CROSS-BORDER TAX PROBLEMS OF INTERNATIONAL PERFORMING ARTISTS

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1. Introduction of problems

Problems with the special tax rules for international performing artists (and sportsmen), as specified in Art. 17 OECD Model. This article creates a source withholding tax for non-resident performers, regardless whether they are self-employed or employees (see text on page 4).

Because the performers also have to report the foreign income in their residence country, double taxation may occur. This should be eliminated by a tax credit for the foreign tax (or a tax exemption).

This suggests that the taxation of performance income of performers is balanced, but the reality is that problems very often arise:

Example

A German pop group performs in Portugal earning EUR 30,000. The Portuguese non-resident withholding tax is 25% from gross. The direct and indirect expenses are 50% of the costs, i.e. EUR 15,000. The average German income tax rate for the musicians is 35%. Accordingly:

<table>
<thead>
<tr>
<th>EUR</th>
<th>Portuguese withholding tax: 25% x EUR 30,000 = 7,500</th>
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<tbody>
<tr>
<td></td>
<td>German foreign tax credit (max):</td>
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<tr>
<td></td>
<td>gross 30,000 - 50% expenses = 15,000 income x 35% = 5,250</td>
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<tr>
<td></td>
<td>International excessive taxation = 2,250</td>
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</tbody>
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Three problems:

a. Non-deductibility of expenses in the country of performance
b. Obtaining tax credits in the residence country
c. High administrative expenses

2. History of Article 17 for Performers

Article 17 exists since the first OECD Model Tax Convention of 1963, because of "practical difficulties". Article 17 was extended in OECD Model 1977 with the addition of a second paragraph, stating that when another person (not the entertainer or sportsperson himself) receives remuneration for a performance, the country of performance still holds the right to tax the income. The OECD also noted in 1992 that countries can tax the gross performance fee, but then need to apply a low tax rate.
3. Unilateral Exemption in the Netherlands, Ireland and Denmark

Three EU Member States do not have this special taxation on performers: the Netherlands, Ireland and Denmark. Reasons: the three practical problems.

Also major sports events do not want withholding tax in the performance countries. This started with the IOC for the 2010 Winter Olympics in Vancouver, Canada, where an exemption was given for the 15% withholding tax for non-resident performers. The same happened with the 2012 Olympics in London, UK (20% source tax), 2014 Winter Olympics in Sochi, Russia and the Olympics since then. There was also no source tax at the UEFA Champions League finals since 2011, the UEFA Europe League finals since 2011, the EURO since 2012 and the FIFA World Cup since 2014, amongst other sports events.

The sports world is not waiting on changes in bilateral tax treaties, but is forcing with the power of the major sports events that the organizing countries remove the source taxation for the sportspersons temporarily to avoid the problems resulting from Article 17 of the tax treaties.

4. The 2014 Update: OECD keeps Article 17, but Gives Options for Restrictions

4.1. Deletion of Article 17?

On 25 June 2014, the OECD published the report “Issues related to Article 17 of the OECD Model Tax Convention”, in which the deletion of Article 17 was discussed. But the OECD Member States wanted to keep the article for three reasons:

a. Residence taxation should not be assumed given the difficulties of obtaining the relevant information.

b. Article 17 allows taxation of a number of high-income earners who can easily move their residence to low-tax jurisdictions.

c. Source taxation of the income covered by the article can be administered relatively easily.

There are several arguments against the view of the OECD Member States:

- Countries can exchange information.
- There is no need for Article 17 in treaty situations, because there are no tax treaties with low-tax jurisdictions.
- Article 17 is complicated and causes much administrative expenses both in the performance country with the deduction of expenses and tax returns, and in the residence country with the foreign tax credits. This is an obstacle for performers, organizers and tax authorities in both countries.
- Article 17 creates the risk of excessive or even double taxation.

Therefore, the reasons for defending Article 17 are invalid, the article in its current form is counterproductive and leads to cross-border tax problems.
4.2. Options to Restrict the Scope of Article 17

But the OECD has also made some proposals to restrict the scope of Article 17, although they are only mentioned in the Commentary on the article:

a. Article 17 only for self-employed, normal rules from Art. 15 for employees
b. Deduction of expenses, normal tax settlement
c. De-minimis-rule of 15.000 IMF SDR
d. Support from public funds
e. Limited use of Article 17(2), only in cases of artist-companies

Best practice examples are the UK and the USA, because:

- UK: the general allowance of £11,500 p.p. per year is also applicable to non-resident performers
- USA: has a minimum threshold of $10,000 (or more) p.p. per year in every tax treaty. New tax treaties have $30,000 p.p. per year.

5. Summary and Conclusions

The taxation of cross-borders performances is complicated, both in the country of performance and in the residence country. Article 17 of the OECD Model Convention has been taken over in most bilateral tax treaties to "avoid practical difficulties", but in reality creates practical problems and can easily lead to double taxation and high administrative expenses.

The best option would be to follow the example from the Netherlands, Ireland and Denmark and exempt unilaterally the non-resident performers.

The next best option would be a minimum threshold for smaller performers as the UK and USA are using.

Furthermore, the OECD gives five options in the Commentary to restrict the scope of Article 17 OECD Model. Countries should take over these options in their bilateral tax treaties or leave out Article 17.

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ARTICLE 17

ENTERTAINERS AND SPORTSPERSONS

1. Notwithstanding the provisions of Article 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 sportsperson, from that resident's 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 sportsperson acting as such accrues not to the entertainer or sportsperson but to another person, that income may, notwithstanding the provisions of Article 15, be taxed in the Contracting State in which the activities of the entertainer or sportsperson are exercised.