

“An Analysis of Corporate Sponsorship of Tax-Exempt Organizations and the Unrelated Business Income Tax”

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Abstract

Throughout the history of the unrelated business income tax (“UBIT”), corporate sponsorship of exempt organizations has been a controversial issue. This is because of the competing interests of corporate responsibility and citizenship and tax policy implications. Thus, this paper will examine this area of law and taxation and discuss how Congress, the courts, and the IRS have struggled to strike the right balance in between establishing consistent and appropriate tax regulations and the encouragement of funding for tax-exempt organizations. This paper will examine the history of corporate sponsorships and the UBIT, including the laws, cases, and regulations that have been promulgated in this area. In addition this paper will highlight the reality that due to the importance of these sponsorships to exempt organizations, and the resulting political sentiment surrounding them, it is unlikely that they will ever be completely subject to the UBIT, and as a result the debate over the taxation of these activities will continue for the foreseeable future.

Keywords: Unrelated Business Income Tax (“UBIT”), Corporate Sponsorships, Tax-Exempt Organizations, Qualified Sponsorship Payments

I. Introduction

A. History and Purpose of UBIT

The enactment of the Unrelated Business Income Tax (“UBIT”) initially grew out of the perceived unfairness of tax-exempt organizations competing in commercial activities with non-tax-exempt organizations.²

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²Richard F. Wall, Section 513(j) of the Internal Revenue Code: Does it Clarify the Uncertainty Which Exists in the Law Governing the Taxation of Sponsorship Payments as Unrelated Business Taxable Income? 25 Ohio N.U.L. Rev. 65, 66-67 (1999).

Basically, without the UBIT, tax exempt organizations would have an unfair advantage over organizations not exempt from taxes. "Thus, a tax exempt organization could offer goods or services at a lower price while still having the same profit margin on those goods or services as a corporation subject to the income tax"³ This result directly contradicts one of the main driving forces behind Congress' grant of tax exempt status to certain organizations: the general idea that these organizations do not have a profit motive. Instead, Congress thought, many of these organizations have religious, scientific, charitable, or educational purposes.⁴ Congress reasoned that these purposes were beneficial to the community, and in turn would most likely have to be provided by the government, without the existence of these organizations.⁵ As a result Congress agreed that the funds raised by these organizations for "charitable" purposes should not be taxed.⁶ It would follow then that in many ways, the UBIT helps to fulfill Congress' intent, by ensuring that funds that are not related to an organization's exempt function are not exempt from federal income tax. Thus, Congress enacted the UBIT as a part of the Revenue act of 1950, and currently the Internal Revenue Code ("Code") imposes the UBIT on virtually all exempt organizations.⁷

B. Early growth of Corporate Sponsorship of Tax-Exempt Organizations

Since the mid-1980's and early 1990's, corporate sponsorship for various tax-exempt organizations raised billions of dollars and the number corporate sponsors doubled.⁸ "Corporate sponsorship of charitable events and organizations has become a lucrative source of donations for charitable organizations, and a visible means of charitable support by the donors..."⁹ This was likely precipitated by the reduction in funding from the government, and the need among exempt organizations for support from the private sector.¹⁰

³ Id.

⁴ Id

⁵ Id

⁶ Id

⁷ David A. Haimes, *Corporate Sponsorships of Charity Events and the Unrelated Business Income Tax: Will Congress or the Courts Block the IRS Rush to Sack the College Football Bowl Games?* 67 *Notre Dame L. Rev.* 1079, 1081(1992).

⁸ Elizabeth M. Roberts, *PRESENTED TO YOU BY . . . : CORPORATE SPONSORSHIP AND THE UNRELATED BUSINESS INCOME*, 17 *Va. Tax Rev.* 399, 400-401. (1997).

⁹ Id.

¹⁰ Id.

However with the rise of the use of corporate sponsorships of tax-exempt organizations, has come an increase in controversy of over their taxation, especially with regard to the UBIT. From this historical background this paper will proceed to define the UBIT and examine the evolution of the tax treatment of corporate sponsorships under the UBIT. This paper will next analyze proposed IRS regulations and the corporate sponsorship problem, as well as proposed solutions. Following that, this paper will discuss unresolved issues and the future of corporate sponsorships and tax exempt organizations. Finally, this paper will draw conclusions based on the information presented and follow with recommendations based on those conclusions.

II. Definition of the UBIT

A. Administrative Guidance

The basic definition of the UBIT is the gross income generated by any organization from any trade or business which is unrelated to the organization's regular business.¹¹ "The term 'unrelated trade or business' means . . . any trade or business the conduct of which is not substantially related (aside from the need of such organization for income or funds or the use it makes of the profits derived) to the exercise or performance by such organization of its charitable, educational, or other purpose or function constituting the basis for its exemption."¹² Thus, it seems that the Code will look to see whether a trade or business being carried on by the organization is sufficiently related to its exempt purpose to determine if the UBIT applies. Furthermore, the UBIT excludes dividends, royalties, and certain other specified categories of passive income. "Accordingly, for UBIT purposes, income is first divided into tax-free "passive" income (income that fits into certain excluded categories) and potentially taxable "active" income (income from all other sources). Active income is further divided into tax-free "related" income (income from the active conduct of a business related to an exempt purpose), and taxable "unrelated" income (income from all other active business endeavors)."¹³

¹¹ Haines, *supra* note 6 at 1081.

¹² *Id.*

¹³ Ethan G. Stone, Halos, Billboards, and the Taxation of Charitable Sponsorships, 82 *Ind. L.J.* 213, 218(2007).

B. Judicial Interpretation

Furthermore, Courts have interpreted the test for determining whether an exempt organization's activity is subject the UBIT as having three requirements: (1) the activity is a trade or business, (2) that is regularly carried on, and (3) and that it is not substantially related to the tax-exempt purpose of the organization.¹⁴ This test articulated by the courts is very similar to the definition provided by the Code. Also, courts have interpreted a trade or business as including the sale of goods and/or the performance of services.¹⁵ Furthermore, in interpreting the UBIT, courts will also look to see whether the exempt organization's trade or business creates the likelihood of unfair competition with businesses whose earnings are taxed, as this was the purpose of the UBIT.¹⁶

III. Evolution of Corporate Sponsorship Tax Treatment

A. Initial Concept of Corporate Sponsorship

Before 1950 generally most activities by colleges and universities were deemed tax-exempt.¹⁷ "Because the IRS only distinguished between two types of organizations, taxable or tax-exempt, activities engaged in by colleges and universities were generally upheld as tax-exempt without reference to the relationship between the activity and the organization's exempt purpose."¹⁸ Additionally, the prevailing rule during this time was that if the payments or income ultimately went to a tax-exempt organization, then the income would be considered tax-exempt.¹⁹

B. Mobil Cotton Bowl Ruling

A major development in the landscape encompassing corporate sponsorship and the UBIT, was the IRS' private letter ruling holding that Mobil Oil Company's corporate sponsorship payments to the Cotton Bowl, were taxable payments for advertising rather than charitable contributions.²⁰

¹⁴Stone, *supra* note 12 at 218.

¹⁵ *Id.*

¹⁶ Haines, *supra* note 6 at 1081

¹⁷ Erin Guruli, Commerciality of Collegiate Sports: Should the IRS Intercept? 12 *Sports Law. J.* 43, 47 (2005).

¹⁸ *Id.*

¹⁹ Guruli *supra*, note 16 at 54-55. (Referred to as the Destination test.)

²⁰Deirdre Dessingue Halloran, UBIT UPDATE, 36 *Catholic Law.* 39, 51 (1995).

This situation involved payments by Mobil Oil Company to the Cotton Bowl, which were treated as charitable contributions by the Cotton Bowl.²¹ Mobil Oil's commercials were shown during all commercial breaks during the game, and Mobil Oil's logo was visible on the players' uniforms and throughout the stadium. Ultimately, the IRS decided that the corporate sponsorship payments by Mobil Oil to the Cotton Bowl, were payments for advertising, and were therefore taxable, and not charitable contributions.²²

C. Post-Mobil Cotton Bowl IRS Regulations

Proposed IRS Regulations issued after the Mobil Cotton Bowl Ruling indicated that corporate sponsorships that are deemed advertisements, or that provided substantial benefits to a sponsor, constituted unrelated income and thus generated UBIT to exempt organizations, but corporate sponsorships that are merely acknowledgments constituted related income, and thus were not subject to the UBIT.²³ Under these regulations, advertising was defined as, "any message or other programming material that is broadcast or otherwise transmitted, published, displayed, or distributed in exchange for any remuneration and which promotes or markets any company service, facility, or product."²⁴ On the other hand, acknowledgments were defined as "a mere recognition of corporate sponsorship."²⁵ In order to determine the difference the IRS would consider all of the surrounding facts and circumstances. For example, under these proposed regulations, payments contingent on broadcast ratings, or particular attendance level, would be treated as advertising income, subject to the UBIT. In contrast where payments were contingent upon an event actually taking place, the payments would not be classified as advertising payments.

²¹ Id.

²² Halloran, *supra* note 18.

²³ Id.

²⁴ Id at 52.

²⁵ Id.

IV. Proposed IRS Regulations and the Corporate Sponsorship Problem

A. Political Pressure

One of the major criticisms of the Proposed IRS regulations was that they evidenced a change of position due to political pressure.²⁶ Before these proposed IRS regulations were issued in 1993, public broadcasters pointed out that the Federal Communications Commission (“FCC”) had already confronted the issue of nonprofit broadcasters by allowing identification of sponsors, but prohibiting the promotion of products and services of the sponsor. This approach appealed to the IRS as it had already been approved by Congress, and public broadcasters were already amenable to it. Notwithstanding the foregoing, “[t]he critics noticed that the IRS had abandoned the distinction between commercial and gratuitous transactions. Existing doctrine seemed to require this distinction.”²⁷

B. Ambiguity in Application

Instead of creating a bright line of demarcation for exempt organizations to follow, the Proposed IRS Regulations created more ambiguity for charities attempting to utilize sponsorships, without incurring UBIT liability.²⁸ This is largely due to the fact that many sponsorship arrangements between exempt organizations and corporate sponsors contained a mix of both acknowledgment and advertising. “At the charities’ urging, Congress passed a rule that retained only a symbolic tax on advertising.”²⁹

V. Proposed Solutions to the Corporate Sponsorship Problem

A. Qualified Sponsorship Payments

Congress eventually acted to clarify the Proposed IRS Regulations by creating an exception to the UBIT, for Qualified Sponsorship Payments.³⁰ IRC section 513(i) was passed as a part of the Taxpayer Relief Act of 1997.

²⁶ Stone, *supra* note 12 at 245-247.

²⁷ *Id.*

²⁸ *Id.* at 215.

²⁹ *Id.*

³⁰ Guruli *supra*, note 16 at 54-55; see also Taxpayer Relief Act of 1997, (2000). 26 U.S.C. section 513(i).

This section added the term, “qualified sponsorship payments,” codified rules regarding the taxation of corporate sponsorship payments, as well as implemented the proposed IRS regulations.³¹ “In accordance with section 513(i), qualified sponsorship payments are statutorily exempted from UBIT. A qualified sponsorship payment is defined as any payment made by any person engaged in a trade or business with respect to which there is no arrangement or expectation that such person will receive any substantial return benefit other than the use or acknowledgement of the name or logo (or product lines) of such person’s trade or business in connection with the activities of the organization that receives such payment.”³² Merely using or acknowledging a sponsor’s logo is not inclusive of advertising the sponsor’s products or services, as this definition is interpreted. Furthermore, Section 513(i) also includes many limitations that will deny qualified sponsorship payment treatment to certain sponsorship arrangements. These limitations include payments contingent upon attendance at an event, acknowledgments that are consistently scheduled and printed by the exempt organization, which is unrelated to one of its specified events, trade show payments, and apportionment among income that constitutes qualified sponsorship payments and income that does not.³³

B. Elimination of Tainting Rule

In passing Section 513(i) of the Internal Revenue Code, Congress circumvented the previous Proposed IRS regulations by among other things, eliminating the tainting rule, which denied automatic exempt status for activities that involved both advertising and sponsorship characteristics.³⁴ This was a victory for many charities who lobbied Congress for elimination of the tainting rule, after it was included within the proposed regulations in 1993.

³¹ *Id.*

³² *Id.*

³³ Guruli *supra*, note 16 at 55.

³⁴ Stone *supra*, note 13 at 247.

VI. Corporate Sponsorship Unresolved Issues

A. Costs of Compliance

Despite the benefits of Section 513(i), its distinction between advertising and sponsorship creates significant compliance costs to exempt organizations.³⁵ This is because exempt organizations have had and will likely continue to have to hire professionals and pay steep professional fees in large part to ensure that their sponsorship arrangements are not treated as taxable, under Section 513(i).

B. Untaxed Revenue

Additionally under Section 513(i), the Qualified Sponsorship Payments Exception results in a large amount of revenue going untaxed, due to carefully crafted transactions by exempt organizations and sponsors.³⁶ "Although section 513(i) appears to provide adequate guidelines for sponsorship agreements between exempt organizations and for-profit corporations, the provisions leave open the possibility that large amounts of revenues will continue to escape taxation because exempt organizations generally have the ability to structure their receipts as qualified sponsorship payments."³⁷ This seems to leave open the question of excessive contributions that are disguised as qualified corporate sponsorship payments, as well as how much of these contributions actually contribute to the exempt purpose of the organization.

C. College Football Bowl Games and Collegiate Sports Activities

Despite the legislative history and precedent supporting the non-application of the UBIT to revenues derived by college football bowl games and university athletic programs in general, many scholars and commentators feel that this issue still needs to be revisited by the IRS and Congress. As an initial matter, it is important to note that the IRS has long departed from its initial position in the late 1970's that revenue from broadcasting rights for the Cotton Bowl, would be subject to the UBIT.³⁸

³⁵ Id.

³⁶ Guruli supra, note 16 at 55.

³⁷ Guruli supra, note 16 at 55

³⁸ Id at 65.

In fact, the third prong of the test for the UBIT, i.e. that the activity is an unrelated trade or business, has always been difficult to apply to collegiate athletic programs. This is largely due to the perpetual pronounced position of the IRS and Congress that these activities are not unrelated to the university's exempt function. For example, "In explaining its position [that income derived from admissions to college football games would not be subject to the UBIT], the IRS placed a strong emphasis on the 'close relationship of college athletics and education.'"³⁹ Furthermore, "Two subsequent rulings were issued in the early 1980s, and, again, the IRS stated that 'an athletic program is considered to be an integral part of the educational process of a university, and activities providing necessary services to student athletes and coaches further the educational purposes of the university.'"⁴⁰

Moreover, "...historically, Congress has stated that 'athletic activities of schools are substantially related to [the] educational function' of colleges and universities. Consequently, certain income, such as profits from football game admissions, is not subject to the UBIT because sports are substantially related to the educational purpose of colleges and universities."⁴¹ Thus, one conclusion that can be derived from this history of the position of the IRS and Congress on this issue is that the unrelated trade or business prong of the UBIT test has been, " ... 'applied liberally to college and university athletic programs.'"⁴² This fact has not prevented criticism by commentators, of not subjecting the income from collegiate athletic programs to the UBIT. Furthermore, some commentators have made some plausible arguments for the IRS and Congress to change their positions on this matter. For instance, some argue that the enormous revenue that these athletic programs earn clearly exceeds the needs of the educational purpose of the university.⁴³ Additionally, it is argued that the excessive salaries paid to athletic personnel and coaches along with other expenses, cannot be said to relate to the educational purpose of the university, and thus should be subject to the UBIT.⁴⁴ In addition, generally speaking, if the college football bowl game can show that there is no expectation of any substantial return benefit other than the use or acknowledgment of a company's logo, the income derived therefrom will meet the "qualified sponsorship payment" definition.

³⁹ *Id.*

⁴⁰ Guruli *supra*, note 16 at 65.

⁴¹ *Id.* at 64-65.

⁴² *Id.* at 65.

⁴³ *Id.* at 66.

⁴⁴ *Id.*

For instance, as long as the bowl game or athletic program can show that the sponsorship payment is not "...contingent upon the level of attendance at one or more events ...[or]... indicating the degree of public exposure to one or more events...",⁴⁵ the income received by the bowl game or athletic program will not be subject to the UBIT, under Section 513(i) of the IRC.

D. Other Examples of Corporate Sponsorship

Throughout the existence of the UBIT, there have been other exempt organizations besides college football bowl games and other athletic activities that receive corporate sponsorship payments. For example, a court has ruled that paid advertisement by the American College of Physicians, an exempt organization, which published scholarly articles and advertisements, was not substantially related to the organization's exempt purpose.⁴⁶ On the other hand, a court was unable to separate voluntary contributions to the American Bar Endowment ("ABE"), an exempt organization, from its provision of products and services.⁴⁷

VII. Future of Corporate Sponsorships and Tax Exempt Organizations

A. Clear Safe Harbor Rule

One important future development in the taxation of corporate sponsorships would be the creation of clearer and more concise safe harbor rules for sponsorships of exempt organizations to avoid the UBIT.⁴⁸ A clear safe harbor rule would likely avoid the problems encountered as a result of the 1993 regulations, and even Section 513(i), by providing true safety and security to exempt organization planners, helping them remain within the acceptable parameters.

⁴⁵ Guruli *supra* note 16 at 55.

⁴⁶ Haims, *supra* note 6 at 1098.

⁴⁷ Haimes *supra*, note 6 at 1085.

⁴⁸ Stone *supra*, note 13 at 255-256.

B. Definitions and Bright Line Test

Including clear definitions for acknowledgment and advertising along with providing a clear test to distinguish between the two concepts, will aid in providing future guidance for determining when corporate sponsorships will be subject to the UBIT.⁴⁹ Indeed one of the problems with both the 1993 regulations and Section 513(i) was that the distinction between acknowledgment and promotion in the former, and advertising and sponsorship in the latter, was the ambiguity for exempt organizations. The implementation of clear definitions and standards for these important terms will go a long way to finally eliminate this problem.

C. Draft Tax Reform Act of 2014

As mentioned earlier, the UBIT and corporate sponsorship has been the subject of much debate in the political and charitable circles. In fact, Congress convened numerous hearings and bipartisan committees to review this and other related issues over the past few years.⁵⁰ The result of these hearings is the Draft Tax Reform Act of 2014 ("DTRA") for the U.S. House of Representatives, Ways and Means Committee.⁵¹ The DTRA has several provisions which could impact not only tax-exempt organizations in general, but also, colleges and universities, as well as corporate sponsorship of tax-exempt organizations to include possibly college football bowl games and other similar activities, specifically. To that end, for instance, probably one of the most significant provisions in the draft document, is Section 5008, which proposes that sponsorship payments made in return for the use or acknowledgment of the sponsor's name or logo by the tax-exempt entity that refers to the any of the sponsor's product lines, would not be treated as qualified sponsorship payments, and therefore would not be exempt from the UBIT rules.⁵²

⁴⁹ Wall, *supra*, note 1 at 85-86.

⁵⁰ Kalick, Laura, Draft Tax Reform Act of 2014 Proposes Profound Impact on Tax-Exempt Organizations, *Nonprofit Quarterly*, March 18, 2014, retrieved on December 27, 2014 from: <https://nonprofitquarterly.org/policysocial-context/23858-draft-tax-reform-act-of-2014-proposes-profound-impact-on-tax-exempt-organizations.html>.

⁵¹ See *Id.*

⁵² U.S. House of Representatives Ways and Means Committee Tax Staff, Draft Tax Reform Act of 2014, p. 155, retrieved on December 27, 2014, from: http://waysandmeans.house.gov/uploadedfiles/ways_and_means_section_by_section_summary_final_022614.pdf. (2014).

Instead these payments would be treated trade or business advertising income which is considered to be *per se* unrelated business income and therefore is taxed accordingly.⁵³ Another important provision, is the proposal to prevent any single donor's name or logo from being used or acknowledged as the exclusive sponsor of any event which generates more than \$25,000 in qualified sponsorship payments.⁵⁴ A proposed provision that is tangentially related to corporate sponsorships and tax-exempt entities, is Section 5002, which is a proposal to treat any revenue or royalties paid to a tax-exempt organization for the licensing or sale of its name or logo as *per se* unrelated business income that is therefore subject to the UBIT rules.⁵⁵ Furthermore a similar provision is Section 5004, which is a proposal to treat funding to tax-exempt entities for research that is not made available to the public as unrelated business income that is subject to the UBIT rules.⁵⁶ Funding for research that is publicly available may still be excluded from being subject to the UBIT rules.⁵⁷ As with any Congressional proposal, it is not clear which if any of the provisions of the DTRA will be passed by Congress and signed into law by the President, especially in light of the recent election results, the increasing federal budgetary constraints and needs, as well as the public and political view of the issue of corporate sponsorship of tax-exempt organizations. Thus tax exempt organizations, corporate sponsors, tax professionals, researchers, and other interested parties will likely have to stay tuned.

VIII. Conclusion and Recommendations

A. Conclusion

This article concludes that corporate sponsorships will likely continue to be a large source of revenue for exempt organizations in the future. This paper concludes that it is likely that a significant percentage of this revenue will go untaxed with proper planning and structuring of sponsorship activities by the exempt organization and the sponsor. Furthermore, the current economic climate, and governmental budgetary concerns, will likely force exempt organizations to continue to rely on sponsorships and contributions to remain viable.

⁵³ See *Id.*

⁵⁴ See *Id.*

⁵⁵ See *Id.* at p. 153.

⁵⁶ See *Id.* at p. 154.

⁵⁷ See *Id.*

This necessity of funding from private and corporate sponsorship for exempt organizations, compared with the possibility of taxable sponsorships escaping taxation will likely cause this debate to continue well into the future. Finally, this paper concludes that political pressure could result in greater or lesser restrictions on the use of corporate sponsorships by exempt organizations.⁵⁸

B. Recommendations

1. Income Restriction

This paper indicates the difficulty lawmakers and the IRS have faced in drawing distinctions between different types of activities which will generate UBIT to exempt organizations. One possible alternative is to simply place a cap on the amount of income from corporate sponsorships that exempt organizations receive, despite the nature of the activity, with any amounts above the limit, subject to the UBIT. This approach would help to respond to excessive contributions that are likely to escape taxation due to artful drafting and structuring of transactions between exempt organizations and corporate sponsors, while still securing the ability of exempt organizations to continue to receive reasonable corporate sponsorship income that is not subject to the UBIT.

2. Clear Guidelines

Alternatively, as indicated in this paper despite the form of the regulation or statute governing corporate sponsorships, more clarity will assist all sides with effective compliance under the UBIT. Furthermore, the clearer guidelines would likely be more desirable than having the IRS or Congress simply do what they have done historically regarding this issue, which is to respond to the taxability of corporate sponsorships based on public outcry and/or political pressure. Moreover, clearer guidelines would also likely be more advantageous to the IRS and even Courts respectively, having to enforce and interpret the code provisions and rules governing corporate sponsorships to exempt organizations, instead of those bodies having to merely rely on a facts and circumstances analysis in every situation.

⁵⁸ Frank James Vari, THE UNRELATED BUSINESS INCOME TAX AND ITS EFFECTS UPON COLLEGIATE ATHLETICS, 9 Akron Tax J. 111, 122 (1992)

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