Belgium: Tax Treatment of a Lump Sum Payment for the Exploitation of the Image Rights of a Professional Football Playerunder the Belgium–Croatia DTC

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1. Introduction[1]

The case reviewed in this chapter deals with the qualification of a lumpsum payment derived by a professional football player from the exploitation of his image/portrait rights under the Belgium-Croatia Income and Capital Tax Treaty (2001)[2] (hereinafter: Belgium-Croatia Tax Treaty), more precisely whether it falls under the scope of article 12 (Royalties) or article 14 (Independent Personal Activities). Despite not being addressed by the Court of appeal, the present contribution also examines the potential application of other provisions of the tax treaty such as for example article 15 (Income from Employment) and 17 (Artistes and Sportsmen).

2. Facts of the Case

The taxpayer is a Croatian national, who was active as a professional football player in Belgium. Between September 2006 and June 2010, he had an employment contract with "Sporting Lokeren", a Belgian football club in the first division and established in Lokeren, Belgium.

Besides the aforementioned employment contract with Sporting Lokeren, the taxpayer signed approximately one year later (in July 2007) a further agreement with a consultancy company, pursuant to which he was entitled to a [single] lump-sum payment (in the amount of EUR 350,000) for the exploitation of his image (portrait) rights for a period of three years while playing for Sporting Lokeren. From the factual description of the case provided by the Court of Appeal of Ghent, it cannot be clarified or inferred whether (or not) Sporting Lokeren and the consultancy company were in connected or linked to each other in any manner whatsoever. It appears however that the payment was related to the taxpayer's status as a Lokeren football player.

At the time of the conclusion of the second agreement (i.e. relating to his image/portraits rights), the taxpayer was resident in Croatia, which was not disputed by the Belgian tax authorities.

The taxpayer did not include this lump-sum payment in his Belgian tax return. However, based on the payment slips issued by the consultancy company (so-called "fiche 281.50"), the Belgian tax authorities issued a tax assessment, in which the lump-sum payment was qualified – in accordance with articles 227(1) and 228(1) of the Belgian Income Tax Code (hereinafter: BITC)– as income from independent personal activities derived in Belgium by a non-resident. The income

1 BE: Hof van beroep Gent [Court of Appeal Ghent], 15 May 2018, 2017/AR/589.

2 Agreement between the Kingdom of Belgium and the Republic of Croatia for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income and on Capital (31 Oct. 2001), Treaties IBFD [hereinafter Belgium-Croatia Tax Treaty].

was taxed and a penalty of 10% was imposed (for failure to declare taxable income).

The taxpayer challenged the tax assessment, arguing that the lump-sum payment was not taxable in Belgium according to article 12 of the Belgium-Croatia Tax Treaty. In the taxpayer's view, the lump-sum payment had to be qualified as a payment for the transfer of copyright related rights. The taxpayer also argued that, if Belgium was entitled to tax such income, it had to be qualified and taxed (at a fixed lower rate) for the purpose of Belgian domestic tax law as passive income derived from movable property.

His objections were rejected by the tax authorities. The Court of first Instance of East-Flanders (district Ghent) also rejected his arguments. He appealed before the Court of Appeal of Ghent.

3. The Court's decision

The two issues addressed to the Court of Appeal of Ghent were (i) whether under the Belgium-Croatia Tax Treaty, Belgium was entitled to tax the lump-sum payment [for the exploitation of taxpayer's image/portraits rights] and, if so, , (ii) whether such income had to be characterized and taxed, under Belgian domestic tax law, as income from independent personal activities or as passive income from movable property.

As mentioned already, the taxpayer argued that the lump-sum he had received was not taxable in Belgium (according to article 12 of the Belgium-Croatia Tax Treaty), but in Croatia (i.e. state of residence), whilst the Belgian tax authorities considered that this income fell within the scope of article 14.

The issue of residency (when signing the – second – agreement relating to the exploitation of taxpayer's image/portrait rights) was not disputed or discussed[3]. As a result, the Court of Appeal of Ghent concluded that the lump-sum payment (i) was derived by a non-resident taxpayer and (ii), being from Belgian source, was taxable in Belgium, in accordance with articles 227(1) and 228 1) of the BITC. In line with the position of the Belgian tax authorities, the Court of Appeal of Ghent held that the lump-sum payment fell within the scope of article 14, which rendered article 12 of the Belgium-Croatia Tax Treaty inapplicable (due to the third

3 The main reason for this situation can be found in the fact that Belgium had established a beneficial tax regime that was intended to attract foreign sportsmen to Belgium. Under that regime and up to 31 Dec. 2007, the income derived by non-resident sportspersons and artistes (in contrast to the professional income received by ordinary non-residents or resident sportspersons) was subject to a beneficial final (wage) withholding tax at a rate of 18%. However, this tax legislation created a distortion, so that it was revised in 2007. As of 1 Jan. 2008, the flat rate of 18 % only applies to income derived by non-resident sportspersons and artistes from activities in Belgium with a duration of less than 30 days. For a complete description of the tax regime applicable to non-resident sportspersons, see BE: Administrative Guideline Ci.RH.241/603.774 (AFER nr.48/2010), 2 July 2010.

paragraph of latter provision, stating that article 12 is not applicable where article 14 applies).

The Court of Appeal of Ghent noted that it was clear from the wording of the second agreement that the taxpayer had received the single lump-sum payment for his image/portraits rights; according to the Court of Appeal of Ghent, this payment was *specifically* linked or connected to the taxpayer's activities as a professional football player (and it could not, therefore, be equated – as the taxpayer argued – with the transfer of a copyright).

In this regard, the Court of Appeal of Ghent found in particular that based on the terms of said second agreement per se, (i) the lump-sum payment in question was characterized as professional income and (ii) execution of the payment was [directly] dependent on the taxpayer's employment contract (in the event of premature termination of the employment contract, the taxpayer would have to reimburse the consultancy company in the sum of the remuneration wrongly paid in relation to these image/portraits rights).

On the basis of these findings, the Court of Appeal of Ghent concluded that the lump-sum payment had to be qualified as income from independent personal activities.

Consequently, the Court of Appeal of Ghent stated that the Belgian tax authorities had correctly concluded that the *transfer* of the exploitation of image/portrait rights had to be seen as an *independent* subdivision of the taxpayer's professional activities, which were taxable in Belgium (according to article 14 of the Belgium-Croatia Tax Treaty), as far as the income resulting from such activities was *attributable* to a fixed base in Belgium.

According to the Court of Appeal, the taxpayer did have such a fixed base in Belgium in 2007 for the purposes of article 14: the football club's stadium and its other infrastructure were [seen by the Court of Appeal of Ghent as a] fixed base in space and time and were used in a permanent way by the taxpayer thanks to his employment contract. The court ruled that it was not relevant that the taxpayer did not rent those premises, nor had an exclusive right of use.

As a result, the Court of Appeal of Ghent concluded that the taxpayer carried out his professional activities in Belgium through a fixed base and so was able to derive an income from such activities.

As regards the taxpayer's other argument (see above), the court ruled that despite the very close link or connection to the taxpayer's professional activities, the lump-sum payment could not be equated to wages under an employment agreement and therefore, for Belgian tax purposes, it had to be characterized and taxed as income [derived] from independent personal activities (according to article 228,(2)(4) of the BITC), and not – remarkably –- as income of whatsoever qualification (…) derived by a sportsperson (according to article 228(2)(8) of the BITC).

4. Comments on the Court's Reasoning

4.1. Qualification of the Lump-Sum Payment

4.1.1. Application of article 15 of the Belgium-Croatia Tax Treaty

As regards the different issues arising in the case, the reasoning of the Court of Appeal of Ghent appears to be rather inconsistent. One of these issues concerns the qualification and, therefore, the tax treatment of the lump-sum payment.

On the one hand, the court starts its reasoning by stating that based on the wording of the second agreement (concluded between the taxpayer and the consultancy agreement in July 2007), it is clear that (i) the lump-sum payment is directly and *specifically* linked or connected to taxpayer's professional activities as a football player in Belgium and (ii)its payment was *dependent* on the [main] employment contract (as already mentioned above, a premature termination of latter employment contract would imply a reimbursement of the remuneration paid in relation with the exploitation of taxpayer's image/portrait rights).

On the other hand, after having made these initial statements, the court concludes its reasoning by ruling that the income resulting from the exploitation of the taxpayer's image/portrait rights had to be seen as an *independent* part of the taxpayer's professional activities in Belgium.

It is rather questionable that from a legal and judicial point of view, the same income can be regarded as being *specifically* dependent on an employment contract (as regards its execution or payment) and at the same time can constitute an independent part of the taxpayer's professional activities.

The Court of Appeal of Ghent noticed correctly that the effective value of taxpayer's image/portrait rights was *directly* correlated with his performances on the football pitch (and therefore with his employment contract). On the basis of that statement and analysis, a possible solution would have been to qualify the lump-sum payment as a "salary *bonus*", rather than as "income from independent personal activities". Furthermore, from a more practical point of view, it is also highly questionable whether the mere granting (by the taxpayer) of a right to exploit the latter's image/portraits rights as such can –*per se*– constitute an *independent* professional activity requiring a fixed base (as regards this particular issue, see further developments below) in Belgium, and therefore be subject to article 14 of the Belgium-Croatia Tax Treaty.

Qualification of the payment as, for example, a salary bonus would have been in line with the BITC, which defines the concept of salaries/wages broadly. According to article 31 of the BITC, the concept of salaries/wages also encompasses bonuses (see article 31(2)(1)), as well as advantages of any kind obtained in connection with or at the occasion of the exercise of the professional activity (see article 31(2)(2))[4]. It is, however, required that the *remunerated counterpart* (i.e. the salary or wage) be *directly* linked or connected to a *physical presence* and *effective* work in the state of activity.[5]

In the case under review, it would – from a theoretical point of view –be quite consistent to apply article 15 of the Belgium-Croatia Tax Treaty to the income in dispute[6]. However, there are at least two obstacles to this: (1) formally, two different agreements have been signed at two different points in time and between different parties. We do not have any information that would allow us to establish that (i) *in fact* the football club and the consultancy company are [closely] related parties and (ii) the two agreements have *artificially* (i.e. for tax planning purposes) been separated; and (2) it is rather unlikely that such an activity would require a physical presence and effective work from the taxpayer.

From a conceptual point of view and as a general rule, it would make sense that sportspersons under an employment contract be *completely* subject to the provisions of article 15 rather than those of article 17 of the OECD Model. However, based on the actual wording of article 17, such a solution is not possible at present. It would, however, be a suitable solution.

4.1.2. Application of article 17 of the Belgium-Croatia Tax Treaty

As pointed out by Michel (2018),[7] neither the Belgian tax authorities, nor the Court of Appeal of Ghent considered the possibility of applying article 17 of the Belgium-Croatia Tax Treaty, which reproduces – except for some slight terminological changes – the text of article 17 of the OECD Model.

In its revised version, the Commentary on article 17 of the OECD Model states the following:[8]

> It is frequent for entertainers and sportspersons to derive, directly or indirectly (…), a substantial part of their income in the form of payments for the use of, or the right to use, their 'image rights', e.g. the use of their name, signature or personal image. Where such uses of the entertainer's or sportsperson's image rights are not closely connected with the entertainer's or sportsperson's performances in a given State, the relevant payments would generally not be covered by Article 17. There are cases, however, where payments made to an entertai-

4 See BE: Administrative Guideline AFZ 2005/0652 (AFZ 08/2005), 25 May 2005, n3.3; C. Lebegue, *Artikel 14:Inkomsten uit een dienstbetrekking*, in *Het Belgisch Standaardmodel van Dubbelbelastingverdrag. Een Artikelsgewijze Commentaar*p. 381 m.no. 884 (P. Bielen & S. Janssens eds., Larcier 2018).

5 See BE: Administrative Guideline AFZ 2005/0652 (AFZ 08/2005), 25 May 2005, n3.1.

6 See Para. 9 *OECD Model: Commentary on Article 17* (2010).

7 B. Michel, *Payments for the Use of a Footballer's Image Rights: a Belgian Court's Interesting Endeavour at Treaty Qualification*, in 72 Bull.Intl.Taxn. 11,sec. 3.2. (2018), Journals IBFD.

8 Para. 9.5. *OECD Model: Commentary on Article 17* (2017).

> ner or sportsperson who is a resident of a Contracting State, or to another person, for the use of, or right to use, that entertainer's or sportsperson's image rights constitute in substance remuneration for activities of the entertainer or sportsperson that are covered by article 17 and that take place in the other Contracting State. In such cases, the provisions of paragraph 1 or 2, depending on the circumstances, will be applicable.(emphasis added by author)

From the aforementioned Commentary on article 17 of the OECD Model, it can be inferred that the income in dispute could fall within the material scope of article 17 of the Belgium-Croatia Tax Treaty, insofar as, based on the concrete circumstances of the case, a close or *direct*[9]connection with the sportsperson's performances in a given state can be established and evidenced. According to some Belgian authors, sponsorship income paid to a professional tennis player as a result of his ATP ranking should/can fall within the material scope of application of article 16 of the Belgian Model[10] (the provision corresponding, except for slight terminological differences, to article 17 of the OECD Model).

In the present case, the Court of Appeal of Ghent did correctly identify some factual and legal elements (see above) that help to establish the necessary *direct* link or connection to a taxpayer's sporting performances. In particular, the court rightly underlined that the effective value of taxpayer's image/portrait rights was *directly* correlated with his performances on the football pitch (and therefore with his employment contract). This last element can be compared, *mutatis mutandis*, with the sponsorship income allocated to a professional tennis player, as a result of his ATPranking.

4.1.3. Application of article 12 of the Belgium-Croatia Tax Treaty

As already mentioned above, the taxpayer considered that his income derived from the exploitation of his image/portraits rights was covered by article 12 of the Belgium-Croatia Tax Treaty, which contains an *autonomous* definition of the concept of royalties[11] in its second paragraph. That *autonomous* definition makes reference to several concepts of intellectual property law (such as for example trademarks, designs, patents, etc.) which are not defined *autonomously* and which,

9 W. Coppens&A. De Bevere, *Artikel 16: Artiesten en sportbeoefenaars*, in *Het Belgisch Standaardmodel van Dubbelbelastingverdrag. Een Artikelsgewijze Commentaar* p. 513 m.nos. 1067 and 1068 (P. Bielen & S. Janssens eds., Larcier 2018).

10 W. Coppens & A. De Bevere, *Artikel 16. Artiesten en sportbeoefenaars*, in *Het Belgisch Standaardmodel van Dubbelbelastingverdrag. Een Artikelsgewijze Commentaar* p. 513 m.no. 1069 (P. Bielen & S. Janssens eds., Larcier 2018).

11 For a more detailedanalysis of the intellectualpropertyrightscovered by Article 12, see: D. Kaesmacher, *Le traitement fiscal des redevances générées par l'exploitation des droits de propriété intellectuelle dans un contexte international*, in *Fiscalité internationale en Belgique – Tendances récentes*, p. 196 (E. Traversa & I. Richelleeds., Brussels 2013); B.Vanbrabant, *La notion de redevances au sens de l'article 12 des Conventions fiscales internationales*, in Journal de Droit Fiscal 5/6, pp. 130–164 (2016).

therefore, have to be interpreted in accordance with article 3(2) of the Belgium-Croatia Tax Treaty.

Article 12 of the Belgium-Croatia Tax Treaty does not mention or refer to the term “image rights”.

From a Belgian domestic law perspective, it is interesting to note that a person’s image rights are protected by the Copyrights Act of 30 June 1994, which was subsequently integrated into the Belgian Commercial Code in February 2013.[12]

From a Belgian tax point of view, paragraphs 1, 3 and 5 of article 17 of the BITC cover the different royalties within the meaning of article 12 of the OECD Model, although this domestic provision does not use or mention the term “royalty” itself. However, income deriving from the cession of the licensing of a *copyright* or so-called “neighbouring rights” (according to article 17(1)(5) of the BITC) does not constitute a royalty within the meaning of article 12of the OECD Model, but is qualified as income from movable property.[13]

From a “conventional” point of view, as article 12(2) of the Belgium-Croatia Tax Treaty does not mention, nor refer to image rights, it may be inferred– as the Court of Appeal of Ghent did – that income deriving from the exploitation of such image rights is not covered by that article. Concluding otherwise would likely violate the ordinary meaning of the terms of the provision.[14]

This solution is also confirmed by the analysis made under Belgian tax law: income deriving from the cession of the licensing of a copyright or neighbouring rights qualifies as income from movable property, and not as royalty income.

4.2. Determination of a “Fixed Base” and attribution of income

The other key issue of the present case concerns the decision of the Court of Appeal of Ghent to allocate to the taxpayer a fixed base in Belgium, which consisted– according to the Court – in the football club’s stadium and its other infrastructure (despite the fact that the taxpayer did not rent those premises, nor had an exclusive right of using them). This decision also appears to be inconsistent and merits some comment.

Firstly, as already mentioned above, it is doubtful whether the mere granting to a party (by the taxpayer) of a right to exploit the granter’s image/portraits rights as

12 BE:Loi relative au droit d’auteur et aux droits voisins/Wetbetreffende het auteursrecht en de naburigerechten (Copyrights Act), National Legislation IBFD.

13 A. Rayet& C. Katz, *Les droits d’auteur et les droits voisins dans l’article 17 du CIR/92*, in Revue Générale du Contentieux Fiscal 5, pp. 377-402 (2009); E. Traversa & V. Deckers,*La réforme de la fiscalité des droits d’auteur*, in Journal des Tribunaux, p. 333 (2009).

14 B. Michel, *Payments for the Use of a Footballer’s Image Rights: a Belgian Court’s Interesting Endeavour at Treaty Qualification*, in 72 **Bull.ntl.Taxn. 11**, sec. 3.3. (2018).

such can – *per se* – constitute an *independent* professional activity. As Michel (2018)correctly pointed out, such an activity does not "entail any active commitments on [the taxpayer's] part".[15]

Secondly, it is also questionable whether such a rather passive activity requires a fixed base. Even assuming that the taxpayer was authorized to use the football club's premises and infrastructure (such as for example the shower or the cloakroom, but very likely not administrative spaces or other administrative facilities) with regard to the different football games to be played during the regular season, there was no legal or factual element that might establish that the taxpayer did use these premises or infrastructure for the purpose of exploiting his image/portrait rights.

In other words, there was no legal or factual element from which it could be inferred that the taxpayer's income, as resulted from the exploitation of his image/portrait rights, was *attributable* to his fixed base in Belgium.

The requirement that the exploitation of the taxpayer's image/portrait rights be "*effectively connected*" to the fixed base is therefore *obviously* not met.[16]

5. Conclusion

The reasoning of the Court of Appeal of Ghent in this present case is rather strange, and on certain fundamental issues, is not in line with international standards.

Firstly, considering the circumstance that the taxpayer is a professional sportsperson under an employment contract, it is quite surprising that the Court of Appeal of Ghent did not even consider a possible application of article 17 of the Belgium-Croatia Tax Treaty and did not check its *material* scope of application. The formulation of article 17 of the treaty (starting with the expression "*Notwithstanding the provisions of Articles 14 and 15*") shows the very close interaction between these provisions, one (i.e. article 17) being generally seen as a derogation (*Lex specialis*) from the other two. By not even checking the *material* scope of application the said article 17, the Court of Appeal of Ghent missed an opportunity to clarify the interaction between these provisions, particularly considering the fact that it correctly pointed out that the execution or payment of the lump-sum in dispute was directly dependent on the employment contract.

Secondly, as regards the application of article 14 of the Belgium-Croatia Tax Treaty to the income in dispute, the reasoning of the Court of Appeal of Ghent

15 B. Michel,*Payments for the Use of a Footballer's Image Rights: a Belgian Court's Interesting Endeavour at Treaty Qualification*, in 72 **Bull. Intl.Taxn. 11**, sec. 3.5. (2018).

16 In the assumption that such a right can be qualified as a 'royalty', see Paras. 16, 21 and 21.1. of the *Commentary on Article 12 of the OECD Model* (2010).

appears to be unrealistic and *artificial*. There was no factual or legal element to support the view that the taxpayer did use the football club's premises or infrastructure for the purpose of exploiting his image/portrait rights. Furthermore, there was no evidence that the income resulting from the exploitation of taxpayer's image/portrait rights could have been *attributable* to his fixed base in Belgium.

Finally, as already mentioned above, from a policy perspective, cases like this show, once again, that (at least) sportspersons under an employment contract should be *completely* subject to the provisions of article 15 of the OECD Model, rather than those of article 17 of the OECD Model. However, considering the actual wording of article 17, such a solution would require a change of the Model and of the numerous tax treaties which follow its wording.