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OITI Commentaries Project

Art. 17

Entertainers and Sportspersons Income

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Scope of article

- Art. 17 as an exception to OECD rationale:
 - SOURCE TAXATION.
- Sports and Entertainment income.
- Challenges regarding scope:
 - Definition of “entertainer” (Thomas Cheek Case)
 - Definition of “sportsperson” (Chess Player and Referee Cases)
 - Definition of “as such”
 - Definition of “where the performance takes place”



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Scope of article

- Exception to art. 7, no matter a PE or not.
- Exception to art. 15, no matter there be an employment contract.
- Justification on practical problems concerning the taxation of very mobile income earners.
- Critics based on lack of difference related to other mobile income earners.



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Current wording (OECD 2014):

1. Notwithstanding the provisions of Article 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, from that resident's personal activities as such exercised in the other Contracting State, may be taxed in that other State.



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Current wording (OECD 2014):

2. Where income in respect of personal activities exercised by an entertainer or a sports person acting as such accrues not to the entertainer or sports person but to another person, that income may, notwithstanding the provisions of Article 15, be taxed in the Contracting State in which the activities of the entertainer or sports person are exercised.



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Current status of treaty net assessment

Countries assessed:

- Brazil;
- Mexico;
- Chile;
- Argentina;
- Colombia;
- Portugal;
- Spain.



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Deviations classified until now

- Only art. 17 (1) (Brazil-Argentina)
- Addition of art. 17 (3)
- Addition of a “de minimis clause”
- Restriction of the scope of art. 17 (1) to business income.
- Exclusive taxation at source.
- Addition of “reputation clause”.
- Addition of Burden of “proof clause”.



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Art. 17 (3) (par. 14 of the Commentaries)

The provisions of paragraphs 1 and 2 shall not apply to income derived from activities performed in a Contracting State by entertainers or 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 or the sportsman is a resident.



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de minimis clause

Notwithstanding the provisions of Article 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, 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.



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de minimis clause

Examples:

- Jamaica-US Treaty:
 - 400 dollars a day or
 - 5.000 dollars in the taxable year.
- Barbados-US treaty:
 - 250 dollars a day or
 - 4.000 dollars in the taxable year.

***Some US treaties refer to “any 12 month period”.**



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art. 17 (1) only to business income
(par. 2 of the Commentaries)

Replacement of the words (in paragraphs 1 and 2):

“notwithstanding the provisions of Article 15”

By

“subject to the provisions of Article 15”



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Exclusive taxation at Source Andean Community Income and Capital Tax Convention (2004)

Article 16 Income From Public Entertainment Activities Income derived from the performance of artistic and public entertainment activities **shall be taxable only in the Member Country in whose territory the activities were carried out**, regardless of the time the persons engaging in such activities remained in that territory.



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“reputation clause”.

Income referred to in this paragraph shall include income derived from any personal activities performed in the other Contracting State by such resident relating to his reputation as an entertainer or a sportsman.
(art. 17 (1) Brazil Mexico Treaty)



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“burden of proof clause”

Notwithstanding other provisions of the Convention, income derived by a resident of a Contracting State from the performance of independent personal services, the direct use, letting or use in any other form of goods, connected to the personal activities exercised by an entertainer or a sports person in his capacity as such shall be considered as income derived by the entertainer or sports person for the purposes of the Article, unless the entertainer or sports person demonstrates that he nor person related thereto participates directly or indirectly in the income of that resident in any manner, including the receipt of deferred remuneration, bonuses, fees, dividends or other distributions. (art. 17 (3) Mexico Portugal Treaty)



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Treaties with art. 17 (3)

Brazil-Portugal (2000)

Argentina-Mexico (2015)

México-Spain (1992)

Portugal-Spain (1993)

Argentina-Spain (2013)

México-Panamá (2010)

Barbados-Panama (2010)

Mexico-Uruguay (2009)

Ecuador-Uruguay (2011)



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Treaties with the “reputation clause”

Brazil-Mexico (2003)

Chile-Mexico (1998)

México-Portugal (1999)

México-Peru (2015)

Chile-Peru (2001)

Peru-Portugal (2012)

Ecuador-Uruguay (2011)



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Treaties with no deviation

Brazil-Chile (2001)

Brazil-Spain (1974)

Chile-Portugal (2005)

Chile-Argentina (2015)

Chile-Spain (2003)

Brazil-Peru (2006)

Panama-Portugal (2010)

Panama-Spain (2010)

Panama-UK (2013)

Portugal-Uruguay (2009)



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Art. 17 (3) Mexico Panama Treaty

if the visit to that other State is supported for at least 75% by public funds of the first-mentioned State or a political subdivision or local authority thereof.

- *Paying-State Principle*



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Additional challenges

- Net or gross taxation at source.
- Criteria for tax base assessment at residence state.
- How much of public fund is enough to trigger Art. 17 (3).
- Allocation of salaries.
- Why is chess not a sport but billiards are?
- What about e-sports??



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Thank you for your attention and comments

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