



2013

The IRS' Double-Bogey: Goosen v. Commissioner Remains a Fairway to Characterize Endorsement Income for Nonresident Alien Athletes in Garcia v. Commissioner

Seth William Stern

Follow this and additional works at: <https://digitalcommons.law.villanova.edu/mslj>



Part of the [Entertainment, Arts, and Sports Law Commons](#), and the [Immigration Law Commons](#)

Recommended Citation

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

Available at: <https://digitalcommons.law.villanova.edu/mslj/vol20/iss2/9>

This Casenote is brought to you for free and open access by Villanova University Charles Widger School of Law Digital Repository. It has been accepted for inclusion in Jeffrey S. Moorad Sports Law Journal by an authorized editor of Villanova University Charles Widger School of Law Digital Repository.

THE IRS' DOUBLE-BOGEY: *GOOSEN V. COMMISSIONER*
REMAINS A FAIRWAY TO CHARACTERIZE
ENDORSEMENT INCOME FOR
NONRESIDENT ALIEN ATHLETES
IN *GARCIA V. COMMISSIONER*

I. INTRODUCTION

Over the last several decades, endorsements of professional athletes have risen substantially.¹ Although endorsements often do not fuel sales, much of their value comes in the form of better product recall with consumers.² As a result, larger companies are often willing to spend large sums of money to align themselves with athletes whom they feel best represent their target brand and can help them reach a wide-ranging audience.³ In the cases of athletes such as David Beckham, Tiger Woods, and LeBron James, lifetime earnings far exceed \$100 million.⁴

As of 2010, one of the largest endorsers of professional athletes, Nike Inc., had approximately \$3.8 billion in outstanding long-term endorsement obligations.⁵ Such endorsement deals typically fall into one of two types of licensing agreements: (1) the athlete granting the rights to his or her identity; or (2) the athlete agreeing to develop products associated with him or her, or with his or her

1. See Sarah Jane Gilbert, *Marketing Maria: Managing the Athlete Endorsement*, HARVARD BUSINESS SCHOOL (Oct. 29, 2007), <http://hbswk.hbs.edu/item/5607.html> (summarizing rise of athlete endorsements).

2. See Kevin YC Chung, Timothy P. Derdenger & Kannan Srinivasan, *Economic Value of Celebrity Endorsements: Tiger Woods' Impact on Sales of Nike Golf Balls*, CARNEGIE MELLON UNIVERSITY COMPUTING SERVICES (Aug. 22, 2012), <http://www.andrew.cmu.edu/user/derdenger/CelebrityEndorsements.pdf> (explaining benefits of celebrity endorsement).

3. See Gilbert, *supra* note 1 (discussing willingness of companies to spend large sums of money on endorsements).

4. See Jeanne Rose, *Five of the Biggest Athlete Endorsement Deals*, YAHOO! SPORTS (Feb. 27, 2012), <http://sports.yahoo.com/nba/news?slug=ycn-11011486> (exploring larger endorsement deals in history).

5. See Daniel Kaplan, *Nike Endorsement Tab Swooshes Down*, STREET & SMITH'S SPORTSBUSINESS JOURNAL (Aug. 2, 2010), <http://www.sportsbusinessdaily.com/Journal/Issues/2010/08/20100802/This-Weeks-News/Nike-Endorsement-Tab-Swooshes-Down.aspx> (establishing Nike's outstanding long-term endorsement obligations).

sport.⁶ Nevertheless, sometimes endorsement deals encompass elements of both, with obligations varying by the specific deal.⁷

With the growing size of athlete endorsements, options are emerging to address the tax implications of such earnings.⁸ In the case of taxation of nonresident foreign-nationals relating to business in the U.S, however, there have been several classification issues concerning the type of income under such arrangements.⁹ This issue ultimately surfaced in the context of a professional athlete with worldwide endorsements, where the United States Tax Court was forced to address the character and source of such income for the purposes of United States taxation.¹⁰ Despite this decision, the issue recently resurfaced before the Tax Court once again as professional athletes continue to challenge the method of determining the character and source of income for the purposes of their United States tax liability due to the significant amount of money routinely at stake.¹¹

Section II of this comment will discuss the relevant tax code provisions and regulations that apply when nonresident foreign athletes earn endorsement income that creates U.S. tax liabilities.¹² Sections III and IV will trace the development of relevant jurisprudence, up through *Goosen*, in determining whether worldwide endorsement income is classified as personal services income or endorsement income.¹³ Section V will then analyze the Tax Court's methodology in *Goosen*, argue the need for a balance between the ability to promote domestic events and the ability to adequately col-

6. See Daniel Auerbach, *Morals Clauses as Corporate Protection in Athlete Endorsement Contracts*, 3 DEPAUL J. SPORTS L. & CONTEMP. PROBS. 1, 1-2 (2005) (stating common types of athlete endorsements).

7. See Chung et al., *supra* note 2 (describing Tiger Wood's contract with Nike involving endorsement and use of equipment).

8. See Robert W. Wood, *And Now For Olympic Endorsement Deals . . .*, FORBES (Aug. 8, 2012), <http://www.forbes.com/sites/robertwood/2012/08/12/and-now-for-olympic-endorsement-deals/> (describing rolling endorsement income into annuities option to flatten earnings and reduce tax liabilities).

9. For a discussion on previous issues regarding the taxation of nonresident aliens U.S. business income, see *infra* notes 41 – 76 and accompanying text.

10. See *Goosen v. Commissioner*, 136 T.C. 547, 548-69 (2011) (analyzing endorsement income of professional golfer for character, source, and connection with trade or business in determining tax consequences).

11. For a discussion about Sergio Garcia's recent case before the Tax Court, see *infra* notes 171 - 193 and accompanying text.

12. For a discussion regarding the applicable tax code provisions and regulations relating to the taxation of nonresident aliens' endorsement income, see *infra* notes 16 - 40 and accompanying text.

13. For a discussion tracing the development of jurisprudence pertaining to the taxation of nonresident alien athletes and entertainers, see *infra* notes 41 - 120 and accompanying text.

lect tax on income earned in the United States, and explore related issues that came up in the 2012 London Olympic Games.¹⁴ Finally, section VI will examine the Tax Court's recent *Garcia* decision, and the degree to which it conformed to the precedent set forth in *Goosen*.¹⁵

II. BACKGROUND ON TAXATION OF NONRESIDENT ALIENS

A variety of factors come into play when examining the U.S. tax liabilities of a nonresident alien; however, one must begin with determining that the income is U.S.-sourced, as the United States generally taxes only U.S.-sourced income for such individuals.¹⁶ Although the Internal Revenue Code ("IRC") does not provide guidance for sourcing every specific type of income, it expressly sets forth sourcing rules for classifying types of income as from U.S. sources, sources outside the United States, and/or income to be prorated between the two.¹⁷ Nonetheless, income from sources outside the United States is rarely tax exempt under specific circumstances.¹⁸

Specifically, as relevant to the forthcoming discussion on professional golfers, IRC section 861(a)(3) states that compensation for personal services performed inside the United States shall be deemed U.S.-sourced.¹⁹ However, it excludes income from personal services in the United States if performed by nonresident aliens in the United States for less than a total of ninety days, for compensation less than \$3,000, and for compensation received for performance as an employee or under contract with a foreign entity not engaged in business with the United States, or with a domestic corporation if the services are performed abroad.²⁰ Although nonresident alien professional athletes are generally under contract

14. For a discussion on the impact of *Goosen* and this area of law moving forward, see *infra* notes 121 - 193 and accompanying text.

15. For an examination of the Tax Court's most recent guidance on endorsement income, see *infra* notes 121 - 193 and accompanying text.

16. See generally I.R.C. §§ 861-863 (2006) (establishing framework for taxing nonresident aliens).

17. See *id.* (setting forth rules for classifying type and source of income).

18. See *id.* § 864(c)(4) (describing reverse-sourcing rule where foreign sourced income is deemed effectively connected with U.S. trade or business with U.S. office or fixed place of business).

19. See *id.* § 861(a)(3) (stating that compensation for personal services performed in the U.S. is U.S.-sourced income); see also Treas. Reg. § 1.861-4 (2005) (providing more specific guidance for sourcing personal services performed inside U.S.).

20. See I.R.C. § 861(a)(3) (stating criterion for income not deemed from sources within United States).

with foreign management companies, this exception generally does not apply if their compensation exceeds the threshold.²¹ Further, section 862(a)(3) establishes that any compensation for all personal services performed outside the United States shall not be U.S.-sourced.²²

Similarly, IRC section 861(a)(4) declares that rents and royalties from use of intellectual property in the U.S. is U.S.-sourced.²³ However, section 862(a)(4) of the IRC states that “rentals or royalties from . . . any interest in . . . property, including rentals or royalties for the use of or for the privilege of using without the United States patents, copyrights, secret processes and formulas, good will, trade-marks, trade brands, franchises, and other like properties” shall be treated as income from outside the United States.²⁴ The Internal Revenue Service (“IRS”), in *Revenue Ruling 68-443*, has provided additional guidance on the taxation of royalties derived from intellectual property.²⁵ *Revenue Ruling 68-443* bolsters the conclusion that royalties or use of a foreign trademark on products that are ultimately used in foreign countries are income from sources without the United States, despite any initial sale of the items being inside the United States.²⁶

Next, to determine the tax liability for a nonresident alien, an assessment as to whether they are engaged in a U.S. trade or busi-

21. See, e.g., Andrew Mitchel, *Golfer Endorsement Fees: Part Royalties & Part Services, Part U.S. Source & Part Foreign Source*, ANDREWMITCHEL.COM (2011), <http://www.andrewmitchel.com/charts/goosen.pdf> (discussing structure of athlete’s income through management subsidiary); M.L. Rose, *The Average Salary of Men Pro Golfers*, GOLFSMITH, <http://golftips.golfsmith.com/average-salary-men-pro-golfers-20330.html> (last visited Oct. 24, 2012) (putting forth average compensation for golf tournament).

22. See I.R.C. § 862(a)(3) (2006) (announcing “compensation for labor or personal services performed without the United States” shall be treated as gross income without United States).

23. See *id.* § 861(a)(4) (stating income without United States includes “rentals or royalties from property located without the United States or from any interest in such property, including rentals or royalties for the use of or for the privilege of using without the United States patents, copyrights, secret processes and formulas, good will, trade-marks, trade brands, franchises, and other like properties”); see also Treas. Reg. § 1.861-5 (1975) (providing further guidance on royalties attributable to United States as source).

24. See I.R.C. § 862(a)(4) (quoting statute on sourcing rents and royalties to outside United States); see also Treas. Reg. § 1.862-1 (1983) (detailing further instruction on royalties sourced to outside United States).

25. See Rev. Rul. 68-443, 1968-2 C.B. 304 (1968) (“Royalties for the use of a foreign trademark on products that are ultimately used in foreign countries are income from sources without the United States even though the initial sale of the articles took place in the United States.”).

26. See *id.* (concluding source of royalty income to be from end-use location).

ness is required.²⁷ The IRC provides slim guidance as to the exact definition of a U.S. trade or business.²⁸ It appears that the determination is fact-driven and is subject to a case-by-case analysis; however, the performance of personal services in the United States by a nonresident alien is deemed a U.S. trade or business.²⁹ Moreover, *Rev. Rul. 70-543* used a relevant example:

B, a professional golfer, is a nonresident alien individual who enters various professional golfing tournaments in the United States during the taxable year. . . . The amounts received by B during the year as prizes for participation in various golfing tournaments are compensation for personal services as a self-employed nonresident alien individual.³⁰

If the nonresident alien is deemed to be engaged in a U.S. trade or business, the inquiry turns to whether the alien has any income that is “effectively connected” with his U.S. trade or business.³¹ Generally, a nonresident alien with a U.S. trade or business will have all its U.S.-sourced income “effectively connected” to that U.S. business.³² As a result, such income would be taxed at the graduated rates, per section 871(b) of the IRC.³³ If the nonresident alien’s income is not “effectively connected,” it is subject to taxation in the United States only if it is U.S.-sourced income and if it meets other tests.³⁴

For cases of so-called “fixed or determinable annual or periodical gains, profits, and income” (“FDAP”), if U.S.-sourced, then this income is “effectively connected” with a trade or business, as long as it qualifies under either the business activities test or the asset use test.³⁵ Such FDAP income explicitly includes interest, dividends,

27. See I.R.C. § 864(b) (defining U.S. trade or business); see also Treas. Reg. 1.864-2 (1975) (clarifying definition of trade or business).

28. See I.R.C. § 864(b) (describing ambiguity in definition of U.S. trade or business).

29. See Rev. Rul. 70-543, 1970-2 C.B. 172 (stating personal services in the United States is U.S. trade or business).

30. See *id.* (quoting IRS Revenue Ruling Scenario 2).

31. See I.R.C. § 864(c)(3) (defining term “effectively connected” income).

32. See *id.* (describing scenarios when income is treated as effectively connected with conduct of a trade or business with the United States by a nonresident alien individual).

33. See *id.* § 871(b) (subjecting income connected with U.S. business to graduated rate of tax).

34. See *id.* §§ 871(a)(1)-(a)(2) (setting forth types of non-“effectively connected” income that is taxed by United States).

35. See *id.* § 864(c)(2) (establishing tests for FDAP and capital gains income to qualify as “effectively connected”).

rents, salaries, wages, rents, and royalties, among other items of income.³⁶ The assets use test asks whether “the income, gain, or loss is derived from assets used in or held for use in the conduct of such trade or business.”³⁷ The business activities test inquires whether “the activities of such trade or business were a material factor in the realization of the income, gain, or loss.”³⁸ However, if the U.S.-sourced FDAP fails to meet either test, it will not be considered “effectively connected” to the U.S. business, and consequently, it will be taxed under the thirty percent rate required by section 871(a) of the IRC.³⁹ Moreover, specific FDAP income, such as royalties on intangible property, is often either reduced from the thirty percent rate by treaties that lower rates or is abolished altogether.⁴⁰

III. EARLIER GUIDANCE

A. United States v. Johansson⁴¹

In *United States v. Johansson*, one of the court’s earliest efforts at tackling the issue of royalties for nonresident alien professional athletes, a taxpayer contested royalties stemming from a boxing match.⁴² Ingemar Johansson, a citizen of Sweden, received compensation for a boxing match against Floyd Patterson in 1960 and 1961, including percentages of receipts from movie, radio, and television rights to the fights in which he participated.⁴³ The United States District Court in the Southern District of Florida found that the compensation Johansson received should not be considered royalties within the framework of the international tax treaties relevant to Mr. Johansson.⁴⁴ In doing so, the court specifically noted:

36. See *Internal Revenue Service, Fixed, Determinable, Annual, Periodical (FDAP) Income*, IRS, [http://www.irs.gov/Individuals/International-Taxpayers/Fixed,-Determinable,-Annual,-Periodical-\(FDAP\)-Income](http://www.irs.gov/Individuals/International-Taxpayers/Fixed,-Determinable,-Annual,-Periodical-(FDAP)-Income) (last updated Aug. 2, 2012) (listing items that are examples of FDAP income, including royalties).

37. See I.R.C. § 864(c)(2)(A) (stating assets use test for U.S.-sourced FDP and capital gains income to be effectively connected with a U.S. trade or business).

38. See *id.* § 864(c)(2)(B) (imposing business activities test for U.S.-sourced FDP and capital gains income to be effectively connected with a U.S. trade or business).

39. See *id.* § 871(a) (declaring 30% tax rate for types of income not qualifying as “effectively connected”).

40. See, e.g., *Double Taxation: Taxes on Income and Capital Gains, U.S.-U.K.*, art. IV, ¶ 1(a)(i), Dec. 31, 1975, 31 U.S.T. 5668 (stating that United Kingdom will tax nonresident U.K. citizens on non-U.K. sourced income only to extent that such income enters U.K.).

41. 8 A.F.T.R.2d 6001 (S.D. Fla. 1961), *aff’d*, 336 F.2d 809 (5th Cir. 1964).

42. See *id.* (summarizing circumstances of case).

43. See *id.* (describing plaintiff contesting tax liabilities).

44. See *id.* (“No part of the compensation received by Ingemar Johansson during the involved periods from the television rights, movie rights, and radio

Ingemar Johansson did not have any proprietary interest in any of the non-Scandinavian radio rights, television rights, or movie rights to the fights of June 26, 1959, June 20, 1960, or March 13, 1961. The use of the amounts received from these non-Scandinavian movie, radio, and television rights to the involved fights in the computation of Ingemar Johansson's compensation from those fights was but the method of computing Ingemar Johansson's personal service income for his appearance in those fights, which had been agreed upon by Ingemar Johansson and the promoter of those fights.⁴⁵

As such, it was merely a basis for compensation without any real ownership rights in the property.⁴⁶ As a result, the court refused to deem such income "royalties" within the terms of the treaty in question.⁴⁷

B. *Kramer v. Commissioner*⁴⁸

Prior to *Goosen*, *Kramer v. Commissioner* was the primary authority relied upon for characterizing endorsement income.⁴⁹ Kramer, a former amateur and professional tennis champion, was paid royalties by the Wilson Sporting Goods Company in 1975 and 1976 from the sale of tennis equipment.⁵⁰ Kramer's contract also required that he make promotional appearances and participate in activities for Wilson.⁵¹ Based on Kramer's activities in connection with his contract with Wilson, the Commissioner found deficiencies in Kramer's taxes and challenged the amounts received by Kramer as "earned income" for the years in question.⁵²

rights . . . was royalties within the meaning of the Tax Convention existing between the United States and Switzerland or within the meaning of the Tax Convention existing between the United States and Sweden.").

45. *See id.* (stressing petitioner maintained no ownership of movie, radio, or television rights).

46. *See id.* (describing court's holding).

47. *See id.* (discussing ultimate outcome of case).

48. 80 T.C. 768 (1983).

49. *See* Tony Nitti, *Tax Court Determines Character, Source of Golfer's Worldwide Endorsement Income*, THE TAX ADVISOR (Sept. 1, 2011), http://www.aicpa.org/publications/taxadviser/2011/september/pages/taxtrends_sep2011.aspx (declaring primary authority for characterizing income prior to *Goosen* was *Kramer*).

50. *See Kramer*, 80 T.C. at 769-70 (describing facts surrounding case).

51. *See id.* at 771-72 (summarizing obligations under endorsement agreement).

52. *See id.* at 769 (describing central issue of case).

Kramer was actively involved in being a liaison to the sport and was required to make appearances separate from his Wilson obligations.⁵³ The court determined, despite Wilson's obvious benefit from Kramer's travel and appearances in its sale of "Jack Kramer" racquets, that "the bulk of [Kramer]'s tennis-related travel was not directly connected with Wilson, or . . . requested by [Wilson.]"⁵⁴ Relying on this point, the court held that the royalties were paid primarily in exchange for the right to use Kramer's name and likeness exclusively and only secondarily for the personal services performed by him.⁵⁵ As a result, the court determined the endorsement income in question was properly allocated as seventy percent royalties income and thirty percent income derived from personal services.⁵⁶

C. *Boulez v. Commissioner*⁵⁷

Similar to *Johansson* and *Kramer*, the Tax Court in *Boulez* built upon the aforementioned principles when determining whether certain payments from a contract were royalties or compensation in consideration of personal services for the purposes of international taxation.⁵⁸ Pierre Boulez, a citizen of France and resident of Germany, was a world-renowned music director and orchestra conductor.⁵⁹ Boulez had entered into a contract with CBS Records to produce recordings of orchestral works, some of which would be in the United States.⁶⁰ It specified that the recordings would remain the property of CBS, who would then pay Boulez a percentage of its sales.⁶¹

Boulez maintained that the payments he received from CBS were not taxable by the United States because they were royalties within the meaning of the applicable treaty between the U.S. and

53. *See id.* at 772-75 (establishing Kramer's travel schedule for commitments both for Wilson as well as other engagements).

54. *See id.* at 775 (describing conclusions drawn by court regarding Kramer's travel schedule).

55. *See id.* at 781 ("In our judgment these royalties were primarily for the grant of the right to use petitioner's name, facsimile signature, etc., and only secondarily for services that petitioner was required to render under the contract.").

56. *See id.* at 781-82 (finding that determination of allocation made by Kramer was appropriate).

57. 83 T.C. 584 (1984).

58. *See id.* at 584 (setting forth issue to be decided by court).

59. *See id.* at 584-85 (describing plaintiff's citizenship, residency, and employment details).

60. *See id.* (stating facts relevant to characterizing and sourcing plaintiff's income).

61. *See id.* at 586 (defining terms of contract).

Germany.⁶² In opposition, the IRS argued that the payments in question were taxable to Boulez by the United States because they represented compensation for personal services performed in the United States by the petitioner.⁶³

The court looked to whether Boulez licensed or conveyed a property interest in the recordings to CBS that he was contracted to make to CBS, and whether he received actual royalties in return.⁶⁴ The court acknowledged that the contract consistently refers to the compensation to Boulez as royalties, and that the payments were tied directly to the proceeds from sales of the recordings.⁶⁵ However, the court found that the contract between Boulez and CBS was “replete with language indicating that what was intended . . . was a contract for personal services.”⁶⁶ Additionally, it was agreed that the recordings would be entirely the property of CBS, and there was no language indicating a licensing of a purported right or a copyright within the agreement.⁶⁷

Further, in evaluating whether Boulez maintained a property interest that he could license or sell, the court determined that the applicable treaty was not explicit and was forced to remit to U.S. law to make a determination.⁶⁸ Resting upon case law, the court stated that “the existence of a property right in the payee is fundamental for the purpose of determining whether royalty income exists, and this is equally true under our domestic law as well as under the treaty.”⁶⁹ Because Boulez did not maintain any property rights in the recordings he made for CBS Records, the court determined he could neither license nor sell the recordings, and consequently, could not earn any royalty income.⁷⁰ Therefore, the Tax Court concluded that the payments to Boulez should not be classified as royalties, but instead as personal services income under the applicable treaty.⁷¹

62. *See id.* at 589 (characterizing petitioner’s argument before court).

63. *See id.* (setting forth position of Internal Revenue Service).

64. *See id.* at 591-95 (recounting court’s progression of analysis).

65. *See id.* at 591-93 (summarizing court’s findings supporting royalties argument).

66. *See id.* at 592 (describing facts supporting personal services income argument).

67. *See id.* (detailing ownership agreement of recordings in contract).

68. *See id.* at 591 (outlining that treaty was inadequate to answer question of law).

69. *See id.*

70. *See id.* (concluding that lack of property interest prohibited any license agreement giving rise to royalty income).

71. *See id.* (ruling that payments to petitioner qualify as personal services income).

D. Other Prior Guidance

In 1994, the IRS included a chapter titled “Characterization of Income for Professional Tennis Players” in its publication *Market Segment Specialization Training Guide*.⁷² In it, the IRS stated that the “characterization of endorsement income is not clear cut” and that it is very fact-dependent.⁷³ Nevertheless, the IRS advised its examiners to approach the characterization of on-court endorsement income aggressively, relying on the fact that it had successfully made the argument that all endorsement income is personal service income since an athlete was required to play in tournaments to receive the income.⁷⁴

In 2009, the IRS Chief Counsel provided general legal guidance concerning what constitutes endorsement income.⁷⁵ In AM 2009-005, the Associate Chief Counsel addressed the characterization of U.S.-sourced ranking and placement bonuses paid, pursuant to on-course endorsement contracts, to nonresident aliens under the IRC.⁷⁶ Once again, the Chief Counsel took the position that all on-course endorsement income should be treated as personal services income.⁷⁷

IV. GOOSEN V. COMMISSIONER

In *Goosen v. Commissioner*, the Tax Court examined specific taxation issues concerning a professional golfer’s international endorsement deals.⁷⁸ Retief Goosen, a nonresident alien and professional golfer, petitioned the Tax Court for redetermination of income tax deficiencies that arose from international endorsement deals.⁷⁹ Goosen, a citizen of South Africa and resident of the United Kingdom, had entered into endorsement agreements with

72. See Nitti, *supra* note 49 (describing IRS publication relating to characterization of income for tennis players).

73. See *id.* (stating position of IRS advisement in its training guide).

74. See *id.* (describing IRS advisement to examiners to aggressively pursue endorsement income on successful precedent that all on-course endorsement income is essentially personal services income).

75. See Memorandum from Steven A. Musher, Associate Chief Counsel to the Internal Revenue Service on U.S. Source Retainer Fees and Ranking and Placement Bonuses Derived by Professional Golf and Tennis Players from On-Court Endorsement Contracts (June 26, 2009), *available at* IRS AM 2009-005, 2009 WL 2009043 (providing input on matter from IRS Chief Counsel).

76. See *id.* (characterizing general content of memorandum).

77. See *id.* (stating position of IRS Chief Counsel).

78. See 136 T.C. 547, 548-69 (2011) (examining character and source of income earned by nonresident alien professional golfer).

79. See *id.* at 548-49 (explaining basis for case).

sponsors such as Acushnet, TaylorMade, Izod, Upper Deck, Electronic Arts, and Rolex, which allowed the use of his name, face, image, and likeness in advertising and marketing campaigns globally.⁸⁰ Each of the endorsement agreements paid Goosen a base endorsement fee; however, while several sponsors prorated the fee if he did not play in a required number of golf tournaments, others instead provided bonuses for top finishes or a notable World Golf Ranking.⁸¹

When filing his 2002 and 2003 United States federal income tax returns, Goosen determined the endorsement fees and bonuses from Acushnet, TaylorMade, and Izod consisted of half royalty income and half personal services income.⁸² Additionally, he determined the endorsement fees from Upper Deck, Electronic Arts, and Rolex entirely consisted of royalty income.⁸³ Moreover, Goosen reported that around seven percent of his endorsement income was U.S.-sourced income.⁸⁴

Conversely, the IRS determined that Goosen should have categorized the totality of the endorsement fees and bonuses from Acushnet, Taylormade, and Izod as personal services income.⁸⁵ Additionally, the IRS increased the amount of Goosen's endorsement fees specifically allocated as U.S.-sourced income.⁸⁶

The Tax Court ultimately found that the endorsement fees and bonuses that Goosen received from Acushnet, Taylormade, and Izod was fifty percent personal services income and 50 percent royalty income.⁸⁷ Additionally, the court held that the royalty income from Acushnet, Taylormade, and Izod were 50 percent U.S.-sourced income effectively connected with U.S. business.⁸⁸ Fur-

80. *See id.* at 547-48 (discussing petitioner's citizenship, residency, and endorsement contracts).

81. *See id.* at 547 (summarizing terms of endorsement contracts).

82. *See id.* (paraphrasing Goosen's determination on personal services and royalty income amounts).

83. *See id.* (describing Goosen's returns for 2002 and 2003).

84. *See id.* (outlining amount of Goosen's endorsement reported as U.S.-sourced).

85. *See id.* (boiling down Internal Revenue Service's position and determinations).

86. *See id.* (discussing findings of IRS).

87. For a further discussion on the allocation of personal services versus royalty income, see *supra* notes 16-40 and accompanying text. For a further discussion on the court's characterization of income in *Goosen*, see *infra* notes 90-96 and accompanying text.

88. For a further discussion on the determination of U.S.-sourced income, see *supra* notes 16-40 and accompanying text. For a further discussion regarding the court's determination of U.S.-sourced income in *Goosen*, see *infra* notes 97-109 and accompanying text.

ther, royalties Goosen received from Rolex were determined to be half U.S.-sourced income not effectively connected with a U.S. trade or business, royalties received from Upper Deck were determined to be ninety-two percent U.S.-sourced income not effectively connected with a U.S. trade or business, and royalties received from Electronic Arts were determined to be seventy percent U.S.-sourced income not effectively connected with a U.S. trade or business.⁸⁹ This comment will now examine the court's determinations on each matter.

A. Character of Income

In examining the character of income for Goosen's various endorsement deals, the court first noted that the parties agreed that all endorsement fees under off-course endorsement agreements constitute royalty income.⁹⁰ In light of that, the only contested income was derived from the on-course endorsement agreements from TaylorMade, Izod and Acushnet.⁹¹ On this issue, Goosen primarily relied on *Boulez v. Commissioner* to bolster his argument in favor of royalties as he maintains an ownership interest in his name and likeness.⁹² The IRS argued that the sponsors primarily paid the petitioner to perform personal services, as the required services included playing golf and carrying or wearing the sponsor's merchandise.⁹³

In reaching its decision, the court stated that the "characterization of the petitioner's on-course endorsement fees and bonuses depends on whether the sponsors primarily paid for petitioner's services, for the use of the petitioner's name and likeness, or for both."⁹⁴ In examining the record, the court found that the endorsement agreements granted the sponsors the right to use Goosen's name and likeness for advertising, required him to wear or use the sponsors' products and make promotional appearances,

89. For a further discussion on the determination of U.S.-sourced income connected to a trade or business, see *supra* notes 31-40 and accompanying text. For a further discussion on the court's determination of effectively connected income, see *infra* notes 110-120 and accompanying text.

90. See *Goosen*, 136 T.C. at 560 (describing stipulation by both parties that off-course endorsement agreements constitute royalties).

91. See *id.* (setting forth remaining area of contention between parties).

92. For a further discussion on *Boulez v. Commissioner*, see *supra* notes 57-71 and accompanying text.

93. See *Goosen*, 136 T.C. at 560 ("Respondent argues that the personal services petitioner was required to perform included playing golf and carrying or wearing the sponsors' products.").

94. See *id.* (quoting opinion of court).

paid him tournament and ranking bonuses for his on-course performance, and failed to allocate the endorsement income between personal services and royalties.⁹⁵ Despite the difficulty in allocating the endorsement fees between performance of services and use of name or likeness the court estimated both were equally important, and allocated each 50 percent of the fees.⁹⁶

B. Source of Income

In turning to the source of the income, the court accepted the stipulation sourcing the personal services income, tournament bonuses, and ranking bonuses to the United States.⁹⁷ Nevertheless, the parties disagreed on what portion of royalty income from on-course and off-course endorsement fees should be U.S.-sourced income.⁹⁸ In sourcing intangibles, the court referenced sections 861(a)(4) and 862(a)(4) of the IRC for sourcing intangible property, which require sourcing it where it is used or granted the privilege of being used.⁹⁹ The court then proceeded to examine where Goosen's name and likeness were used, or would be used, to determine the actual U.S.-sourced amount.¹⁰⁰

The court stated that taxpayers must make an appropriate sourcing allocation if the royalties relate to the right and use of the property within the United States.¹⁰¹ Courts have been known to allocate all royalty income to the United States in the absence of a reasonable allocation, unless a sufficient basis exists for allocating the income otherwise.¹⁰² Here, Goosen and his endorsers agreed to source twenty-five percent of his income to the United Kingdom, and seventy-five percent to the rest of the world—failing to specifically allocate income to the United States.¹⁰³

95. *See id.* (discussing court's findings in regards to personal services income and royalties income).

96. *See id.* (stating court's allocation of income between personal services and royalties).

97. *See id.* at 563 (describing court's treatment of personal services income sourced to United States).

98. *See id.* (describing remaining issue of sourcing royalties income).

99. For a further discussion on §§ 861 and 862, see notes *supra* 16–24 and accompanying text.

100. *See Goosen*, 136 T.C. at 563 (examining where name and likeness were used by looking at sales figures).

101. *See id.* at 564 (discussing standards for sourcing royalty income).

102. *See id.* (summarizing courts' previous approaches to unreasonable allocation of royalty income).

103. *See id.* (recounting petitioner's sourcing).

As a result, the court proceeded to evaluate the petitioner's name and likeness in the context of each endorsement deal.¹⁰⁴ In reaching its decision regarding each company's endorsement deal, the court searched the record for evidence of sales and usage of names and likeness.¹⁰⁵ Despite noting that product sales do not necessarily reflect relative worldwide value of intangible rights, the court found that the petitioner's name and likeness added value to both Upper Deck's and Electronic Arts' sales, and sourced to the U.S. at the same percent of these companies' U.S. sales.¹⁰⁶ Similarly, the court found it "perplexing . . . that [Goosen] allocated . . . only 6.4 percent of his royalty income to the United States[,]” despite testifying that the U.S. is one of his three largest markets.¹⁰⁷ Looking at the rest of the facts, the court recognized the petitioner's demonstration of his global image, and while acknowledging the United States to be his largest market, the court stated it was unreasonable to source all royalties to the United States.¹⁰⁸ As a result, taking into account the entirety of the evidence, the court sourced fifty percent of royalties from Rolex to the United States.¹⁰⁹

C. Effectively Connected Income

Finally, the court turned to the issue of whether the U.S.-sourced income is effectively connected with a U.S. trade or business.¹¹⁰ The parties agreed that Goosen engaged in the U.S. trade or business of playing golf.¹¹¹ As mentioned earlier, U.S.-sourced income effectively connected with a U.S. trade or business subjects the nonresident alien to the graduated tax rates applicable to U.S. residents; non U.S.-sourced income not effectively connected with a trade or business (i.e. royalties and other FDAP) is subject to a flat thirty percent withholding tax.¹¹²

104. *See id.* (describing court's opinion).

105. *See id.* at 564-66 (accounting for court's examination of record).

106. *See id.* at 564-65 (reconciling analysis of court).

107. *See id.* at 565-66 (discussing areas of concern found by court in examining petitioner's allocation of royalty income to United States).

108. *See id.* at 566 (setting forth reasoning of court in sourcing petitioner's image to United States.)

109. *See id.* (sourcing half of royalties from Rolex to United States after inquiry).

110. *See id.* (tracing analysis of court that ends with effectively connected prong of analysis).

111. *See id.* (setting forth petitioner's trade or business for purposes of analysis).

112. *See id.* (describing rates applicable to effectively connected and non-effectively connected income).

As Goosen did not maintain a place of business in the U.S., he is not subject to U.S. tax on income from non-U.S. sources.¹¹³ Moreover, the parties did not dispute that the petitioner's golf play constituted personal services and was appropriately taxed at the graduated rates.¹¹⁴ Nevertheless, the court still had to determine whether Goosen's U.S.-sourced royalty income was effectively connected with his U.S. trade or business.¹¹⁵

In determining whether U.S.-sourced royalty income is effectively connected with a U.S. trade or business, the activities of the trade or business must be a material factor in realizing the royalty income.¹¹⁶ The court separately considered the U.S.-sourced royalty income received from the on-course and off-course endorsements in conducting its analysis.¹¹⁷ In the former, the court reasoned that petitioner's participation in a golf tournament was material to receiving the income for the use of his name and likeness.¹¹⁸ As a result, it found that such income was effectively connected with a U.S. trade or business, and thus was subject to the graduated tax rates.¹¹⁹ Conversely, since the off-course endorsements required no play or tournament victories, nor did they require petitioner to be physically present in the United States, the court deemed the associated income as not effectively connected with a U.S. trade or business, and thus was subject to the flat thirty percent tax on the gross income of such endorsements.¹²⁰

V. ANALYSIS AND IMPLICATIONS

A. Generally

The issue of nonresident alien professional athletes being taxed on their worldwide endorsement income in the United States

113. *See id.* (stating petitioner's income from non-U.S. sources not subject to U.S. tax).

114. *See id.* at 566-67 (discussing petitioner's acquiescence to taxes on income directly resulting from golf play).

115. *See id.* at 567 (noting court's need to determine whether royalty income was effectively connected to U.S. trade or business).

116. For a further discussion on determining if U.S.-sourced royalty income is connected with a trade or business, see *supra* notes 16 - 40 and accompanying text.

117. *See Goosen*, 136 T.C. at 567 (noting how court conducted its evaluation).

118. *See id.* (deciding petitioner's golf play was required for such income).

119. *See id.* (concluding on-course income effectively connected to U.S. trade or business).

120. *See id.* at 567 (reasoning off-course income required no play element and thus was not effectively connected).

has recently increased.¹²¹ *Goosen* has provided both practitioners, and athletes clarifying guidance on the treatment of international endorsement contracts for athletes competing in events both within the United States and abroad.¹²² Despite such guidance, many still do not agree with the Court's and the IR's position and characterization of income, and others subsequently raised issues that appear to remain unanswered.¹²³

In evaluating the *Goosen* decision, commentators expressed concern for how the court sourced royalty income for the purposes of endorsement contracts.¹²⁴ Specifically, one commentator stated:

The aspect of the decision that seems to have scared some practitioners (other than the existence of a worldwide market of collectible golf cards, which maybe scares only this practitioner) was how the court sourced royalty income according to the U.S.-to-worldwide sales percentages. The fear is that the IRS will simply apply those percentages in every case, and taxpayers will have no room to negotiate a more favorable allocation.¹²⁵

For *Goosen*, the direct result of such methodology increased his U.S.-sourced royalty income from deals with Upper Deck by 83% and Electronic Arts by 62%, thereby increasing his tax liability.¹²⁶ In addition, this precedent leaves an uphill battle for athletes to overcome in contesting future sourced income.¹²⁷

Additionally, *Goosen* raises a subsequent concern through its inconsistent methodology for characterizing and sourcing *Goosen's*

121. See Peter Finch, *Turbo-Taxing The Tour Pros*, GOLFDIGEST (Apr. 2011) (“[W]hat’s becoming much more of an issue these days is golfers’ endorsement income.”).

122. See Nitti, *supra* note 49 (“The Tax Court’s decision in *Goosen* provides nonresident professional athletes with long-awaited authority for determining the character and source of their worldwide endorsement income.”).

123. For a further discussion regarding the impact and criticisms of *Goosen*, see *infra* notes 124–137 and accompanying text.

124. See Steve Dixon, *Tax Court Addresses Character and Sourcing Issues for Golfer’s Endorsement Income*, TAX APPELLATE BLOG (Nov. 1, 2011), <http://appellatetax.com/2011/11/01/tax-court-addresses-character-and-sourcing-issues-for-golfer%E2%80%99s-endorsement-income/> (discussing apprehension for court’s method in sourcing royalty income).

125. See *id.* (quoting author, Steve Dixon).

126. See Nitti, *supra* note 49 (“[T]he sourcing of off-course royalty income according to the sales of the underlying product increased *Goosen's* tax liability, raising his U.S.-source royalty income from contracts with Upper Deck and Electronic Arts by 83% and 62%, respectively.”).

127. See *id.* (“This sourcing methodology becomes a precedent that will be difficult for athletes to overcome in future decisions.”).

on-course royalty income related to Rolex.¹²⁸ One critic stated, “[i]t is curious that the court chose to use an estimated allocation [for the Rolex endorsement] amount rather than to employ the same approach used in sourcing Upper Deck and Electronic Arts income.”¹²⁹ Another commented:

I was surprised at the informal manner [sic] in which the Tax Court “guessed” at several key allocations, including splitting the on-course endorsement income 50/50 between royalty income and personal service income, then again in sourcing the royalty income 50% to the U.S. Both amounts were completely arbitrary, with no quantitative analysis performed.¹³⁰

Nonetheless, uncertainty appears to linger as it is unclear why some allocations were sometimes based on sales figures, while others were left to a simple estimation by the court.¹³¹ Moreover, speculation remains as to whether the result would have been the same had Goosen been ranked 150 on the money list instead of within the top ten, or whether his failure to win a major tournament would have had any impact.¹³² Similarly, it is unclear whether the outcome would have changed if Goosen were a hero in his home country but unknown in the US—thus, laying the foundation for an inequitable outcome.¹³³

Finally, in approaching the taxation of nonresident alien professional athletes, one must be mindful of the impact this issue has on the events, such as tournaments, that generate the revenue for athletes in the United States.¹³⁴ When foreign athletes compete in the U.S., the IRS must focus on the tax liabilities that arise from

128. *See id.* (raising issue of inconsistency by court in methodologies used).

129. *See id.* (quoting issue raised by commentator).

130. *See* WithumSmith Brown, CPAs, *Tax Court Settles Case Involving Professional Golfer; Offers Lesson in Sourcing of Endorsement Income*, DOUBLE TAXATION: A TAKE ON ALL THINGS TAXES (Jun. 11, 2011), <http://double-taxation.com/2011/06/10/tax-court-settles-case-involving-professional-golfer-offers-lesson-in-sourcing-of-endorsement-income/> (quoting commentator).

131. *See id.* (elaborating on uncertainty proposed by commentator).

132. *See* Nitti, *supra* note 49 (discussing issues raised by commentator with court’s decision).

133. *See id.* (speculating on areas of possible inconsistencies in future decisions related to court’s decision).

134. *See* 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, 400-04 (2009) (discussing impacts of taxing nonresident alien professional athletes and discussing need to balance competing interests).

such activities and collect the proper amount.¹³⁵ However, the U.S. must be sure to avoid obstructing the flow of talent into the country with deterrent tax impacts on foreign athletes.¹³⁶ Therefore, in the context of the issue at hand, the goal must be a tax regime that adequately balances collecting taxes on endorsement income earned in the United States with maintaining incentives for the flow of talent into the United States.¹³⁷

B. Implications of Morality Clauses, Tournament Requirements, and Bonuses

Morals or morality clauses, also known as public image or good-conduct clauses, are provisions in an endorsement contract that grant the endorsee the right to terminate the agreement in the event that the endorsed does something to damage his or her own image.¹³⁸ Similarly, stemming from instances of unethical, immoral, or criminal behavior from endorsers, reverse-morality clauses have emerged to allow the endorsed to terminate an endorsement contract to protect the reputation of the endorsee.¹³⁹ As these provisions have become commonplace in endorsement deals, the need to carefully craft and negotiate such provisions has increased.¹⁴⁰ After the court's opinion in *Goosen*, endorsed athletes must recognize the implications of such provisions for the purposes of characterizing endorsement income.¹⁴¹

The court noted that the petitioner's endorsement deals "even included a morals clause . . . to terminate the agreements if peti-

135. See *id.* at 375 ("This focus exists because the IRS wants its portion of the performance income foreigners earn while in the United States.").

136. See *id.* at 404-05 ("The United States must be careful not to hinder the talent flow onto its shores by burdening artists and athletes with tax consequences. These burdens, which may not exist in the current tax code, may nonetheless exist as misperceptions that have significant deterrent effects on foreign entertainers and artists.").

137. See *id.* at 405 (stating need to balance competing interests).

138. See Daniel Auerbach, *Morals Clauses as Corporate Protection in Athlete Endorsement Contracts*, 3 DEPAUL J. SPORTS L. & CONTEMP. PROBS. 1, 2 (2005) (explaining concept of morals clauses).

139. See Porcher L. Taylor, III, Fernando M. Pinguelo & Timothy D. Cedrone, *The Reverse-Morals Clause: The Unique Way to Save Talent's Reputation and Money in a New Era of Corporate Crimes and Scandals*, 28 CARDOZO ARTS & ENT. L.J. 65, 66 (2010) (describing emergence of reverse morals clauses in endorsement contracts).

140. See generally Fernando M. Pinguelo & Timothy D. Cedrone, *Morals? Who Cares About Morals? An Examination of Morals Clauses in Talent Contracts and What Talent Needs to Know*, 19 SETON HALL J. SPORTS & ENT. L. 347 (2009) (setting forth various negotiation points and effects of morals clauses in endorsement contracts for athletes).

141. See *Goosen v. Commissioner*, 136 T.C. 547, 553-61 (2011) (noting petitioner's morals clauses in various endorsement deals and their impact).

tioner compromised his image.”¹⁴² In doing so, it took the presence of such morals clauses as evidence that bolstered the argument that such agreements were for royalties.¹⁴³ This is because, through the lens of Tiger Woods’ rise (and subsequent fall) in brand and image, the court believes morals clauses exist to protect endorsers in case the image they licensed (and paid royalties on) gets damaged.¹⁴⁴ Moving forward, although the inclusion or exclusion of a morals clause will never be outcome-determinative in such a characterization of income, this type of recognition by the judiciary is noteworthy; morals clauses should reasonably be included or omitted based on the type of endorsement and desired tax treatment, as they demonstrate the intent of the sponsors and the athlete when at trial.¹⁴⁵

Additionally, the court’s opinion lends itself to drawing conclusions from the presence of tournament requirements in endorsement contracts.¹⁴⁶ The court notes that in Goosen’s endorsement deals with sponsors, he is required to attend specific promotional events and play in a specified number of tournaments per year.¹⁴⁷ If he fails to do so, sponsors will prorate Goosen’s endorsement fees.¹⁴⁸ The court concluded that such requirements support the presence of a personal services element to the deal—similar to the sponsors’ valuation of Goosen’s play at tournaments.¹⁴⁹ The court extended similar logic to the issue of ranking bonuses for success in play, finding that sponsors value such success.¹⁵⁰ As the court concluded, these types of events are not *de minimis* or ancillary to the licensing of his image, but rather the endorsement contracts included both royalty and personal services income.¹⁵¹ As a result, practitioners and athletes must recognize that such play require-

142. *See id.* at 561 (quoting opinion of court).

143. *See id.* (reasoning that morals clauses support petitioner’s characterization of endorsement income as royalties-based).

144. *See id.* (explaining morals clauses exist to protect endorser from damage to endorsee’s image).

145. *See id.* (finding morals clauses lay foundation for characterization of endorsement income as royalties income); *see also* Ark. State Police Ass’n v. Comm’r, 282 F.3d 556, 560 (8th Cir. 2002).

146. *See Goosen*, 136 T.C. at 562 (summarizing analysis of court).

147. *See id.* (describing facts court notes in opinion).

148. *See id.* (stating conditions of endorsement contract).

149. *See id.* (noting court’s conclusion that tournament or play requirements lends itself to personal services income characterization).

150. *See id.* (extending tournament requirement argument to ranking bonuses).

151. *See Goosen*, 136 T.C. at 562 (concluding both types of income present due to varying conditions of endorsement contracts).

ments and performance incentives will be characterized in-part as personal services income, and must structure future endorsements accordingly.¹⁵²

C. 2012 London Olympics, UK Tax Amendments, and The Olympic Tax Elimination Act

In summer 2012, London hosted the Games of the XXX Olympiad (the “Games”).¹⁵³ The Games attracted more than 180,000 spectators and 8.8 million tickets were available for them.¹⁵⁴ Approximately 10,500 athletes from 204 countries took part in the Games, which had twenty-six sports, featuring thirty-nine disciplines, and took place across thirty-four venues.¹⁵⁵ In anticipation of this event, the United Kingdom amended its tax code to serve the interests of participating international athletes.¹⁵⁶

In recent years, athletes have been apprehensive of competing in the United Kingdom, as it forced them to submit to a tax system that many considered unfavorable.¹⁵⁷ Foreign sports stars competing in Britain are taxed fifty percent on their appearance fee and on a proportion of their worldwide sponsorship income.¹⁵⁸ Unlike when athletes were taxed based on how many days they competed in Britain, HM Revenue & Customs now bases taxation on the proportion of an athlete’s competitions that take place in Britain.¹⁵⁹

152. *See id.* (summarizing provisions of endorsement contracts analyzed specifically by court’s opinion).

153. *See London beats Paris to 2012 Games*, BBCSPORT (Jul. 6, 2005), http://news.bbc.co.uk/sport2/hi/front_page/4655555.stm (announcing host of 2012 Olympics).

154. *See OFFICIAL WEBSITE OF OLYMPIC MOVEMENT, LONDON 2012* <http://www.olympic.org/london-2012-summer-olympics> (last visited Oct. 24, 2012) (summarizing notable aspects of games).

155. *See id.* (describing makeup of athletes and countries represented at 2012 Olympic Games).

156. *See Tax Exemption Regulations for 2012 Games*, HM REVENUE & CUSTOMS, <http://www.hmrc.gov.uk/2012games/tax-exemption-regs.htm> (last visited Oct. 24, 2012) (stating special tax policies for competitors of 2012 London Olympic Games).

157. *See Kelly Phillips Erb, Nadal Declines to Play in UK Tourney, Citing Tax Laws*, FORBES (Oct. 14, 2011), <http://www.forbes.com/sites/kellyphillipserb/2011/10/14/nadal-declines-to-play-in-uk-tourney-citing-tax-laws/> (summarizing Rafael Nadal’s decision to skip tennis tournament due to possible tax consequences of playing); *see also* Simon Hart, *London 2012 Olympics: Usain Bolt set to shun Britain over punitive tax rules*, THE TELEGRAPH (Jul. 12, 2010), available at <http://www.telegraph.co.uk/sport/othersports/athletics/7884142/London-2012-Olympics-Usain-Bolt-set-to-shun-Britain-over-punitive-tax-rules.html> (describing Usain Bolt’s decision not to run in Britain until Olympics because of punitive tax rule).

158. *See Hart, supra* note 157 (describing UK tax policy as it applies to foreign athletes).

159. *See id.* (describing previous UK tax policy).

This procedure evolved from HM Revenue & Customs successful 2006 challenge of Andre Agassi, in which it argued that in addition to his prize earnings, a proportion of his worldwide sponsorship was also earned during his time in the UK, and therefore taxable.¹⁶⁰

Subsequently, the Her Majesty's Revenue & Customs revised their tax policies in anticipation of their potential impact on athlete's participation in the Olympics.¹⁶¹ Specifically, it passed regulations providing exemptions for certain individuals temporarily in the UK on Games-related business.¹⁶² HM Revenue & Customs provided the following guidance:

The Regulations implement tax commitments made by the UK in bidding to host the Olympic and Paralympic Games ("the Games"). The Regulations exempt from income tax the activity of specified individuals who come to the UK temporarily to take part in or assist in the hosting of the Games. They also prevent the work of such individuals, where relevant, from creating a permanent establishment of their employer, if one does not already exist, for corporation tax purposes.¹⁶³

As a result, athletes would not be subject to a steep UK tax rate for competing in the London Olympics.¹⁶⁴ However, the likelihood of professional athletes missing events in the United Kingdom for tax reasons remains uncertain, as such regulations only applied to the Olympics.

Similarly, in the United States, tax debate increased approaching the Olympics as the topic of Olympic athletes being taxed on their medals and earnings was raised.¹⁶⁵ In response, Senator

160. *See id.* (summarizing evolution of policy based on successful challenge of Andre Agassi's income). For example, if Bolt were to take part in ten meetings worldwide, with one in the UK, the HMRC could tax him on one-tenth of his worldwide earnings. *See id.* (offering illustration of UK tax policies).

161. For a discussion on athletes hesitation to compete in the United Kingdom, see *supra* note 157.

162. *See* TAX EXEMPTION REGULATIONS FOR 2012 GAMES, *supra* note 156 (noting impact of specific provisions of policy passed for Olympic Games).

163. *See Explanatory Memorandum To The London Olympic Games And Paralympic Games Tax Regulations 2010*, 2010 No. 913 (2010), available at http://www.legislation.gov.uk/ukxi/2010/2913/pdfs/ukxiem_20102913_en.pdf (quoting HM Revenue & Customs); *see also* TAX EXEMPTION REGULATIONS FOR 2012 GAMES, *supra* note 156 (setting forth policies of governing tax body of UK).

164. *See Explanatory Memorandum To The London Olympic Games And Paralympic Games Tax Regulations 2010*, *supra* note 163 (characterizing impact of regulations on Olympic competitors).

165. *See Meredith Bennett-Smith, Olympians Could Owe The IRS Thousands In Taxes On Medals, Cash Bonuses*, HUFFINGTON POST (Aug. 1, 2012), <http://www.huffington>

Marco Rubio introduced a bill that aimed to exempt such income from U.S. taxation.¹⁶⁶ President Barack Obama, in an attempt to support American athletes, favored the bill.¹⁶⁷ However, some speculated that US Olympic Athletes might not be subject to any taxes after taking applicable deductions, and commented that such legislation unnecessarily complicates the system.¹⁶⁸ As international sporting events grow in popularity and as the world increasingly becomes interconnected, issues related to the taxation of international athletes likely will continue to arise.¹⁶⁹

VI. *GARCIA V. COMMISSIONER*¹⁷⁰

Sergio Garcia, a resident of Switzerland, is a nonresident of the United States for tax purposes and a worldwide professional golfer.¹⁷¹ In 2001, 2002, 2004, 2005, and 2008, Garcia was ranked as one of the top seven golfers in the world.¹⁷² However, in March of 2010, Sergio Garcia received a Notice of Deficiency disputing tax returns for 2003 and 2004.¹⁷³ In the notice, the Commissioner determined deficiencies in Garcia's income tax in the amount of \$930,248.00 for 2003, and \$789,518.00 for 2004.¹⁷⁴ The disputed amount centered primarily on the determination to increase Garcia's Schedule C Gross Receipts for the years in question.¹⁷⁵ In do-

post.com/2012/08/01/olympians-owe-irs-taxes-medals-cash-bonuses_n_1729486.html (noting tax consequences of winning Olympic medals).

166. See Press Release, U.S. Senator Marco Rubio (R-FL), *Senator Rubio Introduces Bill to Eliminate Tax on Olympic Medal Winners* (Aug. 1, 2012), available at <http://www.rubio.senate.gov/public/index.cfm/press-releases?ID=ea518eca-4667-4771-bee6-3eeda7106aac> (summarizing bill introduced by Senator Rubio).

167. See Kelly Phillips Erb, *President Obama Supports Tax Exemption for Olympic Athletes*, FORBES (Aug. 6, 2012), <http://www.forbes.com/sites/kellyphillipserb/2012/08/06/president-obama-supports-tax-exemption-for-olympic-athletes/> (noting President Barack Obama's support of Senator Rubio's bill).

168. See Kelly Phillips Erb, *It's Possible That U.S. Olympic Medalists Won't Actually Pay Tax On Winnings, Exempt or Not*, FORBES (Aug. 10, 2012), <http://www.forbes.com/sites/kellyphillipserb/2012/08/10/its-possible-that-u-s-olympic-medalists-wont-actually-pay-tax-on-winnings-exempt-or-not/> (speculating on need for Senator Rubio's bill); see also Erb, *supra* note 167 (revealing author's belief that granting exemption would unnecessarily complicate tax law system).

169. For a discussion summarizing concerns of taxation of international athletes, see *supra* notes 153 - 168 and accompanying text.

170. No. 13649-10, 140 T.C. No. 6, 2013 WL 999377 (T.C. Mar. 14, 2013)

171. See Petition at 3, *Garcia v. Commissioner*, Docket No. 13649-10, U.S. Tax Court (Jun. 15, 2010), available at http://dontmesswithtaxes.typepad.com/garcia_tax_court_petition.pdf (summarizing petitioner's professional athletic career).

172. See *id.* (stating petitioner's worldwide rank).

173. See *id.* at 2 (describing Notice of Deficiency from IRS).

174. See *id.* (stating position of IRS in Notice of Deficiency)

175. See *id.* (characterizing issue of dispute between petitioner Garcia and Internal Revenue Service).

ing so, his gross receipts would increase by approximately \$3.2 million in 2003, and by \$3 million in 2004.¹⁷⁶

In disputing the Commissioner's findings, Garcia purported that "[t]he Commissioner erred by treating all of the TaylorMade payments to Garcia . . . in 2003 and 2004 as 'personal service income' and by failing to treat a portion of the TaylorMade payments as 'royalty income.'"¹⁷⁷ This position was based upon the endorsement agreement with TaylorMade explicitly allocating a specified portion of Garcia's compensation to personal services and a different portion to royalties.¹⁷⁸ However, the Commissioner deemed the TaylorMade endorsement income to be "personal services income" in its entirety—rejecting the treatment of such payments in whole and in part as royalty income.¹⁷⁹

On March 14, 2013, the Tax Court issued its findings.¹⁸⁰ Despite previously finding a 50-50 split between royalty services income in *Goosen*, it found the same inappropriate for Garcia.¹⁸¹ Additionally, the court found neither Garcia's nor the IRS' allocation between royalty and personal service income accurately reflected the motives behind the endorsement agreement.¹⁸² Primarily, the court focused on Garcia's status as a TaylorMade Global Icon, especially given how important his image is to selling their products, and found it convincing evidence that the endorsement agreement was more heavily weighted towards image rights than that of Goosen's.¹⁸³ Moreover, the court found it of nominal importance that Garcia's agreement required more personal services than Goosen's did, as it found that fewer appearances were required in practice and testimony supported that the personal services element did not constitute a large portion of the contract.¹⁸⁴ Further, as Garcia played in fewer professional golf events while us-

176. *See id.* (summarizing impact IRS's characterization of income would have on petitioner).

177. *See id.* at 8 (stating position of petitioner).

178. *See id.* (noting facts relevant to position of petitioner and characterizing and sourcing income in endorsement contracts).

179. *See id.* (describing IRS' characterization of all endorsement income as personal services).

180. *See Garcia v. Commissioner*, No. 13649-10, 140 T.C. No. 6, 2013 WL 999377 (T.C. Mar. 14, 2013).

181. *See id.* at 24 (noting ruling in *Goosen* inappropriate for *Garcia*).

182. *See id.* at 28-29 (summarizing court's opinion that neither party's allocation is correct).

183. *See id.* at 25 (stating importance of Garcia's image to TaylorMade demonstrates agreement more heavily weighted towards royalties).

184. *See id.* at 25-26 (finding little importance in Garcia's agreement containing more personal services elements).

ing endorsed products than Goosen did, the court interpreted this as strong evidence that Garcia's agreement was less proportionately weighted toward personal services.¹⁸⁵ Ultimately, the court relied upon *Goosen* when acknowledging that the allocation between royalty and personal services income payments is a fact-driven determination.¹⁸⁶ Therefore, in consideration of the circumstances surrounding Garcia's endorsement agreement, it found that sixty-five percent of the endorsement fees Garcia received represented royalty compensation, and thirty-five percent represented personal service compensation.¹⁸⁷

As a result, Garcia's tax liability will increase as his personal services income increases from his original claim of fifteen percent of his endorsement contract to the court-determined thirty-five percent.¹⁸⁸ Nevertheless, the outcome is still a far better result for Garcia than the 100 percent allocation sought by the IRS.¹⁸⁹ Moving forward, the case is considered a victory for professional golfers and a defeat for the IRS, despite Garcia's increased tax liability.¹⁹⁰ The IRS has consistently taken the position that worldwide endorsement income for nonresident alien professional athletes is to be characterized entirely as personal services income, and such a position has now been defeated twice in both *Goosen* and *Garcia*.¹⁹¹ Further, the decision in *Garcia* demonstrates that the percentage of endorsement income the Tax Court is willing to characterize as royalty income is increasing.¹⁹² Based on such precedent, it appears one may only expect that the larger a nonresident alien athlete's name, the more likely the endorsement fees they receive is for their image and not their skills.¹⁹³

185. *See id.* at 27 (concluding agreement weighted more towards use of Garcia's image due to less play requirements).

186. *See id.* at 28 (noting examination of circumstances surrounding agreement required to make allocation).

187. *See id.* at 28-29 (establishing court's holding).

188. *See* Coleman McDowell, *Sergio Garcia Must Pay More U.S. Taxes on Endorsements*, GOLF.COM (Mar. 15, 2013), <http://blogs.golf.com/presstent/2013/03/sergio-garcia-forced-to-pay-additional-taxes-on-endorsements.html> (discussing implications of court's decision).

189. *See id.* (comparing ultimate outcome to position of IRS).

190. *See id.* (characterizing outcome of case).

191. *See* Tony Nitti, *Golfer Sergio Garcia Comes Up Short in Tax Court, But Is The Decision A Victory For Other Athletes?*, FORBES (Mar. 14, 2013), <http://www.forbes.com/sites/anthonymitti/2013/03/14/golfer-sergia-garcia-comes-up-short-in-tax-court-but-is-the-decision-a-victory-for-other-athletes/> (summarizing benefits for professional golfers from decision).

192. *See id.* (observing trends in allocation by Tax Court).

193. *See id.* (predicting future outcomes of similar cases based on *Garcia* and *Goosen*).

VII. CONCLUSION

The U.S. taxation of nonresident alien professional athletes is an issue that has arisen frequently as sports have become more globalized and international endorsement deals have become more popular.¹⁹⁴ National sports icons have evolved into international megastars, and as a result, multinational companies have reason to hire such athletes to endorse their products or brand.¹⁹⁵ However, the difficulty in sourcing just how much income is connected to a specific country, and the type of income it qualifies as has become far from easy.¹⁹⁶

The Tax Court's decision in *Goosen* builds upon the earlier jurisprudence of characterizing and sourcing athletes' income while providing long overdue guidance addressing specific types of endorsement structures.¹⁹⁷ Nevertheless, while the court reached an outcome for Retief Goosen, many subsequent concerns from practitioners required further guidance.¹⁹⁸ Many of these concerns appear to have been addressed in the court's guidance and decision in *Garcia*, as it largely provided a second defeat for the IRS' position.¹⁹⁹ Nonetheless, it is important that a balance remains to ensure that promoters of domestic sporting events are able to attract talent, while the IRS is able to allocate and tax the proper amount of income earned in the United States.²⁰⁰ The issues surrounding the 2012 London Olympics demonstrate both the deterrent this issue can pose, and serve as a model for avoiding such issues in the case of larger global sporting events in the future.²⁰¹ Therefore, the ultimate goal moving forward must be for the United States to establish and maintain a more transparent and logical framework for taxing the endorsement income attributed to the United States

194. For a discussion on instances of tax disputes relating to athletes, see *supra* notes 41-71, 110-120, 171-193 and accompanying text.

195. For a discussion on the development of athlete endorsement deals, see *supra* notes 1-7 and accompanying text.

196. See generally *Goosen v. Commissioner*, 136 T.C. 547 (2011) (examining each endorsement contract to characterize, source, and effectively connect income for taxation purposes).

197. For a discussion on relevant jurisprudence leading up to *Goosen*, see *supra* notes 41-76 and accompanying text.

198. For a discussion summarizing concerns of *Goosen* decision, see *supra* notes 121-137 and accompanying text.

199. For a discussion summarizing the issues and outcome of *Garcia*, see *supra* notes 170-193 and accompanying text.

200. See Taylor, *supra* notes 134-137 (stating need to balance interests of athletes, promoters, and tax authorities in solution).

201. For a discussion describing tax issues relating to the 2012 London Olympic Games, see *supra* notes 153-168 and accompanying text.

and earned by international athletes in a fashion that adequately collects the owed taxes without impeding the attractiveness of the country's sporting leagues, teams, events, or venues.²⁰²

*Seth William Stern**

202. See Taylor, *supra* note 134-137 (stressing importance of balancing competing interests in reaching viable long-term solution for taxing international athletes).

* J.D. Candidate, 2013, Villanova University School of Law; M.B.A. Candidate, 2013, Villanova School of Business; B.A., 2009, Boston University.