GARRIGUES

NEWSLETTER

SPORTS & ENTERTAINMENT

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INTERPOSED COMPANY DOES NOT EXEMPT CLUB FROM LIABILITY IN PERMANENT INCAPACITY SCENARIO

SUPREME COURT JUDGMENT ON EXPLOITING AUDIOVISUAL RIGHTS AND VOIDING CONTRACTUAL CLAUSES CONTRARY TO COMPETITION LAW

THE DEBATE OVER DETERMINING THE TAX CREDIT BASE FOR ADVERTISING EXPENSES RELATED TO COMBINED MEDIUMS

CONTENTS

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When it is evidenced that the services are provided for the benefit of the Club, the Club becomes liable for its obligations as employer even if, formally, a sponsorship agreement was signed between the player and a third company, which is acknowledged to be simply an interposed company

INTERPOSED COMPANY DOES NOT EXEMPT CLUB FROM LIABILITY IN PERMANENT INCAPACITY SCENARIO

1. Issue under debate

The judgment rendered by Andalucía High Court (sitting in Seville) examined the potential liability of the Club for which a player competed, despite being hired by a third entity, when the professional sustained an injury which prevented him from engaging in sport.

2. Facts of interest

The player had provided his services for a football club for four seasons uninterruptedly, over which he remained registered for social security purposes. He sustained an injury to the anterior cruciate ligament and the medial collateral ligament, in addition to a tear of the posterior horn of the medial meniscus on his left knee, from which he recovered satisfactorily.

At the end of that period, and immediately afterwards, the player signed a sponsorship agreement with a third entity to play with the club that had previously employed him directly for two seasons. In this period, in which the player held an amateur license and was not registered for social security purposes, he sustained an injury in a competition match, to his left knee again.

The sponsorship agreement provided that a number of items of fixed annual remuneration would be paid to the athlete and specific sums for every match he played with the Club. It further stipulated that the player could compete solely and exclusively with that sport entity.

As a result of that injury, the footballer was granted entitlement to benefit for total permanent incapacity for his habitual profession, by reason of his organic and functional limitations.

The player, after his earlier claim was denied, brought a claim with the courts, requesting an increase to his contribution base and a declaration of the club's liability, by arguing that the sponsorship agreement with the third company disguised what in actual fact was an employment contract with the sport entity.

3. Judicial interpretation

At first instance, the Labor Court dismissed the claim, and fully acquitted the Club, after concluding that it was not liable for the consequences of the decision holding the athlete's permanent incapacity.

In an appeal, the high court of justice overturned the decision and, in relation to the matters of interest to us here, held that the sponsorship agreement signed by the player with a third entity was not, in actual fact, anything more than a step taken to interpose that company between the real employer (the Club) and the worker (the professional athlete).

For these purposes, the court settling the appeal reasoned that: (i) the sponsorship agreement is, purely speaking, an employment contract in disguise, from the standpoint of the terms and conditions it contans and the nature of the covenanted obligation, and (ii) despite the formal appearance of the contract, it may be inferred from the facts that it is the Club that has available the services of the player within the scope of its organization and management.

Therefore, the high court of justice acknowledged the player's permanent incapacity, and broadened the consequences to the Club for which the player had been competing.

SUPREME COURT JUDGMENT ON EXPLOITING AUDIOVISUAL RIGHTS AND VOIDING CONTRACTUAL CLAUSES CONTRARY TO COMPETITION LAW

ÍÑIGO MÚGICA GORTAZAR

The Supreme Court dismissed the cassation appeal lodged against the judgment rendered by Zaragoza Appellate Court by a company against a football club.

The business entity, engaged in television production, and the Club signed, on May 2, 2006, an exclusive licensing agreement for the television rights over a term spanning five sport seasons; namely, the term of the agreement ended after the 2011/2012 season (provided the club competed in the first division of the Spanish Liga Championship). On August 1, 2007 the parties convenanted an extension to the initial five seasons to include a sixth. All of this on the basis of General Audiovisual Communication Law 7/2010, of March 1, 2010, which stipulated a maximum term of four years in agreements for acquiring television rights.

On April 14, 2010, the Spanish Competition Commission (CNC) rendered a decision holding that agreements with terms longer than three seasons were contrary to article 1 of the Competition Law and article 101 TFEU. For that reason, the Club terminated the agreement and notified the production company. The production company, however, contended that the CNC's decision rendered on April 14, 2010 had been challenged to the National Appellate Court, besides arguing that General Audiovisual Communication Law 7/2010, of March 1, 2010 applied.

In this scenario, on March 22, 2013, the company sued the Club for breach of contract. At both the first and second instances, the claim was dismissed, having regard to the decision rendered on April 14, 2010 by the CNC in relation to the maximum term of agreements for acquiring audiovisual rights. It held, moreover, that exclusive audiovisual exploitation agreements for periods longer than three years amounted to market abuse. Accordingly, in view of the potential conflicts that could arise, it granted precedence to the competition rules over General Audiovisual Communication Law 7/2010, of March 1, 2010.

The company lodged a cassation appeal with the Supreme Court. The Court dismissed the first ground, among others, by arguing that when General Audiovisual Communication Law 7/2010, of March 1, 2010 came into force, the CNC decision holding that agreements with terms longer than three seasons were contrary to the Competition Law had already taken place. It further dismissed the second ground by arguing that the EU and the Spanish national antitrust legislation was mandatory, and the CNC was the competent administrative body by reason of the subject-matter.

THE DEBATE OVER DETERMINING THE TAX CREDIT BASE FOR ADVERTISING EXPENSES RELATED TO COMBINED MEDIUMS

JOSÉ MARÍA COBOS GÓMEZ

The supreme court judgment of July 13, 2017 (appeal 1351/2016) has put an end, for the time being, to the debate that has arisen over determining the tax credit base for multiyear advertising and publicity expenses incurred directly to promote events of exceptional public interest.

As you may recall, article 27 of Law 49/2002, of December 23, on the tax regime for not-for-profit entities and for tax incentives to patronage, allows to be determined by law a number of specific tax benefits applicable to steps taken to ensure adequate arrangements for events of exceptional public interest.

Those tax benefits include a 15% tax credit for any multiyear advertising and publicity expenses which, under the plans and programs established by the organizers or public authority body, are incurred directly to promote the event.

One of the most controversial issues, which the discussed judgment has settled, arose in relation to determining the base on which the credit is calculated. According to the Report by the Sub-Directorate for Legal Regulation and Legal Assistance of the State Tax Agency, issued on February 22, 2011, there activities to disseminate an event must fall into two categories:

a) Activities which are purely for advertising purposes, with the particular feature that they

simultaneously publicize both the event and the sponsor's produce or service. This is the case of the inclusion of advertising "bugs", or slots or inserts on the television or radio or in the press. These types of activities do not pose any particular issues.

b) Cases in which there is a "combined" activity, because the taxpayer inserts the advertising content for the event of exceptional public interest on its own product or on elements of the production process associated with its operations. This, for example, is the case of the insertion of a logo for the event of exceptional public interest on the cans, containers and packaging in which its product is sold, on the vehicles used to carry on the company's ordinary operations (vans, trucks, trains, aircraft) or on the screens of ATMs.

It is this second category that has sparked a deep debate, expressed in the opposing views of the Central Economic-Administrative Tribunal (TEAC) and the National Appellate Court:

a) The TEAC decisions rendered on May 28, 2009, March 3, 2010 y and May 28, 2013 (together with a later decision on November 3, 2016) confirmed the tax authorities' interpretation, by holding that the tax credit base may only include costs or expenses actually related to the insertion or dissemination of the advertising content. Therefore, the tax credit base will not be the aggregate amount paid to acquire boxes, bags and packaging, but only the amount relating to the graphic with the logo for the event.

b) Those TEAC decisions were appealed to the National Appellate Court and the appeals were upheld in judgments rendered on May 3, 2012 (in relation to the TEAC decision rendered on May 28, 2009), May 16, 2013 (in relation to the TEAC decision rendered on March 3, 2010) and February 18, 2016 (in relation to the TEAC decision rendered on May 28, 2013). In those judgments, the National Appellate Court pinpointed an inconsistency between the decisions and TEAC's own earlier decision on May 14, 2008, upholding the opposite view, an absence of justification for a change of method, and lastly, the "devil's proof" (*probatio diabolica*) required by the tax authorities, consisting of determining the added cost or value of placing graphics representing those events on bags, boxes or packaging, with respect to the expenditure that would have been made on those same elements had they only contained the enterprise's anagrams or signs.

TEAC reiterated the same view in its decision of March 5, 2014, which is the origin of the supreme court judgment we are discussing.

2. SUPREME COURT JUDGMENT RENDERED ON JULY 13, 2017

2.1 The auditors' view

The taxpayer had claimed in fiscal years 2006, 2007, 2008 and 2009 the tax credit for advertising expenses related to three events of exceptional public interest: the "*Año Lebaniego 2006*" event, Barcelona World Race and the "*Año Jubilar Guadalupense*" event to celebrate the centenary of the proclamation of Our Lady of Guadalupe as the patron of Latin America in 2007.

In this case, the enterprise had claimed the tax credit for the acquisition of containers and packaging on which the logo for the event had been placed. To claim the tax credit, the taxpayer had obtained the certificate issued by the organizers, setting out, among other elements, a description of the activity or expense and its total amount, and the essential nature of the contents of the medium for the purpose of calculating the tax credit base, and therefore the tax credit was calculated on the aggregate amount invested. Furthermore, the required notification had been made to the tax authorities to obtain provisional acknowledgement of the right to tax the tax benefit.

The auditors, however, ascertained that, among the expenses characterized in the issued certificates as advertising and publicity expenses, there were a number of items related to the acquisition of containers and packaging on which the event logo had been placed. In tax authorities' opinion:

a) The purchase of the containers and packaging for the product that is being sold are ordinary expenses associated with the enterprise's operations which the enterprise is going to incur before, during and after the event.

b) This does not prevent them from being used as an advertising medium.

c) Nor, however, does the fact that they may be used as an advertising medium alter their being the fundamental and inseparable medium for another function: holding, protecting and

preserving the product. In other words, the function of the container holding the product and the packaging protecting and preserving it is not to advertise either the product, or the event. They have a different function to the purpose an advertising service may achieve.

d) The characterization by the organizers of the advertising activity as an essential element of the dissemination of the event can neither invalidate nor alter the original characterization of the expense, by completely changing what is a regular procurement expense of the business into an advertising and publicity expense.

Therefore, after finding it had been substantiated that there had been genuine advertising or publicity of that event by the party with tax obligations by including the relevant logos on the containers for its products and after observing in the design of those logos the specifications contained in the manuals approved by the organizers, they failed to accept that the aggregate cost of the containers should be treated as an advertising and publicity expense and only allowed the tax credit base to include the amounts directly related to the cost generated for the placement of that logo (in this case, a sum amounting to €1,500 in respect of "Services for adapting images and wording to the production specifications for our containers").

2.2 TEAC's view

Following the filing of an economic-administrative claim against the assessment decision, TEAC, in a decision rendered on March 5, 2014, confirmed the tax authorities' view. Taking its cue from the views expressed in its own earlier decisions and in the national appellate court judgment of May 3, 2012, it founded its judgment as follows:

a) The taxpayer must evidence in the procedure the existence of advertising and publicity expenses directly related to the promotion of the event, which must be supported and quantified in documents.

b) In keeping with the National Appellate Court's findings, the tax credit in respect of those expenses, where the costs of including a logo on containers or packaging are involved, may not be associated with the fact that creating them gives rise to an additional production cost for those containers or packaging.

c) Despite this, in its analysis of the national appellate court judgment rendered on May 16, 2013, in relation to that of May 3, 2012, it found that the tax credit must be confined to the expenses of placing the logo because "*the party with tax obligations has only managed to associate with the advertising and publicity of the promoted events, certain specific costs related to services for adapting images and wording to the production specifications for the containers. Consequently, as a result of the comments outlined above, these are the only expenses that must be treated as the tax credit base for this item*".

Therefore, since in the case we are looking at the party with tax obligations could only associate with the advertising and publicity of the promoted events certain specific costs related to services for adapting images and wording to the production specifications for the containers, these are the only expenses that must be treated as the tax credit base for this item.

As a result, using very complicated arguments to try and tie in its view with that of the National Appellate Court, the practical effect was to retain the consequences arising from the view held by the tax authority and the TEAC in their earlier decisions.

2.3 National Appellate Court's view

Against that TEAC decision an application for judicial review was filed with the National Appellate Court, which, in a judgment rendered on March 10, 2016, overruled TEAC's view and confirmed that the tax credit must be calculated on the aggregate cost of the containers bearing the logo of the events. Relying on its earlier judgments, it used the following arguments:

a) The legislation on the tax benefits associated with events of exceptional public interest does not require anywhere that the advertising expenses (or the investments in new plant property and equipment or the renovation of buildings) must imply for the person incurring them an additional cost with respect to the cost it would bear without the tax benefit.

b) By placing the logos referring to the events on elements of packaging, it contributed to raising awareness and disseminating the event among the population, which means that the enterprise complied with what was expected of it to obtain the tax credit. Nobody would

voluntarily engage in replacing or sharing the signs or symbols identifying an enterprise competing on the market with those related to other aims or activities, unless they had the necessary incentive to do so, which in the examined case is given by the right to take a tax credit.

c) It is therefore completely unnecessary to lay down for recognition of the tax credit almost impossible proof ("*probatio diabolica*"), regarding the added value or cost of placing on bags, boxes or packaging the graphic signs representing the events, with respect to the expenditure that would have been made on those same elements had they only contained the enterprise's anagrams or signs.

d) It is the spirit and purpose of the law that counts. In the examined case, the purpose of the tax incentive is to allow the organizers to promote the event without paying the market prices that would be charged for placing advertising on the television, on packaging, on means of transport, and the like. The purpose of the incentive lies, therefore, in a cost-saving that benefits the organizers, or, which amounts to the same thing, the advantage in terms of publicity for the event gained by including the brand or logo, rather than in the extra cost that may arise from promoting the event, which is usually negligible.

e) Similarly, it is obvious that right from the start the lawmakers attached a considerable amount to importance to giving legal certainty to sponsors, by treating this, expectably, as an essential condition for attracting those sponsors.

f) From this standpoint, the tax benefit would clearly make no sense if the tax credit base is confined to the extra cost incurred by the taxpayer, or the portion of the production cost that relates to including the logo or brand for the event, which will usually be very small.

g) It is therefore completely irrelevant whether, in addition to the aim of advertising or promoting the event, the expense also serves the enterprise's purposes. This is precisely the element that entices enterprises to sign up for the program, because they obtain a tax incentive if they promote an event on expenses they would be incurring anyway.

h) Therefore, the tax credit base may not be confined to the advertising expense, or to the additional portion of expenses that the placing of the logo creates, and this is regardless of the advertising medium used, including packaging and the elements of the production process, because no distinction is made in the law.

i) In short, the relevant factor is not the nature of those expenses, but rather whether in every case those expenses serve, besides the enterprise's own purposes, to promote the event, and the organizers do not have to pay for that advertising or promotion.

2.4 The Supreme Court's view

The Supreme Court clearly did not share the National Appellate Court's view, since it overturned the judgment and confirmed the tax authorities' view. It based its conclusion on the following observations:

a) The possible interpretation doubts must be resolved under a method that rules out interpretation by analogy or extension of the exemptions or other tax benefits or incentives (article 14 of the General Taxation Law) and also applies the principle of equality (article 31.1 of the Spanish Constitution). This latter principle, as applied to substantially similar non-advertising company expenses incurred by different business operators, does not appear to allow different tax treatment for deducting those expenses according to whether or not the enterprise has decided to take part in advertising the events concerned.

b) In cases of combined advertising, meaning advertising mediums that add to that publicity function another different function linked to an ordinary need of the production or distribution operations for goods or services that form the corporate purpose, a distinction is required between the following two scenarios:

   (i) Those where the cost of the part of the medium that fulfils a non-advertising function is not easily separable from the cost of the other part of the medium having advertising as its only function (the container or bottle on which an advertising sticker is placed or the vehicle used by the enterprise to carry of distribute goods on which an advertising graphic or sign is placed). In this scenario, the taxpayer could be required to

substantiate the costs relating to one part of the medium or the other.

(ii) Others where it is not easy to draw the boundary between one part of the medium and the other due to the advertising being of little economic value. In this case it would be accepted as sufficient support for the taxpayer to substantiate the amount the same advertising would cost on paper having advertising as its only function.

c) Based on those observations, the tax authorities and the TEAC in its decision acted correctly when they made a distinction, in relation to the advertising medium, between the part that strictly had an advertising function and the other part that had different functions and they only allowed the costs of that first part to benefit from the tax incentive.

d) This means that the costs of acquiring containers bearing the logo of the events may not be included in the tax credit base established in article 27 of Law 49/2002.

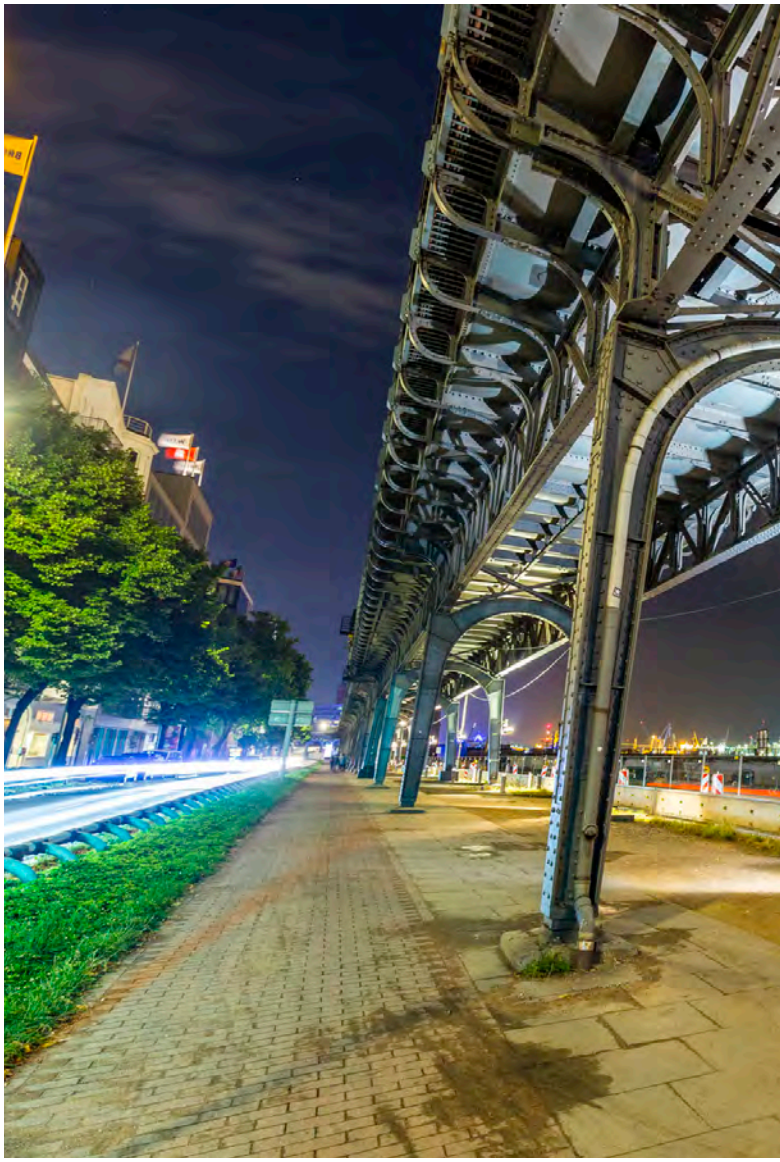
e) Having established that, the Supreme Court failed to accept that the certificate of the expense by the organizers and the prior recognition of the tax benefit by the tax authorities could prevent the auditors from questioning the tax credit base.

An ancillary proceeding to have the judgment rendered null and void was brought, which was dismissed in a decision rendered on September 26, 2017.

2.5 A final view? The dissenting opinion

At the beginning of this article we mentioned that this judgment had put an end, "for the time being", to the debate that has arisen over determining the tax credit base for multiyear advertising and publicity expenses that serve directly to promote events of exceptional public interest.

We suggested that the view in this judgment might be provisional as a result of a dissenting opinion, signed by three judges, in which they express a difference of



opinion with respect to the other judges, and submit that the arguments in the national appellate court judgment should have been accepted, confirming that the tax credit base must include the aggregate cost of the containers bearing the logo for the event. In their opinion:

a) The supreme court judgment does provide any reasoning as to why the literal interpretation made of the tax credit is not admissible, which does not require that in respect of the advertising service for the events there must be an additional expense in the cost of the product (generally it will not exist or, if it does, it will be negligible).

b) A purpose-based interpretation must be made of the law, because it is clear that to interpret

the aim of the law we cannot simply look at the cost of the physical elements of the advertising (in this case, of the ink added to the label on the medium), but rather at the advertising expense that the public authority has not had to pay. This reasoning may be illustrated with the example of an internationally known brand that decides to advertise a subsidized event worldwide. The cost of the advertising placed on a container may be nonexistent, whereas the advertising may have significant benefit.

c) The existence of an instance of application by analogy of a tax benefit must be rejected. It is not a question of applying another tax credit by analogy, which is not even mentioned by the Supreme Court, but rather of determining the correct scope of the law setting out the tax credit. What the supreme court judgment does is interpret its scope restrictively.

d) The existence of a breach of the principle of equality must be rejected, because the law is general and applicable to all enterprises, who will elect to claim the tax incentive or not voluntarily, and at all times within the limits set out in the legislation. They did not observe that inequality, therefore, and they affirm again that the interpretation upheld by the supreme court judgment implies a restrictive interpretation of the tax benefit, which reduces it to negligible amounts and therefore making no sense, which counters the literal and purpose-based interpretation of the law.

Therefore, we will have to watch how the case law evolves to see whether this Supreme Court view becomes established or whether it is corrected in line with the arguments given in the dissenting opinion.

3. Subsequent determinations

Despite any uncertainty over the establishment of the Supreme Court's view, the truth is that later decisions by the judicial and administrative authorities are reproducing it, and in some cases, adjusting their own precedents to the Supreme Court's finding.

This is the case of the national appellate court judgment rendered on October 6, 2017, and the even more recent TEAC decision rendered on November 2, 2017. In both cases they discussed the inclusion in the tax credit base of the expenses of acquiring containers and packaging bearing the logos of the events of exceptional public interest that were sponsored by the taxpayer. As in the earlier cases, the auditors had found that the tax credit base did not have to include the cost of acquiring the container, but rather the cost of placing the logo on the container. And, because those costs of placing the advertising for the event on the containers and packaging had not been proven, it did not allow any amount to be deducted in respect of this item. In both cases, in view of the reflections contained in the supreme court judgment, the tax authorities' view was confirmed.

NEWS

GARRIGUES SPORTS & ENTERTAINMENT PARTICIPATES IN BOOK PUBLISHED BY ARANZADI RELATED TO THE CONVENTION ON A NEW LEGAL FRAMEWORK FOR SPORT, ORGANIZED BY THE NATIONAL SPORTS COUNCIL

Garrigues participated in the preparation of a chapter in the book published by publishing house Thomson Reuters Aranzadi, on the convention on a new legal framework for sport ("*Nuevo marco jurídico para el deporte*").

Félix Plaza, partner in the tax department and co-leader of Garrigues Sports & Entertainment prepared one of the chapters in the book (chapter 18 on a tax framework for sport), which discusses a number of tax measures that could be introduced in the legislation to encourgage sport in Spain, centering on personal income tax and the tax on sport sponsorship.

GARRIGUES SPORTS & ENTERTAINMENT PARTICIPATES IN SPORT IP FORUM 2017

On November 22 and 23, Valencia Feria hosted Sport Ip Forum 2017, organized by the Global Sport Innovation Center, having as its central theme the evolution of technology on sport and the future of the industry in the new digital context.

Félix Plaza, partner in the tax department and co-leader of Garrigues Sports & Entertainment, and Carolina Pina, partner in the Intellectual Property Department and co-leader of Garrigues Sports & Entertainment, took part in the event, at which, in the company of other international experts, they reflected on the impact of new technologies on intellectual property in two conferences that addressed management of the rights in sports competitions, the impact of Big Data on the future course of the industry, and management of the image rights of athletes in the new digital context.

PRESENTATION OF GARRIGUES SPORTS & ENTERTAINMENT AND LA LIGA'S SBA SPORT BUSINESS ADMINISTRATION PROGRAM

On November 2, the presentation took place of the new edition of the SBA Sport Business Administration program run by Centro de Estudios Garrigues and LaLiga, led by Félix Plaza, partner in the tax department and co-leader of Garrigues Sports & Entertainment and by Javier Gómez, the general manager of LaLiga.

This event, attended by Jaime González Castaño, sports general manager at the National Sports Council, had the participation of Fernando Hierro, former Real Madrid player, coach and current sporting director for the Spanish football association (REFE), who together with Enrique Ramón, external relations manager at the National Sports Council, and Luis Villarejo, head of sports at press agency Agencia EFE, opened the program for this 2017 – 2018 course.

The event was attended by the recipients of LaLiga scholarships in this second edition of the program: karate expert Damián Quintero, rugby player Ignacio Villanueva Martín, rugby player Berta García Alonso, taekwondo expert Eva Calvo and football player Lola Gallardo Núñez.

GARRIGUES SPORTS & ENTERTAINMENT PARTICIPATES IN WORLD FOOTBALL SUMMIT INDUSTRY AWARDS

Last Octobr 16 Palacio de Neptuno hosted the World Football Summit Industry Awards, which acknowledge and reward the work done by professsionals in the football industry.

The event rewards the achievements of the world's leading football club managers, agencies, sponsors, press associations and NGOs, working in the sports industry's leading sport.

Félix Plaza, partner in the tax department and co-leader of Garrigues Sports & Entertainment, was on the jury for the "Executive of the year" award.

JUDGMENTS AND RULINGS

1 Judgment rendered by Pamplona Labor Court on March 31, 2017, regarding probative value of contract with scanned signature to evidence contractual consent

Club Atlético Osasuna brought a claim against a player in the football club for breach of contract, seeking damages amounting to €12,000,000.
The claimant argued that the contract, which gave rise to the claim brought by the appellant, was attached in a PDF document to an email sent by the player; a document containing the player's signature, although it was a scanned rather than a handwritten signature. After assessing the evidence, the court held that the player's consent could not be held proven, because the emails might have been altered, and only through the use of mechanisms, such as an electronic signature or through computing expert evidence giving assurance of its truthfulness, could it meet the requirements of integrity and authenticity.
The Court, in the absence of its probative value, ruled to dismiss the claim brought by Club Atlético Osasuna.

2 Judgment rendered by Asturias Provincial Appellate Court on May 26, 2017, regarding unlawfulness of temporary incapcity indemnity for football player who sustained hand injury in football match

Asturias Provincial Appellate Court settled the appeal lodged by a football player against a lower court's judgment, dismissing the claim brought against a sport cultural association and a mutual insurance company for Spanish football players (Mutualidad de Previsión Social de Futbolistas Españoles a Prima Fija), in which the claimant sought indemnity for a hand injury sustained in a football match.
Confirming the conclusions reached by the lower court, the Chamber of Appeal considered that, regarding the liability of the sport cultural association, because the injury is a characteristic element of the activity and happens by chance, and the appellant did not evidence that it resulted from negligent acts attributable to the association, no liability could be found on its part.
In relation to the potential liability attributable to the mutual insurance company, the Chamber of Appeal followed on from the lower court's reasoning to conclude that the subject-matter of the claim was not covered by the benefits under the policy, and therefore the payment of indemnity in respect of the injury sustained by the player could not be claimed.

3 National appellate court judgment rendered on June 19, 2017, regarding the holding null and void of the National Sports Council's decision ordering removal of high level athlete status for athlete penalized by Spanish body exercising authority delegated by IAAF

The National Appellate Court upheld the application for judicial review lodged by a high level athlete against the decision by the National Sports Council (CSD) on January 28, 2016, which upheld the removal of high level athlete status as a result of the imposition of a penalty for doping rendered by the Sport Disciplinary Committe of the Spanish athetics association (Real Federación de Atletismo) and later confirmed by the Court of Arbitration for Sport.
The Chamber overturned that decision by arguing that the removal of high level athlete status was not allowable, in that the main requirement for such a removal - a definitive penalty for doping in the administrative jurisdiction- did not take place. Therefore, given that the penalty was ordered by the sport disciplinary committee of the Spanish athletics association, exercising authority delegated by the IAAF, the applicable legislation requires prior acknowledgment of the foreign penalty decision by the Spanish Agency for the Protection of Health in Sport (Agencia Española de Protección de la Salud del Deporte), to confirm that it complies with the the World Anti-Doping Code and that the entity that rendered it had powers in these matters.

4 Judgment rendered by Balearic Island Provincial Appellate Court on June 22, 2017, regarding attack on football player's reputation through publication of photograph in sport newspaper reporting a prison sentence

The Balearic Island Appellate Court settled an appeal lodged against the decision of a lower court by the appellant, a football player whose photo appeared in a sport newspaper associating him with a prison sentence for a criminal offense against public health. Although the lower court's judgment recognized the unlawful attack on the appellant's reputation, it held that a violation of his right to privacy had not occurred.
The Chamber of Appeal concluded that, having regard to the case law settled by the Constitutional Court, the constitutional requirement for the truthfulness of the information referred to in article 20.1.d) of the Spanish Constitution means that the informant has a special duty to confirm the sources of the information to confirm the truth of the facts that are reported, by making the appropriate

properly confirmed enquiries and employing the standard of care required of a professional.
It therefore held that the attack on the reputation of the football player was undisputable, because anyone reading the news and seeing the photograph cannot fail to arrive at the conclusion that the player has been sentenced to prison.
Lastly, confirming the reasoning in the lower court's judgment, the Chamber, determined that there had not been a violation of the football player's right to privacy, because the publication of his image did not disclose any elements of his private life.

5 National appellate court judgment rendered on July 21, 2017, regarding financial liability of the state for damage caused to a French national derived from National Sports Council's decision authorizing Spanish tae kwon do association to prevent participaton of foreign athletes in Spanish championships

The National Appellate Court partially upheld the application for judicial review lodged by a French athlete against the purported dismissal of the claim for the financial liabiltiy of the state brought in respect of the damage and losses caused by the decision of March 13, 2013 by the National Sports Council, authorizing the Spanish tae kwon do association to prevent his participation in the Spanish championships.
The decision rendered by the National Sports Council on March 13, 2013 was overturned by the national appellate court judgment of December 12, 2014, by arguing that it violated additional provision two of Law 19/2017, and the case law of the CJEU on the special status of sport.
In the context of the process, and despite the national appellate court judgment being challenged in a cassation appeal, the French athlete applied for its provisional enforcement, which was ordered by the National Appellate Court itself in a decision rendered on January 18, 2016. The athlete could therefore participate in the Spanish tae kwon do championship in that year.
In any event, the applicant considered that all the requirements determining the financial liability of the state were satisfied, and therefore, he was entitled to indemnification as a result of the overturning of the decision preventing him from competing, which caused a number of losses to him, and among them, not participating in national championships in 2013 and 2014, and his return to France, despite having resided in Spain for 10 years.
The National Appellate Court considered that the existence of the financial liability of the state requires, in addition to the specific administrative decision being rendered null and void, an effective, individualized and economically quantifiable type of effective damage caused by it; a causal link between the actions of the state and the damaging outcome, together with unlawful harm, meaning the citizen has no legal duty to bear the harmful result.
After determining the unlawful nature of the overturned decision, the National Appellate Court argued that the other determining factors were present for the existence of the financial liability of the state, both if it is found from a domestic standpoint– having regard to the then in force Law 30/1992-, and from the standpoint of the obligation of EU member states to compensate private parties for infringement of the rules of European law, in view of the existence in this case of a clear breach of the prohibition on discrimination by reason of nationality, and therefore a duty arises for the state to indemnify the applicant for an unlawful outcome which the applicant was not under obligation to bear and which caused him a number of types of non-material damage.

6 National appellate court judgment rendered on October 2, 2017, regarding lawfulness of Order ECD/2764/2015, of December 18, 2015, on election processes at Spanish sport associationss

The National Appellate Court partially upheld the application for judicial review filed by the Spanish football association (RFEF), against Order ECD/2764/2015, of December 18, 2015 on the election processes of Spanish sport associations, by arguing that it infringes the principle of self-organization for associations as set out in Sport Law 10/1990, and in the mandatory FIFA legislation.
Countering the arguments contended by the applicant, the Appellate Court held that, because these types of associations exercise public functions, and represent Spain in the international arena, certain requirements must be laid down in connection with their organization and procedures, which is also set out in the election processes for their managing bodies. Accordingly, the Chamber explained, that Ministerial Order is part of the preestablished legal regime applicable to the association, but does not alter its essential elements as they appear in superior statutory or regulatory rules.
Spefically, in relation to the regulations on the election process, the National Appellate Court concluded that the Ministerial Order observes the four-year mandate set out in Sport Law 10/1990, and makes the election process coincide with the years in which the Summer Olympic Games are held, purely for organizational reasons.
The majorities laid down by the Ministerial Order for motions of no confidence in the Chairpersons of sports associations (absolute majority of the members), however, breach the principle of the hierarchy of legislation in that the Spanish football association's bylaws (enabled by royal decree, and therefore, a higher piece of legislation than the Ministerial Order) provide for a different majority (two-thirds), and therefore that regime is null and void ab initio.

7 Judgment rendered by National Appellate Court on October 2, 2017, regarding partial refund of the official subsidy for distributon to amateur football granted to Spanish football association

The Spanish football association (RFEF) filed an application for judicial review against the decision by the office of the head of the National Sports Council ordering partial refund of the official subsidy granted to the RFEF for distribution to amateur football of 1% of the revenues collected in respect of the tax on gambling activities, in relation to football sweepstakes, due to breach of the obligatons assumed by the RFEF.

In the RFEF's opinion that decision is not lawful, in that the party responsible for approving the projects was the mixed committee formed by members of both the RFEF, and the National Sports Council itself. Additionally, the applicant argued, the projects funded with the granted subsidy had actually been carried out, which was evidenced by producing various invoices to the RFEF.

The National Appellate Court dismissed the appeal, after concluding that the RFEF is the only legal owner of the subsidy in accordance with the contract signed between the National Sports Council and the RFEF, the mixed committee's role being confined to approving and following up on the projects. In line with this, the RFEF was responsible for justifying the destination of the granted subsidy, which includes the obligation to evidence the performance of the projects not just formally by producing the relevant invoices, but also that they have been paid, since only an expense that has actually been paid qualifies as an incurred expense, pursuant to articles 31.2 and 30.3 of General Subsidies Law 38/2003, of November 17, 2003.

8 Judgment rendered by Barcelona Labor Court on October 17, 2017, regarding the holding null and void of dismissal of a basketball player as a result of posting comments related to his sport activity on Instagram

A professional basketball player provided his services at Fútbol Club Barcelona, and his employment relationship started in the 2016 season. After sustaining an injury to his ankle in a playoff match, reducing his sport performance, the player published a post on Instagram, in which he wrote: "(...) *The team's doctor said it was only a sprain so they pushed me to try and play again. They didn't tell me until it was too late that I had an edema causing swelling in my foot and that my season had ended* (...)". After this publication, the club notified him of disciplinary dismissal on the ground of a breach of clause 7 of his contract, setting out that any statements that the player makes regarding the club must be made with due respect.

The court examined whether or not the comments made by the player are protected by the fundamental right to freedom of expression. According to the case law of the Supreme Court, the conclusion of an employment contract may not imply a limitation on fundamental rights, although the fundamental right to freedom of expression is not an unlimited right, and therefore the unrestricted dissemination of thoughts, ideas and opinions, regardless of whether or not they include acts of criticism in a broad sense, may not under any circumstances imply an unlawful attack on the other party's right to protect his reputation and dignity.

For all these reasons, the courts held that the statements published by the player were clearly neutral and caused no offense, so the dismissal was held null and void due to violating the author's right to freedom of expression. Due to there being no provisions on null and void dismissal in Royal Decree 1006/1985, of June 26, 1985, on the employment relationships of professional athletes, regard must be had to the Workers' Statute, which is so provided in article 21 of that Royal Decree, and therefore the consequence of null and void dismissal will be immediate reinstatement and payment of any outstanding salary.

9 Judgment 271/2017 rendered by Asturias Provincial Appellate Court, on September 11, 2017, regarding absence of payment of insurance premiums and interruption of insurance cover until they are paid

An insurer lodged an appeal against the judgment at first instance which denied its right to a refund of paid benefits, as a result of finding that the policyholder, the Asturias skating association (Federación de Patinaje del Principado de Asturias), did not have standing to be sued due to not being the recipient.

The policyholder, the Asturias skating association, stopped paying the premiums under the insurance policy it had taken out. The Insurance Contract Law provides that insurance cover will be interrupted from the month after the maturity date for payment of the premium. Therefore, since this period had elapsed, the insurer's obligation to pay any benefits that might have arisen from the occurence of the risk, had been put on hold. As a result of having paid those benefits to the athletes forming part of the association or to the clinics that treated them, the insurer claimed a refund of them.

The fact that the beneficiaries and the policyholder are different parties does not render the provisions in the Insurance Contract Law invalid.

Therefore, in addition to any amounts that the athletes may claim from the association, which in actual fact paid their proportionate part of the premiums out of their membership fees, the Court ordered the association to refund the sums paid by the insurer.

10 Judgment rendered by Madrid High Court on September 12, 2017, regarding the holding null and void of an arbitral award rendered by the jurisdictional committee of the RFEF

Madrid High Court upheld an application for judicial review filed by a football club against an arbitral award rendered by the jurisdictional committe of the Spanish football association (RFEF), under which it dismissed a monetary claim filed by the football club against a company.

The High Court held that the challenged award breached article 41.1.b) of Arbitration Law 60/2003, of December 23, 2003, in that the applicant had been deprived of any chance to plead or provide evidence in relation to a new factual element added to the procedural debate by the company – in this case, on the foregery of the signature of the company's representative on a contract concluded between both parties-, due to not having been notified of the pleading made by the company and of the evidence proposed and taken by it.

These circumstances, in the opinion of the High Court, had clearly deprived the applicant of its right to defense, and the proceedings had breached the principles that both sides must be informed of the other side's contensions, must be heard and must be treated equally, in accordance with article 24 of the Spanish Constitution.

11 Judgment 2049/2017 rendered by Asturias High Court on September 26, 2017, regarding nonexistence of employment relationship between the coach and the assignee company of the club's economic and sports activity, in view of absence of compensation

The Spanish social security treasury lodged an appeal against a labor court judgment that held that an employment relationship between the coach and the asignee company of the club's economic and sports activity did not exist.

In relation to the main matter at issue in the dispute which concerned assessing whether or not the employment relationship between the coach and the assignee company existed, the court argued that the requirements under the Workers' Statute to consider that a relationship of these characteristics exists were not present. The appeal was founded, among other reasons, on the need for a different assessment of the evidence. In relation to which, the Court noted that article 190.2 of the Law on the Labor Jurisdiction excludes that subject-matter from a special appeal to a superior court in the labor jurisdiction, and it is only possible in the event of an error in assessment of the evidence, which did not exist in this case. Moreover, it clarified that the reports issued by the auditors have a rebuttable presumption associated with them, and therefore may be invalidated by proof to the contrary, as occurred in the appealed judgment.

Therefore, the Court dismissed the appeal lodged by the social security general treasury, and, as a result, confirmed the challenged decision..

12 Judgment of the Court of Justice of the European Union, case C-90/16, of 26 October 2017, on the interpretation of "sport" for the purposes of VAT Directive 2006/112

A request for a preliminary ruling was submitted by the Upper Tribunal of the United Kingdom, concerning the interpretation of the term "sport" in relation to services exempt from VAT, and whether it need have a physical element.

The British Bridge Union Limited, a British non-profit-making organization, organizes duplicate bridge tournaments, for which payers are charged entry fees to to be able to participate, on which VAT is paid. Being of the opinion that the fees should be exempt pursuant to article 132.1.m) of Directive 2006/112, in that they are supplies of services closely linked to sport, they applied to the UK tax authority for a VAT refund. The tax authority does not consider it a sport, despite involving intellectual activity, because it does not have a significant physical element.

In rendering its judgment, the Court affirmed the need, with regard to application of the VAT exemption, for a strict interpretation. The term "sport" is typically used to refer to an activity of a physical nature or, in other words, an activity characterized by a not negligible physical element, but not covering all activities that may, in one way or another, be associated with that concept. Therefore duplicate bridge is not a sport.

13 Binding ruling V1455-17 by the DGT, on June 7, 2017, regarding VAT charged on sponsorship agreement for racing circuit competitions

The request concerned the VAT on sponsoring services received by a Spanish entity from a Swiss resident entity, together with the ability of that entity to request a refund of input VAT.

Accordingly, the DGT explained an established theory that the advertising provided by the sponsored party, normally in exchange for economic assistance, is classed as a supply of advertising services subject to and not exempt fom VAT.

Regarding the place of supply of the service, although under article 69.One.1 of the VAT Law the advertising service provided by the requesting party to the Swiss

entity is not subject to VAT, insofar as the customer does not appear to be in Spanish VAT territory, in this case the method of the effective use of the services as provided in article 70.Two of the VAT Law as an exception to the general place of supply rule may come into play, for which it will be necessary:

- To determine the place of supply of transactions in relation to which the effective use or enjoyment of the service takes place.

- To determine the relationship of those transactions with the supply of services for which the place of supply is being determined, to observe whether the use or enjoyment of the service effectively takes place in the performance of the transactions mentioned in the previous point.

  Lastly, in relation to the input VAT paid by the Swiss enterprise, it may obtain a refund of that VAT, subject to satisfaction of the conditions provided in article 119.bis of the VAT Law and article 31.bis of the VAT Regulation, on the terms and conditions set out in the reciprocity agreement signed with Switzerland.

14 Binding ruling V1707-17 by the DGT, on June 30, 2017, regarding VAT rate applicable to entry tickets to a hospitality establishment hosting live disc jockey performances

The request concerned the VAT rate applicable to the service for entering entertainment halls, dance halls and night clubs where they offer live shows and, in particular, a disc jockey performance.
The wording in force of article 91.1.2, point 6, of Law 37/1992 applies the reduced 10% VAT rate to entry tickets for concerts, and other live cultural shows. For that reason the DGT is of the opinion that the ticket for entry to see a DJ event at a hospitality establishment must be taxable at 10%, insofar as the DJ is treated as entertainment personnel at entertainment halls, dance halls and night clubs, according to the Decision of April 26, 2012, of the Directorate General for Employment, of the Employment and Social Security Ministry, registering and publishing the statewide collective employment agreement for the personnel at entertainment halls, dance halls and night clubs (BOE – Official State Gazette- of May 18, 2012).

15 Binding ruling V1758-17 by the DGT, on July 6, 2017, regarding the VAT on training services for sport coaches

The requesting entity is a company engaged in providing training services for sport coaches which include, among others, professional standard certificates, and sport education in relation to mountain sports and climbing.
The request concerned whether the exemption under article 20.one.9 of the VAT Law, in relation educational services, applies to the services provided by the requesting party.
The DGT concluded that, to determine the lawful application of that exemption, having regard to the case law settled by the CJEU, it will be necessary to confirm the satisfaction of two requirements:

(i) the activities must be carried on by public law entities or private entities authorized to conduct those activities;

(ii) they must be services related to "teaching", meaning the subjects on a curriculum at any of the levels or stages in the Spanish education system. The power to determine whether or not the subjects are on a curriculum in the education system lies with the Ministry of Education, Culture and Sport.

16 Binding ruling V1903-17 by the DGT, on July 18, 2017, regarding taxation of compensation received by a physical trainer of a Russian professional basketball team

The consulting party worked in the first half of 2016 at a Spanish enterprise in Spain. In the second half of the year he worked as physical trainer for a Russian professional basketball team.
As a result of having Spanish tax resident status, he is liable for personal income tax on his worldwide income, regardless of the country of residence of the payer. The income he obtained as physical trainer of the team will be classed as salary income, if that activity was carried on as a subordinate, within the scope of the club's organizational authority.
Insofar as the requesting party also received salary income in respect of work performed abroad, the exemption under article 7.p) of the Personal Income Tax Law may also apply, if with respect to the income for work performed for a nonresident company or a permanent establishment located abroad, the work was effectively performed abroad and in the territory where the work is performed a tax identical or similar to Spanish personal income tax applies and it is not a country or territory that has been classed in the regulations as a tax haven.

17 Binding ruling V1922-17 by the DGT, on July 19, 2017, regarding deduction of certain training and clothing expenses of an actor and singer

The requesting party, an actor and singer working under temporary contracts, submitted a request concerning the personal income tax credit for certain expenses related to attending auditions and shows, singing and music classes, and clothing, among others.

The DGT is of the opinion that, unless the supply of entertainer and singer services is done in the context of an economic activity, any income obtained under a special employment relationship for entertainers in public shows (governed by Royal Decree 1435/1985, of August 1, 1985) qualifies as salary income.
On the basis of this characterization, the DGT concluded that the expenses to which the request relates are not specifically included in the range of deductible expenses set out in article 19 of the Personal Income Tax Law. Therefore, those expenses must be deemed included in the 2,000 euro limit on deductible expenses provided in that article for "other expenses".

18 Binding ruling V2118-17 by the DGT, on August 14, 2017, regarding nonresident income tax payable on benefits received by a nonresident and paid by the mutual insurance company for professional athletes

The request concerned the nonresident income tax payable on the benefits received by a retired professional football player, tax resident in Brasil, and paid by the mutual insurance company for professional athletes as a result of the contributions made by the player while he played in Spain.
Assuming that those benefits are not defined in the Brazil-Spain tax treaty, the DGT is of the opinion that the domestic legislation must be applied. Accordingly, because the Revised Nonresident Income Tax Law does not clarify the characterization of that income, it will be necesasry to refer to the Personal Income Tax Law as required in article 13.3 of the Revised Nonresident Income Tax Law. And so, additional provision 11 of the Personal Income Tax Law covers the tax treatment of the benefits paid by the mutual insurance company for professional athletes.
As a result, if those benefits relate to a disposal of the vested rights of the mutual insurance member, made in any of the scenarios set out in that additional provision, they will be characterized as salary income. Moroever, given the similarity of these benefits to a pension, they would be taxable in Spain by reason of having been paid by a Spanish entity (article 13.1.d) of the Revised Nonresident Income Tax Law).
In any event, having determined their similarity to pension payments, article 18.1 of the Brazil-Spain tax treaty, on pensions, limits the taxing power of the state of residence on the first US$ 3,000. Therefore, that amount will be taxable only in Brazil, whereas the excess may be taxed in Spain, determined in all cases by reference to the gross sum of income obtained.
Since double taxation may arise on that excess, it will be up to Brazil in any event, as the state of residence, to eliminate that double taxation under article 23.1 of the Brazi-Spain tax treaty.

19 Binding ruling V2194-17 by the DGT on August 22, 2017, regarding classifications for the tax on business activities in which to place an individual engaged in artistic photograph

The requesting party, an individual engaged in artistic photography signed by himself, deemed artworks, for consideration, requested information on the tax on economic activities classification in which he should register. Legislative Royal Decree 1175/1990, of September 28, 1990 approving the tax on economic activities classification places in class 861 of section two, the activity carried on by "*Painters, scupltors, potters, craftspeople, etchers and similar artists*", in group 86 which is for "*liberal, artistic and literary professions*". This being the caption in which he will have to register. Article 82 of the Revised Local Finances Law, contains an exemption for individuals.
For the reasons explained above, the DGT determined that the requesting party was exempt from payment and not required to file form 840, although he had to comply with the other procedural obligations (forms 036 and 037).

NEW LEGISLATION

1 Order PRA/1081/2017, of November 8, 2017, by the Ministry of the Presidential Office and for Regional Authorities, creating the governmental body responsible for implementation of the support program for the holding of events of exceptional public interest "Preparation program for Spanish athletes for the 2020 Tokyo Games ".

2 Decision rendered on October 25, 2017, by the Office of the Head of the National Sports Council, on Adult Sport Education for the 2018-2020 period

3 Decision rendered on October 17, 2017, by the Office of the Head of the National Sports Council, publishing the support agreement for the Spanish team for the 2017-2018 world race, for their adequate training in the time spent by the team in Spain

4 Decision rendered on October 26, 2017 by the Office of the Head of the National Sports, calling for aid applications from the Spanish sport associations for sport equipment and investment in 2017

5 Decision rendered on September 18, 2017 by the Office of the Head of the National Sports Council, publishing the financial statements for 2016 and the auditor's report

6 Decision rendered on September 19, 2017, by the Office of the Head of the National Sports Council, publishing the support agreement with Tarragona city council, for organization investments and expenses for the Mediterranenan Games Tarragona 2018

7 Decision rendered on September 13, 2017, by the Office of the Head of the National Sports Council, publishing the support agreement with Madrid city council, for the organization of the opening event of the third efition of the European Week of Sport, to be held on September 23, 2017

8 Decision rendered on August 24, 2017, by the Office of the Head of the National Sports Council calling for applications for aid for journeys to the Spanish mainland for teams and athletes from the islands and from Ceuta and Melilla to participate in state amateur sport competitions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