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Good morning everyone. My thanks to the Commission for inviting me here to talk with you this morning about tax exemption and college athletics.

I've been writing about tax exemption issues for 20 years as a professor at the University of Illinois College of Law. My interest in this particular topic began when former Rep. Bill Thomas, then chair of the House Ways and Means committee, sent his infamous letter to Myles Brand essentially asking him why the NCAA should be tax exempt. This letter brought out the talking heads in droves. In fact, a Google search revealed over 2000 blog postings and op-ed pieces about this from October 2006 until June 2007. It seemed to me like everyone was saying the same thing, which was that the IRS should pull exemption from the NCAA, or, more broadly, that the IRS "should do something" to help reform college athletics. What was pretty clear to me from all the chatter was that the folks posting their opinions and writing columns, including even George Will, didn't know much if anything about tax law, and particularly the complex and sometimes arcane rules governing tax exemption and the unrelated business income tax (UBIT).

So I decided to write an article about these issues (Colombo, 2009), really to accomplish two things. First, I wanted to provide some education about how tax exemption law and the UBIT applies to the NCAA and big-time college athletics. That's what the first two-thirds of the article does and I conclude that the way the law is currently structured, there is very little the IRS can do about either the tax-exempt status of the NCAA or the application (I should say, "non-application") of the UBIT to college athletics. Pulling tax exemption from the NCAA or universities operating big-time athletic programs is virtually impossible under current law. It is somewhat more plausible that the IRS could apply the UBIT to Division I football and basketball, but even applying the UBIT would face serious legal hurdles, and even if the IRS were successful, I doubt that doing this would advance the reform agenda much: first of all, I doubt there would be any income to tax under the UBIT when universities were through allocating overhead, expenses and depreciation to their gross revenue, and although there would be some disclosure as a result of requiring universities to file Form 990-T, it's not the kind of disclosure that reformers think is necessary. So that's where we are with the law right now.

The second third of the article really addresses the reform agenda. What I do here is first consider whether the current legal landscape was justified by tax

theory. The reason that's important is that if big-time college athletics is exempt because tax theory says it should be so, then all of the reformers that are calling for the IRS "to do something" about college athletics just need to go away and leave us tax folks alone. The Code is messed up enough already. But what I found instead was that tax theory does NOT support tax exemption for big-time college athletics, and that indeed big-time college sports in many ways is a poster child for why we have the UBIT. So on a pure theory basis, the current law probably is wrong—big-time college athletics should be subject to taxation.

That then led me to the final section of the paper. If what I've said about theory is true, then one should view exempting big-time college athletics as simply a public policy issue, not a tax policy issue. That is, we ought to view this the same way as states giving a property tax exemption to a manufacturing company as a quid pro quo to get the plant located there. Or like the tax credit for hybrid automobiles: we're just using the tax laws to implement some broader public policy, to get people to buy hybrid cars. It's not about tax, per se. It's about the underlying public policy. And once you go down that particular road, it opens the possibility that Congress could use tax exemption as a means for advancing reform in big-time college athletics.

Now, what specific form these conditions might take and how doable it might be are issues that experts on athletics (of which I am not one) should address. But I note in the paper that there are three things we've done in the tax exemption world that might be models for things we could do with college athletics. First, we routinely put requirements on exempt charities on how they spend their money—for example, private foundations have to distribute at least 5% of their net asset value each year for charitable purposes; charities can issue tax-exempt bonds only if 95% of the proceeds are used for charity and don't benefit private interests. You could imagine doing something similar with big-time college athletic revenues. For example, one of the arguments the NCAA and universities routinely make about their football and basketball programs is that they need to be as big and successful as they are so that they can fund non-revenue athletic opportunities, particularly for women. OK. I don't have a problem with saying we'll give a tax exemption to big-time sports so they can fund other athletic opportunities, but I'm a lawyer, and we lawyers have an old saying: "trust everyone but get it in writing." If the justification for continuing to grant exempt status to the NCAA and universities operating big-time college athletics is that the revenues support other athletic opportunities, then let's write that into law, either directly in the statute or give the IRS authority to issue regulations that require it so that we know for sure that's what the revenues are being used for, and aren't just being plowed back into bigger coaches' salaries or a fleet of aircraft to fly recruiters around the country.

A second thing we do in the exempt orgs world is place caps on expenditures. We tell exempt charities that they can only spend an "insubstantial amount" on legislative lobbying, for example, and we tell them they can't spend anything at all to support candidates in an election. We have all sorts of excise taxes in the private foundation area that penalize expenditures we don't like, such as certain "self dealing" transactions, excess stock holdings, and so forth. So another thing one could imagine is capping coaches' salaries or capping overall expenditures on athletic programs as a condition of tax exemption. In fact, the Senate Finance Committee floated the idea of capping executive compensation for charities back in 2004, though ultimately they dropped that idea after objections from the charitable

community. However, capping coaches salaries would not necessarily implicate the same broad management issues as capping executive compensation generally, so we might want to take a fresh look at this idea as well as the idea of capping athletic program expenditures overall.

And finally, I suggest that if we are interested in disclosure, then we should consider having the IRS do something like it recently did with nonprofit hospitals. There has been a lot of debate for the past two decades about whether nonprofit hospitals should be tax-exempt, but not a whole lot of hard data on exactly what they do to justify exemption. So two years ago as part of revising Form 990 (the form filed by tax exempt organizations), the IRS decided to develop a whole new schedule to that form that would be filled out by nonprofit hospitals that details what they spend their money on, how it benefits the community, what kinds of plans they have for treating charity patients, all sorts of stuff. It is very detailed, and gets to the heart of the information we want to know. So one could imagine the IRS doing a similar kind of schedule for college athletics: a detailed disclosure form aimed squarely at the finances of college athletics and the academic issues surrounding college athletes.

I'll close by emphasizing again that my purpose here was not to resolve these issues but only to raise what I think might be reasonable possibilities within the confines of the tax laws—to provide some context for a sensible discussion of how we might use the tax laws to advance a reform agenda. It's not very helpful, I think, for people to say that the IRS should "do something" that they probably can't do under existing law, like pulling tax exemption from the NCAA. If people are interested in using the tax laws to advance reforms in college athletics, then I think they need a more nuanced approach, and that's what I tried to provide in this paper.

## References

- Colombo, J. (2009). *The NCAA, tax exemption and college athletics*. Accessed on July 30, 2009 at <http://ssrn.com/abstract=1336727>