Netherlands

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Footballer's Share of a Transfer Fee and the Quasi-Payroll Tax on Excessive Severance Payments

This note examines two conflicting Netherlands decisions regarding the applicability of the quasi-payroll tax on excessive severance payments to a footballer's share of a transfer fee.

1. Introduction

Two lower tax court decisions have been published in the Netherlands concerning a payment to a football player of a share of a transfer fee and the application of the quasi-payroll tax on excessive severance payments. The first court decision set aside this extra tax because of a conflict with the European Convention on Human Rights (ECHR),[1] while the second came to the opposite result, seeing no conflict with international rules.[2] Therefore, the football club in the second case was obliged to pay the quasi-payroll tax, in addition to the top rate of payroll/income tax that the football club had already deducted from the football player.

2. Legal Background

In the past, there has been quite a bit of discussion in the Netherlands in the press about high severance payments ("golden handshakes") for top employees from bigger companies. In particular, in circumstances in which a company needed to restructure because of bad results, most often leading to the loss of a number of jobs, it was considered unfair for failing top managers to receive extra payments when stepping down. During the economic crisis, this was seen as a bad example for employees and other stakeholders of the company.

After discussions in parliament, the Netherlands government enacted, in 2009, a new tax rule to discourage excessive severance fees in the form of an extra employer's tax (quasi-payroll tax) of 30%. This was in addition to the 52% payroll/income tax for top managers, which was deducted from the fee. The extra tax was an employer's tax on top of the leaving fee and applied to any payment in relation to the termination of an employment contract of more than EUR 500,000.[3]

In 2013, the Netherlands government raised the extra tax rate from 30% to 75% because it wanted to ensure that companies would no longer give such excessive fees to departing employees. There was no tax revenue scheduled for the 2009 Budget from this extra tax, as the Netherlands government believed that no company would be so imprudent as to pay a 52% employee tax + 75% employer tax = 127% total tax from leaving fees over EUR 530,000.

3. Share of Transfer Fee

Netherlands football clubs cannot pay the high salaries that have become common in bigger countries, such as China, France, Germany, Italy, Spain and the United Kingdom. The main reasons for this are that, in the Netherlands, TV earnings are much lower, UEFA pays less for Champions and Europa League appearances of clubs from smaller countries and (foreign) investors put more money in the football clubs of bigger countries. Netherlands clubs, however, have been able to keep their top players by adding to their lower salaries the promise of a portion of a future transfer fee. Of course, it is not certain that a transfer will take place, but the trade-off gives the football player an opportunity to at least profit from his own success; therefore, he is willing to accept, for a period, a lower salary than he might obtain abroad. Both sides are happy with this business agreement and it is good for the Netherlands football fans.

4. Different Years and Tax Rates

It is important to note that the first decision of the *Rechtbank Den Haag*, of 30 March 2017, concerned a transfer in 2013, when the quasi-payroll tax rate was 75%, while the second decision of the *Rechtbank Noord-Holland*, of 24 April 2017, concerned 2012, when the quasi-payroll tax rate was still 30%. Both were in addition to the normal payroll/income tax for a football player of 52%.

5. Differences between the Court Decisions

5.1. First decision: Conflict with the ECHR

The *Rechtbank Den Haag* decided, on 30 March 2017, that the 75% quasi-payroll tax on the share of the transfer fee

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1. NL: *Rechtbank* (Lower Court) Den Haag, 30 Mar. 2017, ECLI:NL:RBDHA:2017:3429; discussed by R. Betten, *Special employer's wage tax obligation for "sell-on payment" to football player of Feyenoord held to be in conflict with the European Convention on Human Rights*, Global Sports Law and Taxn. Reports 18 (2017).
2. NL: *Rechtbank* (Lower Court) Noord-Holland, 24 Apr. 2017, ECLI:NL:RBNHO:2017:3212.
3. NL: Wage Tax Act 1964 (*Wet op de loonbelasting*), art. 32bb, National Legislation IBFD. This amount increases every year in line with inflation and was EUR 530,000 in 2012 and 2013.

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exceeding EUR 530,000 was in breach of article 1 of the First Protocol to the European Convention on Human Rights (ECHR). The football club had argued that transfer fees are an important aspect of its financial business model, which was disturbed by the excessive burden of total tax of 127% from the share of the transfer fee to the football player. The club had agreed earlier with the football player that he would receive 10% from a future transfer fee, which turned out to be EUR 12 million (the footballer's share thus being EUR 1.2. million). The *Rechtbank* reasoned that, under article 1 of the First Protocol to the ECHR, countries have broad discretion when they introduce new tax rules and that courts only have a limited right to review such discretion. However, the tax rule still has to be proportional to its aim. It described the discussions of the new tax rule in 2008 in parliament, noting that the Minister of Finance indicated that it is "difficult" to make a distinction between professional soccer players and other top employees. It drew the conclusion from this discussion that the extra employer's tax was not meant to target the professional football sector because transfer fees are not comparable to the severance payments of other top employees. The extra tax would lead, for Netherlands football clubs, to a competitive disadvantage in comparison to other football clubs abroad. Therefore, the court decided that the extra tax did not comply with the proportionality principle. As a result, the tax rule was considered to unlawfully infringe the right to enjoy property undisturbed. This meant that the football club, in this case, did not have to pay the quasi-payroll tax.

5.2. Second decision: No conflict with the ECHR

Rechtbank Noord-Holland came to another decision on 24 April 2017. It approved the quasi-payroll tax assessment of 30%. The football club, in this case, had received transfer fees of EUR 15 million, from which it had to pay the football players approximately EUR 2 million. First, the Court stated that there had been some discussion during the parliamentary hearings in 2008 about the new tax rule in terms of whether or not to make an exception for football clubs, but this was not ultimately included in the legislation, which means that parliament accepted that the extra employer's tax would be a generic tax measure. Second, the Court decided that there was no breach of article 1 of the First Protocol to the ECHR. In this respect, it referred to an earlier decision of the Supreme Court (*Hoge Raad*), wherein the court decided that, for the 2009 taxation year, the extra employer's tax was not in breach of this article of the ECHR.[4] It held that the Netherlands legislator has wide discretion under such international agreements and that the extra quasi-payroll tax leads to a fair balance. The *Hoge Raad* also ruled that the extra employer's tax was not in conflict with the principle of proportionality. Following this, the *Rechtbank Noord-Holland* verified whether or not the tax assessment represented an excessive burden for the football club and came to the conclusion that the quasi-payroll tax of EUR 454,757 was not excessive when compared to the club's business profit in 2012 of EUR 17,713,000.

6. Further Proceedings

In both cases, the losing sides appealed the decisions. This means that the Appeal Courts (*Gerechtshof*) of Den Haag and Amsterdam will have to decide whether or not the decisions of the lower courts were correct. The appeal decisions are expected to be given in early 2018. It is likely that both cases will subsequently go to the *Hoge Raad*, which will take another year or two.

The interesting question is whether or not the decision of the *Hoge Raad* of 20 June 2014 (that the quasi-payroll tax was acceptable for 2009 when the rate was 30%), will be the same for the 2013 tax year when the rate was 75%. It will be sometime, perhaps not until 2020, before it will be known whether or not the *Hoge Raad* will come to a different conclusion.

7. Tax Treaty Application

Most often, when a football player receives a share of a transfer fee, he is moving from a Netherlands club to a foreign one. In these circumstances, it is very likely that he will also move his residence to the state of the new club at the time of the transfer because he will start training there every day and play home and away matches in the competition in the state of the new club.

The share of the transfer fee will not be paid to the football player for a while, perhaps weeks or months later. In that situation, it will, on a cash basis, become part of his worldwide income under the income taxation regime of the state of the new club. The old club in the Netherlands, however, has to withhold Netherlands wage tax from the severance payment and has to pay the quasi-payroll tax on top of that. This leads to double taxation for the football player, which should be eliminated by article 23 of the tax treaty between the two states. In this circumstance, the method for eliminating double taxation following from article 17 will apply, which is, in respect of most treaties, the tax credit method[5] and not the exemption method, as is often used for employment income under article 15.[6]

This tax credit will apply to the withholding of the wage tax (at the top rate of 52%), but does it also apply to the quasi-payroll tax, which is levied on the football club instead of the football player? There seems to be no doubt that the quasi-payroll tax is a tax under article 2(2) of the OECD Model (2014)[7] and, therefore, the tax treaty applies, but as the taxable person in respect of the quasi-payroll tax is a person other than the football player, it is not likely that the football player can claim a foreign tax credit under article 23 of the OECD Model for the quasi-payroll tax borne by

4. NL: *Hoge Raad* (Supreme Court), 20 June 2014, ECLI:NL:HR:2014:1463.

5. As the OECD recommends in *OECD Model Tax Convention on Income and on Capital: Commentary on Article 17* para. 12 (26 July 2014), Models IBFD.
6. This was decided in the Netherlands in NL: HR, 7 May 2010, ECLI:NL:HR:2010:BJ8475.
7. *OECD Model Tax Convention on Income and on Capital* (26 July 2014), Models IBFD.

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the football club.[8] It is questionable whether or not this can be seen as economic double taxation, especially since the purpose of the Netherlands government was not to collect tax revenue but to influence the behaviour of companies and their (former) top employees.

8. Final Remarks

Given the opposing decisions of the two lower tax courts, it is unlikely that Netherlands football clubs will continue making these agreements with their top players. There is a significant risk that the final *Hoge Raad* decision will be that the football player's share of the transfer fee is subject to the extra quasi-payroll tax when the payment exceeds EUR 530,000, and it will take about three more years before the *Hoge Raad*'s final decision. This means that Netherlands football clubs have to change their business model in this respect, pay higher salaries to their top players and keep the transfer fees completely for themselves. But this will bring down their competitiveness relative to football clubs from bigger countries and will not be good for the strength of Netherlands football teams.

8. *See* F.P.G. Pötgens, *The Relationship between the Netherlands Quasi -Final Tax (Quasi-Payroll Tax) on Excessive Severance payments and Tax treaties*, 54 Eur. Taxn. 4, pp. 143-150 (2014), Journals IBFD.

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