European Union/Netherlands

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Scorpio and the Netherlands: Major Changes in Artiste and Sportsman Taxation in the European Union

Contents

1. Introduction

There are currently two important developments regarding the taxation of international performing artistes and sportsmen. First, the decision of the European Court of Justice (ECJ) in the case of *FKP Scorpio Konzertproduktionen GmbH (Scorpio)*[1] means that many Member States will have to change their gross taxation of non-resident artistes and sportsmen and accept the deduction of expenses. This will improve the tax position of most artistes and sportsmen and reduces the risk of double taxation. Second, the Netherlands has decided to relinquish its taxing right in respect of non-resident artistes and sportsmen. The Netherlands believes that the tax revenue involved is too little and the administrative expenses are too high to justify the special tax treatment from this small group of taxpayers. Rather, the Netherlands prefers that these individuals should pay normal tax in their state of residence. This option is, however, only available for artistes and sportsmen living in a state with which the Netherlands has concluded a tax treaty.

Accordingly, in this article, the authors first discuss the special taxing rules for artistes and sportsmen and their effects (see 2. and 3.). They then proceed to consider the implications of the ECJ's judgment in the *Scorpio* case (see 4. and 5.). Finally, the authors discuss the reasons behind the decision of the Netherlands to end the taxation of non-resident artistes and sportsmen (see 6.).

2. Art. 17 of the OECD Model

The taxation of international performing artistes and sportsmen is a small, but specialized topic in international taxation. Most states in the world levy a withholding tax on the performance fees of non-resident artistes and sportsmen, even if they are self-employed, their fees are business income, and they do not have a permanent establishment in the state of performance. This practice is confirmed by the OECD Model Convention (hereinafter: the OECD Model), which devotes a special clause (Art. 17) to artistes and sportsmen. The OECD believes that taxation at source is a reasonable measure to ensure that every artiste and sportsman pays their share of their earnings to the relevant government. Almost all of the Member countries of the OECD follow this instruction, both in their tax treaties and in their national legislation. Due to the fact that Art. 17 of the OECD Model has been incorporated into the UN Model Convention, many other states have also included the special artiste and sportsman provision in their tax treaties.

As artistes and sportsmen must also report their foreign income in their residence state, double taxation may occur. This may, however, be eliminated in the state of residence by either exempting the foreign income or granting the artiste or sportsman a foreign tax credit. The OECD Model recommends the use of the ordinary tax credit of Art. 23B,[2] but the tax exemption method is also still used, often in older tax treaties and by states that adopt a territorial basis for taxation.

This suggests that the taxation of the performance income of artistes and sportsmen is balanced, i.e. in allowing the state of performance the right to tax the income, but reserving a secondary taxing right plus progression for the state of residence. It may, therefore, be that a reasonable allocation of income tax has been established, even though this deviates from the normal allocation rules in the Art. 7 and Art. 15 of the OECD Model.

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1. ECJ, 3 October 2006, Case C-290/04, *FKP Scorpio Konzertproduktionen GmbH v. Finanzamt Hamburg-Eimsbüttel.*
2. See Para. 12 of the Commentary on Art. 17 of the OECD Model.

3. Obstacles to Entering Foreign Markets

Unfortunately, the arrangement described in 2. also increases the risk of practical problems, as, for example, the taxable base in the state of performance can be greater than in the residence state and tax credit problems may arise in this state. Artistes and sportsmen, in any case, end up with comparatively high advisory costs in the state of performance as well as in the state of residence. The literature reveals that these problems occur frequently and that the artistes, sportsmen and the organizers of the performances experience the special international taxing rules as an obstacle to cross-border activities.[3] The authors have previously provided clear examples of international excessive taxation in several publications.[4] One of these is set out below.

Example

A German classical orchestra performs in Spain, earning EUR 25,000. The Spanish non-domestic withholding tax is 25% (gross). The touring expenses are 60% of the costs, i.e. EUR 15,000. The average German income tax rate for the musicians is 35%. Accordingly:

	EUR
Spanish withholding tax: 25% x EUR 25,000 =	6,250
German income tax (exempted and/or maximum tax credit): gross earnings (EUR 25,000) – 60% expenses (EUR 15,000) = EUR 10,000 income	
x 35% =	3,500
International excessive taxation = (= insufficient tax credit)	2,750

It may even be difficult to obtain the tax credit, for example if the musicians are on a monthly payroll or if the Spanish tax certificate is missing. If such difficulties arise, the excessive taxation becomes double taxation, as full tax is paid in both the state of performance and the residence state.

These problems are recognized by the European Union. Following previous discussions, the Council, in November 2004, inserted into its Work Plan for Culture 2005/06 a statement to the effect that

> the Member States and the European Commission need to define and assess the taxation problems specific to mobile artists in the EU and include the findings in the report on Economics of Culture.[5]

The Council expected reports from the Member States in the first half of 2006. The Netherlands Ministry of Education and Culture presented a report in March 2006, entitled "Artist Taxation and Mobility in the Cultural Sector". Other Member States and institutions are currently working on reports.

4. The Deduction of Expenses in *Scorpio*

4.1. The ECJ decision in *Gerritse*

The ECJ has already considered the problems regarding artiste and sportsman taxation. In the *Gerritse*[6] case in 2003, the ECJ answered on pre-judicial questions from the German Supreme Court (*Bundesfinanzhof*) to the effect that the strict taxing rules for non-residents in Germany were in breach of the freedoms in the EC Treaty. The ECJ specifically considered that the non-deductibility of expenses combined with the final character of the gross withholding tax were an obstacle for non-residents in entering the German market.

The German Ministry of Finance (*Bundesfinanzministerium*) interpreted the ECJ's decision restrictively and has only made available an option for non-resident artistes and sportsmen to file a special income tax refund application, in which the expenses of the performances can be deducted.[7] This can, however, only be processed after the performance has taken place. Other states, such as Austria and Norway, have adjusted their national legislation in the same way, but most Member States have simply ignored the *Gerritse* decision and adhered to their gross and final withholding tax applied to the earnings of non-resident artistes and sportsmen. The conclusion must be that the ECJ's decision in the *Gerritse* case, unfortunately, only marginally changed the taxation of non-resident artistes and sportsmen in the European Union.

4.2. The ECJ decision in *Scorpio*

The issue of the deduction of expenses for non-resident artistes and sportsmen returned in the case of *Scorpio*, again in pre-judicial questions from the German Supreme Court. Specifically, the German Supreme Court referred questions to the ECJ on 28 April 2004, as the Supreme Court had its doubts as to whether or not the German tax rules for non-residents complied with the freedoms in the EC Treaty.[8] The main question was, however, whether or not the expenses directly linked to the performances should be deducted when withholding tax. If so, the German withholding tax could only be levied on net income after the deduction of expenses, i.e. the profit on the performance.

3. See, for example, Clare McAndrew, *Artists, Taxes and Benefits - An International Overview* (Arts Council of England, Research Report 28, 2002); Olivier Audeoud, *Mobility in the Cultural Sector* (University of Paris 2002); and Judith Staines, *Tax and Social Security – A Basic Guide for Artists and Cultural Operators in Europe* (Publication of Informal European Theatre Meetings, March 2004).

4. Dick Molenaar, "Obstacles for International Performing Artistes", 42 *European Taxation* 4 (2002), pp. 149-154; Dick Molenaar and Harald Grams, "Rent-A-Star – The Purpose of Article 17(2) of the OECD Model", 56 *Bulletin for International Fiscal Documentation* 10 (2002), pp. 500-509; and Dick Molenaar, "The illusions of international artiste and sportsman taxation", in H. van Arendonk, F. Engelen and S. Jansen (eds.), *A Tax Globalist: The Search for the Borders of International Taxation: Essays in Honour of Maarten J. Ellis* (Amsterdam: IBFD, 2005), pp. 90-104.

5. See http://ue.eu.int/ueDocs/cms_Data/docs/pressData/eu/educ/826gs.pdf.

6. ECJ, 12 June 2003, Case C-234/01, *Arnoud Gerritse v. Finanzamt Neukölln-Nord*. For an explanation of the case, see Dick Molenaar and Harald Grams, "The Taxation of Artists and Sportsmen after the *Arnoud Gerritse* Decision", 43 *European Taxation* 10 (2003), pp. 381-383.

7. Decree of the *Bundesfinanzministerium*, 3 November 2003, IV A 5 – S 2411 – 26/03.

8. Art. 59 and Art. 60 (now Art. 49 and Art. 50) EC Treaty.

The facts[9] of the case were that, in 1993, *FKP Scorpio Konzertproduktionen GmbH* organized a tour involving performances of the US band "Inner Circle". *FKP Scorpio* contracted with *Europop*, a Netherlands international tour promoter, who was undertaking a European tour with the band and wished to include Germany in the schedule. *FKP Scorpio* paid a total fee of DEM 438,600, in addition to some additional expenses, to *Europop* in respect of the total service package, including the performances of the US artistes. Subsequently, the German tax authorities (*Bundesamt für Finanzen*) audited *FKP Scorpio*. The German tax inspectors did not accept the fact that *FKP Scorpio* had not withheld and paid any tax and raised a tax assessment of DM 70,395, which was 15% from the gross fee plus extras. *FKP Scorpio* appealed. The German Supreme Court, ultimately, refused the claim of *FKP Scorpio* and raised the pre-judicial questions with the ECJ.

The ECJ clearly answered the main question regarding the deductibility of expenses as follows:

> The answer to Question 3(a) must therefore be that Articles 59 and 60 of the EEC Treaty must be interpreted as precluding national legislation which does not allow a recipient of services who is the debtor of the payment made to a non-resident provider of services to deduct, when making the retention of tax at source, the business expenses which that service provider has reported to him and which are directly linked to his activity in the Member State in which the services are provided, whereas a provider of services residing in that State is taxable only on his net income, that is, the income received after deduction of business expenses.[10]

This answer to the main pre-judicial question of the German Supreme Court can be regarded as a follow-on from the answers in the earlier *Gerritse* case. Then, the ECJ had been unclear regarding the timing of the deduction of the expenses, but now, in the *Scorpio* case, the ECJ has left no doubt that taxation should be on the net performance income, after the deduction of the expenses directly linked with the activity. Gross taxation is in breach of the freedoms in the EC Treaty because it obstructs entrance into the market of another Member State, as the residents of that Member State are taxed on their net income. Non-residents, therefore, suffer a disadvantage in the market as a result of this stricter taxation.

Currently, of the Member States, the Netherlands and the United Kingdom allow non-resident artistes and sportsmen to deduct their performance expenses. These Member States have created special departments within their tax administrations that process applications and grant written confirmation of the allowed expenses, even based on reasonable budgets and not on actual invoices, if these are not available before a performance. Non-resident artistes and sportsmen can, therefore, be taxed on their net income in the Netherlands and the United Kingdom and do not experience taxation as an obstruction. The only problem is that the artistes and sportsmen have to engage tax professionals in both their residence state and the state of performance in order to produce applications. The resulting administrative expenses may be up to 30% of the tax involved.

The ECJ does not state in its judgment in the *Scorpio* case that a written approval procedure with the tax authorities is required for the deduction of expenses.[11] It is sufficient that the artiste or sportsman (as the provider of the service) reports the expenses that are directly linked to the performance to the payer of the performance fee (as the recipient of the service). These expenses could, however, be deducted from the performance fee before the withholding tax is calculated. With this direct link between artiste or sportsman and the payer of the performance fee, administrative expenses could be much lower than with the obligatory administrative procedure as in the Netherlands and the United Kingdom. This is sufficient reason for these two Member States to change their procedures into a voluntary approval system, which other Member States could also introduce, so that artistes, sportsmen and the payers of performance fees could request approval in respect of the direct expenses if they were unsure as to whether or not these would be accepted in a later audit procedure.

The disapproved German gross taxation of non-resident artistes and sportsmen was in line with Para. 10 of the Commentary on Art. 17 of the OECD Model, which discusses the deduction of expenses as follows:

> The Article says nothing about how the income in question is to be computed. It is for the Contracting State's domestic law to determine the extent of any deduction for expenses. Domestic law differ in this area, and some provide for taxation at source, at a low rate based on the gross amount paid to the artistes and sportsmen. ...

The OECD's position appears to be neutral in this paragraph. It is, however, in practice, a recommendation for many states to tax non-resident artistes and sportsmen on a gross basis, but at a low tax rate. These rates range from 15% in France, through 21.1% in Germany and 25% in Spain to 30% in Italy. These are not necessarily very low rates if it is considered that, at least, artistes have, on average, 75% expenses in respect of their performances.[12] At this average percentage of expenses, the Spanish tax rate of 25% on the gross amount received turns into a 100% tax rate on the net receipts!

With the ECJ's decision against gross taxation in the *Scorpio* case, the Member States will have to change their tax rules in respect of non-resident artistes and sportsmen into net taxation. Following this, it appears to be very likely that the 19 out of the 30 Members countries of the OECD will ask the OECD to change Para. 10 of the Commentary on Art. 17 of the OECD Model into a clear recommendation in favour of the deduction of direct expenses at source, so that the optional Paragraph of the Commentary conforms with EC law.

9. ECJ, 3 October 2006, Case C-290/04, *FKP Scorpio Konzertproduktionen GmbH v. Finanzamt Hamburg-Eimsbüttel*, Paras. 18-25.
10. Id. Para. 49.
11. Id.
12. Figures have been published in various articles, but a three-year study (2001-2004) of the expenses was undertaken by the All Arts Tax Advisers in the Netherlands and published in Dick Molenaar, *Taxation of International Performing Artistes* (Amsterdam: IBFD, 2006). The study reveals a wide a variation in the expenses from low to high. There are no figures available regarding the expenses of internationally performing sportsmen.

5. Three Other Issues in *Scorpio*

5.1. Introductory remarks

The ECJ had to answer further pre-judicial questions from the German Supreme Court in addition to that relating to the main issue of the deductibility of direct expenses. Specifically, the ECJ answered three questions to the effect that the German non-resident tax system may be in breach of the EC Treaty freedoms, but that there were sufficient reasons to justify the special tax rules.[13] Germany can conclude from these questions (see 5.2. to 5.4.) that it may retain its tax system as it now stands, but that this may, on specific points, be different if new developments are taken into consideration.

5.2. Does a withholding tax breach the EC Treaty?

The first of the other questions in the *Scorpio* case was whether or not, in general, a withholding tax in respect of non-resident service providers, such as artistes and sportsmen, was in line with the freedoms in the EC Treaty, as resident artistes and sportsmen could file an income tax return at the end of the year and were only taxed afterwards with regard to annual income tax. The ECJ held that this difference in tax treatment is an obstacle to the freedom to provide services,[14] but that such legislation was nevertheless justified by the need to ensure the effective collection of income tax.[15] Accordingly, taxation at source constitutes a legitimate and appropriate means of ensuring that the income concerned does not escape taxation in the Member State that has the right to tax the income.

The ECJ, however, added, that this was specifically the case in 1993, i.e. the year in which the US artistes had performed for *FKP Scorpio*, as, then, there was no Community directive or any other instrument regarding mutual administrative assistance concerning the recovery of tax debts between Germany and the other Member States. Without a withholding tax, Germany would not have had any right to claim and collect the income tax at the end of the year from the artiste in another Member State. Accordingly, a withholding tax was a reasonable measure for the source Member State to collect its taxes.[16]

But what is the situation following the Council Directive of 15 June 2001 regarding mutual assistance for the recovery of tax claims?[17] The ECJ was not clear as to whether or not this makes a difference for the position of withholding taxes after 15 June 2001. It appears in the English version of the *Scorpio* decision that the ECJ only discussed the situation in respect of 1993, as the Court uses the past tense, i.e.: "[m]oreover, the use of retention at source represented a proportionate means of ensuring the recovery of the tax debts of the State of taxation".[18]

But, for example, the German, Netherlands and Spanish versions of the *Scorpio* decision are phrased in the present tense, while, for instance, the French and Greek versions again use the past tense. And even though German was the official language in the *Scorpio* case, the ECJ is of the opinion that the translations into the other languages of the Member States have equal and complete validity. This, however, means that it is unclear from the decision in the *Scorpio* case whether or not the ECJ wants to make a difference between the situation before and after the Council Directive of 15 June 2001 and, therefore, whether or not its decision is still valid in respect of current withholding taxes. It could be argued that, if the ECJ had intended to make this distinction, it would have stated this more clearly in its response to this preliminary question, but against this argument, it can be advanced that the Court only had to answer a question regarding 1993. The authors' conclusion is that a new case is required to clarify the ECJ's position in respect of withholding taxes following the Council Directive of 15 June 2001.

5.3. Is an exemption certificate required for a treaty exemption?

The second question in the *Scorpio* case concerned the effective use of a treaty exemption. The German Supreme Court had asked whether or not the requirement for an exemption certificate from the German tax authorities in order to make use of an exemption under a tax treaty was in breach of the EC Treaty. Taxable persons in some Member States, such as the Netherlands, can make direct use of treaty exemptions without interference from the tax authorities. Other Member States, however, such as Germany, do not accept the direct use of treaty exemptions and require under their national tax law that official written approval from the tax authorities is required to waive national taxation under a tax treaty. In the *Scorpio* case, the ECJ considered that this is an obstacle to the freedom to provide services in the EC Treaty, but that it is justified to ensure the proper functioning of taxation at source.[19] Accordingly, the German requirement for an exemption certificate in respect of an exemption under a tax treaty was accepted by the ECJ.

This means that very clear treaty exemptions cannot be used if the tax authorities have not granted an exemption certificate. Unfortunately, the authors consider this to be a very strange decision in general and specifically in the *Scorpio* case. The financial risk in respect of the performances of the US artistes fell on the Netherlands tour promoter, *Europop*. This company concluded the contract for the German performances with *FKP Scorpio*, received the performance fees, paid various expenses, retained its own profit margin and paid the

13. ECJ, 3 October 2006, Case C-290/04, *FKP Scorpio Konzertproduktionen GmbH v. Finanzamt Hamburg-Eimsbüttel*, Para. 26.
14. Art. 49 EC Treaty.
15. ECJ, 3 October 2006, Case C-290/04, *FKP Scorpio Konzertproduktionen GmbH v. Finanzamt Hamburg-Eimsbüttel*, Para. 35.
16. Id., Para. 36.
17. Council Directive 2001/44/EC of 15 June 2001 is an amendment of Council Directive 76/308/EEC of 15 March 1976 on mutual assistance for the recovery of claims relating to certain levies, duties, taxes and other measures.
18. ECJ, 3 October 2006, Case C-290/04, *FKP Scorpio Konzertproduktionen GmbH v. Finanzamt Hamburg-Eimsbüttel*, Para. 37.
19. Id., Para. 61.

artist fee to the US artistes. Under the 1959 Germany–Netherlands tax treaty, the Netherlands company was exempt from German tax, although this may not have been clear in 1993. Years later the Lower Court (*Finanzgericht*) of Cologne decided that another Netherlands company, which was in the same position as *Europop*, was entitled to a tax exemption certificate for 1994, which had initially been denied by the German tax authorities.[20] Now, in the *Scorpio* case, the only reason why the treaty exemption did not apply was the absence of the certificate, which is no more than a formal administrative aspect of the situation.

This is not a good balance of responsibilities between taxable persons and the tax authorities. A voluntary system in respect of exemption certificates would be much better, thereby leaving the interpretation of the tax treaty to the business partners. This also occurs in other aspects of German tax case law, in which the courts have directly interpreted treaty aspects of the German national tax law. Maybe the German Supreme Court will go further in its final decision in the *Scorpio* case than the ECJ and follow German case law. In this case, the German Supreme Court could avoid the pitfall that a fair tax exemption is only not granted on formal grounds.

5.4. Do the answers only apply to EU residents?

The third question in the Scorpio case was whether or not the previous answers (see 4., 5.2. and 5.3., respectively) only applied to EU residents. The ECJ's answer was positive, i.e. artistes and sportsmen from outside the European Union cannot make use of the EC Treaty freedoms and, therefore, do not qualify for the same tax treatment as EU residents.[21] In the authors' opinion, this is a strict but correct interpretation of EC law. Artistes and sportsmen from outside the European Union could, therefore, only deduct their direct expenses from the gross performance fee before the withholding tax is calculated if Germany and the other Member States amend their national tax laws and implemented the main element of the Scorpio decision, regardless of the residence of the artiste or sportsman.

6. Netherlands Artiste and Sportsman Taxation in 2007

The Netherlands has decided to go one step further than the ECJ in the *Scorpio* case. In particular, from 2007, non-resident artistes and sportsmen performing in the Netherlands can deduct their expenses at the withholding stage, file an income tax return at the end of the relevant year and use treaty exemptions directly without written confirmation from the tax authorities. This means that performing in the Netherlands should not result in international excessive taxation, as a sufficient tax credit can be obtained in the state of residence to compensate for Netherlands taxation. Specifically, the Netherlands government evaluated its tax system in 2004 and decided that the administrative burden was high for all of the parties involved and that the tax revenue was low. In particular, per year, the average tax revenue was approximately EUR 6 million out of total Netherlands tax revenue of EUR 100 billion, which is less than 0.01% of the total. And if the tax credits for Netherlands resident artistes and sportsmen who had performed abroad were deducted from those figures, the net tax revenue was neared to nil. In relation to this, the Netherlands government calculated that the administrative expenses for artistes, sportsmen, the organizers of performances and the tax authorities were approximately EUR 1.6 million a year.

Following discussions with representatives of arts and sports organizations and specialized tax advisers, the Netherlands Minister of Finance decided to end the special source taxation of non-resident artistes and sportsmen from the beginning of 2007. In this context, it should be noted that it is the authors' opinion that a state is not required to use its taxing right under Art. 17 of the OECD Model. By not using Art. 17 of the OECD Model, the normal tax rules as specified in Art. 7 (in respect of companies and independent work) and Art. 15 (in respect of employees) apply to non-resident artistes and sportsmen. The change attracts special attention, as the Netherlands has the right to levy source tax from artistes and sportsmen under 78 of the 82 tax treaties that it has concluded that closely follow Art. 17 of the OECD Model. The Netherlands, however, prefers that only the residence states should levy tax on its internationally performing artistes and sportsmen and, therefore, will not use its taxing right from 2007 onwards.

The exemption for non-resident artiste and sportsman taxation only applies to artistes and sportsmen living in a state with which the Netherlands has concluded a tax treaty, as the Netherlands still wishes to counter tax avoidance schemes used by artistes and sportsmen who claim to live in tax havens. Specifically, an official certificate of residence is required for a tax exemption in the Netherlands, which gives the residence state the information that performance income from the Netherlands can be expected to be included in the artiste's or sportsman's next income tax return. For artistes and sportsmen from non-treaty states, the existing source taxation in the Netherlands remains.

In 12 of the 82 Netherlands tax treaties that closely follow Art. 17 of the OECD Model, double taxation in respect of performance income that falls within Art. 17 is prevented by means of a tax exemption method. When the Netherlands no longer uses its taxing right and if the residence state exempts the Netherlands performance income, the result is double non-taxation. To avoid this, the Netherlands intends to approach these treaty partners with a request not to allow tax exemptions in respect of Netherlands performance income. This may result in protocols to tax treaties. The other 70 Netherlands tax treaties use the tax credit method to avoid double taxation, which gives the residence state full taxa-

20. Lower Court of Cologne, 18 July 2002, 2 K 6389/97.
21. ECJ, 3 October 2006, Case C-290/04, *FKP Scorpio Konzertproduktionen GmbH v. Finanzamt Hamburg-Eimsbüttel*, Para. 69.

tion rights in the absence of Netherlands source tax. It should be noted that the Netherlands has adopted this unprecedented, unilateral initiative, opinion of some authors, who have stated in the international tax literature that the current Art. 17 of the OECD Model cannot be circumvented or abandoned.[22]

7. Conclusions

The special tax rules for international performing artistes and sportsmen, as formulated in Art. 17 of the OECD Model, appear to be balanced, but, in practice, give rise to many difficulties. Expenses are very often not deductible in the state of performance, performers are not sufficiently compensated by lower withholding tax rates and a tax credit in the residence state can often not be obtained. These problems are recognized by tax literature, the ECJ and the Council. Studies are in progress to define and assess the size of the problem that obstruct the mobility in the cultural and sports sector.

The ECJ is playing an active role in the development of this subject with its decisions in the *Gerritse* and *Scorpio* cases. In both cases, the ECJ answered prejudicial questions from the German Supreme Court to the effect that expenses must be deductible, as, otherwise, there is a breach of the freedom to provide services under the EC Treaty. The ECJ has further specified in the *Scorpio* case that the direct expenses in respect of a performance should be deductible before the withholding tax is calculated. This should result in a significant cash flow advantage for artistes and sportsmen, as they should not have to wait until years later for the state of performance to decide on a refund application. This is, therefore, a major breakthrough for international performing artistes and sportsmen, especially as the ECJ does require the tax authorities to approve the direct expenses in advance, but, rather, allows organizers of performances to deduct the direct expenses that are to be reported to them by the artistes or sportsmen.

Additional questions were raised in the *Scorpio* case regarding other aspects of the German withholding tax regime for artistes and sportsmen, but the ECJ stated that there were justifications to retain those aspects of the regime, which were in line with the EC Treaty. This means that Germany can retain its withholding tax on performance fees and can require an exemption certificate if a treaty exemption applies. Both answers may, however, following some discussion, not be as clear as they initially appeared to be. The ECJ has also decided that its answers only apply to EU residents and do not apply to residents from countries outside of the European Union.

It is interesting to note that, whilst most Member States have yet to react to the ECJ's decision in the *Scorpio* case, the Netherlands has gone one step further. The Netherlands already satisfies the requirements in the *Scorpio* case, but has now decided to end its taxation of non-resident artistes and sportsmen from 2007. It has calculated that the tax revenue from this special taxation is low (EUR 6 million), whilst the related administrative expenses are relatively high (EUR 1.6 million). This has resulted in the Netherlands deciding to abolish its taxation of non-resident artistes and sportsmen, but only if they reside in one of the 82 states with which the Netherlands has a tax treaty that closely follow Art. 17 of the OECD Model. This is an unprecedented, unilateral initiative, as the Netherlands has preferred not to use its taxing right, which is allocated to it under Art. 17 of the 82 tax treaties.

These two developments are of great significance for international performing artistes and sportsmen within the European Union. As has already been noted, most of the Member States still have to react to the implications of the *Scorpio* decision and accept the deduction of direct expenses. These Member States will also have to change their national legislation and tax artistes and sportsmen only on their net performance income. This will make taxation in these Member States not only fairer but also more complicated. After some years, these Member State may come to the same conclusion as the Netherlands has, i.e. that the tax revenue from this group of taxpayers is too small and that the administrative expenses are too high to warrant taxation. It could be for this reason that other Member States will, in the future, follow the initiative of the Netherlands and end the special tax treatment of artistes and sportsmen if they reside in normal treaty states. This would also be a compelling prospect for everyone to return to the normal allocation rules in international taxation.

22. The discussion regarding the legitimacy of Art. 17 started with Daniel Sandler, *The Taxation of International Entertainers and Athletes: All the World's a Stage*, (The Hague: Kluwer Law International, 1995), p. 344. A radical change was proposed by Harald Grams, "Artist Taxation: Article 17 of the OECD Model Treaty – A Relic of Primeval Tax Times?", 27 *Intertax* (1999), p. 188; Joel A. Nitikman, "Article 17 of the OECD Model Treaty – An Anachronism?", *Intertax*, Vol. 29, Issue 8/9 (2001), p. 268; Molenaar and Grams, note 4, p. 500; and Molenaar, note 12, p. 353.