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ABSTRACT

In 2017, Congress passed the Tax Cuts and Jobs Act, a sweeping tax reform bill which altered huge swaths of the Internal Revenue Code. Among the numerous changes was an alteration to § 1031 of the Code, which defers taxable gains for taxpayers exchanging property with other taxpayers for similar property; more specifically, the Act limited this section to real property.

Sports teams would often trade player contracts with one another, and those trades were considered like-kind exchanges of personal property. As a result of this new law, these organizations have to grapple with the chance that they will face additional tax liability. Since the recognition of gain requires the identification of an asset's fair market value, these teams may be required to develop a workable system for valuing player contracts across their leagues.

This task may prove impossible thanks to the difficulty of assigning value to player contracts and may lead to deleterious effects to teams both on and off the field. As a result, the most plausible and reasonable solution would be for Congress to amend the Code to exempt professional sports leagues from compulsory compliance.

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I. INTRODUCTION

On the eve of the 2017 trade deadline, the Houston Astros were in a tough spot. Having lost 17 of their previous 27 games, the division-leading Astros seemed to stall in their hunt for postseason play, and General Manager Jeff Luhnow wanted to act.[1] In the waning seconds of the day, the Astros sent three prospects to the Detroit Tigers in exchange for 34-year-old former All-Star and Cy Young Award winner Justin Verlander in return.[2] While Verlander was a stable, reliable arm, he finished the season with the Astros in a way nobody expected – pitching in five games over the rest of the season, throwing for 34 innings, giving up four earned runs, hurling 43 strikeouts, and walking five for an eye-popping earned run average ("ERA")[3] of 1.06.[4] Verlander continued his dominance in the postseason, winning four games in five starts with 38 strikeouts and notching a 2.21 ERA.[5] In the end, the Astros hoisted the franchise's first World Series trophy in its 55-year existence.[6] Verlander was named the American League Championship Series' Most Valuable Player ("MVP") as well as co-Babe Ruth Award winner.[7]

It is not often that a late-season addition like Verlander makes such an immediate and substantial impact on a team's chances of winning, yet it is hard to imagine the Astros realizing the same success if the front office had not made the decision to trade for him. Looking at the trade in retrospect, this was an easy decision. But what if it had not been so easy? What if the Astros were forced to incur substantial tax liability in order to bring Verlander to Houston? Would the owners have found the transaction to be worth it at the time, and would they have even been able to accept the resulting decrease in their finances?

From the 2017 Major League Baseball ("MLB") offseason through the trade deadline in September 2018, MLB teams participated in more than 130 trades.[8] While some of the trades involved relative no-names, has-beens, and minor leaguers, some franchises in baseball said goodbye to their beloved heroes, all in the name of the future.[9] Baseball trades are now less of a sideshow and more of a central focus of America's pastime, arguably as important as the actual games unfolding on the diamond. However, a recent change in the tax law might funda-

1. Ben Reiter, *The Astros' Justin Verlander Trade Violated Their Philosophy… And May Win Them the Pennant*, SPORTS ILLUSTRATED (Sept. 22, 2017), https://www.si.com/mlb/2017/09/22/houston-astros-justin-verlander-trade-0.

2. Brian McTaggert, *Last-minute Verlander deal lifts up Houston*, MLB.COM (Aug. 31, 2017), https://www.mlb.com/news/astros-trade-for-pitcher-justin-verlander/c-251757752.

3. STATMUSE, https://www.statmuse.com/musings/justin-verlander-has-43-strikeouts-this-month-the-most-by-a-houston-astr-60a3e8db (last updated Sept. 27, 2017).

4. *Verlander, Altuve, Astros wrap up sweep, rout Rangers 12-2*, CBS SPORTS (Sept. 27, 2017), https://www.cbssports.com/mlb/gametracker/recap/MLB_20170927_HOU@TEX/.

5. *Justin Verlander Stats*, ESPN.COM, http://www.espn.com/mlb/player/stats/_/id/6341/justin-verlander (last visited Oct. 9, 2019).

6. Richard Justice, *Astros gave their city 2017's greatest gift*, MLB.COM (Dec. 31, 2017), https://www.mlb.com/news/astros-world-series-win-helped-houston-heal/c-264115530.

7. Simon Sharkey-Gotlieb, *Altuve, Verlander share Babe Ruth Award as postseason co-MVPs*, THE SCORE, https://www.thescore.com/mlb/news/1417589 (last visited Oct. 9, 2019).

8. *2018 MLB Transactions*, BASEBALL REFERENCE, https://www.baseball-reference.com/leagues/MLB/2018-transactions.shtml (last visited Oct. 9, 2019).

9. *Id.*

mentally change whether baseball trading continues in the future—a change that will similarly affect transactions in other sports as well.[10]

On December 22, 2017, President Trump signed into law the Tax Cuts and Jobs Act of 2017 ("TCJA").[11] Amid its wide array of statutory changes to the Internal Revenue Code,[12] one particular change could have a profound effect on sports franchises: the repeal of the like-kind exchange provisions for exchanges of personal property.[13] Because sports trades are deemed like-kind exchanges of intangible personal property, a literal application of this law will require professional sports teams to calculate gains received in exchanges of player contracts between teams and pay tax on those gains.[14] Putting aside the questions concerning how to assign a fair market value to a player contract, this law could also have a potentially deleterious effect on player trades (like those that gave the Astros a World Series championship and MVP pitcher), as well as adverse effects on owners, players, and even spectators. This article will delve deeply into how this law will work in practice by examining the issues that will likely arise. It will also assess some of the law's unforeseen consequences and propose a solution that will allow professional sports trades to go on unfettered.

Part II of this article will first establish a statutory framework of relevant tax concepts, including depreciation, capital gains, realization events, and like-kind exchanges, as well as how those provisions have molded transactions between professional baseball teams in the past. Part III of this article will introduce the Tax Cuts and Jobs Act of 2017, specifically the portion that alters like-kind exchanges, as well as the policy justifications for its enactment. Part IV will provide a thorough explanation of the implications of the TCJA, along with speculation of its consequences, with particular emphasis on the problems concerning objective player valuation and a closer look at an already-proposed solution. Finally, Part V of this article will explore a number of solutions to the problem, spanning from the feasibility of requesting a Congressional exemption to a uniform valuation system that would be palatable and acceptable to baseball teams so as to preserve the ability of teams to participate fully in inter-league transactions.

II. PRE-TCJA STATUTORY FRAMEWORK AND ITS APPLICATION TO BASEBALL PLAYER CONTRACTS

Before exploring the effects of the tax law on the sports player contract system, it is useful to provide background information concerning relevant tax concepts.

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10. Beate Erwin, A Fundamental Change of The Professional Sports Landscape Under The 2017 U.S. Tax Reform? The End of Like-Kind Exchanges for U.S. Sports Trades, MONDAQ (July 16, 2018), http://www.mondaq.com/unitedstates/x/716850/Sport/A+fundamental+change+of+the+professional+sports.
11. Tax Cuts and Jobs Act of 2017, Pub. L. No. 115–97, 131 Stat. 2054.
12. *See generally Preliminary Details and Analysis of the Tax Cuts and Jobs Act* (Tax Found., Special Report No. 241, 2017), https://files.taxfoundation.org/20171220113959/TaxFoundation-SR241-TCJA-3.pdf.
13. Tax Cuts and Jobs Act of 2017, Pub. L. No. 115–97, 131 Stat. 2054, § 13303(a).
14. Jim Tankersley, *A Curveball from the New Tax Law: It Makes Baseball Trades Harder*, THE N.Y. TIMES (Mar. 19, 2018), https://www.nytimes.com/2018/03/19/us/politics/baseball-tax-law-.html.

A. Basis

An asset's basis is the amount of a taxpayer's capital investment in that asset.[15] In most instances, a taxpayer's basis is its cost to that taxpayer.[16] This amount includes the purchase price of the asset plus other expenses incurred in its acquisition, such as debt incurred to buy the asset, property given in exchange for the asset, or services.[17] There are also a number of instances when a taxpayer's adjusted basis is not its cost.[18] For example, in the event that a taxpayer acquires an asset by exchanging it for another asset, the taxpayer's basis in the item that he receives is equal to the fair market value of the property received.[19] If a taxpayer acquires an asset in exchange for performing services, the fair market value of the property received is deemed to be the taxpayer's basis.[20] There are a number of other ways to determine basis, all contingent on the circumstances under which the property was acquired by the taxpayer.[21]

In any case, once a taxpayer arrives at the initial basis (cost, transferred, exchanged or otherwise), it must then be adjusted upward or downward as a result of subsequent events.[22] For example, basis is increased if a taxpayer makes capital expenditures with respect to the asset.[23] Other events, like § 179 depreciation, may cause the basis in the asset to go down.[24] Upon making these alterations, the taxpayer is left with his or her "adjusted basis," which is then used to calculate total gain or loss realized by the taxpayer upon disposition of that asset in the future.[25]

For example, assume that on January 1, 2019, Farmer A purchases a barn for $50,000. In addition to the sale price of the barn, he also pays $2,000 in commission to the broker who facilitated the sale, as well as title and legal fees of $1,000. Farmer A pays $5,000 to run utility lines to the barn and spends an additional $12,000 to repair and improve the barn. At this point, Farmer A's adjusted basis in the barn is $70,000; since the aforementioned actions adjust his basis upward, they are added to the $50,000 cost basis in the barn to arrive at the adjusted basis. After one year, on January 1, 2020, Farmer A decides to depreciate a portion of the barn over the next year by an amount of $7,000 (more on depreciation in Subpart II-B). On January 1, 2021, Farmer A's adjusted basis in the barn is now at $63,000: his adjusted basis up to January 1, 2020, less the amount depreciated for 2020.

As was briefly mentioned, basis does not always tell the whole story. The Internal Revenue Code provides taxpayers with the ability to defer tax liability for certain asset transactions, so long as they account for that benefit in a way that attaches to the asset itself, preserving any inherent characteristics which would yield tax revenue. One such example is depreciation.

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15. INTERNAL REVENUE SERVICE, U.S. DEP'T OF THE TREASURY, PUB. NO. 551, BASIS OF ASSETS 2 (2018), https://www.irs.gov/pub/irs-pdf/p551.pdf [hereinafter BASIS OF ASSETS].
16. Id.
17. *Id.*
18. *Id.* at 7.
19. Philadelphia Park Amusement Co. v. United States, 126 F. Supp. 184, 188 (1954).
20. BASIS OF ASSETS, *supra* note 15, at 7.
21. *Id.* at 7–11.
22. *Id.* at 4.
23. *Id.* at 5.
24. *Id.* at 6.
25. *Id*. at 4.

B. Depreciation

Depreciation is a mechanism by which a taxpayer may recover the costs of a particular piece of property over the economically-useful life of that property.[26] The purpose of depreciation is to "offset the taxpayer's *original* investment against the gross income received in subsequent years, and to thereby limit the taxpayer's net taxable income to the excess of revenues over related expenses."[27] When a taxpayer depreciates an asset, they are lowering their basis in that asset by the depreciation amount.[28] The amount depreciated may not exceed their basis; that is to say, once a taxpayer has depreciated an amount equal to their basis, they have reached their limit and may not depreciate any more.[29] While used mainly for tangible property, the depreciation allowance also extends to intangible assets, a category to which player contracts belong, albeit under a technically different mechanism known as "amortization."[30]

For a property to be deemed depreciable, four requirements must be met: (1) "[t]he taxpayer must own the property," (2) the taxpayer must use the property in his or her trade or business or in an income-producing activity, (3) "[t]he property must have a determinable useful life of more than one year," and (4) the property must be subject to wear and tear or obsolescence.[31]

Property may be depreciated only "if its useful life is 'definite and predictable.'"[32] Useful life is essentially how long the property "is likely to be in service in the taxpayer's business" or profit-making activity.[33] Estimating the useful life of a property is of utmost importance in determining the property's depreciation strategy.[34] Assuming that straight-line depreciation is used,[35] the taxpayer's final depreciated amount will dovetail with the end of its useful life.[36] However, by estimating the useful life of property in a way that does not truly reflect its expected useful life, a taxpayer may either help or hinder herself financially.[37] For instance, if a taxpayer were to overestimate the useful life of a property, depreciation will still be taking place after the actual useful life of the property for the taxpayer to take full advantage of the deduction allowance, representing a missed opportunity for the taxpayer.[38]

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26. INTERNAL REVENUE SERVICE, U.S. DEP'T OF THE TREASURY, PUB. NO. 946, HOW TO DEPRECIATE PROPERTY 3 (2019), https://www.irs.gov/pub/irs-pdf/p946.pdf [hereinafter HOW TO DEPRECIATE PROPERTY].

27. Marvin A. Chirelstein & Lawrence Zelenak, Federal Income Taxation 183 (14th ed. 2018).

28. *Id.* at 182.

29. *Id.* at 183.

30. *Id.*

31. INTERNAL REVENUE SERVICE, A BRIEF OVERVIEW OF DEPRECIATION, https://www.irs.gov/businesses/small-businesses-self-employed/a-brief-overview-of-depreciation (last visited Oct. 16, 2019).

32. Chirelstein & Zelenak, *supra* note 27.

33. *Id.* at 184.

34. *Id.*

35. The straight-line method, which allows a taxpayer to "deduct the same amount of depreciation each year over the useful life of the property," is calculated by subtracting any salvage value of an asset from its adjusted basis (resulting in the total depreciation amount available for a particular asset) and dividing that number by the years of useful life of the asset. HOW TO DEPRECIATE PROPERTY, *supra* note 26, at 9.

36. Chirelstein & Zelenak, *supra* note 27, at 184.

37. *Id.* at 184–85.

38. *Id.*

On the other hand, if a taxpayer underestimates the useful life of the property, the straight-line deduction leads to greater amounts deducted earlier on.[39] This allows the taxpayer to postpone the tax liability. For example, if an asset's true useful life is ten years and the taxpayer estimates the useful life as five, he will depreciate the full amount in five years. In this case, he will have taken full advantage of the immediate benefits afforded by depreciation yet will still only face tax liability if and when the asset is disposed of.[40]

This latter method represents a substantial opportunity to the taxpayer.[41] If the taxpayer owns property during a period of inflation, the depreciation benefit might otherwise be wiped out by rising inflation levels.[42] The net effect of this is that the taxpayer realizes a benefit more quickly and the economic effects are essentially the same for the taxpayer.[43] However, because of the time value of money,[44] this would seemingly represent an economic loss to the government.

Indeed, in 1981, the Internal Revenue Code ("IRC" or "Code") was amended in such a way that allowed taxpayers to depreciate their assets over shorter periods of time – much shorter than their actual useful life.[45] By enacting the Accelerated Cost Recovery System ("ACRS"),[46] Congress acted with the stated intent to stimulate investment in depreciable assets by business owners.[47] In doing so, it became less important to tie such depreciation to its true useful life; rather, the focus shifted to doing what was necessary to permit and encourage business and investment transactions.[48]

While there are still concerns about how ACRS and similar depreciation mechanisms affect the measurement of a taxpayer's true taxable income, determining whether a depreciation schedule is proper has largely been shaped by notions of how manipulating this schedule incentivizes or inhibits investment in depreciable assets.[49] Still, it must be noted that the ACRS is beneficial to taxpayers not by eliminating a tax burden, but by allowing a deferral of the tax.[50] The two primary benefits of the ACRS are that (1) it allows property to be depreciated over its recovery period, which is nearly always shorter than its actual useful life, and (2) it allows personal property to be depreciated using an accelerated method, which provides for more depreciation in the early years and thereby allows a taxpayer to recover his or her investment costs more quickly.[51]

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39. *Id.* at 184.
40. *Id.*
41. *Id.* at 184–85.
42. *Id.* at 183.
43. *Id.* at 184.
44. *Time Value of Money*, INVESTOPEDIA, https://www.investopedia.com/terms/t/timevalueofmoney.asp ("The time value of money… is the concept that money available at the present time is worth more than the identical sum in the future due to its potential earning capacity.") (last visited Oct. 17, 2019).
45. Chirelstein & Zelenak, *supra* note 27, at 184.
46. INTERNAL REVENUE SERVICE, U.S. DEP'T OF THE TREASURY, PUB. NO. 534, DEPRECIATING PROPERTY PLACED IN SERVICE BEFORE 1987 2 (2016), https://www.irs.gov/pub/irs-pdf/p534.pdf [hereinafter DEPRECIATING PROPERTY].
47. Chirelstein & Zelenak, *supra* note 27, at 185.
48. *Id.*
49. *Id.* at 185–86.
50. *Id.* at 192.
51. *Id.* at 194.

The initial idea for the ACRS was to increase cash flow for investments and allow more property depreciation.[52] Indeed, the system's supporters said this goal was achieved, attributing the country's recent rebound from an economic recession in part to the ACRS.[53] However, it was not without criticism. Some argued that the ACRS, by allowing businesses to depreciate assets very quickly (thereby lowering corporate taxes owed), helped corporations dress up their earnings by creating wider gaps between cash flow and reported earnings.[54] Others argued that the ACRS created a favorable environment for hostile corporate takeovers.[55]

In light of these concerns, Congress replaced the ACRS with the Modified Accelerated Cost Recovery System ("MACRS").[56] This newer system is distinct from ACRS in that its recovery periods are longer, which reduces the annual depreciation amounts taken.[57] MACRS is made up of two separate depreciation methods: the General Depreciation System and the Alternative Depreciation System.[58] While the General Depreciation System is used for most kinds of property, the Alternative Depreciation System applies only to property "which is used for business purposes 50 percent of the time or less, is used predominantly outside the United States, or is used for tax-exempt purposes"[59]

In 2004, the IRS published temporary and proposed changes to MACRS.[60] One of the relevant alterations involves like-kind exchanges, in that property acquired through such an exchange is handled differently, if both the property received and the property given are subject to MACRS.[61] Additionally, the property "must also have changed hands prior to February 27, 2004."[62]

There are certain types of property which cannot be depreciated.[63] Land, for example, cannot be depreciated, as it does not wear out, achieve obsolescence, or become "used up" as the phrase is generally understood to mean.[64] Another class of assets which cannot be depreciated is § 197 intangibles, which must be "amortized."[65] In general, if intangible property is the type which can be amortized, the preferred method is the straight-line method.[66] If an asset is not used for a full year in the first year of its use, the depreciation deduction must be prorated in accordance with the number of months it was actually in use.[67]

The taxpayer may begin depreciating property when it is placed into "service for use in [a] trade or business or for the production of income."[68] A property is no

52. *Accelerated Cost Recovery System (ACRS),* INC. (2019), https://www.inc.com/encyclopedia/accelerated-cost-recovery-system-acrs.html (last visited Oct. 17, 2019).
53. *Id.*
54. *Id.*
55. *Id.*
56. *Id.*
57. *Id.*
58. *Id.*
59. *Id.*
60. *Id.*
61. *Id.*
62. *Id.*
63. HOW TO DEPRECIATE PROPERTY, *supra* note 26, at 6.
64. *Id.*
65. *Id.*
66. *Id.* at 9; Taxpayers may also have the opportunity to depreciate certain intangibles in accordance with the "income forecast method." *See id.* at 10.
67. *Id.* at 9.
68. *Id.* at 7.

longer eligible for depreciation when the taxpayer has deducted an amount equal to their basis in that property, or if the taxpayer retires that property from service—whichever happens first.[69]

For example, assume Farmer A purchases a seed patent for $50,000. Assuming that (a) the patent is eligible for depreciation deductions and is not a § 197 intangible, (b) the patent has a useful life of ten years, and (c) the farmer chooses to deduct the patent via straight-line method, Farmer A may deduct $5,000 in depreciation from the basis of the patent each year for ten years. At that point, Farmer A will have an adjusted basis in the patent of $0.

After a taxpayer's adjusted basis in an asset has been changed, he may dispose of these assets in some way, either through sale, exchange, retirement, or the like.[70] In some of these cases, the taxpayer may find that the asset is fetching a price to another person which differs from the adjusted basis they themselves have in that property. In that case, the taxpayer will likely face tax consequences for a transaction that reflects the disparity of values in the form of realizing, and possibly recognizing, gain or loss.[71]

C. Gain or Loss

Upon the disposition of an asset, the price fetched for property is not always exactly the same as the original owner's basis in that property. In fact, in many cases, it is preferable to the taxpayer for another person to value the asset more than he does. If a taxpayer agrees to a transaction in which he is departing with property and receiving an amount of cash or property which has a higher value than his basis in the property he gives up, and that property is a capital asset,[72] he has experienced a gain.[73] The opposite is also true: if he receives an amount or item valued lower than the basis in the property he is giving up, he has experienced a loss.[74]

Realization is the event by which an asset, either through being sold or dispossessed by its owner in some way, results in the owner having to account for such a change in that item's value.[75] This event occurs at the point of sale or loss of an asset, when the taxpayer receives or loses something of monetary value.[76] Even if a taxpayer realizes a gain, however, they need not face tax consequences immediately. Realized gains have an immediate impact on the taxpayer, by being included in gross income, only if they are subject to "recognition."[77]

Conceptually, recognition typically goes hand-in-hand with realization.[78] In fact, the IRS provides that if a gain or loss is realized, it is recognized by default

69. *Id.*
70. INTERNAL REVENUE SERVICE, U.S. DEP'T OF THE TREASURY, PUB. NO. 544, SALES AND OTHER DISPOSITIONS OF ASSETS 2 (2019), https://www.irs.gov/pub/irs-pdf/p544.pdf [hereinafter SALES AND OTHER DISPOSITIONS OF ASSETS].
71. *Id.*
72. I.R.C. § 1221 (2019); *see* SALES AND OTHER DISPOSITIONS OF ASSETS, *supra* note 70, at 20.
73. I.R.C. § 1001(a) (2019); *see* SALES AND OTHER DISPOSITIONS OF ASSETS, *supra* note 70, at 3.
74. I.R.C. § 1001(a) (2019); *see* SALES AND OTHER DISPOSITIONS OF ASSETS, *supra* note 70, at 3.
75. SALES AND OTHER DISPOSITIONS OF ASSETS, *supra* note 70, at 3.
76. Helvering v. Bruun, 309 U.S. 461, 469 (1940).
77. SALES AND OTHER DISPOSITIONS OF ASSETS, *supra* note 70, at 4.
78. The implication of § 1001(c) is that realization is typically accompanied by recognition, with a few noted exceptions. *See* I.R.C. § 1001(c) (2019).

unless otherwise provided by the Code.[79] Scattered throughout the Code are these conditions wherein a gain or loss may be eligible to go unrecognized—aptly referred to as "nonrecognition provisions."[80] It is common for a nonrecognition provision to apply if the IRS views a transaction as a taxpayer merely shifting his investment from one property to another. In such a case, the idea is that the taxpayer is "continuing his investment," and therefore should not have a taxable consequence.[81] Keep in mind, however, that such an unrecognized gain or loss does not disappear; rather, it is preserved and "deferred" to a point in the future, ostensibly at a point where the taxpayer truly "ends" their investment in the property by sale or exchange.[82]

For example, assume that Farmer A purchases a tractor for $50,000 and later sells it for $100,000. Assuming no depreciation, Farmer A's basis in the tractor is $50,000, the amount realized is $100,000, and the realized gain is $50,000. Assuming a nonrecognition provision does not apply to this transaction, Farmer A must recognize this gain by including the $50,000 in his gross income for the taxable year in which the transaction occurred.

Some examples of nonrecognition provisions include transfers between spouses and certain former spouses,[83] involuntary conversions,[84] and like-kind exchanges.[85] The last of these is the most relevant to our inquiry and is explored in depth in the following section.

D. Like-Kind Exchanges

Section 1031 of the Code provides a unique opportunity for taxpayers who wish to exchange an asset with another to do so with beneficial tax consequences. A like-kind exchange, also known as a § 1031 exchange, occurs when parties exchange assets that are so similar, the gain inherent in those assets is deferred, and does not generate an immediate tax liability.[86]

There are four requirements for a like-kind exchange. First, both properties to be transferred must be held for use in the taxpayer's trade or business, or held for investment.[87] Second, as the name suggests, both properties must be of a similar kind.[88] The properties must be of similar nature or character, without regard to

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79. *Id.* ("Except as otherwise provided in this subtitle, the entire amount of the gain or loss, determined under this section, on the sale or exchange of property, shall be recognized.").

80. Michael J. Graetz & Deborah H. Schenk, Federal Income Taxation: Principles and Policies 625 (Foundation Press, 5th ed. 2005).

81. Erik M. Jensen, *The Uneasy Justification for Special Treatment of Like Kind Exchanges*, 4 Am. J. Tax Pol'y 193, 203 (1985) (discussing the relatively "noncontroversial" justification for like-kind exchanges receiving nonrecognition treatment).

82. James D. Bryce, *Deferred Exchanges: Nonrecognition Transactions After Starker*, 56 TUL. L. REV. 42 (1981) ("Section 1031 of the Internal Revenue Code provides that no gain or loss will be recognized in an exchange of like-kind property. In other words, the gain that is realized when appreciated property is exchanged for other property is not taken into account for federal income tax purposes at the time of the exchange, but is deferred until the property received is sold or exchanged.").

83. I.R.C. § 1041 (2019).

84. I.R.C. § 1033.

85. I.R.C. § 1031.

86. *What Is a 1031 Exchange? The Basics for Real Estate Investors*, CWS CAPITAL PARTNERS, https://www.cwscapital.com/what-is-a-1031-exchange/ (last visited on Oct. 19, 2019).

87. I.R.C. § 1031.

88. *Id.*

"grade or quality."[89] Further, the determination of whether property is like-kind to another will also depend on the "class" or "kind" of the properties being exchanged.[90] If one party receives additional consideration in the transaction other than like-kind property, such as cash or non-like-kind property, the gain to the recipient of the exchange must be recognized to the extent of the fair market value of that extra property received.[91] Such gain realized in a like-kind exchange is considered ordinary income to the extent that the gain is subject to depreciation recapture.[92] Third, there must be an exchange.[93] Fourth, the taxpayer must only receive like-kind property in the transaction.[94]

As mentioned previously, in a like-kind exchange, any realized gain is not eliminated; rather, it is deferred to when the asset is later transferred.[95] Since basis in the asset is required to make that calculation, the taxpayer must properly record the basis of the property received so that the realized gain is recognized when that property is later sold.

In a like-kind exchange, the basis of the property a taxpayer receives is equal to the basis in the property they give up.[96] The taxpayer receives a holding period equal to the holding period they had in the asset they transferred, but only in the like-kind asset itself; additional property received in the exchange aside from the like-kind asset receives a new holding period.[97] A like-kind exchange need not occur all at once. The property may be received within 180 days after conveyance of the departing property.[98] Further, the taxpayer must identify the property they are receiving in the exchange within 45 days of relinquishing the outgoing property.[99] Thus, the basis of an asset acquired in a like-kind exchange is an exchanged basis, equal to the basis of the property given in the exchange.[100] This preserves the gain in the property transferred by locking its basis into the acquired property. When the received property is later sold, the seller recognizes both any gain that accrued since he began possessing the property, as well as any gain that had occurred in the hands of its previous owner (which had been deferred via § 1031).[101]

For example, assume Farmer A possesses a tractor with a basis of $50,000 and a fair market value of $100,000. He wishes to exchange his tractor with Farmer B for a similar tractor with a fair market value of $110,000 as well as $10,000 in cash. Farmer A will recognize a gain of $10,000, includable in income, attributable to the cash. He will have realized an additional $60,000 gain attributa-

89. Treas. Reg. § 1.1031(a)-1(b) (2019) ("Definition of "like kind." As used in section 1031(a) [26 USCS § 1031(a)], the words like kind have reference to the nature or character of the property and not to its grade or quality.").

90. *Id.* ("One kind or class of property may not, under that section, be exchanged for property of a different kind or class.").

91. I.R.C. § 1031(b); such additional consideration is commonly referred to as "boot." *See Boot*, INVESTOPEDIA, https://www.investopedia.com/terms/b/boot.asp (last updated Feb. 22, 2018).

92. *See* I.R.C. § 1245. For additional information about depreciation recapture, *see* Depreciation Recapture, INVESTOPEDIA https://www.investopedia.com/terms/d/depreciationrecapture.asp (last updated Aug. 28, 2019).

93. I.R.C. § 1031.

94. *Id.*

95. Bryce, *supra* note 82, at 42.

96. BASIS OF ASSETS, *supra* note 15, at 8.

97. I.R.C. § 1223.

98. I.R.C. § 1031(a)(3)(B)(i).

99. I.R.C. § 1031(a)(3)(A).

100. BASIS OF ASSETS, *supra* note 15, at 10.

101. SALES AND OTHER DISPOSITIONS OF ASSETS, *supra* note 70, at 12.

ble to the difference between his basis ($50,000) and the fair market value of Farmer B's tractor ($110,000), but—assuming the tractors are considered to be of similar nature or character—§ 1031 applies to the transaction, allowing Farmer A to defer this $60,000 gain until he disposes of the tractor in a later taxable sale or exchange.

E. Status Quo of Player Contract Tax Treatment Pre-TCJA

In order to understand the potential consequences to MLB teams engaged in the player trade market, it may prove useful to first establish the tax consequences as the teams themselves grew accustomed to them, as they have stayed until the passage of the TCJA.

A sports team has a tax basis in a player's contract which equals what they paid to acquire that player, which could include any amount owed to that player in the future.[102] This amount includes any bonuses paid to the player for signing their contract.[103] In accordance with the principles of exchanged basis, upon an exchange of players, a team would ostensibly take an adjusted basis in the player contract they receive equal to the fair market value of the contract of the player they gave up. However, for reasons that are discussed below,[104] the calculation of fair market value for a player contract is a nebulous concept which, in conjunction with the like-kind exchange treatment afforded by player contract trades, often rendered the calculation unnecessary.

It seems intuitive that a baseball contract would be a depreciable asset; as time goes on, players get older and lose some of their athletic skill, contributing less to the value of their team.[105] However, this intuition does not always win the day. Thus, a historical analysis of the tax treatment of player contracts is necessary.

The dispute concerning player contracts began in the early 20th century, after the Chicago Cubs and Pittsburgh Pirates broke accounting tradition.[106] While most teams up until this point had deducted the difference between contracts bought and sold each year, these two teams began deducting the full amount of a given player's contract in a given year.[107] Each team's rationale for this practice was that because the contracts themselves were usually only for one year at a time, teams should deduct them in that year, as opposed to depreciating their value over time, because the useful life of the contract was at most a year.[108] The Internal Revenue Service ("IRS" or "Service"), however, took issue with the teams' interpretation

102. Erwin, *supra* note 10.
103. Rev. Rul. 67–379, 1967–2 C.B. 127.
104. *See infra* Part IV.
105. Harvey Bezozi, *Tax Reform's Impact on Professional Sports*, WEALTHMANAGEMENT.COM (Apr. 30, 2018), https://www.wealthmanagement.com/high-net-worth/tax-reform-s-impact-professional-sports.
106. Chicago Nat'l League Ball Club v. Comm'r; 33,197 B.T.A.M. (P-H) 239 (1933), *aff'd* 74 F.2d 1010 (1935); Pittsburgh Athletic Co. v. Comm'r, 27 B.T.A. 1074 (1933), *aff'd* 72 F.2d 883 (1934).
107. Jeff Peterson, The Tax Implications of Owning a Professional Sports Franchise (Apr. 23, 2018) (unpublished B.A. thesis, University of Connecticut) (on file with the University of Connecticut Library).
108. *Id.*

of the contract terms, specifically regarding their relationship to a common provision in those contracts: the "reserve clause."[109]

Prior to 1975 and the advent of free agency, baseball contracts took the form of one-year contracts that included what was known as a reserve clause.[110] Once a player signed a contract, the team was entitled to one year of performance from that player at the agreed-upon rate.[111] Upon the expiration of that contract, however, the reserve clause took effect. This allowed the team to exercise an exclusive option to renew the player's contract for another year, subject to negotiation of terms with that player.[112] The player was not free to enter into a contract with another team while the reserve clause was in effect.[113] If he were to continue playing professional baseball, his former team effectively had the right of first refusal. Unless the team agreed to unconditionally release that player to be signed by other teams, his professional career was tied to that team.[114] While he certainly had the right to hold out and refuse to sign a contract with that team, exercising that right would effectively put an end to his career.

In *Pittsburgh*, the Service attempted to disallow the team's preferred deduction schedule, ostensibly under the logic set out in earlier cases that,[115] because the reserve clause gave each team a perpetual option, a one-year contract rarely resulted in a player having a single-year tenure with a team.[116] In fact, it was common that players would remain with a single club for their entire career, which could often span a decade, because of the reserve clause.[117] To remedy this problem, the Service suggested that player contract amounts should be deducted over the course of at least three years, a period of time that represented the average length of a player's career at the time.[118]

In both cases, the U.S. Board of Tax Appeals ruled in favor of the teams.[119] The rationale was that even though the teams had these perpetual options, the player could technically retire at any time; therefore, the team did not have complete control over them (at least to the extent relevant to the court).[120] Further, the Board said that these options did not change the fact that the contracts were still,

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109. *Id.*

110. *See generally Reserve Clause*, BASEBALL REFERENCE, https://www.baseball-reference.com/bullpen/reserve_clause (last updated Nov. 30, 2012).

111. *Id*.

112. *Id.*

113. *Id.*; Pittsburgh Athletic Co. v. Comm'r, 27 B.T.A. 1074, 1075 (1933), *aff'd* 72 F.2d 883 (1934).

114. *Reserve Clause*, *supra* note 110.

115. *See* Dallas Athletic Assn. v. Comm'r, 8 B.T.A. 1036 (1927) ("Each contract covered only the playing season the year in which or for which it was made, but was according to its terms renewable by the club or its assignee for the succeeding year. By virtue of the renewal provisions, the rights acquired under each contract extended beyond the year when the contracts were acquired."); *see* Houston Baseball Assn. v. Comm'r, 24 B.T.A. 69 (1931).

116. Stephen R. Keeney, *The Roster Depreciation Allowance: How Major League Baseball Teams Turn Profits into Losses*, SOC'Y FOR AMERICAN BASEBALL RES. (2016), https://sabr.org/research/roster-depreciation-allowance-how-major-league-baseball-teams-turn-profits-losses.

117. *Id.*

118. Peterson, *supra* note 107, at 12.

119. *See* Chicago Nat'l League Ball Club v. Comm'r; 33,197 B.T.A.M. (P-H) 239, 240 (1933), *aff'd* 74 F.2d 1010 (1935); Pittsburgh Athletic Co. v. Comm'r, 27 B.T.A. 1074, 1078 (1933), *aff'd* 72 F.2d 883 (1934).

120. Peterson, *supra* note 107, at 12.

technically speaking, simply one-year agreements.[121] The Board rejected the Service's suggestion that player contracts had an indefinite life.[122] However, the Service's logic in the cases provided an opening for a future team owner to make another run at depreciating player contracts.[123]

In 1946, baseball legend Bill Veeck purchased the Cleveland Indians.[124] Known throughout baseball for his creative approach to the sport, both on and off the field,[125] Veeck made an interesting argument to the Service. He claimed that when a baseball team was purchased, the amount of the purchase price spent on acquiring player contract rights should be depreciable.[126] His logic was easy to follow: when purchasing a sports team, an owner is buying relatively few tangible things.[127] Outside of some equipment, an owner is mainly purchasing the goodwill of the sports team and rights to player contracts, among other intangibles, such as stadium leasing and merchandise rights.[128] However, at the time of Veeck's purchase, most intangible assets were not depreciable.[129] For an asset to be depreciable, it must decline in value at a readily determinable amount over a period of time that could be reasonably estimated—a set of criteria that only applied to tangible goods.[130]

However, in a remarkable show of ingenuity, Veeck attempted to use the Service's logic against it to solve his problem. According to the ruling in *Pittsburgh*, player contracts, though intangible, were subject to amortization.[131] While intangible assets were not depreciable due to the lack of a readily-ascertainable useful life, the ruling that Veeck pointed to clearly allowed contracts to receive this treatment.[132] Further, because there was no mechanism in the tax code by which to value these intangibles, the Service had to rely on the owner's assessment of the collective contracts' value as part of the overall purchase price.[133] This created an incentive for franchise buyers to assign a large amount of the franchise purchase price to player contracts in order to take advantage of the depreciation allowance.[134]

121. *See Pittsburgh*, 27 B.T.A. at 1078 ("The contracts here involved were only for one year, with the option of renewal. If renewed, there is another contract."); Peterson, *supra* note 107, at 12.

122. Keeney, *supra* note 116.

123. *Id.*

124. Warren Corbett, *Bill Veeck*, SOC'Y FOR AMERICAN BASEBALL RES., https://sabr.org/bioproj/person/7b0b5f10 (last visited Oct. 19, 2019).

125. Veeck was known for his creative accounting practices (using debentures to fund his purchase of the Cleveland Indians), over-the-top promotional events (making on-the-field game decisions by having audience members hold up numbered placards, hiring 3'7" pinch hitter Eddie Gaedel for one game to make a single plate appearance with the St. Louis Browns, hiring the "Clown Prince of Baseball" Max Patkin as a coach), and forward-thinking approach to the ongoing racial divide in baseball (signing black center fielder Larry Doby, the second black player in Major League Baseball, to play for his Cleveland Indians; when, during pregame festivities, Doby was shunned by three of his teammates, Veeck immediately fired them). *See id.*

126. Keeney, *supra* note 116.

127. *A History of Tax Sheltering for Sports Team Ownership*, HEAT HOOPS (Nov. 24, 2014), http://heathoops.com/2014/11/a-history-of-tax-sheltering-for-sports-team-ownership/.

128. *Id.*

129. *Id.*

130. *Id.*

131. *See* Pittsburgh Athletic Co. v. Comm'r, 27 B.T.A. 1074, 1078 (1933), *aff'd* 72 F.2d 883 (1934); Peterson, *supra* note 107, at 13.

132. Peterson, *supra* note 107, at 13.

133. *A History of Tax Sheltering for Sports Team Ownership*, *supra* note 127.

134. Keeney, *supra* note 116.

Similarly, in 1965, the newly-created Atlanta Falcons NFL team found itself in court after trying to depreciate the contracts of the players it had acquired in a recent expansion draft using Veeck's method.[135] The Service, in asserting a deficiency, said the owners had assigned too much of the purchase price of the franchise to player contracts.[136] The Service also argued that the mass asset rule—a rule which essentially prevents the depreciation of intangibles with indeterminate life if they are inseparable from intangibles with a determinable life—should apply because it would be impossible to separate the cost of the franchise from the cost to acquire players.[137]

The court disagreed with the Service yet again.[138] It held that the mass asset rule did not apply because the contracts both had a separate value, easily discernible from the franchise, and a limited, useful life that could be reasonably ascertained.[139]

As a natural progression of Veeck's logic concerning the cost of player contracts and their allocation, future MLB commissioner Bud Selig purchased the Seattle Pilots baseball team in 1970.[140] Out of the $10.8 million purchase price, Selig allocated an eye-popping $10.2 million to player contracts, representing about 94% of the total purchase price.[141] Perhaps even more interesting, however, was that the contract obligations themselves totaled only $607,400.[142] Selig amortized the player contracts cost over their five-year useful lives, in accordance with Code § 167(a).[143] In 1979, the Service disallowed the allocation, arguing instead that the contracts were effectively worth nothing, and adjusted Selig's tax liability in line with that reasoning for 1967, 1968, and 1970 through 1976.[144]

In the ensuing case, the district court found in favor of Selig's allocation.[145] In its holding, the court found that Selig's valuation method was not inherently faulty.[146] Further, and perhaps more importantly, the court found that player contracts were the "primary assets" of the sports team at issue, and as such, allocating such a large percentage to player contracts was not unreasonable.[147] In effect, by allowing franchise owners the ability to depreciate player contracts years before,[148] the court was condemning the Service to reckon with its decision for the foreseeable future.

Before the Selig decision was handed down, but after the Service had begun butting heads with Bud Selig over his allocation, Congress had already set out to combat the natural consequence of the Service's framework. That framework gave

135. Laird v. United States, 556 F.2d 1224, 1226 (5th Cir. 1977).
136. *Id.* at 1227.
137. Laird v. United States, 556 F.2d 1224, 1232 (5th Cir. 1977).
138. *Id.* at 1233–35.
139. *Id.* at 1234–35.
140. Peterson, *supra* note 107, at 15.
141. *See id.*
142. *Id.*
143. Selig v. United States, 740 F.2d 572, 575 (7th Cir. 1984).
144. *Id.* After the Service issued deficiencies, Selig paid the deficiencies and subsequently applied for a refund, which was rejected. In light of Selig's allocation but before the eponymous case settled the question, Congress acted to prevent similar allocations in the future. *See* I.R.C. § 1056 (2014).
145. Selig v. United States, 565 F. Supp. 524, 542 (E.D. Wis. 1983).
146. *Id.* at 543.
147. Selig v. United States, 740 F.2d 572, 580 (7th Cir. 1984) (citing Laird v. U.S., 556 F.2d 1224, 1237 (5th Cir. 1977)).
148. Pittsburgh Athletic Co. v. Comm'r, 27 B.T.A. 1074, 1076 (1933), *aff'd* 72 F.2d 883 (1934).

franchise owners a fair amount of discretion to allocate the purchase price of a franchise themselves, and the unspoken incentive among savvy team owners to overstate their basis in player contracts for the tax-sheltering benefits.[149] In September 1976, President Gerald Ford signed into law the Tax Reform Act.[150] The law set the allocation percentage to player contracts at a 50% limit via a newly-created § 1056.[151] This provision, in conjunction with a prior regulation, created what became known as the "50/5" rule: upon the purchase of a sports franchise, a new owner may depreciate, at most, 50% of the purchase price of the team over five years.[152]

The 50/5 rule was seen by some team owners as unfair, because it limited depreciation of intangible assets in a way that only applied to sports teams, while purchasers in other industries were largely permitted to allocate the purchase price of their assets as they saw fit.[153] Nonetheless, many team owners took advantage of the Tax Reform Act of 1976's rebuttable presumption. They continually argued that the percentage of their team's purchase price should be greater than 50%.[154]

In 1993, the tax landscape shifted again. As part of the Omnibus Budget Reconciliation Act of 1993,[155] Congress enacted Code § 197, which mandated that all intangible assets acquired as part of a business could be amortized over a 15-year period.[156] However, in what surely seemed to team owners to be brazen cruelty, only one industry was exempted from this 15-year rule: the sports industry.[157]

From then on, sports owners began using creative logic to allocate more of their purchase price to intangible assets (in addition to the 50% for player contracts, which they normally exhausted).[158] For example, team owners began looking to other intangible assets in their franchises to amortize, including media rights, stadium lease agreements, season ticket holder lists, and the like.[159] The Service then dedicated significant resources towards combating this creative accounting, even going so far as to insist that teams use Service-provided guidance on government standards of valuation instead of the arbitrary valuation of the owners themselves.[160]

149. Keeney, *supra* note 116.

150. *See* Tax Reform Act of 1976, Pub. L. No. 94–455, 90 Stat. 1520 (1976).

151. *Id.* § 212 at 1545. ("PRESUMPTION AS TO AMOUNT ALLOCABLE TO PLAYER CONTRACTS. —In the case of any sale or exchange described in subsection (a), it shall be presumed that not more than 50 percent of the consideration is allocable to contracts for the services of athletes unless it is established to the satisfaction of the Secretary that a specified amount in excess of 50 percent is properly allocable to such contracts. Nothing in the preceding sentence shall give rise to a presumption that an allocation of less than 50 percent of the consideration to contracts for the services of athletes is a proper allocation."); Keeney, *supra* note 116.

152. Keeney, *supra* note 116.

153. *A History of Tax Sheltering for Sports Team Ownership*, *supra* note 127.

154. *See* Robert Holo & Jonathan Talansky, *Taxing the Business of Sports*, 9 FLA. TAX REV. 161, 190–91 (2008).

155. Omnibus Budget Reconciliation Act of 1993, Pub. L. No. 103–66, 107 Stat. 312 (1993).

156. *Id.* § 13261 at 107. ("GENERAL RULE.—A taxpayer shall be entitled to an amortization deduction with respect to any amortizable section 197 intangible. The amount of such deduction shall be determined by amortizing the adjusted basis (for purposes of determining gain) of such intangible ratably over the 15–year period beginning with the month in which such intangible was acquired.").

157. *Id.* at 535. ("(e) EXCEPTIONS.—For purposes of [section 197], the term 'section 197 intangible' shall not include any of the following: . . . A franchise to engage in professional football, basketball, baseball, or other professional sport, and any item acquired in connection with such a franchise.").

158. *A History of Tax Sheltering for Sports Team Ownership*, *supra* note 127.

159. *Id.*

160. *Id.*

After nearly a decade of disputes between sports teams and the Service caused by § 197, team owners were finally handed a victory when Congress passed the American Jobs Creation Act of 2004.[161] The Act repealed § 1056 and allowed sports teams to join the rest of the business world in amortizing their intangible assets over a 15-year period.[162]

In addition to the clear benefits for sports team owners, this repeal also provided instant benefits for the Service as well. By allowing nearly all intangible assets to be amortized over 15 years, the enforcement costs to the Service fell to nearly zero.[163] Further, the Service reasoned that extending the length of time required to take advantage of this full amortization would lead to less turnover between sports teams.[164] As had been the practice up until then, when a team had exhausted its amortization after five years, it became commonplace to sell the franchise to someone new, who could then amortize the assets for another five years.[165] As such, the Service concluded that this extension would "increase tax revenue by $382 million over [ten] years."[166] Though no studies have been done to show the accuracy of this assumption, team ownership among many sports now tends to exceed five years, lending credence to this theory.[167]

Thus, after nearly a century of tumultuous battles between the Service and sports teams, there seems to be universally accepted harmony in allowing owners to amortize player contracts over 15 years at most.[168] Indeed, this seems logical, as the average MLB player's career lasts 5.6 years,[169] and contracts rarely reach ten years in duration.[170] However, up to this point court discussion dealt mostly with player contracts acquired by means of purchasing a franchise. In today's game, a substantial number of player contracts are acquired by rookie contracts, free agent signings, player contract trades between teams, as well as a myriad of other methods.[171]

In the context of exchanges between businesses, tax consequences for teams that were a party to these player trades were, in theory, largely shaped by the value of the departing contract as it compares to the player contract they are receiv-

161. American Jobs Creation Act of 2004, Pub. L. No. 108–357, 118 Stat. 1418 (2004).

162. *Id.* § 886 at 1641. ("(a) IN GENERAL.—Section 197(e) (relating to exceptions to definition of section 197 intangible) is amended by striking [the section concerning the exclusion of professional sports franchises]… (b) CONFORMING AMENDMENTS.—(1)(A) Section 1056 (relating to basis limitation for player contracts transferred in connection with the sale of a franchise) is repealed.").

163. *A History of Tax Sheltering for Sports Team Ownership*, *supra* note 127.

164. *Id.*

165. *Id.*

166. *See* Joint Committee on Taxation, Estimated Budget Effects of the Conference Agreement for H.R. 4520, The "American Jobs Creation Act of 2004", Fiscal Years 2005–2014 (Oct. 7, 2004); *see also A History of Tax Sheltering for Sports Team Ownership*, *supra* note 127.

167. *A History of Tax Sheltering for Sports Team Ownership*, *supra* note 127.

168. Peterson, *supra* note 107.

169. William D. Witnauer, Richard G. Rogers, & Jarron M. Saint Onge, *Major League Baseball Career Length in the Twentieth Century*, 26-4 POPULATION RES. & POL'Y REV. 371 (2007) ("The career expectancy[] is 5.6 years for all players who reach the major leagues.").

170. Sarah Langs, *Longest Contracts in Baseball History*, MLB.COM (Mar. 20, 2019), https://www.mlb.com/news/longest-contracts-in-baseball-history ("Less than three weeks after Bryce Harper shook up the baseball world by signing a 13-year deal with the Phillies worth $330 million [in February 2019], the Angels agreed to a 12-year extension with Mike Trout. Trout's deal is the 13th contract of at least 10 years in MLB history, including extensions where at least 10 years were added to the existing deal.").

171. Drew Balen, *How Do MLB Clubs Acquire Players?*, CALL TO THE PEN (Feb. 26, 2012), https://calltothepen.com/2012/02/26/how-do-mlb-clubs-acquire-players/.

ing.[172] Further, because some teams may receive players that are more valuable than the players they gave up, the concept of taxable gain arises.[173]

The Service has historically viewed a player trade as an exchange of contracts, not people, and has allowed them to be treated as like-kind exchanges.[174] As a result, two trading teams were not required to recognize any gains or losses incurred (with the exception of boot).[175] Because the like-kind exchange provision eliminates what might otherwise be a significant recognized gain for tax purposes, little else stood in the way of professional sports teams trading player contracts. If an exchange resulted in a substantial gain to a given team, the team could just roll that gain over "into the cost basis value of the new property," deferring taxes into later years, which could theoretically go on indefinitely.[176] If the trade involved cash as well (as some trades do), the cash received would not be covered by the nonrecognition clause and would be taxed at the time of the exchange.[177] Another type of transaction, the trade for a player-to-be-named-later,[178] was allowed so long as the receiving team identified the player in question within a given time frame.[179]

Thus, before 2018, the development of taxation policy concerning the tax treatment of player contract trades led to a favorable environment for teams. From the ability to depreciate player contracts to the application of the like-kind exchange provisions, courts, Congress, and the Service fairly consistently treated such transactions quite favorably for tax purposes.[180] Accordingly, teams across

172. Ailsa Chang, *Tax Change Delivers a Blow to Professional Sports*, NPR (Mar. 21, 2018), https://www.npr.org/2018/03/21/595610804/professional-sports-leagues-go-head-to-head-with-new-tax-code.

173. *See id.*

174. Rev. Rul. 67–380, 1967–2 C.B. 291; Rev. Rul. 71–137, 1971–1 C.B. 137; *see* Erwin, *supra* note 10.

175. Rev. Rul. 67–380, 1967–2 C.B. 291; Rev. Rul. 71–137, 1971–1 C.B. 137. "Boot" is a concept which refers to, in a taxable transaction, the "value of [any] other property or money you received in the exchange." *See* SALES AND OTHER DISPOSITIONS OF ASSETS, *supra* note 70.

176. Harvey Bezozi, *Tax Reform's Impact on Professional Sports*, WEALTHMANAGEMENT.COM (Apr. 30, 2018), https://www.wealthmanagement.com/high-net-worth/tax-reform-s-impact-professional-sports.

177. Erwin, *supra* note 10.

178. When a team consents to a trade involving a player to be named later, they are agreeing to decide on the final player in the trade at a later date, usually after they have had time to evaluate a number of potential players. *See What Is a Player to Be Named Later*?, Slate (Aug. 3, 2000), https://slate.com/news-and-politics/2000/08/what-is-a-player-to-be-named-later.html. This peculiar arrangement can sometime lead to interesting results, such as in 1962, when the New York Mets traded catcher Harry Chiti to the Cleveland Indians for a player to be named later—which ended up being Harry Chiti himself. *See* Scott Ferkovich, *These Major Leaguers Were Traded for Themselves*, DETROIT ATHLETIC (Nov. 22, 2014), https://www.detroitathletic.com/blog/2014/11/22/major-leaguers-traded/.

179. I.R.C. § 1031(a)(3) (2019) ("(3) Requirement that property be identified and that exchange be completed not more than 180 days after transfer of exchanged property.--For purposes of this subsection, any property received by the taxpayer shall be treated as property which is not like-kind property if--(A) such property is not identified as property to be received in the exchange on or before the day which is *45 days after the date on which the taxpayer transfers the property* relinquished in the exchange, or (B) such property is received after the earlier of--
(i) *the day which is 180 days after the date on which the taxpayer transfers the property relinquished* in the exchange, or (ii) the due date (determined with regard to extension) for the transferor's return of the tax imposed by this chapter for the taxable year in which the transfer of the relinquished property occurs."); Erwin, *supra* note 10.

180. *See generally* Erwin, *supra* note 10.

all sports transacted with one another with abandon, a freedom that would soon become severely restricted by the enactment of the TCJA.[181]

III. THE TAX CUTS AND JOBS ACT OF 2017

On December 22, 2017, President Trump signed into law the Tax Cuts and Jobs Act,[182] which had been introduced in the House of Representatives less than two months prior. The law was quickly recognized by tax analysts as significantly beneficial to businesses in a variety of ways, not least being a reduction of the corporate tax rate.[183] According to Congress and the President, the purpose of this lowered corporate tax rate was to allow American businesses to be more competitive globally.[184] Some analysts estimated that the reduction of tax rates would provide more incentives for investment.[185] However, it is also estimated that these positive effects would be modest, and would only offset a portion of the loss of significant tax revenue expected to come from the law.[186] In turn, Congress made a number of other alterations to the Code in order to offset the revenue losses, including modifying the net-operating loss deduction,[187] limiting business interest deductions,[188] and modifying the like-kind exchange provision,[189] among many others.[190]

Congress amended § 1031 of the Code by disallowing exchanges of any personal property to qualify for like-kind treatment.[191] Nonrecognition treatment for like-kind exchanges now applies only to exchanges of real property to the exclu-

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181. *Id.*

182. Tax Cuts and Jobs Act of 2017, Pub. L. No. 11–97, 131 Stat. 2054 (2017).

183. *Tax Cuts and Jobs Act: Impact on Corporations*, GT REILLY & CO. (Mar. 29, 2018), https://www.gtreilly.com/newsletters/article/tax-cuts-and-jobs-act-impact-on-corporations.

184. James McBride, *How Will the Tax Overhaul Affect U.S. Competitiveness?,* COUNCIL ON FOREIGN REL., (Jan. 5, 2018), https://www.cfr.org/backgrounder/how-will-tax-overhaul-affect-us-competitiveness.

185. *How Might the Tax Cuts and Jobs Act Affect Economic Output?,* TAX POL'Y CTR, (2018), https://www.taxpolicycenter.org/briefing-book/how-might-tax-cuts-and-jobs-act-affect-economic-output ("In the longer run, the TCJA is likely to affect the economy primarily through increased incentives to work, save, and invest.").

186. *Id.*; McBride, *supra* note 184 ("The nonpartisan Congressional Budget Office projects that the tax code changes will add some $1.5 trillion to the federal deficit over the next ten years, not accounting for any macroeconomic effects the legislation could have over that period.").

187. INTERNAL REVENUE SERVICE, U.S. DEP'T OF THE TREASURY, PUB. NO. 5318, TAX REFORM: WHAT'S NEW FOR YOUR BUSINESS 6 (Nov. 2018), https://www.irs.gov/pub/irs-pdf/p5318.pdf [hereinafter TAX REFORM] ("TCJA limits the NOL deduction to 80 percent of taxable income for the year rather than allowing the loss to offset 100 percent of the deduction of 100 percent of the taxable income. Also, most businesses can no longer carry back their NOLs to the prior two tax years as was allowed under prior law. Now, a business may carry forward an NOL indefinitely, rather than expiring after 20 years as was the case under prior law.").

188. *Id.* at 6–7 ("The business interest deduction limit for the taxable year is the sum of: []Business interest income, []30 percent of the adjusted taxable income, and []Floor plan financing interest expense, if applicable. The amount of any business interest expense that is not allowed as a deduction for the taxable year is carried forward to the following year as a disallowed business interest expense carryforward.").

189. *Id.* at 7 ("[The] TCJA now limits like-kind exchange treatment only to certain exchanges of real property and not to exchanges of personal or intangible property.").

190. *See generally Tax Cuts and Jobs Act: A Comparison for Businesses,* IRS (Mar. 8, 2019), https://www.irs.gov/newsroom/tax-cuts-and-jobs-act-a-comparison-for-businesses; *see also* TAX REFORM, *supra* note 187.

191. I.R.C. § 1031 (2019); TAX REFORM, *supra* note 187, at 7.

sion of all other types of property, including sports player contracts.[192] According to the Joint Committee on Taxation, this change alone was projected to raise at least $31 billion.[193]

In all, the TCJA represented some of the most sweeping changes to the Code in decades.[194] As is the case for a number of other businesses whose operations were upset by some ambiguities in the law,[195] it is unclear whether Congress intended to so drastically affect the trading of player contracts between professional baseball teams.[196] In fact, considering Major League Baseball's often favorable treatment by the legislative and judicial system,[197] it is hard to imagine such a major effect on the sport was foreseen at all.[198] However, § 1031 itself has often been part of tax reform proposals over the past decade.[199]

In February of 2014, the Chairman of the House Ways and Means Committee, Rep. David Camp, issued a draft of his "Tax Reform Act of 2014."[200] The document, which spanned nearly a thousand pages, included a repeal of § 1031.[201] Around two weeks later, President Obama released his budget proposals for 2015, in which most of the provisions matched Camp's suggestions.[202] However, while Camp aimed to eliminate § 1031 altogether, President Obama proposed a like-kind deferral limit of $1 million per taxpayer annually, indexed for inflation.[203] His proposal also differed in that the limit was meant to apply only to like-kind exchanges of real property, ostensibly leaving personal property exchanges untouched for the time being.[204]

While neither bill had much success in making it through a heavily-gridlocked Congress, the subject of altering § 1031 was again raised in 2016, in

192. Erwin, *supra* note 10.

193. *See* JOINT COMMITTEE ON TAXATION, ESTIMATED BUDGET EFFECTS OF THE CONFERENCE AGREEMENT FOR H.R. 1, THE "TAX CUTS AND JOBS ACT", FISCAL YEARS 2018–2027 (Dec. 18, 2017).

194. *2018 Tax Cuts and Jobs Act Overview*, SMITH & HOWARD (Mar. 2018), https://www.smith-howard.com/2018-tax-cuts-jobs-act-overview/.

195. Both the restaurant industry and the agricultural industry have been negatively affected by the TCJA. *See* Jim Tankersley & Alan Rappeport, *G.O.P. Rushed to Pass Tax Overhaul. Now It May Need to Be Altered.*, THE N.Y. TIMES (Mar. 11, 2018), https://www.nytimes.com/2018/03/11/us/politics/tax-cut-law-problems.html.

196. *See* Tankersley, *supra* note 14.

197. In 1922, the Supreme Court ruled that the Sherman Antitrust Act did not apply to Major League Baseball. *See* Fed. Baseball Club of Baltimore v. Nat'l League of Prof'l Baseball Clubs, 259 U.S. 200 (1922). In 1913, a Missouri court found that a baseball team could not be held liable for injuries sustained by spectators struck by foul balls, so long as the teams offered at least a modicum of protected seating. *See* Crane v. Kansas City Baseball & Exhibition Co., 153 S.W. 1076 (Mo. Ct. App. 1913). In 2018, Congress signed a $1.3 trillion spending bill that included a provision that stripped minor league baseball players of minimum wage law protection. Consolidated Appropriations Act, 2018, Pub. L. No. 115–141, § 201 (Save America's Pastime Act), 132 Stat. 348 (2018).

198. Tankersley, *supra* note 14 ("I don't think that they thought about baseball when they thought about this change . . . It raises all kinds of issues, which I think were easier to ignore, probably, when we had a simple rule that it was a like-kind exchange," said Kari Smoker, accounting professor and occasional consultant for NBA and NHL).

199. *See* Garvey Schubert Barer et al., *Decoding the Tax Cuts and Jobs Act – Part II: IRC § 1031 and Tax Deferred Exchanges Take a Haircut*, JD SUPRA (Jan. 11, 2018), https://www.jdsupra.com/legalnews/decoding-the-tax-cuts-and-jobs-act-part-79351/.

200. Tax Reform Act of 2014, H.R. 1, 113th Cong. (2014).

201. *Id.* § 3133.

202. OFFICE OF MGMT. & BUDGET, EXEC. OFFICE OF THE PRESIDENT, BUDGET OF THE UNITED STATES GOVERNMENT, FISCAL YEAR 2015 (2015).

203. *See* Barer et al., *supra* note 199.

204. *Id.*

President Obama's budget proposal for 2017.[205] This time, the president's suggestion was similar to his last—a $1 million limitation on deferrals of gain realized via like-kind exchanges—albeit with one significant difference: this time, the limitation would apply to both real *and* personal property.[206] Even more, the proposal sought to exclude certain kinds of personal property from that definition, including some collectibles and art.[207] The Treasury estimated that tax revenues would have been increased by more than $47 billion over ten years had the bill been accepted.[208]

The TCJA took an opposite view of President Obama's first proposal concerning like-kind exchanges, namely in its limitation to real property only.[209] According to the legislative history of the House proposal, the change was intended to continue the eligibility for real property that would otherwise already be eligible for tax deferral.[210] After the Senate largely adopted the bill's language on like-kind exchanges without modification, President Trump signed the bill into law.[211]

Some analysts suggested the change would create "traps for the unwary" arising from the TCJA's temporary expensing provisions, timing issues, and exchanged personal property which will likely be considered "boot."[212] On the other hand, some opined that the TCJA's change to § 1031 simplified the provision overall, as it rendered obsolete certain regulations and guidance that helped determine how property of disparate product and asset classes would be treated.[213] Further, it was argued that two additional changes to the Code actually would result in *more favorable* treatment of dispositions of personal property, even those not of like-kind.[214] First, the TCJA modified § 168(k) "to allow businesses to immediately deduct 100% of" certain qualified property, rather than the 50% that was previously allowed, through what is known as "bonus depreciation."[215] The rule applies to both new and used property (another distinction from the previous bonus depreciation requirement, which only applied to new property), and is available through December 31, 2022.[216] Second, the TCJA increased the maximum amount a taxpayer can immediately deduct under § 179 from $520,000 to $1 million.[217] This deduction is phased out if the amount of eligible property exceeds a certain amount (currently $2.5 million, an increase from $2.07 million).[218] Despite these small provisions, which seem to help make up the difference for the § 1031 change, there are still certain instances where personal property exchanges

205. OFFICE OF MGMT. & BUDGET, EXEC. OFFICE OF THE PRESIDENT, BUDGET OF THE UNITED STATES GOVERNMENT, FISCAL YEAR 2017 151 (2016).
206. *Id.* at 179.
207. *Id.*
208. Barer et al., *supra* note 199.
209. *Id.*
210. H.R. REP. NO. 115–466, pt. 1, at 396, n. 726 (2017) (Conf. Rep.).
211. Barer et al., *supra* note 199.
212. *Id.*
213. *Id.*; Treas. Reg. § 1.1031(a)–2 (2005); Rev. Proc. 87–56, 198–2 C.B. 674; I.R.S. Chief Counsel Advice 200911006 (Mar. 13, 2009).
214. Christopher Rogers, *Repeal of the Personal Property Like-kind Exchange (... or, the Swap of §1031 for Increased Bonus Depreciation and Expensing)*, JD SUPRA (Aug. 3, 2018), https://www.jdsupra.com/legalnews/repeal-of-the-personal-property-like-14430/.
215. I.R.C. § 168(k) (2019); Rogers, *supra* note 214.
216. Rogers, *supra* note 214.
217. I.R.C. § 179(b)(1) (2019); Rogers, *supra* note 214.
218. I.R.C. § 179(b)(2).

do not qualify for bonus depreciation or § 179 expensing.[219] Unfortunately, like-kind exchanges and the resulting intangibles are among the types that do not qualify.[220]

IV. THE FUTURE OF PLAYER CONTRACTS IN THE SHADOW OF THE TCJA

In general, when an MLB team signs a player to a new contract (distinct from a transaction where the team exchanges a contract with another team for a different player or players), the salary is expensed by the team, while any signing bonuses are capitalized and then depreciated if the contract term exceeds one year.[221] In this way, the cost of the player's contract is depreciated over the life of the contract itself, not the average amount of time that the player himself will be in service for that team.[222] Additionally, the signing bonus is eligible for bonus depreciation, which accelerates the write-off of certain depreciable assets.[223]

Because of the TCJA's decision to disallow like-kind exchanges of personal property, teams engaging in player trades will ostensibly be subject to immediate taxation in an amount equal to the difference between the fair market value of the player contract received and the adjusted basis of the player contract given up. Most, if not all the gain, will be ordinary gain because of the recapture provisions, which were not changed as a result of the TCJA.[224] This change in the tax law can have a major impact on baseball trades in the future. Using rough numbers, it is estimated that the average baseball team has approximately $23.7 million of deferred tax liability.[225] This amount equals nearly 61% of a team's operating revenue for a single year.[226] While some teams may assume they are freed from this liability by virtue of the statute of limitations on federal income tax filings, it is possible that the TCJA will cause the statute of limitations here to stretch from the trade date (or, rather, the like-kind exchange) to whenever that player retires or is traded to another team.[227] However, the change made in the TCJA, which increased the bonus depreciation allowance from 50% to 100%, could reduce the sting of this tax liability somewhat by allowing teams to deduct in full the costs of signing new players.[228]

A. The Valuation Issue

The largest issue with the TCJA's effect on the player contract market is not necessarily the potential for tax liability. Rather, the single most pressing issue is

219. Rogers, *supra* note 214.
220. *Id.*
221. I.R.S. Chief Couns. Mem. 20133901F (Sept. 27, 2013); *see also* Valrie Chambers et al., *'There's No Crying in Baseball' or the Taxation Thereof*, TAX NOTES 345 (July 16, 2018), https://www.taxnotes.com/tax-notes-federal/deferral-taxes/theres-no-crying-baseball-or-taxation-thereof/2018/07/16/285fy.
222. Chambers et al., *supra* note 221, at 346.
223. *Id.*
224. *Id.* at 249.
225. *Id.* at 350.
226. *Id.*
227. *Id.* at 351.
228. *Id.* at 346–47.

how to value player contracts to ensure compliance with the TCJA.[229] For example, in the trade involving Justin Verlander, the Houston Astros took on an obligation to pay him according to the terms of his contract with Detroit, which was approximately $28 million.[230] In exchange, Detroit received four minor league players, each making minor league salaries (a negligible sum compared to those of major leaguers).[231] The difference in salary obligations for each team may prove a useful means of determining the value of a player for purposes of calculating gain upon a trade. However, this is hardly the only solution. Some argue that baseball statistics could play a large role in valuing players for financial reasons, despite their initial use in assisting on-field management.[232] For example, the statistic Wins Above Replacement ("WAR") is often touted as a useful comprehensive statistic for valuing players.[233] WAR's meaning is somewhat intuitive from its context: by taking into account a large number of a player's statistics, the value aims to represent just how valuable he is compared to his replacement.[234]

Teams often use WAR to explain how many extra wins they might accrue over the course of a season with a given player on their roster.[235] Moreover, teams will use a player's WAR in conjunction with other factors, such as ticket revenue or merchandise sales, in order to assign him a dollar value.[236] For example, the Astros were estimated to have two extra wins as a result of their acquisition of Verlander (for a post-acquisition WAR of 2.0), which they calculated as being worth approximately $20 million to their team.[237] This was merely the team's own assessment; others suggested that Verlander's impact to the Astros was $10 million more than the players they gave up in the exchange.[238] However, because the TCJA had not yet been passed and the like-kind exchange provision still applied, the Astros experienced no taxable gain on the transaction; Verlander stayed with the team, allowing them to defer recognizing any gain until he is traded. Some even believe that contract value can be determined by calculating a player's esti-

229. Tankersley, *supra* note 14.
230. Mike Axisa, *Tigers Trade Justin Verlander to Astros and Fully Commit to Rebuild*, CBS SPORTS (Sept. 1, 2017), https://www.cbssports.com/mlb/news/tigers-reportedly-trade-justin-verlander-to-astros-and-fully-commit-to-rebuild/.
231. Chambers et al., *supra* note 221, at 351.
232. Tankersley, *supra* note 14.
233. Steve Slowinski, *What is WAR?,* FANGRAPHS (Feb. 15, 2010), https://library.fangraphs.com/misc/war/ ("Wins Above Replacement (WAR) is an attempt by the sabermetric baseball community to summarize a player's total contributions to their team in one statistic… WAR offers an estimate to answer the question, 'If this player got injured and their team had to replace them with a freely available minor leaguer or a AAAA player from their bench, how much value would the team be losing?'").
234. Typically, this is a readily available minor league player in that team's farm system. *Id.*
235. *Id.*
236. SAMUEL KAUFMAN & MATTHEW TENNENHOUSE, DETERMINING THE VALUE OF A BASEBALL PLAYER 8 (2012) ("Though our [performance-based statistical] results could technically be used as the only source for determining a player's value to his team, it only takes into account his performance on the ball field and as a result leaves out a number of factors that greatly affect his overall value. These factors may include revenue sources such effects to ticket and jersey sales, leadership skills on and off of the field, and even how much potential he has for improvement.").
237. Tankersley, *supra* note 14.
238. Chang, *supra* note 172.

mated future value to the team and subtracting the value of the players a team gives up in the exchange.[239]

Despite all the valuation methods discussed, creating a mutually advantageous strategy for valuing player contracts remains a difficult task.[240] The greatest obstacle stems from the fact that there are only 30 teams in Major League Baseball, meaning the market is very small and the teams themselves have different needs. For example, a shortstop may be worth more to the St. Louis Cardinals than the Cincinnati Reds.[241] Indeed, this is common in player contract trades, and the logic is easy to follow: a specific team finding that it has a surplus of talent at a given position will look for another team with a talent deficit at that same position and offer a trade, hoping that the other team will value that player more than they do. Again, because the contracts have been depreciated or amortized, in most instances there will be gain to both teams because basis is reduced by depreciation and might even be at zero.[242]

This valuation difficulty expands further when considering the other methods by which a team acquires future players, such as through the MLB Draft. In certain situations, a team may trade draft picks to other teams.[243] Because there is a clear correlation between the talent levels of players drafted at higher positions, earlier draft picks would naturally have a higher value than lower ones.[244] This would mean that teams trading those higher picks would likely recognize some gain.

Though Major League Baseball requested guidance from the IRS on valuing player contracts, some experts suggested that the Service has more pressing issues.[245] Some predicted that the Service would view this the same as any other valuation issue, but because MLB saw the most player contract trades out of the four highest-profile sports leagues in the United States in 2017,[246] many suggested that the issue could prove to be more significant than analysts think.

B. Revenue Procedure 2019-18

In April 2019, MLB got what it asked for: the IRS released official guidance on how to navigate the TCJA's alterations to the like-kind exchange provision.[247]

239. Paul Jacobs, *A Legislative Error to Open Baseball Season*, PALISADES HUDSON FINANCIAL GROUP (Mar. 29, 2018) https://www.palisadeshudson.com/2018/03/a-legislative-error-to-open-baseball-season/.

240. *See* Allyson Versprille, *Sports Team Trades: An Unexpected Casualty of the New Tax Law*, BLOOMBERG (Mar. 12, 2018) https://www.bloomberglaw.com/document/P5HCYO3H65TS.

241. Tankersley, *supra* note 14.

242. *See generally id.*

243. *See generally Competitive Balance Draft Picks*, MLB (2019), m.mlb.com/glossary/transactions/competitive-balance-draft-picks ("The 10 lowest-revenue clubs and the clubs from the 10 smallest markets are eligible to receive a Competitive Balance pick (fewer than 20 clubs are in the mix each year, as some clubs qualify under both criteria)… Unlike other Draft picks, Competitive Balance Draft picks can be traded.").

244. *See generally* Mike Rosenbaum, *Examining the Percentage of MLB Draft Picks Who Reach the Major Leagues*, BLEACHERREPORT (June 12, 2012), https://bleacherreport.com/articles/1219356-examining-the-percentage-of-mlb-draft-picks-that-reach-the-major-leagues#slide4.

245. David van den Berg, *IRS Could Balk at Guidance for Valuing Pro Sports Trades*, TAXNOTES (May 1, 2018), https://www.taxnotes.com/tax-notes/tax-policy/irs-could-balk-guidance-valuing-pro-sports-trades/2018/05/07/280qv.

246. *Id.*

247. Rev. Proc. 2019–18, 201–18 I.R.B. 1077.

In its analysis, the IRS acknowledged that correctly valuing baseball contracts is an attempt to hit a moving target.[248] More specifically, the IRS noted that a number of factors contribute to that value fluctuating, such as player performance, team needs, player's effect on ticket sales, and contract length.[249] The IRS also pointed out the fact that a particular team's valuation of the future value of a traded player is inherently subjective and varies from team to team due to differing needs.[250] Ultimately, the Service came to the natural conclusion that all of these reasons make it particularly difficult to assign an objective value to player contracts. [251] To remedy this difficulty and avoid "highly subjective, complex, lengthy, and expensive disputes" between the IRS and sports teams over these issues, a safe harbor provision was introduced that allowed the teams to value traded contracts as zero for gain and loss purposes under certain conditions.[252]

In order for a team to use the safe harbor in a given trade, both teams must use it;[253] they must also annotate the trade on their tax return in conformity with the guidance, but only if the team is subject to federal income tax in the U.S.[254] Further, the exchange must consist of only contracts, draft picks, or cash, and may not include § 197 intangibles.[255] If the transaction involves no cash, then neither "party recognizes gain or loss on the trade," and the basis in the contract received has a zero basis;[256] if cash is part of the deal, however, the team sending the cash has a basis in the contract equal to the amount of the cash.[257] This safe harbor also does not apply to team-for-team trades—only to trades of contracts or draft picks.[258]

The release of Revenue Procedure 2019-18 effectively turned back the clock and allowed sports teams to continue trading while experiencing the same consequences as before the enactment of the TCJA.[259] Though a number of other tax rules regarding sales and exchanges still apply,[260] the IRS's willingness to play ball seems to have largely averted the crisis. However, time will tell whether the IRS guidance will be enough to provide a long-term solution to the issue, especially due to the constantly changing nature of the Code. Indeed, the guidance does only apply to a portion of potential trade scenarios for teams (though it does ad-

248. *Id.* at 3–5.
249. *Id.* at 3.
250. *Id.* at 4 ("The subjective needs of each team will differ for particular players at different points in time throughout a league's season and is highly dependent on the particular needs of each team.").
251. *See id.* at 5.
252. *Id.*
253. *Safe harbor for professional sports team, valuation of certain player contracts*, KPMG (Apr. 11, 2019), https://home.kpmg/us/en/home/insights/2019/04/tnf-rev-proc-2019-18-safe-harbor-for-professional-sports-team-valuation-of-certain-player-contracts.html.
254. Sally P. Schreiber, *Safe harbor issued for valuing pro sports trades*, J. OF ACCT. (Apr. 11, 2019), https://www.journalofaccountancy.com/news/2019/apr/irs-safe-harbor-for-player-contract-exchanges-201921021.html.
255. *Id.*
256. *Id.*
257. *Id.*
258. *Id.*
259. Alan Parnes et al., *Players, Staff and Draft Picks May be Traded Tax-Free Under New Safe Harbor*, NAT'L L. REV. (Apr. 26, 2019), https://www.natlawreview.com/article/players-staff-and-draft-picks-may-be-traded-tax-free-under-new-safe-harbor.
260. Sections 1231 and 1245(a)(1) of the Code, for example, are still applicable. *Id.*

dress a majority of them).[261] Although, it is curious that the Department of the Treasury was the party that acted to address this issue.

Though Treasury certainly had the authority to act, action on the part of Congress would have been a more resounding solution to the issue. This also would not have been out of character, given the broad support given to professional sports teams (most of all baseball) by Congress in the past, as well as—in the eyes of some—"a solid legal basis for treating such trades as nontaxable" events.[262]

V. THE ROAD FORWARD: A MODEST PROPOSAL FOR RESOLVING PLAYER CONTRACT TRADE ISSUES

In addition to the recent guidance, another possible solution to the issue is a new Code provision that maintains the taxability of player contract trades while affording teams significant authority to establish acceptable parameters for how to value player contracts. This system would likely hinge on all 30 teams coming to a mutually agreed-upon system for valuing players. However, because of issues with valuation,[263] such a system is well beyond the scope of this article. If this solution is also chosen, it might be in the best interests of the Service to provide guidance to the teams as well.[264]

A much more reasonable alternative would be for Congress to create a "carve out" in the Code which would specifically include professional sports player contracts in the category of properties which should receive like-kind treatment. Some sample language is provided:

> **26 U.S. Code § 1031. Exchange of real property held for productive use or investment**
>
> **(a) NONRECOGNITION OF GAIN OR LOSS FROM EXCHANGES SOLELY IN KIND**
>
> **(1) In general.** No gain or loss shall be recognized on the exchange of real property held for productive use in a trade or business or for investment if such real property is exchanged solely for real property of like kind which is to be held either for productive use in a trade or business or for investment.
>
> …
>
> ***(4) Exception for Sports Player Contracts.*** *For purposes of this section, "real property" shall include sports player contracts.*

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261. *See* Kari Smoker et. al., *Pandora's Box Enters the Batter's Box: How the Tax Cuts and Jobs Act's Unintended Consequence Places MLB, and All North American Leagues, in Tax Chaos*, 26 JEFFREY S. MOORAD SPORTS L.J. 291, 321–22 (2019).
262. Richard M. Lipton et al., *Taxation of Player Contract Trades—The IRS Reaches the Correct Result*, 131 J. TAX'N 05, 9 (2019).
263. *See supra* p. 25.
264. After Revenue Ruling 67-380 was obtained in 1967, it came under immediate scrutiny which continues today. *See* van den Berg, *supra* note 245.

Applying such a provision to the Code would avert a substantial hardship to professional sports teams while allowing the Service to realize a significant addition to revenue, which likely was the goal of the amendment in the first place. Additionally, affording player contracts the treatment that they would receive in this example would likely shield these events from similar hiccups that may arise in future amendments to the Code. This is all the more appealing given the relatively negligible amount of revenue that might be lost through this exemption,[265] compared to the potentially detrimental effect the law might otherwise have on professional sports teams.

VI. Conclusion

Despite an extremely polarized political climate, the TCJA has found a significant number of supporters due to its favorable treatment of corporations. However, inherent in this favorable treatment is the necessity for Congress to take base-broadening measures to make up for lost tax revenue. As such, it seems unlikely that the TCJA would be repealed to any significant degree, relevant to this subject. But the game of baseball has been considered America's pastime since its inception in the 19th century. Since that time, the focus of the game has spread from the athletic feats on the field to the personnel decisions made in the front office. The trading of players is an intrinsic feature of the sport, and factors as much into a team's success as their actual performance on the diamond. If the TCJA is to be applied literally to professional sports teams, especially without proper guidance, there is a chance that baseball could change for the worse. In order to preserve the balance between all facets of the game, Congress should address how a seemingly insignificant oversight has created an untenable scenario on the baseball diamond, and proactively reverse its course by implementing an exception to the Code which would allow professional sports teams to freely participate in player trades without recognizing gain. To do otherwise would be to sacrifice too much in order to gain too little. Given the prominence of baseball on American culture, this is a sacrifice that should be avoided at all costs.

265. *See supra* p. 31–32.