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Entertainers and Sportspersons Following the Updated OECD Model (2014)

The author, in this article, considers various problems arising from the context and history of, and recent developments regarding, article 17 of the OECD Model on entertainers and sportspersons. He suggests a "solution" via a new text for article 17, which is supported by the 2014 Update to the OECD Model.

1. From the OECD Discussion Draft (2010) to the Updated OECD Model (2014)

Overall, the updated OECD Model (2014)[1] has a large amount of (new) text regarding article 17 on "artistes and sportsmen". The new text was included following the OECD Discussion Draft (2010)[2] and the reactions to it. Most obviously, the title of article 17 of the OECD Model (2014) has been changed from "Artistes and sportsmen" to "Entertainers and sportspersons", a phrase which the author generally uses in this article. The text of article 17 of the OECD Model (2014) itself is unchanged, but the Commentary on Article 17 of the OECD Model (2014)[3] has doubled in size with clarifications and options regarding the restrictions to the scope of article 17.

Following the publication of the OECD Discussion Draft (2010), the Netherlands proposed that article 17 should be deleted from the OECD Model.[4] In this regard, the Dutch proposal was related to the unilateral tax exemption for non-resident entertainers and sportspersons that the Netherlands had inserted into its national tax law in 2007. The conditions for the exemption are that qualifying entertainers and sportspersons must be resident in a state with which the Netherlands has concluded a bilateral tax treaty and that they are not an employee of a Dutch employer. The Dutch proposal was also related to the official Dutch treaty policy,[5] published in February 2011, in which the Netherlands stated that it would conclude future bilateral tax treaties preferably omitting article 17 in respect of entertainers and sportspersons, so that such individuals would fall within the scope of the normal allocation rules of the articles 7 and 15 on self-employed individuals and employees, respectively.

During Seminar E at the 2010 International Fiscal Association (IFA) Congress in Rome the representative from the Dutch Ministry of Finance in the panel advanced the arguments for the Dutch approach and proposed that the OECD should adopt this in the OECD Model. In particular, with the deletion of article 17 of the OECD Model, the risk of the excessive or double taxation of international entertainers and sportspersons would be removed and the administrative burden on both the tax authorities and taxpayers would be considerably reduced, but the tax avoidance on the part of top stars and performers, who tend to the move the residence to low-tax jurisdictions, would be still countered.[6]

However, the Committee of Fiscal Affairs (CFA) did not include this proposal in the updated OECD Model (2014). The Dutch proposal was discussed in Part 1 of the OECD Report, entitled "Issues related to Article 17 of the Model Tax Convention",[7] but the great majority of OECD member countries supported the view that article 17 should be retained in the OECD Model. During the discussions, these OECD member countries expressed the views that: (1) residence taxation should not be assumed given the difficulties of obtaining the relevant information; (2) article 17 of the OECD Model permits the taxation of a number of high-earners who can easily move their residence to low-tax jurisdictions; and (3) source taxation of the income covered by article 17 can be administered relatively easily.

This rejection was disappointing, as the Dutch proposal had not been discussed seriously. In this respect, the arguments for retaining article 17 of the OECD Model are completely negated by the Dutch proposal. If article 17 of the OECD Model were deleted, the performance state would still retain source taxation in its national legislation and only give this up if an entertainer or sportsperson could demonstrate that they had their fiscal residence in a treaty state. The application procedure in respect of such an exemption could be effected with a form, which would have to be countersigned by the tax authorities in the residence state to ensure that they also had the relevant information regarding the income derived from the other state that later should be reported in a tax return for that year. In addition, as there are no tax treaties with low-tax

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1. *OECD Model Tax Convention on Income and on Capital* (15 July 2014), Models IBFD.
2. OECD,*Discussion Draft on the Application of Article 17 (Artistes and Sportsmen) of the OECD Model Tax Convention* (OECD 2010), International Organizations' Documentation IBFD.
3. *OECD Model Tax Convention on Income and on Capital: Commentary on Article 17* (15 July 2014), Models IBFD.
4. Some international organizations also proposed significant changes to *OECD Model Tax Convention on Income and on Capital* art. 17 (22 July 2010), Models IBFD in their reactions to the *OECD Discussion Draft* (2010), *supra* n. 2, with a preference for the deletion of the article. One of these was Pearle of Brussels, in which employers in the performing arts within the European Union and certain other countries are associated.
5. Ministry of Finance, *Notitie Fiscaal Verdragsbeleid* (11 Feb. 2011).
6. *See* D. Molenaar, M. Tenore & R. Vann, *Red Card Art. 17?*, 66 Bull. Intl. Taxn. 3 (2012), Journals IBFD.
7. OECD, *Issues Related to Article 17 of the OECD Model Tax Convention* (OECD 2014).

jurisdictions, source taxation would simply remain when an entertainer or sportsperson decided to move residence to such a jurisdiction.[8] With these changes, article 17 of the OECD Model would become completely superfluous. It, therefore, appears that the OECD member countries are unwilling to understand, or incapable of appreciating, the problems that arise from the current tax rules in respect of entertainers and sportspersons.

This article ultimately discusses the changes to the updated OECD Model (2014), together with further potential changes (*see* section 5.). This follows on from a brief explanation of the history of entertainer and sportsperson taxation (*see* section 2.), the problems that arise from article 17 (*see* section 3.) and developments in this regard in recent years (*see* section 4.). In this regard, the author proposes a new text regarding article 17 of the OECD Model (*see* section 5.3.) for treaty negotiators that includes all the possible options for the restriction of article 17 considered in this article (*see* sections 5.2.2. to 5.2.7.). Section 6. summarizes and concludes the article.

2. The History of Article 17 of the OECD Model

The special tax rules for international taxation of entertainers and sportspersons first appeared publicly in 1959 in the second report prepared by the Organisation for European Economic Cooperation (OEEC) and were included in the OECD Draft (1963)[9] based on the argument that there were "practical difficulties" in applying the normal taxing rules to this specific group of taxpayers. Article 17 was extended in the OECD Model (1977),[10] with the addition of a second paragraph, stating that, when another person, not being the entertainer or sportsperson, receives the remuneration for the performance, the performance state retains the right to tax the income. This gave states an extra option to tax "star companies", which are typically established by top entertainers and sportspersons in tax havens. Article 17(2) of the OECD Model (1977) was, therefore, an additional measure to counter this form of tax avoidance.

More concerns appeared in the OECD Report (1987),[11] which recommended that the scope of the "star companies" provision be extended to all legal entities receiving fees for artistic and sporting performances. This change was duly included in the OECD Model (1992),[12] but only by way of a change in the interpretation of the relevant provision in the Commentary on Article 17 of the OECD Model (1992).[13] Accordingly, not only the income of the individual entertainer or sportsperson, but also the profits of every separate legal entity receiving income for the performance are taxable in the performance state, regardless of whether the entertainer or sportsperson is the owner, a shareholder or has any profit-sharing rights in the company. This change in the OECD Commentary on Article 17 (1992) removed any possibility of avoiding source taxation on performance income. Three countries, Canada, Switzerland and the United States, disagree with this change.[14] Specifically, the United States provides special language in the US Model (2006)[15] to preserve the previous interpretation. Treaty practice to the same effect is also followed by Canada, France and some other states. Most states, however, adopt the text of the OECD Model (1992) and the OECD Commentary on Article 17 (1992).

The OECD Report (1987) also noted, as the Commentary on Article 17 of the OECD Model (2014) does now, that the article does not specify the method of taxation in the performance state and indicated that some states use gross taxation at a low tax rate.[16] In addition, the OECD recommends the use of the tax credit method to eliminate double taxation.[17] This approach was adopted by many states, even when they normally apply the exemption method to active income.

3. Practical Problems with Article 17 of the OECD Model

3.1. The problems

Unfortunately, the allocation rule in article 17 of the OECD Model increases the number of practical problems. For instance, the taxable base in the performance state can be greater than that in the residence state and tax credit issues may arise in this state, while entertainers and sportspersons, in any case, can incur comparatively high advisory costs in the performance state as well as in the residence state. These problems arise frequently, which means that the entertainers, sportspersons and the organizers of performances regard the special international taxing rules as an obstacle to cross-border activities.

3.2. Examples

There are a number of clear examples of international excessive taxation. Two of these are set out below:

Example 1

A Dutch pool billiard player is third in a tournament in Poland and receives EUR 8,000 in prize money. His direct travel and lodging expenses are EUR 900 and his (allocated) indirect materials, coaching and overhead expenses are EUR 2,600, resulting in a profit on the Polish tournament of EUR 4,500 (EUR 8,000 less (EUR 900 + EUR 2,600)). The Polish withholding tax rate is 20% without the option to deduct expenses, which means that the equivalent of EUR 1,600 (EUR 8,000 X 20%) is paid in tax in Polish zloty. Back in the Netherlands, the pool billiard player includes the Polish income in his income tax return, deducts his expenses and after other deductions, for example, for mortgage or self-employment allowances, the Dutch tax payable on this profit is EUR 850. The Dutch foreign tax credit cannot be higher than this amount, which

8. This had been proposed in H. Grams, *Artist Taxation: Art. 17 of the OECD Model Treaty – a relic of Primeval Tax Times?*, 27 Intertax 5, p. 188 (1999).
9. *OECD Draft Tax Convention on Income and on Capital* (30 July 1963), Models IBFD.
10. *OECD Model Tax Convention on Income and on Capital* (11 Apr. 1977), Models IBFD.
11. OECD, *Taxation of Entertainers, Artistes and Sportsmen*, Issues Intl. Taxn. No. 2 (OECD 1987).
12. *OECD Model Tax Convention on Income and on Capital* (1 Sept. 1992), Models IBFD.
13. *OECD Model Tax Convention on Income and on Capital: Commentary on Article 17* (1 Sept. 1992), Models IBFD.
14. Id., at para. 16.
15. *US Model Tax Convention on Income* (15 Nov. 2006), Models IBFD.
16. Para. 10 *OECD Model: Commentary on Article 17* (2014).
17. Id., at para. 12.

means that EUR 750 (EUR 1,600 – EUR 850) of excessive taxation remains.

In the Netherlands, such an excess tax credit can be carried forward, but it is unlikely that, given these figures, the pool billiard player will pay sufficient tax in subsequent years for the excess tax credit to be utilized.

Perhaps some of the Polish tax can be refunded (in Polish zloty) once a tax return has been filed there. However, Poland still has to be compelled to allow such a tax return and the advisory costs will be relatively high, as tax advisers will be involved in both Poland and the Netherlands.

Example 2

A German classical orchestra performs in Spain, earning EUR 30,000. The Spanish non-domestic withholding tax is 25% of the gross amount. The direct and indirect expenses are 50% of the costs, i.e. EUR 15,000 (EUR 30,000 x 50%). The average German income tax rate for the musicians is 35%. Accordingly:

Spanish withholding tax: EUR 30,000 x 25% = EUR 7,500

German tax credit (maximum): gross EUR 30,000 – EUR 15,000 = EUR 15,000 x 35% = 5,250

Excessive taxation: EUR 7,500 – 5,250 = 2,250

It may also be difficult to obtain the tax credit for various reasons, i.e.: (1) the Spanish tax certificate is missing; (2) the German orchestra is exempted from corporate income tax in Germany; or (3) the musicians are on a monthly payroll and the foreign tax cannot be converted to individual tax credits. These difficulties can arise quite easily, which means that the excessive taxation becomes double taxation, as the full quota of tax is paid in both the performance state and the residence state.[18]

4. Developments Regarding Article 17 of the OECD Model

4.1. Initiatives in the European Union

Over the last 12 years, there have been developments surrounding article 17 of the OECD Model in the European Union. These started with the decision in *Gerritse* (Case C-234/01),[19] in which the Court of Justice of the European Union (ECJ) held that expenses should be deductible and that, after a period of a year, the difference between the withholding tax rate and normal income tax rates should be refunded to the taxpayer. However, this decision did not make clear when the expenses should be deductible. This was clarified in *Scorpio* (Case C-290/04),[20] in which the ECJ held that, at least, direct expenses should be deductible at source, thereby resulting in lower withholding taxes. Next, the decision in *Centro Equestre* (Case C-345/04)[21] clarified how the indirect expenses should be deducted in a tax return following the end of the relevant taxable year.

Most Member States of the European Union amended their legislation following these decisions, although some are still reluctant to do so and may need to be required to comply with these ECJ decisions by the European Commission. This also resulted in the OECD changing paragraph 10 of the Commentary on Article 17 of the OECD Model (2008)[22] to permit a choice between gross taxation at a low rate and net taxation after the deduction of expenses and normal tax settlement after the end of the relevant tax year.

The ECJ did not, however, wish to decide to remove the withholding tax obligation on the part of the organizer of a performance in the source state, which was questioned in *X NV (Football Club Feyenoord)* (Case C-498/10).[23] This case did not question whether the performance state had the right to tax the performance fee under article 17 of the OECD Model, but, rather, only whether the organizer or the entertainer or sportsperson should file and pay the source tax. The ECJ held that the withholding tax obligation of the organizer was justified by the need to ensure the effective collection of tax and that it would give rise to even more administrative work if the non-resident performer were to have to file a tax return regarding the income in the performance state.

4.2. Article 17(3) of the OECD Model and subsidized entertainers and sportspersons

Over the years, more states decided to opt out of the provisions set out in paragraph 14 of the Commentary on Article 17 of the OECD Model so as to exclude performances supported from public funds from the scope of article 17(1) and (2) of the OECD Model. These states have, therefore, added a third paragraph to article 17 of their tax treaties, under which entertainers and sportsperson who are wholly or mainly supported by public funds are not taxed in the performance states, but, rather, in the residence state. This option was inserted into the Commentary on Article 17 of the OECD Model (1977),[24] using the argument that that cultural exchanges and subsidized entertainers and sportspersons would suffer from the far-reaching effect of article 17 of the OECD Model. States started to make use of this option in their bilateral tax treaties[25] and the option was extended and made more specific by the proposed text in the Commentary on Article 17 of the OECD Model (1992),[26] which was also adopted by many states.

Worldwide, the exception in article 17(3) of the OECD Model is now included in approximately two thirds of

18. For further consideration of these problems, *see* D. Sandler, *The Taxation of International Entertainers and Athletes – All the World's a Stage* (Kluwer L. Intl. 1995), IFA *Cahier de Droit Fiscal International, Taxation of Non-Resident Entertainers*, vol. 20b (Kluwer L. Intl. 1995), Online Books IBFD; Grams, *supra* n. 8; D. Molenaar & H. Grams, *Rent-A-Star, The Purpose of Article 17(2) of the OECD Model Treaty*, 56 Bull. Intl. Fiscal Docn. 10 (2002), Journals IBFD; and D. Molenaar, *Taxation of International Performing Artistes* (IBFD 2006), Online Books IBFD and X. Oberson, *International Taxation of artistes & sportsmen* (Schulthess & Bruylant 2009).
19. DE: ECJ, 12 June 2003, Case C-234/01, *Arnoud Gerritse v. Finanzamt Neukölln-Nord*, ECJ Case Law IBFD.
20. DE: ECJ, 3 Oct. 2006, Case C-290/04, *FKP Scorpio Konzertproduktionen GmbH v. Finanzamt Hamburg-Eimsbüttel*, ECJ Case Law IBFD.
21. DE: ECJ 15 Feb. 2007, Case C-345/04, *Centro Equestre da Leziria Grande Lda v. Bundesamt für Finanzen*, ECJ Case Law IBFD.
22. *OECD Model Tax Convention on Income and on Capital: Commentary on Article 17* (17 July 2008), Models IBFD.
23. NL: ECJ 18 Oct. 2012, Case C-498/10, *X NV (Football Club Feyenoord) v. Staatssecretaris van Financiën*, ECJ Case Law IBFD.
24. *OECD Model Tax Convention on Income and on Capital: Commentary on Article 17* para. 3 (11 Apr. 1977), Models IBFD.
25. For instance, *see* the tax treaties concluded by Poland with Germany (1972) and France (1975).
26. Para. 14 *OECD Model: Commentary on Article 17* (1992).

bilateral tax treaties and, for some states, almost every tax treaty has an (equivalent of) article 17(3).[27] The exception represents the recognition of the problems arising from the broad effect of article 17 of the OECD Model, but only gives relief to a restricted group. It appears as if states were trying to protect their own interest with article 17(3) of the OECD Model, as they are aware of the excessive or even double taxation resulting from the general rules of article 17, which would evidently result in the need for higher subsidies. By way of the exception in article 17(3) of the OECD Model, the residence state is defending its national budget. While only some entertainers and very few sportspersons can make use of this exception, it can be considered to be a good restriction to article 17 of the OECD Model and gives rise to hope that more restrictions will be made in the future.

The use of article 17(3) of the OECD Model in tax treaties, however, raises questions regarding equal treatment. Specifically, it is easier for a subsidized group of entertainers to enter a foreign market than for a commercial group, which encounter the problems described in section 3.1. This can give rise to a disadvantage in respect of (new) foreign markets, for which there appears to be no justification. It is, therefore, possible that the distinction between subsidized and not (or insufficiently) subsidized entertainers and sportspersons breaches the non-discrimination principles of international agreements, such as article 24(1) of the OECD Model, article 26 of the International Covenant on Civil and Political Rights (BUPO), the European Convention on the Protection of Human Rights (ECPHR) and article 56 et seq. of the Treaty of the Functioning of the EU (TFEU).[28,29]

4.3. Unilateral exemption in the Netherlands and the same approach in Netherlands treaty policy

As already noted in section 1., the Netherlands took a significant step forward in 2007 with its unilateral tax exemption for non-resident entertainers and sportspersons residing in a state with which the Netherlands had concluded a bilateral tax treaty.[30] As the Netherlands had, at the time of the writing of this article, 92 bilateral tax treaties, this potentially covers many entertainers and sportspersons. Interestingly, all of these tax treaties contain a clause comparable to article 17 of the OECD Model, but the Netherlands has decided to make use of the wording "... may tax...", which makes source taxation optional and not obligatory. The reason for this radical change is that the then government had a policy of reducing the administrative burden with regard to tax over four years by 25% and, as the tax revenue from non-resident entertainers and sportspersons was no more than EUR 6.5 million and the government wished to remove any risk of double taxation, the exemption was unilaterally adopted by the Netherlands. With this unilateral exemption at source, entertainers and sportspersons only have to pay tax in their residence state, as the Dutch income must be reported there as worldwide income. Again, with the credit method for avoiding double taxation applying in most of the Netherland's tax treaties, these states do not have to allow a foreign tax credit and can subject such income only to national tax. In 2007, the Netherlands still used the exemption method for avoiding double taxation in 14 of its tax treaties, but, with the conclusion of new tax treaties, this number was reduced to seven in 2014.[31]

In contrast, however, the Dutch entertainers and sportspersons performing abroad cannot take advantage of this exemption because of article 17, which is included in Dutch bilateral tax treaties and which most of the Netherlands's treaty partners use to its full extent. Accordingly, these individuals suffer from the problems noted in section 3.1. However, the Dutch government has given Dutch entertainers and sportspersons something to hope for with its Dutch Tax Treaty Policy (*Notitie Fiscaal Verdragsbeleid*) of 11 February 2011.[32] This acknowledged the problems of entertainers and sportspersons and stated that the Netherlands no longer wishes to include the equivalent of article 17 of the OECD Model in new tax treaties. As an alternative, if a treaty partner were not to cooperate on this, the Dutch government would at least insert the option of the OECD Model (2008)[33] and include the deductibility of expenses and use of normal tax rates in a (new) bilateral tax treaty.

The Netherlands has since then succeeded in keeping article 17 out of the Ethiopia-Netherlands Income Tax Treaty (2012).[34] This is a small success, as Dutch entertainers and sportspersons are unlikely to perform frequently in Ethiopia, and, if so, any performance fees are likely to be relatively small. On the other hand, Ethiopian entertainers and sportspersons can make use of the Dutch unilateral tax exemption, so the new tax treaty would seem to be of little interest to such individuals. However, the new tax treaty could also represent the adoption of a new treaty policy on the part of Ethiopia to omit article 17 of the OECD Model. This is because many successful and high-earning athletes come from, and continue to live in, Ethiopia and the country's budget benefits when no foreign tax credits have to be allowed in respect of this group of taxpayers.

27. Examples are the tax treaties concluded by China (People's Rep.), Hungary, Indonesia, Slovenia and Turkey.
28. Consolidated Versions of the Treaty on European Union and the Treaty on the Functioning of the European Union (2008/C115/01) OJ C 306 (2007), EU Law IBFD.
29. For more on this, *see* D. Molenaar, *Article 17(3) for Artistes and Sportsmen: Much More than an Exception*, 40 Intertax 4, p. 270 (2012).
30. Art. 5a and b NL: *Wet op de loonbelasting* (Wage Tax Act).
31. The exemption method still applies in the Dutch tax treaties with Ireland, Israel, Luxembourg, Morocco, Singapore, Spain and Thailand, while entertainers and sportspersons from Belgium and Germany cannot make use of the exemption method in the relevant bilateral tax treaties because of a subject-to-tax clause in the tax treaty (Belgium) and national tax law (Germany), respectively.
32. *See supra* n. 5.
33. *OECD Model Tax Convention on Income and on Capital* (17 July 2008), Models IBFD.
34. *Convention between the Kingdom of the Netherlands and the Federal Democratic Republic of Ethiopia for the Avoidance Of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income*, (10 Aug. 2012), Treaties IBFD.

The Netherlands was unable to omit article 17 for the new Germany-Netherlands Income Tax treaty (2012).[35] This is significant, as Germany, being a neighbouring state, is very important for Dutch entertainers and sportspersons. The new tax treaty was concluded on 12 April 2012. It transpired that the negotiations regarding article 16, which is the equivalent number for article 17 as the tax treaty followed the OECD recommendation of omitting article 14 of the OECD Model in respect of self-employed individuals, were already finalized when the Netherlands adopted its new treaty policy and both states did not wish to reopen this issue. In addition, Germany did not wish to circumvent the OECD's recommendations and, therefore, wanted to retain article 17 of the OECD Model. Both states agreed on inserting the optional article 16(3) (article 17(3) of the OECD Model) regarding performances that were wholly or mainly supported by public funds, as described in section 4.2. This is in line with official German Tax Treaty Policy (*Verhandlungsgrundlage für Doppelbesteuerungsabkommen*).[36]

The next test will be the new Belgium-Netherlands tax treaty, in respect of which talks were taking place at the time of the writing of this article. As Belgium and the Netherlands are again neighbouring states, the new tax treaty will also be very important, especially, as the inhabitants of Flanders in north Belgium speak (broadly) the same language as the Netherlands. It will be a serious challenge as to whether the Netherlands can bring its official treaty policy into practice and omit article 17 from the new tax treaty. In this regard, it should be noted that, to date, only the exception in article 17(3) for subsidized entertainers and sportspersons has been included in the Belgium-Netherlands Income and Capital Tax Treaty (2001).[37]

4.4. Tax exemptions and major sporting events

In recent years, the sporting world has become actively involved in trying to counter double taxation and the administrative burdens arising from article 17 of the OECD Model. The background to this was that, at the 2000 Olympics in Sydney, all participating athletes had to file Australian income tax returns, reporting all income connected with the Olympics, regardless of where it had been earned. The tax revenue might have represented some compensation for Australia for the costs of the Olympics, but the administrative burden was enormous, both for the athletes and their advisers and for the Australian tax authorities and in the various residence states of the athletes, and, in the author's opinion, was probably too high compared to the tax collected.

That was enough for the International Olympics Committee (IOC) and, for the 2010 Winter Olympics in Vancouver, it agreed with Canada to remove non-resident taxation in respect of the participating athletes. Normally, Canada imposes a 15% withholding tax with regard to non-resident entertainers and sportspersons, with the right to file a normal income tax return after the end of the tax year, in which expenses can be deducted, but, in respect of which normal tax rates are applied. However, these rules were set aside for the 2010 Winter Olympics.

The same happened with the 2012 Olympics in London, in respect of which the United Kingdom unilaterally did not apply its 20% withholding tax,[38] and the 2014 Winter Olympics in Sochi, Russia.[39] Withholding taxes were also not applied in respect of the UEFA Champions League finals in 2011 and 2013 (London), 2012 (Munich) and 2014 (Lisbon), the UEFA Europa League finals in 2011 (Dublin), 2012 (Bucharest), 2013 (Amsterdam) and 2014 (Turin), the EURO 2012 in Poland and Ukraine,[40] the 2014 World Cup in Brazil,[41] the 2011 World Cricket Cup in India, the 2011 World Rugby Cup in New Zealand, the 2013 Diamond League in London and the 2014 Commonwealth Games in Glasgow.[42]

The foregoing demonstrates that the sporting world is not waiting for changes in bilateral tax treaties, but, rather, that it is compelling, using the incentive of hosting major sporting events, organizing countries not to apply source taxation in respect of sportspersons temporarily present in these countries so as to negate the problems that result from article 17 of the OECD Model. With this, these major sporting events are following the initiative adopted by the Netherlands in 2007.

4.5. The OECD Discussion Draft (2010) and the 2010 IFA Congress

4.5.1. The OECD Discussion Draft (2010)

On 23 April 2010, the OECD published a Discussion Draft containing proposed changes to the Commentary on Article 17 of the OECD Model.[43] Oddly, none of the problems, which the author described in section 3.1., were discussed in the proposal, but, rather, only the minor changes in the definition of who are "artistes and sportsmen" and what income falls within the scope of article 17 of the OECD Model. Inevitably, there were clarifications regarding issues, such as image and broadcasting rights in respect of live performances, but the real problems with article 17 were not considered. In reaction, two of the comments on the OECD Discussion Draft (2010)

35. *Convention between the Federal Republic of Germany and the Kingdom of The Netherlands for The Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income* (unofficial translation) (12 Apr. 2012), Treaties IBFD.
36. On this, *see* M. Lipp, *Germany's Tax Treaty Negotiation Policy*, 54 Eur. Taxn. 7 (2014), Journals IBFD.
37. *Convention between the Kingdom of Belgium and the Kingdom of the Netherlands for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income and on Capital* (unofficial translation) (5 June 2001) (as amended through 2009), Treaties IBFD.
38. *See* K. Tetlak, *The taxpayer as the unofficial sponsor of the London 2012 Olympic Games*, Intl. Sports L. J. (Mar. 2013).
39. *See* K. Tetlak, *Sochi 2014 Olympic Tax Legislation*, 54 Eur. Taxn. 4 (2014), Journals IBFD.
40. *See* K. Tetlak & D. Molenaar, *Tax Exemptions for Euro 2012 in Poland and Ukraine*, 52 Eur. Taxn. 6 (2012), Journals IBFD.
41. *See* P. Paraguay & B.M. Santo, *The tax treatment of income derived by participants in the 2014 World Cup in Brazil*, Global Sports L. & Taxn. Rpts. 1, p. 22 (2014).
42. *See* K. Tetlak, *UK Tax Breaks for the 2014 Commonwealth Games in Glasgow*, 54 Eur. Taxn. 5 (2014), Journals IBFD.
43. OECD, *supra* n. 2.

more broadly criticized how article 17 can result in excessive or double taxation for entertainers and sportspersons and gave existing and new options as to how this could be removed, including the recommendation to delete article 17 from the OECD Model.

4.5.2. The 2010 IFA Congress

At the 64th IFA Congress in Rome in 2010, the IFA/OECD Seminar was devoted to the taxation of entertainers and sportspersons under the title "Red Card Article 17?". The representative of the Dutch Ministry of Finance in the Seminar supported the idea of removing article 17 from the OECD Model, the four representatives of the OECD wanted to retain article 17, but modify it, a Swiss professor and American tax lawyer wanted to retain article 17, as it provided them with a lot of work, and the Australian professor, who was the chairman of the seminar, recognized the problems with article 17 and found it remarkable that exemptions were granted when significant amounts was earned from performances, such as major sporting events. The Seminar, therefore, made it clear that the taxation of entertainers and sportspersons was a subject that gave rise to much discussion and was a priority for the OECD.[44]

5. The OECD Model (2014): The Retention of Article 17 but Options for Restriction

5.1. Retention of article 17 of the OECD Model

Two weeks before the publication of the OECD Model (2014) on 15 July 2014, the OECD published the report "Issues related to Article 17 of the OECD Model Tax Convention" (2010),[45] which considered the comments from the Discussion Draft (2010). First, the recommendation to delete article 17 of the OECD Model, which had been advanced by an association of entertainers and, within the CFA, had been advocated by the representative of the Netherlands, was discussed. The representative also explained why the Netherlands had decided to exempt non-resident entertainers and sportspersons from withholding tax (*see* section 4.3.). However, the great majority of the OECD member countries wished to retain article 17 of the OECD Model. During the discussion, as noted in section 1., the following three reasons for this were noted:

(1) residence taxation could not be assumed, given the difficulties of obtaining the relevant information;
(2) article 17 of the OECD Model permits the taxation of a number of high-income earners who could otherwise easily move their residence to low-tax jurisdictions; and
(3) source taxation of the income covered by article 17 of the OECD Model can be administered relatively easily.

Unfortunately, in the author's opinion, all of these reasons are erroneous and still result in the same misconception that has been the case over many years. Specifically, again as noted in section 1., the following five arguments counter the view of the majority of OECD member countries:[46]

(1) There is no need for article 17 of the OECD Model. It is sufficient if the performance state has source taxation in respect of non-resident entertainers and sportspersons in its national tax law and source taxation should only be relinquished when such individuals file an application that has been countersigned by the tax authorities of the residence state.

(2) With the involvement of the residence state, the tax authorities of that state also have the relevant information regarding the foreign income that must later be filed in the income tax return of the resident entertainer or sportsperson.

(3) Typically, there are no tax treaties with tax havens or low-tax jurisdictions, so an entertainer or sportsperson moving to such a location cannot obtain a tax exemption in the performance state.

(4) Article 17 of the OECD Model is not easy to apply, but, rather, gives rise to great administrative expenses and inconvenience, both in the performance state with regard to the deduction of expenses and normal income tax returns and in the residence state in respect of foreign tax credits. This represents a significant obstacle that must be circumvented by entertainers and sportspersons, the organizers of the performances and the tax authorities in both states.

(5) Finally, the different tax treatment following from articles 17 of the OECD Model increases the risk of excessive or even double taxation.

Accordingly, the three reasons set out at the beginning of this section and used to defend article 17 of the OECD Model are invalid, but still the majority of OECD member countries are not willing to delete the article. That is disappointing, and it means that more is needed to convince the majority of the OECD member countries that article 17 of the OECD Model in its current form is superfluous and even counterproductive.

5.2. Options to restrict the scope of article 17 of the OECD Model

5.2.1. Opening comments

The CFA did not leave matters with the refusal to delete article 17 of the OECD Model outlined in section 5.1., but, rather, made some more or less fundamental proposals to change article 17. The six options described in sections 5.2.2. to 5.2.7. to restrict the scope of article 17 of the OECD Model are now dealt with in the Commentary on Article 17 of the OECD Model. The CFA hoped that these would remove some the problems associated with article 17.

44. *See* Molenaar, Tenore & Vann, *supra* n. 6.
45. OECD, *supra* n. 7.
46. This had already been discussed by Grams, *supra* n. 8 and in many subsequent articles and books.

5.2.2. *Article 17 of the OECD Model for the self-employed and article 15 for employees*

The first option is contained in paragraph 2 of the Commentary on Article 17 of the OECD Model. This states that too strict provisions could, in certain circumstances, impede cultural exchanges. In order to avoid this, states may decide in their bilateral tax treaty to restrict article 17(1) of the OECD Model to business activities. It would be sufficient to replace the words "notwithstanding the provisions of Article 15" with "subject to the provisions of Article 15" in article 17(1) and (2) of the OECD Model to realize this. In such a case, employed entertainers and sportspersons would fall within the scope of article 15 of the OECD and could be entitled to the exemption set out in article 15(2). The restriction was widely adopted in old German and Swiss tax treaties in the 1950s and 1960s, in which the special rule for entertainers and sportspersons only referred to the self-employed and not to employees.

However, there is a clear trend in music, theatre and dance companies to change the status of employees into that of freelance group members who are only contracted for a given project or tour and after that continue with other groups or their own activities. With this restriction, the question also arises as to when an entertainer or sportsperson is an employee, i.e. whether an entertainer or sportsperson must follow the instructions of an employer (which can be the case in relation to cycling, skating and other sports). However, taken altogether, even though this restriction is losing its importance, it would still be very helpful to include it in new tax treaties.

5.2.3. *Deduction of expenses and normal tax settlements*

The second option was included in paragraph 10 of the Commentary on Article 17 of the OECD Model (2008). This is the first choice of the following two (sub-) options: (1) taxation of the gross performance fee, but a low tax rate; or (2) the deduction of expenses and taxation under the normal rules. The Member States of the European Union do not have this choice and must adopt the second option following the decisions of the ECJ in *Gerritse*, *Scorpio* and *Centro Equestre* (*see* section 4.1.). This means that the Member States do not have to include this restriction in their bilateral tax treaties, but may still do so to make clear their intentions.

The proposed text in paragraph 10 of the Commentary on Article 17 of the OECD Model may not, however, be sufficient for the Member States, as it appears only to allow for a refund after the end of the relevant tax year, while the ECJ clearly held in *Scorpio* that directly linked expenses should be deductible at the time of the performance.[47] The deduction of expenses can make a very significant difference[48] and may be a disincentive to cross-border activities if deduction is only allowed after the end of the relevant tax year, given cash-flow disadvantages and uncertainty regarding tax refunds.

5.2.4. *A de minimis rule of 15,000 IMF Special Drawing Rights*

The third option is new and is contained in paragraphs 10.1 to 10.4 of the Commentary on Article 17 of the OECD Model (2014). According to this option, there is a minimum amount of 15,000 IMF Special Drawing Rights (SDR) per entertainer or sportsperson per year, in the case of which the performance state does not have the right to tax the performance income. This has been adopted from article 16 of the US Model (2006), which refers to an amount of USD 20,000. This minimum works very well to ensure that entertainers and sportspersons who earn relatively small amounts fall outside the scope of source taxation in the performance state, thereby removing tax problems if they reside in a treaty state. The amount of 15,000 IMF SDR was, at the time of the writing of this article, equivalent to approximately USD 17,000.

A crucial element is, however, whether or not such a *de minimis* rule can be used directly in relation to the performance. The Technical Explanation to Article 16 of the US Model (2006)[49] states that problems may arise when an entertainer or sportsperson exceeds the *de minimis* limit in a tax year. It can, therefore, be agreed that tax should be withheld in a tax year, and this tax can then be refunded after the end of the relevant tax year when it becomes clear that the *de minimis* limit has not been exceeded.

The United States has included this provision in approximately one quarter of its bilateral tax treaties, while the direct method applies in the remaining three quarters.[50] Paragraph 10.3 of the Commentary on Article 17 the OECD Model (2014) now also refers to this possibility. Unfortunately, this refund obligation makes the *de minimis* rule less effective than the direct method. It is also unnecessary, since, in an application procedure in which the tax authorities countersign the relevant application form, the two states can communicate with each other when the *de minimis* limit is exceeded. In addition, just like in the case of the option outlined in section 5.2.3., refunds after the end of the relevant year are a disincentive to cross-border work.

5.2.5. *Subsidized entertainers and sportspersons (and not-for-profit and cultural and sporting exchanges?)*

The fourth option has existed for a long time and is specified in paragraph 14 of the Commentary on Article 17 of the OECD Model. This is the exemption for performances subsidized by public funds. As noted in section 4.2., two thirds of the bilateral tax treaties have a clause based on article 17(3) of the OECD Model containing this exemption, which means that it is already a part of the tax treaty policy of many states. The exception has been criticized, but especially subsidized entertainers frequently make use of it, which, in the author's opinion, is positive.

47. *Scorpio* (C-290/04), *supra* n. 20.
48. *See* Molenaar, *supra* n. 18.
49. *US Model Tax Convention on Income: Technical Explanation to Article 16* (15 Nov. 2006), Models IBFD.
50. *See* Molenaar, *supra* n. 18.

A number of tax treaties have adopted article 17(3) of the OECD Model somewhat differently by including not-for-profit organizations and cultural and sporting exchanges and programmes. These exceptions have the same objective, i.e. to remove the problems that follow from the too strict provisions of article 17(1) and (2) of the OECD Model in respect of those entertainers and sportspersons that are not likely to be involved in tax avoidance. Unfortunately, the option in paragraph 14 of the updated Commentary on Article 17 of the OECD Model (2014) has not been extended to include not-for-profit organizations and cultural and sporting exchanges and programmes. The option could be strengthened by the condition that not-for-profit organizations and cultural and sporting exchanges and programmes should be recognized by the two states in a mutual agreement procedure (MAP).[51]

5.2.6. Foreign teams and groups

The fifth option is new and is set out in paragraph 14.1 of the Commentary on Article 17 of the OECD Model (2014). This is an exemption for foreign teams and groups with entertainers and sportspersons as employees. There is an overlap with the first option in paragraph 2 of the OECD Commentary on Article 17 (*see* section 5.2.2.), but paragraph 14.1 makes it clear that some states wish for a more restricted exemption than one of completely removing all employees from article 17 of the OECD Model to article 15. Paragraph 14.1 of the OECD Commentary on Article 17 contains a proposed text, under which the exemption is only available in respect of cross-border competition. This is adapted from article XVI(3) of the Canada-United States Income and Capital Tax Treaty (1980),[52] which assists the joint Canadian-US hockey, football, baseball and basketball competitions in eliminating tax problems.

This looks to be promising for European competitions, such as in the UEFA Champions and UEFA Europa Leagues, which have many more cross-border matches. However, the UEFA does not need this provision, as it has so organized itself that the problems arising from article 17 do not occur. Under the UEFA set up, home teams retain the match earnings and do not share these, while the broadcasting and advertisement fees are paid from Switzerland as royalties, in respect of which, under article 12 of Switzerland's tax treaties, no withholding tax is applied. The new paragraph 9.4 of the updated Commentary on Article 17 of the OECD Model (2014) specifies that such earnings do not fall within the scope of article 17 of the OECD Model. Only the earnings in relation to the finals of the UEFA Champions and UEFA Europa Leagues are shared by the participating teams, but, in relation to the finals, the UEFA agrees with the country in which the final is held that a tax exemption is granted, which means that no withholding tax is applied.

This fifth option could be of interest to other sports, but, first, the countries of the teams participating in the cross-border competition should include the exception in their tax treaties to make is effective. In Europe, this would be much more complicated than in North America. It is, therefore, unlikely, that this is a solution for other sports.

5.2.7. Is paragraph 16 still in the Commentary on Article 17 of the OECD Model?

The sixth and final option concerns the fact that paragraph 16 of the Commentary on Article 17 of the OECD Model (2010) is not discussed in the updated Commentary on Article 17 of the OECD Model (2014). In their Reservation to the Commentary on Article 17 of the OECD Model, Canada, Switzerland and the United States express the opinion that article 17(2) of the OECD Model should only be used in abusive situations, as noted in paragraph 11.2(c) of the OECD Commentary on Article 17. This applies when the entertainer or sportsperson is the owner of the legal person that receives the performance income. This change was introduced in article 17(2) of the OECD Model (1977) so as to have extra means to counter "rent-a-star" structures (*see* section 2.) and initially the OECD only wished to make limited use of this paragraph. However, the scope of article 17(2) of the OECD Model (1992) was, by way of paragraph 11 of the Commentary on Article 17 of the OECD Model (1992), made unlimited. This means that payment of the performance fee to a person other than the entertainer or sportsperson is taxable under article 17(2) of the OECD Model. However, Canada, Switzerland and the United States retained their reservations included in paragraph 16 of the Commentary on Article 17 of the OECD Model (2010). In the updated Commentary on Article 17 of the OECD Model (2014), the deleted text has been crossed out and the new text is in bold, but nothing is stated regarding paragraph 16, from which the author would conclude that the reservation still remains.

An example of this restriction can be found in the Netherlands-Switzerland Income and Capital Tax Treaty (2011)[53] as an addition to article 17(2). This reads as follows:

> unless it is established that neither the entertainer or sportsperson nor persons related thereto (whether or not residents of that State) participate directly or indirectly in the receipts or profits of that other person in any manner, including the receipt of deferred remuneration, bonuses, fees, dividends, partnership distributions, or other distributions.

Many of the tax treaties concluded by Canada, the United States and certain other states contain a comparable restriction, which limits the use of article 17(2). This is, therefore, an additional option that states can consider including in their bilateral tax treaties so as to eliminate the problems arising from article 17(2) of the OECD Model.

51. An example of this is *Convention between the Republic of Austria and the Kingdom of the Netherlands for the Avoidance of Double Taxation with Respect to Taxes on Income and Capital* (unofficial translation) art. 18(3) (21 Apr. 1972) (as amended through 2009), Treaties IBFD.
52. *Convention between Canada and the United States of America with Respect to Taxes on Income and on Capital* (26 Sept. 1980) (as amended through 2007), Treaties IBFD.
53. *Convention between the Kingdom of the Netherlands and the Swiss Confederation for the Avoidance of Double Taxation with Respect to Taxes on Income and Capital* (unofficial translation) (26 Feb. 2010), Treaties IBFD.

5.3. Potential new text of article 17 of the OECD Model (2014)?

Were the six options outlined in sections 5.2.2. to 5.2.7. to be adopted to form a new article 17 of the OECD Model, this would result in the following (new) text, which the author has compiled and would support:

Article 17 – Entertainers and Sportspersons

(1) Notwithstanding the provisions of Article 7, but subject to the provisions of Article 15, income derived by a resident of a Contracting State as an entertainer, such as a theatre, motion picture, radio or television artiste, or a musician, or as a sportsperson, from his personal activities as such exercised in the other Contracting State, may be taxed in that other State.

(2) Paragraph 1 does not apply when the gross amount of such income derived by that resident from these activities exercised during a taxation year of the other Contracting State does not exceed EUR 15,000 or the equivalent expressed in the currency of that other State at the beginning of that taxation year or any other amount agreed to by the competent authorities before, and with respect to, that taxation year.

(3) Where income in respect of personal activities exercised by an entertainer or a sportsperson in his capacity as such accrues not to the entertainer or sportsperson himself but to another person, that income may, notwithstanding the provisions of Article 7, be taxed in the Contracting State in which the activities of the entertainer or sportsperson are exercised.

(4) Where a resident of a Contracting State derives income referred to in paragraph 1 or 2 and such income is taxable in the other Contracting State on a gross basis, that person may, before the activities take place or afterwards within three years after the taxable year in which the activities have taken place, request the other State in writing that the income be taxable on a net basis in that other State. Such request shall be allowed by that other State. In determining the taxable income of such resident in the other State, there shall be allowed as deductions those expenses deductible under the domestic laws of the other State which are incurred for the purposes of the activities exercised in the other State and which are available to a resident of the other State exercising the same or similar activities under the same or similar conditions.

(5) The provisions of paragraphs 1 and 2 shall not apply to income derived from activities performed in a Contracting State by entertainers or sportspersons if the visit to that State is wholly or mainly supported by public funds of one or both of the Contracting States or political subdivisions or local authorities thereof, or when the person which receives the income for the performing entertainers or sportspersons is a non-profit organizations or when the activities take place as part of a cultural or sports program, if this non-profit organization or cultural or sports program is recognized by the Contracting States in a mutual agreement procedure. In these cases, the income is taxable only in the Contracting State in which the entertainer or the sportsperson is a resident.

(6) The provisions of Article 17 shall not apply to income derived by a resident of a Contracting State in respect of personal activities of an individual exercised in the other Contracting State as a sportsperson member of a team of the first-mentioned State that takes part in a match organised in the other State by a league to which that team belongs.

(7) The provisions of paragraph 3 shall not apply if the entertainer or sportsperson establishes that neither he, nor any person associated with him or related to him, participates directly or indirectly in the profits of the person referred to in that paragraph.

It should be noted that such an article 17 of the OECD would still remain within the terms of the Commentary on Article 17 of the OECD Model.

This extension to article 17 of the OECD Model would make the article more complicated. However, the simplicity of the (old) article 17(1) and (2) of the OECD Model, with only two paragraphs, was the primary reason for the double taxation that many entertainers and sportspersons experience. It is, therefore, better to refine article 17 of the OECD Model using the available options.

5.4. Further changes to article 17 of the OECD Model (2014) and the Commentary on Article 17 of the OECD Model (2014)

Further changes have been made to article 17 of the OECD Model (2014) and the Commentary on Article 17 of the OECD Model (2014), in addition to the six potential options noted in sections 5.2.2. to 5.2.7., to restrict the application of article 17 of the OECD Model. Consequently, the size of the OECD Commentary on Article 17 has doubled as a result of clarifications, practical examples and the positions of the OECD member countries and the observers to the OECD.

These changes can be summarized as follows:

– As noted in section 1., the title of article 17 of the OECD Model (2014) has been changed from "Artistes and sportsmen" to "Entertainers and sportspersons".
– Paragraph 3 of the Commentary on Article 17 of the OECD Model (2014) provides examples of persons who are not regarded to act as entertainers. These include a former politician speaking on a conference and a model presenting clothes in a fashion show or in a photo session.[54]
– Paragraph 9 of the Commentary on Article 17 of the OECD Model (2014) states that income which is directly connected with a performance, but is earned outside a state, may also be taxed in the performance state. This addition is a direct result of the UK House of Lords (HL) decision in *Agassi* (2006)[55] and the US Tax Court (TC) decisions in *Goosen* (2011)[56] and *Garcia* (2013),[57] in which the sponsor and endorsement income of a tennis player and two golf players, respectively, as far as they were directly connected to the performances in the state, were allocated to that state and taxed accordingly. The fact that both the sportsperson and the sponsor had their residence abroad did not make a difference to principle of territoriality.

54. In their Positions at the end of the *OECD Model: Commentary on Article 17* (2014), Argentina, Brazil, China (People's Rep.), India and Malaysia make it clear that they think differently regarding these two examples, primarily about models, and prefer to include them in their treaty articles based on article 17 of the *OECD Model* (2014).
55. UK: HL, 17 May 2006, *Agassi v. Robinson* [2006] UKHL 23.
56. US: TC, 9 June 2011, *Goosen v. Commissioner*, 136 T.C. No. 27, Tax Treaty Case Law IBFD.
57. US: TC, 13 Mar. 2013, *Garcia v. Commissioner*, 140 T.C. No. 6, Tax Treaty Case Law IBFD.

– Paragraph 9 of the Commentary on Article 17 of the OECD Model (2014) also allocates the sale of merchandise regarding performances to article 17 of the OECD Model (2014). There has been some discussion surrounding larger pop and rock concerts on this subject and, for some performers and bands, this represents important additional income. Consequently, only when there is no direct relationship between the performance and the sale of the merchandise does the income fall outside the scope of article 17 of the OECD Model (2014).

– Paragraph 9.1 of the Commentary on Article 17 of the OECD Model (2014) clarifies that preparation, rehearsals and training fall within the scope of the activities of the entertainers and sportspersons. This means that the income from such activities is taxable in the state of the activities, even when no public performance takes place there. Such an addition is interesting, as most often the state in which these preparations, rehearsals or trainings sessions take place is unaware of this income because no payments, such as the salaries of football players and orchestra musicians, are made in that state. This is not a problem where the credit method is used to eliminate double taxation in the residence state, but results in double non-taxation where the exemption method applies.[58]

– Paragraph 9.4 of the Commentary on Article 17 of the OECD Model (2014) notes that payments to an entertainer or sportsperson in respect of the broadcast of a performance on radio, television and other media fall within the scope of article 17 of the OECD Model (2014).[59] However, when a payment is made to a third party and the entertainer or sportsperson does not directly receive a payment in respect of such activities, the income does not fall within article 17 of the OECD Model (2014). Paragraph 9.4 of the Commentary on Article 17 of the OECD Model (2014) gives the example of a football tournament, in respect of which the organizer holds the rights, receives the income and makes payments to the football teams involved. According to the OECD Commentary on Article 17 (2014), this does not fall within the scope of article 17 of the OECD Model (2014). This is interesting, as there is a clear connection between the performances of the football teams and the income, which under article 17(2) of the OECD Model (2014) would be taxable in the performance state. This approach appears to be too harsh for the OECD, although such an unlimited approach adversely affects many others in the arts and sporting world. In this regard, the lobbying of FIFA and UEFA seems to have paid off and they have succeeded in keeping their finances outside the scope of article 17 of the OECD Model (2014). However, this is unfair compared to other sporting teams, orchestras, music ensembles and theatre and dance groups, which are taxable on all of the income that they receive from their performances.

– Paragraph 9.5 of the Commentary on Article 17 of the OECD Model (2014) discusses the "image rights" of entertainers and sportspersons. In this respect, the OECD is of the opinion that such earnings also fall within the scope of article 17 of the OECD Model (2014) where there is a direct link to performances.

– Finally, paragraph 11.2 of the Commentary on Article 17 of the OECD Model (2014) states that prize money in respect of the owner of a race horse or a motor racing team falls outside the scope of article 17 of the OECD Model (2014). In this regard, the OECD believes that such prize money is used in respect of the training of the horse and the development of the design, manufacture and preparation of the racing car, respectively, and not for activities in relation to the jockey or the racing car driver. Only when the owner receives income specifically for the jockey or the racing car driver, is this income taxable in the hands of the owner. Unfortunately, this is also unfair, as for paragraph 9.4 of the Commentary on Article 17 of the OECD Model (2014), because, again for other sporting teams, orchestras, music ensembles and theatre and dance groups, most of the performance income is not intended as payment to the performers, but remains with the team or group to pay for creation and other direct and indirect expenses. However, such payments, including any element of profit, fall within the scope of article 17(2) of the OECD Model (2014). The approach adopted by the OECD in paragraph 11.2 of the Commentary on Article 17 of the OECD Model (2014), therefore, appears to be very inconsistent.

6. Summary and Conclusions

The updated OECD Model (2014) contains a significant amount of text on article 17 in respect of entertainers and sportspersons. Following the Discussion Draft (2010), the OECD considered the removal of article 17 of the OECD Model, as proposed by the Netherlands, but the other OECD member countries decided to retain the article, though, unfortunately, in the author's opinion, advancing erroneous arguments. However, it appears that the majority of OECD member countries did not want to follow the example of the Netherlands regarding major sporting events and, regarding these, revert to the normal allocation rules. This means that the associated tax problems remain for entertainers and sportspersons, and excessive or even double taxation and relatively high administrative costs are likely to result.

However, the OECD has provided five options in the updated OECD Model (2014), which restrict the scope of article 17, and there may also be a sixth

58. *See* R. Betten, *Netherlands Ice Skater not Eligible for Relief for Foreign Training Days*, 45 Eur. Taxn. 6 (2005), Journals IBFD.
59. This is also to be found in paragraph 18 of the *OECD Model: Commentary on Article 12* (2014).

option. This article has also set out a proposal for a new lengthy text of article 17 of the OECD Model containing all of the options that states could include in their new tax treaties and still remain within the official OECD guidelines. If used to its full extent, many entertainers and sportspersons could apply for an exemption from withholding tax and thereby avoid excessive or double taxation.

The best option is still, in the author's opinion, not to include article 17 of the OECD Model in new tax treaties. This is because no entertainer or sportsperson escapes normal taxation, given source taxation under national tax law, the normal allocation rules in articles 7, 14 (if present) and 15 of the OECD Model, and an application procedure for exemption in the performance state, regarding which the tax authorities of the residence state must countersign the application form. Such problems would be removed if article 17 of the OECD Model were to be deleted, although tax avoidance would still be countered.

However, given the available options in the new Commentary on Article 17 of the OECD Model (2014), which restrict the application of article 17 of the OECD Model (2014), some problems disappear for, at least, some entertainers and sportspersons. Accordingly, hopefully, states will start to actively adopt these options in their treaty negotiations and support their entertainers and sportspersons by way of a modern and better defined article 17 in their tax treaties.