THE "JOCK TAX": FAIR PLAY OR UNSPORTSMANLIKE CONDUCT

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Just as the players of the Seattle Seahawks began to settle into their off-season routines following the 2005 season, April 17[1] brought an unpleasant reminder of the loss they suffered in Super Bowl XL. Although it may not have set in entirely by then for many of the players, each of them likely realized the exact nature of his loss in Detroit. Of course the loss referred to is not the team's 21-10 defeat at the hands of the Pittsburgh Steelers.[2] Rather, it is the income that each player was forced to surrender to the state of Michigan and the city of Detroit in compliance with the "jock tax"[3] levied by those jurisdictions.[4] It has been estimated that Michigan's 3.4% tax on nonresident athletes cost the Seahawks nearly $300,000 just to play at Ford Field.[5] In addition to that, the city of Detroit imposes its own 1.275% tax on the earnings of the athletes.[6] In the end, Seattle quarterback Matt Hasslebeck was forced to pay out an estimated $10,000 of his salary to a city and state where he has no residence and no affiliation.[7]

Perhaps fed up with seeing his state's athletes fund the budgets of other states and cities, Washington State Representative Chris Strow recently proposed what some have called a "retaliation tax" on nonresident athletes.[8] House Bill 3104 would impose a surcharge on out-of-state professional

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1. April 17, 2006 was the last day that a taxpayer could file state and federal tax returns for 2005. It is used merely for illustration purposes here. The income referred to was earned in 2006, and taxes on that income will not be collected until 2007.

2. The Pittsburgh Steelers defeated the Seattle Seahawks in Super Bowl XL in Detroit, Michigan on February 5, 2006. Judy Battista, *The Chase is Over*, N.Y. TIMES, Feb. 6, 2006, at D1.

3. The term "jock tax" refers to taxation of nonresident athletes by foreign jurisdictions in which they perform. *See* Elizabeth C. Ekmekjian, *The Jock Tax: State and Local Income Taxation of Professional Athletes*, 4 SETON HALL J. SPORT L. 229, 230 (1994).

4. *See* Mike Baker, *Measure Would Tax Visiting Pro Athletes; Bill Comes in Response to Other States' Levies*, COLUMBIAN (Vancouver, WA), Jan. 31, 2006, at C2.

5. *Id.*

6. *Id.*

7. *Id.*

8. *Id.*

athletes when they play in the state of Washington.[9] This seems like a fair measure since 20 of the 24 states that host a major professional sports team[10] currently impose a similar jock tax.[11] However, unlike those 20 states, the state of Washington imposes no personal income tax, and therein lies the problem.[12] Mr. Strow's bill died before the state legislature during the current session in Olympia.[13] This leaves Washington and the three other states hosting major professional sports teams that do not impose a personal income tax[14] in a precarious position. "[M]oney flows out of those states when their pro sports teams play away games, but none flows in from the income tax states when their athletes compete [there]."[15]

This note will examine the problem posed above. Part I will provide an extensive background of the development of the so-called jock tax. The discussion will consider the derivation of a state's authority to tax the income of a nonresident that is earned within its borders and study the application of such taxing authority to nonresident athletes. Federal income tax considerations will be ignored, as athletes are treated the same as all other taxpayers for determining federal taxable income.[16] Part II will shift the focus specifically to Mr. Strow's proposal in Washington, including an analysis of why the proposal as it stands will not become law and whether any alternatives exist for the four states that do not impose a personal income tax. Part III will further analyze the desirability of the jock tax generally and whether the tax as administered by the 20 imposing states is really much different than the proposal in Washington. The analysis will bring to light the ills present in the current scheme of nonresident athlete income taxation and will be followed by the conclusion, suggesting the abolishment of the jock tax.

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9. *Id.* Strow's proposal would impose a surcharge of $3,500 on professional football and basketball players and $750 on professional baseball players. *Id.*; H.B. 3104, 59th Leg., Reg. Sess. (Wash. 2006).

10. For the purposes of this note, "major professional sports team" refers to a franchise that is affiliated with Major League Baseball, the National Basketball Association, the National Football League, or the National Hockey League.

11. Baker, *supra* note 4.

12. *See* Editorial, *Game Over for 'Jock Tax,'* THE NEWS TRIBUNE (Tacoma, WA), Feb. 4, 2006, at B05.

13. *Id.*

14. Washington, Florida, Tennessee, and Texas are the four states that host a major professional sports team and impose no personal income tax. *Id.*; Baker, *supra* note 4.

15. *Game Over for 'Jock Tax,' supra* note 12.

16. Marc Yassinger, *An Updated Consideration of a Taxing Problem: The Harmonization of State and Local Tax Laws Affecting Nonresident Professional Athletes*, 19 HASTINGS COMM. & ENT. L.J. 751, 753 (1997). All U.S. residents, including professional athletes, are taxed by the federal government on their taxable income, which is defined as "gross income minus deductions allowed." I.R.C. § 63(a) (2005).

I. BACKGROUND OF THE "JOCK TAX"

Two key concepts are important to understanding the practice of taxing nonresident athletes. First, a jurisdiction may tax nonresidents on income earned within that jurisdiction, even though such nonresidents have no representation in that jurisdiction.[17] Second, although the administrative burden of levying such a tax against infrequent visitors may outweigh its benefits in a number of cases, athletes are easy targets with large salaries and public schedules indicating where they will be on any given day.[18] These two concepts are the foundation upon which the jock tax has developed, and they will be expounded upon in the following sections.

A. State Taxation of Nonresidents

To understand the complexities faced by athletes in complying with state tax law it is important to understand the provisions and circumstances that give rise to those complexities. It is well established that each state, as well as each city, has the authority to tax the personal income of its residents.[19] Additionally, each state may impose a tax on the income of a nonresident that is derived from sources within the state.[20] This authority is based on the fact that the foreign state grants the nonresident the right to do business within the state, extending to the nonresident the benefits of its government.[21]

Already it is apparent that a taxpayer may be exposed to double taxation of income earned outside his state of residence. The Supreme Court has ruled that the Due Process Clause does not preclude such double taxation, meaning a taxpayer's state of residence is free to tax income earned regardless of its source, even if that income is taxed by another state, the state in which it was earned.[22] Fortunately, this theoretical exposure to double taxation of nonresident earnings is not a practical problem in most cases[23] because a

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17. *See infra* note 20 and accompanying text.

18. *See infra* notes 35-36 and accompanying text.

19. *See* New York *ex rel.* Cohn v. Graves, 300 U.S. 308, 313 (1937) ("Domicile itself affords a basis for such taxation. Enjoyment of the privileges of residence in the state and the attendant right to invoke the protection of its laws are inseparable from responsibility for sharing the costs of government.").

20. Shaffer v. Carter, 252 U.S. 37, 53 (1920).

21. *See id.*

22. *See Graves*, 300 U.S. at 314-15.

23. The state of Illinois refuses to grant a credit to its resident athletes for taxes paid to a foreign jurisdiction, effectively double taxing the athletes on dollars allocated to another jurisdiction. It is the only

taxpayer's state of residence usually grants a tax credit for taxes paid to another jurisdiction.[24] The concept of tax credits as applied to athletes will be discussed further and illustrated in Part I.B., but at this point of the discussion, it is sufficient to know that most often tax credits relieve any potential double taxation burden.

Cities and states that tax nonresidents typically do so on a source basis.[25] Gross income for city and state tax purposes includes only that income from sources within the jurisdiction.[26] That is to say that in order for a city or state to have taxing authority over a nonresident, the services from which the income to be taxed is derived must have taken place within that city or state. It is therefore necessary to allocate the taxpayer's income among the various jurisdictions in which it is earned to determine the tax liability in each jurisdiction.[27] The methods used by states to allocate income for taxing purposes can reasonably differ and have historically done so, especially with regard to allocating the income of a professional athlete.[28] Regarding taxation of nonresident athletes, there are two generally accepted allocation methods; the commonly used duty days method and the less popular games played method.[29] These two allocation methods will be discussed in greater detail in the next section.

B. Application of Nonresident Income Tax to Athletes

Although state taxation of nonresident income is not a new concept, application of such a tax to professional athletes is a relatively recent development.[30] Many states have had nonresident income tax regulations in

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of the 20 states that impose a jock tax that does not grant such a credit. DAVID K. HOFFMAN, TAX FOUNDATION SPECIAL REPORT NO. 123, STATE AND LOCAL INCOME TAXATION OF NONRESIDENT ATHLETES SPREADS TO OTHER PROFESSIONS 3 (2003).

24. Ekmekjian, *supra* note 3, at 241.

25. FEDERATION OF TAX ADMINISTRATORS REPORT, STATE INCOME TAXATION OF NONRESIDENT PROFESSIONAL TEAM ATHLETES: A UNIFORM APPROACH 1 (1994) [hereinafter FTA Report].

26. *See Shaffer*, 252 U.S. at 49.

27. Ekmekjian, *supra* note 3, at 238.

28. *See generally* Jeffrey Adams, Comment, *Why Come to Training Camp Out of Shape When You Can Work Out in the Offseason and Lower Your Taxes: The Taxation of Professional Athletes*, 10 IND. INT'L & COMP. L. REV. 79 (1999) (providing extensive discussion of different allocation methods used to determine the tax liability professional athletes face in the different tax jurisdictions in which they perform).

29. *See id.* at 99; Ekmekjian, *supra* note 3, at 238.

30. The first instance of active imposition of a jock tax was by California in 1991, when the state's legislature voted to levy its state income tax on players of visiting teams. Jennifer K. Davidson, *Jock Tax: Occupation Discrimination?*, MD. B.J., May-June 2004, at 23, 24; HOFFMAN, *supra* note 23, at 2.

place for decades but applied the regulations primarily to entertainers such as musicians.[31] Athletes were not targeted for many years because tax officials felt that the amount of income allocated to their state would be insignificant, perhaps not even worth the administrative burden of collecting.[32] That attitude changed dramatically though as the salaries of professional athletes began to escalate significantly during the 1980s.[33] New York State Department of Taxation and Finance Director of Taxpayer Services Gabe DiCerbo summed up the change in attitude toward taxing nonresident athletes by saying, "What triggered our interest in athletes is their salaries are getting bigger and bigger. We suddenly found there was now enough dollars to make it worth our while."[34]

In addition to the growth in salaries, several other factors made taxing the income of nonresident professional athletes very attractive.[35] Professional athletes are well-known individuals, it is easy to determine when they are present in a particular taxing jurisdiction given their schedules, as nonresidents they cannot express their displeasure through voting, and the athletes cannot avoid the taxing jurisdiction since their schedules determine the sites at which they will play.[36] Coupling these considerations with the fact that during the early 1990s many state and local governments were faced with fiscal pressures from external economic conditions such as a recession, cuts in federal funding, and the growth of budget deficits, it is no surprise that when forced to seek untapped sources of revenue officials turned to the increased enforcement of nonresident tax laws against athletes.[37]

1. How the Practice Began

California became the first state to actively impose a jock tax when the state's legislature voted to actively levy its state income tax on players of visiting teams in 1991.[38] The decision came just after the Chicago Bulls defeated the Los Angeles Lakers four games to one in the NBA Finals, playing

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31. Ekmekjian, *supra* note 3, at 234.
32. *Id.*
33. *Id.*; Adams, *supra* note 28, at 80.
34. Ekmekjian, *supra* note 3, at 234 n.24.
35. *See* Robert D. Plattner, *FTA Recommendations on Taxing Nonresident Athletes Could Have Wider Application*, 5 J. MULTISTATE TAX'N 36, 36 (1995) (listing factors that make taxing income of nonresident professional athletes attractive).
36. *Id.*
37. *Id.*; Ekmekjian, *supra* note 3, at 234.
38. *See* Davidson, *supra* note 30, at 24.

and winning the last three games of the series in California.[39] In considering the measure, state tax officials estimated that in that year alone California would collect two to three million dollars from out-of-state athletes.[40] Illinois responded to California's act the following year by passing a bill proposed by state Senator John Fullerton that was informally entitled "Michael Jordan's Revenge."[41] The bill is a reciprocal taxing measure that applies only to athletes from states that impose a nonresident income tax on Illinois athletes.[42]

Just as Illinois felt compelled to reciprocate, so too did many other states, and once the idea of collecting taxes from nonresident athletes was out of the bag, it spread quickly. At present, every state hosting a major professional sports team that levies a tax on personal income actively levies that tax on nonresident athletes that visit the state.[43] The jock tax sometimes exists as a separate tax law, but is usually "just an aggressive extension of an income tax to selected nonresidents."[44] Washington, Texas, Tennessee, and Florida are currently the only four states with major professional sports teams that do not tax the personal income of their residents and thus do not impose a jock tax on nonresident athletes.[45] Despite that fact, it is clear now that even those states may try to get into the game.[46]

In addition to the 20 states, several cities that are home to major professional sports teams impose their own tax on the earnings of nonresident athletes who come to play in those cities.[47] Examples include Cleveland, Cincinnati, Detroit, Kansas City, and the first city to tax nonresident athletes at the local level, and arguably the most aggressive, Philadelphia.[48] Philadelphia tax officials announced their intention to collect from nonresident athletes earning income within the city in 1992, before many states had even taken such a step.[49] The move was prompted by a deficit that

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39. *Id.*; HOFFMAN, *supra* note 23, at 2.

40. Ekmekjian, *supra* note 3, at 235.

41. Hugh Dellios, *Legislators OK 'Jordan's Revenge,'* CHI. TRIB., July 1, 1991, at 3. Senator Fullerton remarked, "I heard Michael was being taxed when the Bulls were playing the Los Angeles Lakers in the NBA Finals, [and] I thought that was unfair . . . . Why should we be losing money to the state of California?" *Id.*

42. Ekmekjian, *supra* note 3, at 235.

43. *See* Baker, *supra* note 4.

44. HOFFMAN, *supra* note 23, at 2.

45. *See* Baker, *supra* note 4.

46. *Id.*

47. Richard E. Green, *The Taxing Profession of Major League Baseball: A Comparative Analysis of Nonresident Taxation*, 5 SPORTS LAW. J. 273, 290 (1998).

48. *See id.*

49. *See* Leslie A. Ringle, *State and Local Taxation of Nonresident Professional Athletes*, 2 SPORTS

was estimated at the time to grow to about $1 billion by 1996.[50] The solution seemed ideal to the newly elected mayor Edward Rendell, as it allowed him to squeeze more revenue from existing tax laws but to extract that revenue from taxpayers outside of his constituency.[51] Philadelphia did not stop with athletes either. The city has actively targeted nonresident entertainers, doctors, and attorneys who perform services and earn income within the city.[52]

2. *Allocation of Income*

Once a jurisdiction has decided to tax the income of nonresidents earned within its borders, that jurisdiction must determine a method by which it will compute the amount of the nonresident's total income that is to be allocated to it. States are free to formulate their own allocation methods, and historically states have attempted different approaches.[53] Generally, two allocation methods have been used: the duty days method and the games played method.[54]

a. *Duty Days Approach*

The duty days method has historically been the more widely accepted approach to allocating income.[55] California was the leading advocate of this method, which a majority of states decided to adopt.[56] The duty days method has also received the approval of the federal government, as it is the system by which income is apportioned between the United States and Canada for federal income tax purposes.[57] Compared to the alternative games played method, the duty days approach is viewed as a more complete and realistic way to apportion income, encompassing more of the services that athletes perform in earning their income.[58] The approach determines the portion of an

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LAW. J. 169, 169 (1995).

50. Michael deCourcey Hinds, *Philadelphia Mines New Tax Sources*, N.Y. TIMES, Oct. 9, 1992, at A14.

51. *Id.*

52. Hank Grezlak, *Philadelphia Lawyers May Face Taxes From Other Areas; But Double Taxation is Not a Result*, LEGAL INTELLIGENCER, Oct. 29, 1993, at 3.

53. *See* Adams, *supra* note 28, at 99-100.

54. *Id.*; Ekmekjian, *supra* note 3, at 238.

55. *See* Ekmekjian, *supra* note 3, at 240; Yassinger, *supra* note 16, at 758; Adams, *supra* note 28, at 100.

56. *See* Green, *supra* note 47, at 282; Ekmekjian, *supra* note 3, at 240.

57. *See* Stemkowski v. Comm'r, 690 F.2d 40, 44 (2d Cir. 1982).

58. The duty days approach takes into consideration more than just game days, including other

athlete's income allocable to the particular taxing jurisdiction by multiplying the athlete's total income by a ratio of the number of duty days spent within the jurisdiction to the total number of duty days, or all days in which the athlete performs services in satisfaction of a contractual obligation.[59]

The total number of duty days (the denominator in the ratio) is generally defined to include all practice days, game days, and travel days from the beginning of the team's official preseason training through the last game in which the team competes, including any postseason play.[60] In addition, taxing authorities normally include off-season days in which the athlete has a contractual obligation to perform services, such as camps, instructional leagues, all-star games, team imposed training activities, and promotional events.[61] The number of duty days spent within a particular jurisdiction (the numerator of the ratio) includes not just game days within that jurisdiction, but also days spent there on which a required practice or meeting was held, as well as travel days that include a game, practice, meeting, or other required service.[62] Travel days that involve no game, practice, or other required service are not apportioned to any particular state, but are included in the total number of duty days.[63]

A quick analysis of the duty days approach illustrates why it is the more accepted approach. It favors the state that applies it, ensuring that a resident athlete will pay as little as possible to foreign jurisdictions and as much as possible to the state in which his home team is located. This is true whether or not that state is the athlete's state of residence. Because the formula considers not just game days, but all days that include performance of some contractual obligation (practice, training, meetings, etc.), the denominator of the ratio is maximized, thus decreasing the percentage of the athlete's total income that will be allocated to each separate foreign jurisdiction.[64] Furthermore, because the bulk of such additional activities will occur in state

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activities that athletes have a contractual obligation to undertake. *See* Adams, *supra* note 28, at 100-02.

59. *See* FTA Report, *supra* note 25, at 12.

60. *See* Ekmekjian, *supra* note 3, at 238-39; Ringle, *supra* note 49, at 174.

61. Adams, *supra* note 28, at 100.

62. FTA Report, *supra* note 25, at 4.

63. *Id.*

64. Because the number of days that an athlete will spend performing in each foreign jurisdiction is set by his schedule, increasing the denominator of the ratio will decrease the amount of his total income that is allocated to each foreign jurisdiction. If it is predetermined that a New York athlete earning $1 million will spend 5 duty days in California, then each day that can be added to his total number of duty days decreases the fraction by which he will multiply his $1 million salary to determine the amount of income taxable by California.

where the athlete's team is located, increasing the numerator of the ratio for that state, most of the athlete's total income will be allocated to that state.

In addition to favoring the home state, the duty days approach can result in significant tax benefits for players that are able to perform contractual obligations in the location of their choice. Two cases have argued that an athlete should be allowed to include individual off-season training in the number of total duty days, the denominator of the ratio.[65] Although both cases were unsuccessful on their particular facts,[66] both rulings could be interpreted to suggest that under certain circumstances off-season training may be includable.[67] The argument turns on whether such training is a contractual obligation or a condition of employment.[68]

If allowed to include such days, an athlete could decrease his tax burden by conducting off-season training in a state that does not impose a nonresident tax on athletes.[69] This would increase his total number of duty days, the denominator in the ratio, lowering the amount of income allocable, and in turn the tax dollars owed, to each state and city. The days added to the denominator would have to be allocated to the state in which the training was conducted, but if that state imposes no tax, then there is no corresponding payout due. The catch is that the income would still be taxable by the athlete's state of residence, as any resident's income would be taxed. However, for athletes that reside in a state that imposes no personal income tax, this trick may significantly lower their total tax bill. This illustrates the benefit to Major League Baseball franchises of holding spring training in Florida. In addition to the great weather, the players are able to increase the number of total number of duty days with days that are allocable to a state that imposes no income tax. This means that the athlete's state of residence, often the home state of the franchise for which he plays, will reap the benefit of taxing the income allocable to those activities, as they do not have to grant a credit since Florida does not tax that income.

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65. Stemkowski v. Comm'r, 690 F.2d 40, 42 (2d Cir. 1982); Favell v. United States, 16 Cl. Ct. 700, 702 (1989).

66. *Stemkowski*, 690 F.2d at 45; *Favell*, 16 Cl. Ct. at 722.

67. In neither case was off-season conditioning found to be a mandatory part of the athlete's contract. Neither ruling precludes inclusion of off-season conditioning where it is found to be an explicit requirement of a contract. *See* Adams, *supra* note 28, at 105-07.

68. *See id.*

69. *See id.* at 104.

b. Games Played Approach

The alternate and less popular allocation method used to apportion income between taxing jurisdictions is the games played method.[70] This method uses a formula much like the one used in the duty days approach, but the ratio involved reflects the number of games played in a particular jurisdiction to the total number of games played.[71] With this method, determination of the numbers to be used in the ratio is simpler because it takes into consideration only game days.[72] Inherent in its simplicity is its shortcoming. It "fails to reflect that athletes are paid for services in addition to game performances such as practice days, team meetings, and public relations activities."[73] However, the games played method was previously the method of choice in New York, Oregon, and Pennsylvania.[74]

c. A Move to Uniformity

As more states began to tax nonresident athletes, inconsistent application of the tax and variation in the allocation methods used among the states led to fear of double taxation of some portions of the athlete's income.[75] Even the states that used the same method of allocation may define the revenue that would be generated differently.[76] The frustration and discontent with the inconsistency led then Kansas City Chiefs owner Lamar Hunt to approach the Federation of Tax Administrators (FTA) with a plea for the development of a consistent and more uniform approach.[77] In response, the FTA created a Task Force to help solve the problem.[78] The report issued by the FTA Task Force called for a uniform apportionment formula and suggested the duty days method as the preferred allocation method.[79]

The FTA Task Force's report led to the abandonment of the games played method by the states, with the favored duty days formula prevailing.[80] New

70. *See* Adams, *supra* note 28, at 103.
71. *Id.* at 102-03.
72. *Id.* at 103.
73. *Id.*
74. *See* Ekmekjian, *supra* note 3, at 240.
75. *See* Yassinger, *supra* note 16, at 756.
76. *See id.*
77. *Id.* at 756-57.
78. *See id.* at 757; Plattner, *supra* note 35, at 36.
79. FTA Report, *supra* note 25, at 2-3.
80. *See* Plattner, *supra* note 35, at 36-37; Adams, *supra* note 28, at 103.

York, the last state to use the method, gave up on it as of January 1, 1995, switching to the more accepted duty days approach and thus ending its significance.[81]

3. *Application of Tax Credits*

With a framework now in place of how states allocate and tax the income of nonresident athletes, the issue of tax credits should be revisited. Suppose an athlete resides in New Jersey, plays for a New York sports franchise, and over the course of the season plays away games in ten of the twenty states that impose a jock tax. The athlete's total income is taxable by his state of residence, New Jersey.[82] Most of that income is earned in and allocable to New York, where he plays his home games, attends practice, and attends team meetings and functions. That income derived from services performed within New York is taxable by that state as well.[83] Additionally, the income derived from services performed within each of the ten other states, where the athlete plays in away games, is taxable by the state in which it is earned.[84] This means that each dollar earned by the athlete would hypothetically be taxed twice, once by his state of residence and once by the state to which the income is allocated, or where it was earned. Even if the athlete lived in New York, where he plays his home games, every dollar allocable to road trips would be subject to such double taxation.

The first reaction of any taxpayer might be, "That is not fair." Fair or not though, the Supreme Court has ruled that such a practice is not prohibited by the Constitution.[85] Fortunately, almost every state grants its resident taxpayers a tax credit for amounts paid to other jurisdictions to prevent double taxation.[86] For residents of states that levy a personal income tax the end result is essentially the same, although residents of low rate states will end up paying a little more than they would otherwise because of payments owed to high rate foreign states. But in any case, so long as credits are granted by the state of residence, each dollar is being taxed only once. If the state of residence is one that imposes no income tax, then credits are meaningless and

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81. Adams, *supra* note 28, at 103-04.
82. *See supra* note 19 and accompanying text.
83. *See supra* note 20 and accompanying text.
84. *Id.*
85. *Graves*, 300 U.S. at 314-15.
86. *See supra* notes 23-24 and accompanying text.

do not exist. That taxpayer simply incurs tax liability that he would not otherwise incur.

With the exception of residents of states that impose no personal income tax, a taxpayer's liability does not typically change too dramatically due to the grant of a tax credit by the state of residence. Thus the real loser is the state granting the credit. That state is losing tax revenue from the income of its residents to another state. How is the lost revenue replaced? The state imposes its own tax on nonresident athletes.[87] So at a glance it seems like the whole process evens itself out. The athletes are taxed on each dollar only once because of the tax credit granted by their home state, and the home state that loses tax dollars to those states imposing nonresident taxes makes up the lost dollars by taxing the athletes visiting from the other states.

There is a catch though with the receipt of tax credits for taxes paid to a nonresident state. The resident state, the state granting the credit, generally credits only up to the amount the home state would have collected.[88] Each dollar above what the athlete would have paid to his home state, due to a higher rate of taxation in the foreign jurisdiction, is a dollar that is not credited, subjecting the athlete to a higher tax burden than the home state would. If the home state taxes at a higher rate than the foreign jurisdiction, home states will typically take advantage of the disparity by taxing the athletes for the difference.[89]

States that grant tax credits to resident taxpayers are effectively conceding the loss of potential revenue. Dollars that would otherwise fund the state's government as revenue from state income tax are instead funding the government of a foreign jurisdiction. This concession forces each state to reciprocate by taking a more active approach to collecting from nonresidents earning income within its own borders.

II. ANALYSIS OF WASHINGTON BILL AND ALTERNATIVES FOR "NO INCOME TAX" STATES

The concession of lost tax revenue and replacement through an active, reciprocal taxation of nonresidents by a state that imposes a personal income tax is not a surprising cause and effect. But what about those states that choose to fund their government through other means? Seven of the fifty

87. Yassinger, *supra* note 16, at 764.
88. HOFFMAN, *supra* note 23, at 6.
89. *Id.*

states do not tax the personal income of their residents.[90] One might argue that because such states are granting no credit to excuse tax dollars paid to foreign jurisdictions, those states are losing nothing when a foreign jurisdiction taxes their residents. There is no loss of tax revenue because the states have chosen not to tax a resident's individual income.[91] This argument is not entirely true though. When a resident of a state that imposes no personal income tax is taxed by a foreign jurisdiction, potential revenue that would otherwise fund the government of the state of residence is being forfeited to the foreign jurisdiction. Although the state of residence is not losing outright income tax revenue, disposable income is flowing out of the state in the form of payment to a foreign jurisdiction. Every dollar of disposable income that flows out is one less that can be spent within the state of residence, meaning less sales tax revenue, less property tax revenue, and generation of less revenue of whatever form that state uses as an alternative to personal income tax.

This brings us to the problem faced by Mr. Strow in Washington. Although Washington does not impose a personal income tax on its residents, Strow hoped to find a way to bring to his state the benefits that other states receive when nonresident athletes visit to perform contractual duties, and more importantly a way to protect against the outflow of disposable income caused by taxation of Washington residents by foreign jurisdictions. Mr. Strow's proposal was in the form of a flat surcharge, administered on a per game basis, on nonresident athletes when they visit the state of Washington to perform in a sporting event.[92]

It is not hard to see the logic behind Mr. Strow's proposal. Other states protect themselves from revenue lost to foreign jurisdictions in the form of jock tax payments by imposing their own jock tax on nonresident athletes that perform within their state.[93] Washington should protect itself from lost revenue in a similar matter. The protective measure will not be administered exactly the same as in the other states since Washington does not levy a personal income tax, but the principle seems to be the same.

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90. Alaska, Florida, Nevada, Texas, South Dakota, Washington, and Wyoming impose no individual income tax. Additionally, New Hampshire and Tennessee levy a tax on individual income only in the form of dividends or interest, but not on wages and salaries. CURTIS S. DUBAY & SCOTT A. HODGE, TAX FOUNDATION BACKGROUND PAPER NO. 51, STATE BUSINESS TAX CLIMATE INDEX 16-17 (2006).

91. *See* HOFFMAN, *supra* note 23, at 7 ("States that have franchises but no income tax—Florida, Tennessee, Texas and Washington—are indifferent. They do not gain revenue when athletes visit, and they don't lose revenue when their athletes are taxed by other states because, of course, they grant no credits.").

92. H.B. 3104, 59th Leg., Reg. Sess. (Wash. 2006).

93. *See supra* note 87 and accompanying text.

It seems like Mr. Strow has a point. The fact that the state of Washington chooses not to tax personal income does not mean that the state's government funds itself. The citizens of Washington are still responsible for funding, but through means other than taxation based on their individual levels of personal income. The most significant means used by Washington for funding its budget is the state sales tax.[94] In addition to a state sales tax of 6.5%, Washington levies a gross receipts tax and a local option sales tax.[95] The state also levies a relatively high property tax and high excise taxes to generate funding.[96] Although Washington does not lose revenue in the form of forgone income tax payments when the state's athletes are taxed by foreign jurisdictions, the flow of disposable income out of the state leaves less money in the hands of Washington residents, meaning less money spent within the state. Consequentially, that means generation of less government funding of through sales and excise taxes, the state's primary means of raising revenue.

Mr. Strow's proposal is a clear and logical reciprocal measure to replace lost sales and excise tax revenue resulting from taxation of Washington residents by foreign jurisdictions. In theory it would accomplish the same end that states imposing a personal income tax accomplish through enforcement of reciprocal jock tax provisions. It would replace government funding that is lost when another state taxes the income of Washington resident athletes. However, in its method, the proposal is flawed. Mr. Strow's proposal comes in the form of a tax against nonresidents who enter the state to perform services.[97] For that reason the proposal comes into conflict with the interstate commerce clause.[98]

The interstate commerce clause gives the federal government the authority to regulate commerce among the several states.[99] The negative implication of the clause, known as the dormant commerce clause, stands for the principle that states may not pass laws that impact interstate commerce, causing harm to other states.[100] This prohibits a state from imposing a tax on goods or services coming into that state from another state in a manner that

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94. *See* DUBAY & HODGE, *supra* note 90, at 23.

95. *Id.* Washington is the only state with a gross receipts tax on top of a high statewide sales tax. *Id.*

96. *See id.* at 23. Washington ranks third among the states with the highest gasoline tax and third among states with the highest tobacco tax, per pack of cigarettes. *See id.* at 26.

97. H.B. 3104, 59th Leg., Reg. Sess. (Wash. 2006).

98. Discrimination between in-state and out-of-state taxpayers is "offensive to the commerce clause." *See* Bacchus Imports, Ltd. v. Dias, 468 U.S. 263, 269 n.8 (1984).

99. U.S. CONST. art. I, § 8.

100. Pennsylvania v. West Virginia, 262 U.S. 553, 596 (1923).

favors in-state business over out-of-state business for no other reason than location.[101] This is the flaw of Mr. Strow's proposal in Washington.

The charge that would be imposed upon nonresident athletes by House Bill 3104 takes the form of a tax rather than a fee.[102] The tax would be imposed exclusively on nonresidents, and revenues generated by the tax would directly fund state football, baseball and basketball facilities.[103] Thus, the tax entails differential treatment of in-state and out-of-state economic interests, benefiting the former while burdening the latter, and such a tax is in violation of the commerce clause.[104]

Ultimately, the problem faced by the bill's proponents in Washington is that without a state personal income tax, the state has nothing behind which to mask the reciprocal measure. One might argue that any state taxation of a nonresident athlete's income fails the dormant commerce clause, but states that impose a personal income tax can easily pass such a jock tax off as a uniform part of their income tax scheme. Those nonresidents taxed have been granted the right to conduct business within the state, earning income there and benefiting from the state's governmental services while doing so. The tax does not unfairly burden nonresidents any more than it burdens residents. Everyone is taxed uniformly, so the interstate commerce clause is not impinged upon.

The question that remains in Washington and the other states that do not impose a personal income tax is whether there is any alternate way to make up for revenue lost when foreign jurisdictions chip away at the disposable income of state residents. The preceding dormant commerce clause analysis shows that any surcharge levied only against nonresident athletes will be struck down. This holds true under the analysis whether the measure is a flat surcharge like the proposal in Washington, or a percentage tax on the income of the nonresident athlete allocable to the state.[105] The states are likely to stop

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101. American Trucking Associations v. Scheiner, 483 U.S. 266, 286 (1987).

102. "To determine whether a particular charge is a 'fee' or a 'tax,' the general inquiry is to assess whether the charge is for revenue raising purposes, making it a 'tax,' or for regulatory or punitive purposes, making it a 'fee.'" Valero Terrestrial Corp. v. Caffrey, 205 F.3d 130, 134 (4th Cir. 2000). House Bill 3104 is for revenue raising purposes. H.B. 3104, 59th Leg., Reg. Sess. (Wash. 2006).

103. H.B. 3104, 59th Leg., Reg. Sess. (Wash. 2006).

104. District of Columbia v. Eastern Trans-Waste of Maryland, Inc., 758 A.2d 1, 17 (D.C. 2000) ("[A] local regulation or tax is discriminatory without regard to its underlying purpose when it entails 'differential treatment of in-state and out-of-state economic interests that benefits the former and burdens the latter.'") (*quoting* Oregon Waste Sys., Inc. v. Department of Envtl. Quality, 511 U.S. 93, 99 (1994)).

105. Additionally the Privileges and Immunities Clause of the U.S. Constitution, Article IV, Section 2, prohibits one state from taxing citizens of another at a higher rate. Travis v. Yale & Towne Mfg. Co., 252 U.S. 60, 78, 82 (1920). In the case of a percentage tax on nonresident athletes, this clause would come

far short of considering imposition of broad state income tax in response to such a narrow problem. The remaining alternative lies in between the two previous solutions. States could impose a surcharge on all athletes, both resident and nonresident. This would cure the interstate commerce clause problem.[106] However, such proposal is unlikely, and it is even more improbable that it would pass. Such a measure would be too damaging to in state sport franchises, and those organizations would fiercely oppose it.[107]

With seemingly little recourse in the way of an income tax, the states are left with the alternative methods that they impose upon their own residents for revenue collection. Any sort of property tax can be immediately ruled out. Nonresident athletes that visit only to play have no property in the state to tax. It is true that while in the state, the nonresident athlete is subject to the same sales and excise taxes as all other residents, and that such sales and excise taxes, as the primary methods of revenue generation used by a state not imposing an income tax, may likely be higher than the sales and excise taxes the visiting athlete pays in his home state. The home state of the nonresident athlete visiting the no-income tax state may not even charge a sales tax. This could be analogized to a nonresident athlete from a state with no income tax paying income taxes to a foreign state on the income earned there. However, this is realistically a poor analogy. First, the amount of income tax liability incurred by an athlete for one road trip would grossly exceed the amount of sales tax paid to a state for purchases within by an athlete on a road trip.[108] Second, an athlete who visits a state that levies a high sales tax can choose not to spend his money in that state during that trip, effectively removing himself from subjection to the tax. The athlete visiting a state that imposes a nonresident income tax does not have that choice. That athlete is required by his schedule to travel to the venue, and he may not opt to refrain from paying the tax.

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into play since any rate would exceed zero, the rate charged to residents.

106. This is an instance of a uniform tax on a service, applied to those originating both in state and out of state. It would be analogous to uniform tax on a certain good applied to those produced in state and those imported from another state. Take apples for example. Simplistically, and for illustration only, one could compare a tax on services performed by all athletes to a tax on all apples, whether grown in state or imported from another state. Such a tax does not raise a commerce clause problem (although in the case of singling out a particular profession to tax, other problems are raised).

107. Those resident athletes would be charged for every game played in the state just as nonresidents would. This would add up very quickly as they play the majority of their games at home.

108. Take for example the case of Matt Hasselbeck, raised in the introduction. He was forced to pay out an estimated $10,000 to Michigan for performing in the Super Bowl. *See supra* note 7. It is unlikely that any athlete visiting another state merely for the purpose of playing a game will spend enough within that state to incur a sum of $10,000 in sales taxes.

III. Evaluation of Taxation of Nonresident Athletes Generally

Examination of the problem faced in Washington and the lack of solutions should lead to a reexamination of the practice of taxing nonresident athletes altogether, exposing the faults of the jock tax. It hardly seems fair to allow 20 of the states with a major professional sports team to fight with each other over who can pull the most from the wallets of professional athletes from other states to fund the government of their own, but to force the four remaining states hosting a team to watch the pockets of their athletes be picked with no recourse, based simply upon the method by which those states have chosen to fund their governments. At least three factors support an argument in favor of abolishing the practice of taxing nonresident athletes. Those three, discussed below, are the lack of economic nexus between the income earned and the nonresident state, the selective enforcement of the nonresident income tax, and the burden that professional athletes face in complying with the provisions. Considering all three, the jock tax simply appears to be poor tax policy.

A. Economic Nexus

While the taxation of nonresidents on a source basis has been approved by the Supreme Court,[109] it has been questioned whether the income of a nonresident athlete that is taxed by a foreign jurisdiction is actually derived from sources within the foreign jurisdiction.[110] An athlete is a salaried employee of the organization for which he plays, and his paychecks are issued in the state of the home team.[111] "[T]hose paychecks are in no substantial way dependent on the specifics of the team's travel schedule."[112]

An athlete is taxed by a foreign jurisdiction that his team visits because that jurisdiction deems part of his income to be derived from sources within that jurisdiction. While it is fair to say that an athlete's salary as a whole may be attributable to, or perhaps to some extent contingent upon,[113] the games he

109. *See supra* note 20 and accompanying text.

110. *See* Davidson, *supra* note 30, at 25; Hoffman, *supra* note 23, at 4.

111. Hoffman, *supra* note 23, at 4.

112. *Id.*

113. For example, an athlete may have incentives and bonuses written into his contract that are contingent upon things such as staying healthy and being available for a certain number of games, including those on the road.

plays in several states, one could argue that it is inaccurate to say that the income is derived from sources within the several states. For example, consider one athlete's road trip to a foreign jurisdiction for one game. If the jurisdiction imposes a jock tax, it will be levied against the athlete on an amount equal to his whole salary multiplied by the ratio representing the number of duty days spent in the foreign jurisdiction to the total number of duty days for which his salary is paid. But in reality the athlete's salary will remain the same if the player for some reason does not travel with the team, if the player does travel but never takes the field due to an injury or any other reason, or even if not one person purchases a ticket and attends the game.[114] If this is the case, how can any income be deemed derived from sources within the state?

The last scenario in the preceding list best illustrates the tenuousness of the connection between an athlete's income and the out-of-state locations in which he plays. Professional sports teams generate their revenue primarily from sources like home game ticket sales, broadcasting rights, and merchandising contracts.[115] Although there is some revenue sharing among franchises in some leagues, the majority of these economic activities are within the team's home state.[116] Because these revenues pay the salaries of the team's athletes, the athletes' income is earned through economic transactions in his team's home state, not in the other states in which he performs.[117] To reiterate the former point, an athlete could play every away game in front of an empty stadium, and his paycheck would be unaffected.

To define "source of income" in the way that a typical jock tax provision currently does is a dangerous and unwise step. Such a definition implies that the income of every pilot, every truck driver, and every railworker must be apportioned among the several states through which he passes in the course of his job. It may often be the case that no part of his salary is actually derived from within those states, but his job requires his presence in each. The burden of enforcing a nonresident income tax on all such people would certainly outweigh the benefits derived.

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114. HOFFMAN, *supra* note 23, at 4.
115. *Id.* at 10.
116. *Id.*
117. *Id.* at 11.

B. Selective Enforcement

The reasons athletes are targeted by foreign jurisdictions are obvious and have already been touched upon.[118] To allow states to target a specific profession in such a way though seems irrational. If a state attempted to tax all athletes, resident and nonresident, but no one else, such an attempt would likely be thwarted. However, the way that most states administer their nonresident income tax provisions singles out the professional athlete,[119] leaving in reality a tax on out-of-state athletes entering the state to perform services. Given the tenuous nexus between the imposing state and the income earned, we now have what looks quite similar to the proposed bill in Washington. The differences are that one uses flat fee and the other a percentage of an arbitrarily determined amount, and that one state raises revenue primarily through sales and property taxes while the other uses primarily a tax on the income of its residents.

A nondiscriminatory administration of any purported source based nonresident income tax would be enforced beyond the professional athlete, rather than selectively applied to him. No jurisdiction makes their intent with regard to application of the tax more clear than Cincinnati. There, visiting professionals not employed by professional athletic teams only have to pay the city's nonresident income tax if they work in the city for 12 or more days per year.[120] Not athletes though. They pay from day one.[121]

The practical burden of strict enforcement upon pilots, truck drivers, and the like, mainly tracking time spent within a jurisdiction, is recognized, but states could at least make a good faith effort to remind such people to file a return in an attempt to enforce nonresident income tax provisions fairly. The burden of tracking those in the medical, legal, and business worlds would seemingly be a bit lighter, as their trips to a foreign jurisdiction would mostly likely be less frequent and of longer, more significant duration, rather than merely passing through.

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118. *See supra* Part I.B.

119. Many states currently ignore professionals with comparable lifetime earnings such as doctors, lawyers, and business executives. *See* HOFFMAN, *supra* note 23, at 3. Currently only New Jersey extends the jock tax to nonresident lawyers. *Id.* at 4. Only rock stars and other entertainers are pursued with the same vigor as athletes. *See id.*

120. Davidson, *supra* note 30, at 25.

121. *See id.*

C. The Compliance Burden

There likely are not many willing ears to sit in on a conversation of how the poor professional athlete faces the unfair burden of filing returns in several different states. People tend to have little sympathy for multi-million dollar earners. But the fact is that most states are reaching into the pockets of any team affiliate that travels with the team.[122] This includes the mediocre athlete, struggling to keep a roster spot, who knows he probably does not have too many years in the league to earn. It also includes coaches, scouts, and trainers, some of which may have quite moderate salaries.[123] The expense of tax preparation for such people may be a burden heavily felt.

IV. CONCLUSION

It is unlikely that House Bill 3104 in Washington, or any similar proposal for that matter, will ever become law, and perhaps rightfully so. However, the proposal should open the door to criticism of the jock tax provisions that are imposed in the 20 collecting states. The tax is poor policy. Among the states that tax the personal income of residents, it simply shifts tax revenues from one state to another, due to the grant of tax credits by most states, with the states that tax at high percentages winning at the expense of those that tax at lower percentages. Even worse, in the case of states that fund their budgets through non-income based taxes, no recourse is available to compensate for the potential revenue that is lost when disposable income of their own residents flows out to fund the budgets of foreign jurisdictions.

Furthermore, the nonresident taxpayers are stuck with what can amount to very large compliance expenses. While this may not be a problem for those at the top of the pay scale, it is certainly felt by lower paid athletes, coaches, and other team affiliates such as trainers, broadcasters, and scouts. Worst of all, such people are targeted merely because of the nature of their profession. Because the salaries of athletes in the upper echelon are so large and because one look at a team's schedule will tell you when each athlete was within any given jurisdiction, the attention of the jurisdiction's tax administrators is focused on athletes and team affiliates, while other professionals like doctors, lawyers, and business executives, who often bring in comparable lifetime

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122. *See* HOFFMAN, *supra* note 23, at 3.
123. *Id.*

earnings, are ignored. In summation, the whole concept seems like poor sportsmanship.