Income from employment

IATJ 13th Assembly - The Hague, Netherlands - September 8 and 9, 2023

Panel presentation

- Raphael Gani (Switzerland - Chair)
- Jeannette van der Vegt (Netherlands)
- Jon Alexander Neder (Norway)

Agenda

1. Introduction to the general topic - Raphael Gani (5’)
2. Dutch case - Jeannette van der Vegt (25’)
3. Norwegian case - Jon Alexander Neder (25’)
4. Swiss case – Raphael Gani (25’)
5. General discussion/questions/conclusion (10’)

Introduction to the general topic – Art. 15 MC OECD

Art. 15 (1) MC OECD = General rule

Subject to the provisions of Articles 16, 17 and 19,

salaries and 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.

Introduction to the general topic – Art. 15 MC OECD

Art. 15 (2) MC OECD = Exception = “Clause du Monteur”

Remuneration derived by a resident of a Contracting State in respect of an employment exercised in the other Contracting State shall be taxable only in the first-mentioned State if:

→ 3 cumulative conditions

Introduction to the general topic – Art. 15 MC OECD

Art. 15 (2) MC OECD = Exception = “Clause du Monteur”

a) the recipient is present in the other State for a period or periods not exceeding in the aggregate 183 days in any 12-month period commencing or ending in the fiscal year concerned, and

b) the remuneration is paid by, or on behalf of, an employer who is not a resident of the other State, and

c) the remuneration is not borne by a permanent establishment or a fixed base which the employer has in the other State.

Introduction to the general topic – Art. 15 MC OECD

Art. 15 MC OECD

- Primary right to tax: **place of activity**
- Fall back rule for the **State of residence**:

  “clause du monteur”→ only if the 3 conditions are met
- Remuneration received from 3rd state = taxed in State of residence
- System based on days of work spent in a territory

I. Income from employment – Art. 15 MC OECD

Salary, wages and similar remuneration:

- **Very broadly defined** = connection between the work performed and the compensation
- Severance pay
- compensation for cancelled employment - premature dismissal
- Sign-on fees
- Payment for the abstention of an activity
- Non-competition agreements
- Stand-by fees
- In regard to the qualification, it's Irrelevant where and when remuneration is paid

I. Income from employment – Art. 15 MC OECD

Application of the 183-day rule

- Until 1992 MC OECD: “calendar year”
- Since 1992 MC OECD: “12 month period”

I. Income from employment – Art. 15 MC OECD

The problem of the hiring out of labor

- Update of the OECD Commentary ad art. 15 (2) lit. b on 22 July 2010
- Definition of « employer » - reference to domestic law of State of source
- Art 3 (2) MC OECD: ... *meaning that it has under the law of that State* …
- Distinction between the States who have a formal or substance over form approach in their domestic law

September 9th, 2023

de Rechtspraak
Gerechtshof
's-Hertogenbosch

13th Assembly IATJ

Substantive session: Recent Case Law on Employment Income: article 15 par. 2 OECD

Decision of the Dutch Supreme Court 14 October 2022

Jeannette van der Vegt

Court of Appeal 's Hertogenbosch

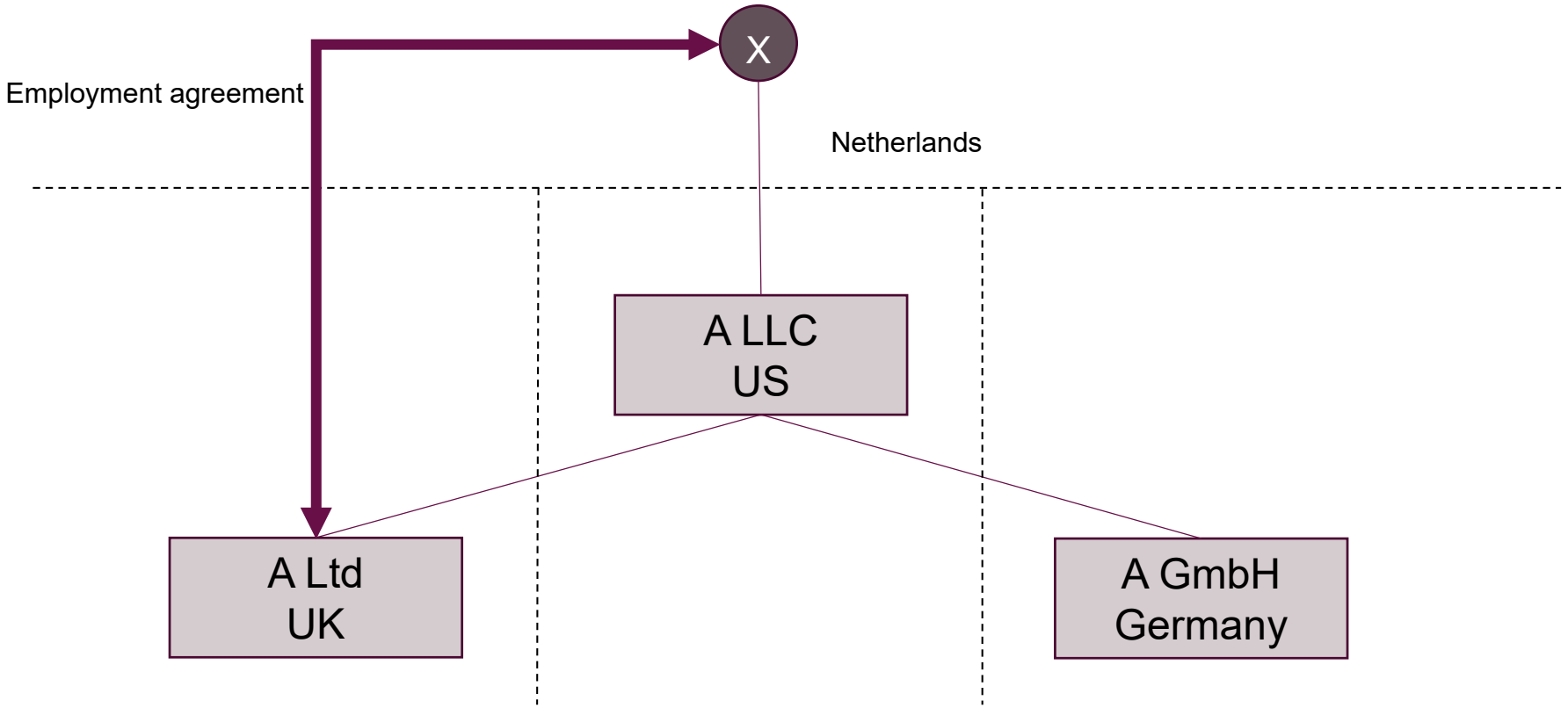
The case

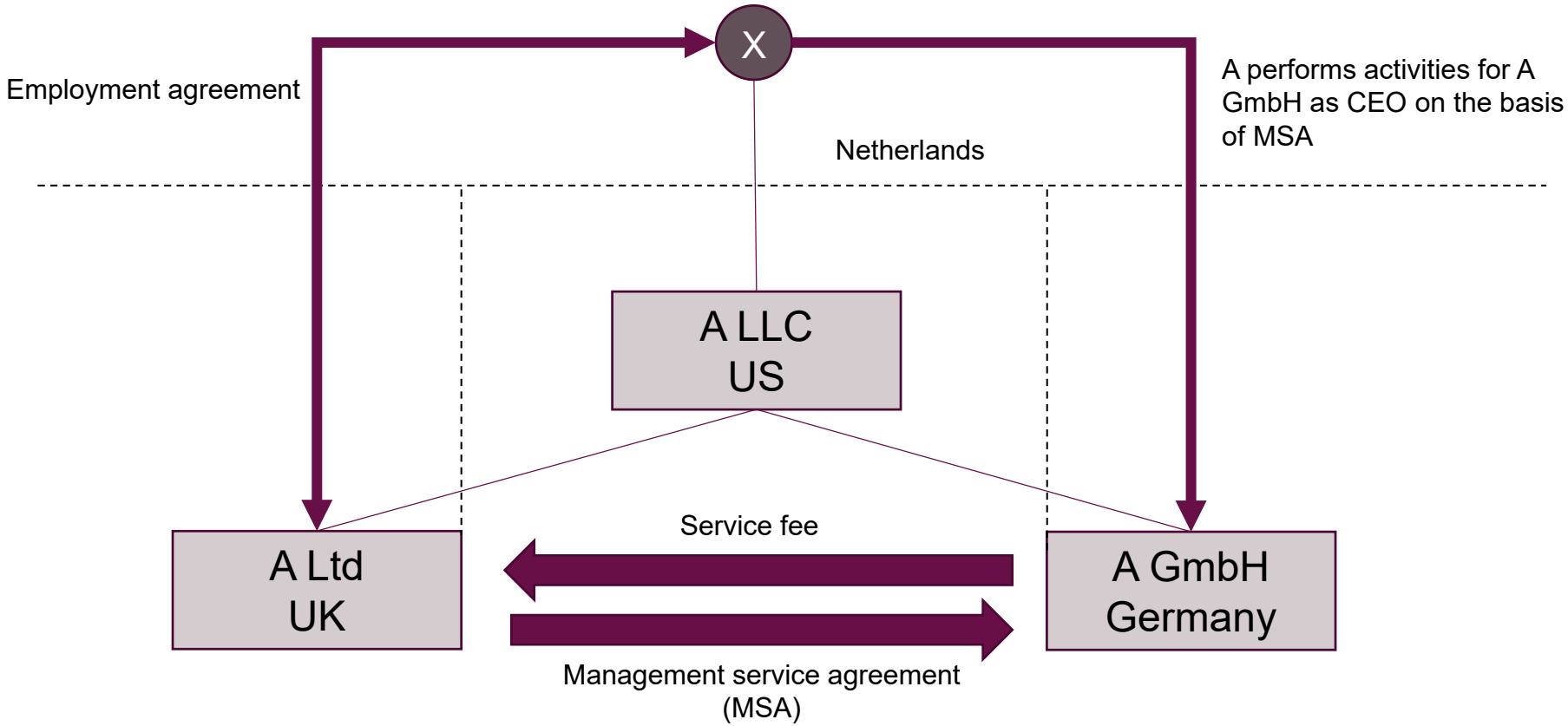
- A hiring-out case international group
- A-group: A LLC in US (parent company), with 2 subsidiaries: A Ltd UK and A GmbH Germany
- X, resident of the Netherlands, works as an executive
- X has an employment agreement with A Ltd UK and reports to CEO of A LLC
- Management service agreement A Ltd UK – A GmbH Germany: X is hired out to GmbH for a service fee
- X performed activities in Germany for 36 days in the concerning year

The case – continued

Question: has X received a compensation from a German employer for the activities performed?

German tax authorities: salary belongs ‘at arms length’ in Germany and is taxed in Germany.


X
Employment agreement
Netherlands
A LLC
US
A Ltd
UK
A GmbH
Germany


X
Employment agreement
A performs activities for A GmbH as CEO on the basis of MSA
Netherlands
A LLC
US
A Ltd
UK
Service fee
A GmbH
Germany
Management service agreement
(MSA)

Two topics

- Netherlands approach to the term employer
- Netherlands approach to which OECD commentary to use

Case law in the Netherlands on employer

- In 2006 the Supreme Court decided a number of cases
- German, Belgian, and Danish cases: all short-term hiring-out cases.
- The Supreme Court defined the concept of an employer.
- In short, the requirements of the Supreme Court are:
  1. The entity must have the authority to instruct
  2. The employer must bear the risk of the activities of the employee.
- Point [2] implies that if the employee's salary is not paid by the hiring entity, the salary must be individually recharged to that entity.

Double tax convention Netherlands/Germany

- Treaty concluded in 1959
- Article 10 Netherlands-German convention. Akin to article 15 MC
- Article 10(1) and (2) of the Netherlands-Germany tax convention :

  1. Where an individual who is a resident of one of the States derives income from employment, the said income shall be taxable in the other State, if the employment is exercised in that State.

  2. Notwithstanding paragraph 1, income derived from employment shall be taxable solely in the Contracting State of which the employed person is a resident if:

  (1) he is present in the other State temporarily, for a total of not more than 183 days in one calendar year;

  (2) the remuneration for his employment activities during that time is paid by an employer who is not a resident of the other State; and

  (3) the remuneration for his work is not borne by a permanent establishment or fixed base which the employer has in the other State.

Decision District Court Zeeland-West-Brabant:

- Does A GmbH have the authority to instruct?
  - Yes: as X must answer to the CEO of LLC, shareholder of A GmbH

- Is the renumeration borne by A GmbH?
  - Yes: the court takes the 2017 OECD commentary in account and uses the dynamic method of interpretation. X's salary is borne by A GmbH as these costs must, as per the at arm's length principle, be borne by A GmbH and X's activities are an integral part of the business of A GmbH.
- Conclusion: A GmbH is the employer, income taxed in Germany

Decision Court of Appeal ‘s Hertogenbosch

- Did X receive his German renumeration from an employer in Germany?
  - Is the renumeration borne by A GmbH?
  - Has A GmbH the authority to instruct and is thus X’s employer?

Decision:

- The court took the 2017 OECD commentary into consideration: this was a ‘contract for services’ not a ‘contract of services’. X’s salary was not directly charged, not borne by A GmbH
- The authority to instruct existed in the US and not in Germany.

Summary: income taxed in the Netherlands; no deduction for double taxation.

Advisory Opinion Advocate-General

- Which commentary? Convention 1959: 1963 commentary can be used.
- OECD uses dynamic interpretation.
- Netherlands case law: new versions of the Commentary that precise or clarify can be used for interpretation of existing treaties if there is no material change.
- Agreed with X who argues that the German interpretation should in principle be followed (but only if and insofar as Germany is allowed to tax the employment income).
- The Court of Appeal did not apply the integration test correctly.

Decision Supreme Court: employer

- The concept of an employer is not defined in tax treaty nor in national tax law.
- It has an independent and *autonomous* meaning.
- Supreme court refers to the definition in its earlier 2006 decisions.
- In these situations, the renumeration should be individually recharged to the entity in the work state.
- The employer is the entity with the authority to instruct the employee.

Decision Supreme Court: employer

- Paragraph 8 of the OECD commentary to article 15 was added in 2010 and sections 8.1 to 8.24 in 2014.
- These paragraphs include the integration test.
- In this case the integration test is not relevant as the 2014 or 2017 commentary cannot be used.
- This also covers section 8.10: should the state of residence follow the work state?
- The Supreme Court explained that section 8.10 post dates the 1959 treaty and is therefore not relevant.

Formal vs. economic employer

- The Netherlands: not a formal approach but a decision based on the circumstances of the case.
- German tax authorities in this case: uses an economic approach; Should the GmbH according to at arm's length principles bear the costs of X's activities?
- Two different 'substance over form' approaches

Decision Supreme Court: role of commentary

- Supreme court gives clear rules on which commentary should be used.
- The text of article 10 of the Netherlands-Germany tax treaty is close to that of the OECD model. In that case, the Commentary on the corresponding OECD Model provision, available at the time of signing of the tax treaty, is highly relevant.
- The importance of commentary of a later date (posterior) is limited. It can be used as a supplementary means of interpretation, only if it is a precision or clarification of a provision.
- Supreme Court bases these rules on articles 31 and 32 of the Vienna convention.

Which commentary to use?

- The OECD:
- 2017 commentary paragraph 35 advocates a dynamic approach:

> "However, other changes or additions to the Commentaries are normally applicable to the interpretation and application of conventions concluded before their adoption, because they reflect the consensus of the OECD member countries as to the proper interpretation of existing provisions and their application to specific situations."

- The Netherlands: commentary that predates the convention is highly relevant. Posterior commentary is a supplementary source of interpretation.

Discussion

- Would the decision have been different for the current 2012 Netherlands/Germany double taxation convention or other current treaties?
- The outcome is double taxation; Should the Netherlands have followed the German position?
- How do our German colleagues regard this case?
- What is the opinion on the relevance of the commentary in other countries?

13th Assembly IATJ
Substantive session: Recent Case Law on Employment Income

decision no. HR-2021-1243-A in Farid Ati Allah & Others vs Skatteetaten

Jon Neder
law clerk

Facts of the case

Six claimants employed with the shipping agent Poseidon Personnel Services S.A. (PPS)

- Five claimants residents of Spain
- One claimant resident of Belgium
- PPS registered in Switzerland

Facts of the case

The six claimants + 190 other PPS employees who were tax resident outside of Norway hired in 2016 to work on board the ship Pioneering Spirit

- The work: remove the top deck on an oil platform and transport it from the Yme field on the Norwegian continental shelf to a shipyard on the island of Lutelandet for dismantlement
- The time period: Pioneering reached the continental shelf on 17 August 2016, came into Norwegian internal waters on 23 August and returned from Lutelandet to Rotterdam on 2 September
- Shift system: The workers' period on board the ship were followed by days off on land (2 types of contract: "five on five" and "eight on four")


Møre og Romsdal
Vestland
Innlandet
Viken
Oslo
Vestfold og
Telemark
Rogaland
Agder
50 km

How much of the claimants' income from work aboard Pioneer is taxable to Norway?

The claimants are hired on a net salary system. PPS manages and carries the employees' tax obligations. Pursuant to the employment agreements PPS, not the employees, carries the economic risk related to tax

- PPS party to the case as a intervener

Art. 15 (2) Norway-Belgium convention (1988)

- "Notwithstanding the provisions of paragraph 1, remuneration derived by a resident of a Contracting State in respect of an employment exercised in the other Contracting State shall be taxable only in the first-mentioned State if:
  - a) the recipient is present in that other State for a period or periods not exceeding in the aggregate 183 days in any period of twelve months; and
  - b) the remuneration is paid by, or on behalf of, an employer who is a resident of the State of which the recipient is a resident, and whose activity does not consist of the hiring out of labour; and
  - c) the remuneration is not borne by a permanent establishment or a fixed base which the employer has in the other State."
- Akin to article 15 (2) of Norway-Spain convention (1999) (as to art. 15 (2) MC)
- ➔ Income not taxable in Norway according to this provision

Art. 21 (5) a ("shelf provision") of the Norway-Belgium convention:

"Subject to subparagraphs b) and c), salaries, wages and similar remuneration derived by a resident of a Contracting State in respect of an employment connected with offshore activities in the other Contracting State may, to the extent that the duties are performed offshore in that other State, be taxed in that other State provided that the employment offshore is carried on for a period exceeding 30 days in the aggregate in any period of twelve months".

Art. 23 (4) a (“shelf provision”) of the Norway-Spain convention:

“Subject to sub-paragraph b) of this paragraph, salaries, wages and similar remuneration derived by a resident of a Contracting State in respect of an employment connected with the exploration or exploitation of the seabed and its subsoil and their natural resources situated in the other Contracting State may, to the extent that the duties are performed offshore in that other State, be taxed in that other State provided that the employment offshore is carried on for a period or periods exceeding 30 days in the aggregate in any twelve months period commencing or ending in the fiscal year concerned.”

Two main issues:

1) whether tax liability to Norway also covers income from work performed within the baseline from which the territorial sea boundary is stipulated («the location condition»)

2) whether the requirement that the work must exceed 30 days in any twelve months period for the salary to be taxable, only includes active workdays and not earned days off (“the time condition”)

The proceedings

The tax returns

- PPS on behalf of the employers entered the income from work off the baseline as taxable, and the income from work within the baseline as non-taxable

The Central Office for Foreign Tax Affairs

- All 196 PPS employees were considered tax liable to Norway also for the income earned within the baseline
- The workers' days off was included in the application of the 30-day rule
- 6 of the employees brought legal action against this decision, while the other 190 appealed to the Tax Appeals Board (their appeal was suspended pending a final judgment in the case for the Supreme Court)

Oslo District Court and Borgarting Court of Appeal concluded in favor of the State

The case was then appealed to the Supreme Court

Supreme Court decision: “offshore”

The term “offshore” is not defined in any of the relevant tax conventions

- Art. 3 (2)? “… unless the context otherwise requires”

The ordinary meaning of the term

- Cambridge English Dictionary: “away from or *at a distance from* the coast”
- Lexico UK Dictionary: “ situated at sea *some distance from* the shore”
- Opposite of “onshore”, i.e. at sea as opposed to on land?

The context of the term

- Commentaries on the Model Tax Convention, the 2010 edition, page 125: Norway, Denmark, the United Kingdom, Canada and Ireland found that art. 5 created special problems with taxation of activities related to «offshore» hydrocarbon exploration and exploitation, and reserved the right to insert a special article related to such activities in their respective Conventions ➔ The shelf provision
- Supreme Court: In the water, the mobility is the same within and off the baseline

Supreme Court decision: “offshore”

The object and purpose of the term

- the need for a rule that leaves no doubt as to whether the activities are carried on “offshore” (when is a person “at some distance” from the coast?

➔ “Offshore” must be understood as at sea, i.e. outside the coastline

What about the baseline?

- Provides a clear delineation, however…

Supreme Court decision: “offshore”

- The baseline option would not give consistent outcomes
- UNCLOS art. 5: *“the normal baseline for measuring the breadth of the territorial sea is the low-water line along the coast as marked on large-scale charts officially recognized by the coastal State”*
    - → same as the coastline
- UNCLOS art. 7 (1): *“In localities where the coastline is deeply indented and cut into, or if there is a fringe of islands along the coast in its immediate vicinity, the method of straight baselines joining appropriate points may be employed in drawing the baseline from which the breadth of the territorial sea is measured.”*
    - → Some areas which are undoubtedly “some distance from” the shore may not be considered “offshore”, for example in Northern Norway and archipelagic states

Supreme Court decision: 30-day rule

The ordinary meaning of the terms used

- “employment”, “carried on” and “exercised” may point to the actual performance of the work…
- but may also have a wider meaning than just the actual physical work performance

Wording of the art. 24 (6) a of the Norway-Netherlands convention (1990): «the employment is ***exercised*** offshore»

- This convention is the only one on which Norwegian tax authorities previously accepted that only actual workdays should be counted (after protests from the Netherlands in 1996)
- «exercised» (Netherlands convention) vs «carried on» (Belgium convention. Relevant differences? The state argued that yes. The Supreme Court did not agree.

Supreme Court decision: 30-day rule

The context of the terms

- The relevant context: “to the extent that the duties are ***performed*** offshore in that other State, be taxed in that other State provided that the employment offshore is ***carried on*** for a period…”
- The time requirement understood as a restrictive additional condition to the location requirement
- Since “performed” more precisely points to the actual performance of the work → “carried on” must be understood in the same way
- Different terms used seen by the Court as a wish to vary the language

Supreme Court decision: 30-day rule

Norwegian tax authorities: days off have been consistently taken into account under the 30-day rule

- i.e. when a shift system is five weeks on and five weeks off, one day off must be added for each workday, while a shift system of eight weeks on and four weeks off gives one extra day off for every two workdays
- Supreme Court: Such a technical rule does not naturally follow from the terms of the convention and would have had to be clearly expressed
- In addition, the rule creates complications: individual employment agreements, as well as possible collective agreements, drafted in a foreign language, would have to be interpreted to determine what has in fact been agreed with regard to the periods on and off

Supreme Court decision: 30-day rule

The state's argument: the object of the shelf provision is to extend the "shelf state's" right to tax compared to what would otherwise follow from the Convention and that days off should therefore be included, as that would provide the greatest extension of such a right

Supreme Court: It cannot be ruled out that the other Contracting State has found the rule acceptable *because* it is limited to income from work actually performed during a period exceeding 30 days in any twelve months period.

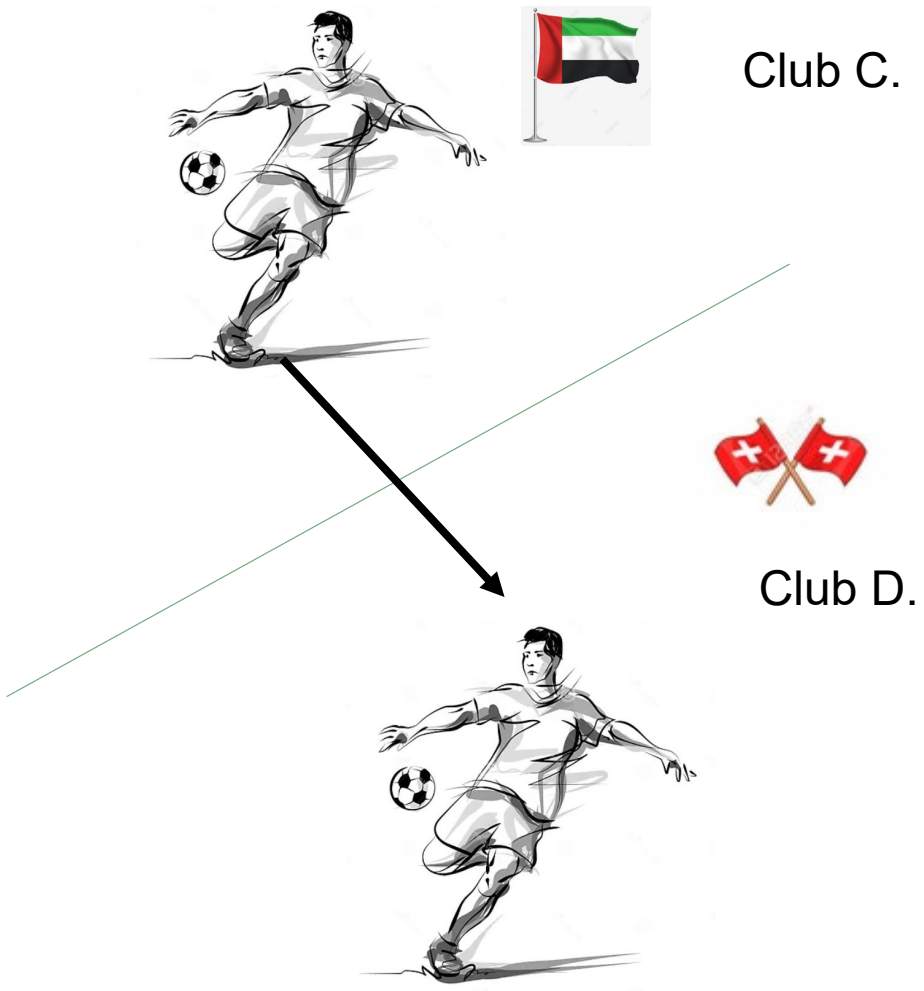
➔ The time requirement in the shelf provision (in the Conventions with Belgium and Spain) must be interpreted to include *actual workdays only*, not the earned days off

Discussions

Are there any other possible interpretations of the shelf provision?

- The baseline as an alternative delineation under the location condition?
- Days off taken into account under the time condition?
- Examples from other states?

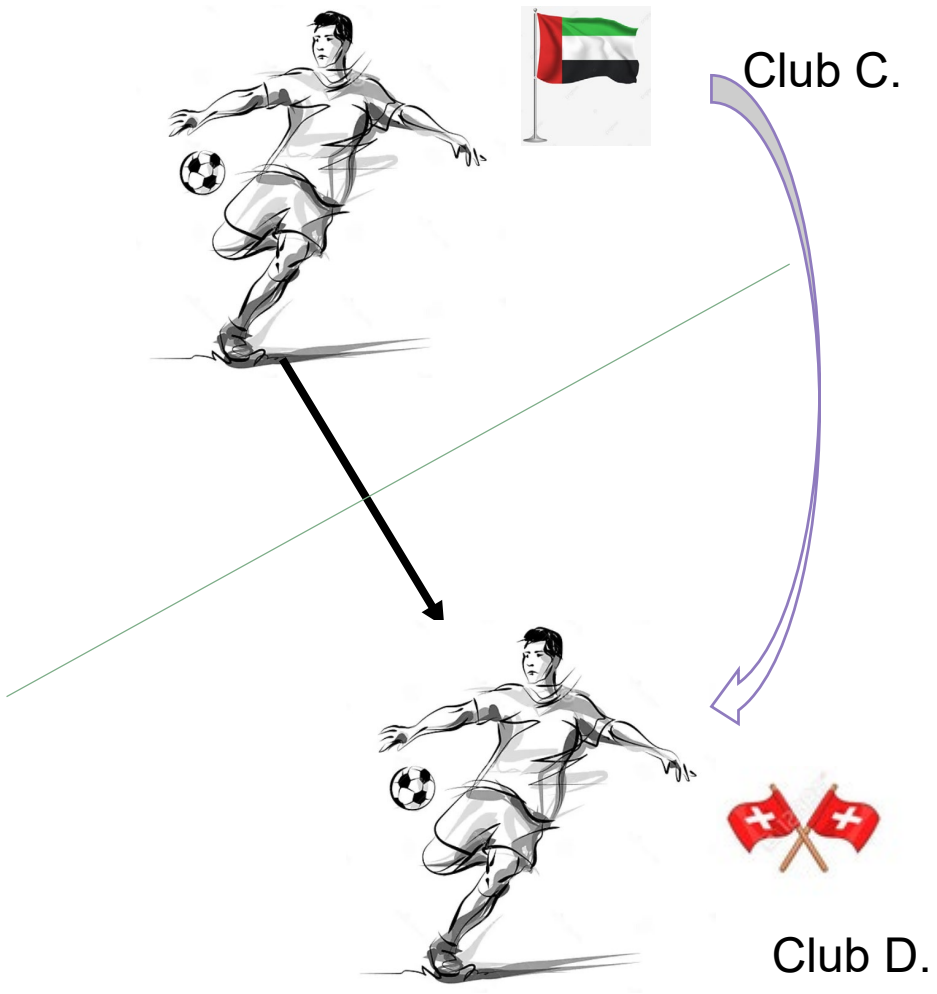
Swiss Supreme Court, 9C_682/2022, June 23rd 2023



Facts of the case

- Under contract with Club C/UAE until 2015; resident in UAE
- By Settlement agreement dated July 9, 2013, parties agreed to terminate the employment contract prematurely and with immediate effect. The Agreement provided for the payment of compensation of EUR 2,345,000.- from Club C
- The payment was to be staggered (EUR 469,000.- each as of ["on or before"] July 30, 2013, as of January 30, 2014, as of June 30, 2014, as of January 30, 2015 and as of June 30, 2015)
- In June 2013, Club C. made the first payment in the amount of EUR 469,000

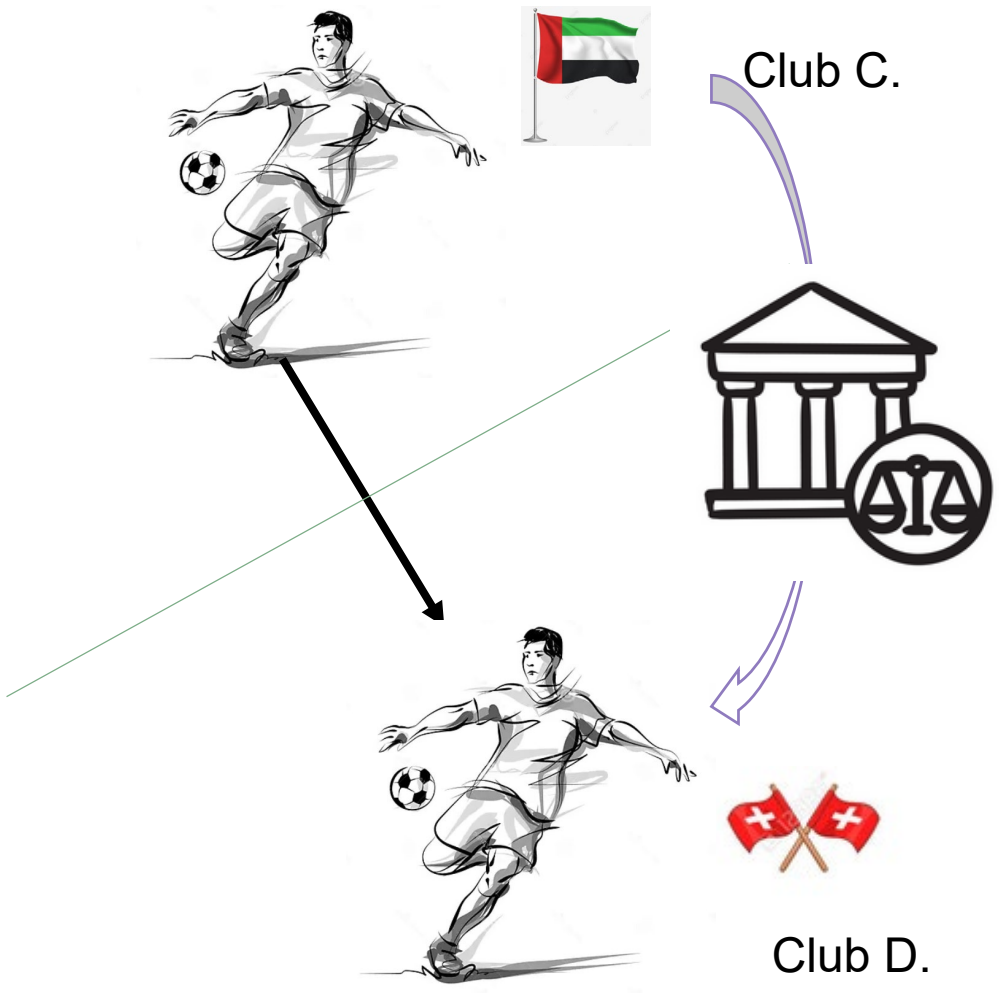
Swiss Supreme Court, 9C_682/2022, June 23rd 2023



Facts of the case (cont')

- New contract signed on 13 July 2013 with Swiss Club (Club D; employment contract)
- Transfer: Residence taken in Switzerland as of the end of October 2013
- January 2014, second payment of EUR 234,000, but… then the Club C refused to pay the further amounts pretending they were time-barred under UAE law.

Swiss Supreme Court, 9C_682/2022, June 23rd 2023



Facts of the case (cont')

- Proceedings in front of the Court of Arbitration for Sport (CAS)
- Award dated April 25, 2017, the CAS declared that the statute of limitations under labor law did not apply and obliged Club C. to pay the claim.
- Subsequently, in 2017, Club C. made the outstanding payments in the amount of (converted) CHF 1,813,412.

Swiss Supreme Court, 9C_682/2022, June 23rd 2023

Timing issue (when is the income realized?)

- The taxpayer could not acquire a fixed entitlement to the disputed installments prior to the due dates.
- The remaining installments on the respective due date was **no longer sufficiently certain** to be considered as realized on a tax level.
- The mere prospect of possibly one day being able to obtain the payments by legal means, as the taxpayer finally succeeded in doing, does not make the fulfillment of the claim appear so certain as to justify immediate taxation.
- Income realized when effectively received: in 2017 when the taxpayer was in Switzerland.

Swiss Supreme Court, 9C_682/2022, June 23rd 2023

Qualification issue (which clause of the DTC is applicable to the case?)

The potentially relevant treaty provisions are:

- Art. 17 (Artists and Sportsmen)
- Art. 15 (Dependent personal services)
- Art. 21 (Other Income).

Swiss Supreme Court, 9C_682/2022, June 23rd 2023

Double tax convention (DTC) with UAE: application of the Sportsmen' clause (art. 17 DTC)?

- Sportsmen' clause presupposes that the income is received by the taxpayer as a sportsman from his activity personally exercised in the State in which the activity takes place
- On this point DTC CH-UAE=OECD MC
- The Commentary requires a close connection between the income and the activity carried out in the country in question.
- Federal Supreme Court has already pointed out that the clause requires a direct, immediate connection with a sporting performance. This ruling was criticized by scholars, namely because it goes too far and is not covered by the OECD-MC to completely exclude the fixed salary of an athlete from Art. 17 para. 1 OECD-MA because it is not related to a performance
- But it's in line with OECD Commentary that states that art. 17 is not applicable to payments for cancelled performances

Swiss Supreme Court, 9C_682/2022, June 23rd 2023

Double tax convention (DTC) with UAE: application of the Sportsmen's clause (art. 17 DTC)?

- In the case, the settlement agreement does not require from taxpayer any appearances after July 9, 2013 and the no reason to assume that the payment would have served to provide additional compensation for appearances already made for the football club
- Thus, payment corresponds functionally to compensation received by an athlete for the loss of one or more appearances, indirectly related to the respondent's previous activity in the UAE
- Taking into account the OECD-MC, this connection does not appear to be close enough

Swiss Supreme Court, 9C_682/2022, June 23rd 2023

So, it shall be Dependent personal services: Art. 15 DTC

- In order for severance payments, termination indemnities and other payments at or after the end of the employment relationship to fall under Art. 15 para. 1 DBA CH-AE at all, they must constitute "salaries, wages and similar remuneration".
- However, a right of taxation for the State in which the work is performed results from this provision only insofar as the payment is made for work **performed in the State** in which the work is performed

Swiss Supreme Court, 9C_682/2022, June 23rd 2023

Double tax convention (DTC) with UAE: Interpretation of DTC

- DTAs must be interpreted in accordance with the Vienna Convention (VC), and in particular art. 31, even if the parties have not both ratified it, as this is international custom
- The Federal Supreme Court takes into account the OECD Model Convention (OECD-MC) and the associated commentary when interpreting DTCs, insofar as they are based on this standard
- The OECD Commentary, although not binding for interpretation, is in principle an important means of interpretation

Swiss Supreme Court, 9C_682/2022, June 23rd 2023

So, it shall be Dependent personal services: Art. 15 DTC (cont')

- In a previous ruling (ATF 143 II 257), the Federal Supreme Court came to the conclusion with regard to the provision in the French DTC that a severance payment which had been paid to a managing director of a French company resident in Switzerland did not fall under Art. 15 DTC.
- Although the payment had its legal basis in the former activity for the company, it did not constitute consideration for work performed in the State in which the activity took place.

Swiss Supreme Court, 9C_682/2022, June 23rd 2023

So, it shall be Dependent personal services: Art. 15 DTC (cont')

- Guidance of the OECD Commentary ?
- The OECD-MC's comments on severance payments at or after the end of an employment relationship were not included until around three years after the conclusion of the DTC CH-AE
- The version of the Commentary that was available to the contracting states of the DTC CH-AE at the time of conclusion of the agreement did not yet contain any specific statements on the treatment of payments at or after the end of the employment relationship
- The question therefore arises as to what significance later versions of the Commentary can have for the interpretation of a DTC.

Swiss Supreme Court, 9C_682/2022, June 23rd 2023

Double tax convention (DTC) with UAE: Art. 15 DTC (cont')

- Later versions of the Commentary, which were not available when the DTC was concluded, could at most be relevant within the framework of Art. 31 para. 1 or 4 VC for the determination of the ordinary or special meaning of a provision
- Federal Supreme Court: international treaties are in principle to be interpreted statically. Accordingly, the meaning of the terms and provisions used in the treaty at the time of the conclusion of the treaty is usually decisive
- A dynamic interpretation can only be considered if, in international treaties, which are entered into for a very long or indefinite period, open terms are used, the meaning of which will recognizably be subject to change over time for the parties

Swiss Supreme Court, 9C_682/2022, June 23rd 2023

Double tax convention (DTC) with UAE: Art. 15 DTC (cont')

- The dynamic interpretation of international treaties entails the risk that the application of the law moves away from the consensus of the contracting states and undermines the will of the contracting states
- But… authorities and courts applying the law should not be completely prohibited from consulting later commentaries as an aid to interpretation.
- In contrast to the version of the Commentary at the time of the conclusion of a DTC, however, later commentaries can only draw persuasive force from the soundness of their argumentation, as are scholar's writings or other Court decisions

Swiss Supreme Court, 9C_682/2022, June 23rd 2023

Double tax convention (DTC) with UAE: Art. 15 DTC (cont')

- *In casu*, Art. 15, para. 1, § 2 DTC CH-AE requires the connection between remuneration and work performed ("If the employment is so [i.e.: in the other Contracting State] exercised, such remuneration as is derived therefrom may be taxed in that other State.")
- In this respect, however, no open terms are apparent whose meaning would change in the course of time and whose dynamic interpretation the Contracting States of the DTC CH-UAE could have intended

Swiss Supreme Court, 9C_682/2022, June 23rd 2023

Double tax convention (DTC) with UAE: Art. 15 DTC (cont')

- In summary, it can be stated that there is no right of taxation of the State in which the work is carried out if a severance payment does not effectively compensate for work carried out in that State, even if it has its basis in a (previous) employment relationship
- It does not matter whether the payment in question is to be treated as other income within the meaning of Art. 21 OECD-MA or whether the severance payment is seen as income within the meaning of Art. 15 para. 1 sentence 1 OECD-MA, which does not meet the requirements of Art. 15 para. 1 sentence 2 OECD-MA
- Only Switzerland has a right to tax!

Swiss Supreme Court, 9C_682/2022, June 23rd 2023

In **summary** :

- Income realized only when the taxpayer received the payments (as he was a Swiss resident)
- The Sportsmen' clause of the DTC between CH-UAE does not applies because the income has no direct, immediate connection with a sporting performance
- OECD Commentary although not binding for interpretation, is in principle an important means of interpretation
- International treaties are in principle to be interpreted statically but a dynamic interpretation can be considered if open terms are used
- Severance payment does not effectively compensate for work carried out in the State in which the work is carried out and thus has to be taxed in the Residence State

Panel conclusion / General discussion