GSLTR

Global Sports Law & Taxation Reports

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Dutch football player in India

BY DR. DICK MOLENAAR[1]

Introduction

A Dutch football player had a contract in India from 12 October until 22 December 2014. The professional Indian Super League started again that year with a small competition of 8 teams, which meant that 14 matches were played in 10 weeks. The teams were located in the four corners of this big country, which meant that they had to do much travelling for the away games.[2] The Dutch player used a hotel in the city of his Indian football club, while his wife and children stayed at home in The Netherlands. He earned US$ 185,000 net, plus the club paid US$ 15,000 commission for him to his two agents. The total amount of US$ 200,000 was grossed up by the club, which paid US$ 58,400 withholding tax to the India tax authorities, so that the gross fee became US$ 258,400.

Back in The Netherlands, the football player had to file his Dutch income tax return for 2014 after the year and mentioned that he had moved his residence for 10 weeks to India. Therefore, he did not report his Indian salary in The Netherlands and no Dutch tax was due on this income.

The *Belastingdienst* (Dutch tax administration) did not agree with him and took the position that he had kept his residence in The Netherlands during his work period in India. They added the Indian salary to his worldwide income in The Netherlands and taxed this at the top rate of 52%, but also allowed a foreign tax credit for the Indian withholding tax. This meant that he had to pay € 59,619 additional tax in the Netherlands.

The football player did not agree with this correction and appealed to Rechtbank Noord-Holland (Lower Court of North Holland), but this court decided against him on 13 October 2017.

He further appealed to the Gerechtshof Amsterdam (Appeal Court of Amsterdam), which, on 9 October 2018, also decided against him.[3]

Tax residence

The courts expressed clearly that staying abroad in a hotel for 10 weeks, while the family was still at home, did not constitute a move of residence. This was based on the national tax law in The Netherlands, which provides that residence is to be determined by all relevant and combining facts.[4] This means that, not only registration or number of days in the country are decisive, but also family, friends, work, social groups, dentist, hairdresser and other personal and economic circumstances must be taken into account.

The courts also decided that the football player could not make use of art. 4 of the tax treaty between India and The Netherlands regarding residence, because he did not meet the condition that he should at least be taxed in both states as resident. This had not been the case in India, where he was taxed as non-resident only on his Indian source income.

Therefore, it was evident that the football player had remained Dutch resident in the 10 weeks in India and was taxable in The Netherlands on his worldwide income.

Deductibility of agency commissions

Unfortunately, the football player was not allowed to deduct the agency commissions of US$ 15,000 (€ 11,772) from his taxable income in The Netherlands. The agency commissions had also been taxable in India, because there the tax gross-up was calculated from the net salary plus the agency commissions.

The non-deductibility of agency commissions, nowadays, is widespread, as can be seen in various articles in *GSLTR*[5] on this issue about agency fees in The Netherlands.

Many countries do not allow the deduction of expenses for employees anymore, mostly for simplifying taxation rules; but some countries also do not allow the tax-free reimbursement of these expenses by the employer.

This is very much against the taxation principle that a person should be taxed on his spendable income, which means that business expenses should be kept out of the taxable income. But India, in this case, also raises tax from

1 All Arts Tax Advisers and researcher with the Tax Law Department at the Erasmus School of Law in Rotterdam, The Netherlands.

2 More information about the 2014 Indian Super League can be found in Wikipedia. Nowadays, the Indian Super League is a full competition with teams as Mumbai City, Bengaluru, Pune FC, North East United, ATK, Goa and others. The winner of the league plays the next year in the Asian Champions League against teams from Korea, Vietnam, China, Japan, Indonesia, Australia, Qatar, Uzbekistan and other countries.

3 *Gerechtshof Amsterdam* (Appeal Court of Amsterdam), 9 October 2017, ECLI:NL:GHAMS:2018:3917, NTFR 2018/2773.

4 Art. 4 *Algemene wet inzake rijksbelastingen* (General Tax Law Act).

5 See articles about various countries in the series "International transfers of professional football players".

clear expenses, which means that this football player pays much more tax than another employee with the same spendable income. This is the same in The Netherlands.[6] This leads to unequal treatment and unfair taxation.

Interestingly, there seems to be no doubt that the football player had been an employee in India and had not been working as a self-employed sportsman. It is clear that he had to follow the instructions of the coach of the Indian football team, including training, tactics, position, clothing and such; but, on the other hand, the football player was hired because of his specific skills and experience, he only had to fulfil a clearly defined task, was relatively independent during matches, and his contract lasted only 10 weeks, which are also signs of self-employed work.

As self-employed, the agency commissions would have been deductible normally in The Netherlands and he would be entitled to an extra allowance of 14% of his business profit for being self-employed, bringing down his taxable income with – € 38,515, saving him – € 20,028 income tax (at 52%). This is an unfair difference in taxation.

Method to eliminate double taxation

There was no discussion at both courts about the method to eliminate double taxation.

The football player did not appeal against the tax credit method, which was used by the *Belastingdienst* (Dutch tax administration), and did not ask for the tax exemption method, which is applicable for foreign employment income both unilateral in The Netherlands as well as in the Dutch tax treaties.

This issue has been decided already in 2010 by the Hoge Raad (Dutch Supreme Court) concerning a Swedish football player. The Hoge Raad decided that, for sportsmen, the elimination method for art. 17 prevails over the method for art. 15 for employees[7].

This comes from the opening words of art. 17, which states that "Notwithstanding Article 15, [...]", which means that art. 15 is set aside and only the allocation rule of art. 17 applies to artists and sportsmen, regardless how their work relationship is qualified. According to the Hoge Raad, this not only works for the taxing right, but also for the method to eliminate double taxation in art. 23.

This decision did not attract international attention in 2010 and I do not know whether other countries have the same approach.[8]

This treatment makes a difference in more than 90% of the Dutch bilateral tax treaties, because they have, in art. 23, the exemption method for foreign employment income and the credit method for foreign income as sportsmen or artists. In some tax treaties, the exemption method also still applies to sportsmen and artists.[9] But it would be fair if The Netherlands would allow employed sportsmen (and artists) also the tax exemption method following from art. 15.

In this case of the Dutch football player in India, the difference in additional Dutch tax was € 59,619 (credit method) against € 4,880 (exemption method). With the exemption method only the progression in tax rates has effect, leading to a lower tax total than when the income would only have been earned domestically. But this is a normal situation for employees and the Dutch Government has been following this line with positive arrangements for directors' fees[10] and for employees working in the Gulf states.[11] There is no valid reason why sportsmen and artists with foreign employment income should be treated differently and pay more tax. They should be entitled to the same tax exemption (with progression) as other employees.

Final words

The court decisions in this case of the Dutch football player in India were right, but the non-deductibility of the agency commissions and the use of the credit method to eliminate double taxation lead to an unfair result.

This constitutes double unequal treatment for which no justifications exist.

It should be changed so that this football player and other sportsmen and artists working as employees abroad do not have to pay more tax than other employees with foreign income or than self-employed performers.

6 This is the so-called "*werkkostenregeling*" from art. 31a *Wet op de loonbelasting* (Wage Tax Act), with which all payments to or for employees are considered to be taxable, with only some exceptions, and a free space of 1.2% of the total year salaries for the remaining reimbursement of expenses. Above this free space, the employer has to pay 80% wage tax from the net amount, but no social security contributions. See also the article in this issue: "The Netherlands tax treatment of fees paid to intermediaries" by Patrice van Oostaijen.

7 *Hoge Raad*, 7 May 2010, ECLI:NL:HR:2010:BJ8475, BNB 2010/245.

8 This difference is not an issue in countries using the tax credit method for all foreign income, including employment income, such as the UK, USA, Australia and others. The difference between art. 15 and 17 especially exists in the continental European countries.

9 These countries are Ireland, Israel, Luxembourg, Morocco, Singapore, Spain and Thailand. The Dutch tax treaty policy is that when a tax treaty is renewed, the exemption will be changed into the credit method for artists and sportsmen.

10 *Resolutie* (Decree) Minister of Finance, 11 July 1994, nr. IFZ 94/779.

11 *Besluit* (Decree) Minister of Finance, 7 September 2017, nr. IZV 2017-000015971.