

REVIEW OF NEW R105S SIMPLIFIED WAIVER

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What is a Simplified Waiver?

- A Simplified Waiver is a document signed by both a non-resident individual artist and the buyer which allows Canadian withholding tax to be eliminated or reduced
- It is a new initiative which was introduced by the Canada Revenue Agency in June, 2018

Who can use a Simplified Waiver?

- An individual non-resident artist earning less than \$15,000 CAN in Canada during the calendar year
- Earnings include actual performance fees plus any expenses reimbursed or paid on the individual's behalf

What are the benefits of a Simplified Waiver?

- There is no interaction with the Canada Revenue Agency
- When the Simplified Waiver can be used, the 15% withholding tax is waived or reduced simply by the artist and buyer signing the Simplified Waiver document
- The individual artist need not apply for an Individual Tax Number (ITN)
- Can be completed at any time up until the moment the artist is being paid – There is no 30-day processing time.

What are the limitations of the Simplified Waiver?

- Cannot be used by corporations (including LLC's, LLP's, etc.)
- Cannot be used for employees of the artist
- Only U.S. residents can have their 15% withholding tax automatically waived

Limitations - continued

- Only can be used by actual on-stage performers; cannot be used by support personnel on tour such as tour manager and technicians
- In the case of non-U.S. artists, the only option is to have 23% of tax withheld on the net of the artist's fee after deducting travel and hotel expenses. In the case of non-U.S. support performers, this option has no value since these expenses are always paid by the lead artist or the buyer.

Limitations - continued

- As with regular R105 Waivers, a Simplified Waiver should be in place before payments are made, including deposits.

If a deposit has already been paid, the deposit amount is subject to withholding and only the balance is eligible for the Simplified Waiver.

Further Complications

Groups of Individuals

In the case for instance where you have 4 US musicians who are the principals (partners) in a non-incorporated group earning \$40,000 CAN for 4 dates in Canada during the year, technically this income could be allocated as \$10,000 to each individual partner thereby supporting the use of the Simplified Waiver.

However, unless the contracts for each performance are between the buyer and the 4 individuals (as opposed to the name of the “group” which is the industry norm), this creates a difficult situation for the buyer.

Further complications - continued

For the buyer to agree to participate in the Simplified Waiver where the contract is with the “group”, the buyer would be ignoring the contract in:

- (a) Signing 4 separate Simplified Waivers
- (b) Sending 4 payments to the individuals as opposed to a single payment to the group
- (c) Sending 4 T4A-NR's at the end of the year to the 4 individuals as opposed to a single T4A-NR to the group

Further complications - continued

Providing that a buyer is willing to support this new administrative burden in order for the Simplified Waiver to be used, all of the performance contracts should then be between the buyer and the 4 individuals (who collectively would be providing the services of the “group”)

Further complications - continued

Travel Receipts

For non-U.S. artists who must provide details of their expenses, it is unclear whether they must also provide receipts for their travel expenses, or whether their declaration is sufficient for the buyer's records.

The directives advise buyers to retain receipts provided by the artists, but it is not clear whether the artist is required to provide such receipts to be eligible.

The buyer therefore cannot be sure if they may be held liable for failing to withhold without documented receipts.

Conclusion

The Simplified Waiver is only particularly helpful and efficient in the following circumstances:

- A US individual headline artist earning less than \$15,000 CAN in a calendar year
- A Non-US individual headline artist earning less than \$15,000 CAN in a calendar year who paid for their own travel and hotel for their Canadian performances and these expenses exceeded 50% of the amount being paid to the artist

Conclusion - continued

- US support performers earning less than \$15,000 CAN in a calendar year, but not necessarily where there are also non-performing support personnel (i.e. tour manager and technicians) on the tour

In this case, regular R105 Waivers will need to be used for the non-performing support personnel. Once regular R105 Waivers need to be filed for a tour, it arguably is more coherent to use these as well for the support performers

- There remains uncertainty for buyers regarding the administration of the program.

Concerns Regarding Compliance

Due to the absence of any involvement by the CRA, the Simplified Waiver program creates a real risk of mischief and abuse.

For instance, there is no way an individual buyer can know what an individual artist is earning from other buyers in a calendar year, and therefore an artist could be earning fees well beyond the \$15,000 CAN and still benefit from Simplified Waivers.

Compliance - continued

The CRA may be able to detect this mischief upon processing T4A-NR forms from various buyers after completion of the calendar year, but what is the consequence?

Beyond the fact that the CRA will undoubtedly require such artist to file a tax return so that the proper tax will be paid, what prevents this artist from creating the same mischief the following year?

Compliance - continued

The simplification of the waiver process is a privilege granted to those who meet the eligibility requirements.

Generally, where a greater privilege is granted, there is a mechanism by which that privilege can be revoked in cases of abuse.

Compliance - continued

Unless the CRA created a “blacklist” that was circulated to every buyer in Canada, or somehow directs Canada Border Services to not allow such an artist into the country, there seems to be no viable manner in which the CRA can ensure that artists will not continue to abuse this privilege.

The CRA has yet to provide any comments on how they might address cases of mischief and abuse.

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