CHAPTER 3

WHO IS AN ARTISTE?

3.1. Various publications, different views, Article 3(2) of the OECD Model

Given the special treatment of international artistes it is important to have a clear definition and perception of who is an artiste. Who will fall under the special provisions of Article 17 and who under the normal rules of Article 7 ("Business profits") or Article 15 ("Income from employment")? For international artistes it is in most cases not important to consider whether their work is done as a self-employed person or as an employee, because under Article 17 the approach is different, focusing on the type and content of the work and not on the legal position. Artistes are not treated the same as other people when it comes to international taxation. But who has the right (or obligation) to call himself an artiste?

Artistes are to be taxed in the country of their performance activities, meaning that not just the international definition of "artiste" but also the national definitions are important. This is inevitable, because the country of performance needs to exercise tax rights based on its own national tax law. Article 3(2) of the OECD Model Tax Convention also stresses the importance of the national definitions in situations when a specific term has not been defined clearly enough within a tax treaty or its context, such as the OECD Model Tax Convention, the OECD Commentary, other explanations and in national court cases.

Article 3(2) of the OECD Model Treaty reads as follows:

> Article 3(2)
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> As regards the application of the Convention at any time by a Contracting State, any term not defined therein shall, unless the context otherwise requires, have the meaning that it has at that time under the law of that State for the purpose of the taxes to which the Convention applies, any meaning under the applicable tax laws of that State prevailing over a meaning given to the term under other laws of that State.

The article allows countries to rely on their national law when the OECD definition or examples are not clear enough. Article 3(2) is a "general rule

of interpretation",[1] a so-called "catch all" provision. Priority is first given to the text of a tax treaty, with the context of the tax treaty as a second priority. This context could include all of the items which may be taken into account, or to which one may have recourse, in interpreting treaties generally,[2] but for artistes, this context will be Article 17 of the OECD Model Treaty, its Commentary and other documents, such as the 1987 OECD Report, together with tax authority and court decisions in the contracting states in matters involving a tax treaty.[3] Only when a definition is still not clear enough will national interpretation rules take over, at the bottom of the interpretation hierarchy.[4] Not everyone agrees with this hierarchy, considering that national rules should come into play at an earlier stage.[5]

Article 3(2) contains a more direct approach than Articles 31, 32 and 33 of the Vienna Convention on the Law of Treaties (VCLT), which also provide interpretation rules for tax treaties. These articles require the interpretation of a treaty "in good faith" and "in the light of its object and purpose" and also refer to the context of a treaty, but do not make any reference to national law.[6]

In the last few years the dynamic interpretation of tax treaties has more often prevailed, meaning that the applicable interpretation is not derived from the OECD texts or national tax laws in force at the time of the signing of the tax treaty, but from those existing at the time of imposing the tax.[7] This means that for artistes the details of the 1987 OECD Report or additions in the Commentary on Article 17 can also be important for the

1. Paragraph 11 of the OECD Commentary on Art. 3(2).
2. John Avery Jones et al., "The Interpretation of Tax Treaties with Particular Reference to Art. 3(2) of the OECD Model", *British Tax Review* (1984), at 14 and 90.
3. Daniel Sandler, *The Taxation of International Entertainers and Athletes – All the World's a Stage* (Kluwer Law International, The Hague, 1995), at 196.
4. American Law Institute, *Federal Income Tax Project – International Aspects of United States Income Taxation II* (Philadelphia, 1992), at 43.
5. Klaus Vogel, *Klaus Vogel on Double Taxation Conventions* (3rd ed., Kluwer Law International: 1998), at 207; Rolf Füger and Norbert Rieger, "German Anti-Avoidance Rules and Tax Planning of Non-Resident Taxpayers", 54 *Bulletin for International Documentation* 8/9 (2000), at 434.
6. Edwin van der Bruggen, "Unless the Vienna Convention Otherwise Requires: Notes on the Relationship between Article 3(2) of the OECD Model Tax Convention and Articles 31 and 32 of the Vienna Convention of the Law of Treaties", 43 *European Taxation* 5 (2003), at 142.
7. See Frank Engelen, *Interpretation of Tax Treaties under International Law* (IBFD, Amsterdam, 2004).

interpretation of Article 17 in bilateral tax treaties that were concluded earlier. For more discussion on this subject, see 2.15.9. and further.[8]

National tax rules can also be important in this discussion about tax treaty interpretation. The opinions of the various authors, which are often discussed in this thesis, are interesting for interpretation but do not belong to the context of a tax treaty and therefore do not have an official position under Article 3(2) of the OECD Model Treaty. Although they can provide assistance in doubtful cases they are not binding.

The following paragraphs will start with an explanation of the literal common-language meaning of the words “artiste” and “entertainer” by bringing together explanations from various dictionaries and languages. After that, several publications that have been issued about the definition of an “artiste”, by international institutions, various authors and by the governments of different countries, will be discussed. These publications will be brought together and compared, to ascertain the overlaps and differences in the definitions. Finally, a general and acceptable definition of the term “artiste” will be given, to be used in all circumstances, for all types of modern and classical artistic services. Together with this definition, a list of existing artistic services will be produced and tested against the general definition. The objective is to provide an exhaustive definition of all the types of artistic service that can be considered.

3.2. The meaning of the words “artiste” and “entertainer”

What do the words “artiste” and “entertainer”, the two central words in Article 17(1) of the OECD Model Tax Convention, literally mean?

> Article 17. Artistes and Sportsmen
>
> 1. Notwithstanding the provisions of Articles 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.

The word “artiste” is mentioned in the title of Article 17 of the OECD Model Tax Convention and the word “entertainer” is used in the text of the

8. See also the decision of the German *Bundesfinanzhof* (Federal Supreme Court) of 18 July 2001, which is described in 3.4. and 3.10.

article, but then again the word "artiste" is linked to the examples that are given in the text. Therefore, both words need a good explanation, although the word "artiste" seems to have a predominant position.

Dictionaries (US and UK) give the following meanings for the word "artiste":

- "A professional person in any of the performing arts; a person very skilled in his work; often humorous or facetious" – *Webster's New World Dictionary* (2nd College ed., Simon and Schuster, New York, 1980);
- "An artist, especially an actor, singer, dancer, or other public performer" – *Random House Webster's Unabridged Dictionary* (2d ed., Random House, New York, 1999);
- "A public performer who appeals to the aesthetic faculties, as a professional singer, dancer, etc.; also one who makes a 'fine art' of his employment, as an artistic cook, hairdresser, etc." – *Oxford English Dictionary* (2nd ed., 1989);
- "Professional performer, especially a singer or dancer" – *Concise Oxford Dictionary* (9th ed., Clarendon Press, Oxford, 1995);
- "A professional entertainer such as a singer, a dancer or an actor" – *Oxford Advanced Learner's Dictionary* (6th ed., 2003); and
- "A professional entertainer, especially a singer or dancer: *cabaret artistes*. Origin: early 19th cent.: from French (see Artist)" – *Oxford Dictionary of English* (2nd ed., 2003).

The difference between the word "artist", and "artiste" is quite interesting. Artist has a broader meaning, according to most of the dictionaries, and covers those who create works of art, such as painters and sculptors, together with the more figurative meaning of the word "artist", as in "whoever made this cake is a real artist". In this thesis the word "artiste" is used because of its restriction to the performing arts.

The word "entertainer" is also a key word, especially in the text of Article 17 of the OECD Model Tax Convention. The dictionaries give the following meaning for the word "entertainer":

- "Professional provider of amusement" – *Concise Oxford Dictionary* (9th ed., Clarendon Press, Oxford, 1995);
- "A person whose job is amusing or interesting people, for example, by singing, telling jokes or dancing" – *Oxford Advanced Learner's Dictionary* (6th ed., 2003); and

– "A person, such as a singer, dancer, or comedian, whose job is to entertain others" – *Oxford Dictionary of English* (2nd ed., 2003).

With the wording in the title ("artiste") and the text ("an entertainer, such as a ... artiste"), Article 17 of the OECD Model Tax Convention seems to assume a strong connection and partial equivalence between these two words. This connection also exists in the dictionary descriptions, but there are also differences. The word "entertainer" seems to cover the lighter versions of the performing arts, comparable with the term *Unterhaltungskunst (U-Kunst*) in the German language, while the word "artiste" seems to cover the more serious expressions of performing arts, such as classical dance, music, theatre and opera, comparable with the term *Hochkunst (H-Kunst)* in the German language.

The dictionary explanations are very informative, but do not give a sufficiently complete definition of the word "artiste" for the interpretation of the artiste article in many tax treaties, following the example of Article 17 of the OECD Model Tax Convention. Much more is needed to arrive at a complete definition.

3.3. First description in the 1939 United States–Sweden tax treaty

As described in 2.6., the first special artiste provision in a tax treaty was found in the 1939 United States–Sweden tax treaty. According to Article XI(d) of this treaty this special provision had to be applicable to "individuals such as actors, artistes, musicians". In the discussion afterwards the moving-picture actor was specifically mentioned as an example. No clear definition was given in the tax treaty; it seemed at that time clear what was meant by this special provision.

This did not change in the tax treaties that were concluded by the United States with other countries in the 1940s and 1950s.

3.4. Second description in German tax treaties in 1950s and 1960s

From 1954 to 1967 Germany concluded ten similar tax treaties with other European countries. These treaties did not contain the same artiste

provision as the early US tax treaties, because only self-employed artistes were brought under the taxation in the country of performance. I have described this in 2.9.

Nor did these tax treaties give a clear definition of "artistes". For instance, Article 9(2), second sentence, of the tax treaty of 1959 between Germany and the Netherlands used the phrase *künstlerische, vortragende, sportliche oder artistische Tätigkeit* ("artistic, performing or sports activity"), but did not explain the words further. It is important to notice that the German tax treaties used a much wider description than the earlier US treaties, making clear the necessary "arts", "performing" or "entertainment" character of the activity.

Did all three criteria have to be met to qualify for the special provision or was it enough to fall under only one? In the first situation the scope of the provision would be limited to the performing and entertainment arts, focusing on acting in front of an audience; in the latter situation the effect of the provision would become very wide, including as artistes even sculptors and painters, who make their works of art in their ateliers, performers as speakers in front of an audience during scientific conferences, and anyone in the entourage of performing artistes. Following the exact wording of the article in the German tax treaties the conclusion needs to be that the latter, much wider explanation had to be followed, because of the connecting word *oder* ("or").

This wide description has in practice given Germany for many years the opportunity to tax more non-residents under the general non-resident tax rules in its country than only real performing artistes. When a tax treaty does not restrict the tax right, Germany applies its general non-resident tax rules, making any foreigner earning income in Germany liable to German income tax.[9] Therefore, under the broader "artiste" tax rules of the older German tax treaties non-resident artistic service providers, who did not perform on stage but played their role in putting on performances, were also taxed in Germany. This changed only a few years ago, when the *Bundesfinanzhof* (Supreme Tax Court) decided to modify its explanation of the treaty article about "artistes" to a more limited version, with a decision about *Bühnenbildner* ("stage designers" and "builders") and

9. § 50a *Einkommensteuergesetz* (Income Tax Act).

Regisseure ("play directors").[10] This decision is also discussed in 3.10. and 3.12.1.

But even after this modification of the German definition of an artiste by the *Bundesfinanzhof* a Dutch sound technician, for example, could still suffer double taxation after having worked in Germany. In practice, a non-resident needs to apply in Germany for an official exemption for any German income, even when this is clearly exempted in the tax treaty or has been decided by an institution such as the *Bundesfinanzhof*. This administrative obstacle exists today not only in Germany but also in countries such as Spain and France.

In the case of the Dutch sound technician the Dutch tax authorities did not allow him a tax exemption (or credit) in the Netherlands for the self-employed income that was taxed in Germany under the broader "artiste" tax rules. The Dutch *Gerechtshof* (Tax Court) decided to follow this opinion and concluded that the sound technician was not an artiste under the Germany–Netherlands tax treaty. Therefore Germany did not have the right to tax the income and the sound technician was not entitled to a tax exemption in the Netherlands. The *Gerechtshof* concluded its decision with the consideration that a German tax refund could easily be obtained.[11] Unfortunately, this is easier said than done and is based on a misunderstanding of the very broad and protective German withholding tax system, that still exists, despite the decision of the *Bundesfinanzhof* mentioned above. It has taken the sound technician in practice until early 2005 to obtain a partial German tax refund. Unfortunately, 2 of the 5 years had by then expired for the refund, leaving the sound technician with considerable overtaxation (on aggregate 60% of his gross fees).

3.5. Clearer description in the 1963 OECD Draft Model Treaty

The first centralized artiste provision was introduced officially in Article 17 of the 1963 OECD Draft Model Treaty, as discussed in 2.10. It applied the new provision to "*public entertainers, such as theatre, motion picture, radio or television artistes, and musicians*". The 1963 Draft Model Treaty was explained further by an official Commentary, but the descriptions of

10. *Bundesfinanzhof* 18 July 2001, I R 26/01, *Internationales SteuerRecht* 20/2001, at 653.
11. *Gerechtshof Den Haag*, 7 November 2002, 00/2288, *Vakstudie Nieuws* 2003/9.12.

"public entertainers" and "musicians" were not specified further. Article 17 first appeared in Article XI of the 2nd Report of the OEEC Committee on Fiscal Affairs of July 1959. This article contained the same text.

The introduction of the description "public entertainers" in 1963 made Article 17 more precise and accurate than the description in the US and German tax treaties up to then. The combination of the words "public", showing that the activity needed to be available for people to watch or listen to, and "entertainers", stressing the necessity of an entertainment character to the activity, limited the scope of the article considerably compared with e.g. the German tax treaties.

The examples that were given specified that in any case, but not only, "theatre, motion picture, radio and television artistes, and musicians" would fall under the description. The examples make it clear that not only performances directly before an audience but also recorded performances for film, radio and television were considered to be public, since the latter performances are made indirectly before an audience. But the addition of the term "artistes" is also important because it refers to an artistic performance, although nothing is said about the necessity for a certain artistic level.

3.6. Minor adjustments in the 1977 OECD Model Tax Convention

The description of Article 17 was slightly changed when the second paragraph was added to the article in 1977, to counteract tax avoidance schemes involving artiste star companies. Two changes were made: (1) Article 17 received the title "Artistes and Athletes", and (2) the word "public", originally placed in front of the word "entertainers", was deleted from Paragraph 1 of the article. The description after the 1977 changes reads as follows: "an entertainer, such as theatre, motion picture, radio or television artistes, and musicians".

The official Commentary regarding the description in Article 17(1) was kept unchanged in 1977, perhaps making it clear that the change was to be considered as a minor adjustment. No explanation was given as to why the word "public" was deleted in 1977.

3.7. More description of the "artiste" in the 1987 OECD report

In 1987 the OECD published a Report on the taxation of artistes and sportsmen;[12] this was partiallly discussed in 2.12. This Report changed the Commentary on Article 17 drastically and gave an indication of the impression that national governments had about international artistes (and sportsmen). Submissions for the Report came from 19 different countries and the descriptions provided referred to the year 1986.

Paragraph 5 of the 1987 Report provided a more or less general definition of an artiste:

> 5. Since the main focus for the report is on the tax treatment of "artistes and athletes", it may be as well to define these terms. For the purpose of the report, these terms are taken to cover any person engaged, either individually or as a member of a group, in public entertainment or sporting activities. A number of countries prefer the term "entertainer" to "artiste" and "sportsman" to "athlete" and the text and commentary of Article 17 used the terms artiste and entertainer almost interchangeably. To simplify matters, however, this report uses the terminology "artiste" and "athlete", though it has been agreed that in any general revision of 1977 Model, the term "sportsmen" will replace "athletes". Sometimes the term "performer" is used as a shorthand term for persons carrying out public entertainment, artistic and sporting activities.

This general definition unfortunately did not make the terms "entertainer" and "artiste" much clearer, because the same wording of "public entertainment" was used again in the explanation. And the vague distinction between the just slightly differentiated words "entertainer" and "artiste" did not contribute to a clearer definition.

In the Paragraphs 67-69 and 72-73 of the 1987 Report the "personal scope" of Article 17 is discussed again:

> 67. The first issue concerned was whether the term "artistes" (as it appears in the title of Article 17), "entertainers" and "athletes" were sufficiently broad to cover all the persons it is wished to tax under Article 17.
>
> 68. As far as "artistes" are concerned, it was noted that paragraph 1 of the Article included examples of persons who would be regarded as such. However, these examples should not be considered as exhaustive. It was

12. "Taxation of Entertainers, Artistes and Sportsmen", in: *Issues in International Taxation*, No. 2 (OECD, Paris, 1987).

agreed that it was not possible to give any precise definition of "artiste", and that a variety of situations could arise. On the one hand, the term clearly includes the stage performer, film actor, actor (including for instance a former athlete) in a television commercial. Article 17 may also apply to artistes participating in activities which are political, religious or charitable nature, if an entertainment character is present. On the other hand, conference lecturers and persons interviewed on television are clearly not "artistes" in the meaning of Article 17. There is however a variety of intermediate situations where say, appearance on television or in public could generally be seen as "acting" for entertainment purposes, thereby falling under Article 17. In this grey area, it is necessary to review the overall balance of the activities of the persons concerned.

69. A discussion was held on whether and how Article 17 applied to the intermediate case of the "actor/producer" (or the television presentator/producer, or the dancer/choreographer). The conclusion was that in such cases, it is necessary to look at what the individual predominantly does in the country where the performance takes place. If his activities in that country are predominantly of a performing nature, Article 17 will apply to all the resulting income he derives in that country. If, on the other hand, the performing element is a negligible part of what he does in that country, the whole of the income will fall outside Article 17. In other cases, an apportionment might be necessary.

72. Consideration was given to whether, under the present wording of Article 17, there was some scope for covering "support" staff of artistes. There was agreement that a narrow interpretation should prevail and that both the intention and the language of Article 17 do not presently allow taxation under Article 17 of producers, film directors, choreographers, technical staff, etc. Other Articles of the 1977 Model Convention would apply to such support staff (generally Article 14 and 15 and in certain cases Article 7).

73. While income received by impresarios, etc. for arranging the appearance of an artiste is outside the scope of Article 17, any income they receive on behalf of the artiste does of course come within the Article.

These paragraphs of the 1987 OECD Report give more detail about the scope of the terms "artiste" and "entertainer". Although the countries that provided the information for the 1987 Report were together not able to give a precise definition of the terms, the 1987 Report provided some more examples of how to decide in specific situations, such as artistes taking part in television commercials and in political, religious and charity events, or the status of conference lectures and television interviews. It also made clear the position of "impresarios", such as agents, managers and event promoters, and of technical staff, accompanying personnel, choreographers and directors.

Of course, activities with both performing and non-performing elements are still difficult to allocate. But Paragraph 69 has given a helpful procedure for decision-making in these situations. When one of the activities is predominant, the smaller portion of the activities can be ignored. The question remains, however: what is predominant, and where does the cut-off point lie – at 51%, 70% or 90% of the total activity? The 1987 Report seems to suggest that it needs to be larger than a simple majority, because otherwise the last sentence of Paragraph 69 about apportionment would not make sense. But when the word "predominant" is studied more closely, e.g. by taking the definition from the Oxford Dictionary of English,[13] the position that a simple majority is sufficient can also be supported.

The Austrian Ministry of Finance has given a suggestion for a percentage,[14] resulting in the following decision procedure:

> Combined activities, partly consisting of performing arts and entertainment activities:
> – when more than 80% of total activities: only Article 17 applies
> – when between 20% and 80% of total activities: apportionment of income over Article 17 and Article 7 or 15
> – when less than 20% of total activities: Article 17 does not apply (but Article 7 or 15)

The 1987 Report did not say anything about the artistic or entertainment level of the performance. For the scope of Article 17, a performance must be artistic or entertaining and needs to add a certain value, but no objective or subjective artistic level has to be met.

3.8. Continuation in the 1992 OECD Commentary

The 1992 Commentary on Article 17 of the OECD Model Tax Convention took over parts of the 1987 OECD Report. The Paragraphs 5, 67, 68, 69, 72 and 73 were combined and inserted in the new Paragraphs 3, 4 and 7 of the 1992 Commentary.

13. The Oxford Dictionary of English describes the word "predominant" as: "present as the strongest or main element: *the predominant colour was white*" or "having or exerting control or power: *the predominant political forces*".
14. *ÖstBMF* 12 April 1994, 4 *SWI* 150 (1994).

In many areas, adjustments were made in the text of the Commentary after 1992, updating more regularly the interpretation of the OECD Model Tax Convention. The latest issue is now the 2003 Commentary. However, the paragraphs defining the term "artiste" have not been changed since 1992. See Appendix 1 at the end of this thesis for the full text of the 2003 Commentary on Article 17.

3.9. Little help in the wording in the 1996 US Model Tax Convention

As discussed in 2.14., the United States has its own Model Tax Convention. The heading of Article 17 of this US Model Tax Convention uses the word "Artistes" and the article talks about "an entertainer, such as a theatre, motion picture, radio or television artiste, or a musician". This is the same description as in the OECD Model Tax Convention (after the 1977 changes).

The Technical Explanation to Article 17 of the 1996 US Model Tax Convention adds little to the OECD Commentary and does not make the scope of Article 17 much clearer:

> [224] This Article applies only with respect to the income of performing artistes. Others involved in a performance, such as producers, directors, technicians, managers, coaches, etc., remain subject to the provisions of Articles 14 and 15. In addition, except as provided in Paragraph 2, income earned by legal persons is not covered by Article 17.
>
> [231] As indicated in paragraph 4 of the Commentaries to Article 17 of the OECD Model, where an individual fulfils a dual role as performer and non-performer (such as an actor-director), but his role in one of the two capacities is negligible, the predominant character of the individual's activities should control the characterization of those activities. In other cases there should be an apportionment between the performance-related compensation and the other compensation.

These two paragraphs show that there is also no in-depth description of the term "artiste" in the Technical Explanation to the 1996 US Model Tax Convention. This is not particularly strange because the US Model is partly based on the OECD Model and its Commentary, as they existed in 1995.[15] This means that any gap in the Technical Explanation to the 1996

15. Paragraph 2 of the Technical Explanation to the US Model Income Tax Convention of 20 September 1996.

US Model may be filled with the descriptions from the Commentary to the OECD Model, especially as Article 17(1) has the same basic wording in both texts.

3.10. Klaus Vogel on double taxation conventions

The standard book edited by Klaus Vogel (hereinafter: "Vogel") about double tax conventions also includes a chapter about Article 17.[16] The chapter has been written by Frans Stockmann and gives some extra explanation of the definition of the term "artiste". The book is mainly based on the OECD Model Tax Convention and its Commentary, but also refers to German tax treaty policy and domestic tax law. This combination leads to some new views. The following are taken from the chapter about Article 17:

> Comment 13a:
> *Entertainer*: The exemplary enumeration of the various types of entertainers is not exhaustive, but is restricted to *performing entertainers*. That only these can be meant is borne out by both original versions of the MCs: the English text of OECD MC refers to "entertainers" (MC 63: "public entertainers") and the French text refers to "artistes du spectacle" (MC 63: "professionels du spectacle").
>
> In general, the text of Art. 17 MC suggests a narrow interpretation of the entertainer term on the broader domestic interpretation.
>
> Therefore Art. 17 refers only to entertainers who directly or indirectly (via the media) *appear in public* performances which possess an *artistic* or *entertainment character*.
>
> Art. 17, therefore, does not cover those forms of artistic services which consist of *producing "works"*, such as the activities of painters, sculptors, writers, composers. Nor do individuals involved in producing films (such as directors, cameramen, cutters, sound engineers, choreographers, producers) have income of the kind envisaged by Art. 17, but only actors, and musicians, if involved.
>
> *Not* included in the entertainer term are speakers at conferences and interview guests on television shows (round-table discussions, talk-shows) as well as support staff and administrative personnel (such as technical personnel or the road crew for a pop group).

16. *Klaus Vogel on Double Taxation Conventions* (3rd ed., Kluwer Law International, 1998), at 965.

In contrast, according to German practice where theatres are concerned, directors, stage designers and costume designers who only have an *indirect* artistic effect are assimilated to actors. See Bundesfinanzhof 31 HFR 8 (1991), on Germany's DTC with Belgium, with reference to the German domestic tax law, establishing that a director and stage designer who only have an *indirect* artistic effect on the production are subject to the application of Article 17.

An exception arises, however, where an artistic activity does not directly "flow into" a performance, but where the *finished product* of the activity is used in the performance, such as a painting by a stage painter.

Comment 13b:
Often, it is uncertain whether the performance in question should be classified under Article 17 MC or not. For instance, it is possible for the same person in one show to be both an actor and producer, or a dancer and choreographer. In this type of combined case, taxation is to be geared to the *predominant part of the activity* performed in the State of the activity. Depending on this predominant part, either the State of performance or the State of residence taxes the respective income fully. This is recommended because the numerous contractual arrangements make a division of the income received by the tax authorities difficult, if not impossible.

If a foreign entertainer receives a lump-sum payment for giving a concert and the parties have agreed that 80 per cent of the payment is for the artistic performance and 20 per cent is for using the instruments, according to ÖstBMF the entire payment is to be taxed in the source State (ÖstBMF of 12 April 1994, 4 SWI 150 (1994)).

Comment 13c:
In the case of *new forms of art*, i.e. where performance and production of a "work of art" intermingle – "happenings", "land art" etc. – the decisive point is whether the income is based on the performance in public (audience) or on a later showing of the "work". In regard to the applicability of Art. 17, the artistic quality of the performance or performer is just as irrelevant as is the question of whether the performance is entertaining.

According to BFH cases, it should at least be artistic ("künstlerisch"). However, in view of the original versions of the MCs, even this interpretation is still too narrow.

Comment 16:
Whether or not *touring theatrical companies* and other troupes come under Art. 17 is unclear even following the 1992 change to the MC Commentary, although the MC Commentary now intends to cover these legal entities as well. In the cases meant by para 8 MC Commentary Article 17, however, the artistic activity is of primary importance, while the supporting elements such as building the stage, etc. are of lesser significance. Touring theatrical companies, in contrast, 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. Article 17 could be considered to be applicable only if the whole show was a matter of acting. If not, Article 7 would be applicable, viz. that taxation in the State in which the company merely gave performances at varying places would generally not be permissible because of the absence of a permanent establishment (US Letter ruling 8439039: DTC USA/Austria).

The comparison between the OECD Model Tax Convention and its Commentary and the national tax rules, such as the German domestic legislation and case law, makes Vogel's approach very interesting. Do individual countries accept the recommendations of the OECD Commentary on Article 17 or do they follow their own interpretation? The German approach towards the scope of the definition of an "artiste" is a good example of the different views that can exist.[17] In the sixth point of Comment 13a, Vogel suggests a difference in views between Germany and the OECD regarding directors, stage designers, etc., but evidently this book from 1997 could not deal with the later decision by the German *Bundesfinanzhof*, which changed its tack in 2001 with the decision that these persons were (no longer) considered as artistes under the tax treaties between Germany and Austria and Germany and the Netherlands.[18] The *Bundesfinanzhof* explicitly referred to the 1977 Commentary on Article 17 of the OECD Model, even though the tax treaties with Austria and the Netherlands were concluded in 1954 and 1959, respectively.[19]

3.11. Daniel Sandler and IFA Seminar in 1995

In his book *The Taxation of International Entertainers and Athletes*[20] Daniel Sandler also discusses the definition of the terms "artiste" and "entertainer". On pages 179-181 he makes some critical remarks about the wording of the OECD Commentary:

17. See also 3.4.
18. *Bundesfinanzhof* 18 July 2001, I R 26/01, *Internationales Steuerrecht* 20/2001, at 653. See also 3.4. and 3.12.1.
19. A discussion about the effect of changes in the OECD Commentary on tax treaties concluded earlier can be found in 2.15.4., 2.15.5. and 2.15.6.
20. Daniel Sandler, *The Taxation of International Entertainers and Athletes* (Kluwer Law International, 1995).

> Article 17(1) specifically lists a number of examples of artistes. The Commentary to Article 17 states that the examples given should not be considered exhaustive.
>
> This Commentary is not particularly contentious. The provision is limited to performing entertainers – individuals who perform in public, directly or indirectly (via the media). Individuals providing services "behind the scenes", such as directors, cameramen, cutters, and sound engineers are not included. Nor are artistic activities which do not involve public performances, such as the activities of painters, sculptors, photographers, writers and composers.
>
> What is surprising, in fact, are the individuals specifically excluded from the ambit of Article 17, rather than those included. For example, film directors are often more well-known and certainly as mobile and as well paid as the actors they direct. If directors are excluded from Article 17, it is likely that they would (if non-resident) escape liability from taxation in respect of fees paid for directing a theatre production or film in a source State (whether paid by a person in that State or not), as they would likely lack a fixed base in that State.
>
> Neither the Article nor the Commentary considers professional models. Many "super-models" have reputations at least as great as the designers whose clothes (or other fashion accessories) adorn them. It is certainly open to doubt whether models participating in photo-shoots could be considered entertainers, as that term is used in Article 17. The issue becomes more clouded where the model participates in a fashion show or a commercial. It is unlikely that a fashion show could be considered theatre, although it may be considered a form of entertainment for spectators, many of whom may attend as much to see the models as to see the clothes they wear. Where a model appears in a commercial, they may be considered to be acting.

Sandler touches on the interesting issue of why Article 17 of the OECD Model Tax Convention had to be limited to only artistes and sportsmen. Non-compliance and tax avoidance issues[21] also apply to other individuals who can be very mobile and earn fortunes on their way through the world. It can therefore be questioned why these others have not been included in Article 17?

On the other hand Daniel Sandler unfortunately did not attempt in his book to give a more precise definition of the terms "artiste" and/or "entertainer".

In September 1995 the International Fiscal Association (IFA) held its annual conference in Cannes, France. In Seminar D the international

21. See chapter 2 and especially the 1987 OECD Report for the reasoning behind these arguments.

taxation of entertainers and sportsmen was discussed.[22] Daniel Sandler presented the introduction to the Seminar, in which he expressed his views on the question: "Who is an entertainer?"[23] He mentioned parts of the critical remarks of his book and again stressed the exclusion from Article 17 of some other professionals, such as models and film directors.

3.12. Articles and court cases in various countries

The definition of an artiste has been the subject of various court cases and articles in tax magazines. This paragraph provides a short overview of publications in different countries.

3.12.1. Germany

In 1986 Dr Helmut Krabbe described the position of the artiste in the German tax law in his article "Beschränkte Steuerpflicht bei künstlerischen, sportlichen, artistischen und ähnliche Darbietungen".[24] He confirmed the very broad German scope that resulted from the text of the older tax treaties that Germany had concluded in the 1950s and 1960s. Any artistic presentation was taxable in Germany – not only performances in front of an audience or recorded to be broadcast later, but also artistic exhibitions by painters and sculptors not having a performance character. Even supporting persons, such as directors, choreographers, composers, stage designers, impresarios and agents, together with non-artistic persons such as quiz masters and quiz participants, were taxable in Germany, according to Krabbe, who was a government director at that time. This was a very broad but also logical explanation, seen in the light of the German tax treaties, as discussed above in 3.4.

Most prominent is the article by Prof. Dr Franz Wassermeyer of Germany in 1995, called "Der Künstlerbegriff im Abkommenrecht".[25] Coming from a judge at the *Bundesfinanzhof* in Munich, Wassermeyer's opinion may be considered quite important for German practice. In the article

22. The proceedings of the seminar were published in the book *Taxation of Non-Resident Entertainers* (Kluwer Law International, 1995).
23. IFA (1995), at 14.
24. *FinanzRundschau (FR)* 16/1986, at 425.
25. Franz Wassermeyer, "Der Künstlerbegriff im Abkommenrecht", *Internationales Steuerrecht (IStR)* 12/95, at 555.

Wassermeyer takes the view that to determine who is an artiste in tax treaties, Germany solely needs to focus on the definition in the international tax treaties and especially the OECD Model Tax Convention and its Commentary. With this approach he turned away from the existing, very broad German definition,[26] as described in 3.4. Whilst saying this, he also concedes that the OECD Model Tax Convention does not give a real definition but only some examples, and he follows this by himself giving a long list of examples from various German tax court decisions.

Wassermeyer is also very explicit that the performance of an artiste needs to be artistic,[27] but he does not set a certain level of artistry. Even if the entertainment character of a performance outstripped the artistic element, the performance would for Wassermeyer fall within the definition of an "artiste". In this he followed the explanation of Vogel, as described in 3.10.

Scientists as speakers at conferences are not artistes, as Wassermeyer mentions in connection with his own profession and that of Prof. Vogel. This is the same for painters, sculptors, composers, authors, photographers, designers, architects, stage builders and directors. But on the other hand Wassermeyer considers as artistes orchestra conductors, soloists, singers, orchestra and ensemble members, classical, rock, pop or dance musicians, poetry readers, circus artistes, fakirs or clairvoyants. He mainly uses decisions of the German *Bundesfinanzhof* as authority for his division between artistes and non-artistes.

Wassermeyer has an interesting opinion about the artiste Christo, who covered the *Reichstag* with paint in Berlin in the early 1990s as a piece of art. Christo was partly creating a piece of art and partly performing. But with the disappearance of the piece of art, Wassermeyer considers this less important than the performance, which means that according to Wassermeyer's opinion Christo fell under Article 17. After giving some more examples Wassermeyer finally concludes that the definition of the term "artiste" still seems to be quite arbitrary.[28]

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26. The articles in German tax law (§§ 18 Abs. 1 No. 1 and 50a Abs. 4 Nos. 1 and 2 of the EstG and § 5 Abs. 3 S. 1 GG) are going much further than the definition in Article 17 of the OECD Model.
27. He founds his opinion on these decisions: *Bundesfinanzhof* 16 February 1987, IV R 105/85, *BStBl. II* 1987, 376; BFH 22 March 1990, IV R 145/88, *BStBl. II* 1990, 643; BFH 14 December 1976, VIII R 76/75, *BStBl. II* 1977, 474.
28. The opinion of Franz Wassermeyer returns in Debatin/Wassermeyer, *Doppelbesteuerung: DBA* (Art. 17 *MA*) (Verlag C.H. Beck, 2004), at 18.

Wassermeyer's opinion came through in a decision of the *Bundesfinanzhof* 18 July 2001.[29] This held that the income of a stage builder and theatre play director was not taxable in the source country, although the applicable tax treaties between Germany and Austria, and Germany and the Netherlands contained the broad description of artistic services as described in 3.4. The *Bundesfinanzhof* clearly put aside the very broad German approach in favour of the more generally accepted but narrower approach of the OECD Model Tax Convention. This was an important decision for the practice of German tax treaty interpretation.

It cannot be expected that national German tax legislation will be adjusted after this *Bundesfinanzhof* decision. The tax rules of § 50a of the *Einkommensteuergesetz* (Income Tax Law) will remain very broad, making all payments from German sources to foreigners taxable in the first instance. But a referral to the applicable tax treaty between Germany and the home country of the foreign off-stage creative person will restrict German taxation and lead to a German tax exemption. To achieve this, an application needs to be filed with the *Bundesamt für Finanzen* in Bonn.

The German interpretation is also explained by Michael Maßbaum in the publication *Die Künstler- und Sportlerklausel in DBA*.[30] One of the issues Maßbaum discusses is whether the artistic element of the performance ought to be a creative achievement at a certain level. Maßbaum denies this and supports the opinion that an artistic performance can be simply entertaining and bring pleasure, *diversion and pastime*. In his opinion also quizmasters and quiz participants can be seen as artistes. After Wassermeyer Maßbaum also believed that Germany had to change from its own broad scope to the narrower OECD scope.

3.12.2. Austria

Articles were written by Dr Helmut Loukota,[31] concentrating especially on the differences between the wider description in Austria (and Germany) and the narrower approach in the OECD Model Tax Convention. In Austria

29. See 3.4.
30. *Internationale Wirtschaftsbriefe (IWB)* 3, 12 February 1997, at 127.
31. Dr Helmut Loukota, "Besteuerung ausländischer Künstler", *SWI* 1991, at 251; "Doppelbesteuerungsabkommen und 'Ausländersteuer'", *SWI* 1993, at 275; "Grenzüberschreitend tätige Künstler", *SWI* 1998, at 58.

an artiste is a person who carries out a personal, creative activity in a cultural environment based on artistic talent or education:

> *Als Künstler kann nur derjenige angesehen werden, der eine persönliche, eigenschöpferische Tätigkeit in einem umfassenden Kunstfach auf Grund künstlerischer Begabung entfaltet. Das vorliegen einer künstlerischer Begabung ist in der Regel bei einer abgeschlossener Hochschulbildung anzunehmen; andersfalls ist die Künstlereigenschaft nach der vom Abgabepflichtigen entfalteten Tätigkeit zu prüfen. Neben der Künstlereigenschaft it die Art der Tätigkeit für die Zuordnung zu den Einkünften aus selbständiger Arbeit maßgebend.*[32]
>
> (Only a person who has a personal, creative activity in a cultural field, based on artistic talent, can be considered an artiste. The existence of artistic talent will be present if an arts education programme has been followed successfully; otherwise the artistic element needs to be proved from its actual appearance. Next in importance to the artistic element for the allocation to self-employed earnings is the sort of activity.)

This means that there are three main differences from the OECD Model description: (1) in Austria the artistic element is important and is considered from the perspective of the artiste, (2) in Austria the performance element seems to be ignored, and (3) a distinction is made between employees and self-employed activities. It is as if mainstream entertainment does not fall under the Austrian national artiste definition. This view was followed in articles by Roland Rief,[33] Stephan Loydolt[34] and Heinz Jirousek.[35]

Loukota also explains that in international situations the OECD approach has to prevail over the Austrian definition. With the existing national definition this does not seem to lead to a restriction in Austria. On the other hand the broader definition in Article 17 of the OECD Model Tax Convention should not lead to an extension of the Austrian national tax rules.

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32. *VwGH* 24 February 1970, 528/69.
33. Roland Rief, "Die 'Künstler und Sportler'-regel des Artikel 17 OECD-Musterabkommen 1992", *SWI* (1994), at 183.
34. Stephan Loydolt, "Künstler und Sportler im DBA-Recht", *SWI* (1996), at 387.
35. Heinz Jirousek, "Die geänderte Auslegung der 'Künstler- und Sportlerklausel' im DBA mit Deutschland", *SWI* (1997), at 148; Heinz Jirousek, "Die Künstler- und Sportlerbesteuerung nach dem neuen östereichisch-amerikanischen Doppelbesteuerungsabkommen", *SWI* (1997), at 210.

3.12.3. Canada

The Canadian Income Tax Act uses the term "artist" but does not provide a definition. Most attention is paid to the criteria for distinguishing between employment and self-employed income to determine the deductibility of expenses. In this part of the Canadian Income Tax Act an artistic activity is described as – amongst other things – "the performance by the taxpayer of a dramatic or musical work as an actor, dancer, singer or musician".[36]

The decision in Canada in *Cheek v. The Queen* that was reached on 31 January 2002 was very interesting.[37] Under discussion was whether a "radio broadcaster" of baseball games would fall under Article XVI (Artistes and Athletes) of the 1980 Canada–United States Income Tax Convention. The radio broadcaster in question, Thomas Cheek, had been the commentator of the Toronto Blue Jays at home and away games since 1977, together with a partner-commentator. The parties agreed that Thomas Cheek was resident in the United States, was not an employee and – surprisingly – did not have a fixed base in Canada that would have made him taxable under Article XIV (Independent Personal Services). The only question that remained before the court was whether "the voice of the Blue Jays" was a "radio artiste", who had to fall under Article XVI of the treaty.

In a baseball game of three hours, only 16-18 minutes are actual "motion", the rest is "down time". The challenge facing the broadcaster is to hold the attention of the radio audience, even when there is no activity on the field. He needs to know a lot about statistics, players, coaches and any other prominent persons connected with the game, and is expected to fill the gaps with colourful commentary about anything happening. The court stated that professional sports in itself is entertaining, but doubted whether the broadcaster could be seen as an entertainer, i.e. as a "radio artiste", such as the late Bing Crosby. The baseball fan who turns on the radio to hear a particular baseball game wants to know how the players are performing on the field. The broadcaster may be able to hold the attention of the fan with his "down time" commentary but he is not the reason why the fan turns on the radio. Therefore the court decided that Thomas Cheek

36. Paragraph 8(1)(q)(iii) of the Income Tax Act.
37. *Cheek v. The Queen*, 2002 DTC 1283 (Tax Court of Canada); see also Nathan Boidman, "Canadian Taxation of Foreign Service providers: Tax Treaty Issues and Court Decisions", 56 *Bulletin for International Fiscal Documentation – Tax Treaty Monitor* 7 (2002), at 321.

was not a radio artiste, although he was a very skilful and experienced radio journalist.[38]

The Tax Court of Canada also referred for its interpretation to the Articles 31 and 32 of the Vienna Convention on the Law of Treaties, which in turn led to a reference to Article 17 of the OECD Model Tax Convention and its Commentary, together with some other court decisions. The court had stated already earlier that "in interpreting a treaty, the paramount goal is to find the meaning of the words in question",[39] and therefore looked at the definitions of the word "artiste" in various dictionaries. I have explained these definitions in 3.2.

Altogether the Tax Court of Canada carried out extensive research on the meaning of the word "artiste" for non-resident taxation, not only in Canada but also in other countries.

3.12.4. United Kingdom

In the UK Regulations an entertainer is defined as:

> any description of individuals (whether performing alone or with others) who give performances in their character as entertainer in any kind of entertainment, including any activity of a physical kind, performed by such an individual, which is or may be available to the public or any section of the public and whether for payment or not.[40]

A "relevant activity" refers to an activity performed in the United Kingdom by the entertainer in his character as such on or in connection with a commercial occasion, and includes any appearance of the entertainer in the promotion of any such occasion, and any participation by the entertainer in or for sound recordings, films, videos, radio, television or other similar transmissions (whether live or recorded).[41]

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38. Even though the court acknowledged that there was a grey area between "journalism" and "performing arts", as the last sentence of Paragraph 3 of the OECD Commentary on Article 17 also mentions.
39. *The Queen v. Crown Forest Industries Ltd.*, 95 DTC 5393 (Tax Court of Canada).
40. Paragraph 2(1) of The Income Tax (Artists and Sportsmen) Regulations 1987 (SI 1987/530).
41. Paragraph 6(2) of The Income Tax (Artists and Sportsmen) Regulations 1987 (SI 1987/530).

The special department for non-resident artistes, the Foreign Entertainers Unit (FEU), has issued an explanatory booklet with the name *FEU 50*, also giving a non-exhaustive list of examples.

Robert Maas published an article in 1988 explaining this regulation.[42] It seems clear to him that in the United Kingdom an entertainer must be a performer. The definition would not include people who were not on public view, such as playwrights, screenwriters, songwriters, composers, film or TV producers or directors, record producers, set designers or other similar people.

3.12.5. United States

The performance income of non-resident artistes is not mentioned specifically in the US Internal Revenue Code, but earnings from a US source fall under the general rules for "non-resident alien individuals".[43] Any foreigner receiving income from a US source falls under US taxation, unless a double tax treaty allows him an exemption.

The withholding requirements for payments to "non-resident alien individuals" are specified in a yearly IRS publication, in which a special section pays attention to the category "Artistes and Athletes".[44] This IRS publication does not give a definition of the term "artistes", but is providing the following examples:

> This category includes payments made for performances by public entertainers (such as theatre, motion picture, radio, or television artistes, or musicians) and athletes.

This refers to the text of Article 17(1) of the 1996 US Model Tax Convention, but unfortunately does not give any further information.

The US IRS sometimes clarifies specific situations, as in 1999 for an actor who was contracted to perform for a company in the advertising,

42. Robert Maas, "Withholding Tax on Foreign Entertainers and Sportsmen", *Taxation Practitioner, The Journal of the Institute of Taxation*, January 1988, at 6.
43. Title 26, Subtitle A, Chapter 1, Subchapter N, Part II, Subpart A, Sec. 871 of the Internal Revenue Code specifies a 30% tax, if the income is not connected to a US business. This tax is levied by means of a withholding tax under Title 26, Subtitle A, Chapter 3, Subchapter A, Sec. 1441 of the Internal Revenue Code.
44. IRS Publication 515, Rev. February 2004, page 25, Artists and Athletes (Income Code 20).

marketing, promotion and merchandise of products. The IRS concluded that the primary purpose of these activities was to promote and sell the company's products and therefore that the actor was not an "artiste" or "entertainer" for the purpose of non-resident artiste taxation. The fact that the contract referred to the person's normal activities as acting did not change the primary purpose of the contract. In this situation the US taxing rights needed to be judged by the normal rules for dependent or independent services.[45]

3.12.6. Netherlands

The current definition of the term "artiste" given in the Dutch *Wet op de loonbelasting 1964* (Wage Tax Act) is unfortunately far from clear:

> An artiste is someone who performs as such under an agreement (or any other basis for performance) for a short period.[46]

This definition is applicable to self-employed non-resident artistes and to non-resident artistes who are employed by a non-resident company that does not have a permanent establishment in the Netherlands. For an employment contract by a non-resident artiste with a Dutch employer the normal rules for employees are to be used.

A "short period" is defined as a period shorter than 3 months. This means that when self-employed artistes or groups perform in the Netherlands for a period of 3 months or longer no Dutch artiste withholding tax is applicable.

Before the year 2001 the Netherlands had an official definition of "artiste" in its tax regulation, namely "an artiste is someone who is performing directly or indirectly before an audience delivering an artistic service". This was published in an official publication, called the *Besluitenlijst van de Commissie Coördinatie Loonbelasting en Sociale Verzekering*.[47] The regulation was withdrawn in 2001 and was not replaced by a new, in-depth definition of the term "artiste", aside from the brief description in the *Wet op de loonbelasting* (Wage Tax Act), as given above.

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45. IRS Field Service Advice 30 September 1999, FSA 199947027, 19 *Tax Notes International*, at 2146.
46. Article 5a of the *Wet op de loonbelasting* 1964.
47. *Besluitenlijst* 27 May 1991, *V-N* 1991, at 1647.

Two recent Dutch court cases, about a self-employed Dutch sound technician in Germany[48] and a Dutch photo model in the United States,[49] made clear that in the Netherlands the description of an artiste in the OECD Model is followed.

Older Dutch court cases concerning disc jockeys decided that their performances were not artistic but just technical, because they only put completed records on a record player.[50] This would only be different if their announcements were entertaining, making their performances the act of a comedian.[51] It can be questioned whether this still makes sense in the modern dance music world, where disc jockeys are the new stars, announced on posters and playing their own record collections during large-scale and big-crowd dance festivals. The Netherlands seems to be the only country with this fiscal approach towards disc jockeys and the gap in the domestic tax law cannot be filled by the more extensive definition in Article 17 of the OECD Model Tax Convention.

This might lead to a situation of double non-taxation for disc jockeys coming from countries which rely on the exemption method in the tax treaty with the Netherlands as a measure to eliminate any double taxation. This is still the case in 12, mainly older, Dutch tax treaties.[52] Even with the credit method in a tax treaty, double non-taxation is also possible for disc jockeys from countries that unilaterally use the exemption method for foreign active income, and for disc jockeys living in tax havens.[53]

Income from rehearsals does not fall under the artiste tax legislation in the Netherlands, because rehearsals are not performances directly or indirectly before an audience.[54]

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48. *Gerechtshof Den Haag* 7 November 2002, 00/2288, *V-N* 2003/9.12. See also the end of 3.4.
49. *Gerechtshof Den Bosch* 14 November 2002, 00/2974, *NTFR* 2002/1907; following an earlier decision by the *Hoge Raad* 25 March 1992, 27 694, *V-N* 1992, at 1670.
50. *Gerechtshof Den Haag* 24 September 1981, *BNB* 1983/83.
51. *Centrale Raad van Beroep* 1 November 1977, *V-N* 1983, at 1849.
52. See 7.3.2. for an overview of double taxation elimination methods in the Dutch tax treaties.
53. More in general the issue of double non-taxation was a main subject at the 2004 IFA Congress in Vienna.
54. *Gerechtshof Den Bosch* 22 May 1970, *BNB* 1971/91.

3.12.7. Belgium

In the Belgian *Wetboek van inkomstenbelastingen 1992* (Income Tax Act) an artiste is defined as:

> a stage artiste, who takes part in performances and interpretations of artistic works to entertain an audience.[55]

Examples of stage artistes are actors, musicians, singers, dancers, imitators, circus artistes and entertainment hosts. Theatre and film directors, choreographers, stage designers, scenario writers, composers, mannequins and journalists presenting TV or radio journals are not considered artistes.

3.12.8. Australia

Australia does not have a separate regime for the taxation of non-resident artistes. They are generally treated in the same manner as other non-residents for tax purposes. In principle all Australian-source income is taxable, but exceptions are possible on the basis of bilateral tax treaties. Non-resident artistes are considered to be employees,[56] so that they can be brought under the Pay-As-You-Go withholding. This tax law together with the Income Tax Assessment Act has therefore specified a more detailed description of an artiste (and non-artiste):

> Regulation 44 [of the Pay-As-You-Go Withholding][57]
>
> Performing artiste includes a singer, dancer, actor, model or similar individual who is engaged to use his or her individual intellectual, artistic, musical, physical or other personal skills, conducted in the presence of an audience, intended to be communicated to an audience by print or electronic media, for a film or tape or for a television or radio broadcast.
>
> Section 405-25 [of the Income Tax Assessment Act 1997] – Meaning of special professional, performing artiste and production associate[58]
>
> You are a performing artiste if you exercise intellectual, artistic, musical, physical or other personal skills in the presence of an audience by performing

55. Article 228, § 2, 80 of the *Wetboek van inkomstenbelastingen* 1992.
56. Superannuation Guarantee Determination (SGD) 93/14.
57. Taxation Administration Regulations 1976, Part 5, effective per 1 July 2000.
58. Part 3-45 Rules for particular industries and occupations, Division 405, Above-average special professional income of authors, inventors, performing artistes, production associates and sportspersons.

or presenting music, dance, a play, entertainment, an address, a display, a promotional activity, an exhibition or any similar activity.

You are a production associate if you provide artistic support as an art director, choreographer, costume designer, director, director of photography, film editor, lighting designer, musical director, producer, production designer, set designer or similar services relating to the activity.

3.13. General definition of "who is an artiste"; list of examples

After this survey of the literature a more general definition of the term "artiste" for the purpose of Article 17 of the OECD Model seems to be possible:

"An artiste is a person giving an artistic and entertaining performance directly or indirectly before an audience, regardless of the artistic or entertainment level."

This definition implies that:
- there must be a performance;
- the performance is in public, i.e. directly before an audience or recorded and later reproduced for an audience; and
- the predominant element of the performance must be artistic and entertaining, but the level is irrelevant.

With this definition and after the discussion in the previous paragraphs it is possible to make two lists of persons, "artistes" and "non-artistes":

Artistes	Non-artistes
acrobats	actors, musicians, etc. in commercials
actors (theatre, television, radio)	anchormen (radio, television)
circus artistes	architects
comedians	auctioneers
conductors	authors
disc jockeys (DJs)	booking agents
fakirs	cameramen
magicians	choreographers
masters of ceremony (MCs)	composers
musicians	crew (film, television, radio, live show)
packaging artists (e.g. Christo)	cutters

Artistes	Non-artistes
puppet theatre players	dead artistes (entitled to part of performance fee)[a]
quizmasters and participants	designers (stage, light, fashion)
radio play actors	directors (theatre, television, radio)
ring masters in circus	discoverers
sex performers (peep- and live shows)	engineers (sound, light, video)
singers	fashion designers
TV and radio "artistes"	funeral orators
video jockeys (VJs)	impresarios
writers reading from their work	interviewers (television, radio, live)
	interview guests (idem)
	inventors
	journalists
	managers
	models in commercials
	models in fashion shows
	painters
	photographers
	piano tuners
	politicians
	producers
	radio personalities (e.g. disc jockeys, news readers)
	rehearsals by any artiste, conductor, etc.
	reporters
	restaurateurs
	sculptors
	sound technicians
	speakers at conferences
	stage builders
	teachers of music, theatre, dance, etc.
	technical personnel
	TV and radio personalities (e.g. anchor personnel, weather persons, talk show hosts)
	tour accountants
	tour managers
	writers

a. An example in 2003 was the US band Lynyrd Skynyrd, who allocate a part of their performance fees to the estates of two former band members who have died but are still considered to be part of the band. Another example is "Elvis, the concert", in which the late Elvis only appears on a video screen.

3.14. General discussion and conclusions

The special provisions for artistes in Article 17 of the OECD Model Tax Convention require a clear definition of who is an artiste. This chapter has studied first the literal meaning of the words "artiste" as well as "entertainer", after which a historical overview of the introduction and development of Article 17 of the OECD Model Tax Convention has been given. The opinions of several authors on the international interpretation of the term "artiste" have been discussed. After this an overview of the national legislation and court decisions in some of the bigger countries has been given.

Taken together, all this information has made it possible at the end of this chapter to give a more general definition of the term "artiste". A long list of professional artiste expressions has been drawn up and tested against this general definition, to distinguish between "artistes" and "non-artistes".

The definition and the list of examples have clarified to a certain extent who is an "artiste" and who is not. But in some cases difficulties with the definition can still be expected, such as with actors or musicians in commercials, disc jockeys, TV personalities, writers reading from their work, famous persons at public appearances and masters of ceremonies. When the source country has a broad definition of the word artiste, these persons can fall under the non-resident artiste tax of that country, while on the other hand the residence country can have a restricted definition of an artiste and not allow a tax credit (or exemption) for the foreign income of the same professional. This will inevitably lead to double taxation.

But with the source country having a restricted and the residence country having a broad definition, double non-taxation may also arise when the exemption method is used in Article 23 of the applicable tax treaty as the method to avoid double taxation. But this is not so likely, because the OECD, in Paragraph 12 of the Commentary on Article 17 of the OECD Model Tax Convention, advises implementing the ordinary credit method in tax treaties. Then the residence country still has an extra, "secondary" tax right over the foreign income.

These problems with the differences between countries may be resolved with the use of Article 3(2) of the OECD Model Tax Convention, which is taken over into most bilateral tax treaties.

Altogether, it needs to be concluded that a better and more complete definition of an "artiste" is needed. And although some repair may be possible with the general treaty interpretation rule of Article 3(2), the risk of double taxation remains.