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New Options to Restrict Article 17 for Artistes and Sportsmen

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The Organisation for Economic Co-operation and Development (OECD) has come to changes in the 2014 Commentary on Article 17 for artistes and sportsmen. It did not want to delete the article from the Model Tax Convention, although it used false reasoning to support this decision. In the mean time, major sports events (Olympics, World Cup Football) and states such as the Netherlands do not use the source taxation anymore, taking away the risk of excessive or even double taxation for artistes and sportsmen.

But still the OECD has recognized that many artistes and sportsmen are having problems with the source taxation. In the 2014 Commentary it recommends some exceptions, such as an exemption for groups with employees, a minimum threshold, as in the US Model Tax Convention, and the deduction of expenses. In addition, some states also limit the scope of Article 17(2) to only abusive situations. At the end of the article, the author gives a revised Article 17 with all exceptions included.

1 2014 Update of the OECD Model Tax Convention

On 15 July 2014 the Organisation for Economic Co-operation and Development (OECD) has published the latest update of its Model Tax Convention with much text about Article 17 for artistes and sportsmen.[1] The changes for Article 17 mainly come from the 2010 Discussion Draft,[2] but also from the reactions on the following public consultation. The text of Article 17 itself has remained unchanged,[3] but the Commentary has doubled in size with clarifications and gives (new) options to restrict the scope of the article. The author discusses the problems arising from Article 17, how the changes and (new) options from the Commentary can lead to solutions for performers and gives a new text proposal for Article 17 with the options included.

2 History of Article 17 for Entertainers and Sportspersons

The special tax rules for international performers first appeared publicly in 1959 in the second report prepared by the Organisation for European Economic Cooperation (OEEC) and were carried over to the OECD Draft (1963) with the argument that there were 'practical difficulties' when applying the normal taxing rules of Article 7 (companies and self-employed) and Article 15 (employees) to this specific group of taxpayers. Article 17 was extended in OECD Model 1977 with the addition of a second paragraph, stating that, when another person (not the performer himself) receives the remuneration for the performance, the country of performance still holds the right to tax the income. This gave countries an extra option to tax a 'star company', which was often 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,[4] which recommended that the scope of the 'star company' provision would 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 performer, but also the profits of every separate legal entity receiving income for the performance are taxable in the country of performance, regardless of whether the performer 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

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1 2014 Update to the OECD Model Tax Convention, OECD 15 July 2014.

2 Discussion Draft on the Application of Art. 17 (Artistes and Sportsmen) of the OECD Model Tax Convention, OECD 23 Apr. 2010.

3 Besides the change from 'artists' to 'entertainers' and 'sportsmen' tot 'sportspersons'.

4 OECD, *Taxation of Entertainers, Artistes and Sportsmen*, Issues in International Taxation No. 2 (1987).

countries, Canada, Switzerland and the United States, disagree with this reversal.[5]

The 1987 OECD Report also discussed the computation of the taxable income in the performance country. OECD Members had brought forward that it was problematic to calculate the profit when performers were only staying for a short period of time in their country, which brought the OECD to the recommendation that countries can tax the gross income without deductions for expenses, but then should use a lower tax rate.[6]

3 Problems following from article 17

Article 17 has been taken over in almost any bilateral tax treaty, not only from OECD Member States but also from other countries. But unfortunately, this special allocation rule also increases the risk of practical problems. Two regular 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 EUR 8,000 prize money. His direct travel and lodging expenses are EUR 900 and his indirect material, coaching and overhead expenses are (allocated) EUR 2,600, leading to a profit on this Polish tournament of EUR 4,500:

– The Polish withholding tax is 20% from the gross = EUR 1.600.
– Back in the Netherlands the Dutch tax on the profit = EUR 850.
– The foreign tax credit will not be higher than the Dutch tax, which means that EUR 1.600 – 850 = EUR 750 excessive taxation remains.

Example 2: A German orchestra performs in Spain, earning EUR 30.000. The Spanish non-domestic withholding tax is 20% from gross. The direct and indirect expenses are 70% of the costs, i.e. EUR 21.000, leading to a profit of EUR 9.000. The average German income tax rate for the musicians is 35%.

Spanish withholding tax: 20% x EUR 30.000 = EUR 6.000
German tax credit (max): 35% x EUR 9.000 = EUR 3.150
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International excessive taxation = EUR 2.850

In addition, it is very often difficult to obtain the tax credit in the residence country, such as because the Polish or Spanish tax certificate might be missing, the German orchestra might be exempted from corporation tax and cannot obtain a tax credit, and the musicians 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 country of performance and the residence country.

In practice, this creates much administrative work, both in the performance country where the organizer of the performance is responsible for the withholding of the tax and in the residence country where the artiste or sportsmen has to apply for the foreign tax credit. Also the tax authorities in both countries are involved and have to audit whether the tax filings have been correct. This administrative work is especially high because artistes and sportsmen are very often performing in many different countries during a year, most often only for a short period of time.

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

The Netherlands have taken away these problems in 2007 with a unilateral tax exemption for non-resident performers residing in a country with which the Netherlands have concluded a bilateral tax treaty.[7] This covers many performers, because the Netherlands have ninety-four bilateral tax treaties. Interesting is that in all these treaties a clause comparable to Article 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 performers was very low and the government wanted to take away the risk of double taxation. With the unilateral exemption at source the performers only have to pay tax in their residence country, where the Dutch income has to be reported in the worldwide income. With the credit method in the Dutch tax treaties[8], 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 artistes and sportsmen performing abroad cannot make use of this exemption,

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5 Para. 16 of the Commentary on Art. 17.

6 Since 1992 taken over in §10 of the Commentary on Art. 17 OECD Model.

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

8 As § 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.

because of Article 17 in the Dutch bilateral tax treaties, which most treaty partners use to the full extent. They suffer from the problems described in section 3 of 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 performers and expressed the new policy that the Netherlands does not want to include Article 17 anymore in new tax treaties. The Netherlands succeeded since then to keep Article 17 out of only one new treaty, with Ethiopia, but it was not able to leave it out of the new tax treaty with Germany, as neighbour country very important for the Dutch performers. The next tests will be the new tax treaties with Belgium and Spain, for which talks are taking place at the moment.

5 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 Article 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[9] and the 2014 Winter Olympics in Sochi, Russia.[10] Also without source tax were the UEFA Champions League finals in 2011 and 2013 in London, in 2012 in Munich, in 2014 in Lisbon and in 2015 in Berlin, the UEFA Europe League finals in 2011 in Dublin, 2012 in Bucharest, 2013 in Amsterdam, in 2014 in Turin and in 2015 in Warsaw, EURO 2012 in Poland and Ukraine,[11] the 2014 World Cup in Brazil,[12] 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.[13] The same will happen will the 2016 Olympics in Rio de Janeiro[14] and EURO 2016 in France.[15]

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 Article 17.

6 Deletion of article 17 remains the best solution

Why would there be 'practical difficulties' in a treaty situation between two countries? In the two examples from section 3, the Netherlands and Germany as residence countries could easily be able to tax the foreign performance income under Article 7 and 15(2) of the treaties with Poland and Spain. Which practical obstacles would there be specifically for performers and not for other taxpayers?

But after discussion since 2010[16], the OECD has decided not to delete Article 17. In part 5 of the OECD Report '*Issues related to Article 17 of the OECD Model Tax Convention*'[17] it was noted that, despite the explanation from the Netherlands why it had decided to leave out the special tax treatment of artistes and sportsmen from source tax, a vast majority of the OECD Member States wanted to keep the article. During the discussion, three reasons were given, which will be discussed below:

(1) 'Residence taxation should not be assumed given the difficulties of obtaining the relevant information': an invalid argument, because almost every country has a withholding tax on any monies leaving the

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9 *See* K. Tetlak, *The Taxpayer as the Unofficial Sponsor of the London 2012 Olympic Games*, 13(1) Intl. Sports L.J. 97–103 (Mar. 2013).

10 *See* K. Tetlak, *Sochi 2014 Olympic Tax Legislation*, 54 Eur. Taxn. 4 (2014), Journals IBFD.

11 *See* K. Tetlak & D. Molenaar, *Tax Exemptions for Euro 2012 in Poland and Ukraine*, 52 Eur. Taxn. 6 (2012).

12 *See* P. Paraguay & B.M. Santo, *The Tax Treatment of Income Derived by Participants in the 2014 World Cup in Brazil*, Global Sports Law and Taxation Reports, 2014/1.

13 *See* K. Tetlak, *UK Tax Breaks for the 2014 Commonwealth Games in Glasgow*, 54 Eur. Taxn. 5 (2014).

14 *See* B.M. Santo & L. Lucon, *The Tax Benefits Brought by the Brazilian Government for Implementation of the 2016 Olympic Games and Paralympic Games 2016*, Global Sports Law and Taxation Reports, 2015/3.

15 *See* K. Tetlak, *The French Tax Dumping for Sports Mega-Events: Fiscal Exemption for UEFA EURO 2016 and Beyond*, Global Sports Law and Taxation Reports, 2015/1.

16 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?'. *See* the article D. Molenaar, M. Tenore & R. Vann, *Red Card Article 17?*, 66 Bull. Intl. Taxn. 3 (2012).

17 This OECD Report was published on 26 June 2014, three weeks before the 2014 Update of the OECD Model Income Tax Convention.

country, only allowing an exemption at source when a bilateral tax treaty explicitly mentions this. When the tax administration in the residence country also needs to undersign the application form, it also has the information about the foreign which needs to be reported in the income tax return. Therefore, gathering the information can run parallel with the exemption procedure.

(2) 'Article 17 allows taxation of a number of high-income earners who can easily move their residence to low-tax jurisdictions': Article 17 is not necessary for this purpose. When every country has a withholding tax for non-residents, which will only be exempted in a treaty situation, the move to tax havens will be counteracted perfectly. Unless when countries decide to conclude tax treaties with tax havens, but that should then be their choice from which the performers should not become the victims.

(3) 'Source taxation of the income covered by the article can be administered relatively easily': a strange argument, because the examples from section 3 show that the administrative expenses following from Article 17 are high, involving the performers, organizers of the performances and the tax authorities in both the performance and residence country. It might be easy for the tax collection in the performance country, but it is unfair for the performers.

Altogether, the OECD has come with false reasoning to defend Article 17. This means that the problems of excessive and very often double taxation remain for international artistes and sportsmen. That is disappointing, because Article 17 in its current form is superfluous and counterproductive and deletion is still the best solution.

7 Options to restrict the scope of article 17

The OECD did not leave it with this refusal, but came with proposals to restrict the scope of Article 17. The following options are now mentioned in the Commentary, with which a part of the problems can be taken away:

7.1 *Article 17 Only for Self-Employed, Normal Rules from Article 15 for Employees*

This first option is mentioned in §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 paragraph 1 of the article to business activities. To achieve this it would be sufficient to replace the words 'notwithstanding the provisions of Article 15' by 'subject to the provisions of Article 15' in paragraphs 1 and 2. In such a case, employed entertainers and sportspersons would fall under Article 15 and can be entitled to the exemption following from Article 15(2). This 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.

7.2 *Deduction of Expenses, Normal Tax Settlements*

The second option is mentioned in §10 of the Commentary, which is the choice between (1) taxation of the gross performance fee but a low tax rate, and (2) the deduction of expenses and taxation under the normal rules. European Union (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.[18] This means that they don't have include this restriction in their bilateral tax treaties, but still can do it to be clear about their intentions.

The text proposal from §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[19] 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.

7.3 *De-Minimis-Rule of 15.000 IMF SDR*

The third option is new in §10.1 to 10.4 of the Commentary, which is a minimum amount of 15,000 IMF Special Drawing Rights (SDR) per performer per year, under which the performance country does not have the right to tax the performance income. This has been taken over from Article 16 of the 2006 US Model Tax Convention, which mentions the amount of USD 20,000. This minimum works very well to keep small and medium-size performers outside the scope of the source taxation in the performance country and take away their tax problems, if they reside in a treaty country. The 15,000 IMF SDR is currently equivalent to approx. EUR 20.000.

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18 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 Feb. 2007, C-345/04, *Centro Equestre da Leziria Grande Lda v. Bundesamt für Finanzen.*

19 D. Molenaar, *Taxation of International Performing Artistes* (IBFD 2006).

Furthermore, the 15,000 IMF SDR is not a fixed amount for the OECD but just an example. Countries can also include another fixed amount in their treaty or can even use a dynamic definition with which the amount can be adjusted yearly. 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 Gross Domestic Product (GDP) for OECD countries was USD 38,867 in 2014, which means that the threshold could be set at 50% = USD 19,434 for e.g. 2016.[20] This is comparable to the USD 20,000 which the US Model Income Tax Convention is using.

But it is very different from the USD 20,000 which the United States introduced back in 1996 and is using since then. The average GDP for OECD countries was USD 20,960 in 1996, which means that the United States 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 Article 17(1). This would be USD 38,867 per 1 January 2016[21] as the minimum threshold.

A crucial element is whether this *de-minimis-rule* can be used directly at the performance. The Technical Explanation with Article 16 of the 2006 US Model discusses that there may arise problems 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. But the United States has this refund provision in only 17% of its bilateral tax treaties, while in the other 83% the direct method applies. Now §10.3 of the new Commentary on the OECD Model also mentions this possibility. Unfortunately, this refund obligation would make the *de-minimis-rule* less effective than the direct method. Refunds after the year are an obstacle for cross-border work, so the direct method should be used.

7.4 *Support from Public Funds (Also for Non-Profits and Cultural and Sports Exchange?)*

The fourth option excludes performances supported from public funds from Article 17(1) and (2). This exception is since 1977 specified in §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-third of the bilateral tax treaties have an Article 17(3) clause with this exemption and for some countries almost every tax treaty has an Article 17(3)[22], which means that it is a part of the tax treaty policy of many countries.[23] Especially subsidized artistes (and groups) are using this exemption frequently, but it does not seem to be very helpful for sportsmen (and teams) because are not so often subsidized.

Quite some tax treaties have specified Article 17(3) in a different manner, 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 Articles 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 §14 of the Commentary and even in the text of Article 17.

7.5 *Foreign Teams and Groups*

The fifth option is new in §14.1 of the Commentary on Article 17 and is an exemption for foreign teams and groups working with performers as employees. There is an overlap with the first option in §2 of the Commentary, which I have discussed in paragraph 6.1, but §14.1 makes clear that some countries want a narrower exemption than completely removing all employees from Article 17. As example, §14.1 gives a text proposal in which the exemption is only available for cross-border competitions. This has been taken over from Article XVI(3) of the treaty between Canada and the United States, which helps the joint hockey, football, baseball and basketball competitions to eliminate tax problems.

This looks promising for European competitions with many cross-border matches, such as in football with the Champions and Europe League, but the UEFA does not need this provision, because it has organized itself that the problems from Article 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 Article 12 normally do not levy a source tax. Also the new §9.4 of the 2014 Update to the OECD Model specifies that these earnings do not fall under Article 17. Only the box office earnings of the CL and El finals are shared by the participating teams, but for these finals the UEFA forces the country of the final to grant a tax exemption, as shown in section 5 of this article.

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[20] Which was EUR 17.889 and GBP 13.152 at the exchange rates of Jan. 2016.

[21] This would go more in the direction of the *de-minimis-amount* of USD100,00, which was proposed by Daniel Sandler in 2007 in *Source Versus Residence: Problems Arising from the Allocation of Taxing Rights in Tax Treaty Law and Possible Alternatives* (M. Lang ed., Wolters Kluwer 2008 & Taxmann 2008).

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

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

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 is effective. This is in Europe much more complicated than with Canada and the United States.

7.6 *Limited Approach of Article 17(2) Still in §16 of the Commentary*

Remarkable is that §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 United States express their opinion that Article 17(2) should only be used in abusive situations as mentioned in §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 United States, Switzerland and some other countries contain a restriction which leads to a limited use of Article 17(2). This is very practical to avoid problems resulting from Article 17, such as example 2 in section 3 of this article.

8 New text of article 17 after the 2014 update

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

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, 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 (50% of) the average GDP per capita for OECD countries, as determined by the OECD, or the equivalent expressed in the currency of that other State at the beginning of that taxation year.

1. 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 Article 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.
2. 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.
3. 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.

(2) 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 organized in the other State by a league to which that team belongs.

9 Other changes in the commentary on article 17

There are also other changes in the Commentary on Article 17, besides the six options to restrict the article. Altogether the size of the Commentary has been doubled with clarifications, practical examples and positions of the

Member States and observers to the OECD. The following changes are relevant:

(1) *Who is an artiste/entertainer*: §3 now gives examples of persons not acting as entertainers, such as a former politician speaking on a conference and a model presenting clothes on a fashion show or in a photo session.[24]

(2) *Sponsoring and endorsement*: §9 states that income which is directly connected with a performance, but is earned outside the country, may also be taxed in the performance country. This addition is a direct result of the *Agassi*[25] case in the UK and the *Goosen*[26] and *Garcia*[27] cases in the United States, in which the sponsor and endorsement income of this tennis player resp. these two golf players as far as they were directly connected to the performances in the country were allocated to that country and taxed. The fact that both the sportsman and the sponsor had their residence abroad did not make a difference for this use of the territoriality principle.

(3) *Merchandising*: §9 also allocates the sale of merchandise around performances to Article 17. There has been some discussion with bigger pop concerts about this subject and for many bands this is interesting extra income. Only when there is no direct relationship between the performance and the sale of the merchandise, the income will fall outside the scope of Article 17.

(4) *Preparation, rehearsals en training*: §9.1 clarifies that preparation, rehearsals en training also fall under the activities of the performers, which means that the income from this is also taxable in the country of the activities, even when no public performance would take place there. This is an interesting addition, because most often the country in which these preparations, rehearsals or trainings sessions take place most often don't know anything about this income, because no payments are done in that country, such as salaries of football players and orchestra musicians. This is no problem when the credit method is used to eliminate double taxation in the residence country, but leads to double non-taxation when the exemption method applies.[28]

(5) *Radio, TV and other media*: §9.4 mentions that the payments to an entertainer or sportsperson for the broadcast of his performance on radio, TV and other media also falls under Article 17.[29] However, when the payment is done to a third party and the entertainer or sportsperson does not receive a direct payment for his activities, the income does not fall under Article 17. §9.4 gives the example of a football tournament, from which the organizer holds the rights and receives the income, after which payments are done to the football teams. This does not fall under Article 17, according to the new Commentary, which is interesting, because there is a clear connection between the performances of the football teams and the income and under Article 17 (2) this would be taxable in the performance country. But this seems too harsh for the OECD, although this unlimited approach hits many others in the arts and sports world. However, the lobby of the UEFA and FIFA seems to have worked very well and they have succeeded to keep their finances also for the OECD outside the scope of Article 17. But it is unfair when compared with other sports teams, orchestras, music ensembles and theatre and dance groups, which are taxable for every income they receive from their performances.

(6) *Image rights*: §9.5 discusses 'image rights' of entertainers en sportspersons. The OECD holds the opinion that also these earnings fall within the scope of Article 17, when there is a direct link to performances.

(7) *Owner of a race horse or race team*: §11.2 states that the prize money for the owner of a race horse or a race team falls outside Article 17. The OECD believes that this prize money is used for the training and development of the horse resp. the design, manufacturing and preparation of the race car and not for the activities of the jockey or the race driver. Only when the owner receives income specifically for the jockey or the race driver, this will be taxable for the owner. Unfortunately, this is also unfair – same as with §9.4, because also for other sports teams, orchestras, music ensembles and theatre and dance groups most of the performance income is not meant for the payments to the performers, but stays with the team or group to pay the creation and other direct

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[24] In the Positions at the end of the new Commentary on Art. 17, Argentina, Brazil, Malaysia, China and India have made clear that they think differently about these examples, mostly about models, and prefer to include them in Art. 17.

[25] UK: HL, 17 May 2006, *Agassi v. Robinson* (2006) UKHL 23.

[26] US: TC, 9 June 2011, *Goosen v. Commissioner*, 136 T.C. No. 27.

[27] US: TC, 14 Mar. 2013, *Garcia v. Commissioner*, 140 T.C. No. 6.

[28] *See* R. Betten, *Netherlands Ice Skater not Eligible for Relief for Foreign Training Days*, 45 Eur. Taxn. 6 (2005).

[29] This can also be found in §18 of the Commentary on Art. 12 OECD Model Tax Convention.

and indirect expenses. But they fall under Article 17 (2), even for their profit element. The approach of the OECD in §11.2 is therefore inconsistent.

10 Summary and conclusions

The 2014 Update to the OECD Model Tax Convention has much text about Article 17 for artistes and sportsmen. After the 2010 Discussion Draft, the OECD has considered the deletion of the article, which was advocated by the Netherlands, but the Member States have decided to keep it. With incorrect arguments, but 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 performers, which lead to excessive or even double taxation and relatively high administrative expenses.

The best option will still be not to include Article 17 at all in new tax treaties, because the normal allocation rules of Article 7 (and 14) and Article 15 are sufficient to counteract tax avoidance. But the withholding tax in the country of performance should then only be exempted after an application procedure in which also the tax authorities of the residence country would undersign the application form and therewith receive the information about the foreign income.

The OECD has decided not to delete Article 17, but to give six (new) options in the 2014 Update to restrict the scope of the article. With these options a new, lengthy Article 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 performers can apply for an exemption at source and avoid excessive or double taxation. Hopefully, countries will start to use these options actively in their tax treaty negotiations and support their artistes and sportsmen with a modern and better defined Article 17.