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The Netherlands:

Changes in Tax Treaty Policy 2020 for sportspersons and artists

BY DR DICK MOLENAAR[1]

Introduction

In December 2020 I published an article[2] about art. 17 in the new Dutch Tax Treaty Policy 2020. This was different from the 2011 version and actually a step backwards. It seemed understandable, because The Netherlands had been ahead of the developments within the OECD with the policy of preferably not including art. 17 anymore in its bilateral tax treaties, but the OECD had denied in 2014 the removal of art. 17 from its Model Tax Convention.

In the new 2020 Tax treaty Policy, the Dutch Secretary of Finance stated that he had been successful only in two new tax treaties with leaving out art. 17, namely Ethiopia (2012) and Iraq (2019).

Therefore, he wants to return to the international practice and include art. 17 again in tax treaties, although with restrictions such as a minimum threshold and the deduction of expenses.

In my previous article, I explained why the three reasons from the OECD in 2014 were wrong:

1. it is not difficult anymore for residence states to obtain information about foreign performance income;
2. art. 17 does not have anything to do with tax havens because they don't have tax treaties;
3. the simplicity of source state taxation leads to problems with double taxation.

Also, I have shown with figures from Belgium that the taxation of foreign sportspersons and artists only leads to very low tax earnings. Also, I have extrapolated these figures to other states and concluded that the tax earnings (benefit principle) cannot be the reason to keep art. 17.

The Tax Treaty Policy 2020 had been sent to the Dutch parliament, because this had to agree with the principles of the Dutch government for the negotiation of new and revised bilateral tax treaties. During the discussion, the members of parliament were critical, which has led to some adjustments in the Dutch Tax Treaty Policy 2020 for sportspersons and artists.

Discussion in the Dutch parliament

The Dutch parliament did not accept the new approach of the Secretary of Finance, Hans Vijlbrief, and especially members of parliament Helma Lodders (VVD, right wing liberals) and Steven van Weyenberg (D66, left wing liberals) have raised several questions.

Initially, with his letter of 22 September 2020, the Secretary of Finance tried to keep his policy intact, but after quite some pressure, he has changed his position with the letters of 21 and 29 January 2021. But this was not enough for the members of parliament and they forced him during the meeting of 11 February 2021 to go further. He also promised to answer some questions in a new letter, which he did on 22 March 2021.

Summary of the new Dutch Tax Treaty Policy

After these discussions in parliament, this is what the new Dutch Tax Treaty Policy for sportspersons and artists looks like.

1. Before the negotiations for a new tax treaty will be started, The Netherlands will first study whether the treaty partner wants to leave out art. 17 in the new treaty. This will be done by checking the national legislation of the treaty partner. Examples can be Ireland and Denmark, which do not have a source withholding tax for visiting sportspersons and artists, the same as The Netherlands, so with them the proposal to leave out art. 17 in the new or revised tax treaty seems likely. But also, other states do not actively tax foreign sportspersons and artists, so, therefore, do not need an art. 17 in their treaty with The Netherlands.

2. If art. 17 cannot be left out, which might happen often in practice, then The Netherlands will try to achieve:

a. minimum threshold: this will help smaller and medium-sized sportspersons and artists. In para. 10.1 of the OECD Commentary, a threshold of 15,000 IMF Special

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2 Dr. Dick Molenaar, "Dutch Tax Treaty Policy 2020 for sportspersons and artists", in: *Sports Law & Taxation* (formerly GSLTR) 2020/4 (december 2020).

Drawing Rights per person per year is mentioned, which is comparable to € 18,000. But the Secretary of Finance is also willing to set a higher threshold, such as € 20,000-25,000 per person per year. I want to add that also the variable variant from para. 10.2 of the OECD Commentary can be inserted, with the example that the threshold can be mentioned as *"50 per cent of the average GDP per capita for OECD countries, as determined by the OECD"*. But it can also be higher, as the 2016 US Model Tax Convention shows. I will discuss this later in this article. An example in treaty negotiations can be the UK which allows the national personal allowance of £ 12,570 per person per year (tax year 2021-2022). It can be expected that the UK, therefore, is willing to include a comparable (or even higher) threshold in tax treaties, because the threshold then works reciprocally, thus also for UK sportspersons and artists performing abroad.

b net taxation, which means deductions for expenses at source: interesting is that also the 2011 Dutch Tax Treaty Policy mentioned this option, but it was not included in any of the new or revised Dutch tax treaties since then. This is not strange for tax treaties with EU member states, because they are already obliged to offer net taxation and normal tax returns after the *Gerritse*[3], *Scorpio*[4] and *Centro Equestre*[5] decisions of the European Court of Justice. But it would be clearer if every tax treaty would have this normal taxation clause, as described in para. 9 of the Commentary on Article 17 OECD Model. The parliamentary discussion has not paid special attention to this restriction, but hopefully the Dutch tax treaty negotiators will start using it actively.

c exemption for performances financed with public funds: The Netherlands already has this in approximately 60% of its tax treaties. But the members of parliament criticized that the minimum of subsidies is set at of 50%, following para. 14 of the Commentary on Article 17 of the OECD Model, which only rarely applies to sportspersons and artists or their teams, groups and companies. This means that only a few well subsidized can profit from this exception, which does not make it effective. But the Dutch Secretary of Finance has promised to study whether The Netherlands can set a lower percentage in new tax treaties, such as the 30% in the 2001 tax treaty with Belgium.

d other exemptions from the OECD Commentary on Article 17: the Secretary of Finance has promised also to consider other possible restrictions from the Commentary on Article 17 of the OECD Model, such as:

- employees to be excluded from art. 17 and treated normally under art. 15 (para. 2 Commentary);
- limited approach of art. 17(2), only when the performer is owner of the company receiving the performance fee (para. 16 Commentary).

Furthermore, the Secretary of Finance paid much attention in his answers to the members of parliament to the problem of double or excessive taxation. He gave an overview of the possibilities for elimination of double taxation in the Dutch tax rules, but also acknowledged that still very often the foreign source tax is higher than the Dutch income or corporation tax. This should be brought down with the previous measures in the performance states. He also mentioned that The Netherlands allows the carry forward of excess tax credits to the following year, which means that excess tax credits are not lost.

Also, the Secretary of Finance reacted on the problems with cross-collateral tax credits between a sports or artist company and the sportsperson and artist personally. The tax authorities hold the position that this is legally not possible, because of different legal persons, but there is a case pending at the Dutch Hoge Raad (*Supreme Court*) at the moment about a DJ and his personal limited company. The tax courts at first and second instances decided against the cross-collateral tax credits, but the Advocate General at the Hoge Raad has advised, in January 2021, in favour of the artist. This would mean that the DJ might be able to credit the excess tax from his personal limited company against his personal income tax, because he received the salary from the limited company for his performances. At the moment, we are waiting for the final decision of the Hoge Raad and hopefully this will be positive, which would mean that it would give more room for tax credits.

Furthermore, the Secretary of Finance promised the members of parliament to give a yearly update of the planning of tax treaty negotiations and pay special attention to art. 17 for sportspersons and artists.

Altogether, this revised Dutch Tax Treaty Policy 2020 gives more options in tax treaty negotiations and perhaps better results for Dutch sportspersons and artists performing abroad. This means that the active approach of the members of parliament has had a positive influence on the tax treaty policy.

New Dutch tax treaties

The most recent Dutch tax treaties are promising for the new Dutch Tax Treaty Policy. In 2019, The Netherlands achieved to leave out art. 17 in the tax treaty with Iraq. Together with the 2012 tax treaty with Ethiopia, this shows that developing countries are willing to conclude tax treaties with developed countries without a special article for sportspersons and artists, because this is in their interest. There is huge prize money and performance income to be earned in the developed world and without an art. 17 the developing countries can tax this foreign income from its residents without any foreign tax credit. It might also be attractive for the sportspersons

3 ECJ 12 June 2003, nr. C-234/01 (Arnoud Gerritse).

4 ECJ 3 October 2006, nr. C-290/04 (FKP Scorpio Konzertproduktionen GmbH).

5 ECJ 15 February 2007, nr. C-345/04 (Centro Equestre da Leziria Grande Lda).

and artists to stay resident of the developing countries, because the risk of double taxation is eliminated.

A first minimum threshold was achieved in the 2021 tax treaty with Chile. The threshold has been set at € 5,000 per performer per year, which looks quite low, but is comparable to the 2010 tax treaty between Chile and the USA with $ 5,000 per person per year. The threshold can be used directly at the performance, which means that the performer does not have to accept withholding first and apply for a refund later.

These two tax treaties are promising for the future of the Dutch tax treaties. At the moment, The Netherlands is negotiating with:

- final stage: Cyprus, Colombia, Spain and Thailand;
- under construction: Andorra, Bangladesh, Belgium, Brazil, Morocco, Mozambique, Uganda, Portugal, Russia, Senegal and Sri Lanka;
- to be started: Bahrain, Barbados, Ecuador, Moldova, United Arab Emirates, Philippines, Kenya, Vietnam and Zimbabwe.

With the revised Dutch Tax Treaty Policy 2020, it should be possible to either leave out art. 17 from several tax treaties, but, in any case, include various restrictions as described in the previous paragraph.

Sportspersons and artists in US tax treaties

The new 2021 Dutch tax treaty with Chile shows that tax treaties with the USA can be good examples for an art. 17 for sportspersons and artists in new Dutch tax treaties. Interesting, therefore, is how the USA has agreed the minimum threshold in art. 17(1) and the limited approach in art. 17(2) in its tax treaties:

Minimum threshold in art. 17(1) and limited approach in art. 17(2) in US tax treaties.

COUNTRY	YEAR	ARTICLE	THRESHOLD (x US$)	USE	17(2)	LIMITED
Armenia	1973	no				
Australia	1982	17	10,000	direct	yes	yes
Austria	1996	17	20,000	direct	yes	yes
Azerbaijan	1973	no				
Bangladesh	2006	18	10,000	direct	yes	yes
Barbados	1984	17	4,000	direct	yes	yes
Belarus	1973	no				
Belgium	2006	16	20,000	direct	yes	yes
Bulgaria	2007	16	15,000	direct	yes	yes
Canada	1980	XVI	15,000	direct	yes	yes
Chile	2010	17	5,000	direct	yes	yes
China	1984	16			yes	
Cyprus	1984	19	5,000	direct	yes	yes
Czech Republic	1993	19	20,000	after	yes	yes
Denmark	2000	17	20,000	direct	yes	yes
Egypt	1980	17	400/day	direct		
Estonia	1998	17	20,000	direct	yes	yes
Finland	1989	17	20,000	direct	yes	yes
France	1994	17	10,000	direct	yes	yes
Georgia	1973	no				
Germany	1989	17	20,000	direct	yes	yes
Greece	1950	X	10,000	direct	yes	yes
Hungary	2010	16	20,000	direct	yes	yes
Iceland	2007	16	20,000	direct	yes	yes
India	1989	18	1,500	direct	yes	yes
Indonesia	1988	17	2,000	direct	yes	yes
Ireland	1997	17	20,000	direct	yes	yes
Israel	1975	18	400/day	direct		
Italy	1999	17	20,000	direct	yes	yes
Jamaica	1980	18	5,000	direct	yes	yes
Japan	2003	16	10,000	direct	yes	yes
Kazakhstan	1993	no				
Korea	1976	no				
Kyrgyzstan	1973	no				
Latvia	1998	17	20,000	direct	yes	yes
Lithuania	1998	17	20,000	direct	yes	yes
Luxembourg	1996	18	10,000	direct	yes	yes
Malta	2008	16	20,000	direct	yes	yes
Mexico	1992	18	3,000	after	yes	yes
Moldova	1973	no				
Morocco	1977	16			yes	
Netherlands	1992	18	10,000	after	yes	yes
New Zealand	1982	17	10,000	direct	yes	yes
Norway	1971	13	3,000	direct	yes	yes
Pakistan	1957	no				
Philippines	1996	17	3,000	direct	yes	yes
Poland	2013	17	20,000	direct	yes	yes
Portugal	1994	19	10,000	direct	yes	yes
Romania	1973	14	3,000	direct		
Russia	1992	no				
Slovakia	1993	18	20,000	after	yes	yes
Slovenia	1999	17	15,000	direct	yes	yes
South Africa	1997	17	7,500	direct	yes	yes
Spain	1990	19	10,000	direct	yes	yes
Sri Lanka	1985	18	6,000	direct	yes	yes
Sweden	1994	18	6,000	direct	yes	yes
Switzerland	1996	17	10,000	direct	yes	yes
Tajikistan	1973	no				
Thailand	1996	19	3,000	direct	yes	yes
Trinidad	1970	17	100/day	direct	yes	
Tunisia	1985	17	7,500	direct	yes	yes
Turkey	1996	17	3,000	direct	yes	yes
Turkmenistan	1973	no				
Ukraine	1994	17			yes	yes
United Kingdom	2001	16	20,000	direct	yes	yes
Uzbekistan	1973	no				
Venezuela	1999	18	6,000	direct	yes	yes
Vietnam	2016	17	5,000	direct	yes	yes
US model	2016	16	30,000	direct	yes	yes

From this overview, it can be learned that:

- the USA has no art. 17 for sportspersons and artists in tax treaties which are older or which are still following the old treaty with the Soviet Union;
- a minimum threshold of US$ 10,000 is present in tax treaties from the 1990s and that US$ 20,000

has become regular in the 2000s; and
- the limited approach of art. 17(2) is present in almost every US tax treaty.

The minimum threshold will be higher in new US tax treaties, because the 2016 US model has set this at US$ 30,000 per person per year.

OECD developments

These minimum thresholds in the US model and the new Dutch Tax Treaty Policy are also influencing the OECD.

At the moment, the OECD Working Party responsible for the OECD Model Tax Convention is undertaking a project on the global mobility of workers and how this might adapt the OECD Model or Commentary to reflect this new reality.

Some aspects of the treatment of sportspersons and entertainers (especially with low income) could be within the scope of that project, which might lead to an upgrade of the minimum threshold from the Commentary (para. 10.1-10.4) to the text of art. 17(1) of the OECD Model.

Also the limited scope of art. 17(2) can be considered, in relation to art. 15(2), for employees. Nothing has been published yet, but the project is under discussion at the OECD and its member states.

Final words

The Netherlands has been ground-breaking with the 2011 Tax Treaty Policy in which art. 17 for sportspersons and artists was left out. Unfortunately, this was only successful with Ethiopia and Iraq, because it is in the interest of developing countries to leave out the article, but it also shows that other states prefer to follow the OECD line.

After the OECD decision in 2014 to keep art. 17 in the Model Tax Convention, The Netherlands decided to return to the official international line with the new 2020 Tax Treaty Policy. But members of parliament have forced the Secretary of Finance to be more ambitious, especially because it is clear that art. 17 is creating tax problems. He has changed the Dutch Tax Treaty now towards a more flexible and modern tool for tax treaty negotiators, so that an optimal result for Dutch sportspersons and artists can be achieved.

The examples from the USA and other states and the options from the OECD Commentary can be used to put this in practice in the coming years.

A new development at the OECD might lead, in the near future, to a comparable text of art. 17 to art. 16 of the US Model Tax Convention and, therefore, tax relief for many sportspersons and artists.

Hopefully, The Netherlands can remain the front runner, either without art. 17 in tax treaties or with the article, but then with as many restrictions as possible to avoid tax problems.