

Taxation of International Performing Artistes

The problems with Article 17 OECD
and how to correct them

Other titles in this series

- Vol. 1 – *The concept of Income: A Multi-Disciplinary Analysis*
by Kevin Holmes
- Vol. 2 – *Taxing Portfolio Income in Global Financial Markets*
by Doron Herman
- Vol. 3 – *Free Movement of Persons and Income Tax Law: The European Court in Search of Principles*
by Servaas van Thiel
- Vol. 4 – *Advance Tax Rulings and Principles of Law: Towards a European Tax Rulings System?*
by Carlo Romano
- Vol. 5 – *Arbitration under Tax Treaties: Improving Legal Protection in International Tax Law*
by Mario Züger
- Vol. 6 – *E-Commerce and Source-Based Income Taxation*
by Dale Pinto
- Vol. 7 – *Interpretation of Tax Treaties under International Law*
by Frank Engelen
- Vol. 8 – *Taxation of Investment Funds in the European Union*
by Tomi Viitala
- Vol. 9 – *Taxation of Cross-Border Partnerships: Double Tax Relief in Hybrid and Reverse Hybrid Situations*
by Jesper Barenfeld

Taxation of International Performing Artistes

The problems with Article 17 OECD
and how to correct them

Dick Molenaar

Thesis submitted to Erasmus University Rotterdam
in fulfilment of the requirements for the degree of Doctor of Law

Degree awarded on 9 February 2006



Volume 10, Doctoral Series

IBFD – Academic Council

IBFD

Visitors' address:

H.J.E. Wenckebachweg 210
1096 AS Amsterdam
The Netherlands

Postal address:

P.O. Box 20237
1000 HE Amsterdam
The Netherlands

Telephone: 31-20-554 0100

Fax: 31-20-622 8658

www.ibfd.org

© 2005 Dick Molenaar

All rights reserved. No part of this publication may be reproduced, stored in a retrieval system or transmitted in any form or by any means, electronic, mechanical, photocopying, recording or otherwise, without the written prior permission of the publisher. Applications for permission to reproduce all or part of this publication should be directed to: permissions@ibfd.org.

Disclaimer

This publication has been carefully compiled by the IBFD and/or its author, but no representation is made or warranty given (either express or implied) as to the completeness or accuracy of the information it contains. The IBFD and/or the author are not liable for the information in this publication or any decision or consequence based on the use of it. The IBFD and/or the author will not be liable for any direct or consequential damages arising from the use of the information contained in this publication. However, the IBFD will be liable for damages that are the result of an intentional act (*opzet*) or gross negligence (*grove schuld*) on the IBFD's part. In no event shall the IBFD's total liability exceed the price of the ordered product. The information contained in this publication is not intended to be an advice on any particular matter. No subscriber or other reader should act on the basis of any matter contained in this publication without considering appropriate professional advice.

Where photocopying of parts of this publication is permitted under article 16B of the 1912 Copyright Act jo. the Decree of 20 June 1974, Stb. 351, as amended by the Decree of 23 August 1985, Stb. 471, and article 17 of the 1912 Copyright Act, legally due fees must be paid to Stichting Reprorecht (P.O. Box 882, 1180 AW Amstelveen). Where the use of parts of this publication for the purpose of anthologies, readers and other compilations (article 16 of the 1912 Copyright Act) is concerned, one should address the publisher.

ISBN 90-76078-87-4

NUR 826

PREFACE

The taxation of international performing artistes is a small but special topic in international taxation. Most countries in the world levy a withholding tax on the performance fees of non-resident artistes, even when the artistes are self-employed, their fees are business income and they do not have a permanent establishment. This practice is confirmed in the OECD Model Tax Convention, which devotes a special clause (Article 17) to artistes (and sportsmen). The reasons for this special tax treatment will be explained in this thesis.

The subject has attracted my attention over the years because many performing artistes and organizers of performances complain about these divergent tax rules. Artistes experience different tax rules in various countries and have problems with obtaining a sufficient tax credit in their residence country. Some artistes, therefore, prefer to agree net performance fees and pass the tax buck to the organizer of the performance, who is then confronted with an extra expense that he would not have to pay for the performance of a resident artiste. Non-resident artiste taxation is an obstacle to international performances.

The general public became aware of this in 1996 when Michael Jackson decided not to perform in Germany because of its onerous tax rules. The concert promoter who could not contract Michael Jackson was later imprisoned for three years because he tried to get round the German tax rules for the performances of other non-resident artistes.

I asked myself what artistes had done to deserve this harsh tax treatment. Gross performance fees are made taxable, no deductions for expenses are allowed, and even reimbursement of expenses and free use of hotels and travel are included in the taxable performance fee. The tax rules for international performing artistes are totally different from those for “normal” people or businesses.

The study for this thesis officially started in March 2000. I approached Professor Maarten J. Ellis with the idea and although this was clearly not his usual subject he found it an interesting topic for my dissertation. In the course of my research I have tried to look at the subject from a different perspective from that usually found in the tax literature. Normally it is the tax avoidance behaviour of the top stars and the “rent-a-star” constructions invented by accountants and tax lawyers that attract writers’ attention. But

these top stars are perhaps no more than 1% of the artiste population; in contrast, the vast majority of artistes cannot even consider using tax havens; they live in normal countries, at normal addresses, with their children at a local school, as good next-door neighbours. Their only knowledge of tax havens comes from summer holiday brochures.

This led me to carry out four new surveys: on the use of the special artiste tax rule in the tax treaties of 46 countries; on the non-resident artiste tax rules in performance countries; on the amount of (production) expenses for performing artistes; and on the tax revenue collected by performance countries. The results of these surveys are published and discussed in this thesis. Conclusions are drawn and recommendations for change are given.

I intend to study aspects of the taxation of international performing artistes further and I hope that others will take up the challenge of discussing the results and supporting the proposals. My aim is to achieve a fairer taxation of international performing artistes.

I want to acknowledge that this dissertation could not have been completed without the encouragement and support of many people, some of whom require special mention here.

First of all, I would like to thank Professor Maarten J. Ellis for being an encouraging supervisor. Initially he was surprised at my choice of subject, but with my research results, figures and calculations he became more and more interested in the problems with Article 17 of the OECD Model, and possible alternatives. Later, I heard to my pleasant surprise that he had been advocating in public a change to Article 17. That must have been convincing for his audience, as his public appearances usually are. Over the years our discussions have helped me to sharpen my thoughts and have been a great motivation to continue. This thesis would not have been possible without his support.

My special thanks go to Dr Harald Grams from Germany. Very often we have seemed to be inseparable, at conferences, as co-authors for articles, as defendants before the European Court of Justice, at prize ceremonies, study weekends and in other places. We have developed this subject together and he has stimulated me to push through and publish my personal view on the taxation of international performing artistes. I hope to combine forces with my good friend for many more years.

The “muse” for this academic work has been my wife, Dr Moniek de Maat. She has inspired me to undertake the long journey of this thesis and has given me the support to continue to the end. She is a medical researcher and has nothing to do with international tax law, but she has shown that the academic approach and discussions can be universal. I want to thank her for all the inspiration.

I would also like to thank Professor Daniel Sandler from Canada for our discussions, his interesting book from 1995 and the comments he gave on my draft manuscript. Also thanks to Professor Peter Kavelaars and Professor Henk van Arendonk, who gave their comments.

I am grateful for the trust of Professor Wim Wijnen of the International Bureau of Fiscal Documentation, who gave me access to the online tax treaty database of the IBFD for one of the surveys and gave me the opportunity to publish this book in the Doctoral Series.

Furthermore, many thanks to everyone at All Arts Tax Advisers and our clients, the organizers and attendants of the International Live Music Conference, Ben Giezenaar, everyone at Mojo Concerts, the Concertgebouw, The Alternative and many others who gave me the chance to gather information for this thesis in practice. Also thanks to Rijkele Betten for our discussions and his support.

And personally I would like to thank many, many friends for their understanding and inspiration while I was working on this thesis.

Where this book says “he”, it always includes “she”. The word “artiste” is both male and female, but any other word that is used in only the male form is always intended to include the female form.

The views expressed in this book are solely those of the author and do not purport to represent the views of any other person.

Dick Molenaar
November 2005

