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Red Card Article 17?

In this article, the authors assess the current position regarding the debate over article 17 of the OECD Model (2010) and whether or not the provision should be amended, or even be considered for removal from the OECD Model.

1. Introduction¹

The number and importance of international sporting events are constantly increasing and these are generating very significant revenues. Apart from the monster events with worldwide involvement such as the Summer and Winter Olympic Games and the FIFA World Cup, there are other major events that occur on a four-year cycle on a worldwide or regional basis such as the Rugby and Cricket World Cups, and the UEFA Euro Cup. Annual international circuits in various sports include the tennis Grand Slam and WTP events and the motor racing's F1, and there are an increasing number of leagues and competitions that operate across borders, such as the UEFA Champions and Europa Leagues, North American baseball, northern and southern hemisphere rugby (Six and Tri Nations, Heineken Cup and Super Rugby), and various golf tournaments and tours.

Equally, entertainers often embark on massive global concert tours, such as Coldplay, Rihanna and U2, and major festivals, like Big Day Out, Glastonbury, Pinkpop and Roskilde, attract large audiences, while many relatively unknown entertainers regularly perform in other countries.

Artistes and sportsmen (to use the terminology of the OECD Model (2010)² for entertainers and sporting stars) who perform internationally are taxed in a special manner. Most countries where a performance occurs impose a withholding tax on the fees of artistes and sportsmen, which is permitted by article 17 of the OECD Model (2010) that gives the country of performance the right to tax the income of a non-resident artiste or sports-

man from their activities as such in the country, regardless of whether they are self-employed or employees. The article is an exception to the normal rules of articles 7 and 15 of the OECD Model (2010), under which income is only taxable in a country other than residence if it is attributable to a permanent establishment (PE) in that other country in respect of self employment or after a presence of 183 days in the country for employment (if the employer is a non-resident and does not have a PE in that other country which bears the payment of the employment income). According to the OECD,³ the rule can be regarded as an anti-avoidance measure to prevent often highly remunerated and mobile artistes and sportsmen paying tax in any country, i.e. neither in the source nor residence countries, by various means ranging from artificial tax avoidance structures to outright evasion (the non-reporting of income).

But article 17 also causes problems, especially for not so rich and famous artistes and sportsmen. With the OECD permitting gross taxation in the country of performance,⁴ the taxable base there is very often much higher than the taxable base in the country of residence because the former does not allow deduction of expenses of earning the income, whereas the latter usually does. This very often leads to excessive taxation, even when the withholding rate is lower than the tax rate in the residence country and double taxation is possible because of problems with the application of tax credits in the residence country.⁵ These two problems can only be prevented by considerable taxpayer compliance and tax administration cost.

More recently, there have been varied responses to the problems that are elaborated in this article. The Netherlands has decided not to tax performance fees at source for artistes and sportsmen resident in treaty countries and various major international sports bodies have flexed their negotiating muscles to obtain tax exemptions from countries to which major sports events have been awarded. The OECD is also giving new attention to article 17. In 2008,⁶ it added the option for net taxation in the Commentary and, in April 2010, published a Discussion Draft with more proposed changes in the Commentary

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1. This article is based on Seminar E (the "Seminar"), the subject of which was "IFA/OECD: red card 17", of the 2010 Rome IFA Congress. The panel members consisted of Mary Bennett (OECD), Andrew Dawson (United Kingdom), Prof. Dr Xavier Oberson (Switzerland), Michael Pfeifer (United States), Aart Roelofsen (Netherlands) and Jacques Sasseville (OECD). The Seminar was chaired by Richard Vann (Australia) with the help of Mario Tenore (Italy) as panel secretary. The facts of the case studies were drafted by Jacques Sasseville.
 2. *OECD Model Tax Convention on Income and on Capital* (condensed version) art. 17, at 32 (22 July 2010), Models IBFD.

3. OECD, *Taxation of Entertainers, Artistes and Sportsmen*, Issues in International Taxation No. 2 (1987).
 4. See OECD Model Tax Convention on Income and on Capital: Commentary on Article 17 para. 10 at 273 (22 July 2010), Models IBFD, which states that countries can decide to tax the gross performance income, but then need to apply a low tax rate. Since 2008, this paragraph also provides a specimen treaty provision in tax treaties for net taxation at source, but this has not yet made much headway in actual tax treaties.
 5. See, for examples and a survey about deductible expenses, and tax credits, respectively, D. Molenaar, *Taxation of International Performing Artistes* chap. 8 and sec. 7.2.7. (IBFD 2005), Online Books, IBFD.
 6. *OECD Model Tax Convention on Income and on Capital: Commentary on Article 17* para. 10 (17 July 2008), Models IBFD.

which formed the basis for the 2010 International Fiscal Association (IFA)/OECD Seminar E in Rome.⁷

At the same time, problems continue. Usain Bolt decided not to run the 100 metres at Crystal Palace in London in August 2010 and US golf players threatened not to appear at the 2010 Ryder Cup in Wales in September 2010 because of high source taxation in the United Kingdom. This article assesses the current state of play in the debate over article 17 and whether or not the provision should be given a metaphorical “red card” and dismissed from the OECD Model, or at least a “yellow card” and put on notice of a possible sending off unless it improves its behaviour.

2. The History of Article 17

2.1. Introduction and elaboration 1959/92

The special tax rules for international taxation of artistes and sportsmen 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)⁸ with the argument that there were “practical difficulties” when applying the normal taxing rules to this specific group of taxpayers.⁹ Article 17 was extended in OECD Model 1977¹⁰ with the addition of a second paragraph, stating that, when another person (not the artiste or sportsman himself) receives the remuneration for the performance, the source country 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, which recommended that the scope of the “star company” provision be extended to all legal entities receiving fees for artistic and sports performances. This change duly occurred in the next version of the OECD Model (1992),¹¹ but only through a change in interpretation of the existing

7. OECD, *Discussion Draft on the Application of Article 17 (Artistes and Sportsmen) of the OECD Model Tax Convention*, International Organizations' Documents, IBFD, also available at www.oecd.org/dataoecd/31/15/45058769.pdf. Article 17 was also discussed in 1995 at the IFA Congress in Cannes. See IFA Congress Seminar Series Vol. 20d, *Taxation of Non-Resident Entertainers* (Kluwer Law International 1995).

8. OECD Model Tax Convention on Income and on Capital (30 July 1963), Models IBFD.

9. OEEC, *The elimination of double taxation, 2nd Report by the Fiscal Committee of the OEEC* pp. 28 and 41-42 (1959). The OEEC archives are now available at www.taxtreatieshistory.org. The relevant documents leading to the 1959 report are: FC/WP10(57)1; FC/WP10(58)1; FC/M(58)1; FC/M(58)3; FC/M(58)4; FC/M(59)1; FC/M(59)3; FC(58)7; and FC(59)2. The interesting variations are that the article was originally part of the independent personal services article and, therefore, did not apply to employees. At the suggestion of Switzerland, it became a free standing article which, therefore, also applied to employees and was extended, it seems, to cover income of promoters (“those performing for the account of purveyors of entertainment and the purveyors themselves”), and, finally, it was cut back to public entertainers (with a list including artistes of various kinds, musicians and athletes). The emphasis was on income arising from “public performance” in a state though those words disappeared from the final draft.

10. *OECD Model Tax Convention on Income and on Capital* (11 Apr. 1977), Models IBFD.

11. *OECD Model Tax Convention on Income and on Capital* (1 Sept. 1992), Models IBFD.

provision in the Commentary.¹² Accordingly, not only the income of the individual artiste or sportsman, 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 artiste or sportsman 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.¹³ Three countries, Canada, Switzerland and the United States, disagree with this reversal.¹⁴ The United States in the US Model (2006)¹⁵ provides special language to preserve the previous interpretation.¹⁶ Treaty practice to the same effect is also followed by Canada, France and some other countries. Most countries, however, follow the text of the OECD Model and with it the Commentary (2010).

The 1987 OECD Report also noted, as the Commentary does now, that the article does not specify the method of taxation in the country of performance and indicated that some states use gross taxation at a low tax rate.¹⁷ Furthermore, the OECD recommends the use of the tax credit method for the elimination of double taxation when the state of performance does not tax, though the OECD Model was not modified to bring this about and the matter was left to negotiation between countries.¹⁸ This approach was adopted by many countries, even when they normally apply the exemption method to active income. If the residence country still applies the tax exemption method and the country of performance does not use its taxing right or restricts this to a low-tax

12. See OECD, *supra* n. 3, at paras. 88-90. The 1992 change is currently reflected in para. 11, at 273 of the *OECD Model: Commentary on Article 17* (2010).

13. The change attracted some criticism at the time as an undesirable u-turn in the Commentary and has been used as a reason why later Commentaries should not be used to interpret tax treaties signed earlier (see D. Ward et al., *The Interpretation of Income Tax Treaties with Particular Reference to the Commentaries on the OECD Model* p. 83 (IBFD 2005)).

14. In the 1987 OECD Report, *supra* n. 3, at Annex, para. 6, Canada and the United States made an Observation on, i.e. disagreed with, the new Commentary. In para. 16, at 275 of the *OECD Model: Commentary on Article 17* (2010), this has changed to a Reservation proposing the use of a different version of the paragraph and includes Switzerland.

15. US Model Income Tax Convention art. 16 (15 Nov. 2006), Models IBFD and *Technical Explanation* (2006), Models IBFD. The *US Model* (2006) and *Technical Explanation* are also available at www.treasury.gov/resource-center/tax-policy/treaties/Documents/model006.pdf and www.treasury.gov/resource-center/tax-policy/treaties/Documents/TEMod006.pdf, respectively.

16. It is not immediately obvious from the *US Model* (2006) that this is the effect. The Model provides that para. 2 of art. 16 does not apply if “the contract pursuant to which the personal activities are performed allows that other person to designate the individual who is to perform the personal activities”. The *Technical Explanation* makes clear what is intended: “[t]he premise of this rule is that, in a case where a performer is using another person in an attempt to circumvent the provisions of paragraph 1, the recipient of the services of the performer would contract with a person other than that performer (i.e., a company employing the performer) only if the recipient of the services were certain that the performer himself would perform the services. If instead the person is allowed to designate the individual who is to perform the services, then likely the person is a service company not formed to circumvent the provisions of paragraph 1.”

17. See OECD, *supra* n. 3, at para. 94 and para. 10, at 272 of the *OECD Model: Commentary on Article 17* (2010).

18. See para. 12, at 274 *OECD Model: Commentary on Article 17* (2010).

rate on the net income, the result is double non-taxation or very low taxation.¹⁹

An important common exception to the general rules of article 17 concerns events supported from public funds, such as cultural exchanges. This concern has always been noted in the Commentary and, in 1992, a suggested provision was added to the Commentary though on the condition that the exemption “should be based on clearly definable and objective criteria to ensure they are given only where intended”.²⁰ Many countries have implemented this approach, some long before 1992, others more recently.²¹

2.2. Analysis, criticism and responses 1992/2010

After the changes in the Commentary (1992), more attention was directed to article 17 of the OECD Model. Sandler (1995) published his standard book following a thorough study of the business and the literature around it and in the same year article 17 was also the subject of a seminar at the IFA Congress.²² Furthermore, Betten and Lombardi (1997) demonstrated the complexity of article 17 in triangular situations.²³

The first real criticism on article 17 was by Grams (1999).²⁴ He believed that article 17 was not necessary and that it could be turned around and changed into a similar provision as for royalties. Still, the country of performance should impose a withholding tax under its national tax legislation, but this could be exempted in respect of artistes and sportsmen from countries with which bilateral tax treaties were concluded because normal taxation would then be secured. He argued that, with a good exemption application procedure in the country of performance, the country of residence would be very well aware of the foreign income and be able to audit whether or not this was later included in the worldwide income. This approach was followed by Nitikman (2001),²⁵ who provided an overview of the state of non-resident artiste and sportsman taxation in the United States and the first introduction of a special clause in the Sweden–United States Income and Capital Tax Treaty (1939).²⁶

On more specific issues, the problems with the non-deductibility of expenses under article 17 were discussed by Molenaar (2002)²⁷ who made clear that the difference in the taxable base in the countries of performance and residence could easily lead to excessive taxation. He also argued that, within the European Union, this might be in breach of the freedom principles of the EC Treaty.²⁸ The negative effect of the wide interpretation of the second paragraph following the Commentary (1992) and the problems facing groups of artistes and sportsmen as employees were the subject of a critique by Molenaar and Grams (2002).²⁹ Excessive or even double taxation could be the result of the strict taxing rules following from article 17. One of their conclusions was that some of these problems could be removed by options already available in the Commentary on Article 17, but that these were not used by countries. Molenaar (2005) carried out an extensive survey on the production expenses of performing artistes and came to 75% on average.³⁰ He discussed the problems with obtaining tax credits, and did a survey on the (small) tax revenue from article 17 in four countries and related this to the relatively high administrative expenses for both the performing artistes, the promoters and the tax authorities in two countries. He ended with the same conclusion as Grams and Nitikman, which is that article 17 should be removed.

In 2007, discussions regarding article 17 were held at two conferences.³¹ Sandler started the discussion at both conferences with his contribution that article 17 was both over and under-inclusive in terms of persons and types of income and that he would prefer an extension to all celebrities, including former politicians as speakers, sport coaches, film directors, models and such, but also a restriction to earnings of more than, say, USD 100,000 per year per country. This would catch only the bigger names with the source tax. Molenaar responded that he preferred the full removal of article 17 because it is useless in treaty situations and creates the risk of excessive or even double taxation, but could also accept Sandler’s proposal, which follows from a new “contribution principle”.

Court decisions have also indirectly demonstrated problems in the taxation of international income of artistes and sportsmen under article 17. The European Court of Justice (ECJ) ruled that the non-deductibility of expenses and exclusion from the use of the normal tax rates for non-resident artistes and sportsmen in Germany was not in accordance with the freedom to provide services

19. See R. Betten, *Netherlands Ice Skater not Eligible for Relief for Foreign Training Days*, 45 Eur. Taxn. 6 (2005), Journals IBFD. This also happened with the Spanish national football team playing in the 2010 World Cup Final in South Africa, where the withholding tax was only 15% on the individual income of the players, followed by a tax exemption in Spain. This might have given the Spanish team a tax incentive to defeat the Netherlands team, whose players had to pay additional tax in their residence countries because of the tax credit method in the tax treaties with South Africa.

20. OEEC, *supra* n. 9, at para. 98 and *OECD Model Tax Convention on Income and on Capital: Commentary on Article 17* para. 14, at 164 (1 Sept. 1992).

21. The use by countries varies from one third of the tax treaties concluded by Brazil to virtually all of the tax treaties entered into by Hungary. See Molenaar, *supra* n. 5, at sec. 5.5.

22. D. Sandler, *The Taxation of International Entertainers and Athletes - All the World's a Stage* (Kluwer Law International 1995) and IFA, *supra* n. 7.

23. R. Betten & M. Lombardi, *Article 17(2) of the OECD Model in Triangular Situations*, 51 Bull. Intl. Fiscal Documentation 12 (1997), Journals IBFD.

24. H. Grams, *Artist Taxation: Article 17 of the OECD Model Treaty - a Relic of Primeval Tax Times?*, 27 Intertax 5, p. 188 (1999).

25. J. Nitikman, *Article 17 of the OECD Model Treaty - An Anachronism?*, 29 Intertax 8/9, p. 268 (2001).

26. *Agreement for the Avoidance of Double Taxation and the Establishment of Rules of Reciprocal Administrative Assistance in the case of Income and Other Taxes* (23 Mar. 1939), Treaties IBFD.

27. D. Molenaar, *Obstacles for International Performing Artists*, 42 Eur. Taxn. 4 (2002), Journals IBFD.

28. EC/EU Treaty: Consolidated Versions of the Treaty on European Union and of the Treaty Establishing the European Community, EU Law IBFD.

29. D. Molenaar & H. Grams, *Rent-A-Star, The Purpose of Article 17(2) of the OECD Model Treaty*, 56 Bull. Intl. Fiscal Docn 10 (2002), Journals IBFD.

30. Molenaar, *supra* n. 5.

31. See *International Taxation of artistes & sportsmen* (X. Oberson ed., Schulthess & Bruylant 2009) and *Source Versus Residence: Problems Arising from the Allocation of Taxing Rights in Tax Treaty Law and Possible Alternatives* (M. Lang ed., Wolters Kluwer 2008 and Taxmann 2008).

in the EC Treaty.³² This no doubt influenced the change to the Commentary (2008), offering countries the option between gross and net taxation.³³ Two UK court decisions in 2003 and 2006 discussed the endorsement income of tennis players, first with three unknown international tennis players and secondly with André Agassi. They had entered into endorsement contracts with the manufacturers and resellers of tennis equipment and clothing. The conclusion in these cases was that an equivalent part of the worldwide endorsement income also had to be allocated to the UK performances. The taxable income of the tennis players was substantially increased.³⁴ The UK tax authorities apply this extensive interpretation to other sports events, such as the London Marathon, Wimbledon, the Open Golf Championship, athletic events and the 2010 Ryder Cup in Wales. In 2010, the United States followed the UK approach and forced several golf players, such as the South Africans Charles Schwartzel and Retief Goosen,³⁵ to report an equal part of their endorsement in the United States.

There have been a number of responses to these various issues. The small tax revenue and relatively high compliance and administrative costs resulted in the Netherlands adopting the unilateral measure not to use the taxing right anymore from 2007 onwards for non-resident artistes and sportsmen resident in countries with which the Netherlands has concluded bilateral tax treaties.³⁶ Figures from the Netherlands tax administration from 2003 showed that the tax revenue was a mere EUR 7 million per year, even though the option to deduct expenses and file income tax returns was not used by every non-resident artiste and sportsman. The unilateral measure was estimated to cost the Netherlands EUR 5 million per year, but it would save all parties involved EUR 1.6 million costs per year. This made it a very good trade-off in the Netherlands and the non-resident artistes and sportsmen would normally pay income tax in their residence countries, under the presumption that the tax credit method is used in the bilateral tax treaty, which was the case in 78 of the 90 tax treaties concluded by the Netherlands in 2007. The Netherlands government announced that it would start negotiations with the other 12 countries to change the exemption into the credit method.³⁷ The Netherlands

removal of its artiste and sportsman withholding tax was welcomed by the artistes and sportsmen visiting the Netherlands as a very positive development because it took away much administrative work and the risk of double or excessive taxation.

Major international sporting bodies also entered the fray. The International Olympic Committee (IOC) agreed with Canada for the 2010 Winter Olympics in Vancouver to exempt the participating sportsmen and national teams from source taxation. The IOC had set as a condition for the Olympic bid, after experiences with complicated tax issues for participating sportsmen at earlier Olympics, that no source tax should be levied from the direct prize monies or the related other earnings, such as sponsoring, advertisement income and bonuses from national federations. This was against the Canadian national tax rules, which apply a 15% withholding tax on performance income for non-resident sportsmen, with the option to file a normal Canadian income tax return at the end of the year, but still the Canadians accepted the exemption for the 2010 Winter Olympics. Furthermore, there was no Indian withholding tax for the International Cricket Council World Cup Cricket in 2011 and New Zealand gave up its normal 20% withholding tax for the participating national teams in the 2011 Rugby World Cup.

The OECD has not entered these larger debates, but, on 23 April 2010, it published a Discussion Draft for changes in the Commentary on Article 17³⁸ because of various issues that had been raised about the interpretation of the article. In the first place, the OECD with reference to the term “entertainer” instead of “artiste” clarifies what in its view falls under article 17, such as the prize money of an amateur and advertisements and interviews directly related to entertainment and sports events, but also what falls outside the scope of the article, such as the reporting or commenting by an entertainer or sportsman in broadcasting who does not participate in the match or tournament.³⁹ The Discussion Draft also makes it clear that the income of the owner of a race car or horse does not fall under article 17 with regard to prize money won and that preparation and training come under the “personal activities as such” of entertainers and sportsmen.

The taxation in two stages in some countries, thereby creating the risk that the non-resident artiste or sportsman is taxed twice at source, is noted and it is suggested that such countries should leave out the income at the second level.⁴⁰ An optional text for competitions with teams from different countries is suggested that would exclude source taxation. There are suggested rules to break down income and expenses of tours through various countries. The

32. DE: ECJ, 12 June 2003, Case C-234/01 *Arnoud Gerritse v. Finanzamt Neukölln-Nord*, ECJ Case Law IBFD and DE: ECJ, 3 Oct. 2006, Case C-290/04, *FKP Scorpio Konzertproduktionen GmbH v. Finanzamt Hamburg-Eimsbüttel*, ECJ Case Law IBFD.

33. See *supra* n. 4.

34. UK: SC, 2003, *Mr Set, Miss Deuce & Mr Ball v. Robinson* [2003] UKSC SPC00373 and UK: HL, 17 May 2006, *Agassi v. Robinson* [2006] UKHL 23.

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

36. D. Molenaar & H. Grams, *Scorpio and The Netherlands: Major Changes in Artiste and Sportsman Taxation in the European Union*, 47 Eur. Taxn. 2 (2007), Journals IBFD.

37. *Convention Between the Republic of Austria and the Kingdom of the Netherlands for the Avoidance of Double Taxation with respect to Taxes on Income and Capital* [unofficial translation] (21 Apr. 1972) (as amended through 2009), Treaties IBFD and *Convention Between the Kingdom of the Netherlands and the Republic of Estonia for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with respect to Taxes on Income and on Capital* (14 Mar. 1997) (as amended through 2005), Treaties IBFD have since been changed. Currently, eight tax treaties still have the exemption method and lead to double non-taxation for artistes

and sportsmen from those countries for their Netherlands performance income. One of the major countries is Spain.

38. OECD, *Discussion Draft*, *supra* n. 7.

39. CA: TC, 2002, *Cheek v. Her Majesty the Queen*, 2002 DTC 1283. See N. Boidman, *Canadian Taxation of Foreign Service Providers: Tax Treaty Issues and Court Decisions*, 56 Bull. Intl. Fiscal Documentation 7 (2002), Journals IBFD. The OECD also considers that models at fashion shows, former politicians at speaking engagements and independent concert promoters are outside the scope of the article.

40. An example of such two-tier taxation is Germany with DE: *Ausländersteuer* at the 1. Stufe and 2. Stufe.

OECD clarifies that prizes and awards paid to national federations, associations and leagues fall under the article, but that merchandising and broadcasting income only fall under the article when there is direct connection with specific performances, and that this is the same for the use of image rights.

As with other Discussion Drafts, the OECD asked for comments. Ten individuals and organizations responded.⁴¹ They gave their practical experience with article 17, raised various problems and suggested further improvements or asked for removal of the article.

3. Case Studies

3.1. Case 1: football player and team

3.1.1. Facts

Ron is a football player resident of State R who plays for SOCO, a professional football team established in State T. Ron is paid an annual salary of 1 million plus various bonuses based on his performance. His contract provides that he must participate in all training sessions and be available to play in all the matches of his club. Under a separate agreement between SOCO and RONCO, a company established in State H and wholly-owned by Ron, SOCO is entitled to use the “image rights” of Ron on a non-exclusive basis. As part of that agreement, SOCO pays to RONCO an amount roughly equal to Ron’s salary of 1 million. But, in fact, during the period covered by the contract, SOCO makes very limited use of Ron’s image (he appears with all the other players in a few team pictures). The league in which SOCO participates includes two teams in State S. As a result, SOCO plays four of its 40 games in State S during 2010. SOCO is entitled to a share of the ticket sales for each of these matches.

During the year, Ron is present in State S for 30 working days (out of 200 working days, which include days of travel, training and matches): these are 18 days of pre-season training not directly related to a match (out of 140 days when he trains); eight days of travel and training before and after matches played in State S; and four days when he prepares for the four matches played by SOCO in State S, although he actually only plays in one of them (he plays in 30 matches during the year).

While the provisions of all the relevant tax treaties are generally identical to those of the OECD Model, article 17 of the State S-State T Tax Treaty includes the following additional paragraph (the “league provision”):

3. The provisions of paragraphs 1 and 2 shall not apply to the income of:
 - a) an athlete in respect of his activities as an employee of a team which participates in a league with regularly scheduled games in both Contracting States; or
 - b) a team described in subparagraph a).

41. All Arts Tax Advisers, *Cirque du Soleil*, Ricardo da Palma Borges, *Fédération des Employeurs du Spectacle Vivant Public et Privé* (FEPS), Cristian Garate, Music Managers Forum (MMF), Performing Arts Employers Associations League Europe (Pearle*), RSM Tenon, Schlote Productions, Taxand and Dr Craig West, available at www.oecd.org/document/48/0,3746,en_2649_33747_45783920_1_1_1_1,00.html.

3.1.2. Taxation of Ron’s salary in State S

Ron’s taxation in State S with regard to the salary relies at first on the relevant domestic law of such State. If State S were the United Kingdom, for example, the salary payments of Ron would be taxed in the proportion of 30:200, where 30 is the number of days spent by Ron in State S for purposes related to the performance there. This taxation is consistent with the State R-State S Tax Treaty as proposed to be interpreted by the OECD.

From a Swiss perspective, the situation appears to be rather different. In a similar situation, the Swiss Federal Tribunal, i.e. the Swiss Supreme Court (*Tribunal fédéral*),⁴² denied the application of article 17 of the Netherlands–Switzerland Income and Capital Tax Treaty (1951).⁴³ The case dealt with a professional cyclist, resident in (and national of) Switzerland, employed by a Netherlands team participating in races all over Europe, including the Netherlands. The issue was whether or not the salary attributable to races in States other than Switzerland and the Netherlands (Belgium, France, Germany, Italy and Spain) was taxable in Switzerland. This case (the “cyclist case”) raises many of the issues covered in the draft OECD proposal to amend the Commentary on Article 17. The Court then looked at the Netherlands–Switzerland Income and Capital Tax Treaty (1951) and recognized that the person had to be considered a sportsman under article 17 of the tax treaty. The question was, however, whether or not there was a sufficient link between the salary related to races in third States and the activity of the sportsman as such. The Supreme Court ruled, in essence, that the income from third countries was not sufficiently linked with a specific performance, including training, in those countries. The Court took an opposite approach to what the Discussion Draft suggests and affirmed that, in the case at issue, there was a mere indirect link that made article 17 not applicable. The Supreme Court, instead, upheld the application of article 15 of the tax treaty. According to this provision, however, the Swiss Court concluded that, as the cyclist was not present in any of the third states for a period of longer than 183 days, Switzerland had an exclusive right to tax the salary attributable to races in third states. The “cyclist case” shows how the Swiss case law favours a very restrictive application of article 17, based on the existence of a direct link between the salary and the performance.

A different approach, which is more consistent with the OECD Discussion Draft, was upheld in Netherlands case law. Three recent decisions dealt with the exemption in the Netherlands with regard to a portion of the salary referred to a performance held abroad.⁴⁴ The Netherlands Supreme Court (*Hoge Raad*) adopted an approach

42. CH: TF, 6 May 2008, A. et B.X. c. Tribunal administratif Administration fiscale cantonale du canton de Berne, 2C_276/2007, Tax Treaty Case Law IBFD.

43. *Convention Between the Kingdom of the Netherlands and the Swiss Confederation for the Avoidance of Double Taxation with respect to Taxes on Income and Capital* [unofficial translation] (12 Nov. 1951) (as amended through 1966), Treaties IBFD.

44. NL: HR, 9 Feb. 2007, BNB 2007/142, 2007/143 and 2007/144, Tax Treaty Case Law IBFD.

consistent with that taken in the United Kingdom. The reasoning of the Netherlands Court was the following: at the time the contract was agreed the parties already knew about the performances abroad and there was no additional payment for such performances; the salary would, therefore, have been paid even if there was no competition at all. The link between the performance and salary was strong enough to attribute part of the salary to the performances abroad. In determining the income to be considered foreign sourced (and, therefore, exempt in the Netherlands), the Court affirmed that days of training, stand by in the foreign country, travelling and necessary stay had to be taken into account insofar as they were all related to the performance abroad. In one of the three cases, the Court also clarified that, in the absence of a sportive performance, performing at a press conference or promoting the name of a sponsor had to be considered activities falling within the scope of article 17.

Unlike Switzerland, both the Netherlands and the United Kingdom appear to comply with what the OECD Discussion Draft suggests: article 17 should also extend to income from third states and, in determining the amount of such income, preparation and training days must be taken into account, being days to be regarded as working days.

So far as the proposed OECD Commentary provides for taxing training days in a state which are not linked to a particular performance there (apart from the training itself), the history of article 17 suggests that this goes beyond the original intention which was only to confer taxing rights where there was a public performance (which was not used in the sense of the performance involved in training). Once annual salaries not directly linked to specific performances are involved, however, as is nowadays common, apportionment necessarily becomes an issue and the sensible approach seems to be to use a method based on days of presence. Omitting training days in a state not associated with a performance effectively allocates those days to the state of residence under such an apportionment approach, depending on the accident of whether particular training is associated with a performance in the state.

3.1.3. The application of the “league provision” to Ron

Canada is one of the few countries that has included in (some of) its tax treaties the “league provision”; this provision provides that article 17 will: (1) neither apply to the income of an athlete member of a team (participating regularly in scheduled games taking place in the two contracting states); nor (2) to the income of the team itself. This provision is intended to provide some administrative ease and certainty; the provision assumes that the members of the team are resident in the same country where the team is established. However, in reality, this is increasingly not the case, just as in Case 1, where Ron is resident of State R and is employed by a team established in State T.

In paragraph 14.1 of the OECD Discussion Draft,⁴⁵ the OECD has proposed an alternative provision, with similar effects to the league provision included in the State S-State T Tax Treaty, although the provision does not cover triangular situations.

State T, therefore, does not obtain additional taxing rights over Ron under the league provision. It applies article 17 of the State R-State T Tax Treaty and, therefore, it would only tax the income from Ron’s employment activities exercised therein, taking into account the working days spent in State D, which also include training days, days of travel as well as the days of the matches.

3.1.4. Taxation of bonuses and image rights

Performance bonuses should be treated like salary as far as the apportionment is concerned, unless a particular bonus payment is related to a specific event, such as scoring a goal in a particular football match.

Some tax treaties contain specific provisions dealing with bonuses: the Canada–United States Income and Capital Tax Treaty (1980),⁴⁶ for example, has a special rule on signing bonuses (also known as “inducement bonuses”). The provision states:

Notwithstanding the provisions of Articles XIV ... and XV ... (Dependent personal services) an amount paid by a resident of a Contracting State to a resident of the other Contracting State as an inducement to sign an agreement relating to the performance of the services of an athlete (other than [salary]) may be taxed in the first-mentioned State, but the tax so charged shall not exceed 15 per cent of the gross amount of such payment.

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45. OECD, *Discussion Draft*, *supra* n. 7, at para. 14.1 states that: “Also, given the administrative difficulties involved in allocating to specific activities taking place in a State the overall employment remuneration of individual members of a foreign team, troupe or orchestra, and in taxing the relevant part of that remuneration, some States may consider it appropriate not to tax such remuneration. Whilst a State could unilaterally decide to exempt such remuneration, such a unilateral solution would not be reciprocal and would give rise to the problem described in paragraph 12 above where the exemption method is used by the State of residence of the person deriving such income. These States may therefore consider it appropriate to exclude such remuneration from the scope of the Article. Whilst paragraph 2 above indicates that one solution would be to amend the text of the Article so that it does not apply with respect to income from employment, some States may prefer a narrower exception dealing with cases that they frequently encounter in practice. The following is an example of a provision applicable to members of a sports team that could be used for that purpose:
‘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 sportsman 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.’
The Agreement Between the Government of Australia and the Government of New Zealand for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with respect to Taxes on Income (27 Jan. 1995), Treaties IBFD also contained a league provision but it was limited to the income of the players and did not include the team. Further, it excluded leagues that involve the national teams and leagues involving third countries which knocked out the Tri Nations Rugby competition on two counts and Super Rugby on one count. The revised version in the *Convention Between Australia and New Zealand for the Avoidance of Double Taxation with respect to Taxes on Income and Fringe Benefits and the Prevention of Fiscal Evasion* (26 June 2009), Treaties IBFD has removed the requirement that the league only involve the two countries so that Super Rugby now qualifies in respect of games played in Australia and New Zealand.
46. *Convention Between Canada and the United States of America with respect to Taxes on Income and on Capital* (26 Sept. 1980) (as amended through 2007), Treaties IBFD.

These types of bonuses are paid prior to the performance and they, therefore, raise the issue of whether or not they are related to performance. In particular, the signing bonus is linked to a future performance, and, therefore, before actual performance takes place. The signing bonuses may be paid directly to the sportsman (such as in the US sport leagues) or be paid as transfer fees to the team (as in European and Latin American countries). When such bonuses are not paid directly to the sportsmen, the issue is which part of the payment ultimately reaches the performer.

On the other hand, with regard to the taxation of payments for image rights, it must be remarked that, in the case under discussion, Ron's team made little use of such rights. Such payments are often considered a disguised remuneration: in many countries, for example, in the Netherlands and the United Kingdom, they would likely be treated as remuneration and taxed in accordance with article 17(1) and (2). (The fact that the payment is to RONCO rather than Ron is taken up subsequently.)

From a Swiss perspective, the taxation of the image rights depends on whether Switzerland is the state of residence of Ron or of the "star company". In the first case, the issue would be the recognition of the company. In the second case, the issue would be whether or not the "star company" does have actual substance, taking into account also the abuse of law doctrine. Should the "star company" be considered a mere fiduciary, i.e. an entity with no actual substance, Switzerland would ignore the existence of the company and would tax the non-resident sportsman in respect of the income derived from the image right.

Whether or not payments made for the use of image rights should be regarded as a form of disguised remuneration, however, still remains a doubtful issue. During Seminar E, the panellists gave some examples. What if the organizer of a tennis tournament pays a famous tennis player for the right to use her picture on posters to advertise tournament in which she plays? Promoting the tournament is clearly related to the performance, and, therefore, no doubts should arise about the application of article 17.

What if a soccer team pays one of its famous soccer players for the right to use his picture on a team calendar? This case raises some more doubts, as the link with the performance is more remote than in the previous case; only in a broad sense would it be possible to argue that the remuneration is related to the games that the soccer player plays in the season.

What if a videogame producer pays a soccer player to use his picture in a video game? In this case, the remuneration would likely be unrelated to performance by the player in particular countries, but, rather, related to the reputation or the fame of the player. Article 17 should, therefore, not be applicable in such case.

Finally, it is worth noting that in the United States, the Internal Revenue Service (IRS) in 2010 issued a "General Legal Advice Memorandum" on endorsement income. The IRS pointed out that in many cases the incremental

value to the player, if any, is rather marginal, for example, when the right to use his or her name and likeness rights is not valuable on a stand-alone basis. Accordingly, retainer fees paid under such contracts should be characterized as income from personal services and, to the extent that the fees are related to services performed in the United States, taxed on a net basis at graduated rates. Vice versa, in the atypical situation, in which a player can establish that the sponsor retained the player to use his or her name and likeness rights on a stand-alone basis, for example, to market a signature line of equipment, a portion of the retainer fees may be characterized as royalties or, depending on the facts, may be effectively connected with the conduct of that player's US trade or business.

3.1.5. Taxation of SOCO and RONCO in State S

Due to the existence of the league provision included in the State S-State T Tax Treaty, article 17 would not be applicable to the team that is a resident enterprise of State T (as noted previously, this tax treaty does not apply to Ron as he is resident in a third state, i.e. State R). Accordingly, article 7 would apply to the income of the team from the games in State S, thereby preventing this income from being taxed in State S in the absence of a PE of SOCO in State S. In the case of a tax treaty similar to the OECD Model (lacking the league provision), would the team be taxable under article 17? The provision refers to artistes and sportsmen, but the Commentary since 1992 has made clear that article 17(2) includes the team.⁴⁷

This approach is generally shared by the OECD Member countries; for example, if the Netherlands were State S, there would be no doubt about the application of article 17 to the team as such.⁴⁸

An additional issue related to the taxation of the team, is constituted by the possible double taxation that might arise when the team and the sportsmen are taxed with regard to the same profit element. In this regard, the OECD Discussion Draft suggests that the team should not be taxed on the payments that are passed on the entertainer or the sportsmen so as to avoid the application of article 17(2) resulting in double taxation of the same income. The Commentary, however, recognizes that it may be too difficult to allocate the remuneration to the team members, thereby suggesting in this case the taxation of the team.

In this respect, it is worth mentioning the reservation of Canada, Switzerland and the United States, according to which the application of article 17(2) should be targeted

47. Para. 11(b), at 163 of the *OECD Model: Commentary on Article 17* (1992): "[t]he second is the team, troupe, orchestra, etc. which is constituted as a legal entity... The profit element accruing from a performance to the legal entity would be liable to tax under paragraph 2 [of Article 17]".

48. See the case before the ECJ about two UK football clubs, which had played friendly matches in the Netherlands in 2002 and 2004 (NL: ECJ, Case C-498/10, X, ECJ Case Law IBFD). D. Molenaar & H. Grams, *The ECJ X Case (Football Club Feyenoord)*, 51 Eur. Taxn. 8 (2011), *Journals IBFD*. This article discusses how the home and away matches in the UEFA competitions (Champions League and Europa League) escape art. 17 source taxation and that UEFA since 2011 requires the state that wants to organize the final to exempt the earnings from source tax.

to tax avoidance arrangements and the provision in the United States Model effectively limiting it to “star companies”.

The approach envisaged in the OECD Discussion Draft is adopted in the United Kingdom, for example, to prevent the application of article 17(2) to cause possible double taxation problems when the team and the sportsmen are taxed with regard to the same profit element.

Finally, it is worth mentioning that, if State S were Switzerland and the team was a jazz or a rock band, Switzerland would tax the promoter who has the domestic tax liability on the payment to the band. There is a pending controversy with a somewhat similar reasoning for the organizer of a football match.

With regard to RONCO which is resident in State H, article 17(2) of the State S-State H Tax Treaty would apply according to the current OECD Commentary.⁴⁹ The OECD Discussion Draft does not propose any change to this position. The issue of whether or not the image rights income paid to RONCO is attributable to the performance has been discussed previously.

3.1.6. *The future of article 17*

It is apparent from this case study that taxation involves considerable difficulties and that states may well disagree on how various issues are to be handled. As noted previously, issues of these kinds have led the Netherlands to abandon the exercise of its taxing rights under article 17 in respect of residents of treaty countries, with little apparent cost to revenue and considerable saving of compliance costs to taxpayers.

The Netherlands has, in effect, given article 17 a red card and this raises the question of whether or not other countries should do likewise. It was pointed out, however, with an example of the Swiss lump-sum taxation system for certain wealthy foreigners, that the abandonment of source taxation in favour of residence taxation may lead to a (further) migration of entertainers and sportsmen subject to article 17 to such low tax countries with a suitable treaty network.

Well-intentioned changes to source taxation can have unexpected effects. Shipping companies which are taxed on a residence only basis in most countries have long since migrated to shipping havens and most developed countries have had to introduce tonnage taxes (effectively little tax at all) to get their shipping industries back again. Would the same result occur if article 17 is removed from the OECD Model?

3.2. Case 2: the big international tournament

3.2.1. *Facts*

State S has been awarded the organization of the 2013 tournament of WIFAA, an international federation established in State R, which is the world governing body for

49. See para. 11.1, at 274 of the *OECD Model: Commentary on Article 17* (2010).

a major sport. Sixteen teams from various countries will participate in that tournament. The Local Organizing Committee (LOC) and State S have contractually agreed that State S would set-up de facto tax free-zones around WIFAA designated sites where the tournament will take place (a condition for hosting the tournament). In each of these zones, WIFAA and its subsidiaries as well as all the foreign teams will be exempt from all income taxes, customs duties and VAT. In these zones, WIFAA commercial subsidiaries, its licensees, merchandise partners and service providers will be exempt from income taxes on their profits. It has been agreed, however, that VAT will be paid on tickets sold by the LOC, but not on the tickets given to WIFAA. Subject to the applicable laws and tax treaties, all non-resident players will pay tax on salaries and prizes derived from their participation in the tournament, except on the prizes awarded by WIFAA.

WIF-TV, the wholly-owned broadcasting subsidiary of WIFAA, which is a resident of State R, has sold the rights to broadcast the tournament matches in State S to SCC, a company resident of State S. In consideration for these rights, SCC will pay WIF-TV a significant lump-sum amount and will provide, free of charge to WIFAA and the LOC, 500 advertising slots for WIFAA events and the tournament. WIF-TV has entered into similar contracts with broadcasters in a number of different countries; these agreements provide that the live feed for each match of the tournament will be provided by WIF-TV through its host broadcaster. Around 50% of the money derived by WIF-TV from the granting of the broadcasting rights will be distributed to the teams that will compete in the tournament and 30% will go to the LOC. Each foreign broadcaster that has secured broadcasting rights will send its commentators and journalists to State S for periods ranging from a few weeks to several months. These commentators and journalists, who are often former athletes and famous members of teams that did not qualify for the tournament, will travel across the country to broadcast the matches and to provide interviews and reports before and after these matches.

3.2.2. *Payments for broadcasting rights*

With regard to payments for broadcasting rights the OECD Discussion Draft provides new suggested Commentary as follows:

9.4 Payments for the simultaneous broadcasting of a performance by an entertainer or sportsman made directly to the performer or for his benefit (e.g. a payment made to the star-company of the performer) fall within the scope of Article 17 (see paragraph 18 of the Commentary on Article 12, which also deals with payments for the subsequent sales or public playing of recordings of the performance). Where, however, the payment is made to a third party (e.g. the owner of the broadcasting rights) and that payment does not benefit the performer, the payment is not related to the personal activities of the performer and therefore does not constitute income derived by a person as an entertainer or sportsman from his personal activities as such. For example, where the organiser of a football tournament holds all intellectual property rights in the event and, as such, receives payments for broadcasting rights related to the event, Article 17 does not apply to these payments; similarly, Article 17 will not apply

to any share of these payments that will be distributed to the participating teams. Whether such payments will constitute royalties covered by Article 12 will depend, among other things, on the legal nature of such broadcasting rights, in particular under the relevant copyright law.

With regard to broadcasting rights, the observation by Germany in the Commentary on Article 17) is noteworthy:

15. ... Germany, considering paragraph 18 of the Commentary on Article 12, takes the view that payments made as remuneration for live broadcasting rights of an event are income of the performing or appearing sportspersons or artistes under paragraph 1 of Article 17. This income may be taxed in accordance with paragraph 2 of Article 17 in the case of payments made to any other third party in the context of an economic exploitation of the live broadcasting rights.

It is to be noted that the proposed new Commentary leaves open the question whether or not such payments are royalties – if not, presumably they will be business profits or other income. This matter is important because of the common treaty practice of permitting tax on royalties at source even though this is not the position in the OECD Model. In a number of countries it is considered that if the organizer running the event never owns the copyright, but, rather, the copyright vests initially in the broadcaster, then payments to the organizer cannot be payments for copyright. The payment in effect is simply for access to the venue and permission for the broadcaster to make a recording of the event in which the broadcaster holds the copyright. There are cases in India coming to that conclusion and in Australia the tax administration has given up claims in some cases that the payments are royalties.

Some countries seek to clarify this issue in treaties (with if necessary supporting rules in domestic law). For instance, under the Mexico–Russia Income Tax Treaty (2004),⁵⁰ the term “royalties ... includes payments of any kind as consideration for the reception of, or the right to receive, visual images or sounds, or both, transmitted to the public by satellite or by cable, optic fibre or similar technology, or the use in connection with television broadcasting or radio broadcasting”. Australia has similar provisions in domestic law and recent tax treaties, but it is still considered by many Australian advisers that the provisions do not catch the payment by the broadcaster to the organizer of the sporting (or entertainment) event. Rather, the provisions are dealing with cable TV and the like generally and deal with payments by the cable broadcaster for content to the copyright owner or another broadcaster. The matter may be tested in litigation in Australia in the near future.

3.2.3. Special exemptions

The recent tendency of international sporting organizations to flex their negotiation muscles in choosing the location of major sporting events has already been noted.

50. *Agreement Between the Government of the Russian Federation and the Government of the United Mexican States for the Avoidance of Double Taxation with respect to Taxes on Income* art. 12(3) (7 June 2004), Treaties IBFD.

These were not isolated examples but reflect a growing trend. With regard to the 2012 Olympics Games, the United Kingdom has introduced a special tax regime that provides for many exemptions in favour of the London organizing committee, the competitors and the entourage. The exemptions extend to income tax, capital gains tax and corporation tax, but not to VAT.

In the Netherlands, similar issues were raised with regard to the 2018 FIFA World Cup that the Netherlands proposed it would organize together with Belgium. There was an intense public debate, but, ultimately, it was decided that the conditions demanded by the FIFA were too onerous.

Similar issues arose in Brazil, where legislation was enacted to cover the fiscal periods 2013 and 2014 on the occasion of the 2014 FIFA World Cup. The same was also true in South Africa for both the 2009 Confederation Cup and the 2010 FIFA World Cup. It is not so much the taxation of the organizing entity that counts, such an entity being a non-profit organization. What is relevant is the scope of the exemptions that covers import taxes, excise taxes for the organizing entity and its subsidiaries, royalties, and credit and insurance transactions. In Brazil, for example, the exemption has been extended to referees, although this does not cover other Brazilian-source income.

In Europe, some of the tax issues have been sidestepped by other means. In the matches in the UEFA Champions or Europa League football, the tournaments are organized so that every home club keeps its own box office earnings and does not pay anything to the visiting foreign clubs. Accordingly, in the UEFA competitions there is no taxable foreign performance income under article 17 of the OECD Model for the participating football clubs. Furthermore, UEFA collects the revenue from the TV rights, a portion of which is paid to the participating clubs, based on their results and size of their home state. If these payments fall under article 12 of the OECD Model (discussed previously), which allocates the taxing right to the residence state, there is no risk of excessive or even double taxation in respect of competitions as source taxation is eliminated.

This differs from the finals for the Champions League and Europa League, which are played on independent soil (not the home country of either finalist). In 2011, the Champions League final was at Wembley stadium in London and the Europa League final was in the Dublin arena. The box office earnings for these finals are shared by the two clubs and the UEFA, which means that the state where the final is held can levy tax if the finalists are non-residents. Due to pressure from the UEFA, however, the United Kingdom gave up its withholding tax in regard to the Champions League final. Ireland did not levy any tax with regard to the Europa League final, as there is no domestic withholding tax provision applicable to non-resident sportsmen and artistes. This means that, although the United Kingdom normally levies a 20% withholding tax, subject to a right to deduct expenses at source and an optional income tax settlement at the end

of the year, the teams of the Champions League final in 2011 received their gross fees free from any deduction and pay tax (if any) in their residence state.

With regard to the UEFA Euro Cup for national teams, which, in 2012, is to be held in Poland and Ukraine, UEFA has also forced both organizing states to allow an exemption for the 24 participating national teams.

3.2.4. More erosion of article 17

Even where countries seek to tax income produced by sporting events, it is becoming increasingly difficult to do so because of the negotiating might of major international sporting organizations. For sporting organizations that lack such negotiating strength, there are other avenues available to produce similar outcomes. The result often is that many highly paid sports stars manage to avoid tax in the country of performance, while lower paid sports persons may not, even though in the latter case the cost of collection and compliance may exceed the revenue collected.

Highly paid entertainers do not as yet seem to have achieved the negotiating position of the sporting organizations, but even in this area by other means (such as generous tax concessions and transfer payments), the people behind the entertainers like large film studios have managed to improve their tax and financial position at the expense of states, which no doubt allows them to pay higher amounts to the entertainers.

3.3. Case 3: the tennis player

3.3.1. Facts

Renée is a famous tennis player resident of State R. One of the 20 tournaments in which Renée participates in 2010 takes place in State S (she wins that tournament). Under a sponsorship contract with HCO, resident of State T, Renée is paid 600,000 per year for wearing HCO's trade mark and trade name on her tennis shirts during tennis tournaments, including in matches and interviews. In addition, bonus payments are made by HCO for each tournament in which she reaches the final. In a period of six months during which Renée recovers from an injury, she derives the following income: (1) 100,000 for a public speech in State S to an audience of 5,000 persons who attend a major conference; (2) 50,000 to participate in a televised fashion show, which is recorded in State S, but is broadcasted worldwide, in which she models HCO's clothes; and (3) 50,000 to assist the play-by-play commentator during the broadcast of a tennis tournament in State S.

3.3.2. Endorsement income

The OECD Discussion Draft proposes changes to the Commentary to allocate endorsement income to the place of performance based on the number of tournaments, regardless of their relative importance. An interesting similar case arose in Canada concerning the famous singer Sting (Gordon M. Sumner), who was resi-

dent in the United Kingdom.⁵¹ He performed concerts in Canada under contract with a US company (Roxanne). Sting reported limited income from performances in Canada based on days in Canada during the concert tour. The Court ruled that Sting's income had to be allocated on reasonable basis. Specifically, it held that the gross revenue from concerts was a reasonable basis (more or less an apportionment based on the number of concerts in Canada out of the total number of concerts, similar to the per tournament basis).

The OECD Discussion Draft does not discuss whether or not the new approaches of the United Kingdom and the United States towards endorsement income discussed previously is in line with article 17 of the OECD Model.⁵² Both countries apply their taxing rights extensively, even on endorsement income that is not being paid by an entity in the state or to a resident of the state. But tax courts in both states have confirmed this approach in the *Agassi*⁵³ and *Goosen*⁵⁴ cases.

3.3.3. The cult of celebrity

With regard to the treaty treatment of the payment for the public speech, the proposed changes to the Commentary address the issues as follows:

The payment for the public speech does not fall within Article 17; paragraph 3 of the OECD Commentary on Article 17 makes clear that this provision "... does not extend to a visiting conference speaker (e.g. a former politician who receives a fee for a speaking engagement ...)".

With regard to the payment for the fashion show, the issue of whether or not such a payment is covered by article 17 is more uncertain. The Commentary on Article 17 (2010) affirms that the provision "... does not extend ... to a model performing as such (e.g. a model presenting clothes during a fashion show or photo session...)"; it is, therefore, very likely that the payment in question falls outside the scope of the provision.

The same conclusion is true in regard to the payment as a sport commentator, which is clearly outside article 17.⁵⁵

Endorsement payments and the public speaking and similar spinoffs for entertainers and sports stars relate as much to their celebrity status as to any performance. True it is that the celebrity status starts from the sporting or entertainment performances (and in this regard the proposed new Commentary makes clear the participants in reality TV shows are within article 17), but celebrity quickly takes on a life of its own. A patch on a tennis shirt worn during a tournament clearly relates to the sporting performance, but is the same true for a watch that is taken off during the match, or underwear designed by the sports star (even if worn on the court)?

51. CA: TC, 7 Dec. 1999, *Gordon M. Sumner & Roxanne Music Inc. v. The Queen*, 98-1222(IT)G and 98-1410(IT)G, Tax Treaty Case Law IBFD.
 52. As discussed in sec. 2.2.
 53. See *Agassi* (2006), *supra* n. 34.
 54. See *Goosen* (2001), *supra* n. 35.
 55. The OECD, *Discussion Draft*, *supra* n. 7 states this specifically in the amended para. 3 of the (proposed) new *OECD Model: Commentary on Article 17*.

3.3.4. Familiar shortfalls of article 17

The situations highlighted by this case study cover fairly familiar territory even though there is some additional commentary proposed by the OECD. Article 17 has always seemed to come up short (at least since payments relate more to celebrity than anything else). Activity as a celebrity is activity as a sports star or entertainer, and payments generated by celebrity often do not relate to activity as a sports star or entertainer.

4. Red Card, Yellow Card or As Is, Article 17?

The discussion of the case studies reveal that article 17 of the OECD Model causes many practical problems, such as: (1) when is the artiste performing; (2) how should the salary be attributed when the performances relate to different countries; (3) should the income be taxed on a gross basis; and (4) how can tax credit problems be avoided? Furthermore, the application of article 17 produces administrative and compliance costs that may be ultimately higher than the tax revenue derived from the taxation of the artistes and sportsmen, especially when the withholding tax from non-residents and tax credits for residents are balanced.

In EU Member States, the taxation of artistes has also raised several issues of conflicts with EU law. This has led the Netherlands to review its system of taxing the artistes and sportsmen; the Netherlands system is currently limited to persons resident in non-treaty countries, although this may obviously raise issues of double non-taxation. This approach has also been adopted with regard to major sports events, such as the Olympics, the UEFA Champions League Final, and the EURO Championships, and the Cricket and Rugby World Cups.

The panel members of Seminar E at the 2010 IFA Congress had varying responses. At least one expressed an opinion in favour of removing article 17 because of the many problems and the administrative burdens. Other panellists were more ambivalent, preferring to retain the article, but willing to make amendments, such as a threshold as in the US Model (2006), exemptions for cultural groups, teams in league competitions and, especially, employees. One panel member (tongue firmly in cheek and clearly desiring to be sent off) wanted to retain the article as is because of the lucrative fees it generates for advisers. The chair of the panel expressed doubts about article 17 because of the problems noted previously and the fact

that, when more money was at stake at big sports events, the source tax was removed.

The panel provided two examples from 2010 to demonstrate the special attention high-profile artistes and sportsmen have in the media. The first⁵⁶ was the triple Olympic champion Usain Bolt, who decided not to compete at August 2010's Aviva London Grand Prix because of the United Kingdom's tax laws. The second⁵⁷ was the "Black Stars" football team from Ghana, which reached the quarterfinals at the 2010 World Cup in South Africa. Ghana's Internal Revenue Service demanded tax payments of about USD 349,000 on the earnings of the members of the national soccer team, which reportedly represented 10% of the total income of the team members.⁵⁸

Whatever its specific issues, the chair noted that article 17 is a very special and distinctive measure amongst different types of services. This group of taxpayers very often develop a high value in a short period of time, but the special tax rules create a discussion about fairness versus envy and power. The risk of excessive or double taxation is likely, while the tax revenue from the special taxing rules is limited. He stressed the importance of net taxation to make the special taxing rules fairer and underlined the problems with identification and apportionment. Finally, he believed that no special taxing rules should be given to a specific group of taxpayers, but that general principles should be implemented in the taxation of high value services generally. In devising such principles, it is necessary to balance a variety of competing considerations. Exclusive residence taxation may lead to the shift of high-value service providers to convenient havens. But source taxation can be overdone and probably currently applies to many of the people captured by article 17. The conclusion is that the current application of article 17, as for services generally, is a mess, but cleaning it up is not a simple task.⁵⁹

56. Dexter Communications (July 2010).

57. Tax Analysts (July 2010).

58. The 23 "Black Stars" team members reportedly received USD 70,000 each in appearance fees, USD 45,000 each in winning bonuses for the three group matches and USD 17,000 each at the one-sixteenth stage (the team reached the quarterfinals before being eliminated by Uruguay), and USD 20,000 each as "thank you" gift from the Ghanaian President, John Evans Atta Mills, when they returned to Accra.

59. See also F. Vanistendael, *Seminar E – IFA/OECD: red card 17?* (2 Sept. 2010), News IBFD and B. Arnold, *The Taxation of Income from Services under Tax Treaties: Cleaning Up the Mess*, 65 Bull. Intl. Taxn. 2 (2011), Journals IBFD.