

Taxation of Non-Resident Artistes or Sportspersons - Domestically and Internationally



Research Committee
The Institute of Chartered Accountants of India
(Set up by an Act of Parliament)
New Delhi

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Foreword

As we advance in the 21st century, we are witnessing a metamorphosis change. With the increased pace of globalisation and technology the world has become a smaller place, and this has led to the increased ambit of tax residency and its implications for charging tax. The taxation of Non-residents involves an interplay between the tax laws and the treaties. Furthermore, the Double Taxation Avoidance Agreement (DTAA) and the model tax conventions make it a complex issue to be taken into consideration for each sector.

In this regard, I am pleased to note that the Research Committee of the Institute of Chartered Accountants of India (ICAI) under the 'ICAI Research Project Scheme 2022' undertook the Research Project on "**Taxation of Non-Resident Artistes or Sportspersons - Domestically and Internationally**". As nomenclature indicates, this research witnesses the dedication to advancing the understanding the complex tax issues in case of Non-Resident Artists/ Sportsmen. It provides a comprehensive overview of the associated challenges and opportunities and also offer valuable insights into the tax implications and obligations faced by Non-Resident Artistes/ Sportspersons.

I would like to take this opportunity to express my thanks to CA. (Dr.) Anuj Goyal, Chairman, CA. Cotha S. Srinivas, Vice Chairman, and all other members of Research Committee for their participation in this Research Project under "ICAI Research Project Scheme 2022".

I am confident that this Research Report will guide and assist the members in their future professional endeavours.

December 05, 2023
Delhi

CA. Aniket Sunil Talati
President, ICAI

Preface

The Institute of Chartered Accountants of India (ICAI) has always been at the forefront of promoting knowledge, research and excellence in the realm of taxation. The research project exemplifies our commitment to addressing contemporary tax challenges.

The world of sports has seen a tremendous transition, emerging into a worldwide sector that crosses boundaries and engages individuals and organisations from various backgrounds. With this internationalization of sports, tax issues have become increasingly multifaceted, impacting non-resident sportsmen and sports associations both domestically and internationally.

I am thankful to CA. Aniket Sunil Talati, President, ICAI and CA. Ranjeet Kumar Agarwal, Vice President, ICAI who inspired me and Research Committee to undertake the research projects on the emerging and relevant topics.

I would also like to extend my thanks to CA. Cotha S Srinivas, Vice Chairman, Research Committee and all the members of the Research Committee for their contribution and guidance.

Further, I would like to take this opportunity to congratulate **CA. Amit Rustagi** for writing Research Report on the topic of “**Taxation of Non-Resident Artistes or Sportspersons - Domestically and Internationally**” and express my thanks to Direct Tax Committee of ICAI for providing their valuable comments and suggestions for improvement of technical aspect of the Research Report.

I also acknowledge the assistance and co-operation rendered by Dr. Amit Kumar Agrawal, Secretary, Research Committee, CA. Neha Bansal, Assistant Secretary and CA. Rahul Jain, Professional who gave their valuable inputs during finalisation of this Research Report.

I believe and trust that this Research Report will be immensely useful to the members and others interested.

New Delhi
November 02, 2023

CA. (Dr.) Anuj Goyal
Chairman, ICAI

Abstract

Background

International performing artistes and sportspersons earned performance income from different countries other than their country of residence and their such performance income is subject to special tax treatment. The purpose of this research study is to analyse the Article 17 of OECD MTC, 2017 along with the current format of the non-resident artistes or sportsperson article in Income Tax Act, 1961.

Objective

To evaluate and provide a comprehensive resource and reference guide for taxation implications for non-resident artistes or sportspersons-Domestically and Internationally.

In-scope contents

The report has four parts with relevant sub-chapters under them.

- Part I of this report sets the research relevance, methodology and epistemological framework.
- Part II of this report broadly identifies the existing global and India's domestic perspective for taxation of non-resident artistes or sportspersons, which has divided into three sub-parts viz., (a) Literature review: Global perspective, (b) Literature review: India's domestic perspective and (c) Existing challenges with respect to the non-resident artistes or sportspersons.
- Part III of the report suggests survey findings and analysis. These suggestions will bolster the tax certainty quotient.
- Part IV of the report provides the concluding remarks to sign off for a better future.

Exclusion

This report's scope excludes examine the domestic tax law of other countries nor any other taxes (for example, VAT, Customs and Excise, etc.) and does not test the application of the credit or exemption methods for the relief from

double taxation as permitted by the India Income-tax Act, 1961 or under the OECD MTC or UN MTC.

Results

To ensure the research solutions are not mere academical or theoretical and to make it more pragmatic, the research study will identify, the road map or guidance regarding the tax base, tax rate and form of collecting tax and deduction of expenses in the context of taxation on non-resident artistes or sportspersons.

Contents

PART I : Research Relevance, Methodology and epistemological framework

1.	Introduction	2
2.	Research Relevance- Objectives of the Report.....	4
3.	Structure of the Research Report	6
4.	Statement of Problem of Research.....	8
5.	Limitation to the Report.....	10
6.	Research Methodology and Epistemological Framework -Research Methodology	11
7.	Data collection	13
8.	Construction of Questionnaire	16

PART II : Existing Global and India's Domestic Perspective for Taxation of Non-Resident Artistes or Sportspersons

Part II : Sub-Part (A)

Literature Review : Global Perspective

9.	Historical Development of Article 17 of OECD MTC	19
10.	Meaning of key terms - Entertainer, Sportsperson, Athlete & Artiste.....	22
11.	Article 17(1) and Article 17(2) of OECD MTC could be Mutually Exclusive.....	28
12.	Exception to Article 17(1) and 17(2) of OECD MTC	35
13.	Key Pointers for Certain Income earned by Artistes or Sportspersons....	36
14.	Tax Treatment of Team Performance under OECD MTC.....	42
15.	Tax Treatment of Team Members	44
16.	Limitation & Problems Following from Article 17.....	47
17.	Rationale behind Keeping & Deleting the Article 17 in OECD MTC	49
18.	An Alternative Prescribed by OECD to Restrict the Scope of Article 17 ..	53
19.	Interaction of Article 17 of OECD MTC with other Articles.....	55

Part II : Sub-Part (B) :
Literature Review: India's Domestic Perspective

20.	Philosophy over Existing India's Domestic Framework	58
21.	Rationalization of Provisions of withholding tax under India's Domestic Framework.....	64
22.	Different approach under Model Convention and India's Domestic tax law for Certain Terms.....	66

Part II : Sub-Part (C) : Existing challenges

23.	Unilateral Measures	70
24.	Specific issues - Triangular situation	72
25.	Specific Issues - Performance in Multiple Geographics Event.....	73
26.	Specific issues - Influencer income.....	74
27.	Specific Issues - Production Expenses for a Performance	75

Part III : Survey Findings and Analysis

28.	Survey findings	77
29.	Survey Results and Diagnosis	109

Part IV : Conclusions and Recommendations

30.	Conclusions and Recommendations	117
	Appendix I	121
	Appendix II	131

Abbreviations

BEPS	Base Erosion and Profit Shifting
CBDT	Central Board of Direct Taxes
DAC	Directive on Administrative Cooperation
DTAA	Double Taxation Avoidance Agreement
EU	European Union
EURO Cup	European Championship
FHTP	Forum on Harmful Tax Practices
FTC	Foreign Tax Credit
GAAR	General Anti-Avoidance Rules
HMRC	Her Majesty's Revenue and Customs
IBFD	International Bureau of Fiscal Documentation
ICAI	The Institute of Chartered Accountants of India
IMF	International Monetary Fund
OECD	Organization for Economic Co-operation and Development
OECD MTC	Organization for Economic Co-operation and Development Model Tax Convention
OEEC	Organization for European Economic Cooperation
PRODECON	The Office of the Attorney for the Defense of the Taxpayer
SDR	Special Drawing Rights
TCC	Tax Clearance Certificate
UEFA	Union of European Football Associations
UK	United Kingdom
UN	United Nations
UN MTC	United Nations Model Tax Convention
USA	The United States of America
US Model	The United States of America Model Tax Convention
VAT	Value Added Tax

Part I
Research Relevance, Methodology
and epistemological framework

Chapter 1

Introduction

1.1. Artistes and sportspersons enjoy a special treatment in international tax law. Article 17 of OECD MTC look small, but it is special topic in international taxation. Mobility is a fundamental aspect of working life for many artistes or sportspersons and their performance income is often derived in many countries other than their country of residence.

1.2. Non-resident artistes or sportspersons are not taxed in accordance with the usual allocation rules based on OECD MTC, but Article 17 gives them a special position in the OECD MTC. The Article 17 makes it clear that the general rule for business income from Article 7 does not apply to artistes. This means that the source country has the right to tax the performance income when the artistes are self-employed, even if their fees are business income and they do not have a permanent establishment in the country of performance. Nor does the general rule for income from employment from Article 15 apply to artistes. This means that artistes who are employees may also be taxed in the country of their performance, even if they are employed and paid by a company in their residence country and travel abroad only for short-term performances. It should be noted that Article 17 of the OECD Model allows the source state to impose a tax according to its domestic law, without any limitations.

1.3. OECD in its report¹ has provided the basis for special tax treatment to non-resident artistes or sportspersons to prevent highly mobile artistes who profess to live in tax havens from receiving performance income without paying tax in any country² and artistes from not disclosing foreign income in their home country.³ But lamentably, this arrangement has also increased the risk of practical incompleteness, because the taxable base in the country of performance can be higher than in the residence country, the exchange of information between countries for these often short-term business activities has not been developed properly and tax credit problems often arise in the country of residence. Various research studies show that the issues in relation to cross-border taxation for non-resident artistes or sportspersons

¹ Taxation of Entertainers, Artistes and Sportsmen in issues in International Taxation 2, OECD (Paris, 1987).

² Paragraph 7 of the 1987 OECD Report.

³ Paragraph 6 of the 1987 OECD Report.

such as unequal treatment to non-resident artistes, excessive or double taxation, tax credit problems, high administrative costs, etc. are on the rise.

1.4. This report⁴ is set out in four main sections. The first addresses the research relevance, methodology and epistemological framework around taxpayers particularly non-resident artistes or sportspersons. The second sets out the key domestic and international features for taxation of non-resident artistes or sportspersons. The third section deals with the analysis and findings of survey. Lastly, the fourth section contains the concluding remarks followed by recommendations that can tax jurisdictions can explore and adopt to help address some of the issues around taxation of non-resident artistes or sportspersons.

1.5. It is pertinent that any research into the impact of taxation on artists sportspersons does not, however, depict the boundary of analysis too narrowly. There is a diversity of ways in which the government of any country can rationalize the taxation of non-resident artistes or sportspersons and at long last their economic well-being. This report acknowledges that cross-border taxation for non-resident artistes or sportspersons is a global concern requiring global resolutions, otherwise the issue is simply relocated, rather than resolved.

⁴ This document and any chart included herein are without prejudice to the status of or sovereignty over any territory, to the delimitation of international frontiers and to the name of any territory, city or area.

Chapter 2

Research Relevance- Objectives of the Report

2.1. **Objectives of the research report:** This research paper aims first, to study whether the effects resulting from the special taxing rules for international performing artistes or sportspersons, as derived from Article 17 of the OECD MTC, lead to unequal or justified treatment for artistes or sportspersons in comparison with other taxpayers and, second, to discuss the consequences of possible adjustments.

2.2. To achieve the above-mentioned objective, the following sub objectives were framed:

- analyse and examination of the adequacy and effectiveness of existing provisions of taxation on non-resident artistes or sportspersons from global and India perspective;
- the research report mainly focuses on specific income of artistes or sportspersons from performances and corresponding significant tax issues:
 - key pointers for certain income earned by artistes or sportspersons such as training activities, income from inaction, advertising income, other income, pension, income from contract splitting, etc., with their coverage, justification & reference to the OECD commentary;
 - significant tax issues for the team members who are either performing employees or non-performing employees or performing independent contractors or non- performing independent contractors;
 - significant tax issues for the team for various income such as indirect payments to performers, income in respect of performance, any non-performance profit to the team;
- highlighting the need for potential renegotiation of older tax treaties considering the dynamic changes in current business scenario;
- exploring potential alternate tax system prescribed by OECD

need to be followed as closely and consistently as possible by countries when they conclude their bilateral tax treaties and impose their national tax rules;

- unilateral steps taken by the organizing sports countries wherein the major sports events get the tax exemptions which shows that the sports world is not waiting for changes in bilateral tax treaties and the organizing sports countries temporarily removing the source taxation for the non-resident sportspersons which could avoid the potential problems resulting from the Article 17 of OECD MTC;
- identify the road map or guidance regarding the tax base, tax rate and form of collecting tax and deduction of expenses in the context of taxation on non-resident artistes or sportspersons;
- with exchange of information, how the same can be utilized for taxation on non-resident sportsmen or sports association; and
- with global experience with respect to taxation of non-resident artistes or sportspersons, how the same can be sourced to see tax disputes can be resolved cohesively using country examples.

2.3. While the efforts are made through this study to assess and evaluate the existing India's domestic and global perspective on international performing artistes and sportspersons framework, the key purpose is to make over the motto for the taxation of international performing artistes from the dark *"Hang-ups, letdowns, bad breaks, setbacks, natural fact is, oh, honey that I can't pay my taxes"*¹ into the realistic *"There is no business like show business!"*²

2.4. **Year of study:** The study was conducted in the year 2023.

¹ Marvin Gaye, Innerscity Blues (1971).

² Irving Berlin (1937).

Chapter 3

Structure of the Research Report

3.1. The report has four parts with relevant sub-chapters under them. Each chapter in this research study answers questions relevant to the central theme of the taxation of non-resident artistes or sportspersons.

3.2. **Part I, 'Research relevance, methodology and epistemological framework'**, has started with introduction and research relevance, in chapters 1 to 5, as taxpayers particularly non-resident artistes or sportspersons across the world have always demanded tax certainty, with growing international sports across the world, states have realized the need for tax certainty. Chapters 6 to 8 contains the research methodology and epistemological framework.

3.3. **Part II, 'Existing Global and India's domestic perspective for taxation of non-resident artistes or sportspersons'**, has divided into three sub-parts viz., (a) Literature review: Global perspective, (b) Literature review: India's domestic perspective and (c) Existing challenges with respect to the non-resident artistes or sportspersons, with the results on extensive research and forms the central part of this research report.

3.4. **Sub-part (a): 'Literature review: Global perspective'**, has started with the background to historical aspects of Article 17 of OECD MTC in chapter 9 along with overview of certain key terms used under Article 17 of OECD MTC in chapter 10. The material reference for the research for this part of the study is the literature on international taxation. Then, in chapters 11 and 12, scope along with limitation of each of the sub-paragraph of Article 17 of OECD MTC has been discussed with the objective of providing an overview of analysis of existing provisions of taxation on non-resident artistes or sportspersons from global perspective. Thereafter, the chapter 13, provides a comprehensive discussion on various types of performance income earned by artistes or sportspersons which is based on the information from international literature and from India tax law. Chapters 14 & 15 contains a comprehensive description of tax implications of earning foreign income is provided for sports team as well as for sports team members. Aspects of the previous chapters are brought together in chapter 16 which provides the inherent limitation & practical problems faced from Article 17 of OECD MTC. Thereafter, in chapters 17 & 18, contains the rationale behind keeping & deleting the Article 17 of OECD MTC with

comprehensive analysis of few alternative options suggested in the OECD Commentary to restrict the scope of Article 17 of OECD MTC. Sub-part (a) ends with interaction of Article 17 of OECD MTC with other articles of OECD MTC, 2017 which has been discussed in chapter 19.

3.5. **Sub-part (b): ‘Literature review’, India’s domestic perspective’** has started with philosophy over existing India’s domestic framework with regard to non-resident sportsmen and sports bodies taxation provided under chapter 20. The methodological approach for computing the income and analysis of provisions of withholding tax on sportsmen to sports association along with compliance requirement thereto has been discussed under chapter 21. Sub-part (b) ends with analysis of different approach under OECD MTC & UN MTC and India domestic tax law for certain terms which has been discussed in chapter 22.

3.6. **Sub-part (c): ‘Existing challenges’**, takes a closer look at adoption of unilateral tax exemption measures for non-resident performers by certain contracting state under chapter 23 and under chapters 24 to 27, various specific issues of the previous chapters are brought to the attention which clarify the obstacles to non-resident artistes or sportspersons.

3.7. **Part III, ‘Survey findings and analysis’**, the survey findings with respect to taxation of non-resident artistes or sportspersons published in chapter 28, which is divided into four sections viz., section A: ‘The existing framework’, section B: ‘Tax disputes’, section C: ‘Effectiveness and section D: ‘Future scope’ of Article 17 of OECD MTC and thereafter, the chapter 29 contains the comprehensive discussion on survey results.

3.8. **Part IV, ‘Conclusions, Recommendations and Future scope’**, Chapter 30 provides the conclusions and recommendations derived from the research report to sign off for a better future and takes a look at the options for improvement that are already available, both for India’s domestic tax law and for the OECD & United Nation. With the direct tax reforms committee set up by the Government of India at the cusp of submitting its reforms for the Income Tax Act, the research output will be relevant for incorporating some new or sanitized suggestions under the Indian tax laws.

Chapter 4

Statement of Problem of Research

4.1. Performance income of international performing artistes is often generated in many countries other than their country of residence, and the area of taxation of non-resident artistes and sportspersons has attracted global attention.

4.2. The research report mainly focuses on specific problems faced by non-resident artistes or sportspersons such as:

- a. there are many arguments against Article 17 of OECD MTC such as no guidance regarding the tax base, tax rate and form of collecting tax, no rules on the deduction of expenses, etc. which resulted into excessive taxation leads as well as double taxation of international performance;
- b. conflicts in interpretations between India domestic tax law and OECD MTC and UN MTC for certain terms with respect to non-resident artistes or sportspersons;
- c. limitations to the cross-border taxation of non-resident artistes and sportspersons under the look-through approach in Article 17(1) and limited or unlimited approach under Article 17(2) of the OECD MTC;
- d. identifying potential difficulties that will be faced in applying the withholding tax under Income-tax Act, 1961 with regard to non-resident artistes or sportspersons;
- e. income of artistes or sportspersons performances and corresponding significant tax issues;
 - (i) key pointers for certain income earned by non-resident artistes or sportspersons such as training activities, income from inaction, advertising income, other income, pension, income from contract splitting, etc., with their coverage, justifications & reference to OECD commentary.
 - (ii) significant tax issues for the team members who is either performing employees or non-performing employees or performing independent contractors or non-performing independent contractors.

Research Methodology and Epistemological Framework -Research Methodology

- (iii) significant tax issues for the team for various income such as indirect payments to performers, income in respect of performance, any non-performance profit to the team, etc.

Chapter 5

Limitation to the Report

5.1. **Exclusion:** This report has examined the Indian domestic tax law provisions in the context of non-resident artistes or sportspersons and OECD MTC and UN MTC effects on artistes or sportspersons and the report's scope does not examine the domestic tax law of other countries nor any other taxes (for example, VAT, Customs and Excise, etc.). Domestic law of other countries are mentioned for illustrative purposes.

5.2. The report mainly focuses on the income from artistic or sports performances. It has also discussed other income, such as royalties, merchandising income, copyright, sponsoring, subsidies and so on, but only if it has a relationship to performances.

5.3. The report also does not test the application of the credit or exemption methods for the relief from double taxation as permitted by the India Income-tax Act, 1961 or under the OECD MTC or UN MTC.

Chapter 6

Research Methodology and Epistemological Framework - Research Methodology

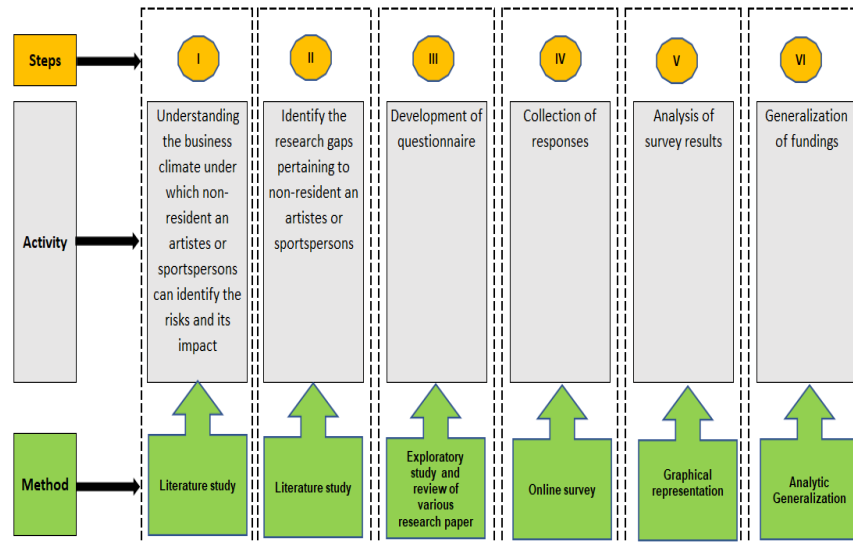
6.1. This chapter describes the methodology used for the current research work. In this context it also becomes incumbent upon the research to follow a dynamic approach so that at each stage of the research the subsequent actionables are re-aligned and reviewed, if required, on the basis of the outcomes available at each stage.

6.2. **Research design:** A research design is a plan describing the how, when and where of data collection and analysis. Study has been carried out in the following manner:

- Hypothesis testing was carried out to test the assumption to analyses and evaluate the taxation on non-resident artistes or sportspersons.
- Descriptive study has been made to understand the characteristics of non-resident artistes or sportspersons.
- Exploratory study has been carried out to known more regarding the study.
- Diagnostic study was done to obtain the ground reality of non-resident artistes or sportspersons.

6.3. The overview of the research study is depicted as follows in Figure 1:

Figure 1: Overview of research study



6.4. **Literature review:** Literature review addresses the challenges, issues and study of taxation of non-resident artistes or sportspersons. A literature review is an analysis of what has already been done or published on any research topic. It provides the critical review of articles, books, journals and thesis related to a specific topic or research question in order to situate research work in relation to existing knowledge. Literature review helps researcher to increase the overall knowledge on the topic by evaluating, synthesizing and analyzing the sources of work published on non-resident artistes or sportspersons.

Chapter 7

Data collection

7.1. **Sample and data collection:** Most academic research depends on primary and secondary data. In the present research work, both primary and secondary data were collected and analysed. Qualitative and quantitative method of data collection is used to collect data from primary and secondary data sources.

7.2. Primary data is collected through a questionnaire study completed by tax professionals, tax consultants, tax advisors working in Industry, consultancy firm or revenue department, academicians, professors to determine, explain, analyses the real situation in practice with regard to complexity for special tax treatment provided to non-resident artistes or sportspersons. Data was collected from industry leaders and senior management personnel to receive a first-hand report to fulfil the purpose of the research. It was ensured that the respondents have necessary experience level and belong to industries of large and mid-sized operations.

7.3. Online surveys are an effective tool for qualitative research as they provide depth and richness on the research topic.¹ An online survey undertaken amongst tax practitioners expertizing in international taxation. The choice of experts was made on the basis of the definition given by Bogner, Littig, and Menz, 'An expert possesses technical, process and interpretative knowledge in their areas of expertise'.² The data was collected by questionnaire method that included concurrently administered e-mail and online survey through google form. The reason for our choice of multi-mode survey mode was that we wanted to recruit a sample frame with the widest possible diversity of respondent profile while maintaining a 'reasonable similarity to the population of interest'.³

7.4. Interview conversations were documented in the form of notes as a data collection strategy. The meetings were conducted face to face and over Microsoft team.

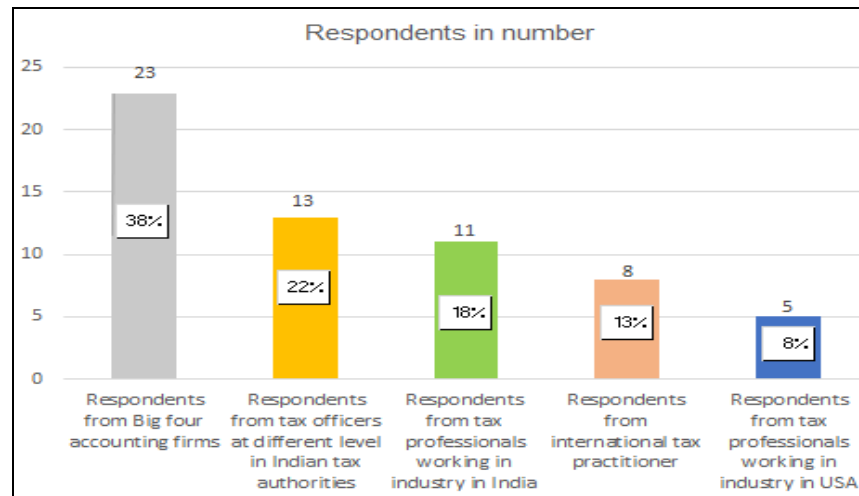
¹ The online survey as a qualitative research tool by Virginia Braun, Vitoria Clarke, Elicia Boulton, Louise Davey and Charlottle McEvoy (2020), International Journal of Social Research Methodology.

² Bogner, A., Littig, B., Menz, W. (Eds.), Interviewing Experts, 2009, Palgrave Macmillan UK.

³ Mollen, 2010.

7.5. Responses were received from 60 tax professionals which were used for our analysis. The summary details of the final respondents that have been considered for the results are given below in Figure 2.

Figure 2: Summary of survey respondents



7.6. The survey respondents were sent a detailed questionnaire with responses sought on the following categories relevant to the central theme of the taxation of non-resident artistes or sportspersons:

- **Current framework:** Identify the road map or guidance regarding the tax base, tax rate and form of collecting tax and deduction of expenses in the context of taxation on non-resident artistes or sportspersons.
- **Tax dispute:** Major reasons of tax dispute as well as foresee an increase in tax disputes in relation to taxation of non-resident artistes or sportspersons in the future.
- **Effectiveness:** Lessons that can be learnt from non-tax areas should be sourced to enhance the tax transparency in relation to non-resident artistes or sportspersons.
- **Future scope:** Need of any alteration in Article 17 of OECD MTC.

7.7. Secondary data is captured from the various research related to Article 17 of OECD MTC. To get a better insight for the research, different books, articles, and research papers were referred to, in order to have a fair idea about the complexity of tax aspects and different concepts that are relevant over time in relation to non-resident artistes or sportspersons in the changing dynamics of the risk landscape.

Research Methodology and Epistemological Framework -Research Methodology

7.8. **Time period:** The data collection period was from January 2023 till end of July 2023. A total of 60 usable responses were received from above mentioned respondents through online mode.

Chapter 8

Construction of Questionnaire

8.1. The methodology used for the research study included a survey that is based on the interviews done on the basis of a questionnaire. The survey was conducted for academic purpose and that all responses would be kept anonymous and confidential.

8.2. The questionnaire was designed to cover the entire framework of existing India's domestic and global provisions as well as commonly faced cross-border tax disputes to the future road map in relation to taxation on non-resident artistes or sportspersons, however, with significant emphasis on effectiveness of the existing India's domestic & global regulations.

8.3. The questionnaire constructed for the research study comprised of mix of multiple choices of 20 questions which are sub-divided into four sections. The questionnaire is given in Appendix II. The first section A covered the theme around the existing framework with respect to taxation of non-resident artistes or sportspersons and identify the road map or guidance regarding the tax base, tax rate and form of collecting tax and deduction of expenses in the context of taxation on non-resident artistes or sportspersons. Section B of the questionnaire survey comprised of three questions and this section explored the major reasons of tax dispute as well as probable increase in tax disputes in relation to taxation of non-resident artistes or sportspersons in the future. The questionnaire in Section C had nine questions centered around the theme to enhance the tax transparency, efficiency and effectiveness in administrative procedures in relation to non-resident artistes or sportspersons. Finally, Section D had questions covering the future scope of Article 17 of OECD MTC.

Part II

**Existing Global and India's
Domestic Perspective for Taxation
of Non-Resident Artistes or
Sportspersons**

Part II
Sub-part (A)

Literature Review :
Global Perspective

Chapter 9

Historical Development of Article 17 of OECD MTC

9.1. Historical development of Article 17 of OECD MTC

- First appeared publicly in 1959 in the 2nd report prepared by the Organization for European Economic Cooperation ('OEEC').
- Carried in OECD Draft, 1963.¹
- Further, extended in OECD MTC, 1977 with the addition of a second paragraph.²
- 1987 OECD report recommended that the scope of the 'star company' provision be extended to all legal entities receiving fees for artistic and sports performance.
- The above recommendations have been incorporated in the next version of the OECD MTC in 1992.³
- 1987 OECD MTC also noted that Article 17 does not specify the method of taxation in the country of performance and indicated that some states use gross taxation at a low tax rate.⁴
- 1992 OECD MTC added common exception to the general rules of Article 17 concerns events supported from public funds such as cultural exchanges.⁵

9.2. Article 17 of the OECD MTC, 2017 & UN MTC, 2021

Article 17 of the OECD MTC, 2017 and UN MTC, 2021 covers the income of artistes and sportspersons.

¹ OECD MTC on Income and on capital, 30.07.1963, models.

² OECD MTC on Income and on capital, 11.04.1977, models.

³ OECD MTC on Income and on capital, 01.09.1992, models.

⁴ OECD, supra n. 3, at para. 94 and para. 10, at 272 of the OECD commentary on Article 17 (2010).

⁵ OECD commentary on Article 17 para. 14, at 164, 01.09.1992.

Taxation of Non-Resident Artistes or Sportspersons - Domestically and Internationally

Table 1: Extracts of Article 17 of the OECD MTC, 2017 and UN MTC, 2021

Article/ Para No.	Extracts from OECD MTC, 2017	Extracts from UN MTC, 2021	Remarks
Heading	Entertainers and sportspersons	Artistes and sportspersons	-
17(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 sportsperson, from that resident's personal activities as such exercised in the other contracting state, may be taxed in that other state.	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 a sportsperson, from his personal activities as such exercised in the other contracting state, may be taxed in that other state.	Article 17(1) provides general coverage overriding Article 14 or Article 15 dealing with income of an entertainer or artiste and sportsperson from his or her personal activities, exercised in the source country.
17(2)	Where income in respect of personal activities exercised by an entertainer or a sportsperson acting as such accrues not to the entertainer or sportsperson but to another person, that income may, notwithstanding the provisions of Article 15, be taxed in the contracting state in	Where income in respect of personal activities exercised by an entertainer or a sportsperson in his capacity as such accrues not to the entertainer or sportsperson himself but to another person, that income may, notwithstanding the provisions of	Article 17(2) provides overriding Article 7 or Article 14 or Article 15 dealing with income accruing to the person other than an entertainer or artiste and sportsperson on account of the personal activities

Historical Development of Article 17 of OECD MTC

	which the activities of the entertainer or sportsperson are exercised.	Articles 7, 14 and 15, be taxed in the contracting state in which the activities of the entertainer or sportsperson are exercised.	exercised by the entertainer or sportsperson.
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Article 17(1) and 17(2) of the OECD MTC differs from the Article 17(1) and 17(2) of UN MTC to the extent that the OECD MTC does not refer to Article 14.

Table 2: Salient features OECD MTC, 2017 & UN MTC, 2021

MTC	Coverage	Right to tax	Notwithst- -anding other articles	Exemptio n from tax in India	Income Accruing to a person other than Entertainer/ Sportsperson
OECD	Entertainer /Sportsperson	Source state	Article 15	Not available	Taxable in source state whether business profits or salary payments.
UN	Entertainer /Sportsperson	Source state	Article 7, 14, 15	Not available	Taxable in source state whether business profits or salary payments or contractor payments.

Chapter 10

Meaning of key terms - Entertainer, Sportsperson, Athlete & Artiste

10.1. **Meaning of key terms:** The special provisions for artistes and sportspersons in Article 17 of the OECD MTC require a clear definition of terms viz., entertainer, sportsperson, athlete, and an artiste. The overview of certain terms is depicted as under:

Table 3: Meaning of key terms

Particulars	Entertainer	Sportsperson	Athlete
Define under OECD Commentary	The term 'Entertainer' is not defined under the Model convention's and OECD commentary.	The term 'Sportsperson' is not defined under the Model convention's and OECD commentary.	The term 'Athlete' was replaced by the term sportsperson in 1992, pursuant to an OECD report titled "The Taxation of income derived from entertainment, artistic and sporting activities". Further, the replacement of the word 'athlete' with 'sportsperson' should be considered as clarificatory in nature. ¹
Dictionary meaning	• One who gives amusing	Dictionary meaning for the	A person who is very good at sports

¹ Para 46 of Klaus Vogel on Double Taxation Conventions, 4th edition, Page No. 1330.

Historical Development of Article 17 of OECD MTC

Particulars	Entertainer	Sportsperson	Athlete
	<p>performances professionally.²</p> <ul style="list-style-type: none"> A person for example, singer or dancer or comedian whose job is to entertain others.³ 	<p>word 'Sports': A game or an activity especially one involving physical exercise.⁴</p>	<p>or physical exercise, particularly one who competes in organized events.⁵</p>
Definition indicates	<ul style="list-style-type: none"> As per Dick Molenaar, 'Entertainer'⁶ definition indicates that: <ol style="list-style-type: none"> There must be a performance. The performance should be in public. Performance can be directly before an audience or recorded and subsequently reproduces for an audience. The main elements of the performance must be entertaining. 	<p>The term 'Sportsperson' seems to cover any person involved in physical or mental activity that is exercised on the basis of predefined rules and in standard organizational forms specifically designed for it.</p>	<p>The OECD report 1992 observed that Para 70, as far as athlete are concerned, it was agreed that the intension was to cover sportsperson in the broad sense of the word. The term is not restricted to what are traditionally thought of as athletic event (e.g., running, jumping, javelin throwing). It also covers, for example, footballers, golfers, jockeys, crickets and tennis plyers, as well as racing drivers.</p>

² 2011-English Dictionary for South Africa, Pharos.

³ 2003 – Oxford Dictionary of English, 2nd edition.

⁴ Chambers Dictionary.

⁵ Chambers Dictionary.

⁶ Dick Molenaar, Taxation of International Performing Artistes, IBFD, Edition 2006.

Taxation of Non-Resident Artistes or Sportspersons - Domestically and Internationally

Particulars	Entertainer	Sportsperson	Athlete
Person covered as Entertainer or Sportsperson or Athlete - illustrative examples in the OECD Commentary to Article 17	Stage performer ⁷ , Film Actor, Actor including a former sportsperson in a television commercial, etc.	Participants in traditional athletic events such as runners, jumpers, swimmers, golfers, jockey, footballers, cricketers, tennis players, racing drivers, etc.	Acrobats, actors (theatre, television, radio), circus artistes, comedians, disc jockeys, magicians, singers, puppet theatre players, etc.
Person not covered as Entertainer or Sportsperson or Athlete - illustrative examples in the OECD Commentary to Article 17	Conference speaker, Model ⁸ (Model presenting clothes during a fashion show or photo shoot), Administrative or Support staff (cameramen for a film)	Mountaineers, Scuba divers, Umpires ⁹ , Referees, etc.	Authors, cameramen, architects, auctioneers, funeral orators, reporters, tour managers, writers, politician, photographers, journalists, etc.

10.2. The word 'artiste' is mentioned in the title of Article 17 of the OECD MTC and the word 'entertainer' is used in the text of the article. The word 'entertainer' seems to encompass the lighter versions of the performing arts while the word 'artiste' seems to encompass more detailed expressions of performing arts, such as classical dance, music, theatre, etc.

10.3. **General definition of Artiste:** An artiste is a person giving an artistic and entertaining performance directly or indirectly before an audience, regardless of the artistic or entertainment level. With this definition, it is possible to make two lists of persons, artistes and non-artistes as follows:

⁷ Public performance as a pre-requisite in order to qualify as an entertainer which can be either directly i.e., with the performer and audience both being physically present at the same place or indirectly i.e., through media, with the performer and the audience being at different place.

⁸ However, India has reserved its position on the above observation in the OECD Model commentary.

⁹ Indcom vs. Commissioner of Income-tax (TDS), Kolkata, (2011) 11 taxmann.com 109 (Calcutta).

Table 4: Illustration of Artistes and Non-artistes¹⁰

Artistes	Non-artistes
acrobats	actors, musicians, etc. in commercials
actors (theatre, television, radio)	anchormen (radio, television)
circus artistes	architects
comedians	auctioneers
conductors	authors
disc jockeys (DJs)	booking agents
fakirs	cameramen
magicians	choreographers
masters of ceremony (MCs)	composers
musicians	crew (film, television, radio, live show)
packaging artists (e.g. Christo)	cutters
puppet theatre players	dead artistes (entitled to part of performance fee) ¹¹
quizmasters and participants	designers (stage, light, fashion)
radio play actors	directors (theatre, television, radio)
ring masters in circus	discoverers
sex performers (peep- and live shows)	engineers (sound, light, video)
singers	fashion designers
TV and radio “artistes”	funeral orators
video jockeys (VJs)	impresarios
writers reading from their work	interviewers (television, radio, live)
	interview guests (idem)

¹⁰ Background material of Diploma in International Taxation, Seventh Edition, January, 2023, p. 3.532.

¹¹ An example in 2003 was the US band Lynyrd Skynyrd, who allocate a part of their performance fees to the estates of two former band members who have died but are still considered to be part of the band.

Taxation of Non-Resident Artistes or Sportspersons - Domestically and Internationally

	inventors
	journalists
	managers
	models in commercials
	models in fashion shows
	painters
	photographers
	piano tuners
	politicians
	producers
	radio personalities (e.g., disc jockeys, news readers)
	rehearsals by any artiste, conductor, etc.
	reporters
	restaurateurs
	sculptors
	sound technicians
	speakers at conferences
	stage builders
	teachers of music, theatre, dance, etc.
	technical personnel
	TV and radio personalities (e.g., anchor personnel, weather persons, talk show hosts)
	tour accountants
	tour managers
	writers

10.4. **Film artist:** Any person involved in his professional capacity in the production of a cinematograph film whether produced by him or by any other person as actor, director including an assistant director, music director including an assistant music director, art director including an assistant art director, dance director including an assistant dance director, screen play writer, editor, dialogue writer, singer, lyricist, story writer, cameraman, and dress designer.¹²

10.5. Such person should be engaged in professional activity in production of cinematography would only be called a film artist and artists performing in social functions or events cannot be considered film artists and payment made to them does not fall in the ken of section 194J of Income-tax Act, 1962.¹³

¹² Explanation (c) of Rule 6F(2) of Income-tax Rules, 1961.

¹³ *Jasminder Singh vs ACIT* (2017) 83 taxmann.com 239 (Lucknow - Tribunal).

Chapter 11

Article 17(1) and Article 17(2) of OECD MTC could be Mutually Exclusive

11.1. **Scope of Article 17(1) of OECD MTC:** The conditions for applicability of Article 17(1) of OECD MTC are as follows:

- a. the individual is a resident of one of the Contracting States,
- b. the individual is an artiste or a sportsperson,
- c. the individual derives income as an artiste or sportsperson from personal activities,
- d. such personal activities are exercised in the other Contracting State,

If these conditions are satisfied, income derived through such personal activities may be taxed in the other contracting state.

11.2. **Term 'Personal activities':** The term 'personal activities' seems to indicate that Article 17(1) of OECD MTC applies to income accruing to individuals.¹ Further, it implies that in order to empower the source country to tax the income of the artistes or sportspersons such income must be connected to the exercise of his or her activities as artistes or sportspersons within performance country.

11.3. **Payer of income is irrelevant:** Article 17(1) of OECD MTC applies regardless of who pays the income i.e., whether the payer is a resident of the state of performance or irrespective of who employs the artistes or sportspersons for instance the artistes or sportspersons could be employed by the Government.²

11.4. **Income 'derived' by artistes or sportspersons:** Income 'derived' from personal activities is to be covered within the scope of the Article 17(1) of OECD MTC. OECD commentary suggests that any income earned by the artistes which is connected to such performance is covered within the scope of the Article 17(1).

¹ Para 8.1 of the Commentary on Article 17 of OECD MTC, 2017

² Para 13 of the Commentary on Article 17 of OECD MTC, 2017

11.5. **Income ‘closely connected’ to performance:** OECD commentary provides the following determinative factors to determine such ‘close connection’:³

Table 5: Factors determining close connection

Factor 1: Timing of the income-generating event	Factor 2: Nature of the consideration for payment of the income
For instance, a payment is received by a professional golfer for an interview given during a tournament in which he participates.	For instance, a payment made to a star tennis player for the use of his picture or advertising a tournament in which he will participate.

11.6. **Scope of Article 17(2) of OECD MTC:** The conditions for applicability of Article 17(2) of OECD MTC are as follows:

- a. Income arises in respect of personal activities exercised by an artiste or a sportsperson as contemplated under article 17(1) of OECD MTC.
- b. However, income accrues to another person and not to the sportsperson himself.

11.7. Article 17(2) deals with situations where income from their activities accrues to other persons. It provides that the portion of the income which cannot be taxed in the hands of the performer may be taxed in the hands of the person receiving the remuneration and the income may be taxed in the performing state even in the absence of a fixed base of said person, or if the person receiving the income carries on business proceedings, tax may be applied by the source country even if the income is not attributable to a permanent establishment there.

11.8. Further, paragraph 2 of Article 17 permits that state to tax the income derived by a star-company resident of the other contracting state even where the artistes or sportspersons is not a resident of that other state. Paragraph 2 of Article 17 covers income that may be considered to be derived in respect of the personal activities of artistes or sportspersons.

11.9. OECD commentary suggests that there are three main situations when the income from personal activities of the artistes or sportspersons accrues to another person:

³ Para 9 of the Commentary on Article 17 of OECD MTC, 2017

Table 6: Situations when income from personal activities of the artistes or sportspersons accrues to another person

Situation I	Situation II	Situation III
<p>A management company which receives income for the appearance of, for example, a group of sportspersons which is not itself constituted as a legal entity.</p>	<p>A team, troupe, orchestra, etc. which is constituted as a legal entity. While the individual performers will be liable to tax under article 17(1) on any income derived from the performance of these activities, the profits element accruing from the performance to the legal entity would be liable to tax under article 17(2).</p>	<p>A star companies where remuneration for the performance of artistes or sportspersons is not paid to the artistes or sportspersons himself but to another person in such a way that the income is taxed in the state where the activity is performed neither as personal service income to the artistes or sportspersons nor as profits of the enterprise, in the absence of a permanent establishment. Where a performance takes place in such a country, Article 17(2) permits it to impose a tax on the profits diverted from the income of the artistes or sportspersons to the enterprise.</p>

11.10. Interplay of Article 17(1) and Article 17(2): Article 17(1) targets taxation of personal performances by artistes and sportspersons as the legal entities are not capable of carrying out artistic or sporting activities personally⁴ and Article 17(2) deals with situations where performances are offered through an intermediary to a resident of another state.⁵ In other

⁴ A. Malin, Employed artistes and sportsmen according to the OECD MTC, in Taxation of artistes and sportsmen in international-tax law.

⁵ D. Felderer, Taxation of artistic and athletic performance under Article 17.2 OECD MTC, in taxation of artistes and sportsmen in international-tax law.

words, Article 17(1) enables taxation of income where the beneficial owner is the artiste or sportsperson himself and Article 17(2), by contrast, permits source taxation regardless of whether or not the artiste or sportsperson himself receives any payments.

11.11. The most reasonable approach is, however, that article 17(2) applies in the alternative to Article 17(1), not in addition, as, otherwise, double taxation may arise.⁶

11.12. **Possible overlap of Article 17(1) and Article 17(2):** The income derived in respect of the personal activities of artistes or sportspersons should not be taxed twice through the application of these two paragraphs.

11.13. Article 17(2) allows a contracting state to tax the star-company of artistes on a payment received by that company with respect to activities performed by the artistes in that state and Article 17(1) also allows that state to tax the part of the remuneration paid by that company to the artistes that can reasonably be attributed to these activities. In such a case, the contracting state may have the following options based on its domestic tax law:

- a. tax only the star-company, or
- b. the artistes on the whole income attributable to these activities, or
- c. tax each of artistes on part of the income by taxing the income received by the company but allowing a deduction for the relevant part of the remuneration paid to the artistes and taxing that part in the hands of the artistes.

11.14. **Limited or unlimited approach under Article 17(2):** Article 17(2) allows a contracting state more scope to 'look through' the tax avoidance structures i.e., when non-resident artistes or sportspersons wanted to utilize their personal limited liability companies, usually based in tax havens, to partially run off from taxation.

11.15. The approach of Article 17(2) was made unlimited⁷, making all payments to any third party for the performance of artistes and sportspersons taxable in the source country.

⁶ Álvaro de Juan y Ledesma, The artistes and sportsmen's article (Article 17 of the OECD MTC): Has the time come to stop counting stars in the sky? IBFD, European Taxation February/March 2012

⁷ OECD modified the commentary on Article 17 in 1992.

Taxation of Non-Resident Artistes or Sportspersons - Domestically and Internationally

11.16. The said unlimited approach has encountered the following problems:

- a. a major risk of excessive taxation where the performer and the intermediary are completely independent persons,
- b. article 17(2) leads to a distortion of international competition because domestic artistes and sportspersons, who do not experience excessive taxation, are better off than foreign artistes and sportspersons,
- c. risk of tax credit problems, and
- d. high administrative costs when compared with the earnings.

11.17. Switzerland, Canada and The United States have expressed reservations on this unlimited approach adopted by the OECD MTC and decided to use Article 17(2) only in abusive situations.⁸ As per the commentary to the US Model⁹, Article 17(2) should not apply when the artistes or sportspersons are not shareholders and do not receive bonus payments or profit shares from a third company. It further states that Article 17(2) should not apply if it is established that neither the performer nor any persons related to the performer, participates directly or indirectly in the receipts or profits of the person providing performers' services.

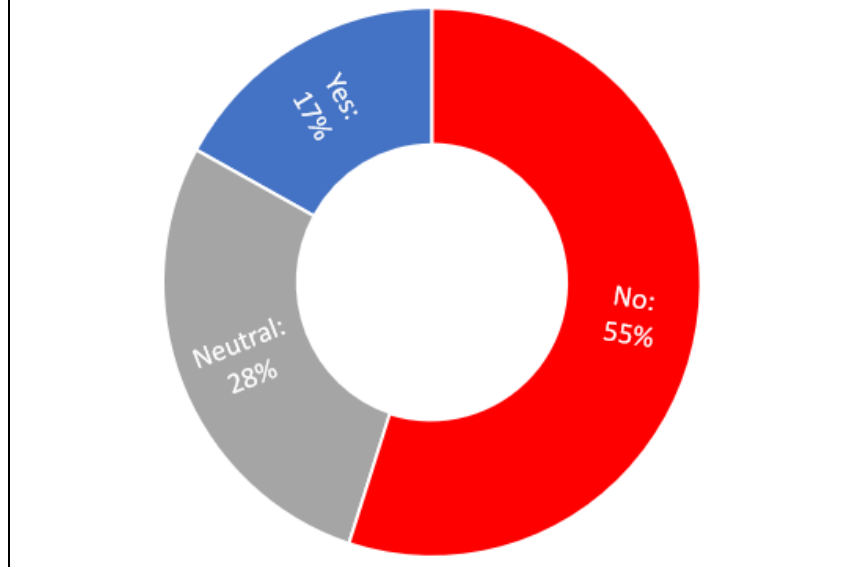
11.18. Some of the problems encountered from unlimited approach would be significantly reduced if Article 17(2) restricted to the limited approach.

11.19. On the survey undertaken as part of this report, which is explained in the next section, 55% of the survey respondents indicated that look-through approach in Article 17 of OECD MTC does not take into account all possible tax avoidance in connection with international performer income and risk of excessive double taxation as well as tax credit problems still continue. Figure 3 below provides a snapshot of the survey result for appropriateness of look through approach under Article 17.

⁸ Paragraph 16 of the commentary on Article 17 of the OECD MTC.

⁹ United States Model Technical Explanation of November 15, 2006.

Figure 3: Appropriateness of look through approach under Article 17



11.20. **Situation when Article 17(2) not apply**¹⁰: For example, Article 17(2) does not apply in the following scenario:

- a. The income derived by the independent promoter of a concert from the sale of tickets and allocation of advertising space.
- b. Prize money that the owner of a horse or the team to which a race car belongs derives from the results of the horse or car during a race or during races taking place during a definite period. Such prize money is not derived from the personal activities of the jockey or race car driver and is not covered by Article 17.

11.21. **Situation when Article 17 will not apply**¹¹: Article 17 will not apply to any share of these payments that will be distributed to the participating teams and will not be re-distributed to the players and that is not otherwise paid for the benefit of the players. In general, other Articles would apply whenever there is no close connection between the income and the performance of activities in the country concerned.

¹⁰ Background material of Diploma in International Taxation, Seventh Edition, January, 2023, p. 3.542.

¹¹ Background material of Diploma in International Taxation, Seventh Edition, January, 2023, p. 3.537.

Taxation of Non-Resident Artistes or Sportspersons - Domestically and Internationally

11.22. **Domestic anti-avoidance rules:** In case of abusive arrangements, OECD MTC would not prevent the application of general anti-avoidance rules¹² ('GAAR') of the domestic law of the state of source which would allow that state to tax either the artistes or sportspersons or the star-company.¹³

¹² Para 24 of the commentary on Article 1 of OECD MTC, 2017.

¹³ Para 11.3 of the commentary on Article 17 of OECD MTC, 2017.

Chapter 12

Exception to Article 17(1) and 17(2) of OECD MTC

12.1. Some of the OECD countries contains Article 17(3) which allows exemption by the source state of performance income of artistes or sportspersons for performances that are supported by public funds. In that situation only the residence country has the right to tax performance income.

12.2. Countries may consider it appropriate to exclude from the scope of the Article 17 of OECD MTC events supported from public funds. This exception leads to unequal treatment of subsidized cultural and sports institutions, on the one hand, and commercial artistes and sports companies, on the other.

12.3. OECD acknowledges that there could be administrative difficulties involved in allocating to specific activities taking place in a state the overall employment remuneration of individual members of a foreign team and in taxing the relevant part of that remuneration, some states may consider it appropriate not to tax such remuneration or could unilaterally decide to exempt such remuneration.

12.4. Some states may consider it appropriate to exclude such remuneration from the scope of the Article. While some state would amend the text of the Article so that it does not apply with respect to income from employment.

12.5. India's position on Article 17(3), India has reserved the right to exclude from the application of Article 17(1) and Article 17(2), performance income of artistes or sportspersons for performances that are substantially supported by public funds, thereby providing residence-based taxation of such income.¹

¹ Para 14 of the commentary on Article 17 of OECD MTC, 2017 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 sportsmen 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 artiste or the sportsman is a resident.*'

Chapter 13

Key Pointers for Certain Income earned by Artistes or Sportspersons

13.1. **Income received by impresarios:** Income received by impresarios for arranging the appearance of artistes or sportspersons is beyond the scope of the Article 17 of OECD MTC but any income they receive on behalf of the artistes or sportspersons is fall under the scope of the Article 17 of OECD MTC.¹

13.2. **Sale of merchandising:** Sales of merchandising in or around the venue are handled by persons other than the artiste himself. Most of the countries have decided to treat merchandise income as royalty income and can fall under Article 12 or business income under Article 7 or Article 15 of OECD MTC, in the case of an employee receiving such income. However, when the personal performance of artistes or sportspersons in the venue, leading to the sales of the merchandising then it would be possible to tax the earnings under Article 17 of the OECD MTC.²

13.3. **Subsidies given to artistes:** Mostly orchestras, theatre companies may be subsidized either for specific projects or in general for the activities of the said companies by government in their home country. In the former case, there will be a direct link with a performance and therefore, taxation in the country of performance based on Article 17 of the OECD MTC. Even in latter case, general subsidy is indirectly linked to performances and giving the country of performance the right to tax a portion of general subsidy.

13.4. In practice, it will not be easy to identify subsidy for specific project or for general subsidy which can resulted into double non-taxation when there is exemption method is used in home country.

13.5. **Tour support from record companies:** In case of international tour, record company may be asked for the tour support over and above the guaranteed minimum performance fees to cover the full production expenses of artiste or sportsperson. Such tour support from the record companies is paid as an advance and such earnings would be possible to tax under Article 17 of OECD MTC. However, OECD has not specified such tour support

¹ Para 7 of Article 17 of OECD MTC, 2017

² Para 9 of the Commentary on Article 17 of OECD MTC, 2017

earnings from the record companies and allow the right to impose the tax based on the domestic tax law according to Article 3(2) of OECD MTC.

13.6. In practice countries will not know of the existence of such earnings i.e., tour support from the record companies when they are not paid in their country as the record company will be based in a foreign jurisdiction, very often the same jurisdiction as the country of residence of the artiste or sportsperson.

13.7. **Royalties for intellectual property rights:** Royalties for intellectual property rights will be covered by Article 12 rather than Article 17 of OECD MTC. Article 17 will apply to advertising or sponsorship income which has a close connection with a performance in a given state. For example, payments made to a tennis player for wearing a sponsor's logo, trademark or trade name on his tennis shirt during a match.³

13.8. Such a close connection may be evident from contractual arrangements which relate to participation in specified events or a number of unspecified events; in the unspecified events, a contracting state in which one or more of these events take place may tax a proportion of the relevant advertising or sponsorship income.⁴

13.9. **Player transfer fee:** In case the player transfer fees or sign-on bonus paid to artistes by sports clubs and leagues to join their team, which are for participating in future entertainment events should fall under the scope of the Article 17(1) of OECD MTC, however, if the player transfer fees or sign-on bonus is for the purpose of preventing a sportsperson from joining another leagues then such an income would be beyond the scope of Article 17 of OECD MTC.

13.10. **Neighbouring rights:** There are two views on neighbouring rights earnings. One view is that it should be considered as royalties that fall under the Article 12 of OECD MTC as there is no link between performance and the earnings from neighbouring rights and another view is that neighbouring rights, the earnings being seen as deferred compensation for an earlier performance⁵ and therefore, taxation in the source country based on Article 17 of the OECD MTC. However, neighbouring rights earnings should be considered as royalties which seems to be a good practical solution.

13.11. **Income from single event:** The activities of artistes or sportspersons

³ United Kingdom: Mr Set, Miss Deuce & Mr Ball v. Robinson (HMIT) (SPC No. 0373)(2003).

⁴ Para 9 of the Commentary on Article 17 of OECD MTC, 2017.

⁵ Pierre Boulez v. Commissioner of Internal Revenue, (1984) 83 T.C. 584.

Taxation of Non-Resident Artistes or Sportspersons - Domestically and Internationally

do not include only the appearance in an entertainment or sports event in a given state but also includes appearing in the single event such as interviews or advertising in that state that are closely connected with such an appearance. Thus, Article 17 of OECD MTC can apply to a person who is not an actor but who gets a fee for a once-in-a-lifetime appearance in a television commercial or movie, or to an amateur who wins a monetary sport prize.⁶

13.12. Guarantee fees paid to overseas sports association: The payment by way of guarantee fees to non-resident sports associations⁷ needs to be considered in terms of the article on 'other income' or on 'income not expressly mentioned' of the relevant tax treaty.

13.13. However, if guarantee fees are paid to any overseas sports association in relation to any match played in the country of performance, that income by way of guarantee fee is liable to tax in the country of performance⁸ and shall fall under the scope of Article 17 of OECD MTC.

13.14. Persons involved in mixed activities: There could be certain mixed activities which would fall into a grey area where it would be necessary to review the overall balance of the activities of the person concerned. For mixed activities, it would have been to be seen if the activities are predominately of performing nature or not. If the performing element composes a nugatory part of the overall activity, then whole of the income will fall outside the scope of Article 17 of OECD MTC.

13.15. OECD commentary provides the illustration on mixed activities performed by person, for instance, a person performing a dual role of an actor as well as the director of a movie.⁹ In such a case, if the acting done in the film is only for one shot, then one might conclude that the predominant role of such person was not that of artistes and whole of the income will fall outside the scope of Article.

13.16. Payments towards inducement: Inducement payments are made to persuade an artiste to be available to perform during a certain period. In this case, no clear artistic or entertainment activity can be identified, which make the inducement payment will fall outside the scope of Article 17 of the OECD MTC.

⁶ Para 9.1 of the Commentary of Article 17 of OECD MTC, 2017.

⁷ CBDT Circular No. 787 dated February 10, 2000.

⁸ BCCI v. DIT (2005) 96 ITD 263 (Mum. Trib.), PILCOM v. CIT (2020) 116 taxmann.com 394 (SC).

⁹ Para 3 of Commentary on Article 17 of OECD MTC, 2017.

13.17. Payments towards options: Artiste agrees to open negotiations about the terms of a contract that may lead to an actual performance in the foreign country. When the option is used, the option payment will fall under the scope of Article 17 of the OECD MTC as there will be a clear link between the option payment and the future artistic or entertainment activity whereas when the option is not used, the option payment seems to fall outside the scope of Article 17 of the OECD MTC.

13.18. Payments towards retainers: Artistes keep him available for performances during a period of time for which he promises not to enter into agreements with others to perform. The retainer payment will fall outside the scope of Article 17 of the OECD MTC, because no artistic or entertainment proceedings in the country is requested from the artiste.

13.19. Payments towards restrictive covenants rights: Where an amount is paid to a non-resident artiste to restrict his activities. This payment may not be considered a payment in respect of personal activities exercised in the country of performance and will not be taxable in the country of performance under Article 17 of the OECD MTC. Normally, these payments are qualifying as royalties and falling under Article 12 of the OECD MTC.

13.20. Pensions and other insurance benefits: With regard to artistes or sportspersons, they can also receive deferred payments, such as pensions schemes from employment, deferred payments for early retirement, personal pension schemes or other insurance benefits.

- a. **Pensions schemes from employment:** It will not fall under Article 17 but under Article 18-Pensions from employment or Article 19(2)-Pensions from governments.
- b. **Deferred payments for early retirement:** When artistes or sportspersons during their active career are allowed set aside a percentage of their income into a specific fund and receive deferred payments from this fund when their active career is complete. These special arrangements have indirect link with the performances to make the deferred payments taxable in the country of performance as per Article 17.
- c. **Personal pension schemes:** It will fall under Article 21 and the taxing right for the personal pension income is then allocated to the country of residence.
- d. **Other insurance benefits:** There is no link with specific performances, the insurance benefits cannot fall under Article 17 but

Taxation of Non-Resident Artistes or Sportspersons - Domestically and Internationally

will fall under Article 7 for self-employed artistes or Article 15 for employees or Article 19 for governmental insurance benefits or Article 21 in other situations, as appropriate.

13.21. Cancellation of performance and insurance cover: As cancellation of performance has no connection with the actual performance and fall under Articles 7 or 15 of OECD MTC¹⁰, as appropriate. Even the artistes can try to cover this risk with an insurance contract, still there will be no taxing right in the performance country as no performance taken place.

13.22. Preparation, rehearsal and training: OECD commentary provides that the income pertaining to rehearsal, preparation and training shall be taxable irrespective of whether the specific performance is taking place in that state or not.¹¹

13.23. Commission to a foreign agent, reimbursement of expenses: Income of foreign agent did not arise from personal activities in India as an artiste or athlete.¹²

13.24. Interviews and appearance on shows: Interviews and appearance on shows are closely connected with the personal activities of the athlete and even fees for granting interviews during the period of the performance is included under Article 17.¹³

13.25. Owner of a racehorse or race team: If the owner or team receives a payment in consideration for the personal activities of the race car driver than such income may be taxed in the hands of the race car driver under Article 17(1).¹⁴

13.26. When the prize money is not paid in consideration for the personal activities of the race car driver but in consideration for the activities related to the ownership and training for the horse or the design, construction, ownership and maintenance of the car than such prize money is not covered by Article 17.¹⁵

13.27. Image rights: When the uses of their image rights are closely connected with their performance or personal activity in the given state and are normally paid as a percentage of the box office earnings minus VAT or

¹⁰ Para 9 of the Commentary on Article 17 of OECD MTC, 2017.

¹¹ Para 9.1 of the Commentary on Article 17 of OECD MTC, 2017.

¹² DIT vs. Wizcraft International Entertainment Pvt. Ltd. 364 ITR 227 (2014).

¹³ Para 9.1 of the Commentary on Article 17 of OECD MTC, 2017.

¹⁴ Para 11.2 of the Commentary on Article 17 of OECD MTC, 2017.

¹⁵ Para 11.2 of the Commentary on Article 17 of OECD MTC, 2017.

sales tax than the income from image rights will be covered under Article 17.¹⁶

13.28. When the uses of their image rights are not closely connected with their performance or personal activity in the given state and its merely for the exploitation of his or her personality than such uses of image rights is not covered by Article 17.¹⁷

13.29. **Broadcasting:** If the payments for broadcasting of performance by artistes or sportspersons made directly to the performer or for his or her benefit to star company of the performer than it will cover within the scope of Article 17.¹⁸

13.30. If the payments for broadcasting of performance by artistes or sportspersons does not benefit the performer or the payment is not related to the personal activities of the performer than it will not cover under Article 17. For example, the fee that a former or injured sportsperson would earn for offering comments during the broadcast of a sports event in which that person does not participate would not be covered by Article 17.¹⁹

13.31. **Sponsorship, advertisement, endorsement:** Where the product to be endorsed is to be worn only at the time of performance by artistes or sportspersons. In other words, Article 17 will apply to advertising or sponsorship income, etc. which is related directly or indirectly to performances or appearances in a given state.²⁰ CBDT Circular No. 787 dated 10.02.2000 provides that sponsorship or advertising fees are covered under Article 17 when they are predominantly attributable to the performance.

13.32. Where the product to be endorsed is to be worn in general while he or she is not performing.²¹

¹⁶ Para 9.5 of the Commentary on Article 17 of OECD MTC, 2017.

¹⁷ Para 9.5 of the Commentary on Article 17 of OECD MTC, 2017.

¹⁸ Para 9.4 of the Commentary on Article 17 of OECD MTC, 2017.

¹⁹ Para 9.4 of the Commentary on Article 17 of OECD MTC, 2017.

²⁰ Para 9 of the Commentary on Article 17 of OECD MTC, 2017.

²¹ Para 9 of the Commentary on Article 17 of OECD MTC, 2017.

Chapter 14

Tax Treatment of Team Performance under OECD MTC

14.1. A team carrying on sporting or entertainment activities can be recognized as a separate taxpayer and its operations have certain tax consequences. The remuneration received by the team comprises not only of the total of the salaries of its members but accommodate a profit component earned by the team itself. Profits of teams performing in another country should be covered by the general rules set out in the Article 7 of the OECD MTC, which permits taxation in the source country only to the extent to which such profits are attributable to a permanent establishment situated in that country. Further, team could receive the income in the following ways:

Table 7: Type of team income

Type-I	Type-II	Type-III
Indirect payments to performers	Income in respect of performance	Non-performance profit of the team
<p>Covered under Article 17(2): When artistes or sportspersons indirectly receive income from the team which is for the performance with such team than in such case, the contracting state of performance apply the similar taxation rights as if the compensation had been paid directly to individual performers. Therefore, the event</p>	<p>Covered under Article 17(2): Income from performance that is attributable to the team itself rather than individual performers, Article 17(2) expressly takes precedence over Article 7 but only with respect to the profit element of the team relating to entertainment activities in the contracting state of performance.</p>	<p>Not covered under Article 17(2): The profit element of the team unrelated to the personal exercise of entertainment or sports activities by team members in the source country is not subject to tax under Article 17(2).</p>

Key Pointers for Certain Income earned by Artistes or Sportspersons

<p>organizer applies Article 17 and relevant provisions of domestic law regarding income of artistes and sportspersons to an appropriate part of the payment to the team attributable to individual performers.</p> <p>Derived from personal exercise: It is crucial to determine the extent to which a payment made to the team includes income indirectly derived by performers and resulting from personal exercise of artistic or sporting activities, because only such income may be subject to tax under Article 17(1) of the OECD MTC.</p>	<p>Double taxation: The income derived in respect of the personal activities of an artiste or sportsperson should not be doubly taxed through the application of these two paragraphs. Alternatively, tax the income received by the team but allowing a deduction for the relevant part of the remuneration paid to individual performers and taxing that part in the hands of the performers.</p>	<p>May be covered under Article 7: Consequently, may be taxed in the state of activity only if the team has a permanent establishment in this state to which this income is attributable.</p> <p>Combined Fee: In the case where the team receives a single fee, apportionment may be necessary.</p>
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Chapter 15

Tax Treatment of Team Members

15.1. There could be following four different types of team members and their tax treatment are as follows:

Table 8: Type of team members & their tax treatment

Taxation of Employee		Taxation of independent contractors	
Performing Employee	Non-performing Employee	Performing independent contractors	Non-performing independent contractors
<p>Benefits of Article 15 not available: Employment income derived from personal activities of artistes or sportspersons in their capacity as such is covered by Article 17 rather than Article 15 and exceptions provided for in Article 15 do not apply.</p> <p>The critical factor is their services rather than the legal basis on which such services are rendered.</p>	<p>Benefits of Article 15 available: Income of a non-performing employee is taxable in the source state if the artistic or sports event requires presence in that country or if the employer has a permanent establishment in that contracting state which pays the remuneration to the employee.</p> <p>The thresholds provided for in Article 15 ensure that an employee is not taxable in</p>	<p>Benefits of Article 7 not available: Article 17 provides that income from independent services derived by such a performer is not taxable under Article 7 and it is taxable under Article 17</p> <p>Consequently, it is irrelevant whether the performer has a permanent establishment in the source country or not.</p> <p>Further, Income from artistic or</p>	<p>Benefits of Article 7 available: A non-performing member of an artistic or sports team performed on an self-governing basis is not taxable on his income in the source country as long as he has no permanent establishment there.</p> <p>If non-performing member performed in that contracting state wherein he has the permanent establishment</p>

<p>Income linked to public performance: OECD commentary does not provide that what income should be considered linked to performances. A commonly accepted interpretation restricts Article 17 to public performances.¹</p> <p>There could be 2 types of training activities²:(1) Those without an audience and without a direct link to a performance. (2) Those relating to a performance or appearance for an audience. The former would be covered with under Article 15 and the latter under Article 17.</p>	<p>the state of performance if he or she is present there only for a short period of time and non-performing employee is employed by an entity which is not subject to tax in the source country.⁴</p>	<p>sporting activities is taxable in that state without regard to thresholds required for taxation of business profits.</p> <p>Gross basis taxation: The taxpayer cannot benefit from net basis taxation and in most cases, the tax is charged on gross payments received from the organizer or from the team.</p>	<p>than his or her profits may be taxed in the performing source state but only so much of them as is resultant to that permanent establishment.</p> <p>Thus, an independent non-performing contractor are covered under Article 7.</p> <p>Net basis taxation: The taxpayer can benefit from net basis taxation.</p>
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¹ Source versus Residence, 1st edition (Vienna: Linde, 2008), p. 215 at 221.

² Sandler, note 7, at 227.

Taxation of Non-Resident Artistes or Sportspersons - Domestically and Internationally

<p>Allocation rules³: Items of income directly linked to specific activities exercised by the artistes or sportspersons in a state will be considered to be derived from the activities exercised in that state.</p> <p>Combined Cases: Where the same individual is both an actor and director in one show. If his activities in that contracting state are especially of a performing nature, Article 17 will apply to all the resulting income he or she derives in that state. If the performing element is insignificant part, the whole of the income will fall outside this provision.</p>			
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⁴ Sandler, note 7, at 238.

³ Para 9.2 of the Commentary on Article 17 of OECD MTC, 2017.

Chapter 16

Limitation & Problems Following from Article 17

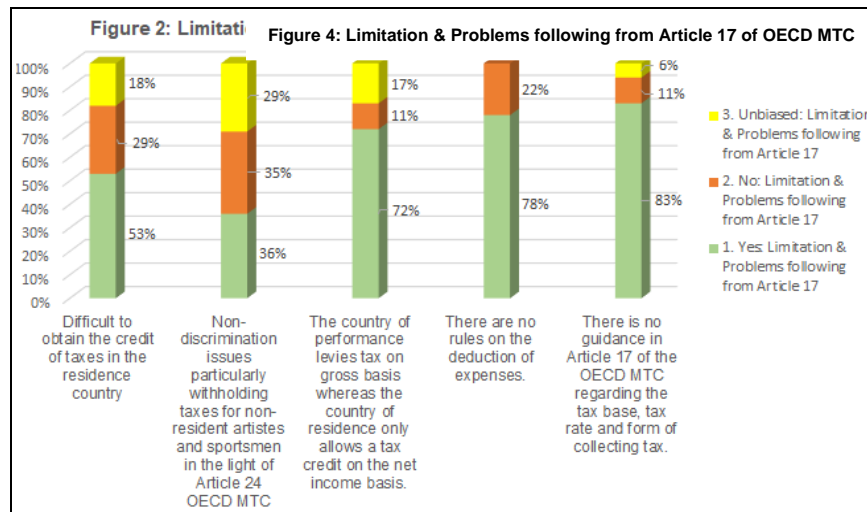
16.1. Article 17 has been included in almost all bilateral tax treaties and not only from OECD member states but also from other non-member states. Following are the major practical problems arising from Article 17:

- international excessive taxation which leads to double taxation;
- the country of performance levies tax on gross taxation basis whereas the country of residence only allows a tax credit on the net income basis;
- difficult to obtain the credit of taxes in the residence country;
- few countries do not qualify the foreign tax for a tax credit;
- where the country of performance has not issued a tax certificate than in such a case there is no proof for the tax authorities in the residence country about the source tax;
- when the tax certificate is in the name of the team and the tax credit requires to be obtained by the individual artistes or sportspersons;
- tax authorities in both the countries (residence state as well as source state where the performance takes place) to audit whether the tax audit whether the tax filings have been correct;
- there is no guidance in Article 17 of the OECD MTC regarding the tax base, tax rate and form of collecting tax;
- there are no rules on the deduction of expenses;
- there is not specific guidance on attribution of income to past or future performances other than the general criterion of 'closely connected';
- there is no guidance on the allocation of specific payments such as transfer fees, prizes, signing bonus, guarantee fee, etc. relating to work performed or to be performed over indefinite periods of time;
- non-discrimination issues particularly withholding taxes for non-resident artistes and sportspersons in the light of Article 24 OECD MTC;

Taxation of Non-Resident Artistes or Sportspersons - Domestically and Internationally

- increase in administrative work and compliance costs;
- if there is no artiste & sportspersons clause in a tax treaty¹, the taxability of performance income has to be decided by using the normal allocation rules of Articles 7, 14 or 15 of the UN MTC, for business profits or self-employed artistes or employee artistes, as appropriate and in case of OECD MTC, Article 7, 15, for business profits or employee artistes, as the case may be.

16.2. In our survey as a part of this report, few questions were focused on limitations and problems following from the Article 17 of OECD MTC. The survey respondents were broadly uncomfortable with the range of 36% to 83% of the respondents strongly agreeing with the view that there are various inherent administrative limitations following from the Article 17 of the OECD MTC, which are governed by the respective contracting state domestic tax law. Thereby signifies the importance of having best global experience for effective administrative mechanisms in relation to non-resident artistes or sportspersons to be sourced by the respective contracting state. Figure 4 below represents the details.



¹ Pg.124 of Ch.5, Tax Treaties-Allocation with Article 17 of Taxation of international performing artistes by Dick Molenaar.

Chapter 17

Rationale behind Keeping & Deleting the Article 17 in OECD MTC

17.1. **Rationale behind keeping the Article 17 in OECD MTC:** On June 25, 2014, OECD published the report 'Issues related to Article 17 of the OECD MTC Tax Convention' wherein OECD member states wanted to keep the Article 17 for the following reasons:

Table 9: Continuation of Article 17 of OECD MTC

Reason I	Reason II	Reason III
Residence taxation should not be pretended given the perplexity of obtaining the relevant information.	Article 17 allows high-income earners who can easily move their residence to low-tax jurisdictions.	Source taxation of the income surrounded by the article can be administered comparatively easily.

17.2. **Rationale behind deleting the Article 17 in OECD MTC:** The taxation of non-resident artistes or sportspersons does not bring huge tax revenue to any contracting state. The estimated tax revenue from artistes and sportspersons mentioned in below table are not inspiring.

Table 10: Estimated tax revenue from artistes and sportspersons in selected states (2007)¹

Sl. No.	State	Citizens (millions)	Tax Rate (%)	Estimated tax revenue (EURO million)
1	Australia	25.5	29.0	80.0
2	Austria	8.9	2.0	19.3
3	Canada	37.6	15.0	61.0
4	Denmark*	5.8	-	11.3

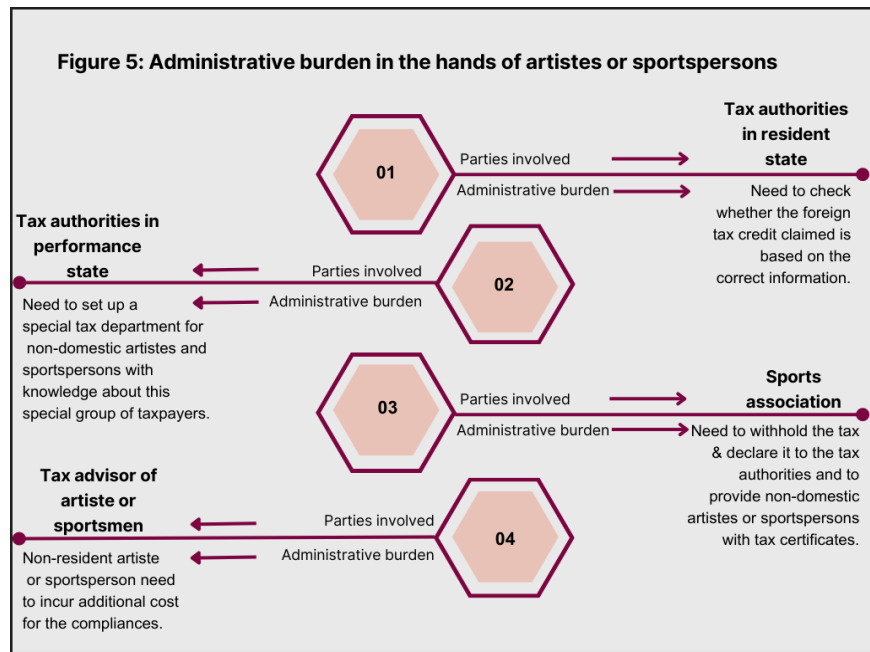
¹ Dick Molenaar, IBFD, European Taxation, Feb./Mar. 2021, p. 122.

Taxation of Non-Resident Artistes or Sportspersons - Domestically and Internationally

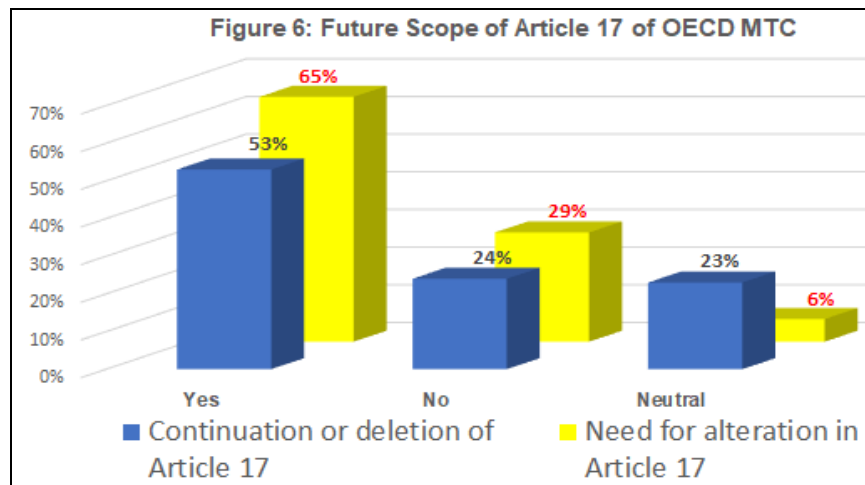
5	France	67.0	15.0	108.7
6	Germany	83.0	15.8	142.1
7	Ireland [^]	4.9	-	9.5
8	Netherlands [~]	17.3	9.0	33.7
9	Sweden	10.2	15.0	16.5
10	UK	66.7	20.0	144.3
11	US	325.1	30.0	1054.9
<p>* The estimated tax revenue is theoretical as Denmark does not have a source withholding tax for non-resident artistes and sportspersons. [^] Ireland also does not have a source withholding tax. [~] The same as for Denmark and Ireland.</p>				

17.3. The total tax revenue in each contracting state will go down remarkably because of the tax credits or tax exemptions, as appropriate, for resident artistes and sportspersons engaging in the foreign performances and sports events, which means that there is no real tax revenue will remain for a state. Hence, the removal of the Article 17 in a tax treaty and link it to the general rules of Article 7, Article 14, or Article 15, as appropriate, would minimize the risk of double non-taxation in situations where the residence country applies the exemption method and the source country does not levy a withholding tax.

17.4. **Administrative burden:** As compared to the performance income, the administrative costs in the hands of non-resident artistes or sportspersons is too high which involve at least following four parties, besides the artistes or sportspersons himself, are involved in the process of foreign tax credit in the resident state and the taxation in the performance state, is provided in the figure 5 below.



17.5. According to our survey undertaken, respondents were requested to provide responses on the future scope of Article 17 of OECD MTC. We have asked the survey respondents two questions viz., Whether the Article 17 should be kept as such with no modifications or delete? Is there a need to change Article 17?



17.6. Majority of the survey respondents 65% indicated that there should be change in Article 17 as risk of double taxation as well as qualification

Taxation of Non-Resident Artistes or Sportspersons - Domestically and Internationally

problems and unequal treatment to non -resident artistes or sportspersons still exist and 53% respondents indicated that Article 17 of OECD MTC should retain as such since major limitations and problems following from the Article 17 can be resolved with increased exchange of information and also, qualification problems can be partly resolved by the use of interpretation rule of paragraph 2 of Article 3 of OECD MTC. Figure 6 above presents the details.

Chapter 18

An Alternative Prescribed by OECD to Restrict the Scope of Article 17

“What I can give is not necessary what you will get but along our disagreements we will find some alternate ways.” – Santosh Kalwar¹

18.1. There are few options mentioned in the OECD commentary to restrict the scope of Article 17 such as:

Table 11: Alternative options by OECD to restrict the scope of Article 17 of OECD MTC

Option	Particular	Paragraph number Commentary on Article 17	Explanation
1	Article 17 only for self-employed, normal rules from Article 15 for employees	2	OECD commentary has given the option to the contracting states that they can decide in their bilateral tax treaty to restrict the Article 17(1) to business activities. To meet this requirement, it would be sufficient to replace the words ‘notwithstanding the provisions of Article 15’ by ‘subject to the provisions of Article 15’ in paragraphs 1 and 2.
2	Deduction of expenses	10	Two choices have been mentioned in paragraph 10 to Article 17 commentary. Choice 1: Taxation of the

¹ Santosh Kalwar, ‘Quote Me Everyday’, January 1, 2010 by Lulu Press Inc.

Taxation of Non-Resident Artistes or Sportspersons - Domestically and Internationally

			gross performance fee but a low tax rate. Choice 2: The deduction of expenses and taxation under the normal rules.
3	De-Minimis-Rule of 15.000 international monetary fund (IMF) special drawing rights (SDR)	10.1 to 10.4	Under the 3rd option, minimum amount of 15,000 IMF SDR per performer per year, under which the performance country does not have the right to tax the performance income.
4	Support from public funds	14	Under 4th option, excludes the performances supported from public funds from Article 17.
5	Foreign teams & groups	14.1	Under 5th option, an exemption to foreign teams and groups working with performers as employees. Further, paragraph 14.1 provides a text proposal in which the exemption is available to cross-border competitions only.

18.2. The implementation of the available options would lead to a much lower risk of double or excessive taxation for international performing artistes and sportspersons. If OECD took the options in its own commentary more serious than a considerable proportion of international performing artistes and sportspersons would be better off, however, this would also bring up new discussions about the qualification for the conditions for the exemptions which would make the use of Article 17 more difficult.

Chapter 19

Interaction of Article 17 of OECD MTC with other Articles

19.1. **Scope of Article 17(1):** The scope of Article 17 of OECD MTC and UN MTC are as follows:

Table 12: Scope of Article 17 (1) under OECD MTC & UN MTC

Under UN MTC	Under OECD MTC
It starts with 'Notwithstanding the provisions of Articles 14 and 15'.	It starts with 'Notwithstanding the provisions of Article 15' ¹ .
Artistes and sportspersons who are residents of a contracting state may be taxed in the other contracting state in which their personal activities as such are performed, whether these are of a business nature, or of the nature of technical services or of independent or dependent personal services.	Artistes and sportspersons who are residents of a contracting state may be taxed in the other contracting state in which their personal activities as such are performed, whether these are of a business nature, or employment nature.
This provision is an exception to the rules in Articles 7, 12A and 14 and to that in paragraph 2 of Article 15, respectively.	This provision is an exception to the rules in Articles 7 and to that in paragraph 2 of Article 15, respectively.

19.2. **Article 17(2) unrestricted by Article 7:** Article 17(2) of the OECD MTC is identically worded as Article 17(2) of the UN MTC.

19.3. Article 17(2) allows the state in which the activities of artistes or sportspersons are exercised to tax the income derived from these activities and accruing to another person nevertheless of other provisions of the convention that may otherwise be applicable.

19.4. Notwithstanding the provisions of Article 7, the application of Article 17(2) is not restricted to situations where income accrues to artistes or

¹ Article 14 in OECD MTC was deleted.

Taxation of Non-Resident Artistes or Sportspersons - Domestically and Internationally

sportspersons & star-company where both are residents of the same contracting state or are not residents of that other contracting state or who is a resident of a third state with which the state of source does not have a tax convention nothing will put a stop to the contracting state from taxing that person in accordance with its domestic laws.

19.5. **Interaction of Article 17(2) with Article 19:** Article 17 will not apply when the artistes or sportspersons is employed by Government and derives income from that Government under defined conditions.² In other words, the provisions of the Article 17 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. However, certain conventions embrace provisions with the exception of artistes and sportspersons employed in organizations which are subsidized out of public funds from the application of Article 17.

² This is due to paragraph 3 of Article 19 which reads as follows: “3. *The provisions of Articles 15, 16, 17, and 18 shall apply to salaries, wages, pensions, and other similar remuneration in respect of services rendered in connection with a business carried on by a Contracting State or a political subdivision or a local authority thereof.*”

Part II
Sub-part(b)

**Literature Review: India's Domestic
Perspective**

Chapter 20

Philosophy over Existing India's Domestic Framework

20.1. Taxation of non-resident sportsmen or sports associations- Domestically under the Income Tax Act, 1961

20.2. Rationalization in the taxation provisions for non-resident sportsmen and sports association: Section 115BBA¹ brings within its scope certain incomes of a non-resident sportsman (including an athlete), sports association and an entertainer.

Table 13: Tax regime under section 115BBA

Taxpayer	Applies to	Coverage of income		
Sportsman	Non-resident and not a citizen of India	Sl. No.	Income by way of	Remarks
		a	Participation in India in any game or sport	If players are rewarded with bonuses in view of their good performance in India, then such income will be charged in India by virtue of section 5 read with section 115BBA. Due importance to be given to the phrase ' <i>in India</i> '.
		b	Advertisement	Regarding

¹ Inserted vide Direct Tax Laws (Second Amendment) Act, 1989 w.e.f. 01.04.1990.

Philosophy over Existing India's Domestic Framework

				income earned by a non-resident sportsperson from a non-resident company for shooting advertisements which are broadcasting globally including India than a proportion of this income as attributable to India, may be subjected to tax in in India.				
		c	Contribution of articles relating to any game or sport in India in newspapers, magazines or journals.	Only contribution of any articles is covered. Any income earned from appearing in interviews, debates shall not be covered here.				
Sports Association	Non-resident	<table border="1"> <thead> <tr> <th align="left">Income by way of</th> <th align="left">Remarks</th> </tr> </thead> <tbody> <tr> <td>Any amount guaranteed in relation to any game or sport</td> <td>The expression 'in relation to' has a wide connotation and if the amount guaranteed to be</td> </tr> </tbody> </table>			Income by way of	Remarks	Any amount guaranteed in relation to any game or sport	The expression 'in relation to' has a wide connotation and if the amount guaranteed to be
		Income by way of	Remarks					
Any amount guaranteed in relation to any game or sport	The expression 'in relation to' has a wide connotation and if the amount guaranteed to be							

Taxation of Non-Resident Artistes or Sportspersons - Domestically and Internationally

		played in India.	paid or payable bears any relation to any game or sports played in India, the same should fall within the purview of section 115BBA.
An entertainer	Non-resident and not a citizen of India	Income from performances in India.	
<ul style="list-style-type: none"> Any expenses shall not be allowed as deduction. 			
<ul style="list-style-type: none"> Further, this section provides for a gross basis of taxation for specified incomes earned by non-resident sportspersons and entertainers from India at rate of 20% plus applicable surcharge and health and education cess. 			
<ul style="list-style-type: none"> This section is merely a computational provision and not a charging one. 			

20.3. The CBDT notifies the services rendered by following persons in relation to the sports activities as 'Professional Services' for the purpose of section 194J of the Income-tax Act, 1961, namely, anchors, event managers, sportspersons, umpires and referees, coaches and trainers, team physicians and physiotherapists, commentators, and sports columnists.²

20.4. The CBDT has issued Circular 787 dated 10 February 2000 that deals with certain issues on taxation aspect concerning national and international events and shows for entertainment, sports in India. The key highlights of the said Circular³ are as follows:

20.5. The Circular provides that income of artistes, entertainers, sportspersons, etc. participating in an event in India would be liable to tax in India. The relevant extracts of circular are as under:

In the case of non-residents, in addition to the provisions of the Income-tax Act, 1961, the applicability of Double Taxation Avoidance Agreement

² Notification no. S.O. 2085(E) [NO.88/2008 (F. NO. 275/43/2008-IT(B))], dated 21-08-2008.

³ Circular No.787 dated 10 February 2000.

(DTAA) should be examined. The Income-tax Act, 1961 provides that in case of sportsmen or artistes participating in such events or shows, all income accruing or arising or deemed to be accruing or arising, received or deemed to be received in India is taxable in India.

20.6. Receipts from events or shows for entertainment, sports, etc. may include sponsorship money, gate money, advertisement revenue, sale of broadcasting or telecasting rights, rents from hiring out of space, rents from caterers, etc.

20.7. For illustrations, DTAA Article on 'Artistes and Sportsmen', 'Royalties' or 'Other Income' will apply to following type of income of the non-resident artistes or performer in India:

Table 14: Classification of nature of income under OECD MTC

DTAA Article	Nature of Income				
DTAA Article on 'Artistes and Sportsmen'	<ul style="list-style-type: none"> • Income from personal activities of sportsman or artistes in India, which accrues to such sportsman or artistes or to another person. • Advertising income or sponsorship income, if it is related directly or indirectly to performance or appearance in India. 				
DTAA Article on 'Royalties'	<ul style="list-style-type: none"> • Where the performance is recorded and royalties are stipulated to be paid, the same would be covered under the Article on 'Royalties' in the DTAA, whether it has been mentioned under the same contract or under a separate one. 				
DTAA Article on 'Other Income'	<ul style="list-style-type: none"> • The payment by way of guarantee money to non-resident sport associations needs to be considered in terms of the Article on 'Other income' or on 'Income not expressly mentioned' of the relevant DTAA. • The position of the taxation of such guarantee money under this Article in some of the DTAA's is as under: <table border="1" style="margin-left: 20px; border-collapse: collapse; width: 80%;"> <tbody> <tr> <td style="padding: 2px;">India-U.K. DTAA</td> <td style="padding: 2px;">Taxable in India, as per article 23.3</td> </tr> <tr> <td style="padding: 2px;">India-U.S.A. DTAA</td> <td style="padding: 2px;">Taxable in India, as per article 23.3</td> </tr> </tbody> </table> 	India-U.K. DTAA	Taxable in India, as per article 23.3	India-U.S.A. DTAA	Taxable in India, as per article 23.3
India-U.K. DTAA	Taxable in India, as per article 23.3				
India-U.S.A. DTAA	Taxable in India, as per article 23.3				

Taxation of Non-Resident Artistes or Sportspersons - Domestically and Internationally

	India-Japan DTAA	Taxable in India, as per article 22.3
	India-Australia DTAA	Taxable in India, as per article 22.2
	India-New Zealand DTAA	Taxable in India, as per article 22
	India-France DTAA	Taxable in India, as per Article 23.3

20.8. For example, the following income are taxable and not taxable in India for the non-resident artistes or performer in India:

Table 15: Taxability of income of non-resident artistes or performer

Nature of income	Taxability in India		Justification
	Yes	No	
Performance in India gratuitously without consideration	-	-	As there would be no income and consequently, no tax.
Performance in India for no consideration, to promote sale of records	-	-	There will be no tax as artists does not receive any income for performance in India.
Consideration paid to acquire the copyrights of performance in India for subsequent, sale, broadcast or telecast abroad	-	-	It is not taxable in India due to exclusions provided in section 9(1)(vi) of the Income-tax Act.
Consideration for live performance or simultaneous live telecast or broadcast in India consideration paid to acquire the copyrights of performance in India for subsequent, sale,	-	-	It would qualify as income and consequently, should be taxable. Even, if separate consideration is received for simultaneous live telecast, etc., of performance, the same shall be taxable in India and is to be treated under

Philosophy over Existing India's Domestic Framework

broadcast or telecast in India			the article on 'Artists and Sportsmen' in the DTAA.
Endorsement fee (for launch or promotion of products, etc.) that relates to the performance in India	-	-	It is taxable in India in accordance with the provisions of section 5 of the Income-tax Act. Under the DTAA, this would fall under the article on 'Artists and Sportsmen'.

20.9. The said circular also provides that wherever the participants in such shows or events are not domiciled in India, they may be required to obtain tax clearance certificate ('TCC') under section 230 of the Income-tax Act from the competent authority and the competent authority should insist on obtaining of TCC by the performers in such shows are events wherever such persons are believed to be having taxable income in India and no tax has been paid or no arrangement for the payment of tax has been made.

Chapter 21

Rationalization of Provisions of withholding tax under India's Domestic Framework

21.1. Taxation of non-resident sportsmen or sports associations-Domestically under the Income Tax Act, 1961

21.2. Mechanism for computing Income: The Article 17 of OECD MTC says nothing about how the income in question is to be computed. It is for a contracting state's domestic law to determine the extent of any deductions for expenses.

21.3. Some state provides for taxation at source, at a low rate based on the gross amount paid to artistes and sportspersons, however, some states may consider that the taxation of the gross amount may be inappropriate even if the applicable rate is low.

21.4. Some states may also consider that it would be inappropriate to apply Article 17 to a non-resident artistes or sportspersons who would not otherwise be taxable in a contracting state and who, during a given taxation year, derives only low amounts of income from activities performed in that state.

21.5. Rationalization of provisions of withholding tax: Section 194E¹ provides that where any income referred to in section 115BBA is payable to a non-resident sportsman including an athlete or an entertainer who is not a citizen of India or a non-resident sports association or institution, the person responsible for making the payment shall deduct income-tax thereon at the rate of 20% at the time of credit or payment of such income to the account of the payee, whichever is earlier.

21.6. Compliance requirements: No return is required to be filed if the total income of such non-resident consists solely of the income referred to in section 115BBA and taxes thereon withheld under the Income Tax Act, 1961 as per Chapter XVII-B.²

¹ Inserted by the Direct Tax Laws (Second Amendment) Act, 1989, w.e.f. 01-11-1989.

² Section 115BBA(2) of the Income-tax Act, 1961.

Rationalization of Provisions of withholding tax under India's Domestic Framework

21.7. A tax clearance certificate is required to be obtained by non-resident performer from the tax authorities prior to departure from India as per provision of section 230 of the Income Tax Act, 1961.

Chapter 22

Different approach under Model Convention and India's Domestic tax law for Certain Terms

22.1. There are different approaches under OECD MTC and UN MTC as compared to section 115BBA of the Income-tax Act, 1961 for certain terms such as:

Table 16: Different approach for certain terms under OECD MTC, UN MTC and India domestic tax law

Areas	Article 17 of OECD & UN MTC, 2017	Section 115BBA of the Income Tax Act, 1961						
Persons covered	<ul style="list-style-type: none"> • Covers only individuals i.e., sportsperson and artistes. • It includes all other persons but only to the extent of such income that accrues to them on account of the personal activities of the individuals. 	Sports associations are covered in relation to the sports played in India.						
Incomes covered	Covers income from all 'personal activities' of the artiste or sportsperson.	Covers the specific streams of incomes such as: <table border="1" style="width: 100%; margin-top: 10px;"> <thead> <tr> <th style="text-align: center;">Tax-payer</th> <th style="text-align: center;">Applies to</th> <th style="text-align: center;">Coverage of income</th> </tr> </thead> <tbody> <tr> <td style="text-align: center;">Sports-person</td> <td style="text-align: center;">Non-resident and not a</td> <td style="text-align: center;">Income by way of participation in India in any</td> </tr> </tbody> </table>	Tax-payer	Applies to	Coverage of income	Sports-person	Non-resident and not a	Income by way of participation in India in any
Tax-payer	Applies to	Coverage of income						
Sports-person	Non-resident and not a	Income by way of participation in India in any						

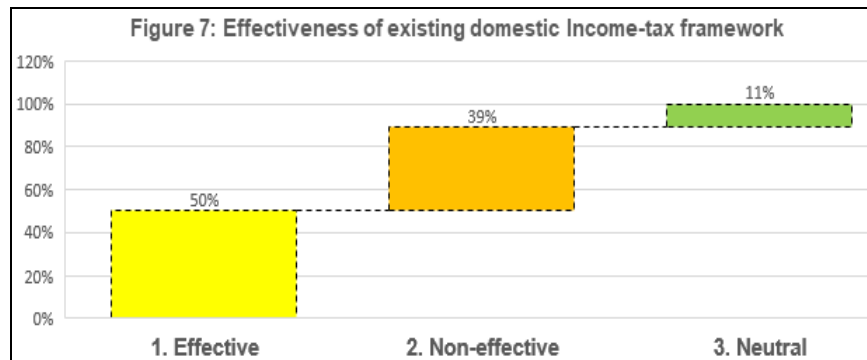
Different approach under Model Convention and India's Domestic tax law for Certain ...

			citizen of India	game or sport, advertisement, contribution of articles relating to any game or sport in India in news-papers, magazine or journals.
		Sports Association	Non-resident	Income by way of any amount guaranteed in relation to any game or sport played in India.
		Entertainer	Non-resident and not a citizen of India	Income from performances in India.
Gross basis vs. Net basis taxation	Only right to tax is allocated by virtue of Article 17 & the mode of computation of the income is left for the contracting states to deal as per their domestic law.	Denying any deduction to the non-resident performer and taxing the income on a gross basis.		

22.2. According to the primary survey undertaken as part of this report, in terms of effectiveness of existing domestic Income-tax framework in relation to non-resident artistes or sportsperson, 50% of the survey respondents

Taxation of Non-Resident Artistes or Sportspersons - Domestically and Internationally

divulged that India's domestic Income-tax framework are effective. 11% of the survey respondents are impartial while 11% oppose with the above statement on account of the following reasons such as the terms viz., entertainer, sportsperson, an athlete, and an artiste are not defined, difficulties in obtaining a tax clearance certificate¹ by non-resident performer from the tax authorities prior to departure from India, etc. These results amplify further the need for an effective domestic Income-tax mechanism is imperative. Figure 7 below represents the details.



¹ Section 230 of the Income-tax Act, 1961.

Part II
Sub-part(c)

Existing challenges

Chapter 23

Unilateral Measures

23.1. **Unilateral Exemption:** The Netherlands have turned aside Article 17 problems in 2007 with a unilateral tax exemption for non-resident performers residing in a country with which the Netherlands have assured a bilateral tax treaty.

23.2. The main reasons for said changes are that the Netherlands government needed to reduce the administrative burden as the tax revenue from non-resident performers was very low and it helps them to take off from the risk of double taxation.

23.3. Sporting bodies do not want to encounter such excessive bureaucracy with regard to non-resident sportsperson or sports association and have therefore compelled host states to exempt the athletes from the taxation.

23.4. There are few examples wherein most the major sports events get the tax exemptions which shows that the sports world is not waiting for changes in bilateral tax treaties and temporarily removing the source taxation for the non-resident sportspersons which could avoid the potential problems resulting from the Article 17.

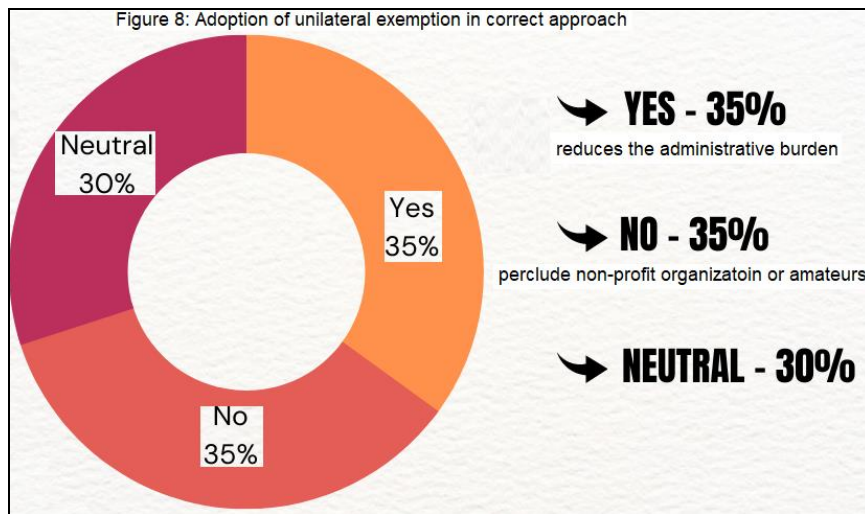
Table 17: Tax Exemption (Unilaterally Exemption) for Major Sports Events

Year	Major sports events & country removed source taxation unilaterally	Year	Major sports events & country removed source taxation unilaterally	Year	Major sports events & country removed source taxation unilaterally
2011	UEFA Champion League in London, UK	2012	UEFA Europe League Finals in Bucharest	2013	The Diamond League in London
	World Cup Rugby in New Zealand		EURO Cup in Poland & Ukraine		UEFA Europe League Finals in Amsterdam

Different approach under Model Convention and India's Domestic tax law for Certain ...

2011	World Cup in Cricket in India	2012	Olympics in London, UK	2013	UEFA Champion League in London, UK
	UEFA Europe League Finals in Dublin		UEFA Champion League in Munich		
2014	UEFA Europe League Finals in Turin	2015	UEFA Champion League in Berlin	2016	Olympics in Rio de Janeiro
	World Cup in Brazil		UEFA Europe League Finals in Warsaw		EURO in France

23.5. During the survey that was undertaken for this report, respondents were requested to provide responses on adoption of special unilateral exemptions by some of the countries for peculiar sports events. Equal part of 35% survey respondents agree and contradict with the above statement while 30% of respondents are unbiased. Figure 8 below summarises the details.



Chapter 24

Specific issues - Triangular situation

24.1. The allocation of the taxing right under Article 17 can become unclear when more than two countries are involved when artistes and artiste company are resident in different countries. The following figure describe the triangular situation:¹

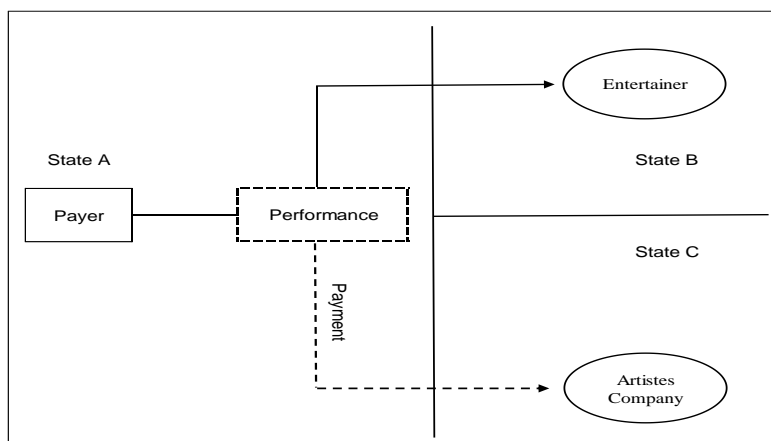


Figure 9: Triangular situation

24.2. **Double taxation problems in triangular situation:** When performance contract drawn up between the organizer and the artistes company, while the artiste lives in another country and organizer is forced to 'look through' the artistes company and tax the artistes directly, it can happen that the residence country of the artistes will not allow a tax credit because the artistes was not a partner to the contract which resulted into double taxation .

24.3. **Tax credit problems in triangular situation:** If the artiste company is involved in the agreement between the artiste and the organizer of the performance and the three parties are based in different countries, a tax credit problem can arise for either the artiste or the third party, or even for both. The tax authorities of both the country of residence of the artiste and the artiste company can be unsure which tax treaty the source state applies.

¹ Rijkele Betten and Marco Lombardi, "Article 17(2) of the OECD MTC in Triangular Situations, Does Article 17(2) apply if the Artiste or Sportsman is Resident in a Third State?", 51 Bulletin for International Fiscal Documentation 12 (1997), at 560.

Chapter 25

Specific Issues - Performance in Multiple Geographics Event

25.1. Artistes and sportspersons often perform their activities in different states making it necessary to determine which part of their income is derived from activities exercised in each state. There could be two situations, case one is that an element of income which is closely connected with specific activities exercised by the artistes or sportspersons in a state will be considered to be derived from the activities exercised in that state and in the another case, where the remuneration received by the artistes or sportspersons employed by a team covers various activities to be performed during a period of time and it will be appropriate to allocate that salary or remuneration on the basis of the working days spent in each state in which the artistes or sportspersons has been required under his or her employment contract to perform these activities.

25.2. **Cross-border allocation of income of artistes or sportspersons:** OECD commentary provides the two examples¹ for allocation of actual income in a particular manner between the residence state of artistes or sportspersons and state of performance as follows:

Table18 : Cross-border allocation of income of artistes or sportspersons

Example 1: A self-employed singer earning a fixed amount and a share of ticket sales	Example 2: Cyclist employed by team for fixed annual salary plus bonuses based on results
<p>Allocation of</p> <pre> graph TD A[Allocation of] --> B[Fixed amount of ticket consideration sales] A --> C[Share in] B --> D[on the basis of number of concerts performed in such payment.] C --> E[on the basis of where the concerts generated each state.] </pre>	<p>Allocation of</p> <pre> graph TD A[Allocation of] --> B[Fixed annual salary] A --> C[Share in bonus] B --> D[on the basis of number of working days during which she present in where related activities] C --> E[on the basis of where the days relevant races he or she took place. each state the employment are performed.] </pre>

¹ Para 9.3 of Commentary to Article 17 of OECD MTC, 2017.

Chapter 26

Specific issues - Influencer income

26.1. Influencer primary activity is to upload pictures or videos from their daily lives. Influencers can derive income from sources such as income for the use of, or right to use, image and/or name rights, sponsorship income and merchandizing income.

26.2. There are two school of thought whether the activities of Influencers fall under scope of Article 17 of OECD MTC or not. View one is that Influencers could fall within the scope of Article 17 of the OECD MTC as their activities either participation in public events or their online activities have an entertaining content. However, if the performance of the influencer has only an informative content, it is not an entertaining event and, therefore does not fall within the scope of Article 17 of the OECD MTC.

26.3. Another view is that an influencer mainly promotes products or goods for others, which means that the real entertainment character is only secondary and promoting goods or services does not fall under the definition of entertainment. Therefore, influencer does not fall within the scope of Article 17 of the OECD MTC.

26.4. If influencers do not fall under Article 17 of the OECD MTC, then it is likely that Article 7 of the OECD MTC (as business profit) or Article 12 of OECD MTC and in case of UN MTC, Article 7 (as business profit) or Article 14 (as self-employed earners) or Article 15 (as income from employment) of the UN MTC would apply to them, as appropriate.

26.5. In case of virtual influencer such as Esther Olofsson¹, which does not exist in the reality. The foreign Income derived from her activities will not be for her but for the communications agency, and these will clearly be business profits under Article 7 of the OECD MTC or the UN MTC, as the case may be.

¹ She is the creation of Maarten Reijngensberger of the RauwCC communication agency based out at Rotterdam Area, Netherlands.

Chapter 27

Specific Issues - Production Expenses for a Performance

27.1. When the organizer of a performance agrees to pay production expenses to the agent or manager of the artiste, there are two views whether the payments towards production expenses to the agent of the artist considered as performance income or not which makes a significant difference to the amount of tax due.

27.2. One view is that the value of the services contracted by the performance organizer but to be used by the artiste has to be added to the artiste's fee to compute the taxable performance fee¹ and another view is that payments by the organizer of a performance directly to people other than the artiste are not taxable as performance income, as these expenses are borne on behalf of the organizer and not on behalf of the artiste.²

27.3. The Bombay High Court in the case of Wizcraft International Entertainment Private Limited vs ADIT³ held that (a) agency commission or remuneration; and (b) reimbursement of travel and other expenditure of artistes paid to a non-resident agent are not covered in the provisions of Article 18(2) of the India – UK tax treaty as the services were rendered by outside India by the foreign agent and moreover, income of the foreign agent did not arise from personal activities in India as an artiste or sportsperson.

¹ Germany: Bundesfinanzhof 25 November 2002, I B 69/02.

² Australia: F C of T v. Robinson (1992) 23 ATR 364.

³ 364 ITR 227, 2014 (Bombay).

Part III

Survey Findings and Analysis

Chapter 28

Survey findings

28.1. **Survey findings and analysis:** An analysis of data collected through the primary survey of the questionnaire yielded the following insights which are provided in a tabular format.

28.2. For the present study, section A centered around broadly the existing framework with respect to taxation of non-resident artistes or sportspersons and identify the road map or guidance regarding the tax base, tax rate and form of collecting tax and deduction of expenses in the context of taxation on non-resident artistes or sportspersons. Section A of the questionnaire addresses the following questions along with the existing tax regulations from India's domestic tax law as well as OECD MTC, as appropriate, compare it with the responses as indicated by the survey respondents.

Table 19: Survey response for Section A-Current framework

Question focused during survey	Key features of existing tax regulations	Survey response
1. Whether there should be guidance on Article 17 of the OECD MTC regarding the tax base, tax rate and form of collecting tax are required?	Tax treaties do not provide any mode of computation of income, deduction for expenses, or the rate of tax, it is for a performing state's domestic law to determine the same.	On guidance on Article 17 of OECD MTC regarding the tax base, tax rate and form of collecting tax, refer chart 1 at page 105 of Appendix I. - Majority of the respondents 83% out of which 70% are from big four accounting firms, tax professionals working in industry in India international tax practitioner, agreed that there should be guidance on Article 17 on account

Taxation of Non-Resident Artistes or Sportspersons - Domestically and Internationally

		<p>of the following reasons:</p> <ol style="list-style-type: none"> 1. The terms viz., entertainer, sportsperson, athlete and artiste are not defined and are left open for different interpretation. 2. Neither the term 'sport' nor 'game' is defined and both are left open for different interpretation. 3. Unlike section 195 of the Income-tax Act, 1961 which requires taxes to be withheld on '<i>any sum chargeable to tax at the rates in force</i>', no such discretion is granted to a deductor while deducting taxes under section 194E of the Income-tax Act, 1961. 4. In case of performance in multiple geographies, there could be several challenges in apportioning the different income streams earned by the international performer through the global event. <p>- 11% of the</p>
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		respondents agreed that there should not be guidance on Article 17.
2. Whether there should be specific rule prescribed on deduction of expenses in relation to Article 17 of OECD MTC?	The issue of the deduction of expenses for international performing artistes or sportspersons seems to be ignored by most countries and they do not allow a deduction of the amount of expenses.	<p>On specific rules for deduction of expense under Article 17, refer chart 2 at page 105 of Appendix I.</p> <p>- Almost 78% of the respondents indicated that there should be specific rules prescribed for the deduction of expenses for the income of international performing artistes or sportspersons on account of the following reasons:</p> <ol style="list-style-type: none"> 1. Most of the non-resident artistes or sportspersons have higher expense than earnings and do not make a profit. 2. Some of the countries¹ have put a special allowance for small non-resident artistes or sportspersons. <p>- 22% of the</p>

¹ For example, (a) United Kingdom: GBP 1,000 per artiste or group per show as per Article 4(3)(b) of the Income Tax (Entertainers and Sportsmen) Regulations 1987, (b) Belgium: EUR 400 per artiste per show for the first day and EUR 100 per artiste per show for the following days as per Circulaire 16.10.01/1 (Ci.Rh. 244/536.588, dated 16 October 2001), (c) The Netherlands: EUR 136 per artiste per show plus free reimbursement of food, drinks, travel and accommodation as per Article 35 of the Wet op de loonbelasting 1964 (Wage Tax Act).

Taxation of Non-Resident Artistes or Sportspersons - Domestically and Internationally

		<p>respondents are not agreed with the specific rules prescribed for the deduction of expenses for the income of international performing artistes or sportspersons on account of the following reasons:</p> <ol style="list-style-type: none"> 1. Many countries have made special rules to exclude smaller performance fees from non-resident artistes or sportspersons similar to de-minimis rule as prescribed by OECD commentary on Article 17. 2. Artistes or sportspersons expenses are difficult to determine, especially when they perform in more than one country.
<p>3. Whether there should be specific rule prescribed on gross taxation basis or net income basis in relation to article 17 of OECD MTC?</p>	<p>The OECD mentions the tax credit method to the country of residence of the artiste to eliminate double taxation.²</p>	<p>On specific rules for gross basis taxation or net income basis taxation under Article 17, refer chart 3 at page 105 of Appendix I.</p> <p>- 72% of the respondents opined that</p>

² Para 12 of the Commentary on Article 17 of OECD MTC, 2017.

		<p>there should be specific rules prescribed for gross basis taxation or net income basis taxation for international performing artistes or sportspersons on account of the following reasons:</p> <ol style="list-style-type: none"> 1. Very often it leads to excessive taxation as performance countries do not allow the deduction of expenses whereas the residence country tax only the net profit after expenses from the foreign activities. 2. Difficulty in qualification of foreign tax. 3. Differences in taxable base. 4. Complexity of the system of foreign tax credits. 5. Difficulty arising from the absence of a withholding tax certificate. <p>- 17% of the survey respondents are neutral while 11% disagree with the above statement on account of the following reasons:</p> <ol style="list-style-type: none"> 1. Countries are free to
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Taxation of Non-Resident Artistes or Sportspersons - Domestically and Internationally

		<p>choose the basis of taxation.</p> <p>2. Specific foreign tax credit rules³ are prescribed under India's domestic tax law.</p>
<p>4. Whether the tax exemption (unilaterally exemption) for the major sports events is correct approach?</p>	<p>Few countries⁴ have inserted unilateral exemptions in their national tax legislation to cover non-resident artistes or sportspersons.</p>	<p>Despite the acknowledged importance of taxation on non-resident artistes or sportspersons, refer chart 4 at page 106 of Appendix I.</p> <p>- 35% of the respondents are agree for this statement i.e., adoption of unilaterally exemption for the major events is correct approach by some of the state's due to following reasons:</p> <p>1. It could avoid the potential problems resulting from the Article 17 of OECD MTC.</p> <p>2. It reduces the administrative burden.</p>

³ Rule 128 of Income-tax Rules, 1962, Inserted by the IT (Eighteenth Amendment) Rules, 2016, w.e.f. 01-04-2017.

⁴ (a) New Zealand has unilateral exemption for non-resident entertainers performing in an event under a cultural programme which is sponsored by a government, (b) German provides unilateral exemption from the German income tax for groups of more than four non-resident artistes who are subsidized by the national or local government of their residence country, (c) Norway has a unilateral exemption for artistic performances taking place as part of a cultural exchange, provided that they are publicly funded.

		<p>3. It helps non-resident sportsperson to take off from the risk of double taxation.</p> <p>- However, 30% of the survey respondents are neutral while 35% of the survey respondents disagree with the above statement due to following reasons:</p> <p>3. Some countries exclude amateurs from their domestic tax law.</p> <p>4. Few countries preclude non-profit organization from their domestic tax law for non-resident artistes or sportspersons.</p>
<p>5. Whether the look-through approach in Article 17 measures all possible tax avoidance in connection with performer income for his entertaining activity?</p>	<p>Article 17(2) of the OECD MTC allows a contracting state more scope to 'look through' the tax avoidance structures i.e., when non-resident artistes or sportspersons wanted to utilize their personal companies, mainly based in tax havens, to partially escape from taxation.</p>	<p>- 17% of the respondents indicated that look-through approach in Article 17 not measures all possible tax avoidance in connection with performer income (refer chart 5 at page 106 of Appendix I.) due to following reasons:</p> <p>5. Risk of tax credit problem.</p> <p>6. Risk of excessive taxation where the performer and the</p>

Taxation of Non-Resident Artistes or Sportspersons - Domestically and Internationally

		<p>intermediary are completely independent persons.</p> <ol style="list-style-type: none"> 1. Distortion of international competition. 2. Soaring administrative costs as compared to earnings. <p>- 28% of the survey respondents are neutral while 55% of the survey respondents disagree with the above statement on account of the following reasons:</p> <ol style="list-style-type: none"> 1. It allows a contracting state to look- through the tax avoidance structure used by the non-resident artistes or sportspersons where the income arises in respect of their personal activities and income accrues to a star-company.
<p>6. Whether the existing India's domestic Income-tax framework with respect to the taxation of non-resident artistes or sportspersons are effective?</p>	<ul style="list-style-type: none"> - Provisions of Article 17 of OECD MTC giving the state of performance the taxing right on income derived by non-resident artistes or sportspersons. - The performing state is responsible for determining the 	<p>On the effectiveness of India's domestic Income-tax framework with respect to the taxation of non-resident artistes or sportspersons (refer chart 6 at page 106 of Appendix I.):</p> <ul style="list-style-type: none"> - 50% of the respondents indicated the India's domestic

	<p>relevant criteria regarding the subjective attribution of income which falls within the scope of Article 17.</p>	<p>Income-tax framework are effective on account of the following reasons:</p> <ol style="list-style-type: none"> 1. Compliance conditions are elucidated clearly. 2. Separate CBDT Circular⁵ issued to dealt with certain issues on taxation aspect concerning national and international events and shows for entertainment, sports in India. <p>- 39% of the respondents indicated the India's domestic Income-tax framework are ineffective on account of the following reasons:</p> <ol style="list-style-type: none"> 1. The terms viz., entertainer, sportsperson, athlete and artiste are not defined. 2. Classification issues for certain income earned by non-resident artistes or sportspersons. 3. Difficulties in obtaining a tax clearance certificate⁶ by non-
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⁵ Circular 787 dated 10 February 2000.

⁶ Section 230 of the Income-tax Act, 1961.

Taxation of Non-Resident Artistes or Sportspersons - Domestically and Internationally

		resident performer from the tax authorities prior to departure from India.
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28.3. The next three questions relate to section B of the questionnaire survey and this section B explored the major reasons of tax dispute as well as foresee an increase in tax disputes in relation to taxation of non-resident artistes or sportspersons in the future. The table below highlights the board responses from the survey respondents to each of the section B questions is presented below:

Table 20: Survey response for Section B-Tax disputes

Question focused during survey	Key features of existing tax regulations	Survey response
1. What are the common tax issues that you encounter in Article 17 of OECD MTC?	The problems with the special tax rules for international performing artistes or sportspersons very often arise such as obtaining tax credits in the residence country, non-deductibility of expenses in the country of performance, etc. which can easily lead to double taxation and high administrative expenses.	On common tax issues that encounter under Article 17 of OECD MTC (refer chart 7 at page 107 of Appendix I.): - 39% of the respondents indicated the major tax issues encountered in Article 17 of OECD MTC due to no specific guidance on tax base, tax rate and form of collecting tax has been prescribed. - 22% of respondent indicated that another major issue is taxation base i.e., either gross basis taxation or net income basis taxation follows in the resident state and another 22% of the respondent indicated

Survey findings

		<p>that difficulty to obtain the foreign tax credit is major concern while dealing in Article 17.</p> <ul style="list-style-type: none"> - Further, 6% of the survey respondents indicated other concerns of arranging the withholding tax certificate from the country of performance and remaining 11% of the survey respondents indicated the other reasons such as: <ol style="list-style-type: none"> 1. Foreign tax credit problem. 2. Excessive taxation in the performance country can turn into double taxation.
<p>2. What is the major reason for Article 17 tax disputes in India?</p>	<p>Non-resident artistes or sportspersons derive a considerable part of their income from international performances since such persons enjoy high mobility and their international performing income could easily escape taxation and to conquer this challenge, most of the countries adopted the different regulations in this regard.</p>	<ul style="list-style-type: none"> - 44% of the respondents indicated the major reason for tax disputes in India for Article 17 of OECD MTC due to outdated international tax law and it is not in sync with the modern growing international sports across the world. (refer chart 8 at page 107 of Appendix I). - 28% of respondent opined that another major issue is interpretation issues of tax treaty and another 28% of the respondent indicated that lack of understanding on

Taxation of Non-Resident Artistes or Sportspersons - Domestically and Internationally

		<p>the facts and circumstances of particular case leads to the tax disputes for Article 17 of OECD MTC.</p>
<p>3. Do you foresee an increase in disputes in relation to taxation of non-resident artistes or sportspersons in the future?</p>	<p>Some of the factors due to which surge in future tax disputes with respect to taxation of non-residents or sportspersons arise are divergent interpretation of tax treaties, wrong characterization of income, discrimination, treaty override through domestic law, denial of foreign tax credit, lack of procedural infirmities, etc.</p>	<p>- Majority of the respondents 61% out of which 57% are from big four accounting firms and tax professionals working in industry in India, agreed that there could be increase in tax disputes in India in future with respect to Article 17 of OECD MTC on account of the following reasons (refer chart 9 at page 107 of Appendix I):</p> <ol style="list-style-type: none"> 1. The elimination of double taxation is complicated and incomplete. 2. Administrative infirmities. 3. Definition of specific terms such as entertainer, artiste, sportsperson, etc. used in Article 17 of OECD MTC are not clear and unambiguous. 4. Interpretation issue of Article 17 of OECD MTC. 5. Difference in administrative procedures such as

		<p>computation of taxable income, tax rates, etc.</p> <p>6. Tax rates in the countries of performance too high with additional levy on tax rates such surcharge or cess which may not be creditable in the resident state.</p> <p>- 17% of the survey respondents are unbiased while 22% of the respondents disagreed with the above statement that there should not be surge in tax disputes in future with respect to Article 17 of OECD MTC on account of the following reasons:</p> <ol style="list-style-type: none"> 1. Improvement in the exchange of information between the contracting state. 2. Countries even adopted unilaterally exemption measures to exempt the income of non-resident artistes or sportspersons and not to make use of the existing tax provisions in the tax treaties in relation to international performing artistes or sportspersons.
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Taxation of Non-Resident Artistes or Sportspersons - Domestically and Internationally

28.4. Section C had nine questions centered around the theme to enhance the tax transparency, efficient and effectiveness in administrative procedures in relation to non-resident artistes or sportspersons. The table below highlights the broad responses from the survey respondents to each of the section C questions is presented below:

Table 21: Survey response for Section C-Effectiveness

Question focused during survey	Key features of existing regulations of tax	Survey response
1. Is exchange of information provisions effective with respect to non-resident artistes or sportspersons?	Exchange of information is about attaining global tax co-operation through the execution and implementation of international tax standards and to put an end to bank confidentiality and tackle tax evasion.	<p>- 44% of the respondents agreed that exchange of information provisions is effective on account of the following reasons (refer chart 10 at page 108 of Appendix I):</p> <ol style="list-style-type: none"> 1. Helped to ensure compliance and prevent tax evasion. <p>- 28% of the survey respondents are neutral while another 28% of the respondents disagreed that exchange of information provisions is ineffective due to the following reasons:</p> <ol style="list-style-type: none"> 1. Risk of violation of confidentiality. 2. Risk of breach of privacy right & legal protection of international performing artistes or sportspersons.

Survey findings

		<p>3. Increased the administrative cost and compliance burdens of tax authorities.</p>
<p>2. Whether the exchange of tax rulings under BEPS Action item 5 will result in taxpayers seeking advance rulings less frequently?</p>	<p>The OECD-Forum on harmful tax practices ('FHTP') focused on developing a mechanism for compulsory spontaneous exchange of tax-payer specific rulings in respect of preferential regimes.</p>	<p>On effectiveness of exchange of tax rulings (refer chart 11 at page 108 of Appendix I):</p> <ul style="list-style-type: none"> - 29% of the respondents indicated that they have never opted for advance ruling. - 29% of the respondents agreed that exchange of tax rulings under BEPS Action item 5 could result in taxpayers seeking advance ruling less frequently due to following reasons: <ol style="list-style-type: none"> 1. The obligation to spontaneously exchange applies not only to future rulings, but also to past rulings that relate to earlier years, result in taxpayers seeking advance ruling less frequently. 2. Application of advance rulings are not disposed of in a time-efficient

Taxation of Non-Resident Artists or Sportspersons - Domestically and Internationally

		<p>manner.</p> <p>3. Risk of non-maintaining the confidentiality of information.</p> <p>4. In the absence of transparency can create distortions and may lead to erosion of tax base.</p> <p>- 18% of the survey respondents are unbiased while another 24% of the respondents disagreed with the above statement that exchange of tax rulings under BEPS Action item 5 could results in taxpayers seeking advance ruling less frequently due to following reasons:</p> <p>1. It overcome the challenge of tax uncertainty.</p> <p>2. It resolves complex interface between domestic tax laws and tax treaties for cross-border transactions particularly for non-resident artistes or sportspersons.</p> <p>3. Reference can be taken from the</p>
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		<p>Council of European Union ('EU') with reference to the exchange of information on rulings⁷ which reduces the incentives and advantages leading to harmful tax competition through transparency measures related to tax rulings which is governed by Directive on Administrative Cooperation ('DAC')-3.</p>
<p>3. Whether Non-discrimination provisions particularly withholding taxes for non-resident artistes or sportspersons are effective?</p>	<p>Non-discrimination provisions provides that the tax provision should not provide for differential treatment to the non-residents in similar situations and the objective is rooted in ensuring equality, so that such persons are not treated differently due to their disparate characteristics.</p>	<p>- 36% of the respondents agreed that non-discrimination provisions are effective particularly withholding taxes for non-resident artistes or sportspersons due to the following reasons (refer chart 12 at page 108 of Appendix I):</p> <ol style="list-style-type: none"> 1. Compliance conditions are spelt out clearly. 2. Less complex and reasonable withholding tax rates are provided under

⁷ Council Directive 2011/16.

Taxation of Non-Resident Artistes or Sportspersons - Domestically and Internationally

		<p>the India's domestic tax law.</p> <ul style="list-style-type: none"> - 29% of the survey respondents are neutral while another 35% of the respondents indicated that non-discrimination provisions particularly withholding taxes for non-resident artistes or sportspersons are ineffective due to the following reasons: <ol style="list-style-type: none"> 1. No rules for deduction of expenses. 2. No special refund procedure with extra administrative burden.
<p>4. Are foreign tax credit provisions effective with respect to non-resident artistes or sportspersons?</p>	<ul style="list-style-type: none"> - FTC is allowed on foreign tax paid to the extent of tax payable in India on such income. - Sections 90 and 91 of the Income-tax Act, 1961 deal with FTC's concept. - Section 90 discusses claiming FTC in a case where India has entered into DTAA with alternate country and such DTAA issues for declaring FTC. In dissimilarity, Section 91 	<ul style="list-style-type: none"> - Majority of the respondents 53% agreed that foreign tax credit provisions are not effective with respect to non-resident artistes or sportspersons on account of the following reasons (refer chart 13 at page 109 of Appendix I): <ol style="list-style-type: none"> 1. Foreign tax credit with the per-country method leading to limitations in foreign tax credit for high-tax source countries.

	<p>deals with claiming FTC in a scheme where India has not entered into a DTAA with the country where the income emerges for a taxpayer.</p>	<ol style="list-style-type: none"> 2. There is ambiguity that whether resident state should tax on gross income or only the net income after expenses from the foreign activities. 3. There is no mechanism for carry forward or carry back of unutilized foreign tax credit. 4. Existing foreign tax credit provisions leads to market inefficiencies. 5. In the absence of any detailed guidelines or rules with respect to granting or availment of FTC, uncertainty persists on various aspects such as timing mismatch, treatment of exemptions or deductions, effective or actual payment of taxes and documentary evidence, etc. <p>- 18% of the survey respondents are unprejudiced while 29% of the respondents out of which 22% from tax officers at different level in Indian tax authorities</p>
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Taxation of Non-Resident Artistes or Sportspersons - Domestically and Internationally

		<p>indicated that foreign tax credit provisions are effective with respect to non-resident artistes or sportspersons due to the following reasons:</p> <p>1. To reduce ambiguities in computing and claiming foreign tax credit, the CBDT has notified the Foreign Tax Credit Rules⁸ which laid down broad principles and conditions for computation and claim of taxes paid in foreign countries by resident taxpayers, and procedural conditions associated with availing foreign tax credit in India.</p>
<p>5. How has been experience obtaining lower/nil withholding tax certificate with respect to non-resident artistes or sportspersons?</p>	<p>- In a case where a taxpayer or tax deductor considers that withholding tax rate is greater than the actual tax liability, then such taxpayer could file an application before the tax authority for a lower or nil withholding tax certificate⁹.</p>	<p>On experience in obtaining withholding tax certificates (refer chart 14 at page 109 of Appendix I):</p> <p>- 29% of the respondents indicated that they have never opted for lower withholding tax certificate.</p>

⁸ Rule 128 of the Income-tax Rules, 1961 vide notification no. 54/2016 dated June 27, 2016, effective from April 01, 2017.

⁹ Section 195(2) and Section 197(1) of the Income-tax Act, 1961.

	<p>- Further, the payee could also apply to determine the income chargeable to tax in India.</p>	<p>- 29% of the respondents indicated that this mechanism is ineffective as it is prejudiced in favour of the revenue.</p> <p>- 18% of respondents indicated that obtaining the certificate is cumbersome and time-consuming while 12% of respondents are neutral.</p> <p>- 12% indicated that the process for arranging the lower withholding tax certificate is satisfactory but not smooth.</p>
<p>6. Whether the Global experience with respect to taxation of non-resident artistes or sportspersons should be sourced to see how tax disputes can be resolved cohesively?</p>	<p>Various mechanism such as limited approach, opportunity to carry back or carry forward the excess tax credit, etc. are present in numerous countries providing to be an effective resolution of tax disputes arising with respect to international performing artistes or sportspersons.</p>	<p>- Majority of the respondents 82% out of which 78% are from Big four accounting firms, international tax practitioner and tax professionals working in industry in USA & India, agreed that global experience with respect to taxation of non-resident artistes or sportspersons should be sourced to resolve the tax dispute arising for Article 17 of OECD MTC on account of the following reasons (refer chart 15 at page 109 of Appendix I):</p>

Taxation of Non-Resident Artistes or Sportspersons - Domestically and Internationally

		<ol style="list-style-type: none">1. Taking a cue from 1996 US Model and its Technical Explanation, limited approach of Article 17(2) can be sourced.2. De-minimis rule can also be sourced from 1996 US Model for small international performing artistes or sportspersons which also reduce the administrative burden.3. Taking a cue from United Kingdom and the Netherlands, it is possible to implement a well-functioning system for deduction of expense before the withholding tax is calculated.4. Reference can be taken from The Netherlands¹⁰, Germany¹¹, Belgium¹² who has changed its foreign tax credit method from the per-country method to
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¹⁰ Article 13(2) of the Double Taxation Decree 2001 for non-treaty situations and order of the secretary of state for Finance 20 July 2000 for treaty situations.

¹¹ § 34c of the Income Tax Act (EstG).

¹² Article 155 of Income Tax Code 1992.

		<p>the overall method while Luxembourg¹³ and Switzerland,¹⁴ give their artistes a choice between the overall and the per-country method.</p> <p>5. Global reference can be sourced from the USA¹⁵ and The Netherlands¹⁶ who have introduced the opportunity to carry back or carry forward the excess tax credit.</p> <p>- 6% of the survey respondents are unbiased while 12% of the respondents indicated that there is no need to take reference from the global experience with respect to taxation of non-resident artistes or sportspersons on account of the following reasons:</p> <p>1. Global experience with respect to taxation of non-resident artistes or sportspersons should not be sourced as</p>
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¹³ Xavier Hubaux, "Offsetting of Foreign Taxes for Resident Companies", 39 European Taxation 1 (1999), at 21.

¹⁴ Howard R. Hull, "The Foreign Tax Credit in Switzerland", 56 Bulletin for International Fiscal Documentation 3 (2002), at 124.

¹⁵ § 904(c) of the Internal Revenue Code, 2 years back and 5 years forward.

¹⁶ Articles 13 and 14 of The Double Taxation Decree 2001.

Taxation of Non-Resident Artistes or Sportspersons - Domestically and Internationally

		<p>various countries non-resident artistes or sportspersons rules can also be different.</p> <p>2. Each country has sovereign rights over collecting taxes, sourcing global experience could result into conflict.</p>
<p>7. Lessons that can be learnt from non-tax areas to improve the administrative challenges?</p>	<p>Taking an indication from the non-tax areas which provides comprehensive framework to improve the tax administrative challenges as Tax administration is a very crucial for economic development of nation.</p>	<p>- 71% of the respondents agreed, out of which 18% are strongly agreed that non-tax areas experience can be sourced to improve the administrative challenges in relation to non-resident artistes or sportspersons due to the following reasons (refer chart 16 at page 110 of Appendix I):</p> <p>1. Taking a cue from the bilateral investment treaties, a similar dispute settlement joint committee or ombudsman may be made under the tax treaties for non-resident artistes or sportspersons to approach ombudsman for resolving tax treaty disputes.</p>

		<p>2. Jurisdictions like United States, United Kingdom, The Netherlands and Belgium have also successfully utilized tax mediation as a viable alternative dispute resolution mechanism for tax disputes.¹⁷ Tax mediation can go a long in improving the administrative challenges.</p> <p>3. Learnings from Mexico's PRODECON from non-tax areas can be sourced which is a well-established precedent for taxpayer rights and grievances.</p> <p>4. Taking an indication from Her Majesty's Revenue and Customs ('HMRC')-litigation settlement strategy¹⁸, a similar dispute settlement mechanism may be established in India which provides a comprehensive</p>
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¹⁷ Diana van Hout, Is Mediation the panacea to the Profusion of Tax Disputes?, World Tax Journal, 2019, 45-95.

¹⁸ [Resolving tax disputes: Commentary on the litigation and settlement strategy \(publishing.service.gov.uk\)](https://www.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/404222/resolving-tax-disputes-commentary-on-the-litigation-and-settlement-strategy.pdf).

Taxation of Non-Resident Artistes or Sportspersons - Domestically and Internationally

		<p>framework of principles governing how should Indian tax authorities conduct & conclude tax disputes.</p> <p>- 29% of the survey respondents are unbiased.</p>
<p>8. Whether use of technological tools would be efficient to enhance tax transparency in relation to taxation of non-resident artistes or sportspersons?</p>	<p>- Technology plays a significant role in bringing in more tax transparency in the tax environment and provides strong deterrent to unfair practices on the part of taxpayer.</p> <p>- Technology facilitating and monitoring compliance which enhance the tax transparency.</p>	<p>- Almost 82% of the respondents agreed, out of which 47% strongly agreed that use of technological tools could be efficient to enhance tax transparency in relation to taxation of non-resident artistes or sportspersons due to the following reasons (refer chart 17 at page110 of Appendix I):</p> <ol style="list-style-type: none"> 1. Improve information transparency. 2. Blockchain technology has the potential to simplify compliance and automate transparency of legal arrangements.¹⁹ <p>- 29% of the survey respondents are unbiased and remaining 6% of the survey</p>

¹⁹ Tax Capacity Building for Tomorrow: Digital and Analogue Approaches to Reform, Wilton Park, UK 27-29 November 2017, J Owens.

		<p>respondents indicated that tax transparency is myth due to following reasons:</p> <ol style="list-style-type: none"> 1. Concerns over data privacy. 2. High chances of errors if the wrong algorithms define. 3. Lack of flexibility.
<p>9. Whether use of technological tools would be efficient for dispute resolution in relation to taxation of non-resident artistes or sportspersons?</p>	<p>Technology is fast becoming an indispensable tool for tax authorities to tackle tax evasion and tax fraud, if implemented effectively, substantial progress can be made in dispute resolution, legislative measures, effective enforcement, taxpayer consultation and international co-operation.</p>	<p>- Almost 65% of the respondents out of which 52% are from big four accounting firms and tax professionals working in industry in India agreed that use of technological tools could be efficient for dispute resolution in relation to taxation of non-resident artistes or sportspersons due to the following reasons (refer chart 18 at page 110 of Appendix I):</p> <ol style="list-style-type: none"> 1. Ensure comprehensive documentary evidence to support transaction. 2. Technology is helping tax authorities improve the evaluation of enormous volumes of available data that

Taxation of Non-Resident Artistes or Sportspersons - Domestically and Internationally

		<p>can help identify and address significant compliance risks and upgrade audit selection processes.</p> <p>3. Many tax authorities across the world are now using dedicated, secure portals for communicating with taxpayers and exchanging documents. This efficiency can help accelerate the dispute resolution process overall.</p> <p>- 24% of the survey respondents are unbiased and another 6% of the survey respondents indicated that tax transparency is myth due to following reasons:</p> <p>1. Tax transparency in itself lead to serious additional administrative cost.</p> <p>2. Risk of data privacy.</p> <p>- 4% of the survey respondents are not agreed that use of technological tools could be inefficient for dispute resolution in relation to taxation of non-resident artistes or sportspersons</p>
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		<p>due to the following reasons:</p> <ol style="list-style-type: none"> 1. Lack of adequately staffed teams of professional with tax dispute management experience. 2. The majority of respondents said tax authority is open to mediation, arbitration or other alternative mechanisms for settling disputes resolution.
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28.5. In the final section D, survey respondents were requested to provide responses for the questions covering the future scope of Article 17 of OECD MTC. The table below highlights the board responses from the survey respondents to each of the section D questions is presented below:

Table 22: Survey response for Section D-Future scope

Question focused during survey	Key features of existing tax regulations	Survey response
1. Whether the Article 17 of OECD MTC should be kept it as such or remove/delete?	There are varied views on continuation or deletion of Article 17 of OECD MTC with the removal of Article 17 would take away the risk of double non-taxation and other administrative obstacles and in contrast, few countries wanted to keep the Article 17 as international	<p>On deletion or to keep it as such of Article 17 of OECD MTC (refer chart 19 at page 111 of Appendix I):</p> <ul style="list-style-type: none"> - 53% of the respondents indicated the Article 17 of OECD MTC should retain as such on account of the following reasons: <ol style="list-style-type: none"> 1. Qualification problems can be

Taxation of Non-Resident Artistes or Sportspersons - Domestically and Internationally

	<p>performing high-income earners can easily move their residence to low-tax jurisdictions to escape taxation.</p>	<p>partly resolved by the use of interpretation rule of Article 3(2) of OECD MTC.</p> <p>2. With increased exchange of information over the last two decades, Article 17 of OECD MTC should be kept as such.</p> <p>- Almost 23% of the respondents are neutral and while 24% of the respondents indicated the deletion of Article 17 of OECD MTC due to the following reasons:</p> <p>1. Arguments of tax avoidance and non-compliance by non-resident artistes or sportspersons cannot justify a special tax regime for non-resident artistes or sportspersons.</p> <p>2. The special taxing rules for international performing artistes or sportspersons shows clear signs of inefficiencies in terms of excessive or double taxation, unequal treatment and an unbalanced division of rights and</p>
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		responsibilities between the non-resident artistes or sportspersons and the tax authorities.
2. Whether there is a need to change Article 17 OECD MTC?	With the special tax treatment right of Article 17, the taxation of international performing artistes or sportsperson are not balanced and they need to pay income tax in the country of performance, regardless of the general rules for companies, self-employed persons or employees.	<p>- Majority of the respondents 65% out of which 60% are from big four accounting firms and tax officers at different level in Indian tax authorities, agreed that there should be change in Article 17 of OECD MTC on account of the following reasons (refer chart 20 at page 111 of Appendix I):</p> <ol style="list-style-type: none"> 1. Risk of double taxation as well as qualification problems for non-resident artistes or sportspersons are still exist. 2. Risk of unequal treatment to non-resident artistes or sportspersons because subsidized artistes or sportspersons can receive better tax treatment over others person. 3. Non-resident artistes or sportspersons rules in the various

Taxation of Non-Resident Artistes or Sportspersons - Domestically and Internationally

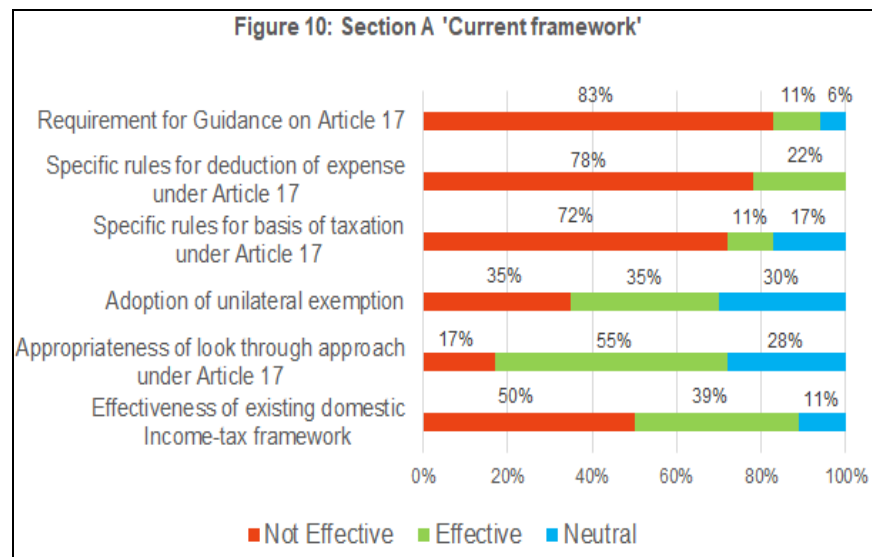
		<p>countries are not clear which resulted into problems in gathering information such as whether his income is taxable in the country of performance, whether he can make use of a unilateral exemption, can deduct his expenses and can file a normal income tax return.</p> <p>- 6% of the survey respondents are neutral while 29% of the respondents agreed that there should not be alternation in Article 17 on account of the following reasons:</p> <ol style="list-style-type: none">1. International performing artistes or sportspersons does not have tax avoidance intentions and live in treaty countries and do report their foreign income in their domestic tax returns.
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Chapter 29

Survey Results and Diagnosis

29.1. The present chapter discusses the results for research findings for the section A, B, C and D of the questionnaire.

29.2. In Section A of the questionnaire, the overall responses from the survey respondents to current framework of taxation of non-resident artistes or sportspersons is presented below in figure 10:



29.3. The questions for section A have been brought together and compared, and the conclusions from the figure 10 leads to the following summary:

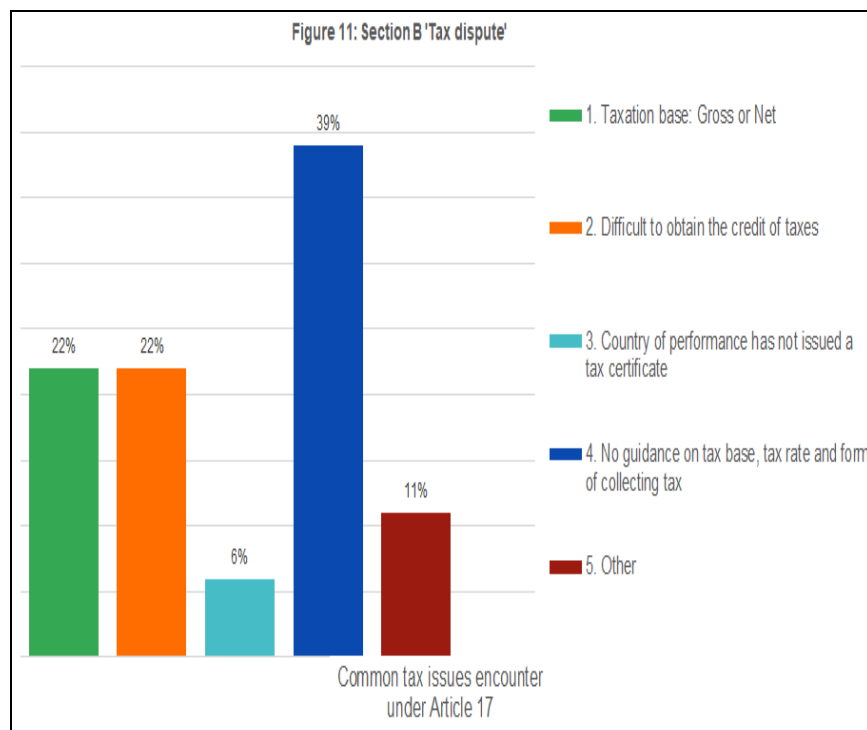
- (1) there is a big concentration at and just above 83% of the survey respondents were agreed that there should be requirements to have guidance regarding the tax base, tax rate and form of collecting tax for application of Article 17;
- (2) rules for deduction of expenses are very different per country and very often, expenses are not deductible in the country of performance. The survey shows that almost 78% of the respondents indicated it as ineffective;

Taxation of Non-Resident Artistes or Sportspersons - Domestically and Internationally

- (3) 72% of the current study respondents indicated that there is clear evidence of inefficiency in the existing rules for basis of taxation which leads to excessive or double taxation;
- (4) the variation in response for adoption of unilateral exemption by few countries for sporting events are not very large and equal percentage of survey responded;
- (5) the survey shows that only 55% of the respondents agreed that existing look-through approach to tackle tax avoidance strategies are constructive while 28% respondents are impartial; and
- (6) it can be seen that 50% of survey respondents indicated it as ineffective, only 39% opined that existing domestic India's Income-tax framework with respect to non-resident artistes or sportspersons are efficacious.

29.4. Overall based on the voting by survey respondents across each of the question of section A, it is evident from figure 10 that current framework of non-resident artistes or sportspersons are not effective which leads to market inefficiencies, excessive or double taxation, unreasonable administrative burden on artistes or sportspersons as well as on the tax administration.

29.5. Section B of the questionnaire was regarding the reasons for current and on future of tax dispute flowing from Article 17 of OECD MTC. Figure 11 below gives the details of our survey.



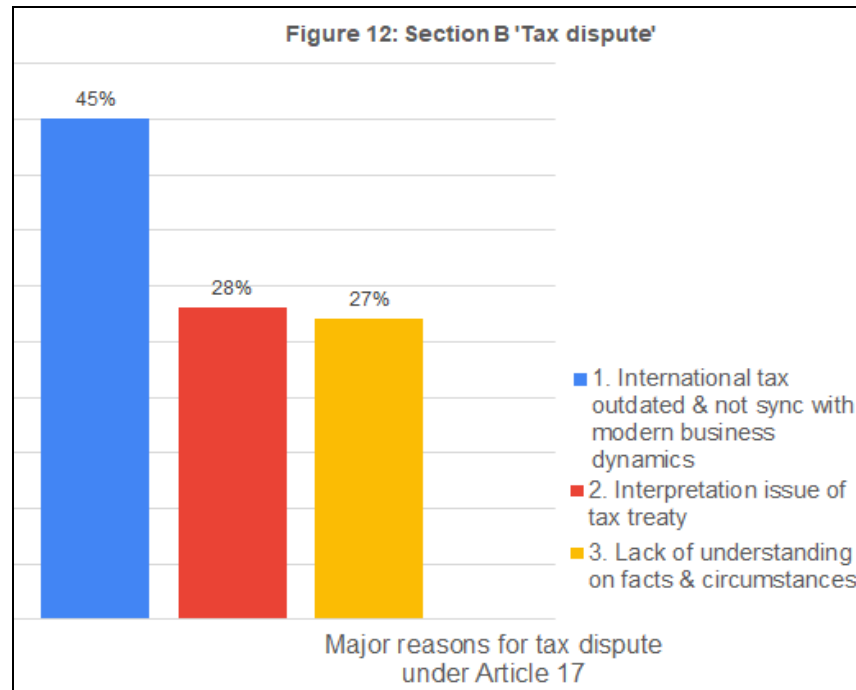
29.6. Respondent's feedback was sought on their experience regarding the tax disputes encountered under Article 17.

29.7. Based on the outcome of the survey on frequent tax issues encounter under Article 17, 45% of the respondents had encountered exercise of tax disputes under Article 17 due to no specific guidance on tax base, tax rate and form of collecting tax has been prescribed, 22% of the respondents indicated that on grey areas of the law with no clarity on taxation base under the India's domestic tax law and another 22% of the respondents faced the biggest issue of obtaining the credit of taxes which leads to tax disputes, 6% of the respondents also encountered the greatest issues faced on arranging the withholding tax certificate from the country of performance, and remaining 11% of the respondents felt that the other major tax issues such as foreign tax credit problems, unequal treatment to non-resident artistes or sportspersons are increasingly experiencing.

29.8. We also asked the respondents about the major reasons for Article 17 of OECD MTC tax disputes in India. Figure 12 below gives the details of our survey. Based on the outcome of the survey, 44% of the respondents felt that international tax law is anachronistic, and it is not in conform with the modern

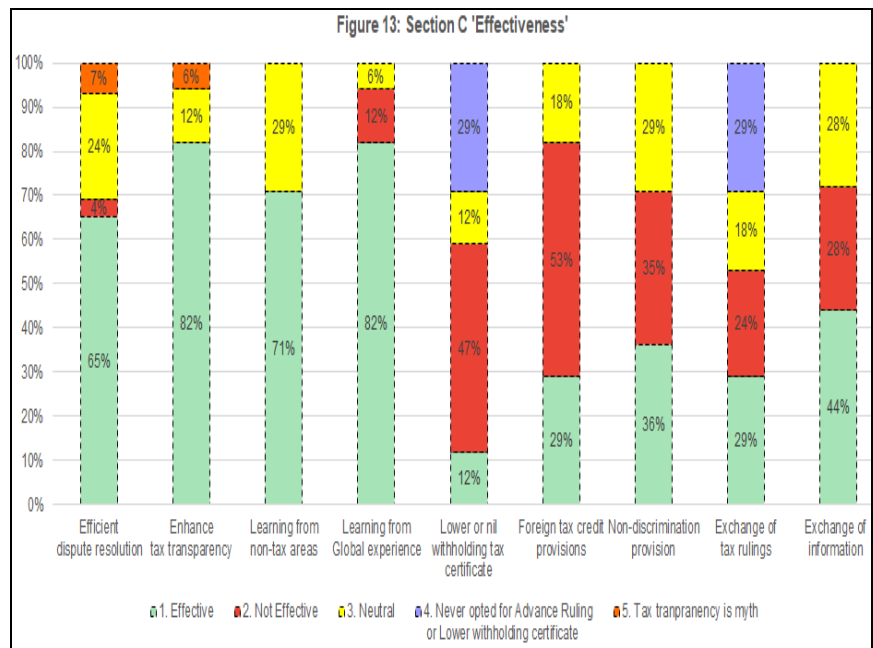
Taxation of Non-Resident Artistes or Sportspersons - Domestically and Internationally

growing international sports across the world, 28% of respondent opined that interpretation issues of Article 17(2) about whether the limited or unlimited approach should be used leads to the tax disputes, and another 28% of the respondent indicated that lack of understanding on the facts and circumstances of particular case accelerate the tax disputes arising from Article 17 of OECD MTC.



29.9. In summary, section B of the questionnaire was clearly confirmed by the clear responses by the survey respondents that existing Article 17 of OECD MTC continue to give rise to tax disputes in the hands of artistes, sportspersons due to bilateral tax treaties and national tax treaties have too many variations. Further, the key terms of Article 17 such as an artiste, sportsperson, an entertainer, etc., are not clearly defined, interpretation issues particularly for Article 17(2) as the text of Article 17(2) is quite broad, problem of qualification also exist, etc.

29.10. Section C of the questionnaire had centered around the theme to enhance the tax transparency, efficiency and effectiveness in administrative procedures in relation to non-resident artistes or sportspersons. Figure 13 below gives the details of our survey.



29.11. We sought respondent's feedback on their experience which is divided into three parameters, viz., (a) effectiveness in administrative procedures, (b) adequate focus on foreign tax credit provisions, and (c) lessons that can be sourced from global experience or non-tax areas.

29.12. The questions for section C have been brought together and compared, and the conclusions from the figure 12 leads to the following summary:

29.13. **Parameter 1 - Effectiveness in administrative procedures:** A vast majority of respondents indicated that India's domestic administrative procedures are effective with respect to taxation of non-resident artistes or sportspersons in terms of various transparency initiatives by tax authorities, increased collaboration among countries resulting in swift exchange of information, far ranging digital technologies shift in tax administration, procedures, etc.

29.14. **Parameter 2- Adequate focus on foreign tax credit provisions:** Nearly 50% of respondents surveyed cite risk of tax credit as their top concern is for the performing artistes or sportspersons which often arises in the country of residence due to the absence of a tax certificate, the difference in taxable base, the qualification of the foreign tax, unavailability of carry forward or carry back of excess foreign tax, etc., which would makes the foreign tax credit provisions ineffective.

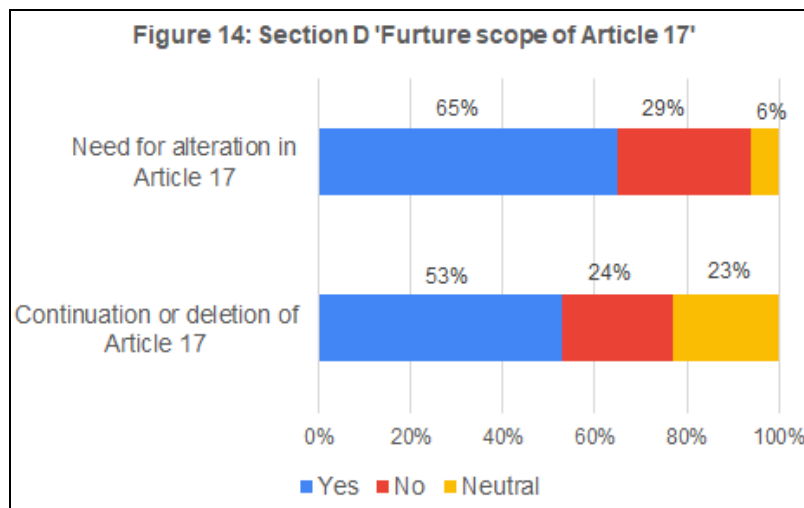
29.15. Parameter 3- Lessons that can be sourced from global experience or non-tax areas: The survey results show that 82% of respondents indicated that global experience with respect to taxation of non-resident artistes or sportspersons should be sourced to make corresponding tax provisions as well as tax administration procedures more adequate, which could help in improving the quality of compliance, minimize conflicts between non-resident artistes or sportspersons and tax authorities.

29.16. Table 23 below gives the details for each of the questions asked in section C of the questionnaire in our survey.

Table 23: Survey findings on effectiveness - Section C of the questionnaire

Parameters	Sub-parameters	Vote of percentage of respondents	Survey findings on effectiveness
Effectiveness in administrative procedures	Exchange of information provisions	44%	Effective
	Exchange of tax rulings provisions	29%	Neutral
	Non-discrimination provisions	36%	Neutral
	Enhance of tax transparency	82%	Effective
	Efficient tax dispute resolution	65%	Effective
Adequate focus on foreign tax credit provisions	Foreign tax credit provisions	53%	Ineffective
	Lower or nil withholding tax certificate	47%	Ineffective
Lessons that can be sourced from global experience or non-tax areas	Reference from global experience	82%	Effective
	Reference from non-tax areas	71%	Effective

29.17. The final section D of the questionnaire was regarding the modification or continuation with the existing scope of Article 17, while also ensuring that the correct taxation on international performing artistes or sportspersons takes place. Respondent's feedback was sought on whether we can go further than just modify or delete Article 17 of OECD MTC and shift the taxing right to other articles of the OECD MTC such as Article 7(business profit) or Article 15(employee artistes) and in case of UN MTC, Article 7(business profit) or Article 14(self-employed artistes) or Article 15(employee artistes), as the case may be.



29.18. Based on the outcome of the survey, majority of the survey respondents, viz. 65%, indicated that there should be change in Article 17 as there is risk of double taxation as well as qualification problems, there is no clear and unambiguous definition of certain key terms used under Article 17, it provides unequal treatment to non-resident artistes or sportspersons as it contains a special tax treatment for a specific group of taxpayers i.e., non-resident artistes or sportsperson. These are neither accurate nor justified. On the other hand, 53% respondents indicated that Article 17 of OECD MTC should retain as such since major limitations and problems following from the Article 17 can be resolved with increased exchange of information including automatic and spontaneous exchange of information and qualification problems can be partly resolved by the use of interpretation rule of Article 3(2) of OECD MTC. Figure 14 above gives the details of the survey.

Part IV
Conclusions and Recommendations

Chapter 30

Conclusions and Recommendations

30.1. This section provides conclusions and recommendations of the current study with respect to special taxing rules for international performing artistes or sportspersons, as derived from Article 17 of the OECD MTC. The recommendations have drawn on various resources, namely primary data collected through a questionnaire, interviews and discussions with key stakeholders, and relevant secondary data captured from various research related to Article 17 of OECD MTC. The recommendations demonstrate the synthesis of all information collated over a short period of six months while conducting research on this topic. However, the recommendations are provided with a disclaimer. Though the recommendations and suggestions here may not necessarily be perfect, the recommendations presumably provide a better framework for taxation of non-resident artistes or sportspersons, and hence these deserve some attention.

30.2. Many of the complications with the taxation of non-resident artistes or sportspersons can be circumvent with measures which are already available and all below recommendations leave the general principle of source taxation in the country of performance intact.

30.3. **Revisiting Article 17(2) from unlimited approach to limited approach:** Unlimited approach under Article 17(2) allows all payments to any third party became taxable in the country of performance. A good option for the improvement of Article 17 of the OECD MTC would be the reintroduction of the limited approach for Article 17(2) as was originally intended at the introduction of the paragraph in 1977.

30.4. **Application of de-minimis rule:** The OECD inserted a minimum threshold option to restrict the application of Article 17 of OECD MTC for the first time in the commentary on Article 17 of the OECD MTC in 2014. The threshold of 15,000 IMF SDRs is not a fixed amount for the OECD, but rather an example. States can incorporate a divergent fixed amount in their tax treaties or can even implement a dynamic definition by which the amount can be adjusted annually. When the threshold is exceeded, the entire fee is taxed in the performance state, which means that the amount does not function as a personal allowance but only as a threshold.

30.5. By way of application of this de-minimis rule into the tax treaties, state

Taxation of Non-Resident Artistes or Sportspersons - Domestically and Internationally

may not tax the performers in the performance state subject to threshold prescribed under the de-minimis rule.

30.6. It is very imperative that the minimum threshold can be used directly at the time of the performance and not only after the end of the tax year in a refund procedure, otherwise, the risk of double taxation would increase instead of being reduced.

30.7. Similar to US and Belgian, India should have a central office¹ for non-resident performers to which an application can be made to know how much of the minimum threshold has already been used in respect of the previous performance and whether it is linked to be exceeded.

30.8. Allow deduction of expenses before the tax is calculated and deducted: Most of countries in the world including India follow the gross basis taxation in respect of income from non-resident artistes or sportspersons. However, few countries such as United States, New Zealand, Australia, Switzerland, and the Netherlands accept the deduction of expenses at the time of the withholding tax. India can also be benefited from the experience of countries such as United States, United Kingdom and the Netherlands, which have set up special tax offices for non-resident artistes, sportspersons and allow the deduction of expenses before the tax is calculated and deducted.

30.9. An option for exemption for an equivalent part of fixed salaries or allow deduction for employment-related expenses: When artistes on monthly payroll then it is very difficult to allocate a portion of that income to specific performance. Most of the time, country where the performance take place just tax the gross performance income without deductions of expenses or allocation between the individual artistes and the company involved which not only leads to excessive taxation but also to tax credit problems.

30.10. The option of an exemption for an equivalent part of fixed salaries would remove this risk of double taxation or similar to Netherlands practice, employees can deduct their employment-related expenses or can have these expenses reimbursed by their employer's tax free.

30.11. Revisiting the grant of foreign tax relief: India follows the ordinary tax credit which limits the compensation for the foreign tax to the tax which is

¹ In the United States, central office i.e., Central Withholding Agreement (CWA) program in Downers Grove, Illinois, which is a suburb of Chicago and in Belgium, central office i.e., Dienst Directie Buitenland in Brussels, which has a special team for non-resident performers.

due on the income in India which very often leads to excessive taxation as many performance countries do not allow the deduction of expenses when the performance income taxed in source country on gross basis while the India tax only the net profit (after expenses) from the foreign activities. Hence, it is recommended that either full tax credit or tax exemption method can be applied with respect to artistes or sportspersons for the elimination of double taxation.

30.12. Reference can be taken from The Netherlands², Germany³, Belgium⁴ who has changed its foreign tax credit method from the per-country method to the overall method while Luxembourg⁵ and Switzerland⁶, give their artistes a choice between the overall and the per-country method.

30.13. Further, global reference can be sourced from the USA⁷ and The Netherlands⁸ who have introduced the opportunity to carry back or carry forward the excess tax credit.

30.14. **Lessons that can be learnt from non-tax areas to improve the administrative challenges:** The most critical learning from the primary survey is that the learnings from non-tax areas can be sourced to improve the administrative challenges following from the Article 17 and the authors recommend that implementation of such programs would lead to a much lower risk of excessive taxation from international performing artistes or sportspersons.

Table 24: Best practices from non-tax areas to improve administrative challenges

Non-tax area	Best practices from non-tax areas to improve administrative challenges
Bilateral investment treaties	A similar dispute settlement joint committee or ombudsman may be made under the tax treaties for non-resident artistes or sportspersons to approach ombudsman for resolving tax treaty disputes.
Tax mediation	Tax mediation can go a long in improving the

² *ibid* supra note at p. 87

³ *ibid* supra note at p. 87

⁴ *ibid* supra note at p. 88

⁵ *ibid* supra note at p. 88

⁶ *ibid* supra note at p. 88

⁷ *ibid* supra note at p. 88

⁸ *ibid* supra note at p. 88

Taxation of Non-Resident Artistes or Sportspersons - Domestically and Internationally

	administrative challenges and jurisdictions like United States, United Kingdom, Netherlands, and Belgium have also successfully utilized tax mediation as a feasible substitute dispute resolution mechanism for tax disputes. ⁹
Mexico's PRODECON	A well-established precedent for taxpayer rights and grievances.
Litigation settlement strategy ¹⁰ of HMRC	A similar dispute settlement mechanism may be established in India which provides a comprehensive framework of principles governing how should Indian tax authorities conduct & conclude tax disputes.

30.15. **Increased exchange of information:** An effective and comprehensive information gathering system is required. Similar to US & Belgian, setting up specific central office¹¹ for non-resident performer for this purpose, which would also help artistes and sportspersons performing worldwide, because it would reduce their administrative expenses arising from different procedures in every state.

30.16. Taking an indication from the Council of European Union ('EU') with reference to the exchange of information on rulings¹² which reduces the incentives and advantages leading to harmful tax competition through transparency measures related to tax rulings which is governed by Directive on Administrative Cooperation ('DAC')-3.

30.17. **Assessment and Collection:** From the investigation point of view, a centralized approach to deal with the liability of non-resident artistes or sportspersons is desirable.

⁹ *ibid* supra note at p. 89

¹⁰ *ibid* supra note at p. 90

¹¹ *ibid*.

¹² *ibid*.

Appendix I

1. Whether there should be guidance on Article 17 of the OECD MTC regarding the tax base, tax rate and form of collecting tax are required?

60 responses

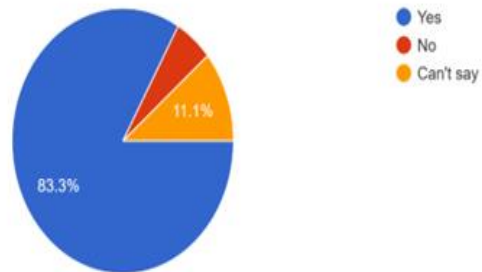


Chart 1: Guidance on Article 17

2. Whether there should be specific rule prescribed on deduction of expenses in relation to article 17 of OECD MTC?

60 responses

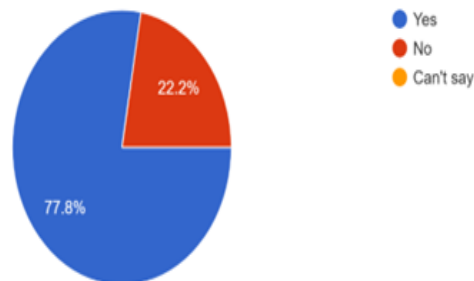


Chart 2: Specific rules for deduction of expense under Article 17

Taxation of Non-Resident Artistes or Sportspersons - Domestically and Internationally

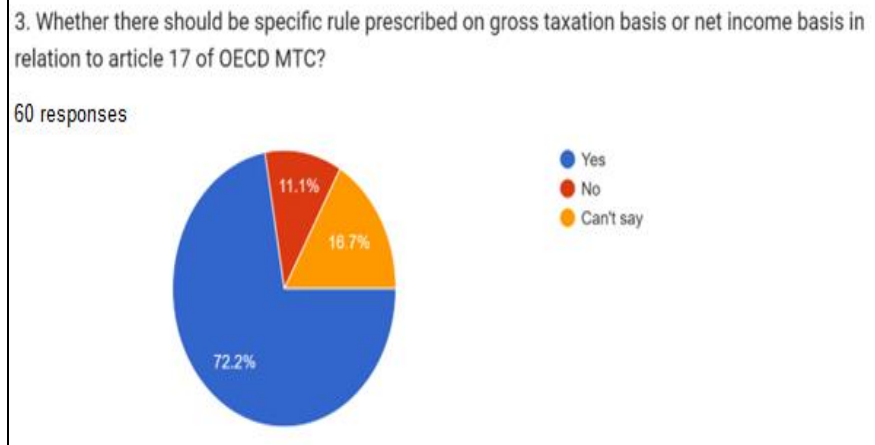


Chart 3: Specific rules for basis of taxation under Article 17

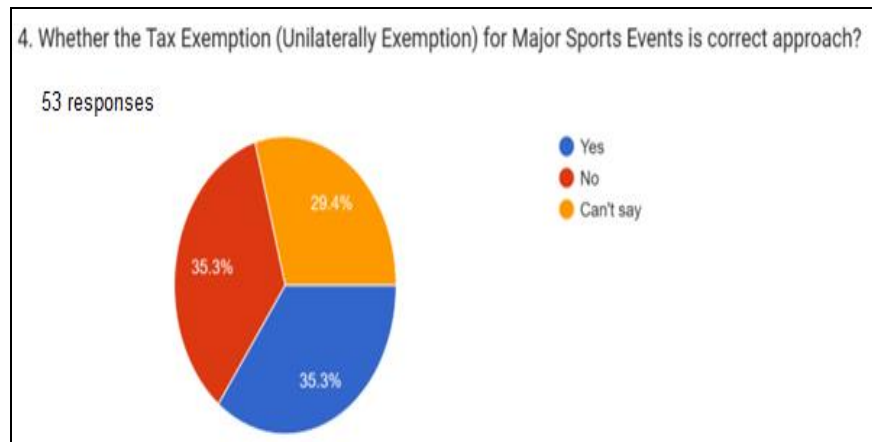


Chart 4: Adoption of unilateral exemption

5. Whether the Look-through approach in Article 17 measures all possible tax avoidance in connection with performer income for his entertaining activity?

58 responses

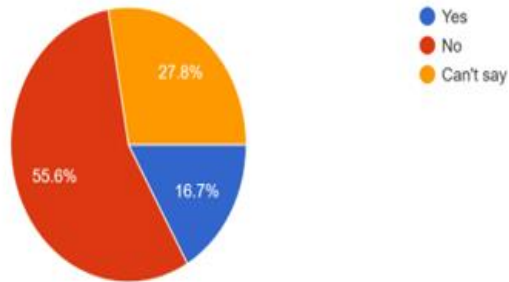


Chart 5: Appropriateness of look through approach under Article 17

6. Whether the existing domestic Income-tax framework with respect to taxation of non-resident sportsmen or sports associations are effective?

60 responses

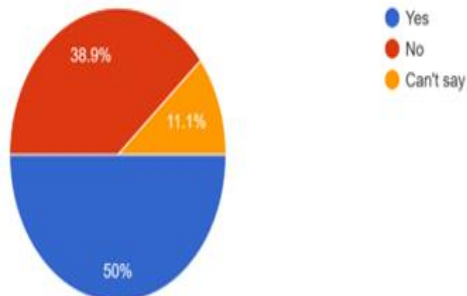


Chart 6: Effectiveness of existing domestic Income-tax framework

Taxation of Non-Resident Artistes or Sportspersons - Domestically and Internationally

7. What are the common tax issues that you encounter in Article 17?

60 responses

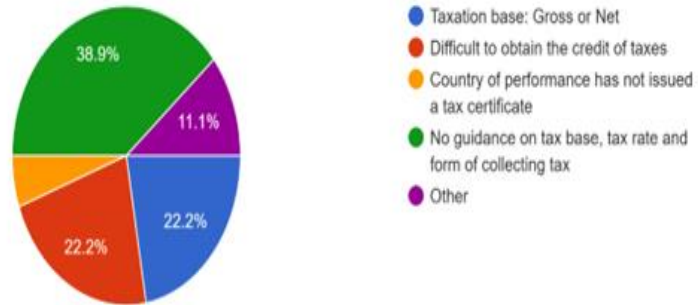


Chart 7: Common tax issues encounter under Article 17

8. What is the major reason for Article 17 tax disputes in India?

60 responses

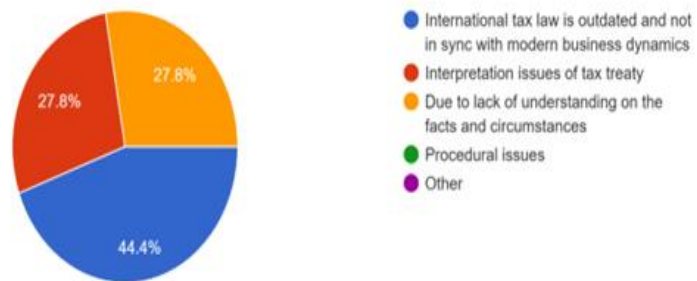


Chart 8: Major reasons for tax dispute under Article 17

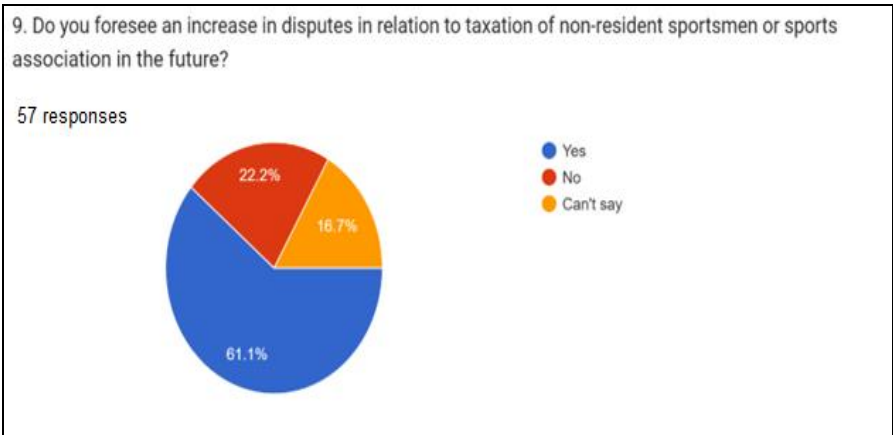


Chart 9: Future tax dispute in relation to Article 17

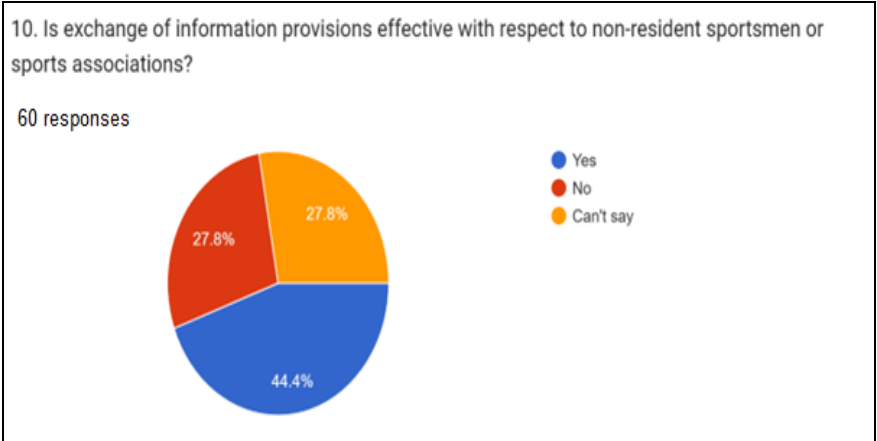


Chart 10: Effectiveness of exchange of information

Taxation of Non-Resident Artistes or Sportspersons - Domestically and Internationally

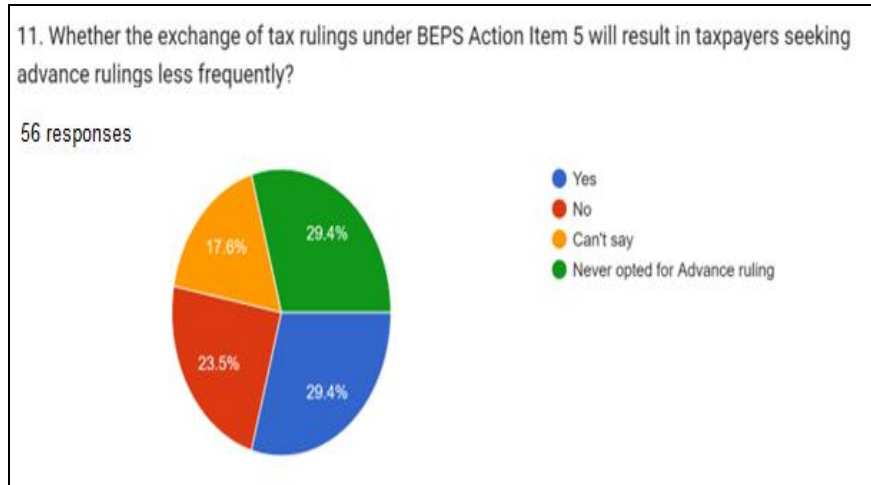


Chart 11: Effectiveness of exchange of tax rulings

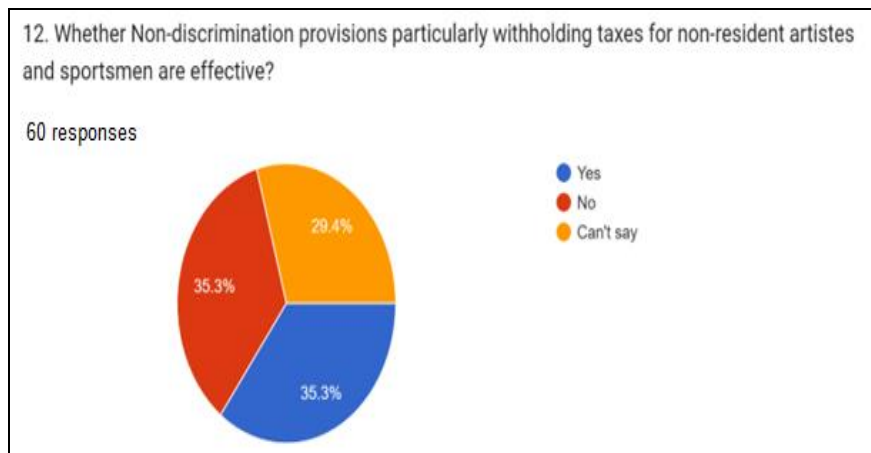


Chart 12: Effectiveness of non-discrimination provision

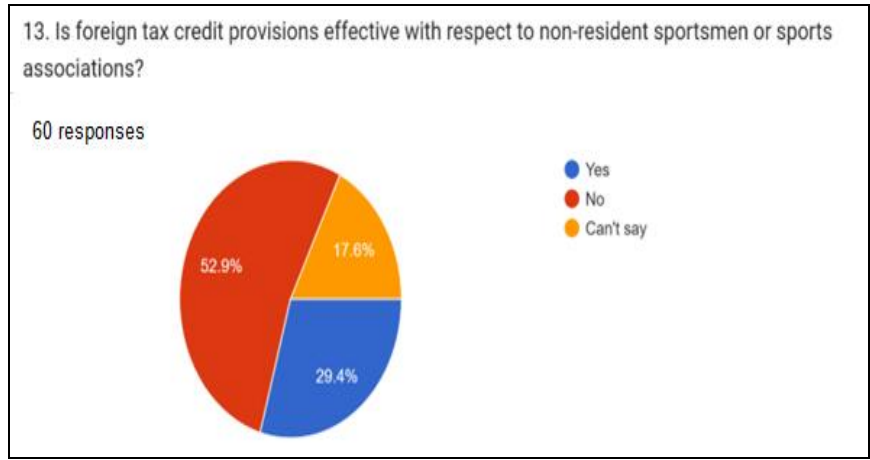


Chart 13: Effectiveness of foreign tax credit provisions

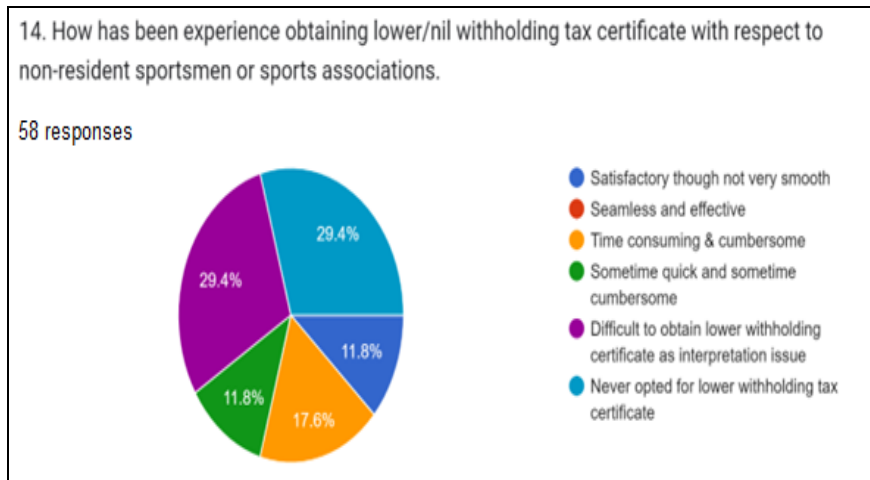


Chart 14: Concerns for obtaining lower or nil withholding tax certificate

Taxation of Non-Resident Artistes or Sportspersons - Domestically and Internationally

15. Whether the Global experience with respect to taxation of non-resident sportsmen or sports association should be sourced to see how tax disputes can be resolved cohesively

55 responses

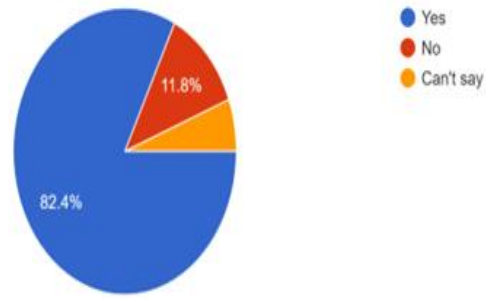


Chart 15: Learning from Global experience to resolve tax dispute for Article 17

16. Lessons that can be learnt from non-tax areas to improve the administrative challenges.

60 responses

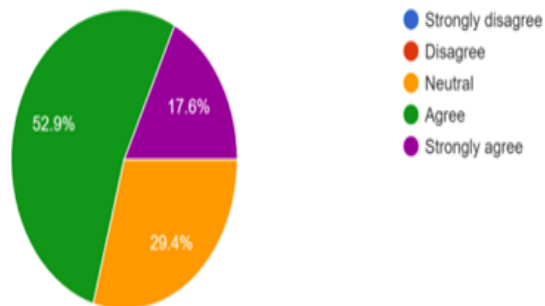


Chart 16: Learning from non-tax areas to improve administrative challenges

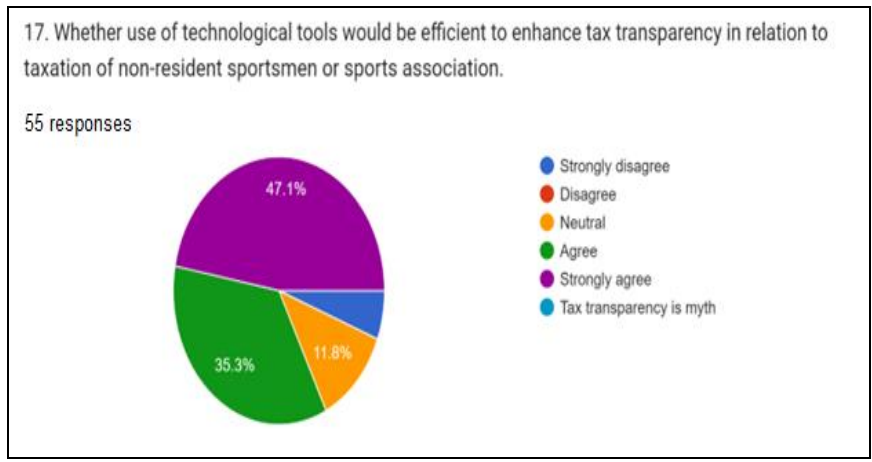


Chart 17: Effectiveness of technological tools to enhance tax transparency

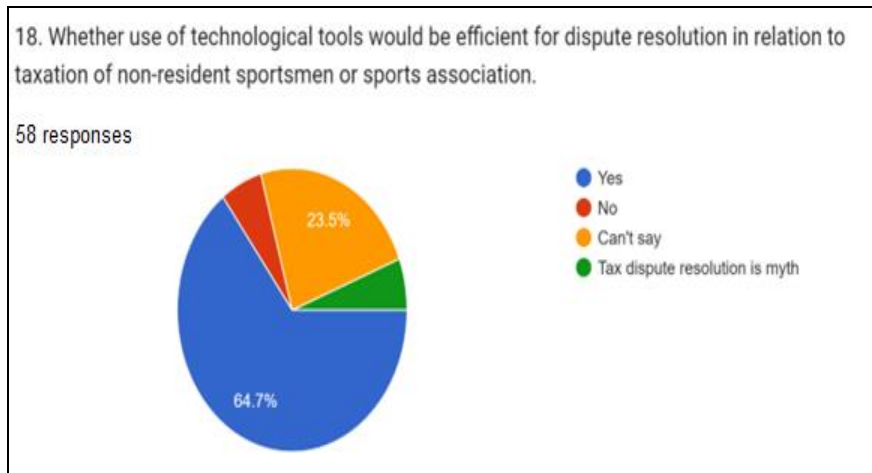


Chart 18: Effectiveness of technological tools for efficient dispute resolution

Taxation of Non-Resident Artistes or Sportspersons - Domestically and Internationally

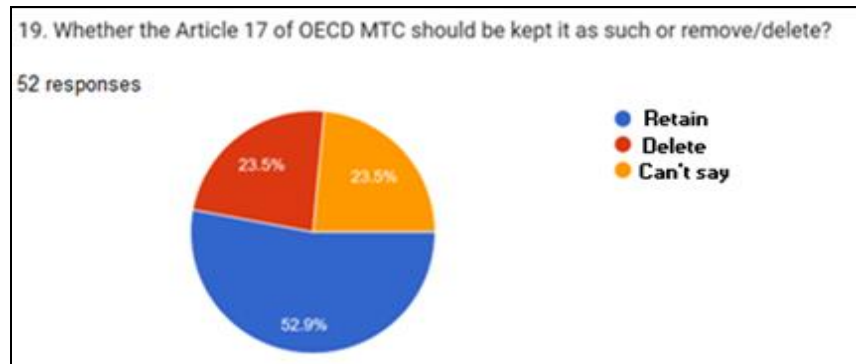


Chart 19: Continuation or deletion of Article 17

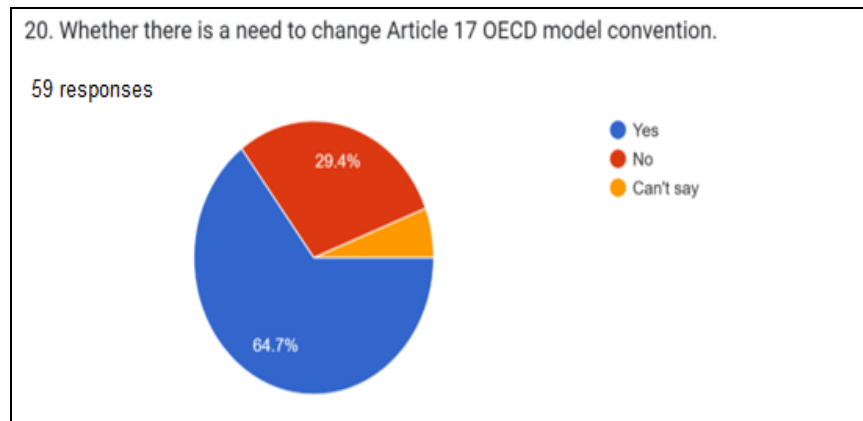


Chart 20: Need for alteration in Article 17

Appendix II

Section	Sl. No.	Question
Section A: Current framework	1	<p>Whether there should be guidance on Article 17 of the OECD MTC regarding the tax base, tax rate and form of collecting tax are required?</p> <p><input type="checkbox"/> Yes</p> <p><input type="checkbox"/> No</p> <p><input type="checkbox"/> Can't say</p>
	2	<p>Whether there should be specific rule prescribed on deduction of expenses in relation to Article 17 of OECD MTC?</p> <p><input type="checkbox"/> Yes</p> <p><input type="checkbox"/> No</p> <p><input type="checkbox"/> Can't say</p>
	3	<p>Whether there should be specific rule prescribed on gross taxation basis or net income basis in relation to Article 17 of OECD MTC?</p> <p><input type="checkbox"/> Yes</p> <p><input type="checkbox"/> No</p> <p><input type="checkbox"/> Can't say</p>
	4	<p>Whether the Tax exemption (unilaterally exemption) for the major sports events is correct approach?</p> <p><input type="checkbox"/> Yes</p> <p><input type="checkbox"/> No</p> <p><input type="checkbox"/> Can't say</p>
	5	<p>Whether the look-through approach in Article 17 measures all possible tax avoidance in connection with performer income for his entertaining activity?</p> <p><input type="checkbox"/> Yes</p> <p><input type="checkbox"/> No</p> <p><input type="checkbox"/> Can't say</p>
	6	<p>Whether the existing India's domestic Income-tax framework with respect to taxation of non-resident artistes or sportspersons are effective?</p> <p><input type="checkbox"/> Yes</p> <p><input type="checkbox"/> No</p> <p><input type="checkbox"/> Can't say</p>

Taxation of Non-Resident Artistes or Sportspersons - Domestically and Internationally

Section	Sl. No.	Question	
Section B: Tax dispute	7	What are the common tax issues that you encounter in Article 17 of OECD MTC? <input type="checkbox"/> Taxation base: Gross or Net <input type="checkbox"/> Difficult to obtain the credit of taxes <input type="checkbox"/> Country of performance has not issued a tax certificate <input type="checkbox"/> No guidance on tax base, tax rate and form of collecting tax <input type="checkbox"/> Other	
	8	What is the major reason for Article 17 of OECD MTC tax disputes in India? <input type="checkbox"/> International tax law is outdated and not in sync with modern business dynamics <input type="checkbox"/> Interpretation issues of tax treaty <input type="checkbox"/> Due to lack of understanding on the facts and circumstances <input type="checkbox"/> Procedural issues <input type="checkbox"/> Other	
	9	Do you foresee an increase in disputes in relation to taxation of non-resident artistes or sportspersons in the future? <input type="checkbox"/> Yes <input type="checkbox"/> No <input type="checkbox"/> Can't say	
	Section C: Effective- ness	10	Is exchange of information provisions effective with respect to non-resident artistes or sportspersons? <input type="checkbox"/> Yes <input type="checkbox"/> No <input type="checkbox"/> Can't say
		11	Whether the exchange of tax rulings under BEPS Action item 5 will result in taxpayers seeking advance rulings less frequently? <input type="checkbox"/> Yes

Section	Sl. No.	Question
Section C: Effective- ness		<input type="checkbox"/> No <input type="checkbox"/> Can't say <input type="checkbox"/> Never opted for Advance ruling
	12	Whether non-discrimination provisions particularly withholding taxes for non-resident artistes or sportspersons are effective? <input type="checkbox"/> Yes <input type="checkbox"/> No <input type="checkbox"/> Can't say
	13	Are foreign tax credit provisions effective with respect to non-resident artistes or sportspersons? <input type="checkbox"/> Yes <input type="checkbox"/> No <input type="checkbox"/> Can't say
	14	How has been experience obtaining lower or nil withholding tax certificate with respect to non-resident artistes or sportspersons? <input type="checkbox"/> Satisfactory though not very smooth <input type="checkbox"/> Seamless and effective <input type="checkbox"/> Time consuming & cumbersome <input type="checkbox"/> Sometime quick and sometime cumbersome <input type="checkbox"/> Difficult to obtain lower withholding certificate as interpretation issue <input type="checkbox"/> Never opted for lower withholding tax certificate
	15	Whether the global experience with respect to taxation of non-resident artistes or sportspersons should be sourced to see how tax disputes can be resolved cohesively? <input type="checkbox"/> Yes <input type="checkbox"/> No <input type="checkbox"/> Can't say

Taxation of Non-Resident Artistes or Sportspersons - Domestically and Internationally

Section	Sl. No.	Question
	16	<p>Lessons that can be learnt from non-tax areas to improve the administrative challenges?</p> <p><input type="checkbox"/> Yes</p> <p><input type="checkbox"/> No</p> <p><input type="checkbox"/> Can't say</p>
Section C: Effective- ness	17	<p>Whether use of technological tools would be efficient to enhance tax transparency in relation to taxation of non-resident artistes or sportspersons?</p> <p><input type="checkbox"/> Yes</p> <p><input type="checkbox"/> No</p> <p><input type="checkbox"/> Can't say</p> <p><input type="checkbox"/> Tax transparency is myth</p>
	18	<p>Whether use of technological tools would be efficient for dispute resolution in relation to taxation of non-resident artistes or sportspersons?</p> <p><input type="checkbox"/> Yes</p> <p><input type="checkbox"/> No</p> <p><input type="checkbox"/> Can't say</p> <p><input type="checkbox"/> Tax dispute resolution is myth</p>
Section D: Future scope	19	<p>Whether the Article 17 of OECD MTC should be kept it as such or remove/delete?</p> <p><input type="checkbox"/> Retain</p> <p><input type="checkbox"/> Delete</p> <p><input type="checkbox"/> Can't say</p>
	20	<p>Whether there is a need to change Article 17 OECD MTC?</p> <p><input type="checkbox"/> Yes</p> <p><input type="checkbox"/> No</p> <p><input type="checkbox"/> Can't say</p>