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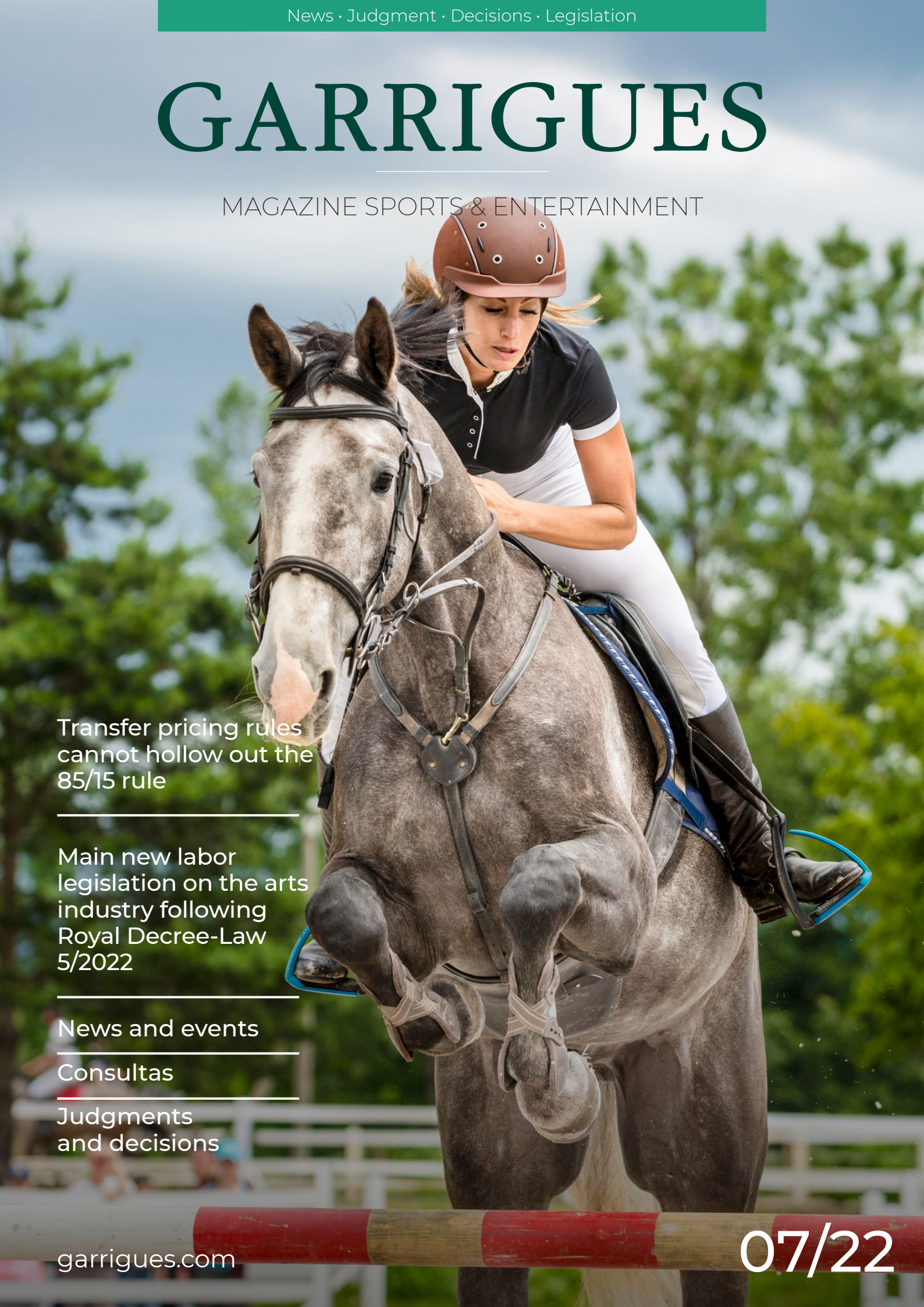

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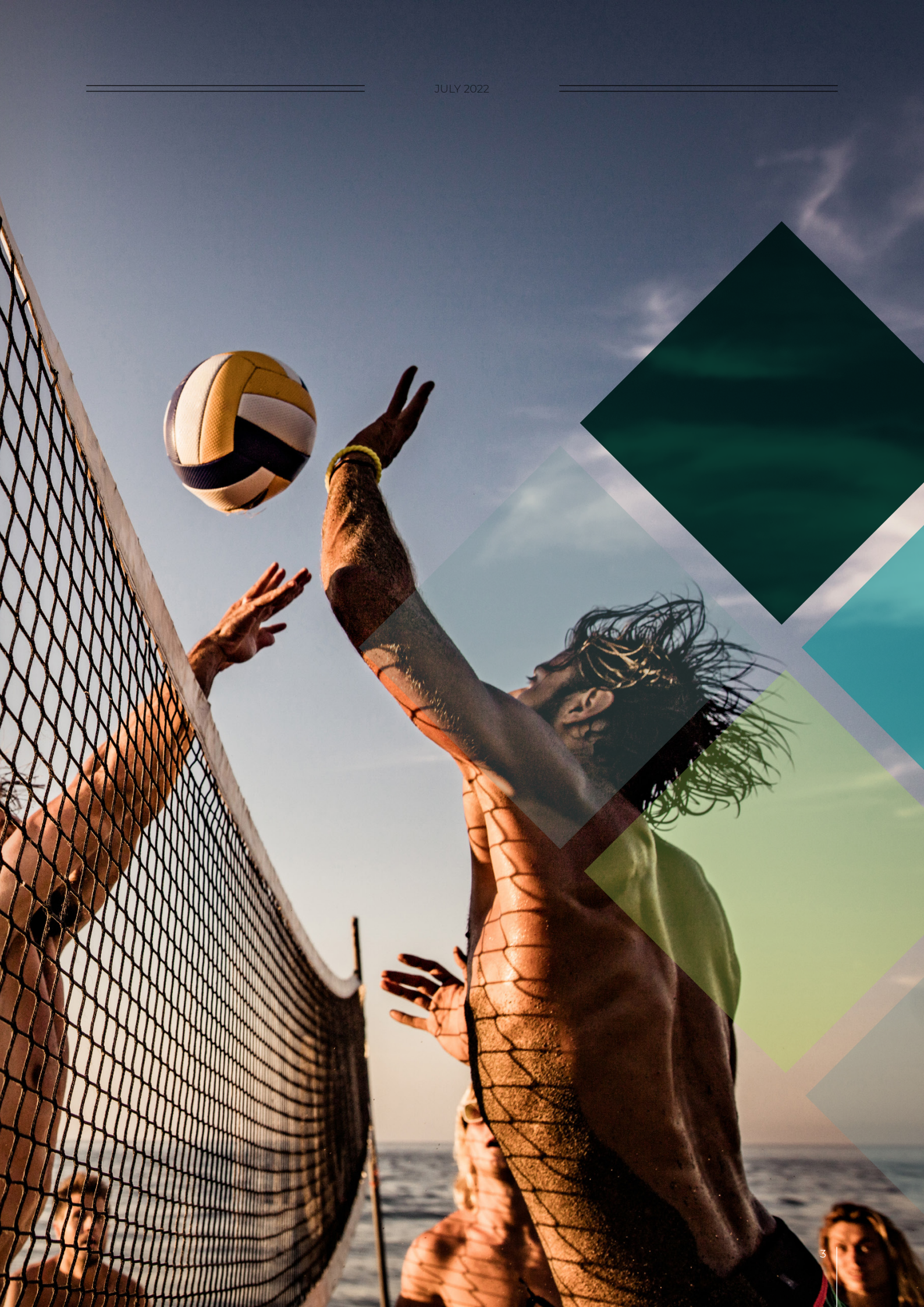

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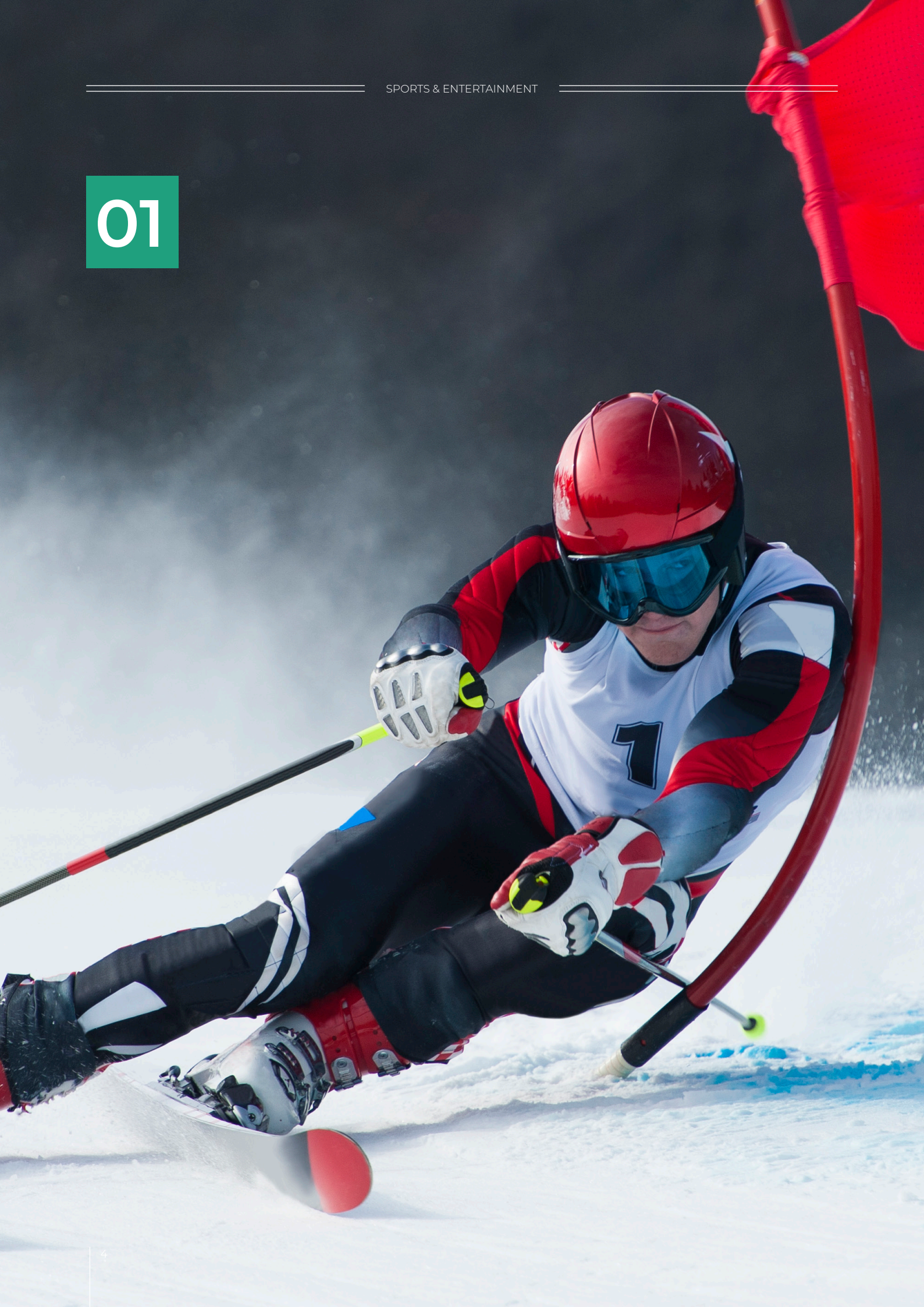

Transfer pricing rules cannot hollow out the 85/15 rule

José María Cobos Gómez

The now familiar 85/15 rule allows athletes to assign their rights of publicity to the club employing them through a company if the amount paid by the club in exchange does not exceed 15% of the aggregate amount of compensation paid (employment relationship plus rights of publicity). If this limit is exceeded, the income arising from assignment of rights of publicity is attributed to the athlete.

However, taking the view that assignment by an athlete of rights of publicity to a personal company is a controlled transaction due to the close relationship between the two, the tax authorities have been making adjustments based on the transfer pricing rules. The approach is apparently straightforward: for a company to be able to assign rights of publicity to a club, that company must first have "acquired" them from the athlete. And because in most cases the athlete is shareholder in the company, owning an interest which, for tax purposes, makes them related parties, transactions between the athlete and the company (and, in particular, the assignment of rights of publicity to the company) have to be priced at market value, meaning the price that would have been agreed between independent parties, and the conditions should satisfy the arm's length principle. In the tax authorities' opinion, the best way to determine this market value is by reference to the income received by the assignee companies in respect of the rights of publicity.

The tax authorities' approach entails, de facto, a hollowing out of the special income allocation rules. The safe haven that the 85/15 rule had appeared to provide has ceased to function, since even where the limit in question has been observed,

However, taking the view that assignment by an athlete of rights of publicity to a personal company is a controlled transaction due to the close relationship between the two

any income deriving from rights of publicity continues to be allocated to the athlete based on transfer pricing rules. This form of adjustment has been confirmed, for example, by the January 26, 2022 Madrid high court judgment (appeal 30/2020).

There has nevertheless been a dramatic shift in the debate, initially in the Catalan high court judgment of April 20, 2021 (appeal 1618/2021), and definitively in the decision delivered by the Central Economic-Administrative Tribunal on November 23, 2021 and the national appellate court judgments of February 25, 2022 (appeal 605/2019), March 16, 2019 (appeal 604/2019)

These rulings start out from the premise that for the special rule to apply to income from rights of publicity only three requirements have to be met:

a) The taxpayer must assign the right to commercial exploitation of their identity to another, resident or nonresident individual or entity (assignee).

b) The taxpayer (worker) must provide their services to an individual or entity (employer) under an employment relationship.

c) The employer must have obtained from the assignee the right to exploit the worker's identity.

This approach is the core factor for understanding the true scope and purpose of the 85/15

rule, because where the above requirements are met, the case falls completely within the scope of that rule, and two possible scenarios are inferable from applying it:

a) If the 85/15 rule is not followed, the athlete is liable for personal income tax on all amounts of income paid by the employer which come from the assignment of rights of publicity.

b) If the 85/15 rule is followed, there is no such allocation, and all amounts of income paid by the employer that come from the assignment of rights of publicity are taxed in the hands of the entity to which those rights were assigned.

In other words, satisfaction of the requirements attached to the 85/15 rule implies that amounts of income generated by rights of publicity are not allocated to the athlete, and additionally prevents the transfer pricing rules being applied to assignment of the commercial exploitation of their rights of publicity to the taxpayer's own company.

The described principles do not, however, mean that we will be seeing an end to disputes relating to the commercial exploitation of rights of publicity through companies. Several scenarios may be identified in which all or part of the pricing of assignment of rights of publicity and in particular transfer pricing rules will continue to attract considerable attention, for example:

a) Where athletes carry out their activities as an economic activity, because the requirements for an employment relationship to exist are not met, not even a special employment relationship, there will be no incompatibility whatsoever because the income allocation rules will not be directly applicable.

b) Where athletes who have employment contracts with their clubs have assigned their rights through their personal companies to other individuals or entities with which they have no employment relationship, we find that these other amounts of compensation are not covered by the income allocation rules.

It is clear from this that it would be particularly helpful to see the tax rules applicable to the income of athletes reformed in such a way that takes into consideration the specific characteristics of this group. From this standpoint, the Sports Law Bill, currently laid before parliament, which contains a statement of policy recognizing the right of professional athletes to "receive a specific tax treatment adapted to the lengths of their professional careers and the income generated during them", is a magnificent opportunity to establish rules that would bring an end to disputes over rights of publicity.

The described principles do not, however, mean that we will be seeing an end to disputes relating to the commercial exploitation of rights of publicity through companies

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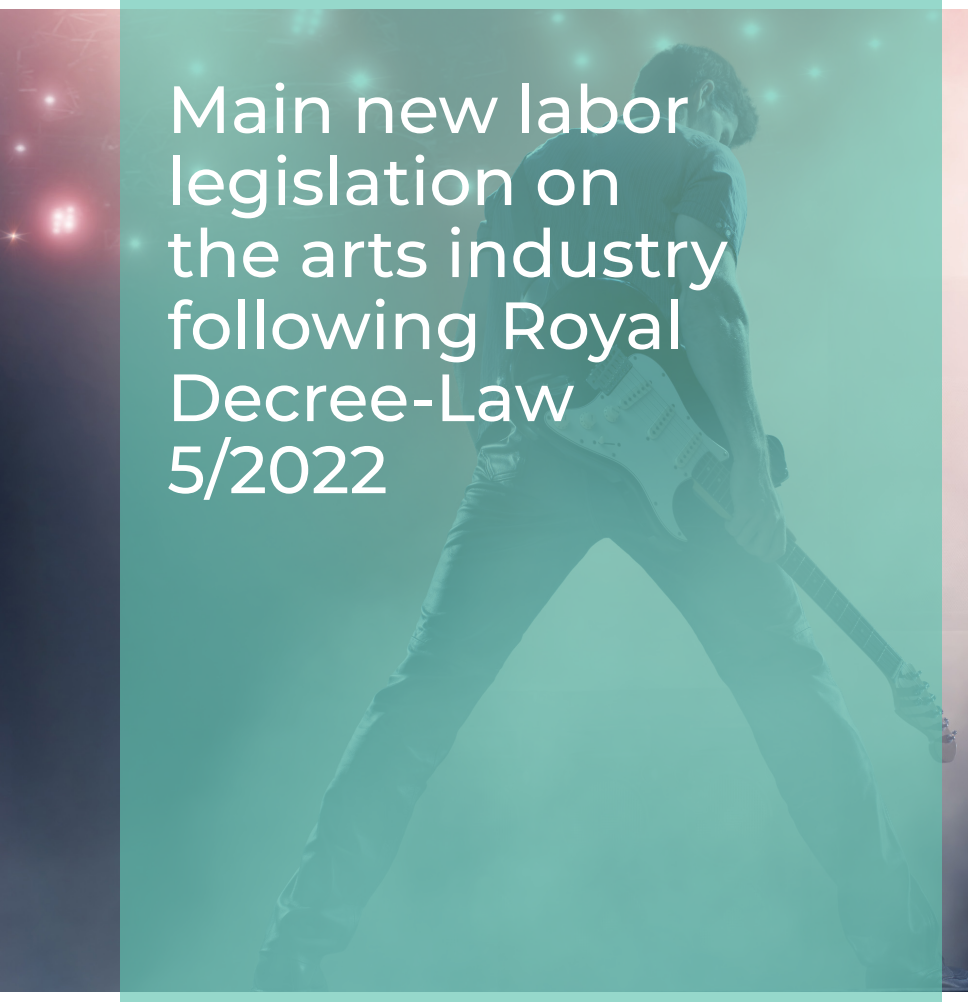
Main new labor legislation on the arts industry following Royal Decree-Law 5/2022



La nueva regulación incorpora importantes novedades para los profesionales que forman parte de este sector y se adapta a las nuevas realidades.

Ángel Olmedo Jiménez

Royal Decree-Law 5/2022 published in the Official State Gazette on March 23, 2022 has brought key new labor legislation for individuals carrying on arts activities and the technical and support activities needed for those activities.

Firstly, the royal decree-law broadens the definition of the parties considered to be included within the scope of a special employment relationship, which previously only included artists performing in public shows, and will cover "artist individuals who carry on their activities in the performing, audiovisual and musical arts, together with individuals who carry out the necessary technical and support activities for those activities to take place".

For these purposes, the main amendments, to Royal Decree 1435/1985, are as follows:

- The categories of individuals falling within the scope of the royal decree have been broadened, as follows:
  - In relation to technical and support activities, Royal Decree 1435/1985 defines technical and support staff as individuals providing services related directly to the artistic activity and who are absolutely necessary for that activity to be carried out, such as preparation, assembly and technical support for the event, or any task needed for that activity to be carried out completely, such as costumes, hairstyling and makeup and any others regarded as support activities, provided the activities are not carried out on a structural or permanent basis by the company, including cyclically.

It needs to be clarified that those individuals in technical and support jobs will be subject to Royal Decree 1435/1985 except in relation to the following matters: (i) ability to enter into contracts, (ii) parties' rights and obligations, (iii) compensation, (iv) working hours, (v) rest periods and vacation and (vi) termination of contract (in relation to breach of contract by the employer or by the worker where it entails complete non-performance of the artistic obligation).

- Moreover, the new article 2 of Royal Decree 1435/1985 includes examples of activities that will be considered to fall within its scope, such as: "individuals who carry out artistic activities, whether drama, dubbing, choreography, variety, music, singing or dance, recreation activities, the activities of specialists; artistic leadership, film-making, orchestra activities, musical adaptation, scenography, production, choreography, audiovisual work; circus performers, puppeteers, magic, scriptwriters, and, generally, any other individual whose activities are recognized to be those of an artist, actor or performer, by the collective labor agreements applicable to performing arts, audiovisual and musical activities".

- It includes as employer of the artist the person "who produces an artistic activity, including entities in the public sector".

- The definition of how artistic activities may be carried out has been updated to accommodate the internet, streaming and public communication or fixation or broadcasting via any technical medium or means.

- Changes have been made to the terms and types of employment contracts with the following effects:

  - Fixed-term contracts may only be concluded to cover employers' temporary needs. The grounds for temporary contracts will have to be reflected in the contract, as well as the circumstances that justify use of a fixed-term contract, including the connection with the term stipulated for the contractual relationship.

  - Fixed-term contracts may be arranged with technical and support staff who carry out activities belonging directly and exclusively to performance of the activity which is the ground for the artistic contract. This is only allowed if they do not relate to the employer's structural or permanent activities.

  - Where the requirements described above for concluding the contract are not fulfilled workers will acquire permanent status.

  - Similarly, any workers who have not been registered for social security purposes or any employees who have entered into back-to-back fixed-term contracts that exceed the limits set in the Workers' Statute (articles 15.4 and 15.4) will become indefinite employees.

- The severance payment for termination of artists' employment contracts on the ground of expiry of the stipulated term has been increased to 12 days' pay per year of service or any other higher amount determined in a collective labor agreement or employment contract.

  Moreover, if the contract was for a term longer than 18 months, the required severance payment must be equal to at least 20 days' pay per year of service.

- The notice required for termination of contract will be as determined in the collective labor agreement or, where none is specified, the periods set out in RD 1435/1985 have been retained.

- Any contracts that were in force before the entry into force of RDL 5/2022 (March 31, 2022) will be governed by the legislation in force when they were concluded.

RDL 5/2022 also determines the following new legislation:

a) A reduced contribution is stipulated for artists whose annual income is below €3,000 and who are registered for the special social security regime for self-employed workers (it states that to accommodate this amendments or adaptations will be made to the contribution and assessment regulations).

b) Contracts under Royal Decree 1435/1985 are made exempt from the additional contribution stipulated for fixed-term contracts for periods shorter than 30 days.

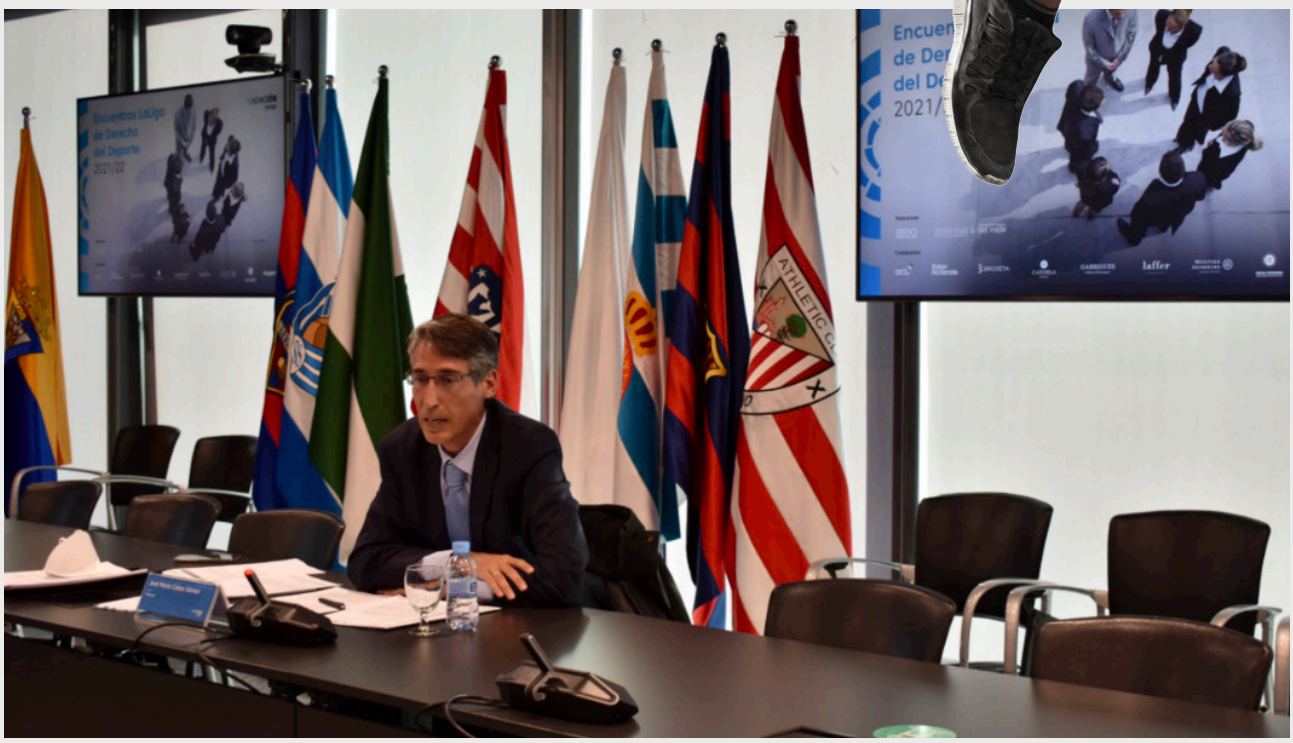
c) Specific categories of artists are included for the purposes of contributions for non-occupational contingencies under article 32.3 of the Contribution Regulations.

NEWS AND EVENTS

Conference held on “The Culture and Sports Industry. Key Activities in the Spanish Economy” organized by CEOE

The Culture and Sports Committee of Spanish employer’s confederation CEOE held on February 2022 a conference on “The Culture and Sports Industry. Key Activities in the Spanish Economy”.

The second round table, with the participation of Félix Plaza, director of Sports & Entertainment at Garrigues, explored the challenges that the sports community has to face to be represented in economic policies as a sector that benefits people’s welfare. There was a debate on this subject.



Conference organized by LaLiga foundation. José María Cobos gave talk on the firm’s behalf

Garrigues partner José María Cobos, participated in the seventh forum organized by Fundación LaLiga on Sports Law in the 2021-2022 season, with a talk on new legislation in relation to the assignment of rights of publicity under the 85/15 rule, which examined the latest administrative and judicial pronouncements on the compatibility of transfer pricing rules and income allocation rules in relation to the assignment of publicity rights.

Resolutions

There is no specific rule on application of article 18.6 of the Corporate Income Tax Law (LIS) where professional member is non-Spanish resident

DGT resolution V3227-21 of December 28, 2021

The requesting party is a non-Spanish resident individual and therefore not a Spanish personal income taxpayer. He is professional member of a Spanish limited liability company providing sports advisory services. The issue concerned how to determine market value in relation to services provided by non-Spanish resident professional partners.

Article 18.6 of the Corporate Income Tax Law sets out the requirements for the value agreed between the parties to be considered to match the market value for services provided by a professional partner.

The DGT concluded that this article does not contain any specific rule as to how it applies where the professional member is non-Spanish resident.

Support granted to non-Spanish resident high level athlete is exempt from nonresident income tax if requirements in personal income tax legislation are met

DGT resolution V3145-21 of December 20, 2021

The issue concerned the nonresident income tax exemption for economic support received by a high level athlete.

The DGT replied that the nonresident income tax legislation simply states that income is exempt if it is exempt for personal income tax purposes subject to the same conditions as for residents. Article 4 of the Personal Income Tax Regulations contains the requirements that have to be met to apply the exemption to economic support for sports training and coaching.

It has to be checked therefore whether the requirements set out in the personal income tax legislation have been met to determine whether the nonresident income tax exemption may be applied.

DGT analyzes possible tax on economic activities classifications applicable to football training activities for small children as out of school activity

DGT resolution V2754-21 of November 10, 2021

A taxpayer requested clarification over the classifications captions into which to class the training of groups of children to play football as an out of school activity.

The DGT replied that there are several options:

- Section two "Professional activities", group 82 for "Teaching professionals", which is the category for teaching activities by levels of education carried out by individuals on an individual and personal basis, including sports and physical education professionals, which contains group 826 "Teachers of various subjects such as physical education and sports, languages, typing, preparation for exams, public sector exams and similar".

- Section three "Artistic activities", group 04 for "Sport-related activities" is the category for professionals carrying out activities more directly related to sport. This category contains group 041 "Football players and trainers".

Lastly, the DGT concluded that it should be registered in group 826 of section two "Teachers of various subjects such as physical education and sports, languages, typing, preparation for exams, public sector exams and similar", if the football trainer services for groups of children are given for sports education and teaching, or in group 041 of section three "Football players and trainers", if those services are related more to participating and competing in sport.

DGT examines difference in tax on income of non-Spanish resident artists and technical staff

DGT resolution V2965-21 of November 22, 2021

An entity that organizes and manages concerts submitted an issue related to the obligation to withhold tax, and, where that obligation existed, the applicable percentage of income paid to non-Spanish resident artists and technical staff and to nonresident companies who act as intermediaries with the artists and outsource other elements needed for a performance.

- On the income received by Portuguese and French artists, the DGT noted that, under the tax treaties, that income is taxable in Spain if it is received directly and also if it is received through other individuals or entities. That income is taxable under article 13.1. b) 3 of the Revised Nonresident Income Tax Law and therefore subject to the rules on withholdings at source. Because the taxpayers are resident in another EU member state the withholding rate is 19%.

- On the income received by Portuguese and French technical staff, the DGT noted that the tax treaty provisions on income from professional activities as independent contractors do not apply to them. Accordingly, this income is not taxable in the state where the services are provided, unless they have a fixed base from which to perform the activities. Therefore, the income received by technical staff is not taxable in Spain, nor should any withholdings be made from it, although there is a requirement to file a negative tax return under article 31.5 of the revised Nonresident Income Tax Law.

- The income received by intermediary companies to outsource other elements needed for a performance does not fall within the scope of article 17 of the tax treaty and therefore is not taxable in Spain unless companies carry out their activities through a permanent establishment. Moreover, the DGT noted that if there is not a proportional relationship between the amount paid as compensation for the support activities for a performance and that paid in respect of

the artists' performance, a portion of that income may be considered to relate to the artist's performance and to be taxable in Spain.

Income obtained by not-for-profit sports association is subject to and not exempt from corporate income tax if it comes from the conduct of an economic activity

DGT resolution V0248-22 of February 11, 2021

A sports enterprise is set up as a not-for-profit association and has been declared to be in the local public interest by the local authorities for the place where it has its headquarters. The enterprise asked about the rate of tax for income obtained from performing tasks falling outside its activities as an association, namely, activities related to advertising and public relations.

The DGT noted that the written request for resolution does not say whether the enterprise has been declared in the public interest under Organic Law 1/2002 of March 22, 2002 on the Right of Association, and therefore the reply is based on the assumption that, due to not having that declaration, Law 49/2002 is not applicable to it. Because it is a not-for-profit entity, it is considered partially exempt and the special rules under Chapter XIV of Title VIII of the Corporate Income Tax Law are applicable to it. Therefore, the income obtained by the requesting entity is exempt if it comes from the performance of its purpose or specific aim and was not obtained from the conduct of an economic activity, so the income obtained from providing services related to advertising or public relations not related to its purpose or aim is subject to and not exempt from corporate income tax.

Steward services are considered to be provided in Vizcaya if their effective use takes place there

Resolution by Vizcaya provincial tax authorities dated June 19, 2021

A company is going to provide steward services during matches in a European competition which is going to take place in Vizcaya, organized by an entity located in Switzerland. An issue was submitted in relation to where the steward services are supplied for VAT purposes.

The Vizcaya provincial tax authorities noted that the general rule is that the services are taxable for VAT purposes where the customer is a trader or professional established in the VAT area. They may also be regarded as supplied in the VAT area where their effective use or enjoyment take place there.

How the effective use rule applies to steward services depends on whether the customer plans to carry out transactions in the area to which they are connected. In this case, the company entering into the agreement for the service, headquartered in Switzerland, is going to use it in the course of a sports event that it has to organize. Therefore, the provincial tax authority concluded that the services are regarded as provided in Vizcaya and must be taxed there.

DGT explores the requirements to be met for medical services to be VAT exempt

DGT resolution V0477-22 of March 10, 2022

A registered doctor is going to attend to any medical incident that arises during the matches of a basketball team. The issue concerned whether those services are exempt from VAT. The DGT explained that the doctor will be treated as a trader or professional for VAT purposes if they organize a set of human and material resources, independently and under their responsibility, for the conduct of a business or professional activity. It noted, however, that medical assistance is exempt from VAT. The CJEU's case law requires two conditions to be met to apply the exemption: i) the supplied services must involve medical services; and ii) they must be provided by individuals who possess the necessary qualifications. Based on that case law, the DGT replied that the supplied services must be assistance to individuals consisting of the provision of medical, surgical or health care services relating to the diagnosis, prevention or treatment of illnesses. Additionally, the services must be supplied by a medical or health care professional, a condition that is expressly defined in the law.

The DGT concluded that the VAT exemption applies to medical assistance, surgical and health care services, relating to the diagnosis, prevention and treatment of illnesses supplied by medical or health care professionals (in line with the law), even if those professionals act through a business company that issues invoices for those services to customers. If these requirements are not met, the supplied services are taxable and not exempt and the applicable rate is 21%.

DGT explores possible tax on economic activities classifications for activities involving teaching padel and tennis and organizing sports events and camps

DGT resolution V0435-22 of March 7, 2022

The issue concerned the tax on economic activities liability and captions in which to register the activities of a requesting party who teaches padel and tennis and is going to organize sports events and camps. The services that will be provided include accommodation, training, rental of sports facilities for the event and sales of tickets and sports equipment.

The DGT explained that the requesting party has to register under the following captions:

- Due to carrying on activities for teaching tennis and padel the requesting party should be registered in group 826 of section two of the classifications, "Teachers of various subjects such as physical education and sports, languages, typing, preparation for exams, public sector exams and similar".

- Due to organizing professional sports events at the facilities of others, the requesting party should be registered in caption 968.2 of section one of the classifications , "Organization of sports events at facilities that are not owned by the organizers". Registration under that caption covers selling tickets, which is not a separate activity from organizing the events.

- Due to the services supplied as part of the organization of sports camps and events (such as accommodation and transport) in which they carry out the activities of an intermediary, the individual should be registered in group 755 of section one of the classifications, "Travel agencies".

- Due to the rental of sports facilities for the camps and events, if they are leased in the consulting party's name, the individual should be registered in caption 968.1 of section one of the classifications, "Facilities for holding sports events". If they are not leased in any capacity, in that caption 968.2.

- Due to the sale of sports equipment, if the consulting party sells directly they should be registered in the relevant retail trade caption according to the type of sports equipment that they sell. If the consulting party does not sell the equipment directly, but carries out mediation activities in person directly, they should be registered in group 599 of section two of the classifications, "Other professionals related to trade and hospitality, not included elsewhere". If the mediation activities are carried out by a business organization, they should be registered in group 631 of section one of the classifications, "Trade intermediaries".

Regarding the tax liability, due to being an individual, all economic activities carried out by the consulting individual are exempt

Income gained from transfer of ownership by eminent domain of land used to carry on an economic activity by a not-for-profit sports enterprise is not exempt from corporate income tax

DGT resolution V0850-22 of April 20, 2022

The consulting entity is a private not-for-profit association set up for encouraging and carrying out sports activities and participating in official activities or competitions. It is also a recognized social enterprise and is partially exempt from corporate income tax. The local authority initiated and approved an eminent domain procedure that included a portion of the land used for its specific activity and, following court proceedings to determine the just compensation, paid the determined amount. The issue concerned the exemption for transfers for a consideration of assets used to carry out the specific purpose of a partially exempt entity under article 110 of the Corporate Income Tax Law (LIS).

The DGT explained that the activities carried out by the consulting entity amount to the conduct of an economic activity which involves the organization for its own account of material and human resources with a view to participating in the production or distribution of assets or services. Therefore, insofar as the land transferred by eminent domain is used to perform the entity's specific purpose and performance of its purpose determines the conduct of an economic activity, the income obtained on the transfer does not give entitlement to the exemption under article 110.1.c) of the Corporate Income Tax Law, because income from the activity itself does not benefit from the exemption.

Liability for tax on certain modes of transport on acquisition of high-performance competition catamaran

DGT resolution V0950-22 of April 25, 2022

A company acquired a high-performance competition catamaran which it will use exclusively to participate in regattas and competitions. The issue concerned the occurrence of the taxable event for the tax on certain modes of transport defined in the Excise Taxes Law.

The DGT explained that, if the boat is used in Spain by a resident or owner of an establishment in Spain, it will need to be registered in Spain, as required in additional provision one of the Excise Taxes Law. And the first registration of recreational boats and yachts or watercraft is taxable.

However, this obligation (registration) does not apply if within 30 days following the date on which it starts to be used in Spain a self-assessment of the tax has been filed as required in article 65.1.d) of the Excise Taxes Law.

Judgments ans decisions

Penalty on well-known footballer set aside

Supreme court judgment dated December 15, 2021

The Supreme Court settled a cassation appeal lodged by a well-known footballer against the national appellate court judgment dated May 13, 2019 which dismissed the application for judicial review of TEAC's decision on a personal income tax assessment. In its judgment the Supreme Court pronounced on two points of law that qualify for a cassation appeal:

- Whether the social security contributions paid in another EU member state, where they are mandatory for workers, may be regarded as a deductible expense in respect of salary income for personal income tax purposes. The Supreme Court held that insofar as it is a necessary expense to obtain the income, it is intrinsic to the essence of the tax for it to be deductible.

- Whether the income obtained by the appellant from transferring his rights of publicity is income from movable capital or income from economic activities. The Supreme Court explained that the characterization of that income depends on the particular circumstances existing in each case. It pointed out that in this case contractual obligations exist that go beyond simply exercising and exploiting rights of publicity, and therefore it involves the conduct of an economic activity for which the organization of human resources is needed.

As a result, the Supreme Court set aside the assessment decision and the penalty decision.

Penalty imposed on well-known football coach set aside

National appellate court judgment dated December 23, 2021

The National Appellate Court has settled an application for judicial review filed against a TEAC decision setting aside an economic administrative claim relating to a personal income tax assessment on a well-known football coach.

The National Appellate Court held that the authorities' rights to assess and impose penalties had become statute-barred because the period for completion of the audit had been exceeded. It moreover confirmed that the payments made by a club to an entity acting as intermediary between athletes and football clubs must be regarded as payments made on behalf of the coach. This is an amount of income for the coach therefore and must be included in his tax assessment.

Lastly, the National Appellate Court set aside the penalty due to considering that in the penalty decision no reasons were given for the existence of fault, instead only a factual description of the conduct, and as a result the conduct cannot be characterized as reckless or negligent.

Leave granted for cassation appeal lodged by a football club on the deduction of VAT on payments made by the club to its footballers' agents or representatives

Supreme court decision dated March 30, 2022

The Supreme Court granted leave for a cassation appeal filed by a well-known football club against the national appellate court dated May 26, 2021 which dismissed the application for judicial review filed against the TEAC decision that validated the principle applied by auditors regarding the club's inability to deduct input VAT paid on invoices issued by agents or representatives of footballers for signing up or transferring players or making changes to their contracts.

The authorities considered that, although the monetary transaction takes place between the club and the agent, in actual fact the agent is providing a service to the player and the club makes the payment on behalf of the player. Therefore, the amounts paid by the club must be treated as an additional amount of compensation for the footballer as salary income. For that reason, the entity's input VAT is not deductible.

It was held that a definitive ruling on a point of law required for a cassation appeal exists in determining whether the authorities may exercise the power to characterize on the basis of private law, which is the case of the Players' Agents Regulations. Also in determining whether the party that has been denied the deduction of certain input VAT payments is entitled to a complete adjustment to verify whether they are entitled to a refund of incorrectly paid tax.

Horse riding may be considered an economic activity if it is evidenced that an organization of material and human resources exists

Madrid high court judgment dated January 12, 2022

Madrid High Court has partially upheld an appeal lodged by a private party against the Madrid TEAR decision that dismissed the economic-administrative claim filed against a personal income tax assessment decision in which the authorities determined that the expenses associated with horse riding activities were not deductible, due to concluding that the claimant's horse riding activities were not an economic activity for two reasons: for one, that it was not considered reasonable for a professional activity to be carried on which involved such heavy losses; and, for another, it noted that the fact of owning a horse and entering competitions did not amount to an economic activity.

The high court noted that the Supreme Court determined clearly, in a judgment delivered on February 3, 2016, that the fact of having constant losses on an economic activity does not mean that it is irrational and that the horse riding activities do not have to be simply a pastime, because it may be regarded as an economic activity if the existence of an organization of material and human resources for conducting that activity is evidenced. It also explained that the claimant was registered under caption 047 for the tax on economic activities.

The high court concluded that there is no doubt that he carried on horse riding as an economic activity and that it needed to be determined whether the expenses intended to be deducted were associated with his horse riding activity. This issue could not be determined by the high court, due to not having the material resources and support to examine the large number of documents that had been produced and which had not been examined by AEAT. For that reason, the TEAR decision was set aside along with the assessment at issue and a reversion of procedure was ordered for it to be AEAT that determined the expenses that would be deductible in relation to the horse riding activity.

The Valencia TEAR also reached this conclusion in its decision dated October 28, 2021.

The sign of a well-known football club may not be the subject of an international registration as a mark for stationery and office supplies

Judgment by the General Court of November 10, 2021

The General Court of the European Union has set aside the appeal filed by a well-known football club against a decision by the European Union Intellectual Property Office (EUIPO) that refused registration of a mark coinciding with the name of the team for stationery and office supplies. EUIPO upheld the opposition filed by a German company which had registered another mark for identical or similar products, because it considered that the registration of the mark at issue in the proceedings could give rise to confusion among the German public.

The General Court noted, based on items of proof produced by the German company comprising invoices and advertising matter, that its mark had been in actual and continuous use in Germany. It further pointed out that although on a few of the goods designated by the mark applied for it was claimed that an additional figurative element had been added, the head of a bird of prey, it cannot be considered such as to alter the distinctive character of the mark as registered. Additionally, it held that the dominant element in the mark showed a high degree of similarity with the registered mark.

Accordingly, the General Court held that the similarities of the two signs are of a sufficient degree to conclude that there is a likelihood of confusion and stated that the football club may not make an international registration of the mark for stationery and office supplies.

Authorities' prior recognition is needed to be able to apply the tax benefit in support programs for events of special public interest

Murcia High Court judgment dated October 15, 2021

The Murcia High Court has dismissed an application for judicial review against a decision by the Murcia TEAR that validated the principle applied by the auditors on the application of a tax credit in respect of an irrevocable contribution to a not-for-profit entity due to a special event. This was a gift for athlete training programs for the 2016 Olympic Games in Río de Janeiro.

The Murcia High Court explained that the procedure for applying tax benefits provided in support programs for events of exceptional public interest takes place in two steps. The first is for the association of funders concerned to issue a certificate stating that the investments were made within the set of activity plans for the event. The second is prior recognition by the tax authorities that the tax benefits under the applicable law apply. The high court explained that, in this case, the certificate that had to be issued by the association of funders had not been requested nor had prior recognition of the tax benefit by the tax authorities been applied for. This does not involve a formal breach, although it does determine that the company is not entitled to apply the tax benefit.

In relation to the imposed penalty, the high court set the penalty aside due to considering that sufficient reasons were not given because general statements were used regarding an omission of the standard of care required for correct calculation of the tax liability.

If the 85/15 rule is met, transfer pricing rules do not have to be applied to the assignment of rights of publicity between a footballer and the entity at which he is shareholder

National appellate court judgment dated March 31, 2022

The National Appellate Court settled an application for judicial review filed against a TEAC decision dismissing the economic administrative claim relating to a decision on a corporate income tax assessment. In that assessment the tax authorities considered that the income obtained on the assignment of publicity rights to a football club had to be allocated to the shareholder of an entity (a football player). It noted moreover that the transaction between the shareholder and the interposed entity had to be priced at market value.

The National Appellate Court reiterated the reasoning given in two earlier judgments on the same issue. It explained that where the factual condition described in article 92.2 of the Personal Income Tax Law is met, namely, satisfaction of the 85/15 rule (which is not disputed in this case), the transfer pricing legislation in article 16 of the Corporate Income Tax Law does not apply (the judgment refers to the TRLIS, namely the Revised Corporate Income Tax Law). That reasoning is based on article 92 of the Personal Income Tax Law being regarded as a specific law with respect to article 16 of the Corporate Income Tax Law.

The National Appellate Court moreover confirmed the principle determined in the TEAC Decision dated November 23, 2021. TEAC explained that the special regime requires the taxpayer to be liable for personal income tax on all amounts of income paid by the club from the assignment of rights of publicity where the 85/15 rule is not satisfied.

RFEF's conduct for awarding the VAR system amounts to abuse of dominant position

Decision by Commercial Court No 3 dated February 16, 2022

The court upheld a claim filed by a business against Real Federación Española (RFEF), the Spanish football association, on the ground of infringement of competition rules, due to abuse of a dominant position. In 2018, RFEF and la Liga Nacional de Fútbol Profesional signed an agreement for implementation of the VAR system in Spain and the agreed time limit for the experimentation phase of the project was June 30, 2019. Under that decision, on March 1, 2018 the claimant business was appointed technology supplier to the project. On May 15, 2019, however, RFEF launched a public tender to allocate the right to provide the support service for the VAR. The call for applications determined two criteria for awarding the contract: the economic bid and experience in the industry.

The court noted that the exclusive power to organize the award of the service gives RFEF a dominant position in the market. It noted also that the fact that the claimant could submit a bid for the tender means that it cannot be considered abuse of a dominant position. For this to happen, it is necessary for there to be another practice besides that determining exclusion of the claimant from the market. In this regard, the disproportion in the assessment of the only two criteria to be considered for the award indicated that it could be known in advance which of the operators was most likely to be awarded the service. The court determined that all of this had the effect of excluding the claimant from the market for providing the VAR service and therefore concluded that RFEF's conduct amounted to abuse of a dominant position.

The court explained that these are not illegal acts of and in themselves, instead acts amounting to abuse and therefore did not declare the tender for providing the VAR service null and void as the claimant intended. It did uphold the claim for damages for actual loss and loss of profit, set at €1.2 million.

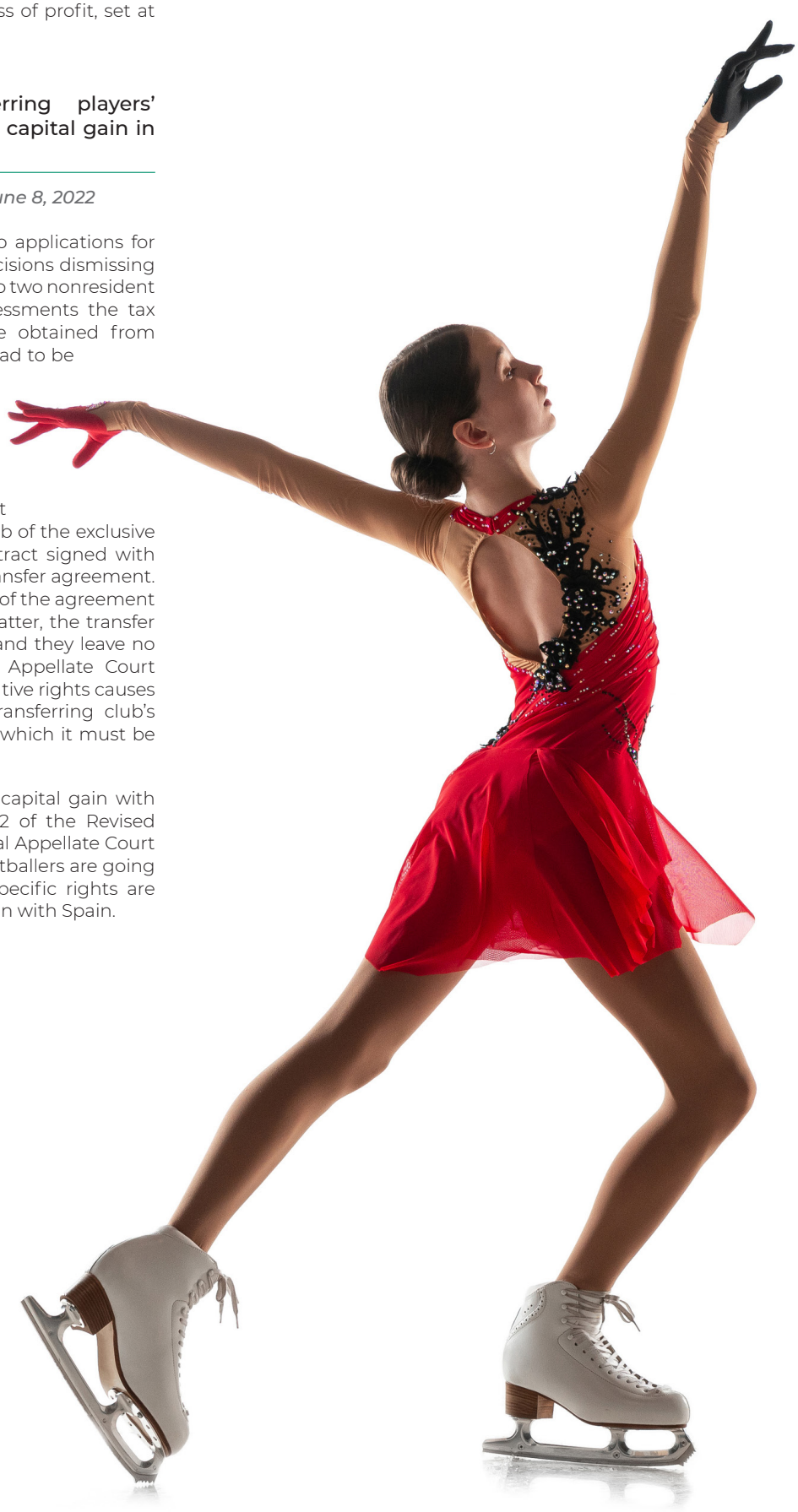
Income obtained from transferring players' federative rights has to be taxed as capital gain in Spaina

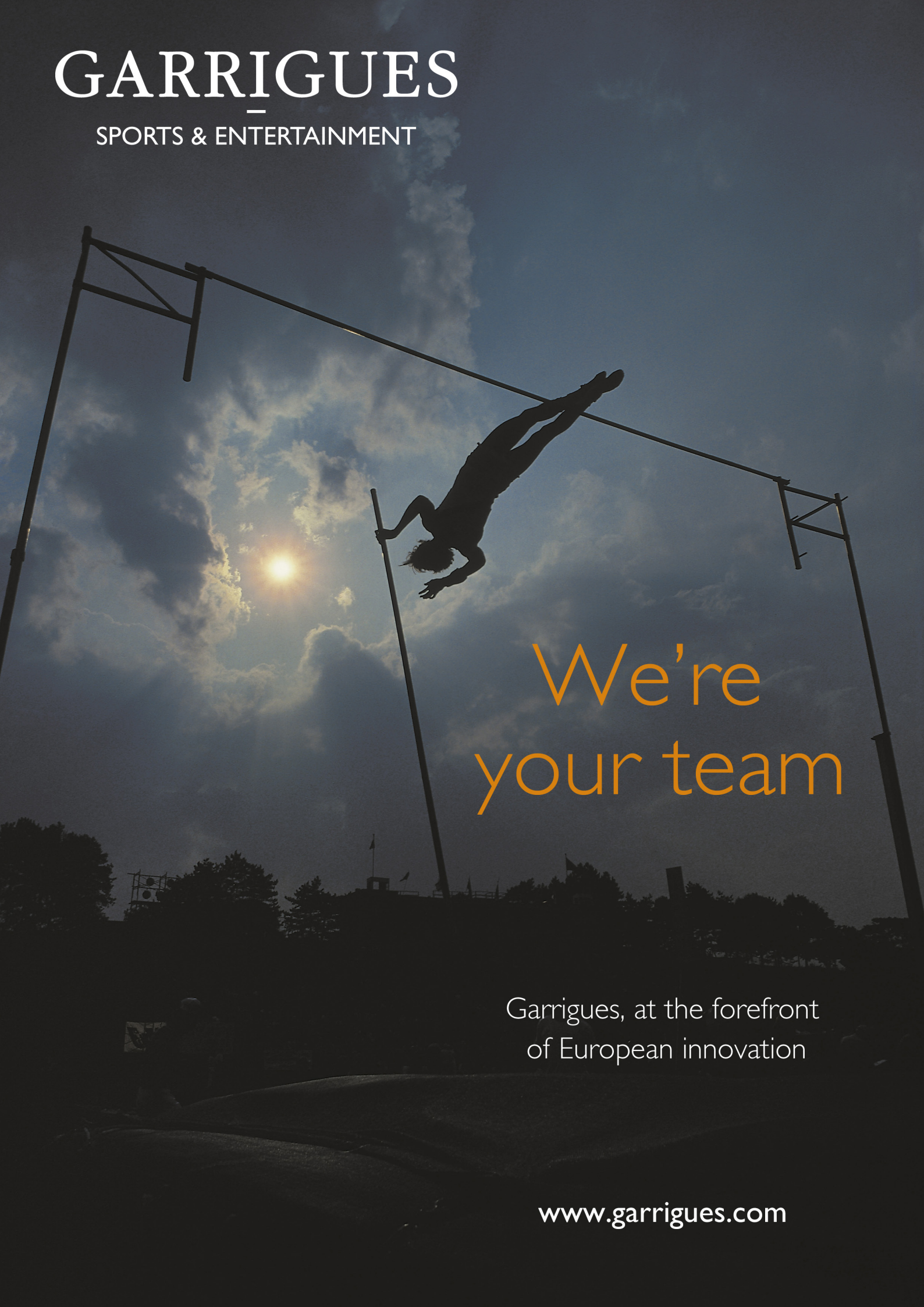
National appellate court judgment of June 8, 2022

The National Appellate Court settled two applications for judicial review filed against two TEAC decisions dismissing economic administrative claims relating to two nonresident tax assessment decisions. In those assessments the tax authorities considered that the income obtained from the transfer of players' federative rights had to be taxed as a capital gain in Spain.

The National Appellate Court explained that there is supreme court case law characterizing contracts of this type. According to that case law, it cannot be considered that the waiver by the transferring football club of the exclusive rights granted by the employment contract signed with the player is being remunerated in the transfer agreement. It explained in this respect that the terms of the agreement are very clear in relation to its subject-matter, the transfer of the football player's federative rights, and they leave no leeway for interpretation. The National Appellate Court noted that the transfer of a player's federative rights causes a change to the composition of the transferring club's capital, in other words, a capital gain on which it must be taxed.

In relation to the factor connecting the capital gain with Spain for the purposes of article 13.1.b).2 of the Revised Nonresident Income Tax Law, the National Appellate Court explained that it is the place were the footballers are going to carry on their activity. Accordingly, specific rights are transferred with an undeniable connection with Spain.

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