GSLTR

Global Sports Law and Taxation Reports

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Managing Editor
Dr Rijkele Betten

Consulting Editor
Prof. Dr Ian S. Blackshaw

Coordinator
Erica Pasalbessy (MSc)
Nolot
P.O. Box 206
5270 AE Sint-Michielsgestel
The Netherlands
Tel.: +31 (0)625279308
Fax: +31 (0)735530004
E-mail: erica@nolot.nl

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Minimum threshold in tax treaties

by Dick Molenaar[1]

Introduction

The special tax rules for sportspersons (and entertainers) very often lead to problems, resulting in excessive or even double taxation and much administrative work. Art. 17 OECD Model is followed by many countries in their tax treaties and allocates the taxing right to the country of work, while the residence country will also tax the income (as part of the worldwide income) and will allow a tax credit to eliminate double taxation.[2] But this very often goes wrong. The OECD has decided not to remove art. 17 from its Model Tax Convention,[3] but it has acknowledged the problems and has given five options to restrict the scope of the article. These options were discussed in the March 2015 issue of this publication.[4]

One of the options is to insert a minimum threshold for performers in art. 17, under which the taxing right is not allocated to the country of the work. If so, the other treaty articles apply, such as art. 7 (companies and self-employed) or 15 (employees), and the performers are taxed in the same manner as other persons. Above the threshold, the allocation rule of art. 17 will normally apply. This article will discuss this new option for a minimum threshold for performers in tax treaties; explain that it comes from the US treaty practice; give an overview of the practical use; and show which dynamic choice the new option gives to tax treaty negotiators.

Art. 17 OECD Model creates problems

Most states have a withholding tax in their national law for foreign entertainers and sportspersons performing on their territory and, even when the performer is entitled to a tax credit in his residence state, this approach increases the risk of practical problems. Two clear examples of international excessive taxation are:

Example 1
A Dutch pool billiard player becomes third in a tournament in Poland and receives € 8,000 prize money. His direct travel and lodging expenses are € 1,000 and his indirect material, coaching and overhead expenses are (apportioned) € 2,500, leading to a profit on this Polish tournament of € 4,500.
The Polish withholding tax is 20% without the option to deduct expenses, which means that € 1,600 Polish tax is paid. Back in the Netherlands, the billiard player files the Polish income in his income tax return, deducts his expenses, and after other deductions for mortgage, self-employment allowances and such, the Dutch tax on this profit is € 850. The foreign tax credit will not be higher than this, which means that € 1,600 – 850 = € 750 excessive taxation remains.
Perhaps some of the Polish tax can be refunded after a tax return has been filed in Poland, but the costs for this will be relatively high, because tax advisers should be involved both in ~~Poland and~~ in the Netherlands.

Example 2
A German hockey team plays in Spain, earning € 30,000. The Spanish non-domestic withholding tax is 20% from gross. The direct and indirect expenses are 65% of the costs, i.e. € 19,500, leaving a profit of € 10,500. The average German income tax rate for these players is 35%, the hockey team itself is exempted. This leads to the following result:

Spanish withholding tax:		
20% × € 30,000 =		€ 6,000
German tax credit (max):		
€ 10,500 income × 35% =	–	€ 3.675
Int/ excessive taxation =		€ 2.325

In addition to these two examples, it is very often difficult to obtain the tax credit, such as when:

1 the Polish or Spanish tax certificate is missing, or
2 the German hockey players are on a monthly payroll and the foreign tax cannot be converted into individual tax credits.

These difficulties arise easily, which means that then the excessive taxation goes over in double taxation, as full tax is paid in both the state of performance and the residence state.

Recent developments around art. 17

The Netherlands has taken this problem seriously and has removed the taxation of non-resident performers unilaterally in 2007, under the condition that they are resident of a state with which the Netherlands has concluded a bilateral tax treaty.[5] Also the Netherlands has taken over this approach in its official tax treaty policy in 2011, which means that it tries not to insert a special clause for performers comparable to art. 17 anymore in new tax treaties.

Also Ireland and Denmark do not have a source tax for visiting non-resident performers, even though their tax treaties entitle them to levy a tax at source taxation.

Also the major sports events have recognized the problems with art. 17 and the international sports bodies have negotiated tax exemptions in the host states, such as the IOC with the Olympics since 2010; the UEFA with the Champions League

1 Dick Molenaar is a partner with All Arts Tax Advisers and a researcher with the Erasmus University, Rotterdam.
2 Art. 23B OECD Model specifies the ordinary tax credit method. Some countries allow performers tax exemption (with progression), either in every tax treaty (e.g. Belgium) or only in older tax treaties (e.g. Germany, the Netherlands and Spain). The OECD recommends to use the tax credit method for income from art. 17 (§ 12 Commentary on art. 17 OECD Model).
3 OECD Report *Issues related to Article 17 of the Model Tax Convention*, 26 June 2014, part 1.1 (§ 5).
4 Dick Molenaar, "New options to restrict Article 17 of the OECD Model Tax Convention for international sportspersons", in: *GSLTR 2015/1*.
5 Currently the Netherlands has 94 bilateral tax treaties.

finals since 2010; EURO 2012 in Poland and Ukraine; and EURO 2016 in France; as well as the FIFA with the World Cup in 2014 in Brazil. The reason was the big hassle during the 2000 Olympics in Sydney, where all athletes had to file Australian tax returns for the income with a relation to the tournament, despite that most of them did not earn much. The sports bodies do not want to experience this enormous bureaucracy for the mainly smaller athletes anymore and, therefore, force the host states of the events to exempt them (and often also others involved).

The OECD has started a discussion about art. 17 in 2010 and from the reactions came the fundamental question whether art. 17 should be removed from the Model. The reason is that the world will do well without art. 17 for performers. To counteract the tax avoidance behaviour of top stars, a source tax of 15%-30% of the gross fee in the state of the performance is sufficient and this should only be given up when the performer or his group can show residence in a treaty state. And when the tax authorities of the residence state also have to undersign the application form for the exemption at source, they also know about the foreign income. This makes art. 17 superfluous and should make it possible that performers will normally be taxed in accordance with art. 7 (companies and self-employed) and art. 15 (employees).[6]

But the OECD has decided not to do this. It published in a special report about entertainers and sportspersons[7] before the new 2014 Commentary to the OECD Model that it wants to keep art. 17. Unfortunately with specious arguments, as described in the previous publication[8], but it is the reality that the OECD did not want to solve the tax problems of international performing entertainers and sportspersons with one bang.

But the good news is that the OECD also officially has recognized the problems with art. 17 in the June 2014 report, and has inserted some new options in the Commentary to restrict the article. These measures take away the harshest aspects of art. 17 for performers for whom it is very clear that they will not avoid taxation but declare their income just normally in their resident state. These optional restrictions are as follows:

a art. 17 is only applicable to self-employed, so that art. 15 applies to employees;[9]
b deduction of expenses and settlement in accordance with the normal rules in the performance state;[10]
c minimum threshold of 15,000 IMF special drawing rights (SDR); [11]
d exemption for performances mainly supported by public funds;[12]
e exemption for cross-border competitions;[13]
f restriction of art. 17(2) to personal companies of performers (limited approach).[14]

Example: *de-minimis*-rule in US tax treaties

The third option, the minimum threshold, has been taken over from art. 16 of the US Model Income Tax Convention. Both the 1996 and the 2006 versions of this Model have a *de-minimis*-rule of US$ 20,000 per year, under which the state of the performance does not have the right to tax the income of the entertainer or sportsperson from the other state. Before 1996, lower amounts were used in US tax treaties, such as US$ 400 per day (Egypt - 1980, Israel - 1970), US$ 1,500 per year (India - 1989) and US$ 3,000 per year (Belgium - 1970, Philippines - 1976). The threshold in the US tax treaties is including reimbursement of expenses and is, therefore, calculated from the gross fee paid to the performer. When the threshold is exceeded, the whole fee will be taxed in the state of the performance, which means that it does not work as a personal allowance, but only as a threshold.

When the performer is engaged in a group (company, team or other production) and the performance fee is paid to the group, the taxing right of art. 16(2) of the US Model will apply. Subsequently, a payment from the group to the individual performers will fall under art. 16(1), for which the minimum threshold can be used. This can be explained with the following example:

> ***Example 3***
> A UK football club with 24 players has been invited for an exhibition match in New York for a total fee of US$ 500,000. The club is incorporated in a limited company, from which the players are not shareholders, and is the employer of the players. The performance fee is paid to the limited company, which is not taxable in the USA because the tax treaty uses the limited approach for art. 17(2) of the treaty, meaning that this payment is only taxable when the performers would be the owners of the club.
> The players' salaries can be apportioned to a total of US$ 300,000 for this match and travel days, which is also not taxable in the USA because the US$ 12,500 per player falls under the minimum threshold of US$ 20,000 per performer per year. But both the club and the actors do not escape taxation, because they will fall under the normal taxing rules of the UK as their residence state.

The text of art. 16(1) of the US Model Income Tax Convention itself does not say anything about when the minimum threshold should be used, but the accompanying Technical Explanation has the following wording about this:

> *"Since it frequently is not possible to know until year-end whether the income an entertainer or sportsman derived from performances in a Contracting State will exceed $20,000, nothing in the Convention precludes that Contracting State from withholding tax during the year and refunding it after the close of the year if the taxability threshold has not been met."*

This is an important element for the practical use of the minimum threshold: can it already be used directly at the performance or should there be a withholding first which can be refunded after the taxable year? An example of this direct use is the tax treaty between the USA and Belgium (threshold US$ 20,000). Both

6 See for further comments e.g. Harald Grams, *Artist Taxation: Article 17 of the OECD Model Treaty – a relic of Primeval Tax Times* (Intertax 1999), p. 188, and Dick Molenaar, *Taxation of International Performing Artistes* (IBFD, Amsterdam 2006).
7 OECD Report *Issues related to Article 17 of the Model Tax Convention*, 26 June 2014, part 1.1 (§ 5).
8 Dick Molenaar (2015).
9 § 1 of the Commentary on Article 17 OECD Model.
10 § 10 of the Commentary on Article 17 OECD Model.
11 § 10.1 to 10.4 of the Commentary on Article 17 OECD Model.
12 § 14 of the Commentary on Article 17 OECD Model.
13 § 14.1 of the Commentary on Article 17 OECD Model.
14 § 16 of the Commentary on Article 17 OECD Model.

Table 1. US tax treaties

state	year	art.	threshold	moment
Armenia	1973			
Australia	1982	17	US$ 10,000	direct
Austria	1996	17	US$ 20,000	after
Azerbaijan	1973			
Bangladesh	2006	18	US$ 10,000	direct
Barbados	1984	17	US$ 4,000	direct
Belarus	1973			
Belgium	2006	16	US$ 20,000	direct
Bulgaria	2007	16	US$ 15,000	direct
Canada	1980	XVI	US$ 15,000	direct
China	1984	16		
Cyprus	1984	19	US$ 5,000	direct
Czech Republic	1993	14	US$ 20,000	after
Denmark	2000	17	US$ 20,000	direct
Egypt	1980	17	US$ 400/day	direct
Estonia	1998	17	US$ 20,000	direct
Finland	1989	17	US$ 20,000	direct
France	1994	17	US$ 10,000	direct
Georgia	1973			
Germany	1989	16	US$ 20,000	after
Greece	1950	X	US$ 10,000	direct
Hungary	1979			
Iceland	2007	16	US$ 20,000	direct
India	1989	18	US$ 1,500	direct
Indonesia	1988	17	US$ 2,000	direct
Ireland	1997	17	US$ 20,000	direct
Israel	1975	18	US$ 400/day	direct
Italy	1999	17	US$ 20,000	direct
Jamaica	1980	18	US$ 5,000	direct
Japan	2003	16	US$ 10,000	direct
Kazakhstan	1993			
Korea	1976			
Kyrgyzstan	1973			
Latvia	1998	17	US$ 20,000	direct
Lithuania	1998	17	US$ 20,000	direct
Luxembourg	1996	18	US$ 10,000	direct
Malta	2008	16	US$ 20,000	direct
Mexico	1992	18	US$ 3,000	after
Moldova	1973			
Morocco	1977	16		
Netherlands	1992	18	US$ 10,000	after
New Zealand	1982	17	US$ 10,000	direct
Norway	1971	13	US$ 3,000	direct
Pakistan	1957			
Philippines	1976	17	US$ 3,000	direct
Poland	1974			
Portugal	1994	19	US$ 10,000	direct
Romania	1973	14	US$ 3,000	direct
Russia	1992			
Slovak Republic	1993	18	US$ 20,000	after
Slovenia	1999	17	US$ 15,000	direct
South Africa	1997	16	US$ 7,500	direct
Spain	1990	19	US$ 10,000	after
Sri Lanka	1985	18	US$ 6,000	direct
Sweden	1994	18	US$ 6,000	direct
Switzerland	1996	17	US$ 10,000	after
Tajikistan	1973			
Thailand	1996	19	US$ 3,000	direct
Trinidad and Tobago	1970	17	US$ 100/day	direct
Tunisia	1985	17	US$ 7,500	direct
Turkey	1996	17	US$ 3,000	direct
Turkmenistan	1973			
Ukraine	1994	17		
United Kingdom	2001	16	US$ 20,000	direct
Uzbekistan	1973			
Venezuela	1999	18	US$ 6,000	direct

the Belgians and Americans have no problems with applying this threshold directly in practice, because this is only possible after approval by the tax authorities in the state of the performance. Both states have a central office for non-resident performers at which an application can be made.[15] When there are other performances during that same taxable year, the special tax offices will know how much of the minimum threshold has already been used with the previous performance and whether it will be exceeded. Different from the wording of the Technical Explanation, this example shows that is very well possible to know already during the taxable year how a non-resident performer is using the minimum threshold.

Table 1 shows that in 40 US tax treaties the threshold can be used directly and in 8 treaties only after the taxable year. Some treaties do not have a special clause for performers, which means that the normal allocation rules apply to them, while in 3 treaties no de-minimis-rule has been specified.

The conclusion to be drawn from table 1 is that the USA has included a minimum threshold in 94% of its tax treaties, with a special clause for performers, and that in 83% of these treaties the threshold can be used directly, while in 17% only just after the taxable year.

Unfortunately, the USA has not raised the amount of US$ 20,000 since 1996. When the inflation from the past 20 years is taken into account, an increase to US$ 35,000 seems to be reasonable to remain comparable.

In practice, two court cases can be found about problems when using the US d*e-minimis*-amount.

One was in Israel, where US basketball players were playing during the season in an Israeli basketball team. Under art. 18 for performers, they would not have been taxable in Israel when earnings were less than US$ 400 per day, which was the case. The Israeli tax authorities held the opinion that art. 17 for employees had to apply, which would give Israel the right to tax the Israeli salaries of these US basketball players. The District Court of Beer-sheba (Israel) agreed with the Israeli tax authorities, because art. 18 did not apply and, therefore, the normal allocation rules in the treaty should be applied, which led

15 In Belgium this is the *Dienst Directie Buitenland* in Brussels, which has a special team for non-resident performers, in the US this is the Central Withholding Agreement (CWA) Program in Downers Grove, Illinois (a suburb of Chicago).

to art. 17 for employees and the right for Israel to tax the salaries.[16]

The other case was in Belgium, where under the 1970 tax treaty with the USA a US$ 3,000 threshold had been specified. The issue was whether the organizer of a performance has to check if the US performers also had earned other Belgian income during the year, so that they would exceed the US$ 3,000 threshold. The decision of the Court of Appeal of Antwerp was that this is not the responsibility of the organizer but of the Belgian tax authorities.[17]

Minimum threshold in the 2014 Commentary on Article 17 OECD Model

The OECD inserted the minimum threshold for the first time in the 2014 Commentary on Article 17. It is mentioned in § 10.1 to 10.4 as an option for states to include in their bilateral treaties. The threshold is set at 15,000 IMF special drawing rights (SDR) per performer per year. At the current exchange rates, this is approximately € 19.400, US$ 20,700 resp. £ 13,500. Under this amount, the performer cannot be taxed in the performance state, which means that the taxing right only gets to the performance state when the threshold is exceeded. The OECD has given the following text proposal for states to include in art. 17 of their new tax treaties:

> *"Notwithstanding 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, except where 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 an amount equivalent to* [15,000 IMF special drawing rights] *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."*

Furthermore, the 15,000 IMF SDR is not a fixed amount for the OECD but just an example. States can also include another fixed amount in their treaty or can even use a dynamic definition with which the amount can be adjusted yearly. This dynamic approach takes away the argument against the fixed *de-minimis*-amount as mentioned at the end of the previous paragraph of this article.

For such a dynamic definition, the OECD gives the example in § 10.2 that the yearly amount can be determined by a formula such as "*50 per cent of the average GDP per capita for OECD countries, as determined by the OECD*". This average GDP for OECD countries was US$ 38,867 in 2014, which means that the threshold could be set at 50% = US$ 19,434 for e.g. 2016.[18] This is comparable to the US$ 20,000 which the US Model Income Tax Convention is using.

But it is very different from the US$ 20,000 which the US introduced in 1996 and is using since then. The average GDP for OECD countries was US$ 20,960 in 1996, which means that the USA had set the *de-minimis*-amount then at the level of the OECD average GDP for that year. Following this, it would be very reasonable not to use 50% of the average GDP but 100% of the average GDP for OECD countries as the dynamic definition in art. 17(1). This would be US$ 38,867 per 1 January 2016[19] as the minimum threshold.

Unilateral national solutions for smaller performers

Some countries also have their own thresholds in the national income tax laws to help smaller performers. Examples are:

- The Netherlands with a fixed deduction for expenses of € 163 per person per performance;[20]
- Belgium with a forfait for expenses of € 400 per person for the first performance and € 100 for the following performances for the same promoter with a maximum of 9;[21]
- Germany with a threshold of € 250 per person per performance, but this only applies when the income is lower and not when the threshold is exceeded. This means that with a fee of € 251 the full amount is taxed at the rate of 15,825%;
- the United Kingdom with the general personal allowance of £ 10,600 per year for non-residents. This can already be used at the moment of the performance when an application for a reduced tax rate has been filed with the Foreign Entertainers Unit (FEU)[22], a special office of the UK HMRC (Her Majesty's Revenue and Customs).

These states try to keep the smaller performers already out of the source taxation as much as possible, with these unilateral deductions and exemptions, so that they have make as little administrative expenses as possible to avoid double taxation. But this is only done by a few states with very different rules.

Summary and conclusions

The special taxing rules of art. 17 OECD Model can easily lead to double taxation and relatively high administrative expenses, especially for smaller entertainers and sportspersons. Where the OECD did not want to remove art. 17 from the OECD Model, it has come with some new options to restrict this article in the new 2014 Commentary. Especially for smaller performers, the US$ 20,000 *de-minimis*-rule from the US Model Income Tax Convention has been taken over, with which states can insert a minimum threshold in their bilateral tax treaties under which performers are not taxed in the performance state. The OECD has proposed the fixed amount of 15,000 IMF SDR (which is € 19,400 at the current exchange rate), but has also done the interesting suggestion to make this amount variable and set at the yearly average of 50% of the average GDP per capita for OECD countries, which is around US$ 20,000 at the moment. This means that it can follow the income development and be adjusted over the years.

Compared with the US$ 20,000 amount

16 Beit Mishpat Mehozi (District Court) Beersheba, 31 August 2008, Case 505/04, source: IBFD Tax Treaty Case Law.

17 Court of Appeal of Antwerp, 11 May 2010, source: Sports and Taxation, 15 July 2010.

18 Which was € 17,889 and £ 13,152 at the exchange rates of January 2016.

19 This would go more in the direction of the *de-minimis*-amount of US$ 100.00, which was proposed by Daniel Sandler in 2007 in M. Lang ed., *Source Versus Residence: Problems Arising from the Allocation of Taxing Rights in Tax Treaty Law and Possible Alternatives* (Wolters Kluwer 2008 and Taxmann 2008).

20 Art. 35a(4) and art. 12a(7) *Uitvoeringsbesluit LB*. This is only necessary for performers from non-treaty states, because they cannot make use of the unilateral exemption from art. 5a(1)(b) and art. 5b(1)(2) Wet LB.

21 Attachment 3 with the *Koninklijk Besluit tot uitvoering van het Wetboek van de inkomstenbelastingen*, part 75.

22 The FEU is based in Liverpool.

which the USA is using since 1996, a reference to 100% of GDP for OECD countries seems to be more fair for smaller (and medium-size) performers, which would be almost US$ 40,000 in 2016. Those performers are not the top stars, who try to evade taxation by moving to tax havens, so, therefore, do not have to be hit by tough tax measures and can be exempted at source with this minimum threshold.

Very important is that the minimum threshold can already be used directly at the moment of the performance and not just after the end of the year in a refund procedure, because otherwise the risk of double taxation would increase (instead of being resolved).

A threshold of US$ 20,000 (or US$ 40,000 or dynamic) could be added to the tax treaty policy of every state, as has happened over the last twenty years with the art. 17(3)-clause for subsidized performers. This optional restriction from § 14 of the Commentary is nowadays part of 66% of the bilateral tax treaties, while some states use it in almost every treaty.[23] Also with a minimum threshold in their tax treaties, states remain within the official OECD policy lines. And preferably, the minimum threshold can at best be inserted in the official text of art. 17(1) in the next update of the OECD Model, to make it equal to the US Model, but then with the dynamic definition.

The OECD Model is a good example for states on how to divide their taxing rights and is very helpful against tax avoidance, but states also have to be aware that excessive and double taxation should be avoided, as much as possible. To achieve this for smaller (and medium-size) performers, it would be good when states would start using this minimum threshold for art. 17 in their tax treaties.

[23] 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).

