliance, this ignorance was irrelevant, as were the likelihood of possible penalties.

Although James LJ in *Ex parte Blain*\(^{59}\) and the Court of Appeal in Agassi both claimed to have considered the legislature’s intention in passing the relevant legislation and the application of the territoriality principle, the House of Lords went a step further in reaching their judgment, seemingly considering the legislature’s intentions.

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56 Ibid [33].
57 Agassi v Robinson (Inspector of Taxes) [2006] UKHL 23; [2006] All ER (D) 240 (May), [34]. per Lord Mance.
58 Ibid
59 (1879) 12 Ch D 522 at p526.
“perceived intentions,” possibly a new form of statutory interpretation. In this case the four eminent Law Lords held that, whatever the customary presumptions, if Parliament had thought of this particular scenario it would not have allowed the tax to be so easily avoided as to make it almost voluntary, and so the provisions should be interpreted accordingly, however inconsistent this might be with their Lordships’ previous decisions.

In reaching these conclusions they have seemingly ruled that the presumption of the territoriality principle has no effect with regard to tax statutes, thus at the least doubting Oceanic, and that the other generally held principle of statutory interpretation, cited by Lord Esher MR in Tuck v Priester, that if a reasonable interpretation could avoid a penalty in a particular case then that must be the interpretation adopted, should not apply in this case.

Michael Gilbert noted before the House of Lords’ judgment that the Paymaster General had made a written statement to the House of Commons stating that ‘legislation designed to counter tax advantages would be backdated if necessary to catch “any arrangements which attempt to frustrate our intention that employers and employees should pay the proper amount of tax and NIC’s on the rewards of employment”...[contrary] to the longstanding principle that tax legislation should not be retrospective, a principle known as the Rees Rules.’

However, Parliament did not seek to address the situation in the Income Tax (Trading and Other Income) Act 2005, merely clarifying the situation when a payment was made to a company by amending s.556(2). Perhaps no amendments were necessary as their Lordship’s future judgment was “glaringly obvious”.

Although the figure of £500 million was used in the introduction to this article, this was only an estimate of the amount refundable since 1988 and it was unlikely any such figure would have been refunded by the Revenue if the Lords had supported Agassi. Leaving aside the thorny issue of how amounts earned by non-residents from global sponsorship will be apportioned to UK activities, it is submitted that the nature of these endorsements and apportionment due to UK presence will make the decision with relevance to all non-UK based parties of limited value to the Revenue.

Therefore, the amounts involved will not drastically alter the amount of tax revenue and raise the obvious issue of proportionality in regard to whether it is reasonable to impose this obligation on an extra-territorial individual when there is no reasonable

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61 (1887) 19 QBD, 638.
63 556 Activity treated as trade etc and attribution of income
   (1) . . .(2) If—
   (a) under section 13(5) of ITTOIA 2005 a payment made to a person is treated
       as made instead to the performer, and(b) the person to whom the payment is
       actually made is a company within the charge to corporation tax,
   the company is treated for corporation tax purposes as if the payment had not been made to it.]
64 Lusher Adam,’Tax on stars is unfair says Agassi as £500 m battle goes to Lords’, Daily Telegraph (19/03/2006), www.telegraph.co.uk/news.
65 Hedley Julian, ‘Good Shot!' Taxation, 10 Feb 2005, 446.
prospect of recovery and a minimal chance of enforcing the obligation or the penalties for non-compliance. The cost of administering the extra-territorial aspect of the deduction scheme would, presumably, be large for a small return.

The Revenue was obviously concerned that this apparent loophole could be exploited. In this period of large amounts paid for appearances by sports and entertainment stars in the UK it would be relatively easy for a star to be paid a modest appearance fee by a domestic company to appear in the UK whilst a large sponsorship fee could be paid by an extra-territorial body, with no apparent connection to the UK or the domestic company, to the star’s extra-territorial artiste company. If Agassi were right then this income was not liable to UK taxation although earned by a UK appearance. 66

However, it seems unlikely that Parliament considered this situation when it passed the 1988 Act, as it is not explicitly addressed in spite of the close temporal decision in Oceanic, and these large extra-territorial payments are more of a modern phenomenon. Although it would be sensible to draw the conclusion that Parliament would have intended to tax these payments if it had considered them, if the truth is that Parliament and its draftsmen did not expressly address these issues and the principle of territoriality with regard to these provisions because it had not considered them, then the decision in Agassi is, at best, teleological and an example of their Lordships interpreting the provisions by considering the presently desired result first.

However contemptuous any critic of Parliament may be it seems unlikely that Parliament passes legislation intended to be unenforceable therefore the presumption of territoriality should apply to ss.555 and 556.

66 HMRC already operate a de minimis provision of £1,000. If the amount paid to the entertainer is less than this during a tax year than no tax need be deducted although this is subject to aggregation and does not refer to each employer: SI 1987/530 reg 4(3).