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Rights in Tax Treaty Law and Possible Alternatives

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Chapter 13

Artistes and Sportsmen (Article 17 OECD Model Convention)

*Daniel Sandler**

There are certain characteristics of the world of entertainment – not least the international mobility of performers and the ability of entertainers to engage in international tax avoidance activities – which make it inappropriate for the general rules relating to dependent and independent personal activities to apply.¹

Article 17 of the OECD Model tax treaty gives source countries the primary jurisdiction to tax non-resident artistes and sportsmen on the personal services income they earn ‘as such’ in the source country – whether that income is earned directly (Article 17(1)) or by a third-party (Article 17(2)) – regardless of the length of time spent in the source country and regardless of whether or not the individual (or third party) has a permanent establishment in the source country. Thus, source taxation of artistes and sportsmen is much broader than that generally applicable to

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1. P. Baker, *Double Taxation Conventions and International Tax Law*, 2nd ed. (London: Sweet & Maxwell, 1994), 316.

individuals carrying on business or employed in source countries under Articles 7 and 15 of the OECD Model, respectively. This article considers whether the jurisdiction-allocation rule in Article 17 is justified.

The article assumes – indeed, advocates – that a source country’s domestic tax law should apply to personal services income derived therein by *any* non-resident individual. As an initial premise, it accepts that the current jurisdiction-allocation rules in Articles 7 and 15 of the OECD Model for personal services income of individuals other than artistes and sportsmen impose appropriate limits on source taxation. The focus of this paper is whether Article 17 is a justifiable exception to these limits.

My thesis is that Article 17, as it currently exists, is not a justifiable exception. It is under-inclusive, in terms of the character of the individuals and the nature of the personal services income that it subjects to source taxation, and over-inclusive in that it subjects to source taxation all of the personal services income earned by artistes and sportsmen as such regardless of how small the amount. However, I do not advocate abolishing Article 17 and leaving the existing jurisdiction-allocation rules in Articles 7 and 15 to apply. Rather, I advocate revising Article 17 to give the source country primary jurisdiction to tax any individual who earns in that country personal services income that exceeds a relatively high threshold amount – say 100,000 US dollars (USD).

In essence, my thesis recognizes that artistes and sportsmen are no longer the only ‘celebrities’ who are highly mobile and command enormous compensation for their services. Rather, in today’s ‘winner-take-all markets’ – to use the phrase coined by Robert Frank and Philip Cook – ‘a new class of “unknown celebrities” . . . have permeated law, journalism, consulting, medicine, investment banking, corporate management, publishing, design, fashion, and even the hallowed halls of academe’.² I advocate that the source country should have the jurisdiction to tax the personal services income of all celebrities, known or unknown.

Part 1 of this article provides a brief history of Article 17 of the OECD Model and sets out the rationale for the provision as suggested in OECD documents. Part 2 considers the breadth of the source country’s jurisdiction to tax the income of non-resident artistes and sportsmen under Article 17 of the OECD Model, in contrast to the general taxation of non-resident individuals under Articles 7 and 15. Part 3 critiques the OECD’s policy rationale for Article 17 and considers whether the provision is otherwise supported by international tax principles. Part 4 considers possible amendments to Article 17. Part 5 concludes with a consideration of whether Article 17, even as amended, is warranted or whether it should be eliminated altogether from the OECD Model.

2. R.H. Frank and P.J. Cook, *The Winner-Take-All Society* (New York: Penguin Books, 1996), 3–4.

1 A BRIEF HISTORY OF ARTICLE 17 OECD MODEL
CONVENTION

There is surprisingly little in the history of Article 17 that speaks to the rationale for the provision. Article 17(1) is virtually unchanged from the original provision introduced in 1963. Article 17(2) was introduced as an anti-avoidance rule in 1977. Significant changes were made to the Commentary on Article 17 in 1992 and it is from this Commentary, and the 1987 OECD report on which this Commentary is based,³ that one gets a sense of the provision's rationale, at least as espoused by the OECD.

The OECD Model Convention has had a provision dealing with entertainers and athletes since the original 1963 OECD Draft Double Taxation Convention on Income and Capital. However, unlike most of the other allocation rules in the 1963 Draft, this provision did not have a historical counterpart in the London and Mexico Tax Conventions published by the League of Nations in 1946.

Article 17 of the 1963 Draft was based on Article XI of the draft tax treaty provisions contained in the second report of the Fiscal Committee of the OEEC.⁴ Paragraph 12 of the Commentary on the draft provision provides the first hint of the rationale of the provision:

12. By this provision the practical difficulties are avoided which often arise in taxing public entertainers and athletes performing abroad. Certain Conventions, however, provide for certain exceptions such as those contained in paragraph 2 of Article VII. Moreover, too strict provisions might in certain cases impede cultural exchanges. In order to overcome this disadvantage, the States concerned may, by common agreement, limit the application of Article XI to independent personal activities by adding its provisions to those of Article VI relating to professional services and other independent activities of a similar character. In such case, public entertainers and athletes performing for a salary or wages would automatically come within Article VII and thus be entitled to the exemptions provided for in paragraph 2 of that Article.

It is obvious from the Commentary that by 1959 there were a number of tax treaties that had a provision similar to that in draft Article XI, although it is unclear what 'practical difficulties' are specifically germane to the taxation of public entertainers and athletes that are not equally problematic for other mobile individuals. Perhaps there were few other mobile individuals (at least, ones who could earn relatively significant amounts in short periods) at that time.

The earliest treaty of which I am aware that included a specific provision dealing with artistes and sportsmen was the 1939 United States – Sweden tax treaty. Article XI(d) of that treaty excluded from the general source limitations

3. OECD, 'The Taxation of Income Derived from Entertainment, Artistic and Sporting Activities', in *Issues of International Taxation* No. 2 (Paris, OECD, 1987).

4. OEEC, *Elimination of Double Taxation*, 2nd Report of the Fiscal Committee (Paris, OEEC, 1959).

on the taxation of compensation for labour or personal services ‘the professional earnings of such individuals as actors, artists, musicians and professional athletes’. Evidently the provision was introduced at the insistence of the US delegation over the objections of the Swedish delegation.⁵

The introduction of a similar provision in Article XI(3) of the 1945 United States – United Kingdom treaty evidently led to the first extensive discussion of the provision. After the treaty was submitted for approval to the US Senate Committee on Foreign Relations, representatives of the Screen Actors Guild and Artists Managers Guild requested that the treaty be referred back to the subcommittee to allow it to make representations. Their representations were reminiscent of Shylock’s famous plea for equality in *The Merchant of Venice*.⁶ According to the Screen Actors Guild representations:

What is there different about our profession that we alone should continue to carry the burden that our Government proposes to lift from the backs of everyone else – doctors, lawyers, salesmen, businessmen, government representatives, and all other professions, businesses, and activities?

There was a time in England, and for that matter, in the early history of some of our States, when actors were officially noted on the statutes as ‘rogues’ and ‘vagabonds’. That time, we think, is no more. Actors as a class have proved their desire, worthiness, and ability to take their place in civic, community, and national affairs, and in fact in times of emergency or need are particularly called upon by their National Government, the Treasury Department, and the War Department to give freely of their time and talents. They have always responded, and in fact are today responding, to these pleas. They do not then understand why this Government should set them apart adversely from all other occupations.⁷

The Actors’ Guild won the day: the Senate subcommittee recommended to the full Committee that Article XI(3) be removed, which was done by a 1946 protocol to the treaty. But their success was relatively short-lived. A special provision permitting source taxation of entertainers and athletes appeared in other early US treaties as well as in treaties of other countries. By 1959, it was common enough to warrant inclusion in the OEEC’s draft treaty provisions and became Article 17 of the 1963 OECD Draft treaty.

Paragraph 2 of the Commentary on Article 17 of the 1963 OECD draft treaty was substantially similar to paragraph 12 of the Commentary on the 1959 OEEC

5. J. Nitikman, ‘Article 17 of the OECD Model Treaty – An Anachronism?’ *Intertax* (2001): 268–274 at 260–270.

6. William Shakespeare, *The Merchant of Venice*, Act 3, Scene I, lines 51–59: ‘Hath not a Jew eyes? Hath not a Jew hands, organs, dimensions, senses, affections, passions? – fed with the same food, hurt with the same weapons, subject to the same diseases, healed by the same means, warmed and cooled by the same winter and summer, as a Christian is? If you prick us, do we not bleed? If you tickle us, do we not laugh? If you poison us, do we not die? And if you wrong us, shall we not revenge?’

7. Quoted in Nitikman, *Intertax* (2001): 270.

draft. It spoke of 'the practical difficulties which often arise in taxing entertainers and athletes performing abroad'. Thus, source taxation appears to be based on the problems that resident countries have in taxing such individuals, implying that such individuals might escape taxation altogether if they were not subject to tax in the source country.

The 1977 OECD Model treaty added Article 17(2). The Commentary on Article 17(2) added at the time suggested that the provision was an anti-avoidance rule targeting the use of loan-out companies:

4. The purpose of paragraph 2 is to counteract certain tax avoidance devices in cases where remuneration for the performance of an entertainer or athlete is not paid to the entertainer or athlete himself but to another person, e.g., a so-called artiste-company, in such a way that the income is taxed in the State where the activity is performed neither as personal service income to the entertainer or athlete nor as profits of the enterprise in the absence of a permanent establishment. Paragraph 2 permits the State in which the performance is given to impose a tax on the profits diverted from the income of the entertainer or athlete to the enterprise where for instance the entertainer or athlete has control over or rights to the income thus diverted or has obtained or will obtain some benefit directly or indirectly from that income. It may be, however, that the domestic laws of some States do not enable them to apply such a provision. Such States are free to agree to alternative solutions or to leave paragraph 2 out of their bilateral convention.

The 1977 Model also replaced the term 'public entertainers' in Article 17(1) with 'entertainer', although the listed examples remained the same.

In the 1992 Model, only one minor revision to the Article itself was made: the term 'athlete' in Articles 17(1) and (2) was replaced with 'sportsman'. At the same time, significantly more revisions and additions were made to the Commentary on the Article, increasing it from five to fourteen paragraphs. These revisions and additions were largely the result of a 1987 study by the OECD on the taxation of income derived by artistes and sportsmen.⁸

The 1987 OECD study sheds more light on the rationale for the provision. The 'practical difficulties' faced by residence countries associated with the taxation of artistes and sportsmen performing abroad were elaborated in the OECD's 1987 report:

16. However, as is usually the case with itinerant activities, the country of residence has difficulty in identifying the activities of its residents abroad. It will therefore have to rely mostly on information provided by the country where the activities are exercised. For this reason, and also in order to avoid practical difficulties, it is felt that the principle on which Article 17 of the 1977 Model Convention is based should be followed. The main purpose of this report

8. OECD, 'The Taxation of Income Derived from Entertainment, Artistic and Sporting Activities', in *Issues of International Taxation*.

is therefore to help Member countries to establish a system by which the income of artistes and athletes could effectively be taxed in the country of performance . . .

19. The experience of countries participating in the study shows that, generally speaking, relying on the taxpayers themselves to report accurately the amount of income earned at home and abroad is even less realistic in the entertainment area than in other areas, considering how easy it is for a number of performers to conceal such income. Also it is commonly believed in the entertainment world of some countries that all sums earned abroad are free of domestic tax, and returns and accounts frequently reflect this belief. In the absence of other checks, the tax authorities will therefore not be able to impose tax on such activities.⁹

The concerns expressed suggest that artistes and sportsmen either evade tax or negligently under-report income in the country of residence. Implicit in this is the suggestion that the source country is in a better position to enforce the payment of tax by such individuals (i.e., by imposing a withholding obligation on persons paying amounts for the services of such individuals) and it is better that one country collect tax from these individuals than no country at all. Therefore the source country should have the jurisdiction to tax such individuals.

2 BREADTH OF SOURCE JURISDICTION UNDER ARTICLE 17 OECD MODEL CONVENTION

Because Article 17 is, in essence, an exception to the general limitations on source taxation of independent personal services and employment income in Articles 7 and 15, respectively, the scope of Article 17 demarks the boundaries of the exception. As an anti-avoidance measure – essentially targeting highly mobile and highly paid individuals – the boundaries of the provision are problematic in many respects. The author and others have written in greater detail about these problems;¹⁰ they are highlighted here.

-
9. OECD, *ibid.*, paragraphs 16 and 19. The concerns expressed in these paragraphs were recurrent throughout the study. For example, paragraph 7 referred to '[s]ophisticated tax avoidance schemes, many involving the use of tax havens . . . employed by top-ranking artistes and athletes'. Paragraph 8 suggested that artistes and athletes may be '[r]elatively unsophisticated people – in the business sense', that 'various forms of ostentation are inherent in the business' and that 'there is a tendency to be represented by adventurous and not very good accountants'. Paragraph 77 reiterated 'the difficulties inherent in taxing artistes and athletes' and reflected on the problematic scope of Article 17 due to 'the large variety of types of income from different sources' that such individuals can earn.
10. See, particularly, D. Sandler, *The Taxation of International Entertainers and Athletes: All the World's a Stage* (The Hague: Kluwer Law International, 1995), 179–186; and D. Molenaar, *Taxation of International Performing Artistes: The Problems with Article 17 OECD and How to Correct Them*, IBFD Doctoral Series vol. 10 (Amsterdam: IBFD, 2005) 65–117.

2.1 WHO IS AN ARTISTE OR SPORTSMAN?

Prior to changes made to the Commentary on Article 17 in 1992, there was no discussion as to who constituted an ‘entertainer’ or an ‘athlete’. The implication from the examples of entertainers listed in the provision was that the Article applied to entertainers performing in or for the public (despite deleting the word ‘public’ in 1977). Thus, for example, non-resident painters and sculptors who are commissioned to do artistic works in a source country would not generally be included in Article 17.¹¹ Even though the term ‘athlete’ or ‘sportsman’ has never been modified and no examples of the term are given in the Article itself, it has been commonly understood to be similarly restricted to public performances. So, for example, a mountain climber hired to lead a private expedition or a tennis player hired to give private lessons in a source country would not be included in Article 17.

The replacement of the term ‘athlete’ with ‘sportsman’ in the article itself in 1992 was intended to broaden the ambit of the provision. As now indicated in paragraph 5 of the Commentary:

5. Whilst no precise definition is given of the term ‘sportsmen’ it is not restricted to participants in traditional athletic events (e.g., runners, jumpers, swimmers). It also covers, for example, golfers, jockeys, footballers, cricketers and tennis players, as well as racing drivers.

An amendment to the text of the treaty provision, as opposed to an amendment to the Commentary, cannot be given an ambulatory interpretation. Thus, an ‘athlete’ referred to in an older bilateral tax treaty must encompass a narrower range of individuals than the term ‘sportsman’. The term ‘athlete’ would likely be interpreted to include more than the ‘traditional athletic events’ of ancient Olympic Games, and therefore footballers, cricketers and tennis players likely would be considered ‘athletes’ in any event. However, there is some question as to whether the term would include golfers, jockeys and racing drivers.

In terms of artistes, the 1992 Commentary elaborates on the examples given in Article 17 itself:

3. It is not possible to give a precise definition of ‘artiste’, but paragraph 1 includes examples of persons who would be regarded as such. These examples should not be considered as exhaustive. On the one hand, the term ‘artiste’ clearly includes the stage performer, film actor, and actor (including for instance a former sportsman) in a television commercial. The Article may also apply to income received from activities which involve a political, social, religious or charitable nature, if an entertainment character is present. On the other hand, it does not extend to a visiting conference speaker or to

11. Vogel suggests that certain new forms of art, such as ‘performance art’ (e.g., Jackson Pollack) or ‘environmental art’ (e.g., Christo and Jean-Claude) may come within the scope of Article 17 if ‘the income is based on the performance in public (audience)’ rather than ‘a later showing of “the work”’: Vogel, *On Double Taxation Conventions*, 3rd ed., (The Hague: Kluwer Law International, 1997), Art 17 m. no. 13c.

administrative or support staff (e.g., cameramen for a film, producers, film directors, choreographers, technical staff, road crew for a pop group etc.). In between there is a grey area where it is necessary to review the overall balance of the activities of the person concerned . . .

6. The Article also applies to income from other activities which are usually regarded as of an entertainment character, such as those deriving from billiards and snooker, chess and bridge tournaments.

The Commentary draws a clear demarcation between those in front of the camera or microphone and those behind the scenes, although the policy rationale for doing so is unclear. For example, film directors are often more well-known and better paid than the individuals they direct; yet directors are excluded from the provision.

The 'grey area' referred to in paragraph 3 of the Commentary is extremely broad and contentious. For example, Molenaar's list of artistes and non-artistes for the purposes of Article 17 includes a few debatable entries.¹² For example, he includes 'disk jockeys', 'video jockeys' and 'writers reading from their work' as artistes. The first two are arguably more akin to behind-the-scenes personnel like directors or choreographers. They artfully arrange the order of the artistic works that they play, but it is at least questionable whether they reach the level of entertainment. An author, on the other hand, is clearly not an entertainer when devoting time to the craft of writing. When on a book tour, their public appearances take on more of an 'entertainment' character but whether it is sufficient to come within the scope of Article 17 may depend on the nature of the appearance. For example, it is unlikely that appearing at a book signing, without more, would constitute entertainment. What if the author, while on a book tour, is paid to appear as a guest on a radio or television talk show? Molenaar himself suggests that an 'interview guest' is not an entertainer (an issue to which I'll return below). What if the author is prevailed upon to read an extract from his or her book while on the show? In contrast, where the author contracts to provide a public reading from a book and tickets are sold to the event, it is likely that the author crosses the line and becomes a public entertainer at this event.

Molenaar's list of non-artistes includes 'actors, musicians, etc. in commercials', 'interviewers (television, radio, live)', 'interview guests', 'models in commercials', 'models in fashion shows', 'radio personalities (e.g., disc jockeys, news readers)', and 'TV and radio personalities (e.g., anchor personnel, weather persons, talk show hosts)'. The OECD Model Commentary specifically lists actors in television commercials, which would presumably include anyone paid to appear in the commercial (such as models). It also arguably includes musicians performing in or for such commercials since they are specifically contracting to perform for the public in this regard.¹³ As for interviewers, in the Canadian tax case, *Cheek v. The Queen*,¹⁴ it was suggested that 'a radio artiste is a person who by some skilful and

12. Molenaar, *International Performing Artistes*, 91–92.

13. In contrast, where a musician is paid a fee for the use of previously recorded music in the commercial, the fee should be construed as a royalty under Article 12 rather than under Article 17.

creative performance (for example, singing or acting *or interviewing third parties*) can attract an audience to hear that person herself or himself.¹⁵ While a news anchor is unlikely an artiste, there seems little doubt that talk show hosts such as David Letterman or Oprah Winfrey would be considered artistes for the purposes of Article 17¹⁶ and the guests invited to appear on the show are often there for entertainment value. Finally, many would argue that a fashion show is an elaborate stage production and that the models strutting the catwalk are as much ‘artistes’ as any stage actor.

Returning to paragraph 3 of the Commentary, while it is acknowledged that a ‘visiting conference speaker’ is not included in Article 17, where one crosses the line from ‘conference’ to something of ‘an entertainment character’ is difficult to discern. Consider the following examples. Bill Clinton, the former president of the United States, is paid significant sums for speaking engagements around the world. For example, in 2006 he gave sixteen speeches in Canada receiving in the aggregate over USD 2.5 million for these appearances.¹⁷ In some cases, he spoke on current events (e.g., the Middle East); in other cases, he provided motivational talks. Tickets may have been sold to some of these events. Some events were used as fundraisers for the organization paying for Clinton’s talk. Is he an artiste under Article 17 of the OECD Model? Similarly, former vice-president Al Gore has given numerous talks worldwide on climate change. His talks include an elaborate PowerPoint presentation and are well-choreographed. Tickets are sold for these presentations. Indeed, the movie, *An Inconvenient Truth*, for which Gore received an Oscar, is essentially a film of the presentation plus some additional footage of interviews with Gore. Leaving aside for the moment his presentations that were filmed and used as footage in the movie, is he an ‘artiste’ under Article 17 when he speaks on global warming?¹⁸ Finally, consider a televangelist such as Billy Graham: is he an ‘entertainer’? Believers may not think so.

The Commentary on Article 17 suggests that snooker players, bridge players and chess players are ‘artistes’ (as opposed to sportsmen) since their activities

14. 2002 DTC 1283, [2002] 2 CTC 2115 (TCC).

15. *Ibid.*, para. 30 (emphasis added).

16. Although not directly related to this issue, consider the UK Special Commissioner’s decision in *Madeley and Finnigan v. HMRC* (SpC547, 2006), where Special Commissioner Nowlan concluded that the taxpayers (‘Richard and Judy’, the presenters of ITV’s morning show, ‘This Morning’) were ‘theatrical artists’ for the purposes of s. 201A of the Income and Corporation Taxes Act 1988 (TA 1988) and could therefore deduct the cost of their agent as an employment expense.

17. Lisa Priest, ‘Canadian Fees Help Clinton Earn His Keep: “Dollar Bill” raked in \$2.5 million last year’, *Globe & Mail*, June 18, 2007. Clinton evidently earned between USD 9 million and USD 10 million in total on the lecture circuit in 2006: John Solomon and Matthew Mosk, ‘For Clinton, New Wealth in Speeches: Fees in 6 Years Total Nearly \$40 million’, *Washington Post*, 23 February 2007.

18. Even in those presentations that were filmed and included in footage in *An Inconvenient Truth*, was he an ‘actor’? Put another way, is a person appearing in a film documentary an ‘actor’ for the purposes of Article 17? The same question can be asked of an individual such as Michael Moore, who ‘stars’ in his own documentaries.

are of an 'entertainment character'. Although not specifically mentioned in the Commentary, presumably poker players (at least those playing in tournaments viewed by the public) would also be included in Article 17. These examples in the Commentary are not necessarily supported by the text of the Article itself. This paragraph of the Commentary follows the discussion of sportsmen. I agree that it would be an improbable stretch even of the term sportsman to include snooker players, card players, darts players, chess players and the like. However, I think it is equally a stretch of the term 'entertainer' to include some of these individuals.¹⁹ Indeed, the phenomenal expansion of 'reality television shows' can give virtually any activity an 'entertainment character', from police officers on duty to doctors performing surgery (cosmetic and other) to persons 'competing' for an organ transplant. Game show contestants can potentially earn a lot for their appearances, although it is questionable whether they would be considered entertainers, in contrast to the game show host and other 'regulars' on the show.²⁰

In terms of sportsmen, it is clear that players on professional sports teams are included in Article 17 while their coaches and trainers are not. But there are others that pose difficulties even within the context of the broadened term 'sportsman'. Consider two examples. First, some professional sports referees can earn significant sums of money (match-fixing aside). These referees must be physically fit and can be as much in the limelight as many players in a game. Indeed, the audience often has choice words for referees when they consider a game to be poorly officiated. Second, caddies for professional golfers perform their services in public during tournaments. They must be physically fit to carry clubs around an eighteen-hole course and they can be compensated extremely well. They typically receive a base amount and per diem for their services at tournaments and a percentage of the golfer's winnings. If Steve Williams, the caddy for Tiger Woods, were listed with PGA money leaders, he would have placed in the top one hundred in 2007.²¹ It is also likely that Williams has his own endorsement contracts, at least based on the logos seen on his clothing during golf tournaments. However, it is

19. There are reported examples going both ways with respect to chess players. The Italian tax authorities issued a note in 1981 holding that participants in the 1981/82 World Chess Championships were considered entertainers for treaty purposes: Note No. 12/062, 26 November 1981, summarized in M. Edwardes-Kerr, *The International Tax Treaties Service* (London: In-Depth Publishing, 1977). Interestingly, this view was given prior to the amendment to the OECD Commentary in 1992. In contrast, a German court concluded in 1995 that a chess player was not an artiste or sportsman: see Vogel, *On Double Taxation Conventions*, Art 17, m. no. 14a.

20. Even individuals such as Vana White of 'Wheel of Fortune' or the models holding briefcases on 'Deal or No Deal', who say little or nothing while on the show, would likely be considered television artistes.

21. In 2007, Tiger Woods' winnings were USD 10,867,052 (not including the USD 10 million he received in a deferred retirement account as the winner of the 2007 FedEx Cup). Assuming Woods pays Williams the 'going rate' for professional caddies – 10% of winnings – Williams would have been paid over USD 1,080,000 compensation from Woods, putting him 90th on the PGA money list: see <www.pgatour.com/r/stats/info/?109>.

unlikely that either referees or caddies would be considered sportsmen under Article 17.

If the rationale for Article 17 is tax avoidance – the difficulty of taxing ‘itinerant activities’ of artistes and sportsmen, as suggested by the OECD in 1987 – it is difficult to see why Article 17 draws the distinctions that it does. Indeed, one must wonder why the provision is limited to the world of entertainment and sports.

2.2 INCOME SUBJECT TO SOURCE TAXATION UNDER ARTICLE 17 OECD MODEL CONVENTION

2.2.1 **Types of Income Included in Article 17 OECD Model Convention**

Given the supposed problems that artistes and sportsmen pose for tax regimes, it is surprising that Article 17 is limited in terms of the income that it covers. Certain income, such as royalties, is clearly within the scope of other treaty provisions. If the concern is with respect to the particular individuals (i.e., artistes and sportsmen) rather than specific types of income that they earn, then source taxation should be permitted on all income earned by artistes and sportsmen.²² However, because royalties are treated separately, the characterization of an amount as a royalty or income from personal services affects whether or the extent to which a source country has jurisdiction to tax the amount under the OECD Model. The characterization issue is highlighted by the well-known case of *Boulez v. Comm.*,²³ where the United States Tax Court concluded that amounts paid to the German-resident conductor Pierre Boulez based on the sale of live concert recordings were held to be personal services income having its source in the United States (where the concerts took place) rather than royalty income, despite the fact that the amounts were based on sales and were referred to as a ‘royalty’ in the contract with the recordings’ producer. According to the court, because Boulez had no ownership interest in the recordings, the payments to him could not constitute royalties; rather, the payments were for his personal services performed at the time the recordings were made. A recent addition to paragraph 18 of the Commentary on Article 12 indicates that the OECD agrees with this decision:

18. The suggestions made above regarding mixed contracts could also be applied in regard to certain performances by artists and, in particular, in regard

22. Unlike most of the jurisdiction allocation rules in the OECD Model which grant the source country at least some taxing right (even if not the primary right), Article 12 gives exclusive jurisdiction to tax royalties to the resident country. A number of countries, including some developed countries such as Canada, follow the UN Model on Article 12 and provide some jurisdiction to the source country to tax royalties. Based on the OECD’s rationale for Article 17, Article 12 should likewise permit source taxation of royalties if the recipient of the royalty is an artiste or sportsman.

23. (1984), 83 TC 584 (USTC).

to an orchestral concert given by a conductor or a recital given by a musician. The fee for the musical performance, together with that paid for any simultaneous radio broadcasting thereof, seems to fall under Article 17. Where, whether under the same contract or under a separate one, the musical performance is recorded and the artist has stipulated that he, on the basis of his copyright in the sound recording, be paid royalties on the sale or public playing of the records, then so much of the payment received by him as consists of such royalties falls to be treated under Article 12. Where, however, the copyright in a sound recording, because of either the relevant copyright law or the terms of contract, belongs to a person with whom the artist has contractually agreed to provide his services (i.e., a musical performance during the recording), or to a third party, the payments made under such a contract fall under Articles 7 (e.g., if the performance takes place outside the State of source of the payment) or 17 rather than under this article, even if these payments are contingent on the sale of the recordings.²⁴

Similar characterization problems can arise where the name, likeness, or signature of an artiste or sportsman is attached to a particular product.²⁵ If the individual helps design the product, then arguably a portion of the amount paid is for personal services, which are not within the scope of Article 17. Where the payment is for the use of the name, signature or likeness alone, it is similarly doubtful whether the payment would fall within the scope of Article 17; even if the payment may be considered a payment for personal services, which is doubtful, it is unlikely that the payment would be for personal services as an artiste or sportsman. The question of which OECD Model treaty article would cover such payments (when made to a non-resident) – whether Article 7, 12 or 21 – is beyond the scope of this paper.

In terms of personal services income (whether business income or employment income), Article 17 applies to income derived by the artiste or sportsman ‘from his personal activities as such exercised in’ the source country.²⁶ According to paragraph 9 of the Commentary on Article 17:

9. Besides fees for their actual appearances, artistes and sportsmen often receive income in the form of royalties or of sponsorship or advertising

24. The last sentence of this commentary was added in 2003 (from the report, ‘The 2002 Update to the Model Tax Convention’ adopted by the Council of the OECD on 28 January 2003).

25. Numerous examples come to mind, including: Nike’s ‘Air Jordan’ running shoes; Maurice Lacroix’s ‘Roger Federer Chronometer’; Activision’s ‘Tony Hawk’ skateboard video games (as well as Kohl’s Hawk clothing and footwear); ‘Rawlings’ ‘Mickey Mantel Signature Baseball Glove’; and various ‘celebrity perfumes’ too numerous to list.

26. The determination of whether the income is derived by the artiste or sportsman ‘from his personal activities as such’ is not usually relevant for domestic law purposes, since personal services income is generally subject to tax in the source country where the personal services are performed (or are deemed to be performed) regardless of the nature of the personal services.

fees. In general, other Articles would apply whenever there was no direct link between the income and a public exhibition by the performer in the country concerned. Royalties for intellectual property rights will normally be covered by Article 12 rather than Article 17 (cf. paragraph 18 of the Commentary on Article 12), but in general advertising and sponsorship fees will fall outside the scope of Article 12. Article 17 will apply to advertising or sponsorship income, etc. which is related directly or indirectly to performances or appearances in a given State. Similar income which could not be attributed to such performances or appearances would fall under the standard rules of Article 7 or Article 15, as appropriate. Payments received in the event of the cancellation of a performance are also outside the scope of Article 17, and fall under Article 7 or 15, as the case may be.²⁷

Clearly performance income falls within Article 17, although the Article and Commentary provide no assistance in allocating such income where it is earned in more than one country. The income attributable to rehearsals or practices is more questionable. To the extent that a rehearsal relates to a specific performance and there is no breakdown of the payment to the artiste between the live performance and rehearsal time, the entire payment is likely included in Article 17. In contrast, where a professional sportsman plays for a team that has games in more than one country and the team holds practices both in its home country and in the source countries where it plays, it is more difficult to determine what portion of the sportsman's salary should be allocated to the source country.²⁸

Endorsement income raises a variety of issues under Article 17. The first, a threshold issue, is what endorsement income is within the ambit of Article 17? Endorsement income paid to an artiste or sportsman to use specific equipment or wear specific clothing (or logos) *during public performances* is surely within the scope of Article 17,²⁹ as suggested by paragraph 9 of the Commentary. Where, however, the individual is paid an amount to endorse certain products outside of public performances, it is doubtful whether such payments would come within Article 17. In these cases, the individual is paid to endorse the product *because of*

27. This commentary is derived from paragraphs 78–84 of OECD, 'The Taxation of Income Derived from Entertainment, Artistic and Sporting Activities', in *Issues of International Taxation*.

28. According to the Dutch Advocate General's conclusions in Cases Nos. 40465, 40604 and 41478, there are two types of training activities: '(1) those without an audience and without a direct link to a performance and (2) those relating to a performance or appearance for an audience'. The former would be dealt with under Article 15 and the latter under Article 17. See Rijkele Betten, 'Annex to Advocate General's Conclusion on Whether or Not Art. 17 of the OECD Model Applies to the Basic Salaries of Sportsmen', *European Taxation*, vol. 46, no. 5 (2006): 231–236 at 235.

29. This was the income subject to tax in the United Kingdom in *Agassi v. Robinson (Inspector of Taxes)*, [2006] UKHL 23.

his or her celebrity status, but the payment is arguably not for services, at least directly, *as* an artiste or sportsman.³⁰

Even where endorsement income is within the ambit Article 17 because of its close connection with public performances, it is difficult to determine the amount applicable to particular source countries in which such income is derived. For example, an endorsement contract entered into by a professional tennis player for using particular equipment or wearing a particular logo may include three elements: a base amount; tournament bonuses (paid depending upon results in particular tournaments); and a ranking bonus (paid depending on the individual's rank at a particular time). The endorsement income should be considered income from personal services that is sufficiently connected with public performances (i.e., tournament play) that it would be within the scope of Article 17. Each country in which the tennis player performs may claim jurisdiction to tax at least some portion of the endorsement income. A tournament bonus should be considered to have its source in the country in which the particular tournament took place. However, allocating the base amount and the ranking bonus to the various countries in which the individual performs is more difficult. It is simple to say that the amount should be apportioned 'reasonably', but there may be a number of 'reasonable' methods that give rise to different results.³¹

It is questionable whether certain inducement payments and payments for restrictive covenants come within Article 17. If the payment is for the individual's agreement to appear in a particular public entertainment or sporting event in the source country, there is little doubt that such payment is within Article 17. Where, however, the individual is paid a true 'signing bonus' – at least one that is not conditional on the individual's actual performance in the source country³² – it is questionable whether the payment is in consideration for the individual's services 'exercised' in the source country. Similarly, if a sportsman is paid in exchange

30. Contrast Article 16(1) of the Canada-Mexico tax treaty, concluded on 12 September 2006, which provides in part that 'Income derived by an entertainer or a sportsman who is a resident of a Contracting State from that resident's personal activities relating to that resident's reputation as an entertainer or sportsman exercised in the other Contracting State may be taxed in that other State'. This treaty provision is broad enough to include endorsement income characterized as personal services income, even where the personal services are not directly connected with a public performance.

31. Take the ranking bonus as an example. One allocation method may be based on the 'points' earned with respect to a tournament in a particular country compared to aggregate points earned in the year. The ATP has an elaborate points system for determining rank based on the level of the tournament and the final round that the player achieved (plus additional ranking points for winning the event and for qualifying for the event): see the ATP's Rule Book, part VIII, available at <www.atptennis.com/en/players/ATP_Rulebook2007.pdf>. Another reasonable allocation could be based on tournament winnings compared to total winnings. Finally, it is arguable that all tournament play contributes toward an individual's ultimate ranking and therefore allocation should be based on the number of days (or tournament days) that the individual spends playing tennis in each country.

32. Consider, for example, a sportsman who is paid a non-refundable signing bonus by a particular team and prior to the commencement of his services, he is severely injured and unable to play for the team.

for his agreement to negotiate exclusively with a particular team or to not negotiate with any other team for a particular time period, and the payment is not conditional on signing a contract for services, it may be difficult to argue that the payment is for personal services 'exercised' in the source country, particularly where the individual does not conclude a contract for services with the team paying the amount and does not enter the source country at all during the period of negotiations. Finally, where an amount is paid to an individual in consideration for his or her agreement *not* to perform in a country for a stipulated period of time, it is questionable whether the payment is in respect of personal services exercised in that country.

A source country may introduce domestic deeming rules in order to ensure that it has the jurisdiction to tax certain types of payments for personal services. A more limited example is Canada's treatment of signing bonuses or lock-up payments. If the payer is able to deduct the amount paid in determining its tax liability in Canada (e.g., where the payer is resident in Canada), the non-resident recipient is deemed to be employed in Canada in the year and therefore subject to tax under its domestic law.³³ Canada further takes the position that the deeming provision applies for the purposes of interpreting its tax treaties, relying on Article 3(2) of the OECD Model and section 3 of the Income Tax Conventions Interpretation Act.³⁴

2.2.2 Deductibility of Related Expenses

Assuming that particular income is within the scope of Article 17, it is necessary to consider the extent, if any, to which the artiste or sportsman can deduct expenses, incurred to earn that income. The Commentary on Article 17 is ambivalent in this respect. Paragraph 10 of the Commentary provides:

10. The Article says nothing about how the income in question is to be computed. It is for a Contracting State's domestic law to determine the extent

33. See ss 115(1)(a)(v), 115(2)(c.1), 115(2)(d) and 115(2)(e)(v) of the Income Tax Act, RSC 1985, c. 1 (5th Supp.), as amended (ITA).

34. RSC 1985, c. I-4, as amended. See the Canada Revenue Agency's technical interpretation dated 11 August 1998, document no. 9819311. The CRA suggests that the decision in *Hale v. The Queen*, (1992) 2 CTC 379, 92 DTC 6473 (FCA) supports this position. While a resident of Canada, Hale received stock options from his Canadian employer. He exercised some of the options after ceasing to be resident in Canada and becoming resident in the United Kingdom. Hale argued that the benefit he derived from such options (which, for resident employees are subject to tax under ITA s. 7(1)) were exempt from tax in Canada under the dependent personal services article of the Canada-United Kingdom tax treaty because he did not receive the benefit from an employment exercised in Canada. The Federal Court of Appeal disagreed. ITA 7(4) provides that, in the case of an employee who exercises stock options after ceasing employment, the tax benefit provision 'shall continue to apply as though the person were still an employee and as though the employment were still in existence'. The Court concluded that this provision was 'complementary' to the dependent personal services article of the treaty, and accordingly Hale was considered to have received the benefit from an employment exercised in Canada in the year that he exercised the stock options.

of any deductions for expenses. Domestic laws differ in this area, and some provide for taxation at source, at a low rate based on the gross amount paid to artistes and sportsmen. Such rules may also apply to income paid to groups or incorporated teams, troupes, etc.³⁵

Every EU country must tax personal services income on a net basis if the country taxes residents on a net basis in order not to be discriminatory under the EC treaty.³⁶ Where income is taxed on a net basis, it is necessary to determine which expenses and how much of such expenses are applicable to the income earned in each source country.³⁷ Furthermore, where the expenses incurred generate both personal services income and royalties,³⁸ arguably the expenses should

35. In the 'Draft Contents of the 2008 Update to the Model Tax Convention' (21 April 2008), the OECD has proposed adding the following text at the end of current paragraph 10 of the Commentary:

Some States, however, may consider that the taxation of the gross amount may be inappropriate in some circumstances even if the applicable rate is low. These States may want to give the option to the taxpayer to be taxed on a net basis. This could be done through the inclusion of a paragraph drafted along the following lines:

Where a resident of a Contracting State derives income referred to in paragraph 1 or 2 and such income is taxable in the other Contracting State on a gross basis, that person may, within [period to be determined by the Contracting States] request the other State in writing that the income be taxable on a net basis in that other State. Such request shall be allowed by that other State. In determining the taxable income of such resident in the other State, there shall be allowed as deductions those expenses deductible under the domestic laws of the other State which are incurred for the purposes of the activities exercised in the other State and which are available to a resident of the other State exercising the same or similar activities under the same or similar conditions.

For tax treaties between EU Member States, this provision would not conform to the ECJ's judgment in *FKP Scorpio*, infra note 36.

36. See *Gerritse v. Finanzamt Neukölln-Nord*, Case C-234/01, 12 June 2003, where the European Court of Justice (ECJ) concluded that Germany's gross final withholding tax (i.e., the non-deductibility of expenses when determining the amount of tax withheld without the ability to the taxpayer to file a final return on a net basis) was held to be discriminatory. Germany amended its legislation to permit a non-resident to file a return and claim a refund of withholding taxes if expenses directly connected to the taxed income exceed 50% of the gross income derived from services. In *FKP Scorpio Konzertproduktionen GmbH v. Finanzamt Hamburg-Eimsbüttel*, Case C-290/04, 3 October 2006, the ECJ held that the inability to claim expenses at the time that tax was withheld was discriminatory. In *Centro Equestre da Lezíria Grande Lda v. Bundesamt für Finanzen*, Case C-345/04, 15 February 2007, the ECJ held that the limitation of expenses to those directly connected to the taxed income was not discriminatory; however, limiting the refund to only those circumstances where such expenses exceeded 50% of gross income was discriminatory. In November 2003, Germany removed the 50% limitation.
37. Many expenses apply to income earned in more than one country, such as depreciation of assets used in each country to earn income, coaching, agent and other overhead fees.
38. Consider, for example, an artiste (e.g., a rock band) that goes on tour. Usually the purpose of the tour is not only to generate income from the live performances but also to generate record sales for the producer and therefore royalty income for the artiste. This issue is considered further in Molenaar, *International Performing Artistes*, 218–220.

be apportioned between the two sources since the source country either gives up its jurisdiction to tax royalties or taxes them on a gross basis.

2.3 SCOPE OF ARTICLE 17(2) OECD MODEL CONVENTION

As noted in part 1 above, when Article 17(2) was introduced in 1977, the Commentary added at that time suggested that it was an anti-avoidance measure targeting the use of 'rent-a-star' companies. A rent-a-star company is one that is controlled by the artiste or sportsman. The problem addressed by Article 17(2) arises where the company pays the individual a low salary compared to the profits earned by the company from the public performances of the individual.³⁹

In the expanded Commentary on Article 17 added in 1992, Article 17(2) was described as having much greater breadth, although the text of the provision remained unchanged. Paragraph 11 of the Commentary now reads:

11. Paragraph 1 of the Article deals with income derived by individual artistes and sportsmen from their personal activities. Paragraph 2 deals with situations where income from their activities accrues to other persons. If the income of an entertainer or sportsman accrues to another person, and the State of source does not have the statutory right to look through the person receiving the income to tax it as income of the performer, paragraph 2 provides that the portion of the income which cannot be taxed in the hands of the performer may be taxed in the hands of the person receiving the remuneration. If the person receiving the income carries on business activities, tax may be applied by the source country even if the income is not attributable to a permanent establishment there. But it will not always be so. There are three main situations of this kind:

- (a) The first is the management company which receives income for the appearance of e.g., a group of sportsmen (which is not itself constituted as a legal entity).
- (b) The second is the team, troupe, orchestra, etc. which is constituted as a legal entity. Income for performances may be paid to the entity. Individual members of the team, orchestra, etc. will be liable to tax under paragraph 1, in the State in which a performance is given, on any remuneration (or income accruing for their benefit) as a counterpart to the performance; however, if the members are paid a fixed periodic remuneration and it would be difficult to allocate a portion of that income to particular performances, Member countries may decide, unilaterally or bilaterally, not

39. The source country has the jurisdiction to tax the salary paid to the individual performer (to the extent that it relates to services performed in the source country) under Article 17(1), although it may have difficulty enforcing such taxation where both the company and the individual are non-resident.

to tax it. The profit element accruing from a performance to the legal entity would be liable to tax under paragraph 2.

- (c) The third situation involves certain tax avoidance devices in cases where remuneration for the performance of an artiste or sportsman is not paid to the artiste or sportsman himself but to another person, e.g., a so-called artiste company, in such a way that the income is taxed in the State where the activity is performed neither as personal service income to the artiste or sportsman nor as profits of the enterprise, in the absence of a permanent establishment. Some countries ‘look through’ such arrangements under their domestic law and deem the income to be derived by the artiste or sportsman; where this is so, paragraph 1 enables them to tax income resulting from activities in their territory. Other countries cannot do this. Where a performance takes place in such a country, paragraph 2 permits it to impose a tax on the profits diverted from the income of the artiste or sportsman to the enterprise. It may be, however, that the domestic laws of some States do not enable them to apply such a provision. Such States are free to agree to other solutions or to leave paragraph 2 out of their bilateral conventions.

Canada, Switzerland and the United States filed a reservation to the Commentary, indicating that Article 17(2) ‘should apply only to cases mentioned in subparagraph 11(c)’ and many of their treaties are so limited.⁴⁰ Subparagraph 11(c) is similar to paragraph 4 of the 1977 Commentary on Article 17, with the noted addition of the reference to ‘look-through’ provisions in domestic law. These look-through provisions are considered in part 2.4 below.

A problematic element of the expanded Commentary is the increase in the scope of the provision to situations described in subparagraphs 11 (a) and (b). As indicated in the opening words of the Commentary, ‘paragraph 2 provides that the portion of the income which cannot be taxed in the hands of the performer may be taxed in the hands of the person receiving the remuneration’. In the situation described in subparagraph 11(b) of the Commentary, for example, a portion of the salaries of the individual performers employed by the entity (team, orchestra, troupe, etc.) is subject to tax in the source country under Article 17(1). It is the ‘profit element’ of the entity *relating to the performance of such individuals* in the source country that is subject to tax in the source country under Article 17(2). However, individuals other than artistes or sportsmen may be employed by and contribute to the profit of the entity. Consider a professional sports team (say a soccer team) resident in Country R that is paid a lump sum by a resident of Country S to play in an exhibition game in Country S. The lump sum covers not only the services of the team players (i.e., the sportsmen), but also the coach, manager, trainers, and team doctor, all of whom accompany the team for the exhibition

40. According to Molenaar, *International Performing Artistes*, 86% of US treaties are so limited, while 54% of Canadian treaties and 45% of Swiss treaties are so limited.

game. Is the entire lump sum paid to the team (or the profit of the team from the game, if Country S taxes on a net basis) subject to tax in Country S even though some of the lump sum (or profit) relates to services performed by non-sportsmen? Similar problems arise with an orchestra (e.g., accompanied by stage hands, coaches, lighting specialists, etc.) and particularly with a theatre troupe that has a significant ‘behind-the-scenes’ contingent. The Commentary on the OECD Model does not consider what part of the payment to such entities would be covered by Article 17(2), but it is certainly arguable that some of the payment would be excluded because it relates to services provided by individuals who are not artistes or sportsmen.⁴¹

2.4 ARTICLE 17(2) OECD MODEL CONVENTION AND DOMESTIC DEEMING RULES

A number of countries, including the United Kingdom, France, Germany and Japan, have introduced specific rules dealing with the situation where a third party is interposed between the individual artiste or sportsman and the person paying for such individual’s services – that is, the situation described in Article 17(2) of the treaty. These rules may be necessary because the domestic law otherwise limits source taxation⁴² or because the country has many older treaties that do not have a provision similar to Article 17(2) of the OECD Model. In the absence of the domestic rule, the third party’s business income would be exempt from tax under the equivalent of Article 7 of the OECD Model. Legislation in the United Kingdom and France essentially disregards the interposition of third parties in these circumstances.⁴³

While the OECD is ‘strongly opposed’ to treaty overrides even where such legislation is aimed at counteracting the abuse of tax treaties,⁴⁴ it countenances the use of domestic fictions (i.e., domestic deeming rules) to deal with the problem of

41. There are other problematic results of the expanded scope of Article 17(2). For example, it is arguable that profits accruing to the owner of a winning race horse are ‘in respect of personal activities exercised by’ a sportsman, i.e., the jockey. Yet the owner of a winning greyhound in dog races would be outside the scope of Article 17(2) because there is no sportsman involved in that race.

42. For example, there may be a general requirement in the domestic law that a non-resident corporation have a permanent establishment in the country before its business income is subject to tax therein.

43. In the United Kingdom, legislation dealing specifically with non-UK resident artistes and sportsmen was originally introduced as TA 1988, ss 555–558 and Income Tax (Entertainers and Sportsmen) Regulations 1987 (SI 1987/530). The regime dealing with non-UK resident artistes and sportsmen is now found primarily in the Income Tax (Trading and Other Income) Act 2005 (ITTOIA 2005), ss 13–14 (as amended) and the Income Tax Act 2007 (ITA 2007), ss 965–970. In France, see s. 155A of the French Tax Code.

44. OECD Committee on Fiscal Affairs, *Report on Tax Treaty Overrides* (Paris: OECD, 1989), para. 34.

the absence of Article 17(2) in tax treaties. According to paragraph 8 of the OECD Commentary on Article 17 (added in 1992):

8. Paragraph 1 applies to income derived directly and indirectly by an individual artiste or sportsman. In some cases the income will not be paid directly to the individual or his impresario or agent. For instance, a member of an orchestra may be paid a salary rather than receive payment for each separate performance: a Contracting State where a performance takes place is entitled, under paragraph 1, to tax the proportion of the musician's salary which corresponds to such a performance. Similarly, where an artiste or sportsman is employed by e.g., a one person company, the State where the performance takes place may tax an appropriate proportion of any remuneration paid to the individual. In addition, where its domestic laws 'look through' such entities and treat the income as accruing directly to the individual, paragraph 1 enables that State to tax income derived from appearances in its territory and accruing in the entity for the individual's benefit, even if the income is not actually paid as remuneration to the individual.⁴⁵

It is unclear why a domestic 'look through' rule, such as that introduced in the United Kingdom and France, appears to be acceptable notwithstanding that it is similar in design and has the same effect as an unacceptable treaty override.⁴⁶ Whether or not such deeming rules would be interpreted by a court in a manner consistent with the OECD Commentary is beyond the scope of this paper.⁴⁷

45. This 'look-through' approach is repeated in subparagraph 11(c) of the Commentary, quoted *supra*.

46. OECD, *Report on Tax Treaty Overrides* (1989) paras 31–33 gives an example of a deeming rule (based on the US Foreign Investment in Real Property Act of 1980) that is considered a treaty override. In the example,

State B taxes gains from the alienation of immovable property. Taxpayers have found a way to avoid paying the tax by interposing, in State B, a company between themselves and the property and by selling the shares in the company rather than the immovable property itself. State B cannot tax the gain from the sale of shares as its treaties follow Article 13 of the OECD Model Convention. State B legislates that the sale of shares of any real estate company is deemed to be a sale of immovable property for the purpose of the application of tax treaties.

According to the OECD report, '[t]he effect of such legislation is in contravention of [the country]'s tax treaty obligations, even though the overriding measure is clearly designed to put an end to improper use of its tax treaties'.

47. I consider this issue in greater detail in Sandler, *International Entertainers and Athletes*, 191–238. See also A.J. Juárez, 'Limitations to the Cross-Border Taxation of Artistes and Sportsmen under the Look-Through Approach in Article 17(1) of the OECD Model Convention', *European Taxation*, part I vol. 43, no. 11(2003): 409–419 and *European Taxation*, part II, vol. 43, no. 12 (2003): 457–472.

3 RATIONALIZING ARTICLE 17 OECD MODEL CONVENTION

3.1 THE RATIONALE AS ESPOUSED BY THE OECD

According to the OECD, Article 17 is required as an anti-avoidance measure targeting highly mobile artistes and sportsmen who, in the absence of source taxation, might not pay any tax at all. The OECD's purported justification for source taxation can be criticized on a number of grounds. Three grounds are provided here. First, while I agree that enforcement concerns are a legitimate consideration in allocating the jurisdiction to tax, the scope of Article 17 belies this concern. Given the problems with enforcing tax on highly mobile individuals, particularly artistes and sportsmen, it is difficult to discern why Article 17 is limited in terms of both the persons covered (i.e., only artistes and sportsmen performing in public) and the income covered (i.e., income from personal activities as an artiste or sportsman exercised in the source country). Some behind-the-scenes personnel in the entertainment and sports world, such as certain film directors and coaches of sports teams, are as well (if not better) paid than the artistes or sportsmen that they direct or coach and can similarly take advantage of sophisticated tax structures to minimize residence taxation. More to the point, though, there are numerous other individuals beyond the world of entertainment and sports, who are capable of earning substantial amounts of money outside their country of residence in relatively short time periods without establishing a permanent establishment in the source country.⁴⁸ And if the concern really is with artistes and sportsmen themselves, as opposed to the types of income that they can earn, why not permit source taxation for all types of income that such individuals earn?

Second, the source jurisdiction granted by Article 17 creates numerous administrative problems – and therefore costs – for tax administrations and for taxpayers in both the source and residence countries. The administrative costs associated with source taxation are particularly burdensome for artistes and sportsmen who are not earning significant amounts in the source country – that is, the vast majority of such individuals. The amount of taxes raised in source countries by taxing non-resident entertainers and sportsmen is extremely small, particularly when the tax credits granted to similar resident individuals for their foreign-source income are taken into account.⁴⁹

48. As noted by Frank and Cook, *Winner-Take-All Society*, *supra* note 2 and corresponding text. Indeed, there is some irony in the OECD's stated justification for Article 17. For those artistes and sportsmen who earn significant sums of money, the accompanying celebrity status confers almost universal knowledge of the whereabouts and earnings of these individuals. If a resident country wants information about the income-earning activities of its resident celebrities, it need only 'google' them. On the other hand, other highly mobile high-income earners – the 'unknown celebrities' – do not make the radar screen. Thus, information-gathering is likely more problematic for unknown resident celebrities than it is for known resident celebrities in the entertainment and sports world.

49. Molenaar, *International Performing Artistes*, provides figures for certain taxation years for the Netherlands, the United Kingdom, Australia and New Zealand.

Third, source taxation of such individuals can lead to double or ‘excessive’ taxation, for various reasons, where the resident country relieves foreign tax using the credit method.⁵⁰ First, where the source country taxes such income on a gross basis (assuming it can do so⁵¹) and the individual incurs significant expenses to earn such income, the individual may not get full credit for the source tax due to limits on the tax credit granted by the resident country. Where source taxation is imposed on gross income at low rates, as suggested in paragraph 10 of the Commentary on Article 17 of the OECD Model, this should not be a concern. However, gross withholding rates can be as high as 25%, and when expenses are taken into account, gross withholding rates can potentially far exceed even the highest marginal tax rate in many resident countries.⁵² Second, the resident country may not grant any tax credit at all where, for example, there is a dispute about the source country’s jurisdiction to tax⁵³ or a dispute over the amount of income earned in the particular source country. Where the individual earns income in multiple countries, allocation of both income and expenses is much more difficult in the absence of a permanent establishment in any country. These disputes may not necessarily be settled using the mutual agreement procedure in an applicable tax treaty (or treaties), leaving the taxpayer to pursue relief through the domestic appeals process, perhaps in more than one country. Third, the interposition of a third party can create tax credit difficulties for both the third party and the artiste or sportsman employed by the third party. In these circumstances, the source country may tax the third party (under the equivalent of Article 17(2)) or the individual artiste or sportsman using a ‘look-through’ approach. Where the source country taxes the third party on the gross amount paid to it and the third party pays out the entire amount received to the individual, the individual’s country of residence may refuse to give the individual credit for the tax withheld on the payment to the third party. Similarly, where the source country applies the look-through approach and taxes the individual, the resident country of the third party may refuse to give the third party credit for the tax withheld.⁵⁴

50. Paragraph 12 of the Commentary on Article 17 recommends that resident countries use the credit method because the exemption method may lead to double non-taxation. Alternatively, the Commentary recommends that countries which otherwise use the exemption method to relieve double taxation retain a subsidiary right to tax if the source country cannot otherwise exercise the jurisdiction to tax granted by Article 17.

51. *Supra*, note 36 and corresponding text.

52. Molenaar, *International Performing Artistes*, provides a summary of withholding rates on the income of artistes in 34 countries (at 156–158). According to his survey, the majority of source countries (24 of 32) use gross withholding, with rates varying from 15 to 25%.

53. For example, the source country characterizes an amount as income from personal services for which it has jurisdiction to tax under an applicable treaty while the resident country characterizes the amount as a royalty for which it has exclusive jurisdiction to tax under the treaty. See, e.g., *Boulez*, *supra* note 23 and corresponding text. Similarly, the resident country may dispute the source country’s characterization of an individual as an ‘artiste’ or ‘sportsman’.

54. This issue is considered in more detail in Juárez, *European Taxation* 2003. Molenaar, *International Performing Artistes*, provides a number of other tax credit problems (187–194).

3.2 A MORE PLAUSIBLE RATIONALE?

There is no doubt that, as a general principle of international tax law, a source country has the jurisdiction to tax income that has its source therein. It is equally clear that, as a general principle of international tax law, a country has the jurisdiction to tax its residents on their worldwide income. Given the fact that the avoidance of double taxation is also a general principle of international tax law, the question is whether there is some principled approach for allocating the jurisdiction to tax certain income or certain taxpayers between the resident and source countries.

The predominant theory underlying a country's jurisdiction to tax is generally considered to be the 'benefits theory'. Construed narrowly, the benefits theory suggests that taxes levied by a country on taxpayers (grouped by criteria such as residence) are the price of that country's public sector goods and services provided to these taxpayers. Shay et al. suggest a broader construction of the benefits theory rationale for taxing non-residents in the US context, which is equally applicable to any source country:

Government benefits received by non-residents who invest or do business in the United States are not limited to such basic services as the road leading to a particular business location and police and fire protection of that site. A non-resident who invests in or carries on a U.S. business profits from U.S. government activities that create and foster general public safety, national security, a fair legal system, a transparent and safe financial infrastructure, a healthy and educated workforce, transportation and communication infrastructure, legal protection of intellectual property licensed or sold in the United States by the non-resident, and redistributive assistance to the poor that contributes to a stable social order.

The U.S. physical, legal, and economic infrastructure (the 'U.S. market') on which the non-resident depends is largely the result of U.S. government activities mentioned above. If the non-resident mineral exploiter can be taxed for accessing and exploiting a U.S. natural resource deposit, it also is legitimate to tax a non-resident for accessing and exploiting the U.S. market that is, to a great extent, the creature of U.S. government services and programs.⁵⁵

While the benefits theory justifies both worldwide taxation of residents and source taxation of non-resident individuals earning personal services income, the theory has little to say about how best to allocate the jurisdiction to tax such income between the source and residence country in order to ensure the single taxation of such income.⁵⁶ The allocation rules for such income in Articles 7, 15 and 17 of the OECD model are necessarily arbitrary.

55. S.E. Shay, J.C. Fleming, Jr. and R.J. Peroni, 'The David R. Tillinghast Lecture "What's Source Got to Do With It?" Source Rules and U.S. International Taxation', *Tax Law Review*, vol. 56 (2002): 81–155 at 90–91, footnotes omitted.

56. According to Avi-Yonah, the definable principles of the international tax regime are the 'single tax principle' and the 'benefits principle'. The former 'states that income from cross-border

In the context of personal services income, the ‘normal’ jurisdiction allocating rules in Articles 7 and 15 are based on a substantial ‘presence’ in the source country. For business income, that requires a permanent establishment. For employment income, it requires that the individual either is present in the source country for a substantial period of time (183 days) *or* be employed by an entity that is subject to tax in the source country. These criteria are arbitrary thresholds beyond which it is assumed that the source country is providing such individuals, considered collectively, sufficient benefits to justify the jurisdiction to tax. If there is merit in deviating from these criteria for artistes and sportsmen, for whom no permanent establishment is required and no stay is too short, it must be because the benefits provided by the source country to such individuals are significantly greater than those provided to others performing personal services in the source country. But that is only true in relatively limited circumstances. Well-known artistes and sportsmen – indeed, any well-known individual making public appearances – may require enhanced security and may appear in venues heavily subsidized by public funds. These individuals – whom I’ll refer to as ‘known celebrities’ for lack of a better term – may benefit more than others from some elements of the public sector and from a sufficiently large and prosperous economy to support their public performances. For these individuals, perhaps there is a justification for source taxation. If so, then Article 17 could be better targeted, rather than catching *all* artistes and sportsmen regardless of how well (or not) they are known and regardless of the extent to which they benefit from either the public sector or the economy generally in the source country.

I suggested in 1995 that the rationale for Article 17 is not based on the benefits theory. Rather, it is more pragmatic:

[P]ersons involved in the entertainment and sporting industry . . . are well-known and receive constant media attention. The most famous can obtain substantial profits during very short periods of time. The media is often quick to point out the significant fortunes such individuals can amass and also the relatively insignificant taxes they may pay (or, more precisely, the amount of taxes such personalities avoid paying). If this impression is held by

transactions should be subject to tax once (that is, not more, but also not less, than once) at the rate determined by the benefits principle. The benefits principle allocates the right to tax active business income primarily to the source jurisdiction and the right to tax passive investment income primarily to the residence jurisdiction’. R.S. Avi-Yonah, ‘Tax Competition, Tax Arbitrage and the International Tax Regime’, *Bulletin for International Taxation*, vol. 61, no. 4 (2007): 131. Later in the article (at 134), Avi-Yonah suggests that ‘[o]n a theoretical level the benefits theory makes sense because it is primarily individuals who derive investment income, whereas it is primarily corporations that derive business income. For individuals, residence-based taxation makes sense. . . . In the case of multinational corporations, source-based taxation seems generally preferable’. It is unclear whether Avi-Yonah advocates residence-based taxation or source-based taxation of an individual deriving business or employment income.

the general body of taxpayers – that there is a category of taxpayers who can avoid paying taxes – it can be harmful to the general tax climate.⁵⁷

The 1987 OECD study suggested that 18 of the 19 OECD Member countries that provided submissions shared this concern.⁵⁸ However, there are other individuals who can earn large amounts of money in a source country in relatively short time periods without the need of a permanent establishment, and some of these individuals garner as much media attention as high-profile performing artistes and sportsmen. Even where such individuals are unknown and do not attract media attention, the simple fact that they can earn large amounts of money for their personal services is sufficient, in my view, to justify source taxation of such income.

4 BETTER TARGETING OF ARTICLE 17 OECD MODEL CONVENTION

4.1 PERMIT SOURCE TAXATION OF ALL CELEBRITIES, KNOWN AND UNKNOWN

I propose that Article 17 should be amended to permit source taxation of personal services income of all ‘celebrities’ regardless of the length of time spent in the source country or the presence of a permanent establishment. The term ‘celebrity’ would certainly include well-known artistes and sportsmen; it would also encompass – and should encompass for these purposes – others, such as well-known film directors, supermodels, individuals on the ‘lecture circuit’ (such as former politicians) and even televangelists. However, I believe that it should extend to any individual who can command a large amount of money for personal services, including the ‘unknown celebrities’ referred to by Frank and Cook.⁵⁹ Rather than attempt to define the term ‘celebrity’ – which will necessarily cause interpretation issues at the margin – it would be simpler (and, in my view, justifiable) to adopt a ‘proxy’ for celebrity status and apply it to all individuals.

A simple proxy for celebrity status is the ability to command significant amounts of money for one’s appearances or services. That is, any individual who earns a substantial amount of money (i.e., more than a threshold amount) in a source country is considered to be a celebrity. Thus, I would extend source taxation under Article 17 to any individual who earns gross personal services

57. Sandler, *International Entertainers and Athletes*, 339.

58. See paragraph 7 and note 3 thereto of OECD, ‘The Taxation of Income Derived from Entertainment, Artistic and Sporting Activities’, in *Issues of International Taxation*. Submissions were provided by Australia, Austria, Belgium, Canada, Denmark, Finland, France, Germany, Ireland, Japan, Luxembourg, the Netherlands, Norway, Portugal, Spain, Sweden, Switzerland, the United Kingdom and the United States. Only Switzerland reported no particular problem in this area.

59. Frank and Cook, *Winner-Take-All Society*, *supra* note 2 and corresponding text.

income in the source country in excess of a relatively high defined threshold.⁶⁰ In this way, the difficulty of defining who is or is not an artiste or sportsman is replaced with a simple proxy for celebrity status: if an individual earns more than a stipulated amount from personal services (whether employed or self-employed) performed in the source country, the individual *is* a celebrity and the source country has the primary jurisdiction to tax the individual on the full amount of the income earned in the source country. This rule would remove many artistes and sportsmen who are currently caught by Article 17 from source taxation. On the other hand, it will catch the mobile unknown celebrities who command significant income from their personal services. Like known celebrities, these individuals benefit from a sufficiently strong economy in the source country to support their high fees.⁶¹

The question is what threshold amount is an appropriate proxy for celebrity status. The US Model Tax Treaty currently includes a USD 20,000 threshold in Article 16(1), its entertainers and sportsmen provision. However, this threshold has not changed since the proposed 1981 US Model.⁶² Given the amounts that celebrities (even lesser-known ones) can earn from even single appearances, the threshold should be much higher. Simply increasing the US threshold from its original 1981 limit by the rate of inflation would increase it to almost USD 50,000 at the end of 2007.⁶³ However, in today's 'winner-take-all markets', I believe that a much higher figure – say USD 100,000 per year – would be a more suitable threshold.

Since the threshold applies on an annual basis,⁶⁴ there may be 'cash flow' concerns for some individuals as well as the need for an administrative procedure for refunds where tax is withheld at source but the non-resident individual's annual source-country income does not exceed the threshold.⁶⁵ In addition, there ought

60. Alternatively, Article 17 could be removed from the Model and Articles 7 and 15 could be amended to permit source taxation of business income and employment income, respectively, of any individual if such income exceeds the stipulated threshold. In Article 7, this would be an exception to the usual requirement of a permanent establishment while in Article 15 it would be an exception to the 183-day rule.

61. *Supra* note 55 and corresponding text.

62. The first US Model tax treaty, in 1977, included a USD 15,000 threshold in Article 17. The 1981 US Model (if it had been adopted) would have increased the threshold to USD 20,000. However, the Model was withdrawn in 1992 and a new US Model was introduced in 1996 with the same USD 20,000 threshold. It remained unchanged in the 2006 US Model Tax Treaty.

63. Based on the US Consumer Price Index, using the insurance calculator available online at <www.westegg.com/inflation>.

64. Alternatively, the threshold could apply on a 'per appearance' or 'per transaction' basis, in which case a lower threshold would be used. However, a per appearance threshold would be more cumbersome to administer and more open to abuse.

65. Such cash flow concerns can be alleviated if interest is paid on excess tax withheld at source to compensate the individual for the lost time value of money. Resident taxpayers, however, are not generally fully compensated for this loss when tax withheld at source exceeds their ultimate tax liability for the year. In these circumstances, the taxpayer is generally entitled to the return of the excess tax and perhaps interest from the due date of the tax return rather than from the date that excess tax was withheld. However, the difficulty in computing interest on excess withholding tax for resident taxpayers would be exceedingly complex due to the difficulty in

to be a relatively simple *ex ante* exemption procedure for individuals who clearly will not earn the threshold amount in the source country in a given year. Despite these complexities, even Molenaar agrees that ‘the practical experience with the *de minimis* rule in the US tax treaties up to now has been quite good and the negative aspects do not occur frequently’.⁶⁶ With a significantly higher threshold, the frequency of any negative aspects should correspondingly drop.

A few elements (and potential criticisms) of my proposal require comment. First, because I advocate the taxation of celebrities – as defined – in the source country without the need for a permanent establishment, is it logical to extend source taxation to the business income of any entity, including corporations, where the profits realized in the source country exceed a certain threshold? My proposal is limited to personal services income of individuals, which is a relatively narrow class of income. There are other considerations that come into play for corporate business profits, given the variety of businesses and the extent to which such businesses have any connection to the source country beyond (at a minimum) sales in that country. The ‘permanent establishment’ threshold has become increasingly problematic and has come under increased criticism in today’s digital economy. Whether a wholesale reconsideration of Article 7 is warranted is beyond the scope of this paper.⁶⁷

Second, a relatively arbitrary monetary threshold for celebrity status – USD 100,000 gross personal services income earned in the source country – creates a couple of concerns. First, because tax treaties potentially remain in force for a long time, the ‘value’ of the threshold declines over time and after a number of years would become relatively meaningless. This concern can be dealt with in the same manner as monetary thresholds are dealt with in some countries’ domestic tax laws: by indexing the amount each year based on a mutually-agreed cost-of-living index. Alternatively (and again, for simplicity), the parties could agree at the outset that

determining the point (or points) in the year that the tax withheld became excessive. For example, where a taxpayer realizes a substantial loss in a single transaction near the end of a year, the tax withheld on, say, employment income earlier in the year should not be considered excessive until the time that the loss arose. On the other hand, where employment income is the taxpayer’s sole source of income and the tax withheld on each payment is excessive, the taxpayer should arguably be entitled to interest on the excess portion of each payment from the date of each payment.

66. Molenaar, *International Performing Artistes*, 343.

67. See R.S. Avi-Yonah and K.A. Clausing, ‘Business Profits (Article 7 OECD Model Convention)’ in this volume, and various sources cited therein. The OECD public discussion draft ‘The Tax Treaty Treatment of Services: Proposed Commentary Changes’ (8 December 2006) indicated some discord over permanent establishment requirements for services income. The draft concluded that no change should be made to this requirement, although it proposed lengthy additions to the Commentary on Article 5. The proposed Commentary, incorporated in the 2008 update to the OECD Model (*supra* note 35), provides some reasons for this conclusion. It also suggests an alternative (additional) treaty provision for those states that disagree with the conclusion in order to broaden source taxation. However, even the alternative provision requires a substantial time presence of the enterprise providing services in the source country – 183 days – before the enterprise is deemed to have a permanent establishment in the source country.

the amount will increase each year by an arbitrary amount or arbitrary percentage as a proxy for inflation. Or, the amount can be set sufficiently high at the outset that it should not require any reconsideration (i.e., renegotiation) for a number of years. The second concern with a monetary threshold is that it might lead to ‘inappropriate’ tax planning at the margins. If USD 100,000 of gross personal services income is subject to source taxation but USD 99,999 is not, then a non-resident may agree to accept a few dollars less revenue at the margin in order to avoid source taxation.⁶⁸ That is true, as it is of any arbitrary rule. For example, planning can occur around the current 183-day rule in Article 15⁶⁹ and even around elements of the definition of ‘permanent establishment’ in Article 5. However, in most cases a monetary threshold should not create inappropriate planning opportunities. For example, it is highly unlikely that the prize for winning the PGA’s US Open is going to be reduced from over USD 1,000,000 to just under USD 100,000 just so that the winner avoids source taxation. I would be prepared to live with some inappropriate planning at the margin in order to bring greater certainty to Article 17’s application.

Third, my proposal does not ‘cure’ all of the characterization and source problems previously highlighted with current Article 17. It does not, for example, address the borderline between personal services income and royalty income (e.g., in the context of product endorsements). Because the former is covered by my proposal and the latter not, characterization issues will remain at the margin and attempts may be made to manipulate this distinction in order to avoid source taxation. While this may be true, I believe that personal services and royalties are not easily substitutable arrangements. The legal rights associated with each are sufficiently distinct that non-tax considerations will drive the contractual arrangements creating one rather than the other. In contrast, my proposal purposefully includes both independent and dependent personal services income because the distinction between the two is not as clear and arrangements creating one rather than the other are more easily substitutable. Furthermore, there is no policy rationale for distinguishing between the two in the context of my proposed source taxation of personal services income.⁷⁰

Although my proposal does little to clarify what income has its source in a particular country or what expenses are deductible (assuming that the source country taxes such income on a net basis), I suggest that these issues should be left to the domestic law of each source country and the resident country should

68. This also illustrates why the USD 100,000 celebrity threshold must apply on an annual (or per 12 consecutive month) basis rather than per transaction basis, where there would be greater scope to manipulate amounts at the margin.

69. The 183-day rule applies per twelve consecutive month period rather than on an annual basis in order to reduce the scope for manipulation. The USD 100,000 celebrity threshold could similarly apply on a twelve consecutive month basis.

70. I therefore disagree with the position advocated by some critics of Article 17 (see, e.g., Moleenaar, *International Performing Artists*, 344–345), who advocate removing employment income from its scope.

abide by such determination. The source country will still have problems enforcing its jurisdiction to tax such income where both the person paying the amount and the celebrity are not resident in the source country. Consider, for example, the tennis player's endorsement contract discussed in part 2.2, above where both the company paying the endorsement and the tennis player are not resident in the source country.⁷¹ Leaving aside the difficulty of enforcing the collection of tax, the first question is whether such income has a source in every country where the tennis player performs and, if so, how much is attributed to each country. The OECD Model (even as I suggest it be amended), does not answer this threshold question, nor do I attempt to address it in my proposal. The determination of whether such income is personal services income (as opposed to a royalty) and if so, whether it has its source in a particular country would be determined under that country's domestic laws. If it does, then the source country should have the jurisdiction to tax it and should retain that jurisdiction under its treaties (subject to the monetary threshold). The residence country should accept this determination and provide a credit for such source taxation. Whether the source country chooses to exercise its jurisdiction is another matter. If it chooses not to do so, the resident country of the celebrity should retain the residual right to tax the celebrity in full. In effect, tax treaties should relieve the potential for double taxation in these cases with the credit method as opposed to the exemption method.

4.2 RESTRICT ARTICLE 17(2) OECD MODEL CONVENTION TO LOAN-OUT COMPANIES

Even with my proposed changes, it remains necessary to have an anti-avoidance rule dealing with rent-a-star companies and similar structures. That is, a celebrity should not be able to avoid source taxation simply by interposing a third party that contracts to provide the celebrity's services. In the absence of this rule, if the third party is not an individual, it would avoid source taxation in the absence of a permanent establishment. However, my proposed anti-avoidance provision would be restricted to the original intent of Article 17(2) as set out in 1977. This restriction should not be left to Commentary. Rather, I propose that Article 17(2) be limited in the same manner as Article 17(2) of the 1996 US Model tax treaty. That is, the source country has the primary jurisdiction to tax a third party that earns more than the threshold amount from the provision of services of any individual where the individual or a related person participates directly or indirectly in the profits of the third party. 'Participates in the profits' should be defined for this purpose, although perhaps a little more narrowly than in the 1996

71. This is quite common for athletic endorsements, particularly for individual (as opposed to team) sports. See, e.g., the *Agassi* decision, *supra* note 29. See also John J. Coneys, Jr., 'To Tax or Not To Tax: Is a Non-Resident Tennis Player's Endorsement Income Subject to Taxation in the United States?' *Fordham Intell. Prop. Media & Ent. L.J.*, vol. 9. (1999): 885-910.

US Model, where it included ‘the receipt of deferred remuneration, bonuses, fees, dividends, partnership distributions, or other distributions’.⁷²

This anti-avoidance provision does not address the difficulties faced by the source country of enforcing the collection of tax where none of the payer for the services, the non-arm’s length third party recipient or the celebrity is resident in, or otherwise has any connection with, the source country. I simply advocate that the source country should have the jurisdiction to tax in these circumstances. If it chooses not to exercise that jurisdiction, the residence country of the celebrity or the third party still has the residual right to tax such person.

5 ABOLISH ARTICLE 17 OECD MODEL CONVENTION?

Source countries face numerous problems in effectively taxing non-residents generally. Artistes and sportsmen highlight many of these problems because of the various types of income that they earn and the relatively short time periods that they spend in any one country. The problems of source taxation are complicated by existing Article 17 of the OECD Model due to the uncertainties as to its scope.

Some have advocated that Article 17 should be abolished, leaving the normal jurisdiction-allocation rules in Articles 7 and 15 to apply. Molenaar is probably the most active protagonist of this view. I agree with him that the current Article 17 is problematic: its scope is uncertain, it causes administrative problems for both taxpayers and tax authorities, and in many countries it raises very little tax revenue. My proposal deals with the first of these problems, largely reduces the second, and purposefully disregards the third.⁷³ My proposed ‘celebrity’ tax is justified within current international tax norms while at the same time eliminating many of the problematic features of Article 17.

In his book on this issue, Molenaar suggests that source countries should, under their domestic law, tax any non-resident artiste or sportsman, but should give up that right where the individual is resident in a treaty country and the tax authorities of that country certify this to be the case. Source taxation is preserved

72. My concern with the 1996 US Model definition is that a regular employer-sponsored pension plan would constitute participating in the profits of the employer since a pension is deferred remuneration.

73. One of Molenaar’s reasons for abolishing Article 17 is that it raises little tax revenue when both inbound and outbound activities of artistes and sportsmen are taken into account. Based on this rationale, though, any time two countries have relatively comparable flows of certain capital (whether monetary or human), the countries should agree to give exclusive jurisdiction to tax to the resident country because the net amount earned in the source country would be low. Apart from the difficulty of attempting to measure these flows in advance of treaty negotiations and the fact that the treaty would have to be renegotiated every time these flows changed, this approach undermines the uniform approach to bilateral tax treaties advocated by the OECD. The preferable approach, in my view, is to develop principled jurisdiction-allocation rules applicable in all cases, even though in some cases the net revenue collected by a source country is small when both inbound and outbound activity is taken into account.

under domestic law for all celebrities resident in non-treaty countries. Molenaar advocates giving up source taxation of this income to treaty partners

because treaty partners only come to conclude a bilateral tax treaty after they have certified that they both have reasonable tax systems. And the proposal would still counteract tax avoidance behaviour, because countries do not have tax treaties with tax havens and therefore do not waive their source tax for artistes [and sportsmen] residing in those territories.⁷⁴

Herein lies the crux of our disagreement over the appropriate reform of Article 17. In my view, the existence of a tax treaty is a poor proxy for residence-based taxation. Many countries, particularly those with broad treaty networks – already have concluded tax treaties with tax havens and, as tax treaties continue to proliferate, there is a greater likelihood that this trend will continue. The United Arab Emirates, to take one example, does not impose an income tax, yet it has a fairly extensive treaty network that includes a number of high-tax countries, such as Canada, Finland, France, Germany and Italy. In addition, a number of countries that are not ‘classical’ tax havens may have geographic enclaves or circumstances in which little or no tax is payable. Because celebrities are some of the most mobile individuals, they can easily change their country of residence to a ‘tax haven’ with a relatively broad treaty network and may do so solely for tax reasons.

In my view, there is sufficient justification to tax celebrities’ personal services income at source and that source taxation should be preserved under treaties in appropriate circumstances. Simply eliminating Article 17 is not justified because there are circumstances where Articles 7 and 15 are not sufficiently broad: specifically, celebrities should remain subject to source taxation because of the economic rents they command and, to a lesser extent, because of the media attention that they garner. It is necessary and appropriate to tax them at source to preserve the integrity of the tax system. In my view, broadening the scope of Article 17 to include all personal services income of all celebrities, known and unknown, together with maintenance of an anti-avoidance rule targeting rent-a-star companies, is a more appropriate solution.

74. Molenaar, *International Performing Artistes*, 355.

Chapter 14

Discussion of Daniel Sandler's Paper on Article 17 OECD Model Convention

*Dick Molenaar**

'I hate taxes, I pay a lot more than my share' – Robert Cray ('1040 Blues' – 1993)

1 INTRODUCTION OF THE COMMENTS

In his paper for this conference 'Source versus Residence', Prof. Daniel Sandler has discussed the exceptional allocation rule of Article 17 of the OECD Model (Artistes and Sportsmen). Some comments can be made to his contribution.

Over the last years, Article 17 has attracted more attention than before by authors in the international tax literature. And the taxation of artistes and sportsmen has led to decisions by the European Court of Justice, which influences the scope and use of Article 17. It is very interesting to read today's opinion of Daniel Sandler; because with his book¹ and with a seminar at the IFA Congress² in 1995 the impression was that everything was fine with Article 17 and that the taxation of artistes of sportsmen was dealt with in a proper way.

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1. Sandler, *The Taxation of International Entertainers and Athletes – All the World's a Stage* (1995).
2. IFA, 'Taxation of Non-Resident Entertainers', 49th IFA Congress, Cannes, France, *Cahiers de droit fiscal international*, vol. 20d (1995).

But how different was the practice, already by then. In 1996 Michael Jackson decided not to perform in Germany, because the withholding tax on his performance income was far too high, 25% from gross. And in 1999,³ 2001⁴ and 2002⁵ articles in the tax literature were published, showing many problems arising from the simple gross taxation of artistes and sportsmen. In 2003 the European Court of Justice decided that the gross taxation of artistes and sportsmen was in breach with the EC Treaty.⁶ And on many international conferences the music, theatre and sports world complained about the rigid taxing rules for their profession and their experiences with excessive and double taxation. Much has followed since then, at the European Court of Justice,⁷ in the individual EU Member States, in the literature⁸ and in the entertainment world.

Therefore, it is interesting to read a new approach in Sandler's paper for this conference.

2 OPINION OF PROF. DANIEL SANDLER

Sandler assumes in his paper that every country has a source tax in its own tax legislation for personal services rendered by non-residents. He also accepts that the allocation rules of Articles 7 and 15 of the OECD Model impose appropriate limits on this source taxation. But he brings up the question, whether Article 17 is a justifiable exception to these allocation rules. The thesis of Sandler is that Article 17, as it currently exists, is not a justifiable exception. It is under-inclusive and over-inclusive, which means that it does not cover specific persons and types of income, but that it also covers too much income.

Sandler proposes to bring more well-known persons (or 'celebrities') under Article 17 and not restrict the Article to only artistes and sportsmen anymore, but also to set a threshold of 100,000 US dollars (USD) per person per year, over which the taxing right is allocated to the source country and under which only the residence country has the sole taxing right. His proposal is based on the 'Benefits Theory'.

3 ARTICLE 17 OECD MODEL CONVENTION IS NOT A JUSTIFIABLE EXCEPTION TO ARTICLES 7 AND 15 OECD MODEL CONVENTION

Sandler's thesis, that Article 17, as it currently exists, is not a justifiable exception to Articles 7 and 15 of the OECD Model, seems to be right, although he emphasizes

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3. Grams, 'Artist Taxation: Article 17 of the OECD Model Treaty – a Relic of Primeval Tax Times?', *Intertax* (1999): 188.
 4. Nitikman, 'Article 17 of the OECD Model Treaty – An Anachronism?', *Intertax* (2001): 268.
 5. Molenaar, 'Obstacles for International Performing Artists', *European Taxation* (2002): 149; Molenaar and Grams, 'Rent-A-Star, The Purpose of Article 17(2) of the OECD Model Treaty', *Bulletin for International Fiscal Documentation* (2002): 500.
 6. ECJ 12 June 2003, C-234/01, *Arnoud Gerritse* [2003] ECR I-5933.
 7. E.g., ECJ 3 October 2006, C-290/04, *FKP Scorpio Konzertproduktionen GmbH*.
 8. E.g., Molenaar, *Taxation of International Performing Artistes* (2006).

some arguments more and others less than tax practitioners, who are active in the entertainment world and work for performing artistes and sportsmen and the organizers of their performances.

The entertainment world struggles with three main issues:

- problems with gross taxation and the non-deductibility of expenses in the source country;
- tax credit problems in the residence country;
- too much administrative work (and expenses).

Discussions about the definition of who is an artiste or sportsman and what falls under the taxable performance income may look very interesting, but are not real factors in practice. Article 17 as an anti-avoidance or compliance measure is not recognized in the entertainment world, because the vast majority of the international performing artistes and sportsmen do not want to avoid (normal) taxation, but want to pay a fair share from their income to the government.

4 THE PYRAMID OF SUCCESS

Artistes and sportsmen experience the pyramid of success:

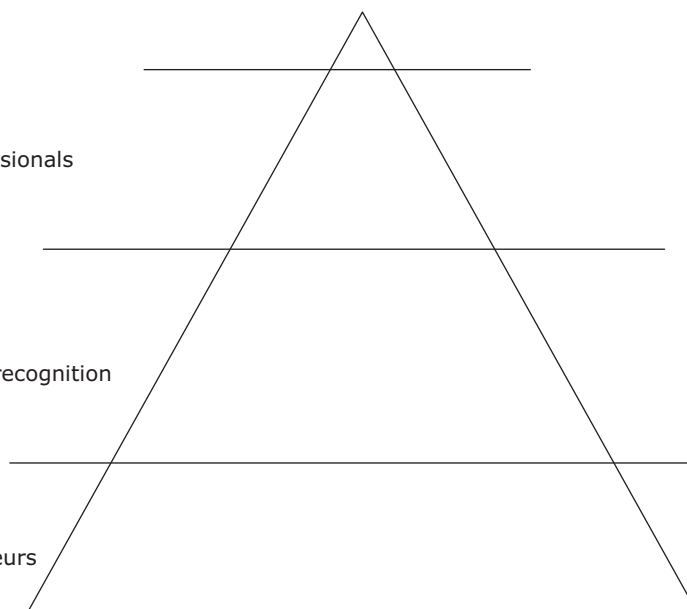
- The few top artistes receive far more than their proportional share.
- A reasonable number of well-established professionals are better off than average.
- Many artistes struggle for recognition, but remain underpaid.
- Largely unknown but willing amateurs receive hardly any remuneration.

happy few

well-established professionals

artistes struggling for recognition

small but willing amateurs



The ‘happy few’ do not have a problem with taxation in the source country, as long as the taxation is fair and based on the profit instead of the gross performance fee, because they can compensate the source tax with a foreign tax credit in their residence country. For them the source taxation is not more than an advance payment on their final income or corporation tax obligation. And they are very well organized, which means that they can provide any information required.

But going lower in the pyramid, the source tax rules following from Article 17 become more and more problematic. Sandler has already described this in his paper, especially the non-deductibility of expenses in the source country leads to excessive taxation, while the problems with tax credits in the residence country can even lead to double taxation. Everyone below the ‘happy few’ is confronted with these threats and it causes many administrative expenses to prevent from this excessive or even double taxation.

5 OLD REASONS FOR ARTICLE 17 OECD MODEL CONVENTION

In 1963 the exceptional Article 17 for artistes and sportsmen was introduced in the first OECD Model with the argument that ‘practical difficulties are avoided which often arise in taxing public entertainers and athletes performing abroad’.⁹ And the 1987 OECD Report brought forward that Article 17 was meant to ‘counteract tax avoidance behaviour and non-compliance’.¹⁰

These reasons are not valid anymore in 2007. Almost all countries have a broad source taxation on the income of performing artistes and sportsmen. And performances are held in public, organizers need to have book keepings, artistes and sportsmen are not ‘rogues’ and ‘vagabonds’ anymore, the entertainment world has professionalized and has become a normal business, payments are almost only done through the bank and not in cash, at any level. What should countries and the OECD be afraid of nowadays?

6 IMPROVEMENT OF ARTICLE 17 OECD MODEL CONVENTION

To take away the problems arising from Article 17, the article could be improved. Several measures are already available, such as:

- Restrict the scope of Article 17(2) to the limited approach (rent-a-star constructions).¹¹

9. Paragraph 12 of the Commentary on Article 17 of the 1963 OECD Model Treaty.

10. Paragraphs 6, 7 and 8 of ‘Taxation of Entertainers, Artistes and Sportsmen’, in *Issues in International Taxation* No. 2, OECD (1987).

11. Observations of Switzerland, Canada and the United States in paragraph 16 of the 1992 Commentary on Article 17 OECD Model.

- Change paragraph 10 of the Commentary: recommend deduction of expenses and normal income tax settlements.¹²
- Insert special limits for small artistes and sportsmen (*de-minimis* rule).¹³
- Restrict Article 17 to business activities, exempt employees.¹⁴
- Add Article 17(3) in the official text of Article 17.¹⁵

7 RADICAL CHANGE: TURN ARTICLE 17 OECD MODEL CONVENTION AROUND

But the most radical change would be the turnaround of Article 17 into Residence State taxation in treaty situations. No loss of tax revenue, if every country would join, elimination of administrative expenses and no risk of excessive or double taxation anymore.¹⁶

The Netherlands has followed this idea unilaterally and has skipped its source taxation from non-resident artistes and sportsmen coming from treaty countries as of 1 January 2007.¹⁷ And the result is that everybody is happy, not only the artistes, sportsmen and organizers, but also the tax administrations in both countries.

8 A NEW REASON FOR ARTICLE 17 OECD MODEL CONVENTION: THE 'BENEFITS THEORY'

In his paper for this conference, Sandler brings a new theory forward for Article 17, the 'Benefits Theory'. In his opinion, artistes and sportsmen with higher performance income should contribute to a state's budget, because they will make use of the performance country's public services and infrastructure and the performance country wants its share of their considerable earnings. He sets a limit at USD 100,000 per artiste or sportsman per taxable year, which means that only the 'happy few' will be taxed in the performance country. Anyone below this level of income can be waived for the source taxation.

This new theory is interesting. As already mentioned before, the 'happy few' do not have a problem with the source taxation, because they are well organized and will qualify for a foreign tax credit in their residence country. The 'Benefits Theory' may not be very strong, especially because the total tax revenue from performance income is quite low and the balance of withholding tax and tax credits

12. The OECD has inserted this change in paragraph 10 of the 2008 Commentary on Article 17.

13. E.g., the USD 20,000-threshold of Article 17(1) of the 1996 US Model Income Tax Convention.

14. Paragraph 2 of the Commentary on Article 17 OECD.

15. Paragraph 14 of the OECD Commentary on Article 17 OECD.

16. Molenaar, *Taxation of International Performing Artistes* (2006), 353.

17. Molenaar and Grams, 'Scorpio and the Netherlands: Major changes in artiste taxation in the European Union', *European Taxation* (2007), 63.

even nil,¹⁸ but countries would like to keep their tax revenue from this well-known visiting top stars, even when it is only ‘window-dressing’ for the general public.

But two comments should be added:

- It is no problem when the limit would be set at USD 100,000 gross income per person per taxable year. But when an artiste or sportsman would exceed this limit, he should have the option to deduct his expenses before being taxed, the tax rate should be at a reasonable level and a normal income or corporation tax return should be possible after the year.
- And the exemption for those who stay under the USD 100,000 limit per person per taxable year should be given already at the moment of the performance, and not just after the taxable year in a refund procedure.

Cash flow problems are a very big issue in the entertainment world, besides that nobody in the USA or UK believes that e.g., Spain, Italy, Greece or even Germany are refunding their withholding tax (within reasonable time).

9 CONCLUSIONS

The old reasons for Article 17 (‘practical difficulties’, ‘tax avoidance behaviour’ and ‘non-compliance’) are not valid anymore. Therefore, Sandler is right that Article 17, as it currently exists, is not a justifiable exception. The best option would be to turn around the article and bring it in line with the other articles of the OECD Model.

But the new reason for Article 17 (taxation above a specific limit, based on the ‘Benefits Theory’) is also acceptable. Then only the ‘happy few’ will be taxed in the source country and they will under normal circumstances not experience excessive or double taxation.

The main concern with Article 17 is: when do we start taking away the existing tax problems for anyone below the ‘happy few’? Why do we tax normal artistes and sportsmen harder than other taxable persons? What did they do wrong to deserve this harsh tax treatment? Let us forget the myth that artistes and sportsmen cannot be trusted and only want to avoid taxation. Let us face the real world full of tax problems for most of these taxpayers.

Therefore, the proposal by Sandler for a change of Article 17 and only tax the ‘happy few’ would be a good step forward and should, together with the comments in this article, be considered very seriously by the OECD.

18. A study of the tax revenue from non-resident artistes and sportsmen in the UK, the Netherlands, Australia and New Zealand was published in Molenaar, *Taxation of International Performing Artistes* (2006), 243.