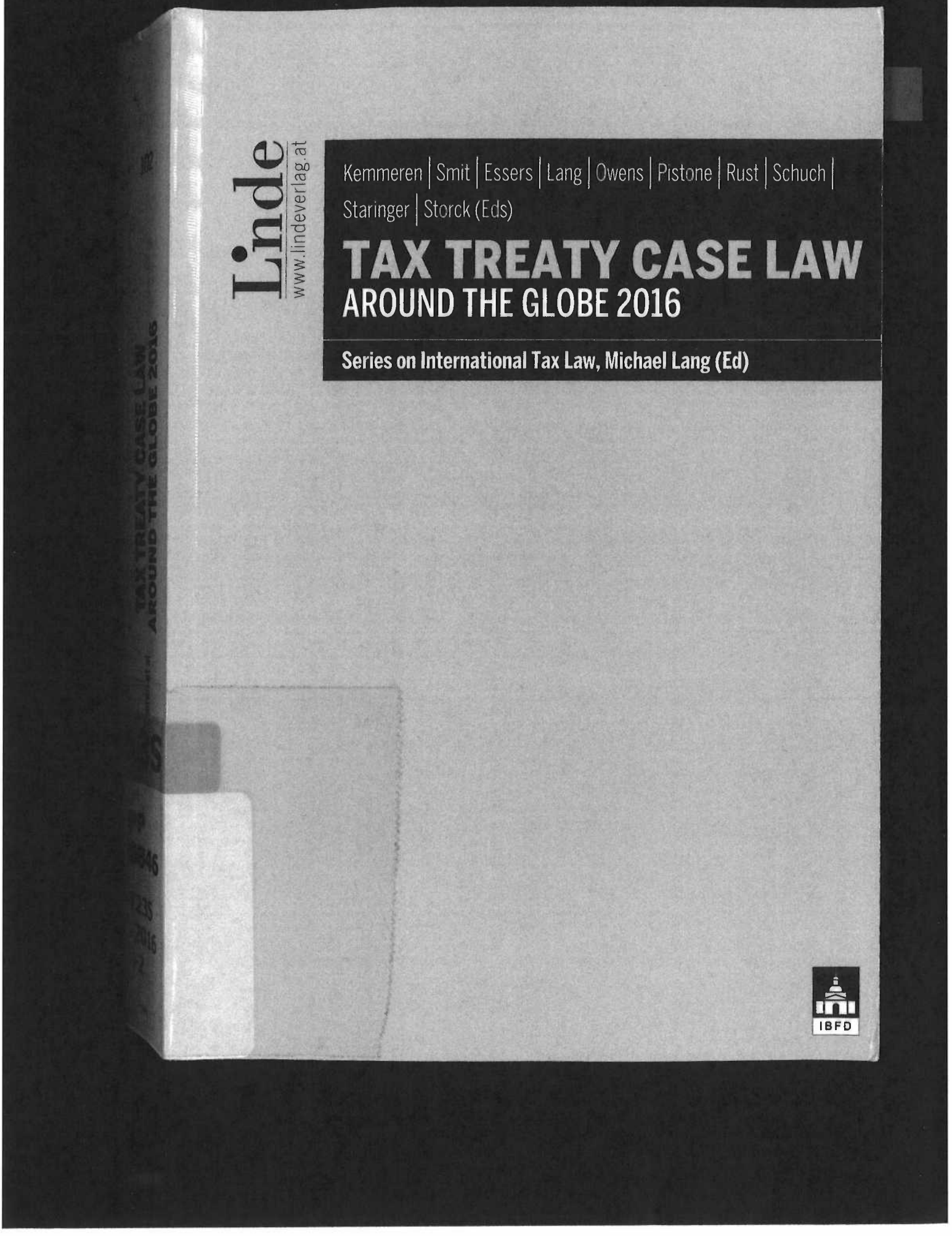
Linde
www.lindeverlag.at
Kemmeren | Smit | Essers | Lang | Owens | Pistone | Rust | Schuch | Staringer | Storck (Eds)
TAX TREATY CASE LAW
AROUND THE GLOBE 2016
Series on International Tax Law, Michael Lang (Ed)
IBFD

Chapter 21

Austria: Entertainers under Article 17[1]

Michael Lang, Selina Siller and Stephanie Zolles

21.1. Introduction

Under article 17 of the OECD Model (2014), income derived by a resident of a contracting state as an entertainer or sportsperson from his personal activities as such exercised in another contracting state is subject to taxation in the source state. The provision explicitly prescribes its priority over articles 7 and 15 of the OECD Model (2014). In contrast to articles 7 and 15, article 17(1) of the OECD Model (2014) does not require a permanent establishment (PE), an employer or a prolonged presence in the source state, but solely prescribes that the state in which the activity takes place is entitled to tax.[2] The crucial element for the application of article 17 of the OECD Model (2014) lies in its personal scope: neither article 17 nor any other provision of the OECD Model (2014) provides a definition of who shall be considered an "entertainer" or "sportsperson" under article 17(1) of the OECD Model (2014). The prevailing opinion prefers to apply an autonomous approach whereby the terms are to be interpreted irrespective of their meaning under national laws.[3]

Article 17 was first introduced to the OECD Model in 1963. While the term "entertainer"[4] was used in the text of article 17 of the OECD Model (1963), the title of article 17, as well as the title and text of the Commentary on Article 17 of the OECD Model (1963) referred to the term "artistes". The term "artist" has been substituted over the course of time. The latest versions of the OECD Model (2014) and its Commentary only refer to "entertainers".

1. AT: *Verwaltungsgerichtshof* (Supreme Administrative Court) (VwGH), 30 June 2015, no. 2013/15/0266.
2. A. Cordewener, *Article 17. Entertainers and Sportspersons*, in *Klaus Vogel on Double Taxation Conventions*, 4th edn, vol. II, para. 26 (E. Reimer & A. Rust eds., Kluwer Law International 2015).
3. J. Roeleveld & K. Tetlak, *Article 17: Entertainers and Sportspersons – Global Tax Treaty Commentaries* sec. 5.1.1.1., Global Tax Treaties Commentaries (IBFD 2016), Online Books IBFD; Cordewener, id., at para. 31.
4. While the *OECD Model Tax Convention on Income and on Capital* (1963) referred to "public entertainer", subsequent versions of the Model merely used the term "entertainer" in their texts.

Against this historical background, it is obvious that the OECD only considers the term "entertainer" to be relevant for the application of article 17. The term "artist", which in some respects is narrower than entertainer, may be disregarded – at least for treaties which follow the OECD Model (2014) – for the interpretation of article 17. Nevertheless, the meaning of the term "entertainer" and thus the scope of article 17 remain unclear. The OECD Commentary attempts to give guidelines for the interpretation of the term "entertainer". The OECD Commentary on Article 17 has constantly been extended over the course of time. However, even the latest version of the Commentary does not define the term "entertainer" but merely offers examples and a variety of aspects which need to be considered.

Despite the need for a clear definition of "entertainers" and the high practical relevance of article 17, hardly any Austrian high court decisions on the interpretation of the term "entertainer" under article 17 exist.[5] However, a case on the interpretation of article 17 has recently been rendered on 30 June 2015, the Supreme Administrative Court decided on a case regarding the interpretation of the term "entertainer" under article 17 of the Austrian-US Income and Capital Tax Treaty (1998). In particular, it dealt with the question as to whether article 17 encompasses performances which fulfil an advertising function.[6] In its reasoning, the Court aimed at interpreting the term "entertainer".

21.2. Facts of the case[7]

The claimant was a US resident who worked, inter alia, as an actress, model and promotional figure. In 2006, she derived income from a performance during an "Open Air Party" in Austria, the purpose of which was to advertise canned prosecco. The claimant's performance consisted of giving an interview, making a few dance moves and advertising a drink. The Austrian tax authorities considered the performance to be an entertaining activity in the sense of article 17 of the Austrian-US Income and Capital Tax Treaty (1996). As a consequence, the Austrian tax authorities found that Austria retained the taxation right for the income derived from the aforementioned performance and made the payment subject to withholding

5. E.g. *see* AT: VwGH, 11 Dec. 2003, 2000/14/0165 and VwGH, 23 Feb. 1994, 93/15/0175.
6. AT: VwGH, 30 June 2015, 2013/15/0266.
7. Id.

tax.[8] The claimant appealed, arguing that the performance did not qualify as an entertaining activity since it was carried out solely for advertising purposes. Accordingly, the income should not be subsumed under article 17 but under article 7 or 14 of the Austrian-US Income and Capital Tax Treaty (1996). According to the claimant's approach, Austria would have no taxing right on the income from the performance.[9]

21.3. The Court's decision[10]

The Supreme Administrative Court concluded in its decision of 30 June 2015, 2013/15/0266, that the claimant's performance qualified as an entertaining activity in the sense of article 17 of the Austrian-US Income and Capital Tax Treaty (1996). Hence, Austria, acting as state of performance, was permitted to tax the income, including levying a withholding tax.

In the first part of its reasoning, the Court held that pursuant to article 17 of the Austrian-US Income and Capital Tax Treaty (1996), residents acting as entertainers, by for example taking part in theatre productions, motion pictures, or radio or television programmes, are subject to taxation in Austria with their income from activities personally carried out in the source state. The Court further recalled that within article 17, the term "entertainer" does not require a performance to be of a certain quality, duration or "the like". Rather, article 17 requires that an entertainer carries out an activity in his capacity as an entertainer. The Court subsequently argued that it was undisputedly established that the claimant's activity was personally carried out in public. The claimant indisputably performed on stage and attracted a broad audience.

As regards the advertising function of a performance, the Court took the position that the advertising purpose of an activity does not preclude its entertaining character if it can – from an objective point of view – be established that the entertaining character remains preserved. The Court

8. AT: *Bundesgesetz vom 7. Juli 1988 über die Besteuerung des Einkommens natürlicher Personen* [Federal Law of 7 July 1988 on the taxation of personal income], sec. 99(1)(1); *Einkommensteuergesetz* 1988, EstG 1988), [Income Tax Act (ITA 1988)], *zuletzt geändert durch das Bundesgesetz BGBl. I Nr. 163/2015 von 28.12.2015* (last amended by Federal Law Gazette. I 163/2015 of 28/12/2015), National Legislation IBFD).
9. For the legal situation under domestic law, *see also* the Court's prior decision on this case: AT: VwGH, 24 June 2009, 2009/15/0090.
10. AT: VwGH, 30 June 2015, 2013/15/0266.

pointed out that the claimant intentionally used her reputation as a celebrity to attract a broad audience. According to the Court, the fact that the claimant attracted the audience by virtue of her recognition or reputation as an entertainer already constitutes an entertaining activity since an entertainer characteristically attracts an audience. Moreover, the Court emphasized that in the English (authentic) version of the Austrian-US Income and Capital Tax Treaty (1996), the term "entertainer" was used. In the Court's opinion, this term implies that from a qualitative perspective, the scope of article 17 is rather broad.[11]

21.4. Comments on the Court's reasoning

21.4.1. The Court's interpretation of the term "entertainer"

In its reasoning, the Supreme Administrative Court examined the meaning of the term "entertainer" under article 17. The significant elements of this decision are certainly the Court's remarks on the public component of a performance and the (non-) importance of quality and duration. Even more interesting are the aspects which finally convinced the Court of the entertaining character of the performance in the case in question.

One such aspect that the Court emphasized was the public nature of the performance. This is in line with the prevailing view in literature[12] and the 1987 OECD Artiste Report,[13] which also states that article 17 applies only to performances carried out personally in front of an audience. This interpretation of article 17 also corresponds to the original wording of the original OECD Model (1963), wherein the term "public entertainer" was used.[14] However, the Court refrained from explicitly stating whether a public performance is decisive for the application of article 17, but instead merely described the claimant's performance as a public one.

The Court then explained that an activity may qualify as entertaining in the sense of article 17 irrespective of its quality, duration or "the like". This

11. With reference to the OECD Model; F. Wassermeyer, *Doppelbesteuerung* 125th suppl. Art. 17 MA m.no. 22 (F. Wassermeyer et al.); F. Stockmann, in *Doppelbesteuerungsabkommen* 6th edn, Art. 17, m.no. 22 (K. Vogel & M. Lehner eds., Beck 2015).
12. M. Grossmann, *Die Besteuerung des Künstlers und Sportlers im internationalen Verhältnis* p. 28 et seq. (Paul Haupt 1992); Cordewener, *supra* n. 2, at para. 31 et seq.; Roeleveld & Tetlak, *supra* n. 3.
13. OECD CFA, *The Taxation of Income Derived from Entertainment*, para. 72.
14. *OECD Model Tax Convention on Income and on Capital* (1963).

part of the reasoning is rather ambiguous. Although the Court clarified that a certain artistic quality or minimum period is not required for the application of article 17,[15] the wording "the like" leaves open what else shall be considered irrelevant for the application of article 17. Furthermore, the Court refrained from explaining how it developed this interpretation and from referring to any sources at this point of its reasoning.

Finally, the Court affirmed that an entertaining activity was carried out in the present case. It recalled that the claimant was publicly known as an entertainer through her prior entertaining activities as a model and actress. Furthermore, the Court found that the tax authorities were right in considering the present case activity "entertaining" since the entertaining character becomes evident from the planning, conduct and promotion of the event. Interestingly, the Court did not refer to the claimant's activity itself, i.e. the interview or the dance moves. Rather, the court seems to rely on three aspects to conclude that the claimant's activity qualifies as entertaining: (i) the claimant's prior work as an entertainer; (ii) the claimant's recognition gained from prior work which attracts audience and (iii) the entertaining character of the specific event. As the Court did not clarify the relation between these conditions, it is not conclusive whether all three criteria were decisive for the present case and how the criteria can be applied in comparable cases. Consequently, it is also uncertain whether the Court would have come to the same solution if one of the conditions was not met in the present case. This part of the reasoning may thus merely serve as guideline for similar cases in which all three conditions are met. The problematic of applying the judgment to other cases becomes evident when comparing two scenarios. The first is the case of someone who (i) previously worked as an entertainer and (ii) is famous for being an entertainer. This person then performs (iii) within a promotional event of entertaining character. In this scenario, all three conditions are met. Accordingly, the Court's decision may be used as a guideline for this scenario. The second scenario is the case of someone who previously did not work as an entertainer, but is (ii) famous for non-entertaining activities and (iii) acts as a promotional figure at a promotional event. While all three conditions are met in the first scenario, the second scenario lacks condition (ii), i.e. the person in the second scenario did not previously work as an entertainer. It remains unclear whether article 17 could apply to the second scenario, as only condition (ii), fame, and condition (iii), the entertaining character of the event, are met.

15. The view that the quality of a performance is not relevant for the application of article 17 corresponds to the prevailing opinion. In this regard, *see* Wassermeyer, *supra* n. 11; Cordewener, *supra* n. 2, at paras. 31 and 34; Grossmann, *supra* n. 12.

If, however, the three conditions are to be understood as cumulative, the application of article 17 to both scenarios would be clear: it would apply in the first scenario and not apply in the second scenario. The relation between the conditions can be illustrated by three variations of the present case:

- *Case 1*: If the performance, which merely consists of giving an interview, promoting a product and performing a few dance moves, was not carried out by an actress but by a famous politician, the audience would also feel attracted by his person and fame.[16] In this scenario, the event itself remains the same, i.e. in view of its planning, conduct and promotion, it appears to be an entertaining event. Nevertheless, article 17 does not apply in this scenario since the performing person's fame did not derive from entertaining activities but from political activities. Accordingly, article 17 could not be applied in this scenario since only condition (ii), the person's fame, and (iii), the entertaining character of the event itself, are fulfilled.

- *Case 2*: If a famous US actress holds a speech on politics and taxation, she may nevertheless attract the audience by virtue of her recognition as an actress. Thus, conditions (i) and (ii) are fulfilled, but the event itself may not appear to be of an entertaining character. In absence of condition (iii), article 17 would not be applicable to this case if (i), (ii) and (iii) are cumulative criteria.

- *Case 3*: An actress, who has not yet gained any recognition and fame, advertises a product at a promotional event. Again, only two criteria, (i) and (iii), are met. Under the assumption that the conditions are cumulative, article 17 would not be applicable.

The above scenarios illustrate the complexity of identifying the relation and relevance of the individual aspects mentioned by the Court. They also emphasize the difficulty of applying the Court's understanding of the term "entertainer" to other slightly amended cases. For cases which are similar to the present case, the Court's reasoning may be used as an orientation: the promotion of a product within an event that appears to be of entertaining character by a person who is publicly known for his prior work as an entertainer falls within the scope of article 17. The decision does not provide, however, any guidance for cases in which one of the three criteria mentioned by the Court is not given.

16. S. Siller & S. Zolles, *Begründet ein Auftritt bei einer Werbeveranstaltung eine künstlerische Tätigkeit iSd Article 17 DBA Österreich-USA?*, SWI, p. 153 (2016).

21.4.2. Relevance of the English and German versions of the Austrian-US Tax Treaty

The Court referred to the OECD Model as well as to the authentic English version of the convention in order to explain the meaning of "entertainer" under article 17 of the Austrian-US Income and Capital Tax Treaty (1996). The Court also mentioned the equally authentic German version of the convention, but did not further examine its meaning. Thus, the question arises whether the Court takes the view that the German version of the Austrian-US Income and Capital Tax Treaty (1996) should be given no relevance at all. Such an approach also finds support in the fact that the Austrian-US Income and Capital Tax Treaty is based on the US Model (1981).

The Court argued that the term "entertainer" used in the English version of the convention supports a broad interpretation with respect to the quality of the activity performed. The Court did not pay particular attention to the wording of the German version of the treaty. Since the treaty has been authenticated in English and German,[17] both versions are equally authoritative according to article 33(1) and (2) of the Vienna Convention on the Law of Treaties. Nevertheless, the Court refrained from referring to the German version wherein the term "*Künstler*" is used. In common language, a person acting as "*Künstler*" can be defined as someone who (professionally) produces or performs a work of art or someone who has special skills in a certain field.[18] Against this background, the common meaning of the German term allows a different, in some regards narrower, interpretation as compared to the English version. Since the Court did not consider the meaning of the German wording of article 17 but based its reasoning only on the English term "entertainer", the question arises whether the Court attributed any relevance to the term used in the German version of the convention. Since the OECD Model is authentically drafted in English and French, these languages should be the primary ones to be considered in the interpretation of tax treaties.[19] Such an approach would be in accordance with general Austrian treaty policy, which attempts to

17. *See Convention between the Republic of Austria and the United States of America for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income* (1 Feb. 1998), art. 29.

18. *See* http://www.duden.de/rechtschreibung/Kuenstler; http://de.pons.com/%C3%BCbersetzung?q=K%C3%BCnstler&l=dede&in=ac_de&lf= Meyers.

19. M. Lang, *The Interpretation of Tax Treaties and Authentic Languages*, in *Essays on Tax Treaties: A Tribute to David A. Ward* p. 24 (G. Maisto, A. Nikolakakis & J. Ulmer eds., CTF 2013).

conform to the OECD Model and the OECD Commentary.[20] The predominant argument for giving the authenticated English and French versions of a convention only minor relevance is that the interpretation of bilateral treaties would diverge if they are interpreted according to other languages.[21] After all, the German version of the treaty is only reconciling the OECD Model.[22]

In addition to the above argument, the Court's reliance on the English version of the treaty also finds support in the materials used in the treaty negotiations. The basis for the Austrian-US tax treaty negotiations was certainly the US Model (1981). This becomes evident from a comparison of the US Model (1981) and the English version of the Austrian-US Income and Capital Tax Treaty (1996). The wording of the tax treaty is similar to the wording in the convention and both contain a *de minimis* clause. The *de minimis* clause for income of entertainers and sportspersons is a peculiarity of US treaties and is not included in the OECD Model or in the Austrian Model.[23] It therefore appears that the US Model was the relevant Model for the treaty negotiations. The US Model of 1981 was amended in 1996 and again in 2006 and 2016. As the amended versions were published after the Austrian-US Income and Capital Tax Treaty was signed at the end of May 1996, the treaty negotiators could not have foreseen the content of these US Models. Thus, the US Model of 1981 is the sole relevant version for the interpretation of the treaty concluded between Austria and the United States. As the text of article 16 of the US Model (1981), which is the equivalent provision to article 17 of the OECD Model, also refers to the term "entertainers", this term is certainly to be considered of major importance as compared to the German term. However, the Court refrained from making any reference to the US Model and merely referred to the applicable treaty, the OECD Model and several literary sources.

20. H. Jirousek, *Die österreichische Position beim Abschluss von DBA*, in *Die östereichische DBA-Politik* p. 21 et seq. (M. Lang, J. Schuch & C. Staringer eds., Linde 2013).
21. Lang, *supra* n. 19, at p. 31, according to whom, authentic versions of a treaty other than English or French are only of minor relevance for the interpretation of double taxation conventions.
22. Id., at p. 24.
23. *Österreichischer Entwurf, Die östereichische DBA-Politik* p. 418 (M. Lang, J. Schuch & C. Staringer eds., Linde 2013).

21.4.3. The OECD Commentary on Article 17

In addition to the Austrian-US Income and Capital Tax Treaty, the OECD Model (1992) and the US Model (1981), the OECD Commentary of 1992 may be used for the interpretation of article 17 of the Austrian-US Income and Capital Tax Treaty.[24] In particular, paragraphs 3 and 9 of the Commentary on Article 17 of the OECD Model provide remarks on the interpretation of article 17 which could be relevant for the present case:

Paragraph 3 of the Commentary on Article 17 of the OECD Model (1992) clarifies that there is no definition of the term "entertainer" and paragraph 1 of article 17 of the OECD Model provides examples of persons regarded as entertainers under article 17. The OECD Commentary further suggests that article 17 also applies to income received from activities involving a political, social, religious or charitable nature, "if an entertainment character is present". The same approach was taken by the Supreme Administrative Court in the present case: the Court takes the position that article 17 certainly includes stage performers, film actors and actors in television commercials. The Court then argued that article 17 applies notwithstanding the promotional purpose of an activity if a person performs in her capacity as an entertainer. This part of the Court's reasoning is similar to paragraph 3 of the OECD Commentary on Article 17 of the OECD Model (1992) and thus can be considered in line with the OECD Commentary (1992).

Paragraph 9 of the Commentary on Article 17 of the OECD Model (1992) may provide further input for the present case: payments for advertising are encompassed by article 17 if they are directly linked[25] to the performances in a given state. If such a direct link cannot be established, the respective income is subject to other articles of the OECD Model (1992). In the present case, the claimant advertised a product and held an interview. It could be argued that the interview itself is not part of the claimant's entertaining activity. In that case, a direct link between the interview and the entertaining activity must be established in order to apply article 17 to the interview. This argument was not even raised by the Court, which did not distinguish between the claimant's activities but merely held that the claimant's "performance" qualifies as entertaining.

24. S. Walter & S. Loydolt, *Artist and Athlete Taxation according to the new Double Taxation Treaty between the U.S. and Austria*, SWI, p. 257 (1997).
25. Note that in the 2014 Update of the OECD Commentary the wording "direct link" was replaced by "closely connected income".

From the above explanations it appears that the OECD Commentary (1992) contains various remarks that are relevant for the present case. Although paragraph 3 of the Commentary on Article 17 of the OECD Model strongly corresponds to the Court's reasoning, the Court did not even mention the OECD Commentary. In contrast, paragraph 9 of the Commentary on Article 17 provides a further element for the interpretation of the present case. Neither of the two paragraphs were mentioned by the Court.

21.5. Conclusion

In its decision of 30 June 2015, 2013/15/0266, the Supreme Administrative Court recalled that the advertising purpose of an activity does not per se exclude that it was carried out for entertaining purposes. The Court also made clear that the crucial element for an "entertaining" activity is neither its quality nor the duration of the period it has been exercised, but whether someone performs in his capacity as an entertainer. However, it remains unclear precisely how the Court reached its conclusion.

Although the Court's determination that the quality of the performance is not important for the meaning of the term "entertainer" under article 17 seems to be in line with the prevailing opinion,[26] as well as the 1987 Artiste Report and the original version of the OECD Model (1963), the Court refrained from referring to any of these sources at this point of its reasoning. In a subsequent part of its reasoning, the Court referred to the English version of the Austria-US Income and Capital Tax Treaty (1996) and the OECD Model (2014). Interestingly, the Court did not take into account the meaning of the German equivalent of the term "entertainer". Hence, the question remains as to whether the Court attributed any relevance to the equally authentic German version. The emphasis on the English language version would seem reasonable in light of the fact that the US Model (1981), which was the basis of the Austrian-US treaty negotiations, also contains the term "entertainer".

In addition to the respective tax treaty, the OECD Model and the US Model, another source of interpretation that is relevant for the present case is the OECD Commentary. In particular, paragraphs 3 and 9 of the Commentary on Article 17 of the OECD Model (1992) provide valuable guidance on the meaning of "entertainer" and on linking payments to an entertaining

26. Grossmann, *supra* n. 12, at 28 et seq.; Cordewener, *supra* n. 2, at para. 31; Roeleveld & Tetlak, *supra* n. 3.

performance. Nevertheless, the Court neglected to mention any reference to the OECD Commentary.[27]

As regards the entertaining character of the activity in the present case, the Court considered three aspects: (i) the claimant's prior work as an entertainer; (ii) the claimant's recognition gained from prior work and (iii) the nature of the specific event. However, the relation between these criteria still remains unclear. So far, the Court has not fully revealed its understanding of the term "entertainer" and the uncertainties arising from this decision will possibly lead to subsequent case law in future.

Overall, the final outcome of the decision finds support in literature and other sources, e.g. the OECD Model, the US Model and the OECD Commentary. The Court relied on a number of arguments to apply article 17 but did not make clear which criterion was finally the decisive one for the application of article 17. Thus, the decision does not offer a definitive solution for comparable cases but provides, at best, only a general orientation for the interpretation of the term "entertainer".

27. S. Siller & S. Zolles, *Begründet ein Auftritt bei einer Werbeveranstaltung eine künstlerische Tätigkeit iSd Art 17 DBA Österreich-USA?*, ecolex, p. 341 (2016).