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The Tax Significance of Place of Residence for Professional Athletes

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THE TAX SIGNIFICANCE OF PLACE OF RESIDENCE FOR PROFESSIONAL ATHLETES

WILLIAM H. BAKER*

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I. INTRODUCTION

In recent years, many professional athletes have been able to earn enormous sums from their athletic performances and from contractual arrangements based on their reputations. Although these individuals often know almost all there is to know about the sport in which they participate, in many cases, they know very little about the rules of taxation relating to them. In addition, they generally have almost no knowledge about the world of financial investments.[1] Accordingly, they usually have relied on the advice of others in making many important decisions that affect their lives and the lives of their families. Because they have devoted so much time to perfecting their athletic skills, they have not developed skills that are required for success in the business world, and their judgment in selecting business advisors has demonstrated this weakness.[2]

Athletes, like so many others, unfortunately have permitted their advisors to convince them of the desirability of certain investments, not because of the financial soundness of the investments, but because of the tax deductions supposedly available through such investments. Because the fields of taxation and investment are so complex, it might be difficult to expect that athletes should be sufficiently knowledgeable in these fields to guide their own activities. The most that one can hope is that they use good judgment in selecting the people who assist them.

There are certain areas in the field of taxation, however, of which professional athletes personally should be aware. This awareness should enable them to ask the right questions of their advisors and to realize the tax significance of different choices. A clear example of an important choice, from a tax standpoint, which professional athletes make, is the selection of a place of residence.

It can be said that there are two types of professional athletes — those who participate in their sport as individuals, such as tennis players and golfers, and those who are members of a team, such as football, basketball, baseball and hockey players. In the case of individual sports, athletes are in a position to select the place where they will reside, giving consideration to all of the personal and business factors that are important to them. However, in the case of team sport participants, athletes generally prefer to live in the area where the team is based, but often they maintain permanent places of abode in a location distant from the team's base.

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1. Penn, *Pro Athletes Post a Lot of Bad Scores in Their Investments*, Wall St. J., Dec. 13, 1985, at 1, col. 4.
2. Lowenstein, *Many Successful Athletes Suffer Setbacks in Business*, Wall St. J., Jan. 7, 1987, at 37, col. 4.

II. The Choice of State As a Residence

The states vary considerably in the tax rates they apply to income of residents, and for athletes with large incomes, the state income tax can be a substantial factor to consider. For example, California applies a tax rate of 9.3% on the income of a resident individual (and on the income of a nonresident individual) that exceeds $23,950.[3] New York imposes its highest rate of 8% on taxable income of individuals exceeding only $12,400, and on income exceeding $24,800 on a joint return.[4] Connecticut does not have an income tax as such, but it imposes a tax on dividend and interest income if the taxpayer's federal adjusted gross income exceeds $54,000.[5] If dividend and interest income exceeds $100,000, the rate of tax is 12%.[6] New Hampshire taxes only dividend and interest income, both at a rate of 5%.[7] Tennessee taxes only dividends and interest, both at a rate of 6%.[8]

A recent phenomenon, the alternative minimum tax, has come upon the scene. High income individuals, with so-called preference income, should take into consideration this tax when selecting a state of residence. Although this tax originated at the federal level, several states have adopted their own versions of it.[9]

Some states including Alaska,[10] Florida,[11] Nevada,[12] South Dakota,[13] Texas,[14] Washington[15] and Wyoming[16] have no income tax applicable to individuals. Martina Navratilova, now an American citizen, chose to live in Texas, which has mild weather, good outdoor tennis conditions and a friendly tax climate.[17]

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3. CAL. REV. & TAX. CODE § 17041 (West 1983 & Supp. 1989).
4. N.Y. TAX LAW § 601 (McKinney 1984 & Supp. 1988).
5. CONN. GEN. STAT. ANN. § 12-506 (West 1983 & Supp. 1989).
6. *Id.*
7. N.H. REV. STAT. ANN. §§ 77:1, 77:4 (1970 & Supp. 1988).
8. TENN. CODE ANN. § 67-2-102 (1983 & Supp. 1988).
9. California, Iowa and Wisconsin have added this tax. *See* CAL. REV. & TAX. CODE ANN. § 17062 (West Supp. 1989); IOWA CODE ANN. § 422.5 (West Supp. 1989); WIS. STAT. ANN. § 71.08 (West Supp. 1989).
10. ALASKA STAT. §§ 43.20.011 - .040 (1983 & Supp. 1988).
11. FLA. STAT. ANN. §§ 192-209 (West 1989).
12. NEV. REV. STAT. ANN. §§ 360-377A (Michie 1986 & Supp. 1988).
13. S.D. CODIFIED LAWS ANN. §§ 10-1-1 to -42 (1989).
14. TEX. TAX CODE ANN. §§ 1.01-.12 (Vernon 1982 & Supp. 1989).
15. WASH. REV. CODE ANN. §§ 82.01.010 - .020 (1981 & Supp. 1989).
16. WYO. STAT. ANN. § 39-7-101 (1985).
17. Other well-known international tennis players and former world-class tournament players like Cliff Drysdale and Kevin Curren also prefer the state of Texas as a place to reside. Florida also has its share of tennis celebrities and residents — Chris Evert, Johann Kriek, Robert Seguso and a number of others.

Although athletes participating in individual sports are free to choose any state for their residence, those who participate in team sports find that as a practical matter they must live in the area where the team is based. But even in the case of team sport athletes, some choices may be available at times. There may be instances where a player is unhappy with his present team position and is thinking about making a change. It may be that he has received several offers from teams located in different states. Assuming that the offers are substantially similar and that a player has no strong personal preference for one state over another, he may decide to join the team in a state that does not have a personal income tax. For example, a player might choose the Dallas Cowboys or the Miami Dolphins, which are located in states that have no personal income tax, over the San Francisco Forty-Niners or the Los Angeles Rams, which are located in a state with a very high rate of personal income tax.

Depending on the circumstances, a player might even decide to accept a lower salary with a team in a state that has no income tax instead of a higher salary from a team in a state with a significant state income tax.[18] Although it is true that state income taxes are deductible on the federal income tax return,[19] with the highest federal rate now being 28% (a marginal rate of 33% in some instances),[20] the deduction does not mean quite as much as it once did.

III. FEDERAL SIGNIFICANCE OF PLACE OF RESIDENCE

The federal system of income taxation taxes all individuals in a uniform way. Accordingly, it makes no difference, in view of applicable federal individual income tax rates, in which state a person chooses to live. But aside from rates, there are tax implications associated with the place where one lives. The primary statutory provision that will be of interest to professional athletes is Section 162(a)(2) of the Internal Revenue Code. That section, the basic one for allowance of business expenses, allows for traveling expenses "while away from home in the pursuit of a trade or business."[21]

18. Care should be taken to determine whether a particular state has some other tax that "replaces" the income tax. For example, Florida has an intangible property tax. FLA. STAT. ANN. §§ 199,012 - .302 (West 1989).

19. I.R.C. § 164(a)(3) (1989). Deductions for state income taxes may be taken only as itemized deductions from adjusted gross income, assuming that the taxpayer elects to itemize his or her deductions rather than take the standard deduction. I.R.C. § 63(b).

20. I.R.C. § 1.

21. I.R.C. § 162(a)(2) provides:

(a) In general — There shall be allowed as a deduction all the ordinary and necessary expenses paid or incurred during the taxable year in carrying on any trade or business, including — . . . (2) traveling expenses (including amounts expended for meals and lodging

The major traveling expense items include those items that relate to actual transportation costs, meals and lodging. In addition, the regulations provide for the deduction of certain other items associated with travel.[22] Accordingly, it is clear that when one is on a trip "away from home," traveling expenses are fully deductible. Although that would appear to be a straightforward provision, a considerable amount of litigation has developed over the meaning of the term "home" — the place from which one must be away in order to deduct traveling expenses.

For most taxpayers, the determination of the "tax home" has no significance because they live and work in the same general location. Since that location is both where the personal abode is located and where their principal place of work is situated, only that place could be their tax home. At the other extreme, there are individuals who travel constantly, and do not maintain an abode or base of operations at any one place. While these individuals travel, they do not have a "tax home." The difficult situations center around those people who live in, or maintain a permanent place of abode in one location, but who work in another location. Although individual athletes are likely to maintain just one residence and be based in one place, team athletes may live, for extended periods, in more than one place during the year. For example, football and baseball players might maintain a place of abode during the "season" in the city where their team is located. However, during the off-season, these players may return to a more permanent residence, either in the suburbs of the same city or in a distant city where their family is located, and where they have permanent ties. Those cases raise the issue of which place is their "tax home," and subsequent discussion will elaborate on that point.

As indicated above, individual athletes usually maintain only one place of abode throughout the year. The Service has taken the position that:

> Generally, a taxpayer's 'home' for purposes of § 162(a)(2) of the Code is considered to be located at (1) the taxpayer's regular or principal (if more than one regular) place of business, or (2) if the taxpayer has no regular or principal place of business, then at the taxpayer's regular place of abode in a real and substantial sense.[23]

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other than amounts which are lavish or extravagant under the circumstances) while away from home in the pursuit of a trade of business . . . .

Id.

22. Treas. Reg. § 1.162-2(a) (1988) provides: "(a) Traveling expenses include travel fares, meals and lodging, and expenses incident to travel such as expenses for sample rooms, telephone and telegraph, public stenographers, etc."

23. Rev. Rul. 83-82, 1983-1 C.B. 45.

Accordingly, for individual athletes who travel extensively and have no employer and no business headquarters where they are based, the question is whether or not they have a permanent residence, which could be treated as a "tax home" from which they can be treated as absent.

It should be noted that under a provision in the Tax Reform Act of 1986, unreimbursed expenses for meals, while traveling on business, are deductible only to the extent of eighty percent of their cost.[24] The Act also provides that the only business expenses that *employees* can deduct from gross income in arriving at adjusted gross income, are reimbursed expenses.[25] Other business expenses of employees will be itemized deductions from adjusted gross income. In the case of travel expenses, they will be treated as miscellaneous expenses and will be subjected to a new two percent floor (required to exceed two percent of adjusted gross income) before they will be treated as deductible expenses.[26] Accordingly, in the case of individual athletes who are not employees, travel expenses will be business expenses that can be deducted directly from gross income. In the case of athletes who are employees of a team or other employer, those travel expenses, which are not reimbursed, will be deductible only from adjusted gross income, and will be subjected to the two percent floor that applies to miscellaneous deductions.

IV. The Traveling Individual Athlete

World class tennis players probably do more traveling than any other athletes and, therefore, represent the best example of the type of athlete for whom the instant discussion should be applicable. While playing in tournaments, tennis players often live for periods ranging from several days to several weeks in a particular location. Because many barely make ends meet,[27] it is important that their airline tickets, hotel bills and meals be deductible as they travel from one tournament to another.

Many years ago, the Internal Revenue Service announced the position that golfers who travel from city to city playing in different tournaments are engaged in a trade or business and, therefore, can deduct their traveling expenses.[28] If traveling athletes were treated as not having a tax home anywhere, their meals and lodging would not be deductible. They would be

24. I.R.C. § 274(n).
25. I.R.C. § 62(a)(2)(A).
26. I.R.C. § 67(a)-(b).
27. Herman & Carroll, *Labor or Love?*, Wall St. J., Feb. 26, 1988, at D20, col. 2.
28. Gen. Couns. Mem. 7133 (1929).

treated like itinerant workers, and their tax homes would be in the place where they were playing in a particular tournament.[29]

The basic case defining the test for traveling expense deductions while away from home is *Commission v. Flowers*,[30] in which an attorney was denied a deduction for expenses incurred while working and living in Mobile, Alabama, during the week. On weekends, he returned to his home in Jackson, Mississippi. He took the position that he was "away from home" while he lived and worked in Mobile during the week. In ruling against him, the United States Supreme Court set forth three prerequisites to support an away-from-home-travel-expense deduction, which have been cited often by subsequent court decisions. First, the expense must be reasonable and necessary;[31] second, the expense must be incurred "away from home;"[32] and third, the expense must be incurred because of the exigencies of business.[33] Although touring athletes should have little trouble satisfying tests one and three, it is test two that must be given careful consideration.

The traveling expense deduction came into the tax law in the Revenue Act of 1921.[34] It was contained in all of the subsequent revenue acts and became section 23(a)(1) of the Internal Revenue Code of 1939.[35] Before the Revenue Act of 1921, the tax law simply provided for the deduction of "ordinary and necessary expenses paid or incurred . . . in carrying on any trade or business."[36] The Treasury Regulation in effect at that time provided that traveling expenses could be deducted in amounts that exceeded the expenditures that were ordinarily required for similar items when at home.[37] At that time, the Service took the position that a single taxpayer who had no home and was continuously traveling on the road could not deduct these living expenses in computing net income.[38] The change in the law made by the 1921 Revenue Act allowed for the deduction of the entire amount of qualified meals and lodging while in travel status. This change was enacted because of the difficulty the Treasury Department was having in administering the so-called "excess" provision contained in the regula-

29. Brandl v. Commissioner, 513 F.2d 6979 (6th Cir. 1975); James v. United States, 308 F.2d 204 (9th Cir. 1962); Barone v. Commissioner, 85 T.C. 462 (1985).

30. 326 U.S. 465 (1946).

31. *Id.* at 470.

32. *Id.*

33. *Id.*

34. Rev. Act of 1921, Pub. L. No. 67-98, § 214, 42 Stat. 227, 239 (1921).

35. *See* Schurer v. Commissioner, 3 T.C. 544 (1944).

36. Rev. Act of 1918, Pub. L. No. 65-254, § 214, 40 Stat. 1057, 1066 (1919).

37. T.D. 3101, 3 C.B. 191 (1920).

38. T.D. 905, 4 C.B. 212 (1921).

tions existing under prior law.[39] The legislative history relating to the Revenue Act of 1921 does not indicate that Congress considered the traveler without a home at the time it enacted the new legislation.[40] The purpose of adding the new provision to the tax law was to provide a measure of justice that would encourage men to enter business on their own.[41] In *Williams v. Patterson*,[42] the United States Court of Appeals for the Fifth Circuit expressed the view that this statute should not be given a narrow interpretation but indicated, nevertheless, that there would be difficult factual situations to resolve.[43]

Several cases involving professional ice skaters perhaps typify the way young athletes manage their affairs as they travel from place to place. Although the athletes in these cases were employed by the Ice Follies and might be classified as "team" athletes, their entire season was "on the road," so they did not operate out of one base location the way teams typically do. In addition, because the skaters incurred expenses above the amount paid to them on a weekly basis for living expenses by the Ice Follies, they resembled individual athletes more.

In *Hall v. Commissioner*,[44] the taxpayer was a professional ice skater who performed for the Ice Follies. She traveled extensively throughout the United States and lived with her mother in Spokane, Washington, in the family house, when not traveling. The Ice Follies reimbursed her a maximum of $52 per week for meals and lodging while she was away from home. She had her own bedroom in her mother's house, which was set aside for her use at all times. She kept her car in the two-car garage, except during the winter when it was left with her sister in California. Her car was purchased and registered in Spokane at the family address. Her personal belongings were kept there, and she was a registered voter in Spokane. She paid $600 per year toward household expenses. In addition, she paid real estate taxes and also paid for some repairs and utilities. Her employer treated the Spokane address as her home. She stayed there five or six weeks each year when on vacation and at certain other times as well. The government took the position that she had no home from which to be away because her home was where she was performing.

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39. *See, e.g.*, United States v. Correll, 389 U.S. 299 (1967).

40. *See* Rosenspan v. United States, 438 F.2d 905 (2d Cir.), *cert. denied*, 404 U.S. 864 (1971).

41. J.S. SEIDMAN, LEGISLATIVE HISTORY OF FEDERAL INCOME TAX LAWS, 1938-1861, 822 (1938).

42. 286 F.2d 333 (5th Cir. 1961).

43. *Id.* at 335-36.

44. 33 T.C.M. (P-H) 64,157 (1964).

In ruling for the taxpayer, the Tax Court noted that the taxpayer's contract of employment was based on Spokane being the taxpayer's home city — the "point of engagement" — and that the employer agreed to pay rail transportation from the home city to the city where the taxpayer joined the show and back to the home city at the end of the show in the various cities.[45] The court described this as a borderline case but likened it to situations where an individual is in a trade that requires union membership and accepts work for short periods of time away from the home city where a fixed and permanent residence is maintained.[46] The court found that all three tests set forth in the *Flowers* case were satisfied and noted that the statute does not limit the deduction based on the time of the taxpayer's traveling away from home. Both her business home and personal home were held to be in Spokane. That was her permanent home. She contributed to the maintenance of it and never abandoned it. "She was neither a homeless nor an itinerant individual."[47]

Another Ice Follies skater won a similar case in the Tax Court in *Gooderham v. Commissioner*.[48] The facts involved the same standard contract and reimbursement arrangement for meals and lodging and indicated that the taxpayer maintained both a business home and a personal home at her parents' home in Canada. The house had three bedrooms, and one of them was set aside for her use at all times. She kept all of her clothing there, except what she took with her on the tour. All of her other personal belongings were also kept there.[49] When not performing, she returned to her home in Canada. In this case, as in *Hall*, there were clear indications of definite ties to a community, and the Tax Court held that her parents' home had sufficient characteristics of permanence to constitute her tax home.[50]

Similarly, in *Boyer v. Commissioner*,[51] resident alien professional ice skaters with the Ice Follies were treated as having a home to be away from in Austria as they traveled extensively in the United States and Canada.[52] The taxpayers purchased land in Austria in 1964 and built a house on it in 1967. The house was worth $70,000 at the time of the trial, and the Tax Court emphasized the taxpayers' substantial investment in the property, the

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45. *Id.* at 64-1030.

46. Hartsell v. Wright, 182 F. Supp. 725 (D. Idaho 1960), *aff'd*, 305 F.2d 221 (9th Cir. 1962); *Schurer*, 3 T.C. 544.

47. *Hall*, 33 T.C.M. (P-H) at 64-1031.

48. 33 T.C.M. (P-H) 64,158.

49. *Id.* at 64-1036.

50. *Id.* at 64-1037.

51. 46 T.C.M. (P-H) 77,331 (1977).

52. *Id.* at 77-1330.

expenses they paid to maintain it, the fact that they spent most of their time there when not performing, and the fact that they intended to return to it when they retired.[53]

In the above cases, the professional ice skaters were all employees of the Ice Follies, and the Tax Court seemed to place considerable importance on their contractual arrangements, which acknowledged their abodes as their homes and provided for rail fare to and from that location.[54] In addition, in each situation, the taxpayers either had longstanding connections with the place called home or a substantial financial investment in real property there.[55] Those factors seem to be the key to the final result reached in each case, although, as indicated, there were other factors present that showed ties to the community.

V. Duplication of Expenses

One of the important factors that courts have considered in deciding these questions is the one relating to duplication of expenses. The reason the statute allows taxpayers to deduct away-from-home travel expenses incurred on business trips is to alleviate the burden of maintaining the costs of two households — one back home and one on the road.[56]

The position of the government in these cases has focused on the taxpayer's center of business activity - his business headquarters - as being his tax home.[57] The Supreme Court has declined to adopt that position.[58] In *Rosenspan v. United States*, because a traveling salesman appeared to have business headquarters in New York City but did not have an abode anywhere in the conventional sense, the government was placed in the position of arguing that although the place of business headquarters is usually one's tax home, one must have some kind of a permanent residence or abode to be away from in order to deduct away-from-home expenses. The Court of Appeals for the Second Circuit in *Rosenspan* ruled in favor of the government, and noted that the words "away from home" in the statute reflect a congressional intent to allow a deduction for the taxpayer whose travel expenses are a duplication of expenses incurred at a permanent residence.[59]

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53. *Id.*

54. *See supra* notes 39, 42 and accompanying text.

55. *See supra* note 43 and accompanying text.

56. Brandl v. Commissioner, 513 F.2d 697, 699 (6th Cir. 1975) (citing Rosenspan v. United States, 438 F.2d 905, 912 (2d Cir. 1971)).

57. *Rosenspan*, 438 F.2d at 907.

58. *See* Commissioner v. Stidger, 386 U.S. 287 (1967); Puerifoy v. Commissioner, 358 U.S. 59 (1958); Commissioner v. Flowers, 326 U.S. 465 (1946).

59. *Rosenspan*, 438 F.2d at 912.

The Tax Court, however, in *Johnson v. Commissioner*,[60] recently classified the duplicative nature of the taxpayer's expenses as being merely one of the factors to be considered in the ultimate factual determination of the question of temporariness of a trip. In that case, the taxpayer was a tenured nursing professor at the University of Texas who traveled to Hawaii to pursue doctoral studies. She had worked at the University of Texas for nineteen years prior to her trip, and she intended to and did return to her position at Texas after her trip was concluded. Even though she had sold her house in Texas before taking the trip to Hawaii, the court allowed her travel expenses to be deducted because the total facts and circumstances indicated that her tax home had remained in Texas.[61]

For individual traveling athletes, the best procedure to follow would be to establish a permanent residence somewhere that involves a substantial financial commitment. This procedure would establish a tax home even though the athletes have no one place that could be called their business headquarters. As the court commented in *Barone v. Commissioner*,[62] which involved a truck driver who lived in motels while on the road for 227 days in 1981, and stayed at his parents' house in Phoenix for 138 days:

> In his attempt to show that Phoenix was his principal place of business, petitioner points out that his home terminal was in Phoenix and that eight trips either terminated or originated in the Phoenix area. These facts alone do not require a finding that Phoenix was his principal place of business. The relatively few business connections petitioner had with the Phoenix area are indicative that petitioner's true place of business was on the road.[63]

The *Barone* case would seem to be particularly relevant for many young tennis players and other athletes who live with their parents when not on the road. It is noted that Mr. Barone had the use of his own room, bathroom and telephone in his parents' house. In addition, he paid his phone bills, his share of the electric bills and a small amount ($503) of rent.[64] The court found that "[t]his token amount together with payments he made for his share of the electric and telephone bills does not constitute *substantial continuing living expenses*."[65]

For professional tennis players and other individual traveling athletes, the danger is that if they have no business headquarters and no real and

60. 57 T.C.M. (P-H) 88,177 (1988).
61. *Id.* at 88-993.
62. 85 T.C. 462 (1985).
63. *Id.* at 466; *cf. Rosenspan*, 438 F.2d at 905.
64. *Barone*, 85 T.C. 462.
65. *Id.* at 466 (emphasis added).

substantial commitment to a place of residence, they will be held to have no tax home from which they can be away. Accordingly, these professional athletes should note the necessity of making a substantial financial commitment to a dwelling place, particularly if they have no business headquarters.

VI. MAINTAINING A HOME FOR ANOTHER PERSON

With respect to construction workers, the government has taken the position that it is not necessary for a worker to be married in order to establish that he has a tax home at his place of abode and where his employment contracts are made. This result has been reached even though a single person may find it more difficult than a married person to establish by a preponderance of the evidence that he has both a regular place of abode and a business headquarters and that his temporary trips away from that place are for business purposes.[66] In *Sapson v. Commissioner*,[67] the government argued, however, that a taxpayer's expenses in maintaining a place of abode were "too small" to establish that place as a tax home.

In the *Sapson* case, the taxpayer was a traveling salesman who operated out of San Antonio, Texas, and sold military uniforms. He traveled for periods ranging from six months to eleven months per year, and he kept his clothing and furniture in his sister's house in San Antonio.[68] He provided some funds for maintaining the household, and he stored some belongings with a friend in Fort Worth. He paid a poll tax in Texas, and he also had his automobile licensed there. The government argued that although the taxpayer's business headquarters was in San Antonio, he had no permanent place of residence in Texas because he had not established that he paid his sister rent for his living accommodations. Even if he did pay rent, it was not enough to establish a residence. The position advanced by the Government was the same as that advanced in *Rosenspan* — a business headquarters alone is not enough to establish a tax home; one must also maintain a personal residence in order to be allowed the away-from-home deduction.[69]

In ruling in favor of the taxpayer, the Tax Court in *Sapson* noted that the cases relied on by the government held that a taxpayer will receive the benefit of a travel expense deduction "away from home" where there is a duplication of costs incurred in traveling because a permanent residence is

66. Rev. Rul. 60-189, 1960-1 C.B. 60.

67. 49 T.C. 636 (1968).

68. *Id.* at 636-37.

69. *Id.* at 644-45; *see also* James v. United States, 308 F.2d 204 (9th Cir. 1962); Deneke v. Commissioner, 42 T.C. 981 (1964); Fisher v. Commissioner, 23 T.C. 218 (1954), *aff'd*, 230 F.2d 79 (7th Cir. 1956).

being maintained at some particular place. The court pointed out, however, that in each of those cases that dealt with the question of whether the taxpayer had a permanent personal residence, the taxpayer did not have a principal place of business. In the *Sapson* case, the taxpayer clearly did have a principal place of business, which was conceded by the government to be San Antonio.[70] The government argued that the taxpayer did not pay sufficient rent for the room in his sister's house to make it his residence. That argument implicitly stated that unless the taxpayer maintained a home for someone other than himself he would not be entitled to deduct travel expenses "away from home." The court responded that the logical result of that position would be to deny the traveling expense deduction to all unmarried people traveling away from home. Even though a single person might fare better than a married person from a financial point of view when traveling away from home on business, the court refused to distinguish between the two, and ruled in favor of the taxpayer.

Because single athletes tend to live in a less permanent or settled way than married athletes, they should be certain to establish a permanent place of residence. If they do not own a residence, they should have a lease showing a legal commitment to periodic rental payments. In addition, having a telephone listing, registering an automobile in the location of residence, voting there, and belonging to various organizations in that location will all strengthen the taxpayer's position.

Where the taxpayer has a substantial business interest in a particular location, even relatively small expenses of maintaining a household can be sufficient to establish a permanent residence. For example, in *Kit v. United States*,[71] the taxpayer, who was a magician and hypnotist, lived with his wife in a leased trailer in West Yellowstone, Montana. They bought a shirt shop in West Yellowstone where they worked during the summer when not on the road. Even though they did not duplicate their West Yellowstone residence expenses "in any very substantial way"[72] while they were traveling, the court found that there was some duplication. Due to this duplication and with their substantial commitment to West Yellowstone, that was

70. *Sapson*, 49 T.C. at 642.

71. 76-2 U.S.T.C. (CCH) 9721; 38 A.F.T.R.2d (P-H) 76-5297 (D. Mont. 1976); *see also Fisher*, 230 F.2d 79 (Itinerant musician could not deduct traveling expenses when he and his wife stayed in the apartment of his mother-in-law on off days. He paid no rent, paid part of the expenses while he and his family were there, part of the phone bill and used the location of the apartment on his business brochures.); Kalmus v. Commissioner, 49 T.C.M. (P-H) 80,044 (1980); Cross v. Commissioner, 48 T.C.M. (P-H) 79,059 (1979) (construction worker had no permanent residence and no away-from-home deduction was allowed).

72. Kit v. United States, 76-2 U.S.T.C. (CCH) 9721.

held to be their tax home. Accordingly, their travel expenses while away from home were deductible.

VII. Team Athletes

For individual athletes, since it would be unusual for them to have a business headquarters, the focus has been on determining whether their living facilities were maintained with a sufficient degree of permanence to constitute a "home." In other words, the question was whether these athletes had any home from which they could be away while traveling. However, in the case of team athletes, it seems clear that usually an athlete's principal place of employment or business is where the team is located.[73]

As of 1969, no reported cases had determined the question of a "tax home" with respect to professional baseball players.[74] In 1954, the Internal Revenue Service issued Revenue Ruling 54-147,[75] which set forth the Service's position with respect to travel expenses away from home for professional baseball players, managers, coaches and trainers. The Revenue Ruling referred to a major league baseball season as ordinarily being 154 games, with half the games played in the "home" town of the team and the other half played in the various other cities fielding teams in the league.[76] Major league teams start their spring training about one and a half months before the season starts and training camps are held in places far from the team's base. Revenue Ruling 54-147 treated the teams' "home" cities as the players' principal places of business and the "home" from which they had to be away in order to be able to deduct traveling expenses.[77] It made no difference where a player's home residence was maintained.

In *Wills v. Commissioner*,[78] the taxpayer played for the Los Angeles Dodgers from 1959 to 1966. In the years in question (1962 and 1963), he spent about eighty-seven days in Los Angeles, and five to six weeks in Florida for spring training. In 1958, he purchased a house in Spokane, Washington, where he and his family resided during the off season. In 1962, he bought a second house outside of Spokane, and he and his family moved into it and rented out the first house in Spokane. During the same year, he spent 138 days with his family at its personal residence. In 1963, he spent 96 days there. He did public relations work for a minor league team of the

73. *See generally* Wills v. Commissioner, 411 F.2d 537 (9th Cir. 1969); Bailey v. Commissioner, 53 T.C.M. (P-H) 84,610 (1984); Gardin v. Commissioner, 64 T.C. 1079 (1975).

74. *Wills*, 411 F.2d at 540.

75. Rev. Rul. 54-147, 1954-1 C.B. 51.

76. At the present time, a normal baseball season for a major league team is 162 games.

77. Rev. Rul. 54-147, 1954-1 C.B. 51.

78. 411 F.2d 537.

Dodgers and received $5,000 dollars each year for it. While in Los Angeles, he lived with the pastor of his church and paid rent. The Court of Appeals for the Ninth Circuit agreed with the Tax Court and held that the taxpayer's travel, meal and lodging expenses in the Los Angeles area could not be deducted because the taxpayer was not away from home.[79] Taking the position that the taxpayer's principal place of business is his tax home, the court cited *Commissioner v. Flowers*,[80] *Commissioner v. Stidger*,[81] *Smith v. Warren*[82] and *Steinhort v. Commissioner*.[83]

In *Wills*, the taxpayer's business activities and the money earned in the area of his personal residence were minimal, so it was clear that his center of business activity was the hometown of his employer — Los Angeles. The *Wills* case is distinguishable from *Hall* and *Gooderham* which involved professional ice skaters with the Ice Follies.[84] In those cases, the taxpayers traveled from city to city, and they never stayed in any of the cities for a substantial period of time. None of those cities, therefore, could become a center of business activity. However, in *Wills*, the taxpayer was based in Los Angeles for a substantial period of time each year. Accordingly, it was logical to conclude that the team headquarters in Los Angeles was the center of business activity of the taxpayer.

The same result was reached in *Bailey v. Commissioner*,[85] which involved a professional hockey player who maintained a home in Massachusetts while he lived in Detroit and St. Louis, playing on teams in those cities. He was denied a deduction for living expenses in those cities because they were treated as tax homes — principal places of employment in which the teams were based.[86]

In light of the cases, which have ruled on these questions, it seems clear that athletes on teams ordinarily will not be able to deduct the cost incurred for living facilities and food at the place where the team is based. In addition, of course, traveling expenses incurred in going between the personal residence in another location and the team headquarters will not be deduct-

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79. *Id.* at 540. Although travel expenses away from Los Angeles would be deductible as away-from-home expenses, they are not likely to be in issue because the team pays such expenses.

80. 326 U.S. 465 (1946).

81. 386 U.S. 287 (1967).

82. 388 F.2d 671 (9th Cir. 1968).

83. 335 F.2d 496 (5th Cir. 1964).

84. *Wills*, 411 F.2d at 540-41.

85. 53 T.C.M. (P-H) 84,610 (1984).

86. *Id.* at 84-2481; *see also* Stemkowski v. Commissioner, 690 F.2d 40 (2d Cir. 1982); Dews v. Commissioner, 56 T.C.M. (P-H) 87, 353 (1987). In the *Dews* case, a coach of the Atlanta Braves was denied deductions for living expenses in Atlanta, where the Braves were based. His family home, where his wife lived, was in Albany, Georgia, 166 miles south of Atlanta.

ible because such travel will not be occasioned by business necessity.[87] When team athletes travel with their teams away from their home team headquarters to participate in sports events, the players clearly are traveling in connection with their business activities, and such travel, meal and lodging expenses are all fully deductible.[88] However, no issue ordinarily will be raised by these expenses because they are usually reimbursed or paid directly by the teams for which the athletes play.

On the other hand, athletes may have personal business interests in locations away from where their team is based. In most instances, these personal businesses will be located in the same city where their permanent personal residence and family are maintained. It also is possible, however, for athletes to have personal business interests in cities away from both their team headquarters and the city where their permanent personal residence is located.

VIII. Business Activities in Places Away From Team Headquarters

As previously indicated, the position of the Internal Revenue Service is that, as a general rule, one's center of business activity is one's tax home. Although most courts reach results that seem to be in line with the Service's position, the Second Circuit seems to focus on the place of abode or residence as being the tax home.[89] The Fifth Circuit also seems to disagree with the Service's view.[90] In some cases, taxpayers have business activities at more than one location, and in those situations, the position of the Service has been that the principal place of business will be the tax home.[91] This is a factual determination. Revenue Ruling 54-147 points out the factors used in determining whether the team headquarters or some other location is the principal place of business and therefore the tax home:

> The more important factors to be considered in making a factual determination regarding the location of the taxpayer's principal place of business or tax "home" are the total time ordinarily spent by the taxpayer at each of his business posts, the degree of the business activity at each such post, and whether the financial return in respect of each post is significant or insignificant. No one factor is determinative, although the point last mentioned should be given

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87. Rev. Rul. 54-147, 1954-1 C.B. 51.
88. *Id.*
89. *See* Six v. United States, 450 F.2d 66 (2d Cir. 1971).
90. *See* Steinhort v. Commissioner, 335 F.2d 496 (5th Cir. 1964).
91. Rev. Rul. 75-432, 1975-2 C.B. 60; Rev. Rul. 73-529, 1973-2 C.B. 37; Rev. Rul. 60-189, 1960-1 C.B. 60; *see also* Markey v. Commissioner, 490 F.2d 1249 (6th Cir. 1974).

> great weight in cases where all services are performed as an "employee" or in those instances where a player for a nominal consideration does some work for others primarily for the purpose of maintaining suitable physical condition.[92]

It should be noted that, recently, the government has treated time as the most important of the above three factors.[93] As indicated, if the application of this test results in a place other than the team headquarters being treated as the player's principal place of business, then the cost of meals and lodging are deductible in the team's "home" town, and transportation expenses to and from the team base are deductible, since such travel is primarily for business purposes.[94] The time factor in any given situation should be determined with reference to both home and away games while the taxpayer is a member of a particular team.

Assuming that the team headquarters is the tax home of the players, how would travel away from that place to a second business location be treated, even if the taxpayer's permanent residence is in that same location? Revenue Ruling 54-147 contains the following provisions relating to that question:

> On the other hand, where the "club town" is the taxpayers' principal place of business, such taxpayers are entitled to deduct their traveling expenses, including meals and lodging, while traveling away from their principal place of business, even though their permanent residence is located at the minor business post. In the latter case, only that portion of such expenses at his residence which is directly attributable to the taxpayer himself is a deductible expense for Federal income tax purposes.[95]

Even though the above position seems straightforward, there have been some unusual cases involving this problem. In *Gurney v. Commissioner*,[96] a construction worker, whose tax home was held to be located at the construction site sixty miles away from a ranch on which he lived, was unable to deduct daily traveling expenses between the construction site and his residence, even though he conducted ranching operations at the residence. The taxpayer, in *Gurney*, relied on Revenue Ruling 54-147 and contended that the expenses for travel, which included meals and lodging at his residence-ranch, were deductible.

The Tax Court rejected the taxpayer's position, stating that

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92. Rev. Rul. 54-147, 1954-1 C.B. 51 at 52.
93. *Markey*, 490 F.2d 1249.
94. Rev. Rul. 75-432, 1975-2 C.B. 60; Treas. Reg. § 1.162-2 (1988).
95. Rev. Rul. 54-147, 1954-1 C.B. 51 at 53; *see also* Rev. Rul. 75-432, 1975-2 C.B. 60.
96. 40 T.C.M. (P-H) 71,329 (1971).

> if the minor post of duty is located at the taxpayer's residence, as it is here, the revenue ruling is inapplicable. Since the petitioner's ranching activities were carried on at his residence, he had no additional expenses (outside of commuting) in traveling from the construction job to his ranching business . . . . This situation is simply beyond the scope of the revenue ruling because the conduct of a minor business at a taxpayer's residence cannot transform an otherwise nondeductible commuting expense into a deductible business expense.[97]

It is noted that the taxpayer's ranching operation was significant enough to have lost $1,224.00 in the tax year in suit and accordingly, the language of the court seems to be inconsistent with the quoted portion of the revenue ruling set forth above.

In 1974, the case of *Markey v. Commissioner*[98] was decided. In *Markey*, the taxpayer worked in Warren, Michigan, for five days each week during a fifty week period and returned on weekends to his permanent residence in Lewisburg, Ohio, where his wife lived. He also conducted a consulting business, rented out two farms and operated apartments in Lewisburg.

In the audit, the government treated Warren, Michigan, as the taxpayer's tax home and allowed him to deduct expenses under section 212 of the Internal Revenue Code for travel between Warren and Lewisburg on twelve occasions each year. The government took the position that these trips were necessary to manage his business operations in Lewisburg. Once the number of trips was determined for managing the business activities in the locality of the personal residence, the travel from the tax home to that location would be deductible under Regulations 1.162-2 because the trips were "primarily" for business purposes on those occasions. In addition, the meals and lodging associated with those business trips were also allowed deductions by the government.

In cases of this kind, the government contends that when a taxpayer returns to the area of his permanent principal residence, even though some business activity is conducted in that area, the purpose of the trip is to visit his or her family rather than to pursue trade or business, and therefore, the travel expenses are not deductible. The government was unsuccessful with respect to that argument in *Folkman v. United States*,[99] where a Pan American pilot, stationed in San Francisco (tax home), traveled to Reno, Nevada, where his permanent residence and family home were located and where he served in the Nevada Air National Guard. In order to serve in the Guard,

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97. *Id.* at 71-1502.
98. *Markey*, 490 F.2d 1249.
99. 615 F.2d 493 (9th Cir. 1980).

there was a requirement that an individual maintain a residence in Reno. Although the government argued that the trips to Reno were simply to visit family, the court held that the homes would not have been located in Nevada except for the Guard service.[100] In other words, business exigencies compelled the family to live in Reno.

The government successfully raised this argument in *Sargent v. Commissioner*[101] where the taxpayer was stationed in the Air Force Reserve in New Jersey, and made trips back to Ohio where he and his wife maintained a permanent residence and owned stock in a corporation, which operated a tavern.[102] In that case, the Tax Court concluded that the New Jersey location was the taxpayer's tax home, and denied a deduction for living expenses incurred there, and for traveling expenses from the alleged tax home in Ohio to the airbase in New Jersey.[103] The court went on to hold that the taxpayer could not deduct traveling expenses from New Jersey to Ohio stating: "Moreover, because petitioner actually maintained a residence with his wife within the locale of the tavern in Ohio, in the absence of evidence to the contrary, we must concude that his reasons for traveling to Ohio from New Jersey were primarily personal and that, therefore, the costs of that travel are not deductible."[104] If the taxpayer had been able to substantiate his business activities in Ohio, he would have been able to more logically contend that the Ohio location was his tax home and, therefore, his travel expenses to New Jersey and his living expenses while there could have been deductible. Even if his business activities in Ohio were not sufficient to constitute the Ohio location as his tax home, by establishing those Ohio business activities, he probably would have been able to deduct travel expenses from New Jersey to Ohio, which could have been treated as a minor place of business.

IX. How The Temporary vs. Indefinite Factor Can Affect Athletes

When a taxpayer travels away from his tax home and goes to another locality where he engages in business activities, the question arises as to whether the trip is temporary or indefinite. If the trip away from the tax home to the place where business activities are pursued is regarded as temporary, travel, meal and lodging expenses related to such a trip would be

100. *Id.* at 496-97.
101. 53 T.C.M. (P-H) 84,390 (1984).
102. *Id.*
103. *Id.*
104. *Id.*

proper deductions.[105] On the other hand, if the circumstances surrounding the trip away from the tax home indicate that the trip was made for an indefinite period of time, travel, meals and lodging expenses for the trip will not be deductible.[106] The reason for this result is that if the taxpayer expects to be in a place for an indefinite period of time, that place has become his center of business activity — his tax home — and expenses incurred at one's tax home are usually not deductible.[107] In *Montgomery v. Commissioner*,[108] the court stated:

> This Court has consistently held that a taxpayer should be expected to make his home in the vicinity of his permanent business or employment and that only the expenses of traveling from a home so situated are deductible as a business expense under § 162(a)(2). If for personal reasons he fails to move his home to the vicinity of his permanent business or employment, his expenses of traveling from the home are incurred for personal, not business, reasons and are not deductible.[109]

For the athletes engaged in individual sports who leave their tax homes and travel from city to city, never remaining in one place for a substantial period of time, the temporary versus indefinite problem does not arise. These taxpayers are continuously in a traveling mode, and their travel expenses would be away-from-home expenses. These individuals are never in one place long enough for a logical argument to be made that that place has become their tax home due to the length of their stay there.

In addition, the issue would not arise where a taxpayer has no single center of business activity and no permanent place of abode but continuously travels, working in different localities for different periods of time.[110] Such a taxpayer has no home to be away from and would be classified as an itinerant.[111] Every city in which such an individual worked would be his tax home, so he would never be "away from home," and his meals and lodging in each place would be non-deductible.[112] As previously indicated, this could be the situation for individual athletes with no ties to any particular community who constantly travel from one place to another.

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105. Rev. Rul. 83-82, 1983-1 C.B. 45.
106. *Id.*
107. 64 T.C. 175 (1975), *aff'd*, 532 F.2d 1088 (6th Cir. 1976).
108. *Id.* at 179.
109. *See* Rosenspan v. United States, 438 F.2d 905, 912 (2d Cir. 1971).
110. *Id.*
111. *Id.*
112. *See, e.g.*, Hantzis v. Commissioner, 638 F.2d 248, 255 (1st Cir.), *cert. denied*, 452 U.S. 962 (1981).

In order for the temporary versus indefinite issue to become relevant, a taxpayer must live in one place, work in another locality, and have business activities in both places. In that situation, where the travel is temporary, all travel expenses would be deductible so as to prevent the duplication of living expenses at both locations.[113]

Under normal circumstances, when an athlete receives the usual contract from a team and reports to the team's headquarters, the employment is not treated as temporary, but as "indefinite" employment.[114] As a result, that location would be his tax home, unless there were some other place where his business activities and his personal involvement were so extensive that it would be treated as his tax home. If such were the case, the job with the athletic team would be treated as a permanent, regularly recurring seasonal job, and travel expenses relating to transport to the team headquarters would be deductible.[115]

With respect to normal team travel for "away" games, athletes are engaged in business travel, and no question could arise as to the nature of their expenses. In any event, their expenses are paid by their teams or are reimbursed.

There are, nevertheless, several ways in which the temporary versus indefinite problem can arise. First, the issue could arise where a baseball player is called up from the minor leagues to play out the rest of the season with the major league parent club. That player typically would leave his permanent home and family in his minor league city and rent an apartment in the major league city. The reverse of this situation would arise where the major league team sends a player back to the minors, and he leaves his permanent home and family in the major league city when he goes to the minor league city.

Second, the problem could arise where it becomes necessary to activate an inactive or a retired player to fill in a team's roster, either for the balance of the season or for the following season as well. He might leave his permanent home and family in the town where he has been living and rent an apartment in the city where the team is based.

Finally, there are the situations in which a player is traded often from one team to another, and spends a relatively short amount of time based in the cities where each team is headquartered.

In the case of a taxpayer, who lives and works in a particular city, and who accepts employment in other localities for various periods, the Service

113. Gardin v. Commissioner, 64 T.C. 1079, 1084 (1975).
114. Rev. Rul. 75-432, 1975-2 C.B. 60.
115. Rev. Rul. 83-82, 1983-1 C.B. 45.

takes the position that if the anticipated and actual duration of the stay is for less than one year, the facts and circumstances will determine whether the employment is temporary.[116] This rule is further amplified by the Service's position that anticipated employment in another location of one year or more, which in fact lasts that long, will be presumed to be indefinite, rather than temporary.[117] But the presumption may be rebutted in cases where the employment is expected to and does last at least one year, but for less than two years.[118] In order to do this, certain objective factors would have to be shown.[119] The Revenue Ruling 83-82 also provides that an expected or actual stay of two years or longer will be considered an indefinite stay "regardless of any other facts or circumstances."[120]

Although this ruling is based on facts relating to workers who accept jobs in various places, it could be relevant where players are brought up from the minor leagues under relatively short-term contracts to play for major league teams. It also could apply where a major league team sends a player back to the minors to gain more experience. The decided cases discuss certain concepts that should provide guidance for athletes concerned about this problem.[121]

Although the tax home of a professional team athlete is considered to be the place where the headquarters or home of the team is located,[122] there have been instances where the argument was made that assignments to certain team headquarters were merely temporary in nature, giving rise to the argument that meals and lodging in that place were deductible expenses.[123]

Generally, the question of whether a job is temporary or permanent is determined at the beginning of the employment.[124] In determining whether

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116. Rev. Rul. 83-82, 1983-1 C.B. 45.

117. *Id.* at 46.

118. Rev. Rul. 83-82 provides that in this situation, the taxpayer must show by objective evidence that he had a realistic belief that the employment would last for less than two years and that he would return to the place claimed as a tax home after the job ended. The taxpayer also must show that the place claimed as a tax home was the regular place of abode in a real and substantial sense. *Id.* Three objective factors are used in making this determination: whether the taxpayer used the claimed place of abode immediately before his present job and keeps his contacts there while on the present job; whether his living expenses are duplicated because he presently is away from the alleged abode; and whether relatives of the taxpayer live at the claimed abode or the taxpayer uses the abode frequently for lodging. *Id.*

119. *Id.*

120. *Id.*

121. *See supra* note 73.

122. *Gardin*, 64 T.C. at 1079; *Bailey* 49 T.C.M. at 141.

123. *Id.*

124. Peurifoy v. Commissioner, 254 F.2d 483 (4th Cir. 1957), *aff'd per curiam*, 358 U.S. 59 (1958); *Gardin*, 64 T.C. at 1084; Dilley v. Commissioner, 58 T.C. 276 (1972); Blue v. Commissioner, 51 T.C.M. (P-H) 82-486 at 82-2201 (1982).

a position is temporary, we should try to see whether its termination "within a short period of time could be logically expected and foreseen."[125] The fact that athletes are engaged in seasonal business activity does not mean that their employment is temporary.[126] Once a position is determined to be indefinite, the fact that the end of an athlete's career is near will not change the nature of his employment to temporary.[127] "Even 'permanent' jobs usually end at predictable dates — for example, at mandatory retirement, at the end of a contract, or on completion of a construction project. But that does not render them temporary within the meaning of the court-made exceptions."[128] Professional athletes have been unsuccessful in contending that their positions were temporary because they were subject to being traded to another team.[129] The potentiality of transfer does not necessarily require that an employment be characterized as 'temporary.'[130] "To hold otherwise would cause most players of professional sports to be engaged in a series of temporary employments, so that their living expenses at franchise locations would be deductible. We do not believe that Congress intended § 162(a)(2) to produce such a result."[131]

Contract terms, of course, are significant in this regard, but in most instances the typical professional athlete's contract, although usually short term, has not helped the athlete show that his position was temporary. In *Blue v. Commissioner*,[132] a player with the San Francisco Forty-Niners had entered into a series of three one-year standard National Football League contracts. The contracts were identical except for the salary provision. Such provisions are standard practice in the NFL, and when a player is traded, the new team must take the player subject to the terms of the existing contract.[133] Blue was traded to the Baltimore Colts when his contracts still had three years remaining, and because his future looked bright when he joined the Colts, his employment was held not to be temporary.[134] Although Blue's contracts covered a three-year period, as did the contracts

125. Groover v. Commissioner, 714 F.2d 1103 (11th Cir. 1983); Horton v. Commissioner, 86 T.C. 589 (1986); Albert v. Commissioner, 13 T.C. 129 (1949).

126. *Gardin*, 64 T.C. at 1084.

127. *Blue*, 51 T.C.M. at 82-2201.

128. *Id.*

129. *See, e.g.*, Stemkowski v. Commissioner, 76 T.C. 252 (1981), *rev'd on other grounds*, 690 F.2d 40 (2d Cir. 1982); *see also* Dews v. Commissioner, 56 T.C.M. (P-H) 87,353 (1987) (baseball coach unsuccessfully contended that coaches are more susceptible to change in position than players); *Gardin*, 64 T.C. 1079.

130. *Gardin*, 64 T.C. at 1085.

131. *Id.* at 1084.

132. *Blue*, 51 T.C.M. at 82-2197.

133. *Id.*

134. *Id.* at 2201.

of Ronald L. Gardin,[135] another Baltimore Colt, these standard NFL contracts contained the following provision:

> If the player fails to establish his excellent physical condition to the satisfaction of the Club physician . . . or . . . if, in the opinion of the Head Coach, Player does not maintain himself in such excellent physical condition or fails at any time . . . to demonstrate sufficient skill and capacity to play professional football of the caliber required by the League, or by the Club, or if in the opinion of the Head Coach the Player's work or conduct in the performance of this contract is unsatisfactory as compared with the work and conduct of other members of the Club's squad of players, the Club shall have the right to terminate this contract.[136]

Despite the uncertainty built into these contracts in light of the above provision, the Tax Court viewing all of the circumstances in these cases, found that, viewed from the time the job was begun, there was not that degree of impermanence to make the job temporary.

In *Stemkowski v. Commissioner*,[137] a hockey player with the New York Rangers had a two-year NHL standard players contract with an option to renew. The Court of Appeals for the Second Circuit held that such a contract "is not merely temporary in nature."[138]

Contract terms, nevertheless, coupled with other circumstances, can work to an athlete's favor. In *Horton v. Commissioner*,[139] a hockey player left his permanent residence and wife in Michigan and went to California where he played with several teams under six-month contracts over a two-year period. Between seasons, he returned to Michigan. The Tax Court permitted Horton to deduct his travel expenses relating to his stays in California, treating Michigan as his tax home. During the period of time in suit, Horton's wife in Michigan earned more than half the income for the family. Focusing on the uncertainty of the California positions, the court found that there could be no other expectation other than that of temporary employment, when Horton accepted these positions. Under these circumstances, it was not reasonable to expect Mrs. Horton to give up her permanent job in Michigan and move to California and establish a home there.

It is important to point out that the court in *Horton* observed that neither party considered or argued the significance of the effect on the tax home of Mrs. Horton's job and the fact that she earned more money than

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135. *Gardin*, 64 T.C. at 1079.
136. *Id.* at 1080 (citing Standard National Football League Contract).
137. *Stemkowski*, 76 T.C. at 252.
138. *Stemkowski*, 690 F.2d at 48.
139. *Horton*, 86 T.C. at 589.

her husband. The court deemed that to be significant.[140] It does seem, however, that in a case of that kind, the most important factor will be the circumstances surrounding the employment of the spouse who leaves the permanent residence to work elsewhere. If that work has a sufficient degree of permanence associated with it, each spouse will have a tax home in a different place.[141]

X. STATE LAW CONSIDERATIONS FOR COMPETITION IN DIFFERENT STATES

A. *Individual Athletes*

The provisions of state income tax statutes vary considerably from state to state, and one must exert care in becoming familiar with the exact provisions of the laws of the state applicable to a particular taxpayer. For those states having a full-fledged income tax law, the usual rule that is followed is to tax "residents" on all of their taxable income from whatever source, and to tax nonresidents on their income which has a source in the particular state in question. In California, for example, the statute provides that a tax "shall be imposed for each taxable year upon the entire taxable income of every resident of this state and upon the entire taxable income of every nonresident which is derived from sources within this state."[142]

States often define a "resident" as either one who is domiciled in the state or one who is in the state with some degree of permanence. For example, in California, the term "resident" is defined as including: "(1) Every individual who is in this state for other than a temporary or transitory purpose; (2) Every individual domiciled in this state who is outside the state for a temporary or transitory purpose."[143]

Anyone who spends more than nine months of the taxable year in California is presumed to be a resident, but the presumption can be overcome

140. *Id.* at 593, n.4.

141. *See* M.L.E. Chwalow v. United States, 470 F.2d 475 (3d Cir. 1973); Felton v. Commissioner, 51 T.C.M. (P-H) 82,011 (1982); E.C. Weston v. Commissioner, 50 T.C.M. (P-H) 81,166 (1981).

142. CAL REV. & TAX CODE § 17041 (West Supp. 1989). By way of examples of corresponding provisions in other states, the similar Wisconsin statute is found at WIS. STAT. ANN. § 71.02 (1989) (but the entire amount earned may end up being exempt from Wisconsin income tax) and the pertinent Illinois statute is ILL. ANN. STAT. ch. 120, ¶ 2-201 (Smith & Hurd Supp. 1989). *Id.* at ¶¶ 301, 3-302 and 3-304. Under ¶ 3-302, Illinois permits agreements to be made with the taxing authorities of other states under which income earned by Illinois residents in other states will be exempt from tax by such other states and in return, residents of such other states who earn income in Illinois will be exempt from tax on such income.

143. CAL. REV. & TAX CODE § 17014. The similar Illinois provision is ILL. ANN. STAT. ch. 120, ¶ 15-1501(a)(20).

by showing that the individual was in California for a temporary or transitory purpose.[144] A "nonresident" is defined in the California statute as "every individual other than a resident."[145]

As the California statute clearly indicates, anyone domiciled in that state is taxable on his or her total taxable income. There have been cases involving athletes domiciled in California who went to other states during the athletic season for a temporary or transitory purpose, and it was held that they would be treated as having maintained their domicile in California.[146]

In California, as with many other states, when a nonresident athlete comes into California to compete, he or she will be taxed by California on income earned from sources in California.[147] In fact, a section of the regulations provides that nonresident actors, singers, performers, entertainers, wrestlers, boxers, etc. must include in gross income the gross amount received for performances in that state.[148] These nonresidents are allowed a credit against their California tax for taxes paid to their state of residence on the same income,[149] if the tax statute of the state of residence satisfies certain requirements.[150] If athletes are residents of a state which has no

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144. CAL. REV. & TAX CODE § 17016.

145. *Id.* at § 17015. The corresponding Illinois statute is ILL. ANN. STAT. ch. 120, ¶ 15-1501(a)(14).

146. Appeal of Brucker SBE (8/18/61) and Appeal of Berry SBE (3/22/71).

147. Regs. 17951-2.

148. Regs. 17951-5(a)(2).

149. CAL. REV. & TAX CODE §§ 17055, 18002.

150. *Id.* at § 18002. Among other things, the California statute provides in part:

> (1) The credit shall be allowed only if the state of residence either does not tax income of residents of this state derived from sources within that state or allows residents of this state a credit against the taxes imposed by that state on such income for 'net tax' (as defined by § 17039) paid or payable thereon under this part.
>
> (2) The credit shall not be allowed for taxes paid to a state which allows its residents a credit against the taxes imposed by that state for 'net tax' (as defined by § 17039) paid or payable under this part irrespective of whether its residents are allowed a credit against the taxes imposed by this part for income taxes paid to that state.

Id.

Under the Wisconsin statute, income derived from personal services performed in Wisconsin by an individual domiciled outside of Wisconsin is excluded entirely from Wisconsin gross income if it is subject to tax by the state of domicile. Under the Wisconsin law, however, this benefit will be available only if the state of domicile allows a similar exclusion of income earned from personal services in that state by domiciliaries of Wisconsin, or a credit against the tax imposed by such state on the income in question equal to the Wisconsin tax on such income. WIS. STAT. ANN. § 71.05(2).

As previously indicated, Illinois will exempt income earned in Illinois by residents of other states if such other states agree to exempt income earned in those states by Illinois residents, where a reciprocal agreement exists between Illinois and the other states. ILL. ANN. STAT. ch. 120, ¶ 3-302(b).

income tax, then they would have to pay the tax due to a state like California without the benefit of a credit because the credit provisions would be inapplicable.

It seems clear that individual athletes will select their states of residence without regard to the above discussion. Although one has considerable choice in selection of a state for permanent residence, there is very little choice with respect to the states where the performance will take place. An athlete competes where the tournaments and other events are held. Ideally, an athlete would want to live in a state which has no income tax, and compete in other states which do not tax nonresident athletes on income earned there.

B. Team Athletes

When team athletes travel with their teams from their home headquarters to other states to compete, they become liable to the visited state for income taxes as nonresidents, assuming that such states tax earned income to nonresidents. The discussion above with reference to individual athletes is equally applicable to team athletes who travel away from their state of residence which normally will be where their team is headquartered.

In some instances, a team athlete will maintain a permanent residence in a state like California, but live in another state where his team is headquartered during the sports season. Such an individual would be a resident for California income tax purposes and may or may not receive a credit for California income tax paid, which would offset the tax due in the state where the income was earned. The laws of such states would have to be examined before that determination could be made. That type of situation could give rise to a controversy over which state is the proper state of "residence" or domicile. All of the usual factors bearing on the individual's connections with each place would come into focus, such as: where his family is located, whether or not he maintains a dwelling in either place, where he is a registered voter, where his automobile is registered, and where his friendships and ties to the community are strongest.

XI. THE RELEVANCE OF PLACE OF RESIDENCE TO FOREIGN SPORTS ACTIVITY

Under the U.S. tax law, income tax liability is based on either citizenship or residence.[151] That means that an American citizen, regardless of where he or she may live in the world, is subject to income taxation by the

151. Treas. Reg. § 1.1-1(a) (1988).

United States Government on his or her world-wide income. The same rule applies to alien residents[152] — they are subject to tax by the United States on their world-wide income. If a U.S. citizen moves to a foreign country and renounces his U.S. citizenship, the United States imposes its regular tax rates on the expatriate's United States source income whether or not it is effectively connected with the conduct of a U.S. trade or business, regardless of the source of such income.[153]

In recent years, many foreign tennis players, from countries that tax the worldwide income of only residents, have moved to countries, which either have no income tax at all applicable to them or have an applicable rate of tax that is lower than the rate prevailing in their native countries. Three-time Wimbledon champion, Boris Becker of Germany lives in Monaco which exempts him from income tax.[154] Since he is no longer a resident of Germany, he is not taxed by his native country on his tennis earnings.[155] In that regard, Germany, like many other countries, follows the so-called territorial approach to taxation.

Bjorn Borg, five-time Wimbledon champion, also lives in Monaco along with fellow Swede Joachim Nystrom. The Swedes, Stefan Edberg and Anders Jarryd, and the Frenchman Henri Leconte choose to live in England,[156] which recently reduced its top tax rate to forty percent from sixty percent.[157] Ivan Lendl has chosen the United States, which now has a top rate much lower than that in many other countries.

As indicated above, for athletes who are American citizens, moving to another country would not produce the same savings for them that it produces for so many foreign athletes because the United States tax is based on *citizenship* or residence. However, when an American athlete competes overseas, certain benefits, nevertheless, may be available. It is possible, under certain circumstances, for an American to elect to exclude from gross income up to $70,000 of earned income while living abroad.[158] But in order to do that, he would have to be either a resident of a foreign country for an uninterrupted period of time that includes a whole calendar year, or be physically present in a foreign country or countries for at least 330 days in

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152. *Id.* at § 1.1-1(b).
153. I.R.C. § 877 (1989).
154. Monaco has no income tax with respect to the citizens of almost all countries of the world who reside in Monaco. *See* 2 W. DIAMOND, TAX HAVENS OF THE WORLD: MONACO 4.
155. PRICE WATERHOUSE, DOING BUSINESS IN GERMANY 152 (1988).
156. Moynihan, *Tennis Plays the Tax Game: Advantage, Monaco,* Wall St. J., Aug. 2, 1988, at 20, col. 3.
157. Finance Act, 1988, ch. 39 [hereinafter Finance Act].
158. I.R.C. § 911(b)(2)(A).

any period of twelve consecutive months.[159] Regardless of the application of this residence rule, if an American pays income tax to a foreign country, he is entitled to receive a foreign tax credit[160] or a deduction[161] with respect to such foreign tax paid. The entire amount of foreign tax paid, however, may not serve to reduce the athlete's United States tax liability, because of the limitation which is applicable.[162] On the other hand, if a taxpayer decides to deduct on his United States return the foreign taxes paid, he will not be able to deduct such taxes to the extent that the deduction is allocable to amounts excluded from gross income under the rules relating to residence or physical presence in a foreign country.[163] In addition, the treaties which exist between the United States and most major countries in the world, often have provisions which benefit American athletes competing overseas.

A. Individual American Athletes Competing Abroad

Athletes from the United States often leave this country to compete in other countries. Once again, tennis players probably are the largest group of professional athletes who travel to other parts of the world. They generally do not remain in each place where a tournament is held longer than approximately two weeks. Accordingly, the $70,000 annual exclusion, which can be elected under I.R.C. Section 911, will not be available to these individuals. They are not in any foreign country long enough to be considered a resident of any foreign country, and they are probably not physically present in any foreign country or countries for at least 330 full days in any period of twelve consecutive months.

Assuming that the athletes have a tax home from which to be away from in the United States,[164] all of their traveling and lodging expenses will be deductible, and eighty percent of their expenses for meals will be deductible.[165] The income which they earn in these foreign tournaments may or may not be subject to income taxation by the foreign country. That question will be determined by the provisions of the income tax treaty which is in effect between the United States and the particular foreign country.[166]

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159. *Id.* at §§ 911(d)(1)(A)-(B).

160. *Id.* at § 901.

161. *Id.* at § 164(a).

162. *Id.* at § 904(a).

163. Treas. Reg. § 1.911-6(a).

164. Since all of the athletes' expenses normally will be in connection with a trade or business, no problem should arise relating to the allocation required under I.R.C. § 274(c).

165. I.R.C. § 274(n).

166. The significance of "residence" as it relates to treaty provisions is demonstrated by the case of Ingemar Johansson v. United States, 336 F.2d 809 (5th Cir. 1964) in which a famous

Under the United States Constitution, all treaties entered into are treated as the "supreme law of the Land."[167] The Internal Revenue Code has acknowledged the superiority of treaty provisions over its own provisions.[168]

By way of example, we may focus on the touring tennis players and see what their income tax picture would be in three of the many countries which they visit — the United Kingdom, Italy and Canada. In the case of the United Kingdom, the treaty with the United States provides that the income of athletes from their personal activities may be taxed in the country where the athlete competes, except where the gross receipts of the athlete from these activities, including reimbursement of expenses, do not exceed $15,000 or its equivalent in pounds sterling, for the tax year in question.[169] If United States athletes, however, are present in the United Kingdom for more than an aggregate of 183 days in a tax year, or if they have a fixed base in the United Kingdom which is regularly available for the purpose of the performance of their activities, they come under another provision of the treaty. That provision subjects them to tax in the United Kingdom on all income derived from the performance of personal services there.[170] Of course, if the winnings of a U.S. tennis player in England exceed $15,000, the entire amount of the winnings would be subject to tax in England, regardless of the time spent there.[171]

Although the treaties with the various countries often have corresponding provisions, they are not always identical. Care should be taken to examine the precise wording of the provisions of any particular treaty. For example, the treaty between the United States and Italy has a provision relating to athletes, which, like the provision in the U.K.-U.S. Treaty, is

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boxer, a citizen of Sweden, claimed residence in Switzerland so that he could bring himself within the provisions of the Switzerland-U.S. Income Tax Treaty and thereby exclude his purse, earned from a fight in the United States, from federal income tax.

167. U.S. CONST. art. VI, cl. 2 provides:

> This Constitution, and the Laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the judges in every State shall be bound thereby, any thing in the constitution or laws of any State to the contrary notwithstanding.

168. I.R.C. §§ 7852(d), 894(a).

169. Income Tax Treaty Between the United Kingdom and the United States, December 31, 1975, United States - United Kingdom, art. 17.

170. Income Tax Treaty Between the United Kingdom and the United States, December 31, 1975, United States - United Kingdom, article 14, applies to both athletes and non-athletes if they are present in the U.K. exceeding in the aggregate 183 days in the tax year concerned, or if they have a fixed base in the U.K., which is regularly available to them for the purpose of the performance of their activities.

171. *See* Technical Explanation of the U.K. - U.S. Convention, 3 CCH Tax Treates, 8107-30.

designated as Article 17.[172] This provision, however, differs from the corresponding provision of the U.K. Treaty in two respects. First, it provides that if an American athlete, who is a resident of the United States, travels to Italy to compete, he may be taxed by Italy if his gross receipts from his athletic activities in Italy exceed the equivalent of $12,000. Second, the treaty provides in substance that regardless of the amount earned in Italy, the American athlete can be taxed there if he is present in Italy for an aggregate of more than ninety days in the fiscal year in question. Accordingly, these differing provisions might determine in which country — the United Kingdom or Italy, a touring tennis player would prefer to compete. Since both countries have a higher tax rate than the United States, the foreign tax credit will not produce a completely satisfactory result for Americans.[173] They will wind up paying a higher tax on their European tennis winnings than would result if the income were taxed only in the United States. It, therefore, would be preferable if they satisfy the treaty provisions and are not required to pay any tax to the U.K. or Italy, as the case may be.

It seems doubtful that most American tennis players would be in any foreign country long enough in any year to come close to exceeding the time limit typically found in Article 14 of the treaties. If, for some reason, a player should plan on playing in a number of tournaments in these countries, which will keep him there for a substantial period of time, he may want to split his time between the U.K. and Italy in such a way as not to violate the 183 day time period in England or the ninety day time period in Italy.

As indicated above, if a touring player paid income tax in a foreign country, he would be entitled to a foreign tax credit or a deduction against his U.S. tax liability. The foreign tax credit would be subject to a limitation

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172. Income Tax Treaty between Italy and the United States, April 17, 1984, Italy-United States, Article 17 provides in part as follows:

> Notwithstanding the provisions of Articles 14 (Independent Personal Services) and 15 (Dependent Personal Services), 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 an athlete from his personal activities as such exercised in other Contracting State, may be taxed in that other State if:
>
> (a) the amount of the gross receipts derived by such entertainer or athlete, including expenses reimbursed to him or borne on his behalf, from such activities exceeds twelve thousand United States dollars ($12,000) or its equivalent in Italian lire for the fiscal year concerned; or
>
> (b) such entertainer or athlete is present in that other State for a period or periods aggregating more than 90 days in the fiscal year concerned.

173. The highest rate of income tax in the U.K. for individuals is 40%. *See* Finance Act, *supra*, note 157. In Italy, income tax rates for individuals start at 12% and graduate up to 62% on income over $425,531. *See* 2 W. DIAMOND, FOREIGN TAX AND TRADE BRIEFS 117.

so that the credit cannot exceed the same proportion of his U.S. tax, which the taxable income earned in the foreign country bears to his entire taxable income for the year.

The corresponding provisions contained in the U.S.-Canada Treaty differ from those contained in both the U.K. Treaty and the Italy Treaty. The Canadian Treaty provides in substance that an individual athlete, resident of the United States, will be taxed on gross receipts earned while competing in Canada so long as his gross receipts are in excess of the equivalent of $15,000. If the $15,000 figure is not exceeded for the tax year, however, an individual athlete would be taxed in Canada only if he has a fixed base regularly available there and the income is attributable to the fixed base.[174] The treaty, however, does not have the typical 183 day rule for *independent* individuals found in other treaties.

B. Individual American Athletes Who Move to a Foreign Country to Compete

Many American athletes move to foreign countries, usually to become a member of a team in the foreign country. The best example of this might be the many American basketball players who play for European teams. For our purposes, one might focus on basketball players Danny Ferry and Brian Shaw, who moved to Italy and played for teams there. Looking at their situations, one finds that the concepts relating to residence have a significant bearing on their overall income tax liability.

Under I.R.C. Section 911, when these players moved to Italy (or any foreign country), they can become eligible for exclusions from gross income relating to foreign earned income and a housing cost amount.[175] These ben-

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174. Income Tax Treaty between Canada and the United States, September 26, 1980 - June 14, 1983, United States - Canada, Article XVI provides in part:

> 1. Notwithstanding the provisions of Articles XIV (Independent Personal Services) and XV (Dependent Personal Services), income derived by a resident of a Contracting State as an entertainer . . . or as an athlete, from his personal activities as such exercised in the other Contracting State, may be taxed in that other State, except where the amount of the gross receipts . . . do not exceed fifteen thousand dollars ($15,000) in the currency of that other State for the calendar year.

Article XIV provides:

> Independent Personal Services. Income derived by an individual who is a resident of a Contracting State in respect of independent personal services may be taxed in that State. Such income may also be taxed in the other Contracting State if the individual has or had a fixed base regularly available to him in that other State but only to the extent that the income is attributable to the fixed base.

175. I.R.C. § 911(a) provides as follows:

> EXCLUSIONS FROM GROSS INCOME. - At the election of a qualified individual (made separately with respect to paragraphs (1) and (2)), there shall be excluded from the

efits are elective (separately) with respect to "qualified individuals." An American basketball player moving to Italy should have no difficulty meeting the definition of this term if his tax home is in Italy during the entire time that he is either a citizen of the United States who is a bona fide resident of Italy for an uninterrupted period which includes an entire taxable year, or is a citizen or resident of the United States who is physically present in Italy for at least 330 days during any period of twelve consecutive months.[176]

The term "tax home" has the same meaning under Section 911 that it has under Section 162(a)(2).[177] For purposes of the bona fide residence test, residence in Italy will be satisfied by applying the principles of Section 871 and the Regulations thereunder relating to the determination of residence of aliens in the United States.[178] In light of the provisions of the Regulations, athletes should not submit any statements to the Italian authorities in which they claim to be a nonresident of Italy.

The exclusion for foreign earned income is limited to $70,000 for any taxable year.[179] The housing cost exclusion amount, which also may be elected by the athlete, permits an exclusion for the excess of housing expenses relating to himself, his spouse and dependents residing with the taxpayer, over a base housing amount computed with reference to the salary of an employee of the federal government in the first step of GS-14.[180] This exclusion applies to housing costs that are paid in the form of salary or reimbursements for housing expenses by the employer. This includes gross income of the individual for the taxable year (disregarding Section 911). Housing expenses include rent, utilities (other than taxes), insurance, furniture rental, housing repairs and other related items.[181] The housing expense exclusion serves to reduce the limitation applicable to foreign earned income.[182]

Whether or not an American athlete living in Italy will be liable for income tax to Italy will be determined with reference to the treaty between Italy and the United States. As indicated above with reference to Article 17

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gross income of such individual, and exempt from taxation under this subtitle, for any taxable year -

(1) the foreign earned income of such individual, and

(2) the housing cost amount of such individual.

176. Treas. Reg. §§ 1.911-2(a)(1), (2).

177. *Id* at § 1.911-2(b).

178. *Id.* at § 1.911-2(c).

179. I.R.C. § 911(b)(2)(A).

180. Treas. Reg. § 1.911-4(c).

181. *Id.* at § 1.911-4(b).

182. *Id.* at § 1.911-3(d)(2).

of the treaty with Italy, if an American athlete earns in excess of the equivalent of $12,000 in Italy, or is present there for more than ninety days in the fiscal year, all of his earned income will be subject to income tax in Italy. American basketball players living in Italy clearly would be subject to income taxation there under these provisions.

Where an American athlete pays income taxes to a foreign country, such taxes may be claimed as a foreign tax credit against the athlete's U.S. income tax liability, or the taxpayer may choose to claim these foreign taxes as a deduction on his U.S. tax return.[183] If the deduction is elected, it would be an itemized deduction — a subtraction from adjusted gross income.[184] On the other hand, if the foreign tax credit is elected, the credit could be claimed regardless of whether or not the taxpayer itemizes his other deductions. Since the foreign tax credit offsets the U.S. tax liability on a dollar for dollar basis, in most cases, it probably would be to the advantage of the taxpayer to elect the foreign tax credit rather than the deduction. However, computations will be necessary in any given situation to determine which method of computing the tax liability will be advantageous. The amount of foreign tax paid, which may be credited against U.S. tax liability, is limited to the U.S. tax liability, multiplied by a fraction, the numerator of which is the amount of the foreign income and the denominator of which is the total taxable income of the taxpayer from all sources.[185]

Athletes who move to foreign countries on a temporary basis will continue to be subject to tax in their state of domicile in the United States, assuming that state has an income tax. It is customary for states to tax "residents" on their total taxable income, and one who is domiciled in a particular state is deemed to be a "resident." One does not change his domicile until he abandons the old domicile physically with the intent not to return to it and acquires a new domicile by actual physical residence in the new place with the intent to make it a permanent home, as demonstrated by the facts relating to his life there.[186] If an athlete were to move to another country with the intent to remain there indefinitely and adopt the country as his permanent place of residence, and the facts substantiated that he abandoned his old domicile and established a new one, he would no longer be subject to state income tax.

183. I.R.C. § 901(a).

184. *Id.* at § 164(a)(3).

185. *Id.* at § 904(a); *see also* examples found in Treas. Reg. § 1.904-1(a)(2).

186. Ryder v. Ryder, 2 Cal. App. 2d 426, 37 P.2d 1069 (1934); Re Eaton, 186 Wis. 124, 202 N.W. 309 (1925).

C. America Athletes Competing in Foreign Countries

The treaty with Canada contains some unusual provisions. Team athletes can be of two types — those Americans who move to Canada and become members of Canadian teams, and those Americans who are members of American teams which play against Canadian teams in Canada. Article XVI of the United States - Canada Treaty provides that the country of source will tax athletes from the other country, unless the income earned does not exceed $15,000. This basic rule, however, which will apply to individual athletes, will not apply to the income of athletes who are employees of a team which is part of a league and who participate in regularly scheduled games in both countries.[187] If Article XVI does not apply, Article XV governs. It provides that the income earned in the source country will not be taxed by that country if it is less than $10,000, *or* if the recipient is present in the source country 183 days or less in the year, and the remuneration is not borne by an employer who is a resident of the source country or by a permanent establishment or a fixed base of the source country.[188] American baseball and hockey players playing for American teams which visit Canada and play league games there would be protected by this provision.

D. Foreign Athletes Competing in the United States

1. Individual Sports

The key distinction made under U.S. tax law in taxing foreigners is the one made between residents and nonresidents. As previously indicated, the U.S. tax system taxes citizens or residents on their worldwide income. Resident aliens, therefore, are taxed by the United States on their worldwide income. On the other hand, aside from treaty provisions, which might be applicable, nonresident aliens must include in gross income, any income from sources within the United States, which is not effectively connected with a trade or business here, and any gross income, which is effectively connected with a trade or business here.[189] The term "trade or business within the United States" includes the performance of personal services within the United States, except in certain situations. [190]

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187. U.S. - Canada Income Tax Treaty, Article XVI, par 3.

188. U.S. - Canada Income Tax Treaty, Article XV, par 2.

189. I.R.C. § 872(a).

190. *But see* I.R.C. § 864(b), which provides that the term "trade or busines within the United States" does not include:

(1) The performance of personal services for foreign employer. — The performance of services —

Under U.S. tax law, the terms "resident" and "nonresident" are defined in Section 7701(b).[191] The statute defines a resident alien as an individual who is lawfully admitted for permanent residence, meets a substantial presence test or makes a first year election.[192]

Foreign athletes who travel to the U.S. to compete in sports events here and stay only a short time (for example, the tennis players who compete at the U.S. Open), are nonresident aliens who are taxable on their winnings by the United States (assuming that I.R.C. Section 864(b) is not applicable), unless a treaty between their countries and the United States requires a different result.[193] With respect to the income tax treaty with the United Kingdom, although under Article 14, individuals performing personal services in the United States in an independent capacity can be taxed by the United States if present here for 183 days or more in the tax year, or if a fixed base in the United States is regularly available to the individual and the income is attributable to the fixed base, Article 17 provides a special rule for athletes. Notwithstanding Article 14, except where gross receipts do not exceed $15,000, the 183 day rule and the fixed base rule would apply. For players from Italy, as indicated above, the U.S. - Italy treaty permits

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(A) for a nonresident alien individual, foreign partnership, or foreign corporation, not engaged in trade or business within the United States; or

(B) for an office or place of business maintained in a foreign country or in a possession of the United States by an individual who is a citizen or resident of the United States or by a domestic partnership or a domestic corporation, by a nonresident alien individual temporarily present in the United States for a period or periods not exceeding a total of 90 days during the taxable year and whose compensation for such services does not exceed in the aggregate $3,000.

See also I.R.C. § 861(a)(3).

191. I.R.C. § 7701(b) provides in part as follows:

(b) Definition of resident alien and nonresident alien. -

(1) In General. - For purposes of this title (other than subtitle B) -

(A) Resident Alien. - An alien individual shall be treated as a resident of the United States with respect to any calendar year if (and only if) such individual meets the requirements of clause (i), (ii), or (iii):

(i) Lawfully admitted for permanent residence. - Such individual is a lawful permanent resident of the United States at any time during such calendar year.

(ii) Substantial presence test. - Such individual meets the substantial presence test of paragraph (3).

(iii) First year election. - Such individual makes the election provided in paragraph (4).

(B) Nonresident Alien. - An individual is a nonresident alien if such individual is neither a citizen of the United States nor a resident of the United States (within the meaning of subparagraph (A)) . . .

192. *Id.*

193. *See* I.R.C. § 1441, which requires payors to withhold from gross income from sources within the United States paid to nonresident alien individuals, a tax equal to 30%.

the United States to tax these individuals if income from their activities here exceeds $12,000 *or if they are present here for more than ninety days in the year.* Players from Italy whose winnings are $12,000 or less will want to make certain not to remain in the U.S. for more than ninety days.

2. Team Sports

Of all the professional athletes who compete in the United States on a continual basis or with a considerable degree of permanence, the Canadian hockey players and baseball players seem to be most visible. In addition, there are a number of Latin American baseball players playing in the major leagues as well as some foreigners who play in the National Basketball Association. The two ways in which most foreign athletes are engaged in team sports activities in the United States are: 1) They move to the United States, either on a permanent basis or for the sports' season, while they play for an American team; or 2) They play on a Canadian team that plays against U.S. teams in the United States (as well as in Canada).

As to category one, taxability by the federal government will turn on whether the individual is a resident or a nonresident as indicated previously.[194] Because the home base of the team in the United States ordinarily would be treated as the athlete's tax home, any travel away from that place on business would give rise to deductible travel expenses. If they were to travel back to Canada or some other country of origin during the off-season, that would be a personal trip and travel expenses would not be deductible.

As to category two, the well-known Canadian hockey teams and baseball teams play many games in the United States against teams which are in a league with the Canadian teams. For these Canadian athletes, the U.S. - Canada Treaty has the provision referred to above which clearly covers income they earn in the United States.[195] Under Article XV of the Treaty,[196]

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194. Nonresidents may have "allocation" of income problems concerning which part of their income may have been earned outside of the U.S. *See* Favell v. United States, 89-1 U.S.T.C. 9287 (1989).

195. The U.S.-Canada Income Tax Treaty, Article XVI provides in part as follows:

3. The provisions of paragraphs 1 and 2 shall not apply to the income of:
   (a) An athlete in respect of his activities as an employee of a team which participates in a league with regularly scheduled games in both Contracting States; or
   (b) A team described in subparagraph (a) . . . .

196. The U.S.-Canada Income Tax Treaty, Article XV provides in part as follows:

Dependent Personal Services . . . .

2. Notwithstanding the provisions of paragraph 1, remuneration derived by a resident of a Contracting State shall be taxable only in the first-mentioned State if:
   (a) Such remuneration does not exceed ten thousand dollars ($10,000) in the currency of that other State; or

although these athletes probably earn more than $10,000 from their activities in the United States, they probably are not here in excess of 183 days and their remuneration is not borne by an employer who is resident in the United States or by a permanent establishment or fixed base which the employer has in the U.S.. Accordingly, the U.S. would not tax their income earned here.

XII. SUMMARY

Athletes customarily travel extensively. Those who play on teams often are traded from one team to another causing a move from one location to another. Athletes engaged in individual sports will not have a center of business activity in the usual sense, so they must make certain that they have a fixed personal residence in some location to be "away from" while traveling. They should consider making a definite financial commitment in acquiring living facilities or having a written lease arrangement on an apartment. Those who live with parents or other relatives in their homes can treat that as their home if all the facts and circumstances indicate real permanence to their living arrangement. Greater care must be taken in those cases than where the athlete owns or leases his or her own place.

Team athletes will have a difficult time trying to treat a location other than where the team is based as their tax home. If, however, they maintain a permanent residence in some location distant from the team headquarters, it might be possible for them to take the position that the location of the residence is their tax home, if they are present at that location for the greater part of the year and are engaged in regular and continuous business activity there which produces significant profits. If successful in contending that the place of their permanent residence is their tax home, they might be able to deduct travel, meals and lodging expenses incurred in connection with their activities at the team's headquarters. However, if unsuccessful, they should be able to deduct travel expenses relating to business activities in the area of their permanent residence.

Foreign travel raises the most complicated planning considerations. In most cases, it probably would not be beneficial, from a U.S. tax point of view, for an American athlete to be based in a foreign country. It may be possible, however, for certain less successful tennis players, for example, to spread their time between tournaments in selected countries so that no tax

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(b) The recipient is present in the other Contracting State for a period or periods not exceeding in the aggregate 183 days in that year and the remuneration is not borne by an employer who is a resident of that other State or by a permanent establishment or a fixed base which the employer has in that other State . . . .

will be owed to any of them. Since most countries now have tax rates higher than those in the United States, these individuals would be in a position to pay income taxes only to the United States at its lower rate.