OFFICE OF
CHIEF COUNSEL

DEPARTMENT OF THE TREASURY
INTERNAL REVENUE SERVICE
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INTERNAL REVENUE SERVICE NATIONAL OFFICE FIELD SERVICE ADVICE

MEMORANDUM FOR

FROM: Elizabeth U. Karzon
Office of Associate Chief Counsel (International) CC:INTL:1

SUBJECT:

This Field Service Advice responds to your memorandum March 19, 1999. Field Service Advice is not binding on Examination or Appeals and is not a final case determination. This document is not to be used or cited as precedent.

LEGEND:

Taxpayer A	=
Corp B	=
Country X	=
Date C	=
Date D	=
Type B Product	=
U.S.-Country X Treaty	=

Year 1 =
Year 2 =
X Dollars =
Y Dollars =

ISSUE:

Whether Taxpayer A, a model and actor, is an "entertainer" with respect to Taxpayer A's activities under the Agreement, for purposes of Artistes and Athletes Article of the U.S.-Country X Treaty.

CONCLUSION:

Based on the language of the Agreement, Taxpayer A is generally not an "entertainer" with respect to Taxpayer A's activities under the Agreement, for purposes of the U.S.-Country X Treaty, because the primary purpose of Taxpayer A's activities under the Agreement is generally not entertainment, but is instead the promotion, marketing and sale of Corp B Products.

FACTS:

For the years in issue, Taxpayer A is a nonresident alien individual who is a citizen and resident of Country X. Taxpayer A is a model and actor who comes to the United States for assignments as such. According to Form 2106 (Employee Business Expense), attached to Taxpayer A's return, Taxpayer A's occupation is acting. For Year 1 and Year 2, Taxpayer A filed a 1040NR. On each return, Taxpayer A indicated that Taxpayer A was claiming the benefit of the Royalties Article of the U.S.-Country X Treaty. Specifically, the returns indicate that income of X Dollars for Year 1 and Y Dollars for Year 2, while effectively connected with the conduct of a trade or business within the United States, is nevertheless exempt from U.S. income tax because such income qualifies as royalties under the U.S.-Country X Treaty.

Taxpayer A entered into a contract with Corp B on Date C ("the Agreement"). The Agreement is a contract between Taxpayer A and Corp B with respect to Taxpayer A' services:

> as a model and performer in connection with the advertising, marketing, promotion, publicizing, merchandising, and distribution for [Corp B] products

> and services manufactured, sold, offered, furnished, licensed, or distributed, now or in the future, under the [Corp B] trade name (hereinafter collectively referred to as the "Products"). [Emphasis added.]

As a part of such services required by the Agreement, Taxpayer A was required to render services as a spokesperson to Corp B, including appearing at press conferences and granting interviews. Taxpayer A was also required to render services:

> as a performer and model in the production of materials advertising and promoting Corp B and its Products in all forms of media, electronic or otherwise, whether now or later developed, including but not limited to, television (free-t.v., basic cable, premium, pay-per-view, and closed circuit) and radio commercials, consumer and trade print, magazines, newspapers, point of purchase, mailers and mailing inserts, theatrical and cinema advertising, interactive and multimedia programming, home shopping, video for in-store use, video trailers, infomercials, how-to videos, outdoor, collateral, catalogs, packaging, in-store, direct mail, internal company materials, and public relations/press interview kits (hereinafter collectively referred to as the "materials"). Without limiting the foregoing, however, we agree that [Taxpayer A] will not be required to sell or deliver copy offering the sale of any Products on home shopping or in any infomercials, although [Taxpayer A] may be required to discuss the Products in a favorable fashion. In addition, we shall not have the right to separately sell video tapes or cassettes embodying [Taxpayer A's] performance, our rights in such video tapes and cassettes being limited to broadcast uses and uses as free giveaways or as premium items accompanying Product offers. [Emphasis added.]

Additionally, the Agreement required Taxpayer A to attend an orientation session with Corp B's senior management to acquaint Taxpayer A with Corp B's products and philosophy. Taxpayer A was further required to grant interviews and make appearances at public relations events each year of the Agreement. The Agreement also required Taxpayer A to use best efforts to promote and endorse Corp B and its products at all Corp B functions attended by Taxpayer A, and to consider promoting and endorsing Corp B and its products in all public and professional appearances attended by Taxpayer A. The Agreement required Taxpayer A to perform the services required thereunder in a competent and "artistic" manner to the best of Taxpayer A's ability.

In addition to the foregoing, the Agreement required that Taxpayer A only use Corp B products for Taxpayer A's Type B Product needs, unless Corp B did not manufacture or distribute such a product required by Taxpayer A. The Agreement further required that, during the term of the Agreement, Taxpayer A use reasonable

efforts not to publicly handle any Type B Product other than those manufactured or distributed by Corp B.

In addition to Taxpayer A's services, the Agreement provides that:

> During the term of this agreement, [Taxpayer A] hereby grant to [Corp B] the right to use and to license the use of your performance, name, signature, photograph, voice, picture, likeness, or other indicia of your identity in connection with the materials produced hereunder in such advertising, merchandising, publicizing, promotional and marketing medium as permitted pursuant to this agreement....

LAW AND ANALYSIS

The issue involved in this case is whether Taxpayer A, a model and actor, is an "entertainer," for purposes of the Artistes and Athletes Article of the U.S.-Country X Treaty, with respect to services performed under the Agreement. Paragraph 1 of the Artistes and Athletes Article of the U.S.-Country X Treaty provides, in part, that:

> [I]ncome derived by entertainers, such as theatre, motion picture, radio or television artistes, and musicians, and by athletes, from their personal activities as such may be taxed in the Contracting State in which these activities are exercised....

While the Artistes and Athletes Article of the U.S.-Country X Treaty sets forth examples of "entertainers" falling within its provisions, it does not define the term "entertainer". Further, Taxpayer A's activity as a model under the Agreement is not an enumerated activity under the language of the treaty. Accordingly, it is not clear on the face of the Artistes and Athletes Article of the U.S.-Country X Treaty whether Taxpayer A is an "entertainer" with respect to Taxpayer A's activities under the Agreement.

The Treasury Department Technical Explanation of the Artistes and Athletes Article of the U.S.-Country X Treaty also does not define the term "entertainer," nor does it further describe the types of individuals that would be considered "entertainers" for purposes of the U.S.-Country X Treaty. Where a U.S. treaty and the technical explanations thereto are ambiguous or silent on a point, it may be appropriate to consider comparable provisions of the Organization for Economic Co-operation and Development Model Double Taxation Convention on Income and on Capital (the "OECD Model Convention"), and the official commentaries thereto, in interpreting the U.S. treaty, provided the language of the OECD Model Convention is in substance substantially similar to that of the U.S. Treaty at issue.

The provisions of the OECD Model Convention and the official commentaries thereto are relevant because the United States is an OECD member-country and has incorporated provisions of OECD Model Conventions into its treaties, including the U.S.-Country X Treaty. See United States v. A.L. Burbank, et al., 525 F.2d 9, 15-16 (2d Cir. 1975); Taisei Fire and Marine Insurance Co., et al. v. Commissioner, 104 T.C. 535, 548-50 (1995).

Paragraph 1 of the Artistes and Sportsmen Article of the 1998 OECD Model Convention is substantially similar to the language of the Artiste and Athletes provision of the U.S.-Country X Treaty. Paragraph 1 of the Artistes and Sportsmen Article of the 1998 OECD Model Convention provides:

> Notwithstanding the provisions of Articles 14 and 15, income derived by a resident of a Contracting State as an entertainer, such as a theatre, motion picture, radio or television artiste, or a musician, or as a sportsman, from his personal activities as such exercised in the other Contracting State, may be taxed in that other State.

Paragraph 3 of the Commentary to the Artistes and Sportsmen Article of the 1998 OECD Model Convention, which explains the meaning and purpose of paragraph 1 of the Artistes and Sportsmen Article, provides:

> Paragraph 1 refers to artiste and sportsmen. It is not possible to give a precise definition of "artiste", but paragraph 1 includes examples of persons who would be regarded as such. These examples should not be considered as exhaustive. On the one hand, the term "artiste" clearly includes the stage performer, film actor, actor (including for instance a former sportsman) in a television commercial. The Article may also apply to income received from activities which involve a political, social, religious or charitable nature, if an entertainment character is present. On the other hand, it does not extend to a visiting conference speaker or to administrative or support staff (e.g. cameramen for a film, producer, film director, choreographers, technical staff, road crew for a pop group etc.). In between there is a grey area where it is necessary to review the overall balance of the activities of the person concerned. [Emphasis added.]

Paragraph 6 of the Commentary to the Artistes and Sportsmen Article of the 1998 OECD Model Convention further provides that:

> The Article also applies to income from other activities which are usually regarded as of an entertainment character, such as those deriving from billiards and snooker, chess and bridge tournaments.

Therefore, the commentaries that address the scope of the Artistes and Athletes Article focus on whether there is an entertainment character to the activity performed by the individual and on whether such activity is "usually" regarded as of an entertainment character.

Based on the foregoing, we believe that, in determining whether Taxpayer A is an "entertainer" with respect to Taxpayer A's activities under the Agreement, for purposes of the Artistes and Athletes Article of the U.S.-Country X Treaty, the focus should be on whether the primary purpose of the specific activity being performed by Taxpayer A under the Agreement is entertainment.

The Agreement provides that Taxpayer A's would provide services:

> as a model and performer in connection with the advertising, marketing, promotion, publicizing, merchandising, and distribution for [Corp B] products and services manufactured, sold, offered, furnished, licensed, or distributed, now or in the future, under the [Corp B] trade name (hereinafter collectively referred to as the "Products").

The foregoing language indicates that, generally, the primary purpose of Taxpayer A's activities under the Agreement is the promotion, marketing and sale of Corp B Products, not entertainment. This is further supported by the fact that the provisions of the Agreement setting forth the services to be performed by Taxpayer A also focus on the promotion, marketing and sale of Corp B Products. The fact that the Agreement refers to Taxpayer A rendering services as a model and "performer", or that the Agreement requires Taxpayer A to perform the services required thereunder in an "artistic" manner, does not, in itself, change the primary purpose of Taxpayer A's activities under the Agreement from promotion, marketing and sale or Corp B Products to entertainment, because entertainment is generally not the end sought to be accomplished by the activities required under the Agreement.

Accordingly, based on the foregoing, since the primary purpose of Taxpayer A's activities under the Agreement is generally not entertainment, Taxpayer A is generally not an "entertainer" for purposes of the Artistes and Athletes Article of the U.S.-Country X Treaty, with respect to Taxpayer's activities under the Agreement, despite the fact that Taxpayer A may also be an actor outside of the Agreement. However, if Taxpayer A did in fact perform an activity pursuant to the Agreement, and the primary purpose of such activity was entertainment, then, with respect to such activity, Taxpayer A could be an "entertainer" for purposes of the Artistes and Athletes Article of the U.S.- Country X Treaty.

If Taxpayer A is not an "entertainer" within the meaning of the Artistes and Athlete Article of the U.S.-Country X Treaty, with respect to Taxpayer A's activities

under the Agreement, Taxpayer A's income from such activities is not taxable by the United States under that article of the U.S.-Country X Treaty. However, such income may be taxable by the United States under other articles of the U.S.-Country X Treaty. For example, the Independent Personal Services Article of the U.S.-Country X Treaty may apply to the portion of such income attributable to Taxpayer A's personal services under the Agreement if Taxpayer A either had a fixed base regularly available in the United States for the purpose of performing Taxpayer A's services, or was present in the United States for an aggregate of more than 183 days in the respective years at issue. Further, the Independent Personal Services Article of the U.S.-Country X Treaty may apply to royalty income derived by Taxpayer A under the Agreement if Taxpayer A performed independent personal services within the United States from a fixed base and the right or property with respect to which the royalties are paid is effectively connected with such fixed base. If Taxpayer A did not have a fixed base within the United States, taxation of royalties, as defined under the U.S.-Country X Treaty, derived by Taxpayer A under the Agreement would be governed by the Royalties Article of the U.S.-Country X Treaty and, therefore, would be taxable only by County X, Taxpayer A's country of residence.

If you have any further questions, please call
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