

# UNECESSARY ROUGHNESS: PITTSBURGH'S JOCK TAX AND ITS EQUAL PROTECTION CLAUSE VIOLATIONS

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## I. INTRODUCTION

Every jurisdiction is free to tax any class of individuals as they see fit, so long as they remain in bounds of the U.S. Constitution. The last three decades have seen an exponential growth of the “jock tax”—a tax levied against professional athletes. The widespread adoption has come with numerous challenges to their constitutionality, leaving many wondering: what are the proper bounds for the jock tax? One such challenge, and the focus of this Essay, is an Equal Protections Claim against the City of Pittsburgh’s Sports Facility Usage Fee.

Section II of this Essay will introduce the jock tax and its two forms of calculation. Section III outlines the Sports Facility Usage and the current challenges to its constitutionality. Finally, Section IV concludes by calling for a federal standard for the jock tax to avoid future constitutional challenges.

## II. THE JOCK TAX

The “jock tax”— a nonresident income tax levied against the employees of professional sporting organizations— has enjoyed a silent stronghold in professional sports since the 1990s.<sup>2</sup> Most states, and a growing number of cities, that host professional sports teams have utilized the jock tax in an effort to solve their financial problems without adding a burden to its residents.<sup>3</sup> In this regard, the taxing jurisdictions are able to raise revenue without increasing taxes on their residents.<sup>4</sup> The exponential growth in athlete salaries and the public nature of a professional athletic schedule made the transition to the jock tax an easy choice for taxing jurisdictions.<sup>5</sup> Cities and states found the optimum opportunity: tax professional sports and their exorbitant salaries, and monitor compliance by using the teams’ publicized schedules. These two concepts provide the justification for the wide application of the tax.<sup>6</sup>

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<sup>2</sup> Mary Pilon, *The Jock Tax Man*, THE NEW YORKER, (Apr. 10, 2015), <https://www.newyorker.com/business/currency/the-jock-tax-man>; See Also Kara Fratto, *The Taxation of Professional U.S. Athletes in Both the United States and Canada*, 14 SPORTS LAW J. 29, 40 (2007). (“although the taxes are not formally directed specifically at athletes, they are most commonly enforced only against athletes and other entertainers.”).

<sup>3</sup> Elizabeth C. Ekmekjian, *The Jock Tax: State and Local Income Taxation of Professional Athletes*, 4 SETON HALL J. SPORTS L. 229, 235. (1994).

<sup>4</sup> Fratto, *supra* note 2 at 41.

<sup>5</sup> *Id.* at 234. (“The escalation of salaries in professional sports... has triggered a strong financial interest in taxing athletes”).

<sup>6</sup> Nick Overbay, *A Uniform Application of the Jock Tax: The Need for Congressional Action*, 27 MARQ. SPORTS L. REV. 217, 222 (2016).

Historically, however, the tax has not always held such wide support.<sup>7</sup> The city of Pittsburgh, for example, initially rejected the idea of imposing a jock tax, instead taking the stance that “an income tax imposed on visiting athletes ... would cause [them] to avoid performing in Pittsburgh.”<sup>8</sup> The advent of the jock taxes popularity began in the context of the 1990’s with “the recession, cuts in federal funding, and the growth of budget deficits...”<sup>9</sup>

### Allocation of Income: Duty Days v. Games Played

States and cities have the authority to tax nonresident income that is earned within their respective jurisdictions.<sup>10</sup> When taxing income earned through professional sports, there are two methods used to calculate the amount of taxable income per jurisdiction: the duty days formula and the games played formula. Jurisdictions are free to base the jock tax on either formula, much to the displeasure of the professional sporting world.<sup>11</sup>

#### A. Duty Days

Under the duty days conception, an athlete calculates their taxable income by dividing the total number of days spent working in the jurisdiction by the total number of days on duty in the jurisdiction. The quotient is then multiplied by the athlete’s total salary.<sup>12</sup> “Days on duty” include days when the athlete has a mandatory job function; training camp, preseason, postseason, all-star games, travel days, practice days, and actual games plays are included in the count.<sup>13</sup>

#### B. Games Played

The games played conception, on the other hand, considers only the total number of games an athlete has played in the taxing jurisdiction. The taxable income in a jurisdiction using the games played formula is the games played in the jurisdiction divided by the total games played that year. The quotient is then multiplied by the athlete’s yearly salary.<sup>14</sup>

The differing methods of allocating income has long been a source of frustration for the athletes. If one jurisdiction uses duty-days while another uses games plays, a portion of the athlete’s income will be taxed twice. From their perspective, the jock tax presents considerable concerns, including: “burdensome filing of multiple income tax returns, [and] double taxation...”<sup>15</sup> In 1992, the Federal Tax Administration (FTA) formed a task group, at the request of then Kansas City Chiefs owner, to

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<sup>7</sup> See *id.* (arguing that taxing jurisdictions are worried about deterrence for host city bidding). See also Ekmekjian, *supra* note 3 at 237. (Georgia’s governor vetoed a jock tax bill for fear it would make the jurisdiction less appealing to athletes and entertainers in the future).

<sup>8</sup> Ekmekjian *supra*, note 3 at 237.

<sup>9</sup> *Id.* at 234-35.

<sup>10</sup> *Id.* at 223

<sup>11</sup> See John DiMascio, *The Jock Tax: Fair Play or Unsportsmanlike Conduct*, 68 U. PITT. L. REV. 953, 926 (2007).

<sup>12</sup> Fratto, *supra* note 2, at 42; See also Over, *supra* note 8, at 224. (“The duty days model “is as follows:  $Income\ Earned\ in\ State\ X = Yearly\ Salary \times (Duty-Days\ Spent\ in\ State \div Total\ Duty\ Days)$ ”).

<sup>13</sup> *Id.*

<sup>14</sup> Overbybay *supra* note 8, at 224.

<sup>15</sup> Ekmekjian, *supra* note 8, at 242

assist with issues surrounding the jock tax.<sup>16</sup> The FTA worked towards developing a “consistent and uniform approach” to allocating athlete’s income per jurisdiction.<sup>17</sup> The FTA called for a uniform nation-wide duty-days apportionment method, but their conclusions never became law<sup>18</sup> and states continue to apply divergent methods.

### III. NONRESIDENT SPORTS FACILITY USAGE FEE

In 2004, the city of Pittsburgh enacted the Nonresident Sports Facility Usage Fee (“SFUF”). The current SFUF was amended and adopted in 2016. Though the city maintains that the mandatory payment is a license fee and not a tax,<sup>19</sup> it represents a large departure from just a decade earlier, when the city thought a tax on professional athletes would have negative implications.<sup>20</sup> The SUSF holds that:

A license fee equal to three (3) percent of taxable earned income allocable to the days worked in a publicly funded facility is hereby imposed upon each nonresident who uses a publicly funded facility to engage in an athletic event or otherwise render a performance for which a such nonresident receives remuneration.<sup>21</sup>

Any professional athlete “domiciled outside the [c]ity”<sup>22</sup> has 3% of their taxable income withheld by their “qualified managing entity” (QME).<sup>23</sup> The QME must register with the city of Pittsburgh and “deduct monthly, or more often than monthly, the license fee imposed by [the SFUF] based on the earned income allocable to the services in a publicly funded facility paid or payable to any nonresident employee,”<sup>24</sup> and shall file a return to the Treasurer of the city.<sup>25</sup>

#### Allocating Income Under the SFUF

The SFUF utilizes both duty-days and games played models of allocation. Nonresident professional football teams calculate their taxable income using a duty-days calculation: “[e]arned income from the team x (total duty days in [Pittsburgh] in the respective publicly funded facility ÷ total duty days) x .03.”<sup>26</sup> Duty days “include preseason and regular season

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<sup>16</sup> Crystal Williamson, *Taxation of Income on Professional Team Athletes*, Senior Thesis at 33, LIBERTY UNIV., (Spring 2017), <https://digitalcommons.liberty.edu/cgi/viewcontent.cgi?article=1731&context=honors>

<sup>17</sup> Overbay *supra*, note 8, at 962.

<sup>18</sup> *Id.*

<sup>19</sup> See section III(B), *infra*, for a discussion on whether the SFUF is a tax or a fee.

<sup>20</sup> See section 1, *supra*. The city of Pittsburgh vetoed a tax on professional athletes because they were worried it would have negative implications.

<sup>21</sup> Nonresident Sports Facility Usage Fee, 2 CITY OF PITT. CODE, art. X § 271.02. (Note that the statute applies to *any* nonresident who uses a Pittsburgh sports facility—i.e., musical performers, traveling operations staff of a sports team, etc. The scope of this Essay focuses only on one type of nonresident subject to this statute: professional athletes).

<sup>22</sup> *Id.* at § 271.01(g).

<sup>23</sup> *Id.* at X § 271.03(a). (A “qualified managing entity” is “[a] person, partnership, association, corporation, institution, governmental body or unit or agency, or any other entity employing one (1) or more nonresident contracting parties for a salary, wage, commission or other compensation.”). *Id.* at § 271.01(e).

<sup>24</sup> *Id.*

<sup>25</sup> *Id.* (Under § 271.04, relevant individual taxpayers assume responsibility for paying the jurisdiction if their QME fails to).

<sup>26</sup> *Id.* at § 271.05(b).

practice sessions; pre-season and regular season games; and post-season games and practice sessions that officially sanctioned by the team's league office in both the numerator and denominator if this fraction."<sup>27</sup>

In contrast, all other professional athletics teams use a games played formula. "total games played within the City of Pittsburgh versus total games played (including exhibition, preseason, regular season and pose-season games)..."<sup>28</sup> Save for football players, then, all professional athletes carry the weight of a higher tax burden in Pittsburgh.<sup>29</sup>

#### A. *NHLPA v. City of Pittsburgh*

The uneven application of the jock tax predictably draws criticism from those subjected to its rules. At present, the highest court to have decided legal issues surrounding the jock tax is the Ohio state Supreme Court.<sup>30</sup> Still, legal challenges continue to trickle in. At their heart are claims of interstate commerce violations, taxation without representation, and basic violations of the tenets of equity.<sup>31</sup> One such challenge against the SFUF was recently filed at the Court of Common Pleas in Pittsburgh.<sup>32</sup>

In *NHLPA v. City of Pittsburgh*, the Plaintiffs (National Hockey League Players' Association, Major League Baseball Players Association, National Football League Players Association, Jeffrey B. Francoeur,<sup>33</sup> Kyler C. Palmieri,<sup>34</sup> and Scott Wilson<sup>35</sup>) challenge the constitutionality of the SFUF. They argue that the SFUF: (1) is a nonresident professional athlete tax, not a fee; (2) is a violation of the uniformity clause of the Commonwealth of Pennsylvania; (3) is a violation of the Dormant Commerce Clauses of the U.S. Constitution; (4) is a violation of the Privileges and Immunities Clause of the U.S. Constitution; (5) is a Due Process violation of the U.S. and Commonwealth of Pennsylvania Constitutions; (6) is a violation of the Equal Protections Clause, and; (7) exceeds the taxing power afforded by the Commonwealth of Pennsylvania.<sup>36</sup>

The case is still an ongoing lawsuit in the pre-trial phase, but the filed complaint lays out the Plaintiffs arguments and thus is worth analyzing in detail to determine the future of the SFUF.

#### B. Tax or Fee?

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<sup>27</sup> *Id.*

<sup>28</sup> *Id.* at 271.05(a) (quotation marks omitted). ("Earned income from team x (total games played in [Pittsburgh] in the respective publicly funded facility [÷] total games played) x .03").

<sup>29</sup> Fratto, *supra* note 2 at 43. ("The games played formula will yield a higher tax burden than the duty days formula.")

<sup>30</sup> *See* Hillenmeyer v. Cleveland Bd. Of Rev, 144 Ohio St.3d 165 (2015) (finding that a games-played allocation method violated constitutional due process).

<sup>31</sup> Ekmekjian *supra* note 3, at 244. ("Professional athletes have minimal contacts with the cities and states in which away games are played, and sometimes they spend only a few hours within the taxing jurisdiction. [In addition,] it is common knowledge that individuals... cross state borders every day to conduct business, and the [taxing jurisdictions] make no attempt to impose nonresident income taxes on those people").

<sup>32</sup> *NHLPL v. City of Pittsburgh*, GD-19-015542 (Pa. Comm. Pleas. Ct. Nov. 5, 2019).

<sup>33</sup> Professional baseball player residing in Iowa, Louisiana.

<sup>34</sup> Professional hockey player residing in Montvale, New Jersey.

<sup>35</sup> Professional hockey player residing in Pittsford, New York

<sup>36</sup> Complaint at 22-33, *NHLPA v. City of Pittsburgh*, (Pa. Comm. Pleas. Ct.) (GD-19-015542).

The city of Pittsburgh considers the SFUF a fee for using its sporting facilities, instead of an income tax for conducting business in the jurisdiction. The Plaintiffs, however, argue that the statute has all the hallmarks of a tax:

It is a percentage, rather than a flat amount. It is assessed on “earned income,” just as an earned income tax is, and thus varies dramatically in amount depending upon the income level of the professional athlete. It is deducted by the athletes’ employers and remitted to the City quarterly, just as the athletes’ earned income tax would be if they were employed in any other industry.<sup>37</sup>

A fee, in contrast to a tax, is materially different:

First, they are imposed on specific persons, activities, or properties that receive a service or benefit, or that cause negative externalities (public bads) that burden the rest of the population. Second, they come with a distinct set of legal protections to ensure that the level of each charge does not exceed the cost of the service, benefit, or mitigation of the public bad allocated to the person charged and to ensure that the proceeds of the charge are used solely for the provision of services, benefits, or mitigations and *not* used for general governmental purposes<sup>38</sup>

Here, the SFUF uses a definition of “earned income” that is identical to the State’s definition of taxable income under Pennsylvania law.<sup>39</sup> The revenue collected is used for general government purposes<sup>40</sup>, and not for a specific fund—as it would be for a traditional fee.<sup>41</sup> For these reasons, I assume in this analysis that the SFUF is a tax and therefore subject to the bounds set out in the Constitution.

### C. Equal Protections Clause Challenge

Jurisdictions enjoy broad freedom to impose taxes on any class of persons they see fit.<sup>42</sup> At issue here is a tax levied against professional sports employees. To survive constitutional challenge, “there must be no discrimination in favor of one against another of the same class.”<sup>43</sup> Specifically, “the

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<sup>37</sup> *Id.* at 7-8.

<sup>38</sup> Hugh D. Spitzer, *Taxes v. Fees: A Curious Confusion*, 38 GONZ. L. REV. 335, 343 (2002.)

<sup>39</sup> Complaint *supra*, note 36 at 6.

<sup>40</sup> See Complaint *supra*, note 36 at exhibit B, pg. 5. (The current/updated statute excludes language that allocates the funds collected from the SFUF. At the time the complaint was filed however, § 201 of the SFUF read “A fee for general revenue purposes of three (3) percent of Earned Income is hereby imposed on each Nonresident who uses a Publicly Funded Facility to engage in athletic event...”) *Id.*

<sup>41</sup> Spitzer, *supra* note 38 at 339. (Tax revenue can be used for *any* governmental function...”)

<sup>42</sup> Joel Michael, *Taxation and Equal Protection*, HOUSE RESEARCH (Sep. 2018), <https://www.house.leg.state.mn.us/hrd/pubs/ss/clsstxep.pdf>. (stating states are subject to a “rational basis test” when courts review the legality of a tax. As long as the states can prove a rational relationship between the tax and a legitimate legislative purpose, the tax will be allowed); See also *San Antonio Independent School District v. Rodriguez*, 411 U.S. 1, 41 (1973) (“[I]n taxation, even more than in other fields, legislatures possess the greatest freedom in classification”).

<sup>43</sup> CORNELL L. SCHOOL, LEGAL INFORMATION INSTITUTE <https://www.law.cornell.edu/constitution-conan/amendment-14/section-1/taxation>; See also Kirk Berger, *Foul Play: Tennessee’s Unequal Application of Its Jock Tax*

Equal Protections Clause of the fourteenth amendment prevents states and governmental bodies from discrimination against individual tax paying groups that impose irrational tax classifications.”<sup>44</sup>

Under the SFUF, a nonresident professional athlete is the only individual subject to a 3% income tax.<sup>45</sup> Every other individual must pay a 1% income tax.<sup>46</sup> In pertinent part, the tax applies unevenly within the classification of “professional athletes.” For example, a resident professional athlete is subject to a 1% income tax.<sup>47</sup> Again, the uneven allocation of income by SFUF raises constitutional concern. The Plaintiffs argue that

[a]ppportioning income to Pittsburgh on a games-played basis, rather than a duty-days basis, creates anomalous results. Pittsburgh effectively obtains higher tax as the days that the athlete spends in his home state practicing, travelling, and performing other work on behalf of the team that employs him are not counted, increasing the income apportioned to the City far beyond what the professional athlete actually earns there.<sup>48</sup>

Professional football players utilizing a duty-days allocation method while other professionals are held to a games played standard creates a separation among the class of professional athletes that allows football players to enjoy a lower taxable rate than other athletes. Furthermore, the SFUF separates the uniform class they purport to tax without justification by allowing resident professional athletes to pay a 1% tax while requiring nonresidents in the same class to pay 3%.<sup>49</sup> The SFUF is within its power to tax professional athletes as a class; however, Fourteenth Amendment constraints force the tax to be applied evenly. At least in these two practices, the SFUF has demonstrated a departure from the standards required by Fourteenth Amendment.

#### IV. CONCLUSION

The SFUF provides an example of an unconstitutional tax on professional athletes. Though jurisdictions enjoy the freedom to tax any class of individuals so long as they have a rational basis for the mandate, the Equal Protections Clause requires an added layer of protection for the individuals. To avoid the multitude of challenges to the jock tax that have been amassing in since the early 1990’s, the various players associations and professional sporting organizations should renew the call of Lamar Hunt and push for the federalization of the jock tax. In an effort to protect the athlete’s constitutional rights, a uniform application must be applied going forward.

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*Against Professional Athletes*, 13 CARDOZO PUB. L. POLY & ETHICS J. 333, 336 (2014). (“When the laws of a state treat those that are similarly situated differently, it raises proverbial red flags regarding the constitutionality of such legislation.”)

<sup>44</sup> Berger, *id.* at 344.

<sup>45</sup> Complaint *supra* note 36, at 9.

<sup>46</sup> See *id.* at 12. (Tax Rate Table).

<sup>47</sup> *Id.* at 11.

<sup>48</sup> *Id.* at 14.

<sup>49</sup> *Id.* at 11. (The Supreme Court of Pennsylvania has held that “Residence cannot be made the basis of discrimination in taxation of persons engaged in the same occupation or profession.”) (citing *Danyluk v. Johnstown*, 178 A.2d 609, 610 (Pa. 1962)).