# PART D

# DISCUSSION OF THE PRESENT SITUATION

# CHAPTER 13

# DISCUSSION AND CONCLUSIONS AFTER THE STUDY

## 13.1. End of the study

The first aim of this thesis was to study whether the effects resulting from the special taxing rules for international performing artistes, as derived from Article 17 of the OECD Model Tax Convention, lead to unequal treatment for such artistes compared to other taxpayers and if so, whether the result is reasonable and if not, whether the treatment can be justified.

The study has been divided into different subjects and these have been discussed in the previous paragraphs. New information came from the surveys on four topics and has been added to the study. All this will be tested in this chapter against the nine criteria defined in 1.4.

Then the original reasons for Article 17 of the OECD Model, counteracting tax avoidance and improving compliance, will be discussed. And a review will be given of what the OECD has done with the recognition in the 1987 Report that artistes need to be treated in the same way as other taxpayers.

Finally, conclusions will be drawn for the present situation of the taxation of international performing artistes.

## 13.2. Conclusions based on the nine criteria defined in 1.4.

In 1.4. nine criteria were given to test the first aim of this thesis:

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

Chapters 3 and 4 have discussed the definitions of an "artiste" and "performance income". This was done with a study of the literal meaning of the word "artiste", the historical development and discussion in the

literature of both definitions, a list of examples of possible "performance income" and a new definition of the term "artiste" together with a list of examples.

At the end of each chapter it was concluded that qualification problems still exist. These problems can partly be resolved by the use of the general interpretation rule of Article 3(2) of the OECD Model, but not completely. The lack of unambiguous definition leads to the conclusion that the risk of double taxation for artistes is still likely.

Although the definitions cover both terms to a great extent, the conclusion has to be that they do not meet the first criterion of 1.4. sufficiently.

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

Chapter 5 provides the results of an extensive survey on the use of Article 17 of the OECD Model Tax Convention in the tax treaty practice of the 30 OECD Member countries and 16 other countries. This survey shows that 97% of these tax treaties contain an article comparable with Article 17. And a vast majority of 87% of the tax treaties have also inserted Article 17(2), which covers the payment of performance income to anyone other than the artiste. A minority of countries, i.e. Canada, Switzerland, the United States and some others, limit this Article 17(2) only to situations where the artiste participates in the profit of the company involved or controls that company.

Surprisingly, 66% of the many tax treaties of the 46 countries contain an Article 17(3), in which most often the taxing right for performances supported by public funds is allocated to the country of residence of the artiste. But this provision is only an option in Article 17 of the OECD Model, mentioned in Paragraph 14 of the Commentary. It is as though countries want to defend their state budgets by allowing residence state taxation to subsidized artistes and prevent these artistes experiencing excessive or double taxation.

Countries often change the condition from "public funds" to "cultural exchange", "cultural agreement" or even "non-profit organizations", which means that the reliability of the third paragraph declines. The risk of

double taxation increases sharply if source and residence country interpret the conditions for the third paragraph differently.

Article 17(3) bears the risk of unequal treatment, because subsidized artistes (or others) can receive better tax treatment than commercial artistes (or others).

In chapter 6 the artiste tax rules of 34 countries have been studied. Only 2 countries do not have special taxing rules for non-resident artistes. The deduction of expenses is not allowed in 24 of the other 32 countries (= 75%), while 20 of the 32 countries (= 63%) do not allow non-resident artistes to file a normal income tax return after the end of the taxable year. Some countries have unilateral exemptions, either structural or incidental, such as for the World Expo or bigger sporting events, or exclude amateurs and non-profit organizations from the tax rules for non-resident artistes.

In general, the national non-resident artiste tax rules in the various countries are not very clear-cut for an international performing artiste. He will have problems gathering information about whether his income is taxable in the country of performance, whether he can make use of a unilateral exemption, can deduct his expenses and can file a normal income tax return (or is obliged to file one).

It can be concluded that the first two paragraphs of Article 17 of the OECD Model are followed up in almost all bilateral tax treaties, but that the widespread use of the optional Article 17(3) creates an awkward distinction amongst artistes. The non-resident artiste tax rules in performance countries are often very different and it is problematic for an artiste to get a clear picture in advance of the taxation of his foreign performances in various countries. The good coordination effort by the OECD ends in disarray because of the deviations in both tax treaties and national tax rules.

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

Chapter 7 has discussed the taxation in the country of residence of the artiste and the elimination of double taxation. In the Commentary to Article 17 the OECD has recommended using the ordinary tax credit method, while for other sources of active income in the Model Tax

Convention, Article 7 and Article 15, the Member countries can choose whether they want to insert the tax credit or tax exemption method in their bilateral treaties. This difference between sources of active income leads to unequal treatment.

Unfortunately, the ordinary tax credit leads to the worst result of the four possible elimination methods, because the limitation to the amount of tax that is due in the residence country can easily lead to an excess tax credit.

Many tax credit problems can occur in practice, as was shown in 7.5.; there is a major risk that a tax credit in the country of residence may not be obtainable.

The conclusion needs to be that the elimination of double taxation for performing artistes is far from complete and causes many difficulties.

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

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

In chapter 9 examples have been given in which the taxation in the performance and the residence country and the influence of the tax credit were brought together. The risk of excessive taxation is very real for international performing artistes. The examples show that the strict national artiste tax rules and the unlimited approach of Article 17(2) of the OECD Model lead to a higher than normal tax burden in the countries of performance. The effective tax rates on the profit of performances (up to 50%-70% from the net income) are higher than the highest marginal tax rate in any source country's tax table.

On the other side, residence countries restrict the (ordinary) tax credit to the amount of tax that is due on the foreign performance income. This increases the problem of international excessive taxation.

The reversal of Article 17(2) from the limited to the unlimited approach in the 1992 OECD Commentary hits the wrong target. The examples show that the unlimited approach does not give an extra defence measure against tax avoidance schemes; artistes using these schemes achieve the same result under both approaches. But the negative effect from the unlimited approach is that it taxes normal artistes more severely than the limited approach does.

The conclusion has to be that there is a real risk that the tax burden for artistes in the performance country is higher than the tax burden for other taxpayers. This can be even worse for the combined tax burden of the performance and the residence country.

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

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

In chapter 10 the tax revenue in the performance country was studied. A survey of four countries, the Netherlands, the United Kingdom, Australia and New Zealand, shows a total tax revenue from non-resident artistes and sportsmen of EUR 63 million per year. Compared to a total tax revenue of EUR 656 billion per year, the non-resident artiste and sportsmen taxation contributes on average not more than 0.01% to a country's budget.

The conclusion from this calculation is that the taxation of the performance fees of non-resident artistes (and sportsmen) does not make a significant contribution. This becomes even more appalling if the tax credits for foreign income of resident artistes and sportsmen are taken into consideration.

Paragraph 10.6 discussed the administrative burden for both the international performing artiste and the tax administration. This administrative burden arises in both the country of performance and the country of residence. There are signs that the administrative expenses are high, although no exact figures are available. For small and medium artistes the administrative costs will be disproportionate compared to the performance income, especially when performances have taken place in

various countries. These costs will be an obstacle to international artistes making use of their rights in both the source and the residence country. Practical evidence from Germany, the Netherlands and the United Kingdom supports this conclusion. But the tax authorities also complain about the extra administrative expenses that result from the special artiste tax rules.

The combination of minimal tax revenue and high administrative expenses leads to the conclusion that the special artiste tax rules are not cost effective.

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

Chapter 11 has discussed the taxation of artistes within the European Union. The European Union is developing its internal market and has concluded the EC Treaty with non-discrimination and freedom principles. But studies have shown that the taxation of performing artistes causes obstacles within the common market because artistes are treated differently from other taxpayers. The European Court of Justice has confirmed this in the *Gerritse* case and has removed some of the obstacles. Other parts of the deviating taxing rules in the performance countries are now being tested in the pending cases of *Scorpio* and *Centro Equestre*. But even after these cases the different treatment of performing artistes may still be in conflict with the principles of the EC Treaty. This may mean that elements of Article 17 of the OECD Model should be changed to accord with EU principles.

The conclusion has to be that the taxation of performing artistes within the European Union still causes obstacles to further cross-border activity and has therefore not yet contributed to the integration process of the European Union. The Council of the European Union has ordered in its Work Plan 2005/2006 improvement in the mobility of performing artistes.

(9) The special tax rules should not cause disturbances or hindrances on the market

The excessive taxation, as calculated in chapter 9, and the extra administrative expenses, as explained in 10.6., make it less attractive for performing artistes to plan international performances or tours. Both problems bring extra costs, and the costs of touring are already quite high,

as was seen in chapter 8. The reluctance of artistes to perform abroad leads to other choices, such as promoting their records and generating royalties, or to perform only in the country of residence. The income can be made more attractive if source taxation can be avoided.

The conclusion has to be that the problematic and excessive taxation of international performance income causes disturbances and hindrances on the market.

## 13.3. Considerations of tax avoidance and non-compliance

Article 17 was introduced in the 1963 OECD Model Treaty to counteract anti-avoidance behaviour by top artistes (and sportsmen) and to improve the compliance of foreign income. The result of the article is that almost all of the bilateral tax treaties contain a provision comparable to Article 17 and that almost all countries have imposed a withholding tax on the performance income of non-resident artistes in their national tax rules. Effectively, artistes are paying tax on their performance income when they earn it, i.e. in the country of their performance.

Unfortunately, the risk of tax avoidance behaviour seems to be exaggerated. The vast majority of international performing artistes are not rich and famous and do not feel more than the normal temptation to avoid tax. This is certainly the case for the "small but willing amateurs", the "artistes struggling for recognition" and the "well-established professionals" from 1.2. of this thesis, who live in normal houses, send their children to the local schools and see tax havens only as possible (although expensive) holiday destinations.

Perhaps the top stars, the "happy few", may be looking for ways to use tax havens, but with the foreign-source taxation on performance fees this has long ceased to be attractive. For some years now these artistes have preferred to receive their international performance income in their normal country of residence (and not in a tax haven), because they can then make use of normal business and administration facilities, pay their high touring expenses, claim a foreign tax credit and use the net result in their home country for private expenditure. For these top stars the foreign tax credit can be considerable, because their taxable worldwide income is high and they are taxed at the top rates of the progressive tax table. The survey on

the expenses for performances in the Netherlands, which was published in chapter 8, also gave the extra information that it rarely happens that a performing artiste has a residence address in a tax haven, even when he can be categorized as one of the "happy few".

Therefore it cannot be concluded that international performing artistes nowadays really have (more than normal) tax avoidance intentions.

The compliance behaviour of artistes has also much improved over the years. The main reason is that the method of payment for artiste performances has fundamentally changed. Where it was normal in the rock 'n' roll period of the sixties and seventies for performance fees to be paid in cash to artistes, nowadays bank transfers are the regular means of payment. Only very small artistes still receive their fees in cash, but the non-compliance issue is not at stake for these artistes because their production expenses are relatively high and they make hardly any taxable profit from their foreign performances.

When an artiste grows in popularity, he will insist on bank transfers as far as possible, very often with advances before the performance, to acquire funds for the preparation costs for an international tour, but also to be sure that the organizer of the performance is serious and creditworthy. Sometimes a small part of the performance fee is paid in cash at the show, to fund the tour manager with money as "float for the road", i.e. to pay for catering, per diems and other costs during the tour. But it is much safer to collect the main part of the performance fee with bank transfers than to be on tour with wads of cash. And payments for expenses with credit cards are easier to administer afterwards, also because they are already converted into the currency of the home country.

With this change to bank transfers, there no longer seems much risk of significant amounts of foreign income not being administered and reported in the home country.

All in all it must be concluded that the reasons for the existing system of international artiste taxation seem to be no longer valid. Artistes normally live in treaty countries and report their foreign income in their domestic tax returns.

## 13.4. Awareness at the OECD in 1987, but lack of action since then

The 1987 Report has been an important reconsideration for the OECD of the international artiste taxation.[1] The report focused on the mistrust of artistes in its opening paragraphs and supported source taxation as the method to use against the tax avoidance and non-compliance behaviour. But the report also stated the following in the Paragraphs 14-17:

> 14. The main principle, which underlines this report, is that income from entertainment and sport activities should be taxed in the same way as income from any other activities. Exceptions to this principle should be kept to a minimum. …
> 15. The second principle upon which this report is drafted is that artistes and athletes are, as are other taxpayers, fully liable to tax in their country of residence and, ideally, should be taxed accordingly. Whilst certain countries provide for exemption of foreign income, the amount of income earned abroad should be known when, under the general income tax, this affects the progressive rate that is applied to other income sources.
> 16. However, as is usually the case with itinerant activities, the country of residence has difficulty in identifying the activities of its residents abroad. It will therefore have to rely mostly on information provided by the country where the activities are exercised. For this reason, and also in order to avoid practical difficulties, it is felt that the principle on which Article 17 of the 1977 Model Convention is based should be followed. The main purpose of this report is therefore to help Member countries to establish a system by which the income of artistes and athletes could effectively be taxed in the country of performance.
> 17. In taxing artistes and athletes, tax authorities encounter problems first in obtaining information about the performances taking place and secondly of the trade or the use of legal avoidance schemes.

This means that the OECD recognized at the beginning of these paragraphs that artistes should be taxed in the same way as other taxpayers, which is ideally in the country of residence. But because of problems with the exchange of information about performance income it did not seem to be possible to achieve this and therefore source taxation was recommended. That is not a positive approach: because the tax authorities were not able in the 1980s to set up a good system of exchange of information, artistes had to suffer from the problems arising from source taxation.

1. See 2.12.

Later in the 1987 Report the OECD itself admitted that it had suggested some tentative recommendations,[2] such as taxation of the gross performance fee, because expenses were difficult to quantify, and reversion to the unlimited approach for Article 17(2). But it also suggested improvements to the artiste tax system, especially with regard to the exchange of information and assistance in collection.[3]

And finally, the OECD recommends that countries should use the mutual agreement procedure for cases that lead to double taxation.[4]

This shows the OECD was already aware in 1987 that the deviating taxation of international artiste taxation in the main had to be continued because of the inability of national tax authorities to set up a proper system for the exchange of information. There were many complaints about the misbehaviour of artistes at the beginning of the Report, but the conclusion was also drawn that tax authorities were not able to work together and provide each other with information about performance income on a regular basis.

The efficiency and scope of exchange of information have increased significantly over the last two decades, but Article 17 in the OECD Model Treaty has been kept as strict as it was. That is especially strange because artistes are mentioned in bilateral agreements about the exchange of information.[5] But the OECD has not provided any follow-up since 1987 to study whether the allocation of artiste income to the source state is still necessary in the new information era.

## 13.5. Conclusions

At the end of the study for the first aim of this thesis it can be concluded that Article 17 of the OECD Model was justifiable when it was introduced in 1963, as a means of counteracting tax avoidance and improving compliance. The existence of Article 17 and its implementation in many bilateral tax treaties has led most countries to impose a withholding tax in their national tax rules. This is very positive.

2. See Paragraph 105 of the 1987 OECD Report; see also 2.12.4. of this thesis.
3. See Paragraphs 105-108 of the 1987 OECD Report.
4. See Paragraph 109 of the 1987 OECD Report.
5. See 12.8.3.

But the influence of Article 17 has gone too far and the rules have become too oppressive, especially after the 1987 OECD Report and the changes in the 1992 Commentary. The risk of excessive or even double taxation is now very real, as the study of the present situation has shown. The results of the study largely exceed the criteria that the author had given as benchmark for the first aim of the thesis:

– the definitions are not clear and unambiguous enough to allow special tax rules for only this specific group of taxpayers;
– bilateral tax treaties and national tax treaties have too many variations to make the special taxation fair and reliable;
– the elimination of double taxation is complicated and incomplete;
– the tax burden for artistes is higher than for other taxable persons;
– the tax revenue for the state's budget is minimal, while the administrative expenses are high;
– the special artiste tax rules cause disturbances on the market.

The risk of tax avoidance behaviour seems to be exaggerated. It cannot be concluded that artistes nowadays show more than normal tax avoidance behaviour. And the compliance behaviour of artistes has changed over the years. Cash payments are now made only for small performances, bank transfers have become normal in the performance business. The original reasons behind the special artiste tax provision in tax treaties no longer seem to be valid.

The OECD already recognized in its 1987 OECD Report that artistes should be taxed in the same way as other taxpayers. But because of problems with the exchange of information about performance income it did not seem possible to achieve this and therefore source taxation was recommended. This was a negative approach and showed that it was mainly the inefficient work processes of the tax authorities that kept the source taxation of performing artistes in place. Unfortunately, it is unclear whether the OECD has taken action over the last two decades to remove these inefficiencies in order to pave the way for better tax treatment for performing artistes.

Altogether the study of the effects resulting from the special taxing rules for international performing artistes, as derived from Article 17 of the OECD Model, shows clear signs of inefficiencies, excessive or double taxation, unequal treatment and an unbalanced division of rights and responsibilities between the artistes and the tax authorities. The negative results are not reasonable and the arguments of tax avoidance and non-

compliance cannot justify a special tax regime for a specific group of taxpayers, which deviates so heavily from the normal taxing rules of the Articles 7 and 15 of the OECD Model Tax Convention and in which so many artistes are worse off than other taxpayers.

The next chapters will discuss how these problems can be solved and improvements can be achieved.