

ISSUES RELATED TO ARTICLE 17 OF THE MODEL TAX CONVENTION

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ISSUES RELATED TO ARTICLE 17 OF THE OECD MODEL TAX CONVENTION

INTRODUCTION

1. Under Article 17 of the OECD Model Tax Convention, the State in which the activities of a non-resident entertainer or sportsperson 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 sportsperson, what are the personal activities of an entertainer or sportsperson acting as such and what are the source and allocation rules for activities performed in various countries.

2. On 23 April 2010, the OECD Committee on Fiscal Affairs released a discussion draft¹ dealing with these and other questions related to the application of Article 17 that was prepared by a subgroup of Working Party 1 on Tax Conventions and Related Questions. That public discussion draft included proposals for additions and changes to the Commentary on the OECD Model Tax Convention resulting from the work of that subgroup.

3. Comments on the discussion draft were received from 11 organisations and individuals. The Committee, through its Working Party 1, reviewed the proposals included in the discussion draft in light of these comments. This report is the result of that subsequent work.

4. A significant part of the comments received did not relate directly to the proposals included in the discussion draft; these comments are dealt with in Part 1 of the report. Part 2 of the report includes the specific proposals for changes to the Commentary that were included in the discussion draft, as amended in light of the comments received, together with a summary of the relevant comments and the response of the Committee. Annex 1 includes a consolidated version of Article 17 and its Commentary that includes all the changes proposed in this report.

PART 1 – COMMENTS NOT SPECIFICALLY RELATED TO THE PROPOSALS

1. Suggestion that Article 17 should be deleted

5. The Committee first discussed the suggestion, included in some of the comments received, that Article 17 should be deleted and that no specific rule should therefore apply to income derived from the activities of entertainers and sportspersons. The Delegate for the Netherlands explained the reasons why his country had decided to exempt foreign sportspersons from source taxation. The vast majority of delegates, however, supported the view that Article 17 should be kept. During the discussion, it was noted that residence taxation should not be assumed given the difficulties of obtaining the relevant information,

¹ See http://www.oecd.org/document/32/0,3343,en_2649_33747_45056800_1_1_1_1,00.html.

that Article 17 allows taxation of a number of high-income earners who can easily move their residence to low-tax jurisdictions and that source taxation of the income covered by the Article can be administered relatively easily.

2. *Suggestion that Article 17 should be substantially amended*

6. The Committee also discussed a number of comments that included proposals for substantial changes to Article 17. The interventions focussed on the suggestion to include a *de minimis* rule under which low-income earners would be exempt from the application of Article 17. It was noted that such a rule is included in many treaties concluded by the United States.²

7. The Committee discussed the various features that such a *de minimis* rule should have and reached the following conclusions:

- Whilst various options are possible with respect to the determination of the threshold amount under which Article 17 would not apply, the rule should ideally avoid the reference to the currency of one of the two States and should provide an amount that remains relatively constant in value regardless of currency fluctuations. It was therefore decided to refer to the IMF Special Drawing Rights (SDRs), which are based on a basket of currencies revised periodically (see <http://www.imf.org/external/np/exr/facts/sdr.htm>) and are easily converted in most convertible currencies.
- For ease of administration, the approach chosen should provide a constant amount for each taxation year and that amount should be known at the beginning of the year. For this reason, it was decided that the rule would indicate that the agreed amount should be converted in the currency of each Contracting State at the beginning of each of that State's taxation years. It was also agreed that the threshold amount would have to be updated periodically.
- The rule would not prevent Contracting States from collecting tax at the time the relevant income was earned and refunding it after the end of the year once it is established that the threshold amount has not been exceeded.
- The *de minimis* exception should only apply with respect to paragraph 1. Applying the rule with respect to entities covered by paragraph 2 would likely result in a fragmentation of contracts among many related entities in order to multiply the benefit of that exception.
- The rule should only restrict the additional taxing right granted by Article 17 and should not affect the source taxing rights otherwise available under Articles 7 and 15. It should therefore not prevent taxation to the extent that the entertainer has a permanent establishment in the

² The provision included in the 2006 US Model Treaty reads as follows:

1. 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, which income would be exempt from tax in that other Contracting State under the provisions of Articles 7 (Business Profits) and 14 (Income from Employment) may be taxed in that other 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 twenty thousand United States dollars (\$20,000) or its equivalent in ----- for the taxable year of the payment.

State of source or is present in the other State for more than 183 days (or is employed by an employer who is a resident of that State or has a permanent establishment in that State).

8. After discussion, the Committee agreed that the Commentary on Article 17 should include the following alternative provision (and explanations thereon) that countries wishing to do so could include in their bilateral treaties:

Add the following paragraphs 10.1 to 10.4 to the Commentary on Article 17:

10.1 Some States may also consider that it would be inappropriate to apply Article 17 to a non-resident entertainer sportsperson who would not otherwise be taxable in a Contracting State (e.g. under the provisions of Article 7 or 15) and who, during a given taxation year, derives only low amounts of income from activities performed in that State. States wishing to exclude such situations from the application of Article 17 may do so by using an alternative version of paragraph 1 drafted along the following lines:

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 his personal activities as such exercised in the other Contracting State, may be taxed in that other State, except where the gross amount of such income derived by that resident from these activities exercised during a taxation year of the other Contracting State does not exceed an amount equivalent to [15 000 IMF Special Drawing Rights] expressed in the currency of that other State at the beginning of that taxation year or any other amount agreed to by the competent authorities before, and with respect to, that taxation year.

10.2 The amount referred to in the above provision is purely illustrative. The reference to “IMF Special Drawing Rights” avoids the reference to the currency of one of the two Contracting States and is intended to provide an amount that remains relatively constant in value regardless of currency fluctuations in each State (the IMF Special Drawing Rights (SDRs) are based on a basket of currencies revised periodically and are easily expressed in most convertible currencies). Also, for ease of administration, the proposed provision provides that the limit applicable in a State for a given taxation year is the amount converted in the currency of that State at the beginning of that year. The proposed provision also allows competent authorities to modify the amount when they consider it appropriate; instead of adopting a static amount, however, some States may prefer to adopt an objective mechanism that would allow periodic changes (this could be done, for example, by replacing the amount by a formula such as “50 per cent of the average GDP per capita for OECD countries, as determined by the OECD”).

10.3 The proposed provision would not prevent Contracting States from collecting tax at the time the relevant income is earned and refunding it after the end of the year once it is established that the minimum amount has not been exceeded.

10.4 The proposed provision only applies with respect to paragraph 1 (applying the rule with respect to other persons covered by paragraph 2 could encourage a fragmentation of contracts among many related entities in order to multiply the benefit of the exception). Also, the provision only restricts the additional taxing right recognised by Article 17 and does not affect the source taxing rights otherwise available under Articles 7 and 15. It would therefore not prevent taxation to the extent that the entertainer has a permanent establishment in the State

of source or is present in that State for more than 183 days (or is employed by an employer who is a resident of that State or has permanent establishment in that State).

3. *Suggestion that Article 17 should not apply to entertainers who are employed*

9. The Committee examined the suggestion, included in one of the comments, that artistes who are employed should be excluded from the application of Article 17. It was objected that excluding all employees would allow an artiste to set up a star-company that would act as his/her employer in order to avoid the application of Article 17. This led to a discussion of how a provision could be designed to exempt employees of bands and orchestras that were independent from these bands and orchestras, whether by excluding situations where the performer participated in the profits of the band/orchestra or, based on the mechanism put forward in the US Model³ in order to ensure that the application of that paragraph is restricted to star-companies, by excluding situations where the event organiser could designate the individual performers. After further discussion, however, the Committee concluded that it would be inappropriate to extend the scope of the optional provision proposed in paragraph 14.1 for employees of foreign sports teams and it was concluded that the inclusion of a *de minimis* rule as previously discussed would significantly reduce the scope of the problem of the taxation of employees.

4. *Comments according to which many entertainers earn small amounts of income and not recognising expenses results in excessive taxation.*

10. The Committee concluded that paragraph 10 of the Commentary on Article 17 already addressed the concern, expressed in some comments, that many entertainers earn small amounts of income and that not recognising expenses may result in excessive taxation. It was also noted that the proposal concerning a *de minimis* rule would indirectly deal with such cases. It was also suggested that taxation on a gross basis but at a low rate will often be more beneficial than allowing the deduction of expenses but taxing the net income at a high rate.

5. *Suggestion that treaties do not eliminate double taxation if States do not agree on the interpretation of Article 17*

11. Some comments stressed the need for a common interpretation of Article 17, noting that differences of views between States may result in unrelieved double taxation. The Committee noted that differences of interpretation were one of the reasons why it had undertaken work aimed at clarifying how Article 17 should be interpreted and applied.

6. *Special issues for theatre producers (non-profit companies should not be taxed and the part of the income of artistes that does not relate to performance should not be covered by Article 17)*

12. The Committee discussed one set of comments that suggested that non-profit companies should not be taxed and the part of the income of artistes that does not relate to performance should not be covered by Article 17. These comments seemed to be based on a misunderstanding of the nature of a withholding

³ The relevant paragraph of Article 16 of the US Model reads as follows:

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 7 (Business Profits) or 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.

tax obligation imposed on a theatre company; they also appeared to be based on a misunderstanding of Article 17(2) to the extent that they suggested that a foreign commercial theatre producer would not be taxed on its profits, a view that is contrary to the interpretation put forward in subparagraph 11 *b*) of the Commentary.

7. *Other comments not specifically related to the proposals included in the discussion draft*

13. Various other comments suggested that administrative procedures applicable to the taxation of entertainers and sportspersons were too cumbersome, that interest should be paid on refunds of overpaid taxes, that tax should be paid on an estimated net basis, that countries should not collect tax under domestic law if the treaty results in no tax being payable, that issues related to withholding taxes and relief of double taxation should be addressed, that paragraphs 5 and 6 of the Commentary should be clarified and that the underlying purpose of Article 17 should be better articulated.

14. The Committee concluded that these comments either dealt with the way in which individual countries were exercising the taxing rights allocated by Article 17, which was a matter of domestic law, or reflected theoretical concerns that need not be addressed.

PART 2 – PROPOSALS RELEASED IN APRIL 2010 AND COMMENTS DIRECTLY RELATED TO THESE PROPOSALS

1. What is an entertainer or sportsperson?

15. The discussion draft included a proposal for a new paragraph 9.1 aimed at clarifying whether certain persons constitute entertainers or sportspersons so as to fall within the scope of Article 17.

16. A few comments were received on the proposed new paragraph. One commentator objected to the inclusion of one-time payments (*e.g.* where an amateur receives a prize for participation in a single sporting event). The Committee disagreed with the view expressed in these comments since the general principle of Article 17 was that taxing rights were based on the nature of the activity and introducing a distinction between professionals and amateurs would add complexity; it also disagreed with the suggestion that any domestic law distinction between the capital or revenue nature of the payment would be relevant for the purposes of Article 17.

17. The same commentator suggested that the example of a reporter did not belong in the paragraph. The Committee considered, however, that this example was a useful clarification of who is not covered by Article 17, particularly as regards the example of the former or injured sportsperson commenting on a sports event. The need for such a clarification is shown by another comment according to which where a sportsperson acts as a commentator on a sporting event, the income derived therefrom should be covered by Article 17 and that only a professional commentator should be outside the scope of Article 17. The Committee did not support that interpretation since Article 17 refers to the income that an entertainer or sportsperson derives from activities as such.

18. Finally, one commentator suggested that the distinction between activities that are covered by Article 17 and those that are not should be clarified by stating the “necessary objective and subjective elements for discerning between different situations, together with a non-exhaustive list of cases that illustrate the application of the article”. The Committee was not convinced, however, that the definitions of “artiste” and “athletic activities” proposed by that commentator would be a useful addition to the Commentary since they would likely raise additional interpretation issues.

19. The Committee also discussed the application of Article 17 to sports commentators. In doing so, it examined various examples, including the example of retired sportspersons acting as commentators and that of commentators who may be said to act as entertainers. Whilst the suggestion was made that Article 17 should apply to certain sports commentators whose comments have a high entertainment value, it was concluded that whether or not the reporting is done in an entertaining manner is a subjective test that would be extremely difficult to administer. It was also concluded that the fact that a reporter or commentator is a famous sportsperson does not change the nature of that person’s reporting or commenting activities. It was also stressed that the proposed clarification only dealt with a person who comments during a sports event or reports on that event; it did not preclude the application of Article 17 where, for example, a retired sportsperson participates in a weekly television show during which sports events are discussed.

20. During the discussion, the Committee noted that the Commentary included some confusing references to payments that are “directly or indirectly related” to the activities of an entertainer or sportsperson. It therefore decided to use a more consistent terminology throughout the Commentary on Article 17. For that reason, it was agreed that the reference, in paragraph 9.1, to “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”. Similar changes were agreed to in other paragraphs of the Commentary (see the revised version of the Commentary included in the Annex).

21. The following is the revised version of paragraph 9.1 that was adopted by the Committee.

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 sportsperson from that person's personal activities as such. The following principles may be useful to deal with such cases:*

- The reference to an “entertainer or sportsperson” 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 sportsperson 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 closely connected with 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 sportsperson acting as such. Thus, for instance, the fee that a former or injured sportsperson would earn for offering comments during the broadcast of a sports event in which that person does not participate would not be covered by Article 17.*

2. Application of Article 17 to race prizes

22. The discussion draft included a new paragraph 11.2 dealing with 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.

23. One commentator asked whether the proposed change meant that “all money paid in respect of animals is outside of Article 17”. That commentator suggested that entertainers might be tempted to use animals in their stage acts to escape taxation on part of the fee and therefore recommended “[t]hat the exclusion of prize money for performances by animals and cars is deleted and it be noted that such income should be considered as caught by Article 17.” The Committee, however, did not agree with that suggestion and considered that Article 17 required a distinction to be made between the income derived from the personal activities of entertainers and sportspersons and income derived from the ownership of horses and cars used in performing these activities.

24. As explained elsewhere in this note, the Committee made a number of changes to the Commentary in order to replace the term “sportsmen” and some confusing references to payments that are “directly or indirectly related” to the activities of an entertainer or sportsperson. These changes were made to paragraph 11.2. In addition, other changes were made to reflect more accurately the arrangements under which payments are made in the case of car racing. The following is the revised version of paragraph 11.2 that was adopted by the Committee:

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 that the owner of a horse or the team to which a race car belongs derives from the results of the horse or car during a race or during races taking place during a certain period. In such a case, the prize money is not paid*

in consideration for the personal activities of the jockey or race car driver but in consideration for the activities related to the ownership and training of the horse or the design, construction, ownership and maintenance of the car. Such prize money is not derived from the personal activities of the jockey or race car driver and is not covered by Article 17. Clearly, however, if the owner or team receives a payment in consideration for the personal activities 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 sportsperson as such?

25. The discussion draft included proposed changes to the Commentary on Article 17 aimed at clarifying in which circumstances income derived by an entertainer or sportsperson (or a person referred to in paragraph 2) can be said to be related to the personal activities of the entertainer or sportsperson “as such”. These changes related to the following activities.

Activities of models and public speakers

26. Proposed changes were first included in paragraph 3 of the Commentary in order to deal with practical issues related to whether, and to what extent, Article 17 applies to the activities of models as well as public speakers. Additional changes made to the paragraph (and to other parts of the Commentary) were intended to clarify that Article 17 applies to entertainers and not only to “artistes”.

27. One commentator expressed the view that the examples added to paragraph 3 “do not seem to be on either end of the scale, but rather in the grey area. ... The examples added do not provide clarity but rather greater confusion.” The Committee, however, concluded that it was useful to indicate how these additional examples should be dealt with since these were practical situations that had raised difficulties in the past.

28. One commentator suggested clarifying that “the personal activities ... of an entertainer may involve mere self-restraint (artist that act as ‘man statue’).” Whilst the Committee agreed that such activities would be covered by Article 17, it did not consider it necessary to clarify that point in the Commentary.

29. Another commentator expressed the view that “[b]y including the film actor in the scope of Article 17 it seems that the performance required for the purposes of that article does not involve acting before an audience. Therefore ‘performance’ is not necessarily ‘public performance’.” Whilst the commentator suggested that this should be clarified, the Committee noted that the words “performance” and “public performances” do not appear in Article 17 and that paragraph 3 of the Commentary already includes the example of film actors.

30. One commentator disagreed with the proposed clarification concerning models and speakers, suggesting that “there is a level playing field and ex-politicians should be regarded as performers as much as any other public speaker, who is not currently and directly involved in politics” and that “[m]odels ... are more analogous to actors”. That commentator went on to recommend that “the references to ex-politicians and models being exempt from Article 17, be deleted and it be made clear such activities fall within Article 17”. The Committee, however, disagreed with that view.

31. Some comments focused on the replacement of the word “artistes” by “entertainers”. Whilst two commentators noted that the change was technically correct, at least in the English version, it was suggested in some comments that the word “artistes” might be easier to translate in other languages. One commentator also suggested that a list describing the different types of artistes should have been included.

The Committee concluded that since the reference to “artiste” in Article 17(1) is merely illustrative of the broader term “entertainer”, it was preferable to focus on the concept of “entertainer” in the Commentary. It also noted that there was a difference between the French and English meaning of the word “artistes” and that it would be wrong to translate “entertainers” in a way that would suggest that a public performance is required for Article 17 to apply.

32. One commentator suggested that the word “sportsman” should be replaced by the gender-neutral “sportspersons”. The Committee agreed to make that change throughout Article 17 and its Commentary (see the Annex). The Committee also concluded that no additional changes should be made to the revised version of paragraph 3 that was included in the discussion draft:

*Replace paragraph 3 of the Commentary on Article 17 by the following (changes to the existing text of the Commentary appear in **bold italics** and ~~strikethrough~~):*

3. Paragraph 1 refers to ~~entertainers~~~~artistes~~ and ~~sportsmen~~~~sportspersons~~. 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~~~~sportsperson~~) 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.

Preparation and training activities

33. The discussion draft also included a proposed addition aimed at clarifying that Article 17 applies to the part of the remuneration of an entertainer or sportsperson that relates to preparation and training, and not only to the part of such remuneration that relates to actual performances.

34. One commentator indicated that the practice of the UK tax authorities was “to tax a proportion of income earned under contracts for services – even if that income is earned by a personal service company – on the basis of competition days in the UK.” The commentator argued, however, that it would be inappropriate to tax endorsement income of a sportsperson on that basis since a sportsperson has to train the rest of the year. Using the example of a marathoner, the commentator argued that “if the athlete was in the UK for a week for the London Marathon and did not return in a given tax year, but could demonstrate that he/she trained on every day of the year (as many marathon runners do) then 1/52 of global income for services should fall within the UK tax net.” The Committee, however, disagreed with that suggestion, which does not take into account the consideration for the payments received: where a marathoner derives all of her income from her participation and performance during races held in one country, it is difficult to consider that any part of that remuneration is paid for training in another country. It also disagreed with the argument that the proposal “seems to grant preferential status to employed, rather than self-employed sportspeople”: under the proposed interpretation, self-employed individuals who are paid to train or rehearse are treated like employed individuals who are paid to train or rehearse. The Committee simply noted that it seemed more unusual for self-employed entertainers and sportspersons to be paid for training or preparation.

35. Two commentators, however, objected to that last observation and referred to the following situations where they argued that self-employed individuals were paid for preparation or training:

- “[S]elf-employed sportspeople have contracts which include the fact that products must be used in training as well as competition”.
- “Actors may need to undertake preparation for specific roles (e.g. a role requiring him/her to ride a horse); in that case they will need to train for the role, but the days spent in training will form part of the work in relation to the film fee.”
- Some self-employed persons performing in plays, operas and concerts may be contractually required to participate in rehearsals.

36. Whilst it was unclear, in the first two examples, whether or not the person was paid for the training or preparation period, the Committee agreed that the last example involved payments for preparation made to a self-employed person.

37. Based on these comments, the Committee concluded that the reference to rehearsals and the example of a self-employed person being paid for rehearsing should be added to proposed paragraph 9.1. The following revised version of the relevant part of the paragraph was therefore adopted by the Committee:

Add the following subparagraphs to proposed paragraph 9.1 (see above) of 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 sportsperson from that person’s personal activities as such. The following principles may be useful to deal with such cases:]

- *[...]*
- ***Preparation, such as rehearsal and training, is part of the normal activities of entertainers and sportspersons. If an entertainer or sportsperson is remunerated for time spent on preparation, rehearsal, training or similar preparation in a State (which would be fairly common for employed entertainers and sportspersons but could also happen for a self-employed individual, such as an opera singer whose contract would require participation in a certain number of rehearsals), the relevant remuneration, as well as remuneration for time spent travelling in that State for the purposes of performances, rehearsal and training (or similar preparation), would be covered by the Article. This would apply regardless of whether or not such rehearsal, training or similar preparation 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).***

Activities of producers and promoters and need to avoid double taxation when paragraph 2 is applied

38. Another change included in the discussion draft dealt with the activities of promoters and with the potential double taxation of income where paragraph 2 applies. Some comments were received concerning paragraph 11.5, which deals with the second issue.

39. One commentator suggested that paragraph 11.5 should be renumbered and placed under the section headed “Additional considerations relating to paragraphs 1 and 2”. The Committee considered that

such a change was not necessary. Another commentator suggested that “by explicitly deferring to national tax regimes to determine whether any deductions from such income is available, and to what extent, the OECD seems implicitly to accept that gross taxation of such income may be the preferred choice of a Contracting State”. That commentator went on to suggest that “the introductory statement about calculation of income and deduction of expenses should be eliminated from paragraph 11.5”. The Committee, however, concluded that the introductory statement in paragraph 11.5 provided a useful clarification that was technically correct.

40. The Committee therefore concluded that, apart from the replacement of the word “sportsmen”, no changes should be made to the following proposals included in the discussion draft:

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 sportspersons***—~~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 a 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.

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 deductions (see paragraph 10 above), the income derived in respect of the personal activities of a sportsperson 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.

Alternative provision for the members of a sports team

41. The discussion draft included a proposed paragraph indicating that given the administrative difficulties involved in taxing a share of the overall employment remuneration of individual members of a foreign team, troupe or orchestra, some States may consider it appropriate not to tax such remuneration. The paragraph also included an alternative provision providing for an exemption limited to members of a sports team.

42. Comments received on this proposal stressed the administrative difficulties involved in taxing a share of the overall employment remuneration of individual members of a foreign team, troupe or orchestra. One commentator expressed the view that “it remains a question how this will work in practice: a company will have to send extensive explanation on the calculation methods and details of the remuneration attributed to the activities, if already that is possible and feasible for a live performance company.” Another commentator indicated that the solution proposed by paragraph 14.1 was not ideal and that “[t]he better solution is still submitted to be the abolition of Article 17 and the redistribution of its effects between the relevant effective Articles.”

43. As explained under Part 1 above, however, the Committee rejected suggestions related to the elimination of Article 17 or the complete exemption of employees from the application of that Article. The following version of paragraph 14.1, which is identical to the proposal included in the discussion draft (except from the replacement of the word “sportsman”), was therefore adopted by the Committee:

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 sports person 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

44. The discussion draft included a proposal intended to clarify how the income should be sourced and allocated when entertainment activities are performed in various countries.

45. One commentator indicated that “we do not believe the proposed amendments make clear the fact that preparation and training time in a particular state should be factored in to the apportionment calculation”. A similar comment was made by another commentator according to whom “no account is

taken of preparation/rehearsal time in relation to a performer. If a payment is received for a concert tour performed over 30 nights, but which requires 20 days worth of preparation in a specific country prior to the tour, this preparation time should be taken into account.” The Committee, however, considered that example 2 in paragraph 9.3 addressed the issue of remuneration that clearly relates to preparation. Since the payment made under example 1 does not cover preparation but only actual performances, it would not be appropriate, in that example, to refer to days spent preparing or rehearsing. Whilst it is clear that a self-employed entertainer requires preparation (like many self-employed persons), the real question is whether income received by that entertainer is paid specifically for that preparation.

46. Another commentator argued that “[w]hereas artistes are already at a disadvantage with regard to their tax position compared to other workers, the proposed text for addition in the commentary creates another important difficulty. In order to be able to allocate the salary on the basis of the working days spent in each country of performance, one can only do so after a year. This is administratively burdensome and complicated to do, in particular for the company that employs several artists and undertakes several tours a year.” According to another commentator “[t]he examples add little by way of explanation, but rather further highlight the complexities in the article” and “[t]he principles contained in the commentary concerning apportionment are sound but impractical”. The Committee considered that these comments were more related to the general question of whether Article 17 should be included in a treaty than to the specific issue of sourcing and allocation of income covered by the Article.

47. A commentator suggested that “to be consistent with the spirit of Article 17, it would be appropriate to tax in the State in which the activity is performed only those amounts that the sportsman or entertainer receives additionally or specifically for the performance of his activity in the other State. Conversely, in cases where the entertainer or sportsman does not receive an additional amount for the activity performed in the other State, we consider that his ordinary remuneration should only be taxed in his State of residence”. The Committee did not consider that such an interpretation would conform to the wording of Article 17; as indicated in proposed paragraph 14.1, States that wish to exempt the remuneration of employees of sports team or orchestras from the application of Article 17 are free to do so by amending the wording of the Article.

48. Finally, one commentator asked for additional clarification concerning two specific types of payments: third-party sick pay for work-related injury (*i.e.* an entertainer or athlete is injured during a performance and receives a “sick pay” either from the employer, a private insurance company or a governmental insurance plan) and stand-by fees (*i.e.* “an entertainer receives employment remuneration for being available and ready to perform activities as an entertainer being part of a troupe in a performance State”). The Committee considered that it would be impossible to provide a general answer regarding the first category of payment, which could cover very different payments (*e.g.* employment income, insurance proceeds or social security payments); it decided, however, to examine the treaty treatment of these payments as part of another project dealing with payments that are received following the termination of employment. As regards the second type of payment, it considered that it was similar to the salary paid to a member of a sports team who is paid whether or not he plays in a match: the application of Article 17 does not depend on whether or not he actually participates in the match but on whether he is present in a State for the purposes of his activities as a sportsperson, which includes being available for the match.

49. The Committee did not consider that these comments required additional changes to the proposal. As already indicated, however, the Committee made a number of changes to the Commentary in order to replace the term “sportsman” by “sportsperson” and to replace some confusing references to payments that are “directly or indirectly related” to the activities of an entertainer or sportsperson. Apart from these changes, the following version of paragraphs 9.2 and 9.3, which was adopted by the Committee, is identical to the proposal included in the discussion draft:

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

9.2 *Entertainers and sportspersons 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 closely connected with specific activities exercised by the entertainer or sportsperson 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 sportsperson 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 sportsperson has been required, under his or her 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 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.*

5. Special categories of payments

Merchandising payments and prizes and awards paid by a national federation, association or league

50. The discussion draft included proposals for a new paragraph 8.1 and for changes to paragraph 9 intended to clarify whether or not Article 17 applied to various payments, including prizes and awards paid by a national federation, association or league for a particular event, sponsorship payments and merchandising payments.

51. One commentator noted that whilst the second sentence of paragraph 9 provides that other Articles generally apply where “there is no *direct* link” between the income and the performance, the paragraph subsequently indicates that “advertising or sponsorship income directly *or indirectly* linked to the performance must be included in the scope of Article 17”. That commentator argued that “[t]he indirect links of income to performance raise great difficulties”. As already explained, the Committee recognised that the Commentary included some confusing references to payments that are “directly or indirectly related” to the activities of an entertainer or sports person and decided to use a more consistent terminology in paragraph 9 and throughout the Commentary on Article 17. In addition, paragraph 9 was amended to provide greater clarification with respect to the link with an event that is required for a payment to be covered by Article 17.

52. Another commentator suggested that there was a difference between advertising income, sponsorship income and endorsement income. He added that, “This is a complex area which Article 17 effectively offers little guidance on. We believe that more detailed analysis is required in relation to the definitions the income which should be taxed under Article 17. Further discussion with stakeholders would be required, but we feel it is vitally important to establish these principles, and whether the various types of income should in fact be subject to tax under Article 17.” The Committee considered, however, that given differences between the types of payments and the terms of relevant contracts, it would be very difficult to go beyond the general principles included in paragraph 9.

53. As regards endorsement payments (*e.g.* made to a tennis player for wearing clothing with the logo or the trademark of a given sponsor), one commentator expressed the view that Article 17 should not apply “where such amounts are received pursuant to a global agreement with a commercial trademark that has a scope ranging from the airing of advertisements through to the exclusive use of its sports material, and the setting of that remuneration does not bear any relation to the place where the activity is going to be performed”. As already indicated, the Committee has modified paragraph 9 in order to clarify the type of connection that would be required between the payment and a specific event for Article 17 to apply.

54. One commentator indicated that, whilst paragraph 9 indicates that royalties for intellectual property rights will normally be covered by Article 12, rather than Article 17, “[i]t is not clear under which circumstances Article 12 will give way to Article 17 and no explanation is provided by the Commentary.” That commentator suggested that “[t]he sentence ‘Royalties for intellectual property rights will normally be covered by Article 12 rather than Article 17’, should be amended deleting ‘will normally be’ and substituted with ‘are’. The whole of the final sentence in Paragraph 9 should be deleted. This sentence does not provide clarification or explanation, but confuses the situation with regard to the separation of the two income streams of copyright income and performance income.” Given the explanations already provided in the Commentary on Article 12 (see, for example, paragraph 18 of that Commentary), the Committee did not consider it necessary to provide additional explanations on the distinction between Articles 12 and 17 in the Commentary on Article 17. It did agree, however, that if music CDs of a performer are sold at a concert venue, Article 12, and not Article 17, would apply to the copyright royalties (if any) derived by the entertainer from these sales. For that reason, it decided to amend the last sentence of proposed paragraph 9 to clarify that point.

55. The following is the revised version of the relevant proposals that the Committee adopted after discussing these comments:

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** and ~~strikethrough~~):

9. Besides fees for their actual ~~performances~~^{appearances}, ~~entertainers~~^{artists} and ~~sportsmen~~^{sportspersons} 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~~^{close connection} between the income and ~~the performance of activities~~^{a public exhibition by the performer} in the country concerned. *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. 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).* Royalties for intellectual property rights will normally be covered by Article 12 rather than Article 17 (see 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~~ *has a close connection with a* ~~performances~~^{appearances} or ~~appearances~~^{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*). *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).* Similar income which could not be attributed to such ~~performances~~^{appearances} or ~~appearances~~^{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 sportsperson of a share of the merchandising income closely connected with a public performance but not constituting royalties would normally fall under Article 17, merchandising payments derived from sales in a country that are not closely connected with performances in that country and that do not constitute royalties would normally be covered by Article 7 (or Article 15, in the case of an employee receiving such income).*

Broadcasting payments

56. The discussion draft also included a proposed new paragraph 9.4 intended to deal with payments for broadcasting rights.

57. Only one commentator commented on that proposed paragraph, suggesting that “[p]aragraph 9.4 confuses the income sources and requires greater clarification. Where a broadcast of a performance takes place, the payment for the performance may be subject to Article 17, however, payments may cover the performance and the right to record the performance for later and/or multiple broadcasts. Payment for this right is a copyright payment covered by Article 12”. The Committee considered that since paragraph 9.4 only deals with payments “for the simultaneous broadcasting of a performance”, the paragraph does not confuse these payments with payments for the “right to record the performance for later and/or multiple broadcasts”. Where the same payment covers both the right for the simultaneous broadcast and the right to record for later broadcasts, the principles of paragraph 18 of the Commentary on Article 12 should be followed instead of considering that the entire payment is covered by Article 12.

58. The same commentator suggested that where a performance is recorded and the artiste does not own the copyright in the recording but is entitled to payments based on the recording, that payment would be outside Article 17; the commentator also suggested that Article 17 would not apply “where the artistes own their own copyrights and the payment will be made to their own loan-out companies”. The Committee considered, however, that these situations would also be dealt with in accordance with the principles expressed in paragraph 18 of the Commentary on Article 12.

59. The Committee did not consider that these comments required any changes to the proposal and adopted the following paragraph 9.4, which is identical to the proposal included in the discussion draft subject to the replacement of the word “sportsman” and to a minor clarification concerning broadcasting rights distributed to teams that are members of a league:

Add the following new paragraph 9.4 to the Commentary on Article 17:

9.4 Payments for the simultaneous broadcasting of a performance by an entertainer or sportsperson made directly to the performer or for his or her 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 sportsperson from that person’s 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 and will not be re-distributed to the players and that is not otherwise paid for the benefit of the players.. 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.

Payments for image rights

60. The discussion draft finally included a proposal to add to the Commentary on Article 17 a new paragraph 9.5 dealing with payments for the use of, or to right to use, image rights of entertainers and sportspersons.

61. The only comments received on that paragraph alleged that the UK tax authorities did not accept that the athlete’s “image” had a value and asked that this point be clarified. These comments also suggested that the paragraph was slightly ambiguous and asked for “examples of the kind of payments for the use of a sportsperson’s image which the OECD feels do and do not fall within the ambit of Article 17”. The Committee considered, however, that it would be difficult to go beyond the general principles expressed in paragraph 9.5 and that each case had to be dealt with on the basis of its own facts and circumstances, especially as regards valuation issues.

62. The Committee did not consider that these comments required any changes to the proposal. As already indicated, however, it made a number of changes to the Commentary in order to replace the word “sportsman” and some confusing references to payments that are “directly or indirectly related” to the activities of an entertainer or sportsperson. These changes were made to paragraph 9.5 and the following is the revised version of that paragraph that was adopted by the Committee:

Add the following new paragraph 9.5 to the Commentary on Article 17:

9.5 *It is frequent for entertainers and sportspersons to derive, directly or 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, 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 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). There are cases, however, where payments made to an entertainer or sportsperson who is a resident of a Contracting State, or to another person, for the use of, or 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.*

ANNEX

CONSOLIDATED VERSION OF THE CHANGES TO ARTICLE 17 AND ITS COMMENTARY INCLUDED IN THIS REPORT

[Changes made to existing text of the Model Tax Convention appear in **bold italics** for additions and ~~strikethrough~~ for deletions; changes made to the Commentary changes that were included in the April 2010 discussion draft are underlined]

ARTICLE 17

~~ARTISTES AND SPORTSMEN~~ 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 ~~sportsman~~ **sportsperson**, from *that resident's* ~~his~~ 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 ~~sportsman~~ **sportsperson acting as such** ~~in his capacity as such~~ accrues not to the entertainer or ~~sportsman~~ **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 ~~sportsman~~ **sportsperson** are exercised.

COMMENTARY ON ARTICLE 17 CONCERNING THE TAXATION OF ~~ARTISTES AND SPORTSMEN~~ ENTERTAINERS AND SPORTSPERSONS

Paragraph 1

1. Paragraph 1 provides that ~~entertainers~~ **artistes** and ~~sportsmen~~ **sportspersons** 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 (over which it prevails by virtue of paragraph 4 of that Article) 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~~ **sportspersons** 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.~~ replace the words “notwithstanding the provisions of Article 15” by “subject to the provisions of Article 15” in paragraphs 1 and 2. In such a case, ~~entertainers~~ **artistes** and ~~sportsmen~~ **sportspersons** 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~~artists and ~~sportsmen~~sportspersons. 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~~sportsperson) 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~~sportspersons” 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~~sportsperson is outside the scope of the Article, but any income they receive on behalf of the ~~entertainer~~artiste or ~~sportsman~~sportsperson is of course covered by it.

8. Paragraph 1 applies to income derived directly and indirectly from a performance by an individual ~~entertainer~~artiste or ~~sportsman~~sportsperson. In some cases the income will not be paid directly to the individual, or his impresario or agent, directly with respect to a specific performance. 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~~sportsperson 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~~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~~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~~artists and ~~sportsmen~~sportspersons often receive income in the form of royalties or of sponsorship or advertising fees. In general, other Articles would apply whenever there ~~was~~is no ~~direct link~~close connection between

the income and *the performance of activities*—a public exhibition by the performer in the country concerned. 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. 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). Royalties for intellectual property rights will normally be covered by Article 12 rather than Article 17 (cf. see 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 has a close connection with a 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). 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). 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~~sportsperson of a share of the merchandising income ~~related to~~closely connected with a public performance but not constituting royalties would normally fall under Article 17, merchandising payments derived from sales in a country that are not ~~related to~~closely connected with performances in that country and that do not constitute royalties would normally be covered by Article 7— (or Article 15, in the case of an employee receiving such income).*

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~~sportsperson from ~~his~~that person's personal activities as such. The following principles may be useful to deal with such cases:

- *The reference to an “entertainer or ~~sportsman~~sportsperson” 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~~sportsperson 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~~closely connected with 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~~sportsperson acting as such. Thus, for instance, the fee that a former or injured ~~sportsman~~sportsperson would earn for offering comments during the broadcast of a sports event in which ~~he~~that person does not participate would not be covered by Article 17.*
- *Preparation, such as rehearsal and training ~~are parts, is part~~ of the normal activities of entertainers and sportspersons. If an entertainer or ~~sportsman~~sportsperson is remunerated for time spent on preparation ~~and, rehearsal, training or similar preparation~~ in a State (which would be ~~unusual for self-employed individuals but would be~~ fairly common for employed entertainers and ~~sportsmen~~sportspersons but could also*

happen for a self-employed individual, such as an opera singer whose contract would require participation in a certain number of rehearsals), the relevant remuneration, as well as remuneration for time spent travelling in that State for the purposes of performances, rehearsal and training (or similar preparation ~~or training~~), would be covered by the Article. This would apply regardless of whether or not such rehearsal, training or similar 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~~sportspersons 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~~closely connected with specific activities exercised by the entertainer or ~~sportsman~~sportsperson 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~~sportsperson 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~~sportsperson has been required, under his or her 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% 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.*

9.4 *Payments for the simultaneous broadcasting of a performance by an entertainer or ~~sportsman~~sportsperson made directly to the performer or for his or her 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/sportsperson from his/her that person's 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 and will not be re-distributed to the players and that is not otherwise paid for the benefit of the players. 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/sportspersons to derive, directly or 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, 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/sportsperson's image rights are not closely connected to the entertainer's or sportsman's/sportsperson'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/sportsperson 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/sportsperson's image rights constitute in substance remuneration for activities of the entertainer or sportsman/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.

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/artists and sportsmen/sportspersons. 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.

10.1 Some States may also consider that it would be inappropriate to apply Article 17 to a non-resident entertainer or sportsperson who would not otherwise be taxable in a Contracting State (e.g. under the provisions of Article 7 or 15) and who, during a given taxation year, derives only low amounts of income from activities performed in that State. States wishing to exclude such situations from the application of Article 17 may do so by using an alternative version of paragraph 1 drafted along the following lines:

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 his personal activities as such exercised in the other Contracting State, may be taxed in that other State, except where the gross amount of such income derived by that resident from these activities exercised during a taxation year of the other Contracting State does not exceed an amount equivalent to [15 000 IMF Special Drawing Rights] expressed in the currency of that other State at the beginning of that taxation year or any other amount agreed to by the competent authorities before, and with respect to, that taxation year.

10.2 The amount referred to in the above provision is purely illustrative. The reference to “IMF Special Drawing Rights” avoids the reference to the currency of one of the two Contracting States and is intended to provide an amount that remains relatively constant in value regardless of currency fluctuations in each State (the IMF Special Drawing Rights (SDRs) are based on a basket of currencies revised periodically and are easily expressed in most convertible currencies). Also, for ease of administration, the proposed provision provides that the limit applicable in a State for a given taxation year is the amount converted in the currency of that State at the beginning of that year. The proposed provision also allows competent authorities to modify the amount when they consider it appropriate; instead of adopting a static amount, however, some States may prefer to adopt an objective mechanism that would allow periodic changes (this could be done, for example, by replacing the amount by a formula such as “50 per cent of the average GDP per capita for OECD countries, as determined by the OECD”).

10.3 The proposed provision would not prevent Contracting States from collecting tax at the time the relevant income is earned and refunding it after the end of the year once it is established that the minimum amount has not been exceeded.

10.4 The proposed provision only applies with respect to paragraph 1 (applying the rule with respect to other persons covered by paragraph 2 could encourage a fragmentation of contracts among many related entities in order to multiply the benefit of the exception). Also, the provision only restricts the additional taxing right recognised by Article 17 and does not affect the source taxing rights otherwise available under Articles 7 and 15. It would therefore not prevent taxation to the extent that the entertainer has a permanent establishment in the State of source or is present in that State for more than 183 days (or is employed by an employer who is a resident of that State or has permanent establishment in that State).

Paragraph 2

11. Paragraph 1 of the Article deals with income derived by individual ~~entertainers~~^{artists} and ~~sportsmen~~^{sportspersons} 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~~^{sportsperson} 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~~^{sportspersons} (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~~^{sportspersons}** 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* or *sportsman* is not paid to the *entertainer* or *sportsman* himself but to another person, e.g. a so-called *entertainer* 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 *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* 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* 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 that the owner of a horse or the team to which a race car belongs derives from the results of the horse or car during a race or during races taking place during a certain period. In such a case, the prize money is not sufficiently related to paid in consideration for the personal activities of the jockey or race car driver to be considered to be but in consideration for the activities related to the ownership and training of the horse or the design, construction, ownership and maintenance of the car. Such prize money is not derived from thesethe personal activities of the jockey or race car driver and is not covered by Article 17. Clearly, however, if the owner or team receives a payment on behalf in consideration for the personal activities 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 paragraphs 22-22.1 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~~deductions (see paragraph 10 above), the income derived in respect of the personal activities of a ~~sportsman~~sportsperson 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~~sportsperson 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~~sportspersons 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~~artistes or ~~sportsmen~~sportspersons 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~~artiste or the ~~sportsman~~sportsperson 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~~sportsperson 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.