



ORGANISATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT



DISCUSSION DRAFT ON THE APPLICATION OF ARTICLE 17
(ARTISTES AND SPORTSMEN) OF THE
OECD MODEL TAX CONVENTION

23 APRIL 2010 TO 31 JULY 2010



CENTRE FOR TAX POLICY AND ADMINISTRATION

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PUBLIC DISCUSSION DRAFT ON ISSUES RELATED TO ARTICLE 17

23 April 2010

APPLICATION OF ARTICLE 17 (ARTISTES AND SPORTSMEN) OF THE OECD MODEL TAX CONVENTION

Public discussion draft

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

The Committee on Fiscal Affairs, through a subgroup of its Working Party 1 on Tax Conventions and Related Questions, has examined these and other questions related to the application of Article 17. This public discussion draft includes proposals for additions and changes to the Commentary on the OECD Model Tax Convention resulting from the work of that subgroup, which have recently been presented to the Working Party for discussion (the Annex includes a consolidated version of the Commentary on Article 17 that includes all the proposed changes).

The Committee intends to ask the Working Party to examine these proposed additions and changes to the OECD Model Tax Convention for possible inclusion in the OECD Model Tax Convention (these changes will not, however, be finalised in time for inclusion in the next update, which is scheduled to be published in the second part of 2010). It therefore invites interested parties to send their comments on this discussion draft **before 31 July 2010**. These comments will be examined at the September 2010 meeting of the Working Party.

Comments on this discussion draft should be sent electronically (in Word format) to:

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Unless otherwise requested at the time of submission, comments submitted to the OECD in response to this invitation will be posted on the OECD website.

This document is a discussion draft released for the purpose of inviting comments from interested parties. It does not necessarily reflect the final views of the OECD and its member countries.

1. What is an entertainer or sportsman?

1. It is unclear whether certain persons constitute entertainers or sportsmen so as to fall within the scope of Article 17. It is therefore proposed to clarify the matter by adding the following paragraph to the Commentary on Article 17:

Add the following paragraph 9.1 to the Commentary on Article 17:

9.1 *Apart from the above examples, there are a number of cases where it may be difficult to determine whether a particular item of income is derived by a person as an entertainer or sportsman from his personal activities as such. The following principles may be useful to deal with such cases:*

- The reference to an “entertainer or sportsman” includes anyone who acts as such, even for a single event. Thus, Article 17 can apply to an amateur who wins a monetary sports prize or a person who is not an actor but who gets a fee for a once-in-a-lifetime appearance in a television commercial or movie.*
- As noted in the previous paragraphs, the activities of an entertainer or sportsman do not include only the appearance in an entertainment or sports event in a given State but also, for example, advertising or interviews in that State that are directly or indirectly related to such an appearance.*
- Merely reporting or commenting on an entertainment or sports event in which the reporter does not himself participate is not an activity of an entertainer or sportsman acting as such. Thus, for instance, the fee that a former or injured sportsman would earn for offering comments during the broadcast of a sports event in which he does not participate would not be covered by Article 17.*

2. Application of Article 17 to race prizes

2. The OECD was invited to provide guidance concerning the application of tax treaties to prize money obtained by the owner of a horse or a race car from the results of the horse or car during a race. It is therefore proposed to clarify the matter by adding the following paragraph to the Commentary on Article 17:

Renumber existing paragraph 11.2 of the Commentary on Article 17 as paragraph 11.3 and add the following new paragraph 11.2:

11.2 *Paragraph 2 does not apply, however, to prize money derived by the owner of a horse or a race car from the results of the horse or car during a race. In such a case, the prize money is not sufficiently related to the personal activities of the jockey or race car driver to be considered to be derived from these personal activities. Clearly, however, if the owner receives a payment on behalf of the jockey or race car driver, that income may be taxed in the hands of the jockey or race car driver under paragraph 1 (see paragraph 7 above).*

3. What are the personal activities of an entertainer or sportsman as such?

3. The wording of paragraph 1 imposes two conditions, *i.e.* that the income be derived by a person “as an entertainer [...] or as a sportsman” and that it be derived “from his personal activities as such”. Thus, even if a person is an entertainer, income derived from the activities of that person may not be derived from the person’s activities “as an entertainer” and may therefore not be covered by Article 17. There is therefore a need to clarify in which circumstances income derived by an entertainer or sportsman (or a person referred to in paragraph 2) can be said not to be related to the personal activities of the entertainer or sportsman “as such”. The main practical issue relates to the part of the remuneration of an entertainer or sportsman that relates to preparation and training, as opposed to the part which relates to actual performances; other practical issues relate to whether, and to what extent, Article 17 applies to the activities of promoters, models as well as public speakers. It is proposed to make the following changes to the Commentary on Article 17 to address these issues:

Replace paragraph 3 of the Commentary on Article 17 by the following:

3. Paragraph 1 refers to ~~entertainers~~^{artists} and sportsmen. It is not possible to give a precise definition of “~~entertainer~~^{artiste}”, but paragraph 1 includes examples of persons who would be regarded as such. These examples should not be considered as exhaustive. On the one hand, the term “~~entertainer~~^{artiste}” clearly includes the stage performer, film actor, **or** actor (including for instance a former sportsman) in a television commercial. 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. On the other hand, it does not extend to a visiting conference speaker (*e.g. a 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.*). In between there is a grey area where it is necessary to review the overall balance of the activities of the person concerned.

Add the following subparagraphs to proposed paragraph 9.1 (see above) of the Commentary on Article 17:

[Apart from the above examples, there are a number of cases where it may be difficult to determine whether a particular item of income is derived by a person as an entertainer or sportsman from his personal activities as such. The following principles may be useful to deal with such cases:]

- [...]*
- Preparation and training are parts of the normal activities of an entertainer or sportsman. If the entertainer or sportsman is remunerated for time spent on preparation and training in a State (which would be unusual for self-employed individuals but would be fairly common for employed entertainers and sportsmen), the relevant remuneration, as well as remuneration for time spent travelling in that State for the purposes of performances, preparation or training, would be covered by the Article. This would apply regardless of whether or not such preparation or training is related to specific public performances taking place in that State (e.g. remuneration that would be paid with respect to the participation in a pre-season training camp would be covered).*

Replace subparagraph 11 b) of the Commentary on Article 17 by the following:

- b) The second is the team, troupe, 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 **they perform their activities as entertainers or sportsmen** ~~a performance is given~~, on any remuneration (or income accruing for their benefit) ~~as a counterpart to~~ **derived from** the performance **of these activities** (see, however, paragraph 14.1 below). ~~; 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 or bilaterally, not to tax it. The profit element accruing from a performance to the legal entity would be liable to tax under paragraph 2.~~

Add the following paragraphs 11.4 and 11.5 to the Commentary on Article 17:

11.4 Paragraph 2 covers income that may be considered to be derived in respect of the personal activities of an entertainer or sportsman. 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.

11.5 Whilst the Article does not provide how the income covered by paragraphs 1 and 2 is to be computed and leaves it to the domestic law of a Contracting State to determine the extent of any deduction (see paragraph 10 above), the income derived in respect of the personal activities of a sportsman or entertainer should not be taxed twice through the application of these two paragraphs. This will be an important consideration where, for example, paragraph 2 allows a Contracting State to tax the star-company of an entertainer on a payment received by that company with respect to activities performed by the entertainer in that State and paragraph 1 also allows that State to tax the part of the remuneration paid by that company to the entertainer that can reasonably be attributed to these activities. In that case, the Contracting State may, depending on its domestic law, either tax only the company or the entertainer on the whole income attributable to these activities or tax each of them on part of the income, e.g. by taxing the income received by the company but allowing a deduction for the relevant part of the remuneration paid to the entertainer and taxing that part in the hands of the entertainer.

Add the following paragraph 14.1 to the Commentary on Article 17:

14.1 Also, given the administrative difficulties involved in allocating to specific activities taking place in a State the overall employment remuneration of individual members of a foreign team, troupe or orchestra, and in taxing the relevant part of that remuneration, some States may consider it appropriate not to tax such remuneration. Whilst a State could unilaterally decide to exempt such remuneration, such a unilateral solution would not be reciprocal and would give rise to the problem described in paragraph 12 above where the exemption method is used by the State of residence of the person deriving such income. These States may therefore consider it appropriate to exclude such remuneration from the scope of the Article. Whilst paragraph 2 above indicates that one solution would be to amend the text of the Article so that it does not apply with respect to income from employment, some States may prefer a narrower exception dealing with cases that they frequently encounter in practice. The

following is an example of a provision applicable to members of a sports team that could be used for that purpose:

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 a 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.

4. Source and allocation rules for activities performed in various countries

4. The OECD was invited to clarify what should be the source and allocation rules when entertainment activities are performed in various countries. It is proposed to make the following changes to the Commentary on Article 17 to address this issue:

Add the following paragraphs 9.2 and 9.3 to the Commentary on Article 17:

9.2 *Entertainers and sportsmen often perform their activities in different States making it necessary to determine which part of their income is derived from activities exercised in each State. Whilst such determination must be based on the facts and circumstances of each case, the following general principles will be relevant for that purpose:*

- An element of income that is directly linked to specific activities exercised by the entertainer or sportsman in a State (e.g. a prize paid to the winner of a sports competition taking place in that State; a daily allowance paid with respect to participation in a tournament or training stage taking place in that State; a payment made to a musician for a concert given in a State) will be considered to be derived from the activities exercised in that State.*
- 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. Where the remuneration received by an entertainer or sportsman employed by a team, troupe or orchestra covers various activities to be performed during a period of time (e.g. an annual salary covering various activities such as training or rehearsing; travelling with the team, troupe or orchestra; participating in a match or public performance, etc.), it will therefore be appropriate, absent any indication that the remuneration or part thereof should be allocated differently, to allocate that salary or remuneration on the basis of the working days spent in each State in which the entertainer or sportsman has been required, under his employment contract, to perform these activities.*

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% 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.

5. Special categories of payments

5. The OECD was also invited to clarify whether or not Article 17 applied to the following payments:

- prizes and awards paid by a national federation, association or league for a particular event;
- payments made to an entertainment company or sports organisation in relation with broadcasting rights or merchandising;
- payments for broadcasting rights made to clubs by leagues or federations;
- payments for the use of, or to right to use, image rights of entertainers and sportsmen.

6. The following changes to the Commentary on Article 17 are proposed in order to clarify the treatment of these payments:

Add the following paragraph 8.1 to the Commentary on Article 17:

8.1 *The paragraph applies regardless of who pays the income. For example, it covers prizes and awards paid by a national federation, association or league which a team or an individual may receive in relation to a particular sports event.*

Replace paragraph 9 of the Commentary on Article 17 by the following (changes to the existing text of the Commentary appear in bold italics):

9. Besides fees for their actual ~~performances~~ appearances, ~~entertainers~~ artists and sportsmen often receive income in the form of royalties or of sponsorship or advertising fees. In general, other Articles would apply whenever there was no direct link between the income and ~~the performance of activities~~ a public exhibition by the performer in the country concerned. Royalties for intellectual property rights will normally be covered by Article 12 rather than Article 17 (cf. paragraph 18 of the Commentary on Article 12), but in general advertising and sponsorship fees will fall outside the scope of Article 12. Article 17 will apply to advertising or sponsorship income, etc. which is related directly or indirectly to performances ~~or appearances~~ 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 shirt during a match*). Similar income which could not be attributed to such performances ~~or appearances~~ would fall under the standard rules of Article 7 or Article 15, as appropriate. Payments received in the event of the cancellation of a performance are also outside the scope of Article 17, and fall under Articles 7 or 15, as the case may be. *Various payments may be made as regards merchandising; whilst the payment to an entertainer or sportsman of a share of the merchandising income related to a public performance would normally fall under Article 17, merchandising payments derived from sales in a country that are not related to performances in that country and that do not constitute royalties would normally be covered by Article 7.*

Add the following new paragraphs 9.4 and 9.5 to the Commentary on Article 17:

9.4 *Payments for the simultaneous broadcasting of a performance by an entertainer or sportsman made directly to the performer or for his benefit (e.g. a payment made to the star-*

company of the performer) fall within the scope of Article 17 (see paragraph 18 of the Commentary on Article 12, which also deals with payments for the subsequent sales or public playing of recordings of the performance). Where, however, the payment is made to a third party (e.g. the owner of the broadcasting rights) and that payment does not benefit the performer, the payment is not related to the personal activities of the performer and therefore does not constitute income derived by a person as an entertainer or sportsman from his personal activities as such. For example, where the organiser of a football tournament holds 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; similarly, Article 17 will not apply to any share of these payments that will be distributed to the participating teams. Whether such payments will constitute royalties covered by Article 12 will depend, among other things, on the legal nature of such broadcasting rights, in particular under the relevant copyright law.

9.5 It is frequent for entertainers and sportsmen to derive, directly or indirectly, a substantial part of their income in the form of payments for the use of, or the right to use, their “image rights”, e.g. the use of their name, signature or personal image. Where such uses of the entertainer’s or sportsman’s image rights are not connected to the entertainer’s or sportsman’s performance in a given State, the relevant payments would generally not be covered by Article 17 (see paragraph 9 above). There are cases, however, where payments made to an entertainer or sportsman who is a resident of a Contracting State, or to another person, for the use of, or right to use, that entertainer’s or sportsman’s image rights constitute in substance remuneration for activities of the entertainer or sportsman 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.

ANNEX

CONSOLIDATED VERSION OF THE COMMENTARY ON ARTICLE 17 THAT INCLUDES THE PROPOSED CHANGES

Paragraph 1

1. Paragraph 1 provides that ~~entertainers~~ ~~artistes~~ and sportsmen who are residents of a Contracting State may be taxed in the other Contracting State in which their personal activities as such are performed, whether these are of a business or employment nature. This provision is an exception to the rules in Article 7 and to that in paragraph 2 of Article 15, respectively.

2. This provision makes it possible to avoid the practical difficulties which often arise in taxing ~~entertainers~~ ~~artistes~~ and sportsmen performing abroad. Moreover, too strict provisions might in certain cases impede cultural exchanges. In order to overcome this disadvantage, the States concerned may, by common agreement, limit the application of paragraph 1 to business activities. To achieve this it would be sufficient to amend the text of the Article so that an exception is made only to the provisions of Article 7. In such a case, ~~entertainers~~ ~~artistes~~ and sportsmen performing in the course of an employment would automatically come within Article 15 and thus be entitled to the exemptions provided for in paragraph 2 of that Article.

3. Paragraph 1 refers to ~~entertainers~~ ~~artistes~~ and sportsmen. It is not possible to give a precise definition of “~~entertainer~~ ~~artiste~~”, but paragraph 1 includes examples of persons who would be regarded as such. These examples should not be considered as exhaustive. On the one hand, the term “~~entertainer~~ ~~artiste~~” clearly includes the stage performer, film actor, actor (including for instance a former sportsman) in a television commercial. 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. On the other hand, it does not extend to a visiting conference speaker (*e.g. a 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.*). In between there is a grey area where it is necessary to review the overall balance of the activities of the person concerned.

4. 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.

5. Whilst no precise definition is given of the term “sportsmen” it is not restricted to participants in traditional athletic events (e.g. runners, jumpers, swimmers). It also covers, for example, golfers, jockeys, footballers, cricketers and tennis players, as well as racing drivers.

6. The Article also applies to income from other activities which are usually regarded as of an entertainment character, such as those deriving from billiards and snooker, chess and bridge tournaments.

7. Income received by impresarios, etc. for arranging the appearance of an ~~entertainer~~ ~~artiste~~ or sportsman is outside the scope of the Article, but any income they receive on behalf of the ~~entertainer~~ ~~artiste~~ or sportsman is of course covered by it.

8. Paragraph 1 applies to income derived directly and indirectly by an individual ~~entertainer~~ ~~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 paragraph 1, to tax the proportion of the musician's salary which corresponds to such a performance. Similarly, where an ~~entertainer~~ ~~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 income derived from ~~performances~~ ~~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.

8.1 *The paragraph applies regardless of who pays the income. For example, it covers prizes and awards paid by a national federation, association or league which a team or an individual may receive in relation to a particular sports event.*

9. Besides fees for their actual ~~performances~~ ~~appearances~~, ~~entertainers~~ ~~artistes~~ and sportsmen often receive income in the form of royalties or of sponsorship or advertising fees. In general, other Articles would apply whenever there was no direct link between the income and ~~the performance of activities~~ ~~a public exhibition by the performer~~ in the country concerned. Royalties for intellectual property rights will normally be covered by Article 12 rather than Article 17 (cf. paragraph 18 of the Commentary on Article 12), but in general advertising and sponsorship fees will fall outside the scope of Article 12. Article 17 will apply to advertising or sponsorship income, etc. which is related directly or indirectly to ~~performances~~ ~~or appearances~~ 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 shirt during a match*). Similar income which could not be attributed to such ~~performances~~ ~~or appearances~~ would fall under the standard rules of Article 7 or Article 15, as appropriate. Payments received in the event of the cancellation of a performance are also outside the scope of Article 17, and fall under Articles 7 or 15, as the case may be. *Various payments may be made as regards merchandising; whilst the payment to an entertainer or sportsman of a share of the merchandising income related to a public performance would normally fall under Article 17, merchandising payments derived from sales in a country that are not related to performances in that country and that do not constitute royalties would normally be covered by Article 7.*

9.1 *Apart from the above examples, there are a number of cases where it may be difficult to determine whether a particular item of income is derived by a person as an entertainer or sportsman from his personal activities as such. The following principles may be useful to deal with such cases:*

- *The reference to an “entertainer or sportsman” includes anyone who acts as such, even for a single event. Thus, Article 17 can apply to an amateur who wins a monetary sports prize or a person who is not an actor but who gets a fee for a once-in-a-lifetime appearance in a television commercial or movie.*

- *As noted in the previous paragraphs, the activities of an entertainer or sportsman do not include only the appearance in an entertainment or sports event in a given State but also, for example, advertising or interviews in that State that are directly or indirectly related to such an appearance.*
- *Merely reporting or commenting on an entertainment or sports event in which the reporter does not himself participate is not an activity of an entertainer or sportsman acting as such. Thus, for instance, the fee that a former or injured sportsman would earn for offering comments during the broadcast of a sports event in which he does not participate would not be covered by Article 17.*
- *Preparation and training are parts of the normal activities of an entertainer or sportsman. If the entertainer or sportsman is remunerated for time spent on preparation and training in a State (which would be unusual for self-employed individuals but would be fairly common for employed entertainers and sportsmen), the relevant remuneration, as well as remuneration for time spent travelling in that State for the purposes of performances, preparation or training, would be covered by the Article. This would apply regardless of whether or not such preparation or training is related to specific public performances taking place in that State (e.g. remuneration that would be paid with respect to the participation in a pre-season training camp would be covered).*

9.2 *Entertainers and sportsmen often perform their activities in different States making it necessary to determine which part of their income is derived from activities exercised in each State. Whilst such determination must be based on the facts and circumstances of each case, the following general principles will be relevant for that purpose:*

- *An element of income that is directly linked to specific activities exercised by the entertainer or sportsman in a State (e.g. a prize paid to the winner of a sports competition taking place in that State; a daily allowance paid with respect to participation in a tournament or training stage taking place in that State; a payment made to a musician for a concert given in a State) will be considered to be derived from the activities exercised in that State.*
- *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. Where the remuneration received by an entertainer or sportsman employed by a team, troupe or orchestra covers various activities to be performed during a period of time (e.g. an annual salary covering various activities such as training or rehearsing; travelling with the team, troupe or orchestra; participating in a match or public performance, etc.), it will therefore be appropriate, absent any indication that the remuneration or part thereof should be allocated differently, to allocate that salary or remuneration on the basis of the working days spent in each State in which the entertainer or sportsman has been required, under his employment contract, to perform these activities.*

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% 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.

9.4 *Payments for the simultaneous broadcasting of a performance by an entertainer or sportsman made directly to the performer or for his benefit (e.g. a payment made to the star-company of the performer) fall within the scope of Article 17 (see paragraph 18 of the Commentary on Article 12, which also deals with payments for the subsequent sales or public playing of recordings of the performance). Where, however, the payment is made to a third party (e.g. the owner of the broadcasting rights) and that payment does not benefit the performer, the payment is not related to the personal activities of the performer and therefore does not constitute income derived by a person as an entertainer or sportsman from his personal activities as such. For example, where the organiser of a football tournament holds 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; similarly, Article 17 will not apply to any share of these payments that will be distributed to the participating teams. Whether such payments will constitute royalties covered by Article 12 will depend, among other things, on the legal nature of such broadcasting rights, in particular under the relevant copyright law.*

9.5 *It is frequent for entertainers and sportsmen to derive, directly or indirectly, a substantial part of their income in the form of payments for the use of, or the right to use, their “image rights”, e.g. the use of their name, signature or personal image. Where such uses of the entertainer’s or sportsman’s image rights are not connected to the entertainer’s or sportsman’s performance in a given State, the relevant payments would generally not be covered by Article 17 (see paragraph 9 above). There are cases, however, where payments made to an entertainer or sportsman who is a resident of a Contracting State, or to another person, for the use of, or right to use, that entertainer’s or sportsman’s image rights constitute in substance remuneration for activities of the entertainer or sportsman 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.*

10. 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 deductions 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~~ *entertainers* and sportsmen. Such rules may also apply to income paid to groups or incorporated teams, troupes, etc. Some States, however, may consider that the taxation of the gross amount may be inappropriate in some circumstances even if the applicable rate is low. These States may want to give the option to the taxpayer to be taxed on a net basis. This could be done through the inclusion of a paragraph drafted along the following lines:

Where a resident of a Contracting State derives income referred to in paragraph 1 or 2 and such income is taxable in the other Contracting State on a gross basis, that person may, within [period to be determined by the Contracting States] request the other State in writing that the income be taxable on a net basis in that other State. Such request shall be allowed by that other State. In determining the taxable income of such resident in the other State, there shall be allowed as deductions those expenses deductible under the domestic laws of the other State which are incurred for the purposes of the activities exercised in the other State and which are available to a resident of the other State exercising the same or similar activities under the same or similar conditions.

Paragraph 2

11. Paragraph 1 of the Article deals with income derived by individual ~~entertainers~~ ~~artists~~ and sportsmen from their personal activities. Paragraph 2 deals with situations where income from their activities accrues to other persons. If the income of an entertainer or sportsman accrues to another person, and the State of source does not have the 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. But it will not always be so. There are three main situations of this kind:

- a) 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).
- b) The second is the team, troupe, 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 **they perform their activities as entertainers or sportsmen** ~~a performance is given~~, on any remuneration (or income accruing for their benefit) ~~as a counterpart to~~ **derived from** the performance **of these activities** (see, however, paragraph 14.1 below); ~~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 or bilaterally, not to tax it.~~ The profit element accruing from a performance to the legal entity would be liable to tax under paragraph 2.
- c) The third situation involves certain tax avoidance devices in cases where remuneration for the performance of an ~~entertainer~~ ~~artiste~~ or sportsman is not paid to the ~~entertainer~~ ~~artiste~~ or sportsman himself but to another person, e.g. a so-called ~~entertainer~~ ~~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~~ ~~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 ~~entertainer~~ ~~artiste~~ or sportsman; 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~~ ~~artiste~~ or sportsman to the enterprise. 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 other solutions or to leave paragraph 2 out of their bilateral conventions.

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 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.

11.2 Paragraph 2 does not apply, however, to prize money derived by the owner of a horse or a race car from the results of the horse or car during a race. In such a case, the prize money is not sufficiently related to the personal activities of the jockey or race car driver to be considered to be derived from these

personal activities. Clearly, however, if the owner receives a payment on behalf of the jockey or race car driver, that income may be taxed in the hands of the jockey or race car driver under paragraph 1 (see paragraph 7 above).

11.32 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.

11.4 *Paragraph 2 covers income that may be considered to be derived in respect of the personal activities of an entertainer or sportsman. 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.*

11.5 *Whilst the Article does not provide how the income covered by paragraphs 1 and 2 is to be computed and leaves it to the domestic law of a Contracting State to determine the extent of any deduction (see paragraph 10 above), the income derived in respect of the personal activities of a sportsman or entertainer should not be taxed twice through the application of these two paragraphs. This will be an important consideration where, for example, paragraph 2 allows a Contracting State to tax the star-company of an entertainer on a payment received by that company with respect to activities performed by the entertainer in that State and paragraph 1 also allows that State to tax the part of the remuneration paid by that company to the entertainer that can reasonably be attributed to these activities. In that case, the Contracting State may, depending on its domestic law, either tax only the company or the entertainer on the whole income attributable to these activities or tax each of them on part of the income, e.g. by taxing the income received by the company but allowing a deduction for the relevant part of the remuneration paid to the entertainer and taxing that part in the hands of the entertainer.*

Additional considerations relating to paragraphs 1 and 2

12. Where, in the cases dealt with in paragraphs 1 and 2, the exemption method for relieving double taxation is used by the State of residence of the person receiving the income, that State would be precluded from taxing such income even if the State where the activities were performed could not make use of its right to tax. It is therefore understood that the credit method should be used in such cases. The same result could be achieved by stipulating a subsidiary right to tax for the State of residence of the person receiving the income, if the State where the activities are performed cannot make use of the right conferred on it by paragraphs 1 and 2. Contracting States are free to choose any of these methods in order to ensure that the income does not escape taxation.

13. Article 17 will ordinarily apply when the *entertainer*~~artiste~~ or sportsman is employed by a Government and derives income from that Government; see paragraph 6 of the Commentary on Article 19. Certain conventions contain provisions excluding *entertainers*~~artistes~~ and sportsmen employed in organisations which are subsidised out of public funds from the application of Article 17.

14. Some countries may consider it appropriate to exclude from the scope of the Article events supported from public funds. Such countries are free to include a provision to achieve this but the exemptions should be based on clearly definable and objective criteria to ensure that they are given only where intended. Such a provision might read as follows:

The provisions of paragraphs 1 and 2 shall not apply to income derived from activities performed in a Contracting State by ~~entertainers~~artists or sportsmen if the visit to that State is wholly or mainly supported by public funds of one or both of the Contracting States or political subdivisions or local authorities thereof. In such a case, the income is taxable only in the Contracting State in which the ~~entertainer~~artist or the sportsman is a resident.

14.1 *Also, given the administrative difficulties involved in allocating to specific activities taking place in a State the overall employment remuneration of individual members of a foreign team, troupe or orchestra, and in taxing the relevant part of that remuneration, some States may consider it appropriate not to tax such remuneration. Whilst a State could unilaterally decide to exempt such remuneration, such a unilateral solution would not be reciprocal and would give rise to the problem described in paragraph 12 above where the exemption method is used by the State of residence of the person deriving such income. These States may therefore consider it appropriate to exclude such remuneration from the scope of the Article. Whilst paragraph 2 above indicates that one solution would be to amend the text of the Article so that it does not apply with respect to income from employment, some States may prefer a narrower exception dealing with cases that they frequently encounter in practice. The following is an example of a provision applicable to members of a sports team that could be used for that purpose:*

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 a 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.