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Taxation of Entertainers and Sportspersons Performing Abroad

Guglielmo Maisto / Series Editor

IBFD

Taxation of Entertainers and Sportspersons Performing Abroad

Why this book?
Taxation of Entertainers and Sportspersons Performing Abroad, comprising the proceedings and working documents of an annual seminar held in Milan in November 2015, is a detailed and comprehensive study on the taxation of highly mobile individuals engaged in the artistic and sports sectors. It begins with a comparative analysis of the domestic tax regime of such individuals and then examines the influence of EU law on national law, with a particular emphasis on the jurisprudence of the Court of Justice of the European Union.

The book then moves to selected tax treaty issues. In particular, it analyses: (i) the history of article 17 of the OECD Model Tax Convention; (ii) recent developments concerning that article, particularly the 2014 amendments to the Commentary on Article 17 of the OECD Model Convention; (iii) tax treaty issues related to qualification, allocation and apportionment of income derived by entertainers and sportspersons; and (iv) the taxation of income from image rights, sponsorship and advertising.

Special attention is devoted to the application of article 17(2) of the OECD Model Convention, issues concerning the elimination of international double taxation and the taxation of international sport events and tournaments, such as the Olympic Games and the UEFA and FIFA Championships.

Individual country surveys provide an in-depth analysis of the domestic tax regimes and actual tax treaty application and practices by various states, including Argentina, Australia, Austria, Belgium, Canada, France, Germany, Italy, the Netherlands, Poland, Portugal, Spain, Switzerland, the United Kingdom and the United States.

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Table of Contents

Part Three
Selected Issues in Tax Treaty Law

Part Four
Country Reports

Sample chapter

Tax Treaty Issues Related to Qualification, Allocation and Apportionment of Income Derived by Entertainers and Sportspersons

by Axel Cordewener[1]

6.1. Introduction

When engaging in cross-border activities, entertainers and sportspersons are generally facing complex legal issues, especially with regard to taxation. In recent years, the international discussion of the relevant tax questions has increased heavily[2] and, after having published a Discussion Draft in 2010,[3] the OECD, within the framework of the 2014 Update,[4] not only introduced (minor) changes to the text of article 17 of the Model Tax Convention on Income and on Capital (OECD Model) but, in particular, also made (considerable) amendments to the Commentary on the provision.

On the basis of the 2014 version of the OECD Model and the Commentary, the present contribution sketches a number of disputed tax treaty issues in a systematic way, starting with the qualification of income derived by entertainers and sportspersons (section 6.2.) and then looks into issues of allocation (section 6.3.) and apportionment (section 6.4.) of such income. In this respect, the present analysis will concentrate on article 17(1) of the OECD Model.[5]

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2. For an overview of the literature on the topic, *see* A. Cordewener, *Article 17. Entertainers and Sportspersons*, in *Klaus Vogel on Double Taxation Conventions* 4th edn, para. 1, Bibliography, pp. 1298-1305 (E. Reimer & A. Rust eds., Kluwer Law International 2015).
3. OECD Committee on Fiscal Affairs, *Discussion Draft on the Application of Article 17 (Artistes and Sportsmen) of the OECD Model Tax Convention* (23 Apr. 2010).
4. OECD Council, *2014 Update to the OECD Model Tax Convention* (15 July 2014). For an in-depth analysis of the amendments to article 17 of the OECD Model and Commentary thereon, *see* D. Molenaar, *Entertainers and Sportspersons Following the Updated OECD Model (2014)*, 69 Bull. Intl. Taxn. 1, p. 37 et seq. (2015); P. Pistone & E. Schaffer, *Entertainers According to Art 17 OECD Model Convention*, in *The OECD-Model-Convention and its Update 2014* p. 51 et seq. (M. Lang et al. eds., IBFD/Linde 2015).
5. For a discussion of issues specifically related to article 17(2) of the OECD Model, *see* chapter 8 in this volume.

6.2. Qualification

Pursuant to article 17(1) of the OECD Model (2014), "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 sportsperson, from that resident's personal activities as such exercised in the other Contracting State, may be taxed in that other State." Hence, under a bi- or multilateral double tax convention (DTC) following this model provision, the latter state (as source country) is entitled to tax a specific type of income only if certain subjective and objective conditions are fulfilled. The term "income" concerns the gross receipts from the activities covered by article 17(1) of the OECD Model, the exact computation of which, just like the deductibility of expenses, is a matter for the domestic law of the contracting states.[6]

Concerning the personal scope of application of article 17(1) of the OECD Model, it follows from the wording of this rule that the relevant taxpayer (in addition to being a resident of a contracting state) must qualify as either an "entertainer" (*see* section 6.2.1.) or a "sportsperson" (*see* section 6.2.2.). Furthermore, the provision contains a double attribution requirement, in the sense that the respective income must be "derived from … personal activities as such" (subjective element; *see* section 6.2.3.) and from the exercise of these activities "in the other Contracting State" (objective element; *see* section 6.3.).

6.2.1. Entertainers

Although the term "entertainer" must be considered an autonomous tax treaty term independent of national definitions, it nevertheless remains an indefinite legal concept.[7] Article 17(1) of the OECD Model itself merely contains a number of non-exhaustive examples, namely "a theatre, motion picture, radio or television artiste, or a musician." However, there was little doubt that the provision puts an emphasis on the entertaining rather than the artistic character of a given activity and this has now also been confirmed by the 2014 Update of the OECD Model, which replaced the previous

6. *See OECD Model Tax Convention on Income and on Capital: Commentary on Article 17* para. 10, 1st and 2nd sentences. Note that all citations to the Commentary on Article 17 are to the current version as it read on 15 July 2014; where the year is not indicated at the end of the citation (as here), this means that the 2014 Update changed neither the contents nor the numbering of the existing text; when the year (2014) is given at the end of the citation, this indicates a change was made by the 2014 Update.
7. For further references, *see* Cordewener, *supra* n. 2, at para. 31.

reference to "artistes" in the heading of article 17 and likewise throughout the OECD Commentary on Article 17 by the term "entertainer".[8] Moreover, as could already be derived from the original 1963 version of article 17 of the OECD Model (public performer) and is still reflected in the equally authentic current French version of article 17(1) OECD Model (*artiste du spectacle*), the rule focuses on performing entertainers, i.e. those addressing an audience either directly or indirectly (through the media).[9]

Against this background, certain activities are excluded from the scope of article 17(1) of the OECD Model. First of all, this concerns persons whose activities are limited to the production of "works" (e.g. painters, sculptors, writers, composers, etc.). In addition, mere administrative or support staff (e.g. producers, film directors, cameramen, choreographers, road crews, sound or light engineers, stylists, etc.) are likewise excluded[10] and the same goes for so-called impresarios responsible for "arranging the appearance."[11] Generally, it can be said that the demarcation line runs between "those in front of a camera or microphone and those behind the scenes."[12]

In some cases, however, the personal qualification as "entertainer" may cause difficulties.[13] A first problem in this respect is posed by "speakers" appearing at certain events. While the OECD Commentary on Article 17 generally acknowledges that activities involving "a political, social, religious or charitable nature" are included in the scope of the provision "if

8. It might be useful to also adjust paragraph 18 of the Commentary on Article 12 (*see* section 6.4.2.) to this new terminology in the near future.
9. It should be noted that the OECD Committee on Fiscal Affairs, in its recent report *Issues Related to Article 17 of the Model Tax Convention* (26 June 2014), pointed out that the wording of article 17 does not contain the words "performance" or "public performance" (para. 29) and even hinted at the possibility that a "public performance" may not be necessary for article 17 to apply (para. 31). However, this view is in stark contrast to the strong emphasis the 2014 Update put on the fact that the income covered by article 17 must be "performance-related" (*see* section 6.3.). Moreover, a "performance" is generally (and has historically been) understood to consist of the presentation of a certain activity to an audience (e.g. *see* http://dictionary.reference.com/browse/ performance; last visited 8 Feb. 2016).
10. Para. 3, 6th sentence, *OECD Model: Commentary on Article 17*.
11. Para. 7 *OECD Model: Commentary on Article 17*.
12. In this sense, *see* D. Sandler, *Artistes and Sportsmen (Article 17 OECD Model Convention)*, in *Source versus Residence – Problems Arising from the Allocation of Taxing Rights in Tax Treaty Law and Possible Alternatives* p. 237 (245) (M. Lang et al. eds., Kluwer Law International 2008).
13. *See generally* para. 3, 7th sentence, *OECD Model: Commentary on Article 17*, referring to a "grey area". More specifically, on the discussion of the two examples mentioned hereinafter ("public speakers" and "models"), *see also* OECD Committee on Fiscal Affairs, *supra* n. 9, at para. 26 et seq.

an entertainment character is present",[14] the 2014 Update has added the statement that a "visiting conference speaker (e.g., a former politician who receives a fee for a speaking engagement)" is not covered by article 17(1).[15] The Commentary appears to be contradictory here and certain non-OECD member countries (Brazil, Malaysia and China) have already expressed the view that the latter type of situations should also be covered if there is an entertainment character present in the speeches,[16] although it is not clear yet where exactly the line between activities with an entertaining character and those without should be drawn here.

A quite similar problem concerns the treatment of "models". In this respect the 2014 Update has introduced the statement into the OECD Commentary that article 17(1) does not extend to "a model performing as such (e.g. a model presenting clothes during a fashion show or photo session)."[17] However, national administrative and court practice of various OECD member countries tends to include at least fashion shows in the scope of article 17(1),[18] and while a number of non-OECD countries (Argentina, Brazil, Malaysia and India) agree,[19] OECD member Turkey even takes the view that photo sessions should also be included.[20] And there may even be further events that need to be taken into consideration in this context. For example, in a recent judgment concerning the participation by Paris Hilton in the presentation of a product (drink) on a stage during an open-air party, the Austrian Supreme Administrative Court concluded that Ms Hilton (who had argued that the event had served a commercial rather than an entertaining purpose) had been the main attraction of the event which, as such, altogether had entertaining effects.[21]

14. Para. 3, 5th sentence, *OECD Model: Commentary on Article 17*.
15. Id., 6th sentence (2014).
16. *See OECD Model: Commentary on Article 17* (2014), Non-OECD Economies' Positions on the Commentary, para. 3.
17. Para. 3, 6th sentence, *OECD Model: Commentary on Article 17* (2014).
18. For an overview of the literature on the topic, *see* Cordewener, *supra* n. 2.
19. *OECD Model: Commentary on Article 17* (2014), Non-OECD Economies' Positions on the Commentary, paras. 4 and 7.
20. *OECD Model: Commentary on Article 17* (2014), Observations on the Commentary, para. 15.
21. AT: *Verwaltungsgerichtshof*, 30 June 2015, 2013/15/0266, confirming AT: *Verwaltungsgerichtshof*, 24 June 2009, 2009/15/0090 (both accessible via www.ris.bka.gv.at, last visited 8 Feb. 2016). *See also* B. Renner, *Werbeauftritt als künstlerische Tätigkeit nach dem DBA Österreich-USA*, 25 Steuer & Wirtschaft International (SWI), p. 474 et seq. (2015).

6.2.2. Sportspersons

During the 2014 Update the OECD followed the example of the UN Model (2001) and, without changing the personal scope of article 17 of the OECD Model, replaced the term "sportsman" by the gender-neutral expression "sportsperson" in both paragraphs of the provision. Once again we are dealing with an autonomous tax treaty term which nevertheless forms an indefinite legal concept and, just as in the case of entertainers (*see* section 6.2.1.), the focus is on performances before an audience.[22] However, article 17(1) of the OECD Model is not limited to "traditional athletic events (e.g. runners, jumpers, swimmers)" but also includes other physical activities such as, for example, those of "golfers, jockeys, footballers, cricketers and tennis players, as well as racing drivers"[23] and many more.[24] Moreover, the provision not only covers activities exercised within the framework of competitions, but also mere demonstrations or shows (revues, etc.), and besides the activities of professional sportspersons it also extends to the activities of amateurs.[25]

Concerning the qualification of certain activities, the OECD Commentary is not entirely clear, as it first deals separately with "entertainers" and "sportspersons" and then goes on to state that article 17(1) also applies to "activities which are usually regarded as of an entertainment character, such as … billiards and snooker, chess and bridge tournaments."[26] The lack of further specification in this respect is probably due to the fact that it is often debated whether such activities, and in particular board or card games, should be qualified as forms of "sport". This debate not only concerns the qualification of a given activity for tax purposes,[27] but also its qualification in a more general sense.[28] From a tax treaty point of view, and in particular from the perspective of the aim of article 17(1) of the OECD Model to

22. For details, *see* Cordewener, *supra* n. 2, at paras. 45, 47 and 48.
23. Para. 5 *OECD Model: Commentary on Article 17*.
24. For further examples, *see* Cordewener, *supra* n. 2, at para. 47.
25. *See* the explicit example of "an amateur who wins a monetary sports prize" now mentioned in para. 9.1, 2nd sentence, 1st indent, *OECD Model: Commentary on Article 17* (2014).
26. Para. 6 *OECD Model: Commentary on Article 17*.
27. Concerning the qualification of chess players for tax purposes, *see* Cordewener, *supra* n. 2, at para. 48 with further references.
28. E.g. regarding the refusal to accept bridge as a "sport" (due to a lack of physical activity), *see* UK: High Court of Justice (Queen´s Bench Division, Administrative Court), 23 Apr. 2015, CO/524/2015, *English Bridge Union v. Sport England* [2015] EWHC 1347 (Admin) and UK: High Court of Justice (Queen´s Bench Division, Administrative Court), 15 Oct. 2015, CO/524/2015, *English Bridge Union v. The English Sports Council et al.* [2015] EWHC 2875 (Admin).

facilitate the taxation of highly mobile individuals,[29] there are no major objections against an inclusion of "mind sports" into the scope of the provision. In any case, the hint in the OECD Commentary that an "entertainment character" is required indicates that there is a large degree of overlap between the activities of "entertainers" and those of "sportspersons", so that ultimately the latter may even be considered as a special subcategory of a more encompassing concept of entertainment activities.

Nevertheless, certain activities will have to remain outside the scope of article 17(1) of the OECD Model. Once again, administrative and support staff (*see* section 6.2.1.) are therefore excluded from the provision, which in the area of sports, concerns, in particular, referees, golf caddies, race organizers and horse (or car) owners.[30] The same applies to trainers/coaches (including national team managers)[31] and it appears dubious whether they could nevertheless be caught by article 17(1) of the OECD Model as "entertainers" in the above sense (*see* section 6.2.1.).[32]

29. Cf. Cordewener, *supra* n. 2, at para. 3.

30. For further examples, *see* Cordewener, *supra* n. 2, at para. 47.

31. E.g. *see* BE: *Hof van Beroep Antwerpen*, 24 Nov. 1992, Fiscale Jurisprudentie/Jurisprudence Fiscale (F.J.F.) 1993/153; Belgian Federal Ministry of Finance, 1 Feb. 2002, Ci.R.9.Div./546/156 (AOIF 3/2002), www.fisconetplus.be (last visited 8 Feb. 2016), para. 4. *See also* (based on the strict view that "sportspersons" are required to participate in competitions) Austrian Federal Ministry of Finance, 19 Feb. 1994, EAS 391; id., 15 Dec. 1997, EAS 1190; id., 4 May 1998, EAS 1262; id., 19 July 2004, EAS 2496; id., 13 Oct. 2015, EAS 3367 (all accessible via https://findok.bmf.gv.at, last visited 8 Feb. 2016). For a recent discussion, *see also* M. Mayer & P. Orlet, *SWI-Jahrestagung: Deutsche Fußballtrainer in österreichischer Fullballschule*, 26 SWI, p. 17 et seq. (2016).

32. As reported by J. Roeleveld & K. Tetlak, *Article 17: Entertainers and Sportspersons - Global Tax Treaty Commentaries* sec. 5.1.2.2.4., n. 181, in IBFD Global Tax Treaty Commentaries, the Brazilian *Superior Tribunal de Justiça* (27 May 2008, 882.785/RS (2006/0190616-8) concerning the brief engagement of former Brazilian soccer player Paulo Roberto Falcão as coach of the Japanese national team 1994) ruled that a coach was also covered by article 15 of the DTC Brazil-Japan 1967. However, the court did not qualify Mr Falcão as a "sportsperson" (to be more precise, the English version of this rather old DTC still uses the term "athlete" and the Portuguese version refers to "*atletas*") but, on the basis of the Portuguese version, ranked him among the "*participantes em diversões públicas*" (which could be translated as "participants in public entertainments" and appears to be slightly broader than the term "public entertainer" used in the English version). In this respect, *see also* the distinction under Austrian domestic law between the categories of "*Sportler*" and "*Mitwirkender an einer Unterhaltungsdarbietung*": Austrian Federal Ministry of Finance, 4 Feb. 1999, EAS 1412; id., 7 Feb. 2000, EAS 1598 (both accessible via https://findok.bmf.gv.at, last visited 8 Feb. 2016). However, there is a "grey area" here, as a comparison with the example of the conductor of an orchestra mentioned in the OECD Commentary on Article 12, para. 18, 1st sentence, also shows. As suggested by the OECD Commentary on Article 17, para. 3, 5th sentence, it may therefore be "necessary to review the overall balance of the activities of the person concerned".

6.2.3. Income derived from personal activities (as entertainer or sportsperson)

The fact alone that a certain person qualifies as either "entertainer" or "sportsperson" in the above sense does not mean that each and every (item of) income earned by that person would automatically be caught by article 17(1) of the OECD Model. The provision is not equipped with a general "force of attraction" merely based on the abstract status of the taxpayer concerned. Rather, the wording of article 17(1) contains a special filter, namely that the relevant income must be "derived" by that taxpayer "from" the exercise of his "personal activities as such", i.e. as entertainer/sportsperson.

This criterion actually comprises two elements. First of all, it requires that a certain (item of) income must be *subjectively* attributable to the taxpayer concerned, i.e. the "entertainer" or "sportsperson" in the sense of article 17(1). This issue of personal income attribution is a matter for the domestic law of each contracting state and it may be resolved on the basis of general income attribution principles or through the application of "look-through" rules. The exact possibilities existing under domestic law in this respect are particularly relevant in situations of payments made to third parties, where usually the question arises of whether the entertainer/sportsperson himself can be taxed under article 17(1) or whether article 17(2) of the OECD Model will have be relied on in relation to the third party.[33]

In addition, the above criterion requires that the taxpayer concerned must have obtained the relevant (item of) income from the concrete exercise of activities as either "entertainer" or "sportsperson", i.e. from performances in that capacity. Basically, this requirement leads to the core of article 17(1) of the OECD Model, i.e. the determination of the performance-related income (*see* section 6.3.). However, there are situations where it is already debatable whether an entertainer or sportsperson, when exercising a certain activity, is acting "as such".

A first example to be mentioned in this respect is remuneration received for participating in a talk or quiz show. While there is general agreement that the host presenting the show is to be considered an "entertainer" (and will be acting "as such"), there is some doubt as to whether his guests (even when they are professional actors or singers, etc. and therefore generally also qualify as "entertainers") are likewise acting "as such", particularly if they merely answer questions or contribute to a discussion and there is no link

33. For further details, *see* Cordewener, *supra* n. 2, at para. 57 et seq.

to any of their usual performances.[34] The problem is even more obvious where the guest concerned is a "sportsperson" (e.g. a professional soccer player or skier), as it is clear that he will not be acting "as such" during the show. It is frequently argued that "sportspersons" should be regarded as "entertainers" in such cases,[35] but that would lead back to the previous question, namely whether an "entertainer" is acting "as such" in this particular type of situation.

The OECD Commentary does not expressly address the issue and the only statement that seems to contain a little hint (since the 2014 Update) is that "[m]erely reporting or commenting on an entertainment or sports event in which the reporter does not himself participate is not an activity of an entertainer or sportsperson acting as such."[36] Ultimately, it may therefore boil down to a case-by-case analysis of the type of show and the individual contribution of the participant – the closer the activity gets to a mere objective presentation of facts and opinions, the less likely it will be that article 17(1) of the OECD Model can be applied.

Another example that can be added here are preparatory activities, which have now been explicitly addressed in the OECD Commentary during the 2014 Update. In this respect, the Commentary on Article 17 of the OECD Model starts with the general remark that "[p]reparation, such as rehearsal and training, is part of the normal activities of entertainers and sportspersons", and then states that, "[i]f an entertainer or sportsperson is remunerated for time spent on rehearsal, training or similar preparation in a State …, the relevant remuneration, as well as remuneration for time spent travelling in that State for the purposes of performances, rehearsal and training (or similar preparation), would be covered by the Article."[37] One could basically subscribe to this statement if it could be assumed that the remuneration mentioned (for time spent on preparation and travelling) must ultimately be related to a common goal, namely "*the purposes of performances*"

34. For references, *see* id., at para. 39.
35. For references, *see* id., at para. 51.
36. *See* para. 9.1, 2nd sentence, 3rd indent, *OECD Model: Commentary on Article 17* (2014), with the example of a fee paid to "a former or injured sportsperson … for offering comments during the broadcast of a sports event in which that person does not participate."
37. *See* para. 9.1, 2nd sentence, 3rd indent, 1st and 2nd sentences, *OECD Model: Commentary on Article 17* (2014), stating that also remuneration for preparatory activities "would be fairly common for employed entertainers and sportspersons but could also happen for a self-employed individual, such as an opera singer whose contract would require participation in a certain number of rehearsals."

(emphasis added), and if such performances actually take place in the state where the relevant time (for preparation/travelling) is spent.

However, as the final part of the statement in the Commentary makes clear, the OECD does not base its view on this assumption. On the contrary, it claims that article 17(1) of the OECD Model shall apply in such situations "regardless of whether or not such rehearsal, training or similar preparation is related to specific performances taking place in that State", so that, for example, "remuneration … paid with respect to the participation in a pre-season training camp would be covered."[38] Furthermore, the OECD made a deliberate choice in this respect, in the sense that all payments for preparatory activities of entertainers and sportspersons shall be covered by article 17(1) and "*not only the part of such remuneration that relates to actual performances*" (emphasis added).[39]

Nevertheless, the traditional view has always been that both the activities of "entertainers" (*see* section 6.2.1.) and "sportspersons" (*see* section 6.2.2.) require public appearances (directly or at least indirectly) before an audience and this performance-based interpretation also corresponds with the requirement that article 17(1) of the OECD Model only covers "income derived" by the entertainer/sportsperson "from" the exercise of his "personal activities as such."[40] Taken seriously, the approach chosen by the OECD Commentary would therefore mean that the state where the training camp takes place would have a taxing right irrespective of any "actual" performance of the sportsperson concerned within the territory of that state – and it could even mean that this state would have a taxing right without any "actual" performance of that sportsperson at all (imagine the promising newcomer who has just signed up to join a soccer or hockey team, participates in the training camp abroad and, due to unfortunate circumstances, gets so badly injured that he will never be able to play again). It must be doubted whether the scope of article 17(1) of the OECD Model can really be stretched to that extent.[41]

38. *See* para. 9.1, 2nd sentence, 3rd indent, 3rd sentence, *OECD Model: Commentary on Article 17* (2014).
39. *See* OECD Committee on Fiscal Affairs, *Issues Related to Article 17 of the Model Tax Convention* (26 June 2014), para. 33.
40. Moreover, the expression "public performance(s)" is also explicitly used in para. 9, 10th sentence, and para. 9.2, 2nd sentence, 2nd indent, 2nd sentence, *OECD Model: Commentary on Article 17* (2014).
41. In the same vein, *see* Pistone & Schaffer, *supra* n. 4, at p. 64 et seq. *See also* Cordewener, *supra* n. 2, at paras. 50 and 91 et seq. The approach taken by the 2014 Update is fully supported, however, by the Belgian Federal Ministry of Finance, 2 Dec. 2015,

6.3. Allocation

Article 17(1) of the OECD Model 2014 is a rule that aims at preserving the source country entitlement to tax a certain type of income.[42] With a view to achieving this aim, the rule stipulates that "*income derived* by a resident of a Contracting State as an entertainer,… or as a sportsperson, *from* that resident's *personal activities as such exercised in the other Contracting State*, may be taxed in that other State" (emphasis added). Therefore, in addition to the subjective requirement that the relevant income must be "derived" by the taxpayer "from" the exercise of his "personal activities" as "entertainer" or "sportsperson" (*see* section 6.2.), there is the objective requirement that the income-generating activity must be "exercised in the other Contracting State".

The latter requirement, which boils down to a quest for the relevant criteria to determine, for the purposes of source country entitlement, the degree of proximity between a certain (item of) income and the exercise of the personal activity of an entertainer/sportsperson in the source state that suffices to accept that state's right to tax this particular (item of) income, has become the core issue of article 17(1) of the OECD Model. Given the fact that the underlying idea of the provision is to cover public performances of entertainers/sportspersons (*see* section 6.2.), it is obvious that an exact understanding of the concept of "performance-related" income is crucial for the extent of the source state's taxing right. In this respect, a two-step analysis is necessary: first, the place of a given performance must be determined, and then the items of income that can be attributed to that performance have to be identified.

6.3.1. Place of the "performance"

As regards the place where a certain performance of an entertainer/sportsperson takes place, article 17(1) of the OECD Model itself does not contain any indication. However, during the 2014 Update a hint has been introduced into the OECD Commentary on the provision,[43] and that is a reference to paragraph 1 of the Commentary on Article 15 of the OECD Model: there, it is stated as a general rule that income from employment is

AAFisc 40/2015 (701.057), accessible via www.fisconetplus.be (last visited 8 Feb. 2016), para. 13.

42. *See* Cordewener, id., at para. 2 et seq.

43. *See* para. 9.2, 2nd sentence, 2nd indent, 1st sentence, *OECD Model: Commentary on Article 17* (2014).

"taxable in the State where the employment is actually exercised" and, more specifically; it is pointed out that "[e]mployment is exercised in the place where the employee is physically present when performing the activities for which the employment remuneration is paid."[44] With respect to entertainers/sportspersons, this can indeed be regarded as a useful guideline for the application of article 17(1) of the OECD Model to both employed and self-employed persons.

The question may be raised, though, how article 17(1) should then be applied to situations where entertainers/sportspersons merely indirectly reach their audience (*see* section 6.2.1.). This is particularly the case for entertainers appearing on a "virtual stage" (e.g. TV/movie actors, studio musicians). Although it is not fully clear from the reference in the OECD Commentary on Article 17 to the Commentary on Article 15, as the former only quotes a limited part of the latter, the principles applying to employment income could also provide for a solution in this respect: this is because paragraph 1 of the Commentary on Article 15, in its final sentence, explains that under article 15 of the OECD Model, as a consequence of the aforementioned decisiveness of the taxpayer's physical presence, "a resident of a Contracting State who derived remuneration, in respect of an employment, from sources in the other State could not be taxed in that other State in respect of that remuneration *merely because the results of this work were exploited in that other State*"[45] (emphasis added). Some national tax authorities in fact already apply article 17(1) along the lines of this extended analogy to article 15 in practice, focusing on the place of actual production (i.e. where the scenes of a movie were shot or where a song was recorded) and not where the product is made public later through the media.[46] This makes the subsequent step of linking certain items of income with the specific place of an individual performance much easier and predictable.

6.3.2. Connection ("link") between an item of income and the "performance"

6.3.2.1. New approach under the 2014 OECD Commentary

The 1992 OECD Commentary on Article 17 had made a first attempt to define the relationship between a performance and an item of income that

44. Para. 1, 1st and 3rd sentences, *OECD Model: Commentary on Article 15*.
45. Id., 4th sentence.
46. *See* Cordewener, *supra* n. 2, at para. 77 et seq.

is necessary to attribute the latter to the former. Unfortunately, however, the explanations given in the old paragraph 9 had been unclear, not to say contradictory: as a general rule, they had been pointed out that "other Articles would apply whenever there was *no direct link* between the income and a public exhibition by the performer in the country concerned", but then they had added that article 17(1) of the OECD Model would apply to "advertising or sponsorship income, etc. which is related *directly or indirectly* to performances or appearances in a given State"[47] (emphasis added). The overall picture had been blurred even more by the introductory statement in paragraph 8 of the Commentary that article 17(1) "applies to income derived *directly and indirectly* by an individual artiste or sportsman"[48] (emphasis added).

The initial sentence of paragraph 8 has only slightly been rephrased during the 2014 Update and now states that article 17(1) "applies to income derived directly or indirectly from a performance by an individual entertainer sportsperson."[49] Although the key words "directly or indirectly" have remained unchanged, an analysis of the further explanations provided by paragraph 8[50] shows that this part of the Commentary does not concern the specific issue of how to *objectively* attribute a certain item of income to a particular performance, but deals with two different questions: first, it addresses payments that are not made directly to the entertainer/sportsperson himself (which leads to the issue of *subjective* income attribution and the application of either article 17(1) or article 17(2) of the OECD Model to a certain item of income;[51] *see* section 6.3.), and then it turns to the question of whether a certain proportion of an overall remuneration (salary, etc.) paid for several performances can be taxed by the source state regarding those performances that have taken place within its territory (which leads to the issue of cross-border apportionment; *see* section 6.4.2.). Taking account of this specific systematic context, unnecessary complications can therefore be

47. Para. 9, 2nd and 4th sentences, *OECD Model: Commentary on Article 17* (1992).
48. Para. 8, 1st sentence, *OECD Model: Commentary on Article 17* (1992).
49. *See* para. 8, 1st sentence, *OECD Model: Commentary on Article 17* (2014).
50. *See* id., 2nd through 5th sentences.
51. This understanding is also confirmed by paras. 9.4, 1st sentence, and 9.5, 1st sentence, *OECD Model: Commentary on Article 17* (2014), which refer to "[p]ayments for the simultaneous broadcasting of a performance by an entertainer or sportsperson made directly to the performer *or for his or her benefit (e.g. a payment made to the star-company of the performer)*" and the fact that entertainers/sportspersons frequently "derive, directly *or indirectly (e.g. through a payment made to the star-company of the entertainer or sportsperson)* a substantial part of their income in the form of payments for the use of, or the right to use, their 'image rights'" (emphasis added).

avoided if paragraph 8 of the OECD Commentary on Article 17 is simply left aside during the discussion of objective income attribution.

The most confusing part of the 1992 version of the OECD Commentary on Article 17, however, has been paragraph 9[52] and, in this respect, the new 2014 version has opted for a very pragmatic approach. In a first step it has rephrased the decisive criterion for the objective attribution of (items of) income and in a second step it now provides for quite extensive explanations, combined with individual examples, of how that new criterion is supposed to be applied in practice.

Although still somewhat embedded in considerations addressing royalties and sponsorship or advertising fees, the general rule for the interpretation of article 17(1) of the OECD Model now stipulates that "other Articles would apply whenever there is no *close connection* between the income and the performance of activities in the country concerned"[53] (emphasis added). The 2014 OECD Commentary then points out in positive terms that this "close connection", which is uniformly used throughout the subsequent explanations given by the Commentary, "will generally be found to exist where it cannot be reasonably considered that the income would have been derived in the absence of the performance of these activities."[54] There must therefore be a causal relationship between a particular performance and a certain (item of) income and, through a considerable number of positive and negative examples, the Commentary seeks to give a clearer shape to the relevant degree of causality (or causation).

6.3.2.2. Situations with a clear "close connection"

There are a number of situations where the necessary "close connection" is clearly identifiable. The most obvious case is that entertainers/sportspersons receive "fees for their actual performances."[55] Other clear-cut cases are "prizes and awards … in relation to a particular sports event" irrespective of who awards the prize to the sportsperson or bestows the award upon him.[56] In addition, the Commentary also mentions "a prize paid to the winner of

52. This has also been admitted by the OECD Committee on Fiscal Affairs, *Issues Related to Article 17 of the Model Tax Convention* (26 June 2014), paras. 20 and 51.
53. Para. 9, 2nd sentence, *OECD Model: Commentary on Article 17* (2014).
54. Id., 3rd sentence (2014).
55. *See* para. 9, 1st sentence, *OECD Model: Commentary on Article 17* (2014), which only slightly adjusted the wording previously used by para. 9, 1st sentence, *OECD Model: Commentary on Article 17* (1992) ("fees for their actual appearances").
56. Para. 8.1 *OECD Model: Commentary on Article 17* (2014).

a sports competition taking place in that State; a daily allowance paid with respect to participation in a tournament or training stage taking place in that State; a payment made to a musician for a concert given in a State."[57] On the other hand, there are situations where the relevant connection is clearly missing, such as in the case of "[p]ayments received in the event of the cancellation of a performance",[58] simply due to the lack of any relevant exercise of a personal activity.

It should be added, however, that some tricky situations have not been addressed by the 2014 version of the OECD Commentary on Article 17. A first issue are inducement payments such as a "signing-on fee" paid to a sportsperson for joining a certain team.[59] Basically, there should be no doubt that the payment is made for the future exercise of "personal activities" in the sense of article 17(1) of the OECD Model.[60] Yet, since most contracts run for more than a year (or season), and during every single year (or season) there may be matches in different countries, the exact allocation of the payment to various performances (and the apportionment between them; *see* section 6.4.2.) may be a rather cumbersome exercise.[61] A second and potentially even more complex issue are severance payments ("golden handshakes"): for these, it must first be determined whether and to what extent they are related to the exercise of "personal activities" in the past, before their exact distribution over a certain contractual period and allocation to different performances (possibly again through cross-border apportionment) can be tackled.[62]

6.3.2.3. How to determine the relevant "close connection" for casual earnings?

Next to payments clearly related to the exercise of their main activity "*as such*" (*see* section 6.2.3.), entertainers/sportspersons often have additional sources of income. Quite frequently, such "casual earnings" find their origin in the fact that the entertainer/sportsperson has achieved a certain degree of

57. Para. 9.2, 2nd sentence, 1st indent, *OECD Model: Commentary on Article 17* (2014).
58. Para. 9, 9th sentence, *OECD Model: Commentary on Article 17* (2014) (previously para. 9, 6th sentence, *OECD Model: Commentary on Article 17* (1992)).
59. E.g. *see* CA: Tax Court of Canada, 14 Oct. 1999, 96-4680-IT-G, *Nikolai Khabibulin v. Her Majesty the Queen*, Dominion Tax Cases (D.T.C.) 1426 (2000). For further references, *see* Cordewener, *supra* n. 2, at para. 2 et seq.
60. For details, *see* Cordewener, id., at para. 87 et seq.
61. In this respect, *see* US: United States Tax Court, 26 Mar. 1984, 23315-81, *Ken Linseman v. Commissioner of Internal Revenue*, 82 T.C. 520 (1984).
62. *See* Cordewener, *supra* n. 2, at para. 90.

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