

I’m Entertained, but Who’s Doing the Entertaining? A Look at the International Tax Consequences for International “Entertainers”

Carli Marcello*

I.	OVERVIEW	125
II.	BACKGROUND CONSIDERATIONS ON TAX IMPLICATIONS FOR FOREIGN INDIVIDUALS	127
	A. <i>Determining Whether an Individual Is a U.S. Person or Nonresident Alien</i>	127
	B. <i>Green Card and Substantial Presence for Resident Aliens</i>	127
	C. <i>Nature, Source, and Type of Income</i>	128
	D. <i>Entertainer and Entertainment Defined</i>	130
	E. <i>Foreign Entertainer and Athlete’s Income</i>	131
	F. <i>OECD Model Income Tax Treaty</i>	132
	G. <i>Tax Treaties and the Effect on Foreign Entertainers</i>	134
III.	TAX IMPLICATIONS FOR TYPES OF INCOME EARNED BY FOREIGN ENTERTAINERS/ATHLETES	136
	A. <i>Endorsement Contracts</i>	136
	B. <i>Other Sources of Income</i>	138
IV.	CHANGE IN SOCIETY’S CONCEPT OF ENTERTAINMENT.....	140
	A. <i>Who Are They?</i>	142
	B. <i>Why Is “Entertainer” an Important Classification?</i>	143
V.	CONCLUSION	146

I. OVERVIEW

Today, “influencers” play an integral part in the world’s economy.¹ YouTube stars and other individuals who found fame from social media have entertained millions by uploading videos and/or photographs of

* © 2019 Carli Marcello. J.D./MBA candidate 2021, Tulane University; Bachelor of Accountancy 2013, Loyola University New Orleans. Carli Marcello is from Thibodaux, Louisiana. She would like to thank Professor Khrista McCarden for assisting with the selection of this topic.

1. See LINQIA, THE STATE OF INFLUENCER MARKET 2018, at 2 (2017), <http://www.linqia.com/wp-content/uploads/2017/12/Linqia-The-State-of-Influencer-Marketing-2018.pdf> (stating that 92% of the 88% of marketers studied found influencer marketing effective).

themselves or others.² YouTube has become the “launchpad for the next generation of celebrities”—“YouTube is the new TV.”³ Impressively, the accumulated income for the top-ten highest paid YouTube stars in 2018 was over \$180 million.⁴ These people have redefined what entertainment is,⁵ yet they do not necessarily fit the definition of what constitutes an “entertainer” for tax purposes.⁶ Arguably, this new group falls within “a grey area where it is necessary to review the overall balance of the activities of the person concerned.”⁷ The definition of what constitutes an entertainer or what constitutes entertainment character should be changed.

This Comment will show the changing concept of entertainment and explore this new group of “entertainers.” It will discuss the similarities and differences between other foreign entertainers or sportsmen that the Internal Revenue Service (IRS) has encountered. Part II addresses the background information pertinent to tax implications for foreign individuals, such as classifications of individuals and the sources and type of income implicated. Part II also explains the current definition of an entertainer defined by the IRS, as well as a model tax treaty, and how tax treaties are relevant for international persons or businesses. Part III discusses the varying tax implications for the types of income foreign entertainers may earn. Part IV shows the change in society’s concept of entertainment by providing examples of international “influencers” and YouTube stars and comparing their income from previous income tax complications the IRS has addressed.

2. See Paige Leskin, *From PewDiePie to Shane Dawson, These Are the 25 Most Popular YouTube Stars in the World*, BUS. INSIDER, <https://www.businessinsider.com/most-popular-youtubers-with-most-subscribers-2018-2> (last visited Sept. 16, 2019).

3. *Id.*

4. Caitlin O’Kane, *Top 10 Highest-Paid YouTube Stars of 2018, According to Forbes*, CBS NEWS, <https://www.cbsnews.com/news/top-10-highest-paid-youtube-stars-of-2018-forbes/> (last visited Sept. 16, 2019).

5. *Id.*

6. Thomas Bissell, *907-3rd T.M., U.S. Income Taxation of Nonresident Alien Individuals*, BLOOMBERG L., <https://pro.bloombergtax.com/portfolio/u-s-income-taxation-of-nonresident-alien-individuals-portfolio-907/> (last visited Oct. 9, 2019).

7. Org. for Econ. Co-operation & Dev. [OECD], *Model Tax Convention on Income and on Capital* 333 (2017) [hereinafter *Model Tax Convention on Income and on Capital*].

II. BACKGROUND CONSIDERATIONS ON TAX IMPLICATIONS FOR FOREIGN INDIVIDUALS

A. *Determining Whether an Individual Is a U.S. Person or Nonresident Alien*

An individual, for tax purposes, may be classified as a United States citizen, United States income tax resident, or a nonresident alien.⁸ The Internal Revenue Code defines a U.S. person as “a citizen or resident of the United States.”⁹ Thus, within this rule, an individual may be considered a U.S. person for tax purposes if the individual was born and naturalized in the United States,¹⁰ or if the individual meets one of two tests: (1) the green card test or (2) the substantial presence test for the calendar year.¹¹ Those individuals who meet one of the two tests are commonly referred to by the IRS as resident aliens.¹² If none of those tests are met, the individual can be classified as a nonresident alien pursuant to 26 I.R.C. § 7701(b)(1)(B).¹³

B. *Green Card and Substantial Presence for Resident Aliens*

The first residency test for an individual to be considered a “Lawful Permanent Resident of the United States” is the green card test.¹⁴ This test is satisfied if the United States Citizenship and Immigration Services has “issued an alien registration card . . . also known as a ‘green card.’”¹⁵ In

8. I.R.C. §§ 7701(a)(30), 7701(b)(1)(B) (2019); Michael Bruno et al., *The International Athlete and Entertainer: A Summary of Important U.S. Tax Considerations*, 89 FLA. B.J. 29, 29 (2015).

9. § 7701(a)(30).

10. Bruno et al., *supra* note 8, at 29.

11. § 7701(b)(1)(A); INTERNAL REVENUE SERV., U.S. TAX GUIDE FOR ALIENS (2019) [hereinafter PUB. NO. 519].

12. PUB. NO. 519, *supra* note 11, at 3.

13. § 7701(b)(1)(B); PUB. NO. 519, *supra* note 11.

14. *Alien Residency and Green Card Test*, IRS, <https://www.irs.gov/individuals/international-taxpayers/alien-residency-green-card-test> (last visited Sept. 16, 2019); Stephen Taylor, *Are You Not Entertained—Is This Not Why You Are Here—U.S. Taxation of Foreign Athletes and Entertainers*, 16 JEFFREY S. MOORAD SPORTS L.J. 375, 380 (2009).

15. *Alien Residency and Green Card Test*, *supra* note 14. The IRS specifies:

If you meet the green card test at any time during the calendar year, but do not meet the substantial presence test for that year, your residency starting date is the first day on which you are present in the United States as a Lawful Permanent Resident. However, an alien who has been present in the United States at any time during a calendar year as a Lawful Permanent Resident may choose to be treated as a resident alien for the entire calendar year.

Id.

reference to entertainers or athletes, these individuals are likely not to apply for a green card, thus this residency test is irrelevant.¹⁶ The second residency test is the substantial presence test.¹⁷ An individual will meet the requirements of the test if “the individual was present in the United States for at least 31 days during the calendar year, and the total days (multiplied by a specified multiplier) of the current year and two preceding years that the individual was present in the United States . . . equals or exceeds 183 days.”¹⁸ There is an exception that requires an individual be classified as a nonresident alien even though the individual has met the substantial presence test.¹⁹ Such an exception is “The Closer Connection Exception.”²⁰ Essentially, an individual who is present in the United States for fewer than 183 days in a year and maintains a tax home in a foreign country during that year, which provides the individual with a closer connection to that foreign country than the United States, will be treated as a nonresident alien.²¹

C. *Nature, Source, and Type of Income*

The classification of individuals is necessary in determining federal income tax implications for these individuals.²² A U.S. citizen is taxed on the income she has received not only in the United States but also on income earned elsewhere.²³ Items included in income are salaries, endorsement income, royalties, bonuses, dividends from U.S. and foreign companies, and capital gains.²⁴ In contrast, while U.S. persons are taxed on their worldwide income, nonresident aliens are taxed differently.²⁵ Nonresident aliens are “subject to U.S. federal income tax only on certain

16. Taylor, *supra* note 14, at 381; see Jason Finkelman, *International Artist & Musician Immigration FAQ*, FINKELMAN L. (Jan. 27, 2016), <https://www.finkelmanlaw.com/blog/2016/1/27/the-international-artist-musician-immigration-faq> (discussing the types of visas an international entertainer must obtain prior to entering the United States).

17. § 7701(b)(3).

18. *Id.* The multipliers are as follows: for the current year, 1; for the first preceding year, 1/3, and the second preceding year, 1/6.

19. *Substantial Presence Test*, IRS, <https://www.irs.gov/individuals/international-taxpayers/substantial-presence-test> (last visited Sept. 26, 2019).

20. *Id.*

21. *Conditions for a Closer Connection to a Foreign Country*, IRS, <https://www.irs.gov/individuals/international-taxpayers/conditions-for-a-closer-connection-to-a-foreign-country> (last visited Sept. 26, 2019); see also § 7701(b)(3)(B)(i)-(ii).

22. Bruno et al., *supra* note 8, at 30.

23. *Id.*

24. *Id.*

25. *Conditions for a Closer Connection to a Foreign Country*, *supra* note 21; see also § 7701(b)(3)(B)(i)-(ii).

types of U.S.-source income.”²⁶ Many factors determine whether the income is sourced in the United States.²⁷ For example, the factor determining the source of income earned from salaries, wages, or other compensation is the location of where the services are performed.²⁸ The factor determining the source of income from the sale of inventory is the location where the inventory is sold.²⁹

Income that is considered U.S. sourced income includes the following: “(1) income effectively connected to a U.S. trade or business, including gains from the sale of U.S. real property (ECI); and (2) certain types of passive income from U.S. sources that are not deprived from a U.S. trade or business, such as dividends, rents, and interest (FDAP income).”³⁰ A foreign person that conducts trade or business in the United States and produces “income from sources within the United States connected with the conduct of that trade or business” generates income referred to as Effectively Connected Income (ECI).³¹ The IRS states:

[The Taxpayer] must be engaged in a trade or business during the tax year to be able to treat income received in that year as ECI. [The taxpayer] usually [is] considered to be engaged in a U.S. trade or business when [he] perform[s] personal services in the United States. Whether [he is] engaged in a trade or business in the United States depends on the nature of [his] activities. Deductions are allowed against ECI, and it is taxed at the graduated rates or lesser rate under a tax treaty.³²

The second type of income that can be considered U.S. source income is classified as FDAP, which stands for fixed, determinable, annual, periodical income.³³ The IRS defines FDAP as all income, except “[g]ains derived from the sale of real or personal property” and “[i]tems of income excluded from gross income, without regard to the U.S. or foreign status

26. Bruno et al., *supra* note 8, at 30.

27. *Nonresident Aliens—Sources of Income*, IRS, <https://www.irs.gov/individuals/international-taxpayers/nonresident-aliens-source-of-income> (last visited Sept. 26, 2019).

28. *Id.*

29. *Id.*

30. Bruno et al., *supra* note 8, at 30; *see also* § 871(b) (“Income connected with United States Business—graduated rate of tax”); *id.* § 871(a)(1)(A).

31. *Effectively Connected Income (ECI)*, IRS, <https://www.irs.gov/individuals/international-taxpayers/effectively-connected-income-eci> (last visited Sept. 26, 2019).

32. *Id.*

33. *Fixed, Determinable, Annual, Periodical (FDAP) Income*, IRS, <https://www.irs.gov/individuals/international-taxpayers/fixed-determinable-annual-periodical-fdap-income> (last visited Sept. 26, 2019).

of the owner of the income.”³⁴ Such income is taxed at a thirty percent flat rate, and deductions are not allowed.³⁵ Identifying the nature of the income is necessary because “the tax rules for sourcing income . . . as well as the U.S. rules for a lower rate of withholding or exemption from withholding vary with the nature of the income.”³⁶

D. *Entertainer and Entertainment Defined*

Once the foreign individual determines that he or she is a nonresident alien receiving U.S.-source income, there is another hurdle the individual must jump—is he or she an “entertainer?”³⁷ The IRS has determined “whether a particular nonresident alien is an ‘entertainer’ or ‘athlete’ within the meaning of certain tax treaties” by ruling on a factual question.³⁸ According to Field Service Advice (FSA) 1999-47-027, “the focus should be on whether the primary purpose of the specific activity being performed by [the t]axpayer . . . under the Agreement is entertainment.”³⁹ For example, in one case, the purpose of a foreign individual’s activities in the United States “was the promotion, marketing, and sale of products.”⁴⁰ The IRS determined the foreign individual “was not an entertainer for purposes of the . . . tax treaty.”⁴¹ A foreign individual, therefore, is considered an entertainer if there is “an entertainment character to the activity performed.”⁴² The Oxford dictionary defines entertainment as “the action of providing or being provided with amusement or enjoyment,” and “[a]n event, performance, or activity designed to entertain others.”⁴³ Additionally, according to the U.S. Treaty, Article 16, an entertainer can receive income from activities from “a theater, motion picture, radio, . . .

34. *Characterization of Income of Nonresident Aliens*, IRS, <https://www.irs.gov/individuals/international-taxpayers/characterization-of-income-of-nonresident-aliens> (last visited Sept. 26, 2019).

35. § 871 (a)(1); Bruno et al., *supra* note 8, at 2; *see* § 1441(b) (enumerating the withholding tax for nonresident aliens’ income).

36. Paula N. Singer, *U.S. Withholding and Reporting on Payments to Foreign Persons*, 73 TAX NOTES INT’L 1005, 1010 (2014), <https://www.taxnotes.com/tax-notes-international/tax-system-administration-issues/us-withholding-and-reporting-payments-foreign-persons/2014/03/17/sjq0?highlight=non%20U.S.%20resident%20%20entertainer>.

37. Bissell, *supra* note 6, at 1.

38. *Id.*

39. *Id.*; I.R.S. Tech. Adv. Mem. 1999-47-027 (Nov. 26, 1999).

40. Bissell, *supra* note 6, at 1.

41. *Id.*

42. *Id.*

43. *Entertainment*, LEXICO, <https://en.oxforddictionaries.com/definition/entertainment> (last visited Sept. 26, 2019).

television,” or musical performance.⁴⁴ Therefore, there must be some entertainment character to those activities performed by the foreign individual that provides enjoyment or amusement to others.⁴⁵

E. Foreign Entertainer and Athlete's Income

The classifications of individuals and U.S. source income is crucial for determining a foreign athlete's and entertainer's tax liability.⁴⁶ These entertainers often earn a “sizable compensation” for their “short stays in numerous countries within a single tax year”; thus, the IRS “[has] become increasingly interested in collecting their share of remuneration paid to these itinerant individuals.”⁴⁷ In particular, the IRS is concerned with the amount of tax liability these individuals face from the income earned from activities within the United States.⁴⁸ Specific types of income paid to entertainers that are derived from activities within the United States include compensation for personal services and income from endorsement contracts, which may contain a personal service component.⁴⁹ Ultimately, these performances or activities by the foreign entertainer or athlete create “income [for the entertainer] in the form of compensation for personal services in the United States.”⁵⁰

Endorsement contracts appear in two forms: “on-court or on-course contract” or “off-court or off-course contract.”⁵¹ An on-court contract “requir[es] the athlete to wear the sponsor's apparel and use its products during performance.”⁵² Off-court contracts “require[s] the athlete to endorse a brand or product by allowing the sponsor to use the athlete's name, image, fame, or likeness in its advertising.”⁵³ While on-court and off-court contracts may insinuate these endorsement contracts are merely for athletes, musicians enter into endorsement contracts as well—“the

44. United States Model Income Tax Convention art. 16 (U.S. Dep't of Treasury 2016). This is the model the treasury department created to base international tax treaties on.

45. *Id.*; Bissell, *supra* note 6, at 1.

46. See Bruno et al., *supra* note 8, at 30; Steven Auderieth, *U.S. Tax Planning for Non-U.S. Entertainers and Athletes*, CHECKPOINT 1,15 (1997).

47. Auderieth, *supra* note 46, at 14.

48. Taylor, *supra* note 14, at 375.

49. Bruno et al., *supra* note 8, at 2; Taylor, *supra* note 14, at 375.

50. Taylor, *supra* note 14, at 380, 382; see also I.R.C. § 861(a)(3) (2019).

51. Bruno et al., *supra* note 8, at 30.

52. *Id.*

53. *Id.*; see Tony Nitti, *Tax Court Determines Character, Source of Golfer's Worldwide Endorsement Income*, TAX ADVISOR (Sept. 1, 2011), <https://www.thetaxadviser.com/issues/2011/sep/taxtrends-sep2011.html> (discussing the implications of the decision in *Goosen*); see also *Goosen v. Comm'r*, 136 T.C. 547 (2011) (for determining the character and source of income from endorsement contracts for international athletes).

ancillary income that musicians generate from brand sponsorship and endorsements have become of paramount importance to an artist's overall earnings."⁵⁴ Musicians fall within the definition of entertainer recognized by the United States according to U.S. Treaty, Article 16: "[i]ncome derived . . . as an entertainer, such as a theater, motion picture, radio, or television artiste, or a musician, or as a sportsman, from his personal activities."⁵⁵

F. *OECD Model Income Tax Treaty*

Tax treaties commonly are used to protect foreign individuals participating in entertainment activities in foreign countries.⁵⁶ The Organisation for Economic Co-operation and Development (OECD) has a Model Tax Convention, the OECD Model Tax Convention, for countries entering into bilateral tax conventions.⁵⁷ The first Draft Model Tax Convention was created in 1963.⁵⁸ At that time, only a few countries had tax treaties.⁵⁹ Today, "the OECD Model Tax Convention has facilitated bilateral negotiations between countries and made possible a desirable harmonization between bilateral conventions for the benefit of both taxpayers and national administrations."⁶⁰

This model "plays a crucial role in removing tax related barriers to cross border trade and investment."⁶¹ The purpose of the Model Tax Convention is to help businesses who participate on the international scale while also preventing the business from tax evasion.⁶² It also prevents international double taxation—a common problem for international business—by creating a "[uniform] basis for negotiation and application of bilateral tax treaties" for participating countries.⁶³ The OECD was most recently updated on November 23, 2017.⁶⁴

54. Justine M. Jacobson, *Brand Sponsorship & Endorsement Agreement for Artists [Part 1]*, TUNE CORE (June 25, 2018), <https://www.tunecore.com/blog/2018/06/brand-sponsorship-endorsement-agreements-for-artists-part-1.html>.

55. United States Model Income Tax Convention, *supra* note 44, art. 16.

56. Bissel, *supra* note 6, at 1; *see also* Press Release, Org. for Econ. Co-Operation & Dev. [OECD], Tax Treaties: Update to OECD Model Tax Convention Released (Dec. 18, 2017) [hereinafter Update to OECD Model Tax Convention].

57. *See* Update to OECD Model Tax Convention, *supra* note 56; *Model Tax Convention on Income and on Capital*, *supra* note 7, at 9, 332.

58. *See* Update to OECD Model Tax Convention, *supra* note 56.

59. *Id.*

60. *Id.*

61. *Id.*

62. *Id.*

63. *Id.*

64. *Id.*

Article 17 of the OECD Model Tax Convention concerns the taxation of entertainers and sportspersons.⁶⁵ The section does not give a definition of an entertainer.⁶⁶ Rather, Article 17 provides examples of persons who could be considered an “entertainer.”⁶⁷ The examples listed, though, do not provide an exhaustive list.⁶⁸ Paragraph three provides:

[T]he term “entertainer” clearly includes the stage performer, film actor or actor (including for instance a former sportsperson) in a television commercial. The Article may also apply to income received from activities which involve a political, social, religious or charitable nature, if an entertainment character is present [I]t does not extend to a visiting conference speaker (e.g. a former politician who receives a fee for a speaking engagement), to a model performing as such (e.g. a model presenting clothes during a fashion show or photo session) rather than as an entertainer or to administrative or support staff (e.g. cameramen for a film, producers, film, directors, choreographers, technical staff, road crew for a pop group, etc.). In between there is a grey area where it is necessary to review the overall balance of the activities of the person concerned.⁶⁹

Paragraph four of this Article provides that if the activities that the individual participates in are “predominately of a performing nature” then Article 17 applies.⁷⁰ If the performance aspect is just a small part of the activities of the individual, then Article 17 does not apply, or apportionment may be necessary.⁷¹ Additionally, paragraph six provides that “income from other activities which are usually regarded as an entertainment character, such as those deriving from billiards and snooker, chess, and bridge tournaments” makes this Article applicable.⁷² In regard to the entertainer’s income, Article 17 includes “income derived directly or indirectly from a performance,” and other fees that may connect to the performance.⁷³

65. *Model Tax Convention on Income and on Capital*, *supra* note 7, at 333.

66. *Id.*

67. *Id.*

68. *Id.*

69. *Id.*

70. *Id.*

71. *Id.* at 332-33.

72. *Id.* at 333.

73. *Id.* For a more detailed understanding for determining the item of income, see *id.* at 334-35.

G. *Tax Treaties and the Effect on Foreign Entertainers*

The OECD Model Tax Convention is the basis for over “3000 tax treaties in force around the world.”⁷⁴ The United States and foreign countries enter into tax treaties that allow nonresident aliens to be taxed at a reduced rate or be exempt from some taxes “receive[d] from sources within the United States.”⁷⁵ Usually, a tax treaty will reduce the amount of United States’ taxes a resident of a foreign country pays.⁷⁶ Tax treaties are “generally reciprocal; [t]herefore, a U.S. citizen or U.S. treaty resident, who receives income from a treaty country and who is subject to taxes imposed by foreign countries, may be entitled to certain credits, deductions, exemptions, and reductions in the rate of taxes of those foreign countries.”⁷⁷ Additionally, a tax treaty will determine the residency of the foreign taxpayer.⁷⁸ Under a tax treaty, an individual can be considered a resident of a foreign country, but not a resident of the United States, even though that individual may be classified as a U.S. resident for purposes other than determining a tax.⁷⁹ Dual resident taxpayers may also result—an individual is “a resident of both the United States and another country under each country’s tax laws”—thus, a tax treaty “must contain a provision that provides for resolution of conflicting claims of residence.”⁸⁰

Because the United States Internal Revenue Code does not have specific tax rules regarding foreign entertainers or athletes who receive income from events occurring in the United States, tax treaties generally provide the artists or entertainers with a limited exemption.⁸¹ These treaties “contain special limitations that sharply curtail the availability of treaty exemptions from U.S. tax.”⁸² The exemption, though, is capped at a certain amount of income that the entertainer “may earn tax-free in the U.S.”⁸³

74. Update to OECD Model Tax Convention, *supra* note 56.

75. *United States Tax Treaties—A to Z*, IRS, <https://www.irs.gov/businesses/international-businesses/united-states-income-tax-treaties-a-to-z> (last visited Sept. 26, 2019).

76. *Id.*

77. *Tax Treaties*, IRS, <https://www.irs.gov/individuals/international-taxpayers/tax-treaties> (last visited Sept. 26, 2019).

78. *Id.*

79. *Id.*

80. *Id.*

81. *The Artists or Entertainers Exemption*, ARTISTS FROM ABROAD, <https://www.artistsfromabroad.org/tax-requirements/exceptions-to-nra-withholding-requirement/tax-treaties/the-artists-or-entertainers-exemption/> (last visited Sep. 22, 2019); Bissell, *supra* note 6, at 1.

82. Bissell, *supra* note 6, at 1. These individuals come to the United States to perform or participate in activities and earn a large compensation.

83. *The Artists or Entertainers Exemption*, *supra* note 81. For example, the nonresident alien will “be exempt from tax under an applicable treaty only if his or her gross revenues from services in the United States do[es] not exceed . . . \$30,000.” Bissell, *supra* note 6, at 1.

Certain requirements must be met for an entertainer to qualify for this exemption.⁸⁴ First, the entertainer cannot have “permanent establishment” or “fixed base” in the United States.⁸⁵ Additionally, the entertainer must have “spen[t] fewer than a certain number of days in the U.S. during the year.”⁸⁶ Because entertainers receive income from various opportunities, income that may fall under the cap from one opportunity may actually push the entertainer’s U.S.-source income over the ceiling.⁸⁷ Thus, the IRS requires the payer of an entertainer to withhold tax at a thirty percent rate “on all payments made to foreign athletes or entertainers” and remit that amount to the United States government.⁸⁸ Generally, nonresident alien’s taxes are paid via withholding.⁸⁹ Tax treaties, therefore, may provide for a reduced withholding for individuals.⁹⁰

Entertainers performing in the United States are provided special rules by the IRS.⁹¹ I.R.C. § 1441 “permits those aliens and their client payors to meet with the IRS in advance of the alien’s U.S. performances, and to agree that withholding will be at a rate of less than 30%.”⁹² Accordingly, an entertainer and their agent may enter into a Central Withholding Agreement (CWA) to “reduce the amount of taxes withheld on the U.S.-source gross receipts of the foreign athlete or entertainer.”⁹³ According to the IRS’s 2018 U.S. Tax Guide for Aliens,

Under no circumstances will such a withholding agreement reduce taxes withheld to less than the anticipated amount of income tax liability. Beginning October 1, 2018, individual nonresident alien entertainers and athletes must have calendar year-to-date U.S. gross income of at least \$10,000 (including income estimated on the CWA application budget) before the nonresident alien is eligible to apply for a CWA.⁹⁴

84. *The Artists or Entertainers Exemption*, *supra* note 81.

85. *Id.*

86. *Id.*

87. *Id.*

88. *Withholding of Tax on Payments to Foreign Athletes and Entertainers*, IRS, <https://www.irs.gov/individuals/international-taxpayers/withholding-of-tax-on-payments-to-foreign-athletes-and-entertainers> (last visited Sept. 26, 2019); *The Artists or Entertainers Exemption*, *supra* note 81; Robert S. Fink et al., *What Non-U.S. Athletes, Entertainers, and Agents Need to Know About U.S. Taxes and How to Reduce Them*, 24 ARTS & SPORTS L.J. 36, 37 (2013); *see also* I.R.C. § 1441(a) (2019).

89. Fink et al., *supra* note 88, at 37; *see* Treas. Reg. § 1.1441-1 (2013) (general rules of withholding).

90. Fink et al., *supra* note 88, at 37.

91. Singer, *supra* note 36, at 1008.

92. I.R.C. § 1441 (2019); PUB. NO. 519, *supra* note 11, at 40.

93. *Withholding of Tax on Payments to Foreign Athletes and Entertainers*, *supra* note 88.

94. PUB. NO. 519, *supra* note 11, at 40.

III. TAX IMPLICATIONS FOR TYPES OF INCOME EARNED BY FOREIGN ENTERTAINERS/ATHLETES

A. *Endorsement Contracts*

In IRS Technical Advice Memoranda (AM) 2009-005, the Associate Chief Counsel of the IRS discussed retainer fees relating to on-court endorsement contracts for foreign professional golf and tennis players.⁹⁵ The IRS sought to answer “[w]hether retainer fees paid to foreign professional golf and tennis players pursuant to on-court endorsement contracts should be characterized as income from personal services, royalties, or both under the Code.”⁹⁶ More specifically, whether the income received fell under “business profits under Article 7, royalties under Article 12, or income derived by a sportsman under Article 16” of the 2006 U.S. Model Treaty.⁹⁷ The Chief Counsel concluded that those “retainer fees . . . should be characterized as income from personal services and, to the extent the fees relate[d] to services effectively connected with the conduct of the athlete’s . . . businesses in the United States[,]” “taxable on a net basis at graduated rates.”⁹⁸ This income from retainer fees was further characterized as Article 16 income because “Article 16 governs the taxation of retainer fees derived from any use of the player’s name or image that is directly or indirectly related to his or her personal activities as an athlete.”⁹⁹ If retainer fees were obtained, but income was received not in relation to the foreign athlete’s professional activities, then the Chief Counsel determined the income derived “should be classified as business profits under Article 7.”¹⁰⁰ A portion of retainer fees that were paid for using the player’s “name and likeness rights on a stand-alone basis” was determined to be royalties.¹⁰¹ Ultimately, AM 2009-005 decided the particular facts of a case would determine the United States tax treatment of income earned from royalties.¹⁰²

95. See I.R.S. Tech. Adv. Mem. 2009-005 (June 26, 2009) [hereinafter IRS AM 2009-005 Tax Conventions].

96. *Id.*

97. *Id.* The 2016 U.S. Model Treaty has updated language, but that does not impact the analysis here. Bissell, *supra* note 6, at 2 n.347.1.

98. Bissell, *supra* note 6, at 2; IRS AM 2009-005 Tax Conventions, *supra* note 95, at 2. It is important to note that the 2006 U.S. Model Treaty’s fundamental taxation principles have not changed in the 2016 U.S. Model Treaty. Bissell, *supra* note 6, at 2 n.347.1.

99. Bissell, *supra* note 6, at 2; IRS AM 2009-005 Tax Conventions, *supra* note 95, at 2.

100. Bissell, *supra* note 6, at 2; IRS AM 2009-005 Tax Conventions, *supra* note 95, at 2. An example is “to market a signature line of equipment.” Bissell, *supra* note 6, at 2.

101. Bissell, *supra* note 6, at 2.

102. *Id.*

Two recent cases specifically addressed the matters discussed in AM 2009-005.¹⁰³ In *Goosen v. Commissioner*, a professional golfer from the United Kingdom had allegedly underreported his income received from his on-course and off-course endorsement contracts.¹⁰⁴ The foreign professional golfer had reported on-course endorsement contracts as half personal services income and the other half as royalty income.¹⁰⁵ He then reported the off-course income as royalty income.¹⁰⁶ The IRS asserted that all of the income the golfer received was derived from personal services, and that all “income earned in the United States should be U.S.-source.”¹⁰⁷ The golfer, on the other hand, argued the income he received from the endorsement contract was paid to him for the permission to use his name and likeness.¹⁰⁸ The court sided with the golfer on the 50-50 split characterization of income because the sponsor equally valued the golfer’s name and likeness and his performance.¹⁰⁹ The court concluded that some of the royalty income from the on-course endorsement contracts were connected to a U.S. trade of business (ECI), so such income should be subjected to graduated tax rates.¹¹⁰ The off-course endorsement contract, the court also concluded, produced royalty income that was not connected to a U.S. trade or business.¹¹¹ Thus, such income should be subject to a thirty percent flat tax.¹¹² Additionally, the court concluded the golfer possibly could have benefited from the 1975 or 2001 United States-United Kingdom Income Tax Convention (U.K.-U.S. tax treaty) if he would have properly established his eligibility under the treaty.¹¹³ Had he properly established his eligibility, he could have benefited by the treaty’s provision “to the extent that he could have proven that, as a nondomiciled U.K.

103. *Id.* at 2-3; see *Goosen v. Comm’r*, 136 T.C. 547 (2011); *Garcia v. Comm’r*, 140 T.C. 141 (2013); IRS AM 2009-005 Tax Conventions, *supra* note 95, at 2.

104. Bissell, *supra* note 6, at 2; see *Goosen*, 136 T.C. at 549.

105. Bissell, *supra* note 6, at 2; see *Goosen*, 136 T.C. at 562.

106. Bissell, *supra* note 6, at 2; see *Goosen*, 136 T.C. at 563.

107. Bissell, *supra* note 6, at 2; see *Goosen*, 136 T.C. at 557-58.

108. Bissell, *supra* note 6, at 3; see *Goosen*, 136 T.C. at 551-52.

109. Bissell, *supra* note 6, at 3; see *Goosen*, 136 T.C. at 562-63.

110. Bissell, *supra* note 6, at 3; see *Goosen*, 136 T.C. at 566-67.

111. Bissell, *supra* note 6, at 3; see *Goosen*, 136 T.C. at 566-67.

112. Bissell, *supra* note 6, at 3; see *Goosen*, 136 T.C. at 566-67; see also I.R.C. § 881(a) (2019); *id.* § 871(a) (code section which correlated with the court’s decision to tax the royalty income at a thirty percent tax rate).

113. Bissell, *supra* note 6, at 3; see *Goosen*, 136 T.C. at 569; United States-United Kingdom Income Tax Convention, U.K.-U.S., July 24, 2001, <https://www.treasury.gov/resource-center/tax-policy/treaties/documents/uktreaty.pdf> (text of the United States-United Kingdom Income Tax Convention).

resident, his U.K. income from one of the endorsement agreements was remitted to or received in the United Kingdom.”¹¹⁴

In 2013, two years after *Goosen* was decided, the IRS again addressed the characterization and allocation of personal services income and royalty payment from endorsement contracts.¹¹⁵ The court in *Garcia* determined the endorsement contract was different than the endorsement contract in *Goosen* because “the sponsor sought to build its brand around the taxpayer and the endorsement contract” required the golfer to wear the sponsor’s brand at all times.¹¹⁶ Furthermore, the court determined the royalty income “w[as] not taxable in the United States” pursuant to the United States-Switzerland tax treaty, specifically Article 12(1).¹¹⁷ The golfer’s income from personal services, though, was not exempted in the United States.¹¹⁸

B. Other Sources of Income

Income derived from unique sources has made the IRS investigate whether the amounts received should be subject to United States income tax withholding.¹¹⁹ Multiple IRS memorandums address participants in horse shows, such as at local fairs, races, or rodeos, who earn income from his or her participation.¹²⁰ Ultimately, the IRS concluded the fixed base question to determine whether a treaty’s exemption is met is a factual question.¹²¹ For example, nonresident aliens come into the United States from Canada to enter contests at local fairs.¹²² Local sponsors provide the payments to the nonresident alien participants; these payments are quite small.¹²³ The major question that arises from the local fair contests is if the nonresident aliens should cease participating if withholding is required for the income received.¹²⁴ The United States-Canada Income Tax

114. Bissell, *supra* note 6, at 3; *see Goosen*, 136 T.C. at 569;

115. Bissell, *supra* note 6, at 3; *see Goosen*, 136 T.C. at 569;

116. Bissell, *supra* note 6, at 3; *see Garcia v. Comm’r*, 140 T.C. 141, 144 (2013).

117. Bissell, *supra* note 6, at 3; *see Garcia*, 140 T.C. at 159; Tax Convention with Swiss Confederation, Switz.-U.S., Jan 1, 1998, <https://www.irs.gov/pub/irs-trty/swiss.pdf> (entire text of the Tax Convention with Swiss Confederation).

118. Bissell, *supra* note 6, at 3; *see Garcia*, 140 T.C. at 162-63.

119. I.R.S. Tech. Adv. Mem. 1998-46 (Sept. 29, 1992) [hereinafter FSA 1998-46]; *see also* I.R.S. Tech. Adv. Mem. 1998-0383 (Sept. 1, 1992) [hereinafter FSA 1998-0383].

120. *See* FSA 1998-46, *supra* note 119, at 2.

121. *See id.* at 4.

122. *See id.* at 2. Canadian contestants may receive prize money and travel money for their placement in the contest.

123. *Id.* at 2-3.

124. *Id.* at 2.

Convention provides that income received by these nonresident aliens is “covered by Article XVI(1) (Artistes and Athletes)” of the treaty.¹²⁵ Private Letter Ruling 81-38-020¹²⁶ further provided that activities—training, boarding, registering the horse in the race—in the United States may give rise to a permanent establishment (fixed base) for horseshow participants; in particular, those participants that own their own horse.¹²⁷ In FSA 1998-46, the IRS determined the foreign nonresident fair contestants may perform activities that “are extensive enough to constitute a fixed place of business.”¹²⁸ Thus, if the foreign contestant’s annual gross income from U.S.-source entertainment exceeds the ceiling of the tax treaty, then the foreign contestant is subject to U.S. tax.¹²⁹ If the income does not exceed the ceiling, but the contestant has a fixed base, then he is subject to U.S. tax as well.¹³⁰

Foreign contestants mentioned above fell between the IRS’s determination for nonresident alien rodeo participants and racehorse owners.¹³¹ Most rodeo participants were found not to own their own horse—they were provided the horse by local sponsors—and only the highest paid rodeo participants brought their own horse to the United States.¹³² Foreign racehorse winners, on the other hand, were found to own their horses and had entered multiple races in the United States.¹³³ Additionally, FSA 1998-383 determined that most income from rodeo participants were exempted from U.S. tax under relevant tax treaties.¹³⁴ The IRS concluded: “[T]he IRS should waive the withholding requirement to the extent that the prizes won by a nonresident alien, participating in [redacted text] do no [sic] exceed the treaty exemption for

125. *Id.* at 3; see United States-Canada Income Tax Convention, Can.-U.S., Sept. 21, 2007, <https://www.irs.gov/pub/irs-trty/canada.pdf> (entire text of the United States-Canada Income Tax Convention). Article XVI(1) provides that a nonresident Canadian is not subject to U.S. tax if his income is less than \$15,000 unless the income falls under the Convention’s Article XIV (Independent Personal Services) or Article XV (Dependent Personal Services). United States-Canada Income Tax Convention, *supra*, art. 14-15.

126. I.R.S. Priv. Ltr. Rul. 81-38-020, 441.01-00 (June 18, 1981). This PLR was the basis for Revenue Ruling 85-4. Rev. Rul. 85-4, 1985-1 C.B. 294.

127. FSA 1998-46, *supra* note 119, at 4.

128. *Id.*

129. *Id.*

130. *Id.*

131. *Id.*; FSA 1998-0383, *supra* note 119, at 3.

132. FSA 1998-46, *supra* note 119, at 4.

133. *Id.*; see also Rev. Rul. 60-249, 1960-2 C.B. 264, 2019 Thomson Reuters/Tax & Accounting at 1 (1960); Rev. Rul. 85-4, 1985-1 C.B. 294, 2019 Thomson Reuters/Tax & Accounting at 1 (1985) (providing information on nonresident horserace owners tax implications).

134. FSA 1998-0383, *supra* note 119, at 5, 10. The tax treaties examined were Canada, Australia, and New Zealand.

income of athletes and entertainers.”¹³⁵ Such a conclusion was a result of the small number of individuals this affects, thus the IRS can more easily “monitor whether the nonresident aliens are fulfilling U.S. filing and paying requirements.”¹³⁶ This decision is “consistent with the flexibility give[n] the IRS in administering treaty exemptions, with the procedures in place for central withholding agreements.”¹³⁷

IV. CHANGE IN SOCIETY’S CONCEPT OF ENTERTAINMENT

Actors or actresses, musicians, athletes—they entertain. They act prewritten scripts for television shows, movies, or plays so others can be entertained. Or they play a musical instrument or sing in front of an audience, so the audience can sing along to the music to which they are using to entertain. Or they play a specific game in front of an audience, so the audience will be entertained while they kick or throw or hit a ball. Acting, singing, dancing, or performing a sport are considered to have an “entertainment character” to the activity performed.¹³⁸ The group of people they are performing for, be it their fans or viewers who just want to be passive spectators, are amused and/or entertained.¹³⁹ Those fans or viewers pay to view those activities; thus, that payment eventually constitutes income for the actors, musicians, and athletes performing.¹⁴⁰

These people mentioned above are entertainers, and the OECD Model Tax Convention, U.S. Model Treaty, and other tax treaties classify them as such.¹⁴¹ They provide some sort of entertainment character by the activities they perform.¹⁴² But, those are the traditional ways to provide entertainment. Today, there are different platforms besides a movie theater, television screen, or playhouse stage for viewers to be entertained.¹⁴³ Today, there are different types of performances that viewers find

135. *Id.* at 10.

136. *Id.*

137. *Id.*

138. *Model Tax Convention on Income and on Capital*, *supra* note 7, at 333; United States Model Income Tax Convention, *supra* note 44, art. 16.

139. *Entertainment*, *supra* note 43.

140. United States Model Income Tax Convention, *supra* note 44, art. 16 (1).

141. *Id.*; *Model Tax Convention on Income and on Capital*, *supra* note 7, at 332.

142. United States Model Income Tax Convention, *supra* note 44, art. 16; *see Model Tax Convention on Income and on Capital*, *supra* note 7, at 332.

143. Leskin, *supra* note 2; *see* Pharra Perry, *16 International Influencers to Check Out on Instagram*, REELIO (May 2, 2017), <https://blog.reelio.com/16-international-influencers-on-instagram>; Madeline Berg, *The Highest-Paid YouTube Stars 2017: Gamer Dan TDM Takes the Crown with \$16.5 Million*, FORBES (Dec. 26, 2017), <https://www.forbes.com/sites/maddieberg/2017/12/07/the-highest-paid-youtube-stars-2017-gamer-dantdm-takes-the-crown-with-16-5-million/#2d38cf231397>.

entertaining.¹⁴⁴ Today, people can become famous by describing their make-up routine, or showing their outfit of the day, or posting about their travels, all on social media.¹⁴⁵ Thus, the Internet has changed the way that people are entertained.¹⁴⁶ More specifically, technology has changed the way that people can be entertained.¹⁴⁷ Furthermore, social media has become a form of entertainment; thus, social media and technology have created a new group of people that could be classified as entertainers.¹⁴⁸

This new group of people include, but are not limited to, “YouTubers” or “YouTube stars,” “influencers,” and podcast hosts. A “YouTuber” or “YouTube Star” is a person who has become famous by posting videos for others to view on the Internet—www.YouTube.com.¹⁴⁹ An “influencer,” on the other hand, is an “individual[] who ha[s] the power to affect purchase decisions of others because of their (real or perceived) authority, knowledge, position or relationship” with their audience.¹⁵⁰ Influencers may post on social media, for example on www.snapchat.com or www.instagram.com, for a particular brand because they have many followers on that platform, and the brand’s sales increase due to the post.¹⁵¹ A podcast is “a series of spoken, audio episodes, often focused on a particular topic or theme, like cycling or startups[; one] can subscribe to . . . [episodes] with an app on . . . [the] phone and listen to episodes whenever [one] like[s] on . . . headphones, in the car or through

144. See Doctor Squish, *Cutting Open Squishy Cookie Monster!? Huge Homemade Stress Ball!*, YOUTUBE (Aug. 27, 2017), <https://www.youtube.com/watch?v=s68L0uEGUHY> (showing a person cutting open squishy toys, which has over 4 million views); see also Jeffree Star Cosmetics, *Blue Blood Palette & Collection Reveal!*, YOUTUBE (Mar. 19, 2019), <https://youtube/PHox-7EzWXo> (showing a makeup tutorial).

145. See HAUTE OFF RACK, <https://hauteofftherack.com/> (last visited Sept. 26, 2019) (a Louisiana-based fashion, travel, and lifestyle Blogger who has over 200,000 followers on Instagram); also see *Bucket List Family*, BUCKET LIST, <https://www.thebucketlistfamily.com/about> (last visited Sept. 26, 2019) (a family that sold all their belongings to travel around the world and document their adventures).

146. *How the Internet Has Changed Entertainment for Us*, TECHQUARK (Aug. 14, 2018), <https://www.techquark.com/2018/08/how-internet-has-changed-entertainment.html>.

147. *Id.*

148. *Id.*; *Model Tax Convention on Income and on Capital*, *supra* note 7, at 332.

149. See Leskin, *supra* note 2.

150. *Influencers*, BUS. DICTIONARY ONLINE (2019), <http://www.businessdictionary.com/definition/influencers.html>.

151. See Hayley Soen, *The Instagram Models and Influencers that Promoted the Fyre Festival Scam*, TAB (Jan. 17, 2019), <https://thetab.com/uk/2019/01/17/fyre-festival-instagram-models-89928> (showing the influence models and “influencers” had on people purchasing tickets for a music festival because the people were under the impression those models and influencers were attending).

speakers.”¹⁵² Thus, the person who hosts a podcast, if the podcast becomes quite popular, entertains the listeners.¹⁵³ The individuals in this new group, thus, create content that has an entertainment character to the activity that they are performing.¹⁵⁴

A. *Who Are They?*

The new group of people, who arguably are “entertainers” during this new age of entertainment, are from around the world.¹⁵⁵ For example, Camila Coelho is a fashion and lifestyle “expert” who has over eight million followers on Instagram.¹⁵⁶ Camila is from Brazil and due to her “influencer” role, she collaborated with Lancôme on a lipstick collection.¹⁵⁷ The collection was launched on a global scale.¹⁵⁸ Murad Osmann and his wife are international travel influencers who document their travels for their over five million Instagram followers.¹⁵⁹ Forbes named him the “Top Influencer” for Travel in 2017.¹⁶⁰ This Russian “influencer” has evolved his travel series from one photograph posted on October 17, 2011, to now “a Channel One Russian travel show, and a coffee-table book.”¹⁶¹ Marta Greber, the creator of the Instagram Handle “What for Breakfast,” is a German “influencer.”¹⁶² She posts pictures of her breakfast, her travels, and her family, occasionally, to her over four-hundred thousand Instagram followers.¹⁶³ She also has her own website

152. *What Is a Podcast?*, PODCAST HOST, <https://www.thepodcasthost.com/listeners-guide/what-is-a-podcast/> (last visited Sept. 2019).

153. *Id.*

154. See United States Model Income Tax Convention, *supra* note 44, art. 16; *Model Tax Convention on Income and on Capital*, *supra* note 7, at 333.

155. See Jacqueline Lauren Yates, *Style Influencer Camila Coelho Shares Her Tips for Getting the Perfect Insta-Ready Vacation Pics*, ABC NEWS (Aug. 2, 2019), <https://abcnews.go.com/GMA/Style/style-influencer-camila-coelho-shares-tips-perfect-insta/story?id=64789767>.

156. *Id.*

157. *Id.*; Bridget March, *How Influencer Beauty Lines Became as Celebrity Collections*, HARPERS BAZAAR (Feb. 22, 2019), <https://www.harpersbazaar.com/uk/beauty/a26320975/influencers-beauty-collaborators-brands/>; Perry, *supra* note 143.

158. March, *supra* note 157.

159. Perry, *supra* note 143; see #FOLLOWMETO, <https://followmeto.travel/> (last visited Sept. 26, 2019) (Murad Osmann’s website).

160. *Murad and Nataly Osmann*, FORBES, <https://www.forbes.com/profile/murad-and-nataly-osmann/#413ec1061720> (last visited Sept. 26, 2019).

161. Deborah Krieger, *Unpacking Murad Osmann’s #FollowMeTo Instagram Travel Series*, L.A. REV. BOOKS (June 30, 2018), <https://lareviewofbooks.org/article/unpacking-murad-osmanns-followmeto-instagram-travel-series/>.

162. Perry, *supra* note 143; see *What Is an Instagram Username?*, PIXLEE, <https://www.pixlee.com/definitions/definition-instagram-username> (last visited Sept. 26, 2019) (definition of Instagram handle).

163. Perry, *supra* note 143.

that features the recipes of the breakfasts she posts.¹⁶⁴ Additionally, her website offers suggestions on where to eat in Berlin, Poland, and Barcelona.¹⁶⁵ These three international influencers have provided entertainment for their followers merely by posting pictures for others to see—followers from across the globe.¹⁶⁶

YouTube has provided a platform for individuals to “entertain” people from around the world. In 2014, *Variety* surveyed 1500 teenagers on whether YouTube stars were more influential than mainstream celebrities.¹⁶⁷ For example, Sean McLoughlin, a YouTube personality from Ireland, began his rise to international fame when a fellow YouTuber mentioned him in a 2013 video.¹⁶⁸ Now, he has approximately 22.7 million YouTube subscribers.¹⁶⁹ Daniel Middleton, a British YouTube star known as DanTDM, has 21.6 million YouTube subscribers.¹⁷⁰ He daily uploads reviews of video games and videos of himself playing those games.¹⁷¹ In 2017, *Forbes* named Middleton the highest-paid YouTube star, and in 2018, “he had a world tour that included four sold-out nights at the Sydney Opera House.”¹⁷² World tours or meet-and-greet events now are a common occurrence in the rise of the “new TV,” providing large compensation for these YouTube stars.¹⁷³

B. Why Is “Entertainer” an Important Classification?

The compensation these individuals earn may have complicated tax consequences. For example, Company A gives Camila Coelho \$10,000 to “promote,” on her Instagram, Company A’s product.¹⁷⁴ She also promotes

164. WHAT SHOULD I EAT FOR BREAKFAST TODAY, <http://whatshouldieatforbreakfasttoday.com/> (last visited Sept. 26, 2019).

165. *Id.*

166. See Perry, *supra* note 143.

167. Susanne Ault, *Survey: YouTube Stars More Popular than Mainstream Celebs Among U.S. Teens*, *VARIETY* (Aug. 5, 2014), <https://variety.com/2014/digital/news/survey-youtube-stars-more-popular-than-mainstream-celebs-among-u-s-teens-1201275245/>.

168. Leskin, *supra* note 2.

169. *Id.*; *jacksepticeye*, YOUTUBE, <https://www.youtube.com/user/jacksepticeye/featured> (last visited Sept. 26, 2019).

170. Leskin, *supra* note 2.

171. *Id.*

172. Berg, *supra* note 143.

173. *Id.*; see *International YouTube Stars to Perform at BKC*, *TIMES INDIA* (May 28, 2018, 9:04 AM), <https://timesofindia.indiatimes.com/videos/city/mumbai/international-youtube-stars-to-perform-at-bkc/videoshow/63519879.cms> (for a look at a meet-and-greet event for international YouTube stars).

174. See Perry, *supra* note 143. While this example is from an influencer’s standpoint, the example relates to YouTube stars or other social media personalities.

that she will attend the premiere of Company A's product launch at Location 1. She will be paid \$5000 for her performance. Is this truly a promotion? What if she attends many events within that country and earns income from each of her performances? If the country is the United States, is it considered U.S.-source income? Is there a tax treaty that makes her eligible for exemption from U.S. taxes because she received the compensation in Brazil?¹⁷⁵ But before any tax treaties can be considered, is Camila Coelho even considered an entertainer?¹⁷⁶ Does merely attending an event constitute entertainment? With the change in the way that people are entertained, her appearance could have some form of entertainment character to it.¹⁷⁷

FSA 199947027 stated that a nonresident alien's income earned in the United States for the promotion or marketing of a product does not make the nonresident alien an entertainer for tax treaty purposes.¹⁷⁸ But, in the case of Camila, are people entertained by merely being in the same room as the "influencer" they see post every day? Why would these individuals have so many subscribers or "likes" if people were not watching for entertainment? While, technically, Camila's appearance at Company A's event is a promotion for the company, her appearance should be considered a performance.¹⁷⁹ She must exude the persona she has taken on for her "fans." If one decides that her appearance is actually a performance, then the activities that she participates in are "predominately of a performing nature," so Article 17 of OECD Model Tax Convention would apply.¹⁸⁰

Some of these international "influencers" or YouTube stars enter into endorsement contracts with companies.¹⁸¹ Those companies use the "influencers" name or likeness for advertising.¹⁸² The compensation that the influencer earns from those rights could be classified as income for personal services, or income from royalties, or both.¹⁸³ As the court in *Goosen* concluded, a 50/50 split characterization of income would be

175. See *United States Tax Treaties—A to Z*, *supra* note 75.

176. *Model Tax Convention on Income and on Capital*, *supra* note 7, at 332.

177. *Id.*; United States Model Income Tax Convention, *supra* note 44, art. 16.

178. Bissell, *supra* note 6, at 1.

179. See United States Model Income Tax Convention, *supra* note 44, art. 16; *Model Tax Convention on Income and on Capital*, *supra* note 7, at 333.

180. *Model Tax Convention on Income and on Capital*, *supra* note 7, at 332-33. Assume the language in Article 17 is present in the tax treaty between Brazil and the country where Location 1 is located; thus, she would be considered an entertainer.

181. Bruno et al., *supra* note 8, at 30.

182. *Id.*

183. Bissell, *supra* note 6, at 3.

proper if the company valued the influencer's name and likeness as well as the influencer's performance.¹⁸⁴ Like the IRS's determination in AM 2009-005, the facts of each case should determine the U.S. tax treatment;¹⁸⁵ thus, if these influencers' appearances constitute performance, as it should, then the income could be appropriated as derived from personal services and royalties.¹⁸⁶ If the endorsement contract is more similar to the contract in *Garcia* that required the golfer to wear the sponsor's brand at all times because the sponsor sought to build its brand around the taxpayer, then the influencer's income would be apportioned differently.¹⁸⁷ Ultimately, these cases show that sponsors use the image of famous entertainers to promote a product to the public;¹⁸⁸ today, companies seek out "influencers" for the same purpose.¹⁸⁹ Influencers, thus, are now as valued as athletes and celebrities, and even though their performances are quite different, influencers should be considered "entertainers" like athletes are for tax purposes.¹⁹⁰

If nonresident alien "influencers" are deemed entertainers, they would benefit from tax treaties and limited exemptions that other nonresident alien entertainers are given.¹⁹¹ Like the income from local fair contestants, rodeo participants, and horserace owners that was covered by a tax treaty, the income of "influencers" and similar persons should also be covered.¹⁹² Whether that income is exempted from U.S. taxation or if withholding is required is dependent on the facts of the nonresident alien—Does the nonresident have a fixed base?¹⁹³ Is the group large or small? Will withholding discourage participation?¹⁹⁴—but, these nonresident aliens should be given the same tax treatment as those who are considered "entertainers."¹⁹⁵

184. Bissell, *supra* note 6, at 3; see *Goosen v. Comm'r*, 136 T.C. 547, 562-63 (2011).

185. Bissell, *supra* note 6, at 2; IRS AM 2009-005 Tax Conventions, *supra* note 95, at 2.

186. See *Goosen*, 136 T.C. at 562-63.

187. Bissell, *supra* note 6, at 3; see *Garcia v. Comm'r*, 140 T.C. 141, 144 (2013).

188. Bissell, *supra* note 6, at 3; see *Garcia*, 140 T.C. at 144.

189. See LINQIA, *supra* note 1, at 2 (Ninety-two percent of the eighty-six percent of marketers studied found influencer marketing effective).

190. *Id.* at 11 (see Chart: Which of the Following Influencer Marketing Trends Are You Planning to Adopt in 2018?); Vickie Saunders, *Athlete Sponsorship 101: Everything You Need to Know About Becoming a Sponsored Athlete*, SPONSORSHIP CONSULTANTS, <https://www.the-sponsorshipconsultants.com/athlete-sponsorship-need-know/> (last visited on Sept. 26, 2019).

191. See I.R.C. § 1441 (2019); Bissell, *supra* note 6, at 1.

192. FSA 1998-46, *supra* note 119, at 4; FSA 1998-0383, *supra* note 119, at 10.

193. FSA 1998-46, *supra* note 119, at 3; FSA 1998-0383, *supra* note 119, at 7.

194. FSA 1998-46, *supra* note 119, at 2, 14; FSA 1998-0383, *supra* note 119, at 10.

195. FSA 1998-46, *supra* note 119, at 4; see FSA 1998-0383, *supra* note 119, at 10. More specifically, these nonresident aliens should be afforded the opportunity to enter into Central

V. CONCLUSION

The concept of what is entertaining has changed.¹⁹⁶ People now watch videos of others playing and commenting on video games.¹⁹⁷ They watch videos of another person playing with toys.¹⁹⁸ They scroll through their social media accounts to see the latest trends in fashion.¹⁹⁹ They search for their favorite “influencer” suggestions on restaurants before going out to dinner.²⁰⁰ There is now an entertainment character in activities that were not as heavily present or did not exist years ago.²⁰¹ Countries should consider this a new form of entertainment and be willing to classify such activities as entertainment, so international “influencers,” YouTube stars, podcast hosts, and other individuals who make social media entertainment, can be classified as “entertainers.” Tax treaties already include provisions for entertainers and athletes, so whether more specific language should be included is a question for the countries involved.²⁰² What should be understood by those countries, though, and more specifically the departments responsible for tax enforcement, is that the concept of entertainment has changed, and new “entertainers” have emerged. One cannot simply disqualify a person as an “entertainer” based on the old concept of entertainment.

Withholding Agreements (for those who are receiving income in the United States) to reduce taxes withheld. *Withholding of Tax on Payments to Foreign Athletes and Entertainers*, *supra* note 88; see I.R.C. § 1441 (2019).

196. See *How the Internet Has Changed Entertainment for Us*, *supra* note 146.

197. Leskin, *supra* note 2.

198. See Madeline Berg, *How This 7-Year-Old Made \$22 Million Playing with Toys*, FORBES (Dec. 3, 2018), <https://www.forbes.com/sites/maddieberg/2018/12/03/how-this-seven-year-old-made-22-million-playing-with-toys-2/#3b93d8b04459>. Ryan, a seven-year-old, plays with toys and reviews the toys for other children.

199. See HAUTE OFF THE RACK, *supra* note 145.

200. *Restaurant Social Media Influencers*, IZEA, <https://izea.com/2019/04/26/restaurant-social-media-influencers/> (last visited Sept. 26, 2019).

201. *How the Internet Has Changed Entertainment for Us*, *supra* note 146; *Model Tax Convention on Income and on Capital*, *supra* note 7, at 332.

202. See *The Artists or Entertainers Exemption*, *supra* note 81; Bissell, *supra* note 6, at 1.