



Italian Supreme Court confirms fashion models' income as not covered by article 17 OECD MC

With order n. 21865/2018, the Italian Supreme Court settled a case concerning whether Italy might tax payments made to models for activities carried out in Italy in connection with the shooting of a commercial for advertising purposes. The Supreme Court confirmed the decision of the Tax Court of Appeal of Milan (decision no. 36/32/10 of 24 February 2010), holding that such payments fall outside the scope of article 17 of Italian OECD MC-based tax treaties and, thus, are not taxable in Italy absent a fixed base/permanent establishment.

According to the Court of Appeal, in order to perform in a fashion show or photo-video shooting a model does not have to carry out any activity of an artistic or entertaining character, which excludes the applicability of article 17 of OECD MC-based tax treaties. The Supreme Court upheld the principle affirmed by the lower Court, while highlighting that the assessment of the actual character of the activities performed by the models is a matter of facts, which could not be reviewed by the Supreme Court as it was thoroughly assessed by the Court of Appeal on the basis of the evidence available.

The order is welcomed, as it follows a number of conflicting decisions issued by lower courts (both of first and second instance) on the subject matter. In addition, it leads to a result that clearly departs from the Supreme Court's previous decision (no. 17955 of 19 October 2012), where it was held that fashion shows (as well as the main activities put in place in order to carry them out) should be generally regarded as events of an artistic character.

The end result is in line with the Commentary on article 17 of the OECD MC (as modified in 2014), according to which that article "*does not extend to [...] a model performing as such (e.g. a model presenting clothes during a fashion show or photo session) rather than as an entertainer*" (paragraph 3 of the 2017 Commentary on article 17 OECD MC, with regard to which Italy did not enter any observation). On the one hand, the Supreme Court appears to agree with the general principle that the ordinary activity of a model is not of an entertaining character. On the other hand, however, it seems to recognize that the characterization of the activities performed by models active in the fashion industry depends, at least to a certain extent, to the actual facts of the case. The order, thus, leaves room for the characterization of those activities as performances of an entertaining nature in borderline situations. This somewhat

echoes the wording of the OECD Commentary, which states that, between clear-cut cases “*there is a grey area where it is necessary to review the overall balance of the activities of the person concerned*” (paragraph 3 of the 2017 Commentary on article 17 OECD MC; a similar position was taken by the Italian Ministry of Finance in its Ruling no. 12/191 of 16 June 1980).

In this respect, the position of the Italian Tax Authorities is that article 17 should apply where the person carrying out the relevant activities (i) addresses an audience (ii) with a performance of an entertaining character (Ruling no. 15/E of 15 January 1996, which makes reference to the 1992 OECD Commentary on article 17 and emphasizes the relevance of the elements of the “*prestation scenique*” and of the “*element de divertissement*” as essential characteristics of the performance by the artiste/entertainer).

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