The Netherlands:

# Tax planning for incoming individual sportspersons and entertainers

by Dr. Dick Molenaar[1]

## Introduction

This article deals with the income tax treatment of incoming individual sportspersons and entertainers in The Netherlands. It discusses the employment status, residence, worldwide and limited taxation and the elimination of double taxation for foreign source income.

In *GSLTR* 2013/1, a comparable article was published about incoming team sports players in The Netherlands.

## Definition

The definition of individual sportspersons and entertainers for this article is: they are not and will not be a member of a team, ensemble, orchestra or other group, but they are performing individually.

They can visit The Netherlands for a short period of time, such as one day, a week or a month, but can also be in the country more often and rent (or even buy) a house or apartment there.

They can be supported by a group, including a manager, agent, crew, assistants, technicians and other supporting staff, but these persons will not be performing and, therefore, not be considered sportspersons or entertainers. It may also be that they are performing as a soloist, with e.g. an orchestra.

Examples of individual sportspersons are tennis, squash, snooker, pool, billiard, golf, chess, poker and darts players, athletes, wrestlers, gamers, horse riders and race drivers. Examples of individual entertainers are singers, musicians, conductors, soloists, actors, comedians, circus and variety acts, dj's, vj's, mc's and authors reading from their work.

Caddies, coaches, speakers at conferences, film and theatre directors, models and behind-the-scenes personnel are not considered to be sportspersons or entertainers.

## Employment status

For taxation in The Netherlands, the employment status is very relevant. The distinction between an employee and self-employed person is specified in the Dutch Civil Code[2] and is mainly based on the obligation to follow ongoing instructions regarding the work, which employers can give to employees. Basically, a self-employed will be responsible for his own work and his contract with his principal will not go further than a definition of the expected service to be rendered, place and time of the performance, and the financial conditions. Also organizational instructions or exclusivity to protect the principal's rights will normally not lead to employment status. When ongoing instructions deal with how and what work needs to be done and are obligatory, the salary falls under the employment rules.

But incoming individual sportspersons and entertainers will just rarely be employees (different from team sportspersons, as discussed in GSLTR 2013/1) and in almost every case be self-employed. Therefore, mainly the tax implications for self-employed will be discussed in this article.

## Taxation of resident individual sportspersons and artists

Self-employed in The Netherlands have special deductions, allowances and exemptions, such as:

- deductions for business expenses;
- investment allowances;
- self-employment deduction of € 7,280 per year, if more than 1225 hours per year are spent on the self-employed activities;
- self-employment allowance of 14% of the profit minus the self-employment deduction.

The rules for employees are not so broad and are mentioned in the article in GSLTR 2013/1.

| taxable income | income general tax | social security | total tax |
|---|---|---|---|
| 0 – 19,822 | 8.35% | 28.15% | 36.5% |
| 19,823 – 33,589 | 13.85% | 28.15% | 42% |
| 33,590 – 57,585 | 42% | – | 42% |
| 57,585 – | 52% | – | 52% |
| personal allowances: | | | |
| – general | 1,342 – 2,203 | | |
| – extra for workers | 1,366 – 2,103 | | |

*Figure 1*

[1] Dr. Dick Molenaar is a partner with All Arts Tax Advisers and researcher with the Erasmus University, Rotterdam, the Netherlands.

[2] Art. 7:610 *Burgerlijk Wetboek (BW)* for *arbeidsovereenkomst* (employee) and art. 7:400 *BW* for *opdrachtovereenkomst* (self-employed).

They cannot deduct their business expenses, but can receive reimbursement of expenses from their employers, and they do not have the investment allowance and self-employed allowance and deduction. When compared, self-employed pay less tax in The Netherlands than do employees.

When the taxable income after theses deductions and allowances has been calculated, the tax rates and personal allowances are as follows in 2015 (in euros). (*See figure 1*)

## International taxation of sportspersons and entertainers

### *Residence*

In cross-border situations, first to be studied is the residence status of the individual sportsperson or entertainer. When visiting for one or a few performances, it will not be likely that he is moving his residence to the country of the performance. He will return to his residence country after the visit and will travel again to foreign performances from there.

Art. 4 of the OECD Model provides a special provision to determine the residence status of a person, but this is only necessary when that person has houses at his disposal in two (or more) countries. If not and the person does not have a house or habitual abode in the country of the performance, he will not be resident there.

But when there are two homes in two countries, including the performance country, the tiebreaker rule of art. 4 OECD Model applies with criteria as "*centre of vital interest*", "*permanent home*" and "*nationality*" in that order as deciding factors. When no decision can be made, the competent authorities will settle the question by mutual agreement. Most bilateral tax treaties have taken over this residence provision.

### *National tax rules for non-resident sportspersons and entertainers*

Almost every country has a withholding tax on payments to non-resident sportspersons and entertainers, also for individuals. This withholding tax can be a simple scheme with one fixed rate or can be a progressive scheme with progressive rates. Nowadays, most countries allow the deduction of expenses at the date of the event and normal tax returns after the taxable year. In Europe, this became obligatory after the decisions in the Gerritse[3] and the Scorpio[4] cases of the European Court of Justice.

### *Art. 17 in tax treaties, both for employees and self-employed*

In most tax treaties, this taxing right for the country of work has been acknowledged.

Countries normally follow the recommendation of the OECD and take over art. 17 for sportspersons and entertainers when concluding their bilateral tax treaties. With art. 17, the taxing right for the performance country becomes very broad and catches all payments to the non-resident sports players and entertainers, either directly[5] and or to others[6]. The text of art. 17 makes clear that it does not make a distinction between employees and self-employed, because the article sets aside the normal allocation rules for employees (art. 15 of the OECD Model) and self-employed (art. 7 of the OECD Model[7]).

Many countries have also concluded an exception to art. 17 in their tax treaties for performances in the other country, which are wholly or mainly supported from public funds.[8] Unfortunately, individual sportspersons and entertainers most often do not qualify for this condition and, therefore, cannot return to the normal taxing rules of art. 7 or art. 15. With the 2014 Update of the OECD Model, the new Commentary gives new options to restrict the scope of art. 17[9], but this has not been followed by changes in bilateral tax treaties yet.

### *Elimination of double taxation: exemption versus credit*

Opposite of the taxing right for the country of performance, the country of residence will include the foreign source income in the worldwide income, which means that it will be taxed again in the residence country. To eliminate double taxation, tax treaties have inserted a provision comparable to art. 23 of the OECD Model Treaty, granting the sportspersons and entertainers a tax exemption for the foreign income or a tax credit for the foreign tax. Since 1992, the OECD recommends the ordinary credit method for income falling under art. 17[10], but many countries from the European continent, which are generally using the exemption method for active income, still have this exemption method for art. 17 income, especially in older, pre-1992 tax treaties.

The exemption method gives a relief from the national income tax equal to the percentage of the foreign performance income from the worldwide income, regardless of whether or how much has been paid in the performance country. This can lead to over or under taxation.

With the tax credit method, the foreign tax can be offset against the national income tax, which means that under taxation is not possible. On the other hand, the residence country will not give more foreign tax credit than an equivalent part of the national income tax. This maximum credit is the same as the outcome of the exemption method.

Both methods can easily lead to excessive taxation when expenses have not or not completely been deducted in the performance income and, therefore, the taxable income in the residence country is much lower. In addition, the tax credit method

---

3 *Arnoud Gerritse vs. Finanzamt Neukülln-Nord*, ECJ 12 June 2003, C-234/01.

4 *FKP Scorpio Konzertproduktionen GmbH vs. Finanzamt Hamburg-Eimsbüttel*, ECJ 3 October 2006, C-290/04.

5 Art. 17(1) OECD Model.

6 Art. 17(2) OECD Model.

7 In older tax treaties, art. 14 is still mentioned for self-employed work, but the OECD has removed this article in 2000 from its Model Tax Treaty and included self-employed work in art. 7 (Business Profits).

8 As research shows, this art. 17(3) has been included in two-thirds of the bilateral tax treaties, with some countries using the exception in almost every bilateral tax treaty. Sometimes, other conditions are set for the exception, such as non-profit status and cultural exchange or agreement. See Dick Molenaar and Harald Grams, "Article 17(3) for Artistes and Sportsmen: Much More than an Exception", in: *40 Intertax 4* (2012), p. 270.

9 For an overview of these new options and an alternative text for art. 17 with all options included, see Dick Molenaar, "New options to restrict art. 17 of the OECD Model Tax Convention for international sportspersons", in: *GSLTR* 2015/1. One of the options that can help smaller individual sportspersons and entertainers is a minimum amount of € 15,000 per person per year, under which an exemption in the performance country applies. This *de minimis*-rule already exists in most of the US tax treaties, where the 2006 US Model Tax Convention specifies a US$ 20,000 minimum per person per year.

10 See para. 12 of the *Commentary on Article 17 OECD Model*.

can lead to double taxation when no foreign tax certificate is available, which happens very often. This obstacle does not exist with the exemption method, which applies regardless of the provided information.[11]

## Non-resident individual sportspersons and entertainers in The Netherlands

### *Residence*

As mentioned in the previous paragraphs, it is not very likely for a foreign individual sportsperson or entertainer to have his residence in The Netherlands when visiting the country for a short visit. The Dutch domestic residence rules are that someone's residence is based on the facts and circumstances of that person.[12] Without a home there will be no residence in The Netherlands. When there is a home, according to the Dutch domestic rules, there may be residence, but then the tax treaty with the country in which the sportsperson or entertainer has his main home, needs to determine according to the tiebreaker rule in which country he has his fiscal residence. He will then be non-resident in the other country.[13] But this will just rarely happen, so for this article the presumption is that the incoming individual sportspersons or entertainers are non-residents in The Netherlands.

### *Tax rules for non-residents in The Netherlands*

Whereas residents are taxed on their worldwide income, non-residents are only taxed on some Dutch source income, such as profit from a Dutch-based company, salary from Dutch employment and income from Dutch real estate. Also non-resident sportspersons and entertainers are taxable in The Netherlands[14] and the withholding tax is specified as a 20% levy from gross with the right to deduct expenses.[15] The promoter of the performance is the withholding agent and responsible for the payment of the tax to the *Belastingdienst* (tax authorities).[16] The withholding obligation can be transferred to another person designated by the *Belastingdienst* with an *inhoudingsplichtigeverklaring* (withholding agent approval). This other person needs to be tax resident in The Netherlands and takes over the withholding obligation from the promoter of the performance.[17]

But most important is that non-resident sportspersons and entertainers are exempted from Dutch withholding tax, when they are resident of a country with which The Netherlands has concluded a bilateral tax treaty[18]. This is a unilateral exemption, because the tax treaty in almost every case gives The Netherlands the right to tax the income of the non-resident sportspersons or entertainers, but The Netherlands has decided in 2007 to not make use of this right anymore. With tax treaties with 92 countries, this unilateral exemption applies to many non-resident sportspersons and entertainers. They can prove their residence in one of these countries simply by delivering their residence address and a passport copy to the promoter of the performance. Normally, there is no need for a residence certificate from the tax authorities in the residence countries; only when the promoter in The Netherlands has serious doubts about the provided information he needs to ask for more evidence. It is not relevant to whom the performance fee is paid, which may be another person, another country than the residence country and may even be a tax haven. The unilateral Dutch tax exemption is solely based on the residence address of the sportsperson or entertainer and does not have other conditions.

Opposite, sportspersons and entertainers from non-treaty countries, such as Cuba, Mali, Jamaica, Senegal and Angola, still fall under the 20% Dutch withholding tax. But they have the right to deduct their expenses, which needs to be done with the application for a *kostenvergoedingsbeschikking* (cost deduction approval)[19] for the performance. This can be arranged in advance, but also after the performance (maximum 5 years). When a taxable performance fee remains and 20% withholding tax has been paid, an income tax return after the year can be profitable, because, in almost any case, only the income tax rates of 8.35%, 13.85%, 42% and 52% apply, because non-resident sportspersons and entertainers are exempted for social security in The Netherlands when they have a short-term contract[20]. When the income tax leads to a lower amount than the withholding tax, the balance will be refunded, but when it is higher the additional tax does not have to be paid, so the total tax is capped at the 20% withholding tax.[21] Much more work than the unilateral exemption, but still a good way to avoid excessive international taxation or create a tax advantage.

When the contract lasts longer than 3 months, the non-resident sportsperson or entertainer will fall under the Dutch social security, according to the Dutch national social security rules. But this can be set aside when art. 13 of the EU Directive 883/2004 or a social security bilateral treaty, as with the USA, applies, especially when the same activities are also rendered in the residence country.

### *Image rights, sponsorship and endorsement income*

In the Dutch legal system, image rights can be recognised and endorsement income can be connected. It may refer to the portrait of a person or to his reputation, i.e. how he is perceived by the public. Sportspersons and entertainers have an interest in controlling the commercial use of their image, which means that they want to protect their image rights. This is legally supported by the Dutch *Auteurswet* (Copyright Act), *Burgerlijk Wetboek* (Civil Code) and *Benelux Verdrag inzake de intellectuele eigendom* (the Benelux Convention on Intellectual Property).[22] But the Dutch *Belastingdienst* (tax authorities) has a very defensive approach towards image rights structures, especially when they have been set up for players either originating from or starting to work in The Netherlands. They have brought several cases to the tax courts, which decided mostly in favour of the tax authorities, because they found the contracts for the split of the image rights from the employment contract not realistic and only meant to be constructed for tax avoidance.[23]

---

[11] Dick Molenaar, "Foreign tax credit or tax exemption for a Dutch kick boxer", in: GSLTR 2014/3.

[12] Art. 4 *Algemene Wet Rijksbelastingen* (general tax act).

[13] See paragraph "Residence" of chapter "International taxation of sportspersons and entertainers" in this article.

[14] Art. 5a W*et op de loonbelasting* (wage tax act).

[15] Art. 35 *Wet op de loonbelasting* (wage tax act).

[16] Art. 8a *Wet op de loonbelasting* (wage tax act).

[17] Art. 8a, clause 3 *Wet op de loonbelasting* (wage tax act).

[18] Art. 5a, clause 1(b) *Wet op de loonbelasting* (wage tax act).

[19] Art. 12a *Uitvoeringsbesluit loonbelasting* (wage tax regulation).

[20] Short-term means up to three months.

[21] Art. 7.2, lid 3 and Art. 9.4, lid 3, onderdeel b *Wet op de inkomstenbelasting* (income tax act).

[22] See Steffen Hagen, "Sports Image Rights in the Netherlands", in *The International Sports Law Journal*, 2011/3-4, p. 115.

[23] See e.g. *Gerechtshof* (Tax Appeal Court) Amsterdam 10 March 2005, *NTFR* 2005/569.

Incoming sports persons having a high profile, which was already protected abroad and structured with a separate image rights company, have a better chance to be accepted by the Dutch tax authorities, especially self-employed sportspersons and entertainers. They can use image rights structures and receive endorsement income without any taxation in The Netherlands, because there is no Dutch source tax on outgoing royalties. The Dutch tax authorities very often do not have an interest in auditing these structures, because also prize money is unilaterally exempted from Dutch source tax for non-resident sportspersons and entertainers from a treaty country, as explained above. This means that source taxation, as in the Agassi case in the UK[24] and the Goosen[25] and Garcia[26] cases in the USA, can only happen in The Netherlands for self-employed sportspersons and entertainers not residing in a treaty country, such as Monaco, although the *Belastingdienst* is not active on recognizing this endorsement income.

**Elimination of double taxation in Dutch tax treaties**

The exemption method is still included in the eight Dutch tax treaties with Germany[27], Belgium, Ireland, Israel, Luxemburg, Morocco, Singapore, Spain and Thailand, although Belgium has set the condition for the exemption that the income must effectively be taxed in The Netherlands. With this exemption, the sportspersons and entertainers from the other countries are lucky to have double non-taxation on their Dutch performance income.

The other 84 Dutch tax treaties contain the tax credit method. With the Dutch unilateral exemption, the sportspersons and entertainers from those countries will pay normal tax in their residence country. This avoids an excess tax credit, as explained in the paragraph "Elimination of double taxation: exemption versus credit" of this article.

**Conclusions**

Incoming individual sportspersons and entertainers in The Netherlands will mainly be self-employed, because they do not have to follow ongoing instructions from their principals, but will be responsible for their own work. The Dutch tax rules for resident employees and self-employed are different regarding deductions, but have the same tax rates. Residence is an important deciding factor, because Dutch residents are taxable on their worldwide income, while non-residents only for Dutch source income.

Unfortunately, international taxation of sportspersons and entertainers very often leads to excessive taxation because of deductible expenses and missing tax certificates. But on the other hand, when the exemption method applies also double non-taxation may occur.

Internationally, most countries have a national withholding tax on performance income for visiting sports teams. This is supported by the OECD recommendation to include art. 17 for sportspersons and entertainers in bilateral tax treaties. The Netherlands, however, in 2007 removed its source taxation for visiting sportspersons and entertainers, when they reside in a country with which The Netherlands has concluded a bilateral tax treaty. This means for self-employed individuals from a treaty country that no Dutch source tax is levied and that they need to pay normal tax in their residence country. When the residence country uses the basket method for foreign income, the Dutch unilateral exemption will give more room for the foreign tax credit for performance income from other countries. This is only different for the eight treaty countries with the exemption method, where double non-taxation will be the result.

Protection of image rights is very well possible under Dutch civil law, but image rights structures with offshore companies for sportspersons and entertainers working as employees are very often rejected by the Dutch *Belastingdienst* (tax authorities) and this has been confirmed by the Dutch tax courts. On the other hand, self-employed non-resident sportspersons and entertainers can use their image rights structures in The Netherlands, especially when they reside themselves in a treaty country. The unilateral Dutch tax exemption will cover the performance income and there is no Dutch withholding tax on outgoing royalties from image rights, regardless of which country these royalties are paid. Residents of non-treaty countries, such as Monaco, still fall under the 20% Dutch withholding tax on the performance income, with the right to deduct expenses and reclaim income tax, when lower. The Dutch *Belastingdienst* is not active on connecting endorsement income to Dutch performances.

The final conclusion is that the Dutch tax system for incoming individual sportspersons and entertainers does not have the risk of excessive taxation for performance income; while it also has some tax planning opportunities and leads to double non-taxation for sportspersons and entertainers from the countries with the exemption method.

---

[24] UK: HL 17 May 2006, *Agassi v. Robinson* [2006] UKHL 23.

[25] US: TC 9 June 2011, *Goosen v. Commissioner*, 136 T.C. No. 27.

[26] US: TC 14 March 2013, *Garcia v. Commissioner*, 140 T.C. No. 6.

[27] But only in the old 1959 tax treaty, where the 2012 treaty has the tax credit method in art. 23 and will become effective in 2016.