

The Netherlands:

CFK bridging scheme and international taxation

BY DICK MOLENAAR¹

Introduction

The Netherlands has a special bridging scheme for professional football players and cyclists, the CFK.²

During their active career they pay contributions into the CFK fund, from which they will receive the benefits directly after their career, paid as an annuity over a period of time. The purpose of the CFK fund is to give football players or cyclists time to adjust to a life without active sports and to build up a new career.

The contributions during the career can be deducted from the taxable salary, which means that the benefits after the career are taxable income. But it might be that the football player or cyclist has become a resident of another state than The Netherlands when the benefits are paid and then the question arises which state has the right to tax the income.

This was at stake in the decision of *Rechtbank* (Court of First Instance) *Gelderland* of 21 January 2020, which concluded that only the residence state Australia had the right to tax the benefit from the bridging scheme of the CFK and not the source state The Netherlands.³ This decision was based on the text of art. 18 of the Tax Treaty between Australia and The Netherlands.

A comparable situation has been discussed by Rijkele Betten in *GSLTR* 2013/4, but then about an appeal court decision in Antwerp, Belgium⁴. That court came to the

same conclusion about the application of art. 18 of the Tax Treaty Belgium-Netherlands as *Rechtbank Gelderland* in this case about Australia, but with other considerations.

CFK scheme

The CFK bridging scheme started in 1972, initially only for professional football players, but later also for professional cyclists. The reasons for the CFK bridging scheme are:

- a the bridging payments give the football player or cyclist a period of time to switch to a new profession;
- b the contributions are taken from the top of the high salary and create considerable tax savings (NL top tax rate is 49.5% in 2020, but was 52% for many years), while the later benefits after the career most often are taxed at a lower rate (NL starting tax rate of 37%, above the personal allowances);
- c the football players and cyclists do not have to do the savings themselves, but are helped by a professional and independent institution, which also makes a yearly return on investment of between 1% and 4% on the fund of the participants (after expenses);
- d no Dutch wealth tax of approx. 0.7%-1.6% per year is due on the individual participant fund at the CFK.

The CFK organization falls under the control of the Dutch National Bank and other financial authorities. The fund had a total value of approx. € 630 million at 30 June 2019 and invests with a mixed but low risk strategy. The scheme is obligatory for all Dutch professional football clubs and cyclist teams because it is mentioned in the *collectieve arbeidsovereenkomsten* (collective employment agreements) and these CAOs have been declared generally binding for the whole professional football and cyclist sectors.

The contribution to the CFK scheme is 15%-30% of the gross salary with a maximum contribution of € 5,785 per month. Also signing bonuses can be used as contribution, up to 100% of the bonus. The contributions come in an individual fund per football player or cyclist at the CFK, to which the return on investment is added yearly. This individual fund can be checked online by the participant. There is a cap of 1 million total fund value per individual, but this will anyhow not be reached within 10 years employment with the club or team.

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² *Contractspelers Fonds KNVB* ("CFK") – Contractplayers Fund KNVB. The KNVB (*Koninklijke Nederlandse Voetbal Bond*) is the Royal Netherlands Football Association.

³ *Rechtbank* (Court of First Instance) *Gelderland* 21 January 2020, ECLI:NL:RBGEL:2020:259, NTFR 2020/829.

⁴ Rijkele Betten, "Belgium: court case on the taxation of a pension payment out of the Netherlands Cyclist Fund to an emigrated Netherlands' professional cyclist", in: *GSLTR* 2013/4, p. 44. That was based on the decision of the Court of Appeal of Antwerp of 25 September 2012, Nr. 2011/AR/2067.

The CFK scheme is not a pension scheme, because it is not meant for an old age benefit at the pension age⁵, but for a bridging benefit directly after the end of the active sports career. This means that the general Dutch tax exemption for pension rights⁶ would not work for the CFK scheme and the contribution to the CFK would normally not be tax deductible from the salary. But this has been repaired by the Dutch Minister of Finance with a separate decision⁷, which allows that the contributions can be deducted and are tax-free, while only the later benefits are taxable at the moment when the instalments are received by the ex-football player or cyclist.⁸ This is comparable with the tax treatment of pensions in The Netherlands.

The only dispensation from the CFK scheme is for foreign football players and cyclists who are entitled to the Dutch 30% scheme. Under this scheme, the foreign employee can deduct 30% from his salary before Dutch income tax is calculated. The 30% is meant as deemed compensation for extraterritorial costs for the foreign employee, who comes to The Netherlands for temporary work. The 30% rule is valid for a maximum of 5 years.⁹ There are minimum conditions for the 30% rule, which means that only some foreign football players and cyclists at Dutch clubs or teams qualify for the 30% rule. They can apply for a dispensation for the CFK scheme.

Football players and cyclists also have a scheme for old age pensions, separate from the CFK scheme. This pension scheme is not run by the CFK, but by Nationale Nederlanden, a commercial (life) insurance company.

Taxing right under the OECD Model Tax Convention

When the foreign football player or cyclist moves to another state after his active career at a Dutch club or team, then the question arises whether The Netherlands as the source state has the right to tax the income.¹⁰ Under its national tax law, The Netherlands will tax the CFK benefits as periodic payments, but also the new residence state will want to tax this income. The result would be double taxation, unless when a bilateral tax treaty between The Netherlands and the new residence state applies, because then the taxing rights are allocated and double taxation is eliminated.

⁵ The Dutch pension age has been 65 for many years but is now increasing gradually to 67 years in 2024.

⁶ *Wet op de loonbelasting* (Wage Tax Act), art. 18.

⁷ *Besluit* (Decision) 30 November 1972, nr. B 71/24096.

⁸ This is called the *omkeerregel* (delayed taxation system).

⁹ This period has been 10 years, 8 years previously but was brought down to 5 years by the Dutch government in 2016 as a budget savings measure.

¹⁰ This is only when the foreign football player or cyclist was not exempted for the CFK because of the 30% rule.

These tax treaties mostly will follow the OECD Model Income Tax Convention, but this Model does not seem to have a special provision for such bridging schemes. Art. 18 only applies to real pension schemes (and other similar payments in consideration of past employment), meant for old age benefits. This article allocates the taxing right solely to the residence state of the pensioner, so that the source state needs to allow an exemption at source to eliminate double taxation:

“Article 18 – Pensions (OECD Model (2017)):

Subject to the provisions of paragraph 2 of Article 19, pensions and other similar remuneration paid to a resident of a Contracting State in consideration of past employment shall be taxable only in that State.”

Where the official Commentary on Art. 18 OECD Model is clear that the article is only meant for pensions (and similar payments) and not for other annuities, some states have made a reservation with the article: Brazil, Bulgaria, Ivory Coast, South Africa and Ukraine. They reserve the right to include an explicit reference to annuities in art. 18 of their bilateral treaties.¹¹ The OECD discusses this option in the Commentary on Art. 18 but concludes that it prefers to restrict art. 18 to only pensions for old age benefits.

A missing element is that the OECD has not included a subject-to-tax clause for the annuity in the residence state in art. 18. The Commentary discusses that it might be possible that source and residence state have different taxation rules for pensions and that double taxation may occur, but it can also lead to double non-taxation.

Art. 19 of the OECD Model with the specific rule for government pensions is not relevant here, because football clubs are almost everywhere private entities.

Dutch tax treaties

Strangely enough, The Netherlands did not make a reservation with art. 18 OECD Model, although it has included annuities in this article in most of its bilateral tax treaties and has made this its official policy in the *Notitie Fiscaal Verdragsbeleid* (Notice Tax Treaty Policy).¹²

An example of this text of art. 18 can be found in the tax treaty between Australia and The Netherlands:

*“Article 18 – Pensions and Annuities
(Australia and Netherlands (1976)):*

1 *Pensions, including pensions provided under the provisions of a public social security system, but not including pensions to which Article 19 applies, paid to a resident of one of the States, and annuities*

¹¹ See para. 2 of the Positions on the Article in the Commentary on Art. 18 OECD Model.

¹² See part 2.11.4 of the *Notitie Fiscaal Verdragsbeleid* (Notice Tax Treaty Policy) of 15 February 2011.

so paid, shall be taxable only in that State.

- 2 *The term “annuity” means a stated sum payable periodically at stated times during life or during a specified or ascertainable period of time under an obligation to make the payments in return for adequate and full consideration in money or money’s worth.”*

The remark at the end of the previous paragraph about the missing subject-to-tax clause is also relevant here. Australia has a different view on the taxation of pensions and other annuities, for which very often the contributions are not deductible but the benefits are tax-free. If that would apply to the Dutch CFK benefits, then this art. 18 in the treaty with The Netherlands would lead to double non-taxation.

The case before *Rechtbank Gelderland*

The case before *Rechtbank Gelderland* was about the year 2018 and was started by the CFK itself. It was paying benefits to a former football player, who had played for clubs in various countries, also for some years for a club in The Netherlands. From his salary, the football player had paid contributions into the CFK fund and after he ended his professional career, he had moved to Australia and started to receive benefits. But then a discussion between the CFK and the *Belastingdienst* (Dutch Tax Authorities) arose whether art. 18 of the tax treaty would apply to these benefits. That would mean that The Netherlands would not have the taxing right, but solely Australia.

For many years, the *Belastingdienst* had accepted that CFK benefits to residents of other states would fall under an extended art. 18 of a tax treaty, which includes annuities.¹³ But if art. 18 of the treaty was restricted to only pensions, then the benefits would fall under art. 17 of the treaty, because the income came from (previous) activities as a sportsman.¹⁴ Then The Netherlands would have the source taxing right and the residence state would have to allow elimination of double taxation.

But the *Belastingdienst* changed its mind after a court decision about ontslagvergoedingen (dismissal compensations), which were not paid at once but in periodic instalments. In that case, the *Hoge Raad* (Supreme Court) decided that these periodic payments cannot be considered as “annuities” under art. 18, because the benefits were not “in return for adequate and full consideration in money or money’s worth”, as required in the definition in art. 18(2) of an annuity in the tax treaty.¹⁵ The *Belastingdienst* ordered the CFK to apply this decision to the benefits to former football players and cyclists, which means that CFK benefits would not fall under an extended art. 18

(including annuities) anymore but under art. 17 of a treaty. With the result that The Netherlands has the taxing right for any CFK payment to rights holders abroad.

The CFK followed the order of the *Belastingdienst* under protest and appealed against the obligation to withhold the Dutch loonbelasting (wage tax). The *Belastingdienst* rejected this administrative appeal, after which the CFK sent its appeal to the rechtbank (court).¹⁶

Rechtbank Gelderland decided not to follow the reasoning of the *Belastingdienst*, because the CFK benefits do not come from a type of dismissal payment, but from a fund which was created after contributions from the salary of the football player. Therefore, *Rechtbank Gelderland* came to the conclusion that the CFK benefit payments to the resident of Australia still fall under art. 18 of the Tax Treaty Australia-Netherlands as an annuity, so that The Netherlands does not have any taxing right on the income.

Hierarchy between (extended) art. 18 or art. 17

It is interesting that *Rechtbank Gelderland* considers that the taxing right for the CFK income for former football players and cyclists, in principle, falls under art. 17, unless when this income can be characterized as a pension or annuity because then art. 18 applies.¹⁷ This suggests a hierarchy between an extended art. 18 and art. 17 in a tax treaty, but it can be discussed whether this is correct. The text of art. 17 is not specific about this, only art. 15 is mentioned:

“Article 17 – Entertainers and sportspersons (OECD Model (2017)):

- 1 *Notwithstanding the provisions of Article 15, income derived by a resident of a Contracting State as an entertainer, such as a theatre, motion picture, radio or television artiste, or a musician, or as a sportsperson, from that resident’s personal activities as such exercised in the other Contracting State, may be taxed in that other State.*
- 2 *Where income in respect of personal activities exercised by an entertainer or a sportsperson acting as such accrues not to the entertainer or sportsperson but to another person, that income may, notwithstanding the provisions of Article 15, be taxed in the Contracting State in which the activities of the entertainer or sportsperson is exercised.”*

And it is also clear that art. 17 prevails over art. 7, as is mentioned in art. 7(4) of the OECD Model.

¹³ This was decided in The Netherlands already with *Gerechtshof* (Appeal Court) *Amsterdam* 3 January 1986, BNB 1987/182.

¹⁴ This was decided in The Netherlands with *Hoge Raad* (Supreme Court) 3 May 2000, BNB 2000/328.

¹⁵ *Hoge Raad* (Supreme Court) 19 May 2017, BNB 2017/179.

¹⁶ See para. 5.4 of the CFK *Annual Report* 2018/19. The *Belastingdienst* agreed not to enforce the taxing right retroactively, but only for new benefit payments. This case before *Rechtbank Gelderland* can be seen as a test-case and both parties have agreed to go directly to the *Hoge Raad* (Supreme Court) for the appeal, which means that they will leave out the appeal stage at the *Gerechtshof* (Appeal Court).

¹⁷ Consideration 12 of the Court decision.

The question is whether deferred payments, which are taken from the salary as contributions in a personal fund, from which directly after the active career benefits are paid as periodic payments, still fall under the original article of the OECD Model. If so, then in this case, it would be art. 17 for sportspersons, but for employees it would be art. 15.

Art. 15 of the OECD Model is clear in para. 1 that it gives priority to art. 18:

“Article 15 – Income from employment (OECD Model 2017)”:

- 1 *Subject to the provisions of Articles 16, 18 and 19, salaries, wages and other similar remuneration derived by a resident of a Contracting State in respect of an employment shall be taxable only in that State unless the employment is exercised in the other Contracting State. If the employment is so exercised, such remuneration as is derived therefrom may be taxed in the other state.”*

But this is not mentioned in the text of art. 17, while also the Commentary on Art. 17 does not discuss this situation. This means that it is unclear whether art. 18 has priority over art. 17.

Elimination of double taxation/administrative burden

The reasons for the OECD for residence taxation of pensions and exemption at source are that:

- 1 the residence state has the best position to apply the proper tax rates and personal allowances; and
- 2 the taxpayer and the pension fund would have much lower administrative expenses than with taxation at source.

These reasons are also relevant for an extended art. 18 with other annuities. Here in this case, without the application of art. 18, The Netherlands would have to withhold *loonbelasting* (wage tax), while Australia would also want to include the CFK benefits in the worldwide income, but would have to allow a tax credit for the Dutch *loonbelasting*.

Some states also oblige their residents to file income tax returns after the taxable year in the source state, because a tax refund might be possible and then the residence state would only have to allow a tax credit for the final income tax in the source state. In addition, The Netherlands has the calendar year as taxable year, while in Australia this is July up until June, which means that tax certificates and income tax returns/assessments need to be divided to the right periods to come to the right figures. This creates an even more administrative burden.

Good reasons in favour of the application of the extended art. 18 (including annuities) of the Tax Treaty Australia-Netherlands and the sole taxing right for Australia, which means exemption at source in The Netherlands.

In the comparable case in Belgium from 25 September

2012,¹⁸ there was a specific reason why the former football player wanted the source withholding tax from the CFK in The Netherlands. That Dutch source tax would have been quite low because the football player did not have any other Dutch income, while the tax exemption in Belgium would be quite high, as it was calculated from the total income. The former football player would have had to pay some additional Belgian tax because of the progression, but together with the low Dutch source tax it would have been much lower than the normal Belgian tax on the CFK benefits. But the football player lost his case in the Court of Appeal of Antwerp, which confirmed that art. 18 of the Treaty Belgium-Netherlands gives the sole taxing right for the CFK benefits to the residence state Belgium.

Final words

This decision of *Rechtbank Gelderland* of 21 January 2020 had the same result as previous court decisions, not only in The Netherlands but also in Belgium. Whether the new theory of the *Belastingdienst* that the CFK benefits are comparable to dismissal compensations for employees makes sense, will be decided by the *Hoge Raad der Nederlanden* (Supreme Court of The Netherlands) as the final appeal instance.

It is interesting to see that The Netherlands uses the extended version of art. 18 in most of its tax treaties, because this is not in line with the OECD Model, but The Netherlands has not made an official reservation with the article. It is clear that, with a normal art. 18 in a bilateral tax treaty, the CFK benefits would fall under art. 17 of the same treaty and that The Netherlands would keep the taxing right.

But even when the extended art. 18 with pensions and other annuities is included in a tax treaty, it can still be discussed whether this will prevail over art. 17 for sportsmen. There is no wording as in art. 15 to support this priority and with the short time period between the contributions and the benefits, the income from the personal CFK bridging scheme could still be characterized as “*income from the personal activities of the sportsman as such*”, as mentioned in the text of art. 17. It is interesting whether the *Hoge Raad* (Supreme Court) will also pay attention to this aspect in its forthcoming decision.

An extended art. 18 with only taxation in the residence state would bring down the administrative work considerably, not only for former football players and cyclists but also for the CFK and the tax authorities in the residence state. But it also creates the chance of double non-taxation, if the income would not be taxed in the residence state.

Finally, this is a small subject, because only The Netherlands has such a bridging scheme and foreign high earners can get dispensations when they qualify for the 30% rule, but still there are interesting international tax aspects to this CFK scheme.

¹⁸ See footnote 4.



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