



**Discussion on Cross border
Taxation of Sportsperson –
Article 17** IFA India - SRC Chennai

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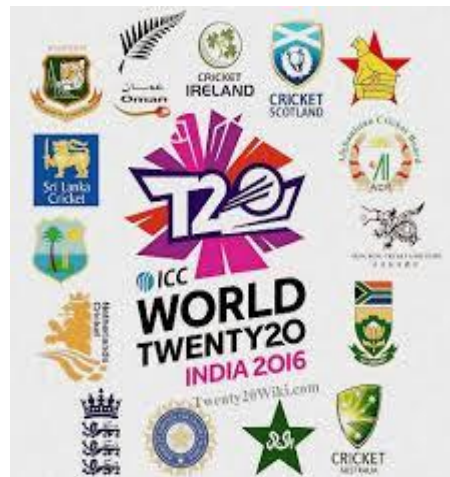
In headlines for a different reason!!

- Lionel Messi – Argentine footballer
- Sarah Ferguson – UK Formula E driver
- Nick Faldo – UK professional golfer
- Gianni Infantino – FIFA President
- Nico Rosberg - Formula 1 Racer
- Michel Platini – UEFA PAST President
- Jarno Trulli – Italian Formula One Driver
- Luca Montezomolo – Former Ferrari President
- Gabriel Heinze – Argentine footballer former United.
- Tomas Berdych – Czech Tennis player
- Neymar – Brazilian Football star
- Lewis Hamilton – F1 racer

Significance of having a robust Sports economy/Sports sector

- Sports sector is estimated to be USD 480-620 billion.
- Contributes 1-5% of GDP of various countries
- In UK alone sports industry supports 400,000 jobs.
- India 29.3% population in the age of 0-14 years.
- National Sports Development Bill recognises 66 sports
- Sports industry contains sports tourism, sporting goods, sports apparel, sports marketing firms etc.
- Lack of medal winners in Olympic Games
- Economy apart, increase in obesity is alarming!!
- **Areas for improvement : Sports governance, leagues and tournaments, performance incentives, sports infrastructure and more importantly Direct tax**

Significance for Article 17 –Sporting Events in India



Taxability under Income-tax Act, 1961

Section 115BBA

Taxation of sportsmen/ sports association

- Section 115BBA taxes the following income of non-resident (not citizen of India) athletes and sportsmen at 20%* on a gross basis
 - Participation in any game or sport
 - Advertisement
 - Contribution of articles relating to any game or sport in India in newspapers, magazines or journals
- Section 115BBA also taxes the amount guaranteed to non-resident sports association or institution in relation to any game in India at 20%* on gross basis
- No requirement to file the return of income if:
 - Income of sportsmen (or sports association/ institution) comprises only of those mentioned above and
 - Appropriate taxes are withheld at source

* Plus applicable surcharge and education cess

Taxability under Income-tax Act, 1961



Taxation of artistes/ entertainers

- Income earned by a non-resident (not citizen of India) entertainer also covered under section 115BBA (vide Union Budget 2012)
- Erstwhile provisions
 - No specific provision in respect of taxability of non-resident artists and hence, the general provisions apply
 - Consideration for income arising from performance in India taxable on net basis

Withholding tax

- Section 194E provides for withholding tax on income referred to in section 115BBA
- Section 195 applicable in other cases

- CBDT Circular 787 dated 10 February 2000 providing guidelines for taxation of income of artists, entertainers, sportsmen, etc from international/ national/ local events

Article 17 – Artistes and Sportsperson

- International Sporting events. in India.
- Various non-Indian films such as Zero Dark 30, Slumdog Millionaire, A Mighty Heart being shot in India
- Concerts by non-resident entertainers happening in India – Metallica, Lady Gaga, Katy Perry etc
- Indian sportsmen and entertainers performing in various parts of the World.
- Evolution - Special rules for taxation of ‘artistes and sportsmen’ first appeared publicly in 1959*
- Carried over as Article 17 in 1963 OECD Model ‘*to avoid the practical difficulties*’ in taxation of international performing artistes and athletes
- Article 17(2) added in 1977 to tax in source country, remuneration earned by another person (not the artiste or sportsman himself) for performance of artistes/ sportsmen
 - This was meant to counteract tax avoidance schemes using “loan-out” or “star” companies, normally registered in low tax jurisdictions

Article 17(1)

OECD Model

- Article 17(1) reads as follows:
- *“Notwithstanding the provisions of Article 7 and 15, income derived by a resident of a Contracting State as an entertainer, such as a theatre, motion picture, radio or television artiste, or a musician, or as a sportsman, from his personal activities as such exercised in the other Contracting State, may be taxed in that other State”*
- Non-obstante clause
 - Exception to normal provision contained in Article 7 (business income) and Article 15 (dependent personal services)
- No major difference between OECD Model and UN Model

Article 17(1) - Overview



- Article 17(1) applies to a person if:
 - He is a resident of a Contracting State
 - He is an entertainer or a sportsman
 - He derives income as an entertainer or sportsman from personal activities
 - Such *personal activities are exercised in the other Contracting State
- If all the above conditions are satisfied, income derived through such activities ‘may be taxed’ in the source country
- Personal activities connote activities rendered by an individual in the capacity of an entertainer or a sportsman.

Article 17(1) - Overview



- Article 17(1) applies:
 - To an entertainer or sportsman who performs services on his own behalf or on behalf of another person, either as an employee or in any other manner
 - Irrespective of whether the entertainer performs individually or as a member of a troupe
 - Irrespective of who employs the artiste
 - Irrespective of the smallness of quantum
 - Irrespective of duration of the visit
 - Irrespective of the timing of payment for services
 - Irrespective of who pays the income

Article 17(1) – Interpretation issues

Case Study 1 :

Mr Stokes is an English Cricket player and a UK tax resident. For any income rendered from his personal activity from India, Mr Stokes wants to determine whether Article 17 of the India-UK DTAA be eligible for him?

UK -ARTICLE 18

ARTISTES AND ATHLETES

- 1. Notwithstanding the provisions of Articles 15 (Independent personal services) and 16 (Dependent personal services) of this Convention, income derived by entertainers (such as stage, motion picture, radio or television artistes and musicians) or **athletes**, from their personal activities as such may be taxed in the Contracting State in which these activities are exercised.

Article 17(1) – Interpretation issues

- 1992, OECD Report titled “The Taxation of Income derived from entertainment, artistic and sporting activities”. The said Report had observed as under:

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

- Klaus Vogel Commentary – The change is clarificatory in nature.

Assuming Mr Stokes is a Chess player, will he still be eligible to claim shelter under Article 17 of the DTAA as a sportsperson?

- *“a game or an activity; especially one involving physical exercise” (Chambers Dictionary)*
- Para 71 of OECD Report titled “The Taxation of Income derived from Entertainment, Artistic & Sporting Activities – Including Bridge

Article 17(1) – Definition of Sportsmen



- **‘Sportsmen’ – Meaning?**
 - ‘Sportsmen’ not defined exhaustively but is not restricted to participants of traditional events such as runners, jumpers, swimmers
 - Presence of entertainment character of significance
 - A sportsman also includes golfers, jockeys, footballers, cricketer, tennis players, racing drivers
- This Article also applies to income from other activities which are usually regarded as of an entertainment character, such as billiards, snooker, chess and bridge.

Article 17(1) – Personal Activities



- What are personal activities of an entertainer or sportsman as such?
 - Must be a performance;
 - Performance should be in public, i.e. directly before an audience or recorded and later reproduced for an audience;
 - Predominant element of the performance must be artistic and entertaining (level is irrelevant);
 - Performer by himself / herself should be the direct or indirect reason why the audience is listening to or watching the performance
- Predominantly performing nature? – Article 17 would apply
- Performing element negligible? – entire income out of Article 17
- In other cases – Apportionment, as necessary

Article 17(1) – Interpretation issues

Case Study 2 :

Mr Kieron Pollard, is a professional cricket player and a tax resident of Trinidad and Tobago. Pollard is currently injured and not fit to play. However on invitation of a sports channel, he was in India as a commentator. Whether Article 17 as per India-T&T DTAA will trigger for the income received in India. Will it be treated as a personal activity?

Case Study 3 : same as 2, except that instead of Pollard it is Mr Brett Lee, retired Australian Cricketer who is invited as the commentator?

Case Study 4: Lance Armstrong a professional road racing cyclist comes to India for promoting cancer awareness for which he was paid some money, whether Article 17 of India –USA DTAA trigger?

Case Study 5: Mr David Gower , English Cricketer is in Chennai, India to deliver KS Narayanan Memorial lecture. Whether payment for the same will trigger Article 17(1)

•* illustrative

Article 17(1) – Interpretation issues

OECD MC 2014 Commentary

Para 9.1 “Merely reporting or commenting on an entertainment or sports event in which the reporter does not himself participate is not an activity of an entertainer or sportsperson acting as such. Thus, for instance, 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.”

India’s observation to the above: India does not agree to the above view,

India does not agree with the third example in paragraph 9.1, related to reporting or commenting activities during the broadcasting of an entertainment or sports event, as it considers that such activities are covered by Article 17.

Article 17(1) – Income streams



- Performance based income (participation fees/awards/prize money)
- Remuneration for preparation and training
- Income generated from promotional activities of the entertainer/sportsperson during his presence in source country
- Income connected with performance such as awards
- Advertising and sponsorship fee directly or indirectly related to performance in source country
- Image Rights
- Payments for participation in Interviews, press conferences etc.
- Payments received upon cancellation of a performance are not taxable under Article 17(1)
- Income from restrictive covenants –to do or not to do something

Article 17(2) – Income accruing to other persons

Paragraph 2 deals with situations where income from their activities accrues to other persons

OECD Model – Unlimited Approach – US is against it.

- Article 17(2) reads as follows:
 - *“Where income in respect of personal activities exercised by an entertainer or a sportsman in his capacity as such accrues not to the entertainer or sportsman himself but to another person, that income may, notwithstanding the provisions of Articles 7 and 15, be taxed in the Contracting State in which the activities of the entertainer or sportsman are exercised.”*
- No major difference between OECD Model and UN Model
- Article 17(2) applies if:
 - Income arises in respect of personal activities Such activities are exercised by an entertainer or a sportsman in his capacity as such; and
 - Income accrues to another person and not to the entertainer or sportsperson himself

Article 17(2) – Income Accruing to other person

Three situations:

- Management company receives income for appearance of a group (not constituted as a legal entity)
- Team, troupe, orchestra, etc., constituted as a legal entity
 - Income for performances may be paid to entity
 - Individual members liable to tax under Paragraph 1
 - Profit element of legal entity under Paragraph 2
- Entertainer / Sportsman Company (Neither as personal activities or business income)
 - Taxable under Paragraph 2 (Individual and Star Company may be residents of different States)
 - If Country P Looks Through, taxable under Paragraph 1 ‘Star companies’ covered
 - Even if the star company is a tax resident of a third country

Practical Scenarios –

Advertisement income - Wearing a sponsor's logo

Case Study 6

- Mr ABC is a popular English Cricketer. An Indian Co. I Co signs an agreement where in Mr ABC would use the logo of I co in his Bat, Gloves and Leg Guard wherever he plays Cricket matches (worldwide) and also during training period. In this regards, I co would like to make a lump-sum consideration of INR 1 crore to ABC upon signing of the contract. Whether any withholding of taxes to be made by I Co?
- Instead of Mr ABC, ABC's star company ABC Ltd enters into the contract with I Co. Will it have any tax impact?

Points for consideration

- Section 115BBA, Section 195, Section 194E of the Income Tax Act.
- Article 17(1) and 17(2) of the India –UK DTAA.

Practical Scenarios – Slight Variation

Advertisement Income- Wearing a sponsor's logo



Case Study 7

- Mr Zubin Mehta is a resident of US citizen and a world renowned Music Conductor. M/s IFA Ltd , Netherlands entity enters into a contract with Zubin, wherein he is required to wear the Jacket which has IFA's logo in it for all his concert and press conferences. He is paid 10 Lakh Euros lump sum consideration for a year.
- Mr Zubin conducts a concert in Chennai, India and he also attends a press conference after the concert wearing the jacket with IFA's logo.
- What is the income that is chargeable from India perspective?

Practical Scenarios – Slight Variation

Advertisement Income- Wearing a sponsor's logo

Circular No. 787 dated 10 February 2000

222. Guidelines regarding taxation of income of artists, entertainers, sportsmen, etc., from international/national/ local events.

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- ***v) The portion of endorsement fees (for launch or promotion of products, etc.) which relates to artist's performance in India shall be 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".***

Sponsorship income - Wearing a sponsor's logo

OECD Commentary Para 9 -2014 MC

*9....Article 17 will apply to advertising or sponsorship income, etc. **which has a close connection** with a performance in a given State (e.g. payments made to a tennis player for wearing a sponsor's logo, trade mark or trade name on his tennis shirt during a match). Such a close connection may be evident from contractual arrangements which relate to participation in named events or a number of unspecified events; in the latter case, a Contracting State in which one or more of these events take place may tax a proportion of the relevant advertising or sponsorship income*

Income streams -Interpretative issues



Imaging Rights

Case Study 8

- Mr ABC is a popular English Cricketer. An Indian Co. I Co signs an agreement with ABC Ltd, (star company) which manages the personality rights of Mr ABC. As per the agreement, I Co will use Mr ABC's image, signatures etc., while promoting its brand and its products globally.
- In this regards, I co would like to make a lump-sum consideration of INR 2 crore to ABC Ltd upon signing of the contract. Whether any withholding of taxes to be made by I Co?.

A handwritten signature in black ink, which appears to be 'Sachin Tendulkar', written in a cursive style.



Income streams - Interpretative issues

Image Rights

- The term ***“image rights”**** means the ability of a sportsperson to exclusively control the commercial use of his name, physical/pictorial image, reputation, identity, voice, personality, signature, initials or nickname in advertisements, marketing and all other forms of media. Further these rights have value because they can be licensed to a third party for commercial exploitation in the marketplace.
- Imaging rights are akin to personality rights. Personality rights are either protected as right to privacy or they can be protected as the property of a persona
- Possible to contend it as Royalty

* *Cloete et al Introduction to Sports Law in South Africa (2005) 76*

Income streams – Practical Scenarios



Case Study 9

- **Mr Palti a US tax resident and a professional Formula 1 racer is contracted for \$10,000 by a UK Company 'Force Escape' to participate in a car racing championship conducted by an Indian Race Association. The car races were held at Dubai, Bahrain, Sharjah and Chennai (spread over a period of two months) . Chennai was the venue for the last race.**
- **Force Escape emerged as the winner of the Championship Race and Prize money for winning the same is INR 5 crores.**
- **Mr Palti was awarded the best car racer and accordingly received a prize money of INR 50 lakhs.**
- **Mr Palti made a guest appearance in a song for a 'Tamil' movie , for which he was paid INR 5 lakhs.**
- **Taxability for Mr Palti and Force Escpae.**

Income streams – Practical Scenarios

Taxability of Force Escape

- Prize money –whether Article 7 or Article 17(2)? – OECD Commentary Para 11.2
- ***Paragraph 2 does not apply, however, to 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 certain period. In such a case, the prize money is not paid in consideration for the personal activities of the jockey or race car driver but in consideration for the activities related to the ownership and training of the horse or the design, construction, ownership and maintenance of the car. Such prize money is not derived from the personal activities of the jockey or race car driver and is not covered by Article 17. Clearly, however, if the owner or team receives a payment in consideration for the personal activities of the jockey or race car driver, that income may be taxed in the hands of the jockey or race car driver under paragraph 1 (see paragraph 7 above) – India does not agree to this view.***
- **Applicability of Section 115BBA?**
- **Taxable in India on net basis –Normal provisions**

Article 17(3)

- Article 17(3) provides for an exception to the general rules of Article 17 for performances that are substantially supported by public funds
- 1992 OECD Commentary on Article 17 extended this exception and provided a draft as follows:

“The provisions of paragraph 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”

- India has Article 17(3) in most of its DTAAAs

Article 17(3)

Case Study 10



- Magnus Carlsen, a Norway Chess Player was crowned the World Chess Champion in an event in Chennai in 2014. The said title match was sponsored by the Tamil Nadu Government.
- Magnus Carlsen received a cheque of Rs 10 Crores as prize money.
- Whether any withholding taxes to be made on this?

Way forward to bring it to a level playing field



- Practical Ground Realities are harsh.
- Netherlands has given up the right to tax foreign sportsperson .
- Clarity with regards to Applicability of Article 17 for imaging rights, connection with performance , attribution of income etc.
- Issues during Triangular treaty scenarios.
- Consider removing Article 17 itself.
- India needs a separate code for sports matters, if not on all branches atleast on taxation.

Real (Tax) Champions!!!!





THANK YOU