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# GARRIGUES

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## Footballers' tax residence: Sporadic absences and center of economic interests

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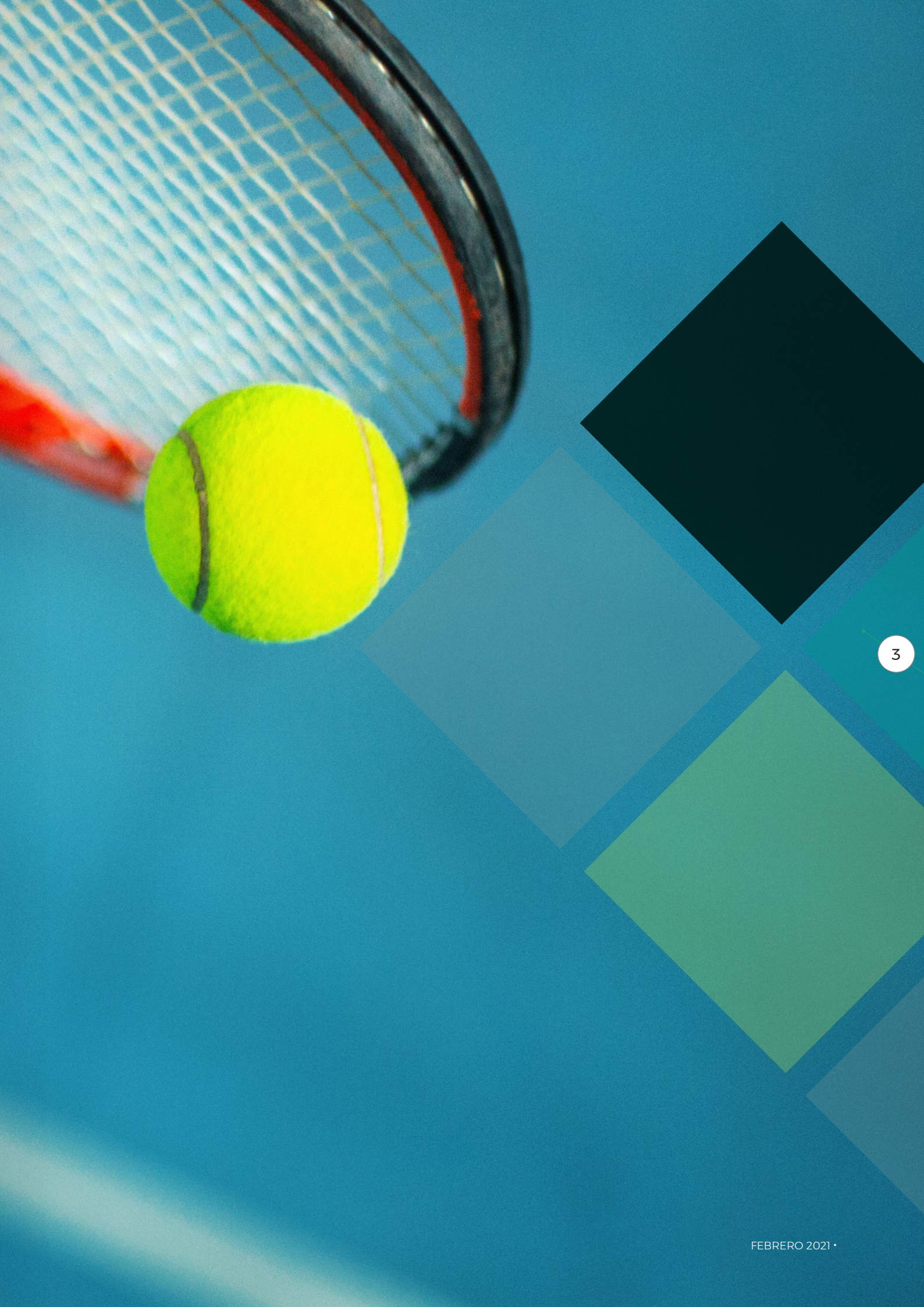

# Footballers' tax residence: Sporadic absences and center of economic interests

## National appellate court judgments of September 30, 2020 and November 20, 2019

**José María Cobos Gómez**

As we discussed in earlier issues, tax residence is a common source of dispute in relation to athletes. It arises for athletes competing mainly on international circuits (tennis or golf players or pilots, for example), though also for team athletes who change residence after signing new contracts.

This second case was examined in the two judgments discussed in this commentary, both concerning the same football player who, after coming to the end of his contract with FC Barcelona and being hired by a team in Argentina, was taxed in Spain under the nonresident income tax rules in fiscal year 2011. The judgments contained the following factual information:

- The footballer provided services as player for FC Barcelona, under a contract signed on November 18, 2010 and expiring on June 30, 2012.
- On May 31, 2011 he left Spain to participate in training sessions with his national side for Copa América to be held in Argentina between July 1 and July 24 of that year, after which he never returned to Spain.
- On August 1, 2011, club management gave notice of termination of his contract taking effect on August 4, 2011, for which he would receive a severance payment.
- On that same date the player had joined the new Argentine team.

In TEAC's opinion, until August 4, 2011 the player was under the control of FC Barcelona, even though on

May 31 he traveled to Argentina to play in the Copa de América tournament. In its opinion, the loan of players to compete in tournaments with their national sides must be treated as a fact that is episodic, normal and even mandatory according to FIFA's Regulations on the Status and Transfer of Players, so his absences from Spain for these reasons should treated as sporadic for the purpose of computing the 183 days spent in the country, unless the taxpayer substantiates residence in another country with a tax certificate evidencing that they took up residence elsewhere. And, because the documents provided to substantiate residence in Argentina had no force as evidence, it concluded that in fiscal year 2011 the player resided in Spain for more than 183 days and therefore was tax resident in Spain.

The issue centered therefore on the definition of "sporadic absence" for determining residence under the physical presence test in Spain. The National Appellate Court sought the answer in the Supreme Court's case law, according to which sporadic absences are computed to reinforce the main rule regarding the time spent in Spain, in that the length of time spent for the purposes of the law is not reduced by the fact that the taxpayer temporarily or occasionally spends time outside Spain. It also recalled that the Supreme Court has explained that sporadic absences must be determined exclusively by reference to the objective fact of the length or degree of physical presence outside Spain, and their existence cannot be linked to the presence of a volitional or intentional element which gives priority to the taxpayer's decision to become established temporarily outside Spain, with a clear intention of returning to the point of departure.

According to this principle, it concluded that the footballer's decision not to return to Spain after Copa América was held is not a determining factor for substantiating his tax residence. And on this point the National Appellate Court turned its reasoning around by stating that the crucial factor is that, between January 1 and August 4 2011, the center of the athlete's economic interests was in Spain (second test specified in the tax legislation for determining tax residence), because he was bound to FC Barcelona under a contract that did not terminate until August 4, as evidenced by the fact that until that date he was receiving his salary from the club, and as a result, until that date he could not sign a new contract with the new Argentine club. In short, his move to Argentina to play in the Copa América tournament with his national side cannot be treated as a final severing of ties with FC Barcelona, because it is instead a temporary exit from the country as part of a mandatory temporary loan of players to compete in championships with their national sides, as allowed in the FIFA regulations.

On the subject of evidencing tax residence in another country, it highlighted that, although the personal income tax legislation does not require as the only means of proof a certificate issued by the tax authorities of the country concerned, this is an irrefutable and accepted means of proving that status. Therefore, due to a certificate of tax residence issued by the tax authorities in Argentina not having been submitted, or reasons for being unable to do so because those authorities had refused to issue it, and because the documents produced to replace that certificate were not sufficient, the National Appellate Court concluded that the footballer was tax resident in Spain in 2011 and therefore was liable for personal income tax rather than for nonresident income tax.

After determining that his tax residence was in Spain, the National Appellate Court examined a second issue of interest, concerning the tax relief on severance payments. As you may recall, the Supreme Court set a principle holding that the minimum severance payment for unjustified dismissal under article 15 of Royal Decree 1006/1985 must always be treated as exempt from personal income tax. However, the issue debated in this judgment was whether an unjustified dismissal or termination by mutual agreement had taken place, because only in the first case could the relief be claimed.

In this case, the National Appellate Court took the view that termination of the employment contract was the result of an agreement between the parties. Although the document terminating the employment relationship characterized the termination as unjustified dismissal, it did not express the ground for dismissal or specify the principles and calculations used to determine the severance. But in addition to this, the National Appellate Court underlined, for the purpose of determining the true ground for termination of the employment relationship, the fact that the player joined the Argentine club before his employment relationship with FC Barcelona had ended required a way to leave this club to be found, which makes it clear that neither party wished to continue with the employment relationship. For that reason it disallowed the relief on his severance payment.


# Compensation list for women's professional football approved

**National Appellate Court approves compensation list in collective labor agreement for women's professional football, although only allows it to apply to clubs that negotiated the collective labor agreement and players who were members of the signing unions, because it had not yet been published**

## National appellate court judgment of July 16, 2020

**Ángel Olmedo Jiménez**

### 1. Issue under debate

The national appellate court judgment examined the validity of the compensation list for women's football players in the Spanish first division from the standpoint of (i) its lawfulness, (ii) the acceptability of the procedure for its creation, and (iii) its scope of application, in that the collective labor agreement had not been published at the time of the trial hearing.

### 2. Facts of interest

After a long negotiation process, which required mediation by the government, the collective labor agreement for women's professional football was signed. Later, the formalities for including players on the training list were carried out, which certain clubs did by notifying the presence of certain

football players and the amounts they deemed appropriate.

Spanish union Futbolistas ON brought a collective dispute claim, asking for the compensation list to be rendered invalid (i) due to having been delivered outside the time limit, (ii) because the amounts on the list had not been negotiated, but instead had been determined unilaterally by the clubs, and (iii) due to the disproportionate nature of the amounts determined as compensation in relation to the training expenses actually paid by the clubs (arguing that, underneath, it was a disguised retention fee).

Additionally, the union asked for the collective labor agreement to be held to fall outside the Workers' Statute, because it had not yet been published and therefore could not apply to clubs that had not participated in its negotiation (Real Madrid, Athletic Club de Bilbao and Fútbol Club Barcelona), or to players who were not members of the unions signing the agreed terms. Real Madrid also supported this secondary petition.

Whereas the other parties objected to the claim, by arguing that the training fee scheme contained in the collective labor agreement was completely lawful and had been negotiated validly and officially, in addition to raising certain procedural exceptions, notably including the multiple party and non-collective nature of the dispute, stating that it only affected 6 players because the others had renewed their contracts with the clubs that had included them on the compensation list.

## 3. Judicial interpretation

The National Appellate Court first rejected the raised exceptions, by arguing (i) that the collective dispute procedure is the correct mechanism because what is sought is an interpretation of the article in the collective labor agreement relating to training fees and (ii) that the dispute concerns a uniform group of players (aged under 23, eligible for inclusion on that training list) and the inclusion of those players was observed when the dispute was submitted for a court decision.

Entering into the facts of the case, the court took the view that the formal process for including players on the compensation list, according to the observed sequence of facts, fell within the agreement's requirements.

The petition for invalidity met with a similar fate, a decision dismissing the union claimant's claim, due to considering that the amounts on the compensation list had not been negotiated, in that the court ruled that it is not inferable from the wording of the article in the agreement that there is any obligation for those amounts to be agreed between clubs and players.

On this point, and because it was a collective dispute, the National Appellate Court determined that cases that might involve any type of disproportion had be resolved in individual proceedings. The court decision argued in this respect, citing the interpretation in EU case law (Case C325/08 Olympique Lyonnais), that the training fee scheme must be proportionate to the expenditure incurred by clubs on training the players.

Lastly, the claim was partially upheld in relation to inclusion in the scope of the collective labor agreement, after the court stated that it could only apply to players who were members of the signing unions and the negotiating clubs. The reason for this is, because it has not been published in the official gazettes on the date of the trial hearing, the collective labor agreement fell outside the workers' statute and therefore was not enforceable against all comers.

That judgment has now become final.

# EU General Court rules on application of competition law to sporting body eligibility rules and endorses role of the Court of Arbitration for Sport

**Sam Villiers**

On 16 December 2020, the EU General Court handed down an eagerly awaited judgment confirming that the eligibility rules of the International Skating Union (ISU), which penalised athletes participating in competitions not authorised by the ISU, breached EU competition law. The General Court clarifies that while sports governing bodies may establish common standards for the organisation of sporting events, such rules must not unjustifiably prevent third party organisers from accessing the market. Moreover, such rules must be fair and proportionate.

In addition, the General Court underlines that the current arbitration system as adopted by the ISU and many other sports governing bodies, that essentially grants the Court of Arbitration for Sport exclusive jurisdiction over sports-related disputes, does not violate EU law.

## Background

The ISU is the sole body recognised by the International Olympic Committee to administer figure skating and speed staking on ice. The ISU and its members — the national ice staking associations — organise and generate revenues from speed staking competitions such as the Winter Olympics and the World and European championships.

Under the ISU eligibility rules, speed skaters participating in competitions which were not sanctioned by the ISU could receive severe penalties, including a lifetime ban.

The ISU had refused to approve a third party event to be organised by the Korean company Icederby to take place in Dubai, and thus limited Icederby's ability to attract speed skaters without the threat of severe sanctions.

As discussed in the June 2018 edition of this newsletter, the European Commission opened an investigation into this conduct following a complaint from two prominent

Dutch professional speed skaters. The Commission ruled in December 2017 that the ISU's rules violated the competition rules, namely Article 101 TFEU. The ISU was ordered to stop its illegal conduct and to refrain from any similar measure.

The ISU lodged an appeal of the Commission's decision before the EU General Court.

## The General Court judgment

In its judgment, the General Court confirmed the Commission's Decision that the ISU eligibility rules had as their object the restriction of competition in the market for the organization and commercial exploitation of international speed skating events.

The General Court explained that conflict of interest issues may arise in a situation whereby a sporting body, such as the ISU, both organises its own events and has the power to authorise events organised by third parties. In these circumstances, the sporting body must, when examining applications for authorisation, ensure that those third party organisers are not unduly deprived of market access.

The General Court stated that it is legitimate for sporting bodies to put in place rules that pursue objectives particular to the specific characteristics of the sport. Indeed, the General Court held that sporting bodies such as the ISU may in principle seek to ensure common standards for sporting events by means of a pre-authorisation system. They may also seek to protect the integrity of speed staking from the risks associated with betting. However, in this case, the ISU eligibility rules went beyond what was necessary to achieve these objectives and so were found to be disproportionate. Among other things, the penalties (such as a lifetime ban) were found to be overly severe and the rules allowed the ISU too much discretion to refuse to authorise events proposed by third parties.

The only aspect of the Commission's analysis with which the General Court did not agree related to the Commission's conclusion that the arbitration procedure endorsed by the ISU constituted an aggravating factor for calculation of a potential fine. According to the General Court, recourse to arbitration proceedings before the Court of Arbitration for Sport (CAS) in Lausanne did not constitute an aggravating circumstance in the determination of the level of the fine, as the CAS was an independent body that was appropriately placed to adjudicate disputes between the ISU and its members.

Finally, while the General Court acknowledged that the arbitration rules do not allow skaters to bring an action before a national court for annulment of an ineligibility decision which infringes Article 101 TFEU, they may nonetheless bring an action for damages before a national court. The same applies for third party organisers challenging authorisation refusals. Once before the national court, a request for a preliminary ruling may be submitted to the EU Court of Justice. Additionally, athletes and third party organisers may lodge a complaint, as in this case, to the European Commission or a national competition authority.

Note that the General Court's judgment can still be appealed to the Court of Justice of the EU.

## Implications for sporting bodies

Despite the result in this case, the General Court clearly underlines that sports federations remain free to adopt eligibility rules in order to ensure the proper functioning of their sport, to protect the health and safety of athletes, to ensure the integrity of the sport and to prevent racism, among other legitimate objectives.

Sporting bodies may continue to adopt pre-authorisation systems as long as the criteria set out therein are clearly defined, transparent, non-discriminatory, reviewable and capable of ensuring the organisers of events effective access to the relevant market.

In the wake of this judgment, sporting bodies are advised to amend or update their various regulations in order to ensure that they remain compliant with competition law.

Finally, sporting bodies may continue to apply compulsory arbitration rules that automatically bring sports-related disputes to the CAS.

# NEWS

## Fourth LaLiga conference on sport law. Garrigues Sports & Entertainment invited as guest speaker

The Fourth LaLiga Conference on Sport Law, organized by Fundación LaLiga, was held at LaLiga's offices on December 15.

Felix Plaza, partner in the tax department and co-director of Garrigues Sports & Entertainment, spoke at the conference on the impact of tax on the competitiveness of LaLiga and various proposals of *lege ferenda*.



## SBA opening ceremony

The sport business administration program (SBA) was opened for this academic year on November 19 at Centro de Estudios Garrigues.

Félix Plaza, partner in the tax department and co-director of Garrigues Sports & Entertainment, took part in presenting the program, along with José Guerra Álvarez, LaLiga's general manager, Luis Villarejo, head of sports news at EFE news agency, and Alberto García, goalkeeper for Club Rayo Vallecano de Madrid.

## Garrigues Sports & Entertainment in the media

The co-director of Garrigues Sports & Entertainment and partner in the tax department, Félix Plaza, has been interviewed in the media regarding football taxation and, specifically, about how the Spanish tax regulations harms the player exchange market compared with other jurisdictions. He has explained it in publications such as El Confidencial, Revista Jurídica LaLiga o Playbook.

# Judgments

## 1 Reduced VAT rate not applicable for organization of amateur sports events

*Catalan regional economic-administrative tribunal decision of June 2, 2020*

A business entity organizing amateur motorcycle shows requested clarification of a binding resolution by the Directorate General for Taxes, arguing that the VAT Law article concerned does allow the 10% reduced rate to be charged on amounts invoiced to either spectators or athletes taking part, in relation to the organization of amateur sports shows.

The Catalan TEAR held however that this article does not allow the reduced rate for services provided to individuals participating in sport or physical education activities, or for supplies of services such as those submitted for resolution in the request, but instead are applicable, in eligible cases, on amounts paid for entry to those shows.

The tribunal concluded that the DGT's conclusion is consistent with EU law, so the activities carried out by the requesting party, consisting of the organization of training sessions and competitions for amateur motor cyclists are subject to the 21% standard VAT rate.

## 2 Images captured for news summaries do not have to be confined to the playing field

*National appellate court judgment of October 2, 2020*

An audiovisual media company operating throughout Spain appealed, with opposition from Spanish professional football league Liga Nacional de Fútbol Profesional, against the decision by the Spanish Markets and Competition Commission (CNMC) holding to be lawful the fact that communication service providers, when exercising their right to inform on sporting events of public interest, through news summaries lasting 90 seconds as allowed in the applicable legislation, can capture images of items that are ancillary or indirectly connected with the event, without having to confine them to events that happened on the playing field.

The court considered, however, that sporting events must be seen as an undivided whole, and put concisely, was prevented from upholding the appellant's argument that contents or images not forming part of or not directly linked to the football event should not be computed in the 90 second limit determined for news summaries.

## 3 Breach of decisions adopted at Spanish motor racing association (RFEA) general assembly is a very serious violation of sports rules

*National appellate court judgment of October 2, 2020*

RFEA appealed against the decision by the central judicial review court upholding a claim by the chairperson of an autonomous community motor racing association who considered to be unjustified the penalty for a very serious violation of sports rules imposed on them by the Spanish government's disciplinary committee for sport (Tribunal Administrativo Deportivo or TAD).

The National Appellate Court held that the decision adopted by the RFEA at its general assembly, which came within the scope of budgetary management for the correct funding of sports activities for which the association is responsible is indeed an infringement of sports disciplinary rules and when upholding the appeal, it confirmed the imposed penalty disqualifying that individual from holding any positions of authority in the organization of sport for a two year period.

## 4 The obligation to migrate to DTT for local broadcasters does not infringe on freedom of speech and information and is not discriminatory either

*Supreme court judgment of October 22, 2020*

A number of DTT audiovisual media services providers appealed against various articles in the royal decree approving Spain's Digital Terrestrial Television Technical Plan, by arguing it had discriminated against the providers of local broadcasting services with respect to the national autonomous community providers.

According to the appellants, the obligation to carry out an accelerated process for migrating a few channels to others had been imposed with a breach of the principle of legal certainty and of the principle forbidding arbitrary decisions by public powers, thereby affecting the fundamental rights of freedom of speech and information.

However, the Supreme Court dismissed the appeal, in that the relevant procedure was observed in approval of the plan and the time limit for carrying out the migration, the required compensation mechanisms had been allowed and no breach of the pleaded fundamental rights had existed, in that the appellants had not been deprived of any of the radio spectrum in which they are allowed to broadcast.

## 5 Supreme Court to rule on principle of equality between women and men in non-professional sports competitions

*Supreme court judgment of October 29, 2020*

Two professional kayakers lodged a cassation appeal against a judgment confirming the decision by the Spanish kayaking association not to consider that a loss of opportunity existed for women as a result of women athlete participants being prevented from enrolling in the senior men's category in the descent of the river Sella, by being relegated in the starting positions.

The Supreme Court ruled to admit the appeal for consideration, due to considering that there was no case law on the issue raised and that there was also a need to clarify the scope of the EU directive on the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation for professional athletes participating in non-professional competitions.

## 6 Fixed-term contract limit applies to special relationship for artists

*Supreme court judgment of November 11, 2020*

The Spanish Performing Arts and Music Institute lodged a cassation appeal against a Madrid high court judgment confirming earlier decisions holding that the relationship established with a dancer at Spain's National Ballet is an indefinite-term contract as a result of a string of back-to-back contracts that together had exceeded the maximum duration of 24 months in a 30 month period, under the general rules applicable to fixed-term employment contracts.

Contrarily to the appellant's arguments, the Supreme Court held that it is absolutely inconceivable to allow a temporary contract to be signed without a ground for its temporary nature, or that the EU legislation on the subject should not be applicable.

It therefore held that, to prevent abuses by using successive employment contracts or relationships for fixed terms, the objective principle of limiting temporary contracts to a maximum number applies to special employment relationships for artists, for which it is not necessary to find circumstances indicating abuse or fraud on the law.

## 7 Separate treatment for hunting and fishing for sport in the plan for transition to the new normal as a result of Covid-19

*Supreme court judgment of November 25, 2020*

The Spanish fishing and hunting association lodged an application for judicial review seeking a decision rendering null and void the article in the order easing certain national restrictions following the state of emergency under phase 1 of the plan for transition to the new normal which excludes hunting and fishing as sports from the scope of these new more relaxed measures.

The appellant pleaded that a breach of the fundamental right to equality had occurred as a result of a decision, which in its view was unjustified, to leave those activities outside the plan for easing restrictions. Countering this, the Supreme Court argued that the vast area in which hunting and fishing activities take place makes it impossible to monitor observance of the necessary prevention measures against Covid-19. It held therefore that this characteristic prevents the ability to implement easing measures in the same way as for other sports activities, in view of the intense social contact that they involve. The Supreme Court therefore dismissed the lodged appeal.

## 8 Sponsorship expenses included to compute the 90% tax credit limit for events are not deductible

*National appellate court judgment of December 9, 2020*

A food and beverage business operating internationally appealed against a TEAC decision holding that any sponsorship expenses included to compute the 90% tax credit limit for support to events of exceptional public interest must be treated as gifts and therefore are not deductible from the tax base.

The National Appellate Court confirmed TEAC's decision by arguing that the lawmakers' intention was for sponsorship expenses and gifts to treated in the same way, which necessarily means that the former cannot be deducted from the tax base. So if the expenses were computed to determine the 90% tax credit and were also deducted as expenses, then double deduction would occur.

In short, the National Appellate Court ruled to dismiss the appeal by holding that their treatment as a deductible expense for tax purposes and as computable for the tax credit limit as proposed by the appellant is contrary to the structure of the tax.

## 9 Member states can restrict VAT exemption for services linked to sport or physical education services

*Judgment by the Court of Justice of the European Union (CJEU) on December 10, 2020*

In a proceeding between a golf club and the German government, various questions were referred for a preliminary ruling by the CJEU over whether the article in the VAT Directive allowing an exemption for certain transactions by non-profit making organizations has direct effect.

The CJEU held that the article concerned did not have direct effect, which means member states can define with a certain degree of discretion the specific supplies of services that are exempt, although they must be linked to sport. It concluded by affirming that the article in the directive cannot be relied on to obtain the exemption for other supplies of services closely linked to sport or physical education.

And noted that a non-profit-making organization is an autonomous concept of EU law for which a necessary requirement is that, if the organization is wound up, it cannot distribute profits to its members that exceed the value of the shares in its equity paid up by those members and the market value of contributions in kind.

## 10 Data on doping in sport are health-related data and enjoy special protection

*National appellate court judgment of November 24, 2020*

The Spanish Health Protection Agency (AEPSAD) appealed against a decision by the director of the Spanish Data Protection Agency (AEPD) declaring that AEPSAD had committed an infringement of the Spanish Data Protection Law, defined as very serious.

It was not the existence of health-related data that was at issue, but instead their characterization. The appellant pleaded that an item of data on doping is not an item of health-related data, so its disclosure is a serious rather than a very serious infringement.

The National Appellate Court held that there is no basis for the claimant's argument that data on doping in sport are not the athlete's health-related data, although in the fight against doping detailed rules have been drawn up on determining the existence of violations and their public disclosure to avoid distortion in competitions and, in short, attempt to ensure fair play. It cannot be inferred from those rules that infringements on data protection law are not to be regarded as equally serious as those relating to special categories of data that are specially protected, such as health-related data.

## 11 Madrid High Court overturns acquittal judgment on well-known footballer for violation of fundamental right to effective judicial protection

*Madrid high court judgment of January 20, 2021*

The public prosecutor's office and the government lawyer appealed against a Madrid provincial court judgment upholding acquittal on tax offense accusations for the footballer, his tax advisor and the director of the company responsible for exploiting his rights of publicity.

The appellants pleaded a violation of the right to a public trial with all the guarantees under the Constitution, such as effective judicial protection, on the basis that the evaluation of evidence was unreasonable, illogical, arbitrary and inconsistent.

The court dismissed the first ground, although it partially upheld the appeal due to a defect caused by an absence of reasons in the appealed judgment that makes the judgment voidable producing an adverse effect on the right to effective judicial protection, evidenced by an irremediable "internal inconsistency" in its reasoning.

Therefore, the court did not question application of article 92 of the Personal Income Tax Law (85/15 rule), or the substance of the assignment of the footballer's rights of publicity, but it did consider that there was inconsistency in the judgment due to not replying to an issue raised by the appellants. That issue is the need to make a distinction according to the provenance of the income from the assignment of the right to exploit the right of publicity. The appellants argued that any income that is not connected with his employment relationship with the club is not protected by the special attribution regime in article 92, and the defrauded tax liability in respect of those items is much higher.

The court therefore overturned the appealed judgment and ordered for the case to be returned for a new judgment to be rendered, in which the omissions rendering it null and void are remedied. No determination was made regarding the pleaded unreasonable evaluation of evidence in the appealed judgment.

# Resolutions

## 1 Physiotherapy and osteopathy services are exempt from VAT and personal trainer services are chargeable at the standard rate

*DGT resolution V2257-20 of July 2, 2020*

The request concerned the correct VAT and personal income tax treatment of the activities of two fellow shareholders providing physiotherapy and osteopathy and physical trainer services to individuals and groups to enhance psychomotor skills and assist with readaptation after injuries.

First, in relation to VAT the DGT noted that therapeutic treatments provided by physiotherapists are exempt due to involving the provision of care services in the exercise of a paramedical profession, in the same way as osteopath, gymnastics or therapeutic rehabilitation services are. Teaching the Pilates method, and services linked to sport provided as personal training, group training or for psychomotor skills and personal training for readaptation after an injury, etc. – if they are not provided by social enterprises or establishments – are subject and not exempt, and the 21% standard rate is chargeable.

Moreover, the DGT characterized for personal income tax purposes as income from professional activities the fees paid for services provided to the company by shareholders, where the requirement of being registered for social security purposes is met

## 2 Producing musical works and making audio mixes is not treated as an electronically supplied service

*DGT resolution V2597-20 of July 30, 2020*

The request concerned the VAT treatment of the activity conducted by a sound engineer who has the use of a recording studio where he produces musical works and makes audio mixes which are received by and delivered to clients by email. His clients are both end consumers and traders or professionals in Spain, or inside or outside the EU.

The DGT noted first that the services supplied by the requesting individual are not treated as electronically supplied services, even though the deliverable of the recording and audio services described is recorded and sent electronically. Next it explained that the place of supply of the services for VAT purposes depends on whether the customer is a trader or professional, and they will be deemed to be supplied in the Spanish VAT area, if the customer is not a trader or professional acting as such.

Lastly, for the purposes of the tax on economic activities, the activity must be notified only in classification 039 "Other activities related to music n.e.c." if he does not make the recording of the musical works, and also in 355.2 "Editing recorded sound, video and computer media", if he does.

## 3 The making available of digital platforms may be treated as an electronically supplied service

*DGT resolution V2660-20 of August 17, 2020*

The DGT looked into the VAT treatment of the activity conducted by a company that has developed a computer tool on which musical artists, producers and agents can make their musical repertoires available to digital platforms, for consumers to listen to them online. Through this platform it provides an intermediary service, and is able to include collecting payments from digital platforms for use of copyright protected work by end consumers.

First the DGT explained that the supplied services are characterized as electronically supplied services if they only involve the making available of a computer tool online and the services are essentially automated. In the case submitted for resolution however a mediation service is provided on behalf and for the account of another which cannot be characterized as an electronically supplied service. Besides, since the customers are the musicians and producers who use the computer tool and they are treated as traders or professionals, the place of supply of the service is deemed to be the Spanish VAT area if those services are located in that area.

## 4 Restoration of works of art is chargeable at the standard VAT rate, whereas the supply of those works is subject to the reduced rate and copyright is exempt

*DGT resolution V2777-20 of September 10, 2020*

The request concerned the VAT rate, as well as the personal income tax withholding rate for advertising and public relations activities and activities as painter, potter and sculptor carried on by the requesting individual.

In relation to VAT, the DGT confirmed that the supplies made by the requesting individual are subject to the 10% reduced rate if they qualify as pieces of art. Supplies of services consisting of copyright in sculptures are exempt, though not the restoration of works of art on which the 21% standard rate should be charged, as well as on the services provided as part the advertising and marketing activities conducted by the requesting individual.

In relation to the applicable personal income tax withholding rate, because the income is characterized as income from economic activities the applicable rate is 15%.

## 5 Footballer treated as tax resident in Spain due to spending more than 183 days as result of two contracts with different clubs

*DGT resolution V2833-20 of September 22, 2020*

It was examined whether a nonresident professional footballer who signed a contract with a club for January through June - with a 24% withholding rate as a nonresident taxpayer - and later signed a new contract with another Spanish team - with a withholding rate as resident taxpayer - was tax resident in Spain in that year.

The DGT noted that, because he spent more than 183 days in the year in Spain, which is a determining factor for being treated as a resident tax payer in Spain in that tax period, the requesting individual had to be taxed in Spain as a personal income taxpayer on his worldwide income. It clarified also that on his personal income tax return he can include both his nonresident income tax and personal income tax withholdings.

## 6 The supply of free PDF copies of a sports journal to promote sales is a self-supply for VAT purposes

*DGT resolution V2885-20 of September 23, 2020*

The DGT looked into the VAT treatment of the free supply by an entity publishing a sports journal of earlier issues of that journal in PDF to promote its sales, and whether an invoicing obligation existed in this respect.

First the DGT characterized this transaction as an electronically supplied service - not a supply of goods - taking place as part of a promotional campaign subject to VAT as a self-supply, on which the 4% reduced VAT rate is chargeable. Additionally, due to being a transaction subject to and not exempt from VAT, it is mandatory to issue an invoice and the chargeable amount of VAT must be reported on the periodical VAT return.

## 7 Income from sublease of industrial building for studio is subject to withholding tax

*DGT resolution V3039-20 of October 8, 2020*

It was asked whether tax had to be withheld from the income obtained by a lessee who leases out an industrial building to companies for use as a film studio, and invoices them for use of the building and the utilities they consume while using it.

The DGT stated that the income received from subleasing an industrial building is subject to personal income tax withholdings, provided the income is subject and not exempt, and is paid by an individual or entity under the obligation to act as a withholding agent. Additionally, the DGT noted that the applicable withholding rate on all items paid to the lessee is 19%.

## 8 Withholding rate for various types of payments made by sport association

*DGT resolution V3065-20 of October 13, 2020*

The DGT examined the characterization of payments made by a sport association in respect of courses given, technical reports prepared, and sports activities organized, to determine the applicable personal income tax withholding rate. Their characterization as income from economic activities or salary income depends on the existence of an organization of productive factors by the association.

The DGT took the view that the income obtained from the occasional preparation of technical reports must be characterized as income from professional activities. Payments made to management personnel and refunds of traveling expenses must be treated as salary income, and this second type must be exempt if they are received by an employee subject to certain statutory requirements. Lastly, in relation to the income received by occasional participants in the association's event organization activities, if their participation is provided when undertaking a professional activity, it is characterized as income from professional activities, and otherwise, as salary income.

## 9 Referee services provided by non-profit association are VAT exempt

*DGT resolution V3236-20 of October 29, 2020*

It was asked whether the supply by a non-profit association of referee services at football matches to a business entity holding a concession under a municipal contract for

organization services of municipal sporting events is VAT exempt.
The services supplied by the requesting association are VAT exempt if the association is an entity governed by public law or a private social enterprise or establishment carrying on activities linked to sport or physical education for individuals (regardless of whether the individuals taking part in sport are professionals or amateurs).

### 10 The licensing of rights of publicity as an unpaid and ancillary activity does not trigger 24% withholding tax obligation

*DGT resolution V3362-20 of November 16, 2020 (and similar resolution V2375-20 of September 7, 2020)*

The submitted issue concerned the applicable withholding rate for the remuneration derived from the licensing by a production company to a collaborator of rights to exploit a graphic pack including the design and animation of graphic clips for a television program, as well as the publicity right, provided that their personal appearance is required first on the audio or audiovisual recordings or works.

According to the DGT, because the remuneration to be paid by the requesting person is for the licensing of copyright relating to the design and animation of the graphic clips that the collaborator has to create for a television program, it is treated as income from a professional activity, because it is obtained by the collaborator as part of his economic activity as designer (15% withholding rate).

That conclusion, however, does not alter because the contract stipulates the licensing of publicity rights - for potential personal appearances in the recordings -, because it is not stated that the licensing is remunerated and the signed contract relates to the creative task of producing the design and animation of the graphic clips for the television program and the licensing of the copyright in them, so it cannot be determined that income from licensing the right to exploit the right of publicity arises, which would have given rise to the obligation to withhold tax at 24%.

# Legislation

### 2021 Tax and Customs Control Plan

Decision of January 19, 2021, by the Directorate-General of the State Tax Agency, approving the general guidelines for the 2021 Annual Tax and Customs Control Plan.

In 2021 the income obtained by artists and athletes performing activities in Spain will be more closely monitored. Spain is a venue for international sport events and for the organization of artistic events of various types. Nonresident professionals take part in these activities, individually or in groups, and they can obtain substantial amounts of income for their participation, which in many cases should be subject to nonresident income tax.

The income that will be monitored goes beyond the income received for their professional activities by artists or athletes and includes other types of income closely linked to their participation in Spain.

The monitoring activities will include obtaining information on events organized in Spain to gather information on their promoters, organizers and participants. In view of the wide range of activities that may be included in this field, coordinated activities will be carried out among AEAT's departments with monitoring powers, with the cooperation of the National Office of International Taxation and the National Office of Tax Management