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# Music and Taxation

Dick Molenaar & Mario Tenore*

The seminar 'Music and Taxation: The State of Art' was held on 18 July in Verbier, Switzerland. The seminar, which is intended to become an annual event, took place just before the opening concert of the twenty-first edition with the Verbier Festival Orchestra.[1] It was organized by Prof. Guglielmo Maisto (University Cattolica del Sacro Cuore di Piacenza, Italy) and Prof.Robert Danon (University of Lausanne, Switzerland), with the support of Fevis Europe, the European network of specialized music ensembles (from medieval to contemporary music).

## 1 Special tax rules for performing artistes

The aim of the seminar was to investigate the various issues relating to the taxation of international music performances. Together with visas and social security, taxation is an obstacle for musicians and ensembles, who are very often performing internationally, especially because language is not a barrier for understanding music. Many states have special domestic tax rules for non-resident musicians, ensembles, and other artistes and groups, while in bilateral tax treaties Article 17 from the OECD Model Tax Convention is most often taken over, providing the performance state with the right to tax the performance income, setting aside the normal rules of Articles 7, 14, and 15. Also the residence state will tax the foreign performance income and therefore a foreign tax credit is needed to eliminate double taxation. The seminar showed that this goes wrong easily, both in the performance and the residence state, which leads to excessive or even double taxation.

The seminar was divided in two parts: the first part addressed national trends in France, United Kingdom and Italy and the second part discussed tax treaty and European law issues.

## 2 France

Eric Ginter[2] gave the French perspective illustrating French domestic law and treaty practice. The rules for non-resident artists performing in France (hereinafter the 'NRA Regime') are set forth in Article 182A bis of the French General Tax Code (GTC) and contemplates:

(a) the application of a withholding tax to any performance income derived in France;

(b) a general deduction of 10% for professional expenses;

(c) the applicability of either a rate of 15% or 75%, depending on whether the income is paid in cooperative or in a non-cooperative territory.

This withholding tax is also the final French tax when the non-resident artist earns less than EUR 41.658 per year in France. If the income is more, normal income tax should be paid according to domestic rules (and the withholding tax can be credited).

France has more than eighty bilateral tax treaties and most of them contain a provision similar to Article 17 of the OECD Model Tax Convention (MC), allocating the taxing right to the state of the performance. By exception, in some French tax treaties only the residence state has the taxing right, such as the treaties with:

- the USA when the total remuneration is less than USD 10,000 per year;
- South Africa, Spain, USA, Switzerland, Czech Republic and others when the performances are mainly financed by public funds of the residence state;
- China, Poland, Macedonia and others when the performances follow from official cultural agreements;
- Russia and Belgium in any situation, which means that the special clause for performers does not exist in these treaties.

Notes

* Dr Dick Molenaar, All Arts Tax Advisers and Erasmsu University Rotterdam, the Netherlands.; Dr Mario Tenore, Maisto e Associati, Milan, Italy.

1 Hosts of the tax seminar were Prof. Guglielmo Maisto (University Cattolica del Sacro Cuore di Piacenza, Italy) and Prof. Dr Robert Danon (University of Lausanne, Switzerland), with the support of Fevis Europe, the European network of specialized music ensembles (from medieval to contemporary music).

2 Hoche Sociéte d'Avocats, Paris, France.



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On the other hand, some treaties mention specifically that the performance state also has the taxing right for income paid to corporate bodies (such as orchestras), which means that they are fully taxable in the performance state, even in the absence of a permanent establishment.

Ginter explained that France has specific anti-abuse rules in Article 155A GTC, leading to taxation in France for performance fees paid to a company established outside France, if the company is controlled by the artiste and does not have any other activity than providing services, or, in any case, if the company is established in a tax haven. He explained that this provision was found lawful by the French courts:

– the Court d'Appel in Paris did not find a breach of the freedom of establishment within the EU when the company is not an artificial arrangement;[3]

– the Conseil d'Etat even allowed France a by-pass of existing double tax treaties to tax such income.[4]

Ginter finished his presentation with the conclusion that given the complexity of individual situations as well as the diversity of provisions contained in the various tax treaties, a case-by-case approach is highly recommended.

## 3 United Kingdom

Euan Lawson[5] gave the UK perspective, illustrating UK domestic law and treaty practice. In the UK, special rules regarding the taxation of non-resident performers were introduced in 1987 and since then they remained substantially unchanged. Euan Lawson pointed out that income of a foreign entertainer is deemed to be sourced in the UK insofar as the performance is '*in the course of a trade, profession or vocation*'. This rule applies notwithstanding the legal basis under which the performer is engaged and also applies to individuals, groups, self-employed, employees, pop stars, orchestra members, and athletes (including chess players).

For the assessment a difference can be made between:

– a trade, which is an operation of a commercial character, such as providing customers for reward some kind of goods or services;

– a profession, which is an occupation requiring intellectual skill in some degree;

– a vocation, which is a 'calling'.

The difference between these three lies in the deductibility of expenses.

Performances by non-resident entertainers are taxed by means of withholding tax levied on the gross amount of the payment, including expenses, which are paid on behalf of the performer, at the basic rate of currently 20%. The payment is deemed to be on account of the performer's liability to UK tax. The obligation to levy a withholding tax arises vis-à-vis all 'payments or transfers' made at all stages of the chain. In order to avoid these procedural complexities, special schemes may apply such as the 'middleman' scheme for rock and pop acts, whereby no tax is withheld in the chain by approved 'middlemen', or the 'simplified' scheme for classical music, whereby no tax is withheld if paid to approved agents, orchestras and other organizations.

Alternatively, performers have the option to apply for a Reduced Tax Payment Agreement (RTPA) at the Foreign Entertainers Unit (FEU) in Liverpool in which they can deduct their expenses. The FEU can approve these expenses and bring down the taxable income, but will also apply the normal, progressive tax rates, up to 45% from net. After the taxable year, the artiste is obliged to file a UK tax return and will get a final tax assessment.

Much attention has attracted the *Agassi* case in the UK in recent years. The House of Lords have accepted the view of HMRC[6] that also income from a non-resident sponsor paid outside of the UK to the performer can be taxed in the UK, if the income is connected to a performance in the UK.[7] HMRC has picked this up actively and is approaching especially top stars with questions about their foreign sponsoring and endorsement income. Lawson explained that the UK taxes all payments and transfers connected with performances, such as appearance fees, sponsorship and endorsement income, merchandising sales, TV and radio broadcast fees and DVD fees. Finally, he mentioned that under UK practice remuneration for cancellation of events is not subject to UK tax.

With regards to the UK treaty practice, Lawson pointed out that UK tax treaties are meant to tax the profits generated by the musicians in UK, but that HMRC makes an exception for 'profits' of orchestras, despite Article 17(2) of the UK tax treaties and equivalent UK domestic tax rules.

He also explained that HMRC is under pressure to collect tax, which leads to fierce political criticism on settlements. The effect on RTPA negotiations is that there is less scope for reasonable compromise, so that any

*Notes*

[3] CAA Paris (9e ch) 11 Oct. 2012, nr. 10PA04573 (Casta).

[4] Conseil d'Etat 28 Mar. 2008, nr. 271366 (Aznavour).

[5] Michael Simkons LLP, London, UK.

[6] Her Majesty's Revenue and Customs (UK tax administration).

[7] House of Lords 17 May 2006, [2006] UKHL 23.

unresolved dispute will require self-assessment filing after the taxable year. This is especially strange when the tax exemptions for the 2012 London Olympics, 2011 and 2013 Champions League Finals, and 2014 Commonwealth Games in Glasgow are taken into account.

## 4 Italy

Andrea Parolini[8] gave an overview of the taxation of artists in Italy under domestic law and Italian treaty practice. Under Italian law the income of artists can fall in four different categories each with its proper sourcing rules, namely:

(1) Income from independent personal services which is considered to be sourced in Italy if the service is supplied on the national territory.

(2) Income from employment income which is considered to be sourced in Italy if the work is performed on the national territory.

(3) Business income which is considered to be sourced in Italy if it is derived through an Italian permanent establishment.

(4) Miscellaneous income, which is sourced in Italy if derived from activities in Italy or related to assets located in Italy.

According to Article 23(1) let. D of the Italian Tax Code, income earned by non-resident artistes, companies or entities for services with an artistic nature performed in Italy are also considered to be Italian source income, regardless to which category it belongs, when the income is paid by the Italian government, an Italian resident or a permanent establishment located on the Italian territory. The withholding tax rate is 30% and no deduction for expenses is allowed, despite the CJEU rulings, such as *Gerritse*[9] and *Scorpio.*[10] Parolini concluded that Italian legislation therefore does not comply with EU law and discussed with the audience to open a court case against this.

When the payor would not be a withholding agent, the non-resident performer is obliged to self-assessment, but is unclear whether he then would fall under the 30% flat rate or the normal progressive tax rates.

The Italian tax treaty practice is mostly based on Article 17 OECD MC with exceptions in the treaties with:

– Cyprus, Ireland, Tanzania, Trinidad and Tobago, Zambia and some others do not contain a provision similar to Article 17(2) OECD MC for payments to others than the performers;

– the USA contains a de-minimis exemption of USD 20,000 per performer per year;

– the USA, Japan and Canada provide that Article 17(2) applies only if the performer has an interest in the entity;

– Switzerland, where a Swiss company engaged in entertainment may not benefit of the reduced rates on dividends and interest;

– many treaties containing an Article 17(3) with an exemption for cultural exchange, non-profit organizations and performances supported by public funds.

Parolini also gave an overview of Italian court decisions about performers, such as a chess player,[11] individuals performing in circuses,[12] and models.[13] He also illustrated the court case about a show girl performing for Italian TV, who had signed two contracts, for independent personal services and for the exploitation of author's right, which is taxed on a reduced taxable basis. Lower courts found that the fragmentation of the contracts was artificial and the Italian Supreme Court has confirmed this.[14]

## 5 Article 17 of the OECD model tax convention

In the second part of the seminar, Dick Molenaar[15] started with the historical background of Article 17 OECD MC. The article appeared in the first Model in 1963 with the argument 'to avoid practical difficulties' with taxing artistes and sportsmen. With the article the OECD tries to counteract tax avoidance and non-compliance behaviour of international performers. Article 17(2) was added in 1977 for 'Rent-A-Star' constructions, in which the performer is an employee of his personal company in a tax haven and from there loaned out for the performance. Because he received personally only a low salary, the profit remained

Notes

8 Professor at Università Cattolica del Sacro Cuore in Piacenza.

9 CJEU 12 Jun. 2003, C-234/01 (Arnoud Gerritse).

10 CJEU 3 Oct. 2006, C-290/04 (FKP Scorpio Konzertproduktionen).

11 Ruling letter of 26 Nov. 1981, no. 12/062.

12 Ruling letter of 15 Jan. 1996, no. 15/E.

13 Ruling letter of 16 Jun. 1980, no. 12/191.

14 Raffaella Carrà, Suprema Corte di Cassazione, 16407/2003.

15 All Arts Tax Advisers and Erasmus University Rotterdam, the Netherlands.

in the company in the tax haven. Initially, the Commentary on Article 17 recommended to use Article 17(2) only in these abusive situations, the so called 'limited approach'. But with the 1992 Commentary the OECD switched to the 'unlimited approach', which means that any payment to another person than the performer is also taxable in the performance state.

The 1987 OECD Report[16] with contributions from the ECD Member States contained clear expressions of mistrust of performers.[17] To make taxation easier, the Report gave the option for gross taxation, so that expenses are not deductible, but under the condition that the tax rate should then be lower than normal.[18] Many states have chosen for this option in their national legislation. But unfortunately, this non-deductibility of expenses very often leads to excessive taxation, when the tax in the residence state is insufficient for the credit for the foreign tax. Molenaar illustrated this with a clear example, which easily happens in practice.

He discussed further that it very often occurs that a tax credit cannot be obtained in the residence state in various situations:

– a tax certificate is not available;
– the tax certificate is released in the name of the group, but the tax credit needs to be obtained by the performers;
– an administrative conflict with monthly salary administration may arise;
– the tax certificate is issued in a foreign language and is not accepted by the local tax inspector.

These tax credit problems result in double taxation for the performer, because he is taxed in both the performance and the residence state.

The problem of the non-deductibility of expenses seems to be solved in the EU with the CJEU decisions in the *Gerritse* and *Scorpio* cases.[19] Many EU states have implemented these decisions in their national legislation since then (such as Germany, Austria, Spain, Belgium, Sweden), although some are still reluctant, such as Italy.[20] The CJEU decisions have brought the OECD to change section 10 of the Commentary on Article 17 in its 2008 Update, which now gives the option for gross taxation at a low rate or allow the deduction of expenses and tax returns after the year with taxation at normal rates.[21]

Molenaar also discussed the potential unequal treatment between subsidized and non-subsidized performers that could result from Article 17(3) OECD MC, because subsidized performers that meet the conditions are better off than non- or not enough-subsidized performers when it comes to administrative expenses and the risk of excessive or even double taxation. He doubts whether there could be a justification for this difference in treatment, which would mean that the provision would be against the freedom principles of Treaty on the Functioning of the European Union (TFEU).[22]

Molenaar set up a discussion about the taxation of orchestras and theatre and dance groups under Article 17(2) and the potential unequal treatment within the EU when domestic orchestras are exempted from corporation tax. Normally, the special national taxing rules for non-resident artistes tax any performance fee regardless of the recipient and Article 17(2) confirms this, which means that also the profit element of the entity that receives the income will be taxed.[23] But this may be in conflict with the decision of the CJEU in the *Stauffer* case,[24] according to which this national exemption also has to apply to non-residents, which meet the conditions other than the place of residence.

A radical change was made by the Netherlands in 2007, where source taxation for non-resident performers was abolished, when these performers come from a state with which the Netherlands have concluded bilateral tax treaties and are not employees of a Dutch resident company. What is interesting is that the Netherlands does have the taxing right under Article 17 of its tax treaties, but that with this unilateral exemption it does not make use of it anymore. Reasons for the abolition were that the administrative expenses for this taxation were too high[25] and that the tax revenue was too low.[26] The unilateral exemption means that the Netherlands has returned to the

**Notes**

[16] 'Taxation of Entertainers, Artistes and Sportsmen', in *Issues in International Taxation*, no. 2 (Paris: OECD 1987).

[17] Sections 7 and 8 have these expressions: 'clear evidence of non-compliance', 'rarely disclose casual earnings', 'sophisticated tax avoidance schemes, many involving the use of tax havens, are frequently employed by top-ranking artistes and athletes', 'relatively unsophisticated people – in the business sense – can be precipitated into great riches', 'travel, entertainment and various forms of ostentation are inherent in the business and there is a tendency to be represented by adventurous but not very good accountants'.

[18] Section 94 of the 1987 OECD Report, taken over in s. 10 of the 1992 Commentary on Art. 17 OECD.

[19] See notes 9 and 10.

[20] See para. 5 for presentation of Andrea Parolini.

[21] The OECD gives a text proposal in s. 10 of the Commentary, which can be used for tax treaties, but in practice this text has not been inserted in any new bilateral tax treaty.

[22] Dick Molenaar And Harald Grams, 'Article 17(3) for Artistes and Sportsmen: Much More than an Exception', 41 Intertax 4 (2012).

[23] This is recognized in s. 11(b) of the Commentary on Art. 17 OECD MC.

[24] CJEU 14 Sep. 2006, C-386/04 (Centro di Musicologia Walter Stauffer).

[25] The Dutch government has calculated a savings of EUR 1.6 million per year.

[26] With this unilateral exemption the Netherlands gave up EUR 5 million tax revenue per year.

normal taxing rights under Articles 7 and 15 of the OECD MC.

The Dutch example was followed by an exemption from source tax for quite some major international sports events.[27] In sports, the international bodies achieved to avoid double taxation and take away administrative expenses that follow from the source taxation. Molenaar pointed out that such an exemption do not have to cost any tax revenue when it is agreed reciprocally, so that also no tax credits for foreign source tax are to be given.

Molenaar explained that it is not possible for the EU to end the source tax for performers within the European Union. The Treaty of the Functioning of the TFEU) has very limited powers regarding direct taxation and the ECJ decision in the *X NV* case (*Football Club Feyenoord*) has confirmed that it is up to the Member States to levy source tax from non-resident performers, also with a withholding tax.[28]

In the 2014 Update of the OECD Model, which was released just two days before the seminar, many changes to the Commentary on Article 17 were made.[29] Molenaar touched upon the various options offered by this new Commentary to take away the negative effects of the article:

(a) Restrict Article 17 to individual business activities and exempt normal employees.[30]

(b) Allow the deduction of expenses and use of normal tax rates.[31]

(c) Adopt the limited approach for Article 17(2), so that this provision is only applicable to personal artiste companies (abusive situations).[32]

(d) Exemption for subsidized artists and sportsmen, non-profit organizations and cultural exchange in Article 17(3).[33]

(e) Introduce a de-minimis-amount per performer per year, as the USD 20,000 threshold in the 2006 US Model Tax Convention treaties.[34]

Molenaar concluded his presentation by stating that in his view Article 17 should be removed from the OECD Model MC. He gave a number of reasons in this respect, as the Article is not necessary against tax avoidance, because there are no tax treaties with tax havens, the loss of tax revenue from non-residents is negligible when the removal is done reciprocally, the risk of excessive or double taxation disappears and it leads to less administrative work and expenses. While on the other hand, Molenaar insisted that source taxation should remain for non-resident performers without a resident of residing in non-treaty countries, such as Monaco.

Together with the 2014 Update, the OECD has also published the report *Issues related to Article 17 of the Model Tax Convention*,[35] in which it starts with the suggestion that Article 17 should be deleted, which has been initiated by the Netherlands and was discussed by the Member States, but that they have decided to keep the article as it is, with the changes in the new Commentary, as Molenaar explained in his presentation.

## 6 Influence of European Law

Mario Tenore[36] discussed the case law of the CJEU in which substantive and procedural measures for artistes (and sportsmen) have been tested for their compatibility with the freedom to provide services (Article 56 TFEU). Tenore gave an overview of such obstacles, analysing the relating case law and drawing some conclusions as to whether the case law has contributed to the elimination of these obstacles.

With regard to the deduction of expenses, Tenore pointed out that the CJEU has ruled that directly linked expenses are to be taken into account at the time of the performance. That is the moment of the withholding of the tax, which means that directly linked expenses should be deductible immediately and not in the framework of a refund procedure afterwards, because that would entail additional administrative and economic burden.[37] In this

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27 In particular, a exemptions from source tax was provided: in 2010 for the Winter Olympics held in Vancouver (Canada), in 2011 for the ICC World Cup Cricket held in India (after problems in 2004 with the Champions Trophy), in 2011 for the Champions League Final held in London (UK), in 2012 for the Summer Olympics held London (UK), in 2014 for the Winter Olympics held in Sochi (Russia) and in 2014 for the World Cup held Brazil.

28 CJEU 18 Oct. 2012, C-498/10 (X NV (Football Club Feyenoord)).

29 *2014 Update to the OECD Model Tax Convention*, adopted by OECD Coun cil on 15 Jul. 2014.

30 Section 2 of the Commentary.

31 Section 10 of the Commentary.

32 Sections 11 and 16 of the Commentary.

33 Sections 14 and 15.1 of the Commentary.

34 Section 20 of the Commentary.

35 *Issues related to Art. 17 of the Model Tax Convention*, adopted by the OECD Committee on Fiscal Affairs on 26 Jun. 2014.

36 Maisto & Associati, Milan, Italy.

37 See *Scorpio* decision (note 11), s. 47.

respect the CJEU seems to take a more generous approach than in the case law in other areas, such as dividends, where the CJEU has taken an opposite position.[38] On the other hand, refund procedures are necessary for expenses which are not directly linked to the performance.[39] Tenore mentioned that section 10 of the Commentary on Article 17, as changed in 2008, is nonetheless not fully consistent with EU law as it does not clarify when the expenses are to be taken into account and does not contain any statement regarding direct and indirect expenses.

Tenore questioned whether EU Member States are allowed to levy a withholding tax and pointed out that the CJEU generally considers a withholding tax obligation as a legitimate and appropriate means of ensuring the tax treatment of the income of a non-resident performer (to the extent no discrimination is involved) as well as an appropriate means of ensuring the effective collection of the tax due. The discussion turned then on the liability requirement imposed on the payor. The case law of the CJEU shows that liability of the withholding agent should be justified as it ensures the effective collection of tax even in the light of the opportunities provided for in the Directive for mutual assistance in the recovery of taxes. In this respect, however, Tenore pointed out that case law has not been consistent. In the *Scorpio* decision, section 36[40] the CJEU held that the WHT was justified because in 1993 no Community directive referred to mutual administrative assistance concerning the recovery of tax debts between the states. Later in *Commission v. Belgium*,[41] section 32, the CJEU decided that the withholding obligation constituted a restriction on the freedom to provide services, which was not justified. Subsequently, in the *X NV* case,[42] section 53, the CJEU came to the opposite (and final) conclusion that the application of the withholding obligation of the payor is justified by the need to ensure the effective collection of tax, even after the implementation of the EU Directive 76/308 about the mutual assistance concerning the recovery of taxes.

## 7 VAT, Social Security and Tax Problems

Mark Wingate[43] closed the seminar with several VAT, social security, and tax issues, which he had gathered from his advisory role with the Association of British Orchestras (ABO) and the International Association of Music Agents (IAMA), both based in the UK.

Wingate started with the EU VAT system, in which individual Member States are allowed to decide about their VAT rates and exemptions for the music (and cultural) sector. Normally, self-employed performers are taxable for VAT and their cross-border B2B services will be subject to the reverse charge mechanism, if the administrative requirements are met. But Wingate gave an example of a conductor of a ballet, a US resident, performing in Germany, where he claimed the reduced rate VAT rate of 7%, instead of the ordinary VAT rate of 19%. The ballet, however, deducted this VAT from his fee because it was exempted under German VAT rules and could not reclaim this VAT as input tax. An intervention from the audience, however, learned that also the conductor could be exempted in Germany, when recognized as such by the *Bundesland* in which the ballet is based.[44]

Wingate also analysed the social security aspects of performances. He concluded that performers as self-employed individuals, who normally work in one EU Member State but also have temporary engagements in another Member State, remain subject to social security exclusively in the first Member State, if the work in the other Member State does not exceed twenty-four months.[45] To apply this exemption, some states require an A1 (formerly E101) declaration from the first Member State, while other states have unilateral exemptions for non-resident self-employed persons with short-term contracts. He also explained that the nature of an activity is determined by the first Member State where the self-employed will normally work, which means that the actual activity is stronger than a designation of employed activity which may be given to the activity by the other Member State.[46] Wingate gave practical examples from Sweden, France, and Spain, where these social security rules were not correctly applied and contributions were withheld from non-resident performers with short-term arrangements.

Wingate also showed the practical problems for UK orchestras with the taxation of concerts in Germany.

**Notes**

[38] See CJEU 12 Dec. 2006, C-446/04 (FII GLO), s. 53.

[39] CJEU 15 Feb. 2007, C-345/04 (Centro Equestre da Leziria Grande Lda).

[40] See note 10.

[41] CJEU 9 Nov. 2006, C-433/04 (*Commission v. Belgium*), which is not a case about performers.

[42] CJEU 18 Oct. 2012, C-498/10 (X NV (Football Club Feyenoord)).

[43] Smith & Williamson, London, UK.

[44] This exemption is specified in s. 20, Nr. 4 of the German *Umsatzsteuergesetz* and was initiated by the decision CJEU 5 Apr. 2003, C-144/00 (Matthias Hoffmann).

[45] Article 12(2) of Regulation 883/2004/EC.

[46] Article 14(4) of Regulation 987/2009/EC.

Article 16(1)[47] of this treaty allocates the taxation right for these artistes to Germany as the performance country, while Article 16(2) extended this taxing right to the situation the income accrues to another person than the performer. But Article 16(3) gives an exemption for performances in the other state, when the visit is financed entirely or mainly from public funds of the residence state, a political subdivision or a local authority of a 'Land' or by an organization which in the residence state is recognized as a charitable organization. In such a case the performance income shall only be taxable in the residence state. The UK orchestras read from this Article 16(3) that there are two options, which is either being subsidized for more than 50% ór being recognized as a charitable organization. Where UK orchestras are most often subsidized for less than 50%, but are recognized as charities, this would give them a German tax exemption on the second argument. But the German text of Article 16(3) gives another view on this exemption, saying:

*Die Absätze 1 und 2 gelten nicht für Einkünfte aus der von Künstlern oder Sportlern in einem Vertragsstaat ausgeübten Tätigkeit, wenn der Aufenthalt in diesem Staat ganz oder überwiegend aus öffentlichen Mitteln des anderen Vertragsstaats, einem seiner Länder oder einer Gebietskörperschaft eines Landes oder eines Vertragsstaats oder von einer im anderen Staat als gemeinnützig anerkannten Einrichtung finanziert wird*.'

From the German text follows clearly that charities itself do not fall under Article 16(3), but that funding received from charities can be added to government subsidies for the 50% threshold. Because the UK orchestras do not meet this condition, they are taxable in Germany.

In addition to this, Wingate discussed a problem with the elimination of double taxation under Article 23 of the Germany-UK tax treaty. The UK allows a foreign tax credit only to the orchestra, because this entity has received the performance income, while Germany has taxed the full income, including the payments to the performers. Because UK orchestras as charities are exempted from UK corporation tax, they do not have a UK tax liability and therefore cannot offset the foreign tax as a credit. This means practically that because of this mismatch between taxing rules in the performance and the residence state, double taxation occurs.[48]

## 8 Summary and conclusions

The seminar 'Music and Taxation: The State of Art' gave much information about the special tax rules for musicians and other performers, both in domestic law and bilateral tax treaties. The presentations from France, the UK, and Italy showed that non-resident performers fall under a withholding tax, even when they are self-employed and do not have a permanent establishment in the performance state. In France, the tax rate can go up to 75% when the income is paid to a non-cooperative state, in the UK, also endorsement income paid outside the UK is taxable when there is a connection with the performance in the UK, and in Italy, the CJEU decisions in the *Gerritse* and *Scorpio* cases have not been implemented yet, which means that expenses are not deductible and tax returns cannot be filed by non-resident performers.

Also tax treaties contain a special rule for artistes and other performers, following the recommendation from the OECD to include Article 17, giving the performance state the right to tax the income of non-resident performers. Understandable in the fight against tax avoidance and non-compliance, but unfortunately the special provision leads to more problems than it solves, which was illustrated by many examples in the presentations. The practical use of Article 17 very often results in excessive or even double taxation, because of the non-deductibility of expenses, the inability to obtain foreign tax credits and the mismatches in interpretation by the performance and the residence state. The OECD has decided not to follow the initiative from the Netherlands to delete Article 17, but has changed parts of the Commentary on Article 17 to improve the practical use of the article.

The tax problems for performers have also been under discussion in several CJEU cases, but because the EU does not have the authority for measures in the field of direct taxation, the CJEU needed to refer to the freedom principles of the TFEU to break down the tax obstacles for cross-border performances. The CJEU succeed when it comes to the deductibility of expenses and the use of normal tax rates, but left the right to tax the payor of the performance fee with the performance state. The seminar expressed interesting thoughts about potential new cases for the CJEU regarding Article 17(2) and (3).

Also VAT and social security matters were briefly discussed, showing that performers with short-term contracts in other states can easily experience more levies than necessary.

After a lively discussion between the audience, the moderators, and the panel members, the seminar had to come to a close because the opening concert of the Verbier Music Festival was about to start.

Notes

[47] After the deletion of Art. 14 for self-employed work from the OECD MC in 2000, many new tax treaties have the special rules for artistes and sportsmen in Art. 16 instead of Art. 17. The OECD MC itself has kept the same numbering, but specifies that Art. 14 has been deleted.

[48] An intervention from the audience referred to the potential unequal treatment following from Art. 17(2), which was discussed earlier by Molenaar in his presentation, where he made a comparison with the Stauffer case of the CJEU (see note 24).

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This established international tax journal offers detailed coverage of direct tax, indirect tax, and social security from both legal and economic angles, and provides 12 issues a year of practical, up-to-date, high-level international tax information. Coverage includes all aspects of transnational tax issues. The journal includes authoritative, reliable content, written for tax attorneys, practitioners (litigation and transactional) in other areas where international tax issues are a concern, and academics.

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Manuscripts should be submitted to the General Editor, Fred de Hosson.
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