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INDEX

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Félix Plaza
Partner in charge of the Sports & Entertainment area
felix.plaza.romero@garrigues.com
T +34 91 514 52 00

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01

An attempt to amend a contract to reduce its terms and not allow the player to carry out his activities is held to be unjustified dismissal

Madrid High Court judgment of December 14, 2022

Ángel Olmedo Jiménez

Madrid High Court holds a player's dismissal to be unjustified and orders the club to pay the amounts of salary stipulated for the two seasons determined in the contract

Issue in dispute and facts of interest

A football club traveled to France, to attract a player, and when he came to Spain, provided him with a house shared with fellow players.

The sports entity delivered a first contract to the player, setting out a term spanning two seasons, a salary amounting to €7,000, gross, for each season, and the right to live in a shared house with full board.

In July of the first season, the player was called up to play in friendly matches and the coach drew up a favorable coach report on his condition. In August, he passed his medical examination, although the club had not yet applied for his Spanish football federation license, nor had he been registered for social security purposes.

At the end of August, the club offered the player a new contract, in which it (i) reduced his salary by almost 50% with respect to the previous obligation, (ii) removed the right to a house, (iii) included an option for renewal and assignment, and (iv) increased the buy-out clause to €20 million. The player did not sign that document.

In the final weeks of September, the club offered the player a new contract which the player refused to sign and the coach notified him that, under instructions from club management, he would not be allowed to participate in the team's training sessions. Later, he was barred access to the team's facilities.

After that happened, and because he had not received any payment from the sports entity, at the end of October he signed a contract with another Spanish team.

The first instance court judge declared that the employer's conduct entailed an unjustified dismissal, and the team was ordered to pay, as severance, the salary amounts stated for the first two years of his contract.

Judicial interpretation

The court validated on appeal that the club's actions were a clear example of unjustified dismissal, and rejected the club's arguments to the effect that (i) no contract had existed because there is no record of the name of the person who signed it on behalf of the sports entity, (ii) the player had not received any amount in respect of his services and (iii) there was no conduct by

The first instance court judge declared that the employer's conduct entailed an unjustified dismissal, and the team was ordered to pay, as severance, the salary amounts stated for the first two years of his contract

the employer that showed any wish to terminate the relationship between the parties.

In relation to this, the judge held it had been evidenced that:

a) The contract was signed between the parties, especially since the team itself traveled to the player's home country to sign him and the team provided him with a home in Spain, shared with fellow players with whom he trained.
.

b) b) The fact that the club did not pay the stipulated amounts of salary does not prevent the existence of a special employment relationship for professional athletes, but rather only generates an evident debt owed to the worker.

Lastly, the judgment ratified the interpretation given by the lower court's judgment when determining the severance for unjustified dismissal, and noted that:

a) In view of the absence of a contractual clause determining the amount of severance, the sum equal to 60 days' pay per year of service is a minimum, and the court has discretion to determine the severance by reference to the existing circumstances (especially, the payments not received due to termination of the contract).

b) In light of the existing circumstances (particularly, that it was the club that brought the player to Spain, that it was later attempted to reduce his working conditions, that no salary was paid to the player during the relationship,

nor was any application made for registration of the player with the Spanish football federation or the social security authorities), an amount equal to the salary that the player did not receive throughout the term of the contract (two years, in this case) was held to be adequate compensation for unjustified dismissal.

It is important to note that Madrid High Court held that it was irrelevant, for the purposes of determining the amount of severance, that the player signed to play for another club in October of the first season (namely, in the fifth of the twenty-four months stipulated in the contract with the club).

Lastly, the judgment ratified the interpretation given by the lower court's judgment when determining the severance for unjustified dismissal

"SAD" companies do not have a specific obligation to audit their financial statements simply because of their legal form

Decision by the General Directorate for Legal Certainty and Attestation, July 12, 2023

Manuel Gómez Estévez

The General Directorate for Legal Certainty and Attestation has analyzed the obligation of SAD companies (*sociedades anónimas deportivas*, the Spanish equivalent of public limited sport companies) to have their financial statements audited simply because they have that legal form, and has concluded that no obligations to this effect exist beyond those under the general rules applicable to any capital company.

Issue in dispute and other facts of interest

An application was filed with Alicante Commercial Registry to deposit the financial statements for the fiscal year ended June 30, 2022 of a company with the legal form of a SAD company which competed in the Segunda División championship organized by the Spanish football federation (RFEF).

Among other defects, that registry refused to accept the financial statements for deposit because they "*are not accompanied by the auditor's report for fiscal year 2021/2022 of the SAD company*". It gave the following reasons for refusal:

a) Both Sport Law 39/2022 of December 30, 2022, in article 69.3, and Royal Decree 1251/1999 of July 16, 1999 on SAD companies ("**RDSAD**"), in article 2, define SAD companies as companies whose corporate purpose is to participate in professional sport competitions, even if temporarily relegated to compete in non-professional categories.

b) Article 69.1 of the Sport Law states that SAD companies are governed by the general rules of corporate law, the Capital Companies Law, and sport legislation.

c) The obligation to audit financial statements for any companies competing in professional categories is set out clearly in the Sport Law in article 41.1.b or in article 64.3 (according to additional provision six of the RDSAD these are professional competitions in the A first and second football divisions and the first men's basketball division - Liga ACB -).

d) Article 20.4 RDSAD contains a general requirement for financial statements to be audited before they are deposited at the commercial registry.

The SAD company concerned filed an appeal against the (negative) assessment report which after being elevated to the general directorate was ultimately upheld for the reasons mentioned above.

The decision has attracted particular attention for the following reasons:

a) It applies the new Sport Law (in force since January 1, 2023).

b) The legislation applicable to the case is not as clear and determinative as would have been desirable (referring to the Sport Law and to the RDSAD) and it therefore sheds light on the issue.

Administrative interpretation

The General Directorate for Legal Certainty and Attestation upheld the appeal lodged by the SAD company, noting that from the described legislation it cannot be concluded that companies of this type are subject to compulsory audit of their financial statements beyond cases in which, under the general rules (article 263 of the Capital Companies Law and additional provision one of Audit Law 22/2015 of July 20, 2015), the requirements making this so are met. The legislation does indeed contain articles on audits of financial statements, although they do not determine a general obligation to have their financial statements audited.

The article that could create the most doubts is article 64.3 of the Sport Law (implemented by article 20.4 RDSAD), which provides as follows:

> "*Sports entities participating in professional competitions shall send to the Sports High Council and the relevant competition organizer the auditor's report on the financial statements and the directors' report before depositing those financial statements, as well as any other accounting and financial information that they may determine*".

The General Directorate determined that not even in this case is any obligation laid down for sports entities participating in professional competitions other than sending the auditor's report to the Sports High Council before it is deposited, but no prior and general obligation is laid down to have the financial statements audited in cases other than those provided for in the legislation on capital companies and on audits.

In short, the directorate general upheld the SAD company's appeal and affirmed that there is no legal provision requiring SAD companies to audit their financial statements simply due to having that legal form. It finished by acknowledging a lack of clarity and specificity in the legislation, and establishes that precisely for this reason it cannot be inferred that a legal obligation exists that is not perfectly established as primary legislation.

Among other defects, that registry refused to accept the financial statements for deposit because they "are not accompanied by the auditor's report for fiscal year 2021/2022 of the SAD company".

NEWS AND EVENTS

Roundtable on '2Playbook Class': the role of compliance in the sustainability of modern sport

In October a new roundtable was held on the widely used sport magazine 2Playbook, in which Félix Plaza, partner and co-director of Garrigues Sports & Entertainment took part. A range of subjects were discussed in this meeting related to compliance and good business practices in the context of the professionalization of sport. Javier Ferrero, partner at Senn, Ferrero Asociados Sports & Entertainment also took part.

In the words of Félix Plaza, "sport exemplifies how things should be in a society, so organizations and athletes should be aware of the impact of their actions".

Event marking the 25th anniversary of Fundal

Félix Plaza, partner and codirector of Garrigues Sports & Entertainment and chairman of Centro de Estudios Garrigues, took part on June 22 in the event marking the 25th anniversary of Fundación Deporte Alcobendas (Fundal), one of the most highly regarded organizations in Spanish sport management.

At this annual event, to which several collaborating entities attended, three new members were accepted, and "Insignias de Plata" awards were given for contributions to the development of their clubs and sport sponsorship programs.

'Who's Who Legal' holds its award ceremony celebrating leading lawyers and law firms in 2023

The legal directory held its annual award ceremony on November 9 to honor leading lawyers and law firms. Félix Plaza, Garrigues partner and codirector of Garrigues Sports & Entertainment, has been recognized in the directory as Global Leader in the practice of sport law.

NEWS AND EVENTS

Todojuristas publishes its annual ranking of law lecturers in 2023

In its now traditional annual ranking of best law lecturers at universities and law schools, Todojuristas singled out five professionals who form part of Garrigues Sports & Entertainment, partners of the firm: Félix Plaza, in the tax law and sport law category; Rosa Zarza, in the labor law category; Carolina Pina, Cristina Mesa and Antonio Muñoz Vico, in the IP category.

Opening ceremony of the 2023-2024 academic year for the MBA Sports, Business & Law program at Centro de Estudios Garrigues

Last October the opening ceremony for the MBA Sports, Business & Law program at Centro de Estudios Garrigues took place, organized in conjunction with the Spanish basketball association (ACB). The MBA is codirected by Antonio Martín, the ACB chairman, and Félix Plaza, partner and codirector of Garrigues Sports & Entertainment and chairman of Centro de Estudios Garrigues.

Resolutions

Reduced VAT rate (10%) applies to walking tours

STA resolution V1886-23 of June 29, 2023

The requesting entity provides walking tour services consisting of tours for tourists with performances by actors or comedians at certain emblematic spots in Spanish towns and cities, recreating historical scenes associated with those places. In its request for resolution, the company asked: i) what the applicable VAT rate would be for sales of tickets for the walking tours, and ii) what the applicable VAT rate would be for services provided by professional comedians and actors for conducting those sightseeing tours.

In reply to the first question, the STA stated that the reduced VAT rate (10%) applied to tickets for the walking tours, under article 91.One.2.6 of the VAT Law, insofar as they may be considered a live cultural show.

On the second question, the STA determined that the 10% reduced VAT rate applied under article 91.One.2.13 of the VAT Law, if the actors/comedians can be considered performers/technical staff, the walking tour is classed as a theatrical work and the requesting entity is the organizer of the work, and does not simply act as intermediary, without taking responsibility for management and organization of the theatrical performance.

Amounts for acting in adverts are classed as earned income

STA resolution V1516-23 of June 2, 2023

The requesting individual was hired by a production company to act in an advert. She is paid €600 for her services and has been registered for contributions under the social security program for artists and performers. The requesting individual asked how her income must be classified for personal income tax purposes.
The STA replied that, under article 1 of Royal Decree 1435/1985 of August 1, 1985, the contractual relationship set up between the production company and the worker meets the requirements to be a special employment relationship. Therefore, those amounts of income must be classified as determined in article 17 of the Personal Income Tax Law. The STA noted in this respect that, because there has not been an organization for the individual's own account of means of production or of human resources with a view to participating in the production or distribution of goods or services, the income obtained by the requesting individual must be classed as earned income.

The STA analyzes whether the income obtained from organizing online videogame competitions is subject to VAT

STA resolution V0558-23 of March 8, 2023

The requesting party's primary activity consists of organizing online videogame tournaments worldwide. A fee is charged to take part in the tournaments, and it was asked whether that fee is subject to VAT.

The STA noted that, under article 7.2.f) of Council Regulation (EU) No 282/2011 of 15 March 2011, accessing automated online games which are dependent on the Internet, or other similar electronic networks, where players are geographically remote from one another is considered an electronically supplied service. Under article 69 of the VAT Law, that service is considered to be supplied in the Spanish VAT area, and therefore subject to Spanish VAT, where the customer is established in that area, or where the requirements set out in article 70.1.8 of the same law are met.

Lastly, the STA concluded that the tax becomes chargeable at the point when the service is performed or supplied. However, if advance payments are required before the service is provided, the tax becomes chargeable at the point when all or part of the fee is collected and in respect of the amounts actually received.

Services consisting of hiring out rooms by sports associations are subject to 10% VAT

STA resolution V0560-23 of March 8, 2023

The requesting organization is a not-for-profit sports association which carries on its activities at a sports facility licensed by a public authority. The requesting organization wishes to hire out the facility to other sports associations to obtain income in respect of the use of rooms, maintenance and cleaning. It was asked whether in the described case the exemption under article 20.1.13 of the VAT Law applies.

The STA replied that to be able to apply the exemption mentioned above three requirements must be met: (i) the transactions must be considered supplies of services, within the meaning of the VAT Law; (ii) the supplies of services must be directly related to the performance of sport or physical education by an individual and (iii) those services must be supplied by one of the entities mentioned in letters a) through e) of article 20.1.13 of the VAT Law. It noted in this respect that, because the supplied services fail to meet the second requirement, the exemption does not apply.

Lastly, the STA concluded that income from the services supplied by the requesting organization is subject to the reduced 10% rate under article 91.1.2. of the VAT Law.

The organization of sport camps is a single whole service for a sport-based business event

STA resolution V0623-23 of March 16, 2023

The requesting entity's primary activity consists of organizing sport camps with food and accommodation services. Its activities are carried on in the Spanish VAT area and the companies purchasing the services are based outside the European Union. It was asked whether the activity carried on by the requesting entity is subject to VAT.

Based on the case law of the European Court of Justice, the STA noted that the services supplied by the requesting entity are an aim in themselves, and therefore, an organization service as a single whole for a sport-based business event. Due to being a single whole the organization service must fully include everything needed for it to be held. For this reason, the STA considered it artificial to exclude from this organization service as a single whole any ancillary but complementary services, such as transport or accommodation. As a result, any accommodation or transport services are not subject to the special scheme for travel agencies, because they are considered to be a means to better enjoy the principal service: the organization of a sport camp.

In relation to the place of supply of the service, the STA noted that, under article 69.1.1 of the VAT Law, the services supplied by the requesting entity are not subject to VAT where the customer does not have a place of business, permanent established or habitual abode in the VAT area. Therefore, because the purchasing companies are based outside the EU, the services supplied by the requesting entity are not subject to VAT.

Amounts of income paid to technical and auxiliary staff hired for public shows are classed as earned income

STA resolution V0339-23 of February 20, 2023

The requesting entity asked about the personal income tax withholding rate that has to be applied to amounts of income paid to technical and auxiliary staff hired in public shows and registered for contributions under the social security program for artists and performers.

The STA noted that the technical and auxiliary staff meet all the requirements under article 1 of Royal Decree 1435/1985 to be included in a special employment relationship. Therefore, they are employees providing services directly related to artistic and performing activities, and needed to perform those activities. Consequently, the amounts of income obtained by these employees are classified, under article 17.2.j) of the Personal Income Tax Law, as earned income.

The applicable withholding rate has to be determined under article 80.1.1 of the Personal Income Tax Regulations. The 15% minimum rate is applicable to special employment relationships until January 25, 2023, when, under the new wording of article 86.2 of the Personal Income Tax Regulations, that minimum rate becomes 2%.
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The STA analyzes the classification of amounts of income paid to artists and performers for carrying out cultural activities

STA resolution V0355-23 of February 20, 2023

The request was submitted by a local council who regularly hires performers such as musical duets or orchestras for cultural activities. It asked whether the amounts of income having to be paid to the performers are subject to withholding tax.

The STA replied that any amounts of income that the local council pays to hired performers are subject to personal income tax regardless of whether they are classed as earned income or income from professional activities. If they were hired under Royal Decree 1435/1985 of August 1, 1985, the amounts of income would be classed as earned income, unless the activity that is carried out implied an organization for the individual's own account of means of production or distribution of goods or services, in which case they would be classed as income from professional activities.

The STA concluded that tax must be withheld from amounts of income classed as earned income under the general procedure set out in article 82 of the Personal Income Tax Regulations, and the applicable rate is determined in article 86.2. In relation to amounts of income from professional activities, withholdings are determined by reference to article 95.1 of the Personal Income Tax Regulations.

Álava provincial tax authorities confirm the deduction of sponsorship advertising expenses

Resolution by Álava provincial tax authorities dated April 18, 2023

The requesting entity intends to carry out advertising activities in 2023. To do so, it wants to sign a sponsorship advertising agreement with an athlete specializing in plate shooting. The items to be sponsored by the requesting entity include: hiring the shooting range for training sessions, plates and bullets, accommodation, daily allowances and travel expenses and the costs of registering to participate in shooting events. It was asked whether the amounts to be paid by the entity would be deductible for corporate income tax purposes.

Álava provincial tax authorities replied that if the sponsorship expense described in the request is an expense for accounting purposes that is appropriately recognized in the fiscal year in which it falls due, has supporting documents and has matching revenues, it only needs to be reviewed whether the tax legislation contains an exemption for the deduction of this type of advertising expenses.

In this respect, under article 31.1 e) of Provincial Corporate Income Tax Law 11/2013 of December 5, 2013), and as determined in the Supreme Court's case law (judgement 458/2021, of March 30, 2020), the Álava provincial tax authority noted that it can be accepted that the sponsorship advertising expenses are incurred to promote the requesting entity's business activities, either directly or indirectly. Therefore, the expenses would have matching revenues, with a present or future impact, and would be tax-deductible.

Amounts paid to athletes for medals obtained in championships organized by sport federations are classed as earned income

STA resolution V1120-23 of May 4, 2023

The requesting individuals are classed as high-level athletes within the meaning of Royal Decree 971/2007, belong to the national side for a specific sport, and participate regularly

in world championships, qualifying heats for the Olympic Games, as well as in the Olympic Games themselves. The athletes asked about how the amounts received from the federation in respect of medals obtained in those championships must be taxed and whether the exemption under article 7.m) of the Personal Income Tax Law is applicable to them.

In its reply to the first question, the STA reiterated the principle determined in resolution V2634-13 and noted that, under article 17.1 of the Personal Income Tax Law, the income described in the request must be classed as earned income. This is because, despite no employment or statute-based relationship existing between the entity and the players, the received amounts derive indirectly from services provided as a result of being selected.

With respect to the exemption under article 7.m) of the Personal Income Tax Law, the STA noted that, in the documents provided, the Sports High Council considers that the amounts are a prize subject to withholdings, and that the Spanish Olympic Committee states that they are not a subsidy. Therefore, although the funds relate to the entities mentioned in article 4 of the Personal Income Tax Regulations, the prizes are subject and not exempt due to not being subsidies for sport training and coaching.

The STA analyzes the tax liability on a number of transactions related to the licensing of rights to make commercial use of an athlete's rights of publicity

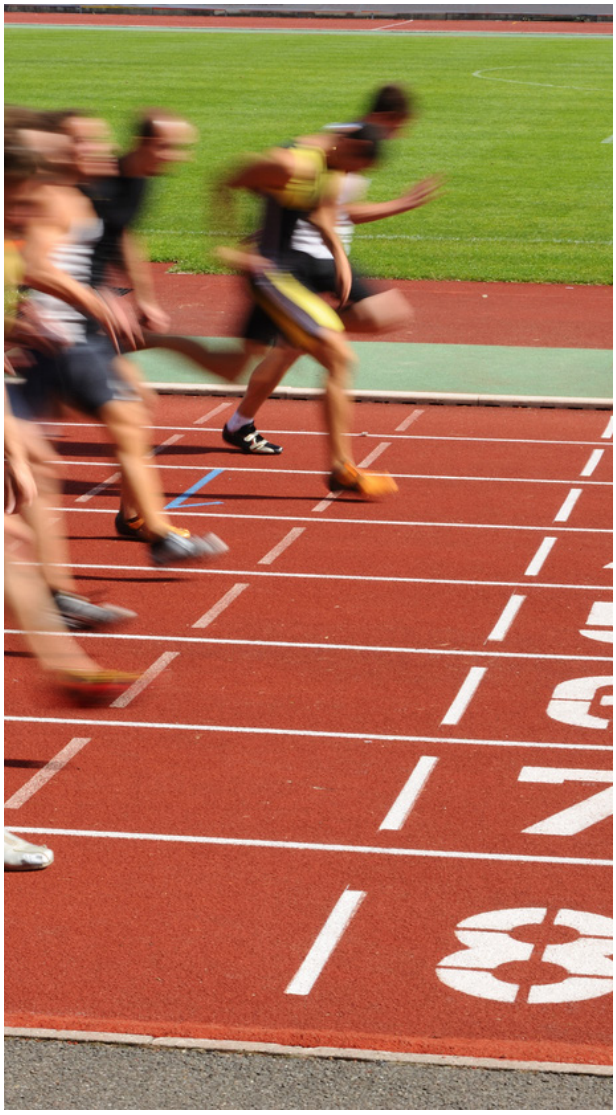
STA resolution V1341-23 of May 22, 2023

The request came from a professional football player who was considering carrying out the following transactions:

- Licensing rights to make commercial use of his rights of publicity over a 25 month period to company A, which is not related to him. In return, the company would pay him a majority percentage of the amounts it receives under various agreements concluded with third parties for the commercial use of his rights of publicity.
- Non-monetary contribution of the rights to payment against company A relating to collecting the sums covenanted for the licensing to a second company B, to which he is not related either.
- Licensing for no consideration to a foundation, in which he will be trustee, of the right to make commercial use of his rights of publicity related to agreements on the use of football boots, with the goal of enabling the foundation to fund itself and fulfill its purpose of promoting sport in childhood, train in values, offer physical and nutritional education to minors and organize sport events for them.

La DGT analiza la tributación en el IRPF de las anteriores operaciones, estableciendo que:

- Under article 25.4 of the Personal Income Tax Law, the licensing of rights of publicity made by the requesting individual to company A and the foundation is classed as income from movable capital.



- If the foundation fulfilled the requirements laid down in Law 49/2002 of December 23, 2002, article 23.1 of that law would be applicable and therefore the income from movable capital obtained by the requesting individual from licensing for no consideration the right to use his likeness to a foundation in which he is trustee would be exempt.
- As regards the transfer of rights to payment to company B before the payments fall due, the STA applied the principles determined in resolution V3324-20, such that the requesting individual, as owner of the rights giving rise to the transferred rights to payment will have to recognize the income from movable capital relating to them.
- With respect to whether any obtained income would qualify for the reduction under article 26.2 of the Personal Income Tax Law, the STA concluded that the amounts of income are generated in respect of every agreement made, and it cannot be affirmed that a generation period greater than two years exists, which is a necessary requirement for it to be classed as clearly multiyear income.

Judgments and decisions

Seville Provincial Appellate Court convicts a former professional football player for a tax offense after finding that income from sport sponsorship received by his sole-shareholder company has to be reported on his personal income tax return

Seville Provincial Appellate Court judgment of March 9, 2023

Seville Provincial Appellate Court convicted a former professional football player for not reporting certain amounts of income on his personal income tax return.

The taxpayer failed to report on his personal income tax return the interest received as income in three accounts owned by him. He also failed to include income from economic activities received under a sponsorship agreement between a well-known sport brand and a company in which he appears as sole shareholder and which was created to hide that income, due to there being no record of any licensing to it of rights to make commercial use of his likeness.

Based on the fact that the accused agreed with the classification and sentence requested by the public prosecutor's office and the private prosecution, the Provincial Appellate Court imposed on the accused a custodial sentence of 6 months and 1 day, disqualified him from standing as a candidate for the duration of his sentence, and ordered him to pay a fine equal to 50% of the defrauded tax liability. Additionally, the court suspended the custodial sentence on the ground that the accused did not have a criminal record and had paid his civil liability debts.

For the purposes of an appeal in cassation a right worthy of protection may be found by examining whether it is necessary for the licensing of rights of publicity to involve a specific activity distinct from sport for it to be classed as income from economic activities

Supreme Court decision of July 20, 2023

The Supreme Court admitted an appeal in cassation lodged by the government lawyer's office against the national appellate court judgment upholding an appeal for judicial review brought by a professional tennis player. The dispute arose over the licensing of rights of publicity by a tennis player to a company in which he owned 2.39% of its share capital. On his personal income tax return, the tennis player reported the income obtained under the licensing agreement as income from movable capital. However, the tax authorities considered that the income had to be classed as income from economic activities.

In its judgment the National Appellate Court had rejected classification of the income as coming from an economic activity due to considering that it had not been obtained in the context of his economic activity as tennis player. It noted in this respect that article 27 of the Personal Income Tax Law provides that in the definition of economic activity it is the taxpayer who organizes for his own account the material and human resources to carry on the activity and assumes the associated risks. However, under the signed agreement it is the company that is responsible for participating in and managing the negotiation processes in the commercial use of the rights of publicity.

The Supreme Court held that there could be a right worthy of protection for the purposes of an appeal in cassation in discerning whether, for amounts of income obtained by professional athletes from the licensing to be classed as income from economic activities, the licensing of rights of publicity needs to entail a specific activity distinct from the sport activity.

Radio stations must pay for the whole season the fee to access stadiums to broadcast football matches

Supreme Court judgment of July 18, 2023

The Supreme Cort decided the appeal lodged by LaLiga, the Spanish professional football league, against the national appellate court judgment of January 28, 2015 which partially upheld the appeal lodged by LaLiga against the decision by the Telecommunications Market Commission. The debate centered on determining the economic compensation that radio stations have to pay for access to stadiums to broadcast sport events and which was set by the Commission at €85 for each match and stadium.

The Supreme Court submitted a request for a ruling on unconstitutionality regarding the article determining free access for providers of radio audiovisual media services in exchange for economic compensation equal to the generated costs. The Constitutional Court determined that the article is not precluded by the right to property or by the freedom to conduct a business because the restriction imposed on organizers of sport events contributes to the achievement of a constitutionally lawful aim - the right to inform and receive information - and is subject to an amount of economic consideration.

The Supreme Court noted that the amount of compensation must be determined by reference to the fixed costs that the clubs incur to provide the radio media services with a cabin or area set up for broadcasting the sport event. The amount must be paid for the whole football season rather than exclusively for each match they attend, because, otherwise, the clubs would be paying the costs generated to ensure the right, regardless of whether the radio operators attend the matches or not. Consequently, the amount was set at €100 for each stadium and match, the sum that must be paid for each complete season.

Payments made to nonresidents in respect of licensing broadcasting rights for sport events relating to the UEFA brand are subject to nonresident income tax

Central Economic-Administrative Tribunal decision of June 26, 2023

TEAC decided the economic-administrative claim filed by an entity on applications for correction of various

self-assessments and for refunds of withholdings on payments to nonresidents in respect of broadcasting rights for sport events and other audiovisual content. The claimant supported that the remuneration for licensing the broadcasting rights of matches does not fall within any of the categories mentioned in article 12 of the Spain-Switzerland tax treaty and as a result considered that the income should not be characterized as a fee. For that reason, it considered that the obtained income should be classed as business profits and may only be taxed in the state of residence of the recipients.

TEAC dismissed the claim because it considered that the element determining classification of the income consists of all the products and services linked to the brand and to the brand's other distinctive signs. It noted in this respect that the essential element that is remunerated in those agreements consists of the licensing of rights which make it possible to broadcast sport events under a certain brand. Therefore, the purchased services are shaped around an intangible asset with a nature that is aligned with that of royalties, and, as such, they must be taxed together.

Lastly, TEAC concluded that the obligation to evidence tax residence lies with the entity interested in applying a tax treaty benefit, not with the tax authorities. As a result, where a certificate evidencing tax residence in a third country has not been provided, the withholding agent must apply the percentage relating to Spanish law.

The Catalan TEAR supports application of the family business regime in a case involving a company owned by a racing driver

Catalan Regional Economic-Administrative Tribunal decision of June 16, 2023

El TEAR de Cataluña resuelve las reclamaciones económico–administrativas interpuestas por un motorista profesional contra los acuerdos de liquidación y las resoluciones sancionadoras derivadas de un procedimiento de inThe Catalan TEAR decided the economic-administrative claims filed by a professional racing driver against the assessment and penalty decisions arising from a tax audit. The Regional Financial and Tax Bureau of the Catalan Special Tax Office adjusted the taxpayer's personal income tax and wealth tax returns for the period between 2014 and 2017, on the basis of evidence of his tax residence in Spain in that period due to having spent more than 183 days in Spain.

After confirming he was liable for wealth tax as a tax resident in all the periods considered, the TEAR examined the eligibility for the exemption under article 4.8 of the Wealth Tax Law of an entity owned by him. The auditors had rejected the exemption because the taxpayer did not receive an amount of remuneration in respect of the management activities he performed which accounts for more than 50% of all the income he obtained. In this case, the racing driver had received amounts of remuneration derived from the provision of his professional services and from the licensing of his rights of publicity, although not for performing his management activities.

Applying the same principles as those applied by TEAC (decisions of February 26 and November 23 2021), the TEAR determined that the truly relevant factor for the purposes of applying the exemption or not is whether the activities carried out by the taxable person at the entity imply the administration, management, running, coordination and operating of the organization concerned. After it has been shown that the taxpayer performs management activities and, additionally, holds a remunerated relationship with the entity for providing services, the legal requirement has been fulfilled, and therefore the exemption may be applied.

The Supreme Court admits for consideration an appeal in cassation to determine whether the income obtained by foreign football clubs in respect of the transfer of players to Spanish clubs is taxable in Spain

Supreme Court decision of March 29, 2023

The Supreme Court admitted an appeal in cassation lodged by a well-known Brazilian football club against the national appellate court judgment of July 12, 2022 which stated that the capital gain obtained by the Brazilian club on the transfer of a player to a Spanish club is taxable in Spain.

In its judgment, the National Appellate Court determined that the Brazilian football club had in its assets the player's federative rights needed for his activities. By transferring them to another club in exchange for an amount of compensation an alteration in the composition of assets took place together with a capital gain (calculated as the difference between the transfer and acquisition value). Under article 13.3 of the Brazil-Spain tax treaty, capital gains are taxable in both contracting States. Therefore, because the player's federative rights for him to carry out his activities in Spain were transferred, article 13.1.b) 2 of the Nonresident Income Tax Law must be applied and the income must be taxed in Spain.

The Supreme Court admitted the appeal in cassation lodged by the Brazilian club and held that the issue that could give rise to a right worthy of protection for the formation of case law consists of determining whether the economic rights derived from the transfer of the federative rights of a player that are received by a club or sports entity not resident in Spain in respect of the transfer of that player to a club or sport entity resident in Spain constitute a capital gain subject to nonresident income tax.

The Supreme Court concludes that the economic conditions imposed by the Spanish basketball association (ACB) in relation to promotions and relegations are disproportionate and discriminatory

Supreme Court judgment of June 26, 2023

The Supreme Court has upheld the appeal in cassation lodged by the government lawyer against the National Appellate Court judgment of June 29, 2021, setting aside the decision by the Spanish Markets and Competition Commission (CNMC) which imposed a penalty amounting to €400,000 on the ACB for engaging in practices precluded by the Competition Law.
Promotions and relegations between Liga ACB and the league immediately below take place between the

champion and the runner up in that second league, which are promoted to Liga ACB, and the bottom two teams in Liga ACB, which are relegated. To be able to be promoted, however, the club concerned has to fulfill the economic-administrative conditions determined by the ACB in its statutes, regulations and decisions. An entry fee needs to be paid which has gradually been increased and the charge varies depending on whether or not the club belongs to the ACB.
The Supreme Court therefore upheld the appeal in cassation due to finding that the ACB decisions determining the economic conditions for promotion and participation in Liga ACB are collusive decisions that prevent or restrain competition by determining disproportionate and discriminatory conditions.

The Supreme Court analyzes the compatibility of disciplinary sport sanctions with administrative penalties imposed under anti-violence legislation and their impact on the 'non bis in idem' principle

Supreme Court judgment of June 29, 2023

The Supreme Court decided an appeal in cassation lodged by the government against the National Appellate Court judgment of December 12, 2019. The latter judgement upheld the appeal filed by a well-known football club, which confirmed the sanction imposed by the Spanish Disciplinary Committee for Sports consisting of closing its stadium for reasons related to a match in the official 2018/2019 season.

In an official football match in one of the qualifying phases for promotion in the Segunda División National Championship, played at the Madrid club's stadium, a number of violent clashes broke out between fans of rival teams. These events gave rise to several administrative proceedings which resulted in the imposition of an economic sanction on the club, on top of that discussed above. The club considered that the non bis in idem had been breached because it was being penalized twice.

The Supreme Court determined that the existence of sport sanctions and administrative penalties does not imply a breach of the bis in idem principle. It noted that, to be able to confirm that breach three identical elements must exist (party, facts and grounds) in both types of sanctions. In this respect, the Supreme Court stated that although the facts and the party are the same, the legal grounds, namely the sanctioning rules, safeguard and protect different interests. The sport sanction is imposed for reasons relating to discipline in sport and the administrative penalties relate to the need to preserve public policy. Therefore, due to not finding a breach of the *non bis in idem principle*, the Supreme Court upheld the appeal in cassation.

The Supreme Court analyzes a potential breach of the privacy and publicity rights of a minor due to the publication of unpixelated photos in two news stories

Supreme Court judgment of February 14, 2023

The Supreme Court decided the appeal in cassation lodged by a father on behalf of his eldest daughter against the Jaén provincial appellate court judgment of December 13, 2021 setting aside a breach of the minor's privacy and publicity rights due to the publication of unpixelated photos of her in two news stories.

To examine the potential breaches of privacy and publicity rights, the Supreme Court examined the circumstances of each of the news stories:

- The first story was an article on the life of the mother with the minor in lockdown. The Supreme Court considered that the validity of the consent given by the mother may be considered to be protected by social use and the circumstances at the time and that it could be presumed in good faith that the publication was not released against the father's wishes. Additionally, it noted that no confidential or private data were disclosed in the article..

- The second article reproduced a link to the mother's social media, which was public and accessible online, in which she had published several photos of the minor. The fact that the photos were accessible online with the mother's consent implies, according to the Supreme Court, that consent to publicly communicate them existed and it cannot be held that publication of the images in this case was contrary to the minor's interests.

Consequently, the Supreme Court dismissed the appeal in cassation due to considering that publication of the photos of the minor does not constitute, based on the circumstances of this case, a breach of the minor's privacy and publicity rights.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