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INTERNATIONAL TAXATION OF ENTERTAINMENT INCOME

Article 17 OECD Model: Objective scope and thresholds to its force of attraction

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LIST ANACRONYSMS

ATAD – EU Anti-Avoidance Directive

BEPS – Base Erosion Profit Shifting

CRS – Common Reporting Standard

CFC – Controlled Foreign Corporations

CITA – Corporate Income Tax Act

CITR – Corporate Income Tax Regulations

DGT – Directorate of General Taxes

DTT – Double Tax Treaty

EEA – European Economic Area

ETVE – Spanish Holding Company regime

ECJ – European Court of Justice

FATCA – Foreign Account Tax Compliance Act

GAAR – General Anti-Avoidance Rule

IFA – International Fiscal Association

IRS – Internal Revenue Service

MLI – Multilateral Instrument

NRITA – Non-Resident Income Tax Act

NRITR – Non-Resident Income Tax Regulations

OEEC – Organization for European Economic Co-Operation

OECD – Organization of Economic and Cooperation Development

OECD Model – OECD Model Convention throughout different versions

SAAR – Specific Anti-Abuse Rules

Sp-NL DTT – Double taxation treaty between the Netherlands and Spain

PITA – Spanish Personal Income Tax Act

PITR – Spanish Personal Income Tax Regulations

PPT– Principal Purpose Test (PPT)

TEAC – Spanish Central

TEAR – Regional Economic Administrative Tribunal

TFUE – Treaty on the Functioning of the European Union

UN – United Nations

US Model – 1996, 2006 and 2016 US Model Income Tax Conventions

CHAPTER 1 - INTRODUCTION, AIM AND DELIMITATION

1.1 Entertainers and sportspersons

Entertainers and sportspeople continue to be a specific target group attracting the attention of the worldwide media and audience. The fact that this qualifying group of taxpayers obtains relevant amount of income in a limited period of time, together with the impact in the media, leads them to be included in the action plan of tax authorities around the globe.

The source of their income arises within the context of international arena through performances carried out all over the world. Anti-abuse tax planning measures are tailored-made by OECD and tax authorities, in order to combat the erosion of their taxing powers as source countries, as well as seeking to counteract tax evasion.

The pivotal issue of this work resides on analyzing the reasoning behind these specific measures addressed to a limited group of taxpayers. In this sense, this thesis primarily focuses on a detailed analysis of its objective boundaries, as opposed to the subjective scope of Article 17 of the Model Tax Convention of the Organisation for Economic Co-operation and Development (hereinafter OECD Model).

It involves analyzing not only the reasons behind its implementation, enabling to fully understand its “lex specialis” character, but it also tackles the determination of its scope of application by resorting mostly to the objective approach. It is carried out for the purposes of offering what we consider the most accurate available position when applying Article 17 OECD Model and, if so, limiting its force of attraction versus other items of income.

Thus, said comprehensive scope of the analysis helps to better understand the kernel of Article 17 OECD Model and to provide for a critical position when applying and interpreting it. In this regard, the aim of this thesis is to help avoiding the tax distortions arising from source countries exercise of their taxing rights, when cross-border performances of entertainers and sportspersons take place. In particular, by using Spanish tax rules and jurisprudence as a yardstick to overcome the main shortcomings arising from unlimited force of attraction of Article 17 OECD Model.

Moreover, it helps to improve the correct characterization of certain qualifying items of income under Article 17 of the OECD Model based on a correct interpretation of the OECD Commentary on Article 17.

1.2. Aim of the study and delimitation

The purpose of this research work consists of shedding some light, as well as consistency, in relation to the objective scope of Article 17 OECD Model and its force of attraction when applying it.

Throughout this research work, the main question to be ascertained is whether Article 17 OECD Model, as it is currently drafted, provides for an appropriate international tax tool, in order to tackle the taxation of entertainers and sportspersons carrying out international performances.

ARTICLE 17 ENTERTAINERS AND SPORTSPERSONS

1. *Notwithstanding the provisions of Articles 7 and 15, income derived by a resident of a Contracting State as an entertainer, such as a theatre, motion picture, radio or television artiste, or a musician, or as a 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 in his capacity as such accrues not to the entertainer or sportsperson himself but to another person, that income may, notwithstanding the provisions of Articles 7 and 15, be taxed in the Contracting State in which the activities of the entertainer or sportsperson are exercised.*

Most of the efforts have been addressed so far to the issue of whom must be included under Article 17 OECD Model. In other words, who is considered to qualify as entertainer or sportsperson (subjective approach). However, the novelty of the approach endorsed within this research work consists of developing the analysis from a new perspective. Accordingly, it focuses on what are the main consequences and challenges when adopting the interpretation of Article 17 OECD Model from an objective approach and granting the primary role to the entertainment element.

The novelties are analyzed with the aim at overcoming old problems when applying in practice Article 17 OECD Model. In this regard, the main hypothesis to be tested is whether a well-balanced objective approach may be used as a yardstick, when applying Article 17 OECD Model versus the overvaluation of the subjective approach. Also, the performance orientated approach may be overcome through the proposed appropriate application of Article 17 OECD Model based on the primary role of the entertainment activity itself rather than the definition of entertainer or sportsperson.

In this sense, the main questions, as well as consequences when trying to replying them, arise when dealing with the analysis of Article 17 OECD Model, related to international performances of those entertainers and sportspersons, which require an answer (methodological framework) in connection with the main tax issues:

- "What" items of income of entertainment character can be subject to tax under Article 17 OECD Model.

- "Where" the taxing rights involving entertainment activities must be allocated. In this regard, new trends of performances or professionals (online context) are analyzed under the new approach (entertainment approach).

- "How" the author focuses on the methodological approach in order to address the negative consequences that may arise from a subjective approach (unlimited force of attraction when applying Article 17 OECD Model), in the context of international income allocation and apportionment. In fact, Spanish Supreme Court Case – U2, is used as a pivotal analysis in order to give evidence about the negative consequences of the unlimited subjective approach of Article 17 OECD Model.

Moreover, the OECD proposals within the BEPS [1] context, endorsed by EU Commission and Unites States are of great value when analyzing them, intertwined with the potential consequences in the context of Article 17 OECD Model.

Thus, the entertainment element becomes crucial when applying Article 17 OECD Model in connection to the characterization arising from other potential items of income within the same OECD Model, which can be obtained by entertainers and sportspersons.

[1] Base Erosion Profit Shifting it is the OECD collaboration plan in order to combat tax avoidance. As of November 4, 2021, over 135 countries and jurisdictions joined a new two-pillar plan aimed at amending international taxation rules in order to achieve a fairer international tax system, regardless of the State where they operate.

Furthermore, a detailed analysis of the Spanish tax rules applicable to resident entertainers and sportsperson, who perform internationally, with special attention to the special regime applicable to image rights. Conversely, it also deals with domestic tax rules applicable to same target group but having foreign tax residency status, insofar their performances take place in Spain.

The novelty as regards the analysis of the mentioned set of domestic tax rules resides in carrying out it together with the domestic jurisprudence of similar tax Court cases and/or replies by the Spanish tax authorities to binding consultation are brought into analysis, in order to link it to a critical analysis within the far-reaching approach when applying Article 17 OECD Model in the international context.

Finally, the ECJ jurisprudence plays a primary role in order to ascertain whether there is any potential discrimination within the Spanish domestic tax legislation, together with the main findings when applying the EU abuse of law doctrine ("Danish Cases") in the context of entertainers and sportspersons.

In terms of delimitation of the study, it is also important to note that all references include in this work to other Model Treaties, such as the 2016 United States (US) Model or the United Nations (UN) Model, are subservient to the analysis and/or conclusions of those stemming from the OECD Model. Thus, said references to US and UN Models are encompassed insofar they are useful to the above mentioned analysis. In any case, they are not aimed at performing a thoughtful analysis of both mentioned Model tax treaties, as opposed to OECD Model.

Moreover, the research work does not encompass the subsequent analysis when applying of Article 17 OECD Model, i.e. the application of the double tax relief measures, either at treaty level or domestic ones. In other words, the relevance and potential issues arising from the application of Article 23 of the OECD Model, intertwined with the corresponding domestic tax relief measures, deserve a detailed analysis, out of scope of the limits of this thesis. However, certain domestic tax aspects of Spanish tax system, as residence State are tackled, as well as potential mismatches in certain tax treaty scenarios.

Likewise, the analysis and consequences arising from the indirect taxation in relation entertainers and sportspersons are far beyond the content of this research work. However, certain references are included for the purposes of Chapter 3.

Therefore, the choice of this particular topic about the force of attraction within context of entertainers and sportspersons (Article 17 OECD Model) is based on the fact of

allowing the author to lay down a critical analysis and a potential solution. All this within the boundaries stated in double tax treaties mirroring the OECD Model and their interaction with domestic tax laws (such as Spain), within the context of source income taxation and European Union freedoms. Furthermore, the transversal character of this article leads to determine its limits as opposed to other OECD Articles.

Finally, this research work is addressed to worldwide tax authorities alongside tax practitioners, in order to find out a common position as regards what could be the correct approach to be adopted when determining the scope of application of Article 17 OECD Model. It follows the trend endorsed by the OECD in 2014 whereby, it supported the suggestion whereby Article 17 OECD Model should be substantially amended, as opposed to its removal. Last but not least important, it enables to avoid the application of a far-reaching approach when determining the force of attraction of Article 17 OECD Model, which may lead to double or excessive taxation scenarios.

1.3. Structure and research methods

This thesis is divided into four main parts. In particular:

Part 1. After a brief introduction of the international tax context where the analysis takes place, it includes a detailed historical analysis of how the main content of Article 17 OECD Model has been drafted throughout amendments in different periods. The novelty of this work resides in describing the historical path up to the subsequent OECD Models in 1963, 1977, 1992, 2000 and 2014 and the underlying reasons why the main amendments have been incorporated.

Those changes encompassed in subsequent OECD Models enable to better understand the rationale behind its boundaries of application versus other OECD articles. In its turn, they may lead to help solving potential conflicts arising from characterization of income in various OECD articles.

Moreover, relevant double tax treaties which incorporated relevant changes when applying and interpreting Article 17 OECD Model are also scrutinized, with the aim of fully understanding the purpose and scope of it. In particular, special attention is posed at scrutinizing the objective and subjective scope of the mentioned OECD Article.

The methodological added value of the historical OECD path is of great relevance in order to better understand the underlying reasons why Article 17 exists up to day. Moreover, it provides for the context under Article 17 OECD Model where the unlimited force of attraction still has room, as well as the great weight granted to the subjective scope.

In particular, it is analyzed the reasoning why a special tailored-drafted article was introduced within the OECD Model, in respect of a target group of persons, as opposed as the general trend of the remaining OECD articles, based on the type of income, instead. In addition, it also lays down a comprehensive critical analysis of previous tax publications dealing with Article 17 OECD Model, stated by recognized tax scholars, which are of great help to pave the way, for the purposes of providing the context where conclusions reached throughout this research work are laid down.

Also, the value and legal status of the OECD Commentaries is scrutinized. In particular, when dealing with scenarios involving reversal of previous interpretations via domestic tax rules and application to the OECD Commentaries to previously concluded double tax treaties. In this sense, a practical approach based on previous international court decisions is undertaken.

Part 2. It is the most extensive part of this research work and contains a great part of the achieved novelties**.** The starting point is the analysis of the "*lex specialis*" status of Article 17 OECD Model versus other general or "*umbrella*" double tax treaty articles.

In order to determine the scope of this OECD Article, two main interpretative approaches, subjective and objective, may be endorsed. A detailed description of both mentioned approaches together with the consequences arising from each position are carried out. In this regard, each position may either strengthen or limit the force of attraction of Article 17 OECD Model, respectively.

One of the primary novelties of this research work resides in determining a new objective approach of Article 17 OECD Model, based on the existence and relevance of the entertainment element. Through it, the shortcomings historically arising when endorsing the subjective scope or the limitations related to the performance-orientated approach are tried to be overcome.

Once the scope of Article 17 OECD Model is tackled within the boundaries of the objective approach, the next target of this research work consists of accomplishing a

proper application of Article 17 OECD Model when various sources of income are obtained by entertainers and sportspersons in different jurisdictions. This analysis is based on previous landmark international tax Court Cases, as well as Spanish domestic ones and replies to binding consultations from the Spanish tax authorities. They are used as means of interpretation for the splitting of the income and the resulting distribution within the various OECD Model Articles and countries involved.

The main goal of this part of the analysis consists of looking for security when applying this distribution of various sources of income and their related and subsequent taxing rights. It is a grey area where the only valid means of interpretation are the broad statements within the OECD Commentary and Court Cases around the globe, when tackling this particular tax issue of entertainers and sportspersons performing in various foreign countries. In this context, the analysis and conclusions reached by the author in relation to U2 Case are of essence.

Moreover, when this thesis deals with the analysis of the apportionment in the context of the split contracts concluded by entertainers and sportspersons, the OECD Model is the yardstick, in order to find out a feasible solution. The proposed solution may be applicable to scenarios dealing with similar facts as in the U2 Case. However, its main goal is to try to accomplish an international and uniform accurate application of the scope of Article 17 of the OECD Model and its corresponding apportionment, based on the most relevant international Court Cases.

The potential use of the transfer pricing rules is scrutinized into detail by the author in order to find out feasible solutions which might be applicable to the context of entertainers and sportspersons.

Also, the OECD proposals under the BEPS project and, in particular Pillar I and II proposals, are of great relevance since this international framework, may help to achieve a more appropriated force of attraction when applying Article 17 OECD Model.

Pursuant to the main role of the objective approach within this research work the qualification issues arising from the various items of income, directly or indirectly linked to the entertainment income obtained in the performances are also tackled.

Said qualification procedure is essential, in order to determine the type of income included in the scope of Article 17 OECD Model. The approach taken by the author consists of analyzing each item of income from tax treaty perspective, including major cases in the international arena, with the aim at adding international tax perspective to the application of these rules when source States exercise their taxing rights.

Part 3. It contains a detailed explanation of the Spanish domestic tax rules applicable to entertainers and sportspersons. This analysis is twofold.

On the one hand, Spanish tax resident entertainers and sportspersons performing internationally. In this sense, the objective approach based on the grounds of the entertainment element is challenged and analyzed in relation to the context of the Spanish domestic tax legislation. Also, the Spanish special regime for image rights is encompassed.

On the other hand, the applicable domestic tax rules when foreign tax resident entertainers and sportspersons carry out performances in Spain are scrutinized. In particular, those addressing qualification issues and the determination of the taxable base, in accordance with main Court Case and domestic tax authorities position through the reply to binding consultations.

Part 4. Finally, a specific chapter is devoted to EU Law and the related jurisprudence arising from the European Court of Justice (ECJ). The compatibility between article 17 OECD Model and EU Law is analyzed. The ECJ jurisprudence is the yardstick in order to ascertain the potential discriminations included in the Spanish tax legislation in relation to EU fundamental freedoms, intertwined with entertainers and sportspersons.

The abuse of law doctrine in the EU context is also analyzed for the purpose of reaching conclusions that may be applicable in the context of EU entertainers and sportspersons and even when tax residents in third countries are involved.

CHAPTER 2 - ARTICLE 17 OECD MODEL: HISTORY / COMMENTARY

2.1. International tax context

It is worth starting by dealing with certain introductory concepts, which are used or referred to throughout this thesis, such as international taxation, double taxation and double tax agreements or treaties. In addition, those tax issues provides for the context where the analysis of Article 17 OECD Model is carried out.

The wide definition of **international tax**[2] refers to domestic legislation covering foreign income of residents, based on their worldwide income approach, as well as the domestic income obtained by non-residents at the foreign source State. In other words, it consists of the overall international aspects of involved domestic tax laws[3]. As a result, all elements of foreign character within domestic tax laws are included within the international tax concept.

There is a minimum of two countries involved, the resident State where the taxpayer is resident and the source State, where the foreign income arises and if so, subject to tax under the domestic tax rules addressed to non-residents. In this sense, the resident country considers the taxpayer investment as an outbound transaction, whilst the source State regards it as inbound one.

The international tax arena does not limit to income tax. Other taxes, such as wealth tax, sales tax, etc. are also included. Nonetheless, the scope of this thesis only involves income tax consequences in the international tax context, when dealing with Article 17 OECD Model.

Moreover, the effects of the international taxation are twofold. On the one hand, both sets of tax rules (residence and source) are limited for the purposes of determining the overall tax payable from the taxpayer viewpoint. On the other hand, interaction between the taxing powers of the involved countries leads to agreed revenue collection in international tax scenarios.

[2] Larking, B. (Ed.), *International Tax Glossary*, IBFD, Third Edition, pp. 172.
[3] Arnold, B.J. and McIntyre M.J., *International Tax Primer*, Kluwer Law International, 1995, pp. 3-4.

Among the domestic rules covering the international tax aspects are the double tax treaties[4], which are also analyzed in below paragraphs. It is worth mentioning its original main purpose, the elimination of the international juridical/legal **double taxation**[5].

To this end, the distinction between international economic and juridical double taxation becomes crucial, in order to better understand the reliefs granted by domestic tax laws[6], as opposed to treaty level. Again, the starting point is their respective definitions. The international juridical double taxation is considered to exist, when the same person is taxed twice on the same income, by two contracting States. By contrast to the economic double taxation arising when the same item of economic income is taxed twice, even though being applied to different persons. For example, dividend income is taxed firstly when the subsidiary obtains the income and subsequently at the level of the parent receiving those dividends.

Therefore, when tackling double taxation, the objective resides in providing to the taxpayer with the tools in order to relief or eliminate it. This is consistent with the aim at not distorting cross-border transactions in favour of domestic ones. To this end, the scope of double tax relief measures must focus on tax rates mainly, but not leaving aside the determination of the taxable base alongside the extension of the taxing powers claimed by the involved States.

In this sense, the States as a matter of public law must limit or relinquish its jurisdictional claims to tax, for the purposes of accomplishing an equal treatment between resident and foreigners carrying out inbound transactions within their territories.

The primary international instruments for the purposes of reaching said goal are **double tax treaties**. Those international agreements must be ratified by each signatory country, in accordance with the constitutional domestic law, respectively[7]. Moreover, they are governed by the rules of public international law and specifically by

[4] They can be named as double tax treaties, double tax conventions or double tax agreements, alike.

[5] IFA (2016), The notion of tax and the elimination of international double taxation or double non taxation. *Cahiers de droit fiscal international*, IFA Congress Seminar Series, Vol. 101b, International Fiscal Association, 2016 Madrid Congress, Sdu Uitgevers, 2016.

[6] Unilateral tax relief measures granted by the particular country, when available.

[7] Thuronyi, V., *Tax Law Design and Drafting*, International Monetary Fund, 1998, pp. 727.

the Vienna Convention[8]. In this regard, the provisions included in double tax treaties prevail over the domestic tax rules in case of a conflict[9].

As a general rule, they grant the taxing powers either exclusively to the residence State or the source State, depending on the involved item of income. Alternatively, they oblige to both of them to share the income by imposing thresholds to the source country and/or by determining the double tax measures to be granted by the residence State. All those distributive rules are addressed in order to accomplish the relief of double taxation.

In addition, there also exist double taxation, based on the fact that the residence and the source States consider that taxpayer as resident in each of them, in accordance with the domestic tax rules. To this end, albeit being out of the double tax treaty relief measures, they establish, as a general rule in article 4 of the tax treaties, the tie-breaker rules, whereby a unique tax residency is determined, as a solution in scenarios of potential double taxation when the taxing rights thresholds of the two States concur.

Double tax conventions include within their scope, most of income taxes imposed by contracting States, regardless of being imposed by central, regional or local authorities. In particular, the exhaustive list of the taxes is encompassed, as a general rule in article 2 of the tax treaties. Nonetheless, those double tax conventions do not impose taxes[10]. Conversely, their main purpose is to relieve taxpayers from double taxation, alongside the prevention of fiscal evasion.

Apart from above mentioned tax reasons, double tax agreements are endeavoured to foster economic relationships between the countries[11]. Mainly, their implementation among countries became effective after the Second World War. In this regard, the

[8] Vienna Convention on the law of treaties. Concluded in May 23, 1969. Articles 31-33 tackle the interpretation of international treaties.

[9] For instance, article 96.1 of the Spanish Constitution lays down that the provisions of the international conventions, once ratified by the corresponding authorities solely can be amended, repealed or withdrawn by the rules included within those treaties or in accordance with the rules of international law.

[10] Larking, B. (Ed.), *supra* n.2, pp. 95. Certain countries do not follow said trend, such as France.

[11] Williams, D.W. International Fiscal Association. British Branch, pp. 113-118. In particular, this author explains into detail how rapidly United Kingdom expanded its tax treaty network, aft*., Trends in International Taxation* er concluding its first comprehensive tax treaty with Unites States in 1945.

oldest **Model tax treaty** drafted by the OECD[12] was a yardstick used by developed countries when negotiating and signing tax treaties.

The OECD Model structure is crucial since most of the contracting States use this pattern, in order to negotiate and draft bilateral tax treaties. Chapter I (Articles 1-2) determines the scope of the convention by defining the persons and taxes included. Chapter II (Articles 3-5) provides for the general definitions, together with the specific definitions of resident and permanent establishment. Chapter III (Articles 6-21) contains the distributive rules dealing with the taxation of the items of income. In this specific chapter is included the article 17, which is pivotal for this thesis. Chapter IV (Article 22) encompasses the specific rule dealing with capital tax. Chapter V (Article 23) includes the double tax relief measures. Chapter VI (Articles 24-28) deals with special provisions, such as non-discrimination, exchange of information, etc. Finally, Chapter VII includes the procedural rules establishing the entry into force and termination.

Said tax treaty model is drafted by the Committee on Fiscal Affairs of the OECD, formed by senior tax officials from member countries. They are in charge of updating the mentioned Model, but also the Commentaries, which are tailored-drafted on an article-by-article basis. The OECD Commentaries is one of the international tax tools used by the tax authorities and Courts[13] of the member countries, as well as those from non-member countries, with the aim at interpreting the application of tax rules concerning the items of income contained in the OECD Model[14]. Among those items is included the income obtained by entertainers and sportspersons, corresponding to Article 17 of the OECD Model.

In order to counter-balance the OECD Model which endorses the approach of capital exporting countries, the United Nations (hereinafter UN) released its own model convention supported by developing countries. It provides for greater taxing powers to the source countries, by not imposing thresholds on their withholding taxes and

[12] Larking, B. (Ed.), *supra* n.2, pp. 95. The starting points were 1943 and 1946 model conventions, drafted by the League of Nations, which solely dealt with income taxes.

[13] Vogel, K., *Double tax Conventions*, The Hague. Kluwer Law. 3rd Edition, 1998, pp. 43. The importance of the OECD Model and its commentary resides in providing a source from which the courts of different States may look for a common interpretation.

[14] Russo, R., *Fundamentals of International Tax Planning*, IBFD, 2007, pp. 18-19. It is pointed out that the legal status of the OECD Commentaries is one of the most debated issues in international taxation. The effectiveness depends on each country taking advantage of them. Spanish Tax authorities and Courts rely on the OECD Commentaries statements, as opposed to other countries which consider them as another tax scholar work. However, the appropriateness of their approach when interpreting must be analyzed on a case-by-case basis.

allowing to be determined on a case-by-case basis, depending on the particular tax treaty.

Another model tax convention is the one adopted by Unites States[15] (hereinafter US Model) which serves as the starting point used by this country to negotiate and conclude bilateral tax treaties[16]. Similar to OECD Commentaries approach, the US drafted a Technical Explanation which deals with each of the convention articles separately, for the purposes of shedding light when interpretation the tax treaties concluded by United States[17].

The author, as a general rule, focuses his analysis of Article 17 on the OECD Model and related Commentaries, in accordance with the extended use of the OECD Model. Nonetheless, express and particular referrals to UN Model and US Model are carried out, whenever is appropriate for illustrative or comparative purposes.

2.2. Historical approach to items of income included in Article 17

2.2.1 League of Nations

In the early twenties of the past century, the Fiscal Committee[18] of the League of Nations was the predecessor of the current one within the OECD, when dealing with the issues of international taxation at a supranational level. In fact, as a result of the tasks carried out since 1923, four model bilateral conventions were published[19]. The

[15] The US Model Income Tax Convention was firstly released in September 20, 1996. Also, in November 15, 2006 and February 17, 2016.

[16] Isenbergh, J., *International Taxation*, Foundation Press, 2000, pp. 198. It contains the unique concerns of the United States, such as tax-haven transactions, limitation on benefit clause, etc.

[17] Additionally, US Department of Treasury issues of specific Technical Explanations related to certain tax conventions, such as the one signed by Spain and the US on February 22, 1990. *Treasury Department of the Technical Explanations of the Convention between the United States of America and the Kingdom of Spain. June 14, 1990.* It expressly that "(*…) is an official guide to the Convention. It reflects the policies behind particular Convention provisions, as well as understandings reached during the negotiation of the Convention with respect to the interpretation and application of the Convention*."

[18] The Fiscal Committee undertook the work initiated by the General Meeting of Government Experts in the League of Nations.

[19] - Model Convention for the prevention of double taxation in the special matter of direct taxes,
- Model Convention for the prevention of double taxation in the special matter of succession duties,
- Model Convention on administrative assistance in matters of taxation, and
- Model Convention on assistance in the collection of taxes.

Model Convention tackling direct taxes[20] was the yardstick to the subsequent work which lead to the draft of Mexico Model Convention (June 1943) and London Model Convention (1946)[21]. They lay down the foundations and principles on which modern international tax treaties have been developed subsequently.

However, both Model tax treaties did not include any specific rule addressed to artists and athletes[22]. As opposed, the general rules set forth for remuneration from personal services and private employment were fully applicable to them.

In this sense, employment income was taxed in accordance with Mexico and London Conventions[23], whereby it is subject to tax in the country of source, as long as the employee resided there more than 183 days within the fiscal year. The purpose of this rule was to facilitate the movement of workers across national borders[24].

When dealing with independent/professional income, the taxing powers were also granted to the source country[25], insofar the independent professional would have considered having a permanent establishment[26] there.

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[20] League of Nations, *Double Taxation and Fiscal Evasion – Report presented by the General Meeting of Government Experts on Double Taxation and Tax Evasion*, Geneva, October 1928. Document C. 562.M.178.1928.II

[21] League of Nations, *London and Mexico Model Tax Convention - Commentary and Text*, Geneva, 1946. Document C.88.M.88.1946.II.A.

[22] It must be highlighted that the reference to entertainers and sportspersons has been changed throughout the different OECD Models. In the early stage they were named as artists and athletes. The current name of entertainers and sportspersons was introduced in the 2014 OECD Model.

[23] Article VII paragraphs 1 to 3 of the Mexico Convention and Article VI paragraphs 1 to 3 of the London Convention. The text of both treaties is equal, except for the replacement of the word compensation for remuneration in paragraph 1.

"1. Compensation for labour or personal services shall be taxable only in the contracting State in which such services are rendered.

2. A person having his fiscal domicile in one contracting State shall, however, be exempt from taxation in the other contracting State in respect of such compensation if he is temporarily present within the latter State for a period or periods not exceeding a total of one hundred and eighty-three days during the calendar year, and shall remain taxable in the first State.

3. If the person remains in the second State more than one hundred and eighty-three days, he shall be taxable therein in respect of compensation he earned during his stay there, but shall not be taxable in respect of such compensation in the first State."

[24] The Fiscal Committee, *supra* n.17, pp. 23.

[25] Article VII paragraph 4 of the Mexico Convention and Article VI paragraph 4 of the London Convention.

"Income derived by an accountant, an architect, a doctor, an engineer, a lawyer or other person engaged in the practice of a liberal profession shall be taxable only in the contracting State in which the person has a permanent establishment at, or from, which he renders services."

Therefore, entertainers and sportspersons not being more than 183 days during the fiscal year, in case of being employees or when befitting from independent status, where not considered to have a permanent establishment in the source country, thus were not subject to tax there. It can be considered that the option taken by the League of Nations of not including a particular clause applicable only to entertainers and sportspersons was the outcome of strengthening cultural exchanges versus any other potential opposite argument of fiscal policy.

2.2.2. United States-Sweden double tax treaty

The forerunner of the current Article 17 OECD Model was included in double tax treaty (hereinafter DTT) signed between the United States-Sweden in 1939. The facts and circumstances surrounding the draft and implementation of said double tax treaty were the income streams obtained by, among others, the Swedish actress Ingrid Bergman through her contracts with the Hollywood´s film industry. In this regard, Unites States kept insisting on introducing a tailored clause for entertainers and sportspersons, although objections were posed by the Swedish counterparty[27].

Article XI of the mentioned tax treaty established a general rule, whereby labor and personal services were taxable only in the country where they are rendered.

This rule also included an important exception, in its paragraph b) of the same article, whereby the Swedish employees working in United States for less than 180 days, during a taxable year or those persons temporarily present in United States for periods not exceeding 90 days during the taxable year and receiving a service compensation not exceeding USD 3,000 were out of United States taxation as a source country. Also is worth noting that residents in United States receiving compensation for personal services within Sweden applied *mutatis mutandis* the same conventional rule, as per paragraph c).

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[26] For clarification purposes, a person is considered to have a permanent establishment in the source country when having "*some "fixed place" of business in the country; and that place of business must have a productive character—i.e., contribute to business earnings*." Commentaries on article IV of the London and Mexico Model Tax Convention, pp. 14.

[27] The US Treasury Department reasons were stated as follows "(….) *With this view the US representatives were in substantial agreement but maintained the positions, acquiesced in somewhat unwillingly by the Swedish delegation, that the provision should be framed so as not to permit the moving picture actor, the professional athlete, or like individuals to escape tax upon earned income from United States sources*".

However, said exceptions based on days and amount thresholds were not applicable to the professional earnings of such individuals such as actors, artists, musicians and professional athletes, based on Article XI, paragraph d). Thus, in the particular context of entertainers and sportspersons, the place of performance was the key rule to determine the country having the primary taxing rights, by not applying the threshold rules, granted to the remaining employees or professionals.

The US Treasury Department´s recognized that there existed Swedish actors obtaining large sums of money in United States without the need of having a permanent establishment there. The point is that they also recognized the small number of entertainers and/or sportspersons coming into United States in 1939, as well as the non-relevant amount of involved tax revenue[28].

2.2.3. United States-Canada and United States-United Kingdom double tax treaties

This position held by United States versus Sweden paved the way in the negotiations of next tax treaties signed, such as the Convention and Protocol between the United States and Canada for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion in the Case of Income Taxes, signed on March 4, 1942 and the supplementary protocol signed in 1950 (hereinafter Canada-US tax treaty), alongside the tax treaty between United States and United Kingdom signed in April 16, 1945 (hereinafter UK-US tax treaty).

As regards Canada-US tax treaty, it should be noted that the specific clause dealing with entertainers and sportspersons was not included in the original signed convention of 1942. Instead, through the Supplementary Convention agreed by both countries in June 12, 1950, whereby certain articles of the original 1942 tax treaty were amended and supplemented[29]. Among them, article VII dealing with personal services, which

[28] Nitikman, J., Article 17 of the OECD Model Treaty – An Anachronism?, *Intertax*, 29(8/9), 2001, pp. 268-274.

[29] Article VII of the US-Canada treaty read as follows:

"*1. A resident of Canada shall be exempt from United States tax upon compensation for personal (including professional) services performed during the taxable year within the United States of America if he is present therein for a period or periods not exceeding a total of 183 days during the taxable year and either of the following conditions is met:*

a) his compensation is received for such personal services performed as an officer or employee of a resident or corporation or other entity of Canada, or

after said modification mirrored the one accomplished in the previous mentioned tax treaty between Sweden and United States [30]. The counter-exception was also introduced as regards entertainers and sportspersons, by leaving outside of the scope of employment and professional income tax rules, the earnings obtained by actors, artists, musicians and professional athletes.

Again, no substantial tax reason whatsoever was laid down in order to support the implementation of said tax rule addressed to a specific group of professionals receiving a tax treatment different than any other employee or professional.

Conversely, the UK-US tax treaty did include the specific rule for entertainers and sportspersons[31] in the original agreement dated in 1945. However, it was subsequently deleted by article I of the 1946 Protocol to said tax treaty.

Prior analysis has been already devoted to this particular clause within said tax treaty[32]. The point of tackling again this tax issue resides on highlighting the justifications from the United States' viewpoint, in order to include that clause, as well as the arguments laid down subsequently with the aim at revoking it one year after.

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b) his compensation received for such personal services does not exceed $5,000.

"2. The provisions of paragraph 1 (a) of this Article shall have no application to the professional earnings of such individuals as actors, artists, musicians and professional athletes.

"3. The provisions of paragraphs 1 and 2 of this Article shall apply, mutatis mutandis, to a resident of the United States of America with respect to compensation for such personal services performed in Canada."

[30] Albeit certain nuances lead to certain difference, such as the threshold of USD 5,000, the period of 183 days within the fiscal year and the referral to stage, motion picture or radio artists, musicians and athletes.

[31] Article XI. Paragraphs 1 to 3:

(1) An individual who is a resident of the United Kingdom shall be exempt from United States tax upon compensation for personal (including professional) services performed during the taxable year within the United States if (a) he is present within the United States for a period or periods not exceeding in the aggregate 183 days during such taxable year, and (b) such services are performed for or on behalf of a person resident in the United Kingdom.

(2) An individual who is a resident of the United States shall be exempt from United Kingdom tax upon profits, emoluments or other remuneration in respect of personal (including professional) services performed within the United Kingdom in any year of assessment if (a) he is present within the United Kingdom for a period or periods not exceeding in the aggregate 183 days during that year, and (b) such services are performed for or on behalf of a person resident in the United States.

(3) The provisions of this Article shall not apply to the compensation, profits, emoluments or other remuneration of public entertainers such as stage, motion picture or radio artists, musicians and athletes.

[32] Molenaar, D., *Taxation of international performing artistes.* IBFD. Doctoral Series, pp. 26-28. Also, Nitikman, J., *supra* n. 28, pp. 268-274.

A pivotal role was played by the fact that the screen actors guild was able to testify on Article XI.3. In particular, they posed a question to the Committee on Foreign Relations as to whether they did not understand the reasons underlying why they were set apart from tax treatment granted to other occupations[33].

The justifications stated by the US negotiators were twofold. On the one hand, they argued that the application of the credit system, as double taxation relief measure, in order to avoid criticisms of excessive taxation from source and residence states. On the other hand, they also argued that the domestic US law applicable by then[34] entitled them to exempt from US tax, when working in the United States less than 90 days and earning less than USD 3,000. Those reasons were stated since this particular tax treaty did not grant exemptions to entertainers and sportspersons when salary income was obtained in a period of less than 183 days or qualifying as professional income, even though a permanent establishment was not considered to exist.

In this sense, no valid argument was laid down from the US Government´s perspective, in order to support the implementation of a particular tax measure addressed to a specific group of taxpayers, since both above explained measures, the treaty and the domestic ones, where available to all other professionals and/or employees and by no means lead to justify any tax measure meant to limit rights, such as the one applicable to entertainers and sportspersons, with no additional reasons backing for its implementation.

Nevertheless, the negative consequences arising from Article XI.3 of the UK-US tax treaty were revoked via the Protocol agreed by both countries in June 6, 1946. The latter adopted the deletion of the specific measure addressed to entertainers and sportspersons[35]. In its Article I was expressly stated that Paragraph (3) of Article XI of the Convention of the 16th April, 1945, for the avoidance of double taxation and the prevention of fiscal evasion with respect to taxes on income shall be deemed to be deleted and of no effect.

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[33] "(…) *Without figure or prognostications, as actors we say to you, what is there difference about our profession that we alone should continue to carry the burden that our Government proposes to lift from the backs of everyone else, like doctors, lawyers, salesmen, businessmen, government representatives, and all other professions, businesses, and activities? (….)"*

[34] 1936 US Revenue Act.

[35] Article I of the Protocol to the UK-US tax treaty. "*Paragraph (3) of Article XI of the Convention of the 16th April, 1945, for the avoidance of double taxation and the prevention of fiscal evasion with respect to taxes on income shall be deemed <u>to be deleted and of no effect</u>*". Emphasis added by the author.

The arguments supporting the deletion of the tailored clause solely referred to entertainers and sportspersons was clear-cut, since there were rock-solid grounds to state that Article XI.3 of the UK-US tax treaty was discriminatory[36].

These are the main findings as regards the early stage of double tax treaties dealing with entertainers and sportspersons taxation, by introducing a particular rule addressed to them.

Unfortunately, the US tax treaty policy was not consistent when tackling this tax issue since the next steps taken after the UK-US treaty and its subsequent amending protocol were inconsistent or they were not of pivotal status, when negotiating with the counterparties. In fact, the ones signed with Norway (1949), Ireland (1949), Greece (1950) and The Netherlands (1948) did not introduce a specific clause for entertainers and sportspersons, as opposed to the tax treaties signed with South Africa (1946), New Zealand (1948), Canada (1950) and Switzerland (1951). Nonetheless, it must be stated in favour of the US Senate that said countries declined to accept the US Senate position when negotiating their respective tax treaties with the United States. Fortunately, Canada and Switzerland did finally accept the deletion of the exceptional rule to the entertainers in September 17, 1951[37].

[36] Report of the US Secretary of State, which accompanied the 1946 Protocol, Senate Executive F, 79th Cong., 2d Sess.

[37] *Memorandum by Mr. Frederick Livesey, Adviser, Office of Financial and Development Policy,* November 23, 1951. Recent Developments in U.S. Tax Treaties and International Phases of U.S. Tax Legislation. Foreign Relations of the United States, 1951, National Security Affairs, Foreign Economic Policy, Volume I.

US-Sweden DTT (1939)	US-UK DTT (1945/46)	US-Can DTT (1950/51)
Article XI a) Compensation for labor or personal services, including the practice of liberal professions, shall be taxable only in the Contracting State in which such services are rendered. b) The provisions of paragraph a) are, however, subject to the following exceptions: A resident of Sweden shall be exempt from United States tax upon compensation for labor or personal services performed within the United States of America if he falls within either of the following classifications: i) he is temporarily present within the United States for a period or periods not exceeding a total of 180 days during the taxable year and his compensation is received for labor or personal services	Article XI (1945) (1) An individual who is a resident of the United Kingdom shall be exempt from United States tax upon compensation for personal (including professional) services performed during the taxable year within the United States if (a) he is present within the United States for a period or periods not exceeding in the aggregate 183 days during such taxable year, and (b) such services are performed for or on behalf of a person resident in the United Kingdom. (2) An individual who is a resident of the United States shall be exempt from United Kingdom tax upon profits, emoluments or other remuneration in respect of personal (including professional) services performed within the United Kingdom in any	Article VII (1951) *1. A resident of Canada shall be exempt from United States tax upon compensation for personal (including professional) services performed during the taxable year within the United States of America if he is present therein for a period or periods not exceeding a total of 183 days during the taxable year and either of the following conditions is met:* *a. his compensation is received for such personal services performed as an officer or employee of a resident or corporation or other entity of Canada, or* *b. his compensation received for such personal services does not exceed $5,000.* *"2. The provisions of*

performed as employee of, or under contract with, a resident or corporation or other entity of Sweden; or ii) he is temporarily present in the United States of America for a period or periods not exceeding a total of 90 days during the taxable year and the compensation received for such services does not exceed USD 3,000.00 in the aggregate." c) The provisions of paragraph (b) of this article shall apply mutatis mutandis, to a resident of the United States of America deriving compensation for personal services performed within Sweden." d) The provisions of paragraphs (b) and (c) of this article shall have no application to the professional earnings of such individuals as actors, artists, musicians and professional athletes."	year of assessment if (a) he is present within the United Kingdom for a period or periods not exceeding in the aggregate 183 days during that year, and (b) such services are performed for or on behalf of a person resident in the United States. (3) The provisions of this Article shall not apply to the compensation, profits, emoluments or other remuneration of public entertainers such as stage, motion picture or radio artists, musicians and athletes. Article I of the 1946 Protocol to the UK-US tax treaty. "Paragraph (3) of Article XI of the Convention of the 16th April, 1945, for the avoidance of double taxation and the prevention of fiscal evasion with respect to taxes on income shall be deemed to be deleted and of no effect."	*paragraph 1 (a) of this Article shall have no application to the professional earnings of such individuals as actors, artists, musicians and professional athletes.* *"3. The provisions of paragraphs 1 and 2 of this Article shall apply, mutatis mutandis, to a resident of the United States of America with respect to compensation for such personal services performed in Canada."* US deleted exceptional tax treatment to artists and professional athletes in 1951.

2.2.4. 1959 OEEC / 1963 OECD

2.2.4.1 OEEC Reports

Back to the role in the tax field carried out by the Fiscal Committee within the League of Nations, it is worth mentioning that after the Second World War, it was replaced by the Fiscal Committee of the Organization for European Economic Co-Operation [38] (hereinafter the OEEC). This body was endorsed by the OECD in September 1961. It changed its name to the Committee for Fiscal Affairs in 1971.

In this regard, four reports were issued by the OEEC related to the elimination of double taxation [39]. In the second OEEC report [40] was established the option to standardize the tax rules, when applying to income arising from professional services, as well as the remuneration from employment, in contrast to the special provisions addressed to the income obtained by public entertainers and the remuneration of the company boards. It expressly mentioned that the scope of these special provisions were a specific group of taxpayers, regardless of whether performing for salary or on their own account, being also taxable in the State where the activities are exercised[41].

Accordingly, the OEEC drafted in 1959 the article XI, which read as follows:

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[38] Active since April 16, 1948. It emerged from the Marshall Plan and the Conference of Sixteen. In 1956 a Working Group on Double Taxation was established, formed by national experts of OEEC member States. This group inherited the role of a similar body created in the 1930s by the League of Nations and later of a fiscal committee established by the UN, which was dissolved in 1954.

[39] OEEC (1958), *First Report of the Fiscal Committee of the OEEC on the Elimination of Double Taxation*. September 1958.
OEEC (1959), *Second Report of the Fiscal Committee of the OEEC on the Elimination of Double Taxation*. July 1959. Document n. C(59) 147.
OEEC (1960), *Third Report of the Fiscal Committee of the OEEC on the Elimination of Double Taxation*. August 1960. Document n. C(60) 157.
OEEC (1961), *Fourth Report of the Fiscal Committee of the OEEC on the Elimination of Double Taxation*. August 1961. Document n. C(61) 97.

[40] Paragraph 24, pp. 18.

[41] Paragraph 24 of the objects and scope of the proposed new articles of the *Draft Report to the Council, Note by the Secretary of the Committee)* FC(59)2. 21st May, 1959. "*24. Despite the almost universal adoption of the above principles, however, there are in some case appreciable dissimilarities in regard to its application, particularly in regard to professional services. Consequently, the Fiscal Committee found it necessary to standardise the rules applying respectively to income from professional services and to remuneration from employment in the form of salaries, wages or the like (including pensions), and to make special provisions for certain particular cases such as remuneration and pensions paid by a State, remuneration of members of company boards, or income of public entertainers".*

"*Notwithstanding anything contained in this Convention, income derived by public entertainers, such as theatre, motion picture, radio or television artistes, and musicians, and by athletes, from their personal activities as such may be taxed in the Contracting State in which these activities are exercised*".

2.2.4.2. Implementation path up to 1959 OEEC

In order to shed some light as regards the implementation of mentioned article XI of 1959 OEEC recommendation, it is of great value to highlight the main changes introduced throughout the implementation path. It starts with the report on the taxation of profits or remuneration, in respect of dependent and independent personal services, carried out since 1957 by the working party nº 10 of the Fiscal Committee (Sweden)[42]. This particular report and related OECD works ended up with the implementation of the Recommendation of the Council concerning the Avoidance of Double Taxation in July 1959[43]. The Recommendation was aimed at adopting, for member countries, either when concluding new Conventions or when revising existing Conventions, the provisions set out in the Annex to this Recommendation, as interpreted by the Commentaries contained in the Reports of the Fiscal Committee of 28th May, 1959 and 18th June, 1959.

In this sense, September 1957[44], was the first time within the OEEC that was proposed a special rule for entertainers and athletes. However, it was included as an exception within the article tackling the professional services.

The purpose of this addition to the professional services article consisted of ensuring the taxation in the country where the performance took place, based on the grounds of risk for tax evasion[45].

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[42] Organisation for European Economic Co-Operation, Working Party nº 10 of the Fiscal Committee (Sweden). *Report on the taxation of profits or remuneration in respect of dependent and independent personal services. FC/WP10(57)1. 11th September, 1957.* Although the work was performed in respect of dependent and independent income, the developments as regards income obtained by entertainers and athletes were also encompassed on it.

[43] Adopted by the Council at its 443rd Meeting on 3rd July, 1959.

[44] Organisation for European Economic Co-Operation, *supra* n. 42.

[45] Commentary on Article A (Professional Services): "*As appears from paragraph (2) of this article, public entertainers would always be taxed for the remuneration for their performances in the State in which the performances take place. This rule is now rather common. It would, of course, presuppose the existence of a tax at the source in the cases concerned. The reason for the introduction of the rule would seem to*

The next step as regards the particular taxation of entertainers and athletes was to propose the draft of the entertainers and athletes, in a separated article and not as an exception to the independent services' article. In this sense, the OEEC Fiscal Committee decided in January 1958[46] that "On the proposal of the Delegate for Switzerland, the Committee decided that the second paragraph of Article A would be made a separate Article which would cover not only artistes, musicians and professional athletes and sportsman performing for their own account, but also those performing for the account of purveyors of entertainment and the purveyors themselves."

Pursuant this position, the Working Party nº 10 of the OEEC Fiscal Committee issued a second report[47] about the taxation of profits or remuneration in respect of dependent and independent personal services which included the special rules applicable to entertainers and athletes.

The Annex I, among the draft articles encompassed article F which expressly read as follows:

"Notwithstanding anything contained in this Convention, profits or remuneration derived by public entertainers such as theatre, motion picture, radio or television artistes, musicians and professional athletes, or by persons arranging public entertainments in which such entertainers take part, shall be subjected to tax in the Contracting State in which the services are performed."

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be, foremost, the risk for tax evasion. The rule of tax applicable is mostly a flat rate which would hardly involve a larger tax burden than the general rate applicable to other taxpayers." Emphasis added by the author.

However, the mentioned report about the taxation of profits or remuneration in respect of dependent and independent personal services also included referrals to position of previous tax treaties in relation to the tax treaty treatment of entertainers and athletes, whereby the taxation rights were only granted to the source country, which was opposite to the United States or German tax treaty policy. In particular, it was stated in page 4 of the above-mentioned report that "*Public entertainers. According to a special exception provided for in most modern conventions, public entertainers such as theatre and motion picture artists are taxed for their income from such activities only in the State in which the activates are carried on, regardless of the existence of a fixed base and of the duration of the activities"*.

[46] Fiscal Committee, Organisation for European Economic Co-Operation (1957), *Minutes of the 6th Session held in 25th*, 26th and 27th November 1957. FC/M(58)1. 6th January 1958 which discussed at length the report included in footnote 44.

[47] On the basis of the discussion held at the sixth session and of material received from various Delegates to the Committee, the Working Party has drawn up the revised proposals contained in Annexes I (Draft articles) and II (commentary on draft articles) of the *Second Report on the taxation of profits or remuneration in respect of dependent and independent personal services*. FC/WP10(58)1. 31st January, 1958.

Again, the primary purpose of this new independent draft article was to ensure the taxation at the country of performance[48]. Commensurate with the new separated status of the draft Article F, dealing with entertainers and athletes' income, the Commentary also described the application of the new rules, regardless of being of independent or dependent nature[49].

Also, a step further was taken by including in the draft Article F, as well as the Commentary on it, the profits obtained by persons arranging the public entertainments[50]. The extension of the subjective scope of the particular tax treaty rule addressing the entertainers and athletes' profits is a great novelty, which deserves further attention in the next analysis of the subsequent OECD Models throughout the 20th century in order to ascertain whether it is endorsed or deleted.

The outcome of the Working Party nº 10 of the OEEC Fiscal Committee was decided by the later in October 1958[51] through the adoption of the wording of Article F:

"Notwithstanding anything contained in this Convention, income derived by theatre, motion picture, radio or television artistes, musicians, athletes, or all other persons participating in public entertainments, from the performance of their activities in those capacities shall be taxable only in the Contracting State in which such activities are performed."

As regards the subjective scope of Article F two main relevant changes[52] were adopted in comparison to the previous draft Article F. On the one hand, the subjective income was extended to all other persons participating in public entertainments and not only to persons arranging or organizing them. On the other hand, it is the first time that the

[48] Commentary on draft article F, paragraph 7 stated "*The provision contained in Article F concerns public entertainers who will always be liable to tax in the State where they perform*".

[49] *Id*. at paragraph 7 "*whether the services are of an independent of a dependent nature. In the first instance, the provision in Article F is an exception to the rule in Article A; in the second, it is an exception to the rule in Article B (2*)".

[50] *Id.* at paragraph 7 *"The same rule as applies to remuneration derived by the entertainers themselves will, under the Article, apply also to the profits obtained by those organising and arranging the entertainments. In certain cases, therefore, the provision contained in the Article will be an exception to the rules applicable to business income*".

[51] Fiscal Committee, Organisation for European Economic Co-Operation (1958), *Minutes of the 9th Session held in 22nd, 23rd, 24th and 25th September 1958*. FC/M(58)4. 31st October, 1958.

[52] Moreover, minor changes were implemented in October 1958, such as the replacement of the words profits or remuneration by income. Likewise, the athletes were no required any longer to be benefit from the professional status.

subjective scope of the artistes and athletes was limited to the performance of activities in their capacities.

It is pivotal the addition of this clarification for the purposes of avoiding the unlimited force of attraction of Article F versus other potential draft articles to be applied. In particular, it helped to interpret and limit the items of income that might be included within the artiste and athlete specific rule.

In this regard, it expressly stated that not all income obtained by the artiste or athlete was included within Article F. Conversely, only the income obtained from their performances of activities based on their capacities was subject to the rules of Article F. It also indirectly affected to ascertain whether the income obtained by other persons involved in the entertainment context might be caught within article F or not.

Furthermore, the taxing rights were granted exclusively to the source country, with no underlying reason to support said relevant important change in the distributing rules between the country were the performance takes place or source country and the country of tax residency of the public entertainer or athlete[53].

Final text and Commentary on Article XI of 1959 OEEC Recommendation was drafted by implementing the optional, but not exclusive, right to tax to the source country[54].

As regards the subjective scope of Article XI, third persons involved in arranging or participating in the entertainment event were no longer included within the scope of

[53] The same position is maintained in the Note by the Secretary of the Committee in relation to the *Taxation of profits or remuneration in respect of dependent and independent personal services*. FC (58)7. 30th December, 1958. It included a version of the draft articles and Commentary to them. Article F remains the exclusive right to tax to the source country. However, the extension to all persons related to entertainment activities and limitation to income from entertainers and athletes related to their capabilities are not included at all. Furthermore, the Delegate for Switzerland in the *Minutes of the 11th Session held in 20th, 21st, 22nd and 23rd January 1959*. FC/M(59)1. 28th February, 1959 proposed that "*the expression "shall be taxable only" should be used only when the right to tax was conferred on that country of residence, and that in the contrary case the expression "shall be taxable" should be used. On the Chairman's proposal, the Committee decided that the Drafting Group would submit a suitable formulation when the report of Working Party No. 15 had been examined*." In those Minutes, it was also stated the takeover from the reporter position held by Sweden within Working Party number 10 to the Reporting Group, in order to adopt the draft articles and their respective Commentaries.

[54] Article XI of the text of the Articles drafted by the *Drafting Group of the Fiscal Committee (Note by the Secretary of the Committee)* TFD/FC/63. 21st April, 1959, "*Notwithstanding anything contained in this Convention, income derived from public entertainment by public entertainers such as theatre, motion picture, radio or television artistes, musicians and athletes may be taxed in the Contracting State in which the entertainments take place.".* Subsequently, Article XI, among others, was sent together with the Commentary to those articles within the *Draft Report to the Council, Note by the Secretary of the Committee)* FC(59)2. 21st May, 1959.

Article XI. Likewise, the objective approach when determining the items of income which entertainers and athletes may obtain in the source country were also limited to those arising from their activities exercised as such[55].

2.2.4.3. Final remarks

Pursuant to the main amendments, either from the subjective scope, together with the objective one, which were highlighted in the previous paragraphs' explanation, as regards the implementation procedure, the 1959 express wording of Article XI leads to the following main conclusion. The treaty tax treatment granted to public entertainers and athletes was an exception to the overall Convention. Nevertheless, the 1959 OEEC Commentary on Article XI, limited the scope versus other potential applicable conventional articles.

"*11. The provisions of article XI relate to public entertainers and athletes and stipulate that they may be taxed in the State in which the activities are performed, whether these are of an independent or of a dependent nature. This provision is an exception, in the first case, to the rule laid down in article VI, in the second case, to the rule laid down in paragraph 2 of article VII.*"[56]

Furthermore, the next paragraph of said Commentary pointed out the underlying explanation of its implementation "*12. By this provision the practical difficulties are avoided which often arise in taxing public entertainers and athletes performing abroad. Certain Conventions, however, provide for certain exceptions such as those contained in paragraph 2 of Article VII (…)".*

The OEEC Fiscal Committee was fully aware of the negative impact that the implementation of this specific rule might entail "*Moreover, too strict provisions might in certain case impede cultural exchanges"*. However, it found a practical solution to solve

[55] Article XI of the *Final text of articles V to XIV*, Fiscal Committee, OEEC, TDF/FC/69, 11th June 1959. "*Notwithstanding anything contained in this Convention, income derived by public entertainers, such as theatre, motion picture, radio or television artistes, and musicians, and by athletes, from their personal activities as such may be taxed in the Contracting State in which these activities are exercised."* Emphasis added by the author. In June 18, 1959 was released by the Fiscal Committee, Organisation for European Economic Co-Operation, *Second Report by the Fiscal Committee to the Council,* C(59)147. 18th June, 1959, including the text of the articles and respective commentary.

[56] *Second Report of the Fiscal Committee of the OEEC on the Elimination of Double Taxation*, pp. 41, paragraph 11.

it by limiting its application only to independent public entertainers "*In order to overcome this disadvantage, the States concerned may, by common agreement, limit the application of Article XI to independent activities by adding this provision to those of Article VI relating to professional services and other independent activities of a similar character. In such case, public entertainers and athletes performing for a salary or wages would automatically come within Article VII and thus be entitled to the exemptions provided for in paragraph 2 of that article.*"

As a result, the text of article XI was far reaching, by including a clause applicable to all public entertainers and athletes versus any other article of the convention. By contrast, the OEEC Commentary softened and limited the force of attraction of article XI in relation to article VI (professional services). Therefore, it limited the subjective scope of Article XI to independent artistes and athletes. Therefore, on the one hand the participants and those collaborating with the public entertainments were left out of the scope of article F which, in its turn, was the forerunner of 1959 Article XI. On the other hand, only independent artistes and athletes were caught under Article XI, by leaving aside those of employee status.

Nonetheless, the relevant conclusion is that the OEEC Fiscal Committee did adopt the taxation at source country for public entertainers and athletes, when dealing with personal activities as such, by jeopardizing cultural exchanges[57] as a result of their performances. Thus, the underlying and unexplained practical difficulties, when taxing public entertainers and athletes performing abroad, were pivotal to the OEEC in order to implement Article XI versus any other rationale tax policy argument.

Again, the limitation of the scope of Article XI from both subjective and objective scopes is of great value. In particular, the OEEC´s position implemented in the Commentary, when proposing the exceptional rule of Article XI, applicable only to artists and athletes of independent status, by opening the door to an alternative draft of article XI[58]. Nevertheless, the arguments in order not to apply said article XI to public entertainers and sportspersons being employees were unknown.

[57] Molenaar, D., *supra, n. 32*, pp. 35 mentions that paragraph 12 of 1959 OEEC Commentary was drafted, similar to articles 9 and 10 of The Netherlands-Germany double tax treaty.

[58] This alternative proposal had been already endorsed by German tax treaties since 1954, including the tax treaties with Austria (1954) Luxembourg (1958), Norway (1958), The Netherlands (1959), France (1959), Sweden (1959), Denmark (1962), Israel (1964), Greece (1966) and Belgium (1967). See further, Molenaar, D., *supra* n. 32, pp. 31-33.

For example, Article 9 of the tax treaty between Germany and The Netherlands, dealing with income from independent activities read as follows: "*1. Where a resident of one of the States derives income in*

2.2.4.4. 1963 OECD Model

The next step in this regard was the first uniform multilateral Model treaty issued in 1963 by the OECD. In fact, the 1959 OEEC Recommendation, apart from including the text of proposed articles and their respective Commentaries, did encompass certain recommendations. Among them, it was number 4 which expressly stated the obligation "*To submit to the Council before 1st July, 1961, a Draft Convention for the avoidance of double taxation with respect to taxes on income and capital as well as concrete proposals for the implementation of that Convention"*.

Accordingly, the Drafting Group of the Fiscal Committee of the OEEC provided for the first draft of the convention articles, including Article 17, devoted to the specific rule of artistes and athletes in January 26, 1962.

Thus, from 1963 onwards, the OECD Model has been the conventional pattern used by many countries when negotiating their bilateral treaties, including the new exceptional provision addressed to entertainers and sportspersons.

Article 17 of the OECD opted again for dealing with entertainers and sportspersons separately and not endorsing the option of the Commentary of Article XI of the 1959 OEEC Convention, by limiting the scope of it, to those of independent status. Therefore, the sole argument posed then, in order to ease the cultural exchange was not used again in the text of 1963 OECD Model treaty. It is also worth noting that the Commentary for the 1963 OECD version mirrored to the 1959 OEEC version. Therefore, the alternative draft was not used either in the 1963 OECD Model or via reservations adopted by OECD country members.

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respect of present or past independent activities performed in the other State, the said income shall be taxable in the latter State.

2. A person shall not be considered to perform independent activities in the other State unless he makes use, in the exercise of his occupation, of a permanent base regularly available to him there. This restriction, however, shall not apply to independent activities of artistes, performers, athletes or entertainers."

It is also important to mention that the tax treaty concluded between Germany and United Kingdom, dated in 1964 did follow the conventional tax policy of the United Kingdom in previous treaties, such as the one concluded with United States in 1945, whereby the exceptional rule addressed to entertainers and sportspersons was applicable, regardless of the dependent or independent status of both.

German position, based on the proposal held in the Commentary of 1959 OEEC Model was changed in subsequent tax treaties, such as the one concluded with Spain in 1968. It included the wording in accordance with 1963 OECD Model Convention, through a separate Article 17, in contrast to previous limitations encompassed in the article dealing with independent activities' income.

The only remarkable change to be taken into account from 1959 OEEC convention versus 1963 OECD version as regards entertainers and athletes resided on replacing the reference to "*Notwithstanding anything contained in this Convention*" by "*Notwithstanding the provisions of articles 14 and 15*". Thus, the wording of the 1963 OECD version is in the same page that the Commentary on the specific clause devoted to entertainers and sportspersons, since it is considered of exceptional character, but only referred to salary income (article 14) or independent/professional income (article 15) and not to anything contained in the Convention, as it was drafted in the 1959 OEEC version.

This clarification can also be read in the sense that the alternative draft which endorsed the exceptional rule addressed to entertainers and sportspersons, when being of independent status is no longer in place, since the text of 1963 Model treaty expressly refers to both type of provisions, dependent and independent status.

Evolution of OEEC work up to 1959 recommendation	
11/09/1957	*"Notwithstanding the provisions of the preceding paragraph, profits derived by public entertainers such as theatre, motion picture, radio or television artistes, musicians and professional athletes may be subjected to tax in the other Contracting State only if the services are performed therein."*
31/01/1958	*"Notwithstanding anything contained in this Convention, profits or remuneration derived by public entertainers such as theatre, motion picture, radio or television artistes, musicians and professional athletes, or by persons arranging public entertainments in which such entertainers take part, shall be subjected to tax in the Contracting State in which the services are performed."*
31/10/1958	*"Notwithstanding anything contained in this Convention, income derived by theatre, motion picture, radio or television artistes, musicians, athletes, or all other persons participating in public entertainments, from the performance of their activities in those capacities shall be taxable only in the Contracting State in which such activities are performed. "*
21/04/1959	*"Notwithstanding anything contained in this Convention, income derived from public entertainment by public entertainers such as theatre, motion picture, radio or television artistes, musicians and athletes may be taxed in the Contracting State in which the entertainments take place."*
11/06/1959 Final draft	*"Notwithstanding anything contained in this Convention, income derived by public entertainers, such as theatre, motion picture, radio or television artistes, and musicians, and by athletes, from their personal activities as such may be taxed in the Contracting State in which these activities are exercised."*

1959 OEEC	1959 Alternative draft German tax treaty policy	1963 OECD Model
Article XI *1) Notwithstanding anything contained in this Convention, income derived by public entertainers, such as theatre, motion picture, radio or television artistes, and musicians, and by athletes, from their personal activities as such <u>may be taxed in the Contracting State in which these activities are exercised.</u>*	Article 9 (GE-NL) *1. Where a resident of one of the States derives income in respect of present or past independent activities performed in the other State, the said income shall be taxable in the latter State.* *2. A person shall not be considered to perform independent activities in the other State unless he makes use, in the exercise of his occupation, of a <u>permanent base</u> regularly available to him there. <u>This restriction, however, shall not apply to independent activities of artistes, performers, athletes or entertainers.</u>*	Article 17 *1) Notwithstanding the provisions of articles 14 and 15, income derived by public entertainers, such as theatre, motion picture, radio or television artistes, and musicians, and by athletes, from their personal activities as such <u>may be taxed in the Contracting State in which these activities are exercised.</u>*

2.2.5. 1977 OECD and related international tax court cases

2.2.5.1 Introduction

A step further was taken in 1977 OECD Model. It included a major addition, the second paragraph of Article 17[59] which was aimed at counteracting tax avoidance devices, when payment to third persons would be involved, in accordance with paragraph 4 of its Commentary[60].

It must be noted that the interaction between both paragraphs of Article 17 OECD Model is based on the existence of domestic "look through" provisions in the source State. If so, the first paragraph of Article 17 OECD Model becomes applicable, by taxing the individual entertainer or sportsperson. When, there is no domestic provision allowing for the "look through", the intermediary company would be subject to tax, in accordance with the second paragraph of the mentioned OECD Article[61].

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[59] Hence, up to 1977 OECD Model and the adoption of the second paragraph of article 17, the "*substance over form*" approach, adopted by members of the OECD, was not enough to disregard the payments received by rent-a-star companies. The tax treaty to be applied was between the residence country of the artist and the residence of the "loan-out" company. The negative consequence of this position was the possibility of treaty shopping, since the incorporation of companies in low tax regimes was simple to be carried out. Companies could be structured in the most favorable way for the taxpayer, in order to reduce the tax burden. Furthermore, they did not infringe either tax treaties or the anti-avoidance rules of the other contracting party, although certain court case exceptions took place, such as Johansson´s case, which will be explained into detail in paragraph 2.2.5.2. Conversely, tax treaties following Article 17 as per the draft included in the 1977 OECD Model incorporated the specific substance over form clause addressed to artistes and athletes, in its paragraph 2. It means that the treaty itself defines the anti-abuse standard to be applied and the domestic anti-avoidance rules of each contracting party cannot be invoked.

[60] "*The purpose of paragraph 2 is to counteract tax avoidance devices in cases where remuneration for the performance of an entertainer or athlete is not paid to the entertainer or athlete himself but to another person, e.g. a so called artiste-company, in such a way that the income is taxed in the State where the activity is performed neither as personal service income to the entertainer or athlete nor profits of the enterprise on the absence of a permanent establishment. Paragraph 2 permits the State in which the performance is given to impose a tax on the profits diverted from the income of the entertainer or athlete to the enterprise where for instance the entertainer or athlete has control over or rights to the income thus diverted or has obtained, or will obtain, some benefit directly or indirectly from that income. It may be, however, that the domestic laws of some States do not enable them to apply such a provision. Such States are free to agree to alternative solutions or to leave Paragraph 2 out of their bilateral conventions.*" Emphasis added by the author.

[61] Paragraph 8 (last indent) of the OECD Commentary on Article 17, which was added in 1992. *"In addition, where a State´s domestic laws "look through" such entities and treat the income as accruing directly to the individual, paragraph 1 enables that State to tax income derived from performances in its*

"*2. Where income in respect of personal activities exercised by an entertainer or an athlete in his capacity as such accrues not to the entertainer or athlete himself but to another person, that income may, notwithstanding the provisions of Articles 7,14,15, be taxed in the Contracting State in which the activities of the entertainer or athlete are exercised*".

However, from a practical viewpoint, the text of the new paragraph 2 of Article 17 OECD Model did not expressly include such a limited scope recognized within paragraph 4[62] of the Commentary on Article 17 OECD Model, consisting of combating tax avoidance devices.

Thus, through subsequent amendments to the Commentary on Article 17 OECD Model this anti-avoidance tool can be applied to all potential scenarios, whereby the entertainer or sportsperson would be hired by a company or entity or team and would perform in the source country.

Pursuant to the boundaries established in the Commentary on Article 17 OECD Model, Canada and United States included an observation to 1977 OECD Model[63] stating the limited application of the second paragraph of the mentioned article, only to the qualifying scenarios included within paragraph 4 of Commentary on Article 17.

2.2.5.2 Johansson's Case

The implementation of the second paragraph of Article 17 OECD Model was closely connected to the previous Johansson's court case[64] in the international tax arena. Johansson Case provided for clear-cut reasons why the OECD was eager to combat aggressive tax planning, involving top stars from the entertainment and sport context. It consisted of the case of Ingemar Johansson, a Swedish boxing champion, back in 1964. On three occasions, he fought against Floyd Patterson for the heavyweight boxing championship of the world and those fights took place in the United States. The

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territory and accruing in the entity for the individual's benefit, even if the income is not actually paid as remuneration to the individual". (2014 OECD Model version).

[62] "*The purpose of paragraph 2 is to counteract certain tax avoidance devices in cases where the remuneration for the performance of an entertainer or athlete is not paid to the entertainer or athlete himself but to another person, e.g., a so-called artiste company (…)*".

[63] "6. *Canada and United States are of the opinion that paragraph 2 of the Article applies only to cases mentioned in paragraph 4 above and these countries will propose an amendment to that effect when negotiating conventions with other Member countries*".

[64] *Johansson vs. United States*, 336 F.2d 809 (5th Cir.1964).

Government brought an action against Johansson to collect the taxes assessed and against Feature Sports, Inc., Thomas Bolan, Roy Cohn, and Humbert Fugazy to foreclose tax liens against funds held by them for Johansson's benefit. The District Court for the Southern District of Florida entered judgment against Johansson for the full amount of the taxes claimed by the Government, plus interests. The main question was whether the United States was entitled to tax the overall income that he earned from his activities carried out there.

In its turn, Johansson claimed an exemption included in the tax treaty of United States and Switzerland, effective from September 27, 1951. In particular, he argued the application of Article X(1), which stated the exemptions when providing labor or personal services in the United States territory for less than 183 days during the taxable year.

From the factual perspective, it was far from any doubt that he stayed less than 183 days in United States. However, the Court discussion resided in the fact that Johansson had to prove that he was a resident of Switzerland and that he received the income in question as an employee of, or under contract with, a Swiss entity. As regards the first issue, the facts presented to the Court gave evidence that Johansson was not a resident of Switzerland during the period in question[65].

Leaving aside the issue of his personal tax residency, the exemption requested another requirement in order to benefit from it. The income must have been received in the condition of employee of the Swiss entity, which in fact existed with Scanart, S.A., a Swiss corporation formed that very month, having Johansson as his sole employee and the only source of income was Johansson's activities. Also, he was entitled under the terms of the contract to seventy per cent of Scanart's gross income, alongside a pension fund.

In this regard, the Court[66] found that "*Scanart, S.A., had no legitimate business purpose, but was a device which was used by Ingemar Johansson as a controlled*

[65] This conclusion was fully supported by evidences. Between 1960 and March 13, 1961, he only spent 79 days in Switzerland country as compared with 120 days in Sweden and 218 days in the United States.

[66] The District Court for the Southern District of Florida. Its judgment was based on the previous case about the application of double tax treaties, *Maximov v. United States*, 2 Cir., 1962, 299 F.2d 565, 568, aff'd, 373 U.S. 49, 83 S.Ct. 1054, 10 L.Ed.2d 184 (1963) whereby the application on the tax treaty relied on the language of it, as well as the entire context of the agreement including the shared expectations of the contracting parties.

depositary and conduit by which he attempted to divert temporarily, his personal income, earned in the United States, so as to escape taxation thereon by the United States."

The structure designed by the boxer produced an unsuccessful outcome in the Court, but it was the forerunner of widely used "loan-out" companies by artistes and athletes[67].

2.2.5.3. 1977 OECD Model / Sweden-Switzerland positions

The starting point in relation to 1977 OECD Model is to highlight the OECD work carried out until the final implementation of paragraph 2 of Article 17. In this regard, when Japan was negotiating its membership into the OECD in 1964[68], the Japanese Government introduced certain reservations to the 1963 OECD Model, among which was number five, dealing with the application of Article 17.

It read as follows "*Japan reserves the right to subject profits derived from a business which consists of providing the services of public entertainers, such as theatre, motion picture, radio or television artists, musicians and athletes, to the taxes imposed under the relevant laws, whether the business is conducted through a permanent establishment in Japan or not*."

Hence, Japan expressly included the option to subject to tax in Japan, as a source country, to independent or professional services rendered by entertainers, by not relying on the fact that a permanent establishment was considered to exist there. In this sense, it is relevant to note that the scope was limited to independent business, leaving aside income from entertainers receiving salary from their employers as regards their

[67] Isenbergh, J., *International Taxation*, Foundation Press, pp. 219-220. He expressed *"(...) it suggests a road map to success by avoiding its pitfalls. If Scarnart had employed several boxers, had had real economic activity in Switzerland, and had taken on other indicia of reality, the arrangement could have succeeded"*. See further, IFA (1995). *Taxation of Non-Resident Entertainers (Seminar D at the 49th IFA Congress in Cannes, France),* Cahiers de droit fiscal international, IFA Congress Seminar Series, Vol. 20d (The Hague: Kluwer Law International, 1995). Swiss report, pp. 136. In this regard, a Swiss Supreme Court decision in 1987, even though regarded as tax evasion, it also considered that if the company had established a 10% commission, as opposed to the actual 3-5%, it would have been considered that the loan-out company had a true entrepreneurial risk.

[68] OECD (1964), Fiscal Committee, Note by the Japanese Delegation on the position of Japan in relation to the draft Double Taxation Convention on Income and Capital. A.49008- 1 -FC(64)1, 64/31/HM/so, 29th July, 1964.

performances. Somehow, it did follow paragraph 12 of the Commentary on Article XI of the 1959 OEEC proposal, but extending the scope also to business income.

Furthermore, this reservation could be read with the aim at counteracting loan-out companies, since the business income received by public entertainers was subject to tax at source, without taking into account the rules established in Article 15 of business/independent income which requested for the existence of permanent establishment, in order to grant the taxing rights to the source country of the performance.

Two OECD internal working documents dated in 1967 [69] gave evidence of how Sweden, Portugal and Switzerland, as OECD members, respectively raised and tried to solve the tax issue involving the use of loan-out companies by entertainers and sportspersons.

From Portugal's side, the problem was described, but no solution whatsoever was proposed in this regard "*This Article raises the problem of the taxation of remunerations received indirectly by persons there mentioned (the case of remuneration obtained by a person who employs artistes or athletes)."*

The Swedish explanation included in the observations of the member countries as regards Article 17 and, in particular, the artiste or loan-out company was very illustrative.

> *"In recent years special attention has been drawn to cases of tax avoidance where Swedish artistes or athletes living abroad have formed companies there ("artiste-companies"), the only or main purpose of which apparently is to employ the artiste or the athlete and to provide his services to agencies which organise public entertainments. In such cases the agency would be under contract to pay the remuneration for the services directly to the company. The artiste or athlete reports a comparatively low salary to the Swedish tax authorities and claims that the Swedish tax which is levied on the gross remuneration, should be based on that salary. The Swedish tax authorities in these cases have adopted the practice of computing the tax on the gross amount paid to the foreign artiste-company.*

[69] OECD (1967), Fiscal Committee, Observations of Member Countries on difficulties raised by the OECD Draft Convention on Income and Capital. TFD/FC/216. 9th May, 1967. Also, OECD (1967), Fiscal Committee, Consolidated list of outstanding points concerning the OECD Draft Convention on Income and Capital. TFD/FC/218. 21st May, 1967.

However, the provisions of Article 17 of the Draft Convention do not clearly leave room for this Swedish assessment practice of bringing the remuneration paid to an artiste-company into the claim of tax. In order to counteract tax avoidance by way of artiste-companies the new Swiss-Swedish Tax Convention of 7th May, 1965, incorporates the following additional clause to the OECD Draft provisions: "The same shall apply, notwithstanding the provisions of Article 7, when the income is received by a person who employs the artiste or the athlete." (Emphasis added by the author).

The main tax consequence was the scope of Article 17, which extended to those scenarios whereby the income was received by a loan-out company, used for the purposes of circumventing the application of said article.

Even though the Swedish tax authorities' target were the Swedish nationals who moved into another country for tax reasons, becoming tax resident in that tax friendly country, the scope of the provision encompassed in the Swiss-Swedish double tax treaty applied to any foreign entertainer or athlete performing in any of both countries and taking advantage of the use of the artiste-company as a method of receiving the payment and not limited to tax avoidance scenarios. The draft of the additional clause was far-reaching by including any potential scenario of entertainers or athletes being employees, as it happened in Article 17 of 1977 OECD Model. The intention of the counterparts and the final draft of Article 17 were not in the same page.

In the particular case of Switzerland, the unlimited approach of the clause included in the 1965 Sweden-Switzerland double tax treaty for the purposes of combating the use of loan-out companies lead to uncertainty. However, a change of its position within the course of years was taken, as regards the application of Article 17.2 OECD Model.

In 1967 Switzerland suggested to include the mentioned clause with no limit about tax avoidance scenarios. In particular, their representatives expressed briefly that "*The provisions of Article 17 are insufficient to the extent that they cover only fees received by artistes or athletes but not the receipts of companies who employ them. Para. 2 of Article 18 of the Convention with Sweden attempts to make good this lack".*

Switzerland did not include any reservation on Article 17 in connection to 1977 OECD Model, as opposed to other countries, such as United States and Canada, by limiting the application to cases of tax avoidance scenarios. However, it did implement

subsequently a reservation on Article 17.2[70] in relation to 1992 OECD Model, joining the United States and Canada common position.

In this regard, in 1971 the OECD issued a report[71] tackling, among others, the specific issue of use for tax avoidance purposes of so-called artiste-companies[72]. The OECD working group reached two main conclusions. On the one hand, the frequent use of the loan-out companies by entertainers and sportspersons, as tax planning tool. On the other hand, the need to look for new tax measures to combat it, since the 1963 OECD Model draft was not enough to counteract them.

Two solutions were posed in this regard. Firstly, in case of using a company as an intermediate entity concluding the service contracts of the artiste or athlete in the source country, it would be considered as having a permanent establishment. This solution was based on certain tax conventions concluded by Belgium, Canada, France and Japan. Nevertheless, the main shortcoming of this counteract measure was that it would need to be implemented from the domestic legislation of the country where the performance took place.

Therefore, again the solution contained in Article 17 of the 1965 Swedish-Swiss double tax treaty was analyzed. However, the scope of application of said clause was limited to "*income received by a person who employs the artiste or the athlete*". Thus, all other potential tax avoidance devices not involving the employment formula, but the use of a company were out of the scope to combat it.

In this sense, an alternative solution, encompassing the two above mentioned positions, was brought, by using the provision used in other Swedish tax treaties. In particular, it read as follows "*2. Where income in respect of personal activities as such*

[70] See further paragraph 2.2.6.2.

[71] OECD (1971), Fiscal Committee, Working Party n. 1 of the Committee on Fiscal Affairs On Double Taxation. Working group nº 28 (Denmark-Ireland-Sweden). *Report on Articles 16, 17 and 19 and the question concerning residence of diplomats*. CFA/WP1(71)7. December 23, 1971.

[72] It explained into very detail the rationale behind those companies. "*The problem originates from the fact that the provisions of Article 17 deal only with the income derived by the artiste or athlete himself and not with remuneration paid to a person who employs the artiste or the athlete. This being so, devices aiming at tax avoidance have been applied in the following manner. An artiste living in one country forms a company in that country or abroad, presumably in a low-tax country, the main or only purpose of which is to employ himself and to provide his services to agencies which organise public entertainments. A contract is concluded stipulating that the main part of the remuneration for the services should be paid directly to the company in order to avoid taxes in the country in which the services are performed, the artiste then argues that that country's claim is limited to a minor part of the remuneration, i.e. the part paid directly to him."*

of an artiste or athlete accrues not to that artiste or athlete himself but to another person that income may, notwithstanding the provisions of Articles 7, 14 and 15, be taxed in the Contracting State in which the activities of the artiste or athlete are exercised." Hence, it permitted to counteract tax avoidance schemes whereby a third person was used, regardless of the fact that the artist or athlete had the condition of employee of the loan-out company.

1965 Sweden-Switzerland	**Swedish tax treaties**	**1977 OECD Model**
The same shall apply, notwithstanding the provisions of Article 7, when the income is received by a person who employs the artiste or the athlete"."	*2. Where income in respect of personal activities as such of an artiste or athlete accrues not to that artiste or athlete himself but to another person that income may, notwithstanding the provisions of Articles 7, 14 and 15, be taxed in the Contracting State in which the activities of the artiste or athlete are exercised."*	*"2. Where income in respect of personal activities exercised by an entertainer or an athlete in his capacity as such accrues not to the entertainer or athlete himself but to another person, that income may, notwithstanding the provisions of Articles 7,14,15, be taxed in the Contracting State in which the activities of the entertainer or athlete are exercised".*

2.2.5.4. Rolling Stones' Case

Moreover, from the Spanish tax viewpoint, the Rolling Stones' Case, a ruling of October 20, 1992[73], issued by the Spanish Central Economic Administrative Tribunal (hereinafter TEAC), was a reference as regards the use of loan-out company, referred to the application of The Netherlands-Spain Double tax treaty, concluded in 1971[74].

It was decided when most of the court cases dealing with mentioned use of rent-a-star companies were enacted between 1992 and 2000, by TEAC[75]. They tackled the "slave agreements," wherein the artist received a salary from a foreign employer in connection with services undertaken in Spain. In this regard, there were not relationship between the Spanish promoter of the event and the entertainer performing within Spanish territory. In its turn, the payment was carried out from the Spanish promoter to the "loan out" company, in exchange for the entertainer's performance alongside fees related to planning and organization of the event.

The key point resided on the fact that those payments were received overseas by loan-out companies and they did not have a fixed base in Spanish territory through which carried out trade or business in Spain. Hence, the use of those companies was aimed at avoiding taxation at the country where the performance took place, in accordance with article 17 of the OECD Model.

As a starting point, Spanish tax inspectors held that said payments were subject to tax in Spain, according to article 18 of the tax treaty of Spain-The Netherlands, which mirrored article 17 of 1963 OECD Model treaty, by not including paragraph 2 of it.

By contrast, in the next step the TEAC characterized the income received from the Spanish promoter under article 7 (business income) of the Spain-Netherlands double tax treaty. According to the facts of the case, the "slave company" transferred to the domestic promoter the right to record the concert of the band, as well as the right to reproduce the concert after the performance.

[73] Even though the date of the decision (RG 9/1991) was back in 1992, the OECD Model used as a yardstick of interpretation was the version of 1977 based on the time when the facts took place.

[74] Calderón Carrero, J.M., "Operaciones triangulares de planificación fiscal internacional, o de la técnica de evasión lícita: el caso Rolling Stones". *Quincena Fiscal*, n. 21, 1993.

[75] Vogel, K., Taxation of payments to "star companies" in Spain. Tax treaty News, *Bulletin for International Fiscal Documentation,* 8/2001, pp. 319.

TEAC ruled that payments made by Spanish promoter to the "slave company" used by the Rolling Stones as regards the concerts held in Spain and related "primary cosponsor rights" were caught by article 7 of the Spain-The Netherlands income tax treaty.

The TEAC finally rejected that argument and held that income paid to the "slave company" in exchange for the Rolling Stones "primary cosponsor rights" had to be characterized as business profits under article 7 of the Spain-The Netherlands double tax treaty. Thus, the use of loan-out companies was accepted, in order to avoid taxation in Spain, as source country for foreign artists/sportsmen, when article 17.2 was not included in the particular tax treaty and a permanent establishment was not regarded to exist.

2.2.5.5. 1977 OECD Model – Conclusions

As explained within the OECD working groups previous to 1977 OECD Model, as well as the position of the domestic tax administrations, such as the American Internal Revenue Service in the Johansson´s case, alongside the Spanish tax authorities in the Rolling Stones' case, there existed a great concern about the tax avoidance schemes consisting of taking advantage of loan-out companies by top star artistes and athletes. Thus, paragraph 2 of article 17, included in the draft of 1977 OECD Model, accomplished the target of counteracting said avoidance schemes. However, it was drafted in a way that its scope might be interpreted by applying it whenever a company or team was interposed between the payor resident in the country where the performance is carried out and the entertainer and/or athlete.

It also provided a solution in line with the position held by tax commentators, whereby the application of first paragraph of article 17 of 1963 OECD Model was limited to individuals, either based on the fact that describes income from personal activities[76] or

[76] Vogel, K., Shannon, H. A., Doernberg, R. L, and Van Raad, K., United States income tax treaties. Commentary on article 17. Kluwer Law International. December 1992, number 8, pp. 12. In fact, those authors, in accordance with the US Model understand that the presence of article 17.2 which can be applied to a company or other entity emphasizes the inability of Article 17(1) to reach those persons, as opposed to paragraph 8 of the Commentary on article 17 of 1977 OECD Model.

based on the reference to the provisions of articles 14 and 15 which, in its turn, are only applicable to individuals[77].

However, the Commentary on Article 17 OECD Model devoted its paragraph 8[78] to the correct application of taxing rights when a company is interposed and the domestic law of the source country, where the performance takes place, allows to look through.

Basically, three main rules are laid down. When a salary is paid to member of a team, such as an orchestra, the tax at source must be commensurate to the performance taking place there. In the case of using a one-person company, the source country was also entitled to tax an appropriate proportion of any remuneration paid to the individual. Finally, in those cases that the domestic law of the source country had "look through" provisions of said entities allows to tax the income from appearances, even if paid to a different person. Therefore, the application of paragraph two of article 17 of 1977 OECD Model was limited to those cases where the domestic law of the source country of the performance did not have "look through" provisions, enabling to tax the individual, even if the income was received by a third party.

Finally, back again to the final draft of article 17 of 1977 OECD Model, it included other relevant changes such as:

- The income derived by a resident of a contracting State as an entertainer or athlete as opposed to previous OEEC/OECD versions that referred directly to the entertainer or athlete with no reference to the resident concept. As result of using the term resident as central word, the article was drafted individually, by avoiding references to entertainers and athletes in the plural.

[77] Parolini, A., *Fiscalidad Internacional*, Chapter 13: La tributación internacional de artistas y deportistas, CEF, First Edition, 2001, pp. 385.

[78] "*Paragraph 1 applies to income derived directly and indirectly by an individual artiste or sportsman. In some cases the income will not paid directly to the individual or his impresario or agent. For instance, a member of an orchestra may be paid a salary rather than receive a payment for each separate performance: Contracting State where a performance takes place is entitled, under paragraph 1, to tax the proportion of the musician's salary which corresponds to such a performance. Similarly, where an artiste or sportsman is employed by e.g., a one person company, the State where the performance takes place may tax an appropriate proportion of any remuneration paid to the individual. In addition, where the domestic laws "look through" such entities and treat the income as accruing directly to the individual, paragraph 1 enables that State to tax that income derived from appearances in its territory and accruing the entity for the individual´s benefit, even if the income is not actually paid as a remuneration to the individual".*

- It was deleted the public characteristic of the entertainers as a requirement with article 17 of the OECD Model.

Also, in 1977 OECD Model, there are reservations and observations of relevance. In particular, Canada and United States included an observation on paragraph 6 of the Commentary on Article 17 whereby the application of paragraph 2 of article 17 was limited to the cases of tax avoidance[79].

Furthermore, United Sates included a reservation in paragraph 9 of the Commentary on Article 17[80] whereby the application of paragraph 1 of article 17 was limited to qualifying cases in which certain thresholds of time or amount are exceeded. This conventional tax rule is known- as "*de minimis*" rule.

Finally, Greece, Portugal and Japan reserved their respective taxing rights in relation to income derived in connection with trade or business by entertainers or athletes who are employed by the Government.

2.2.6. 1987 OECD Report / 1992 OECD Model and related international tax court cases/2000 OECD Model

2.2.6.1. 1983/1987 OECD Reports

In 1983 the OECD issued a study on the taxation of entertainers, concerning problems arising for interpreting bilateral double taxation conventions[81] (hereinafter 1983 OECD Report).

The most relevant tax issues tackled within said report consisted of posing questions to be worked out in the future. In this regard, it was raised the question of whether it was advisable to state a rule whereby a secondary right to tax the income would be conferred to the State of residence of the artist or sportsman.

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[79] *"Canada and United States are of the opinion that paragraph 2 of the Article applies only to cases mentioned in paragraph 4 above and these countries will propose an amendment to that effect when negotiating conventions with other member countries".*

[80] "*The United States reserves the right to limit paragraph 1 to situations where the entertainer or athlete is present in the other State for a specific period or earns a specified amount*".

[81] OECD (1983), *Double taxation problems related to entertainers,* paragraphs 67-72. DAFFE/CFA/WP1/83, Fiscal Committee, Organisation for European Economic Co-Operation and Development April 5, 1983.

Furthermore, it was mentioned one of the pivotal issues when dealing with Article 17 OECD Model, such as the objective scope of said article, in other words, how far the activity-related income can be brought under article 17 OECD Model. Also, as regards the second paragraph of Article 17, the "slave contract" scheme was highlighted in order to take into account the position of Australia, which argued that there are cases that the fee paid to the company is not qualified as income in respect of personal activities exercised by the entertainer or athlete and if so, it cannot be covered by Article 17. The same approach was taken by Austria where the profits are attributed in respect of its management.

Finally, the application of Article 17 in the context of triangular scenarios, where the residence of the artiste or athlete and the slave company are different, is posed for the first time.

Those questions were partially responded in the 1987 OECD Report about the taxation of income derived from entertainment, artistic and sporting activities[82] (hereinafter 1987 OECD Report), whereby the practical difficulties of taxing foreign performances, which were mentioned in 1983 OECD Report, were analyzed into detail. Its target was "*to describe the main problems which arise in taxing income from entertainment, artistic and sporting activities at the national and international level and to suggest ways in which these problems can be overcome*"[83].

In particular, the report is divided into five parts. Part I outlined the particularities of this particular context. Part II included the difficulties in obtaining information. Part III encompassed the assessment and collection of taxes. Part IV dealt with double tax conventions. Part V reached the conclusions.

It showed the perception that most of international artistes and sportsmen used sophisticated tax avoidance schemes, in order to escape from tax either in the source or the residency country, as a general rule. When dealing with "*performers at the low end*" the practice consisted of not reporting income. As opposed to the "*top ranking artistes and athletes*" whose abusive tax planning involving tax haven schemes. It went further by stating that[84] "*Relatively unsophisticated people – in the business sense –*

[82] OECD (1987)*, Report on the taxation of income derived from entertainment, artistic and sporting activities*, OECD, Paris, adopted by the OECD Council on 27 March 1987. Said report was drafted based on 19 country submissions. In particular Australia, Austria, Belgium, Canada, Denmark, Finland, France, Germany, Ireland, Japan, Luxembourg, Netherlands, Norway, Portugal, Spain, Sweden, Switzerland, United Kingdom and the United States.

[83] *Id*. at paragraph 3.

[84] *Id*. at paragraphs 6-8.

can be precipitated into great reaches, income sources can be many and varied (….) and there is a tendency to be represented be adventurous but not very good accountants."

The underlying reason of treating the artistes and athletes different from the rest of mobile professions[85] from a fiscal perspective was clear-cut statement "(…) *there is a general agreement that where a category of – usually well-known – taxpayers can avoid paying taxes this is harmful to the general tax climate, which therefore justifies coordinated action between countries*"[86]. Therefore, the approach as regards the taxation of artists and athletes' income arising from different countries was not only a matter of relevance from the recollection perspective. It cannot be separated from the reputational risk of the tax authorities allowing to their celebrities benefiting from tax avoidance schemes, which might be reported by the worldwide media.

Although in other parts of the report, the special tax treatment granted to artists and athletes is justified on the grounds of "*relying on taxpayers themselves to report accurately the amount of income earned at home and abroad is even less realistic in the entertainment area than in other areas*". In addition, the tax recollection problems were considered to be higher for this group of taxpayers since "*the fact that they can frequently leave a country without notice, open up wide possibilities of evasion and make assessment and collection of tax problematic in the absence of any withholding tax*"[87]. The mobility was considered as a pivotal circumstance, in order to widen evasion options, but it did not provide any reasoning why it was only linked to artists and athletes.

From the information and related recollection perspectives, the main concern of the governments participating in the report resided on the use of the "slave agreements" with foreign employers. By proceeding under this tax planning scheme, artists and athletes converted the income to an overseas source[88], by removing that income from the scope of the source country[89].

This tax shortcoming was also shared when tackling business income from entertainment, artistic and sporting activities of a non-resident. The taxing rights were

[85] OECD (1985), *Trends in International taxation: Leasing of Equipment and Hiring-out of Labour*, Organisation for Economic Co-operation and Development. Committee on Fiscal Affairs, 1985.
[86] See 1987 OECD Report, *supra*, n. 82, paragraph 7.
[87] See 1987 OECD Report, *supra*, n. 82, paragraphs 19 and 29.
[88] See 1983 OECD Report, *supra*, n. 81, paragraph 70. It replied to the tax concern posed by Australia.
[89] See 1987 OECD Report, *supra*, n. 82, paragraphs 25 and 26.

granted to the source country as long as a permanent establishment is maintained there, which it did not happen in most of the cases, due to the short-term characteristic of the performances. However, the OECD went further by establishing that the tax avoidance or non-taxation opportunities in this field are wider than other cases[90], either at source or residence countries.

However, the outcome after the conclusions laid down in above paragraphs are completely opposite to "*the main principle which underlines this report is that the income from the entertainment and sporting activities should be taxed in the same way as income from other activities. Exceptions to this principle should be kept to a minimum*"[91].

The author´s opinion is that said statement was only maintained from a theoretical point of view, since it also established in the mentioned report[92] that the taxation of this specific group must follow the principle laid down in Article 17 of 1977 OECD Model, whereby the taxation at source was the effective means to combat the practical difficulties of the potential avoidance at the residence country. Thus, the OECD stated that 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*"[93].

The main question posed in 1983 OECD Report was the one trying to determine how far activity-related income can be brought under the scope of article 17 OECD Model. 1987 OECD report responded to this question, from a twofold perspective[94]. On the one hand, the subjective approach, in other words, to whom the application of Article 17 affected[95]. On the other hand, the objective approach or the variety of types of

[90] See 1987 OECD Report, *supra*, n. 82, paragraph 32. It included an illustrative example of avoidance "*a restaurant makes a contract with a foreign company, according to which the musicians, show-stars, etc., employed by the company, perform in the restaurant. The restaurant only supplies the space and does not itself pay any performance or other fees. The foreign company receives the proceeds from the admission fees. There is a great temptation for the company to leave the proceeds undeclared in its home country".*

[91] See 1987 OECD Report, *supra*, n. 82, paragraph 14.

[92] See 1987 OECD Report, *supra*, n. 82, paragraph 16.

[93] Therefore, the question posed as regards of the secondary right to tax for the country of residence, in order to avoid non-taxation scenarios. See further, 1983 OECD Report, *supra* n. 81, paragraph 67. Also, see further, 1987 OECD Report, *supra* n., 82. paragraphs 99-101 including the reply. In particular, the solution was granted at tax treaty level, by using the credit method as a double tax relief measure or granting the subsidiary right to tax for the country of residency.

[94] Both perspectives of article 17 OECD Model are tackled into detail in paragraph 3.2.

[95] See 1987 OECD Report, *supra*, n. 82, paragraphs 67-74 and 78.

income from different sources that might be brought under Article 17 OECD Model[96]. Also 1987 OECD Report was the first time that a position from the OECD was taken about the triangular scenarios[97].

Another major amendment was introduced in the 1987 OECD Report, the implementation of the reversal position whereby the unlimited approach was adopted as regards the second paragraph of Article 17 OECD Model. It expanded its scope not only to loan-out companies, but also to any kind of independent companies, such as troupes, teams, etc. Thus, it changed of the original intention of paragraph 2 of Article 17 OECD Model, since its text allowed proceeding in this regard[98]. As opposed to the limited scope which had been encompassed in 1977 Commentary of said article[99].

Related to question posed by Austria in the 1983 OECD Report as to whether the income related to the management when applying paragraph 2 of article 17 would be subject to tax, the 1987 OECD Report considered that the fact of opting for the unlimited approach when using an intermediate company supported that the source country would be entitled to tax the whole of the income paid to a performer own entity[100]. Hence, it left open the question in those cases that under the unlimited approach applied to the second paragraph of Article 17 OECD Model, but the artiste or athlete did not hold any shares or participations in the intermediate entity.

Finally, it is important to highlight that 1987 Report did bless the freedom granted to source States when determining the taxable base, by accepting the gross taxation[101]. Moreover, it suggested to improve and to increase the use of the exchange of information, with the aim at avoiding double non taxation scenarios, where the country of performance would provide for the exemption method[102].

[96] See 1987 OECD Report, *supra*, n. 82, paragraphs 77-84 and 95-97.

[97] The triangular scenarios analysis is included in paragraph 3.4.3.

[98] See 1987 OECD Report, *supra*, n. 82, paragraphs 89-91. In particular, it was expressly stated that "*It was therefore agreed that the provisions in Article 17 enabled to be levied on: The amounts paid to the artistes and athletes through a separate entity, but accruing to them; The amounts allocated to an entity, but not paid to the artiste or athlete, which has the effect of indirectly taxing the profit element kept by the entity*".

[99] Molenaar, D., and Grams, H., Rent-a-Star - The Purpose of Article 17(2) of the OECD Model. *Bulletin for International Fiscal Documentation,* 56(10), 2002, pp. 500-509.

[100] See 1987 OECD Report, *supra*, n. 82, paragraph 92.

[101] See 1987 OECD Report, *supra*, n. 82, paragraph 94.

[102] See 1987 OECD Report, *supra*, n. 82, paragraphs 106-107.

2.2.6.2. 1992-2000 OECD Model-Commentaries and related international tax court cases

The changes proposed and discussed in the 1987 OECD Report were useful[103] to the amendments implemented in the 1992 OECD Model[104]. As a result, the Commentary on Article 17 OECD Model expanded by adding new paragraphs, still included in 2014 OECD Model Commentary.

In particular, the changes implemented in the 1992 OECD Commentary on Article 17, were the following. Prior to analyze them, it is important to note that within Article 17 the term athlete of the English version of the 1977 OECD Model was replaced by the sportsman in 1992 OECD version[105], which was of broader character.

In the Commentary on Article 17 OECD Model itself, the referral to public entertainer still existed. Thus, it was removed in order to be in line with Article 17 OECD Model, since the deletion in 1977.

It was incorporated in the Commentary on Article 17 OECD Model the non-exhaustive list of entertainers[106] and sportspersons[107], together with the main requirements to be considered as such.

The clarification of the scope of Article 17 OECD Model, by not included within it, the income received by impresarios arranging the performance[108]. Also, it was clarified the "income arising from personal activities" as, well as the application of paragraph 1 of

[103] The 1992 OECD Commentary on Article 17 did not include all statements encompassed in the above mentioned 1987 OECD Report, such as the different position as regards the characterization arising from compensation for cancellations which can fall under the characterization of articles 7 or 15, the application of the article 17.2 OECD Model to the management companies (paragraph 11.a) not envisaged in said report, and no reference whatsoever was included to the issue of triangular scenarios.

[104] It is worth to note that the amendments of 1992 OECD Commentary also did encompass the minor additions and deletions dated in 1995 and 1997.

[105] OECD (1992), *Model Tax Convention on Income and Capital –Text and Commentary*, OECD, issued in July 23, 1992.

[106] See further, paragraphs 3 and 4 of the OECD Commentary on Article 17. Also, see 1987 OECD Report, *supra* n. 82, paragraphs 68 and 69. It is tackled into detail in paragraph 3.2.1.

[107] See further, paragraphs 5 and 6 of the OECD Commentary on Article 17. Also, see 1987 OECD Report, *supra* n. 82, paragraphs 70 and 71. It is tackled into detail in paragraph 3.2.1.

[108] See further, paragraph 7 of the OECD Commentary on Article 17. Also, see 1987 OECD Report, *supra* n. 82, paragraph 73.

Article 17 OECD Model when source country domestic laws include "look through" provisions[109].

A new paragraph was included in order to distinguish between royalties and income caught under Article 17 OECD Model related to sponsorship and advertising fees[110], as well as other specific paragraphs dealing with the acceptance of gross taxation at source[111] and the exception of its application to cultural events[112].

It is important to mention that as regards the application of the second paragraph of Article 17 OECD Model, two main changes were included. On the one hand, the unlimited approach by adding two additional scenarios[113] to the existing measure addressed to combat avoidance situations.

As a consequence, Switzerland joined United States and Canada as regards the reservation included in paragraph 16 of the Commentary on Article 17 OECD Model[114]. Accordingly, they expressly stated their willing of applying Article 17.2 OECD Model, restricted to counteract tax avoidance schemes or the use of "loan-out companies". As a result, it is not within the scope of said provision, to counteract the use of independent legal entities taking part of the business, related to performing activities of the entertainers and sportspersons[115].

On the other hand, the 1992 OECD Commentary deleted the express referral include in paragraph 11.c) whereby the taxation at source was allowed to the interposed company *"(…) where for instance the entertainer or athlete has control over the rights*

[109] See further, paragraph 8 of the OECD Commentary on Article 17. Also, see 1987 OECD Report, *supra* n.82, paragraphs 75 and 76.

[110] See further, paragraph 9 of the OECD Commentary on Article 17. Also, see 1987 OECD Report, *supra* n. 80, paragraphs 77-84. The latter included a more detailed analysis whereby the two opposite views were explained. It is also dealt within paragraph 3.4.2.

[111] See further, paragraph 10 of the OECD Commentary on Article 17. Also, see 1987 OECD Report, *supra* n. 80, paragraph 94.

[112] See further, paragraph 14 of the OECD Commentary on Article 17. Also, see 1987 OECD Report, *supra* n. 80, paragraph 98.

[113] See further, paragraph 11 scenarios a) and b) of the OECD Commentary on Article 17. Also, see 1987 OECD Report, *supra* n. 80, paragraphs 89-91.

[114] *"Canada, Switzerland and United States are of the opinion that paragraph 2 of the Article should apply only to cases mentioned in sub-paragraph 11.c) above and theses countries reserve the right to propose an amendment to that effect."* Based on the previous observation included in 1977 OECD Model Commentary by Canada and United States. See further Canada and United States observation to the Commentary on Article 17 OECD Model *supra*, n. 79.

[115] See detailed analysis in relation to the tax consequences arising from US Model versus OECD Model, Toribio Bernárdez, L., Problemas prácticos en la tributación de las rentas obtenidas por los deportistas en el extranjero. El caso particular de la International Champions Cup a la luz del Convenio entre España y Estados Unidos, *Crónica Tributaria*, Instituto de Estudios Fiscales, vol. 170(1), March, pp. 185-217.

to the income thus diverted or has obtained or will obtain some benefit directly or indirectly from that income". Thus, it was no longer required to link the existence of a benefit of the entertainer or sportsperson of the intermediate company[116].

In 1995, the 49th IFA Congress held in Cannes devoted a Seminar[117] to the taxation of non-resident entertainers[118]. The 1987 OECD Report as well as the changes implemented in 1992 Model were of relevance. There exist tax literature providing constructive analysis in relation to the rationale of treating differently to entertainers and sportspersons. In particular, the position whereby the overall existence of Article 17 OECD Model was under scrutiny[119].

What it was clear-cut was that the solutions encompassed to that date would lead to over taxation, double taxation or even to double non-taxation. Furthermore, the invoked reasons by OECD to support the different tax treatment to those qualifying individuals were blurred, since they might be tantamount applicable to other high-earners individuals.

In 2000 another OECD Model Tax Convention on Income and Capital was released[120]. Three main issues were incorporated. In the Article 17 OECD Model itself, the reference to Article 14 (professional income) was deleted, since the 2000 OECD Model endorsed the tax treatment of this particular type of income together with Article 7 (business income).

The OECD Commentary on Article 17 included two new paragraphs tackling the triangular scenarios[121] and stated the application of general anti-avoidance rules compatible with Article 17 OECD Model[122].

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[116] See 1987 OECD Report, *supra* n. 82, paragraph 92.

[117] IFA (1995), *Taxation of Non-Resident Entertainers (Seminar D at the 49th IFA Congress in Cannes, France)*, Cahiers de droit fiscal international, IFA Congress Seminar Series, Vol. 20d, The Hague: Kluwer Law International, 1995.

[118] See further, Sandler, D., *The Taxation of International Entertainers and Athletes-All the World´s a Stage*. The Hague, Kluwer Law International, 1995.

[119] See further in this regard:

- Grams, H., Artist Taxation: Art. 17 of the OECD Model Treaty – a relic of Primeval Tax Times? 27 *Intertax*, 1999, pp. 188-193.
- Molenaar, D., Obstacles for International Performing Artists, 42, *European Taxation* 4, 2002, pp. 149-154.
- Molenaar, D., and Grams, H., *supra* n. 99, pp. 500-509.

[120] *Model Tax Convention on Income and on Capital*, issued by the OECD Committee on Fiscal Affairs in April 30, 2000.

[121] *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*

2.2.6.3. Sting's Case

It is important to note that worldwide tax authorities during those years were carrying out tax audits against artists and sportsmen, in order to combat either aggressive tax structures or interpretation of the tax benefits granted in certain favourable tax regimes. Most of them, ended up with major court cases which are useful to better explain the tax climate in which OECD tasks were addressed, in relation to entertainers and sportspersons.

In this sense, the decision issued by the Canadian tax court[123] as to the case of Gordon Sumner, more known in the artist world as "Sting" (hereinafter Sting Case).

This ruling was about the artist Gordon M. Sumner, a rock star better known under his stage name "Sting", who used an intermediated company (Roxanne Music) to receive the earnings obtained from an extensive tour in North America. The famous appellant argued the absence of a permanent establishment in Canada, as well as the payment of an amount of money in the Canadian tax return in order not to apply the clause referred to loan-out companies. Roxanne signed an agreement with Wyneco, a Dutch company, which effectively "loan-out" Sting's services.

The Canadian tax court upheld the position of the Canadian tax authorities whereby the application of paragraph II of Article XVI of the Double tax treaty between the US and Canada, dealing with artists and athletes conventional tax regime, took precedence over article VII of the same tax treaty.

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same Contracting State. The paragraph 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 a 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.
In this regard, see further, Betten, R. and Lombardi, M., Article 17(2) of the OECD Model in Triangular Situations, 51 *Bulletin for International Fiscal Documentation* 12, 1997, pp. 560. Also, see 1987 OECD Report, *supra* n. 82, paragraphs 102-104.

[122] 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*."

[123] Sumner et al vs. The Queen enacted in December 7, 1999. Docket: 98-1222-IT-G; 98-1410-IT-G.

The discussion[124] between the taxpayer and the Canadian tax authorities resided in determining the prevalence of the anti-abuse scope of paragraph II, article XVI of the Canada-US double tax treaty, in accordance with the Reservation in the OECD Commentary on Article 17[125], over the application of Article VII (business profits) appealed by the taxpayer.

Among other arguments, the Canadian Court based its reasoning on the paragraph 11 of Commentary on Article 17 OECD Model[126], which determines the rules of application regarding paragraphs 1 and 2 of said tax article. Basically, depending upon the fact that whether the source country has adopted a look-through provision or not, paragraph 1 becomes applicable and, if so, the tax at the level of the entertainer versus the loan-out company, in the absence of said specific provision. It explicitly states that *"(…) paragraph 2 provides that the portion of income which cannot be taxed in the hands of the performer may be taxed in the hands of the person receiving the remuneration*".

By means of this specific OECD Commentary statement, the appeal of the taxpayer did not have any legal effect, since it was totally based on the taxability of the artist. Accordingly, there was no need to invoke the anti-avoidance scope of paragraph II of article XVI of the Canada-US tax treaty, since the particular case did not involve a scenario of succeeding in escaping taxation. However, the Canadian tax court, relied on the grounds of the OECD Commentary on article 17 (paragraph 11) concluded that "*This clearly indicates that paragraph 2 of the Canada-U.S. treaty does not envisage an either/or, or all or nothing situation. Rather it contemplates that a performer´s income may be earned in part by the performer personally and in part by the company, and both may be taxed.* "

Hence, the application of paragraph II of article XVI of the Canada-US double tax treaty (tantamount to article 17.2 OECD Model, except for the reservation held by both countries involved) was used as a measure to combat the loan-out structures insofar the income was received, totally or partially, by a third party, regardless the absence of a permanent establishment in the source country.

[124] It is also important the position of the Canadian Tax Court as to the split of the salary income, to be allocated into Canada, in relation to the six concerts that take place there, among the different North American performing countries.

[125] Observation included in paragraph 6 of 1977 OECD Commentary on Article 17, which became a reservation to said OECD Article, included in paragraph 16 in 1992 Commentary, which added Switzerland to United States and Canada.

[126] As well as the Technical Explanation of the US-Canada double tax treaty on Article XVI.II.

In order to conclude this paragraph 2.2.6 a table summarizing the main additions via OECD Reports or OECD Model is included below for illustrative purposes.

17.1

Issue	**1987 OECD Report**	**1992 OECD Model**	**2000 OECD Model**
Artist definition	Paragraphs 68 and 69	Paragraphs 3 & 4	/
Sportsmen definition	Paragraphs 70 & 71	Paragraphs 5 & 6	/
Impresarios	Paragraph 73	Paragraph 7	/
Personal activities	Paragraphs 75 & 76	Paragraph 8	/
Items income	Paragraphs 77 & 84	Paragraphs 9	/
Gross income	Paragraph 94	Paragraph 10	/

17.2

Issue	1987 OECD Report	1992 OECD Model	2000 OECD Model
Management Co	Not included	Paragraph 11 a)	/
Team	Paragraphs 89	Paragraph 11 b)	/
Tax avoidance	Paragraph 92	Paragraph 11 c)	/
Public funds	Paragraph 98	Paragraph 14	/
Triangular cases	Paragraph 102-104	/	Paragraph 11.1
Domestic GAAR	Not included	/	Paragraph 11.2

2.2.7. Post 2002 up to 2022

2.2.7.1. Introduction

As regards the historical path of Article 17 OECD Model, the period post-2002 OECD Update until 2022 entails significant events for the purposes of its existence and scope.

In this regard, two main stream positions are upheld from tax commentators, consisting of either endorsing the deletion of Article 17 OECD Model, due to the inconsistencies when applying it, in comparison to other taxpayers, which lead to double taxation scenarios. The primary supporters of this position are Molenaar, D. and Grams H[127].

[127] Molenaar, D., and Grams, H., Scorpio and The Netherlands: Major Changes in Artiste and Sportsman Taxation in the European Union*, European Taxation*, vol. 47, n.2, 2007 pp. 63-68. Grams, H., *supra* n. 119, pp. 188-193. Molenaar, D., *supra* n. 32. Also, in line with this position, West, C., *Discussion draft on the Application of Article 17 OECD Model (Artistes and Sportsmen) of the OECD Model Tax Convention*. OECD, Paris, 23 April 2010 to 31 July 2010. Comments officially delivered by this author during the public

As opposed to the previous option, Sandler[128], endorses the application of Article 17 OECD Model, but overcoming the current shortcomings. On the one hand, it over includes any kind of entertainer or sportsperson, regardless of the size of income obtained in the international performances carried out in different source countries. On the other hand, he suggests the extension the application of said OECD article, also to other professionals benefiting from similar characteristics of earning relevant sums of income around the globe, in shorts period of time.

From the OECD's perspective, the OECD Discussion draft on the Application of Article 17 OECD Model issued in April 23, 2010 (hereinafter 2010 OECD Report) is of capital importance, since it opened the door to further discuss about various and relevant topics of said article. It is important to know, the reasons underlying the issue of said OECD report, as well as the following Report about the Issues related to Article 17 of the Model Tax Convention, adopted by the OECD Committee on Fiscal Affairs in June 26, 2014 (hereinafter 2014 OECD Report), being the yardstick of the 2014 Update to the Article 17 OECD Model and its commentaries, implemented in July 15, 2014. Moreover, the comments delivered by various professionals suggesting different changes and proposals for additions into Article 17 OECD Model, shed some light into the itinerary of changes finally implemented by the OECD Fiscal Committee. In this regard, the reasons provided by the OECD to maintain Article 17 as of essence.

In the meanwhile, IFA Congresses took place which scrutinized the main practical issues concerning the application of Article 17 OECD Model which resulted in a significant contribution to the debate of the matter. In particular, the IFA Congress held in Vancouver in 2009 dealt with the taxation mobile activities, by encompassing among them, the taxation of international sportspeople[129].

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discussion in which he stated that the best available option consisted of the abolition of Article 17 OECD and if so, the redistribution of its effects between the OECD umbrella articles. Also, see Parolini, A., *supra* n. 77, pp. 83.

[128]Sandler, D., *International taxation of artistes & sportsmen*. Chapter: Problems taxing Non-resident Artistes and Sportsmen, Ed. Shulthess & Bruylant, 2009, Genève, Zurich, Bâle, 2009, pp. 191-213. Also, Sandler, D., *Source versus residence: Problems Arising from the Allocation of Taxing Rights in Tax Treaty Law and Possible Alternatives*, Chapter 13: Artistes and Sportsmen (Article 17 OECD Model Convention), Ed: Lang, M., Wolters Kluwer 2008, pp. 215-245.

[129] IFA (2009), *Race to the Bottom? The taxation of Mobile Activities*. Seminar Panel I. Congress in Vancouver, Canada.

Furthermore, the 2010 IFA Congress at Rome in the Seminar E "IFA/OECD: red card 17?"[130] tackled most of the issues included in the 2010 OECD Report in the context of three practical cases. Also, in 2016 took place in Madrid the IFA Congress, devoting its Seminar J to the Taxation of sportspersons, taxation of sports organizations and sports events[131]. Again, the option of abolishing Article 17 OECD Model was put into place, this time in the context of the exemptions granted by the hosting country where mega sports events took place, such as the Football World Cup, Olympic Games and the like.

It is also worth mentioning that apart from the relevant update of Article 17 OECD Model that was implemented 2014; two prior OECD updates took place in 2008 and 2010. In the former, a new paragraph 10.3 was included in order to arrange the computation of the net income. In the latter, a German observation was encompassed when tackling income arising from live broadcastings.

2.2.7.2. 2009 IFA Vancouver

In said IFA Congress, the issue of the taxation of entertainers and sportspersons was dealt with alongside other mobile activities. The main point was analyzing the effects caused by the sourcing tax rules, as well as the applicable tax treaties.

As regards the sourcing rules, it was concluded that as a general rule they are far reaching of scope when focusing on sportsmen, by granting the taxing rights to the country where the performance takes place. However, they do not apply in relation to the bodies organizing the sports events, unless a permanent establishment is considered to exist in the source country.

Also, the sports event may lead to obtain royalties in the source country and, if so, subject to tax there. In this particular case, the addressing rule resides on the country of the payor.

[130] Molenaar, D., Tenore, M. and Vann R., Red Card Article 17?, *Bulletin for International Taxation*, 2012, Volume 66, n. 3, pp. 1-17. It provides for a detailed analysis of the main issues dealt with the mentioned Seminar chaired by Richard Vann (Australia) and the participation of Mario Tenore (Italy-Secretary), Mary Bennett (OECD), Andrew Dawson (UK), Xavier Oberson (Switzerland) Michael Pfeifer (USA), Aart Roelofsen (The Netherlands) and Jacques Sasseville (OECD).

[131] It was chaired by Han Kogels (The Netherlands) and the remaining panellists were Xavier Oberson (Switzerland), Anna Gunn (The Netherlands), Daniel Sandler (Canada) and Jacques Sasseville (OECD).

Regarding the tax treaty arena, a general criticism was posed when applying Article 17 OECD Model, since the source country is entitled to apply its taxing rights, without any limitation, such as deduction of expenses, etc. In addition to that, the underlying reasons of this tailored and anti-avoidance provision, in comparison to other mobile activities, are still unclear.

As opposed to the income obtained by the sportspersons, the sport body organizing the event is caught by Article 7 OECD Model and if so, the source taxation is limited to scenarios when a permanent establishment exists there. Thus, the mentioned far reaching tax effects are not applicable. Similar to what happens when dealing with royalties and the application of Article 12 OECD Model does not grant the power of taxation to the source country.

A case study highlighted the mentioned tax issues from a practical perspective. In particular, the sportspersons' income leads to difficulties of apportionment as regards salaries and prizes obtained in performances carried out in various source countries. Additionally, it was analyzed the interaction between the paragraphs 1 and 2 of Article 17 OECD Model, by taxing either the sportsperson or the team/national team, respectively. In this regard, it is worth noting to take into account that the tax residency of the sportsplayer may be different from the one of the national team. Subsequently, depending on the taxation at source level may lead to credit shortcomings in the State of residency, unless certain exemptions are granted, such us 2004 Portugal UEFA European Championship, 2010 Canada Olympic Games, 2010 South Africa FIFA World Championship and the like.

Finally, the taxation of other mobile activities, such as international shipping, financial services, film productions and income from intangibles, leads to the conclusion that as general rule the taxpayers seek for the lowest level of taxation at source country. In this sense, the source States try to attract foreign professionals/entrepreneurs by reducing the tax burden, leading to the diminution of the source country taxation and fiscal competition. It confirmed that taking into account the general tax approach adopted as regards other mobile activities, the position adopted by Article 17 OECD Model lacks of underlying reasoning for their unique and far-reaching effects.

2.2.7.3. 2010 OECD Discussion Draft

Among the OECD tasks carried out since 2004, a relevant step further was taken when it was released a discussion draft for the purposes of inviting to participate any interested party providing constructive comments as regards Article 17 OECD Model. From this work, two main contributions derived in this regard. On the one hand, those provided by the OECD itself via the 2010 Discussion Draft[132] and the related proposed changes. On the other hand, the comments received from interested third parties[133].

Back to the 2010 OECD Discussion Draft, the five main points as regards the Commentary on Article 17 OECD Model, which were proposed to be amended or expanded where as follows:

First issue: The concept of artiste and sportsman. Taking into account the difficulties in order to determine whether or not any of these two types of qualifying persons are considered to meet, certain principles were stated. They must act as such, regardless of the number of times carrying out the performance/s. A direct or indirect reference to the appearance in an entertainment or sport event is considered to be included within Article 17 OECD Model. Finally, those persons commenting or reporting entertainment or sports event were out of the scope[134]. Even though, it is mistakenly included within the third issue or the objective scope, it was expressly mentioned that public speakers[135], models and promoters are also out of the scope or Article 17 OECD Model.

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[132] OECD (2010), Discussion draft on the Application of Article 17 OECD Model. (Artistes and Sportsmen) of the OECD Model Tax Convention. OECD, Paris, 23 April 2010 to 31 July 2010.

[133] Sasseville, J., *Taxation of Entertainers and Sportspersons Performing Abroad*. Chapter 5: The 2014 Changes to Article 17 of the OECD Model Tax Convention, Ed Maisto, G., EC and International Tax Law Series. Volume 13. IBFD. 2016, pp. 85-102.

[134] Based on the *Cheek vs. The Queen*, held in the Tax Court of Canada, issued in January 31, 2002 TCC 46707. See further, Boidman, N., Canadian Taxation of Foreign Service Providers: Treaty Issues and Court Decisions, *Bulletin of Fiscal Documentation*, Treaty Monitor, July 2002. Also, Arnold, B.J., Canada's Tax Court Says Announcer for Toronto Blue Jays not Entertainer, *Tax Notes International*, March 4, 2002, pp.993-996. In both tax articles, it is explained the restricting view adopted by the Canadian Tax Court when interpreting the concept of entertainer.

[135] About this topic, in particular the example of former politicians, a different view was held by Fend, L., Does the OECD Artistes and Athletes Article Cover Speeches?. *Tax Analysts*, June 30, 2003. In fact, this tax issue remains debatable when dealing with China (as well as Malaysia and Brazil), since they included an Observation to Article 17 OECD Model, whereby the activities of public speakers, including former politicians are under the scope of said OECD Article, insofar entertainment character is present in their speeches.

Second issue: A particular reference to the application of Article 17 OECD Model to the race prizes, by distinguishing between the owner of the cars or horses versus the performing activities of the jockey and race car driver[136]. Thus, the owner of the cars/horse would be out of the scope of Article 17 OECD Model.

Third issue: The objective scope of Article 17 OECD Model or the personal activities of an entertainer or sportsman as such was of major interest in this report. The main conclusion in this regard consisted of including the preparation and training activities within the concept of personal activities. Also, it clarified that income obtained by team troupes or orchestras were included, as opposed to income of companies involved in the production of entertainment and/or sports events. An important principle was laid down, whereby the income arising from personal activities of the sportsman or the entertainer cannot be taxed twice through the application of the two paragraphs of Article 17 OECD Model (at the level of the team/orchestra, together with the members).

Fourth issue: The distributive and allocation rules when performing in various foreign countries. It related them to the link of the specific activities exercised by the entertainers or sportsmen. It limited the allocation rules to the working days physically present in the source State.

Fifth issue: Special categories of payments. It started by clarifying further the grey area between the applications of Article 12 vis a vis Article 17 OECD Model, when dealing with income in the form of royalties, sponsorship or advertising fees. Also, two new paragraphs were suggested to be included in the Commentary on Article 17 OECD Model. In particular, paragraphs 9.4 and 9.5, tackling broadcasting and image rights, respectively.

2.2.7.4. 2010 IFA Rome

In the context of the 2010 OECD Discussion Draft, already published but pending to be further discussed[137], the Seminar E in the 2010 IFA Congress held in Rome dealt with

[136] See Sasseville, J., *supra* n. 133, pp. 98.

[137] It should be noted that eleven organizations and tax professionals had delivered their valuable comments, in order to propose potential amendments, in line with the public debate opened through the 2010 OECD Discussion Draft. In particular, Dick Molenaar from All Arts Tax Advisers, Taxand, Dr. Craig West, Schlote Productions, RSM Tenon, Performing Arts Employers Association League Europe (Pearle), Ricardo da Palma Borges, Cristian Garate, Music managers Forum (MMF), the Federation des Employeurs du Spectacle Vivant Public et Privé (FEPS) and Cirque du Soleil.

the practical difficulties, when Article 17 OECD Model is applied in the international tax context.

In this Seminar the Chair was Richard Vann (Australia), together with the panellists Xavier Oberson (Switzerland), Michael Pfeifer (United States), Aart Roelofsen (The Netherlands), Andrew Dawson (UK), Jeffrey Owens, Mary Bennett and Jacques Sasseville from the OECD.

The title of the Seminar, Red Card Article 17?, gives evidence of the shortcomings when applying said article may lead to pose the question of abolishing it. Even more, there exist examples in which the level of taxation may jeopardize on the decision to take part on an international performing event, such as the case of Usain Bolt did not participate in Aviva London Grand Prix, in August 2010, as well as US golf players posed not to participate in the 2010 Ryder Cup, based on the high level of taxation in United Kingdom.

The core discussions at the Seminar E 2010 IFA Congress were carried out through tackling three case studies[138]. In particular:

- A football player receiving a salary from his team, image rights income via his loan-out company, as well as receiving a percentage of the sale tickets in a foreign country, where he spent time based on performance matches, alongside training days.
- A big international tournament in which special exemptions were granted at the source State. In addition, the broadcasting rights were granted by the organizing body to broadcasters from different countries. Those broadcasters, in its turn, sent commentators or reporters to the sport event.
- A tennis player received payments from different items of income, related to a tennis tournament. Among others, sponsorship's income based on a fixed amount, plus additions for particular achievements in specific tournaments and a percentage of the merchandising sales. Also, during an injury time, received a payment for a public speech, televised fashion show and as a play-to-play commentator.

It is clear that the debate of the panellists was in line with the 5 main tax issues raised in the 2010 OECD Discussion Draft. It was very fruitful, since the views from different countries, such as Switzerland, The Netherlands, United States, United Kingdom and

[138] Molenaar, D., Tenore, M. and Vann R., *supra* n. 130, pp. 1-17. The main purpose of this tax article was to lay down the debate between the abolition of Article 17 OECD Model and at least to amend it, in order not continue carrying out the same relevant tax mistakes.

the OECD were shared in a public debate. Furthermore, the practical problems when foreign entertainers and sportspersons perform in foreign countries were also highlighted.

From the author's perspective, the debate was much more focused in determining who qualified as an entertainer or sportsperson. As a result, depending on who was performing or participating in certain events, such as a fashion show, the force of attraction of Article 17 OECD Model led to be applied. In other words, too much attention was rendered to the persons carrying out the entertainment or sport activities, instead of focusing in said activities as such. Additionally, certain relevant practical problems remained unclear[139].

2.2.7.5. 2010 Proposals by tax professionals and organizations

Prior to tackle the 2014 OECD Report on Article 17 OECD Model, it is important to note the proposals laid down by eleven tax professionals and organizations, as a result the 2010 OECD Discussion Draft, in order to subsequently ascertain which of them were incorporated into the Commentary on Article 17 OECD Model.

In this regard, it is important to note that four of the tax commentators endorsed the complete abolition of Article 17 OECD Model[140].

In particular, Molenaar advocated for the deletion of Article 17 OECD Model, based on the position of Dutch tax authorities. In accordance with their domestic tax rules, they unilaterally relinquish to tax at source, when performing entertainers and sportspersons who are tax residents in a country with which The Netherlands has concluded a double tax treaty. The general or umbrella Articles 15 and 7 of the OECD Model are the tax rules to be applied in this regard. The excessive gross taxation at source, whose rate vary from 15% to 30% leads to an over taxation, which the double taxation relief measures granted by the residency State are not able to eliminate.

The same reasons mirroring to the ones stated by Molenaar were laid down by Pearle, by highlighting the fact that Article 17 OECD Model entails a discriminatory tax

[139] Molenaar, D., Tenore, M. and Vann R., *supra* n. 130, pp. 12 *"The discussion of the case studies reveal that article 17 of the OECD Model causes many practical problems, such as: (1) when is the artiste* performing; (*2) how should the salary be attributed when the performances relate to different countries; (3) should the income be taxed on a gross basis; and (4) how can tax credit problems be avoided? (…)".*

[140] Molenaar, D., from All Arts Tax Advisers, West, C., Pearle and Schlote Productions.

treatment versus other economic sectors. Additionally, it was disregarded that most of the entertainers are of small or medium size, struggling to earn normal income. In this regard, Schlote Productions arguments were in the same line. It expressly stated that *"In reality about 70% of these artistes do not earn enough money to get taxed with their annual income at home. If those persons get taxed in addition in the performing country they will become discriminated by overtaxing because their personal situation is not considered. It seems that for tax authorities each artist is a star who earns high fees."*

Also, West[141] endorsed for the abolition of Article 17 OECD Model. The reasons underlying his position were based on the fact that said special rule addressed to entertainers and sportspersons was archaic in an age of great mobility. It also considered that Article 17 OECD Model is much more focused on the type of persons rather than the type of income. Accordingly, the examples of entertainers and sportspersons provided in the Commentary on said article, highlight the practical problems arising from this arguably mistaken approach. Again, the best solution appealed by this author consisted of applying the umbrella articles, instead.

Back to the argument that most of the entertainers and sportspersons were classified in the group of low-medium income earners, another alternative solution was endorsed by Taxand, Pearle and FEPS. It consisted of applying a *de minimis rule*, similar to the one included in the United States Model Tax Convention. Through this, Article 17 OECD Model becomes applicable; insofar certain threshold of income is reached.

Another relevant proposal was the non-application of the apportionment rules as regards preparation and training activities, as well as the salary of the employees when performing abroad, unless a specific payment, such as bonus, prize or the like was granted to this end[142].

[141] See further, West, C., *supra* n. 127.

[142] It was explicitly stated by Taxand in line with Betten, R.; Netherlands Ice Skater not Eligible for Relief for Foreign Training Days, *European Taxation* n. 6, 2005, Journals IBFD. In this regard, through the Decision No. 03/04112 of the Court of Appeal of Amsterdam of 6 October 2004, it was stated that Article 17 OECD Model does not apply when there is no specific remuneration related to a certain performance. RSM asked for more clarification as regards the computation of the apportionment, due to the fact that UK HMRC took a far-reaching computation method, whereby the determining factor was the number of performances per year, in order to proceed with the break-down, regardless of the number of days effectively performing or training in the source country.

The key tax issue about the deduction of expenses[143] when determining the taxable base at the performing country was pivotal. Apart from the burdensome administrative tasks and expenses in which they are involved and in certain cases with no solution, it leads to excessive tax burden scenarios, whereby the profits are totally offset by the gross taxation system[144].

A very illustrative example is the one included in the Schlote's proposal. "*For example: Germany was taxing artistes for more than 30 years on the gross income. The European Court of Justice adjudged that this is not allowed. Germany cashed in that time (about 30 years) nearly 1 Billion Euro (until the year 2009) by overtaxing (as tax professionals have calculated). The artistes did not get a correct treatment by the tax authorities and the German courts, because it was German law to discriminate foreign artistes with their income*".

Other tax issues were included in the proposals, such as the gender-neutral use of the term sportspersons[145], as well the replacement of artists by entertainers[146]. Also, the characterization's position about the tax treatment to be granted when employees receive third-party sick payments for work related injuries, as well as stand-by fees[147]. Finally, the persons qualifying under the concept of entertainer or sportsperson did not find a pacific solution. In fact, the examples proposed by the OECD in the 2010 OECD Discussion draft led to more confusion[148].

[143] Detailed explained by Molenaar, D., from All Arts Tax Advisers and endorsed by Schlote, Pearle, MMF and Taxand.

[144] A chapter of the book of Molenaar, D., is devoted to examples of international excessive taxation. See further, Molenaar, D., *supra* n. 32, pp. 227-242.

[145] It was suggested by Dr. West. Also, about the gender-neutral language, Thuronyi, V., *Tax Law Design and Drafting, International Monetary Fund*, 1998, page 89, in which he expressly stated "*In English, it has become common to avoid exclusive use of the masculine gender to refer to an antecedent of indefinite gender to avoid nouns denoting a particular gender where an indefinite gender is intended*."

[146] It was suggested by Pearle, Feps, da Palma Borges and West, C.

[147] It was suggested by Cirque du Soleil.

[148] It was suggested by MMF in very detail about the United Kingdom's position, as well as Dr. West in the context of the excessive role granted to the subjective scope of Article 17 OECD Model.

2.2.7.6. 2014 OECD Report[149] and Updated Commentary

The next step in this regard resides in highlighting the proposed amendments[150] which were incorporated into the 2014 OECD Update of the Commentary on Article 17 OECD Model. However, prior to tackle them, it is important to state the underlying reasons why the majority of OECD Members did not endorse the option of deleting it. In particular, three main reasons were stated:

(1) Residence taxation should not be assumed given the difficulties of obtaining the relevant information;

(2) Article 17 of the OECD Model permits the taxation of a number of high-earners who can easily move their residence to low-tax jurisdictions; and

(3) Source taxation of the income covered by Article 17 can be administered relatively easily.

In particular, the divergent position held by tax commentators[151] provided five counter-arguments giving evidence that the OECD reasons to maintain Article 17 OECD Model were not valid from a practical perspective. Accordingly, its application still may lead to many practical shortcomings, such as over taxation and high administrative expenses to tax.

In this sense, the OECD was aware of the practical problems arising from Article 17 OECD Model and Commentary. It explains the fact that it included new options to restrict the application of Article 17 OECD Model[152].

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[149] OECD (2014), Issues related to Article 17 of Model Tax Convention, Adopted by the OECD Committee on Fiscal Affairs on 26 June 2014.

[150] A comprehensive analysis of the 2014 OECD Update of the Commentary on Article 17 was carried out in a joint contribution of some members of the International Tax Entertainment Group (ITEG), Dick Molenaar, Harald Grams, Karolina Tetlak, Mario Tenore, Luis J. Durá, Christophe Moreau, Kevin Offer and Angel Juarez, ITEG comments on (selected) 2014 Updates to the Commentary on Article 17 OECD Model Tax Convention, *Global Sports Law and Taxation Reports*, 2014 (March), Vol. 6, No. 1.

[151] See further, Molenaar, D., Entertainers and sportspersons following the updated OECD Model (2014). *Bulletin for International Taxation*, January 2015, pp. 37-47. Also, Molenaar, D., and Grams, H., Influencer Income and Tax Treaties: A Response. *Bulletin for international taxation*, 2020(9), pp. 550-555.

[152] See further, Molenaar, D., New Options to Restrict Article 17 for Artistes and Sportsmen, *Intertax*, 2016, Volume 44, Issue 12. In particular the new options granted within 2014 OECD Commentary on Article 17 were the following:

1. Article 17 OECD Model may be only applicable to self-employed, as opposed to Article 15 for employees (Paragraph 2 of 2014 OECD Commentary).

For the sake of clarity, the final changes which were adopted in Article 17 OECD Model and Commentary, are classified within five main topics. It follows the break-down of issues included in the explanation about the 2010 OECD Discussion Draft[153], in order to ascertain the main changes finally incorporated by the OECD.

First amendment: What is an entertainer or sportsperson? The amendment of the subjective scope of Article 17 OECD Model, by replacing the terms artists and sportsmen into entertainers[154] and sportspersons, respectively. It lacks of a definition of both terms. Instead, it was clarified that those of amateur character or participating in a single event are also encompassed[155].

The list of examples about who are in and out, respectively, was expanded. In this regard, the position adopted by the OECD as regards the models was not accepted by Turkey, Argentina, Brazil and Malaysia, which reserved the right to consider them as entertainers, by taking into consideration the performance and the nature of the activity carried out.

Also, as it was mentioned in the 2010 OECD Discussion Draft, the reporter or commentator of entertainment or sports events, are out of the scope of Article 17 OECD Model. However, the criterion underlying said position is far from clear. On the one hand, the OECD Committee considers[156] that analyzing the existence of the

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2. Deduction of expenses or normal tax settlements (Paragraph 10 of 2008 OECD Commentary).
3. De-Minimis-Rule of 15.000 IMF SDR (Paragraphs 10.1-10.4 of 2014 OECD Commentary).
4. Support from public funds (Paragraph 14 of 2014 OECD Commentary).
5. Foreign teams and groups (Paragraph 14.1 of 2014 OECD Commentary).
6. Potential application of limited approach of Article 17(2) based on reservation in paragraph 16 adopted by Canada/US and Switzerland.

[153] It is worth to note that the issue of the owner of the horse and/or car racing was replaced by the adoption of the "de minimis" threshold as regards Article 17 OECD Model.

[154] The term entertainer is broader than artiste, in order to include more activities within the scope of Article 17 OECD Model, although the OECD Committee referred to this change as "merely illustrative".
The use of the term of entertainers, instead of artistes and athletes, was already implemented in the double tax treaty signed between United States and Australia, signed in 1982. In fact, the scope of the replacement went further, by replacing not only artists, but also athletes within the entertainers' term. It reads as follows: "*Notwithstanding the provisions of Articles 14 (Independent Personal Services) and 15 (Dependent Personal Services), income derived by entertainers (such as theatrical, motion picture, radio or television artists, musicians and athletes) from their personal activities as such may be taxed in the Contracting State in which these activities are exercised* (…)". However, the change is inconsistent with the subsequent Technical Explanation of said double tax treaty, which distinguishes between entertainers and athletes "*This Article provides certain exceptions to the rules otherwise governing income from personal services in the case of income derived by entertainers and athletes".*

[155] Paragraph 9.1 of the Commentary on Article 17 OECD Model.

[156] See OECD, *supra* n. 149, paragraph 19.

entertainment character is a test difficult to be ascertained. On the other hand, it left an open door to still apply Article 17 of the OECD Model to retired sportsperson participating in a weekly television show during which sports events are discussed. From the author's position, the OECD parameters used to draw a line between two scenarios remains unclear. Instead, a position endorsing the entertainment or sport character of activities must prevail over the characteristics of the person carrying out, injured, retired or still active.

Finally, it was regarded that the entertainment and sport activities are covered by said Article. However, the fact that rehearsal, training activities are also included, regardless of whether they are related to a specific public performance, leads to the conclusion that public activity is no longer explicitly required. On the contrary, it is understood that said entertainment or sports activities must be available to the public by any means, since private activities are not included. In addition, the referrals to public performances or appearance are no longer available in the Commentary on Article 17 OECD Model.

Second amendment: In order to avoid the excessive taxation on low, middle-income earners, a *de minimis* rule[157], similar to the one contained in the US Model tax treaty, but avoiding the referral to a specific currency, which enables to update the value of the included figure. To this end, the referral to the IMF Special Drawing Rights is carried out. It is worth to note that the refrain to tax when the threshold is not reached includes only Article 17 OECD Model, keeping in force the umbrella Article 7 or 15 of the OECD Model. Furthermore, the use in practice of this option to include a de minimis rule with tax treaties it has been hardly implemented to the date of this research work[158].

Third amendment: In relation to the personal activities as such, it was implemented[159] by the OECD Committee, the position whereby the training and rehearsal activities are also included in those of entertainment and sports character. It is important to take into account that the OECD Committee endorses[160] the UK tax authorities' approach, whereby it is not only important the number of days physically present in the country of performance. Instead, if there are major events only in a source country, it must be

[157] Paragraph 10.1 of the Commentary on Article 17 OECD Model.

[158] Molenaar, D., Minimum Threshold for Entertainers and Sportspersons in Article 17 of the OECD Model, *Bulletin for International Taxation*, IBFD, April 2016, pp. 224-229.

[159] Paragraph 9.1 of the Commentary on Article 17 OECD Model.

[160] See OECD, *supra* n. 149, paragraph 19.

attributed to said country, based on the events closely connected which generate the income, regardless the number of days physically present there[161].

Moreover, the replacement of the terms *"derived directly or indirectly from a performance"* by *"closely connected"* may solve confusing references, in order to appropriately apply Article 17 OECD Model to personal activities as such. However, the arguably mistaken approach, such as the one adopted by Spanish Supreme Court, in December 7, 2012[162], about the taxation of certain production income obtained in relation to U2 concerts in Spain (hereinafter the U2 Case) may still consider that said incorrect position still has room under paragraph 9 of the OECD Commentary on Article 17. "*Such a close connection will generally be found to exist where it cannot be reasonably considered that the income would have been derived in the absence of the performance of these activities*." (Emphasis added by the author).

Moreover, paragraph 11.4 of the above-mentioned Commentary contains a clear-cut statement, whereby the application of paragraph 2 of Article 17 OECD Model does not cover the production of entertainment or sports events, by illustrating an example of an independent promoter of a concert. It is a positive step forward, but superfluous, since paragraph 3 of the Commentary on Article 17 OECD Model already excluded them from the scope of its application. In addition, it leads to an open question, why the OECD Committee considers changing its interpretation in relation to the scope of Article 17.2 towards the limited approach, but only in relation to certain qualifying subjects and not adopting the position held by Canada, United States and Switzerland in the Reservation on Article 17 of the OECD Model.

Finally, the OECD Committee suggested that it is possible to include in the double tax treaties an alternative provision[163], in order to avoid the administrative difficulties when sharing the taxation of members of sports team, troupes and orchestras. If so, the

[161] The solution may be accepted in a clear-cut scenario where the income is obtained in only one country. However, it leads to the subsequent open question about the allocation rule, where various countries are involved and there is only certain number of training and performance days in each source country which will be dealt with in the fourth amendment, tackling the allocation rules when performing in various countries.

[162] Spanish Supreme Court, issued in December 7, 2012, Rec. 1139/2010.

[163] Paragraph 14.1 Commentary on Article 17. It may read as follows "*The provisions of Article 17 shall not apply to income derived by a resident of a Contracting State in respect of personal activities of an individual exercised in the other Contracting State as a sportsman member of team of the first-mentioned State that takes part in a match organised in the other State by a league to which that team belongs*." For instance, double tax treaties concluded by Canada-United States (Article XVI.3) and New Zealand-Australia (Article 17.3), respectively.

treaty provision may grant a sourced exemption, limited to the members of them, insofar the State of residency does not provide the exemption method, as a double taxation relief, in order to avoid double non-taxation scenarios. Through this OECD position, when the alternative provision is not implemented, even if no specific payment related to the event exists, Article 17 OECD Model applies.

Fourth amendment: Source and allocation rules for activities performed in various countries.

In this regard, the answers to the source and allocation issues are included in paragraph 9.2 the Commentary on Article 17 of the OECD Model and the examples illustrating is paragraph 9.3 of the same Commentary.

In fact, the solution is twofold; entertainers and sportspersons must allocate the income based on the event generation's rule, when they are closely connected to the event; versus the employees which are subject to tax in accordance with the number of working days physically present in the source country.

Again, the referral to the particular facts and circumstances of the case are of relevance. In order to ease the interpretation, two illustrative examples are included. The analysis about when an income is closely connected to a performance event, a referral to a self-employed singer is made. The point is, again, an open question is posed. It is unclear whether all self-employed persons must allocate the income in the source country by the close connection to the event, as opposed to the employees. According to author's position, it is the case, since the rule of the working days is explicitly referred to employees and the second example dealing with this rule includes a cyclist employed by a team. However, in the case of the employees receiving bonus or specifics payment are also covered by the rule of close connection, as opposed to the working days, and, if so, to be allocated where the relevant event takes place.

Moreover, it is important to note that a replacement of the direct and indirect links is carried out by a unique and uniform test, the close connection with the performance when dealing with the source and allocation rules. Additionally, the fact that the contractual relationship between the payor and the entertainer or sportsperson is out of the source country does not affect to source and allocation rules[164], as per the doctrine

[164] See OECD, *supra* n. 149, paragraph 61.
Paragraph 53 of the Issues related to Article 17 of the Model Tax Convention issued by the OECD Committee expressly clarifies that paragraph 9 of the Commentary on Article 17 OECD Model already describes the type of connection to apply said OECD Article. By adopting said position, the MMF

settled by the UK Courts in the Agassi's Case[165] and the cases of Goosen[166] and Garcia[167] in the US, subsequently endorsed by the OECD Committee. The determining factor in order to grant the taxing rights to the source country is the close connection to the performance event, regardless of the residency of the entertainer/sportsperson and the sponsor when dealing with sponsorship fees and/or merchandising income.

Fifth amendment: Specific categories of payment:

Broadcasting income

It is tackled in paragraph 9.4 of the Commentary on Article 17 OECD Model. Thus, above comments as regards the source and allocation rules are applicable to this item of income. In addition, certain specific tax rules are tailored to it. The taxing rights are attributed to the country where the performance takes place, as opposed to the State of the broadcasting.

It refers to "*payments for the simultaneous broadcasting of a performance by an entertainer or sportsperson made directly to the performer or for his or her benefit (…) fall within the scope of Article 17*." Thus, radio, TV, online-internet and other media live broadcasting of the performance are included in Article 17 of the OECD Model. On the contrary, when the payment if made for the subsequent sales related to the broadcasting performances is caught under Article 12 of the OECD Model. Also, out of the scope of Article 17 OECD Model are the payments for the broadcasting rights when received by the organizer of a football tournament and/or the participating teams, insofar the entertainers or the sportspersons do not benefit from those payments.

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proposal consisting of granting more weight to the global agreement between the entertainer and the sportsperson alongside the commercial trademark company is not endorsed, with all tax consequences.

[165] *Agassi v. Robinson* (HMIT), High Court of Justice, March 17, 2004; *Agassi v. Robinson*, November 19, 2004 Court of Appeal; HL, May 17, 2006, *Agassi v. Robinson* (HM Inspector of Taxes), 2006, UKHL 23. See further, Norfolk, C., Agassi v. Robinson: territorial limitation on withholding obligation – some confusion in the House of Lords, *British Tax Review*, n. 6, 2006, pp. 684.

[166] *Goosen v. Commissioner*, 136 TC Nº 27. See further, Kimberly, S. B., What's good for the Goosen, *Tax Management International Journal*, 40, September 2011.

[167] *Garcia v. Commissioner*, 140 TC, Nº 6. See further, Kimberly, S. B. ... Is good for Garcia?, *Tax Management International Journal*, 42(7), 2013, pp. 419-421. Also, Arnold, B.J, The Tax Woes of a Global Golf Icon, *Bulletin for International Taxation*, Tax Treaty Case Law News, 2013, Vol. 67, n. 7.

As regards the example of the broadcasting income received by the participating team, the characterization under Article 12 OECD Model in accordance with paragraph 9.4 of the Commentary on Article 17 takes precedence over the last sentence of paragraph 11.b of the same Commentary. The latter characterizes the payment under Article 17 OECD Model as a general rule. However, when dealing with broadcasting rights, the specific rule addressing the classification under Article 12 OECD Model takes precedence over it. Thus, the unlimited approach of taxing under Article 17.2 OECD Model all income received by third parties is again limited, in this particular case when dealing with broadcasting income[168].

Image Rights Income

This category of income is tackled in paragraph 9.5 of the Commentary on Article 17 OECD Model.

This is a very debatable issue, since there exist various and opposed approaches when dealing with this type of income[169]. Additionally, the OECD Fiscal Committee also recognizes that a substantial part of the income obtained by entertainers and sportspersons is received in the form of image rights.

A general rule is established whereby said income is not caught under Article 17 OECD Model, when it is not closely connected to a performance event in the source country. However, paragraph 9.5 of the Commentary on Article 17 OECD Model does not include any illustrative examples helping to the interpretation of it[170]. Conversely, the explanations included in paragraph 9 may be of great help. In particular, *"(…) This connection may be related to the timing of the income-generating event (e.g. a payment received by a professional golfer for an interview given during a tournament in*

[168] See further, paragraph 3.4.2.5.

[169] For instance, Switzerland included in paragraph 15.2 of the Commentary on Article 17 OECD Model, among others, that income arising from the use or the rights to use image rights (paragraph 9.5 of the Commentary) are not covered by Article 17. Furthermore, France included in paragraph 18 of the Commentary on Article 17 reading as follows: "*According to France´s doctrine and treaty practice, income that a sportsperson or entertainer derives from the use of that person's image is inseparable from that person´s professional activities and must therefore be taxed in the State in which such income arises. France therefore reserves the rights to include in its bilateral conventions an additional paragraph allowing the source taxation of income from activities that cannot be disassociated from professional notoriety."*

[170] See OECD, *supra* n. 149, paragraph 61. It expressly mentioned that the OECD Committee did not answer the question about the issue as to whether the athlete's image has a value or not, in the context of the UK tax authorities' position, which do not agree about granting value to the image's right.

which she participates) or to the nature for the consideration of the payment of the income (e.g. a payment made to a tar tennis player for the use of his picture on posters advertising a tournament in which he will participate)".

These two characteristics about the timing and the nature of the payments closely connected to the performance, together with the examples of paragraph 9 of the Commentary on Article 17 OECD Model, can be used in order to correctly characterize income obtained by entertainers and sportspersons and his/her image rights. However, there still exist plenty of unanswered questions to be solved in this regard[171].

In order to conclude about the update included in 2014 OECD Model and Commentary on Article 17, it is a crux matter to tackle any potential shortcoming arising from its application. Above all, once the deletion of Article 17 OECD Model was not endorsed by OECD Members.

In particular, said shortcomings jeopardize the main goals whereby tax treaties are adopted, which are avoiding double taxation and double non-taxation. In this regard, 2014 OECD Model was a step further, but not enough for the purposes of achieving the mentioned goals.

In this regard, the purpose of this Chapter 2 is to provide an overall view of Article 17 OECD Model throughout the time, in order to provide solutions/amendments to better implement Article 17 OECD Model. All this aimed at avoiding double tax, over taxation or double non-taxation scenarios.

2.2.7.7. 2015 Milan Seminar / 2016 IFA Madrid

A high-level seminar about the "Taxation of Entertainers and Sportspersons Performing Abroad" was held in Milan in November 30, 2015[172].

The interesting point was that the practical experiences about this topic was explained by different country perspectives, including US/Canada, European Union, the OECD, as well as certain representative States[173].

[171] See further, paragraph 3.4.2.6.

[172] As a result of this international tax event, it was subsequent released the book edited by Maisto, G., *Taxation of Entertainers and Sportspersons Performing Abroad*. EC and International Tax Law Series. Volume 13. IBFD. 2016.

In this regard, the main conclusions[174] reached within the mentioned seminar were that at domestic level there is not a uniform approach when dealing with the taxation of entertainers and sportspersons. In particular, when determining the computation and taxable base rules. At tax treaty level, despite the efforts from the OECD in improving Article 17 OECD Model, it leads to high administrative expenses, based on the difficulties arising from its practical application. More important, as a matter of fact, entertainers and sportspersons are subject to over taxation or even to double taxation. Thus, the tax inefficiency of Article 17 OECD was far from any doubt. As a result, the proposed solution was to completely change Article 17 OECD Model.

In September 2016 was held in Madrid the 70th Congress of the International Fiscal Association. In particular the Seminar J was about the taxation of sportspersons, sport organizations and sports events, chaired by Han Kogels (The Netherlands) alongside the panellists Xavier Oberson (Switzerland), Anna Gunn (The Netherlands), Daniel Sandler (Canada) and Jacques Sasseville (OECD)[175].

Oberson dealt with the taxation of the residency country of the main sports organizations. In particular, three of the main sports entities organizing mega sport events are resident in Switzerland. Among others, UEFA, FIFA and the International Olympic Committee (IOC). In fact, there are 46 international sports organizations which are tax resident in Switzerland. From the legal perspective, the choice for the association of these organizations is based on the fact that they have legal personality for Swiss legal viewpoint, as opposed as international law. Additionally, the associations may benefit from the exemption from direct taxes, based on the public service goal exception granted at domestic level[176].

From the double tax treaty perspective, the Swiss application of the resident definition to the associations is of relevance, although not being shared by all countries when interpreting tax treaties. From the Swiss definition, since the associations are liable to tax and considered to be an unlimited taxpayer under Swiss law, the fact that is

[173] Argentina, Australia, Austria, Belgium, Canada, France, Germany, Italy, The Netherlands, Poland, Portugal, Spain, Switzerland, United Kingdom and United States.

[174] See futher, Fantozzi, A., *Taxation of Entertainers and Sportspersons Performing Abroad,* Chapter 27: Conclusions. Edited by Prof. Guglielmo Maisto. EC and International Tax Law Series. Volume 13. IBFD. 2016, pp. 765-772.

[175] See further, Silvani, C., *New Trends in the Taxation of International Sportsmen*, IFA Research Paper in relation to IFA Madrid 2016, released in January 31, 2014. Also, Antón, A., *Taxation of International Sport Organizations*, IFA Research Paper. IFA Madrid 2016.

[176] Swiss Circular of July 8, 1994, which establishes that granting the exemption, is subject to both general and specific conditions for either public service or public utility exemption. In this regard, the general conditions are: legal person, exclusivity, irrevocability and effective pursuit of the legal goal.

effectively not subject to tax relies upon the application of a tax exemption based on achieving the goal of public interest.

Moreover, the IOC has National Organizational Committees, which are separate and different entities not qualifying for branch or subsidiary definitions. Therefore, the IOC is only subject to tax in the host country when having a permanent establishment as regards the income obtained from the exploitation of the sports events. The point is that the IOC benefits from significant tax advantages from the host State based on the factual powers within the bidding process.

Gunn, in her intervention tackled the issue of State aid in the context of the sports and the European Union. She explained the broad definition of State aid whereby anything ending up being a selective benefit may qualify as such[177]. She provided certain examples: UEFA 2016 tax exemptions granted by France, renovations of the French stadiums for the EURO 2016[178], investigations related to certain measures of football clubs in The Netherlands and Spain[179]. In this respect, Oberson posed an open question about the existence of State aid in those cases where the beneficiary's entity does not have stakeholders or whether it is enough when selectivity benefits are granted under the context of an economic activity. Gunn endorsed the position that in order to qualify for State aid, only a broad notion of economic activity is requested with no need of profit's motive.

[177] From a technical viewpoint, State aid is considered to exist when an advantage from State resources is obtained, which is of selective character, granted to an "undertaking" and entails a distortive impact on the internal market. If so, they are considered to be against the fair competition within the EU market, as per Article 108 of the Treaty on the Functioning of the European Union (TFUE).

[178] These beneficial measures were considered as subsidies and not State aid by the European Commission.

[179] EU Commission (2016), *Decision of the European Commission of July 4, 2016,* Decision C (2016) 4046, on the State aid implemented by Spain for certain Football clubs, whereby the tax regime in force through Act 10/1990 granting a special tax regime with tax rate of 25% instead of converting in public limited sports companies "Sociedades Anonimas Deportivas" whereby they were taxed at 30%, as any other regular Spanish regular company. Those entities, benefiting from the reduced rate, since they qualified as non-profit entities under Spanish tax law were Real Madrid, Barcelona, Athletic Bilbao and Osasuna. However, the European Court of Justice, in its sentence of February 26, 2019 (T-679/16) accepted the arguments posed by the four football clubs and rejected the 2016 European Commission Decision. It was based on the grounds that the remaining football clubs which were not benefiting from the reduced tax rate, in its turn, they took advantage of a specific and more favorable tax measure, whereby a tax credit was obtained by the reinvestment of extraordinary benefits.

Sasseville focused on historical approach of Article 17 OECD Model related to the exceptional rule introduced in order to tax at source the personal activities as such. He started from 1939 double tax convention between United States and Sweden which included the exception for artists and sportsmen to the general rules stated for employees and self-employed persons in the country of performance. This double tax convention novelty, which was introduced, based on the notoriety and related income obtained by Ingrid Bergman, a Swedish actress succeeding in Hollywood's industry.

He explained certain relevant amendments introduced into Article 17 OECD Model and its Commentary. Also, he explained the importance of the "de minimis" rule of the US Model Convention amounting to USD 30,000[180] which was incorporated into the Commentary of Article 17 OECD Model in 2014.
Also, he highlighted the importance to leave out of the scope of Article 17 OECD Model the income obtained by the employees when performing all over the world, by providing the examples of the Conventions of United States and Canada, as well as the Convention between New Zealand and Australia, respectively.

Sandler explained the broader scope of the term sportsperson versus athlete, which leads to include certain sport activities such as the golf player, since the athlete involves and requires an active role. Also, the issue of what is included in the scope of "personal activities as such" when dealing with endorsement income, salary versus bonus and performance versus participation income. He also analyzed the taxation when using rent-a-star companies.

The relevant tax issue of the wording "may be taxed" included in Article 17 OECD was dealt with. In particular, he stated the position of applying Article 15 of the OECD Model when dealing with employees, in the context of those cases where the above-mentioned Article 17 does not qualify[181]. Therefore, Article 17 OECD Model is considered to be an additional taxing right in connection with the "umbrella" Articles 7 and 15 of the OECD Model.

Sandler also explained an interesting distinction between the mega sports events carried out under the organization of UEFA, FIFA and IOC benefiting from the exemption at source versus the remaining list sports events[182], in which there were no

[180] In accordance with the 2016 US Model.
[181] He rejected the interpretation carried out in the *Amutat Maccabi Rishon Le'tzion v. the Assessment Office from Tel Aviv District Court*, December 16, 2012, Income Tax Appeals 1051/04 and 1061/05.
[182] On the one hand, the XX and XXI Commonwealth Games held in Glasgow and Queensland, 2014 and 2018, respectively. Juegos Deportivos Panamericanos held in Toronto and Lima, 2015 and 2019,

tax exemptions granted by the host country. It leads to an open question posed to the audience whereby he tried to find out the rationale between the mega sports events, as opposed to other minor entertainment and sports events. Also, he related with a major question about the rationale of Article 17 of the OECD Model and the option to abolish it due to lack of rationale to support it.

Finally, Oberson stated a couple of interesting tax issues related the rationale of Article 17 OECD Model. In particular, the income splitting used in practice in Switzerland and the purpose of the tailor-made rule of Article 17 OECD Model in the era of transparency when FATCA and Common Reporting Standard agreements are already implemented by most of the major countries[183].

2.2.7.8. 2017 Lausanne Seminar

Another international tax event was held in Lausanne[184], with the participation of Professor Robert Danon (Switzerland), Manuel Tenore (OECD), Dick Molenaar (The Netherlands), Mario Tenore (Italy), Emmanuel Llinares (France) and Vikram Chand (Switzerland). They analyzed the current tax issues and the taxation of image rights.

It started with a jointly presentation carried out by Molenaar and de los Santos in which they tackled practical problems arising from the application of Article 17 OECD Model. It is important to highlight that it was recognized that the maintenance of said Article is based on the ground of political reasons, since the mobility reason affect to other professionals not included within this qualifying group and the exchange of information at worldwide level already effectively combat tax avoidance schemes[185].

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respectively. The Rugby World Cup in England and Japan, in 2015 and 2019, respectively. On the other hand, other sport events follow the path of mega sport events and provided exemption at source. For example, the Cricket World Cup in Australia & New Zealand and in England & Wales, in 2015 and 2019, respectively. Moreover, the sailing events America´s Cup held in Valencia (Spain) in 2008 and the Volvo Ocean Race held in Alicante (Spain). As regards the latter, the exemptions were rejected in 2018 based on the grounds of not being of considered an event of exceptional public interest.

[183] See further, West, C., *The Taxation of International (non-resident) Sportspersons in South Africa*, Thesis Presented in the Department of Accounting University of Cape Town, August 2009. In particular, Chapter 6 about the Exchange of Information on Sportspersons.

[184] See further, Molenaar, D., *International taxation of sportsmen and entertainers: Seminar Université de Lausanne*, Global Sports Law and Taxation, Vol. 8, 2017, n. 4, pp. 18-21.

[185] Prof. Danon also stated a position about the replacement of Article 17 paragraph 2 of the OECD Model, once the adoption of the Multilateral Treaty by most of the States and in particular the implementation of the Principal Purpose Test. It would avoid the existence of too many anti-avoidance rules having the same purpose or scope.

The unsolved double taxation problems were evidenced with practical examples showing the difficulties in achieving a tax credit in the country of residency. It was summarized in three main problems: (i) the deduction of expenses in the performance States is different in every country and sometimes impossible to obtain (ii) difficulties in obtaining the tax credits at tax residency States (iii) administrative work and related high expenses. All these problems may lead to scenarios in which low-medium sports/artistic professionals incurred in more taxes than income. Again, the adoption of the Dutch tax authorities' position[186] was endorsed based on the trend of exempting from tax at source the major sport events.

Furthermore, the options to restrict the application of Article 17 OECD Model after the 2014 were discussed. Two technicalities were important to highlight as regards "de minimis" rule. It is an alternative for the paragraph 1 of Article 17 OECD Model, aimed at obtaining undesired results via the fragmentation of contracts using intermediate companies under the second paragraph of it. The member States willing to incorporate said rule addressed to low-income earners must also include a direct application of the rules, instead of a refund procedure, in order to avoid burdensome and expensive procedures at source country.

Tenore analyzed the changes introduced in the field of image rights after the amendments to the Commentary on Article 17 in 2014[187]. Chand dealt with an interesting case study involving a triangular scenario: (i) the country of residency of the sportsperson, (ii) the State of performance and (iii) the country where the company exploiting the image rights is located. Additionally, both authors dealt with some examples, in order to determine whether or not they would fit within the items of income of paragraph 9.5 of the Commentary on Article 17 OECD Model. Finally, Llinares tackled the specific tax issue of valuating the image rights, in the context of the main valuation methods of practice (income/market/asset methods).

[186] The Netherlands do not apply withholding taxes at source to non-resident entertainers and sportspersons, insofar a tax treaty is applicable.
[187] It is analyzed into detail in paragraph 3.4.2.6.

2.2.7.9. Update and Concluding remarks

It is important to highlight the main analysis and developments from 2017 onwards carried out by other tax commentators[188]. Starting from the accurate and thoughtful analysis as regards Article 17 OECD Model performed by Schaffer[189]. Through it, this author tried to shed light into the allocation conflicts arising from the interaction of domestic attribution of income and the proper application of Article 17.1 and 17.2 OECD Model.

Moreover, in 2017 a detailed study of Article 17 OECD Model was also undertaken by Tetlak and Roeleveld[190]. All major aspects of Article 17 OECD Model are tackled via a descriptive approach. Molenaar and van Overbeek[191] discussed in 2020 about the types of income involved in esports and the tax consequences arising from them.

Also, in 2020 the analysis or Article 17 OECD Model is carried out in conjunction with new models of business, professionals or activities who/which may be subject to the scope of said OECD Article. In this sense, the tax article of Kostikidis[192] about the taxation of influencers, duly responded by another tax article of Molenaar and Grams[193] were of relevance. In particular, the latter which included an analysis of the benefit principle based on practical information about the tax revenue derived from Belgium tax authorities, as regards income from entertainers and sportspersons. Again, the need of Article 17 OECD Model was put into question by providing practical arguments in favor of its removal.

Moreover, it is important to highlight the tax article released by Tetlak[194] whereby the force of attraction of this OECD Article is scrutinized as regards two main issues. The attribution of income and the interaction of both paragraphs of Article 17 OECD Model.

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[188] Among them, the dichotomy about whether endorsing the removal of it versus its amendment has been maintained over the years.

[189] Schaffer, E., *Domestic Attribution of Income and Taxation of International Entertainers and Sportspersons.* Volume 5. WU Institute for Austrian and International Tax Law, European and International Tax Law and Policy Series. IBFD. 2017.

[190] Tetlak, K., and Roeleveld, J., *Global Tax Treaty Commentaries - Article 17: Entertainers and Sportspersons*, in R. Vann (Ed.), 2017. IBFD.

[191] Molenaar, D., and van Overbeek, S., The emergence of Esports, *Bulletin for International Taxation* (Volume 73), 2019(2), IBFD Journals, pp. 106-111.

[192] Kostikidis, S., Influencer Income and Tax Treaties. *Bulletin for International Taxation*, 74(6), 2020, pp. 359-376.

[193] Molenaar, D., and Grams, H., *supra* n. 151, pp. 550-555.

[194] Tetlak, K., Taxation of entertainers and sportspersons and the force of attraction. Chapter included in *Research Handbook on International Taxation*. Edward Elgar Publishing, 2020, pp. 120-145.

In 2021, Klootwijk and Molenaar[195] carried out an interesting and novelty analysis about the differences and similarities when taxing the digital economy versus Article 17 OECD Model. Also in 2021, Toribio[196] released an interesting new unified approach in order to tackle the taxation at source countries within the European Union.

In this context, the author adopts the approach of trying to undertake a comprehensive and overall analysis of the main issues arising from Article 17 OECD Model. It starts from this Chapter whereby all amendments of said Article are analyzed and, above all, the underlying reasons to carry out them are explained into detail. However, the main novelties duly tackled in the next chapter consist of focusing in the objective approach of said Article, for the purposes of finding out potential solutions in line with the existing shortcomings of Article 17 OECD Model. In particular, those arising from the application of an unlimited force of attraction of said OECD Article.

It is also worthy to note that all potential amendments are commensurate with the international tax tendency arising from BEPS project as it is detailed dealt with paragraph 3.6.

For illustrative purposes, it is included an explanatory table including the issues in relation to Article 17 OECD Model, introduced throughout the years in the OECD Commentary/Reports and Model Convention.

[195] Klootwijk, M., and Molenaar, D., Sportspersons, entertainers and taxing the digital economy. *Sports, Law and Taxation (formerly GSTLR)*, 2021/1, pp. 41-44.

[196] Toribio Bernárdez, L., *La dimensión internacional del deporte desde la perspectiva del derecho tributario. Reexaminando el concepto de residencia fiscal y el principio de imposición en la fuente.* Comares. Publicaciones de la Facultad de Derecho de la Universidad de Sevilla, V Centenario. 2021.

Year	Tax Treaty/OECD Commentary	Context	Relevance
1939	US-Sweden DTT	Exemption to labour and professional income not applicable to artists and athletes	First point in time to grant specific tax treatment in double tax treaties
1945-46	US-UK	Above-mentioned exemptions not applicable to public entertainers. Subsequently deleted via 1946 Protocol	It gives evidence of difficulties in implementing exceptional tax measure
1951	US-Canada	Exemption to labour and professional income not applicable to artists and athletes US deleted exceptional tax treatment to artists and professional athletes in 1951	Again, it gives evidence of difficulties in implementing exceptional tax measure
1959	OEEC	Article XI OEEC Model	First time a separated treaty article providing specific tax treatment to artists and sportsmen
1963	OECD Model	Article 17 OECD Model	Confirms taxing rights to source State

1977	OECD Model	Paragraph 2 of Article 17 OECD Model	Taxation of income receiving by “loan-out” companies
1987	OECD Report	Detailed analysis about Article 17 OECD Model and underlying reasons of its implementation	Comprehensive analysis of this tailored-made rule. Forerunner of 1992 OECD Comm.
1992	OECD Model	Definitions of artists and sportsman. Personal activities. Relation to other items of income. Gross Income. Broad scope of 17.2	Major changes of Article 17
2000	OECD Model	Triangular scenarios and domestic General Anti-Avoidance Rules (GAAR)	Clarifications of specific issues
2010	Discussion Draft	Concept of artiste and sportsman. Personal activities. Distributive and allocation rules. Special categories of payments.	Public discussion to solve and update Article 17 shortcomings
2014	OECD Comm.	Entertainers and sportspersons terms. Optional *de minimis* rule. Rehearsal activities. Source and allocation rules in various countries. Broadcasting and image rights income.	Still exist the risk of over or double taxation based on current draft of OECD Commentary on Article 17 and tax treaty article itself

2.3. Special reference to the Commentaries on Article 17 OECD Model

2.3.1. Introduction

In order to understand the correct way for the application of Article 17 OECD Model, it is necessary to elucidate the legal status of the OECD Commentary. Even though it can be considered a theoretical debate, it is indispensable to tackle this issue with the aim at enabling to know how Article 17 OECD Model works and to what extent is correctly applied.

In fact, most of the involved changes are referred to the period elapsed between the 1977 OECD Model and the subsequent amendments introduced in 1992 and 2000 in the same treaty model. Nonetheless, it is an issue which is far to be pacific, either at domestic or tax treaty level at the time of the writing of this research work. Thus, it is of great help to analyze and reach conclusions that may be applied within the context of the force of attraction of Article 17 OECD Model.

In accordance with the statements included within paragraph 8[197] of the Commentary on Article 17 OECD Model since 1992, paragraphs 1 and 2 of Article 17 OECD Model enter into force, conditional upon the application domestic anti-avoidance rules of the source country. The scrutinized issue is whether it is possible to introduce these distributive rules through the OECD Commentary and, if so, they can be inferred from the text of Article 17 OECD Model. In this respect, the entire application of the Article 17 OECD Model, paragraph 1 or paragraph 2, depends on the existence of domestic anti-abuse clauses in the country of source. This is not only about the election of different paragraphs to be applied, rather which tax treaties are applicable (country of

[197] Paragraph 8 of the Commentary on Article 17 OECD Model, 1992 version. It reads as follows: *"Paragraph 1 applies to income derived directly or indirectly by an individual artiste or sportsman. In some cases the income will not be paid directly to the individual or his impresario or agent. For instance, a member of an orchestra may be paid a salary rather than receive payment for each separate performance: a Contracting State where a performance takes place is entitled, under paragrap1, to tax a proportion of the musician's salary which corresponds to such a performance. Similarly, where an artiste or sportsman is employed by e.g. a one person company, the State where the performance takes place may tax an appropriate proportion of any remuneration paid to the individual. In addition, where its domestic laws "look through" such entities and treat the income as accruing directly to the individual paragraph 1 enables that State to tax the income derived from appearances in its territory and accruing in the entity for the individual´s benefit, even if the income is not actually paid as remuneration to the individual". (Emphasis added by the author).*

source-country of residence of artist versus country of source-country of residence of a "rent-a-star" company.

Accordingly, double tax treaties are subservient to these domestic anti-abuse clauses completely. Under this approach, when tax treaties are signed after the implementation of 1992 amendments to the OECD Commentary on Article 17 and the source includes a look-through (anti-abuse) provision, the applicable treaty is the one between the source country and the State of residence of the artist or sportsman.

Conversely, when the source country does not include among its domestic tax law a look through provision, Article 17.2 OECD of the tax treaty signed between State of source and the residence of the loan-out company (the place of incorporation or effective management) receiving the payment[198] is applicable.

Furthermore, paragraph 11 of the Commentary on Article 17 OECD Model explains all-catching situations, to which its second paragraph may apply[199], in cases when the source State does not have the statutory right to look through. Accordingly, the implementation of the unlimited approach as regards the use of legal entities as team, troupe, orchestra, included in scenarios b) and c) stated in paragraph 11 of the Commentary in the context of entertainers and sportspersons are applicable when the

[198] This has been the common approach supported by the vast majority of authors and it is regarded totally correct. See further, Sandler, D., *supra* n. 118.

[199] This extension of the situations covered by article 17.2 was the result of the 1987 OECD Report. It was introduced in the Commentary on Article 17 OECD Model in 1992. The scenarios encompassed by Article 17.2 OECD Model are the following:

"*The first is the management company which receives income for the appearance of e.g. a group of sportsmen (which is not itself constituted as a legal entity).*

The second is the team, group, 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 o bilaterally, not to tax it. The profit element accruing from a performance to the legal entity would be liable to tax under paragraph 2.

The third situation involves certain tax avoidance devices in cases where remuneration for the performance of an artiste or sportsman is not paid to the artiste or sportsman himself but to another person, e.g. a so-called artiste company, in such a way that the income is taxed in the State where the activity is performed neither as personal service income to the artiste or sportsman nor as profits of the enterprise, in the absence of a permanent establishment.

Some countries "look through" such arrangements under their domestic law and deem the income to be derived by the artiste or sportsman (...). Other countries cannot do this. Where a performance takes place in such a country, paragraph 2 permits it to impose a tax on the profits diverted from the income of the artiste or sportsman to the enterprise".

source country does not have implemented a “look-through” provision in its domestic tax law.

Last, but not least important, the determination of the scope and force of attraction of Article 17 OECD Model was drafted through amendments incorporated in 1992 and 2000 OECD Commentary on Article 17 OECD Model. However, the particular court cases under analysis did apply double tax treaties, signed earlier, under the former interpretation of the 1977 Commentary on Article 17 OECD Model. Likewise, the Commentary on Article 17 OECD Model grants to domestic tax laws the decision about to what extent domestic anti-abuse clauses can be implemented, as a response to treaty shopping (loan-out companies) considered illegitimate by contracting States.

2.3.2. Tax scholar positions

In respect of the status of the OECD Commentary, tax scholars have been endorsing divergent points of view[200]. Mainly, there are two main approaches for the status of the OECD Commentary. The first one is called the **ambulatory approach**, which gives a great weight to the OECD Commentary. The relevance of this position is that revisions to the Commentary are considered as modifications or updates. This approach gives flexibility to interpret double tax treaties. Accordingly, they can modify the meaning of a term of the tax treaty, with the adoption of new paragraphs in the OECD Commentary.

From a practical point of view, it represents a clear advantage, since the States do not need to renegotiate the tax treaties, in order to adopt new interpretations. It is clear that this approach confers on the states the possibility of adapting the OECD Model to current circumstances.

However, OECD Commentaries have not the same status than the tax treaty itself, because the latter is submitted to approval by the national Parliaments, whilst the OECD Commentary is solely the common interpretation of each tax treaty’s article by the OECD Council. In this regard, Paragraph 29 of the Introduction to the OECD Commentary states that “*The Commentaries are not designed to be annexed in any manner to the conventions signed by the Member countries*”.

[200] This issue was object to particular discussion on the occasion of the 55th IFA Congress, held in San Francisco, 2001.

This is the yardstick followed by the tax supporters of the second and opposite approach, as regards the status of the OECD Commentary. They[201] consider said Commentary as a **qualified interpretation by the members of OECD Council**, since these opinions are consequence of an international consensus, which they should followed, even when they do not formally bind neither the taxpayers, nor the courts.

Furthermore, those opposing to the ambulatory approach do not accept that the role of the OECD Commentary consists of adapting the meaning of the wording of the tax treaty, without limitations. This is regarded as inconceivable by the tax commentators endorsing this second position. In this regard, the principle of legality impedes such an extended approach, although OECD Model Commentary is a qualifying tool to interpret tax treaties among member States. In any case, they are not allowed to include, when they involve substantial modifications, as the reversal of the meaning stated in previous interpretations or the inclusion of factual situations, which were not encompassed in previous double tax treaty.

In order to state the author's position, a further analysis is carried out in connection with both above mentioned main approaches to the legal status of OECD Commentaries.

As a starting point, the OECD Commentary itself should be analyzed. It states in paragraphs 34-36 of the Commentaries on the Introduction to the OECD Model that the correct approach in respect of its legal status, on the interpretation of tax treaties is the "ambulatory approach". As a general rule, said Commentaries are the consensus interpretation of the member States of the OECD. Thus, they lead to clarification when the provisions of tax treaties leave room for a number of ways of looking at the tax issue.

In this sense, the OECD Commentary on the Introduction to the OECD Model endorses the ambulatory approach either for previous tax treaties or current ones. It expressly states that "*Changes or additions to the Commentaries are normally applicable to the interpretation and application of conventions concluded before their adoption, because they reflect the consensus of the OECD Members countries as to the proper interpretation of existing provisions and their application to specific situations". The*

[201] Inter alia, Vogel, K., The influence of the OECD Commentaries on Treaty interpretation, *Bulletin for International Fiscal Documentation*, December 2000, pp. 612-616. Ward, D.A., Avery Jones, J.F., de Broe, L., Ellis, M.J.W.M., Killius, J., Goldberg, S.H., Le Gall, JP., Maisto, G., Miyatake, T., Torrione, H., Van Raad, K., Wiman, B. 2005. *The Interpretation of Income Tax Treaties with Particular Reference to the Commentaries on the OECD Model*. International Bureau for Fiscal Documentation, 2005. Ward, D.A., *The Role of the Commentaries on the OECD Model in the Tax Treaty Interpretation Process*. International Bureau for Fiscal Documentation, 2006.

same is concluded, when it is granted in case of interpretation of current tax treaties, since a common position is more probable to achieve"

However, the position of other relevant tax scholars dissenting from the ambulatory approach[202] differs from the OECD Commentary in its introduction. They do not accept the ambulatory approach, since it produces a fragmentation of laws, depending on the version of the OECD Model and Commentary, which underlies the treaty concluded by the parties[203].

In the following paragraphs the international tax court cases and the debate in the 2001 IFA Congress helps to better understand the scope of the effects, as well as put into context the final position endorsed by the author. All of them have direct effects in the context of the taxation of entertainers and sportspersons.

[202] For example, Lang, M., Later Commentaries of the OECD Committee on Fiscal Affairs, Not to Affect the Interpretation of Previously Concluded Tax Treaties, *International Tax Review*, 1997/25, pp. 7-9. This author endorses the position of the Austrian Supreme Administrative Court which does not accept the ambulatory approach.

[203] Furthermore, the legal value of the Commentaries with regards to Vienna Convention has been largely debated among scholars. To sum up the existing views, the OECD Commentary has been seen as ordinary meaning, in accordance with article 31.1. of the Vienna Convention, such as Prokisch, R., Fragen der Auslegung von Doppelbesteuerungsabkommen, *SWI,* 1994, pp.52. Alternatively, it has been also regarded as special meaning, as per article 31.4 of the Vienna Convention, such as Ault, H.G., The role of the OECD Commentaries in the Interpretation of the Tax treaties, *Intertax*, 1994, pp. 144 and ss. Additionally, it has been considered as a supplementary means of interpretation when the ordinary meaning of the treaty is ambiguous or it leads to an absurd or unreasonable result. The last one regards the possibility to include the OECD Commentaries as an instrument agreed by the parties parallel to the conclusion of the treaty. Thus, being included in the context of the treaty, as per article 31.2.b) of the Vienna Convention.

However, Ellis, M.J.W.M., The Influence of the OECD Commentaries on Treaty Interpretation-Response to Prof. Dr. Klaus Vogel*. Bulletin for International Fiscal Documentation,* 54 December 2000, 617-618. This author stated that the legal status of the OECD commentaries can be classified under article 31.3 of the Vienna Convention, in other words, meaning any subsequent agreement or practice in respect of the interpretation or application of the tax treaties. From a different point of view, Avery Jones, J., The effect of Changes in the OECD Commentaries after a Treaty is Concluded, *IBFD*, March 2002, pp. 102-109. Although being adherent to the ambulatory approach, he considered that the subsequent practice or agreement is only possible between parties, which may not be members of the OECD. In order to reach a conclusion in relation to the legal status of the OECD Commentary within the Vienna Convention, a pragmatic point of view consists of considering the legal basis of the OECD Commentary in relation to the Vienna Convention as a broad concept, including all potential characterizations included in the latter, depending on the specific circumstances of the case at hand.

2.3.3. Related international tax court cases and doctrine

2.3.3.1 2001 IFA Congress San Francisco

The option endorsed by the OECD and subsequently by the tax authorities as regards the legal status of the OECD Commentary directly affects to the taxation of entertainers and sportspersons, in the international arena. A good example was the tax debate at the International Fiscal Association in the Congress of San Francisco in 2001, regarding the effects of the OECD Commentaries on treaty interpretation. In concrete, the debated case was referred to a company, which owned a professional sport team, and the cross-border payments received as remuneration for two exhibition matches.

The panel assumed that the applicable tax treaty was signed in 1985, and the amendments to the Commentary on Article 17 OECD were introduced subsequently.

It is important to note that substantial similarities with the facts and the rule of law discussed in the above-mentioned Canadian case of Sting[204]. As regards the Sting case, the Canadian court did not scrutinize the question about the validity of the approach, in respect of the legal status of the OECD Commentary. It directly considered this particular scenario, as one included in the three alternatives expressed in paragraph 11 of the Commentary on Article 17 OECD Model. There was no reference to the date in which the tax treaty between Canada and US was signed. The Canadian court focused on different issues, which are not connected status of the OECD Commentary. By implicitly, it can be considered that it was out of the situation involving avoidance devices. So, later changes in the OECD Commentary could have affected the solution of the case (ambulatory approach).

Another far-reaching interpretation was adopted by one of the panellists, Mr. Sasseville (OECD), when analyzing the IFA case expressly referred to the Sting case. He stated that the Canadian court accepted the reversal of via the position in 1992 Commentary on Article 17 OECD Model related to the prior Canadian-United States double tax treaty dated in 1980. The author respectfully disagrees about this assertion, since Canada and United States expressly included a reservation in paragraph 16 of the Commentary on Article 17 OECD Model, whereby the unlimited approach of the 1992 modification of the Commentary was not accepted and, if so, the article 17.2 of the OECD Model was limited to avoidance scenarios. Unfortunately, the Canadian court

[204] See Sting Case *supra* n. 123.

did not tackle this relevant tax issue, by automatically applying Article 17 as per 1992 modification in the OECD Model and related Commentary, and not taking into account the previous date of the Canada-United States double tax treaty.

Back to the discussed case at the 2001 IFA Congress, the key point is the lack in the 1977 version of the Commentary on Article 17 OECD Model, available when the treaty was signed[205], of situations a) and b) of the paragraph 11 of the Commentary on Article 17. It meant that Article 17.2 OECD Model was not applicable when avoidance devices were not encompassed. Therefore, the State of source was not entitled to tax entertainment or sport performances, since those activities of the foreign company in the State do not constitute a permanent establishment (Article 5-7 OECD Model), unless the ambulatory approach was adopted. Under this approach, amendments of later versions of the Commentary (in the analyzed case, 1992 OECD version) were accepted as a means of interpretation, even in case of previous signed tax treaties.

Again, the referral to the status of the OECD Commentary in respect of Article 17 OECD Model was crucial. The members of the panel of the joint IFA/OECD Seminar (Seminar B) dealing the analysis of this tax issue, held both opposite approaches.

Some of them considered the amendments introduced by the Commentary as a complete reversal of the previously stated position[206]. As opposed to those endorsing that an opposite interpretation between the two versions may be achieved through the

[205] The Commentary to the 1977 Model did contain a paragraph in the Commentary on Article 17 OECD Model which limited the application of paragraph 2 to counter tax avoidance devices, as opposed to the unlimited approach in the Commentary to the 1992 OECD Model. The 1977 Commentary on Article 17 OECD Model read as follows:

"*The purpose of paragraph 2 is to counteract certain avoidance devices in case where remuneration for the performance of an entertainer or athlete is not paid to the entertainer or athlete himself but to another person, e.g. a so-called artiste company, in such a way that the income is taxed in the State where the activity is performed neither as personal service income to the entertainer or athlete nor as profits of the enterprise in the absence of a permanent establishment. Paragraph 2 permits the State in which the performance is given to impose a tax on the profits diverted from the income of the entertainer or the athlete to the enterprise where for instance the entertainer or athlete has control over the rights to the income thus diverted or has obtained, or will obtain, some benefit directly or indirectly from that income. It may be, however, that the domestic laws of some States do not enable them to apply such a provision. Such States are free to agree to alternative solutions or to leave paragraph 2 out of their bilateral convention".*

[206] In particular, Martin, P. (Conseiller d'Etat, France) held that the scope of Article 17.2 in accordance with 1977 OECD Commentary was clear-cut, by excluding the taxation of the companies not involved in international tax avoidance devices. Same position was held by Avery Jones, J., since new Commentaries cannot change older concluded treaties.

change of the OECD Commentary, regardless of the unchanged wording of Article 17.2 OECD Model. Having regard to these conflicting views, it cannot be understood that 1992 Commentary on Article 17 OECD Model represents a consensus among various parties. Above all, when the country of source (Canada) made a reservation referred to the implementation of paragraph 11.a) and b) of the Commentary on Article 17 of the OECD Model, by limiting the unlimited approach.

From the ambulatory approach, some panellists understood the wording of Article 17.2 OECD Model in a sufficiently clear way to tax the team in the case at hand, included in the reference to "another person"[207]. The 1992 OECD Commentary was only the confirmation of the correct interpretation contained in the wording of Article 17 OECD Model. Furthermore, they regarded the explanation of the subsequent Commentary as a clarification of a previous wrong interpretation[208]. They support their view with the mentioned Canadian Case, in which the later version of the OECD Commentary was the key point to interpret previously signed tax treaty, under similar circumstances to the case debated[209].

2.3.3.2 Spanish case "Viajes Halcón-Julio Iglesias"

Based on the outcome of tax debate held in 2001 IFA San Francisco, a pacific position cannot be meet, as regards the value of later OECD Commentary on previous signed double tax treaties. Moreover, the scenario turns even more complicated when the applicable tax treaty does not contain a clause similar to Article 17.2 OECD Model.

To illustrate this point, a Spanish Court case regarding the taxation of payments to loan-out companies in Spain[210] is of great help, hereinafter Viajes Halcón-Julio Iglesias Case[211].

[207] Lang, M. (Vienna University of Economics and Business Administration).

[208] Vann, R. (University of Sydney).

[209] Sasseville, J. (OECD).

[210] TEAC, September 8, 2000. In this respect the analysis of the resolution by Vogel, K., *supra* n. 75, pp. 319 and Molenaar, D., and Grams H., *supra* n. 99, pp. 500-509. Also, as regards subsequent Spanish court decisions, Durá García, L.J., Caso Viajes Halcón: Utilización de sociedades de intermediación de artistas y deportistas, *Tributação Internacional – Análise de Casos*, São Paulo, MP Editora, 2010, pp. 199-219; García Prats, A., La interpretación jurisprudencial como mecanismo para hacer frente a la elusión tributaria. Apuntes a la Sentencia del Tribunal Supremo de 11 de junio de 2008, *Tribuna Fiscal*, 220, 2009.

It involved a Spanish entity, Viajes Halcón S.A., which entered into an agreement with the artiste-company ITCON, B.V, tax resident in The Netherlands and without having a permanent establishment in Spain. Said company dealt with the image rights and sponsorship rights of the artist Julio Iglesias, in relation to the recording of one of his concerts in Spain, as well as the broadcasting of said concerts within Spanish territory, which were also granted to Viajes Halcón. At the same time, the entertainer and Viajes Halcón, S.A. concluded a contract whereby the former would sign in Spain in a tour of eight concerts[212].

The crux of the matter in this ruling was the inexistence of the equivalent of Article 17.2 OECD, in the applicable tax treaty to the case at hand, the one concluded between Spain and the Netherlands, since its signature was dated in 1971. It is important to recall that the implementation of the second paragraph was in connection with the 1977 OECD Model.

It was not a dilemma of treaty interpretation, as it was the determination of the extension to which scenarios Article 17.2 OECD Model was applicable, according to the modifications in the OECD Commentary introduced in 1992. In particular, Paragraph 11 a) and b) of the Commentary on Article 17 OECD Model, which involved scenarios beyond the scope of the tax avoidance, as well as the distributive rules of application involving paragraph 1 and 2 of said tax article.

The key issue resided in determining the tax consequences for entertainers and sportspersons, when the applicable double tax treaty does not include the second paragraph of Article 17 OECD and the interaction with the “umbrella” Article 7 OECD Model, which plays its role and requires the existence of a permanent establishment in the source country, in order to have the right to tax.

Spanish TEAC upheld, in previous cases, the qualification under Article 7 OECD Model in accordance with the original position. It was supported since DGT ruling issued in

[211] TEAC (Segunda Vocalía), RG2765/1996, dated 8 September 2000. Audiencia Nacional (Section 2), Case n. 115/2000, dated in June 13, 2002 and Tribunal Supremo (Section 2), Case n. 7710/2002 dated in June 11, 2008.

[212] The amounts involved as regards each of the concepts, included in the above-mentioned contract is further analysed in Chapter 3.

October 20, 1992. It was followed by subsequent TEAC decisions issued in November 6, 1996, May 26, 2000 and July, 21 2000[213]. In all of them it held an opposite approach to the one endorsed in Viajes Halcón-Julio Iglesias Case. In particular, it handed down the refrain from tax in the source country, in accordance with the lack of the second paragraph of Article 17 OECD Model. Based on the fact pattern that a Dutch company-star did not have a permanent establishment in Spain to attribute the profits.

It is important to express that the old position held by the TEAC coincides completely with the author´s position. However, Spanish TEAC reversed its position by accepting the interpretation of former tax treaties, signed with the spirit of 1977 OECD Model, together with the interpretation of 1992 OECD Commentaries on Article 17, albeit the applicable tax treaty did not encompass the new changes. It is important to note that the adoption of paragraph 2 of Article 17 OECD Model was not a clarification of previous meaning. In accordance with 1977 OECD Model, in force when the Spanish-Dutch double tax treaty was concluded, it was an anti-avoidance clause which implemented an exception to Article 7 OECD and, accordingly, it cannot be applied, when contracting parties did not agree its adoption, in the concrete tax treaty.

When the TEAC handed down the decision, it was aware of the tax tool to counteract tax-avoidance and related consequences. In this regard, it was not allowed to levy any tax in Spain as source State, even if the performance was there and the payor was Spanish. That's the reason why the majority of foreign entertainers performing in Spain, structured their payments through Dutch "loan-out" companies.

Unfortunately, the TEAC's position was endorsed by the final decision about Viajes Halcón-Julio Iglesias Case at the level of the Spanish Supreme Court[214]. It stated that the source taxation in Spain was allowed based on the look-through approach included in Article 17.1 OECD Model, in accordance with the above-mentioned position endorsing the ambulatory approach with no limits at all.

The ground of the change adopted firstly by the TEAC and subsequently by the Spanish Supreme Court was based on the paragraph 36 of the Commentary on the

[213] See further about DGT rulings and TEAC decisions in paragraph 3.4.2.6.2.

[214] Except for the Spanish National Court, in its ruling of October 3, 2002 adopted an opposite approach. Finally, the ruling was enacted from the Spanish Supreme Court in June 11, 2008. Moreover, it has confirmed this position through additional rulings, such as those enacted in April 13, 2011 and February 28, 2013.

Introduction[215] to the OECD Model. It gives room to understand that changes in the Commentary on Article 17 OECD Model do not mean any interpretation *"a contrario"* of the mentioned article. Thus, the interpretation of previous treaties has to take into account the OECD Commentary, since neither Spain nor The Netherlands have adopted reservations to the Commentary. In accordance with the Commentary on Article 17 OECD Model, the lack of its second paragraph is replaced by the implementation of anti-abuse domestic legislation, which allows the application of Article 17.1 to this scenario.

It is obvious that TEAC and Spanish Supreme Court extended the application of the "artiste clause" to situations that the tax treaty concluded between Spain and The Netherlands did not have included it. Thus, this position was the last resort from the Spanish tax administration and tribunals[216] to counteract abusive situations, when dealing with loan-out companies, used by foreign artists, which were located in tax countries benefiting from the loophole of lacking Article 17.2 OECD Model in the applicable double tax treaty.

Moreover, the case at hand leads to another tax debate which was the existence of a look-through provision within Spanish domestic tax rules[217], applicable to non-tax residents. Again, two positions are upheld in this regard. On the one hand, those

[215] This position was already maintained by the Spanish Tax Administration. It follows the steps expressed in an article of a tax inspector. Alonso Sanjuán, R., Tributación de artistas no residentes, *Tribuna Fiscal,* 1996, pp. 62-66.

[216] Belgium adopted the opposite viewpoint. See further on this, Peeters, B., Docclo, C., *2002 Trilateral IFA Belgian-French-Italian*, Belgian National Report about the Evolution of Double Tax Treaties. Chapter about Anti-Abuse provisions. *"From a Belgian perspective it can also mentioned that there is a very recent trend in the case law of lower jurisdictions considering the domestic look through provision for fees which are paid to a foreign rent a star company with respect to activities of foreign performers on the Belgian territory, not to be applicable in case the double tax treaty between the state of residence of the performer and Belgium does not provide for a provision similar to art.17.2 OECD-Model. This decision follows the analysis recently made by the Spanish Supreme Court".*

The problem might be relevant, when potential involved countries, such as Spain and Belgium adopt opposite positions and, if so, an asymmetry can arise in terms of interpretation of Article 17 OECD Model.

[217] *In particular, article 13.1.b.3º of the Non-resident Income Tax Act (hereinafter NRITA).* It read as follows "*When they are directly or indirectly derived from the personal performance of artists and sportsmen in Spanish territory or from any other activity related to said performance, even if they are received by a person or entity other than the artist or sportsman*".

considering that it implicitly exists[218], as opposed to the dissenting view whereby, a mere attribution of income obtained directly or indirectly by the entertainer or sportsperson, does not benefit from the character of a look-through provision[219].

Thus, under the former, the specific counteracting tax measure established in the Article 17.2 OECD Model can be feasible applied to former tax treaties, intertwined with the use of domestic look through provision through Article 17.1 OECD Model[220] and paragraph 8 of the related Commentary.

For those not accepting a far-reaching approach, the alternative would be to achieve a re-negotiation of the tax treaty, in order to agree whether or not the implementation of the second paragraph of Article 17 OECD Model proceeds. Thus, the limits to the ambulatory approach[221] are the touchstone of the discussion.

However, the Spanish Supreme Court found an indirect way to get the same result, by avoiding extra efforts of negotiations by Contracting States. It was the use of domestic anti-avoidance clause, granted via the application of Article 3.2 of the OECD Model, blessed by paragraph 8 of the Commentary on Article 17 OECD Model. To this end, the ambulatory approach with no limits of the Commentaries is needed, since paragraph 8 of the Commentary on Article 17 OECD Model was incorporated in 1992[222].

2.3.4. Author's position

The author´s endorsed in the analysis of the previous Court case, the non-existence of a look through provision in Spanish tax law, enabling the taxation at source via Article 17.1 OECD Model.

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[218] Juarez, A., *Taxation of Entertainers and Sportspersons Performing Abroad*. Part Four-Country Reports-Chapter 23: Spain, Edited by Maisto, G., EC and International Tax Law Series. Volume 13. IBFD. 2016, pp. 634.

[219] See further Durá García, L.J., *supra* n. 210, pp. 199-219.

[220] See further Tetlak, K., and Roeleveld, J., *supra* n. 190 at section 5.1.3.2.2.5.

[221] See further de Juan y Ledesma, A. The Tax Treatment of Non-Resident Sportsmen Image Rights: An Ambulatory Interpretation of the Spain-Netherlands Tax Treaty, 49 *European Taxation* 11 (2009), pp. 518-526.

[222] As a matter of fact, the 1992 OECD Commentary on Article 17 OECD Model was used to interpret the Spanish-Dutch double tax treaty which entered into force 21 years earlier.

However, the scope of the debatable tax issue is greater. It arises the need to ascertain whether it is possible that OECD Member States change the meaning of the wording of a tax treaty through the modifications implemented in the OECD Commentary. In particular in those scenarios where the particular tax treaty assigns via domestic laws, taxing rights to certain State unilaterally, by breaking the reciprocity achieved in the tax treaty itself.

It is important to note that through 1992 and 2000 changes into the Commentary on Article 17 OECD Model, the distributive rules of the double tax treaty and the scope of it were changed completely[223]. Through them, the scope of Article 17.2 OECD Model solely covers situations in which the source country does not adopt domestic look-through counteracting measures in its domestic tax law. So that, since 1992 Article 17.1 OECD Model includes scenarios involving entertainers and sportspersons which, up to said change in the OECD Commentary on Article 17, were encompassed by its second paragraph.

The original intention of the legislator because Article 17.2 OECD Model was created, was completely changed through 1992 OECD Commentary on Article 17. Said paragraph not only encompasses situations non-related with abuse, but even the latter goal can be counteracted through the use of first paragraph. The key point was the change in the interpretation of the word “derived” in the first paragraph of Article 17 OECD Model.

From 1992, entertainers can derive benefits from the country of source directly or indirectly[224]. Accordingly, the entertainer or sportsperson can be subject to tax under paragraph 1 or Article 17 OECD Model, when the country of source includes domestic look through anti-abuse clauses tackling this scenario. Paragraph 2 of Article 17 OECD Model solely entails a subsidiary function, in case of non-implementation of unilateral measures to counteract the abuse of tax treaties, by the source country. In this scenario, the intermediate company receiving the performing income is subject to tax, as opposed to paragraph 1 which would tax the entertainer or sportsperson directly.

In this regard, the main function why Article 17.2 OECD Model was created is passed to its first paragraph. Therefore, when source countries regard the use of artist-

[223] In concrete, the previous mentioned paragraphs 8 and 11 of the Commentary on Article 17 OECD Model.

[224] Paragraph 8 of the Commentary on Article 17 OECD Model.

company as an abuse, they are entitled to implement their own tax rules, without the approval of the other contracting State. It can be another argument against the ambulatory approach, when it goes beyond the limits. In fact, it is a completely change in the meaning of Article 17 OECD Model, through the implementation and use of domestic anti-abuse clauses by the involved contracting States.

Accordingly, in scenarios, such as the Sting Case and Julio Iglesias-Viajes Halcón Case, it is essential to determine the weight to be given to the Commentary on previous concluded tax treaties. In other words, whether the **ambulatory approach** would be accepted and, if so, whether limits would be imposed in order to apply the endorsed approach.

The author understands that the solution is placed in the Introduction to the OECD Commentary, by taking into account the limits and reservations of the ambulatory approach, too. Paragraph 36 of the introduction of the OECD Commentary, it reads as follows:

"*Whilst the Committee considers that the changes to the Commentaries should be relevant in interpreting and applying conventions concluded before the adoption of these changes, it disagrees with any form of A CONTRARIO interpretation that would necessarily infer from a change to an Article of the Model Convention or to the Commentaries that the previous wording resulted in consequences different from those of the modified wording. Many amendments are intended to simply clarify, not change, the meaning of the Articles or the Commentaries, and such A CONTRARIO interpretations would be wrong in those cases."*

However, by endorsing this paragraph of the Commentary on the Introduction to the OECD Model can lead to the misunderstood conclusion that "*Changing the OECD Commentary is preferable to changing the Model Convention*" [225] . The general drawback of this principle, as well as the ambulatory approach is that when applied without limitations, they may lead to override of the applicable tax treaty. The limitations of the ambulatory approach are based on the provisions of the applicable tax treaty, to the extent that changes in the OECD Commentary are intended for the sake of the

[225] It is the second principle stated in "Dr. Loukota´s 10 Guiding Principles" by Dr. Helmut Loukota in the Eliat (Israel) IFA Congress, 1999, in the seminar about Tax Treaty Interpretation.

clarification. Therefore, by explaining or extending ideas already contained in the tax treaty[226].

Therefore, the solution would consist of opting for the ambulatory approach, insofar it entails a broad interpretation of the OECD Commentary limits, in order to protect the text of the tax treaties, according to Article 31 of the Vienna Convention[227]. It states that "*The text must be presumed to be the authentic expression of the intentions of the parties and, in consequence, the starting point of interpretation is the elucidation of the meaning of the text*". In this context, the OECD Commentary would play a role of a mere aid to the interpretation of tax treaty´s text. Moreover, wrong faculties must not be conferred to the OECD Commentary, when interpreting international tax issues that solely must be implemented through changes in tax treaties.

Furthermore, as Vogel[228] pointed out that the authority of the OECD Commentary decreases due to frequent modifications and the way in which they are published. It can be another option to accept the ambulatory approach, but only with substantial reservations/limitations.

Thus, the legal basis of the OECD Commentaries endorsed by the author would consist of a hybrid of the two approaches included in paragraph 2.3.2. It would lead to achieve the proper balance among the flexibility of adapting tax treaties to current times, alongside avoiding the "frozen" interpretation of their provisions, and the

[226] Some tax commentators expressed the existence of this kind of explanatory positions within the OECD Commentary in exceptional circumstances. Inter alia, Sandler, D. and Jinyan Li, The relationship Between Domestic Anti-Avoidance Legislation and Tax Treaties, *Canadian Tax Review*, pp. 898-900. An example is the Commentary on Article 5.5 OECD Model referred to the absence of a permanent establishment, provided that the agent has an independent status. Later OECD commentaries included more information about what has to be understood by independent status, from a legal and economic point of view. In this scenario, the OECD Commentary clarifies the meaning of the tax treaty. It does not add any "*a contrario*" meaning to the tax treaty and it does not extend its application to situations not originally encompassed by it. Under these circumstances, late clarifying Commentary can be applied to previous tax treaties. It is an example of ambulatory approach within the bounds, in accordance with author´s position. Unfortunately, the 1992 and 2000 as regards the Commentary on Article 17 OECD Model are totally opposite to this pattern.

[227] Also see, West, C., *supra* n. 183, pp. 29-32. This author included four categories of later commentaries interpreting previous tax treaties. In particular, filling a gap, amplifying existing commentary by adding new examples, recording what states have been doing in practice and contradicting previous commentary. The latest two categories must be considered carefully, in order to be in line with the Vienna Convention, as well as the customary international law.

[228] See further, Vogel, K., *supra* n. 201, pp. 612-616

uncertainty of modifications referred to relevant parts of tax treaties via OECD Commentary.

Within this approach, drawbacks expressed by the tax commentators against the ambulatory approach would no longer exist. Hence, the legal status of tax treaties, acquired by national parliamentary approval, is protected from out of proportion authority mistakenly conferred to the Commentary of the OECD Model.

This hybrid approach as regards the legal status of the OECD Commentary and the effects in previous concluded tax treaties becomes of crucial relevance when dealing with the context of court cases. They may use the OECD Commentary as an interpretative tool combined with the ambulatory approach, upon condition of respecting the limits expressed above. If not, the taxpayer would be submitted to judicial decisions, based on the interpretation of unknown effects which would be determined at the time when tax assessment takes place.

Thus, the limit between what is considered interpretation of tax treaties and extra limitation leading to incompatibility with double tax conventions, regarding the OECD Commentary, has to be drawn in each concrete case, based on the facts and the circumstances.

In the **specific case of the entertainers and sportspersons**, the author's view considers that paragraph 8 and 11 of Commentary on Article 17 OECD Model, as per the 1992 version was not simply clarifying the meaning of said article. It stated the core functions of said article. In particular, by determining how to apply it and to which particular scenarios. These functions have to be reserved to Article 17 OECD Model itself and, if so, by not granting such tax policy authority to the OECD Commentary.
In this sense, the priority of tax treaties over the OECD Commentary cannot be forgotten. In this sense, when it is applied the ambulatory approach with no limits, treaty override can result, based on the misleading legal status of the OECD Commentary. When dealing with entertainers and sportspersons, the mentioned amendments of the Commentary on Article 17 OECD Model led to the reversal interpretation of previous tax treaties via the change in its related OECD Commentary.

To sum up, the main issue of interpretation is to draw up a conclusion for the legal basis in the application of later OECD Commentary to previous-concluded treaties, since its legal status is far from clear. Nevertheless, the ambulatory approach, insofar

the limits detailed in previous paragraphs are adopted, has been proved to fit within the international tax context and Vienna Convention.

Nonetheless, the issue as regards the value of the later amendments in OECD Commentary in previous tax treaties is not a pacific issue. In this regard, latest Court Cases have determined that it is relevant to establish limits to the dynamic interpretation[229] via the OECD Commentary on tax treaties. In particular, the Stryker Case [230] upheld that it is not permitted to use later version (2005) of OECD Commentary on Article 5 in relation to the Spanish Swiss double tax treaty signed in 1996. It rejected the position of the Spanish tax authorities which denied the double tax relief to a permanent establishment, based on the grounds of a different interpretation of the said term included in 2005 OECD Commentary and applied it retroactively to the mentioned tax treaty.

In the same line than Colgate-Palmolive Case[231] whereby Spanish Supreme Court analyses whether, in the light of OECD Commentary on Article 12, beneficial ownership may be understood to be implicitly included, even though the Spanish-Swiss tax treaty does not contain such an explicit clause in relation to the taxation of royalties. Again, the beneficial ownership figure was rejected to be applied, based on the grounds of legal certainty, by expressly limiting the application of the ambulatory approach of the OECD Commentary.

Unfortunately, within the context of Article 17 OECD Model, the domestic taxing rights together with the amendments introduced into the Commentary on Article 17 OECD Model have endorsed the ambulatory approach with no limits. As a result, it grants unlimited force of attraction to Article 17 OECD Model and, in particular, to its Commentary [232] and related domestic tax rules [233], as means of interpretation.

[229] Navarro, A., International Tax Soft Law Instruments: The Futility of the Static v. Dynamic Interpretation Debate, *Intertax*, Volume 48, Issue 10, pp. 848-860.
[230] Spanish Supreme Court Case, issued in March 3, 2020 (n. 5448/2018).
[231] Spanish Supreme Court Case, issued in September 23, 2020 (n. 1996/2019).
[232] For example, in the 2014 amendments introduced into the Commentary on Article 17 OECD Model, in paragraph 9.1 was included that said OECD Article also covers the rehearsal and training periods, by reversing the scope of application. It is clear-cut example of extending the force of attraction of Article 17 OECD Model via the OECD Commentary, since it is not clarifying any previous meaning. The same can be applicable when the paragraph 3 of the Commentary on Article 17 OECD Model excludes from its application to models and a visiting conference speakers. In the latter, the consequences are even worse, since it interacts with the application of a pure subjective approach, providing a higher degree of uncertainty.

Accordingly, in light with the latest Court cases, the position held in Viajes Halcón-Julio Iglesias case is no longer compatible with them. Therefore, the correct application of both paragraphs of Article 17 OECD Mode must be carried out without benefiting from the unreasonable force of attraction used by the source country, above all when the particular tax treaty does not expressly grant said taxing rights.

[233] Spanish tax authorities adopt a practical approach when tackling the source taxation of "loan-out" companies used by entertainers (mostly) and sportspersons, whereby they apply paragraph 1 (taxation of the entertainer or sportsperson via the presumed existence of a "look through" provision) or paragraph 2 (taxation of the company itself) depending on the degree of difficulty on each scenario. Article 17 OECD Model ends up being "*a la carte*" taxation. In this regard, the reply to the binding consultation issued by the Directorate of General Taxes, (hereinafter DGT) in December 17, 1996, whereby, Article 17.1 OECD Model (in this particular case of the double tax treaty between Spain and Germany) together with the domestic "look through" provision allowed them to choose the taxation at the level of the entertainer.

CHAPTER 3 - OBJECTIVE APPROACH / FORCE OF ATTRACTION

3.1. Specific tax treaty provision

3.1.1. Introduction

Prior to tackle the main tax issues arising from the practical application of Article 17 OECD Model when international performing scenarios take place, it is important to lay down the purpose, scope and target of this Chapter.

Throughout this research work the author endeavours to find out the most appropriated approach within Article 17 OECD Model. In particular, special attention is devoted in order to restrict the force of attraction when applying it. To this end, the objective approach may be used as touchstone, for the purposes of reducing the shortcomings arising from the overvaluation of the subjective approach. It must also take into account that Article 17 OECD Model must be applicable by taken into consideration the remaining set of OECD Articles dealing with related items of income, which might be also obtained by entertainers and sportspersons.

Moreover, the entertainment element plays a key role when applying Article 17 OECD, by overcoming the performance orientated approach, as well as avoiding pure subjective referrals based on the definition of entertainer or sportsperson.

The approach of the author is endorsed by the analysis of main international Court cases, in order to determine the appropriateness of Article 17 OECD Model in order to grant balance taxing rights to the involved countries and, by doing so, limiting the potential application of a far-reaching force of attraction of said article and, as a result of it, potential over taxation or double taxation.

In this sense, this new position is tested versus the other applicable OECD items of income, with the aim at providing evidences whereby Article 17 OECD Model under a well-balanced objective approach does not overlap other tax treaty articles.

Once main conclusions endorsed for the purposes of combating the unlimited approach of Article 17 OECD Model are laid down from technical and practical viewpoints, the apportionment among the particular countries is tackled, by trying to find out the most suitable position in tax treaty scenarios.

Last but not least important, the main position, as well as the amendments or interpretation means, suggested by the author in relation to Article 17 OECD Model are put into perspective, by analysing the policy principles and techniques arising from Pillar I and II of OECD in BEPS and its potential implementation in the context of Article 17 OECD Model.

3.1.2. "Lex specialis" and relationship with other OECD Model Articles

Article 17 OECD Model takes preference over other "umbrella" Articles of the same Model. In particular, said preference is over Article 7 (Business income) and Article 15 (Dependent income) OECD Model. The rationale behind this "lex specialis" was clearly explained in the 1987 OECD Report[234], in which the source taxation on non-resident artistes and sportsmen was recommended, regardless of the existence of a permanent establishment[235] there, when dealing with independent professionals or companies[236].

Thus, the degree of the real economic activities carried out in the source State, as measure to determine the taxation in this territory is not a valid test to be applied[237] to entertainers and sportspersons. The underlying reason of not using the permanent establishment test resides in tax policy reasons[238]. Also, tax avoidance was pointed out by 1987 OECD Report as the yardstick to combat potential aggressive tax structures

[234] See further, OECD supra n. 82 at paragraph 47. It expressly states that "*Considering the aim of taxing effectively income from entertainment, artistic and sporting activities in the country of performance. The Committee considers that, in the context of general income tax, domestic legislation should ideally for the tax to be withheld at source on payments to non-resident artistes and athletes".*

[235] A position about the unjustified and exceptional rule for entertainers and sportspersons is held by Sandler, *supra* n. 128, pp. 215-245.

[236] Article 7.4 of the OECD Model expressly states that "*Where profits include items of income which are dealt with separately in other Articles of this Convention, then the provisions of those Articles shall not be affected by the provisions of this Article*". Thus, it is a general rule which applies, among others, when effectively applying Article 17 OECD Model. Paragraph 73 of the Commentary on Article 7.4 of the OECD Model refers to other Articles of the same Model which deal specifically with this question, such as, paragraph 1 and 2 of Article 17 OECD Model.

[237] For example, when domestic tax authorities would opt for applying Article 17 OECD Model to all type of services, directly or indirectly related to performances of entertainers or sportspersons, there would be no need to analyze whether a permanent establishment of would be considered to exist in the source country.

[238] See further, Ault, H., *Comparative Income Taxation (A structural analysis),* Kluwer Law International, 1997, pp. 431. He stated as regards the threshold of activities in the source country *"If the activities are not relevant, it will be difficult to collect the tax, since it would usually not be possible to use the withholding techniques and the tax must be directly assessed. In addition, if the local activities are not substantial, the income does not have a real economic "source" in the jurisdiction".*

used by entertainers and sportspersons. In particular, its paragraph 32 expressly stated that "*Business income from entertainment, artistic and sporting activities of a non-resident will usually be taxed only if a permanent establishment is maintained in that country. In some countries certain income received by artistes and athletes is considered under domestic law to be business income. Opportunities for tax avoidance or non-taxation are rather wide in these cases*"[239].

Furthermore, in scenarios involving entertainment or sport employees, the 183-day rule, as well as the tax residency of the employer paying the salary, are also disregarded. In relation to employees, since 2014 OECD Update on the Commentary on Article 17, member States have the option of exempting from tax in the source country, the income obtained by entertainers and sportspersons benefiting from employee status.

In particular, the first paragraph of the Commentary on Article 17 OECD Model establishes the scope of it and expressly states that "*(…) This provision is an exception to the rules in Article 7 (over which it prevails by virtue if paragraph 4 of that Article) and to that in paragraph 2 of Article 15, respectively*"[240].

The fact that Article 17 OECD Model prevails over other OECD Articles does mean that in case of not being subject to tax under said Article, the "umbrella" OECD Articles may still be applicable, as already explained in the paragraph 2.2.7.6. It is based on the wording included, "*may be taxed*", by leaving room for the existence of subsidiary applicable rules.

Moreover, the particular relationship between Article 12 OECD Model (Royalties) and Article 17 OECD Model is remarkable in the context of entertainers and sportspersons. There is a grey area of conflict when certain items of income, such as broadcasting rights obtained by said qualifying group of taxpayers. In addition, the OECD Model

[239] It also includes a practical example of case which may lead to tax avoidance "*A restaurant makes a contract with a foreign company, according to which the musicians, show-stars, etc., employed by the company perform in the restaurant. The restaurant only supplies the space and does not itself pay any performance or other fees. The foreign company receives the proceeds from the admission fees. There is a great temptation for the company to leave the proceeds undeclared in its home country."*

[240] Spanish DGT reply to the binding consultation, issued in May 28, 1995 (1082-97) stated that Dutch, Swiss, Belgian, and French tax resident cyclists hired by a Spanish professional team were under the scope of application of the articles of their respective tax treaties, mirroring Article 17 OECD Model, instead of Article 15 OECD Model.

Convention provides for guidance in order to help characterizing items of income within said grey area[241].

The point is when Article 17 OECD Model applies by taking precedence over other OECD Articles, the source State is provided with unlimited taxing powers, which might lead to double tax situations based on, among others, the different characterizations of income of the countries involved.

The taxing rights of the source country when entertainment and/sport activities are performed becomes the primary target, by only taking into consideration the potential erosion of the tax payments at the level of the country where the performance takes place. Also, in certain countries such as Spain[242], the tax liability may also encompass to the domestic payor, in order to enforce the final tax payment of the foreign entertainer or sportsperson, via the application of the domestic withholding tax at source.

3.1.3. Tailored tax rule addressed to a specific occupation

The outstanding characteristic of this distributive rule resides on the fact that a specific type of occupation[243] is the target group, instead of the type of income. Hence, conflicting scenarios may arise between involved countries as regards characterizations, by focusing on the subjective aspects versus the objective approach of the income obtained by this qualifying group of taxpayers.

Another debatable issue is the grounds to currently maintain this tailored tax measure limited to entertainers and sportspersons, in contrast to other taxpayers who also

[241] Even though no preference of Article 17 OECD Model over Article 12 is stated in the scope of the former, it would be determined based on the particular circumstances of the case, by taking into consideration the guidance established in the respective Commentary to both OECD Articles. In this sense, paragraph 18 of the Commentary on Article 12 of OECD Model, as well as paragraph 9 of the Commentary on Article 17 OECD Model are the paragraphs providing for key guidance, when dealing with items of income potentially caught by the scope of both OECD Articles. In this regard, see further paragraph 3.4.2.2.

[242] Article 9.1 of NRITA.

[243] Students, member of the board of directors and diplomats are also examples of OECD Model distributive rules addressed to a qualifying group of taxpayers.

obtain high sums of income in limited periods of time, as well as benefiting from mobile service activities worldwide[244].

The author considers in this regard that there are no longer reasons to justify the application of this specific tax rule addressed to entertainers and sportspersons. This conclusion is based on three statements.

The main reason to apply this tailored rule was based on **pure efficiency tax reasons**, by granting the primary right to tax to the source country, versus the option of being taxed only at the residency State, with the corresponding practical difficulties in obtaining the information from the other contracting State[245]. These tax justifications cannot be longer appealed, since most of the developed countries are under the main exchange of information agreements, either the Common Reporting Standard [246] (hereinafter CRS) and the Foreign Account Tax Compliance Act [247] (hereinafter FACTA); whereby the automatic exchange of information applies almost all over the world, except for tax haven countries, with hardly relevance as performance countries for entertainers or sportspersons.

Thus, the tax residency State is in the suitable position to better evaluate the overall information from the worldwide income of their entertainers and sportspersons, as opposed to the source State which focuses in a narrower scope via the performance/s carried out there[248].

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[244] In this regard, IFA, *Taxation of Non-Resident Entertainers (Seminar D at the 49th IFA Congress in Cannes, France)*, Cahiers de droit fiscal international, IFA Congress Seminar Series, Vol. 20d, The Hague: Kluwer Law International, 1995, pp. 20. Also, García Prats, F.A., *Comentarios a los Convenios para evitar la doble imposición y prevenir la evasión fiscal concluidos por España*, Chapter: Artículo 17. La tributación de los artistas y deportistas Fundación Pedro Barrié de la Maza, pp. 831-872.

[245] Vogel, K., *supra,* n. 13, pp. 970. Also, OECD, *supra* n. 82 at paragraph 16.

[246] As per the information included in the OECD website, the Common Reporting Standard (CRS), was developed in response to the G20 request and approved by the OECD Council on 15 July 2014, calls on jurisdictions to obtain information from their financial institutions and automatically exchange that information with other jurisdictions on an annual basis. It sets out the financial account information to be exchanged, the financial institutions required to report, the different types of accounts and taxpayers covered, as well as common due diligence procedures to be followed by financial institutions.

[247] In accordance with the information included in the Internal Revenue Service (hereinafter IRS) website, FATCA requires that foreign financial Institutions and certain other non-financial foreign entities report on the foreign assets held by their U.S. account holders or be subject to withholding on withholdable payments.

[248] The option of granting the taxing powers to the source State in the tax treaty context is common for passive income, such as dividends, interests and royalties. See further, Wagner Y., *Taxation of Artistes and Sportsmen in International Tax Law*, Chapter: Historical Background of Article 17 OECD Model. Edited by Loukota, W. and Stefaner, M., Linde. 2007, pp. 57-70.

Moreover, most of the entertainers and sportspersons like other professionals are struggling to make a living. According to Molenaar[249] those "*artistes struggling for recognition*" are the base of the pyramid, since it is quite difficult to qualify as "*well-established professionals*" and even more difficult to become the "*happy few*" stars or top-ranking artistes and athletes[250]. However, said classification can be used for any kind of professions or occupations. Therefore, there are no reasons to address specific and unlimited power of taxation to the source countries where the entertainers and sportspersons perform there.

Finally, the OECD was fully aware of the difficulties that can arise when setting up special tax system for entertainers and sportspersons departing from other categories of taxpayers, even though special systems could be devised to deal with certain other categories[251]. The key point after revising the implemented measures following the principles stated in the 1987 OECD Report consists of checking the accomplishment of the main goals. In this regard, the yardstick of said report was "*that income from entertainment and sporting activities should be taxed in the same way as income from any other activities*."

The elapse of the years and the amendments included throughout the Commentary in Article 17 OECD Model and bilateral tax treaties have confirmed that the tax policy addressed to sportspersons and entertainers have achieved the opposite outcome. These occupations are treated differently from a tax perspective, with no grounds supporting such a discriminatory treatment.

As regards the **mobility**, it was the reason appealed in the 1987 OECD Report, which permitted to change the status of the services, between dependent and independent. Furthermore, the fact of leaving a country without notice would enable to tax avoidance in case of non-existing a withholding tax at source. However, all above shortcomings may be also familiar to any other independent occupation, benefiting from the mobile nature of the activities[252]. Therefore, there are no longer reasons to treat different the sportspersons and the entertainers[253] based on said reason.

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[249] Molenaar, D., *supra* n. 32, pp 211-216.

[250] Reference included in OECD, *supra* n. 82 at paragraph 6.

[251] See further, OECD, *supra* n. 82 at paragraphs 62 and 63.

[252] See further, IFA, *supra* n. 129. The examples dealt with in the Seminar Panel are very illustrative in this regard.

[253] See further, Sandler, D., *supra* n. 128, pp. 215-245. In particular, a couple of relevant and illustrative statements included in the above-mentioned book are *"My thesis is that Article 17, as it currently exists, is not a justifiable exception. It is under inclusive, in terms of the character of the individuals and the*

The fact of obtaining **relevant sums of income is shorts periods of time** can be only applicable to a reduced part of them, like any other independent professional, too. This issue has been accepted by the OECD Council through the implementation of the "*de minimis*" rule in the 2014 Update to the Commentary on Article 17 OECD Model[254].

Thus, it leaves only a reason why the OECD maintains this tailored tax rule for entertainers and sportspersons, which in its turn enables to still be applicable at treaty level and by the domestic tax administrations. It is the **reputational risk** attached to the fame or celebrity surrounding this group of people, even though is limited to the qualifying top-ranking stars. It harmed greater to the implemented domestic tax system, when the tax fraud is carried out by a football star player, as opposed to a regular and anonymous independent taxpayer[255]. The point is whether there are grounds in the constitutional systems to maintain such discriminatory system of taxation, based on the mentioned reputational risk, as well as at international tax treaty level.

3.2. Subjective versus objective approach

3.2.1. Subjective approach

The first part of the subjective analysis in the context of Article 17 OECD Model is to ascertain whether the person providing services is considered to be an entertainer[256] or a sportsperson, although a definition is not encompassed in said article.

Nonetheless, certain qualifying characteristics are common to them[257], such as the public[258] performance[259], either directly or indirectly via the media. The requirement of

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nature of the personal services income that it subjects to source taxation (….)". "In essence, my thesis recognizes that artistes and sportsmen are no longer the only "celebrities who are highly mobile and command enormous compensation for their services. Rather, in today´s winner-take-all-markets – to use the phrase coined by Robert Frank and Philip cook – "a new class of unknown celebrities" …. Have permeated law, journalism, consulting, medicine, investment, banking, corporate management, publishing, design, fashion ad even the hallowed halls of academe. I advocate that the source country should have the jurisdiction to tax the personal services income of all celebrities, known and unknown."

[254] It is tackled into detail in paragraph 2.2.7.6.

[255] See further, Sandler, D., *supra* n. 118, pp. 339. Moreover, see detailed analysis in paragraphs 2.2.6.1. 3.2.2.3. and 3.6.2.2.

[256] See further paragraph 2.2.7.6. related to the implementation in 2014 OECD Commentary on Article 17. As regards, the historical implementation of the term, see further, Molenaar, D, *supra* n.32, pp. 67-90. Parolini, A., *supra* n.77, pp. 377-440.

[257] Among others, Sandler, D., *supra* n. 128, pp. 203.

public performing leads to exclude certain categories of entertainers, since they do not carry out appearances in public. In this regard, those entertainers focused on producing works, instead of the performance itself, such painters[260], sculptors, composers and the like, are not caught under Article 17 OECD Model[261].

Likewise, those entertainers who are categorized as acting "behind the scenes"[262] are excluded from the application of Article 17 OECD Model. Although they are involved somehow in the performance, the key element is the technical skill, such as the choreographers, engineers and the like[263]. Among them, those working in the

[258] It is important to note that this characteristic has been maintained, even though the express referral to public performance was removed from Article 17 OECD Model in 1977, as well as from the related Commentary on said article since 1992. Moreover, the indirect referral to public exhibition was also removed from paragraph 9.1 of the OECD Commentary on Article 17 OECD Model from 2014. However, the Spanish version of said paragraph 9.1 OECD Commentary on Article 17 still includes it. See also paragraph 3.2.2.2.

[259] In particular, Spanish DGT reply to the binding consultation, issued in March 18, 2019 (V0572-19) as regards an orchestra conductor performing one concert in Spain. He received the income in exchange for the concert (not allowed to subsequent broadcast of the recorded performance) and the availability of marketing material for the marketing of the concert. The Spanish DGT remarked the predominant part of the performing characteristic, in accordance with paragraph 4 of the Commentary on Article 17 OECD Model. Therefore, it is considered that all income was directly connected to the performance in Spain.

As regards paragraph 2 of the Commentary on Article 17 OECD Model, India expressly included a Position on Article 17 whereby it reserves the right to include in the scope of the term entertainers, performing, as well as non-performing artists.

[260] Spanish DGT reply to the binding consultation, issued in May 23, 1990, whereby the sale of paintings carry out in Spain by a French tax resident painter did not qualify under the subjective scope of Article 17 OECD Model.

[261] Vogel, K., *supra* n. 13, pp. 965. The finished product of the activity becomes the relevant characteristic, as opposed to the public performance.

[262] Sandler, D., *supra* n. 128, pp. 222.

[263] In this regard, the exercise of characterization carried out by the Spanish tax authorities, through the binding rulings issued by the DGT are helpful in the context of interpreting the concept of entertainer in the international tax arena, as opposed to be considered performing "behind the scene". Among others, the reply to the binding ruling issued in June 25, 2014 (V1635-14) qualifying out of the scope of Article 17 OECD Model, the income received in relation to opera performances within a summer festival carried out in Spain, by French professionals. In particular, based on the application of paragraph 3 of the Commentary on Article 17 OECD Model, the stage manager, lighting designer, costume designer, stage designer and pianist for rehearsal purposes were considered not to be caught under Article 17 OECD Model. They qualified as clear-cut scenarios of "behind the scene" individuals. Other technical jobs not qualifying as entertainers are artistic directors (DGT 1373-02), dance teachers (DGT 1140-02), cameraman or sound technicians (DGT 0197-05).

Separately, the analysis as regards the composer was performed. The outcome was the same, but the application of Article 12 OECD Model was also encompassed for those cases in which the income received for the composer was carried out in exchange for the right to use the opera copyright. The composer would classify under those behind-the-scenes professionals in the grey area, being also out of the scope of Article 17 OECD Model, but existing more reasons to include them within Article 17 OECD Model.

administrative field and/or support staff are not included within the scope of Article 17 OECD Model, due to the lack of the entertainment element at all[264].

However, there are some of them in a grey area of interpretation as to whether they are considered to qualify as entertainers, such as a film director. On the one hand, they technically act behind the scenes and, if so, they must be out of the scope of Article 17 OECD Model. On the other hand, they are capable to provide more entertainment, receive more income and also being well-recognized than other entertainers appearing in public (supporting actors). Thus, it gives evidence of the lack of accuracy when adopting a pure subjective approach as regards entertainer or sportsperson categorizations.

It is important to note that paragraph 3 of the Commentary on Article 17 OECD Model relies on a non-exhaustive of qualifying entertainers *"(…) as an entertainer such as theatre, motion picture, radio or television artiste, or a musician, or as a sportsperson (…).*"[265] The subjective approach is complemented with the list of occupations not considered to be caught by Article 17 OECD Model *"(…) It does not extend to a visiting conference speaker (e.g. former politician who receives a fee for a speaking engagement), to a model performing as such (e.g. a model presenting clothes during a fashion show or photo session) rather than as an entertainer or to administrative or support staff (e.g. cameramen for a film, producers, film directors, choreographers, technical staff, road crew for a pop group, etc.)".*

The interesting conclusion is that there is no common rationale, whereby any of the above-mentioned jobs are excluded from Article 17 OECD Model. The variety is too extensive, by including in the same group of exclusion the road crew, models and visiting conference speakers[266].

Two examples, such as the **models and the disc-jockeys**, are analyzed into detail in order to scrutinize the OECD position in the Commentary on Article 17 OECD Model, when determining whether or not they qualify as entertainers. To this end, the approaches endorsed by national Courts and/or tax administrations of OECD member

[264] Vogel, Shannon, Doenberg and Van Raad, *supra* n. 76, pp. 12.

[265] In connection with a potential list of qualifying entertainers, see further Molenaar, *supra* n. 32, pp. 91-92 who carry out an extensive task of interpretation, by analyzing whether or not a relevant number of particular entertainers were included within the scope of Article 17 OECD Model.

[266] Sandler, D., *supra* n. 128, pp. 205 includes good examples in relation to conference speakers. Bill Clinton received in 2006 USD 2.5 million in exchange for 16 speeches in Canada. Likewise, the worldwide conferences provided by Al Gore regarding global warming.

States help to enrich and better understand whether the subjective approach suffices to determine the scope of Article 17 OECD Model.

In relation to **models**, the starting point is the position held by paragraph 3 of the OECD Commentary on Article 17 Model[267], whereby a model presenting clothes during a fashion show or photo session is not under entertainer´s definition[268].

In contrast to the approach endorsed by non-OECD member countries, such as Argentina, Malaysia and Brazil[269] which hold the viewpoint that model performing in a fashion show entails entertainment nature. Thus, the income arising from those fashion shows are included in Article 17 OECD Model, as opposed to the income from photo sessions which are not entertainment nature. The same approach was supported by the Belgian[270] and Dutch[271] Courts, by drawing a line between the activities involving a theatre performance when the fashion show takes place, as oppose to those carried out in photo sessions aimed at publications for catalogues.

The scope of models included in the entertainer´s definition of Article 17 OECD Model can be also extended, such as Turkey´s position[272], as OECD member country. It considers the models within the scope of Article 17 OECD Model, even if carrying out photo sessions[273].

From the Spanish domestic tax viewpoint, the Spanish tax authorities (DGT) position has evolved from considering them within the subjective scope of Article 17 OECD

[267] Paragraph 3 of the 2014 Commentary on Article 17 OECD Model, even though no additional reason is provided, in order to better understand the arguments supporting it.

[268] de los Santos, M., *Manual de Fiscalidad Internacional*, Chapter 20: La tributación de las rentas de artistas y deportistas, 4th Edition, IEF, 2016, pp. 704. This author leaves the door open for the models to be included in Article 17 OECD Model, when their performance entails an entertainment element.

[269] Position n. 4 of the Commentary on Article 17 OECD Model.

[270] REA/TPI (Arlon), in March 16, 2009, Decision N. 05/5497/A.

[271] *Gerechtshof Den Bosch*, enacted in November 14, 2002 (Decision N. 00/2974) whereby a photo model acting in United States was not considered an artist.

[272] Paragraph 15 of the Commentary on Article 17 OECD Model, including the observation from Turkey. "*With respect to the examples given in paragraph 3, Turkey considers that the activity of a model performing as such (e.g. a model or presenting clothes during a fashion show or a photo session) falls within the scope of this Article regarding the performance and appearance nature of this activity*. "

[273] In line with Turkish´s position, Sandler, D., *supra* n. 128, pp. 204 stated that the Non-Resident Advisory Services area of the Canadian Revenue Agency replied unofficially that scenarios involving a super model appearing in a live fashion show, in a television commercial and in a print advertisement that would take place in Canada, Article 17 would apply to the model as entertainer. Previously, the same author, in Sandler, D., *supra* n. 118, pp. 179-181, posed his doubts about considering the model when acting in a fashion show, as an entertainer, as opposed to clear-cut scenarios in which not such as acting in photo-shoots or in television commercials.

Model[274] towards excluding the models from the application of the mentioned Article[275]. It confirms the main characteristic of the subjective approach when dealing with models, among others. It leads to shortcomings of interpretation since the adoption of Article 17 OECD Model[276].

Hence, whether or not the models are included in the entertainers' definition of said OECD article is an outstanding problem, far to be solved. One example is the Austrian Administrative Supreme Court decision[277] confirming the application of article 17 OECD Model, in relation to the participation of an American female celebrity, in the course of a promotional event, based on the entertainment nature of her appearance, as opposed to a mere promotional event[278].

As regards the **DJs**, they are not mentioned in the Commentary on Article 17 OECD Model. Thus, national Court decisions, together with positions held by tax administrations, shed some light about the application of Article 17 OECD to this group of professionals.

Again, the main posed question is whether the entertainment element is of greater relevance than technical skills. In this regard, the extended list of entertainers drafted by Molenaar[279] includes them, among the qualifying entertainers[280], performing in large-scale and big-crowd dance festivals.

The position held from the Spanish tax administration seems to be more in line with the entertainment scope of the services rendered by the disc-jockeys[281]. It distinguishes

[274] DGT reply to the binding consultation, issued in July 13, 1995, in the context of American models hired for the purposes of advertising campaigns to be shoot in Spain.

[275] DGT reply to the binding consultation, issued in May 30, 2014, dealing with models who participated in TV commercials. It is important to note that the ruling's reply was based on paragraph 3 of the Commentary on Article 17 OECD Model before 2014 amendments were implemented.

[276] For example, the Italian Ministerial Order n.12/191, issued in June 16, 1980, which considered that models are under the scope of Article 17 OECD Model when providing services of artistic nature. See further Parolini, A., *supra* n.77, pp. 411.

[277] *Verwaltungsgerichtshof*, June 24, 2009, 2009/15/0090, based on the application of domestic Austrian law (Article 99.1.1, of 1988 EStG). Subsequently, *Verwaltungsgerichtshof*, June 30, 2015, 2013/15/0266, based on the application of Article 17 of Austria-United States double tax treaty.

[278] As regards the ambiguities from practices related to national tax administrations and courts. See further, Cordewener, A., *Klaus Vogel on Double tax Conventions*, Article 17, 4th Edition. The Hague: Kluwer Law. 2015, pp. 1325-1326.

[279] Molenaar, D., *supra*, n. 32, pp. 91-92.

[280] Although older Dutch Court cases involving disc jockeys considered that their performances were technical, based on the fact that they were in charge of putting records on a record player. *Gerechtstof Den Haag, September 24, 1981, BNB 1983/83.*

[281] Reply to binding consultations issued by the Spanish DGT in May 20, 2010 and in October 19, 2015. It is important to highlight the evolution of the analysis. In the second one, the Spanish tax administration do not even consider to carry out the analysis of checking whether or not the DJs were included in the

between the DJ and a sound technician, since the former entails drawing the attention of the audience, as well as the nature of the entertainment activity that carries out.

It is true that they have highly skilled capacities in the field of electronic instruments, IT and sound. However, they are mostly hired, due to their entertainment call to the audience when performing. Therefore, the Spanish DGT concluded by endorsing the application of the income arising from this group of professionals within Article 17 OECD Model.

The same ambiguities and qualifying shortcomings arise from sportspersons' [282] definition. The OECD Committee took the same approach when tackling sportspersons by not including any definition, neither in the Article itself nor in the related Commentary on Article 17 OECD Model. Although, certain interpretation rules are included in the Commentary, such as not limiting them to those practicing athletic events and encompassing more passive sporting activities[283], such as bridge and chess players, insofar those activities encompass an entertainment character.

Therefore, the main conclusion when adopting the subjective approach when dealing with Article 17 OECD Model is that there is a high degree of uncertainty, when both groups of qualifying taxpayers, entertainers and sportspersons are involved. Whenever the particular individual is out of the non-exhaustive list, provided in the OECD Commentary on Article 17[284], the potential scenarios of double taxation or non-taxation may arise commensurate with the asymmetries when qualifying them within the scope of Article 17 OECD Model.

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definition of entertainer. It directly included them, by replying to other further questions arising from the application of Article 17 OECD Model to the case at hand.

[282] Tetlak, K., and Roeleveld, J., *supra* n. 190; West, C., *supra* n. 183, pp. 40-42; Zoubek, J., *Taxation of Artistes and Sportsmen in International Tax Law*, Chapter: Notion of Sportsmen in art. 17 OECD Model, Eds: Loukota, W. and Stefaner M., Linde. 2007), pp. 35-54.; Cordewener, supra n. 278, pp. 1329-1333; Tetlak, K. and Tenore, M., ITEG comments on (selected) 2014 Updates to the Commentary on Art. 17 OECD Model Tax Convention, Section: Definition of entertainers and sportspersons under Article 17 of the OECD Model (2014) in *Global Sports Law and Taxation Reports*, 2015 (March), Vol. 6, No. 1.

[283] The OECD position differs from the Valued Added Tax approach held in the UE Directive 2006/112/CE, whereby the Tribunal of Justice of the European Union stated in The English Bridge Union case, C-90/16. Accordingly, bridge players cannot benefit from the VAT exemption granted to sporting activities. It is based on the fact that only sport activities involving relevant physical effort may benefit from it, as opposed to those of mere entertainment character, such as the bridge.

[284] The degree of uncertainty may lead to difficulties of characterization. For instance, the French Conseil d'État decision issued in May 16, 2006 concerning the analysis of the bullfighters/toreros who performed in Nimes, in order to ascertain their classification under the artiste concept. See further, Vogel, K., Tax Treaty News. Treaty Monitor. *Bulletin for International Fiscal Documentation*, IBFD. June 2007, pp. 222-223.

3.2.2. Objective approach

3.2.2.1. Entertainment element

In accordance with previous paragraphs, the main conclusion when tackling Article 17 OECD Model from the subjective perspective, leads to the taxpayer to a high degree of uncertainty. It has been proved throughout the years of conflicts of characterizations when dealing with specific type of professionals, i.e. models. Moreover, there exists a lack of guidance in the Commentary on Article 17 OECD Model from the subjective approach. Therefore, another alternative solution is requested, in order to ease the taxation of the entertainers and sportspersons.

In this regard, the first step is already taken by Article 17 OECD Model and its related Commentary. Actually, the subjective and objective approaches of Article 17 OECD Model are connected, since it is required that the income must be derived by an entertainer or sportsperson from "*his personal activities as such*". Hence, the lack of definition of entertainers and sportspersons is replaced by the objective characteristics of the income obtained by these qualifying individuals.

So far, the Commentary on Article 17 OECD Model already describes that the key characteristics of an entertainer and/or sportsperson, by giving preference to the objective approach, over a subjective definition or list of entertainers and sportspersons. In particular, the main characteristics are the following:

- His/her income arises from a performance. In accordance with the Commentary on Article 17 OECD Model, the performing nature is one of the key elements when determining its application. Again, there is a lack of definition of this term, but its relevance is far from any doubt.
- The performance must be in public, either directly or indirectly via the media.
- Personal engagement of his/her activities.
- Performance must be of entertainment or sport character.

To sum up, an individual qualifying as entertainer or sportsperson must carry out a public entertaining or sport performance in the country of source. From that performance with personal involvement, the closely connected sourced income may be subject to tax in accordance with Article 17 OECD Model.

However, the main shortcomings, when applying Article 17 OECD Model, are the lack of definition of the main terms/references, such as entertainer and sportsperson, performance, entertainment nature and the like. Therefore, Article 3.2 of the OECD Model[285] becomes applicable, when facing undefined treaty concepts.

It reads as follows "*As regards the application of the Convention at any time by a Contracting State, any term not defined therein shall, unless the context otherwise requires, have the meaning that it has at the time under the law of that State for the purpose of the taxes to which the Convention applies, any meaning under the applicable tax laws of the State prevailing over a meaning given to the term under the laws of that State*".

There are two main conclusions arising from this specific double tax treaty rule. On the one hand, the resort to the definition included in the domestic law of the Contracting States, applying the particular double tax convention. On the other hand, it must be taken into account the threshold to be respected by domestic definitions, which are determined by the rules when the context otherwise requires.

As regards the resort to the definitions contained in domestic laws, the author refers to the analysis of Spanish domestic law in Chapter 4. It is of great value, since it is also a touchstone, in order to also ascertain the accuracy of the objective approach versus subjective viewpoint. Said analysis is carried out from a domestic perspective, in relation to undefined terms of Article 17 OECD Model.

Furthermore, it is crucial to compile and analyze any rule addressing the context limits, to correctly shape the scope of Article 17 OECD Model, prior to proceed with any domestic reference. Additionally, it disables approaches endorsed by national tax administrations or courts, whereby far-reaching force of attraction approaches of Article 17 OECD Model are endorsed. As a result, when the context of Article 17 OECD Model is respected, the conflicts of qualification among the countries applying it in practice are reduced, accordingly.

[285] Tetlak, K., and Roeleveld, J., *supra* n. 190, section 5.1.1.1. includes this tax issue.

In this regard, paragraph 3 of the Commentary on Article 17 OECD Model states that "*The Article may also apply to income received from activities which involve a political, social, religious or charitable nature, if an* ***entertainment character*** *is present*[286]".

The starting point is an expressly statement of intent, by looking for finding out support in the objective character, due to the shortcomings arising from a unique subjective perspective.

Paragraph 4 of the same Commentary continues shedding some light, in order to help interpreting what activities are under Article 17 OECD Model[287]. For the purposes of being included in Article 17 OECD Model the activities must be **predominantly of a performing nature**[288].

Thus, the only way out from the situation arising from the paragraph 3 of the Commentary on Article 17 of OECD Model is again to check the nature of the activities carried out[289], in other words, the objective scope of Article 17 OECD Model.

It is reinforced by the same idea when dealing with the case of sportspersons, since the entertainment character is again the relevant characteristic alongside the common sporting ones[290] to qualify under Article 17 OECD Model. Thus, it expands the scope to not only physical sports, but also embracing mental sports, such as bridge, chess, poker and the like.

However, there exists a position held by Vogel[291] and accepted by most of tax scholars[292], whereby "*the artistic quality of the performance or performer is just as irrelevant as is the question of whether the performance is entertaining*".

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[286] The same approach was already held in 1987 OECD Report, *supra* n. 82, paragraph 68 "*There is however a variety of intermediate situations where say, appearance on television or in public could generally be seen as "acting" for entertainment purpose, thereby falling under Article 17.*"

[287] Although it limits the scope to scenarios in which the individual directs a show, acts on it, or he/she is a producer and also takes a role in it.

[288] Tetlak, K., and Roeleveld, J., *supra* n. 190, section 5.1.1.2.1. They consider that the key determinant characteristic is a performance activity, to be ascertained on case-by-case basis, in order to be subject to Article 17 OECD Model. Also, they consider that the performance must have an entertainment quality, i.e. relaxation, amusement, distraction or the like.

[289] In order to ascertain the correct application, it expressly refers "*to review the overall balance of the activities of the person concerned*", when the person is to be in the "*grey area*", about being included in the subjective scope of Article 17 OECD Model.

[290] Zoubek, J., *supra* n. 282, pp. 35-54. This author understands that by emphasizing the entertainment character of the activities over the sporting one, it is possible to achieve uniform interpretation, thereby avoiding diverse characterizations from domestic interpretations.

[291] Vogel, K., *supra* n. 13, pp. 976. Comment 13.c.

In this regard, Tetlak and Roeleveld[293] stated that the emphasis in order to be considered an entertainer under Article 17 OECD Model resides in determining whether "*he or she is the direct or indirect reason why the audience is listening to or watching the performance. Thus the activities covered under Article 17 have to be available for the people to watch or listen (live or recorded), regardless of the artistic or entertainment level*." Again, vast majority of the tax commentators supported it[294].

Moreover, Molenaar[295] softened this position when explained this issue in relation to 1987 OECD Report, by stating that "*The 1987 Report did not say anything about the artistic or entertainment level of the performance. For the scope of Article 17, a performance must be artistic or entertaining and need to add certain value, but no objective or subjective artistic level has to be met*". Therefore, the entertainment link to the performance was also a must.

In the author´s opinion, it is important that highlighting the requirement of the public performance must not jeopardize the main element of it, which is the entertainment character. In addition, it may be accepted that the level of entertainment is not primary, insofar the entertainment element exists as such, in order to qualify under Article 17 OECD Model. Therefore, a question of qualifying the level of entertainment must not affect its existence as requirement, in any scenario dealing with Article 17 OECD Model, either with sportspersons or entertainers themselves.

Furthermore, the entertainment element must become the yardstick for the purposes of the application of Article 17 OECD Model. It is supported by the OECD in the 1987 OECD Report[296], the Commentary on Article 17 OECD Model, as well as the position of the tax scholars who have evolved to recognize its primacy above other existing elements. In this regard, it is very illustrative that Cordewener[297] included the entertainment as *"(…) an essential requirement for the application of Article 17 OECD and UN MC that the person concerned ("artiste, or …musician") must, either directly (e.g., on a stage in a theatre or music hall) or indirectly (through the media), address an audience with a performance of an entertaining character*".

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[292] Among others, Tetlak, K., and Tenore, M., *supra* n. 282 section and De los Santos, M., *supra* n. 268, pp. 703.
[293] Tetlak, K., and Tenore, M., *supra* n. 282.
[294] Molenaar, D., *supra* n. 32, pp. 72; Kreisl, R., *Taxation of Artistes and Sportsmen in International Tax Law*, Chapter: Treatment of Artistic Income where there is no Public Performance, Eds: Loukota, W. and Stefaner M., Linde. pp. 139-158.
[295] Molenaar, D., *supra* n. 32, pp. 75.
[296] 1987 OECD Report, *supra* n. 82 at paragraphs 47, 68 and 71.
[297] Cordewener, A., *supra* n. 278, pp. 1322. The same approach is endorsed by Tetlak, K. and Roeleveld, J., *supra* n. 190, section 5.1.1.

Moreover, it is clarified that other qualities of the performance are compatible, such as educational, advertisement, as long as they are subordinated to the entertainment. This line of reasoning is the underlying idea held by the Austrian Supreme Court when supported the application of Article 17 OECD Model to the well-known US celebrity acting in the promotion event of a drink[298]. However, it is not an easy task to draw a line and, if so, decide when the entertainment character is considered to be over the other concurrent elements[299].

3.2.2.2. Public performance vs. Entertainment element

The author supports that the essential element to switch on the application of Article 17 OECD Model is the entertainment. Its relevance applies over the other two elements considered by the courts and doctrine: public and performance. In other words, they are also considered to be important elements, insofar they support and accompany the existence of an entertainment event. Therefore, they must be subordinated to the entertainment nature of the service provided.

As regards the **public characteristic** which was considered to be requested by implicitly since 1992[300]. However, the analysis to the public element was included again in the OECD Update of the Commentary on Article 17 OECD Model since 2014[301]. In particular, its paragraph 9.1, fourth indent, contains the reference to the fact that said OECD Article still applies to preparation, such as rehearsal and training, regardless of whether they are not related to specific public performances. Therefore, the Commentary on Article 17 OECD Model is the main supporting reason, to open de door to the interpretation whereby said OECD Article still applies, even if a public performance does not take place[302]. In this regard, it provides the example of the remuneration received with respect to the participation in a pre-season training camp.

Hence, it is clear that the application of Article 17 OECD Model has endorsed a far-reaching approach, not being limited by the need of a public element. The author´s position in this regard, resides in the middle term. Not all training activities must fall

[298] See further, *supra* n. 277.
[299] Sandler, D., *supra* n. 128, pp. 205.
[300] See further paragraph 3.2.2.2.
[301] See further paragraph 2.2.7.6.
[302] Cordewener, A., *supra* n. 278, pp. 1352. This author states his opposite position and asks for reconsideration of the Commentary of Article 17 OECD Model related to income arising from rehearsal activities.

within Article 17 OECD Model. However, those scenarios benefiting from an entertainment character by themselves, they are caught under the scope of said OECD Article. It is important to note that those might be exceptional cases, since in most of them may be linked to final performances and lacking of entertainment character by themselves.

Thus, the application of Article 17 OECD Model to scenarios lacking of public performance as such, only can be accepted under exceptional scenarios. For example, training activities of a football team during the pre-season, which takes place in a foreign country, insofar the entertainment element is present. Said training activities may also entail the payment of sponsorship rights for showing a trademark in the football T-shirts and for the broadcasting rights. Another example would entail the payment in exchange for rehearsal activities connected to a final performance which is finally cancelled.

In these exceptional cases, the training or rehearsal activities become entertainment performances by themselves, even though the public element under a narrow interpretation is not met. However, the public element must be considered to be linked to a performance, as a general rule, despite the current draft of paragraph 9.1 of the Commentary on Article 17 OECD Model.

On the contrary, the **performance** must exist in every single scenario. Nonetheless, it must be instrumental to the entertainment character. Therefore, it leads to advocate for a broader interpretation of the term, whereby the term must be more flexible. On the one hand, when dealing with virtual scenarios or when no direct public performances take place, in order to understand where the performance actually take places. On the other hand, by giving more weight to the entertainment character over the performance, and, if so, by including within Article 17 OECD Model those professionals who are instrumental to the performance of entertainment character. For example, music composers, coaches, referees, film directors and the like. Although they are not performing by themselves, they play a key role in providing an entertainment character to the performance.

As regards the **allocation into the place of performance**, the value of this element must be adapted to the current trends, where the indirect or virtual performances are as common as the classical ones. In the latter, the performer and the audience are together in the same place and, if so, it enables to determine the source taxation within the same country. As opposed to the virtual performance, where there are various

potential countries of performance, since it may be carried out in a country whilst being available to the public in different countries.

In this regard, the author considers that the **place of the performance is where the entertainment arises from the audience**. In other words, until the point in time that the performance is consumed by the audience, there is no entertainment element at all. It is based on the idea of a broad interpretation of the performance term, which does not entail a unique event, and, if so, it enables to be repeatable.

In fact, it makes sense, by taking into account new forms of entertainment or sport, such as esports[303]. In particular, the offline esports tournaments follow the approach of classical performances, where the performer and audience match in the same location. As regards online tournaments, the involved countries where the organizing company is placed, the country/ies of the participating players and the computer sever location led to practical difficulties in order to enforce the taxation at source, granted under Article 17 OECD Model.

A critical example is a motion picture, when determining the source country where the performance takes place and the corresponding allocation taxing rights. Two main alternatives exist, the country where the shoot is carried out, as opposed to the country where it is subsequently played. It is far from any doubt, that the filming is neither a performance nor a public one. It only remains the link to the physical presence of the qualifying individuals participating in the movie. However, it seems to consist of a weak connecting point to allocate the source taxation in this country. Conversely, the State where the motion picture is played adds the entertainment element by making available to the audience.

Therefore, a uniform approach must be granted to all kind of performances, by taking into account where the entertainment element arises. It can be either when the performer and audience are located in the same place (classical performance) or where the audience is located, in case of exercising the activity in a country, being different to the one where the final product is thereafter made available to the audience[304].

[303] Molenaar, D., & van Overbeek, S., *The emergence of Esports, Bulletin for International Taxation (Volume 73),* n.2, 2019, IBFD Journals.

[304] Against this reasoning, Kreisl, *supra* n. 294, pp. 139-158. Likewise, Cordewener, A., *supra* n. 278, pp. 1346, relies on the classical criterion of physical presence, in order to disregard the importance of the place where the final product is thereafter made public. This author considers it as broader interpretation of Article 17 OECD Model. This position is also endorsed by the Austrian and German tax administrations.

Moreover, this approach would be in line of ascertaining a fair taxation at the source country, by avoiding tax planning tools, such as looking for low-tax jurisdictions where the filming, recording would be carried out. It seems more consistent from tax policy perspective to ensure the taxation where the audience is placed, even though practical shortcomings [305] may be faced, such as the apportionment among the involved countries[306], as well as the interaction with Article 12 OECD Model[307].

The fact of granting priority to the entertainment element over the performance also leads to broaden the scope of the professionals included within Article 17 OECD Model. In particular, those considered to be classified as "behind the scenes" within the grey area of interpretation. For example, the film director[308], who despite the fact of not performing live or directly, his/her skills are essential and instrumental to the entertainment character of the motion picture. The same rationale applies to the coach of sport teams[309], who are not performing directly, but the entertainment role is equal to the one carried out by an orchestra conductor. Therefore, the objective scope of Article 17 OECD Model, based on the entertainment nature of the performance, enables to include more professionals within Article 17 OECD Model. In case of not endorsing this approach, they would not fall within said OECD Article, by applying a narrow and formalistic approach, in accordance with the widespread position, endorsed by the Commentary on Article 17 OECD Model[310] and tax scholars[311].

[305] Against this position, Cordewener, A., *Taxation of Entertainers and Sportspersons Performing Abroad*, Chapter 6: Tax Treaty Issues Related to Qualification, Allocation and Apportionment of Income Derived by Entertainers and Sportspersons. Edited by Prof. Guglielmo Maisto. EC and International Tax Law Series. Volume 13. IBFD. 2016, pp. 105-136. pp. 114 "*This makes the subsequent step of linking certain items of income with the specific place of an individual performance much easier and predictable*."

[306] See further, paragraph 3.5.

[307] See further, paragraphs 3.4.2.1., 3.4.2.2. and 3.4.2.5.

[308] IFA 1995, *Taxation of Non-resident Entertainers, 49th IFA Congress, Seminar D, Cannes., Cahiers de droit fiscal international*, IFA Congress Seminar Series, Vol. 20d (The Hague: Kluwer Law International, 1995). pp. 14. "*What it is surprising are those individuals involved in the entertainment industry to which the provision does not appear to apply. Film directors, are often more well-known than the actors they direct, yet directors are excluded from the provision*".

[309] Tetlak, K. And Roeleveld, J., *supra* n. 190, section 5.1.2.2.4. hold an opposite view. *"Although they use sports skills, fitness and expertise, and sometimes even take part of the performance, they do not appear in the role of sportspersons and do no fall within the personal scope of article 17 of the OECD Model. Coaching activities contain no element of competition, which is crucial in athletic activities*. "

[310] Paragraph 3 of the Commentary on Article 17 OECD Model states that "*(…) it does not extend to (…) or to administrative or support staff (e.g. cameramen for a film, producers, film directors, choreographers, technical stall, road crew for a pop group, etc.). In between there is a grey area where it is necessary to review the overall balance of the activities of the person concerned*."

[311] Among others, Tetlak, K. and Roeleveld, J., *supra* n. 190, section 5.1.1. "*Article 17 of the OECD Model does not extend to (…) Professionals of an artistic character but lacking the performance element, for example opera directors, also fall outside of the scope of this provision*".

An illustrative example to conclude as regards the benefits when endorsing the objective scope, based on the grounds of the entertainment element, leads to analyze the Canadian court case of *Thomas F. Cheek v. Her Majesty the Queen*[312]. The Canadian court ruled out that Thomas Cheek, a US tax resident, who carried out the radio play-by-play broadcasting of the baseball games of Toronto Blue Jays, was not a "radio artiste". Accordingly, he would not be fall within the scope of Article XVI of the US-Canada double tax treaty (mirroring Article 17 OECD, with certain exceptions), albeit the entertainment element was considered to exist by the Canadian court[313].

In this regard, the subjective approach prevailed, based on a formalistic viewpoint[314], by leaving aside the primary element, the entertainment character of the activity carried out. However, in accordance with the author´s view, those professionals who are instrumental to the performances and provide the entertainment character into them, must be included within Article 17 OECD Model. All this, through adopting a broader meaning of the term performance from an objective perspective. If not, it would lead to the misunderstanding of not applying said OECD Article to professionals carrying out activities of entertainment nature, such as the radio play-by-play broadcaster.

As a general rule, this type of professionals providing for entertainment elements into the performance must be distinguished from those who highlighted based on their technical, administrative or support role. The key point resides that all those included in the latter carry out activities not providing entertainment nature, such as the road crew for a rock group, technical staff and the like. Thus, they must be out of the scope of Article 17 OECD Model.

[312] See further, *supra* n. 134.

[313] "*It is, therefore, misleading for the Appellant to describe himself as a sport broadcast journalist because the "broadcast" element of his particular work (a play-by-play description of a game as it is played) bring him within the entertainment are of professional baseball (…)*".

[314] In this regard, Express Answer Services (EAS) of the Austrian Tax Authorities issued in July 24, 2020 EAS 3425 (2020), whereby a E-Sportsperson was considered to be included within the definition of entertainer or athlete under Article 17 of Austria-United States double tax treaty. The novelty of the reply resided on the position to include them under Article 17. In particular, they determined that the purpose of the performance was of entertainment, as well as the audience was set by the public at the venue, intertwined with the online broadcasting.
Also, Tetlak, C, and Tenore, M., *supra* n. 282.

3.2.2.3. Entertainment Income

Based on the conclusions stated in previous paragraphs, the definition of the entertainment term becomes crucial, in order to support the approach of entertainment's income under the objective viewpoint (laid down in below paragraphs). However, there are no references or definitions of said term in Article 17 OECD Model or the related Commentary. Additionally, from the domestic tax perspective[315], there is not a well-developed definition of said term for the purposes of international tax interpretation within the context of Article 3.2 OECD Model.

Moreover, the definition of the term via English dictionaries can be of assistance. For example, the Oxford English Dictionary[316] gives Latin and French origins for the word, including inter (among) + tenir (to hold) as derivations, giving translations of "to hold mutually" or "to hold intertwined" and "to engage, keep occupied, the attention thoughts or time (of a person)". It also provides words like "merry-making", "pleasure", "delight", as well as "to receive as a guest and show hospitality to"[317]. Therefore, any activity whose target consists of providing the above mentioned elements to the audience must be included within Article 17 OECD Model and, if so, it also allows for the application of the taxing rights from the country of source.

Despite the fact that a lack of definition of entertainment from tax treaty perspective, it has been proved in above paragraphs that the entertainment/objective entails more pros than cons, in comparison to the application from its subjective viewpoint[318]. Hence, it should not undermine the total and accurate effectiveness of the objective approach versus the subjective one.

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[315] For example, the US domestic tax definition of "entertainment" within Section 18 of the US Income Tax Act 1967, prior to amendment by Act 761 of 2014. "*Entertainment" includes – (a) the provision of food, drink, recreation or hospitality of any kind; or (b) the provision of accommodation or travel in connection with or for the purpose of facilitating entertainment of the kind mentioned in paragraph (a), by a person or an employee of his in connection with a trade or business carried on by that person*." It is referred to the deductibility of expenses for US businesspersons, when distinguishing between entertainment expenses and promotional ones. Thus, it is not useful for the purposes of interpreting Article 17 OECD Model.
Other countries, for instance India, Russia Malta, South Africa, Turkey, United Kingdom included into their tax system, an indirect tax referred to as entertainment tax or amusement tax, applicable to any kind of commercial entertainment.

[316] Oxford University Press, 1971, Vol 1 pp. 213-214.

[317] See reference about the artiste term in Molenaar, D., *supra* n. 32, pp. 68.

[318] In line with Tetlak, K., and Roeleveld, J, *supra* n. 190, section 5.1.1.2.3. "*The decisive factor for including income under article 17 of the OECD Model is not the profession of the taxpayer or whether he qualifies as an artiste but whether the income is derived in the capacity of an entertainer, which is a broad and dynamic concept, dependent on the circumstance of the case and the evolving definition of entertainment".* (Emphasis added by the author).

In particular, when taking into account that the subjective approach, following the title of Article 17 OECD Model: entertainers and sportspersons, it leads to the final outcome of analyzing the type of activity[319]. In other words, there is no added value by endorsing the subjective approach, when tackling characterization issues within the context of Article 17 OECD Model, since it finally leads to the unique option of scrutinizing the objective approach.

The proposed objective approach of tackling the taxation of Article 17 OECD Model from the entertainment income's viewpoint is in line with most of OECD items of income. They deal with the type of income, as opposed to specific group of taxpayers. It must be highlighted that one of the main underlying reasons to include a specific provision, such as Article 17 OECD Model, was the harmful tax climate[320] surrounding entertainers and sportspersons, based on the benefits achieved through aggressive tax planning structures[321].

However, over the years it has been proved that this characteristic is not only link to this specific group. It seems that the primary reason to keep this tailored-drafted provision is much more of **reputational risk** than anything else. The top star entertainers and sportspersons benefit from a worldwide recognition and appeal with relevant consequences in the audience, including the media. The national tax authorities are in a difficult position, every time that a tax scandal arises involving this specific group of taxpayers[322]. Accordingly, it does not make sense to adopt formalistic and narrow approach as to whether the professionals are included or not within the

[319] Zoubek, J., *supra* n. 282, pp. 54. "*In view of the fact that legal certainty required legal rules to be clear and precis, it would be appropriate to support the interpretation of the new term "Entertainers" by i) the specific criteria to qualify as entertainer an, and ii) the non-exhaustive list of activities covered by Article 17. The explicit determination of the criteria as well as such a list of activities would serve the Contracting States as well as the taxpayers by allowing them too easily determined whether a particular activity falls within the scope of Article 17 or not."* (Emphasis added by the author). These statements must be put into context, since they were released before the implementation of the entertainer term by 2014 OECD Update of the Commentary on Article 17 OECD Model.

[320] Sandler, D., *supra* n. 118, pp. 339. "*Persons involved in the entertainment and sporting industry (…) are well-known and receive constant media attention. The most famous can obtain substantial profits during very shorts periods of time. The media is often quick to point out the significant fortunes that such individuals can amass and also the relatively insignificant taxes they may pay (or, more precisely the amount of taxes such personalities avoid paying) If this impression is held by the general body of taxpayers – that there is a category of taxpayers who can avoid paying taxes – it can be harmful to the general tax climate*".

[321] 1987 OECD Report, *supra* n. 82 at paragraphs 6-8. "(…) *sophisticated tax avoidance schemes, many involving the use of tax havens, are frequently employed by top-ranking artistes and athletes*".

[322] See further paragraph 3.1.3. of this Chapter.

subjective definition of entertainers or sportspersons, when the consequences into the audience are linked to activities with a high degree of entertainment.

In this regard, Sandler[323] advocated for better targeting of Article 17 OECD Model. The underlying idea of reshaping scope of said provision was two-fold. On the one hand, it was considered over-inclusive when dealing. As a result, this tax author requested for the application of a "*de minimis*" rule, similar to the one included in the US Model Convetion. It has been already accepted in the 2014 OECD Commentary on Article 17 OECD Model[324], by including a recommendation to enforce it in the particular double tax treaties, when entertainers and sportspersons derive only low amounts (15.000 IMF Special Drawing Rights)[325] from sourced performances.

On the other hand, the scope was under-inclusive when defining the subjective scope of persons included in Article 17 OECD Model. He invokes the use of the term "celebrities"[326]. However, it leads to the same, although reduced, shortcomings when trying to solve the situations arising from said tax treaty provision, via the subjective approach. In this regard, his proposed solution to avoid defining the term celebrity was to link it to a proxy status consisting of the ability to command a significant amount money of USD 100.000 on an annual basis.

The step forward carried out by the author to reshape Article 17 OECD Model as an item of income linked to an activity (entertainment income), as opposed to the current subjective scope (entertainers and sportspersons) provides for more certainty, accurateness, precision and accommodation with the remaining types of income included in the OECD Model.

Nonetheless, the qualification problems still remain to exist when the type of income interact with characteristics of other OECD Model articles, such as Article 7 or 12, among others. In this regard, paragraph 3.4 analyzes the main international tax rules

[323] Sandler, D., *supra* n. 128, pp. 239-244.
[324] In particular, paragraphs 10.1 to 10.4.
[325] See further Sandler, D., *supra* n. 128, pp. 239-244. This author proposed a threshold of USD 100,000.
[326] Sandler, D., *supra* n. 128, pp. 239. *"The term "celebrity" would certainly include well-known artistes and sportsmen; it would also encompass – and should encompass for these purposes – other, such as well-known film directors, supermodels, individuals on the "lecture circuit" (such as former politicians) and even televangelists. However, I believe that it should extend to any individual who can command a large amount of money for personal services, including the "unknown celebrities" (…) Rather than attempt to define the term "celebrity" – which will necessarily cause interpretation issues at the margin- it would be simpler (and, in my view, justifiable) to adopt a "proxy" for celebrity status and apply it to all individuals".*

and the correct approach to better carry out the decision-making process of qualification.

In addition, the previous mentioned allocation rule[327], based on the grounds that allocation of taxing rights must be determined in accordance with the country where the audience consumes the entertainment element. Hence, it would have a great impact in the apportionment tax rules[328] to be applied, since more States may be involved as potential source countries of entertainment income within the re-shaping of Article 17 OECD Model.

3.3 Allocation of international entertainment activities

3.3.1. Introduction

The target of this paragraph is to support the position whereby too much consideration is rendered to entertainers and sportspeople as such and not to the type of income. Furthermore, the focus on the negative consequences arising from this position is analyzed in the context of income allocation and apportionment. The latter occurs when various jurisdictions are involved related to the international performances of entertainers and sportspersons.

In this sense, three main questions arise when dealing the income related to international performances of those entertainers and sportspersons.

Firstly, it must be determined **what** items of income of entertainment character can be obtained by them. It is essential to recall the step forward by linking to the entertainment's condition as primary characteristic to be caught under article 17 OECD Model. Due to its relevance and worth to be analysed into detail, paragraph 3.4 is entirely devoted to this end.

Secondly, the allocation of those items of income of entertainment character within the country of residency and the country of source. In other words, **where** the taxing rights involving entertainment activities must be allocated.

[327] In paragraph 3.2.2.2.
[328] See further paragraph 3.5.

Finally, in case of having various sourced countries of entertainment income, **how** said income must be split among them, by including a fair and reasonable apportionment method.

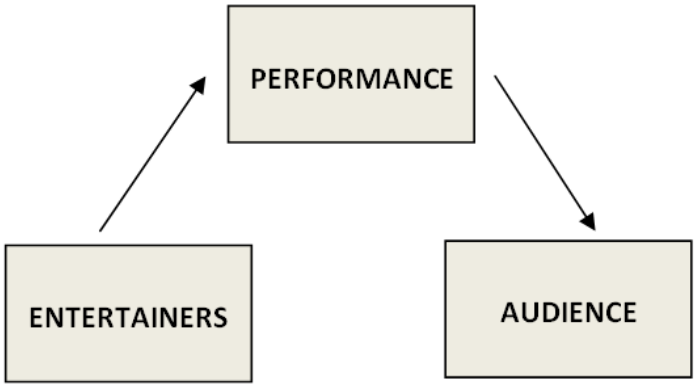
Hence, minimum two countries may be involved:

- The country of tax residency of the entertainer or sportsperson.

- The jurisdiction/s where the performance take/s place.

- Alternatively, the State/s where the entertainment event is/are at the disposal of the audience or the outcome of it is/are exploited, regardless of whether it/they match/s with the performance State or not.

POTENTIAL INVOLVED COUNTRIES



Finally, it is important to note that this objective-orientated approach when tackling the entertainment income looks for limiting the force of attraction of Article 17 OECD Model. This is based on the adverse effects that may arise when said force of attraction is unlimited exercised[329], leading to the qualification of any item of income obtained by entertainers and sportspersons under the scope of Article 17 OECD Model.

[329] See further paragraph 3.3.3.

3.3.2. Allocation

As regards the allocation of the taxing rights, there are two main potential alternatives under the objective approach. The **performance's approach**, whereby the performance is the touchstone for income allocation purposes, irrespective of where the final product is available to the audience[330]. As opposed to the **entertainment's approach** whereby the yardstick resides in determining where the entertainment character to the performance is included through its exploitation by the audience[331].

The former's position is based on the Commentary on Article 15 OECD Model[332]. The main link is where the activity is actually exercised, by **being physically present** when carrying out the performing activities, in the case of the entertainers and sportspersons[333]. In this regard, the OECD Commentary on Article 17, paragraph 9.2, second intend, expressly refers to this position: "*As indicated in paragraph 1 of the Commentary on Article 15, employment is exercised where the employee is physically present when performing the activities for which the employment remuneration is paid".*

Furthermore, in case of professionals not being under employee status, also the place of where the activities are exercised is the key element[334]. "*An element of income that is closely connected with specific activities exercised by the entertainer and sportsperson in a State (…) will be considered to be derived from the activities exercised in that State.*"

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[330] This is the position held by Spanish tax authorities when analysing the potential taxing rights of Spain when the scenario involves a Spanish company, but the entertainers are not tax residents in Spanish territory and the performance takes place overseas. This approach involves not granting any taxing rights to Spain, even though the company is tax resident there. Among others, Spanish reply to binding consultations issued in June 10, 2020, CV 1887-20. Another example is the reply to the binding consultation enacted by Spanish DGT in June 16, 2020, CV 1961-20 whereby the prize granted to a South African company in a Spanish film festival is not subject to tax in Spain. Thus, when no performance is carried out in Spain, there is no right to tax as source country.

[331] See further paragraph 3.2.2.2.

[332] Paragraph 1 "*Paragraph 1 establishes the general rule as to the taxation of income from employment (other than pensions), namely, that such income is taxable in the State where the employment is actually exercised. The issue of whether or not services are provided in the exercise of an employment may sometimes give rise to difficulties which are discussed in paragraph 8.1 ff. Employment is exercised in the place where the employee is physically present when performing the activities for which the employment income is paid. One consequence of this would be that a resident of a Contracting State who derived remuneration, in respect of an employment, from sources in the other State could not be taxed in that other State in respect of that remuneration merely because the results of this work were exploited in that other State*."

[333] See further, Kreisl, R., *supra* n. 294, pp. 140. Also, Cordewener, A., *supra* n. 278, pp. 1345-1346.

[334] Paragraph 9.2, first intend. It must be noted that both references to the country where the activities are exercised are within the context of general principles for apportionment purposes.

Nonetheless, the entertainment's approach held by the author considers that the key element takes place where the performing activities are available to the audience. The latter provides for the determining factor of entertainment character.

In this regard, even though both positions are based on objective approaches, only the latter avoids the shortcomings that may arise from the existing applicable subjective approach of Article 17 OECD Model. This is due to the fact that the performance-orientated approach needs from the entertainer and sportsperson's subjective definitions, in order to determine the scope of the activities to be caught under Article 17 OECD Model. In contrast to the entertainment's income approach, whereby the objective's approach suffices to shape the scope of activities under Article 17 OECD Model. This pivotal character to be included within Article 17 OECD Model resides in the point in time that the performance is available to the audience for entertainment purposes, regardless of whether or not the particular individual qualifies under the entertainer and/or sportsperson definitions, respectively.

In this sense, clear-cut examples are those involving YouTubers or Instagramers[335], representing twenty-first celebrities who are followed by millions of individuals. Moreover, they qualify among those earning relevant sums of income in limited periods of time, as well as benefiting from a reputational risk and influence over the public, as entertainers and sportspersons. Nonetheless, YouTubers or Instagramers are not formally covered under the subjective definitions of entertainers and sportspersons of Article 17 OECD Model[336]. Thus, they may be entitled to benefit from the more beneficial double tax treaty rule of Article 7 OECD, by being subject to tax in the source country, only where the permanent establishment would be considered to exist.

In addition, the physical presence criterion helps to choose where to record their posts and also to determine the most beneficial country of tax residency. Accordingly, their posts must give evidence that they are not actually residing in other countries than those stated to be the official ones[337].

[335] See further, García Novoa, C., La tributación de los "Youtubers". Nuevas profesiones en viejos odres fiscales. *Blog: Taxlandia*. January 26, 2021.

[336] For Spanish tax purposes, it has been already recognised as business for income tax, VAT and local economic activity purposes through the replies to binding consultations issued by the Spanish DGT in March 14, 2016 (CV 0992-16) and January 18, 2019 (CV 0117-2019), respectively.

[337] Spanish tax authorities have included in 2021 Tax Audit plan in which specifically includes the target of those taxpayers who state having tax residency status in foreign countries which are fictitious in order to avoid Spanish direct taxes. The use of Big Data is explicitly mentioned. For example, in Shakira´s case, the Spanish tax authorities took advantage of her posts in social media, in order to gather evidences to support her tax residency in Spain, as opposed to the alleged one in Bahamas, in relation to the tax periods under scrutiny. See further paragraph 4.1.2.1.

As explained in paragraph 3.2.2.2, in connection to the example of the allocation of taxing rights regarding the movies. In particular, the shooting's criterion of allocating sourced taxing rights versus the position of allocating them based on the subsequent commercial exploitation. The same rationale of allocating the taxing rights under the performance-orientated approach only, gives room to YouTubers and Instagramers, for the purposes of choosing their tax residency, by being physically present in a tax friendly[338] country and benefit from the media tools, in order to reach the audience. Therefore, these tax consequences are completely against the goals which Article 17 OECD Model were designed to combat. Those taxpayers, not formally qualifying as entertainers or sportspersons, may take advantage of the loopholes arising from the current draft of Article 17 OECD Model and Commentary, by choosing low tax regimes of tax residency and blurred or nil allocation of taxing rights in the source country.

The example of YouTubers or Instagramers is very illustrative as to whether it would be considered as income under Article 17 OECD Model, since their posts usually are for free, as opposed to their income steaming from advertisement and sponsorship/ endorsement. It is relevant to acknowledge the potential shortcomings to face when there is no income from performance and the application of Article 17 OECD Model to them is jeopardized, under the performance-approach[339].

In the same line of reasoning, the options to arrange for allocating taxing rights, when the performance is secondary, subsidiary or even negligible, become wide. In this regard, the online or virtual performances [340] carried out within COVID-19 have considerably increased[341]. For example, the "Perpetual Music" initiative, sponsored by Rolex[342] consisted in three concerts, held between August 21 and September 3, of 2020, at the Teatro Rossini, in Pesaro; the Staatsoper Unter den Linden, in Berlin; and at the Palais Garnier of the Opéra national in Paris. However, the relevance of the performance was totally subservient to the streamed internationally broadcasting of

[338] Andorra is increasingly becoming home to wealthy Spanish YouTubers and Instagramers, among other less recognized taxpayers, who have moved to this low tax country (flat tax rate of 10%). For example, the online influencer "El Rubius", having 39.5 million followers, with reported earnings of EUR €4.3M per year, is one illustrative high-profile example to announce is relocation to Andorra's tax dodge.

[339] It must be completed with the detailed analysis about the term "close connection" throughout Chapter 4 and the potential apportionment of paragraph 3.5. of this Chapter.

[340] Live performances offer no room to benefit from the above-mentioned shortcomings, since the country where the entertainment takes place/is consumed and the country of performance is the same.

[341] Also, this is the current context where services are channeled through digital means, primarily the use of apps and websites via the mobile phones.

[342] See further in https://www.rolex.org/en/arts/perpetual-music

those events, by providing a worldwide audience, whilst the above-mentioned concert stages were almost empty[343].

The role of the performance as a yardstick for the application Article 17 OECD Model is, at least, far from clear. As opposed to the entertainment character of the event which is totally linked, regardless of the fact whether the audience is physically present where the performance takes place or not.

Moreover, the tax consequences in virtual scenarios have become essential, since virtual performances are more usual, due not only to the COVID-19 change of tendency, since the use of online platforms, such as Spotify, YouTube and the like[344] have been firmly established worldwide among the audience.

Therefore, the Perpetual Music event endorsed by Rolex has been a good example whereby the allocation of income would be more feasible to be placed where the audience is located. In particular, in the digital time, since every item of information may be recorded for the purposes of audience's allocation.

Nevertheless, the classical approach could survive by understanding that the performances are still pivotal, regardless of the fact that no physical audience is present, as long as it can be accepted the online audience. In order to look for easier and predictable links to the place of virtual performance, the place where the virtual recording takes place grants the right to tax as source country[345]. However, the is no underlying rationale to support this indirect performance link in relation to Article 17

[343] Those opera concerts were made available digitally to audience in more than 180 countries through the free streaming service medici.tv.
In relation to the idea of providing services to the audience for free, within the entertainment sector, in October 2007, the famous UK band Radiohead announced publicly that fans may directly download their new album In Rainbows from their website, under a 'pay-what-you-want' or 'pay-what-you-think-it-is-worth' agreement (Even though, the aim at that time was different, such it was defeating digital piracy). It was considered to be a commercial success although they allowed downloading their album practically for free for 3 months. Said album was ranked nº 1 in the UK and in the US (as reported by Music Ally and based on this marketing strategy the band's overall fan base increased, which was likely to generate other sources of income.

[344] The policy of tax allocation carried out by the tech giants, such as Netflix, Facebook, Spotify and the like in the previous years has led, among other tax issues, to the reaction of domestic tax administrations. For example, among others, France, India, Italy and Spain (Law 4/2020 of October 15, 2020). In addition to other tax proposals issued at supranational level within the BEPS framework. See further, Greil, S., and Eisgruber, T., Taxing the Digital Economy: A Case Study on the Unified Approach, *Intertax*, Volume 49, Issue 1, 2021, pp. 53-70. All these relevant tax issues are tackled in paragraph 3.6. of this Chapter.

[345] In this regard, Cordewener, A., in *supra* n. 305, pp 114-115 and *supra* n. 278, pp. 1345-1348 supports for the application to Article 17 OECD Model when indirect performances taking place by virtual means. Also, Kreisl, R., *supra* n. 294, pp. 146-149. Finally, Tetlak, K., and Roeleveld, J., supra n. 190, paragraph 5.1.3.1.1.

OECD Model, when there is no performance at all, but the entertainment character still exist, as it has been explained in the case of Youtubers and Instagramers.

It is important to note that as regards the entertainment approach there are potential shortcomings, such as the practical difficulties arising from apportionment involving numerous source countries, as well as the administrative burden to the entertainers and sportspersons may be overcome by the context in which transactions take place. In this regard, digital performances, together with the tracking of the entertainment events help to control and tax the income arising from them. In addition, the effective exchange of information arising from the implementation of the Common Reporting Standard[346] is a plus in order to double check where the income is obtained and paid. Finally, a voluntarily factor may arise from taxpayers as the primary interested persons in providing to the tax authorities with a break-down of actual figures as regards the entertainment events and the profits obtained in each country in order not to be overtaxed.

Needless to say, that this type of administrative involvements and efforts from the tax authorities and taxpayers would include entertainers and sportspersons whose income exceeds certain sensible threshold, whether or not connected to the minimum proposed under the 2014 Commentary on Article 17 OECD Model. In fact, the mentioned potential shortcomings are also common when the performance orientated approach would be endorsed, since they would arise when a reasonable apportionment must be carried out on a per country basis[347].

In any case, the force of attraction of Article 17 OECD Model must be determined by respecting the application of other OECD Articles, such as Article 12. In this sense, the author endorses for establishing limits to the application of Article 17 OECD, included in other parts of the OECD Commentary[348]. Again, the entertainment's approach would be in a better position to ensure Article 17 OECD Model to be in line with other OECD Model Articles. In this regard, the boundaries of each OECD Article would be determined from an objective viewpoint, as well as limiting the force of attraction of Article 17 OECD Model to the performances in virtual scenarios, where the audience

[346] See *supra* n. 246.

[347] See further, Simpson, A., Taxation of Non-Resident Entertainers and Sportsmen: The United Kingdom's Definition of Performance Income and How It Ought to Be Measured. *Washington University Global Studies Law Review*, 2012, vol. 11, pp. 711-713.

[348] For example, paragraph 18 of Commentary on Article 12 which expressly states "*Where, whether under the same contract or under a separate one, the musical performance is recorded and the artist has stipulated that he, on the basis of his copyright in the sound recording, be paid royalties on the sale or public playing of records, then so much of the payment received by him as consists of such royalties falls to be treated under Article 12*".

plays the key role, instead of the mentioned performance itself. Therefore, the existence of a direct or indirect connection to a performance must not lead to include all related income under Article 17 OECD Model, unless the all-encompassing approach of the "infection theory", explained in the next paragraph is endorsed. Thus, the analysis of the unlimited force of attraction of Article 17 OECD Model becomes pivotal.

3.3.3. Unlimited force of attraction - U2 Case

The U2 Spanish Supreme Court´s sentence[349] provides for a clear-cut scenario when tackling the broad objective approach and Article 17 OECD Model. It is useful to scrutinize the primary drawbacks arising from a mistaken unlimited force of attraction approach of Article 17 OECD Model to income obtained by entertainers and sportspersons, versus other OECD Model tax Articles.

In this regard, it is important to highlight that this Court Case involves a triangular scenario: Spanish source (concerts and promoter), Irish tax resident-member of the band and intermediate companies (located in Ireland and The Netherlands). It is important to note that issues arising from triangular scenario of this particular Court case are dealt with into detail in paragraph 3.4.3.

As regards the deduction of expenses, the dates in which the concerts took place in Spain (1997), there were no domestic tax rules enabling for said tax deduction. However, in 2010, the Spanish NRITA permitted them within the context of EU involved parties[350]. Unfortunately, neither the Spanish National Court nor the Supreme Court did tackle its potential application, even though the taxpayer invoked for them within the course of the Court procedure[351].

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[349] - TEAC n. 00/291/2005 issued in February 2, 2007.
- Sentence of the Spanish National Court issued in January 28, 2010, Rec. 152/2007.
- Spanish Supreme Court, issued in December 7, 2012, Rec 1139/2010.

[350] Article 24 of the Spanish NRITA, which entered into effect through the Law 2/2010, for the purposes of complying with the ECJ jurisprudence. See further Chapter 5.

[351] See further in this regard. Martin Jiménez, A., *Tax Treaty Case Law Around the Globe 2011*. Spain: Taxation of Artistes and Sportsmen – U2's tour in 1997, Eds. Lang, M. et Al., Alphen on the Rhine: Kluwer Law International, 2012, pp. 355-383. Also, Plaza Romero, F., Sujeción a tributación en España de las rentas obtenidas por sociedades irlandesas no residentes por la prestación de servicios relativos a la producción de los conciertos en España del Grupo musical U2. *Revista de Derecho del Deporte y del Entretenimiento*, 2013, 38, pp. 663-670. Calderón Carrero, J.M., Spanish tax court rulings on the taxation of non-resident entertainers under Spain´s tax treaty provisions pose as many questions as answers. *Tax Analysts*, 2001. Calderón Carrero, J.M., Star Companies, Tax treaties and Spanish tax Administration. The Decline of the Slave agreement. *Tax Notes International*, 2001.

Back to the fact pattern of the U2 case arises from the income obtained by the U2 band in connection with its concerts that took place in Madrid and Barcelona during their 1997 tour. Those concerts were agreed in a contract dated June 13, 1997, between the Spanish promoter and a Dutch company, Concert Productions International B.V. This company, together with other Irish companies, were the holders of exclusive rights covering public appearances in concert by the band, as well as all related production elements connected to them.

Nevertheless, the overall payment of USD 2,700,000 in connection with U2 concerts in Spain was broken down, including different items of services provided by each involved company. In particular, invoices were issued by four entities:

- Eventcorp Ltd., an Irish company in exchange for the provision of artistic services of U2 within Spanish territory amounting to USD 624,000;
- Concert Productions International BV, for the booking and promotion services related to the Spanish concerts amounting to USD 720,000;
- Remond Ltd. and Brenwell Ltd. The concepts contained in their invoices were, production services, including sound, lights, stages, laser, video and those related to organization and consultancy services of the concerts, respectively. The invoices amounted to USD 1,200,000 and USD 156,000.

In this regard, the adopted stance by the Spanish Supreme Court in this particular case was grounded on domestic tax legislation, in connection with Spain-Ireland Double tax treaty which, in its turn, mirrors the OECD Model and its Commentary. Basically, it permitted to tax in Spain as source country all above-described items of income.

The conclusions need to be analyzed into detail for the purposes of determining whether the Spanish Supreme Court's decision was in line with Article 17 OECD Model, its related Commentaries and the proposed objective approach when interpreting them.

The core issue resided in determining which items of were considered to be "*directly and indirectly related to*" performance income, in accordance with the particular double tax treaty and OECD Model. In this regard, the approach of the author resides in highlighting the shortcomings arising from the Spanish Supreme Court when endorsing Spanish domestic rules, by not respecting the proper application of Article 3.2 OECD Model. It is pivotal, since this OECD clause is the yardstick to clarify every controversy between the applicable double tax treaties and tax domestic clauses.

The text of Article 3.2 OECD Model reads as follows: "*As regards the application of the convention at any time by a Contracting State, any term not defined therein shall, unless the context otherwise requires, have the meaning that it has at any time under the law of that State for the purposes of the taxes to which the Convention applies, any meaning under the applicable tax laws of that State prevailing over a meaning given to the term under other laws of that State*". (Emphasis added by the author).

This particular article was designed to fill the gap, when the applicable double tax treaty, Spain-Ireland in the U2 Case, does not fully define the meaning of a term. In this regard, personal activities of an entertainer and/or a sportsperson are not expressly defined neither in the applicable double tax treaty or Article 17 OECD Model and the related Commentary. Moreover, said Commentary on Article 17 OECD Model refers to personal activities as income derived directly or indirectly from the performance by an entertainer or sportsperson[352]. Also, other undefined terms such as directly or indirectly, which have been replaced by closely connection[353]. Nevertheless, it is obvious that double tax treaties cannot define completely all the potential envisaged scenarios arsing in practice. Therefore, assistance from domestic legislations to develop this task is needed in accordance with article 3.2 OECD Model.

Accordingly, the extended or unlimited approach adopted by the Spanish Supreme Court in the U2 Case must not disregard the limits to domestic interpretation included in Article 3.2 of OECD Model and its related Commentary. It establishes[354] *"(...) a satisfactory balance between, on the one hand, the need to ensure the permanency of commitments entered into by States when signing a convention (since a State should not be allowed to make a convention partially inoperative by amending afterwards in its domestic law the scope of terms not defined in the Convention), and, on the other hand, the need to be able to apply the Convention in a convenient and practical way over time (the need to refer to outdated concepts should be avoided)".*

This is the correct dichotomy, between interpretation via updating the tax treaty terms and avoiding treaty override. In other words, the breach of International Law through the inoperativeness of the applicable double tax treaty[355]. When analyzing the legal

[352] Paragraph 8 of Commentary on Article 17 OECD Model.
[353] In fact, all referrals to "directly or indirectly obtained" must be understood to "close connection" under the 2014 Update to Article 17 OECD Model.
[354] Paragraph 13 of the Commentary on Article 3.2 OECD Model.
[355] See further, Sandler, D. and Li, J., The relationship between domestic anti-avoidance legislation and tax treaties, *Canadian Tax Review*, 1997, Vol 45, n. 5, pp. 904-909.

accuracy of the Spanish Supreme Court's position as regards the U2 Case, it should be borne in mind, the three-stage approach when applying domestic provisions, in the field of double tax treaties in accordance with Article 3.2 OECD Model[356].

Firstly, it should be determined whether the term is not defined by the applicable tax treaty. In the U2 Case, the Ireland-Spain double tax treaty did not include any definition or interpretation to "personal activities" income or "directly or indirectly related to", referrals equal to those of the OECD Model. Secondly, as a general rule, the term could have been relied upon domestic legislations, insofar the boundaries are established based on the expressly statement of "**unless the context otherwise requires"**. Therefore, the key point resides in ascertaining whether the applicable double tax treaty offers any guidance in terms of interpretation, which envisages the limits to adopt when the meaning is granted at domestic law level.

The context[357] in a double tax treaty requires the definition of the treaty term, through either the intention expressed by the States, when signing the particular convention or the meaning conferred on the domestic legislation of the other contracting State (principle of reciprocity)[358].

The crucial issue of discussion is what needs to be included in the prior definition of "context" under Article 3.2 of the OECD Model. According to tax commentators who deeply analyzed in relation to this tax issue[359], the author endorses Edwards-Ker's

[356] About the relevance of article 3.2 of the OECD Model, Lang, M. (Editor), *Tax Treaty Interpretation*, Eucotax- Kluwer Law International, pp. 312-313.

[357] It is worth to note the distinction between the definition of context offered by the Vienna Convention in its article 31.2 and the term "context" referred to in article 3.2 of the OECD Model.

[358] Based on paragraph 12 of the commentary on Article 3.2 OECD Model.

[359] As regards a detailed analysis of the mainstream position when tackling tax treaty interpretation in the context of Article 3.2 OECD Model. There are the two ways of understanding the term "context" in respect of Article 3.2 OECD Model. In particular, the two mainstream positions are those supported by the authors Avery Jones and Edwardes-Ker, respectively. See further, Avery Jones, J.F., The interpretation of tax treaties with particular reference to article 3(2) or the OECD Model, *British Tax Review*, pp. 14-54. Avery Jones, J.F., Article 3(2) of the OECD Model Convention and the Commentary to It: Treaty Interpretation, *European Taxation*, 1993, Vol. 33, n. 8, pp. 252-257. Edwardes-Ker, M., Conference based on the materials written by the author, such as *Tax Treaty Interpretation and The International Tax Treaties Services*, Leiden, October 21, 2001 Also, Edwardes-Ker, M., *Tax Treaty Interpretation*. Thesis, Queen Mary University of London, 1994.
Both points of view are focused on establishing the limit of the redefinition settled via domestic law. This extra limitation should be somehow avoided, due to the inconsistency with double tax treaties. At the end, the outcome from domestic interpretations is of opposite characterizations, which may provoke double taxation or non-taxation.
Also, it is of great relevance, determining the correct approach of interpretation when focusing the difficulties in obtaining information from the country of the treaty partner. In this regard, the author endorses Van Raad´s position whereby when the context of an undefined term has to be analysed, the

position, which pays more attention to the potential asymmetry caused by the application of the "substance over form proviso" of each country. The key decision resides on where the line is settled in order to limit the powers of interpretation granted to domestic legislations based on the importance of the contextual approach[360]. This author even goes further by stating the undesirability of applying domestic definitions and characterisations in the treaty context. In this regard, unless both States confirm the existence of domestic provisions in the respective domestic legislation and they express their intention to use this characterisation in the treaty context, these provisions are not permitted to be applicable under tax treaty context. If not, each country could implement domestic anti-avoidance legislation via Article 3.2 of the OECD Model (broad interpretation of the possibility to adopt domestic definitions).

As regards U2 Case, the Spanish domestic provision[361], allowing for the unlimited approach when taxing entertainment and/or sport income, was not included and foreseen within the Spain-Ireland double tax treaty. Nevertheless, Spanish Supreme Court endorsed the far-reaching approach when characterizing all items of income under Article 17 OECD Model. It carried out said analysis regardless of whether sound/lighting/laser/videos/management/consultancy services were not of personal status. In addition, the direct or indirect relation to the performance income was carried out based on Spanish domestic interpretation of the undefined term. Thus, it is against the tax treaty interpretation based on Article 3.2 OECD Model endorsed by the author.

In other words, the context of Spain-Ireland Double Tax Treaty did not include any particular view of the unlimited force of attraction when qualifying all income under Article 17 OECD Model, as it was stated under Spanish domestic tax law. If the Spanish Supreme Court 's position were accepted, the context of Article 17 Spain-Ireland (mirroring Article 17 OECD Model) in accordance with Article 3.2 OECD Model would be changed completely.

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common intention of the parties derives from the text of the double tax treaty and from the official explanations offered by the treaty partners. See further, IFA 1994, *How Domestic Anti-Avoidance Rules Affect Double Taxation Conventions: Proceedings of a Seminar Held in Toronto in 1994 During the 48th Congress of the International Fiscal Association*. Vol. 48, 1995, Springer. An opposite view on this issue, Katz, S. 48th IFA Congress, above mentioned, pp. 34-35. He interpreted Article 3.2 OECD Model literally, whereby the practical difficulties in obtaining information could be easily overcome. The analysis of the context needs the definition of the term offered by the other party.

[360] The second step in the above mentioned three-stage approach used for the application of double tax treaties.

[361] Former article 45.1.d) of the former Spanish Corporate Income Tax Law (hereinafter CITA) , which expressly stated that not only the income directly or indirectly derived from performing personal artistic activities, must be caught by said Article. In addition, income "from other activities connected to said personal performance". Article 13.1.b).3º of NRITA.

Therefore, the aim of this interpretation of the double tax treaty context is to avoid granting an unlimited role to domestic interpretations when dealing with undefined term at treaty level, as it happened in the U2 Case. In this sense, the author's view is to endeavour for maintaining an international tax context, for the application of double tax treaties, which cannot be jeopardized by the unilateral combat of each country to stop the potential abusive application of them.

In the U2 Case, it means that the requirement of an express clause in the Spain-Ireland Double Tax Treaty[362], in order to accept the extended characterisation of the payments as regards any other activity related to the performance, in order to be caught under Article 17 OECD Model.

Moreover, the most relevant argument against the unlimited force of attraction of Article 17 OECD Model resides on the fact that even if the other opposite mainstream position[363] (for tax treaty interpretation purposes) had been accepted by the author, the conclusion would have been the same. This due to the fact that the applicable context already provides for enough clarification, in order to consider the Spanish Supreme Court´s position in the U2 Case, against the context of the Spain-Ireland double tax treaty already into force.

Said context of Article 17 OECD Model and its related Commentary support for the author´s position, based on the grounds that they clearly state that main underlying principles against its unlimited force of attraction. In particular:

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[362] This solution is unattractive for the States, since the strength of discouraging measures intended to tax abuse disappears, because they need to be agreed with the other treaty partner. It is still possible to use these so-called "deeming provisions", nevertheless under the context of treaty override, with the respective consequences. It is based on Articles 26 and 27 of the Vienna Convention, the State, which suffered the enactment from its treaty partner, could make a complaint under the mutual agreement procedure (Article 25 OECD Model) or before an international arbitral body such as the International Court of Justice. The extreme situation is the termination of the treaty. Furthermore, this breach of an international agreement will hamper any attempt to reach an agreement in the next future by the treaty partners.

[363] Avery Jones, J.F., The interpretation of tax treaties with particular reference to article 3(2) or the OECD Model. *British Tax Review*, pp. 108 "*The context must therefore be reasonably strong for the internal law meaning to be ousted*". Vogel, K. and Prokisch R., *Interpretation of Double Tax Conventions*, General Report-IFA Volume 78a, pp. 55-85, IFA Cahiers de Droit Fiscal International 1993. However, this approach gives more room for the enactment of deeming provisions by the contracting States, as to the prohibition of using internal anti-abuse clauses due to the requirement of the context is exceptional. Once particular circumstances have been analysed, the context requirement should be quite important to overcome the legislation enacted. The definition of domestic rules is accepted as a general rule, unless Treaty partners through the particular double tax treaty can prove the opposite intention.

- Prevailing activity (Par. 4) vs. contract splitting.

- No income arising from technical staff and road crew for a pop group (Par.3) can be caught under Article 17 OECD Model.

In relation to the main allocation rule when distributing taxing rights, paragraph 4 of the Commentary on Article 17 OECD Model[364] expressly states *"An individual may both direct a show and act in it, or may direct and produce a television programme or film and take a role in it. In such cases it is necessary to look at what the individual actually does in the State where the performance takes place. If his activities in that State are predominantly of a performing nature, the Article will apply to all the resulting income he derives in that State. If, however, the performing element is a negligible part of what he does in that State, the whole of the income will fall outside the Article. In other cases an apportionment should be necessary"*[365].

According to those statements the main interpreting rule, when facing a range of services related to a performance in a source country, is laid down at treaty level. As a general rule, the unlimited approach of Article 17 OCDE Model is only permitted when the performing nature of the activities is predominant. On the contrary when said income does not benefit from this characteristic, other articles of the OECD Model may be applicable. Nevertheless, it should be bore in mind that the apportionment method is the primary rule, insofar there are not predominant or negligible activities.

It is important to highlight the main difference between the 1987 OECD Report and paragraph 4 of the Commentary on Article 17 OECD Model when tackling the apportionment rule. The latter strengthens the apportionment approach as an obligation[366], whilst the 1987 OECD Report included it as an option, due to the administrative difficulties in taxing these activities, the overall approach is suggested to be implemented[367].

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[364] The forerunner of the OECD Commentary on Article 17 was paragraph 69 of 1987 OECD Report.

[365] In the same line of reasoning, paragraph 11.6 of the Commentary on Article 12 OECD Model endorses for the break-down of services under a reasonable apportionment, as general rule to tackle mixed contracts.

[366] Another proof of the OECD endorsement for the apportionment approach is the fact that no reference to the complexity of the contracts within the OECD Commentary on Article 17.

[367] Paragraph 80 of 1987 OECD Report states *"(…) the complexity of the contracts (often so-called package deals) governing the exercise of those activities, and the forms or payment received (frequently qualified as "royalties" for tax avoidance purposes) make I impossible for tax authorities to identify each of them separately, and since the payments are connected, they should all be brought within the scope of Article 17*."

The reinforcement of the apportionment rule under the Commentary on Article 17 OECD Model is granted, regardless of whether the various services are included within the same contract or different contracts contain each service separately. Said underlying reasoning was endorsed within the context of the U2, in the sentence laid down by Spanish National Court´s[368] In this previous judicial stage, it was clear-cut the need to distinguish among different services within one but complex contract, in connection with U2 performances in Spain. Accordingly, those services may lead to different income´s characterization based on the nature of each of them.

However, in the appeal against the Spanish National Court's sentence, the Spanish Supreme Court´s approach was reversed and, if so, fully inconsistent with paragraph 4 of the Commentary on Article 17 OECD Model which supersedes the statement held previously in the 1987 OECD Report.

Additionally, in accordance with paragraph 3 of the Commentary on Article 17 OECD Model, from a pure subjective point of view, the "behind the scene" personnel are regarded to be out of the scope of said OECD Model. Therefore, all income related to those services involving those qualifying persons, even though related to the performance, cannot be caught within the scope of said article.

Leaving aside the practical difficulties in drawing the line between entertainers and sportspersons versus back-stage personnel, it is clear that in all cases the administrative and support staff is not included within the subjective scope of Article 17 OECD Model. Therefore, in the U2 Case, the income obtained by the Irish companies not involving performance services must have been subject to tax in accordance with alternative OECD articles, other than Article 17, based on the rationale underlying paragraph 3 of the Commentary on Article 17 OECD Model.

Accordingly, paragraphs 3 and 4 of the Commentary on Article 17 OECD Model are of great assistance in order to determine the context of said article and no domestic taxation can exceed the treaty boundaries through which the countries reach and international agreement. The fact that Spanish Supreme Court adopted a pure domestic far-reaching approach about what was considered to be income obtained by entertainers and sportspersons is against tax treaty policy established in accordance Article 3.2 OECD Model. The inconsistency in the U2 Case resides in interpreting that

[368] Dated in January 28, 2010.

there are no restrictions to enforce the domestic rules when applying article 17 of the Spain-Ireland Double Tax Treaty, leading to overweight the taxing powers of Spain, by decreasing those corresponding to Ireland.

Therefore, according to the author´s position, treaty context does not permit a characterisation based on deeming domestic legislation, which is considered to be an extra limitation. In the U2 Case was based on the grounds that no terms were included in the wording of the Spain-Ireland double tax treaty, alongside with the evidences included in the OECD Commentary on Article 17, allowing for taxing all items of income under an unlimited force of attraction of said OECD Article. Said infection theory[369] completely disregarded the endorsement of the contract splitting as a general approach to be applied, unless a predominant or negligible activity is encompassed. If not, a treaty override caused by the unilateral application of the domestic tax law would take place, as it happened in the U2 case. Moreover, one of the main goals in tax treaty practice, which is avoiding double taxation is jeopardized, based on the different positions that might be held by the Contracting States, when permitting the unlimited approach of Article 17 OECD Model supported by unilateral domestic viewpoint.

Unfortunately, the OECD Model Commentary on Article 17 provides for enough room to defend both positions. On the one hand, the author´s position is supported by paragraph 7 which states that "*Income received by impresarios, etc. for arranging the appearance of an entertainer or sportsperson is outside the scope of the Article, but any income they receive on behalf of the entertainers or sportsperson is of course covered by it".* It endorses the position of leaving aside Article 17 OECD Model the income obtained by third persons, not being entertainers and sportsperson, insofar they are not received on their behalf.

On the other hand, the unlimited approach of Spanish Supreme Court might be interpreted by paragraph 11 of the same Commentary on Article 17.2 seems to provide arguments in the contrary when expressly states that *"If the income of an entertainer or sportsperson accrues to another person, and the State of source does not have the*

[369] Felderer, D., *Taxation of Artistes and Sportsmen in International Tax Law*, Chapter: Taxation of Artistic and Athletic Performance under Art. 17 (2) OECD Model, Eds: Loukota, W. and Stefaner M., Linde. 2007, pp. 273-276. The author criticizes the pragmatic simplification adopted by tax administrations which over-interpret the principle of prevailing activity. This author provides for the information that the entertainer remuneration represents 5-10% of the total proceeds arising from the performance. However, the total income derived from different services is caught under Article 17 OECD Model based on his coined expression of "infection theory". Also, Cordewener, A., *supra* n. 278, pp. 1328-1329, explains into detail that certain national courts and tax authorities still do follow what he quotes "all or nothing approach". In particular, this author analyses the particular cases of Germany and Austria.

statutory right to look through the person receiving the income to tax it as income of the performer, paragraph 2 provides that the portion of the income which cannot be taxed in the hands of the performer may be taxed in the hands of the person receiving the remuneration. If the person receiving the income carries on business activities, tax may be applied by the source country even if the income is not attributable to a permanent establishment there". (Emphasis added by the author).

However, this apparently unlimited force of attraction of Article 17 OECD is correctly interpreted when combined with Paragraph 11.4 of the same Commentary whereby "*Paragraph 2 covers income that may be considered to be derived in respect of the personal activities of an entertainer or sportsperson. Whilst that covers income that is received by an enterprise that is paid for performing such activities (such as a sports team or orchestra), it clearly does not cover the income of all enterprises that are involved in the production of entertainment or sports events. For example, the income derived by the independent promoter of a concert from the sale of tickets and allocation of advertising space is not covered by paragraph 2*[370]. (Emphasis added by the author).

In its turn, paragraph 11 of the Commentary on Article 17 OECD Model mirrors with paragraph 3, which leaves outside of the scope of said OECD article the income arising from production and auxiliary services, but referred to second paragraph of said Article, instead of the first paragraph.

Nevertheless, there are still grounds to support the unlimited approach via paragraph 9 of the OECD Commentary on Article 17. In particular, the statement "*Such a close connection will generally be found to exist where it cannot reasonably be considered that the income would have been derived in the absence of the performance of these activities*." It is too broad drafted that mistaken and unlimited approach can find the support under it[371].

[370] Paragraph 11.4 of the Commentary on Article 17 OECD Model is in line with paragraph 3 which leaves outside of the scope of said OECD article the income arising from production and auxiliary services as regards Article 17.1 OECD Model.
[371] See further paragraph 3.4.1

3.3.4. Post-U2 Case

It is important to note that the Spanish tax authorities have fortunately endorsed the break-down of services, when applying Article 17 OECD Model to different items of income, by overcoming the position of the Spanish Supreme Court in U2 Case[372].

According to the position held by the Spanish DGT through various binding rulings, the items of income related to a performance may be broken-down, mainly between the production income, qualified as business income and entertainment income under Article 17 OECD Model, received by the entertainers, insofar a reasonable and a proportional apportionment is carried out. The detailed analysis of the mentioned apportionment is carried out in paragraph 3.5. of this Chapter.

On the contrary, there are sentences from different Spanish Courts confirming the unlimited approach of U2 Case[373]. Therefore, both approaches are still valid, by providing a high degree of uncertainty to foreign taxpayers performing in Spain.

In this regard, for illustrative purposes a **chart in which all arguments in favour and against the unlimited approach** is included below. It includes the position supported by the Court or by the taxpayers when cases are brought into the Court or when confirmed by the tax authorities via the binding rulings. Also, the prevalence of Article 17 OECD Model over Article 7 and vice versa is scrutinized, together with the analysis of anti-avoidance character of Article 17 OECD Model and the proportionality test.

[372] Tax Authorities binding ruling, V1678-14, issued in July 1st, 2014.
- Tax Authorities binding ruling, V1635/2014, issued in June 25, 2014.
- Tax Authorities binding ruling, V1332/2014, issued in May 19, 2014.

[373] - Supreme Court Ruling, December 7, 2012. (U2 Case), Rec. 1139/2010
- Spanish National High Court, January 28, 2010. (U2 Case). Rec. 152/2007
- Madrid High Court of Justice, April 28, 2015. Rec. 138/2013
- Spanish National High Court, April 13, 2000. (Sting Case). Rec. 210/1997
- Spanish TEAC, resolution issued in September 11, 2017, Rec. 969/2014.
- Cataluña Regional Administrative Regional Tribunal (hereinafter TEAR), issued in September 13, nº 08/10407/2015/00/00.
- Valencia High Court of Justice, February 25, 2020, Rec 1535/2017.

SEPARATE SERVICES APPROACH	UNLIMITED APPROACH
Taxation by nature of income	**All items of income under Article 17 OECDE Model**
(1) Taxpayer: Production and artist income should be differentiated.	(1) State's attorney: There is no reason to differentiate two types of income. All related to the performance (Paragraph 9 Commentary on Article 17 OECD Model).
(1) Taxpayer: Different nature of the expenses: several invoices with different concepts. Lack of analysis by the Spanish tax administration of the nature and kind of provided services.	(1) State's attorney: The invoices state that services are provided in relation to U2 concerts held in Madrid and Barcelona.
(1) Taxpayer: "directly or indirectly" must be distinguished from "related to the performance".	(1) State's attorney: One single contract in relation to the concerts and production service. All payments carried out to the same bank account.
(1) Taxpayer: Only income remunerating the entertainer's performance shall be subject to tax in Spain.	(1) Court ruling: The existence of a single payment and a single contract means that all income benefits from the same nature.
(1) Taxpayer: Production as business income with Art.7 DTT.	

(1) Spanish Supreme Court, December 7, 2012 - U2 Case
(2) Spanish National High Court, January 28, 2010 - U2 Case
(3) Madrid High Court of Justice, April 28, 2015
(4) Spanish National High Court, April 13, 2010 - Sting Case
(5) DGT ruling, V1678-14, July 1st, 2014
(6) DGT ruling, V1635/2014, June 25, 2014
(7) DGT ruling, V1332/2014, May 19, 2014
(8) Comunidad Valenciana High Court of Justice, February 25, 2020
(9) Catalonia Regional Economic Administrative Court, September 13, 2018
(10) Central Economic Administrative Court, September 11, 2017
(11) DGT ruling, V5328-16, December 16, 2016
(12) DGT ruling, V2428-17, September 28, 2017

	(1) Court ruling: it included all sums remunerating production services, including sound, light, stage, laser, video services, consulting and organization services for the concert performances. Therefore, it is income derived from performances in Spain of "U2" Band, which applicable tax treaty allows to subject to tax in the territory where the artistic activity took place.
	(1) State's attorney: The judgment violates article 45.1 d) Law 43/1995, former CITA "*any other activity related with the performance*", in relation to art 17.2 Spain-Ireland DTT "*income derived from personal activity*"
(2) Taxpayer: The amounts paid do not qualify as entertainment´s income, but business income (Paragraph 11 of the Commentary on Article 17 OECD Model).	(2) State's attorney: Amounts remunerated performances, which take place since the production companies organize the concerts. Issued invoices in connection to services linked to performances. (Same line of reasoning which was

(1) Spanish Supreme Court, December 7, 2012 - U2 Case
(2) Spanish National High Court, January 28, 2010 - U2 Case
(3) Madrid High Court of Justice, April 28, 2015
(4) Spanish National High Court, April 13, 2010 - Sting Case
(5) DGT ruling, V1678-14, July 1st, 2014
(6) DGT ruling, V1635/2014, June 25, 2014
(7) DGT ruling, V1332/2014, May 19, 2014
(8) Comunidad Valenciana High Court of Justice, February 25, 2020
(9) Catalonia Regional Economic Administrative Court, September 13, 2018
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(2) Taxpayer: Income obtained by impresarios involved in the performance (Paragraph 11 of the Commentary on Article 17 OECD Model).	subsequently included in 2014 Commentary on Article 17 OECD Model).
(2) Court ruling: Although it is a contract with unique content, the different services included must be distinguished. Different tax consequences based on the nature of the income.	(2) State's attorney: Unique contract involving concerts and production services.
(2) Court ruling: Not all income derived from the services, included in the contract of complex content signed by the parties, can be described as "artistic income". The OECD Commentary on Article 17 must be taken into account in order to define "artistic income", by leaving out of the scope of said OECD Article, the business income.	(2) Court ruling: When domestic law of the State of performance allows for "look through" of such entities and consider the income as if it was obtained directly by the individual, that State may tax the income arising from the performances carried out in such territory, as if it was obtained by the entity for the benefit of the individual, even if the income is not actually paid as compensation to the individual.
(2) Court ruling: It must be distinguished between the "pure" artistic performance and the "complementary services" of the performance. (Paragraph 4 of the Commentary on Article 17 OECD Model).	

(1) Spanish Supreme Court, December 7, 2012 - U2 Case
(2) Spanish National High Court, January 28, 2010 - U2 Case
(3) Madrid High Court of Justice, April 28, 2015
(4) Spanish National High Court, April 13, 2010 - Sting Case
(5) DGT ruling, V1678-14, July 1st, 2014
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(8) Comunidad Valenciana High Court of Justice, February 25, 2020
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(11) DGT ruling, V5328-16, December 16, 2016
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(2) Court ruling: OECD Commentary on Article 17 applicable only to income obtained by entertainers and not third parties. Article 7 OECD Commentary on Article 17.	
(2) Court ruling: Only the income obtained by the personal performances of artists, are considered of "artistic income" within the meaning of Article 17, regardless whether they were obtained by those artists directly or indirectly. (Paragraph 11 of the Commentary on Article 17 OECD Model).	
(3) Taxpayer: Business income's characterization for production invoices.	(3) State's attorney: All income is related to the musical artistic performance. Thus, they are regarded as the remuneration for entertainment activities.
(3) Taxpayer: Technical, production means and choreography services are excluded from the concept of entertainer provided by the OECD.	(3) State's attorney: The production is linked to the performance and, if so, included on it. The services were "necessary services" for the purposes of the performances in Spain. Thus, they should be taxed in Spain.
(3) Taxpayer: The companies receiving part of the overall entertainment income do not involve personal performance of any person.	

(1) Spanish Supreme Court, December 7, 2012 - U2 Case
(2) Spanish National High Court, January 28, 2010 - U2 Case
(3) Madrid High Court of Justice, April 28, 2015
(4) Spanish National High Court, April 13, 2010 - Sting Case
(5) DGT ruling, V1678-14, July 1st, 2014
(6) DGT ruling, V1635/2014, June 25, 2014
(7) DGT ruling, V1332/2014, May 19, 2014
(8) Comunidad Valenciana High Court of Justice, February 25, 2020
(9) Catalonia Regional Economic Administrative Court, September 13, 2018
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(12) DGT ruling, V2428-17, September 28, 2017

(3) Taxpayer: Income subject to tax in the source State arising from performance income and not when related to income of the entertainer in his capacity as producer.	(3) State's attorney: Practical problem of global performances, in order to break-down the type of services.
(4) Taxpayer: Mistaken application of Article 17 OECD Model, since the company is not owned by the entertainer and the income does not stem from the entertainment activity. In order to carry out the performance, other elements of not performing nature are requested. (4) Taxpayer: Article 17.2 OECD Model cannot be applied, since there is no interposed company obtaining income corresponding to the entertainer. (4) Taxpayer: Income qualifies as business income as opposed to entertainment income.	(4) Court ruling: The overall range of services is needed to carry out the concerts. Thus, income in exchange for the overall tour. (4) State's attorney: Entertainment performance carried out altogether. Thus, all income must be subject to the same tax treatment, under Article 17 OECD Model.

(1) Spanish Supreme Court, December 7, 2012 - U2 Case
(2) Spanish National High Court, January 28, 2010 - U2 Case
(3) Madrid High Court of Justice, April 28, 2015
(4) Spanish National High Court, April 13, 2010 - Sting Case
(5) DGT ruling, V1678-14, July 1st, 2014
(6) DGT ruling, V1635/2014, June 25, 2014
(7) DGT ruling, V1332/2014, May 19, 2014
(8) Comunidad Valenciana High Court of Justice, February 25, 2020
(9) Catalonia Regional Economic Administrative Court, September 13, 2018
(10) Central Economic Administrative Court, September 11, 2017
(11) DGT ruling, V5328-16, December 16, 2016
(12) DGT ruling, V2428-17, September 28, 2017

(4) Taxpayer: two separated contracts, on the one hand with the entertainer's company and on the other hand with the production company. Both items of income have different character.	
(5) Binding ruling: In principle, producers and technical staff are not included under Article 17 OECD Model. Thus, income derived from these "support" activities cannot be taxed in Spain. Therefore, income paid to the producer is not considered to be obtained in Spain.	(5) Binding ruling: If the income paid to individuals or entities different to entertainer himself, but correspond to the activities of the latter; they may be subject to tax in Spain, under Article 17.2 OECD Model.
(6) Binding ruling: Those professional services remain outside the scope of Article 17 OECD Model, together with the lack of permanent establishment status in Spain. Accordingly, their income cannot be taxed in Spain, but in their State of tax residency.	

(1) Spanish Supreme Court, December 7, 2012 - U2 Case
(2) Spanish National High Court, January 28, 2010 - U2 Case
(3) Madrid High Court of Justice, April 28, 2015
(4) Spanish National High Court, April 13, 2010 - Sting Case
(5) DGT ruling, V1678-14, July 1st, 2014
(6) DGT ruling, V1635/2014, June 25, 2014
(7) DGT ruling, V1332/2014, May 19, 2014
(8) Comunidad Valenciana High Court of Justice, February 25, 2020
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(6) Binding ruling: The activity of the stage manager, lighting technician, costume designer, set designer and repeater to accompany rehearsals, are "professional services" of "independent professionals".	
(7) Binding ruling: In principle, producers and technical staff are not included in Article 17 OECD Model, so income derived from these activities should not be taxed in Spain, since they qualify “pure production” services. Paragraph 3 of the Commentary on Article 17 OECD Model.	(7) Binding ruling: Management companies are subject to tax in Spain, since the income is paid “on behalf of” the entertainer. Paragraph 7 of the Commentary on Article 17 OECD Model. (7) Binding ruling: If there were no applicable tax treaty, all income would be subject to tax as per Art.13 NRITA which expressly states “*any other activity related to the performance*”. Thus, all income related to the performance would be subject to tax in Spain.
(8) Taxpayer: Companies offered their logistic services related to jazz concerts in Spain. Thus, foreign entertainers were able to perform in Spain. Thus, payments from promoters related to those	(8) Court ruling: Income obtained by the singer (as a consequence of his musical performance) and income received by the companies working for him (promoting his performance)

(1) Spanish Supreme Court, December 7, 2012 - U2 Case
(2) Spanish National High Court, January 28, 2010 - U2 Case
(3) Madrid High Court of Justice, April 28, 2015
(4) Spanish National High Court, April 13, 2010 - Sting Case
(5) DGT ruling, V1678-14, July 1st, 2014
(6) DGT ruling, V1635/2014, June 25, 2014
(7) DGT ruling, V1332/2014, May 19, 2014
(8) Comunidad Valenciana High Court of Justice, February 25, 2020
(9) Catalonia Regional Economic Administrative Court, September 13, 2018
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services were not subject to Spanish tax as source country. (8) Taxpayer: Payments do not remunerate entertainer's personal activity, but from an activity related to such activity (concert organization). Thus, it should be considered business income. (8) Taxpayer: The taxpayer´s requested for the qualification of business income under Article 7 OECD Model that would be taxed only in the residence country, provided that a permanent establishment is not considered to exist. Based on allegations included in (2). (8) Court ruling: Income received by companies working for entertainers is not taxable in Spain insofar it is proved that the latter did not participate in the benefits of the companies, based on Article 19.2 US-Sp DTT. However, the case did not include any evidence in this regard, based on the circumstances of the case at hand. (8) Court ruling: The Court did recognise the degree of difficulty of	are taxable in Spain (Article 19 Spain-US DTT mirroring Article 17 OECD Model, but not including the unlimited approach of Article 17.2 OECD Model). (8) Court ruling: In accordance with Article 13 TRLIRNR, income received by third parties related to performances is taxable in Spain, as long as it derives from Spanish performance or professional activity. (8) Court ruling: it explicitly referred and copied an extract of (1) which "*sums up, teaches and provides the reasoning*" in relation to the taxpayer's failure to comply of Spanish tax obligation in the case at hand.

(1) Spanish Supreme Court, December 7, 2012 - U2 Case
(2) Spanish National High Court, January 28, 2010 - U2 Case
(3) Madrid High Court of Justice, April 28, 2015
(4) Spanish National High Court, April 13, 2010 - Sting Case
(5) DGT ruling, V1678-14, July 1st, 2014
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(8) Comunidad Valenciana High Court of Justice, February 25, 2020
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(11) DGT ruling, V5328-16, December 16, 2016
(12) DGT ruling, V2428-17, September 28, 2017

the tax issue. Moreover, by expressly referring to the arguments posed in (2) it accepted to declare null and void the related penalty.	
(9) Taxpayer: Difference between entertainer's income, and other expenses. Only the former must be taxed in Spain. The remaining items corresponded to business income not taxed in Spain.	(9) TEAR: Promoter pays to non-resident entertainers, through non-resident entities. Application of Art. 17.1 and 17.2 OECD Model.
(9) Taxpayer: Invoices were not paid directly to entertainers, but to entities devoted to the entertainer's management.	(9) TEAR: State of the performance is entitled to tax said income in accordance with Article 17.1 and 17.2 OECD Model. Domestic taxing rights as per Article 13.1.b).3º NRITA.
(9) Taxpayer: Withholding tax limited to income arising from entertainers. Article 17.1 OCDE Model.	(9) TEAR: It is not proved that the total amount paid does not correspond to remuneration arising from entertainer performances. Based on the fact that issued and received invoices do not distinguish the services from objective and/or amount viewpoints.
(9) Taxpayer: Only subject to tax in Spain the income exclusively and directly received by entertainer (individual) for his personal activity there.	

(1) Spanish Supreme Court, December 7, 2012 - U2 Case
(2) Spanish National High Court, January 28, 2010 - U2 Case
(3) Madrid High Court of Justice, April 28, 2015
(4) Spanish National High Court, April 13, 2010 - Sting Case
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	(9) TEAR ruling: Taxpayer tries to avoid the application Article 17.2 OECD that allows the taxation of income derived directly or indirectly from the artistic performance that is not received by the artist but by another person (entity). (9) TEAR: All profits must be included within the income obtained by non-residents, derived from a global provision of entertainment services.
(10) TEAC: They involved scenarios where a company provided artistic services and technical services altogether, whilst other scenarios services were provided by different companies, separately. (10) Taxpayer: Income obtained from “production services” should qualify as business income. Documentation supporting the expenses incurred to provide such “production services”. Referral to application of court case (4).	(10) TEAC: Tax inspector understood that withholding tax must also be applied on the amounts paid to non-resident companies for "technical services". (10) TEAC: it distinguishes between income derived from technical services and entertainment services. Both are subject to taxation in Spain. (10) TEAC: All income entails an intrinsic element of the entertainment’s performance, which is essential for the

(1) Spanish Supreme Court, December 7, 2012 - U2 Case
(2) Spanish National High Court, January 28, 2010 - U2 Case
(3) Madrid High Court of Justice, April 28, 2015
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(5) DGT ruling, V1678-14, July 1st, 2014
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(10) Taxpayer: Important to take into account production expenses, qualifying as business income. Entertainers were just employees not participating from company's profits. Their salaries were already taxed at source (Spain). (10) Taxpayer: Referred to Court case (2). Taxpayer claimed that amounts paid do not qualify as entertainer's income, since they must be characterized as business profits. Companies provided services to the promoter to carry out the concerts. (10) Taxpayer: Not all items of income received by entertainers should be classified as entertainment income. Spanish tax administration must analyze the different concepts. Referral to Court case (2). (10) Taxpayer: It is not appropriate to proceed with an overall approach of entertainment income when tackling income arising from production companies. It must be distinguished from income directly or indirectly obtained by the entertainer for his personal performance, from income derived from the payments made to	performance of the concert. Thus, it must be considered as related to the entertainer's personal performance. As a consequence, all payments from promoter are related to performance and caught Under Article 17 OECD Model. (10) TEAC: Services are essential for carrying out the concerts. Hence, payments made to companies, for technical services, together with those made for the personal performance were in exchange for the overall tour of the entertainers. Taking into account Court case (1) instead of (2).

(1) Spanish Supreme Court, December 7, 2012 - U2 Case
(2) Spanish National High Court, January 28, 2010 - U2 Case
(3) Madrid High Court of Justice, April 28, 2015
(4) Spanish National High Court, April 13, 2010 - Sting Case
(5) DGT ruling, V1678-14, July 1st, 2014
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(7) DGT ruling, V1332/2014, May 19, 2014
(8) Comunidad Valenciana High Court of Justice, February 25, 2020
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other companies for the services provided (even though they are related to the performance). Referral to Court case (2).	
ARTICLE 7 TAKES PRECEDENCE OVER ARTICLE 17 OECD MODEL	**ARTICLE 17 TAKES PRECEDENCE OVER ARTICLE 7 OECD MODEL**
(11) DGT ruling: Paragraph 7 Commentary on Article 17 OECD Model states that income obtained by producers, etc. is not included on it, except for income received on behalf of the entertainer.	(1) State's attorney: Art 17.2 takes precedence over Art. 7 OECD Model
(11) DGT ruling: When income received by the production company does not derive from entertainer's performance, but only corresponds to the remuneration of the services subcontracted by the promoter in order to make the artist's performance possible, it cannot be taxed in Spain.	(1) Court ruling: Unlike National High Court, the Spanish Supreme Court considered as the only applicable standard Article 17.2 of the Convention, which should take precedence over the application of Articles 7, 14 and 15 of the Spain-Ireland bilateral tax treaty. Thus, all items of income shall be subject to tax in Spain.
(11) DGT ruling: Income obtained by production companies is not	(3) Court ruling: Article 17.2 of the Convention, which should take precedence over the application of Articles 7.

(1) Spanish Supreme Court, December 7, 2012 - U2 Case
(2) Spanish National High Court, January 28, 2010 - U2 Case
(3) Madrid High Court of Justice, April 28, 2015
(4) Spanish National High Court, April 13, 2010 - Sting Case
(5) DGT ruling, V1678-14, July 1st, 2014
(6) DGT ruling, V1635/2014, June 25, 2014
(7) DGT ruling, V1332/2014, May 19, 2014
(8) Comunidad Valenciana High Court of Justice, February 25, 2020
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covered by Article 17. Thus, according to Article 7 OECD Model, business income is taxed only residence State, when no permanent establishment is considered to exist. (12) DGT ruling: Difference between “entertainment fee” and “production fee” remunerating production entities. (12) DGT ruling: Producers and technical staff are not included in the scope of application of Article 17.2 and, consequently, cannot be taxed income paid in exchange for support activities. (12) DGT ruling: Producer has no relationship with the entertainers, from whom is totally independent. The contracted production services are not related to the personal activities of the entertainers (US-Spain DTT).	(8) Court ruling: Article 17.2 OCDE Model applies in cases where income from entertainer’s performance is attributed to any person other than the entertainer. (11) DGT ruling: Paragraph 11 OECD states that Article 17.2 applies when income generated by entertainment activities are attributed to other persons. (12) DGT ruling: Article 17.2 allows taxation of income derived from the entertainer's performance that is attributed to another person, unless there is no participation in the benefits of that person on the part of the entertainer (US-Spain DTT).

(1) Spanish Supreme Court, December 7, 2012 - U2 Case
(2) Spanish National High Court, January 28, 2010 - U2 Case
(3) Madrid High Court of Justice, April 28, 2015
(4) Spanish National High Court, April 13, 2010 - Sting Case
(5) DGT ruling, V1678-14, July 1st, 2014
(6) DGT ruling, V1635/2014, June 25, 2014
(7) DGT ruling, V1332/2014, May 19, 2014
(8) Comunidad Valenciana High Court of Justice, February 25, 2020
(9) Catalonia Regional Economic Administrative Court, September 13, 2018
(10) Central Economic Administrative Court, September 11, 2017
(11) DGT ruling, V5328-16, December 16, 2016
(12) DGT ruling, V2428-17, September 28, 2017

ARTICLE 17: ANTI-AVOIDANCE CLAUSE	ARTICLE 17: ANTI-AVOIDANCE CLAUSE
Relationship between entertainer and interposed company	**Relationship between entertainer and interposed company**
(3) Taxpayer: Entertainers are not related parties with interposed companies and not entitled to benefits. Thus, independent service providers.	(1) Court ruling: Scope of Art 17.2 OECD Model to combat the erosion of source taxation.
(3) Taxpayer: The company's shareholders are not entertainers and are not part of the performances.	(1) Court ruling: Article 17.2 OECD Model Tax Convention is an anti-tax avoidance clause.
(3) Court ruling: The Court leaves an open door for those cases where it may be proved that entertainers are not linked to the company, and do not participate in the benefits of it directly or indirectly.	(2) State's attorney: Anti-avoidance scope of Art 17.2 OECD Model applies regardless of Art. 7 OECD Model. If not, it would allow not to tax said income neither as entertainer's remuneration nor as company´s benefit. The latter based on the non-existence of a permanent establishment in the source country.
	(3) Court ruling: Article 17 OECD Model emerges as a solution to avoidance practices in the entertainment context.

(1) Spanish Supreme Court, December 7, 2012 - U2 Case
(2) Spanish National High Court, January 28, 2010 - U2 Case
(3) Madrid High Court of Justice, April 28, 2015
(4) Spanish National High Court, April 13, 2010 - Sting Case
(5) DGT ruling, V1678-14, July 1st, 2014
(6) DGT ruling, V1635/2014, June 25, 2014
(7) DGT ruling, V1332/2014, May 19, 2014
(8) Comunidad Valenciana High Court of Justice, February 25, 2020
(9) Catalonia Regional Economic Administrative Court, September 13, 2018
(10) Central Economic Administrative Court, September 11, 2017
(11) DGT ruling, V5328-16, December 16, 2016
(12) DGT ruling, V2428-17, September 28, 2017

	(4) Court ruling: Anti-avoidance scope of Article 17.2 requires for the entertainment income to be attributed to a person/company different to the entertainer.
	(3) Court ruling: Since neither the absence of connection between the entertainers and the companies was not proven, nor the participation in their benefits, the payments made to the production company established in another State, may be taxed in Spain.
(5) DGT ruling: Income derived from entertainment performances is not taxable in Spain, when there is no evidence of participation in the entertainment's profits. Application of Spain-US DTT.	(4) Court ruling: Although not required to prove the control of the interposed company, the corporate domicile is the same than the company invoicing for performance services. In addition, it is not proved the identity of one of the shareholders.
(5) DGT ruling: The production company had no legal or economic links with the entertainer, so the income was	(8) Court ruling: Anti-avoidance clause aimed at avoiding the non-taxation in the State of source, by regarding as indirect

(1) Spanish Supreme Court, December 7, 2012 - U2 Case
(2) Spanish National High Court, January 28, 2010 - U2 Case
(3) Madrid High Court of Justice, April 28, 2015
(4) Spanish National High Court, April 13, 2010 - Sting Case
(5) DGT ruling, V1678-14, July 1st, 2014
(6) DGT ruling, V1635/2014, June 25, 2014
(7) DGT ruling, V1332/2014, May 19, 2014
(8) Comunidad Valenciana High Court of Justice, February 25, 2020
(9) Catalonia Regional Economic Administrative Court, September 13, 2018
(10) Central Economic Administrative Court, September 11, 2017
(11) DGT ruling, V5328-16, December 16, 2016
(12) DGT ruling, V2428-17, September 28, 2017

considered "business profits", not subject to tax in Spain. (7) DGT ruling: If there is no relation between the income obtained by the producer and the individual activities of the entertainers, the income shall not be subject to tax in Spain. (7) DGT ruling: Regarding the Spain-US tax treaty, the inclusion of a specific clause on the production contract indicating that the company has no relation with the entertainers may be a proof of the independence of the producers, but not the only proof to be taking into account. The parties may defend their rights with any evidences admitted by law.	income not attributable to the entertainer himself. (8) Court ruling: Article 17 OECD Model contains an anti-avoidance clause to combat it by means of interposed companies, receiving the income related to activities of entertainers. (9) TEAR: It is common for the promoter to pay fees to the non-resident entity (slave company). That´s why the anti-avoidance clause of Article 17.2 OECD Model was introduced, in order to subject to tax the company itself. (10) TEAC: Double tax treaties, applicable in the case at hand, mirror the anti-avoidance clause of Article 17.2 OECD Model. (9) TEAR: Article 17.2 allows taxing the income paid to the non-resident entity –producer– considered as arising from entertainer's performances (anti-avoidance clause). (9) TEAR: Article 17.2 OECD Model applies to income obtained

(1) Spanish Supreme Court, December 7, 2012 - U2 Case
(2) Spanish National High Court, January 28, 2010 - U2 Case
(3) Madrid High Court of Justice, April 28, 2015
(4) Spanish National High Court, April 13, 2010 - Sting Case
(5) DGT ruling, V1678-14, July 1st, 2014
(6) DGT ruling, V1635/2014, June 25, 2014
(7) DGT ruling, V1332/2014, May 19, 2014
(8) Comunidad Valenciana High Court of Justice, February 25, 2020
(9) Catalonia Regional Economic Administrative Court, September 13, 2018
(10) Central Economic Administrative Court, September 11, 2017
(11) DGT ruling, V5328-16, December 16, 2016
(12) DGT ruling, V2428-17, September 28, 2017

	directly and indirectly by the entertainer regarding his professional activities or services, regardless of who actually receives said income, and the accessory elements that may be included. (10) TEAC: Income received in relation to production services may be subject to taxation in Spain in accordance with Article 17 OCDE Model (anti-avoidance clause).
PROPORTIONALITY RULE (7) (11) DGT rulings: The inclusion of a contractual clause stating that one of the contracting parties has no relationship with the entertainer or a person related to him/her could be considered as means of proof, but not necessarily the only and sufficient one.	**PROPORTIONALITY RULE** (7) (11) (12) DGT rulings: If there is no proportionality between the income arising from production and income related the performance (by taking into consideration the overall payment), it may be regarded as attributable to the performance of the entertainer, also the production income, and if so, should be also taxed at source.

(1) Spanish Supreme Court, December 7, 2012 - U2 Case
(2) Spanish National High Court, January 28, 2010 - U2 Case
(3) Madrid High Court of Justice, April 28, 2015
(4) Spanish National High Court, April 13, 2010 - Sting Case
(5) DGT ruling, V1678-14, July 1st, 2014
(6) DGT ruling, V1635/2014, June 25, 2014
(7) DGT ruling, V1332/2014, May 19, 2014
(8) Comunidad Valenciana High Court of Justice, February 25, 2020
(9) Catalonia Regional Economic Administrative Court, September 13, 2018
(10) Central Economic Administrative Court, September 11, 2017
(11) DGT ruling, V5328-16, December 16, 2016
(12) DGT ruling, V2428-17, September 28, 2017

(11) DGT ruling: If income received by the production companies are not arising from the entertainer's performance and it corresponds to production services hired by the promoter, it would not be caught under Article 17 OECD Model and, if so, not subject to tax in Spain. (7) (11) (12) DGT rulings: What is considered to be proportionated or not, does not rely on DGT, it should be determined by the Spanish tax administration auditors when scrutinizing entertainer versus production income	

(1) Spanish Supreme Court, December 7, 2012 - U2 Case
(2) Spanish National High Court, January 28, 2010 - U2 Case
(3) Madrid High Court of Justice, April 28, 2015
(4) Spanish National High Court, April 13, 2010 - Sting Case
(5) DGT ruling, V1678-14, July 1st, 2014
(6) DGT ruling, V1635/2014, June 25, 2014
(7) DGT ruling, V1332/2014, May 19, 2014
(8) Comunidad Valenciana High Court of Justice, February 25, 2020
(9) Catalonia Regional Economic Administrative Court, September 13, 2018
(10) Central Economic Administrative Court, September 11, 2017
(11) DGT ruling, V5328-16, December 16, 2016
(12) DGT ruling, V2428-17, September 28, 2017

3.4. Entertainment income versus other items of income

3.4.1. General Statements

Aside from the objective scope leading to apply Article 17 OECD Model to entertainment income, said objective scope also determines the type of income which must fall within the mentioned OECD Article. In this regard, should the objective scope of Article 17 correctly enforced, less characterization conflicts must arise with other distributive rules of the particular double tax treaty.

The range of income streams that an entertainer or sportsperson may obtain is wide and varied[374]. In this regard, when determining the scope of the objective approach of Article 17 OECD Model, there are two main positions held by tax commentators:

1. Limited interpretation. Only the income actually linked to the entertainment event must be included within the scope of Article 17 OECD Model. All other types of income obtained by the entertainer or sportsperson must be subject to other allocation rules of the applicable Double Tax Treaty at hand.

2. Broad interpretation. It is based on paragraphs 8 and 9 of the Commentaries on Article 17 OECD Model, whereby the income obtained by entertainers or sportspersons must derive directly or indirectly from the entertainment event. The indirect reference gives room to include under the scope of Article 17 OECD Model any kind of activity taking place in the country of source in connection to the performance[375].

For the purposes of looking for the correct approach, the viewpoint from developments included in OECD Model Convention (and Commentary on Article 17), US Model (and its Technical Explanation) provide for an all-encompassing context, from which the most accurate position regarding the objective approach can be accomplished.

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[374] In this regard, Molenaar, D., *supra* n. 32. pp. 95-120. Also, Sandler, D., *supra* n. 118, pp. 145-146. This author stated a deeper analysis of the main types of income that may be obtained by those professionals and 1987 OECD Report.

[375] Two illustrative examples are laid down in Pfeiffer, S., *International Taxation of Artistes and Sportsmen.* Under practical implications of the European Tax College Moot Court Competition 2010/2011. Master Thesis. The broad interpretation was classified under the "infection theory" by Felderer, D., *supra* n. 369, pp. 271-300. Ribes Ribes, A., Interpretación del artículo 17.2 del Convenio de Doble Imposición entre España e Irlanda. STS 7-12-2012, Caso U2. *Crónica Tributaria*, 2013, 2, explains the two approaches in connection with this particular Spanish court Case.

The OECD position in relation to income derived from of entertainers and/or sportspersons started with paragraphs 77-84 of the 1987 OECD Report on the taxation of income derived from entertainment, artistic and sporting activities. Paragraph 83 clearly states the OECD stance "*It was therefore agreed that, with regard to the application of Article 17, account should be taken of the extent to which the income was connected with the actual activity of the artiste and athlete in the country concerned. In general, Articles other than Article 17 would apply whenever there were no direct link*[376] *between the income and a public exhibition by the performer in the country concerned*". Thus, although it misses a clear definition of taxable income, it requires for a direct connection of the performance income with the entertainment or sport activity in the source country, in order to apply article 17.

Subsequently, the 1992 OECD Commentary, unfortunately opted for a much more condensed drafted version than the above mentioned 1987 Report. In particular, express reference was made to the application of Article 17, paragraph 1, "*to income derived directly or indirectly from a performance of an individual artiste or sportsman*"[377]. Therefore, the scope of performance income activities was clearly extended, leading to a degree of uncertainty, as to the type of activities qualifying for entertainment income where not only those directly related to the performance, also those of indirect status.

Nevertheless, the key question is whether the extended version of the objective approach of Article 17 OECD Model, introduced via 1992 OECD Commentaries, provides for the legal background to domestic tax legislations, such as the Spanish one, in order to endorse the broad interpretation when applying Article 17 OECD Model. The Spanish tax authorities clearly opted for the unlimited force of attraction of Article 17 OECD Model, by encompassing any kind of services somehow related to the performance[378], as opposed to any potential alternative qualification from other tax treaty items of income.

To this end, the position held in the US Model Convention and its Technical explanation, alongside 2014 OECD Commentary on Article 17, are of great guidance to solve this question.

The US Technical Explanation on Article 17 of the US Model, devoted to artistes and sportsmen, mirrors into the paragraph 9 of the Commentary of OCDE Model related to

[376] Emphasis added by the author.

[377] Paragraph 8 of 1992 OECD Commentary on Article 17.

[378] As explained into detail in paragraph 3.3.3.

the same article. It expressly states that *"(…) Article 17 applies to all income connected with a performance by the entertainer, such as the appearance fees, award or prize money and a share of the gate receipts. Income derived from a Contracting State from a performer who is resident of the other Contracting state from other than actual performance (….) is not covered by this Article".* (Emphasis added by the author).

In this sense, the US Model supports the position of the connection with the performance, by avoiding any reference to indirect activities related to it. Therefore, it does not open the door to extensively regard the objective scope of Article 17[379]. The above-mentioned paragraph 9 of the OECD Model Commentary on Article 17 in its 1992 version was referred to direct link. This term was replaced in its 2014 OECD draft of the Commentaries by close connection. However, indirect reference to the performance it has been maintained over the time via paragraph 8 of the Commentary on Article 17 OECD Model. Therefore, both different and opposite interpretations of the objective scope of said OECD article are encompassed in its related OECD Commentary, yet.

The OECD recognizes great difficulties of interpretation when dealing with the reference to payments that are "*directly or indirectly related*" to the performance income[380]. It expressly mentioned that the Committee "*decided to use a more consistent terminology throughout the Commentary on Article 17*". For example, "*in paragraph 9.1 advertising or interviews that are directly or indirectly related to such an appearance should be replaced by advertising or interviews that are closely connected with such an appearance"*. According to above OECD statement, not only direct link, but also indirect link must be replaced by **close connection**. The analysis of this term in connection to each particular item of income is carried out within paragraph 3.4.

Nevertheless, it is important to note the main shortcoming arising from paragraph 9 of the OECD Commentary on Article 17 OECD Model, since it establishes that a close connection is considered to exist "*where it cannot reasonable be considered that the income would have been derived in the absence of the performance of the activities*". The OECD Committee, when drafting this statement, again has enabled that member countries, through domestic tax legislations, may endorse the broad interpretation of

[379] See further Vogel, Shannon, Doenberg and Van Raad. *supra* n. 76.

[380] In particular, OECD (2014) *supra* n. 149 at paragraph 20. It is important to note that this Report was issued in June 26, 2014, weeks earlier than the final draft of the 2014 Update to the OECD Model Tax Convention, adopted in July 15, 2014.

objective approach with no limits. Fortunately, the OECD determines the close connection´s reference with timing and nature requirements[381].

Unfortunately, even if those requirements are complied with, the reference that no income would have been derived in the absence of the performance may lead to include within the scope of Article 17 OECD Model, independent services with no entertainment character at all. It permits to extend the force of attraction of Article 17.1, beyond the boundaries and, if so, leading to a conflict of characterization between said article and other OECD "umbrella" articles, such as Articles 7, 12 and 15.

In addition, the lack of definition in the OECD Commentary on Article 17 of "*personal activities as such*" of the entertainers and sportspersons, "*directly and indirectly related to*" activities, "performance income"[382] and "*closely connected*" leads to a high degree of uncertainty. Nonetheless, it cannot give support to domestic tax authorities and courts to endorse a broad interpretation of the objective scope by including all related items of income, based on an unlimited force of attraction of Article 17.1 OECD Model[383].

The key point also resides in determining the relevant factor linked to the entertainment event, instead of following the performance-orientated approach, as it has been already explained in paragraph 3.2.2.2. Despite the fact that in most of the occasions both criteria would match in the same country, the trend of carrying out virtual performances may jeopardize the correct allocation where the entertainment element is created by the audience.

On the one hand, it is true that the link to the performance helps to limit the taxing rights of the source country where the performance takes place[384]. However, the unlimited far-reaching approach can be articulated when interpreting Article 17 OECD

[381] Paragraph 9 of the Commentary on Article 17 OECD Model.

[382] Molenaar, D., *supra* n. 32, pp. 98. Back to the income obtained from performances, it is also important to remark that the nature of performance is far to be clear, since no definition has been included in the Commentary on Article 17 OECD Model. Nonetheless, there exist a continuously reference to this concept throughout said Commentary. Thus, it becomes essential to find out interpretative support with legal basis, in order to define what is a performance and the scope of it.

[383] See further, Molenaar, D., *supra* n. 32, pp. 93. Also, Schaffer, E., Domestic Attribution of Income and Taxation of International Entertainers and Sportspersons. Volume 5. WU Institute for Austrian and International Tax Law, European and International Tax Law and Policy Series. IBFD. 2017, pp. 47.

[384] Moreover, the performance must be distinguished from a simple exhibition in which the "finished product" of the artistic activity is the key element as opposed to the performance itself, i.e. exhibition of a famous painter. The painter does not perform before the public, he/she only shows to the audience the result of his/her work. Therefore, the income arising from painter works are out of the scope of Article 17 OECD Model. In other words, the entertainment or sport character of the performances is the key characteristic, whilst the outcome arising from them is irrelevant, when dealing with Article 17 OECD Model.

Model. On the other hand, shortcomings as regards Article 17 OECD Model may arise where the criterion of allocation only links to performance, regardless of the country where income streams are obtained in relation to the subsequent exploitation of the rights. The scenario dealing with the determination of the source country as regards income arising from movies is clear-cut[385] and illustrative example of how to determine the country/ies where the entertainment income is/are sourced.

Finally, it is important to note that the issue as regards other items of income which might be included within Article 17 OECD Model, when prevailing the entertainment element over any other characteristic, it is dealt with in the below paragraphs, as per each separated item of income.

3.4.2. Items of income related to Article 17

3.4.2.1. Endorsement/Advertising/Sponsorship

This specific type of income is considered to exist when a third party financially supports an entertainer or sportsperson, in exchange for showing to the public its products, in order to achieve an association between the sponsor's brand and the success of the entertainer/sportsperson.

Endorsement/advertising/sponsorship[386] income may be related to active appearance-based activities of the sportspersons and/or entertainers. For example, when sportsperson wears equipment or clothes from a particular manufacturer, such as Messi and his related Adidas endorsement. It may be also led to o obtain passive income, arising from licensing of personality rights with advertising/sponsorship purposes, based on the ground of entertainer/sportsperson popularity, the so-called celebrity status.

[385] There are two alternative criteria, the country where the movie is shot versus where the countries where income is obtained from its related exploitation rights paid in exchange for its broadcasting. See further paragraph 3.2.2.2.

[386] For clarification purposes, all income related to the mentioned categories is analyzed altogether. However, RSM Tennon comments delivered during the discussion draft on the application of article 17 (Artistes and Sportsmen) of the OECD Model Tax Convention, 3 April 2010 to 31 July 2010, pp. 3-4, they pointed out that the importance of distinguishing among the three types of income. Also, Molenaar, D., *supra* n. *32,* pp. 104-107, distinguishes among advertising, sponsorship and endorsement income obtained by entertainers and sportspersons.

In this regard, OECD Commentary on Article 17[387] states that *"(…) in general advertising and sponsorship fees will fall outside the scope of Article 12. Article 17 will apply to advertising or sponsorship income, which has a* ***close connection with a performance*** *in a given State (…)*". (Emphasis added by the author).

In addition, it establishes the guidance about what is considered to be regarded as close connection to the performance. It links it to the timing of the income generating event and the nature of the consideration for the payment of the income[388].

However, by supporting the performance-orientated approach a far-reaching and negative force of attraction to Article 17 OECD Model may exist, by unbalancing its application versus other distributive rules contained in the OECD Model, such as Article 7, 15 or 12.

It is important to draw a distinction among the different options of characterization arising from endorsement/sponsorship/advertising income. In particular, they can be classified as income from employment, when the payment to the entertainer or sportsperson is included within the obligations agreed in accordance with an employment contract. On the contrary, Article 7 OECD Model becomes applicable, either when the sportsperson or entertainer carries out independent performing activities, out of the scope of employer's instructions, such as tennis-player, boxer, etc., or even though while qualifying as an employee, but performing other additional activities outside of the scope of his/her employment's obligations[389].

In this regard, it is important to highlight previous tax commentators' position, among others, Sandler [390] already pointed out the difficulties of linking endorsement/sponsorship/advertising payment to professional performances of the entertainers and sportspersons. It is arguable that certain payments are based on the public recognition and appeal of them, instead of particular performance events. However, said personal characteristics are achieved, in its turn, as a result of their professional activities throughout the professional career.

[387] Adopted in July 15, 2014.

[388] The amendments introduced in the OECD Commentary on Article 17 follows the German domestic rule included in Sec. 49(1) no. 2 (d) of its Income tax Act, whereby advertising income has a close link to sport or artistic performance in Germany in terms of time and location elements.

[389] For example, football players, during vacation period are paid by sponsoring "Football campus" activities targeted to children all over the world.

[390] IFA 1995, s*upra* n. 117, pp.15.

Moreover, all passive income related to the person or the intellectual property rights of the entertainer/sportsperson[391] are out of the scope of performance-related income[392].

Therefore, in accordance with the author´s position and divergent with the applicable 2014 Commentary on Article 17 OECD Model, there are **three main connecting points** when advertising/sponsorship/endorsement are obtained by entertainers and sportspersons. In particular:

- Those items of income based on the performance orientated approach, in accordance with Paragraph 9 of the OECD Commentary on Article 17. "*This connection may be related to the timing of the income-generating event (e.g. a payment received by a professional golfer for an interview given during a tournament in which she participates) or to the nature of the consideration for the payment of the income (e.g. a payment made to a star tennis player for the use of his picture on posters advertising a tournament in which he will participate)[393]".*
- Author´s position, whereby the direct and material connection must be referred to the entertainment event, instead of the performance. Accordingly, the connection point granting taxing rights is located where the audience provides for added value. This is of great assistance in order to combat aggressive tax planning via choosing low tax jurisdictions as performance places, as well as distributing source taxing rights when tackling virtual events.
- In any case, regardless of the final position adopted, either the 2014 OECD Commentary on Article 17 or the author's opinion, the taxing rights assign from Article 17 OECD Model cannot include income arising from advertising/sponsorship/endorsement (as well as any other type of income) when exploiting the notoriety of an entertainment or sportsperson over the direct and material connection to the performance or entertainment event, respectively.

[391] Zadek, G., *Taxation of Artistes and Sportsmen in International Tax Law*, Chapter: Treatment of Advertising Income of Artists and Sportsmen according to the OECD Model, Eds: Loukota, W. and Stefaner M., Linde. 2007, pp. 159-180. This author establishes a clear-cut example of the advertisement of a banking institution featuring well-known skiers. In this particular case, the payment is not measured by the artistic or sport performance. It is based on the popularity of the skiers, regardless of the link to a particular event.

[392] Mody, D., *International Guide to the Taxation of Sportsmen and Sportswomen*, German Chapter, IBFD, pp. 44.

[393] OECD Commentary on Article 17 OECD Model is moving towards to its objective scope. In other words, the close connection of the income with the performance, in terms of time and nature of the payment, is the yardstick through which the classification within Article 17 OECD Model resides.

Hence, the role of the reference to direct connection to performance is of great assistance, in order to clarify the preference of applying Article 17 OECD Model over royalty income. However, it does not limit the taxing powers of the country where the performance takes place[394], as regards advertising, endorsement and sponsorship income (among others). Paragraph 9 of the Commentary on Article 17 OECD Model expressly states that "*(…) in general adverting and sponsorship fees will fall outside the scope of article 12. Article 17 will apply to advertising or sponsorship's income, etc. which has a close connection with a performance in a given State (e.g. payments made to a tennis player for wearing a sponsor´s logo, trade mark or trade name on his tennis shit during a match)*".

In relation to advertising/sponsorship/endorsement payments **received from foreign companies,** but still linked to the performance, there is no doubt that the performance country retains its right to tax as long as article 17 OECD Model becomes applicable[395]. Another different issue is how those taxing rights can be enforced when involving a foreign payor. A far-reaching position has been implemented by United Kingdom tax authorities (HRMC) in the case of Agassi[396]. Moreover, from US perspective the cases of Goosen and Garcia[397] are also of essence. Therefore, despite the importance of the mentioned sentences, the OECD did not amend the 2014 Commentary in this regard. Accordingly, it opted for maintaining the same line of reasoning, by not treating differently endorsement income related to a performance, even though the existence of a foreign payor and being part of a worldwide, lump sum endorsement agreement[398].

[394] In 2010, the Olympic champion Usain Bolt refused to participate in the Diamond League competition. The reasons underlying such a sport decision were based on tax consequences, since UK tax rules applicable on non-residents include said items of income, his winnings at source, as well as the corresponding apportionment of his global sponsorship income attributable to the performance in UK.

[395] See further OECD (2014), *supra* n. 149, pp.16. The OECD, among others, analyzed the approach suggested by one tax commentator, whereby global endorsement payment in exchange for wearing sports material does not bear any relation with the country where the performance takes place. However, the OECD Committee stated that paragraph 9 of the OECD Commentary on Article 17 has been amended, in order to clarify the type of connection required between the payment and the specific event, for the purpose of applying Article 17 OECD Model.

[396] *Supra* n. 165. It is worth noted that there existed a forerunner case *Mr. Set, Miss Deuce & Mr. Ball v. Robinson*, HMIT 2003 dealing with the apportionment of the worldwide endorsement income, for the purposes of allocating the corresponding part of UK performances.

[397] *Supra* n. 166.

[398] See further, Simpson, A., *supra* n. 347, pp. 7143.

In this regard, the analysis of the contractual clauses in relation to the participation in qualifying event is of great assistance[399]. It may also support for the subsequent apportionment among the involved countries, based on the above criteria.

Finally, paragraph 9 of the Commentary on Article 17 OECD Model also refers to **merchandising** income[400]. Again, this item of income is encompassed in the more general category of income consisting of advertising/sponsorship/endorsement income. It refers to the products themselves related to the entertainer or sportsperson's activity, such as live recordings, sales at concerts, online sale, etc. The requirement to be caught within Article 17 OECD Model is twofold; to be performance-related and not falling under royalty categorization.

However, tax commentators[401] have been holding the position supported by most countries, whereby they consider merchandise products within royalty characterization, in accordance with Article 12 of the OECD Model. In particular, when third party holds the right to exploit the merchandising products of the entertainer and/or sportsperson. Unfortunately, the force of attraction granted to the test of being performance-related under Article 17 OECD Model may take preference over Article 12. Accordingly, Article 17 OECD Model benefits from an oversized force of attraction when dealing with merchandising income, as opposed to royalty income characterization, since they mistakenly may include reproductions of items (pictures/recordings and the like) more suitable to be included under Article 12 than Article 17 OECD Model.

Accordingly, the above analysis leads to a final question, the taxation at the source country has been clarified at the level of the Commentary on Article 17 OECD Model, when dealing with sponsorship/endorsement/advertising. However, each country must advocate the application of its domestic law, in order to ascertain whether this item of income is included within Article 17 OECD Model, since Double Tax Treaties' goal is to distribute taxing rights among States, as opposed to create new ones.

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[399] Paragraph 9 of the Commentary on Article 17 OECD Model *"(…) Such a close connection may be evident from contractual arrangements which relate to participation in named events or a number of unspecified events; in the latter case, a Contracting State in which one or more of these events take place may tax a proportion of the relevant advertising or sponsorship income (as it would do, for example, in the case of remuneration covering a number of unspecified performances; see paragraphs 9.2 and 9.3) (…)*".

[400] The OECD Commentary on Article 17 only refers to them as "*various payments may be made as regards merchandising".* Sandler, D., referred to it as *"concert paraphernalia".* See further, Sandler, D., *supra* n. 118, pp. 8, 184 and 328.

[401] Molenaar, D., *supra* n. 32, pp. 112-113. Sandler, D., *supra* n. *118*, pp. 8 and 328. Cordewener, A., *supra* n. 278, pp. 1355.

In this regard, two main opposite views as regards taxation of advertising/sponsorship/endorsement income are adopted by the States. For example, Switzerland and United Kingdom, among others. The former considers that they qualified under either Article 7 or 15 OECD Model (paragraph 15.2 of the Commentary of Article 17 OECD Model), versus United Kingdom that endorses the far-reaching approach of Article 17 OECD Model when applying the taxation of non-residents obtaining endorsement income in relation to a performance in this country[402].

Finally, it is important to highlight that the close connection to the entertainment event, may broaden the scope of applying Article 17 OECD Model, by more domestic laws interpretations. All this based on the exploitation of the rights in the country/ies where the audience is located. Nonetheless, it must be borne in mind that the scope of Article 17 OECD Model must not be oversized by jeopardizing a correct balance between said Article and Article 12 OECD Model. In other words, whenever the income is obtained off court and/or when prevailing the assignment of rights (passive) over involvement in the entertainment event (active), the related income must not be caught under Article 17 OECD Model. Thus, only when the combination of having an entertainment event intertwined with active involvement exists, Article 17 OECD Model may become applicable.

3.4.2.2. Broadcasting income

As regards Article 17 OECD Model and its Commentary, the performance must be carried out in public, directly or indirectly broadcasted via media. Due to the development of new technologies, the interpretation of public performance through broadcasting means must be carried out in a broad sense. Thus, it would encompass any new manner of broadcasting involving the performance of the entertainer or sportsperson. Nevertheless, the broadcasting of a performance to be regarded within Article 17 OECD Model is limited to the first transmission of a recording, in accordance

[402] See further, Simpson, A., *supra* n. 347, pp. 693-714.

with 1987 OECD Report[403]. However, Commentary on Article 17 OECD Model, in its paragraph 9.4 also refers to simultaneous broadcasting[404].

To this end, the boundaries of Article 17 OECD Model, in connection with royalty income must be clearly stated, as regards broadcasting rights. In this regard, paragraph 9.4 of the Commentary on Article 17 OECD Model clearly prescribes the conditions to be complied with, in order to consider when the broadcasting of a performance is out of the scope of Article 17 OECD Model. In particular, it requires for payments carried out to third parties and the performer not benefitting from it, by any means. Said paragraph concludes the conditions whereby that Article 17 OECD Model does not apply by way of enforcing Article 12 OECD Model, instead. Nevertheless, royalty income characterization must be ascertained by analyzing the legal nature of the broadcasting rights, in accordance with the copyright law.

Although broadcasting term is not further developed within the OECD Commentary on Article 17, it is clear that makes reference to live broadcasting, as opposed to any kind of subsequent recorded broadcasting[405]. The means, through which the entertainment events are made public, are not of importance. Thus, it encompasses radio, TV internet or any other mean capable to simultaneously broadcast the performance to the public.

The objective scope is again a key issue, when limiting the scope to the broadcast of the entertainment event itself, through which the entertainer or sportsperson carries out personal entertainment activities. Accordingly, broadcasting of other events which are not of entertainment nature is out of the scope of Article 17 OECD Model. Thus, pursuant to entertainment income's approach, it leads to the conclusion that the country where the event is being broadcasted is regarded as essential, regardless of whether or not it matches with the country of performance. Therefore, the countries where the event is being broadcasted are entitled to tax simultaneous broadcasting, by appropriately apportion it.

[403] See further, OECD (1987) *supra* n. 82, at paragraph 78. It sets out that income deriving from an exhibition was referred to (a) live performance or the first transmission of a recording. However, 2014 OECD Update of the Commentaries does not encompass any reference to the mentioned first transmission. Thus, it is only valid insofar complying with simultaneous requirement.

[404] 2014 OECD Update of the Commentaries does not encompass any reference to the mentioned first transmission. Thus, it is only valid insofar complying with simultaneous requirement. This paragraph of the OECD Commentary on Article 17 was added in 2014, by specifically including the "broadcasting income" as an item of income related to said OECD Article.

[405] Repeated, "relive" and delayed transmission of live performances are not considered to fall within broadcasting income categorization, in accordance with paragraph 9.4 of Article 17 OECD Model.

Again, the apportionment of the income must be present, even though the practical difficulties arising from it, as well as the enforceability rules to become effective[406]. In this regard, when global broadcasting agreements are reached in the entertainment or sports field, the taxing rights of the country of broadcasting are limited as a source country commensurate with the portion attributable to exploitation of the broadcasting rights as a source State. All this, by taking into account that the income characterization under Article 17 OECD Model only becomes effective insofar there the payment directly benefits the entertainer or sportspersons and not any other third party, as owner of the broadcasting rights.

Once, it is ascertained that the broadcasting is simultaneous and linked to the entertainment, in which the entertainer or sportsperson carries out personal activities as such, the next requirement consists of determining that the income is paid to the qualifying individual. In contrast to those scenarios where the payment is carried out to a third party, who/which previously obtained the assignment of broadcasting rights or alternatively create them[407]. In those cases that the broadcasting income is received by a third party, other OECD Model Articles such as 7 or 12, may become applicable, depending on the legal nature of the broadcasting rights, under the relevant domestic copyright law[408].

3.4.2.3. Cancellation fees

The position held by the OECD is that Article 17 does not apply to this particular item of income. Nevertheless, the subsidiary rule to be applied has been changed over the time. At first stage, in accordance with 1987 OECD Report[409] stated that Article 21 OECD Model (Other income) became applicable. Conversely, 2014 OECD Commentary on Article 17 established that other general OECD "umbrella" articles, such as Articles 7 and 15 OECD Model are into force when cancellations take place.

[406] See further, OECD (2010), *supra* n. 132, part 2 (proposals included in April 2010 Discussion Draft). Also OECD (2014), *supra* n. 149, pp. 17, when dealing with both simultaneous broadcast and the right to record for later broadcasts.

[407] Juarez, A., *Taxation of Entertainers and Sportspersons Performing Abroad*. Part Four-Country Reports-Chapter 23: Spain, Edited by Prof. Guglielmo Maisto. EC and International Tax Law Series. Volume 13. IBFD. 2016, pp. 611-652.

[408] Paragraph 9.4 (…) *For example, where the organisers of a Football tournament hold all intellectual property rights in the event and, as such, receives payments for broadcasting rights related to the event, Article 17 does not apply to these payments (…)".*

[409] *Supra* n. 82 at paragraph 84.

An alternative and dissenting view was held by Vogel[410] since the underlying reason where the compensation is received is "*the initial contractual relationship in his capacity as artiste or sportsman*". This author highlighted the subjective scope of Article 17 OECD Model, by considering that the fact of being received by an entertainer or sportsperson enables to proceed with no further considerations.

In its turn, the author endorses the 1987 OECD Report´s position in this regard[411], since no entertainment event whatsoever is carried. Therefore, there is no reason supporting the application of taxing rights in the source country via Article 17 OECD Model[412]. Again, this conclusion is reached by supporting the sport or entertainment character of the activities carried out (objective scope), as opposed to the qualifying person receiving the cancelation fees.

3.4.2.4. Restrictive Covenants/Inducement and Severance payments

Again, the requirement of carrying out personal activities as such needs to be scrutinized when facing inducement or severance payments, as well as restrictive covenants received by entertainers or sportspersons.

The fact of whether the source State is where the audience consumes the entertainment service versus the performance orientated approach in relation to the Commentary on Article 17 OECD Model becomes secondary, since the key rule is whether or not the income arises from the exercise of an entertainment or sport activity at all.

In this regard, there are two main positions as regards the tax treatment arising from the above-mentioned items of income.

On the one hand, there are international Court tax cases endorsing the qualification of the income in the same manner as the replaced income. In this regard, Article 17 OECD Model is the governing rule, in accordance with the Canadian Tax court decision in Khabibulin[413], as well as the US Tax Court decision in Linseman[414]. Accordingly, in

[410] *Supra* n. 13, pp. 980.

[411] See also, Molenaar, D., *supra* n. 32, pp. 103. Article 21 OECD Model also applies when the cancellation arises from the entertainer or sportsperson side, by way of receiving an insurance payment.

[412] See further, West, C., *supra* n. 183, pp. 58.

[413] Tax Court of Canada of October 14, 1999. 96-4680-IT&-G, *Nikolai Kabibulin v. Her Majesty the Queen*, TCC 964680 (1999). See further Cordewener, A., *supra* n. 278 at paragraph 87.

both Court rulings the signing bonus income (inducement payment) was based on the purpose of inducing the sportsperson to exercise the qualifying activities. Additionally, the latter court decision stated that the corresponding apportionment needed to be carried out among various performances, in order to determine the taxing rights attributable to the source State/s.

On the other hand, opposite tax Court cases were upheld[415], in order to support the nature of capital in relation to the income arising from restrictive covenants. They were considered to be different from the main entertainment or sport activity, since they did not arise from personal activities.

The same positions can be reached when dealing with severance payments or golden handshakes, insofar their cause is linked to the previous exercise of the activities. However, under this type of payments the potential reasons in order to sign them can be wide, such as the compensation for the lack of income in contrast to the remuneration of previous activities. Whenever the underlying and actual reason to the payment would not be the past performances/entertainment events, the income must not be included within the scope of Article 17 OECD Model.

In this regard, the restrictive covenants consisting of not to participate in an entertainment event, are closer to the nature of a cancellation payment, more than the payment in exchange for carrying out actual entertainment activity before the audience. Thus, Article 17 OECD Model would not be feasible to be applicable to those scenarios[416].

Therefore, depending on the type of inducement/severance[417] payment or restrictive covenant and the related primary element, to be analyzed and ascertained on a case-

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[414] Tax Court of US: *Linseman v. Commissioner, 82 TC, 514*. See further Cordewener, A., supra n. 278, pp. 749-750.

[415] Danis, J., *Taxation of Artistes and Sportsmen in International Tax Law*, Chapter: Treatment of Income from Inaction of Artistes and Sportsmen according to the OECD Model, Eds: Loukota, W. and Stefaner M., Linde, pp. 95. It includes various UK, New Zealand and Indian Court cases supporting this position.

[416] See further, Molenaar, D., *supra* n. 32, pp. 102-103. This author understands that the payment cannot be considered a payment in respect of personal activities exercised in the country of performance.

[417] See further, Danis, J., *supra* n. 415, pp. 91-114. It includes a detailed analysis about the different type of inaction, by distinguishing between primary and secondary inactions. According to this author, there are two type of inactions, those is received in connection with an entertainment event, either previous or past. In contrast payments received in exchange for personal activities which have not related to a performance event (refrain from other appearing on other advertisements). Also, Sandler, D., *supra* n. 128, pp. 230. This author includes an example whereby the taxing rights of the source State are questionable. "*if a sportsman is paid in exchange for his agreement to negotiate exclusively with a particular team or to not negotiate with any other team for a particular time period, and the payment is not conditional on signing a contract for services, it may be difficult to argue that the payment is for*

by-case basis, leads to the potential characterizations to apply under Article 7, 12, 15, 17 or 21 OECD Model.

3.4.2.5. Royalties - IP rights

On the one hand, in accordance with above paragraphs, the author's position of locating the source taxing rights in the country where the exploitation of entertainment event is carried out, potentially leads to expand the number of countries where taxing rights are granted as source country, within Article 17 OECD Model boundaries.

On the other hand, the distinction between the simultaneous and subsequent broadcasted of recording entertainment explained in paragraph 3.4.2.2. leads to include within the potential scope of Article 17 OECD Model, only live events and those related items of income.

In addition to the broadcasting items of income, the author understands that the intervention of a third party who actually holds the rights previously granted by the entertainer or sportsperson, leads to not applying Article 17 OECD Model. Also, it is against the unlimited force of attraction granted under paragraph 11 of the Commentary on Article 17.2 OECD Model. The author endorses the approach of US, Canada and Switzerland of the Reservation 16 of the mentioned Commentary, whereby Article 17.2 OECD Model only applies in the case mentioned in subparagraph 11.c), i.e. tax avoidance schemes[418]. In other words, whenever the entertainer or sportsperson does not benefit from the income received by the third party, Article 17.2

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personal services 'exercised' in the source country, particularly where the individual does not conclude a contract for services with the team paying the amount and does not enter the source country at all during the period of negotiations."

[418] Paragraph 11.c of the Commentary on Article 17 OECD Model. "*The third situation involves certain tax avoidance devices in cases where remuneration for the performance of an entertainer or sportsperson is not paid to the entertainer or sportsperson himself but to another person, e.g. a so-called star- company, in such a way that the income is taxed in the State where the activity is performed neither as personal service income to the entertainer or sportsperson nor as profits of the enterprise, in the absence of a permanent establishment. Some countries "look through" such arrangements under their domestic law and deem the income to be derived by the entertainer or sportsperson; where this is so, paragraph 1 enables them to tax income resulting from activities in their territory. Other countries cannot do this. Where a* performance takes place in such a country, paragraph 2 permits it to impose a tax on the profits diverted from the income of the entertainer or sportsperson to the enterprise (…)".

does not become effective and the corresponding Article of the OECD becomes applicable (mainly Article 7, 15, 12 or 21)[419].

Therefore, whenever there are items of income arising from subsequent broadcasting rights or any other exploitation of rights hold by a third-party entrepreneur, the force of attraction of Article 17 OECD Model becomes limited, since the taxing rights are not encompassed within the scope of said mentioned OECD Article and, if so, the States where the audience is located would not be entitled to tax as source countries.

Accordingly, the application of Article 12 OECD Model in connection with entertainment events is left to those cases in which the entertainer or the sportsperson previously transferred the copyrights to an independent third party, by adopting a pure passive position as regards the exploitation of rights, among others, recorded music albums, movies, TV programs and the like. Accordingly, the personal involvement of the entertainer and/or sportsperson in the entertainment event does not entail a direct connection to the exploitation of the copyrights, held by an unrelated third-party company/entrepreneur and not receiving remuneration by the entertainer/sportsperson.

The author understands that the key element of the royalty, i.e. the copyright, fully performs its role when used for the purposes of not carrying out any personal involvement in the entertainment event. Accordingly, in those scenarios Article 12 OECD Model would be applicable as regards the payment between the independent company and the promoter/payor of the event in exchange for the exploitation rights. As opposed to the exploitation of the copyrights by the entertainer and/or sportsperson linked to the entertainment event, which qualify under Article 17 OECD Model.

However, it is worth to note that Article 7 also might be the governing tax rule between source countries and the independent company exploiting the copyrights of the entertainer and sportsperson, in accordance with paragraph 7 of the Commentary on Article 17 OECD Model, insofar no copyrights would be involved.

It is clear-cut that the consequences of not applying Article 17 OECD Model are not beneficial for the taxing rights of the source country/ies, either when adopting the performance orientated approach or the related entertainment event approach, since in both scenarios may lead to exemption (or limited taxation) at source country. Said exemption would take place when fully independent companies would be in charge of

[419]The scope of Article 17.2 is applicable as it was originally included in the OECD Commentary, in 1977. See further paragraph 2.2.5.3.

the exploitation of copyrights[420] via Article 7 or Article 12 OECD Model, unless a live event takes place (Article 17 OECD Model).

In a second stage, entertainer and/or sportspersons receiving remuneration in exchange of the exploitation rights licensed, assigned or sold to an independent party, the type of income may be twofold:

- Either Article 12 OECD Model, in accordance with copyright law[421] and the subsequent exploitation of rights, as opposed to income arising from live performances, or

[420] It is important to note the US Court Cases of Enrico Caruso held in 1931 and Pierre Boulez held in 1984.

On the one hand, in the *Ingram v. Bowers*, 47 F.2d 925 (S.D.N.Y. 1931), those names were granted based on the condition of Mr. Caruso's widow and the person representing the IRS, respectively. In this case, the IRS considered that the income arising from the agreed percentage of the recording sales was of personal character and if so, taxed in US. It is important to note that Mr. Caruso was not tax resident in US, as well as the sales were sold partially out of the US. However, the fact that Mr. Caruso did not hold any copyright or proprietorship right on the records, was of relevance in order to characterize the income as personal services, despite the compensation based on the sales. See further, Buitrago, E., *El concepto de cánones y/o regalías en los convenios para evitar la doble Tributación sobre la Renta*. CISS: Grupo Wolters Kluwer. 2007, pp. 204-210.

On the other hand, the American case *Boulez v. Comm,* (1984) 83 TC 584 was interesting since US adopted the same position of the previous case, by considering that the orchestra conductor had not copyrightable property interest in the recordings. Hence, US did apply the similar governing rule than Article 17 OECD Model, but included in the 1954 German (RFA)-US double tax treaty, to income arising from a percentage or the record sales. The IRS interpreted that it was a compensation for entertainer services, as opposed to an actual license of the exploitation rights. It was subsequently confirmed by the US Courts. See further Molenaar, D., *supra* n. 32, pp. 108 and Sandler, D., *supra* n. 118, pp. 109.

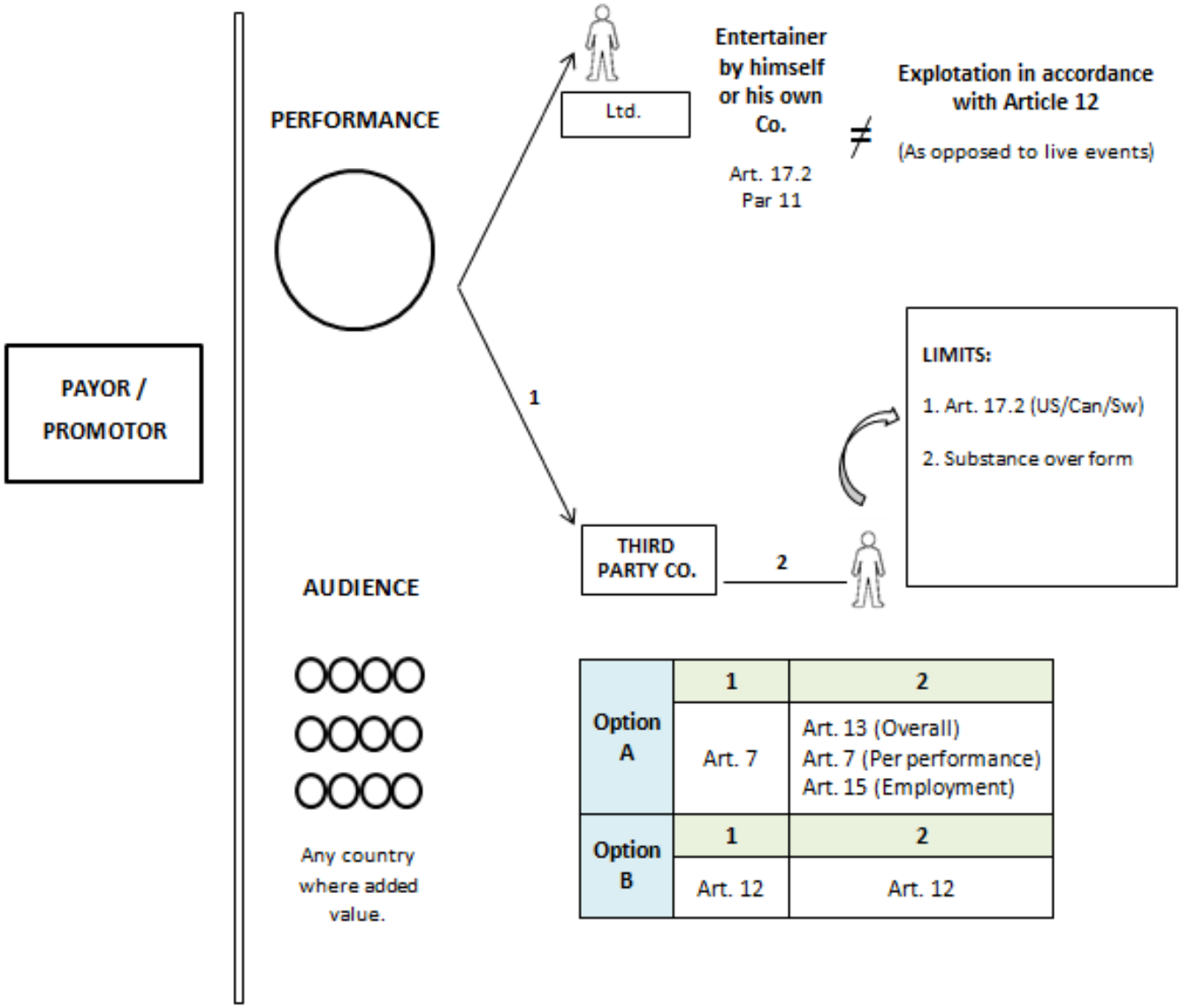
Finally, Canada adopted an interesting and less far-reaching position in the reservation on the Article 12 OECD Model paragraph 35, whereby the royalties of artistic, musical dramatic and cultural character are exempt from royalty taxing rights, as opposed to those in relation to films or television recordings. "*Canada reserves its position on paragraph 1 and wishes to retain a 10 per cent rate of tax at source in its bilateral conventions. However, Canada would be prepared to provide an exemption from tax for copyright royalties in respect of cultural, dramatic, musical or artistic work, but not including royalties in respect of motion picture films and works on films or video tape or other means of reproduction for use in connection with television* (…)".

[421] Paragraph 9 of the OECD Commentary on Article 17 refers to royalties for intellectual property rights, by referring to paragraph 18 of the Commentary on Article 12 OECD Model. In its turn, said paragraph 18 expressly states that "*The fee for the musical performance, together with that paid for any simultaneous radio broadcasting thereof, seems to fall under Article 17. Where, whether under the same contract or under a separate one, the musical performance is recorded and the entertainer has stipulated that he, on the basis of his copyright in the sound recording, be paid royalties on the sale or public playing of the records, then so much of the payment received by him/her consists of such royalties falls to be treated under Article 12*".

Finally in 2003 a last and additional sentence within paragraph 18 of the Commentary on Article 12 OECD Model was introduced, which reads as follows "*Where, however, the copyright in a sound recording, because of either the relevant copyright law or the terms of contract, belongs to a person with whom the artist has contractually agreed to provide his services (i.e. a musical performance during the recording), or to a third party, the payments made under such a contract fall under Articles 7 (e.g. if the performance takes place outside the State of source of the payment) or 17 rather than under this article, even if these payments are contingent on the sale of the recordings".*

- Any other umbrella Article of the OECD Model such as Article 7 (Professional income) when carried out by the entertainer or sportsperson on an individual basis), Article 13 (Capital Gains) when the involved person has disposed of the overall copyrights for a certain period of time or Article 15 (Employment income) when the disposal has been carried out within the context of employment relationship.

For illustrative purposes, it is included below a table with the above-mentioned relationships and related characterizations.



	1	2
Option A	Art. 7	Art. 13 (Overall) Art. 7 (Per performance) Art. 15 (Employment)
Option B	1	2
	Art. 12	Art. 12

Once the main statements as regards the difference between royalties and services subservient to the entertainment event are determined, the remaining key question is whether **image rights** can be included in the OECD definition of royalties of Article 12.2 of the OECD Model[422]. Regardless of the position held by domestic tax authorities and Courts[423], said definition does not allow to include them due to its close character[424]. Therefore, a dividing line must be drawn in order to provide clarity, when the interaction between items of income may lead to classify them, under royalty definition or image rights in connection with related performance fee of Article 17 OECD Model or outside the scope of both mentioned OECD Articles.

In particular, when dealing with the difference between image rights and royalty income, it is illustrative the South African Court Case[425], whereby a non-resident taxpayer obtained a fee, sourced in said country, from the organizers of the tournament, in exchange for the use of his name, biographical details, conduct interviews and public appearance in pre- and post-tournament events. The Court established that *"In our view the submission made on behalf of the appellant is untenable. The appellant was paid the monies to allow his name, biographical details and interviews with him to be used in promoting the tournament. Patents, designs, trademarks and copyright are all rights designed to protect the creators or their assigns of original intellectual works. The appellant's name, likeness, biographical details etc. are not creative effort by the appellant and are accordingly of an entirely different nature to the rights listed in [section 35(1)]"*[426].

Accordingly, the line must be drawn depending on the basis of the payment relies on creative effort or on the contrary, in the celebrity status of the person. Royalty income covers income arising from the exploitation of intellectual property rights, by referral to the domestic definitions, in accordance with Article 3.2 OECD Model. Said definition

[422] Article 12.2 OECD Model states that "*The term "royalties" as used in this Article means payments of any kind received as a consideration for the use of, or the right to use, any copyright of literary, artistic or scientific work including cinematograph films, any patent, trade mark, design or model, plan secret formula or process, or for information concerning industrial, commercial or scientific experience*."

[423] See further, paragraph 3.4.2.6.2, as regards the position of the Spanish National Court in Viajes Halcón/Julio Iglesias Case, whereby a flexible and mistaken interpretation of royalty definition allowed including image rights on it. However, the particular circumstances of this Court case led to a final classification under Article 17 OECD Model by the Spanish Supreme Court. Moreover, paragraph 4.1.6.2. dealing with Spanish domestic tax treatment on image rights.

[424] On the contrary, Tenore, M., *Taxation of Entertainers and Sportspersons Performing Abroad.* Chapter 7: Image Rights, Sponsoring and Advertising Income, Edited by Prof. Guglielmo Maisto. EC and International Tax Law Series. Volume 13. IBFD. 2016, pp. 137-164. This author states that the same line of reasoning used for separating broadcasting and performance fee can be applied for image rights, in order to enable them to qualify under Article 12 OECD, as royalty income.

[425] ITC 1735 (2002) 64 SATC 455, known as ITC 1735.

[426] See further, West, C*., supra* n. 183, pp. 55-58.

may vary from country to country, but not including the exploitation of image rights, since they lack the qualifying characteristic of being creative or an intellectual right.

Finally, it is important to highlight the emphasis included in the second part of the paragraph 9.5 of the Commentary on Article 17 OECD Model, in order to ensure the application of said article in "(….) *cases, however, where the payments made to an entertainer or sportsperson who is a resident of a Contracting State, or to another person, for the use of, or the right to use, that entertainer's or sportsperson's image rights constitute in substance remuneration for activities of the entertainer or sportsperson that are covered by Article 17 and that take place in the other Contracting State. In such cases, the provisions of paragraph 1 or 2, depending on the circumstances, will be applicable*."

The rationale behind this paragraph consists of ensuring the application of Article 17 OECD Model when the image rights payments are disguised remunerations of personal performance fees, instead of an independent and actual exploitation of image rights not connected to the performance. Thus, as a general rule, image rights' income does not fit within the intellectual work, which can be exploited in exchange for royalty payments. As a result, they can be either classified under Article 17 when remunerating personal activities of entertainers/sportspersons (including substance over form scenarios). If not, any other OECD Article becomes applicable when both primary rules are not applicable to the case at hand, as it is explained into detail in the next paragraph.

3.4.2.6. Image rights

3.4.2.6.1. International approach

As regards income arising from image rights of entertainers and sportspersons, it becomes complex in terms of qualification, as well as the subsequent apportionment.

The next paragraphs are devoted to shed some light in relation to the items of income within the context of entertainers and sportspersons which can be characterized under Article 17 OECD, as opposed to other Articles, such as Article 12 (Royalties), Article 7 (Business income), Article 15 (Work Income) and Article 21 (Other income).

In this regard, the 2014 Commentary on Article 17 OECD Model added a new paragraph 9.5, which expressly recognizes the economic exploitation of the image through various manners *"It is frequent for entertainers and sportspersons to derive, directly and indirectly (e.g. through a payment made to the star-company of the entertainer or sportsperson), a substantial part of their income in the form of payments for the use of, the right to use, their "image rights", e.g. the use of their name, signature or personal image".*

Furthermore, it draws a clear-cut line between those not included in Article 17 OECD Model *"(…) Where such uses of the entertainer's or sportsperson's image rights are not closely connected with the entertainer's or sportsperson's performance in a given State, the relevant payments would generally not be covered by Article 17 (see paragraph 9 above) (…)"* and those *"(…) cases, however, where the payments made to an entertainer or sportsperson who is resident of a contracting State, or to another person, for the use of, or the right to used, that entertainer's or sportsperson's image rights constitute in substance remuneration for activities of the entertainer or sportsperson that are covered by Article 17 and that take place in the other Contracting State. In such cases, the provisions of paragraph 1 or 2, depending on the circumstances, will be applicable".*

Thus, the key terms are "*closely connected*" together with "*constitute in substance remuneration for activities of the entertainer or sportsperson*", in order to be caught within the scope of Article 17 of the OECD Model.

From a theoretical point of view, the above conclusions are of great assistance, in order to avoid disguised remunerations obtained by entertainers and sportspersons to escape from the application of Article 17 OECD Model. In accordance with 2014 Commentary on Article 17 OECD Model, when the payment is carried out to an entertainer or sportsperson in exchange for the use of his/her image right based on his/her celebrity/notoriety status, in the context of an off-court scenario, not closely connected to a performance, said income is out of the scope of Article 17 OECD Model.

However, from a practical perspective, the facts and circumstances of the particular case at hand must be taken into account, since the final qualification of the items of income that can be qualified, either as image rights, or royalty, business or employment income, leading to a practical analysis involving a high degree of difficulty.

To this end, the positions adopted from various domestic tax perspectives are of great assistance and must be taken into consideration. In this sense, the positions held by Germany, France, Switzerland and US are explained below.

Germany introduced in 2014 a new paragraph 17 to the Commentary on Article 17 OECD Model, based on the former Observation to said Commentary in paragraph 15 of the 2010 OECD Model Commentary (even though this one was limited to the live broadcasting rights, as opposed to other commercial exploitations). Said paragraph 17 reads as follows *"Germany reserves its right to insert a provision according to which the income derived by a person for the transfer of live broadcasting rights or other commercial exploitations of personal activities of entertainers or sportspersons may be taxed in the State where the entertainer or sportspersons exercise personal activities".*

This statement included in the OECD Model must be interpreted, taken into consideration that German tax rules[427] applicable to non-residents, whereby the income characterization distinguishes between active appearance-based, as opposed to passive licensing of personality rights for purposes other than the performance. The point is that the German tax authorities endorse a broad characterization of income from the utilization of entertainment and sport activities, even if a double tax treaty applies.

Furthermore, it was introduced in 2014 a new paragraph 18 to the Commentary on Article 17 OECD Model whereby *"According to **France**´s doctrine and treaty practice, income that a sportsperson or entertainer derives from the use of that person´s image is inseparable from that person´s professional activities and must therefore be taxed in the State in which such income arise. France therefore reserves the right to include in its bilateral conventions an additional paragraph allowing the source taxation of income from activities that cannot be disassociated from professional notoriety".* Again, a domestic and far-reaching approach is appealed to be respected through its introduction within the OECD Commentary on Article 17. Similar to above-explained German approach, France is eager to protect the taxing rights as source country, whenever image rights of entertainers and sportspersons are involved. Even more, it is entitled to go further by applying Article 17 OECD Model in all scenarios where entertainment or sport's image rights are involved.

[427] In particular Sec. 49(1) n. 2(d) (f) and 3, of the German Income Tax Act.

However, the French jurisprudence has nuanced in practice this approach[428]. In particular, the decision of the Conseil d'Etat related to the case of Edmilson Gomes de Moraes[429]. It did recognize the option to exploit the image rights as an autonomous business, disregarded from the personal rights of the individual, when carrying out his professional activity/employment. Having reached that relevant conclusion, the Conseil d'Etat ruled out that the particular case, the assignment of image rights by the football player to a UK company cannot be dissociated from his football´s performances. In other words, the similar approach to the OECD's close connection to the performance lead to conclude that the exploitation of image rights was an actual disguised remuneration for his performance, based on the involved amounts of the image right´s transfer, as well as the lack of substance at the level of the UK company, which was supposed to carry out the exploitation activity.

Thus, from the French Court´s perspective, even though the existing paragraph 9.5 in the Commentary on Article 17 OECD Model, the Court practice has started to interpret the option to exploit the image rights disassociated from the performing activity of the entertainers and sports players and, if so, not to apply Article 17 OECD Model when evidences on the contrary are provided in order not to link this stream of income from the related performance.

Moreover, **Switzerland** introduced in the 2014 OECD Commentaries on Article 17, the paragraph 15.2 which lays down *"Additionally, Switzerland takes the view that merchandising income and income in the form of payments for the use of, or the right to use, image rights (paragraph 9.5. of the Commentary) are not covered by Article 17."* Thus, the completely opposite and dissenting viewpoint is held by another OECD Member. The income arising from image right´s exploitation cannot be characterized within the parameters of Article 17 OECD Model, from the Swiss perspective[430], even if they are directly linked to a performance.

Finally, the **US** position held by American IRS is also of relevance. It enacted in 2009 a General Legal Advice Memorandum[431] which dealt with, among others, the domestic tax treatment to be granted to income arising from the exploitation of image rights, which differs from the OECD's position*. "The incremental value to the player, if any, for*

[428] Moreau, C., ITEG comments on (selected) 2014 Updates to the Commentary on Art. 17 OECD Model Tax Convention, Section: Image Rights. *Global Sports Law and Taxation Rep*orts, 2015 (March), Vol. 6, No. 1.

[429] Decision of the Conseil d'Etat dated in December 4, 2013, n. 348136 in relation to the previous sentence from the Administrative Court of Lyon 5è ch., dated in November 23,2010, n°09LY1539.

[430] Tetlak, K., and Roeleveld, J., *supra* n. 190, paragraph 5.1.3.2.3.2.

[431] US General Memorandum released by the IRS, AM2009-005, dated in February 7, 2009.

granting the sponsor the right to use his or her name and likeness rights on a stand-alone basis apart from those services is de minimis. Accordingly, retainer fees paid pursuant to these contracts should be characterized as income from personal services and, to the extent the fees relate to services performed in the United States, taxed on a net basis at graduated rates (...) In the atypical situation in which a player can establish that the sponsor retained the player to use his or her name and likeness rights on a stand-alone basis (for example, to market a signature line of equipment), a portion of the retainer fees may be characterized as royalties and, depending on the facts, may be effectively connected with the conduct of that player's U.S. trade or business (…). Accordingly, the domestic US general tax rule consisted of qualifying those items of income as professional or service income, as opposed to exceptional scenarios whereby the use of the image rights can be clearly distinguished from the remaining services and, if so, to be characterized as royalty income".

From the US double tax treaty practice, the Technical Explanation of the US Model tax convention[432] establishes as determining factor to include items of income within Article 16 of the US Model (similar rule to the one included in Article 17 OECD Model) that *"In determining whether income falls under Article 16 or another article, the controlling factor will be whether the income in question is predominantly attributable to the performance itself or other activities or property rights. For instance, a fee paid to a performer for endorsement of a performance in which the performer will participate would be considered to be so closely associated with the performance itself that it normally would fall within Article 16. Similarly, a sponsorship fee paid by a business in return for the right to attach its name to the performance would be so closely associated with the performance that it would fall under Article 16 as well".*

The chosen terms in order to determine the application of Article 16 US Model, as opposed to other potential general US Model articles are *"predominantly attributable to the performance" and "closely associated to the performance".* The Technical Explanation of the US Model Tax Convention already included those terms in the previous version[433]. It is very similar to the 2014 Commentary on Article 17 OECD Model which replaced the referral to income derived directly or indirectly from a performance, by the reference to the close connection.

In this sense, after analyzing the position held by various countries, either OECD Members or the US with its own Model Tax Convention, the pivotal question that

[432] Technical Explanation on US Model Convention of November 15, 2016.
[433] September 20, 1996.

remains open is the meaning of close connection to the performance. In addition, there are no practical examples in any of the two above major interpretative tools in the international tax treaty arena, when dealing with image rights.

It is important to remember that paragraph 9 of the OECD Commentary on Article 17 related the close connection to the timing of the income generating event and the nature. Also, it establishes that the close connection may be evident from the contractual arrangements.

However, the international tax doctrine and domestic bodies have provided examples, which can be of great help. In this regard, the practical examples discussed during in the IFA Congress held in Rome in 2010[434] are helpful to this end. In particular, the third case concerning a famous tennis player who received various types of remuneration, among others, payment for wearing a trade mark and trade name in her tennis shirts, public speech, participating in a televised fashion show, recorded in the sourced country. It is clear-cut in those cases, the use of the image and/or ancillary rights related to the trademark (endorsement) were the only ones connected to the performance, in terms of timing, place and the like. In the remaining cases, the payment for the use of the image is more related to the celebrity status than the performance itself in the source country. The conclusions are blurred in those cases where the payments for the use of the image are carried out in relation to events connected to the notoriety or the celebrity of the entertainer or sportsperson, whether or not Article 17 OECD Model become applicable, being more difficult to characterize them within the scope of said Article.

In those cases, the connection to the performance is not the predominant element. Moreover, on the one hand said celebrity is status has been acquired throughout the course of public performances. On the other hand, the entertainer and sportspersons can also organize his/her activity carried out in the field of the image rights (by themselves or handle by third parties), like any other individual. The fact of qualifying as entertainers and sportspersons cannot jeopardize their right to use the image in all potential scenarios. For instance, the payment for the right to use the image in TV or on-line commercials, video games and the like, are example whereby the economic outcome of this off-court activity must be qualified out of the scope of Article 17 OECD Model, unless there exist a specific circumstance in the particular case which links said

[434] 175- IFA (2010), *IFA/OECD: Red Card 17?*, September 1, 2010. 64th Annual Congress in Rome, Italy, Seminar E.

activity to the performance in the source State (such as the advertisements before or after the tournament) and if so, transforming them into on-court activities.

An important step forward as regards the characterization of the image rights consists of the replacement of "directly or indirectly" related to the performance, by "close connection". It gives more certainty in terms of characterization of image rights within Article 17 OECD Model, since it does not give room to any indirect link to the performance. However, as it has been mentioned in the paragraph 3.4.1. dealing with the general statements of entertainment income versus other items of income, the image rights are also tackled within the same paragraph 9 of the OECD Commentaries on Article 17, which establishes a broaden drafted sentence *"Such a close connection will generally be found to exist when it cannot reasonable be considered that the income would have been derived in the absence of the performance of those activities".* (Emphasis added by the author).

Through this statement, the domestic tax Courts could misunderstand the interpretation of image rights, among others items of income, and to characterize them under Article 17 OECD Model. It would take place by endorsing a far-reaching approach, when tackling image rights, whereby in case of existing a remote and/or indirect connection to the performance. Accordingly, it would lead to the qualification of image rights within the terms of Article 17 OECD Model. Therefore, it is the author´s position to replace the use of the connection to the performance for the entertainment event, in order to avoid the shortcomings explained throughout paragraph 3.4.1. Furthermore, the above-mentioned paragraph leading to unlimited force of attraction of Article 17 OECD Model must be deleted, with the aim at avoiding misinterpretation from domestic tax administrations and Courts, as it happened in the Spanish court case explained in the next paragraph.

3.4.2.6.2 Julio Iglesias/Viajes Halcón Spanish Case

The Spanish Court Case of Viajes Halcón and Julio Iglesias[435] is a yardstick, giving evidence of how far the domestic tax Courts can misinterpret the tax characterization of

[435] The case has been discussed in Molenaar, D. and Dr. Grams, *supra* n. 99, pp. 504, where they refer to an earlier discussion of the same case in Vogel, K., *supra* n 75, pp. 319.

image rights and their connection to unlimited force of attraction of Article 17 OECD Model[436].

The starting point was the Spanish tax authorities' approach, which subsequently was endorsed by the TEAC[437], in its decision dated in September 8, 2000[438], it was reversed by the Spanish Audiencia Nacional in October 3, 2002[439] and finally the Spanish Supreme Court issued its final decision in June 11, 2008[440].

The case concerned the performance in Spain of eight concerts by the famous singer Julio Iglesias during July 1995. At that time Mr. Iglesias was not tax resident in Spain. The promoter had entered into two contracts: according to the first one, Julio Iglesias had to perform in each of the eight concerts and he had to receive a performance fee of ESP 112,500,000 (approx. to EUR 676,000); according to the second one, the promoter, by previously acquiring from a Dutch company (ITCON BV) the entertainer´s image rights, licensed those image rights of the singer to a fully independent company Viajes Halcón. In particular, "*the right to record one of the performances of the singer for television and the right to broadcast such a performance on television in Spain only and for a single occasion*". The fee paid by Viajes Halcón to the Dutch company under the second agreement was of ESP 250,000,000 (approx.. EUR 1,500,000). The double taxation agreement between the Netherlands and Spain (hereinafter Sp-NL DTT) did not, and does not still to date, contain a clause similar to Article 17(2) OECD Model.

The TEAC concluded that there was a close connection between the rights conferred by means of the second agreement, on the first hand, and the artistic qualities of the singer and his Spanish personal performance, on the second hand. Thus, in the TEAC's view, the fee under the second agreement should have accrued for the benefit

[436] See further Durá García, L.J., *supra* n. 210, pp. 199-219.

[437] The analysis of the jurisdictional nature of the Spanish Tribunales Económico-Administrativos was the subject of European Court of Justice (hereinafter ECJ), 21 March 2000, Joined Cases C-110/98 to C-147/98 Gabalfrisa SL and Others v Agencia Estatal de Administración Tributaria (AEAT) [2000] ECR I-01577 ("Gabalfrisa")]. The Tribunales Económico-Administrativos are administrative bodies empowered to resolve tax disputes. In connection with such a decision, the ECJ concluded that Tribunales Económico-Administrativos where permanent bodies established by law with compulsory jurisdiction, that resolved tax disputes *inter partes* through the application of the law. As to its independence from the tax authorities, the ECJ concluded that "Article 90 of Law No 230/1963 ensures a separation of functions between, on the one hand, the departments of the tax authority responsible for management, clearance and recovery and, on the other hand, the Tribunales Económico-Administrativos which rule on complaints lodged against the decisions of those departments without receiving any instruction from the tax authority" (Par. 39).

[438] TEAC (Segunda Vocalía), RG2765/1996, dated 8 September 2000.

[439] Audiencia Nacional (Section 2), Case No 115/2000, dated in June 13, 2002.

[440] Tribunal Supremo (Section 2), Case No 7710/2002.

of the singer and the Dutch intermediate company was no more than an agent collecting its payment[441].

It is important to highlight that the Spanish tax authorities did maintain a different position in previous and post replies to other tax rulings[442]. However, that was certainly the position that the Spanish tax authorities successfully maintained throughout the litigation procedure of this particular tax case.

What is interesting in respect of the present case is that the decision of the TEAC, as well as the subsequent Court decisions did not make any reference as to whether the entertainer derived any benefit from the payments carried out to the Dutch company dealing with his image rights or simply it was not a fact to take into consideration. The singer was presumed to be the actually beneficial owner of such payment, irrespective

[441] TEAC also addressed the issue of interpreting the double taxation agreement between The Netherlands and Spain, which lacks of incorporation a specific article similar to Article 17.2 OECD Model. In doing so, it adopted the ambulatory interpretation approach, i.e. although the treaty is dated in June 6, 1971, TEAC adopted the interpretation given by the 1992 amendments to the Commentary on Article 17 OECD Model. See further paragraph 2.3.3.2. TEAC based its decision in paragraph 8 of the Commentary on Article 17 OECD Model, TEAC concluded that it could look through the third person which materially received the income. It is surprising that TEAC did not find necessary to quote what was the tax statute, either under the applicable double tax treaty or under domestic law, where it was found the legal ground to support the application of the look-through approach.
As to treaty law, it was quite possible that the entertainer could have been resident either of the United States at that time (and, if so, Article 19.2 of the double taxation agreement between Spain and the United States might have allowed for the look-through approach to be applied) or of a non-treaty country.
As to domestic legislation it is worth noting that the TEAC did not find necessary to point out to any domestic tax statute specifically attributing the income arising from the second agreement to the performance of the entertainer. The only article quoted by the TEAC in this respect was Article 70(Uno)(e) of Personal Income Tax Regulations (hereinafter PITR), adopted by Royal Decree Law 1841/1991 which, it is submitted, contains a mere source rule that does not attribute to the entertainer the income obtained by the other person.
It did so based on the previous TEAC decisions held between 1999 and 2000 (TEAC (Primera Vocalía), RG 9282/1996, dated 17 November 1999, TEAC (Quinta Vocalía), RG 9283/1996, dated 17 November 1999; TEAC (Sexta Vocalía), RG 35/1997, dated 21 July 2000; and TEAC (Sexta Vocalía), RG 499/2000, dated 22 September 2000. In accordance with those TEAC decisions the so-called "image rights" of entertainers and sportspersons were so closely connected to the performance of such individuals that they could not be taxed other than as personal (i.e. employment or professional) income of those entertainers and sportspersons, no matter whether the payments were effectively received by those other persons and irrespective also as to whom was the beneficial owner of such income.

[442] DGT ruling 2672/1997, dated 23 December 1997; DGT ruling 978/1998, dated 5 June 1998; DGT ruling 1058/1998, dated 12 June 1998; DGT ruling 1322/1998, dated 20 July 1998; DGT ruling 1859/1999, dated 14 November 1999; DGT ruling 888/2000, dated 18 April 2000; DGT ruling 954/2000, dated 26 April 2000; DGT ruling 365/2002, dated 8 March 2002 and, DGT ruling 595/2003 dated 30 April 2003.

to whether and to what extent was he effectively benefiting from such payment as a matter of fact.

At the level of the Spanish National Court "Audiencia Nacional" in its decision of October 3, 2002, the scope of potential characterizations to be applied in relation to the income obtained by ITCON BV was broaden. In this regard, four options were granted:

1. Royalty income, in accordance with Article 12 of the Sp-NL DTT and, if so, being subject to a 6% withholding tax at source.

2. Entertainment or sport income, based on Article 18 of Sp-NL DTT (similar to Article 17 OECD Model) and being subject to a 25% withholding tax at source, as per the domestic tax rules applicable at that time.

3. Business income, in accordance with Article 7 of the Sp-NL DTT, with no applicable withholding tax at source.

4. Employment income, based on the potential application of Article 16 of the Sp-NL DTT (similar to Article 15 OECD Model).

It is important to highlight that the Spanish National Court was following a position held until 2007, whereby it considered that royalty income was the correct classification of image rights of Spanish tax resident football players, when licensed by their Spanish football clubs to intermediate Dutch entities[443].

However, said mistaken approach of the Spanish National Court was based on the fact that the interpretation was solely focused in the domestic tax rules[444], by leaving aside the analysis of the definition included in Article 12 of the Sp-NL DTT. In doing so, Article 96 of the Spanish Constitution, whereby the supremacy of the international treaties over domestic rules was stated, was not respected. Additionally, a forbidden treaty override took place in relation to the Spanish domestic tax rules and the Sp-NL DTT.

[443] Among others, the sentences from the Spanish National Court of May 24, 2007, February 8, 2007 and July 18, 2006, with their respective previously TEAC decisions of December 5, 2003, December 19, 2003 and November 20, 2003. It also of relevance the ruling issued by the Spanish National Court in November 30, 2005, Case No. 360/2005 (TV3 Court Case). Again, the royalty characterization took preference over other potential characterizations. See further, De Juan y Ledesma, A., The artistes and Sportsmen's Article (Article 17 of the OECD Model): Has the Time Come to Stop Counting Stars in the Sky? *Bulletin for International Taxation*, 2012, 2.

[444] Article 13.1.f.3º of NRITA.

In this regard, the position of the Spanish National Court in Viajes Halcón/Julio Iglesias case was reversed when subsequent court cases dealing with image rights and interposing Dutch entities which theoretically were exploiting them. In particular, tax rulings issued in July 18, 2007 and September 25, 2007[445]. In those tax judgements, the Spanish National Court, as opposed to the case of Viajes Halcón/Julio Iglesias, recognized that the interpretation of the royalty income cannot be so flexible that image rights are considered to be encompassed on it. This reasoning was based on paragraph 9 of the Commentary on Article 17 OECD Model, whereby the advertising and sponsorship fees falls outside of Article 12 OECD Model as a general rule. In addition, said OECD Article does not expressly include image rights, among its definition. Therefore, the Spanish tax authorities cannot invoke the application of royalty characterization based on an all-encompassing and flexible interpretation, whereby the image rights are assimilated to rights arising from intellectual property[446].

Back to Viajes Halcón/Julio Iglesias Court Case, the final outcome from the Spanish National Court was the classification of the image rights under Article 7 OECD Model, based on the fact that Sp-NL DTT did not include a counteract clause similar to the one encompassed in Article 17.2 of the OECD Model[447].

Finally, the Spanish Supreme Court enacted its final decision about Viajes Halcón/Julio Iglesias Court Case in June 11, 2008, by endorsing back the position held by the Spanish tax administration and TEAC. Again, the image rights related to the performance of the singer were classified under Article 17 OECD Model (article 18 of Sp-NL DTT), together with the remaining items of income of entertainment nature[448]. Thus, all items of income obtained directly or indirectly related to the performance of the eight concerts in Spain, were subject to tax under the applicable article of the Sp-NL DTT, mirroring Article 17 OECD Model (but lacking paragraph 2), regardless of

[445] Spanish National Court sentence, issued in July 18, 2007, Rec. 249/2005 and Spanish National Court sentence issued in September 25, 2007, Rec. 171/2006, against R.C.D. Espanyol and F.C. Barcelona football clubs, respectively.

[446] Furthermore, analogy is prohibited as means of interpretation under Article 23.3 of the Spanish General Tax Act.

[447] The Spanish National Court understood that the only manner to attribute the income obtained via the loan-out company is the application of Article 17.2 of the OECD Model. In those scenarios such as the case at hand, when there is no clause similar to Article 17.2 in the applicable double tax treaty, the dynamic interpretation of the Commentaries of the OECD Model cannot replace the wording of the tax treaty itself, in accordance with the willing of the parties when concluding said treaty.

[448] The same approach was also confirmed in the TV3 Court Case through the Spanish Supreme Court decision issued in April 13, 2011, Rec. 456/2006, by mirroring the approach adopted in Viajes Halcón/Julio Iglesias Court Case. See further a critical analysis of the TV3 Court case, De Juan y Ledesma, A., *supra* n. 443. Also, Spanish Supreme court case issued in February 28, 2013, Rec. 2773/2010.

whom was the actual person receiving the income, either the entertainer himself or the Dutch entity (ITCON B.V.)

Its reasoning follows and exceeds the TEAC's position, by stating that the income received by the entertainer as well as the Dutch company "*arise with no doubt, from the agreed performance of Juan Manuel in Spain, being not forced the presumption that said income is received by the entertainer and not the Dutch entity*". The Spanish Supreme Court recognized as potential categorizations were either royalty income (Article 12 OECD Model) or income caught under Article 17 OECD Model. Again, the alternative of applying Article 7 was not taken into consideration, even though part of the income is paid through a Dutch entity[449].

The final outcome consisted of classifying the income under Article 17 (18 Sp-NL DTT) OECD Model, based on the fact that overall income was connected to the concerts in Spain was the yardstick to the income characterization of image rights. It is a clear-cut example of a narrow and far-reaching interpretation of the scope of Article 17 OECD Model over any potential alternative classification.

3.4.2.6.3. Conclusions

In accordance with the author´s position, the main tax consequence arising from an actual disposition of the economic exploitation of image rights consists of limiting the force of attraction of Article 17 OECD Model, whereby it cannot be classified under

[449] Most of the reasoning included in the sentence was devoted, in its turn, to the application of Sp-NL DTT, despite the fact of not creating a clause mirroring Article 17.2 OECD Model, alongside the related Commentary of the OECD Model, in order to reverse the conclusions reached by the Spanish National Court. In particular, the Spanish Supreme Court appealed for paragraph 36 of the Preamble of the Commentary of the OECD Model, whereby the interpretation of the tax treaties, must be carried out in accordance with the OECD Commentary in force, when the application of particular tax treaty takes place, irrespective of the content of OECD Commentary, at the time of the signature of said tax treaty was carried out. In addition, paragraphs 7, 8, 9 and 11 of the Commentary on Article 17 OECD were brought into consideration, as well as the fact that Spain and The Netherlands had not included any reservation to the application of the mentioned paragraphs of the OECD Commentary when the Spanish sentence was released.
In this regard, the look through approach was considered legal to be implemented via the existence of Spanish domestic tax rules enabling to apply it, together with the above-mentioned paragraphs of the Commentary on Article 17 OECD Model, enclosing the ambulatory interpretation of the Article 3.2 of OCCD Model. The critical analysis of the position held by the Spanish Supreme Court in Viajes Halcón/Julio Iglesias Case is included into detail in 2.3.3.2.

Article 17 OECD Model [450], as opposed to the Spanish Court Case of Viajes Halcón/Julio Iglesias[451]. This position is supported though the fact of giving preference to Article 7 OECD Model (business income), insofar certain requirements must be met within the business structure managing those rights.

It is based on the rationale of the Commentary on Article 17 OECD Model. In particular, its paragraph 9.5, requires for their application to be "closely connected" with the entertainer or sportsperson's performance in the source State. However, when being previously transferred to a third company and not being exploited by entertainers or sportspersons from their personal activities, in accordance with the author´s interpretation of paragraph 11 of the Commentaries on Article 17.2, it should not be caught by Article 17.1 or 17.2 of the OECD Model.

In its turn, paragraph 7 of the OECD Commentaries on Article 17 is the touchstone through which "*Income received by impresarios for arranging the appearance of an entertainer or sportsperson s outside of the scope of the Article (…)*".

Therefore, the mentioned force of attraction of Article 17 OECD Model is appropriately limited when actually carrying out the exploitation of image rights by third independent companies. In order to ensure avoiding fraudulent benefits out of this position, it is pivotal to ensure that the company managing the image rights has real substance, by carrying out actual business transactions though its professional staff (not being friends, relatives or related persons of the entertainer or sportsperson). Moreover, properly means and infrastructure is required in order to enable carrying on the managing of the image rights. Those facts can only be determined on a per case basis.

A clear and guidance example is the French Court Case of Laetitia Casta[452] whereby the economic exploitation of her image rights was performed by a company set up by a pool of Dutch banks. Subsequently, it was acquired by two professionals of the entertainment management. To this end, said Dutch company tackling her image rights had several employees and supplied effective services in the context of negotiating and executing image rights' contracts.

[450] Also, the domestic characterization under employment income is no longer permitted when dealing with independent sponsors' (not being the sports club themselves) and effectively transferred to actual image rights companies.

[451] In the same line of reasoning, Spanish Supreme Court Judgment of April 14, 2011. See further, *supra* n. 448.

[452] Laetitia Casta Court Case: Administrative Court of Appeal of Paris (CAA Paris), October 11, 2012 n°10PA04573.

Thus, active companies having real substance to undertake the negotiation, execution and management of image rights transactions and related functions, enable for the application of Article 7 OECD Model for the income steaming from those activities. By adopting this position, it correctly defines the boundaries of Article 17 OECD Model, in light of the required close connection to the entertainment event and personal activities of the entertainer or sportsperson, in order to apply Article 17 OECD Model. In this sense, structuring and implementing the exploitation of image rights can become a highly valuable asset for entertainers and sportspersons in terms of protection and business profits. In addition, it would prevent them from unpleasant surprises related to audit from the involved domestic tax authorities and the subsequent reputational damages to entertainers and sportspersons via media released information about tax fraud issues.

3.4.3. Triangular Scenarios

In order to end up the analysis of the relationship between Article 17 versus other OECD Articles, the triangular scenarios are of relevance in order to describe the scenarios where the potential conflicts of characterization may take place.

In this sense, the first tax issue to be addressed when tackling triangular scenarios is the applicable double tax treaty to the particular case at hand. In principle, at least three countries, with their subsequent taxing powers may be involved. For illustrative purposes, the **countries involved in the U2 Case**[453] are used as example:

A) The countries where the companies providing the services were resident. The Netherlands and Ireland.
B) The country where the entertainers where tax resident (or, in its turn, where company receiving artistic income was resident on behalf of band members). Ireland.
C) The country of the performance. Spain

In this regard, difficulties may arise from triangular relationships, in relation to the application of Article 17 of the OECD Model. However, this tax issue was clarified on the one hand by the introduction of paragraph 8[454] of the Commentary on said article,

[453] See further paragraph 3.3.3. including a detailed analysis of this major Court case.
[454] See further, OECD (1987), *supra* n. 82 at paragraph 102. Addition included in 1992 Commentary on Article 17 OECD Model.

whereby the income arising from the performance must be taxable under Article 17.1 of the Double Tax Treaty corresponding to the performance country and the tax residency of the entertainer/sportsperson, regardless of the interposed company´s tax residency.

On the other hand, paragraphs 11.1 and 11.2[455] into the Commentary on Article 17 OECD Model[456] also deals with this particular tax issue. The former expressly allows for the application of the second paragraph of the mentioned article, when the country of the tax residency of the entertainer or the sportsperson is different to the country where the "slave" company is tax resident.

The key issue aimed at determining the applicable double tax treaty relies on the fact whether the country where the performance takes place includes within its domestic tax system, a look-through provision for artistic and/or sports income. By taking as a reference the U2 case, if it had been existed said provision under Spanish domestic tax law, article 17.1 of Spain-Ireland Double tax treaty would have become applicable, based on residency of the members of the band.

However, in case of not having implemented a domestic look-through provision, as it actually happened in the Spanish tax law, applicable when the U2 Supreme Court's sentence was enacted. The double tax treaty between Spain and Ireland, as well as the one concluded between Spain and The Netherlands were the applicable international tax rules, based on the fact of the tax residency of the particular companies providing services in connection with the U2 Spanish performance. Thus, the applicable double tax treaties were those concluded between Spain and the countries where the intermediate companies were resident, even though in the particular case of U2 certain companies matched the tax residency with the band members benefiting from the Irish tax residency status, too. It is determined, based on the applicable governing distributive rules, since they were the tax resident persons entitled to treaty protection, in accordance with Article 1 of both above mentioned Double Tax Treaties[457].

The position adopted by the Spanish tax authorities, as well the Spanish Courts in the U2 case vary inconsistently. As a starting point, the tax audit did not include any payment addressed to the Dutch producer, among the issues to be scrutinized. In addition, the taxpayer´s appeal before the Administrative Court was mistakenly based on the grounds of the double tax treaty signed between The Netherlands-Spain. The

[455] Addition included in the 2000 Commentary on Article 17 OECD Model.

[456] See further, Betten, R. and Lombardi, M., *supra* n. 121, pp. 560.

[457] See further, Vogel, K*, supra* n. 13, pp. 992.

Spanish National Court also encompassed it within its analysis under the "*booking and promotion*" characterization of services. By proceeding so, it analyzed the consequences arising from the above-mentioned treaty. Although, it did not specifically express the reason why it was carried out. Mistakenly, it concluded that, based on the application of the Spanish domestic law and the Spanish Supreme Court doctrine previously established in the case enacted in June 11, 2008 (Julio Iglesias/Viajes Halcón's case[458]). Said Court case stated that the double tax treaty signed between the Spain-The Netherlands enabled Spanish tax authorities to subject to tax this item of income as source State, although the mirroring provision to Article 17.2 OCDE Model was not encompassed in said particular tax treaty.

Nevertheless, in its final outcome, the Spanish National Court left aside the non-performance´s income from Spanish taxing powers, based on the objective scope of Article 17 OECD Model of the applicable Spain-Ireland double tax treaty. The income arising from the booking and promotion of the concert paid to the Dutch company[459], Concert Production International, B.V. was not tackled, based on the position of Spanish tax authorities in their tax audit, whereby it was considered not to be subject to withholding tax in Spain with no further explanation.

In its turn, the Spanish Supreme Court, instead of shedding some light through its sentence, it fuelled the degree of uncertainty by avoiding any reference to the Spanish-Dutch Double Tax Treaty. It reversed the outcome of the Spanish National Court sentence. However, it did not analyze the Spain-The Netherlands double tax treaty throughout the sentence. Therefore, the tax consequences of its outcome must be limited within the boundaries of Ireland-Spain double tax treaty and the consequences raised by the Spanish National Court.

Back to the general analysis of triangular scenarios, the purpose of below paragraphs is to provide a conclusion consistent with Article 17 OECD Model, its related OECD Commentary and Spanish domestic tax law.

As a starting point, the mentioned paragraph 11.1 of the Commentaries on Article 17 partially provides for a solution, when there is no double tax treaty between the country of source and the country where the "slave company" is resident. In particular, the domestic laws of the country of source become applicable. However, in those cases,

[458] See further, paragraph 3.4.6.2.

[459] In this regard, the structure of the sentence leads to misunderstandings, since the income obtained by the Dutch company falls outside the scope of Spanish taxing powers, but mistakenly incorporated under the paragraph dealing with the analysis of Spain-Ireland double tax treaty.

equal to U2´s scenario, where it does exist a double tax treaty between Spain-The Netherlands, but lacking of the incorporation of Article 17.2 OECD Model, alongside the fact that Spanish legislation as source country had not implemented a look-through provision, there exists a lack of solution from the Commentary on Article 17 OECD Model.

Pursuant to Vogel´s position[460], there exist two potential main scenarios, when dealing with triangular scenarios, in the context of article 17 OECD Model:

- Based on the lack of domestic look-through provisions at the source country, the solution of paragraph 11.1 of Commentaries on Article 17 is fully effective. It provides for the application of the double tax treaty involving performance´s country and the country where the star company is resident. This solution is based on the application of Article 17.2 OECD Model.
- In addition, when article 17.1 combined with domestic look through provisions of the source state are into effect, the double tax treaty between the source country and the entertainer/sportsperson country becomes effective.

Finally, from the author's perspective a third alternative may be applicable, too. In particular, there are cases which may mirror to the particular circumstances of the U2 case, leading to the outcome of not applying article 17 OECD Model (Article 18 of the case at hand, Spain-The Netherlands Double Tax Treaty), due to the fact that the second paragraph of Article 17 does not exist, as well as not existing domestic look-through provision enabling for the application of Article 17.1 OECD Model.

In this sense, the double tax treaty between Ireland (the tax residency of certain service providers companies), and Spain, as a source country, would be the only tax convention feasible to be applied, as opposed to the scenario involving the Dutch company. It is based on the fact that Spanish domestic tax laws do not contain a "look through" provision, whereby the income paid to a company is attributed to the entertainer or sportsperson[461]. Therefore, only those tax treaties, such as the Spain-

[460] Vogel, K., *supra* n. 13, pp. 992.

[461] This analysis exceeds the scope of this tax article. However, see further on this issue. García Prats, A., *supra* n. 210, pp. 31-32, supporting the view about the lack of look through provision for entertainer and sportspersons within the Spanish domestic tax laws. The same position is supported by Gracia Espinar, E., y Lete Achirica, C., *Fiscalidad Internacional*, Chapter 18, Fiscalidad artistas y deportistas. Aspectos Internacionales, pp. 881. An opposite approach was held by Juarez, A., Limitations to the Cross-Border Taxation of Artistes and Sportsmen under the Look-Through Approach in Article 17(1) OECD MC (Part I and II), *European Taxation*, Vol. 43, n. 11 and 12, 2003, pp. 409-419 and pp. 457-472, respectively.

Ireland double tax treaty containing a comparable paragraph 2 of Article 17 OECD Model enable to grant the taxing powers to Spain as a source country. Therefore, the income obtained by the Dutch provider under any event could not be included, since paragraph 2 of the article 18 of the Spain-The Netherlands Double Tax Treaty did/does not exist.

The alternative solution granted by paragraph 11.2 of the Commentaries on Article 17 OECD Model is the enforcement of the general domestic anti-avoidance measures of the source country[462]. Under this context, if Spanish tax authorities had opted to use the mentioned anti-abuse measures, the income would have been subject to tax at the level of the entertainers by disregarding the existence of the Dutch "loan-out" company, based on abusive proved evidences.

Therefore, the Spanish Supreme Court, by not addressing and analyzing the application of the Spain-The Netherlands double tax treaty in the U2 case implicitly confirmed the accurate approach to triangular scenarios, involving source countries which lack domestic "look through" rules, as well as paragraph 2 of Article 17 OECD Model, (tantamount to article 18 of the Spain-The Netherlands tax treaty, to the case at hand) in the applicable double tax treaty.

In other words, Spain as source State when applying a double tax treaty which does not encompass the governing rule equal to paragraph 2 of Article 17 OECD Model (18.2 of Spain-The Netherlands Double Tax Treaty in the U2 case) and not having a domestic look-through provision attributing the income to the entertainer or the sportsperson, cannot invoke Article 17 OECD Model to exercise its taxing rights as source country. In the U2 case, the conclusion is that the provision of booking and promotion services carried out by the Dutch producer was not subject to tax in Spain, unless the application of domestic anti-avoidance provisions would be invoked, in order to enable to exercise the Spanish taxing rights or a permanent establishment would be considered to exist.

To conclude, the correct application of the particular double tax treaty in triangular scenarios becomes relevant, in order to determine the source taxing rights and allowances to be applied at treaty level or by the domestic source country, when dealing with Article 17 OECD Model. In particular, when depending on the applicable tax treaty (the one signed with entertainer's country or "slave company" country) the outcome would lead to consider tax residents in European Union´s countries, as

[462] Based on paragraph 24 of the Commentary on Article 1 OECD Model.

opposed to other who/which would not be[463], with the corresponding different tax consequences.

3.5. Cross-border Apportionment/Contract Splitting

3.5.1. OECD/Spanish Approaches

Once the arguments against the unlimited approach of Article 17 OECD Model are laid down from technical and practical viewpoints, the application of the apportionment or contract splitting is endorsed by the author when dealing with mixed contracts in the entertainment and sport arena.

In this regard, the starting point is how the OECD has tackled this relevant tax issue either in 1987 OECD Report, as well as the Commentary on Article 17 and other related OECD Model articles.

In the former, paragraph 13 pointed out performing and non-performing activities. In particular it states that "*In a number of cases, artistes and athletes may take more money from these related activities as performers. However, this report concentrates, in first instance, on income related to actual performances even though this distinction may be artificial in some cases*".

Moreover, paragraph 33 established the lack of source taxation of non-performing activities. "*In some cases, the entertainer´s performance is "sold" to local organisers as part of the complete show. As the contract for the "package" does not refer to any particular performer and includes various types of services, the "package" may hardly be considered as performance for artistic activities. It would then avoid taxation in the country as there is no permanent establishment there*".

In paragraphs 77-83 of the same OECD Report tackled into detail the practical problems in connection with identifying, qualifying and taxing separately the various items of income included in the package deals. In essence, it highlights the practical difficulties arising from contracts signed in one country, but covering performances throughout the world.

[463] It might entail, depending on the applicable domestic tax rules, to different tax treatment and, if so, to potential discriminations against EU freedoms, as it is explained into detail in Chapter 5.

Furthermore, paragraphs 95-97 of the mentioned OECD Report dealt with the shortcomings that may arise when allocating and carrying out the assessments of income connected to various performances all over the world. Again, the issue of separating[464] between "artiste income" and "income from other services", even though a lump sum payment is carried out to intermediate companies.

Thus, both types of apportionment, "vertical"[465] among various types of income, as well as "horizontal" among various performing countries as regards one lump-sum contract[466], were already included in 1987 OECD Report[467].

However, depending on the position held by the involved countries, it may lead to a pacific outcome when matching both tax perspectives about allocation and, if so, the related apportionment. Nevertheless, double non-taxation or double taxation may also arise in case of not adopting the same approach[468] by involving countries[469].

Again, there are certain boundaries in the Commentary on Article 17 OECD Model, aimed at limiting potential far-reaching domestic tax interpretations for apportionment purposes,

As regards horizontal contract splitting paragraph 9.2 of said Commentary explicitly states the general principles applicable to the case at hand, since it must be

[464] It is important to note that the OECD stated that this contract splitting issue did not differ from other classical allocation problems. Accordingly, no further and specific comments were needed to this end.

[465] It is coined by Cordewener, A., *supra* n. 305, pp. 124 "*A first situation of apportionment between different distributive rules of a DTC that is mentioned in the OECD Commentary concerns "mixed contracts" (or "package deals") under which an entertainer/sportsperson receives remuneration both for his performance and its exploitation*".

[466] See further, Cordewener, A., *supra* n. 305, pp. 124 "*The typical situation triggering a need for the apportionment of income between different states under article 17(1) of the OECD Model is the exercise of personal activities by an entertainer/sportsperson in more than one state*".

[467] In fact, both type of apportionments may take place within the same scenario. For example, a "touring ensemble" whereby a break-down of services provided to the promoter must be carried out for a proper qualification of the items of income. Additionally, the horizontal contract splitting must be also performed, in order to correctly allocate the income within the various countries where the entertainers or sportspersons have carried out performances.

[468] In this regard, see further Cordewener, A., *supra* n. 278, pp. 1359, included very illustrative and practical examples, by giving evidence of the opposite domestic position that may be held by domestic Courts. On the one hand, the High Court of Australia, in the case held in April 30, 1965, *Federal Commiss'r of Taxation v. Mitchum*, 113 CLR 401(1965) whereby the actor Robert Mitchum who mainly shoot a movie in Australia, considers as not sourced in this country the salaries received via US and Swiss companies. On the other hand, the example of the former tennis player Andre Agassi, see further, *supra* n. 165, whereby expanded the scope of the source taxation of endorsement income was expanded, by considering as subject to tax in UK the endorsement income obtained by foreign entertainers and sportspersons, directly or through the interposed companies, as long as it was a performance there. Also, see detail explanation in paragraph 3.4.2.1.

[469] The issue of double taxation may be solved by the taxpayers by appealing to the application of the Mutual Agreement Procedure of Article 25 OECD Model.

determined on a per case basis. In particular, the pivotal element of "close connection" and the physical presence of these qualifying individuals in their performances. Also, illustrative examples are provided in paragraph 9.3. in the field of employees and self-employments[470].

It is also of great relevance the main arguments set forth by the Commentary on Articles 17 and 12 of the OECD Model. In particular, paragraph 11.6 of the Commentary on Article 12 OECD Model, in its third sentence[471] endorses for the apportionment, unless one of the parts is considered to be by far the principal purpose of the contract, versus the other parts regarded as ancillary and largely unimportant.

Furthermore, paragraph 4 of the Commentary on Article 17 OECD Model[472] supports for the position of adopting the apportionment as a general rule, and only accepting the

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[470] Paragraph 9.3 "*The following examples illustrate these principles:*
– Example 1: a self-employed singer is paid a fixed amount for a number of concerts to be performed in different states plus 5 per cent of the ticket sales for each concert. In that case, it would be appropriate to allocate the fixed amount on the basis of the number of concerts performed in each state but to allocate the payments based on ticket sales on the basis of where the concerts that generated each such payment took place.
– Example 2: a cyclist is employed by a team. Under his employment contract, he is required to travel with the team, appear in some public press conferences organised by the team and participate in training activities and races that take place in different countries. He is paid a fixed annual salary plus bonuses based on his results in particular races. In that case, it would be reasonable to allocate the salary on the basis of the number of working days during which he is present in each State where his employment-related activities (e.g. travel, training, races, public appearances) are performed and to allocate the bonuses to where the relevant races took place.

[471] *"(Mixed Contract) (…) The appropriate course to take with a mixed contract is, in principle, to break down, on the basis of the information contained in the contract or by means of a reasonable apportionment, the whole amount of the stipulated consideration according to the various parts of what is being provided under the contract, and then to apply to each part of it so determined the taxation treatment proper thereto. If, however, one part of what is being provided constitutes by far the principal purpose of the contract and the other parts stipulated therein are only of an ancillary and largely unimportant character, then the treatment applicable to the principal part should generally be applied to the whole amount of the consideration".* It is important to highlight the change as regards the 1977 version which stated that "*then it seems possible to apply to the whole amount of the consideration the treatment applicable to the principal part*". In this regard, Baez Moreno, A., Contract Splitting and Article 17 of the OECD Model. Is source taxation of Artistes and Sportsmen a new kind of "Tax on Dummies"?, Working Paper n. 1*, PriceWaterhouseCoopers Chair on International Corporate Taxation*, pp. 12. This author considers that the solution proposed in the Commentary of Article 12 OECD Model cannot simple be implemented in the case of big artistic events. In the latter, the shortcoming resides on the valuation of the break-down of services, instead of break-down of the services itself, since it can be carried out in accordance with the distributive rules of the applicable double tax treaty.

[472] *"An individual may both direct a show and act in it, or may direct and produce a television programme or film and take a role in it. In such cases it is necessary to look at what the individual actually does in the State where the performance takes place. If his activities in that State are predominantly of a performing nature, the Article will apply to all the resulting income he derives in that*

unlimited approach, when one of the items of income is negligible, as opposed to the other item/s of income or benefiting from predominant character.

The bottom-line target is to exclude position held by certain domestic tax administrations or Courts, such as the line of reasoning supported by the Spanish Courts, following the tendency started with the U2 Case. The key point is that when not permitting the apportionment, it leads to a mistake qualification of the items of income related to entertainment or sport events.

The author endorses the position held by the Spanish tax authorities post-U2 Case (as opposed to Spanish Courts) via the replies to binding consultations[473].

In essence, they upheld that, in relation to musical performances, the characterization may be mainly twofold:

- Entertainment income: Performance services, fees paid to entertainers for the performances.

- Business income: As regards production services. It may include, among others, companies independent from entertainers that design and hire a wide range of elements needed for the performances, such as stage, lighting, sound, transportation and paying the fees of the entertainer´s agent and manager.

State. If, however, the performing element is a negligible part of what he does in that State, the whole of the income will fall outside the Article. In other cases an apportionment should be necessary".

[473] See detailed analysis in paragraph 3.3.4. In this regard, DGT rulings:

Tax Authorities binding ruling, V1332/2014, May 19, 2014.

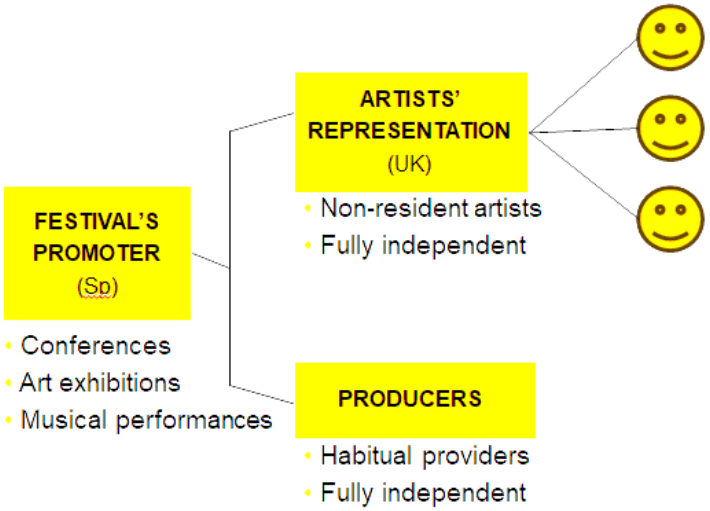
Tax Authorities binding ruling, V1635/2014, June 25, 2014.

Tax Authorities binding ruling, V1678-14, July 1, 2014.

Tax Authorities binding ruling, V5328-16, December 16, 2016.

Tax Authorities binding ruling, V2428-17, September 28, 2017.

Binding ruling: Spanish Directorate General for Taxation, May 19, 2014



When the touring company, apart from performance services, also provides production services, the taxation sourced in Spain can be split and, if so, it would apply article 17 and 7 of the OECD Model, respectively.

In order to apply article 7 of OECD Model, both type of services provided must be clearly identified, in separate contracts signed by the touring company and the production management company, respectively. Such distinction of income shall be supported in all the documentation related to the performance, not only the contracts, but also in the invoices to be issued and the subsequent bank accounts used for the payment of different services. If not, according to the Spanish Tax Authorities criteria, all services provided would be considered to be of entertainment character.

The approach consisting of the apportionment of services has been confirmed by the Spanish Tax Administration, based on paragraph 4 of the OECD Commentary. In this regard, producers and technical staff are not included within the scope of Article 17 OECD Model. Thus, income derived from their activities should not be taxed in Spain, since it is "pure production", according to paragraph 7 of the OECD Commentaries on Article 17 OECD Model[474].

Through those binding rulings it was confirmed that if there is no relation between the production income and the personal activities of the entertainers, said income shall not be subject to tax in Spain, unless a permanent establishment is considered to exist in Spain.

[474] It reads as follows "Income received by impresarios, etc. for arranging the appearance of an entertainer or sportsperson is outside the scope of the Article, but any income they receive on behalf of the entertainer or sportsperson is of course covered by it".

In the particular binding ruling issued by the DGT, V1635/2014, Spanish tax authorities (DGT) stated that if the production company had no legal or economic links with the entertainers, said income shall be considered "business profits" and if so, not being subject to tax in Spain Insofar a permanent establishment is not considered to exist. Accordingly, it must be proved that the business income has no relation with the entertainment income, in order not to be subject to tax in Spain.

The key point is that the position held by the Spanish tax authorities has been confirmed in subsequent years, 2016 and 2017, by distinguishing between "entertainment fee" and "production fee"[475].

It also reinforces the pivotal idea of paragraph 7 of the Commentary, by referring to paragraph 11.4 of the same Commentary whereby it excludes for the application of Article 17.2 income paid in exchange for support production activities[476].

In those cases where the applicable tax treaty follows the US Model[477], such as the Spain-US double tax treaty, in order not to include the items of income under Article 16 US Model, the producer must be totally independent from entertainers, in terms of participation of the benefits. DGT binding ruling, V2428-17, issued in September 28, 2017, in accordance with paragraph 19.2 of the 1990 Spain-US Double tax treaty *"(…) unless it is established that neither the entertainer or athlete nor persons related thereto participate directly or indirectly in the profits of that other person in any manner*,

[475] DGT binding ruling, V5328-16, issued in December 16, 2016 and DGT binding ruling, V2428-17, issued in September 28, 2017.

[476] Paragraph 11.4 of the Commentary on Article 17 OECD Model "*Paragraph 2 covers income that may be considered to be derived in respect of the personal activities of an entertainer or sportsperson. Whilst that covers income that is received by an enterprise that is paid for performing such activities (such as a sports team or orchestra), it clearly does not cover the income of all enterprises that are involved in the production of entertainment or sports events. For example, the income derived by an independent promoter of a concert from the sale of tickets and allocation of advertising space is not covered by paragraph 2*".

[477] 2016 US Model. Article 16 Entertainers and Sportsmen:

"1. Notwithstanding the provisions of Article 14 (Income from Employment), income derived by a resident of a Contracting State as an entertainer, such as a theater, 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 Contracting State, except where the amount of the gross receipts derived by such entertainer or sportsman, including expenses reimbursed to him or borne on his behalf, from such activities does not exceed thirty thousand United States dollars (30,000) or its equivalent in ---------- for the taxable year of the payment."

2. Where income in respect of 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, notwithstanding the provisions of Article 14 (Income from Employment), may be taxed in the Contracting State in which the activities of the entertainer or sportsman are exercised unless the contract pursuant to which the personal activities are performed allows that other person to designate the individual who is to perform the personal activities.

including the receipt of deferred remuneration, bonuses, fees, dividends, partnership distributions, or other distributions"[478].

Thus, the touchstone resides in proving by any means admitted in law[479] that the entertainer and/or sportsperson does not benefit from the income received by the independent management company.

However, when the OECD Model does apply[480], the burden of proof must provide evidence in the other way around, as opposed to the US Model. In other words, the independent production company must prove that it does not benefit from income arising from the personal performance of the entertainer or sportsperson. Moreover, in this context it also raises the related and pivotal issue of the **proportionality**, in relation to the apportionment of income between the entertainers and the independent production companies.

The key issue resides in providing evidence that the payment received by the promoter and/or agent who/which is/are independent from the entertainer and sportsperson must be commensurate with the overall income arising from the performance. In case of not existing said proportionality, it may lead to the conclusion that the supposed income received by independent parties must be allocated to the entertainer or sportsperson in connection to the performance.

In this regard, the fact of whether the entertainer or sportsperson is a related person can be of interest. Even though, the Spanish DGT have stated opposite positions, even within the same DGT ruling[481]. It finally referred to the relevant criterion established in DGT V1332-14. In accordance to this reply to the binding ruling, the relationship between the parties might be considered a means of proof, but not the only one, whereby including a contractual clause which gives evidence that the contracting party does not have any relationship with entertainer or sportsperson or any person related to them.

As regards what is considered to be an appropriated proportion between the income of the entertainer and the sportsperson and those arising from independent

[478] It follows 2006 US Model, which is drafted more clear-cut than the one included under the 2016 US Model.
[479] Article 106.1 of the Spanish General Tax Act which, in its turn, refers to Spanish Civil Code and the Spanish Civil Procedural Law.
[480] For example, DGT binding ruling, V5328-16, issued in December 16, 2016.
[481] DGT binding ruling, V5328-16, issued in December 16, 2016.

promoters/agent/technical services, the Spanish DGT has pointed out that it must be determined based on the particular circumstances of the case, as well as leaving the analysis of the existence of proportion at the level of tax auditors.

Thus, it leaves the door open in order to know more in the future via Court cases, including the position held by the taxpayers versus the Spanish tax administration through their tax auditors, in order to ascertain whether it exists a reasonable proportion between the entertainer fee versus the production fee.

In the DGT V2428-17, the taxpayer proposed to analyse the correctness of a split consisting of 70% artist fee versus 30% production fee. Moreover, it described into very detail each of the items included within the production fee. Despite the taxpayer's efforts to obtain a clear-cut reply from Spanish tax authorities, unfortunately it did not take place, the DGT left a pivotal question totally unresolved.

Hence, the contracts agreed between the involved parties can be of great help in order to shed some light as regards proportional apportionments for the purposes of Article 17 OECD Model in connection to other OECD Articles. When drafting the contracts, the more details are provided as regards the items of income involved, the better, in order to protect from future tax contingencies arising from tax audit that may take place in sourced countries.

Additionally, the tax authorities may be willing to accept reasonable apportionments between entertainment income and technical support activities, insofar the latter are not juridical related or even further, when their activities are not influenced by the entertainer[482]. It is not a pacific issue from tax authorities' viewpoint, since the taxing rights at source would not be easily relinquished. In particular, when potential future enforcement difficulties may be envisaged in the particular case at hand or the use of aggressive tax planning is involved.

The main purpose of the proportion qualifying condition required by the Spanish tax authorities is to counteract tax avoidance. Basically, by artificially overweighting the technical or production services, the income to be included under Article 17 OECD Model may be reduced and, if so, avoiding the taxation of entertainers and sportspersons at source country.

In other words, the apportionment must be proportion or fair and reasonable in order to enable tax authorities from source countries to accept the application of Article 7

[482] See further, Cordewener, A., *supra* n. 278, pp. 1329 and 1369.

(Business income) or 12 (Royalties) OECD Model versus Article 17 OECD Model, since the former provides for more beneficial tax treatment at source countries.

Since there no direct further guidance about the proportion to be respected, other established criterion issued by Courts in other tax issues are of great help. In this regard, Schwarz[483] laid down the main arguments arising from UK Courts[484] together with the referrals to main general principles which are underlying the Principal Purpose Test (hereinafter PPT) of the OECD BEPS Plan[485], as well as the GAARs, proposed in the European Anti-Avoidance Directive (hereinafter ATAD)[486].

The underlying principle is common to the application of the overall treaty under PPT and the specific application of Article 17 OECD Model in the accepted apportionment. In this sense, whenever there would be tax avoidance by not respecting what is considered proportion or just and reasonable, the benefiting tax rules would not be longer applicable[487]. In the next paragraph, practical examples and methods are explained in order to shed light into the correct proportion or what is considered to be just/fair and reasonable.

3.5.2. Methods

The more unified would be the approach among the involved domestic tax laws, the less room for double taxation or double non-taxation.

It is important to note that these comments are limited to the so-called vertical apportionment (characterization of income), as opposed to the horizontal apportionment (apportionment among various source countries for the same item of income[488]).

The first step when determining the reasonable apportionment consists of establishing the thresholds where the split would not be permitted. In other words, those scenarios

[483] Schwarz, J., Allocation issues: Transfer pricing and tax avoidance: just and reasonable solutions?, *Kluwer International Tax Blog*. November 16, 2020. Wolters Kluwer.
[484] *Total E&P North Sea UK Ltd. v. HMRC* (2020) EWCA Civ 1419 and *BlackRock Holdco 5 LLC v. HRMC* (2020) UKFTT 443 (TC).
[485] See further, *supra* n. 1.
[486] EU Council (2016), *Council Directive laying down rules against tax avoidance practices that directly affect the functioning of the internal market*, n. 2016/1164, issued in July 12, 2016, ("ATAD I").
[487] It is illustrative the Roman Law rules applicable to the sale, when in those cases where the vendor received less than half of the fair price, he/she was entitled to recover what he/she had sold (*justum*).
[488] As regards methods in the context of horizontal apportionment, see further, Cordewener, A. *supra* n. 278, pp. 1365. Also, Zadek, G., *supra* n. 391, pp. 177. Cordewener, A. *supra* n. 305, pp. 125-134. Roeleveld, J., and Tetlak, K*., supra* n. 190 at 4.2.4.1.

where the unlimited force of attraction becomes feasible. Said approach would be allowed where the final remuneration of the production services is part of the economic services paid to the entertainer or sportsperson[489]. Also, abusive scenarios may be taken into consideration, when the payments to the production company are finally distributed to the entertainer or sportsperson.

Out of these thresholds, the entertainer or sportsperson may take into consideration other non-tax orientated goals whereby production services are provided by actually independent parties[490]. Accordingly, the allocation of tasks, as well as how the parties bear the risks help to apply a reasonable, just and proportionated split between entertainment incomes versus business income.

In practice, ratios are used in order to enable apportionments to be accepted by domestic tax authorities, court cases or even included in domestic tax laws as safe harbours. In this regard, they only show a practical estimation more than an accurate allocation of profits, based on the tasks performed or assume risks in the particular case. However, they are a very useful guidance tool as a starting point which may be adapted to the particular case, based on the involved key circumstances.

As regards the apportionment between the performance and the subsequent exploitation of them, the German Ministry of Finance assumed the split of 1/3 performance and 2/3 income from subsequent recording exploitation[491].

Furthermore, in the Viajes Halcón/Julio Iglesias Case[492], the apportionment proposed by the taxpayer was of 1/4 income corresponding to the performance and 3/4 income arising from the assignment of image rights with the aim at recording and subsequent broadcasting eight concerts held in Spain by the entertainer.

At US Court level, the Goosen[493] and Garcia[494] cases were of great help for the purposes of apportionment ratios. Both cases dealt with mirroring facts, non-US tax

[489] See further, Wherli, T., *Taxation of Artistes and Sportsmen in International Tax Law*, Chapter: Taxation of Contract Splitting with Artistes and Sportsmen, Eds: Loukota, W. and Stefaner M., Linde. 2007, pp. 214-219.

[490] Even if the production company is suggested by the entertainer/sportsperson, or if it has been hired in previous performances or the contract is signed in close temporal circumstances. In this regard, the EAS decisions of the Austrian Tax Authorities in order to analyzed into detail the particular circumstances to take into consideration, when determining the split in the context of touring ensemble. For example, EAS 2254 (2003) and EAS 2053 (2002), as well as the Court Case held in the Finance Court of Munich, issued in March 22, 2002, 1 V 4030/01, IStR 12/2002, 418.

[491] See further, Kreisl, R., *supra* n. 294, pp. 157.

[492] See further paragraph 2.3.3.2.

[493] *Supra* n. 166.

[494] *Supra* n. 167.

residents golfers playing tournaments in US and having endorsements contracts with sponsors related to the business of selling golf equipment. The purposes of both Court cases were to allocate the apportionment of income in US in exchange for personal services and endorsement contract arising from the characterization of income. Thus, by leaving outside the scope the horizontal apportionment between US sourced income versus those related to foreign markets[495].

For example, in Garcia's Case, the golf player granted to TaylorMade (subsidiary of Adidas) the right to use his image in all TaylorMade products (golf clubs, balls, clothing, shoes, hat, etc.) throughout all golf tournaments as well as other public appearances. The level of endorsement involvement was so far-reaching that even his caddy was obliged to wear TaylorMade clothing in any professional tournament.

The role of the US Courts consisted of providing the most appropriated apportionment to the different items of income. In doing so, the US tax court found that both personal services and image rights were crucial elements of the endorsement contract and rejected the split consisting of 85% royalty income versus 15% personal services, as regards the endorsement contract in Garcia Case. It finally laid down a 65%/35% apportionment which deviated from 50%/50% established in Goosen's case, based on the fact that in the latter a larger allocation to personal services as opposed to Garcia's case since "*TaylorMade valued Mr. Garcia's flash, looks and maverick personality more than [Goosen's] cool, 'Iceman' [Goosen's nickname] demeanour*" [496]. It is important to finally note that four experts were involved in order to provide the most accurate apportionment in Garcia case.

Another interesting and debatable split issue arises when the apportionment between income arising from performances and the related production income. In this regard, the U2 Case was of great help from the taxpayers' side by providing the following break-down of services related to U2 concerts in Spain.

It was divided between the entertainer fee/income/profit (USD 624.000 to Eventcorp Ltd) versus the business expenses (USD 720.000 to CPI BV; USD 1.200.000 to

[495] For example, in Garcia's Court case, the IRS and the taxpayer agreed that just less than 70% of his personal services income and 50% of any royalties were considered as US-source income.

[496] In this regard, Kimberly, S. B., supra n. 167, pp. 419-421. This author considers more appropriated that the endorsement payment has no relation to the personal services carried out by the golfer in US, since it pays in exchange for the use of image rights as a celebrity "*The same should be true in reverse - where personal ser-vices (really personal activities) are de minimis as compared with the value of the image being hired, all of the income should be treated as allocable to the image rights. Indeed, the Tax Court gave lip service to this line of cases in Goosen, but proceeded to reject the primary purpose test, opting arbitrarily for an al-location as it had done in Kram*er".

Remond Ltd and USD 156.000 to Brenwell Ltd: Total of USD 2.700.000). It means that 77% entertainment income versus 23% business income was submitted before the Spanish tax authorities by the taxpayer.

However, Spanish tax authorities took the approach of applying the unlimited force of attraction of Article 17 OECD Model, by disregarding the existence of business income. It was missed a great opportunity to ascertain whether the 23% entertainment income versus 77% related business income was correctly apportioned.

Furthermore, it must be taken into account that international tours involve a high degree of expenses in order to be carried out. Thus, a line must be drawn between what consists of the remuneration for the entertainer in exchange of his/her performance and the reimbursement for the business expenses incurred to that end.

In fact, the above-mentioned proposed apportionments arising from the characterization of income (entertainment versus business/image right income) must be completed by the subsequent splitting between income from entertainment events and expenses incurred to that end, average of 75% expenses and 25% income caught by Article 17 OECD Model, in accordance with Molenaar's position[497].

Therefore, at the time when the U2 and Viajes Halcón/Julio Iglesias Court cases took place, the unlimited force of attraction was twofold. On the one hand, the Spanish tax authorities, with the subsequent blessing of the Spanish Courts, did subject to tax the overall income, by not permitting the qualification of business/image rights income. On the other hand, the entertainment income was subject to tax on a gross basis, by not allowing for the deduction of expenses.

In other words, only 30% of the income would have subject tax in Spain, provided that said income would have not been artificially diverted to companies providing business or image right services which would have been exempted at source. Additionally, out of that 30% income subject to Spanish sourced tax, expenses would have been permitted. In this regard the above mentioned 75% ratio of expenses would have been applicable. To sum up, the entertainers were subject to an unlimited force of attraction when entertainment events took place in Spain, leading to an unreasonable level of source over-taxation.

Fortunately, Spanish tax authorities have reversed the position by accepting the apportionment, but leaving open what is considered to be a reasonable allocation

[497] Molenaar, D., *supra* n. 32, pp. 207-226.

between both items of income. Again, the reply to the binding ruling issued by DGT V2428-17, even though the taxpayer proposed to analyse the correctness of a split consisting of 70% entertainment fee versus 30% production fee, no answer was provided by Spanish tax authorities. Nevertheless, it is important to highlight that said taxpayer's request differs from ratios of splitting provided so far in above mentioned cases or positions. Thus, the apportionment among the various type of income when Article 17 OECD Model is involved is puzzling, despite the efforts from the taxpayers to accomplish the maximum degree of certainty.

In this sense, a new-fangled approach was adopted by the Canton of Vaud in Switzerland[498] through which the music organizer of the event is in charge to assess precisely by attributing to the entertainer the correct amount of net income arising from the performance.

Finally, certain qualifying domestic tax regimes applicable when the image rights are involved are of help to ascertain the accepted apportionments. For example, in the Spanish domestic tax law[499] establishes a 15% "safe harbour" to income arising from the assignment of image rights of a sports employee. In contrast to the attribution rule applicable to the sportspersons at progressive rates, when more than 15% of their overall remuneration from their employer would be considered to be image right income. It was enacted to counter tax-avoidance schemes related to the use of rent-a-star companies by resident employee sportspersons, in particular in the football players context[500].

A similar approach was included in the Australian guideline[501] in relation to the income arising from the "use and exploitation of their 'public fame' or 'image' under licence" of the players. It included a threshold of 10% and it can be received by a private trust or company within the terms of legal tax planning. However, it was set back by the

[498] Oberson, X., New practice of the canton of Vaud on the taxation at source of artists, athletes and speakers performing in Switzerland. *Global Sports Law and Taxation Reports*, Vol. 7, n. 3, September 2016. pp. 34-36. In particular, the Circular on the withholding tax dated December 2013, which is a rule of interpretation that would not bind the Court in a potential later stage. As regards tax deductions, they are permitted. 20% Gross benefits are subject to withholding tax. Finally, higher effective costs may be allowed when duly proved.

[499] Article 92 of the PITA.

[500] See further paragraph 4.1.6.

[501] Practical Compliance Guide PCG 2017/D11. See further Levy, G., Australia: The taxation of income from the exploitation of image rights – currently and proposed changes. *Global Sports Law and Taxation Reports*, Vol. 10, n. 1, March 2019. pp. 40-43 and Offer, K., The Taxation of Image Rights, *ITSG Global Tax Journal*, Vol 1, n. 1, May 2018. pp. 26-31.

Australian Government as part of the May 2018 Federal Budget[502]. Therefore, all remuneration in exchange for the commercial exploitation of a person's fame or image is no longer benefiting from lower tax rate and it qualifies in assessable income of the individual.

Thus, a wide range of options are available to the taxpayers when tackling the methods of apportionment and the outcomes arising from them. All this for the purposes of providing to the tax authorities at source country (and also in the tax residency country) with a just and reasonable apportionment between the entertainment incomes, as opposed to income arising from independent services carried out third party providers. Moreover, in this path to find out guidance about the just apportionment, the taxpayer and tax authorities must work together with the aim of seeking the most legal certainty available counterbalanced by fight against tax avoidance.

3.5.3. Potential Use of Transfer Pricing Rules

In the context of entertainers and sportspersons, it may be applied an overvaluation the services related to the performance within the overall services embedded in a complex contract, in order to benefit from tax avoidance in the source country[503].

In this regard, the transfer pricing tools play a key role aimed at ascertaining the accurateness of the valuation provided by the non-resident taxpayer in the source country. Tax commentators have already provided for different position when analyzing the arm´s length as a solution in the apportionment context, related to the non-defined terms such as just and reasonable.

On the one hand, Article 9 of the OECD Model may be amended to enable the source State to apply the arm's length as a touchstone to carry out a valuation of the overall complex contracts of entertainers and sportspersons when performing in a source country[504].

[502] From July 1, 2019.

[503] Baez Moreno, A., Contract Splitting and Article 17 of the OECD Model. Is source taxation of Artistes and Sportsmen a New Dummensteuer?, *Bulletin for International Taxation*, 2014, Volume 68, n. 3. Also, Chand, V., Achieving Certainty in an Uncertain Profit Allocation Environment, *Intertax*, Volume 47, Issue 12, pp. 1000-1002. Monsenego, J., *Selectivity in State Aid Law and the Methods for the Allocation of the Corporate Tax Base*, EUCOTAX Series on European Taxation, Vol. 60, Kluwer Law International, 2018.

[504] See further, Juarez, A., *supra* n. 461, pp. 409-419.

On the other hand, those authors who do not envisage the application of said OECD Article[505], in its turn, understand that nothing prevents to provide to the source country with an arm´s length apportionment between associated companies, even if the scenario would involve resident and non-resident taxpayers not qualifying as related parties with the source taxpayer.

Furthermore, other authors[506] strongly opposed to the "*de facto"* break-down as it was blessed by international case law, such as Garcia and Goosen Cases. They have endorsed for the application of domestic transfer pricing rules, such as the Spanish ones, when abusive scenarios are tackled, such as the overvaluation of certain qualifying services in big international entertainment events. However, potential collateral qualification issues may arise when the amendment to said overvaluation of items of income leads to change of their characterization which, in its turn, it must be carried out at tax treaty level. In fact, this re-characterization must be embedded within the broader subject of the compatibility of domestic GAAR and double tax treaties.

To sum up, two main alternatives are available to solve the valuation when dealing with the proper characterization and allocation of taxing rights when international entertainment events take tax place in foreign countries.

- A *de facto* approach allowing for a breaking down of services and the related valuation. In the author´s opinion it implicitly recognizes the application of the arm´s length principle and Article 9 of the OECD to these particular scenarios and, if so, it benefits from the legal certainty of said OECD Article.
- Application of domestic GAARs, among which the domestic transfer pricing rules would be included[507].

Moreover, the underlying rationale to provide a legal and tax proportionated valuation of involved services would be a justified and evidenced apportionment whereby the

[505] Martín Jiménez, A., El artículo 17 MCOCDE y la Sentencia de la Audiencia Nacional de 28 de enero de 2010 (o cómo no aplicar los convenios para la eliminación de la doble imposición y por qué el artículo 17 MCOCDE debería ser eliminado), *Quincena Fiscal* 15, 2011, pp. 53-80. The main drawback, in order to apply Article 9 OECD Model lays down in the fact that the payor (organizer of the event) and the payee (entertainer or companies providing services related to the performance) are not related parties, in accordance with the definition of said OECD Article.

[506] See further, Baez Moreno, A., *supra* n. 471. Moreover, Falcón, R., and Pulido, E., *Derecho Fiscal Internacion*al, Madrid, Marcial Pons, 2010, pp. 257.

[507] It is essential to take into consideration the Commentary on Article 1 OECD Model expressly admits the application of domestic GAARs in the tax treaty context, insofar a conflict does not exist (as it is mentioned to happen in the vast majority of the cases). See further into detail, paragraph 77 of the mentioned OECD Commentary.

improper use of tax treaties or the abuse concept would the guiding principles[508]. As such, it would help to establish the thresholds when the characterization, allocation and apportionment must be carried out the particular case at hand.

Finally, the transfer pricing rules are under scrutiny in order to bring some light when tackling digital economy[509]. It is a great opportunity to check whether some of the underlying ideas may be also useful in the context of entertainers and sportspersons.

3.6. Pillar I & II / Article 17 OECD Model

3.6.1. Introduction

The key point is to find out the similarities and divergences arising from the comparable analysis of Pillar I and II of BEPS versus Article 17 OECD Model.

As regards BEPS, in its origin were addressed to the taxation of the digital economy, since it has been of relevant interest in the international tax arena for years. In particular, because it allows exploiting markets without being physically present in the target countries.

It was included in the Reports Addressing Base Erosion and Profit Shifting in the context of Base Erosion and Profit Shifting (BEPS), Action 1: Taxation of the Digital Economy[510]. In January 2019 was published the Policy Note[511], which was under public consultation in February-March 2019[512]. Furthermore, in May 2019, it was released the "Programme of Work"[513], also under public consultation in November-December

[508] See further paragraph 5.4 dealing with this particular issue within the context of the European Union.
[509] See further, Dourado, A.P., Transfer Pricing in the Digital Economy, *Intertax*, Vol 47, Issue 12, pp. 998-999. Also, Vikram, C., Achieving Certainty in an Uncertain Profit Allocation Environment, *Intertax*, Vol 47, Issue 12, pp. 1000-1002.
[510] OECD (2015), Addressing the Tax Challenges of the Digital Economy, Action 1 – 2015 Final Report, OECD/G20 Base Erosion and Profit Shifting Project (OECD Publishing October 2015).
[511] OECD, Addressing the Tax Challenges of the Digitalisation of the Economy – Policy Note, As Approved by the Inclusive Framework on BEPS on 23 Jan. 2019: OECD/G20 Base Erosion and Profit Shifting Project (OECD Publishing 2019). ("Policy Note 2019")
[512] OECD, Tax Challenges of the Digitalisation of the Economy, Public Consultation Document 13 Feb. – 6 Mar. 2019 (OECD Publishing 2019). ("Consultation Document Feb 2019")
[513] OECD, Programme of Work to Develop a Consensus Solution to the Tax Challenges Arising from the Digitalisation of the Economy, OECD/G20 Inclusive Framework on BEPS (OECD Publishing May 2019). ("Programme of Work").

2019[514]. It encompassed the proposals dealing with the allocation of taxing rights, together with the application of an effective minimum taxation.

In October 2020 the next step consisted of proceeding with Inclusive Framework of 139 States of the BEPS program and Blue Prints Pillar 1[515] & 2[516], under so-called Unified Approach[517] and the subsequent public consultation[518].

The reported aim was to draft recommendations for the taxation of the digital economy, including a proposed deadline established at the end of 2020. However, this plan failed, in large part due to the US position which insisted that the Pillar I would be drafted as an optional "safe harbour"[519]. Thus, countries within the Inclusive Framework were endeavoring to reach an agreement on new rules for taxing multinational groups by mid-2021.

However, in July 1, 2021, most of 139 countries member countries being part of the Inclusive Framework of BEPS agreed on updated the main components of both Pillars, as well as an implementation plan[520]. In particular, it is important to note that the agreement was no longer only focused in the digital economy. In its turn, it has been designed in order to accomplish a comprehensive scope, by also including the overall consumer sector.

The **main tax issues contained in Pillar I & II** are the following:

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[514] OECD, Public consultation document, Secretariat Proposal for a "Unified Approach" under Pillar One, 9 October 2019 – 12 November 2019. Also, OECD, Public consultation document, Global Anti-Base Erosion Proposal ("GloBE") -Pillar Two, 8 November 2019 – 2 December 2019. ("Consultation Documents Oct-Dec 2019").

[515] OECD (2020), *Tax Challenges Arising from Digitalisation – Report on Pillar One Blueprint: Inclusive Framework on BEPS*, OECD/G20 Base Erosion and Profit Shifting Project, OECD Publishing, Paris, https://doi.org/10.1787/beba0634-en. Hereinafter "Blueprint Pillar One".

[516] OECD (2020), Tax Challenges Arising from Digitalisation – Report on Pillar Two Blueprint: Inclusive Framework on BEPS, OECD/G20 Base Erosion and Profit Shifting Project, OECD Publishing, Paris, https://doi.org/10.1787/abb4c3d1-en. Hereinafter "Blueprint Pillar Two".

[517] It is aimed at avoiding and/or postponing the application of unilateral domestic digital taxes.

[518] OECD/G20 Inclusive Framework on BEPS, Public Consultation Document, Report on the Pillar One and Pillar Two Blueprints, 12 October 2020 – 14 December 2020.

[519] Russo, R., 60 Years Later: Wishes Coming True?, *Kluwer International Tax Blog*. April 21, 2021. Wolters Kluwer.

[520] In this regard, the OECD/G20 Inclusive Framework on BEPS issued in October 8, 2021, an official statement whereby 137 members (as of November 4, 2021) agreed on the updated solutions and the implementation plan. OECD (2021), Statement on a Two-Pillar Solution to Address the Tax Challenges Arising from the Digitalisation of the Economy.

- Pillar I: It addresses the issue of business taxation when there is no physical presence. It overcomes the traditional principle of arm´s length principle. It also deals with the allocation of taxing rights and the basis underlying them, as well as the apportionment among overall jurisdictions in accordance with the customers/users location.

- Pillar II: To avoid tax avoidance, by ensuring a minimum tax rate applicable to multinationals (threshold of 750 million worldwide turnover). It looks to address potential tax challenges that may arise as a result of the digitalization of the economy.

To sum up, the reallocation of taxing rights (including the apportionment) and fighting tax avoidance are the primary goals to be achieved in the course of the negotiations involving the States within the Inclusive Framework.

The mentioned goals exactly mirror the same shortcomings faced in the context of Article 17 OECD Model. In fact, in 1987 OECD Report the mentioned goals were included, among others, such as the lack of taxation at source when a permanent establishment was not considered to exist in the source country[521], the use of avoidance schemes which lead to collection and assessments problems[522] and what proportion of income must be subject to tax in the performing country[523].

Thus, the analysis of technical issues, intertwined with the tax policy considerations included in Pillar I and II may be of great assistance to solve the main issues, when applying the mentioned Article 17 OECD Model.

3.6.2. Tax policy principles

3.6.2.1. General

The first step consists of analysing the underlying principles when tackling Pillar I and II, intertwined with Article 17 OECD Model. Those principles taken into consideration for the purposes of choosing the best alternative when opting for the taxation at the

[521] Paragraph 32 of 1987 OECD Report.
[522] Paragraph 17 of 1987 OECD Report.
[523] Paragraph 27 of 1987 OECD Report.

consumer location within the BEPs context. It helps to choose also the consequences of being implemented in relation to Article 17 OECD Model[524].

In particular, it is important to note that although Pillar I and II are addressed to high profit multinationals and they consists of rules which overlay the existing profit allocation rules. Accordingly, Article 17 OECD Model is already included within their scope. Thus, Pillar I and II underlying principles can be use as illustrative example to ascertain how to implement the nexus in the consumer jurisdictions.

Moreover, the main principles which were stated in the Otawa Taxation Framework[525] are also analyzed for the purposes of concluding the pros and the cons when adopting the mentioned taxation in the market jurisdictions either at Pillar I and II, as well as regarding Article 17 OECD Model.

3.6.2.2. Nexus / Tax Avoidance / Benefit Principle

One of the tax policy key factors to be chosen by countries is the nexus of the non-resident taxpayers with the territory when implementing a particular tax. To this term, tax commentators have devoted in-depth analysis in order to conclude the underlying

[524] In this regard, the primary tax issues related to entertainers and sportspersons compared to the BEPS Proposal on taxing digital economy has been already carried out by tax commentators. See further, Klootwijk, M., and Molenaar, D., *supra* n. 195, pp. 43-44.

[525] OECD Committee on Fiscal Affairs, *Electronic Commerce: Taxation Framework Conditions*, Paris, OECD, 1998. It set out a number of principles that governments should adopt in their approach to taxation of the emerging sector of the electronic commerce. They became a practical guidance for international tax application. Subsequently, it was released by the OECD, the *Implementation of the Otawa Taxation Framework Conditions: The 2003 Report,* Paris, 2003 and its page 13 includes a summarize of the main principles to be taken into consideration:

i) ***"Neutrality****: Taxation should seek to be neutral and equitable between forms of electronic commerce and between conventional and electronic forms of commerce. Business decisions should be motivated by economic rather than tax considerations. Taxpayers in similar situations carrying out similar transactions should be subject to similar levels of taxation. Efficiency*

ii) ***Efficiency****: Compliance costs for taxpayers and administrative costs for the tax authorities should be minimised as far as possible.*

iii) ***Certainty and simplicity:*** *The tax rules should be clear and simple to understand so that taxpayers can anticipate the tax consequences in advance of a transaction, including knowing when, where and how the tax is to be accounted.*

iv) ***Effectiveness and fairness****: Taxation should produce the right amount of tax at the right time. The potential for tax evasion and avoidance should be minimised while keeping counter-acting measures proportionate to the risks involved.*

v) ***Flexibility****: The systems for taxation should be flexible and dynamic to ensure that they keep pace with technological and commercial developments".*

reasons supporting how to establish the nexus either at a general level[526] or into specific group of persons, such as mobile individual services providers[527].

The touchstone issue relies on determining whether the source State, as consumer jurisdiction is entitled to impose taxation or not. If so, based on what grounds and to what extent, those main questions are tackled as regards Pillar I and II. However, the author´s position is that in any case they must be consistent with the previous allocation of taxes, such as the one adopted in Article 17 OECD Model.

It must be borne in mind throughout these paragraphs that one of the main goals of concluding double tax treaties consists of avoiding double taxation of the involved States. Thus, in every layer of taxation must be ascertained that all means have been applied (Article 17 OECD Model in the case at hand) to this end, in order to enable applying the next potential layer of taxation (Pillar I and II).

Back to the issue of the nexus between the taxpayers and the market jurisdictions, various reasons can be appealed in order to justify them. Mainly, three main lines of reasoning can be appealed, either separately or by endorsing a mixture of various of them:

- Anti-avoidance reason
- Reputational risk
- The benefit principle

The anti-avoidance reason is one of the man goals looked for BEPs project. In particular, in order to combat the fight against the double non-taxation the involved States are entitled to impose specific tailored-made taxes. The same reasoning was adopted for the application of Article 17 OECD Model, as it was ascertained in 1987 Report, as well as the 2014 Commentary on this particular OECD Article. Those reasons need to be revisited since the current context of exchange of information and the use of tax havens with no substance is no longer an easy tool to be used[528].

[526] Baker, P., *Some Thoughts on Jurisdiction and Nexus, in Current Tax Treaty Issues: 50th Anniversary of the International Tax Group*, pp. 441-465, Ed. Maisto, G., IBFD, 2020.
[527] Kostikidis, S., *Nexus for Source Taxation of Mobile Individual Service Providers in Tax Treaties*, January, 2022. Max Planck Institute for Tax Law and Public Finance.

[528] Molenaar, D., and Grams, H., *supra* n. 151, pp. 552. For example, within the context of the European Union, additional tax measures have been addressed to combat the use of tax avoidance structures. In particular, see further European Commission (2021), *Proposal for a Council Directive laying down rules*

On the one hand, the anti-avoidance reason cannot be understood as a tool whereby the States are granted with unlimited sovereignty in order to design taxes. Unfortunately, this is the rationale behind Article 17 OECD Model, when domestic tax administrations and Courts adopt the unlimited "force of attraction" approach[529]. It can be softened by the implementation of Pillar I and II policies and techniques into Article 17 OECD Model, since both set of rules share a common root of combating tax avoidance. Therefore, the grounds to apply them and the commensurate extent of the tax measures become essential to determine.

On the other hand, Pillar II addresses a global response from involved countries whereby tax competition is not permitted without any restriction, by imposing a minimum tax, regardless of whether the income has been produced within the geographical territories[530]. Thus, tax avoidance prevails over tax competition with the further implementation of Pillar II.

Additionally, it must be borne in mind that in accordance with the author's position, in paragraph 3.1.3., the primary reason for maintaining Article 17 OECD is of avoiding the reputational risk of having celebrities involved in major cases of tax evasion. The bottom line is that the tax authorities cannot accept those mistaken tax behaviors from well-known taxpayers, regardless of the final tax impact in terms of revenue.

Nevertheless, the main issue to be discussed is the shift of the taxing rights from the country where the provider is tax resident, towards the States where the products or the services are consumed. In this context is where the benefit principle[531] must be placed for the purposes of correctly understanding the main goals of Pillar I and II. Furthermore, this change as regards where to tax from the investment jurisdiction to the market jurisdiction[532] is also the rationale supporting the author´s position when

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to prevent the misuse of shell entities for tax purposes and amending Directive 2011/16/EU. December 22, 2021.

[529] See further paragraphs 3.3.3. and 3.3.4. Also, Tetlak, K., *Research Handbook on International Taxation*, Chapter: Taxation of entertainers and sportspersons and the force of attraction. Edward Elgar Publishing, 2020, pp. 120-145.

[530] de Wilde, M.F., *Why Pillar Two Top-Up Taxation Requires Tax Treaty Modification*. Available at SSRN 4018341, 2022.

[531] The benefit principle is understood to be the theory allowing a State to impose taxes based on the idea of being the price for all services to be provided by the State to the taxpayers. The point is that income taxes, as well as double tax treaties' principles go beyond that theory. See further, Sandler, D., *supra* n. 118, pp. 18-21. Vogel, K., Worldwide vs. source taxation of income – A review and evaluation of arguments, *Intertax*, 216, 310 and 393, 1998, pp. 394-395. Kostikidis, S., *supra* n. 192, pp. 359-376.

[532] de Wilde, M.F., Towards a '2020s Compromise' in International Business Taxation; Reflections on an Emerging New Tax Paradigm. *Reflections on an Emerging New Tax Paradigm*. February 10, 2022.

defending the taxing rights in the source State where the entertainment performance is consumed as regards Article 17 OECD Model[533].

In this sense, three main proposals were analyzed while negotiating the implementation of Pillar I. The European Union[534] and United Kingdom[535] endorsed for the *"user contribution approach*" whereby the added value arises from the activity of the users of digital services. As opposed to United States [536] which supported the "*marketing intangible approach*" which allocates only residual profits to those jurisdictions where a foreign company has created a digital intangible asset. Finally, the "*significance economic presence*" approach under which the concept of permanent establishment is expanded by allocating the profit in market countries via a formulaic basis, supported by the developing economies under G-24[537] and also via United Nations [538] , which looks for a much simpler approach, by avoiding the more administrative burdensome OECD's approach.

[533] See further paragraphs 3.2.2.2 and 3.3.2.

[534] Further developed in point 3 of this paragraph 3.5.2. Revenue sourcing/allocation rules.
For illustrative purposes, in the website of the European Commission (at https://ec.europa.eu/commission/presscorner/detail/en/MEMO_18_2141) includes Questions and Answers on a Fair and Efficient Tax System in the EU for the Digital Single Market, in which is includes a clear-cut statement as regards the underlying rationale for supporting the value creation's approach "*In the digital economy, value is often created from a combination of algorithms, user data, sales functions and knowledge. For example, a user contributes to value creation by sharing his/her preferences (e.g. liking a page) on a social media forum. This data will later be used and monetised for targeted advertising. The profits are not necessarily taxed in the country of the user (and viewer of the advert), but rather in the country where the advertising algorithms has been developed, for example. This means that the user contribution to the profits is not taken into account when the company is taxed*".

[535] HM Treasury, Corporate Tax and the digital economy: position paper (November, 2017). Also, HM Treasury, Corporate Tax and the digital economy: position paper update (March, 2018). The latter, in its page 10 expressly states that "*The paper concluded that the failure of the international tax rules to take account of this user-created value is leading to outcomes that are inconsistent with the objectives of those rules, through the creation of a mismatch between the location in which business profits are taxed and the location in which business value is created*".

[536] The last position from US Department of the Treasury has been included in The Made in America Tax Plan, issued in April 2021. Said US proposal provides for raising corporate tax to 28% on US companies, intertwined with strengthening global minimum tax for US multinationals via the negotiations of Pillar Two with OECD/G20 members. In this regard, US proposed for a minimum tax of 21%.

[537] G-24 Working Group on tax policy and international cooperation, Proposal for Addressing Tax Challenges Arising from Digitalisation (January 17, 2019).

[538] Draft Proposal on Taxation of Automated Digital Services, a New Article 12.B to be included in the UN Model. In this regard, see further, Radhakishan R., Taxation of Digitalized Economy – Proposed UN Solution, *Asia-Pacific Tax Bulletin*, 2020 (Volume 26), No. 3. IBFD. This author explicitly summarizes the purpose and mechanics of Article 12.B UN Model that "*The taxing right is given to the source country for income from automated digital services arising in the source country. As is the case with other articles, the contracting states are expected to bilaterally negotiate the highest rate of tax which can be charged by the source country on income from automated digital services. Article 12B also gives an option of taxation on net basis. This option is to be exercised by the person earning income*."

Finally the position endorsing the value creation by digital users was the selected one for Pillar I purposes, but also intertwined with the main features of the two proposals. In other words, the value creation was considered a yardstick in order to determine the nexus of the territory benefiting from taxing rights, as well as taken into consideration the residual profit approach together with the formulaic position when determining the allocation of taxing rights.

In this sense, Article 17 OECD Model would be more in line with this position when the audience of a performance would grant taxing rights in the country where the entertainment activities are consumed. The added value as regards Article 17 OECD Model would be granted from the market jurisdiction regardless of whether it matches or not the performance country. It would depend on the fact that entertainment event entails physical presence or can be consumed online.

Prior to state the main conclusions as regards this position supporting the market jurisdiction right to tax, it is also important to check the pros and cons arising from the analysis within the context of the Otawa Framework principles which are tackled in the next two paragraphs[539].

3.6.2.3. Enforceability vs. Equality

The starting point when designing the tax system or implementing a particular tax is ensuring that they are in line with fairness or equality principles. The adoption of the value creation as a yardstick of the value creation when implementing Pillar I, which arises from evolution of the benefit principle in the digital era, must try to find the balance between fairness and enforceability.

The value creation at the level of the market jurisdiction leads to enforceability challenges either at Pillar I and II level, as well as Article 17 OECD Model. In the former, the key point resides on the fact that the tax compliance must be complied with the companies carrying out the business in the country where the goods or services are consumed.

However, it has been already remarked its lack of effectiveness, even if finally included in the UN Model, when negotiated in bilateral tax treaties. In this regard, Russo, R, *supra* n. 519, pp. 5.

[539] For simplicity reasons the five Ottawa Taxation Framework Conditions (neutrality, efficiency, certainty and simplicity, effectiveness and fairness, flexibility) are rephrased into enforceability, equality, accuracy and practicality.

However, when dealing with Article 17 OECD Model, it would entail an excessive burdensome for the entertainers, in case that they were compelled to fulfill tax obligations in every country where the entertainment event were consumed. In addition, the alternative consisting of the enforceability granted by the application of withholding taxes by consumers, it would be also too burdensome for the final consumers. In this regard, the analysis of indirect taxation when dealing with business to consumer (B2C) scenarios in which the collection would be performed at consumer level is of great help to foresee the practical shortcomings and practical solutions in this context.

The use of new technologies[540] can play a relevant role in order to enable the shift of the taxation from the performance country into the consumer where the value is created. All this, regardless of the country where the service is being provided. Thus, it is much fairer in terms of market competition, as well as avoiding a race to the bottom tax competition between countries.

Accordingly, the main practical problems arising from taxation linked to public performances[541], such as the mentioned example of the taxation of the movies, would be solved in a fairer manner via the taxation at the market jurisdictions. Under this scenario, income arising from movies exploitation would be shifted from the country where they are shot, as a source country, to the country where they are consumed[542].

Therefore, the position of opting for the taxation at the level of the market jurisdiction is much fairer for Pillar I and II purposes, but also in relation to the application of Article 17 OECD Model. It helps to solve problems of tax avoidance in the latter by enabling the taxation where the entertainment services is consumed or created by the audience.

In terms of enforceability, it is a great challenge for the tax administrations from all over the world which need to cooperate further and benefit from the current exchange of information agreements. The fact that modern technologies provide for the traceability of the entertainment services may be of great help to finally implement the taxation at the consumer level, as the VAT within B2C transactions are showing the path to be followed.

[540] The analysis about the technological systems enabling to collect taxes where the entertainment services are provided exceeds the scope of this work. Nevertheless, it is very illustrative the ideas arising from VAT context dealing with B2C. See further, Merkx, M., *The wizard of OSS: effective collection of VAT in cross-border e-commerce*. Erasmus School of Law. Inaugural Lecture. February 7, 2020.
[541] See further, paragraph 3.2.2.2.
[542] Thresholds are of essence, as explained in paragraph 3.6.3.1.

From a practical point of view, the fact of adopting this position does not entail that the application of withholding taxes are no longer in place. On the contrary, in those cases where the digital users do not have primary role and the consumers are located at the country where performance place, for example a live concert, the entertainment promoter of the event would keep the existing tax compliance obligations at the source country. Therefore, the scope of the consumers' obligations would be applicable under those scenarios in which the entertainment event does not match the market jurisdiction, such as a live-streamed concert with viewers all over the world, the participants of online e-sports events and the like.

3.6.2.4. Accuracy vs. Practicality

Whenever the market jurisdiction model is seriously considered, practical problems are put into place, such as the compliance from the customer side, as well as the apportionment of the taxation over the income among the various involved countries[543].

In other words, from a theoretical point of view, market taxation system in line with the main principles of fair taxation. However, it may lead to far-reaching tax challenges from a practical point, such as the administrative workability either from the taxpayer's side or the tax administration.

Again, it must be taken into account that as regards the context of Pillar I, it provides for the proper accuracy since the taxation at the market jurisdiction helps to achieve a fairer system, together with reducing the scope for tax avoidance. From a practical perspective the tax burden relies is certain qualifying large multinationals, which would be in charge to compute and collect to taxes in market jurisdictions.

However, when transposing the idea within the context of Article 17 OECD Model, the tax burden would be placed either at the level of the entertainers or the consumers, either in B2C scenarios or B2B (involving promoters). In both cases, it would entail s tax collection system more difficult to manage and also to control from the tax authorities' perspective[544].

In this sense, the author endorses the position that consumers/promoters should be the ones in charge of paying the taxes. In this sense, it would be carried out via

[543] Kostikidis, S., supra n. 192, pp. 359-376.

[544] Except for B2B scenarios where the withholding system applies in the country where the performance takes place, by matching the place where the audience is located.

marketplaces or platforms which would transfer effectively tax payments to the tax authorities. The consumers are the ones knowing exactly the type of entertainment service has been requested/consumed. Moreover, the marketplaces and platforms are the feasible parties connecting all involved participants; entertainment providers, consumers and tax authorities.

Therefore, the apportionment and compliance efforts at the level of entertainer would be eliminated, since they are not justified to be imposed (as opposed to other mobile professionals[545]), combined with certain qualifying thresholds (explained into detail in next paragraphs). When those limits are exceeded, those qualifying large entertainment taxpayers would afford the tax burden also in the source State/s.

Nonetheless, the implementation of tax payments to source tax authorities would still reside at the level of consumers via marketplaces or the promoters of said taxes, depending on the type of transaction. For illustrative purposes, it is summarized in the below table:

Scenario	**Responsible person**
B2C	Consumers via marketplaces
B2B physical presence	Promoters
B2B via online	Consumers via marketplaces

3.6.2.5 Conclusion

Once it has been scrutinized over the main principles related to international tax policy, the primary conclusion is that the most viable and fairest option in current times, it is

[545] New positions from tax commentators have arised in this regard, Toribio Bernárdez, L., *La dimensión internacional del fútbol desde la perspectiva del derecho tributario. Reexaminando el fundamento y la aplicación práctica del artículo 17 del Modelo de Convenio de la OCDE*. Tesis Doctoral. Universidad de Sevilla 2019. This author supports for the application of Article 17 OECD Model, based on the current position of BEPS and their ability to carry out mobile activities through the exploitation of image rights, pp. 394-399. Moreover, Kostikidis, S., *supra* n. 527. In this case, the position is to re-establish Article 14 with a monetary threshold and eliminating Article 17 OECD Model.

the one supporting the nexus place where the value is created, either for Pillar and II purposes or Article 17 OECD Model. In respect of the latter, by granting taxing rights to the country where the audience consumes the entertainment event, regardless of whether it matches the performance event or not.

It justifies the benefit principle in line with the creation of the value, in order to enable the nexus to the country applying the tax at source.

The market jurisdiction's approach is the one championed within the content of Pillar I and II. Accordingly, the position of the author in relation to Article 17 OECD Model is that the taxation where the audience of the entertainment event is located and, if so, the entertainment income is subject to tax in those countries, combined with the final tax in the country where the tax residency of the entertainment provider is located[546].

The determination of the source country becomes more crucial in the context of Article 17 OECD Model, since certain line of interpretation, endorsed by domestic legislations or Courts leads to the unlimited force of attraction[547]. Therefore, no room must be left to domestic tax authorities in order to carry out "infection theory" when applying Article 17 OECD Model.

In this regard, the unlimited taxing rights should not be permitted under the umbrella of Article 17 OECD Model, A general statement rejecting the application of the force of attraction within Article 17 OECD Model must be included in its Commentary, similar to the existing one regarding Article 7 OECD Model[548]. As a consequence, far-reaching domestic policies whereby the aim of avoiding double taxation were jeopardized, would become inapplicable, even if countries where the consumption takes place would try to take such an expanding and unjustified view when applying Article 17 OECD Model.

Therefore, tax administrations among the globe are urged to avoid the use of the force of attraction policy under the context of Article 17 OECD Model, as well as to endeavor benefiting from modern technology, in order to control the taxation arising from market jurisdictions. It would help to enable the shift of taxation from the place of performance to the actual nexus where the value is created (which can match the place of performance or not) and, if so, taxing rights must be granted accordingly.

Even though the market jurisdiction approach is supported by Pillar I and II, as well as Article 17 OECD Model, there is an outstanding broader key question. It is unclear why

[546] The residency tax country must provide for the unilateral and tax treaty double tax relief measures.
[547] See further paragraphs 3.3.3. y 3.3.4.
[548] Paragraph 12 of the Commentary on Article 7 OECD Model.

the proposed tax rules aimed at combating tax avoidance must be limited to the taxation of the entertainment context, as opposed to any type of mobile activity[549]. There is no rationale behind it, more than the common tax policy agreed among the States based on the unique cause of reputational risk arising from this qualifying group of taxpayers. However, the scope of Article 17 OECD Model goes further than the remaining OECD Articles covering other potential mobile activities.

Thus, it arises a tax relevant issue to be tackled in the next paragraph 3.6.3., where to allocate the taxing rights and the related thresholds either in Pillar I and II, intertwined with the limits on taxation granted under Article 17 OECD Model.

3.6.3. Pillar I

The tax techniques/measures dealt with Pillar I and II are analyzed to the extent that they may be useful to solve the existing shortcomings under Article 17 OECD Model. In this regard, the building blocks' method of classification, in accordance with the proposal from the OECD (also from the European Commission) is of great help[550]. They are the pattern to follow in order to analyze them, within the broader context of Pillar I and II of the Unified Approach.

As regards Pillar I, the main tax issues are as follows:

[549] Again, this tax issue was already discussed in 2010 IFA Congress held in Rome, Seminar E. See further, paragraph 2.2.7.4.

[550] OECD (2021), *supra* n. 520. Furthermore, in March 21, 2018, the European Commission (2018) published the *Proposal for a Council Directive laying down rules relating to the corporate taxation of a significant digital presence*.

1. Proposal for a Council Directive laying down rules relating to the corporate taxation of a significant digital presence.
2. Proposal for a Council Directive on the common system of a digital services tax on revenues resulting from the provision of certain digital services.
3. Commission Recommendation relating to the corporate taxation of a significant digital presence.

In the first proposal, a common reform of the EU's corporate tax rules for digital activities, whereby the new nexus rules are laid down. In particular, when the following alternative tests are complied with:

- It exceeds a threshold of €7 million in annual revenues in a Member State, or
- It has more than 100,000 users in a Member State in a taxable year, or
- Over 3000 business contracts for digital services are created between the company and business users in a taxable year.

3.6.3.1 The nexus or taxable persons

First of all, it is important to distinguish between the scope of the taxpayers included within Pillar I and II, as opposed to the nexus allowing for the allocation of residual profits[551] to market jurisdictions[552].

Under the former, taxable persons[553] are determined in accordance with a minimum monetary threshold in the market country, as opposed to the physical presence, there. The remarkable change consists of most the activities can be carried out remotely and no active participation in the market countries. Depending on the size of the threshold, the scope multinationals/companies that may be affected might vary considerably[554]. Moreover, the objective approach in relation to Article 17 OECD Model may be additionally supported by adopting monetary thresholds which indirectly focus less in the type of qualifying taxpayer included under this particular tax rule.

The scope of the taxpayers included within Pillar I started with a threshold of EUR 750 million worldwide turnover and EUR 50 million turnover per State. In July 1, 2021[555] was updated to multinational enterprises having a turnover exceeding EUR 20 billion and profitability above 10%. Also, after a 7-year period of successful implementation of the agreement the threshold can be reduced to EUR 10 billion.

Those amounts determining the scope of the taxpayers under Pillar I and II must be distinguished from the nexus rule. The nexus rule entails the application of taxation of Amount A at the market jurisdiction, when EUR 1 million revenue would be obtained in said jurisdiction (or even EUR 250,000 limit for countries having a GDP of less than EUR 40 billion).

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[551] The analysis of this Chapter is focused on the first building block of Pillar I, Amount A which establishes the new taxing right in market jurisdictions. As opposed to Amount B foresee to cover a fixed return of marketing and distribution activities taking place physically in market jurisdictions.

[552] See further, OECD (2022), *OECD Pillar One – Amount A: Drat Model Rules for Nexus and Revenue Sourcing*, February 4, 2022.

[553] It must be highlighted that the scope of Pillar I and II is of companies, instead of individuals.

[554] Schön, W., One Answer to Why and How to Tax the Digitalized Economy, *Intertax*, Volume 47, Issue 12, 2019, pp.1021. This author proposes that *"the relevant nexus should be established on the basis of a two-prong test: country-specific expenditure for digital investment by the taxpayer should exceed a certain multi-year threshold, and the size of the local user base should exceed a certain threshold as well (either defined by number of users, number of contracts, or amount of revenue). Only if both thresholds are passed should the market country be awarded a taxing right under the relevant legislation or treaty. Last, but not least, it should be ascertained that simple remote (online) selling and servicing is not covered by this nexus definition*".

[555] See further, OECD (2021), *supra* n. 520.

It was already proposed by other tax commentators[556] that the threshold arising from the OECD Unified Approach's proposal[557] could be adopted also for the purposes of Article 17 OECD Model. As a result, small and medium-sized entertainers would be relieved from the excessive taxation, as well as the administrative burden stemming from the application of this particular OECD Article. In this regard, it was supported the idea of taking advantage of the high minimum thresholds set for the digital tax presence, in order to insert in the text of Article 17 OECD Model.

The author understands that there is need to review the concept of nexus, in accordance with current draft of Article 17 OECD Model. In this regard, Article 17 OECD Model is not in line with Pillar I underlying proposal and entails a more far-reaching approach, whereby there is no need of physical presence at all, since the pure performance is enough to grant the taxing rights to the source State.

It leads to analyze the potential main changes to be implemented in Article 17 OECD Model in order to be consistent with Pillar I and II main tax issues. There is no sense, to consider Article 17 OECD Model as an isolated item of income with particular and far-reaching tax rules, cumulative to the existing draft tax measures of Pillars I. Moreover, there is no reason to support that entertainment/sport activities still be targeted by a particular OECD Article, when the draft at this stage of Pillar I and II has broaden its scope to all activities, determined and limited only by quantitative thresholds.

In this regard, the starting point is that the current thresholds of Article 17 OECD are too low, by including within their scope every entertainer/sportsperson exceeding the following limits. In case of applying tax treaties based on the OECD Model, 15,000 IMF Special Drawing Rights, equivalent to approx. USD 20,000 per person per year (at the time of writing this PhD work). This suggestion included in the Commentary on Article 17 OECD Model[558] has only had exceptional impact in the tax treaty context[559]. Therefore, the mentioned threshold must be included within Article 17 OECD Model

[556] See further, Klootwijk, M., and Molenaar, D., *supra* n. 195, pp. 43-44.

[557] In this regard, it must be noted that it was referred to the scope of the qualifying taxpayers when the Unified Approach set a minimum threshold of EUR 750 million turnover worldwide and € 50 million per State. it would entail directly applying thresholds of Pillar I to market jurisdictions in Article 17 OECD Model. As a consequence, a "de facto" abolition of Article 17 OECD Model, except for entertainers having EUR 20 billion global turnover. These figures are far from the revenue obtained by entertainers and sportspersons, even if they qualify under the top worldwide stars. Furthermore, it would only apply to entertainment or sport companies, in accordance with the draft of Pillar I, as opposed to individuals.

[558] Paragraph 10.1 of the Commentary on Article 17.

[559] Only the tax treaty concluded between Chile and the Netherlands as of January 2021.

text itself, instead of the Commentary, to become directly applicable to all OECD parties entering into a tax treaty mirroring the OECD Model[560].

Moreover, when applying a tax treaty having US as counterparty, the threshold of USD 30,000 per person and per year would become applicable[561]. Its effectiveness is higher since it is adopted in the text of the treaty and, if so, it entails a direct effect in order to relieve from source taxation low earners entertainers and sportspersons.

Nevertheless, a critical analysis leads to the conclusion that there is an excessive gap between the thresholds, the one of Article 17 OECD Model amounting to USD 20,000 as suggestion included in its related Commentary, as opposed to the monetary nexus suggested in Pillar I amounting to EUR 1 million. In particular, when the main underlying reason supporting the existence of Article 17 OECD Model has been proved to be linked to the reputational risk, surrounding to this group of well-known taxpayers.

Two main conclusions may be reached out of the comparative analysis between Pillar I and Article 17 OECD Model.

On the one hand, there is no reason to apply Pillar I, in the field of entertainers and sportspersons, with no changes into the current draft of Article 17 OECD Article Model and its related Commentary. All this based on the fact that previous allocation rules of Article 17 OECD Model leaves with no effect any intended tax consequence arising from Pillar I allocation rules.

On the other hand, it is far from any doubt that the current draft of Article 17 OECD Model also includes within its scope entertainers and sportspersons not entailing any kind of reputational risk. For example, as it is drafted a simple performance of EUR 3,000 may lead to taxation at source State.

To worsen the current scenario, the proposed shift to the market jurisdiction in Article 17 OECD, following the underlying ideas of Pillar I would lead to potential taxation in multiple countries and creating excessive administrative work to these qualifying taxpayers. In this regard, one main idea must be respected. The monetary threshold or determination of the nexus cannot be left entirely to domestic laws. Additionally, the final amount must be in line with the primary goal of this OECD tax article, avoiding tax

[560] Molenaar, D., and Grams, H., *supra* n. 151, pp. 550-555.

[561] The former limit was established in USD 20,000. However, since the adoption of 2016 US Model the threshold has been updated to USD 30,000. Thus, the effective threshold must be ascertained, depending on the particular tax treaty and the date of entry into force.

avoidance connected with reputational risk. Therefore, the tax authorities are in a better position to determine the average of an entertainment/sport event carried out by well-known entertainers. From the author´s viewpoint a threshold of EUR 250,000, as it is suggested in Pillar I to be applicable by countries having GDP of less than 40 billion, would be tantamount applicable as a threshold for Article 17 OECD Model in each particular market jurisdiction. All this based on the fact that this qualifying group of taxpayers entails a reputational risk for the tax authorities when failing to comply with their tax obligations.

In this sense, for illustrative purposes the table of paragraph 3.6.2.4. must be completed in conjunction with the mentioned thresholds in the source country.

Scenario	**Responsible person**
B2C	Consumers via marketplaces
B2B physical presence	Promoters
B2B via online	Consumers via marketplaces

Finally, it is important to highlight that the increase in the monetary threshold of Article 17 OECD Model, in order to grant taxing rights to the source country, would be applicable on a per country basis. It would be undertaken by taking into account the greater number of apportionments arising from different market jurisdictions, also intertwined with the application of minimum level of taxation, similar to the one proposed in Pillar II[562].

[562] See further, paragraph 3.6.4.

3.6.3.2. Revenue sourcing and allocation rules

In order to determine the countries entitled to the new revenue sourcing and allocation taxes[563], the proposed initial rules of Pillar I stated that digital companies would be subject to tax in those countries where they are considered to have significant digital presence or virtual permanent establishment, insofar any of the following qualifying tests were met:

- Profits from user data, such as where the advertisements are displayed. The jurisdiction entitled to tax is where the geolocation of the device of the advertisement's viewer[564].
- Digital intermediation of tangible/intangible goods/services, the revenue is sourced based on a 50:50 split between the purchaser and the seller[565].
- Other digital services, such as streaming services are located where the ordinary residence of the purchaser[566].

The goal of these rules consisted of trying to allocate the taxation in the countries where the digital profits arise. It leaded to allocate the taxing rights to where the companies create value online via the consumption of the users.

From July 1, 2021, under the more comprehensive scope, the revenues would be considered to be sourced in the market jurisdictions where the goods and services are consumed, carried out through the digitalization of the economy, as opposed to the limitation of the scope to digital companies.

Although both set of rules have different scope, they completely reverse the tax allocation rules within the international taxation of business profits. So far, it relies mostly in the permanent establishment concept. Under the latter proposed rules, it shifts to a concept whereby the taxing rights would be located where the consumption would be carried out.

Again, the Unified Approach proposed under Pillar I confirms the unfairness of the current taxation in accordance with Article 17 OECD Model. Under this OECD Article, the key role of the audience when it does not match the performance's country is faded

[563] See further, OECD (2022), *supra* n. 552.
[564] Paragraphs 237-242 of Blueprint Pillar One.
[565] Paragraphs 251-265 of Blueprint Pillar One.
[566] Paragraphs 267-268 of Blueprint Pillar One.

against the performance´s location. Thus, the position held by this author[567] is more in line with the position of Pillar I, by taking into consideration where the added value is created and the service is consumed by the audience.

Back to the revenue sourcing and allocation rules of Pillar I, they are aimed at identifying in which country the revenue arises, depending on the type of revenue involved, such as services, finished goods, intangible property components, real property, government grants and non-customer revenues. When comparing to Article 17 OECD Model, the governing rule of services about revenues sourcing is the key one. Accordingly, Pillar I[568] dealing with the location of specific services is of essence:

"*Revenues derived from the provision of Location-Specific Services are treated as arising in a Jurisdiction when the place of performance of the services is in that Jurisdiction*".

Again, the place of performance is the governing rule in order to determine the sourcing State, as it happens within Article 17 OECD Model. In this regard, Pillar I also determines the place of performance by using the indicator of the place where the customer or its agent is situated when the service is performed[569], as long other permitted reliable indicators are not appealed.

Again, by transposing this key location rule of Pillar I as regards services into Article 17 OECD Model, the primary rule is the place where the customer consumes the service[570]. In other words, in the field of entertainment, the country eligible to tax would be where the audience is located. Thus, Pillar I revenue sourcing rule of services supports the author´s position regarding the proper source allocation rule when tackling Article 17 OECD Model.

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[567] See further paragraphs 3.2, 3.3 and 3.4.

[568] OECD (2022), *Progress Report on Amount A of Pillar One, Two-Pillar Solution to the Tax Challenges of the Digitalisation of the Economy*, OECD/G20 Base Erosion and Profit Shifting Project, July 11, 2022, OECD, Paris, https://www.oecd.org/tax/beps/progress-report-on-amount-aof-pillar-one-july-2022.pdf, Article 4.8.a.i, pp. 14.

[569] *Id.* at section 6.A.4., which is devoted to Services Performed at the Location of the Customer.

[570] Against the position of allocation, the revenue into the country where the transactions are consumed, it is invoked the challenges arising from the implementation of these tax compliance rules by the tax administration and taxpayers. See further, OECD (2022), *Tax challenges arising from digitalisation: Public comments received on the draft rules for nexus and revenue sourcing under Pillar One Amount A*. PwC's position issued in February 18, 2022.

3.6.3.3. Tax base determination and profit allocation

From July 1, 2021, the tax base determination for Pillar I purposes would be carried out in accordance with the consolidated financial accounting profit of the multinational group, as a starting point. Furthermore, certain qualifying book-to-tax adjustments are applicable to the group financial accounting profit, among them, the tax expenses[571].

Thus, it is not debatable that a group multinational should allocate the net income in the consumer jurisdiction, leads to the question why Article 17 OECD Model should keep the gross taxation at source[572]. Thus, maintaining source taxation combined with potential high applicable domestic tax rates in accordance with Article 17 OECD Model, it is not compatible with the line of reasoning of Pillar I. This tax pattern under Article 17 OECD Model, by providing unlimited taxing rights to the source country might lead to double taxation[573]. Also, the system whereby the domestic tax system is applicable can be freely chosen by the domestic law of the source State by either opting for the taxation at a low rate based on the amount paid or alternatively the net basis tax system[574].

Thus, a change into Article 17 OECD Model must be implemented and the optional net basis regime of its related Commentary must be included in the text of the treaty article. It must be a compulsory tax measure in order to become compatible with Pillar I, exceeding the current proposal on Commentary on Article 17 OECD Model[575] which only applies as per the request of the taxpayer, insofar the State has included it within the text of the particular tax treaty.

In terms of allocation, the key rule is the arm's length standard. Moreover, it should be borne in mind that in order to determine the profit related to the allocation of taxing rights, the physical presence is no longer a relevant requirement under this context. Certain activities may be located anywhere, such as engineers, marketing,

[571] See further OECD (2022) *supra* n. 568, Article 5.2.a.
[572] It should be note that paragraph 10 of the Commentary on Article 17 OECD Model only provides for the determination of the taxable base in accordance with the domestic law of the source State. It also provides for an optional regime within said Commentary based on the net system is granted to the States. However, it has not been implemented in practice.
[573] Paragraph 10 of the Commentary on Article 17 OECD Model expressly states that "The Article says nothing about how the income in question is to be computed. It is for ta contracting State´s domestic law to determine the extent of any deductions of expenses.
[574] Unfortunately, there are no evidences in practice showing the use of this suggested clause of the Commentary on Article 17 OECD Model has been implemented in double tax treaties. At least in the Spanish tax treaty network, at the time of writing this PhD work.
[575] Paragraph 10.

commercials and the like, as opposed to where the income actually arises from the users.

About the methods, the US and the EU/UK approaches endorsed for residual profit split allocation, instead of the traditional profit allocation methods. The key factors are the quality of the activities, how the market risks are borne and the level of investments (research, development, marketing, data and users)[576]. From July 1, 2021, the profit allocation rules are based on a formula which allocates 25% of residual profit in excess of 10% of revenue. It will be allocated into the market each jurisdiction in proportion to the amount of revenues generated there[577].

Even though the profit allocation rules are limited to multinational enterprises, they may be of great importance to find out a reference in relation to Article 17 OECD Model. Since, there is no any official reference so far and the application of transfer pricing rules under Article 17 is hardly a pacific issue.

Thus, a two-fold conclusion can be reached in relation to Article 17 OECD Model.

On the one hand, Pillar I opens the door to the taxation in the country of consumption, insofar certain qualifying thresholds are overcome. This is quite incompatible with the unlimited taxing rights granted in the source country, as per Article 17 OECD Commentary. In particular, there is a high risk of being subject to relevant withholding taxes intertwined with gross basis system in the source country[578] leading to potential double taxation. Hence, additional evidences that Article 17 OECD Model when unlimited taxing rights in the source country are applied, are not in line with main elements of Pillar I.

Thus, it can be concluded that through the application of residual profit split method, market jurisdictions would be entitled to tax only a limited portion of the non-routine profits. It would be determined commensurate with the value created by the audience in relation to entertainment events. As a consequence, it would provide a high degree of certainty to the taxpayers when having a referral of the income to be included, in source countries.

[576] See further, Schön, W., *supra* n. 554, pp. 1021.
[577] Subsequent adjustments arising from Marketing and Distribution Profits Safe Harbour (MDSH) are applicable.
[578] See further, Gram, H and Molenaar, D., *supra* n. 151, pp. 554.

On the other hand, the current split or fractional apportionment[579] used in practice when characterizing income under Article 17 OECD Model versus other items of income, does not follow the method endorsed by the OECD by Pillar I.

Thus, the determination of the taxable base in the market jurisdiction by Pillar I, leads to scrutinize another relevant tax issue as regards Article 17 OECD Model. In particular, in case of endorsing the residual profit split method suggested by Pillar I by Article 17 OECD Model, coexisting with transfer pricing rules, it would minimise disputes or would provide a higher degree of certainty versus the current fractional method. Al least, having as a reference the rule included Pillar I would reduce the scope of the current unlimited rights potentially adopted by tax authorities as source country when applying Article 17 OECD Model.

In any case, the determination of the taxable base and profit allocation within Article 17 OECD Model cannot be left at domestic level and without considering the underlying principles of Pillar I[580]. Also, it must be taken into account that Pillar I position is addressed for the purposes of reallocating taxing rights at group level, as opposed to particular transactions carried out by separate entities which would occur in most of the cases under Article 17 OECD Model.

3.6.3.4. Elimination of double taxation

It is far from any doubt that one of Pillar I primary goals is to avoid double taxation arising from the new rule of allocation of taxing rights[581]. It is in the opposite direction to the OECD position when Article 17 grants taxing rights at the source country[582].

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[579] OECD (2019), *Programme of Work to Develop a Consensus Solution to the Tax Challenges Arising from the Digitalisation of the Economy, OECD/G20 Inclusive Framework on BEPS*, OECD, Paris, May 28-29, 2019,www.oecd.org/tax/beps/programme-of-work-to-develop-aconsensus-solution-to-the-tax-challenges-arising-from-the-digitalisation-of-the-economy.htm.Programme of Work, paragraphs 30-31. This approach helps to accomplish the simplicity, allocating more taxing rights in the user´s country by including also routine profits (such as those arising from marketing and distribution activities).

[580] It is important to note that the final position on profit allocation under Pillar I must be complete once rules concerning Amount B are determined. The intention is to cover a percentage of routine marketing and distribution activities within the context of the current transfer pricing model.

[581] Paragraph 556 of Blueprint Pillar One "(…) *As the profit of an MNE group is already allocated under the existing profit allocation rules, a mechanism to reconcile the new taxing right (i.e. calculated at the level of a group or segment), and the existing profit allocation rules (i.e. calculated at an entity basis) is necessary to prevent double taxation*".

[582] There is no reference whatsoever in the Commentary on Article 17 OECD Model, in order to avoid double taxation. Furthermore, there are references to the potential unlimited taxing rights granted to domestic legislations, such as paragraph 10.

The Pillar I proposal[583] for avoiding double taxation can be incorporated, in order to explore the effectiveness of the particular applicable tax treaty, as well as domestic law provisions, in the context of entertainers and sportspersons. The only reference in the Commentary on Article 17 OECD Model[584] is not enough to accomplish one of the main goals of implementing double tax treaties among countries.

Hence, potential double tax scenarios may arise from divergent views adopted by tax authorities when applying Article 17 OECD Model. In this regard, the particular case of Dutch entertainers touring in Europe (including Spanish performances) by using intermediated companies. The Spanish tax authorities understand that they are entitled to tax the entertainer instead of the company, based on the first paragraph of Article 18 of the Dutch-Spanish double tax treaty (mirroring Article 17 OECD and not including its second paragraph). In particular, Spanish tax authorities, following the Commentary on Article 17 OECD Model[585], understand that that they have been granted with legitimated taxing rights via its look-through provisions. Unfortunately, in practice when the invoices are provided under the company level, the Spanish tax administration applies the taxes also at company level with no underlying rationale to support it. In fact, in the major Court case held in Spain in this regard, the Viajes Halcón-Julio Iglesias[586], the withholding taxes applied by the Spanish promoter on the Dutch company were mistakenly maintained by the Spanish Court, although the taxation on the Dutch company was proved not to proceed.

On the contrary, the Dutch tax authorities endorse a divergent view whereby the lack of paragraph 2 of Article 18 Spanish-Dutch double tax treaty should lead not to tax at company level, as regards performances in Spain carried out through Dutch entertaining companies. Accordingly, Dutch authorities and Courts[587] do not grant double tax relief measure (exemption) to those companies, since Spanish tax at source is applied only at the level of the individuals, as opposed to the entertaining companies.

[583] See further, OECD (2022), *supra* n. 568, Title V, pp.18-21.

[584] Paragraph 10 states that "*The article says nothing about how the income in question is to be computed. It is for Contracting State's domestic law to determine the extent of any deductions for expenses".* It could lead to excessive taxation, combined with the tax credit as relief double taxation measure leads to potential double taxation in the field of entertainers and sportspersons.

[585] Paragraph 8.

[586] See further, paragraph 2.3.3.2.

[587] Sentence issued by *Hoge Raad* in September 24, 2021 (Nr. 20/01875). Furthermore, another sentence in this regard was issued by the Court of Zeeland-West Brabant in June 9, 2022, (BRE 21/170), whereby the Dutch DJ was entitled to use the US tax credits arising from the performance in that country against its personal taxes back in The Netherlands. The scope of the positive outcome is limited since the Dutch Court accepted them on the grounds that payment of LLC taxes was carried out at personal level, based on the fact that it was transparent for US purposes.

It is true that the mismatch arises from the opposite views about the application of Article 17.1 and 17.2 OECD Model (Article 18 of the Dutch/Spanish double tax treaty). However, it is also true that this over taxation may take place since the source State is entitled with unlimited taxing rights when applying Article 17 OECD Model.

Moreover, if this unlimited taxing right at source is combined with limited credit method as a general double tax relief measure rule in the tax residency States, leads to potential double taxation[588]. Said over taxation may arise even in cases where mismatches in characterization (as the previous explained case) do not arise.

Therefore, when Pillar I and II would be finally implemented, it must be a great chance to achieve a better level of avoiding double non-taxation, but also avoiding double taxation. If so, it would be useful for the purposes of avoiding the current mismatches and over taxation scenarios under Article 17 OECD Model.

Furthermore, it is essential for Article 17 OECD Model to benefit from the improvement in terms of tax certainty arising from Pillar I and II. It would be accomplished via an elective binding dispute resolution mechanism within the broader context of the implementation of a multilateral convention which is expected to take place in the next future. All these actions are recommended for the purposes of avoiding the existing double taxation in the context of Article 17 OECD Model.

3.6.4. Pillar II

Pillar II is aimed at ensuring a minimum level of global taxation[589] by combating potential non-taxation or taxation below acceptable limits.

As regards the proposed tax system within Article 17 OECD Model, its goal would consist of accomplishing tax neutrality by not imposing new layers of taxation. Thus, it would be similar to the rules included in Pillar II, unless it would lead to potential double non-taxation. It is in line with the double tax treaty policy, whereby exemption at source is granted, insofar effective taxation preventing from tax avoidance is complied with.

Back to Pillar II, there are four main proposed tax tools aimed at achieving a more stable international tax system and combating profit-shifting.

[588] See further in this regard, Molenaar, D., *supra* n. 32, Chapter 7.
[589] Also known as the Global Anti Base-Erosion Proposal ("GloBE").

At domestic tax level, the income inclusion and undertaxed payment rules, as opposed to tax treaty measures, such as the switch-over and the subject-to tax rules. However, for clarification purposes, the analysis of those tax tools is classified depending on the country enforcement, residence versus source[590].

The tax residency State is allowed to combat effective low taxes at source by either using the domestic inclusion rule or the treaty switch-over rule. The latter applies via the denial of the application of exemption method and instead applying the credit method as a double taxation relief combined with the minimum tax rates, to ensure that potential low tax rates at source does not provide any final unintended tax benefit.

When the tax enforcement relies on the source State, it can apply the undertaxed payment rule, by denying a deduction at source or applying a withholding tax. Moreover, the subject to tax clause which allows for adjusting treaty benefits or applying a withholding tax, too.

The bottom-line conclusion is that either at source level or later on at the State of residency, it must be complied a minimum global tax, that United States proposed to establish at 21% in first stage. Accordingly, the residency States where major potential companies would be tax residents, mainly US, are open to apply the Pillar I insofar the minimum level of global taxation of Pillar II will be applied. If so, the taxation of the tax residency State is not eroded via the taxation of excess profits.

In this regard, United States also included a major change as regards Pillar I and II, since its proposal does not limit the scope only to automated digital services[591]. This proposal which endorses the US viewpoint was implemented by the OECD/G20 Inclusive Framework on BEPS in July 1, 2021[592]. Instead, the new rules of Pillar I and II would apply to companies qualifying for certain level of turnover and the highest potential profit-shifting. Therefore, all type of multinationals may be caught within this new US proposal of re-shaping Pillar I and II. In any case, the questions and measures arising from Pillar I and II arise from the context of digitalization of the economy.

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[590] Pursuant to the classification carried out by Magalhaes, T., and Christians A., Rethinking Tax for the Digital Economy After COVID-19. *Harvard Business Law Review*, 2021, Available at SSRN Electronic Journal: https://ssrn.com/abstract=3635907 or http://dx.doi.org/10.2139/ssrn.3635907SSRN, pp. 24-28.

[591] The former business activity test covering the so-called "automated digital services" and "consumer facing businesses" has been abandoned.

[592] OECD (2021), *supra* n. 520.

As regards Pillar II, it stated a 15% minimum tax rate for the purposes of the application of income inclusion and undertaxed payment rules. Furthermore, the scope of application of Pillar II is determined by way of a EUR 750 million threshold, combined with carve-outs based on the value of tangible assets and payroll.

The Global Base Anti-Erosion Rules (hereinafter "GloBE") adopted since July 1, 2021 also included a *de minimis* exclusion for those jurisdictions where the multinationals' revenue would be less than EUR 10 million and profits of less than EUR 1 million.

At this stage, the far-reaching tax consequences to be implemented by this multilateral international tax approach are very challenging. In the meanwhile, the point is whether the involved countries, including major players such as United States, United Kingdom, European Union and G20 would be able to articulate an international tax framework whereby the tax avoidance would be effectively combated.

In relation to entertainers and sportspersons, counter tax measures may be also adopted in order to combat tax avoidance. All of them, based on the rationale endorsed by Pillar II. In this regard, some domestic tax legislations already provide for rules similar to the ones suggested within Pillar II.

On the one hand, Dutch tax authorities, as a source country, do not apply the withholding tax to non-resident entertainers and sportspersons, insofar they reside in a tax treaty country[593]. It may be understood as a sort of undertaxed payment rule, by avoiding the application of the withholding tax whenever it is considered that taxation in the treaty counter-party is presumed to take place. On the contrary, when dealing with entertainers being tax residents in countries not having a tax treaty with The Netherlands, a 20% withholding tax becomes applicable.

On the other hand, under Spanish tax rules (as a tax residency State) when applying the exemption as the method to grant relief of double taxation for Spanish companies obtaining foreign income, it would be limited to those cases where the foreign subsidiary would pay at least an effective nominal 10% corporate tax rate[594]. This rule is in line with Pillar II, and, in particular, with the tax treaty switch-over rule whereby the exemption is not granted provided that the effective taxation cannot be ascertained.

[593] Article 5.a. Wet op de loonbelasting (Dutch Wage tax Act) for individuals and article 5.b. of the same Act for groups, respectively.
[594] Article 21.1.b) of Spanish CITA.

Thus, the Spanish participation exemption regime for Spanish companies would only apply when at least with a minimum of 10% tax burden applies[595].

Therefore, besides Pillar II proposals, both domestic tax rules can be used as an example to be implemented within the entertainers and sportspersons context. In this sense, a mixture of the above-mentioned domestic tax rules, when applying Article 17 OECD Model as Source State may be implemented within Article 17 OECD Model. It would be similar to the Dutch exiting one, but requiring a minimum effective taxation, in line with the Spanish domestic tax relief measure requesting for a 10% minimum taxation at source or alternatively a 15% minimum tax, as suggested by Pillar II.

Thus, the source State or where the audience is located and the entertainment service is consumed, would not be entitled to tax, insofar the tax residency State of the entertainers would be within the countries effectively applying Pillar I and II Unified Approach. As a result, an effective taxation in all potential scenarios involving Article 17 OECD Model would be ensured.

In its turn, when minimum above-mentioned threshold (EUR 250,000) would be exceeded, the source country would be entitled to tax, too. However, the source country would not benefit from unlimited taxing rights, as opposed to the currently applicable 2014 OECD Commentary on Article 17.

Therefore, Article 17 OECD Model would be under the parameters of Pillar I and II. It would limit the application of the force of attraction of Article 17 OECD Model versus other tax treaty articles and, if so, by eliminating the potential over taxation of said qualifying taxpayers.

Moreover, it would also maintain the exceptional tax treatment based on reputational risk reasons[596] (as per the tax authorities concerns and OECD viewpoint), as opposed to other regular taxpayers, Accordingly, it would only lead to the application of a reduced threshold of EUR 250,000 (similar to the one suggested to developing countries under Pillar I). However, it would not enable to apply Article 17 OECD Model, without any restrictions applicable to the source country, as it is permitted under the

[595] See further, Poza Cid, R., *Cahiers de droit fiscal international*, Berlin Congress 2022, Volume 106 A, Group approach and separate entity approach in domestic and international tax law. Summary and conclusions (Spanish Chapter), pp. 151-152.

[596] See further about the reputational risk, Betten, R. and Blackshaw, I., Editorial. *Global Sports Law and Taxation Reports*, 2022 (September), Vol. 13 No. 3, pp. 4-8.

2014 Commentary. In particular, it would stop the over taxation arising from the application of the optional threshold of IMF 15,000 (or dynamic definition)[597], no restrictions in the determination of the taxable base and withholding taxes on gross income by source States.

To sum up, when applying Article 17 OECD Model, the implementation of the ideas endorsed in Pillar I and II would lead to eliminate the excessive taxation at the source State. Furthermore, a specific tax treatment would be granted, based on the grounds of reputational risk, by reducing the threshold at EUR 250,000 at source, instead of the general one amounting to EUR 1 million, in order to be subject to tax in source States.

3.6.5. Conclusions

A relevant amendment of Article 17 OCED Model needs to be undertaken, as a consequence of the reluctance of the OECD to abolish a specific international tax measure, such as Article 17 OECD Model. This tailor-made and far reaching measure, theoretically designed for combating tax avoidance, must be treated at least under the same framework of Pillar I and II measures. In this sense, if the scope of Article 17 OECD Model is not in line with the scope of Pillar I and II, entertainers and sportspersons would be subject to a more burdensome tax measure, with no underlying tax reasons. Furthermore, the consequences of Pillar I and II when applicable to income previously taxed under Article 17 OECD Model, would have no effect, insofar the above-mentioned recommendation as regards Article 17 OECD Model were not implemented.

Hence, when Article 17 OECD would be adapted to the rules explained in previous paragraphs, the potential unlimited approach adopted by source States, would be no longer an option. Hence, the force of attraction of Article 17 OECD Model when applicable vis a vis other international tax rules included in double tax treaties when dealing with other type of income or other taxpayers, would be eliminated. In doing so, Article 17 OECD Model would become an appropriated tax tool to deal with the taxation of international entertainers and sportspersons.

[597] In this regard, Molenaar, D., *supra* n. 158, pp. 224-228.

Thus, Article 17 OECD Model must be amended in order to be in line with the proposal of Pillar I and II and limiting the current unlimited taxing rights granted to the source country under Article 17 OECD Model. Also, it would lead to apply/allocate the taxation at source where the audience consuming the service is located, either physically or remotely, via the digitalization of the services. Therefore, the main rules of Article 17 OECD Model about what, where and how to allocate the income may be correctly replied with the help of Pillar I and II underlying principles. Moreover, VAT rules when dealing with distance sales pave the way in relation to Article 17 OECD Model and the use of the objective approach, in order to grant taxing rights to the country where the audience consumes the service.

All those conclusions must be undertaken within the context of the continuous evolution path of implementation related to Pillar I and II, and if so, the respective precautions. Nonetheless, Article 17 OECD Model may start benefiting from suggested amendments based on the Pillar I and Pillar II rationale, regardless of whether when and how the latter rules are finally. Throughout all previous paragraphs it has been proved the goal of that Article 17 OECD Model becomes an appropriated international tax tool that would avoid double non taxation, but also double taxation or over taxation which is against one of the main goals of double tax treaties.

CHAPTER 4 – SPANISH TAX RULES ON RESIDENTS VERSUS NON-RESIDENT ENTERTAINERS AND SPORTSPERSONS

4.1. Relevant Spanish domestic tax law on tax residents

4.1.1. Introduction

In this Chapter, the Spanish domestic tax rules dealing with entertainers and sportspersons are detailed analysed. They are tackled with the aim at explaining how Spanish tax authorities and Courts interpret the domestic tax rules applicable to this specific group of taxpayers, within context of international performances and the interaction of double tax treaties and Spanish domestic tax rules.

On the one hand, said interaction can shed some light when interpreting the double tax treaties when the taxpayer (either individual or company) becomes tax resident in Spanish territory. In particular, the Spanish replies from DGT to binding rulings posed by taxpayers are of great assistance.

On the other hand, said analysis is also carried out in relation to those scenarios where the entertainers and sportspersons are only linked to the Spanish territory via the pure performance as opposed to the stronger connection of the tax residency. In other words, the taxation system and interpretative rules when tackling non-residents in the context of double tax treaties signed by Spain and the Spanish NRITA[598].

Again, the force of attraction of Article 17 OECD Model is the touchstone when analysing all particular domestic tax issues that may interact with the entertainers and sportspersons taxation. The first step is the factual approach when determining their tax residency status, including the solution granted when facing double tax residency scenarios.

Since the objective approach is endorsed by the author throughout this work, the domestic qualification of the income that entertainers and sportspersons may obtain are of great relevance also from the Spanish tax perspective, as well as the reasoning supporting the particular approach endorsed by the Spanish tax authorities. Related to

[598] In particular Article 13.1.b.3rd of NRITA when dealing with entertainers and sportspersons.

the type of income, the domestic taxation of this group of taxpayers is analysed, by including the main pros and cons, in the context of international performances.

Conversely, when dealing with non-tax residents in Spain who obtained income in Spanish territory, the Spanish tax rules and interpretative approaches from Spanish tax authorities and Courts help to clarify how the interaction between the subjective and objective approach included in Article 17 of OECD Model is applied, when particular scenarios are faced.

Furthermore, the determination of taxable base for non-tax residents is also tackled, since the source country may be entitled to exercise its primary taxing rights. As a consequence, it may lead to shortcomings to be taken into account by the tax residency country, when subsequently applying their respective income taxes of the entertainers and sportspersons and, if so, enabling them to benefit from double taxation relief measures.

Finally, as any other developed tax system, the Spanish one also encompasses anti avoidance tax rules, such as Controlled Foreign Corporations (CFC) and transfer pricing rules, which may impact on the final taxation of entertainers and sportspersons as Spanish tax residents.

4.1.2. Individuals tax residency

4.1.2.1. Spanish tax residency rules

One of the central concepts when dealing with sportspersons and entertainers is determining their tax **residency status**. According to it, they report to the tax authorities their worldwide income, as well as asking for the application of the corresponding double tax relief measures, available at domestic or treaty level.

It is important to note that due to their mobility within the international performances, in general terms, they do follow a similar pattern by not staying long period in a particular country. As a result, it gives room to plan their tax residency[599]. Nonetheless, the tax rules addressing the tax residency in the OECD Model, intertwined with the applicable domestic tax rules must be respected.

[599] Gupta, A., David Bowie: rock star of tax planning, *Tax Notes International*. Vol. 81, 2016, n. 3, pp. 195-197. It explains the history of this artist when planning his tax residency in Switzerland and Ireland.

In this regard, article 4 of the OECD Model treaty lays down a definition of tax resident that gives reference to the domestic law of the contracting States. From the Spanish tax viewpoint, a facts-and-circumstances approach is followed, for the purposes of determining the residency of individuals. In particular, an individual taxpayer is considered to be tax resident in Spain, according to the below tests[600]:

1. The 183 days test during a calendar year.

2. The taxpayer's main place of business or professional activities or his/her centre of economic interests is located in Spain.

3. Additionally, there is an assumption whereby, if the spouse (not legally separated) and dependent children reside in Spain, the taxpayer will be deemed to be Spanish resident, unless otherwise proven.

In the sport and entertainment arena there is no specific tax treatment when determining the tax residency of the individuals. Thus, the main domestic tax rules are applicable, by adding the emphasis, when issues of relevance may impact to entertainers and sportspersons.

As regards the first condition or the **183 days test**, the particular facts and circumstances of the case must be taken into account. In this regard, the issue of how the Spanish tax administration and Courts [601] interpret how to take into account sporadic absences becomes important in the context of entertainers and sportspersons[602].

[600] Article 9 of PITA, which final draft was updated through the Law 26/2014 of November 27, 2014.

[601] The Spanish Supreme Court issue several judgments in November 28, 2017, n. 807/2017, n. 809/2017, n. 812/2017, n. 813/2017 and n. 815/2017 dealing with this particular issue, even though in the field of students. Also, the Spanish National Court sentence issued in September 30, 2020, Rec. 298/2017.

[602] A major tax audit involves the well-known Colombian singer, Shakira. Although she claimed to be tax resident in The Bahamas since 2007, the Spanish State Prosecutors understood that she spent in Spain 243 days in 2012, 212 in 2013 and 244 days physically present in 2014. Accordingly, they consider her as tax resident in Spain since 2012 and request for the payment of the corresponding income tax related to the above-mentioned fiscal years, by amounting to final tax quota of EUR 14.5M.
It did not help much to her position the fact that she stated in magazine that she was officially living in Barcelona, back in 2011.
Nonetheless, the main debate resides in determining whether the spent time in foreign countries must be considered as sporadic absence. From the singer perspective, those absences did not qualify as sporadic, since she was actually residing in foreign countries, by giving evidence through her agenda of concerts; together with her participation in the US TV show "The Voice". In contrast to this position, the Spanish prosecutors held and provides evidences in order to prove that she spent more than 183 days.

In this regard, while determining the minimum period of 183 days in Spain within a calendar year, the sporadic absences must be taken into account, unless the taxpayer gives evidence of his/her tax residency in another country.

Accordingly, a formal approach is endorsed by the Spanish tax authorities when accepting evidences of the tax residency in a different country. In terms of burden of proof about the fiscal residency, the taxpayer may solely give evidence via the certificate of tax residency. In particular, when the taxpayer requests for the application of a double tax convention. This strict position is valid at the Spanish tax administration level, but it may be argued in the Spanish Courts. In addition, the tax residency certificate must be issued in accordance with certain requirements:

- Only the competent foreign tax authorities[603] are able to issue those certificates and limited to one year period.

- The wording of the certificate must expressly include that the taxpayer is resident in terms of the applicable double tax treaty, when applicable.

Additionally, the main conclusion is that the interpretation of **sporadic absence** does not rely on the aim of the entertainer or sportsperson. It must be determined whether sporadic or permanent, by the duration and the degree of the intensity of the stay outside of the Spanish territory, supported by objective facts.

Moreover, the conditions in order to move the Spanish tax residency into a tax haven country[604] by Spanish nationals are tougher, with the aim at combating a tax residency

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In fact, she was living in Spain with permanent purposes, which was only stopped by professional or leisure activities.

Thus, up to date there is no final outcome regarding this particular case. The point is whether the involved parties would reach an agreement or a Court would shed light about the interpretation of sporadic absences in the field of entertainers, which would be more than welcome for interpretation purposes.

[603] Spanish Tax Authorities are authorized to issue two types of tax residency certificates, either limited to domestic tax purposes or aimed at proving the tax residency at double tax treaty level.

[604] It is worth noting that Spain approved a blacklist of tax havens the Royal Decree 1081/1991. The list of tax havens is as follows: Anguilla, Antigua and Barbuda, Bahrain, Bermuda, British Virgin Islands, Brunei, Cayman Islands, Cook Islands, Dominica, Falkland Islands, Fiji, Gibraltar, Grenada, Guernsey and Jersey (the Channel Islands), Jordan, Lebanon, Liberia, Liechtenstein, Macao, Monaco, Mauritius, Montserrat, Nauru, Northern Mariana Islands, Oman, Saint Lucia, Saint Vincent and the Grenadines, Seychelles, Solomon Islands, Turks and Caicos Islands, U.S. Virgin Islands, and Vanuatu.

Said Spanish domestic tax haven blacklist was of closed character until the enactment of the 1st Additional rule of the Law 36/2006, whereby the included countries were feasible to be removed from it, when signing a double tax treaty with Spain, including an exchange of information agreement clause. Moreover, countries signing an agreement of mutual administrative assistance within the OECD and the European standards were also considered to be removed from the list. Accordingly, the Spanish DGT in

"*a la carte*". In particular, there exists a domestic tax quarantine lasting five years, which does not take into consideration any legal prove in the contrary. Accordingly, sportspersons and entertainers must be aware that becoming tax residents in certain jurisdictions may lead to an unpleasant surprise consisting of being deemed to be tax resident within an extended period of four years, plus the one in which the tax residency takes place.

Additionally, entertainers and sportspersons moving their tax residency into a tax haven country must also prove that the taxpayer has actually spent 183 days there. Both anti-tax haven measures were implemented as a response[605] to the unwilling outcome of the relevant Court Case of the famous tennis player Arancha Sánchez Vicario[606].

The starting point was when the Spanish tax authorities assessed the fiscal years between 1989 and 1993, based on the grounds of her change of tax residency from Spain to Andorra in 1987, which at that time was regarded as a tax haven territory for Spanish tax purposes. The purpose of the mentioned transfer of residency consisted of benefiting from the more favourable tax regime granted in Andorra for personal income tax purposes, versus the progressive income tax rate scale established in Spain.

The Spanish tennis sportsplayer tried to give evidence of her tax residency in Andorra via the issuance of various certificates from the police, the tennis federation and the parish of said country. In contrast to the fact that all her family members, including her

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February 2, 2003, issued a report which confirmed that the following countries were removed from the Spanish tax haven blacklist: Andorra, Aruba, Bahamas, Barbados, Cyprus, Emirates Arab United, Hong Kong, Jamaica, Luxembourg, Malta, Oman, Panamá, San Marino, Singapore and Trinidad and Tobago.
Conversely, through the 50th additional rule included in the Law 9/2017 of November 8, 2017, the Spanish Government undertook the obligation to update said tax haven blacklist by including those jurisdictions considered to be a tax haven by the OECD or European authorities. In this regard, the European Counsel of Economics and Financial Issues (ECOFIN) issued in February 27, 2019 an updated list of non-cooperative countries which expressly included the following countries: American Samoa, American Virgin Islands, Cayman Islands, Fiji, Guam, Oman, Palau, Panama, Samoa, Seychelles, Trinidad and Tobago, and Vanuatu. Accordingly, it is still expected how Spain Government reacts as to whether Oman and Panama are back to be considered to be tax havens. Moreover, in October 4, 2022 EU Council adopted in its meeting, the revised EU list of non-cooperative jurisdictions for EU tax purposes, approved by the Council including American Samoa, Anguilla, Bahamas, Fiji, Guam, Palau, Panama, Samoa, Trinidad and Tobago, Turks and Caicos Islands, US Virgin Islands and Vanuatu.
Thus, the Spanish blacklist encompasses a reduced scope of countries, by limiting to those with no involvement in relevant sportsleagues or major performance countries. Nonetheless, it might have an impact when the entertainers or sportspersons would select of the qualifying tax haven countries.

[605] It is important to note that the content of Article 9 of PITA was updated through the Law 40/1998. The five-year period of tax was introduced originally in article 9.3 of PITA, but changed into article 8.2 of the same law.

[606] Spanish Supreme Court sentence issued in November 11, 2009, Rec. n. 8294/2003.

father (apart from being her manager) with whom she shared the tennis academy where she usually trained, were resident in Barcelona. In addition, she owned various real estate assets in Spain through a Spanish company, as well as being the corporate vehicle through which her worldwide advertising and sponsorship income was received.

Moreover, the key point resided in the evidences which were not provided by the taxpayer, such as the purchase or rental contract of the habitual abode in Andorra, as well as the certificates of the supplies proving the effectiveness of the residency there. Also, it is important to take into account that the tax residency certificate from the fiscal tax authorities of Andorra was not provided throughout the tax audit and court procedures. Therefore, by no means, the actual tax residency in Andorra was not ascertained by the taxpayer and the income tax assessments issued by the Spanish tax authorities were considered to be valid from the Spanish Courts[607].

Another relevant issue is the **Spanish observation to Article 4 OECD Model**, included in paragraph 26 of the Commentary on Article 4 OECD Model[608]. It is based on the grounds that Spanish domestic tax law does not envisage the option to cease the fiscal year, as a result of the change of residence of the taxpayer. It may have a

[607] The same tax rationale, but referred to Italian tax residency status versus Monaco was present at the Pavarotti Case. Pavarotti tried to move to Monaco since 1983, by recording him in the Official Register of the Italian population as resident abroad. However, the Italian tax authorities challenged said change into a favorable tax regime via a tax audit entailing 1989-1991 fiscal years, on the grounds of the substance-over-form approach and subsequently by the Italian Tax Court of First Instance of Modena, February 9, 1999 and the Tax Court of Second Instance of Bologna. They upheld that the tax residency was attached to Italy based on the link to his Italian investments, even though the taxpayer was able to give evidence that from the professional viewpoint that he worked abroad, his manager was not Italian, that he spent less than 183 days in Italy and lived apart from his wife and children since 1985. Finally, an agreement was reached whereby the taxpayer agreed to pay a monetary tax quota and penalty to the Italian Tax Authorities, by considering that the taxpayer was not actually changing his tax residency status. Similar to Spain, it had a collateral effect, by including an anti-avoidance provision when an Italian tax resident claimed to be tax resident in a tax haven country. It was introduced specifically in Art. 10 (1) of Law N. 448 of December 23, 1998.
See further, Rotondaro, C., The Pavarotti Case, 40 *European Taxation* 8, 2000, pp. 385-39, in which she upheld that unfortunately in this particular case the income stream approach was not taken into consideration and too much attention was granted to the taxpayer asset location.
See further about this topic, Mastellone, P., Fiscal Residence and Criminal Implications for Professional Football Players, *Global Sports Law and Taxation Reports*, n. 11, March 2021. pp. 49-50.

[608] "*Spain, due to the fact that according to its internal law the fiscal year coincides with the calendar year and there is no possibility of concluding the fiscal period by reason of the taxpayer's change of residence, will not be able to proceed in accordance with paragraph 10 of the Commentary on Article 4. In this case, a mutual agreement procedure will be needed to ascertain the date from which the taxpayer will be deemed to be a resident of one of the Contracting States.*"
It must be noted for clarifications purposes that an Observation is introduced when the involved State, although agrees within the context of the OECD Article, disagrees with the viewpoint endorsed by a specific Commentary to said OECD Article, such as the case of Spain and paragraph 10 of the Commentary on Article 4 OECD Model.

relevant impact in those entertainers and sportspersons who are changing of fiscal tax residency on the middle of the calendar year. For example, sportsplayers changing of tax residency and playing in two competitions within the same year.

Therefore, the potential scenario as depicted in paragraph 10 of the OECD Model Commentaries on Article 4, of an entertainer and sportsperson being tax resident until March 31 in one State and becoming a tax resident in a different State from April 1 onwards, may only be solved, when said entertainer or sportsperson is a fiscal resident in Spain in any of the two periods, through the mutual agreement procedure[609]. It would help to solve the tax residency status in two States within the same fiscal period, based on the respective domestic tax rules, determining the tax residency,

Finally, as regards the **183 days test,** the Spanish tax authorities are endeavouring in order to attack any loophole through which the entertainers and sportspersons, among other celebrities, may try to unduly benefit from it and avoiding an actual Spanish tax residency. Accordingly, they are trying to argue in favour of the Spanish tax residency where the taxpayer is actually living, despite the fact of spending a relevant part of the calendar year in foreign countries, due to professional commitments. All this is based on the fact that the counterparty claimed tax jurisdiction of tax residency are considered to be a sham, by not entailing any kind of physical presence.

In this regard, and link to the second test, **the centre of economic interest**, a Spanish Court case[610] is very illustrative to understand the Spanish tax authorities position versus the evidences that may be provided by the entertainers and sportspersons, among others.

Prior to tackle the main tax issues of the mentioned Court case, it is important to note that the Spanish criterion of the centre of economic interests, as opposed to the tie-breaker rules stated in article 4 OECD Model, does not take into account the personal links to the territory, insofar do not encompass an economic consequence[611].

[609] In this regard, Juarez, A., *supra* n. 218, pp. 613, states that Spanish tax authorities follows an unwritten administrative practice as regards employed sportsplayers whereby they are considered to be Spanish tax residents when the remuneration within the second half of the year is greater than that received in the first part of the year. Moreover, the same practice is applied when departing from Spain and the greater income is obtained within the first part of the calendar year.

[610] Barcelona Regional Court, issued in May 21, 2019 (n. 36/2019). It resolved the appeal to the previously sentence issued by the Barcelona Criminal Court, Section 19, in October 1, 2018 (n. 369/2018).

[611] The key factors to ascertain the centre of economic interested leads also to other open questions which may be solved based on the particular circumstances of the case. As to whether income is of

As regards the particular facts of the case involving a recognised Spanish Gran Prix motorbike rider, he was accused of tax fraud, in the grounds of personal income tax and wealth tax, involving 2006 fiscal year. Although not spending more than 183 days in Spain, the tax debate with criminal consequences were related to the determination of the tax residency based on the centre of economic interests.

In the case the centre of economic interests is determined by analysing the tax residency in the canton of Fribourg (Switzerland) claimed by the sportsperson versus the tax residency in Barcelona (Spain) supported by the Spanish prosecutor, together with the Spanish auditors. The Spanish Courts in different levels agreed on issuing the sentences which determined the tax residency in Switzerland based on the relevant facts, such as the certificate issued by the Spanish consul in Geneva, press reports evidencing his tax residency in Switzerland, diving insurance, Swiss rental payments, medical insurance and certificate from Justice and Security department giving evidence of his entry in the country since June 2000 up to February 2007[612].

On the one hand, these Court sentences evidence lack of clear and technical guidance[613], when tackling the analysis of the centre of economic interests. On the other hand, they are not helpful for the purposes of counteracting the potential far-reaching position of the Spanish tax authorities, when dealing with entertainers and sportspersons, by taking into consideration that apart from the economic consequences, a reputational risk for this particular group of taxpayers may be also encompassed.

Finally, there exist a **rebuttable presumption** also applicable to entertainers and sportspersons, whereby a taxpayer is considered to benefit from Spanish tax

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greater value, as opposed to the wealth of the taxpayer. In this regard, it is also unclear if "active" income is taken into more consideration than "passive" income. Also, whether it is more important where the assets are located versus the place of management. More evidence is provided by Spanish Courts when determining the comparison between Spanish territory versus every single foreign State and not taking into account the overall foreign economic interests. In this regard, Spanish Supreme Court sentence issued in July 4, 2006, Rec. n. 3400/2001 and Spanish National Court sentence issued in December 9, 2020 Rec. n. 605/2018.

[612] The above mentioned proves were considered to sufficient to give more weight, as opposed to those counter evidences supporting for the Swiss tax residency as a sham, held by the Spanish tax authorities and, subsequently, by the Spanish prosecutor. In particular, trips from Barcelona to different destinations, together with the lack of evidences of trips to Switzerland, other than tickets from sky stations and hotels. The rental of three real estate assets in Spain to linked individuals, even though not being relatives, such as the former partner, the sportsperson's Spanish driver. Likewise, his companies were tax resident in Spain, as well as the "motorhome" was located in Barcelona.

[613] The fact that these procedures are usually dealt with by criminal Courts which tend to focus more in the procedural aspects than in the actual technical tax residency issues.

residency, as long as his spouse and children under eighteen years old are considered to be Spanish tax residents, in accordance with any of the above two tax residency conditions. In fact, it shifts the burden of proof into the taxpayer, since it is very difficult to give evidence in those scenarios, such as the entertainers and sportspersons with worldwide income and assets and not having a long period of stay in any particular country.

4.1.2.2. Tie-breaker rules

In the context of entertainers and sportspersons with a high degree of mobility, it may lead to dual tax residency scenarios, which only may be solved, by using the tie-breaker rules included in Article 4.2 of the OECD Model, when a double tax treaty applies, mirroring the above-mentioned OECD treaty rule.

It gives preference to the permanent home, centre of vital interests, habitual abode, nationality or mutual agreement procedure.

Starting from the **permanent home,** it is important to highlight the permanency characteristic, regardless of being owned or rented. It must be reserved by the individual with the purposes of permanency.

In case that the permanency of the permanent home is proven from both involved treaty jurisdictions, the second test of **centre of vital interest**, from the Spanish interpretation must be taken into consideration. As opposed to the domestic test of the centre of economic interest, it entails both the economic, intertwined with the personal circumstances. As regards the latter, Spanish tax authorities endorse the personal circumstances through various replies in binding ruling, such as the one issued in June 27, 2014[614], whereby in case of changing the permanent home, the personal link is considered to be established where the direct family, spouse and children under 18 are also living. Again, a tie may take place whenever the economic ties are also linked to the dual tax residency country through the value of the company's shares, investments, salary and the like.

Thus, it would lead to apply the next tie-breaker rule, the **habitual abode.** In this regard, paragraphs 17 and 19 of the Commentary on Article 4 of the OECD Model

[614] DGT V1643/2014.

Convention are the pivotal rules of interpretation also for Spanish domestic tax purposes, whereby *"(…) the case where the individual has a permanent home available to him in both States, the fact of having an habitual abode in one of the State but not in the other appears therefore as the circumstance which, in case of doubt as to where the individual has his centre of vital interests, tips the balance towards the State where he stays more frequently* (…)".

"(…) The phrase "séjourne de façon habituelle" which is used in the French version of subparagraph b) (habitual abode) provides a useful insight as to the meaning of "habitual abode", a notion that refers to the frequency, duration and regularity of his stays that are part of the settled routine of an individual´s and are therefore more than a transient (…)"

"Subparagraph b (habitual abode) does not specify over what length of time the determination of whether an individual has a habitual abode in one or both States must be made. The determination must cover a sufficient length of time of it to be possible to ascertain the frequency, duration and regularity of stays that are part of the settled routine of the individual´s life."

Above characteristics must be ascertained in the particular case of the entertainer or sportsperson, in order to enable to determine his habitual abode, for the purposes of the application of the tie-breaker rule and, if so, the determination of his tax residency status. In case of having habitual abode in both or in neither involved countries, the preference would be granted to the State where the entertainer or sportsperson is national. Again, if national in both or neither of them, it would apply the mutual agreement of Article 25 OECD Model.

4.1.2.3. "Beckham Law" regime

As mentioned in previous paragraphs the main consequence of determining the Spanish tax residency is being subject to tax under the worldwide system [615]. Nonetheless, it also exists the option of limiting the scope of the tax, to those arising from Spanish territory (except for work income) as if they were non-tax residents, under

[615] It involves the application of the domestic tax rules, with the limited tax scale applicable to passive income (dividends, interests, royalties and capital gains) ranging from 19% to 26% and the progressive tax rates from 19% to 49% applicable (in 2022) to all remaining items of income, under the general tax base. Moreover, the allowances and double tax relief measures are also applicable.

the special **elective inbound tax regime** (the so-called "**Beckham Regime**")[616], fostering the establishment of temporary inbound residents or impatriates. The main purpose of said special regime consists of attracting into Spain valuable human capital under employment rules.

In order to qualify for said beneficial tax regime, the requirements are as follows:

- The inbound resident should not have been Spanish tax resident, during a 10-year period prior to his/her relocation to Spain.
- The relocation into Spanish territory must be caused for an employment contract or by acquiring the status of company's director, not owning more than 25% of the shares.
- No income obtained can qualify as obtained through a Spanish permanent establishment.

The temporary status of said elective impatriate regime limits its application to the year in which the impatriate becomes Spanish tax resident, as well as the following five years[617]. Therefore, when accurate planning is carried out, it allows for the first year of arrival not wasted by not spending more than 183 days in the Spanish territory.

When the impatriate regime becomes applicable, the taxpayer is subject to tax, but limited to Spanish sourced income, in the context of Spanish wealth tax and personal income tax[618], in accordance with the Spanish NRITA[619].

[616] Said elective inbound tax regime is applicable since 2004. It is included in Article 93 PITA (former 9.5 of the same tax rule), as well as the Royal Decree 687/2005 and the Ministerial Order EHA/1731/2005.

[617] For the purposes of benefiting from this impatriate tax regime, among the formal obligations to be met, it is relevant to highlight that the filing of the impatriate election must be carried out within the six months pursuant to the starting date of the employment contract. Additionally, the elective notice must also include either the employer´s certificate stating the employment relationship or the employee letter of assignment.

The ending of this beneficial tax treatment, articles 117 and 118 of PITR may take place either voluntarily or when they fail to comply with any of the qualifying requirements. In the case of being chosen by the taxpayer, the waiver application must be filed within the month of November or December, before the calendar year in which the waiver becomes applicable, whereas the exclusion takes place during the year in which the failure takes place.

The main consequence in ceasing to benefit from the special regime of impatriate entertainer or sportspersons is that they are not entitled for a second election.

As a result, the taxpayer would be subject to PITA rules of tax base determination, being subject to worldwide taxation of their income and wealth, as well as having an easier access to Spanish tax treaty benefits.

[618] The Spanish tax authorities have stated their position through the reply to the binding consultations from the taxpayers. In this sense, the DGT in December 15, 2017 (V3238-2017) replied to the question posed by a taxpayer about the taxation in the field of Spanish inheritance and gift tax when being under the elective "Beckham regime". The main question was whether he would be subject to inheritance and gift tax rules applicable to non-resident or Spanish resident taxpayers.

However, since 2010 a EUR 600,000 salary threshold was established, in order not to be eligible for those taxpayers exceeding said amount of income per year. Again, in 2015 two other major amendments were implemented. On the one hand, the employed sportspersons under the special regime of the Spanish Royal Decree 1006/1085, dealing with the employment relationship between professional sportsplayers and their sport clubs are out of the scope of application of said elective tax regime. On the other hand, the 24% flat rate applicable to the Spanish sourced income[620], arising from employment income is applicable to the first EUR 600,000, and 47%[621] for the remaining income, by granting again the option to apply this tax regime to high income earners, exceeding the EUR 600,000 limit.

Accordingly, employed sportsplayers outside of the scope of the relationships between them and sports club or companies organizing sport events[622], as well as all employed entertainers are entitled to benefit from this beneficial tax regime.

In summary, the impatriate tax regime would be extremely tax advantageous for inbound qualifying employed sportspersons and entertainers moving into Spain. They would only be subject to tax on their Spanish sourced dividends, interests, royalties

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The Spanish tax authorities did change the position held trough previous replies to binding rulings, such as the DGT Consultation V0766-08, through which they considered those qualifying taxpayers as non-tax resident for inheritance purposes, following the conditions granted for income tax purposes and wealth tax.

The latest position of the Spanish tax authorities states that they are fully tax resident for Spanish tax purposes and the only difference is that for personal income and wealth taxes they do apply certain rules, equal to non-tax residents.

The difference is relevant. Under the former position, the foreign assets of the taxpayer were left outside of the scope of the Spanish Inheritance and Gift tax. However, under the new approach they included in the taxable base of said tax, since tax residents are also subject to tax worldwide, by also benefiting from the allowances granted at regional level, which in certain scenarios can reach 99% of the taxable quota, such as the Madrid region. From a practical perspective, when international elements of the inheritance and gifts are faced, the application of said regional allowances is not straightforward and the taxpayer needs to ask for tax refunds.

[619] Articles 5, 6, 8, 9, 10 y 11 of the NRITA do not apply, since they include the definition of non-resident taxpayer (article 5), residency rules for non-residents (article 6), determination of the income (article 9), liability (article 10) and obligation to appoint a representative (article 11). It is coherent because the taxpayer electing for the impatriate regime is a Spanish tax resident but being subject to certain qualifying non-resident tax rules.

[620] Exceptionally, all employment income is considered to be obtained in Spain and regarded as Spanish sourced income, regardless of its actual sourced location. It is worth noted that the proposal of the so-called "Start-up Law" already approved by the Spanish parliament in December 1, 2022, extends the application of the impatriate regime to other new scenarios such as "digital nomads", innovative and high-qualified entrepreneurs. Thus, this tax regime provides for the application of the above-mentioned 24% flat rate also to professional income.

[621] In case of existing Spanish sourced passive income, it would be subject to the limited tax rate between 19% and 26%.

[622] From a practical perspective, there is almost no room to apply this beneficial tax regime in the field of sportspersons.

and capital gains. Thus, foreign sourced income (except for work income) that otherwise would be taxed on their annual worldwide income is left aside for tax authorities' control, including strict obligations of reporting foreign assets. As a collateral tax consequence, the qualifying impatriate would not be eligible to benefit from double tax treaties, since most of them do not allow to grant their tax treaty benefits, when liable to tax, but limited to income sourced in one State[623]. It is based on the fact that Spanish tax authorities' only issue tax residency certificates within the context of the Spanish domestic tax law, as opposed to those enabling to tax treaty entitlement[624].

It is worth noting that in December 1, 2022 Spanish Parliament[625] approved the definitive draft of the so-called "Start-ups Law", which is aimed at introducing, among others, substantial improvements to the special tax regime for impatriates. In particular, the period of non-tax residency in Spain before relocation has been reduced from 10 to 5 years[626]. The primary new benefit resides on broadening its scope in order to include of entrepreneurial or self-employed status, as well as high qualified professionals. Managers are not restricted to less than 25% shareholding in "active" companies. The regime is extended to individuals moving into Spain, in order to work from home (known as "digital nomads") as long as they also benefit from the new visa for international tele-working individuals. Finally, family members are also entitled to this beneficial tax regime insofar certain conditions are met[627]. Thus, it opens the door to entertainers or sportspersons qualifying as self-employees who would move into Spain, insofar the remaining requirements are complied with.

[623] Last paragraph of Article 4.1 of OECD Model expressly states that "*This term, however, does not include any person who is liable to tax in that State in respect only of income from sources in that State or capital situated therein*."

[624] In this regard, Juarez, A., *supra* n. 218, pp. 620-621 states that since 2015 the fact that the work income is subject to tax under this beneficial tax regime in a worldwide basis, leads to support to be eligible for the Spanish double tax treaty benefits. However, there is no guidance from the Spanish tax authorities clarifying this particular issue, more than keeping the administrative practice of issuing only domestic tax residency certificates to impatriate beneficiaries, as stated in above paragraphs.

[625] The forerunner was the preliminary text approved by the Government back in June 2021. Once the Parliament approval has been obtained, it is only pending the release in the Spanish Official Gazette.

[626] However, it should be noted that the extension to 11-year period of "Beckham law" regime has not been finally implemented. Thus, the 6-year period continues to be the governing timing rule.

[627] In this regard, it should be noted that work/professional/passive income of other family members must be lower than income of the person enabling the application of this tax regime.

4.1.2.4. Exit tax

Another relevant tax issue that entertainers and sportspersons must take into consideration, due to the high mobility of their professional careers, is the potential application of the Spanish domestic tax rules[628] on **exit tax**.

The first step consists of ascertaining whether they qualify under the taxpayers who are under this specific tax. Accordingly, it is addressed to those being Spanish tax residents ten years out of the last fifteen-year-period[629]. In case of being under the elective Beckham regime, said period would start to compute, once said special regime ended up.

Furthermore, there is a threshold for the application of the Spanish exit tax on individual taxpayers, depending on the size of the investment. In this sense, when the taxpayer holds shares in listed or not listed companies, as well as collective investment institutions, whose overall value of the assets exceeds EUR 4M. Alternatively, when not reaching said limit, the shareholding in the entity is greater than 25%, combined with the market value of the investment exceeding EUR 1M.

Accordingly, at the point in time that the taxpayer changed his tax residency status, the taxation of the latent capital gains would become applicable[630]. The final determination of the taxable depends on the country where the taxpayer becomes tax resident. There are specific rules when the country is located within the European Union[631], the underlying reasons are due to a new employment in country with double tax treaty in

[628] Article 95 bis of PITA and Articles 121-123 of PITR.
[629] Since January 1, 2015 through Law 26/2014.
[630] In particular, the submission period is of three months, since the taxpayer loses his Spanish tax residency status, based on the change of tax residency.
[631] In this particular scenario, the obligation is of reporting character, by stating the capital gain at the time of the tax residency change, the involved EU country of tax residency, the domicile and the maintenance of the assets. As an exception, the latent capital gain would be subject to tax, insofar said assets are sold within a ten-year period after the change of residency into the EU, the taxpayer would leave the EU or EEA or fail to report in accordance with the above-mentioned rules. If the taxation under the exit tax became applicable, the capital gain would be based on the actual value of the sale at this point in time.

force with Spain (including exchange of information clause)[632] or tax residency into a country considered to be a tax haven for Spanish tax purposes[633].

In the potential scenario of being subject to Spanish exit tax and subsequently the taxpayer became tax resident in Spain again, by still holding the assets which were taxed under the Spanish exit tax, he/she would be entitled to ask for a refund of said tax, as well as the late interest payments.

Therefore, the entertainers and sportspersons must take into consideration not only the Spanish general domestic rules, but also the exit rules, since they may have a relevant tax impact in the short performing career, which may include change of tax residency.

4.1.3. Companies tax residency

All above detailed explained tax rules are addressed to individual entertainers and sportspersons. However, they may also arrange their business similar to other taxpayers, under legal tools, such as the use of companies, mainly for the purposes of limiting their liabilities.

As regards the determination of tax residency for companies, Spanish domestic tax legislation[634] provides for the Spanish tax residency status to any corporation meeting one of the following requirements[635]:

- Registered office located in Spain.
- Place of effective management located in Spain.
- Place of incorporation test.

In connection with the company tax residence's definition under Spanish domestic tax law, it was enacted a specific tax rule[636] dealing with prevention of tax fraud. It

[632] Under these circumstances the payment of the exit tax would become compulsory. However, the taxpayer may also benefit from a deferral of the payment up to five years, by including sufficient guarantees to the Spanish tax authorities and the payment. When the change of tax residency is subsequent to employment reasons, the period can be extended for additional five years.

[633] Even though the tax quarantine of 5 years would become applicable, the payment of the exit tax must be carried out, since the change of the habitual residency, in accordance with Article 95.bis.7º.a) of PITA.

[634] Article 8 of CITA.

[635] From a practical point of view, Spanish Tax Authorities considers a company of having a foreign residency status, insofar a certificate of residency gives evidence of such a tax status. Other means used to proof it may not ascertain the approval from the Spanish tax authorities.

[636] It was incorporated into Article 8.1 of CITA via the Law 35/2006 about the prevention of fiscal fraud.

establishes a presumption[637] whereby an entity based in a non-tax country/territory or a country/territory considered to be a tax haven[638] will be deemed to be tax resident for Spanish tax purposes, provided that its main assets or company activities are, directly or indirectly, located or exercised in Spain.

This specific anti-abuse rule broadens the domestic concept of Spanish tax residency for legal entities. As a result, Spanish tax treaty counterparts must be aware of the application of this anti-abuse tax measure to the above-described companies, when tackling this type of aggressive tax structures.

In the double tax treaty context, article 4 of the OECD Model lays down a definition of resident that gives reference to the domestic law of the contracting States. Thus, the above paragraph explaining the Spanish domestic tax rules tackling the company tax residency determination are fully applicable

Again, the **tie-breaker rule** for dual residence companies included on the double tax treaties follows the OECD Model Convention rule on Article 4.3, which endorses the place of effective management´s criterion.

Spanish tax authorities[639] through various rulings[640] laid down its interpretation of the place of effective management concept, as a pivotal concept to solve dual company´s tax residency scenarios.

The main criteria, when determining the company´s tax residency status in Spain in accordance with the place of effective management are:

1. Where key management and commercial decisions that are necessary for the conduct of the entity's business are in substance made.

[637] Nevertheless, this presumption may be rebutted, in case the legal entity proves any of the following circumstances:

- That the company is running and effective management takes place in the country or territory where it is incorporated.

That the legal entity´s incorporation and operations respond to valid economic and substantive business reasons other than the mere management of securities or other assets.

[638] See further, paragraph 3.1.2.1.

[639] Due to the lack of relevant Spanish Court decisions dealing with this particular issue. It is worth noting that they used OECD criteria, as valid means of interpretation.

[640] See further ruling issued by the Spanish DGT in May 7, 2002, V-0011-02; ruling issued in June 13, 2007 V1235-07; ruling issued in January 18, 2008, V0106-08; ruling issued in March 10, 2014, V0654-14; ruling issued in April 4, 2014, V0962-14; ruling issued in June 19, 2015, V1949-15 and ruling issued in July 27, 2016, V3538-16.

2. The place where the most senior person or group of persons (for example a board of directors) makes its decisions.

3. Where the actions to be taken by the entity as a whole are determined.

Thus, the Spanish interpretation of the place of effective management concept was based on the place where the high-level decisions of the company take place, regardless where the consequences of said decisions become effective. In fact, the wording of the rulings issued by Spanish tax authorities expressly mirrored the former paragraph 24 of the Commentaries on Article 4 OECD Model[641].

Nevertheless, Spain shifted its interpretation of the place of effective management based exclusively on place of company high level decision are taken, commensurate with the criteria included in the position of the OECD[642]. In particular, the various factors that could be taken into account, when performing an analysis based on the facts and circumstances of each case:

1. *Where the meetings of its board of directors or equivalent body are usually held.*

2. *Where the chief executive officer and other senior executives usually carry on their activities.*

3. *Where the senior day-to-day management of the person is carried on.*

4. *Where the person's headquarters are located, which country's laws govern the legal status of the person.*

5. *Where its accounting records are kept.*

Pursuant to this line of interpretation, not only the place where the senior executive decisions are taken determines the place of effective management. Also, the day-to day management, accounting activities and the location of the head office are also taken into consideration.

[641] They were based on OECD Model Convention published in June 15, 2005, except for binding ruling V-0011-02 which was drafted based on the 2000 OECD Commentaries.

[642] These criteria were proposed in the draft commentaries on article 4.3 included in OECD (2008), Draft Contents of the 2008 update to the OECD Model Tax Convention, issued in June 2008, which, in its turn, encompasses as regards to the place of effective management, the draft entitled OECD (2003), *Place of Effective Management Concept: Suggestions for Changes to the OECD Model Tax Convention*, released in May 2003.

In 2017 the OECD Committee of Fiscal Affairs recognized that although situations of double residence of entities other than individuals were relatively rare, there had been some avoidance cases involving dual residence companies. In order to remove this avoidance cases, Article 4.3 OECD Model has been amended, by allowing the determination of the residence of legal persons through a "*case-by-case approach*"[643].

As it is set out in paragraph 24.2 of the Commentary on Article 4 OECD Model, countries have to solve the problems of dual residence through a friendly and mutual settlement procedure established in Article 25.1 OECD Model. In case that this agreement is not reached, persons shall not be able to benefit from the exemptions or reductions provided for in the Convention.

Regarding the criteria to be taken into account by both involved double tax treaty countries, when determining tax residency, the OECD Model Convention provides for the possibility to establish their own domestic criteria. In case that both countries do not establish it, paragraph 24.1 of the Commentary provides for general criteria that should be followed in their case-by-case approach.

Said criteria are exactly the same mentioned in above paragraph for the purposes of determining the effective place of management on the basis of *Draft Contents of the 2008 update to the OECD Model Tax Convention*.

Also, it is important to note that paragraph 24.5 of the Commentary, provides for the possibility, for those countries that consider it appropriate, of continue using the criterion of the "*place of effective management*" for the purpose of determining the tax residence of a company. This is the position that the author's endorses, since by formally replacing the place of effective management by a case-by-case approach, more uncertainty has been added to the countries, when applying the tie-breaker rule of Article 4.3 OECD Model[644].

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[643] Since 2017, the wording of Article 4.3 OECD Model Convention is: "*Where by reason of the provisions of paragraph 1 a person other than an individual is resident of both Contracting States, the competent authorities of the Contracting States shall endeavour to determine by mutual agreement the Contracting State of which such person shall be deemed to be a resident for the purposes of the Convention, having regard to its place of effective management, the place where it is incorporated or otherwise constituted and any other relevant factors. In the absence of such agreement, such person shall not be entitled to any relief or exemption from tax provided by this Convention except to the extent and in such manner as may be agreed upon by the competent authorities of the Contracting States*".

[644] In line with this view, IFA (2019), *London Congress Report, Summary of proceedings*, IFA Permanent Scientific Committee, pp. 62. It goes further, by stating that the removal of the place of management as tie-breaker rule for corporations could leave taxpayers in limbo.

Thus, the effective management should be where the key management of entertainers and sportspersons companies is and where the important company decisions are taken. In particular, the pivotal issue resides in locating the key actual management decisions related to entertainment and sport activities and, if so, also determining the tax residency of the company. Moreover, the most qualified employees must also be tax resident in said country. As a result, when the above criteria are complied with, the entertainment and/or sport company would be tax resident where the place of effective management was located. Accordingly, when said business structure is put into place, by giving evidence of the existing and actual effective management of the company, it would also lead to shift the burden of proof to the Spanish tax authorities. Thus, they would be requested to prove that said company´s tax residency has been solely carried out for the purposes of avoiding Spanish taxation.

Finally, it is also important to note that entertainers and sportspersons using a Spanish company to organize their performances and/or businesses must be aware that also a Spanish exit tax rule applies[645] for companies. According to it, when the transfer of the company´s tax residency takes place[646], the capital gain arising from the difference between the market value and the accounting value is subject to Spanish corporate tax, unless those assets are affected to a Spanish permanent establishment[647].

4.1.4. Qualification Rules

4.1.4.1. Introductory remarks

This paragraph analyzes the Spanish domestic tax rules dealing with the qualification and taxation of Spanish tax resident entertainers and sportspersons. In this respect, the objective approach versus the subjective one is the underlying rationale behind the detailed explanation of said Spanish domestic tax rules.

[645] Article 19.1 of CITA.

[646] As opposed to the rule addressed to individual taxpayers, the fiscal year ends up, as soon as the change of tax residency takes place, without the need to wait until the end of the calendar year. Article 27.2.b) CITA.

[647] The CITA incorporated paragraph 2 in Article 19 CITA, for the purposes of complying with the European Court of Justice´s jurisprudence dealing with exit taxes within EU member States. In particular, it followed the sentence of the European Court of Justice, *Commission v. Spain*, ("Exit tax rules on companies"), (C-371/10), issued in November 29, 2011, whereby it accepts the application of the exit tax, as long as the final payment may be deferred (by granting a guarantee to the Spanish tax authorities), until the assets are transferred to a third party.

The purpose of the below paragraphs is not only to describe how the Spanish rules on tax residents do apply, when dealing with entertainers and sportspersons. Moreover, it is scrutinized the selected approach through which the main Spanish direct taxes are applied to them. In this regard, the value granted to the objective approach or the activity carried out versus the type of person obtaining the income is taken into consideration throughout the various tax characterizations.

This type of different analysis when dealing with domestic tax rules, such as Spanish ones, maybe of great help, in the context of Article 17 OECD Model, which finally relies on the application of domestic laws of Contracting States. In other words, the final taxation of the country where the entertainer or sportsperson is tax resident, becomes equally important as the source taxing rights granted through Article 17 OECD Model.

In this regard, it is important to note that much emphasis is placed in the manner that the Spanish tax on economic activities[648] is articulated and subsequently applied, as well as the Spanish personal income tax. Although, the former is not part of the Spanish taxes included in the scope of taxes under the double tax treaties, it is the starting point from Spanish tax on entertainers and sportspersons (as well as any other tax resident taxpayer). Accordingly, depending on the classification under the Spanish tax on economic activities, the subsequent characterization of the Spanish personal income tax is carried out.

In accordance with the tax treatment granted in both Spanish taxes, a critical analysis is included as to whether the objective or the subjective approach is endorsed. In this regard, it is also important to ascertain to which extent there exists alignment between the position adopted by the OECD in relation to Article 17 and the Spanish tax treatment granted to tax resident entertainers and sportspersons.

Finally, Spanish taxation can be used as a pattern, like any other domestic tax system when dealing with the two main tax treaty counterparties. On the one hand, the tax residency country of the entertainer or sportsperson which provides for the worldwide taxation, intertwined with the double tax relief measures. On the other hand, as a source country enabled to exercise its taxing rights via the application of a withholding

[648] Legislative Royal Decree 2/2004, March 5, 2004, through which the consolidated text of the Law regulating the Local Administrations was released. See further, Magraner Moreno, F.J., *Tributación de los artistas y deportistas*, CISS, 1995 and Magraner Moreno, F.J., *La imposición sobre las rentas obtenidas en España por artistas y deportistas*, Tirant lo Blanch, 2019.

tax, in accordance with the wording of Article 17 OECD Model, as opposed to any other business income not taxed at source, pursuant to Article 7 OECD Model.

4.1.4.2. Tax on Economic Activities

In the field of professional entertainers and sportspersons related to Spanish tax domestic perspective; the first step consists of analyzing the impact that domestic tax on economic activities may have on this particular group of taxpayers.

Under this Spanish local tax, the taxable event is determined in accordance with a pure objective approach. In particular, it is applied to the mere performing on Spanish territory, of business, professional or artistic activities.

In line with the former OECD Models up to 2000, it distinguishes between the business activities covered by Article 7 OECD Model, professional activities under the scope of former Article 14 OECD Model and artistic activities which are caught by the specific tailored tax measure of Article 17 OECD Model.

All these categories of qualifying activities have in common that in order to carry out them, involvement of human and/or productive means is required, with the aim at taking part in the manufacturing or distribution of goods and services. Each of type of activity (business/professional and artistic) has its own Section, in the tax on economic activities. In particular, Section 3 is the one dealing with artistic activities[649] and, among others, includes sport activities.

The common characteristic between artistic and sport activities is the fact that they are out of the scope of the Spanish tax on economic activities, when carry out them within the terms and conditions of an employment relationship.

[649] In its turn, this section encompasses the following activities:

- Activities related to cinema, theater and circus.
- Activities related to dance.
- Activities related to music.
- Activities related to sport.
- Activities related to bullfighting spectacles.

From a formal perspective, it would have been more suitable to classify the above-mentioned activities as entertainment activities, instead of artistic ones, for the purposes of better describing the overall type of activities included on them.

Thus, it is important to determine the scope of the special existing Spanish labour regimes, as regards sportspersons and public artists[650]. On the one hand, the Royal Decree 1006/1985 defines a professional sportsperson, as the individual who voluntarily carries out sport practice, by virtue of a regular relationship, on behalf of and within the scope of an organization and management of a sports club or entity, in exchange for a salary.

On the other hand, the Royal Decree 1435/1985 dealing with the special labour relationship of public artists defines it, as the one set between the person in charge of organizing the public spectacle or impresario and those voluntarily performing an artistic activity on behalf and within the scope of management of the former, in exchange for a salary payment.

The key point in both definitions, employed sportspersons and artists, focus on the objective scope, instead of defining who are included within the list of artists or sportspersons. The main underlying objective rules, such as the exercise of sport and performing artistic activities, are the yardstick in order to characterize them, within the scope of the labour regime applicable to sportspersons and artists.

However, the referral to the fact of actively exercising sport activities and/or performing artistic activities would lead to exclude from the scope of application of these labour rules, to certain individuals[651], who in double tax treaty context would be included in the grey area of interpretation[652]. The exclusion is based on the lack of active role of the performing sport or artistic activities.

Back to the Spanish tax on economic activities, it is important to note that despite the classification of activities under the objective scope, it also includes a referral to the subjective approach, by adding a developed list of particular artistic jobs within any of the described artistic activities. In this regard, all technical and administrative staff, such as camera operators, as well as coaches, are included within the subjective sub-list of the tax on economic activities, as opposed to the objective approach on the special labour regime of artists or sportspersons. It gives evidence that when the objective

[650] Throughout this paragraph 4.1.4.2., the reference to entertainers as artists is carried out, since the formal characterization under the Spanish tax on economic activities is of artist, instead of entertainer, such as in the context of the double tax treaties.

[651] Coach or members of the coach´s staff are not considered to practice any sport for labour purposes. As regards the employer, it extends the scope the labour relationship, not only to club or sports organizations, also commercial companies hiring sportspersons to carry out labour sport activities.

[652] For instance, coaches and models, in accordance with paragraph 3 of the Commentary on Article 17 OECD Model.

approach does not play a primary role, drawbacks may arise from relying on the subjective approach through the implementation of lists of qualifying taxpayers.

From a practical perspective, the lack of more developed rules in relation to the Spanish tax on economic activities, when determining the scope of sport and artistic activities subject to it, leads to rely on the objective definitions of the labour arena. In fact, it is a customary practice to grant priority to the labour rules and, in case of not applying them to the particular sportsperson or artist, the activity may be considered to be under the tax on economic activities[653].

However, not all activities excluded from the special regime applicable to sportspersons and artists and in line with the list of activities of the Section 3 dealing with the artistic activities of the tax on economic activities. The resort of using the referral to specific subjective sub-list of artists and sportspersons leads to the mismatch arising between the Spanish tax on economic activities and the special labour rules addressed to them. For example, the cameramen working on movies, as well as the coaches can be registered under the tax on economic activities, whilst not being considered to carry out and sport or artistic activities for labour purposes.

Despite the fact of facing shortcomings, when using a subjective list of artistic jobs, the Spanish tax on economic activities resorts to a final objective approach, when the particular individual does not qualify for any of the specific subjective job descriptions, but he/she still performs an activity of artistic nature. In this regard, a specific rule applicable in the field of tax on economic activities[654] states that any artistic (among others) activity, not specifically included in the list, would be classified[655] under a group of not classifying in other ones, within those to which it resembles by nature.

Thus, the closing and primary rule in the tax on economic activities is the classification based on the nature of activities. For example, the reply to the binding consultation[656] as regards the application of the Spanish taxation of economic activities to models and TV hosts. Although these individuals were not specifically included in the tax on economic activities' list, in accordance with the mentioned rule; they were considered to be included within the Section 3 of artistic activities. In particular, under group 019

[653] In this regard, the reply to the binding consultation issued by the DGT in December 24, 1992 in relation to motorbike races and the priority of the labour relationship over self-employed regime and the related tax on economic activities.
[654] Royal Decree-Law, 1175/1990, September 28, 1990, though which the tax on economic activities rates/tariffs were approved.
[655] By formally refer to them as non-classified in other fields.
[656] DGT ruling issued in October 19, 1994 and November 25, 1993.

dealing with the activities related to cinema sector, theater and circus, even though not being included in the subjective sub-list of artistic jobs.

The major coincidence with the Spanish tax on economic activities and Article 17 OECD Model is when both endorse the subjective approach of either including or excluding particular entertainment of sport jobs. In both cases, the asymmetries of including certain qualifying individuals lead to high degree of uncertainty. Fortunately, both also recognize the resort to the objective nature of the activities in order to finally classify the activities within the respective tax or Article 17 OECD Model.

Thus, the entertainment income approach supported by the author is reinforced when tackling the Spanish domestic tax rules related to the tax on economic activities, based on the fact that the objective viewpoint of the nature of the activities prevails over any list of encompassing individuals (subjective point of view).

4.1.4.3. Professional income

The next step, as a result of the classification under the tax on economic activities is the characterization for personal income tax purposes. It does not include any specific rule for entertainers and sportspersons. On the contrary, the general tax rules for professionals and employees are totally applicable to them.

The general rule is to consider the income obtained by entertainers and sportspersons within the economic activities category of the PITA[657]. In case of obtaining income in the context of an employment relationship they would be considered work income[658]. Finally, in case of not being classified under any of the above categories, it would be characterized as passive income[659].

As regards income arising from economic activities, Article 95.2.a) of the PITR explicitly include among them, those arising from activities of Section 2º (Professional Activities) and 3º (Artistic Activities) of the tax on economic activities[660].

[657] Article 27 of the PITA and articles 22 to 27 of PITR.
[658] Article 17 PITA and articles 9 to 12 PITR.
[659] Either income from movable assets, article 25.4 or capital gains, article 33 of the PITA, as well as articles 40 to 42 of PITR.
[660] See further, DGT ruling V0704-18 issued in March 15, 2018 as regards the classification of income obtained by a pigeon shooter; DGT ruling V0170-18 issued in January 29, 2018 related to a musician and owner of an orchestra; DGT ruling V2334-17 issued in September 14 2017, dealing with the classification

The taxation under this category is determined by the difference between income and expenses related to the activity. Article 28.1 of the PITA expressly refers to the rules of the Spanish CITA[661] dealing with the determination of the taxable base.

Among the income to be included are those of recurrent character, as well as the prizes[662], income arising from sponsorship[663] and image rights[664], subsidies and income from copyrights or intellectual property, insofar it is obtained by the same author[665] in the context of a professional or economic activity.

In relation to the expenses, being accepted for the net computation, are those related to the income arising from the activity[666]. Moreover, they must be correctly temporary accrued[667], recorded into the company´s accountancy, as well as duly justifiable through supportive documentation, such as the invoices[668].

There exist certain rules, as regards the computation of the net income of economic activities. In particular, a 30% reduction of the net income is granted whenever the economic activity income qualifies as non-recurrent[669]. Among them, those with an accrual period over 2 years, allowances received in relation to the ending of the

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of the income obtained by "rejoneador" and DGT ruling V0756-16 issued in February 25, 2016 concerning the activity of a chess player.

[661] Article 10.3 of CITA establishes that the taxable base is determined by the accounting outcome in accordance with the Code of Commerce, as well as the related rules and regulations developing it and the subsequent applicable amendments included in the CITA.

[662] See further, DGT ruling V0704-18 issued in March 15, 2018 and DGT ruling V0756-16 issued in February 25, 2016. In both cases, the prizes obtained by the pigeon shooter and the chess player are encompassed within the income from economic activities.

[663] DGT ruling issued in February 26, 1992 whereby the income obtained by a car racing driver, including the prizes related to specific championships and the sponsorship income are of economic character. In the same line DGT ruling V0201-19, issued in January 30, 2019 and DGT ruling V0702-18 issued in March 15, 2018. In the latter, the income from sponsorship was included in the economic activities, even though no income was raised from the tournament in which the sportsplayer participated.

[664] See further paragraph 4.1.6.

[665] DGT ruling V1605-19, issued in June 27, 2019, as regards the income obtained by a comic book writer in exchange for the copyrights, it is considered as professional income, in accordance with Articles 17.3 and Article 95.2.b).1º PITA. As regards income from intellectual property, such as income arises from sporadically assignment of literary, artistic or scientific works, in accordance with Article 17.2.d) PITA, is characterized under work income. In this regard, DGT ruling issued in March 6, 2020, V0549-20, dealing with the particular case of a retired individual assigning he author´s rights to a publishing company are considered to qualify as work income, since it lacks of recurrent characteristic need to be characterized under economic activity income.

[666] Articles 12 to 14 of the CITA include, among other deductible expenses, amortizations/depreciations of the assets, value adjustments, accounting provisions. Furthermore, Article 15 and 16 include the non-deductible expenses and the limitation on financing expenses, respectively.

[667] Article 11.1 of CITA, included on accrual basis, regardless of the payment timing.

[668] According to Article 11.3 of CITA.

[669] Article 32.1 PITA. It is limited to maximum amount of EUR 300,000.

activities, prizes non-benefiting from income tax exemption and subsidies to acquire assets not eligible for depreciation[670].

Additionally, independent entertainers and sportspersons in the early stage of their career can also apply for a 20% reduction of the net income, during the first two years of profits, up to a threshold of EUR 100.000 net income[671]. In this regard, it would not be applicable, in case of exercising the same activity in a foreign country, in the previous year/s[672].

Finally, it is important to note that the referral to the rules of the CITA, when dealing with individuals carrying out economic activities, also entails the deductions granted to the companies. For example, in the field of international entertainers can benefit from for allowances granted to Spanish audio-visual productions, foreign feature films or audio-visual productions carried out in Spain by Spanish producers and those tax benefits granted to music and scenic arts spectacles (live shows)[673].

As regards, the tax allowance granted to perform foreign feature films or audio-visual productions carried out in Spain, the main goal is to attract foreign film investment into Spain, in order to strengthen the competitiveness of the Spanish audio-visual industry in the international market. It is essential that a Spanish producer is hired, for the purposes of carrying out all or part of the foreign production.

A tailor-made deduction[674] is granted in relation to the qualifying Spanish costs directed link to a foreign production, insofar the expenses incurred in the Spanish territory are of at least EUR 1 million[675], including the services provided and the goods delivered in

[670] Article 25 PITR.

[671] Article 32.3 PITA. Thus, the two-year period starts to apply whenever net income arises.

[672] See further DGT Ruling V-0494/16, issued in February 8, 2016.

[673] Article 36 Spanish CITA. Implemented by 27/2014 Law, of November 27, 2014. Subsequently, it was amended by 11/2020 Law, of December 30, 2020 and 11/2021 Law of July 9, 2021.

[674] Article 36.2 CITA. In June 2, 2015, a DGT binding ruling was issued, V1746/15, whereby most of the doubts arising from the practical application of this particular tax allowance was solved. As a general rule, a 30% reduction is applicable for the first EUR 1 million of qualifying expenses. The exceeding amount would benefit from 25% tax reduction. This two-fold tax reductions would be applicable insofar related qualifying Spanish expenses would be of at least EUR 1 million (EUR 200,000 animation productions).

[675] The allowed expenses that enable for 25%/30% tax deduction are as follows:

- Expenses related to the creative staff (director, actors, screenwriters, photography director, composers etc.) if tax residents in Spain/EEA. Threshold EUR 100,000 per employee.
- Expenses related to the use of technical industries and other suppliers: executive producer, producer, assistant producer, scenery team, decorators, florists, costume design and make-up team etc., special effects, lighting and sound, choreographers, drivers, securities, accommodation and support, transport, rental/purchase of furniture, rental of locations for filming, limited liability insurance directly related to the production, etc.

Spain, regardless of the supplier´s nationality. Moreover, this deduction, together with the grants must represent less than 50% overall production costs. In any case the threshold of the deduction is of EUR 10 million, per production.

Additionally, entertainers either individuals or companies may benefit from the tax deduction granted to live shows in the music-scenic arena. It amounts to 20% production and performance costs [676], including those of artistic, technical and marketing activities. The main requirements are the reinvestment of at 50% of benefits in these qualifying activities within a period of 4 years and to obtain a certificate from Spanish Institute of Scenic and Music Arts.

4.1.4.4. Work income / Passive Income

As a general rule, work income is the alternative characterization of income obtained by entertainers and sportspersons, under Spanish tax law. Nonetheless, it may resort also to capital gain classification under certain cases, where the two main characterizations (economic activity and work income) do not apply.

As regards, work income definition[677], it includes items of income, such as salaries, incentives, not-exempted prizes and compensations, not-exempted subsidies, pension plan income, and last but not least important, remuneration arising from special labour relationships, such as the one dealing with artists and sportspersons. In particular Royal Decrees 1435/1985, June 26 and 1006/1985, August 1, respectively.

On the contrary, the production expenses not eligible for the deduction are those related to administrative tasks:

- Legal and labour advice; administration's office rent; administrative staff; administration's office supplies and administration's office furniture/equipment.
- Equipment's transport costs (from other countries).
- Fiscal amortization of foreign assets linked to film.

It is important to note that in cases of services partially rendered in Spain, the application of the tax allowance is limited to those actually rendered in Spain.

[676] Article 36.3 CITA. The thresholds to benefit from this tax deduction are:

- Tax deduction of maximum EUR 500,000 per taxpayer, reduced by grants actually received.
- This tax deduction, together with the grants must represent less than 80% overall qualifying expenses.

[677] Article 17.1 and 17.2 of PITA.

The crux of the matter is the definition of both types of qualifying taxpayers, artists working on public spectacles and professional sportspersons[678]. As it has been already stated in paragraph 4.1.4.2., the objective approach is the leading rule of interpretation when tackling the Spanish tax on economic activities and the distinction of the income under labour rules as opposed to them. Furthermore, there is no any list of jobs in order to clarify the meaning of both terms. In its turn, the referral to the performance of artistic activities and the exercise sport are the key issues.

A very illustrative example is the particular case of the bullfighter when classifying the type of income that he obtains. The same pattern applies over the time[679] and to other professionals, by qualifying as work income when carried out pursuant to the instructions and on behalf of an impresario, whilst being considered as professional activity income, when the entertainers and sportspersons perform under their own risk.

In the case of the work income the accrual basis is also applicable with limited deductions[680], even though certain relevant exceptions do exist, which can be applicable in the field of entertainers and sportspersons. In this regard, there is an exemption available in relation to statutory severance payments[681]. In the field of sportspersons, the severance payment is limited to two months of salary per year of service[682]. The exceeding amount of said statutory severance payment can benefit from a reduction of 30% of the taxable base, insofar it does not exceed EUR 1 million. Also, there are other items of income eligible for the mentioned 30% tax reduction,

[678] Other issues tackled within the mentioned Royal Decrees are the requirement of the contracts, the types of contracts, obligations and rights of the parties, remuneration of the employees and termination of the contracts.

[679] Since the DGT binding ruling V0729-19, issued in July 17, 1986 to the DGT binding ruling issued in April 2, 2019. In fact, it can coexist to labour relationship. On the one hand, the existing labour relationship between the entrepreneur organizing the bullfighting event and the bullfighter. On the other hand, the labour relationship between the bullfighter and the remaining persons who are members of the bullfighter's squad, known as "Cuadrilla". The two potential qualifications are granted also to bullfighters riding a horse ("Rejoneadores"). Income obtained by a "rejoneador" (bullfighter carrying out his activity by riding a horse) is considered as a general rule of employment nature. Furthermore, the income qualifies for economic activity nature, when they carry out their shows, by organizing their own material and human resources, by hiring the squad and becoming their employer. In this regard, the DGT ruling V2334-17 issued in September 14, 2017.

[680] A general deduction amounting to EUR 2,000 applicable to all employees, as well as the Social Security contributions paid by the employees, contribution to Unions, contribution to professional bars up to EUR 500 per year. Article 19 PITA.

[681] Article 7.e) of the PITA, which limits to EUR 180,000 of exempted income.

[682] It is stated in Article 15.1 of the Royal Decree 1006/1985, as opposed to the general employment regime, as per Royal Decree-Legislative 3/2012, which establishes a limit of 33 day per year of service, with a maximum of 24-month payment. It is worth to mention that prior to this labour rule, the severance payment was of 45 days per year of service, with a maximum of 42 months payment.

such as artistic prizes, subsidies revived based on permanent disabilities[683]. Finally, the pension contributions (to alternative qualifying entities vs. Social Security) for professional sportspersons may benefit from taxable reduction of EUR 24,250 per year[684], which can be rescued after one year of the end of the professional career.

Moreover, employed entertainers and sportspersons, as opposed to those of self-employed status, can also benefit from the application of personal income tax exemption. It amounts to a maximum of EUR 60,100[685] per year, whenever certain qualifying requirements are complied with. In particular, it must be carried out under an employment relationship, carried out outside Spain, in the benefit of a foreign company or permanent establishment of a Spanish company, located in a country not considered to be a tax haven for Spanish tax purposes and applying a tax similar to the Spanish income tax (assumed to exist when country has signed a double tax treaty, including exchange of information clause).

If all the above-mentioned conditions are met, the income related to the employment income obtained abroad is eligible for the exemption[686]. The computation must be performed commensurate with the number of days spent in the foreign territory within a calendar year.

Again, the DGT replies to binding consultations are of great help to ascertain the scope of the application of said beneficial elective tax regime, in the context of entertainers and sportspersons. In this regard, the two main shortcomings are that this personal income tax exemption is not applicable to income obtained by professionals, even though the taxpayer does comply with all remaining requirements. The DGT[687] denied the application of this regime to professional motorcycle racer obtaining income from foreign companies, with which he signed sponsorship contracts.

[683] Articles 18 PITA and 11 PITR limit to a maximum amount of EUR 300,000.
[684] 11th Additional Rule of PITA, as opposed to the general threshold of EUR 1,500 per year, applicable to the reduction applicable to any pension plan of employees (Article 51 and 16th Additional Rule of PITA).
[685] Article 7.p) of the PITA and article 6 of the PITR.
[686] For example, DGT binding ruling V0396-19, issued in February 25, 2019, whereby the employees of management body related to the Spanish Ministry of Education, Culture and Sport and involved in theatre, music, dance activities carried out through international tours in venues and events owned/organized by foreign companies or public bodies. Among those employees are dancers, production staff or technical personnel. It is important to note that the scope of application this personal income tax allowance entails all kind of employees. It is normal that opera singers are hired in foreign countries, such as Germany Austria, under employment relationship, by benefiting from the exemption of Article 7.p) PITA, insofar the Spanish tax residency is kept.
[687] DGT ruling V0201-19, issued in January 30, 2019.

The second drawback of this regime is when the company befitting from the employees' services, although carried out all of them in foreign countries are on the benefit of Spanish company directly. The DGT denied the benefits of this particular income tax exemption to the employed coach of Spanish tennis player, participating in international tournaments. It applies a narrow approach of understanding that the coach´s work is not carried out for a foreign person/company, even though part of the salary is determined in relation to the prizes obtained in foreign tournaments.

Finally, when the income obtained by the entertainers do not qualify for either work income or economic activity income, the Spanish PITA in those cases considers among passive income, either as capital gains any increase of the taxpayer's assets, which do not qualify under any other specific items of income tax[688] or income from movable assets (passive income)[689] when payments arising from intellectual property are not carried out within an economic activity. In this sense, the Spanish DGT in its binding ruling V0431-19, issued in February 28, 2019, characterized as capital gains, the prizes received by amateur tennis players, since they did not perform their activity under an employment relationship or have material and human resources to organize their activity under their own risk (amateurs)[690].

4.1.5. Anti-avoidance tax rules

4.1.5.1. Introduction

It is important to note again the interaction between Article 17.1 and 17.2 OECD Model, when using intermediate companies, by taking into account the approach endorsed by the domestic tax law of the source country. All this for the purposes of taxing the indirect income obtained through the company, in the hands of the entertainer/sportsperson or intermediate company, respectively.

[688] Article 33.1 PITA.
[689] Article 25.4.a) PITA. It also includes the income from intellectual property when exploited by other individuals, not being the author.
[690] As opposed to the Commentary on Article 17 OECD Model which includes the income, regardless of the professional status of the entertainer or sportsperson.

In addition, the Commentary on Article 17 OECD Model added paragraph 11.3 as regards the interaction between tax treaties and domestic anti-abuse clauses[691]. It expressly states that "*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 paragraphs 76 to 79 of the Commentary on Article 1*[692]*. Also paragraph 9 of Article 29 will prevent the benefits of provisions such as those of Article 7 and 15 from being granted in theses abusive cases."*

Said paragraph 11.3 of the Commentary on Article 17 OECD Model is a step further in the recognition of the validity of general domestic anti-avoidance rules in the tax treaty context and, in particular, in the field of entertainers and sportspersons.

Furthermore, Specific Anti-Abuse Rules (hereinafter SAAR) are dealt with in paragraphs 68 to 75 of the Commentary on Article 1 of the OECD Model. Its paragraph 68 expressly states that "*Tax Authorities seeking to address the improper use of a tax treaty may first consider the application of specific anti-abuse rules included in their domestic tax law".* However, the application of the provisions of the domestic law must respect tax treaties, in accordance with the principle of "*pacta sunt servanda*" encompassed in Article 26 of the Vienna Convention[693].

Accordingly, the Spanish anti-avoidance domestic tax rules, such as Controlled Foreign Corporations ("CFC")[694], transfer pricing rules, anti-tax haven provisions and the specific provision as regards image rights in the field of employed sportspersons maybe applicable in the field of cross-border entertainers and sportspersons, insofar the tax treaty provisions are respected.

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[691] Addition included in the 2000 Update of Commentary on Article 17 OECD Model, in its former paragraph 11.2.

[692] The dates of 1992 and 2000, in which both, paragraphs 76-79 of the Commentary on Article 1, (former paragraph 24 of Article 1 OECD Model) and paragraph 11.3 of Commentary on Article 17 OECD Model were implemented, (former paragraph 11.2 of Article 17 OECD Model), respectively, give evidence of the succession and expansion in the criterion of accepting the anti-avoidance domestic tax rules at tax treaty level.

[693] Paragraph 70 of the Commentary on Article 1 of the OECD Model. Nonetheless, paragraphs 71 to 75 of the Commentary on Article 1 OECD Model subsequently develop practical examples and guidelines whereby the conflicts between the domestic laws and tax treaties can be avoided.

[694] As regards the relationship between the CFC Rules and tax treaties, see further Arnold, B., The evolution of Controlled Foreign Corporation Rules and Beyond, Bulletin for International Taxation, December 2019. IBFD. pp. 640-641. This author describes into detail the interaction of this specific anti-abuse rule and tax treaties since 1977 up to 2014 Update version of the Commentary on Article 1 OECD Model, where CFC rules are considered to be in accordance with the provisions of double tax treaties.

In this regard, it is important to highlight that the tax measures adopted within the international tax scenario of the so-called BEPS plan[695] are equally applicable to the context of entertainers and sportspersons. In particular, the 15 Actions[696] included within the BEPS plan. They did include a calendar of implementation which was complied with the BEPS signatories' countries. In this regard, the Multilateral Instrument (MLI) signed in June 7, 2017[697] was one of the major achievements in the international tax arena.

In the context of the European Union, the BEPS actions have been incorporated into the ATAD[698]. The ATAD contains five legally-binding anti-abuse measures, which all member States should have applied these minimum tax measures as from 1 January 2019, in order to combat common forms of aggressive tax planning.

In particular, Controlled Foreign Company (CFC) rules are aimed at deterring profit shifting to a low/no tax country[699]. Switchover rule (hybrid mismatch), focus on preventing double non-taxation of certain items of income[700]. Exit taxation[701], for the purposes of preventing companies from avoiding tax when re-locating assets. Interest limitation[702], seeking to discourage artificial debt arrangements designed to minimise taxes and General Anti-Abuse Rule (GAAR)[703] looking for counteracting aggressive tax planning when other rules don't apply.

All above-mentioned rules arising from either the BEPS context or the ATAD arena are tailored to combat abusive scenarios, involving companies. Spanish domestic tax rules partially anticipated in the implementation of the ATAD tax measures, since they were already part of the existing Spanish anti-abuse measures. However, as regards hybrid

[695] See further paragraph 3.6.1.

[696] 1. Tax challenges arising from digitalization; 2. Neutralising the effects of hybrid mismatch arrangements; 3. Controlled Foreign Company; 4. Limitation on Interest Deduction; 5. Harmful tax practices; 6. Prevention of tax treaty abuse; 7. Permanent Establishment Status; 8-10; Transfer Pricing; 11. BEPS data analysis; 12. Mandatory Disclosure Rules; 13. Country-by-Country Reporting; 14. Mutual Agreement Procedure and 15. Multilateral Instrument.

[697] It was firstly signed in June 7, 2017 and entered into force in July 1, 2018. To the date of drafting this research work, 100 jurisdictions have joined the MLI, out of which 79 jurisdictions have ratified, accepted, or approved it.

[698] See further, EU Council Directive (2016), *supra* n. 486.

[699] Articles 7-8 of ATAD. OECD (2015) *Designing Effective Controlled Foreign Company Rules – Action 3: 2015 Final Report*, Primary Sources IBFD.

[700] Articles 2 and 9 of ATAD.

[701] Article 5 of ATAD.

[702] Article 4 ATAD. In this regard, Spain obtained an extension until the end of 2023.

[703] Article 6 ATAD. It is considered that the GAAR is already included in its Spanish General Tax Act.

mismatches, CFC, exit tax and the switchover rule[704], tax measures have been implemented within the Spanish domestic tax rules[705].

Individuals are not targeted within the scope of BEPS and ATAD rules. However, Spanish tax resident individuals are also included in the scope of these domestic anti-avoidance provisions. Thus, in the context of entertainers and sportspersons, the Spanish tax rules analyzed in the following paragraphs are tantamount applicable to companies and individuals.

4.1.5.2. Controlled Foreign Corporations (CFC)

Spanish tax rules[706] dealing with Controlled Foreign Company (CFC) rules have the effect of re-attributing to the corporate or individual taxpayer, the sheltering of profits in companies of low or no-taxed controlled jurisdictions.

As a result, the controlling Spanish tax resident entertainer or sportsperson is attributed with the undistributed profits sheltered in low or no-tax countries, when certain qualifying items of passive income are obtained.

It is important to note that the Spanish entertainer or sportsperson may escape from it, as long as any of the following requirements is met:

- When having a shareholding of less than 50 % to the capital of a company, individually or together with family members, or
- If the corporate tax rate abroad is equal or greater than 18'75%.

On the one hand, when the foreign low tax company does not have an organization of material and personal means to carry out its activity, the shareholder would carry out an imputation of the profits obtained by the foreign sheltered company, into the personal or corporate income tax. On the other hand, when not applying the previous

[704] It is aimed at combating the hybrids with countries from outside the European Union. It is also worth mentioning that the ATAD Directive has been amended in order to include within its scope, the tax measures to combat hybrid scenarios involving third countries, under the so-called ATAD II, EU Council (2017), *Council Directive (EU) 2017/952 of 29 May 2017 amending Directive (EU) 2016/1164 as regards hybrid mismatches with third countries.*

[705] For instance, 4/2021 Royal Decree issued in March 9, 2021 which incorporates Article 15 bis CITA as regards hybrid mismatches. Also, 11/2021 Law, issued in July 9, 2021 incorporated amendments, among others, in relation to exit tax on companies of Article 19.3 CITA, CFC on Article 100 CITA.

[706] Article 100 of CITA and Article 91 PITA. In relation to Articles 7-8 ATAD and Action 3 of BEPS.

mentioned lack of substance at company level, the attribution of sheltered income would be carried out when obtaining foreign qualifying passive income[707].

The main tax consequences when being under the Spanish CFC rules depends on the type of taxpayer. In the individual context, the worst tax consequence is that said attributed income would be taxed within the general taxable base up to 49%. Under normal conditions, the distributions of profits would be involved a taxation under a reduced tax scale between 19%-23%, in case of not interposing the mentioned low tax controlled foreign company. In the corporate context, the tax consequence is of timing nature, by eliminating the deferral obtained through the foreign low-tax company.

[707] It is defined as income obtained by a qualified non-resident entity from each of the following sources:

1) Ownership of real estate or real property rights not assigned to business activities.
2) Interest in the equity of any kind of entity and income from financing of third parties. Passive income derived from the financing of third parties will be understood to arise from the source described in point 1) above when both the lender and the borrower belong to the same group of companies and at least 85 per cent of the borrower's income arises from business activities.
3) Capitalization and insurance transactions.
4) Intellectual and Industrial Property.
5) Transfer of the goods and/or rights referred to in points 1) through 4).
6) Derivative financial instruments, unless those articulated for the coverage of economic activities.
7) Credit, financial, insurance and services activities, performed, directly or indirectly, with a connected person or entity resident in Spanish territory, insofar such activities give rise to tax deductible expenses for the Spanish resident entity.

However, four exemptions from Spanish CFC inclusion are granted:

1) The first escape clause for income generated by a non-resident entity and qualifying under points 2), 3), 4) or 5). Such income will not be subject to Spanish income taxation if it is received from entities in which the non-resident entity holds a minimum direct or indirect 5% shareholder interest and when the following two additional requirements are met:

- The non-resident entity supervises and manages its shareholder interest through a corresponding organization of human and material resources; and
- At least 50% of the non-resident company assets are affected to business activities.

2) The second escape clause for income is addressed to income generated by a non-resident entity and qualifying under points 2), 3), 4) or 5). Such income will not be subject to Spanish income taxation when the sum of the income generated is lower than 15% of the non-resident entity's total income;

3) The final escape clause states that the items of income considered to be of passive status can avoid CFC consequences, when they correspond to expenses not deductible in Spanish territory.

4) EU Companies are not included in the Spanish CFC tax rules, insofar it is proved that the setting up and maintenance of the company is based on economic criteria and they carry out business activities or they are entities included in the Council and Parliament Directive 2009/65/CE dealing with collective investments institutions.

The scenario can worsen when including in their tax strategies companies or assets in jurisdictions considered to be tax haven for Spanish tax purposes[708]. In particular, the following negative presumptions do apply[709].

- The foreign tax is presumed to be lower than 18.75% tax rate.
- All tax-haven income is attributed via CFC, regardless of its passive status.
- It is considered to obtain profits yearly, amounting to 15% of the acquisition value of the assets located there.
- No deduction of the taxes paid in tax haven jurisdictions[710].

4.1.5.3. Transfer Pricing

Pursuant to Spanish transfer pricing rules[711], the CITA includes the option granted to Spanish tax Authorities of transactions between/among related party transactions at market value, regardless of its accounting or agreed value[712]. They look for adjusting the transactions prices in accordance with arm's length principle[713].

The main purpose is to avoid improper allocation of income, in order to shift it to beneficial tax jurisdictions resulting in lower taxation and if so, by reducing the overall tax burden of the related parties, member of multinational enterprises.

It is specifically stated the relationships qualifying as related parties[714]. It is important to highlight that transactions between individuals are not caught by Spanish transfer pricing rules[715], insofar a company is not involved at all.

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[708] See further, *supra* n. 604.

[709] They accept to be proven on the contrary by the taxpayer ("*iuris tantum presumption*"). Article 107.12 of CITA.

[710] This particular presumption does not accept prove on the contrary ("*iures et de iure presumption*"). Article 107.9 CITA.

[711] OECD (2015), *Aligning Transfer Pricing Outcomes with Value Creation, Actions 8-10 - 2015 Final Reports.* OECD. October 5, 2015. Also, in June 2018, under the mandate of BEPS Action 10, it was released OECD (2018), *Final report on the revised guidance on the application of the transactional profit split method*. Under the mandate of BEPS Action 8, it was also released OECD (2018) *Additional guidance for tax administrations on the application of the approach to Hard-to-Value Intangibles (HTVI)*. Finally, in February 2020 under the mandate of BEPS Action 4 and 8-10, it was released OECD (2020), *Transfer Pricing Guidance on Financial Transactions.*

[712] Article 18.1 CITA based on the general principles laid down in Article 9 of the OECD Model.

[713] Arm´s length price is the price independent parties would have agreed upon under the same or similar circumstances. Definition provided in the *supra* n. 2, pp. 19.

[714] Article 18.2 CITA. The following persons qualify as related parties:
a) An entity and the shareholders.

In such circumstances the Spanish tax authorities are entitled to check and, if so, carry out adjustments on related party transactions[716], based on arm´s length principle in the context of PITA, CITA and NRITA.

The Spanish tax authorities, as well as the Spanish taxpayers are bound by the methods established by the OECD in order to determine the market value between independent parties, which are mainly, the comparable price method, resale price method, cost-plus method, profit distribution method and transactional net margin method.

In addition, the taxpayer is obliged to draft and keep at the disposal of the Spanish tax authorities, the documentation supporting the market value, as well the methods underlying it, unless the transactions are carried out within the same consolidated group, those carried with the same related party which does not exceed EUR 250,000 per year.

Therefore, the Spanish tax resident entertainers and sportspersons involved in related party transactions are obliged to fulfill the above-mentioned transfer pricing requirements. If not, they are exposed to relevant penalties based on the failure of either provide the documentation evidences[717] or when adjustments are carried out by the Spanish tax authorities[718].

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b) An entity and the managers or members of Board of directors, unless the salaries arising from their posts.
c) An entity and the spouses, ascendants or descendants of the shareholders, directors or managers
d) Two entities of the same Group of companies in accordance with the provision of the Spanish Code of Commerce.
e) An entity and the shareholders, directors and managers of another company or their spouses, ascendants or descendants, when both companies qualify under the same Group of companies.
f) Two entities, when one of them indirectly holds at least 25% of the share capital of the other.
g) Two entities in which the same shareholders, their spouses, ascendants or descendants hold, directly or indirectly, at least 25% of the share capital.
h) An entity tax resident in Spain and its foreign permanent establishments or vice versa.
l) Two entities when one of them exercises decision-making power over the other.

[715] Article 41 of PITA refers to Article 18 CITA. However, the latter do not envisage the application of transfer pricing rules when only individuals are involved. Criterion confirmed by DGT ruling V2416/2008, issued in December 16, 2008.

[716] Article 18.10 CITA.

[717] It amounts to EUR 1,000 per data or EUR 10,000 per group of data, having a limit of the minor of the following amounts: 10% of the overall transactions subject to CIT, PIT or NRIT of 1% of the company´s turnover.

[718] In this scenario the tax penalty entails 15% of the resulting amount from the Spanish tax authorities' adjustments.

4.1.6. Special Regime for Image Rights

4.1.6.1. Introduction and legal framework

This particular type of anti-abuse tax measure, even though not included in BEPS or ATAD scope, is of special interest to entertainers of sportspersons when tackling image rights and related tax strategies.

The main Spanish Court cases addressing this particular topic were dealt with in paragraph 3.4.2.6. The key element is again the objective approach, as referred to the items of income obtained by entertainers and sportspersons. It becomes relevant in order to define the scope of Article 17 OECD Model, by taking into consideration the limitation of the force of attraction, which was previously concluded in the mentioned paragraph 3.4.2.6. Moreover, the particular tailored-made tax regime applicable to employed sportspersons and entertainers is of great importance.

The kernel of the image rights' issue starts from analysing the legal framework, by tackling the Spanish Constitution, where image rights are regulated and provides for the context, where the subsequent detailed analysis of their legal and tax treatment can be performed.

According to the Spanish Constitution, in its article 18.1, the image rights are recognised alongside other personal rights, such as the honor and privacy. The purpose of the constitutional protection is to disallow illegal third-party infringements, in the context of their moral scope[719].

As regards the economical scope of the image rights, its treatment is included in depth in the Royal Decree 1006/1085, dealing with the special labour relationship of the professional sportspersons, as opposed to entertainers. It clearly states[720] that there is a distinction between the image rights' income obtained by employed sportspersons, which are considered to be salary, in accordance with the Collective Labor Agreement and the particular contract, as opposed to those arising from commercial relationships, between the sportspersons and companies with advertising or sponsorship purposes. The bottom-line is that the force of attraction from a labour viewpoint is of exceptional

[719] In this regard, the Organic Law 1/1982 further develops the protection of the image rights, in conjunction with privacy and honor. However, the economical content is hardly mentioned. Conversely, Spanish jurisprudence (as well as other laws) has further established their content.

[720] From the wording of articles 7.3, 8 and 1.3 of the above-mentioned Royal Decree.

character, by extending its effects only and limited to those image rights licenses granted by the sportsperson to his/her employer.

In the particular field Spanish football players, its Collective Labor Agreement[721] confirms the above conclusion and even goes further. It explicitly states that image rights income only can be categorised as salary, insofar as two qualifying conditions are met. On the one hand, the exploitation of the image rights must be carried out by the sportsperson himself. On the other hand, the direct exploitation must be concluded between the football player and the Club hiring him/her. Accordingly, those scenarios whereby the football player's image rights are licensed to a third party, prior to being granted to the Club, will not fall within the salary classification. Again, the force of attraction from labour viewpoint relies upon certain thresholds about by and to whom the image rights are licensed.

4.1.6.2. Tax Treatment

The tax position of the income stemming from image rights related to Spanish tax resident employed sportspersons and entertainers is of great importance.

Within this context, the classification from the Spanish domestic tax perspective must fit, by taking into consideration the legal characterisation. In this regard, from the Spanish Personal Income Tax viewpoint, the characterisation of the income arising from the exploitation of image rights depends on whether the income stream is directly obtained by the sportsperson or entertainer as a holder, versus income obtained by third parties, once a previous assignment agreement has been carried out.

If the latter, as a general rule it is considered to be passive income. The express referral within the Spanish Personal Income Tax (PITA) is of income from movable assets. Thus, they are taxed at a limited progressive scale ranging from 19% to 26%[722]. At the time of payment, a 24% withholding tax applicable on gross income must be deducted[723]. However, said qualification of passive income gives preference to

[721] Articles 24 and 32 of the Professional Football Collective Labor Agreement enacted in November 23, 2015.

[722] It was determined by Law 11/2020 (Budget law) released in December 30, 2020, applicable from 2021 onwards. Also, from January 1, 2023 onwards it has been determined to increase the maximum tax rate to 28%, when EUR 300,000 would be exceeded. (Draft of 2023 Budget Law).

[723] Art. 101.10 PITA. Except in those cases where the WHT is applicable under the special regime for image rights under paragraph 4.1.6. when payments are carried out to non-residents.

business/professional income, when it is obtained within the course of a professional/business activity of the image right´s third party holder[724]. Accordingly, business/economic activity income is subject to tax, according to the general progressive scale ranging from 19% to 49%[725] applicable to Spanish individual tax residents. Moreover, the party benefiting from the exploitation of image rights of entertainers or sportspersons usually carries out through the use of companies, being subject to the CITA rules related to the determination of the taxable base.

Conversely, when the income is directly exploited and obtained by the entertainer or sportsperson, the characterisation may be, in its turn, twofold. Income from professional activity[726], as earlier explained or when it takes place within the context of a working relationship may be subject to a particular regime that deserves further analysis due to the importance in the context of employed entertainers or sportspersons, such as football players.

4.1.6.3. Tailored tax regime: Image rights-employee

It is relevant to analyse the Spanish well-known tax rules as regards the particular tailored Spanish tax regime applying to Spanish resident employed sportspersons and entertainers, when licensing the image rights to their employers. It is aimed at highlighting the main pros and cons arising from its application from a practical perspective.

In this regard, it was enacted to counter tax-avoidance schemes related to the use of rent-a-star companies by resident employee sportspersons, in particular football players[727].Article 92 PITA[728] contains a deeming provision[729], whereby such image

[724] The main difference in the above characterisations is the deductible expenses allowed to be used. When dealing with professional/business income, expenses permitted at corporate level are also applicable, *mutatis mutandi,* as it was explained in 4.1.4.2. It leads to the determination of the tax income based on the accounting records and subsequently amended by the particular rules stated in CITA. In this regard, the rules addressing the deduction of expenses at corporate level establish that they are permitted as long as they are considered to be incurred for the purposes of obtaining professional income, as well as being correctly incurred, duly recorded and justified.

[725]From the withholding tax viewpoint, 24% still applies for professional or business activity income.

[726] It is also subject to 24% withholding tax.

[727] This rule reflects the common position reached by the Spanish Professional Football League and Spanish Ministry of Finance, back in 1996. The final outcome was the Law 13/1996, governing tax, administrative and social measures. During the previous years, Spanish football players took advantage of the income tax characterisation, when third parties were exploiting image rights, by granting the

rights will be deemed to be qualified as imputation income, insofar as the following conditions are cumulatively met:

(i) The individual resident[730] taxpayer ("taxpayer") shall have performed services to any other person under an employment relationship[731].

(ii) The taxpayer shall have assigned the exploitation of his image rights to a third person[732] ("third person"), whether resident in Spain or not.

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corresponding licenses to Spanish football clubs, in order to avoid work income classification. However, Spanish tax authorities, alongside the Spanish Courts adopted a straightforward approach, whereby image rights were considered to be intransferrable, based on Spanish civil law, and, as a result, re-characterised them as employment income for income tax purposes. In this sense, the tax burden was shifted to the Spanish football clubs, to justify the failure to apply withholding taxes. As a consequence, most of them were led to the edge of bankruptcy, based on the joint liability of the employed sportsperson as recipient tax payer, in conjunction with Spanish football clubs as withholding agent.
Within this context, the above mentioned 15% safe harbour tax rule was implemented by the Spanish legislative, in order to combat the potential abuse of using interposed companies which, in fact, where loan-out companies owned by the football players. The option of "*piercing the veil*" of the interposed entities between the employed sportspersons and their respective football clubs was adopted, aimed at avoiding the practical shortcoming of proceeding via the application of Spanish General Anti-Avoidance Rules (GAARs). In particular, by being regarded as sham transactions, through the specific application of the regulated tax procedure to this end.

[728] As a matter of fact, most of the paragraphs included in article 92 of the PITA are drafted on the grounds of the forerunner tax rules relating to the Spanish CFC Rules (article 91 of the PITA) or the former domestic look-through provisions. In this regard, it is important to note that this regime cannot be considered itself as a look-through regime. It is also worth to note that, since 2015, image rights are considered to be qualifying passive income, for the purposes of the Spanish Controlled Foreign Corporation rules.

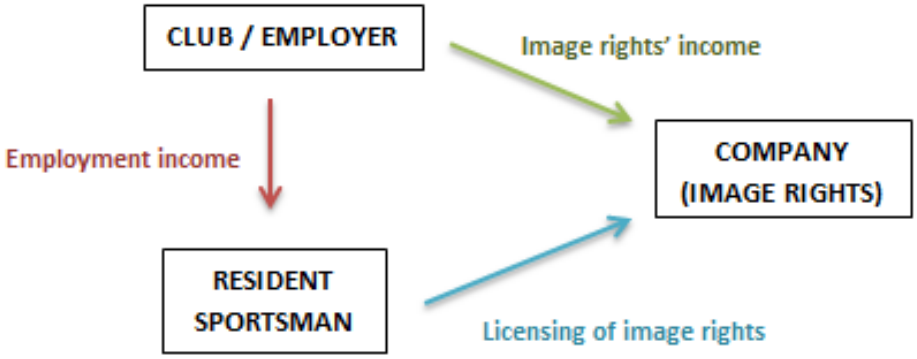
[729] The main aspects of such a special regime dealing with entertainers and sportspersons image rights are based on an "*iures et de iure*" presumption, whereby the attribution of income falls within the above-mentioned persons, regardless of being the latter the effective beneficiary, the percentage of their final shareholding and the place of the effective management of the rent-a-star company. It is considered to be obtained by the entertainer or sportsperson when the payment of the employer to the rent-a-Star company takes place. There is no room for "bona fide" transactions to be performed with actual third parties being the licensors of the image rights.

[730] The force of attraction of the mentioned rule leads to encompass the image rights income received prior to become a Spanish tax resident, through to the attribution of the first year of Spanish residence. Furthermore, image rights income received after ceasing to be a resident in Spain are attributed to the last year of Spanish tax residence. Article 92.5 of PITA.

[731] Finally, the wording of said deeming provision goes further than article 17 of the OCDE Model Treaty. Article 92 of PITA expressly refers to "taxpayers performing services under an employment relationship". Therefore, in the field of sportspersons and entertainers, it also encompasses coaches and technical assistants considered to be employees of the club or sports corporation. It does not exist any Spanish Court Decisions shedding light on how to interpret this particular requirement, when an existing Double Tax Treaty containing Article 17 OECD Model, becomes applicable. Thus, as a general rule, the deeming provision does not restrict its scope to sportsperson or entertainers, as opposed to other "behind the scene" professionals.

(iii) The recipient of the services under the employment relationship, or a person associated to the recipient of services ("employer group"), shall have obtained from the third person the right to use the image of the taxpayer.

Thus, it applies to a threefold relationship. In other words, it becomes applicable in case of licensing the entertainers or sportsperson's image rights to the employer through interposed companies. The basic scenario is as depicted below:



Therefore, non-residents as well as non-employed persons are out of the scope of the over-reaching Spanish tax regime on image rights. It also leaves out of the scope this anti-abuse tax rule, the income arising from licensing image rights directly to a third party, which is unrelated to the club or sports/entertainer corporation[733].

(iv) The payments done by the employer group in consideration for the use of the taxpayer's image rights shall exceed 15% of the sum of (a) the salaries and wages paid by the employer group to the taxpayer and (b) the consideration paid by the employer group to the third person for the use of the taxpayer's image.

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[732] The fact of interposing entities not paying corporate income tax is not taken into account by Article 92 of PITA, since it applies with no exception, even if the interposed company is located in Spain.

[733] The key issue resides in distinguishing whether the third party exploiting the image rights of the sportsmen is completely unrelated to the club or corporation paying the sportsman's salary income. For example, a sponsorship agreement between a football player and a well-known trademark manufacturer of football boots. Another example was when FC Barcelona used an unrelated TV company, in order to exploit the image rights of its football players, which were previously assigned to a rent-a-star company. Albeit paragraph 3 of article 76 PITA expressly refers to image rights licensed from third parties to the employer or related parties, according to Spanish transfer pricing rules, the Spanish Supreme Court in July 1, 2008, Rec. n. 5296/2008 considered to said TV company as a mere paying agent of the Club. The Court based its decision on the grounds of regarding the use of the TV company as a sham transaction. Needless to say that this line of reasoning might be discriminatory as to it applies solely in the field of team sportsplayers, as opposed to those employed taxpayers. See further in this regard, Monroy, A., La tributación por IRPF de los derechos de imagen de los deportistas. *Revista internacional de Derecho y Gestión del deporte*, (2), 13-21.

Accordingly, this safe harbour is permitted only when the payments for the use of the employee entertainer or sportsperson's image rights does not exceed 15% of (A) the sum of the salaries and wages paid by the employer, and (B) the consideration paid by the employer to the intermediate company for the use of the mentioned image rights. If so, the above explained tax treatment becomes applicable either as passive income or income from professional activities, respectively.

On the contrary when it exceeds the 15%[734] of the total, the overall payment will be caught and will be classified under attributed or tainted income[735]. As a result, the progressive personal income tax rate scale, from 19% up to 49% becomes applicable. When the latter occurs, not only are the image rights in connection with employment services taxed, but it may also include related income arising from the use of intangibles.

The key point of this tailored tax regime is to grant the Spanish tax authorities with an anti-abuse tax tool, helping to overcome the personal income tax classification under passive income, insofar as the above conditions are met. However, it does not take into account that said domestic anti-avoidance tax measure goes beyond previously agreed boundaries, when applying double tax treaties signed by Spain or the European Union Fundamental Freedoms[736].

The far-reaching scope of the rule may lead to domestic and international double taxation, since article 92 of the PITA completely disregards the existence of the rent-a-Star company in all potential scenarios, even though double tax relief measures are intended to solve it[737].

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[734] Safe Harbour: B ≤ 15% x (A+B) or A ≥ 85% x (A+B).
Meaning that the effective threshold applicable to image rights arising from the above formula may be also understood that it refers to 17.64705 %, in accordance with the following formula:
A= 85(A+B)/100, 100A=85A+85B, 15A= 85B, A=17.64705 %, based on the assumption that when the author includes = it is referred to equal or greater than.

[735] Tainted income differs from the classification as work income, since it is considered to be attributed income. Nevertheless, the tax consequences of both qualifications are the same in terms of applying the progressive tax rate to personal income, up to 49% tax rate. Certain nuances, such as tax deductions permitted are not applicable when qualifying as tainted income

[736] Under the Spanish PITA, withholding taxes on account must be performed, insofar as the payment with regard to the employed sportsperson's image rights has been made to a non-resident person or entity, regardless of whether they are within the European Union.

[737] Article 92.4 of PITA.

4.1.6.4. Spanish tax administration/Courts practice

According to Spanish tax administration practice, as well as the position held by Spanish Courts, is also tackled in order to analyse the common approach adopted by them, for the purposes of combating abusive transactions in the field of image rights licensed by employed sportspersons and entertainers, by virtue of the application of the doctrine of piercing the corporate veil.

In particular, the application of the above mentioned 15% safe-harbour was the target of a massive tax audit plan, by Spanish tax authorities in recent years, including football players[738]. To this end, Spanish transfer pricing rules have been used as the yardstick to challenge the use of Spanish companies by entertainers with regards to 15% image right´s allowed income.

In particular, Spanish tax auditors are considering that in order to license the image rights from a company to a club, the rights must be previously acquired by the company from the employed sportsperson. The point is that, in most scenarios, said employed sportsperson is a shareholder qualifying as a related party for transfer pricing purposes. As a consequence, the transactions must be valued on an arm's length basis between independent parties. The criteria used by the Spanish tax authorities consists of using the ex-post results of the company exploiting the image rights in order to determine the previous transfer value from the employed sportsperson to said company. Accordingly, the transfer benefit is considered to qualify as professional income, subject to the progressive personal income tax rates.

Therefore, a "*de facto*" non-application of the 15% safe harbour related to taxation of image right´s income is taking place, since football players are not willing to bear tax audits and reputational consequences. They would rather negotiate their salaries on a net basis, by transferring tax burden arising from image rights' income to Spanish football clubs.

The above analysis leads to the conclusion that, over the past decades, the Spanish image rights tax regime has been evolving commensurate to the business development. However, the degree of uncertainty arising from the Spanish tax

[738] According to the Spanish media, *i.e.* El Mundo, November 12, 2015, tax audits have scrutinized the application of the image rights regime, involving Spanish structures used by Spanish football players, such as Casillas, Sergio Ramos, Xavi Hernández or Piqué. See further in this regard, Juarez, A., *supra* n. 218, pp. 618-619.

authorities' approach alongside the abusive implementation of aggressive tax planning by top football players poses an actual situation with no clear-cut outcome. There are certain issues, such as the required substance of the image rights companies, as well as the valuation of the image rights at the time of the transfer and subsequently, which need to be addressed, from a common viewpoint and at supranational level.

As it was already mentioned in paragraph 3.4.2.6, the French case of Laetitia Casta sheds lights about the pivotal issue of the substance when exploiting the image rights. In this regard, the companies must be active with sufficient personal and business assets to carry out an actual activity. In fact, it is starting to happen at the level of top football players and clubs[739].

Therefore, insofar the acquisition and exploitation of mage rights of the entertainers would be actually carried out by companies with sufficient means, the image rights income must not be caught by far reaching anti-avoidance rules, either specific, such as the one in Spain for those with employment status or general anti-abuse clauses[740].

Accordingly, the transfer pricing measures must be useful in order to carry out independent analysis whereby the value of said rights is determined in accordance with an actual benchmarking and risk analysis. Thus, the personal circumstances, such as club, position in the field would be essential to perform said analysis, versus other approach of limiting the potential image right to 15%, as it is determined for employees under the Spanish tax rules. The value of the image rights is the one that third party commercial sponsors are willing to pay for the right to use the entertainer´s image

[739] For example, in accordance with www.sportbusiness.com, issued in January 25, 2018, Chelsea brought in Doyen to lead image rights sales for men and women first teams, as its exclusive player endorsement agency. Moreover, the football superstar Cristiano Ronaldo sold his image rights to Mint Media, a Hong Kong-based firm owned by the Singaporean business tycoon Peter Lim, aimed at further growth of Ronaldo's image rights in the context of the Asian market. Reported, among others, by www.espn.com, in June 29, 2015.

[740] In this regard, the Court cases of Spanish sportsplayers, Ricky Rubio Court Case: Catalonia´s Regional Court, May 23, 2019, n. 610/2019 and Piqué Court Case: Spanish National Court, May 13, 2019, n. 0000064/2017 are very illustrative. On the one hand, the Spanish NBA player Ricky Rubio took advantage of the legal use of companies to exploit his image rights, based on the value of the transfer into the company, as well as the Court accepted that the lower tax rate is true, as long as the distributions of profits via dividends is carried out. On the other hand, the Barcelona football player Piqué incorporated an abusive structure for image rights purposes, whereby those were exchange for EUR 3,000 back and the company had not evidence of any payment since then. In addition, it completely lack of human or material resources. However, it led to another issue about the characterisation by providing two options, passive or business income, which entails different domestic tax rates' consequences, depending on the particular circumstances.

rights in association with their products[741]. Accordingly, it must not be limited by any threshold or at least, to enable the taxpayer to provide an actual and justified percentage of image rights income versus employment income.

4.1.6.5. Abusive image rights structures – Messi & Ronaldo Cases

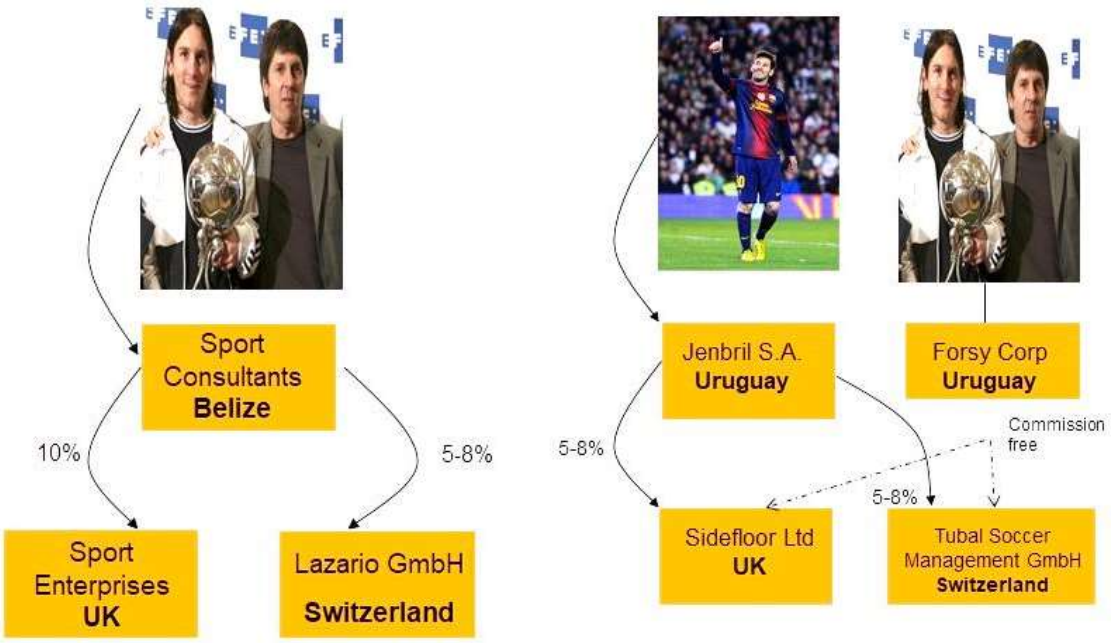
On the contrary, there are numerous and relevant Spanish Court Cases about how not to benefit from abusive structures involving image rights. In particular, when dealing with image rights, the use by "*La Liga*" football players and celebrities of offshore companies in the context of exploitation of image rights, as well as companies located in tax jurisdictions lacking of substance. They attracted the attention of the Spanish tax authorities[742] and subsequently, the Spanish Courts. Spanish tax authorities included them as a target within the tax audit plan, in order to "*pierce the veil*" the disguised licenses of image rights, which actually cover maneuvers to illegally reduce the tax burden[743]. In other words, the Spanish tax authorities were pioneer in attacking sham or abusive structures, whose main goal was to avoid reporting the main ultimate beneficiary, submit and pay the actual income tax arising from image rights.

Firstly, it was the tax audit dealing with the arrangements of Lionel Messi's image rights. The facts are of relevance, in order to understand the position adopted by the Spanish authorities and subsequently, the criminal proceedings.

[741] See further in this regard, Offer, K., Alonso and Geovanni: image rights case comparison*, Sports Law & Taxation*, Vol 11, n. 2, June 2020. pp. 60-63.

[742] 2013 General Tax Audit Plan issued by the Spanish Tax Authorities. This plan must be put into context of the Spanish difficulties in tax collection during the crisis period.

[743] It is an international trend, whose analysis in United Kingdom was carried out by Offer, K., The Taxation of Image Rights, *ITSG Global Tax Journal*, Vol 1, n. 1, May 2018.



In March 3, 2005, when Messi was under 18 years old[744], assigned the right to economically exploit his image rights to Sports Consultants Ltd., a company tax resident in Belize. The period of time was of 10 years, holding the assignee the option to renew it, at its discretion when the mentioned period was expired. The agreed prize of the transaction was of USD 50,000. Accordingly, Messi's parents and subsequently himself, implemented a transaction whereby they were supposedly no longer the holders of said image rights.

The very next day, March 4, 2005, Sports Enterprises Ltd, a company located in United Kingdom, became the exclusive agent of Messi's commercial and advertising image rights, with a worldwide scope, except for United Kingdom. The agreed commission was of 10% of the related revenue. In the same year, but in September 15, Messi's arranged another agreement with Sports Consultants-Lazario GmbH, a company resident in Switzerland, whereby it was in charge or the sponsorship and merchandising contracts, in exchange for 5-8% commission.

In March 12, 2007, the company in Belize was replaced, by two companies in Uruguay[745]. In addition, the subsidiaries were set up in United Kingdom and Switzerland, again. The main difference was that at that time Messi was already a

[744] He ratified such an assignment in January 27, 2006, once he was 18 years old and acting in full capacity.

[745] The aim of this replacement, was in accordance with the statements of former agent of Messi, Mr. Schinocca, to include Messi's father as a recipient of the commission, by leaving aside of this entitlement to receive the payments to Mr. Schinocca.

football star in F.C. Barcelona[746]. In this regard it is worth to note that they were no new payments for the assignment of image rights, even though new companies were incorporated into the structure.

As a result of a court case between Messi and his former manager (Mr. Schinocca)[747], tax structure of the former was disclosed to the public. The rationale of both structures was to channel the income arising from image rights' income arising from agreements with multinationals[748], to companies located in tax friendly countries, such as United Kingdom and Switzerland. Those countries enable to benefit from extended tax treaty networks, by allowing from reduced or no withholding taxes in the country were the payments from third party sponsors or image rights' assignees were located. The payment of taxes in United Kingdom and Switzerland were carried out at normal rates, but limited to the previously agreed commissions.

In addition, the domestic tax legislations of the two mentioned countries did not pose any difficulty to invoice and carry out payments to related entities located either in Belize or Uruguay. Accordingly, the income obtained throughout the world from the exploitation of image rights of Messi was successfully channeled back to offshore jurisdictions, where payment of income taxes was low or null, as well as benefiting from the non-disclosure of the ultimate beneficiary of the shares.

Spanish tax authorities started a tax audit encompassing the lack of payment related to personal income tax arising from image rights, involving 2007, 2008 and 2009 fiscal years. The main circumstances taken into consideration were the use of companies located in a low jurisdiction, such as Uruguay and Belize.

Moreover, the Spanish tax authorities were not allowed to tax said income arising from the exploitation of image rights, through the use of the entities in United Kingdom and Switzerland, which, in its turn, provide for the requested treaty shopping and enable to carry out commercial transactions with offshore jurisdictions. Another key element was the fact of using entities which do not disclose the ultimate beneficiary, in order to provide protection to the actual holder/s of the image rights.

In this regard, the Court Case was debated and carried out in the criminal arena, since tax fraud becomes a criminal offence for Spanish legal purposes, when the unpaid and

[746] For example, an agreement was already in place between Messi and Nike.

[747] The former manager of Messi was claiming the agreed percentage of the commissions arising from sponsorship contract based on the grounds of fraud.

[748] Such as Danone, Banco Sabadell, Adidas, F.C. Barcelona, P&G, Pepsi, Telefonica and the like.

hidden taxable quota is of at least EUR 120,000 per fiscal year, as well as per unpaid tax[749].

The final sentence and the corresponding criminal charges as regards the case of Jorge Horacio Messi and Lionel Messi were confirmed by the Spanish Supreme Court in May 24, 2017[750]. They were accused of tax fraud involving three fiscal years, 2007, 2008 and 2009, which a prison penalty of 5 months each of them[751]. The fact that the overall penalty did not exceed 24 months and they had no previous criminal records implied that no actual prison penalty was obliged to be implemented, in accordance with the Spanish criminal system.

Regardless, of the criminal consequences, Messi's Court case was not a masterpiece from international tax perspective. However, certain issues were of interest either enacted directly from the Courts dealing with the case or to enable achieving tax conclusions from tax commentators, among other, within this analysis.

From the starting point, the value of the assignment of image right had not rationale or evidence support to combat potential claims arising from the Spanish tax authorities.

Moreover, no one would assign to a third party the image rights of a football player for such a reduced amount (EUR 38,000), when the income stream is about to start or even already providing sources of income. In particular, within the year in which Messi assigned the image rights to the entity tax resident in Belize, he was already member of Barcelona´s team, he was dealing with an agreement with Nike (and subsequently with Adidas[752]) and he assigned his image rights to Barcelona for a five-year term, in exchange for a higher amount. Also, the fact of lacking the control of his economic rights totally, via potential subsequent renewals at the assignee´s discretion were

[749] Article 305 and 305 bis of the Spanish Criminal Code.

[750] The sentence from the Spanish Supreme Court, issued in May 24, 2017, n. 374/2017 confirmed the previous decision issued by the Barcelona's Province Court in July 15, 2016, n. 110/2015, in relation to the initial and previous criminal proceedings carried out before the Court of Gavá n. 3, n. 598/13. Also, other employed sportspersons have reached an agreement by admitting the criminal offence, in order to avoid major criminal penalties, such as Mascherano and according to Spanish media, other are in the process, such as Adriano and Eto'o.

[751] In the Barcelona's Province Court the prison penalties were of 7 months of prison penalty per fiscal year, as well as the monetary penalties were of EUR 532,313.31, EUR 792,300.54 and EUR 768.387.70, respectively. In contrast to the monetary penalties finally agreed by the Spanish Supreme Court of EUR 354,875.54, EUR 528,200.36 and 512,258.47, respectively.

[752] Clear-cut evidence of the value of image rights carried out in 2005 versus the actual one, was proved in 1.6 million bonus paid by Adidas when the image rights' agreement was signed in January 31, 2006. Also, the fact of not paying for the image rights in 2007 when the change of the companies took place, only gives evidence of the lack of business rational in the supposed assignment of image rights by the family of Messi and himself.

evidences of carrying out a sham, in order not to disclose the actual income arising from the exploitation of image rights to the Spanish tax authorities.

Moreover, regardless of the fact that the image rights were assigned to a company, Messi was the person in charge of signing most of sponsorship contracts. Therefore, image rights assignment to companies was only of formal status, different to the economic reality, proved on the contrary by evidences when signing the contracts by the football player.

In this sense, the lack of substance of all involved entities was of relevant, since no actual economic and independent activity was proved to exist by them, throughout the Court proceedings, more than the mere use of service providers.

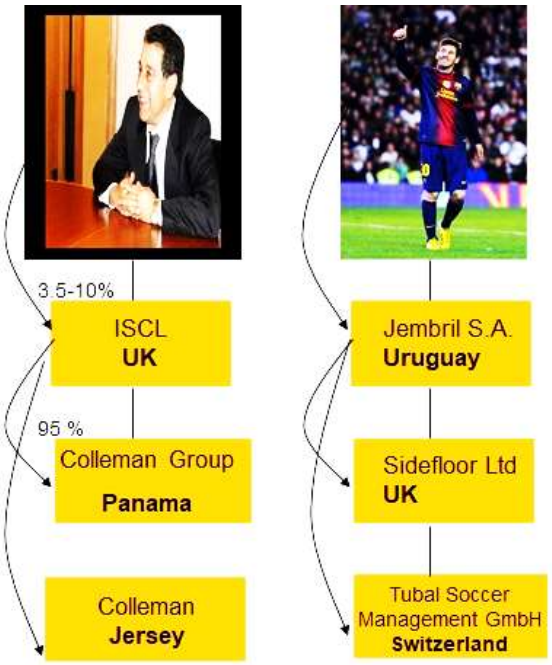
Thus, the main purpose of the structure was to benefit from low tax jurisdictions having territorial systems and, if so, not being subject to tax when obtaining income arising from third countries. It is important to note that the selection of the involved countries took into account that they were not included in the Spanish blacklist of tax havens[753]. The fact of benefiting from bearer shares in the holding companies located in Belize and Uruguay was proved the one of the main purposes of interposing those companies in the structure.

In this regard, before Messi's Court Case, other criminal cases took place, as regards the use of sham structures, very similar to those implemented in the exploitation of image rights by Messi and his father. For example, the Court case issued by the Valencia's Province Court, in November 2, 2012[754], involving the former FIFA agent of football players, **Alain George Migliaccio**. He became famous for representing French football players who won the 1998 World Cup and UEFA Euro 2000, such as Zinedine Zidane, Laurent Blanc, as well as other top players, such as Ribéry, Nasri, etc.

The fact pattern was very similar to Messi's Case. Mr. Migliaccio used interposed companies, in order not to pay income tax in Spain, in the fiscal years 2000 and 2001 fiscal, in which he became fiscal resident in said country.

[753] See further, *supra* n. 604.

[754] Valencia Province's Court, Section 2, Sentence n. 576/12.



Again, in this particular case, it was of pivotal importance the use of a company located in United Kingdom, International Sport Consultant Ltd., for the purposes of benefiting from the application of double tax treaties, when receiving the agent´s commissions was pivotal. Subsequently, the benefit obtained through the UK company was channeled to a company tax resident in Panama, through a partnership in Jersey, composed by 95% the Panamanian entity and 5% the company in UK. It was important to note that the UK company was owned, in its turn, by two companies located in the Isle of Man, in order not to allow knowing to Spanish or British tax authorities who was behind the UK Company. The rights as football agent were assigned to the UK company in exchange for EUR 540,000 per year, during a period of 10 years.

Thus, leaving aside, the fact that Panama (at that time) and the Isle of Man and Jersey qualified as tax havens, the facts mirror exactly those included in the Messi's case[755]. The key point was that the Court considered said structure as a sham, based on the business purpose test. In this regard, the use of nominee shareholders in the Isle of Man, the use of a P.O. Box company in UK, trust services and not having an actual business activity in any of them lead to conclude that they were a sham and income tax must be paid to the Spanish tax authorities in 2000 and 2001, imposing additional an additional monetary penalty of EUR 6,4 million and seven years of prison.

[755] Even though the assignment of rights were of football agency rights, instead of image rights, the conclusion is tantamount valid for the purposes of determining the abusive assignment of rights connected to sport activities, among others.

Those Court cases give evidence of the Spanish Courts mainstream position when dealing with abusive structures and the avoidance of tax payments. They started from the Spanish tax authorities' position and subsequently were blessed by the Spanish Courts. Their underlying rationale was to avoid the application of the Spanish GAAR[756], based on the "step transaction doctrine", whereby artificial or improper executed arrangements are carried out in order to achieve the avoidance of the taxable event.

The point is that said domestic GAAR entails a complicated procedure to be implemented, as well as precluding criminal charges. As a result, the Spanish Court unapplied it in practice, by having hardly enacted any judgment[757] through the GAAR.

Therefore, the "sham" transaction doctrine fits better within the target of the Spanish tax administration, when attacking abusive structures, such as the context of the exploitation of image rights by football players.

Finally, the tax audit as regards **Cristiano Ronaldo** is also of interest, when analyzing the tax consequences when exploiting image rights. In this regard, it is important to explain the main differences between this one and Messi´s, case. Even though after checking both structures it seems that they entailed the same tax issues, the tackled tax scenarios were totally different.

In particular, as it happened in Ronaldo´s Case, the taxation of the image rights becomes highly difficult, when tax audits involving low tax regimes are intertwined with the application of the Spanish so-called Beckham Law[758] or the "impatriate regime".

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[756] Included in Article 15 and 16 of the Spanish General Tax Act.

[757] With the exception of the Supreme Court cases in relation to leveraged acquisitions of the intra-group companies, issued in February 24, 2016, among others, Rec. n. 1017/2014, Rec. n. 3908/2014, Rec. n. 3976/2014, Rec. n.3819/2013, Rec. n. 948/2014, Rec. n. 4044/2014 y Rec. n. 4134/2014.

[758] Tax incentive included in article 93 of PITA. It fosters the establishment of temporary inbound residents in Spain. Despite that the scope of this tax provision is not limited solely for sportsmen. It did become relevant in the international tax arena where famous sportsmen benefit from it. In fact, the tax law regulating said tax regime took the name of "Beckham Law", for obvious reasons. Nevertheless, the main purpose was to attract valuable human capital of international multinationals, which benefit from other Spanish tax incentives, for example the Spanish Holding Company regime (ETVE).
It was applicable to qualifying impatriate who relocate to Spain due to an employment agreement may benefit from advantages included in the Spanish elective inbound regime. Firstly, not all incoming sportsplayers were entitled to elect for it, since independent sportspersons, and those being Spanish resident during the 10 years prior to their relocation to Spain, are out of its scope. In addition, the work must be performed in Spain and for the benefit of either a Spanish company or a Spanish permanent establishment of a non-resident entity.
The temporary status of said elective impatriate regime limits its application to the year in which the sportsperson becomes Spanish resident, as well as the following five years. Therefore, when accurate

Apart from determining the value of the image rights transferred to a third company, the split between those arising from Spanish territory versus those from foreign source must be ascertained.

The kernel of the tax audit resided in determining where the source of the income was in Spanish territory and, if so, subject to tax, up to 24% flat rate, in contrast to any other foreign source of income, escaping from being subject to tax in Spain, in accordance with the Spanish Beckham-Law tax rules[759].

Additionally, the income arising from image rights was disclosed, even though he used a similar structure to the one implemented by Messi. The question was the amount of Spanish sourced income arising from image rights.

Tax fraud proceedings have been initiated in June 13, 2017 against him, even though the "*animus defraudandi*" of the former Real Madrid player was doubtful in this scenario, since tax returns were submitted, tax fraud proceedings have been initiated in June 13, 2017 against him. The Spanish prosecutor accused him of defrauding EUR 14.7 million as regards 2011 to 2014 fiscal years, based on potential inaccurateness of the transfer of his image rights to a company located in British Virgin Islands, as well as the taxation of the subsequent income arising from them when being considered to be Spanish sourced.

However, it is worth to note that a final agreement was reach between the Spanish prosecutor alongside the Spanish tax authorities on the one hand, and Cristiano Ronaldo as taxpayer on the other hand, whereby the final agreed penalty was settled in EUR 5,7 million, as opposed to the initial requested EUR 14,7 million. Additionally, the prison charge was of 2 years, by avoiding its actual application, due to the lack of previous criminal record. Unfortunately, there was no chance to know the Spanish Court´s position as regards the interpretation when image rights are considered to be Spanish sourced, within the context of application of Beckham Law.

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planning is carried out, it allows for the first year of arrival not wasted by not spending more than 183 days in Spanish territory.
From 1 January 2010 an additional threshold consisting of a maximum payment of salary amounting to EUR 600,000 yearly was introduced in order to benefiting from this regime. However, it did not affect to those qualifying person already benefiting from it, such as Cristiano Ronaldo, for the purposes of avoiding retroactive effects.
Finally, as from January 1, 2015, the regime was modified and it is no longer applicable to those sportspersons included in 1006/1985 Royal Decree, dealing with labour rules of said group of qualifying persons and limited to other impatriates-employees.

[759] It is further tackled in paragraph 4.1.2.3.

The consequences arising from previous cases are as follows. It is permitted the commercial exploitation of the image rights, separate from the individual holding them[760]. However, a line must be drawn in order to avoid facing fraud issues when the transfers are simulated or not receiving an actual market price.

Then, the use of company exploiting the image rights are permitted, insofar there exist an effective transfer, whereby the image rights are valued by an independent and expert appraisal. Said appraisal must take into consideration the personal circumstances of the sportsperson or entertainer[761].

As a result of the transfer, a capital gain may arise, based on the difference between the acquisition value and the transfer price. Accordingly, efficient tax planning can be implemented in order to minimize the tax exposure, by trying to proceed with the transfer at the early stage[762] of the sports career.

4.2. Relevant Spanish domestic tax law on non-tax residents

4.2.1. Qualification rules

It is worth noting to analyze into detail the Spanish tax rules applicable to non-residents entertainers and sportspersons, insofar non-treaty context is applicable.

In this regard, Spanish sourced tax rules involving non-tax residents carrying out economic activities are basically divided in two main types of income streams. On the one hand, those obtained through a permanent establishment considered to exist within the Spanish territory[763]. On the other hand, those dealing with particular items of

[760] Even in countries historically reluctant to accept image rights disassociated from personal rights, have been started to accept their commercial exploitation. For example, see further Laetitia Casta's Court Case, *supra* n. 452. In this particular case, the image rights' exploitation was considered to be an autonomous commercial activity which could be dissociated from her professional activity.

[761] In this regard, transactions involving Hard-to-Value intangibles, which may fit for the purposes on the transactions between sportspersons/entertainers and their corresponding image rights licensing companies, are encompassed in the Amendment of the OECD Transfer Pricing Guidelines. In particular, its new section D.4 of Chapter VI, 6.187-6.188. Also, based on the previous report, OECD (2015), *supra* n. 711. It would entitle Tax authorities to use ex post financial income, in order to determine the arm's length pricing of transactions involving ex-ante transfer of image rights.

[762] Insofar the particular jurisdiction allows implementing it. For example, United States does not allow to NCAA players to receive income related to image rights or commercial revenues.

[763] The illustrative example of entertainment income obtained through a Spanish permanent establishment is a foreign circus performing within Spanish territory. *i.e*. Cirque Du Soleil. They are

income considered to be Spanish sourced, even though a fixed or a degree of permanent presence does not take place. Thus, the link whereby the taxing rights are granted to Spain, as a source country, is the fact of obtaining income within the Spanish territory.

Within the latter, the income of non-resident entertainers and sportspersons is tackled in a particular provision, in the context of economic activities. In particular, the yardstick rule applicable to said group of taxpayers is article 13.1.d. 3rd of NRITA.

"*When they are directly or indirectly derived from the personal performance of artists and sportsmen in Spanish territory or from any other activity related to said performance. Even if they are received by a person or entity other than the artist or sportsman*[764]*".*

Thus, the source's rule granting taxing powers[765] to Spanish tax authorities is referred to the income derived from the performance of the entertainers and/or sportspersons carried out in Spanish territory[766]. It is equal to the one tackling business activities as such, which, in its turn, are subject to tax in Spain, when carried out in Spanish territory. Those links differ from the one referred to services which are subject to tax, only when used in Spanish territory.

Certain nuances that might be of relevance, as the reference made "directly or indirectly", are unclear, since no guidance whatsoever has been provided through Spanish Court cases or Spanish tax administration binding rulings. However, the purpose of including those mentioned words is to attract, as much items of income as possible, under the scope of this specific Spanish sourced rule of income obtained by non-resident entertainers and sportspersons.

Additionally, the scope of said domestic tax rule is also extended, even beyond the parameters of Article 17 OECD Model, by including the reference to any other activity related to the performance. The wording of said extension may lead to tax in Spain,

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considered to have a fixed place of business in Spain, through which the activities of the head office´s activities are carried out.

[764] It is important to highlight that Spanish NRITA has not updated the terms artists and sportsmen into the OECD adopted terms of entertainers and sportspersons.

[765] Up to 2003, Spanish tax authorities were also entitled to apply their taxing powers, when the payor of the artistic and sport income activities was tax resident in Spain, regardless of whether the entertainer or sportsperson was performing in Spain or not. It encompassed Spanish individuals and companies, as well as Spanish permanent establishments of foreign companies, unless the payment was linked to a foreign permanent establishment. See further, Briones, L., Taxation of Non-Resident Entertainers and Athletes. *Tax Management International Forum*, March 2000. Volume 22, n. 1.

[766] Under the approach of the territorial scope. In other words, whenever, there is no performance in Spain, there will not be Spanish taxation under NRITA.

items of income which are not of performing nature at all. However, since they are, by any means, linked to the Spanish performance, they might be caught within the Spanish source rules applicable to non-resident entertainers and sportspersons.

In contrast to Article 17 OECD Model, the above-mentioned Spanish tax rule goes beyond the objective and subjective scope of the former. It enables to apply the Spanish source rules to any professional income arising from independent services, somehow related to the performance or being a member within an international tour or tournament, which takes place in Spain, among other countries. As a result, the particular nature of the item of income becomes of no relevance, as long as it may be connected to the Spanish performance, as it happens in the above-mentioned Spanish U2 Case[767].

Therefore, when a non-tax treaty scenario occurs, the Spanish domestic and far-reaching tax provision dealing with non-residents performing artistic or sport activities may lead to unrelieved double taxation. It may arise, when the country of tax residency of the entertainer or sportsperson, as opposed to the Spain, adopts a limited approach in its domestic legislation, whereby not all income related to a performance is regarded of artistic or sport nature and if so, opposite characterization from source and resident countries may lead to double taxation.

Furthermore, the specific rule addressing the income arising from Spanish performances of non-resident entertainers and sportspersons may lead to conflict of with other domestic general allocation rules.

In particular, as stated in previous paragraphs, non-resident independent professionals providing services may be also subject to tax in Spain, as source country, when those services are used in Spanish territory[768]. This allocation criterion is completely overruled, by the specific domestic provision dealing with of entertainers and sportspersons within the NRITA. However, from a practical view point, when a tour or tournament takes place in Spanish territory, the outcome may be the same under both rules, since it is difficult to ascertain scenarios whereby services are connected to said performance, but not used in Spain[769].

[767] See further, paragraph 3.3.3.
[768] Article 13.1.b.2nd NRITA.
[769] The service may still be subject to tax in Spain, insofar it is considered to be used in Spain, even if the provision of services is of partial character.

In the field of foreign employed entertainers or sportspersons performing in Spain, the income generated is considered of Spanish source, where the personal activity takes place there. Thus, the link mirrors the one established for those of independent status.

However, the far-reaching scope of the sourced allocation rule dealing with non-resident tax entertainers and sportspersons, in a non-treaty context may also cover payments to non-resident employees, since it expressly refers to income "*even though received by a person or entity different to the artist or sportsperson*". Therefore, the Spanish domestic tax unlimited approach, in order to tax entertainment and sport income, even if third independent foreign parties participate, leads to the conclusion that employment income related to entertainment or sports events is not feasible to be characterized.

Conversely, when a Spanish tax residency employer pays a salary to an entertainer or sportsperson, without using an intermediate vehicle, the income may qualify as employment income. It overcomes the general rule whereby entertainment or sport income is considered to be characterized as income from economic activity. An illustrative example is the scenario of a foreign actor hired by a Spanish production company in order to participate in a film shooting in Spain.

From a practical point of view, in the entertainment field, the Spanish Social Security and labour authorities, as a general rule are reluctant to accept those qualifying individuals as of self-employed status, based on the general labour rules of risk bearing of the activities, as well as the employer´s control over the activities carried out by the employee. However, it may exist clear-cut evidences on the contrary showing the status of self-employed activities of the entertainers and sportspersons. Again, the mainstream trend from Spanish authorities is to characterize them as employees and, if so, to classify them among work income[770].

Thus, only professional or independent entertainers or sportspersons are included within 13.1.d. 3rd of NRITA, as opposed to those benefiting from status of employees.

Moreover, the scenario can be worsened, in accordance with Spanish tax authorities' practice, through which they are entitled to choose who/which is the taxpayer, when interposing a loan-out company, since any of them via application of look-through approach or not, regardless of the artiste/sportsperson dependent or independent status.

[770] See further, García Prats, A., *supra* n. 210, pp. 843

Finally, the bottom-line conclusion from the objective key element is the performance within Spanish territory. Accordingly, it must be taken into consideration that all performing related income, obtained by independent foreign artists and/or sportspersons in Spanish territory is subject to tax there. Thus, the far-reaching force of attraction of entertainment and sports income is applicable when domestic tax scenarios are in place.

From the subjective viewpoint, there is no definition of entertainers or sportspersons within the NRITA. This mentioned tax law establishes[771] that in order to define the terms, not being included in it, they may be defined by reference to PITA. However, both Spanish mentioned laws do not include any definition at all, in the field of entertainers and sportspersons, which might be considered to be helpful for these purposes[772].

4.2.2. Determination of taxable base

Once the allocation tax rules included in the NRITA are explained, the next step is to ascertain the Spanish tax burden and related formal obligations affecting non-tax resident entertainers and sportspersons.

In this regard, the general tax rate applicable to non-residents obtaining Spanish sourced income is of 24%[773]. Nevertheless, for residents in the European Union may be reduced to 19%[774], which matches the lowest progressive tax rate applicable to tax residents. The amendment was aimed at being in line with EU tax rules[775].

[771] Article 13.3 NRITA.

[772] As it was earlier mentioned in paragraph 4.1.4.2., the only Spanish domestic tax that might be of assistance in this regard, it is the local tax on Economic Activities, which contains the different categories of entertainers and sportspersons. Said specific tax is only applicable to independent professionals as opposed to employees. Accordingly, the scope of entertainers and sportspersons of employment character are regulated under the Spanish Royal Decree 1435/1985, August 1, 1985 and Royal Decree 1006/1985, June 26, 1985, respectively. Those rules also shed light in order to define the concept of entertainers and sportsmen at domestic level.

[773] Among others, the replies to binding consultation issued by the DGT: V-0572-19 issued in March 18, 2019; V-0964-16 issued in March 10, 2016; V-2312-12 issued in December 5, 2012 and V-1077-10 issued in May 20, 2010.

[774] As well as the European Economic Area. In both cases, it is also required that the residency State has a double tax treaty agreement with Spain, including an effective exchange for information clause or a tax information exchange agreement concluded with Spain or it has ratified and applies the Convention on Mutual Administrative Assistance in Tax Matters, in accordance with OECD and the European Council standards.

[775] It was implemented via Article 2.6 of Law 26/2014, November 27, 2014 which modified Article 25 of NRITA.

Moreover, those taxpayers being tax resident of countries which are not members of the European Union and performing economic activities may benefit from the deduction of only three categories of expenses[776]. Those arising from direct personnel costs related to the employees hired or deployed into Spanish territory for the purposes of the economic activities, provided tax Spanish withholding taxes are applied to the said salaries. Also, costs of the materials included in the works carried out in Spain. Any other supply consumed in Spanish territory, insofar they are not eligible for stocking and are connected to the economic activities.

Therefore, from a practical perspective, said taxpayers are subject to tax under gross basis, except for the above-mentioned expenses, having a reduced scope of application in certain and specific scenarios.

Conversely, those tax residents from an EU country, carrying out performances, among other economic activities, within Spanish territory are entitled to the same tax allowances than those granted to Spanish tax residents, either individuals[777] or corporations[778], as long as the same requirements are complied with. In other words, the expenses eligible for NRITA deduction must have a direct and inseparable economic link to the economic activity carried out in Spain. In the particular case of the entertainers and sportspersons, they must be referred to a performance carried out in Spain[779].

All Spanish tax resident entities, as well as individuals carrying out business or economic activities are obliged to apply the withholding tax on entertainment gross income[780]. In addition, said qualifying persons carrying out the payment to the entertainers and sportspersons, together with the applicable withholding tax, are also jointly liable for the payment of the applicable withholding tax income. Accordingly, the withholding tax agent would tend to apply the most conservative approach, in terms of allocation, qualification, apportionment and the like.

Hence, the EU entertainer or sportsperson taxpayer would be led to carry out the final Spanish tax payment through self-assessment or tax refund, in order to accomplish the most favorable tax scenario on a net basis, subsequent to the withholding tax.

[776] Article 24.2 NRITA and Article 5 NRITR.
[777] Article 24.6.1º.a of NRITA.
[778] Article 24.6.1º.b of NRITA.
[779] See further paragraph 5.2.3.
[780] Article 31 of NRITA.

Most of the cases, the EU tax residents may carry out via the application of a tax refund[781], based on the net computation of the Spanish sourced income, within the four-year period of Spanish statute of limitations[782]. Said period starts to last, since the deadline of the corresponding quarter period in which the withholding tax was carried out[783].

Thus, it would allow reducing the impact of a 24% withholding tax applied on gross income versus a refund based on net self-assessment at 19% tax rate to those EU taxpayers. However, the main shortcomings that may be faced by taxpayers within this refund procedure are the administrative burden related to the overall refund procedure in a foreign country, such as obtaining the requested tax residency certificate from the tax authorities of the taxpayer's home country[784], as well as going through a tax audit procedure were every single invoice is double checked.

4.2.3. Other income obtained by non-tax residents in Spanish territory

Back to the objective approach whereby entertainment income must be taken into consideration, intertwined with the items of income linked to the performance, it is important to note the position held by the Spanish tax authorities and Courts when the entertainers and sportspersons received other items of income.

Other sourced rules may be applied, such as the one addressing employment income[785] and royalties[786]. However, the force of attraction of the Spanish domestic rules applicable to non-tax resident entertainers and sportspersons is far-reaching, by considering connected to the performance.

It is important to note the lack of tax jurisprudence involving scenarios with taxpayers from jurisdictions with no tax treaty with Spain. Therefore, the best guidance has been

[781] The Spanish tax authorities have to proceed with the refund within 6 months after the submission of the refund by the EU taxpayer. In particular, Article 221 of the Spanish General Tax Act, which in its turn refers to the general four-year period of Article 104 of the same Law.
[782] Article 66.d of the Spanish General Tax Act.
[783] There are four quarter periods, in accordance with Spanish domestic tax. First quarter: April 20 (January to March); second quarter: July 20 (April to June); third quarter: October 20 ((July to September); fourth quarter: January 20 (October to December). In accordance with Article 5.c.1º of the Ministry Rule EHA/3316/2010, of December 17 2010, through which the 2010, 211 and 213 Non-resident Income Tax Forms are officially approved.
[784] Said tax residency certificate must include the wording referred to the tax residency concept, in the context of the applicable double tax treaty.
[785] Article 13.1.c of NRITA.
[786] Article 13.1.f.3rd of NRITA.

already explained in paragraph 3.4. when tackling tax treaties scenarios, such as the Spanish U2 Case. Moreover, the corresponding apportionment arising from the income related to performance is detailed dealt with paragraph 3.5.

Another clear-cut example is the Spanish Court case of Viajes Halcón-Julio Iglesias[787]. Although referred to tax treaty scenarios, the applicable tax consequences are tantamount to domestic law scenarios applicable to non-tax residents in Spain. In particular, the fact that the payment in exchange for the exploitation of the image rights are specifically included within the royalty's concept, under the NRITA[788] did not affect at all when qualifying this item of income. The connection of the payment in exchange for the exploitation of entertainer's image rights to the performance of the eight concerts held in Spain were considered sufficient to qualify said image rights' income among the entertainment income.

Thus, when the particular case, such as the above-mentioned tackles a tax treaty scenario, the image rights characterisation theoretically differs from the classification provided in the NRITA[789]. However, due to the far-reaching approach adopted also when a non-resident taxpayer from a non-treaty country receives income in exchange for licensing his image rights in Spain, the conclusion is the same. It would be caught under income obtained by entertainers and sportspersons.

In accordance with Spanish Courts' jurisprudence when dealing with double tax treaties scenarios, they have given preference to include income within Article 17 of the OECD Model (entertainers and sportspersons income), in those cases where income arises from image rights linked to entertainers or sportspersons, as opposed to the potential application of Article 12 (royalty income) or Article 7 OECD Model (business/professional income). The same conclusion is totally applicable when dealing with non-tax treaty scenarios, by the applying the similar qualification domestic tax rules.

The author´s position is that those other items of income, even though related to the entertainer or sportsperson's performance may benefit from other alternative and more suitable domestic qualifications, such as service/business income, royalty and image

[787] Already tackled in 3.4.2.6.2., even though it was referred there to the dynamic interpretation of the OECD Commentaries, there.
[788] Art. 13.1.f.3rd .
[789] Art. 13.1.f.3rd NRITA states that all income arising from the use or the right to use image rights of a person by a third party must be qualified as royalty income. However, pursuant to the regime established in the PITA which also envisages said characterization, preference must be provided to business income when carried out within the context of an economic activity.

rights income, depending on the particular facts and circumstances. Thus, not all income related to the performance must be caught under the unlimited force of attraction of entertainment income qualification either under domestic tax rules applicable to non-tax residents or Article 17 OECD Model in tax treaty scenarios. Again, it must be provided the characterization to every item of income in accordance with the objective approach. An objective approach that must be connected to the place where the audience consumes the entertainment services, instead of the pure performance approach. Also, the subjective approach must be overcome by not linking to the income to the status of entertainers and sportspersons, only.

CHAPTER 5 - EU LAW AND INTERNATIONAL ENTERTAINERS AND SPORTSPERSONS

5.1. EU Law in the international tax context

5.1.1. Introduction

Another relevant issue when dealing with the international taxation of entertainers and sportspersons is the compatibility of the rules addressing their taxation either in double tax treaties or the applicable domestic rules with the European Union tax law[790], intertwined with the non-discrimination principle[791].

In particular, in the context of EU direct taxation, the four pivotal EU freedoms[792] are of essence in order to achieve the single market, namely the freedom of establishment, free movement of workers, free provision of services and freedom of capital as well as payments.

[790] It is important to note that the Treaty on the Functioning of the European Union (hereinafter TFEU) is based on the grounds of 1957 Treaty of Rome which established the European Economic Community back 1957. In the next stage, the Treaty of the European Union (TEU) was set up in through the Treaty of Maastricht, which was signed in 1992 and entered into force in 1993. Subsequently, it has been amended via the Treaty of Amsterdam, signed in 1997, which entered into force in 1999, the Treaty of Nice, signed in 2001, which entered into force in 2003 and the Treaty of Lisbon, signed in 2007, which entered into force in 2009.
According to Herminen, M., *EU Direct Taxation*, IBFD, 2020 Edition, pp.2, "*EU law consists of the founding treaties (the TEU and the TFEU) and the legal provisions based on the legislative powers delegated to the European Union by the founding treaties. The part of the EU law provisions that may have an effect on taxes is referred to as EU tax law.*"
Also, the same author states as regards the EU tax law that "*The EU law provisions that are directly applicable and that are relevant in relation to direct taxes include, for example, the TFEU general nondiscrimination rule (article 18), the TFEU articles on the basic freedoms (articles 21, 45, 49, 56 and 63) and the sufficiently precise provisions of the Parent-Subsidiary Directive, the Interest-Royalty Directive and the Merger Directive. Wherever the provisions of a directive are unconditional and sufficiently precise, those provisions may, in the absence of proper implementing measures adopted within the prescribed period, be relied upon.*"

[791] Article 18 TFEU.

[792] Included in Articles from 45 to 66 of the Consolidated Version of TFEU. Its consolidated version was published in the Official Journal of the European Union in October 26, 2012. In particular, the above-mentioned EU freedoms are:
- Freedom of movement of workers - Articles 45 to 48 TFEU.
- Freedom of establishment – Articles 49 to 55 TFEU.
- Freedom of provision of services – Articles 56 to 62 TFEU.
- Freedom of capital and payments – Articles 63 to 66 TFEU.

In this regard, the role of the European Court of Justice (ECJ), among others, consists of ensuring that all Members State does apply tax policies which do not entail the discriminations against the above-mentioned EU freedoms[793].

The EU freedoms are granted to EU nationals and companies, insofar economic activities are carried out involving cross borders scenarios within the European Union. In other words, three main requirements must take place in order to face a discrimination against EU freedoms. In particular, nationality, economic-substance and cross-border nexus.

Moreover, it is important to determine within the introduction of this chapter, the scope of the analysis to be carried out in this Chapter, devoted to EU Law.

The starting point is the interaction between EU Law and double tax treaties. Also, it is relevant to dealt with the potential discriminations in direct taxation between residents and non-residents. Furthermore, the general principles of EU Law stated by the ECJ over the years, in relation to the international direct tax context are analyzed into detail. In particular, the main obstacles faced by entertainers and sportspersons in the EU context. In this regard, the main ECJ rulings are analyzed with the aim of looking for relevant findings which may be connected to the particular case of Spanish domestic tax rules. It is drafted for the purposes of giving evidence of the existing discriminations against EU freedoms, despite the fact of the previous enacted ECJ rulings leading to avoid discriminations, mostly in the field of deduction of expenses for non-residents.

As regards the Spanish domestic tax rules and the related discriminations, a summary of the previous Spanish court cases dealing with the fundamental freedoms and international entertainers are tackled, as well as other Spanish or ECJ Cases which might lead to shed some light in the context of EU discriminations. It includes the pros and cons arising from those rulings that might have an impact in the potential future pleas from appellants/taxpayers and resolutions from Courts.

Finally, it is important to tackle the issues of abuse of law in the context of ECJ jurisprudence and the subsequent endorsement of the ECJ position by national Courts. It is carried out in connection with the entertainment and sports arena, together with the relationship of ECJ ruling and double tax treaties and domestic tax legislation. It

[793] Molenaar, D., *supra n.* 32, pp. 261. This author explicitly states that "*For the analysis of a possible conflict with the freedom principles of the EU Treaty, the ECJ has developed an examination pattern, also called the "rule of reason test". Generally, the ECJ starts by assessing whether or not the obstacle at hand that leads to a disadvantage falls within the scope of at least one of the non-discrimination provisions."*

included the ECJ decisions within the abuse of law context in 2019 and the related position from national courts arising from them.

5.1.2. EU Law and double tax treaties

The next tax issue to tackle consists of solving the potential conflicts between double tax treaties and EU freedoms. In this sense, it is important to highlight the divergent points of view between international tax law and TFEU[794]. The former is based on the dichotomy, resident (worldwide taxation) versus non-resident (limited taxation at source). In the worldwide taxation, personal circumstances are taken into account, whilst source taxation is referred and limited to the income obtained in certain territory. Moreover, the primary goals of double tax treaties are to allocate the taxing rights between the source and resident States, as well as accomplishing the avoidance of double taxation.

On the other hand, TFEU does not encompass the target of eliminating double taxation[795]. However, its aim is not limited to taxation and the focus resides on providing an equal treatment to EU nationals within the single market. Thus, based on the fact that the main goals are different, it might lead to different tax consequences.

The difficulties may reside when the international tax rules are scrutinized based on the principles of the TFEU. The latter rules do not allow direct, covert discriminations and restrictions based on the grounds of nationality. So, by implicitly the discrimination based on the residence of nationals from Members States is prohibited in the EU context. Conversely, international tax rules, according to Article 24.1 of the OECD

[794] Terra, B.J.M., Wattel, P.J., *European Tax Law*, Third edition, Fiscale Studieserie, pp. 45-46.

[795] Article 293 European Community Treaty of 1958 included a referral for the elimination of double taxation. It reads as follows *"Member States shall, so far as necessary, enter into negotiations with each other with a view to securing for the benefit of their nationals (…) (2) the abolition of double taxation within the Community".* (Emphasis added by the author). It cannot be misleading that this article confers powers on the EU to enter into negotiations on behalf of the Members States, with third countries. Furthermore, this provision does not confer to EU member states, total independency from the fundamental freedoms. It is not an absolute right, which does not need to respect the provisions of EU Law. The same position is held by Molenaar, D., *supra.* 32, pp. 261. This author also states that it does not involve a binding effect, whereby individuals can appeal to national Courts on the grounds of said EU rule. Also endorsed by Martín Jiménez, A. and Calderón Carrero, J.M., *Manual de Fiscalidad Internacional*, Chapter 6: La tributación de las rentas de artistas y deportistas, 4th Edition, IEF, 2016, pp. 203. See further, Essers, P., de Bont, G., and Kemmeren, E., (Editors), *The compatibility of anti-abuse provisions in Tax Treaties with EC Law*, EUCOTAX Series on European Taxation, pp.17-18.

Model[796], limit the prohibition of the discrimination in ground of nationality, by allowing different treatment between residents and non-residents[797].

The key point resides in analyzing **the supremacy of the EU Law and the related ECJ judgements**[798] over the distributing rules of the double tax treaties or the applicable domestic tax rules. However, once it is confirmed that the domestic tax rules lead to EU discrimination, the concerned State must solve it and arrange the domestic rules in order to be in line with the EU freedoms[799]. Thus, it confirms the EU law

[796] "*Nationals of a Contracting State shall not be subjected in the other contracting State to any taxation or any requirement connected therewith which is other or more burdensome than the taxation and connected requirements to which nationals of that other State in the same circumstances, in particular with respect to residence*". In this regard, Spanish binding ruling issued by the DGT issued in November 20, 2018 (V2990/2018) analyzed the non-discrimination principle in terms of nationality and related tax consequences, as regards the double tax treaty between Spain and UAE.

[797] It must be distinguished between the direct discrimination, which is endorsed by Article 24.1 OECD Model from the indirect discriminations which are also covered by the ECJ, and, if so, considered to be forbidden within the EU context. In this regard, *Bundesfinanzhof*, (Federal Tax Court) decision issued in September 3, 2020 (I R 80/16), determined that a scenario whereby a US entertainer, tax resident in Netherlands but national from US, was not able to carry out a tax assessment in Germany since he was not an EU citizen, did not violate Article 24.1 German-US Double tax treaty. In this regard, it must be noted that a constitutional complaint before *Bundesverfassungsgericht* (German Federal Constitutional Court) has been posed, 2 BvR 148/21, on the grounds of violation of principle of equal treatment, which is still pending to be solved at this point in time.

[798] For example, *Commission v. French Republic* ("Avoir Fiscal"), issued in 28 January 1986, C-270/83, in its paragraph 26 which expressly states the supremacy of the EU over double tax agreements. It expressly states that "*Finally, the French Government is wrong to contend that the difference of treatment in question is due to the double-taxation agreements. Those agreements do not deal with the cases here at issue as defined above. Moreover, the rights conferred by Article 52 of the Treaty <u>are unconditional and a Member State cannot make respect for them subject to the contents of an agreement concluded with another Member State</u>. In particular, that article does not permit those rights to be made subject to a condition of reciprocity imposed for the purpose of obtaining corresponding advantages in other Member State."* (Emphasis added by the author).

The subsequent released ECJ case law about this particular tax issue helps to reach clear-cut conclusions. Pursuant to the path started via Avoir Fiscal ECJ ruling, ECJ ruling *Finanzamt Köln-Altstadt v Schumacker* ("Schumacker"), C-279/93, issued in February 14, 1995, its paragraph 21 reads as follows: "*Although, as Community law stands at present, direct taxation does not as such fall within the purview of the Community, the powers retained by members states must nevertheless be exercised consistently with Community law*". Furthermore, the subsequent ECJ jurisprudence confirmed the limitation of tax powers conferred to the EU members States in the field of direct taxation, such as *G. H. E. J. Wielockx v Inspecteur der Directe Belastingen* ("Wielockx"), C-80/94, issued in August 11, 1995, paragraph 16 and *P. H. Asscher v Staatssecretaris van Financiën* ("Asscher"), C-107-94, issued in June 27, 1996, paragraph 36 and *Futura Participations SA and Singer v Administration des contributions,* ("Futura Participations"), C-250/95, issued in May 15, 1997, paragraph 19.

[799] *Krzysztof Filipiak v. Dyrektor Izby Skarbowej w Poznaniu* ("Filipiak"), C-314/08, issued by the ECJ in November 19, 2009, paragraphs 82-83. "*Pursuant to the principle of the primacy of Community law, a conflict between a provision of national law and directly applicable provision of the Treaty is to be resolved by a national court applying Community law, if necessary by refusing to apply the conflicting national provision, and not by a declaration that the national provision is invalid, the powers of authorities, courts and tribunals in that regard being a matter to be determined by each Member State. In that context, it must be recalled that the Court has already held that the incompatibility with Community law of a subsequently adopted rule of national law does not have the effect of rendering that rule of national law non-existent. Faced with such a situation, the national court is obliged to disapply*

supremacy over domestic provisions (including the double tax treaties concluded by the State), even though it might lead to different interpretation of the same discrimination from country to country. Furthermore, the mentioned supremacy does not ensure that national courts may also interpret from different points of view the same ECJ rulings, leading to a diversity of implementations arising from the same ECJ judgement.

5.1.3. Resident versus non-resident discriminations

Accordingly, the ECJ rulings may have a great impact on direct taxation, in general terms and in respect of international entertainers and sportspersons of Article 17 OECD Model, together with related domestic tax rules. It leads to analyze and combat possible discriminations or restrictions, in grounds of nationality or residence, insofar comparable situations take place between **residents or non-residents.** Nonetheless, when the comparability criterion is not met, the different treatment may be feasible and justified. Accordingly, EU fundamental freedoms cannot be invoked by the taxpayers for the purposes of giving evidence of discriminations.

In connection with article 17 OECD Model, the requirement of comparable criterion must be ascertained, in connection with the scope of taxpayers affected by it. It should be taken into account that different treatment between resident and non-resident entertainers and sportspeople, related to Article 17 OECD Model depends on whether and how EU member States have implemented the related tax domestic rules. If they are targeted to affect to both non-resident and non-resident entertainers, without having an underlying factual scenario justifying the different tax treatment, the discrimination or restriction against EU freedoms may be not considered to exist.

It is worth to describe the main ECJ rulings which have paved the way in connection to EU discriminations between residents versus non-residents.

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that rule, provided always that this obligation does not restrict the power of the competent national courts to apply, from among the various procedures available under national law, those which are appropriate for protecting the individual rights conferred by Community law (Joined Cases C-10/97 to C-22/97 IN.CO.GE.'90 and Others [1998] ECR I-6307, paragraph 21)."

As a starting point, the ECJ draws a line of distinction between income-related benefits and personal tax benefits[800]. The bottom line is that the source State must grant the same tax treatment, as regards income-related benefits to non-residents on the same footing as to residents, being objectively in the same position[801]. The expansion of this protection of taxpayers against discrimination was carried out from the free movement of workers towards the freedom of establishment, applicable to non-resident self-employed individuals carrying out activities in a different State of the tax residency[802].

The conclusion is that in an early stage of the jurisprudence enacted from the ECJ, EU member States were reluctant to grant the tax allowances available to their tax residents in an equal manner to non-residents, unless they were forced to do so by the ECJ, pursuant to *Schumacker ECJ ruling*. In other words, only source State may provide tax allowances when non-residents earn most of their income there.

The ECJ in next stage of enacted rulings[803] took a step forward in favour of taxpayers form other EU member States, by asking for a relevant factual difference between

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[800] Terra, B.J.M., Wattel, P.J, *supra* n. 794, pp.48-49.

[801] In this regard, "Schumacker" ECJ Ruling. Moreover, *Klaus Biehl v Administration des contributions du grand-duché de Luxembourg* ("Biehl"), C-175/88, issued in May 8, 1990. The ECJ stated that in respect of personal income tax benefits, as a general rule, residents and non-residents are not objectively in the same position, since the major part of the income is normally concentrated in the State of residence. Thus, the comparable scenario required to consider the existence of EU discrimination does take place. However, when the major part of the income of the non-resident taxpayer is obtained in the source State, the discrimination may also arise as regards personal tax income, since this particular type of non-residents are considered to be in the same footing as residents.

In fact, in "Asscher" ECJ Ruling, the ECJ took a step forward by asking for a relevant factual difference between resident and non-residents, in order to accept the subsequent difference in tax treatment, regardless of whether they were of income or personal related status.

[802] See further, "Wielockx" ECJ ruling expressly states that "However, a non-resident taxpayer, whether employed or self-employed, who receives all or almost all of his income in the State where he works is objectively *in the same situation in so far as concerns income tax as a resident of that State who does the same work there. Both are taxed in that State alone and their taxable income is the same*".

[803] *"*Asscher*" ECJ Ruling*; *Mr and Mrs Robert Gilly v Directeur des services fiscaux du Bas-Rhin* ("Gilly"), C-336/96, issued in May 12, 1998 and *Frans Gschwind v Finanzamt Aachen-Außenstadt*, ("Gschwind"), C-391/97, issued in September 11, 1999. As regards, "Asscher" ECJ Ruling concerning a Dutch self-employed national, who was tax resident in Belgium, even though carrying out business in The Netherlands. The ECJ rejected the Dutch tax authorities position of taxing higher the non-residents as regards the first-bracket tax rate, based on the grounds that was disproportionate and rough, due to the fact that non-residents can be treated different only in case of existing different factual scenarios. "*In the light of the foregoing, the answer to the first two questions must be that Article 52 of the Treaty is to be interpreted as precluding one Member State from applying to a national of a Member State who pursues an activity as a self-employed person within its territory and at the same time pursues another activity as a self-employed person in another Member State, in which he resides, a higher rate of income tax than that applicable to residents pursuing the same activity where there is no objective difference between the situation of such taxpayers and that of taxpayers who are resident or treated as such to justify that difference in treatment".*

residents and non-residents. It was carried out in order to accept the subsequent difference in tax treatment, regardless of whether the tax allowances were of income or personal related status.

Moreover, the discrimination concept has been widened over the years through ECJ jurisprudence. In this regard, it important to highlight that it might be also applicable to different tax treatment between non-residents[804], instead of the usual discrimination between residents and non-residents[805].

Furthermore, it is also of relevance the application of the discrimination in the context of the EU in connection with the freedom of movement of capital. It can be appealed when non-members States are also involved, in relation to the discrimination raised in the domestic tax legislation of a member State[806].

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[804] *C.G. Sopora v Staatssecretaris van Financiën,* ("Sopora"), C-512/13, issued in February 24, 2015. It tackled the freedom of movement for workers of Article 45 TFEU, as regards the equal treatment of non-resident workers. In particular, it analyzed the tax advantage consisting of the exemption of reimbursements paid by the employer. One of the requirements was the residence of more than 150 km from the border of The Netherlands. The key point is that certain non-residents are not eligible from this tax allowance, in contrast to other non-residents who can benefit, together with other tax residents. It consists of discrimination against the freedom of workers, based on an unjustified restriction between the nationals of different EU member States.

[805] García Prats, F.A., *Impuestos Directos y Libertades Fundamentales del Tratado de Funcionamiento de la Unión Europea. Cuestiones fundamentales en la jurisprudencia de Tribunal de Justicia de la Unión Europea.* Chapter 2: La tributación de los no residentes en la jurisprudencia del TJUE: Avoir Fiscal, 270/83; Schumacker, C-279/03 y Sopora, C-512/13 Eds: Martín, A., Carrasco, F.M., Thompson Reuters Aranzadi, EU Tax Law Jean Monnet Chair, 1st Edition. 2016. pp. 110-114.

[806] See further *Yvon Welte v Finanzamt Velbert,* ("Welte"), C-181-12, issued in October 17, 2013. The Court case dealt with Mr. Welte, widower of a Swiss national deceased in Switzerland against the Finanzamt Velbert concerning the assessment of inheritance tax relating to a piece of land in Germany, owned by the deceased. The novelty resided in the fact that the deceased person as well as the heir were residents in a third country. The link to the European Union freedoms, namely to the freedom of capital, was the fact that the immovable property was located in a Member State. In particular, this ECJ decision analyzed the application of a German domestic tax allowance against the taxable value, in the context of the different treatment of residents and non-residents, being the latter a resident of a non-member State of the EU.

It is important to note that Belgian and German Governments, together with the EUR Commission submit that the restriction to apply the freedom of movement of capital to national of third countries may be allowed under the former Article 57(1) EC (Current 64.1 TFEU).

However, the ECJ ruling in its paragraphs 38-40 stated that "*The present case, by contrast, concerns the interpretation of a derogation from the free movement of capital in a situation where it is established that that freedom is applicable. While the fundamental freedoms recognised by the Treaty should be interpreted broadly, derogations from such a freedom must, as already stated in paragraphs 29 and 36 of this judgment, be interpreted strictly.*

Consequently, a restriction such as that at issue in the main proceedings relating to the free movement to a third country such as the Swiss Confederation does not escape the application of Article 56(1) EC on the basis of Article 57(1) EC.

In those circumstances, it should be examined to what extent this restriction on the free movement of capital may be justified in the light of the provisions of the Treaty." (Emphasis added by the author).

Nevertheless, there is still room for the existence of EU unjustified restriction, in domestic tax rules scenarios, where they are applicable to resident entertainers and sportspersons. It may take place when the discrimination is based on the use by those residents of a cross-border element, such as for example the use of a non-resident "rent-a star company". Said distinction cannot be invoked, in order to grant a discriminatory tax treatment in comparison to other entertainers or sportspersons not using the mentioned international involvement. If so, this domestic tax treatment would be considered to be not in line with the EU freedoms[807].

5.2. EU Law related to international entertainers and sportspersons

5.2.1. Introduction

The taxation of international entertainers and sportspersons may entail obstacles when entering to foreign markets[808], including those related to EU member States. In fact,

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Also paragraphs 67-68 of the mentioned ECJ ruling are very illustrative, since they state the final conclusions in relation to the particular case, once the potential existence of a justification for the restriction on the free movement of capital under Article 58(1) and (3) EC (Current Articles. It expressly states "*In those circumstances, the German Government cannot claim that the national legislation at issue in the main proceedings, in so far as it deprives the heir of an estate passing between residents of a third country, such as the Swiss Confederation, of the benefit of the full tax-free allowance is necessary to preserve the effectiveness of fiscal supervision.*

The answer to the question referred is therefore that Articles 56 EC and 58 EC must be interpreted as precluding legislation of a Member State relating to the calculation of inheritance tax which provides that, in the event of inheritance of immovable property in that State, in a case where, as in the main proceedings, the deceased and the heir had a permanent residence in a third country, such as the Swiss Confederation, at the time of the death, the tax-free allowance is less than the allowance which would have been applied if at least one of them had been resident in that Member State at that time." (Emphasis added by the author).

In this regard, the ECJ Ruling, *European Commission v Spain*, C-127/12, issued in September 3, 2014 dealing with Articles 63-65 TFEU in connection with existing discrimination in the Spanish Inheritance and Gift Tax rules applicable to non-residents (or foreign assets) not eligible for the regional allowances.

[807] In this regard, the ECJ ruling of *Halliburton Services BV v. Staatssecretaris van Financiën*, ("Halliburton"), C-1/93, issued in April 12, 1994 and *Patrick Zurstrassen v Administration des contributions directes* ("Zurstrassen*"),* C-87/99, issued in May 16, 2000. In both cases, although the scenarios seemed to involve only pure internal situations, they were considered to be discriminatory against the freedom of establishment and the free movement of workers, based on the fact of granting unfavorable tax treatments when cross-border elements took place. In the former, the fact of denying the exemption granted to Dutch transfer tax, when the transferor had no Dutch legal form and, in the latter, the spouses were not allowed to benefit from the Belgium allowance related to splitting of income, by the fact of working in Luxembourg.

[808] See further, Molenaar, D., Obstacles for International Performing Artistes, 42, *European Taxation,* 4, 2002, pp. 149-154; Molenaar, D., and Grams, H., *supra* n. 99, pp. 500-509; and Molenaar, D., The illusions of international artiste and sportsman taxation, *A Tax Globalist: The Search for the Borders of*

fundamental EU freedoms may be affected by the restrictions imposed by member States via domestic provisions or at tax treaty level.

In particular, the interaction between domestic or treaty tax rules dealing with entertainers and sportspersons and the EU freedoms may affect as follows:

- Freedom of establishment[809]: This freedom includes the right to set up a new undertaking (primary right of establishment), by including self-employees and companies. Moreover, with the same level of importance, the secondary right of establishment or the free choice of setting up a business through a branch or a subsidiary. Both aspects of the right of establishment are hampered by the taxation to the entertainers or sportspersons, in cases in which the profits are accrued by another person, in accordance with both provisions of Article 17 OECD Model. This "another person" could be a branch or a subsidiary set up as a consequence of exercising the entertainer or sportspersons right of establishment. Accordingly, tax treaty or domestic anti-abuse clauses targeting the activities performed by entertainers and sportspersons may encompass, in principle, a characteristic that hinders the peaceful coexistence with EU fundamental freedoms. They may hamper the freedom of establishment in the source country, since the income related to the entertainment activities are attributed to the entertainer or sportsperson, instead of the company ("pierce the veil") by the Source State.

- Freedom of movement of capital and payments[810]. This particular freedom encompasses two concepts, the free movement of capital and the freedom of payment within the European Union[811]. They may be affected, when the income received by the "loan-out company" is regarded to be received and if so, attributed

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International Taxation: Essays in Honour of Maarten J. Ellis, (Eds.) H. van Arendonk, F. Engelen and S. Jansen, IBFD, 2005, pp. 90-104.

[809] Article 49 TFEU "*Within the framework of the provisions set out below, restrictions on the freedom of establishment of nationals of a Member State in the territory of another Member State shall be prohibited. Such prohibition shall also apply to restrictions on the setting-up of agencies, branches or subsidiaries by nationals of any Member State established in the territory of any Member State. Freedom of establishment shall include the right to take up and pursue activities as self-employed persons and to set up and manage undertakings, in particular companies or firms within the meaning of the second paragraph of Article 54, under the conditions laid down for its own nationals by the law of the country where such establishment is effected, subject to the provisions of the Chapter relating to capital.*"

[810] Article 63 TFEU "*Within the framework of the provisions set out in this Chapter, all restrictions on the movement of capital between member States and between member States and third countries shall be prohibited".* And article 63.2 *"Within the framework of the provisions set out in this Chapter, all restrictions on payments between member States and third countries shall be prohibited*".

[811] It was distinguished in ECJ ruling, such as *Graziana Luisi and Giuseppe Carbone v Ministero del Tesoro.* ("Luisi et Carbone Case"). Joined cases C-286/82 and C-26/83, issued in January 31, 1984.

to the entertainer and sportspersons, either via Article 17 .1 OECD Model, intertwined with the domestic tax rule or Article 17.2 OECD Model respectively.

- Freedom of provision of services[812] and free movement of workers[813]. It becomes relevant to analyse those scenarios when there exists a prohibition to **deduct the expenses**[814] linked to profits obtained by the entertainers in the source country. As a consequence, the EU entertainers and sportspersons performing in EU member States which disallow the deduction of expenses to non-residents may end up in a worse position in comparison to the residents.

In fact, the freedom of providing services prohibits any kind of restriction to nationals from a member State different from the State in which the services are rendered. Therefore, the EU source State should provide entertainers and sportspersons with the right to deduct the expenses in the same manner that is accepted for the resident sportspersons or entertainers.

In fact, there is no argument to defend such a different tax treatment, depending on the location in which the service is rendered, the State of residence or elsewhere, inside the European Union.

5.2.2. EU Law and Article 17 OECD Model

On the one hand, as referring to the deduction of expenses related to the performances of entertainers and sportspersons, the Commentary on Article 17 OECD Model, in its paragraph 10, when dealing with the deduction of expenses expressly states that "*The Article says nothing about how the income in question is to be computed. It is for a Contracting State´s domestic law to determine the extent of any deduction for expenses. Domestic laws differ in this area and some provide for taxation at source, at a low rate based on the gross amount paid to entertainers and sportspersons*".

[812] Article 56 TFEU "*Within the framework of the provisions set out below, restrictions on freedom to provide services within the Community shall be prohibited in respect of nationals of Member States who are established in a State of the Community other than of the person for whom the services are intended*".

[813] Article 45.2 TFEU "*Such freedom of movement shall entail the abolition of any discrimination based on nationality between workers of the Member States as regards employment, remuneration and other conditions of work and employment*".

[814] For clarification purposes, the potential restrictions that may arise as regards the deduction of expenses are primarily linked to the provision of services, where the range and impact of tax deductions are wider than in the free movements of workers.

Thus, it is left to EU member States, the decision of adopting deduction of expenses when imposing taxes as a source country. Said deduction may influence over the effective tax rate in the source country applicable to non-residents, and if so, to potential infringements of EU freedoms, in case of discriminations. In fact, the denial of the deductions in the State of source may lead to excessive tax burden, in some cases could mean a 100% effective tax rate[815].

Furthermore, it should be noted that the main group of entertainers and sportspeople affected by this potential tax shortcoming consists of normal people earning a medium salary[816]. In this regard, the total freedom granted to the contracting States under Article 17 OECD Model, when dealing with the deduction of expenses in the field of provision of services, may lead to double taxation. Thus, one of the main roles of tax treaties is not achieved, as well as the potential discriminations against EU freedoms, when UE members States are involved.

On the other hand, the compatibility of Article 17 OCDE Model alongside the EU fundamental freedoms lead back to discrepancies between international taxation and TFEU. The dichotomy between Article 17 OECD Model and EU Law is laid down when implementing anti-avoidance clauses either at domestic level or at treaty level, together with their compatibility with the EU freedoms. In accordance with Article 17 OECD Model, member countries may choice to introduce clauses via domestic legislation, being applicable through paragraph 1 of Article 17, the so-called "look through approach" when indirect income is considered to be received by entertainers or sportspeople. The other alternative is paragraph 2 of Article 17 OECD Model, through which the income paid to another person is deemed to be obtained by sportspeople or entertainers, even though subject to tax at the level of the interposed third person.

Therefore, in both cases, fundamental freedoms established in TFEU may be affected by domestic tax measures. The conflict exists between the sovereignty of the States, in order to assure the benefit of double tax treaties in situations which entail transactions with actual or substantial activity versus the purpose of achieving a common internal market, in which EU fundamental freedoms should not be hampered by any means.

[815] To illustrate this point, in the Sting Case, the expenses in his North American Tour amounted to 79 % of the profits. Also, Molenaar, D., *supra* n. 32, pp. 224, whereby the figures in The Netherlands between 2001 and 2004 ranged from 64% to 75%.

[816] According to Molenaar, D., *supra* n. 32, pp. 211-215. This author expressly mentions them as the "*happy few*" in contrast to "*artistes struggling for recognition*".

Thus, the conflict with the EU freedoms may arise at two different levels. In both cases, as it has been mentioned in previous paragraphs, the supremacy of the EU freedoms over the double tax treaties or domestic legislation has been stated by the ECJ, must also be respected within the context of Article 17, regardless of the referral at the tax treaty itself or domestic tax legislations.

The criteria established by ECJ to be complied by EU member States may affect not only domestic provisions, also double tax treaties among EU member States should respect EU Law principles, as well as double tax treaties signed between EU member States and third countries. In this respect, Saint Gobain ECJ Ruling[817] statements are very illustrative about the application of TFUE even if third countries are involved. In particular, its paragraph 58 states that: *In the case of a double–taxation treaty concluded between a Member State and a non-member country, the national treatment principle requires the Member State which is party to the treaty to grant to a permanent establishments of non-resident companies the advantages provided by that treaty on the same conditions as those which apply to resident companies*". (Emphasis added by the author).

The ECJ ruling have a great influence over the application of Article 17 OECD Model, because the latter must be in line with the EU requirements, even if the double tax treaty at hand has been signed with a third country. It means that the vast majority of tax treaties may be affected by EU fundamental freedoms when dealing with Article 17 scenarios. Only when double tax treaties are concluded between non-EU member States are applicable, the tax administrations may escape from EU tailored requirements[818].

Thus, in the next paragraph the ECJ jurisprudence is analyzed into detail for the purposes of shaping the scope of Article 17 OECD Model, when dealing with either domestic tax rules or double tax treaties involving at least an EU member. It must be also noted that the vast majority of the ECJ rulings issued in the field of direct taxation of entertainers and sportspersons have been devoted to the discrimination when determining the deduction of expenses, and, if so, the application of withholding taxes, together with the determination of the taxable base.

[817] Compagnie de Saint-Gobain, Zweigniederlassung Deutschland v Finanzamt Aachen-Innenstadt ("Saint Gobain"), C-307/97, issued in September 21,1999.

[818] See further, Martín Jimenez, A., Garcia Prats, F.A., Calderón Carrero, J.M., Triangular Cases, Tax Treaties and EC Law: The Saint-Gobain Decision of the ECJ, *Bulletin for International Fiscal Documentation*, Vol.55, June 2001, pp. 241-253.

5.2.3. ECJ Jurisprudence

5.2.3.1. Gerritse

The ECJ role has become pivotal in order to combat the excessive sourced taxation arising from EU member States, when taxing entertainers and sportspersons residents in other EU member States. In this sense, they have been forced to introduce the deduction of expenses[819] in their tax systems, in order to be in line with the EU freedoms leading to a single EU market.

To this end, three landmark ECJ Court Cases are analysed into detail, in order to highlight the main achievements in the field of entertainers and sportspersons intertwined with the EU freedoms.

Starting from Gerritse ECJ ruling[820] dealing with the deduction of production expenses held by a Dutch drummer related to performances in a radio station in Berlin[821]. The yardstick of this ECJ decision relied on analysing the compatibility of the German tax on residents via the application of gross withholding tax that finally becomes a final taxation in comparison to residents[822]. In this sense, the analysis focused on the potential more burdensome tax on non-residents versus residents. The impact of this decision consisted of the potential application to all EU member States having a tax system not allowing the deduction expenses to other EU tax residents.

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[819] Certain Anglo-Saxon countries already introduced into their tax systems, the deduction of expenses in the field of entertainers and sportspersons. For example, United Kingdom through its Foreign Entertainers Unit ("FEU") the entertainers and sportspersons are eligible to be taxed on a net basis either on a submission of a reduced tax payment or filing a self-assessment return. Furthermore, in United States, foreign entertainers and sportspersons are entitled to apply for the Central Withholding Agreement (an agreement between the IRS, the withholding agent and them), in order to soften the tax burden when non-residents carry out performances in US.

[820] ECJ ruling *Arnoud Gerritse v Finazamt Neukölln-Nord.* ("Gerritse Case"). C-234/01, issued in June 12, 2003.

[821] Molenaar, D., and Grams, H., The taxation of the Artists and Sportsmen after the Arnoud Gerritse Decision, *European Taxation* (43), n. 210, 2003, pp. 381-383. Furthermore, Molenaar, D., *supra* n. 32, pp. 262-271.

[822] Paragraph 47 *"(…) income of non-residents subject to a definitive tax at the uniform rate of 25% deducted at source, whereas the income of residents is taxed according to a progressive table including a tax-free allowance.",* as well as paragraph 52 *"(…) as regards the application to non-residents of a flat rate of tax of 25% while residents are subject to a progressive table (…)*".

Therefore, the EU freedoms and, in particular, the freedom of establishment was analysed, in order to ascertain whether the German tax system is in line with it. Even though this ECJ decision started from the referral to previous enacted ECJ jurisprudence, through which the scenarios of residents and non-residents were not considered to be in comparable situations, as a general rule[823]. Furthermore, the ECJ endorsed the position of not considering as discriminatory the tax measures only granted to tax residents, based on the fact that there were objective differences between residents and non-residents[824].

The primary novelty included in Gerritse Case was the option to invoke the EU freedoms for the purposes of combating discriminations on non-residents, even though the EU taxpayer did not obtain most part of the income in the source State. In other words, the Schumacker Case doctrine was overcome in the context of EU taxpayer's protection.

In particular, the ECJ ruled out that that the non-deductibility of production expenses related to entertainer's performances within German territory was in breach with the freedom of establishment. Paragraph 53 is very illustrative as regards the ECJ change of its reasoning "*That means that, with regard to the progressivity rule, non-residents and residents are in a comparable situation, so that application to the former of a higher rate of income tax than that applicable to the latter and to taxpayers who are assimilated to them would constitute indirect discrimination prohibited by Community law, in particular by Article 60 of the Treaty (see, by analogy, Asscher, paragraph 49).*"

Thus, from Gerritse case onwards, tax resident and non-residents entertainers (as well as any other taxpayer) were considered to be in comparable scenarios. As a

[823] Paragraph 43 which expressly states that "*As the Court has already held, in relation to direct taxes, the situations of residents and of non-residents are generally not comparable, because the income received in the territory of a Member State by a non-resident is in most cases only a part of his total income, which is concentrated at his place of residence, and because a non-resident's personal ability to pay tax, determined by reference to his aggregate income and his personal and family circumstances, is easier to assess at the place where his personal and financial interests are centred, which in general is the place where he has his usual abode (Schumacher, paragraphs 31 and 32; Gschwind, paragraph 22; Case C-87/99 Zurstrassen [2000] ECR I-3337, paragraph 21).*"

[824] Paragraph 44 "*Also, the fact that a Member State does not grant to a non-resident certain tax benefits which it grants to a resident is not, as a rule, discriminatory having regard to the objective differences between the situations of residents and of non-residents, from the point of view both of the source of their income and of their personal ability to pay tax or their personal and family circumstances (Schumacker, paragraph 34; Gschwind, paragraph 23).*"

consequence, the level of taxation applicable to both must be similar based on deduction of expenses[825] and the applicable tax rate[826], among others.

However, the German Ministry of Finance took a position when interpreting the Gerritse Case from a narrow perspective and, accordingly, German tax system granted to the non-residents with the option to file an income tax refund application, through which the deduction of directly linked expenses supported by original invoices was allowed.

5.2.3.2. FKP Scorpio / Bouanich

A step further was taken via FKP Scorpio Case[827]. Again, the German Federal Fiscal Court raised pre-judicial questions to the ECJ[828]. In this particular ECJ case, the analyzed primary tax issue was whether or not the deduction of expenses can be carried out at the time the withholding tax is levied. Thus, the withholding tax system on gross income applicable to international performing artists was under ECJ scrutiny, in order to ascertain the obligation of carry out said withholding tax on net profits, as result of a potential breach of EU freedoms, in particular the freedom of provision of services[829].

[825] Expenses must be distinguished from personal allowances. The latter were permitted by the ECJ to be granted only to the tax residents. Paragraph 48 "*Concerning, first, the tax-free allowance, since, as the Finanzgericht Berlin, the Finnish Government and the Commission have argued, it has a social purpose, allowing the taxpayer to be granted an essential minimum exempt from all income tax, it is legitimate to reserve the grant of that advantage to persons who have received the greater part of their taxable income in the State of taxation, that is to say, as a general rule, residents."* This position held by the ECJ was considered to be incoherent, by certain authors, such as Almudí Cid, J.M., La relevancia de los comentarios de los Convenios de Doble Imposición Internacional para determinar el incumplimiento de las Libertades Comunitarias en el Estado de la Fuente, *Quincena Fiscal*, n. 9, 2008, pp. 11-35.

[826] In this regard, Molenaar, D., *supra* n. 32, pp. 266, points out that here resides the main difference between the ECJ Decision and the related conclusion of the Advocate-General, since the former upheld the discrimination when applying a fixed tax rate on non-residents whilst the latter found justifiable sad fixed rate.

[827] ECJ ruling FKP Scorpio Konzertproduktionen GmbH v Finanzamt Hamburg-Eimsbüttel, ("FKP Scorpio Case"), C-290/04, issued in October 3, 2006.

[828] It did not happen by coincidence, the German music industry was disappointed by the strict position held by the German Ministry of Finance and counteracted by bringing new tax cases to German Courts, which in its turn lead to preliminary questions to the ECJ. In Fact, FKP Scorpio is one of the leading organizers of pop-rock concerts and festivals within the German market.

[829] Article 56 TFEU.

In contrast to Gerritse Case which left open the timing issue[830], FKP Scorpio Case specifically addressed the refund option to non-residents, with the aim at analyzing its compatibility with the EU freedoms.

The starting point consisted of recognizing the withholding tax system, as a legitimate tool eligible to be used by the EU member States under their tax systems[831]. Furthermore, the ECJ jurisprudence has confirmed said position whereby the application of the withholding tax is justified based on public interest, justifying the limitation of the EU fundamental freedoms. For example, in the ECJ Football Club Feyenoord Case[832], a potential discrimination was considered not to exist, when applying withholding tax on short term services provided by non-residents versus residents. It was based on the rationale that the above-mentioned potential application of EU Directives was not aimed at replacing taxation[833]. It was also stated by the ECJ in this scenario that the withholding tax on non-residents was less burdensome that filing a tax return by residents. It is important to highlight that paragraph 39 of this Football Club Feyenoord Case expressly referred to paragraph 36 of FKP Scorpio Case which included the primary support to the withholding on non-residents.

Back to FKP Scorpio Case, it also comprises, under the freedom to provide services, the obligation of not imposing to non-residents additional economic or administrative burdens[834], in relation to the optional tax refund procedure.

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[830] Paragraph 43 "(…) *It did not, however, rule on the question of the stage of the taxation procedure at which the business expenses incurred by a provider of services must be deducted, in a case where several different stages are possible.*"

[831] Paragraph 36 "*The procedure of retention at source and the liability rules supporting it constitute a legitimate and appropriate means of ensuring the tax treatment of the income of a person established outside the State of taxation and ensuring that the income concerned does not escape taxation in the State of residence and the State where the services are provided* (…)".

[832] *X NV v. Staatssecretaris van Financiën*, ("Football Club Feyenoord Case"), C-498/10, issued in October 18, 2012.

[833] In particular, the case was solved involving scenarios where the EU Council (2001), *Council Directive 2001/44/EC of 15 June 2001 amended Council Directive 76/308/EEC of 15 March 1976 on mutual assistance for the recovery of tax claims* was already into force. In this regard, see further, Molenaar, D., and Grams, H., The ECJ X Case (Football Club Feyenoord), *European Taxation*, Volume 51 - Issue 8, 2011, pp. 358- 363. Also, IFA (2009), Death of Withholding Taxes?, Seminar "G", *Cahiers de droit fiscal international,* Vol. 94, Sdu fiscale en financiële uitgevers, 2009.
In line with Football Club Feyenoord are the previous and post ECJ Court Cases, which supported the withholding tax system on non-residents such as, Belgian State v. Truck Center SA, ("Truck Center Case"), issued in December 22, 2008, Case C-282/07 and *Strojírny Prostějov, a.s. / ACO Industries Tábor s.r.o.* v *Odvolací finanční ředitelství*, ("Strojírny Prostějov Case"), Joined Cases C-53/13 and C-80/13, issued in June 19, 2014, respectively. Nevertheless, these two ECJ cases dealt with taxpayers out of the entertainers and sportspersons context, as opposed to Football Club Feyenoord and FKP Scorpio Cases.

[834] Paragraph 46 "(…) *it should be recalled that, according to settled case-law of the Court, the application of the host Member State's national rules to providers of services is liable to prohibit, impede*

In lieu of the above, the ECJ FKP Scorpio ruling clearly stated, in its paragraphs 47 and 48, the pivotal ideas supporting the discriminatory tax rules applicable on EU residents within the German tax system. In particular, said paragraphs of the concerned ECJ ruling emphasizes that "(…) *In that commencing such a procedure involves additional administrative and economic burdens, and to the extent that the procedure is inevitably necessary for the provider of services, the tax legislation in question constitutes an obstacle to the freedom to provide services, prohibited in principle by Articles 59 and 60 of the EEC Treaty."*

Furthermore, *"The answer to Question 3(a) must therefore be that Articles 59 and 60 of the EEC Treaty must be interpreted as precluding national legislation which does not allow a recipient of services who is the debtor of the payment made to a non-resident provider of services to deduct, when making the retention of tax at source, the business expenses which that service provider has reported to him and which are directly linked to his activity in the Member State in which the services are provided, whereas a provider of services residing in that State is taxable only on his net income, that is, the income received after deduction of business expenses".*

Again, both residents and non-residents are in comparable situation and the tax rules must be granted in the same fashion, as per Gerritse Case's position. However, not only the subjective scope must be taken into account, also timing is of essential character, in order to protect the freedom to provide services within the EU single market. Thus, the tax refund procedure granted to non-residents within the German tax system did not suffice to be compatible with the EU freedoms.

Moreover, indirect expenses, as opposed to direct ones, were not considered as discriminatory against the EU freedoms and if so, the refund procedure was completely in line with EU freedoms when applied to this specific type of expenses[835].

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or render less attractive the provision of services to the extent that it involves expense and additional administrative and economic burdens (see Case C-165/98 Mazzoleni and ISA [2001] ECR I-2189, paragraph 24, and Joined Cases C-49/98, C-50/98, C-52/98 to C-54/98 and C-68/98 to C-71/98 Finalarte and Others [2001] ECR I-7831, paragraph 30)."

[835] Furthermore, it was also analyzed in paragraphs 52-61 of FKP Scorpio Case whether or not the requirement of issuing a tax exemption certificate at source, when applying the Double tax treaty, signed between The Netherlands and Germany was compatible with the freedom of provision of services. Although it was recognized as an obstacle within the context of said EU freedom, it was justified in order to ensure the proper functioning of the procedure for taxation at source.

In order to conclude, the consequences arising from FKP Scorpio ECJ ruling was not limited to Germany, since any other EU country adopting the withholding tax as a solution was obliged to ascertain whether their set of tax rules on non-residents performing entertainers were in line with ECJ jurisprudence.

In this regard, it is important to put into context the main issues of FKP Scorpio with those arising from the ECJ Bouanich Case[836] when computing the taxable base of non-residents. According to the latter, it may exist different systems of computing the taxable base, applicable to residents versus non-resident, insofar the tax rate applicable to non-residents offset the restrictions to deduct expenses[837]. It should be noted that this ECJ ruling dealt with the dividends arising from repurchase of shares (and the potential deduction of the acquisition cost), instead of international performing entertainers. Moreover, the EU freedom under analysis was the freedom of movement of capital, as opposed to the freedom of establishment or the provision of services corresponding to Gerritse and FKP Scorpio ECJ Cases.

The Bouanich Case seems to be in line with the statement included in paragraph 10 of the Commentary on Article 17 OECD Model which expressly states that "*The Article Says nothing about how to the income in question must be computed. It is for the Contracting States domestic law to determine the extent of any deduction for expenses. Domestic laws differ in this area, and some provide for taxation at source, at a low rate based on the gross amount paid to the entertainers and sportspersons (…)*". (Emphasis added by the author).

In fact, the ECJ decision on Bouanich Case addressed to the national Courts the final answer about the potential EU discrimination between residents and non-residents, when determining the taxable base. "*It is therefore a matter for the national court to determine in the proceedings before it whether the fact that non-resident shareholders*

[836] ECJ ruling *Margaretha Bouanich v Skatteverket* ("Bouanich Case"). C-265/04, issued in January 19, 2006.

[837] Paragraph 32 "(…) *Accordingly, a shareholder resident in Sweden is permitted, on the occasion of a repurchase of shares in connection with a reduction in share capital, to deduct the cost of acquisition of those shares, whereas a non-resident shareholder is not permitted to do so. The right to a deduction thus constitutes a tax advantage reserved solely to resident shareholders*". Also paragraph 43 "*The answer to the first question must therefore be that Articles 56 EC and 58 EC must be interpreted as precluding national legislation, such as that at issue in main proceedings, which provides that a payment in respect of a share repurchase to a non-resident shareholder in connection with a reduction in share capital is taxed as a dividend without there being a right to deduct the cost of acquisition of those shares, whereas the same payment made to a resident shareholder is taxed as a capital gain with a right to deduct the cost of acquisition.*"

are permitted to deduct the nominal value and are liable to a maximum tax rate of 15% amounts to treatment that is no less favourable than that afforded to resident shareholders, who have the right to deduct the cost of acquisition and are taxed at a rate of 30%".

Thus, domestic Courts have the final decision as to whether the lower rates compensate the lack of application of certain deductions, such as the acquisition cost deduction in the case at hand[838].

However, in the field of the entertainers and sportspersons said relevant tax issue is of great importance, since their level of expenses are so high on average that the tax rates based on a gross system, even though being lower than those applicable to residents, cannot offset the lack of deduction of expenses[839]. Thus, the Bouanich Case, as well as paragraph 10 of the Commentary on Article 17 OECD Model must be ascertained on a case-by-case basis by national Courts, in order to ascertain whether the non-residents are granted with a less favourable tax treatment than residents.

In this regard, it is relevant to note that Article 17 OECD Model is not of great help, since it does not limit the taxation at source State (as opposed to other OECD Articles) when distributing the taxing rights between the contracting States. Therefore, it unlimitedly grants taxing rights to the source State and if so, the empowerment to decide as to whether thresholds become applicable to non-resident when implementing the withholding tax.

Thus, from FKP Scorpio Case onwards the tax refund procedure is not the best option granted to non-residents by EU tax systems, when dealing with the deduction of direct expenses. However, it must put into perspective by the previously enacted Bouanich Case which endorses the application of lower tax rates in order to offset the lack of deduction of expenses. Moreover, the specific characteristic of the entertainers and sportspersons of facing a high degree of expenses, together with the unlimited taxing

[838] Paragraph 55 "*It is therefore a matter for the national court to determine in the proceedings before it whether the fact that non-resident shareholders are permitted to deduct the nominal value and are liable to a maximum tax rate of 15% amounts to treatment that is no less favourable than that afforded to resident shareholders, who have the right to deduct the cost of acquisition and are taxed at a rate of 30%.*"

[839] In this regard, Molenaar, D. and Grams, H., *supra* n. 127, pp. 65. *"(…) these rates range from 15% in France, through 21.1% in Germany and 25% in Spain to 30% in Italy. These are not necessarily very low rates if it is considered that, at least, artistes have, on average, 75% expenses in respect of their performances. At this average percentage of expenses, the Spanish tax rate of 25% on the gross amount received turns into a 100% tax rate on the net receipts."*

rights granted to the source State by Article 17 OECD Model Commentary lead to a more favourable application of FKP Scorpio's reasoning versus Bouanich underlying position, in the field of entertainers and sportspersons.

A positive step further has been undertaken by Bundesfinanzhof[840] as regards the taxation under Article 17.2 of Austrian-German Double tax treaty, whereby the production costs and the entity´s own share of the profits (as opposed to the entertainer) are out of the scope of said tax treaty article. Thus, net basis of taxation is fully applicable at the level of double taxation agreements.

5.2.3.3. Centro Equestre

In Centro Equestre Case[841] the conclusions held in above-analyzed ECJ cases are totally confirmed, in the field of the EU freedom of service provision.

Prior to explain the rationale of the ECJ case, it is important to highlight the facts of the case. Again, German tax system and its compatibility with EU freedoms were scrutinized, in relation to the provision of services. In this particular case, the context was a Portuguese company organizing equestrian presentations and lessons in Germany. In this regard, paragraph 6 of the mentioned ECJ Case stated that when obtaining a refund by non-residents in accordance with the German tax system was limited to "(…) *the condition that the operating expenses or business costs that have a direct economic connection to that income are greater than half of that income*".

Two main tax issues were addressed by the ECJ as regards the application of the EU freedoms in the field of entertainers and sportspersons:

On the one hand, only direct expenses are taken into account for the purposes of the German refund granted to non-residents, consistent with the position held in FKP Scorpio. As a consequence, the indirect expenses were left aside the application of the German refund.

The ECJ tried to shed light as regards what is considered to be direct and indirect expenses. In this regard, certain costs were provided by the Portuguese company for

[840] *Bundesfinanzhof* sentence, I R 59/15, issued in April 25, 2018.
[841] *Centro Equestre da Lezíria Grande Lda v Bundesamt für Finanzen*, ("Centro Equestre Case"). C-345/04, issued in February 15, 2007.

the purposes of the tax refund *"(…) communications, travel, accommodation, advertising and personnel costs, in addition to day-to-day expenses relating to the horses, water and electricity supply costs, costs relating to veterinary, medication and blacksmith services and to equipment for horses and riders, transporter and tax advice costs, together with writing-down costs for the horses"* and "(…) *subsequently claimed further costs relating to accountancy costs and the payment of licence fees*[842]*".*

A direct economic connection between the costs included in the tax repayment and the income obtained in Germany was requested from the German tax perspective[843]. As a result, the ECJ left the final decision at the level of the national Courts dealing with the particular case at hand to decide what is included in direct cost concept or not, as well as the compatibility of the limitation to the deduction of direct costs with the EU freedom of services provision[844].

However, a different and extensive understanding about what is considered to be included as direct cost was carried out in *ECJ Brisal Case* [845]. In this regard, among the direct costs to be included are regarded a fraction of the general costs, by extending the interpretation held in ECJ *Centro Equestre Case*.

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[842] Paragraph 10.

[843] In paragraph 17 refers to them as "(…) *operating expenses that have a direct economic connection to that income* (…)". Also, paragraph 25 tried to include a definition which turned to be not very useful. "*Operating expenses directly connected to the income received in the Member State in which the activity is pursued must be understood as being expenses which have a direct economic connection to the provision of services which gave rise to taxation in that State and which are therefore inextricably linked to those services, such as travel and accommodation costs. In that context, the place and time at which the costs were incurred are immaterial*". In any case, the ECJ analyzed or referred to the particular costs in order to be categorized under any of the two alternatives, direct or indirect costs.

[844] Paragraph 26 "(…) *It is for the referring court, before which the dispute has been brought and which must assume responsibility for the subsequent judicial decision, to determine in the main proceedings which of the operating expenses claimed by CELG are directly connected to the provision of services which gave rise to taxation in that State and are therefore inextricably linked to those services".* Also, paragraph 27 *"(…) Article 59 of the EC Treaty does not therefore preclude national legislation from making repayment of corporation tax deducted at source on the income of a taxpayer with restricted tax liability subject to the condition that the operating expenses in respect of which that taxpayer seeks a deduction have a direct economic connection to the income received from activities pursued within the Member State concerned, provided that all of the costs that are inextricably linked to that activity are considered to have such a direct connection, irrespective of the place and time at which those costs were incurred."*

[845] *Brisal — Auto Estradas do Litoral SA, KBC Finance Ireland v Fazenda Pública,* ("Brisal Case"). C-18/15, issued in July 13, 2016. In particular, its paragraph 52 "*It is for the referring court, before which the dispute has been brought and which must assume responsibility for the subsequent judicial decision, to determine in the main proceedings, first, which of the expenses claimed by KBC may be regarded as business expenses directly related to the financial activity in question for the purposes of national legislation, and secondly, what is the fraction of the general expenses which may be regarded as directly related to that activity (see, by analogy, judgment of 15 February 2007 in Centro Equestre da Lezíria Grande, C 345/04, EU:C:2007:96, paragraph 26)."* (Emphasis added by the author).

On the other hand, the limitation of requesting for costs greater than half of the income sourced in Germany and the potential restriction on the freedom to provide services in the context of entertainment. In this case, the conclusion was clear-cut "*By contrast, that article precludes such national legislation in so far as it makes repayment of that tax to that taxpayer subject to the condition that those same operating expenses exceed half of that income".*

Thus, Centro Equestre Case did confirm the deduction of expenses when benefiting from direct character only, but without providing further clarification of what is included in this category, apart from travel and accommodation ones. Moreover, it precluded any additional restriction, such it was the requirement of 50% costs related to German income, based on the grounds of restriction on EU freedom of service provision.

5.3. Spanish taxation on entertainers and sportspersons, as example of potential EU discrimination

5.3.1. Past experiences in other Spanish domestic taxes

5.3.1.1. Positive: Spanish Inheritance and gift tax

The next step is to analyze into detail about the potential discrimination against EU freedoms included in the Spanish tax system, when dealing with entertainers and sportspersons.

In this regard, the position of the Spanish tribunals in this field is not very helpful or illustrative. Thus, it may help sentences issued involving different tax aspects, enacted by the Spanish courts in light of the previous ECJ jurisprudence and the potential restrictions on EU freedoms.

The Spanish inheritance and gift tax is a great example of how the Spanish domestic rules have been adapted over the years commensurate with ECJ decisions [846]. Moreover, in those cases that the Spanish legislative has not been proactive, the Spanish tribunals have carried out a monitoring task to ensure that the EU freedoms are totally protected.

[846] See further, Durá García, L.J., Developments Reduce Spanish Inheritance and Gift Tax for Non-residents, *ITSG Global Tax Journal*, January 2019, Volume 2, Number 1, pp. 3-8.

Back in 2011, the European Commission sued Spain for breaching obligations imposed by EU freedom movement of capital[847]. Subsequently, the ECJ held that Spanish inheritance tax law violated the right of free movement of capital in a ruling issued in September 3, 2014[848].

In response to the ECJ sentence, the Spanish government amended the domestic inheritance and gift tax legislation in 2015[849]. However, it affected only EU and EEA tax residents. Therefore, it was not initially applicable to tax residents from outside the EU. However, in an appeal brought by a Canadian tax resident, the Spanish Supreme Court ruled in February 19, 2018[850] that the exclusion of regional inheritance and gift tax allowances for tax residents of countries from outside the EU was contrary to the EU concept of freedom of capital. It was also confirmed by another Spanish Supreme

[847] In October 27, 2001, the European Commission decided to refer Spain to the ECJ for discriminatory rules on inheritance and gift tax that entailed non-residents to pay higher taxes than residents.
The Commission had already formally requested Spain in May 5, 2010 and additionally in February 17, 2011 to take action to ensure compliance with the EU freedoms in relation to domestic inheritance and gift tax provisions. However, no amendments were implemented into Spanish legislation on the matter. As a result, the issue was brought to the ECJ by the Commission.
In fact, the path to non-discrimination began with three ECJ cases, even though they involved other EU member States. In particular, ECJ ruling Theodor Jäger v Finanzamt Kusel-Landstuhl, ("Jäger Case"), C-256/06, issued in January 17, 2008; ECJ ruling Vera Mattner v Finanzamt Velbert, ("Mattner Case"), C-510/08, issued in April 22, 2010, and ECJ ruling Yvon Welte contra Finanzamt Velbert ("Welte Case"), C-181/12, issued in October 17, 2010.

[848] ECJ ruling Commission v. Spain, ("Spanish Inheritance and Gift Case"), C-127/12, issued in September 3, 2014.
The ECJ explained, by citing Jäger and Mattner Cases that restrictions on the movement of capital included domestic tax measures which have the effect of reducing the value of an inheritance or gift of individuals not being tax resident of the State where the asset is located. Thus, a regulation of an EU member State constitutes a restriction on the free movement of capital, when the application of an allowance to the tax base is conditioned on residence status within that member State.

[849] As a result of the ECJ decision of 3 September 2014, Spanish legislation was revised in 2015 to conform with the ruling. In particular, it was added the second Additional Provision into the Spanish Inheritance and Gift Law, Law n. 29/1987. According to this addition, an option to EU and EEA tax residents was provided in order to allow access to either the national law or the rules in a relevant autonomous region. However, said amendment did not apply the same tax treatment to individuals or assets from third countries.

[850] Spanish Supreme Court sentence issued in February 19, 2018, n. 242/2018 whereby the revised provisions of IHT were struck down base on the grounds that they prevented a person resident in a third country to benefit from regional inheritance and gift tax allowances. In the particular case, a tax resident of Canada inherited real property located in the autonomous region of Catalonia. She filed the self-assessment related to inheritance and gift tax under Spanish national law. As a result, the inheritance tax liability amounted to EUR 308,547.34. Had she been able to file the self-assessment under the rules of the autonomous region of Catalonia, the tax would have been limited to EUR 189,525.91. She timely filed a claim for refund in the amount of EUR 119,021.43, the difference between the tax due under Spanish national law and the tax due under the regional rules in Catalonia. The tax for the Canadian tax resident was almost 60% greater than the tax for an EU or Spanish resident of the Catalonian autonomous region.

Court sentence[851] which is of great relevance, since it rose to the level of binding jurisprudence, provided that two sentences from the Spanish Supreme Court tackling the same issue were enacted.

Hence, it established the tax treatment to be provided to resident in third countries as regards Spanish inheritance and gift tax, even beyond that the wording included in the Spanish domestic tax rules. In addition, TEAC[852], together with the Spanish tax authorities, through replies to binding rulings by DGT[853], have confirmed the Spanish Supreme Court's position[854]. Thus, it is considered as discriminatory against the freedom of capital any restriction included in domestic rules dealing with inheritance and gift taxes and residents in third countries.

It has been a successful case in which the ECJ has paved the way to Spanish Courts in order to correctly apply the freedom of capital when involving tax resident in third Sates. However, the challenge is to ascertain whether it is limited to the application of this particular domestic tax or can be extended to similar taxes, when the circumstances and/or the EU freedoms are the same or similar.

5.3.1.2. Open question: Spanish Wealth tax

In contrast to the Spanish Supreme Court sentence endorsing the line of reasoning against the discrimination on residents in third countries and the freedom of capital, in the context of Spanish inheritance and gift law, the Spanish Tribunal of the autonomous region of Madrid[855] issued a ruling whereby the opposite conclusion was

[851] Spanish Supreme Court sentence issued in March 22, 2018, n. 491/2018.
[852] TEAC Decision n. 0/02652/2016/00/00, issued in September 16, 2019.
[853] DGT replies to binding consultations: V3151-18, issued in December 11, 2018; V3193-18, issued in December 14, 2018; V1256-19 issued in June 3, 2019; V1517-19 issued in June 24, 2019; V2113-19 issued in August 12, 2019; V3060-19 issued in November 30, 2019 and V3180-19, issued in November 15, 2019.
[854] The Spanish Supreme Court has enacted a judgement in July 16, 2020 (Sentence 1016/2020) whereby the above-mentioned ECJ sentence of September 3, 2014 is not enough to consider by itself as null and void any act. However, it entails that an tax liquidation issued by the authorities not allowing for the application of the reliefs to residents in third countries, and confirmed by the taxpayer, may be revoked based on the grounds of the mentioned ECJ sentence, without the timing limitations granted to the tax claims.
[855] Madrid Province Court ruling issued in December 23, 2019, n. 1248/2019.

reached, in the field of Spanish wealth tax[856] and the related potential discrimination against residents in third countries.

The key point of the regional Court decision resides on the fact that it refers to the above mentioned ECJ ruling of "Spanish Inheritance and Gift Case". The latter addressed only issues linked to those specific Spanish taxes versus the appeal of the taxpayer in the Madrid Regional Court case was referred to the wealth tax. In this sense, the Madrid Regional Court did not extend the effects of the EU jurisprudence into a different tax, such as the wealth tax[857].

It is important to note, even though the ECJ "Spanish Inheritance and Gift Case" tackled only the mentioned taxes, the Spanish tax authorities, as a result of the mentioned ECJ ruling amended not only the Spanish Inheritance and Gift Law, but also the Spanish wealth tax[858], in order to allow EU and EEA tax residents benefit from regional allowances.

In this regard, a relevant part of the Madrid Regional Court decision was referred to the option of applying retroactively the Spanish wealth tax amendment, to the particular case dealt with an Irish national, tax resident in Spain for 2014 purposes. Therefore, the statement of the facts was more important than the conclusion, since the right to appeal for tax resident in third countries as regards Spanish wealth tax remained open a that point in time. However, the wealth tax benefits available to Spanish/EU/EEA tax residents have been expanded to tax residents in a country not being a member of the EU[859]. Hence, there is no longer room for EU discrimination based on the freedom of capital.

In any case, this tax matter has not been solved from the Spanish Supreme Court, yet. Thus, there exist chances to bring the case to the ECJ in order to analyze the potential restriction on the freedom of capital, when applying the Spanish wealth tax to tax residents in third countries.

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[856] Spanish wealth tax is regulated in the Spanish Law 19/1991, even though the taxing rights and the final determination of taxable base, rates, and allowances are established at regional level, equal to the Spanish Inheritance and Gift tax law.

[857] This line of reasoning was based on the grounds of the rejection of the analogy under the Spanish tax system, article 14 of the Spanish General Tax Act "*The analogy will not be permitted in order to further extend the scope of the taxable event, exemptions and other tax benefits or allowances*".

[858] In the particular case of the Spanish Wealth Tax, the same law, Law 26/2014, which enacted the additional provision of Spanish Inheritance and Gift tax law, was used to incorporate a new fourth additional provision, into the Spanish Wealth Tax Law.

[859] They have been incorporated into the Spanish Wealth tax Law, as from July 11, 2021, through the Law 11/2021.

From the entertainers and sportspersons perspective, the key EU freedom is the one dealing with the provision of services, in order to enable the deduction of expenses, whilst the primary improvements from the Spanish Courts when applying the ECJ jurisprudence has been linked to the freedom of capital and its application also to third countries[860].

5.3.1.3. Spanish Court cases tackling EU discriminations and entertainers and sportspersons

As a general rule, when focusing on the taxation of entertainers and sportspersons, leaving aside the image rights tax issue[861], no reference is carried out by the Spanish Courts to the previous EU jurisprudence issued by the ECJ.

There is one main exception, the resolution issued by the Spanish TEAC issued in September 11, 2017[862]. It analyzed into detail the ECJ ruling of PKF Scorpio, Gerritse and Asscher in connection with the deduction of expenses, when foreign entertainers obtain income through Spanish performances[863].

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[860] There are other cases involving the EU Commission against Spain. However, they exceed the scope of this EU analysis more focused in the field of entertainers and sportspersons. The most relevant ones are the following:

- ECJ ruling Commission v. Spain, ("Capital gains Case"), C-219-03, issued in December 9, 2004;
- ECJ ruling Commission v. Spain, ("Pension funds Case"), C-47-05, issued in January 18, 2007;
- ECJ ruling Commission v. Spain, ("R&D Case"), C-248-06, issued in March 13, 2008;
- ECJ ruling Commission v. Spain, ("Lottery winnings Case"), C-153-08, issued in October 6, 2009;
- ECJ ruling Commission v. Spain, ("Dividends Case"), C-487-08, issued in June 3, 2010;
- ECJ ruling Commission v. Spain, ("Exit taxation Individual Case"), C-269-09, issued in July 12, 2012;
- ECJ ruling Commission v. Spain, ("Exit taxation Company Case"), C-64-11, issued in April 25, 2013;
- ECJ ruling Commission v. Spain, ("Fiscal representative Case"), C-678/11, issued in December 11, 2014.

Also, the Spanish Supreme Court rulings issued in November 13, 2019, n. 3023/2018 and in November 14, 2019, n. 1344/2018, whereby the taxation of dividends distributed to investments funds from third countries in accordance with the Spanish NRITA was considered to be discriminatory against the freedom of capital. The novelty resided on the fact that the Spanish Supreme Court considered that there was no need to bring the case into the ECJ in order to ascertain said discrimination.

[861] In Messi´s Case, the sentence issued by the Barcelona Province's Court in July 5, 2016, in its page 27 included the reasoning of taxpayer, with the aim at supporting the use of intermediate companies with no substance, based on the grounds of the EU freedom of capital, since his tax planning involved a UK company (EU member State at that time). See further, paragraph 4.1.6.5.

[862] Rec. 969/2014.

[863] In particular, the amendment included in the Law 2/2010, issued in March 1, 2010, amending the Spanish Non-resident Income Tax Law for the purposes of adapting it into the EU Law, as well as implementing certain EU Directives. Its goal was to "(…) *favor the free movement of workers, free*

This particular case dealt with the taxation in Spain of music and circus performances carried out by companies located in Belgium, United Kingdom and US. The services that were provided by those companies consisted of entertainment performances, as well as technical services, such as lighting, sound, recording and tickets management[864].

The taxpayer claimed application of the Spanish sourced withholding tax, but limited to the performance's income, as opposed to any other income related to production services and, subsidiarity, the computation of the taxable base on net basis[865].

The tax authorities, firstly in the tax audit and subsequently, in the reasoning to defend their position at administrative court level (TEAC) focused primarily on the fact that all income was considered to be essential to carry out the concerts or performances, being an embedded element of the performances.

As regards the computation of the non-resident taxable base of the entertainers on gross versus net basis, the taxpayer reasoning when defending before the TEAC was based on the application of ECJ rulings of FKP Scorpio, Gerritse and Asscher.

In this regard, the State attorney (representing the Spanish tax authorities), as a counter-party, upheld the opposite view of TEAC in previous cases. It consisted of applying to Spanish withholding tax to all income paid by Spanish entities to non-residents by referring to the express wording of the NRITA[866] and to the fact that there is no restriction to do so, in the applicable double tax treaties. In this particular case, the tax treaties to be applied were the one concluded between UK-Spain Double tax treaty[867] and US-Spain Double tax treaty[868].

The pivotal issue was to determine the deduction of costs connected to the income obtained by the UK entertainment company in Spanish territory, once the withholding

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provision of services and the movement of capital, in accordance with the EU Law". In addition, the Preamble of said Law established that "*it lays down special rules to determine the taxable base corresponding to income obtain without permanent establishment by other EU taxpayers*".

[864] The allocation and apportionment consequences arising from TEAC have been already dealt with in paragraph 3.3.4.

[865] In fact, it was accepted by the Spanish tax inspector, as regards one of the companies, NV T Belgium. Unfortunately, there is no more information or guidance in relation to the underlying reasons whereby it was accepted in the particular case of the Belgian entity, as opposed to the remaining EU entertainment companies. It must be noted that the tax audit procedure remains private, with no access to the public, as a general rule. It was another argument held by the taxpayer at TEAC level, by referring to the same underlying and unknown reasons why the Spanish tax authorities accepted not to include under withholding tax rules the income obtained by the Belgian company.

[866] Article 31 of NRITA.

[867] Dated in October 21, 1975.

[868] Dated in February 22, 1990.

tax was already carried out by the payor. In fact, the Spanish TEAC analyzed into detail the taxpayer´s appeal to the ECJ jurisprudence. However, the TEAC interpretation must be ascertained whether it was in line with the conclusions reached in the above-mentioned ECJ rulings.

As a starting point the Spanish TEAC stated that as a general rule the withholding tax is accepted as valid means to tax the income obtained by non-residents in the source country[869]. The position of the ECJ accepted restriction to the freedom in relation to the provision of service, based on the effectiveness of the tax collection.

The most contested position held by TEAC resided on concluding that not allowing the deduction of expenses by EU non-resident entertainers was not against EU free provision of services, insofar the overall analysis of comparable scenarios takes into account that the tax rate applicable to tax residents was higher to the one applicable on non-residents.

For the purposes of endorsing said position, the TEAC referred to *Schumacker Case* and *Gerritse Case*. In particular paragraphs 43 and 44 were incorporated in the Spanish TEAC's resolution. Nonetheless, it is important to highlight the *Gerritse Case* was the landmark ECJ case whereby the computation of the net income was accepted, even though the most part of the income was not obtained in the source Sate (*Schumacker Case*).

In order to interpret correctly the ECJ position as regards the deduction of expenses, TEAC had to continue reading *Gerritse Case*. In particular, its paragraphs 53 and 54.

"53 That means that, with regard to the progressivity rule, non-residents and residents are in a comparable situation, so that application to the former of a higher rate of income tax than that applicable to the latter and to taxpayers who are assimilated to them would constitute indirect discrimination prohibited by Community law, in particular by Article 60 of the Treaty (see, by analogy, Asscher, paragraph 49).

54 It is for the referring court to verify, in this case, whether the 25% tax rate applied to Mr Gerritse's income is higher than that which would follow from application of the progressive table. In order to compare comparable situations, it is necessary in that

[869] It expressly refers to paragraph 36 of PKF Scorpio Case, paragraph 39 of Football Club Feyenoord Case and Truck Center Case.

respect, as the Commission has rightly pointed out, *to add to the net income received by the person concerned in Germany an amount corresponding to the tax-free allowance. According to the Commission, which carried out that calculation, application of the progressive table, in a case such as that at issue in the main proceedings, would lead to a rate of tax of 26.5%, which is higher than that actually applied."* (Emphasis added by the author).

In the author's opinion, the conclusion is clear-cut after reading these above-mentioned paragraphs. However, Spanish TEAC incorrectly tried to apply the conclusions reached out of the entertainment and sport context via the *Truck Center Case*. Furthermore, the TEAC did not take into account the more favorable position held by the ECJ the *Bouanich Case* which upheld the use of lower rates in order to offset the no deduction of expenses, outside the context of entertainers and sportspersons.

Moreover, there are two additional arguments for the purposes of defending the opposite view to the one held by the Spanish TEAC.

On the one hand, the taxation of Spanish companies as regards the tax periods under audit, namely from 2008 to 2010, was of 35%, whilst the NIRTA tax rate was of 25%. However, at this point in time the domestic company's tax rate is of 25%, having an option to pay 15% during the two first periods in which positive income is obtained[870]. Therefore, there are no longer grounds to main such a lower rate mentioned in the TEAC's ruling[871].

On the other hand, the Spanish TEAC again refers to *Gerritse Case* with the aim at supporting its mistaken position. In particular, it includes part of paragraph 55 of the mentioned ECJ ruling:

"(…) However, those articles of the Treaty do not preclude that same provision in so far as, as a general rule, it subjects the income of non-residents to a definitive tax at the uniform rate of 25%, deducted at source, whilst the income of residents is taxed according to a progressive table including a tax-free allowance, provided that the rate

[870] Article 29.1 of the Spanish CITA.

[871] It expressly refers to it "*As it was concluded by the ECJ in that ruling, in the current case the tax technique of taxing the income of non-resident companies different to tax resident companies, do not lead to a discrimination or disadvantage whatsoever, based on the fact that the withholding tax (which turns into a final tax in the scenario of non-residents carrying out activities in Spain without permanent establishment) is very lower that the tax on income obtained by resident companies*."

of 25% is not higher than that which would actually be applied to the person concerned, in accordance with the progressive table, in respect of net income increased by an amount corresponding to the tax-free allowance." (Emphasis added by the author).

It is very strange that the Spanish administrative body reached this conclusion in relation to entertainers and sportspersons. In this regard, Spanish TEAC considered that the performances of this group of professionals are characterized by a high level of expenses when providing their services. Therefore, the analysis entails that it is not applicable the above-mentioned conclusions, since the taxable rate applicable tax rate to non-residents is of 24% (gross income), as a general rule, and 19% to residents in EU member States versus 25% tax rate applicable to Spanish tax resident companies[872] and/or the progressive scale of 15% to 45% applicable to Spanish tax resident individuals, intertwined with the determination on a net basis.

As regards the effective tax rate on non-residents when the deduction of expenses is not allowed can reach up to 80-90% of the total income[873]. Therefore, it is not consistent the position held by TEAC whereby that the lower tax rate applicable to non-residents offsets the policy of no deducting the expenses.

Furthermore, the TEAC's resolution stated that in case of accepting the deduction of expenses by non-residents, a reverse discrimination may take place, by providing a better tax rate for them than the one applicable tax residents, in accordance with the applicable tax treaties. Again, this TEAC statement is incorrect in the case of entertainers and sportspersons, since Article 17 OECD Model does not include any reduction or limitation through the applicable tax treaty. Moreover, TEAC's resolution included an express mention to rental income, instead of entertainment income, which can be caused by accident or by copying from other previous TEAC resolutions[874],

[872] In this sense, Almudí Cid, J.M., *supra* n. 825, pp. 18. Moreover, Almudí Cid, J.M., La fiscalidad directa del turismo residencial y su cuestionable compatibilidad con el Derecho comunitario originario, *Revista Técnica Tributaria*, n. 77, 2007, pp. 33-36.

[873] A thorough analysis about the deduction of (production) expenses in the entertainment arena was carried out by Molenaar, D., Supra n. 32. In particular, pages 199-226. This author concluded that the average of expenses is of 75%.

[874] In particular, in the introduction/summary of this TEAC's resolution, it is established that the TEAC resolution of September 11, 2017 consists of reiterated criteria of TEAC resolution issued in May 7, 2015, n. 225/2014, TEAC resolutions issued in March 30, 2012, n. 2839/2010 and n. 2508/2009. Also, TEAC resolution issued in October 25, 2012, n. 3442/2009.These TEAC resolutions were addressed to the issue of the applicable deduction of expenses in the context of taxation of international bareboat charter.

without taking into account that those conclusions cannot applicable *mutatis mutandis* to all items of income arising from double tax treaty scenarios, without analysing the particular circumstances of each of them.

Accordingly, the author's position consists of analyzing three intertwined circumstances, in order to find out whether or not the non-resident and resident entertainers and sportspersons (as well as other items of income) are in comparable circumstances:

- The nominal tax rate applicable to both.
- The effective tax rate, by taking into account computation on gross basis versus net income.
- Whether and to what extent there are limits established at tax treaty level, when determining the tax rate on non-residents.

Once, these three circumstances are duly ascertained, the comparability analysis in order to determine the existence of discrimination against EU freedoms can be accomplished.

Therefore, throughout the reasoning included in above paragraphs, the TEAC's position issued as regards the deduction of expenses by EU companies obtaining entertainment income in Spanish territory was completely inaccurate and inconsistent with ECJ jurisprudence, namely *Gerritse, FKP Scorpio and Centro Equestre Cases*[875].

The final paragraphs and pages of these TEAC resolutions are totally equal to the one issued by the same administrative court in September 11, 2017, even though the latter was referred to the entertainment field.

Moreover, there exist other examples whereby the ECJ rulings are scrutinized by the TEAC, such as the one issued in October 25, 2012, n. 3442/2009. In this particular case, referred to the application of dividend withholding taxes to non-residents.

[875] In this regard, ECJ ruling *Ulrich Schröder v Finanzamt Hameln*, ("Schröder Case"), C-450/09, issued in March 31, 2011. Even though it dealt with expenses in connection to the freedom of movement of capital and inheritance and gift taxes, its paragraph 40 encompassed a summary as regards the deduction of expenses in direct taxes. "*However, the Court has held, in relation to expenses, such as business expenses which are directly linked to an activity which has generated taxable income in a Member State, that residents and non-residents of that State are in a comparable situation, with the result that legislation of that State which denies non-residents, in matters of taxation, the right to deduct such expenses, while, on the other hand, allowing residents to do so, risks operating mainly to the detriment of nationals of other Member States and therefore constitutes indirect discrimination on grounds of nationality (see Gerritse, paragraphs 27 and 28; Case C-346/04 Conijn [2006] ECR I-6137, paragraph 20; Case C-290/04 FKP Scorpio Konzertproduktionen [2006] ECR I-9461, paragraph 49; Case C-345/04 Centro Equestre da Lezíria Grande [2007] ECR I-1425, paragraph 23; Case C-11/07 Eckelkamp and Others [2008] ECR I-6845, paragraph 50; and Case C-43/07 Arens-Sikken [2008] ECR I-6887, paragraph 44)*."

5.3.2. Potential EU discriminations within Spanish domestic tax law

5.3.2.1. Spanish Non-Resident Income Tax: Deduction of expenses

Fortunately, the Spanish tax authorities' practice does not follow, as a general rule, the above-mentioned TEAC's position. Although there are no replies to binding rulings, issued by the Spanish DGT, they proceed with the tax refund arising from the difference between computing the taxable base on a gross basis, versus net basis, insofar correct documented evidences are provided.

In this regard, the withholding tax carried out by the Spanish payor, in most of the cases, the entertainment event organizer, can be established either at 24%, as a general rule or 19% in those cases that the recipient provides for a tax residency certificate proving the mentioned tax residency in an EU member State[876].
There exists a general tax rule applicable to EU non-residents[877] whereby the deduction of expenses is permitted. In particular, the income obtained by EU tax

[876] Article 25.1ª NRITA. For clarification purposes, all NRITA references to EU member States must be interpreted by also included the countries of the European Economic Area (EEA), such as Liechtenstein, Iceland and Norway.

[877] Article 24.6 NRITA. This tax rule, targeted to EU tax residents, is the response from the Spanish authorities from the formal request issued by the European Commission in October 16, 2008 through the substantiated opinion n. IP/08/1533 in the context of an infringement procedure, which urged for the amendment if the tax rules applicable to non-residents obtaining income in Spanish territory on a gross basis. The addition of the new paragraph 6 into article 24 entered into force in March 1, 2010.
It is worth noting that there is another specific tax rule in the Spanish NRITA, in its article 24.2 (in connection with Article 5 of NRITR) tailored targeted to the provision of services, technical assistance, installation or assembly works related to engineering contracts and, in general, to all economic exploitations or activities, without having a permanent establishment. Said tax rules provides for the deduction of a qualifying group of expenses. In particular:
- Direct personnel costs, such as social security contributions, salaries and wages, insofar said personnel is directly employed in the Spanish economic activity and withholding taxes have been applied in the mentioned salaries and wages.
- Cost of materials incorporated in the works performed in Spain.
- Other supplies consumed in the Spanish territory related to the activity carried out there, as long as those supplies are not eligible of stocking.
In this regard, Juarez, A., in *supra* n. 218, pp. 651. This author understands that Article 24.2 of NRITA (as well as Article 5 NRITR) is the only tax rule applicable to EU entertainers and sportspersons in relation to Spanish sourced income, as opposed to the more encompassing rule of Article 24.6 of NRITA. Therefore, a limited group of expenses are suitable to be carried out, by misinterpreting the ECJ landmark cases in this regard, such as Gerritse, PKF Scorpio and Centro Equestre.
By taking into account the dates in which the Spanish domestic tax rules dealing with the deduction of expenses entered into force, it is clarified that the applicable rule to entertainers and sportspersons (as well as other non-resident taxpayers) is the most widen one, Article 24.6 NRITA. This tax rule was incorporated into the NRITA in March 3, 2010, through the Law 2/2010 which was aimed at implement certain EU Directives in the indirect tax arena and to adapt the Spanish NRITA to EU Law. As opposed to

residents in Spanish territory, without having a permanent territory there. Hence, entertainers and sportspersons are also encompassed under the consequences of this tax rule.

To this end, an all-encompassing referral is performed to the deductions included in the tax law applicable to Spanish tax resident individuals and companies, insofar the non-resident taxpayer gives evidence that the expenses are directly linked to the income obtained in Spain. Additionally, said expenses must have a direct and inseparable connection to the activity carried out in Spain. In the particular case of entertainers and sportspersons, they must be linked to the performances carried out in Spain.

Therefore, two main underlying ideas exist as regards the deduction of expenses by non-residents under the Spanish tax system. On the one hand, only direct expenses linked to Spanish activities, as per the ECJ doctrine settled in *Centro Equestre Case*[878], are permitted to be deducted. On the other hand, in those cases, it applies the Spanish rules of the determination of taxable base, available for individuals (PITA) and companies (CITA), as long as the previous mentioned rule is respected.

Finally, it is paramount to determine the potential EU freedoms involved in the particular case of the international taxation of entertainers and sportspersons.

Article 24.2 of the NRITA which was included in the original text of the NRITA enacted in March 5, 2004 through the Royal Legislative Decree 5/2004, which approved the consolidated text of the NRITA.
Therefore, Article 24.2 NRITA did not take into account all ECJ Cases determining the scoped of the deduction of expenses by obvious reasons, whilst the addition in Article 24.6 NRITA did adapt it in accordance with the ECJ requirements. Accordingly, the Spanish determination of taxable for entertainers and sportspersons (among other taxpayers) complies with the ECJ requirements established in the above-mentioned ECJ landmark rulings.

[878] As regards the deduction of direct expenses, it is also important the Schöder Case, *"(…) whether Articles 18 TFEU and 63 TFEU must be interpreted as precluding legislation of a Member State which, while allowing a resident taxpayer to deduct annuities paid to a relative who transferred to him immovable property situated in the territory of that State from the rental income generated by that property, does not allow such a deduction to be made by a non-resident taxpayer.*"
It tackles the analysis of what expenditures (annuity payment) is considered direct link to the activity. In particular, paragraph 42 of said ECJ ruling states that "*the fact remains that the existence of a direct link within the meaning of the case-law cited in paragraph 40 of the present judgment results, not from a correlation, of whatever kind, between the amount of the expenditure in question and that of the taxable income, <u>but from the fact that that expenditure is inextricably linked to the activity which gives rise to that income</u> (see, in that regard, Centro Equestre da Lezíria Grande, paragraph 25).*" Emphasis added by the author.

The closest reference to them was the above-mentioned substantiated opinion issued by the EU Commission in October 16, 2008[879] as regards the deduction of expenses by non-residents in Spain, included in the Spanish NRITA.

In said opinion, three EU freedoms were referred to. In particular, freedom of movement of capital, free provision of services, free movement of persons/workers. However, it expressly referred to *Asscher Case* which dealt with the freedom of establishment.

In this sense, the freedom of establishment differs from the provision of services since the former involves the willing of permanency and stability which lack the latter. The freedom to provide services is characterized by its temporary quality and not being stable. In line with this reasoning, the performances of entertainers and sportspersons are protected by the EU freedom of provision of services in most of the scenarios. However, the freedom of establishment might arise in those cases when the permanency throughout the performances take place, such as a circus established in a country with a permanent character.

Furthermore, the difference between the freedom of movement of capital and the free provision of services must be tackled. There are situations whereby both freedoms might co-exist. Nonetheless, it must be analyzed which EU freedom prevails over the other one[880]. The distinction is of essence since the freedom to provide services does

[879] The formal request issued by the European Commission in October 16, 2008 through the substantiated opinion n. IP/08/1533 in the context of an infringement procedure, which urged for the amendment if the tax rules applicable to non-residents obtaining income in Spanish territory on a gross basis. As a consequence, paragraph 6 was added into article 24 and entered into force in March 1, 2010.

[880] In this regard, ECJ ruling *Fidium Finanz AG v Bundesanstalt für Finanzdienstleistungsaufsicht* ("Fidium Finanz Case"). C-452/04, issued in October 3, 2006.

According to paragraphs 14 and 15 "*Fidium Finanz is a company incorporated under Swiss law which has its registered office and central administration in St Gallen (Switzerland). It grants credit of EUR 2 500 or EUR 3 500, at an actual rate of annual interest of 13.94%, to clients established abroad. According to the information provided by Fidium Finanz, approximately 90% of the credit which it grants is to persons resident in Germany*."

Therefore, it involves third States and the involvement of either the freedom to provide services vis a vis the freedom of movement of capital. In this sense, paragraph 22 "*By its question, the national court wishes to know whether granting credit on a commercial basis constitutes a provision of services and is covered by Article 49 EC et seq. and/or whether it falls within the scope of Article 56 EC et seq. governing the free movement of capital.*"

Moreover, paragraph 34 provides for an illustrative statement as regards the scenario of one EU freedom prevailing over the other one. "*Where a national measure relates to the freedom to provide services and the free movement of capital at the same time, it is necessary to consider to what extent the exercise of those fundamental liberties is affected and whether, in the circumstances of the main proceedings, one of those prevails over the other (see by analogy Case C-71/02 Kärner [2004] ECR I-3025, paragraph 47; Case C-36/02 Omega [2004] ECR I-9609, paragraph 27; an d the judgment of the EFTA*

not entail the relationship with third States, as opposed to the freedom of movement of capital[881] which, in its turn, it does.

As regards entertainers and sportspersons, the EU freedom to provide services prevails over the freedom of movement of capital. Accordingly, the latter cannot be invoked in order to ask for the same tax treatment to entertainers and sportspersons, being tax resident in third States than the one granted to Spanish tax residents or residents in EU member States.

In other words, an entertainer or sportsperson tax resident in a third country cannot invoke the ECJ jurisprudence tackling the deduction of expenses, since the scope of the freedom to provide services does not encompass relationship with third countries, as opposed to the freedom of movement of capital.

The tax consequences are of relevance in connection with the option to submit tax refunds to the Spanish tax authorities by non-residents. According to the EU freedom to provide services, only refunds articulated by tax residents within EU member States are eligible to this end[882]. In this sense, this limitation to apply the deduction of expenses for tax residents in third States entails a big impact to tax residents in United Kingdom[883], after the Brexit.

Court in Case E-1/00 State Management Debt Agency/Islandsbanki-FBA [2000] EFTA Court Report 2000-2001, p. 8, paragraph 32). The Court will in principle examine the measure in dispute in relation to only one of those two freedoms if it appears, in the circumstances of the case, that one of them is entirely secondary in relation to the other and may be considered together with it (see by analogy Case C-275/92 Schindler [1994] ECR I-1039, paragraph 22; Case C-390/99 Canal Satélite Digital [2002] ECR I-607, paragraph 31; Karner, paragraph 46; Omega, paragraph 26; and Case C-20/03 Burmanjer and Others [2005] ECR I-4133, paragraph 35)."

[881] Paragraph 50 of the mentioned ECJ Case includes a clear-cut conclusion in this regard. "*In the light of the above, the answer to the first question referred must be that national rules whereby a Member State makes the granting of credit on a commercial basis, on national territory, by a company established in a non-member country subject to prior authorisation, and which provide that such authorisation must be refused, in particular, if that company does not have its central administration or a branch in that territory, affect primarily the exercise of the freedom to provide services within the meaning of Article 49 EC et seq. A company established in a non-member country cannot rely on those provisions.*"

[882] See further, Martín Jiménez, A., *Impuestos Directos y Libertades Fundamentales del Tratado de Funcionamiento de la Unión Europea. Cuestiones fundamentales en la jurisprudencia de Tribunal de Justicia de la Unión Europea*, Chapter I: Situaciones tributarias internas y derecho de la UE: Nuevas perspectivas sobre la interpretación del TJUE. Eds. Martín, A., Carrasco, F.M., Thompson Reuters Aranzadi. EU Tax Law Jean Monnet Chair. 1st Edition. 2016. pp. 31-33.

[883] UK tax residents are considered as tax resident from third States. It is uncertain whether in the next future they would qualify from a special status by benefiting from the EU fiscal Directives or even to be part of the European Economic Area (EEA). Thus, relevant tax consequences have raised from Brexit as regards the taxation of the UK tax residents' entertainers and sportspersons, in terms of the effective tax rate, the determination of the taxable base, the potential application of the exit tax and the like.

5.3.2.2. Spanish Non-Resident Income Tax: WHT versus quarterly tax payments on tax residents

Pursuant to *Scorpio PKF Case*[884], it is far from any doubt that the withholding tax is a fully valid procedure to tax non-residents when obtaining income sourced in EU member States. However, issues involving liquidity/cash flow disadvantage may arise as a potential discrimination against the free provision of services[885].

As regards the Spanish tax system when tackling non-resident entertainers and sportspersons (as well as other taxpayers), the withholding tax might entail certain liquidity disadvantages versus the taxation of tax resident individuals and companies, since the latter is based on the final payment of income tax within the year subsequent to the one in which the income arises[886].

In order to achieve a comparable scenario where the income tax for residents and non-residents are in the same footing, payments on accounts for income tax purposes of residents' taxation are of essence. Nonetheless, it is relevant to ascertain whether there exist cash flow disadvantages which may lead to a discrimination against EU free provision of services.

In this regard, in the case of resident individual taxation, the payment on account amounts to 20% of the net income[887]. However, it does not arise the obligation to submit the quarterly tax payment in advance, when the percentage of income already subject to domestic withholding tax is of at least 70%[888]. Thus, there is little room to consider the existence of cash flow disadvantage within individual tax residents vis a vis individual non-tax residents obtaining income in Spain.

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[884] Paragraph 36 "*The procedure of retention at source and the liability rules supporting it constitute a legitimate and appropriate means of ensuring the tax treatment of the income of a person established outside the State of taxation and ensuring that the income concerned does not escape taxation in the State of residence and the State where the services are provided (…)*." Emphasis added by the author.

[885] See further, Gutman, D., *Taxation of Entertainers and Sportspersons Performing Abroad*. Chapter 3: The Influence of EU Law on the Design of Domestic Tax Law for Entertainers and Sportspersons. Edited by Prof. Guglielmo Maisto. EC and International Tax Law Series. Volume 13. IBFD. 2016, pp. 44-46.

[886] In particular the deadline for individual income tax purposes is of June 30 of the subsequent year where the income arises and for company income tax purposes up to July 25 of the subsequent year, too.

[887] In this regard, it is important to note that the income obtained by entertainers and sportspersons is subject to withholding tax, when the payor is another professional or company. Article 101.5.a PITA and Article 75 PITR. Moreover, the tax rules dealing with tax payments on account for individuals are included in Article 99.7 PITA and Articles 109 y 112 PITR.

[888] Article 109.3 PITR.

However, the scenario changes in the context of the withholding tax of non-resident companies versus Spanish resident companies. As regards the performance income as such, there is no obligation to withhold when obtained by tax resident companies[889], as opposed to non-resident companies which are subject to 19% gross income when being tax resident in an EU member State.

In its turn, the Spanish tax resident companies, whose activity is in the context of entertainment and sport activities, are subject to tax payments on account, under a system which enables two options. On the one hand, the first alternative, as a general rule, is based on the actual net income obtained in the previous fiscal year[890]. On the other hand, the alternative is to be actually subject to tax commensurate with the actual net income corresponding to the period elapsed when the payment on account takes place[891].

Therefore, again the ECJ rulings are the background which may enable to analyze whether a potential discrimination exist in the field of the withholding tax applicable to EU companies versus Spanish companies obtaining entertaining and sport income. This cash flow disadvantage, which may end up in discrimination, would be based on the grounds of the freedom to provide services within the European market.

The *Exit taxation Individual Case*[892] , in its paragraph 59 clearly states that "*However, it cannot be denied that the withdrawal of that advantage constitutes a clear disadvantage in terms of cash-flow. In this connection, the Court has repeatedly held that the exclusion of a cash-flow advantage in a cross-border situation where it is available in an equivalent domestic situation is a restriction on the freedom of establishment (…)*"[893].

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[889] Article 60 CIT). It establishes the non-application of withholding tax on income from professional or economic activities paid to companies, as opposed to income from rental and exploitation of image rights.

[890] Article 40.2 CITA.

[891] Article 40.3 CITA. As a general rule, it applies the first option, unless the taxpayer did have a turnover of EUR 6 million in the previous year or it voluntarily opts for the second method within the two first months of the fiscal year.

[892] See further, *Exit taxation Individual Case, supra n.* 859.

[893] It also encompasses the previous rulings from ECJ supporting this position. In particular, *"(…) see, to that effect, inter alia, Joined Cases C-397/98 and C-410/98 Metallgesellschaft and Others [2001] ECR I-1727, paragraphs 44, 54 and 76; Case C-436/00 X and Y [2002] ECR I-10829, paragraphs 36 to 38; Case C-446/03 Marks & Spencer [2005] ECR I-10837, paragraph 32; and Case C-347/04 Rewe Zentralfinanz [2007] ECR I-2647, paragraph 29)*." It is also of relevance the ECJ ruling *Kronos International Inc. v Finanzamt Leverkusen*, ("Kronos Case"), C-47/12, issued in September 11, 2014. Its paragraph 80 endorses the position held by the ECJ in the Exit taxation individual Case, but referred to

Although said restriction stated by the ECJ in the case of the Spanish exit tax applicable to individuals was referred to the freedom of establishment, the same conclusion can be reached for companies tackling entertainment and sport activities and being subject to gross withholding tax at the moment of payment, versus the tax resident companies which may opt from taxation on net income in relation to the payments on account.

In addition, no different treatment can be justified based on objective situations between residents and non-residents[894], since both are in similar scenarios as regards the taxation of the income arising from entertainment and sport activities[895]. Hence, the current withholding tax system applicable to non-resident companies in the field of entertainers and sportspersons (as well as other taxpayers) versus similar tax treatment granted to Spanish companies, ensuring the net computation of the income leads to a potential EU discrimination against the provision of services.

5.3.2.3. Triangular scenarios involving paragraphs 1 and 2 of Article 17 OECD Model

In the context of the application of double tax treaties, the two paragraphs of Article 17 OECD Model, are by themselves the best example of a tax device to be used for the purposes of combating "loan out" companies. The scope of this tax measure is to avoid foreign entertainers and sportspersons to avoid withholding taxes at source, by means of using an intermediate company.

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the freedom of capital. "*It is true that it follows from the Court's case-law that the exclusion of a cash-flow advantage in a cross-border situation where it is available in an equivalent domestic situation is a restriction on the free movement of capital (see, by analogy, judgment in Commission v Spain, C-269/09, EU:C:2012:439, paragraph 59 and the case-law cited)*."

[894] Again, the reference to *Exit taxation Individual Case* is crucial in order to endorse the position held in that ECJ tax ruling. In particular, its paragraph 40 "*As it is, that difference in treatment cannot be explained, in the present case, by an objective difference of situation. From the point of view of legislation of a Member State designed to tax realised income, the situation of a person transferring his residence to another Member State is similar to that of a person maintaining his residence in the former Member State, as regards the taxation of the income already realised in that Member State before the transfer of residence (see, by analogy, National Grid Indus, paragraph 38).*"

[895] As opposed to the field of dividends in the *Kronos Case*, where it was considered that tax residents and no-residents were not considered to be in the same footing, by the fact that the particular double tax treaty granted exemption to tax in relation to this item of income. In this regard, paragraph 82 of the mentioned ECJ ruling expressly states that "*The difference between those situations stems, first, from the fact that the Federal Republic of Germany, following the conclusion of double taxation conventions with other Member States and with third States, waived the exercise of its powers of taxation over the dividends distributed by companies resident in those States.*"

They expressly refer to the use of "another person". Thus, when dealing with cases involving EU resident taxpayers, Article 17.1 and 17.2 OECD Model may have an impact with the discriminations against EU freedoms. Needless to say, that measures only affect to non-residents, as opposed to resident taxpayers, since the nature of the tax treaties requires a foreign element to enter into force.

In this sense, the EU freedoms can be invoked whenever the application of paragraph 1 and 2 of Article 17 OECD may lead to different tax consequences in tax treaty scenarios[896] involving EU tax residents.

For instance, it is of special relevance the scenario whereby an entertainer/sportsperson is tax resident in a country outside the EU, but using a company for the purposes of the performances within the European Union[897].

The consequences would be different, depending on which paragraph of Article 17 OECD becomes applicable. From the Spanish tax perspective, the tax consequences would be opposite in terms of deduction of expenses when determining the taxable income for EU tax resident entertainers and sportspersons.

By taking advantage of Article 17.1 OECD and in accordance with the applicable look-through domestic provision[898], the taxpayer would be an entertainer/sportsperson tax resident outside the EU. Therefore, no entitlement to benefit from the deduction of expenses, when determining the taxable base would be applicable. A total look-through approach of the EU company would be carried out.

Moreover, if the above-mentioned taxpayer had used a Spanish company, instead of the European one, the look-through approach would not have been applicable since no Article 17 clause mirroring to the one of the OECD Model would be applied, and, if so, no withholding tax would be existed.

Therefore, the anti-abuse character of Article 17 OECD Model via the application of the look through formula of its paragraph 1, in the particular case of the Spanish tax

[896] See further, Molenaar, D., *supra* n. 32, pp. 295-300. It should be noted that this author bases the EU discrimination on the grounds of the unlimited approach of Article 17.2 OECD Model.

[897] See further, Juarez, A., *supra* n. 461, pp. 409-419. This author carried out a thorough analysis of three potential scenarios involving EU and non-EU countries. Nonetheless, it must be taken into account that at the point in time when the tax article was published (2003) Spanish NRITA did not include the deduction of expenses in the context of EU tax residents.

[898] See further, paragraph 3.4.3. dealing with triangular scenarios and the potential existence of Spanish domestic look-through provision in order to implement Article 17.1 OECD Model.

system may lead to EU discrimination, involving three potential EU freedoms. In particular, freedom of movement of capital, freedom of establishment and freedom to provide services.

In practice, in the context of Spanish tax system, the EU discrimination as regards Article 17.2 OECD Model might also arise, since Spanish tax authorities in certain tax audits do prefer to apply Article 17.2 OECD Model by taxing the interposed company, whenever the entertainer of sportsperson is located in a non-transparent country. It may also involve scenarios of individual entertainers/sportspersons tax residents in EU countries qualifying for this lack of transparency.

The Spanish tax authorities do proceed via a pure factual approach, based on collection reasons, since tax rules supporting to undertake this approach do not exist. In those cases, in case of a company in a non-EU country would be subject to tax, by denying the determination of the income on net basis, even though the individual would be tax resident in an EU member State. Again, it would be otherwise available in case of applying correctly Article 17.1 OECD Model.

Thus, the anti-abuse approach undertaken by the Spanish tax authorities when tackling triangular scenarios in double tax treaty scenarios may lead to EU discriminations. They involve Spanish sourced income related to performances of entertainers and sportspersons, when companies are used by them, regardless of whether they are located within or outside the EU. They may arise since the anti-abuse nature of Article 17 OECD Model, regardless of the particular first two paragraphs applied leads to discrimination of EU tax residents as opposed to Spanish tax residents not being caught by the unlimited approach of Article 17 OECD Model.

On the one hand, when Article 17.1 OECD Model, intertwined with the domestic provision enabling for the look-through approach, an EU company established within the EU, receiving capital/income from Spain and providing for entertainment or sport services within the borders of the EU would be disregarded with all tax consequences.

On the other hand, when Article 17.2 OECD Model does apply, the EU entertainer or sportsperson may be ignored by taxing the other person/intermediated company. Accordingly, in case of being the latter tax resident outside the EU, it would lead to an EU discrimination.

Therefore, the unlimited approach of Article 17 OECD Model, paragraphs 1 and 2, may lead to EU discriminations as regards the deduction of expenses, in the context of above-mentioned qualifying scenarios, by not respecting the freedom of establishment, freedom of movement of capital or freedom to provide services.

5.3.2.4. Spanish Personal Income Tax: Payment on account on image rights regime

When dealing with Spanish tax resident entertainers and sportspersons, Spanish PITA[899] includes an anti-avoidance tax measure, applicable to employed entertainers and sportspersons, regardless of the residency of the third person used for the tax planning structure. Accordingly, it applies to all companies, irrespective their tax residency. The main tax consequence is that the income exceeding the safe harbour rule of 85%-15% (employment income-image rights income) must qualify under a specific item of income known as "attributable income"[900].

It is a sort of fiscal transparency, similar to the Spanish controlled foreign corporations' tax rules. However, it differs from them, since it leads to an attribution of the income to the employed entertainer or sportsperson whose image rights are traded between the employer and a third person.

Therefore, there is a disregarding rule as regards the use of intermediated company. The key point is that it applies equally to resident and non-resident companies. Thus, it cannot lead to an EU discrimination scenario. However, it might encompass a discrimination against EU companies in terms of the payment on account applicable[901] when the exploitation of the image rights of the employed person is carried out through a non-resident company, including those tax resident within the EU[902]. Also, the final

[899] Article 92 PITA.

[900] See further the tax consequences arising from the tailored tax regime applicable to image rights-employees in paragraph 4.1.6.3.

[901] Article 92.8 of the PITA establishes that whenever the attribution of income arising from image rights applies, the Spanish entity which is the employer of the taxpayer whose image rights are exploited must carry out a payment on account commensurate with the payments in Exchange for those image rights.

[902] It should be remarked that Spanish Supreme Court rejected to refer the ECJ a case involving this Spanish tax rule tackling the attribution of income arising from image rights of employees. Spanish Supreme Court Ruling issued in April 16, 2012, n. 2659/2008, Suker Case. It did not tackle the potential mentioned discrimination as regards the payments on account arising from this regime when involving non-resident companies.
See further in this regard, Juarez, A., *supra* n. 218, pp. 646-651.

attribution to the taxpayer is higher in terms of taxable income[903], when the company exploiting the image rights is tax resident outside Spanish territory.

In any case, the unlimited approach when establishing the payment on account, does not respect the requirement to apply this counteracting tax rule only to abusive scenarios, by ensuring that said tax rules is in line with the principle of legal certainty. All this, in accordance with the jurisprudence of the ECJ, such as the SIAT Case[904].

5.3.2.5. Spanish PITA / CITA: Quarterly tax payments

Another domestic tax field where potential EU discriminations may arise is the advance tax payments carried out by Spanish tax resident individuals and companies, when part of their activity is performed worldwide, including EU member States.

In this sense, Article 17 OECD Model entitles for the taxation at source, in other words, where the taxation takes place.[905] Subsequently, Spain a as tax residency country of the sportsperson or the entertainer holds taxing rights over their worldwide income, too.

To this end, the double tax relief measures included either at tax treaty level[906] or domestic tax legislation[907] must apply, in order to achieve of the main target when singing a double tax treaty, to avoid double taxation in international scenarios.

From a practical perspective, all income regardless of its origin must be taken into account when either submitting the quarterly tax returns by individual independent

[903] Due to the implementation of a gross-up rule when determining the taxable base, in accordance with Article 92.3 of PITA.

[904] ECJ ruling *Société d'investissement pour l'agriculture tropicale SA (SIAT) v. État belge* ("SIAT Case"), C-318/10, issued in July 5, 2012. In particular, paragraphs 58 and 59 "*Such a rule does not, therefore, meet the requirements of the principle of legal certainty, in accordance with which rules of law must be clear, precise and predictable as regards their effects, in particular where they may have unfavourable consequences for individuals and undertakings (see, to that effect, Case C-17/03 VEMW and Others [2005] ECR I-4983, paragraph 80, and Joined Cases C-72/10 and C-77/10 Costa and Cifone [2012] ECR, paragraph 74)." "As it is, a rule which does not meet the requirements of the principle of legal certainty cannot be considered to be proportionate to the objectives pursued.*" See further in this respect, paragraph 5.4.

[905] Cobos Gómez, J.M., Fiscalidad Internacional de deportistas residentes en España: Pronunciamientos recientes de la Dirección General de Tributos. *Magazine Sports & Entertainment*. Garrigues. March 2019, pp. 6-8.

[906] As a general rule, tax treaties mirroring the OECD Model include the double tax relief measures in Article 23. It can be accomplished by applying the imputation or the exemption methods, depending on the particular applicable tax treaty at hand, in accordance with the tax policy of the involved countries.

[907] Article 80 PITA (imputation system) for individuals. Articles 31 CITA (economical double taxation relief- imputation system) and Article 21 CITA (economical double taxation relief-exemption method) for companies.

sportspersons/entertainers[908] or the payments on account in those cases that they carry out the performances by using a Spanish company[909].

However, in accordance with Spanish PITA and CITA, withholding taxes carried out in the country of performance, based on the distribution of taxing rights established in Article 17 OECD Model, are not permitted to take into account for the purposes of the mentioned advance tax payments.

In the particular case of Spanish individual independent entertainers and sportspersons (as well as other independent taxpayers), there exist the option of not carry out said quarterly tax payment when 70% of the income has been subject to withholding tax[910]. Nonetheless, the withholding taxes applied in a foreign country are not encompassed for the computation of the potential exemption not to submit the quarterly tax return[911].

It is clear-cut that when the income is obtained from performances in EU countries, the fact that they cannot be taken into consideration for the purposes of determining the Spanish domestic advance tax payments, as well as the potential exemption to submit them, leads to an EU discrimination versus the withholding taxes applied in pure domestic scenarios.

According to the Spanish position in their respective PITA and CITA, it is only permitted to take into consideration foreign withholding taxes at the time the final and annual income tax (either at individual or company level) are submitted, in order to relieve the international double taxation applied on the field of entertainers and sportspersons.

Furthermore, it must also note that the reasoning as regards the discrimination arising from cash-flow disadvantages within the European Union is tantamount applicable to this particular scenario, when withholding taxes applies in EU countries are carried out and not permitted to take into account for Spanish income tax payments in advance. Therefore, discrimination against EU freedoms is considered to exist, since the applicable tax rules are different, depending on whether the entertainer and sport services are performed, within Spain versus the European Union.

[908] Article 99.7 PITA and Articles 109 y 112 PITR, including the rules dealing with quarterly tax payments.
[909] Article 40 CITA includes the rule tackling corporate tax payments on account.
[910] See further paragraph 5.3.2.2. quarterly tax payments on tax resident individuals.
[911] See further Spanish reply to the binding consultation V0079-19, issued in January 14, 2019. It has confirmed the criterion that it has been applied in practice by the Spanish tax authorities for personal income tax purposes. It consists of only permitting the deduction of the withholding taxes performed by Spanish taxpayers, for the purposes of either determine the taxable base of the 70% threshold, related to the option of not submitting the quarterly tax payment.

5.4. Abusive scenarios and the impact on the international entertainers and sportspersons arena

5.4.1 Introduction

EU member States must apply the treaty clauses included under Article 17 OECD Model, in accordance with the characteristics of the autonomous concept of abuse of law [912] designed by the European Court of Justice, through diverse rulings and subsequently implemented by the national courts.

Throughout the next paragraphs, the author tries to highlight the main aspects of abuse in the EU context, linked with the services rendered by entertainers and sportspersons. Domestic and tax treaty anti-abuse clauses allowed by Article 17 OECD Model have to fulfil the requirements established by ECJ, in order to be compatible with EU fundamental freedoms. In any case, Article 17 OECD Model, intertwined with domestic look through provisions cannot diminish the meaning of EU fundamental freedoms.

5.4.2. Article 17- Justification based on risk Tax Avoidance and Abuse of Law

Among other reasons, tax authorities may appeal to the justification of risk of tax avoidance[913], which can lead to EU discrimination, when domestic and/or tax treaty provisions involves unequal tax treatment granted to residents and non-residents entertainers and sportspersons.

It could be proved the existence of discrimination or restriction in respect of anti-abuse provisions, such as Article 17 OECD Model, because the non-resident taxpayer is subject to a different tax treatment, when the income is accrued by another person.

[912] In accordance with the *International Tax Glossary*, IBFD, Third Edition, pp. 1, abuse of law is the "*Doctrine used in a number of Western European civil law countries, which is broadly equivalent to the substance over form doctrine found in Anglo-Saxon systems. (…) Invariably, the doctrine is only applied where a degree of a tax avoidance or evasion is involved (…).*"

[913] See further, Pinto Nogueira, J.F., *Impuestos Directos y Libertades Fundamentales del Tratado de Funcionamiento de la Unión Europea. Cuestiones fundamentales en la jurisprudencia de Tribunal de Justicia de la Unión Europea*. Chapter VI: Justificaciones y proporcionalidad. Los dos últimos tramos en la jurisprudencia del TJUE en materia de compatibilidad de normas tributarias internas sobre fiscalidad directa con las libertades fundamentales, Eds: Martín, A., Carrasco, F.M., Thompson Reuters Aranzadi. EU Tax Law Jean Monnet Chair. 1st Edition. 2016. pp. 274-288. It deals with the risk of tax avoidance as means of justification, among others reasons, to accept discriminations within the context of EU freedoms.

Nonetheless, there is still room for justifying said provisions, insofar a real risk of tax avoidance is invoked.

In the concrete case of Article 17 OECD Model and EU freedoms, tax avoidance would consist of using intermediate companies for the purposes of escaping from the taxation in the source country.

The actual existence of tax avoidance needs to be analysed subservient to the concept of abuse[914] in the EU context. When the abuse is met, anti-avoidance tax rules may be applied. Thus, it is necessary to summarize the main characteristics of abuse and the relationship with tax avoidance, through the rulings enacted by the European Court of Justice.

In fact, there is no a specific definition within EU terms of abuse or tax avoidance Thus, each ECJ ruling takes into account the particular circumstances involving it, by helping to try to build up a concept abuse throughout various rulings applicable to the field and the underlying rationale surrounding it.

The starting point was stated through the ECJ ruling of Avoir Fiscal[915]. The ECJ did not accept the tax avoidance as valid means of justification for the discriminatory treatment before EU fundamental freedoms[916].

Although the justification was not accepted in this particular case, it could be used as valid means of justification in different scenarios. Therefore, its validity *in abstracto* must be concluded from *Avoir Fiscal Case*[917].

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[914] See further, Terra, B.J.M., Wattel, P.J, *supra* n. 794, pp. 84. According to them, abuse situations exist when the following elements are met:
1. The structure is designed to get a benefit, which was not aimed to encompass these situations. In other words, the advantage is achieved by means of artifice. (Subjective element). It is regarded as artificial or frivolous since the undertaking located in the country of establishment does not carry out any economic activity.
2. The application of the EC Law as a result of an artificial operation it is at odds to object and purpose of the EC law. (Objective element).

[915] ECJ ruling *Commission of the European Communities v French Republic*, ("Avoir Fiscal Case"), C-270/83, issued in January 28, 1986.

[916] The French tax legislation did grant tax credit only to persons who have their habitual residence or registered office in France. Thus, the discrimination against branches and agencies registered in other Member States was scrutinized. In this regard, the statement included in this ECJ ruling was clear-cut. In particular, paragraph 25 included: "*The risk of tax avoidance cannot be relied upon in this context*". Also, the Opinion of Advocate General Mancini, issued in October 16, 1985, reinforced the ECJ position held in this ruling. Paragraph 8 stated that "(…) *That argument is without foundation. The Commission has persuasively shown that far from involving a reduction in tax revenue from French State, the hypothesis advanced by the French Government would result in an increase in the tax burden on foreign companies*".

It is also significant to point out another ECJ ruling, *Centros Case*[918] dealing with a non-tax scenario. It consisted of the registration in UK of a company set up by Danish individuals, looking for circumventing the strict Danish rules about minimum capital contribution. The ECJ held that a member State does not have the right to refuse registration of a company formed in accordance with the law of another EU member State in which it has its registered office.

The main point is that registration has to be granted, even in cases when the company does not engage in any activity in the Member State of incorporation[919]. Besides, the only purpose is to carry on its business completely, on the other Member State in which the branch is registered (the same member State of the nationals who set up the company). Apart from the consequences in the field of company law[920], this ruling meant a completely change in the conception of abuse of law[921].

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[917]Terra, B.J.M., Wattel, P.J, *supra* n. 794, pp. 77-78, this author considers that tax avoidance has been recognized "in abstracto" in this particular ECJ Case. In a parallel way, Pistone, P., *The impact of Community Law on Tax Treaties*. Issues and Solutions. Eucotax. Kluwer Law International. 2002, pp. 104-106. This author stated that the tax avoidance risk was not accepted in this particular case, since the Commission excluded the existence of such a risk.

[918] ECJ ruling *Commission of Centros Ltd v Erhvervs- og Selskabsstyrelsen*, ("Centros Case "), C-212/97, issued in March 9, 1999.

[919] In particular, paragraphs 26 and 27 of Centros Case state that *"(...) The provisions of the Treaty on freedom of establishment are intended specifically to enable companies formed in accordance with the law of a Member State and having their registered office, central administration or principal place of business within the Community to pursue activities in other Member States through an agency, branch or subsidiary". "That being so, the fact that a national of a Member State who wishes to set up a company chooses to form it in the Member State whose rules of company law seem to him the least restrictive and to set up branches in other Member States cannot, in itself, constitute an abuse of right of establishment. The right to form a company in accordance with the law of a Member State and to set up branches in other Member States is inherent in the exercise, in a single market, of the freedom of establishment guaranteed by the Treaty".*

[920] Eicker, K. and Nakhai, K., Analysis of the agreement on the Statute for a European Company. *ITPJ,* July-August 2001, pp. 95-102. Garcimartín Alférez, F.J. "La sentencia Centros: el status questionis un año después". *Noticias de la Unión Europea*, 2001, (195), pp. 79-95.

[921] The change introduced by the *Centros Case* can be understood from different points of view. Firstly, due to the succession of rulings, *Centros Case* was released subsequently to other ECJ judgements. Therefore, there was a breach in respect of the traditional way of understanding the existence of abuse of law. This ECJ judgement overruled an amalgam of decisions, which required the freedom of establishment to be connected with the existence of a real activity in the EU member State in which this freedom was alleged. Conversely, other tax commentators considered that the existence of abuse, albeit the existence of the Centros case. They confirmed their position through other ECJ non-tax cases. Among others, Terra, B.J.M., Wattel, P.J, *supra* n. 794, pp. 82-83.

Moreover, said ECJ ruling has to be connected with judgements held by the ECJ regarding tax law issues. In particular *Eurowings Case* [922] , *ICI Case* [923] , *Metallgeselschaft Case*[924] and *Leur Bloem Case*[925].

The *Eurowings Case* supported the previous mentioned reasoning handed down by the ECJ in the *Centros judgement*. It states that inside the European Union the competitiveness among member States is fair, since there is no harmonization in the field of direct taxation. Any EU member State cannot invoke the risk of tax avoidance, due to reduced taxes in certain EU member States[926]. The result of the combination between this ECJ judgement and Centros ruling is the option of using different tax advantages offered by EU member States to companies. These can be established in any member State, even in cases in which the real activity is carried out in the State in which the tax rates are higher, in comparison with the State of establishment[927].

In this respect, the ECJ held the position in the *ICI Case* that in order to accept tax avoidance as a justification for EU discrimination, it has to prevent situations of "***wholly artificial arrangements***"[928]. Under the concrete circumstances of the case, it was stated the necessity to prove that the structure of the holding and its subsidiaries were aimed at circumventing tax legislation. However, based on the particular facts of the case, it was concluded that there was no direct risk of tax avoidance, where most of the subsidiaries were established outside the UK[929].

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[922] ECJ ruling *Eurowings Luftverkehrs AG v Finanzamt Dortmund-Unna*, Case C-294/97, ("Eurowings Case") issued in October 26, 1999.

[923] ECJ ruling *Imperial Chemical Industries plc (ICI) v Kenneth Hall Colmer* (Her Majesty's Inspector of Taxes), Case C-264/96, ("ICI Case") issued in July 16, 1998.

[924] ECJ ruling Metallgesellschaft Ltd and Others (C-397/98), Hoechst AG and Hoechst (UK) Ltd (C-410/98) v Commissioners of Inland Revenue and HM Attorney General. Joined Cases C-397/98 and C-410/98, issued in March 8, 2001.

[925] ECJ ruling A. Leur-Bloem v Inspecteur der Belastingdienst/Ondernemingen Amsterdam 2, Case C-28/95, ("Leur-Bloem Cases") issued in July 17, 1997.

[926] In its paragraph 44 stated*: "Any tax advantage resulting for providers of services from the low taxation to which they are subject in the Member State in which they are established cannot be used by another Member State to justify less favourable treatment in tax matters given to the recipients of services established in the latter State".* (Emphasis added by the author).

[927] The tax avoidance risk is not applicable to the field of low tax regimes, because they drive from disparities among EU member States and they do not lead to discrimination. The problematic issue resides in the possibility of exercising the right of establishment, according to *Centros Case*'s reasoning.

[928] Paragraph 26 of *ICI Case*: "*As regards the justification based on the risk of tax avoidance, suffice it to note that the legislation at issue in the main proceedings does not have the specific purpose of preventing wholly artificial arrangements, set up to circumvent UK tax legislation, from attracting tax benefits, but applies generally to all situations in which the majority of a group's subsidiaries are established, for whatever reason, outside the United Kingdom. However the establishment of a company outside the United Kingdom does not, of itself, necessarily entail tax avoidance (....*)".

[929] Paragraph 27 of *ICI Case*: "*Furthermore, the risk of charges being transferred, which the legislation at issue is designed to prevent, is entirely independent of whether or not the majority of subsidiaries are*

Furthermore, in the *Metallgeselschaft Case*, the ECJ reiterated its view about the absence of tax avoidance, where those subsidiaries or branches were situated outside the country, by granting the relief, irrespective of the effective tax rate imposed[930].

The key issue is to what extent it can be drawn a line between artificiality and tax planning, in the context of substantial economic activity?[931]. The ECJ did clarify in its judgments the boundaries between legal tax planning and abuse of tax law, based on the unduly use of fundamental EU freedoms.

In fact, the ECJ enacted its conclusions about this pivotal issue, in the limited field of the anti-abuse clause included in the EU Merger directive, specifically the *Leur-Bloem Case*[932]. In light of the wording of this ECJ case, the validity of the designed tax structure could be based solely on the aim to achieve a tax reduction or to attain the circumvention of restricted domestic tax rules[933].

By regarding taxation of entertainers and sportspeople, the allowance of implementing measures intended to counteract tax avoidance must be related to counteract devices designed by these taxpayers, having the target of escaping from the taxation in the source country.

Nonetheless, in accordance with above mentioned ECJ judgements, tax planning aimed at taking advantage of lower rates is feasible under EU Law. In other words, the

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resident in the United Kingdom. The existence of only one non-resident subsidiary is enough to create the risk invoked by the United Kingdom Government". Furthermore, the opinion of Advocate general Tersauro, paragraph 29, "*I find it difficult to reconcile the need to prevent tax evasion in order to preserve the cohesion of the tax system with the fact that consortium relief is granted whenever only a minority of companies is resident outside the United Kingdom*".

[930] Paragraph 57 "*As regards the risk of tax avoidance, the court has already held that the establishment of a company outside the United Kingdom does not itself, necessarily entail tax avoidance, since the company will in any event be subject to the tax legislation of the State of establishment*" (ICI paragraph 26).

[931] In connection with the circumstances under which the criterion of artificiality can be ascertained. Institute for Fiscal Studies. Tax avoidance. *Tax Law Review Committee.* London.1997. pp. 2-7.

[932] See further Leur-Bloem Case, *supra* n. 924.

[933] Its most clarifying paragraphs of this ruling are the following:

Paragraph 51 of the Leur-Bloem Case *"(...) A merger or a restructuring carried out in the form of an exchange of shares involving a newly created holding company which does not therefore have any business may be regarded as having carried out for valid commercial reasons. Similarly, such reasons may render necessary the legal restructuring of companies, which already form an entity from the economic and financial point of view. Even if this may constitute evidence of tax evasion or tax avoidance, it is nevertheless possible that a merger by exchange of shares with the aim of creating a specific structure for a limited period of time and not on a permanent basis may have valid commercial reasons*". (Emphasis added by the author). Also, in its paragraph 56: "*It is clear from the wording and aims of article 11, as it is from those of the Directive, that "valid commercial reasons" is a concept involving more than the attainment of purely fiscal advantage. A merger by way of exchange of shares having only such aim cannot therefore constitute valid commercial reason within the meaning of that article*".

so-called “jurisdiction shopping” is permitted. In the particular case of Article 17 OECD Model, “loan-out companies” have to be disregarded, only in case of wholly artificial arrangements. In contrast, when the structure is totally valid under economic point of view, the “pierce the veil” cannot be applied[934]. In particular, when entertainers or sportspeople are exercising EU fundamental freedoms, in order to allocate their income in other member States, different to the source country.

Therefore, the approach of Article 17 OECD Model does not fulfil the requirement of counteracting tax avoidance, only when situations involving artificial arrangements are ascertained to exist. From this perspective, the anti-abuse clauses, such as Article 17 OECD Model, may restrict EU fundamental freedoms only when wholly artificial arrangements are do exist in the case at hand.

Furthermore, as regards the tax avoidance’s justification in the field of EU freedoms, the final issue to be tackled is the **proportionality test**. In respect of Article 17 OECD Model, it is referred to the clause included in paragraph 2, or domestic clauses permitted by the interpretation of paragraph 1 through the OECD Commentary on this Article[935].

The ECJ tackled this issue of the proportionality required to anti-avoidance measures for the purposes to be accepted as a justification to restriction of the EU fundamental freedoms, among others[936], in the above-mentioned *Leur-Bloem Case*[937].

[934] More considerations about the excessive extension of the wording and application of Article 17 OECD Model are held in respect of the analysis referred to the proportionality test.

[935] In particular, paragraph 11 of the Commentary on Article 17 OECD Model.

[936] As regards other ECJ rulings, the first clue about the proportionality principle in the ECJ was in the ECJ ruling *Robert Gerardus Coenen and Others v. Sociaaleconomische Raad*. (“Coenen Case”) C-39/75, issued in November 26, 1975. It was stated in the judgement that “*For these reasons it should be held that the provisions of the EEC Treaty, in particular Articles 59, 60 and 65, are to be interpreted as meaning that national legislation may not, through requiring residence in the territory, make impossible the supply of services by persons residing in another member-State, when less restrictive measures would be able to secure compliance with the professional [FN5] rules to which the supply of the services is subject in that territory*.”

[937] See further, Leur-Bloem Case, *supra* n. 931.

According to this particular ECJ ruling, it is not allowed to exclude situations of benefiting from tax advantages automatically[938]. This is a too broad interpretation of anti-abuse clauses[939].

In the entertainers and sportspeople context, it means that where profits of their performances are obtained through intermediate companies cannot be disregarded as a general rule. Thus, Article 17 OECD Model does not comply with the requirement of ascertaining the presence of tax avoidance in the particular scenario[940]. Thus, the specific anti-abuse clauses addressed to entertainers and sportspeople do not adopt the requested less restringing approach to affect EU fundamental freedoms[941].

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[938] According to the Leur Bloem Case, paragraph 50:"(...) *in order to determine whether the planned operation has such an objective, the competent national authorities cannot confine themselves to applying predetermined general criteria but must subject each particular case to a general examination* (...)" (Emphasis added by the author).

[939] A closer look at the general anti-abuse clause was carried out by Weber, D., A closer look at the general anti-abuse clause in the Parent-Subsidiary Directive and the Merger Directive, *EC Tax Review*, Volume 5, Issue 2 (1996) pp. 63-69. This author pointed out the necessity of checking the verification of risk of tax avoidance in a per case basis.

[940] The analysis concerning article 17 OCDE Model have similarities with the acceptance in the EU context of the domestic Controlled Foreign Corporation Rules. See further, paragraph 4.1.5.2.

However, Spanish CFC Rules which are only applicable to resident taxpayers, with subsidiaries are located in qualifying low tax jurisdictions. However, both sets of tax rules must be applied in situations encompassing lack of real economic substance. Besides, the draft and scope of both tax measures are addressed to a general target group of taxpayers. Under the fundamental freedoms granted by the EU treaty, such a broad approach of combating abuse is inconceivable. Each case has to be subject to general examination, if not anti-abuse clauses cannot justify any restriction to EU fundamental freedoms, since the risk of tax avoidance could be tackled from a less restrict way. In this regard, OECD (2015), *Designing Effective Controlled Foreign Company Rules – Action 3: 2015 Final Report*, Primary Sources IBFD, pp. 17-20.

It provides for the relevant elements in order to draft the CFC rules by EU member States, in order to comply with the EU freedoms. In particular, to include a substance analysis. Apply those counteracting tax rules to both domestic and foreign subsidiaries. In doing so, the rulings issued by the ECJ in this field are of relevance. For example, ECJ ruling *Cadbury Schweppes Overseas Ltd v. Commissioners of Ireland Revenue*, ("Cadbury Case"), C-196/04, issued in September 12, 2006. Also, the ECJ ruling *Itelcar-Automóveis de Aluguer Lda v Fazenda Pública*, ("Itelcar Case"), C-282/12, issued in October 3, 2013. The OECD bottom-line conclusion is to apply the CFC rules in the context of EU freedoms as a restrictive tax measure whenever it specifically wholly artificially arrangements which do not reflect economic reality and the sole purpose of which is to avoid the tax that it would be payable otherwise. Also see further, Schön, W., CFC Legislation and European Community Law, *British Tax Review*, 2001, pp. 250-260.

[941] It is worth noting to highlight the existence of alternative modes to construct the anti-avoidance measures with regard to entertainers and sportspeople. A good example is the anti-abuse provision included in the Proposal for a Council Directive on a common system of taxation applicable to interest and royalty payments made between associated companies of different member States, (98/C 123/07), published in April 22, 1998, (Article 7).

This proposal of anti-abuse clause was a combination of the two previous Directives EU Council (2011), *EU Parent/Subsidiary Directive-Council Directive*, 2011/96/EU of November 30, 2011 and EU Council (1990), *Merger Directive-Council Directive*, 90/434/EEC, of July 23, 1990. Besides, it limited the application of the anti-avoidance measure insofar any of following requirements were met:

- When it is subject to tax at a rate which is lower than the rate which would be otherwise normally applicable to the same income in the other State, or

Article 17 OECD Model (both paragraphs) suits for not being accepted as an anti-avoidance tax measure, since as a general rule, it excludes the potential application of all tax benefits within EU countries[942] in which performance income is received via an intermediate company[943]. They are not restricted to apply only to abusive operations[944]. Thus, it does not meet the EU criterion of proportionality[945], consisting of an outright prohibition on the exercise of the freedom of establishment, and the freedom of movement of capital.

Besides, Article 17 OECD Model clause is drafted as *iuris et de iure* presumption[946], which is regarded as incompatible with EU Law, because it overcomes the necessity to achieve the goal (anti-abuse measure).

To sum up, Article 17 OECD Model falls outside admissible measures to combat tax avoidance devices, since does not respect the two cumulative primary requirements, to combat artificial arrangements and the proportionality test. Both of them are demanded to accept the tax avoidance risk as a justification to the restriction on EU fundamental freedoms.

- When it benefits from a reduction in the tax base which would not otherwise be available to companies situated in the other State.

It is worth noted that it was not finally implemented in EU Council (2003), *Directive on Interests and Royalties, Council Directiv*e, 2003/49/EC, of 3 June 2003.

[942] See further, Pistone, P., *supra* n. 916, pp. 204-205. This author's point of view is interesting and clarifying. He distinguishes twofold situations. On the one hand, when the entertainer resides in a tax haven, the abuse occurs frequently, so *lex specialis* is compatible with the principle of proportionality. On the other hand, when entertainers and sportspeople are not resident of a tax haven, there is a possibility to impose less restrictive measures.

[943] In accordance with Article 17 OECD Model, the "look through" approach is applicable to both type of companies, either resident of the source State or from abroad, but in any case, affecting to non-resident companies.

[944] See further, Molenaar, D., *supra* n. 32, pp. 298-300. This author refers to the unlimited approach when applying Article 17 OECD Model, but limited to its second paragraph.

[945] The anti-abuse clauses referred to entertainers and sportspeople do not comply with the principle of proportionality, which "*must be appropriate for securing the attainment of the objective it pursues and must not go beyond what is necessary to attain it*". See further ECJ Ruling *Commission of the European Communities v Kingdom of Belgium*, ("Commission/Kingdom of Belgium Case"), Case C-478/98, issued in September 26, 2000.

[946] Pistone,P*.,* Presunzione assolute, discrezionalità dell´amministrazione finanziaria e principio di proporcionalità in materia tributaria secondo la Corte di Giustizia, *Rivista di Diritto Tributario*, Parte III, 1998, pp. 77-91.

5.4.3. Abuse of Law - Danish Cases

5.4.3.1. Danish Cases

In order to tackle all relevant tax issues, connect to the abuse of law concept within the EU freedoms, it is important to analyze the landmark ECJ decision issued in February 26, 2019 Joined Cases[947], the so-called "Danish Cases":

Although they are not specifically referred to the entertainment context, the consequences of said ECJ decision are far reaching and, in practice, it can affect also to the application of Article 17 OECD Model when interacting with EU elements. For example, when non-EU bands organize its EU performances through an EU company/subsidiary. Apart from helping in looking for the appropriately application of the anti-abuse character of paragraphs 1 and 2 of Article 17 OECD Model, the ECJ doctrine laid down in ECJ Danish Cases can be also used for the purposes of legally avoiding the consequences of the EU abuse of law.

In this sense, up to five layers of different anti-abuse rules/doctrine are eligible to be invoked by the involved tax authorities against taxpayers, depending on the particular facts and circumstances. In particular:

- The OECD has included a general Anti-Abuse Rule (GAAR) through BEPS Action 6[948] on anti-treaty abuse, with the aim at addressing tax avoidance in the Multilateral Instrument (MLI)[949].

[947] ECJ rulings issued, in February 26, 2019, Case C-116/16 (T Denmark) and Case C-117/16 (Y Denmark), as regards the EU Royalty and Interest payments Directive. Also, ECJ rulings issued in February 26, 2019, Case C- 115/16 (N Luxembourg 1), Case C-118/16 (X Denmark), Case C-119/16 (C Denmark I) and Case C-299/16 (Z Denmark), in relation to the EU Parent/Subsidiary Directive.

[948] OECD (2015). *Action 6 Final Report 2015 – Preventing the Granting of Treaty Benefits in Appropriate Circumstances,* Primary Sources IBFD.

[949] Article 29.9 of OECD Model (2017): "*Notwithstanding the other provisions of this Convention, a benefit under this Convention shall not be granted in respect of an item of income or capital if it is reasonable to conclude, having regard to all relevant facts and circumstances, that obtaining that benefit was one of the principal purposes of any arrangement or transaction that resulted directly or indirectly in that benefit, unless it is established that granting that benefit in these circumstances would be in accordance with the object and purpose of the relevant provisions of this Convention.*" The so-called Principal Purpose Test includes a two-tier clause, of subjective and objective character, respectively. Furthermore, it also incorporates an escape clause. See further in this regard, Lang, M., The Signalling Function of Article 29(9) of the OECD Model – The "Principal Purpose Test", *Bulletin for International Taxation*, April-May 2020, pp. 264-268.

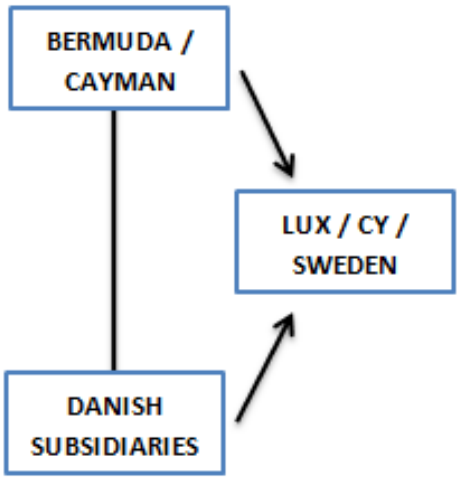
- At double tax treaty level, the GAAR with subjective approach, are established in Articles 10, 11 and 12 OECD Model[950]. They consist of a beneficial ownership clause test addressed to combat treaty shopping.

- At European level, there is no reference of abuse of law at EU Treaty level. However, the abuse of law concept is shaped in accordance with the ECJ judgements, in order to event circumventing tax effects by using artificial arrangements.

- In addition, in secondary EU law, such as the ATAD Directive, Parent/Sub Directive, Merger Directive, and Interest/Royalty Directive. The key point is that they are only applicable to corporate taxpayers and also they are compatible with domestic GAAR and Specific Anti- Abuse Rules (SAAR)[951].

- Domestic GAAR and SAAR rules with the corresponding application at domestic court levels.

Within this amalgam of potential tax tools to combat abuse of law, the ECJ Danish Cases were enacted by expanding the position held by the ECJ up to this judgement.



EU Case Law: February 26, 2019

T Danmark and Y Denmark Aps

C-116/16 & C-117/16 ("Dividend Cases")

N Luxembourg 1, X Denmark A/S,

C Danmark I and Z Denmark ApS,

C-115/16, C-118/16, C-119/16 & C-299/16 ("Interest Cases")

[950] *"The provisions of articles 10, 11 and 12 shall not apply if it was the main purpose or one of the main purposes of any person concerned with the creation or assignment of shares or other rights in respect of which dividends are paid, with the creation or assignment of debt-claim in respect of which the interest is paid and with the creation or assignment of rights in respect of which the royalties are paid to take advantage of these Articles by means of creation or assignment"*

[951] As regards ATAD, the emphasis is placed over the genuineness of the economic reality of the particular transaction, as opposed to the artificiality test of the ECJ.

In this six joined ECJ decisions, the beneficial ownership concept and the identification of abuse of law in the context of the Parent/Sub[952] and the Interest/Royalty Directives were analyzed into detail.

The key issue resided in determining the application of the exemptions included in above-mentioned EU Directives to Danish sourced dividends and interest, when distributed or paid to intermediate EU companies which, in they turn, were owned by non-EU shareholders.

Thus, by focusing in the beneficial ownership clause, the ECJ stated that in order to benefit from the application of the interest/dividend exemption, the beneficial owner must be able to freely determine the use of them and actually benefit from them, from an economical point of view.

The ECJ endorsed for an EU autonomous meaning of beneficial ownership, leaving aside the potential application of Article 3.2 of the OECD Model[953] in tax treaty scenarios, which enables the domestic interpretation of the undefined terms of the treaty[954]. It consists of a general principle, with no need to be included in the specific EU Directive or domestic law to be applied, in order to counter-balance the expansion of the EU freedoms.

The next concept which is deeply analyzed within the ECJ Danish Cases is the abuse of law, related to the use of artificial arrangements by the taxpayers. In this landmark case the key question was whether the exemptions granted under EU Directives can be denied on the grounds of abuse of law. There was a shift in the interpretation of the ECJ, from requesting the existence of an artificial arrangement with the essential aim of obtaining a tax advantage to a new test. The latter consists of requesting as being the

[952] With no beneficial ownership requirement included on the mentioned Directive.

[953] See further Schwarz, J., Beneficial ownership: CJEU Landmark ruling. *Kluwer International Tax Blog*. February 27, 2019. Wolters Kluwer. This author refers to the Canadian Case of *Prevost Car Inc v. The Queen*, 2008 TCC, 231 affd., 2009 FCA 57, in which the Tax Court of Canada relied on Article 3.2 of the OECD Model in order to determine the meaning of the term via domestic legislation.

[954] In addition, the ECJ referred to the position held by the OECD Model in the Commentaries when dealing with beneficial ownership concept. However, it mistakenly concluded that the beneficial ownership approach supported by ECJ follows the position of the OECD Model Commentary on Article 10. As opposed to the ECJ, the latter only excludes mere conduit companies (those which are bound by law or contract to retransfer dividends/interests/royalties) from beneficial ownership concept. However, there is room to maintain the ECJ's position, based on the grounds that changes of the meaning within the beneficial ownership in the OECD Model were carried out throughout the mentioned Commentary and, if so, it may lead to different and even opposite interpretations varying from country to country, depending on the position held by national courts. As regards the approach of beneficial ownership in national courts, see further Hattingh, J., The Relevance of BEPS Materials for Tax Treaty Interpretation, *Bulletin for International Taxation*, April-May 2020, pp. 179-196.

principal objective or one of the principal objectives of said arrangement to obtain the tax advantage.

Once this new expanded test was settled, the ECJ provide for guidance as regards when abuse of law is met, based on the existence of artificial arrangements. In other words, it must exist a lack of economic justification or substance[955] at the level of the companies, trying to apply tax benefits. In this regard, the ECJ points out several factors giving evidence of the absence of actual economic activity, such as insignificant taxable profit, levels of staffing, premises and equipment, management of the company, balance sheet, costs and expenses, funds passed shortly after they are received. All mentioned factors regardless of the existence of a contract, whether there is a right "in substance" to use the dividends, beneficial ownership clause in a non-EU country and the like[956].

Therefore, the tax authorities, as it happened with the Danish tax authorities in the ECJ case at hand, have another counter-acting tax weapon to combat abuse of law. The point is that said ECJ's position is surrounded by additional GAAR measures which may interact by entailing potential opposite views.

Nonetheless, the main conclusion applicable to entertainers, as well as other taxpayers is twofold. On the one hand, whether the ECJ will confirm the position held in Danish cases with the following ECJ judgments, as opposed to other previous decisions[957]. On the other hand, whether this ECJ landmark decision, have expanded the concepts of beneficial ownership and abuse of law within the EU context, by affecting the national court's decisions to come. Hence, entertainers using intermediate companies must be aware of the fact that the abuse of law concept may be invoke in order to restrict the application of treaty shopping, not inly where mere artificial arrangements are considered to exist. Again, the tax certainty when tackling legal tax planning scenarios would be difficult to ascertain, due to the 5 layers of anti-avoidance measures at the disposal to the tax authorities in EU member States.

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[955] See further Martins, A., An Accounting and Financial Note about the Economic Substance Test, *EC Tax Review* 2020-5, pp. 250-256

[956] See further, De Broe, L. and Gommers, S., Danish Dynamite: The 26 February 2019 CJEU Judgments in the Danish Beneficial Ownership Cases, *EC Tax Review* 2019-6, pp. 270-299.

[957] In connection with the position held by the ECJ as opposed to Danish cases, see further Kuzniacki, B., The ECJ as a Protector of Tax Optimization via Holding Companies. *Intertax*, Volume 47, Issue 3, pp- 312-323. This author analyzed the ECJ ruling *Eqiom SAS, formerly Holcim France SAS and Enka SA v Ministre des Finances et des Comptes publics*, ("Equiom Case"), C-6/16, issued in September 7, 2017. It confirmed the criterion of limiting the abuse of law to scenarios involving wholly artificial arrangements which do not reflect economic reality. Furthermore, it did not accept the shift of the burden of proof of abuse from the tax authorities to the taxpayer.

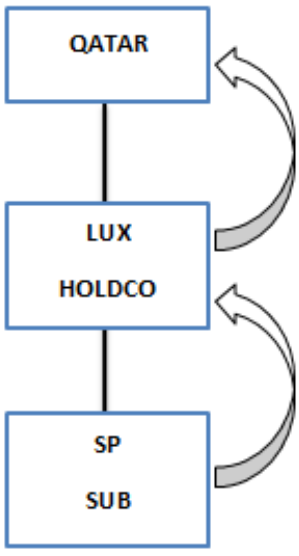
5.4.3.2. Post-Danish Cases

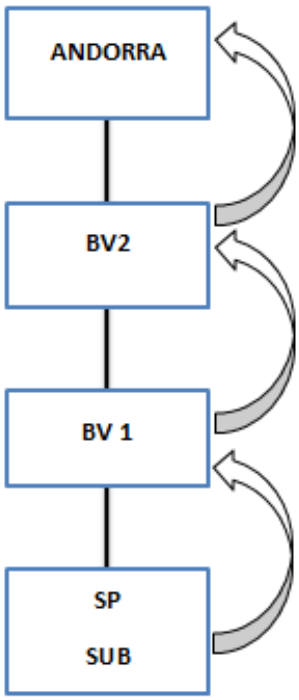
Some light can be shed as regard above mentioned second issue, since the domestic courts have already released judgements taking advantage of Danish Cases.

All of them have a common factor, since they involved international group structures and flow of funds from EU subsidiaries to EU parent companies, in which the ultimate beneficial owner are tax residents in third countries.

As a starting point, Spanish TEAC issued a couple of resolutions[958] dealing with the payment of Spanish-sourced dividends and interests to EU intermediate companies. Those TEAC resolutions were released in light of previous ECJ abuse of law's doctrine. In particular, TEAC resolution n. 2188/2017 denied the application of withholding tax exemption on dividend payments to a Luxembourgish intermediate parent owned by a Qatari Entity, in accordance with the ECJ position in Danish Cases.

TEAR 2188/2017	TEAC 185/2017





[958] TEAC n. 2188/2017 and n. 185/2017, dated in October 8, 2019.

In accordance with previous adopted position of the Spanish administrative court, there was no need to apply the specific Spanish GAAR's procedure[959] when determining the existence of abuse. The taxpayer was compelled to justify the existence of valid economic reasons or substance in order not to deny the exemption of dividends on the grounds of beneficial owner's concept and the abuse of law as a general principle of EU Law. Accordingly, TEAC considered that it was not enough to use an intermediate company as a regional investment platform, in which Spanish investing represented less than 50% of the total portfolio in different jurisdictions and it held substantial level of income for other investments, apart from Spanish assets[960].

On the contrary, the key factors that the Spanish TEAC took into account were that legal domicile of the Luxembourgish company was at an external service provider, the directors of the intermediate company were employees of the same service provider, not having any additional company's own employee. Furthermore, the intermediate company was not considered to be the beneficial owner since Spanish sourced dividends were passed onto the Qatari Entity on a yearly basis. TEAC did not take into consideration the fact that no correlation existed between the Spanish sourced distribution of dividends and the subsequent repayment of debt/distribution of dividends by the Luxembourgish entity to the Qatari shareholder[961]. Also, financing of the Luxembourg company by way of convertible certificates (CPECs) was qualified as a 'non-formal but actual dividend payment' to its Qatari parent company.

Thus, the Luxembourgish holding company was considered not to qualify the beneficial owner of the dividends and, hence, it was not entitled to the dividend exemption based on the Spanish implementation of the EU Parent/Subsidiary Directive. All this reasoning was based on the grounds of the abuse of law doctrine stated by the ECJ in Danish Cases. However, Spanish TEAC did not take into account that substance

[959] It is important to note that Spanish statutory General Anti-Avoidance Rules existing since 1963 ("Fraus Legis") and 2003 "Step transaction Doctrine" looking for the avoidance of taxable event has been repeatedly unapplied in practice by the Spanish Courts. It was based on fact that both entail complicated procedures and preclude for criminal charges. In its turn, the Spanish Courts have relied on the "avoidance of the anti-avoidance provision" by applying the "sham transaction doctrine" whereby in case of not existing valid commercial reasons, the intermediate companies were completely disregard, even if no statutory provision allowed to do so. In addition, it permitted to tackle and impose penalties from a criminal perspective, too.

[960] In TEAC decision n. 185/2017 it was more evidence the lack of real economic activity of the Dutch companies, since the repayment of interest income from the Spanish subsidiary to each respective parent company were carried out in close dates as mere conduit companies.

[961] The same outcome was applied by the Spanish TEAC in both decisions, even though the factual scenarios were totally different. In one scenario the interest payment between the Dutch intermediate companies and the final shareholder in Andorra took place in close dates and involved same amounts as opposed to the above-described Qatari-Luxembourg's scenario.

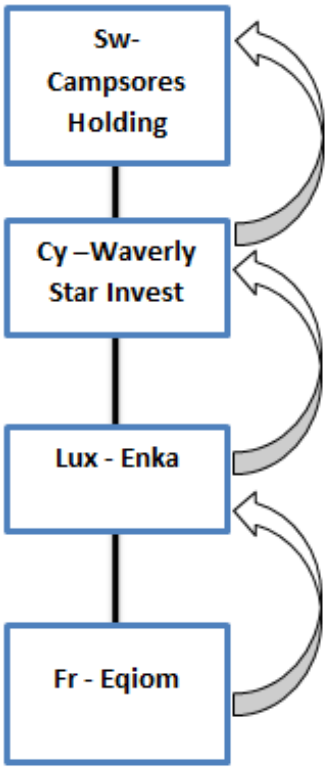
requirements in holding companies must be commensurate with the specific activity carried out by them (act as a shareholder of operating subsidiaries which provides for receiving dividends and capital gains in order to finance other group activities/investments), in accordance with ECJ *Eqiom Case*[962].

However, as regards the *Eqiom Case,* at domestic level, the French Conseil d'Etat released[963] its decisions as regards the implementation of the previous released ECJ *Eqiom Case* and the related eligibility for the withholding tax exemption on French sourced dividends under the Parent-Subsidiary Directive.

Nonetheless, the ECJ Danish Cases also had a major impact in this final domestic French court decision. This particular case involved a French subsidiary (Eqiom) distributing to the Luxembourgish parent (Enka) receiving the dividends in a Swiss bank account, which in tis turn, was owned by a Cypriot company (Waverly Star Investment Ltd.) and finally an ultimate parent company (Campsores Holding S.A.).

CONSEIL d' ETAT

June 5, 2020



[962] See further, *Eqiom Case*, *supra* n. 956.
[963] Conseil d'Etat decisions n. 423810, 423811, 423809, 423810 and 423812, issued in June 5, 2020.

The French law implementing the Parent/Sub Directive prescribes that the withholding tax exemption applies provided that the EU recipient is the beneficial owner of the dividends. Further, it disallows said exemption if the mentioned EU recipient is directly or indirectly controlled by one or more shareholders in third countries, unless the taxpayer proves that the principal purpose or one of the principal purposes of the structure was not to benefit from the withholding tax exemption[964].

In this sense, the Conseil d'Etat confirmed the position of French tax authorities and tribunals[965] whereby the beneficial ownership requirement can be the key element to enable the application of the withholding tax exemption on French dividends. The relevance of this decision is the confirmation from the French court's perspective that ECJ *Danish Cases* overruled the previous ECJ position held in ECJ *Eqiom Case*. Thus, the final Conseil d'Etat decision departed completely from the ECJ arguments held in ECJ *Eqiom Case*, leaving aside the criterion of only referring to artificial arrangements and shifting the burden of proof to the taxpayer.

Also, other relevant domestic court cases were issued in various countries such as Switzerland[966], Italy[967], The Netherlands[968] or Argentina[969] which confirmed the implementation by national Courts of the ECJ Danish Cases' doctrine. The point is that the position arising from ECJ *Danish Cases* have led to tax consequences even outside of the European Union member States.

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[964] It resembles to the GAAR included in Article 6 of ATAD and Article 7 of the MLI.

[965] Administrative Court of Montreuil issued in April 28, 2011 and the Administrative Court of Appeal in Versailles which confirmed the dismissal of the appeal.

[966] Swiss Federal Court Decision issued in April 20, 2020, n. 2c_354/2018 involving the denial of a dividend withholding tax refund based on the grounds of the Swiss-EU Savings Agreement. The Swiss Supreme Court upheld its decision in the fact that the share-transfer arrangement was aimed at becoming eligible for applying the tax benefit, by expressly referring to ECJ Danish Cases and the related abusive restructuring. Contrary to the above-mentioned French Supreme Court Decision, the Swiss Supreme Court did not conclude the anti-abuse clause of the Parent/Sub Directive was subject to a beneficial ownership limitation. See further in this regard, Danon, R., and Malek, B., Swiss Supreme Court Refers to the CJEU "Danish cases" in Outbound Dividend Case Involving the Swiss-EU Savings Agreement. *Kluwer International Tax Blog*. July 23, 2020. Wolters Kluwer.

[967] Italian Supreme Court Decision n. 14.756 issued in July 10, 2020, which shed some light into the beneficial ownership requirement under the Interest and Royalties Directive, related to the context of ECJ Danish Cases. It did make express reference to the condition of the beneficial ownership as general anti-avoidance principle.

[968] Dutch Supreme Court ruling issued in January 10, 2020, n. 18/00219, (ECLI:NL:HR:2020:21). Furthermore, Dutch Supreme Court joined cases n. 19/862 and n. 19/879, enacted in June 26, 2020. These joined cases were interpreted in a positive way, by accepting the highest Dutch Court that the taxpayer was able to counter proof sufficient activity, in order to avoid the consequences arising from the abuse of law's doctrine arising from EU viewpoint.

[969] Argentine Supreme Court decision *Molinos Rio de la Plata SA v. Dirección General Impositiva*, CAF 1351/2014/CA1–CS1, issued in September 2, 2021.

Therefore, in the field of entertainers and sportspersons, the conclusion about the ECJ is that although the abuse of law concept has been expanded via ECJ Danish cases in connection with the corresponding implementation by national Courts, Article 17 OECD Model's force of attraction goes even further by not permitting the use of an interposed company, by no means. The unlimited approach endorsed at treaty level, encompasses any payment of entertainment or sport character under the force of attraction of Article 17 OECD Model, regardless of being artificial or under the abuse of law concept.

In addition, when paragraph 1 of Article 17 OECD Model becomes applicable by enabling the anti-abuse domestic provisions, it leads to the source State to decide to what extent the use of look-through rules is permitted and the goal targeted with them. Thus, a diversity of look-through rules must be taken into consideration by the entertainers and sportspersons depending on where the performance takes place. Furthermore, the respect by each EU member State to the ECJ interpretation of abuse of law and, in particular, the one established in Danish cases, needs to be ascertained on a country per country basis[970].

[970] See further in this regard, Gutmann, D., *supra* n. 884, pp. 34-35.

CHAPTER 6 - CONCLUSIONS

6.1. General Introduction

According to the thorough analysis carried out in this PhD work the primary conclusions reached as to whether the current draft of Article 17 OECD Model appropriated deals with the taxation of international entertainers and sportspersons, two main positions are adopted.

On the one hand, the scope of Article 17 OECD must be determined from its objective approach with the aim at avoiding past shortcomings arising from a pure subjective approach. In this sense, the core item playing the central role is the entertainment element. On the other hand, the application of the force of attraction of Article 17 OECD Model to any item of income obtained by those professionals are unjustified and leads to problems of over taxation.

To this end, this PhD research work devotes most of the analysis to the above-mentioned primary goals for the purposes of reshaping Article 17 OECD Model into a useful international taxa tool able to tackle the taxation of entertainment income.

6.2. Conclusions related to historical path

The first step is to find out why all previous amendments included in old tax treaties, as well as prior versions of OECD Model were introduced. By doing so, it helps to better understand the current draft of Article 17 OECD Model and the existing pros and cons arising from the targets looked for through all mentioned amendments.

In this regard, the initial trials whereby Article 17 OECD Model in its old versions was tried to be included in bilateral tax treaties, gives evidences of the difficulties in implementing such an exceptional tax measure. In particular, 1945/46 tax treaty between United States and United Kingdom, as well as 1951 tax treaty concluded between United States and Canada. Those specific tailored-made conventional rules applicable to entertainers and sportspersons were subsequently deleted. Accordingly, the first step further taken was the 1959 OEEC, which was the forerunner, providing for

a separated treaty article and the related specific tax treatment to artists and sportsmen with the taxation at source State.

1987 OECD Report was another remarkable event in terms of confirming and expanding the tax policy about taxation of entertainers and sportspersons where the performance takes place, as opposed to other taxpayers who/which be only taxable at source country where a permanent establishment was considered to exist. All the main positions were established and later on implemented in 1992 OECD Model version of Article 17. In particular, the definitions of artists and sportsman, what was considered to qualify as personal activities, relationship to other OECD items of income, the determination of the taxable base in accordance with gross basis, and the broad scope of second paragraph of Article 17, which was previously implemented in 1977 version.

Since those dates, the main shortcomings arising when applying Article 17 OECD Model still exists. It is also true that OECD endeavoured to improve said OECD Model Article, mainly through 2010 Discussion Draft and subsequently 2014 OECD Report and Update Commentary. Nonetheless, only minor positive effects were included, as it was the optional application of *de minimis* rule. Therefore, the risk of over or double taxation based on current draft of OECD Commentary on Article 17 and tax treaty article itself still exists.

Thus, the proposals of improvement encompassed in this PhD research work are included within this context and their goal is to overcome the difficulties when applying Article 17 OECD Model based on previous experiences arising either at domestic or tax treaty level.

It is also important to note that the position endorsed by the author when tackling the interpretation of the OECD Commentary in general terms. In this sense, the dynamic interpretation whereby the later versions of the Commentary can be used to interpret previous tax treaties may jeopardize the term of the agreement between the parties at the time of the signature. In the particular context of entertainers and sportspersons is of essence, since main developments were included in different points in time, such as 1963, 1977, 1992 and 2000. The positive news in this regard is the position of the Courts in recent judgements which are in line with the mentioned arguments, aimed at imposing limits to the dynamic interpretation of the OECD Commentary.

6.3. Conclusions involving the objective scope and its related force of attraction

Once the historical context is set and the most accurate position as regards interpretation of tax treaties via OECD Commentaries is adopted, the next conclusion is that Article 17 OECD Model no longer benefits from old reasonings whereby it was implemented. In particular, when the exchange of information via FATCA and CRS are the general rule, together with the mobility/tax avoidance reasons may be applied not only to this qualifying type of taxpayers. In accordance with this PhD Thesis, the only underlying reason to maintain this specific tax treatment, resides in pure reputational risk arguments. The tax authorities around the globe (and OECD) are not willing to relinquish their taxing rights in a particular sensitive tax matter. All this regardless of the lack of evidences justifying the special tax treatment under this "*lex specialis*" versus other OECD items of income.

By accepting the taxation under Article 17 OECD Model, under tax policy reasons of the OECD member States, the PhD research work focus on trying to review Article 17 OECD Models as an appropriated tax tool which accomplishes one of the main targets of double tax treaties, i.e. avoiding double taxation. To this end, the implementation of the objective scope is of essence. The resort of relying in the definition of entertainers and sportspersons has been proved to entail more shortcomings than benefits. There are illustrative examples, such as film directors, models and DJs, which leads to a high degree of uncertainty.

The subjective definition of entertainers and sportspersons lead to the objective approach "*personal activities as such*", by giving evidences of the lack of solutions. Hence, it finally relies on the objective approach. In particular, the main elements requested under the latter are the existence of a performance, carried out before the public, involving personal engagement and having entertainment and/or sport character. Among them, the entertainment element is the yardstick and prevails over the remain elements. In particular, the performance is subservient to the entertainment item. It means that in most of the cases where the audience would be located in the same country of the performance. However, when the audience did not match the performance's country, the taxing rights of the country where the audience were located would prevail.

The key point in this PhD research work consists of providing the allocation rights to the country where the entertainment element arises from the audience. This

remarkable shift of interpreting Article 17 OECD Model is tested in the particular scenarios of Esports and motion pictures. Under this manner of interpreting, it provides for a better solution to include within the scope certain items of income, as well as allocating them to the actual place where the added value from audience takes place. It also leads to expand the scope of Article 17 OECD Model to other professionals such as coaches, film directors as opposed to those having a pure technical or administrative position.

Despite the fact that a lack of definition of entertainment from tax treaty and domestic tax perspective, throughout this PhD research work has been proved that the entertainment/objective approach entails more pros than cons, in comparison to the application from its subjective viewpoint.

The step forward carried out by endorsing the position of reshaping Article 17 OECD Model as an item of income linked to an activity (entertainment income), as opposed to the current subjective scope (entertainers and sportspersons) provides for more certainty, accurateness, precision and accommodation with the remaining types of income included in the OECD Model. Nonetheless, the qualification problems still remain to exist when the type of income interact with characteristics of other OECD Model articles, such as Article 7 or 12, among others.

As regards allocation and apportionment issues arising from Article 17 OECD Model, their perspective is also completely changed, since they are based on the grounds that allocation of taxing rights must be determined in accordance with the country where the audience consumes the entertainment element. Hence, it entails a great impact in the apportionment tax rules to be applied, since more States may be involved as potential source countries of entertainment income within the re-shaping of Article 17 OECD Model. Again, the new position of the PhD research is checked with actual examples, such as Youtubers, Instagramers and the virtual opera event “Perpetual Music-Rolex”. As a result of those analysis, the objective approach based on the entertainment element is reinforced, by overcoming practical administrative difficulties when carrying out the apportionment, which can be solved in the digital era and the generally adopted exchange of information system.

The other relevant issue of this PhD research work is tackling the unlimited force of attraction which is mistakenly adopted by domestic tax authorities and Courts when interpreting Article 17 OECD Model. U2 Case is used as touchstone in order to ascertain the mistakes when adopting said unlimited approach. The interpretation must be performed in accordance with Article 3.2 OECD whereby the resort to domestic

rules should respect what the context otherwise requires. In the particular case of Article 17 OECD Model, two main rules are requested by its Commentary in this context. Paragraph 3 leaves out of the scope income related to administrative or support staff and paragraph 4 supports for the apportionment, unless there exist negligible or predominant items of income. Therefore, the unlimited approach mistakenly adopted in U2 Case, among others, is incompatible with the current set of rules applicable under Article 17 OECD Model and related means of interpretation.

Fortunately, the position supported in this PhD research work is also supported by Courts and tax authorities, although there exist decisions with opposite outcomes. In particular, an extensive analysis of the Spanish Court decisions and binding rulings is carried out, which helps to state the main reasonings to endorse the application of thresholds to the unlimited force of attraction of Article 17 OECD Model.

Nevertheless, there are still grounds to support the unlimited approach via paragraph 9 of the OECD Commentary on Article 17. In particular, the statement "*Such a close connection will generally be found to exist where it cannot reasonably be considered that the income would have been derived in the absence of the performance of these activities*." It is too broad drafted that mistaken and unlimited approach can find the support under it. Therefore, the best alternative is to delete from the OECD Commentary on Article 17 said statement, with the aim at helping not to apply the inaccurate unlimited approach.

In terms of qualification, the main conclusion consists of applying in each item of income (endorsement/advertising/sponsorship, broadcasting income, cancellation fees, restrictive covenants, royalties and image rights), the same approach. Said approach leads to the application of Article 17 OECD Model, insofar there is a direct and material connection with the entertainment event, instead of the performance. Accordingly, the connecting point granting taxing rights is located where the audience provides for added value. This is of great assistance in order to combat aggressive tax planning via choosing low tax jurisdictions as performance places, as well as distributing source taxing rights where virtual events are actually consumed.

In this sense, it must be borne in mind that the scope of Article 17 OECD Model must not be oversized by jeopardizing a correct balance between said Article versus other items of OECD Model. In other words, whenever the income is obtained off court and/or when prevailing the assignment of rights (passive) over involvement in the entertainment event (active), the related income must not be caught under Article 17 OECD Model. Thus, only when the combination of having an entertainment event

intertwined with active involvement exist, Article 17 OECD Model may become applicable.

It is of interest the analysis of Julio Iglesias/Viajes Halcón Case for the purposes of avoiding the unlimited approach when qualifying image rights linked to a performance. Again, the Commentary of Article 17 OECD Model, in its paragraph 7 allows for assigning image rights to third parties out of the scope of Article 17 OECD Model, as opposed to the mentioned Court case´s approach. In addition, legal substance must exist, having as a reference Laetitia Casta Case supporting for the exploitation of image rights and not qualifying as income within Article 17 OECD Model.

In relation to the apportionment rules and the potential use of transfer pricing methods in Article 17 OECD Model, it is important to note that a wide range of options are available to the entertainers and sportspersons when tackling the methods of apportionment. All this for the purposes of providing to the tax authorities at source country (and also in the tax residency country) with a just and reasonable apportionment between the entertainment income, as opposed to income arising from independent services carried out third party providers. Moreover, further cooperation needs to be undertaken by taxpayers and tax authorities must work together with the aim of seeking the most legal certainty available counterbalanced by fight against tax avoidance.

Thus, the analysis of technical issues, intertwined with the tax policy considerations included in Pillar I and II may be of great assistance to solve the main issues, when applying Article 17 OECD Model.

The primary conclusion is that the most viable and fairest option in current times, it is the one supporting the nexus place where the value is created, either for Pillar and II purposes or Article 17 OECD Model. Thus, Pillar I revenue sourcing rule of services supports this PhD research work´s position regarding the proper source allocation rule when tackling Article 17 OECD Model. Moreover, VAT rules when dealing with distance sales pave the way in relation to Article 17 OECD Model and the use of the objective approach, in order to grant taxing rights to the country where the audience consumes the service.

The determination of the source country becomes more crucial in the context of Article 17 OECD Model, since certain line of interpretation, endorsed by domestic legislations or Courts, leads to the unlimited force of attraction. Therefore, no room must be left to

domestic tax authorities in order to carry out “infection theory” when applying Article 17 OECD Model.

Therefore, tax administrations among the globe are urged to avoid the use of the force of attraction policy under the context of Article 17 OECD Model, as well as to endeavour benefiting from modern technology, in order to control the taxation arising from market jurisdictions. It would help to enable the shift of taxation from the place of performance to the actual nexus where the value is created (which can match the place of performance or not) and, if so, taxing rights must be granted accordingly.

Relevant amendments of Article 17 OECD Model need to be undertaken. This tailor-made and far-reaching measure, theoretically designed for combating tax avoidance, must be treated at least under the same framework of Pillar I and II measures. In particular, the determination of taxable, elimination of double taxation, determining the thresholds to apply the taxation at source countries.

Nevertheless, a critical analysis leads to the conclusion that there is an excessive gap between the thresholds, the optional one included in the Commentary on Article 17 OECD Model amounting to USD 20,000, as opposed to the monetary nexus suggested in Pillar I, amounting to EUR 1 million. In particular, when the main underlying reason supporting the existence of Article 17 OECD Model has been proved to be linked to the reputational risk, surrounding to this group of well-known taxpayers.

The position endorsed in this PhD research work leads for the application of a threshold of EUR 250,000 (as it is suggested in Pillar I to be applicable by countries having GDP of less than 40 billion) would be tantamount applicable as a threshold for Article 17 OECD Model in each particular market jurisdiction.

Finally, it is relevant to note that if the scope of Article 17 OECD Model is not in line with the scope of Pillar I and II, entertainers and sportspersons would be subject to a more burdensome tax measure, with no underlying tax reasons. Furthermore, the consequences of Pillar I and II when applicable to income previously taxed under Article 17 OECD Model, would have no effect, insofar the above-mentioned recommendation as regards Article 17 OECD Model were not implemented.

Nonetheless, Article 17 OECD Model may start benefiting from suggested amendments based on the Pillar I and Pillar II rationale, regardless of whether, when and how the latter rules are finally approved. Thus, throughout this PhD research work, it has been proved that with above-mentioned amendments, Article 17 OECD Model may become an appropriated international tax tool, since it would avoid double non

taxation, but also double taxation or over taxation, in the context of international entertainers and sportspersons.

6.4. Conclusions involving EU Law and Spanish tax rules

The last chapters of the PhD research work are devoted to Spanish tax rules and EU Law. In respect of the former, domestic tax rules applicable either to tax residents and non-residents are analysed, in order to ascertain whether and how they can be applied to entertainers and sportspersons, such as tax residency, exit tax, the so-called "Beckham law", CFC, transfer pricing rules, image rights special regime. In this regard, Spanish major Court cases involving entertainers and sportspersons are also analysed. In particular, special attention are paid to Shakira, Cristiano Ronaldo and Messi Court Cases. Thus, the importance of Spanish tax system applicable to international entertainers and sportspersons resides on the fact that in a subsequent stage it would entail the distribution of taxing rights between the States applying a particular double tax treaty.

The domestic tax rules applicable to entertainers and sportspersons are also scrutinized with the aim of testing the underlying ideas of the objective scope. In this regard, the main novelties are placed by checking the qualification rules in relation to personal income tax and tax on economic activities by testing the objective scope endorsed throughout this PhD research work.

Last but not least importance, it is the issue of the compatibility of Article 17 OECD Model and related domestic rules with EU fundamental freedoms. The conclusion is twofold, either at treaty level or domestic level (Spain in the case at hand).

At treaty level, it must be intertwined with the abuse concept from ECJ. Therefore, in the field of entertainers and sportspersons, the conclusion about the ECJ is that although the abuse of law concept has been expanded via ECJ Danish cases in connection with the corresponding implementation by national Courts, Article 17 OECD Model's force of attraction goes even further by not permitting the use of an interposed company, by no means, regardless of whether the company is independent or it entails actual substance. The unlimited approach endorsed at treaty level, encompasses any payment of entertainment or sport character under the force of attraction of Article 17 OECD Model, regardless of being artificial or under the abuse of law concept.

At domestic level, potential discriminations of Spanish domestic rules against EU freedoms are tested. In this regard, evidences are provided that they may exist in relation to Spanish NRITA when dealing with the application of withholding tax versus quarterly tax payments on tax residents. Furthermore, Spanish PITA on quarterly tax payments when the deduction of foreign taxes is involved, as well as the payments on account as regards the special image rights tax regime.

SUMMARY IN SPANISH

1. Introducción General

Este trabajo de investigación doctoral plantea el análisis de la fiscalidad de los artistas y deportistas cuando actúan a escala internacional. En particular, el artículo 17 del Modelo de Convenio de la OCDE (en adelante Modelo de la OCDE) es el referente de las cláusulas recogidas en la mayoría de los convenios para evitar la doble imposición internacional aplicables a dichos contribuyentes. Su tenor literal es: "*No obstante lo dispuesto en los artículos 7 y 15, las rentas obtenidas por un residente de un Estado contratante como artista del espectáculo, del cine, de la radio o de la televisión, o como músico, o como deportista, procedentes de sus actividades personales como tal ejercidas en el otro Estado contratante, pueden someterse a imposición en ese otro Estado*".

Como se aprecia, el objetivo principal del artículo 17 del Modelo de la OCDE es el establecimiento de una regla excepcional con respecto, por un lado, a los rendimientos de actividades dependientes (artículo 15 del Modelo de la OCDE), y, por otro, a los rendimientos empresariales (artículo 7 del Modelo de la OCDE). Por tanto, se entiende que este artículo, por su especificidad y excepcionalidad, prevalece sobre otros artículos de corte general emanados de la OCDE. En concreto, frente a los efectos previstos en los propios artículos referenciados: artículos 15 y 7 del Modelo de la OCDE.

En el ámbito práctico, y directamente relacionado con la hipótesis de trabajo de esta tesis doctoral, se ha detectado un creciente interés de las autoridades fiscales estatales —y de la propia OCDE— por incluir a este grupo específico de contribuyentes entre aquellos capaces de generar una gran cantidad de beneficios en periodos de tiempo reducidos. Además, se ha incrementado el riesgo de que, por consejo de expertos fiscales, se diseñen ingeniosas estructuras societarias o mercantiles con la simple finalidad de reducir la carga fiscal —incluido, en su caso, el recurso al uso de paraísos fiscales—. Finalmente, tales autoridades fiscales han intensificado en sus planes de inspección la atención a estos concretos profesionales, debido singularmente a su amplia repercusión mediática y, por qué no decirlo, el carácter ejemplarizante de las posibles sanciones administrativas o penales.

A este respecto, el Informe de la OCDE de 1987 es muy ilustrativo: "*Los artistas y deportistas de alto nivel recurren con frecuencia a sofisticados sistemas de evasión fiscal, muchos de los cuales implican el uso de paraísos fiscales. (...) existe un consenso general sobre el hecho de que una categoría de contribuyentes —generalmente muy conocidos— pueda eludir el pago de impuestos, lo que es perjudicial para el clima fiscal general y justifica, por tanto, una acción coordinada entre los países*".

Esta cuestión de fiscalidad internacional ha suscitado un gran interés por parte de la doctrina en las últimas décadas, y es en ese contexto de debate doctrinal internacional en el que se enmarca esta tesis. Su hipótesis principal se centra en la propuesta de un cambio en el punto de vista habitual del tratamiento subjetivo de esta norma, para centrarse en un enfoque objetivo y la consiguiente imposición de límites a una potencial interpretación con base en una "fuerza de atracción" ilimitada del mismo.

En este sentido, se alcanzan dos conclusiones principales con relación a si la actual redacción del artículo 17 del Modelo de la OCDE permitiría o no una adecuada fiscalidad de artistas y deportistas. Por un lado, de admitirse esta diferente interpretación de corte "objetivista", se corregirían las deficiencias detectadas derivadas de un enfoque puramente subjetivo. La propuesta planteada en el trabajo de investigación tendría como elemento central las rentas derivadas del entretenimiento, más que el carácter profesional específico de quien las produce. Por otro lado, evitaría la fuerza atractiva del artículo 17 del Modelo de la OCDE a cualquier tipo de renta obtenido por dichos profesionales, lo cual sería manifiestamente excesivo, teniendo en cuenta los problemas de sobreimposición que podría conllevar.

En definitiva, a lo largo de este trabajo de investigación doctoral se ha planteado si la principal cuestión a dilucidar es si el artículo 17 del Modelo OCDE, en su estricta redacción actual, pero con una interpretación centrada en la actividad más que en el profesional, constituiría la más eficaz herramienta fiscal internacional para abordar la tributación de artistas y deportistas que realizan actuaciones en el ámbito internacional, o si merecería introducir algunos cambios para alcanzar dicho objetivo.

2. Análisis histórico

Como punto de partida se analizan por orden cronológico los trabajos realizados por la doctrina y por la propia OCDE. Ello permite una mejor comprensión de la actual redacción del Artículo 17 del Modelo de la OCDE y los pros y contras derivados de los objetivos buscados a través de todas sus sucesivas enmiendas. Así, partiendo de los trabajos realizados en el ámbito de la Sociedad de Naciones, y hasta las recientes adaptaciones de 2022, se analizan en detalle las principales razones subyacentes a las modificaciones introducidas por la OCDE, tanto en su Comentario al artículo 17 del Modelo de la OCDE como en el propio artículo. Se toman en consideración, asimismo, los principales pronunciamientos judiciales que lo han aplicado para una correcta y completa interpretación jurisprudencial.

A este respecto, los intentos de incluir las versiones iniciales del artículo 17 del Modelo de la OCDE en los convenios fiscales bilaterales, dan pruebas de las dificultades para aplicar una medida fiscal tan excepcional. En particular, es objeto de análisis detallado el Convenio para evitar la doble imposición firmado en 1945/46, entre Estados Unidos y el Reino Unido, así como el Convenio para evitar la doble imposición firmado en 1951 celebrado entre Estados Unidos y Canadá. Apreciadas tales dificultades, paulatinamente fueron eludiéndose dichas normas convencionales específicas aplicables a los artistas y deportistas. Fue la OEEC de 1959 la que produjo un cambio radial, propiciando su definitiva implementación, al contemplar en un artículo específico la tributación de artistas y deportistas en el Estado de la fuente. El Informe de la OCDE de 1987 supuso otro hito importante en cuanto a la confirmación y ampliación de la política fiscal sobre la tributación de los artistas y deportistas en el país donde tiene lugar la actuación, a diferencia de lo previsto para otros contribuyentes que sólo tributan en el país de la fuente cuando existe un establecimiento permanente.

Todas estas modificaciones derivadas del Informe de la OCDE de 1987 se cristalizaron en 1992 con la redacción inicial del artículo 17 del Modelo de la OCDE. En particular, fue relevante la definición de artista y deportista como actividad personal, a diferencia de otros tipos de rentas del propio Modelo, o la determinación de la base imponible sin deducciones de gastos y el amplio alcance en la aplicación del segundo párrafo del artículo 17.

Con todo, la aplicación de ese artículo 17 seguía adoleciendo de notables deficiencias, pese a que la OCDE se esforzó en mejorar su redacción —principalmente a través del Borrador de Discusión de 2010 y posterior Informe de 2014, así como las modificaciones al Comentario del Artículo 17 del Modelo de la OCDE—. *No* obstante, todo se tradujo en cambios menores, como la aplicación opcional de la regla de *minimis*. Por ello, el riesgo de sobreimposición o doble imposición basado en la aplicación de la actual redacción del artículo 17 y de su *Comentario*, sigue existiendo.

Como hemos anunciado previamente, las propuestas de mejora que se recogen en este trabajo de investigación se dirigen a superar las dificultades aplicativas del artículo 17 del Modelo de la OCDE, sobre la base de experiencias previas surgidas tanto a nivel nacional, como en el ámbito de los convenios fiscales internacionales.

Y ello se hace sin olvidar las importantes consecuencias hermenéuticas que comportaría, como cuestión fiscal transversal, respecto de la interpretación del Comentario al Modelo de la OCDE, en el ámbito de la fiscalidad internacional de los artistas y deportistas. En este sentido, cabe destacar que la interpretación dinámica, según la cual, las versiones posteriores del Comentario al Modelo de la OCDE pueden utilizarse en la interpretación de los acuerdos fiscales firmados con una fecha anterior. Resulta esencial en el caso particular de artistas y deportistas, ya que los principales cambios en el Artículo 17 del Modelo de Convenio de la OCDE se incluyeron en distintos momentos temporales, por ejemplo 1963, 1977, 1992 y 2000. Por tanto, dependiendo de la versión del Comentario del Artículo 17 del Modelo de Convenio OCDE utilizado en la interpretación del Convenio de doble imposición al caso particular, las consecuencias pueden ser diferentes. En este sentido, la jurisprudencia más reciente de los Tribunales españoles, está en línea con los argumentos defendidos en este trabajo de investigación doctoral, enfocándose los Tribunales a imponer límites a la interpretación dinámica de los Comentarios al Modelo de la OCDE.

3. Ámbito objetivo y fuerza de atracción Artículo 17 Modelo OCDE

Una vez establecido el contexto histórico y fijada la posición más precisa en lo que respecta a la interpretación de los Convenios de Doble Imposición a través de los Comentarios de la OCDE, el siguiente tema analizado consiste en determinar si el artículo 17 del Modelo de la OCDE ya no puede sustentarse actualmente con los antiguos razonamientos por los que fue implementado. En particular, el intercambio de información a través de FATCA y CRS, junto con las razones de movilidad y elusión fiscal, son los motivos esgrimidos —los cuales podrían aplicarse no sólo a este tipo de contribuyentes—. La única razón subyacente, de acuerdo con la posición mantenida a lo largo de este trabajo de investigación doctoral, para mantener este tratamiento fiscal específico, reside en un argumento de riesgo reputacional. Las autoridades fiscales de todo el mundo, incluida la OCDE, no están dispuestas a renunciar a sus potestades tributarias en un asunto especialmente delicado. Todo ello con independencia de la falta de evidencias que justifiquen el tratamiento fiscal excepcional en virtud de esta "*lex specialis*" frente a otras partidas de ingresos de la OCDE.

Al aceptar la imposición en virtud del artículo 17 del Modelo de la OCDE, por razones de política fiscal de los Estados miembros de la OCDE, este trabajo de investigación doctoral se detiene en tratar de adecuar el ámbito objetivo del artículo 17 del Modelo de la OCDE, así como evitar la doble imposición o la sobreimposición.

Las conclusiones y resultados del trabajo de investigación doctoral permiten afirmar que, de adoptarse un enfoque diferente al avalado por la OCDE (subjetivista), como es el **enfoque objetivo equilibrado** a la hora de aplicar el artículo 17 del Modelo de la OCDE, se conjurarían los históricos problemas vinculados a este especial tratamiento fiscal. Frente a la sobrevaloración del enfoque subjetivo (quiénes están incluidos en las definiciones de artista y deportista), se evidencia que el recurso a la remisión en la definición de artistas y deportistas conlleva más deficiencias que beneficios. En este sentido existen ejemplos ilustrativos, como los directores de cine, las modelos y los DJ, situaciones que conducen a un alto grado de incertidumbre.

La definición subjetiva “artistas” y “deportistas” recurre al planteamiento objetivo de que incluye dentro de las "*actividades personales*" de estos contribuyentes, evidenciándose la falta de soluciones desde el ámbito subjetivo. Por tanto, queda probado que el artículo 17 del Modelo de la OCDE pivota sobre el elemento objetivo, para una correcta aplicación, ya que proporciona más pros que contras, en comparación con el enfoque subjetivo. En particular, los principales elementos de este

enfoque son la existencia de una actuación realizada ante el público, que implique una personal y tenga una finalidad de entretenimiento o deportiva. Entre ellos, el entretenimiento es el elemento esencial que prevalece sobre el resto. Así, conlleva a ampliar el ámbito de aplicación del artículo 17 del Modelo de la OCDE a otros profesionales, como animadores o directores de cine, frente a aquellos que ocupan un cargo puramente técnico o administrativo.

En particular, destacar la conclusión alcanzada en este trabajo doctoral, por la que la principal nota característica y diferenciadora radica en determinar que **actuación está subordinada al elemento de entretenimiento**. De ahí que, aunque en la mayoría de los casos la actuación y el país de consumo del servicio con entretenimiento coincidan, cuando la localización de la audiencia no coincida con el país de la actuación prevalecerán los derechos fiscales del país en el que se encuentre la audiencia frente al país donde tiene lugar de la actuación.

Por tanto, conforme a esta interpretación, el artículo 17 del Modelo de la OCDE otorga los derechos de tributación al país en el que el **elemento del entretenimiento surge desde la audiencia**. Este notable cambio de interpretación sobre los países que detentan la atribución de poderes fiscales de acuerdo con el artículo 17 del Modelo de la OCDE se analiza en casos prácticos concretos, como los eSports y las producciones cinematográficas. Bajo dicha posición, se proporciona una mejor solución para incluir en el ámbito de aplicación ciertos tipos de renta, así su asignación al lugar real donde se otorgar un valor añadido por la audiencia.

En relación con el **marco metodológico**, se da respuesta a las principales preguntas que surgen al tratar los ingresos originados con ocasión de las actuaciones internacionales de artistas y deportistas, derivadas de las principales cuestiones fiscales:

a) **Qué** ingresos con carácter de entretenimiento pueden someterse a imposición en virtud del artículo 17 del Modelo de la OCDE.

b) **Dónde** se deben asignar los derechos de imposición relativos a las actividades de entretenimiento. En este sentido, se analizan las nuevas tendencias de actuaciones o profesionales (contexto online) bajo el nuevo enfoque propuesto (enfoque de entretenimiento).

c) **Cómo** debe ser aplicado para combatir las consecuencias negativas que pueden derivarse de un enfoque subjetivo, en el contexto de la distribución de

las rentas obtenidas por los diferentes países. Además, se toman en consideración los métodos utilizados por la OCDE y en casos de relevancia internacional emitidos por tribunales de diferentes países, así como el posible uso de normas sobre precios de transferencia.

Así pues, el elemento de entretenimiento resulta crucial a la hora de aplicar el artículo 17 del Modelo de la OCDE, en relación con la caracterización derivada de otros posibles elementos de renta dentro del mismo Modelo de la OCDE (cánones, beneficios empresariales, etc.).

La reconfiguración del artículo 17 Modelo OCDE como un elemento de renta vinculado a una actividad (servicios entretenimiento), frente al actual ámbito subjetivo (artistas y deportistas) aportaría una mayor certeza, exactitud, precisión y acomodo con el resto de rentas incluidas en el Modelo OCDE. No obstante, siguen existiendo problemas de calificación cuando el tipo de renta interactúa con otros artículos del Modelo OCDE, como el artículo 7 o el 12, entre otros.

En relación con las cuestiones de asignación y distribución derivadas del artículo 17 del Modelo de la OCDE también cambia por completo, ya que se basan en que la asignación de la potestad tributaria debe determinarse en función del país en el que el público consume los servicios de entretenimiento. Por lo tanto, implican un gran impacto en las normas fiscales distributivas a aplicar, ya que más Estados podrían estar involucrados como potenciales países con potestad tributaria para gravar los ingresos derivados del entretenimiento dentro de la remodelación propuesta del Artículo 17 del Modelo de la OCDE. De nuevo, la posición adoptada en esta investigación doctoral se contrasta con ejemplos reales, como Youtubers, Instagramers y el evento de ópera virtual "*Perpetual Music-Rolex*". A través del análisis de estos casos reales, la conclusión alcanzada refuerza el enfoque objetivo basado en el aspecto del entretenimiento, superándose así las dificultades administrativas a la hora de realizar la distribución de las potestades tributarias de los países donde se consume el servicio, ya que puede resolverse con la ayuda de la tecnología existente en la era digital y el sistema de intercambio de información utilizado en la práctica por las Administraciones tributarias.

Otro tema de especial relevancia y analizado con detalle en este trabajo de investigación doctoral es el análisis de la sentencia del Tribunal Supremo español relativa al caso U2, de fecha 7 de diciembre de 2012. Dicho análisis tiene un papel clave a la hora de determinar la posición defendida por el doctorando en cuanto al

enfoque objetivo y la determinación de los **límites aplicables a una fuerza de atracción ilimitada del artículo 17 del Modelo OCDE** y los efectos colaterales negativos derivados de dicha posición sin restricción. La interpretación debe realizarse de conformidad con el artículo 3.2 del Modelo de Convenio de la OCDE, según el cual el recurso a la normativa doméstica debe respetar lo que el contexto determine. El comentario del artículo 17 del Modelo de la OCDE exige dos normas principales en relación con dicho contexto. El apartado 3º deja fuera de su ámbito de aplicación a las rentas atribuidas al personal administrativo o de apoyo. Por su parte, el apartado 4º apoya por distribución de rentas entre los diferentes conceptos, a menos que existan partidas de ingresos insignificantes o predominantes que conlleven la atribución uniforme dentro de un tipo único de rentas. Por lo tanto, el enfoque extensivo adoptado, entre otros, en el caso U2, es incompatible con el actual conjunto de normativa aplicable en virtud del artículo 17 del Modelo de la OCDE e instrumentos de interpretación relacionados que confirman su contexto, según el mencionado artículo 3.2.

Afortunadamente, la posición defendida en este trabajo de investigación doctoral por la que se limita la aplicación extensiva a todas las rentas obtenidas por artistas y deportistas, también es apoyada por los Tribunales y las Autoridades fiscales de diferentes países. Sin embargo, debe tenerse en cuenta que también existen pronunciamientos judiciales y administrativos opuestos. En este sentido, se realiza un extenso análisis de las resoluciones judiciales y doctrina administrativa vinculante española, que ayuda a exponer los principales razonamientos que conducen a avalar la aplicación de límites a la incorrecta y extensiva fuerza de atracción del artículo 17 frente a otros artículos del Modelo OCDE.

No obstante, el apartado 9 del Comentario de la OCDE al artículo 17 sigue ofreciendo argumentos a favor del enfoque ilimitado. En concreto, la afirmación "*Por lo general, se considerará que existe tal vínculo estrecho cuando no pueda considerarse razonablemente que los ingresos se habrían obtenido en ausencia de la realización de estas actividades*" está redactada de modo demasiado amplio, dando potencial cabida a enfoques erróneos e ilimitados. La mejor alternativa propuesta en este trabajo de investigación doctoral consistiría en suprimir dicha frase de los Comentarios de la OCDE al artículo 17, para no fomentar la aplicación de un enfoque ilimitado e impreciso.

La principal conclusión con relación a la calificación consiste en aplicar la misma posición basada en el enfoque objetivo a cada renta obtenida en este (publicidad,

patrocinio, derechos de retransmisión, gastos de cancelación, pactos restrictivos, cánones y derechos de imagen). Dicho enfoque conduce a la aplicación del artículo 17 del Modelo de la OCDE, en tanto exista una conexión directa y material con el evento de entretenimiento, en lugar de con la actuación. En consecuencia, el punto de conexión de la potestad tributaria se sitúa en el país en el que se le aporta un valor por la audiencia, circunstancia que resulta de gran ayuda para combatir la planificación fiscal agresiva mediante la elección de jurisdicciones de baja tributación como lugares de actuación, así como la distribución de la potestad tributaria en los estados donde realmente se consumen los servicios del entrenamiento bien sea vía eventos virtuales o actuación en directo.

En este sentido, hay que tener en cuenta que no se debe sobredimensionar el ámbito de aplicación del artículo 17 del Modelo OCDE haciendo peligrar el equilibrio entre dicho artículo y otros preceptos del Modelo OCDE. Siempre que los ingresos se obtengan sin relación con la participación en el evento de entretenimiento (activa), las rentas obtenidas no deben ser incluidas en el ámbito del artículo 17 del Modelo OCDE. Por tanto, sólo cuando exista un evento de entretenimiento combinado con participación activa, el artículo 17 del Modelo de la OCDE debería ser aplicable.

Resulta de especial interés el análisis del Caso Julio Iglesias/Viajes Halcón a efectos de evitar un enfoque ilimitado a la hora de calificar los derechos de imagen vinculados a una actuación y, por tanto, caracterizados dentro del artículo 17 Modelo OCDE. De nuevo, en contra del planteamiento del Tribunal, debe señalarse que el Comentario del artículo 17 del Modelo OCDE, en su apartado 7, permite la cesión de derechos de imagen a terceros fuera del ámbito de aplicación del artículo 17 del mencionado Modelo. En este sentido, para evitar dicha calificación, la explotación de los derechos de imagen debe contar con sustancia de medios humanos y materiales, teniendo como referencia el Caso judicial francés de Laetitia Casta que apoya la explotación de los derechos de imagen fuera del ámbito de tributación del Artículo 17 Modelo OCDE, al ser un negocio independiente y con sustancia.

En relación con las normas de distribución y la posible utilización de métodos de fijación de precios de transferencia en el artículo 17 del Modelo de la OCDE, es importante señalar que los artistas y deportistas disponen de una amplia gama de opciones a la hora de abordar los métodos de distribución de potestades tributarias. Todo ello con el fin de proporcionar a las autoridades fiscales del país de fuente (y también del país de residencia fiscal) una distribución justa y razonable entre las rentas de los servicios de entretenimiento, en contraste con las rentas derivadas de

servicios independientes prestados por terceros proveedores. Por otra parte, los contribuyentes y las autoridades fiscales deben cooperar más estrechamente con el fin de lograr una mayor seguridad jurídica y luchar contra la evasión fiscal.

Además, este trabajo de investigación doctoral busca encontrar **las similitudes y divergencias derivadas de los principios y reglas de aplicación que surgen del análisis comparable dentro del contexto BEPS de la OCDE (Pilar I y II) frente al artículo 17 del Modelo de la OCDE**. Dicho contexto BEPS apoya el objetivo de alcanzar un reparto de derechos impositivos incluyendo al Estado donde se consumen los productos o servicios prestados por grandes multinacionales, así como el establecimiento de un tipo mínimo de tributación.

Es de gran ayuda para una correcta redacción y aplicación del Artículo 17 del Modelo de la OCDE, beneficiarse de los principios y reglas establecidos en el Pilar I o II de BEPS. En caso contrario, estos últimos no tendrían efecto alguno en el ámbito del Artículo 17 del Modelo de la OCDE que otorga derechos ilimitados de tributación a los Estados donde tienen lugar las actuaciones.

La conclusión principal de dicho análisis comparativo es que la opción más viable y justa en los tiempos actuales, es la que apoya la tributación en el país donde se otorga valor añadido, ya sea a efectos del Pilar y II o del Modelo del Artículo 17 de la OCDE. Así pues, la normativa del Pilar I relativa a la tributación en destino (consumo) de las rentas correspondientes a servicios, respalda la posición de este trabajo de investigación doctoral, en lo que respecta a tributación de los países donde se consumen los servicios de entretenimiento del artículo 17 del Modelo de la OCDE. Por otra parte, las normas de IVA aplicables a las ventas a distancia allanan el camino en relación con el artículo 17 del Modelo de OCDE y el uso del enfoque objetivo, con el fin de otorgar los derechos de tributación al país en el que audiencia consume el servicio de entretenimiento.

En este sentido, al existir mayor número de Estados con potestades tributarias donde se consumen las rentas del entretenimiento, se vuelve más crucial en el contexto del artículo 17 del Modelo de la OCDE, la limitación de cierta línea de interpretación asumida por legislaciones y tribunales, que podría conducir a la su aplicación de modo incorrecto e ilimitada. Así, no se debe dejar margen a las autoridades fiscales nacionales para utilizar la "teoría de la infección" vía la aplicación del artículo 17 del Modelo de la OCDE.

Así, se insta a las autoridades tributarias de todo el mundo a evitar el uso de la política de fuerza de atracción en el contexto del artículo 17 del Modelo de la OCDE, así como instar al uso de las nuevas tecnologías, con el fin de controlar la fiscalidad derivada de los países donde se consumen dichos servicios. De dicho modo se contribuiría a permitir el desplazamiento de la tributación desde el país de actuación a la jurisdicción donde realmente se genera y añada valor (que puede coincidir o no con el lugar de tributación) y, en tal caso, atribuir la potestad tributaria correspondiente.

Por tanto, es necesario introducir las modificaciones pertinentes en el artículo 17 del Modelo de la OCDE. Esta medida específica fiscal que puede tener amplias consecuencias tributarias, teóricamente concebida para combatir la evasión fiscal, debe tratarse con el mismo marco normativo y de principios que las medidas del Pilar I y II. En particular, la determinación de la base imponible según ingresos netos, la eliminación efectiva de la doble imposición y, sobre todo, la determinación de umbrales mínimos para aplicar la imposición en los países de la fuente.

En relación con los umbrales que deben ser excedidos para la aplicación de ambas normas, un análisis crítico conduce a la conclusión de que existe una brecha excesiva entre los límites del artículo 17, que no existe como regla general —sólo opcional según Comentario al artículo 17 del Modelo OCDE— y que asciende a 20.000 de Dólares estadounidenses en el Modelo de Convenio para evitar la doble imposición de Estados Unidos, frente al límite sugerido en el Pilar I, que asciende a 1 millón de Euros. Y todo ello, cuando se ha demostrado que la principal razón que respalda la existencia en nuestros días del artículo 17 del Modelo de la OCDE está vinculada con un riesgo reputacional, derivada del impacto social de los actos realizados por este grupo de contribuyentes.

La posición mantenida en esta investigación doctoral concluye que la aplicación de un límite de 250.000 Euros (tal y como sugiere el Pilar I para los países con un PIB inferior a 40.000 millones) sería la cantidad a partir de la que el artículo 17 del Modelo de la OCDE se aplicaría en cada jurisdicción donde se consume el servicio de entretenimiento.

Por último, cabe señalar que si el ámbito de aplicación del artículo 17 del Modelo de la OCDE no coincide con el ámbito de aplicación de los Pilares I y II, los artistas y deportistas estarían sujetos a un régimen fiscal más gravoso, sin unas razones fiscales de calado que lo justifiquen. Además, las consecuencias de los Pilares I y II aplicables a las rentas anteriormente gravadas en virtud del artículo 17 del Modelo de la OCDE

no tendrían ningún efecto, en la medida en que no se aplicasen las recomendaciones antes mencionadas en relación con el artículo 17 del Modelo de la OCDE.

No obstante, se recomienda expresamente que el artículo 17 del Modelo de la OCDE empiece a beneficiarse de las modificaciones sugeridas y basadas en los fundamentos del Pilar I y del Pilar II, con independencia de si estas últimas normas se aprueban definitivamente. Así pues, a lo largo de este trabajo de investigación, se ha demostrado que, con las modificaciones mencionadas, el artículo 17 del Modelo de la OCDE puede convertirse en una herramienta fiscal internacional adecuada, ya que evitaría la doble no imposición, pero también la doble imposición o la sobreimposición, en el contexto de los artistas y deportistas internacionales.

4. Derecho de la Unión Europea y la normativa fiscal española en relación con artistas y deportistas

Una vez más, este enfoque objetivo se vuelve a poner a prueba al analizar las normas fiscales españolas aplicables tanto a los residentes fiscales como a los no residentes, con el fin de determinar si pueden aplicarse a los artistas y deportistas, y de qué manera, tales como la determinación de la residencia fiscal, el impuesto de salida, la denominada "ley Beckham", las normas de transparencia fiscal internacional (“CFC”), las normas sobre precios de transferencia y el régimen especial de los derechos de imagen. Adicionalmente, se analizan los principales asuntos judiciales españoles relacionados con la tributación de los artistas y deportistas. En particular, se presta especial atención a los casos judiciales de Shakira, Cristiano Ronaldo y Messi. La importancia del régimen fiscal español aplicable a los artistas y deportistas internacionales reside en el hecho de que, en una fase posterior, se determine la distribución de las potestades fiscales entre los Estados que apliquen un determinado Convenio para evitar la doble imposición.

También se examinan las normas tributarias nacionales aplicables a artistas y deportistas con el fin de comprobar las posiciones mantenidas respecto al ámbito objetivo en el trabajo de investigación doctoral. En este sentido, las principales novedades se sitúan en el análisis de las normas de calificación del IRPF y del Impuesto sobre Actividades Económicas mediante la revisión de las implicaciones con base en el ámbito objetivo avalado a lo largo de este trabajo doctoral.

Por último, se aborda la compatibilidad del artículo 17 del Modelo de la OCDE y las medidas fiscales nacionales conexas, con el **Derecho de la UE**. En el marco de la Unión Europea, los Estados miembros están obligados a respetar las libertades fundamentales comunitarias. Así, se comprueba si el artículo 17 de la OCDE cumple con los parámetros exigidos por la UE, prestando especial atención a las principales sentencias del TJUE dictadas en el contexto de los artistas y deportistas. En particular, *el asunto Gerritse del TJUE, el asunto FKP Scorpio del TJUE y el asunto Centro Equestre del TJUE*. Las conclusiones alcanzadas se derivan de dos ámbitos: por una parte, los Convenios para evitar la Doble Imposición y, por otra, a la legislación doméstica.

En relación con los mencionados convenios, este régimen de la OCDE debe relacionarse con el concepto de “abuso” utilizado por el TJUE y que debe ser tenido en cuenta, según su jurisprudencia, en particular de acuerdo con el enfoque adoptado en

los denominados "*Danish Cases*". En este sentido, también se analiza la potencial argumentación por parte de los Estados miembros de combatir la elusión fiscal para justificar las discriminaciones comunitarias. La posición final a este respecto lleva a determinar las consecuencias derivadas del uso abusivo de la norma internacional en el contexto de los artistas y deportistas. En este sentido, el artículo 17 del Modelo de la OCDE tiene unos efectos que exceden de lo establecido el TJUE, ya que el uso de entidades intermedias, aunque sean independientes o evidencien existencia de medios materiales y humanos, conlleva la tributación de las rentas dentro de dicho artículo de la OCDE.

En relación con la normativa doméstica española, en la investigación se realiza un análisis particular y novedoso con el fin de determinar las potenciales discriminaciones contrarias a las libertades comunitarias incluidas en la normativa fiscal española en materia de artistas y deportistas. En particular, las retenciones determinadas en el impuesto sobre la renta de no residentes en comparación con la normativa de tributación fiscal trimestral de los residentes fiscales en España. Adicionalmente, la normativa del impuesto sobre la renta de las personas fiscales cuando aplica la deducción de medidas de doble imposición internacional frente a retenciones en territorio español, así como los pagos a cuenta en relación con el régimen especial de los derechos de imagen.

A modo de conclusión, la tesis doctoral presentada defiende la idoneidad de la adopción de un criterio hermenéutico objetivo —fundado en el tipo de rentas incluidas bajo el concepto de ingresos procedentes de los servicios de entretenimiento—, frente a una posición basada únicamente en la definición de artistas o deportivas. De esta forma, se facilita una aplicación razonable del artículo 17 del Modelo de la OCDE, posibilitando a su vez la tributación en el Estado donde la audiencia consume dicho servicio, en línea con la distribución de poderes fiscales según la posición de la OCDE, en su “Pilar I” de BEPS.

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