Introduction:
It is firstly acknowledged that any attempt to clarify or amend the OECD Model Tax Convention is difficult, but that clarification and progressive amendments are both necessary and welcomed. This document does attempt to limit the discussion to the proposed changes rather than issues arising from the commentary as a whole, except as detailed below. Further comments and criticisms may be warranted but are not addressed.

Secondly, it is submitted that the amendments proposed do not go far enough. Article 17 seems an archaic inclusion in an age of great mobility of not only sportspersons and women, but also consultants and other, entirely unconnected to the entertainment or sporting arenas. For example the commentary excludes visiting conference speakers who may be as mobile as sportspersons, yet would (if independent) be subject to Article 7 rather than entertainers and sportspersons classified separately. There appears to be a growing call for article 17 to be withdrawn and either replaced with an article addressing all mobile earners or to simply leave such mobile individuals subject to the other articles of the OECD Model Tax Convention. The article is submitted to be too narrow in nature and is based on the type of person rather than the type of income.

It is noted that an IFA seminar has been scheduled for the Rome congress to debate the existence of Article 17.

Commentary on proposed changes:

Paragraph 1:
(a) Reference to “artiste” changed to ‘entertainer’:
This change does bring the commentary to the OECD Model in line with the article itself. Entertainer is a gender neutral term. It is therefore surprising that in the updates the gender neutral term “sportspersons” does not replace “sportsmen”.
While some may say that the term “entertainer” is broader in scope than that of “artiste”, it is submitted any difference in meaning is never practically applied and that the term “entertainer” conveys the necessity for something of an “entertainment character” to be present before a person is included within the scope of this article and its commentary.

(b) Paragraph 3:
Paragraph 3 includes an effective scale of extremes for entertainment character, with the acknowledgement that there is a large grey area in between. The examples provided in the proposed changes do not seem to be on either end of the scale, but rather in the grey area. Models and the shows in which they appear can certainly be well within an entertainment character. Indeed, the two examples given for models can have very different outcomes. Photo shoots tend to be static and could be argued to lack entertainment character, whereas fashion shows would tend to have elements of entertainment (certainly more prevalent in the modern shows). The examples added do not provide clarity but rather greater confusion. Ultimately it would seem that the interpretation from the perspective of the source state and negotiation with the residence state would have to be the determining factor. In particular exclusions and inclusions within the same industry are particularly problematic.

(c) Paragraphs 5 & 6:
While no changes are proposed to these paragraphs by the OECD, it should be noted that the examples provided are not very useful. For example, paragraph 5 provides that “sportsmen” is not restricted to participants of traditional athletic events. While in principle that is correct, the paragraph does seem to
restrict the application to *participants*. Who a participant is in a sporting event is critical. For example, the guarantees that the South African government gave to FIFA for the recent 2010 World Cup excluded the referees from taxation in South Africa. Is a referee a participant? There would be proponents and antagonists for both arguments. Referees (and the decisions they make) can, at times, bear an entertainment character, as can the antics of the coaches on the sidelines. It is again submitted that the “grey areas” created by Article 17 are created by focussing on the person and not the income type.

*(d) Paragraph 9 and sub-paragraphs:*

Paragraph 9 appears to attempt to clarify the apportionment of income. In the second sentence, the paragraph provides that other Articles generally apply where there is no *direct* link between the income and the performance. Later (in the same paragraph) the statement is made that advertising or sponsorship income directly or *indirectly* linked to the performance must be included in the scope of Article 17. The indirect links of income to performance raise great difficulties. This can be illustrated by the new example at the end of the paragraph concerning merchandising income. This example can be likened to the question of how long a television advert generated sales. How does one split the sales between sales that would have happened irrespective of the entertainer’s involvement and those sales related to the advertising campaign? It is of course accepted that difficulty of calculation should not cloud good principle, but good principle should take practicality into consideration. Entertainers and sportsmen will be subjected to higher administrative costs in determining the appropriate apportionments.

The commentary raises increasingly difficult (perhaps impossible) issues of apportionment that seemingly encourage disagreement (between revenue services and the taxpayer, and perhaps between the source and residence States).

Other examples provided in the sub-paragraphs raise further concerns:

(i) The amateur receiving a sporting prize once off: This could be argued to include the participant who receives a lucky draw prize for participating in a sporting event as the entry requirement was performance in the event. The link here is suggested to be tenuous. The inclusion of all once-off events fails to take into consideration that nature of the income as being of a capital or revenue nature (and whether or not such winnings should even be taxable).

(ii) The example of the reporter in paragraph 9.1 does not belong there. The entire paragraph is more concerned with the nature of the income and the link to performance than the nature of the person performing. The example seems to tie to the discussion in paragraphs 5 & 6 better than in this paragraph. It is clear from the paragraph that the issue discussed is that the reporter is not an entertainer or sportsman and so the income should not be considered in terms of the paragraph. This is very different to considering the training activities of the sportsman.

It seems strange that the employed entertainer or sportsman should be subjected to a special rule in Article 17 when a similar rule exists in Article 15 (as indicated in paragraph 9.2). It follows though that should employed entertainers and sportsmen be extracted from the scope of Article 17 that the independent / self-employed entertainers or sportsmen could be included in the scope of Article 7 (as where Independent Personal Services in previous amendments to the OECD Model).

**Paragraph 2:**

Paragraph 11 and its sub-paragraphs do not clearly provide the principle for the application of paragraph 2 of Article 17. It is submitted that the broad principle underlying the application of paragraph 2 of the Article should be to tax in the other persons hands (as a result of the performance of the entertainer or sportsperson in the source State) that portion of income attributable to that performance.
The scope of paragraph 2 remains too broad in that it may tax the business activities of the other person despite there being no permanent establishment. It should not extend to all business activities but rather be limited to the income that is attributable to the entertainer or sportsman (now and in the future, for example distribution to the entertainer or sportsman in the future by way of dividends should be taxed now in the hands of the entity). All other business activities should remain within the scope of Article 7. This appears to have been clarified in 11.3 (new numbering) but not overtly stated as reverting to Article 7.

If the principle is appropriately stated, then examples (such as that added in 11.2) would serve a better purpose.

Paragraph 11.5 should perhaps be renumbered and placed underneath the heading “Additional considerations relating to paragraphs 1 and 2”.

Paragraph 14.1 does not present an ideal solution. The better solution is still submitted to be the abolition of Article 17 and the redistribution of its effects between the relevant effective Articles.

**Summary**

A number of core issues emerge from the above, namely:
1. The examples add little by way of explanation, but rather further highlight the complexities in the article.
2. The principles contained in the commentary concerning apportionment are sound but impractical.
3. The article has an incorrect focus, being on a person rather than an income stream.
4. The article is out-dated and its principles could be better applied in Articles 15 and 7.

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