MOBILITY OF INDIVIDUALS AND WORKFORCES

Tax Challenges Raised by Digitalization

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IBFD

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Chapter 10

Taxing the Income of Influencers

Dick Molenaar*

"To be an influencer you have to love people before trying to lead them"
John C. Maxwell

10.1. Introduction

Social media platforms, such as Instagram, Facebook, Twitter, TikTok and Snapchat – but also the broader platform of YouTube – started as open and democratic spaces, where every voice could be heard freely and words could be spread around in every possible way. This includes both freedom of speech and the availability to listen to anyone interesting – no institutions, no rules, no expectations, no obligations, but only information, a wide perspective and inspiration. It started with Twitter and Facebook, and life has never been the same since.

But after some time, it turned out that some voices were louder and more interesting than others. Some contributors to the platforms were followed more than others, while most of the public were not sending messages, but only following what others were saying and showing. Twitter started with short but plain text and Facebook added photos, while Instagram, Snapchat and TikTok almost only have pictures and images. After some time, it became clear that – same as in normal life – there was a small group of trendsetters or cultural vanguards, while most of the public just wanted to listen and follow what these celebrities were saying or showing. Also, the opinion or expression of these trendsetters was also influencing these groups in the public, showing them expressions and directions which they did not dare to do themselves or would not have thought of doing. This development especially arose within Instagram, which was created in 2010. There was a new name invented for those attracting so much attention: influencers.

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10.2. Influencers and commerce

The growing following of influencers gave a new opportunity for commercial parties. The link of a product to an influencer gave a new chance of publicity, other than classical advertisement, especially when the influencer was using the product in their videos – as if it were part of normal life – and then the threshold was lowered for followers to consider buying the product. When the number of followers becomes higher, the company is willing to pay more to the influencer for this promotion.

This in-video support of products is special for social media, such as Facebook, Instagram and TikTok, while YouTube also gives the opportunity to have advertisements around the particular channel of the influencer. These can be totally separate from the messages and actions of the influencer, although preferably the products (or services) shown should be focused on the followers watching the YouTube videos of the influencer. This promotion and advertisement can be big business for the influencer who, therefore, tries to increase the number of followers.

Influencers have become the new stars of this time[1] – not because of their music, theatre, dance or sports results – but because of their messages. They are attracting big numbers of followers who want to watch and consume what has been made by famous people, instead of create and send messages themselves.

The most famous influencers nowadays[2] are Kylie Jenner (350 million followers), Kim Kardashian (319 million followers) and Whindersson Nunes Batista (135 million followers), but there are many, many more with also high numbers of followers.

The volume of the influencer market was estimated at EUR 13 billion in 2022.[3]

A special dimension in the discussion comes from the existence of virtual influencers. These are not real persons of flesh and blood but virtual crea-

1. "Online marketing rockstars" according to R. Hornuth, *Einkünfte X.0: Blogger, Influencer, YouTuber & Co.*, NWB 26 (2018).
2. This excludes famous sportspersons and entertainers followed on social media, such as Cristiano Ronaldo (517 million followers), Justin Bieber (455 million followers), Ariane Grande (429 million followers), Taylor Swift (361 million followers) and Lionel Messi (298 million followers).
3. O. Yallop, *Break the Internet: in pursuit of influence* (Scribe UK 2021).

tions from most often advertisement agencies. Famous examples are Lil Miquela (United States – 3.1 million followers (Instagram: @lilmiquela)) and Lu do Magalu (Brazil – 5.9 million followers (Instagram: @magazineluiza)) and, on a smaller scale, also Esther Olofsson (The Netherlands – 43,000 followers (Instagram: @esther.olofsson)). They look like real people, although almost everyone knows that they are virtual and experience the same things on Instagram or social media as real-life influencers (e.g. meeting with girls, kissing with a boyfriend and going out for shopping and, at the same time, also promoting products and services).

10.3. Tax treaty qualification

10.3.1. Crossing borders and taxation

Influencers can be internationally active, which means that the taxation of their income depends on both national and international tax law.

Example

A Danish influencer is sponsored by a UK clothing brand and travels to Madrid for 3 days to go shopping, visit a fashion show and see a football match. She posts six videos per day about her trip, wearing clothes of the brand, visiting shops in Calle Gran Via in the city centre and meeting football players sponsored by the same brand in the Wanda Metropolitano stadium of Atletico Madrid. It all looks very spontaneous, including behind-the-scene visits of the fashion show and in the dressing room of the football team. The last post is about the influencer with her friends walking up the stairs of the plane at airport Madrid-Barajas to take them back to Denmark.

The question is how and where the payments by the UK fashion brand to the Danish influencer should be taxed. It is clear that the income of the Danish influencer will be taxed in her residence state (Denmark) as part of her worldwide income. She will have to report all her income in her Danish income tax return, regardless of where she has earned it and from where it originates. She can also deduct her expenses, both business and personal, in Denmark, apply the Danish personal allowances and will fall under the Danish progressive income tax rates.

But it might also be that the United Kingdom, as the source state of the income, wants to raise tax on the advertisement income. Many states have a source withholding tax on every payment leaving the state, which can only be taken away if a bilateral tax treaty allocates differently. But this is not the practice in every state because some hold the opinion that, in clear situations, gross payments without deductions are better for the circulation of business and lead to more economic activity. For them, a bilateral tax treaty with the other state is only a confirmation that there is no taxing right at source.

Finally, in this example, it might also be that Spain – as the state in which the activities have taken place – wants to tax the UK-source income paid to the Danish resident, and this will also be influenced by the tax treaty between Spain and Denmark.

Tax treaties are mostly concluded bilaterally (between two states) but sometimes multilaterally, such as the Nordic,[4] Asean,[5] Andean[6] and Caribbean[7] multilateral tax treaties. Most states follow the recommendations of the OECD Model Income Tax Convention (OECD Model) in their treaty negotiations – even when they are not OECD member countries – but also the UN Model is followed, as this has some variations on the OECD Model and focuses more on the interest of the developing states. Besides this, also the US Model plays a big role in the world because the economic force of the biggest economy in the world is an important factor during treaty negotiations with the United States.

10.3.2. General allocation rules

These three Models all have four articles under which the income of influencers can be qualified. These are:
- article 7 – business profits;
- article 12 – royalties;
- article 14 – independent personal services (not in the OECD Model anymore);
- article 15 – dependent personal services; and
- article 17 – entertainers and sportspersons.

4. Denmark, the Faroe Islands, Finland, Iceland, Norway and Sweden.
5. Brunei, Cambodia, Indonesia, Laos, Malaysia, Myanmar, the Philippines, Thailand, Singapore and Vietnam.
6. Bolivia, Colombia, Ecuador and Peru.
7. Antigua, Belize, Dominica, Grenada, Guyana, Jamaica, St. Kitts, Saint Lucia, St. Vincent and Trinidad and Tobago.

Articles 7, 14 and 15 are opposite articles because a distinction needs to be made between working independently, as a self-employed person, and working under the authority of an employer in a dependent position.

Articles 12 and 17 are exceptions to these employment elements. When royalties are recognized, article 12 has priority over the other articles. For entertainers and sportspersons, the special status of article 17 goes even further because this article sets aside articles 7,[8] 14 and 15.[9]

A good starting point for the tax treaty qualification of influencers is the special article 17 for entertainers and sportspersons because this has both a restricted personal scope and only covers some types of income.

10.4. Influencers and the personal scope of article 17 of the OECD Model

Crucial for the application of article 17 is whether influencers belong to the group "entertainers and sportspersons". Most of the influencers are, in normal life, entertainers and sportspersons (as explained in section 10.2.), but the OECD has set official conditions for the personal scope of article 17 of the OECD Model and, therefore, it needs to be checked whether the influencers meet those conditions.

This starts with the text of article 17(1), which says that it applies to "income for an entertainer or a sportsman from his personal activities as such". This means that the article only applies to the personal activities of an entertainer or sportsperson and not to activities around this, which are a spin-off of the entertainment and sports activities.

The OECD, in paragraph 3 of the OECD Model Commentary on Article 17 (2017), acknowledges that a precise definition of "entertainers and sportspersons" cannot be given and, therefore, chooses to give examples. But it also mentions that this should not be considered as exhaustive.

8. This is mentioned in art. 7(4) *OECD Model Tax Convention on Income and on Capital* (27 Nov. 2017), Treaties & Models IBFD [hereinafter *OECD Model*].
9. This is mentioned in the opening sentence of art. 17 *OECD Model*; and *United Nations Model Double Taxation Convention between Developed and Developing Countries* (2021), Treaties & Models IBFD [hereinafter *UN Model*].

The following examples of entertainers are provided:
- stage performer, film actor, actor (or a former sportsperson) in a television commercial;
- activities with a political, social, religious or charitable nature, if an entertainment character is present;
- but not a visiting conference speaker, such as a former politician, receiving a fee for a speech or a model performing as such during a fashion show or photo session; and
- also not administrative or support staff, such as cameramen, producers, film directors, choreographers, technical staff or road crew for a pop group.

But the OECD also recognizes that there is a grey area in between for which it is necessary to revive the overall balance of the activities of the person concerned. In paragraph 4 of the Commentary on Article 17, the OECD explains that mixed activities can take place, such as that an individual may both direct a show and act in it. In such cases, it is necessary to look at what the individual actually does in the state of the performances. If the activities in that state are predominantly of a performing nature, then article 17 will apply to all the resulting income from that state. But if the performing element is a negligible part of what has been done in that state, the whole income will fall outside the article. It other cases, an apportionment should be necessary.

In paragraph 5 of the Commentary on Article 17, sportspersons are also described through examples, albeit far fewer than entertainers. Also here is mentioned that no precise definition can be given to the term "sportspersons". It is not restricted to traditional athletes (such as runners, jumpers and swimmers) but also covers golfers, jockeys, footballers, cricketers, tennis players and racing drivers.

In paragraph 6 of the Commentary on Article 17, the OECD mentions that some others are usually regarded as of an entertainment character, such as billiards and snooker, chess and bridge.

For influencers, these examples and descriptions are helpful. The motives for influencers to start with posts on social media are to show what is happening in their lives. These posts are entertainment, performing and acting for the public and clearly relate to the example of an actor, as mentioned in paragraph 3 of the Commentary on Article 17. The influencer wants to make such interesting posts that many users want to follow them. This is relatively easy for sportspersons and entertainers who are already famous

from their sports or entertainment activities and, therefore, they have the most followers, as people want to see what these stars are doing when they are not performing. But also this is acting, even though in normal life, because these influencers look into the camera and say things specifically for the post. This is perhaps not based on a written script, but it also happens often with stage performers and film actors. The performance in the post is directly aimed at the followers and is of an entertainment character. Therefore, influencers fall under article 17 of the OECD Model – not as sportspersons because even though the influencer can be a famous sportsperson, the posts are not the result of the activities as a sportsperson, but rather have an entertainment nature.

This means that article 17 is relevant for influencers so, in the following sections, it will be explained where the article comes from; how it was developed; what the problems with the article are; and how that has been discussed.

10.5. Article 17 for entertainers and sportspersons

10.5.1. Early years of article 17, up to 1963

Article 17 was first mentioned in article XI of the Sweden-United States Income and Capital Tax Treaty (1939) as an exception to the rules for independent personal services. It gave the state of the work the right to tax the performance income, regardless of whether there was a permanent establishment (PE). This was an initiative of the US treaty negotiators because many Swedish boxers came to the United States for fights with considerable amounts of prize money.[10] Later, in 1945, such an article did not make it into the United Kingdom-United States tax treaty.

The first OECD Model of 1963 already had an article 17 for artists and sportspersons, after the article first appeared in article XI of the 1959 OEEC Second Report.[11] In its Commentary, this Report gave an explanation for the introduction of this new article XI:

> 11. The provisions of Article XI relate to public entertainers and athletes and stipulate that they may be taxed in the State in which the activities are

10. J.A. Nitikman, *Article 17 of the OECD Model Treaty – An Anachronism?*, 29 Intertax 8/9 (2001).
11. OEEC Fiscal Committee, *The Elimination of Double Taxation* (OEEC 1959). The OEEC was the predecessor of the OECD.

> performed, whether these are of an independent or of a dependent nature. This provision is an exception, in the first case, to the rule laid down in Article VI (Independent activities), in the second case, to the rule laid down in paragraph 2 of Article VII (Salaries and wages)
>
> 12. By this provision the practical difficulties are avoided which often arise in taxing public entertainers and athletes performing abroad. Certain Conventions, however, provide for certain exceptions such as those contained in paragraph 2 of Article VII. 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 Article XI to independent activities by adding its provisions to those of Article VI relating to professional services and other independent activities of a similar character. In such case, public entertainers and athletes performing for a salary or wages would automatically come within Article VII and thus be entitled to the exemptions provided for in paragraph 2 of that Article.

Apart from the cryptic justification ("practical difficulties") for the introduction of this new article, the Second Report did not give any evidence or examples of the problems that national governments had experienced with taxing non-resident entertainers (and athletes). With its reasoning, the Fiscal Committee seemed to have its eye more on securing taxation than on eliminating double taxation.

Already the Second Report made it implicitly clear that the allocation of the taxation of entertainers to the source country would lead to obstacles in the international arts world: the new article contained a very strict provision, and the reporters were afraid of impeding cultural exchanges. This meant that it was clear from the start that the cultural world was going to suffer from this tax measure.[12]

This was taken over in the 1963 OECD Model and renumbered as article 17: "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, from his personal activities as such exercised in the other Contracting State, may be taxed in that other State."

12. D. Molenaar, *Taxation of International Performing Artistes* (IBFD 2006), Books IBFD.

10.5.2. Change in 1977, addition of second paragraph

In 1977, article 17 was extended and a new paragraph was added:

> 1. Notwithstanding ……
> 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.

With article 17(2), so-called "star companies" could be targeted. Some countries had reported to the OECD that top entertainers and sportsmen were increasingly often being loaned out by companies that paid the entertainers and sportsmen a small salary and took the major part of the performance income as company profits. These companies were based mostly in tax havens without normal income or corporation tax. It also appeared that the entertainers or sportsmen were themselves the actual shareholders of these offshore companies or received a large share of their profits. This was often combined with the personal change of residence of entertainers and sportsmen to tax havens.[13]

Since then, most OECD member countries followed the 1977 recommendation to add article 17(2) to their tax treaties because they believed it gave them the means to combat tax avoidance by the top stars.

10.5.3. Dramatic 1987 OECD Report

In 1987, the OECD published a report about entertainers and sportspersons, in which the mistrust became more evident. The report used phrases such as "clear evidence of non-compliance", "rarely disclose casual earnings", "sophisticated tax avoidance schemes, many involving the use of tax havens, are frequently employed by top-ranking entertainers and athletes", "relatively unsophisticated people, in the business sense, can be precipitated into great riches", and "travel, entertainment and various forms of

13. A classic example is the Swedish heavyweight boxing champion Johansson, who was knocked out by the US tax authorities in US: US Court of Appeals for the Fifth Circuit, 2 Sept. 1964, *Johansson v. United States*, 336 F.2d 809. *See also* F.J. Safarik, *Entertainment Company: Simulated Employment*, 30 Eur. Taxn. 9, p. 307 (1990), Journal Articles & Opinion Pieces IBFD, about a Swiss-based "star-company".

ostentation are inherent in the business and there is a tendency to be represented by adventurous but not very good accountants".[14]

The report acknowledged that the entertainment industry covers a larger entourage than only the performers and includes "managers, various administration and publicity staff and road crews … [b]esides performance fees also music and/or writing royalties and fees are involved". Sources of income are taken through different companies "crossing international boundaries". The report found it "likely that the inventiveness and complexity of the industry will continue to expand".[15]

The international world represented within the OECD believed in 1987 that rich and famous entertainers and sportsmen in particular tried to escape from normal taxation via avoidance schemes and that lesser known entertainers failed to report their non-resident income in their home countries. The 1987 OECD report mentioned that systematic audits in Canada and the Netherlands, as well as studies in Canada, had been undertaken, but figures were not disclosed.[16,17]

10.5.4. Deduction of expenses or gross taxation at a low rate

The 1987 OECD report also discussed the deduction of expenses from the performance income in the source country, as "Article 17 says nothing about how the income in question is to be computed". The report concluded that some countries "provide for taxation at source at an appropriate rate based on the gross amount paid to artistes and athletes" but did not want to interfere with these national tax rules, stating that "it is for a Contracting State to determine the extent of any deductions for expenses".[18] This hidden recommendation was inserted in paragraph 10 of the OECD Model Commentary on Article 17 (1992).

Most states followed this recommendation with a gross source withholding tax in their national tax rules. But this was blocked in the European Union from 2003 to 2007 with the decisions of the European Court of Justice

14. Paras. 6, 7 and 8 of OECD, *Taxation of Entertainers, Artistes and Sportsmen* (OECD 1987), Primary Sources IBFD [hereinafter 1987 OECD Report].
15. Id., at para. 9.
16. Id., at para. 6.
17. D. Molenaar, *Taxation of International Performing Artistes* (IBFD 2006), Books IBFD.
18. Para. 94 1987 OECD Report.

(ECJ) in the cases *Gerritse*,[19] *Scorpio*[20] and *Centro Equestre*.[21] The ECJ held it against the freedom principles of the European Treaty, if expenses were not deductible for non-residents – while they are for residents – even when a lower tax rate is applied. Those non-residents should be entitled to a normal tax settlement with deductions and normal tax rates, while the direct expenses should already be deductible at the moment of the performance.

In 2008, this led the OECD to change paragraph 10 of the Commentary on Article 17 (2008) and give states, besides the gross taxation at a low tax rate, also the option to include the deductibility of expenses in article 17 of their tax treaties. The OECD made a text proposal for its member countries, which makes the deduction of expenses only possible via an income tax return or other tax refund procedure after the taxable year. It is good that this should be allowed under the same terms as for resident taxpayers, but there is still a cashflow issue because, with this proposed text, the expenses cannot be deducted at the moment of the performance in the other state. This makes the OECD text proposal in line with the *Gerritse* and *Centro Equestre* decisions of the ECJ, but clearly not with the *Scorpio* decision.

Unfortunately, states have not included this reasonable alternative for net taxation in article 17 of their bilateral tax treaties since 2008. Within the European Union, such an addition is not needed because these Member States have to follow the ECJ decisions anyways but, for other states, it is up to the national tax law whether expenses can be deducted and normal tax rates can be applied. It is very fortunate that states with bigger economies, such as the United States, the United Kingdom, Canada and Australia, allow a normal taxation route – both at the moment of the performance and after the taxable year.

10.5.5. Problems with elimination of double taxation

10.5.5.1. Tax credit method (instead of exemption method)

Allocating the taxing right to the work state means that the residence state should take care of eliminating double taxation. This residence state will tax the worldwide income, which means that it will include the foreign

19. DE: ECJ, 12 June 2003, Case C-234/01, *Arnoud Gerritse v. Finanzamt Neukölln-Nord*, Case Law IBFD.
20. DE: ECJ, 3 Oct. 2006, Case C-290/04, *FKP Scorpio Konzertproduktionen GmbH v. Finanzamt Hamburg-Eimsbüttel*, Case Law IBFD.
21. DE: ECJ, 15 Feb. 2007, Case C-345/04, *Centro Equestre da lezíria Grande Lda v. Bundesamt für Finanzen*, Case Law IBFD.

performance income in the taxable income – regardless of whether it has been taxed abroad – and then allow a tax exemption for the foreign income or a tax credit for the foreign tax. These two methods for the elimination of double taxation are mentioned in article 23 of the OECD Model, and states are free to choose which will be used. The Anglo-Saxon states (such as the United States, United Kingdom, Canada and Australia) use the tax credit method for every income item, while the continental European states prefer to use the tax exemption method for active income from business profits and from personal work and the tax credit method for passive income from dividends, interest and royalties.

Initially, these continental European states also used the tax exemption method for income falling under article 17 of their bilateral treaties because this is active income. But they experienced that the work states very often were using low tax rates for visiting entertainers and sportspersons, as described in section 10.5.4. When the expenses were very low, then the effective tax rate would also be low and with the tax exemption method in the residence state, the entertainer or sportsperson was paying less tax than normal in the residence state.

In 1992, this brought the OECD to recommend using the tax credit method in article 23 of a bilateral tax treaty for income taxed under article 17.[22]

Residence states normally use the ordinary credit method, which will not give more foreign tax credit than an equivalent part of the national tax.[23] This maximum is the same as the outcome of the tax exemption method because that gives an exemption equal to the national tax raised on the foreign income.[24] The conclusion therefore is that tax credit is lower or at best the same as exemption. Therefore, taxpayers are most often better off with the exemption method because, at best, the tax credit method only gives the same result.

10.5.5.2. Unequal treatment for employees

Since 1992, many states have followed this recommendation and have made a distinction in their national tax law between normal foreign active

22. This is mentioned in *OECD Model Tax Convention on Income and on Capital: Commentary on Article 17* para. 12 (23 Nov. 2017), Treaties & Models IBFD.
23. This is different from a full tax credit.
24. Normally, this is exemption with progression because it is not taken from the top tax rate but from the average tax rates.

income, which is entitled to the tax exemption method, and foreign performance income falling under article 17 to use the tax credit method. But this means that an entertainer or sportsperson working as a normal employee for a group or team cannot use the exemption method, but is obliged to use the tax credit method. This leads to higher taxation.

Example

A Swedish football player was transferred from a Swedish to a Dutch football club per 1 July of a year. After some months, he received a share of the transfer fee from his former club on which Swedish payroll tax was withheld. As resident in the Netherlands, he had to include this Swedish income in his Dutch income tax return but – different from a normal employee – he was not entitled to a tax exemption (with progression) for the Swedish income but had to use the tax credit method for the Swedish income. The result was that he had to pay extra Dutch tax up to normal Dutch tax rates.[25]

10.5.5.3. Excessive taxation because of difference in taxable base

There are also other tax credit problems arising from article 17. This happens when the taxable base is higher in the performance state than in the residence state because expenses cannot (or can only partly) be deducted in the performance state, and the residence state restricts the ordinary tax credit (or the tax exemption with progression) to the amount of national tax levied on the profit from the foreign activities. This might be compensated by the lower tax rate in the residence state, but very often that is not enough.

Example

An Austrian actor received a performance fee of EUR 30,000 from Spain, which was taxed at 19% from the gross fee (EUR 5,700 Spanish tax). He had expenses of EUR 12,000 from his agent, travel, accommodation in Spain, advisers, equipment and such, which means that he had a foreign profit in Austria of EUR 18,000. The average tax rate on his worldwide income was 28%, leading to Austrian tax on the foreign income of EUR 5,040. The excessive taxation for this Austrian actor is then EUR 5,700 (Austria) minus EUR 5,040 (Spain), which is EUR 660.

25. NL: *Hoge Raad* (Supreme Court), 7 May 2010, BNB 2010/245.

This excessive taxation will be higher with more deductible expenses or, more precisely, a bigger difference in taxable base between the performance state and the residence state.[26]

This problem will also arise when the income has been received by a legal entity, either owned by the performer or an independent production company, and a salary has been paid to the performer. Then the foreign tax can only be credited by the legal entity, but its taxable base will become lower for the ordinary tax credit. Then the result is also excessive taxation.[27]

A solution might be the deduction of expenses in the performance state, either before the activities take place or after the year in an income tax return. This has been discussed in section 10.5.4. and should be possible in EU Member States after the ECJ decisions of *Gerritse*, *Scorpio* and *Centro Equestre* and in other states under national legislations, such as the United States, the United Kingdom, Canada and Australia. The option from paragraph 10 of the Commentary on Article 17 has not been used by states in their bilateral tax treaties, so that does not give relief until now.

But this will lead to considerable extra administrative expenses, both in the performance state, where a (specialized) tax adviser or accountant needs to be hired, and in the residence state, where the information needs to be collected and presented in an ordinary statement. Also, the tax authorities in the performance state have extra work because of these deductions and tax returns.

10.5.5.4. Other tax credit problems that lead to double taxation

It can also easily happen that the tax credit cannot be obtained, because of the following problems:
- there is no tax certificate confirming the foreign tax;
- the tax certificate is in the wrong name, e.g. the name of a group or production company and not the individuals;
- the tax certificate is in another language; or
- the income in the residence state is too low and remains under the personal allowance.

26. Results of the research on these expenses were published in D. Molenaar, *Taxation of International Performing Artistes* ch. 8 and sec. 7.2.7. (IBFD 2005), Books IBFD.
27. This happened recently in the Netherlands in NL: *Hoge Raad* (Supreme Court), 24 Sept. 2021, nr. 20/01875, BNB 2022/7; and NL: Appeal Court Amsterdam, 14 Oct. 2021, nr. 19/01571, NTFR 2021/4282.

10.5.6. Discussion within the OECD between 2010 and 2014

The problems following from article 17 of the OECD Model were shown between 1994 and 2009 in various books,[28] articles[29] and presentations. But when the OECD published a Discussion Draft for the Commentary on Article 17 in 2010,[30] it was strange that these problems were not mentioned. The OECD discussed other relevant aspects, such as more wording about the taxation of image rights, but the problems of excessive and even double taxation were not mentioned.

There was input from around 15 parties and organizations, and some made the remark that it would be better to remove article 17 from the OECD Model because of the existing problems. They also explained that article 17 is not needed when tax avoidance is to be counteracted because, in a tax treaty situation, the risk of tax avoidance to a tax haven does not exist. The only thing needed is that the performance state has a withholding tax for visiting entertainers and sportspersons, which can be exempted when the entertainer or sportsperson can prove to have residence in the state of the treaty partner. When the tax authorities of the residence state are asked to confirm this residence, they also have information about the foreign income to be declared in the tax return for that year. This is the same as with article 12 for royalties, for which the OECD Model also allows an exemption at source and for which the source states have an exemption procedure to be completed.[31]

This was discussed within the OECD and also the IFA/OECD Seminar E at the 2010 IFA Congress in Rome under the title “Red card Article 17?”. There, the representative of the Ministry of Finance of the Netherlands explained why his state has removed the taxation of visiting entertainers

28. Such as D. Sandler, *The Taxation of International Entertainers and Athletes – All the World’s a Stage* (Kluwer Law International 1995); D. Molenaar, *Taxation of International Performing Artistes* (IBFD 2006), Books IBFD; and X. Oberson ed., *International Taxation of artistes & sportsmen* (Schulthess & Bruylant 2009).
29. Such as H. Grams, *Artist Taxation: Article 17 of the OECD Model Treaty – a Relic of Primeval Tax Times?*, 27 Intertax, p. 188 (1999); J. Nitikman, *Article 17 of the OECD Model Treaty – An Anachronism?*, 29 Intertax, p. 268 (2001); D. Molenaar, *Obstacles for International Performing Artists*, 42 Eur. Taxn. 4, p. 149 (2002), Journal Articles & Opinion Pieces IBFD; and D. Molenaar & H. Grams, *Rent-A-Star, The Purpose of Article 17(2) of the OECD Model Treaty*, 56 Bull. Intl. Taxn. 10, p. 500 (2002), Journal Articles & Opinion Pieces IBFD.
30. OECD, *Discussion Draft on the Application of Article 17 (Artistes and Sportsmen) of the OECD Model Tax Convention* (OECD 2010), Primary Sources IBFD.
31. See H. Grams, *Artist Taxation: Article 17 of the OECD Model Treaty – a Relic of Primeval Tax Times?*, 27 Intertax, p. 188 (1999).

and sportspersons unilaterally, if they can prove that they come from a state with which the Netherlands has concluded a bilateral tax treaty. With this, the Netherlands is not using the taxing right from article 17 of their bilateral tax treaties.[32]

10.5.7. No removal but new official reasons for article 17 in the 2014 OECD report

But these remarks and discussions did not lead to the removal of article 17 from the OECD Model, as the OECD decided in June 2014.[33] The OECD wrote the following about the discussion and updated its official reasons for the existence of article 17:

> 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, 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.[34]

This means that article 17 of the OECD Model has three official reasons since 2014:[35]

- it is difficult for the residence state to obtain the relevant information;
- high-income earners can easily move their residence to low-tax jurisdictions; and
- source taxation of the income can be administered relatively easily.

32. A summary of the discussion at this Seminar E of the 2010 IFA Congress can be found in R. Vann, D. Molenaar & M. Tenore, *Red Card Article 17?*, 66 Bull. Intl. Taxn. 3, p. 127 (2017), Journal Articles & Opinion Pieces IBFD.
33. OECD, *Issues Related to Article 17 of the OECD Model Tax Convention* (OECD 2014).
34. OECD, *Issues related to Article 17 of the OECD Model Tax Convention* (OECD 2014) [hereinafter 2014 OECD Report].
35. D. Molenaar, *Entertainers and Sportspersons Following the Updated OECD Model (2014)*, 69 Bull. Intl. Taxn. 1, p. 37 (2015), Journal Articles & Opinion Pieces IBFD.

Unfortunately, these reasons are wrong and still lead to the same misconception over many years, as well as to excessive and double taxation, as explained in this chapter (and other articles and books). First, the reality is that the residence state can easily obtain the information about the foreign income, whether through the exemption procedure, from bank statements or from exchange of information. Second, low-tax jurisdictions do not have tax treaties, so an article 17 in a treaty does not help. Third, source taxation is complicated and causes tax credit problems and extra administrative expenses.

Regardless, the OECD Member States want to keep article 17 of the OECD Model and this means that the described problems still exist.

10.6. Is article 17 based on a benefit principle?

It is interesting whether OECD member countries also want to keep article 17 because of the tax revenue (benefit principle).[36] This would mean that the tax revenue was one of the reasons why the OECD and its member countries wanted special taxing rules for entertainers and sportspersons. Officially, this reason cannot to be found in the OECD Report (2014) or in other publications, such as the OECD Report (1987). It is only mentioned in the literature in a presentation at a conference in Vienna in 2008 by Daniel Sandler, who wanted to broaden the scope of article 17 of the OECD Model to all well-known persons, including speakers, former politicians giving lectures and others, and defended this with the argument that it would be fairer to tax all well-known persons at source and that this could result in a valuable amount of tax revenue for source states.[37] Later, another Canadian, Brian Arnold (2011), supported this new approach,[38] but it did not make it into the OECD reasons for article 17 of the OECD Model.[39] Als Savvas Kostikidis discussed the benefit principle for article 17 in 2020.[40]

For the benefit principle to apply, it is important to know how much tax is raised from visiting entertainers and sportspersons. Not much information

36. S. Kostikidis, *Influencer Income and Tax Treaties*, 74 Bull. Intl. Taxn. 6 (2020), Journal Articles & Opinion Pieces IBFD.
37. D. Sandler, *Artistes and Sportsmen (Article 17 OECD Model Convention)*, in *Source versus Residence – Problems Arising from the Allocation of Taxing Rights in Tax Treaty Law and Possible Alternatives* pp. 215-246 (M. Lang ed., Wolters Kluwer 2008).
38. B. Arnold, *The Taxation of Income from Services under Tax Treaties: Cleaning Up the Mess*, 65 Bull. Intl. Taxn. 2 (2011), Journal Articles & Opinion Pieces IBFD.
39. *See* sec. 10.5.7.
40. S. Kostikidis, *Influencer Income and Tax Treaties*, 74 Bull. Intl. Taxn. 6 (2020), Journal Articles & Opinion Pieces IBFD.

is available but, in 2019, the Belgian Minister of Finance had to answer parliamentary questions on this point. He provided the list of tax earnings (per year in euros) shown in Table 10.1.

Table 10.1. Tax revenue derived by Belgium from entertainers and sportspersons (2014-2018)

Year	Entertainers (EUR)	Sportspersons (EUR)	Total revenue (EUR)
2014	14,783,534	2,438,895	17,222,429
2015	14,732,761	3,535,922	18,268,683
2016	15,989,872	3,393,602	19,383,474
2017	17,572,315	4,423,913	21,996,228
2018	16,675,645	4,209,088	20,884,733

The most lucrative year was 2017, bringing EUR 22 million in revenue from the source withholding tax. Belgium had 11.3 million citizens in 2017 and is an open and active state with many performances and sports events, which implies that the tax revenue can be extrapolated to other states (*see* Table 10.2.).

Table 10.2. Extrapolated tax revenue from entertainers and sportspersons for other states, derived from the Belgian example

State	Citizens (millions)	Tax rate (%)	Estimated tax revenue (millions (EUR))
Australia	25.5	29	80.0
Austria	8.9	20	19.3
Canada	37.6	15	61.0
Denmark	5.8	n/a	11.3
France	67.0	15	108.7
Germany	83.0	15.825	142.1
Ireland	4.9	n/a	9.5
Netherlands	17.3	n/a	33.7
Sweden	10.2	15	16.5
United Kingdom	66.7	20	144.3
United States	325.1	30	1,054.9

The estimate of tax revenue in Denmark, Ireland and the Netherlands is only theoretical, as these states do not have a source withholding tax for non-resident entertainers and sportspersons.

The conclusion needs to be that these figures are not impressive and do not support the position that states want to retain article 17 of the OECD Model (and in their bilateral tax treaties) because of the tax revenue.

But even more important, the total tax revenue in each state will fall considerably because of the tax credits (or exemptions) for resident entertainers and sportspersons engaging in foreign performances and sporting events. This will equalize the tax earnings from non-residents so that – given an equal influx and outflux of entertainers and sportspersons – no real tax revenue will remain for a state. This means that including an article 17 in a bilateral tax treaty would result in the same tax result for states as not including it.

Therefore, the conclusion has to be that the benefit principle cannot be a reason to justify the existence of article 17.[41]

10.7. Taxable income under article 17: Apportionment

Influencers may have various types of income, and the question can be raised whether all income would fall under article 17 of the OECD Model and, therefore, can be taxed in the state of the work, appearance or performance. Already in the example of the Danish influencer from section 10.3.1., some income items have been mentioned, but this can be broader.

Overall, influencers can be characterized as entertainers – playing a role in their real life – which means that the explanation from paragraph 4 of the Commentary on Article 17 applies, saying that "if the activities in the work state are predominantly of a performing nature, the article will apply to all the resulting income he derives in that state". The Danish influencer received a fee from the fashion brand from the United Kingdom, and this fee should be taxable in Spain, following the OECD Commentary. Likewise, as part of the worldwide income, it should also be taxable in the

41. D. Molenaar & H. Grams, *Influencer Income and Tax Treaties: A Response*, 74 Bull. Intl. Taxn. 9, p. 550 (2020), Journal Articles & Opinion Pieces IBFD.

residence state (Denmark), but this state should allow a foreign tax credit to eliminate double taxation.

But the fee for the advertisement might be paid as a lump sum for a period of time in which more activities have taken place, both in Denmark and in other states. This means that the income should be apportioned over these states, e.g. based on the number of days spent in those states.

It is interesting whether the work state (Spain) has the information about this payment from the fashion company in the United Kingdom to the influencer in Denmark. If not, then no tax will be raised in Spain, but also no foreign tax credit will be given in Denmark.[42]

It is also interesting whether Spain has the authority to tax a part of the income which has not been paid in that state, even though it is connected to work and activities in Spain. This discussion about the territoriality principle has led (in) to tax court decisions about Andre Agassi,[43] Retief Goosen[44] and Sergio Garcia.[45] These three sportspersons received sponsoring and endorsement payments from companies selling tennis and golf equipment, but these payments were done outside the United Kingdom and the United States. Still, both countries believed they had the right to part of this sponsoring/endorsement income, which could be allocated to the performances within their territory. The tax courts in those states approved this taxing right, which meant that the sportspersons were partly taxable there. While it would normally not be a problem – because then they would be entitled to a foreign tax credit in their residence state – all three had received the income in a state with a favourable tax regime and low tax rates. This means that the United Kingdom and the United States, by applying this territoriality principle, were successful in their measures against tax avoidance schemes.

If influencers receive payments for the use of image rights, the Commentary on Article 17 has wording since 2014 on how to treat these payments.[46] When the use of the image is not closely connected with the performance

42. This means that the OECD recommendation for the tax credit method for art. 17 income (*see* sec. 10.5.5.1.) is very effective because, with the tax exemption method, this would lead to double non-taxation for this part of the income.
43. UK: House of Lords, 17 May 2006, [2006] UKHL 23, *Agassi v. Robinson (Her Majesty's Inspector of Taxes)*.
44. US: US Tax Court, 9 June 2011, 136 T.C. No. 27, Docket No. 23323-09.
45. US: US Tax Court, 14 Mar. 2013, 140 T.C. No. 6, Docket No. 13649-10.
46. Para. 9.5 *OECD Model Commentary on Article 17*.

in the work state, the payments are not taxable under article 17, but when there is a link with performances, the work state has the right to tax the income. This is comparable to the taxation of sponsoring and endorsement income, as was at stake in the Agassi (United Kingdom) and Goosen and Garcia cases (United States).

10.8. Comparison with the proposals for Pillars One and Two

Concerning influencers, it is a small step to make a comparison with the major project of the tax challenges of digitalization, which led to the OECD Pillars One and Two proposals for a unified approach of the OECD/G20 Inclusive Framework on BEPS,[47] because not only do influencers and other social media stars only communicate with digital means but also both article 17 of the OECD Model and Pillars One and Two set aside the main international principle of a PE for taxing companies (and self-employed persons) in the source state and replace it with the use of the services by consumers there (consumer-facing business). It also openly brings forward the benefit principle as one of the reasons why a source taxation can be justified.

The tax challenges of digitalization resulted from the BEPS Project, which was successfully coordinated by the OECD and has led to many recommendations (including proposals for changes in bilateral tax treaties), which are implemented with a multilateral instrument. This has taken so much energy and focus from the OECD that the follow-up of "Taxing the Digital Economy" was not directly being picked up. Some states became anxious because they saw big international digital companies, mainly US but also some Chinese ones, collecting income from their territory which they could not tax because of the lack of a PE.[48] This has brought some states to announce unilateral source withholding tax rates, between 1.5% and 7.5%,[49] even when under the tax treaties it is unclear whether the digital company in its residence state would be entitled to a tax credit or exemption. This leads to a realistic risk of double taxation.

47. This Inclusive Framework now consists of around 140 states and jurisdictions.
48. Examples are Google, Apple, Facebook, Netflix, Spotify and Alibaba.
49. Examples of countries with unilateral digital service taxes are Austria (5%), Belgium (3%), France (3%), Hungary (7.5%), Poland (1.5)%, Spain (3%), Turkey (7.5)% and the United Kingdom (2%), all from gross earnings without deduction of expenses.

The tax problems of both entertainers/sportspersons and the digital companies are comparable, i.e. the definition of the personal scope; apportionment of income; deductibility of expenses; risk of double or excessive taxation; and high administrative expenses. These problems hit the small and medium-sized companies much harder than the "big players", who will have the budget for good advisers to avoid double taxation.

The OECD has taken the initiative and come up with a proposal for a unified approach, not only for digital companies but for all multinational companies, with Pillars One and Two. Briefly put, Pillar One will allocate the worldwide profits of a company over the states of the users, while Pillar Two will set a minimum tax rate of 15% to eliminate competition between states on tax rates and artificial tax structures to move the profits to a low-tax jurisdiction.

Pillars One and Two are still very much under discussion, but the entertainment and sports taxation can draw from some elements:[50]

- A high minimum threshold: there seems to be consensus that such a high minimum threshold for Pillars One and Two would be reasonable. This will prevent small and medium-sized companies from also having to fulfil the complicated administrative work. The proposal is a minimum of USD 750 million turnover per year worldwide and varied turnover per state depending on the size of the market, but a minimum of USD 5 million per year for small states.

  This is a comparable approach as the United States already has for entertainers and sportspersons a threshold of USD 30,000 per person (per year, per state) in article 16(1) of the US Model and applies it in its tax treaties. But the OECD only mentions the threshold in its Commentary and should upgrade this to the text of article 17 itself, after which all states would start to use this in their tax treaties.

- A low source withholding tax: the digital service taxes vary from 1.5% to 7.5% from gross, while entertainers and sportspersons face a 15% to 30% tax from gross at source. A lower rate would make the risk of double taxation less likely.

- Only a part of the profits can be taxed in the source or work state: the new taxing right of Pillar One allocates just 25% of profits in excess of 10% of revenue to the source or work states, and this is now based on a formula, not on the arm's length principle. This is totally different from the taxation under article 17, with which entertainers and sportspersons are most often taxed on their full gross earnings and it is often hard to deduct expenses. Following the example of Pillar One, it should be recognized under article 17 that a major part of the work has been the creation, preparation and rehearsals, which should be taxable in the residence state.

- Coordination between tax authorities: Pillar One has already expressed that tax authorities will work together and exchange information so that the residence state can allow a proper tax exemption or credit for the foreign taxable income and the foreign tax, respectively.

  Such cooperation would also help entertainers and sportspersons performing worldwide because it would bring down their administrative expenses from different procedures in every state and would certify the tax credit in the resident state.

- Extra tax up to a minimum tax rate (Pillar Two): under Pillar Two of the Inclusive Framework, the OECD has developed an additional tax in the residence state if the multinational company has not paid at least a minimum tax of 15% in the source or work state. Such additional tax already exists under article 17 with the OECD recommendation of the tax credit method[51] because then entertainers and sportspersons pay additional tax in the residence state up to the normal tax rate. This is even higher than the minimum rate of 15% from Pillar Two, and it can be questioned why the taxation of entertainers and sportspersons should be higher than that of big multinational companies.

10.9. Comparison with the new article 12B of the UN Model

Also the United Nations have taken action with new taxing rules for automated digital services and, in 2021, it added a new article 12B to the UN Model.[52] The earnings from those services arising in the source state can be taxed without the need of a PE there, which means that article 12B

50. *See also* M. Klootwijk & D. Molenaar, *Sporters, Artiesten en de belastingheffing van de digitale economie*, Weekblad voor Fiscaal Recht 7379 (2021).

51. This has been discussed in sec. 10.5.5.1.
52. Art. 12B *UN Model.*

sets aside article 7 for this specially defined group of multinational digital companies.

There is no threshold in article 12B of the UN Model[53] and no allocation of profits to the states in which the multinational is providing the digital services, but just a simple withholding tax on the earnings arising in the source state. This article 12B is therefore very much comparable to article 17 for entertainers (such as influencers) and sportspersons.

The UN Model Commentary on the new Article 12B recommends to mention the withholding tax rate in the text of article 12B in a bilateral tax treaty and to set this at a relatively low level because it is calculated from the gross earnings.[54]

Furthermore, article 12B gives the non-resident multinationals the option to choose net taxation (with deduction of expenses) at the normal corporation tax rate of the source or work state.[55] The Commentary gives a relatively simple calculation model with which the "qualified profits" can be calculated, as it refers to the worldwide profit margin of the multinational company.[56]

The gross taxation is comparable to article 17 for entertainers and sportspersons, for whom the option for net taxation is only mentioned in the Commentary and not in the text of article 17 itself. This means that entertainers and sportspersons are worse off in the UN Model than the companies with automated digital services.

Under article 12B, multinational companies with automated digital services might have a risk of double taxation, especially when the tax credit method applies in the residence state, which is usual in Anglo-Saxon states. Then the company needs to prove that the foreign tax has been paid, which might go wrong, as is often the case for entertainers and sportspersons (*see* section 10.5.5.).

Double taxation will not happen in resident states using the tax exemption methods because the exemption will be allowed regardless of whether tax has been paid abroad. This is much better than for entertainers and sportspersons from those states, as most states have followed the recommenda-

53. Para. 7 *UN Model Commentary on Article 12B.*
54. Id., at para. 4.
55. Art. 12B(3) *UN Model.*
56. Para. 4 *UN Model Commentary on Article 12B.*

tion of using the tax credit method for article 17 income. But even with the exemption method, excessive taxation can be the result when the taxable base in the source state is higher than in the residence state and has a bigger impact than the difference in tax rate between the two states. This happens often with entertainers and sportspersons, as described in section 10.5.5.3.

But the big question is whether this alternative of article 12B of the UN Model will be followed by states in their tax treaties because most of them are also members of the Inclusive Framework and, therefore, are working on the Pillars One and Two proposals. But especially for developing countries that want to keep it simple, article 12B of the UN Model is an easy article to include in their bilateral tax treaties. If so, it would be fair if article 17 of the same tax treaty were to have the same rules.

10.10. Final considerations

Influencers are entertainers because they fall under the description of the OECD Commentary on Article 17. This means that they can be taxed in the state of their activities. The example of the Danish influencer in paragraph 3 showed that besides Denmark as the residence state, also Spain can tax the payments from the UK fashion company to Denmark.

In practice, most states are not aware that influencers can be taxed as other entertainers and sportspersons but consider them as regular self-employed persons, which fall under article 7 of the OECD Model. This means that because the influencer normally does not have a PE in the source or work state, the payments are paid on a gross basis, such as in the example of the Danish influencer, in which the Spanish tax authorities most often will not raise their withholding tax. But they can change their approach.

Virtual influencers, as named at the end of paragraph 2, should be treated differently. They do not really exist but are digitally created, and they look real but are fake. This means that they are not entertainers as described in the Commentary on Article 17, but that the owners of the virtual influencers fall under article 7 of the OECD Model as self-employed or business profits. They can be exempted from tax in the source state if they do not have a PE there.

This chapter has shown that article 17 is creating excessive or even double taxation for real life entertainers, such as influencers, and sportspersons. This was discussed between 1995 and 2014 and also back then authors

motivated why article 17 is not needed in the fight against tax avoidance. It is enough if every state has a withholding tax on outgoing payments, which is only exempted if the entertainer or sportsperson can show that they are resident of the tax treaty partner state and normally taxable there. The OECD came up with three new reasons for article 17 in 2014, but these reasons are wrong. Regardless, this means that article 17 has stayed in place and the risk of excessive or double taxation remains for influencers, other entertainers and sportspersons.

A new opportunity to resolve this is that article 17 can be improved with the experience of Pillars One and Two (OECD) and article 12B of the UN Model. Not that influencers, other entertainers and sportspersons will fall under these new rules, but the motives are comparable, i.e. (i) not a PE but the use of the services in the source state is the reason for taxation; and (ii) tax avoidance can better be counteracted with taxation at the source. These reasons are the same for the taxation of entertainers and sportspersons as for automated digital services and other big multinationals. It is clear that both sides can learn from each other because there is much negative experience in the entertainment and sports world, while there are good solutions in the proposals for taxing digital and multinational companies, such as (i) high thresholds; (ii) very low withholding tax rates; (iii) the official choice between gross and net taxation in the source (or work) state; (iv) the tax exemption method in the residence state; and (v) cooperation between tax authorities.

Though the best option would be not to have an article 17 for influencers, other entertainers and sportspersons, given the developments around the taxation of the digital economy, this is no longer a realistic scenario. The future is with taxation at source in the state where the users are. This is mainly to counteract tax avoidance but perhaps also for the tax benefit, although this reason is very poorly justified, as described in section 10.6. Therefore, if article 17 were to remain, then this should be done at the same terms as those for the taxation of the digital and multinational companies, as that would remove most of the excessive and double taxation for influencers, other entertainers and sportspersons. It would be a great achievement if fairer taxation were the result of implementing the same measures in article 17 as are created for others.

Part II

Mobility Issues and International Corporate Taxation: Emerging Policy and Technical Issues Under National Tax Law, Tax Treaties, EU Tax Law and the Pillars

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