Chapter 1
Introduction, aim of the thesis and research methods

1.3. Special taxing rules for artistes (Article 17 OECD Model Tax Convention)

This thesis is about the taxation of international performing artistes. Their performance income is often generated in many countries other than their country of residence, and this performance income is subject to special tax treatment.

The taxation of international activities in both the residence and source country is not particular to performing artistes; it is also applied to other taxable persons. They will be taxed in the country of residence on their worldwide income, i.e. regardless of where their income originates, but their income from foreign sources will also very often have been taxed in the source country[1]. If unmitigated, the effect will be double taxation, which obstructs international trade or services.

Countries have concluded bilateral tax treaties in which they have divided the taxing rights between each other in order to eliminate double taxation. These treaties are usually based on the OECD Model Tax Convention, which gives general rules for the allocation of taxing rights to the various types of income. At least four articles of the OECD Model Tax Convention are directly relevant to the taxation of international performing artistes[2]:

- Article 7 - Business profits, including income from self-employed services: no taxation in the source country, unless there is a permanent establishment;[3]
- Article 15 - Income from employment: taxation in the source country, unless the artiste is employed and paid by an employer in the residence country and stays in the source country for less than 183 days;
- Article 17 - Artistes and sportsmen: taxation in the source country; and
- Article 23 - The methods for elimination of double taxation.

It is remarkable to note that artistes are not taxed in accordance with the normal allocation rules, but that Article 17 gives them a special position in the OECD Model Tax Convention. The current text of Article 17 is as follows:

> Article 17 OECD Model Tax Convention
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> 1. Notwithstanding the provisions of Articles 7 and 15, income derived by a resident of a Contracting State as an entertainer, such as a thea-

[1] The various reasons for this source taxation will be discussed in Chapter 2 of this thesis.
[2] Also Article 12 – Royalties may be relevant in some respect. The OECD Model Tax Convention allocates the taxing right for royalties to the country of residence.
[3] Income from self-employed services fell under a separate article in the OECD Model Tax Convention, Article 14, until the year 2000, when it was removed and the income was brought under Article 7. But treaties concluded before the year 2000 will still contain such an article 14.

tre, motion picture, radio or television artiste, or a musician, or as a sportsman, from his personal activities as such exercised in the other Contracting State, may be taxed in that other State.

2. Where income in respect of personal activities exercised by an entertainer or a sportsman in his capacity as such accrues not to the entertainer or sportsman himself but to another person, that income may, notwithstanding the provisions of Article 7, 14 and 15, be taxed in the Contracting State in which the activities of the entertainer or sportsman are exercised.

The article makes it clear that the general rule for business income from Article 7 does not apply to artistes. This means that the source country has the right to tax the performance income when the artistes are self-employed, even if their fees are business income and they do not have a permanent establishment in the country of performance.

Nor does the general rule for income from employment from Article 15 apply to artistes. This means that artistes who are employees may also be taxed in the country of their performance, even if they are employed and paid by a company in their residence country and travel abroad only for short-term performances.

It is fascinating to discover how this special tax treatment has arisen, and how it has developed over the years. According to a 1987 OECD Report[4] the special rule can be seen as an anti-avoidance measure to prevent:

- highly mobile artistes who pretend to live in tax havens from receiving gross self-employed income without paying tax in any country;[5] and
- artistes from not reporting foreign income in their home country[6].

The OECD believes that taxation at source is a reasonable measure to ensure that every artiste pays his share of his earnings to the government. And almost all its member countries follow this instruction, both in their bilateral tax treaties and in their national legislation. And as Article 17 has been taken over in the UN Model Tax Convention, many other countries have also included the special artiste provision in their bilateral tax treaties.

At the same time, artistes also have to report their foreign earnings and expenses in their country of residence, which will tax its residents on their worldwide income. Other earnings will be added and more expenses can be deducted, resulting in a total taxable world income in the country of residence. Income tax will be calculated at the progressive tax rates of the residence state's income tax scheme, including a tax-free allowance.

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[4] "Taxation of Entertainers, Artistes and Sportsmen", in *Issues in International Taxation* No. 2, OECD, Paris (1987).
[5] Paragraph 7 of the 1987 OECD Report.
[6] Paragraph 6 of the 1987 OECD Report.

International double taxation is then eliminated by either exempting the foreign income in the country of residence or granting the artiste a foreign tax credit. The OECD Model Tax Convention advises its member countries to use the ordinary tax credit of Article 23-B of the Model Income Tax Convention as the method to eliminate double taxation, but the tax exemption method of Article 23-A is also still used, often in older tax treaties and by countries which use a territorial basis for taxation.

This suggests that according to the international recommendation of the OECD the taxation of the performance income of artistes is balanced, allowing the country of performance the right to tax the income but reserving a secondary tax right plus progression for the country of residence. It may seem that a reasonable international allocation of income tax has been created, even though it deviates from the normal allocation rules of Articles 7 and 15.

But unfortunately this arrangement has also increased the risk of practical inadequacies, because the taxable base in the country of performance can be higher than in the residence country, the exchange of information between countries for these often short-term business activities has not been developed properly and tax credit problems often arise in the country of residence. And the artistes in any case end up with comparatively high advisory costs, in the country of performance as well as in the country of residence. The literature shows that these problems occur frequently and that the artistes and the organizers of performances both experience the special international taxing rules as an obstacle to cross-border activity[7].

1.4. Aim of the study and delimitation

The aims of this thesis are, first, to study whether the effects resulting from the special taxing rules for international performing artistes, as derived from Article 17 of the OECD Model Tax Convention, lead to unequal treatment for artistes in comparison with other taxpayers and if so, whether the result is reasonable and if not, whether the treatment can be justified; and, second, to discuss the consequences of possible adjustments.

The author has defined 9 criteria for which the effects will be tested in the study:

1) The definition of the person of the “artiste” and the scope of his “performance income” need to be clear and unambiguous in order to allow special tax rules for this specific group of taxpayers.

[7] Clare McAndrew, *Artists, taxes and benefits - an international review*, Arts Council of England, Research Report 28 (2002); Oliver Adeoud, *Mobility in the Cultural Sector*, University of Paris (2002); Dick Molenaar, "Obstacles for International Performing Artists", 42 *European Taxation* 4 (2002), at 149; Judith Staines, *Tax and Social Security – a basic guide for artists and cultural operators in Europe*, Publication of Informal European Theatre Meetings, March 2004

2) The recommendations of the OECD in Article 17 Model Tax Convention need to be followed as closely and consistently as possible by countries when they conclude their bilateral tax treaties and impose their national tax rules.

3) The elimination of double taxation in the residence country has to be simple, complete and feasible, and the risk of inefficiencies needs to be minimal.

4) The sum of the tax burden in the performance and the residence country should not be significantly higher than the tax burden that would have arisen in the residence country if the performance had taken place there rather than abroad. An adjustment can be made for differences in tax rates between the source and the residence country.

5) The tax burden in the performance country should not be significantly higher than for residents of that country, with an adjustment for personal allowances, or for other non-residents, including artistes.

6) The tax revenue in the performance country needs to be high enough to justify a special tax system for non-resident artistes.

7) The administrative burden resulting from the special tax rules has to be reasonable in comparison with the performance income and the tax revenue. It should not be higher than for other taxable persons with international activities.

8) Within the European Union the taxation of international performing artistes needs to contribute to the integration process.

9) The special tax rules should not give rise to disturbances or hindrances on the market.

For the research for this book the author has taken a different approach from other authors of publications on international artiste taxation. Attention is normally concentrated on the “happy few” who perhaps make up no more than 1% of the artiste population. In contrast this thesis also deals with the vast majority of artistes who cannot even consider using tax havens, but live in normal countries, at normal addresses, with children at a local school, as good next-door neighbours. Their only knowledge of tax havens comes from summer holiday brochures. Are special anti-avoidance measures also needed for these artistes? No, is the proposition at the start of this thesis. Unfortunately, in practice normal artistes seem to suffer from the far-reaching national tax rules for non-resident artistes that are not restricted by the OECD in Article 17 of its Commentary.

It will be discussed whether the artiste tax rules as a deviation from the normal allocation rules for self-employed persons and companies (Article 7 and (former) Article 14 of the OECD Model) and for employees (Article 15 of the OECD Model) are really necessary, either in part or in full.

The thesis does not study the position of sportsmen, even though the OECD Model Tax Convention combines the taxation of international performing artistes with the taxation of international sportsmen in Article 17. There are many similarities between these two types of "entertainer", who travel around the world and perform before audiences, but there are also many differences. The author has decided to concentrate his study solely on performing artistes, because of the availability of the research material and the differences in the markets.

The thesis mainly focuses on the income from artistic performances. It will also discuss other income, such as royalties, merchandising income, copyright, sponsoring, subsidies and so on, but only if it has a relationship to performances.

1.5. Structure of the study and research methods

The study in this thesis is divided into five parts. Part A, *Introduction and Definitions*, has started with this introduction and continues in chapter 2 with the historical development of the tax rules for international artistes. The basis for the research for this part of the study was the international literature. Then, in chapters 3 and 4, definitions will be given of the terms "artiste" and "performance income". These definitions will be based on information from the international literature and from national tax rules.

Part B, *Present International Situation – Bilateral Treaties*, starts with the results of extensive research for four topics, and forms the central part of this thesis. The collection of data for these four topics is unique and has never been gathered or published before.

The first survey, published in chapter 5, has been on the use of Article 17 and its variations by the 30 OECD member countries and 16 other countries. Do these countries follow the recommendations of the OECD Model strictly or do they use possible exceptions or even create their own deviations? The author has used the tax treaty database of the International Bureau for Fiscal Documentation for this study; 7 elements of Article 17 (or a comparable article) from the tax treaties of these 40 countries are listed in a table and then discussed.

The second survey, published in chapter 6, was made with the object of providing an overview of the national artiste tax rules that countries have inserted in their legislation. This study was undertaken at four levels, from official institutions in a specific country to the local organizers of performances.

Part B changes in chapter 7 to look at the country of residence and examines methods for eliminating double taxation. The inefficiencies which lead to tax credit problems are described.

The third survey, published in chapter 8, was undertaken in the Netherlands and describes the amount and variation of expenses incurred by international performing artistes. Data were collected from a selection of 1600 artistes who performed in the Netherlands during the years 2001-2003 and for whom the Dutch tax authorities approved the deduction of the expenses.

Chapter 9 contains examples of the international excessive or double taxation of performing artistes. Aspects of the previous chapters are brought together in examples which clarify the obstacles to international performances.

Part B ends with the fourth survey, published in chapter 10, is about the tax revenue that countries collect from the taxation of non-resident artistes. The survey was limited to four countries, but the similarities in the figures suggest that the data may be extrapolated. The tax authorities of these four countries have provided the data for this survey.

Part B changes in chapter 7 to look at the country of residence and examines existing methods for eliminating double taxation. The inefficiencies which lead to tax credit problems are described. Part B ends in chapter 10 with examples of the international excessive or double taxation of performing artistes. Aspects of the previous chapters are brought together in examples which clarify the obstacles to international performances.

Part C, *Present Situation in the European Union*, studies developments with regard to artiste taxation in the European Union. It discusses in chapter 11 whether the existing tax practices in many European countries are in line with the non-discrimination rules and freedom principles of the EC Treaty. The European Court of Justice has already decided in the *Gerritse* case[8] that the German tax rules for non-resident artistes were not in accordance with the EC Treaty, but more cases are pending before the ECJ. Chapter 12 will discuss whether the outcome of these and other cases may also affect Article 17 of the OECD Model Tax Convention or the official Commentary, and thus many bilateral tax treaties and national artiste tax rules.

Part D, *Discussion of the Present Situation*, will finalize, in chapter 13, the study on the effects resulting from the special taxing rules for international performing artistes, as derived from Article 17 of the OECD Model Tax Convention. The results will be discussed and analysed in relation to the 10 criteria set out earlier in this introduction and conclusions will be drawn for the first part of the aim of this thesis.

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[8] *Arnoud Gerritse*, ECJ 12 June 2003, C-234/01.

Part E, *Future*, will discuss the consequences of possible adjustments to the international artiste tax rules. Chapter 14 will look at the options for improvement that are already available, both for individual countries and for the OECD. Some of the options can be applied at short notice. Chapter 15 will discuss whether a radical change to Article 17 of the OECD Model Tax Convention is possible. Consideration will be given to the treaty provision being turned around and reverting to the normal allocation rules for self-employed and employees, although at the same time the anti-avoidance safeguards would need to stay intact and compliance would need to be at an acceptable level. With such a change all parties would be better off, not only because of the elimination of excessive or double taxation, but also because of the lower administrative burden.

The purpose of this thesis is to change the motto for the taxation of international performing artistes from the dark *"Hang-ups, letdowns, bad breaks, setbacks, natural fact is, I can't pay my taxes"* into the vivid and swinging *"There is no business like show business!"*[9].

[9] Irving Berlin (1937)