ARTICLE 17 ENTERTAINERS AND SPORTSPERSONS

1. Notwithstanding the provisions of Article 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 sportsperson, from that resident’s 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 sportsperson acting as such accrues not to the entertainer or sportsperson but to another person, that income may, notwithstanding the provisions of Article 15, be taxed in the Contracting State in which the activities of the entertainer or sportsperson are exercised.
Article 17 of the OECD Model Tax Convention

Background

- Under Article 17 (Artistes and Sportsmen) of the OECD Model Tax Convention on Income and on Capital (The OECD Model tax Convention or the Model Convention), the State in which the activities of a non-resident entertainer or sportsman are performed is allowed to tax the income derived from these activities. This regime differs from that applicable to the income derived from other types of activities, making it necessary to determine questions such as what is an entertainer or sportsman and what are the source and allocation rules for activities performed in various countries.

- The Committee on Fiscal Affairs, has examined these and other questions related to the application of Article 17.

- The 2014 Update reflects changes as a result of what was discussed and detailed in the Report on Issues related to Article 17 of the OECD Model Tax Convention.
Article 17 of the OECD Model Tax Convention

Background

- The general principles of international taxation can be found in the OECD Model Tax Convention:

  - a. companies and self-employed persons pay income tax only in their country of residence, unless they have a permanent establishment (PE) in the source country (Art. 7 of the OECD Model Tax Convention);

  - b. employees pay income tax in the source country (i.e. the country where they work). The country of residence, however, has sole taxation rights in the case where the employee stays in the source country for less than 183 days and the remuneration is paid by an employer who is not a resident of the source country nor has a PE there (Art. 15 of the OECD Model Tax Convention).
Article 17 of the OECD Model Tax Convention

Background

- Most countries levy a source tax on income earned by foreigners in the country. The rates often vary from 15% to 30%.

- Reasons for this source tax are mainly the following:
  
a) taxation in the country of residence cannot be assumed given the administrative difficulties in obtaining information;
b) Article 17 of the OECD Model Tax Convention allows the taxation of a number of high-income earners who could otherwise easily move their tax residence to a low tax jurisdiction;
c) source taxation can be administered relatively easily and with little burden on the performer.
Special rules for entertainers and sportspersons: Article 17 of the OECD Model Tax Convention

• The member countries of the OECD have decided in the 1960s to create an exceptional rule for entertainers and sportspersons. These individuals pay income tax in the country of performance, regardless of the general rules for companies, self-employed persons or employees.

• The fundamental reason for this special treatment is that top artistes and sportsmen are very mobile and can easily move their residency to a tax haven, which levies no income tax. The OECD believes that without Article 17 (and the taxing right for the source country) these top artistes and sportsmen would escape from taxation under the rules set out in Articles 7 and 15.

• The text of Article 17 makes it clear that it does not make a distinction between employees and self employed, since this article sets aside the normal allocation rules for employees that we refer in slide 4.
Article 17 of the OECD Model Tax Convention

Special rules for entertainers and sportspersons: Article 17 of the OECD Model Tax Convention

• Many countries have also included an exception to article 17 of the OECD Model Tax Convention (introducing article 17 (3)) in their tax treaties for performances in the other country, which are wholly or mainly supported from public funds.

• With the 2014 Update to the Model convention, the new commentary gives new option to restrict the scope of article 17 (basically by helping smaller individual sportspersons and entertainers with a threshold of approximately € 18,500 per person (corresponding to 15,000 IMF’s) per year under which an exemption in the performance country applies), and although this has not been followed by changes in bilateral tax treaties, it has systematically been inserted into new tax treaties.

• Worldwide, the exception in article 17 is now included in approximately two thirds of bilateral tax treaties.
Elimination of double taxation: Article 23 of the OECD Model Tax Convention

- The country of residence will include the foreign source income in the worldwide income, meaning that it will be taxed again in the residence country.

- To eliminate double taxation the OECD recommends, in Article 23 of the Model Convention, granting entertainers and sportspersons a tax exemption for the foreign income or a tax credit for the foreign tax.

- Since 1992, the OECD recommends the credit method (which is the most common method).

- Under the credit method, we have two variants: the full credit method - State R allows deduction of total amount of tax paid in State S and the ordinary credit method - State R allows deduction restricted to that part of tax payable in State R which is appropriate to the income earned in State S.
Article 17 of the OECD Model Tax Convention

Elimination of double taxation: Article 23 of the OECD Model Tax Convention

• Under the exemption method, we have also two variants: the full exemption method - Income taxed in State S is not taken into account at all by State R and the exemption with progression method - income taxed in State S is not taxed by State R, but State R takes into consideration the income for tax rate purposes.

• Both methods can lead to double taxation issues.
Article 17 of the OECD Model Tax Convention

An issue of avoidable double taxation?

• When sportspersons or artistes perform abroad they pay income tax in two countries. Not only in their residence country on their worldwide income, but also in the country where the performance takes place (the source country). And although tax treaties have been concluded, double (or excessive) taxation very often occurs.

• With the taxing right of Article 17 and the tax credit of Article 23 the taxation of international performing sportspersons and artistes would appear to be very balanced.

• However, unfortunately, this is not the reality.
Article 17 of the OECD Model Tax Convention

An issue of avoidable double taxation?

• The following problems exist in practice:

• a. The source country levies tax on the gross performance fee, including all expenses, whereas the country of residence only allows a tax credit on the net income.
Article 17 of the OECD Model Tax Convention

An issue of avoidable double taxation?

b. Problems with the tax credit may also arise. These problems can be the following:

- The promoter in the source country does not issue a tax certificate and thus it is not possible to present evidence to the tax authorities of the country of residence of the amount of tax paid in source country;
- The tax certificate is issued in the name of a group or team whereas the tax credit needs to be obtained by the individual artiste or sportsperson;
- The artistes or sportspersons are employees of a group or team, receiving a monthly salary and the tax credit cannot be processed in the monthly payroll processing;
- The tax certificate is issued in the language of the source country (and not in English) or there is no possibility of issuing a tax certificate.
Article 17 of the OECD Model Tax Convention

An issue of avoidable double taxation?

• If any of these problems occur, effective double taxation results, due to the existence of source tax in the country of performance and income tax in the country of residence.
Article 17 of the OECD Model Tax Convention

An issue of avoidable double taxation?

- Over the last years, there have been developments surrounding Article 17 of the OECD Model Tax Convention in terms of the European Union.

- These started with the decision in Gerritse (Case C-234/01) in which the Court of Justice of the European Union (ECJ) held that expenses should be deductible to the gross income. However, this decision did not make clear which expenses should be deductible.

- This was clarified in Scorpio (Case C-290/04) in which the ECJ held that, at least, direct expenses (direct economic connection = travel, accommodation costs, etc…) should be deductible from tax paid at source.

- The decision in Centro Equestre (Case C-345/04) followed the above mentioned jurisprudence and ruled that a German provision that limits the possibility of securing a refund of the tax unless the direct expenses account for more than 50% of the proceeds violates EU law.
Article 17 of the OECD Model Tax Convention

An issue of avoidable double taxation?

- This also resulted in the OECD changing paragraph 10 of the Commentary on Article 17 of the Model Convention (in the 2008 update) to permit a choice between gross taxation at a low rate or net taxation after the deduction of expenses and normal tax settlement at year-end, albeit not clarifying how this could be accomplished.
Article 17 of the OECD Model Tax Convention

An issue of avoidable double taxation?

• On 23 April 2010 the OECD published a new Draft Commentary on Article 17 of the Model convention, in which practical problems have been recognized and solutions were proposed.

• The Netherlands have proposed the removal of Article 17 and the return to the general rules of Articles 7 and 15, but this was not followed by other countries.

• It should be noted that the Netherlands took a decision in 2007 of granting an unilateral tax exemption for non-resident entertainers and sportspersons residing in a state with which the Netherlands have concluded a bilateral tax treaty.
Article 17 of the OECD Model Tax Convention

An issue of avoidable double taxation?

• However, the Committee of Fiscal Affairs did not include this proposal in the updated OECD Model Tax Convention of 2014. The Dutch proposal was discussed in Part 1 of the OECD Report, entitled “Issues related to Article 17 of the Model Tax Convention”, but the great majority of OECD member countries supported the view that article 17 should remain in the OECD Model.

• Major sports events historically tend not to attract withholding tax, such as the Olympics, football tournaments, the finals of the Champions League and Europe League, which acknowledges that, in a certain way, the application of article 17 of the OECD Model Tax Convention raises issues, notably of double taxation.
Article 17 of the OECD Model Tax Convention

OECD Recommendations

- Although the OECD has not decided to remove Article 17 from the OECD Model Tax Convention, it recommended restrictions/suggestions to Article 17 to its Member States to eliminate excessive restrictions on the taxation of internationally performing artists and sportsmen.
Article 17 of the OECD Model Tax Convention

OECD Recommendations

• Some of the suggested restrictions are contained in paragraph 2 of the Commentary on Article 17 of the OECD Model Tax Convention (2014). This states that too strict provisions could, in certain circumstances, prevent cultural exchanges. In order to avoid this, states may decide in their bilateral tax treaties to restrict the application of Article 17, no.1 of the Model Convention to business activities. In such a case, employed entertainers and sportspersons would fall within the scope of article 15 of the OECD and could be entitled to the exemption set out in Article 15, no. 2.

• Moreover, one should also attend to paragraph 10 of the Commentary on Article 17 of the OECD Model Convention (2008) which contains the following two (sub-) options: (1) taxation of the gross performance fee, but eventually at a low tax rate; or (2) the deduction of expenses and taxation under the normal rules.
OECD Recommendations

- Also, and as contained in paragraphs 10.1 to 10.4 of the Commentary on Article 17 of the OECD Model Tax Convention (2014), there is a minimum amount of 15,000 IMF - Special Drawing Rights - per entertainer or sportsperson per year - in the case of which the source state does not have the right to tax the performance income. This has been adopted from article 16 of the US Model Tax Convention (2006), which refers to an amount of USD 20,000.

- Finally, and as specified in paragraph 14 of the Commentary on Article 17 of the OECD Model Tax Convention, a tax exemption is granted to performances subsidized by public funds as we have already mentioned during this presentation.
THANK YOU

Lisbon, 6th of May, 2016.

Henrique Nogueira Nunes
email: hnn@albsa.pt