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The Critical Need for Reform of Article 17 (Artistes and Sportsmen) of the OECD Model Tax Treaty

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INTRODUCTION

The taxation of international performing artistes and sportsmen is a small but special topic in international taxation. When an artiste or sportsman performs outside his country of residence, generally the country of performance levies a withholding tax on the performance fees received by the nonresident artiste or sportsman. This is true even if the artiste or sportsman is self-employed, his fees are business income, and he does not have a permanent establishment (PE) in the country of performance. This practice is blessed by the Organisation for Economic Co-operation and Development's (OECD's) Model Tax Treaty, which devotes a special article (Article 17) to artistes and sportsmen.[1] The OECD believes that taxation at source is a reasonable measure to ensure that every artiste and sportsman pays a share of his earnings to the source government, and almost all its member countries follow this approach, both in their bilateral income tax treaties and in their domestic legislation. Article 16 of the 2006 U.S. Model Tax Treaty and Article 17 of the UN Model Tax Treaty also follow Article 17 of the OECD Model and thus many countries around the world have included this special artiste and sportsman provision in their bilateral income tax treaties.

Because artistes and sportsmen also have to report their foreign income in their residence country, double taxation may occur. This is generally relieved in the country of residence by either exempting the foreign income or granting the artiste or sportsman a foreign tax credit. The OECD recommends use of the foreign

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[1] Article 17 provides as follows:

Article 17

Artistes and Sportsmen

1. Notwithstanding the provisions of Articles 7 and 15, income derived by a resident of a Contracting State as an entertainer, such as a theatre, motion picture, radio or television artiste, or a musician, or as a sportsman, from his personal activities as such exercised in the other Contracting State, may be taxed in that other State.

2. Where income in respect of personal activities exercised by an entertainer or a sportsman in his capacity as such accrues not to the entertainer or sportsman himself but to another person, that income may, notwithstanding the provisions of Articles 7 and 15, be taxed in the Contracting State in which the activities of the entertainer or sportsman are exercised.

tax credit (see Article 23B of the OECD Model Tax Treaty),[2] but the tax exemption method is also used, often in older tax treaties and by countries that use a territorial basis for taxation.

This gives the impression that the taxation of performance income of artistes and sportsmen is fair, allowing the country of performance the right to tax the income but reserving a secondary taxing right, involving progressive taxation, for the country of residence. It may seem that a reasonable allocation of income tax has been created, even though it deviates from the normal allocation rules of Article 7 (Business Profits) and Article 15 (Income from Employment) of the OECD Model Tax Treaty.

DISCUSSION OF SIGNIFICANT PROBLEMS WITH ARTICLE 17 IN THE TAX LITERATURE

Unfortunately, this approach has resulted in practical inadequacies, principally because the taxable base in the country of performance can be much higher than in the residence country and thus tax credit problems arise in the country of residence. This, in turn, results in artistes and sportsmen ending up with comparatively high tax advisory costs, both in the country of performance and in the country of residence. The literature shows that these problems occur frequently and that artistes, sportsmen, and the organizers of performances experience the special international taxing rules as an obstacle to cross-border activities.[3] The authors have given clear examples of international excessive taxation in several publications.[4]

The OECD initially did not believe that anything was wrong with Article 17, but nevertheless entered into discussions with its Member States. This resulted in changes in the Commentary on Article 17 in 2008 and in a Discussion Draft for changes to the same Commentary in April 2010. Moreover, in September 2010 at the 64th International Fiscal Association (IFA) Congress in Rome, the OECD participated in a seminar, under the title ''Red Card Article 17?'' in which the legitimacy and necessity of the Article were discussed.

DISCUSSION OF HISTORY OF ARTISTE AND SPORTSMAN TAXATION IN EARLIER TMIJ ARTICLE

In their 2004 *Tax Management International Journal* article titled ''How to Modernize Income Taxation of International Artistes and Sportsmen,'' [5] the authors made the following points concerning the history of artiste and sportsman taxation:

- Article 17 was introduced in the 1963 OECD Model Tax Treaty because of ''practical difficulties'' regarding the taxation of international performing artistes.
- A second paragraph was added to Article 17 in 1977, stating that when another person (not the artiste or sportsman himself) receives the performance income, the source country still holds the right to tax the income. This was meant to counteract tax avoidance schemes using ''loan-out'' or ''star'' companies, normally registered in tax havens.
- More concerns were brought forward in a 1987 OECD report,[6] which recommended that the scope of Article 17(2) be extended to all third parties that could receive fees for artistic and sports performances. This unlimited approach was accepted by most countries, except Canada, the United States, and Switzerland, which made reservations.[7]
- The 1987 Report also allowed countries to tax gross performance income without the deduction of expenses, but only at a low tax rate.[8] It is unclear how this gross taxation at source related to an earlier expression in the 1987 OECD Report

[2] *See* §12 of the Commentary on Article 17 of the OECD Model Tax Treaty.

[3] *See, e.g.,* Sandler, *The Taxation of International Entertainers and Athletes — All the World's a Stage,* Kluwer Law International, The Hague (1995); McAndrew, *Artists, Taxes and Benefits — An International Overview*, Arts Council of England, Research Report 28 (2002); Audeoud, *Mobility in the Cultural Sector*, University of Paris (2002); Staines, *Tax and Social Security — A Basic Guide for Artists and Cultural Operators in Europe*, Publication of Informal European Theatre Meetings (March 2004); Loukota and Stefaner (eds.), *Taxation of Artistes and Sportsmen in International Tax Law* (Vienna: Linde, 2007).

[4] Molenaar, ''Obstacles for International Performing Artistes,'' 42 *European Tax'n* 4 (2002), at 149; Molenaar and Grams, ''Rent-A-Star — The Purpose of Article 17(2) of the OECD Model,'' 56 *Bulletin for Int'l Fiscal Documentation* 10 (2002), at 500; Molenaar and Grams, ''How To Modernize Income Taxation of International Artistes and Sportsmen,'' 33 *Tax Mgmt. Int'l J.* 4 (2004); Molenaar, ''The Illusions of International Artiste and Sportsman Taxation,'' in *A Tax Globalist — Essays in Honour of Maarten J. Ellis*, IBFD (2005), at 90; Molenaar, *Taxation of International Performing Artistes* (Amsterdam: IBFD, 2006); Molenaar and Grams, ''Scorpio and The Netherlands: Major Changes in Artiste and Sportsman Taxation in the European Union,'' 47 *European Tax'n* 2 (2007).

[5] 33 *Tax Mgmt. Int'l J.* 238 (April 2004).

[6] ''Taxation of Entertainers, Artistes and Sportsmen,'' in *Issues in International Taxation*, No. 2 (Paris: OECD, 1987) (hereinafter, ''1987 OECD Report'').

[7] 1987 OECD Report ¶90, later in Commentary on Article 17 OECD Model ¶16.

[8] 1987 OECD Report ¶94, later in Commentary on Article 17 OECD Model ¶10.

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that only the *profit* of a legal entity should be taxed.[9]

- Most countries were using gross taxation for nonresident artistes and sportsmen in 2004. Exceptions were the United States, the United Kingdom, the Netherlands, Canada, Australia, New Zealand, and Hungary.
- A 2001 survey of 150 performances in the Netherlands showed that the expenses for performing artistes were considerable — on average, 76% of the performance income. (The results were shown in graphics in the *TMIJ* article.)
- The non-deductibility of expenses could easily lead to excessive taxation, because the taxed income in the country of performance was much higher than that in the residence country. This could be the case even though the source country was applying a much lower rate than the residence country.[10] An example was given to make this clear.
- Excessive double taxation was also likely to occur because of problems with obtaining a foreign tax credit.
- Some countries had introduced minimum thresholds for smaller artistes and sportsmen in their domestic taxing rules. The United States was using a *de minimis* rule of $20,000 in its Model Tax Treaty.
- The European Court of Justice had decided in the *Arnoud Gerritse* case that the non-deductibility of expenses was against the freedom in the EC Treaty to provide services and ordered the EU Member States to allow taxation based on the application of the normal tax rates to taxable income.[11]
- An optional exception to the general rules of Article 17 of the OECD Model Tax Treaty has been given in Article 17(3) for performances that are substantially supported by public funds.[12] This Article 17(3) is widely used.
- Article 17 might lead to unequal treatment and distortion of competition. This was already recognized by the OECD in its 1987 Report[13] and whether this was justified could be questioned, not only for EU countries under the EC Treaty, but also under the nondiscrimination articles of both the OECD Model Tax Treaty and the U.S. Model Tax Treaty.
- Tax revenue from the performance income of nonresident artistes and sportsmen was relatively low and the administration costs relatively high, both for the artistes and sportsmen and for the tax authorities in the performance and residence countries.
- The conclusion of the authors in the prior *TMIJ* article was that Article 17 was in need of radical change. They proposed that it would be best to change Article 17 into a provision comparable to Article 12 for royalties. This would involve an approach that allowed source taxation under domestic law, but required exemption from source taxation under income tax treaties.
- This radical change would not cause any negative effect on the anti-avoidance mechanism, because the domestic source tax would remain in nontreaty situations. Compliance would be secured through an exemption procedure, which made the residence country aware of the foreign income. Furthermore, if necessary, treaty partners could agree on a minimal withholding tax, so that they could still share the tax revenue, as happens often under Article 12 for royalties.

THE DEDUCTIBILITY OF EXPENSES: EUROPEAN COURT OF JUSTICE AND THE OECD

Within the European Union, the European Court of Justice decided in two additional cases, *Scorpio* and *Centro Equestre*, that the direct expenses of performing artistes and sportsmen should be deductible at the withholding stage and indirect expenses should be deductible in a normal tax return filed after the year of performance.[14] These two decisions forced the EU Member States to change their domestic legislation

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[9] 1987 OECD Report ¶89, later in Commentary on Article 17 OECD Model ¶11.

[10] This conclusion was also drawn by Daniel Sandler at the 49th IFA Congress in Cannes in 1995 (*see* IFA, "Taxation of Non-Resident Entertainers," 49th IFA Congress, Cannes, France, *Cahiers de droit fiscal international*, Vol. 20d, Kluwer Law International, The Hague (1995)) and by Paul Sczudlo in his contribution to the Seventh Annual IBA/ABA Conference in London in 2001 (Partner with Loeb & Loeb LLP in Los Angeles, CA, USA).

[11] ECJ, 12 June 2003, C-234/01 (Arnoud Gerritse); *see also* "CFE (Confédération Fiscale Européenne) Opinion Statement on the Decision of the European Court of Justice *Arnoud Gerritse v. Finanzamt Neukölln-Nord*, C-234/01," 44 *European Tax'n* 4 (2004); Molenaar and Grams, "The Taxation of Artists and Sportsmen After the *Arnoud Gerritse* Decision," 43 *European Tax'n* 10 (2003), at 381.

[12] ¶14, Commentary on Article 17 OECD Model.

[13] 1987 OECD Report, ¶¶61, 62.

[14] ECJ 3 October 2006, C-290/04, *FKP Scorpio Konzertproduktionen GmbH*, and ECJ 15 February 2007, C-345/04, *Centro Equestre da Leziria Grande Lda*.

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from gross taxation into net taxation (allowing the deduction of expenses). Since the EU Member States constitute the vast majority of the OECD Member States, the decisions also forced the OECD to change its recommendation, in paragraph 10 of the Commentary on Article 17 for gross taxation, into a choice between gross taxation at a low rate or net taxation with the deductibility of expenses, generally at normal tax rates. This choice was introduced in the 2008 change to the Commentary on Article 17 of the OECD Model.[15]

BROADENING THE SCOPE OF "PERFORMANCE INCOME"

Discussion about the scope of performance income under Article 17 received a new dimension with two U.K. court decisions in 2003 and 2006. Both discussed the endorsement income of tennis players, the first involving three anonymous international tennis players and the second Andre Agassi. They had entered into endorsement contracts with the manufacturers and resellers of tennis equipment and clothing. The conclusion in these cases was that a part of the worldwide endorsement income had to be allocated to the U.K. performances, because of the direct relationship to the performances. Thus, the taxable income of the tennis players was substantially increased.[16] The U.K. tax authorities also apply this broad interpretation of the "territoriality principle" to bigger sports events, such as the London Marathon, Wimbledon, the British Open Golf, and the 2010 Ryder Cup in Wales. In fact, in August 2010 Usain Bolt did not want to run the 100 metres at Crystal Palace in London because of this tax principle applied by the U.K. tax authorities.

INITIATIVE FOR MORE COMPLIANCE IN THE UNITED STATES

In October 2007, the IRS announced the launching of a compliance initiative aimed at foreign artistes and sportsmen working in the United States. The initial focus was on those engaged in tennis, golf, and music, as these individuals and those associated with arranging their appearances in the United States and managing their financial affairs are typically high-income taxpayers. The IRS was concerned that foreign artistes and sportsmen were not paying their fair share of withholding tax and were failing to report properly their income in the United States.[17]

In the United States, compensation received by a foreign artiste or sportsman may be subject to either wage withholding, in the case of an employee, or the 30% withholding tax, in the case of an independent contractor. In the latter situation, the 30% withholding tax is generally applied to the gross fee, but expenses can be taken into account if a Central Withholding Agreement (CWA) has been entered into with the IRS. Moreover, after the year of performance, a normal income tax return for nonresidents can be filed, so that the normal income tax rates, starting at 10% and going up to 35%, can be used and the 30% withholding tax can be credited.

CERTAIN COUNTRIES NOT EXERCISING THEIR TAXING RIGHTS

The small tax revenue and relatively high administrative expenses associated with the taxation of nonresident artistes and sportsmen led the Netherlands to the unilateral decision not to exercise its taxing rights anymore, from 2007 onwards, for nonresident artistes and sportsmen from countries with which the Netherlands has concluded bilateral income tax treaties. Figures from the Dutch tax administration for the year 2003 showed that the tax revenue raised from nonresident artistes and sportsmen was a mere €7 million, and would have been much less had every nonresident artiste and sportsman availed themselves of the option to deduct expenses and file income tax returns. Thus, this unilateral measure costs the Netherlands approximately €5 million per year, but saves all parties involved about €1.6 million in administrative expenses per year. Thus, the Netherlands viewed this as a very good trade-off. Moreover, the tax credit method is used in 78 of the Netherlands' 90 income tax treaties (as of 2007) and thus the nonresident artistes and sportsmen would normally pay income tax in their residence countries.[18] The Dutch government announced that it would start negotiations with the 12 other treaty countries to change the exemption method into the credit method.[19] The Dutch removal of its artiste and sportsman withholding tax is welcomed by

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[15] However, the optional text from paragraph 10 of the 2008 Commentary has not been included in any tax treaty yet. (EU countries do not need to include this treaty text because net taxation is obligatory for them after the ECJ decisions referred to earlier.)

[16] *Mr. Set, Miss Deuce & Mr. Ball v. Robinson* (HMIT) (SPC No. 0373) (2003) and *André Agassi v. Robinson* (HMIT), House of Lords, 17 May 2006, [2006] UKHL 23.

[17] *See*, e.g., Ruchelman and Shane, "Tax Concepts Affecting the Foreign Entertainer or Athlete Performing in the United States," 37 *Tax Mgmt. Int'l J.* 5 (2008).

[18] *See* Molenaar and Grams (2007), fn 4 above.

[19] The Dutch tax treaties with Estonia and Austria have been changed since then. This means that 10 tax treaties (including Spain) still have the exemption method and thus lead to double non-taxation for artistes and sportsmen from those countries with

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the artistes and sportsmen visiting the Netherlands as a very positive development, because it takes away much administrative work and the risk of excessive taxation.[20]

This approach was followed by Canada on a limited basis for the Winter Olympics in Vancouver in February 2010. After experiences with complicated tax issues for participating sportsmen at earlier Olympics, the International Olympic Committee (IOC) had set as a condition for Olympic bids that no source tax be levied on direct prize monies or other related earnings, such as sponsoring income, advertisement income, and bonuses from national federations. This was contrary to the Canadian domestic tax rules, which apply a 15% withholding tax on performance income realized by nonresident sportsmen, with the option to file a normal Canadian income tax return at the end of the year. However, Canada agreed to provide the exemption for the 2010 Winter Olympics. This approach will also be followed by the United Kingdom for the Summer Olympics in London in 2012. Moreover, the United Kingdom has also agreed to give up its source taxation for the UEFA Champion's League Final Football at Wembley in London in May 2011.

DISCUSSIONS ABOUT ARTICLE 17 IN GENEVA AND VIENNA

In October and November 2007, discussions were held about Article 17 of the OECD Model Tax Treaty at two international conferences — first in Geneva at a two-day conference involving reports from various countries and practical experiences,[21] and second in Vienna at a conference discussing the fundamentals of the full OECD Model Tax Treaty, including Article 17.[22] Daniel Sandler started the discussions at both conferences with his contention that Article 17 was both over- and under-inclusive in terms of persons and types of income and that the article should be extended to all celebrities, including former politicians (''performing'' as speakers), sports coaches, film directors, models, and such — but also should be limited to earnings of more than, e.g., $100,000 per year per country. In this way, only the bigger names would be caught by the source tax. Dick Molenaar responded that he preferred the full removal of Article 17, because of the risk of excessive taxation that it creates. However, he stated he could also accept Sandler's proposal, which follows from a new ''contribution principle'' and would only catch the ''happy few'' in Molenaar's pyramid of the entertainment world.

DRAFT CHANGES TO THE COMMENTARY ON ARTICLE 17

Because a number of questions had been raised about the interpretation of Article 17, the OECD on April 23, 2010, published a Discussion Draft concerning possible changes to the Commentary on Article 17. As with other Discussion Drafts, the OECD here asks for comments.

In the first paragraph of the Discussion Draft, the OECD clarifies what falls under Article 17, such as prize money of an amateur and income from advertisements and from interviews directly related to entertainment or sports events. It also clarifies what falls outside the scope of the article, such as income from reporting or commenting by an entertainer or sportsman in broadcasting, provided he does not himself participate in the event.[23] (The OECD also proposes changing the term ''artiste'' to ''entertainer.'')

The second paragraph of the Discussion Draft makes clear that the income of the owner of a race car or race horse also falls under Article 17.

The third paragraph of the Discussion Draft clarifies that preparation and training also constitute ''personal activities as such'' of entertainers and sportsmen. It also specifies that models at fashion shows, former politicians at speaking engagements, and independent concert promoters remain outside the scope of the article. This paragraph also discusses the fact that some countries impose taxation in two installments, creating the risk that a nonresident artiste or sportsman is taxed twice at source, and recommends that those countries leave out the income at the second level.[24] Finally, this paragraph pays additional attention to the already existing option to exclude from the article artistes and sportsmen working as employees for teams or groups and gives optional text dealing with competitions involving teams from different countries.[25]

The fifth paragraph of the Discussion Draft gives rules on how to break down income and expenses of tours through various countries.

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respect to their Dutch performance income.

[20] With this radical change, the Netherlands adopted the recommendations of Molenaar (2006), fn. 4 above.

[21] *See* Xavier Oberson (ed.), *International Taxation of Artistes & Sportsmen* (Geneva, Zurich: Schulthess, Bruylant, 2009).

[22] *See* Michael Lang (ed.), *Source Versus Residence: Problems Arising from the Allocation of Taxing Rights in Tax Treaty Law and Possible Alternatives* (The Hague: Wolters Kluwer, 2008 / New Delhi: Taxmann, 2008).

[23] This was the subject in *Cheek v. The Queen*, 2002 DTC 1283 (Tax Court of Canada); *see also* Boidman, ''Canadian Taxation of Foreign Service Providers: Tax Treaty Issues and Court Decisions,'' 56 *Bulletin for Int'l Fiscal Documentation — Tax Treaty Monitor* 7 (2002), at 321.

[24] An example of such two-tier taxation is Germany with *Ausländersteuer* at the *1. Stufe* and *2. Stufe*.

[25] Such a provision was included in Article XVI of the 1980

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The sixth paragraph of the Discussion Draft clarifies that prizes and awards paid to national federations, associations, and leagues are also within the scope of the article and that income from merchandising, broadcasting, and licensing the right to use images is within the scope only when there is a direct connection to specific performances.

Ten individuals and organizations have responded to the request of the OECD for comments on the Discussion Draft,[26] giving their practical experience with Article 17, showing various problems, suggesting further improvements, and/or asking for the removal of the article in its entirety. The Discussion Draft is now pending in Working Party 1 of the OECD.

SEMINAR E AT THE 64TH IFA CONGRESS IN ROME

The OECD Discussion Draft proposed changes to the Commentary on Article 17 of the OECD Model were discussed in Seminar E (''Red Card Article 17?'') at the 64th IFA Congress in Rome in September 2010. Three case studies were presented and discussed by Xavier Oberson (Switzerland), Michael Pfeiffer (United States), Aart Roelofsen (the Netherlands), Mary Bennett, Andrew Dawson, and Jacques Sasseville (all with the OECD), and Richard Vann (Australia).

The conclusion from the seminar was that the current application of Article 17 is, to put it bluntly, a big mess. The main problem is that it singles out a specific group of services, i.e., those performed by artistes and sportsmen, for special treatment (taxation at source without a PE) and the fundamental question is whether these services should receive special treatment. If there is a special problem, it is with all types of services that earn a high value in a very short time when by hypothesis there is no PE. Source countries insist on taxing part of the income, but the present ''mess'' makes the lives of many smaller performers and earners miserable. Some panel members proposed, therefore, to extend the application of Article 17 to all forms of public entertainment on an independent basis in excess of a threshold so as to preserve a certain measure of taxation in the source country.[27] However, other panel members preferred to remove Article 17 in its entirety, as the Netherlands effectively did in 2007. Both measures would reduce administrative expenses considerably and prevent foreign tax credit problems. The OECD representatives admitted that Article 17 creates problems for performing artistes and sportsmen and indicated they are willing to look for solutions.

THE CRITICAL NEED FOR REFORM OF ARTICLE 17

The excessive taxation that flows from Article 17 leads to a distortion of international competition because resident artistes and sportsmen, who do not experience this excessive taxation, are better off than nonresident artistes and sportsmen. Interestingly enough, the OECD already acknowledged years ago that the tax treatment of artistes and sportsmen under Article 17 causes difficulties. The 1987 OECD Report came to two conclusions on this matter:

- Differences in treatment that exist among countries distort competition and suggest the need for a harmonized system whereby resident and nonresident artistes and sportsmen are treated alike and bear a similar tax burden.
- Counteracting tax avoidance and evasion in this area should preferably use ways and means that do not divorce the artiste or sportsman from the main categories of taxpayers to which they belong, i.e., providers of dependent and independent services.

This was an interesting perspective 24 years ago, but unfortunately no realistic follow-up has occurred since then. However, after many authors have shown the practical problems flowing from Article 17, now the OECD appears to realize that Article 17 should be changed. This is a very interesting development and gives hope to international performing artistes and sportsmen.

The following short-term solutions are possible with respect to the current Article 17:

- Make it obligatory (not just optional) that expenses be deductible and that tax be based on net income;[28]
- Reintroduce the limited approach of Article 17(2) and follow the Reservations by Canada, the United States, and Switzerland;
- Restrict Article 17 to business activities, and exempt employees;[29]

U.S.-Canada Income Tax Treaty.

[26] Comments were provided by All Arts Tax Advisers, Cirque du Soleil, Ricardo da Palma Borges, FEPS, Cristian Garate, Music Managers Forum, Pearle*, RSM Tenon, Taxand, and Craig West.

[27] Tax News Service 2010-08-23.

[28] The optional choice between gross and net taxation can be found since 2008 in the new text of paragraph 10 of the Commentary on Article 17.

[29] This option can be found in paragraph 2 of the Commentary

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- Exempt the equivalent part of fixed salaries;[30]
- Exempt cross-border team competitions;[31]
- Add Article 17(3) to the official text of Article 17, so that it is no longer an option;[32]
- Set the *de minimis* rule at a higher level — e.g., $100,000 per artiste or sportsman per year — thus sparing many less lucrative artistes and sportsmen from the source tax.[33]

It is interesting that most of the short-term solutions try to exempt income for normal cultural or sports companies and their employees. The reason is that tax avoidance behavior is not very likely for these companies, artistes, and sportsmen. This is also the approach in Article 16(2) of the 2006 U.S. Model Tax Treaty, supported by examples in the Technical Explanation.

However, when considering changes to Article 17, one must keep in mind the tax revenue compared with the administrative expense needs. It does not seem reasonable to require a complicated application procedure to deduct expenses at source and to file normal income tax returns, in the light of the small tax revenue that comes from visiting nonresident artistes and sportsmen. The Dutch figures of €1.6 million in administrative expense for €7 million of tax revenue (in a country with only 16 million citizens) are compelling evidence of what is at stake.

The more far-reaching change would be to turn Article 17 into a provision comparable to Article 12 for royalties. This would generally mean exemption in the country of performance in treaty situations, based on the normal rules of Article 7 (Business Profits) and 15 (Income from Employment). This would constitute a trade-off: A country would give up source tax collection, but would also no longer need to grant foreign tax credits to its resident artistes and sportsmen. Overall, the change would be positive for the United States because its export of entertainment is bigger than its import of entertainment, which on balance means it is giving up more now through the foreign tax credit for its residents than it is gaining from the U.S.-source tax on nonresidents. It is highly likely, therefore, that the United States would be better off if Article 17 were changed into a provision comparable to Article 12 for royalties.

For countries that mainly import entertainment, a tax treaty negotiating position would be to keep a minimal rate of source tax, but that would have to be no more than 5% on the gross performance income in that country. Of course, a foreign tax credit for the tax would have to be given by the residence country.

In an ideal world we would not need an Article 17 at all in bilateral income tax treaties. The general rules for companies, the self-employed, and employees are good enough to deal with all situations regarding performances. However, it would still be important that every country keep a source tax for nonresident artistes and sportsmen in its domestic tax legislation, because only with this source tax can the tax avoidance behavior of artistes and sportsmen with structures or residence in tax havens be counteracted. But, in treaty situations, this source tax can be given up, provided of course that the artiste or sportsman has complied with a procedure for establishing exemption under the relevant treaty. Thus, in a bilateral income tax treaty context, normal taxation in the country of residence would be secured.[34]

SUMMARY AND CONCLUSIONS

Most countries in the world impose a withholding tax on the performance fees of nonresident artistes and sportsmen. This is supported by Article 17 of the OECD Model Tax Treaty, which allocates the primary taxing right for performance income to the source country. To eliminate double taxation, the residence country of the artiste or sportsman should allow a tax credit (or exemption) for the foreign tax (or income). This special approach in Article 17, which deviates from the normal allocation rules of Article 7 (for companies and the self-employed) and Article 15 (for employees) of the OECD Model, was introduced by the OECD in 1963 to ''avoid practical difficulties,'' but is more specifically meant to counteract tax avoidance behavior and non-compliance by international performing artistes and sportsmen. The United States follows this special approach in Article 16 of the 2006 U.S. Model Tax Treaty.

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on Article 17, but has only been used in German tax treaties from the 1950s and not after the introduction of this option in the Commentary. However, it is already available.

[30] This option can be found in paragraph 11(b) of the Commentary on Article 17.

[31] This is proposed in paragraph 3 of the 2010 Discussion Draft on possible changes to the Commentary on Article 17. The option has been placed in a new paragraph 11.4 of the 2010 Commentary on Article 17.

[32] But then it is also necessary to set clear conditions for qualifying for Article 17(3).

[33] This option is based on the discussion between Sandler and Molenaar in Geneva and Vienna in 2007.

[34] *See* Grams, ''Artist Taxation: Article 17 of the OECD Model Treaty — a Relic of Primeval Tax Times?'' 27 *Intertax* (1999), at 188; Nitikman, ''Article 17 of the OECD Model Treaty — An Anachronism?'' 29 *Intertax* (2001), at 268; Molenaar and Grams, ''How to Modernize Income Taxation of International Artistes and Sportsmen,'' 33 *Tax Mgmt. Int'l J.* 238 (April 2004); and Molenaar, *Taxation of International Performing Artistes* (Amsterdam: IBFD, 2006), at 353.

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Unfortunately, examples show that excessive international taxation occurs very often in practice, and sometimes even the foreign tax credit cannot be obtained because of missing or incomprehensible tax certificates. The existing tax system creates an obstacle to the free movement of international artistes and sportsmen. This was already recognized by the OECD in its 1987 Report, but nevertheless the international organization initiated even stricter rules for this special group of taxpayers. In 2004 the authors described these obstacles and problems in an article in this Journal, and in this article they have shown what has happened since then and what the OECD should do now.

Within the European Union, the unequal treatment of nonresident artistes and sportsmen violates the basic freedom principles of the EC Treaty and the European Court of Justice has ordered net taxation, which was included in 2008 as an option in paragraph 10 of the Commentary on Article 17 of the OECD Model.

While the United Kingdom has broadened the scope of its source taxation and the United States has launched a compliance initiative, the Netherlands has unilaterally given up its source taxation for nonresident artistes and sportsmen from treaty countries. It believes that the tax revenue is too small and the administrative expense too high. The Dutch approach is welcome as a very positive development. The IOC has followed this initiative and was able to secure the removal of the source tax for sportsmen at the 2010 Winter Olympics in Vancouver, Canada, and the 2012 Olympics in London, United Kingdom. Also, the UEFA has forced the United Kingdom to waive its source tax for the 2011 Champions League Final at Wembley in London. It is very interesting to see that the bigger the sport tournaments become, the more pressure is put on the organizers to remove the obstructive source tax that is permitted under Article 17 of the OECD Model.

Discussions were held at special conferences in Geneva and Vienna in 2007 about possible changes to Article 17. These led to new developments at the OECD, which published a Discussion Draft in April 2010 concerning changes to the Commentary on Article 17 and opened the discussion about the future of Article 17 at the 2010 IFA Congress in Rome.

Short-term solutions are already available based on the Commentary on Article 17 and can be implemented on short notice. However, the existing problems would best be solved by turning Article 17 into a provision comparable to Article 12 for royalties. This would lead to normal taxation in accordance with Articles 7 and 15 in treaty situations, but leave the withholding tax regime in place for artistes and sportsmen who choose to reside in tax havens or use structures involving such jurisdictions. With this approach, tax avoidance behavior could still be counteracted, but excessive taxation would become very unlikely for treaty residents. Moreover, high administrative expenses would be removed for artistes, sportsmen, *and* tax authorities.

Very interesting is that entertainment exporting countries, such as the United States and the United Kingdom, would profit from a turnaround of Article 17. Their extra tax revenue, from not having to allow foreign tax credits to their residents anymore, would be much higher than the loss of source tax from nonresidents. These countries should change into strong supporters of an approach that would turn Article 17 into a provision comparable to Article 12 for royalties.

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