

# Artist Taxation: Art. 17 of the OECD Model Treaty - a Relic of Primeval Tax Times?

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## 1. Introduction

Each independent state can extend the taxation based on its national law on income derived from the exercise of an artistic or athletic income which was realized in its national territory. The right of taxation by the state of activity maintains if a tax treaty with another state exists and does not preserve the tax influence. In connection with the practice of an artistic or athletic income the right of taxation for this kind of income is normally conceded in supplying Art. 17, para. 1 of the OECD Model Treaty to the state of practice. According to Art. 17, para. 2 of the OECD Model Treaty this also applies if the concerning income does not run into the artist's or sportsman's account but into a third person's account.

In this way the income derived from the practice or utilization of an artistic or athletic work in the Federal Republic of Germany is subject to the limited tax liability based on s. 49, para. 1, No. 2d; s. 49, para. 1, No. 3 and No. 4 of the income tax law. The tax claim is levied on s. 50a of para. 4 of the income tax law by a 25 per cent source tax off the gross income and not from the gain.

Other states are also taxing the income derived from artistic or athletic activities of people who are not resident in their territory. The tax is also raised in the form of a source tax. In the course of this the basis of assessment is not always the gross income.

In Switzerland for example there is a global deduction of expenses of 20 per cent taken off the gross. The remaining basis of assessment is converted into a daily fee afterwards. The income tax charged thereon is turned progressively and extends from 0.8 per cent to 7 per cent. In view of the canton tax e.g. in

the canton of Zürich the maximum tax burden results in 13 per cent of the income.<sup>1</sup>

Other states levy the tax on the gross like the Federal Republic of Germany. The rate varies from 10 per cent in Luxembourg<sup>2</sup> and 15 per cent in France,<sup>3</sup> Finland, Sweden, Norway<sup>4</sup> and Japan<sup>5</sup> to 20 per cent in Greece, Austria and Italy<sup>6</sup>, with 23 per cent in Great Britain<sup>7</sup> up to 30 per cent in the USA<sup>8</sup> depending on the classification of the tax subject. Differences in the form of taxation might be produced if employees are employed.

Due to simplification reasons the financial effects which the taxation of the gross by the state of activity has on the self-employed should be described and whether it would not be more useful to assign the taxation right within the framework of double tax treaties to the state of residence as well as in connection with other income.

## 2. Reasons for taxation by state of activity

### A. Historical development

The primary **taxation assignment of artists and sportsmen** by international double tax treaties to the state of activity is based on a draft of a 1959<sup>9</sup> model tax treaty and was taken on in consideration of slight changes into the 1963<sup>10</sup> OEEC Model Treaty. There were no regulations included in the predecessors of the 1962 OEEC Model Treaty regarding the taxation of artists and sportsmen. The state of activity was not entitled to tax because of the short stay period (less than 183 days) and the missing branch.<sup>11</sup> In the early years technical development, international communication and therewith the cooperation of the states was

Altenburger, 'Taxation of Non-Resident Entertainers' Swiss Contribution' in: ifa, *Taxation of Non-Resident Entertainers*, p. 129 at 139.

te Spenke, 'International Taxation of Artists and Entertainers' in: van Marel/Nemschoff, *Business and Legal Aspects of Live Concerts and Touring*, Reports presented at the meeting of the International Association of Entertainment Lawyers, MIDEM 1998, Cannes, p. 198 at 208.

Mihac, 'Taxation of Non-Resident Entertainers in France' in: ifa, *Taxation of Non-Resident Entertainers*, p. 43 at 45.

te Spenke: see n. 2 above.

Miyatake in: 'Taxation of Non-Resident Entertainers in Japan' in: ifa, *Taxation of Non-Resident Entertainers*, 4th Congress of the International Fiscal Association, p. 79 at 111.

te Spenke, see n. 2 above.

te Spenke, see n. 2 above.

Sandler, *The Taxation of International Entertainers and Athletes*, p. 149.

Ibid. at p. 177.

Maßbaum in: Becker, Höppner, Grotherr, Kroppen, DBA *Commentary, Art. 17 OECD-MA*, Rdnr. 5 about legal development.

Sandler, see n. 8 above.

not so well organized that the inclusion of the taxable income could be ensured. The tax office being responsible for the taxation of the foreign-resident taxpayer did not receive any information about the foreign-source income.<sup>12</sup> It was the ever-increasing internationalism of artists and sportsmen that made accurate taxation particularly difficult.<sup>13</sup>

## B. Tax claim guarantee

The typical professional problem within the taxation field of this group of taxpayers consists in respect that they finally can escape from taxation because of the combining of companies involved.<sup>14</sup> Like this the participation right of the states of activity in the artists<sup>5</sup> or sportsmen's income might lapse in case of the existence of a double tax treaty because the Services are produced by a subject organized as a corporation.

In this case taxation may be inapplicable according to the form of the international contract due to the lack of place of work in the state of activity, as shown in the example of Australia.<sup>15</sup> The danger that this payment will be completely exempt from taxation is especially high if the state of the place of work knows nothing about the source of income or, however, if the Company concerned or the artist or sportsman behind this lives in a low-taxation area. In view of this a primary taxation by the state of activity seems to be obvious and also appropriate.

The comment of the OECD fiscal committee also sees a problem with regard to the taxation practice and refers the existing experiences in No. 2, para. 1 of Art. 17 of the official OECD Model Commentary to the particular practical problems in the taxation of foreign income of artists and sportsmen.<sup>16</sup> Therefore also when the artist or sportsman is directly included in civil law contracts the mobility and diversity of income possibilities can speak for assigning taxation to the state of activity in order to guarantee the taxation right.<sup>17</sup>

Furthermore the OECD feels obliged to consider this group of taxpayers notoriously hesitant in revealing information regarding their financial matters and refers to the danger that as a result taxation cannot be imposed as the artist or sportsman will have empty pockets later which means that taxation claims as a result only exist in theory.<sup>18</sup> Even adventurous and not particularly good tax advisers will be made responsible for the unfortunate situation of taxation regarding artists and sportsmen liable to restricted tax by the OECD.<sup>19</sup>

Even if this view seems to be very general the danger of non-taxation due to the existing internationality must not be denied totally, at least the temptation is not insignificant. Therefore these aspects also speak for the assignment of taxation right to the state of activity.

There is, however, the question whether the above-mentioned components for the taxation of artistic and sport activities by the state of activity reflect the interests of the modern age.

## 3. Modified view

### A, Difficult control of taxation of no consequence

Artists and sportsmen are desired objects of media reports. The data of taxpayers are regularly recorded by means of Computer Systems. That leads to the fact that in general a source of income can no longer be easily concealed. Apart from that there is according to the domestic right of the state of activity the possibility of creating a legal norm, which would allow him to transfer information about the source of income to the state of residence as shown in the newly inserted § 50, para. 5, clause 4, No. 3 of the EStG (income tax law) 1997. The occupational group of artists and sportsmen cannot therefore evade taxation in general by means of modern data communication Systems.

Miyatake refers to his own experiences which lead to the conclusion that the dramatic descriptions of the OECD are more likely to be a thing of the past. He mentions that nowadays entertainers pay their taxes regularly and in accordance with the regulations in the state of residence. He also emphasizes that although some of the artists and therefore also sportsmen are resident in tax oases, this is not as prevalent as the media believes.<sup>20</sup>

### B. Registration in the state of activity impedes fair taxation

#### 7. Excessive taxation

##### (a) Arguments for gross taxation at source

According to international comparisons gross taxation at source has gained acceptance as already shown

*Issues in International Taxation No. 2, Thin Capitalization, Taxation of Entertainers, Artists and Sportsmen, OECD, Nr. 36.*

<sup>13</sup> Ibid., Nr. 38.

<sup>14</sup> te Spenke, see n. 2 above at p. 202.

<sup>15</sup> Dukes, Taxation of Non-Resident Entertainers in: Australia', in: *Taxation of Non-Resident Entertainers*, 49th IFA Congress, Cannes 1995, p. 42.

<sup>16</sup> 'Substantiations' by Maßbaum, Becker, Höppner, Grotherr, Kreppen, *DBA Commentary, Art. 17 OECD-MA*.

<sup>17</sup> Stockmann in: Vogel, *Double Taxation Convention Commentary, Art. 17, Rdnr. 7*.

<sup>18</sup> See n. 12 above.

<sup>19</sup> 'Substantiation' by te Spenke, see n. 2 above at p. 203.

<sup>20</sup> Miyatake, see n. 5 above.

above.<sup>21</sup> This form of taxation has been established because contemporary taxation of the net amount is especially difficult due to the short duration of the residence in the state of activity.<sup>22</sup> This knowledge is based on the conclusion that for example a great many of the costs in connection with the event cannot be assessed on the day of the concert itself. The taxation of the definite net income is virtually impossible due to the exceptionality in the timing of the performance of the artistic or Sports event.

Therefore it is especially effective for the tax creditor to Start at the level of the debtor with regard to tax deductions. This procedure leads to a fast result, guarantees tax revenues<sup>23</sup> and contains the fixing of a final taxation, if a future assessment is no longer possible.

**(b) Excessive taxation is inherent in the gross taxation at source**

In connection with imposing taxation on the income along the lines of gross taxation at source the actual profit Situation is to be left out of account for the time being, so that there is the danger of a taxpayer having to pay tax even though he has not achieved any actual proceeds.<sup>24</sup> This danger is especially obvious in France<sup>25</sup> and also in the Federal Republic of Germany, as according to the domestic law of these countries there are no legal Instruments for early tax reductions in the case of artists performing a non-cost-effective tour, such as in the case of small or new artist groups.

With regard to subordinate income to the amount of 100,000 DM and business expenses to the amount of 70,000 DM, taxation is in international comparison and without consideration of national tax-reduction possibilities as follows:

income	DM 100,000
expenses	<u>DM 70,000</u>
profit	<u>DM 30,000</u>

Business expenses to the amount of 70 per cent of income is quite common in the tour business.<sup>26</sup> This is especially due to the high costs for the rental of light

and sound equipment as well as the immense personnel and travel expenses.

In the United States the taxpayer has no income left with regard to the previously mentioned example on taxation to the amount of 30 per cent of the income that has not been subject to taxation. Taxation amounts to 100 per cent of net profit. In the Federal Republic of Germany, as per the above-mentioned example, taxation amounts to 94.07 per cent of profit under consideration of the sales tax, which due to the so-called 'nil regulation'<sup>5</sup> of § 52, para. 2 of the UStDV is not imposed and neither is the solidarity surcharge. The extremely high taxation with regard to the net result is also the case in other states. In Great Britain the net tax rate amounts to 76.66 per cent and is less in Greece, Austria and Italy with 66.66 per cent of net proceeds and 50 per cent in France, Finland, Switzerland, Norway and Japan to a final 33.33 per cent in Luxembourg.

This international comparison clearly shows the problems in connection with the exclusive reflection on the income Situation with regard to the confiscational effect of this particular form of taxation. Previous reports have shown that the OECD's argument of tax avoidance is used by a number of states in such a way to raise effective taxation, as Miyatake<sup>27</sup> also discovered.

It is also becoming visible that the assignment of the taxation right to the state of activity helps on the one hand from a fiscal point of view to guarantee the tax claim on one side, but on the other hand from the point of view of the taxpayer it is rather more problematic.

The unfairness in connection with the problem of the confiscational taxation by the state of activity is according to the Statements of renowned representatives in practical experience given that the Federal Republic of Germany is avoided<sup>28</sup> in connection with international tours, which also means a hindrance to the free market in the FU.<sup>29</sup> The particular exceptional problems especially with regard to the Federal Republic of Germany may consist of the fact that a refund can only be granted here on completion of the tour and also of the fact that the risk of the refund being refused may arise due to the domestic debtor not having registered and paying the tax.<sup>30</sup> The legal decrease of

Sandler, *The Taxation of International Entertainers and Athletes*, p. 22 for Australia, p. 47 for Canada, p. 72 for France, p. 108 for Japan, p. 136 for Great Britain, p. 162 for the USA as well as Trivoli in: *Taxation of Non-Resident Entertainers*, p. 58.

<sup>22</sup> Frotscher, *EStG Commentary*, § 50a ESStG, Rdnr. 1.

<sup>23</sup> Engelschalk, *The taxation of non-resident taxpayer on gross basis*, p. 6.

<sup>24</sup> Grams, 'Taxation of artists liable to pay a tax: Reasonableness Procedure pursuant to § 163 AO', FR 1994, p. 489; Grams, 'The constitutional law and the taxation of artists liable to pay a tax under consideration of the annual tax law 1997', DSz 1997, p. 635; Grams, 'Taxation of artists and European Community Law', RfW 1997, p. 763.

<sup>25</sup> Sandler, see n. 21 above, p. 75.

<sup>26</sup> Grams, see n. 24 above.

<sup>27</sup> Miyatake, see n. 5 above.

<sup>28</sup> ROSS, 'The Role of the Agent — An Interview with Neil Warnock of The Agency', in: van der Marel/Nemschoff, *Business and Legal Aspects of Live Concerts and Touring*, Reports presented at the meeting of the International Association of Entertainment Lawyers, MIDEM 1998, Cannes, p. 20 at 22.

<sup>29</sup> Grams, 'Taxation of artists and European Community Law', RIW 1997, p. 763.

<sup>30</sup> Grams, 'The claim for reimbursement in tax deduction procedure pursuant to § 50a Abs. 4 ESStG both annotation about the BFH Beschi, v. 17.05.1995, I B 183/94', BB 1997, p. 70, after what the payment of tax at source do not touch on the claim for reimbursement; opposed Heinicke in: Schmidt, *ESStG Commentary*, § 50 ESStG, Rdnr. 16.

taxation at source requires complex taxation planning in the Federal Republic of Germany<sup>31</sup> and also in other states. Only those who can afford such tax planning can profit from this.

(c) Excessive taxation increases further costs

Existing refund possibilities from the point of view of time after already deducting taxation at source intensify the disadvantages in connection with the problem of excessive taxation. Here the charge of double the amount of tax and legal consultation costs proves to be a substantial potential problem. The refund of excess tax paid requires in this case the determination of profit per state of activity in accordance with domestic tax regulations. As a rule the taxpayer cannot do this himself so that an expert is to be employed in each respective state. This person must be given the prepared figures in the state of residence beforehand. The costs concerning the complete tour project throughout various states must be worked out on the basis of accounting in the state of residence, which again causes substantial consultation costs. The cost potential increases tremendously according to the amount of different countries in which performances take place during the artist's tour.

(d) Possible refund procedure does not prevent excessive taxation

With this background the future potential taxpayers entitled to a refund are to be split into three groups:

- The first group consists of those taxpayers who do admittedly come under the area of excess taxation but are not entirely at a disadvantage as the state of residence has an entire pot for taxable world income and the total amount of withheld tax.
- The second group consists of those taxpayers who admittedly in any case cannot reach a tax credit in the state of residence on excessive tax paid in the state of activity, but also do not claim refund as the tax portion due for refund is compensated by consultation costs. This group of taxpayers sees no point in the refund procedure as there is no result of any visible value to them.
- The third and last group of taxpayers who are too small and insignificant and therefore cannot afford consultation. They are practically forced to tolerate taxation by the state of activity in spite of an existing loss situation.

Even if in the result tax relief on the part of the state of residence in the first-mentioned group were achieved

the excessive taxation caused by the state of activity would not be eliminated. According to German law it must result through relief on the part of the state responsible for this and not on the part of the state of residence.<sup>32</sup> In the second and third case, the result taxation with no legal claim continues to be imposed due to the financial situation of the taxpayer in spite of an existing refund claim.

(e) Application of reduction of tax rates unsuitable

In various states there is the possibility of reducing the tax deduction already before the start of the tour by means of an early reduction<sup>33</sup> of the gross taxation at source on the basis of diverse documents. Admittedly through this there is the early danger of being faced with excessive taxation which does not contribute to the reduction with regard to tax and legal consultation costs. Also in this case, as in net taxation or refund procedures, there is the need for extensive profit and cost distribution which is problematic due to the nature of international tour business.

Despite the above-mentioned practical effects there is the question how the tour costs are to be divided. Must this be done for example with regard to the economic significance of the performance? This approach can lead to the fact that English-spoken concerts in France create less costs than in Germany as the number of visitors in France is not as high as in the neighbouring country Germany. Therefore France is more likely to take into account the economic success and will carry out a corresponding cost apportionment when determining the costs to be accepted.

On the other hand the Federal Republic of Germany would also like to work out a high level of costs from its point of view in order to achieve the highest possible proceeds out of the taxation of the project. Therefore it will endeavour to carry out a division according to the number of performances without considering the economic aspects. In this sense for example costs regarding refund procedures according to § 50, para. 5, clause 4, No. 3 of the EStG (income tax law) will be accepted. The various possible approaches mentioned here show that with regard to international comparison a modified net view considered in an early reduced gross tax rate does not contribute towards a necessarily fairer way of identifying the source of tax.

(f) Annual assessment also unsuitable

Net taxation by the state of activity on completion of the tour or at the end of the taxation year as in

<sup>31</sup> Feingold, 'A Brief Outline of the U.S. Tax Considerations Relevant to the Personal Appearance Income of Artists and Entertainers', in: van der Marel/Nemschoff, *Business and Legal Aspects of Live Concerts and Touring*, Reports presented at the meeting of the International Association of Entertainment Lawyers, MIDEM 1998, Cannes, p. 211 at 215.

<sup>32</sup> BFH Urt. v. 20.04.1988 I R 219/82, BStBl 1990 II, 701 at 705.

<sup>33</sup> Sandler, *The Taxation of International Entertainers and Athletes*, p. 140 for the United Kingdom application is possible until 30 days before the beginning of the event and p. 166 for the USA, after which an agreement can be settled 90 days before.

France<sup>34</sup> can contribute to an effective elimination of an existing excessive taxation. But as mentioned before the carrying out of an artistic or Sports activity is combined with a large amount of internationality. The costs involved in assessing the taxable net income in each individual country in which a performance took place are considerable. The respective taxpayer would have to employ an expert for each state due to the respective exceptional features of the affected taxation Systems. As this would require so much money a large number of those affected cannot afford such a 'luxury'. Net taxation of profit may be desirable but not practicable due to the existing actual difficulties.

## 2. Double taxation is encouraged

You can see from the explanations under point 1.(d) above that the three existing groups of taxpayers can also be judged with regard to potential proceeds. Whereas in the first group you can regularly find well-known artists and sportsmen the possibility of earning money decrease up to those concerned up to the third group. It is especially noticeable in the second group that the actual aim of a double taxation treaty, which according to its wording is to prevent double taxation of proceeds in the state of residence as well as in the state of activity, is not achieved. It can only be presumed that in view of artist tours most of the artist groups are to be found in the second group. This is shown by the circumstance that according to the Statements of renowned representatives of the Federal Finance Office in Bonn hardly any applications for refund as per the new § 50, para. 5, clause 4, No. 3 of the EstG (income tax law) are submitted. In the realization that taxation to the amount of 25 per cent of income in the Federal Republic of Germany has contributed to excessive taxation the legislative Intention to create a refund procedure was to be seen in considering this undesired result in relative terms again.<sup>35</sup>

The aim of a double taxation treaty is definitely not achieved with regard to this group of taxpayers, on the contrary, double taxation is even legally laid down and practised.

## C. Assignment to the state of residence

The problem areas described above would appear to be an argument in favour of thinking over once more whether, in the case of a double taxation treaty passing the test, taxation by the state of residence would not be better and more effective than taxation by the state of activity.

Favouring this, to Start with, is the fact that the state of residence would, on the grounds of better intelligence about its citizens, primarily be in a position to evaluate the international correlation involved. It can best assess the existing capacities as a whole as it can find out all the necessary data from the worldwide records of its citizens.

## 7. Taxation procedure in two stages ensures tax registration

The problem of the proceeds from abroad not being included in the tax declaration of the state of residence can be solved by a revised method of distribution in the OECD Model Treaty, provided that in the end result the tax yield on the basis of the treaty is always registered solely by the state of residence. The manner in which the taxpayer is exempted by the state of activity can be determined in advance in the international treaty. Certainly, for the reasons mentioned above, it would not be in anybody's interest to include a regulation of exemption independent from an application. If the person in question can directly refer to exemption and transfer the income tax-free from the state of activity, he will be severely tempted to refrain from any tax declaration in his state of residence.

There is, however, a procedure which can guarantee that the tax registration in this state is in fact safeguarded. An example of this is the two-phase taxation procedure<sup>36</sup> based on the taxation of artistic or Sports activity.

### (a) Tax deduction in the first phase

According to a norm of distribution, agreed upon and modified in a revised model treaty, the state of activity raises taxes in the first phase initially, as though it was not limited by an agreement. In order to avoid excessive taxation in the first phase, however, the procedure must, in view of the high level of taxation at source, be of a differentiating nature, by refraining from fixing a Standard level of taxation. Instead, a majority of profit-based rates should be created based on the individual expenditure level of the tour project under investigation.<sup>37</sup> Graded gross tax rates though, do not create more justice in taxation in relation to the net result. The reason for this is that every general consideration of the net result based on a gross tax rate bears within it an obvious risk of insecurity concerning the actual result due to the estimates assumed in fixing the tax rate. Furthermore, in this way one avoids expensive procedures for working out the domestic

<sup>34</sup> Milhac, see n. 3, p. 43 at 46.

<sup>35</sup> Heinecke in: Schmidt EStG Commentary, § 50 Rdnr. 13.

<sup>36</sup> Frotscher, EStG Commentary § 50d, Rdnr. If.

<sup>37</sup> Grams, 'Taxation of artists and European Community Law', RIW 1997, p. 763.

share of profits. This is also in the interest of the taxpayer, as explained above.

### (b) Tax relief by exemption based on application

If the final right of taxation with regard to artists or Sports activities is by law assigned primarily to the state of residence, the claim arising from the first phase of the taxpayer's contract can be rescinded in a second phase.<sup>38</sup> Tax relief from taxation by the state of activity is to be achieved by means of a certificate of exemption, when the international procedural practice has been fundamentally changed. The international taxation of the treaty in question, developed from a modified version of an OECD Model Treaty must correspondingly be formulated to include this aim according to application.<sup>39</sup> This means that the state of activity can raise tax as long as no application for exemption has been made by the taxpayer. The issue of such a certificate may, according to the double taxation treaty in connection with the national legislation of the state in question, be made dependent on the condition that the taxpayer's domestic source of income is made known to the state of residence by means of a control notice.<sup>40</sup> This procedure will ensure that the income of the artist or sportsman is inevitably taxed either by the state of residence or the state of activity.

If there is no double taxation treaty with the state of residence, or if the taxpayer does not make use of the procedure of application of exemption, or if he runs an enterprise in the state of activity, the tax registration will be maintained there in the second phase, too. In the last resort this procedure will result in making a move of the artist or sportsman to a tax-free oasis less attractive.

### 2. Exemption procedure will guarantee earlier tax relief

At first sight, the question arises, whether by sticking to the gross taxation at source in the first phase you do not in essence perpetuate the problems mentioned above, so that in the end you do not achieve a change in the taxation procedure. It is, however, important to realize that the taxation procedure in the first phase can be avoided by an early application for the relative certificate of exemption. Therefore it is the taxpayer's decision whether he wants to avoid a foreseeable excessive taxation in time or not. If taxation in the first phase can be avoided altogether - and this way would favour those taxpayers who can prove high production

costs — you can also avoid complicated procedures of refund, giving rise to Interpretation as § 50, para. 5, clause 4, No. 3 of the EStG<sup>41</sup> (income tax law) or the premature tax-reduction procedure<sup>42</sup> as practised in Great Britain. This means a saving of expenditure by the state, because all that would be needed for the exemption procedure would be a proof of entitlement to the benefits of the treaty, which in the last resort consists merely of a question of law. The tax proceeds from the income tax of artists and sportsmen with limited liability to taxation are, in any case, not so high that they could be called a lucrative source of income for the state.

### 3. Procedure already proven in the Federal Republic of Germany

A procedure developed along these lines is already nothing new to legislation in the Federal Republic of Germany. To name an example, payments in the field of licences, including income from Copyright licences are registered in the way described above. To the extent mentioned above also in this case the tax claim remains valid unless the taxpayer is protected from an ultimate tax claim of the Federal Republic of Germany by a double taxation treaty — or if the taxpayer in question, in spite of an existing double taxation treaty, chooses not to make use of the exemption procedure.

### 4. Summary

This article has shown that the tax registration of artists' and sportsmen's<sup>5</sup> activity in the state of activity is a relic of the beginnings of the history of taxation. The disadvantages for the taxpayer in connection with gross taxation at source can be avoided by giving the state of residence the primary right of raising taxes in the framework of a double taxation treaty. To avoid the danger of the source of income in the state of residence not being registered for tax purposes, the state of activity will initially raise a gross tax at source in the first phase. Exemption by the state of activity will be granted only in the second phase by means of an exemption procedure of a special kind. Such a procedure is already being practised in the Federal Republic of Germany in the field of licences. By starting the exemption procedure at an early date, you can avoid being taxed even in the first phase.

<sup>38</sup> Heinicke in: Schmidt EStG Commentary, § 50d, Rdnr. 4f.

<sup>39</sup> BFH Urt. v. 22.10.1986 I R 261/82, BStBl 1987 II, 171; BFH Urt. v. 22.10.1986 I R 128/83, BStBl 1987 II, 253.

<sup>40</sup> z.B. § 50 Abs. 5 Satz 4 Nr. 3 Satz 5 EStG of Federal Republic of Germany.

<sup>41</sup> Grams, 'The special reimbursement procedure pursuant to § 50 Abs. 5 Satz 4 Nr. 3 EStG, IStR 1997, p. 548 after what the profit has to be determined pursuant to § 4 Abs. 1 EStG; opposed Heinicke in: Schmidt EStG Commentary, § 50 EStG, Rdnr. 16.

<sup>42</sup> Grams, see n. 24 above