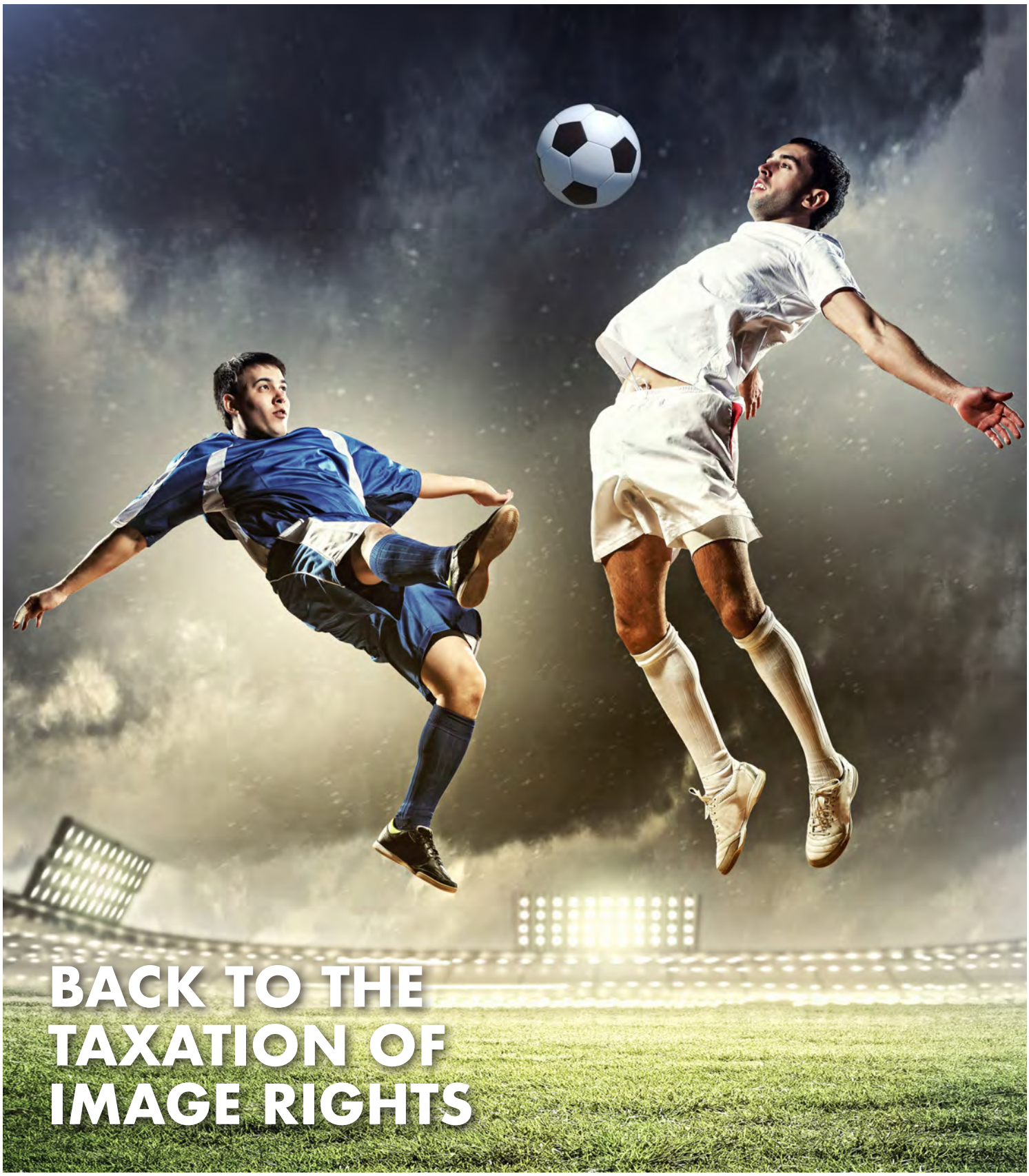
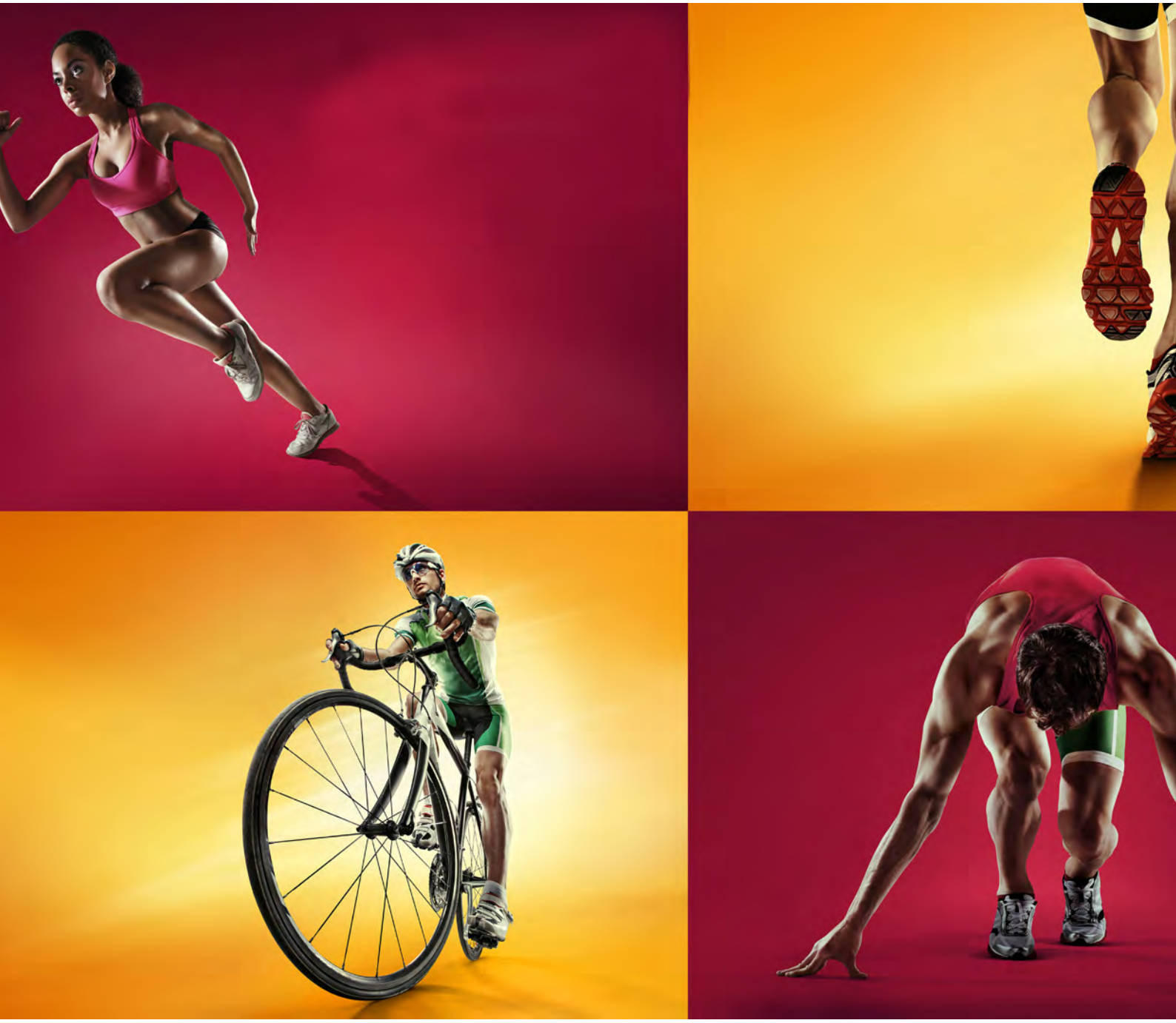
GARRIGUES

SPORTS & ENTERTAINMENT

NOVEMBER 2016



BACK TO THE TAXATION OF IMAGE RIGHTS



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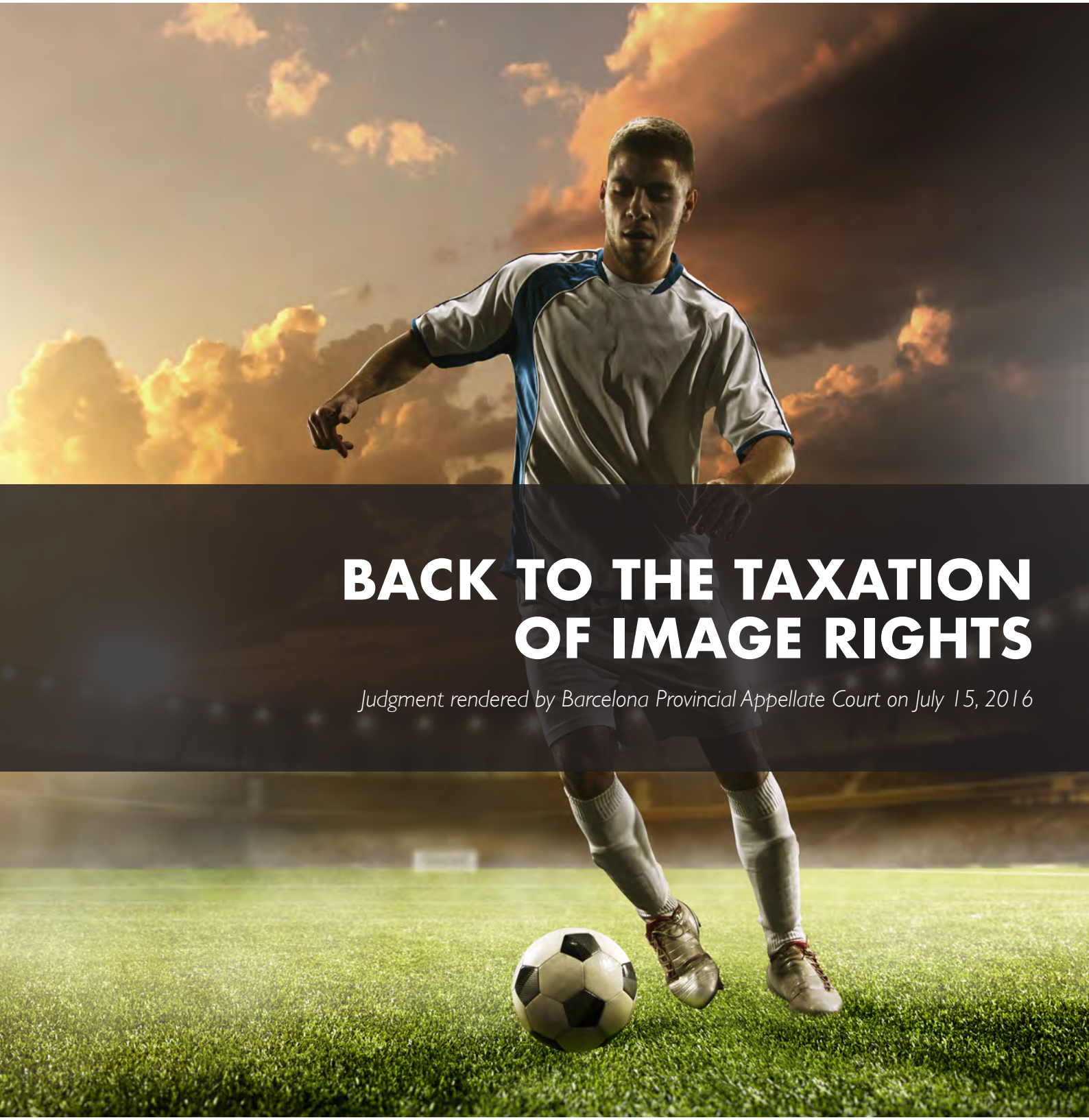


BACK TO THE TAXATION OF IMAGE RIGHTS

Judgment rendered by Barcelona Provincial Appellate Court on July 15, 2016

JOSÉ MARÍA COBOS GÓMEZ

There are possibly few subjects that arouse as much debate and discussion in connection with tax on sport as the taxation of image rights and the sale of those rights through companies. This is not a new issue; it was in the nineteen nineties that the debate flared up in all its intensity, following a series of audits on a large majority of the Spanish football and basketball clubs, later confirmed by the Supreme Court, in which the inspectors treated as salary income the sums paid by clubs to the companies which had received the players' image rights.

The solution seemed to have been found in the provisions introduced by Law 13/1996, of December 30, 1996, on tax, administrative and labor and social security measures, which specifically regulate the tax treatment of image rights by introducing three rules:

a) Characterization of image rights as income from movable capital, generally.

b) Establishment of a special withholding rate, regardless of how the income is characterized.

c) Institutionalization of the sale of image rights through companies, on which the only limit is that the amounts paid by the employers (clubs) may not exceed 15% of the total amount paid both in this respect and under the athlete's employment contract (the so-called 85/15 rule). There is no limit, however, on the transfer of the image rights to entities with which the athlete does not have an employment relationship.

This apparent peace has been altered by the audit work that has been conducted in recent months on both clubs and football players to review the correct taxation of image rights.

By and large, the tax authorities have approached the issue from the standpoint of the tax treatment of controlled transactions, without querying the ability to sell the image rights through companies (as mentioned above, recognized since Law 13/1996). It is an apparently straightforward mechanism: for a company to be able to transfer image rights to a club, that company must have first "acquired" them from the athlete. And because in most cases the athlete is a shareholder in the company, owning an interest which, for tax purposes, makes them related parties, the transactions between the athlete and the company (and, in particular, the transfer of the image rights to the company) they must be priced at their market value, meaning the price that would have been agreed between independent parties and satisfies the arm's length principle. In the tax authorities' opinion, the best way to determine that market value is by reference to the revenues received by the companies in respect of publicity.

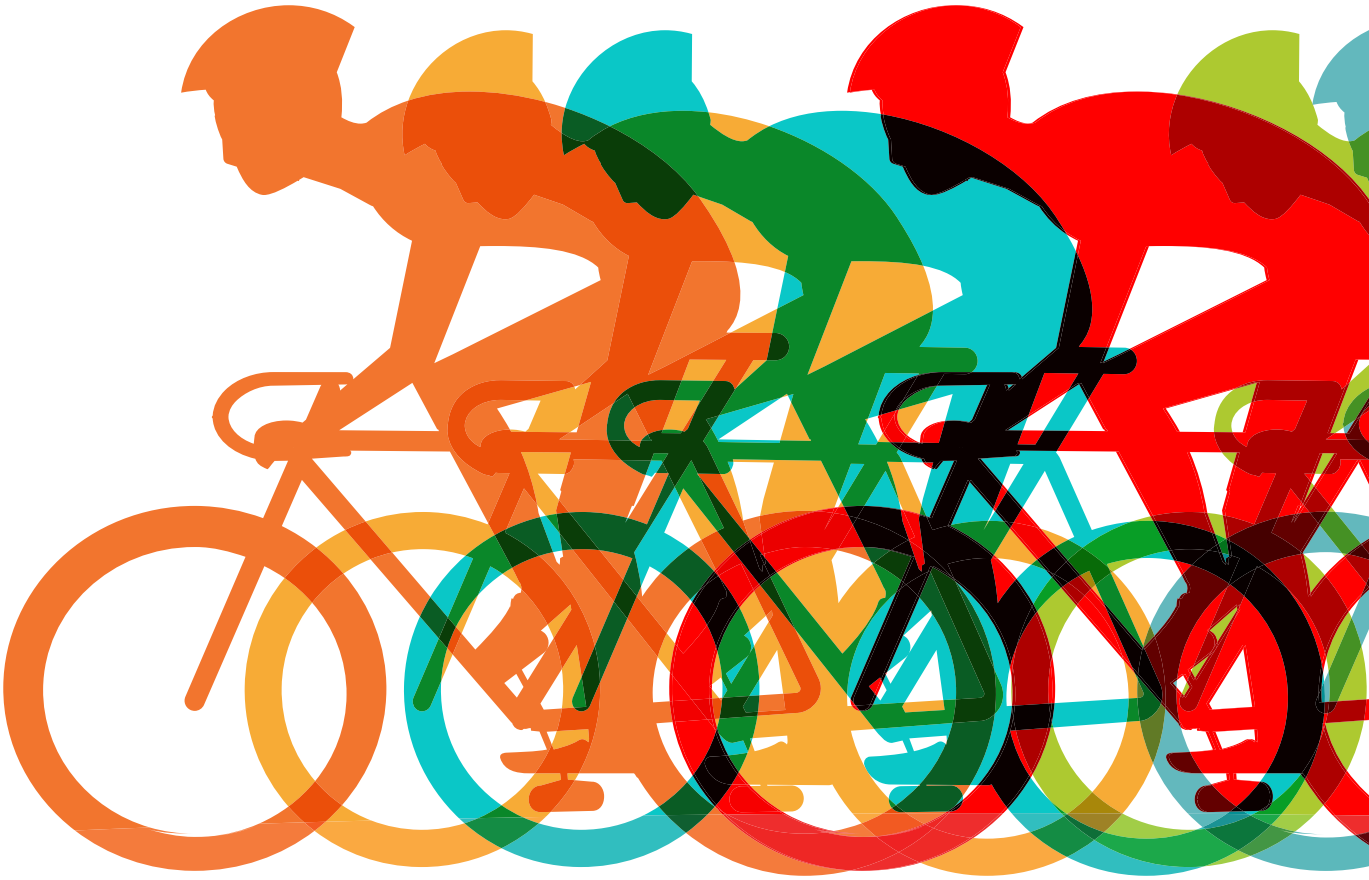
In some more complex cases, the tax authorities have found the existence of sham transactions, and referred the matter to the public prosecutor's office where the amount of tax allegedly evaded might exceed the threshold for a tax offense. It is in this context that the judgment by Barcelona Provincial Appellate Court was delivered on July 15, 2016 which we discuss below.

This judgment examines a structure in which the image rights are transferred to companies situated in low tax jurisdictions and for a very low price, according to the expectations already associated with the player in view of the quality of his game. For their part, the recipient companies signed agreements with companies domiciled in the United Kingdom and Switzerland under which they received services related to the sale of the image rights and in respect of which they paid a number of commission fees.

The provincial appellate court held it proven that the player failed to report in his personal income tax return the revenues obtained on the sale of his image rights, by hiding their existence in a strategy consisting of creating an apparent transfer of the player's image rights to companies situated in low taxation jurisdictions with laws allowing opacity for both the companies and their shareholders and in relation to the reality of the transactions. In its judgment, an additional part of this strategy was the execution of licensing, agency or service agreements between those companies and others located in countries with a broad network of tax treaties and permissive legislation with respect to transactions with companies domiciled in the countries concerned.

By holding that they were sham agreements for the transfer of image rights, executed simply to give the appearance of a transaction without serving any real purpose, the court inferred that the amounts received for the transfer of the image rights had to be taxed as income from movable capital, because they were not obtained in connection with an economic activity, and be included in the player's personal income tax base, which is what would happen if those rights had never left the player's hands.

Therefore, the Provincial Appellate Court held that such acts could be seen as a criminal offense against the public treasury, because it had been convinced completely that the player had evaded receipt of the revenues obtained from selling the player's image rights through a complex maneuvering of transactions (consisting of feigning a number of transactions) the purpose of which was purely and simply to hide from the Public Treasury the revenues generated on those sales and the real recipient of those revenues.



VOLUNTARY TERMINATION OF A CYCLIST'S EMPLOYMENT WHEN HIS CLUB IS APPLYING FOR A COLLECTIVE LAYOFF PROCEDURE AFTER NONRENEWAL OF ITS UCI LICENSE DOES NOT IMPLY A TRANSFER EVEN IF THE ATHLETE IS IN A NEW TEAM

(Judgment rendered by Cantabria High Court on May 20, 2016)

***Summary:** Cantabria High Court held that the acts of the athlete and of the club that had employed him implied a termination by mutual agreement and therefore did not entitle the rider to any indemnification*

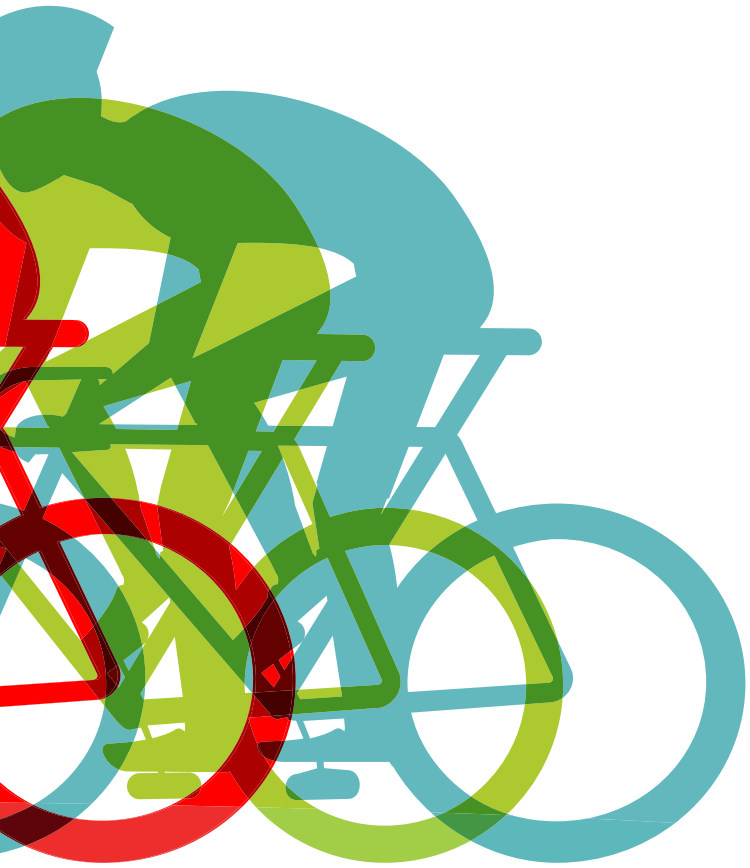
ÁNGEL OLMEDO JIMÉNEZ

ISSUE UNDER DEBATE

The Cantabrian High Court's judgment is devoted to interpreting whether, in light of the facts, it may be held, as the lower labor court had down, that the parties' acts entail a transfer (and therefore entitle the rider to 15% of the price of the transfer) or whether conversely it is tied to a case of mutual agreement to dissolve the employment relationship (from which no type of indemnification whatsoever may be gained).

FACTS OF INTEREST

The cyclist, who had won the 2011 edition of Vuelta a España, signed an employment contract with Club Deportivo Bike Live, for the 2012 and 2013 seasons, under which the cyclist could terminate the contract without any notice or indemnification, "if the employer or a main sponsor withdraws from the sport group and there is no assurance of the continuity of the sport group or if the sport group announces its disbandment (…)". Additionally, the club reserved the right to terminate the employment contract, also without notice and without paying any indemnification whatsoever, among other reasons, due to the suspension or failure to obtain its UCI license.



As a result of various economic setbacks related to the withdrawal of one of its sponsors, the club failed to obtain an UCI license for the 2012 and 2013 seasons.

On December 26, 2011, the cyclist sent a bureaufax in which, referring to the commencement of a collective layoff at the club and the failure to register the club with UCI for the 2012 season, he requested authorization to be able to sign a new contract with another club for that season and subsequent ones, which he would consider granted if he did not receive a reply within three days.

The club replied to the athlete's bureaufax saying (i) it authorized him to terminate his employment with the team and (ii) otherwise, it would terminate his contract in the collective layoff that was under application.

The cyclist signed a new contract for the 2012 and 2013 seasons with Grupo Deportivo Abarca, though for a lower amount of compensation for the whole season by €810,000 than the amount under the agreement he had signed earlier with Club Deportivo Bike Live.

At first instance, Santander Labor Court no 5 held that the contract was terminated by mutual agreement but that it amounted to a final transfer of the athlete to another club and therefore he was entitled to indemnification which, in the absence of any agreement, could not be lower than 15% of the stipulated amount (granting him indemnification amounting to €221,250).

Both club and cyclist disagreed with the judgment and lodged appeals. The athlete asked for his severance pay to amount to €810,000, and his former team argued that he was not entitled to any indemnification.

JUDICIAL INTERPRETATION

Cantabria High Court set aside the lower court's decision completely and therefore held that the termination of the cyclist's employment contract did not entitle him to any indemnification, for the following reasons:

a) The termination of the contractual relationship is based on a scenario of mutual agreement between the parties but in that agreement there was no decision to transfer the cyclist to any other club.

b) On that basis, the court considers that what happened in this case is that the rider, on becoming aware that his club was not going to be able to compete because of its economic problems and failure to obtain the UCI license, decided to request authorization to terminate his contract (under the authority bestowed in his contract) and, because that authorization was granted by the team it cannot be said that any transfer took place.

c) Furthermore, the judgment reasons that the hiring of the cyclist by Grupo Deportivo Abarca was covenanted "of his own accord, without the participation of his former [club]", which proves that the ground for termination was not his transfer.

d) Additionally, the decision explains that the above arguments are reinforced by the fact that the club itself had been given, in the contract, the option to terminate the contract, without any entitlement to indemnification, by reason of failure to obtain the UCI license. Accordingly it finds no justification for paying indemnification to him in the fact that his new contract provided for lower compensation than the previous one.

e) Lastly, the judgment stated that the €1,475,000 sum on which the lower court's judgment had calculated the recognized 15%, was not the price of a transfer, but rather the compensation determined in the event that the cyclist complied fully with his contract with Club Deportivo Bike Live.

AN SL LIMITED LIABILITY COMPANY CANNOT TAKE THE LEGAL FORM OF AN SAD

SPANISH PUBLICLY HELD SPORTS COMPANY

JAVIER BRAGADO LORENZO

The Supreme Court confirmed the National Sports Council's decision not to authorize the registration of Salamanca Athlétic Club, S.A.D. on the Sport Associations Register, by affirming that it is a limited liability company which cannot convert into an SAD.

THE BACKGROUND

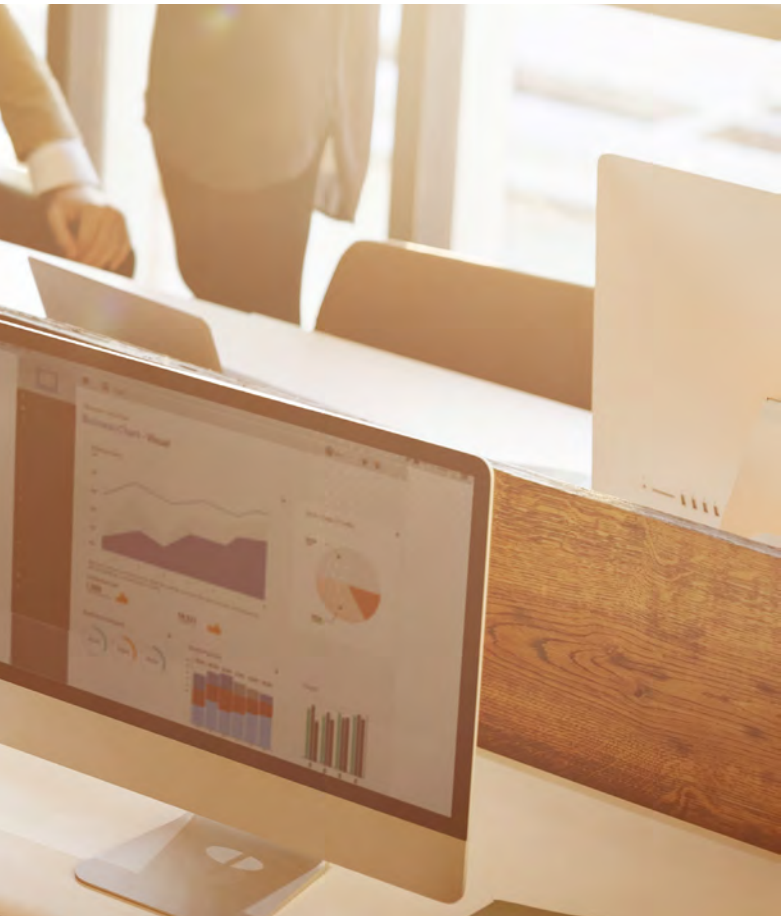
- An insolvency order was issued on Unión Deportiva Salamanca, S.A.D. on October 25, 2011.

- On June 26, 2013 the insolvency manage gave notice to the insolvency judge of the existence of an offer that would allow it to transfer its federative rights for €250,000 to Desarrollos y Proyectos Monterrubio, S.L. before they terminated two days later. The judge held that this option benefitted the creditors' rights and authorized it in a decision on June 27, after the parties had agreed that the assignee would adopt the legal form of an SAD, a Spanish publicly held sports company. Thus, the limited liability company Desarrollos y Proyectos Monterubio, S.L. altered its corporate form to an SAD, and adopted the name Salamanca Athlétic Club, S.A.D ("SAC").

- On August 16, 2013, SAC applied for registration on the National Sports Council's Sport Associations Register.

- On October 17, 2013, the National Sports Council disallowed registration of the SAC on the basis that the SAD company had been formed by converting a limited liability company, and this manner of incorporating a Spanish publicly held company was not envisaged in the applicable legislation.

- Against this decision, SAC lodged an application for judicial review with the National Appellate Court



(Judicial Review Chamber, Panel Six), which on July 15, 2014 delivered a judgment setting aside the National Sports Council's decision and allowing SAC to be registered on the Sport Associations Register. The National Appellate Court held that the SAD company created by converting a limited liability company (Desarrollos y Proyectos Monterrubio, S.L.) could be registered, because neither the Sport Law nor the SAD Regulations prohibit this, and any point on which the sport legislation is silent will be subject to secondarily to the rules in the Corporate Enterprises Law and, in particular, Law 3/2009, on the conversion of business companies.

- That judgment was challenged in a cassation appeal to the Supreme Court by the central government. It contended that the sport legislation lays out a special regime which overrides the general regime, such that SAD companies may only be created as new companies or from the conversion of a sport club, and this is the only conversion envisaged in that special regime.

THE SUPREME COURT JUDGMENT

The Supreme Court ultimately accepted the central government's view. The supreme court judgment held that SAC cannot be registered on the National Sports Council's Sport Associations Register essentially because the Sport Law only allows that class of company (SADs) to be formed as new companies (simultaneously or successively), by converting a sport club or through assignment on the terms of additional provision nine of the Sport Law. SAC, however, was not in any of those three scenarios, because it became an SAD as a result of converting from a limited liability company. Moreover, according to the judgment, rather than applying the general options offered in corporate law, SAC bent them, giving rise not to a simple structural modification of a preexisting company under Law 3/2009, but rather to the formation *de facto* (and fraudulent in that case) of a publicly held company subject to a particular regime on the manner of its incorporation.

The Supreme Court also argued that the provisions in Law 3/2009 do not fit with the transition of a limited liability company to a SAD publicly held sports company. Insofar as after the conversion all previous legal relationships are retained at the converted company (especially the rights of its creditors, falling outside transactions related to sport), that effect would clash with the Sport Law, the intention of which is to seek in the corporate form a special regime for better economic management, financing and transparency for professional sport, hence it provides for the creation of a new company either by altering a sport club or by creating a completely new company, without carrying over legal relationships unrelated to its particular corporate purpose which would bring even further complication to its particular legal regime.

DISSENTING VOTE

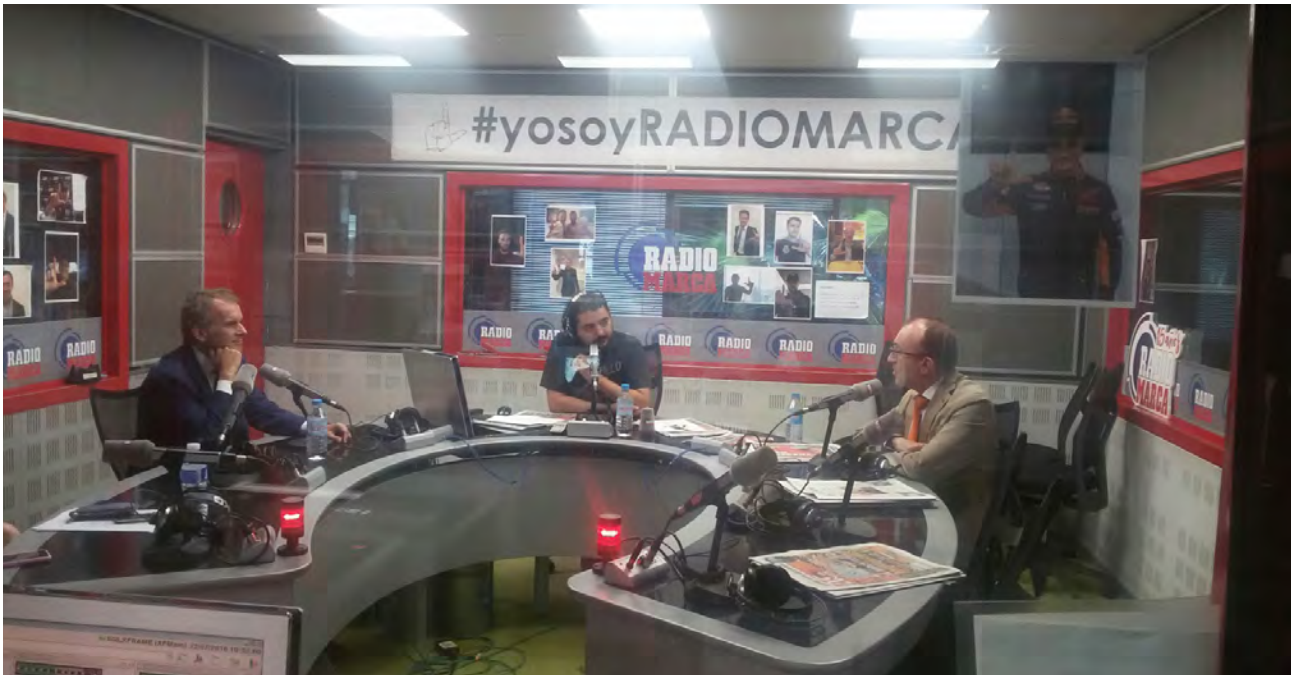
The Supreme Court judgment had two dissenting votes. Two of its six judges did not share the argument that the examined conversion qualified as a fraudulent use of the applicable law.

THE CONSEQUENCES

The Supreme Court judgment confirmed, therefore, the decision delivered by the management committee of the National Sports Council on October 17, 2013, in which the application for authorization to register SAC on the Sport Associations Register of the National Sports Council, attached to the Ministry of Education, Culture and Sport was denied.

NEWS

GARRIGUES SPORTS & ENTERTAINMENT PARTICIPATES IN RADIO PROGRAM DIRECTO MARCA ON RADIO MARCA

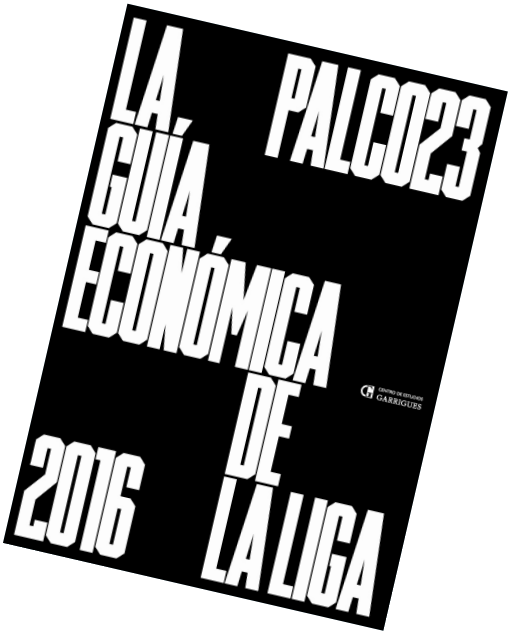


On July 22 Félix Plaza, partner in the tax department and co-leader of Garrigues Sports & Entertainment, took part alongside Javier Gómez, general manager of LaLiga, in the Directo Marca program, directed by Vicente Ortega on Radio Marca.

The program included a discussion of the future employment scenario for sport professionals, the origin and the results obtained on the SBA Sport Business Administration program run by Garrigues Sports & Entertainment and La Liga the main aim of which is to professionalize management in the sport industry.

GARRIGUES SPORTS & ENTERTAINMENT CONTRIBUTES TO JOURNAL PALCO 23

Last August, an economic review of LaLiga (*La Guía Económica de LaLiga*), was published in journal Palco 23, which featured an article drawn up by Félix Plaza, partner in the tax department and co-leader of Garrigues Sports & Entertainment, in conjunction with Javier Gómez, general manager of LaLiga. Under the title "Professionalization of sport: a path with no return" (*Profesionalización de la gestión deportiva: un camino sin retorno*), the article takes a look at the professionalization of sport entities, through qualifications for management professionals, which are not confined to success in sport but rather the opposite is the case.



PRESENTATION OF THE SBA SPORT BUSINESS ADMINISTRATION EXECUTIVE PROGRAM ORGANIZED BY GARRIGUES SPORTS & ENTERTAINMENT AND LA LIGA

On October 6 took place the presentation of the new edition of the Master in Sport Business Administration organized by Centro de Estudios Garrigues and LaLiga. Presenting the ceremony was Miguel Cardenal from the National Sports Council, accompanied by Félix Plaza, partner in the tax department and co-leader of Garrigues Sports & Entertainment and by Javier Gómez, general manager of LaLiga.

Also present were scholarship students from the first edition of the program (Fernando Morientes, Jorge Garbajosa, Nico García, Rubén de la Red, Ana Montero and Elisa Aguilar), and the students awarded the new scholarships by the National Sports Council for the 2016/2017 edition: cyclist Leire Olabarría, athlete Jesús España, gymnast Carolina Rodríguez, former footballer Ismael Urzaiz and former handball player Iker Romero.

JUDGMENTS AND RULINGS

1. Supreme Court judgment rendered on June 7, 2016, concerning the right to reputation of a public figure

The Supreme Court dismissed the cassation appeals lodged by the defendants and ruled along the same lines as the appealed judgment, which invoked the judgment delivered at first instance and affirmed that defendants' acts were unlawful interference with the reputation of the plaintiff.

The respondent reiterated that the right to reputation of his deceased father (a public figure due to appearing regularly in society journalism) must be held violated because he was falsely accused in a program on the Antena 3 television channel of rape, a criminal offense.

Based on the same chamber's interpretation, the Supreme Court, on the subject of striking the right balance between the right to reputation and right to freedom of expression (see supreme court judgments 406/2014, 457/2015), explained that neither the affirmations by one of the appellants, nor the off screen commentary, or the superimposed images on screen simply gave an opinion on the respondent's father, but rather narrated a very serious fact which is damaging to the dignity and prestige of the deceased and his family members. For that reason, the court concluded that freedom of expression did not prevail, with the *neutral reporting* principle not applying in this case, and ended with a reminder that the respondent's status as a public figure did not expose him to any type of accusation.

2. Judgment rendered by Madrid Provincial Appellate Court on June 14, 2016, concerning the right to reputation and privacy of a singer on a television program

The claimant, a public figure with a recognized career as a singer, lodged an appeal against the first instance judgment dismissing the singer's claims against Mediaset Comunicación, S.A., Producciones Mandarina, S.L. and La Fábrica de la Tele, S.L. because the reports broadcast by a television program were not held to be unlawful interferences with the claimant's right to reputation and privacy.

The Provincial Appellate Court, for its part, upheld the appeal after concluding that the comments made on the television program, broadcast over a long period of time, go beyond the limits of mere opinions, because they imply actual interference both with the right to reputation, by describing activities which convey the idea that the claimant was raising his children badly and ruining the people who worked with him, and also with the right to privacy, by disclosing data concerning the claimant's personal relationship with his son, deemed to belong to his private sphere because the claimant had kept his private life out of public view, besides not being a matter of public interest and notoriety. The appellate court concluded on the basis of settled interpretations by the Constitutional Court (see Constitutional Court judgment 300/2006) that the right to privacy of public figures is not left unprotected from any type of interference.

3. Judgment rendered by Murcia High Court on June 14, 2016, concerning the existence of a special employment relationship for footballers

Murcia High Court (Labor Chamber) set aside an appeal lodged by a number of players for Lorca Deportiva, C.F. against the judgment by Murcia Labor Court in a proceeding brought against the club, the insolvency manager and the wage guarantee fund.

The appellant petitioned for the lower court's judgment to be set aside, a judgment which recognized the existence of an employment relationship and ordered Lorca Deportiva, C.F. and the insolvency manager to pay a number of items of compensation requested by the appellants.

In reply, Murcia High Court explained that Royal Decree 1006/1985, of June 26, 1985 on the special employment relationship of professional athletes does not apply to people practicing sport within a club who only receive compensation from the club for the expenses related to practicing their sport. This circumstance was proved with documents in this case, which is why the appeal was dismissed, because the players only received different sums according to their existing personal and pay circumstances, on top of which the third division is for amateur, not professional, football.

4. Judgment rendered by Madrid High Court on June 14, 2016, concerning the use of a business company by a public figure to conclude various agreements with television channels

Madrid High Court delivered a decision on the administrative appeal lodged against a judgment by the Madrid Regional Economic Tribunal dismissing claims brought against two corporate income tax assessments.

The appellant petitioned for reversal of the assessments,

by pleading that its actions had involved tax planning rather than the intention to hide the income it had received and justified its own existence as an intermediary company in the execution of various collaboration agreements between an entertainer and various national television channels, because without it they would not have been able to execute those agreements. Madrid High Court, for its part, considered that there is no rationale for the appellant company to act in the individual's entertainer services relationship (that individual being the appellant's majority shareholder and sole director). Accordingly, the court held that the company does not add any added value to the entertainer's activities, because it was only used as a vehicle for billing the services provided by the entertainer and did not have any employees who would be able to carry on the activities required to act as intermediary in the service relationship between the entertainer and the various television channels.

In short, Madrid High Court concluded that, although Spanish law allows services to be provided through business companies, it is not allowable under any circumstances for a company to be used to bill the services performed by an individual, without the participation of that vehicle company, which simply acts as an instrument to receive payment for the service, its only purpose being to reduce the direct taxation of the individual in respect of personal income tax. Accordingly, the tax on the transaction would be as determined under the rules on transactions between related parties, whereby the real provider would be required to be taxed on the whole of their income, including that in respect of the services not provided by the company but billed by it, in proportion to the taxable amount for personal income tax purposes.

5. Judgement rendered by the National Appellate Court on June 15, 2016, concerning the jurisdiction of the Spanish Disciplinary Committee for Sports (TAD)

The National Appellate Court set aside the judgment by the National Appellate Court (Central Judicial Review Tribunal), by confirming the reasoning in the decision by the Spanish Disciplinary Committee for Sports (TAD), whereby this administrative body was held not to have jurisdiction to hear the appeal lodged by a Spanish athlete against that decision, for the purposes of rendering null and void the biological data contained in the administrative proceeding.

The appealed judgment insisted on applying Organic Law 7/2006, of November 21, 2006, on protecting health and combating doping in sport, which determines that the sanctioning activity of the association is discharged under the authority conferred by the Spanish government as a result of which any such activities may be reviewed in the judicial review jurisdiction, meaning that the TAD has jurisdiction.

The National Appellate Court explained, however, that the whole of the underlying reasoning stems from an incorrect scenario, because the decision in the invoked judgment was based on the fact that the athlete concerned was made to undergo a doping test by reason of an international competition held in Spain, which was not the case, because the appellant was made to undergo the tests belonging to a testing program outside the competition, at the request of the International Association of Athletics Federations, under their own procedural and sanctioning rules, which are separate from those laid down in Organic Law 7/2006.

6. Judgment rendered by the National Appellate Court on June 15, 2016, concerning discipline related to sport

The National Appellate Court dismissed an application for judicial review lodged by the applicant, held liable for a serious infringement defined in Law 19/2007, against violence, xenophobia and intolerance in sport for his active participation in a riot that erupted before a football match between fanatical followers of Club Atlético de Madrid and Real Club Deportivo de la Coruña, in which a person died.

The applicant based his challenge of the decision firstly on a violation of the principle of the presumption of innocence, because he had been sanctioned as a result of the incident report by two police officers who arrived at the scene after the riot had taken place, and secondly, on the incorrectness of the imposed sanction, which had not been sufficiently specified, and involved a vague and general accusation.

Based on the facts that had occurred, the National Appellate Court ruled to dismiss the filed application, because it held that the principle of the presumption of innocence had been rendered invalid by the solid evidence against the appellant. This followed the National Appellate Court's conclusion that evidence had been provided, on the one hand, of the existence of a fight or tumultuous uproar in the vicinity of the Vicente Calderón stadium in relation to the football match to be held which pitted the fans of both teams against each other; and, on the other hand, of the appellant's active participation in it, causing a serious risk scenario for people and property.

7. Judgment rendered by the Balearic Island Provincial Appellate Court on June 19, 2016, concerning a monetary claim under a sponsorship agreement

Football club C.F. Sporting de Mahón lodged an appeal against the judgment upholding the claim filed by a company and ordering the club to pay the sum that the club deemed payable under a sponsorship agreement signed by them.

The dispute mainly concerned determining whether C.F. Sporting de Mahón is the same entity as Club Sporting Mahonés, as the claimant argued, or a new and separate club from the former one, as the defendant pleaded, on which it depends whether the former must be liable for the debts of the latter.

The chamber held that, despite the failure to produce the foundational deed in the proceedings, the registration seen by the court of the appellant as a sport association under the autonomous community legislation is proof of the existence of that foundational deed. In addition to this, press cuttings were produced reporting on the celebration of the 40th anniversary of Club Sporting de Mahón, which does not match the length of the existence of the appellant club, registered since 2013. The crucial element for determining whether it is a new sport association is evidence of the club's assets (players, coaches, materials, name, etc.) which have somehow been gathered together by the new sport association, from which the chamber concluded that Club Sporting Mahonés was not the same club as the appellant entity and therefore the appellant had no standing to sue.

8. Judgment rendered by the National Appellate Court, on July 12, 2016, concerning the deduction of the expense associated with the sale of federative economic rights

The National Appellate Court partially upheld the appeal lodged by COFISER, S.L. against TEAC's decision which confirmed the principle adopted in a tax audit in relation to the deduction of expenses, and the correct recognition of revenues, in connection with successive sales, over a number of years, of federative economic rights, made between COFISER and LEVANTE UD SAD.

The position argued by the inspectors, and later confirmed by TEAC, is based, on the one hand, on the inability under the law for a club or SAD to make a transfer of federative rights to an enterprise not formed as a club or SAD; and on the other, on the fact that, with those decisions, the only aim they sought was to achieve abundant financing for LEVANTE UD SAD out of the sums paid by COFISER, S.L. in respect of the transfer of federative rights, by placing the revenues and expenses in different hands to those of the party carrying on the business activity that generated them.

By contrast, the National Appellate Court considered that a distinction must be made between three types of federative rights:

a) Federative rights "as such", which include the registration of the player at the club and the license to play only for the club at which they are registered. Those rights may be transferred, with the player's prior consent and with indemnification if required, only between clubs or SADs;

b) Employee rights, which arise from the special relationship that may be signed with the club or SAD and the player;

c) And, lastly, federative economic rights, related to the economic income that both the clubs or SADs and the professional athlete receive from transfers or assignments. These economic rights, which may involve the right to receive a percentage or sum in respect of future transfers of federative rights between clubs as a result of assignments or transfers, may be assigned to third parties other than clubs or SADs, which contradicts the view held by the inspectors and later confirmed by TEAC.

Although it is true that under the new rules in the regulations on the status and transfer of players those transactions for assignment of rights to third parties other than clubs or SADs are prohibited, that legislation came into force on May 1, 2015, after the case under examination.

The National Appellate Court held, on the basis that covenants for assignment of federative economic rights to third parties other than clubs or SADs are valid, that the fact that the reason for concluding them is to increase the financial capacity of the club or SAD to be able to operate in the market for transfers under better conditions does not imply under any circumstances any breach whatsoever of tax law. Under no circumstances does a relocation of revenues or expenses occur, but rather simply a matching of the revenues and expenses associated with the course of a legal transaction which is not void of content by any means, since CONFISER, S.L., contrary to the arguments made by the inspectors and TEAC, brings added value, precisely because that transaction enables LEVANTE UD SAD to operate on the transfers market in a better position.

9. Judgment rendered by the Supreme Court (Judicial Review Chamber) on September 29, 2016, concerning the participation of foreigners in competitions organized by the Spanish Taekwondo Association

The Supreme Court dismissed the cassation appeal lodged by the central government by confirming the national appellate court judgment upholding the cassation appeal brought against the decision by Ministry of Education, Culture and Sport granting the Spanish Taekwondo Association (FET- Federación Española de Taekwondo) authorization to prevent the participation of foreigners in certain competitions. That authorization is set out in the applicable legislation as an exceptional positive discrimination measure based on the requirements and needs resulting from high level sport and from its representative function for Spain.

FET pleaded that the representative function of the

Spanish Taekwondo team would be seriously reduced as a result of the participation of foreigners in national competitions, because if they won they would be the only ones able to be selected. In contrast, the National Appellate Court argued that the fact of having won the Spanish championship is one of the selection criteria for athletes but, even if they have not won, from the trial conducted it has been evidenced that an athlete may be part of the national team if the coaching committee so considers, and therefore the authorized restriction is not necessary to achieve the objective of including Spanish athletes in the team.

The Supreme Court dismissed the cassation appeal fully by adopting the reasoning explained by the National Appellate Court.

10. Binding ruling (V2054-16) by the DGT (Directorate General for Taxes), on May 12, 2016, concerning the VAT treatment of organization services for running events open to the general public

Services are exempt if provided to runners participating in an amateur foot race competition by a nonprofit sport entity, which may be treated as an entity or a private social establishment, by being eligible for the exemption under article 20.One.12 of the VAT Law if the other requirements are met.

Concerning the application of reduced VAT rates, in the wording in force since September 1, 2012, article 91 of the VAT Law does not allow the reduced rate to be claimed for services provided to individuals engaging in sport or physical education, which used to be the case for those services if certain requirements were met.

Moreover, the reduced rate is not allowed either for the activities of sport events or competitions organizers but rather will be applicable, if the tests are met, on the ticket for entry to such amateur events

11. Binding ruling rendered by the DGT V2083-16 on May 13, 2016, concerning the VAT and corporate income tax treatment of a sport entity involved in waterpolo

The requesting entity is a private nonprofit sport association, involved in water polo. The ruling determined the following:

a) If the requesting entity satisfies the requirements laid down to be treated as a private social establishment, it may request to be treated as a such by the tax authorities, and as a result, the revenues obtained by the requesting entity from the services it provides as a sport club would qualify for the exemption under article 20.1.13º of the VAT Law.

b) In any event, the revenues obtained by the entity from the services it has provided which are not directly related to the practice of sport (restaurant services or sale of sport equipment, for example), and from the supply of goods, in all cases, will not benefit from that exemption.

c) The income obtained by the requesting entity in respect of charges for using the facilities, of services provided by the club or the sale of sportswear come from an economic activity and is therefore subject and not exempt from corporate income tax, because they are eligible for the partial exemption under article 9.3 of the Corporate Income Tax Law.

12. Binding ruling by the DGT (V2228-16) on May 23, 2016, concerning the VAT and corporate income tax on a sports club

The requesting entity is a sports club qualifying as a private social establishment. It asked firstly whether the revenues obtained by the entity may be treated as VAT-exempt, and secondly, whether the entity may be treated as partially exempt from corporate income tax.

The DGT concluded as follows:

a) It will be eligible for the VAT exemption under article 20.1.13 of the VAT Law for sport social entities, insofar as the services provided by the entity (instructors and personal trainers) are provided to the users of the municipal facilities. That exemption does not apply, however, to transactions which must be characterized for VAT purposes as supplies of goods, and to supplies of services which are not directly related to the practice of sport by, or physical education for, an individual.

b) In relation to corporate income tax, the entity will be partially exempt because it was formed as a nonprofit entity under the special regime provided in Chapter XIV of Title VIII of the Corporate Income Tax Law. Accordingly, the income obtained by the entity from the performance of the activities in its purpose or specific aim, will be exempt.

13. Binding ruling by the DGT (V2338-16) on May 26, 2016, concerning the VAT rate applicable to an entity engaged in organizing triathlon sport events

The income from organization services for triathlon competitions for amateur athletes provided by a sport business entity which does not appear among the entities eligible for the exemption under article 20.1.13 of the VAT Law, do not qualify for this exemption.

Article 91 of the VAT Law no longer envisages the reduced rate for the income from services provided to individuals who practice sport or engage in physical education. Therefore, the reduced VAT rate does not apply either to the activities of a sports events and competitions organizer, because it does not apply to the transactions performed by an organizer of such events through it will be applicable, if the tests are met, on the ticket for entry to such events.

Therefore the standard VAT rate will apply (21%) to the services provided by the requesting entity to amateur runners, for the purpose of organizing triathlon competitions, and neither the exemption under article 20.1.13º of the VAT Law, or the reduced rate under article 91.1.2.8 of that law will be applicable.

14. Binding ruling by the DGT (V2852-16) on June 22, 2016, concerning the taxpayer status of partnerships for corporate income tax purposes

Article 7.1.a) of the Corporate Income Tax Law defines corporate income taxpayers as legal entities resident in Spain with the exception of partnerships that do not have a business purpose. This ruling examines the cases in which the partnership is held, for corporate income tax purposes, to have a legal personality, and secondly, how to interpret "business purpose".

According to article 1669 of the Civil Code, a partnership has a legal personality if the agreements between its partners are not secret, and therefore, require an intention on the part of its partners to act in dealings with third parties as an entity. Moving to the tax arena, for a partnership to be held a corporate income taxpayer, it must have confirmed its status as such to the tax authorities, and, have been formed by public deed or in a private document, provided, in this case, that it has been produced to the tax authorities for them to assign a taxpayer identification number to it.

To have corporate income taxpayer status the partnership with a legal personality must also have a business purpose, meaning it performs an economic activity involving production, exchange, or provision of services, for the market in an industry that does not fall outside the area of business (agricultural, livestock, forestry, mining and professional services activities).

15. Binding rulings by the DGT (V3375-16 and V3549-16) on July 29, 2016, concerning the taxation of buy-out clauses in footballers' employment contracts

These rulings deal with the tax on payment of the so-called "buy-out clause" in transactions for termination of the contractual relationship between a footballer and their club/SAD, consisting in the delivery, by the club/SAD acquiring the player's federative rights, of a sum to the player, who later transfers that sum to the transferring club/SAD.

a) In relation to the corporate income tax on the transaction, the amount stipulated in the buy-out clause will be treated as an intangible asset, for the purpose of determining the corporate income tax base of the transferee club.

b) Regarding the tax on the transaction for the footballer, the income paid by the acquiring club/SAD and later transferred by the player to the transferring club/SAD, is required by article 33.1 of the personal income tax law to be treated as a capital gain and capital loss respectively, to be included and set off in the general personal income tax base.

c) Lastly, concerning the VAT related to the transaction on the amount paid to the footballer by the club/SAD for the player to pay it over, no transaction subject to VAT arises.

NEW LEGISLATION

1. Decree-Law 2/2016, of April 20, 2015, on urgent measures to revive business activity and employment through a reduction and elimination of bureaucracy

Approval of the decree-law introducing special measures designed to help achieve the government deficit target set by the EU authorities. It is sought to increase corporate income tax revenues, in an effort to collect revenues from large enterprises with the necessary tax paying capacity to help keep public finances afloat.

For taxpayers whose net revenues figure in the 12 months before the date on which the tax period began was equal to or higher than €10 million, the main new items of legislation that will have an effect on prepayments are as follows:

- The amount to be paid over cannot, under any circumstances, be below 23 percent of the positive earnings figure on the income statement for the first 3, 9 or 11 months of each calendar year.

- For taxpayers eligible for the 30% rate, the percentage provided in this paragraph will be 25%.

- The positive earnings figure mentioned above will not include the amount of those earnings that relates to income from debt rescheduling or recomposition transactions under an arrangement with creditors concerning the taxpayer, and that earnings figure will include that portion of its amount that will be included in the tax base for the taxable period. Another amount that will not be included for these purposes is the

amount of the positive earnings figure resulting from transactions to increase capital or shareholders' equity by converting debt into equity which will not be included in the tax base under article 17.2 of this law.

- The percentage of the prepayment will be the rounded down figure equal to nineteen twentieth parts of the tax rate. Therefore, for entities taxed at the standard rate the prepayment percentage has been increased from 17% to 24%.

2. Provincial Law 13/2016, of September 19, 2015, partially amending Provincial Law 24/1996, of December 30, 2016 on corporate income tax, to enforce the decision of the European Commission regarding the amendment of the tax regime for certain sport clubs

The European Commission adopted in July Decision SA. 29769 (2013/C), in which it concluded that, in additional provision seven of Sport Law 10/1990, of October 15, 1990, Spain illegally introduced aid in the form of corporate income tax relief for certain sport clubs, including Club Atlético Osasuna, and by doing so, infringed article 108.3 of the Treaty on the Functioning of the European Union (that provision released four sports clubs meeting certain financial soundness and good management tests from the obligation to convert into SADs).

The European Commission imposed on Navarra the obligation to amend the special corporate income tax regime for partially exempt entities, so that sports clubs and other nonprofit entities taking part in professional competitions cannot claim it. Provincial Law 13/2016 was approved to amend that regime.

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