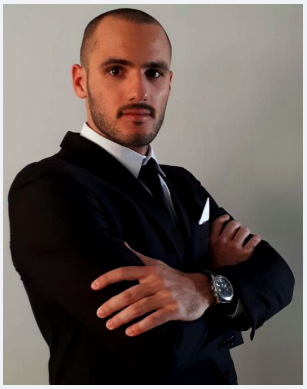
SPECIAL TAX REGIMES: THE EUROPEAN PERSPECTIVE AND THEIR IMPACT ON ASSOCIATION FOOTBALL

Abstract

Undeniably, in every business sector there is a tax reality to be reckoned and, in modern football, the applicable fiscal treatment in tandem with sporting reasons play an inescapable role upon the potential relocation of players. It is not rare that the projected tax treatment fashions players' decisions regarding their career options. In this context, tax incentive packages that were initially designed to attract qualified intellectual capital, nowadays, seem to function as a recruitment tool of foreign football talent as the obtainable benefits can lead to significant tax savings. Such regimes that have sparked discussions around the globe and gained further spotlight, are deemed to be really beneficial for players and clubs (at least indirectly). This article shall delve into these regimes and rules by briefly sketching an overivew of the necessary points and providing an outlook on their consequential effects.



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1. Introduction

Over the past 3 years, the football industry has been tainted by tax scandals, as an increasing number of structures employed by footballers to channel and conceal image rights payments have been scrutinized by the Tax Authorities (the "**Authorities**") of several jurisdictions projecting them as vehicles to defer/avoid taxation of income. As a result, the castigation of footballers has led football fans to be concerned with the tangle of tax laws encompassing the treatment of their remuneration and devote sustained attention to the tax matters arising thereto.

As a preliminary remark, the Authorities underpin their taxation grounds on a wide array of criteria pertaining to the taxpayers' residence. The latter constitutes the main tax-connecting criterion manifesting the *nexus* of the taxpayer with the respective jurisdiction.

Going forward, the move of C. Ronaldo from *Merengues* to *Vecchia Signora* was brought to the fore by the totality of the international media outlets and gave new fuel to the discussions on the beneficial tax regimes legislated in several jurisdictions. It is alleged that the deal was successfully sealed as the move was motivated, not only by pure sporting reasons, but also because one of the main grounds to convince C. Ronaldo was the adopted new Italian tax regime, being amongst the handful of similar regimes that adorn few European leagues.

Even if the premise behind most of these regimes is not totally sports oriented, they display quite an interest for professional footballers. The main precursor could plausibly be deemed to be the notorious Spanish Beckham Law[1] regardless of the fact that as from December 31, 2015 is not applicable to employed sportspersons.

2. Preliminary remarks

Before illustrating these regimes, I shall touch upon some general elements pertaining to the income derived by footballers, which shall be considered as the broader framework to better grasp the following analysis.

2.1. Employment income

As a matter of principle, by virtue of the employment contract, the club pays a player's predetermined salary, directly correlated with the on-field performance. Said contract may also provide for additional variable components that are related to participation in certain competitions (i.e. bonus). Moreover, a stipulated percentage[2] of any transfer fees in the event of a future transfer shall qualify as remuneration linked to said contract, without violating FIFA's rules on third party ownership ("**TPO**") of players' economic rights. FIFA Disciplinary Committee contended that players themselves do not constitute a "third party" in the sense of Article 18ter FIFA RSTP.

2.2. UEFA competitions

As a general remark, when an employed sportsperson performs activities not confined solely in one state, the salary should be filtered and apportioned between the different states[3]. That said, UEFA competitions entail home and away games. As regards the latter,

[1] Royal Decree 687/2005.
[2] The characterization of this type of income varies as it is not considered as employment income in all jurisdictions. The dividing line depends on the nuances granted by the respective domestic law to this income.
[3] AXEL CORDEWENER, "Tax Treaty Issues Related to Qualification, Allocation and Apportionment of Income Derived by Entertainers and Sportspersons", in GUGLIELMO MAISTO (ed) *Taxation of*

the state of performance could, potentially have a right to tax, especially in light of the Double Tax Treaties ("**DTT**")[4]. This could occur regardless of whether the player is to be considered as tax resident there, provided, of course, that a domestic special sourcing rule is foreseen in the relevant state.

Notwithstanding, taking heed of the contractual stipulations[5], it is unlikely that the salary would be segregated during the season. In the very likely scenario of a configured contractual clause by virtue of which the player would be entitled to a premium for qualification to the UEFA competition, it should be accentuated that such premium would remunerate the achievement *per se* but would not tantamount to a causal link with any performance in a specific country whatsoever.

Conversely, any bonus upon reaching the final would have a causal *nexus* with this game and, thus, WHT on the gross amount at source could be levied. This could also be the case for income derived from the national federation upon international fixtures.

2.3. Casual earnings

Nowadays, it is not uncommon for a player to receive remuneration over and beyond the ones stipulated in the employment contract, derived from the commercial exploitation of his image in the context of sponsoring, advertising and endorsement activities. A line should be drawn, on the one hand, as to whether the image rights have been assigned to the club, or licensed to a commercial company, and, on the other hand, as to whether the player exploits himself his image, or uses an interposed image rights company ("**IRC**")[6] to develop his branding so as to monetize on the on-field success and shelter the underlying income.

Entertainers and Sportspersons Performing Abroad, EC and International Tax Law Series 2016, Vol. 13, Chapter 6, pp. 105-136.

[4] Domestic tax law and DTT constitute two distinct legal spheres. While domestic law determines the domestic tax liabilities, the DTT determines which contracting state is entitled to exercise its taxing right. Furthermore, the DTT does not generate taxing rights under domestic tax law but rather restricts the taxing rights of a contracting state and mitigates tax evasion. Generally, DTTs are patterned on the OECD Model Convention on Income and Capital and the respective Commentary of the OECD Committee on Fiscal Affairs.

[5] OECD, 2014, *Commentary on Art. 17, §9.2*.

[6] As the player would, most probable, be the shareholder of the IRC, this would lead to a qualification as a related party by virtue of the transfer pricing tax rules put in place in the respective jurisdiction. Hence, special consideration should be taken of the transfer value of said rights as it should be performed on an arm's length basis, while being commensurate to the player's actual marketability.

Having said that, the qualification of income from image rights and the taxation that follows is fairly convoluted. It necessitates an *ad hoc* assessment while taking into consideration how the pertinent contracts have been formulated and, thus, construed. On a high-level basis, though, if said rights are licensed to the club, income derived therefrom would be deemed to have employment nature. If income derives from a foreign sponsor and either the player directly holds his image rights or the IRC is incorporated in another jurisdiction, this would imply that this stream of income would be considered as foreign-sourced.

On a separate note, it should be pinpointed that the IRC should perform genuine economic activities and have substance in order to avoid potential application of domestic general anti-avoidance rules ("**GAAR**") aiming to attack regimes seeking to circumvent the tax law and exploit potential loopholes (if any).

3. Special tax regimes

3.1. Italy

The "Italian substitute tax regime"[7] provides for the option[8] to new Italian residents[9], with regard to foreign sourced income/capital gains to suffer in Italy a substitute flat income tax[10] equal to a lump sum of EUR 100,000 for each fiscal year[11], with the option to extent such regime to family members that would pay an additional EUR 25,000.[12] Nevertheless, domestic income/gains would follow the general statutory progressive taxation up to 43%. It should be highlighted that in variance with the UK scheme, said regime does not provide for any remittance concept (i.e. foreign sourced income can be transferred to an Italian bank account tax free). What is more, the fact that foreign-sourced income may not be taxed at *situs*, does not prejudice its limited taxation in Italy.

Furthermore, taxpayers could opt out any countries they wish to and income derived therefrom would be subjected to ordinary taxation. As a result, such stream of income

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[7] Law 11 December 2016, no. 232 (2017 Budget Law).
[8] Article 24-*bis* Income Tax Law.
[9] Applicable to both foreign and Italian citizens.
[10] Further, the Regime provides for exemption from net wealth tax and from inheritance and gift taxes.
[11] This option is subject to the following conditions:
1. The new Italian resident has not been considered tax resident in Italy for at least nine of the last ten tax periods;
2. A preliminary ruling request is filed with the Italian tax authorities for the application of the non-domo regime (non-binding character); and
3. The validity of the option has a maximum duration of 15 years.

[12] Article 24-*bis* (1) ITC.

being fully taxable by virtue of the worldwide principle could benefit from the domestic credit method embedded in Art. 165 ITC or the foreign credit method grounded on the applicable DTT (if any) for the taxes levied abroad[13], as such taxpayers shall be considered full-fledged tax residents also with respect to the applicability of DTTs[14].

As a side note, prominent Italian tax experts expect the impact of this regime to be limited, mainly benefiting elite players with substantial commercial value.[15]

3.2. Turkey

A progressive tax system[16] applies to tax residents[17] in Turkey. *A contrario*, athletes' salaries are subject to fixed rates. More specifically, footballers are subjected to 3 different fixed rates depending on the league their team participates in: 15% (Super League), 10% (First League) and 5% (other leagues)[18]. Income covered by said regime comprises salaries, bonuses and any other variable components linked to the employment relationship with the football club.[19] To that effect, any non-employment related stream of income does not fall within the purview of this *proviso* and, therefore, should be subject to the progressive tax system.

3.3. Portugal

At the outset, it should be pinpointed that there is no specific regime applicable to athletes in Portugal. Notwithstanding, footballers can acquire the "Non-Habitual Resident Status" and benefit from a favorable tax treatment for the first ten years of residence.[20] In spite of the fact that their activity does not fall within the scope of "high added value activities"[21], in the sphere of which, any income derived is subject to tax at a rate of 20%[22], the regime is still quite attractive for footballers.

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[13] Article 24-*bis* (5) ITC.
[14] Circular Letter No. 17/E of 23rd May 2017. Part II) [7].
[15] MARIO TENORE, "The newly introduced Italian substitute tax regime: "Much ado about nothing"?" in *European Leagues Legal Newsletter*, #4 ed. July 2018.
[16] Article 103 Income Tax Law (15% to 35%).
[17] Article 5 Income Tax Law.
[18] Transitional Article 72 in Income Tax Law, added with the Law no. 5766/2017 (application until 31.12.2019).
[19] What constitutes salary is stipulated in Article 61 Income Tax Law.
[20] Under the condition that they have not been tax residents in Portugal for any preceding 5 tax calendar years and meet the residency criteria.
[21] Personal Income Tax Code, Articles 72(6) and 72-A.
[22] Instead of the progressive tax rates 14.5% to 48%.

More concretely, it confers to them the entitlement to have foreign income (i.e. investment income, capital gains) exempt from tax in Portugal provided that it is taxed at source (by virtue of the applicable DTT or the OECD Model Tax Convention in the absence of a DTT in force) and does not derive from a so-called "tax heaven". That said, the foreign income element remains tax exempt to the extent it is not obtained in a black-listed jurisdiction.

3.4. United Kingdom

The "*Res non-dom*" applies to UK incoming non-domiciled tax residents. They are deemed *non-dom* as long as they do not intent to reside permanently in the UK and their residency therein lasts no more than 15 years. With such status, they may elect to be taxed on a yearly basis on a "remittance basis"[23]; they would be taxable in the UK solely on their UK-sourced income, whilst they would be absolved from their tax liability for foreign-sourced income, so long as it is not remitted by any means to the UK but retained offshore.[24] That said, such income won't trigger taxation on an accrued basis. Such benefit is provided for the first 15 years of tax residency in the UK as long as no acquisition of UK domicile subsists in the meantime.

To this, a reference to image rights payments to the IRC is, in my view, inextricably linked. Firstly, it should be identified whether the IRC is UK based or non-UK based. If the latter, endorsement income for activities carried out abroad by virtue of a non-UK endorsement contract are not subject to UK tax as long as they remain offshore. For a *non-dom* player with a non-UK IRC, potential payment by the club to the IRC would avoid UK tax liability only if it would be imputed for non-UK activities and remained offshore.[25] However, this cannot be a clear-cut conclusion and would need further confirmation by the Authorities.

3.5. The Netherlands

At the other end of the spectrum, in the Netherlands, there is a special regime pursuant to which should a club has agreed with a player for the latter to be entitled to effectively receive a share of the future transfer fee, the club would suffer a special extra tax (75% tax rate) on said payment as long as the amount exceeds EUR 544,000[26] (on top of the

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[23] Chapter A1, Part 14 Income Tax Act 2007.
[24] JON ELPHICK, "How athletes will be affected by the UK's changes to "non-dom" tax rules". Available at: https://www.lawinsport.com/topics/articles/item/how-athletes-will-be-affected-by-the-uk-s-changes-to-non-dom-tax-rules (Accessed on November 10, 2018).
[25] PETE HACKLETON, "The current legal status of image rights companies in football". Available at: https://www.lawinsport.com/topics/articles/item/the-current-legal-status-of-image-rights-companies-in-football (Accessed on November 11, 2018).
[26] Article 32bb (1) and (2) Wages Tax Act 1964 (*Wet op de loonbelasting 1964*).

normal 52% income tax that would normally have to be deducted from the footballer's portion).[27] In my view, an own goal seems to have been inflicted.

3.6. France

The Impatriate Tax Regime notably applies to international footballers that become tax residents in France[28] as a consequence of a transfer concluded from a foreign club. The obtainable benefits have a duration of 5 years for players having settled in France before July 6, 2016, while as from that date, incoming foreign players would be granted, instead, an 8-year grace period.[29]

Notably, foreign assets are exempt from net wealth tax ("**NWT**")[30] while foreign passive income enjoys a 50% exemption from personal income tax. Moreover, the deemed 30% impatriation premium granted to the footballer for expenses inflicted upon settlement in France enjoys full tax exemption subject to the "Comparable Salary Test"[31] and portion of the salary allocated to performance(s) taking place abroad is exempt, as well. Nevertheless, it should be highlighted that the total exemption granted cannot exceed 50% of the gross salary received.

4. Impact

In light of the foregoing, and on a *prima facie* basis, it seems that the consequences yielded are positive for the game, considering the benefits ensued in the sphere of the players, the clubs and the leagues.

Provided that all the stipulated prerequisites are duly adhered to, players could have their tax exposure mitigated with such benefits being weighed up against the taxes incurred elsewhere. Clubs could concretely be assisted in the pursuit of attracting talented players and established stars who seek to amplify their income. As a consequence, they can monetize their stock of players they have as the latter attract commercial brands with which the club could conclude commercial partnerships.

The existence of strong clubs virtually boosts the quality and enhances the brand value of the respective leagues. *Ergo*, leagues not found in the top edge could challenge the

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[27] DR. DICK MOLENNAR, "The Netherlands: Extra tax on a footballer's share in a transfer fee" in Global Sports Law & Taxation Reports, Vol. 8 No. 3 September 2017 (p. 39-40).
[28] They should not have been French fiscal residents for the past 5 calendar years before the conclusion of the transfer.
[29] Article 155B French Tax Code.
[30] Article 885A French Tax Code.
[31] The remaining taxable base should not be lower than that of a French player of equivalent ability and position who does not avail of the inpatriate tax regime.

status quo of the established leagues and be flagged as the "Promised land" for footballers. The ultimate result could be the attainment of more fans at a global scale, which would render the demand in the broadcasting rights a tangible reality, leading to the exponential boom in TV revenues.

5. Conclusions

It is clearly to be inferred that the tax treatment is not a trivial issue but will always have a significant bearing on players' determination to embark upon a new career path. Hence, said regimes constitute contrivances to a potential transfer as players could be endowed with a beneficial right for themselves and their entourage. Their short career renders crystal clear that they would be motivated to be drawn to those jurisdictions that, through their lens, display a unique opportunity for them to extract as much net as possible. And not every way to minimize the tax burden materializes *per se* an unlawful practice.

Bottom line, embracing such regimes, irrefutably seems one of the most important ways to keep up with the competition going forward, *albeit* not providing a force of attraction covering all items of income. Henceforward, only time will prove their evanescent character or not...