Cross Border Taxation of Entertainers and Sportsmen

1. Introduction

1.1 The familiar advertisement on television goes ‘Micheal Schumaker, Im a huge fan. Can I meet your pit crew?’, to which Micheal Schumaker kindly replies, ‘You can be my pit crew’.

1.2 With the second year of Formula 1 racing in India, concerts by various International Artistes in India, shooting of Foreign films in India, and similarly Indian Artistes performing abroad and shooting of Indian Films abroad, the taxability of Entertainers and Sportsmen is gaining importance globally. With a mention to Sportsmen, we cannot miss out the IPL and other cricket leagues played in India and abroad.

1.3 Such international events have resulted in participating artistes and sportsmen, either independently or as teams, earning income in different countries over short duration. Characterisation and taxation of such income by the country of residence and country of source gains relevance, especially given that the contracts can be structured in extremely creative and complex ways and the quantum of amounts involved can be fairly large at times. Further, often an essential part of their income is derived from touring from one country to another, so that in extreme cases it could be hard to decide in which country they are resident. As a further consequence of their mobility, internationally performing Entertainers and Sportsmen transfer their domicile from a high tax country to a tax haven more easily and more frequently than other taxpayers.

1.4 Hence, it would be relevant to understand the broad streams of income earned by Entertainers and Sportsmen, their character and how such income would be taxed under the Income-tax Act, 1961 (‘Act’) and the tax treaties entered into by India with various countries (‘Treaties’).

1.5 The Organization for Economic Co-operation and Development (‘OECD’) and various tax treaties recognize the exceptional treatment to be given to the taxability of Entertainers and Athletes and hence there is a separate Article 17, which provides for taxation of Entertainers and Sportsmen.

1.6 Further, the Indian Income-tax Act, 1961 (‘Act’), while till 31 March 2012, only provided for a specific treatment to Sportsmen as per Section 115BBA of the Act, has extended the scope of the Section to include Entertainers.

2. Article 17 - Introduction

2.1 Brief Historical background of Article 17

2.2.1 In the year 1959, the Organisation for European Economic Co-operation (‘OEEC’) published a report entitled “The elimination of double taxation”, which for the first time recognized the special treatment to be given to Entertainers and Athletes and provided that the Source Country has the right to taxation of their income. Thereafter, in 1960, the Organization for Economic Co-operation and Development (‘OECD’) took over the tasks of the OEEC and in 1963, published the Model Commentary, as per which, Article 17, read as under:

“Notwithstanding the provisions of Articles 14 and 15, income derived by public entertainers, such as theatre, motion picture, radio or television artistes, and musicians, and by athletes, from their personal activities as such may be taxed in the Contracting State in which these activities are exercised.”

2.2.2 However, the applicability of Article 17, as above, was being avoided by Entertainers and Sportsmen by interposing a loan-out Company to receive the remuneration. Accordingly,
Article 17(2) was introduced to cover such tax-avoidance schemes in 1977 and Article 17 currently reads as follows:

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

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

2.2.3 Similar provisions are also provided in the United Nations Model Tax Convention as well as in the United States Model Tax Convention. Since the provisions are similar, the references in this Article are made to OECD Model Tax Convention.

2.3 Scope of Article 17

2.3.1 Article 17 of the OECD Model Tax Convention (‘MC’) provides the Source Country / the country of performance (‘Country P’) the right to tax income of non-resident Entertainer / Sportsman for performance in the source country. This is irrespective whether the Entertainer or sportsperson is self-employed, is an employee or has a permanent establishment in Country P.

2.3.2 Further, the Commentary to Article 17(2) emphasises that the purpose of this provision is to counteract certain tax avoidance devices / schemes, pursuant to which income arising to Entertainers / Sportsmen from his performance accrues not to him, but to any other person and leads to non-taxation of the entertainers and sportsmen in Country P.

2.3.3 Article 17 starts with ‘Notwithstanding the provisions of Articles 7 and 15…’ and hence overrides the provisions of Article 7 (Business Income) and Article 15 (Dependant Personal Services) and is applicable to income derived directly / indirectly from the personal activities of the Entertainer or Sportsman.

2.3.4 Article 17 does not provide for the method of computation of income of the Entertainer / Sportsman.

2.3.5 Further, Article 17 does not provide for any time threshold or fee threshold upto which Income derived by the Entertainer / Sportsman shall not be taxable in the Source Country. (However, two treaties entered into by India do provide for a fee / time threshold discussed at Paragraph 4.4 below).

2.3.6 Meaning of personal activities

It is important that the term ‘personal activities’ is interpreted appropriately since taxation of income in the Source Country is dependant on the same. Personal activities connote activities rendered by an individual in the capacity of an entertainer or a sportsman. An interesting enumeration on this aspect has been given by Jiri Zoubeck¹:

“As previously mentioned, a sportsman is required to exercise personal activities as such. For instance, race horse owners are not covered by Article 17. In contrast to the jockey, a non-resident horse owner whose horse wins a prize does not derive income from personal

¹ Taxation of Artistes and Sportsmen in International Tax Law - Taxmann
services... This is to say that the mere ownership of a horse is not sufficient for the owner to qualify as a sportsman under Article 17, since she/he does not perform personal activities as such. On the other hand, prize money received by the jockey falls within the scope of Article 17 on the grounds of having been derived from the jockey’s personal activities as such. Another significant consideration with regard to the taxation of “horse-winner” prize money - which is, however, not covered in this thesis in detail - is whether such prize money falls within the scope of Article 17(2) of the OECD Model or not. Giving that the prize is an award for the “sporting skills” of both a jockey and a horse, it would seem appropriate to apportion the given prize money between the jockey and the horse owner. Consistently, solely that portion of the prize money which is attributable to the services rendered by the jockey, even if not paid directly to him/her, should fall within the scope of Article 17(2), whereas the remainder is received for the services provided by the horse, which obviously does not qualify as a sportsman”

3. **OECD Commentary on Article 17**

3.1 To resolve problems of interpretation of application of the Articles, the OECD provides Commentary on each Article. In addition to the commentary on Article 17, the OECD has issued discussion draft on Article 17 (‘Discussion draft’) in 2010. Wherever applicable, the proposed provisions of the Discussion Draft have been mentioned in italics.

3.2 **Preliminary Conditions**

As per Article 17(1), income of Entertainers / Sportsmen derived from their personal activities would be taxable in Country P irrespective of number of days stay in Country P. The conditions for applicability of Article 17(1) are as under:
- The individual is an entertainer resident of one of the contracting states (‘Country R’);
- The income is from performance of personal activities in Country P.

3.3 As per the thesis of Mr. Milan Matijevic, the set of criteria for applicability of Article 17 should be:
- There must be a performance;
- The performance should be in public, i.e. directly before an audience or recorded and later reproduced for an audience;
- The predominant element of the performance must be artistic and entertaining, though the level of artistic or entertainment skill is irrelevant;
- The performer by himself/herself should be the direct or indirect reason why the audience is listening to or watching the performance.

3.4 **Persons covered by Article 17**

**Definition of ‘Entertainers’**

3.4.1 In the International Taxation world, ‘Entertainers’ are treated differently and hence the first step is to define ‘Entertainers’. While Article 17 in the OECD MC reads “…income derived as an entertainer…”, the Commentary of Article 17 uses the term ‘Artiste’.

3.4.2 The OECD MC does not expressly define the term “artiste”. In fact, the commentary to OECD MC 2010 clarifies that it is not possible to define the term “artiste” and the examples provided should not be considered as exhaustive.

3.4.3 The terms ‘Artistes’ and ‘Entertainers’ are used interchangeably, even though the meaning of the term ‘Artiste’ is narrower as compared to ‘Entertainers’. Earlier the word Actor or Artist
was used to denote performers. In recent times, a new genre of individuals called Entertainers has evolved, which includes individuals who may or may not ‘act’. Recognising that specific treatment is required to be given to them, the OECD Discussion Draft of 2010 on Article 17, governing the taxation of Artists and Sportsmen, has recommended to substitute the term ‘Artist’ with the term ‘Entertainer’. Further, even in recent amendment to Section 1155BBA of the Act, the word ‘Entertainer’ has been used (discussed in detail at Paragraph 4.2.2 below). The word Entertainer is apt as it has a wider meaning and includes in its ambit anyone who entertains ie a dancer, singer, comedian etc and is not confined to an Actor. Also, it excludes a painter, sculptor etc, which would be otherwise be included in the meaning of the term ‘Artist’. Accordingly, in this article, the term ‘Entertainer’ has been used.

3.4.4 As per Paragraph 3 of the OECD MC, while it is not possible to give a precise definition of “artiste”, it includes the stage performer, film actor, actor (including for instance a former sportsman) in a television commercial. However, it does not extend to a visiting conference speaker or to administrative or support staff (e.g. cameramen for a film, producers, film directors, choreographers, technical staff, road crew for a pop group, etc.), where there is no ‘performance’. As per “Discussion Draft on application of Article 17 (Artiste and Sportsmen) of the OECD Model Tax Convention” ('Discussion Draft on Article 17') published in 2010, the provisions of Article 17(1) do not extend to a former politician who receives a fee for a speaking engagement, a model performing presenting clothes during a fashion show or photo session since they are performing as such and not as entertainers.

3.4.5 Judicial Precedents on the terms ‘Artist’, ‘Actor’ and ‘Entertainer’

- Amitabh Bachchan vs DCIT² - This case law was in context of erstwhile Section 80RR of the Act, which provided a deduction to income of artists, actors etc earned in foreign exchange. The issue under consideration was whether Mr. Amitabh Bachchan’s performance in the popular show Kaun Banega Crorepati was as an actor. The Hon’ble Mumbai Tribunal, with respect to the meaning of the term Artist, has made the following observation:

“The various meanings assigned to the term ‘artist’ by different standard dictionaries clearly show that the term "artist" is a term which has a wide meaning not merely restricted to the meaning of fine arts but encompasses within its scope, a skilled performer.”

- On a similar issue, the Mumbai Tribunal, has upheld Mr. Sachin Tendulkar’s argument that he was an ‘actor’ while appearing in commercials³.

- Other case laws which are in context of erstwhile Section 80RR of the Act and could be referred are : CIT vs Tarun R Tahiliani⁴, Harsha Bhogle vs ITO⁵

- An interesting decision which could be referred to is of Tax Court of Canada in the case of Cheek Vs. the Queen⁶. The issue in this case was whether, Mr. Thomas Cheek, a radio broadcast of baseball games, could fall under Article XVI (relating to Artistes and Athletes) of the 1980 US-Canada Tax Treaty. The main question before the court was whether the radio broadcaster could be regarded as a “radio artiste” due to his unique voice and the entertaining manner in which he presented the game and its commentaries. The Hon’ble Court held that he is not a radio artiste, but he is a very skillful and experienced radio journalist and hence is not covered by the relevant Article. He is not performing as an athlete or sportsman when he comes to broadcast

²106 TTJ 925
³2011-TIOL-327-ITAT-MUM
⁴2010-TIOL-446-RC-MUM-IT
⁵2003-TIOL-46-ITAT-MUM
⁶2002 DTC 1283
the baseball game on the radio. It is obvious that athletes and sportsmen "perform" in their chosen athletic avocation; and their performance is inherently entertaining. The fans who turn on the radio to hear a particular Baseball game want to know how the team is performing on the field. While he may be able to hold the attention and interest of the fans with his "down time" commentary but he is not the reason why the fan turns on the radio.

- Another interesting decision is one in the case of Pilcom vs Income-tax Officer, where the Hon'ble Calcutta Tribunal has held that the players of the cricket associations of the participating countries in the World Cup Cricket Tournament, 1996, should be considered as Entertainers. While this case law was pronounced in 2000, currently an interesting issue which arises is whether the Indian Premier League Matches can be considered has having more entertainment value than actually being a sport? The IPL has artificially crafted teams ie not all Mumbai Indians are from Mumbai. However, as of now there is no final word as to whether these events should considered as sport or entertainment. Either ways, it would be covered by Article 17 and Section 115BBA of the Act.

**Definition of ‘Sportsmen’**

3.4.6 While no precise definition is given of the term ‘Sportsmen’ also, the Commentary on the OECD MC provides that it is not restricted to participants in traditional athletic events (e.g. runners, jumpers, swimmers) and also covers, golfers, jockeys, footballers, cricketers and tennis players, as well as racing drivers.

3.4.7 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.

**Legal Entities covered by Article 17**

3.4.8 As per the provisions of Article 17(2), even legal entities are covered and the same is discussed at Paragraph 3.6 hereinafter.

**3.5 Income covered by Article 17**

3.5.1 The OECD MC currently reads that income derived from appearance is taxable in Country P. *The Discussion Draft proposes to substitute the word ‘appearances’ with ‘performances’*. Hence, in this Article, the term ‘performances’ has been used.

3.5.2 As a general rule, the provisions of other Articles would be applicable where there is no direct link between the income and the performance of activities in Country P. Further, the income which cannot be attributed to performance in Country P would fall under the provisions of Article 7, Article 12 or Article 15, as appropriate.

3.5.3 Article 17 is applicable regardless of who pays the income ie it covers prizes and awards paid by a national federation, association or league which a team or an individual may receive in relation to a particular sports event.

3.5.4 There is no doubt that the income of the Entertainer / Sportsman from performance is covered by Article 17. However, income is received by the Entertainer / Sportsman, which is not

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7 2003-TII-86-ITAT-KOL-INTL
related to the performance in Country P. Hence, for the sake of simplicity, this Paragraph is divided in two parts - One, where the remuneration paid to the Entertainer / Sportsman is for performance and the Second, where the remuneration paid is for other than performance.

**Remuneration for actual performance in Country P**

3.5.5 Dual services - In cases where an individual performs dual services like directing and acting in a Film, if the activities are predominantly of a performing nature, Article 17 will be applicable to **all the resulting income** derived in the Source Country and vice-versa. In other cases an apportionment should be necessary.

3.5.6 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.

3.5.7 Income received by impresarios, agents etc for arranging the appearance of an entertainer or sportsman is not covered by Article 17, but any income received by them on behalf of the entertainer or sportsman is covered by it.

3.5.8 Income as Employee - In cases where the Entertainer / Sportsman is an employee of the Company and receives annual salary and not separate remuneration specific to the performance, Country P is entitled to tax the proportion of the salary which corresponds to such a performance. **In such cases, it will therefore be appropriate, absent any indication that the remuneration or part thereof should be allocated differently, to allocate that salary or remuneration on the basis of the working days spent in each Country in which the entertainer or sportsman has been required, under his employment contract, to perform these activities.** For example, a self-employed singer is paid a fixed amount for a number of concerts to be performed in different Countries plus 5% of the ticket sales for each concert. Here, it would be appropriate to allocate the fixed amount on the basis of the number of concerts performed in each Country but to allocate the payments based on ticket sales on the basis of where the concerts that generated each such payment took place.

A cyclist, employed by a team, is required to travel with the team, appear in some public press conferences organised by the team and participate in training activities and races that take place in different countries. He is paid a fixed annual salary plus bonuses based on his results in particular races. In that case, it would be reasonable to allocate the salary on the basis of the number of working days during which he is present in each Country where his employment-related activities (e.g. travel, training, races, public appearances) are performed and to allocate the bonuses to where the relevant races took place.

3.5.9 Further, where an entertainer or sportsman is employed by a one person company, Country P 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, Country P is entitled to tax income derived from performances and accruing in the entity for the individual’s benefit, even if the income is not actually paid as remuneration to the individual.

3.5.10 **An “entertainer or sportsman” includes anyone who acts as such, even for a single event. Thus, Article 17 can apply to an amateur who wins a monetary sports prize or a person who is not an actor but who gets a fee for a once-in-a-lifetime appearance in a television commercial or movie.**
3.5.11 Merely reporting or commenting on an entertainment or sports event in which the reporter does not himself participate is not an activity of an entertainer or sportsman acting as such. Thus, for instance, the fee that a former or injured sportsman would earn for offering comments during the broadcast of a sports event in which he does not participate would not be covered by Article 17.

3.5.12 Preparation and training are parts of the normal activities of an entertainer or sportsman. If the entertainer or sportsman is remunerated for time spent on preparation and training in Country P, the relevant remuneration, as well as remuneration for time spent travelling in Country P for the purposes of performances, preparation or training, would be covered by Article 17. This would apply regardless of whether or not such preparation or training is related to specific public performances taking place in Country.

**Remuneration received other than for actual performance in Country P**

3.5.13 Royalties - Royalties for intellectual property rights will normally be covered by Article 12 rather than Article 17

3.5.14 Advertisement and sponsorship income - Article 17 will apply to advertising or sponsorship income, which is related directly or indirectly to performances or appearances in a given State (e.g. payments made to a tennis player for wearing a sponsor’s logo, trade mark or trade name on his tennis shirt during a match). However, if such income cannot be attributed to performance in Country P, it would be covered Article 7 or Article 15, as appropriate where payment made to a tennis player for wearing a particular brand of clothing for normal use, which the sponsor pays with the intention that the clothing will be associated with the tennis player when customers recognize the player on the streets and will in turn encourage the customer to purchase the clothing of the brand.

3.5.15 Payments received in the event of the cancellation of a performance - Such payments would not be covered by Article 17 and would be covered by the provisions of Article 7 or Article 15, as appropriate.

3.5.16 Merchandising - Such income related to a public performance would normally be covered by Article 17. However, merchandising income derived from sales in a country that are not related to performances in Country P and do not constitute royalties would generally be covered by Article 7.

3.5.17 Image rights - Entertainers and sportsmen do derive, directly or indirectly, a substantial part of their income in the form of payments for the use of, or the right to use, their “image rights”, e.g. the use of their name, signature or personal image. Where such uses of the entertainer’s or sportsman’s image rights are not connected to the entertainer’s or sportsman’s performance in a given State, the relevant payments would generally not be covered by Article 17. There are cases, however, where payments made to an entertainer or sportsman who is a resident of a Contracting State, or to another person, for the use of, or right to use, that entertainer’s or sportsman’s image rights constitute in substance remuneration for activities of the entertainer or sportsman that are covered by Article 17 and that take place in the other Contracting State. In such cases, the provisions of paragraph 1
or 2, depending on the circumstances, will be applicable. In my humble view, the Entertainer / Sportsman receives this income because of his popularity and not because of performance.

3.5.18 Payments for the simultaneous broadcasting of a performance by an entertainer or sportsman made directly to the performer or for his benefit (star-company of the performer) will fall within the scope of Article 17 (paragraph 18 of the Commentary on Article 12). Where, however, the payment is made to a third party (e.g. the owner of the broadcasting rights) and that payment does not benefit the performer, the payment is not related to the personal activities of the performer and therefore does not constitute income derived by a person as an entertainer or sportsman from his personal activities as such. For example, where the organiser of a football tournament holds all intellectual property rights in the event and, as such, receives payments for broadcasting rights related to the event, Article 17 does not apply to these payments; similarly, Article 17 will not apply to any share of these payments that will be distributed to the participating teams. Whether such payments will constitute royalties covered by Article 12 will depend, among other things, on the legal nature of such broadcasting rights, in particular under the relevant copyright law.

Further, the following examples have not been covered by the Commentary to Article 17:

3.5.19 Income from Restrictive Covenants - A payment for a restrictive covenant is made to an Entertainer / Sportsmen to not perform a particular action. For example, an Artist may be made a payment not to play a similar role in a movie for a particular period of time. Payment for such restrictive covenants should not be covered by Article 17 and could be covered by Article 7, and hence not taxable in the Source Country, if the Entertainer / Sportsman does not have Permanent Establishment in the Source Country.

3.5.20 Stand-by time for Sportsmen - In case of stand-by time, the substitute player is required to be physically present in the Country where the match is being played, so that he can enter the game, when required. This means that this kind of non-performance could be connected to the Source Country. Thus, the Source Country of the Stand-by time may be identical to the performance and hence it could be concluded that such payment, even though not related to actual performance, may be covered by the provisions of Article 17. If, however, the substitute player is not required to be present in the Source Country, then the provisions of Article 17 may not be applicable.

3.5.21 Player transfer fee - Internationally, in professional football, a transfer is the action taken whenever a player under contract moves between professional clubs. It refers to the transferring of a player's registration from one professional association football club to another. Usually some sort of compensation is paid for the player's rights. Again, this is not related to performance in the source country, and hence may not be covered by Article 17.

3.5.22 Golden Handshakes - Golden Handshakes could be paid for various reasons like early termination of an employment, a bridge between existing employment and a future employment. A Golden Handshake may be more relevant to a Sportsman since it may be paid to him / her on joining a new team. In my humble view, since golden handshakes could be considered as remuneration resulting from an employment and not income from ‘performance’, it should not be covered by the provisions of Article 17 and could be covered
by Article 15 (Dependent Personal Services) or Article 21 (Other Income), as the case may be.

3.5.23 Pensions - Pensions also are in connection with the employment of the individual and it is not relating to performance of the individual. Accordingly, the income from pension may not be covered by the provisions of Article 17 and may be covered by Article 18 (Pensions).

3.6 **Income from Performance accruing to third person**

3.6.1 Article 17(2) covers situations where income of the Entertainers accrue to other persons. It provides that the portion of the income which cannot be taxed in the hands of the Entertainer 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. There are three main situations of this kind:

- Management company which receives income for the appearance (which is not itself constituted as a legal entity);

- The Management Company, which is constituted as a legal entity and 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 Country P, in which they perform their activities as entertainers. The profit element accruing from a performance to the legal entity would be liable to tax under paragraph 2.

- Certain tax avoidance devices in cases where remuneration of an entertainer is not paid to the entertainer himself but to another person, e.g. a so-called entertainer company, in such a way that the income is taxed in Country P neither as personal service income to the entertainer nor as profits of the enterprise, in the absence of a permanent establishment.

3.6.2 The paragraph 2 is applicable to even cases where the entertainer and the star-company, are tax residents of different Countries. However, Article 17(2) does not apply to prize money derived by the owner of a horse or a race car from the results of the horse or car during a race. In such a case, the prize money is not related to the personal activities of the jockey or the race car driver to be considered as derived from these personal activities. If, however, the owner of the horse or the race car merely receives the payment on behalf of the jockey or race car driver, the provisions of Article 17(1) shall be applicable.

3.6.3 Further, the provisions of Article 17(2) are not applicable income of enterprises engaged in the production of entertainment or sports events. For example, the income of a Company organizing an event is not covered by Article 17.

3.6.4 The intention of Article 17 is not to tax the income of the Entertainer / Sportsman twice through the application of Article 17(1) and Article 17(2). For example, if the Entertainers Star-Company receives the income, subject to its domestic tax provisions, Country P may either tax only the Star-Company or the Entertainer or tax each of them by taxing the income received by the Star-Company after allowing deduction of payment to the Entertainer and tax the Entertainer’s remuneration in the hands of the Entertainer.

3.6.5 As a general rule, regardless of Article 17, the application of General Anti-Avoidance Rules of the Domestic Rules of Country P would be applicable.
3.7 **Computation of Income under Article 17**

3.7.1 Article 17 does not provide the manner of computing the income and it is for Country P’s domestic law to determine the extent of any deductions for expenses.

3.7.2 The Domestic Laws of Countries differ with respect to taxation of income of Entertainers and Sportsmen; some may provide for gross based taxation and others for net basis of taxation. Such rules may also apply to income paid to groups or incorporated teams, troupes, etc.

3.8 **Performances supported by Public Funds**

3.8.1 Some countries provide for exemption by the source state of performance income of Entertainers / Sportsmen for performances that are substantially supported by public funds as follows:

“The provisions of paragraphs 1 and 2 shall not apply to income derived from activities performed in a Contracting State by artistes or sportsmen if the visit to that State is wholly or mainly supported by public funds of one or both of the Contracting States or political subdivisions or local authorities thereof. In such a case, the income is taxable only in the Contracting State in which the artiste or the sportsman is a resident.”

3.8.2 The commentary on OECD MC 1992 provides that the exemption, however, should be based on ‘clearly definable and objective criteria’ to ensure that the exemption is only given where intended.

4. **Taxation in India**

4.1 **Circular No. 787**

The Central Board of Direct Taxes had issued a Circular, which provided guidelines regarding taxation of income of artists, entertainers, sportsmen, etc., from international/national/ local events. While this Circular also includes income received by an event manager, artists management or intermediate company, for the purpose of this Article, only the taxation of income of Entertainers and Sportsmen has been considered. The Circular provides the following illustrative examples:

i) If an artist performs in India gratuitously without any consideration, there would be no income and, consequently, no tax. Similarly, where the artists performs in India to promote sale of his records and no consideration is paid for this performance by the record company or anyone else; there will be no tax as he does not receive any income for performance in India.

ii) Any consideration received by artists or performer for the live performance or simultaneous live telecast or broadcast (on radio, television, internet, etc.) in India would qualify as income and, consequently, should be taxable. Even, if separate consideration is received for simultaneous live telecast, etc., of performance, the same shall be taxable in India and is to be treated under the Article on ‘Artists and Sportsmen” in the DTAA.

iii) The consideration paid to the artists to acquire the copyrights of performance in India for subsequent sale abroad (of records, CDs, etc.) or the consideration paid to the artist for acquiring the license for broadcast or telecast overseas is not taxable in India due to exclusions provided in section 9(1)(vi) of the Income-tax Act;

*Dated 10-2-2000*
iv) The consideration paid to the artist to acquire the copyrights of performance in India for subsequent sale in India (as records, CDs, etc.) or the consideration paid to the artist for acquiring the license for broadcast or telecast in India is taxable in India as per sections 9(1)(vi) of the Income-tax Act as royalties. Under the DTAA also, this would fall under the “Royalties” Article;

v) The portion of endorsement fees (for launch or promotion of products, etc.) which relates to artist’s performance in India shall be taxable in India in accordance with the provisions of Section 5 of the Income-tax Act. Under the DTAA, this would fall under the Article on “Artists and Sportsmen”.

Further, the Circular provides that Non-Resident Entertainers and Sportsmen may be required to obtain tax clearance certificate (TCC) under section 230 of the Income-tax Act from the competent authority.

4.2 **Section 115BBA of the Act**

4.2.1 **Taxation of Sportsmen**

Section 115BBA of the Act provides for gross basis of taxation for income of Non-Resident (‘NR’) Sportsmen, who is not a citizen of India, or NR Sports Associations or Institutions. The rate of taxation is 20% (plus applicable surcharge and cess) and was 10% till 31 March 2012. The following income is covered by Section 115BBA of the Act:

- NR Sportsmen - Income from participation in India in any game (other than taxable under Section 115BB ie crosswords, lotteries, races etc) or any sport, advertisement or contribution of articles to newspapers, magazines or journals relating to any game or sport in India.

- NR Sports Association or Institution - Amount guaranteed to be paid or payable in relation to any game (other than Section 115BB) or sport played in India

Further, Section 115BBA provides that no deduction of expenses would be allowed and the NR Sportsmen or NR Sports Association shall not be required to file a Return of Income in India if their Income is covered by Section 115BBA of the Act and appropriate taxes have been withheld under Section 194E of the Act.

4.2.2 **Taxation of Entertainers**

The scope of Section 115BBA of the Act, which was applicable only to NR sportsmen or sports association till 31 March 2012, has been extended to NR Entertainers who are non-citizens of India. Giving due consideration to the OECD Commentary, the expressions used as ‘Entertainers’ and ‘performance’.

As per this Section, a non-citizen NR Entertainer’s income from performance in India shall be taxable at the rate of 20% on gross basis and no deduction for expenses shall be allowed. Up to 31 March 2012, the income of NR Entertainers was taxable on net basis. Further, if appropriate taxes have been withheld at source from the payment made to the NR Entertainer, then an exemption has been provided from filing of Income-tax Return in India. Consequential amendment has been made in Section 194E of the Act, which provides for the rate of withholding taxes on payments to NR Sportsmen and Entertainers to 20%. Further, the income sought to be covered by Section 115BBA of the Act, is only from ‘performance’ in India. In cases where there is no performance in India like image rights, royalty etc, income of the Entertainer may not be covered by Section 115BBA of the Act (please refer to paragraphs 3.5.13 to 3.5.18 above). Accordingly, in such cases, the income of the Entertainer shall be taxable as per the domestic tax provisions r.w. provisions of the treaties.
4.2.3 It should be noted that Section 115BBA does not seek to cover cases of Star-Companies as mentioned in Article 17(2). Accordingly, if the payment is made to a Star Company, as per the provisions of the Act, it will not be covered by Section 115BBA of the Act. In this case, a question arises as to the taxability of income earned by the Star-Company. For example, if an Entertainer comes to India to perform at an event and the payment is made to his Company, while it will be covered by Article 17(2), it will not be covered by Section 115BBA of the Act. Hence, it is possible that the Non-Resident Star Company is liable to pay tax at the rate of 40% applicable to Foreign Companies in India.

4.3 Withholding taxes - Section 194E or Section 195

As per Section 194E of the Act, a person responsible for making the payment to a NR Sportsman, Sports association or Entertainer, with respect to income referred to in Section 115BBA of the Act, shall be obligated to withhold taxes at the rate of 20% on gross basis.

Further, Section 195 of the Act provides that taxes are required to be withheld by any person making payments to a non-resident which are chargeable to tax under the provisions of the Income-tax Act.

Accordingly, a question arises that when making payment to a NR Sportsman, Sports association or Entertainer, whether taxes should be withheld under Section 194E of the Act or Section 195 of the Act. Based on the principle laid out in several judicial precedents that specific provisions override general provisions, a view can be adopted that taxes on payments made to NR Sportsman, Sports association or Entertainer should be covered by Section 194E of the Act.

4.4 Specific Treaties entered into by India

4.4.1 Time threshold

As per the treaty between India and United Arab Republic, Article 18(2) provides that income earned by Artistes / Athletes shall be taxable in the Source Country only if the personal activities exercised are for a period exceeding 15 days during the year.

4.4.2 Fee threshold

As per Article 18(2) of India-USA treaty, income earned by Entertainers / Athletes shall be taxable in the Source Country if the net income exceeds USD 1,500 or its equivalent Indian Rupees.

4.4.3 Paragraph 2 - Payment to Companies

Article 15 of the Treaty between India and Libyan Arab Jamahirya does not provide for Paragraph 2 and hence if payment is received by a Company, the same shall not be taxable as per the Treaty.

4.5 India’s Reservations to the OECD Model Commentary

In its position on the OECD MC, India has reserved the right to exclude from the application of Article 17(1) and Article 17(2), performance income of Entertainers / sportsmen for performances that are substantially supported by public funds, thereby providing residence based taxation of such income. This reservation finds place in most of the bilateral tax treaties signed by India in form of Article 17(3).

4.6 Examples on Article 17 r.w. Section 115BBA of the Act

4.6.1 ACIT vs Wizcraft International Entertainment Pvt Ltd I.T.A.No. 3208/Mum/2003
I Co, engaged in entertainment event management and marketing, organised events / performances of renowned foreign artists/groups in India. For performances of international artists in India, I Co entered into agreement with UK agent, also acting as agent for various event management companies. As per agreement, I Co granted limited authority to UK agent to act on its behalf; enter into contract with artists; and ancillary acts required to be performed outside India. Apart from payment of fees to artists, I Co paid commission to UK agent and reimbursed expenses incurred in connection with performances of artists in India. I Co made payments as follows:

- Fee paid to artist - I Co deducted tax under Article 18 of India-UK DTAA
- Reimbursement of artist’s expenses - I Co did not deduct tax
- Commission and reimbursement to UK Agent - I Co did not deduct any tax since UK agent had rendered services outside India and it did not have PE in India and commission paid to the UK agent was not for services of entertainers/artists. The UK agent had not taken any part in the events, nor performed any activities in India. Hence, it was not covered by Article 18 of India-UK DTAA.

The Mumbai Tribunal held as follows:

- Payment of commission to UK Agent - The UK agent did not have any PE in India [Carborandum Co. v. CIT, (1977) 108 ITR 335 (SC) and CBDT Circular Nos. 17 (XXXVII) dated 17.07.1953 and 786 dated 07.02.2000], and hence the commission paid to the UK agent was not taxable in India and no obligation on I Co to deduct tax at source.

- Reimbursement of expenses - The law is well settled that reimbursement of expenses is not chargeable to tax and hence, there was no obligation to deduct tax at source [DIT (IT) Vs. Krupp UDHE Gmbh (2010) 38 DTR (Bom) 251 following own decision in CIT Vs. Siemens Aktiengesellschaft 220 CTR (Bom) 425]

However, in the above case, reliance was placed on Circular No. 786 dated 7 February 2000, which was withdrawn on 22 October 2009 and implications of the same would require analysis.

4.6.2 Foreign players who become residents in India during the year

In 2011, the World Cup and the IPL were played in India. In such cases, taking into account the practice and training sessions, it is possible that players may become tax residents of India. In such cases, the provisions of Section 115BBA of the Act shall not be applicable since only applicable to NR sportsmen and the provisions of Section 194J shall be applicable. The NR Sportsman will be required to apply for a Permanent Account Number (‘PAN’) in India, would be eligible to claim deduction for expenses and will be required to file return of income in India. In such cases, it would be pertinent to determine the residential status of the NR Sportsman at the beginning of the tax year itself and withhold taxes appropriately.

4.6.3 Live performance in India

Mr. A, a pop singer based in US, visited India for the purpose of live stage performances. The performances were hosted in 5 cities in a span of 15 days. He was paid an aggregate of Rs. 2 crores for all the performances in India by the event management company (‘I Co’ ) in India. After the shows were over, I Co released a compilation of audio and video CDs / DVDs of Mr. A’s performances in India. The CDs / DVDs were released globally by ABC Music, an Indian company. Mr. A was paid Rs 3 crores to acquire the rights by ABC Music.

While his stay in India, Mr. A made a guest appearance at Indian Idol and was paid Rs 1 crore for the same.

Taxability of the Income of Mr. A in India would be as follows:
Remuneration of Rs 2 crores would be taxable as per Article 18(1) of the India-USA tax treaty and Section 115BBA of the Act.

Consideration from ABC Music for release of CDs / DVDs
In this regard, reference is made to Circular 787, which provides that the consideration paid to the artists to acquire the copyrights of performance in India would be characterised as Royalty and would not be covered by Article 17 and if it is for subsequent sale abroad, it would not be taxable in India due to exclusions provided in section 9(1)(vi) of the Income-tax Act. Further, if the consideration is paid for acquiring copyright for subsequent sale in India, it would taxable in India as royalty. Accordingly, an apportionment would be required to be made since the sale is global and the amount which can be attributed to India, shall be taxable in India as royalty and will not be covered by Article 18.

Income of Rs 1 crore for appearance at Indian Idol would be taxable as per Article 18(1) of the India-USA tax treaty and Section 115BBA of the Act.

4.6.4 International Cricket player participating in the IPL

Mr. A, a world famous cricket player, is a tax resident of Brazil. The London United Club (‘the Club’), based in the UK, has contracted with him for a period of four years for playing in the Indian Premier League (‘IPL’) to be played in the Indian Sub-Continent (viz. India, Sri Lanka and China).

The Play-off matches shall be played in India, Sri Lanka and China over 3 weeks and the final match shall be played in India. Typically, 2 matches would be played in a week in each country. But all the training activities of the players would be in India. As a consideration for the above, the Club has agreed to pay Mr. A, a weekly compensation of Rs.2 million, whether or not the player actually takes part in the match. In addition to the above, if the Club wins the final match of the League, then the Club would be entitled to a Prize money of Rs.50 million. As per the arrangement of the Club with its players, 50% of the said prize money received by the Club would be distributed among the players. During the IPL, the Club won the match and Mr. A won the ‘Player of the Year’ award of Rs.10 crore for his individual performance in the entire league.

Also, an Indian sports gear company has entered into an agreement with Mr. A for brand promotion in India. As per the agreement, in all the matches that Mr. A plays during the period covered within the contract, he would have to wear the Company’s sports gears. These will include T-shirts with the logo on it, shoes etc. Further, as per the terms of the agreement, he would also be required to wear the said gears in any of the public appearances he makes anywhere globally. The consideration for brand promotion will be as under:

• Rs 5 crores for promotion by wearing the said gears during the matches
• Rs 2 crores for promotion by wearing the said gears in all public appearances

Mr. A also earned Rs 50 lakhs from a guest appearance in a Bollywood movie (playing himself in the movie), which was shot in India.

To commercially tap the global fame commanded by Mr. A, an American company called Happy Gaming Limited entered into an agreement with him to acquire the world-wide Gaming rights. The game would show the face of Mr. A and which would also use his name and character in the game to be known as “Indian Premier Gaming League 2011”.

Further, a new virtual game has been developed in India, as per which, since he is a Spinner, his hands measurement shall be taken and the person playing the game would be batting to a
delivery by Mr. A. The screen would display his body image and the ball will be bowled by him. For this also, he is remunerated Rs 1 crore.

Taxability of Mr. A in India:

<table>
<thead>
<tr>
<th>Sr No</th>
<th>Income of Mr. A</th>
<th>Taxability</th>
</tr>
</thead>
<tbody>
<tr>
<td>1</td>
<td>Weekly compensation</td>
<td>The compensation pertaining to the number of weeks spent by Mr. A in India, whether for training or playing the match, shall be taxable in India as per Article 17(1) r.w. Section 115BBA of the Act</td>
</tr>
<tr>
<td>2</td>
<td>Player of the Year - Rs.10 million</td>
<td>Even though all matches are not played in India, it may be possible to take a view that the entire income is attributable to India and hence taxable as per Article 17(1) r.w. Section 115BBA of the Act</td>
</tr>
<tr>
<td>3</td>
<td>Share of Prize money for winning IPL</td>
<td></td>
</tr>
<tr>
<td>4</td>
<td>Brand promotion fees for wearing Sports gears:</td>
<td>Amount attributable to India taxable as per Article 17 r.w. Section 115BBA of the Act</td>
</tr>
<tr>
<td></td>
<td>- Rs.50 million: during matches</td>
<td></td>
</tr>
<tr>
<td></td>
<td>- Rs.20 million: during public Appearances</td>
<td>If connected to performance in India, taxable in India</td>
</tr>
<tr>
<td>5</td>
<td>Rs. 5 million for guest appearance in a Bollywood movie</td>
<td>Taxable as Entertainer under Article 17(1) r.w. Section 115BBA of the Act</td>
</tr>
<tr>
<td>6</td>
<td>Gaming rights</td>
<td>Would not be covered by Article 17 since not related to performance and could be taxable as Royalty</td>
</tr>
<tr>
<td>7</td>
<td>Image rights for Virtual Game</td>
<td></td>
</tr>
</tbody>
</table>

Taxability of the Club in India

The prize money of the Club would be taxable under Article 17(2). Further, the income of the Club may not be covered by Section 115BBA of the Act on account of the following:

- It may not be considered as a Non-Resident Sports Association or Institution;
- It is not an amount guaranteed to be paid to the Club

Accordingly, the income of the Club shall be taxable on net basis as per the provisions of the Act. The Club would be eligible for deduction of expenses ie share of prize money paid to the players and other expenses at taxable at the rate applicable to Foreign Companies.

4.6.5 **Athletes running the Marathon in India**

Athletes from Africa are invited to participate in the Marathon conducted in various cities in India. The following models are followed:

- The Indian Organiser (‘I Co’) directly enter into the contracts with the Athletes;
- I Co enters into a contract with the Management Company of the Athlete;
- I Co enters into a contract with the Star-Company of the Athlete

In the first case, the Athlete would be covered by the provisions of Article 17(1) r.w. Section 115BBA of the Act. In the second and third arrangements, the payment to the Company would be covered by Article 17(2) of the Act and would not be covered by Section 115BBA of the Act and would be taxable on net basis in India as per the provisions of the Act (on
account of the reasons discussed in Paragraph 4.6.5 above with respect to income of the Club in India).

5. **Practical difficulties in Application of Article 17**

5.1 The MCs allow the source country to have the first right to tax performance income but, at the same time; reserve the secondary right to tax with the residence country.

5.2 With the above machinery, one may feel that the taxation of income earned by Entertainers / Sportsmen is fair.

5.3 However, Article 17 brings along with it various challenges and practical difficulties.

5.4 The MCs permit gross basis of taxation in the source country, and it is possible that the taxable base in the source country is very high compared to that in residence country. This is especially since the artistes/ sportsmen is liable to tax in the source country on gross income while is liable to tax on net income basis in the residence country. For example, if an Artist from Singapore performs in India and receives a consideration on which Indian taxes would be withheld at the rate of 20% on gross basis. The tax rates in Singapore are based on slab rates between 2% - 20% on net basis. There could be issues with respect to tax credit in Singapore and may even lead to a situation where he pays higher tax in India as compared to Singapore.

5.5 This could also lead to discrimination between the resident and international Entertainers / Sportsmen in international competition.

5.6 In the 1987 OECD Report, these concerns have been acknowledged and hence the OECD MC 2008 provided that the source state can provide an option to tax the Non-Resident Entertainers / Sportsmen on net-income basis.

5.7 Further, there are other challenges with respect to applicability of Article 17 to income which is not related to performance, image rights, attribution of income between various countries etc.

5.8 There are also issues on applicability of Article 17 of the tax treaty in case of triangular treaty scenarios.

5.9 On account of these concerns, several international authors have raised concerns on Article 17(1); a Dr. Dick Molenaars view is that Article 17 should be deleted and the income of Entertainers / Sportsmen should be taxed as per provisions of Article 7 or Article 15. His view is that removal of Article 17 would help as follows:

- The administrative obstacles would be taken away as well as the risk of double taxation and the loss of tax revenue would be nil (as done by Netherlands explained below)

- It would also take away the risk of double non-taxation in situations where the residence country applies the exemption method and the source country does not levy a withholding tax.

- Also, tax avoidance behavior would be still counteracted, because source countries will only give up their national withholding tax, if an non-resident artiste, sportsman or company can prove that he is a resident of a country with which a bilateral tax treaty has been concluded (and in which therefore normal taxation is secured).
5.10 Giving up taxing Rights: The Netherlands
With effect from 1 January 2007, The Netherlands has decided to give up unilaterally its source tax on foreign performing artistes and sportsmen, when they live in a country with which The Netherlands has concluded a bilateral tax treaty ie The Netherlands is not using its taxing right from Art. 17 anymore. While the loss of tax revenue was not more than approx. 5 million euro per year, but also 1.6 million euro in administrative expenses were removed, both with the artistes, sportsmen, promoters as with the tax administration in the two countries. The foreign artistes and sportsmen are now treated in accordance with Art. 7 and Art. 15 of the tax treaties and most often only paying income tax in their residence country.
If all countries would follow this initiative the loss of tax revenue would be nil, because not only the tax earnings would be given up, but also tax credits should not be given anymore.
(Source: Dr. Dick Molenaar)

6. Conclusion
The jurisprudence on taxation of Entertainers / Sportsmen is evolving and this Article only touches the tip of the iceberg.

Given the complexities, coupled with limited Indian and International judicial precedents on the subject matter, it is likely that there will be substantial debate on the taxability of income earned by Entertainers and Sportsmen in light of the provisions of Article 17, in the near future.

Specifically in India, Circular 787 was issued twelve years ago and there is need of a single code for Taxation of Entertainers and Sportsmen.