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U.S. Taxation of Foreign Athletes and Entertainers And the Effects of the TCJA

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In this article, the authors examine the U.S. tax treatment of international athletes and entertainers, focusing on how the Tax Cuts and Jobs Act has changed the way their various types of income are allocated.

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By almost any metric, the sports industry is enormous. As of fall 2015, for example, the sports industry in North America was expected to reach $73.5 billion by 2019.[1] By the end of 2017, the North American sports market had already reached $69.1 billion, with media rights representing the largest portion — clocking in at $19.07 billion — and sponsorship rights falling only slightly short of that amount at $16.7 billion.[2]

The sports industry is exploding internationally as well, and examples of the continuing internationalization of athletes abound. Some examples include Nikola Jokic, a Serbian professional basketball player and All-Star on the Denver Nuggets; Liam Hendriks, from Perth, Australia, who has pitched for the Minnesota Twins, Kansas City Royals, Toronto Blue Jays, and Oakland Athletics; and Joey Votto, perhaps Canada's most famous Major League Baseball player, who is also a perennial U.S. All-Star and the 2010 winner of the U.S. Most Valuable Player award.

Given the growth of the sports industry, it is increasingly critical that foreign athletes become educated regarding the U.S. taxation of their income. Many provisions in the Internal Revenue Code apply not just to athletes, but to artists and entertainers generally. Thus, it is in the interest of foreign athletes and entertainers to carefully analyze the U.S. taxation of their income, as well as potential opportunities to minimize their U.S. income tax.[3]

The 2017 passage of the Tax Cuts and Jobs Act has only heightened the need for that kind of analysis. Several provisions of the TCJA affect athletes, entertainers, and their employers. The IRS, further, has launched a new campaign that may affect athlete and entertainer taxpayers significantly.

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[1] Darren Heitner, "Sports Industry to Reach $73.5 Billion by 2019," *Forbes*, Oct. 19, 2015.

[2] PwC, "At the Gate and Beyond: Outlook for the Sports Market in North America Through 2022" (2018).

[3] This article refers only to the rules governing U.S. federal income taxation, not state and local governments, which may have different rules.

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Taxation of Foreign Athletes and Entertainers

Taxation as Resident Aliens

The first step in determining the U.S. taxation of a foreign athlete or entertainer — namely, one who is not a U.S. citizen — is residency for tax purposes; specifically, whether she is a resident or nonresident alien.[4] Resident aliens are subject to U.S. tax on their worldwide income, while nonresident aliens are typically subject to tax only on U.S.-source income.[5]

If a foreign athlete or entertainer is not a U.S. citizen, she is considered a resident for U.S. tax purposes if she is a lawful permanent resident or satisfies the substantial presence test.[6] The first test for residency, known as the "green card test," is determined by immigration status. Under that test, a foreign national is a resident alien for tax purposes if she is a lawful permanent resident of the United States at any time during the calendar year. The second residency test is the substantial presence test, which an athlete or entertainer is deemed to satisfy if she:

- was present in the United States on at least 31 days during the calendar year; and
- was present in the United States for a total of at least 183 days during the current year and the two preceding calendar years.[7]

If, however, an athlete or entertainer was in the United States for less than 31 days during the year at issue and can establish that she has a tax home in a foreign country with which she has a closer connection than the United States, she would not be classified as being a U.S. resident in that year.

The code carries over days from the preceding two calendar years to prevent nonresident aliens from circumventing the 183-day rule by staying, for example, only 182 days in the United States. Under section 7701(b)(3)(A)(ii), each day of the immediately preceding year counts as 1/3 of a day in the United States and each day of the second preceding year counts as 1/6 of a day. Thus, for example, if an individual spent 90 days in the United States in 2018 and 180 days in 2017, she will be deemed present for 60 days in 2019 (30 from 2018 and 30 from 2017). In that case, the nonresident will be considered a resident alien if she spends at least 123 days in the United States during the current year.

The substantial presence test, however, is triggered only if an individual is present in the United States for at least 31 days in a calendar year. That prevents athletes who spend only a few days in the United States during the tax year but who spent a large amount of time in the United States for the two years before the year at issue from being deemed resident aliens.

Further, some days are exempt from being counted as days present in the United States, such as when foreign athletes compete in charitable events.

Taxation as Nonresident Aliens

U.S. citizens and resident aliens are taxed differently from nonresident alien athletes. Specifically, while U.S. citizens and resident aliens are taxed on their worldwide income, nonresident aliens are subject to U.S. tax only on some U.S.-source income. The code defines a nonresident alien as a foreign national who is not a lawful permanent resident during the calendar year and is not substantially present in the United States.

In the United States, nonresident athletes and entertainers are treated in the same manner as other nonresidents on income they earn, or that is sourced, from the United States. While pre-TCJA, the United States taxed its citizens wherever they lived and taxed U.S. resident aliens on their worldwide income, post-TCJA it generally continues to tax nonresident aliens only on U.S.-source income.

The source of an athlete or entertainer's income — U.S. or otherwise — is thus of critical importance to nonresident aliens. Generally, service income is sourced where the services are performed. Under section 861(a)(3), gross income from U.S. sources includes compensation for labor or personal services performed in the United States. However, that compensation cannot be deemed income from U.S. sources if:

- the labor or personal services are performed by a nonresident alien temporarily present

[4] Section 2(d).

[5] Section 871.

[6] Section 7701(b).

[7] For U.S. tax purposes, a day is defined as any portion thereof.

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in the United States for periods not exceeding 90 days during the tax year;
- it does not exceed $3,000; and
- it is for labor performed as an employee of or under contract with a nonresident alien not engaged in a U.S. trade or business or a U.S. citizen if the services are performed for an office or place of business maintained in a foreign country.

That kind of active U.S.-source income is taxed at the same graduated rates faced by U.S. citizens. Income is considered active if it is earned while engaged in a trade or business (personal services are considered a trade or business).

Generally, wages and compensation for services performed in the United States will be properly classified as U.S.-source income. Thus, when an athlete competes in a tournament or plays a game in the United States, or when an entertainer performs in the United States, the code generally deems the athlete or entertainer to be engaged in a U.S. trade or business. The resulting income is considered effectively connected U.S.-source income.

Allocating Salaries to the United States

While compensation for personal services conducted in the United States is generally considered U.S.-source income, as a practical matter, those services are frequently split between U.S. and foreign activities. In those cases, only the percentage of income earned in the United States is U.S. sourced. Accordingly, a nonresident alien must determine how much of his business occurs in the United States to calculate what percentage of his income is taxable by the IRS. Many nonresident athletes and entertainers receive compensation for services performed both in and outside the United States, and they must typically calculate the allocation of income to the United States using a time basis.

The time basis method calculates U.S.-source income by multiplying total annual compensation by the result of the number of days the athlete performed in the United States in a year divided by the total number of days the athlete performed in a year. If an athlete earns $10 million for services performed during the tax year, and for 150 days, those services were performed in the United States, and for 100 days were performed outside the United States, $6 million of that compensation ($10 million *(150/250)) is U.S.-source income and thus subject to U.S. income tax.

Disputes have arisen, however, regarding the application of the time basis method. In *Stemkowski v. Commissioner*, 76 T.C. 252 (1981), for example, a professional hockey player and Canadian resident playing in the U.S. National Hockey League disputed the portion of the year covered by the contract at issue and thus how many total days of services were performed during the year. The greater the number of total days of services performed would decrease the ratio of the formula, thereby decreasing the amount of U.S.-source income and the resulting U.S. tax owed.

Under his contract, Stemkowski participated in regular season play and training camp, and potentially in playoff play. Stemkowski argued that his performance of off-season services, including his physical conditioning and training camp participation, both of which were performed in Canada, should be included in determining the total days of services performed (an inclusion that would decrease his U.S.-source income).

The U.S. Tax Court held that Stemkowski's contract excluded compensation for off-season services, as well as compensation for participation in playoff games. It said it considered the requirement of "good physical condition" at the beginning of training camp a condition of employment. It added, however, that maintaining a condition of employment does not per se "mandate a holding that every activity in which the employee engages to achieve that condition constitutes performance of services." Services performed outside regular season play were thus not allocable to the United States and would not count toward the total days of services performed there. The Tax Court further held that such income was not deductible in the United States because it was allocable to income earned in Canada.

On appeal, the Second Circuit affirmed the Tax Court's decision regarding the characterization of Stemkowski's off-season services — that is, his physical conditioning performed before his arrival at training camp — but reversed the decision that training camp and

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playoff play should not be included in determining the total days of services performed.[8] The Second Circuit's reasoning was that the contract "plainly requires a player's participation in play-off games in exchange for basic contract salary." The court said the contract's plain language required a player to report to training camp in good physical condition, thus making clear that training camp was also a covered service.

Stemkowski underscores the importance of determining the scope of the services for which compensation is received. If an athlete's compensation requires his participation in playoff games and training camp in exchange for compensation paid under a contract, then *Stemkowski* stands for the notion that days the athlete participates in training camp and playoff games count toward the total days of services performed in the United States (and thus decrease his U.S.-source income if those games were played outside the United States). If, by contrast, compensation is not tied to the athlete's participation in games, those days would not count toward the total days of services performed, because they would fall outside the scope of the contract.

Further, under section 861(a)(4), gross income from U.S. sources includes royalties from property in the United States or any interest in that property, including the use of U.S. goodwill, trademarks, and trade brands. Nonresident aliens can deduct from U.S.-source gross income expenses, losses, other deductions properly apportioned or allocated thereto, and a ratable portion of deductions that cannot be definitely allocated.[9]

A nonresident athlete or entertainer's income is taxed differently depending on whether it is derived from passive investments or active business operations. Passive income represents U.S.-source income not connected with a trade or business. Income is considered passive if it is a fixed or determinable annual or periodic gain.[10] Gross income is taxed at a flat 30 percent rate, so deductions are generally not allowed when considering the amount of income to be taxed. The code provides a 30 percent tax on gross amounts received from U.S. sources as interest, dividends, rents, salaries, wages, premiums, annuities, compensations, remunerations, emoluments, and other fixed or determinable annual or periodic gains, profits, and income, but only if not effectively connected with a U.S. trade or business.

A nonresident athlete or entertainer's income is also subject to tax if the income is considered effectively connected with a U.S. trade or business. Under section 871(b), a nonresident alien engaged in a U.S. trade or business is taxable under section 1 or 55 on his effectively connected income.

Royalties paid in exchange for the license of an athlete or entertainer's name or likeness are generally not considered effectively connected with a U.S. trade or business unless the activities of the athlete or entertainer's U.S. trade or business are a material factor in the realization of the royalty income. Thus, those kinds of royalties are typically subject to withholding at a rate of 30 percent.

Allocating Signing Bonuses to the United States

Signing bonuses that nonresident athletes or entertainers receive must also be allocated between U.S. and foreign sources unless they constitute consideration for signing a contract and are not based on services previously rendered. In Rev. Rul. 74-108, 1974-1 C.B. 248, the IRS concluded that a preliminary agreement that does not require the athlete to perform any services and that provided a bonus to an athlete is in essence a covenant not to compete, so the bonus is paid as consideration for the agreement. Because the bonus is not compensation for labor or personal services performed and not ECI, income tax must be withheld at a flat rate of 30 percent on the U.S.-source portion.

In *Linseman v. Commissioner*, 82 T.C. 514 (1984), the Tax Court considered the proper allocation of a $75,000 signing bonus between income from U.S. and foreign sources. Neither party contended that the signing bonus should have been treated as compensation for the services the taxpayer was expected to render by playing hockey for the Birmingham Bulls, a U.S. hockey team.

[8] *See Stemkowski v. Commissioner*, 690 F.2d 40, at 45 (2d Cir. 1982).

[9] *See* section 861(b).

[10] Section 871(a)(1)(A) lists several examples of passive income, including dividends, rents, and annuities.

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The taxpayer argued that $40,000 of the bonus was properly allocable to sources outside the United States, because it was paid to obtain release of any liability for possible breach of his contract with a Canadian hockey team. The government claimed the signing bonus constituted compensation for the taxpayer's promise to sign a contract to provide services to the Bulls. Relying on Rev. Rul. 74-108, it argued that the taxpayer's 50/50 allocation between the United States and overseas was unreasonable and that the entire bonus should have been allocated to the United States.

The Tax Court disagreed with both parties. It said the most reasonable allocation of the bonus is based on the number of games the Bulls contemplated playing in and outside the United States during the regular 1977-1978 season. It based its holding on its finding that "the underlying purpose of such an agreement is to induce the player to perform the affirmative act of playing," which it said "puts flesh on the bones of the sign-on agreement." The Tax Court found that whether the signing bonus was itself compensation for services performed did not preclude it from using the places the contemplated services were to be performed as the basis for allocation.

Based on Rev. Rul. 74-108 and *Linseman*, foreign athletes and entertainers should be aware that signing bonuses are to be allocated between U.S. and foreign sources. If those bonuses are not deemed compensation for labor or personal services and not ECI, 30 percent income tax must be withheld. Further, courts might allocate signing bonuses based on the number of games to be played in or outside the United States.[11]

[11]The issue goes beyond the allocation of signing bonuses. While the distinction may seem trivial, deciding to play for a U.S., as opposed to a foreign, professional sports team has important implications for the athlete's net income. A hypothetical foreign citizen and resident who is a member of a U.S. baseball team faces unique challenges. Specifically, if he spends more than 183 days in the United States in a given calendar year, he would be deemed a U.S. resident under the substantial presence test. As a U.S. resident, he would be required to file a U.S. tax return and would be subject to U.S. taxation on all his worldwide income. If he were also deemed a resident of his country of citizenship, he would have to file a return and be subject to tax there. There is thus a distinct possibility that he would be subject to double taxation, although he might be able to reduce his non-U.S. taxes under a tax treaty with the United States, should one apply, by virtue of the foreign tax credit for U.S. taxes paid.

Planning Opportunities

With careful planning, some foreign athletes might be able to save on taxes. One opportunity involves a foreign citizen who is a resident of a foreign country and plays a professional sport in the United States. That athlete is potentially subject to double taxation. She might be able to address that unfair outcome by establishing residency in the United States and relinquishing residency in the foreign country (subject to applicable immigration laws, of course), because many foreign countries levy taxes only on their own residents. In so doing, she would eliminate her foreign income tax obligations and the potential for double taxation.

A second strategy is for the foreign athlete to minimize the amount of time she spends performing personal services in the United States. An athlete should take pains not to spend more than 183 days in the United States and become subject to the substantial presence test. If a Canadian athlete signs with a Canadian team rather than a U.S. team, for example, she could well pay less in tax.

A third way an athlete or entertainer can minimize her taxable income is through endorsement contracts. The characterization of income earned in exchange for the performance of personal services versus income characterized as royalty income under an endorsement agreement is critical. Athletes and entertainers under endorsement contracts are subject to graduated withholding rates up to 39.6 percent on income they earn in exchange for the performance of personal services connected to a U.S. trade or business. By contrast, income they earn that can be characterized as royalties and not as attributable to a U.S. trade or business is subject to a maximum rate of 30 percent. Further, tax on that income might be reduced by the application of a tax treaty.

Athletes and entertainers can attempt to minimize the amount of tax they pay by bifurcating the portion of the income they receive under endorsement agreements in exchange for the performance of personal services from the income they receive in exchange for the license of intangible property. By doing that, they might not only face a lower maximum tax rate of 30 percent on at least a portion of that income but they might

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even be able to avoid tax altogether via the application of a tax treaty.

In *Garcia v. Commissioner*, 140 T.C. 141 (2013), Sergio Garcia, a tax resident of Switzerland, entered into an endorsement agreement with TaylorMade Adidas Golf that required that he exclusively wear TaylorMade attire and use TaylorMade golf products, as well as participate in a minimum of 20 golf tournaments a year and perform other personal services.

Under the agreement, Garcia licensed his name, fame, image, and likeness to TaylorMade for use in promotional materials and advertising. An amendment to the agreement allocated 85 percent of the payments from TaylorMade to the license of Garcia's name, fame, image, and likeness, and 15 percent of those payments to Garcia's performance of personal services. Thus, 15 percent of those payments, if effectively connected to a U.S. trade or business, would be taxed at graduated rates up to 39.6 percent, while the remaining 85 percent would be taxed at 30 percent, subject to further reduction by a treaty.

A tax treaty between the United States and a foreign nation can reduce the rate of withholding imposed on the nonresident. Indeed, taxpayers can achieve a large reduction of the U.S. tax liability of their passive income if a treaty applies to them. The Switzerland-U.S. tax treaty does just that, providing that "royalties derived and beneficially owned by a resident of a Contracting State shall be taxable only in that State."

Because Garcia was a tax resident of Switzerland, he reported as ECI on his tax return payments attributable to services performed in the United States (15 percent) but claimed an exemption under article 12 of the Switzerland-U.S. tax treaty for royalty income (the remaining 85 percent). The IRS argued that the 85/15 allocation was improper, and that the majority of TaylorMade's payments under the agreement should be attributed to Garcia's performance of personal services.

The U.S. Tax Court found that an allocation of 65 percent of TaylorMade's payments to the license of Garcia's name, fame, image, and likeness and 35 percent to Garcia's performance of personal services was appropriate. Thus, Garcia would be subject to tax at graduated rates up to 39.6 percent on 35 percent of the payments, and subject to a 30 percent rate on 65 percent of them.

The parties had stipulated that Garcia was a resident of Switzerland for tax purposes. Garcia argued that article 12(2) of the Switzerland-U.S. treaty covered 65 percent of TaylorMade's payments, because it provided that the term "royalties" included "gains derived from the alienation of any such right or property which are contingent on the productivity, use, or disposition thereof." The IRS argued that a Treasury technical explanation supported the notion that article 17 of the treaty overrode article 12. It said that under the explanation, TaylorMade's payments were predominantly attributable to the performance itself — Garcia's participation in golf tournaments — rather than his intellectual property rights. The court found that even though Garcia's golf play and personal services performed in the United States had some connection with his name, fame, image, and likeness, income from his license of those items to TaylorMade was not predominantly attributable to his performance of personal services in the United States. Thus, the court held that while 35 percent of TaylorMade's payments were subject to U.S. tax at graduated rates, 65 percent were not taxable in the United States under article 12(1) of the Switzerland-U.S. tax treaty.[12]

Garcia illustrates the importance of the application of a tax treaty, as well as the role of allocating between payments for personal services and payments for the license of intellectual property in an endorsement agreement. While an explicit enumeration in an endorsement contract might provide an athlete some confidence that the allocation is appropriate, the Tax Court is not bound to respect that allocation and will instead look to the underlying economic substance. By contrast, if an athlete is able to achieve tax residency in a country

[12] *Cf. Goosen v. Commissioner*, 136 T.C. 547 (2011). Retief Goosen was a successful South African professional golfer who had won multiple Major championships. Like Garcia, Goosen had endorsement agreements with several sponsors, including TaylorMade, which paid him endorsement fees in exchange for the use of his name and likeness. Although Goosen's agreement with TaylorMade did not explicitly allocate between personal services and royalty income, Goosen treated the endorsement fees and bonuses to be paid under the agreement as 50 percent personal services income and 50 percent royalty income. The IRS argued that those payments should instead be characterized as 100 percent personal services income. The Tax Court agreed with Goosen, thereby finding Garcia's name and likeness more valuable than Goosen's, given that it allocated 65 percent of the payments made under Garcia's agreement as royalty income.

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with a favorable tax treaty with the United States — such as Switzerland — she might be taxed at a far lower rate for the portion of her endorsement contract that is allocable to the license of her image. Foreign athletes would therefore be wise to consider potential treaty effects and plan carefully to establish residency in countries with favorable tax treaties with the United States.

TCJA Effects

The TCJA could have several effects on athletes and entertainers, as well as the owners and coaches of sports teams.

First, the enactment of section 199A will have implications for the taxation of passthrough partnerships, including sports teams. The 20 percent deduction implemented by section 199A is unavailable to owners of businesses that provide specific types of services, including legal and medical services. Sports franchises, however, arguably fall in the scope of the new section 199A benefit if the service provided by their owners is not directly the performance of a sport.

Indeed, owners of sports franchises have made precisely that argument. Section 199A makes clear that covered services (for which the 20 percent deduction is unavailable) include the performance of services in health; law; consulting; athletics; financial services; brokerage services; or any trade or business in which the principal asset is the reputation or skill of at least one of its employees or owners or that involves the performance of services that consist of investing and investment management, trading, or dealing in securities, partnership interests, or commodities.

When Treasury was promulgating new regulatory guidance under section 199A, it asked for comments from taxpayers in drafting those regulations. In an October 12, 2018, letter to Treasury and the IRS, MLB Commissioner Robert D. Manfred Jr. sought to include MLB teams in the scope of section 199A (and thus exclude them from the specified service trades or businesses in section 199A(d)(2)). Manfred and some other commentators argued that sports team owners are not athletes but are instead business owners who run multifaceted operations with largely nonathletic activities, including the management of stadium operations, ticket sales, marketing, retail, and broadcasting. Manfred offered an example to replace Example 2 in the proposed regulations to make clear that sports team owners are entitled to the deduction for qualified business income in section 199A:

> Example 2. B is an individual who is not a professional athlete. B has invested capital and is a partner in a Partnership that owns and operates a professional sports club. Partnership owns or leases a stadium. Partnership is involved in the trade or business of earning revenue from the sale of media rights, tickets, in-stadium concessions, stadium signage rights, sponsorships, and team-branded merchandise and other goods. Since Partnership is engaged in a multi-faceted business and is not engaged in the performance of services in the field of athletics, Partnership is not a trade or business "described in" section 1202(e)(3)(A) and therefore is not [a specified service trade or business] within the meaning of section 199A and paragraphs (b)(l)(vii) and (b)(2)(viii) of this section.

Despite that and other valid arguments why team owners should be eligible for the 20 percent deduction, Treasury did not incorporate Manfred's example in the final section 199A regulations (T.D. 9847) promulgated in January. In response to comments by Manfred and others, Treasury clarified that the definition of a trade or business involving the performance of services in the field of athletics includes the trade or business of owning a professional sports team. Thus, partnerships that own sports franchises will be unable to claim the 20 percent deduction on qualified business income under section 199A, at least for income derived from the professional sports franchise's operation of athletic teams, including ticket sales and broadcast rights, as opposed to income derived from concession services or broadcasting services.

Second, section 4960, enacted as part of the TCJA, imposes a 21 percent excise tax on both "remuneration paid by an applicable tax-exempt organization for the tax year with respect to employment of any covered employee in excess of $1 million" and on excess parachute payments

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paid by those organizations. The tax, however, is to be applied only to applicable tax-exempt organizations, which section 4960(c) defines as any entity that:

- is exempt from taxation under section 501(a);
- is a farmers' cooperative organization described in section 521(b)(1);
- has income excluded from taxation under section 115(1); or
- is a political organization described in section 527(e)(1).

In recent interim guidance (Notice 2019-9, 2019-4 IRB 403), however, the IRS announced that public universities that had received determination letters recognizing their tax-exempt status would be subject to the excise tax. The IRS noted, however, that under the doctrine of implied statutory immunity, the income of a governmental unit — such as a state, political subdivision of a state, or integral part of a state or political subdivision — is generally not taxable in the absence of specific statutory authority for the taxation of that income. Thus, the IRS also announced that state colleges and universities that had not received determination letters would not be subject to the excise tax, because there was no separate statutory authority for the taxation of that income. The IRS reasoned that had Congress intended to impose the excise tax on state colleges and universities, it would have provided a statutory authorization for that tax, as it did in section 511(a)(2)(B).

Under the interim guidance, then, a state college or university that is not an applicable tax-exempt organization under section 4960 and employs a coach who earns more than $1 million a year does not have to pay the 21 percent excise tax if it has not received a determination letter recognizing its tax-exempt status.[13] Until Congress removes that exception, universities and colleges that employ coaches earning high salaries should remain aware of that loophole.

Third, the reduction of the top individual income tax bracket from 39.6 percent to 37 percent could exacerbate the divide between the taxation of athletes, entertainers, and artists in no- and high-income-tax states. Specifically, residents of high-income-tax states, such as New York, will not be able to offset their lost state and local tax deductions completely. Thus, they might save tens of thousands of dollars by establishing residency in a no-income-tax state such as Texas.

Fourth, the new $10,000 cap on SALT deductions could significantly affect the amount athletes can deduct. While teams in no-income-tax states had an advantage over high-income-tax states in signing athletes even pre-TCJA, the cap on the SALT deduction only increases that advantage.

Fifth, the lost deduction for unreimbursed employee business expenses could dramatically affect athletes. For example, many athletes who previously deducted their agent fees — often among athletes' biggest expenses — are now unable to do so.

Continued Assault on Athletes and Entertainers

As if athletes and entertainers didn't already face enough challenges post-TCJA, the IRS has recently made clear that international athletes and entertainers fall squarely in its crosshairs. On a May 8 conference call of the American Bar Association Section of Taxation, Lindsey Stellwagen, special counsel in the IRS Office of Associate Chief Counsel (International), said that should international athletes and entertainers subject to IRS examinations fail to produce requested documentation within 90 days of the issuance of a formal information request, the IRS could use section 982 to exclude the documentation at trial.

Because international athlete and entertainer taxpayers bear the burden of proof to substantiate deduction claims at trial and thus would typically seek to enter documentation supporting those claims into evidence, Stellwagen said the government's application of section 982 to exclude the documents "could be particularly devastating for the client." She added that a foreign jurisdiction's nondisclosure laws imposing civil or

[13] Until further guidance is issued, taxpayers may base their positions on a good faith, reasonable interpretation of section 4960 to comply with its requirements. The interim guidance itself states that the "positions reflected in this notice constitute a good faith, reasonable interpretation of the statute." Further, the Joint Committee on Taxation's December 2018 bluebook confirms that section 4960 does not apply to state colleges and universities until technical corrections are made to add them to the definition of applicable tax-exempt organizations under section 4960. JCT, "General Explanation of Public Law 115-97," JCS-1-18 (Dec. 20, 2018).

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criminal penalties would generally not meet the threshold of section 982's reasonable cause exception.

Further, a recent campaign by the IRS's Large Business and International Division addressing noncompliance or partial compliance by withholding agents acting on behalf of international athletes and entertainers could affect many of those agents. The campaign focuses on verifying withholding credits associated with Form 1042-S that are claimed on Form 1040-NR. While the campaign has been discussed only in broad terms so far, Stellwagen said LB&I will soon create a "laser-focused" practice unit for the campaign.

Finally, Stellwagen reiterated the IRS scrutiny on the characterization of personal service income and royalty income in endorsement contracts. She noted the intense facts and circumstances analysis of the allocation between the two types of income in endorsement contracts. She also stressed the difference in the appeal and marketability between Sergio Garcia and Retief Goosen, a difference she said explains the greater relative percentage of royalty income in Garcia's case. If anything, Stellwagen's recent pronouncements only underscore the vigilance that athletes and entertainers generally, and international athletes and entertainers in particular, must exercise regarding the tax implications of their vocations.

Conclusion

Both the sports and entertainment industries have exploded internationally in recent years. Thus, athletes and entertainers can be subject to U.S. taxation of their income in multiple jurisdictions — often at very different rates. Because of the diverse treatment of their income, those individuals should analyze the U.S. taxation of their income and be aware of potential opportunities to minimize their U.S. income tax paid.

The TCJA and the IRS's continued focus on athletes and entertainers have only heightened that necessity. While Treasury and the IRS continue to interpret the TCJA, several planning opportunities for keen taxpayers have already been revealed. Entertainers, as well as athletes, coaches, and the institutions that employ them, should thus stay tuned for developments in TCJA interpretation. ■

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