New options to restrict art. 17 of the OECD Model Tax Convention for international sportspersons

by Dick Molenaar[1]

Introduction: 2014 update of the OECD Model Tax Convention

On 15 July 2014, the OECD has published the latest update of its Model Tax Convention with much text about art. 17 for sportspersons (and entertainers). The changes in the 2014 Update come from the 2010 Discussion Draft[2] and the reactions on the public consultation[3]. The text of art. 17 itself has remained unchanged[4], but the Commentary has doubled in size, with clarifications and options to restrict the article. Dr. Karolina Tetlak had already discussed the clarifications in her contribution to *GSLTR* in September 2014[5], I will discuss the new options to restrict the scope of art. 17.

History of art. 17 for sportspersons

The special tax rules for international taxation of sportspersons (and entertainers) first appeared publicly in 1959 in the second report prepared by the Organisation for European Economic Cooperation (OEEC) and carried over to OECD Draft (1963) with the argument that there were "*practical difficulties*" when applying the normal taxing rules to this specific group of taxpayers. Art. 17 was extended in OECD Model 1977 with the addition of a second paragraph, stating that, when another person (not the entertainer or sportsperson himself) receives the remuneration for the performance, the State of performance still holds the right to tax the income. This gave countries an extra option to tax a "*star company*", which are usually set up by top artistes and sportsmen in tax havens. The new paragraph was an additional measure to counter tax avoidance.

More concerns appeared in a 1987 OECD report[6], which recommended that the scope of the "*star company*" provision be extended to all legal entities receiving fees for artistic and sports performances. This was taken over in the Commentary on the next version of the OECD Model (1992). This means that not only the income of the individual sportsperson, but also the profits of every separate legal entity receiving income for the performance are taxable in the state of performance, regardless of whether the sportsperson is the owner or a shareholder or otherwise has any profit-sharing in the company. This reversal in the Commentary removed any possibility to escape from source taxation on performance income. Three countries, Canada, Switzerland and the United States, disagree with this reversal.[7]

Problems following from art. 17

Unfortunately, this allocation rule also increases the risk of practical problems. Two clear examples of international excessive taxation are set out below.

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 € 900 and his indirect material, coaching and overhead expenses are (allocated) € 2,600, leading to a profit on this Polish tournament of € 4,500.

- The Polish withholding tax is 20% from the gross = € 1,600.
- Back in the Netherlands the Dutch tax on the profit = € 850.
- The foreign tax credit will not be higher than the Dutch tax, which means that € 1,600 – 850 = € 750 excessive taxation remains.

Example 2

A German hockey team plays in Spain, earning € 30,000. The Spanish non-domestic withholding tax is 25% from gross. The direct and indirect expenses are 60% of the costs, i.e. € 18,000. The average German income tax rate for the players is 35%. Accordingly, the result is:

- The Spanish withholding tax is 25% × € 30,000 = € 7,500.
- The German tax credit (max.): gross € 30,000 – 60% expenses = € 12,000 income × 35% = € 4,200.
- € 7,500 – € 4,200 = € 3.300 international excessive taxation remains.

In addition, it is very often difficult to obtain the tax credit in the residence State, because:

1 the Polish or Spanish tax certificate might be missing;
2 the German hockey team might be exempted from corporation tax; and
3 the hockey players are on a monthly payroll and the foreign tax cannot be converted into individual tax credits.

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[1] All Arts Tax Advisers and Erasmus University Rotterdam, The Netherlands.
[2] Discussion Draft on the Application of Article 17 (Artistes and Sportsmen) of the OECD Model Tax Convention, OECD 23 April 2010.
[3] 2014 Update to the OECD Model Tax Convention, OECD 15 July 2014.
[4] Besides the change from "*artists*" to "*entertainers*" and "*sportsmen*" to "*sportspersons*".
[5] Karolina Tetlak, "The 2014 update to art. 17 of the OECD Model Tax Convention", in: *GSLTR* 2014/3.
[6] OECD, *Taxation of Entertainers, Artistes and Sportsmen*, Issues in International Taxation No. 2 (1987).
[7] Par. 16 of the Commentary on Article 17.

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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.

Unilateral exemption in The Netherlands, the same approach in tax treaty policy

The Netherlands have taken away these problems in 2007 with a unilateral tax exemption for non-resident sportspersons (and entertainers) residing in a State with which The Netherlands have concluded a bilateral tax treaty.[8] This covers many sportspersons, because The Netherlands have 92 bilateral tax treaties.

It is interesting that in all these treaties a clause comparable to art. 17 OECD Model has been inserted, but The Netherlands have decided to make use of the wording "[...] *may tax* [...]", which does not make source taxation obligatory, but optional. Reasons for this radical change are that the government wanted to reduce the administrative burden, the tax revenue from non-resident sportspersons was very low and the government wanted to take away the risk of double taxation.

With the unilateral exemption at source the sportspersons only have to pay tax in their residence State, where the Dutch income has to be reported in the world-wide income. With the credit method in the Dutch tax treaties[9], these countries do not have to allow a foreign tax credit and can tax the income with only their national tax.

Opposite, however, the Dutch sportspersons (and entertainers) performing abroad cannot make use of this exemption, because of art. 17 in the Dutch bilateral tax treaties, which most treaty partners use to the full extent. They suffer from the problems described later on in this article. But the Dutch government gave them a glimpse of hope with the *Notitie Fiscaal Verdragsbeleid* (Dutch Tax Treaty Policy), which was published on 11 February 2011. This acknowledged the problems of sportspersons and expressed the policy that The Netherlands does not want to include art. 17 anymore in new tax treaties. The Netherlands succeeded since then to keep art. 17 out of only one new treaty, with Ethiopia. It was not able to leave out the article of the new tax treaty with Germany, as a neighbour country that is very important for the Dutch sportspersons. The next test will be the new tax treaty with Belgium, for which talks are taking place at the moment.

Tax exemptions for major sports events

Over the last years, the sports world has become active against the double taxation and administrative burden resulting from art. 17. At the 2000 Olympics in Sydney, all participating athletes had to file an Australian income tax return, reporting every income connected with the Olympics, regardless where it had been earned. The tax revenue might have been some compensation for Australia for the costs of the Olympics, but the administrative work was enormous, both for the athletes and their advisers, as for the tax authorities in Australia and in the countries of the athletes, and was too high compared to the tax revenue. That was enough for the IOC and for the 2010 Winter Olympics in Vancouver it has agreed with Canada to delete its non-resident taxation for the participating athletes in the event. Normally, Canada has a 15% withholding tax for non-resident sportspersons, with the right to file a normal income tax return after the year, but these rules were set aside for the 2010 Winter Olympics.

The same happened with the 2012 Olympics in London, for which the UK removed its 20% source tax unilaterally[10] and the 2014 Winter Olympics in Sochi, Russia.[11] Also without source tax were the UEFA Champions League finals in 2011 and 2013 in London, in 2012 in Munich and 2014 in Lisbon; the UEFA Europa League finals in 2011 in Dublin; 2012 in Bucharest; 2013 in Amsterdam; and 2014 in Turin; EURO 2012 in Poland and Ukraine[12]; the 2014 World Cup in Brazil[13]; the 2011 World Cup Cricket in India; the 2011 World Cup Rugby in New Zealand; the 2013 Diamond League in London; and the 2014 Commonwealth Games in Glasgow.[14] It shows that the sports world is not waiting for changes in bilateral tax treaties, but that it forces with the power of the major sports events that the organizing countries delete the source taxation for the sportspersons temporarily to avoid the problems resulting from art. 17.

OECD Discussion Draft and IFA Congress in 2010

On 23 April 2010, the OECD published a Discussion Draft with proposed changes for the Commentary on Art. 17 OECD Model Tax Convention. Strangely enough, none of the problems described in par. 3 of this article were discussed in this proposal, but only changes in the definition of who is a sportsman (or artiste) and what income falls under the article, and clarifications about image rights and broadcasting rights from live-performances. In reaction, two of the comments on the Discussion Draft more basically criticized how art. 17 can lead to excessive or double taxation and gave existing and new options how this could be taken away, including the recommendation to delete art. 17 from the OECD Model Tax Convention.[15]

At the 64th IFA Congress in Rome in 2010, the IFA/OECD seminar was devoted to taxation of entertainers and sportspersons under the title "Red Card Article 17?". The representative of the Dutch Ministry of Finance in the seminar was supporting the idea of deleting the article; the four representatives of the OECD wanted to keep the article, but make modifications; and the other panel members took mixed positions. The seminar made clear that the taxation of entertainers and sportspersons was a priority at the OECD.[16]

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8 Art. 5a and 5b of the *Wet op de loonbelasting* (Wage Tax Act).

9 As par. 12 of the Commentary on Art. 17 OECD Model recommends. The Netherlands only still have the exemption method with Ireland, Israel, Luxemburg, Morocco, Singapore, Spain and Thailand.

10 See K. Tetlak, "The taxpayer as the unofficial sponsor of the London 2012 Olympic Games", in: *International Sports Law Journal*, March 2013.

11 See K. Tetlak, "Sochi 2014 Olympic Tax Legislation", in: *European Taxation* 54-4 (2014), Journals IBFD.

12 See K. Tetlak en D. Molenaar, "Tax Exemptions for Euro 2012 in Poland and Ukraine", in: *European Taxation* 52-6 (2012).

13 See P. Paraguay and B.M. Santo, "The tax treatment of income derived by participants in the 2014 World Cup in Brazil", in: *GSLTR* 2014/1.

14 See K. Tetlak, "UK Tax Breaks for the 2014 Commonwealth Games in Glasgow", in: *European Taxation* 54-5 (2014).

15 One of the comments came from Pearle, the worldwide association of employers in the cultural sector, which has much experience with the tax problems following from art. 17 in the tax treaties.

16 See the article D. Molenaar, M. Tenore en R. Vann, "Red Card Article 17?", in: *Bulletin for International Taxation* 66-3 (2012).

The 2014 Update: OECD keeps art. 17, but gives options for restrictions

No deletion of art. 17

Two weeks before the 2014 Update, the OECD published the report *Issues related to Article 17 of the OECD Model Tax Convention*, in which the comments on the Discussion Draft from 2010 were considered. At first, the recommendation to delete aArt. 17 from the Model was discussed. The representative of The Netherlands had explained why the country had decided to exempt non-resident sportspersons (and entertainers) from source tax. But a vast majority of the OECD Member States wanted to keep the article and, during the discussion, three reasons were noted:

1 there are difficulties of obtaining the relevant information about the income of sportspersons (and entertainers);
2 art. 17 allows taxation of a number of high-income earners who can easily move their residence to low-tax jurisdictions; and
3 source taxation can be administered relatively easily.

Unfortunately, these reasons are wrong and still lead to the same misconception as it has done over many years. I have the following arguments for that:

1 there is no need for art. 17, because the normal allocation rules of art. 17 (or 14) for self-employed and companies and art. 15 for employees work well enough and the source taxation for non-resident sportspersons (and entertainers) should only be given up when it is clear that they reside in a Treaty State;
2 there are no tax treaties with tax havens or low-tax jurisdictions, so the sportsperson moving there cannot get a tax exemption in the performance State;
3 art. 17 is not easy, but causes much administrative expenses, both in the performance State with the deduction of expenses and normal tax returns and in the residence State with the foreign tax credits: and
4 the different tax treatment following from art. 17 increases the risk of excessive or even double taxation.

Altogether, the reasons to defend art. 17 are not valid, but still the OECD Member States don't want to delete the article. That is disappointing and it means that more is needed to convince them that art. 17 in its current form is superfluous and even counterproductive.

Options to restrict the scope of art. 17

The Committee on Fiscal Affairs of the OECD did not leave it with this refusal, but made some proposals to restrict the scope of art. 17. The following options are now mentioned in the Commentary, with which a part of the problems can be taken away:

Art. 17 only for self-employed, normal rules from art. 15 for employees

This first option is mentioned in par. 2 of the Commentary, which says that too strict provisions might in certain cases impede cultural exchanges. To avoid this, countries can decide in their bilateral tax treaty to restrict par. 1 of the article to business activities.

To achieve this, it would be sufficient to replace the words "*notwithstanding the provisions of Art. 15*" by "*subject to the provisions of Art. 15*" in par. 1 and 2. In such a case, employed entertainers and sportspersons would fall under art. 15 and can be entitled to the exemption following from art. 15(2). The restriction was widely used in old German and Swiss tax treaties in the 1950s and 1960s, in which the special rule for sportspersons (and entertainers) only referred to self-employed and not to employees.

With this restriction the question arises when a sportsperson is an employee, i.e., whether he has to follow the instructions of an employer, which can be discussed in cycling, skating, skiing and other sports.

Deduction of expenses, normal tax settlements

The second option was already in 2008 included in par. 10 of the Commentary, which is the choice between:

1 taxation of the gross performance fee but at a low tax rate, and
2 the deduction of expenses and taxation under the normal rules.

EU Member States do not have this choice and have to follow the second route after the decisions of the ECJ in the *Gerritse, Scorpio* and *Centro Equestre* cases.[17] This means that they do not have to include this restriction in their bilateral tax treaties, but still can do it to be clear about their intentions.

The text proposal from par. 10, however, may not be sufficient for EU Member States, because it seems to allow only a refund after the year, while the ECJ clearly decided in the *Scorpio* case that directly linked expenses should be deductible already at the moment of the performance. The deduction of expenses can make an enormous difference[18] and it will be an obstacle when this can only be effective after the year because of the cash flow disadvantage and the uncertainty about the tax refund.

De-minimis-*rule of 15,000 IMF SDR*

The third option is new in par. 10.1 to 10.4 of the Commentary, which is a minimum amount of 15,000 IMF Special Drawing Rights per sportsperson (or entertainer) per year, under which the performance State does not have the right to tax the performance income. This has been taken over from art. 16 of the 2006 US Model Tax Convention, which mentions the amount of $ 20,000.

This minimum works very well to keep financially small and medium-size sportspersons outside the scope of the source taxation in the performance State and take away their tax problems, if they reside in a treaty State. The 15,000 IMF SDR is currently equivalent to approximately € 17.000.

A crucial element, however, is whether this *de-minimis*-rule can be used directly at the performance.

The Technical Explanation with art. 16 of the 2006 US Model discusses that problems may arise when an entertainer or sportsperson exceeds the minimum during the year. Therefore, it can be agreed that tax needs to be withheld during the year, which can be refunded after the year when the minimum has not been exceeded. The

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17 ECJ, 12 June 2003, C-234/01, *Arnoud Gerritse v. Finanzamt Neukölln-Nord*; ECJ, 3 Oct. 2006, C-290/04, *FKP Scorpio Konzertproduktionen GmbH v. Finanzamt Hamburg-Eimsbüttel*; ECJ 15 February 2007, C-345/04, *Centro Equestre da Leziria Grande Lda v. Bundesamt für Finanzen.*

18 D. Molenaar, *Taxation of international performing artistes* (IBFD 2006).

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US has this provision in approximately 50% of its bilateral tax treaties, while in the other 50% the direct method applies.[19] Par. 10.3 of the new Commentary on the OECD Model now also mentions this possibility. Unfortunately, this refund obligation makes the *de-minimis*-rule less effective than the direct method. Refunds after the year are an obstacle for cross-border work.

Support from public funds (also for non-profits and cultural and sports exchange?)

The fourth option excludes performances supported from public funds from art. 17(1) and (2). This exception, since 1977, is specified in par. 14 of the Commentary with the argument that cultural exchanges and subsidized entertainers and sportspersons could suffer from the far-reaching impact of the article.

Nowadays, two-thirds of the bilateral tax treaties have an art. 17(3) clause with this exemption and, for some countries, almost every tax treaty has an art. 17(3)[20], which means that it is a part of the tax treaty policy of many countries[21]. Especially subsidized entertainers (and groups) are using this exemption frequently, but it does not seem very helpful for sportspersons (and teams).

Quite some tax treaties have specified art. 17(3) differently, such as for non-profit organizations and cultural programs and exchanges. These exceptions have the same objective, to take away the problems that follow from too strict provisions of art. 17(1) and (2) for those entertainers and sportspersons that are not in the risk category of tax avoidance. This could be taken over in par. 14 of the Commentary on art. 17 OECD Model.

Foreign teams and groups

The fifth option is new in par. 14.1 of the Commentary on Article 17 and is an exemption for foreign teams and groups working with sportspersons (and entertainers) as employees. There is an overlap with the first option in par. 2 of the Commentary, which I have discussed in par. 9.2.1, but par. 14.1 makes clear that some countries want a narrower exemption than completely removing all employees from art. 17. As an example, par. 14.1 gives a text proposal in which the exemption is only available for cross-border competitions. This has been taken over from art. XVI(3) of the treaty between Canada and the USA, which helps the joint hockey, football, baseball and basketball competitions to eliminate tax problems.

This looks promising for European competitions with many more cross-border matches, such as in the Champions and Europa League, but UEFA does not need this provision, because it has organized itself so that the problems from art. 17 do not occur. The home teams keep the box office earnings and do not share these, while the broadcasting and advertisement fees are paid from Switzerland as royalties, on which the Swiss tax treaties under art. 12 normally do not levy a source tax. Also the new par. 9.4 of the 2014 Update to the OECD Model specifies that these earnings do not fall under art. 17. Only the box office earnings of the CL and EL finals are shared by the participating teams, but for these finals UEFA forces the country of the final to grant a tax exemption, as shown in par. 7 of this article.

It might be that this fifth option from the Commentary is interesting for other sports, but to make it effective all the countries of the teams participating in the cross-border competition should include this exception in their tax treaties to make it effective. This in Europe is much more complicated than with Canada and the USA.

Limited approach of art. 17(2) still in par. 16 of the Commentary

It is remarkable that par. 16 of the old Commentary on Article 17 of the OECD Model is not discussed in the 2014 Update, but is still mentioned in the new Commentary. In this Reservation, Canada, Switzerland and the USA express their opinion that art. 17(2) should only be used in abusive situations as mentioned in par. 11.2(c) of the Commentary, which is when the entertainer or sportsperson is the owner of the legal person that receives the performance income, as initially meant with the introduction in 1977. Many tax treaties of Canada, the USA, Switzerland and some other countries contain a restriction which leads to a limited use of art. 17(2).

New text of art. 17 after the 2014 update

When the six options are brought together in a new art. 17, this will lead to the following text. With this, art. 17 remains within the lines of the Commentary on the OECD Model Tax Convention:

Article 17 – Entertainers and Sportspersons

1. Notwithstanding the provisions of art. 7, but subject to the provisions of art. 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, unless 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 € 15,000 or the equivalent expressed in the currency of that other State at the beginning of that taxation year.

2. Where income in respect of personal activities exercised by an entertainer or a sportsman in his capacity as such accrues not to the entertainer or sportsman himself but to another person, that income may, notwithstanding the provisions of art. 7, be taxed in the Contracting State in which the activities of the entertainer or sportsman are exercised, unless when 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.

3. The provisions of par. 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

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[19] See Molenaar, *supra* n. 34.

[20] Examples are Hungary, China, Slovenia, Indonesia and Turkey.

[21] D. Molenaar, "Article 17(3) for Artistes and Sportsmen: Much More than an Exception", in: *Intertax* 40-4 (2012), p. 270.

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.

4 Where a resident of a Contracting State derives income referred to in par. 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 art. 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 or 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.

Summary and conclusions

The 2014 Update to the OECD Model Tax Convention has much text about art. 17 for sportspersons. After the 2010 Discussion Draft, the OECD has considered the deletion of the article, which was proposed by The Netherlands, but the Member States have decided to keep it. With incorrect arguments, it seems that the Member States did not want to follow the example of The Netherlands and many major sports events to return to the normal allocation rules. Unfortunately, this means that the tax problems will remain for sportspersons, which leads to excessive or even double taxation and relatively high administrative expenses.

But the OECD also gives six (new) options in the 2014 Update to restrict the scope of art. 17. With these options a new, lengthy art. 17 is possible, which countries can include in their new tax treaties and still remain within the official OECD lines. When used to the full extent, many entertainers and sportspersons can apply for an exemption at source and avoid the excessive or double taxation.

The best option will still be not to include art. 17 at all in new tax treaties, because the normal allocation rules of art. 7 (and 14) and art. 15 are sufficient to counteract tax avoidance. Then the withholding tax in the State of performance should only be lifted after an application procedure for which also the tax authorities of the residence State need to undersign the application form. But with the available options from the new Commentary to restrict art. 17, the problems would also disappear for many of the sportspersons and teams. Therefore, hopefully, countries will start to use these options actively in their tax treaty negotiations and support their sportspersons and teams with a modern and better defined art. 17.