Taxation of Entertainers and Sportspersons Performing Abroad

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23.4. Taxation of international sport events

There are no tax decisions in Spain on direct taxation matters referring to non-Spanish-resident sportspersons in the context of the Champions League, UEFA, FIFA, tennis, cycling, motorcycling[79] or Formula 1. The same probably applies to basketball, handball and some other sports. However, Spanish legislation abides to the almost universal principle that income derived by non-resident entertainers or sportspersons from their personal performances as such taking place in Spain are to be taxed at source. Nevertheless, it seems that either all taxpayers in those contexts have always fully complied with their Spanish tax obligations, and have done so in a manner so clear that the NTA has never questioned their respective assessments, or, conversely, that Spain is not enforcing its taxing rights in any of those contexts.

There are indeed (and have been) Champions League, UEFA, FIFA, tennis, cycling, motorcycling or Formula 1 events in Spain many several times per year. And there certainly have been non-resident sportspersons taking part in such events. However, it is remarkable that there has never been a case litigated in any of those contexts. In the (to some extent similar) field of Spanish cross-border taxation of entertainers performing in entertainment events taking place in Spain, it has been seen that there have been notorious cases of litigation where the positions adopted by the taxpayers and the NTA were not consistent one with the other. The *Iglesias* and *U2* cases are just examples of those type of disputes.

There is no provision in the law, in administrative guidance or in case law indicating that events such as those mentioned above should not be subject to Spanish NRIT taxation at source or that a "tax bubble" should apply to those events. Yet it seems that such kind of tax indeed applies to all such events.

The only case where a tax bubble has been adopted by the parliament was in connection with the America's Cup sailing race (2007 edition) taking place in Valencia.[80]

79. But there are a number of decisions on direct taxation of the organization of the Moto GP World Championship, as Dorna SA, a Spanish resident taxpayer, is the worldwide organizer of such competition.
80. Additional rules 6th and 7th Law 41/007.

Chapter 24

Switzerland

by Ruth Bloch-Riemer[1]

24.1. Taxation of entertainers and sportspersons under domestic law

24.1.1. Introduction and summary

Due to its central position within Europe, the high general standard of life, an excellent health-care system and a positive attitude towards sports, arts and culture, Switzerland has always been a favoured hub for entertainers and sportspersons to establish their domicile (e.g. Michael Schumacher, Ana Ivanovic and Johnny Halliday), as well as a suitable place for international cultural events and sports competitions (e.g. Diamond League Meeting Zurich, Swiss Indoors tennis competition in Basel, opera productions at the Zurich Opera house, etc.). Under both scenarios, from a Swiss domestic perspective and in light of Switzerland's extensive international treaty network, the taxation of entertainers, sportspersons, organizers and many further involved parties is of key relevance and to be determined on a case-by-case basis. After an assessment of the status quo, planning opportunities can be identified on a tailor-made basis for any entertainer, sportsperson and involved third party and should be pre-discussed with the competent tax authorities.

Because of Switzerland's federal structure, taxes are levied on the federal level as well as on the cantonal and communal level. In the field of the taxation of income and wealth, federal legislation governs federal taxes[2] and provides for framework legislation on cantonal and communal taxes.[3] Cantonal and communal income and wealth taxes, however, are levied based on cantonal tax acts. These follow the federal guidelines but provide, in combination with the respective cantons' judicial and administrative

1. Certified tax expert, attorney-at-law, Senior Associate, Bär & Karrer AG, Zurich; http://www.baerkarrer.ch/lawyers/associate/bloch-riemer-ruth.html.
2. On the federal level, income taxes for individuals and legal entities are levied according to the provisions of CH: Federal Act on Direct Taxes of 14 December 1990 (published in SR 642.11, hereinafter DTA). No wealth or capital taxes are levied on the federal level.
3. CH: Federal Act on Tax Harmonization of 14 December 1990 (published in SR 642.14, hereinafter THA).

practices, for diverging detailed regulations among the Swiss cantons. In practice, it is therefore of outmost relevance in which canton an entertainer or sportsperson resides and/or performs his activities.

From a systematic perspective, entertainers and sportspersons are generally taxed according to the same principles in all Swiss cantons. For resident entertainers and sportspersons, it is to be determined whether income streams in relation to performances abroad may be exempt from taxation in Switzerland under a double taxation treaty, in particular, under the respective treaty's clause on the taxation of entertainers and sportspersons.[4] For non-resident entertainers or sportspersons performing in Switzerland, Swiss-source taxation generally applies to all income derived in connection with performances in Switzerland and it is to be further analysed whether the entertainer's or sportsperson's state of residence may claim the taxation right on certain income streams under a double taxation treaty, if available and applicable.[5] Both in the context of article 17 of the OECD Model Convention on Income and on Capital (OECD Model) and the source taxation rules applicable under Swiss domestic law to non-resident entertainers and sportspersons, the scope of taxation in the state of performance is generally limited to income streams with a certain connection to the physical performance. Other income derived by an entertainer or sportsperson in a wider context of the performance or without any connection thereto is typically subject to taxation in the entertainer's or sportsperson's state of residence under the applicable double taxation treaties and, in the absence of a treaty, also from a purely Swiss perspective.

24.1.2. Overview on taxation of sportspersons and entertainers under domestic law

24.1.2.1. Domestic rules applicable to resident sportspersons and entertainers[6]

24.1.2.1.1. *Swiss tax residency and scope of taxation*

Swiss tax law does not provide for any specific residency or domicile rules for entertainers and sportspersons, i.e. in principle, the general rules for

4. *See* section 24.1.2.2.
5. *See* section 24.1.3.
6. Since the notions of "entertainer" and "sportsperson" are defined for Swiss domestic tax purposes in line with article 17 of the OECD Model, detailed definitions can be found in section 24.2.3.

individuals apply also to entertainers and sportspersons.[7] If qualified as Swiss tax residents,[8] entertainers and sportspersons are subject to unlimited tax liability in Switzerland and their respective canton and commune of residence.[9] As such, their worldwide income is generally subject to income taxation on the federal level as well as the applicable cantonal and communal level,[10] and their worldwide wealth is subject to wealth taxation on the applicable cantonal and communal level.[11]

If qualified as Swiss tax residents, the transfer of assets *causa mortis* or *causa donandi* from a Swiss-resident entertainer or sportsperson to another party falls within the scope of the respective domicile canton's inheritance and gift tax legislation.[12] Furthermore, in particular, Swiss VAT provisions apply to self-employed entertainers and sportspersons.[13]

7. Sportspersons and entertainers are considered Swiss tax residents if they either spend 30 days or more exercising a gainful activity or 90 days or more without exercising a gainful activity in Switzerland (qualified sojourn, cf. art. 3(3) DTA/art. 3(1) THA) or if they spend time in Switzerland with the intention of durable stay (domicile, cf. art. 3(2) DTA/art. 3(2) THA). A Swiss tax domicile is generally assumed if the respective individual has the centre of his vital interests of personal and economic nature, i.e. family, friends, leisure activities and professional activities, in Switzerland. The mere formal registration or rent of an apartment are not considered as decisive criteria but may be taken into consideration as an element to the overall picture in a particular case (*see* R.M. Cadosch, *Besteuerung von Sportlern im internationalen Verhältnis,* in O. Arter & M. Baddeley eds., *Sport und Recht, 4*, p. 296 et seq. (Tagungsband 2007), p. 303, with further reference).
8. From a practical perspective, it is to be highlighted that the determination of an entertainer's or sportsperson's centre of vital interests is not always easy as the individuals in question frequently travel and live a cosmopolitan life. It is, in any case, recommended that such entertainers and sportspersons keep an account book or diary tracking their travel, work and leisure activities. Furthermore, it may be advisable to maintain evidence to define a centre of gravity of such individual's activities and, by this, e. g. a "domicile", in this way defining a reliable "home" jurisdiction allowing successful legal and tax planning efforts for the individual.
9. Art. 6(1) DTA.
10. For exceptions under domestic and treaty law, *see* section 24.1.2.2.
11. Art. 13 et seq. THA.
12. In Switzerland, inheritance and gift taxes are levied on the cantonal and communal level only. An initiative to replace the cantonal inheritance and gift tax legislations with a federal inheritance tax has been rejected by a popular vote in June 2015. All Swiss cantons with the exception of the Canton of Schwyz levy inheritance and gift tax legislation, generally providing for the taxation of the transfer of assets through inheritance and donation if either (i) the deceased individual/donor is a tax resident in the respective canton, (ii) real estate situated in the respective canton is transferred or (iii) business assets situated in the respective canton are transferred. As a special case, the Canton of Ticino levies gift taxes if Ticino-resident individuals receive gifts from non-Swiss tax resident donors. Furthermore, special provisions may apply for lump-sum taxed individuals, depending on cantonal legislation.
13. *See* CH: Federal Act on Value Added Taxes of 12 June 2009 (published in SR 641.20, hereinafter VAT Act).

24.1.2.1.2. *Nature and structure of income*

As a general rule, irrespective of its nature, all income of a Swiss tax resident is subject to income taxation under the applicable federal and cantonal/communal legislation.[14] From a tax and also legal perspective, an entertainer's or sportsperson's (taxable) income streams may be grouped as follows:

- Income generated from the *personal physical exercise* of the entertainment or sport activity, including, in particular, start premiums and prize money.

- Income generated from the *further activities* undertaken by the entertainer or sportsperson in connection with their respective physical activity. This includes, in particular, royalty income from the marketing of an entertainer's or sportsperson's intellectual property rights,[15] income from the entertainer's or sportsperson's advertising activities[16] and sponsoring income.

Both the income from the physical exercise of an entertainment or sports activity and the income derived indirectly from such activity may be derived within the framework of an employment relationship[17] or from a self-employment/independent professional activity.[18] For Swiss tax purposes, the distinction between employment and self-employment activity is drawn in accordance with the criteria applied for civil law (contract law) purposes.[19] It is, however, mainly of relevance for the determination of the applicable assessment procedure[20] and the admissible deductions in the ordinary tax assessment procedure as well as the definition of "business assets" related to a possible self-employment activity. The distinction between employment

14. Art. 16(1) DTA/art. 7(1) THA. Exceptions: private capital gains (art. 16(3) DTA/art. 7(4)(b) THA); repayment of capital contribution reserves and nominal capital from legal entities (art. 20(3) DTA/art. 7b THA) and income from real estate, permanent establishments (PEs) and businesses abroad (art. 6(1) DTA). *See also* CH: Federal Supreme Court, 6 May 2008, Decision 2C.276/2007, cons. 3.2.
15. E.g., income from the sale of a CD with records of a concert.
16. E.g., income from publicity activities of a sportsperson for certain products.
17. Art. 17 DTA. E.g. activities of a professional football player for a club, *see* Cadosch, *supra* n. 7, at p. 306.
18. Art. 18 DTA/art. 8 THA. E.g. activities of tennis player or skier. CH: Federal Supreme Court, 6 May 2008, Decision 2C.276/2007, cons. 5.3.; Cadosch, id.
19. Cadosch, *supra* n. 7, at p. 303 et seq.
20. Source taxation applies to employees if the respective prerequisites particularly with regard to their permit status are met. Self-employees as well as employees not subject to taxation at source due to their permit status or Swiss citizenship are subject to the ordinary assessment procedure (tax return).

and self-employment activity is furthermore of importance in the context of the Swiss social security legislation.[21]

Under both the employment and the self-employment scenario, the entertainer's or sportsperson's income may be derived directly from the debtor, i.e. from the organizer of a sports or cultural event. Alternatively, the entertainer or sportsperson may receive the income stream (in full or in parts) from a third party[22] in the form of dividend and/or employment income. Such third party, if structured in the form of a corporate entity, may be owned fully or partially by the entertainer or sportsperson or may be owned by a third party[23] with which the entertainer or sportsperson has entered into a contractual relationship.[24]

24.1.2.1.3. *Taxation of income streams*

Irrespective of their nature, in principle, all taxable income streams are subject to taxation applying the same tax rate.[25] Thereby, the applicable tax rate for Swiss resident entertainers and sportspersons[26] depends on the entertainer's or sportsperson's marital status, church affiliation and commune of residence.[27] Reduced tax rates or a reduced calculation base may apply to dividend income from qualified participations[28] or in the context of lump-sum (forfeit) taxation.

21. Whereas employers are obliged to submit social security declarations and payments to the competent authorities, self-employed individuals are obliged to declare and pay the respective contributions on their own.
22. *See* sections 24.1.3.3.1. and 24.2.7.
23. E.g. a managing company; Cadosch, *supra* n. 7, at p. 316 et seq.
24. Typically, an employment or mandate agreement.
25. Exceptions relating to certain pension payments (art. 38 DTA) as well as certain lump-sum payments (arts. 37 and 37b DTA) shall not be further discussed in the present report.
26. Other than entertainers and sportspersons subject to source taxation only on their income, i.e. entertainers and sportspersons without Swiss citizenship or C permit and not married to a Swiss citizen or C permit holder, with annual gross taxable income below CHF 120,000 and without any further taxable income streams or wealth which would lead to the application of the ordinary tax assessment procedure (in the forms of retroactive ordinary tax assessment procedure or additional ordinary tax assessment procedure), *see* art. 90 DTA.
27. Whereas the federal income tax for individuals applies at the same rates (up to 11.5%) to all Swiss tax residents, cantonal and communal income and wealth taxes (as well as inheritance and gift taxes) vary considerable between the Swiss cantons and communes.
28. Art. 18b DTA (reduction of calculation base to 50% of net taxable dividend income held as business assets available as of participation quota if at least 10% of capital) and

Under the lump-sum taxation regime,[29] the tax base (taxable income and, in some cantons, the taxable wealth) is determined and stipulated in an individual tax ruling with the competent cantonal tax authorities based on the individual's living expenses. The tax base is the highest amount of either (i) the effective living expenses, (ii) seven times the annual rent or rental value of the individual's Swiss housing, (iii) the minimum of CHF 400,000 p.a. on the federal level and the applicable cantonal minimum value or (iv) the control calculation. The application of the lump-sum taxation/forfeit regime available in Switzerland on the federal level as well as in certain cantons on the cantonal and communal level requires that the individual is (i) not of Swiss citizenship, (ii) stays for the first time or after an absence of 10 years in Switzerland and (iii) does not exercise a gainful activity in Switzerland.[30] The eligibility of an entertainer or sportsperson for the application of the lump-sum taxation regime is to be determined on a case-by-case basis, in particular, in consideration of the likelihood of potential future performances in Switzerland of the entertainer or sportsperson. Furthermore, the entertainer's or sportsperson's present and potential future income streams from abroad are to be taken into consideration in so far as treaty benefits shall be claimed for the respective income and the income streams therefore enter into the control calculation's scope.

Whereas Switzerland does not provide for an exit taxation for individuals in case of relocation abroad, exit taxation topics are to be further assessed and a suitable structuring should be prepared if self-employed individuals holding intellectual property (IP) rights or individuals holding entities which, in turn, hold IP rights, leave Switzerland.

24.1.2.2. Elimination of double taxation for resident sportspersons and entertainers performing abroad

24.1.2.2.1. *General exemptions under domestic law*

Under the current domestic federal and cantonal tax legislation and corresponding practice, foreign-sourced income as well as assets situated outside of Switzerland are only exempt from income and wealth taxation in

art. 20(1 *bis*) DTA (reduction of calculation base to 60% of net taxable dividend income held as private assets available as of participation quota if at least 10% of capital).

29. The lump-sum taxation regime is available (status November 2015) on the federal level as well as on the level of all Swiss cantons, with the exception of the Cantons of Zurich, Basel-City, Basel-Landscape, Schaffhausen and Appenzell-Ausserrhoden.

30. *See* art. 14 DTA/art. 6 THA.

Switzerland in so far as they are related (i) to real estate situated outside of Switzerland, (ii) to permanent establishments (PEs) abroad or (iii) to businesses abroad.[31] Income streams and assets exempt from taxation in Switzerland, however, are to be properly declared vis-à-vis the Swiss tax authorities and are taken into consideration for the determination of the available quota of deductions and the applicable tax rate for Swiss tax purposes (exemption with progression).[32]

24.1.2.2.2. *Employment outside of Switzerland*

Income from work performed outside of Switzerland within an employment structure[33] is not generally exempt from income taxation in Switzerland under the applicable Swiss domestic tax legislation and practice. An exemption from taxation, however, may be available under a double taxation treaty Switzerland may have concluded with the respective income stream's or asset location's source state.[34] In this context, the Federal Supreme Court examined the case of a Swiss tax resident professional cyclist who, inter alia, received for his cycling activities (participation in competitions in Europe and the United States) and publicity activities salary payments from his Dutch sponsor under a comprehensive employment and sponsorship agreement. Since the salary payments were effectuated regularly, i.e. independently from his participation in competitions and even in case of sickness of the cyclist, the Federal Supreme Court considered the nexus between the salary payments and the physical exercise of the sports activity as indirect and hence the remuneration was not qualified as within the scope of article 17 of the OECD Model. The international allocation of the cyclist's income for taxation purposes was therefore performed in application of article 15 of the OECD Model, leading to taxation of the cyclist's employment income generally in the cyclist's state of domicile for any working days not physically spent in the Netherlands (seat of employer).[35]

31. *See* art. 6(1) and 3 DTA.

32. *See* art. 7(1) DTA.

33. E.g. the work performed by a Swiss-resident soccer player as an employee for a German soccer club or by a Swiss-resident musician for a German-based orchestra as an employee.

34. Such exemption may be claimed based on a treaty provision relating to employment income in general (in line with art. 15 OECD Model) or on a specific treaty provision relating to entertainers' and sportspersons' performances (art. 17 OECD Model). *See also* CH: Federal Supreme Court, 6 May 2008, Decision 2C.276/2007, cons. 3.2. and 4.4.1.

35. Federal Supreme Court, id., cons. 6.2.

24.1.2.2.3. *Self-employment outside of Switzerland*

Income from work performed, inter alia, by an entertainer or sportsperson outside of Switzerland in the form of self-employment may only be eligible for an exemption under the Swiss domestic tax legislation if it is performed within the framework of a business outside of Switzerland. Generally, such unilateral exemption requires a certain level of substance of such business which, in the context of an entertainer or sportsperson, in most cases is not given. If such exemption under the Swiss domestic tax legislation is not available, an exemption from taxation may only be available under a double taxation treaty Switzerland may have concluded with the respective income stream's or asset location's source state.[36]

24.1.3. Application of income taxes to non-resident sportspersons and entertainers

24.1.3.1. Domestic rules applicable to income of non-resident sportspersons and entertainers

24.1.3.1.1. *Limited tax liability for non-residents*

From a Swiss tax perspective, sportspersons and entertainers with tax residence abroad are considered as non-resident for Swiss tax purposes in two scenarios:

- they do not spend more than 30 days in Switzerland in the context of a professional activity and do not have any intention to stay in Switzerland, by this, they do not meet the requirements for a qualified sojourn;[37] therefore, tax residency and unlimited tax liability in Switzerland are not triggered under Swiss domestic tax law; or
- they meet the requirements for a qualified sojourn[38] leading in principle to unlimited tax liability in Switzerland under Swiss domestic law;

36. E.g. article 14 of the double taxation treaty concluded between Switzerland and Germany on the avoidance of double taxation in the field of taxes on income and wealth, of 11 August 1971, published in SR 0.672.913.62 (hereinafter "DTT-D"). Article 14(1) of the DTT-D provides, as a general rule, for the taxation of income from self-employment in the self-employee's state of residence. Income from self-employment may only be taxed in the source state if it is derived in connection with a fixed establishment (*feste Einrichtung*) in the source state. It is to be highlighted that article 14 of the OECD Model formerly relating to the allocation of the taxation rights on income from self-employment has been deleted from the OECD Model.
37. *See supra* n. 7.
38. Id.

however, the double taxation treaty between Switzerland and the entertainer's or sportsperson's state of domicile provides for the attribution of tax domicile and therefore the general taxation right on the entertainer's or sportsperson's worldwide income and wealth to the other contracting state under the applicable tiebreaker rule.[39]

In such circumstances, Swiss domestic tax legislation provides for the limited Swiss tax liability due to an economic affiliation of non-Swiss tax resident entertainers and sportspersons, particularly if such persons exercise a professional activity in Switzerland.[40]

24.1.3.1.2. *Exercise of entertainment and sports activities as professional activity in Switzerland*

Swiss domestic tax legislation, for the purposes of the establishment of a Swiss tax liability, does not contain any special provisions covering entertainers and sportspersons. It is generally recognized that entertainers' and sportspersons' activities fall within the scope of article 5(1)(a) of the DTA/ article 4(2)(a) of the THA Entertainment and sports activities are therefore considered as "professional activity"[41] and trigger limited tax liability in Switzerland if physically exercised in Switzerland.[42] For the establishment

39. *See* art. 4 OECD Model. Dissenting opinion: R. Zigerlig & G. Jud, *Commentary to Art. 92 DTA*, in M. Zweifel & P. Athanas eds., *Kommentar zum schweizerischen Steuerrecht*, vol. I/2b, *Bundesgesetz über die direkte Bundessteuer (DBG) Art. 83-222*, 2nd edn, p. 54 et seq., N1 ad Art. 92, consider the source taxation rules for Swiss residents applicable if entertainers and sportsmen exercise their activity in Switzerland for more than 30 days and, based on the applicable double taxation treaties, only exclude cross-border commuters from the application of such rules.
40. Limited tax liability in Switzerland is furthermore triggered if a non-Swiss-resident person has ownership or a participation in a business in Switzerland (art. 4(1)(a) DTA/ art. 4(1) THA), has a PE in Switzerland (art. 4(1)(b) DTA/art. 4(1) THA), receives compensation as board member or director of entities domiciled or with PEs in Switzerland (art. 5(1)(b) DTA/art. 4(2)(b) THA), holds or trades in Swiss real estate (art. 4(1)(c) and (d) and art. 5(1)(c) DTA/art. 4(1) and (2)(c) THA) or receives certain pension or retirement payments from Swiss sources (art. 5(1)(d) and (e) DTA/art. 4(2)(d) and (e) THA). If applicable, it is recommended to review the respective entertainer's or sportsperson's position with regard to Swiss taxation at source on such additional income streams and elements or wealth in detail in the context of comprehensive tax planning.
41. F. Richner et al., *Handkommentar zum DBG (Bundesgesetz über die direkte Bundessteuer)*, 2nd edn (2009), N3 ad Art. 92.
42. E.g. within the framework of a tournament, competition or show. For the delimitation of the limited tax liability between the Swiss cantons, *see* e.g. the Zurich Tax Authorities' Guidelines no. 29/254 of 16 March 2015 regarding the taxation at source of non-resident artists, sportspersons and speakers (*Merkblatt Nr. 29/254 des kantonalen Steueramtes über die Quellenbesteuerung von Künstlerinnen und Künstlern, von Sportlerinnen und Sportlern sowie von Referentinnen und Referenten ohne Wohnsitz oder Aufenthalt in der*

of the limited tax liability, however, it is not necessary that the activity's result or its exploitation is in Switzerland.[43]

In application of article 5(1) of the DTA, in principle, the members of groups of artists or sportspersons performing as a collective body, such as e.g. teams and orchestras, trigger their individual limited tax liability by any performance physically exercised in Switzerland. If, however, the compensation for the performance is paid to a third party (e.g. the group) and not to the individual entertainer or sportsperson, the limited tax liability in Switzerland and the respective Swiss canton is triggered on the level of the third party according to article 5(2) of the DTA.

Only if a limited tax liability in Switzerland is established for the individual entertainer or sportsperson or for a third party receiving the compensation for the performance of a group of entertainers or sportspersons, the special provision or article 92 of the DTA/article 35(1)(b) of the THA applies.[44] Based on article 92 of the DTA/article 35(1)(b) of the THA, the applicable tax collection mechanism is defined for non-resident entertainers and sportspersons.[45]

24.1.3.1.3. *Taxation at source of compensation for entertainment/sports activities*

According to article 92(1) of the DTA/article 35(1)(b) of the THA, non-Swiss-resident entertainers and sportspersons are liable to taxation (in Switzerland/the respective canton) for any compensation for activities personally exercised in Switzerland as well as for any additional compensation related to such activities. Any income streams derived *directly* in connection with a physical appearance or performance in Switzerland/the respective canton, such as e.g. employment income, fees, start premiums, appearance fees and prizes, are subject to (source) taxation in Switzerland

Schweiz, hereinafter the "Zurich Guidelines"). The Zurich Guidelines, e.g. provide for a tax liability of the Zurich-based entertainer's or sportsperson's agent who is obliged to declare, deduct and pay source taxes on the artist's or sportsperson's compensation, e.g. at Lucerne rates for performances carried out in the Canton of Lucerne.

43. Zurich Tax Appeals Commission of April 17, 1997, published. in StE 1997 A 31.4 sec. 3.a; Richner et al., *supra* n. 41, at N9 ad Art. 92.

44. The source taxation as set forth in art. 92 DTA/art. 35(1)(b) THA is applicable for non-Swiss resident entertainers and sportspersons with Swiss citizenship, *see* Cadosch, *supra* n. 7, at p. 322; Richner et al., *supra* n. 41, at N4 ad Art. 92.

45. Richner et al., *supra* n. 41, at N3 ad Art. 92. Art. 92 DTA/art. 3(1)(b) THA also apply to speakers, whose tax situation, however, shall not be further analysed in the present report.

and the respective canton.[46] The requirement of a direct connection between the physical performance in Switzerland and the compensation (*Auftrittsbezogenheit*[47]/connection to a performance) leads in practice to delicate delimitation issues with regard to certain income streams.[48]

Not only relevant income streams paid directly to the entertainer but, in line with article 17(2) of the OECD Model, relevant income streams paid instead to a third party that has organized the activity are also, as an explicit anti-abuse mechanism,[49] subject to taxation at source in Switzerland according to article 92(1) of the DTA/article 35(1)(b) of the THA. It is generally understood by doctrine that this approach is also applicable to sportspersons, as this is explicitly stated in the French and Italian versions of article 92(1) of the DTA/article 35(1)(b) of the THA but, due to a legislative oversight, not in its German version.[50]

24.1.3.1.4. *Basis of source taxation*

According to Swiss domestic legislation, the relevant compensation is generally considered on a net basis, i.e. on the gross compensation after deduction of costs. The gross compensation includes not only the remuneration for the performance itself but also any kind of additional benefits[51] and benefits in kind.[52]

46. X. Oberson, *Problèmes récents posés par l'imposition des artistes et sportifs non-résidents*, in P. Locher et al. (Hrsg.), *Internationales Steuerrecht in der Schweiz: aktuelle Situation und Perspektive. Festschrift zum 80* p, 169 (Geburtstag von Walter Ryser 2005); CH: Federal Supreme Court, 6 May 2008, Decision 2C.276/2007, cons. 5.3.; T. Graf & H. Christoffel, *Commentary to Art. 17 OECD Model*, in Zweifel, Beusch & Matteotti, *Kommentar zum schweizerischen Steuerrecht* N67 ad Art. 17 (Internationales Steuerrecht 2015). Paragraph 9.1 of the Commentary on Article 17(1) of the OECD Model also explicitly includes in the tax base remuneration "time spent on rehearsal, training or similar preparation" in the state of performance as well as "remuneration for the time spent travelling".

47. Federal Supreme Court, id.

48. *See* section 24.2.5.

49. Zigerlig & Jud, *supra* n. 39, at N10 ad Art. 92.

50. Richner et al., *supra* n. 41, at N10 ad Art. 92. For further details, *see* section 24.2.7.

51. E.g. lump-sum expenses, travel costs, etc., *see* Zigerlig & Jud, *supra* n. 39, at N7 ad Art. 92 and Zurich Guidelines, p. 2.

52. Benefits in kind (e.g. board and lodging) are to be assessed in application of the principles as set forth for Swiss social security purposes, *see* art. 7(4) of the Ordinance of the Federal Department of Finance on the taxation at source for the purposes of the federal income tax of 19 October 1993 (published in SR 642.118.2, hereinafter "ST Ord."), and Zurich Guidelines, p. 2.

The deduction of costs is allowed[53] either on a lump-sum basis of 20% without the necessity to provide evidential documentation[54] (rebuttable assumption) or – typically if the costs amount to more than 20% – as effective costs. Effective costs have to be substantiated by proper documentation.[55] It is to be highlighted that only professional expenses directly in connection with the performance in Switzerland, and thus the taxable income, are deductible.[56] Further costs not directly attributable to the physical performance in Switzerland such as e.g. general fees for a coach, as well as any further positions as e.g. social deductions, are not allowed. This may lead in practice to the – for the entertainer or sportsperson unsatisfactory – result that certain costs may not be deducted in Switzerland due to a lack of close connection to a performance in Switzerland but may also not be deductible in the entertainer's or sportsperson's state of residence.[57] Overall, and also in light of an international tax allocation potentially undertaken by the entertainer's or sportsperson's state of residence, Swiss (source) taxation is to cover at least the income earned from the performance in Switzerland according to article 6(2) of the DTA.

24.1.3.1.5. *Organizer's joint liability*

According to article 92(4) of the DTA/article 37(1) of the THA, an event's organizer, together with the entertainer or sportsperson, is jointly liable to tax.[58] In practice, the organizer has to assess the gross compensation (in particular, including and valuating the benefits in kind) and the applicability of deductions for each entertainer or sportsperson individually. As a consequence of this quite significant transfer of cooperation obligation, the organizer is in most cases well advised to consider the lump-sum deduction of 20% from an entertainer's or sportsperson's gross compensation unless

53. The deduction of costs for entertainers and sportspersons is allowed by Swiss domestic legislation as an exception to account for entertainers' and sportspersons' specific situations. In contrast, costs are already considered in the applicable tariff and thus not admissible for further deduction in the context of source taxation of employees (art. 91 DTA/art. 35(1)(a) THA) and board members (art. 97 DTA/art. 35(1)(c) THA).
54. Art. 7(3) ST Ord.; Zurich Guidelines, p. 2.
55. Art. 7(3), second sentence, ST Ord.; Zurich Guidelines, p. 2.
56. E.g. costs for travel to/from performance, costs for hotel and meals, costs for equipment specifically used at the performance; *see* art. 7(1) ST Ord. ("costs directly caused by the performance") and Zurich Guidelines, p. 2. The Zurich Tax Appeals Commission, in StE 1997 A 31.4, N 5, cons. 5, considers in this context foreign- (i.e. non-Swiss) source taxes levied in the source state of certain income streams as costs directly in connection with a performance and therefore deductible.
57. In this sense, *see* Cadosch, *supra* n. 7, at p. 323.
58. *See also* art. 100(2) DTA/art. 37(1) THA.

the entertainer or sportsperson can provide sound, documented evidence for higher effective costs to be considered.[59]

24.1.3.1.6. *Calculation of tax burden*

The tax at source on non-resident entertainers' and sportspersons' compensations,[60] unlike the taxation at source of ordinary employment income, is levied at fixed rates instead of a progressive scale, depending on the entertainer's or sportsperson's daily income (*see* Table 1).

The tax at source is not levied if the taxable gross compensation amounts to an aggregate of less than CHF 300 per debtor of the taxable compensation (collection minimum).[61]

Article 92(3) of the DTA in combination with article 7(1) of the ST Ordinance defines the "daily income" as "gross income, including any allowances and fringe benefits, after deduction of costs caused directly by the performance, divided by the number of performance and rehearsal days". If the daily income for an individual performing in Switzerland within the framework of a group cannot or not easily be determined, article 7(2) of the ST Ordinance provides for the calculation of the average daily income per capita for the purposes of the determination of the applicable tax rate.

24.1.3.2. Domestic rules applicable to other income derived by non-resident sportspersons and entertainers in connection with the performance

24.1.3.2.1. *Limited tax liability and source taxation on employment and board membership income*

Other income derived by non-Swiss-resident entertainers and sportspersons in the context of a performance in Switzerland[62] may only be subject to taxation in Switzerland if the income may be considered as earned by a

59. Zigerlig & Jud, *supra* n. 39, at N 9 ad Art. 92.
60. As defined in section 24.1.2.1.2.
61. Art. 92(5) DTA in combination with art. 12 ST Ord. and Appendix 4, sec. 4, 1st lemma, to ST Ord.; Ordinance of the Zurich Cantonal Finance Department regarding minimum taxable amounts of persons resident abroad and subject to taxation at source of 6 December 2011 (published in LS 631.423, Zürcher Steuerbuch No. 29/201).
62. E.g. such as income from sponsoring agreements, merchandising income and advertising income.

Table 1 Non-residents tax at source: Fixed rates

Daily income (in CHF)	Federal rate[1] (%)	Zurich rates[2] (%)		Basel rates[3] (%)		Geneva rates[4] (%)	
		Cantonal / communal rate	Total rate	Cantonal / communal rate	Total rate	Cantonal / communal rate	Total rate
Up to 200	0.80	10.00	10.80	8.20	9.00	9.20	10.00
201 – 1,000	2.40	10.00	12.40	12.60	15.00	9.60[5]/12.60[6]	12.00/15.00
1,001 – 3,000	5.00	10.00	15.00	16.00	21.00	15.00	20.00
> 3,000	7.00	10.00	17.00	20.00	27.00	18.00	25.00

1. Art. 92(2) DTA.
2. Sec. 95(2) of the Tax Act of the Canton of Zurich of 8 June 1997 (published in LS 631.1).
3. Sec. 97(2) of the Direct Tax Act of the Canton of Basel-City of 12 April 2000 (published in no. 640.100).
4. Sec. 8(2) of the Geneva Act on taxation at source of individuals and entities of 23 September 1994 (published in D 3 20, hereinafter "LISP").
5. For gross compensations amounting to CHF 201 to CHF 500, *see* sec. 8(2) LISP.
6. For gross compensation amounting to CHF 501 to CHF 1,000, *see* sec. 8(2) LISP.

professional activity (article 5(1)(a) of the DTA/article 4(2)(a) of the THA; e.g. as an artist or sportsperson) in Switzerland or is received due to any other fact pattern triggering limited tax liability in Switzerland (e.g. a board membership, *see* article 5(1)(b) of the DTA/article 4(2)(b) of the THA).[63] In such cases, if the income is received from Swiss sources, Swiss taxes are typically levied at source in accordance with the rules set forth in article 92 of the DTA/article 35 of the THA. If, in exceptional cases, a sufficient connection (nexus) is recognized but the income is received from non-Swiss sources, or if the income is received in the context of self-employment, at least in theory, Swiss taxes are levied in the ordinary assessment procedure, i.e. by way of a tax declaration to be submitted by the recipient vis-à-vis the competent Swiss tax authorities. Practice, however, recognizes the difficulties for Swiss tax authorities to identify such payments.

With regard to income from a gainful activity in Switzerland, e.g. as an entertainer or sportsperson, from a Swiss perspective, the possibility to levy taxation on income streams realized by non-Swiss-resident entertainers or sportspersons depends mainly on the proximity of the nexus of the income streams to performances (i.e. gainful activities) on Swiss soil. The delimitation between income related to a performance (*auftrittsbezogen*) and income related to the entertainer's or sportsperson's personality (*personenbezogen*) is not always clear and to be reviewed on a case-by-case basis.[64] The degree of nexus required for the purposes of Swiss-source taxation has been defined by Swiss doctrine and practice on certain categories of income streams in line with article 17 of the OECD Model.[65]

24.1.3.2.2. *Royalty income from Swiss sources*

From a Swiss domestic perspective, no Swiss-source taxes or Swiss withholding taxes are applied to royalty income received from Swiss sources by a non-Swiss-resident recipient.[66]

63. *See* section 24.1.3.1.1.
64. *See* Cadosch, *supra* n. 7, at p. 323; Oberson, *Problèmes récents*, *supra* n. 46, at p. 170; Graf & Christoffel, *supra* n. 46, at N71 ad Art. 17.
65. The treatment of certain income streams are further analysed in section 24.2.5.
66. Oberson, *Problèmes récents*, *supra* n. 46, at p. 170.

24.1.3.3. Anti-avoidance and abusive schemes and devices

24.1.3.3.1. *Compensation payments to third parties*

24.1.3.3.1.1. Outline

Article 5(2) of the DTA stipulates a limited tax liability of the third-party recipient if income earned by an individual from an activity exercised in Switzerland is paid to a third party instead of the entertainer or sportsperson. The application of this provision to entertainers or sportspersons is repeated in article 92(1) of the DTA/article 35(1)(b), last sentence, of the THA.[67] It is furthermore in line with most double taxation treaties Switzerland has concluded that include provisions in line with article 17(2) of the OECD Model.[68]

The taxation at source of compensation in Switzerland (state of performance/source state) paid to the organizing third party abroad and without a PE in Switzerland shall prevent the undermining of Switzerland's taxation rights by the use of structures receiving the compensation from performances in Switzerland for the entertainer or sportsperson.[69] In the absence of such regulation, Switzerland would not have the opportunity to levy taxes on such compensation since (i) the receiving entities, as mere "organizers" of a performance, typically do not fall within the scope of "entertainers" or "sportspersons"[70] and (ii) business profits of such organizing third parties would only fall within the scope of the limited Swiss tax liability if the (non-Swiss) entity had a PE or business in Switzerland.[71]

24.1.3.3.1.2. Organizing third party

Swiss doctrine and practice agree that the organizing third party may be an individual, corporate entity or partnership[72] domiciled in Switzerland or

67. Art. 92(1) DTA/art. 35(1)(b) THA state that "This [the tax liability in Switzerland] applies also to income and compensation not paid to the entertainer or sportsperson but to a third party organizing his activity [performance in Switzerland]."
68. Stockmann, in K. Vogel & M. Lehner, *Doppelbesteuerungsabkommen der Bundesrepublik Deutschland auf dem Gebiet der Steuern vom Einkommen und Vermögen, Kommentar auf der Grundlage der Musterabkommen*, 6th edn, (2015), sec. 8, N1 ad Art. 17; Zigerlig & Jud, *supra* n. 39, at N10 ad Art. 92; Oberson, *Problèmes récents*, *supra* n. 46, at p. 172.
69. Zigerlig & Jud, id.
70. As defined in section 24.2.3.; *see also* Zigerlig & Jud, id.
71. Art. 4(1)(a) and (b) DTA/art. 4(1) THA for organizing individuals and art. 51(1)(a) and (b) DTA/art. 21(1)(a) and (b) THA for organizing entities; *see also* Zigerlig & Jud, id.
72. Zigerlig & Jud, id.; Richner et al., *supra* n. 41, at N1 ad Art. 92.

abroad[73] and that the entertainer/sportsperson and the third party have to be in a contractual relationship allowing the third party to collect the entertainer's/sportsperson's compensation.[74] Furthermore, it is generally accepted that the third party may not only be an organizer but also an entertainer's or sportsperson's agent or an entertainer's or sportsperson's company placing the individual entertainer or sportsperson at the performance's organizer's disposal (so-called "rent-a-star' or "star" company).[75]

The further position of the third party encompassed by article 92(1) of the DTA/article 35(1)(b) of the THA as well as the treaty provisions in line with article 17(2) of the OECD Model, however, is discussed divergently in Swiss doctrine and practice and depends on the structure of the applicable double taxation treaty provision on entertainers' and sportspersons' compensation (article 17 of the OECD Model):

- As set forth in the Federal Tax Administration's relevant guidelines,[76] the total compensation is typically a combination of (i) the compensation for the entertainer's or sportsperson's performance and (ii) the organizing third party's activities (e.g. organization of performance, placement of the entertainer/sportsperson).

- Generally, the compensation for the entertainer's/sportsperson's performance itself falls within the scope of article 92 of the DTA/article 35(1)(b) of the THA/article 17(2) of the OECD Model and is, according to the majority of the Swiss double taxation treaties, subject to taxation (at source) in the state of performance.[77] The Swiss double taxation

73. Zurich Guidelines, p. 2; Oberson, *Problèmes récents*, *supra* n. 46, at p. 173. Richner et al., *supra* n. 41, at N11 ad Art. 92, defend, however, the diverging opinion that in order for the provisions of article 92 of the DTA to apply, not only the entertainer or sportsperson must not be a Swiss tax resident. Further to this, in case of the payment of the compensation to a third party instead of the entertainer or sportsperson (*see* section 24.2.7.), also the receiving third party must not have its tax domicile or its place of effective management in Switzerland.
74. Zigerlig & Jud, *supra* n. 39, at N10 ad Art. 92; M. Grossmann, *Die Besteuerung des Künstlers und Sportlers im internationalen Verhältnis*, thesis St. Gall, p. 165 et seq.; Oberson, *Problèmes récents*, id.
75. In the Zurich Guidelines, p. 2, for such cases, the third-party recipient is referred to as employer or customer; Oberson, id.; Richner et al., *supra* n. 41, at N10 ad Art. 92.
76. Federal Tax Administration's Guidelines on the taxation at source of entertainers, sportspersons and speakers of 1 January 2016 (*Merkblatt über die Quellenbesteuerung von Künstlern, Sportlern und Referenten, Stand 1. January 2016*; hereinafter "FTA Guidelines").
77. Zigerlig & Jud, *supra* n. 39, at N11 ad Art. 92. Only the treaties with Ireland, Morocco and Spain do not contain a specific provision allowing an entertainer's or sportsperson's state of performance to levy taxation on compensation for performances on their soil paid to third parties, *see* FTA Guidelines, p. 1.

treaties, inter alia, with Australia, Canada, Luxembourg, Israel and Russia, however, provide that the taxation (at source) in the state of performance shall not apply if it can be established that neither the entertainer/sportsperson nor a closely connected party to the entertainer/sportsperson benefit directly or indirectly from the organizing third party's profits.[78]

In this context, Swiss practice has developed the following principles:

- Swiss source taxation on the compensation to the third party applies if the entertainer or sportsperson, directly or indirectly, profits from the organizing third party's income.[79]

- If neither the entertainer/sportsperson nor a closely connected party to the entertainer/sportsperson benefit directly or indirectly from the organizing third party's profits, the compensation's elements are treated as follows:

  - Source taxation is only to be applied to the portion of the total compensation paid to the third party which will, effectively, be forwarded to the entertainer or sportsperson. In such scenario, the receiving third party may present the contractual agreement between itself and the entertainer/sportsperson to the event's organizer,[80] effectuating the total compensation's payout in order to claim a reduction of the taxation at source to the compensation elements to be forwarded to the entertainer/sportsperson.

  - The compensation elements reflecting the organizing third party's efforts are not considered as compensation derived directly in connection with the entertainer's or sportsperson's personal performance in Switzerland.[81] The taxation of such compensation elements therefore depends on the third party's state of domicile. If the organizing third party is domiciled within Switzerland or in a state with which Switzerland has not entered into a double taxation treaty, Swiss domestic legislation applies (taxation of business profits/corporate income taxation on the level of the organizing third party). If the organizing third party is domiciled in a state with which Switzerland has entered into a double taxation treaty, the treaty provisions on the taxation of business profits of entities or self-employed individuals apply.[82]

78. FTA Guidelines, p. 1.
79. Zigerlig & Jud, *supra* n. 39, at N10 ad Art. 92; Grossmann, *supra* n. 74, at p. 169; Richner et al., *supra* n. 41, at N10 ad Art. 92; FTA Guidelines, p. 2.
80. FTA Guidelines, p. 2.
81. FTA Guidelines, p. 1; Zigerlig & Jud, *supra* n. 39, at N11 ad Art. 92.

24.1.3.3.2. *Anti-abuse doctrine*

Aside of the specific anti-abuse legislation contained in article 17(2) of the OECD Model and article 92(1) of the DTA/article 35(1)(b) of the THA, from a Swiss perspective, the domestic general anti-abuse doctrine established by article 2(2) of the Federal Civil Code and the interdiction to tax evasion is, according to practice, to be respected. Furthermore, the anti-abuse provisions set forth in the context of double taxation treaties, i.e. specific anti-abuse provisions in treaties, the beneficial ownership requirement and the general anti-abuse reservation applicable to treaty law apply.[83]

24.2. Taxation of entertainers and sportspersons under tax treaties

24.2.1. Treaty policy: Deletion of article 17/options for more restricted scope

24.2.1.1. General Swiss treaty policy with regard to article 17 OECD Model

To date, Switzerland has adopted in all of its double taxation treaties a clause on the taxation of entertainers and sportspersons, in particular in the treaties with the European states, the United States, Australia, Canada, Russia and key Asian states.[84]

Whereas the treaty provisions on the allocation of taxation rights on income of entertainers and sportspersons are generally in line with article 17 of the OECD Model, certain treaties include specific features:

82. FTA Guidelines, p. 2 (sec. 2.2(a)); Zurich Guidelines, p. 4.
83. For further details, *see* R. Bloch-Riemer, *Doppelbesteuerungsabkommen Schweiz/USA: Limitation on Benefits und Nutzungsberechtigung (Beneficial Ownership)* pp. 141 et seq. and 170 et seq. (2012).
84. A comprehensive list, status 1 January 2016, can be found in the FTA Guidelines, p. 1. *See also* Graf & Christoffel, *supra* n. 46, at N128 ad Art. 17.

- The treaty between Switzerland and the United States[85] provides for a taxation right of the state of performance for activities of an entertainer or sportsperson only if the gross income for such activities exceeds USD 10,000 in the respective fiscal year.

- The former treaty between Switzerland and the Netherlands[86] provided, at the time until 31 December 2011, that whereas income from entertainment activities would generally be attributed for taxation to the state of performance, income from sports activities would only be attributed for taxation to the state of performance if the sportsperson regularly maintained fixed premises – a prerequisite met only exceptionally in practice.

- The treaties between Switzerland and Denmark,[87] Germany,[88] Ireland,[89] Portugal,[90] Sweden[91] and Spain[92] require the application of the respective clause drafted in line with article 17(1) OECD Model that the entertainer or sportsperson exercises his activity by profession.[93]

85. *Convention between the Swiss Confederation and the United States of America on the avoidance of double taxation in the field of taxation of income* art. 17 (2 October 1996, published in SR 0.672.933.61, hereinafter "DTT-US"); para. 10.1 *OECD Model: Commentary on Article 17* and para. 20 *OECD Model: Reservations on the Article.*
86. *See* FTA Guidelines, p. 1, sec. 2.1.
87. *Convention between the Swiss Confederation and the Kingdom of Denmark on the avoidance of double taxation in the field of taxation of income and wealth* art. 17 (23 November 1973, published in SR 0.672.931.41, hereinafter "DTT-DK").
88. Art. 17(1) DTT-D.
89. *Convention between the Swiss Confederation and Ireland on the avoidance of double taxation in the field of taxation of income and wealth* art 16 (8 November 1966, published in SR 0.672.944.11, hereinafter "DTT-IRL").
90. *Convention between the Swiss Confederation and Portugal on the avoidance of double taxation in the field of taxation of income and wealth* art. 17 (26 Sept. 1974, published in SR 0.672.965.41, hereinafter "DTT-P").
91. *Convention between the Swiss Confederation and the Kingdom of Sweden on the avoidance of double taxation in the field of taxation of income and wealth* art. 18 (7 May 1965, published in SR 0.672.971.41, hereinafter "DTT-S").
92. *Convention between the Swiss Confederation and Spain on the avoidance of double taxation in the field of taxation of income and wealth* art. 17 (26 April 1966, published in SR 0.672.933.21, hereinafter "DTT-Sp").
93. According to X. Oberson, *Commentary to Art. 17 OECD Model*, in R. Danon et al. eds., *Modèle de Convention fiscale OCDE concernant le revenu et la fortune* p. 564 et seq., N88 and N90 ad Art. 17 (Commentaire 2014), the restriction should only apply to entertainers and does not require a full-time activity so that occasional activities should not be excluded from the scope of the double taxation treaties in question; *see also* Stockmann, *supra* n. 68, at N39 ad Art. 17.

24.2.1.2. Special provisions for events sponsored by public funds

The state of performance's taxation rights under certain Swiss treaties are restricted in case of performances supported financially by public means:[94]

- Under the treaties concluded with Belgium, Germany, Côte d'Ivoire, the United Kingdom and Morocco, the rules normally applicable for the allocation of taxation rights on income of *entertainers* shall not apply if the performance in question is sponsored to a significant extent by public funds.

- Under the treaties concluded with Albania, Algeria, Argentina (with retroactive effect as of 1 January 2015), Armenia, Azerbaijan, Australia, Bangladesh, China, Cyprus, Taiwan, Estonia, France, Ghana, Hong Kong, Iran, India, Indonesia, Israel, Jamaica, Kazakhstan, Kyrgyzstan, Colombia, Latvia, Qatar, Lithuania, Malaysia, Malta, Macedonia, Mongolia, Montenegro, the Netherlands, Austria, the Philippines, Poland, Romania, Serbia, Singapore, Slovenia, Korea, Thailand, Turkey, Turkmenistan, Ukraine, Hungary, Uruguay and the United Arab Emirates, the rules normally applicable for the allocation of taxation rights on income of *entertainers and sportspersons* shall not apply if the performance in question is sponsored to a significant extent by public funds.[95].

- The treaties concluded with Algeria, Argentina (with retroactive effect as of 1 January 2015), Armenia, Azerbaijan, Australia (as of 1 January 2015), Bangladesh, Bulgaria (as of 1 January 2014), China, Cyprus, Taiwan, Germany, France, Ghana, the United Kingdom, Hong Kong, Iran, India, Indonesia, Israel, Jamaica, Qatar, Colombia, Malaysia, Malta, Morocco, Montenegro, Austria, the Philippines, Serbia, Singapore, Korea, Thailand, the Czech Republic (as of 1 January 2014), Turkey, Hungary (as of 1 January 2015), Uruguay and the United Arab Emirates provide for a limitation of the state of performance's taxation rights in the above-mentioned sense; however, restricted to the scenario that the financial support is derived from public funds in the entertainers' respectively entertainers' or sportspersons' state of residence.

94. *See* FTA Guidelines, p. 2, sec. 2.3.
95. According to Oberson, *supra* n. 93, at N226 ad Art. 17, at least 50%.

The taxation rights on income derived by entertainers or sportspersons resident in one of the above-mentioned contracting states from their entertaining or sports activities are attributed in accordance with the provisions set forth for employment income (article 15 of the OECD Model) or self-employment income (formerly article 14 of the OECD Model).[96]

24.2.1.3. Treaty provisions relating to payment of compensation to third party

The majority of the Swiss double taxation treaties include special provisions in line with article 17(2) of the OECD Model allocating the taxation rights on compensation for a performance to the state of performance also if the compensation is not paid directly to the entertainer or sportsperson but to a third party.[97] The corresponding element in Swiss legislation can be found in article 92(2) of the DTA.[98]

The Swiss treaties can be grouped as follows:

- The treaties with Ireland, Morocco and Spain do not contain any special provisions relating to compensation paid to third parties.[99]

- The treaties with Albania, Argentina (with retroactive effect as of 1 January 2015), Armenia, Azerbaijan, Australia, Bangladesh, Belarus, Bulgaria, Finland, Georgia, Ghana, Hong Kong, Israel, Jamaica, Canada, Kazakhstan, Qatar, Kyrgyzstan, Croatia, Kuwait, Luxembourg, Macedonia, Mexico, Moldova, Mongolia, the Netherlands, Austria, Peru, the Philippines, Poland, Romania, Russia, Slovakia, South Africa, Tadzhikistan, Tunisia, Turkmenistan, Ukraine, Hungary, Uruguay, Venezuela and the United Arab Emirates restrict the application of the state of performance's taxation right to payments made to third parties

96. FTA Guidelines, p. 2, sec. 2.3. in fine.
97. FTA Guidelines, p. 1, sec. 2.2.
98. *See* section 24.1.3.3.1.
99. FTA Guidelines, p. 1, sec. 2.2. The payments to third parties, however, are to be considered as part of the receiving party's business profits or income (arts. 7 and 21 OECD Model). Furthermore, structures involving compensation payments to third parties instead of the entertainer or sportsperson in person with the purpose to avoid taxation of the compensation payments in the source state (state of performance) are to be analysed in light of the "look-through" doctrine (as implemented by Swiss legislation in art. 92(2) DTA, *see* section 24.2.7.1.) and, ultimately, the general anti-abuse legislation applicable also to double taxation treaties to determine the possibility of the state of performance to levy taxation at source on such payments even in the absence of an explicit provision in line with art. 17(2) OECD Model.

to cases where the entertainer or sportsperson directly or indirectly benefits from the third party's profits. In such case, under Swiss domestic practice, the total compensation, including the remuneration for the performance of the entertainer/sportsperson as well as a compensation for the third party's activity, is subject to taxation at source under article 92(2) of the DTA/article 35(1)(b) of the THA.[100] If neither the entertainer or sportsperson nor persons associated with him directly or indirectly take part in the third party's profits, the taxation right on compensation from the entertainer's/sportsperson's personal performance paid to a third party is not allocated to the state of performance in accordance with the treaty provision in line with article 17(2) of the OECD Model.[101]

24.2.1.4. Teams and orchestras

In the context of article 17 of the OECD Model, Swiss double taxation treaties generally do not contain special provisions relating to teams and orchestras. From a Swiss perspective, the taxation rights on income earned by orchestras are allocated in application of article 17(1) of the OECD Model, i.e. in line with the place of physical performance of the individual team/orchestra member.

In the context of non-Swiss-resident entertainers and sportspersons performing in Switzerland, Swiss domestic tax legislation contains the following features relevant for teams and orchestras:

- Article 5(2) of the DTA: A compensation from a professional activity in Switzerland paid not to the individual exercising the activity but to a third party triggers the third party's limited tax liability in Switzerland. This applies also to income paid to teams and orchestras.[102]

- Article 92(1) in fine of the DTA: Compensation from a professional activity in Switzerland paid not to the entertainer or sportsperson but to an organizing third party is subject to taxation at source in Switzerland.[103]

- Article 7(2) of the ST Ordinance: If the daily gross income of an entertainer or sportsperson performing within the framework of a group

100. FTA Guidelines, p. 2, sec. 2.2.
101. FTA Guidelines, p. 1, sec. 2.2.
102. *See* section 24.1.3.1.2.
103. *See* section 24.1.3.3.1.

cannot be determined or can only hardly be determined, the average compensation of the group members is calculated per capita for the purpose of the determination of the applicable tax rate.[104]

24.2.2. Relationship between treaty provisions applicable to income earned by non-resident entertainers and sportspersons

24.2.2.1. General principle

It is generally recognized by Swiss doctrine and judicial practice that the tax treatment of an entertainer's or sportsperson's overall compensation is to be determined separately with respect to each income stream.[105] In view of its status as an exceptional rule (*lex specialis*) in relation to the general rules, the scope of article 17 of the OECD Model, generally, is to be interpreted restrictively.[106]

24.2.2.2. Relationship to article 12 OECD Model (royalty income)

According to jurisprudence and doctrine, royalty income paid to an entertainer or sportsperson in the (wider) context of his professional activities as entertainer or sportsperson generally falls within the scope of article 12 of the OECD Model and not within the scope of article 17 of the OECD Model.[107] Royalty income is therefore typically taxed in the entertainers' or sportsperson's state of residence and not in the state of performance of the entertainment or sports activity exploited by the intellectual property right.

A specific delimitation is to be drawn with regard to broadcasting income. Doctrine recognizes that direct transmissions of events (live transmissions) fall within the scope of article 17 of the OECD Model since they enlarge the

104. *See* section 24.1.3.1.6.
105. Zurich Tax Appeals Commission of 17 April 1997, published in StE 1997 A 31.4 sec. 2.a.; Oberson, *supra* n. 93, at N27 ad Art. 17.
106. CH: Federal Supreme Court, 6 May 2008, Decision 2C.276/2007, cons. 5.6.; Oberson, id., at N85 ad Art. 17; Graf & Christoffel, *supra* n. 46, at N49 ad Art. 17. This can lead, however, to the – perhaps unwanted – consequence that although of similar importance to a performance, participants contributing to a performance may be taxed differently depending on their performance "on stage" and not "behind stage", *see* Oberson, id., at N87 ad Art. 17.
107. Zurich Tax Appeals Commission of 17 April 1997, published in StE 1997 A 31.4 sec. 3.a.; Oberson, id., at N21 ad Art. 17; Stockmann, *supra* n. 74, at N13 ad Art. 17, para. 1.

audience of a life performance.[108] Non-direct transmissions, to the contrary, only reproduce a performance and therefore do not fall within the scope of article 17 of the OECD Model but rather fall within the scope of article 12 of the OECD Model.[109] On a more general level, according to doctrine, a performance or transmission showing a performance to the public for the first time typically falls within the scope of article 17 of the OECD Model.[110] In contrast, any reproduction of a life performance shall be taxed in accordance with article 12 of the OECD Model rather than article 17 of the OECD Model.[111] The allocation of taxation rights with regard to broadcasting income forms, for the rest, has been integrated into the Commentary on Article 17 of the OECD Model.[112]

24.2.2.3. Relationship to article 15 OECD Model (employment income)

Unless explicitly provided otherwise in the text of a treaty clause on the taxation of entertainers and sportspersons, the provisions on the taxation of income of entertainment and sports activities (article 17 of the OECD Model) generally prevail as *lex specialis* over the respective provisions on the taxation of income from employment (article 15 of the OECD Model).[113]

108. Oberson, *supra* n. 93, at N23 ad Art. 17.
109. Id.
110. Oberson, *supra* n. 93, at N24 ad Art. 17; Graf & Christoffel, *supra* n. 46, at N86 ad Art. 17.
111. Oberson, id.; Graf & Christoffel, id.
112. Para. 9.4 *OECD Model: Commentary on Article 17* and Oberson, *supra* n. 93, at N25 ad Art. 17.
113. E.g. art. 17(1) DTT-D; *Convention between the Swiss Confederation and the Republic of Austria on the avoidance of double taxation with respect to taxes on income and wealth* art. 17(1) (30 January 1974, published in SR 0.672.916.31, hereinafter "DTT-A"); *Convention between the Swiss Confederation and the Republic of Italy on the avoidance of double taxation and other topics with respect to taxes on income and wealth* art. 17(1) (9 March 1976, published in SR 0.672.945.41, hereinafter "DTT-I"); *Convention between the Swiss Confederation and the Republic of France on the avoidance of double taxation with respect to taxes on income and wealth and on the avoidance of tax fraud and tax evasion* art. 19(1) (9 September 1966, published in SR 0.672.934.91, hereinafter "DTT-F"); art. 17(1) DTT-NL; *Convention between the Swiss Confederation and the United Kingdom of Great Britain and Northern Ireland on the avoidance of double taxation with respect to taxes on income* art. 17(1) (8 December 1977, published in SR 0.672.936.712, hereinafter "DTT-UK"); art. 17(1 DTT-US); *Convention between the Swiss Confederation and Canada on the avoidance of double taxation with respect to taxes on income and wealth* art. 17(1) (5 May 1997, published in SR 0.672.923.11, hereinafter "DTT-C"); *Convention between the Swiss Confederation and the Russian Confederation on the avoidance of double taxation with respect to taxes on income and wealth* art. 17(1) (15 November 1995, published in SR 0.672.966.51, hereinafter "DTT-RU"); Oberson, *supra* n. 93, at N18 and N92 et seq. ad Art. 17; Stockmann, *supra* n. 68, at N7 ad Art. 17, para. 1.

As such, the income of entertainers and sportspersons is treated in accordance with the rules as set forth in article 17 of the OECD Model, i.e. if the respective prerequisites are met, subject to taxation in the state of performance (i.e. the source state) and not the entertainer's or sportsperson's state of residence also if the income is derived in the context of an employment. This applies even if the entertainer or sportsperson spends less than 183 days in the state of performance.[114]

Whereas, in principle, the general rules of attribution of taxation rights apply also to team sports or groups of artists, it is, in the context of the delimitation of the applicable treaty provision, to be highlighted that Swiss courts and a part of doctrine generally treat employment income of team members of a sports team under article 15 of the OECD Model and not under article 17 of the OECD Model.[115] Only in specific cases,[116] a close nexus between the performance of a particular team member and his compensation shall be considered as sufficient to subject a portion of the premium paid to his team to taxation at source in Switzerland in application of article 17 of the OECD Model. In any case, the premium may only be taxed in Switzerland to the extent it was effectively forwarded to the player by way of his remuneration from his employer.[117] Another doctrine and the OECD, in contrast, state the general right of a contracting state to levy taxation in application of article 17 of the OECD Model on the fraction of the overall remuneration paid to a team or group which is effectively forwarded to the individual player/group member. In such cases, an "appropriate portion" of the remuneration has to be determined, both with regard to the individual's share to the group's overall remuneration and with regard to a state's share of the total compensation in case the team or group is remunerated for performances in multiple states.[118]

114. Oberson, id., at N18 ad Art. 17.
115. Graf & Christoffel, *supra* n. 46, at N94 et seq. ad Art. 17; CH: Federal Supreme Court, 6 May 2008, Decision 2C.276/2007, cons. 6.2. This is also the view taken by the OECD, *see* para. 14.1 *OECD Model: Commentary on Article 17*.
116. E.g. in the context of the UEFA European Soccer Championship in 2008, *see* Graf & Christoffel, id., at N95 ad Art. 17.
117. Graf & Christoffel, id.
118. Oberson, *supra* n. 93, at N93 et seq. ad Art. 17, with further reference to the OECD Commentary.

24.2.2.4. Relationship to treaty clauses on self-employment/ business income (former article 14 OECD Model, article 7 OECD Model)

Whereas the former article 14 of the OECD Model on self-employment income has been deleted from the OECD Model, many Swiss double taxation treaties still contain provisions on self-employment income, such as e.g. the treaties with Germany, Austria, Italy, France, the Netherlands, the United Kingdom, the United States, Canada, and Russia.[119] It is generally recognized and contained expressly in the provisions on the taxation of income of entertainment and sports performances of the mentioned treaties[120] that the provisions on the taxation of income of entertainment and sports activities (article 17 of the OECD Model) prevail as *lex specialis* over the respective provisions on the taxation of income from self-employment (former article 14 of the OECD Model). Income from self-employment in the field of entertainment or sports is therefore mostly taxed in the state of performance (source state), even in the absence of a PE in this state.[121]

The same holds true for article 7 of the OECD Model on business profits. As *lex specialis*, article 17 of the OECD Model prevails over article 7 of the OECD Model according to Swiss doctrine.[122]

24.2.2.5. Relationship to article 19 OECD Model (public service)

The relationship between the provisions on the taxation of income derived in the context of the public service of one contracting state (article 19 of the OECD Model) and on the taxation of entertainers and sportsmen (article 17 of the OECD Model) is to be determined on a case-by-case basis from a Swiss perspective:

119. Art. 14 DTT-D, art. 14 DTT-A, art. 14 DTT-I, art. 16 DTT-F, *Convention between the Swiss Confederation and the Kingdom of the Netherlands on the avoidance of double taxation with respect to taxes on income* art. 14(2) (26 February 2010, published in SR 0.672.963.61, hereinafter "DTT-NL"), art. 14 DTT-UK, art. 14 DTT-US, art. 14 DTT-C, art. 14 DTT-RU.
120. Art. 17(1) DTT-D, art. 17(1) DTT-A, art. 17(1) DTT-I, art. 19(1) DTT-F, art. 17(1) DTT-NL, art. 17(1) DTT-UK, art. 17(1) DTT-US, art. 17(1) DTT-C, art. 17(1) DTT-RU.
121. Oberson, *supra* n. 93, at N18 ad Art. 17; Stockmann, *supra* n 68, at N7 ad Art. 17, para. 1.
122. Graf & Christoffel, *supra* n. 46, at N48 ad Art. 17; Stockmann, id., at N10 ad Art. 17, para. 1.

- Switzerland has included in certain treaties a provision in line with article 19(3) of the OECD Model, providing expressly that the provision relating to the taxation of entertainers and sportspersons (article 17 of the OECD Model) shall apply to income streams derived from one of the contracting states from services rendered in the context of an industrial or commercial activity of the other contracting state or a subdivision thereof or of a legal entity established under the public state thereof.[123]

  In view of the fact that, in particular, entertainment performances are frequently subsidized, it is in this context to be further determined whether the performance in question may be qualified as "commercial activity" at all and if the performance state's taxation rights as allocated under article 17 of the OECD Model adhere if the entertainer's or sportsperson's activities are subsidized by public funds. Whereas the Swiss courts have apparently not yet had the occasion to issue their opinion on this question, Swiss doctrine qualifies also subsidized performances rendered in the context of public services as "commercial activity". As such, they are to be taxed in the state of performance in line with the provision of article 17 of the OECD Model.[124] If, however, the respective treaty includes a provision in line with article 17(3) of the OECD Model excluding the taxation of income streams from entertainment and sports activities financed by public funds from the scope of article 17 of the OECD Model, the taxation rights on income derived from subsidized performances in the context of public services are allocated to the respective entertainer's or sportsperson's

- In other Swiss treaties, the treaty provision on the taxation of income streams derived in connection with public services (article 19 of the OECD Model) does not include a sub-provision in line with Article 19(3) of the OECD Model.[125] In such cases, the scope of the provisions in line with article 19(1) and (2) of the OECD Model is extended to industrial and commercial activities also in the entertainment or sports sector rendered in connection with the public services of a state.[126] The taxation rights on the compensation for such activities are therefore allocated generally to the state for which the public service is rendered.

123. E.g. art. 21(2) DTT-F, art. 19(2) DTT-NL; Oberson, *supra* n. 93, at N19 ad Art. 17.
124. Oberson, id., at N20 ad Art. 17.
125. E.g. 19 DTT-D, art. 19 DTT-A, art. 19 DTT-I, art. 19(3à DTT-UK, art. 19(3) DTT-US, art. 19(3) DTT-RU.
126. Oberson, *supra* n. 93, at N20 ad Art. 17.

24.2.2.6. Relationship to article 21 OECD Model (further income)

In accordance with the wording of article 21(1) of the OECD Model, the treaty provisions on the allocation of taxation rights on "further income" only apply if the allocation of taxation rights with regard to the income stream is not governed by any other provision of the respective treaty. Therefore, treaty provisions on the allocation of taxation rights on income derived in connection with entertainment and sports activities typically prevail over the respective treaty's provision relating to "other income".

24.2.3. Definition of sportspersons and entertainers

24.2.3.1. Swiss perspective on definition of "entertainers"

24.2.3.1.1. *Scope of application and key elements of the definition*

The notion of "entertainer" is defined in Swiss tax legislation only for the purposes of the application of the specific Swiss-source taxation rules for non-resident entertainers and sportspersons. The notion has so far not been further defined or described content-wise by Swiss courts. It is understood, however, in Swiss literature and practice that the definition of the notion "entertainer" as provided for in article 92 of the DTA is drawn in accordance with the OECD's definition of "artistes" respectively "entertainers" for the purposes of article 17 of the OECD Model.[127] The definition is therefore also applicable to resident entertainers and sportspersons, leading to an identical definition both in the context of inbound and outbound cases. It is generally recognized by Swiss doctrine that article 17(1) of the OECD Model only applies to individuals.[128]

Article 92 of the DTA defines "entertainers" as "artists, such as theatre, motion picture, radio or television artists, musicians and performers".[129] According to the non-exhaustive list included in article 17(1) of the OECD Model, "an entertainer, such as theatre, motion picture, radio or television artist, or a musician" is considered as "artist". It is understood that the lists

127. *See* Zigerlig & Jud, *supra* n. 39, at N2 ad Art. 92.
128. Grossmann, *supra* n. 74, at p. 22 et seq.; Graf & Christoffel, *supra* n. 46, at N51 ad Art. 17. Dissenting opinion: Stockmann, *supra* n. 68, at N20 ad Art. 17.
129. *See* art. 92(1) DTA: "Im Ausland wohnhafte *Künstler, wie Bühnen-, Film-, Rundfunk- oder Fernsehkünstler, Musiker und Artisten* [emphasis by author], sowie Sportler und Referenten sind für Einkünfte aus ihrer in der Schweiz ausgeübten persönlichen Tätigkeit und für weitere damit verbundene Entschädigungen steuerpflichtig."

included in article 92(1) of the DTA and article 17(1) of the OECD Model are non-exhaustive but narrow the scope of article 92(1) of the DTA/article 35(1)(b) of the THA and article 17(1) of the OECD Model to entertaining artists[130] performing directly or indirectly for a public audience providing a performance of artistic or entertaining nature.[131] Thereby, the artistic level of the performance is not decisive.[132] For the purposes of article 92 of the DTA/article 35(1)(b) of the THA, it is of no relevance whether the artist is employed or self-employed and whether the activity as artist is performed as main or side occupation[133] or on an amateur basis.[134]

24.2.3.1.2. *Affirmative cases*

The general definition of "artist" (article 17 of the OECD Model) or "entertainer" (article 92 of the DTA) undoubtedly includes stage and movie artists as well as artists (including former sportspersons) acting in television publicity and musicians.[135] The notion of "artist" furthermore encompasses "civic, social, religious or charitable activities of entertaining character"[136] attended by entertainers. It is recognized by doctrine that in practice, certain activities fall within a "grey area" and in such cases a delimitation and appreciation of arguments has to be drawn on a case-by case-basis.[137]

The entertainment character of an activity has been discussed in Swiss doctrine with regard to certain forms of appearance of – predominantly modern or recently developed – forms of entertainment within the "grey zone"[138] between "entertainment"/"art" or "sports activity" and general professional or amateur activity not within the scope of article 17 of the OECD Model. Key elements have been identified as (i) the public performance of the

130. Oberson, *Problèmes récents*, *supra* n. 46, at p. 168; Grossmann, *supra* n. 74, at p. 29.
131. Grossmann, id., p. 23 et seq.; Zigerlig & Jud, *supra* n. 39, at N2 ad Art. 92 with further references; Federal Supreme Court, 6 May2008, Decision 2C.276/2007, cons. 5.2.
132. Grossmann, id., p. 26 et seq.
133. Richner et al., *supra* n. 41, at N8 ad Art. 92; Zigerlig & Jud, *supra* n. 39, at N1 ad Art. 92; Oberson, *Problèmes récents*, *supra* n. 46, at p. 168; Graf & Christoffel, *supra* n. 46, at N53 ad Art. 17.
134. Para. 9.1 *OECD Model: Commentary on Article 17(1)*. Certain double taxation treaties Switzerland has concluded, however, explicitly only apply to entertainers or sportspersons acting as such by profession, *see* section 24.2.1.1.
135. Richner et al., *supra* n. 41, at N5 ad Art. 92; Stockmann, *supra* n. 68, at sec. 3 in N1 ad Art. 17.
136. Para. 3 *OECD Model: Commentary on Article 17(1)*.
137. Stockmann, *supra* n. 68, at sec. 3 in N1 ad Art. 17. For further examples, *see* section 24.2.3.
138. Oberson, *supra* n. 93, at N56 ad Art. 17(c).

activity in question[139] and (ii) the active creation of an added entertainment value.[140] These criteria have generally to be assessed on a case-by-case basis and may, according to doctrine, be met for the creational process in the contexts of "land art"[141] and "environmental installation art",[142] public readings by authors from their oeuvres,[143] performances of DJs (disc jockeys),[144] radio art if the radio speaker uses a certain "creative talent" and the content and structuring of the programme are of entertaining nature,[145] commentary of sports or entertainment events in so far as the commentator actively participates in the event and provides a certain creative added value,[146] talk-show hosting in so far as the host presents the talk-show in a distinctive, original manner which is the mere reason for the audience to watch the show,[147] VIPs attending events, at least in so far as they are compensated for a defined "appearance" and form part of the event's show programme,[148] fashion models in exceptional cases[149] and participants in "happenings".[150]

24.2.3.1.3. *Negative cases*

Typically not recognized as "artists" or "entertainers" for Swiss domestic tax purposes are camera operators, producers, technical staff,[151] fashion models merely displaying fashion without providing any entertaining added value, choreographers and auction vendors,[152] as well as – due to the

139. Oberson, id., at N42 ad Art. 17; Grossmann, *supra* n. 74, at p. 29.
140. Oberson, id., at N57 ad Art. 17, with further reference; Grossmann, id.
141. The exposition and exploitation of "land art", however, is to be assessed under the applicable other articles of the OECD Model and does not fall within the scope of article 17 of the OECD Model, *see* Oberson, *supra* n. 93, at N48 ad Art. 17.
142. Oberson, id., at N49 ad Art. 17, with further reference.
143. Id., at N50 ad Art. 17, with further reference; Grossmann, *supra* n. 74, at p. 32.
144. Grossmann, id.; Graf & Christoffel, *supra* n. 46, at N59 ad Art. 17.
145. Oberson, *supra* n. 93, at N57 ad Art. 17, distinguishing "radio art" within the scope of art. 17 OECD Model, in particular, from journalism.
146. Oberson, id., at N58 ad Art. 17, distinguishes the "artistic" commentary performance, in particular, from the mere presentation of facts which does not fall within the scope of article 17 of the OECD Model (*see also* Grossmann, *supra* n. 74, at p. 31).
147. Oberson, *supra* n. 93, at N59 ad Art. 17, in fine; Graf & Christoffel, *supra* n. 46, at N59 ad Art. 17. Talk-show or radio show guests or participants in television or radio show competitions, to the contrary, are not considered as "entertainers" or "artists" for the purposes of article 17 of the OECD Model, *see* Oberson, id., at N60 ad Art. 17.
148. Oberson, id., at N62 ad Art. 17, with further reference to an Austrian court case in this regard.
149. Id., at N61 ad Art. 17.
150. Id., at N62 ad Art. 17.
151. E.g. make-up artists, sound technicians, stage technicians, piano tuners, costume designers, *see* Graf & Christoffel, *supra* n. 46, at N60 ad Art. 17.
152. Oberson, *supra* n. 93, at N 63 ad Art. 17; Grossmann, *supra* n. 74, p. 31 et seq.

lack of the element of the personal performance in Switzerland – painters, photographers or sculptors exhibiting in Switzerland.[153] Furthermore, laser shows and fire shows tend not to fall within the scope of article 17 of the OECD Model.[154]

27.2.3.1.4. *Mixed cases*

In cases where an individual exercises within the context of a project, on the one hand, an activity recognized as artistic for the purposes of article 92 of the DTA/article 35(1)(b) of the THA and article 17 of the OECD Model (e.g. acting) and, on the other hand, an activity clearly excluded from the scope of article 92 of the DTA/article 35(1)(b) of the THA and article 17 of the OECD Model (e.g. producing), doctrine postulates, in accordance with the OECD's position, that the artistic and non-artistic elements are to be weighed and article 17 of the OECD Model shall apply to "all the resulting income" if the activity is "predominantly of a performing nature".[155] In order to achieve a "predominance" of the artistic respectively the non-artistic activity, a "qualifying majority" should be required according to Oberson.[156] If, however, the activity cannot be considered as predominantly artistic or non-artistic, an apportionment shall be made.[157]

24.2.3.2. Swiss perspective on definition of "sportsperson"

Swiss domestic legislation and court practice do not contain a definition of the notion of "sportsperson". For the purposes of article 92 of the DTA/article 35(1)(b) of the THA, doctrine and practice, in application of the doctrine and practice developed in the context of article 17 of the OECD Model,[158] consider any physically exercised sports activities[159] as well as

153. Zigerlig & Jud, *supra* n. 39, at N2 ad Art. 92, with further reference; Stockmann, *supra* n. 68, at sec. 3 in N1 ad Art. 17.
154. Graf & Christoffel, *supra* n. 46, at N59 ad Art. 17.
155. Para. 1 *OECD Model: Commentary on Article 17(1).*
156. Oberson, *supra* n. 93, at N 82 et seq. ad Art. 17.
157. Para. 4 *OECD Model: Commentary on Article 17.* With reference to an Austrian court decision, Oberson, id., at N83 ad Art. 17, holds for a qualifying majority requirement: if an activity is 80% or more of entertaining or sports nature, article 17 of the OECD Model shall apply; if, however, an activity is entertaining or consisting in sport to 20%-80%, an apportionment shall be made. If only up to 20% of the activity can be considered as of entertaining or sporty nature, the activity does not fall within the scope of article 17 of the OECD Model.
158. Cadosch, *supra* n. 7, at p. 315; Zigerlig & Jud, *supra* n. 39, at N3 ad Art. 92.
159. E.g. soccer, tennis, athletics, horseback riding, car racing, etc.

intellectual performances[160] as sports activities if they are exercised within a certain framework of rules and an organizational structure.[161]

Also for the definition of the notion "sportsperson" for the purposes of article 17 of the OECD Model, from a Swiss perspective, the public nature of the performance is of key importance.[162] Whereas substitute players, e.g. of a soccer team, both if appointed to play even for a short time within a game and if on the replacement bench only, should qualify as sportspersons;[163] according to doctrine, participants in a quiz show,[164] referees,[165] coaches,[166] technical assistants to a sportsperson,[167] golf caddies,[168] agents, managers, sports functionaries,[169] physical therapists[170] and former sportspersons commenting sports events as experts[171] do not fall within the notion of "sportsperson" for the purposes of article 92 of the DTA/article 35(1)(b) of the THA and article 17 of the OECD Model. Such persons generally fall within the scope of the ordinary taxation rules.[172]

For the purposes of article 92 of the DTA/article 35(1)(b) of the THA, the sports activity may be exercised professionally or on an amateur basis,[173] but it is in any case required that the sports activity is performed in public, e.g. on the occasion of a tournament, car race or riding competition,[174] or

160. E.g. chess, bridge, pool billiards, poker, etc., *see* Oberson, *Problèmes récents*, *supra* n. 46, at p. 168 and Oberson, *supra* n. 93, at N74 ad Art. 17.
161. Richner et al., *supra* n. 41, at N6 ad Art. 92; Zigerlig & Jud, *supra* n. 39, at N2 ad Art. 92.
162. Oberson, *supra* n. 93, at N70 ad Art. 17; Grossmann, *supra* n. 74, at p. 62.
163. Oberson, id., at N71 ad Art. 17, excludes, however, from the scope of application of article 17 of the OECD Model members of a team who are joining their team but follow a match from the tribune and not on the replacement bench, thus not actively contributing to the game.
164. Graf & Christoffel, *supra* n. 46, at N65 ad Art. 17.
165. Richner et al., *supra* n. 41, at N6 ad Art. 92; Oberson, *supra* n. 93, at N73 ad Art. 17.
166. Oberson, id., at N72 ad Art. 17, with further reference.
167. Id.
168. Oberson, *supra* n. 93, at N73 ad Art. 17.
169. Cadosch, *supra* n. 7, at p. 315, with further reference.
170. Graf & Christoffel, *supra* n. 46, at N60 ad Art. 17.
171. Para. 9.1 *OECD Model: Commentary on Article 17(1).*
172. Cadosch, *supra* n. 7, at p. 315; Grossmann, *supra* n. 74, at p. 61 et seq.
173. Para. 9.1 *OECD Model: Commentary on Article 17(1).* Certain Swiss double taxation treaties, however, require the sports activities to be exercised professionally, *see* section 24.2.1.1.
174. Oberson, *Problèmes récents*, *supra* n. 46, at p. 168; Oberson, *supra* n. 93, at N69 ad Art. 17; Zigerlig & Jud, *supra* n. 39, at N3 ad Art. 92; Stockmann, *supra* n. 68, at sec. 5 in N1 ad Art. 92.

within the framework of an entertaining performance.[175] In this context, doctrine considers e.g. alpine tour guides for private tours, scuba divers or tennis teachers not as "sportspersons" within the scope of article 17 of the OECD Model.[176]

24.2.4. Definition of income "related to the personal activities of the performer"

Doctrine limits the scope of application of article 17(1) of the OECD Model to income streams derived in an immediate, direct connection with an activity physically performed by the entertainer or sportsperson in public.[177] The Federal Supreme Court considers only income related to a public performance as qualifying for the special allocation of taxation rights as stipulated by article 17(1) of the OECD Model.[178] In contrast, income from the use of immaterial rights (IP rights) such as, for example, picture, image and name, do not fall within the scope of article 17(1) of the OECD Model due to the lack of a direct connection to a publicly performed entertainment or sports activity.[179].

24.2.5. Definition of "closely connected" income

24.2.5.1. Victory prizes, ranking prizes and appearance fees

Appearance fees paid by the organizers of an event or by an entertainer's or sportsperson's sponsors for a sportsperson's or entertainer's participation in a competition as well as prizes for victory or the achievement of a certain ranking in a specific competition are considered by doctrine as closely connected to a performance.[180] Such income streams are therefore attributed for taxation purposes to the state of performance under article 17 of the OECD Model.

175. E.g. figure skating, Richner et al., *supra* n. 41, at N3 ad Art. 92, or golfing, Stockmann, id., at 6 in N1 ad Art. 17. The Zurich Guidelines, p. 1, refer in this context expressly to a presentation (*Darbietung*) of the sports activity.
176. Oberson, *supra* n. 93, at N70 ad Art. 17, with further references; id., at N76 ad Art. 17, to the contrary qualifies chess or bridge tournaments as sports activity within the scope of article 17 of the OECD Model.
177. Graf & Christoffel, *supra* n. 46, at N67 ad Art. 17.
178. CH: Federal Supreme Court, 6 May 2008, Decision 2C.276/2007, cons. 5.3.
179. Graf & Christoffel, *supra* n. 46, at N68 ad Art. 17; *see also* section 24.2.2.2.
180. Graf & Christoffel, id., at N73 ad Art. 17; Oberson, *supra* n. 93, at N118 ad Art. 17.

Ranking premiums paid by a sponsor for a certain ranking within a list of rankings are, in Swiss doctrine, considered as not within the scope of article 17 of the OECD Model due to a lack of sufficient direct nexus to a performance in a given state[181] and for practicability reasons.[182]

24.2.5.2. Income from use and sale of image rights (intangible property rights)

If Switzerland has concluded a double taxation treaty with the entertainer's or sportsperson's state of residence, the application of the treaty's provision on royalty payments (article 12 of the OECD Model) and not of article 17 of the OECD Model is generally admitted on income from the use and sale of image rights from Swiss sources even if the image rights relate to a performance in a contracting state.[183] Under the majority of the Swiss treaties, the taxation right on royalty income from Swiss sources is attributed to the recipient's state of residence.[184] It is to be noted that Switzerland in any case does not levy withholding or source taxes on royalty payments.[185]

With regard to merchandising income, Swiss doctrine distinguishes as follows: if the merchandising is outsourced to a third-party merchandising provider, the income realized by the entertainer or sportsperson is considered as royalty income and to be attributed in accordance with article 12 of the OECD Model. If, however, the entertainer or sportsperson sells his merchandising products himself on the occasion of a performance, article 17 of the OECD Model shall apply.[186]

181. Cadosch, *supra* n. 7, at p. 311.
182. Graf & Christoffel, *supra* n. 46, at N78 ad Art. 17. Oberson, *supra* n. 93, at N118 ad Art. 17, proposes a "reasonable" allocation of ranking premiums between the involved states but admits, in view of the multiple methods possible, a certain lack of clarity.
183. Zigerlig & Jud, *supra* n. 39, at N5 AD Art. 92; Decision of the Zurich Tax Appeals Commission of 17 April 1997, published in StE 1997 A 31.4 sec. 5, cons. 4a.; para. 9 *OECD Model: Commentary on Article 17*; para. 9.1 *OECD Model: Commentary on Article 17(1)*; Oberson, *supra* n. 93, at N145 ad Art. 17. If, however, the royalty payments rather constitute the remuneration for a personal performance, according to the projected amendment to the OECD Commentary, such remuneration shall fall within the scope of article 17 of the OECD Model and not article 12 of the OECD Model; *see* Oberson, *supra* n. 93, at 3147 ad Art. 17 and Stockmann, *supra* n. 68, at N13 ad Art. 17; para. 1.
184. Richner et al., *supra* n. 41, at N14 ad Art. 92.
185. *See* section 24.1.3.2.2.
186. Oberson, *supra* n. 93, at N158 et seq. ad Art. 17.

24.2.5.3. Sponsorship, advertising and endorsement income

24.2.5.3.1. *Framework*

Sponsoring, advertising and endorsement income of non-Swiss tax resident entertainers or sportspersons is typically subject to taxation in Switzerland (based on article 5(1) of the DTA/article 4(2)(a) of the THA) only in so far as the income is paid directly in connection with a performance on Swiss soil.[187] In contrast, general sponsoring contributions and income derived by an entertainer or sportsperson not in connection with a performance in Switzerland do not fall within the scope of taxation in Switzerland.[188] These are typically considered on the level of the entertainer or sportsperson under the applicable local legislation as income from self-employment[189] or employment and, as such, taxable in the entertainer's or sportsperson's state of residence in accordance with article 7 or article 15 of the OECD Model.[190]

Generally, in line with the Federal Supreme Court[191] and in contrast to the OECD's view,[192] doctrine supports a narrow interpretation of the direct connection of sponsoring, advertising and endorsement income to an entertainment or sports performance. By this, in tendency, the taxation right of the entertainer's or sportsperson's state of residence is rather enlarged in the international context.[193]

24.2.5.3.2. *Content of "close connection" criterion*

The close connection of income streams to an artistic or sports performance in Switzerland, according to the OECD, is generally admitted "where it cannot reasonably be considered that the income would have been derived in

187. Decision of the Zurich Tax Appeals Commission of 17 April 1997, published in StE 1997 A 31.4 sec. 5; Stockmann, *supra* n. 68, at N9 ad Art. 17, para. 1; according to Grossmann, *supra* n. 74, at p. 113, "*auftrittsbezogene Entgelte*" (income with nexus to a performance).
188. E.g. publicity income for the use of a sponsor's products independent from any performances or general ranking premiums paid by sponsors. *See also* Richner et al., *supra* n. 41, at N13 ad Art. 92, with reference to the decision of the Zurich Tax Appeals Commission of 17 April 1997, published in StE 1997 A 31.4 sec. 5; para. 9 *OECD Model: Commentary on Article 17(1)*; Stockmann, id.; according to Grossmann, id., "*personenbezogene Einkünfte*" (income related to an individual).
189. Oberson, *Problèmes récents*, *supra* n. 46, at p. 170.
190. Para. 9 *OECD Model: Commentary on Article 17(1).*
191. CH: Federal Supreme Court, 6 May 2008, Decision 2C.276/2007, cons. 6.2.
192. Para. 9 *OECD Model: Commentary on Article 17.*
193. Oberson, *Problèmes récents*, *supra* n. 46, at p. 170.

the absence of the performance of these activities."[194] The connection can be established by the timing of the income-generating activity in relation to an event or by the nature of the activity.[195] A direct connection is, namely, considered to exist for appearance fees or prizes paid by sponsors or sports associations for performances in Switzerland.

According to doctrine, in particular, a sportsperson's but also an entertainer's[196] contractual agreement with the respective sponsor(s) may be structured as "on-court agreements" or as "off-court agreements":

- "On-court agreements" typically include an active element according to which a public appearance of the sportsperson or entertainer for the sponsor is required. The entertainer or sportsperson typically uses the sponsor's equipment on the occasion of the appearance.[197] Whereas the OECD considers an indirect nexus as sufficient for the application of article 17 of the OECD Model to sponsoring income,[198] Swiss courts and doctrine support the taxation of such income relating to sponsoring agreements' active component in the entertainer's or sportsperson's state of residence, thereby excluding it from the scope of article 17 of the OECD Model for practicability reasons.[199] According to doctrine and the OECD,[200] a delimitation is to be drawn for media and PR activities of an entertainer or sportsperson under a sponsoring agreement: in so far as the activity is carried out in direct or indirect connection with an entertainment or sports activity, it is considered within the scope of article 17 of the OECD Model; otherwise, the further allocation rules of the OECD Model apply.[201] Also not considered as within the scope of article 17 of the OECD Model are compensations derived by an entertainer or sportsperson for his collaboration in the further development of the sponsor's product.[202]

194. Para. 9 *OECD Model: Commentary on Article 17(1).*
195. Id.
196. The following considerations are typically relevant and discussed in doctrine for sportspersons' activities. However, the principles are in general also applicable to entertainers (such as e.g. a star violinist or a movie star), *see*. Graf & Christoffel, *supra* n. 46, at N89 ad Art. 17.
197. Graf & Christoffel, id., at N74 et seq. ad Art. 17.
198. Para. 9 *OECD Model: Commentary on Article 17.*
199. Graf & Christoffel, *supra* n. 46, at N76 ad Art. 17, with further references to Decision of the Zurich Tax Appeals Commission of 17 April 1997, published in StE 1997 A 31.4 sec. 4aa and to Federal Supreme Court, 6 May 2008, Decision 2C.276/2007, cons. 6.2.
200. Para. 9 *OECD Model: Commentary on Article 17.*
201. Graf & Christoffel, *supra* n. 46, at N79 ad Art. 17, with further reference.
202. Id., at N80 ad Art. 17.

Furthermore, on-court agreements often comprise a passive element entitling the sponsor to use the entertainer's or sportsperson's intangible rights on his person, name, picture and image for advertising or other purposes.[203] The overall sponsoring income is therefore typically to be split into an active and a passive component. The income accrued for the passive aspects, like "off-court agreements", typically does not fall within the scope of article 17 of the OECD Model but instead is subject to the other attribution rules of the OECD Model.[204]

- "Off-court agreements" oblige the entertainer or sportsperson to provide promotional services to the sponsor independently from a participation and appearance in a competition or event. Such services include, inter alia, the use of IP rights (name, picture and image) in the entertainer's or sportsperson's person, the collaboration in photo shootings and movies, or the participation in media and PR events. Furthermore, under off-court agreements, particularly in the context of sports performances, ranking premiums may also be paid. Since the obligations under off-court agreements, by definition, do not have a closer connection to a public performance of the entertainer or sportsperson in his function as entertainer or sportsperson, any consideration derived under such agreements is considered as not within the scope of article 17 of the OECD Model.[205]

24.2.5.3.3. *Mechanism of taxation*

In so far as sponsorship, advertising and endorsement payments subject to taxation in Switzerland stem from Swiss debtors, in application of article 92 of the DTA/article 35(1)(b) of the THA, Swiss-source taxation applies to the payments. If the income is derived from non-Swiss debtors, at least in theory, the receiving entertainer or sportsperson is obliged to submit a tax declaration to the competent Swiss tax authorities, which is not considered as a very practicable approach.[206]

24.2.5.4. Broadcasting income

Broadcasting income realized by non-Swiss-resident entertainers and sportspersons in direct connection with a performance physically exercised

203. Id., at N77 ad Art. 17.
204. Id.
205. Graf & Christoffel, *supra* n. 46, at N81 et seq. ad Art. 17.
206. Cadosch, *supra* n. 7, at p. 323; Graf & Christoffel, id., at N78 ad Art. 17.

in Switzerland is generally attributed for taxation to Switzerland[207] and falls within the scope of source taxation in Switzerland. In practice, in so far as the broadcasting income is paid by non-Swiss debtors to non-Swiss-resident entertainers or sportspersons, such taxation would in principle require a tax declaration to be submitted by the recipient vis-à-vis the competent Swiss tax authorities.[208] In view of the lack of published practice, it is recommended to pre-discuss critical cases in advance with the competent Swiss tax authorities.

In cases involving not only a public "live" performance but also at the same time a recording of such performance for further exploitation, a detailed analysis of the contractual basis is necessary to distinguish the income streams earned by the physical performance (considered within the scope of article 17 of the OECD Model) from further income streams realized from the exploitation of the record (not within the scope of article 17 of the OECD Model but typically within the scope of article 7 or article 12 of the OECD Model).[209]

24.2.5.5. Inducement income and signing bonuses

According to Swiss doctrine, signing bonuses e.g. paid by clubs to soccer players on the occasion of the latter's engagement to the club do not fall within the scope of article 17 of the OECD Model since they are not linked to a specific performance.[210]

The nexus between an inducement payment and the respective entertainer's or sportsperson's activity is to be analysed on a case-by-case basis. At least in so far as the payment is effectuated in order to convince the recipient to participate in a specific event, taxation in the state of performance in application of article 17 of the OECD Model seems justified.[211] If the payment cannot be considered within the scope of article 17 of the OECD Model, the allocation rules for employment income (article 15 of the OECD Model) or self-employment/business profits apply (article 7 or 14 of the OECD Model).

207. Graf & Christoffel, id., at N85 ad Art. 17, with further reference.
208. *See* section 24.1.2.1.1., with further reference.
209. Graf & Christoffel, *supra* n. 46, at N87 et seq. with further reference; Stockmann, *supra* n. 68, at N13 ad Art. 17.
210. Oberson, *supra* n. 93, at N167 ad Art. 17.
211. Id., at N166 ad Art. 17.

24.2.5.6. Further income streams

24.2.5.6.1. *Compensation without performance*

Compensations of an entertainer or sportsperson for "stand-by" as replacement as long as the entertainer or sportsperson is not effectively called to exercise the respective activity,[212] cancellation payments, e.g. from an insurance provider[213] and compensations for forbearance obligations,[214] according to Swiss doctrine, are not qualified as sufficiently connected to a performance in Switzerland. They therefore do not fall within the scope of article 17 of the OECD Model from a Swiss perspective.

24.2.5.6.2. *Dividend income*

Income realized by entertainers or sportspersons and paid to corporate structures in Switzerland, if forwarded to the entertainer or sportsperson in Switzerland or abroad in the form of dividend payments, is typically subject under Swiss domestic legislation to the federal withholding tax of 35% on the level of the entity.[215] Under Swiss domestic legislation, only dividends funded from capital contribution reserves are exempt from Swiss withholding taxes[216] and, for Swiss-resident recipients, from income taxation.[217] The Swiss withholding tax of 35% levied on dividend payments is in principle fully refundable for Swiss tax resident shareholders. For non-Swiss tax resident shareholders, the application and eligibility for a full or partial refund is to be assessed in accordance with the double taxation treaty in place between Switzerland and the recipient's state of residence (*see* article 10 of the OECD Model). Any refund of Swiss withholding tax is subject to the general anti-abuse legislation.

If income derived in the context of a performance is accrued to the corporate structure and subject to taxation in the state of performance in application of

212. Graf & Christoffel, *supra* n. 46, at N91 ad Art. 17; *see also* the detailed delimitation for replacement players e.g. for a soccer team, section 24.2.3.2.
213. Graf & Christoffel, id., at N92 ad Art. 17; Oberson, *supra* n. 93, at N124 ad Art. 17.
214. Graf & Christoffel, id., at N93 ad Art. 17.
215. *See* CH: Federal Withholding Tax Act of 13 October 1965 (published in SR 642.21, hereinafter "WTA"). Swiss withholding tax is levied by the debtor of the dividend payment. The debtor distributes a net dividend of 65% to the shareholder and provides him with a form confirming the deduction and forwards the deducted 35% of the dividend to the Federal Tax Administration in Berne. The federal withholding tax is not identical to the taxes levied at source, e.g. on employment income paid to non-Swiss-resident employees.
216. Art. 5(1 *bis*) WTA
217. Art. 20(1 *bis*) DTA/art. 7b THA.

article 17(2) of the OECD Model, however, it is recognized by doctrine that a further distribution of such (taxed) income from the structure to the entertainer or sportsperson shall be tax free in order to avoid double taxation.[218]

24.2.6. Allocation of income from performances in different states

The allocation of income from performances in multiple states may be drawn according to each involved state's domestic rules, which entails the general risk of double taxation.[219] From a Swiss perspective, according to doctrine and the Federal Supreme Court, the delimitation is drawn with regard to the working days spent in Switzerland. In this context, the following principles apply:[220]

- official holidays and weekends are not to be taken into consideration;
- for sportspersons, the relevant period typically starts with the beginning of the official trainings in a given year and ends with the last game (even if "off-season"") in a given tax year; and
- for artists, periods during which they have to be available as back-up are also counted as working days.

For the rest, the approach of a repartition according to the working days spent in a state is in line with the OECD's view.[221]

24.2.7. Income accrued to another person

24.2.7.1. "Look-through" approach

Income from an entertainer's or sportsperson's performance in a state P may be accrued either directly to the entertainer or sportsperson in his residence state R. In such case, article 17(1) of the OECD Model applies.[222] However, the income may also be accrued by an intermediate entity (e.g. a management company, commercialization company or a company associating

218. The distribution may take the form of a dividend, salary payments or further remuneration, *see* Graf & Christoffel, *supra* n. 46, at N147 ad Art. 17. Graf & Christoffel, id., at N148 ad Art. 17, recommend management companies to maintain a suitable accounting system with separate bookings for income taxed in the state of performance and income from entertainment or sports activities still untaxed.
219. Oberson, *supra* n. 93, at N95 ad Art. 17.
220. Id., at N96 ad Art. 17.
221. Para. 9.2 *OECD Model: Commentary on Article 17.*
222. Oberson, *supra* n. 93, at N109 ad Art. 17; Stockmann, *supra* n. 68 at N14 ad Art. 17.

multiple entertainers or sportspersons)[223] domiciled either in state R, state P or a third state T. For such cases, the applicable norms are determined according to the following principles:

- In so far as state P's domestic legislation provides for the "look-through" approach, the intermediate entity, for the purposes of the application of the double taxation treaty, is disregarded, and article 17(1) of the OECD Model (of the treaty between P and R) shall apply.[224] According to doctrine, not the overall compensation paid, e.g. by an event's organizer, to the third party, but only the part of the remuneration effectively forwarded by the third party to the entertainer or sportsperson is in this context to be taken as calculation basis for the taxation applicable in the state of performance.[225] If the third party is organizing the entertainer's or sportsperson's performance, Swiss domestic legislation provides for such attribution (article 92(2) of the DTA).

- If state P's domestic legislation does not provide for a "look-through" approach, state P may only tax the intermediate entity and not the entertainer or sportsperson. The taxation of the entity is only possible if either the latter holds a PE in state P (article 7 of the OECD Model) or the treaty between states P and T contains a provision in line with article 17(2) of the OECD Model, or there is no double taxation treaty in place between states P and T.[226]

Since Switzerland applies the "look-through" approach based on article 92(2) of the DTA, Switzerland has issued a formal reservation against article 17(2) of the OECD Model, limiting the scope of application of article 17(2) of the OECD Model to cases of tax evasion.[227]

24.2.7.2. Triangular cases

In cases where the performance is held in Switzerland (state P), the entertainer or sportsperson resides in state R and the third party (e.g. entertainer's

223. Graf & Christoffel, *supra* n. 46, at N139 ad Art. 17.
224. Stockmann, *supra* n. 68, at N14 ad Art. 17; para. 8 *OECD Model: Commentary on Article 17(1)*.
225. Oberson, *supra* n. 93, at N111 ad Art. 17; para. 8 *OECD Model: Commentary on Article 17(1)*. As a basis, the third party would likely present its contractual agreement with the entertainer or sportsperson to the performance's organizer.
226. Stockmann, *supra* n. 68, at N14 ad Art. 17; para. 11.1 *OECD Model: Commentary on Article 17(1)*; Oberson, *supra* n. 93, at N112 ad Art. 17.
227. Graf & Christoffel, *supra* n. 46, at N138 ad Art. 17.

or sportsperson's employer) is domiciled in state R as well, it will need to be determined with respect to any income stream which provisions of the double taxation treaty between Switzerland and state R apply.[228]

In cases where the performance is held in state P, the entertainer or sportsperson resides in state R and the entertainer's or sportsperson's employer is domiciled in state S, doctrine considers the double taxation treaty between state P and state R applicable for the allocation of taxation rights on income from the entertainer's or sportsperson's performance.[229] Once it is determined under this treaty whether state P may levy taxes on a given income stream, it is to be determined under the treaty between state P and state T whether income accrued to the third party instead of the entertainer or sportsperson may still be taxed in state P. From a Swiss domestic perspective, it is, in view of its domestic legislation (article 92(2) of the DTA), in this context not relevant whether the third party resides in a contracting or a third state.[230]

24.3. Taxation of international sports events

The taxation of international sports events in Switzerland generally follows the principles of the general Swiss tax legislation on corporate entities and individuals. Swiss legislation and practice do not provide for special provisions relating to events, e.g. in view of their importance for Switzerland to foster economy or Switzerland's reputation as a hub for artistic and sports events and activities. In exceptional cases, an event organizer's entity's activity may be regarded and recognized by the tax authorities as charitable within the scope of article 56(g) of the DTA. In any case, a tax exemption would require a written tax ruling obtained from the competent tax authorities.[231]

Legal entities organizing sports events are subject to taxation of their income on the federal level as well as the respective cantonal and communal level and are subject to capital taxes on the cantonal and communal level. In particular, Swiss corporate tax legislation provides for a loss carry-forward

228. For the relationship with the attribution clauses in the OECD Model from a Swiss perspective, *see* sect 24.2.2.
229. Oberson, *supra* n. 93, at N100 and 112 ad Art. 17.
230. Graf & Christoffel, *supra* n. 46, at N140 ad Art. 17.
231. The detailed prerequisites for tax exemptions shall not be further elaborated in this report.

option for 7 years.[232] An entity's overall tax burden depends on the entity's place of domicile and may vary:[233]

Table 2 Entity's overall tax burden: Place of domicile

Tax rates	Zurich (%)	Zug (%)	Schwyz (%)	Geneva (%)	Lucerne (%)
Profit tax approx.	21-22	13-18	12-17	22-28	11-14
Capital tax approx.	0.17	0.07	0.14	0.40	0.18

Furthermore, VAT and withholding tax aspects are particularly to be considered.

Lastly, with regard to the individual sportspersons participating in a sports event in Switzerland, the organizing entities are liable for the correct deduction of source taxes[234] and – if applicable – social security contributions.[235]

232. Art. 67 DTA.
233. Effective tax rates.
234. *See* section 24.1.3.1.5.
235. *See* section 24.1.2.1.2.

Chapter 25

United Kingdom

by Euan Lawson[1]

25.1. Taxation of entertainers and sportspersons under domestic law

25.1.1. Overview on taxation of sportspersons and entertainers under domestic law

25.1.1.1. Domestic rules applicable to resident sportspersons and entertainers

Sportspersons and entertainers who are resident in the United Kingdom, and who earn income from their activities as such, are subject to income tax under the general rules for the imposition of income tax.

25.1.1.1.1. *Self-employed or employed?*

The main distinction required to be made under UK law is between persons who are self-employed and those who are employed. Many sportspersons and entertainers are self-employed, receiving fees or other remuneration from third-party contractors; however, it is not uncommon for sportspersons and entertainers to be employed, e.g. by a team or an ensemble or orchestra, or by a teaching institution, or even by a personal services company specifically established to loan out the individual entertainer or sportsperson's services.

The distinction between the self-employed and the employed is not always, in relation to any taxpayer, easy to determine; but the dividing line can be particularly difficult to define in relation to sportspersons and entertainers. As a result, there is a reasonable body of case law on the subject, together with some detailed guidance from the UK's taxation authority, Her Majesty's Revenue and Customs (HMRC).

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