

Taxing Missy: Operation Gold and the 2012 Proposed Olympic Tax Elimination Act

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Introduction

The 2012 London Olympics provided dramatic athletic performances of world champions including Jamaican sprinter Usain Bolt and American swimmer Michael Phelps, while also introducing the world to new elite champions.¹ U.S. medal-winners at the Olympic Games revel in their successes and cherish the results of their efforts by being awarded gold, silver or bronze individual or team medals. Team U.S.A. has repeatedly succeeded as a power-house at Olympic Games, and the 2012 Summer Olympics proved no exception.²

Nationalism, pride and politics aside, after the close of each respective Olympic Games, sparking the commencement of the Paralympic Games at the same venue, U.S. medal-winners face income tax issues resulting from the Games themselves.³ Given that the United States Olympic Committee (USOC) awards U.S. athletes prize money based upon medal performance, medal-winning athletes must pay income taxes on the award or prize money earned.⁴

The purpose of this article is to explore the legal and tax environment surrounding the August 1, 2012 bill referred to as the Olympic Tax Elimination Act (OTEA) which was introduced in the Senate to exempt from gross income the prize money earned by U.S. Olympians from the USOC for medaling in their respective sport.⁵ The OTEA emanated at a time when American economic growth has been relatively stagnant, and income tax issues became a hotly contested political debate for the 2012 Presidential election.⁶ Part I of this article

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¹ See Associated Press, *Gabby Douglas, Who Won the All-around Title at London Olympics, Edges Missy Franklin as AP's Female Athlete*, N.Y. DAILY NEWS (Dec. 21, 2012), <http://www.nydailynews.com/sports/all-around-champ-gabby-ap-top-female-athlete-article-1.1225131> (American gymnast Gabby Douglas was named AP Female Athlete of the Year in 2012, winning the Olympic All-Around title in London and edging out swimmer Missy Franklin who won four gold medals and a bronze in London).

² See generally, *Olympic Games*, OLYMPIC.ORG, <http://www.olympic.org/> (last visited Jan. 25, 2013). The U.S. won first place in the overall medal count at the 2012 Summer London Olympic Games, the 2010 Winter Vancouver Olympics, and the 2008 Beijing Summer Olympics.

³ See Catherine Rampell, *Taxing Olympic Medalists*, N.Y. TIMES (Aug. 8, 2012), <http://economix.blogs.nytimes.com/2012/08/08/taxing-olympic-medalists/>.

⁴ *Id.*

⁵ *Id.*; see also Kelly Phillips Erb, *President Obama Supports Tax Exemption for Olympic Athletes*, FORBES (Aug. 6, 2012), <http://www.forbes.com/sites/kellyphillipserb/2012/08/06/president-obama-supports-tax-exemption-for-olympic-athletes/>. See also Press Release, Marco Rubio United States Senator for Florida, Senator Rubio Introduces Bill to Eliminate Tax On Olympic Medal Winners (Aug. 1, 2012), available at <http://www.rubio.senate.gov/public/index.cfm/press-releases?ID=ea518eca-4667-4771-bee6-3eeda7106aac>.

⁶ Erb, *supra* note 5.

serves as a primer and explores how tax issues have weaved their way into sports law generally. Part II explores the USOC's *Operation Gold* program, including a discussion of the relationship between the NCAA bylaws and USOC with regard to the program and prize money. Part III investigates the proposed OTEA submitted by U.S. Senator Marco Rubio (R-Florida) in an attempt to shelter from taxation the earnings derived from winning Olympic medals.⁷ This section also addresses alternatives to the OTEA, encouraging other tax savvy options outside the outright elimination of such income from the Internal Revenue Code (I.R.C.) purview.⁸

Part I: Tax Issues and Sports Law

Academic discourse and the practical application of tax-related issues are not new in sports law.⁹ For example, in some sport management courses tax issues are addressed at both the undergraduate and graduate levels.¹⁰ Tax issues in sports law cover an extremely broad range of subjects, only a small part of which involve earned income by individual athletes.¹¹ For example, scholarly discussions may focus on the tax consequences of coaching staff rather than on the athletes themselves.¹²

Additionally, tax issues in sports law may concern preferential tax breaks to lure professional teams away from their home city, or, alternatively, to keep professional teams where they are in an effort to prevent them from relocating elsewhere.¹³ The discussion of taxable revenue can be quite a divisive subject at times, particularly when the subject involves raising

⁷ The authors use the abbreviation OTEA for convenience but actual bill was not proposed as such.

⁸ This article specifically addresses and analyzes federal income tax options. It does not address applicable state or local income taxes which could also be imposed on an individual taxpayer's earnings.

⁹ See Sarah K. Fields & Sarah J. Young, *Learning from the Past: An Analysis of Case Law Impacting Campus Recreational Sport Programs*, 20 J. LEGAL ASPECTS OF SPORT 75 (2010) (analyzing cases over the last 30 years that have had an effect on campus recreation programs, including at least four cases whose primary focus was tax related); see also Rodney L. Caughron & Justin Fargher, *Independent Contractor and Employee Status: What Every Employer in Sport and Recreation Should Know*, 14 J. LEGAL ASPECTS OF SPORT 47 (2004) (discussing a variety of tax subjects including, but not limited to, Federal Insurance Contributions Act (FICA) taxes, Federal Unemployment Tax Act (FUTA) taxes, and federal income tax withholding with particular emphasis on the difference between an employee, contractor and independent contractor); Laura Misener, *Safeguarding the Olympic Insignia: Protecting the Commercial Integrity of the Canadian Olympic Association*, 13 J. LEGAL ASPECTS OF SPORT 79, 86-7 (2003) (noting that The Canada Corporations Act allows public organizations that meet the criteria as charitable organizations to be issued specific tax benefits); see also generally Lori K. Miller & Paul M. Anderson, *The Internship Agreement: Recommendations and Realities*, 12 J. LEGAL ASPECTS OF SPORT 37 (2002).

¹⁰ See Sarah J. Young, *A Content Analysis of Legal Aspects Courses in Sport Management*, 11 J. LEGAL ASPECTS OF SPORT 225 (2001).

¹¹ See, e.g., Chad S. Seifried, *The Legality of the Bowl Championship Series (BCS): Examining Pro-Competitive and Anti-Competitive Outcomes on Consumers and Competitors*, 21 J. LEGAL ASPECTS OF SPORT 187, 204-5 (2012) (noting the economic impact of Bowl Championship Series (BCS) football bowl games related to tax revenues from the event); see also Jeffrey S. Fried, *The Sweet Science, Legally Speaking (Professional Boxing)*, 14 J. LEGAL ASPECTS OF SPORT 75, 92 (2004) (emphasizing the importance of avoiding conflicts of interest over boxer's finances, investments and tax considerations by boxing managers).

¹² See Richard M. Southall, Mark S. Nagel, Paul J. Batista, & James T. Reese, *The Board of Regents of the University of Minnesota v. Haskins: The University of Minnesota Men's Basketball Academic Fraud Scandal-A Case Study*, 13 J. LEGAL ASPECTS OF SPORT 121, 137 (2003) (exploring the case involving former University of Minnesota Men's Basketball Coach Clem Haskins, having been ordered to return \$815,000 of a \$ 1,075,000 settlement from his contract buyout by the University of Minnesota).

¹³ See Paul M. Anderson & W.S. Miller, *Sonic Bust: Trying to Retain Major League Franchises in Challenging Financial Times*, 21 J. LEGAL ASPECTS OF SPORT 117 (2011) (discussing the legal and economic issues, including various tax concerns, involving various NBA franchises including the Seattle SuperSonics).

revenue to build sports facilities.¹⁴ The manner in which professional sports leagues might “tax” themselves, by instituting their own cap on spending, in order to resemble some measure of competitive equity among clubs and teams is an interesting study as well.¹⁵ Tax issues have further worked their way into collective bargaining agreements and contract law in general.¹⁶ Indeed, there is also a discussion of Major League Baseball’s *luxury tax* on an annual basis.¹⁷

Other issues in the context of tax and sports law include whether or not private and exclusive country clubs should maintain their tax-free status.¹⁸ Issues involving unrelated business income tax (UBIT) and planned giving to college and university athletic departments have presented athletic administrators with various legal queries and concerns.¹⁹ The right of homeschooled student-athletes to participate in public high school sports has been a relatively recent legal issue and one which focuses in part on the tax revenue which public schools receive from taxpayers, including homeschool families’ contributions.²⁰ Even the practice of ticket-scalping offers opportunities to explore tax issues related to ticket resale regulation.²¹ Thus, tax issues in sports law may present legal challenges and scholarly interest over numerous parties, to include individual athletes, coaches, owners, shareholders, teams, leagues, practitioners and scholars.

NCAA

¹⁴ *Id.*; see also W.S. Miller & Chad LeBlanc, *Bingo?: An Overview of the Potential Legal Issues Arising From the Use of Indian Gaming Revenues To Fund Professional Sports Facilities*, 19 J. LEGAL ASPECTS OF SPORT 121 (2009).

¹⁵ See Richard A. Kaplan, *The NBA Luxury Tax Model: A Misguided Regulatory Regime*, 104 COLUM. L. REV. 1615, 1631-35(2004) (discussing history of the NBA luxury tax).; see also generally Adam Epstein, *An Exploration of Interesting Clauses in Sports*, 21 J. LEGAL ASPECTS OF SPORT 5 (2011).

¹⁶ Anderson & Miller, *supra* note 13, at 135-138 (exploring the lease provision of the NBA’s Minnesota Timberwolves); see also Kaplan, *supra* note 15, at 1621-22 (noting that the NFL has a player *franchise tag* which can only be used once per season and requires teams to make an offer equal to the average of the top five salaries in the player’s position); see also Michael A. Corgan, *Permitting Student-Athletes to Accept Endorsement Deals: A Solution to the Financial Corruption of College Athletics Created by Unethical Sports Agents and the NCAA’s Revenue-Generating Scheme*, 19 VILL. SPORTS & ENT. L.J. 371, 421 (2012) (discussing the USOC’s current status as a tax-exempt entity as it generally fosters amateur sports competition).

¹⁷ See Ronald Blum, *Yanks’ Luxury Tax Increases \$400k to \$19.3 Million*, YAHOO! SPORTS (Dec. 18, 2012), <http://sports.yahoo.com/news/yanks-luxury-tax-increases-400k-151952634--mlb.html>.

¹⁸ See Barbara Osborne, *Gender, Employment, and Sexual Harassment Issues in the Golf Industry* 16 J. LEGAL ASPECTS OF SPORT 25, 50-2 (2006) (discussing the tax benefits of private country clubs that are classified as non-profit organizations, including property tax exemptions. Osborne also notes that a bona fide private membership club is defined as one that has tax exempt status under Section 501(c) of the Internal Revenue Code (I.R.C.).

¹⁹ See Anna S. Tharrington & Barbara Osborne, *An Analysis of the Presence and Perception of the Juris Doctorate Degree in Division I College Athletics Administration*, 18 J. LEGAL ASPECTS OF SPORT 309 (2008).

²⁰ See Paul J. Batista & Lance C. Hatfield, *Learn at Home, Play at School: A State-by-State Examination of Legislation, Litigation and Athletic Association Rules Governing Public School Athletic Participation by Homeschool Students*, 15 J. LEGAL ASPECTS OF SPORT 213 (2005); see also Kathryn Gardner & Allison J. McFarland, *Legal Precedents and Strategies Shaping Home Schooled Students’ Participation in Public School Sports*, 11 J. LEGAL ASPECTS OF SPORT 25 (2001); Joshua Roberts, *Chalk Talk: Dispelling the Rational Basis for Homeschooler Exclusion from High School Interscholastic Athletics*, 38 J.L. & EDUC. 195, 200 (2009).

²¹ See ADAM EPSTEIN, *SPORTS LAW* 19 (2013) (noting that as of 2010, 28 states regulate the resale of tickets such as by requiring a license, fee, or other tax to work as a ticket reseller).

One of the most controversial tax-related issues in sports law and the sports business involves the NCAA itself.²² This organization, which maintains its tax-exempt status along with many of its member institutions, has been the subject of academic discussion and critique for years.²³ I.R.C. section 501(c)(3) exempts from federal income tax various types of organizations, including those established for religious, scientific, or educational purposes primarily, or to foster national or international amateur sports competition.²⁴ Such exemption includes both the USOC and the NCAA.²⁵

It is reasonable to assert that at no time has criticism of the NCAA's tax-exempt structure been more scrutinized than today, particularly given that its multi-billion dollar television contract for its *March Madness* basketball tournament remains exempt from the purview of the Internal Revenue Service (I.R.S.).²⁶ At times, the NCAA and its member institutions engage in activities not normally associated with a tax-exempt organization, including the imposition of politically correct standards of tolerance on its member organizations and signing multi-billion dollar television contracts.²⁷ Some scholars have suggested that collegiate sports (particularly Division I men's basketball and football) more closely resemble professional sports, and that the NCAA at times has not been able to effectively control itself or its members in maintaining a

²² See generally John D. Colombo, *The NCAA, Tax Exemption, and College Athletics*, 2010 U. ILL. L. REV. 109 (2010) (discussing and analyzing the NCAA as a tax-exempt organization especially after the 2006 inquiry by the U.S. Congress asking the organization to justify its exemption); see also *Nat'l Collegiate Realty Corp. v. Bd. of County Commr's*, 690 P.2d 1366 (Kan. 1984) (reasoning that property used by NCAA for its national headquarters was used exclusively for educational purposes within the meaning of state statute granting an exemption); *Nat'l Collegiate Athletic Ass'n v. Kansas Dep't of Revenue*, 781 P. 2d 726 (Kan. 1989) (reasoning that the NCAA was an *educational institution* within the purview of applicable Kansas statute and therefore exempt from sales taxes in Kansas).

²³ See Kadence A. Otto, *Revisiting Tarkanian: The Entwinement and Interdependence of the NCAA and State Universities and Colleges 20 Years Later*, 18 J. LEGAL ASPECTS OF SPORT 243 (2008) (noting that not only is the NCAA exempt from federal income taxes under the I.R.C, but it has been exempt from state taxes as well noting that when it moved in 1999 from Overland Park, Kansas to the Indianapolis, Indiana area, it secured a 30-year lease in the amount of one dollar annually in addition to funding for the construction of the headquarters there).

²⁴ See 26 U.S.C. § 501(c)(3) which exempts from income tax certain types of organizations, to include corporations organized and operated exclusively for religious, charitable, scientific, testing for public safety, literary, or educational purposes, or to foster national or international amateur sports competition (but only if no part of its activities involve the provision of athletic facilities or equipment); EPSTEIN, *supra* note 21, at 42-3 (questioning whether it was a legitimate action for a tax-exempt organization such as the NCAA to wage a campaign in 2005 to eliminate the use of individual school mascots and nicknames that could be perceived as reinforcing negative stereotypes about Native Americans, many of which had been in use for over a century).

²⁵ See Virginia A. Fitt, *The NCAA's Lost Cause and the Legal Ease of Redefining Amateurism*, 59 DUKE L.J. 555 (2009) (discussing NCAA's tax-exempt status in light of the Andy Oliver case); see also Dionne L. Koller, 50 ST. LOUIS L.J. 91 (2005) (noting that the United States Anti-Doping Agency (USADA) is also tax-exempt).

²⁶ See Amy Christian McCormick & Robert A. McCormick, *The Emperor's New Clothes: Lifting the NCAA's Veil of Amateurism*, 45 SAN DIEGO L. REV. 495, 509-520 (2008) (considering the NCAA's tax-exempt status given the billions of dollars television generates for the organization, post-season bowl games and conferences, especially from the rights to broadcast its *March Madness* basketball tournament).

²⁷ See Corgan, *supra* note 16, at 387-94; see also Epstein, *supra* note 21, at 42-3 (offering that the NCAA's tax-exempt status appears to be at a crossroads given the intense public scrutiny over whether its primary purpose is educational in nature when its actions clearly are motivated by raising more revenue, noting that the organization is treated no differently than Salvation Army, Goodwill, United Way, Red Cross, or the Ronald McDonald House, none of which have a \$10 billion television contract).

clear line of demarcation between the amateur and professional ranks with regard to student-athletes, coaches, and athletic administration.²⁸

Income Taxation of U.S. Athletes

The imposition of tax on professional athletes' and sports teams' earnings in the U.S. is not a new or unique concept. The I.R.C. dictates that all income, no matter the source, be subject to tax.²⁹ Because the I.R.S. has an interest in taxpayers' income and earnings on a global scale, U.S. taxpayers are required report their worldwide income on their individual income tax returns.³⁰ In fact, many countries tax income which arises in their own jurisdictions under similarly-designed sourcing rules.³¹ However, the potential for double-taxation on a U.S. athlete's world-wide income is generally minimized by utilizing credits for income taxes paid to other countries on their foreign source income.³²

Professional athletes are subject to various domestic and international taxing regimes based purely on the nature of their business. With the ever-growing international demand for sporting competitions, athletes are beneficiaries of increased international opportunities.³³ Consider, for example, that the four major tennis tournaments in the world include the Australian Open, French Open, U.S. Open and Wimbledon; and that while arguably the most popular golf tournament -the PGA tour - is mainly hosted on U.S soil, a myriad of top professional golf tournaments are offered around the globe.³⁴ Even swimming and diving garner considerable international attention at different times throughout the year.³⁵

Often, the subject of taxing U.S. athletes appears in literature and news broadcasting as a result of improper tax avoidance by high-profile figures.³⁶ Outside the Olympic setting, athletes

²⁸ See, e.g., T. Matthew Lockhart, *Oliver v. NCAA: Throwing a Contractual Curveball at the NCAA's "Veil of Amateurism,"* 35 U. DAYTON L. REV. 175 (2010) (noting the deference that courts have given to the manner in which the NCAA defines and regulates amateurism according to its rules, more formally known as *bylaws*). This paper references and utilizes the 2012-2013 NCAA DIVISION I MANUAL, [hereinafter NCAA Bylaw(s) or NCAA Manual], available at <http://www.ncaapublications.com/p-4284-2012-2013-ncaa-division-i-manual-available-for-order-now-for-delivery-after-aug-1.aspx> (last visited Dec. 9, 2012); see NCAA BYLAW § 12.01.2 ("Member institutions' athletics programs are designed to be an integral part of the educational program. The student-athlete is considered an integral part of the student body, thus maintaining a clear line of demarcation between college athletics and professional sports.").

²⁹ 26 U.S.C. § 61(a) (2012).

³⁰ 26 U.S.C. § 862(a).

³¹ Carole C. Berry, *Taxation of U.S. Athletes Playing in Foreign Countries*, 13 MARQ. SPORTS L. REV. 1, 7 (2002).

³² Double taxation in the sense of a U.S. athlete being required to pay income tax on earnings made in a foreign country, and thus rightfully taxed per the income tax rules of such country, and also taxed on the same income in the U.S. per the requirements of U.S.C. § 862(a).

³³ Berry, *supra* note 31 at 1.

³⁴ Tiger Woods' 2012 tournament schedule included the Duel at Jinsha Lake in China, Abu Dhabi HSBC Golf Championship in United Arab Emirates, Turkish Airlines World Golf Final in Turkey, and the CIMB Classic in Malaysia.

³⁵ Over the course of his career Michael Phelps has competed at the 2000 Sydney Olympic Games, 2001 World Championships in Japan, 2003 World Championships in Barcelona, 2004 Athens Olympics, 2011 Shanghai World Championships, and the 2012 London Olympic Games. Further, the FINA World Diving Championships have been held in multiple international locations, to include the UK, China, Greece, Spain, Australia, Mexico, Canada and The Netherlands.

³⁶ See Kadence A. Otto, *Criminal Athletes: An Analysis of Charges, Reduced Charges and Sentences*, 19 J. LEGAL ASPECTS OF SPORT 67, 94 (2009) (reminding that former eight-time All-star Darryl Strawberry was convicted in U.S. District Court of tax evasion and owed the IRS over \$ 430,000 in taxes).

competing in various sporting events must pay income tax on any amounts earned or won.³⁷ Large-purse sporting events like golf's PGA Tour or tennis' U.S. Open are not the only arenas which require that the federal government tax income earned. In some cases, prominent athletes are charged criminally (or at least publicly embarrassed) for failing to pay taxes no matter the amount. For example, Sunny Garcia, a Hawaiian surf champion, was sentenced in 2005 to three months in federal prison for tax evasion for failure to pay income tax on over \$114 thousand in winnings derived from surf competitions.³⁸ Similarly, professional skier Lindsey Vonn owed the I.R.S. \$1.7 million in back-taxes for her 2010 earnings.³⁹ Other noted athletes accused of federal tax evasion include baseball star Darryl Strawberry,⁴⁰ boxer Mike Tyson,⁴¹ football quarterback Bernie Kosar⁴² and hockey great Jaromir Jagr.⁴³

Assessing tax on U.S. athletes for income earned via international sporting events can be challenging to athletes and their accountants. The I.R.C. provides rules concerning what types of income are deemed sourced to the U.S.⁴⁴ Not only must the source of the income be determined, but also the character of such income. For example, professional athletes' income might include incentive and signing bonuses, endorsement income and royalties, and monetary purses or awards offered by hosting events.⁴⁵ In many instances, the source and character of such income is unclear and must be assessed and allocated among two or more countries' own tax laws.⁴⁶

To avoid the applicability of double taxation by multiple taxing regimes, foreign tax credits and bilateral income tax treaties play key roles.⁴⁷ Foreign tax credits are generally

³⁷ For instance, professional golf tournaments offer exceptionally large purses for the top seeded golfers, including the 2012 U.S. Open which boasted a purse of \$8 million, of which \$1.44 million was awarded to the winner.³⁷ Tennis is another sport which offers huge purses to tournaments winners, including the 2012 U.S. Open which offered a total purse of over \$25 million. *See Prize Money, US OPEN*, http://2012.usopen.org/en_US/about/history/prizemoney.html (last visited Jan. 24, 2012).

³⁸ *See Allison Hoffman, Sunny Garcia Sentenced to 3 Months For Tax Fraud*, HONOLULUADVERTISER.COM (Oct. 19, 2006), <http://the.honoluluadvertiser.com/article/2006/Oct/19/In/FP610190349.html>.

³⁹ Eamon Murphey, *Gold Medal Skier Lindsey Vonn Owed \$1.7 Million in Back Taxes*, DAILY FINANCE (April 16, 2012, 10:50AM), <http://www.dailyfinance.com/2012/04/16/gold-medal-skier-lindsey-vonn-owed-irs-1-7-million-in-back-tax/>.

⁴⁰ *See William Browning, Famous Athletes With Income Tax Trouble*, Yahoo!Sports (Apr. 8, 2011), <http://sports.yahoo.com/top/news?slug=ycn-8248509> (Darryl Strawberry failed to pay individual income taxes from 1989 – 1990, and was subsequently convicted of income tax evasion, eventually agreeing to pay \$430,000 in back-taxes to the I.R.S.).

⁴¹ *See The Tax Man Cometh*, SPORTS ILLUSTRATED CNN (Sept. 9, 1998 3:59PM), http://sportsillustrated.cnn.com/more/boxing/news/1998/09/09/tyson_lien/ (The IRS put a \$63 million lien on boxer Mike Tyson's Connecticut mansion in 1998).

⁴² *See Football Great Bernie Kosar Pays Tax Lien*, ACCOUNTINGWEB (Aug. 17, 2008), <http://www.accountingweb.com/topic/tax/football-great-bernie-kosar-pays-tax-lien> (Bernie Kosar allegedly paid off the \$228,806.21 I.R.S. tax lien placed on him for income taxed owed for 2006).

⁴³ *See Michael Farber and Don Yaeger, Capital Losses, A Huge Gambling Debt Preceded Jerome Jagr's IRS Problems*, SI VAULT (Mar. 17, 2003), <http://sportsillustrated.cnn.com/vault/article/magazine/MAG1028225/index.htm> (In August 2003 the I.R.S. filed a lien against Jagr in the amount of \$350,000 in back taxes owed for tax year 1999).

⁴⁴ 26 U.S.C. § 861.

⁴⁵ Berry, *supra* note 31, at 6-9.

⁴⁶ *Id.* at 8 (Over 200 cases were docketed in U.S. courts with regard to NHL hockey games played in both Canada and the U.S. in the 1970's in order to deal with the appropriate taxation of the athletes).

⁴⁷ U.S.C. §§ 901 – 908 cover foreign tax credits. Of particular interest with respect to the 2012 London Olympics, relevant U.K. law taxes athletes pro-rata based on the number of events which an athlete competes in inside the country, as well as a fifty percent on appearance fees. However, in order to avoid the possibility that athletes boycott the London Olympics, British taxing authorities limited their imposition requirements, granting an

available to U.S. citizens and residents who pay income taxes in another country, thus limiting the U.S. tax exposure of certain income already taxed in a foreign jurisdiction. Income tax treaties between the U.S. and foreign countries further limit a taxpayer's exposure to double taxation. The U.S. and Organization for Economic Cooperation and Development (O.E.C.D.) Model Tax Treaties provide specific criteria with respect to athletes.⁴⁸

U.S. Taxation of International Athletes

In 2011 the U.S. Tax Court held that a South African professional golfer who resided in the United Kingdom was required to pay U.S. income tax on certain endorsement fees and royalty income which he earned in connection with his U.S. trade or business.⁴⁹ Such decision followed the precedent that international athletes are subject to tax in the U.S.⁵⁰ Indeed, foreign athletes must pay federal income tax on any monies earned while competing on U.S. soil, as well as on any income deemed to be sourced in the U.S.⁵¹

As scores of professional athletes compete on a world-wide scale, determining the taxation requirements with respect to every country where such athletes train, compete, or earn royalties or endorsement income in can be challenging. With respect to U.S. income tax

exemption to those athletes visiting the U.K. in order to compete in the Olympic Games. Thus U.S. medal winning athletes were exempted from having to pay income tax in the U.K. on their earnings from Operation Gold. See Kelly Phillips Erb, *Olympians Get a Free Pass on Taxes at the London Olympic Games*, FORBES (Jul. 28, 2012 10:51AM), <http://www.forbes.com/sites/kellyphillipserb/2012/07/28/olympians-get-a-free-pass-on-taxes-at-the-london-games/>.

⁴⁸ See 2006 U.S. Model, art. 16, *Entertainers and Sportsmen* which states, "Income derived by a resident of a Contracting State as an entertainer, such as a theater, motion picture, radio, or television artiste, or a musician, or as a sportsman, from his personal activities as such exercised in the other Contracting State, which income would be exempt from tax in that other Contracting State under the provisions of Articles 7 (Business Profits) and 14 (Income from Employment) may be taxed in that other State, except where the amount of the gross receipts derived by such entertainer or sportsman, including expenses reimbursed to him or borne on his behalf, from such activities does not exceed twenty thousand United States dollars (\$ 20,000) or its equivalent in---- for the taxable year concerned." See also 2008 O.E.C.D. Model, art. 17, *Artistes and Sportsmen*.

⁴⁹ *Retief Goosen v. Commissioner of Internal Revenue*, 136 T.C. 547; 2011 U.S. Tax Ct. LEXIS 28; 136 T.C. No. 27 (June 9, 2001, filed); *appeal dismissed by Goosen v. Comm'r*, 2012 U.S. App. LEXIS 8708 (D.C. Cir., Feb. 28, 2012).

⁵⁰ See, e.g., *Peter Stenkowski v. Comm'r*, 690 F. 2d 40 (1982 U.S. App.) (The U.S. Court of Appeals affirmed the U.S. Tax Court's decision that a Canadian hockey player who played professional hockey in the NHL for the New York Rangers was required to pay U.S. allocated income tax on earnings derived during the regular season of hockey when the taxpayer was a resident alien in the U.S., and disallowed certain taxpayer deductions for expenses not incurred while pursuing his business in the U.S.); *John J. and Gloria Hannah v. United States*, 424-77T (U.S. Claims Court 1997) (A professional hockey player from Canada was denied certain U.S. income tax deductions for business expenses not associated with his hockey-playing activities in the U.S.); see also Alan Pogroszewski and Kari Smoker, *Cross-Checking: An Overview of the International Tax Issues for Professional Hockey Players*, 22 MARQ. SPORTS L. REV. 187 (2011) (Highlights tax issues surrounding Canadian professional hockey players earning money in the U.S. during the NHL hockey season); see also John J. Coney's, Jr., *To Tax or Not To Tax: Is a Non-Resident Tennis Player's Endorsement Income Subject to Taxation in the United States?*, 9 FORDHAM INTELL. PROP. MEDIA & ENT. L.J., 885 (1999) (Peruses the tax treatment of a foreign tennis player who had certain U.S. source income with respect to endorsement and royalty income.); see also Stephanie C. Evans, *U.S. Taxation of International Athletes, A Reexamination of the Artiste and Athlete Article in Tax Treaties*, 29 G.W. J. INT'L L. & ECON., 297 (1995) (Analyzes and offers suggestions for modifying the content of the Artistes and Athletes Article with respect to the U.S. Model Treaty.).

⁵¹ If a foreign athlete is deemed to be a resident alien of the U.S., their income is subject to tax in the U.S. as if they were a U.S. citizen. If a foreign athlete is not a resident alien of the U.S., but earns money in the U.S., they are only subject to tax in the U.S. based on any income which is sourced to the U.S. See 26 U.S.C. § 871.

obligations, non-resident aliens, to include athletes, are taxed on any income sourced to the U.S.⁵² Ascertaining the source of an athlete's income can be complex, especially as numerous athletes are not affiliated with any particular sporting team.⁵³ Many professional athletes, including swimmers, tennis players, and golfers require the assistance of a sports agent or manager to deal with earning opportunities to include endorsement income, royalties, contract incentives and bonuses.⁵⁴ Such income opportunities may be sourced to numerous global locations, and therefore trigger double taxation on income.

There are certainly challenges applicable to properly sourcing professional athletes' income at an international level. In 2012, the individual athletes with the highest incomes included boxers Floyd Mayweather and Manny Pacquiao, golfers Tiger Woods and Phil Mickelson, tennis stars Roger Federer and Rafael Nadal and Formula One racecar driver Michael Schumacher.⁵⁵ Such individual athletes claim residency in one country, but travel the globe earning money as part of their competitive schedule. As the U.S. is a global hub for sporting events, it markets itself to the world's best athletes to partake in the sports phenomenon within its borders.⁵⁶ International players make up a hefty part of U.S. professional sports team rosters due in large part to increasing athletic talent abroad.⁵⁷ The New York Yankees and Dallas Mavericks, as examples, have numerous players who earn money in the U.S. but are citizens and residents of foreign countries. Because the sports industry boasts big money and earnings, foreign athletes are ideal targets of the I.R.S. to enforce income tax compliance.⁵⁸

The U.S. currently has bilateral income tax treaties with numerous countries, though not every international locale boasts such favorable arrangement. Consider the recent seven year, \$42 million contract between the Los Angeles Dodgers and Cuban-baseball player Yasiel Puig.⁵⁹ Puig defected from Cuba in June 2012, establishing temporary residency in Mexico before signing with the Dodgers.⁶⁰ While Mexico does have a bilateral tax treaty with the U.S., athletes who maintain residency in countries including Cuba, the Dominican Republic, Nicaragua and Panama, but who play on professional sports teams in the U.S. suffer possible consequences of

⁵² 26 U.S.C. §§ 861 & 862.

⁵³ Carole C. Berry, *Taxation of U.S. Athletes Playing in Foreign Countries*, 13 MARQ. SPORTS L. REV. 1, 7 (2002).

⁵⁴ *Id.* In contrast to sports such as swimming, golfing and tennis which do not regularly make up professional sporting teams, numerous athletes are part of professional sports teams which travel both nationally and globally, to include men's and women's soccer, hockey, baseball, and cycling.

⁵⁵ In 2012 Mayweather earned \$85 million in salary/ winnings making him the highest paid athlete of the year, followed by Pacquiao at \$56 million salary/ winnings plus \$6 million in endorsements, Woods (3rd) at \$4.4 million in salary/ winnings and \$55 million in endorsements, Federer (5th) at \$7.7 million salary/ winnings and \$45 million in endorsements, Mickelson (7th) at \$4.8 million salary/ winnings and \$43 million in endorsements, Nadal (#16) at \$8.2 million in salary/ winnings and \$25 million in endorsements and Schumacher (\$20) with \$20 million in salary/ winnings and \$10 million in endorsements. See *Highest-Paid Athletes 2012 – World's Richest Athletes*, THE RICHEST (Jun. 19, 2012), <http://www.therichest.org/sports/forbes-highest-paid-athletes/>.

⁵⁶ Andrew D. Appleby, *Leveling the Playing Field: A Separate Tax Regime for International Athletes*, 36 BROOKLYN J. INT'L L. 605, 615 (2011).

⁵⁷ Dustin C. Lane, *From Mao to Yao: A New Game Plan for China in the Era of Basketball Globalization*, 13 PAC. RIM L. & POL'Y J., 127, 131 – 132 (2004).

⁵⁸ *Id.*

⁵⁹ Jesse Sanchez, *Dodgers Sign Cuban Puig To Seven Year Deal*, MLB.COM (Jun. 29, 2012, 8:57PM ET), http://mlb.mlb.com/news/article.jsp?ymd=20120628&content_id=34081436&vkey=news_mlb&c_id=mlb.

⁶⁰ Chad Moriyama, *Dodgers Sign Yasiel To 7-Year/ \$42 Million Deal*, ACCORDING TO SOURCES + INFORMATION (June 28, 2012), <http://www.chadmoriyama.com/2012/06/dodgers-sign-yasiel-puig-to-7-year42-million-deal-according-to-sources-information/>.

double taxation since no tax treaties exist between their countries of residence and the U.S.⁶¹ These athletes may be subject to tax in their own countries based on their citizenship abroad, as well as in the U.S. where they engage in a trade or business.⁶²

Still, even with the *protection* offered via international tax treaties to avoid double taxation, it can be difficult to accurately establish proper sourcing with respect to an athlete's income.⁶³ In 1997 Swedish tennis star Stefan Edberg, who was a tax resident of the U.K., filed a petition in the U.S. Tax Court contesting the I.R.S.'s determination that his eleven endorsement earnings over a three year period be sourced to the U.S.⁶⁴ Such endorsement deals, which included clothing, shoes, racquets, soft drinks, fitness equipment and cologne carried various royalty and personal service characteristics both within and outside the U.S., thus generating questions as to which of such income should be properly sourced to the U.S.⁶⁵ Although an applicable tax treaty applied, the I.R.S.'s specific characterization of Edberg's income did not protect him against taxation in the U.S., and disagreement between Edberg and the I.R.S. arose as to which portion of such income should be properly sourced to the U.S.⁶⁶ While the I.R.S. and Edberg settled the case, had the Tax Court published a decision on this issue, it would have

⁶¹ Major League Baseball is made up of numerous international players to currently include approximately 20 from Cuba, 128 from the Dominican Republic, 4 from Nicaragua and 8 from Panama. *See List of Current Major League Baseball Players by Nationality*, WIKIPEDIA, http://en.wikipedia.org/wiki/List_of_current_Major_League_Baseball_players_by_nationality (last visited Jan. 24, 2013).

⁶² 26 U.S.C. § 861.

⁶³ Identifying and analyzing every U.S. statutory law, income tax ruling, and bilateral tax treaty applicable to foreign athletes is cumbersome. Literary debate exists as to whether changes should be made to the existing taxing regime of bilateral income tax agreements between the U.S. and foreign countries with respect to athletes, including the proposition that the current bilateral tax treaty benefits in place for foreign athletes be more uniform, and thus multilateral, with respect to issues in sports rather than by geographic location. Still, current laws and tax treaties dictate that foreign athletes be subject to tax in the U.S. when their income is sourced within the states. *See* Jeffrey Dunlop, *Taxing the International Athlete: Working Toward Free Trade in the Americas Through a Multilateral Tax Treaty*, 27 NW. J. INT'L L. & BUS. 227, 248 (2006) (Referencing the "Artiste and Athlete Articles" of both the U.S.-Canada Tax Treaty and U.S.-Mexico Tax Treaty, acknowledging the [A]rticle's generalization in its coverage, noting that "although bilateral tax treaties cover a wide gamut of tax issues, the comprehensiveness comes at the expense of accuracy and detail with respect to each article." The article suggestions that tax issues surrounding international athletes deserve more consideration); *see also* Stephanie C. Evans *supra* note 50, at 332 (proposing that "[A] uniform system will materialize if an agreement is consummated among several countries hosting foreign athletes that specifies the way in which foreign athletes will be treated for tax purposes."); *see also* Andrew D. Appleby, *supra* note 56, at 639 (noting that the "tangled web of disparate and inconsistent tax systems is a nightmare for tax administrators and athletes alike" with respect to international athletes and the differing tax regimes in multiple countries).

⁶⁴ John J. Coneys, Jr., *To Tax or Not To Tax: Is a Non-Resident Tennis Player's Endorsement Income Subject to Taxation in the United States?* 9 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 885, 886 (1999). *See also* Tax Court Petition Docket No. 15576-97, abstract available in [Dockets, Petitions, Index - Digest] Tax Court Reporter (CCH) 9584 (July 21, 1997).

⁶⁵ *Id.*

⁶⁶ Edberg calculated his U.S.-source income by allocating his worldwide endorsement income on the basis of days in the U.S. to total days and allocated U.S.-source income equally between taxable personal service income and royalty income. His multiple endorsement contracts were with both U.S. and non-U.S. companies, and royalties and endorsement fees were for the use of his name and services in both the U.S. and abroad. The IRS alleged that Edberg's U.S.-source income was materially understated and that 100% of the U.S.-source income was personal service income subject to U.S. tax. Edberg's position was that all of his U.S.-source income was tax free under the U.K. treaty, either as personal service income or royalty income, rather than taxable under the Artistes and Athletes article. *See* John J. Coneys, Jr. *supra* note 64, at 886-887.

been the leading authority on sourcing and characterizing endorsement income of international athletes as either royalty, personal service, or artiste and athletes.⁶⁷ However, without a decision emanating from the U.S. Tax Court, the complexity continues as to how foreign athletes are to source income within and outside the U.S.

Part II: Operation Gold and the NCAA

Operation Gold

Colorado Springs, Colorado-based USOC manages *Operation Gold*, a program which pays monetary awards to U.S. medal-winning athletes at Olympic games.⁶⁸ To maintain its tax-exempt status, the USOC does not pay salaries to those athletes participating in the Olympics, though nearly all athletes representing the U.S. are deemed professionals in their respective sports.⁶⁹ The current USOC *Operation Gold* program awards \$25,000 for each gold medal won, \$15,000 for each silver a U.S. athlete wins, and \$10,000 for each bronze medal awarded.⁷⁰ This program has rewarded U.S. athletes and teams handsomely for their Olympic medal-winning efforts.⁷¹

Operation Gold was established in direct response to a poor showing at the 1988 Calgary, Alberta Winter Olympics where Team U.S.A. finished ninth.⁷² The program, however, remains somewhat mysterious: published legal research pertaining to *Operation Gold* is quite limited and

⁶⁷ *Id.* at 887.

⁶⁸ See Nicole Saunches, *USOC Unveils Plan for “America Supports Team USA” Initiative*, THE MAT.COM (May 28, 2010), http://www.themat.com/section.php?section_id=3&page=showarticle&ArticleID=22060. The concept of offering monetary rewards to athletes medaling at an Olympic Games, however, is not limited or unique to the U.S. See Ami Afriatni, *Gold Medals Will Come With Bonus of Rp 2.5 Billion*, JAKARTA GLOBE (Apr. 12, 2012), <http://www.thejakartaglobe.com/sports/gold-medals-will-come-with-bonus-of-rp-25-billion/511002> (Reporting that Indonesia agreed to pay each gold-medal winning athlete at the London Games US\$272,500); see also Belinda Goldsmith, *Olympics - Gold Medals Can Give Athletes the Midas Touch* (Jul. 30, 2012 (6:49 PM IST)), <http://in.reuters.com/article/2012/07/30/oly-goldvalue-day-idINL6E8IT1Q320120730> (reporting that Italy promised US\$182,000 for each gold medal won by an Italian athlete and Russia pledged US\$135,000); see also *China To Reward Top Olympians With US\$51,000 Each*, CHINA DAILY (Aug. 26, 2008, 16:59), <http://www.thejakartaglobe.com/sports/gold-medals-will-come-with-bonus-of-rp-25-billion/511002> (noting that Chinese gold medalists were offered US\$51,000 per gold medal won at the Olympic Games).

⁶⁹ See Howard Gleckman, *Why is the U.S. Olympic Committee Tax-Exempt?*, URBAN INSTITUTE (Feb. 26, 2010, 13:59 EST), <http://taxvox.taxpolicycenter.org/2010/02/26/why-is-the-u-s-olympic-committee-tax-exempt/> (noting that the USOC remains exempt from taxes because of its designation as organization that fosters amateur sports competition despite fact that overwhelming majority of Olympians are actually professional athletes); see also Corgan, *supra* note 16, at 421-22 (noting that the USOC qualifies as a tax-exempt organization because it “fosters national or international amateur sports competition,” even though it allows professional basketball and hockey players who make millions of dollars to participate in the Olympic games).

⁷⁰ See Randy Harvey, *USOC Sets New Gold Standard*, L.A. TIMES (Oct. 21, 2001), <http://articles.latimes.com/2001/oct/21/sports/sp-59910> (noting that beginning in 2002 with the Salt Lake City Olympics, the bounty for a medal increased).

⁷¹ See Darren Rovell, *Operation Gold Proves Costly to USOC*, ESPN.COM (Feb. 25, 2002), <http://sports.espn.go.com/oly/winter02/gen/story?id=1340433>.

⁷² See Larry Siddons, *Olympic Medals Mean Instant Cash*, SEATTLE TIMES (Jan. 23, 1994), <http://community.seattletimes.nwsourc.com/archive/?date=19940123&slug=1891039> (providing that the USOC established the Operation Gold program to pay \$2,000 to any U.S. athletes who finished in the top eight in an Olympic, world-championship or other major event, a pittance relative to today’s program).

mentioned less than a dozen times.⁷³ In fact, only one published decision at the state or federal level specifically mentions the USOC's *Operation Gold* program.⁷⁴

NCAA Bylaws

As delineated in the NCAA Manual and discussed throughout literature, *amateurism* is a driving theme for the NCAA and those student-athletes who wish to remain eligible to compete among NCAA member institutions.⁷⁵ Student-athletes, as a general rule, may not have agents nor accept product endorsement sponsorship or income, nor receive any *extra benefit* from their participation in college sports in order to maintain their NCAA amateur standing.⁷⁶ However, this so-called *clear line of demarcation* between professional and amateur status can be blurry at times, so that in some cases prize money is acceptable, whereas endorsement income is

⁷³ See, e.g., Melissa R. Bitting, *Mandatory, Binding Arbitration for Olympic Athletes: Is the Process Better or Worse for "Job Security"?*, 25 FLA. ST. U.L. REV. 655 (1998) (recognizing-at that time-that Operation Gold is a grant, essentially prize money, in which "a gold medal in Atlanta earned a United States athlete \$ 15,000, a silver netted \$10,000, a bronze earned \$7500, and a fourth place finish garnered \$5000."); see also Leigh Augustine-Schlossinger, *Legal Considerations for Sponsorship Contracts of Olympic Athletes*, 10 VILL. SPORTS & ENT. L.J. 281 (2003) (noting that the USOC pays its staff, the training facility, and funds the "Operation Gold" program by selling sponsorships to corporations); Laura Freedman, *Pay or Play? The Jeremy Bloom Decision and NCAA Amateurism Rules*, 13 FORDHAM INTELL. PROP. MEDIA, & ENT. L.J. 673, 709 (2003) (stating that "The Operation Gold program also permits sizable cash payments to 'amateurs' for silver and bronze medal performances."); David Warta, *Personal Foul: Unnecessary Restriction of Endorsement and Employment Opportunities for NCAA Student-Athletes*, 39 TULSA L. REV. 419 (2003) ("...the NCAA, through its allowance of remuneration to athletes under Operation Gold Grant, recognizes the existence and authority of the USOC."); Kristine Mueller, *No Control Over their Rights of Publicity: College Athletes Left Sitting the Bench*, 2 DEPAUL J. SPORTS L. CONTEMP. PROBS. 70 (2004); Jason Kroll, *Second Class Athletes: The USOC's Treatment of its Paralympians*, 23 CARDOZO ARTS & ENT. L.J. 307 (2005); Christopher A. Callanan, *Advice for the Next Jeremy Bloom: An Elite Athlete's Guide to NCAA Amateurism Regulations*, 56 CASE W. RES. L. REV. 687 (2006) (referencing the NCAA Bylaws that accepting educational expenses from the USOC or a National Governing Body [such as USA Swimming] or an Operation Gold Grant is permitted by the NCAA); W. Burlette Carter, *The Age of Innocence: The First 25 Years of The National Collegiate Athletic Association, 1906 to 1931*, 8 VAND. J. ENT. & TECH. L. 211 (2006); Matthew J. Mitten & Timothy Davis, *Athlete Eligibility Requirements and Legal Protection of Sports Participation Opportunities*, 8 VA. SPORTS & ENT. L.J. 71 (2008).

⁷⁴ *Shepherd v. U.S. Olympic Comm.*, 94 F. Supp. 2d 1136, 1139 (D. Colo. 2000).

⁷⁵ See generally Adam Epstein & Paul Anderson, *Utilization of the NCAA Manual as a Teaching Tool*, 26 J. LEGAL STUD. EDUC. 109 (2009). The word amateurism is mentioned almost 40 times in the 2012-13 NCAA Manual.

⁷⁶ NCAA Bylaw 16.02.3, *Extra Benefit* ("An extra benefit is any special arrangement by an institutional employee or a representative of the institution's athletics interests to provide a student-athlete or the student-athlete's relative or friend a benefit not expressly authorized by NCAA legislation. Receipt of a benefit by student-athletes or their relatives or friends is not a violation of NCAA legislation if it is demonstrated that the same benefit is generally available to the institution's students or their relatives or friends or to a particular segment of the student body."). Amateurism is a major theme that is found throughout the NCAA Manual; see, e.g., NCAA Bylaw 2.9, *The Principle of Amateurism* ("Student-athletes shall be amateurs in an intercollegiate sport, and their participation should be motivated primarily by education and by the physical, mental and social benefits to be derived. Student participation in intercollegiate athletics is an avocation, and student-athletes should be protected from exploitation by professional and commercial enterprises."); see also NCAA Bylaw 12.3.1, *General Rule*. ("An individual shall be ineligible for participation in an intercollegiate sport if he or she ever has agreed (orally or in writing) to be represented by an agent for the purpose of marketing his or her athletics ability or reputation in that sport. Further, an agency contract not specifically limited in writing to a sport or particular sports shall be deemed applicable to all sports, and the individual shall be ineligible to participate in any sport.").

unacceptable.⁷⁷ Thus, the NCAA dictates that accepting a sponsorship from a private swimwear manufacturer such as Speedo, Nike or Arena, for example, would violate the organization's fundamental principles of amateurism as found in NCAA Bylaw 2.9, *Principles of Amateurism*.⁷⁸

Still, much to the credit of the NCAA, student-athletes who compete for the U.S. in an Olympic Games (or attempt to make an Olympic team in their respective sports) are afforded the opportunity to train and receive certain benefits from the USOC without jeopardizing their intercollegiate career.⁷⁹ Laudably, the NCAA has provided specific rules that apply for these specific student-athletes, one which exempts prize money for medals earned from the USOC or a student-athlete's National Governing Body (NGB) (e.g., USA Swimming).⁸⁰ However, the NCAA has not chosen to expand this exemption to student-athletes to earn any other similar bonuses from their NGB for setting world records, for example, without jeopardizing their NCAA amateur eligibility.⁸¹

The 2012-13 NCAA Division I Manual specifically mentions the *Operation Gold* program several times.⁸² Importantly, the NCAA specifically provides that income earned as a result of this program does not result in a student-athlete losing their eligibility in their sport.⁸³

⁷⁷ See Steve Eubanks, *Olympic Cash Muddles NCAA Eligibility Waters*, FOX SPORTS (Aug. 22, 2012), <http://www.foxsportsouth.com/08/22/12/Olympic-cash-muddles-NCAA-eligibility-wa/landing.html?blockID=779435> (Aug. 22, 2012); see also Associated Press, *Zbikowski Will Make Pro Boxing Debut at MSG*, ESPN.COM (Mar. 29, 2006), <http://sports.espn.go.com/ncf/news/story?id=2389473> (Consider that the University of Notre Dame's Tom Zbikowski (football) was allowed to keep prize money for a professional boxing tournament held at Madison Square Garden as long as he did not accept commercial endorsements). However, University of Colorado's Jeremy Bloom (football) had to relinquish his eligibility in football if he was to accept endorsements for his exploits as an Olympic skier, discussed further, *infra*.

⁷⁸ NCAA Bylaw 2.9, *The Principle of Amateurism*, *supra* note 76 ("Student-athletes shall be amateurs in an intercollegiate sport, and their participation should be motivated primarily by education and by the physical, mental and social benefits to be derived. Student participation in intercollegiate athletics is an avocation, and student-athletes should be protected from exploitation by professional and commercial enterprises.").

⁷⁹ NCAA Bylaw 12.1.2.4.9, *Exception for Training Expenses*. ("An individual (prospective or enrolled student-athlete) may receive actual and necessary expenses [including grants, but not prize money, whereby the recipient has qualified for the grant based on his or her performance in a specific event(s)] to cover developmental training, coaching, facility usage, equipment, apparel, supplies, comprehensive health insurance, travel, room and board without jeopardizing the individual's eligibility for intercollegiate athletics, provided such expenses are approved and provided directly by the U.S. Olympic Committee (USOC) or the appropriate national governing body in the sport (or, for international student-athletes, the equivalent organization of that nation).").

⁸⁰ See Michael Rand, *Missy Franklin Can Get Paid for Swimming Accomplishments But Stay an Amateur. Say What?*, STAR TRIBUNE (Aug. 13, 2012), <http://www.startribune.com/sports/blogs/166003656.html>.

⁸¹ *Id.* Thus, prize money is acceptable to the NCAA in this context but not additional bonuses for setting a world record. This may be due to the complex relationship between the NCAA, the USOC and its numerous NGBs which govern their own sport in the U.S. (email correspondence with Bridget Niland on Feb. 4, 2013).

⁸² See NCAA Manual, *supra* note 28. Specific references to the USOC's Operation Gold program, for example, are found in the bylaws related to *Amateurism*: 12.1.2.1.4.1.2; 12.1.2.1.4.3.3; 12.1.2.1.5.1; and *Financial Aid*: 15.02.4.2 (d); 15.02.4.5; 15.1.2 (e). See also, e.g., 15.2.6.4 ("Educational Expenses-U.S. Olympic Committee or U.S. National Governing Body"). Interestingly, one might consider whether or not the NCAA bylaws which exempt Operation Gold grants are skewed in favor of U.S. athletes since only the USOC program is mentioned, not similar programs from any other nation which may have student-athletes competing for NCAA schools. The bylaws related to the NCAA and the Operation Gold program demonstrate the willingness between the USOC and the NCAA in the late 1990s to assist non-revenue ("Olympic") sports with funding and without jeopardizing intercollegiate eligibility (telephone conversation with Bridget Niland, January 14, 2013).

⁸³ NCAA Bylaw 12.1.2.1.4.1.2, *Operation Gold Grant* ("An individual (prospective student-athlete or student-athlete) may accept funds that are administered by the U.S. Olympic Committee pursuant to its Operation Gold

At the 2012 London Olympic Games, U.S. swimmer Missy Franklin became an American icon by earning five medals.⁸⁴ As a result of her efforts, she earned \$110,000 in *Operation Gold* funds from the USOC.⁸⁵ Although she earned *Operation Gold* awards, Missy was free to commit to a collegiate sports team, and she accepted an athletic scholarship with the University of California-Berkeley (UC-Berkeley).⁸⁶ In contrast, world-renowned swimmer Michael Phelps is not eligible to accept an athletic scholarship at any NCAA college or university since he earns endorsement income.⁸⁷ As Phelps has signed sponsorships with at least fifteen companies, including Subway, Hilton, Omega, Speedo, Visa, Procter & Gamble and Under Armour, such agreements expressly violate NCAA rules, also known as their *bylaws*.⁸⁸ While Phelps trained with Club Wolverine in Ann Arbor, Michigan, he did not swim for the University of Michigan.⁸⁹

These NCAA *no agent* and *no endorsement* rules have forced premier student-athletes, to include multi-sport athlete Jeremy Bloom (University of Colorado), to choose between remaining an amateur athlete or pursuing a professional career.⁹⁰ Bloom, a native of Loveland, Colorado, an All-American football player and a world-class skier, had contended that financial endorsements were required in order to afford to stay competitive in freestyle moguls skiing at the international level.⁹¹ The NCAA declared Bloom ineligible after he sued the NCAA in a Colorado state court to obtain an injunction related to this NCAA bylaw. In response, Bloom quit playing football at the University of Colorado, kept his endorsement agreements, and pursued a spot on the Olympic team, competing for the U.S. in the 2006 Turin Olympics in the moguls; eventually Bloom became a fifth round pick for the Philadelphia Eagles in the 2006 NFL draft.⁹²

Part III: The OTEA: The Bill, Concerns and Alternatives

At the inception of London's Summer Olympic Games, the Americans for Tax Reform Foundation announced that U.S. athletes are required to pay income tax on the monetary awards

program.”); The same words are used in the subsequent NCAA Bylaws 12.1.2.1.4.3.3, *Operation Gold Grant* and 12.1.2.1.5.1, *Operation Gold Grant*.

⁸⁴ See Cheryl Preheim, *Olympic Gold Medalist to Swim on High School Team*, USA TODAY (Nov. 28, 2012), <http://www.usatoday.com/story/sports/olympics/2012/11/28/missy-franklin-to-swim-high-school-team/1731537/> (mentioning that Missy decided to attend the University of California-Berkeley).

⁸⁵ See Bob Highfill, *Olympic Glory Comes with a Price*, RECORDNET.COM (Aug. 7, 2012), http://www.recordnet.com/apps/pbcs.dll/article?AID=/20120807/A_SPORTS0203/208070323/-1/A_SPORTS0203 (noting that Missy's tax bill would be \$39,000 for the prize money, \$25,000 for each gold medal won (equating to \$100,000) and \$10,000 for her bronze medal).

⁸⁶ See Preheim, *supra* note 84.

⁸⁷ See NCAA Bylaw 12.5.2.1, *Advertisements and Promotions After Becoming a Student-Athlete*; see also Kurt Badenhausen, *Michael Phelps Locks Up Olympic Immortality And Post-Career Millions*, FORBES (Aug. 1, 2012), <http://www.forbes.com/sites/kurtbadenhausen/2012/08/01/michael-phelps-locks-up-olympic-immortality-and-post-career-millions/>.

⁸⁸ *Id.*

⁸⁹ See Jo-Ann Barnas, *Michigan Club Draws Some of World's Top Swimmers*, USA TODAY (May 21, 2012), <http://usatoday30.usatoday.com/sports/olympics/london/swimming/story/2012-05-21/michael-phelps-former-club-wolverine-thriving/55120602/1>.

⁹⁰ See *Bloom v. Nat'l Collegiate Athletic Ass'n*, 93 P.3d 621 (Colo. App. 2004) (affirming trial court's decision not to allow request for waivers of NCAA rules that restricting Bloom from receiving endorsement income).

⁹¹ *Id.*; see also Adam Epstein, *Surveying Colorado Sports Law*, 2 ROCKY MTN. L.J. XX (2013) (discussing the case of Jeremy Bloom).

⁹² *Id.*

earned for winning Olympic medals.⁹³ Such news immediately went viral, resulting in over one million hits on Google.⁹⁴ In response, Senator Marco Rubio(R-FL) introduced Bill S.3471 (also referred to as *The Olympic Tax Elimination Act (OTEA)*) which proposed to exclude from gross income “the value of any prize or award won by the taxpayer in athletic competition in the Olympic Games.”⁹⁵

Of interest, on the same day which Bill S.3471 was introduced, a House Bill (H.R. 6250) was introduced which proposed to exclude from gross income “the value of any medal awarded in, or any prize money received from the United States Olympic Committee on account of, competition in the Olympic Games.”⁹⁶ While H.R. 6250 has been submitted for review to the House Ways and Means Committee, it has not moved further since its inception in August 2012. Further, H.R. 6250 did not receive the publicity that the OTEA did when introduced by Senator Rubio, and yet its language more concisely dictates the type of income, and perhaps more importantly, the specific source of such income which is to be excluded from gross income, than that of the OTEA.

Whether the OTEA moves further in Congress towards becoming a law is dubious; however, it certainly prompted a number of Americans to voice their opinions as to whether Olympians should be taxed on their medal awards.⁹⁷ When responding to the polled question: *Should Olympians Pay Taxes on Their Prize Money?*, seventy three percent of responders answered *No*.⁹⁸

⁹³ See Johnson, Hugh, *Win Olympic Gold, Pay the IRS*(July 31, 2012, 1:49 PM EDT), <http://atr.org/win-olympic-gold-pay-irs-a7091>.

⁹⁴ Data is derived from inserting the following term in a Google search: *American Tax Reform Foundation Olympics*.

⁹⁵ S. 3471, 112th Cong. (2011 – 2012). Introduced on August 1, 2012, the Bill (hereafter, OTEA) reads:“To amend the Internal Revenue Code of 1986 to eliminate the tax on Olympic medals won by United States athletes. *Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* SECTION 1. ELIMINATION OF TAX ON OLYMPIC MEDALS.

(a) In General- Section 74 of the Internal Revenue Code of 1986 is amended by adding at the end the following new subsection: ‘(d) Exception for Olympic Medals and Prizes- Gross income shall not include the value of any prize or award won by the taxpayer in athletic competition in the Olympic Games.’

(b) Effective Date- The amendment made by this section shall apply to prizes and awards received after December 31, 2011.”

⁹⁶ H.R. 6250, 112th Cong. (2011-2012). H.R. 6250 was sponsored by Rep. Blake Farenthold (TX-27). Another Bill, H.R. 6252, 112th Cong. (2011-2012), was introduced on August 1, 2012 containing the same language as H.R. 6250. H.R. 6252, sponsored by Rep. Mary Bono Mack (CA-45), was also referred to the House Committee on Ways and Means with no further action to the date of this publication. H.R. 6287, 112th Cong. (2011-2012) was submitted on August 2, 2012 by Rep. Laura Richardson (CA-37), which mimics the language in H.R. 6250 and H.R. 6252, but also includes prizes or awards received from the USOC “on account of, competition in the Olympic Games or Paralympic Games”. See also H.R. 6359, 112th Cong. (2011-2012) submitted by Rep. Sylvestre Reyes (TX-16) on August 7, 2012.

⁹⁷ The last major action pertaining to the OTEA took place on August 1, 2012 when it was referred to the Senate Committee. The current status of the OTEA entails that it has been read twice and referred to the Committee on Finance. See *Bill Summary and Status 112th Congress (2011- 2012), Bill S.3471*, THE LIBRARY OF CONGRESS, <http://thomas.loc.gov/cgi-bin/bdquery/z?d112::SN03471:@@D&summ2=m&> (last visited Jan. 25, 2013).

⁹⁸ Chan, Stacey, *Poll: Should Olympians Pay \$9K Tax on Their Gold Medals?* (Aug. 4, 2012), <http://paloalto.patch.com/articles/poll-should-olympians-pay-9-000-tax-on-their-gold-medals..> See also Riccobono, Anthony, *Olympics 2012: Record Number of Viewers Watch London Games in Spite of Tape Delay*, INTERNATIONAL BUSINESS TIMES (July 31, 2012, 11:02AM), <http://www.ibtimes.com/olympics-2012-record-number-viewers-watch-london-games-spite-tape-delay-734520> (noting that the 2012 Summer Olympics resulted in a record number of American viewers tuning in to NBC’s daily coverage).

Concerns Associated with the OTEA

The term *gross income* includes all income from whatever source derived, including amounts received as prizes and awards.⁹⁹ Prizes and awards include amounts received not only from radio, television and door prizes, but also include awards won in contests of all types.¹⁰⁰ Based on the express language of the I.R.C. and U.S. Treasury Regulations, any prize or award money won in a sporting event of any type, including the Olympic Games, would constitute gross income and thus be subject to taxation. Such imposition of tax includes monetary amounts received per *Operation Gold*, as well as the value of each Olympic medal awarded to athletes.¹⁰¹

The biggest problem with the language of the OTEA is that it is overbroad. As proposed, the OTEA exempts “any prize or award won by the taxpayer in athletic competition in the Olympic Games.”¹⁰² If the OTEA were to become law as written, it is foreseeable that athletes and their agents may exploit the ambiguity and claim that endorsement contracts for Olympic-caliber athletes include language allowing for large bonuses for medals won in any Olympics to be tax-exempt.¹⁰³

To illustrate, consider Michael Phelps who won four gold and two silver medals at the 2012 London Games. Per *Operation Gold*, Phelps earned \$130,000 for his medal-winning performances in the pool.¹⁰⁴ The OTEA would exempt from tax prizes or awards won by taxpayers in athletic competitions in the Olympics.¹⁰⁵ Consequently, if each of Phelps’ numerous endorsements contracts¹⁰⁶ included an *Olympic Bonus Clause* drafted to ensure he earn bonuses for each medal won while competing in an Olympics from each of his sponsors, Phelps may be in a position to exclude from taxable income not only any moneys awarded to him per *Operation Gold*, but also any endorsement bonuses applicable to his medal-winning achievements at the Olympic Games.¹⁰⁷

The concern raised with respect to the Phelps’ illustration specifically targets high-income earning professional Olympic athletes. Estimates indicate that Michael Phelps earns an

⁹⁹ U.S.C. §§ 61(a) and 74(a).

¹⁰⁰ Treas. Reg. §1.74-1(a).

¹⁰¹ U.S. income tax is also imposed on the market value of each Olympic medal given to U.S. winning-athletes. However, because the value of such medals is *de minimis* as compared to the income and endorsement opportunities afforded most Olympic athletes, the value of such medals is generally not taxable. See K. Sean Packard, *The Truth On Taxation of Olympic Gold Medals*, TAX TV (Aug. 3, 2012), <http://www.taxtv.com/the-truth-on-taxation-of-olympic-gold-medals/#.UM9fiHfNmSo>.

¹⁰² See OTEA, *supra* note 95.

¹⁰³ See K. Sean Packard, *supra* note 101.

¹⁰⁴ Phelps won 4 gold and 2 silvers equating to \$130,000 per Operation Gold [$\$130,000 = (4 \times \$25,000 + 2 \times \$15,000)$].

¹⁰⁵ See OTEA, *supra* note 95.

¹⁰⁶ See K. Sean Packard, *supra* note 101. Phelps 15 endorsement sponsors including Subway, Hilton, Omega, Speedo, Visa, PowerBar, AT&T, Kellogg, Rosetta Stone, PureSport, SwimRoom, Nike, Head & Shoulders, Under Armour, and Louis Vitton. See also *Michael Phelps Net Worth, Salary, Endorsements*, CELEBRITY NETWORK, <http://celebnetworth.org/michael-phelps-net-worth-salary> (last visited Jan. 25, 2013).

¹⁰⁷ Assume, for example, that each of Phelps’ 15 endorsement contracts contained language which allowed for “bonus awards won by Michael Phelps in athletic competition in the Olympic Games.” If each sponsor awarded Phelps with a monetarily-equivalent award matching those earned per *Operation Gold* (and assuming that the OTEA was in effect during the 2012 London Olympic Games), Phelps would have received \$130,000 tax-free from the USOC [4 golds x \$25,000 + 2 silvers x \$15,000], as well as \$130,000 from each of his 15 sponsors, for a total tax-free award amount of \$2,080,000 for winning Olympic medals at the 2012 London Olympics.

annual income of \$10,000,000.¹⁰⁸ Other high net worth U.S. Olympic athletes include Ryan Lochte, Kobe Bryant, Oscar Pistorius, Shaun White, and Lindsey Vonn, each of whose annual income is in the multi-millions.¹⁰⁹ While perhaps not at the top of the earnings list, numerous Olympians earn significant incomes via endorsements from corporate sponsors, and it beckons a response from OTEA supporters whether most Olympic athletes require the legislative tax-break afforded by the OTEA.¹¹⁰

There are certainly medal-winning athletes participating in Olympic Games who rarely, if ever, earn endorsements or monetary awards outside the amount earned per *Operation Gold*. At the 2012 London Olympics, the U.S. men's archery team won silver.¹¹¹ However, only fleeting moments of the event were actually televised, and arguably most people could not name a single one of the athletes who make up the U.S. men's archery team, much less all three of them. Similarly less-popular Olympic sports include rowing, shooting, judo, and taekwondo, though each of these sports added to the overall medal count in the 2012 Olympics Games for the U.S.¹¹² Generally, to attract endorsement contract offers, athletes must win gold medals, be friendly, good looking, have a clean reputation, and participate in a sport that commands media attention.¹¹³ The available opportunities for athletes in less-popular events to enter into endorsement contracts are incredibly difficult, if not impossible. Thus, for many U.S. medal-winning athletes participating in an Olympic games, the only money they might earn from their sport is through *Operation Gold*. And it is precisely these athletes who should benefit directly from a tax break on such earnings.

Taxing Missy Franklin

Consider seventeen year old Missy Franklin. Missy, a high school senior, became a media sensation with her rigorous competition schedule and overall medal-winning success at the 2012 Olympics.¹¹⁴ While her notoriety in the pool afforded her the opportunity to earn

¹⁰⁸ See, PAYWIZARD.ORG, <http://www.paywizard.org/main/VIPPaycheck/VIPPAYchecksport> (last visited Jan. 25, 2013).

¹⁰⁹ *Id.* Kobe Bryant earns an annual income of \$5.23 million, Ryan Lochte's annual income is \$2 million, Oscar Pistorius' annual income is approximated at \$3.1 million; Shaun White is estimated to earn \$8 million per year, and Lindsey Vonn earns approximately \$3 million annually. See also *Ryan Lochte Net Worth, Salary, Endorsements*, CELEBRITY NETWORTH, <http://celebnetworth.org/ryan-lochte-net-worth-salary> (last visited Jan. 25, 2013); see also PAYWIZARD.ORG, <http://www.paywizard.org/main/VIPPaycheck/salaries> (last visited Jan. 25, 2013).

¹¹⁰ Consider athletes such as gymnast Nastia Liukin who has endorsements from Proctor & Gamble, Subway, Wheaties and GK Elite Sportswear; gymnast Gabby Douglas who is sponsored by Proctor & Gamble and Wheaties, and skier Julia Mancuso who is endorsed by Head.

¹¹¹ Team USA in men's archery was made up of Brady Ellison, Jacob Wukie and Jake Kaminski. See Bill Chappell, *Team USA Wins First Medals of London 2012 Games; More Results From Saturday*, NPR.ORG (July 28, 2012, 1:23 PM), <http://www.npr.org/blogs/thetorch/2012/07/28/157533788/team-usa-wins-first-medal-of-london-2012-games-more-results-from-saturday>.

¹¹² In 2012 Team USA won 1 gold and 2 bronze medals in rowing, 3 gold and 1 bronze in shooting, 1 gold and 1 bronze in judo, and 2 bronze medals in taekwondo. See *Medal Winners*, LONDON2012.COM, <http://www.london2012.com/medals/medal-winners/> (last visited Jan. 25, 2013).

¹¹³ See *10 Rules for Olympic Athletes On Turning Medals in Real Gold*, FORBES (Aug. 5, 2012, 11:58AM), <http://www.forbes.com/sites/tjwalker/2012/08/05/10-rules-for-olympic-athletes-on-turning-gold-medals-into-real-gold/>.

¹¹⁴ Franklin swam a total of six events, to include a bronze in the 4x100 meter Freestyle relay, gold in the 100 meter individual backstroke, 4th place in the 200 meter individual freestyle, gold in the 4x200 meter medley relay, gold in

millions in endorsements after her Olympic debut, Franklin opted to maintain amateur status in order to pursue eligibility to swim under NCAA rules, and signed a letter of intent with UC-Berkeley in October 2012.¹¹⁵ Since the money she earned in 2012 via *Operation Gold* does not deter from her NCAA eligibility, Franklin opted to swim collegiately before turning pro.¹¹⁶ As such, Franklin's 2012 earnings with respect to swimming amounted to the \$110,000 she earned per *Operation Gold* in London, thus allowing her the opportunity to swim collegiately.

Franklin is an anomaly with respect to the tax concerns associated with the OTEA. Unlike other relatively young, popular (and in some cases wealthy) U.S. Olympic teammates, Franklin chose to take the amateur collegiate route in lieu of earning millions of dollars in endorsement contracts.¹¹⁷ She is an example of how Olympic-winning athletes might benefit from new tax legislation with respect to their earnings via *Operation Gold*.

The OTEA would certainly offer Franklin the benefit of tax-free earnings per *Operation Gold*, but it also serves as an open-door for professional Olympic athletes to take advantage of a tax elimination offering. As the majority of athletes who will seriously benefit from such act are those who are already millionaires in their own right, it is precisely those athletes and agents who may take full advantage of such opportunity to make more money by including language in their corporate sponsorship contracts to that effect. Thus, the OTEA, as written, may not be the best approach to limiting or eliminating tax on *Operation Gold* earnings.

Alternatives to the OTEA

Signing federal legislation to eliminate income tax on moneys earned by Olympic athletes is not the only route which medal-winning athletes can hope for in order to properly avoid federal income tax on *Operation Gold* funds. The USOC maintains responsibility for U.S. Olympic and Paralympic teams, and is thus in a position to consider implementing options to help reduce or eliminate taxation on *Operation Gold* earnings.

As a single entity, and working in tandem with the NCAA to ensure amateur eligibility for athletes wishing to compete at the collegiate level, the USOC can offer strategic financial opportunities to Olympic athletes to ensure that they net the total amount of *Operation Gold* earnings following each Olympic Games, either in the form of cash or in qualified scholarships. Outside the parameters of the USOC's authority, for those athletes not in the position to consider NCAA eligibility the current language of the I.R.C. already affords avenues for implementing options to reduce or eliminate federal income tax on their *Operation Gold* earnings. The following three options present alternatives to the OTEA as written.

Option 1 – The USOC Could Pay a 25 Percent Flat Tax on Operation Gold Disbursements

As mentioned, due to Team USA's poor performance at the 1988 Winter Olympics the USOC initiated *Operation Gold* to award financial bonuses for each medal won by a U.S. athlete

the 200 meter individual backstroke, and gold in the 4 x 100 medley relay. See *Missy Franklin*, TEAM USA.ORG, <http://www.teamusa.org/Athletes/FR/Missy-Franklin.aspx> (last visited Jan. 25, 2013).

¹¹⁵ See *Missy Franklin Commits to UC Berkeley*, 9NEWS.COM (Oct. 20, 2012, 8:48PM), <http://www.9news.com/news/article/295274/345/Missy-Franklin-commits-to-UC-Berkeley>.

¹¹⁶ *Id.* See also NCAA Bylaw 12.1.2.1.4.1.2, *supra* note 83.

¹¹⁷ Popular professional U.S. teammates include Michael Phelps, Ryan Lochte and Gabby Douglas.

at an Olympic Games.¹¹⁸ Today, those bonuses amount to \$25,000 for each gold medal won, \$15,000 for each silver, and \$10,000 per bronze medal.¹¹⁹

One option to assist Olympic athletes in limiting their individual exposure to federal income tax on amounts earned via *Operation Gold* is to encourage the USOC to award each medal-winning athlete a monetary bonus which includes a flat-rate tax covering the awards earned. Such financial offering would allow winning athletes to effectively keep the net amount of the awarded bonus money, while the USOC covers the tax imposed on such awards.

As the USOC is a not-for-profit organization and does not deem athletes representing the U.S. employees of the USOC¹²⁰, it is not required to withhold income taxes on bonuses paid to athletes.¹²¹ For general employer purposes, the tax on supplemental wages, to include bonuses, can be withheld at a flat rate of 25 percent.¹²² If the USOC were to utilize the flat percentage rate model and add a 33 percent tax-inclusive rate increase to each amount awarded to winning athletes, such increase would effectively offset the tax each athlete would be required to pay to the I.R.S. on their *Operation Gold* earnings.¹²³ Hence, for each gold medal earned the USOC would actually pay an athlete \$33,250; for each silver medal won the distributable amount would be \$19,950; and for each bronze medal won the USOC would allocate \$13,300.¹²⁴

One might consider with regard to this option whether the USOC can afford to add the supplemental wage tax to the existing *Operation Gold* award moneys paid during an Olympic year. To assess the USOC's financial ability to cover the added 33 percent tax on *Operation Gold* funds dispersed, an analysis of the 2010 and 2012 Olympic Games is useful. During the London Olympics, Team USA won 46 gold, 29 silver and 29 bronze medals.¹²⁵ Per the current model utilized under *Operation Gold*, the USOC awarded a total of \$1,875,000 to its medal-winning athletes.¹²⁶ Had the USOC added a 33 percent tax rate to each medal won to cover each athlete's income tax on such earnings, it would have paid to winning athletes a total amount of \$2,493,750.¹²⁷ The payout difference between the current *Operation Gold* method and the 33 percent tax-inclusive *Operation Gold* rate is \$618,750.

¹¹⁸ See Randy Harvey, *supra* note 70.

¹¹⁹ *Id.*

¹²⁰ See Howard Gleckman, *supra* note 69.

¹²¹ See U.S.C. § 3402 and Treas. Reg. §§ 31.3402(g)-1 and 31.3501-1T.

¹²² The flat 25% rate is also known as the "Percentage Rate". See Treas. Reg. §§31.3402(g)-1. See also *Taxable Fringe Benefit Guide, Federal, State and Local Governments*, I.R.C. (January 2012) at 8. Note, that the Aggregate Method of withholding will not apply since athletes representing the U.S. do not receive employee paychecks from the USOC. Specifically, per the United States Olympic Committee *2012 Athlete Support Designee Form* (Rev. 12/01/11), "All USOC financial benefits provided to athletes will be reported to the IRS and are subject to federal and state income tax, with the exception of tuition grants. The USOC will issue an IRS Form 1099. Since no taxes are withheld by the USOC, athletes may have a tax liability at the time they file their tax returns. If an athlete anticipates such liability, he/ she should consider setting aside some funds for this purpose. The USOC is not, by this document, providing tax advice and readers are advised to retain their own professionals to advise them about the tax treatment of the receipt of USOC funding and benefits."

¹²³ For income tax purposes, it is proper to utilize the tax-inclusive rate of 33% which is equivalent to the tax-exclusive rate of 25%.

¹²⁴ $\$25,000 * .33 = \$8,250 + \$25,000 = \underline{\$31,250}$; $\$15,000 * .33 = \$4,950 + \$15,000 = \underline{\$19,950}$; $\$10,000 * .33 = \$3,300 + \$10,000 = \underline{\$13,300}$.

¹²⁵ See *Medal Count*, LONDON2012.COM, <http://www.london2012.com/medals/> (last visited Jan. 3, 2013).

¹²⁶ $46 \text{ gold medals} * \$25,000 = \underline{\$1,150,000}$; $29 \text{ silver medals} * \$15,000 = \underline{\$435,000}$; $29 \text{ bronze medals} * \$10,000 = \underline{\$290,000}$.

¹²⁷ $(46 * \$33,250) + (29 * \$19,950) + (29 * \$13,300) = \underline{\$2,493,750}$.

As the USOC's 2012 Annual Report is unpublished at press, the USOC's 2010 *Annual Report* can serve as a basis to determine the organization's financial affability to cover the 33 percent added expenses since 2010 was an Olympic Year, thus resulting in added revenue and expenses during such period.¹²⁸ Per its 2010 *Annual Report*, the USOC had total revenue of \$251 million and total expenses of \$191 million, thus generating positive revenue during the 2010 Olympic Games year of \$59 million.¹²⁹ Further, per its 2010 I.R.S. Form 990, *Return of Organization Exempt From Income Tax*, the USOC paid a total of \$2,884,976 in Operation Gold funds that year. Had 33 percent been added to such disbursements to cover the athletes' tax liabilities on such earnings, the USOC would have paid an additional \$952,042. Such payout difference amounts to less than one percent of the total revenue which the USOC earned in 2010. Thus, it is not out of the realm of possibility that in an Olympic Year, the USOC is in a positive financial position to afford paying the extra 33 percent tax on *Operation Gold* disbursements to assist winning athletes in taking home the specified net reward amount of their winnings as one alternative to the OTEA.

Option 2 – The USOC Could Award Operation Gold Funds As Qualified Scholarships for Student-Athletes Rather than Outright Cash Distributions

A second option to potentially mitigate athletes' federal income tax obligations on funds earned per *Operation Gold* is to suggest the USOC make such award money available as *qualified scholarships* for student-athletes.¹³⁰ This option is more complex than that proposed under *Option 1* as it presents the possibility of future judicial interpretation of the I.R.C. with respect to athletic scholarships.¹³¹ However, as the I.R.C. and applicable U.S. Treasury

¹²⁸ See United States Olympic Committee, *2010 Annual Report*.

¹²⁹ Of further interest, per the 2010 USOC Form 990, *Return of Organization Exempt From Income Tax*, the USOC paid a total amount that year of \$2,884,976 in Operation Gold funds. Had the 25 percent added tax been added to such disbursements, the USOC would have paid out an additional \$721,244 to athletes to cover the bonus tax amount, thus paying a total of \$3,606,220. Such payout difference is less than 1% of the total revenue which the USOC boasted that year.

¹³⁰ Under Option 2, the term "qualified scholarship" means a qualified scholarship under 26 U.S.C. § 117. The term "qualified scholarship" as used in Option 2 is a tax term and is not to be confused with an NCAA athletic scholarship, counter, or qualifier as found in the NCAA bylaws. (NCAA Manual 14.02.11.1). Further, per 26 U.S.C. § 117, only athletes pursuing educational degrees are in a position to request and accept *Operation Gold* funds in the form of qualified scholarships should such option become available. However, it is important to note that should the USOC adopt this Option, those athletes eligible for qualified scholarships need not also be NCAA eligible (though they can be, and such analysis will be discussed later in this Section). The sole requirement for athletes interested in pursuing Option 2 if it were made available is that they be candidates for a degree at an educational organization described in U.S.C. § 170(b)(1)(A)(ii). It is also important to note that a number of Olympians who participated in the 2012 London Games are currently collegiate athletes. In track and field alone, of the 2,236 confirmed entries for this sport in the 2012 Olympic Games, 350 are current, former or committed student-athletes in the U.S. (although not all of these student-athletes represent Team USA). Of the 350 athletes with collegiate ties, 123 represented Team USA, and 18 of those athletes attended a college or university in 2012. See Tom Lewis, *Athletics Olympians With Collegiate Ties Number 350*, US TRACK & FIELD AND CROSS COUNTRY COACHES ASSOCIATION (July 21, 2012), <http://www.ustfccca.org/2012/07/featured/olympians-with-collegiate-ties-number-350>.

¹³¹ At press, there are not published cases with respect to the IRS pursuing the taxation of athletic qualified scholarships. See also Adam Hoefflich, *The Taxation of Athletic Scholarships: A Problem of Consistency*, U. ILL. L. REV. 581 (1991); see also Robert W. Lee, *The Taxation of Athletic Scholarships: An Uneasy Tension Between Benevolence and Consistency*, 37 U. FLA. L. REV. 591 (1985).

Regulations do not specifically limit not for profit organizations from granting qualified scholarship money to athletes winning sporting events, it is a plausible option to consider.¹³²

Per the I.R.C., a taxpayer's gross income does not include amounts received as qualified scholarships by individuals who are degree candidates at educational organizations.¹³³ To be considered a *qualified scholarship*, any money received by individuals must be used specifically for tuition and fees, as well as related educational expenses including fees, books, supplies and equipment.¹³⁴

Like the NCAA, which also qualifies for I.R.C. § 501(c)(3) tax-exempt status, the USOC must meet two tests in order to maintain its charitable organization status – the *organizational test* and the *operational test*. The *organizational test* requires that the organization observe certain technicalities, to include being organized as a state-law nonprofit organization, limit its authorized activities to charitable ones, and contain a provision in its organizational documentation stating that its assets will be transferred to a charity or the government should it go out of business.¹³⁵ The *operational test* requires that the USOC primarily engage in charitable activities, including educational activities.¹³⁶ Thus, the USOC is eligible to offer scholarship money to Olympic athletes.

Per the U.S. tax code, qualified scholarship awards are limiting with respect to their exclusion from gross income - if an educational institution requires services of a student *in exchange* for a monetary grant, then such student cannot exclude amounts received from such scholarship from their gross income.¹³⁷ Similarly, the USOC, in granting *Operation Gold* in the form of scholarships to collegiate candidates, may not grant such money in exchange for services on behalf of athlete-recipients. Although the term *services* is not defined in the I.R.C., the U.S. Treasury Regulations limit *services* to those “in the nature of part-time employment required as a condition to receiving the scholarship”.¹³⁸ Per the *USOC's Athletes' Advisory Council Bylaws*, “Athletes may not be paid employees of the USOC” so long as they are “still competing and

¹³²U.S.C. § 117(c) limits the applicability of the exclusion of qualified scholarship money from gross income. Such limitation holds that the exclusion will “not apply to that portion of any amount received which represents payment for teaching, research, or other services by the student required as a condition for receiving the qualified scholarship or qualified tuition reduction.” Treas. Reg. §1.117-2(a)(1) explains the rule in more detail, documenting that such exclusion will “not apply to that portion of any amount received as payment for teaching, research, or other services in the nature of part-time employment required as a condition to receiving the scholarship or fellowship grant.”

¹³³ U.S.C. §117(a).

¹³⁴ U.S.C. §117(b)(1), (2).

¹³⁵ Treas. Reg. § 1.501(c)(3)-1(a), 1(b); *see also* John D. Colombo, *The NCAA, Tax Exemption, and College Athletics*, U. ILL. L. REV. 109, 114 (2010).

¹³⁶ Treas. Reg. § 1.501(c)(3)-1(c)(1); *see also* John D. Colombo, *supra* note 134.

¹³⁷ *Id.* *See also*, Adam Hoeflich, *supra* note 130 at 592; *see also* Thomas R. Hurst & J. Grier Pressly III, *Payment of Student-Athletes: Legal & Practical Obstacles*, 7 VILL. SPORTS & ENT. L.J. 55, 74 (2000) (documenting that while I.R.C. § 117 does not exclude portions of athletic scholarships constituting room and board from gross income, few student-athletes report room and board as income, and the IRS has not pursued the issue. “It is widely recognized that all portions of athletic scholarship do not meet the exclusionary requirements of section 117 because scholarship recipients are required to perform athletic services as a condition of receiving their scholarships. Still, athletic scholarships remain untaxed, and there is case law to support this aberration.” *Citing* Mike Schinner, *Are Athletic Scholarships Merely Disguised Compensation?*, 8 AM. J. TAX. POL'Y 127, 144-148, 155 (1990); *also citing* Robert W. Lee, *supra* note 130 at 595 (noting I.R.C. § 117(c) applies to athletes on scholarship because they must be degree candidates); *see also* Schinner at 139 (stating that since enactment of section 117 forty-five years ago, no court has specifically addressed issue of whether athletic scholarships constitute taxable income).

¹³⁸ Treas. Reg. §1.117-2(a)(1).

receiving benefits from the USOC.”¹³⁹ Thus, funds received by athletes via *Operation Gold* as qualified scholarships should fall outside the *services* limitation for tax purposes, and thus be excluded from recipients’ individual income taxes.

Finally, should the USOC consider pursuing this Option, any scholarship money received under *Operation Gold* would not adversely affect a student-athlete’s NCAA eligibility. Under current NCAA rules, “Educational expenses awarded by the U.S. Olympic Committee which count against an institution’s sport-by-sport financial aid limitations and against the individual’s full-grant-in-aid-limit” are allowed.¹⁴⁰ Further, the NCAA provides that educational expenses awarded by the USOC to student-athletes count against the maximum number of team scholarship awards which an institution may grant.¹⁴¹ Thus, qualified scholarships offered by the USOC to Olympic athletes should not run afoul of a student-athlete’s NCAA eligibility, nor should it pose concerns with respect to the total number of NCAA athletic scholarships which a college or university is allotted.¹⁴²

Option 3 – Training for the Olympics Could Entail Participating in a Trade or Business for Federal Income Tax Purposes

A third option to reduce or eliminate federal income taxes is to encourage *Operation Gold* recipients to take the position when filing their federal income tax returns that their involvement in their specific sporting event(s) is in connection with a trade or business rather than a hobby.¹⁴³ Taking this tax position may allow medal-earning athletes to write off applicable expenses associated with their sport, thus offsetting some or all of the income taxes imposed on *Operation Gold* earnings.

Differentiating a taxpayer’s participation in an activity deemed a trade or business as opposed to a hobby carries significant income tax consequences.¹⁴⁴ If an activity is a *hobby*, the taxpayer must include all revenue generated from such activity in their gross income, and deduct only certain expenses associated with such activity subject at a two percent floor.¹⁴⁵ Thus,

¹³⁹ See USOC Athletes’ Advisory Council Bylaws (As amended December 8-9, 2007), Section II(C)(4), which defines the term “paid employee” as “anyone who is employed on a regular basis. This provision shall not apply to 1) individuals who are engaged on an occasional or temporary basis, which shall include, but not be limited to coaching at a clinic or training camp, making a paid appearance for a sponsor, or working on a finite or discrete project, and 2) athletes who are still competing and receiving benefits from the USOC, the USP or any NGB in his/her capacity as a competing athlete.”

¹⁴⁰ NCAA Manual 15.02.4.2(d)

¹⁴¹ NCAA Manual 15.2.6.4(d).

¹⁴² See NCAA Manual 14.02.11

¹⁴³ Operation Gold recipients considering this Option cannot also be student-athletes seeking NCAA eligibility. Taking the position that an athlete’s participation in a sport is a trade or business falls outside the scope of amateurism as required by the NCAA. See *supra* note 76 which enforces the requirement that “amateurism” is a driving theme for the NCAA and student-athletes who want to remain eligible to compete among NCAA member institutions. Making the argument that an athlete’s participation in a sport is a trade or business is in contrast to the amateur athlete parameters set by the NCAA. Further, the authors acknowledge that some Olympians may already take this position with respect to the filing of their Form 1040 *Individual Income Tax Return*. However, as numerous Olympic athletes are not deemed “professional” with respect to endorsement contracts and/ or other earnings associated with their sport(s), we include this option in our analysis.

¹⁴⁴ See 26 U.S.C. §§ 183 and 162.

¹⁴⁵ See U.S.C. §§ 183 and 67. As an example, Taxpayer participates in swimming as a hobby, and over the course of 2012 had swimming expenses of \$800. If Taxpayer’s adjusted gross income (AGI) in 2012 was \$80,000, Taxpayer would not be able to write off any expenses associated with their swimming hobby because such expenses amounted

before deductions may be taken for expenses associated with the cost of participating in a hobby, such expenses must exceed two percent of the taxpayer's adjusted gross income.

The I.R.C. considers participation in a hobby as engaging in an activity not for profit.¹⁴⁶ The U.S. Tax Court in *Ruth N. Nelson v. Commissioner of Internal Revenue* further identified a *hobby* as “an activity for primarily pleasurable purposes... that differs greatly from experiences provided in... daily professional lives... a mental and physical respite from the rigors of a career.”¹⁴⁷ Distinguish such characterization from that of a *trade or business*, which requires that an individual engage in an activity “with the actual and honest objective of making a profit.”¹⁴⁸ If an activity is deemed to be a *trade or business*, then the taxpayer can deduct all expenses which are ordinary and necessary to carrying on such trade or business.¹⁴⁹

One benefit of characterizing an activity as a *trade or business* as opposed to a *hobby* with respect to Olympic athletes entails that an athlete participating in their sport as a trade or business can write off numerous ordinary and necessary expenses associated with such activity, to include training and travel costs, meet and race fees, equipment, coaching fees, and training and competition attire. Another benefit allows such athlete to write off such expenses without the two percent floor limitation, thus minimizing or possibly eliminating the income tax imposed on *Operation Gold* earnings.¹⁵⁰

to less than 2% of their total AGI. To meet the 2% floor rule, Taxpayer would have to have swimming expenses of more than \$1,600. Further, Taxpayer would only be eligible to write off those swimming expenses which exceeded \$1,600 during 2012.

¹⁴⁶ U.S.C. § 183(b). The Code does not specifically use the word “hobby” in I.R.C. §183. However, Treas. Reg. §1.183-2(a) includes in its discussion of deductions not allowable under I.R.C. §§ 152 or 212 “activities which are carried on primarily as a sport, hobby, or for recreation.”

¹⁴⁷ *Ruth N. Nelson v. Commissioner of Internal Revenue*, T.C. Memo 2001-17; 2001 Tax Ct. Memo LEXIS 145; 81 T.C.M. (CCH) 1632 (May 17, 2001), at 37-38. A list of relevant factors provided in Treas. Reg. § 1.183-2(b) to assist in characterizing an activity as a hobby include: the manner in which a taxpayer carries on his activities, the taxpayer's expertise, the time and effort expended in carrying on the activity, the success of the taxpayer in carrying on other activities, the taxpayer's income or losses with respect to the activity, the amount of occasional profits, if any, which are earned, the taxpayer's financial status, and the elements of personal pleasure or recreation obtained by the taxpayer in participating in such activity.

¹⁴⁸ *Dreicer v. Commissioner*, 78 T.C. 642, 645 (1982), aff'd without opinion 702 F. 2d 1205 (D.C. Cir. 1983).

¹⁴⁹ U.S.C. § 162(a). For example, Taxpayer participates in the sport of swimming as her trade or business, and over the course of 2012 had swimming expenses of \$8,000 which are deemed to be ordinary and necessary to her participation in the sport. If Taxpayer had an adjusted gross income (AGI) in 2012 of \$80,000, Taxpayer can write off the entire \$8,000.

¹⁵⁰ To date, the U.S. Tax Court has not published a case involving an athlete taking the position that their participation in a sport be characterized as a hobby versus a trade or business for tax purposes. However, two California cases have discussed such characterization, though not specific to the area of tax. In *Kevin Okura v. United States Cycling Federation et al*, 186 Cal. App. 3d 1462; 231 Cal. Rptr. 429; 1986 Cal. App. LEXIS 2178 (Cal. App. 1986), Okura was injured while participating in a cycling race and sued race organizers for negligence. While this case did not itself characterize an individual's participation in a sport as being a “hobby”, it was cited in *Barbara Buchan v. United States Cycling Federation, Inc.*, 227 Cal. App. 3d 134; 277 Cal. Rptr. 887 (1991) to such affect. In *Buchanan*, defendant United States Cycling Federation (Federation) appealed an original action suit filed by Barbara Buchanan, a cyclist, against the Federation for negligence which resulted in Buchanan's injury. Unlike Okura, who Buchanan dubbed a “Sunday Cyclist”, Buchanan was an amateur athlete seeking to obtain a spot on the 1984 U.S. Olympic Cycling Team. Buchanan argued that her entry in the bike race at issue was “a practical necessity” to meeting her Olympic goals, as opposed the participation in activities to include scuba diving, skydiving, motor cross racing, or motorcycle dirt-bike racing, each of which the California Court of Appeals have previously held to have “no practical necessity” for participants (*See Norman Madison v. The Superior Court of the County of Los Angeles*, 203 Cal. App. 3d 589, 599; 250 Cal. Rptr. 299 (Aug. 4, 1988); *citing to McAtee v. Newhall Land & Farming Co.*, 169 Cal. App. 3d 1031, 216 Cal. Rptr. 465 (1985); *Hulsey v. Elsinore Parachute Center*, 168

While some Olympians hold jobs outside of their training regimes, for many athletes training for a spot on an Olympic team is their full time job.¹⁵¹ Career-athletes include Michael Phelps, whose swimming regime required that he practice up to six hours per day, six days per week; Olympic gymnasts who generally train forty hours per week to reach peak elite status; and even skeleton sliders who practice up to eight hours each day in order to earn a spot on an Olympic team.¹⁵² The success of Olympic athletes, combined with the time, effort, and money required to become an elite athlete, might differentiate an athlete participating in a *hobby* versus an Olympian participating in a *trade or business*. Thus, while current law requires that a medal-winning athlete pay income tax on their earnings from *Operation Gold*, by taking the position on their federal income tax return that the involvement in their sport is in connection with a *trade or business* they could write off all ordinary and necessary expenses associated with their sport, thus minimizing or even eliminating the income tax imposed on their *Operation Gold* earnings.

Conclusion

For U.S. athletes, earning a medal at the Olympic Games comes with a tax when prize money is awarded. As part of the USOC's *Operation Gold* program, Olympic medalists are paid a modest five-figure sum for each of their efforts. Accepting this program's financial prizes, however, does not invalidate eligibility under NCAA bylaws which have exempted earnings from the *Operation Gold* program from counting against its fundamental principle of amateurism. Thus, U.S. athletes such as Missy Franklin who earn prize money for a gold, silver or bronze medal at the Games do not give up their amateur eligibility by accepting the money in conjunction with this program, even though accepting endorsement income or a bonus for a world record would prevent them from competing in the NCAA.

In response to the continued success of the U.S. team at the Olympics, in 2012 Senator Marco Rubio proposed the OTEA to exempt from taxation earnings of prize money won by a U.S. athlete in the Olympics. No doubt, there were political motivations behind the introduction of the OTEA during a Presidential inaugural year. As of yet, however, Senator Rubio's efforts

Cal. App. 3d 333 (1985); *Kurashige v. Indian Dunes, Inc.*, 200 Cal. App. 3d 606 (1988)). The California Appellate Court reversed and remanded the lower court's decision, finding in favor of the Federation. The Dissent cited key features which set Buchanan, as an Olympic-hopeful, apart from athletes participating in sports for sheer enjoyment, noting, "she [Buchanan] decided to devote full time to amateur cycling. ... but as she progressed in the sport of cycling, the travel and training requirements required her to give up [her] job and become a full-time athlete. In her view, bicycle racing was her career... The evidence shows these goals were objectively realistic, not simply 'dreams'... It clearly took more than 'dreams' to be invited to train at the Olympic Training Center." See *Buchanan* at 44-45. The Dissent's argument is important to this issue as it focuses on the element that requires an Olympic athlete to be a "career athlete", not merely a participant in a sporting event.

¹⁵¹ Vivian Giang and Samantha Cortez, *What 36 Olympic Athletes Do For a Job*, BUSINESS INSIDER (Aug. 3, 2012, 3:24 PM), <http://www.businessinsider.com/what-36-olympic-athletes-do-for-a-living-2012-8?op=1>.

¹⁵² See *Michael Phelps Workout and Diet*, MUSCLE PRODIGY, <http://www.muscleprodigy.com/michael-phelps-workout-and-diet-arcl-1142.html> (last visited Jan. 11, 2013); see also Amy Van Deusen, *Your Road to the Olympic Team – How To Become An Olympic Gymnast*, ABOUT.COM GYMNASTICS, http://gymnastics.about.com/od/majorcompetitions/ss/roadtoolympics_4.htm (last visited Jan. 11, 2013); see also Lindsey Reu, *What It Takes To Be an Olympic Athlete*, FITNESS MAGAZINE, <http://www.fitnessmagazine.com/workout/real-plans/celebrity/what-it-takes-to-be-an-olympic-athlete/?page=2> (last visited Jan. 11, 2013).

have not resulted in a change in law. Still, there are alternative options to consider with regard to reducing or eliminating federal income tax on Olympic medals, to include recommending that the USOC pay the tax on the prize money awarded to athletes; proposing that the USOC award *Operation Gold* funds as *qualified scholarships* for student-athletes; and suggesting that athletes take the position on their individual income tax returns that the participation in their sport is akin to a trade or business, thus allowing the deduction of all ordinary and necessary expenses and resulting in the reduction or elimination of the tax imposed on *Operation Gold* earnings.

If the record number of viewers of the London 2012 Games in any indication, the world will once again tune in to the Winter Olympics when it descends on Sochi, Russia in 2014, followed by the 2016 Summer Games in Rio De Janeiro. Without a change in legislation, U.S. medal-winning athletes may once again face income tax imposition resulting from their successes at each of these Games. However, should the USOC implement a more tax-friendly option to assist athletes, or should athletes utilize the I.R.C. as currently written to take favorable tax positions on their income tax returns, perhaps at a future Olympics Missy Franklin would be in a position to bring home all of her *Operation Gold* earnings.