

Spanish tax law: the Lionel Messi case

Juan de Dios Crespo Pérez is Head of the Sports Law Department at Ruiz-Huerta & Crespo. He specialises in sports, EU and international law. He is an Arbitrator at the Valencia Chamber of Commerce as well as in proceedings of the International Chamber of Commerce in Paris, and with the European Handball Federation. Enric Ripoll is an Associate with the same firm, specialising in sports law and a member of the Spanish Association of Sports Law (AEDD). In this article, they examine the Spanish prosecutor's charges against FC Barcelona player Lionel Messi for tax evasion, and the potential fines and charges.



Juan de Dios Crespo Pérez



Enric Ripoll

In June, a Spanish prosecutor filed a complaint alleging that Lionel ('Leo') Messi and his father owe €4.2 million in back taxes for the fiscal years of 2007 to 2009. Despite recently having paid back €5 million to the Spanish tax authorities, the football star will have to appear before a judge on 25 September, with his father, to explain why they created a network of companies and assigned to them his image rights.

The complaint

It is important to assess the exact charges against Messi, and how the prosecutor thinks Messi acted to avoid paying taxes. In his complaint, the public prosecutor states that while Messi was still a minor in March 2005, his father and mother - Jorge Messi and his wife Celia Maria Cuccittini - assigned the image rights of their son to the company Sport Consultants Ltd., which lists its registered office in Belize (which is a tax haven just in a technical sense as it is not included in the list of tax havens).

This assignment was considered as a simulation, as it was concluded for a price of €38,040 for a period of 10 years extendable, which was so low a price that the authorities believe that it couldn't represent an actual image rights agreement. This contract also included the possibility to the assignee of assigning the image rights acquired to third parties with the sole condition of informing the assignor.

Sports Consultants Ltd. (hereinafter SC) was formed in Belize in 2004 by the trust 'Sovereign' (a British law firm specialising in international tax planning), whose shares were provided to the player's mother, Ms. Cuccittini, in February 2005 (just one month before the assignment contract). The latter

assignment contract with this company was ratified by Messi in 2006, as he was now of legal age, appearing before a Notary Public in Barcelona (Spain).

The legal consequences of this contract were:

- To formally unlink the player, but only apparently of the income that the subsequent exploitation of his image rights would generate;
- To set the residence of the ownership of his image rights and their yields in a company domiciled in a tax haven.

Through an agency contract, concluded in March 2005, the company SC granted a licence to Sports Enterprises Ltd. (hereinafter SE), which listed its registered office in the UK, as the exclusive agent for the commercial and advertising exploitation of the image rights of Lionel Messi worldwide, with the unique exception of the UK. For these services SE, would receive a 10% commission.

The 'Sovereign' trust, which listed its registered office in Uruguay, was also behind the formation of SE in 2004. Fifty percent of its shares were provided to partners Rodolfo Schinocca and the company Goodshire SA, which was also registered in Uruguay in February 2005 and whose final beneficiary was Jorge Messi, the player's father.

In September of 2006, SC entrusted to the company Lazario GmbH (hereinafter LZ), registered in Switzerland, the management of sponsorship contracts, merchandising, etc. in exchange for a commission of between 5% and 8%. The latter company was property of 'Vitop Consulting AG', also registered in Switzerland and whose declared activity involves performing fiduciary functions.

Just four days after the aforementioned ratification by the player, the company SC, represented by SE, concluded a six-

year contract with Adidas in exchange for €9 million (€1.5 million for each year). After some disputes between the player's family and Mr. Rodolfo Schinocca, the latter was excluded from the management of the image rights of the player. The structure formed by the aforementioned companies SC, SE and LZ, was substituted by another formed by Jenbril SA (hereinafter JB), Sidedoor Ltd. (hereinafter SF) and Tubal Soccer Management GmbH (hereinafter TSM), which managed the image rights of the player from 2007.

So, in the previous or the new construction of companies, what is clear is that somebody has built a wall in order to protect (in terms of tax due) the income generated by exploitation of the image rights of Leo Messi.

The assignment made between SC and JB was carried out in exchange for no fee, even though at that moment, the player was already the undisputed star of FC Barcelona and the Argentinean national team. SE was replaced by SF in the management of the sponsorship and merchandising contracts; this company was registered in the UK and its shares were the property of different companies with fiduciary functions related to international tax planning. Finally LZ was replaced by the company TSM, which is also its shareholder 'Vitop Consulting AG', as previously mentioned.

As can be seen, both structures have several parallels; every company, person or institution that wanted to contract the image rights of Lionel Messi, had to conclude a contract with a company registered in countries with international conventions to avoid double taxation (United Kingdom, Switzerland). This comprised SE and LZ in the first structure and SF and TSM in the second one, and whose tax laws

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allow that income earned outside of its territory to be directed towards the tax haven (Belize, Uruguay), where the player's image rights assignees companies - SC in the first structure and JB in the second one - were registered.

According to the prosecutor's complaint, through this complex structure during 2007-2009, Messi and his father evaded a total of almost €4.2 million in tax. Now, of course, there will be more to pay, as interests and fines will have to be added.

The law

The prosecutor accuses the player and his father of three tax offences, one for each year, categorised in Article 305 of the Spanish Penal Code. This Article, now amended, in its origins contained a penalty of between one and four years imprisonment for each offence. Despite the different opinions appearing in the newspapers, this is the only penalty that can be imposed on the player and his father. The new penalties established for tax offences have been set in the Spanish Penal Code after 2010, therefore cannot be applied in this case.

In 2010, the maximum term of imprisonment was increased to five years and in 2012, a new Article was included, 305.bis, creating a new penalty of between two to six years imprisonment for those offences whose value exceeds €600,000 or the case's complexity causes great difficulty in discovering the person responsible or the exact evaded amount.

As mentioned before, this last penalty of between two and six years imprisonment cannot be applied in the case in hand, because it was introduced after the offence. What has remained unchanged is the supplementary fine included in Art. 305 that could rise to six times the amount

defrauded (about €25 million in this case).

Once the facts appeared in the newspapers, the first movement of the player's tax advisors - one of the most recognised law firms in Spain - was to present a supplementary declaration for the personal income tax of the 2010 and 2011 years that were not included in the complaint presented by the prosecutor, to avoid the situation that this could be included in future tax recovery charges.

This supplementary declaration includes a payment of €10 million that was made just a week after the complaint by the prosecutor office. This does not mean that Lionel Messi recognises the offence, but while his lawyers try to prove the absence of offence in the player's conduct and knowing that tax disputes are usually an interpretation matter, they avoid the penalties in case the tax authorities consider that they abused the law. In any case, it seems evident that Messi was trying to avoid another prosecutor's action against him and his father for the subsequent tax years.

Coincidence or not, at the beginning of July, Amancio Ortega, founder and former president of Inditex was ordered to pay €33 million. The textile company Inditex includes, amongst others, the famous Zara brand. In this case, the tax authorities simply understood Mr. Ortega's conduct as a misinterpretation of tax regulations, but not a criminal offence.

We are not Messi's lawyers, but we are sure that his tax advisors will try to demonstrate that the facts are just an interpretation of the personal income tax regulations that the tax authorities understand to be incorrect, and that the player never intended to

evade taxes. It could be argued that this assertion is similar to the excuse of somebody who has been caught with a bloody knife in his hands and a dead body at his feet, who says "It was like that when I arrived...". However, the truth is that the foundation of the first company and the first assignment contract were signed while Messi was still a minor. We must agree that he ratified the agreements when he became of legal age, but it should be known that, in Spain, notaries have to inform the administration of every operation in which they are involved and if there was criminal conduct involved, such a ratification could not be the best advice that he received.

We do not know if there is a criminal offence as we do not have enough information to be sure, but we are sure that it will be a surprise if at the end of this process, the Court concludes that Lionel Messi is found guilty of tax evasion. We still do not know how much he will have to pay, however he has already paid €10 million to cover personal income tax for 2010 and 2011, plus he had until 21 July to present his personal income tax declaration for 2012. However, even if he and his father are found guilty of tax evasion, the new wording of Art. 305 of the Spanish Criminal Code foresees the possibility of avoiding prison in two different ways:

- By regularising the tax status with the corresponding surcharges and penalties. This way is now unavailable for Messi and his father because the Article itself expressly states that to use this

regularisation, the taxpayer has to do it before it is notified of the start of the inspection. Obviously, Messi and his father already know the existence of an inspection because they were notified of the complaint presented by the prosecutor.

- The other way to avoid prison, and unique in that it is available nowadays, is included in the modification of Article 305 carried out in 2012 (this can be applied today, even if the offence was committed in 2008 in application of the more lenient criminal law retroactivity). According to this modification, Judges may impose a lower penalty by one or two degrees if, no later than two months from the court summons, a defendant satisfies the tax liability and judicially recognised facts. Thus, if the penalty foreseen is imprisonment for between one to four years, a penalty lower by one degree would be six months to one year and a penalty lower by two degrees would be between three and six months. Considering this reduction of the criminal liability, if Messi and his father are sentenced to a maximum of two years imprisonment, they may be able to ask for a suspension of the sentence as they have no criminal records and they won't enter prison.

In any case, they will have to pay the €4.2 million allegedly evaded plus the accrued interest, plus the fine that the court could impose on them which could reach six times the amount evaded. Therefore, the total amount that Messi and his father may have to face could be almost €30 million.

On 27 September, both defendants will have to appear before the judge and explain what they did, having the chance to explain every detail and accept their responsibility. The court will decide if their behaviour deserves a severe punishment, or if they just have to regularise their situation, paying the amounts owed plus the interest.

Conclusion

Messi has already - at least tacitly - accepted that he was not clearly fulfilling the Spanish tax regulations, by paying the €10 million for the 2010 and 2011 tax years, and supposedly the 2012 year too, plus the recently-paid €5 million. Whether we will see either Messi or his father playing football in the courtyard of a Spanish prison is another matter.

Finally, this case shows that tax authorities are following football players in particular regarding their image rights. This is not the first time that such a situation involving FC Barcelona players has occurred, as Luis Enrique or Hagi have also struggled with the same issue.

Juan de Dios Crespo Pérez Partner
Enric Ripoll Associate
 Ruiz-Huerta & Crespo Sports Lawyers,
 Valencia
jddcrespo@ruizcrespo.com
eripoll@ruizcrespo.com

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