

2015

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Recommended Citation

Matthew Akers, A Race to the Bottom: International Income Tax Regimes' Impact on the Movement of Athletic Talent, 17 U. Denv. Sports & Ent. L.J. 11 (2015).

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A Race to the Bottom: International Income Tax Regimes' Impact on the Movement of Athletic Talent

A RACE TO THE BOTTOM? INTERNATIONAL INCOME TAX REGIMES' IMPACT ON THE MOVEMENT OF ATHLETIC TALENT

Matthew Akers*

Introduction

As the world has become increasingly global, so too have sports expanded on the international stage. While in the past, athletes may have rarely competed outside of their home countries with the exception of events such as the Olympic Games and world championships, athletes today routinely compete in a number of different countries throughout a single season.¹ In 2013, ninety-two foreign-born players, representing thirty-nine countries, were featured on National Basketball Association (NBA) opening night rosters, breaking the previous league record of eighty-four, set in 2010.² Meanwhile, English Premier League (EPL) rosters for the

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¹ For example, in 2013, American golfer Tiger Woods competed in five different countries including Turkey, China, and the United Kingdom. *2013 Schedule & Results*, TIGERWOODS.COM, <http://www.tigerwoods.com/onTour/scheduleAndResults?year=2013> (last visited Jan. 28, 2014). Serbian tennis pro Novak Djokovic's 2013 schedule included stops in twelve countries including the United States, China, France, and Italy. *Tour*, NOVAKDJOKOVIC.COM, <http://novakdjokovic.com/en/results/2013/> (last visited Jan. 28, 2014).

² *NBA Tips Off 2013-14 Season With Record International Player Presence*, NBA GLOBAL (Oct. 29, 2013), http://www.nba.com/global/nba_tips_off_201314_season_with_record_international_presence_2013_10_29.html.

2013-14 season included 347 players from sixty-four different foreign nations.³

One result of the globalization of professional athletics is an increasing number of high-earning, transient taxpayers who must navigate the tax regimes of each of the countries in which they compete. Income is generally taxed where it is earned, and as each country fights to receive its fair share of an athlete's income, the risk of double taxation increases. In addition, because athletes' income is not limited to salary or prize money, and often includes large amounts of compensation from endorsement deals, conflicts regarding the characterization and apportionment of such income are a key concern for many athletes.⁴

The United Kingdom's taxation of Phil Mickelson, an American golfer and the 2013 British Open Champion, provides an excellent example of the enormous tax liability to which international athletes are often exposed. In addition to tax rates of 40% on income over £32,010 and 45% on income over £150,000 applied to Mickelson's tournament winnings, the U.K. also collects income tax on endorsement income from nonresident athletes based on the amount of time the athlete spends competing in the country.⁵ As a result of these taxes, Mickelson paid 61% of the nearly \$2.2 million he earned over the course of his stay for the British Open to the U.K.⁶

³ *Premier League Foreign Player 2013/2014*, TRANSFERMARKT.COM, http://www.transfermarkt.com/en/premier-league/gastarbeiter/wettbewerb_GB1.html (last visited Jan. 28, 2014).

⁴ *See, e.g., Goosen v. Commissioner*, 136 T.C. 547, 547 (2011); *Garcia v. Commissioner*, 140 T.C. No. 6, at *1 (2013) (regarding the allocation of endorsement earnings between royalty and personal service income).

⁵ Kurt Badenhausen, *Phil Mickelson Wins Historic British Open and Incurs 61% Tax Rate*, FORBES (July 22, 2013, 11:14 AM), <http://www.forbes.com/sites/kurtbadenhausen/2013/07/22/phil-mickelson-wins-historic-british-open-and-incurs-61-tax-rate/>.

⁶ *Id.*

Every country taxes nonresident athletes differently, and there is often a general lack of understanding among athletes as to their tax liability in the individual countries in which they compete.⁷ Although international income tax treaties, such as that between the United States and the United Kingdom,⁸ protect the majority of nonresident taxpayers from double tax liability, athletes are generally exempted from these protections, and must rely on their country of residency to eliminate double taxation through the provision of foreign tax credits or a statutory exemption.⁹ As a result of the differences in countries' tax regimes, lack of treaty protection from double taxation, and a general lack of understanding of the international tax system by athletes, certain countries — specifically the U.S. and the U.K., have been labeled by many international athletes as unfavorable.¹⁰

Considering the sizable incomes earned by professional athletes, the impact of a country's tax regime on its teams' ability to recruit athletic talent becomes apparent. For example, a Spanish soccer club, operating under Spain's favorable tax system that taxes nonresidents, as well as new Spanish residents, at a flat rate of 24%,¹¹ can provide a player with \$5 million in after-tax income

⁷ See Andrew D. Appleby, *Leveling the Playing Field: A Separate Tax Regime For International Athletes*, 36 BROOK. J. INT'L L. 605, 639 (2011) (suggesting that even for tax attorneys navigating “the various withholding and characterization traps” utilized by different countries can prove to be extremely challenging).

⁸ Convention for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income and on Capital Gains, U.S.-U.K., July 24, 2001 [hereinafter U.S.-U.K. Income Tax Treaty].

⁹ Stephanie Evans, *U.S. Taxation of International Athletes: A Reexamination of the Artistes and Athletes Article in Tax Treaties*, 29 GEO. WASH. J. INT'L L. & ECON. 297, 309 (1995); see discussion *infra* Part I.B.1.

¹⁰ Jamaican track star Usain Bolt has been particularly vocal regarding his disagreement with the United Kingdom's tax treatment of nonresident athletes, and has gone as far as boycotting U.K. competitions. *Usain Bolt Tax Bill: Why Sports Stars Won't Compete in Britain*, THE WEEK (Aug. 14, 2012), <http://www.theweek.co.uk/olympics/london-2012/48467/usain-bolt-tax-bill-why-sports-stars-wont-compete-britain>.

¹¹ Appleby, *supra* note 7, at 630-31.

with a \$6.7 million contract.¹² At the same time, an English club attempting to sign the same player would have to offer an \$8.3 million contract to provide the same post-tax benefit.¹³ As demonstrated by this example, income tax regimes have the potential to act as a driving force behind the movement of athletic talent around the world. As up-and-coming sporting nations seek to challenge the established leaders, boost their reputations within the international sporting community, and encourage elite athletes to compete in leagues and events hosted within their country, favorable tax treatment of foreign athletes may be used as a valuable recruiting tool.

This Article begins in Part I by introducing the general framework under which countries collect income taxes from foreign athletes, while presenting in greater depth the tax systems of established sporting powers — the United States and United Kingdom, and several up-and-coming sporting nations — Spain, Brazil, and Russia. Part II outlines the current place of athletics in the global economic and social landscapes. Part III discusses issues presented by the U.S. and the U.K.'s tax treatment of international athletes, as well as those nations' recognition of those issues. Part IV examines tax treatment of athletes by up-and-coming nations as a tool to recruit talent away from the U.S. and the U.K. Finally, Parts V and VI discuss the future of the taxation of international athletes, and provide recommendations for nations seeking to more effectively use their tax regimes to attract international athletic talent.

¹² Gabriele Marcotti, *Taxes Reign in Spain*, WALL ST. J. (Nov. 8, 2009, 7:42 PM), <http://online.wsj.com/news/articles/SB125769766022636765>. However, some of this favorable treatment may be limited by a recent amendment to Spanish tax law. See discussion *infra* Part I.A.3.b.

¹³ Marcotti, *supra* note 12.

I. Legal Background: Overview of the Taxation of International Athletes

Professional athletes are highly mobile taxpayers, and often earn income in multiple countries over the course of a tax year.¹⁴ Therefore, the calculation of an athlete's tax liability in a particular country begins with a determination of the athlete's residency status.¹⁵ If the athlete is determined to be a resident of the country in which the income in question was earned, the taxation of that income will simply be decided by an application of the country's tax code.¹⁶ However, if the athlete is determined to be a nonresident, the applicability of any income tax treaties between the athlete's country of residence and the country in which the income was earned must be established.¹⁷ If an applicable income tax treaty is not in place, or if an income tax treaty is in place but is inapplicable to the athlete, the taxation of the income earned in the source country will be based on that country's tax code as it relates to the taxation of nonresident aliens.¹⁸

A. Treatment Under a Tax Code

Tax codes are the primary method by which countries govern the assessment and collection of income tax from individuals earning income sourced to the country. Tax residents of a country, along with nonresidents from countries with which the taxing country does not have an income tax treaty, will be taxed exclusively under the provisions of the source-country's tax code.¹⁹ Meanwhile, the tax treatment of nonresidents from treaty countries,

¹⁴ See *supra* note 1 (discussing the competition schedules of Tiger Woods and Novak Djokovic).

¹⁵ Stephen Taylor, "Are You Not Entertained? Is This Not Why You Are Here?" *U.S. Taxation of Foreign Athletes and Entertainers*, 16 VILL. SPORTS & ENT. L.J. 375, 379 (2009).

¹⁶ See, e.g., I.R.C. § 861(b) (2013).

¹⁷ Taylor, *supra* note 15, at 389 (treatment under the tax treaty, including provisions for residency status determination, will generally be controlling).

¹⁸ Appleby, *supra* note 7, at 616.

¹⁹ Evans, *supra* note 9, at 308-09.

while generally established by the relevant treaty, may also defer to the source-country's tax code in some situations.²⁰ One such situation, a treaty's inclusion of an "Artiste and Athlete" provision, has a major impact on athletes, who are exempted from coverage under most treaties by such a provision.²¹

Because athletes are generally exempted from coverage under income tax treaties, an understanding of the varying tax treatment of athletes by individual countries' tax regimes is foundational for assessing income taxation as a driver behind the movement of athletic talent around the world. If the calculation of an athlete's tax liability in a particular country falls under the country's tax code, key considerations will include the respective tax treatment of residents and nonresidents, any applicable withholding requirements, and the characterization of the income earned by the athlete.²²

1. The United States

The United States is a world hub for professional athletics. Home to the National Basketball Association National, the Football League (NFL), the National Hockey League (NHL), Major League Baseball (MLB), the Ultimate Fighting Championship (UFC), and the Professional Golf Association (PGA) Tour, American professional sporting leagues and events attract premier athletic talent from around the world.

The United States taxes citizens and resident aliens on their income earned both within the U.S. and abroad.²³ However, a system of foreign tax credits gives citizens and resident aliens who earn income abroad credits to offset their domestic tax liability and

²⁰ *Id.* (in some instances an income tax treaty may specifically call for tax liability to be calculated in accordance with the source country's tax code).

²¹ *Id.*; see also discussion *infra* Part I.B.1.

²² See Appleby, *supra* note 7, at 615-622 (discussing the United States' tax treatment of residents and nonresidents, as well as the characterization and withholding of income earned by such individuals).

²³ See I.R.C. §§ 861, 862.

eliminate double taxation.²⁴ In contrast, nonresident aliens are generally taxed only on their U.S.-source income,²⁵ although a distinction is made between the treatment of income effectively connected with a U.S. trade or business, and income not effectively connected with a U.S. trade or business.²⁶ Under the Internal Revenue Code (I.R.C.), an athlete's tax liability is thus primarily determined by residency status, and if the athlete is determined to be a nonresident, the characterization of the income earned.

a. Residency Status

The first step in calculating a foreign athlete's U.S. tax liability is a determination of residency status. Resident aliens are generally taxed in the same manner as U.S. citizens,²⁷ while nonresident aliens are subject to different treatment under I.R.C. § 871. The determination of whether a foreign athlete is a nonresident or resident alien is governed by I.R.C. § 7701(b). An athlete who satisfies either the "Permanent Residency Test" (also known as the Green Card test) or the "Substantial Presence Test" will generally qualify as a resident alien,²⁸ whereas an athlete who fails to satisfy

²⁴ See I.R.C. §§ 901, 904. Citizens are allowed a foreign tax credit in "the amount of any income . . . accrued during the taxable year to any foreign country . . ." I.R.C. § 901(b)(1) (2013). Resident aliens are allowed a foreign tax credit in "the amount of any such taxes paid or accrued during the taxable year to any foreign country . . ." I.R.C. § 901(b)(3).

²⁵ See I.R.C. § 871

²⁶ I.R.C. § 871(a)-(b).

²⁷ *Taxation of U.S. Resident Aliens*, IRS,

<http://www.irs.gov/Individuals/International-Taxpayers/Taxation-of-Resident-Aliens> (last updated Dec. 6, 2013). However, a U.S. resident alien from a treaty country who satisfies the tiebreaker rule provided by the treaty will be taxed in the foreign country. I.R.S. PUB. 519 (Jan. 21, 2014) at 6, *available at* <http://www.irs.gov/pub/irs-pdf/p519.pdf>.

²⁸ I.R.C. § 7701(b)(3)(B) provides an important exception to the "Substantial Presence Test," under this exception an individual who is present in the U.S. for less than 183 days in the current year and establishes a closer connection to a foreign country is a nonresident alien for purposes of U.S. income tax liability. I.R.C. § 7701(b)(3)(B).

either of these tests will be classified as a nonresident alien.²⁹ Under the “Permanent Residency Test,” an individual who is at any time lawfully admitted for permanent residence in the United States will be considered a resident alien for tax purposes.³⁰ To satisfy the “Substantial Presence Test,” an individual must be “present in the United States on at least 183 days during a three year period that includes the current year. [E]ach day of presence in the current year is counted as a full day. Each day of presence in the first preceding year is counted as one-third of a day and each day of presence in the second preceding year is counted as one-sixth of a day.”³¹

b. Taxation of Nonresident Athletes

Under the I.R.C., taxation of nonresident alien athletes is limited to income received from sources within the United States.³² U.S. source income that is not effectively connected with a U.S. trade or business is subject to a 30% flat rate tax,³³ while income that is effectively connected with a U.S. trade or business is taxed using the same graduated rates as applied to income earned by citizens and resident aliens.³⁴ The performance of personal services within the United States is included under the I.R.C.’s definition of “trade or business within the United States.”³⁵ As a result, salaries, bonuses and prize money will be treated as “effectively connected income.”³⁶

²⁹ I.R.C. § 7701(b)(1)(A)(i), (b)(3).

³⁰ I.R.C. § 7701(b)(1)(A)(i).

³¹ Treas. Reg., 26 C.F.R. § 301.7701(b)-1(b) (2008).

³² See I.R.C. § 871.

³³ I.R.C. § 871(a).

³⁴ I.R.C. § 871(b) (such income is subject to deductions, and the graduated tax rates established by I.R.C. § 1).

³⁵ I.R.C. § 864(b).

³⁶ Taylor, *supra* note 15, at 384.

c. Characterization of Income

Because U.S.-source income earned by nonresident alien athletes is taxed differently depending upon whether or not it is effectively connected with a U.S. trade or business,³⁷ the characterization of a nonresident alien's U.S. source income is of key importance in determining the individual's U.S. income tax liability. Income earned by athletes generally falls into one of three categories: athletic performance income,³⁸ endorsement and sponsorship income, and signing bonus income.³⁹

The characterization of athletic performance and signing bonus income is generally straightforward. Athletic performance income, including salaries and prize money, is paid to the athlete in return for the performance of personal services conducted in the United States, and therefore is treated as being effectively connected to a U.S. trade or business under I.R.C. § 864(b).⁴⁰ In regards to signing bonus income, IRS Revenue Ruling 2004-109 treats signing bonuses as wages.⁴¹ Therefore, income earned in the U.S. by a nonresident athlete that is properly characterized as a salary, prize, or signing bonus will be taxed at the same graduated rates applied to U.S. citizens,⁴² barring more favorable treatment under an applicable treaty provision. The greatest challenge regarding the calculation of U.S. tax liability on athletic performance and signing bonus income is the allocation of the income between United States and any foreign sources.⁴³ In the case of an athlete earning income allocable to multiple countries, the allocation will general-

³⁷ I.R.C. § 871(a)-(b).

³⁸ Athletic performance income may include salaries, bonuses, and prize money.

³⁹ Athletic performance income may include salaries, bonuses, and prize money. See Appleby, *supra* note 7, at 619-22.

⁴⁰ I.R.C. § 864(b).

⁴¹ Rev. Rul. 2004-109, 2004-2 C.B. 958 (2004), available at http://www.irs.gov/irb/2004-50_IRB/ar07.html (“Amounts an employer pays as bonuses for signing or ratifying a contract in connection with the establishment of the employer-employee relationship are wages . . .”).

⁴² See I.R.C. § 871(b), *supra* note 34.

⁴³ Appleby, *supra* note 7, at 619.

ly be based on the number of days during the tax year the athlete performed personal services in the U.S. in relation to the total number of days the athlete spent performing personal services.⁴⁴

The characterization of endorsement and sponsorship income is more challenging. Income attributable to an athlete's endorsement and sponsorship deals, depending on the facts, can be characterized as either royalty or personal service income.⁴⁵ Income will be characterized as a royalty if it is the result of the use of the athlete's name or likeness.⁴⁶ Alternatively, if the athlete is required to perform personal services in connection with the receipt of the income, such as playing in tournaments or using the sponsor's equipment, the income will likely be considered, at least in part, personal service income.⁴⁷ In many cases, an endorsement contract will include compensation for both royalties and personal services, and an allocation between the two is required.⁴⁸ In light of two recent U.S. Tax Court cases involving professional golfers, the IRS's treatment of the allocation of endorsement income between royalty and personal service income remains somewhat of a gray area.⁴⁹ This lack of clarity represents one of the many challenges faced by nonresident athletes obligated to pay taxes in the

⁴⁴ Treas. Reg., 26 C.F.R. § 1.861-4(b) (2005). "The amount of compensation for labor or personal services performed within the United States determined on a time basis is the amount that bears the same relation to the individual's total compensation as the number of days of performance of the labor or personal services by the individual within the United States bears to his or her total number of days of performance of labor or personal services." Treas. Reg., 26 C.F.R. § 1.861-4(b)(2)(E) (2005).

⁴⁵ Appleby, *supra* note 7, at 619. Royalty income is not considered to be effectively connected with a U.S. trade or business, and thus subject to the final 30% gross withholding tax.

⁴⁶ *Goosen v. Comm'r*, 136 T.C. 547, 559 (2011).

⁴⁷ *See id.* at 559-60.

⁴⁸ *See id.* at 562.

⁴⁹ *See id.* at 562-63; *Garcia v. Comm'r*, 140 T.C. No. 6, 10-11 (2013); *see also* discussion *infra* Part III.A.1 (highlighting the U.S. Tax Court's treatment of endorsement income in *Garcia* as evidence of recognition of some of the key issues caused by the U.S.'s taxation of nonresident athletes).

U.S. Like athletic performance income, endorsement and sponsorship income sourced to both the U.S. and foreign countries must also be properly allocated between the U.S. and those other foreign sources. Personal service income will be allocated in the manner discussed above,⁵⁰ while royalties are allocated between the U.S. and foreign sources based on where the royalties are used.⁵¹

2. The United Kingdom

Like the United States, the United Kingdom is one of the most established sporting nations in the world. Based on revenues, the EPL is the most successful soccer league in the world, bringing in €1 billion more than its nearest competitor during the 2011-12 season.⁵² The U.K. also plays host to golf and tennis majors, is home to elite professional cricket and rugby leagues, and showcased a number of new athletic facilities during the 2012 Summer Olympic Games in London.

As in the U.S., U.K. residents are generally taxed on their worldwide income, while nonresidents are taxed on their U.K.-source income.⁵³ To address an alleged annual loss of £75 million resulting from the failure to tax foreign athletes and entertainers making appearances in the U.K., a withholding regime was implemented as part of the Income Tax (Sportsman and Entertainers)

⁵⁰ See 26 C.F.R. § 1.861-4(b), *supra* note 44.

⁵¹ *Goosen*, 136 T.C. at 563 (citing I.R.C. §§ 861(a)(4), 862(a)(4)). While an endorsement contract may specify how royalty income should be sourced, courts are free to make their own determination if the allocation is determined to be unreasonable. *Id.* at 563-64. Sales of the endorsed product and the comparative sizes of the markets for the endorsed product are factors that may be used by the court in determining the appropriate apportionment of royalty income. *Id.* at 565-66.

⁵² *Annual Review of Football Finance 2013- Highlights*, SPORTS BUSINESS GROUP (Deloitte, U.K.), June, 2013, at 6 [hereinafter *Review of Football Finance*], available at http://www.deloitte.com/view/en_GB/uk/industries/sportsbusinessgroup/sports/football/annual-review-of-football-finance/.

⁵³ *Appleby*, *supra* note 7, at 623.

Regulations of 1987.⁵⁴ As a result of this amendment, nonresident athletes and entertainers are subject to a withholding tax that is not applied to other nonresidents.⁵⁵

a. Residency Status

Established by the 2013 Finance Act, the Statutory Residency Test (SRT) is used to determine U.K. tax residency.⁵⁶ Under the SRT, an individual will be considered a resident of the U.K. if he/she (1) spent 183 days in the U.K. during the tax year,⁵⁷ (2) meets the requirements of one of two additional “U.K. tests,”⁵⁸ or (3) meets the “sufficient ties test.”⁵⁹ Additionally, if an individual satisfies any of three “automatic overseas tests,” he/she will not be considered a U.K. resident, and the “U.K. tests” and “sufficient ties test” will not be considered.⁶⁰ Although the SRT is more complex

⁵⁴ DANIEL SANDLER, *THE TAXATION OF INTERNATIONAL ENTERTAINERS AND ATHLETES: ALL THE WORLD’S STAGE* 121-22 (1995).

⁵⁵ *Id.* at 122.

⁵⁶ *Guidance Note: Residence, Domicile and Remittance Basis*, HM REVENUE & CUSTOMS, Oct. 2013, at 12 (U.K.), available at <http://www.hmrc.gov.uk/cnr/rdr1.pdf>.

⁵⁷ *Guidance Note: Statutory Residency Test (SRT)*, HM REVENUE & CUSTOMS, Dec. 2013, at 8 (U.K.), available at <http://www.hmrc.gov.uk/international/rdr3.pdf>.

⁵⁸ *Id.* at 18, 23. The first of these additional tests applies only to individuals who own a home in the U.K., while the second requires an individual to have worked full-time in the U.K. during a 365 day period. *Id.* at 23.

⁵⁹ *Id.* at 28. The sufficient ties test is applied to individuals who do not meet the requirements of the U.K. tests or automatic overseas tests; the test considers both the number of days an individual spent in the U.K. during the tax year, and the individual’s number of U.K. connections. *Id.* U.K. connections may include family ties, accommodation ties, work ties, 90-day ties, and country ties. *Id.*

⁶⁰ *Id.* at 8-10. An individual will satisfy an “automatic overseas test” if (1) the individual was a U.K. resident for one or more of the three preceding years and spends fewer than 16 days in the U.K. during the tax year; (2) was not a U.K. resident for any of the three preceding years and spends fewer than 46 days in the U.K. during the tax year; or (3) the individual works full-time overseas during the tax year without any significant breaks, spends fewer than 91 days in the U.K. during the tax year, and the number of days in the tax year on which the individual works for more than three hours in the U.K. is less than 31. *Id.*

than many other countries' residency tests, Her Majesty's Revenue and Customs (HMRC), the U.K.'s tax authority, has provided taxpayers with substantial guidance in applying the test.⁶¹

b. Taxation of Nonresident Athletes

The United Kingdom employs a schedular income tax system.⁶² Under this system, income paid to team sport athletes will generally be classified as employment income, whereas income earned by individual athletes will be classified as self-employed "trade or profession" income.⁶³ While both employment income and "trade or profession" income are taxed at the same progressive rates, "[t]rade or profession income is generally subject to lower social security taxes and more generous business expense deductions."⁶⁴ For the 2013-14 and 2014-15 tax years, the U.K.'s progressive tax rates include a top rate of 45% for income over £150,000.⁶⁵

Employment income is withheld under a "Pay as You Earn" system, which is applied to both resident and non-resident employees.⁶⁶ However, the U.K. generally does not withhold tax on trade or profession income,⁶⁷ and prior to the 1987 Income Tax (Sportsman and Entertainers) Regulations, tax avoidance by non-resident athletes was common.⁶⁸ The 1987 Regulations address tax avoidance through a withholding regime that applies to entertainers

⁶¹ *Id.* at 6.

⁶² Appleby, *supra* note 7, at 624. As a result of the scheduler system, "all income must be traced to a specific type of source to determine the extent of taxation."

Id.

⁶³ *Id.* at 624.

⁶⁴ *Id.*

⁶⁵ *Income Tax Rates and Allowances*, HM REVENUE & CUSTOMS, <http://www.hmrc.gov.uk/rates/it.htm> (last visited Feb. 1, 2014).

⁶⁶ SANDLER, *supra* note 54, at 132.

⁶⁷ Appleby, *supra* note 7, at 624.

⁶⁸ *Id.*

and sportsmen in any kind of entertainment or sport,⁶⁹ and covers any appearance in the U.K. for which a payment is made.⁷⁰ Under this withholding regime, payments to nonresident athletes are subject to a 20% withholding tax,⁷¹ thus limiting the athlete's ability to wholly avoid U.K. taxation.

c. Characterization of Income

For team sport athletes in the U.K., characterization of personal service income is unnecessary as a result of the “Pay as You Earn” system because an athlete's employer (the team) will be responsible for deducting the appropriate income tax from the athlete's pay.⁷² For individual athletes, the key issue relating to the characterization of income is whether the income falls under the previously discussed withholding regime. The regime has broad reach. The term “athlete” is interpreted very broadly,⁷³ and any appearance within the U.K. made for pay⁷⁴ qualifies for withholding. Furthermore, a direct link between the appearance and payment is not required;⁷⁵ for example, “[endorsement fees paid to a tennis player using sports equipment in a UK tournament would be linked [to the U.K. appearance].”⁷⁶

In terms of characterizing endorsement and sponsorship income, the U.K. system is significantly more straightforward than that of the U.S. In the U.K., royalties are not considered separate

⁶⁹ The Income Tax (Entertainers and Sportsmen) Regulations, 1987, S.I. 530, art. 2, ¶ 1 (U.K.).

⁷⁰ *A Guide to Paying Foreign Entertainers*, HM REVENUE & CUSTOMS, http://www.hmrc.gov.uk/leaflets/feu50_0300.htm (last visited Feb. 1, 2014).

⁷¹ *Id.*

⁷² *Id.*

⁷³ *Id.* (“The following list is not exhaustive. [Athletes], golfers, cricketers, footballers, tennis players, boxers, snooker players, darts players, motor racing drivers, jockeys, ice skaters, contestants in chess tournaments . . .”).

⁷⁴ “Payment” is interpreted broadly, and may include appearance fees, TV rights, tournament winnings, prize money, advertising income, and endorsement fees. *See id.*

⁷⁵ *Id.*

⁷⁶ *Id.*

intellectual property, but instead are categorized as personal service income along with all other endorsement income.⁷⁷ As in the U.S., a nonresident athlete is only subject to U.K. taxation on endorsement income sourced to the U.K.⁷⁸ However, as a result of the House of Lords' holding a 2006 case involving American tennis star Andre Agassi, even sponsorship payments from nonresident companies to nonresident taxpayers are considered to be sourced to the U.K.,⁷⁹ making avoidance of U.K. taxation on sponsorship income very difficult.⁸⁰ This treatment of endorsement income has been, and continues to be, a major point of contention between nonresident athletes and the U.K.⁸¹

3. Spain

Spain is quickly rising as one of the global leaders in professional athletics. In addition to being home to La Liga, one of the largest and most successful professional soccer leagues in the world, Spain is the world's top importer of professional basketball players,⁸² and has produced many professional golfers and tennis players. Spain's growth in the ranks of professional athletics serves as a premier example of the potential benefits available to a country that implements a tax regime favorable to foreign athletes. Spanish law is unique in that it law allows certain new Spanish residents to elect between resident and nonresident income tax

⁷⁷ Appleby, *supra* note 7, at 626.

⁷⁸ *Id.*

⁷⁹ Agassi v. Robinson, [2006] UKHL 23 (appeal taken from EWCA) (U.K.).

⁸⁰ Appleby, *supra* note 7, at 626.

⁸¹ See discussion of Usain Bolt's criticism of the U.K. tax system, *infra* Part III.

⁸² INTERNATIONAL BASKETBALL FEDERATION, INTERNATIONAL BASKETBALL MIGRATION REPORT 6 (2012), [hereinafter FIBA MIGRATION REPORT] available at

http://www.cies.ch/fileadmin/documents/Research/2012_FIBA_IBMR_light.pdf

treatment —providing Spanish teams a comparative advantage in recruiting foreign athletes.⁸³

a. Residency Status

An individual is a resident of Spain for tax purposes as determined by the satisfaction of one of three tests. If “(1) . . . [the individual] spends more than 183 days in Spain in the calendar year; (2) [t]he center of [the individual’s] economic interests is located in Spain; or (3) . . . [the] center of [the individual’s] vital interests is in Spain,”⁸⁴ the individual will be considered a Spanish resident.

b. Taxation of Nonresident Athletes

Spain applies a final flat rate tax of 24% to nonresidents’ Spanish-source income under a gross withholding regime.⁸⁵ This flat rate is applied to both employment and personal service income, as well as to royalty and endorsement income.⁸⁶ Spanish residents are subject to progressive tax rates on net income of up to 52%.⁸⁷

One of the most preferential aspects of the Spanish tax system from the perspective of a professional athlete competing in Spain is Royal Decree 687/2005 — more commonly known as the

⁸³ See Appleby, *supra* note 7, at 631; Henrik Klevin et al., *Taxation and the International Migration of Superstars: Evidence from the European Football Market* 17 (Nat’l Bureau of Econ. Research, Working Paper No. 16545, 2010) available at <http://www.nber.org/papers/w16545>.

⁸⁴ Appleby, *supra* note 7, at 631 (quoting ROMERO, FELIX P., GUIDE ON SPORTS-PERSON TAXATION IN CERTAIN RELEVANT JURISDICTIONS 144 (2008)).

⁸⁵ *Id.* at 630-31.

⁸⁶ *Id.* at 632.

⁸⁷ *Spanish Income Tax Rates 2012 to 2014*, ADVOCO, <http://www.advoco.es/hot-topics/102-spanish-income-tax-rates.html> (last visited Feb. 19, 2014) (the 52% rate applies to income earned over €300,000). Significant “temporary” increases in tax rates applicable to Spanish residents are in effect for the 2012 to 2014 tax years. *Id.* Prior to these increases the top marginal rate applied to residents was 43%. Appleby, *supra* note 7, at 631.

Beckham Law.⁸⁸ The Beckham Law allows new Spanish residents who have recently moved to Spain in the course of their employment to elect between resident and nonresident tax treatment for the year of their move and the following five years.⁸⁹ To be eligible for the election, a new Spanish resident must, “(1) not have been a Spanish resident in the ten years prior to the move; (2) have moved to Spain as a consequence of employment; (3) effectively perform work in Spain, for a Spanish resident; and (4) not be exempt from income tax.”⁹⁰ In 2010, the Spanish Parliament amended the Beckham Law, and a €600,000 income cap for favorable tax treatment was initiated.⁹¹

c. Characterization of Income

For nonresident athletes, the characterization of income is only necessary when determining tax liability under a treaty because, under Spanish tax law, all of a nonresident’s Spanish-source income is subject to the 24% flat withholding tax.⁹² When determining the tax liability of nonresident athletes under a treaty, characterization of image rights income is significant. However, Spanish courts have been inconsistent in their characterization of such income.⁹³ This unpredictable treatment by Spanish courts has created uncertainty and difficulty in tax planning for nonresident athletes.⁹⁴

For athletes who are Spanish residents, endorsement income is characterized as either personal service or royalty in-

⁸⁸ Klevin, *supra* note 83, at 17.

⁸⁹ Appleby, *supra* note 7, at 631.

⁹⁰ *Id.*

⁹¹ *Beckham’s Law Survives*, ADVOCO, <http://www.advoco.es/advice/8-personal-tax/70-beckhams-law.html> (last visited Feb. 8, 2014).

⁹² Appleby, *supra* note 7, at 632.

⁹³ *See id.* at 633. In recent cases Spanish courts have held nonresidents’ image rights income to be a general royalty subject to a 15% withholding tax, analogous to a copyright and subject to a “preferential withholding-rate of 0-5% under most treaties,” and finally a business tax subject to no withholding tax. *Id.*

⁹⁴ *Id.*

come.⁹⁵ Regardless of its characterization, endorsement income is subject to the athlete's marginal tax rate, however, deductions are allowed in connection with personal service income, but not in connection with royalty income.⁹⁶

4. Brazil

Brazil is the fifth-largest country in the world in geographical area, and home to the eighth-largest economy in terms of GDP.⁹⁷ During the 2012 Summer Olympics, Brazilian athletes won seventeen medals, including gold in women's volleyball and men's soccer.⁹⁸ The Brazilian men's national soccer team is currently ranked tenth by the Federation Internationale de Football Association (FIFA),⁹⁹ and features star players such as Kaka, Neymar, and Ronaldinho. In addition, Brazil's top professional soccer league, Série A, is among the world's elite.¹⁰⁰ In the coming years, Brazil will find itself at the forefront of the international sporting stage as it prepares to host the 2014 World Cup¹⁰¹ and the 2016 Summer Olympic Games.¹⁰² In terms of the taxation of nonresident athletes earning income in Brazil, Brazil utilizes a final withholding tax regime similar to that of Spain.

⁹⁵ *Id.* at 632.

⁹⁶ *Id.*

⁹⁷ *Brazil*, CIA WORLD FACTBOOK, <https://www.cia.gov/library/publications/the-world-factbook/geos/br.html> (last updated Jan. 28, 2014).

⁹⁸ *Official Olympic Games Results*, OLYMPIC.ORG, <http://www.olympic.org/olympic-results/> (search "Search For Medalist" for "Brazil" and "London 2012") (last visited Feb. 8, 2014).

⁹⁹ *FIFA/Coca-Cola World Ranking*, FIFA, <http://www.fifa.com/worldranking/rankingtable/> (last updated Jan. 16, 2014).

¹⁰⁰ *The Strongest National League of the World*, IFFHS (Jan. 29, 2014), <http://www.iffhs.de/the-strongest-national-league-of-the-world/#more-187>.

¹⁰¹ *FIFA World Cup*, FIFA, <http://www.fifa.com/worldcup/> (last visited Feb. 8, 2014).

¹⁰² RIO 2016, <http://www.rio2016.org/en> (last visited Feb. 8, 2014).

a. Residency Status

Brazil employs a straightforward method of determining an individual's residency status. Individuals who live permanently in Brazil or have a permanent or temporary visa¹⁰³ are considered Brazilian residents for income tax purposes,¹⁰⁴ while all other individuals are deemed nonresident aliens.

b. Taxation of Nonresident Athletes

Brazilian residents' income, regardless of characterization, is withheld at progressive rates of up to 27.5%.¹⁰⁵ Nonresidents are taxed at flat rates of 25% on gross personal service income, and 15% on sponsorship and image rights income.¹⁰⁶ It is interesting to note that Brazilian residents who make royalty payments to nonresidents are subject to a 10% contribution tax,¹⁰⁷ causing the royalty payment to be taxed at the same effective rate as personal service income, but providing a benefit to the nonresident taxpayer. An understanding of the taxation of nonresident athletes under the Brazilian tax code is especially important to American athletes competing in Brazil, as there currently is no income tax treaty between the countries.

¹⁰³ "If the individual has a temporary visa, they will not become a resident until: (1) arrival date if visa is for employment, (2) after 184 days in Brazil, or (3) the date they obtain a permanent visa or employment." Appleby, *supra* note 7, at n. 226 (citing ROMERO, FELIX P., GUIDE ON SPORTSPERSON TAXATION IN CERTAIN RELEVANT JURISDICTIONS 24 (2008)).

¹⁰⁴ *Id.* at 635 (citing Instrução Normativa No. 208, de 27 de Setembro de 2002, D.O.U. de 11.3.2004. (Braz.)).

¹⁰⁵ *Id.*

¹⁰⁶ *Id.* The 15% flat rate tax on sponsorship and image rights is not dependent on the characterization of the income as either royalty payments or personal service income as it is in countries such as the United States. *Id.*; see discussion *supra* Part I.A.1.a.

¹⁰⁷ Appleby, *supra* note 7, at 635 (it is unclear whether this contribution tax is applied to image rights payments, or just those payments characterized as royalty payments).

c. Other Sports Related Taxes

While not directly related to the taxation of foreign athletes, Brazil has an interesting history of tax laws passed to benefit sport-related employers, and to facilitate the growth of athletic infrastructure. In 2006, Brazil implemented the “Club Mania Law,” which exempted soccer clubs from taxation through 2011 to assist the clubs in recovering from massive tax debts.¹⁰⁸ In 2007, in preparation for the upcoming World Cup and Olympic Games, Brazil implemented the Growth Acceleration Program, which provides tax relief to infrastructure projects.¹⁰⁹ Also in preparation for the 2014 World Cup, the Brazilian legislature implemented several federal tax exemptions applicable to, among others, FIFA (the organizer of the World Cup) and nonresidents hired to work the World Cup events.¹¹⁰ Brazil’s historical willingness to pass tax laws designed to benefit its sporting leagues and events suggests the potential for further tax related legislation as a tool for recruiting international athletes.

5. Russia

Russia presents an interesting case study on the taxation of nonresident athletes when considering the migration of international athletes to compete in the 2014 Winter Olympic Games and 2018 World Cup, as well as the recent growth of its professional

¹⁰⁸ Appleby, *supra* note 7, at 634.

¹⁰⁹ *Investing in the Country of Soccer*, THE WORLD LAW GROUP, http://www.theworldlawgroup.com/files/file/docs/BRAZIL-WORLD_CUP_IN_BRAZIL_MAY_BRING_INVESTMENT.pdf (last visited Feb. 8, 2014) (infrastructure projects include the construction of airports and toll roads).

¹¹⁰ *Brazil Corporate- Tax Credits and Incentives*, PRICEWATERHOUSECOOPERS, <http://taxsummaries.pwc.com/uk/taxsummaries/wwts.nsf/ID/JDCN-89HRSD> (last updated June 6, 2013). The “World Cup Law” as it is known, has been challenged on constitutional grounds in a case currently sitting before the Brazilian Supreme Court. Poonam Majithia, *Does Brazil’s World Cup Law violate its constitution?*, LAW IN SPORT (Oct. 28, 2013), <http://www.lawinsport.com/blog/poonam-majithia/item/does-brazil-s-world-cup-law-violate-its-constitution>.

hockey league, the Kontinental Hockey League (KHL).¹¹¹ Furthermore, Russia is unique in its taxation of nonresidents athletes, who are taxed at a 17% higher rate than residents, unlike the other nations highlighted in this Article, which generally tax residents at higher rates than nonresidents.¹¹²

a. Residency Status

The determination of whether an individual is a Russian resident for income tax purposes is straightforward under the Russian tax code. An individual will be considered a resident “if he/she is physically present in Russia for 183 or more days during the consecutive 12 month period.”¹¹³ According to the Russian Ministry of Finance, “the 183-day check should be made in relation to the particular calendar year.”¹¹⁴ Individuals who do not reach the 183-day threshold are deemed nonresidents for the purpose of calculating their Russian income tax liability.

b. Taxation of Nonresident Athletes

Russian residents are generally subject to a 13% flat rate tax on their worldwide income.¹¹⁵ In contrast, nonresidents are generally subject to a 30% flat rate tax on Russian-source income.¹¹⁶ All tax on personal service income must be withheld by a

¹¹¹ Many former NHL players have left the NHL to play in the KHL, most notably former all-star Ilya Kovalchuk. Jameson Sempey, *Rankign Former NHL Players Who Left for the KHL in 2013-14*, BLEACHER REPORT (Sep. 8, 2013) <http://bleacherreport.com/articles/1753504-ranking-former-nhl-players-who-left-for-the-khl-in-2013-14/page/1>.

¹¹² For example, as discussed *supra*, Spain taxes Spanish residents up to a 28% higher rate than nonresidents. See *supra* note 87 and accompanying text.

¹¹³ *Tax Ties: Russia*, KPMG (June 1, 2013), <http://www.kpmg.com/global/en/issuesandinsights/articlespublications/taxation-international-executives/russia/pages/income-tax.aspx>.

¹¹⁴ *Id.*

¹¹⁵ *Id.* Several exceptions exist; however, none relate directly to the compensation generally collected by athletes. *Id.*

¹¹⁶ *Id.* Again, there are several exceptions that would be unlikely to impact the taxation of income received by an athlete. See *id.*

taxpayer's employer, and remitted to the Russian finance authorities.¹¹⁷ Because Russia taxes both residents and nonresidents at flat rates on both personal service and royalty income,¹¹⁸ income characterization is not a major concern when determining an athlete's Russian tax liability.

If not made clear by the tax code, the determination of what income is attributable to sources in the Russian Federation and what income is attributable to sources outside the Russian Federation will be determined by the Ministry of Finance of the Russian Federation.¹¹⁹ For nonresidents with income that is attributable in part to both Russian and other foreign sources, if there is no provision for an unequivocal attribution of the income set forth in the code the determination will also be left up to the Ministry of Finance.¹²⁰

Of particular significance to American athletes competing in Russia is the fact that unlike most income tax treaties, the income tax treaty between the United States and the Russian Federation does not include an Artiste and Athlete provision.¹²¹ As a result, American athletes competing in Russia and Russian athletes competing in the U.S. will receive preferential treaty treatment not provided to athletes under most other income tax treaties.¹²² An American athlete who is in Russia for 153 days or less during the tax year and is paid by a non-Russian employer will not be subject to Russian tax on employment income under Article 14 of the treaty.¹²³ Furthermore, provided that certain requirements are met,

¹¹⁷ *Id.*

¹¹⁸ *See id.*

¹¹⁹ *Id.*

¹²⁰ NALOGOVYI KODEKS ROSSIISKOI FEDERATSII [NK RF] [Tax Code] art. 208 ¶ 4 (Russ.), *translated in Tax Code of the Russian Federation*, <http://www.russian-tax-code.com/PartII/Section8/Chapter23.html> (last visited Feb. 11, 2014).

¹²¹ Convention for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income and Capital, U.S.-Russ., Jan. 1, 1994 [hereinafter U.S.-Russ. Income Tax Treaty].

¹²² *See discussion infra* Part I.B.1.

¹²³ U.S.-Russ. Income Tax Treaty, *supra* note 117, at art. 14.

Article 12 provides that royalty income will only be taxed in the athlete's country of residence, and Article 13 provides similar treatment for independent personal services income.¹²⁴

B. Treatment Under an Income Tax Treaty

When considering that most countries tax residents on worldwide income, and tax nonresidents on income sourced to the country, the risk of double taxation for individuals earning income in multiple countries becomes significant. To address the issue of double taxation, income tax treaties have been adopted between many nations.¹²⁵ However, the use of income tax treaties to address double taxation is an imperfect solution. The present regime of income tax treaties lacks uniformity, and features primarily bilateral treaties between individual countries.¹²⁶ In contrast to bilateral treaties, multilateral treaties offer a potential uniform solution to double taxation. While multilateral treaties have not been successfully implemented on a broad scale,¹²⁷ some commentators have argued that such a treaty is the ideal solution to double taxation of international athletes because it would provide uniform treatment of this unique group of taxpayers and simplify allocation determinations.¹²⁸

1. Bilateral Treaties

Although bilateral income tax treaties are the generally accepted method of addressing double taxation, there is not a single model for their formation.¹²⁹ In addition, the treaty network is not

¹²⁴ *Id.* at arts. 12-13.

¹²⁵ Evans, *supra* note 9, at 304.

¹²⁶ *Id.* The result is an incomplete treaty network. *See* discussion *supra* Part I.A.4.b (highlighting the lack of an income tax treaty between the U.S. and Brazil).

¹²⁷ *See id.* at 318.

¹²⁸ *See* Appleby, *supra* note 7, at 643-46.

¹²⁹ Evans, *supra* note 9, at 305 (this contributes to the lack of uniformity in the current treaty network).

comprehensive,¹³⁰ and in the absence of a treaty, the determination of income tax liability will defer to the involved countries' tax codes — increasing the uncertainty caused by the current system.

Due to the inconsistencies in tax treaties currently in use, the Organization for Economic Co-operation and Development (OECD) Model Convention (*hereinafter* Model Convention) provides an ideal starting point for the discussion of bilateral treaties.¹³¹ The Model Convention is used as a guide for negotiating tax treaties by member countries, is used as a reference in negotiations between both member¹³² and non-member¹³³ countries, and has provisions that “are globally recognized and are incorporated into a majority of bilateral tax treaties.”¹³⁴

Taxation of international athletes is governed by several key provisions of the Model Convention; Article 7: “Business Profits,” Article 15: “Income From Employment,” and most significantly, Article 17: “Artistes and Sportsmen.”¹³⁵ Articles 7 and 15 provide for favorable treatment of nonresidents earning income in a Contracting State. Article 7 provides that business profits of a Contracting State resident will only be taxable in the country in which the individual is a resident, unless the individual has a

¹³⁰ Appleby, *supra* note 7, at 607-08.

¹³¹ See Evans, *supra* note 9, at 305. Other model income tax treaties include the U.S. Model Treaty and the United Nations Model Double Taxation Convention between Developed and Developing Countries. United States Model Income Tax Convention, U.S., Nov. 15, 2006; U.N. DEP'T OF INT'L ECON. & SOC. AFFAIRS, U.N. MODEL DOUBLE TAXATION CONVENTION BETWEEN DEVELOPED AND DEVELOPING COUNTRIES, U.N. Doc. ST/ESA/PAD/SER.E/21 (2001).

¹³² Members of the OECD include the U.S., the U.K., and Spain. *Members and Partners*, OECD, <http://www.oecd.org/about/membersandpartners/> (last visited Feb. 1, 2014).

¹³³ Non-member countries include Brazil and Russia. *See id.*

¹³⁴ Evans, *supra* note 9, at 306.

¹³⁵ See Comm. on Fiscal Affairs, Org. for Econ. Co-Operation & Dev., Model Tax Convention on Income and on Capital, (Mar. 1, 1994) [*hereinafter* OECD Model Convention]. *See also*, Evans, *supra* note 9, at 307-11.

“permanent establishment” in the source country,¹³⁶ while under Article 15, employment income is not taxable in the source country if (1) the employee is in the country for 183 days or fewer in any twelve month period “commencing or ending in the fiscal year concerned;” (2) the employee is paid by a nonresident employer; and (3) the payment “is not borne by a permanent establishment which the employer has in the [source country].”¹³⁷

Article 17, “Artistes and Sportsmen,” specifically addresses the taxation of athletes, and eliminates the beneficial treatment provided for by Articles 7 and 15, stating that “[n]otwithstanding the provisions of Articles 7 and 15, income derived by a resident of a Contracting State as . . . a sportsman, from his personal activities as such exercised in the [source country], may be taxed in that [country].”¹³⁸ As drafted by the OECD, the Artistes and Sportsmen provision has a broad reach. “Sportsman” is defined broadly to include participants in traditional athletic events, as well as individuals engaged in other sporting activities, such as racing drivers, and billiards players.¹³⁹ Additionally, the Article’s application is extended to advertising and sponsorship income both directly and indirectly related to an athlete’s performance or appearance in a Contracting State.¹⁴⁰

As a result of the Artistes and Sportsmen provision, an athlete earning income in a Contracting State will be taxed in accordance with that country’s tax code, and the treaty will not restrict taxation.¹⁴¹ This treatment highlights both the important role of tax codes in the calculation of a nonresident athlete’s tax liability, as

¹³⁶ OECD Model Convention, *supra* note 135, at M-22. Permanent establishment is defined by Article 5 as, “a fixed place of business through which the business of an enterprise is wholly or partly carried on.” *Id.* at M-16.

¹³⁷ *Id.* at M-39.

¹³⁸ *Id.* at M-42.

¹³⁹ *Id.* at C(17)-2.

¹⁴⁰ *Id.* at C(17)-3.

¹⁴¹ Evans, *supra* note 9, at 309. One reason for the singling out of athletes for different treatment by the Model Convention is athletes’ ability to earn large amounts of income during a short visit to foreign country. *Id.* at 311.

well as the perceived failure of bilateral tax treaties in regulating the taxation of international athletes.¹⁴² The elimination of double taxation is left up to the country of residence, generally through either the exemption or credit method.¹⁴³ For example, the U.S.-U.K. Income Tax Treaty provides specifically in Article 24 for application of the credit method to eliminate double taxation.¹⁴⁴

2. Multilateral Treaties

Multilateral treaties, as the name suggests, are generally formed among a number of nations. While not the prevalent approach, multilateral income tax treaties serve as an alternative means to address double taxation. The OECD has recognized that while the implementation of a multilateral tax convention would be very difficult, it may be possible for certain groups of member countries to consider a multilateral tax convention to suit their particular purposes.¹⁴⁵ From an athlete's perspective, a multilateral treaty represents an ideal alternative to the current network of bilateral treaties — a multilateral treaty would provide for the elimination of uncertainty caused by the current inconsistent tax treatment of athletes around the world, better information sharing between countries, efficient allocations of athletes' income, and a platform for the elimination of double taxation.¹⁴⁶ However, the

¹⁴² *See id.* at 320-26.

¹⁴³ *Id.* at 309 (“[Under] the exemption method- income that is taxable in the source country is exempted in the country of residence . . . [while under] the credit method- income that is taxable in the source country is subject to tax in the country of residence, but the tax levied by the source country is credited against the tax levied by the country of residence on such income.”).

¹⁴⁴ U.S.-U.K. Income Tax Treaty, *supra* note 8, at art. 24.

¹⁴⁵ OECD Model Convention, *supra* note 135, at I-11. Examples of successfully implemented multilateral treaties include the Nordic Convention on Income and Capital, and the Multilateral Convention on Mutual Administrative Assistance in Tax Matters (MAAT). Evans, *supra* note 9, at 318. MAAT, of which the U.S. is a signatory, provides for the exchange of information and administrative assistance in recovering tax claims between member countries. *Id.*

¹⁴⁶ *See Appleby*, *supra* note 7, at 639-43; Evans *supra* note 8, 320-22, 327-29. Some commentators have suggested that although a multilateral treaty could facilitate the elimination of double taxation, the current prevalence of Artiste

creation and adoption of a multilateral treaty to address the taxation of international athletes would require a significant amount of cooperation between nations around the world. Because of the competing interests of many of these nations, including the collection of revenue through the taxation of high-income athletes and the recruitment of foreign athletes away from rivals, the successful implementation of such a treaty in the near future appears unlikely.

II. Factual Background: The Current Place of Sports in the Global Economic and Social Landscapes

Sports undoubtedly play a major role in modern society. Professional sports are a multi-billion dollar industry,¹⁴⁷ and while game attendance and television revenue figures serve as quantitative evidence of sports' place in society, sports' social and political impact should not be discounted. Especially in the context of events such as the World Cup and the Olympic Games, sports serve as an outlet for nationalism,¹⁴⁸ and countries expend great

and Athlete provisions in bilateral treaties indicates countries are more concerned with retaining their share of foreign athletes income. Evans, *supra* note 9, at 327.

¹⁴⁷ In 2009, the global professional sports industry was estimated to be worth between \$480 and \$620 billion. Patrice Zygband & Hervé Collignon, *The Sports Market*, A.T. KEARNEY (May 2011), http://www.atkearney.com/paper/-/asset_publisher/dVxv4Hz2h8bS/content/the-sports-market/10192#.

¹⁴⁸ See Sheela Lal, *Nationalism, Competition, and Diplomacy: Asia at the 2012 London Olympics: An Interview with Victor Cha*, THE NAT'L BUREAU OF ASIAN RESEARCH (July 24, 2012), <http://www.nbr.org/research/activity.aspx?id=264#.UwEILnl0FnE> ("Nationalism is intense in China, and I believe that if the Chinese are pitted against the Americans in any event, there will be special attention paid to every victory as yet another sign of China's rise.").

amounts of resources to maintain and grow competitive leagues and national teams.¹⁴⁹

The United States and the United Kingdom are currently positioned as global leaders in professional sports. These two nations are home to many of the world's premier professional leagues, and some of the most recognized and respected events in all of sports — attracting elite athletes from around the world.¹⁵⁰ However, the United States and the United Kingdom are certainly not alone, for in recent years, nations such as Spain, Brazil, and Russia have experienced considerable growth in their professional leagues and great success in international competition.¹⁵¹

A. The Place of the United States and the United Kingdom as Global Leaders in Professional Sports

The United States is the pinnacle of professional sports. The U.S. “big four,” consisting of the NFL, NBA, NHL, and MLB, are the premier leagues in the world in each of their respective sports, and draw athletes from around the world. In 2012, the NFL had revenues of \$9.5 billion,¹⁵² MLB revenues reached \$7.5 bil-

¹⁴⁹ For example, the United States Olympic Committee had expenses of \$249 million in 2012, including \$101 million attributable to sports programming. USOC, ANNUAL REPORT (2012).

¹⁵⁰ See, e.g., *supra* notes 2-3 and accompanying text.

¹⁵¹ Spain and Brazil are international soccer powers, winning the 2010 and 2002 World Cups respectively. *World Cup Previous Winners*, TOP END SPORTS, <http://www.topendsports.com/events/worldcupsoccer/winners.htm> (last visited Feb. 4, 2014). Russia took home 15 medals at the 2010 Winter Olympic Games and 30 at the 2012 Summer Olympic Games. *Official Olympic Games Results*, OLYMPIC.ORG, <http://www.olympic.org/olympic-results> (last visited Feb. 4, 2014).

¹⁵² Daniel Kaplan, *The Road to \$25 Billion*, SPORTS BUSINESS DAILY, Jan. 28, 2013, at 20, available at <http://www.sportsbusinessdaily.com/Journal/Issues/2013/01/28/In-Depth/NFL-revenue-streams.aspx>.

lion,¹⁵³ and NBA revenues totaled \$5 billion.¹⁵⁴ In addition to its leagues, the United States also plays host to many preeminent events; including golf's U.S. Open and Masters tournaments, tennis' U.S. Open, and many mixed martial arts and boxing matches, as well as international events in a variety of sports, including beach volleyball,¹⁵⁵ track and field,¹⁵⁶ and skiing and snowboarding.¹⁵⁷

The United Kingdom, like the United States, is home to many highly successful leagues and events. From a revenue standpoint, the EPL is the most successful professional soccer league in the world, recording revenues of €2.9 billion, or approximately \$4 billion, in 2011-12.¹⁵⁸ The United Kingdom also features some of the best cricket and rugby leagues in the world, and plays host to golf and tennis majors — the British Open,¹⁵⁹ and Wimbledon. In 2012, the United Kingdom was at the center of the international athletic stage as London hosted the Summer Olympic Games.

While the United States and the United Kingdom each have had significant success in recent international competitions, what has established these countries as global leaders in professional sports is the combined financial success of their respective leagues

¹⁵³ Matt Snyder, *Report: MLB revenues in 2012 were \$7.5 billion*, CBS SPORTS (Dec. 9, 2012, 3:42 PM), <http://www.cbssports.com/mlb/eye-on-baseball/21335810/report-mlb-revenues-in-2012-were-75-billion>.

¹⁵⁴ *Stern Estimates Revenue Up 20 Percent to \$5B*, NBA.COM (Nov. 13, 2012, 6:48 PM), <http://www.nba.com/2012/news/11/13/stern-nba-revenue.ap/>.

¹⁵⁵ *Competition Calendar*, FIVB.ORG, <http://www.fivb.org/EN/BeachVolleyball/calendar.asp> (last visited Feb. 4, 2014).

¹⁵⁶ *Competitions*, IAAF.ORG, <http://www.iaaf.org/competition> (last visited Feb. 4, 2014).

¹⁵⁷ *Calendar*, FIS.COM, <http://data.fis-ski.com/global-links/calendar.html> (last visited Feb. 4, 2014).

¹⁵⁸ *Review of Football Finance*, *supra* note 52, at 6.

¹⁵⁹ The 2013 British Open, like the 2013 U.S. Open, featured an \$8 million purse- among the largest in professional golf. *British Open Prize Money*, GOLF AND COURSE (July 21, 2013) <http://www.golfandcourse.com/news/british-open-prize-money>.

and events, and their ability to attract athletes from around the world to compete in these leagues and events. The attraction of international athletic talent to the United States and the United Kingdom has in many cases allowed the rich to get richer, and has enabled the countries' leagues and events to continue to grow with minimal competition for the world's top-level talent in their respective sports.

B. Up-and-Coming Countries in the Landscape of Professional Sports

Highly successful leagues and sporting events are not exclusive to the United States and the United Kingdom. While the United States and the United Kingdom may be considered established leaders as a result of the sustained success and economic prosperity of their leagues and events, a shift is taking place, beginning with countries such as Spain, Brazil, and Russia. During the 2011-12 season, the top Spanish soccer league, La Liga, recorded revenues of €1.8 billion, third highest among European soccer leagues.¹⁶⁰ In addition, Spain's top professional basketball league, Liga ACB, is among the most competitive in the world.¹⁶¹ In 2012, Spanish basketball leagues imported 428 foreign players, the most of any country.¹⁶²

Brazil and Russia present interesting examples of up-and-coming nations in the professional sporting landscape. Together they will host the next Winter Olympic Games (Sochi 2014), the next Summer Olympic Games (Rio 2016), and the next two World Cups (2014 and 2018). These major international events will contribute to the development of facilities and venues, and bring Russia and Brazil to the forefront of the world sporting stage. Considering the ability of leagues and events in Brazil and Russia to compete for talent with leagues and events located in more established sporting nations, Brazil's top soccer league, Série A, is

¹⁶⁰ *Review of Football Finance*, *supra* note 52, at 6.

¹⁶¹ FIBA MIGRATION REPORT, *supra* note 82, at 16.

¹⁶² *Id.* at 6.

currently ranked by the International Federation of Football History & Statistics as the fifth strongest league in the world, and is home to five of the world's top clubs.¹⁶³ Meanwhile, the upstart Russian KHL serves as an intriguing example of a league that has successfully attracted talent away from an established American league such as the NHL.¹⁶⁴

C. The Race to the Bottom Theory

Professional athletes are highly paid,¹⁶⁵ and generally fall in the top tax brackets of the countries in which they earn income. As a result, the income tax implications of professional athletes' decisions about where to compete can be significant. Based on the comparable economic size of leagues such as the NHL and KHL, or the EPL and La Liga,¹⁶⁶ it is unlikely that professional teams from countries outside of the United States and the United Kingdom will be able to offer salaries comparable to those offered by teams in more established nations to more than perhaps a handful of players. However, the income tax regimes of these up-and-coming countries represent a potential tool for leveling the playing field to some extent.

The use of tax laws as a recruiting tool to support the import of athletic talent creates the potential for what can be described as a "race to the bottom."¹⁶⁷ In the context of taxing nonresident athletes, a race to the bottom theory would suggest that if one country implements favorable income tax provisions that

¹⁶³ *The Strongest National League of the World*, *supra* note 100; *Club World Ranking*, IFFHS (Jan. 8, 2014) <http://www.iffhs.de/club-world-ranking/>.

¹⁶⁴ Sempey, *supra* note 111.

¹⁶⁵ In 2013, the average yearly salary of athletes competing in U.S. leagues and tours ranged from \$5.2 million for NBA players, to \$162,000 for women's golf (LPGA). *Professional Sport Average Salary*, STATISTIC BRAIN, <http://www.statisticbrain.com/professional-sports-average-salary-revenue-salary-cap/> (last updated July 28, 2013).

¹⁶⁶ For example, the EPL had revenues €1 billion greater than La Liga in 2011-12. *Review of Football Finance*, *supra* note 52, at 6.

¹⁶⁷ Appleby, *supra* note 7, at 641.

allow its teams to provide nonresident athletes with effectively greater compensation, other countries will follow suit in an effort to remain competitive in the global market for athletic talent.

The potential impact of a particularly favorable tax scheme on teams' ability to recruit and sign talent in a competitive international market may be best illustrated through an analogy to the competition for free agents in American professional leagues involving teams located in states without a state income tax.¹⁶⁸ For example, in 2010, despite the NBA's salary cap, the Miami Heat were able to sign three of the top players in the league; LeBron James, Dwayne Wade, and Chris Bosh.¹⁶⁹ Florida does not have a state income tax, and as a result the Heat were essentially able to offer James, Wade, and Bosh greater compensation than other teams, such as Los Angeles and Chicago, who were competing for the players' services, while still remaining under the league's salary cap.¹⁷⁰ The contracts offered by the Heat to James, Wade, and Bosh were comparatively more valuable to the players than identical or even higher offers from teams in states with state income taxes, providing the Heat with a significant advantage in the recruitment of these premier players.¹⁷¹

III. Issues Presented by the Tax Treatment of Nonresident Athletes in the United States and the United Kingdom

The tax regimes of the United States and the United Kingdom have been the recent subject of criticism by several high-

¹⁶⁸ See generally, Mitchell L. Engler, *The Untaxed King of South Beach: LeBron James and the NBA Salary Cap* 48 *San Diego L. Rev.* 601 (2011) (discussing the competitive impact of salary caps on professional sports leagues).

¹⁶⁹ *Heat Stars Sign 6-Year Deals*, ESPN (July 10, 2010), <http://sports.espn.go.com/nba/news/story?id=5368003>.

¹⁷⁰ See Engler, *supra* note 168, at 602-03.

¹⁷¹ This concept is not exclusive to team sports, and can also be applied to individual sports where individual events compete to add elite athletes to their fields.

profile athletes. Jamaican sprinter Usain Bolt has been critical of the United Kingdom's taxation of nonresident athletes, specifically its treatment of endorsement income, and has gone so far as to boycott competitions held in the United Kingdom.¹⁷² Spanish tennis star Rafael Nadal has also skipped events in the United Kingdom for tax reasons.¹⁷³ In November 2013, Filipino boxer Manny Pacquiao fought in Macau, China, his first fight outside of the United States since 2006.¹⁷⁴ Tax implications played a large role in Pacquiao's decision to fight in China,¹⁷⁵ where nonresident athletes are subject to significantly lower tax rates on athletic performance income.¹⁷⁶ These examples highlight athletes' awareness of the income tax implications of their decisions regarding where to compete, as well as their willingness to avoid countries they feel do not provide them with favorable tax treatment. Furthermore, the Pacquiao example emphasizes the role of emerging markets, such as China, in the international movement of athletic talent, and the role those markets play in providing alternative venues for athletes who have traditionally competed in the United States and the United Kingdom.

The criticisms of athletes such as Bolt, Nadal, and Pacquiao are not without merit. The United States and the United Kingdom generally tax nonresident athletes at higher rates than other countries.¹⁷⁷ Other aspects of the U.S. and the U.K. tax systems that

¹⁷² See *Usain Bolt Tax Bill: Why Sports Stars Won't Compete in Britain*, *supra* note 10.

¹⁷³ *Id.*

¹⁷⁴ Matt Blumenfeld, *Pacquiao Takes Fight in Macau, U.S. Federal Income Tax Rate Proves Too High*, AMERICANS FOR TAX REFORM (May 7, 2013, 11:01 AM) <http://www.atr.org/pacquiao-takes-fight-macau-u-s-a7603>.

¹⁷⁵ *Id.*

¹⁷⁶ See *id.* See also, Appleby, *supra* note 7, at 638.

¹⁷⁷ Nonresident athletes' U.S.-source income that is effectively connected to a U.S. trade or business is subject to a maximum progressive tax rate of 39.6%. I.R.C. § 1 (2013); see discussion *supra* Part I.A.1.b. The U.K. taxes nonresident athletes' U.K.-source income at a maximum progressive rate of 45%. See discussion *supra* Part I.A.2.b. Meanwhile, Spain taxes nonresident athletes at a

may create challenges for foreign athletes include comparatively complicated residency status determinations,¹⁷⁸ and in the United States, a lack of clarity in the characterization of endorsement income and the sourcing of royalty payments.¹⁷⁹ Additionally, tax authorities in both countries have specifically targeted nonresident athletes as part of strategies to increase tax revenue.¹⁸⁰

In 2006, in an effort to close the federal tax gap created by taxpayer noncompliance,¹⁸¹ the U.S. Department of Treasury issued a Comprehensive Strategy for Reducing the Tax Gap,¹⁸² which sought greater compliance through improved collection efficiency, and the sharing of information with foreign tax authorities to reduce international tax avoidance.¹⁸³ As part of this strategy, the IRS specifically targeted foreign athletes and entertainers through the Project on Foreign Athletes and Entertainers.¹⁸⁴ The IRS has continued to target foreign athletes through 2013, and has not indicated an intention to relax its efforts.¹⁸⁵ While the IRS has a justifiable interest in obtaining tax compliance from nonresident athletes,¹⁸⁶ the perception among many athletes is that the IRS unfairly singles them out to make examples of them.¹⁸⁷ In the

flat rate of 30%, Brazil at progressive rates of up to 27.5%, and Russia at a flat rate of 30%. See discussion *supra* Parts I.A.3.b, I.A.4.b, I.A.5.b.

¹⁷⁸ See discussion *supra* Parts I.A.1.a, I.A.2.a.

¹⁷⁹ See discussion *supra* Part I.A.1.c.

¹⁸⁰ See Taylor, *supra* note 15, at 391-95; The Income Tax (Entertainers and Sportsmen) Regulations, *supra* note 69.

¹⁸¹ See Taylor, *supra* note 15, at 391-92.

¹⁸² U.S. DEP'T OF TREASURY, A COMPREHENSIVE STRATEGY FOR REDUCING THE TAX GAP (2006).

¹⁸³ See *id.*

¹⁸⁴ See Taylor, *supra* note 15, at 396.

¹⁸⁵ *IRS Focus on Foreign Athletes and Entertainers*, IRS.GOV, <http://www.irs.gov/Individuals/International-Taxpayers/IRS-Focus-on-Foreign-Athletes-and-Entertainers> (last updated Sep. 3, 2013).

¹⁸⁶ See Taylor, *supra* note 15, at 398 (suggesting the IRS targets athletes "because they get the most bang for their buck in terms of publicity," and furthermore that nonresident athletes enjoy benefits and services from the countries in which they compete, and as a result should pay their fair share of taxes).

¹⁸⁷ See *id.* at 401.

United Kingdom, athletes have similarly been singled out for differential treatment under the 1987 Amendment, which subjects nonresident athletes and entertainers to a 20% withholding tax not applied to other nonresidents.¹⁸⁸ Similarly to the IRS's targeting of nonresident athletes through the Project on Foreign Athletes and Entertainers, the United Kingdom similarly targets nonresident athletes through the HMRC Foreign Entertainers Unit (FEU), a unit that tracks and manages the taxation of athletes and entertainers.¹⁸⁹

As a result of their treatment of nonresident athletes, a major issue facing the United States and the United Kingdom is athletes' recognition of this potentially unfavorable tax treatment, and willingness to consider competing in alternative locations. In turn, this willingness has created room for up-and-coming nations to recruit athletic talent away from the established leaders. However, the risk presented by athletes choosing to avoid competing in the United States and the United Kingdom is still largely speculative. No mass exodus of athletes has occurred, and the strength and reputation of the leagues and events in the United States and the United Kingdom, along with the size of the available salaries and purses, will continue to draw elite athletes, regardless of the income tax implications.

A. The Established Leaders' Recognition of Issues Presented by Their Current Tax Systems

In recent years, both the United States and the United Kingdom have taken actions that suggest recognition of nonresident athletes' negative perception of their respective tax systems. In the United States, the U.S. Tax Court has begun to provide some clarity as to the process under which endorsement income will be characterized,¹⁹⁰ and has repeatedly denied the IRS's attempts to

¹⁸⁸ The Income Tax (Entertainers and Sportsmen) Regulations, *supra* note 69.

¹⁸⁹ *Foreign Entertainers Unit*, HM REVENUE & CUSTOMS, <http://www.hmrc.gov.uk/feu/feu.htm> (last visited Feb. 10, 2014).

¹⁹⁰ *See Garcia v. Commissioner*, 140 T.C. No. 6, at *8-11 (2013).

characterize nonresident athletes' U.S.-source endorsement income as entirely attributable to personal services.¹⁹¹ Meanwhile, in 2012, during the Summer Olympic Games in London, the United Kingdom amended its tax code to exempt nonresident athletes from U.K. taxation while competing in the Games.¹⁹² Although not comprehensive solutions to the issues discussed above, these actions taken by the United States and the United Kingdom serve as indicators of how issues regarding the taxation of nonresident athletes may be addressed in the future by both countries.

1. The U.S. Tax Court's Treatment of Endorsement Income in *Garcia v. Commissioner*

Two major criticisms of the U.S. tax system as it is applied to nonresident athletes, the IRS's targeting of foreign athletes, and the lack of clarity provided in regards to the characterization of endorsement income, have been addressed in recent cases before the U.S. Tax Court. In 2011, and 2013 respectively, professional golfers Retief Goosen (a South African resident) and Sergio Garcia (a Swiss resident), petitioned the Tax Court for redeterminations of income tax deficiencies arising from income received through endorsement deals with the equipment company TaylorMade.¹⁹³

In both cases, the IRS took the position that the taxpayers' endorsement income should be characterized as entirely personal service income¹⁹⁴ subject to the applicable progressive rates established by I.R.C. § 1,¹⁹⁵ as opposed to royalty income, which is

¹⁹¹ Seth W. Stern, *The IRS' Double Bogey: Goosen v. Commissioner Remains a Fairway to Characterize Endorsement Income for Nonresident Athletes in Garcia v. Commissioner*, 20 Jeffrey S. Moorad Sports L.J. 605, 628 (2013).

¹⁹² See *London 2012 Accredited Individuals: Income Tax Exemptions*, HM REVENUE & CUSTOMS, <http://www.hmrc.gov.uk/2012games/tax-exemptions/accredited-individuals.htm> (last visited Jan. 14, 2014).

¹⁹³ See *Goosen v. Commissioner*, 136 T.C. 547, 547 (2011); *Garcia*, 140 T.C. at *1.

¹⁹⁴ *Goosen*, 136 T.C. at 563, *Garcia*, 140 T.C. at *11.

¹⁹⁵ I.R.C. § 1 (2013) (the top rate is 39.6% for income over \$250,000).

subject to a 30% flat rate tax.¹⁹⁶ In *Goosen*, the Tax Court held Goosen's endorsement income should be characterized as 50% personal service income and 50% royalty income,¹⁹⁷ while in *Garcia*, the Tax Court held Garcia's endorsement income should be characterized as 35% personal service income and 65% royalty income.¹⁹⁸ Although some confusion regarding the characterization of endorsement income still exists as a result of the Tax Court's differing allocations in *Goosen* and *Garcia*,¹⁹⁹ nonresident athletes earning endorsement income in the United States won a substantial victory, as the IRS's position that endorsement income should be characterized entirely as personal service income was rejected by the Tax Court in both cases.²⁰⁰

In regards to the characterization of endorsement income, the Tax Court distinguished *Garcia* from *Goosen*, focusing on Garcia's position as a "Global Icon" for TaylorMade, whereas Goosen was considered only a "brand ambassador."²⁰¹ While commentators have suggested that the Tax Court's characterization of Garcia's endorsement income represents an increasing willingness to characterize endorsement income as royalty income,²⁰² based on the differentiation of Goosen and Garcia's endorsement contracts, such favorable characterization may only be extended to the most elite, recognizable athletes in the future. However, based on the *Garcia* Court's analysis of *Goosen* in its decision, nonresident athletes should have significantly more guidance in the future regarding to the characterization of their endorsement income.

¹⁹⁶ See I.R.C. § 871(a) (2013); see also *supra* note 45.

¹⁹⁷ *Goosen*, 136 T.C. at 563.

¹⁹⁸ *Garcia*, 140 T.C. at *11

¹⁹⁹ *Goosen*, 136 T.C. at 563-64; *Garcia*, 140 T.C. at 151-52.

²⁰⁰ See *Goosen*, 136 T.C. at 563-64; *Garcia*, 140 T.C. at 151-52; see also Stern, *supra* note 191, at 628.

²⁰¹ *Garcia*, 140 T.C. at 154.

²⁰² Stern, *supra* note 191, at 628.

2. The U.K. Olympic Tax Amendment

As the 2012 Summer Games came to London, the United Kingdom addressed the concerns of athletes such as Usain Bolt by exempting nonresident athletes competing in the Games from paying U.K. income tax.²⁰³ The exemption provided by the Amendment, promulgated under the authority of the 2006 Finance Act,²⁰⁴ extended to all competitors in both the Olympic and Paralympic Games, and covered “any financial or other rewards received . . . as a result of . . . performance at the Games . . .,” as well as certain endorsement income.²⁰⁵ Although temporary,²⁰⁶ the United Kingdom’s specific tax exemption of nonresident athletes suggests an awareness of the strong criticisms of athletes such as Bolt, and an understanding of the impact of its tax code on such individuals, as well as a willingness to amend its tax system to promote the flow of elite athletic talent into the United Kingdom for major sporting events.

Some commentators have questioned the actual impact of the Olympic Tax Amendment because it would seem unlikely that an athlete would miss an event like the Olympics over a disagreement on tax policy.²⁰⁷ However, the purpose of the Amendment went well beyond the appeasement of individual foreign athletes.²⁰⁸ The tax exemptions implemented by the Amendment

²⁰³ *London 2012 Accredited Individuals: Income Tax Exemptions*, *supra* note 192.

²⁰⁴ Finance Act, 2006, c. 6 (U.K.).

²⁰⁵ *Additional Information For Non-UK Resident Competitors at the 2012 Games*, HM REVENUE & CUSTOMS, <http://www.hmrc.gov.uk/2012games/tax-exemptions/competitors.htm> (last visited Feb. 17, 2014).

²⁰⁶ The exemption period ran from March 30, 2012 to November 8, 2012.

London 2012 Accredited Individuals: Income Tax Exemptions, *supra* note 192.

²⁰⁷ See Stern, *supra* note 191, at 628.

²⁰⁸ See *Accredited Individuals and 2012 Partner Workers: Business Profits Exemption*, HM REVENUE & CUSTOMS, <http://www.hmrc.gov.uk/2012games/tax-exemptions/bus-profits-exemption.htm> (last visited Feb. 18, 2014) (providing a tax exemption for certain non-resident companies that engage in Games-related activities).

extended to the Game's organizers and sponsors as well.²⁰⁹ Furthermore, the United Kingdom has a history of sports related income tax exemptions, including an exemption for soccer players competing in the 2011 UEFA Champions League Final — a concession to UEFA, the game's organizer, in order to have the game played in London's Wembley Stadium.²¹⁰ This may suggest that even more so than the athletes themselves, organizers of international sporting events serve as a catalyst for the amendment of countries' tax laws. In the future, if a country like the United Kingdom wants to host events such as the Olympic Games or the World Cup it will have to be willing to concede to more favorable tax treatment of athletes, or lose the opportunity to a nation that will.

IV. Tax Treatment of Athletes by Up-and-Coming Sporting Nations - A Tool for Recruiting Athletic Talent

As previously discussed, the unfavorable tax treatment of athletes by the United States and the United Kingdom, both actual and perceived, has provided an opportunity for up-and-coming nations to establish a competitive advantage in the recruitment of international athletic talent.²¹¹ As illustrated by superstar athletes such as Manny Pacquiao, Usain Bolt, and Rafael Nadal, athletes are aware of the income tax implications of their competition schedules, and are willing to take action to avoid unfavorable jurisdictions. While countries' tax regimes serve a far broader purpose than the recruitment of athletes, that recognition should not downplay the potential significance the regimes have on the movement of athletic talent around the world.

²⁰⁹ See Finance Act, 2006, c. 6 (U.K.).

²¹⁰ Lee Boyce, *Olympic Stars Face Tax Sting in the Tail from London 2012*, MAIL ONLINE (June 28, 2011), <http://www.thisismoney.co.uk/money/news/article-2009104/Olympics-stars-face-taxed-promotional-work-London-2012.html>.

²¹¹ See discussion *supra* Part III.

Spain's Beckham Law serves as the principal example of a country using its tax laws to assist its sporting leagues in recruiting athletes.²¹² This amendment to the Spanish tax code has directly improved the ability of Spanish teams to recruit foreign players by providing certain new Spanish residents the opportunity to elect the 24% flat rate tax applied to nonresidents, as opposed to the graduated rates of up to 52% generally applied to residents.²¹³ Research conducted by the National Bureau of Economic Research (NBER) indicates that after passing the Beckham Law, Spanish soccer clubs experienced a sharp influx of "top-quality" foreign players.²¹⁴

A second example of a country's tax reform encouraging the movement of athletic talent into the country is Denmark's 1992 "Tax Scheme for Foreign Researchers and Key Employees."²¹⁵ Under this tax scheme, "foreign researchers and high-income foreigners in all other professions" are taxed at a flat rate of 25% as opposed to Denmark's progressive tax system with a top rate of over 60%.²¹⁶ NBER research established that like in Spain after the passing of the Beckham Law, migration of top-quality soccer players into Denmark also increased following the implementation of this reform — further quantitative evidence of tax reform's

²¹² See Klevin, *supra* note 83, at 17.

²¹³ Appleby, *supra* note 7, at 631 (the favorable treatment provided by the Beckham Law is applied the year of the taxpayer's move and the following five years).

²¹⁴ Klevin, *supra* note 83, at 17-18, fig. 2 (top-quality players are defined as players having played at least once over the career in the national team of [their] home country); see *Spanish Income Tax Rates 2012 to 2014*, *supra* note 87 (with the increases in the graduated rates applied to Spanish residents for the 2012-2014 tax years the favorable treatment of the Beckham Law will be magnified).

²¹⁵ See Klevin, *supra* note 83, at 19.

²¹⁶ *Id.* To qualify for the preferential treatment an individual must not have been tax liable for the three years prior, and earn over 765,600 Danish kroner (€103,000) annually. *Id.* Preferential treatment is limited to a period of 36 months. *Id.*

potential as a driver behind the international movement of athletic talent.²¹⁷

Even absent specific tax reform, tax regimes that provide favorable treatment to international athletes may similarly impact athletes' decisions regarding where to compete. Given the mobility and earning capacity of many athletes it is logical that, if provided with a choice, such athletes will choose to compete in countries that apply lower tax rates. The fact that athletes in many sports have relatively short careers supports the theory that athletes are motivated to maximize their earnings, and will be sensitive to the tax implications of their travel schedules. Furthermore, the growth of professional sports in up-and-coming countries such as Brazil, China, Spain, and Russia has provided athletes with a greater number of alternatives when planning their competition schedules. When comparing the rates applied to nonresidents by these countries with the rates applied by the United States and the United Kingdom, the potential for savings becomes clear. For example, Brazil applies a flat rate of 25% to nonresidents,²¹⁸ compared to the top progressive rates in the United States and the United Kingdom of 39.6% and 45% respectively.²¹⁹ As athletes continue to receive greater levels of compensation the impact of this difference in tax rates will be multiplied, improving the ability of countries such as Brazil to recruit elite athletes away from the established leaders.

V. The Future of Taxation of International Athletes

The creation of a system for the taxation of international athletes represents a balancing of interests between the athletes and the countries in which the athletes are competing and earning income. From the countries' perspectives, athletes represent a

²¹⁷ See *id.* at 19-21.

²¹⁸ Appleby, *supra* note 7, at 635.

²¹⁹ I.R.C. § 1(a)-(d) (2013); *Income Tax Rates and Allowances*, HM REVENUE & CUSTOMS, <http://www.hmrc.gov.uk/rates/it.htm> (last visited Feb. 1, 2014).

significant source of tax revenue, and a failure to maintain athlete compliance with the countries' tax laws may result in tax evasion among these high-earning individuals.²²⁰ Athletes enjoy benefits, services, and significant economic opportunities from the countries in which they compete; and from the countries' perspectives it is only right that athletes pay for their fair share of those benefits and opportunities.²²¹ On the other hand, athletes have a limited window of high earning potential, and want to take home as much of their earnings as possible, as well as to avoid any potential double taxation or differential tax treatment.

Taxation of international athletes presents a unique challenge because of the highly transitive nature of many athletes,²²² and the differences in the income tax regimes and treaties employed by countries around the world.²²³ Generally speaking, income tax is collected primarily for the creation of revenue, and encouraging the flow of athletic talent into a country is not a key function of any nation's tax system. Based on this Article's review of the income tax systems of both established leaders and up-and-coming nations in the international sporting landscape, countries are seemingly more likely to target athletes to ensure tax compliance because of their position as high-income earners than to provide favorable treatment to attract athletes to the countries' leagues and events.²²⁴ As a result, an all-out race to the bottom among countries in terms of providing foreign athletes with favor-

²²⁰ See Taylor, *supra* note 15, at 397. In 2008, race car driver Helio Castroneves was indicted on charges relating to tax evasion in the U.S., "IRS Commissioner Doug Shulman commented on the Castroneves situation, stating, '[t]his case sends a clear message that the IRS is committed to vigorously enforcing the tax laws and stopping offshore tax evasion.'" *Id.*

²²¹ *Id.* at 398.

²²² See *supra* note 1 (discussing the countries in which golfer Tiger Woods, and tennis star Novak Djokovic competed in during 2013).

²²³ See discussion *supra* Part I.A.

²²⁴ Spain's Beckham Law appears to be the major exception to this general trend. However, this law has been amended, and the beneficial treatment scaled back, in recent years. See Klevin, *supra* note 83, at 17; discussion *supra* Part I.A.3.b.

able income tax treatment as a recruiting tool is unlikely. However, because of international athletes' awareness of the income tax implications of their decisions about where to compete, specific amendments to a country's tax code and income tax treaties with foreign nations that provide favorable treatment to nonresident athletes will still serve as a valuable and effective recruiting tool for countries, such as Spain and Denmark,²²⁵ who are willing to forego some tax revenue. Even absent specific amendments designed to benefit nonresident athletes, the existing tax treatment of international athletes by both the established leaders and up-and-coming nations will continue to serve as a key driver behind the international movement of athletic talent.

Looking to the future, income tax treatment will likely impact the international movement of athletes in a number of specific ways. While much of this Article has discussed countries' tax treatment of nonresident athletes, team sport athletes such as hockey and soccer players may, depending on the length of their season, qualify as residents of the country in which they compete.²²⁶ As a result, a league like the KHL will have a comparative advantage over the more established NHL in recruiting players when considering Russia's 13% flat rate tax on the income of Russian tax residents²²⁷ in comparison to the United States' top progressive rate of 39.6%.²²⁸ For example, in 2013, hockey star Ilya Kovalchuk stood to earn \$46 million over the next four years of his contract with the NHL's New Jersey Devils. Instead, Kovalchuk

²²⁵ See discussion *supra* Part IV (highlighting Spain's Beckham Law and Denmark's Tax Scheme for Foreign Researchers and Key Employees).

²²⁶ For example, the NHL season runs from October through April, and the KHL season runs from September to March. *2013-2014 Regular Season*, NHL.COM, <http://www.nhl.com/ice/schedulebyseason.htm?navid=nav-sch-sea> (last visited Feb. 12, 2014); *Scores and Schedules*, KONTINENTAL HOCKEY LEAGUE, <http://en.khl.ru/calendar/244/00/> (last visited Feb. 12, 2014). As a result, players in both leagues would be deemed residents of the U.S. and Russia respectively for income tax purposes.

²²⁷ *Tax Ties: Russia*, *supra* note 113.

²²⁸ 26 U.S.C.A. § 1 (2014).

opted to retire from the NHL, and sign with the KHL's SKA St. Petersburg, where to match his after-tax earnings on the foregone remainder of his NHL contract he would have to sign a four-year contract at only \$6.6 million per year with the Russian club.²²⁹

Conversely, as much of this Article has discussed, non-team-sport athletes, such as golfers and tennis players, when considering the income tax implications of their competition schedules, will be drawn to those countries that provide the most favorable tax treatment to nonresidents. Non-team-sport athletes have significantly more say over their schedules, and are not tied to a league in a single country for an entire season; as a result, they are likely to compete in multiple countries throughout the course of a tax year, and will likely be classified as nonresidents by those countries. Boxer Manny Pacquiao's decision to fight in China instead of the United States suggests that boxers and mixed martial arts (MMA) fighters are some of the athletes most likely to consider taxes when scheduling their events.²³⁰ A trend moving forward may be for these fights to be scheduled outside of the traditional venues of Las Vegas and Atlantic City. The Ultimate Fighting Championship (UFC), the world's top MMA organization, has already scheduled 2014 events in Jaragua, Brazil, and Macao, China.²³¹

Another important consideration moving into the future is the impact of third parties such as event sponsors, event organizers, and international sporting federations on countries' tax treatment of foreign athletes. These third parties serve as an independent

²²⁹ Mike Sielski, *For Kovalchuk, a Tax Break Leaving New Jersey for Russia*, WALL ST. J. (July 15, 2013 6:54 PM), <http://online.wsj.com/news/articles/SB10001424127887323394504578607984088103500>.

²³⁰ The fact that boxing and MMA matches require a smaller number of athletes than many other sports makes them highly mobile, increasing the athlete's ability to be selective of the countries in which the compete.

²³¹ *Events*, UFC.COM, <http://www.ufc.com/schedule/event> (last visited Feb. 12, 2014).

source of pressure on countries to provide favorable tax treatment to athletes beyond the existing competition between nations for athletic talent. The trickle down economic benefits available to a country hosting a major sporting event are often significant,²³² and established leaders such as the United Kingdom have already conceded to the pressures placed on potential host nations by event organizers, as seen by the 2012 Olympic Tax Amendment²³³ and the exemption from income taxation of soccer players competing in the 2011 UEFA Champions League Final.²³⁴ Brazil's "World Cup Law"²³⁵ provides further evidence of the impact of event organizers and sporting federations on countries' policy making, and suggests that even if countries will not amend their tax codes to compete directly with each other, they will amend their tax codes or provide tax exemptions to satisfy these third parties who will serve a significant role in shaping the international taxation of athletes in the future.

Finally, while outside the scope of this Article, income tax treatment of both resident and nonresident athletes may play a significant role in the potential expansion of the "big four" American leagues outside of the United States and Canada.²³⁶ Depending on the income tax regimes of the countries selected for expansion, the expanding leagues could be forced to adjust the

²³² Andrew K. Rose & Mark M. Spiegel, *The Olympic Effect*, 121 THE ECON. J. 652, 675 (2011) (suggesting that countries that host the Olympic Games experience a significant permanent increase in trade).

²³³ Finance Act, 2006, c. 6 (U.K.); London 2012 Accredited Individuals: Income Tax Exemptions, *supra* note 192.

²³⁴ Boyce, *supra* note 210.

²³⁵ See *supra* note 110 and accompanying text.

²³⁶ Both NFL commissioner Roger Goodell, and NBA commissioner David Stern have expressed optimism that their respective leagues will expand into Europe in the future. Will Brinson, *Roger Goodell on LA or London team first: 'I want both'*, CBS SPORTS (Oct. 26, 2013), <http://www.cbssports.com/nfl/eye-on-football/24142624/roger-goodell-on-la-or-london-nfl-team-first-i-want-both>; Eric Freeman, *David Stern says there will be NBA teams in Europe in 20 years, 'for sure'*, YAHOO! SPORTS (Jan. 14, 2013), <http://sports.yahoo.com/blogs/nba-ball-dont-lic/david-stern-says-nba-teams-europe-20-years-160341699--nba.html>.

salary caps of foreign-based teams, or take other preventive measures to avoid the creation of a competitive advantage or disadvantage for new foreign based teams.²³⁷ American leagues expanding abroad may also play a role similar to major event organizers and use their economic power to dictate changes to the tax systems of the countries in which they choose to expand.

VI. Recommendations

As highlighted by this Article, individual countries take very different approaches to the taxation of international athletes — a highly transient, highly compensated group of taxpayers. As a result of the differences in countries' tax regimes and the objectives of those regimes, recommendations for an improved system of taxing foreign athletes are highly dependent on the perspective of the country being considered.

A. Relaxed Tax Treatment of Nonresident Athletes

For up-and-coming sporting nations, amended tax laws providing for relaxed or preferential treatment of nonresident athletes represent one strategy for attracting international athletic talent away from the established leaders. However, the implementation of such a system requires a balancing of interests, and potential consequences include foregone tax revenue, and unrest among other taxpayers who may consider the amendments discriminatory.²³⁸ Additionally, countries such as Brazil and Russia that already have comparably low tax rates may receive little to no benefit by amending their tax regimes to provide even more favorable treatment to certain individuals. Furthermore, although taxation of nonresident athletes serves as a driver behind the international movement of athletic talent, even the most favorable tax regime

²³⁷ See generally Engler, *supra* note 168.

²³⁸ See Majithia, *supra* note 110 (discussing the challenge of Brazil's "World Cup Law" on constitutional grounds).

may not be enough to encourage many athletes to leave the established leaders in the professional sporting landscape.

Conversely, as illustrated by Spain and Denmark, amendments to a country's tax regime that provide favorable treatment to nonresident athletes and other high-earning individuals are statistically proven to be an effective tool for recruiting athletes to a country's leagues and events.²³⁹ In the case of both Spain and Denmark, empirical evidence indicated an increase in top-level foreign athletes competing in the country's leagues following the passage of such amendments.²⁴⁰ In recent years, athletes who object to the tax systems employed by the United States and the United Kingdom have begun to turn to other nations, creating a window of opportunity for countries such as Spain who are willing to amend their treatment of foreign athletes. While such amendments may result in forfeited revenue, favorable tax treatment of athletes may represent the best way for up-and-coming nations to gain a competitive advantage over the established leaders in the arena of professional sports.

From the perspective of the established leaders, the United States and the United Kingdom, there is minimal incentive to provide nonresident athletes with preferred tax treatment. The reputation of these countries' leagues and events, along with the substantial salaries and prize money available to athletes competing in them, will continue to attract the world's best athletes regardless of the applicable tax treatment. The large number of foreign athletes currently competing in leagues such as the NBA, NHL, and EPL serve as evidence that the current tax regimes of the United States and the United Kingdom generally do not cause athletes to compete elsewhere. However, perhaps more so among individual sport athletes, the negative perception of the tax systems in the United States and the United Kingdom have in certain situations caused high profile athletes to compete in other coun-

²³⁹ See discussion *supra* Part IV.

²⁴⁰ Kleven, *supra* note 83, at 17-19, fig. 2.

tries.²⁴¹ While currently only a small minority of athletes seem to have specifically avoided the United States and the United Kingdom, the ability of athletes such as Manny Pacquiao and Usain Bolt to find alternative countries in which to compete, while reducing their exposure to tax liability, may represent a growing trend that should concern these established nations. Because much of the negative perception of the established leaders' income tax systems is based on athletes' belief that they are being singled out for particularly unfavorable treatment, the United States and the United Kingdom may consider moving away from the specific targeting of athletes for tax compliance through the U.S. Treasury's Project on Foreign Athletes and Entertainers and the HMRC's Foreign Entertainers Unit in an effort to avoid reducing the flow of elite level talent into the countries.²⁴²

B. Greater Transparency

As previously established, reform of the tax systems in the United States and the United Kingdom to provide athletes with tax treatment comparable to other, less economically-established countries is highly unlikely. However, because much of the negative sentiment athletes have towards the tax systems of these established nations is based on perception,²⁴³ education of athletes and greater transparency in the tax systems of both the United States and the United Kingdom as they apply to foreign athletes represent potential solutions that may diminish the impact tax treatment has on athletes' decisions about where to compete.

²⁴¹ See discussion of Manny Pacquiao and Usain Bolt *supra* Part III.

²⁴² See discussion *supra* Part III; Taylor, *supra* note 15, at 401 (“[T]he concept of focusing on artists and athletes seems to go against earlier Treasury sentiment of wanting to promote - or at least not hinder- the flow of talent into the United States.”)

²⁴³ Taylor, *supra* note 15, at 402 (suggesting foreign athletes may perceive an additional tax burden when competing in the U.S. based on their lack of understanding of the foreign tax credits provided to them through their country's tax treaty with the United States).

In the United Kingdom, the new Statutory Residency Test used to determine a taxpayer's residency status is significantly more complex than its predecessor. If clear guidance is not provided, athletes who are unclear as to their residency status will be more likely to avoid competition in the United Kingdom all together. Meanwhile, in the United States, one of the greatest areas of confusion caused by the current tax system is the characterization of endorsement income. Replacing the conflicting positions of the IRS and the U.S. Tax Court with a clear statement regarding the characterization of endorsement income will reduce the concerns of nonresident athletes competing in the United States and lead to greater compliance.²⁴⁴

Finally, some of international athletes' greatest concerns stem from the fear of double taxation. Artist and Athlete provisions in most income tax treaties do not eliminate double taxation, but instead place the burden on the athlete's country of residence to provide either an exemption or foreign tax credit.²⁴⁵ Because this method of double taxation elimination is often provided for within the treaty itself,²⁴⁶ better publication of these provisions could serve to eliminate a significant amount of athletes' tax related concerns.

Increased transparency and better education of foreign athlete taxpayers with regards the tax regimes of the United States and the United Kingdom will benefit both countries by reducing athletes' negative perceptions and apprehension towards competing within the countries, as well as increasing athlete tax compliance.

²⁴⁴ An analogy can be drawn to the U.S.'s treatment of signing bonuses. After thirty years of unclear treatment of signing bonuses, resulting in significant confusion among athletes, the IRS's clearly communicated position on signing bonus income in Revenue Ruling 2004-109 has eliminated almost all athlete concerns regarding the taxation of such income. See Appleby, *supra* note 7, at 621-22.

²⁴⁵ Evans, *supra* note 9, at 309.

²⁴⁶ See U.S.-U.K. Income Tax Treaty, *supra* note 8, at art. 24 (providing for the elimination of double taxation through the credit method).

Furthermore, this increased transparency will reduce some of the competitive advantage held by nations with tax regimes that provide more favorable treatment to athletes.

C. Recommendations for Athletes and Their Representation

The complexity of the international income tax system highlights the need for athletes to hire tax experts to help them navigate the various regimes they may be liable under during the course of a season or career. Taxes will have a major impact on athletes' ability to maximize their earning potential, and given the high profile nature of many athletes, being labeled a "tax cheat" may be especially damaging.²⁴⁷ For athletes competing internationally, a tax attorney may be more important than the athlete's agent; and as sports are becoming increasingly global, the ability to offer tax related services will differentiate firms seeking to represent athletes.

Conclusion

As professional sports continue to expand on the international stage, the income tax implications of athletes' decisions regarding where to compete will be increasingly significant. Although in most cases, leagues and events in up-and-coming sporting nations cannot compete directly with those from the established nations for the services of elite athletes, favorable income tax treatment of foreign athletes represents a valuable tool for closing the current gap in recruiting power. Because of the revenue available through the taxation of high-income earning individuals such as professional athletes, a race to the bottom in relation to the tax treatment of foreign athletes is unlikely. However, given the increasingly global nature of professional sports, the tax treatment of

²⁴⁷ See Appleby, *supra* note 7, at 641 (explaining athletes are their own brand, and bad publicity can cost them millions of dollars in endorsements).

foreign athletes around the world will serve as an important driver behind the international movement of athletic talent in the future.

