

Tax Treatment of Team Performances under Art. 17 of the OECD Model Convention

This article discusses the tax treatment of entertainment and sports team performances under Art. 17 of the OECD Model. A comprehensive description of tax implications of earning foreign income is provided for team members and teams. For the purposes of the analysis, team members have been divided into performing and non-performing employees, and performing and non-performing contractors. The review of the tax treatment of income earned by teams covers indirect payments to performers, income in respect of performance and non-performance profits. The discussion of the current international tax system for entertainment and sports teams is followed by an examination of the possible application of alternative taxation models, including those already used by the OECD Model in relation to other items of income. Proposals such as a modification of the scope of Art. 17, income and time thresholds, limitation of Art. 17 to certain situations and gross-basis taxation are considered.

1. Introduction

The tax treatment of entertainers and sportsmen under international tax law has recently attracted a lot of academic attention and raised a number of practical questions. However, while cross-border activities of individual entertainers and athletes give rise to numerous tax problems, professional artistic and sports team performances pose questions that call into doubt the appropriateness of the treatment model proposed by the OECD Model Tax Convention on Income and on Capital (“OECD Model”). In the 1960s, the OECD introduced an exceptional allocation rule based on unlimited source taxation applicable exclusively to performing artistes and sportsmen due to their high mobility, their capacity of earning large sums of money within comparatively short time periods and their (alleged) tendency to take advantage of extensive tax planning in order to escape high tax burdens.¹ Based on these considerations, the OECD Model devotes a separate article to income derived from artistic and sporting activities.

Pursuant to Art. 17(1) of the OECD Model, notwithstanding the provisions of Arts. 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. Art. 17(2) stipulates that 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 Arts. 7 and 15, be taxed in the contracting state in which the activities of the entertainer or sportsman are exercised.

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1. OECD Report, *The taxation of income derived from entertainment, artistic and sporting activities* (1987), m.nos. 6 and 8, p. 39.

The above-cited provision assigns the primary taxing right in relation to income derived by an entertainer or sportsman to the state of performance, which is considered to be the state of source, regardless of whether the income derived by the performer is of a business or employment nature. By including Art. 17 in a tax treaty, the source state can secure its taxing right, which would often be precluded under the general rules laid down in Art. 7 or 15, due to the fact that artistic and sporting events usually do not require a prolonged presence in the state of performance. It should be noted that Art. 17 allows the source state to impose a tax according to its domestic law, without any limitations. There is no guidance in Art. 17 of the OECD Model regarding the tax base, tax rate and form of collecting tax. Moreover, there are no strict rules on the deduction of expenses. All of these important elements are left to the source country's domestic tax law.

The wording of Art. 17 leaves open the question of taxation of income from artistic and sporting activities in the state of residence. It is an open distributive rule which indicates that income "may" be taxed in the source state, omitting "only". Thus, the primary taxation right is left to the state of source but the residence state also formally retains the taxing right. If the state of residence levies tax on such income under domestic law, it depends on Art. 23A or B of the OECD Model whether it must grant an exemption or allow credit for the tax paid to the source state. If the residence state exempts the income, either under its domestic law or pursuant to a tax treaty, double non-taxation may occur when the source state grants certain tax exemptions to entertainers or sportsmen. Taxation in the residence state may be preserved in such situations through the application of the tax credit method or through a subject-to-tax clause.²

The purpose of this paper is to analyse the tax treatment of artistic and sports team performances under Art. 17 of the OECD Model. A comprehensive description of tax implications of overseas events is provided for team members and teams as such. Referring to the nature and structure of transactions involving entertainment and sports teams, it is discussed whether the current system of assigning the right to tax their income conforms to the present economic and legal reality. The paper considers whether income earned by incorporated teams is accorded the same treatment under the OECD Model as that of other entities and, if not, whether any differences are justifiable. Furthermore, the allocation of the taxing rights in relation to income from artistic and sporting services rendered by groups of performers is compared with the tax treatment of income from other personal services, and it is considered whether there is, or should be, any common pattern. The possible application of alternative taxation models, including those already used by the OECD Model in relation to other items of income, is discussed and evaluated.

2. Definition of a Team Performance

For the purposes of this paper, a team performance is defined as the exercise of personal activities by more than one entertainer or sportsman in their capacity as such, who come together as a group, at one time and space, to present themselves to others as part of one show, regardless of whether the group itself is incorporated or not. Examples of teams of artistes or

2. Vogel, K. (ed.), *Klaus Vogel on Double Taxation Conventions: a commentary to the OECD-, UN- and US model conventions for the avoidance of double taxation on income and capital with particular reference to German treaty practice*, 3rd edn. (London, Boston: Kluwer Law International, 1997), Art. 17, m.no. 7b.

sportsmen include a theatre, musical theatre, dance troupe, folklore band, orchestra, revue, cabaret, ballet group, choir, circus, sports club, athletic group, etc. While incorporated or permanent professional groups qualify as teams, the term also covers persons coming together to act as entertainers or sportsmen even for a single event,³ e.g. an amateur stand-up comedy group or break-dance squad winning a monetary prize in a contest.

The wording of Art. 17 and the OECD Commentary make it clear that the terms “entertainer” and “sportsman” refer exclusively to persons performing artistic and sports activities. While the concept of a sportsman is relatively broad and includes not only traditional athletes, but also chess players or car racers, the notion of an entertainer is surprisingly narrow. Although it seems to refer not only to traditional artistes, it is not in line with the modern understanding of entertainment. As a result, not all entertaining team performances are covered by Art. 17 of the OECD Model. An example of an excluded event is a fashion show which involves a group of models, a designer and dozens of auxiliary staff. Such a show is usually an elaborate entertainment production of an artistic nature in terms of choreography, stage design and decoration, music and light. Since models, who are the ones who perform on stage, do not qualify as entertainers, the event escapes Art. 17.⁴

It is important to emphasize that a team performance usually requires extensive activity of individuals other than entertainers or sportsmen. The performance of a group of artistes or sportsmen is supported by a skilled personnel whose services are essential for inventing the show, creating, preparing, producing or directing the performance and arranging the technical side of the show from behind the scene. Auxiliary services relevant to a successful performance also include marketing and managing the group.

However, the definitions of entertainer and sportsman in Art. 17 of the OECD Model preclude the application of this provision to the supporting staff of the team. The Commentary on Art. 17 draws a line between those on stage and those behind the scenes, and expressly states that the scope of the provision does not cover road crew for a pop group, choreographers or technical staff.⁵ As a result, supporting staff such as directors, trainers, coaches, technicians, etc., are not regarded as entertainers or sportsmen within the meaning of Art. 17 of the OECD Model, regardless of their involvement and relevance for the team performance. Consequently, although members of the same team, they do not share the same tax treatment. The policy rationale for such demarcation is unclear.

A team performance is a result of the cooperation of numerous individuals. A successful performance depends on the work of a group. The question arises how income earned by members of such a group should be taxed and whether the nature of the activities performed by (some of) them should determine the tax treatment of the group as such.

3. Taxation of Team Members

The tax treatment of members of artistic and sports groups performing abroad depends on several factors, including the provisions of domestic laws of the source state and the residence

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3. This interpretation is confirmed in the *Discussion Draft on the Application of Article 17 (Artistes and Sportsmen) of the OECD Model Tax Convention*, 23 April 2010 to 31 July 2010, proposed Para. 9.1 to the OECD Commentary on Art. 17, available at <<http://www.oecd.org/dataoecd/31/15/45058769.pdf>>.

4. See also OECD Discussion Draft 2010, note 3, proposed Para. 3 of the Commentary on Art. 17.

5. OECD Commentary on Art. 17, Para. 3.

state and the existence of a tax treaty between these countries. The following analysis focuses on the tax implications of whether or not a team member qualifies as an artiste or sportsman and whether such individual is employed or self-employed. Depending on these considerations, the tax situation of a particular team member may differ.

First, the tax position of a member of an artistic or sports team depends on whether the person qualifies as an artiste or sportsman within the meaning of Art. 17 of the OECD Model. This provision applies to entertainers and athletes who personally perform services of an artistic or sporting character. Individuals involved in the production of shows and planning or running of matches (such as directors, choreographers, producers, sound and light engineers, make-up specialists, trainers, coaches, health personnel, commentators, etc.) are not covered by Art. 17. Accordingly, income derived from the provision of auxiliary services by support staff and administrative personnel (such as technical personnel, stagehands or road crew, stunts and security) is not taxable under the rules applicable to artistes and sportsmen.

Second, team members can be engaged on a contractual basis as independent service providers or as dependent employees. Unlike single performers, who usually render their services independently, entertainers and athletes performing as part of a group often have a contract of employment with the incorporated group. This is usually the case for theatre actors, orchestra musicians, players in a sports team or entertainers engaged by a circus. However, distinguished or high-profile individuals, such as sports stars, divas, visiting actors or musicians, prima donnas, orchestra conductors, etc. are frequently engaged as independent contractors and have special arrangements due to their outstanding skills and capabilities. The same considerations apply to coaches, costume designers and directors. While a professional team (e.g. a theatre or orchestra) usually has permanent staff employees, it is common practice to engage well-known or highly specialized individuals for the purposes of one show (e.g. music composers, fashion designers who design costumes for a particular opera, public relations specialists, interim coaches or instructors). Such persons are likely to retain their independent status.

The nature of the services rendered and the type of contract entered into determine the tax treatment of team members, regardless of their level of income or involvement in the show. On this basis, four different types of team members can be distinguished: performing and non-performing employees, and performing and non-performing independent contractors.

3.1. Taxation of employees

3.1.1. Performing employees

It is often the case that incorporated teams or groups (theatres, orchestras, sports clubs) enter into employment contracts with artistes or sportsmen and pay them a fixed salary. In such event, the performer has no direct contractual relationship with the organizer of the artistic or sporting event in the state of activity. Instead, the team acts as an intermediary entity and is bound by a contract with the organizer from whom it receives a lump-sum remuneration for the performance. The individual performer is remunerated by the team, frequently without special regard to particular guest performances abroad. An employment contract of an entertainer or sportsman usually provides for an annual or monthly base salary covering various activities to be performed during a period of time, such as training or rehearsing; travelling with the team, troupe or orchestra; participating in a match or public performance, etc.

Separate payments may also be made with respect to particular events, such as concerts or tournaments.

Art. 17 expressly stipulates that it constitutes an exception to the general rules applicable to employees as far as entertainers and sportsmen are concerned. Therefore, employment income derived from personal activities of artistes or sportsmen in their capacity as such is covered by Art. 17 rather than Art. 15, which is generally applicable to employees. For this particular group of service providers, the decisive factor is the very nature of their services rather than the legal basis on which such services are rendered. Consequently, entertainers and athletes who derive income from an employment contract may be taxed in the state where the activities are exercised, without any threshold. Yet if Art. 15 were applicable, its thresholds would prevent the source country from taxing an individual who is not present in that country for a substantial period of time (183 days) or who is employed by a non-resident entity, if his salary is not borne by the employer's permanent establishment in the source country. Since the exceptions provided for in Art. 15 do not apply, even short-term employment activities of not more than 183 days exercised by performers in the source state are subject to taxation. The residence state either exempts this foreign income from domestic tax or allows a credit for the foreign tax.

It should be emphasized that the tax treatment of performing employees is in no way dependent on factors relating to the employing team. Thus, it is irrelevant whether the artistic or sporting entity is resident or whether it has a permanent establishment in the country where the services are exercised. However, as discussed below, these considerations are of relevance for non-performing members of the same team or group who usually qualify for exclusive residence-based taxation under Art. 15 and are not subject to tax in the source country.

Under Art. 17(1) of the OECD Model, the state of performance is allowed to tax the portion of the employee's income that is derived by an entertainer or sportsman from his personal activities as such exercised in that state. It can be inferred from such wording that Art. 17 has, in fact, an inherent limitation, whereby employment income that is neither directly nor indirectly related to performances or appearances is beyond the scope of this provision and comes under Art. 15 of the OECD Model.⁶ The OECD Commentary does not explain what income should be considered linked to performances. A commonly accepted narrow interpretation restricts Art. 17 to public performances despite the lack of such a limitation in this provision.⁷ Under this approach there are two types of training activities: those without an audience and without a direct link to a performance and those relating to a performance or appearance for an audience.⁸ The former would be dealt with under Art. 15 and the latter under Art. 17, because the "in public" criterion is regarded as decisive. However, the recent proposal for changes and additions to the OECD Commentary points out that Art. 17 covers all income related to normal activities of an entertainer or sportsman, such as appearances in

6. Vogel, note 2, Art. 17, m.no. 8.

7. See Sandler, D., "Artistes and Sportsmen (Article 17 OECD Model Convention)", in: Lang, M., et al. (eds.), *Source versus Residence. Problems Arising from the Allocation of Taxing Rights in Tax Treaty Law and Possible Alternatives*, 1st edn. (Vienna: Linde, 2008), p. 215 at 221.

8. "To the extent that a rehearsal relates to a specific performance and there is no breakdown of the payment to the entertainer between the live performance and rehearsal time, the entire payment is likely included in Article 17." See Sandler, note 7, at 227; Betten, R., "Annex to Advocate General's Conclusions on Whether or Not Article 17 of the OECD Model Applies to the Basic Salaries of Sportsmen", *European Taxation* 5 (2006), p. 231 at 235.

entertainment or sports events but also preparation and training.⁹ The proposal clarifies that Art. 17 would apply regardless of whether or not such preparation or training is related to specific public performances taking place in that state (e.g. remuneration paid with respect to the participation in a pre-season training camp would be covered).¹⁰ The proposed broader interpretation of Art. 17 seems to better correspond with the wording of the article itself in which there is no direct reference to public performances. Under the new approach it is clear that since, in the case of employed artistes or sportsmen, a fixed salary is generally paid with respect to all their performance and preparation work, the source state should be able to tax the remuneration attributable to such activities exercised in its territory.

If an artiste or sportsman receives a fixed salary for activities exercised in several countries, it is necessary to allocate to each country the proportion of the salary corresponding to the activities exercised in the capacity of an entertainer or sportsman in that country. There is no guidance in the OECD Model on how to do this. In practice, such determination must be made on a case-by-case basis. Possible methods include a division according to the number of performances, or time spent in a given state,¹¹ or a split-up pro rata to the volume of the activities performed in each state. Rather than being restricted to stage appearances or games, the count made in this connection must extend to cover proportionally rehearsals, practice sessions or time spent in training camps.¹² Such an apportionment of the sportsman's salary is also necessary where a professional sportsman plays for a team that has games in more than one country and holds practices both in its home country and in the source countries where it plays.

Recognizing the need to clarify source and allocation rules, the OECD has recently proposed some changes to the Commentary on Art. 17 to address the performance of entertainment activities in various countries. Again, there is a visible shift of emphasis from income derived from performance to income from normal activities of an entertainer or sportsman. The OECD suggests that the base remuneration be allocated on the basis of the working days spent in each state, unless otherwise indicated.¹³ Items of income directly linked to specific activities exercised by the entertainer or sportsman in a state (e.g. a prize paid to the winner of a sports competition taking place in that state; a daily allowance paid with respect to participation in a tournament or training stage; a payment made to a musician for a concert) will be considered to be derived from the activities exercised in that state.¹⁴

Apportionment of the performer's fixed salary is also necessary where the employee is remunerated for various activities, not all of which fall within the scope of Art. 17. If the remuneration consists of various elements, it must be determined whether a particular item of income is covered by Art. 17 or by other distributive rules of the OECD Model. It may happen that income attributable to one state falls under Art. 15, whereas portions allocated to other countries are taxable under Art. 17. An illustration of problems that may arise in this respect is

9. OECD Discussion Draft 2010, note 3, proposed Para. 9.1 of the Commentary on Art. 17.

10. Ibid.

11. OECD Commentary on Art. 17, Para. 8; Malin, A., "Employed Artistes and Sportsmen according to the OECD Model", in: Loukota, W., and Stefaner, M. (eds.), *Taxation of Artistes and Sportsmen in International Tax Law*, 1st edn. (Vienna: Linde, 2007), p. 227 at 232.

12. Vogel, note 2, m.no. 21.

13. OECD Discussion Draft 2010, note 3, proposed Para. 9.2 of the Commentary on Art. 17.

14. OECD Discussion Draft 2010, note 3, proposed Para. 9.2 of the Commentary on Art. 17; Example 2 in proposed Para. 9.3.

provided by so-called “combined cases”, whereby the same individual is both an actor and director in one show, or a dancer and choreographer. In such situations, it is necessary to look at what the individual actually does in the state where the performance takes place.¹⁵ If his activities in that state are predominantly of a performing nature, Art. 17 will apply to all the resulting income he derives in that state. If, however, the performing element is a negligible part of what the person does in that state, the whole of the income will fall outside this provision. Consequently, depending on the predominant part of the activity exercised in the source state, either the state of performance or the state of residence taxes the respective income fully.¹⁶ In other cases it is necessary to estimate what proportion of income is actually derived from services rendered as an entertainer or sportsman and what part should be allocated to other activities. The OECD Model does not prescribe how such allotment should be made and, therefore, if the employment contract contains no apportionment clause, an estimate of how much of the salary corresponds to the respective performance must be provided. The method chosen is a compromise between an accurate reflection of reality and practicality.¹⁷ The part of the income attributable to the additional activities (choreography, direction) that cannot be regarded as normal preparation is subject to taxation only in the residence state under the conditions specified in Art. 15.

Art. 17 of the OECD Model does not provide any guidance regarding the assessment, computation and collection of tax on the proportion of the salary relating to the activities as an entertainer or sportsman in the state of source. Therefore, these issues are determined by domestic law of the source country. The most problematic aspect of the tax computation is the extent of any deductions for expenses. Domestic laws differ in this area, but most states do not allow deductions for expenses to non-resident artistes and sportsmen. Instead, tax is levied at source on the gross amount paid to performers. Because such solution has been criticized, the OECD Commentary (updated in 2008) recognizes that taxation of the gross amount may be inappropriate in some circumstances even if the applicable tax rate is low.¹⁸ Therefore, the Commentary suggests that some states may want to give the option to the taxpayer to be taxed on a net basis.¹⁹ Whereas it is only an optional recommendation, after the decision of the European Court of Justice (ECJ) in *Gerritse*, it is no longer possible for EU Member States to bar the deduction of expenses incurred by non-resident artistes and sportsmen if residents are taxed on a net basis.²⁰ The Commentary on Art. 17, Para. 10 proposes the appropriate wording of a provision that can be included in a treaty to this effect.

As far as tax collection is concerned, withholding taxes are imposed in the case of artistic and athletic activities because of administrative convenience and potential enforcement problems. Since non-resident entertainers or sportsmen usually have no close economic ties with the source country and no assets within the source country, there is generally no recourse in

15. OECD Commentary on Art. 17, Para. 4.

16. Vogel, note 2, m.no. 13b.

17. Malin, note 11, at 232.

18. OECD Commentary on Art. 17, Para. 10.

19. Molenaar, D., and Grams, H., “The Taxation of Artists and Sportsmen after the *Arnoud Gerritse* Decision”, *European Taxation* 10 (2003), at 381.

20. In its decision in the *Gerritse* case (12 June 2003, case C-234/01), the ECJ held that non-resident artistes and sportsmen are entitled to deduct their expenses before tax is calculated and that filing a normal tax return must be possible when a tax refund seems likely.

order to collect the tax.²¹ Therefore, withholding taxes are imposed, deducted and remitted by persons resident in the country who make payments to non-resident taxpayers.

Withholding taxes can take one of two forms: the tax withheld may be a payment on account of the tax ultimately determined as owed by the taxpayer, or it can represent a final tax. In most countries the withholding tax on artistes and sportsmen is final.²² Under Art. 17(1) of the OECD Model, the amount paid by the employer to the individual artiste or sportsman may be subject to tax by means of withholding tax on such payment or by imposing an obligation on the employee to file a tax return. However, the assessment and collection of tax on the employee's salary without already levying a withholding tax on the organizer's payment to the employer may cause practical difficulties when neither the employer nor the employee is resident in the state of activity.²³ Therefore, under Art. 17(2) it is also possible to levy the tax at the level of the domestic event organizer, on the payment from the organizer to the team (employer), to fulfil the tax obligations of the artiste or sportsman.²⁴ The problems arising in connection with such a solution are coupled with the fact that most countries do not allow non-resident artistes and sportsmen to file a normal income tax return after a tax year and exclude them from the application of regular income tax rates.²⁵

In summary, income earned by entertainers and sportsmen from their personal services exercised in the framework of employment is covered by special source-based allocation rules rather than Art. 15 applicable to employees. However, the OECD Model recognizes that some states may wish to apply the special rule of Art. 17 in their bilateral treaties only where the activities of entertainers and athletes constitute independent personal services (business activity). In such cases, if artistes or sportsmen exercise their activities in the source state under an employment contract, taxation of income derived from such activities is governed by the provisions applicable to dependent personal services (Art. 15). As a result, a short stay will generally not trigger taxation in the state of performance.²⁶ Alternatively, recognizing the administrative difficulties involved in allocating to specific activities taking place in a state the overall employment remuneration of individual members of a foreign team, the OECD has recently proposed a narrower exception. Rather than excluding employment income from the scope of Art. 17, some states may prefer dealing with cases that they frequently encounter in practice. The proposal suggests a provision excluding the application of Art. 17 to members of a sports team that takes part in a match organized in the other state by a league to which that team belongs.²⁷

3.1.2. *Non-performing employees*

Supporting staff, technical personnel and all other employees of a team or group who are not artistes or sportsmen within the meaning of Art. 17 of the OECD Model are covered by the general rules applicable to employees laid down in Art. 15. Under this provision, the state in which employment is exercised (the source state) has the right to tax salaries, wages and other

21. Taferner, M., "Source versus Residence Principle. Artistes and Sportsmen", in: Aigner, H.-J., and Loukota, W. (eds.), *Source versus Residence in International Tax Law*, 1st edn. (Vienna: Linde, 2005), p. 253 at 263.

22. *Ibid.*, at 276.

23. Malin, note 11, at 234.

24. *Ibid.*, at 233.

25. Molenaar and Grams, note 19.

26. Vogel, note 2, m.no. 27.

27. OECD Discussion Draft 2010, note 3, proposed Para. 14.1 of the Commentary on Art. 17.

similar remuneration in respect of an employment exercised by a non-resident in that state. Thus, the relevant nexus for source-based taxation of employees is the physical presence in the state of source. However, employment income is taxable only in the residence state if three conditions specified in Art. 15(2) are fulfilled. First, for the exception from source-based taxation to apply, the employee must be present in the source state for a period or periods not exceeding in the aggregate 183 days in any 12-month period commencing or ending in the fiscal year concerned. In other words, the physical presence threshold for taxation involves a time element – it precludes the source country from taxing unless the taxpayer performs services, or is present, in the country for a minimum number of days.²⁸ Second, the remuneration must be paid by, or on behalf of, an employer who is not a resident of the source state. Under the third condition, if the employer has a permanent establishment in the state where the employment is exercised, the exception applies if the remuneration is not borne by that permanent establishment.²⁹

Applying the above rules to a non-performing employee of an artistic or sports team, it follows that, in most cases, such an employee (e.g. a theatre director or coach) is only taxed in his country of residence (which need not be the same as the team's residence country). If the employment is exercised abroad because of a guest performance in another country where the employee renders services supporting a show or game, the source state does not have the taxing right with respect to income derived from employment exercised in that state as long as the employee is present for 183 days or less, the remuneration is paid by a non-resident, and it is not borne by a permanent establishment situated in the source state. Conversely, income of a non-performing employee is taxable in the source state if the artistic or sports event requires a prolonged presence in that country or if the employer has a permanent establishment in that country which bears the remuneration of the employee. It should be noted that usually the occurrence of a permanent establishment (after 6 months) will go hand in hand with the fulfilment of the substantial-presence requirement by the employee in the source country. An example of a non-resident employer having a permanent establishment in the country of performance includes a circus that gives a half-year series of shows in one venue. In such a case, non-performing employees are taxable in the source country on their employment income. If the employer is resident in the country where the services are exercised (e.g. a domestic theatre), the non-resident employee is taxable without limitations, the only threshold being the exercise of services in the source country. This rule operates like the one in Art. 17 applicable to performing employees. Only where the exceptions under Art. 15 do not apply are the non-performing employees taxable under similar rules as those applicable to entertainers and athletes.

There is one final point to be made here with reference to the employer-related requirements that influence the tax position of an employee of a team. The thresholds provided for in Art. 15 aim to ensure that an employee is not taxable in the state of performance if he is present there only for a short time and is employed by an entity which is not subject to tax in the source country.³⁰ However, as explained below, Art. 17(2) subjects to tax income in respect of performance accrued to the entity. Does this mean that the non-performance-related income of employed entertainers and income earned by non-performing employees is taxable in the

28. Arnold, B., "Time Thresholds in Tax Treaties", *Bulletin for International Taxation* 6 (2008), p. 218 at 220.
29. OECD Commentary on Art. 15, Para. 7.
30. Sandler, note 7, at 238.

source state even if they are present there for less than 183 days, because of the fact that they are employed by an entity that is subject to tax in the source country or because the remuneration is paid by a domestic organizer? The answer is no. Rather than saying that the employer must be subject to tax, the wording of Art. 15 expressly requires that the employer or the entity paying the remuneration have a resident status, or the remuneration be borne by the employer's permanent establishment, whereas Art. 17(2) allows taxation even if the team is not resident and does not have a permanent establishment in the source country. In other words, although the sense and effect may be similar in practice, the fact that the team actually *is* taxable in the source country under Art. 17(2) does not preclude the application of the exceptions contained in Art. 15.

3.2. Taxation of independent contractors

3.2.1. Performing contractors

As already mentioned, it is relatively common in the world of sport and entertainment to engage an outstanding artiste or sportsman for the purposes of one show, or even a single guest performance. In such cases, the individual often acts as an independent contractor and enters into special arrangements preserving his freelance status. It may also be the case that an entertainer or athlete is registered as an entrepreneur or sole trader, which is fairly common for celebrities or high-profile individuals, such as sports stars, top actors or popular musicians. However, because Art. 17 expressly provides that it constitutes an exception to Art. 7 of the OECD Model, income from independent services derived by such a performer is not taxable under Art. 7 applicable to business profits. Consequently, it is irrelevant whether the performer has a permanent establishment in the source country; income from artistic or sporting activities is taxable in that state without regard to thresholds required for taxation of business profits. Furthermore, the taxpayer cannot benefit from the rules necessitating net-basis taxation and, in most cases, the tax is charged on gross payments received from the organizer or from the team.

The provision of entertainment or sports services may require considerable outlays, especially related to performance preparation. In most countries expenses connected with earning income caught by Art. 17 cannot be deducted. Therefore, it is crucial to determine whether, and to what extent, actions required from the performer under the contract qualify as normal activities of an entertainer or sportsman. Apart from actual performances, it is often the case that an artiste or sportsman is obligated to undertake additional activities not involving a public appearance, e.g. preparation and training, test performances without audience, participation in the promotion of the event, etc. The activities of an entertainer or sportsman covered by Art. 17 not only include the appearance in an entertainment or sports event in a given state, but also, for example, advertising or interviews in that state that are directly or indirectly related to such an appearance.³¹

Arguably, "preparation", regarded by the OECD as an activity covered by Art. 17, includes preparing an entertainer's own choreography, acquiring additional skills such as martial arts or horse-riding, learning a new language, dialect or changing accents, losing or gaining weight, etc. Self-employed performers often receive remuneration for participation in an event (movie, game, show) and must bear all preparation and training expenses themselves.

31. OECD Discussion Draft 2010, note 3, proposed Para. 9.1, second indent of the Commentary on Art. 17.

If it is the self-employed performer who is paying for such preparation and the domestic law of the source country provides for gross-basis taxation, the entire remuneration of the performer is taxable, without taking into account the cost of preparation and training. However, in combined cases, expenses not related to Art. 17 income can be deducted pursuant to Art. 7. To prevent such differentiation based on the nature of services, non-resident entertainers and sportsmen should be able to deduct their expenses already at the withholding stage. After the end of the taxable year, they should have the possibility to file a normal income tax return, deduct any remaining expenses and make use of ordinary income tax rates. The filing of the income tax return could be optional and performers could decide to accept the withholding tax as their final tax.

The OECD Commentary on Art. 17 (updated in 2008) supports this view and suggests in Para. 10 the appropriate wording of an optional provision that can be included in a treaty between countries that consider gross-basis taxation inappropriate.³² According to the paragraph, where a resident of a contracting state derives income as an entertainer or sportsman and such income is taxable in the other contracting state on a gross basis, that person may request the other state that the income be taxable on a net basis. In determining the taxable income of such resident, the other state should allow as deductions those expenses deductible under its domestic laws which are incurred for the purposes of the activities exercised in that state and which are available to a resident of that state exercising the same or similar activities under the same or similar conditions.

In summary, it is irrelevant whether an entertainer or sportsman performs as an employee of a team or group, or independently, even if such a distinction is made under domestic laws which may impose a certain status on performers. In both cases, the state in which the activity is exercised is granted the primary taxing right without limitation.³³ The determining factor is the nature of the activities performed. Any person who engages in an artistic or sporting activity within the meaning of Art. 17 and derives income therefrom, is an entertainer or sportsman for the purposes of Art. 17 and may not be taxed under Art. 7.³⁴ Again, this rule does not apply to income unrelated to entertainment or sports activities. Non-performance income earned by self-employed artistes and sportsmen can be taxed under Art. 7, which means exclusive residence taxation in the absence of a permanent establishment in the state of performance. In combined cases, apportionment may be necessary.

3.2.2. *Non-performing contractors*

The tax situation of members of artistic or sports teams who are not caught by the definition of an entertainer or sportsman and who perform their activities independently is governed by Art. 7 of the OECD Model. This provision applies to persons engaged in a trade or business who perform professional services and other activities of an independent character.³⁵ Such persons include guest play directors, costume designers, stunts, coaches, doctors, etc.

Pursuant to Art. 7 of the OECD Model, the profits of an enterprise are taxable only in its state of residence unless the enterprise carries on business in the source state through a permanent

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32. According to the ECJ ruling in *Gerritse*, EU Member States must allow deduction of expenses incurred by non-resident artistes and sportsmen if residents are taxed on a net basis.
33. Vogel, note 2, m.no. 8a.
34. *Ibid.*, m.no. 14b.
35. Art. 3(1)(h) OECD Model.

establishment situated in that state. As a result, a non-performing member of an artistic or sports team engaged on an independent basis is not taxable on his income in the source country as long as he has no permanent establishment there. If he does, his profits may be taxed in the source state but only so much of them as is attributable to that permanent establishment. Thus, an independent non-performing contractor benefits from the thresholds applicable to enterprises under Art. 7.

The OECD Model requires that, in determining the profits of a permanent establishment, there be allowed as deductions expenses incurred for the purposes of the permanent establishment, including executive and general administrative expenses, whether in the state in which the permanent establishment is situated or elsewhere. This requirement of net-basis taxation considerably differentiates the tax situation of performing and non-performing individuals cooperating in entertainment or sports teams.

4. Taxation of the Team

A team or group carrying on entertainment or sporting activities (a theatre, orchestra, circus, sports club, etc.) can be recognized as a separate taxpayer, especially if it is incorporated. It is often the case that, as far as team performances are concerned, the team as such has a legal relationship with the event organizer in the source country and it acts as a third person interposed between the organizer and individual artistes or sportsmen. There is nothing artificial about such an arrangement. To the contrary, it reflects the nature of a team performance whereby the organizer is interested in a group show or game rather than in the services of particular entertainers or players. Moreover, a team performance usually requires work and cooperation of a considerable number of persons other than artistes or sportsmen. Within a group which offers entertainment or sports services, performers (both employed and self-employed) come together with creative, supporting and managing staff and develop added value in comparison to individual efforts.

Since a team may constitute a separate entity and profit-earning enterprise, its operations have certain tax consequences. In the context of team performances, the general practice is for the organizer to remunerate the team itself rather than make payments to its particular members. The remuneration received by the team consists not only of the sum of the salaries of its members, but contains a profit element earned by the team itself. In general, teams, troupes and groups which provide entertainment or sporting services qualify as enterprises within the meaning of the OECD Model, since the term “enterprise” applies to the carrying-on of any business.³⁶ Therefore, in the lack of any special provisions, profits of teams performing in another country should be covered by the general rules set forth in Art. 7 of the OECD Model, which allows taxation in the source country only to the extent to which such profits are attributable to a permanent establishment situated in that country.

However, the special rules applicable to income earned by artistes and sportsmen affect the tax position of teams as well. In order to analyse the tax treatment of a team, an important distinction has to be made. First, out of a payment made to the team by the organizer, certain portions are attributable to the performance of individual artistes or sportsmen (respectively forwarded to them in the form of a salary). Second, there is the profit element retained by the team as such, which consists of the part relating to the performance of artistes or sportsmen

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36. Art. 3(1)(c) OECD Model.

and the part attributable to the activities of non-performing member and other activities of the team.

4.1. *Indirect payments to performers*

Art. 17(1) of the OECD Model applies to income derived directly and indirectly by individual artistes or sportsmen from activities exercised in the state of performance.³⁷ In the case of team performances, income is usually not paid directly to performers. Instead, an event organizer or host entity makes payments to a team, and team members are remunerated by the team, generally in the form of a fixed salary rather than payments for each separate performance. If entertainers or sportsmen receive income from the team, i.e. indirectly, for the performance with such team, the state of performance has the same taxation rights as if the compensation had been paid directly to individual performers. Consequently, the event organizer applies Art. 17 and relevant provisions of domestic law regarding income of artistes and sportsmen to an appropriate part of the payment to the team attributable to individual performers.

However, Art. 17(1) may also apply to payments to legal entities established under company law, such as orchestras, choirs, ballet troupes, theatre companies, or sports teams, even if such payments do not flow to individual performers. This could be the case if domestic laws of the source country apply a look-through approach, whereby income earned by the team for appearances in that country is attributed to performers. Under Art. 17(1) payments formally made to the team and accruing for the benefit of individual performers can be taxed in the hands of the performers, even if there is no actual remuneration paid to them.³⁸ The provision is also applicable to a management company that receives income for the appearance of a group of performers which is not itself constituted as a legal entity.

Art. 17(1) can only apply to that part of income accruing to the team which is attributable to activities exercised by artistes and sportsmen; it cannot rule the taxation of the incorporated team itself. This is due to the reference to personal activities which restricts the scope of Art. 17(1) to natural persons. Legal entities are not able to carry on artistic or sporting activities personally.³⁹ Similarly, the personal scope of Art. 17(1) does not cover non-performing team members. Therefore, it is crucial to determine the extent to which a payment made to the team includes income indirectly derived by performers and resulting from personal exercise of artistic or sporting activities, because only such income may be subject to tax under Art. 17(1) of the OECD Model.

The look-through approach has certain consequences as regards the collection of tax. Where the domestic law of the state of performance looks through the team and treats the payment received by the team as attributable to individual entertainers or sportsmen, a withholding tax is levied on the payment to the team to enforce the taxation right under Art. 17(1).⁴⁰ In such a case the tax can be regarded as levied on income of the performers.⁴¹ In this respect,

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37. OECD Commentary on Art. 17, Para. 8.

38. Ibid.

39. Loukota, W., "Unselbständige Künstler und Sportler", in: Gassner, W. et al. (ed.), *Arbeitnehmer im Recht der Doppelbesteuerungsabkommen*, 1st edn. (Vienna: Linde, 2003), at 208; Malin, note 11, at 230.

40. Kalteis, B., *Die Besteuerung international tätiger Künstler und Künstlerbetriebe*, 1st edn. (Vienna: LexisNexis, 1998), at 418.

41. Malin, note 11, at 233.

the application of the look-through approach may result in tax credit difficulties. If the payment is made to the interposed team and the source country taxes the individual, the residence country of the team may refuse to give the team credit for the tax withheld.⁴²

If the domestic law does not allow to look through the team, it is not possible under Art. 17(1) to levy a final withholding tax on such a payment to assess and collect tax on the performers' salaries. Consequently, if the treaty does not allocate the taxing right to the team's income to the state of performance, the state of performance can ultimately enforce its taxation right under Art. 17(1) only by taxing the income paid by the team to the performers and not by taxing the income paid by the organizer to the team.⁴³ In other words, if the payment made by the event organizer is attributable to the team, the state of source is not entitled to tax income accruing to the team as income of the individual performers. Under the general rules, such income would be taxed as business profits in the hands of the team receiving the remuneration. As a result, tax may be levied by the source country only if the income is attributable to a permanent establishment located in that country.

4.2. *Income in respect of performance*

The OECD was concerned that artistes and sportsmen may avoid taxation in the source state under Art. 17(1) by interposing companies that have the sole purpose of diverting the artiste's or sportsman's income to the enterprise in such a way that the income is taxed in the state of activity neither as personal services income of the artiste or sportsman nor as profits of the enterprise. The use of intermediary companies to this effect is possible in particular in countries that do not have the statutory right to look through the person receiving the income to tax it as income of the performer.⁴⁴ In order to counteract such tax avoidance schemes, the drafters of the OECD Model included Art. 17(2), which stipulates that 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 Arts. 7 and 15, be taxed in the state in which the activities of the entertainer or sportsman are exercised. The term "another person" within the meaning of this rule includes an individual, a company and any other body of persons.⁴⁵

Although the original purpose of Art. 17(2) was to counteract the interposition of so-called rent-a-star companies⁴⁶ controlled by artistes or sportsmen, the current broad wording of this provision does not restrict its applicability to tax avoidance or abusive structures. As a result, it also applies to incorporated teams, because income flowing from the event organizer to the team accrues to another person and is related to the performance of entertainers or sportsmen. This interpretation is confirmed in the OECD Commentary on Art. 17, Para. 11. Thus, the state of source can tax at the level of the team the portion of the performance income

42. On problems connected with tax credit see Sandler, note 7, at 236; Juarez, A., "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* 11 (2003) at 409 and 12 (2003) at 457; Molenaar, D., *Taxation of International Performing Artistes: The Problems with Article 17 OECD and How to Correct Them*, 1st edn. (Amsterdam: IBFD, 2005), at 187-194.

43. Malin, note 11, at 234.

44. OECD Commentary on Art. 17, Para. 11.

45. Art. 3(1)(a) OECD Model; Vogel, note 2, m.no. 44.

46. See Molenaar, D., and Grams, H., "Rent-A-Star – The Purpose of Article 17(2) of the OECD Model", *Bulletin for International Fiscal Documentation* 10 (2002), p 500.

which cannot be taxed in the hands of the individual performers, regardless of whether the team has a permanent establishment in that country.⁴⁷ In other words, the cumulative application of Art. 17(1) and 17(2) – whereby individual members of the team are liable to tax under Para. 1 on any remuneration (or income accruing for their benefit) derived from the performance of their activities as entertainers or sportsmen, and the profit element accruing from the performance to the team is liable to tax under Para. 2 – results in source taxation of the entire performance-related income.

However, this does not mean double taxation under Art. 17 (once by imposing tax on the payment made to the team by the host entity or event organizer, and again at the level of the team when payments are made to individual performers). While the wording of Art. 17 leaves scope for ambiguity in this regard, the purpose of Art. 17(2) is to catch only such part of remuneration for team performance that cannot be taxed in the hands of entertainers or sportsmen under Art. 17(1). This approach is confirmed in the OECD Discussion Draft 2010. It is suggested that a new paragraph be added to the Commentary, clarifying that the income derived in respect of the personal activities of an entertainer or sportsman should not be taxed twice through the application of these two paragraphs.⁴⁸ Nonetheless, this can only be achieved under reasonable legislation of the state of performance. Domestic law should either tax only the team or the entertainer on the whole income attributable to activities covered by Art. 17 or, alternatively, tax each of them on part of the income, e.g. by taxing the income received by the team but allowing a deduction for the relevant part of the remuneration paid to individual performers and taxing that part in the hands of the performers.⁴⁹

As regards the part of income from performance that is attributable to the team itself rather than individual performers, Art. 17(2) expressly takes precedence over Art. 7 of the OECD Model but only with respect to the profit element of the team relating to entertainment or sportive activities in the source country.⁵⁰ Art. 17(2) of the OECD Model could be applied to the entire profit of the team only if the whole show was a matter of acting, or the game generated income exclusively due to players' efforts. However, a certain part of the team income results from non-performance services and the team's own business operations rather than from the personal activities of artistes or sportsmen, even though it is connected with it. Art. 17(2) catches only the profit element of the team that is derived from the exercise of activities by entertainers or sportsmen in their capacity as such. Nonetheless, it is often the case that domestic laws refer to the type of entity (entertainment or sports team) rather than activities that generated the income and subject the entire income that accrues to the entity to gross-basis taxation at source.

A separate major problem for teams is the assessment, computation and collection of tax. Art. 17(2) of the OECD Model does not indicate whether the term "income" should be regarded as gross receipts or profit (net income).⁵¹ The OECD Commentary merely suggests the option of taxing performers on a net basis. As a result, the state of activity is not restricted

47. Switzerland, Canada and the United States do not share this view. These countries made a reservation on Art. 17, expressing the opinion that Art. 17(2) should apply only to cases of abuse or tax avoidance.

48. OECD Discussion Draft 2010, note 3, proposed Para. 11.5 of the Commentary on Art. 17.

49. Ibid.

50. For a broad description of a different view, see Felderer, D., "Taxation of Artistic and Athletic Performance under Article 17(2) OECD Model", in: Loukota, W., and Stefaner, M. (eds.), *Taxation of Artistes and Sportsmen in International Tax Law*, 1st edn. (Vienna: Linde, 2007), p. 269 at 284 et seq.

51. Malin, note 11, at 238.

by the treaty and can decide to tax either a gross or net amount. The choice to tax gross profits, even at a lower rate, is usually very disadvantageous to the team as compared to the treatment of other enterprises. Expenses related to a professional show often amount to over 80% of the remuneration and include travel and accommodation (buses, trucks, air travel, hotels, food and drink for a group of persons); equipment (sound, light, stage set-up, instruments, clothing and, in bigger venues, video and laser equipment); accompanying persons (sound and light technicians, roadies, tour managers, tour accountants, drivers and security); agents and managers; and various other expenses (administration, legal advice, insurance, rehearsals and pre-production costs).⁵² If such costs are not taken into account, income tax is unfairly imposed on amounts that do not increase the actual wealth of taxpayers. Furthermore, it is often the case that a deduction for expenses is allowed in the residence country of the team, whereas the source country taxes the non-resident team on the gross fees for performance, effectively including in the taxable base and (double-)taxing the salaries of non-performing staff and other outlays. The result of such a discrepancy is that tax in the residence country is calculated on a lower taxable base, leading to a lower tax exemption or credit. Although the OECD has recently recommended an optional net-basis taxation, it expressly approves of source taxation of gross income paid to groups or incorporated teams.⁵³

Since under Art. 17(2) the team itself is a taxpayer, it is possible for the state of activity to levy a final withholding tax on the payment made by the event organizer to the team. In such a case, the withholding tax is levied in order to fulfil the tax obligations of the team and not the obligations of performers, as is the case under Art. 17(1).⁵⁴ As regards the tax credit, where the source country taxes the team under Art. 17(2) on the gross amount received and the team pays out the salary to an individual performer, the individual's country of residence may refuse to give the individual credit for the tax withheld on the payment to the team.

4.3. Non-performance profit of the team

Pursuant to Art. 17(2) OECD Model, only income that may be considered to be derived in respect of the personal activities of entertainers or sportsmen may be taxed in the hands of the team. However, a professional team usually employs individuals other than artistes and sportsmen who contribute to its profit and enable the entity to carry out separate activities, such as stage set-up and administration. For instance, a professional sports team provides not only the services of the team players, but also the coach, manager, trainers, and team doctor, dietician or cook, all of whom accompany the team and participate in its operations.⁵⁵ Similarly, a theatre troupe or orchestra can have a significant behind-the-scenes contingent, including stage hands, coaches, lighting specialists, etc. Touring theatrical companies, rather than providing only individual performances, tend to supply an overall production which includes not only the performance of a play but also the show as a spectacle, involving auxiliary staff – i.e. a show based in part on acting and in part on technological skills – for which one overall fee is paid.⁵⁶

52. Molenaar and Grams, note 19.

53. OECD Commentary on Art. 17, Para. 10.

54. Malin, note 11, at 240.

55. Sandler, note 7, at 232-233.

56. Vogel, note 2, m.no. 16.

As already mentioned, Art. 17 of the OECD Model could be applied to the entire profit of the team only if a whole show was a matter of acting, or a game generated income exclusively due to players' efforts. Since they are not, the profit element of the team unrelated to the personal exercise of entertainment or sports activities by team members in the source country is not subject to tax under Art. 17(2). This conclusion follows from the assumption that the purpose of Art. 17(2) OECD Model is not to tax any non-artistic or non-sportive, or non-performance-related income of the team, but to ensure the taxation of income from artistic and sporting activities in the case of indirect engagements. The non-artistic or non-sportive income is not subject to Art. 17(2) and, consequently, may be taxed in the state of activity only if the team has a permanent establishment in this state to which this income is attributable.⁵⁷ For example, a circus which travels around the country and has a series of shows in different cities does not establish a permanent establishment. In such a case, Art. 7 of the OECD Model is applicable and, therefore, taxation of non-performance income, if any, in the state in which the circus merely offers shows at varying places would generally not be permissible because of the absence of a permanent establishment.

This interpretation has been confirmed by the OECD in the 2010 Discussion Draft regarding Art. 17. The OECD explains that while Art. 17(2) covers income received by an enterprise such as a sports team or orchestra that is paid for performing entertainment or sports activities, it clearly does not cover the income of all enterprises that are involved in the production of entertainment or sports events.⁵⁸ According to the OECD, Art. 17(2) does not apply to income derived by the independent promoter of a concert from the sale of tickets and allocation of advertising space. It is reasonable to conclude that such income should also not be taxed in the hands of a sports team or orchestra, if they carry out similar operations.

If a team receives a lump-sum remuneration for performance, the part of the lump sum that relates to services provided by non-performing individuals is excluded from the scope of Art. 17(2). In the case where the team receives a single fee, apportionment may be necessary. If there is no price split in the agreement with the organizer, the lump-sum remuneration must be divided and the part attributable to technical and organizational services must be estimated. Moreover, certain other elements of income of the team may fall under Art. 7 of the OECD Model (e.g. payments received in the event of the cancellation of a performance)⁵⁹ or under Art. 12 (e.g. where an orchestra, on the basis of its copyright in the sound recording, is paid royalties on the sale or public playing of the records of a performance).

Again, a separate problem involves the deduction of expenses. Unlike Art. 17(2) of the OECD Model, Art. 7 requires net-based taxation of business profits. For the purposes of the deduction, it is necessary to determine the amount of expenses related to business income. If a team is on tour and performs in various states, the correct proportion of expenses deductible in every source state in which the team has a permanent establishment must be estimated. It should be emphasized that 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.⁶⁰

57. Malin, note 11, at 236.
58. OECD Discussion Draft 2010, note 3, proposed Para. 11.4 of the Commentary on Art. 17.
59. OECD Commentary on Art. 17, Para. 9.
60. Sandler, note 7, at 230.

5. Policy Analysis and Alternative Solutions

The tax treatment of team performances under the OECD Model raises numerous doubts as to its correctness, legitimacy and appropriateness in the light of international tax policy. The most controversial issues include the scope of Art. 17, the application of special rules to performance income, no-threshold source-based taxation of entities earning business profits from artistic or sporting activities, and the withholding tax on gross income derived from such activities. Similarly, in practice, 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.⁶¹ These issues are discussed in turn, taking into consideration the existing patterns, the possibility of alternative treatment based on other provisions of the OECD Model, and the potential new approach to the taxation of team performances.

5.1. Scope of Art. 17

Art. 17 of the OECD Model is limited in terms of both persons and income covered. The personal scope of Art. 17(1) is restricted exclusively to individuals performing activities in the capacity of entertainers or sportsmen. The narrow application of this provision is particularly visible and striking in the context of team performances, because such events involve a substantial number of persons with a wide range of skills. However, only individuals performing on stage are subjected to Art. 17. Such a limitation results in the differentiation of the tax position of members of the same team.⁶² The tax situation of non-performing workers differs significantly from that of entertainers and athletes whose performance they run and support. Different treatment can be justified only if there is a relevant difference between taxpayers. It seems that there is no such difference between actors, directors and costume designers, or between athletes and coaches – at least not the kind of difference that was envisaged by the drafters of the OECD Model in the 1960s. Back then, artistes and sportsmen were considered a special type of service providers because they were able to earn substantial amounts of money during relatively short periods of time. However, in today's world of highly specialized services, a wide range of professionals bear such characteristic, including non-performing members of entertainment and sports teams. The capacity to earn considerable amounts within relatively short timescales is common for both artistes and sportsmen who do not perform in public, and to individuals performing non-artistic or non-sporting services, such as supermodels. Nonetheless, the OECD took an opposite view and proposed to expressly rule out models from the application of Art. 17.⁶³ Given the similarities between a fashion show and any other entertainment event, the application of separate rules dealing exclusively with narrowly understood entertainers and sportsmen is not justified.

61. Molenaar, D., "Discussion of Daniel Sandler's Paper on Article 17 OECD Model Convention", in: Lang, M., et al. (eds.), *Source versus Residence. Problems Arising from the Allocation of Taxing Rights in Tax Treaty Law and Possible Alternatives*, 1st edn. (Vienna: Linde, 2008), p. 247 at 249.

62. The plea for equality was already made in 1945 after one of the first tax treaties containing a provision similar to this article was submitted for approval to the US Senate Committee on Foreign Relations. Representatives of the Screen Actors Guild and Artists Managers Guild claimed: "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?" quoted in Nitikman, J., "Article 17 of the OECD Model Treaty – An Anachronism?", *Intertax* 29 (2001), p. 268 at 270.

63. OECD Discussion Draft 2010, note 3, proposed Para. 3 of the Commentary on Art. 17.

A possible solution to this problem would be to extend the personal scope of Art. 17 of the OECD Model to cover either all individuals deriving income from sport and entertainment-related services, or, preferably, all highly paid service providers. The first proposal involves bringing under Art. 17 all entertainers, including – from a formal point of view – all members of performing teams and – from a substantive point of view – also persons not currently covered by this provision but regarded as entertainers in the modern sense of this term. As far as the uniform treatment of all team members is concerned, the question arises whether it would be justified in all cases to tax in the state of performance income earned by individuals engaged by an entertainment or sports team but working permanently in the residence country of the team, e.g. administrative staff. Arguably, such a provision should be restricted only to the personnel accompanying artistes and sportsmen in their performances abroad. Presumably, this solution would require clear definitions and demarcation, followed by explanatory comments since it would inherently create a lot of uncertainty.

The modern understanding of the term “entertainer” refers to all celebrities, models, speakers, persons “known for being known”, and other individuals deriving income from public performances of any kind. Like those of any artiste or athlete, their performances are designed to provide entertainment. Therefore, it has been advocated that Art. 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.⁶⁴ Such a solution would bring the currently outdated scope of Art. 17 in line with the actual shape of the modern world of entertainment. Consequently, the idea of team performances would then extend to a plethora of entertainment events and activities, including e.g. fashion shows. However, the introduction of a provision imposing tax on income from personal services rendered by celebrities would require a clear definition of the term “celebrity”. The proposal to expand the application of Art. 17 mitigates unfairness resulting from the current narrow scope of this provision but, again, it is difficult to justify a carve-out for celebrities as compared to other service providers. Such an approach would not solve the problems arising in the context of team performances, whereby employees of the same team are subject to different rules depending on the nature of the services that they provide and their personal skills or even personality. It would be difficult to justify different treatment of, for example, directors and other backstage or technical staff working for the team.

The scope of Art. 17 as far as the kind of income is concerned is also restricted and gives rise to numerous problems. Currently, a team is taxable under Art. 17(2) only on the profits accruing to it in respect of the personal activities of entertainers or sportsmen. Given the purported problems that artistes and sportsmen pose for tax regimes, it is surprising that Art. 17 is so limited in terms of the income that it covers, especially since there is such a diversity of types and sources of earnings available to today’s entertainers. Certain items of income, such as royalties, are within the scope of other provisions of the OECD Model and are not covered by Art. 17. The issue is well illustrated by sponsoring contracts, which are often constructed as package deals containing several different forms of payments.⁶⁵ The current approach creates uncertainty and raises a number of classification and assessment difficulties.

A more practical solution would be to bring all income derived from entertainment into the scope of Art. 17, rather than only such income as is attributable to personal services of artistes

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64. Sandler, note 7, at 239.
65. Taferner, note 21, at 271.

and sportsmen. This would mean that the tax treatment of team performances could be brought in line with that applicable to individual entertainers and sportsmen, but it would also lead to deviation from the general rules even with respect to non-performance business profits. However, if the concern is with respect to the particular individuals (entertainers and sportsmen) rather than specific types of income that they earn, then source taxation should be permitted on all income earned by such persons.⁶⁶ A critical remark with respect to this approach is that since the OECD Model adopted the schedular system, it should be more important what type of income is at stake rather than who earns it. It is widely accepted that 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.

5.2. *Income threshold*

Currently, the OECD Model provides for taxation of remuneration of entertainers and sportsmen in the state of performance with no monetary threshold. What is more, Art. 17(2) may apply to an interposed third person, such as a star company or team, and subject the performance income accruing to such person to tax in the source country without any monetary ceiling. A possible modification of the scope of Art. 17 is to introduce an income threshold for taxation. Such a threshold could be designed either as a relatively simple solution altering the already existing rule laid down in Art. 17, or as part of a broadly tailored change involving an expansion of the provision applicable to artistes and sportsmen.

The first option can be found in the United States Model Convention 2006 (“US Model”), which provides an example of a *de minimis* rule applicable to artistes and sportsmen.⁶⁷ Pursuant to Art. 16 of the US Model, an entertainer or sportsman is taxable at the place of performance only if his receipts from artistic or sports activities exceed USD 20,000 annually. Where such receipts are below this “triviality threshold”, the state of source waives its right to primary taxation for reasons of practicability. The Technical Explanation to the US Model does not mention whether the same limitation applies to interposed third persons. Since Art. 17(2) of the OECD Model is not restricted to abusive cases, a monetary threshold would be of great practical importance for troupes, companies and ensembles employing artistes or athletes and visiting the source state for a comparatively short time. Performance income of such groups not meeting the threshold would be exempt. Such a solution is definitely worth considering, if only because of the minimal interference with the existing shape of the OECD Model. It would equalize the tax treatment of low-paid and usually short-stay visiting performing teams with that of other businesses without a permanent establishment.

Alternatively, the scope of Art. 17 could be extended to cover all highly paid service providers, regardless of the type of services rendered. This proposal involves a shift from a taxation pattern based on the nature of activities as the determining factor to a pattern involving a monetary threshold, above which the performance of professional services could be regarded as a highly paid short-time engagement and taxable in the source country. A similar solution was implemented in the 1980 version of the United Nations Model Double Taxation Convention

66. Sandler, note 7, at 225.

67. For a comprehensive analysis of the *de minimis* rule in the US Model, see Brinkmann, J.P., “De minimis clause according to the US Model”, in: Loukota, W., and Stefaner, M. (eds.), *Taxation of Artistes and Sportsmen in International Tax Law*, 1st edn. (Vienna: Linde, 2007), p. 349-368.

between Developed and Developing Countries (“UN Model”). Art. 14(1)(c) proposed a criterion of the amount of remuneration. Under that criterion, remuneration for independent personal services could be taxed by the source country if it exceeded a specified amount (determined in bilateral negotiations), regardless of the existence of a fixed base or the length of stay in that country, but only if the remuneration was received from a resident of the source country or from a permanent establishment or fixed base of a resident of any other country which was situated in that country.⁶⁸

The “triviality threshold” seems to be a good solution, because it provides a clear and objective criterion, thereby increasing certainty. It would equalize the tax position of artistes and sportsmen with that of other highly remunerated individuals, including non-performing team members, without reference to the kind of services provided. A monetary threshold also deserves some merit since it would save a lot of problems to members of low-income teams, such as small folklore bands. However, given that taxpayers would have to keep track of their profits in order to determine whether the threshold is satisfied, an income-based threshold would not lower compliance costs.⁶⁹ Moreover, the shift to a monetary threshold for professional services would be inconsistent with the current schedular system on which the OECD Model is based. In most cases, the type of income is the determining factor and the current threshold requirements in the OECD Model are not based on the amount of income or revenue derived by a non-resident from a country.⁷⁰ Under the proposed approach, there would be no regard to the legal form (business activity or employment) in which such services are rendered. Of course, the OECD could consider reintroducing Art. 14 (a separate provision applicable to professional personal services) with a threshold requirement – which would make the type of income a relevant consideration. Under this approach, if an individual earns more than a stipulated amount from any kind of personal services (whether employed or self-employed) performed in the source country, the source country has the primary jurisdiction to tax the individual on the full amount of income earned in the source country.⁷¹ This rule would remove many artistes and sportsmen who are currently caught by Art. 17 from its scope. On the other hand, it would catch other members of entertainment and sports teams, and all other individuals who derive substantial earnings from short-term engagements abroad. However, such a solution would give rise to other problems, including the demarcation between dependent and independent services and the significance of Arts. 7 and 15 for the provision of professional services.

In summary, the introduction of an income threshold poses some additional issues. First, it is necessary to establish an appropriate level of such a threshold. As mentioned above, the US Model suggests the amount of USD 20,000. However, this threshold has remained unchanged since 1981 and it does not seem appropriate nowadays. Instead, the amount of USD 100,000 has been proposed as a more suitable threshold.⁷² It should be emphasized, nonetheless, that any threshold would in fact be arbitrary. Therefore, it is important to consider the policy behind the introduction of the threshold and determine what level of income would be regarded as creating a relevant nexus with the economy of the source country. If it is high-

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68. Commentary on the UN Model, Para. 7. In 1999, the amount of the remuneration criterion was omitted.
 69. Arnold, B., “Threshold Requirements for Taxing Business Profits under Tax Treaties”, *Bulletin for International Fiscal Documentation* 10 (2003), p. 476 at 487.
 70. *Ibid.*, at 487.
 71. In this vein: Sandler, note 7, at 240.
 72. *Ibid.*

income service providers whom we want to tax, the threshold should be reasonably high. Most importantly, whatever the amount of the threshold, it should be regularly indexed for inflation. Since tax treaties remain in force for a long time, even a relatively generous threshold can become meaningless and ineffective when its value declines due to inflation,⁷³ and would only have the effect of limiting the amount of potentially valuable services that the country would be able to import.⁷⁴ It is also important to establish whether the threshold should apply on an annual basis, on a “per appearance” basis or “per transaction” basis. Obviously, if the monetary limit is applied annually, its level should be higher.

The crucial issue with respect to team performances is whether the discussed threshold should apply only to individual service providers, or to teams (corporations) as well. In other words, should the monetary limit be relevant for taxation of entertainers (and, if the scope of Art. 17 is extended, of non-performing members of a team) or of the team as well? If the latter, should the sum of particular thresholds applicable to qualifying individuals be taken into account? Or should there be a separate threshold set forth in Art. 17(2) that would apply to income in respect of performance accruing to the team? If yes, should it be the same as for individuals or higher? How much higher? These issues show how important it is to take into consideration the whole system created by legal norms when one wishes to improve a provision. It cannot be done without a substantial and well-thought-out change that would be consistent and coherent with international tax policy and the entire OECD Model. In this respect, the applicability of a threshold to teams should depend on the overall policy decision regarding team performances. If the only change to Art. 17 is the introduction of the income threshold and other than that the mechanism of this provision remains the same, then the threshold should also be available for teams. In computing the limit amount applicable to the team, the income attributable to performers should be disregarded. However, if a more profound change of Art. 17 is considered, it might be better to use a different threshold. For instance, by limiting Art. 17(2) to abuse cases it could be possible to bring the taxation of profits earned by teams in line with that applicable to other enterprises. Consequently, the permanent establishment threshold would be a more appropriate measure.

Furthermore, the question arises whether a monetary threshold should be based on gross revenue or net profit. Notwithstanding the plea for net-based taxation of teams and individual artistes and sportsmen, it seems reasonable to refer to gross receipts as far as a monetary threshold is concerned.⁷⁵ Gross revenue can be determined more readily than net profit.⁷⁶ Moreover, it is easier to calculate gross receipts and determine whether the required level has been reached. Again, given that entertainment and sports teams, as well as individual performers, incur substantial expenses in the course of their activity, the level of the threshold should be reasonably high. However, if the threshold requirement were to apply to all highly paid personal service providers, basing the threshold on gross revenue rather than net profit would disregard any costs and, consequently, could lead to potential unfairness caused by the level of expenses inherent in different professions. In other words, an entertainer charging the

73. Arnold, note 69, at 487. This could be done by indexing the amount each year based on a mutually agreed cost-of-living index, or by increasing the amount each year by an arbitrary amount or arbitrary percentage as a proxy for inflation. Alternatively, the amount can be set sufficiently high at the outset that it should not require any reconsideration for a number of years (Sandler, note 7, at 241 et seq.).

74. Commentary on the UN Model, Para. 8.

75. The dollar threshold set forth in the US Model applies to gross receipts, including expenses reimbursed to the individual or borne on his behalf.

76. Arnold, note 69, at 487.

same fee as a lawyer probably incurs much higher expenses to earn income but both would be subject to tax in the source country if the gross receipt would exceed the threshold. It would also have to be determined whether, if the receipts exceed the limit, the full amount or just the excess should be taxed in the state of performance.⁷⁷

Moreover, it is necessary to consider how such a threshold would operate in connection with a withholding system. As explained above, the tax on income earned by individual performers and, to some extent, by teams is usually withheld at source by the event organizer making the payment. If a threshold is introduced, the organizer's obligation to withhold tax would depend on whether the threshold has been exceeded. Where a threshold applies on a per-performance or per-transaction basis, it is considerably easier for the organizer to determine whether the tax should be withheld. However, if a threshold applies on an annual basis, the team or individual taxpayers must provide the organizer with relevant information regarding their income in the source country. Otherwise, the tax would be withheld regardless of whether at that moment the income exceeded the threshold amount.

The application of a threshold may in certain cases cause cash flow disadvantages.⁷⁸ There must be an appropriate mechanism for refunds where tax is withheld at source but the non-resident's annual income earned in the source country does not meet the threshold. To compensate taxpayers for the lost time value of money, interest may be paid on excess tax withheld at source.⁷⁹ It has also been suggested that there ought 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.⁸⁰

Studies show that despite the difficulty in determining the point in the year that the tax withheld became excessive, the need for administrative procedures for refunds and other complexities connected with the application of a threshold, the practical experience with the *de minimis* rule in the US tax treaties has been quite good and the negative aspects do not occur frequently.⁸¹ On the other hand, justifying the deletion of the monetary threshold from the UN Model, it was indicated that the provision to this effect appeared only in 6% of the existing bilateral tax treaties finalized between 1980 and 1997.⁸²

5.3. Time threshold

The allocation rules in Arts. 7 and 15 of the OECD Model are based on a requirement of substantial presence in the source country, which for business income means a permanent establishment and for employment income prescribes that the individual either be present in the source country for a substantial period of time (183-days rule) 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 provides taxpayers with sufficient benefits to justify the collection of tax.⁸³ The lack of any threshold requirement for source country taxation of non-resident entertainers and sportsmen is difficult to justify, since there is no straightfor-

77. Technical Explanation of Art. 16 of the US Model specifies that the full amount may be taxed if the threshold is exceeded.

78. Molenaar, note 42, at 343.

79. Sandler, note 7, at 240 et seq.

80. *Ibid.*, at 241.

81. Molenaar, note 42, at 343; Sandler, note 7, at 240 et seq.

82. Commentary on Art. 14 of the UN Model, Para. 8.

83. Sandler, note 7, at 238.

ward and rightful reason for treating artistic and athletic services differently from other services.⁸⁴ The argument put forward to substantiate the carve-out for performance income is that the mobility inherent in artistic and sportive events would prevent the source state from taxing despite advantages that performers derive from the market of the source country.⁸⁵ However, in today's world it is not only entertainment and sports services that bear the feature of high mobility. Nonetheless, unlike all other enterprises, those providing artistic and sporting services are taxable in the source state regardless of whether they have a permanent establishment in that state. Moreover, no other enterprises' tax situation depends on the type of services rendered by their employees. It is bizarre that a company employing artistes or sportsmen falls under separate rules, at least for part of its profits, because of the services of its employees.

Profits of an enterprise providing entertainment or sports services should be covered by Art. 7 in the way other business profits are taxed. By their nature, group performances usually involve a third person – the incorporated group – interposed between individual artistes or sportsmen and the event organizer. If Art. 17(2) of the OECD Model applies without any restrictions, team performances are mechanically caught by this provision. As regards the anti-circumvention reasoning behind the introduction of Art. 17(2), there is no evidence that in the case of team performances tax avoidance is a considerable problem. However, should that be a concern, the US approach of applying Art. 17(2) only to cases of abuse rather than when an orchestra, ensemble or troupe is incorporated, seems to be a reasonable solution.⁸⁶ Another interesting lesson can be learned from the US Model, which provides that the look-through does not apply where the person to whom performance income accrues is allowed to designate the individual who is to perform the personal activities. The idea behind this rule is that, in a case where a performer is using another person in an attempt to circumvent the provisions of Art. 17(1), the recipient of the services of the performer would contract with an interposed person employing the performer only if it were certain that the performer himself would perform the services. If instead the person is allowed to designate the individual who is to perform the services, then likely the person is a service company not formed to circumvent the provisions of Art. 17(1).⁸⁷

The 1996 version of the US Model restricted the applicability of the look-through rule to cases where the entertainer or athlete participated directly or indirectly in the profits of the third person. As a result, an independent performing contractor engaged by an arm's length team could be taxable under the general rules applicable to business profits. Similarly, where the relationship was truly one of an employee and employer, and the performers merely received their salaries out of the team's gross receipts, the team was covered by Art. 7.⁸⁸ It is true that if Art. 7 is made applicable to entertainment and sports teams, their income will, in general, not be taxed by the source state due to the lack of a permanent establishment. However, this is the case for all other professional services which do not require a prolonged stay in the source country and it seems to be fully acceptable under the OECD Model.⁸⁹

84. Arnold, note 69, at 488.

85. Resch, R.X., "The taxation of profits without a permanent establishment" in: *Permanent establishment in international tax law*, 1st edn. (Vienna: Linde, 2003), p. 475 at 493.

86. The United States has made a reservation to the OECD Model since there is no exception from Art. 17(2) for non-abusive cases.

87. Technical Explanation of Art. 16(2) of the US Model 2006.

88. Technical Explanation of Art. 17(2) of the US Model 1996.

89. OECD Commentary on Art. 5, Para. 42.20.

An interesting alternative solution may be inferred from the recent “services PE rule” proposed by the OECD as part of the 2008 update to the OECD Model. The optional services permanent establishment rule provides that profits from services performed by a non-resident in the territory of the source state are taxable by that state even if there is no permanent establishment to which the profits are attributable. The Commentary emphasizes that such treatment should apply only to profits from these services rather than to payments for them. Also, there should be a minimum level of presence in the source state before taxation is allowed.⁹⁰

It seems that the above proposal could constitute a reasonable compromise in the field of entertainment taxation and perhaps the same mechanism should be considered. However, the OECD expressly disclaimed and excluded the application of this rule to services provided by artistes and sportsmen. Again, such exclusion is difficult to justify, especially that the proposed combination of a physical-presence test and a gross-revenue test⁹¹ would help to bring the taxation of income from team performances in line with the treatment of other professional services.

In summary, the deviation from the general rules regarding taxation of business profits exclusively in the case of artistic and sporting services, including those provided by teams, is not justifiable. Whatever threshold is chosen (be it a monetary limit, permanent establishment, or substantial presence), either all income from services that can generate large returns from short periods of presence should be subject to the same threshold requirement, or all such income should be taxable without any threshold. The very nature of the artistic or athletic activities cannot be regarded as a reasonable and legitimate threshold for source taxation.

5.4. Limitations on Art. 17

Although it seems from the proposals presented so far that potential solutions to the problems arising in connection with team performances require that Art. 17 be expanded, it is also possible to rationalize the application of this provision by limiting its scope. In its current shape, Art. 17 may, in some cases, appear to be too broad. The need for limitations to Art. 17 is illustrated by a surprisingly widespread use of the optional provision suggested by the OECD in the Commentary on Art. 17,⁹² whereby source state taxation is excluded in the case of events supported from public funds, such as performances sponsored by the host country or shows given by a state-run opera, circus, ballet, orchestra, etc. Furthermore, many countries stipulate in their bilateral treaties that income from performances taking place on the basis of cultural exchange agreements is not covered by Art. 17. Consequently, in such cases, the state of residence retains the primary right to tax income derived by entertainers or athletes, if they perform in events covered by official cultural exchange programmes approved by the contracting states or if they are subsidized out of public funds. The reason for such a limitation is to avoid the necessity of increasing public subsidies of sponsored events as a result of taxation imposed by a foreign country. Where cultural exchanges and other publicly funded events are exempt, it is vital that such an exemption be based on clearly definable and objective criteria to ensure that it applies only in those cases for which it is intended.⁹³

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90. Ibid.

91. Arnold, note 28, at 228.

92. OECD Commentary on Art.17, Para. 14.

93. Baker, P., *Double Tax Conventions: a manual on the OECD Model tax convention on income and on capital*, 3rd edn. (London: Sweet & Maxwell, 2002), Art. 17, m.no. 14.

Another limitation on Art. 17 recently proposed by the OECD is the league clause. Pursuant to an optional provision recommended by the OECD in the Discussion Draft 2010, the provisions of Art. 17 should not apply to income derived by a resident of a state in respect of personal activities of an individual exercised in the other state as a sportsman member of a team of the first-mentioned state that takes part in a match organized in the other state by a league to which that team belongs.⁹⁴ By suggesting an addition of such a clause, the OECD has acknowledged that the article is impractical as regards members of sports teams and team performances.

As far as partial solutions already proposed by the OECD are concerned, the Commentary suggests that treaty partners may limit the application of Art. 17 only to cases of independent activities covered by Art. 7.⁹⁵ In such a case, the taxation of dependently employed artistes or sportsmen would be governed by Art. 15. This approach is worth mentioning in the context of team performances because the engagement of performers on the basis of employment contracts is usually typical for teams (orchestras, theatres, sports clubs).

Although such a limitation seems reasonable and has actually been adopted in some treaties, it has been criticized as an inappropriate solution, mainly because the distinction between independent and dependent personal services is not clear-cut.⁹⁶ Since the arrangements creating employment rather than business income are relatively easily substitutable, removing employment income from the scope of Art. 17 might leave it open to manipulation.⁹⁷

5.5. Elimination or reversal of Art. 17

The most radical change that has been proposed with respect to Art. 17 is the elimination of this provision completely.⁹⁸ As a result, artistes and sportsmen would be covered by the general allocation rules laid down in Arts. 7 and 15 of the OECD Model. Such a solution would equalize the treatment of individual performers with that applicable to other service providers. Employed artistes and sportsmen would be taxable under the same rules as other employees of the team and those performing their services independently would be covered by the provisions applicable to other independent contractors hired by the team. The abolishment of Art. 17 would also bring the tax position of teams in line with that of other enterprises. In general, such a change would make the thresholds provided in Arts. 7 and 15 available to individual entertainers and athletes and to teams.

Another change to the same effect that has been proposed is to turn Art. 17 into a provision requiring residence state taxation.⁹⁹ Reportedly, such a change would not lead to a loss of tax revenue if every country would take on this approach, since countries would not merely give up their taxing rights on performance income from non-residents but would also no longer have to grant tax credits or exemptions to residents for their foreign performance income.¹⁰⁰

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94. OECD Discussion Draft 2010, note 3, proposed Para. 14.1 of the Commentary on Art. 17.

95. OECD Commentary on Art. 17, Para. 2.

96. Sandler, note 7, at 242.

97. Nonetheless, some commentators advocate removing the Art. 15 exception from Art. 17 (e.g. Molenaar, note 2, at 344).

98. Molenaar, note 42; Grams, H., "Artist Taxation: Art. 17 of the OECD Model Treaty – a relic of Primeval Tax Times?", *Intertax* 5 (1999), p 188; Nitikman, note 62.

99. Molenaar, note 42, at 353. This proposal was followed unilaterally by the Netherlands, which does not tax non-resident artistes and sportsmen from treaty countries since 1 January 2007.

100. Molenaar, note 42, at 360.

Moreover, such change to Art. 17 would help eliminate administrative expenses and decrease the risk of excessive or double taxation.¹⁰¹

However, the current tax treatment of entertainers and sportsmen under the OECD Model is determined by the fact that the activities they perform generally do not require a prolonged stay in the source country. Therefore, the application of Arts. 7 and 15 to performers and teams would, in most cases, result in exclusive residence taxation. The question arises whether source taxation of income derived from artistic and sporting activities is sufficiently justified. From the perspective of the benefit theory, persons earning income from performances use the source country's public services and infrastructure and are often able to derive substantial income from their artistic or sporting activities. However, if we consider the nexus of such income with the source country as sufficient for the source country to claim its share, why does the source country give up its right where it relates to other highly paid employees who also do not need prolonged visits in that state and usually qualify for applicable thresholds? It seems that the recognition of the source country's right to tax artistes and sportsmen is necessary to preserve the integrity of the tax system,¹⁰² but this right should definitely not be unlimited.

5.6. *Gross-basis taxation*

A major unfairness is caused by the fact that profits from team performances are computed on a gross basis without the possibility to deduct expenses and file a regular tax return in the source state. As already mentioned, team performances usually require considerable expenses. However, since the OECD Model does not determine how tax should be computed, domestic laws fill in the gap and in most cases provide for gross taxation, with the event organizer who makes the payment acting as a withholding agent. Withholding taxes are imposed in the case of artistic and athletic activities because of administrative convenience and potential enforcement problems. Since non-resident entertainment or sports companies usually have no close economic ties with the source country and no assets within the source country, there is generally no recourse in order to collect the tax.¹⁰³ Therefore, withholding taxes are imposed, deducted and remitted by persons resident in the country who make payments to non-resident taxpayers. Non-resident teams are heavily burdened by such rules because they usually perform on a cost-refund basis or at a very low margin.

Non-resident teams of entertainers and sportsmen should be able to deduct their expenses already at the withholding stage. After the end of the taxable year, such teams should have the possibility to file a normal income tax return, deduct any remaining expenses and make use of the ordinary income tax rates. The filing of an income tax return could be optional and teams could decide to accept the withholding tax as their final tax. The switch to net-basis taxation could be achieved by viable means – offering teams the possibility to elect to be taxed on a net basis without a change in the treaty, or by a change in the OECD Model stipulating that Art. 7 should govern the computation of income under Art. 17.

Adopting this view, the OECD Commentary (updated in 2008) recognizes that some states may want to give the option to the taxpayer to be taxed on a net basis and proposes the appropriate wording of a provision that can be included in a treaty to this effect.¹⁰⁴ If there is one

101. Molenaar, note 61, at 251.
102. Sandler, note 7, at 245.
103. Taferner, note 21, at 263.
104. OECD Commentary on Art. 17, Para. 10.

single thing that could be done to improve the tax treatment of individual entertainers and sportsmen and teams, it is definitely a radical switch to net-basis taxation. Such a change, if broadly adopted, would also solve the tax credit problems resulting from differences in taxable bases where the source country does not allow a deduction for expenses and the residence country does. Bringing the taxable base in both the source and residence country at a comparable level would help improve international taxation of teams.

6. Conclusion

Artistes and sportsmen “enjoy” a special treatment in international tax law due to their high mobility, their capacity of earning large sums of money within comparatively short time periods and their tendency of taking advantage of extensive tax planning in order to escape high tax burdens.¹⁰⁵ The concerns expressed by the OECD when Art. 17 was introduced suggest that artistes and sportsmen either evade tax or negligently under-report income in the country of residence. Consequently, the source country is in a better position to enforce the payment of tax by such taxpayers.¹⁰⁶ In order to ensure tax compliance and prevent performers from engaging in tax optimization schemes involving interposed persons, the OECD inserted Art. 17(2) into the OECD Model. However, the consequences of this provision are much more far-reaching because of the Commentary to the OECD Model, which extends the application of Art. 17(2) to incorporated teams and groups even in non-abusive cases. As a result, despite a similar wording of Art. 17(2) of the OECD Model and Art. 16(2) of the US Model, the special tax regime for artistes and athletes designed by these provisions covers team performances with no circumvention purpose only under the OECD Model.

The reasons for the introduction of Art. 17, brought forward in the 1960s and 1980s, are not valid in the case of team performances, and particularly not in the third millennium. Today performances are held in public, information is easily available and subject to exchange mechanisms. The flow of income is transparent because taxpayers keep books and payments are made through banks rather than in cash.¹⁰⁷ Therefore, it seems that the modern rationale for taxing teams in the state of performance is the same as the actual reason for taxing individual entertainers and athletes. Namely, it boils down to the fact that they can obtain substantial profits during very short periods of time and would escape source country taxation under general rules. This approach of source countries is very pragmatic – they want to have a share in the income earned by persons involved in the entertainment and sporting industry, which would otherwise be beyond the reach of those countries. However, there are other services that can generate large amounts of money in the source country in a relatively short time without the need for a permanent establishment. Frequently, individuals rendering such services and performers are members of the same teams. Some behind-the-scenes workers are as well (if not better) paid than the artistes and sportsmen that they direct, or whose performance they support, and can similarly take advantage of sophisticated tax structures to minimize residence taxation.¹⁰⁸

As shown above, Art. 17 of the OECD Model in its current shape is both over-inclusive (unlike other taxpayers, who must fulfil certain threshold requirements, performers are tax-

105. OECD Report, note 1, p. 39.
106. Sandler, note 7, at 220.
107. Molenaar, note 61, at 250.
108. Sandler, note 7, at 235.

able in the source state on their first dollar) and under-inclusive, in terms of the nature of personal services that it subjects to source taxation.¹⁰⁹ It seems that the very idea of the source-based taxation of entertainment and sports services has a lot of merit. The idea was to tax foreign entertainers in the most convenient way so that they have no contact with domestic tax authorities.¹¹⁰ To make it even easier, most countries decided to tax such income on a gross basis at a flat tax rate, without the need to take expenses into account. This amounted to a turnover (receipt) tax on a foreign team rather than an income tax. Although this may be beneficial in certain cases assuming low tax rates, overall it leads to over-taxation of performers. To mitigate this effect, recent updates to the OECD Commentary encourage net-basis taxation.

In summary, there are many arguments against the current taxation model applicable to team performances and affecting both individual team members and teams as such. First, the special tax regime carves artistic and sports activities out of other highly paid services and subjects them to differential treatment, often leaving members of the same team in a completely different tax position. Second, not all artistic and sports groups charge fees that would make the source country tax administration wonder how to get their fair share, but Art. 17 of the OECD Model nevertheless covers all such teams regardless of the level of their income. Third, in today's show business and world of entertainment, there are numerous individuals who derive income from public performances (live or via media) and are very highly paid but escape the narrow scope of Art. 17. What is more, outside the realm of arts and sports highly paid individuals and teams render services that do not require a prolonged stay in the state of performance and that escape source taxation under the general rules of the OECD Model. Arguably, the nature of the activity should not be determinative of a source country's right to tax. It seems that the level of income derived from the activity or the fulfilment of other relevant thresholds would be a better basis for the allocation of the taxing right. Fourth, in the case of artistes employed in an orchestra or sportsmen employed in a sports club, it is often difficult to impute any tax avoidance motive. Such individuals are permanently engaged in the orchestra or sports club and come to the source country for a short-time performance in the course of their artistic or sporting activities. It should be noted that very often domestic sports law imposes an employee status on sportsmen or artistes, or requires a group or team to incorporate. In such a case, the fact that a team is incorporated does not mean that its motive was to acquire the status of an enterprise and escape taxation in the source country due to the lack of a permanent establishment. Similarly, an actor employed by a theatre which is invited for a guest performance abroad should by no means be regarded as trying to escape taxation by abusing the 183-day test applicable to employees, especially since other employees of the same theatre engaged in the performance are covered by Art. 15 and are not taxed in the source state. The unlimited source-based taxation of teams is also badly targeted. While it is true that artistes and sportsmen should not be able to avoid source taxation simply by interposing a third party that contracts to provide their services, the application of identical anti-avoidance rules to non-abusive cases, such as team performances, is not justified. Therefore, perhaps it is worth considering to restrict Art. 17(2) to its original intent by redrafting Para. 11 of the OECD Commentary.

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 109. Ibid., at 216.

110. Loukota, H., "Missverständnisse bei der Besteuerung ausländischer Orchester und Theater", *Steuer und Wirtschaft International* (2000), p. 440.