

Entertainers and Sportspersons under the Revised Netherlands Tax Treaty Policy

In this note, the author comments on the Netherlands' recent decision to reverse its tax treaty policy to exclude article 17 from new tax treaties.

1. Introduction

The Netherlands has changed its tax treaty policy applicable to entertainers and sportspersons. On 29 May 2020, the Secretary of Finance sent a proposal to the Netherlands parliament, in which he discusses, in general, Netherlands tax treaty policy, including BEPS, taxation of the digital economy and the country's relationship with developing countries. It also addresses, however, a proposal for how the Netherlands should deal with the taxation of entertainers and sportspersons. In contrast to the existing tax treaty policy, the Netherlands wants to return to the use of article 17 both in its bilateral tax treaties and its national tax law. This will realign the Netherlands with the OECD Model (2017),¹ potentially creating tax problems for international entertainers and sportspersons performing in and outside the Netherlands.

2. Current Netherlands Tax Treaty Policy (2011)

The current tax treaty policy, published in 2011, contains a remarkable and progressive paragraph regarding entertainers and sportspersons. In 2007, the Netherlands unilaterally abolished the taxation of foreign entertainers and sportspersons working in its territory, provided they are resident in a state with which the Netherlands has concluded a tax treaty. This made life much easier for foreign entertainers, sportspersons and their teams and companies because it removed the risk of double taxation. It also ensured less administrative work for Netherlands organizers of events in relation to such performances.²

Following this step, the Netherlands expressed, in its 2011 tax treaty policy, that it wanted the same result for its resident entertainers and sportspersons engaging in performances abroad. This meant no special rule (article 17) in its tax treaties. Instead, there would be an allocation under the normal rules of article 7 (Business Profits) or article 15 (Dependent Personal Services). This would remove double taxation and administrative expenses for Netherlands entertainers and sportspersons.

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1. *OECD Model Tax Convention on Income and on Capital* (21 Nov. 2017), Treaties & Models IBFD.
2. The Netherlands source tax rate for non-resident entertainers and sportspersons was 20%, subject to a possibility to apply for a deduction of expenses from a special office of the tax authorities (*Belastingdienst*).

3. Tax Treaty Negotiations after 2011

The first tax treaty concluded after 2011 was successful. Ethiopia agreed, in 2012, not to include article 17 in its new treaty with the Netherlands.³ The Ethiopians argued that they wanted to tax the income of their athletes without having to allow for a tax credit for foreign withholding tax. This was aligned with the new Netherlands intentions, so the tax treaty was concluded without an article 17.

The second tax treaty was a renegotiated tax treaty with Germany in 2012.⁴ This ended in disappointment, as the tax treaty included article 16, which corresponded to article 17 of the OECD Model (2017). The only exception made was for subsidized entertainers and sportspersons, mentioned in paragraph 3. The condition was that they be "wholly or mainly" subsidized, which means more than 50% government financial support.⁵ Unfortunately, this exemption, in practice, is not available to sportspersons, but only to certain classical orchestras and dance companies. The Netherlands Secretary of Finance wrote to the parliament that paragraph 3 is aligned with the 2011 tax treaty policy, but this was incorrect information. In the end, as other articles in the new tax treaty were far more important than the new article 16, the Netherlands parliament did not push the Secretary of Finance regarding this element of treaty policy.

The subsequent tax treaties and protocols with China (2013),⁶ Norway (2013),⁷ Denmark (2018),⁸ Ireland (2019),⁹ etc. also contained a special article for entertainers and

3. *Convention between the Kingdom of the Netherlands and the Federal Democratic Republic of Ethiopia for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income* (10 Aug. 2012), Treaties & Models IBFD.
4. *Convention between the Federal Republic of Germany and the Kingdom of the Netherlands for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income* (12 Apr. 2012), Treaties & Models IBFD.
5. This exception amounts to an option to restrict the scope of article 17 and is mentioned in *OECD Model Tax Convention on Income and on Capital: Commentary on Article 17* para. 14 (21 Nov. 2017), Treaties & Models IBFD.
6. *Agreement between the Government of the Netherlands and the Government of the People's Republic of China for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income* (31 May 2013), Treaties & Models IBFD.
7. *Protocol Amending the Convention between the Kingdom of Norway and the Kingdom of the Netherlands for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income and on Capital* (23 Apr. 2013), Treaties & Models IBFD.
8. *Protocol Amending the Convention between the Kingdom of the Netherlands and the Kingdom of Denmark for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income and on Capital* (21 Nov. 2018), Treaties & Models IBFD.
9. *Convention between Ireland and the Kingdom of the Netherlands for the Elimination of Double Taxation with Respect to Taxes on Income and Capital Gains and the Prevention of Tax Evasion and Avoidance* (13 June 2019), Treaties & Models IBFD.

sportspersons. In almost every new tax treaty, the Netherlands included the paragraph 3 exception for “wholly or mainly subsidized” entertainers and sportspersons, not because it worked, but probably because it is mentioned in around two-thirds of tax treaties worldwide.¹⁰

Positive news came in 2019 in respect of the new tax treaty with Iraq,¹¹ which did not include a special article for entertainers and sportspersons. Again, a developing country wanted to retain full taxing rights over its residents.

4. OECD Decided to Retain Article 17

As early as 2010, the Netherlands had started to promote, within the OECD, the idea that article 17 should be removed from the OECD Model because it was not needed to counteract the tax avoidance behaviour of international entertainers and sportspersons and leads to double taxation and administrative obstacles. This was made public at the September 2010 IFA Congress in Rome, where the representative of the Netherlands Ministry of Finance explained why the Netherlands had not been applying article 17 since 2007.¹²

This came some months after the OECD had published its 2010 Discussion Draft about article 17, meant to clarify the Commentary. The Draft contained reactions from several sides and raised the issue as to whether article 17 should be removed from the OECD Model.

After a discussion with its member countries, the OECD came to the conclusion, in 2014, that it wanted to retain article 17.¹³ The OECD gave three reasons for this decision:

- residence taxation should not be assumed, given the difficulties in obtaining the relevant information;
- article 17 allows for the taxation of a number of high-income earners who can easily move their residence to low-tax jurisdictions; and
- source taxation of the income covered by the article can be administered relatively easily.

Further, the OECD provided additional options to restrict the scope of article 17 of the OECD Model, as follows:¹⁴

- the exclusion of employees (paragraph 2 of the Commentary on Article 17 of the OECD Model), so that article 15 prevails over article 17;
- taxation on a net basis (paragraph 10 of the Commentary on Article 17 of the OECD Model);

10. See D. Molenaar, *Article 17 for Sportspersons and Artistes: Much More Than an Exception*, 40 *Intertax* 4, p. 270 (2012).

11. *Convention between the Kingdom of the Netherlands and the Republic of Iraq for the Elimination of Double Taxation with Respect to Income and the Prevention of Tax Evasion and Avoidance* (1 July 2019), Treaties & Models IBFD (not yet in force).

12. See R. Vann, D. Molenaar & M. Tenore, *Red Card Article 17?*, 66 *Bull. Intl. Taxn.* 3, p. 127 (2012), *Journal Articles & Papers IBFD*.

13. OECD, *Issues related to Article 17 of the Model Tax Convention* (26 June 2014). This was adopted in the 2014 Update to the OECD Model (*OECD Model Tax Convention on Income and on Capital* (26 July 2014), Treaties & Models IBFD).

14. See D. Molenaar, *New options to restrict Article 17 of the OECD Model for sportspersons*, 6 *Global Sports Law and Taxation Reports* 1, p. 44 (Mar. 2015).

- a minimum threshold (paragraphs 10.1-10.4 of the Commentary on Article 17 of the OECD Model), such as under the US Model (2016);¹⁵
- an exemption for events funded from public funds (paragraph 14 of the Commentary on Article 17 of the OECD Model); and
- a limited approach under article 17(2) (paragraph 16 of the Commentary on Article 17 of the OECD Model), as employed by Canada, Switzerland and the United States.

5. 2020 Netherlands Tax Treaty Policy

The Netherlands Secretary of Finance acknowledges, in the new tax treaty policy, that article 17 creates problems of double taxation and high administrative expenses for entertainers and sportspersons. But he also concludes that, after nine years, most treaty partners do not want to leave out article 17 in negotiating new tax treaties with the Netherlands. Therefore, he is proposing to the Netherlands parliament to realign tax treaty policy with the OECD approach by including article 17 in tax treaties. He also, however, wants to make use of three of the possible restrictions mentioned in the OECD Commentary, i.e. the deduction of expenses, the minimum threshold and the exception for performances financed from public funds.

As a consequence of this return to the OECD line, he also wants to undertake a study regarding ending the unilateral exemption for non-resident entertainers and sportspersons performing in the Netherlands, which has existed since 2007. This study should indicate whether this Netherlands taxation can be reintroduced in such a manner that it would not cause too many problems for organizers, as well as entertainers and sportspersons.

6. Comments

6.1. In general

This change in the Netherlands tax treaty policy is disappointing for both Netherlands and non-resident sportsmen and entertainers and for the organizers of performances. The Netherlands put significant effort at the OECD level, from 2014 onwards, into removing article 17 from the OECD Model. It is understandable that they gave up, as other tax topics are much more important and detrimental to the Netherlands position internationally, such as BEPS and taxation of the digital economy. But it is also strange that the Netherlands did not criticize the three OECD reasons to retain article 17.

6.2. Why the three OECD reasons are wrong

6.2.1. Difficulties in obtaining the relevant information

The relevant information can, these days, be easily obtained by the residence state because past performance dates can be found on the Internet, payments are made

15. *United States Model Income Tax Convention* (17 Feb. 2016), Treaties & Models IBFD. The *OECD Model Tax Convention on Income and on Capital* (26 July 2014), Treaties & Models IBFD, uses IMF SDR 15,000, which is EUR 18,000, but the *US Model* (2016) refers to USD 30,000.

almost exclusively through banks and states are improving their exchange of information.¹⁶

6.2.2. High-income earners moving their residence to low-tax jurisdictions

Low-tax jurisdictions, such as Monaco, do not have tax treaties, which means that article 17 has no effect. To counteract the move to tax havens, states only need to have a unilateral source of withholding tax on outgoing income. Why would, for example, the Netherlands need to have an article 17 in a treaty with, for example, Belgium, France, Germany or the United Kingdom?

6.2.3. Source taxation can be administered relatively easily

Why is this true only for entertainers and sportspersons? The same argument is not applied to other targets of taxation, such as the self-employed, royalties, dividends, employment income and pensions. Moreover, source taxation makes it more complicated, because the income needs to be reported in two states and double taxation must be eliminated.

The conclusion needs to be that the reasons for retaining article 17 are wrong. We do not need article 17 in the modern world; life would be much easier without such an intrusive tax provision.

6.3. Low tax revenue

Furthermore, the taxation of non-resident entertainers and sportspersons does not bring much tax revenue to a state. In 2019, the Minister of Finance in Belgium provided the tax earnings shown in Table 1 (per year in millions of euros) as an answer to parliamentary questions.¹⁷

Year	Entertainers	Sportspersons	Total revenue
2014	14.7	2.4	17.1
2015	14.7	3.5	18.2
2016	16.0	3.4	19.4
2017	17.6	4.4	22.0
2018	16.7	4.2	20.9

Belgium had 11.3 million citizens in 2017 and is an open and active state with many performances and sports events, which means that the tax revenue can be extrapolated to other states (for the year 2017), as shown in Table 2.

State	Citizens (millions)	Tax rate (%)	Estimated tax revenue (EUR million)
Australia	25.5	29	80.0
Austria	8.9	20	19.3
Canada	37.6	15	61.0
Denmark ¹	5.8	–	11.3
France	67.0	15	108.7
Germany	83.0	15.825	142.1
Ireland ²	4.9	–	9.5
Netherlands ³	17.3	–	33.7
Sweden	10.2	15	16.5
United Kingdom	66.7	20	144.3
United States	325.1	30	1,054.9

1 This estimated tax revenue is theoretical, because Denmark does not have a source withholding tax for non-resident entertainers and sportspersons.
2 Ireland also does not have a source withholding tax.
3 The same as for Denmark and Ireland.

What these figures do not take into account is the possibility of deducting expenses in advance or filing tax returns after the year end. This is often done in Australia, Germany, the United Kingdom and the United States and would be possible in the Netherlands, so the real figures regarding tax revenue will be lower than the figures mentioned in those states.

Therefore, altogether, these figures are not impressive. In addition, the total tax revenue in each state will go down considerably because of the tax credits (or exemptions) for resident entertainers and sportspersons engaging in foreign performances and sports events. On balance, no real tax revenue will remain for a state, which means that not including an article 17 in a tax treaty will lead to the same result.

6.4. More options based on the OECD Commentary are possible

If the Netherlands government really cannot leave out an article 17 from new tax treaties, then the best alternative would be a combination of:

- a minimum threshold of, for example, EUR 25,000 per person per year; and
- a limited approach to article 17(2), as employed by Canada, Switzerland and the United States.

This would exempt smaller and medium-sized entertainers and sportspersons, as well as normal teams, clubs, orchestras, groups and production companies at source. Then article 17 would remain only for high earners, including when they are using their own legal entity.

Furthermore, the exception for employees would be good to include in new tax treaties because the three OECD reasons do not apply to real employment situations. It is, in any event, clear that these restrictions are much more

16. As already mentioned in H. Grams, *Artist Taxation: Art. 17 of the OECD Model Treaty – A Relic of Primeval Tax Times?*, 27 *Intertax* 5, p. 189 (1999).
17. Answers from Minister of Finance Alexander De Croo on Parliamentary Questions from Servais Verherstraeten (8 Aug. 2019).

effective than article 17(3) for subsidized entertainers and sportspersons.

7. Final Words

The Netherlands has been the frontrunner in the pursuit of better taxation of internationally performing entertainers and sportspersons, but now wants to give up and return to the OECD line by inserting article 17 into new tax treaties. It is doing this even though the three OECD reasons for article 17 are wrong and that tax revenue in this respect is very low. This, unfortunately, indicates that the interest in entertainers and sportspersons is very small in comparison to other tax topics.

The Netherlands might, however, achieve some success with its policy of including a minimum threshold for entertainers and sportspersons in new tax treaties. As of now, only the United States employs such a threshold: thus, article 16(1) of the US Model (2016) raised the amount to USD 30,000 (EUR 25,000) per person per year. This would work very well combined with the limited approach of article 17(2). Other possible restrictions based on the Commentary on the OECD Model (2017) could, however, also be inserted easily into new Netherlands tax treaties.

An interesting test will be the new tax treaty with Belgium, which will be agreed in the near future. Will it contain an article 17 for entertainers and sportspersons? The three OECD reasons do not apply to Belgium-Netherlands relations because information regarding performances in the other state is easy to obtain, the states are not tax havens and a source tax is more complicated than sole residence state taxation. Furthermore, the tax revenue will be around the same with or without an article 17 for entertainers and sportspersons.

What is also promising is the fact that some developing countries do not want an article 17 in their tax treaty with the Netherlands, such as Ethiopia and Iraq. They will benefit from increased tax revenue when there is no withholding tax in a developed state.

The Netherlands wants to return to the OECD line, but it also needs to protect the interests of its resident sportspersons, artists and organizers of events. The new 2020 tax treaty policy looks to be a major step backwards, although the Secretary of Finance still has an opportunity, in tax treaty negotiations, to show the opposite. Hopefully, enough effort will be put into this lively topic.



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