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Seminar E – IFA/OECD: red card 17?
Summary of discussion

Chair: Richard Vann (Australia)

Panel members: Mary Bennett (OECD), Andrew Dawson (United Kingdom), Xavier Oberson (Switzerland), Jeffrey Owens (OECD), Aart Roelofsen (Netherlands), Jacques Sasseville (OECD), Michael Pfeiffer (United States)

Secretary: Mario Tenore (Italy)

This seminar was divided into two parts:

– an overview of the current international tax work of the OECD; and

– based on some case illustrations, a debate on whether Art. 17 of the MC on sportsmen and artistes should be given a "Red Card", that would eliminate it from the game of the OECD MC.

Current OECD international tax activities

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Case studies on Art. 17

The discussion on Art. 17 was illustrated on the basis of a few hypothetical cases which were only partially covered. The treatment of these cases in the various jurisdictions showed wildly divergent tax treatment, with a considerable danger for double or even triple taxation. Because of the divergence and complexity only the problems coming out of the cases will be discussed below.

(a) Nexus

The first issue is one of nexus: when is a State entitled to tax an artiste or sportsman (AS) and how is the tax base then calculated?

– UK: general rule applicable to employees if AS is an employee: number of days in the country out of total working days, including travelling and training even if unrelated to a performance inside the country.

– Switzerland: only taxable under Art. 17 if income (dependent and independent AS) relates directly to performance. The link between a regular salary and specific performances (games, races, concerts) is not direct and does not fall under Art. 17 (Cyclist case, 6 May 2008). If the salary does not come under Art. 17, Switzerland has the right to tax the salary as employment income under Art. 15.

– In the Netherlands, salaries of dependent AS were allocated to performances abroad including days abroad related to performances (training, stand-by, travelling).

– US: has some treaties in which provisions of Art. 17(1) and (2) do not apply (a) for the athlete in respect of his activities as an employee of a team which participates in an league with regularly scheduled games in both contacting states, or (b) for a team described in subparagraph (a) (US-Canada treaty).

– OECD: employment is exercised where the employee is physically present when performing the activities for which he is remunerated. Where the remuneration covers various activities in a team, troupe or orchestra to be performed during a period of time the remuneration should be allocated on the basis of working days. Remuneration for preparation and training are also subject to the rules of Art. 17.

– Residence of a team or troupe in a State does not give this State additional taxing rights on the employees under Art. 17. The State may only tax employment exercised on its territory.

(b) Taxation of bonuses or signing rights

– US: Performance of bonuses should be treated like salary, unless tied to specific events. Payments for signing or hiring an AS is not related to performance and therefore may be taxed in the source state where the payor resides, but the tax may not exceed 15% of the gross-amount (US-Canada treaty).

(c) Image rights

– UK: if payment of image rights is disguised remuneration, Art. 17 applies.

– Switzerland: recognition of star companies for image rights depends on issues of substance over form. If a company is not recognized Switzerland would tax the resident AS on image rights.

– US: same approach of substance over form, if payment is disguised remuneration Art. 17 applies. If the image rights are directly related to the performance (e.g. image on advertising material for the performance) it is taxed as performance income. When it is totally unrelated to the performance (endorsement income) the income is not taxable under Art. 17 but may be taxed as royalty income.

(d) Taxation of the team, troupe or orchestra

– OECD: the team, troupe or orchestra which is constituted as a "legal entity...the profit element accruing from a performance to a legal entity would be liable to tax" under Art. 17(2). The proposed commentary specifies that in such case player's compensation should not be subject to double taxation, by taking remuneration into account as the profit element. Commentary also suggests that a team can be taxed where it is too difficult to allocate the team members' remuneration.

– US, Canada and Switzerland have made a reservation and restrict the application of Art. 17(2) to star companies.

– Switzerland would tax the promoter of the team in cases of jazz or rock bands. There is controversy to apply the same rules to soccer teams.

– Netherlands simplified its legislation considerably for groups performing in the Netherlands on short-term contracts. Netherlands abolished taxation of Dutch-source income on short term contracts for groups with residents from treaty partners. Netherlands proposes treaty partners to switch from exemption to credit systems. The result is that non-residents performing as a group on

a short-term contract are not taxed in the Netherlands, but only be taxed in their country of residence and that Dutch residents would only be taxed if they perform in the Netherlands.

(e) The big international tournament

– Taxation of the big international tournament (Olympics, World Cup, World Championships etc.) turns on the taxation of the broadcasting rights. To the extent that broadcasting rights are paid to local organizers or local players they are subject to tax in the state where the events takes place (Art. 17).

– OECD: where the payments are made to third parties the payment is not related to the performance and therefore Art. 17 does not apply. Such payments may be taxed as royalties under Art. 12, depending on characterization of such payments under copyright law.

– Germany: payments made as remuneration of life broadcasts of events are income of the performing AS and may be taxed to the performing AS under Art. 17 (1)! They may be taxed under Art. 17(2) to a third party in the context of exploitation of live broadcasting rights.

– In many countries (Brazil, UK, South Africa) all tax rules are set aside because of the conditions imposed by the big sports organizations. Exemption from all taxes, for the organization, the players, the teams. Only VAT on ticket sales is sometimes allowed. These practices make all existing tax rules irrelevant.

Conclusion

The current application of Art. 17 is a big mess. The main problem is that it singles out a specific group of services from artistes and sportsmen for special treatment (taxation at source without PE) and the fundamental question is whether these services should receive special treatment. The special problem is with all types of services which earn a high value in a very short time when by hypothesis there is no PE. Source countries insist on taxing part of the income. But the present mess makes life of many smaller performers and earners miserable. Some panel members proposed therefore to extend the application of Art. 17 to all forms of public entertainment on an independent basis in excess of a threshold and to restrict the application of Art. 17 to star companies so as to preserve a certain measure taxation in the source country.

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Reference: TNS:2010-08-23:IFA-1; TT:O2:02:ENG:2008:MO.