

BOOKING FOREIGN ARTISTS PART 3: **DEALING WITH WITHHOLDING**

What is Withholding?

Withholding is a payment on account of a non-resident's potential overall tax liability to the United States. Anyone (a promoter, a venue, a presenter, a manager, an agent, etc.) making a payment (therefore becoming a withholding agent) to a foreign artist (non-resident alien or NRA) for services performed in the United States, other than in the course of regular and continuous employment, is required to withhold 30% of the artist's gross income. Gross income includes deposits, advances, fees, commissions and settlements, as well as expense reimbursements (except hotel, travel and meal expenses) – in short, all compensation to the artist. Failure to deduct or remit the withholding tax may result in an assessment of the outstanding amount, plus interest and penalty against the withholding agent. For more information on withholding refer to NRA Withholding and Withholding of Tax on Nonresident Aliens and Foreign Entities.

Individual and Business Withholding

When it comes to individual performers in a group there are two possibilities. Firstly, if the group is unincorporated, then the members of the group will be considered as individuals and withholding will apply. Secondly, if the artist or group of artists is incorporated, but the artist(s) do not participate in the profits of the corporation (i.e., are paid a set fee or salary for their work) then they will be regarded as a business and can claim the withholding exemption for businesses. For more information, see Withholding of Tax on Payments to Foreign Entertainers.

Tax Treaty Exemptions for Individuals

The United States has Income Tax Treaties with 68 foreign countries. Under certain terms of these tax treaties, foreign artists may be able to claim an exception to the 30% withholding requirement. The IRS has published a summary of the tax treaty exemptions for each country in its Publication 901. Most tax treaties have Articles dealing with "Independent Personal Services" and "Artistes (and Athletes)", for foreign artists with no "fixed base", who do not exceed a certain number of resident days annually in the United States. Each treaty should be examined carefully to see when and if income is subject to taxation and therefore withholding. These Articles can provide a tax-free amount for individual performing artists; if the artist earns more than this amount, then all U.S. earnings are subject to tax. To claim this exemption, artists should submit Form W-8BEN or Form 8233. See Instructions for Form W-8BEN and Instructions for Form 8233. The IRS cautions that since a withholding agent cannot know what a performing artist might earn in the course of a year, even with the tax-free amount allowed in a tax treaty, there may be no recourse but to apply the required 30% withholding. Even if it turns out that the artist during the year does earn less than the tax-free amount, the artist will be able to recoup the 30% withholding when the mandatory U.S. tax return is filed.

Central Withholding Agreement (CWA)

A Central Withholding Agreement (CWA) is a process whereby an *individual* foreign artist can enter into a withholding agreement with the Internal Revenue Service to reduce the 30% withholding, provided that the artist is in compliance for all required Federal Income tax returns and payment obligations. In the agreement the artist agrees to timely file Form 1040 NR (or Form 1040NR-EZ) for the year in which the CWA covers independent personal services. *A CWA can substantially reduce or eliminate withholding. NOTE: Under new CWA rules, an artist must earn USD\$10,000 per annum to qualify for a CWA application.* For more information: Central Withholding Agreements

Tax Treaty Exemptions for Businesses

Most tax treaties contain an Article on business profits which can exempt a business from any tax liability in the United States, provided that the business has no "permanent establishment" in the U.S. To claim this exemption, businesses should submit Form W-8BEN-E. See Instructions for Form W-8BEN-E. However, even though the foreign business may be tax-exempt, it will still be required to withhold the statutory 30% on any payments it may make to foreign artists as independent contractors, or at U.S. taxation graduated rates for employees. See Taxation of Non-Resident Aliens for more information.

Payment to a Foreign Agent

Note: If payment is made to a foreign agent for the services of a foreign artist, the payer should request a Form W-8IMY, as well as the appropriate withholding documents for individuals or businesses. See Instructions for Form W-8IMY.

Withholding Procedure

Anyone withholding is required to remit the withheld tax to the IRS via the Electronic Federal Tax Payment System (EFTPS) and file a Form 1042, (See Instructions for Form 1042) as well as issuing Form 1042-S to the foreign artist or entity, detailing the amount paid and the tax withholding. See Instructions for Form 1042-S.

Robert Baird is President of BAM! Baird Artists Management Consulting in Toronto, Canada and an acknowledged expert in international touring including visas, withholding and taxation. He offers free advice to artists, agents, managers and venues and has an international clientele. He served for many years on the Executive Board of Festivals and Events Ontario (FEO) and is a former Vice-President of that organization. He can be reached at: P: 1-800-867-3281 E: robert@bairdartists.com or for more information go to: www.bairdartists.com