

GSLTR

Global Sports Law & Taxation Reports

Contents

2019/13 Doping: The World Anti-Doping Code updated

2019/14 The new Impatriate Regime: Does Italy boost international transfers of football players?

2019/15 Sports brands and a changing marketplace: Preparing to win

2019/16 Football: Loan-out of Belgian players to The Netherlands

2019/17 Sports academies: The contribution of financial education and personal development programs to a holistic model of athlete development

2019/18 Image rights payments are earnings: the Geovanni case

2019/19 Football: Waiver of rights to training compensation

2019/20 Are professional athletes employees? The relationship between sports governing bodies and athletes: should athletes be treated as employees?

2019/21 Third party ownership: Life after the ban in Brazil and new funding sources

2019/22 Question marks around Hungarian sport financing through corporation tax incentives

2019/23 The value of the right of communication to the public for the sporting industry in the Commonwealth Caribbean



10·2

JUNE 2019

Colofon

MANAGING EDITOR

Dr. Rijkele Betten

CONSULTING EDITOR

Prof. Dr. Ian S. Blackshaw

MEMBERS OF THE EDITORIAL BOARD

Prof. Guglielmo Maisto
Maisto e Associati, Milano

Dr. Dick Molenaar
All Arts Belastingadviseurs, Rotterdam

Mr. Kevin Offer
Gabelle, London

Mr. Mario Tenore
Maisto e Associati, Milano

COORDINATOR

Erica Pasalbessy (MSc)
Nolot
P.O. Box 206
5270 AE Sint-Michielsgestel
The Netherlands
Tel.: +31 (0)625279308
Fax: +31 (0)735530004
E-mail: erica@nolot.nl

For further information on the activities
of Nolot see:
www.nolot.nl.

ISSN nr.: 0000-0000

© Nolot BV 2019

All rights reserved.

Preferred citation: GSLTR 2019/2, at page
number(s)

DISCLAIMER

Whilst every care has been taken in the
production of this publication and its
contents, the publisher and the authors
of the articles and reports cannot
accept any legal liability whatsoever for
any consequential or other loss arising
therefrom incurred by any subscribers or
other readers as a result of their relying
on any information contained therein,
which is not intended to constitute
any advice on any particular matter or
subject but merely provide information
of a general character.

Table of Contents

Vol. 10 No. 2 June 2019

Editorial 4

Articles

2019/13 **Doping: The World Anti-Doping Code updated!**
by Aidan Heale 8

2019/14 **The new Impatriate Regime: Does Italy boost
international transfers of football players?**
by Mario Tenore 12

2019/15 **Sports brands and a changing marketplace: Preparing to win**
by Jamie Watt 17

2019/16 **Football: Loan-out of Belgian players to The Netherlands**
by Dr. Dick Molenaar 21

2019/17 **Sports academies: The contribution of financial education and
personal development programs to a holistic model of athlete development**
by Athena Constantinou and Ian Blackshaw 24

2019/18 **Image rights payments are earnings: the Geovanni case**
by Kevin Offer 29

2019/19 **Football: Waiver of rights to training compensation**
by Frans de Weger and Thibault Dochy 32

2019/20 **Are professional athletes employees? The relationship between sports
governing bodies and athletes: should athletes be treated as employees?**
by Katie Russell and Rebecca Nicholson 36

2019/21 **Third party ownership: Life after the
ban in Brazil and new funding sources**
by Marcos Motta and Rodrigo Morais 40

2019/22 **Question marks around Hungarian sport
financing through corporation tax incentives**
by Gabriella Erdős, PhD 47

2019/23 **The value of the right of communication to the public
for the sporting industry in the Commonwealth Caribbean**
by Dr. Justin Koo 55

Subscription: e-mail to rijkele@nolot.nl

Football:

Loan-out of Belgian players to The Netherlands

BY DR. DICK MOLENAAR¹

Introduction

Football players can not only be transferred from one club to another, but can also be loaned out for a specific period of time.

The reasons for the loan-out are most often that a player is not playing regularly in the first team of the club and does not want to be on the bench, together with the fact that the club wants lower salary expenses for unused players to make room in the budget for new players.

The advantage for the new club renting the player is that no transfer fee has to be paid and no long-term contract needs to be agreed.

Most loan-outs are made during the winter transfer window, when, after the first half of the season, the preferences of the coach for the first team of the owner club have become clear, while the new club very often has not done well during the first half of the season and wants to strengthen its team with players from the bench of other, stronger teams.

Also, during the summer transfer window, loan-outs are made; very often from big clubs with too many players for the first team, which want their talents to develop further in other competitions by playing weekly.

Court decision in The Netherlands on signing bonuses

The Lower Court of Gelderland in The Netherlands has decided in a loan-out case from a Belgian club to three football clubs in the Netherlands.²

In 2010, the Belgian football club had three players, who were not playing often in the first team, but whose contracts were still going on for some time. They had good salaries and the Belgian club had also agreed considerable signing bonuses with the three players, when they had come over transfer free from their previous clubs.

One player received a signing bonus at once; for the other two, the signing bonuses were paid in quarterly instalments during the multiple-year contracts. The salaries and signing bonuses were taxed in Belgium and the players also fell under Belgian social security.

Unfortunately, the three players did not play often in the first team, because of the selection preferences of the coach. Both the players and the Belgian club felt unhappy, for the reasons described in the introduction above, and they agreed that the players should get the chance to be loaned out to other clubs.

The three players were loaned out in 2010 to three different Dutch football clubs. These Dutch clubs took over the obligation to pay the full salaries, but the Belgian owner club still had to pay the remaining (quarterly) signing bonuses.

The Dutch *Belastingdienst* (Tax Administration) approached the Belgian owner club for Dutch withholding tax on the payments of the signing bonuses to the three players.

The *Belastingdienst* argued that these signing bonuses were meant as payments for future activities, not only the quarterly payments, but also the one-off signing bonus. The Belgian football club defended that the signing bonuses were connected to the initial conclusion of the agreements and had nothing to do with the loan-outs to the Dutch clubs. More specifically, the Belgian club argued that with the agreement the players had become entitled to a claim against the club, which was paid later in instalments, but was taxable at the start of the agreement.

The Lower Court of Gelderland decided to follow the position of the *Belastingdienst* for the periodical payments of the signing bonuses, because these were connected to the future activities of the football players, but denied the Dutch taxability for the one-off signing bonus, because this had been paid before the player had changed from the Belgian to the Dutch football club and no direct relation with the rental agreement could be found.

The Court supported its decision with three legal sources:

- art. 10 of the *Wet op de loonbelasting* (Wage Tax

¹ Dr. Dick Molenaar is a partner with All Arts Tax Advisers and researcher at the Erasmus School of Law in Rotterdam, The Netherlands.

² Rechtbank Gelderland 27 March 2019, ECLI:NL:RBGEL:2019:1339.

- Act): “All income from employment is taxable”³;
- art. 15(1) of the Income Tax Convention Belgium-Netherlands: “Subject to the provisions of Articles 16, 18 and 20, 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”⁴;
 - art. 17 of the Income Tax Convention Belgium-Netherlands: “Notwithstanding the provisions of Article 15, income derived by a resident of a Contracting State in the capacity as [...] a sportsperson as such exercised in the other Contracting State, may be taxed in that other State”.

The national Dutch tax rule of art. 10 of the Wet op de loonbelasting is broad, because it is not restricted to Dutch salaries, but also covers foreign source employment income. Whether the Belgian football club, as employer, can be held liable for Dutch withholding tax can be found in art. 6 of the Wet op de loonbelasting, which states that non-resident employers can only be withholding agents when they have a permanent establishment (PE) in The Netherlands.

Interesting here is that the law presumes a deemed PE for intermediate activities, which lead to personal work for a third party in The Netherlands, which is the case here for the Belgian football club. There is also an option to be a withholding agent in The Netherlands when the employees of a company are liable to Dutch income tax, when this company chooses to register at the Dutch *Belastingdienst*. Anyhow, before the Court, there was no conflict about the withholding liability of the Belgian club in The Netherlands.

Strange that the Court mentioned art. 15 of the tax treaty in its decision, while this does not apply to sportsmen, even when they are employees, because the opening sentence of art. 17 of the same tax treaty sets aside art. 15. But the effect is the same under art. 17 and art. 15, because the activities for the new Dutch clubs are taking place in The Netherlands and, therefore, the taxing right is allocated to The Netherlands. And the exception in art. 15(2) would not apply here, as the players are loaned out for a longer period than 183 days and conclude employment agreements directly with the Dutch clubs. But with the broad text of art. 17, this is only a hypothetical observation.

The decision of the Lower Court of Gelderland meant that around half of the signing bonuses were taxable in The Netherlands, mainly because the one-off signing bonus was agreed and paid before the loan-out period, so that this taxing right was still allocated to Belgium.

Gross-up, Belgian tax refunds

The Lower Court of Gelderland also discussed whether it was allowed to gross-up the periodical payments of the signing bonuses during the work period in The Netherlands.

³ In Dutch: “Loon is al hetgeen uit dienstbetrekking of vroegere dienstbetrekking wordt genoten.”

⁴ The original text of this tax convention is only in Dutch and French.

The Belgian club stated that it was not planning to recover the Dutch withholding tax from the football players and that it would pay the tax on top of the signing bonuses, giving the players an additional income.

The Court decided that gross-up was only permitted if the periodical payments of the signing bonuses had not been under the withholding tax in Belgium yet, because with its decision, the Belgian club would be able to apply for a refund of withholding tax in Belgium and keep this as compensation for the Dutch withholding tax. In that situation, there is no advantage for the football players and no basis for a gross-up.

Residence

According to the case, the three football players had remained residents of Belgium during the loan-out period. That is possible, because The Netherlands is the neighbouring state and a football player from Belgium can travel daily for training and matches to the Dutch club. It is also possible that a player rents an apartment in the town of the new Dutch club but keeps his home near the Belgian owner club, because the loan-out period is relatively short and the player will return afterwards to the Belgian club.

Both Belgium and The Netherlands have their own national rules determining residence, but, in case of conflict, these are set aside by art. 4 of the Income Tax Convention Belgium-Netherlands. The first factor for the tie-breaker rule of this article is where the economic and personal relations are closer (centre of vital interests) and very often this is sufficient for a conclusion. If not, then the habitual abode is decisive, and if that cannot be determined, then the nationality is used. When there is no conclusion, in the end the competent authorities have to reach an agreement to come to only one resident state.

Residence is an important factor, because it determines where a person has to declare his worldwide income. With their Belgian residence, these players had to include their Dutch salaries from the Dutch football clubs, together with the signing bonuses that were taxable in The Netherlands in their Belgian income tax returns. But under art. 23 of the Income Tax Convention Belgium-Netherlands, the players were also entitled to elimination of double taxation, for which Belgium uses the exemption method. This is with progression, which means that exemption is granted at the average Belgian tax rate and the chance is likely that some extra Belgian tax needs to be paid by the three football players.⁵ This is different when the Dutch taxable income was the only income in the specific taxable year in Belgium, because then the income will be exempted completely.

30% rule in The Netherlands

It is interesting that the three football players had received approval for the 30% rule in The Netherlands before they started working there.

⁵ Anyhow, the three football players had to pay Belgian *gemeentebelasting* (city tax), which is 0%-8% from the Belgian federal income tax before the exemption for foreign taxable income.

This rule is meant for foreign employees with special skills and allows the employer to convert 30% of the salary into a tax-free costs' reimbursement. The initial reason was to compensate a foreign employee for extra expenses for double housing; visits back home to the family; higher living expenses and such. But, in practice, the 30% rule has become an incentive to attract foreigners with special skills from which domestic employees can learn and the Dutch economy can profit.⁶

The effect for the Belgian players was that 30% of their salaries from the Dutch football clubs was not taxable; while, on the other hand, extra expenses for travel between Belgium and The Netherlands and the extra costs of eventual double housing were not deductible. But, on balance, this will have been quite profitable for the three Belgian football players.

It was disappointing that the 30% rule could not be applied to the taxable periodical signing bonuses. This had to do with the remarkable and international unique Dutch system of withholding tax assessments, when no or not enough withholding tax has been taken off from the salary.

When the Belastingdienst in an audit discovers mistakes in the salary administration, it has the right to levy the withholding tax at once as *eindheffing* (final employer's levy), which is normally grossed up, unless when the employer wants the tax assessment to be individualized over the employees involved, so that the employer can recover the withholding tax from the employees.

But when the employer chooses to accept the *eindheffing* and pay the tax assessment as an employer's levy, then the 30% rule cannot be applied, because no individual salary for an employee can be determined.

In this case, the Belgian football club was not aware of this and even though both the Belastingdienst and the tax court asked the Belgian club whether they wanted to change their position, the club insisted on keeping the *eindheffing* as it was and pay the withholding tax assessment as employer for the three football players. With the effect that the 30% rule could not be applied.

This was very unfortunate, but it shows that both the 30% rule and the *eindheffing* are very specific Dutch tax measures.

It is interesting that, with the 30% rule, the Dutch effective tax rates become quite low.

Normally the top Dutch income tax rate is 52%, but this goes down with the 30% rule to effectively 36,4%, which is lower than in most other states. With this, it is financially very interesting for foreign football players to come to The Netherlands and play in the Dutch competitions.

It is not a condition for the 30% rule that the foreign football player should keep his tax residence abroad, he can also move to The Netherlands.

And the 30% rule can be applied to both loan-out and direct employment contracts.

Final remarks

Loan-out of players has become very common in international football.

The decision of the Lower Court of Gelderland in The Netherlands shows complications in the allocation of the taxing rights under art. 17 of the tax treaty; in this case, for the signing bonuses. In combination with the tax residence of the temporarily loaned-out football players, this can lead to double taxation, which should be prevented by art. 23 of the tax treaty.

The Court decision also gives insight into two special Dutch tax measures: the 30% rule for foreigners with special skills; and the *eindheffing* (final employer's levy) for the withholding tax assessment. The Belgian football club here would have had a 30% lower tax assessment with the choice not to apply the Dutch *eindheffing* for the correction of the withholding tax.

But also other states will have their particularities for which a local tax lawyer is needed to avoid mistakes.

⁶ Initially, the 30% rule was given for 10 years, but this was brought back to 8 years and per 2019 further to 5 years. Also, in 2012, a minimum gross salary was introduced of approx. € 50,000 per year (and higher for football players), same as a minimum distance of 150 kilometers to the Dutch border for the previous workplace. With this distance, most of the foreign specialists from Belgium do not qualify for the 30% rule anymore since 2012, but this Court Decision concerned 2010.