

An Analysis of the Taxation of Entertainers and Sportspersons Under Art. 17 OECD-MC

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Abstract

The double tax treaties (DTT) are an important regulator in international tax law. The Preamble to them defines their aim and purpose – to reduce taxation through tax evasion and avoidance in the field of taxes on income and capital.

It should be noted that they do not create new taxes, but they are supranational international agreements ensuring the fair tax treatment between states. According to the Art. 5, para 4 of the Constitution of the Republic of Bulgaria, the international agreements such as the DTTs are part of the domestic law if they have been ratified, promulgated and entered into force. After the fulfilment of the three cumulative conditions, they take precedence over the domestic legislation for any conflicts.

The aim of the current study, with no claim to completeness and comprehensiveness, is to outline the scope of Art. 17 of the Model Tax Convention of Income and Capital of the Organisation for Economic Co-operation and Development (OECD-MC) on the taxation of entertainers and sportspersons. The analysis will begin with a brief historical review. For this purpose, the last three versions of the Commentary of the OECD-MC (the Commentary) will be examined. The author

will also focus on relevant international and domestic practical issues on the topic as well as a brief overview of the concluded DTTs between Bulgaria and other states. Finally, some thoughts will be expressed on the future development of the concept.

Keywords: international tax law, double tax treaties, OECD, taxation of entertainers and sportspersons

JEL: H24 , H26, K34

Introduction

The taxation of entertainers and sportspersons raised interest in the early 1950s. In the Model Tax Convention of the United Nations (UN-MC) of 1928, 1935, 1943 and 1946 such provision was not included and therefore their performance was taxed under other provisions depending on the nature of the activity performed (in/dependent). In 1959, in the Second Report of the Organisation for European Economic Co-operation (the predecessor of the OECD), attention was paid to this issue. In general, it has been determined that the source state has the right of taxation of their performance.

Art. 17 of the OECD-MC appeared for the first time in the OECD-MC from 1963. The initial version of the provision contained only one paragraph (*Notwithstanding the provisions of Article 14 and 15, income derived by public entertainers, such as theatre, motion picture, radio or television artistes, and musicians, and*

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by athletes, from their personal activities as such may be taxed in the Contracting State in which these activities are exercised). In the OECD-MC in 1977 a new second paragraph was published regarding the possibility of taxation of persons other than the entertainers and the sportspersons under this provision (*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 and 15, be taxed in the Contracting State in which the activities of the entertainer or athlete are exercised*). This new text may be interpreted as a measure against tax avoidance by extending the subject criterion.

In 1992 the scope of that paragraph was changed in connection with the proposals made in the OECD Report of 1987. In the following years no significant subsequent changes have been made. In 1995 the International Fiscal Association (IFA) organized a seminar titled *Taxation of Non-Resident Entertainers*.

In 1996 the United States Model Income Tax Convention (US Model) included in Art. 17, para 1 threshold of USD 20 000 or the equivalent gross amount in another currency depending on the other Party of the DTT, which, if exceeded (and after the fulfilment of other cumulative requirements), results in the application of this provision. This amount includes expenses such as airfare, hotel accommodation, etc. This approach was applicable also in the US Model of 2006.

The brief historical overview shows that Art. 17 OECD-MC develops its structure and scope during the years trying to limit tax avoidance and to regulate properly the taxation of entertainers and sportspersons. This approach is connected with the new tendencies in international tax law as well as the issues raised in legal practice.

There are several international researchers that have already examined this issue in detail. For example, Dr. Dick Molenaar in 2006 published a book titled *Taxation of International Performing Artistes*. Furthermore, Prof. Walter Loukota and Markus Stefaner published the book *Taxation of Artistes and Sportsmen in International Tax Law* in 2007 and in 2014 Dr. Karolina Tetlak published the book *Taxation of International Sportsmen*. Another intriguing publication is Prof. Guglielmo Maisto's *Taxation of Entertainers and Sportspersons Performing Abroad* from 2016. Dr. Mario Tenore has written several articles analyzing the future of the concept and has also participated in several webinars on this issue.

In Bulgaria there are no detailed publications on this topic both from practical and theoretical aspect. The author's aim is to outline the basic features of the concept and its development during the years. A positive feature of the current study is the examination of the first steps of the implementation of this text in the DTTs such as the most recently emerging tendencies that give a comprehensive picture of the reason why Art. 17 OECD-MC has been added. The author would like also to pay attention to this article's role in both international and domestic tax law. For this purpose, key international court decisions on this topic as well as the practice of the Bulgarian tax administration have been subject to analysis. So far no comparison between both the Bulgarian and the international practices has been carried out. Another positive aspect of this study is the examination of the concept in all DTTs concluded between Bulgaria and other states. This gives the reader the opportunity to determine whether the OECD-MC has been strictly followed by the Bulgarian tax administration by negotiating the DTTs. Such an approach has been rarely applied in the

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Bulgarian tax doctrine. In the conclusion, some future thoughts regarding the development of the concept have been shared. They will raise the question as to whether Art. 17 OECD-MC is still crucial for the international tax law or whether it needs to be replaced with an alternative one. The current analysis would like to provoke the readers to share some personal views after reviewing both the theory and the practice on this issue.

1. Analysis of Art. 17 OECD-MC in the last versions of the Commentary

For the purposes of the current study the Commentary of 2010, 2014 and 2017 will be analyzed. It should be noted that the title of Art. 17 OECD-MC in 2010 was *Artists and sportsmen*. The Commentary of 2010 regarding para 1 of Art. 17 outlines the main features of the provision. The activity must be personal, i.e. it may not be delegated to others. The form of the contract between the performer and the other party is irrelevant. The activity should be entertaining as outlined in the non-exhaustive examples in para 3, 5 and 6 of the Commentary. A positive measure against possible tax avoidance is the so-called 'look-through approach'. This means inclusion of indirectly acquired by the performer income in connection with his entertaining activity. Explicit attention is paid to the income realized from advertising, sponsorship etc. If it is directly related with the performance, it falls within the scope of Art. 17 OECD-MC. Otherwise, Art. 12 OECD-MC may be applicable. In certain cases, other provisions may also be relevant such as Art. 7 OECD-MC or Art. 15 OECD-MC. It may be concluded that the detailed and individual approach of each case is necessary for the proper tax treatment. The same applies also to the activities with mixed nature where a separate assessment should be made depending on the activity.

According to para 10 of the Commentary, the domestic legislation regulates how the income realized will be taxed – on net or on gross basis. Para 11 treats situations where individuals other than the performer should charge income. However, the question may arise whether in these situations both individuals are jointly liable for non-reporting the income and under what circumstances.

On June 2014, the OECD published a new report on the application of Art. 17 OECD-MC which examines several important issues related to the concept. Perhaps one of the most revolutionary proposals is to abolish the concept by the deletion of the provision. Although this was not adopted, it reveals the attitude of some practitioners to the concept.

Another rejected proposal is the exclusion of the employment contract in the scope of Art. 17 OECD -MC by applying Art. 15 OECD-MC instead. However, such an approach would significantly limit the scope of Art. 17 OECD-MC and would even be perceived as an additional argument for the deletion of the provision.

A welcoming idea is the introduction of a minimum threshold taking into account the US Model's approach. This alternative provision was included in the Commentary as of 2014 and may be applicable by further negotiations between the contracting parties.

Other two intriguing proposals were included in the Commentary as of 2014. The participation of animals and cars may fall within the scope of Art. 17 OECD-MC only if it directly affects the competitor's performance. Normally this is not considered as income attributed to the owners unless the owner is the competitor himself. Another good idea is the explicit clarification that it is not necessary for the film actor to have a live public performance regarding the application of Art. 17 OECD-MC.

Two hypotheses with practical importance that were fairly discussed were also materialized in the Commentary of 2014. The preparatory and the training activities in the source State may fall within the scope of Art. 17 OECD-MC if they are in direct connection with the performance, i.e. they are an integral part of the whole activity.

It is necessary to note that the title of the provision was changed to *Entertainers and sportspersons* in 2014. The Commentary also analyses the competition between Art. 12 OECD-MC and Art. 17 OECD-MC through practical issues such as the sales of music album during a concert, TV broadcasting rights, image rights, etc.

The 2014 Commentary introduces also other texts that develop the concept. For example, a new para 8.1 has been involved under which it is irrelevant who is the payer of the income – football league, sport association, etc. The introduction of the term ‘closely connected’ outlines the basic moments by activities with mixed nature where it is necessary to examine temporally, spatially and qualitatively the realized income. New examples have also been added. Attention is paid to the artificial splitting of contracts whose aim is tax avoidance. There is an option whereby the tax is originally collected and reimbursed at the end of the year if the minimum threshold negotiated in the DTT has been not reached.

In the 2014 Commentary it has been explicitly outlined that the derived income should not be taxed twice – under para 1 and para 2 of Art. 17 OECD-MC. The opposite treatment would contradict the idea of fair and equal treatment of the taxpayers leading to double taxation.

In the Commentary of 2017 no significant difference may be found compared with the 2014 Commentary regarding Art. 17 OECD-MC. On the one hand, this may be due to

the lack of any progress on that issue. On the other, this may be interpreted as a sign of inability for further development that could possibly impact its future deletion.

2. International and domestic issues

Art. 17 OECD-MC is not an abstract provision with very limited scope. For example, it directly affects the taxation of football players in various football tournaments such as the Champions League and the UEFA Cup, the World and the European Football Championship etc. Usually in the knockout phase the visiting teams do not fall within the scope of Art. 17 OECD-MC and are taxed in the states where they play their home matches. Remuneration from TV rights and sponsorship paid to UEFA are subject to Art. 12 OECD-MC. Another approach connected therewith is that the football players of the teams playing in the finals in Munich in 2012, London in 2013, Lisbon in 2014, Berlin in 2015 were exempt from withholding tax. The same treatment applied for the UEFA Cup finals in Bucharest 2012, Amsterdam 2013, Torino 2014, Warsaw 2015. Turkey will also introduce tax exemption in the Champion’s league final this year. Similar changes will probably be introduced for UEFA’s Cup final this year in Poland as well.

The author shares the opinion of Tetlak and Molenaar that such an approach will be efficient if the DTT between the two countries applies the credit method for this provision because otherwise it may lead to double non-taxation (Tetlak, Molenaar, 2012, p. 325-330). However, it raises the question of the application of Art. 17 OECD-MC and whether the domestic legislation may alone resolve this issue.

The Court of Justice of the European Union (CJEU) has already paid attention to the taxation of entertainers and sportspersons. One of the cases examines the taxation of

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the Dutch drummer Mr Gerritse performing some musical pieces in a German radio station (Case C-234/01). Therefore, he has been taxed in the source State on his gross income without the possibility of deduction of the relevant expenses, unlike the German residents who are taxed according to their net income after such deduction. At first glance, such treatment appears to be unfair and thus discriminatory, as Advocate General (AG) Léger states (para 43 of the AG Opinion). Some may argue that such treatment is a violation of the freedom to provide services. According to AG, such treatment constitutes an indirect/hidden discrimination (para 46 and 59 of the AG Opinion). The CJEU came to the same conclusion stressing that there are no proper arguments to justify the different treatment of the German residents and the foreign individuals (para 29 of the CJEU's decision). Additionally, musicians such as Mr Gerritse usually have higher expenses because of their performance (para 26 of the CJEU's decision).

Similar background and CJEU's ruling presents the next case of the current study (Case C-345/04). The Portuguese enterprise CELG organizes horse shows and horse lessons in several countries, one of which is Germany. Questions arose regarding the possibility of deduction of the professional expenses for this activity on the territory of Germany and analysis of the German domestic tax law which provides such opportunity if the foreign enterprise has raised more than 50% of its total income in Germany.

Regarding the AG Opinion such deduction is possible if there is "an economic link between the business expenses in respect of which a deduction is claimed and the chargeable income" (para 37 of the AG Opinion). There should be no different tax treatment on the deductibility of the expenses for the same services provided by different

individuals because of their residence (para 47, 48 and 58 of the AG Opinion). Paying attention to Gerritse's Case, AG concludes that such business expenses are economically connected with the source state where the activity has been performed (para 63 of the AG Opinion). The CJEU expresses the same view (para 21, 23 and 27 of the CJEU's decision) when analyzing the nature of the expenses such as travel and accommodation costs (para 25 of the CJEU's decision).

Regarding the second question on the deduction of the expenses, only if the income generated in Germany is more than 50% of the total income, the arguments are the same. Following the Gerritse case approach, as well as the principle of the equal treatment of taxpayers, the inadmissibility of different taxation regarding the domestic tax legislation of a Member State has been concluded both in the AG's Opinion (para 64, 65 and 68 of the AG Opinion) and the CJEU's decision (para 29, 37 and 38 of the CJEU's decision).

The next case pertains to the tax treatment of two English football clubs which played in the Netherlands several friendly matches with a resident football team (Case C-498/10). Despite the requirement for submission of a declaration for the local football team for the income earned from the English football in compliance with the Netherlands' domestic legislation, such has not been submitted. In this regard, it is disputable whether these domestic provisions are not limitation of the freedom of provision of services for the foreign suppliers as there is no such requirement if the supplier of the service is resident of the Netherlands.

In her Opinion AG Kokott clarifies, in the first place, whether such treatment may be interpreted as discrimination or restriction of the freedom of provision of services. Based on the relevant facts and circumstances, she is of the opinion that there is restriction of

the freedom, which is prohibited (para 17 and 33 of the AG Opinion). The CJEU shares the same view because "it entails an additional administrative burden and related liability risks" (para 21, 30, 31, 32 and 34 of the CJEU's decision). Such an approach confirms once again the understanding of the CJEU's position on the inadmissibility of the restriction of one of the freedoms regarding the taxation of the entertainers and the sportspersons.

In general, the practice of the Bulgarian National Revenue Agency (NRA) follows the same approach as both the Commentary and the CJEU's decisions. For example, foreign artists working on movie production on the territory of Bulgaria fall within the scope of Art. 8, para 5 of the Bulgarian Personal Income Tax Act (PITA) which has the same wording as Art. 17 OECD – MC (Guideline 96-00-637 from 24.09.2012). Thus, their performance is subject to the Bulgarian withholding tax.

Similar are the arguments in another one of NRA's guidelines regarding the taxation of a Swedish artist for participation in a musical event in Bulgaria (Guideline 26-П-230 from 16.12.2014). Instead of monetary sum he received non-monetary income such as food, travel costs, accommodation etc for his performance. Despite the difference in the kind of remuneration received, the case yet again fell within the scope of Art. 8, para 5 of the PITA.

The organisation of sport events through agency will also be treated as source income in Bulgaria if the activity is performed on the territory of Bulgaria by a foreign sportsman, which corresponds to Art. 17, para 2 of the OECD – MC (Guideline 53-04-280 from 31.05.2018).

Based on NRA's three analyzed guidelines, it may be concluded that the practice on the taxation of entertainers and sportspersons is in line with the Commentary.

3. Analysis of the Art. 17 OECD-MC of the DTTs between Bulgaria and other states

The last point of this study is a brief analysis of Art. 17 OECD-MC in DTTs between Bulgaria and other states in their Bulgarian versions. First, attention will be paid to the name of the provision. In most cases it is named 'Artists and Athletes', 'Artists and Sportsmen' or regarding the new changes of the title from 2014 'Entertainers and Sportsmen' (DTT with the United Kingdom) which has the same effect for tax purposes. In some DTTs the word 'income' has also been added to the provision's name in the Bulgarian version, which is more for stylistic purposes and does not have any tax impact (DTTs with Republic of Zimbabwe, Republic of India, Russian Federation). There are several DTTs without any name (DTTs with Republic of Azerbaijan, United Arab Emirates and USA). It may be concluded that the titles of the provisions in the DTTs do not differ from the OECD-MC and do not lead to any practical obstacles.

Art. 17, para 1 (or the equivalent provision) in the concluded DTTs is not significantly different from the respective version of the OECD-MC. In the DTT with the Kingdom of Belgium instead of 'entertainer' the term 'stage performer' is used that does not change the scope of the subject and it is used for stylistic purposes. Proof of this is the inclusion of film artist as a possible hypothesis who hardly has live performances. The 'stage performer' has been added also in the DTT with Republic of Italy, but here the musician has not been explicitly included.

Regarding Art. 17, para 2 (or the equivalent provisions) in the concluded DTTs no significant differences exist, which is a sign of the unanimous position of the states.

One of the most intriguing texts is Art. 17, para 3 in the DTTs in which it exists (para

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3 does not exist in the DTTs with Republic of Azerbaijan, UK, State of Israel, Republic of Ireland, Republic of Latvia, Republic of Lithuania, Kingdom of Morocco, Republic of Moldova and USA). Only in one DTT (with Republic of Finland) para 3 is part of the second sentence of para 1. This text is an exception to the basic rule under Art. 17, para 1 and the income is taxable in the resident state of the performer under certain conditions.

For example, in the DTT with the Republic of Austria, the individual falls within the scope of the para 3 "if the visit to that State is wholly or mainly supported by public funds of the other State or political subdivisions or local authorities thereof or by an institution which is recognized as a non-profit institution. In such a case, the income is taxable only in the Contracting State in which the person is a resident."

The author would like to pay attention also to the DTT with USA. One of the key points is the minimum threshold under Art. 17, para 1 US-MC. The gross receipts including expenses reimbursed shall not exceed USD 15 000 or its equivalent in Bulgarian currency. In essence, Art. 17, para 2 US-MC resembles the OECD-MC, but also adds new criteria to the concept, which is divided into two alternative points. Regarding the first one entertainer's/sportsman name or description shall be included in the contract. On the one hand, such identification ensures direct contact between the performer and the income and also corresponds to the OECD-MC. On the other, the careful analysis raises some questions. It is normal that the name (which may be the nickname) is a compulsory requisite. For some reason (e.g. lack, reluctance, omission etc.) the description is the second option. It remains a mystery what is exactly meant by 'description'- any physical

features, job description, mixture of both or something different.

Under the second alternative option the concluded contract "allows the other party to the contract...to designate the individual who is to perform the personal activities". It may be summed up that there are numerous opportunities to prove the relationship between the performer, the other person and the realized income.

Only the DTT with Republic of Malta does not contain a separate provision on this issue. Art. 12 'Fees' thereof sparingly provides guidance in this regard. According to para 3, artists, musicians and athletes may be taxed in the source State. By a careful reading of Art. 12, para 2 that defines the "liberal profession", it may be noted that as an example is also the artistic activity which is taxed in the residence State. In this regard, the question arises whether those performing the liberal profession differ from the entertainers under Art. 12, para 3. If they do not differ, a specific example or further detailed analysis is required. If they do, then there may be some confusion of terms that may bring about practical difficulties regarding the state of taxation. Paying attention to the year of the conclusion of this DTT, the author believes that further negotiations would provide an adequate solution to this problem.

The brief analysis of the DTTs with the other states shows that they follow as a whole the Art. 17 OECD-MC. The slight differences do not have significant practical issues and are driven more by stylistic purposes.

4. Conclusion

It is challenging to say what is the future of Art. 17 OECD-MC. On the one hand, it seems that the Commentary has already examined the key aspects on this issue and it is difficult to further develop the concept. On the other, there have been ongoing debates

and criticisms concerning the deletion of Art. 17 OECD-MC as unnecessary and artificially adding special provision for certain subjects.

Although the author is not a supporter of permanent changes, the recent opinions on this matter illustrate the beginning of the end of Art. 17 OECD-MC. Despite this, the author believes that it is too revolutionary a measure to delete this provision. Perhaps more suitable options may possibly be found for fair taxation (such as Art. 7, Art. 15 OECD-MC), but it should be kept in mind that such measures may raise further practical issues.

Paying attention to the current global challenges such as the digital economy and the exchange of information, the author is of the opinion that if Art. 17 OECD-MC is subject to any change in its current form. A welcoming idea would be to add a new list of examples (such as the 'virtual players' and their taxation at a virtual tournament).

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