
CHAPTER 15

CAN ARTICLE 17 OF THE OECD MODEL RADICALLY BE CHANGED?

15.1. Is more possible than just modifications?

In the preceding chapter the options already available to improve Article 17 of the OECD Model were discussed. Implementation will lead to modifications and removal of some of the problems resulting from the existing artiste tax rules. But unfortunately one of the conclusions at the end of the chapter was that Article 17 of the OECD Model would also become more complicated with some of these modifications and that discussions would arise about who would qualify for the conditions for exemption in the country of performance (and who would not). This means that some may profit, because they can achieve exclusive taxation in their residence country, no longer bear the risk of international excessive taxation and avoid extra administrative expenses, while others may be unfortunate and remain in the same adverse position. This does not solve the problem of unequal treatment.

The question in this chapter is whether we can go further than just modifications and change Article 17 of the OECD Model more radically, while also ensuring that the correct taxation of international performing artistes takes place.

15.2. A radical change may be considered

15.2.1. Turnaround of Article 17 of the OECD Model

The following adjustments could be made in Article 17 of the OECD Model to remove the current problems and make the taxation of international performing artistes more comparable with the taxation of other persons:

- (a) Turn Article 17 of the OECD Model around, which would mean that the allocation of the taxing right to the country of performance was given up and the normal allocation rules would apply. The effect of this

measure would be that under a tax treaty the income of performing artistes would fall under Article 7 (Business Profits) or Article 15 (Income from Employment), or any other article, if applicable.

- (b) But recommend in the Commentary on Article 17 of the OECD Model that every country should levy a source tax from the performance income of non-resident artistes, unless an exemption procedure has been completed.

With these two elements the normal order in international taxation would be followed. Countries very often create broad taxing rights in their national legislation which can be confirmed or restricted by the allocation rules of bilateral tax treaties. The current Article 17 of the OECD Model is an example of confirmation of the taxing right for the source country, but the radically changed Article 17 of the OECD Model would shift this decision to the other articles of the OECD Model, such as Article 7 and Article 15. These articles would then decide whether the taxing rights in the source country would be confirmed or restricted.

The withholding tax in the country of performance will in any case apply if the artiste is not a resident of a treaty country or does not take any initiative.¹

But if the artiste lived in a country with a tax treaty with the performance country containing the modified Article 17 and the artiste met the conditions for restriction of the taxing right, he could follow an exemption procedure. This would mean that he had to ask the tax authorities in his country of residence to countersign an application form as confirmation of his place of residence; he would then have to send the form to the tax authorities in the country of performance in order to obtain approval for the exemption.² With the exemption certificate, the organizer of the performance could waive the withholding tax and the artiste would have to pay tax on the foreign performance income in his country of residence.

1. Performance countries could insert a simple, gross withholding tax in their national tax systems, applicable to all performance fees for non-resident artistes' performances, regardless of who the recipient of the fee might be.

2. This application procedure is comparable to the application procedure for royalties and other sources of income. Without official approval the original source taxation remains effective.

No exemption would be given if the artiste resided in a treaty country but the tax treaty allocated the taxing right to the source country.³

15.2.2. Still counteracting tax avoidance behaviour

After this proposal Article 17 of the OECD Model would still offer sufficient protection against tax avoidance behaviour. The taxing right could only be transferred from the country of performance to the country of residence under a bilateral tax treaty and if the conditions for the Articles 7 and 15(2) were met. This means that normal taxation would be secured, because treaty partners only come to conclude a bilateral tax treaty after they have certified that they both have reasonable tax systems. And the proposal would still counteract tax avoidance behaviour, because countries do not have tax treaties with tax havens and therefore do not waive their source tax for artistes residing in those territories. Therefore, the proposed turnaround of Article 17 would be an incentive for international performing artistes to live in a normal treaty country (with normal taxation) in order to pay tax in the country of residence and avoid excessive taxation.

In cases of doubt, the country of performance would have the right to ask questions during the procedure and to delay granting the exemption until enough evidence had been given that tax avoidance was not taking place.

15.2.3. Exchange of information and compliance

The radical change of Article 17 of the OECD Model could be accompanied by an improvement in the exchange of information from the performance country to the residence country. This would take away the main objection of the 1987 OECD Report,⁴ after which the OECD decided to keep Article 17 as it had been since 1963.

The tax authorities in the residence country could already be gathering information about the foreign performance income during the exemption procedure. They would need to countersign the application form and insert

3. Examples are if a self-employed artiste had a permanent establishment in the country of performance, or if an artiste was an employee of a company in the country of performance. In these cases the normal tax rules in the performance country would apply.

4. See Paragraphs 106-108 of the 1987 OECD Report and 2.12.4. of this thesis.

a copy of this form in the artiste's file. After the end of the year this could be compared with the report of the income in the annual account or income tax return.

But performance countries also need to improve the exchange of information about the performance income and tax implications for non-resident artistes. Until now Article 26 of the OECD Model Convention, EC Council Directive 77/799/EEC and bilateral treaties between countries have ordered the exchange of information, sometimes explicitly mentioning the performance income of artistes. Automatic and spontaneous exchange of information should no longer be problematic.

This can be added to the remarks from 13.3. that the compliance of performance income in the country of residence has already improved considerably.

15.3. Comparison with the nine criteria from the aim of the thesis

The radical change of Article 17 and return to the normal allocation rules in a treaty situation can be tested against the nine criteria specified in 1.4.:⁵

- (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.

The importance of this first criterion would vanish with the turnaround of Article 17 of the OECD Model. The importance for Article 17 of the OECD Model itself would become minimal, but national tax rules may still need a precise definition to determine who falls under the withholding tax. But countries could also decide to broaden the scope of the withholding tax to all non-residents earning income from activities in their country.

- (2) The recommendations of the OECD in Article 17 of the Model Tax Convention need to be followed as closely and consistently as possible

5. In 13.2. the results from the study of the present situation of international artiste taxation were tested against the nine criteria.

by countries when they conclude their bilateral tax treaties and impose their national tax rules.

The close and consistent following of the OECD recommendations would be improved with the radical change of Article 17 of the OECD Model, because a strange and discriminatory deviation from the general allocation rules would be removed and more consistency with the other articles of the OECD Model Convention would be achieved.

For a change in the short term it may be an obstacle that bilateral tax treaties have already been concluded and will only be changed after renegotiation. A change in the OECD Model would not have a direct effect on these existing tax treaties. Treaty countries could, however, agree not to renegotiate the full tax treaty but to add a protocol to the treaty, in which they followed the new recommendations of the OECD with the modified Article 17. There would be no obligation to bring the agreed provision of Article 17 into practice, because the text says that treaty countries “may” tax the performance income of artistes. The two countries could agree in a protocol to the treaty not to make use of this provision but to follow the new recommendations of the OECD in the modified Article 17 of the OECD Model and to bring artistes under the normal allocation rules.

Countries could even decide unilaterally not to make use of the existing artiste tax provision in tax treaties. They could exempt the income of artistes from tax treaty countries on application, as described in 15.2.3. The Netherlands is considering such a unilateral change, but only for countries with which the tax credit method has been agreed as the method for eliminating double taxation.⁶

Altogether, if countries are willing to solve the short-term obstacles after a turnaround of Article 17 of the OECD Model, then in the long term close and consistent adherence to the OECD Model can be substantially improved.

- (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.

6. See Dick Molenaar, “The illusions of international artiste and sportsman taxation”, in *A Tax Globalist – Essays in honour of Maarten J. Ellis*, International Bureau for Fiscal Documentation (2005), at 90. A list of the use of the methods for the elimination of double taxation by the Netherlands can be found in 7.3.2.

There would no longer be any need for a special tax credit or exemption for artistes in the country of residence after the turnaround of Article 17. If the country of performance retained the right to tax the income under another article of a bilateral tax treaty, then the artiste could make use of the related method for the elimination of double taxation. The risk of inefficiencies would be minimized with this change, and tax credit problems would occur no more frequently for artistes than for other taxpayers.

- (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.
- (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.

The proposal for a radical change of Article 17 of the OECD Model would result in the performance country giving up its taxing right if either Article 7 or Article 15(2) of the OECD Model applied. Obviously, this would reduce the tax revenue for the country of performance, but on the other hand that country would no longer need to allow tax credits (or exemptions) to its resident artistes who had performed in treaty countries and also met the conditions of Article 7 and 15(2) for exclusive taxation in their residence country. The net impact of these two changes would be minimal, which means that countries would not suffer a significant loss in tax revenue.

Performing artistes would be better off, as they would be exclusively taxed in the country of residence and the risk of excessive or double taxation would have disappeared.

The administrative burden following from the exemption procedure in the country of performance would be much lower than the administrative burden from the current artiste tax system.

- (8) Within the European Union the taxation of international performing artistes needs to contribute to the integration process
- (9) The special tax rules should not cause disturbances or hindrances on the market

The radical change of Article 17 of the OECD Model would remove the unequal treatment of non-resident performing artistes. This would square with the freedom principles of the EC Treaty and take away the obstacles within the European Community to cross-border activity. The circulation of performing artistes through the European Union would profit from this change. This would be the same for markets in other territories and would lead to more economic growth for the live performance industry.

15.4. Conclusions

This chapter puts forward a proposal for a radical change of Article 17 of the OECD Model.⁷ The article could be turned around, which would mean that artistes from treaty countries could make use of the same treaty provisions (Article 7 or Article 15(2)) as other self-employed persons or employees and could change from source to residence state taxation if they met the conditions of these treaty provisions.

However, every country of performance needs to keep a withholding tax for non-resident artistes as protection against tax avoidance behaviour, but this withholding tax could be waived in a bilateral treaty relationship after a proper exemption application procedure had been completed. With this,

7. Discussion about the legitimacy of Article 17 started with Daniel Sandler, *The Taxation of International Entertainers and Athletes – All the World’s a Stage*, Kluwer Law International (1995), at 344. A radical change has been proposed by Harald Grams, “Artist Taxation: Article 17 of the OECD Model Treaty – a Relic of Primeval Tax Times?”, 27 *Intertax* (1999), at 188; Joel A. Nitikman, “Article 17 of the OECD Model Treaty – An Anachronism?”, 29 *Intertax* 8/9 (2001), at 268; Dick Molenaar and Harald Grams, “Rent-A-Star – The Purpose of Article 17(2) of the OECD Model”, 56 *Bulletin for International Fiscal Documentation* 10 (2002), at 500; Dick Molenaar and Harald Grams, “How To Modernize Income Taxation of International Artistes and Sportsmen”, 33 *Tax Management International Journal* 4 (2004), at 238.

the risk of tax avoidance would be minimal, because there are no tax treaties with tax havens and therefore artistes residing in those territories could not get an exemption but would still be taxed in the performance country. The risk of non-compliance would not be very great, because the tax authorities of the residence country would be involved in the exemption procedure of the source country and could gather information about the existence of the foreign income. Compliance could be further improved with proper exchange of information from the performance to the residence country about the performance income.

The modified Article 17 of the OECD Model has been tested against the nine criteria that are used as reference for the aim of this thesis. The conclusions are positive.

It would only be problematic for countries to implement the modified Article 17 at short notice because tax treaties have been concluded and renegotiations have more consequences than just a change of Article 17. But if countries have the will to improve the taxation of their international performing artistes, then they can choose to add a protocol to their existing bilateral tax treaties and decide not to use the taxing right of the existing Article 17. This option is directly available.

The radical change to Article 17 would not lead to a loss of tax revenue. Countries would not just give up their taxing rights on performance income from non-resident artistes but would also no longer have to allow tax credits or exemptions to residents for their foreign performance income. The net result would be close to zero. Another positive effect would be that the administrative burden would be considerably reduced for everyone involved.

A special method to eliminate double taxation would no longer be necessary for performing artistes. Tax credit problems would occur no more frequently for artistes than for other taxpayers.

The taxation of international performing artistes would accord with the non-discrimination and freedom principles of the EC Treaty and an important obstacle to the circulation of performing artistes in the European Union and in other territories would be removed. This would increase cross-border activity and lead to more economic growth for the live performance industry.

The conclusion can be drawn after this chapter that with the radical change of Article 17 of the OECD Model the unequal treatment of international performing artistes, as displayed in the study in this thesis, would be removed much more completely than with the modifications in the preceding chapter. The radically changed Article 17 of the OECD Model would meet all the criteria which were set out at the beginning of this thesis.

Courage is needed to take the initiative for this radical change, but everyone would be better off, not only the artistes but also the tax authorities.

PART F

SUMMARY AND CONCLUSIONS

