Note

NFL Expansion Into Europe: Necessary Changes in the Taxation of International Athletes Before the Big Move

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INTRODUCTION

Inside edge, Green left, Switch Nasty X and Y tight, Fake Slash 37 Buster Nudge Naked Right, Z-Sting, Y-Spear on One. To you and I, this sentence (I use the term "sentence" loosely) probably makes no sense. To a National Football League ("NFL") player though, it explains a precise formation, how and where to specifically line up, the type of pre-snap motion if any, what blocking scheme will be used, what route combination the receivers will run, and a cadence. In short, it is a specifically designed play that puts all 11 players on the same page while giving each player specific assignments and responsibilities. And at $130 million over 7 years,[1] saying players are paid to successfully execute these assignments and responsibilities is quite the understatement.

Compensation for today's football player comes in a variety of forms (i.e., compensation for services, royalty income, appearance fees, and endorsements). But the bright lights and the high-priced fame do not come without a financial toll, as professional football players usually find themselves paying more income taxes by virtue of their pro-athlete status than most normal individuals.[2] Responsible not only for federal income tax, NFL players also become subject to a "jock tax" by states and cities in which the players compete during the NFL pre, regular, and postseason, not to mention the state (and if

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[1] See Aaron Rodgers: Current Salary Information, Spotrac (last visited Aug. 10, 2013), http://www.spotrac.com/nfl/green-bay-packers/aaron-rodgers/. Likewise, a perusal of the top 100 of the world's highest paid athletes shows a number of NFL footballers that generate substantial amounts of income from contracts and/or endorsements. See World's Highest Paid Athletes, Forbes (June 2013), http://www.forbes.com/athletes/#page:1_sort:0_direction:asc_search.

[2] See Kurt Badenhausen, Pro Athlete Tax Returns Illustrate Complexity of U.S. Tax Code, Forbes (Apr. 15, 2013), http://www.forbes.com/sites/kurtbadenhausen/2013/04/15/pro-athlete-tax-returns-illustrate-complexities-of-u-s-tax-code/.

applicable, city) income taxes imposed by the NFL franchise's home state.[3] All-in, many professional football players can find themselves burdened by having to file income tax returns in up to 15 jurisdictions every year.

As if the complicated tax situation of an NFL player could not get worse, talks and plans are underway for an NFL expansion team to be placed in the United Kingdom.[4] An international franchise sounds appealing; but it certainly adds to the tax mess described above. For example, in addition to all local, state, and federal taxes imposed on these players as they play in various locations throughout the States, NFL players would now be required to comply with a U.K. tax regime that has recently forced tennis player, Rafael Nadal out of bounds and sent track star, Usain Bolt running for the hills.[5]

As it stands, the United Kingdom's tax regime is a key barrier to the NFL expansion into Europe.[6] The U.K.'s imposition of taxes on appearance fees and worldwide endorsement income, along with its highest marginal tax rate that surpasses its American counterpart act as major restrictions that require the utmost attention before NFL players will begin playing for or regularly against a U.K.-based franchise. While NFL executives are addressing various issues related to the business aspects of successfully operating an NFL team in the United Kingdom[7], one vital aspect that will have to be addressed is the taxation of international athletes. More specifically, a protocol needs to be added to the U.S.-U.K. Income Tax Treaty that makes local endorsement income only taxable in the taxpayer's home country while simultaneously narrowing the gap between the highest marginal tax rates of the respective countries. In short, the NFL needs this change before it can finally impart American football to a world that thinks football can only be played with—well, the foot (or the head).

Part I of this Note briefly sets forth the fundamentals necessary to understand the taxation of international athletes by the United Kingdom. In Part II, I analyze the approaches of both the United Kingdom and the United States with respect to taxing an athlete's endorsement income in an effort to highlight

[3] For a breakdown of how this applies differently to players on the same team and a view of how complicated these taxes can be, see Kurt Badenhausen, Complicated U.S. Tax Code Hits Players During NFL Playoffs, Forbes (Jan. 14, 2013, 11:49 AM), http://www.forbes.com/sites/kurtbadenhausen/2013/01/14/complicated-u-s-tax-code-hits-players-during-nfl-playoffs/.

[4] See Albert Breer, Despite Success Internationally, NFL Still Has a Long Way To Go, NFL.com (Oct. 13, 2011, 4:18 PM), http://www.nfl.com/news/story/09000d5d82317f83/article/despite-success-internationally-nfl-still-has-long-way-to-go.

[5] As recently as 2011, tennis superstar Raphael Nadal declined to participate in a U.K. tennis precursor to Wimbledon, choosing instead to play in Germany, where tax laws were more favorable. See Phillips Erb, Nadal Declines to Play in UK Tourney, Citing Tax Laws, Forbes (Oct. 14, 2011, 10:33 AM), http://www.forbes.com/sites/kellyphillipserb/2011/10/14/nadal-declines-to-play-in-uk-tourney-citing-tax-laws/. Like Mr. Nadal, Usain Bolt chose not to participate in a U.K. track meet leading up to the 2012 Olymics because of exposure to a large tax liability. See Simon Hart, London 2012 Olympics: Usain Bolt Set to Shun Britain Over Punitive Tax Rules, The Telegraph (July 12, 2010, 6:00 AM), http://www.telegraph.co.uk/sport/othersports/athletics/7884142/London-2012-Olympics-Usain-Bolt-set-to-shun-Britain-over-punitive-tax-rules.html.

[6] See Tony Nitti, One Reason The NFL Will Never Permanently Relocate A Team To London: The U.K.'s Tax Treatment of Nonresident Athletes, Forbes (Oct. 29, 2012, 10:14 AM), http://www.forbes.com/sites/anthonynitti/2012/10/29/one-reason-the-nfl-will-never-permanently-relocate-a-team-to-london-the-u-k-s-tax-treatment-of-nonresident-athletes/.

[7] See Breer, supra note 4, at 8.

the disparity of treatment under the current U.K. regime. Within this same Part II, I put forth a proposed protocol that adopts a hybrid of both regimes as they pertain to taxing international athletes, one that better protects U.S. players from harrowing tax treatment should the NFL choose to expand into the United Kingdom. Part III tests the proposed protocol by using the hypothetical example of Aaron Rodgers, a franchise quarterback for the Green Bay Packers. I will explain how Aaron is treated under the current U.K. regime and the U.S.-U.K. Income Tax Treaty. Subsequently, I will later explain how Aaron will be treated under the proposed protocol to the U.S.-U.K. Income Tax Treaty, ultimately resulting in a better tax outlook for Aaron and many other NFL players under contract with U.S.-based franchises.

I. THE U.K. TAX REGIME AND INTERNATIONAL ATHLETES

Every year in February the NFL hosts more than 300 potential football prospects at its Scouting Combine.[8] The prospects are subjected to sometimes weird and often overly extensive physical and psychological tests, which include an evaluation of their mastery of football fundamentals through a series of physical drills.[9] These drills are monitored and evaluated closely by the coaches, executives, and medical personnel of every NFL team, all of whom attempt to gather enough information to predict how a prospect will perform at the NFL level.[10] Because these prospects could one day play for or against a U.K.-based NFL franchise, we will use this same emphasis on fundamentals as we evaluate the United Kingdom's tax regime to predict how U.S.-based players will be taxed when they play in the United Kingdom. Think of it as our very own exclusive tax scouting combine of sorts.

In the U.K., those who are required to pay income tax must do so on their "taxable income," which includes earnings from employment, self-employment, pensions, interest on savings, interest on shares, rental income, and income from a trust.[11] As in the United States, the amount of that income, or your tax band as it is known in the U.K., determines the tax rate applicable to that type of income.[12] Even within the different bands, types of income are taxed at different rates.[13] The bands are labeled as the Basic rate, Higher rate, and

[8] See NFL Scouting Combine, NFLCombine.net, http://www.nflcombine.net. (last visited Aug. 12, 2013).

[9] See NFL Scouting Combine History, NFLCombine.net http://www.nflcombine.net/history (last visited Aug. 12, 2013); Dan Hansus, Lane JohnsonTalks Strange Bengals Interview, NFL.Com (Feb. 28, 2013, 10:29 am), http://www.nfl.com/news/story/0ap1000000145912/article/lane-johnson-talks-strange-bengals-combine-interview; Scott Bischoff, 2013 Combine: 10 Player Measurements That Shocked Everyone, Bleacherreport.com (Feb. 24, 2013), http://bleacherreport.com/articles/1541916-2013-nfl-combine-10-player-measurements-that-shocked-everyone. See also What Goes On at the Combine, NFL.Com, http://www.nfl.com/combine/workouts (last visited Aug. 12, 2013).

[10] See id.

[11] See Income Tax-the basics, HM Revenue & Customs, http://www.hmrc.gov.uk/incometax/basics.htm#6 (last visited Aug. 12, 2013).

[12] See How much Income Tax you pay, HM Revenue & Customs, http://www.hmrc.gov.uk/incometax/basics.htm#6 (last visited Aug. 12, 2013).

[13] See id.

Additional rate, and for non-savings income, they maintain rates of 20 percent, 40 percent, and 45 percent respectively.[14] The tax rates for savings income mirror those for non-savings income across the bands, but rates on dividends are slightly lower at 10 percent, 32.5 percent, and 37.5 percent for the Basic, Higher, and Additional rates respectively.[15]

Like the United States' system, the United Kingdom's tax regime taxes individuals according to the above-described rates on their worldwide income.[16] To do so in the U.K. context, however, depends largely upon two fundamental aspects of the U.K. regime—(1) residency, and (2) domicile,[17] the combination of which leads to varying tax effects.[18] We will look first at residency.

A. Residency For Tax Purposes

Beginning on April 6, 2013, the U.K. rules used to determine an individual's tax residency were solidified in what is known as the Statutory Residence Test ("SRT").[19] In short, an individual is considered a U.K. resident for tax purposes if he or she (1) does not meet any of the three automatic overseas tests, and (2) meets one of the automatic U.K. tests, or the sufficient ties test.[20] If an individual meets any of the three automatic overseas tests, he or she is not considered a tax resident of the United Kingdom.[21]

The first automatic overseas test applies if the individual was a tax resident of the U.K. for one of the three tax years preceding the tax year in question and the individual spends less than 16 days in the U.K. during the current tax year.[22] The second applies if the individual was not a tax resident for any of the three preceding tax years and is in the U.K. for less than 46 days during the current tax year.[23] The third is a bit more complicated, applying in situations where the individual works full-time outside of the U.K. without any significant breaks, spends less than 91 days in the U.K. during the current tax year, and does not work for more than three hours for more than 31 days in the United Kingdom.[24]

If the individual does not meet any of the automatic overseas tests, he or she should then determine the application of any of the two automatic U.K. tests.[25] The first automatic test states that the individual is considered a tax resident of the U.K. if none of the overseas exceptions applies and the person is

[14] Id.
[15] Id.
[16] See Residence, Domicile, and the Remittance Basis, HM Revenue & Customs, 3, http://www.hmrc.gov.uk/cnr/hmrc6.pdf. See also Meaning of 'residence' and How It Affects Your Tax, HM Revenue & Customs, http://www.hmrc.gov.uk/international/residence.htm (last visited Aug. 7, 2013).
[17] Residence, Domicile, and the Remittance Basis, supra note 16, at 6.
[18] See Meaning of 'Residence' and How It Affects Your Tax, supra note 16.
[19] Id.
[20] Guidance Note: Statutory Residence Test (SRT), HM Revenue & Customs, 8, http://www.hmrc.gov.uk/international/rdr3.pdf (last visited Aug. 7, 2013).
[21] Id. at 9.
[22] Id. at 10.
[23] Id. at 11.
[24] Id.
[25] Id.

in the U.K. for 183 days or more during the tax year.[26] The second automatic U.K. test only applies to individuals who have or have had a home in the U.K. during all or part of the tax year.[27] The test states that if the individual stays in the home, or otherwise spends a sufficient amount of time there,[28] for a period of 91 consecutive days—30 of which are in the tax year—and either does not have a house overseas or does not stay in an owned house overseas for no more than a permitted time, or fewer than 30 days, then the individual is automatically a tax resident of the United Kingdom.[29]

If neither of these automatic U.K. tests apply to the individual, he or she still might be considered a tax resident of the U.K. if he or she meets the sufficient ties test.[30] This test calls for consideration of an individual's connections or ties with the U.K. in combination with his or her physical presence in the country.[31] The combination is factored differently depending upon the individual's residence for the 3 preceding tax years.[32] For example, if the individual was not a U.K. resident for any of those 3 years, consideration is given to any family ties[33], accommodation ties[34], work ties[35], and 90-day ties.[36] On the other hand, if the individual was a tax resident for any one or more of the preceding 3 tax years, he or she must consider whether any country ties exist.[37] Country ties exist if the individual was present at midnight for the greatest number of days in that tax year than in any other country.[38]

B. Domicile

Because taxable income, including foreign income, is a function of an individual's residence and domicile, consideration must then be given to the individual's domicile under U.K. tax rules.[39] As a general matter, an individual's domicile is the place of permanent residence or home to which the individual

[26] Guidance Note: SRT, supra note 20 at 18.
[27] Id. at 19.
[28] A sufficient amount of time for purposes of this calculation equals 30 days. That means the individual spends a sufficient amount of time in the U.K. if he or she is present in the home for 30 days or more. Id. at 17.
[29] Id. at 18.
[30] Id. at 10, 29.
[31] Id. at 29.
[32] Guidance Note: SRT, supra note 20 at 29-30.
[33] An individual has a family tie if his or her spouse or child under the age of 18 is a tax resident for any of the three preceding tax years. Id. at 31.
[34] An individual has an accommodation tie if he or she has a place to live in the U.K. that is available for a continuous stay of 91 days or more during the tax year and the individual spends one or more nights there. If the accommodation involves living with a close relative, the individual must stay for a period of 16 or more nights in the home. Id. at 32.
[35] A work tie exists if an individual does more than 3 hours of work in the U.K. on more than 40 days in the tax year. Id. at 33.
[36] A 90-day tie exists if the individual has spent more than 90 days in the U.K. in either or both of the previous two tax years. Id.
[37] Id. at 29.
[38] Guidance Note: SRT, supra note 20 at 33.
[39] See Meaning of 'Residence' and How It Affects Your Tax, supra note 16.

intends to return if he or she leaves.[40] Domicile can only be established in one location at a time.[41] There are three types of domicile: (1) domicile of origin, (2) domicile of dependence, and (3) domicile of choice.[42]

In the United Kingdom, an individual's domicile of origin is the country the individual's father considered to be his real or permanent home at the time of the individual's birth.[43] If the individual's parents were not married at the time the individual was born, domicile of origin is gleaned from the mother.[44] Moreover, domicile of origin continues indefinitely until the individual establishes a new domicile via the other two types.[45]

Individuals who are legally dependent upon another person retain the other person's domicile wherever it is established.[46] This is domicile by dependence. Other rules apply in certain situations but are beyond the scope of this article.

At age 16, an individual can change his or her domicile so long as he or she establishes a permanent settlement in the new country.[47] This is domicile by choice.[48]

C. Arising vs. Remittance Basis

When an individual's tax residency and domicile have both been established, the combination of the two, whatever they may be, exposes what types of the individual's income are taxable now by the U.K. and what types are taxable only when brought in, or remitted to the country.[49] For example, if an athlete is a tax resident of the United Kingdom and also is a U.K. domiciliary, he or she is taxed on the "arising basis," meaning his or her U.K. income, capital gains, and any and all foreign income and capital gains.[50] In other words, he or she is immediately taxed on his or her worldwide income. On the other hand, should the athlete be a U.K. tax resident but a domiciliary of another country, he or she can elect to be taxed on the "remittance basis," meaning that the athlete can pay U.K. tax on all U.K. income and any foreign income or capital gains he or she brings into the country.[51] The remittance basis does not apply to those who are not considered U.K. tax residents.[52]

[40] Meaning of 'Domicile' and How It Affects Your Tax, HM Revenue & Customs, http://www.hmrc.gov.uk/international/domicile.htm (last visited Aug. 7, 2013).
[41] Id.
[42] Id.
[43] Id.
[44] Id.
[45] Id.
[46] See Meaning of 'Domicile' and How It Affects Your Tax, supra note 40.
[47] Id.
[48] Id.
[49] See Meaning of 'Residence' and How It Affects Your Tax, supra note 16.
[50] Id.
[51] Id.
[52] Paying Tax on the Remittance Basis: An Introduction, HM Revenue & Customs, http://www.hmrc.gov.uk/international/remittance.htm (last visited Aug. 7, 2013).

D. Taxing A Non-U.K. Resident Athlete

Schedule 11 of Chapter 41 of the Finance Act 1986, Chapter 3 of part 13 of the Income and Corporation Taxes Act of 1988,[53] and the Income Tax (Entertainers and Sportsmen) Regulations 1987[54] constitute the legal framework under which international athletes are taxed by the United Kingdom.[55] Together they describe in great detail how an athlete's income (gains and profits) from a "prescribed activity" are treated under U.K. tax law.[56]

Sections 555(1) and (2) of Chapter 3 of Part XIII of the Income and Corporation Taxes Act 1988 uses the same wording as Schedule 11 of the Finance Act 1986, and requires that non-resident athletes paid for performing "a relevant activity" in the United Kingdom be taxed on that income within the country.[57] A "relevant activity" is "any activity performed in the U.K. by an entertainer in his character as entertainer on or in connection with a commercial occasion or event."[58] An athlete is considered an entertainer under this provision, and when he or she participates in a competition in the U.K. is taxed by the U.K. on any income earned during that competition.

Because the United States also taxes its citizens and residents on worldwide income, the U.K.'s approach to taxing international athletes, including American athletes, leaves the door open for the great evil of double taxation—or having the same income taxed twice by two separate countries.[59] To address this danger, the United States has negotiated and ratified a number of bilateral income tax treaties with more than 60 countries worldwide, including the United Kingdom.[60] Many of these treaties, including that between the U.S. and U.K., contain provisions that specifically coordinate the tax treatment of an athlete's income.[61]

[53] Income and Corporation Taxes Act, 1988, c. 3. § 555 states in relevant part:
Payment of Tax
(1) Where a person who is an entertainer or sportsman of a prescribed description performs an activity of a prescribed description in the United Kingdom ("a relevant activity"), this Chapter shall apply if he is **not a resident in the United Kingdom** in the year of assessment in which the relevant activity is performed. (emphasis added).

[54] The Income Tax (Entertainers and Sportsmen) Regulations, 1987 Statutory Instruments 530 (U.K.). [hereinafter the Athlete Income Tax Regulations].

[55] Agassi v. Robinson (Inspector of Taxes), [2006] UKHL 23 (appeal taken from Eng.)(U.K.).

[56] See id.

[57] See Income and Corporation Taxes Act, supra note 53.

[58] See Athlete Income Tax Regulations, supra note 54, at 3.

[59] See Carole C. Berry, Taxation of U.S. Athletes Playing in Foreign Countries, 13 Marq. Sports L. Rev. 1, 3-4 (2002).

[60] For a comprehensive list of income tax treaties now in effect between the U.S. and other countries, see U.S Dept. of State, Treaties in Force: A List of Treaties and Other International Agreements in Force on January 1, 2012 (2012).

[61] Article 16 of the U.S.-U.K. Income Tax Treaty states in its entirety:
Article 16 Entertainers and Sportsmen
1. Income derived by a resident of a Contracting State as an entertainer, such as a theatre, motion picture, radio, or television artiste, or a musician, or as a sportsman, from his personal activities as such exercised in the other Contracting State, which income would be exempt from tax in that other State under the provisions of Article 7 (Business Profits) or 14 (Income from Employment) of this Convention, may be taxed in that other State, except where the amount of the gross receipts derived by that resident, including expenses reimbursed to him or borne on his behalf, from such activities does

Article 16 of the U.S.-U.K. Income Tax Treaty requires that U.S. athletes, i.e., American residents playing for a U.S.-based franchise, to pay tax to the United Kingdom on any income earned within the U.K. so long as that income exceeds the Pounds Sterling equivalent of $20,000.[62] This treatment is reciprocal for U.K. athletes participating in the United States.[63] The U.S. Treasury Department's Technical Explanation clarifies that Article 16 governs income that is "connected with a performance" by an athlete, including prize money and other winnings, any shares of gate receipts, and appearance fees.[64]

While the plain text of the U.S.-U.K. Income Tax Treaty clearly sets forth the treatment of income from an athlete's performance, it leaves the treatment of an athlete's endorsement income without further clarification. The Technical Explanation does state that where there is uncertainty as to whether Article 16 governs a particular type of income, the controlling factor is "whether the income . . . is predominantly attributable to the performance itself or to other activities or property rights."[65] The English courts have dealt with this vagueness as to the treatment of endorsement income and determined that international athletes, including Americans, must pay tax on that portion of worldwide endorsement income attributable to training and participation in the United Kingdom.[66] That means that the athlete must allocate endorsement income attributable to the U.K. by dividing the total number of days spent training and competing in the U.K. by the total number of days spent competing and training all year.[67] Training days constitute days on which the athlete spends 3 or more hours practicing his or her sport.[68] With our U.K. tax scouting combine now complete, we are ready to tackle the issues.

not exceed twenty thousand United States dollars ($20,000) or its equivalent in pounds sterling for the taxable year or year of assessment concerned.

2. Income in respect of activities exercised by an entertainer or a sportsman in his capacity as such which accrues not to the entertainer or sportsman himself but to another person may, notwithstanding the provisions of Article 7 (Business Profits) or 14 (Income from Employment) of this Convention, be taxed in the Contracting State in which the activities of the entertainer or sportsman are exercised, unless that other person establishes that neither the entertainer or sportsman nor persons related thereto participate directly or indirectly in the profits of that other person in any manner, including the receipt of deferred remuneration, bonuses, fees, dividends, partnership distributions, or other distributions.

Convention for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion With Respect to Taxes on Income and Capital Gains, U.S.-U.K., July 24, 2001, available at http://www.treasury.gov/resource-center/tax-policy/treaties/Documents/uktreaty.pdf. [hereinafter the U.S.-U.K. Income Tax Treaty].

[62] Id. at art. 16(1).

[63] Id.

[64] Technical Explanation of the Convention Between the Government of the United States of America and the Government of the United Kingdom of Great Britain and Northern Ireland for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion With Respect to Taxes on Income and Capital Gains, U.S. Dept. of Treasury, at 60. [hereinafter the Technical Explanation].

[65] Id. at 61.

[66] See *Agassi*, supra note 55; see also Usain Bolt's Tax Lesson, Wall St. J. (last visited Aug. 17, 2012), http://online.wsj.com/article/SB10000872390444375104577591101501483984.html.

[67] See Nitti, supra note 6.

[68] Id.

II. PROOF OF CLAIM

Every year since 2007 the NFL has maintained a policy of scheduling one regular season game per year to be played at Wembley Stadium in the United Kingdom.[69] On the 5th anniversary of this annual game, the NFL Vice-President of International Business explained the NFL's approach to expanding its European fan base as being two-pronged.[70] First, the NFL wanted to create a home team feel for U.K. fans and so contracted with an NFL franchise to return each year for the annual game.[71] The plan has been to add a second regular season game within a few weeks after the first to ascertain the fans' level of commitment.[72] This year, 2013, marks the beginning of this second prong.[73]

With the prospect of expansion looming, it seems that there is one major obstacle that NFL executives, franchises, and the NFL Players Association ("NFLPA") is not addressing: the current U.S.-U.K. Income Tax Treaty, which does not go far enough in protecting U.S. players from the punishing U.K. tax regime. What is needed is a protocol for the U.S.-U.K. Income Tax Treaty that specifically addresses and directs the taxation of worldwide endorsement income, while providing a compromise to moderate the inherent unfairness that results in the disparity of the top marginal tax rates maintained by each country. In addition, the protocol would institute a foreign tax credit sufficient to make up for the level of disparity that would continue to exist even through the compromised marginal tax rates.

A. Endorsement Income: U.K. Treatment

Newer generations have grown up accustomed to pro sports players acting as spokespersons for companies, products, and services. But it really was not all that long ago that companies began tapping into these athletes' broad appeal through endorsement deals.[74] Since 1975, endorsement deals between companies and athletes have increased.[75] Today, endorsement contracts are standard for most high profile athletes, in some situations generating more income than the player may receive for competing in his or her sport.[76]

The high value of these endorsement deals makes NFL expansion into the U.K. market a danger. That is because it is the current U.K. practice to tax portions of a non-resident athlete's worldwide endorsement income, including income from both overseas and U.K. sponsors.[77] Her Majesty's Revenue &

[69] See Marc Edelman & Bryan Doyle, Antitrust and "Free Movement" Risks in Expanding U.S. Professional Sports Leagues into Europe, 29 NW. J. Int'l L. & Bus. 403, 404 (2009).
[70] See Albert Breer, NFL Team in London? League Entering New Phase of the U.K. Project, NFL.com (Oct. 24, 2012, 8:51 PM), http://www.nfl.com/news/story/0ap1000000084365/article/nfl-team-in-london-league-entering-new-phase-of-uk-project.
[71] Id.
[72] Id.
[73] Id.
[74] See generally Kerry Segrave, Athletes Dominate the Field, 1975-2002, in Endorsements in Advertising: A Social History 126 (2005).
[75] See id.
[76] See World's Highest Paid Athletes, supra note 1.
[77] See Usain Bolt's Tax Lesson, supra note 66.

Customs does so under the authority of a fairly recent court case involving former U.S. tennis player, Andre Agassi.[78]

In that case, Mr. Agassi had entered into two contracts with sports clothing and equipment companies, Nike, Inc. and Head Sport AG.[79] Neither of these two companies at the time maintained tax residence in the United Kingdom.[80] Both had made contractual payments to Mr. Agassi's closely-held company, Agassi Enterprises, Inc., which also did not maintain a U.K. tax presence.[81] Although on his 1998-99 self-assessment tax return Mr. Agassi claimed certain receipts from Nike and Head, the Inspector of Taxes issued him a closure notice on the basis that Nike and Head made additional payments to Agassi Enterprises.[82] Eventually, the Inspector of Taxes amended Mr. Agassi's 1998-99 returns to include an additional £27,500, a move Mr. Agassi challenged.[83]

Although the issues were framed differently as the case wound through the various levels of British courts, the issue upon final appeal at the House of Lords level was the interaction of certain provisions within Part XIII of the Income and Corporation Taxes Act 1988, the entertainer and sportsperson-specific provisions in the U.K. tax code.[84] In particular, the parties argued over the interpretation of § 555(2) of Chapter 3 of Part XIII of the Income and Corporation Taxes Act 1988, which stated that "[w]here a payment is made and it has a connection of a prescribed kind with the relevant activity, the person by whom it is made shall on making it deduct of it a sum representing income tax and shall account to the Board for the sum."

Mr. Agassi argued that a literal interpretation of this provision would lead to an absurd result, in that it would force Nike and Head, both companies that were not tax residents of the U.K., to withhold income tax from payments made to Mr. Agassi and to remit those payments to the Revenue.[85] Focusing on policy implications, the Revenue countered that if Mr. Agassi's argument were to prevail, international athletes would have a mechanism to avoid paying any tax on endorsement income so long as it came from a foreign company that did not have a tax or trading presence in the United Kingdom.[86]

Both Lord Mance and Lord Scott of Foscote adopted the Revenue's arguments and agreed that the debated legislation should not be interpreted to permit the taxpayer to circumvent the statute by arranging payments from companies that did not maintain a tax presence in the United Kingdom.[87] In addition, Lord Scott of Foscote reasoned that §§ 555 through 558 of Chapter 3 of Part XIII of the Income and Corporation Taxes Act 1988 were deliberately enacted to capture foreign entertainers' or sportsmen's gains and profits from

[78] *Agassi*, supra note 55.
[79] Id. at ¶ 5.
[80] Id. at ¶ 6.
[81] Id.
[82] Id. at ¶ 7.
[83] Id.
[84] *Agassi*, supra note 55 at ¶ 8-9.
[85] Id. at ¶ 14.
[86] Id. at ¶ 15.
[87] Id. at ¶¶ 17(1), 32.

their commercial activities in the United Kingdom.[88] With a majority vote, the House of Lords sided with the Revenue, requiring Mr. Agassi to pay the additional tax from the income he earned from his worldwide sponsors.[89]

By siding with Her Majesty's Revenue & Customs, the House of Lords has made attracting top talent for U.K. sporting events nearly impossible.[90] Usain Bolt, the fastest man on earth, refuses to run in Great Britain, and Rafael Nadal, a top-ranked tennis player, routinely shuns British matches not beginning with Wi- and ending in -mbledon, because of the disastrous tax consequences for sporting event participation in the United Kingdom.

One of the main problems with the U.K.'s tax treatment is that it can, and certainly does, lead to disproportionately unfair outcomes for different athletes in different sports.[91] Because the amount of worldwide endorsement income that is taxable is a function of the athlete's training days in the U.K. over total training days worldwide, a U.S. player playing for a U.K. franchise would be subject to a higher proportion of taxable endorsement income than his U.S.-based counterpart.[92] Moreover, that higher taxable amount of endorsement income would be subject to the higher marginal tax rate of 45 percent, with little relief from a foreign tax credit in the United States.[93]

Such a bleak tax situation would logically make a high profile football name think twice about signing a free agent contract with London's first NFL franchise, where his U.S.-based counterparts are being taxed at lower rates on both contract earnings and endorsement income. A team devoid of any franchise players would most likely be less competitive in the grand scheme of the NFL. And NFL teams that are less competitive, such as the current Jacksonville Jaguars, are usually less profitable—something the NFL does not appreciate.[94]

B. Endorsement Income: U.S. Treatment

Like the United Kingdom, the U.S. taxes international or non-resident athletes on their endorsement income.[95] In sharp contrast to the U.K. regime of taxing international athletes on worldwide endorsement income, however, the United States taxes non-resident athletes on only those sponsorship deals that come from American companies.[96] Similar to the U.K. regime and *Agassi v. Robinson* (Inspector of Taxes), this U.S. standard was instituted through a recent United States Tax Court case: *Goosen v. Commissioner.*

[88] Id. at ¶17(3).
[89] Id. ¶¶ 1-3, 36.
[90] See Nitti, supra note 6.
[91] Alan Simpson, Taxation of Non-Resident Entertainers and Sportsmen: The United Kingdom's Definition of Performance Income and How It Ought to be Measured, 11 Wash. U. Global Stud. L. Rev. 693 (2012).
[92] See Nitti, supra note 6.
[93] Id.
[94] See NFL Team Valuations, Jacksonville Jaguars, Forbes (Aug. 2012), http://www.forbes.com/teams/jacksonville-jaguars/; see also Nitti, supra note 6.
[95] See Goosen v. Commissioner, 136 T.C. 547 (2011).
[96] See Usain Bolt's Tax Lesson, supra note 66.

In that case, Retief Goosen, a South African citizen and U.K. resident, challenged an IRS Notice of Deficiency for multiple tax years,[97] which reflected the Service's determinations that Mr. Goosen misallocated certain endorsement fees, tournament bonuses, ranking bonuses, and U.S.-source royalty income on his 2002 and 2003 income tax returns.[98] After winning the 2001 U.S. Open Golf Championship, one of golf's four annual majors, Mr. Goosen's fame grew exponentially overnight.[99] Almost immediately, he entered into a number of endorsement agreements that the Tax Court divided into two categories: (1) those "on course" agreements requiring Mr. Goosen to wear or use certain brands or products while he participated in golf events, and (2) "off course" agreements, which did not require Mr. Goosen's on-course services.[100]

In filing his non-resident alien Federal income tax returns for the years at issue, Mr. Goosen reported all earnings and appearance fees garnered from tournaments played in the United States as income effectively connected to a U.S. trade or business, subjecting these earnings to taxation at graduated rates.[101] He then characterized his endorsement fees and bonuses from endorsement agreements requiring his services during golf events as half royalties and half-personal services income.[102] He determined that the portion of on-course endorsement fees and bonuses representing personal services was prorated by using a ratio of the number of days he played golf in the United States to the total number of days he played in those years everywhere.[103] He declared 3.4 % of his on-course endorsement fees were sourced in the U.S.[104]

Upon auditing Mr. Goosen's returns for the years at issue, the Service determined that the proper allocation of his on-course endorsement fees and bonuses was based on the number of tournaments he played in the U.S. over the number of world-wide tournaments in which he participated.[105] The Service also allocated all bonuses Mr. Goosen received from playing in U.S. tournaments to the U.S. and determined that Mr. Goosen's ranking bonuses should be a function of his U.S. prize money as compared to his worldwide prize earnings.[106] Finally, the Service determined that 25 percent of Mr. Goosen's royalty income U.S.-

[97] The Notice of Deficiency was for tax years 2002 and 2003 in the amounts of $20,224 and $144,474 respectively. *Goosen*, 136 T.C. at 548.
[98] Id. at 557.
[99] Id. at 549-50. With his newly found fame, Mr. Goosen signed with an international sports marketing group that specialized in promoting athletes for sponsorship opportunities, managing their finances, and conducting tax planning. Under a previously-devised strategy, the marketing group executed employment contracts between Mr. Goosen and two entities controlled by the marketing group, which entities were designed to limit Mr. Goosen's U.K. income. These employment contracts provided that any monies received, either prize winnings or endorsements, were to be allocated between and paid to these two entities according to the source of the income. Thus, if Mr. Goosen received earnings or endorsements from the U.K., it was paid to the entity housing all of Mr. Goosen's U.K. income. Likewise, any earnings or endorsements arising from without the U.K. were payable to the entity housing his non-U.K. income. In return, each entity would pay Mr. Goosen a fixed salary and annual bonus. Id. 549-51.
[100] Id. at 552.
[101] *Goosen*, 136 T.C. at 556-57.
[102] Id.
[103] Id.
[104] Id.
[105] Id.
[106] *Goosen*, supra note 101 at 556-57.

source income.[107] Based upon these determinations, the IRS adjusted Mr. Goosen's taxable income and issued him a Notice of Deficiency.[108]

At trial, Mr. Goosen and the Service agreed that Mr. Goosen's participation in golf tournaments satisfied the requirement that he be engaged in a U.S. trade or business.[109] The only questions left for the Tax Court to consider were the proper characterization and sourcing of his various incomes, and whether the incomes he received were "effectively connected" to his golf play.[110]

At the trial's outset, Mr. Goosen affirmatively reported all prize money and appearance fees he received from U.S. tournaments as taxable within the U.S as effectively connected income.[111] He also stipulated with the Service that any fees collected under off-course endorsements amounted to royalty income.[112] With his personal winnings and off-course endorsement monies properly characterized, the only real issue in this respect turned on the proper characterization of his on-course endorsement income.[113]

As noted earlier, Mr. Goosen's endorsement income was comprised of monies received from a number of agreements with different companies. The "on-course" agreements consisted of contracts between Mr. Goosen and golf companies TaylorMade, Izod, and Acushnet.[114] Under the TaylorMade agreement, Mr. Goosen provided TaylorMade the right to use his picture and likeness on the many golf products it manufactured, including golf clubs, apparel, and other accessories.[115] In addition, Mr. Goosen agreed to wear TaylorMade clothing and hats when playing in tournaments while also using TaylorMade clubs.[116] Mr. Goosen also would make himself available for two days out of the year to pose for promotional materials, TV ads, and other advertising materials for TaylorMade advertising executives.[117] In exchange for his compliance with these terms, Mr. Goosen received an annual payment of $400,000.

In his contract with Izod, a clothing and apparel company, Mr. Goosen licensed his personal image and likeness to Izod for use on apparel and accessories.[118] Like his agreement with TaylorMade, Mr. Goosen was required to wear Izod clothing and apparel when competing in golf tournaments and activities.[119] Also similar to the TaylorMade agreement, Mr. Goosen was required to making two international appearances on behalf of Izod.[120] In exchange for compliance with these conditions, Mr. Goosen was paid $71,250 over the tax years in question.[121]

[107] Id.
[108] Id.
[109] Id. at 559.
[110] Id. at 559.
[111] Id. at 556-57.
[112] *Goosen*, supra note 101 at 559.
[113] Id.
[114] Id. at 559.
[115] Id. at 552-553.
[116] Id.
[117] Id.
[118] *Goosen*, supra note 101 at 553-54.
[119] Id. at 554.
[120] Id.
[121] Id.

Mr. Goosen's contract with Acushnet, the manufacturers of the popular Titleist golf balls and gloves, provided that he would use Titleist golf balls and gloves exclusively in all tournaments, exhibitions, and other golf-related activities worldwide.[122] For his product use and compliance with other provisions, Acushnet paid Mr. Goosen $725,000 for the years at issue.[123]

There are notable similarities among these "on-course" agreements that present various problems with respect to characterization. All of these agreements paid Mr. Goosen for using his likeness and image with respect to the company's products—payments that constituted royalties—and all contracts required Mr. Goosen to perform personal services for each of the companies, such as wearing or using a particular company's products while golfing or providing personal availability for promotional events and materials. Given the two possible classifications of income present in each of these agreements, the question becomes: How exactly are these payments supposed to be characterized and allocated to athletes like Mr. Goosen?

In the Tax Court, Mr. Goosen asserted, as most athletes would, that the payments the sponsors were making to him were to royalties because he had an ownership interest in the right to use his name and likeness.[124] The Service countered that Mr. Goosen's sponsors were paying him primarily for the services he rendered on behalf of the companies—namely, wearing, using, or carrying certain products during golf competitions.[125] To further substantiate its argument, the Service pointed to the provisions in each of Mr. Goosen's agreements that required prorated payouts should he fail to compete in a specific number of tournaments each year.[126]

The Tax Court declined to adopt either side's argument in its entirety. Instead, it found, on the basis of both parties' arguments, that Mr. Goosen's sponsors were paying him both for the services he provided as well as for the right to use his name and likeness.[127] As one rationale for its hybrid approach, the Tax Court cited the value of Mr. Goosen's reputation that went beyond merely playing golf.[128] The Tax Court was satisfied that Mr. Goosen's sponsors associated their products with him because they valued his likeable persona and image, and not merely because of his on-course performance.[129] Accordingly, the Tax Court was not willing to adopt the Service's point-of-view that these companies paid Mr. Goosen primarily for his services.

The Tax Court was satisfied that the payments were at the same time sufficiently tied to Mr. Goosen's services to require him to classify at least some of the amount as personal services income.[130] The Tax Court was cognizant of the fact that although the sponsors could use Mr. Goosen's image in their respective promotional campaigns, they would only pay him if he played golf.[131]

[122] Id.
[123] Id.
[124] *Goosen*, 136 T.C. at 559.
[125] Id. at 560.
[126] Id.
[127] Id.
[128] *Goosen*, 136 T.C. at 561.
[129] Id.
[130] Id. at 562.
[131] Id.

Because his participation in golf was vital to compliance with his contracts, it could not be said that the payments were confined to royalties. Thus, the Tax Court held that a portion of these payments constituted royalty payments and the remainder amounted to personal services income.[132]

The division of payments between these two classes of income highlights another issue pertaining to an athlete's endorsement income: Where an endorsement agreement can be part royalty and part personal service income, how are the amounts appropriately allocated between the two? The Tax Court in *Goosen* addressed this issue. It noted that the proper allocation of the endorsement payments between the two classes of income is done through an examination of all surrounding facts and circumstances.[133] The Tax Court reasoned that while Mr. Goosen's sponsors paid him for the right to use his likeness and image, they were doing so only if he participated in golf events.[134] Because one classification was not more important than the other, the Court allocated the payments equally between the two.[135]

Once an athlete's income is properly characterized, the athlete must then define the sources of that classified income. This step is important because non-resident alien athletes are not taxed on their worldwide income—only on any U.S.-source income and income derived from engaging in a U.S. trade or business.[136] I.R.C. §§ 861 and 862 demarcate the source of various types of income. Section 861 provides that personal services income derived from services performed within the United States is sourced "within the United States."[137] This clearly encompasses the portion of an athlete's endorsement income that represents payment for personal services performed in the U.S. Thus, the United States clearly is the source of the portion of personal services income Mr. Goosen received from his endorsement agreements for performing in golf tournaments in the U.S. However, the sourcing of any portions of endorsement income representing payments for royalties is not all that clear. This is because royalty income can stem from a sponsor's right to use the athlete's image or likeness both within and outside the U.S. The Tax Court in Goosen dealt with this vagueness.

In *Goosen*, the Tax Court looked at all of the royalties Mr. Goosen received under both his "on-course" endorsements and his "off-course"[138]

[132] Id.
[133] *Goosen*,136 T.C. at 562.
[134] Id.
[135] Id.
[136] Id. at 559.
[137] I.R.C. § 861(a)(3) (2006).
[138] The bloc of agreements constituting Mr. Goosen's "off-course" endorsements included contracts with Rolex, EA Sports, and Upper Deck. Under Mr. Goosen's agreement with Rolex, he was required to "use all reasonable efforts to wear a Rolex timepiece when featured in any medium or when appearing in public engagements worldwide." Goosen, 136 T.C. at 555. He was not, under this agreement, required to participate in any golfing activities. Id. The Upper Deck agreement provided Upper Deck the right to use Mr. Goosen's name and image for its sports memorabilia and trading cards. In addition, Mr. Goosen was required to sign 3,500 golf trading cards and provide clothing and apparel he used during competitions or practice. Id. Under this agreement, Electronic Arts Sports was permitted to use Mr. Goosen's name, image, and likeness in its software products and video games. In compliance, Mr. Goosen was required to provide 8 hours of product development and nine

contracts, including agreements with Upper Deck, EA Sports, and Rolex.[139] The Tax Court, in framing the applicable rule, looked first to the Code. Sections 861 and 862 state that royalty income is sourced where the associated rights to use an image or likeness are actually used or granted the privilege of being used.[140] In understanding that the rights to use an athlete's image or likeness can and most often are used both inside and outside the U.S., the Tax Court noted the burden carried by the transacting parties to make a reasonable allocation between U.S. and foreign sources in their agreements.[141] Further, the Tax Court noted that where parties fail to make such a reasonable allocation, all of the royalty income is sourced to the U.S. unless the athlete can prove that he or she maintains property rights outside the U.S.[142] Once those property rights are established by the athlete, as in *Goosen*, the Tax Court will seek to properly allocate the royalties based upon where the sponsors actually use the athlete's likeness or image.[143]

When applied to Mr. Goosen's specific situation, the Tax Court looked first to where the off-course endorsers primarily marketed and sold their products as indicative of where Mr. Goosen's image and likeness was being used.[144] As to two of his agreements, the Tax Court looked to those companies' sales figures and determined that since 92 % of Upper Deck trading cards and 70 % of EA Sports video games featuring Mr. Goosen were sold in the U.S., those amounts percentages were applicable in determining U.S.-source royalty income.[145]

With respect to all of the "on-course" and one "off-course" endorsers, the Tax Court faced a different challenge because products bearing Mr. Goosen's likeness and image were sold and distributed all over the world. Taking into account Mr. Goosen's global image, and given the fact that the United States is the largest golf market in the world, the Tax Court divided up these royalties evenly between U.S. and foreign sources,[146] thereby subjecting half to tax by the United States.

C. The Proposed Protocol: Codification of a Hybrid Standard

The different treatments of international athletes in the sponsorship sector—the United Kingdom taxing a non-resident athlete's worldwide sponsorship deals; the United States doing the same only on those deals coming from American sponsors—will effectively prevent high profile players from playing in the United Kingdom without a more permanent solution. The following proposed protocol to the U.S.-U.K. Income Tax Treaty aims to overhaul Article 16 of that agreement by clarifying the scope, interpretation, and application of the article with respect to endorsement income. In addition, it

photographs enabling EA Sports to recreate his likeness for their video game, Tiger Woods PGA Golf 2004. Id. at 556.

[139] *Goosen*, 136 T.C. at 564.

[140] See id. at 563; see also I.R.C. §§ 861(a)(4) and 862(a)(4).

[141] *Goosen*, 136 T.C. at 564.

[142] Id. at 564

[143] Id.

[144] Id. at 564-65.

[145] *Goosen*, 136 T.C. at 565.

[146] Id. at 566.

provides another mechanism to narrow the marginal tax rate gap between the two countries while also providing a foreign tax credit that further evens out the taxation of a U.S. non-resident athlete playing in the United Kingdom. The proposed protocol is as follows:

ARTICLE I

Paragraphs 1 and 2 of Article 16 of the Convention shall be deleted and replaced by the following:

"1. In the case of U.S. entertainers or sportspeople performing or competing in the United Kingdom:

a) The income received by or on behalf of a U.S. resident entertainer or athlete in connection with the entertainer's or athlete's performance, competition, or other similar event in the United Kingdom is taxable in the United at a rate equal to the average of the applicable U.S. marginal tax rate and the applicable U.K. tax rate so long as the athlete's or entertainer's total income exceeds twenty thousand United States dollars ($20,000) or its equivalent in Pounds Sterling.

(i) Entertainer includes theatre, motion picture, radio, or television artistes, and musicians.

(ii) Income includes appearance fees, award or prize money, any gate receipts, property, and portions of endorsement income that are predominantly attributable to the performance, competition, or event.

b) This Article applies to any income that would be exempt from tax under Article 7 (Business Profits) or 14 (Income from Employment) of this Convention.

c) Income received by a third party in connection with the entertainer's or athlete's performance is taxable in the United Kingdom unless the third party can show that the entertainer or athlete does not materially participate directly or indirectly in the business of that third party.

d) A U.S. resident entertainer or athlete is entitled to a tax credit in the United States for any amount of tax paid to the U.K. pursuant to this Article."

Paragraph 2 of this proposed protocol replicates paragraph 1, except that it focuses on a U.K. entertainer or athlete participating in the United States.

The proposed protocol provides reasonable solutions to the very real issues that an NFL player would face under the current U.K. tax regime as it applies to international athletes. Initially, the proposition deals with the disparity that is apparent between the highest marginal tax rates of the respective countries: an NFL player playing in the U.S. would presumably be subject to the highest tax rate in the U.S., 39.6 percent; in the U.K. he would be subject to a top tax rate of 45 percent. The protocol addresses this disparity by instituting an average marginal tax rate between the two. Applied currently, that percentage would be the average of 39.6 and 45 percent, or 42.3 percent. Admittedly, this solution does not completely eliminate the disparate treatment of U.S. NFL players taxed by the United Kingdom, but it does provide a compromise and ultimately a lower U.K. tax rate to which the U.S. player is subject—and lower taxes than the current regime.

Another benefit the protocol provides is flexibility in the face of the ever-changing landscape of taxation. Indeed, as this Note was being written, the

top U.K. tax rate was at a whopping 50 percent, only to be lowered to 45 percent before publication. By tying the rate to an average of the two countries' top rates, the rate is not fixed, but fluctuates with the rise and fall of either or both countries' rates.

Also, the proposed amendment, through its use of plain language, provides a much needed clarification of the taxation of an athlete's endorsement income. As a codification of a meld of the U.S. standard derived under *Goosen* and the U.K. standard derived from *Agassi v. Robinson* (Inspector of Taxes), the proposed protocol clearly subjects endorsement income to taxation by the country where the performance or competition takes place (pursuant to Agassi), but does so on a limited basis—i.e., the host country may tax only that portion of endorsement income that is directly connected with the performance or competition in the host country (pursuant to Goosen). This limitation would apply to endorsements like those in *Goosen* and *Agassi*, where the athlete is required to wear or use certain products during the course of competition. It would not apply to endorsement deals not connected to the competition, event, or performance, again under *Goosen*. And to the extent that the portion connected to the performance or event in the athlete's taxable income would be included, it would be subject to the lower average tax rate discussed above.

As a final matter, the proposed amended Article 16 also provides U.S. athletes with the benefit of a foreign tax credit equivalent to the amount of tax paid in the U.K. This credit prevents the same income from being taxed twice—an issue the current foreign tax credit presents.[147] Without this proposed protocol, the current foreign tax credit only allows an athlete a credit of the amount of taxes paid in the U.K. equal to the top marginal bracket in the U.S., even though the athlete has paid U.K. tax at a 45-percent rate.[148] As a result, the difference between the top U.K. marginal tax band of 45 percent and the top marginal U.S. bracket of 39.6 percent, though already taxed by the U.K., is taxed again by the U.S.[149]

The proposed protocol provides the athletes from both countries with tax credits equivalent to the total amount of tax paid in the other country. So, if an American athlete pays tax at the average rate of 42.3 percent set forth in the proposed protocol, the American athlete is given a tax credit for those taxes paid up to that average rate. The credit precludes the United States from taxing the portion of income (the portion of the rate between 39.6 percent and 42.3 percent), because it has already been taxed by the U.K. under the proposed protocol.

III. TEST SUITE: AARON RODGERS-NFL'S HIGHEST PAID PLAYER

To see how the proposed protocol would work, I will use a concrete example, taking Aaron Rodgers as a test subject. Recently, Aaron signed a new contract extension with the Green Bay Packers of the NFL that has a total value

[147] See Nitti, supra note 6.
[148] Id.
[149] Id.

of $130,750,000, with about $54 million guaranteed.[150] His base salary with incentives for 2013 is about $5 million, and he is due a signing bonus of $7 million for that year alone.[151] First, I will look at Aaron's U.S. federal tax situation as it pertains to 2013 as a baseline.

Because NFL players, per the NFL standard contract, are paid 100 percent of their base salary—not including signing bonus—over the course of the regular season, or 17 weeks,[152] Aaron will be paid a gross amount of $294,117.65 after each game. Forgetting all of the state and city taxes to which Aaron might be subject, his federal income tax liability alone for each paycheck would equal $116,470.59, figured using the highest U.S. marginal rate of 39.6 percent. Over 17 weeks, that federal tax liability would come to $1,980,000.02.

Now, if Aaron's signing bonus of $7 million payable in 2013 is added to the mix, Aaron is required to pay an additional $2,772,000 in federal income tax, using that same rate of 39.6 percent. Finally, taking $6 million dollars Aaron is projected to earn through endorsements[153], Aaron would be required to pay $2,376,000 more in federal tax liability. Aaron's total federal income tax for 2013 would equal $7,128,000 ($1,980,000 tax on 17-week salary + $2,772,000 tax on signing bonus payable in 2013 + $2,376,000 tax on endorsement deals).

If the NFL were to place an expansion team in London and Green Bay was scheduled to play one game in London in 2013, under the U.K.'s current tax regime and the current U.S.-U.K. Income Tax Treaty Aaron would be required to pay $132,352.94, or, using today's exchange rate of £1=$1.55, £85,342.19 on his base salary alone ($294,117.65 weekly salary * .45—U.K.'s rate for top earners). In addition, if Aaron travels with his team a week prior to the matchup to acclimate to the time change, he spends 7 days training and competing in the U.K. that year and a total of 200 days training all year, he would be required to pay U.K. tax on 7/200 of all his endorsement income. Aaron's $6 million in endorsement fees, despite coming from Pizza Hut, State Farm Auto Insurance, Associated Bank in Wisconsin, Wisconsin-area Ford Truck dealers, and a Milwaukee personal injury lawyer,[154] would be subject to U.K. tax at 45 percent, equaling $94,500 or its Pounds Sterling equivalent, £60,934.32. Overall, his U.K. tax bill for playing a single game in the United Kingdom would total $226,852.94 or £146,276.52 ($132,352.94 U.K. tax on weekly salary earned in the U.K. + $94,500 of endorsement income attributable to his U.K. presence).

Because the current U.S. foreign tax credit only allows a credit up to the top U.S. marginal rate of 39.6 percent, Aaron would only be credited for tax

[150] See Aaron Rodgers: Current Salary Information, supra note 1. Unlike the NBA or Major League Baseball, none of the money paid pursuant to an NFL player contract is guaranteed outside of a signing bonus; See Austin Porter, How Far Does an NFL Contract Really Go?, Bleacher Report (Feb. 21, 2012), http://bleacherreport.com/articles/1074216-how-far-does-an-nfl-contract-really-go.

[151] See Aaron Rodgers: Current Salary Information, supra note 1.

[152] See Jack Bechta, 5 Components of An NFL Contract That May Surprise You, National Football Post (Aug. 1, 2012, 4:00 PM), http://www.nationalfootballpost.com/5-components-of-an-NFL-contract-that-may-surprise-you.html.

[153] Because current year endorsement figures are not available, I carried over Aaron's endorsement deals from which he earned $6 million in 2012. See World's Highest Paid Athletes, supra note 1.

[154] See Rick Kirchen, Aaron Rodgers Underperforming Peers in Commercial Work, The Bus. Journal (June 12, 2013, 2:45 PM), http://www.bizjournals.com/milwaukee/blog/2013/06/aaron-rodgers-underperforming-peers-in.html.

paid to the U.K. up to $199,630.59 ($116,470.59, 39.6 percent of Aaron's weekly salary + 83,160, 39.6 percent of the 7/200 of Aaron's endorsement income). The difference of $27,222.35 would be double taxed by both the U.S. and the United Kingdom.

If, however, we apply Aaron's same situation using the proposed protocol, the results would be much different. First, Aaron would pay U.K. tax using the average rate of 42.3 percent on his weekly income, totaling $124,411.77, or its Pounds Sterling equivalent, £80,221.67. This is a difference of $7,941.17 from the tax he would pay at the top U.K. tax rate of 45 percent.

Under the proposed protocol, it is unlikely that Aaron would be required to pay any U.K. tax on his endorsements because it is unlikely that any of them are attributable to the performance, event, or competition in the country. For these endorsements to be attributable to the performance, event, or competition, they would have to be something Aaron uses or wears during the game, or in the week of practice leading up to the game. A Pizza Hut Big Dinner Box or a State Farm Discount Double Check is simply not the type of endorsements envisioned by the proposed protocol.

Finally, under the protocol, Aaron would receive a foreign tax credit for the full amount of U.K. tax he paid in 2013. Because the protocol clearly permits players to take the credit for the full amount of tax paid in the U.K., Aaron's U.K. tax does not run the risk of being double taxed, as is the case under the current regime. As a result, Aaron would only be subject to U.K. tax on his weekly salary amounting to $124,411.77—a significant reduction from his liability of $226,852.94 under the current regime, where $27,222.35 of which would be taxed twice. The merit of the proposed protocol is easy to see.

CONCLUSION

The above discussion and example of Aaron Rodgers' situation clearly demonstrates the problem with current U.K. taxation of international athletes. The results that occur under the regime make it all the more understandable that high profile athletes such as Usain Bolt and Rafael Nadal routinely shy away from competing in the U.K. because of the unfair treatment they experience at the hand of Her Majesty's Revenue & Customs. NFL officials should be aware of this unfair treatment, as it has real repercussions for NFL players should the NFL one day place an expansion franchise in London. To establish a more fair system preceding such an expansion, the NFL should lobby to have a protocol added to the current U.S.-U.K. Income Tax Treaty that alleviates the issues presented under the current regime. The proposed protocol within this Note accomplishes just that: It removes some of the dangers of the U.K. regime and works to promote NFL expansion through the use of an average tax rate, fair treatment of an athlete's endorsement income, and a better foreign tax credit. Only after changes to the U.K.'s current income tax regime could the NFL finally feature its first franchise in the United Kingdom.