Marquette Sports Law Review

Volume 23
Issue 2 *Spring*

Article 7

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IS TENNESSEE'S VERSION OF THE "JOCK TAX" UNCONSTITUTIONAL?

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I. INTRODUCTION

Jon DiSalvatore is in his tenth year as a professional hockey player.[1] Over those 10 years, he has played in 725 professional games in the American Hockey League (AHL) and, until last year, had played in only 5 National Hockey League (NHL) games, all during the 2005–2006 season with the St. Louis Blues.[2] On December 28, 2011, DiSalvatore was called up from Houston to join the NHL's Minnesota Wild in Nashville to play in its game against the Predators.[3] While playing in the NHL is still a dream of DiSalvatore's, he did not expect the monetary price he would have to pay for the one game he played in the NHL last season.

Jon DiSalvatore played under a two-way contract that paid him $550,000 annually if at any time during the 2011–2012 season he performed services in the NHL.[4] DiSalvatore's contract thus afforded him slightly more than the $525,000 NHL league minimum.[5] Had DiSalvatore performed services only

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1. *Jon DiSalvatore*, ELITE PROSPECTS, http://www.eliteprospects.com/player.php?player=9451 (last visited Mar. 26, 2013).

2. *Id.*

3. *Jon DiSalvatore Game-by-Game Stats*, ESPN, http://espn.go.com/nhl/player/gamelog/_/id/2169/jon-disalvatore (last visited Mar. 26, 2013).

4. *See Jon DiSalvatore*, CAPGEEK.COM, http://www.capgeek.com/players/display.php?id=1523 (last visited Mar. 26, 2013).

5. *Collective Bargaining Agreement FAQs*, NHL, http://www.nhl.com/ice/page.htm?id=26366 (last visited Mar. 26, 2013).

in the AHL, he would have earned his minor league salary, which was considerably less. Because DiSalvatore played in only one game in the NHL last year, it is easy to determine the tax consequences for that particular game. The Minnesota Wild used 185 working days (duty days) during the 2011–2012 NHL season in determining Mr. DiSalvatore's daily earnings, which translated into $2,972.97 each day.[6] His income earned for this one game in the NHL was then subject to both federal and state taxes in addition to Tennessee's Professional Privilege Tax, a flat $2,500 fee assessed on NHL and National Basketball Association (NBA) players for the privilege of playing a game in Tennessee.[7]

TABLE I

Duty Days	Salary	Income Per Day	Federal Tax	Social Security	Medicare	Tennessee Privilege Tax	Total Tax	Net
185	$550,000.00	$2,972.97	$489.05	$97.02	$43.11	$2,500.00	$3,129.18	-$156.21

As the table above illustrates, the one game Jon DiSalvatore played in Nashville cost him a hefty price, resulting in a $156.21 net loss.

With states looking for ways to increase their revenues, non-resident professional athletes are attractive targets for state tax collectors. They cannot avoid the taxing jurisdiction because the cities in which they play are predetermined.[8] Nor can non-resident athletes "express their displeasure in the voting booth."[9]

Much has been made of the "jock tax" and its implications for professional athletes. It will generate over $3,000,000 annually in additional tax revenue

6. In this example, we use the method that the Minnesota Wild used in determining Jon DiSalvatore's daily income, dividing his annual NHL salary by the 185 days during the 2011–2012 NHL season. Later in this article, we discuss a method for determining an appropriate allocation of income earned in a state as a non-resident. This method includes adding the athlete's preseason and postseason days. *See In re* White, No. TSB-H-80-(93)-I, 1980 N.Y. Tax LEXIS 535, at *1–3 (Tax Comm'n June 20, 1980). Using the method established in *White*, the example above would need to include the NHL preseason, which for the Minnesota Wild began on September 15, 2011. Training camp scrimmages began on September 17, 2011. *2011–2012 Minnesota Wild Training Camp Scrimmages*, MINN. WILD, http://wild.nhl.com/club/page.htm?id=73176 (last visited Mar. 26, 2013). However, players were required to report two days earlier for a media day and testing for conditioning, hence the September 15 start date. Therefore, the total number of days would equal 207.

7. TENN. DEP'T OF REVENUE, NOTICE #09-13, PROFESSIONAL PRIVILEGE TAX FOR PROFESSIONAL ATHLETES (2009), *available at* http://www.tn.gov/revenue/notices/professional/09-13.pdf [hereinafter NOTICE 09-13].

8. *See* Robert D. Plattner, *FTA Recommendations on Taxing Nonresident Athletes Could Have Wider Application*, J. MULTISTATE TAX'N & INCENTIVES, Mar.–Apr. 1995, at 36, 36.

9. *Id.*

for the state of Tennessee alone.[10] However, should Tennessee's version of the jock tax prove to be unconstitutional, the state is susceptible to potential lawsuits from both the NHL Players' Association and the National Basketball Player's Association, costing it not only the tax revenue collected but also attorneys' fees and the administrative costs it incurred in implementing the tax.

Professional sports are a big business, and athletes need to be aware of the current financial landscape. Taxes are a critical part of that landscape.[11] With just under 1,000 full-time individuals performing services as professional athletes in the NHL and the NBA—and with nearly all players in both leagues scheduled to play in either Nashville or Memphis over the next several years—each one of these athletes needs to understand how he will be affected by this tax.

Athletes like Jon DiSalvatore undoubtedly believe that Tennessee's Professional Privilege Tax is unfair. This article examines whether the tax is unconstitutional, and the notion of "fairness" is certainly an important consideration. Section II outlines Tennessee's version of the jock tax. Section III discusses the constitutional constraints under both the Due Process Clause and the Commerce Clause that are imposed on a state's power to lay taxes. It also evaluates whether Tennessee's jock tax is unconstitutional, examining (i) whether there is a sufficient connection that the state has with NHL and NBA athletes and their income; (ii) whether the tax is fairly apportioned; (iii) whether non-resident athletes are unfairly discriminated against, whether

10. Prior to the NHL lockout, the NHL's Nashville Predators had forty-one home games scheduled during the 2012–2013 season. *See 2012–13 Wild Schedule Set*, MINN. WILD (June 20, 2012), http://wild.nhl.com/club/news.htm?id=635276. Each NHL team is comprised of twenty players for games (eighteen skaters and two goaltenders as per rule 5.1 "Eligible Players" in the NHL Rule Book). NHL OFFICIAL RULES 2011–2012 § 2-5.1. With each player paying $2,500 in tax for each game played in the state, the total revenue produced is $2,200,000. The NBA's Memphis Grizzlies have forty-one home games scheduled during the 2012–2013 season. *Grizzlies Schedules & Results*, GRIZZLIES.COM, http://www.nba.com/grizzlies/schedule#.USmZr-PZ8Vk (last visited Mar. 26, 2013). Each NBA team is composed of twelve players, with at least eight dressed and able to play in any regular season game. *Roster Regulations*, NBA (Oct. 22, 2001), http://www.nba.com/analysis/00421026.html. With each player paying $2,500 in tax for each game played in the state, this produces potential total revenue of $1,320,000. During the 2012–2013 season, no NHL or NBA team, other than the Nashville Predators and the Memphis Grizzlies, is scheduled to play in Tennessee more than three times. Should an individual athlete play more than three games in Tennessee over that time frame (such as a member of the Nashville Predators or the Memphis Grizzlies or an athlete who has switched teams during the season), he would not be subject to the $2,500 tax after his third game, as the tax is capped at a maximum of three games per player. *See infra* Section II.

11. *See generally* Alan Pogroszewski, *Is Canada Overstepping Its Borders? The Alberta Province Tax Specifically Targets Professional Hockey Players in Order to Help Finance Its Professional Franchises*, 14 MARQ. SPORTS L. REV. 509 (2004).

the jock tax could have an adverse effect on interstate commerce, or both; and (iv) whether the services that non-resident athletes receive from Tennessee are in proportion to the tax they pay. The article then concludes with the authors' opinions that Tennessee's version of the jock tax has gone too far.

II. BACKGROUND

Effective July 1, 2009, the Tennessee Department of Revenue began imposing a professional privilege tax on athletes who play in the NHL and NBA.[12] Those athletes are assessed a $2,500 tax for each game they play, up to a maximum of three games, in the state of Tennessee.[13] The tax is imposed whether they play for the Memphis Grizzlies, the Nashville Predators, or for an opposing team.[14]

Non-resident taxation of professional athletes is nothing new. The issue gained national attention in the early 1990s when Philadelphia began assessing a city tax on non-resident athletes and Illinois implemented a jock tax in retaliation against California's non-resident tax, which was assessed to "Michael Jordan and his Chicago Bulls teammates following their 1991 [NBA] Championship against the Los Angeles Lakers."[15] Despite the publicity that these tax assessments generated, "California had [actually] been taxing nonresident athletes as early as 1968, while New York has been doing so since 1971."[16]

Although athletes have been subject to non-resident income taxes for many years, Tennessee's version is unique. First, the tax is a flat tax as opposed to a tax based on a percentage of income or some other relevant tax base.[17] Second, the tax is assessed only on athletes performing services in the NBA and NHL, but not in the National Football League (NFL).[18] Those athletes who perform services under a minor league contract—or under a two-way contract but who have not been on the roster for more than ten days during the tax year—are exempt from the Tennessee Professional Privilege

12. NOTICE 09-13, *supra* note 7.

13. *Id.*

14. *Id.*

15. Alan Pogroszewski, *When is a CPA as Important as Your ERA? A Comprehensive Evaluation and Examination of State Tax Issues on Professional Athletes*, 19 MARQ. SPORTS L. REV. 395, 395 (2009).

16. *Id.* (citing *In re Partee*, 1976 Cal. Tax LEXIS 35 (Bd. of Equalization Oct. 6, 1976); *In re* White, No. TSB-H-80-(93)-I, 1980 N.Y. Tax LEXIS 535, at *1–3 (Tax Comm'n June 20, 1980)). For a more informative breakdown on the history of the taxation of non-resident athletes, see *id.*

17. NOTICE 09-13, *supra* note 7.

18. *See id.*

Tax.[19]

III. CONSTITUTIONALITY

Although Article I Section 8 of the U.S. Constitution establishes the dual sovereignty of the states and the federal government,[20] the Supreme Court has on many occasions invalidated state tax measures on constitutional grounds. What has evolved is a rich body of case law—albeit confusing and often inconsistent—[21]in which the Supreme Court has developed a framework for determining the constitutionality of state tax measures under both the Due Process Clause and the Commerce Clause.

A. Due Process

Section 1 of the Fourteenth Amendment to the U.S. Constitution prohibits states from depriving "any person of life, liberty, or property, without due process of law . . . ."[22] The Supreme Court has held that "[i]t is a venerable if trite observation that seizure of property by the State under pretext of taxation when there is no jurisdiction or power to tax is simple confiscation and a denial of due process of law."[23] In determining whether a state has the jurisdiction to impose a tax, the Court will adhere to a "time-honored concept: that due process requires some definite link, some minimum connection, between a state and the person, property or transaction it seeks to tax."[24]

Nevertheless, there has been some inconsistency in the Court's rulings as to the minimum connection required between the state and a person in order for the state to have jurisdiction to impose a tax on him.[25] Consider, for instance, *National Bellas Hess, Inc. v. Department of Revenue* in which the Supreme Court ruled on the constitutionality of a use tax on sales the taxpayer

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19. *Id.*

20. U.S. CONST. art I, § 8.

21. Even the Supreme Court has observed:

> Our decisions are not always clear as to the grounds on which a tax is supported, especially where more than one exists; nor are all of our pronouncements during the experimental period of this type of taxation[, use tax,] consistent or reconcilable. A few have been specifically overruled, while others no longer fully represent the present state of the law.

Miller Bros. v. Maryland, 347 U.S. 340, 344 (1954).

22. U.S. CONST. amend. XIV, § 1.

23. *Miller Bros.*, 347 U.S. at 342.

24. *Id.* at 344–45.

25. See John A. Swain, *State Income Tax Jurisdiction: A Jurisprudential and Policy Perspective*, 45 WM. & MARY L. REV. 319, 321, 365–73 (2003) for an in-depth discussion of nexus in the context of state taxation.

made within the state.[26] The Court held that the minimum connection required by the Due Process Clause is the taxpayer's physical presence in the state.[27] The Court revisited the issue, however, in *Quill Corp. v. North Dakota*, noting that "due process jurisprudence has evolved substantially in the [twenty-five] years since *Bellas Hess*."[28] It held that physical presence was not required.[29] Rather, "there is no question that Quill . . . purposefully directed its activities at North Dakota residents [and] that the magnitude of those contacts is more than sufficient for due process purposes . . . ."[30] Thus, for purposes of imposing a use tax, the minimum contact required between the taxing state and a person is the person's "economic" presence within the state.

While the Supreme Court has not addressed the Due Process requirements for a professional privilege tax like Tennessee's, Tennessee imposes the tax only on those professional athletes who are performing services inside the state's borders. Therefore, it appears that there is a sufficient connection between the athlete and the state, whether it is measured by the physical presence standard articulated in *National Bellas Hess* or by the more flexible standard articulated in *Quill Corp.*, such that the athlete has an economic presence in the state of Tennessee. Tennessee's jock tax does not seem to violate the Due Process Clause.

The question that remains, then, is whether Tennessee's Professional Privilege Tax can be successfully challenged under the Commerce Clause.

B. The Commerce Clause

The framework for determining the constitutionality of a state tax under the Commerce Clause has evolved over the years, and there are several key

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26. *See generally* Nat'l Bellas Hess, Inc. v. Dep't of Revenue, 386 U.S. 753 (1967), *overruled by* Quill Corp. v. North Dakota, 504 U.S. 298 (1992).

27. *Id.* at 758. The taxpayer in question was a mail order company. *Id.* at 753. Because it had no contact with the state other than deliveries made through the U.S. mail and common carrier, the Supreme Court held that the taxpayer had no physical contact with the state, and thus the state use tax was unconstitutional. *Id.* at 758.

28. Quill Corp. v. North Dakota, 504 U.S. 298, 307 (1992).

29. *Id.*

30. *Id.* at 308. The Court actually stated that "there is no question that Quill has purposefully directed its activities at North Dakota residents, that the magnitude of those contacts is more than sufficient for due process purposes, *and that the use tax is related to the benefits Quill receives from access to the State*." *Id.* (emphasis added). However, the last requirement—*that the tax is related to the benefits the taxpayer receives from his access to the state*—is not actually a requirement under the Due Process Clause. *See id.* at 307–08. The Supreme Court has, on several occasions, apparently confused the requirements of the Due Process Clause with those of the Commerce Clause. *See* Brandon F. White, Case Note, *State Taxation on the Privilege of Doing Interstate Business:* Complete Auto Transit, Inc. v. Brady, 19 B.C. L. REV. 312, 323 n.81 (1978).

points. First, the Supreme Court's decisions respond to very specific state tax measures.[31] Because Tennessee's Professional Privilege Tax is unique, there are no cases that specifically address the constitutionality of this particular tax. Another important point, however, is that all state taxes are subject to scrutiny under the Commerce Clause using the very same analytical framework. Its purpose is to prevent state regulation from impeding interstate commerce.[32]

A third and related point is that the name of the tax is immaterial in determining its constitutionality. Rather, it is the effect of the tax that will determine whether it is unconstitutional.[33] This is important because the Tennessee tax is a so-called "privilege of doing business" tax.[34] In *Complete Auto Transit v. Brady*, there was no objection to the sales tax in question other than the fact that it was called a privilege of doing business tax.[35] Because the tax was not challenged on any other grounds, it was upheld.[36] *Complete Auto Transit* is not authority for the proposition that Tennessee's Professional Privilege Tax is constitutional. It simply underscores the importance of evaluating the *effects* of the tax in determining its constitutionality.

Complete Auto Transit is important for another reason. It is a landmark case in which the Supreme Court provided an analytical framework for determining the constitutionality of a state tax under the Commerce Clause. In order to be valid, the Supreme Court held that a state tax must be "applied to an activity with a substantial nexus with the taxing State, [must be] fairly

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31. The Supreme Court has remarked, "[W]e have described our own decisions in this area as a 'quagmire' of judicial responses to specific state tax measures . . . ." Am. Trucking Ass'ns, Inc. v. Scheiner, 483 U.S. 266, 280 (1987) (citing Nw. States Portland Cement Co. v. Minnesota, 358 U.S. 450, 457–58 (1959)).

32. *See Quill Corp.*, 504 U.S. at 312; *see also* Complete Auto Transit, Inc. v. Brady, 430 U.S. 274, 278 (1977).

> "[T]he Commerce Clause was not merely an authorization to Congress to enact laws for the protection and encouragement of commerce among the States, but by its own force created an area of trade free from interference by the States. In short, the Commerce Clause [. . .] is a limitation upon the power of the States. . . . This limitation on State power . . . does not merely forbid a State to single out interstate commerce for hostile action. A State is also precluded from taking any action which may fairly be deemed to have the effect of impeding the free flow of trade between States. It is immaterial that local commerce is subjected to a similar encumbrance."

Complete Auto Transit, 430 U.S. at 278 n.7 (quoting Freeman v. Hewit, 329 U.S. 249, 252 (1946), *overruled on other grounds by* Okla. Tax Comm'n v. Jefferson Lines, Inc., 514 U.S. 175 (1995)).

33. *See Complete Auto Transit*, 430 U.S. at 288 ("There is no economic consequence that follows necessarily from the use of the particular words, 'privilege of doing business,' and a focus on that formalism merely obscures the question whether the tax produces a forbidden effect.").

34. *Id.* at 289.

35. *See id.*

36. *Id.*

apportioned, [must] not discriminate against interstate commerce, and [must be] fairly related to the services provided by the State."[37]

1. Substantial Nexus with the Taxing State

"Nexus" actually has two distinct meanings for state tax jurisdiction: (1) nexus with the taxpayer and (2) nexus with the income, transaction, activity, or property sought to be taxed.[38]

In Section II.A we examined nexus with the taxpayer—the minimum connection between the state and a person that is required in order for the state to have the jurisdiction to impose a tax on him—within the context of the Due Process Clause. The purpose of the Due Process Clause, however, differs significantly from that of the Commerce Clause. The former ensures that taxpayers are fairly warned that they may be subject to a state's taxing jurisdiction.[39] The latter prohibits states from overreaching and interfering with interstate commerce.[40] Therefore, the nexus requirement of each clause may differ significantly.

So, what is the nexus with the taxpayer that is required under the Commerce Clause? As it relates to state sales and use tax, the Supreme Court in *Quill Corp.* stated that the taxpayer has to have some physical presence in the state.[41] However, it suggested that the standard for taxes *other* than sales and use tax may not be physical presence, implying that a taxpayer's economic presence may be enough.[42] The result is that there is a great deal of uncertainty as to the applicable standard for other state taxes, including state income tax, and state courts are divided as to whether the standard is physical presence or mere economic presence.[43] Unfortunately, the Supreme Court has not answered the question.[44]

Notwithstanding, Tennessee's Professional Privilege Tax is assessed to NHL and NBA athletes, like Jon DiSalvatore, who play a game in the state of Tennessee. To the extent that the athlete is present in the state at the time he is

37. *Id.* at 279.

38. *See* 1 JEROME R. HELLERSTEIN & WALTER HELLERSTEIN, STATE TAXATION ¶ 6.01 (3d ed. 1998).

39. Quill Corp. v. North Dakota, 504 U.S. 298, 308 (1992).

40. *Id.* at 309.

41. *See id.* at 312–13.

42. *See id.* at 317.

43. Swain, *supra* note 25, at 321–22.

44. *See id.* at 321, 339–43 (explaining that the Supreme Court's exploration of the constitutional limits of income tax jurisdiction has been stymied by Congress's enactment of legislation as an affirmative exercise of its Commerce Clause powers).

performing services, there is sufficient nexus under either standard.

The other distinct meaning of nexus in the context of state tax jurisdiction concerns whether there is a sufficient connection between the state and the income, transaction, activity, or property it seeks to tax.[45] This is consistent with the first part of the four-part test articulated by the Supreme Court in *Complete Auto Transit*—that the state tax must be applied to an activity that has substantial nexus with the taxing state.[46] We shall see, however, that while the Supreme Court articulated four seemingly different parts to its four-part test, the parts are very much interrelated. For example, whether there is sufficient nexus with the income, transaction, or activity sought to be taxed is usually viewed as a fair apportionment issue.[47] We turn to the fair apportionment requirement next.

2. The Tax is Fairly Apportioned

The purpose of the fair apportionment requirement is to ensure that a state taxes no more than its "fair share" of an interstate activity.[48] In determining whether a tax is fairly apportioned, the Supreme Court has articulated two separate tests: the "internal consistency" test and the "external consistency" test.[49]

The internal consistency test focuses on the potential strain that a state tax might place on interstate commerce.[50] It examines whether the state tax measure, if adopted by all fifty states, would result in heavier taxes being imposed on interstate commerce than if the commerce was purely intrastate.[51] If the state tax measure places interstate commerce at a disadvantage, then it is invalid under the Commerce Clause because it interferes with free trade among the different states.[52] The purpose of internal consistency, then, is to

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45. HELLERSTEIN & HELLERSTEIN, *supra* note 38, at ¶ 6.01.

46. *See* Complete Auto Transit, Inc. v. Brady, 430 U.S. 274, 279 (1977).

47. *See* Swain, *supra* note 25, at 328–29.

> For example, the state of Arizona may have nexus with Acme Copper Company, but it could not impose a severance tax measured by the copper that Acme extracts in Chile. The question in this example is not whether Acme has Arizona nexus—it clearly does—but whether the object or measure of the tax may be fairly apportioned to Arizona, i.e., whether the severance of Chilean copper has an Arizona nexus.

Id. at 329 n.36.

48. *See* Bradley W. Joondeph, *The Meaning of Fair Apportionment and the Prohibition on Extraterritorial State Taxation*, 71 FORDHAM L. REV. 149, 157–58 (2002).

49. *Id.* at 156.

50. *See id.*

51. *Id.*; *see* Am. Trucking Ass'ns, Inc. v. Scheiner, 483 U.S. 266, 296 (1987).

52. *See Scheiner*, 483 U.S. at 296.

ensure that the state tax measure does not *discriminate* against interstate commerce—the third prong of the *Complete Auto Transit* test.[53] Here, again, we see that the four seemingly different prongs of the *Complete Auto Transit* test are very much interrelated.

The external consistency test, on the other hand, focuses on whether the state has a valid claim to the value it is taxing or whether it is reaching beyond the value that is fairly attributable to economic activity within its borders.[54] In other words, it attempts to limit the value that is being taxed to the amount with which the state has sufficient nexus.[55] If each state taxes only that portion of the value of the income, transaction, or activity fairly attributable to economic activity within its jurisdiction, the taxpayer should not be subject to state taxation on more than 100% of the total value.[56] Thus, the purpose of external consistency is to eliminate the risk of multiple taxation.[57]

In *American Trucking Ass'ns, Inc. v. Scheiner*, the Supreme Court determined that two different tax measures imposed on trucking businesses by the State of Pennsylvania—a "marker fee" and an "axle tax"—[58]were unconstitutional.[59] Unlike a fuel consumption tax that is directly apportioned to the mileage traveled in Pennsylvania, the taxes in question were flat taxes, and the lack of apportionment doomed them to fail under the "internal consistency" standard.[60] "[T]heir inevitable effect [was] to threaten the free movement of commerce by placing a financial barrier around the State of Pennsylvania."[61] The Court held that "[i]f each State imposed flat taxes for the privilege of making commercial entrances into its territory, there is no conceivable doubt that commerce among the States would be deterred."[62] The Court also acknowledged that it is not necessary for other jurisdictions to actually impose a similar tax in order to prove that interstate commerce is at a disadvantage.[63] It did note, however, that the adoption of a similar tax

53. *See id.* at 281 ("In its guarantee of a free trade area among States, however, the Commerce Clause has a deeper meaning that may be implicated even though state provisions, such as the ones reviewed here, do not allocate tax burdens between insiders and outsiders in a manner that is facially discriminatory.").

54. *See* Joondeph, *supra* note 48, at 150, 158.

55. *See id.*

56. *Id.*

57. *See id.*

58. *See Scheiner*, 483 U.S. at 271.

59. *See id.* at 269.

60. *See id.* at 283–84.

61. *Id.* at 284.

62. *Id.*

63. *See id.* at 285.

measure by other jurisdictions even before the lawsuit was resolved "surely suggest[ed] that acquiescence in these flat taxes would occasion manifold threats to the national free trade area."[64]

While the Court focused largely on the internal consistency issues posed by the Pennsylvania tax, it did acknowledge another important concern. The parties stipulated that if all states imposed the same flat tax, the cost for the taxpayer to qualify its trucks in every state in which it drove would amount to a total tax "many times larger" than the company's net pretax income for the year in question.[65] This certainly poses a serious external consistency issue.

The Tennessee Professional Privilege Tax is similarly unapportioned and poses serious issues under both the internal consistency and external consistency standards. It imposes a flat $2,500 tax to NHL and NBA players on a per game basis, up to a maximum of $7,500.[66] If, as the Supreme Court asserted in *Scheiner*, every jurisdiction "imposed flat taxes for the privilege of making commercial entrances into its territory,"—in this instance, to play in the NHL or NBA—"there is no conceivable doubt that commerce among the States would be deterred" and that "acquiescence in these flat taxes would occasion manifold threats to the national free trade area."[67] The Tennessee Professional Privilege Tax thus violates the internal consistency standard.

Recall that the external consistency test focuses on whether the state has a valid claim to the value it is taxing or whether it is reaching beyond the value that is fairly attributable to economic activity within its borders.[68] It attempts to limit that value to the amount with which the state has sufficient nexus.[69] Tennessee's Professional Privilege Tax is a flat tax, and thus, there is a total lack of apportionment. It raises serious questions as to the *value* that Tennessee is taxing and whether that value is fairly attributable to economic activity within its borders. The tax, thus, violates the external consistency standard.

It is important to note at this juncture that state taxes have been upheld, in a few exceptional cases, "as 'fairly apportioned' even though the taxes at issue were, in actuality, completely unapportioned."[70] These cases presented circumstances in which fair apportionment was "administratively cumbersome

64. *Id.*
65. *Id.* at 285 nn.19–20.
66. NOTICE 09-13, *supra* note 7.
67. *See Scheiner*, 483 U.S. at 284–85.
68. *See supra* note 54 and accompanying text.
69. *See supra* note 55 and accompanying text.
70. Joondeph, *supra* note 48, at 151.

or impractical."[71] In upholding the state tax measures, there were two key considerations for the Court: that the tax did not discriminate against interstate commerce and that it was not excessive, reflecting a "fair, if imperfect, approximation" of the benefit conferred.[72]

This was the Court's ruling in *Evansville-Vanderburgh Airport Authority District v. Delta Airlines, Inc.*[73] The tax in question was a $1 fee imposed by the government for each passenger boarding a commercial aircraft operating from the airport.[74] Even though the $1 fee was unapportioned, it was upheld because it satisfied two essential conditions in that it was neither discriminatory nor excessive.[75] The Court held that the fee did not discriminate against interstate commerce because there were no inherent differences between interstate and intrastate flights, and both were subject to the same $1 charge.[76] Nor was the charge excessive inasmuch as it "reflect[ed] a fair, if imperfect, approximation of the use of facilities for whose benefit they are imposed."[77]

In contrast, the *Scheiner* Court held that the Pennsylvania flat tax satisfied neither of these two essential conditions.[78] It "discriminate[d] against out-of-state vehicles by subjecting them to a much higher charge per mile traveled in the State, and [it did] not even purport to approximate fairly the cost or value of the use of Pennsylvania's roads."[79] Much the same can be said of the Tennessee Professional Privilege Tax. It discriminates against non-resident athletes by subjecting them to a much higher charge per game than resident athletes. Compare, for instance, the $2,500 fee paid per game by a non-resident athlete who plays 3 games in Tennessee with the $182.53 fee paid per game by a resident athlete who plays 41 games in Tennessee.[80] And does the tax even *purport* to approximate fairly the cost or value of the athlete's use of Tennessee's facilities? We think not.

Although the Supreme Court has never ruled on fair apportionment as it

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71. *Id.*

72. Evansville-Vanderburgh Airport Auth. Dist. v. Delta Airlines, Inc., 405 U.S. 707, 717 (1972).

73. *See generally id.*

74. *Id.* at 709.

75. *Id.* at 716–17, 719–20.

76. *Id.* at 717.

77. *Id.*

78. *See* Am. Trucking Ass'ns, Inc. v. Scheiner, 483 U.S. 266, 290 (1987).

79. *Id.*

80. *See infra* Table II and Table III, which outline the per-game tax for a non-resident athlete performing services in the state of Tennessee in comparison to that of a resident athlete who plays a full season in the state.

pertains to state taxation of a professional athlete's income, various state courts have provided some guidance.[81] The overriding construct is that there is a reasonable attempt to realistically apportion income.

For instance, in order for apportionment to be fair and justifiable, an appropriate apportionment factor should reflect the number of working days or games played within each jurisdiction in proportion to the total number of working days or total games in a season.[82] In *In re Partee*, the California state court noted that although the "working-day" formula was appropriate for football, the "games-played" method may be more appropriate for other sports, including baseball, basketball, and hockey.[83] Second, the apportionment formula should take into consideration the entire season, including both the preseason and any championship playoff games.[84] Although it is in the athlete's self-interest to train year-round, his contract does not require it, and therefore, off-season training should not be included in the apportionment formula.[85]

To illustrate the total number of working days in a season, which is the standard for apportioning income for players in the NHL, we will use as an example an athlete performing services with the Minnesota Wild during the 2011–2012 NHL season. The denominator in the apportionment factor would include the NHL preseason, which for the Minnesota Wild began on September 15, 2011, and would include all days through the last game day of the season, which was April 7, 2012.[86] Thus, for apportionment purposes there was a total of 207 duty days for the 2011–2012 season.

Finally, the apportionment formula should include all income associated with the performance of the athlete's services, including salary, performance

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81. *See generally, e.g.*, Wilson v. Franchise Tax Bd., 25 Cal. Rptr. 2d 282 (Ct. App. 1993); *In re* Foster, 1984 Cal. Tax LEXIS 18 (Bd. of Equalization Nov. 14, 1984); *In re* Partee, 1976 Cal. Tax LEXIS 35 (Bd. of Equalization Oct. 6, 1976); *In re* White, No. TSB-H-80-(93)-I, 1980 N.Y. Tax LEXIS 535 (N.Y. Tax Comm'n June 20, 1980); *In re* Dorsey, No. 87-I-168, 1989 Wis. Tax LEXIS 8 (Tax App. Comm'n Mar. 17, 1989).

82. *See In re* Partee, 1976 Cal. Tax LEXIS 35, at *11–12.

83. *Id.* The court justified their ruling with the wording in Partee's contract that "require[d] each player to participate in practice sessions," thus concluding "that professional football players are paid for practices and necessary travel, as well as for playing in games." *Id.* at *9.

84. *See In re White*, 1980 N.Y. Tax LEXIS 535, at *2–3. The court ruled that since White was obligated to participate in spring training or face consequences, such as breach of contract, his salary and compensation should have taken into consideration the exhibition games, even though he was not paid directly for those games, as White had as much of a contractual and professional obligation to participate in exhibition games as he did in regular season games. *Id.*

85. *See Wilson*, 25 Cal. Rptr. 2d at 289.

86. *See 2011–2012 Schedule*, MINN. WILD, http://wild.nhl.com/club/schedule.htm (last visited Mar. 27, 2013).

bonuses, and signing bonuses.[87] A signing bonus should be included in total income if the bonus received for signing the contract is either refundable (so that it is conditioned on the athlete's performance of services under the contract) or is otherwise related to services performed over the length of the contract.[88]

If Tennessee's Professional Privilege Tax is evaluated within the construct of a state income tax, the tax fails the fair apportionment requirement. Tennessee's tax is a flat tax and thus does not even *attempt* to fairly apportion the income that an athlete earns. Table II below illustrates the consequences for a hockey player who is employed by the Minnesota Wild of the NHL and earns the $525,000 league minimum while performing services over 207 days during the season. As a result of the $2,500 flat tax, this particular player's single game day in Tennessee will be taxed at a rate of 98.57%, a rate almost in excess of 100% of his daily income.

Recall that whether a state tax measure is fairly apportioned is evaluated under both the internal consistency and external consistency standards and that the purpose of the external consistency standard is to eliminate the risk of multiple taxation. Clearly, Tennessee's Professional Privilege Tax violates the external consistency standard. And even California, which has a maximum income tax on both residents and non-residents of 10.3%, falls well below the rate that Tennessee's Professional Privilege Tax imposes on the athlete in our example.

TABLE II

Salary	Total Tax	Income Per Day	Tennessee Privilege Tax per game	Tax Rate	Net per game
$525,000.00	$2,500.00	$2,536.23	$2,500.00	98.57%	$36.23
$2,500,000.00	$2,500.00	$12,077.29	$2,500.00	20.7%	$9,577.29
$7,500,000.00	$2,500.00	$36,231.88	$2,500.00	6.9%	$33,731.88

It should also be noted that because the income is not apportioned,

87. *In re* Foster, 1984 Cal. Tax LEXIS 18, at *6–7 (Bd. of Equalization Nov. 14, 1984). The court ruled that Foster's "playing bonus [was] plainly distinguishable from [that of] a signing bonus as a matter of custom or practice . . . [, and] the disputed $400,000 portion of [Foster's] salary clearly represented compensation for his services . . . " and should be apportioned to the state of California. *Id.*

88. *See In re* Dorsey, No. 87-I-168, 1989 Wis. Tax LEXIS 8, at *10–13 (Tax App. Comm'n Mar. 17, 1989). The court found compelling the fact that Dorsey's contract stated his bonus was refundable should he fail to report or should he leave the team without its consent. *Id.* at *10. It concluded that the signing bonus represented income derived from a performance of personal services, and thus compensation of services that were performed within the state of Wisconsin; accordingly, the bonus should have been apportioned to the state. *Id.* at *13.

individuals at different income levels bear significantly disproportionate tax burdens. As illustrated in Table II, those athletes who earn the minimum salary bear the greatest tax burden in proportion to their income, while those who earn the greatest bear the least.

3. The Tax Does Not Discriminate

The third part of the four-part test articulated in *Complete Auto Transit* is that the state tax cannot discriminate against interstate commerce.[89] It prohibits discrimination in two very distinct ways. First, "'a State may not tax a transaction or incident more heavily when it crosses state lines than when it occurs entirely within the State.'"[90] Second, it must not discriminate against interstate commerce by interfering with free trade.[91] It is this guarantee of free trade that is ensured, in part, by *Complete Auto Transit*'s fair apportionment requirement discussed above.

In *Scheiner*, the Supreme Court determined that two Pennsylvania state tax measures that imposed a flat marker fee and a flat axle tax on trucking businesses were unconstitutional because they discriminated against interstate commerce.[92] Specifically, the marker fee discriminated against interstate commerce by imposing a heavier burden on out-of-state carriers; the flat tax was "plainly discriminatory" because the practical effect was to "impose a cost per mile on [the out-of-state taxpayer] that [was] approximately five times as heavy as the cost per mile borne by local trucks."[93] This discrimination against interstate commerce was in violation of the Commerce Clause. In addition, the Supreme Court held that the flat axle tax discriminated against interstate commerce by impermissibly interfering with free trade.[94] "If each State imposed flat taxes for the privilege of making commercial entrances into its territory, there is no conceivable doubt that commerce among the States would be deterred."[95]

The Tennessee Professional Privilege Tax has the same discriminatory

89. Complete Auto Transit, Inc. v. Brady, 430 U.S. 274, 279 (1977).

90. *See* Am. Trucking Ass'ns, Inc. v. Scheiner, 483 U.S. 266, 280 (1987) (quoting Bos. Stock Exch. v. State Tax Comm'n, 429 U.S. 318, 328 (1977)).

91. *See Scheiner*, 483 U.S. at 281 ("In its guarantee of a free trade area among States, however, the Commerce Clause has a deeper meaning that may be implicated even though state provisions, such as the ones reviewed here, do not allocate tax burdens between insiders and outsiders in a manner that is facially discriminatory.").

92. *Id.* at 271, 297.

93. *Id.* at 286.

94. *Id.*

95. *Id.* at 284.

effects on interstate commerce as did the Pennsylvania flat tax in *Scheiner*. As illustrated in Table III, the $2,500 flat tax results in a much greater tax burden on professional hockey players who are non-residents of Tennessee as opposed to those who are residents.

TABLE III

Salary	Total Tax	Income Per Day	Tennessee Privilege Tax per game	Tax Rate	Net per game
$525,000.00	$7,500.00	$2,536.23	$182.93	7.21%	$2,353.31
$2,500,000.00	$7,500.00	$12,077.29	$182.93	1.51%	$11,894.37
$7,500,000.00	$7,500.00	$36,231.88	$182.93	0.50%	$36,048.96

A professional hockey player who plays for the Nashville Predators and is a resident of Tennessee is subject to a flat tax of $2,500 for each game he plays in Tennessee, up to a maximum of three games. The maximum tax is thus $7,500. However, he will play forty-one games in Tennessee.[96] If we allocate the total $7,500 tax over all forty-one games, the result is that he is subject to a pro-rated tax of $182.93 per game. This is considerably less than the $2,500 tax that a non-resident athlete is assessed per game.[97] At every income tax level, resident athletes thus pay significantly less tax per game than non-residents.

Tennessee's flat tax is analogous, then, to the flat tax in *Scheiner*, which the Supreme Court found to be plainly discriminatory—the practical effect was to burden the out-of-state taxpayer with a cost that was approximately five times the cost imposed on the in-state taxpayer.[98] In the case of Tennessee's Professional Privilege Tax, the tax is actually 13.67 times the cost imposed on the in-state taxpayer. The Supreme Court also admonished that "acquiescence in these flat taxes would occasion manifold threats to the national free trade area[,]" a clear violation of the Commerce Clause.[99]

96. Half the games an NFL team member plays are in his resident state. Notice that the tax is assessed on a per game basis but that an NHL player's income is apportioned on a duty day basis using the total number of days over the length of a hockey season. Therefore, the salary for a game day would be equal to the player's total salary divided by the total number of days in the season, in this case 207.

97. In practice, NHL players who are members of a team other than the Nashville Predators are non-residents of Tennessee. Non-resident athletes playing in the NHL or the NBA are generally not scheduled to play in more than three games in any given regular season in the state of Tennessee, which happens to be the maximum number of games for which a player can be assessed the $2,500 per game tax.

98. *Scheiner*, 483 U.S. at 286.

99. *Id.* at 285.

Finally, Tennessee's Professional Privilege Tax is discriminatory inasmuch as it only pertains to resident and non-resident professional athletes who perform services for the NHL and the NBA but fails to subject the same tax on athletes who perform services for the NFL.

4. The Tax Must Be Fairly Related to the Services Provided

The Supreme Court "has acknowledged that 'a State has a significant interest in exacting . . . its fair share of the cost of state government.'"[100] A state

> "[I]s free to pursue its own fiscal policies, unembarrassed by the Constitution, if by the practical operation of a tax the state has exerted its power in relation to opportunities which it has given, to protection which it has afforded, to benefits which it has conferred by the fact of being an orderly civilized society."[101]

However, the fourth part of *Complete Auto Transit*'s test imposes an important limitation: the tax must be fairly related to the services that the state provides.[102] While this suggests that the measure of the state tax must be fairly related to the *value* of the services provided, the Supreme Court later expanded on the fairly related requirement and interpreted it to mean that that the tax must be "assessed in proportion to a taxpayer's activities or presence in a State . . . ."[103] The requirement is thus closely connected to the first prong of the *Complete Auto Transit* test—that is, the nexus requirement.[104] It is the taxpayer's activities or presence in the state, then, that should bear a "'just share of state tax burden.'"[105]

However, there is an important exception to this rule. To the extent that a state tax measure is levied on the use of particular public facilities (a "user tax"), the tax is evaluated under a very different standard.

> [A] user tax is valid only if it is related to the cost to the state of the benefit provided to the taxpayer:

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100. Commonwealth Edison Co. v. Montana, 453 U.S. 609, 616 (1981) (quoting Dep't of Revenue v. Ass'n of Wash. Stevedoring Cos., 435 U.S. 734, 748 (1978)).

101. *Id.* at 625 (quoting Wisconsin v. J.C. Penney Co., 311 U.S. 435, 444 (1940)).

102. Complete Auto Transit, Inc. v. Brady, 430 U.S. 274, 279 (1977).

103. *Commonwealth Edison Co.*, 453 U.S. at 627; *see also* R. Douglas Harmon, Note, *Judicial Review Under* Complete Auto Transit*: When Is a State Tax on Energy-Producing Resources "Fairly Related"?*, 1982 DUKE L.J. 682, 683.

104. *Commonwealth Edison Co.*, 453 U.S. at 625–26.

105. *Id.* at 626 (quoting W. Live Stock v. Bureau of Revenue, 303 U.S. 250, 254 (1938)).

> "[W]hile state or local tolls must reflect a 'uniform, fair and practical standard' relating to public expenditures, *it is the amount of the tax, not its formula, that is of central concern.* At least so long as the toll is based on some fair approximation of use or privilege for use . . . and is . . . [not] excessive in comparison with the governmental benefit conferred, it will pass constitutional muster . . . ."[106]

Recall, then, the Court's ruling in *Evansville-Vanderburgh Airport Authority District*, in which the government imposed a $1 user fee for each passenger boarding a commercial aircraft departing from the airport.[107] The $1 fee was upheld, even though it was unapportioned, because it satisfied two essential conditions: it was neither discriminatory nor excessive.[108] The charge, the Court held, was not excessive inasmuch as it "reflect[ed] a fair, if imperfect, approximation of the use of facilities for whose benefit they [were] imposed."[109]

Tennessee's assessment of a $2,500 per game tax looks less like an income tax—particularly in light of the fact that it is completely unapportioned—and much more like a user tax. In this context, the amount of the tax is relevant—and the fact that a $2,500 per game fee is assessed raises serious concerns about whether it is a fair approximation of the use or privilege for use of the state's sports facilities. It also raises serious concerns as to whether the fee is excessive in comparison with the governmental benefit conferred.

In any event, the evaluation of Tennessee's Professional Privilege Tax under the fairly related requirement does not change the fact that the tax is discriminatory.

IV. CONCLUSION

After having $2,500 withheld from his paycheck, Jon DiSalvatore was later reimbursed because he was not on the Minnesota Wild roster for more than ten days during the tax year and was thus exempt from the Tennessee Professional Privilege Tax. Others are not so lucky. A professional athlete who earns the minimum salary in the NHL and performs services in the state

106. Harmon, *supra* note 103, at 694 (quoting Evansville-Vanderburgh Airport Auth. Dist. v. Delta Airlines, Inc., 405 U.S. 707, 716–17 (1972)).

107. *See Evansville-Vanderburgh Airport*, 405 U.S. at 709.

108. *Id.* at 716.

109. *Id.* at 717.

of Tennessee—that is, he shows up on game day—will owe more in taxes than what he earned that day.

Tennessee's Professional Privilege Tax fails Commerce Clause scrutiny because it is not fairly apportioned, it is discriminatory, and it is not fairly related to the services provided by the state of Tennessee. The tax is therefore unconstitutional and puts the state in serious jeopardy of potential lawsuits from both the NHL Players' Association and National Basketball Player's Associations. More importantly, Tennessee's flat tax cannot be tolerated because it will open the floodgates to other discriminatory state tax measures. In the words of the Supreme Court, "acquiescence in these flat taxes would occasion manifold threats to the national free trade area," which is a clear violation of the Commerce Clause.[110]

110. Am. Trucking Ass'ns, Inc. v. Scheiner, 483 U.S. 266, 285 (1987).