

# The ECJ X Case (Football Club Feyenoord)

**Withholding taxes on fees paid to non-resident sportsmen and artistes have long represented an obstacle to the cross-border provision of services within the European Union, as well as in the international context. Art. 17 of tax treaties based on the OECD Model is outdated and results in a significant administrative burden for taxpayers. The authors, in this article, examine the X case (Football Club Feyenoord), which highlights these issues, as well as their wider implications.**

## 1. Introduction

On 24 September 2010, the Dutch Supreme Court (*Hoge Raad*) decided to refer certain questions to the European Court of Justice (ECJ) concerning the football club Feyenoord.<sup>1</sup> The case concerns the Dutch withholding tax on performance fees paid by the Dutch football club Feyenoord to the UK football clubs, Tottenham Hotspur (August 2002) and Fulham (August 2004), for friendly matches in the pre-season training period. Fulham received EUR 50,000 and the Spurs EUR 133,000 for their appearances in the De Kuip football stadium in Rotterdam. Based on a withholding tax rate of 20%, and after a forfait deduction for expenses, the tax amounted to EUR 9,450 and EUR 26,050, respectively, which had to be paid by Dutch football club Feyenoord.

The Dutch Supreme Court, in its decision of 24 September 2010,<sup>2</sup> discussed the fact that this withholding tax might be in breach of the freedom to provide services, as provided for in Art. 56 of the Treaty on the Functioning of the European Union (TFEU). A withholding tax can be an obstacle to entering a foreign market, especially if residents are not subject to this withholding tax, but can, instead, have this income directly taxed pursuant to a final income tax. The Dutch Supreme Court, however, believes that the ECJ has issued conflicting decisions concerning this subject, specifically in the *Scorpio*<sup>3</sup> and *Truck Center*<sup>4</sup> cases, and, therefore, referred the case to the ECJ for a preliminary ruling.

## 2. Art. 17 OECD Model

The taxation of international sportsmen (and performing artistes) is a small but specialized topic of international taxation. Most states, in drafting their tax treaties, include an article based on Art. 17 of the OECD Model Tax Convention (OECD Model), which is a special clause applicable to artistes and sportsmen. They levy a withholding tax on the performance fees of non-resident sportsmen (and artistes) even if they are self-employed, their fees are business income and they do not have a permanent establishment (PE) in the state of performance. According to the OECD, this taxation at source, which deviates from Art.

7 (business profits) and Art. 15 (employment income) of the OECD Model, is a reasonable measure to ensure that every artiste and sportsman pays his share of his earnings to the government. Due to the fact that Art. 17 of the OECD Model has been adopted in the UN Model Tax Convention, many non-OECD Member countries apply this regime, both in their tax treaties and in their national legislation.

Art. 17 was introduced in the 1963 OECD Model. It was argued that, with the introduction of Art. 17, "practical difficulties are avoided which often arise in taxing public entertainers and athletes performing abroad". The 1987 OECD Report<sup>5</sup> noted that Art. 17 was meant to "counteract tax avoidance behaviour and non-compliance". In 1977, a second paragraph was added to Art. 17 that provided that payments to persons other than the artistes and sportsmen themselves could be taxed by the performance state.

As sportsmen (and artistes) must also report their foreign income in their residence state, double taxation may occur. This may, however, be eliminated in the state of residence by either exempting the foreign income or granting the sportsman (or artiste) a foreign tax credit. The OECD Model recommends the use of the ordinary tax credit provided for in Art. 23B,<sup>6</sup> but the tax exemption method is also still used, mainly in older tax treaties and by states that adopt a territorial basis for taxation.

It appears that these special taxing rules balance the taxation of performance income of artistes and sportsmen, i.e. by giving the state of performance the right to tax the income, while reserving a secondary taxing right plus progression for the state of residence. This seems to establish a reasonable allocation of taxing rights, although this regime differs from the normal allocation rules of Arts. 7 and 15 of the OECD Model.

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1. ECJ, Pending Case C-498/10, *X NV v. Staatssecretaris van Financiën*.
2. Published in the Netherlands in BNB 2010/316 (with comments by G. Meussen) and in *Nederlands Tijdschrift voor Fiscaal Recht* 2010/2207 (with comments by D. Molenaar). A discussion can also be found in F.P.G. Pötgens, "Buitenlandse gezelschappen en het vrije verkeer van diensten", *Nederlands Tijdschrift voor Fiscaal Recht Beschouwingen* 2010/45.
3. ECJ, 3 October 2006, Case C-290/04, *FKP Scorpio Konzertproduktionen GmbH v. Finanzamt Hamburg-Eimsbüttel*.
4. ECJ, 22 December 2008, Case C-282/07, *Belgian State v. Truck Center SA*.
5. OECD, "Taxation of Entertainers, Artistes and Sportsmen", in *Issues in International Taxation*, No. 2 (Paris: OECD, 1987).
6. See Para. 12 of the Commentary on Art. 17 of the OECD Model.

### 3. Obstacles to Entering Foreign Markets

Unfortunately, these special taxing rules raise potential practical issues, which can be divided into three groups:

- (1) The non-deductibility of expenses can easily lead to excessive taxation, because the taxable income in the country of performance will be much higher than in the residence country. This difference in taxable income is often more than the difference in the tax rates between the two countries;
- (2) Tax credit problems may arise in the country of residence, creating the risk of double taxation. For example, tax certificates may not be available, may be in the name of the group (and not the individual sportsmen) or in an unreadable language. Also, social security contributions or other levies may be deducted for which no credit is granted; and
- (3) High fees for professional advice are the result for artistes and sportsmen, the promoters of the performances and the tax authorities, both in the country of performance and in the country of residence.

The tax literature demonstrates that these problems frequently occur, especially because sportsmen and artistes are mobile and often undertake tours through various countries with appearances in only one location per country. It is not only the sportsmen and artistes who face an obstacle to cross-border activities as a result of special international taxing rules following from Art. 17 of the OECD Model, but also the promoters of the performances.<sup>7</sup>

### 4. Football Taxation

What is interesting is that the tax issue in the X case (Football Club Feyenoord) only arose in relation to the two friendly matches at issue and not other matches in the UEFA Champions League or Europe League. The reason for this is that the organizer, Feyenoord, paid the two invited clubs a performance fee for the friendly matches in its De Kuip stadium in Rotterdam, whereas, in the Champions League and Europe League, every home club keeps its own box office earnings and does not pay anything to the visiting foreign clubs. Therefore, in the UEFA competitions there is no taxable foreign performance income under Art. 17 of the OECD Model for the participating football clubs. Furthermore, the UEFA<sup>8</sup> collects the revenue from the TV rights, a portion of which is paid to the participating clubs, based on their results and size of their home state. These payments normally fall under Art. 12 of the OECD Model, which allocates the taxing right to the residence state. This means that in regard to the regular Champions League and Europe League, there is no risk of excessive, or even double taxation in respect of competitions that involve home and away matches.

This differs from the finals for the Champions League and Europe League, which are played in one match on independent soil. In 2011, the Champions League final was at Wembley stadium in London and the Europe League final was in the Dublin Arena. The box office earnings for these

finals are shared by the two clubs and the UEFA, which means that the state of the final can levy withholding tax if the finalists are non-residents. Due to pressure from the UEFA, however, the United Kingdom has given up its withholding tax in regard to the Champions League final.<sup>9</sup> Ireland does not levy any tax in regard to the Europe League final, as there is no domestic withholding tax provision applicable to non-resident sportsmen and artistes. This means that although the United Kingdom normally levies a 20% withholding tax, subject to a right to deduct expenses at source and an optional income tax settlement at the end of the year, the teams of the Champions League final have been receiving their gross fees free from any deduction and normally pay tax in their residence state.<sup>10</sup>

The situation is also different in regard to the European Championship tournament for national teams, which, in 2012, will be held in Poland and Ukraine, and in regard to the World Cup, which took place in 2010 in South Africa and will be held in 2014 in Brazil. For these tournaments, as is the situation for friendly matches, such as in the X case (Football Club Feyenoord), the normal source withholding tax rules apply to the performance income. These rules are the same as those applicable to other sportsmen, such as tennis, golf, snooker and billiard players, athletes, cyclists and skaters, as well as performing artistes. Performing artistes, unfortunately, face the international tax problems described in 3. in many more situations than the football clubs.<sup>11</sup>

### 5. Domestic Tax Rules in the Netherlands (and Other States)

In 2001, the Netherlands made its source taxation provisions for non-resident sportsmen (and artistes) more detailed, as follows:

- (1) The tax rate is 20%, which is basically levied on the gross performance fee;
- (2) Expenses can be deducted at source, but only after written approval is received from the Dutch tax authorities (*Belastingdienst*). This cost deduction approval (*kostenvergoedingsbeschikking*, KVB) can be

7. See, for example, D. Molenaar, "Obstacles for international performing artistes", *European Taxation* 4 (2002), pp. 149-154; D. Molenaar and H. Grams, "Rent-A-Star – The Purpose of Art. 17(2) of the OECD Model", *Bulletin for International Fiscal Documentation* 10 (2002), pp. 500-509 and D. Molenaar, "The illusions of international artiste and sportsman taxation", in H. van Arendonk, F. Engelen and S. Jansen (eds.), *A Tax Globalist – Essays in honour of Maarten J. Ellis* (Amsterdam: IBFD, 2005), pp. 90-104.

8. The UEFA is based in Lausanne, Switzerland.

9. The United Kingdom gave up its withholding tax for the 2012 Olympics in London. The IOC also convinced Canada to give up its withholding tax for the 2010 Winter Olympics in Vancouver. The reason for these efforts is that sportsmen, national associations and teams complained about the problems resulting from the use of Art. 17, as described in 4.

10. The United Kingdom for Manchester United and Spain for Barcelona.

11. The IOC has resolved this problem by setting, as a condition for candidate-Olympic cities, that they provide a source tax exemption for competing athletes. This means that these athletes only pay their normal income tax in their residence state. This was the situation for the 2010 Winter Olympics in Vancouver (Canada) and will be the same for the 2012 Olympics in London (United Kingdom). Also, the 2011 ICC Cricket World Cup in India and Bangladesh was exempted from source tax to avoid international tax problems for the participating teams.

applied for in advance of the performance in the Netherlands or up to one month following the performance;

- (3) The contract partner in the Netherlands is obligated to withhold the 20% tax from the performance fee after deducting the KVB. In the absence of this KVB, EUR 136 of deemed expenses per performing sportsman (or artiste) can be deducted;
- (4) The withholding agent bears a significant risk; if he does not follow the administrative rules (for example, providing the names, addresses and passport copies of the performing sportsmen or artistes), the tax rate is increased to 52%;<sup>12</sup> and
- (5) After the tax year, the non-resident sportsmen (or artiste) has the option to file an income tax return if he expects to be entitled to a tax refund, i.e. the Dutch tax authorities cannot force him to file one.

Dutch resident football clubs (or other sportsmen) do not fall under this withholding tax, but can receive their performance fees gross and arrange their income tax affairs themselves. The clubs deduct wage withholding tax from the salaries of their staff and football players and corporate income tax from their taxable income, if any. There is no need for Dutch resident football clubs to apply for special approvals from the Dutch tax authorities prior to a football match.

In practice, the system for non-resident sportsmen (and artistes) in the Netherlands worked quite well because of the opportunity to reduce the Dutch tax to a level that could be compensated for by way of a tax credit in the residence state.<sup>13</sup> This system put the Netherlands ahead of two ECJ decisions, i.e. the 2003 *Gerritse* case<sup>14</sup> and the 2006 *Scorpio* case.<sup>15</sup> The ECJ had decided that it was contrary to the freedom to provide services for a country to levy a withholding tax on the gross fee without allowing a deduction for directly linked expenses<sup>16</sup> in circumstances where the gross withholding tax is higher than the normal tax rates that would otherwise apply to the net income.<sup>17</sup>

The tax system, however, imposed a significant administrative burden on the organizers of sport events (and artiste performances). In 2004, the Dutch tax authorities undertook an official evaluation of the provisions. Most organizers complained that the system was complicated and that it caused significant administrative work.<sup>18</sup> The evaluation also demonstrated that the tax revenue in 2002 in the Netherlands was not more than EUR 7 million.

The administrative burden led the Dutch government to decide to eliminate source taxation of non-resident sportsmen (and artistes) as of 1 January 2007, provided the sportsman or artiste can prove that he is a resident of a state with which the Netherlands has concluded a tax treaty. In these circumstances, the Netherlands does not apply Art. 17 of the specific tax treaty, but unilaterally gives up its taxing right, with the result that the non-resident sportsmen (and artistes) pay normal tax in their residence state. Based on 2002 figures, this new provision costs the Netherlands EUR 5 million in tax revenue

per year, but saves the sportsmen, artistes and the tax administration (in both states) a total of EUR 1.6 million in administrative expenses.<sup>19</sup> The elimination of the withholding tax is a great relief to non-resident sportsmen and artistes performing in the Netherlands, because it takes away the risk of excessive or double taxation. Further, for the organizers of events and performances it eliminates the administrative work and removes the risk of higher tax assessments. The Netherlands has started negotiations with tax treaty states that apply the exemption method to convert to the tax credit method to avoid double non-taxation.

## 6. Developments in Other Member States

It has taken other Member States much more time to adapt their national tax rules to the ECJ decisions in *Gerritse* and *Scorpio*. As of 2011, Germany, France, Belgium, Spain, Sweden, Belgium and the Czech Republic have changed their tax rules for non-resident sportsmen and artistes such that they are more or less in line with the ECJ approach. Italy, Greece, Portugal and states in the eastern part of the European Union, however, have not yet responded to the 2003 and 2006 ECJ decisions. Currently, the withholding tax rates vary between 15% (France) and 30% (Italy), with varying systems applicable to the deduction of expenses at source and the filing of income tax returns following the end of the tax year. Each Member State has its own system, which makes it difficult for sportsmen and artistes on tour, performing in one state today and another tomorrow, in terms of deducting the direct expenses, as well as obtaining the right tax certificate for the tax credit in the residence state. It imposes a significant administrative burden to ensure that the source tax is reasonable.

## 7. Feyenoord against Fulham (2004) and Tottenham Hotspur (2002)<sup>20</sup>

Despite the existing tax rules in the Netherlands, in 2002 and 2004, football club Feyenoord did not levy Dutch withholding tax from the payments of the performance

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12. This much higher tax rate is meant to counteract illegal work in the Netherlands and force employers and other withholding agents to comply with the withholding tax law.
  13. For sportsmen (and artistes) from states that provided for the exemption method in their tax treaties with the Netherlands, the Dutch system could even have been profitable, because the 20% Dutch profits tax was lower than the tax exemption in their residence state. These sportsmen and artistes only paid minimal additional tax in their residence state because of progressive tax rates.
  14. ECJ, 12, March 2003, Case C-234/01, *Arnoud Gerritse v. Finanzamt Neukölln-Nord*.
  15. *Scorpio*, see note 3.
  16. See D. Molenaar and H. Grams, "Scorpio and the Netherlands: Major Changes in Artiste and Sportsman Taxation in the European Union", *European Taxation* 2 (2007), pp. 63-68.
  17. See D. Molenaar and H. Grams, "The Taxation of Artists and Sportsmen after the *Arnoud Gerritse* Decision", *European Taxation* 10 (2003), pp. 381-383.
  18. See for a discussion, D. Molenaar, "De illusies van de artiesten- en beroepsportersregeling", *Weekblad voor Fiscaal Recht* 2004/6587, pp. 1111-1118.
  19. See Molenaar and Grams, note 16; see also D. Molenaar, *Taxation of International Performing Artistes* (Amsterdam: IBFD, 2006).
  20. The final score was a 2-2 draw in both friendly matches.

fees to Tottenham Hotspur and Fulham. Further, neither Feyenoord nor the UK football teams applied for a KVB. Also, the individual football players did not file income tax returns after the relevant tax year. The taxing rules for non-resident sportsmen were simply ignored by Feyenoord. It is unclear whether the club was unaware of these rules, as were most sports events organizers in those years, or whether the club already believed in 2002 and 2004 that its position as withholding agent for the UK football clubs was an obstacle to the freedom to provide services to the Dutch market.

The UK clubs should, instead, have filed a KVB application to deduct their expenses. It would not have been easy to budget direct and indirect expenses but, in the authors' experience, it would not have been impossible. It is anticipated that this would have led to expenses in excess of the earnings of EUR 133,000 (Tottenham Hotspur) and EUR 50,000 (Fulham). Even if the expenses had been less than the earnings, most of the withholding tax could have been reclaimed in regard to one or two individual income tax returns. This means that, in two steps, the Dutch non-resident withholding tax could have been reduced to (almost) zero. This could only have been done, however, with the assistance of a Dutch (and perhaps also UK) specialized tax adviser who understood what needed to be done. The need for tax advice – also because of the extra expense – represents another hurdle for inexperienced non-resident football clubs,<sup>21</sup> especially in comparison to resident football clubs.

If the two UK football clubs were to accept the 20% Dutch source withholding tax, it would be problematic to get a UK tax credit for it, because the two clubs are in a structural loss situation, and a tax credit against the UK corporate income tax would not provide any relief. Further, distributing the Dutch source tax amongst the individual football players to get tax credits would also be problematic because they are in the monthly payroll system and the Dutch tax certificate (if available) will be in the name of the football club and not the individual players.

From 2007 onwards this will no longer be a problem because the Netherlands has unilaterally given up its taxing rights in regard to performance fees of non-residents. This solves not only the problem of double taxation, but also eliminates the administrative expense.

## 8. Reference to the *Scorpio* Case

The X case (Football Club Feyenoord) goes beyond *Scorpio* in that it introduces a new element, which is the question of whether a source withholding tax levied against the resident contract partner is in breach of the freedom to provide services in the internal market. The alternative would be to send a Dutch tax return directly to the UK football clubs, because they know their expenses better than anyone else and, if any taxable income remains after the deduction of expenses, they will also have the proper information for the tax credit against their (corporate) income tax.

The *Scorpio* case concerned payments in 1993 from a German concert promoter (*FKP Scorpio Konzertproduktionen GmbH*) to a Dutch company, who represented a US pop group in regard to performances in Germany. One of the questions in the case was whether or not a German withholding tax levied against *Scorpio* was an obstacle to the Dutch company entering the German market because German resident companies (representing non-resident artistes) were not subject to this withholding tax. The ECJ decided that this withholding tax was, indeed, an obstacle to entering the German market, because it gives an advantage on the market. The ECJ also decided, however, that in 1993 there was a justification for this withholding tax because no EU Directive existed regarding mutual assistance in respect of recovery of tax claims that could be used by Germany if the Dutch company did not file the tax return or pay the tax due.

The authors, in an article published in the February 2007 issue of *European Taxation*,<sup>22</sup> pointed out that there were differences in the translations of the ECJ decision in the *Scorpio* case. In the English, French and Greek versions, the past tense was used, i.e., "[m]oreover, the use of retention at source represented a proportionate means of ensuring the recovery of the tax debts of the state of taxation".<sup>23</sup> But, in the German, Dutch and Spanish versions, the present tense was used. Although German was the official language of the case, the ECJ is of the opinion that translations into other languages are equally valid. This means that it remained unclear, from the decision in the *Scorpio* case, whether or not the ECJ's decision would be different following the 2001 Council Directive,<sup>24</sup> which gives Member States the right to obtain assistance from other Member States in collecting tax claims from non-residents. The authors concluded that a new case was needed to clarify the ECJ's position in respect of withholding taxes following the 2001 Council Directive. Indeed, the X case (Football Club Feyenoord) represents such a case.

## 9. Other Relevant ECJ Decisions

There are other ECJ decisions that have had an influence on the X case (Football Club Feyenoord) that are discussed in this section, i.e. the *Gerritse* and the *Truck Center* cases.<sup>25</sup>

In the *Gerritse* case<sup>26</sup> it was made clear, for the first time, that the existing taxation rules for internationally performing artistes and sportsmen, contained in Art. 17 of

21. Inexperienced in the sense that they do not have to do this in respect of the regular UEFA competitions.

22. See Molenaar and Grams, note 16.

23. *Scorpio*, note 3, Para. 37.

24. Council Directive 2001/44/EC of 15 June 2001 amended Council Directive 76/308/EEC of 15 March 1976 on mutual assistance for the recovery of tax claims. This 2001 Directive had to be implemented by the Member States by 1 July 2002.

25. The reference to these ECJ decisions is also discussed in E.C.C.M. Kemmeren, "The Netherlands: Pending Cases Filed by the Netherlands Courts: The National Grid Indus (C-371/10) and Feyenoord (C-498/10 (X)) Cases", in *ECJ-recent Developments in Direct Taxation 2010* (Vienna: Linde Verlag, 2011), pp. 15-183.

26. *Gerritse*, note 14.