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To be employed or self-employed? That is the question Boris Becker should now have asked himself : French Income tax and social security contributions.

In the Becker case, N° 319240 handed down on 24th August, 2012**,** the French *Conseil d'Etat*, 3rd and 8th sub-sections**,** has drawn a fundamental distinction between a contract of service and a contract for services for athletes and sportsmen . This concerns any non-resident who has attempted to elude article 155 of the *Code Général des Impôts* on their French source remuneration. The principle could extend well beyond artists and sportsmen *per se* and will concern any taxpayer using a foreign company as a conduit to receive remuneration from France or abroad, whilst resident there, or, if non-resident, on French source income, where he is unable to evidence independent status as a sole trader.

What effectively happened here is that the general law and its presumptions in another area of law have been brought into play by the French administration.

The Marseilles *cellule* of the French tax administration dedicated to ensuring that athletes more or less resident in France or who perform in France, pay taxes there, argued successfully that Boris "A" [*alias* Becker] had failed to prove that he was not an employee. Of which employer was apparently irrelevant. He was not specifically held to be an employee of the "Rent a Star " Dutch Company to whom the prize money won at Roland Garros and Monte Carlo had been paid by the French Tennis Federation. Incidentally, the prize money was therefore considered to have been received by the Dutch company as an agent and was therefore considered to have been paid to him directly. The inference is that, if it were to come to this, it would have been the French Tennis Federation organising the tournaments which would have been.

The Conseil d'Etat simply affirmed that an employment law presumption, in this case article L. 762-1 du *code du travail*, now article L. 7121-3, could be used to decide that Boris "A" had not shown sufficient evidence to prove that he did not exercise a professional activity in such a manner as to be registered, were registration required, at the Business Register (*Greffe de Commerce*). He was therefore unable to argue that he was an independent.

Article L. 7121-3 reads as follows:

> *Tout contrat par lequel une personne physique ou morale s'assure, moyennant rémunération, le concours d'un artiste du spectacle en vue de sa production, est présumé être un contrat de travail dès lors que cet artiste n'exerce pas l'activité, objet de ce contrat, dans des conditions impliquant son inscription au registre du commerce.*

This meant that the sums paid to the Dutch company remained his salary, and the Dutch company was no more than a payment intermediary. In short, the sums paid were either one or the other, and not a third type of unclassified payment for services.

The effect of this is surprising. It means that unless there is a real substantial employment contract, and that the "employee" is subservient in all respects to his employer, he may be unable to show that he is not registrable as an independent, which is the underlying basis upon which *article 155 A CGI* is generally circumvented and reverse-engineered. What is more, the judgement appears to enable the administration to treat the overseas employer, in

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these circumstances, as no more than a paying agent, or *mandataire*, of the salary. The 'salary' is treated as earned, as a matter of law, irrespective of whom the employer may or may not be.

Where the "employee" was resident in France and exercised an activity there, whether in whole or in part, the social security consequences could be counter-productive, as these are significantly more expensive than any income tax liability. Here the territorial rules are different, and the EU social security regulations for non-residents may need to be called in aid.

A further point, the fact that Boris "A" had received prize money from the French Federation for Tournaments in Monte Carlo appeared to have no territorial relevance. Boris "A's" tax residency, French or otherwise for the years in question, was never introduced into the debate, and the *Conseil d'Etat* therefore appears to have dealt with the case on the basis that he was a French resident by default.

In a sense, the *Conseil d'Etat* was forced to follow the prior *Cour de Cassation* lead in the area of social security, and take its positions or principle of "employee" protection, as read, without attempting to segregate their application. The *Cour de Cassation* had previously handed down bold judgements protecting the Sportsman, and not requiring any contractual relationship formalising subordination between the Organiser and the Sportsman appearing in the event, nor the payment of money directly between the Organiser and the Sportsman concerned. In so doing it has given the French administration not one, but now two methods of taxing such revenues: *article 155A CGI* and now and perhaps more simpler, as deemed employment income. The later is very difficult to resist, and implies that the Organisers of events in France are now treated as employers, whether they pay the artists or sportsmen appearing or not, and the "employees" are now treated as receiving income directly, irrespective of the conduit through which payment may be made.

Anyone relying on *article 155A CGI* as the tax basis defining their French source income, should now review their position. The implications of the Becker decision may be difficult in some situations, but may also provide method of alleviating uncertainty in others, with correctly drafted and substantiated contractual documentation.

The ramifications of this decision are singularly undefined, and perhaps not thought through in this appeal judgement. The *Conseil d'Etat* was evidently unable to surgically dissect the social security and health and safety aspects of the *Cour de Cassation*'s jurisprudence into employment and social security law and distinguish these from fiscal law, as technically fiscal law is not an independent and self standing body of law (*loi autonome*) in its own right.

Hence the danger of using Anglo-American tax planning techniques in France, based as these are mainly on independent fiscal statutory analysis, without due consideration being given to the law as a whole.

British sportsmen resident in Monaco will need to pay attention to the consequences of this final appeal judgement of principle. As will those who "appear" in any capacity in France; on a "Rent a star" basis or otherwise. Perhaps Queen's will benefit in the future from fiscally propelled "absenteeism" from Roland Garros?

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