

Artistes and Sportsmen - Recent developments around Article 17

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SPECIAL RULES ARTISTS/SPORTSMEN

- National: withholding tax on performance income
- International – tax treaties:
 - ◆ First in 1939 tax treaty USA – Sweden
 - ◆ Later in German tax treaties in 1950s
 - ◆ 1963 OECD Model: Art. 17
“because of practical difficulties”

PERFORMANCE INCOME

Art. 17 OECD Model - Artistes and Sportsmen:
Taxing right for the source country, overruling
other treaty provisions (7, 14 and 15)

Measure to counteract:

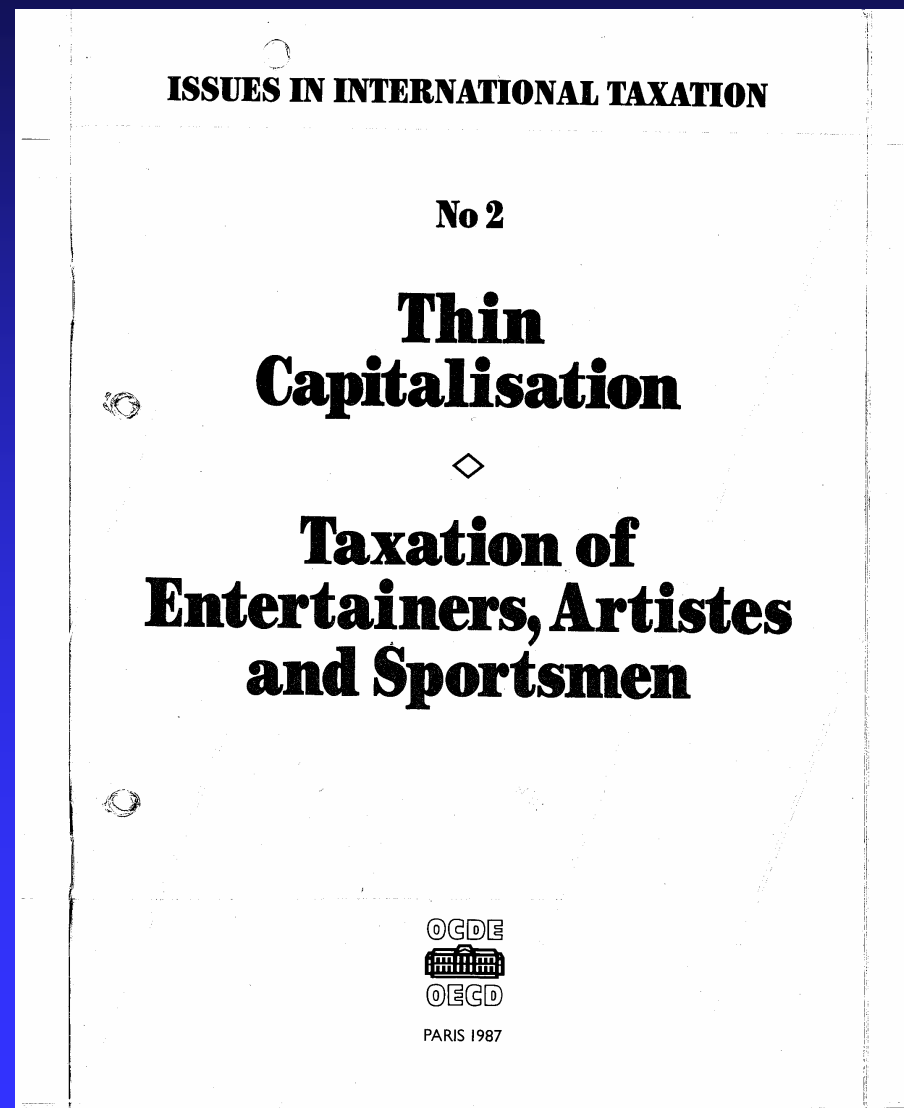
- tax avoidance
- non-compliance

Art. 23 - Tax exemption or credit in the
residence country

ARTICLE 17(2)

- Introduction in 1977
- Also payments to others than the artiste or sportsmen fall under Art. 17
- But limited approach, i.e. only in abusive situations
- Extended to the unlimited approach in 1992, after the 1987 OECD Report
- But USA, Switzerland and Canada: reservation

1987 OECD REPORT



1987 OECD REPORT

Clear expression of mistrust (§ 7 and 8):

“clear evidence of non-compliance”

“rarely disclose casual earnings”

“sophisticated tax avoidance schemes, many involving the use of tax havens, are frequently employed by top-ranking artistes and athletes”

“relatively unsophisticated people – in the business sense – can be precipitated into great riches”

“travel, entertainment and various forms of ostentation are inherent in the business and there is a tendency to be represented by adventurous but not very good accountants”

EXAMPLES

- Sting – Canada / USA / Netherlands
- Johansson – Switzerland / USA
- Luciano Pavarotti – Monaco
- Steffi Graf – Monaco
- Boris Becker – Monaco
- Mario Cipollini – Monaco
- Valentino Rossi – UK (non-domiciled status)

NO DEDUCTION OF EXPENSES

§ 94 of the 1987 OECD Report

(§ 10 of the Commentary on Art. 17 OECD)

“The article says nothing about how the income concerned is to be computed. It is for a Contracting State’s domestic law to determine the extent of any deductions for expenses. Domestic laws differ in this area, and some provide for taxation at source at an appropriate rate based on the gross amount paid to artistes and athletes. Such rules may also apply to income paid to groups or incorporated teams, troupes, etc.”

PROBLEM OF EXCESSIVE TAXATION

Insufficient tax credit in residence country,
because of high withholding tax

Example: 2.000 gross – 1.200 expenses = 800
profit

- Withholding tax: $20\% \times 2.000 = - 400$
- Tax credit: $30\% \times 800 = 240$

Insufficient tax credit = - 160

PROBLEMS WITH TAX CREDITS

It is often problematic to achieve a tax credit in the country of residence. Examples are:

- No tax certificate available
- Name of group, but credit in name of artists
- Conflict with monthly salary administration
- No acceptance by local tax inspector

EUROPE

- 1 Albania
- 2 Andorra
- 3 Armenia
- 4 Austria
- 5 Azerbaijan
- 6 Belarus
- 7 Belgium
- 8 Bosnia-Herzegovina
- 9 Britain
- 10 Bulgaria
- 11 Croatia
- 12 Cyprus
- 13 Czech Republic
- 14 Denmark
- 15 Estonia
- 16 Georgia
- 17 Germany
- 18 Greece
- 19 Hungary
- 20 Iceland
- 21 Ireland
- 22 Latvia

- 23 Liechtenstein
- 24 Lithuania
- 25 Luxembourg
- 26 Macedonia
- 27 Moldova
- 28 Monaco
- 29 Montenegro
- 30 Netherlands

- 31 Poland
- 32 Portugal
- 33 Romania
- 34 Serbia
- 35 Slovakia
- 36 Slovenia
- 37 Switzerland



EUROPEAN UNION

- No direct influence on artiste and sportsman taxation, but indirect through EC Treaty
- Arnoud Gerritse: ECJ 12 June 2003, C-234/01
- FKP Scorpio Konzertproduktionen GmbH: ECJ 3 October 2006, C-290/04
- Deduction of expenses
- Normal tax rates
- Withholding tax?

2008 CHANGE IN OECD MODEL

- Option for deduction of expenses in § 10 of the Commentary on Article 17
- End of gross taxation ?
- New examples: Germany, Austria, Spain, Belgium, Sweden
- Existing examples: UK, USA, Australia, Netherlands

BROADENING THE SCOPE

- Territoriality principle: "Agassi" case
 - United Kingdom
 - House of Lords, 17 May 2006, [2006] UKHL 23
 - Also equivalent part of sponsoring and endorsement income be allocated to country of performance
- But tax credit in country of residence?
- Or resident in tax haven?

ARTICLE 17(3)

- Optional exemption for subsidized artistes and sportsmen
- § 14 of Commentary on Art. 17
- Very often used in bilateral tax treaties
- India in 97% of its bilateral tax treaties
- Why? Is the state defending its budget?
- Unequal treatment towards non-subsidized?

THE NETHERLANDS - 2007

- The government had decided not to tax non-resident artistes and sportsmen from treaty countries anymore
- Although the NL has the taxing right under Art. 17 of its tax treaties
- But tax revenue was too low and administrative expense were too high
- Return to normal taxing rights of Art. 7 and 15

OLYMPICS / UEFA

- Also exemptions from source tax for:
 - ◆ 2010 Winter Olympics – Vancouver (Canada)
 - ◆ 2011 Champions League Final – London (UK)
 - ◆ 2012 Summer Olympics – London (UK)

- Tax literature:
 - ◆ 1999 - Dr. Harald Grams – Germany
 - ◆ 2001 - Joel Nitikman – Canada
 - ◆ 2006 – Dr. Dick Molenaar

DISCUSSION VIENNA NOV 2007

- Daniel Sandler – Canada:
 - ◆ Article 17 is both under- and overinclusive
 - ◆ (+) Former politicians as speakers / models / caddies of golf players/ film directors
 - ◆ (-) Lower income too many obstacles
 - ◆ Broaden to all “celebrities”, but set limit at \$100,000 p.p. per year

- Dick Molenaar – The Netherlands:
 - ◆ Removal of Article 17, but new approach with “contribution” principle is also interesting

OECD – 2010

- Discussion Draft changes in Commentary on Article 17 – April 2010
- Just technical issues
- No discussion about real changes
- Comments are published on website OECD

- But much more in-depth discussion at IFA Congress in Rome – September 2010
- Discussion about existence of Article 17

AVAILABLE OPTIONS FOR CHANGE

- Reintroduction limited approach Article 17(2)
- Definitive change of §10 Commentary (deduction of expenses / normal tax rates)
- Special provisions for smaller artistes and sportsmen (*de-minimis-rule*)
- Restrict Article 17 to business activities, exempt employees
- Exemption for equivalent part of salaries
- Article 17(3) in official text of Article 17
- Change from tax credit to tax exemption

RADICAL CHANGE

- Removal of Article 17
- Special provision is not necessary against tax avoidance behavior, because there are no tax treaties with tax havens
- Loss of withholding tax revenue from non-residents
- But also no tax credits anymore for residents with foreign income
- Balance = 0
- Much less administrative work and expenses

WITHHOLDING TAX REMAINS

- National withholding tax remains in place !!
- Only exemption after procedure in which both countries are involved
- Approval / confirmation by country of residence
- As with royalties and business profits (no PE)
- If tax avoidance scheme: gross withholding tax without deduction of expenses