The Taxation of Income Derived from Entertainment, Artistic and Sporting Activities

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Table of contents

INTRODUCTION

1. This is the second study that the Committee on Fiscal Affairs has undertaken on the problems that arise in the taxation of itinerant activities.[1] It examines the tax treatment of resident and non-resident artistes and athletes.

2. The report is based upon 19 country submissions[2] and, unless otherwise indicated, the descriptions provided refer to 1986. The replies were analysed by the Working Party on Tax Evasion and Avoidance and the tax treaty aspects of the report were prepared by the Working Party on Double Taxation of the Committee on Fiscal Affairs.

3. The purpose of the report is to describe the main problems which arise in taxing income from entertainment, artistic and sporting activities at the national and international level and to suggest ways in which these problems can be overcome.

4. The structure of the report is as follows: Part I outlines the problem; Part II examines the information needs of tax authorities; Part III looks at the assessment and collection of tax and Part IV at the influence of double taxation conventions. Some concluding comments and suggestions for improvement are provided in Part V.

5. Since the main focus of the report is on the tax treatment of "artistes and athletes", it may be as well to define these terms. For the purpose of the report, these terms are taken to cover any person engaged, either individually or as a member of a group, in public entertainment or sporting activities (see Part IV B i) for an elaboration of this definition). The terms "artistes and athletes" are also used in the title of Article 17 of the 1977 Model Convention on Income and Capital (hereafter referred to as the 1977 Model Convention). A number of countries, however, prefer the term "entertainer" to "artiste" and "sportsmen" to "athlete" and the text and commentary of Article 17 used the terms artiste and entertainer almost interchangeably. To simplify matters, however, this report uses the terminology "artiste and athlete", though it has been agreed that in any general revision of the 1977 Model, the term "sportsmen" will replace "athletes". Sometimes the term "performer" is used as a shorthand term for persons carrying out public entertainment, artistic or sporting activities.

I. THE PROBLEM STATED

6. The world of entertainment is characterised by: short-term activities (frequently one-off performances); an increasingly blurred distinction between dependent and independent services and business activities; sophisticated tax avoidance schemes. There are no reliable quantitative

estimates available of tax non-compliance in this area, whether in terms of the amount of income involved or revenue forgone. Nevertheless, where countries have undertaken systematic audits (*e.g.* in Canada and the Netherlands) of these activities, they have shown clear evidence of non-compliance in this area. Studies undertaken a few years age in Canada, for example, indicated a practice of not reporting income, whether consciously or unconsciously, amongst performers at the low end of the income scale whose activities are particularly transient in nature. The United Kingdom has a similar experience. Performers in the lower ranks rarely disclose casual earnings from jobs outside their profession. With the co-operation of management, club entertainers frequently understate their earnings.

7. Sophisticated tax avoidance schemes, many involving the use of tax havens, are frequently employed by top-ranking artistes and athletes. Whilst some countries do not consider such activities of major importance, given the limited number of persons involved in international activities of this sort and the relatively small amounts of revenue involved, there is general agreement that where a category of – usually well-known – taxpayers can avoid paying taxes this is harmful to the general tax climate, which therefore justifies coordinated action between countries.[3]

A. The business

8. The problems of effectively taxing artistes and athletes are rooted in the diverse forms their activities take. Success can be sudden but ephemeral. Relatively unsophisticated people – in the business sense – can be precipitated into great riches, income sources can be many and varied. Travel, entertainment and various forms of ostentation are inherent in the business and there is a tendency to be represented by adventurous but not very good accountants. These activities have evolved rapidly in recent years, taking new presentational and organisational forms. The established performer operating with an easily defined role is still common but the industry is increasingly characterised by loosely and multi-aspect groups. The best examples of this are seen in the pop-music industry which operates through complicated chains of limited companies, partnerships, joint ventures and sole trading enterprises.

9. Apart from the performers themselves, the industry covers a large entourage, including managers, various administration and publicity staff and road crews. Some members of a group receive music and/or writing royalties and fees; they all receive different types of record and broadcasting royalties. Frequently sources of income in different parts of the world are taken through different companies. Such forms of organisation have developed in response to the needs of a business which crosses international and occupational boundaries. It is likely that the inventiveness and complexity of the industry

will continue to expand, and perhaps extend into other aspects of the entertainment business.

B. Scope of the report

10. The diversity of situations described above makes it difficult to cover in a single report all the relevant taxation aspects. The emphasis in the present report is on issues which are specific to the industry. General domestic problems relating to any dependent or independent services which were already dealt with in an earlier report (see note 1) are therefore not dealt with here. A case in point is sportsmen employed permanently in a country (such as professional soccer players) who are normally considered as employees of their clubs.[4]

11. The distinction between professionals, semi-professionals or amateurs is often a fine one in practice, and is not elaborated upon in this report. There are obviously cases – potentially numerous – where, for instance, amateurs obtain compensation for their expenses (or more), and where professionals exercise some undeclared activities when they are not officially working. Problems related to these casual earnings are not limited to the entertainment field and are subject to the usual checks required on "black" activities.

12. Performers may receive a wide variety of types of income, whether directly or indirectly, and not all of which are related to actual performances. Artistes, for example, will frequently receive copyright royalties or other income related to the sales of records; they may benefit from free advertising, or even receive fees for advertising their own name. Sportsmen may receive remuneration from manufacturers of sports equipment on condition that they use the manufacturer's brand or publicise the products of the same brand. Payments for advertising goods not related to the entertainer's activities are not infrequent. For the most famous, the variety of contracts and types of income call for worldwide financial and tax planning with the assistance of specialised advisors. From the tax authorities' point of view, this diversity of income sources raises a number of assessment problems.

13. In a number of cases, artistes and athletes may make more money from these related activities than from their activities as performers. However, this report concentrates, in the first instance, on income related to actual performances, even though this distinction may be artificial in some cases.

C. Main principles

14. The main principle which underlines this report is that income from entertainment and sporting activities should be taxed in the same way as income from any other activities. Exceptions to this principle should be kept to a minimum. Problems can arise because some governments may accept

that a particular event is a "cultural exchange", and, therefore, no tax should be imposed on profits arising from it. Nevertheless, in practice, such events are generally staged for the purpose of profit and granting special treatment to some events of this kind makes it more difficult to resist similar claims from other domestic circles on the grounds of fair competition. Country experiences suggest that some tax authorities are better able to resist the "cultural exchange" pressure groups than others, or are better placed to check that the income generated is taxable in the residence country. Similar problems arise in the context of "charitable events" (where it is assumed that there is no "income" produced by the event), or tax-free performances by State-supported troupes. In all such cases, the Committee considers that tax privileges should be limited to genuine, justified cases, for instance, to events organised as part of an official "cultural exchange programme".

R (7)

15. The second principle upon which this report is drafted is that artistes and athletes are, as are other taxpayers, fully liable to tax in their country of residence and, ideally, should be taxed accordingly. Whilst certain countries provide for exemption of foreign income, the amount of income earned abroad should be known when, under the general income tax, this affects the progressive rate that is applied to other income sources.

16. However, as is usually the case with itinerant activities, the country of residence has difficulty in identifying the activities of its residents abroad. It will therefore have to rely mostly on information provided by the country where the activities are exercised. For this reason, and also in order to avoid practical difficulties, it is felt that the principle on which Article 17 of the 1977 Model Convention is based should be followed. The main purpose of this report is therefore to help member countries to establish a system by which the income of artistes and athletes could effectively be taxed in the country of performance.

17. In taxing artistes and athletes, tax authorities encounter problems first in obtaining information about the performances taking place and secondly in the assessment and collection of tax which arise from the nature of the trade or the use of legal avoidance schemes.

II. THE NEED FOR INFORMATION

18. It is in the nature of the trade that entertainment, artistic and sporting activities should be advertised, so as to attract the public. However, such publicity very much depends on the importance of the event and experience shows that, in many cases, a large part of these activities do not come to the attention of the tax authorities. Furthermore, even when an activity is noticed, problems often arise in identifying the performers themselves.

A. *Country experiences*

19. The experience of countries participating in the study shows that, generally speaking, relying on the taxpayers themselves to report accurately the amount of income earned at home and abroad is even less realistic in the entertainment area than in other areas, considering how easy it is for a number of performers to conceal such income. Also it is commonly believed in the entertainment world of some countries that all sums earned abroad are free of domestic tax, and returns and accounts frequently reflect this belief. In the absence of other checks, the tax authorities will therefore not be able to impose tax on such activities.

20. Where artistes and athletes perform dependent services in most countries, they will come under PAYE or a wage-tax system and their employers (if situated in the country) will report that part of their income. Where, however, the employer is a controlled limited company, the importance of the case may often not be realised by the tax authorities. The PAYE file may contain only the entertainer's real name, not his stage name, and the name of the company may not suggest an association with the entertainment business. This problem is accentuated where, as increasingly occurs, a multiplicity of controlled limited liability companies are created to receive various streams of income. Additional problems can occur if the employer is situated abroad (*e.g.* non-compliance with PAYE regulations). In the absence of any PAYE system, information obtained through the usual reporting system for wage earners may not be useful, as a lot of time may elapse since the income was earned, and the entertainer's position (or residence) may have changed.

21. Most difficulties arise with self-employed artistes and athletes, and it is mainly for them that an elective information-gathering system is desirable. Yet, it is usually difficult to identify and locate such people, even in cases where written contracts exist, because of a number of factors: the use of pseudonyms or stage names on agency contracts; the use of false social security numbers where these are noted on entertainment contracts, the fact that payments for services are made in cash, after deductions for agents' fees; the difficulty inherent in tracing and locating people two or three years following the rendering of the service.

B. *Sources of information*

22. The difficulties set out above require early receipt of information concerning the performance itself, preferably before it takes place. Countries have reported a number of possible non tax-related sources, general sources information, such as newspaper and other advertising, specialised magazines and periodicals. Prize monies earned by major athletes sometimes also appear

in the specialised press (Ireland). Most reputable concert agents, radio and television companies give advance notice of visits to the United Kingdom; so do major impresarios in the Netherlands. In some countries (such as France), authors' or artistes' associations are useful sources of information on forthcoming or past performances. Advance information concerning incoming foreign entertainers may also be obtained through immigration or other Government departments (Sweden, United Kingdom), although work permits do not necessarily specify where the entertainer is to appear, nor when or how often (Sweden). As regards athletes taking part in international tournaments, another important source of information may be the national sports federations, which in the context of sanctioning the arrangements of sports events in their country, may be able to identify foreign athletes participating at such events. Finally, in some countries information will be given in advance for tax reasons (*e.g.* to obtain a reduction of withholding tax in Canada, or a "tax card" in Denmark).

23. In most countries, however, information is usually available only after the event through contacts with local tax offices (Belgium, where a local tax is levied), reports by entertainment agencies, theatres, broadcasting authorities etc. As noted earlier, the information will frequently be available too late for an effective taxation of the performer. Also, in many cases, the promoter is a non-resident, so that the possibility of obtaining information even after the event is rather slight (*cf.* Part IV).

III. ASSESSMENT AND COLLECTION OF TAX UNDER DOMESTIC LEGISLATION

24. Although countries' experience in assessing and collecting tax on artistes and athletes vary, a number of difficulties in this area have been reported. The following paragraphs briefly describe problems arising in assessing or collecting tax on non-resident and resident performers, as well as some existing counteracting measures.

A. Problems in taxing non-resident artistes and athletes

1. *Dependent services*

25. In some countries, tax does not have to be paid on income earned by non-residents in respect of dependent services in the country if the employer is a foreign company which does not maintain a permanent establishment in that country. This opens up wide avenues for tax avoidance, the most famous one being known as "slave agreements" with foreign employers. Other countries whose tax systems are not restricted in this way and which can tax domestic source income providing it relates to duties undertaken in that

country also find that "slave agreements" are used to negate or reduce the tax charge. Payment is made to the artistes or athletes from abroad to convert the income to an overseas source. This may remove the income from the scope of charge completely (this is, for example, the case in Australia).

26. In a typical case of a "slave agreement", the performer receives a salary from a foreign employer for services undertaken in the country of performance. There is no legal relationship between the domestic promoter of an event and the entertainer. The foreign company enters into a contract with the promoter. This provides for a lump-sum payment which represents the fee for the entertainer's appearance as well as a fee for the company for planning and organisation. This payment is usually made abroad often before the performance is given. As contracts are signed and other business is done abroad, it is not possible to contend that the company is carrying on a trade or business in the country of performance. Quite often the salary due to the performer from the company paid outside the country of performance. Many of these foreign employers are companies controlled by the performers themselves and are based in tax havens (rent-a-star companies). There are also organisations[5] which specialise in entering into employment agreements with artistes and athletes.

27. Another problem experienced by tax authorities which retain domestic taxing rights despite the interposition of a "slave company" is determining what proportion of the entertainer's salary relates to his or her performance in the country. The obvious method – time apportionment of the remuneration provided in the service agreement – is clearly open to abuse having regard to the "sham" nature of the agreement.[6]

28. When dependent services are performed directly for the domestic promoter, tax assessment raises in principle less difficulties. Artistes and athletes will frequently be subject to the PAYE or wage tax (or *précompte*) on income paid to them, and the income tax legislation may well provide for a legal liability for the person paying the remuneration (Austria, Belgium, Germany, Netherlands, for instance).[7] However, although the control problems involved are similar in nature to those arising for other dependent activities, they are increased by the itinerant character of the activities performed and the difficulty in obtaining adequate information (see Part II above) so that the usual assessment and collection instruments (*e.g.* withholding) cannot in practice be used effectively.

2. *Independent services*

29. Problems arising in taxing independent services provided by artistes and athletes are substantially similar to the problems usually met in this general area. However, they are aggravated by the mobility of the taxpayers involved,

including the case with which they may change status at will, as between dependent or independent services. Frequent changes of employers or contractors, who themselves often have a rather elusive character and are subject to more lenient reporting requirements, and the fact that they can frequently leave a country without notice, open up wide possibilities of evasion and make assessment and collection of tax problematic in the absence of any withholding tax (see paragraphs 45 to 47 below).

30. A particular problem which arises in assessing income from the self-employed where no withholding tax exists is the basis and timing of assessments. The assessment of tax on the professional income of the self-employed is established during the year after the receipt of the income and in the majority of cases, the tax would not be collectable until after the person concerned had left the country.

31. Even where a withholding tax exists on payments made to non-residents in respect of services performed in the country, some avoidance problems may arise. For example, if there is no requirement that a promoter withholds tax when the payment is to a domestic company (*e.g.* in Canada), non-resident performers will form such a company, which they will use for contracting to appear in the country, with a domestic address (generally that of a lawyer) to receive the income. The money is then deposited in a bank account in the country and immediately thereafter withdrawn by the non-resident performer.

3. *Other*

32. Business income from entertainment, artistic and sporting activities of a non-resident will usually be taxed only if a permanent establishment is maintained in the country. In some countries certain income received by artistes and athletes is considered under domestic law to be business income. Opportunities for tax avoidance or non-taxation are rather wide in this cases.[8]

33. In some cases, the entertainer's performance is "sold" to local organisers as part of a complete show. As the contract for the "package" does not refer to any particular performer and includes various types of services, the "package" may hardly be considered as performance of artistic activities. It would then avoid taxation in the country as there is no permanent establishment there.

34. Another case of possible abuse by non-residents is that relating to liability in respect of payments made for recordings. The United Kingdom noted, for example, that these are assessed to tax on the basis of "royalties" paid on sales in a year in which the performer is present in the country provided the recording was made in that country under a contract with a resident company. Liability is very easily avoided especially where the

recording is for a large multinational corporation by, for example, making the contract with a non-resident subsidiary.

B. Problems in taxing resident artistes and athletes

35. Although the taxation of resident performers raises mainly problems of enforcing existing, more general, domestic legislation, this is also an area of widespread non-compliance. Resident performers exercise, in effect, itinerant activities within the country. Problems in taxing them are, in many respects, not dissimilar to the ones arising for taxing non-residents.

36. As mentioned earlier in the report, a major administrative problem is obtaining information about the activities – combating understatement or non-disclosure of earnings and income splitting amongst controlled limited companies and ensuring that data are available to the tax authorities at the right place at the right time – artistes and athletes are notoriously dilatory about their financial affairs and there is always the danger of the tax authorities being left with an empty basket.

37. Tax authorities experience special difficulties where the legislation does not provide for withholding tax in respect of services performed by self-employed persons who are residents. Even where performers are provided by agencies, contracts are sometimes considered as "contracts for services" rather than "employment contracts" (Canada). In some countries, problems arise due to the fact that a large number of organisers are non-commercial and not taxable; they have therefore no tax interest in keeping accounts or giving information to tax authorities.

38. Tax administrations are particularly vulnerable in respect of overseas engagements and they have to rely heavily on the individual declaring the income. The entertainer's remuneration is often paid in respect of activities which are partly exercised abroad without specification of the share of remuneration which is attributable to domestic activities. Practical difficulties therefore arise as to the appropriate tax base. Furthermore, extravagant deductions for "business" expenses are frequently claimed.

39. Special mention should be made of arrangements by which resident – usually well known – performers endeavour to take themselves out of the self-employed status into a dependent one. This is in general for the purpose of accumulating income abroad, by setting up a sham company in a tax haven, or by using specialised "employer" agencies abroad and the problems discussed in paragraphs 30 and 31 above then arise.

40. However, this may also have purely domestic reasons. Canada and the United States, for example, experienced difficulties with individuals who are involved in entertainment activities and who have entered into corporate arrangements whereby they incorporate a company (usually the performer

holds the shares himself) which then contracts with the performer, as its employee, for his services. The tax advantages of such corporate arrangements lie in the fact that the corporate rate of tax is usually less than that of a high-income individual. Also, the corporation may "employ" the performer's spouse, thus achieving a splitting of income. Certain expenses such as agent's fees may be written-off by the corporation against the amounts received. These expenses would not be allowable to an individual as a deduction from employment income.

C. Measures taken or under consideration

41. The present section sets out various measures which have been tried, or are being considered, to improve compliance in the area of entertainment, artistic and sporting activities.[9] The fact that similar problems arise in different countries in taxing effectively artistes and athletes, wherever the activities are exercised, points to the necessity of having proper domestic procedures both for domestic tax purposes and for assisting other countries. This section therefore also considers some wider policy issues involved when trying to devise efficient instruments for taxing resident and non-resident artistes and athletes on the one hand, and other performers of dependent or independent services, on the other.

1. Measures mainly directed at improving compliance by residents

42. Certain countries (*e.g.* France, United Kingdom) have general powers to call for returns of payments (fees, commissions, etc.) made by residents to people not in their employment (whether resident or non-resident). Given the known low level of voluntary compliance by those in the entertainment, artistic and sporting worlds, such information is considered by these countries to be essential to combat tax avoidance and evasion. Administratively, such legislation will be more effective where machinery exists to ensure that the information reaches the tax file of the person concerned at the earliest opportunity. In the United Kingdom's experience, these arrangements need to be backed up by monitoring new developments and the emergence of new talent with a view to taxing them before they spend their money. Moreover, a centralised approach is considered essential to ensure that they are dealt with satisfactorily, *i.e.* by bringing together all the relevant personal and associated company files. An uncoordinated action, where various offices are unaware of the whole picture, invariably proves to be less successful.

43. Another measure which has been adopted by both France and the United Kingdom is the ability to "look through" controlled overseas companies set up by residents to receive income relating to their activities, and over which they

retain control. In neither case are the provisions restricted to the entertainment and sporting fields. The French scheme, which now also applies to non-residents, is outlined in paragraphs 55 and 56 below. The United Kingdom legislation has not proved of significant practical value in this particular field although its existence does serve as a deterrent to blatant abuse.

2. *Measures concerning non-residents*

a) Income tax provisions

44. In the absence of special legal instruments concerning artistes and athletes (or self-employed generally), some countries (*e.g.* the United Kingdom until recently) have adopted a centralised approach to deal with the liability to tax of foreign visitors. Such an approach requires direct links between the tax office and the industry and that the tax office is kept informed of visits by major non-resident performers.

45. Most countries feel however that tax authorities need special techniques for assessing and collecting tax on artistes and athletes. In principle, an effective instrument available under domestic legislation to deal with situations where income is paid to itinerant people is withholding taxes. While they can usually be levied on income from dependent services, withholding taxes are also levied on income from independent services paid in some countries to non-residents (*e.g.* Austria, Belgium, Canada, Germany, Japan, United Kingdom). Similar techniques are used under the special "artiste taxes" referred to in paragraphs 48 to 53 below.

46. In some countries, specific rules apply to artistes and athletes. In countries where non-residents are liable to income tax only if the income is derived through a permanent establishment or a fixed base, some improvement can be made by deeming the income paid to non-resident artistes or athletes as being earnings derived from employment (Netherlands) or by providing that the taxation right can be exercised even if the performer does not maintain a permanent establishment in the country (Austria and Germany). In Portugal and Spain, non-resident artistes are subject to a 5 and 18 per cent withholding respectively. In Switzerland, income tax is levied at source on income paid to non-resident performers, according to a graduated four-band tax schedule, after deduction of expenses.

47. Considering the aim of taxing effectively income from entertainment, artistic and sporting activities in the country of performance, the Committee considers that, in the context of the general income tax, domestic legislation should ideally provide for tax to be withheld at source on payments to non-resident artistes and athletes.[10] In order to be most effective, this should apply

also where the artiste or athlete has no fixed base or is an employee of a foreign company having no permanent establishment the country. Also for the sake of effectiveness, the rate of such withholding should probably be set at a rather high level. Finally, where withholding tax is levied, the payer of the income could be held responsible for the payment of the tax (as is presently the case in Austria, Belgium, Germany, Netherlands and the United Kingdom with effect from 6th April 1987).

R (7)

b) Special taxes on artistes and athletes

48. Special artiste taxes are levied instead of general income taxes Norway and Sweden on non-resident artistes and athletes performing services in these countries. The basic object of these taxes is to ensure payment of tax where the remuneration of the artiste and athlete is paid, *i.e.* at source, under a technically convenient form.[11] As they are constructed, these taxes are often considered as a tax on the organiser, which gives rise to claims for exemptions, taking the system further away from its starting, basic principles.

49. In both Norway and Sweden these taxes are final taxes and are fixed at a certain percentage of the estimated gross income derived by the performer (30 and 15 per cent in Sweden and Norway, depending upon whether the performer just takes part in a performance, or arranges it himself). These taxes, which are therefore a simplified form of, and a substitute for, ordinary income tax, are always taken as income tax for double taxation convention purposes.

50. The organiser of the event is responsible for the payment of the tax, whether or not he is the artiste or athlete. In Norway, he is also liable to file a detailed statement on the arrangement with the collecting authority, and to present contracts on request. In Sweden, a prior authorisation for the performance is necessary in most cases, but after an amendment in 1977 failure to request authorisation does not entail any fine.

51. Experience shows that in certain respects, such special taxes also are open to abuse. Detecting the activities is a major issue; especially so as work permits, which should in principle be issued prior to the performance, are not required for citizens of Nordic countries. Assessment problems arise, such as the use of foreign controlled companies and of double contracts. Finally, collection problems may also arise where, as in Norway, collection takes place only after the performance, no prepayment or security for payment being required. The combination of a low rate of tax on artistes and athletes and of the requirement that, after six months in the country, the performer is subject to ordinary income tax, opens up possibilities of evasion and creates administrative difficulties.[12]

52. A major problem, as seen in Norway and Sweden, arises from the fact that the tax is perceived as a tax on the organiser, not on the artiste or athlete. The impression prevails that the income of non-resident performers is not taxed. It is argued that the tax is an unjustified additional levy on domestic cultural activities and is inequitable because substantial exemptions are provided for in practice (in Sweden by way of tax relief for performances which form part of cultural exchanges).

53. It is noted that these provisions are under review and that suggestions have been made to improve information gathering through stronger reporting obligations (Norway), as well as assessment and collection of the tax. In Sweden, special attention is being paid to the problems connected with imposing tax on a gross remuneration without taking into account the variety of expenses attributable to different kinds of performances. Experience in these countries seems to indicate that implementing such a tax requires special care if it is to be effective. It also raises policy questions of a wider nature to which paragraphs 60 to 63 below are devoted.

3. *Counteracting the abusive use of "artiste" companies*

54. Counteracting the use of "slave" contracts with "artiste companies" is rather difficult where there is no domestic provision to "pierce" the corporate veil (*e.g.* as is the case in the Netherlands). Special measures to deal with situations like these have been taken in countries like Austria, France, Germany and the United Kingdom and some United States provisions are also of relevance. The Austrian income tax legislation provides (since 1972) that independent personal services income of non-resident artistes and athletes in respect of performances exercised in Austria is subject to withholding tax even if diverted to a third person (*e.g.* an artiste company). The recent United Kingdom provisions are similar in effect.

55. Since 1972, the French legislation contains special provisions, which are not restricted to the entertainment area, and under which income received by a person outside France as remuneration for services rendered in France by another person shall be liable to tax there under certain conditions. These provisions were originally limited in scope to income received by companies registered outside France for services performed in France or abroad by individuals resident of France if the latter had "direct or indirect control" of the companies, or when such companies have no industrial or commercial activity other than the provision of services or, in any event, where the companies were registered in a country which had no general income tax treaty with France. The wording of these 1972 provisions left to the tax administration the burden of showing that the person was a resident in

France, and investigations encountered a number of practical difficulties. The main virtue of the provision was reported to be its dissuasive aspect.

56. The French provisions were revised in 1980 to cover performers of services who are non-residents as well as residents of France, and companies as well as individuals. They apply in all cases where the person receiving the payment is situated in a low-tax country. In other cases they apply unless the performer shows that he has no control over the person, or that the latter exercises mainly an industrial or commercial activity. Finally the person receiving the remuneration is jointly responsible for the payment of the tax and the tax authorities may now collect the amounts necessary for the payment of the tax from third parties (*e.g.* organisers).

57. On 20th December 1985 a provision of the German Income Tax Law went into effect which classifies as taxable domestic income from trade or business, income derived from artistic, athletic or similar performances exercised in Germany or from their exploitation, including income derived from other services connected with these services. This applies regardless of to whom the income accrues. It is not necessary for there to be a permanent establishment or permanent representative in Germany. In addition, income tax shall be withheld from such income regardless of to whom the income accrues.

58. In the United States, the Internal Revenue Service has ruled (Revenue ruling 74.330) that where, among other things, the artiste or athlete retains control over the detained organisation of his work, an employer-employee relationship does not exist. This ruling helped defeat the improper use of a tax convention by claiming exemption under the 183-day rule. Also in the United States, foreign personal holding company provisions extend to income from the performance of certain personal service contracts. Thus a United States artiste or athlete who is a 25 per cent or more shareholder. in a foreign personal holding company cannot avoid United States tax by performing services for that entity.

59. Although experience as to the efficiency of some of these measures is still limited the Committee considers that they constitute a useful means of counteracting the use of shadow-companies within the framework of income tax legislation.[13]

4. *Some policy issues*

60. When discussing possible suggestions for improving domestic legislation generally rather far-reaching policy questions arise. Even though agreeing that taxation should in principle take place at the place of performance and that distortions in tax treatments should be avoided,

countries vary in the ways their systems are devised, which has a bearing on answers to the following two questions:

1. How far should resident and non-resident artistes and athletes be treated alike or differently?
2. How far should artistes and athletes be treated differently from other performers of dependent, or independent services?

61. On the first point, differences in treatment which exist in some countries distort competition and produce claims for a harmonised system whereby resident and non-resident artistes and athletes would be treated alike and pay the same tax. This would also eliminate all incentive to engage in tax avoidance by altering the residence status and would avoid some administrative difficulties (*e.g.* where a resident performer is a member of a non-resident band, which may be unknown to the organiser of an event). More generally, it could be argued that given the nature of the trade, and the fact that some tax problems (*e.g.* for detecting the activities) arise in both situations, a similar system should apply to residents and non-residents.

62. Setting up special systems for taxing artistes and athletes, however, necessarily divorces them from other categories of taxpayers, whether resident or non-resident. 1n some countries, it seems that this could create difficulties, even though special systems could be devised to deal with certain other categories (*e.g.* sub-contractors). There is a feeling, in these countries, that counteracting tax avoidance and evasion in this area should preferably use ways and means which would not divorce the artiste or athlete from the main categories of taxpayers to which they belong, *i.e.* providers of dependent or independent services.

63. It may be noted that, in order to avoid any differences in treatment, a withholding tax can be made to cover all the self-employed, not only self-employed artistes or athletes, or independent contractors. It could apply both to residents and non-residents. Also, as seen under French legislation, some counteracting measures in the case of dependent services (foreign "artiste company"), can be made to apply to all types of services concerned. Such more general instruments would be of use in dealing with income from other types of itinerant activities.

IV. THE INTERPRETATION AND APPLICATION OF BILATERAL DOUBLE TAXATION CONVENTIONS

A. Introduction

64. There are many provisions in the 1977 Model Convention which can affect the taxation of artistes and athletes. Such persons are often in the

position of receiving income of various kinds and from several sources as the circumstances in which they carry on their activities can vary widely.

65. However, the taxation of their incomes is governed essentially by the provisions of Article 17 of the Model Convention which stipulates:

R (7)

1. Notwithstanding the provisions of Articles 14 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 an athlete, from 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 an athlete in his capacity as such accrues not to the entertainer or athlete himself but to another person, that income may, notwithstanding the provisions of Articles 7, 14 and 15, be taxed in the Contracting State in which the activities of the entertainer or athlete are exercised.

66. The reasons for these provisions in the Model are set forth in the five paragraphs of the Commentary, on which an observation was made by Canada and the United States.

B. "Personal Scope" of Article 17

1. *Definitions of "artistes" and "athletes"*

67. The first issue considered was whether the terms "artistes" (as it appears in the title of Article 17), "entertainers" and "athletes" were sufficiently broad to cover all the persons it is wished to tax under Article 17.

68. As far as "artistes" are concerned, it was noted that paragraph 1 of the Article included examples of persons who would be regarded as such. However, these examples should not be considered as exhaustive. It was agreed that it was not possible to give any precise definition of "artiste", and that a wide variety of situations could arise. On the one hand, the term clearly includes the stage performer, film actor, actor (including for instance a *former* athlete) in a television commercial. Article 17 may also apply to artistes and athletes participating in activities which are of a political, social, religious or charitable nature, if an entertainment character is present. On the other hand, conference lecturers and persons interviewed on television are clearly not "artistes" in the meaning of Article 17. There is however a variety of intermediate situations where say, appearance on television or in public could generally be seen as "acting" for entertainment purposes, thereby falling under Article 17. In this grey area, it is necessary to review the overall balance of the activities of the person concerned.

69. A discussion was held on whether and how Article 17 applied to the intermediate case of the "actor/producer" (or the television presentator/producer, or the dancer/choreographer). The conclusion was that in such cases, it is necessary to look at what the individual predominantly does in the country where the performance takes place. If his activities in that country are predominantly of a performing nature, Article 17 will apply to all the resulting income he derives in that country. If, on the other hand, the performing element is a negligible part of what he does in that country, the whole of the income will fall outside Article 17. In other cases, an apportionment might be necessary.

70. As far as athletes are concerned, it was agreed that the intention was to cover sportsmen in the broad sense of the word. The term is not restricted to what are traditionally thought of as athletic events (*e.g.* running, jumping, javelin throwing). It also covers, for example, footballers, golfers, jockeys, cricketers and tennis players, as well as racing drivers.

71. Article 17 also applies to other participants in public entertainment such as billiard players, and participants in chess or bridge tournaments.

2. *Support staff, impresarios*

72. Consideration was given to whether, under the present wording of Article 17, there was some scope for covering "support" staff of artistes and athletes. There was agreement that a narrow interpretation should prevail and that both the intention and the language of Article 17 do not presently allow the taxation under Article 17 of producers, film directors, choreographers, technical staff, etc. Other Articles of the 1977 Model Convention would apply to such support staff (generally Articles 14 or 15 and in certain cases Article 7).

73. While income received by impresarios, etc. for arranging the appearance of an artiste or athlete is outside the scope of Article 17, any income they receive on behalf of the artiste or athlete does of course come within the Article.

74. It was therefore agreed that income of intermediaries could be covered only by supplementing the text of the Article, for example along the following lines:

> The rule laid down in paragraph 1 shall apply to income from the personal activities exercised, in an independent capacity or as an employee, by any person participating in the organisation or carrying out of such performances by artistes or athletes.

3. *Interpretation of the expression "personal activities"*

75. The expression "personal activities" in paragraph 1 of the Article seems to indicate that the paragraph applies to income accruing to the individual "performer". However it is usual for orchestras, choral societies and sports teams to be incorporated. The question therefore arises as to whether only the income received by the members of the incorporated orchestra, etc. come within paragraph 1, or whether income that accrues to the company as "company earnings" is also covered by, that paragraph.

R (7)

76. The conclusion reached on this question was that paragraph 1 applied to income derived directly or indirectly by an individual artiste or athlete. In some cases the income will not be paid directly in the State where the performance takes place to the individual or his impresario or agent. For example, a member of an orchestra may be paid a salary rather than receive payment for each separate performance. In this case the Contracting State where a performance takes place is entitled, under paragraph 1, to tax an appropriate proportion of the musician's salary. Similarly, where an artiste or athlete is employed by *e.g.* a one person company, the State of source may tax an appropriate proportion of any remuneration paid to the individual. In addition, where its domestic laws "look through" such entities and treat the income as accruing directly to the individual, paragraph 1 enables the State where the performance takes place to tax income derived from appearances in its territory and accruing in the entity for the individual's benefit, even if the income is not actually paid as remuneration to the individual (see paragraphs 85 to 93 below for the interpretation of the provisions of paragraph 2).

C. *Income covered by Article 17*

1. *Income other than remuneration accruing to artistes or athletes*

77. In view of the difficulties inherent in taxing artistes and athletes who receive a large variety of types of income from different sources, from the viewpoint of double taxation, the first question which arises concerns the scope of Article 17, *i.e.* what types of income are, or may be, subject to its provisions.

78. One possible interpretation, the narrowest, is that only income deriving directly from an exhibition – normally in public or on television, in respect of live performance or of the first transmission of a recording – of the artistes or athletes talents falls under Article 17, and all other types of income should be taxed in accordance with other relevant rules of the 1977 Model Convention. The argument advanced in support of this interpretation is that, subject to the provisions of Article 17, artistes or athletes should not in principle be taxed

differently from those in other professions, whether self-employed or in dependent employment.

79. Thus, income derived from contracts for the reproduction of an artiste's work (for example, on record, cassette or videocassette), being in the nature of a royalty, should be governed by Article 12 (*cf.* paragraph 13 of the Commentary on Article 12). Income from other independent personal services would come under Article 14. This would apply in particular to income from sponsorship and to remuneration received from commercial enterprises for using, and therefore promoting, sports equipment and clothing. As to business income not expressly mentioned in Article 17, it would come under Article 7.

80. The contrary opinion is that the links which exist between the different activities of performers, the complexity of the contracts (often so-called package deals) governing the exercise of these activities and the forms of payment received (frequently qualified as "royalties" for tax avoidance purposes) make it impossible for tax authorities to identify each of them separately, and since the payments are connected, they should all be brought within the scope of Article 17.

81. The Committee recognised that the complexity of such situations does indeed give rise to serious difficulties even though some of the problems were not specific to this area. It felt that resorting systematically to the solution proposed in paragraph 80 above would however render meaningless many of the provisions – in particular Articles 12 and 14 – dealing with other indirect income habitually received by artistes and athletes over and above monies paid as direct remuneration. Moreover, there will frequently be substantial administrative difficulties in taxing such indirect income in the country where the performance takes place, as contracts concluded with a firm in one country (for example, for advertising) will very often cover the exercise of activities throughout the world. The country where the performance takes place will frequently not be informed of the existence of such income and any apportionment of it (*e.g.* on the basis of the relation to a specific performance) would be problematic, with a risk of double taxation.

82. The Committee considered that it would not be appropriate to bring genuine royalties into the scope of Article 17. It was noted that the definition of "royalty" under Article 12 was rather restrictive and a number of countries would not consider advertising and sponsorship fees as royalty income. Countries would of course be able to check that what was described as a royalty by the taxpayer really was a royalty in the meaning of Article 12: if it were not, then Article 17 might apply.

83. It was therefore agreed that, with regard to the application of Article 17, account should be taken of the extent to which the income was connected

with the actual activity of the artiste and athlete in the country concerned. In general, Articles other than Article 17 would apply whenever there were no direct link between the income and a public exhibition by the performer in the country concerned. On the contrary, advertising or sponsoring income paid especially in connection with a performance (whether before or after the event) or a series of performances, would fall under Article 17.

R (7)

84. Finally, it was agreed that compensation paid to an artiste and athlete when a performance had to be cancelled by the organiser came under Article 21 dealing with "other income". Such compensation is therefore taxable only in the artiste's or athlete's country of residence.

2. *Income paid to a person other than the artiste or athlete*

85. As noted in paragraph 76, paragraph 1 of the Article applies to income derived directly or indirectly by an individual artiste or athlete from his/her personal activities. In some cases, the State where the performance takes place will be in a position to tax at source at least part of such income. However, it will not always be so, *e.g.* when income has been paid by the organiser to a management company for the appearance of a group of sportsmen, or when a team, troupe. orchestra, etc. is itself constituted as a legal entity.

86. In the case of incorporated teams, orchestras etc., income for performances will normally be paid to the entity. Individual members of the team, orchestra, etc. will be liable to tax under paragraph 1, in the country in which a performance is given, on any remuneration or other income directly or indirectly accruing for their benefit as a counterpart of the performance. The question arises as to whether and how the profit made by the legal entity itself from the performance is taxable.

87. Because of the reference to "personal activities" in paragraph 1 of Article 17, the consensus was that this paragraph was not applicable to such profit of the legal entity, which raised the question whether paragraph 2 of the Article was applicable.

88. Paragraph 2 of Article 17 provides that when income in respect of personal activities exercised by an artiste or athlete "in his capacity as such" accrues to another person, that income may be taxed in the country in which the activities of the artiste or athlete are exercised. The original purpose of the provision was "to counteract certain tax avoidance "schemes" by an artiste or athlete under contract with a company which is in effect under his control. The artiste might claim exemption from tax at source under the 183-day rule, the company paying him not being taxable in the absence of a permanent establishment (see paragraph 4 of the Commentary on Article 17 of the 1 977 Model Convention).

89. The Committee found that there was nothing in the text of paragraph 2 to preclude its application to incorporated teams, troupes, etc., even though the original intention was different. It was therefore agreed that the provisions in Article 17 enabled tax to be levied on:

- The amounts paid to artistes or athletes through a separate entity, but accruing to them;
- The amounts allocated to an entity, but not paid to the artiste or athlete, which has the effect of indirectly taxing the profit element kept by the entity.

90. A few countries, however, considered that paragraph 2 should apply only in cases of abuse, especially bearing in mind the text of paragraph 4 of the commentary to Article 17.

91. The Committee noted that the legislation of some countries makes it possible to "look through" arrangements involving entities and to deem the income to be derived by the artiste or athlete: where this is so, paragraph 1 enables them to tax income resulting from such activities in their territory. Other countries cannot do this. Where a performance takes place in such a country, paragraph 2 permits such counties to impose tax on the profits directed from the income of the artiste or athlete to the entity. It may be, however, that the domestic laws of some countries do not enable them to apply such a provision. Such countries are free to agree to alternative solutions or to leave paragraph 2 out of their bilateral conventions (*cf.* paragraph 5 of the commentary).

92. Having earlier considered the application of paragraph 2 to payments made to an entity in respect of artistes' and athletes' performances where they do not control the entity or benefit from that income (see Paragraphs 89 and 91 above), the Committee agreed that there are even stronger reasons for allowing the country of source to tax the whole of the income paid to a performers own entity. The Committee also noted that similar considerations are set out in paragraph 83 above as regards the nature of the income covered by the Article also apply here.

93. In the German view the taxation of income derived by a company resident in a third country for activity exercised in Germany by artistes employed by it should take account of the legal relationship between the German organiser and that company. If there is no Double Taxation Agreement with the third country, the Federal Republic of Germany under its domestic legislation (see paragraph 57) can fully tax such income. Withholding tax is levied on gross receipts at the rate of 15 per cent. The same applies to third countries with whom there is an Agreement containing a provision corresponding to paragraph 2 of Article 17 of the OECD Model Convention.

D. Other relevant issues

1. *Computation of income*

94. The Committee noted that Article 17 says nothing about how the income concerned 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 on appropriate rate based on the gross amount paid to artistes and athletes. Such rules may also apply to income paid to groups or incorporated teams, troupes, etc.

R (7)

2. *Allocation issues*

95. The Committee considered whether allocation issues arising for the application of Article 17 called for special solutions. As noted earlier, only that part of the amounts paid to an incorporated troupe, orchestra, etc., which accrues to artistes and athletes from the "personal" exercise of their talents is taxable under the terms of paragraph 1. It will therefore often be difficult to determine the assessment basis for a specific performance – particularly when the members of the troupe are paid salaries by the company, receiving remuneration covering the "world-wide" activities of the troupe. Only estimates will be possible, and the tax authorities of the country of source and of the country of residence may not agree on the estimate.

96. Similar difficulties will arise for the application of paragraph 2 of the Article where it is difficult to isolate the proportion of "artistic" income *e.g.* in a lump sum payment made to a non-resident company that is attributable to service, which are recognised as not falling under Article 17.

97. The Committee recognised the difficulties involved in separating out, where necessary, "artiste income" and "income from other services", or in apportioning an artiste or an athlete's salary, or sponsoring income, in order to assess the sums taxable in the country of source. As noted earlier (*cf.* paragraph 94), the Article says nothing as to how the income concerned is to be computed and domestic laws apply. The Committee agreed that the problems involved did not differ from other "classical" allocation problems and did not call for special comments.

3. *Cultural events such as those supported from public funds*

98. The Committee noted an increasing trend in the organisation of cultural events, with related claims for tax exemption, which have sometimes led to abuse. The decision as to whether special concessions should be granted to artistes or organisers of such events should best be left to bilateral agreement between Contracting States. However it seems desirable that a standard provision be suggested for insertion in bilateral conventions. Such exemptions

should be based on clearly definable and objective criteria to ensure that they be given only where intended. Discretionary expressions such as "cultural exchange" may easily result in obscurity as to what exactly should be covered by the exemption. For instance, exemption could he limited to events specifically funded by government or where specific conditions are fulfilled (*e.g.* activities of non-profit organisations). Such a clause 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 artistes or athletes if the visit to that State is substantially supported by public funds of the other Contracting State or a political subdivision or a local authority thereof.

4. *Subsidiary right to tax for the country of residence*

99. The provisions of Article 17 could lead to double non-taxation where, on the one hand, the country of the artiste's or athlete's performance cannot exercise the taxing powers afforded it under the convention (for example, because under domestic law the income is not taxable or is specifically exempted) and, on the other hand, the country of residence applies the exemption method to relieve double taxation. This is seen as a major tax compliance issue in the countries of residence. The problem is of direct concern only to those countries of residence which apply the exemption method for relieving double taxation (either under internal law or under a convention). The problem arises not only where the income is not taxed at source; even when income is taxed in the country in which it is earned, the rate is often considerably lower than that of a progressive scale of taxation which would be applied by the country of residence. Some countries are very dissatisfied with this situation and resort to the use of the credit method in such cases.

100. The Commentary on Article 17 refers to this problem when dealing with the special case of artiste companies (in paragraph 5 of the text) and suggests as a solution, that either the credit method be used, or a subsidiary right to tax for the country of residence should be recognised. That country would be allowed to tax the income in question when this has not been done in the country where the performance takes place. The first of these solutions is also referred to in a more general context in paragraphs 32 and 47 of the Commentary on Article 23 A. In cases where a country is unable to use the credit method, it should of course adopt the second solution.

101. The Committee's conclusion on this point is that there is nothing to prevent two Contracting States from adopting one or other of these two

possible solutions in a bilateral convention. They should endeavour to do so when there is a high risk of double non-taxation, tax avoidance or evasion.

5. *Triangular cases*

102. A number of difficulties experienced by countries involve three-country situations. One case is where the artiste resides in State A, performs in State S and is employed under an exclusive "slave" contract by a "shadow company" situated in a non-treaty country B (*e.g.* a tax haven) and which supplies the entertainer's services to a producer in State S against payment of a fee. The question then arises as to whether State S may tax remuneration in respect of the entertainer's performance. An affirmative answer should be given to this question since Article 17 of the convention between A and S, which applies to the artiste resident in A, confers on State S the power to tax, and furthermore this power is not circumscribed by any convention between A and B.

103. In another three-country situation, the artiste is resident in a third State B, while the "shadow company" is established in State A. Even if there is a convention between A and S, the "shadow company" in State A could not argue that the remuneration paid by the producer of the performance in State S constitutes business income received without the intervention of a permanent establishment, since paragraph 7 of Article 7 stipulates that the Article does not apply to "items of income which are dealt with separately in other Articles" of the convention between A and S.

104. Consequently, it appears to matter little where the performer resides since this will either be in a State that has signed a convention with State S (where the activity is performed), under the terms of which State S has the right to tax, or else in a State which has not a convention with State S, whose right to tax therefore cannot be limited.

V. CONCLUSIONS

A. Suggested improvements in the domestic sphere

105. This survey of the difficulties encountered by tax administrations in taxing effectively artistes and athletes, as well as discussions on country experience with counteracting legislation, led the Committee to suggest some tentative recommendations. Having agreed on the principle that activities should be taxable in the country of performance, it was found that there were many instances where, for practical or legal reasons, such taxation was presently not possible or was ineffective. Improvements should therefore be looked for in the first instance in the domestic sphere. Admittedly, in providing for domestic changes, countries may have different approaches as to the proper way of dealing with resident and non-resident artistes and

athletes, or with performers and other taxpayers and these are referred to in the next section. However, the following suggestions for improvements can be offered:

a) *Exemptions* from tax for artistic or athletic events vary in degree among countries and depend on sovereign rights. Where they exist, however, they may lead to considerable inequalities, thereby discouraging tax compliance. Also froma technical point of view special concessions to some parts of the industry may be detrimental to the good functioning of the tax system;

b) *Information:* an effective and comprehensive information-gathering system is required. Setting-up specific units for this purpose would facilitate centralising the information available and communicating with foreign partners (see section B below);

c) *Assessment and collection:* in addition to stricter accounting and reporting obligations on organisers, withholding tax systems at fairly high levels could be set up to cover payments to self-employed artistes and athletes and persons (including, companies) providing the services of artistes and athletes. Although special taxes constitute a useful system for taxing such people, they appear to have drawbacks especially in an international context. From the investigation point of view, a centralised approach to deal with larger domestic cases or with the liability of foreign artistes and athletes is desirable.

B. *Suggested improvements in the international sphere*

1. *Increased exchange of information*

106. It emerges from country experiences that, with the exception of a few countries, little information is obtained through the exchange of information article of double taxation conventions. The Committee recommends that member countries make a more intensive use of such exchanges, either upon request, or preferably spontaneously, when tax authorities of a Contracting state come to learn that some of their residents are about to visit the other State, or when a resident of that State has performed services in the first-mentioned State. It is suggested that competent authorities could usefully issue special instructions or guidelines for dealing with exchanges of information in this area. In the absence of effective exchanges, income of artistes and athletes is likely to go very lightly taxed, or even not taxed at all when exemption is provided for in the State of performance.

107. Admittedly it may be difficult for a State to inform the other of impending visits there. However, some countries with a sophisticated (possibly centralised) information system on artistic and sporting activities

may be in a position to send such advance information. As to information which the State of residence of the performers would need for its domestic taxation, there are quite a few details the transmission of which could be agreed upon and organised: information necessary to verify the facts about the performance, the amounts paid (both remuneration and tax levied at source), the nature of the tax at source, the residence claimed by the entertainer etc. The Committee noted that in countries where special taxes existed (Norway and Sweden), these taxes were covered under bilateral conventions but exchanges of information provisions did not operate in practice, because such taxes were handled by authorities or agencies outside the ordinary tax administration, who were not familiar with exchange of information procedures under double taxation agreements. Although quick, automatic or spontaneous exchanges would be desirable, the relevant procedures are therefore difficult to establish in this case.

2. *Assistance in collection*

108. As seen when reviewing domestic aspects of taxing entertainment activities, substantial tax collection problems arise by reason of the mobility of artistes and athletes, especially for countries where artistes and athletes are taxed by assessment. Also, it is in the nature of the industry that large tax bills relating to a period of popularity and affluence sometimes arrive at a time when popularity has waned and the money gone. Some countries appear to be reasonably successful in ensuring compliance which combines a monitoring system on the movements of artistes and athletes with tax arrears together with a centralised approach to deal with such people visiting the country. In most cases, however, international co-operation is required also in this area. Countries which have, or could have, domestic powers to enforce payment of taxes levied abroad should therefore be encouraged to conclude conventions providing for assistance in the recovery of tax claims, whether bilaterally (*cf.* OECD Model) or multilaterally.

109. Finally, it should be noted that in cases where different national interpretations of the relevant provisions in double taxation agreements lead to double taxation, countries should be prepared to use the mutual agreement procedure to resolve such differences.

Notes and References

1. The first was entitled, "Trends in International Taxation: Leasing of Equipment and Hiring-out of Labour", OECD, 1985.

2. Australia, Austria, Belgium, Canada, Denmark, Finland, France, Germany, Ireland, Japan, Luxembourg, Netherlands, Norway, Portugal, Spain, Sweden, Switzerland, United Kingdom and the United States.

3. Only Switzerland reported no particular problem in this area.

4. Unreporting of income may of course happen there too (*e.g.* partial payments "off the books") but again, the same problem arises for other professions.

5. Reported to be mostly situated in Switzerland and Liechtenstein.

6. This also creates problems under double taxation conventions which are dealt with in Part IV.

7. For practical reasons, the wage tax is sometimes taken as a final tax (*e.g.* in Germany and the Netherlands).

8. Another interesting case of avoidance is the following:

   A restaurant makes a contract with a foreign company, according to which the musicians, show-stars, etc., employed by the company, perform in the restaurant. The restaurant only supplies the space and does not itself pay any performance or other fees. The foreign company receives the proceeds from the admission fees. There is a great temptation for the company to leave the proceeds undeclared in its home country.

9. Measures which exist in certain countries for counteracting general tax avoidance are *not* referred to in this Section, although they may well be of use in certain instances.

10. Problems may arise where tax is withheld only on payments to non-residents (see Canadian experience, paragraph 31 above).

11. A similar tax was imposed until 1982 in Denmark. When the period of performance exceeded 14 days, or in case of total engagement of at least one week payments to non-resident artistes were characterised as income subject to limited taxation in Denmark, and were subject to a 20 per cent gross tax it source. A recent change in jurisprudence now prevents tax authorities from levying the tax: the income is now taxable only if the artiste stays in Denmark for more than 6 months.

12. Following an increase in the rates of the special tax on entertainers in Norway from 1 January 1983 (from 10 to 20 per cent to 15 to 30 per cent on gross payments), experience suggests that an appropriate balance in tax levels has now been found, thereby reducing the speculation seen earlier in the advantages of paying special tax instead of the ordinary income tax.

13. It is also worth mentioning that measures of this kind may apply, as in the case of France, to the performance of services of any kind, not only to that of artistes and athletes.

ANNEX

ARTICLE 17

R (7)

Artistes and athletes

1. Notwithstanding the provisions of Articles 14 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 an athlete, from 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 an athlete in his capacity as such accrues not to the entertainer athlete himself but to another person, that income may, notwithstanding the provisions of Articles 7, 14 and 15, be taxed in the Contracting State in which the activities the entertainer or athlete are exercised.

Commentary on Article 17 concerning the taxation of artistes and athletes

1. Paragraph 1 provides that entertainers and athletes 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 an independent or of a dependent nature. This provision is an exception to the rules in Article 14 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 and athletes 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 independent activities by adding its provisions to those of Article 14. In such a case, entertainers and athletes performing for a salary or wages would automatically come within Article 15 and thus be entitled to the exemptions provided for in paragraph 2 of that Article.

3. The provisions of the Article do not apply when the entertainer or athlete is employed by a government and derives the income from that government. Such income is to be treated under the provisions of Article 19. Certain conventions contain provisions excluding entertainers and athletes employed in organisations which are subsidised out of pubic funds from the application of Article 1. The provisions of the Article shall not prevent

Contracting States from agreeing bilaterally on particular provisions concerning such entertainers and athletes.

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

5. Where in the cases dealt with in paragraph 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 paragraph 2. Contracting States are free to choose any of these methods in order to ensure that the income does not escape taxation.

Observation on the Commentary

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

Reservations on the Article

7. *Greece* and *Portugal* reserve the right to apply the provisions of Article 17, not 19, to income of government entertainers and athletes.

8. *Japan* reserves the right to apply the provisions of this Article to income derived in connection with trade or business by entertainers or athletes who are employed by the government.

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