

**The Taxation of Athlete's Income in Kenya: An analysis of the Duty to pay tax and its link
with optimal tax revenue collection**

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Declaration

I, JOHN NAKHOLI do hereby declare that this research is my original work and that to the best of my knowledge and belief, it has not been previously, in its entirety or in part, been submitted to any other university for a degree or diploma. Other works cited or referred to are accordingly acknowledged.

Signed:

Date:

This dissertation has been submitted for examination with my approval as University Supervisor.

Signed:.....

[Supervisor's Name]

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Dedication

To God for His Grace and to my family for their unending Prayers, Support and Gems of Wisdom

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Abstract

The overarching objective of this paper was to establish whether there existed the issue of double taxation practices against Kenyan athletes with the aim of answering the question, does the abolition of such practices lead to positive results in terms of tax collection? The scope of the paper was Kenyan athletes that ply their trade professionally both locally and abroad. These individuals were chosen because they generate income through their activities; income that is then subject to tax under Kenyan Laws. The paper sought to investigate whether the fact that they would, in many instances, be liable to tax on that income both where it is generated and in Kenya they were effectively being taxed on the same income twice.

The paper met its goals mainly through the utilisation of both primary and secondary data as was available to the researcher with a focus on up to date information, including that from statute, case law and government bodies.

The major conclusions of the paper were that by nature, the income of athletes was a complicated creature because of its varied streams or type and the plurality of its sources. This tended to complicate the definition of what income would be considered taxable. Further, it was found that the athletes had a duty much like all other Kenyans to pay tax on income generated. The athletes however were entitled from protection from the government from situations where they would be unfairly taxed. It was also discovered that government has several tools to ensure this is the case, including the negotiation of double taxation agreements with other states or setting up mandated bodies to assist athlete's on tax matters. Thus while it is true double taxation constitutes an injustice and could mean athletes subjected to it become reluctant to pay tax, as long as they were protected from it they had a duty to pay their tax.

By way of recommendations, this paper would urge all the parties involved to act. On the part of the athletes, there must be sensitisation on the duties and obligation to pay tax and also on the protections they are entitled to. On the part of the government, there must be invigorated effort to ensure Kenyan citizens are protected in terms of their tax rights. This is the only way to create a conducive environment for tax collection that will then mean government generates revenue at an optimal rate.

List of Abbreviations

1. IAAF: International Association of Athletics Federations
2. FA: Football Association
3. OECD: Organisation for Economic Co-operation and Development
4. EU: European Union
5. GAAR: General Anti Avoidance Rule
6. GDP: Gross Domestic Product

List of Cases

1. *People v. Davenport*, 30 llun (N.Y.) 177
2. *Helvering v Gregory*, [1934] 69 F. (2d) 809
3. *Burse v Bursey*, [1999] 47 RFL (4th) 1
4. *Case C364/01 Barbier* [2003] ECR I-15013,
5. *IRC v. Duke of Westminster* [1935] All ER 259 (H.L.)
6. *WT Ramsey LTD V Inland Revenue Commissioners*, [1981] 1 All ER 865, [1982] AC 300, [1981] UKHL 1, [1981] STC 174
7. *Republic v Kenya Revenue Authority Ex parte Bata Shoe Company (Kenya) Limited* [2014] eKLR
8. *Cape Brandy Syndicate v Inland Revenue Commissioners* [1921] 1 KB 64 at 71

Chapter One: Introduction and Background

Kenya is arguably the world's leading producer of athletic talent and has been a top contender to this title since her introduction to the sport in 1922 and her eventual participation in global events in the seventies with great Kenyan athletes such as Kipchoge Keino leading the charge. Today, it is no secret that talent pays. For instance, at the IAAF World Championships, Beijing 2015 to the leading athletes and teams in the 47 events being contested in the games, the total prize money available was set at a total of US\$ 7,194,000¹. Any athlete that achieved a world record was entitled to an additional bonus of US\$ 100,000, currently the world record holder in the Men's 800 meters race is David Rudisha. In the Female category of the same race, Kenya's Eunice Sum holds the record.

When the storm over athletes taxation began, the athletes strongly came out to protest a move that they viewed as double taxation on their earnings², earnings already that they claim they did not enjoy a substantial share over after payments made as tax in the countries they participated in competitions in. not to mention the payments made to their agents, managers and trainers. What does the concept of double taxation entail? The term defines a situation where a country levies tax on an income that has already been taxed in the same or another country. It would be correct then to state that income earned by athletes outside Kenya will be subject to double taxation.

While there exist certain reliefs for double taxation under the Income Tax Act³ these reliefs only apply in situations where there is an existing Double taxation treaty or a special arrangement on tax with that specific state

This paper then seeks to investigate the detriment that double taxation has on the athletes and how exactly the Kenyan position on the taxation of its athletes, especially those that ply their trade in countries that have no double taxation treaties or special arrangements with the Kenyan government.

¹More than Seven Million Dollars on Offer in Beijing
<http://www.iaaf.org/news/press-release/beijing-2015-money> last accessed on 21/2/2016

² Athlete's Association, PAAK, takes root in Kenya, by Justin Lagat
<http://www.runblogrun.com/2014/07/athletes-association-paak-takes-root-in-kenya-by-justin-lagat> last accessed on 13/3/2016

³ Section 41, *Income Tax Act Cap (1973) 470* Laws of Kenya

It is important to study the effect of double taxation that would affect athletes because of the position that sports, particularly athletics holds in the social fabric of the land. Sports has acted as a unifying factor, a source of national pride, a means of livelihood and in many cases a way out of crippling poverty. It is pertinent to investigate the claims of the athletes as regarding the minimal nature of their earnings, an endeavor that will best be achieved by analyzing the income that they obtain. Income can be defined as the return in money from one's business, labor, or capital invested; gains, profit, or private revenue⁴. Certainly legislation on income in Kenya seems to mirror this definition of income in that Section 3(2) of the Income Tax Act states that:

- “(2) Subject to this Act, income upon which tax is chargeable under this Act is income in respect of—
- (a) gains or profits from—
 - (i) any business, for whatever period of time carried on;
 - (ii) any employment or services rendered;
 - (iii) any right granted to any other person for use or occupation of property;
 - (b) dividends or interest;
 - (c) (i) a pension, charge or annuity; and
 - (ii) any withdrawals from, or payments out of, a registered pension fund or a registered provident fund or a registered individual retirement fund; and
 - (iii) any withdrawals from a registered home ownership savings plan;
 - (d) *deleted by Act No. 14 of 1982, s. 17;*
 - (e) an amount deemed to be the income of any person under this Act or by rules made under this Act;
 - (f) gains accruing in the circumstances prescribed in, and computed in accordance with, the Eighth Schedule;
 - (g) the amount or value of the consideration from the sale of property or shares in respect of oil companies, mining companies or mineral prospecting companies.”

From this we can see that income tax will be levied upon a business. Further interpretation of the statute shows that the Kenyan position of what a business is⁵ includes any trade, profession or vocation, and every manufacture, adventure and concern in the nature of trade, but does not include employment and professional athletics (which has long been regarded to be a vocation⁶). While it

⁴ *People v. Davenport*, 30 Illun (N.Y.) 177

⁵ Section 2(1) *Income Tax Act Cap* (1973) 470 Laws of Kenya

⁶ Sports Law; An Overview

is clear that the athletes fall under the scope of individuals who can be taxed based on income, Is it clear what exactly income is? Does the law in Kenya contemplate the various types or aspects of income athletes enjoy, which include prize earnings/winnings, endorsement deals and the commercial exploitation of image rights of these athletes?

To that end, this paper will also investigate the distinctions that exist between the various streams of income available to an athlete once he is competing at any professional stage with a view to discover whether any of the types of income identified bear a different impact on what can be understood as taxable income. The paper will also seek to address an issue that has become pertinent in the taxation of sportsmen; that is the distinction between tax avoidance measures and the criminal offence of tax evasion. Tax avoidance can be understood to be the efforts any one may take so as to arrange his/her affairs to ensure that his taxes shall be as low as possible⁷. There have been efforts to clearly distinguish between the two concepts, for instance in *Bursey*⁸ it was held that:

“Notionally, the words avoid and evade often are employed synonymously in everyday discourse. In the context of taxation, however, frequently these concepts are ascribed different connotations de-marking the line between conduct which is legal and that which is not.

“It is well recognized that it is not considered untoward for one to avoid taxes by arranging one's affairs so as not to incur tax.

“On the other hand, purposely evading of taxes, known to be due and payable, connotes the taking of active steps to elude and shirk one's obligation to pay taxes which have been incurred and are due and owing.”

Tax evasion is a crime and also one of the major reasons for inadequacies in the amount of revenue expected to be collected and the amount actually collected. Kenya loses KSHS 639 Billion shillings annually because of tax evasion⁹ by individuals that are supposed to pay tax. This is an

https://www.law.cornell.edu/wex/sports_law last accessed on 21/2/2016

⁷ *Helvering v Gregory*, [1934] 69 F. (2d) 809

⁸ *Bursey v Bursey*, [1999] 47 RFL (4th) 1

⁹ Kenya Loses over 600 Billion Every Year

<http://www.nation.co.ke/business/Kenya-loses-over-Sh600bn-every-year-in-tax-evasion/-/996/2724818/-/vq77qn/-/index.html> last accessed on 21/2/2016

alarming, ever rising figure, moving up from KSHS 264 Billion every year in 2008¹⁰. Tax avoidance however speaks to efforts taken by persons to arrange their finances in a manner that minimizes the amount of tax they are eligible to pay. This paper will look at which methods athletes have resorted to in their tax avoidance and the ethical implications of such actions. Where the logical flow of events will be:

1. To come up with a clear definition and understanding of what that income is and what it entails.
2. To identify situations when tax can be charged upon that income.
3. What the Kenyan legal position on income tax is, after an analysis of the existing laws and policy.
4. Whether the new Kenyan policy on athlete taxation constitutes punitive double taxation

And finally,

5. Whether there exists a link between punitive taxation practices and reduced collection of revenue (through tax avoidance and evasion).

Statement of the Problem

The problem that arises from the context is the fact that the current policy by the government constitutes double taxation on the income of athletes plying their trade abroad. If unchecked or not addressed, this problem possesses the ability to cripple the efficient collection of revenue from athletes. This is in addition to the punitive nature of double taxation has on the income earner himself.

¹⁰Dr. Attiya Waris, Jack Ranguma and Alvin Mosioma *Taxation and State Building in Kenya: Enhancing Revenue Capacity to Advance Human Welfare* (2009), part of the Tax Justice Country Report Series

Justification of the Study

The study is justified on the basis that there exists a great amount of income generated in Kenya from the exploitation of talent in sports and sports related activities both nationally and in global fora. The appropriate taxation policy undertaken by the government would be the deciding factor in whether the country enjoys fiscal benefit from the efforts of her citizens while ensuring the same citizens are adequately and fairly for the same efforts or completely alienating these same citizens and losing this clearly lucrative source of revenue for the taxman. Especially now that there exists such a glaring deficit in the budgetary needs of the country.

Statement of Objectives

The general objective of this paper is to discuss the possibility of the improvement or increase in the amount of revenue collected from the income generated by athletes in their endeavors abroad.

The specific objective however, is to clarify that the measures undertaken by the Kenya Revenue Authority constitute double taxation and that double taxation poses a threat to the efforts to improve the amount of revenue collected.

Research Question

The research question that this paper seeks to answer is as follows:

“In the past, on the matter of taxation of athletes, state policy has been to avoid double taxation of athletes. Is the current focus on following the letter of the law an endorsement of double taxation and if so, is it the appropriate policy to adopt in the aim to improve revenue collection?”

This question is based on the premise that a distinction between written law and policy can exist and does so in the Kenyan context of taxation on income generated.

Hypothesis

This research proceeds on the following Hypotheses and assumptions:

1. That state policy can exist as an entity separate from the law of the land.
2. That Kenya has a clearly identifiable policy as regards taxation of athletes and that the same policy has undergone a paradigm shift since 2012.
3. That double taxation constitutes an injustice on income earners.

Theoretical Framework

The Ability to Pay Theory¹¹

In its analysis of the situation on taxation in Kenya, this paper intends to rely on various theories of taxation, the main of which will be the ability to pay theory. It provides that the citizens of a country pay tax in accordance with their ability to pay. It appears very reasonable and just that taxes should be levied on the basis of the taxable capacity of an individual. For instance, if the taxable capacity of a person A is greater than the person B, the former should be asked to pay more taxes than the latter¹². With a measurement on the income being the basis in determining one's ability¹³.

Ibn Khaldun's Theory on taxation¹⁴

The provisions of this theory of taxation bear great importance as regards our study today. Ibn Khaldun, the father of economics¹⁵¹⁶ relates the theory of taxation with the government expenditure and argued for low tax rate so that incentive to work is not killed and taxes are paid

¹¹ First presented by Arthur Cecil Pigou (November 18, 1877 – March 7, 1959) an English economist, known for his work in welfare economics and unemployment. He served on a several of royal commissions including the 1919 commission on income tax.

¹² Economic Concepts(Resources Portal)

www.economicconcepts.com last accessed on 21/2/2016

¹³ Majura Ibrahim, *Theories of Taxation* (2013)

¹⁴ Ibn Khaldun (May 27, 1332 – March 19, 1406) also referred to by his full title Abū Zayd ‘Abd ar-Rahmān ibn Muḥammad ibn Khaldūn al-Ḥaḍramī; was a Tunisian historian and Scholar. His seminal work, the *The Muqaddimah*, also known as the *Muqaddimah of Ibn Khaldun* (Arabic: *مقدمة خلدون ابن*) or Ibn Khaldun's *Prolegomena* (Ancient Greek: *ἡ Προλεγόμενα*) is widely viewed as the first major work on several social sciences including economics

¹⁵ M. Oweiss (1988), *"Ibn Khaldun, the Father of Economics"*, *Arab Civilization: Challenges and Responses*, New York University Press, ISBN 0-88706-698-4.

¹⁶ Jean David C. Boulakia (1971), "Ibn Khaldun: A Fourteenth-Century Economist", *the Journal of Political Economy* 79 (5): 1105–1118.

happily¹⁷. He thus takes the position that high tax rates shrink the tax base because they reduce the economic activity. Certainly this is an argument that can find backing among the ranks of athletes, some of whom argued that punitive taxation would bring to a halt the developmental projects many athletes were engaged in in their home country.

Research Methodology

This study intends on making use of a multi-faceted research methodology. However, the primary research methodology used in this study shall be secondary data since majority of the information will not require an individual's perspective and further much of the information can be found in already published works.

a) Secondary data

The study intends to research on and review secondary data in the form of books, journal articles, models for taxation in Kenya and beyond her borders in a comparative aspect. The secondary data pursued will be drawn from the secondary data on Kenya and in other geographical jurisdictions. This study would thus benefit more from qualitative research.

b) Primary Data

This paper has also grasped the importance of conducting primary research in getting the required answers tailored specifically to the research questions expressed in the study. The study thus intends to arrange for meetings with persons with sufficient information and/or authority to answer the research questions in this study.

1. Interviews

¹⁷ Abdul Azim Islahi, Ibn Khaldun's *Theory of Taxation and its Relevance Today*

The study would gain from interviews of people conversant with issues of taxation. Their importance would primarily be to give perspective on information that is not readily available and to clarify various points. Such information could include clarification on tax policy from the relevant Kenya Revenue Authority officials. Ideally it would also encompass current and accurate data on revenue collection by the authority. The research will aim at interviewing people who play a role in the discipline of taxation of athletes in Kenya be it from the Kenya Revenue Authority or an entity legally recognized as having the power to represent and articulate the views of an athlete in the relevant matter.

2. Questionnaires

Should the researcher be unable to get a face-to-face interview with the persons to be interviewed, this study could benefit from structured questionnaires, which may be answered in the researcher's absentia and returned for the purposes of the research. The researcher may also make use of questionnaires during the interviews, as this would give the researcher a chance to assess whether the subject is sincere or well versed with the issues at hand.

Literature Review

There is a multitude of intellectuals that have produced material touching and expounding on the matters introduced in this proposal. While the paper intends to be guided in its research by these leading lights we must contend with the fact that the existing literature does not fully explore all the aspects that this paper intends to analyse.

Starting with Wallace Akondor¹⁸ of Ghana we are introduced to the idea that fairness is one of the canons of taxation and that because of that it is important for any tax system set out by government

¹⁸ Wallace Akondor, *Fair and Efficient Revenue Collection: Overcoming Valuation Challenges*

to strive to strike a balance between the interests of the taxpayer and the tax authorities. The paper, however does not show what the interests of the taxpayer and tax authorities are and how this balance can be achieved. This paper intends to address both matters

Sarbupiya Ray¹⁹ takes the position that taxation of the same income by two parties or more constitutes a prohibitive burden on the tax payer and that it is the duty of domestic law of the countries involved to mitigate this burden by offering reliefs. He expounds on his findings on double taxation by pointing out that in situations where it exists there is risk of an individual making negative income. He suggests that agreements in aid of relieving the burden visited upon a tax payer by double taxation be structured with three possible aims; either to have the income taxed in one country, to exempt the income in both countries or in situations where the income is taxed in both countries, to have the credit for the tax paid in one country given against that same income in the other country. This paper however does not clearly elucidate what a prohibitive burden is and how double taxation produces one. Further the paper does not identify which structure a double taxation agreement must adopt in order to ensure efficient taxation. This paper seeks to answer those questions.

In the same vein of thought, L. Kokken²⁰ and Y. Kitamura²¹ posit that the biggest problem facing international taxation practice is double taxation²². They find that consensus of two states on the issue of double taxation between two or more states should be on two points; that the relief from double taxation is essential for a healthy flow of international development and local business activity and secondly, that the resident country of the tax paying individual would, in an ideal situation, assume the responsibility of alleviating the burden on double taxation on a subject's cross border income. This publication however does not expound on how the resident state will take measures to assume the responsibility of alleviating this burden and it is here that this paper will be effective.

¹⁹ Dept. of Commerce, Shyampur Siddheswari Mahavidyalaya, University of Calcutta, India.

²⁰ Lawrence Lokken is Hugh Culverhouse Eminent Scholar and Professor of Law Emeritus, University of Florida

²¹ Yoshimi Kitamura earned his LL.B. from the University of Hokkaido and his LL.M. from the University of Florida in 2008. He is currently employed by the Finance Ministry of Japan

²² Lawrence Lokken, Yoshimi Kitamura, *Credit vs. Exemption: A Comparative Study of Double Tax Relief in the United States and Japan* (2010), 30 Nw. J. Int'l L. & Bus. 621

Niels Bommen and Luc de Broe²³ look towards the effect of tax practices that punish the tax payer. They introduce the theory of treaty shopping, where by a person resident in a given state but not entitled to the benefits of a tax treaty sets up an entity in another state to obtain treaty benefits similar to those he has been barred from accessing²⁴. These works do not expound on the technicalities of setting up entities to assist in tax avoidance and this is the lacuna that this study wishes to fill.

Area of Study

The paper seeks to focus its study on taxation, specifically on Income tax of individuals under the scope of the Income Tax Act of Kenya²⁵.

The geographical focus shall be on regions where Kenyan athletes ply their trade in international events with special focus on states that have existing arrangements with the Government of Kenya as regards double taxation as set out in the Income Tax Act²⁶.

²³ International Bureau of Tax

²⁴ As described in De Broe, *International Tax Planning and Prevention of Abuse* (2008)

²⁵ *Income Tax Act* Cap 470 Laws of Kenya

²⁶Section 41, *Income Tax Act* Cap 470 Laws of Kenya

Chapter 2: The Definition of Income and How Tax works in Sports

Under this chapter, this paper will aim to define Income, both as is understood in terms of language and the statutory definition of income. In addition to that, the paper will then identify, in the Kenyan Context, where income generated from sporting activities can be taxed.

From a technical standpoint, Income can be defined as money or other forms of payment (received periodically or regularly) from commerce, employment, endowment, investment, royalties and more²⁷. This provides for a very wide range of what sort of earnings can fall under income by definition. It contemplates that over and above wages, income can include earnings from other arrangements such as endorsements or one off cash prizes from events.

From the eyes of the law however, the definition of income becomes problematic. The Income Tax Act of the UK²⁸ is a thorough and extensive piece of legislation that touches on almost all matters income, however it does not define what income is. The situation is replicated in the USA; the term income is not defined in Title 26 of the US Code²⁹, which is the law as relates to income tax. In the American jurisdiction. The Code clearly states what sources of income can exist e.g. compensation for services and earnings from business. There have however been instances where the courts have been called upon to interpret what is meant by the term income. In *Stratton's Independence v. Howbert*³⁰ the Supreme Court was of the opinion that Income could be defined as the gain derived from capital(defined as the basic assets of a business³¹, from labor(defined as productive activity for the sake of economic gain³²), or from both combined. Such a definition certainly retains the flexible nature of what can be income as derived from the technical understanding of the term.

²⁷ Income Definition <http://www.businessdictionary.com/definition/income.html> Last Accessed on 2/11/2016

²⁸ *Income Tax (Earnings and Pensions) Act 2003*

²⁹ 26 U.S. Code § 61

³⁰ *Stratton's Independence v. Howbert*, 231 U.S. 399, 400; 34 S.Ct. 136 (1913)

³¹ Definition sourced from <http://legal-dictionary.thefreedictionary.com/capital> last accessed on 10/1/2017

³² Definition sourced from <http://legal-dictionary.thefreedictionary.com/capital> last accessed on 10/1/2017

Closer to home, the situation in Kenya is pretty similar, while there is no definition of income, there is a clear outline of what gains will be deemed to be treated as income under Section 3(2) of the Income Tax Act³³. These include profits from business carried out or services rendered or even dividends or interest gained from pension funds. One can then logically conclude that from a legal standpoint, the definition of income is left vague or open for interpretation with the laws simply acting as a guide to determine what sort of gains and activities will be construed as income.

Sources of Income

To this end, it must be recognized that a fixed definition of what constitutes income in the context of sports and related activities has proven difficult to obtain. This is because sports, by its nature constitutes of varying streams of income ranging from the actual practice of the sport to ancillary activities that act to generate earnings for the sportsman or woman. Scholar Carol C. Berry³⁴ attempts however to classify income for athletes (understood here as individuals who exert physical strength and skill in their respective discipline) in three main clusters³⁵;

- (1) Income for athletic services performed by the athlete
- (2) Income from signing and incentive bonuses
- (3) Income from endorsement contracts.

She then points out that most athletes, at a certain level of their career will begin to create income from investments such as dividends, annuities, real estate investments, and other business ventures. This certainly seems to be the case in Kenya where for decades athletes seem to have been investing in their home towns be it in real estate or other investments³⁶.

On the three main bands that Berry classifies athletes' income under perhaps it would be best to identify just how each works. Beginning with income for athletic services, we must clarify what

³³ *Income Tax Act* Cap 470 Laws of Kenya

³⁴ Carole C. Berry is the Director of Graduate Programs and Professor of Law at Capital University Law School.

³⁵ Carole C. Berry, *Taxation of U.S. Athletes Playing in Foreign Countries*, 13 Marq. Sports L. Rev. 1 (2002)

³⁶ See for instance the article [Real estate attracts Kenyan Athletes Millions](https://www.standardmedia.co.ke/business/article/2000174859/real-estate-attracts-kenyan-athletes-millions) <https://www.standardmedia.co.ke/business/article/2000174859/real-estate-attracts-kenyan-athletes-millions> last accessed on 10/1/2017

the term entails. Generally, the athletic services can be understood to be the actual engagement in the sport by the athlete. A footballer will play football, a race car driver will drive his car and a golfer will whack his ball into the series of holes on the course. The second band; that is income from signing and incentive bonuses is where things become somewhat more complicated. Professionally such bonuses are the payment made to an individual as an incentive to join an organisation. These bonuses are not limited to signing bonuses, they regularly extend to performance bonuses. As a matter of contracting, these bonuses or incentives have been identified as negotiable terms of a contract. An example would be in professional football where signing bonuses and goal scoring bonuses fall under these incentives that can constitute income³⁷. The immense value such bonuses and incentives add to the players final pay is staggering, recently, it was claimed by the popular whistle blowing site “Football Leaks” that Manchester United had in place such a scheme for its players, offering 5.25million pounds would be distributed to the squad if they won the Champions League, 2.5 million pounds for the Premier League title, 1 million pounds for the FA Cup and 500,000 pounds for the League Cup in the 2009/10 Season. In that year they won United won the League Cup, finished second in the Premier League and were knocked out in the Champions League quarter-finals that season, meaning total bonuses paid out came to 2.25 million pounds³⁸.

The final band speaks towards income from endorsement contracts. Endorsement contracts, as defined by California State law³⁹ (and quoted here verbatim) are "any contract or agreement pursuant to which a person is employed or receives remuneration for any value or utility that the person may have because of publicity, reputation, fame, or following obtained because of athletic ability or performance⁴⁰. Generally, such contracts with athletes create income for the athlete in two main ways; the athlete grants the right to use his or her identify for specific backing of a product or service or the athlete grants the right to develop products associated with that athlete

³⁷ Timothy Davis, *What Is Sports Law?*, 11 Marq. Sports L. Rev. 211 (2001)

³⁸ Manchester United's player bonus scheme released by Football Leaks... including £2.5m for Premier League title win and £5.25m for Champions League
<http://www.dailymail.co.uk/sport/football/article-3435973/Manchester-United-s-player-bonus-scheme-released-Football-Leaks-including-2-5m-Premier-League-title-win-5-25m-Champions-League.html#ixzz4Soy1mZbV> Last Accessed on 14/12/16

³⁹ CAL. Bus. & PROF. CODE § 18895.2(d) (West 1997 & Supp. 1998).

⁴⁰ Daniel Auerbach, *Morals Clauses as Corporate Protection in Athlete Endorsement Contracts*, 3 DePaul J. Sports L. & Contemp. Probs. 1 (2005)

and his or her sport⁴¹. Dynamic sporting brands such as Nike have taken the lead in global multimillion endorsement deals for instance the young footballer Marcus Rashford of England enjoys a 2 Million Pound deal with them⁴². Closer to home, Julius Yego is an example of the various athletes that have benefitted from such deals enjoying partnerships with Orange and Tusker Lager⁴³.

The nature of sports vis-à-vis income

With these streams of income clearly identified, it then becomes possible not only to identify what exactly these sportsmen and women earn but also what part of the earnings will fall under the purvey of taxable income.

Under Kenyan law the ability of the government to charge tax stems from the Supreme Law of the Land i.e. the Constitution of Kenya, Article 209⁴⁴ gives the National Government the power to impose, among others, income tax. This power is manifested in the Income Tax Act Section 3(2) which (quoted below) states that:

- “(2) Subject to this Act, income upon which tax is chargeable under this Act is income in respect of—
- (a) gains or profits from—
 - (i) any business, for whatever period of time carried on;
 - (ii) any employment or services rendered;
 - (iii) any right granted to any other person for use or occupation of property;
 - (b) dividends or interest;
 - (c) (i) a pension, charge or annuity; and

⁴¹ *ibid*

⁴² Marcus Rashford nets bumper £2million Nike contract after breakthrough Manchester United and England heroics - <https://www.thesun.co.uk/sport/football/1418807/marcus-rashford-nets-bumper-2million-nike-contract-after-breakthrough-manchester-united-and-england-heroics/> Last Accessed on 14/12/16

⁴³ Celebrities find fortune in corporate endorsements <http://www.businessdailyafrica.com/Celebrities-find-fortune-in-corporate-endorsements/1248928-1799472-36o834z/index.html> Last Accessed on 14/12/16

⁴⁴ Article 209, *The Constitution of Kenya*, 2010

- (ii) any withdrawals from, or payments out of, a registered pension fund or a registered provident fund or a registered individual retirement fund; and
- (iii) any withdrawals from a registered home ownership savings plan;
- (d) *deleted by [Act No. 14 of 1982](#), s. 17;*
- (e) an amount deemed to be the income of any person under this Act or by rules made under this Act;
- (f) gains accruing in the circumstances prescribed in, and computed in accordance with, the Eighth Schedule;
- (g) the amount or value of the consideration from the sale of property or shares in respect of oil companies, mining companies or mineral prospecting companies.”

Does this provision of the law cover the three bands of income that Berry has envisioned for athletes or is some of what is owed to Caesar being left on the table? To answer this we must analyze the statutory position.

The first band is easily disposed of, under Section 3 2(a) (ii) income tax is levied upon any gains or profits from employment or any services rendered, this would imply that the sportsmen become indebted from a taxation standpoint once they begin to make money from their athletic pursuits. It must be noted that while the ambit of Section 3 is wide enough to cover income generated from all sporting activities, part 6 of the First Schedule of the Act exempts the taxation of income generated by amateurs and amateur sporting organizations. This distinction however is somewhat blurred. While it implies the position that such tax will only be levied upon individuals who generate income from their sporting activities and engagements it does not clarify who will be deemed to be a professional athlete. The Sports Act⁴⁵ comes to our rescue (at least from 2013 when the Act came into being, in comparison to the Income Tax Act that commenced in 1974 one can conclude that such a long period without clarification could have caused confusion) here. Section 2 clearly states that a professional athlete or sports person means a person who is, on the basis of a contract for engagement and remuneration, preparing or training for the purposes of participating

⁴⁵ *Sports Act*, 2013. No 25 Of 2013 Laws of Kenya

in the relevant sports competition. This then implies that under Kenyan law, income tax on sporting activities will only be charged upon individuals whose main source of income is the sporting activity that they engage in, further tax will however be levied from investments that these individuals, and here the definition includes amateur athletes as well, engage themselves in for example Capital gains tax (the tax chargeable on the whole of a gain which accrues to a company or an individual on the transfer of property) on property acquired through sports earnings.

Band two on Incentives and signing bonuses also seems to be covered under Kenyan law. This is because of the fact, as established above, that these incentives and bonuses are resultant of the contract of engagement that these sportsmen enter into with the corporates in question. The bonuses are hinged on the contractual provision of services, something that the Income Tax Act of Kenya has clearly identified as being taxable.

Band number three on income from endorsement contracts seems to need some analysis. While such contracts do generate income for the athlete they are not necessarily contracts of employment. They could however be covered under the second part of that definition i.e. gains or profits made from services rendered. An endorsement is a deal whereby a company will pay an individual for their brand to be associated with that individual. Often if a sporting star is a world renowned individual who is seen by many as a role model and who has value such as integrity shown by his actions on the pitch brands feel that it will be good for their business to be associated with that person⁴⁶. While the agreement is not one of an employer employee it is more of one of a contractor (the corporate, brand or product) and independent contractor (the endorser of the product). The contractor identifies in the independent contractor values that they feel if exploited under agreement could offer great benefits in terms of growth of the products being endorsed. Such agreements come with contractual terms specifying pay, the duration that will be needed for the exploitation of these image rights and most important to the point we are making here, the types of services that the endorser will be expected to offer in furtherance of the agreement. Such services ordinarily include appearance at corporate events, use of the athlete's image rights (upon agreement), taping and photographing of the athlete for modelling and advertisement purposes, recording of taped interviews and featurettes and so on and so forth.

⁴⁶ The sporting endorsements market <http://www.inbrief.co.uk/sports-law/endorsement-contracts-in-sport/> Last Accessed on 16/12/16

Contextual Definitions

Before moving further, there are certain definitions and clarifications that must be made, in order to contextualize the issues that this paper intends to tackle. The first would be the definition of employment. Under Kenyan law, an employee is defined as a person employed for wages or a salary including apprentices and indentured learners⁴⁷. The employee once in an agreement to work for pay would be deemed to be in employment. Such agreements however take two distinct types; a contract of service or a contract for services. A contract of service is also defined under Kenyan law as an agreement, whether oral or in writing, and whether expressed or implied, to employ or to serve as an employee for a period of time⁴⁸. The contract for services however is a completely different animal. Whereas in the contract of services there is established an employee-employer relationship the in contract for services one person agrees to employ another as an independent contractor and the other person works for them on freelance basis at a fee⁴⁹.

Both these contracts have the provision in terms of pay, but a distinction must be created between wages and a salary. The difference is simple, while they both describe pay for work, a salaried person is paid a fixed amount per pay period and a wage earner is paid by the hour⁵⁰. This difference may mean different taxation methods over the two types of pay, for instance, while a salaried employee is relatively easy to deal with under the rates of tax provided for in the Income Tax Act, an employee on hourly pay would need closer scrutiny to identify his or her accurate amount of income.

When looking at the forms of income generated by athletes, we must address the issue of royalties. Royalties are compensation for the use of property which could be copyrighted works or patented inventions. They are usually charged expressed as a percentage of what income is generated from

⁴⁷ Section 2, *Employment Act* Cap. 226 No. 11 of 2007

⁴⁸ Section 2, *Employment Act* Cap. 226 No. 11 of 2007

⁴⁹ K Yati Chua, *Legal Tests to Determine Contract OF/FOR Services*

⁵⁰ Definition sourced from <http://www.accountingtools.com/questions-and-answers/what-is-the-difference-between-salary-and-wages.html> last accessed on 10/1/2017

using the property or as a payment for each unit produced⁵¹. Because they are considered personal property, the income they generate would logically be taxed differently from salaries or wages.

Another key issue to keep in mind is the nature of the sporting activity involved. Take for instance football which is a team sport and athletics which are essentially individual pursuits. There exist differences in how the participants in the different sporting pursuits are charged. Footballers by the nature of their contractual terms tend to fall under the definition of employees and are taxed as such. They are taxed on their base salary and must also declare any additional income. In the case of participants in individual pursuits however their income is likely to be made up of several sources e.g. race wins and bonuses. As such, their final income tax liability will be determined through the completion of tax returns as per the requirements of their jurisdictions⁵².

The final contextual definition would be that of the individuals that are the subjects of this paper that is, the athletes or sports men. The legal definition under the Act of a sports person in Article 2⁵³ is provided as person who is, on the basis of a contract for engagement and remuneration, preparing or training for the purposes of participating in the relevant sports competition. These are individuals who as individuals who exert physical strength and skill in their respective discipline. When this paper refers to athletes or sportsmen, it is to be understood that the definition provided above is what is being referred to. These individuals are subject to the provisions of the Income Act of Kenya and have a duty to pay tax on the income they generate as a result of their athletic pursuits.

Certainly then, it would seem that the situation of income as regards athletes is a complicated one, mainly due to the fluid definitions of income available and the plurality of sources of the income. This paper will attempt to show where the athletes fall on the tapestry of income generation and taxation of the same. In the next chapter we will address the issue of when tax can be charged upon income by looking at the use of tax planning methods and evaluating the legality of the same.

⁵¹ Definition sourced from <http://legal-dictionary.thefreedictionary.com/royalties> last accessed on 10/1/2017

⁵² Sportspeople and UK tax – what you need to know <https://www.taxback.com/blog/sportspeople-uk-tax> last accessed on 10/1/2017

⁵³ *Sports Act*, 2013. No 25 of 2013 Laws of Kenya

Chapter Three: When is Tax due? Issues of Tax planning and Tax Avoidance

In the previous chapter this paper addressed the question of income, specifically what can be deemed income and whether various types of income exist. In this chapter, we seek to address the question of when tax can be charged upon generated income specifically by addressing the existence of tax planning and tax avoidance measures and the legality or otherwise of such measures.

Delving right into the thick of things, we must as always define the various relevant terms. Tax planning can be understood in various respects. For instance, Chaisit Trachoetham⁵⁴ is on record as stating tax planning is the preparation to pay tax completely, correctly and economically. He called tax planning the lessening of paying tax by legal means. The term has been manifested in several ways beyond simple planning. One common reference to the action is the concept of tax avoidance or mitigation where an individual (or a company) seeks, in compliance with the law, to minimize the taxes he or she (or it) pays⁵⁵. Tax planning in this context can take two major forms. The first of these two forms is the basic arrangement of one's affairs in order to minimize the amount of tax owed on income (for example careful analysis of the law in order to identify possible tax deductions and exemptions). The second is to go for more complex tax avoidance schemes which seek to find out where one will have the least tax liability.

When it comes to international taxation, there exist two alternative systems, worldwide taxation and territorial taxation systems. The worldwide system means that the taxpayer will be taxed on his or her worldwide income, regardless of the source of generation⁵⁶. In a territorial system however, tax will only be charged on income that is generated within the borders of the relevant country. In terms of application, the territorial system is the norm with the USA being the exception that applies the worldwide system. Such variances affect the conduct of the taxpayer .For instance

⁵⁴ Deputy Chief Justice, Bangkok Civil Court

⁵⁵ Koen Lenaerts, *TAX MITIGATION VS. TAX EVASION IN THE CASE LAW OF THE EUROPEAN COURT OF JUSTICE*

⁵⁶ John L Stancil, *TERRITORIAL VS. WORLDWIDE TAX SYSTEMS – IMPLICATIONS FOR U. S. TAXPAYERS*

in the European Union because Member States apply different income and corporation tax rates, a natural (or legal) person may decide to exercise an economic activity in a Member State other than his or her (or its) State of residence so as to profit from tax advantages⁵⁷. (The issue of residence is of paramount importance. Residence determines where the individual will be liable to pay tax. The OECD model convention defines a resident as any person who, under the laws of that State, is liable to tax therein by reason of his domicile, residence, place of management or any other criterion of a similar nature⁵⁸. The implication of this is that based on status of residency, the tax payer may be subject to different types or rates of tax). This position is in fact trite law, it was held in *Barbier*⁵⁹ that an EU national could not be deprived of the right to rely on the provisions of the Treaty on the ground that he is profiting from tax advantages which are legally provided by the rules in force in a Member State other than his State of residence.

The more complex set ups have been long accused of blurring the line between what is acceptable and legal in terms of tax planning and mitigation and what amounts to tax evasion. This conversation can now segue into what tax evasion entails. Tax evasion by definition is the intentional and fraudulent underpayment or non-payment of taxes. It is different from tax planning, mitigation and avoidance in that it involves an active action undertaken with the sole aim of not paying the tax due on an amount. Some of these actions could include a failure to record income or falsification of documents essential to identifying the income and subsequent tax owed on it. From this, we can see that the key fundamental difference between legal tax planning and tax evasion is the commission of an action that is prohibited in the relevant tax statute.

Methods of Tax Avoidance/planning

There are several broad principles that inform the practice of tax planning. From these principles individuals then come up with planning structures that best suit their needs. These principles can be enumerated as follows⁶⁰:

1. Short term tax planning

⁵⁷ Koen Lenaerts, TAX MITIGATION VS. TAX EVASION IN THE CASE LAW OF THE EUROPEAN COURT OF JUSTICE

⁵⁸ OECD Model Tax Convention 2014

⁵⁹ Case C364/01 Barbier [2003] ECR I-15013, paragraph 71

⁶⁰ Meaning of Tax Planning <http://incometaxmanagement.com/Pages/Tax-Management-Procedure/5-1-Meaning-of-Tax-Planning.html> last accessed on 12/1/2017

This involves the arrangement of affairs right at the end the income year in order to reduce taxable income in a legal way.

2. Long term tax planning

This on the other hand involves the setting up of one's affairs throughout the income year in order to reduce taxable income.

3. Permissive tax planning

This differs from the other two principles in that it is not based on the application of time but rather on the permissive nature of the law. It involves making plans which are permissible under different provisions of the law. Examples include the exploitation of deductions.

4. Purposive tax planning

This involves coming up with plans that bear the specific purpose to ensure the availability of maximum benefits to the taxpayer. These sort of plans serve as the slippery slope towards aggressive tax planning and subsequent illegal tax.

All identified methods of tax planning fall under the typology listed above. For example, the reliance on tax exemptions i.e. Taxable expenditure, income, or investment on which no tax is levied to serve a specific purpose (such as to encourage a certain activity) for a specified period⁶¹. Can fall under both permissive tax planning and long term tax planning. The same would apply to tax deferrals which are arrangements that allow the taxpayer to delay paying taxes to a future period. Such deferrals can help the tax payer lower the amount of tax owed, for instance in America, taxpayers have been known to prepay income tax in December instead of January to benefit from the available deductions⁶².

⁶¹ Definition sourced from <http://www.businessdictionary.com/definition/tax-exemptions.html> last accessed on 12/1/2017

⁶² Shon & Veliotis "December Effect: Strategic Prepayments of Deductible State Tax Payments," Journal of the American Taxation Association, Fall 2010, Vol. 32, No. 2, 53-71

Tax planning and avoidance in Kenya

On the 7th of June 2016 the *Business Daily* a Kenyan newspaper ran an editorial⁶³ calling for the Kenyan government to either disallow tax avoidance measures altogether or to at least clarify what the law allowed for or did not allow. This editorial stemmed from the president's action to pass into law the Tax Procedures Act of 2015⁶⁴ which came into force in January of 2016. In context, we have seen that tax avoidance measures seemed to be a proper exercise on the part of the taxpayer, essentially, one was allowed to take advantage of the loopholes in the existing statute, within legal bounds of course, to arrange his or her affairs in order to pay the least amount of tax possible.

Certainly, there is a multitude of case law to support this. From the aforementioned *Barbier*⁶⁵ case to the cases of *Inland Revenue Commissioner v The Duke of Westminster*⁶⁶ where it was held that if there are two methods by which a transaction might be effected, and they entail different tax consequences, the taxpayer is free to choose the method leading to lesser liability or that of *W.T. Ramsay Limited v Inland Revenue Commissioner*⁶⁷ where the legality of such measures was upheld as long as they had legitimate economic distinctions. This is what came to be known as the Ramsey Principle, that has informed government policy on a global scale as regards what will be considered permissible and what will not fall under permissible tax avoidance. Several jurisdictions, led by the United Kingdom have enacted GAAR's or Generally Accepted Anti-Avoidance Rules with the aim of coming up with clear rules on the creation and application of such measures.

Kenya, on the other hand, seems to have taken an approach in sharp contrast with the European model. In the *Bata Shoe Company case*⁶⁸, the learned judge held that since payment of tax is an

⁶³ Govt should be clear on law to allow or disallow tax avoidance - <http://www.theeastafrican.co.ke/OpEd/comment/Kenya-law-on-tax-planning-tax-avoidance/434750-3236678-gvp7ox/index.html> last accessed on 28/12/16

⁶⁴ *Tax Procedures Act* NO. 29 OF 2015

⁶⁵ *Case C364/01 Barbier* [2003] ECR I-15013, paragraph 71

⁶⁶ *IRC v. Duke of Westminster* [1935] All ER 259 (H.L.)

⁶⁷ *W T Ramsey LTD V Inland Revenue Commissioners*, [1981] 1 All ER 865, [1982] AC 300, [1981] UKHL 1, [1981] STC 174

⁶⁸ *Republic v Kenya Revenue Authority Ex parte Bata Shoe Company (Kenya) Limited* [2014] eKLR

involuntary obligation imposed by law, a taxpayer is not obliged to pay a single coin more than is due to the taxman and the taxman on the other hand, is entitled to collect up to the last coin that is due from a taxpayer. This would suggest an abandonment of the principle of allowing taxpayers to arrange finances to pay the least amount. In fact the holding suggests that the Kenyan government is actively pursuing every last coin that the taxpayer owes in tax. This confusing position is concretized in the Tax Procedures Act⁶⁹ that has effectively illegalized tax avoidance issues.

The first sign of this position lies in Section Three of the Act⁷⁰ the interpretation of the term tax avoidance found there is a transaction or a scheme designed to avoid liability to pay tax under any tax law. The wording of this text effectively takes a negative position on the intention of tax avoidance measures, the measures have always been understood as actual paying of all tax due albeit minimized where possible, the statute on the other hand calls it outright refusal to pay a tax due to the government. While this distinction may seem insignificant, it was held in the case of *Cape Brandy Syndicate v Inland Revenue Commissioners*⁷¹ that “...one has to look merely at what is clearly said. There is no room for any intendment. There is no equity about a tax. There is no presumption so to a tax. Nothing is to be read in, nothing is to be implied. One can only look fairly at the language used.”⁷² There is to be no room for argument on what the true interpretation of tax avoidance is. The statute would, in an instance where the issue came up, be read to criminalize tax avoidance.

Further down in the statute these fears are confirmed; Section 85 of the Act states “If the Commissioner has applied a tax avoidance provision in assessing a taxpayer, the taxpayer is liable for a tax avoidance penalty equal to double the amount of the tax that would have been avoided but for the application of the tax avoidance provision” effectively providing for punishment of individuals that arrange tax avoidance schemes. In Section 92 (C) the Acts states that tax agent shall have committed an offence when he assists a taxpayer to create a tax avoidance scheme, or abets or aides a taxpayer to evade tax.

⁶⁹ Tax Procedures Act NO. 29 OF 2015

⁷⁰ Tax Procedures Act NO. 29 OF 2015

⁷¹ *Cape Brandy Syndicate v Inland Revenue Commissioners* [1921] 1 KB 64 at 71

⁷² Per Rowlatt J in *Cape Brandy Syndicate v Inland Revenue Commissioners* [1921] 1 KB 64 at 71

The general legal position in Kenya then, at least as per the coming into law of the Tax Procedures Act the efforts of sportsmen to arrange their affairs in a manner that minimizes what they eventually pay as tax are contrary to the law.

However, do sportsmen really have the need to arrange their affairs? Some would argue yes, even more than ordinary individuals. As we have seen in this chapter, the nature of income generated by sportsmen has various complications. The first is the rate and longevity of income generated. When discussing the bands of income in the previous chapter we saw that the footballer Wayne Rooney was signing high value contracts, what was not touched on however was the fact that as a professional footballer he would be at the peak of his athletic capability for a period of about 15 years or less should his career be cut short by injury. He also plies his trade across borders in international matches and from international endorsement agreements a fact that brings us to the third complication that his income stems not from one source but from a collection of sources. Because of these factors sportsmen have a great need for proper financial management and planning to ensure they reap maximum benefit from their skills not just when they are still of income generating age but even past their career. Part of this financial management has been the ability to arrange their tax affairs. This however has been problematic for the athletes; many of whom find themselves accused of tax evasion because of their efforts. Soccer great Lionel Messi, five-time World Player of the Year and one of the richest athletes in the world, was convicted of tax fraud involving income from his image rights and endorsements⁷³. His defence was that he focused on playing football and was unaware of what his financial advisors were doing in the name of saving his money.

In conclusion then, this chapter has revealed that in evaluating when tax can be charged on sportsmen's income the tax payers can engage in the practice of tax planning to minimize the tax liability they would be subject to. Though there exist circumstances around the income generated by sportsmen that call for prudence in expenditure and there are established global principles that guide tax planning the Tax Procedures Act of Kenya cites the engagement in tax avoidance schemes and the advice of tax agents to do the same as an offence.

⁷³ Lionel Messi handed jail term in Spain for tax fraud <http://www.bbc.com/news/world-europe-36721892> Last Accessed on 12/1/2017

Chapter Four: The Duty to Pay Tax and the Bodies Tasked to Collect that Tax

In this chapter, this paper will attempt to analyze the duty that our subjects here i.e. sportsmen have to pay tax and the various structures that the Kenyan government has put in place to identify, collect and utilize tax revenue and whether or not these bodies can act in an advisory capacity towards the athletes on matters of taxation.

It has long been argued that the payment of tax exists both as a legal requirement and as a moral obligation. Kenyan Scholar J M Mutua⁷⁴, in his application of Marina's⁷⁵ definition of tax he states (quoted verbatim) that tax is not only the only known practical manner for collecting resources in order to finance public expenditure for goods and services consumed by any citizenry⁷⁶ but also that it is "any contribution imposed by government whether under the name of toll, tribute, impost, duty, custom, excise, subsidy, aid, supply, and as such is not a voluntary payment or donation, but an enforced contribution, exacted pursuant to legislative, authority"⁷⁷. Let us investigate the implications of the understanding of tax outlined above. Can tax act as a matter of social contract, where the citizenry recognize the value of paying tax i.e. to enable the government that they have put in place to provide service? A study⁷⁸ carried out in Nigeria showed that about 42% of the sample size interviewees viewed the payment of tax as a social obligation that they would undertake even where they were in disagreement with the government of the day. The other percentile would only willingly and openly pay tax where the proceeds in terms of state service delivery were tangible and beneficial.

The Organisation for Economic Co-operation and Development (OECD) Committee of Fiscal Affairs recognized both the rights and duties taxpayers in any system would enjoy in the 1990's

⁷⁴ John M. Mutua, Department of Business Administration, Chuka University

⁷⁵ Marina K. and Kilis Danijela.. *The Citizen's Guide to Taxation*. Zagreb: Institute of Public Finance. 2002

⁷⁶ European Journal of Business and Social Sciences, Vol. 5, No. 02, May 2016. P.P. 134 – 151 ;*EFFECT OF TAX COLLECTION ON SERVICE DELIVERY OF COUNTY GOVERNMENT IN KENYA: A CASE STUDY OF MACHAKOS COUNTY GOVERNMENT*

⁷⁷ European Journal of Business and Social Sciences, Vol. 5, No. 02, May 2016. P.P. 134 – 151 ;*EFFECT OF TAX COLLECTION ON SERVICE DELIVERY OF COUNTY GOVERNMENT IN KENYA: A CASE STUDY OF MACHAKOS COUNTY GOVERNMENT*

⁷⁸ Center for Studies on African Economics Working Paper WPS/2013/02 *The Origins of Social Contracts: Attitudes toward Taxation in Urban Nigeria**

in a document entitled “Taxpayers’ rights and obligations – A survey of the legal situation in OECD countries”. In the text, several rights were identified;

- The right to be informed, assisted and heard
- The right of appeal
- The right to pay no more than the correct amount of tax
- The right to certainty
- The right to privacy
- The right to confidentiality and secrecy

On the other hand, the basic obligations that taxpayers would be bound to included;

- The obligation to be honest
- The obligation to be co-operative
- The obligation to provide accurate information and documents on time
- The obligation to keep records
- The obligation to pay taxes on time

Without this balance, the tax system in place would be at risk of failure, perhaps this would be why these obligations and rights are manifested in the written law on the matter. Article 209 of the Constitution of Kenya 2010 grants powers to impose taxes to both the national and the county governments. Parliament also has legislation in place to effectuate this power, laws such as the Income Tax Act and the Tax Procedures Act (2015). The reach and powers of these laws has been investigated extensively in the preceding chapters. What needs to be touched on is the value of this tax to the state as part of the answer as to why these athletes have a duty to pay tax.

According to the World Bank, Kenya’s GDP for the year 2013 was pegged at 40.7 billion Dollars, with economic growth of 4.6% in the year 2012. This was compared to 4.4% in the year 2011. This rate of growth was estimated to be 5.7% in 2013 and 6.0% in 2014 with income tax revenue averaging ten percent of GDP⁷⁹. Kenyan Scholars S. Lio and J Mirichii in their work “Towards Enhanced Tax Compliance in Kenya” identified the issue of dwindling tax compliance and what effect this failure was having on the economy. They were of the opinion that Kenyan tax compliance was at its lowest since independence and supported this claim with the following facts and figures; In the financial year 2000/01, revenue collected from taxes amounted to Kenya Shillings two hundred billion, rising to only Kenya Shilling eight hundred billion in the financial

⁷⁹ World bank, Kenya economy update June 2013 as sourced from San Lio & John M.Mirichii *Towards Enhanced Tax Compliance in Kenya*
-conference paper Department of finance & Accounting, Chandaria School of Business, United States International University, Nairobi, Kenya

year 2011/2013, a period of over ten years⁸⁰. Kenya's GDP had been growing steadily at almost the same rate, rising from sixteen billion USA dollars in the financial year 2003/4 to thirty seven billion dollars in the financial year 2012/13⁸¹. The two rates of growth ideally should have been congruent. The growth in the GDP is expected to mirror the growth in the tax base for the power of the state to fund its activities. Lio and Mirichii however identified glaring deficiencies in the amount of revenue collected that meant government could not fund its activities in terms of development as is outlined in the table below⁸²

	Year			
	2009/10	2010/11	2011/12	2012/13
Revenue	574.10	673.27	781.63	971.33
Expenditure	574.30	733.35	833.02	1,123.42
Deficit	0.20	60.08	51.39	152.09

Figures in (Kshs Billion)

One may ask what value the investigation of these figures is. This deficit, that has evidently been growing since the financial year of 2009 has increased the debt burden that the everyday Kenyan is subjected to. This in turn has the government scrambling to raise money in order to plug the gap

⁸⁰ Statistical Annex to the Budget Speech for FY 2007/08 & 2011/12

⁸¹ Kenya GDP - <http://www.tradingeconomics.com/kenya/gdp> last accessed on 7/1/2017

⁸² Source: Kenya bureau of statistics, facts & figures 2013

and can be viewed as the direct precursor towards the action of actively seeking out athletes and compelling them to pay tax even when they may be exposed to the injustice of double taxation. These figures show that Kenya is operating below potential in terms of tax collection and the need to restore itself to optimal performance has fostered the discussion points in this article.

Relevant Bodies in the Collection and Utilization of Tax Revenue

In this part, this paper will investigate the relevant bodies in terms of collection and utilization of tax revenue. We will identify the duties that these bodies are bound to and, where possible, assess their performance in this regard.

The chief or main body set up to administer matters of tax is the Kenya Revenue Authority. It was established by an Act of Parliament⁸³, which came into law on 1st July 1995. The Authority is charged with the responsibility of collecting revenue on behalf of the Government of Kenya. Specifically, under Section 5 of the Act its Functions are listed as:

(1) The functions of the Authority are-

(a) To administer and enforce the written laws or the specified provisions of the written laws set out in the First Schedule and for that purpose assess, Collect and account for all revenues in accordance with those laws;

(b) To advise on matters relating to the administration of and the collection of revenue under the written laws or the specified provisions of the written laws set out in the First Schedule:

And

(c) To perform such other functions in relation to revenue as the Minister may direct.

Effectively then, the Kenya Revenue Authority acts as the enforcement arm of government when it comes to upholding the letter of the law as regards tax. For example, where the Income Tax Act

⁸³ Kenya Revenue Authority Act 1995

declares that tax will be levied on earnings then the Authority is entitled to collect that tax. More importantly however, by the provisions of Section 5(1) (b) of the Act the Authority acts as the main policy making body in terms of tax collection and administration under the written laws. It can be concluded that this power can be extended to mean that subsequent legislation can arise from the policy recommendations of the Kenya Revenue Authority. Policy here is to be understood as the aims of the government in terms of tax administration for example policy matters would include streamlining the process of filing tax returns, law on the other hand is the legal basis for government actions. The two concepts inform and influence each other, for example Government reintroduced Capital Gains Tax in 2015⁸⁴ (by law) to support the current government policy of maximum benefit from projected tax revenue. With this sort of power the poignant quote found on the tablets of the ancient civilization of Lagash⁸⁵ comes to mind; "You can have a Lord, you can have a King, but the man to fear is the tax collector." There is nothing to fear however, in a tax system where the taxed are aware of their rights and obligations and the tax collector collects tax revenue in a fair and clear manner and utilizes it to optimally benefit the citizenry.

The directive that was issued then in 2014 by the Kenya Revenue Authority⁸⁶ requiring athletes to pay tax at the usual rate of 30% on any income was well within the rights and powers of the authority. However, we must investigate the performance of the Authority in the context of taxation of athletes. In terms of policy dissemination, the Authority has clearly taken the position that all Kenyans are subject to the legal tax rate of 30% on income generated. Has the authority fought however to protect these athletes from over exploitation in foreign jurisdictions or from the risk of domestic double taxation? One parameter that can be used here is the implementation of double taxation agreements entered into with other states. Double taxation occurs when the same transaction or income source is subject to two or more taxing authorities. A double taxation agreement on the other hand is a reciprocal arrangement between two countries not to re-tax the repatriated income that a firm or person domiciled in one country earned in (and paid taxes on) the

⁸⁴ Capital gains tax reintroduction causes a storm <http://www.businessdailyafrica.com/Capital-gains-tax-reintroduction-causes-a-storm/539552-3020104-90its1z/index.html> last accessed on 13/1/2017

⁸⁵ Lagash is the name of a Sumerian city-state located by the Tigris River, in southeast Mesopotamia. The first cities were developed in the Mesopotamian plain, specifically in the south at about 3500 – 2800 BC

⁸⁶ KRA orders sports stars to pay tax <http://www.capitalfm.co.ke/sports/2014/01/21/kra-orders-sports-stars-to-pay-tax/> last accessed on 13/1/2017

other⁸⁷. According to information obtained from the Kenya Revenue Authority website⁸⁸As of 2005 at the onset of the tax compliance issues facing Kenya today, Kenya had in place in place such agreements with Zambia, Norway, Denmark, Sweden, The United Kingdom, Germany, India and Canada⁸⁹ all of which were negotiated between 1970 and 1989 according to the Legal notices that enforced them. At the time the country was also in negotiation with Tanzania and Uganda, France and Thailand and had plans to enter negotiations with Seychelles, Nigeria, South Africa, Mauritius⁹⁰, Finland, Russia, the United Arab Emirates and the Islamic Republic of Iran.

This would imply that the Kenyan government has actively sought out such agreements. Some of which directly impact on the earnings and incomes of the athletes for instance under DT11218 – DT Kenya: Double Taxation Agreement, with the United Kingdom⁹¹, Article 19 states that;

“Artistes and Athletes: Notwithstanding the provisions of Articles 16 and 17, income derived by public entertainers, such as theatre, motion picture, radio or television artistes, and musicians, and by athletes, from their personal activities as such may be taxed in the Contracting State (Britain) in which those activities are exercised.

“Provided that this Article shall not apply to public entertainers and athletes whose visit to a Contracting State is supported wholly or substantially from the public funds of the other Contracting State.”

This then would mean that Kenyan athletes plying their trade in the United Kingdom for example those that participate in the London Marathon would only be subject to tax in the United Kingdom at the rate of 50 % from appearance fees and prize money as their law demands⁹². While this covers such athletes, the lack of similar agreements in jurisdictions where the athletes participate in on a

⁸⁷ Double Taxation Agreement Definition <http://www.businessdictionary.com/definition/double-taxation-treaty.html> last accessed on 7/1/2017

⁸⁸ Double Taxation Agreements <http://www.revenue.go.ke/ito/ltodta.html> last accessed on 13/1/2017

⁸⁹ List of Double taxation agreements provided by the Kenya Revenue Authority

⁹⁰ The agreement with Mauritius was eventually signed and subsequently published as Legal Notice 59 in the Kenya Gazette of May 23, 2014.

⁹¹ DT11218 – DT Kenya: Double Taxation Agreement

⁹² How the rules on tax work for sporting events in the UK

<http://www.telegraph.co.uk/sport/othersports/athletics/9854259/How-the-rules-on-tax-work-for-sporting-events-in-the-UK.html> last accessed n 13/1/2017

regular basis e.g. the United States (Boston Marathon) and the People's Republic of China (Beijing Marathon) has them exposed to double taxation. The World Marathon Majors, an attractive series to long distance marathoners has annual races in Tokyo, London, Berlin, Boston, Chicago and New York⁹³, of all these events only the London marathon is covered by a double taxation agreement.

This failure to enter such engagements with these states seems even more glaring with the knowledge that the Beijing Marathon has been run annually since 1981 with the first recorded Kenyan victory in 1996 by Nelson Ndereva (another star athlete that emigrated from Kenya to Canada in 2007, he and his Wife Lucy Njeri continued their running careers recording victories in both the male and female categories in the 2013 Mississauga Marathon and the 2013 BMO Vancouver Marathon). It would be extremely beneficial towards the athletes and subsequently to the states to ensure that more agreements, carefully drafted to benefit all stakeholders, are negotiated and signed.

When it comes to the direct effect such a body is to have on the athletics and sporting community in Kenya, we must look at the provisions of the Sports Act⁹⁴. The Act is intended to harness sports for development, encourage and promote drug-free sports and recreation; to provide for the establishment of sports institutions, facilities, administration and management of sports in the country, and for connected purposes⁹⁵. In this wide range of aims, the Act created several bodies that would have the mandate of developing sports in Kenya under these aims. Section 3 of the Act provided for the formation of Sports Kenya, a body with extensive functions listed under Section 4. The function that is relevant in this context however is to be found in Section 4(r) that states:

“The functions of Sports Kenya shall be to—

r) Recommend, in liaison with the relevant sports organizations, tax exemptions for sportspersons”

⁹³ Information obtained from the World Marathon Majors website <https://www.worldmarathonmajors.com/> last accessed 13/1/2017

⁹⁴ *SPORTS ACT* NO. 25 of 2013

⁹⁵ Preamble *SPORTS ACT* NO. 25 of 2013

Unfortunately, since the coming into law of the Act in 2013, there seems to be no record of Sports Kenya utilizing this power to work with government and other stakeholders in the negotiation of such exemptions. This is particularly of concern when one notes the extremely important position and power Sports Kenya can wield with the fact that it is representative of all stakeholders in the industry; from the policy makers to the athletes themselves.

It is evident then, that the subject individuals of this paper are duty bound to pay tax much like every other Kenyan under the provisions of Article 209 of the Constitution and the Income Tax Act. However, it has also become emergent that it is well within the power of the bodies mandated to collect and advise on tax to come up with tax payment schemes that not only offer incentives to the subject individuals but also pay what they rightfully owe. It remains to be seen therefore, whether these bodies will continue to exercise these powers and what that will mean for the subject individuals in future.

Chapter Five: Assessing the Link between State Policy and Law

In this chapter, this paper will investigate whether there exists an interlinkage between state policy and law. This is intended to be achieved following a historical analysis of the Income Tax Act of Kenya from its inception to date. Current government action involves actively ascertaining the income of athletes in order to tax it. This discussion will try to determine whether that action falls under the raft of reforms suggested to boost tax revenue collection. Finally, this chapter will attempt to identify the factors that cause or foster instances of tax evasion and/or avoidance and whether the fear of double taxation is one of these factors.

The History of the Income Tax Act of Kenya

Income tax is incidentally not the first form of taxation that Kenyans were subjected to. As a country that had a tax system imposed on it by the various powers that occupied Kenyan territory there was the introduction of a myriad of taxes. The first generally recognizable taxes operating in the region however, were those introduced by Arab traders at the coast for example the Capitation Tax that imposed by the Sultan of Oman in 1722 for every slave exported by the French from his African dominions⁹⁶. Eventually in 1921 the concept of taxing income was introduced in Kenya⁹⁷. There was general outcry⁹⁸ against the new tax; whereas the British had long been taxed based on their expenditure they would now be subjected to tax based on income they generated. It may seem

⁹⁶ Cheesman, *supra* note 2, page 16. As referenced in Attiya Waris, *Taxation without Principles: A Historical Analysis of the Kenyan Taxation System*

⁹⁷ Attiya Waris, *Taxation without Principles: A Historical Analysis of the Kenyan Taxation System*

⁹⁸ The grievances of the British taxpayers against the tax were collected officially in the report prepared by the Bowring Committee cited as *The First Interim Report of Economic and Financial Committee, Chairman C.C. Bowring Oct 21, 1922*

like second nature to us but at the time it represented a paradigm shift in how taxation was being carried out. In 1952 all the ordinances that related to income tax in the country namely The Income Tax Ordinance 1940, The War Taxation (Income Tax) Ordinance 1940 and the War Taxation (Income Tax) (amendment) Ordinance 1941 were combined into The East African Income Tax (Management) Act 1952. The Act set a basic rate plan for these taxes at 20 shillings for anyone earning less than 60 Pounds, for earnings between 60- 120 pounds a charge of 40 shillings and for earnings over 120 Pounds a charge of 60 Shillings⁹⁹.

From this point on, the tax was levied without any major changes until the post-independence (1963) period. But the future of post-independence Kenya was to be charted out in Sessional Paper No. 10¹⁰⁰, the main aim of this paper was that the Kenyan government, now free of the shackles of colonialization was now going to prioritize the guarantee every citizen full and equal political rights. It was stated specifically that the economic approach of the government would be dominated with ensuring ‘Africanisation’ of the economy and public service. The post-independence government in line with this view adopted a policy¹⁰¹ of cautionary spending¹⁰² where costs were kept purposely low in an effort to ensure the new government would be able to raise enough money to run the new country. 1971 saw the shift of this policy from cautionary spending to expansionism. Expansionism is defined as an increase in the level of economic activity, and of the goods and services available measured by a rise in the Gross Domestic Product of the Country¹⁰³. Some of the measures the government implemented, especially to increase tax competition in the region with the collapse of the East African Community included the decrease of the rate charged on Personal Income Tax from 36% to 29%¹⁰⁴. Since then, with the collection of these and more recommendations into the policy document Sessional paper no 1 of 1986 the

⁹⁹ Attiya Waris, *Taxation without Principles: A Historical Analysis of the Kenyan Taxation System*

¹⁰⁰ *Sessional Paper No. 10 of 1965 on African Socialism and its Application to Planning in Kenya*

¹⁰¹ This was manifested in a 6 year economic plan developed by the Kenyan Government in conjunction with Professor Ben Lewis of Oberlin College and the East African Common Services Organization (EACSO). Information sourced from the Archives of Courtney Nelson’s Development Strategies

¹⁰² Described as “purse-string mentality of treasury officials” in Administration and Economic Planning in Eastern Africa: A Ford Foundation Program Evaluation (1977) sourced from Archives of Courtney Nelson’s Development Strategies

¹⁰³ O’Sullivan, Arthur; Steven M. Sheffrin *Economics: Principles in action*. (2003). Upper Saddle River, New Jersey 07458: Pearson Prentice Hall. p. 310. ISBN 0-13-063085-3.

¹⁰⁴ Vic Muisyo Kenya’s Tax History III – Independent Kenya <https://abacus.co.ke/kenyas-tax-history-iii-independent-kenya/> last accessed on 8/1/2017

government has regularly reviewed the economic position of the country and adjusted its attitude to tax accordingly. Examples of such adjustments would be the suspension of Capital gains tax in 1985 and its re introduction in 2015.

Historically then we can see that government is informed by policy considerations¹⁰⁵ when legislating on tax or handling matters of tax administration. There have been two major policy considerations when it comes to matters of taxation however these considerations are more generally economic goals or positions for example cautionary spending or expansionism to ensure that the Gross Domestic Product of the country grows and keeps doing so. The total tax revenue collected as a percentage of Gross Domestic Product stands currently at 18.4 %¹⁰⁶. This paper is forced to conclude that a streamlining of revenue collected or better yet an increase in the amount of revenue collected would directly act to raise the country's Gross Domestic Product which would then be in line with the economic expansionist aims of the country.

In this context then, policy can exist independently from the law. In fact as we have seen with the application of the Income Tax Act, policy tends to inform the law. This differs from the original perception of this paper as regards policy. In chapter one it was stated that state policy on the charging of income tax did not involve the active pursuit of income tax generated by athletes. However from the subsequent analysis of the law as it stands in terms of universal application on one hand and the identification of policy considerations by the Kenyan government on the other, one would conclude that the actions of the government following the directive¹⁰⁷ on income tax generated by athletes was more of a statement of priority rather than a policy shift.

It would seem that in its efforts to ensure tax collection the Kenya Revenue Authority acting under the powers accorded to it in Section 5 of The Kenya Revenue Authority Act¹⁰⁸ to “advice on matters relating to the administration of and the collection of revenue”. This would mean that the

¹⁰⁵ Policy here is to be understood as the basic principles or action plans that influence government decisions like legislation. For example if government policy would be to eliminate alcohol consumption in the country, government would push for strict laws on alcohol intake

¹⁰⁶ Heritage Foundation (2015). "2015 Macro-economic Data". and *Index of Economic Freedom*, Heritage Foundation

¹⁰⁷ KRA sparks row with fresh tax demand on top athletes <http://www.businessdailyafrica.com/KRA-sparks-row-with-fresh-tax-demand-on-top-athletes--/539546-1536716-view-printVersion-st6e6x/index.html> Last accessed on 8/1/2017

¹⁰⁸ *Kenya Revenue Authority Act*, 1995

authority has by its function recognized an issue in the collection of income tax generated by athletes and chosen to prioritize the issue. In fact, similar prioritization has been seen in the renewed focus of the Kenya Revenue Authority's efforts to come up with an effective tax programme to cover the Kenyan informal sector where an Authority representative is on record stating that the Authority loses more than 200 billion shillings annually from uncollected taxes¹⁰⁹. Evidence that these instances of prioritization are in line with the functions of the Authority is that the findings above stem from a study and report carried out by the Authority on the informal sector entitled *Informal Sector and Taxation in Kenya: Issues and Policy Options*¹¹⁰. Thus, there is no malice to be read in the actions of the Authority with regard to focus on collecting the taxes that are right fully owed under the law.

Factors that Foster Tax Evasion

In this part we will investigate the factors that enable or foster the practice of tax evasion and aggressive tax planning/avoidance. The purpose of this is to try and establish whether the tax collection priorities can influence tax payers into refusing to remit taxes. We seek to answer the question, why do some people feel compelled to evade tax? Is it because they feel they are unfairly or punitively taxed or could there be more behind their decision to do so?

To start with, both practices in the end harm the country. This is because they make the tax collection system inefficient but most importantly they have the effect of eroding the available tax base which in turn widens the national budget deficit¹¹¹.

¹⁰⁹ Tax authority loses Sh200 billion to informal sector <http://www.businessdailyafrica.com/Tax-authority-loses-Sh200-billion-to-informal-sector-/539552-1401976-15785pxz/index.html> last accessed on 8/1/2017

¹¹⁰ A Publication of the Institute of Economic Affairs Budget Information Programme Issue No. 29 September 2012

¹¹¹ Hove K and Hove R, *AN INVESTIGATION INTO THE CAUSES OF TAX AVOIDANCE AND TAX EVASION IN ZIMBABWE: A SURVEY OF BUSINESS OPERATORS IN BULAWAYO* - International Journal of Economics, Commerce and Management United Kingdom Vol. IV, Issue 5, May 2016

Generally there are two factors that influence tax evasion and tax avoidance¹¹². First is the low level of voluntary compliance amongst the taxpayers and the second is the weak enforcement of tax laws.

a) Low level of voluntary compliance

Tax collection is more successful when based on voluntary compliance¹¹³. This is in turn directly tied to tax morale or the “willingness to pay” of the tax payers. Low tax morale directly affects the level of voluntary compliance.

Tax morale on the other hand is affected by a myriad of factors for instance in situations where the tax payers experience low quality of service delivery in return for taxes that they are subjected to, they may be unwilling to continue paying tax¹¹⁴. Such low morale has also been witnessed in situations where there is a perception of unfairness¹¹⁵ in the application of tax rates for example situations where tax rates favor the rich at the expense of the poor.

Another example of something that would lower the tax morale of tax payers is evidence of transparency issues and corruption in the public bodies mandated with the collection or administration of tax revenue¹¹⁶.

b) Weak enforcement of tax laws

This on the other hand is witnessed where the tax regulating authority is unable to enforce the law be it due to a lack of capacity or procedural difficulties that hinder the tax collection

¹¹² *Addressing tax evasion and tax avoidance in developing countries*, a report commissioned by Deutsche Gesellschaft für Internationale Zusammenarbeit (GIZ) GmbH on behalf of Federal Ministry for Economic Cooperation and Development (BMZ)

¹¹³ CSAE Working Paper WPS/2013 02- *The Origins of Social Contracts: Attitudes toward Taxation in Urban Nigeria*

¹¹⁴ Pashev, K. (2005). *Tax Compliance of Small Business in Transition Economies: Lessons from Bulgaria*. Working paper 05-10. Andrew Young School of Policy Studies. Atlanta Georgia.

¹¹⁵ Allingham, Michael G. and Agnar Sandmo (1972), *Income tax evasion: A theoretical analysis*, *Journal of Public Economics* 1, pp. 323-338.

¹¹⁶ Kirchler, Erich, Stephan Muehlbacher, Barbara Kastlunger and Ingrid Wahl (2007), *Why Pay Taxes? A Review of Tax Compliance Decisions*, International Studies Program, Working Paper 07/30, Andrew Young School of Policy Studies Georgia State University.

process. These difficulties stem from various sources; some could be because of poorly drafted tax laws that fail to take into account the context of the area within which they ought to apply or even in situations where tax laws change frequently and cause confusion amongst both the tax payer and the tax collectors¹¹⁷.

With these reasons in place, this paper would argue then that the fear of double taxation is certainly one of the factors that would foster a climate of tax evasion and aggressive tax planning that amounts to tax avoidance. The risk of being taxed twice on the same stream of income would certainly lower voluntary compliance with the tax law by the athletes because it directly lowers their tax morale. This is especially pertinent in the Kenyan situation where athletes have long felt that the government is lax in its efforts to support and develop sport in the country¹¹⁸. Further, rules on when and where double taxation agreements protect the athletes should be clarified and communicated to the athletes to boost their morale in paying tax and in enabling the enforcement of the laws.

To conclude then, we can see that there exists a marriage of sorts between state policy on economic development and tax collection and this marriage has caused the state to look at the collection of income tax from all Kenyans including athletes. We have also witnessed that the existing confusion surrounding the issue has laid the ground work for the issues of tax evasion and tax avoidance that lower the tax base and compel the government to search aggressively for what it is owed in terms of tax revenue.

¹¹⁷ Mo, Phyllis Lai Lan (2003), *Tax avoidance and anti-avoidance measures in major developing economies*, Westport.

¹¹⁸ See the Article quoted below where R. Odinga, the Former Prime Minister of Kenya was quoted as saying “Until the Government demonstrates its investment in the emergence and growth of these athletes, football stars and other sports personalities, we oppose taxation of their earnings”

Read more at: <https://www.standardmedia.co.ke/article/2000103211/athletics-cord-leader-raila-odinga-backs-athletes-on-tax-issue> last accessed on 8/1/2017

Conclusion

At the onset of this paper we set out to find out whether double taxation was an existing issue and if so whether Kenyan athletes were affected by it. It was also the intention to look at the various streams of income that were traditionally available to athletes and whether their nature had an effect on the taxable income. Of note was also a study of the nature of tax avoidance on one hand and criminal tax evasion on the other hand.

Over the course of this paper it has become evident that the situation of income in the context of sports was in fact a tricky one due to the multiple streams available and the plurality of sources from which it can be derived. Because of this the definition of income when it comes to sports is extremely dynamic.

Further, in evaluating when tax could be charged on athlete's income the athletes could engage in the practice of tax planning especially because of the relatively short careers they have which in turn impacts their ability to earn. In the Kenyan sphere however the engagement in tax avoidance schemes was found to be an offence under the law.

In terms of liability to pay tax under Kenyan law, athletes were found to be subject to the universal application of the law. More than this, they were entitled to protection from punitive taxation from the government. This protection was supposed to stem from government action in negotiating double taxation agreements with other states and from government mandated bodies such as Sports Kenya who are tasked with advising government on taxation matters involving athletes. While the double taxation agreements seemed to be on a reasonable track of progress in negotiating the agreements Sports Kenya was seen to be lagging behind on its duties, this may constitute the biggest challenge to fair taxation for athletes. The fact that the body mandated to assist them directly is lax in its efforts.

Interestingly, on the issue of policy or government development goals it was noted that there was interlinkage between the policy of economic development and tax collection which had pushed the state to look closely at the collection of income tax from athletes.

Bibliography

A) Books

1. Majura Ibrahim, *Theories of Taxation* (2013)
2. M. Oweiss, *Ibn Khaldun, the Father of Economics*, Arab Civilization: Challenges and Responses, (1988), New York University Press, ISBN 0-88706-698-4.
3. Abdul Azim Islahi, *Ibn Khaldun's Theory of Taxation and its Relevance Today*
4. Wallace Akondor, *Fair and Efficient Revenue Collection: Overcoming Valuation Challenges*
5. Lawrence Lokken, Yoshimi Kitamura, *Credit vs. Exemption: A Comparative Study of Double Tax Relief in the United States and Japan* (2010), 30 Nw. J. Int'l L. & Bus. 621
6. De Broe, *International Tax Planning and Prevention of Abuse* (2008)
7. Daniel Auerbach, *Morals Clauses as Corporate Protection in Athlete Endorsement Contracts*, 3 DePaul J. Sports L. & Contemp. Probs. 1 (2005)
8. K Yati Chua, *Legal Tests to Determine Contract OF/FOR Services*
9. Koen Lenaerts, *Tax Mitigation vs. Tax Evasion in the Case Law of The European Court of Justice*
10. John L Stancil, Territorial vs Worldwide tax systems – Implications to US Taxpayers
11. Marina K. and Kilis Danijela, *The Citizen's Guide to Taxation*. Zagreb: Institute of Public Finance. 2002
12. Attiya Waris, *Taxation without Principles: A Historical Analysis of the Kenyan Taxation System*
13. O'Sullivan, Arthur; Steven M. Sheffrin *Economics: Principles in action* (2003) Upper Saddle River, New Jersey 07458: Pearson Prentice Hall. p. 310. ISBN 0-13-063085-3.
14. Mo, Phyllis Lai Lan (2003), *Tax avoidance and anti-avoidance measures in major developing economies*, Westport.

B) Journal Articles

1. Jean David C. Boulakia, "Ibn Khaldun: A Fourteenth-Century Economist", (1971) the Journal of Political Economy 79 (5): 1105–1118.

2. Carole C. Berry, *Taxation of U.S. Athletes Playing in Foreign Countries*, 13 Marq. Sports L. Rev. 1 (2002)
3. Timothy Davis, *What Is Sports Law?*, 11 Marq. Sports L. Rev. 211 (2001)
4. Shon & Veliotis "December Effect: Strategic Prepayments of Deductible State Tax Payments," Journal of the American Taxation Association, Fall 2010, Vol. 32, No. 2, 53-71
5. *Effect of Tax Collection on Service Delivery of County Government in Kenya: Case Study of Machakos County Government*, European Journal of Business and Social Sciences, Vol. 5, No. 02, May 2016. P.P. 134 – 151
6. Center for Studies on African Economics Working Paper WPS/2013/02 The Origins of Social Contracts: Attitudes toward Taxation in Urban Nigeria
7. Hove K and Hove R, *An Investigation into the Causes of Tax Avoidance and Tax Evasion in Zimbabwe : A Survey of Business Operators in Bulawayo* - International Journal of Economics, Commerce and Management United Kingdom Vol. IV, Issue 5, May 2016
8. Pashev, K. *Tax Compliance of Small Business in Transition Economies: Lessons from Bulgaria*. (2005) Working paper 05-10. Andrew Young School of Policy Studies. Atlanta Georgia.
9. Allingham, Michael G. and Agnar Sandmo, *Income tax evasion: A theoretical analysis*, (1972), Journal of Public Economics 1, pp. 323-338.
10. Kirchler, Erich, Stephan Muehlbacher, Barbara Kastlunger and Ingrid Wahl (2007), *Why Pay Taxes? A Review of Tax Compliance Decisions*, International Studies Program, Working Paper 07/30, Andrew Young School of Policy Studies Georgia State University.
11. San Lio & John M. Mirichii-conference paper Department of finance & Accounting, Chandaria School of Business, United States International University, Nairobi, Kenya
12. CSAE Working Paper WPS/2013 02- *The Origins of Social Contracts: Attitudes toward Taxation in Urban Nigeria*

C) Reports and Statistical analysis

1. Dr. Attiya Waris, Jack Ranguma and Alvin Mosioma, *Taxation and State Building in Kenya: Enhancing Revenue Capacity to Advance Human Welfare* (2009), part of the Tax Justice Country Report Series
2. Statistical Annex to the Budget Speech for FY 2007/08 & 2011/12
3. Kenya bureau of statistics, facts & figures 2013
4. List of Double taxation agreements provided by the Kenya Revenue Authority
5. The First Interim Report of Economic and Financial Committee, Chairman C.C. Bowring Oct 21, 1922
6. Heritage Foundation (2015). "*2015 Macro-economic Data*". and Index of Economic Freedom, Heritage Foundation
7. A Publication of the Institute of Economic Affairs Budget Information Programme Issue No. 29 September 2012

D) Statute and International Instruments

1. *Income Tax Act*, Cap 470 Laws of Kenya 1973
2. *Income Tax (Earnings and Pensions) Act* 2003
3. U.S. Code § 61
4. California Code Bus. & PROF. CODE § 18895.2(d)
5. *The Constitution of Kenya*, 2010
6. *Sports Act*, No 25 Of 2013 Laws of Kenya 2013
7. *Employment Act* Cap. 226 No. 11 of 2007
8. *Sports Act*, No 25 Of 2013 Laws of Kenya 2013
9. OECD Model Tax Convention 2014
10. *Tax Procedures Act* NO. 29 OF 2015
11. *Kenya Revenue Authority Act* 1995
12. *DT11218 – DT Kenya: Double Taxation Agreement*
13. *Legal Notice 59* in the Kenya Gazette of May 23, 2014
14. Sessional Paper No. 10 of 1965 on African Socialism and its Application to Planning in Kenya

E) Case Law

9. *People v. Davenport*, 30 llun (N.Y.) 177
10. *Helvering v Gregory*, [1934] 69 F. (2d) 809
11. *Burse v Bursey*, [1999] 47 RFL (4th) 1
12. *Case C364/01 Barbier* [2003] ECR I-15013,
13. *IRC v. Duke of Westminster* [1935] All ER 259 (H.L.)
14. *WT Ramsey LTD V Inland Revenue Commissioners*, [1981] 1 All ER 865, [1982] AC 300, [1981] UKHL 1, [1981] STC 174
15. *Republic v Kenya Revenue Authority Ex parte Bata Shoe Company (Kenya) Limited* [2014] eKLR
16. *Cape Brandy Syndicate v Inland Revenue Commissioners* [1921] 1 KB 64 at 71

F) Online Resources

1. More than Seven Million Dollars on Offer in Beijing
<http://www.iaaf.org/news/press-release/beijing-2015-money> last accessed on 21/2/2016
2. Athlete's Association, PAAK, takes root in Kenya, by Justin Lagat
<http://www.runblogrun.com/2014/07/athletes-association-paak-takes-root-in-kenya-by-justin-lagat> last accessed on 13/3/2016
3. Sports Law; An Overview https://www.law.cornell.edu/wex/sports_law last accessed on 21/2/2016
4. Kenya Loses over 600 Billion Every Year <http://www.nation.co.ke/business/Kenya-loses-over-Sh600bn-every-year-in-tax-evasion/-/996/2724818/-/vq77qn/-/index.html> last accessed on 21/2/2016
5. Legal Dictionary <http://legal-dictionary.thefreedictionary.com/capital> last accessed on 10/1/2017

6. See for instance the article Real estate attracts Kenyan Athletes Millions
<https://www.standardmedia.co.ke/business/article/2000174859/real-estate-attracts-kenyan-athletes-millions> last accessed on 10/1/2017
7. Manchester United's player bonus scheme released by Football Leaks... including £2.5m for Premier League title win and £5.25m for Champions League
<http://www.dailymail.co.uk/sport/football/article-3435973/Manchester-United-s-player-bonus-scheme-released-Football-Leaks-including-2-5m-Premier-League-title-win-5-25m-Champions-League.html#ixzz4Soy1mZbV> Last Accessed on 14/12/16
8. Marcus Rashford nets bumper £2million Nike contract after breakthrough Manchester United and England heroics - <https://www.thesun.co.uk/sport/football/1418807/marcus-rashford-nets-bumper-2million-nike-contract-after-breakthrough-manchester-united-and-england-heroics/> Last Accessed on 14/12/16
9. Celebrities find fortune in corporate endorsements
<http://www.businessdailyafrica.com/Celebrities-find-fortune-in-corporate-endorsements/1248928-1799472-36o834z/index.html> Last Accessed on 14/12/16
10. The sporting endorsements market <http://www.inbrief.co.uk/sports-law/endorsement-contracts-in-sport/> Last Accessed on 16/12/16
11. Definition sourced from <http://www.accountingtools.com/questions-and-answers/what-is-the-difference-between-salary-and-wages.html> last accessed on 10/1/2017
12. Definition sourced from <http://legal-dictionary.thefreedictionary.com/royalties> last accessed on 10/1/2017
13. Sportspeople and UK tax – what you need to know
<https://www.taxback.com/blog/sportspeople-uk-tax> last accessed on 10/1/2017
14. Govt should be clear on law to allow or disallow tax avoidance
<http://www.theeastafrican.co.ke/OpEd/comment/Kenya-law-on-tax-planning-tax-avoidance/434750-3236678-gvp7ox/index.html> last accessed on 28/12/16
15. Lionel Messi handed jail term in Spain for tax fraud <http://www.bbc.com/news/world-europe-36721892> Last Accessed on 12/1/2017
16. Capital gains tax reintroduction causes a storm
<http://www.businessdailyafrica.com/Capital-gains-tax-reintroduction-causes-a-storm/539552-3020104-90its1z/index.html> last accessed on 13/1/2017

17. KRA orders sports stars to pay tax <http://www.capitalfm.co.ke/sports/2014/01/21/kra-orders-sports-stars-to-pay-tax/> last accessed on 13/1/2017
18. Double Taxation Agreement Definition <http://www.businessdictionary.com/definition/double-taxation-treaty.html> last accessed on 7/1/2017
19. Double Taxation Agreements <http://www.revenue.go.ke/ito/ltodta.html> last accessed on 13/1/2017
20. How the rules on tax work for sporting events in the UK <http://www.telegraph.co.uk/sport/othersports/athletics/9854259/How-the-rules-on-tax-work-for-sporting-events-in-the-UK.html> last accessed n 13/1/2017
21. Information obtained from the World Marathon Majors website <https://www.worldmarathonmajors.com/> last accessed 13/1/2017
22. Vic Muisyo Kenya's Tax History III – Independent Kenya <https://abacus.co.ke/kenyas-tax-history-iii-independent-kenya/> last accessed on 8/1/2017
23. KRA sparks row with fresh tax demand on top athletes <http://www.businessdailyafrica.com/KRA-sparks-row-with-fresh-tax-demand-on-top-athletes--/539546-1536716-view-printVersion-st6e6x/index.html> Last accessed on 8/1/2017
24. Tax authority loses Sh200 billion to informal sector <http://www.businessdailyafrica.com/Tax-authority-loses-Sh200-billion-to-informal-sector-/539552-1401976-15785pxz/index.html> last accessed on 8/1/2017
25. Economic Concepts(Resources Portal) www.economicconcepts.com last accessed on 21/2/2016
26. Income Definition <http://www.businessdictionary.com/definition/income.html> Last Accessed on 2/11/2016