PART B

PRESENT INTERNATIONAL SITUATION – BILATERAL TREATIES

CHAPTER 5

TAX TREATIES: ALLOCATION WITH ARTICLE 17

5.1. Allocation according to Article 17(1) and (2)

The OECD recommends its Member countries to implement both Article 17(1) and (2) for the taxation of artistes (and sportsmen) in either newly negotiated or fully or partly renegotiated tax treaties. With Article 17 the normal allocation rules for companies (and self-employed persons), as laid down in Articles 7 and 14,[1] and for employees, as laid down in Article 15, are set aside. This is made clear in the text of the Article, not only in Paragraph 1 but also in the extension of the article with Paragraph 2:

> Article 17
>
> 1. Notwithstanding the provisions of Articles 14 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.
>
> 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.

This special treatment means that even when an artiste company does not have a permanent establishment in the country of performance it is still taxable there because Article 17 does not follow this condition of Article 7. It also means that artistes as normal employees are taxable in the country of performance, regardless of where the employer is based, because Article 17 does not follow the conditions of Article 15(2). These broad rules of Article 17 have been discussed in chapter 2.

Not only all OECD Member countries but also non-Member countries propose the use of Article 17 in their treaty negotiations and include both

1. Although Article 14 regarding self-employed services was deleted from the OECD Model Tax Convention in the year 2000, it is still mentioned in many bilateral tax treaties.

Article 17(1) and (2) in their bilateral agreements.[2] This might lead to the conclusion that the coordination by the OECD Model Tax Convention has been successful. But exceptions are quite often made and although they are mostly based on the Commentary on Article 17 of the OECD Model or on reservations that have been added to the Commentary, these exceptions create a very diverse picture of the use of Article 17 in the various tax treaties, even for individual countries.

These variations became evident in a survey undertaken by the author in July/August 2004 on the use of Article 17 in bilateral tax treaties. The survey covers the tax treaties of 46 countries, including all 30 OECD Member countries, together with 16 non-Member countries.[3] Not only the tax treaties between the 46 countries but also the tax treaties of these 46 countries with other countries were studied and brought together in an extensive database. The information came from the online Tax Treaty Database of the IBFD, which is updated regularly.[4]

The following details were studied for each country:
– the number of tax treaties concluded;
– the years in which the tax treaties were concluded;
– how often a special artiste clause has been inserted (Art. 17(1));
– whether and to what degree the *de minimis* rule has been used;
– how often Paragraph 2 has been inserted (Art. 17(2));
– the number of treaties that limit the scope of Article 17(2);
– how often an optional Paragraph 3 has been inserted (Art. 17(3)); and
– what sort of exception has been used for Article 17(3).

2. Non-OECD members will follow the United Nations Model Tax Convention, which has taken over Article 17 regarding artistes and sportsmen completely from the OECD Model Tax Convention.
3. A number of 16 non-OECD Member countries was selected to give a good balance with the 30 OECD Member countries. In the selection countries that were very similar were also excluded, e.g. from the three Baltic states, Estonia, Latvia and Lithuania, only one, i.e. Estonia, was included in the survey.
4. With special acknowledgement to the IBFD in Amsterdam, which allowed the use of their online Tax Treaty Database for this survey.

The survey leads to the following summary for the 46 countries:

Countries	OECD	Treaties	Art. 17(1)				Art. 17(2)				Art. 17(3)	
			No	Yes	%	*De minimis*	Yes	%	Limited	%	Yes	%
Argentina		20	0	20	100	1	17	85	2	12	15	75
Australia	OECD	42	0	42	100	1	41	98	7	17	18	43
Austria	OECD	68	6	62	91	1	46	74	3	7	27	44
Belgium	OECD	84	1	83	99	1	65	78	2	3	46	55
Brazil		27	0	27	100	0	22	81	0	0	9	33
Bulgaria		53	0	53	100	0	50	94	3	6	44	83
Canada	OECD	89	0	89	100	1	85	96	46	54	58	65
Chile		14	0	14	100	0	13	93	1	8	0	0
China (People's Rep.)		81	0	81	100	0	81	100	0	0	79	98
Czech Republic	OECD	65	0	65	100	1	62	95	1	2	41	63
Denmark	OECD	68	0	68	100	1	61	90	2	3	47	69
Egypt		37	0	37	100	1	28	76	0	0	15	41
Estonia		35	0	35	100	1	35	100	2	6	32	91
Finland	OECD	65	2	63	97	4	55	87	4	7	34	54
France	OECD	86	2	84	98	1	72	86	6	8	63	75
Germany	OECD	89	2	87	97	1	62	71	6	10	64	74
Greece	OECD	40	1	39	98	1	32	82	0	0	18	46
Hungary	OECD	60	2	58	97	1	54	93	4	7	57	98
Iceland	OECD	27	0	27	100	1	26	96	1	4	14	52
India		72	2	70	97	1	63	90	1	2	68	97
Indonesia		57	0	57	100	1	55	96	0	0	55	96
Ireland	OECD	44	1	43	98	1	33	77	2	6	16	37
Italy	OECD	88	0	88	100	1	79	90	4	5	43	49
Jamaica		21	0	21	100	1	20	95	1	5	18	86
Japan	OECD	55	2	53	96	1	44	83	6	14	35	66
Korea (Rep.)	OECD	60	0	60	100	2	58	97	0	0	55	92
Luxembourg	OECD	46	0	46	100	1	40	87	5	13	24	52
Mexico	OECD	32	0	32	100	1	32	100	6	19	22	69
Netherlands	OECD	78	4	74	95	1	62	84	3	5	33	45
New Zealand	OECD	30	1	29	97	1	29	100	1	3	12	41
Norway	OECD	84	5	79	94	1	69	87	1	1	64	81
Poland	OECD	68	1	67	99	0	64	96	2	3	61	91
Portugal	OECD	49	0	49	100	1	42	86	2	5	32	65
Russia		66	1	65	98	0	64	98	2	3	42	65
Slovak Republic	OECD	53	0	53	100	1	49	92	2	4	41	77
Slovenia		36	0	36	100	1	35	97	1	3	35	97
South Africa		53	1	52	98	1	46	88	1	2	25	48
Spain	OECD	63	0	63	100	1	46	73	3	7	39	62
Sweden	OECD	103	15	88	85	1	72	82	2	3	45	51
Switzerland	OECD	94	2	92	98	1	58	63	26	45	38	41
Turkey	OECD	56	0	56	100	1	55	98	1	2	52	93
Ukraine		53	1	52	98	0	51	98	2	4	48	92
United Kingdom	OECD	112	2	110	98	1	74	67	1	1	48	44
United States	OECD	65	16	49	75	46	43	88	37	86	24	49

Countries	OECD	Treaties	Art. 17(1)				Art. 17(2)				Art. 17(3)	
			No	Yes	%	*De minimis*	Yes	%	Limited	%	Yes	%
Yugoslavia		24	0	24	100	0	23	96	0	0	23	96
Zimbabwe		13	0	13	100	0	12	92	1	8	7	54
average		*57*	*2*	*55*	*97*	*2*	*48*	*87*	*4*	*9*	*37*	*66*

The calculation of the figures and percentages needs some explanation: The percentages for both Article 17(2) and (3) are taken from the number of tax treaties that include an Article 17(1). But the percentages for the use of the limited approach of Article 17(2) are taken from the number of tax treaties that include Article 17(2). For example for France:

– tax treaties: 86
– Article 17(1): 84
– Article 17(2): 72/84 = 86%
– limited approach: 6/72 = 8%
– Article 17(3): 63/84 = 75%

5.2. No special artiste clause in tax treaties

The results from the survey show a very complete coverage of 97% of all tax treaties that use an artiste clause comparable with Article 17 of the OECD Model. However, some tax treaties do not contain a specific artiste (and sportsman) clause. Remarkable examples are:

Austria (6): Georgia (1981), Hungary (1975), Moldova (1981), Sweden (1951), Tajikistan (1981) and Turkmenistan (1981)

Netherlands (4): Kyrgyzstan (1988), Nigeria (1993), Tajikistan (1988) and Turkmenistan (1988)

Norway (5): Belarus (1980), Kyrgyzstan (1980), Tajikistan (1980), Turkmenistan (1980) and Uzbekistan (1980)

Sweden (15): Armenia (1981), Austria (1951), Azerbaijan (1981), Georgia (1981), Israel (1959), Kazakhstan (1981), Kyrgyzstan (1981), Malawi (1958), Moldova (1981), Morocco (1961), Peru (1966), Singapore (1968), Tajikistan (1981), Turkmenistan (1981) and Uzbekistan (1981)

United States (16): Armenia (1973), Aruba (1948), Azerbaijan (1973), Belarus (1973), Georgia (1973), Hungary (1979), Kazakhstan (1973), Korea (Rep.) (1976), Kyrgyzstan (1973), Moldova (1973), Netherlands Antilles (1948), Poland (1974), Russia (1992), Tajikistan (1973), Turkmenistan (1973) and Uzbekistan (1973)

In many cases former Soviet states are involved because the former Soviet Union had many tax treaties that did not contain an artiste clause. After the disintegration of the Union at the end of the 1980s, the around 20 independent states initially adopted the existing Soviet Union tax treaties with third countries.[5] Later most of these ex-Soviet states started to conclude their own bilateral tax treaties, following the OECD recommendations as far as possible.

Some older tax treaties still differ from the OECD Model, especially those from before 1963 when the first OECD Model Tax Convention was published. When these tax treaties are renegotiated, an artiste clause like Article 17 is normally introduced.

If there is no artiste clause in a tax treaty, the taxability of performance income has to be decided by using the normal allocation rules of Articles 7, 14 or 15 of the OECD Model, for self-employed artistes (business profits) or artistes/employees.

Although tax treaties remain the product of negotiations between two countries, it seems to be accepted worldwide that a special artiste clause needs to be inserted. This assumption is confirmed by the coverage of 97% that is found from the survey. Within the group of OECD Member countries the coverage is almost 100%.

The fiscal cooperation convention OCAM, a multilateral tax treaty between 14 African countries, ranging from Cameroon, Chad, Ivory Coast to Rwanda, Senegal and Zaire, was not included in the survey. This multilateral tax treaty does not have an artiste clause, so that if an artiste from one of these countries performs in any of the other 13 countries the

5. This is not clear for all ex-Soviet states that have declared themselves independent and did not become a part of Russia (the Russian Federal State). An example is Tatarstan (capital Kazan, with 1.1 million inhabitants), which is located 800 km east of Moscow. This state has been independent since 1990, but is completely surrounded by the Russian Federal State. It does not seem to have treaties with states other than Russia.

normal allocation rules for business profits or employment income need to be followed.

5.3. Limitation to only business activities, exceptions for artistes/employees

Paragraph 2 of the Commentary on Article 17 of the OECD Model gives countries the opportunity to decide by mutual agreement to limit the scope of Article 17(1) to business activities only. To establish this, the text of Article 17(1) simply needs to contain an override to the provisions of Article 7. Artistes working as employees would then fall outside the scope of Article 17. Article 15 would apply to their salaries and they would be able to use the exemptions of Paragraph 2 of that article. The text of Article 15(2) reads as follows:

> Art. 15 – Income from employment
>
> 1. ...
>
> 2. Notwithstanding the provisions of paragraph 1, remuneration derived by a resident of a Contracting State in respect of an employment exercised in the other Contracting State shall be taxable only in the first-mentioned State if:
> (a) the recipient is present in the other State for a period or periods not exceeding in the aggregate 183 days in any twelve month period commencing or ending in the fiscal year concerned, and
> (b) the remuneration is paid by, or on behalf of, an employer who is not resident of the Other State, and
> (c) the remuneration is not borne by a permanent establishment which the employer has in the other State.
>
> 3. ...

A second exception (of the same kind) has been made in Paragraph 11(b) of the Commentary on Article 17 of the OECD Model. This part of this paragraph was added in 1995 and reads as follows:

> (b) The second is the team, troupe, orchestra, etc. which is constituted as a legal entity. Income for performances may be paid to the entity. Individual members of the team, orchestra, etc. will be liable to tax under paragraph 1, in the State in which a performance is given, on any remuneration (or income accruing for their benefit) as a counterpart to the performance, *however, if the members are paid a fixed periodic remuneration and it would be difficult to allocate a portion of that income to particular performances, Member countries may decide, unilaterally or bilaterally, not to tax it*. The profit

> element accruing from a performance to the legal entity would be liable to tax under paragraph 2.

Interestingly enough, the possible restriction (in Paragraph 2 of the Commentary) to business activities as a restriction to the general rule of Article 17 is hardly ever used in tax treaties. The use was so rare that it was not specifically mentioned in the results of the survey in 5.1. Only older tax treaties follow this principle, in particular German and US treaties, but these countries have both decided to change their tax treaty policies and to follow the general OECD approach.[6] This means that artistes/employees can make use of the exceptions of Article 15(2) of the OECD Model in only a few situations.

The survey shows that the exception for employment has been used in only 16 tax treaties:

Bulgaria (1):	Malta (1986)
Germany (6):	Belgium (1967), France (1959), Greece (1966), Israel (1962), Luxembourg (1958) and Netherlands (1959)
Indonesia (1):	Russia (1997)
Netherlands (3):	Germany (1959), Netherlands Antilles (1964) and Switzerland (1951)
United States (5):	Belgium (1970), Iceland (1975), Norway (1971), Poland (1974) and Romania (1973)

It is important to note that 15 of these 16 tax treaties do not have Article 17(2). This means that countries that cannot look through the legal form cannot tax any payment to a third party who employs artistes. The taxing right then belongs solely to the home country. On the other hand, source countries that are able to look through legal structures can still tax the profit of the third party, but need to accept that the third party not only deducts the production expenses but also the salaries of the performing artistes.

This comment is not necessary for the 2 of the 17 tax treaties that contain Article 17(2), i.e. Bulgaria–Malta (1986) and Indonesia–Russia (1997). These countries have the right to tax the profit of a third party receiving the performance fee.

6. See 2.9. for an overview of the German tax treaties in the 1950s and 1960s.

How is the term "business activities" defined? It seems clear that self-employed artistes fall within the definition, together with artistes having profit shares in a "third party". Real employment situations for artistes should fall outside the definition, while in some countries the profit of the employer of these artistes can still be taxed.

Amateurs should be excluded from the definition because their expenses are higher than their earnings and they do not aim to make a profit.[7] Cultural and subsidized artistes might also fall outside the definition, because the text of Paragraph 2 mentions that "too strict provisions might in certain cases impede cultural exchanges". But this would make a subtle distinction necessary between artiste companies with a profit objective and orchestras and theatre groups whose (structural) deficit on their performance activities is financed by government subsidies. The question is whether the latter groups do not undertake "business activities", especially when the size of the organization and the economic importance of many cultural institutions are taken into consideration.

In any case the conclusion can be drawn from the survey of the tax treaties that the possible exception from Paragraph 2 and Paragraph 11(b) of the Commentary on Article 17 of the OECD Model is not actively used by countries in their treaty practice.

5.4. The use of Article 17(2) and its limitations

The second paragraph of Article 17 was introduced in 1977 and extended the reach of the article to payments of performance income to people other than the artiste himself. Paragraph 11 of the OECD Commentary on Article 17 explains in what situations Article 17(2) applies. The results of the survey in 5.1. show that in 87% of tax treaties with an artiste clause the second paragraph has been added. That is a very broad coverage, taking into account that there are still many pre-1977 tax treaties in force. This OECD recommendation is very widely followed.

Canada, Switzerland and the United States have made reservations in Paragraph 16 of the Commentary on Article 17 about the very wide scope

7. In Germany, the *Bundesfinanzhof* has decided that in a case of *Liebhaberei* (hobbies) no German tax was to be withheld (*BFH* 7 November 2001, I R 14/01, *Internationales SteuerRecht* 9/2002, p. 307-311). A comparable decision regarding amateurs was reached in the Netherlands in *Hoge Raad* 5 April 1995, *BNB* 1995/218.

of Paragraph 11 of the Commentary. They prefer to follow the limited approach of Article 17(2), as described in 2.14.3. These countries, and others, frequently use this limitation in their tax treaty practice.

The results from the survey show the following use of this limited approach in Article 17(2):

Country	Treaties with Art. 17(2)	%
Australia	7 of 41	17
Canada	46 of 85	54
France	6 of 72	8
Germany	6 of 62	10
Japan	6 of 44	14
Luxembourg	5 of 40	13
Mexico	6 of 32	19
Switzerland	26 of 58	45
United States	37 of 43	86
on average for all tax treaties		9

In particular the United States promotes the use of the limited approach of Article 17(2), not only by inserting it in 86% of its tax treaties that contain an Article 17(2) clause, but also by confirming its position in the Technical Explanation to the 1996 US Model. The United States only wants to use Article 17(2) for real "rent-a-star" situations, where the artiste is owner or shareholder or is entitled to a share of the profits of the company that receives the performance income.[8]

8. See 2.14. for more information about the approach of the United States; see Appendix II for the text of the Technical Explanation to Article 17 of the 1996 US Model.

5.5. The additional Article 17(3)

5.5.1. Exception in the Commentary

An important exception to the general rules of Article 17(1) and (2) is the addition in 1992 of the optional Article 17(3). This possibility comes from Paragraph 14 of the OECD Commentary, which discusses the wish of countries to exclude events supported from public funds from the scope of Article 17. The Commentary allows the exclusion of such events from the scope of Article 17 on the condition that the exemption “should be based on clearly definable and objective criteria to ensure they are given only where intended”. The Commentary also gives a text proposal for the additional Article 17(3):

> The provisions of paragraphs 1 and 2 shall not apply to income derived from activities performed in a Contracting State by artistes or sportsmen if the visit to that State is wholly or mainly supported by public funds of one or both of the Contracting States or political subdivisions or local authorities thereof. In such a case, the income is taxable only in the Contracting State in which the artiste or the sportsman is a resident.

Many countries have implemented the use of the additional Article 17(3) in their tax treaty policy, some long before 1992,[9] others more recently.[10] The 1987 Intra-ASEAN[11] Model Double Taxation Convention has even standardized the “Article 17(3) clause”, so that the provision is widespread in treaties between ASEAN members. The provision has also been included in most ASEAN tax treaties with third countries.[12]

The multilateral Nordic Convention between Denmark, Finland, Iceland, Norway and Sweden contains Article 17(3) as a standard addition to Article 17. It was introduced in the agreement of 1989 and adopted in the most recent agreement of 1996. The text is comparable to the proposal in Paragraph 14 of the OECD Commentary, although there are two differences: the Nordic Convention requires that (1) the visit to the other

9. E.g. the use of Article 17(3) in Poland’s tax treaties goes back to the older tax treaties with Germany (1972) and France (1975).
10. E.g. the Netherlands had inserted Article 17(3) in only few tax treaties in earlier years, but started more regular use from the mid-1990s and recently in the treaties with Belgium (2001) and Portugal (2001).
11. Including Indonesia, Malaysia, the Philippines, Thailand, Singapore, Brunei, Vietnam, Laos, Myanmar and Cambodia.
12. Edwin van der Bruggen, “Salient Features of the ASEAN Model Tax Treaty”, *Tax Notes International* (2002), at 1227.

state has to be *mainly* financed by public funds and (2) there is only a reference to financing from public funds from the *residence* country. These are subtle but interesting differences.

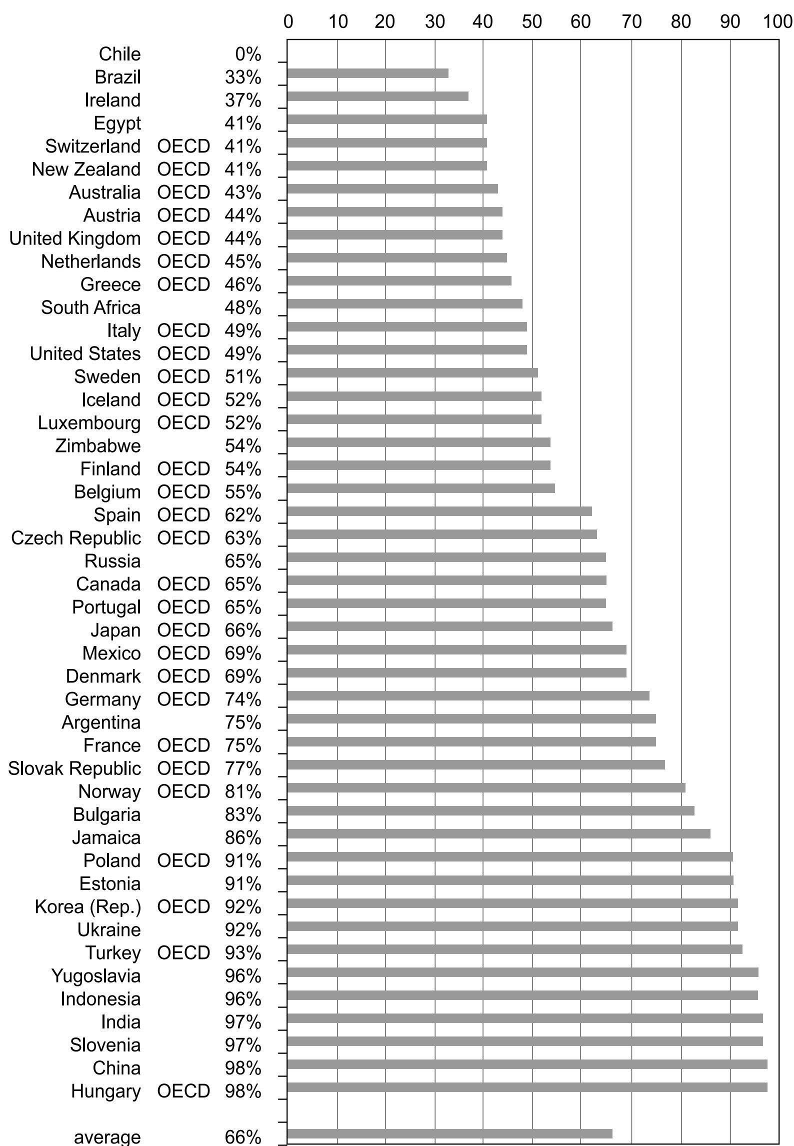
5.5.2. More frequent use than expected

The additional Article 17(3) gets much more attention in the tax treaties than would be expected from the simple and not very eye-catching remarks in Paragraph 14 of the OECD Commentary. It seems that many countries have made the provision an integral part of their tax treaty policy. Article 17(3) is more popular than is realized and it is interesting that so little attention has been paid by authors in the literature to this exception.[13]

For an overview of the use of Article 17(3), reference is made to the results of the survey that were published in 5.1. The conclusion can be drawn that a surprising majority of tax treaties (66% on average for the 46 countries that have been included) use the restriction of Article 17(3) and allocate the taxation of artiste fees in these specific situations to the country of residence – a very broad use for an optional provision that is not mentioned in the OECD Model Tax Convention itself but only in the Commentary.

It might be thought that it is mainly Eastern European, African, Latin American and Asian countries that have inserted Article 17(3) in their bilateral tax treaties with the countries of the Western world, but the results of the survey in 5.1. show that this supposition is not correct. The percentage use of Article 17(3) is higher for these countries, but Western countries also score high percentages. The following table gives an overview of the use of Article 17(3) in order of percentages:

13. More than passing attention is given by Klaus Vogel to the specific German tax treaties in *Klaus Vogel on Double Taxation Conventions* (3rd ed., Kluwer Law International, 1997), at 987.


0
10
20
30
40
50
60
70
80
90
100
Chile 0%
Brazil 33%
Ireland 37%
Egypt 41%
Switzerland OECD 41%
New Zealand OECD 41%
Australia OECD 43%
Austria OECD 44%
United Kingdom OECD 44%
Netherlands OECD 45%
Greece OECD 46%
South Africa 48%
Italy OECD 49%
United States OECD 49%
Sweden OECD 51%
Iceland OECD 52%
Luxembourg OECD 52%
Zimbabwe 54%
Finland OECD 54%
Belgium OECD 55%
Spain OECD 62%
Czech Republic OECD 63%
Russia 65%
Canada OECD 65%
Portugal OECD 65%
Japan OECD 66%
Mexico OECD 69%
Denmark OECD 69%
Germany OECD 74%
Argentina 75%
France OECD 75%
Slovak Republic OECD 77%
Norway OECD 81%
Bulgaria 83%
Jamaica 86%
Poland OECD 91%
Estonia 91%
Korea (Rep.) OECD 92%
Ukraine 92%
Turkey OECD 93%
Yugoslavia 96%
Indonesia 96%
India 97%
Slovenia 97%
China 98%
Hungary OECD 98%
average 66%

5.5.3. Germany: example of a country using Article 17(3) in tax treaty practice

The use of Article 17(3) in tax treaties can be illustrated with the example of Germany. This country had concluded 89 tax treaties up to 2005. It started inserting Article 17(3) in 1967, but did not do this in every tax treaty until 1980. After this year the use of Article 17(3) in the tax treaty negotiations became general practice, failing in only two tax treaties. This example shows that at least in the case of Germany the preceding assumptions are right: it is not only developing countries that use Article 17(3) in their bilateral tax treaties and Article 17(3) has also become a part of the tax treaty practice of West European countries.

Treaty country	Year	
Luxembourg*	1958	
France*	1959	
Netherlands*	1959	
Ireland	1962	
Israel*	1962	
United Kingdom	1964	
Greece*	1966	
Japan	1966	
Spain	1966	
Belgium*	1967	
Thailand	1967	public funds
Iran	1968	
Liberia	1970	
Iceland	1971	
Australia	1972	
Morocco	1972	non-profit
Poland	1972	cultural exchange
South Africa	1973	
Trinidad and Tobago	1973	
Zambia	1973	public funds
Cyprus	1974	public funds
Jamaica	1974	
Switzerland	1974	public funds
Brazil	1975	
Tunisia	1975	non-profit
Hungary	1977	public funds/cultural exchange
Kenya	1977	public funds
Malaysia	1977	public funds

Treaty country	Year	
Argentina	1978	public funds
Mauritius	1978	
New Zealand	1978	
Finland	1979	
Ivory Coast	1979	public funds/non-profit
Sri Lanka	1979	public funds
Czech Republic	1980	cultural exchange
Portugal	1980	
Slovak Republic	1980	cultural exchange
Armenia	1981	public funds
Azerbaijan	1981	public funds
Belarus	1981	public funds
Georgia	1981	public funds
Kyrgyzstan	1981	public funds
Moldova	1981	public funds
Tajikistan	1981	public funds
Turkmenistan	1981	public funds
Uzbekistan	1981	public funds
Ecuador	1982	public funds
Philippines	1983	public funds
China (People's Rep.)	1985	cultural exchange
Turkey	1985	public funds/charitable organizations
Bosnia-Herzegovina	1987	cultural exchange
Bulgaria	1987	public funds/cultural exchange
Croatia	1987	cultural exchange
Egypt	1987	public funds
Macedonia	1987	cultural exchange
Slovenia	1987	cultural exchange
Urugay	1987	
Yugoslavia	1987	cultural exchange
Zimbabwe	1988	
Italy	1989	public funds
United States	1989	public funds
Bangladesh	1990	public funds
Indonesia	1990	public funds
Norway	1991	public funds
Bolivia	1992	public funds
Sweden	1992	public funds
Mexico	1993	public funds
Namibia	1993	public funds/charitable organizations
Mongolia	1994	public funds
Pakistan	1994	public funds

Treaty country	Year	
Denmark	1995	public funds
India	1995	public funds/charitable organizations
Papua New Guinea	1995	public funds/charitable organizations
Ukraine	1995	public funds/charitable organizations
United Arab Emirates	1995	public funds
Venezuela	1995	public funds/charitable organizations
Vietnam	1995	public funds/charitable organizations
Estonia	1996	public funds
Russia	1996	public funds/charitable organizations
Kazakhstan	1997	public funds/charitable organizations
Latvia	1997	public funds
Lithuania	1997	public funds
Kuwait	1999	public funds
Austria	2000	public funds/public utility
Korea (Rep.)	2000	public funds/charitable organizations
Canada	2001	public funds
Malta	2001	public funds/charitable organizations
Romania	2001	public funds/charitable organizations
Singapore	2004	public funds/charitable organizations

* In these tax treaties the use of "Article 17"[14] has been restricted to business activities only, while artistes/employees are excluded from the special artiste clause and taxed under the normal allocation rules.[15]

5.5.4. Variations in the content of Article 17(3)

In various tax treaties it is not only the criterion "supported by public funds" that is used in Article 17(3). The exception can also be based on "cultural exchange", "cultural and sports exchange", "cultural agreement", "cultural cooperation" or "non-profit organizations". Sometimes more than one item is mentioned in an Article 17(3) clause.[16] Unfortunately, the variety of criteria for Article 17(3) make the use of the exception rather inconsistent. Examples of the varied use of Article 17(3) can be found in the 5.5.3. and in 5.6.2. and 5.6.3.

14. In these old German tax treaties the artiste clause very often is not Article 17 but has another number.
15. See 2.9. and 5.3. for more discussion about these old German tax treaties.
16. An example is the 2003 tax treaty between Austria and Cuba, which mentions both performances supported by public funds and culture and/or sports exchange programmes.

5.5.5. Undefined conditions

The conditions for the different types of exception are not very clear. Is a minimum threshold level of support from public funds needed to qualify for Article 17(3)? Some tax treaties use the words "supported *wholly or mainly* from public funds",[17] while other tax treaties require "financed *substantially* by public funds".[18] Unfortunately the OECD does not propose a minimum level, although Paragraph 2 of the Commentary on Article 17 requires that use of the exception should be based on "clearly definable and objective criteria". Belgium and the Netherlands have agreed in a commentary on their new 2001 tax treaty that the threshold condition for the word "mainly" in the treaty should be 30% of total earnings.[19] Germany has decided several times that the sending country has to support at least one third of the costs of the artistes for performances abroad.[20] But for other countries it is not clear whether a minimum threshold percentage has been set.

Unfortunately, a clear percentage will not always be helpful. A group of artistes from e.g. an East European country is very often wholly, substantially or mainly financed by its own government, but does not have a very big budget. A performance in e.g. a West European country can give the group a substantial performance fee that is much higher than the performance fees in the home country. This would make the trip very much more worthwhile, create extra income for the group and give exposure on the Western market. But a threshold of e.g. 30% can then lead to the problem that this specific performance is no longer "wholly, substantially or mainly supported by public funds of one or both of the Contracting States or political subdivisions or local authorities thereof".

An example can be given of a Bulgarian opera company that performs in the Netherlands. The opera is fully subsidized by the Bulgarian government, and performance fees in Bulgaria do not exceeding EUR

17. The 1990 tax treaty between Bulgaria and the Netherlands.
18. The 2001 tax treaty between Belgium and the Netherlands.
19. It is very interesting that there seems to be a difference in the translation from the original treaty languages into English. The official Dutch text says *"een wezenlijk onderdeel"*, which means substantial but not necessarily more than 50%, the official French text says *"pour une large part"*, which has approximately the same meaning as the Dutch text, but the English translation says *mainly*, which should mean "for more than 50%".
20. FinMin NRW 2 November 1977, StEK EstG § 50a/127, FinMin Nds. 14 November 1985, StEK Doppelbest. UdSSR 3; BMF 14 October 1985, StEK Doppelbest. UdSSR 3.

1,000 per evening. The opera is contracted for three performances in the Netherlands against a fee of EUR 8,000 per evening.

The 1994 tax treaty between Bulgaria and the Netherlands contains the following Article 17(3) clause:

> 3. Notwithstanding the provisions of paragraphs 1 and 2 of this Article, income derived from such activities as defined in paragraph 1 shall be exempt from tax in the State in which these activities are exercised, if the visit of the entertainers, the musicians or the athletes to one of the States is supported wholly or substantially from the public funds of the other State, a political subdivision or a local authority thereof, or if these activities are performed under a cultural or sport agreement or arrangement between the States.

An allocation problem arises in this example: what are the expenses of the Bulgarian opera for the three Dutch performances? Is the Bulgarian state subsidy also needed for the visit to the Netherlands? Or do the Dutch performance fees more than cover the expenses for the visit and even contribute to additional funding in Bulgaria?

Taking the figures into consideration, a reasonable conclusion in this example should be that the condition of Article 17(3), that the visit needs to be supported wholly or substantially from public funds by the Bulgarian authorities, will not be fulfilled. This means that Article 17(3) will not apply and that the Netherlands will be allowed to tax the performance income of the Bulgarian opera.

The effect can be that the Netherlands will tax the performance fee of the Bulgarian opera, while the Bulgarian tax authorities will not allow a tax credit (or exemption) to the opera and/or its artistes, because they suggest that the opera will qualify for the use of Article 17(3). This would lead to double taxation and would increase the chance of jeopardizing the cultural exchange.

The other measures for Article 17(3) can also easily miss their target if the conditions are not fulfilled. For example, the exception "cultural exchange" can only be used in one country when a return visit takes place to the other country. And when that happens, is it important whether the levels of the performances are comparable? And is it necessary that the cultural exchange is pre-arranged? Is there a limit in time, e.g. will a visit at Christmas and a return visit at Easter still be considered a "cultural exchange"?

5.5.6. Defending the state's budget?

The question can be raised whether countries are trying to protect their own interests with the Article 17(3) clause. It looks as though the OECD and individual countries are aware of the excessive taxation resulting from the general rules of Article 17, which, evidently, would lead to an extra need for subsidies for the cultural (and sports) organizations and extra expenses for the country's budget. With a reversal of the allocation of the tax right for artistes who rely on governmental subsidies and comparable public funds, from the performance country to the country of residence, these countries seem to be protecting their own national budgets.

5.5.7. Chances of unequal treatment

The use of Article 17(3) in tax treaties can raise questions regarding equal treatment, especially within the European Union, where the additional provision might be in conflict with the freedom principles of the EU Treaty or be seen as a forbidden subsidy. It can become easier for a subsidized artiste group to enter a foreign market with the exceptions of Article 17(3) than for a commercial theatre group, which could experience problems with withholding taxes in the country of performance and tax credits in the residence country. Both excessive taxation and extra administrative expenses can lead to a disadvantage on the (new) foreign market.

It is also possible that the division between subsidized and non-subsidized artiste (and sports) organizations breaches the non-discrimination principles of other international agreements, such as Article 24(1) of the OECD Model, Article 26 of the International Covenant on Civil and Political Rights (BUPO) and the Covenant for the Protection of the Human Rights (ECPHR).

The discussion about possible unequal treatment will be continued in chapters 11 and 12; the position of Article 17(3) will be discussed in 12.5.

5.6. Two examples of country's tax treaties: the United States and the Netherlands

5.6.1. Variations in tax treaty policy

Two examples will show the variation and (in)consistency in a country's tax treaty policy. Below are given the lists of tax treaties of the United States and the Netherlands with the implementation of Article 17, the use of the *de minimis* rule, the limit in US dollars, immediate or later access to the facility,[21] the use of Article 17(2), the unlimited or limited approach and the use of Article 17(3).

The examples show the year the treaties were signed by the two governments. After signing, the treaty still needs to be ratified by the parliaments of the both countries and has to be made effective.

5.6.2. Tax treaties: United States

At the time of the survey (July 2004), the United States had signed 65 bilateral tax treaties. This is the full list with the specific regulations for artistes:

Treaty country	Year	Art. 17(1)	*De minimis (USD)*	Direct/ after	> 90	Not for employees	Art. 17(2)	Limited	Art. 17(3)
Armenia	1973								
Aruba	1948								
Australia	1982	17	10,000	direct			yes	yes	
Austria	1996	17	20,000	after			yes	yes	
Azerbaijan	1973								
Barbados	1984	17	4,000	direct			yes	yes	yes: public funds/non-profit
Belarus	1973								
Belgium	1970	14	3,000	direct	yes	yes			
Canada	1980	XVI*	15,000	direct			yes	yes	
China (People's Rep.)	1984	16					yes		yes: cultural exchange
Cyprus	1984	19	5,000	direct			yes	yes	

21. Very often it will be unclear until the year-end whether the income of the artiste from performances in the foreign country will exceed the USD 20,000 limit. Countries can therefore decide to use a withholding tax on the artiste's income during the taxable year and refund after the year if the threshold has not been exceeded (Paragraph 228 of the Technical Explanation of the 1996 US Model).

Treaty country	Year	Art. 17(1)	*De minimis (USD)*	Direct/ after	> 90	Not for employees	Art. 17(2)	Limited	Art. 17(3)
Czech Republic	1993	18	20,000	after			yes	yes	yes: arrangement
Denmark	1999	17	20,000	direct			yes	yes	
Egypt	1980	17	400/day	direct					
Estonia	1998	17	20,000	direct			yes	yes	yes: public funds
Finland	1989	17	20,000	direct			yes	yes	
France	1994	17	10,000	direct			yes	yes	yes: public funds
Georgia	1973								
Germany	1989	17	20,000	after			yes	yes	yes: public funds
Greece	1950	X	10,000	direct					
Hungary	1979					yes			
Iceland	1975	18	100/day	direct	yes	yes			
India	1989	18	1,500	direct			yes	yes	yes: public funds
Indonesia	1988	17	2,000	direct			yes		yes: public funds
Ireland	1997	17	20,000	direct			yes	yes	
Israel	1975	18	400/day	direct					
Italy	1999	17	20,000	direct	yes		yes	yes	
Jamaica	1980	17	5,000	direct			yes	yes	
Japan	2003	16	10,000	direct			yes	yes	
Kazakhstan	1993								
Korea (Rep.)	1976								
Kyrgyzstan	1973								
Latvia	1998	17	20,000	direct			yes	yes	yes: public funds
Lithuania	1998	17	20,000	direct			yes	yes	yes: public funds
Luxembourg	1996	18	10,000	direct			yes	yes	
Malta	1980	18	500/day	direct	yes		yes	yes	
Mexico	1992	18	3,000	after			yes	yes	yes: public funds
Moldova	1973								
Morocco	1977	16					yes		yes: non-profit
Netherlands	1994	18	10,000	after			yes	yes	
Netherlands Antilles	1948								
New Zealand	1982	17	10,000	direct			yes	yes	
Norway	1971	14	10,000	direct	yes	yes	yes	yes	
Philippines	1976	17	3,000	direct			yes		yes: public funds
Poland	1974					yes			
Portugal	1994	19	10,000	direct			yes	yes	yes: public funds
Romania	1973	14	3,000	direct	yes	yes			yes: arrangement
Russia	1992								
Slovak Republic	1993	17	20,000	after			yes	yes	yes: public funds/ arrangement
Slovenia	1999	17	15,000	direct			yes	yes	yes: public funds
South Africa	1997	17	7,500	direct			yes		yes: public funds
Spain	1990	17	10,000	after			yes	yes	yes: public funds
Sri Lanka	1985	18	6,000	direct			yes	yes	yes: public funds
Sweden	1994	18	6,000	direct			yes	yes	
Switzerland	1996	17	10,000	after			yes	yes	
Tajikistan	1973								

Treaty country	Year	Art. 17(1)	*De minimis (USD)*	Direct/ after	> 90	Not for employees	Art. 17(2)	Limited	Art. 17(3)
Thailand	1996	19	3,000	direct			yes	yes	yes: public funds
Trinidad and Tobago	1970	17	100/day	direct			yes		
Tunisia	1985	17	7,500	direct			yes	yes	
Turkey	1996	17	3,000	direct			yes	yes	yes: public funds/non-profit
Turkmenistan	1973								
Ukraine	1994	17					yes	yes	yes: public funds/ arrangement
Uzbekistan	1973								
Venezuela	1999	18	6,000	direct			yes	yes	yes: public funds
United Kingdom	2001	16	20,000	direct			yes	yes	
US Model		17	20,000	after			yes	yes	
65		49	46		6	6	43	37	24
		75%						86%	49%

* Canada: special provision for league competitions + signing fees.

This list of 65 US tax treaties can be compared with the 1996 US Model Income Tax Convention, as explained in 2.14. As a result of this comparison the following remarks can be made:

- in 16 tax treaties no artiste rule has been specified, but 10 of these tax treaties are with former Soviet Union republics. After becoming independent, these countries took over the bilateral tax treaty of the Soviet Union with the United States, which did not contain an artiste tax rule;
- in 3 tax treaties no *de minimis* rule has been inserted;
- the amount of the threshold (*de minimis* rule) can be set at USD 20,000, according to the 1996 US Model Tax Convention, but is very often set much lower;
- direct use of the *de minimis* rule is allowed in 38 out of 46 tax treaties. In the other 8 tax treaties an artiste from the treaty country has to wait until the end of the year to apply for a tax refund (when applicable);
- in 6 tax treaties an extra condition excludes from the special artiste tax rule artistes who stay for fewer than 90 days in the performance country, but only when their income does not exceed the amount of the *de minimis* rule. If an artiste stays longer, then the source state can tax, regardless of the amount earned;

- in 7 tax treaties the special artiste tax rules do not apply to employees and are therefore restricted to business activities;
- in 37 out of 43 tax treaties Article 17(2) is used in accordance with the limited approach (= 86%); and
- in 24 of the 49 tax treaties the exception of Article 17(3) is used (= 49%), although the content varies. This is less than the average of 66% for the total population of tax treaties, but still a high amount, especially when it is taken into account that the 1996 US Model does not specify any Article 17(3) option.

In general, it can be concluded that the United States inserts an artiste clause very actively in its bilateral tax treaties, including the *de minimis* rule and the limited approach of Article 17(2). In that respect, it follows the 1996 US Model Income Tax Convention closely.

The threshold for the *de minimis* rule differs from treaty to treaty, but the newer treaties seem to be more strict in using the USD 20,000 amount from the Model.

The exceptions, such as the 90-day rule, the limitation to business activities and the use of Article 17(3), cannot be found in the 1996 Model and therefore seem to be the result of the treaty negotiations with the other country, in which both parties obviously need to get their share. But it needs to be said that with 49% of the tax treaties and even treaties with bigger countries such as France, Germany and South Africa containing Article 17(3), the United States needs to consider whether the use of this provision ought to be addressed officially in the Model Income Tax Convention and/or its Technical Explanation. Except in its treaty with Germany, as explained in 5.5.3., the United States has not inserted Article 17(3) in its latest tax treaties. It may be that the initiative for this provision has to come from the other contracting state.

5.6.3. Tax treaties: Netherlands

At the time of the survey (July 2004), the Netherlands had signed 78 tax treaties with various countries. The country's tax treaty policy is most recently specified in the *Nota "Internationaal fiscaal (verdrags)beleid"* (Paper "International Tax Treaty Policy"), *VN* 1998/22.3, but does not give specific rules for the use of Article 17 for artistes (and sportsmen). But in

the details of the 78 tax treaties a tax treaty policy may be found. The full list of these tax treaties, with the special artiste provisions, is given below:

Treaty country	Year	Art. 17(1)	*De minimis*	Art. 17(2)	Limited	Art. 17(3)	
Argentina	1996	18		yes		yes	public funds
Armenia	2001	17		yes		yes	cultural exchange
Australia	1975	17		yes			
Austria	2003	17		yes		yes	public funds/non-profit?
Bangladesh	1995	17		yes		yes	public funds
Belarus	1998	17		yes			
Belgium	2003	17		yes		yes	public funds
Bosnia-Herzegovina	1984	17		yes		yes	cultural exchange
Brazil	1992	17		yes			
Bulgaria	1995	17		yes		yes	public funds/cultural exchange
Canada	1987	17		yes	no participation		
China (People's Rep.)	1989	17		yes		yes	cultural exchange
Croatia	2002	17		yes			
Czech Republic	1972	18					
Denmark	1999	17		yes			
Egypt	2001	17		yes			
Estonia	1995	17		yes		yes	public funds
Finland	1998	17		yes			
France	1974	17		yes	no participation		
Georgia	2002	17		yes		yes	public funds/cultural agreements
Germany*	1959	9					
Greece	1981	18		yes			
Hungary	1988	17		yes		yes	public funds/cultural agreements
Iceland	1999	17		yes			
India	1989	17		yes		yes	public funds/cultural agreements
Indonesia	2002	18					
Ireland	1965	16					
Israel	1970	17		yes			
Italy	1993	17		yes			
Japan	1970	17		yes			
Kazakhstan	1996	17					
Korea (Rep.)	1982	18		yes		yes	public funds
Kuwait	2001	17		yes		yes	public funds
Kyrgyzstan	1988						

Treaty country	Year	Art. 17(1)	*De minimis*	Art. 17(2)	Limited	Art. 17(3)	
Latvia	1996	17		yes		yes	public funds
Lithuania	2001	17		yes		yes	public funds
Luxembourg	1967	18					
Macedonia	2000	17		yes		yes	cultural exchange
Malaysia	1985	17		yes		yes	public funds
Malta	1976	18		yes			
Mexico	1995	17		yes			
Moldova	2002	17		yes			
Mongolia	2002	17		yes		yes	public funds
Morocco	1977	18		yes		yes	non-profit
Netherlands Antilles*	1964	9					
New Zealand	1979	17		yes			
Nigeria	1993						
Norway	1991	17		yes		yes	public funds
Pakistan	1982	17		yes			
Philippines	1992	17				yes	public funds/non-profit
Poland	1978	17		yes		yes	cultural agreement
Portugal	2001	17		yes		yes	public funds/cultural agreements
Romania	2000	17		yes		yes	public funds/cultural agreements
Russia	1999	17		yes			
Singapore	1968	17		yes		yes	public funds
Slovak Republic	1972	18					
Slovenia	1984	17		yes		yes	public funds/cultural exchange
South Africa	1968	18					
Spain	1973	18					
Sri Lanka	1979	17		yes			
Surinam	1975	18		yes			
Sweden	1993	17		yes			
Switzerland*	1949	5					
Taiwan	2002	17		yes		yes	public funds
Tajikistan	1988						
Thailand	1975	17		yes			
Tunisia	1996	17		yes			
Turkey	1989	17		yes		yes	public funds/non-profit
Turkmenistan	1988						
Ukraine	1997	17		yes		yes	public funds/cultural agreements
United Kingdom	1980	17		yes			
United States	1994	18	USD 10,000	yes	no participation		

Treaty country	Year	Art. 17(1)	*De minimis*	Art. 17(2)	Limited	Art. 17(3)	
Uzbekistan	2003	17		yes		yes	public funds/cultural agreements
Venezuela	1998	17		yes			
Vietnam	1996	17		yes		yes	cultural exchange
Yugoslavia	1984	17		yes		yes	cultural exchange
Zambia	1983	17		yes			
Zimbabwe	1992	17		yes			
78		74	1	62	3	33	
		95%		84%		45%	

* Only for self-employed.

This list of 78 Dutch tax treaties shows that the Netherlands is very active in concluding tax treaties, but not always consistent when it comes to the content of Article 17:

– in 4 tax treaties a specific artiste article is missing. Of these, 3 are based on the old tax treaty with the Soviet Union, which did not have an artiste provision. The fourth is the 1993 tax treaty with Nigeria, but no information is available about why the OECD Model Tax Convention is not followed in the treaty negotiations;
– Article 17(2) is missing in only 16 of the 74 tax treaties (= 16%), mainly older ones. The Netherlands has restricted the scope of Article 17(2) only in the tax treaties with Canada, France and the United States;
– the *de minimis* rule is only used in the tax treaty with the United States. It is limited to USD 10,000 and cannot be used directly during the taxable year, but only after the end of the year. This restriction is explained in the preceding paragraph; and
– the additional Article 17(3) is used in 33 of the 74 tax treaties containing Article 17 (= 45%). The Netherlands inserts Article 17(3) more actively in more recent tax treaties, not only in the treaties with Eastern European and Asian countries, but surprisingly also with Belgium. The text of Paragraph 3 unfortunately has not been standardized, but varies between performances supported by public funds, cultural exchanges and cultural agreements (and combinations of these three).

5.7. Triangular situations

5.7.1. Resident in different countries

The allocation of the taxing right under Article 17 can become unclear when more than two countries are involved. This is the case when the artiste and the third party (the representing or supporting company) are resident in different countries or when the main artiste and his accompanying artistes do not live in the same countries. These triangular situations have caused some discussion in the past, but a change to the Commentary on Article 17 of the OECD Model Tax Convention in the year 2000 has made the allocation clearer.

5.7.2. Decision in the Netherlands in 1983

An example of the discussion in triangular situations was a Dutch court case in 1983.[22] A world famous French chanson singer was contracted for three concerts in 1979 in the Netherlands. He was accompanied by five musicians who were living in the United Kingdom but were employees of a Swiss company. The performance fee was NLG 60,000 and was divided as follows:

leading artiste	30,000
Swiss company:	
– salaries accompanying musicians	13,000
– expenses (Swiss company, agent, crew)	17,000
total performance fee	60,000

Under discussion was the payment of NLG 13,000 to the Swiss company, which was paid on as salaries to the accompanying UK musicians/ employees. Did the tax treaty with Switzerland (country of residence of the employer) or with the United Kingdom (country of residence of the artistes) apply in this triangular situation?

22. *Hoge Raad* 23 November 1983, *BNB* 1984/33.

The 1951 tax treaty between the Netherlands and Switzerland only contains a taxing right for the country of performance for self-employed artistes.[23] The taxing right for artistes/employees follows the normal allocation rules for employees and would under Article 6(2) be allocated to the country of residence. This tax treaty has not been changed since 1951.

The 1967 tax treaty between the Netherlands and the United Kingdom only had an artiste allocation rule comparable with Article 17(1). The tax treaty was renewed in 1981 and one of the changes was the addition of Article 17(2).

The *Hoge Raad* decided that the country of residence of the artistes, in this case the United Kingdom, had to be decisive for the application of the tax treaty. And because the 1967 tax treaty with the United Kingdom contained an artiste clause comparable with Article 17, although in the simple form of the 1963 OECD Draft, the Netherlands had the right to tax the income of the accompanying English musicians,[24] even though the payment for their salaries was made to the Swiss company/employer.

This meant that besides the NLG 30,000 for the leading artiste the NLG 13,000 for the accompanying musicians was also taxable in the Netherlands.[25]

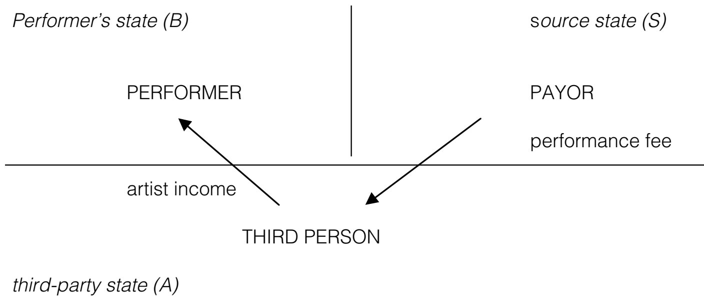
The author believes that this decision is correct, because the Netherlands–Switzerland treaty did not have a provision based on Article 17(2) and therefore the Swiss company should not be subject to tax in the Netherlands in the absence of a permanent establishment. However, the individual musicians, as residents of the United Kingdom, are subject to

23. Article 5 of the treaty. Comparable with the older tax treaties that Germany concluded in 1950s and 1960s. These German treaties were discussed in 2.9.
24. This meant that the Netherlands did not need Article 17(2) to look through a structure with an artiste company and tax the personal income of the artistes, regardless of whether this structure was realistic or whether it had been set up as a star company for the purpose of tax avoidance. This is different in other countries, such as Belgium, where the legal structure is still relevant if Article 17(2) has not been inserted in a tax treaty. This is also recognized in Paragraph 8 of the OECD Commentary on Article 17.
The look-through approach of Article 17(1) has been discussed in Angel J. Juárez, “Limitations to the Cross-Border Taxation of Artistes and Sportsmen under the Look-Through Approach in Article 17(1) of the OECD Model Convention”, 43 *European Taxation* 11 (2003), at 409 (Part I) and 43 *European Taxation* 12 (2003), at 457 (Part II).
25. The expenses of NLG 17,000 for the Swiss company, the agent and the crew were left out of the Dutch taxable income, because the purpose of the Dutch artiste tax system was to tax only the real income of non-resident artistes (at an effective tax rate of 18.75% of the artiste’s income).

the Netherlands–United Kingdom treaty vis-à-vis their salary income and Article 17(1) permits the Netherlands to tax such income.

5.7.3. Article by Rijkele Betten and Marco Lombardi in 1997

A similar problem of triangular situations under Article 17(2) was discussed in December 1997 by Rijkele Betten and Marco Lombardi.[26] They gave the following figure as an example:



The authors describe the introduction of Article 17 in the 1963 Draft, the addition of Article 17(2) in 1977 and the change to the unlimited approach that was first discussed in the 1987 OECD Report and later implemented in the 1992 revision of the Commentary on Article 17. Regarding triangular situations they quote Paragraphs 102-104 of the 1987 OECD Report:

> 102. A number of difficulties experienced by countries involve three-country situations. One case is where the artiste resides in State A, performs in State S and is employed under an exclusive "slave" contract by a "shadow company" situated in a non-treaty country B (e.g. a tax haven) and which supplies the entertainer's services to a producer in State S against payment of a fee. The question then arises as to whether State S may tax remuneration in respect of the entertainer's performances. An affirmative answer should be given to this question since Article 17 of the convention between A and S, which applies to the artiste resident in A, confers on State S the power to tax, and furthermore this power is not circumscribed by any convention between A and B.
>
> 103. In another three-country situation, the artiste is resident in a third State B, while the "shadow company" is established in State A. Even if there is a

26. Rijkele Betten and Marco Lombardi, "Article 17(2) of the OECD Model in Triangular Situations, Does Article 17(2) apply if the Artiste or Sportsman is Resident in a Third State?", 51 *Bulletin for International Fiscal Documentation* 12 (1997), at 560.

> convention between A and S, the "shadow company" in A could not argue that the remuneration paid to it by the producer of the performance in State S constitutes business income received without the intervention of a permanent establishment, since paragraph 7 of Article 7 stipulates that the Article does not apply to items of income which are dealt with separately in other Articles of the convention between A and S.
>
> 104. Consequently, it appears to matter little where the performer resides since this will either be in a State that has signed a convention with State S (where the activity is performed), under the terms of which State S has the right to tax, or else in a State which has not a convention with State S, whose right to tax therefore cannot be limited.

These paragraphs show that tax avoidance schemes could be set up by using a triangular structure. Especially in the second situation (of Paragraph 103), it is unclear whether Article 17 of the treaty between the countries A and S can cover the tax right, because the artiste does not live in country A but in a third country, B. If country S cannot look through this structure in its own tax legislation, the outcome can be that no tax right can be exercised in the source country S. This will not happen in the Netherlands, as the preceding court case showed, but it can be the outcome in other countries that follow the legal structures more strictly.

Paragraphs 102-104 of the 1987 OECD Report were not brought forward into the 1992 Commentary.

Some treaties have dealt with triangular situations in a practical manner by deviating from Article 17 of the OECD Model Tax Convention. For example, Article 17(2) of the 1979 treaty between Germany and Finland:

> 2. Notwithstanding the other provisions of this Convention, income which a resident of a Contracting State derives from the other Contracting State for services supplied by it and performed by a person as referred to in paragraph 1 in the other Contracting State may be taxed in the Contracting State where the services were performed, *even if this person is not a resident of a Contracting State*.

This provision makes it explicit that it applies regardless of whether or not the performer is resident in the other state (A, in the example). But before the source country (S) can exercise its taxing rights, it needs to check its tax treaty with the country of residence of the artiste (B), because this might restrict the taxing right.

An example can be found in the following triangular situation, where a musician with residence in the Netherlands is employed by a Finnish orchestra, which performs for a short period in Germany. As mentioned above, Article 17(2) of the tax treaty between Germany and Finland would allow Germany to tax a portion of the salary of the Dutch musician, but this German taxing right is restricted by Article 10(2) of the tax treaty between Germany and the Netherlands, which does not allow the taxation for artistes with Dutch residency who are employed by a non-German employer and do not stay in Germany for more than 183 days per year. The treaty provision between Germany and the Netherlands will then override the treaty provision between Germany and Finland.

The reason why Finland and Germany inserted this addition to Article 17(2) is unclear. It may be that this treaty of 1979 was already drafted before the addition of Article 17(2) to the OECD Model Tax Convention in 1977, but because of the uncertainties it does not seem right to draw general conclusions from this particular treaty provision.[27]

Betten and Lombardi expressed their regret that under the 1992 Commentary the question of the applicability of Article 17(2) to triangular situations could not be given a general and clear answer. They found it desirable that, where possible, a consistent interpretation of the OECD Model Tax Convention should be pursued. They recommended amending the Commentary so as to provide a clearer interpretation of Article 17(2). This could remove the need for the Observation in the Commentary that was made by Germany by that time.

5.7.4. Change in the 2000 OECD Commentary

The pleas by Betten and Lombardi were followed by the OECD in the changes to the 2000 Commentary. Paragraphs 11.1 and 11.2 were added to cover triangular situations:

> 11.1 [-]The application of paragraph 2 is not restricted to situations where both the entertainer or sportsman and the other person, to whom the income accrues, e.g. a star-company, are residents of the same Contracting State. The paragraph

27. This is different in Dörte Mody, *Die deutsche Besteuerung international tätiger Künstler und Sportler* (Nomos Verlagsgesellschaft, Baden-Baden, 1994), at 173, who argued that all German treaties with a provision such as Article 17(2) of the OECD Model Tax Convention should be interpreted as if they had the additional provision as in the 1979 treaty with Finland.

> allows the State in which the activities of an entertainer or sportsman are exercised to tax the income derived from these activities and accruing to another person regardless of other provisions of the Convention that may otherwise be applicable. Thus, notwithstanding the provisions of Article 7, the paragraph allows that State to tax the income derived by a star-company resident of the other Contracting State even where the entertainer or sportsman is not a resident of that other State. Conversely, where the income of an entertainer resident in one of the Contracting States accrues to a person, e.g. a star-company, who is resident of a third State with which the State of source does not have a tax convention, nothing will prevent the Contracting State from taxing that person in accordance with its domestic laws.
>
> 11.2 [-]As a general rule it should be noted, however, that, regardless of Article 17, the Convention would not prevent the application of general anti-avoidance rules of the domestic law of the State of source which would allow that State to tax either the entertainer/sportsman or the star-company in abusive cases, as is recognised in paragraph 24 of the Commentary on Article 1.

These changes give countries that consistently follow Article 17 of the OECD Model Tax Convention the chance to counteract abusive triangular structures of international performing artistes.

5.7.5. Double taxation problems in triangular situations

The discussion in the preceding paragraphs shows how taxation in the country of performance could be secured. Both the two authors and the OECD were afraid that artistes (and sportsmen) could escape from taxation in a triangular situation; the change in the Commentary has given countries enough tools to fight tax avoidance structures and undertaxation.

It is another question whether artistes suffer double taxation in triangular situations. Unfortunately the authors and the OECD have not paid any attention to this side of the story. The performance contract can be drawn up between the organizer and the third party/company, while the artiste lives in another country. When the organizer is forced to "look through" the third party and tax the artiste directly, it can happen that the residence country of the artiste will not allow a tax credit because the artiste was not a partner to the contract. The same can happen with the third party/company, because the tax will not have been paid in its name. Therefore, a double taxation problem is not hypothetical.[28]

This problem of eliminating double taxation in triangular situations will be discussed in 7.5.6.

5.7.6. Pension benefits

The issue of triangular situations with regard to pension benefits has already been discussed in 4.3.15. The allocation of the taxing right on these benefits follows the rules of Article 17 when there is a direct link with earlier performances, giving the country of these earlier performances the right to also tax the pension benefits.[29] Problems can arise in triangular situations, as was discussed during a presentation of the OECD at the 2003 IFA Congress in Sydney, Australia.

5.7.7. Reference to Article 1 of the OECD Model Tax Convention

The author believes that the confusion over triangular situations and the use of Article 17(2) is unnecessary. The 1993 decision of the *Hoge Raad* in the Netherlands has already made this clear. But the issue is also very well covered by Article 1 of the OECD Model Tax Convention, which states that a tax treaty can only be applied to a person who is a resident of one of the contracting states. Where a payment is made to a third party in State A (using the Betten and Lombardi example) and assuming State S does not apply a "look-through" approach, then it *must* be the treaty between State S and State A that applies to the third party's income. The residence of the performer is then irrelevant as is the treaty between State S and State B (the residence country of the performer). The additional phrase in the Germany–Finland treaty makes this conclusion clearer, but the words are not necessary. And similarly, the addition to the OECD Commentary discussed in 5.7.4. simply states what has always been the case.

---

28. See for a more in-depth discussion of this problem Angel J. Juárez, "Limitations to the Cross-Border Taxation of Artistes and Sportsmen under the Look-Through Approach in Article 17(1) of the OECD Model Convention", 43 *European Taxation* 11 (2003) at 409.
29. This was confirmed in the Dutch decision *Hoge Raad* 3 May 2000, *BNB* 2000/328.

5.8. General discussion and conclusions

Article 17 of the OECD Model Tax Convention provides special allocation rules for artistes. In July/August 2004 the author undertook an extensive survey on the use of Article 17 and its variations in the tax treaties of 46 countries. This survey shows that 97% of these tax treaties contain an article that is comparable with Article 17. At this point the recommendation of the OECD seems to work very well.

Only 17 of the many tax treaties apply the limitation of the artiste article to business activities, following Paragraphs 2 and 11(b) of the OECD Commentary on Article 17. This seems to be a good development, because the exception is questionable, given its anomalous and counterproductive consequences and possible distortion of competition.

A vast majority of 87% of the tax treaties with Article 17 have also inserted Article 17(2), the broad second paragraph of Article 17, which also covers the payment of performance income to anyone other than the artiste. A minority of the countries limit this Article 17(2) only to situations where the artiste participates in the profit of the company involved or controls that company. Only Canada, Switzerland and the United States use the limited approach in most of their tax treaties. This is in line with the reservation they made on Article 17(2), as mentioned in Paragraph 16 of the Commentary.

The surprise of the survey is that Article 17(3) is used in 66% of the many tax treaties of the 46 countries. With this exception the taxing right for performances supported by public funds is allocated to the country of residence of the artiste(s). The use of this restrictive rule is especially striking, because it is no more than an option to Article 17 of the OECD Model, mentioned in Paragraph 14 of the Commentary. It may be that countries want to defend their state's budgets by allowing residence state taxation to subsidized artistes and prevent these artistes from experiencing excessive or double taxation.

Countries often change the criterion for Article 17(3) from "public funds" to "cultural exchange", "cultural agreement" or even "non-profit organizations". This does not make the use of the exception very clear and reliable. The risk of double taxation increases sharply if source and residence country interpret the condition of the provision differently.

Article 17(3) increases the risk of unequal treatment if subsidized artistes (or other artistes meeting the conditions for the provision) can receive better tax treatment than commercial artistes (or others who do not meet the conditions).

The OECD could improve its coordination of international artiste taxation, if it promoted the option of “Article 17(3)” from the Commentary to the text of Article 17 of the Model Tax Convention itself, or removed the option from the Commentary, although the latter does not seem very realistic with so many tax treaties already using the provision.

For two countries, the United States and the Netherlands, all tax treaties have been reviewed in this chapter. Neither of these two countries seems to be very consistent in its tax treaty policy, although in the treaty negotiations the interest of the other contracting country will also have an influence.

Triangular situations have caused some discussion over the years. The OECD has broadened its Commentary on Article 17 in 2000 with the explanation that in abusive situations the country of performance can consider that the artiste is living in the same country as the company involved. Unfortunately, the other side of this issue, i.e. the risk of double taxation in triangular situations, has not been discussed until recently, but deserves more attention. The issue of triangular situations can very often arise with pension benefits and could lead to problems for the original performance countries in realizing their taxing rights.

To avoid confusion, a triangular situation can best be dealt with from the perspective of Article 1 of the OECD Model Tax Convention, which states that a tax treaty can only be applied if a resident is involved, in combination with the normal use of Article 17(2).