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September 9, 2015

Tax Policy Branch
Department of Finance
90 Elgin Street
Ottawa, Ontario K1A 0G5

Re: Comments on Draft Tax Legislative Proposals

Dear Madam, Dear Sir:

We are pleased to submit the attached comments in response the consultation on Draft Tax Legislative Proposals announced on July 31, 2015. We are submitting these comments on behalf of a collective of seventeen performing arts organizations representing more than 1,000 Canadian stakeholders. Our Performing Arts Tax Working Group has been collaborating for more than year in order to explore opportunities of improving the administration of Regulation 105 and Regulation 102. The comments we are submitting today follow correspondence sent to the Ministers of Revenue and Finance on March 16, 2015 and May 14, 2015.

Our comments pertain mostly to parts 15 to 18 of the "Legislative Proposals Relating to the Income Tax Act and Regulations," which relate to withholding for non-resident employers. We also took this opportunity to consider other aspects of the withholding requirements from the perspective of the changes introduced in the Proposals.

We are grateful for the opportunity to provide comments on the Legislative Proposals, and we hope that these comments will help you achieve the streamlining of withholding requirements sought in the 2015 Budget. We look forward to seeing the Legislative Proposals enacted and we remain available to provide any clarification the Department of Finance may require.

Sincerely,

Paul Gravett

President, CAPACOA

On behalf of:

'Arts Common Presents' / Arts Commons Programming
Canadian Dance Assembly

Canadian Independent Music Association
CanDance Network
Danse Danse
East Coast Music Association
Eponymous
Festival International de Jazz de Montréal
Festivals and Major Events Canada
Les Grands Ballets Canadiens de Montréal
Lula Music and Arts Centre
National Arts Centre
North American Performing Arts Managers and Agents
Music Canada Live
Regroupement des événements majeurs internationaux
Sunny Artist Management

c.c.: Isabelle Gervais, Director, Specialty Audit Division, Canada Revenue Agency

Comments by the Performing Arts Tax Working Group on Legislative Proposals Relating to the Income Tax Act and Regulations

The following comments pertain to parts 15-18 of the Proposals related to "Withholding for non-resident employers".

1. The exemptions granted in the draft Legislative Proposals (the "Proposals") will only partially apply to the performing arts sector. In the amended subsection 153(6) of the *Act*, the definition for "qualifying non-resident employee" designates an employee who "(b) is not liable to tax under this Part in respect of the payment because of that treaty." In the case of performing artists, aside from the United States – Canada treaty, no tax treaty provides any level of tax exemption to artists. If the Proposals were implemented, qualified non-resident employers in the performing arts would benefit from a set of exemptions for their support staff/crew, but would still have to withhold tax and file information returns for artists. This would fail to achieve the kind of streamlining intended by the Proposals.

   We believe that a *de miminis* limited tax exemption for artists and athletes – as it exists in the Canada-United States Convention with Respect to Taxes on Income and on Capital and as is proposed in paragraphs 10.1-10.4 of the Commentary on Article 17 of the OECD Model Tax Convention – should be integrated into the tax treaties with major countries with which Canada has frequent cultural and sports exchanges. However, we understand such changes cannot be implemented in the short term.

   Until more tax treaties are amended to include a *de minimis* exemption for artists, if the Proposals are to achieve their intent, the aforementioned qualification would need to be amended to include artists from treaty countries other than the United States. To achieve this goal, our working group recommends qualifying artists from all treaty countries, provided that their total amount of taxable income earned in Canada doesn't exceed a given regulatory allowance of $10,000 (or higher, if possible), such as is proposed in paragraph 200(1.1.b) of the Income Tax Regulations. The Commentary on Article 17 of the OECD Model Tax Convention recommends an allowance of 15,000 IMF Special Drawing Rights, which would be the equivalent of $27,000 CAD at current rates.

2. Similarly, it is not uncommon for non-resident performing arts companies to tour Canada with both employees (subject to R102 withholding) and contract staff (subject to R105 withholding). If the Proposals are to achieve their intent of

streamlining withholding requirements for non-resident employers, the withholding exemption in Subsections 153(1) and 153(6) of the *Act* would need to be extended to qualified contract staff and other payees receiving fees, commissions or other amounts for services.

3. We are supportive the durations established in the definition for "qualifying non-resident employee" Subsection 153(6) of the *Act*. Very few performing arts tours by non-resident companies last more than 45 days. We therefore do not anticipate this criterion to be an issue in the performing arts sector.

4. With regard to Subsection 153(7) of the *Act*, we recommend that the Minister certification for "qualified non-resident employers" be provided to non-profit making and similar publicly-funded entities (as per paragraph 14 of the Commentary on Article 17 OECD Model Tax Convention), who benefit from a tax treatment similar to Canadian not-for-profit and charitable organizations. Not-for-profit and publicly-funded non-resident entities are unlikely to tour Canada on a regular basis or for long durations, and are therefore very unlikely to pay salaries or fees to their staff or contract workers for their services in Canada in excess of $10,000 in any given year. Considering that they present such a low risk, it would appear reasonable to grant them automatic certification by Minister as qualified non-resident employers.

5. We are truly appreciative of the amended subsection 200(1.1) of the *Income Tax Regulations*. An exclusion from the requirement to file T4-type returns is precisely the kind of administrative relief that non-resident companies need.

    1. However, unless amendments are made to expand the definition of "qualifying non-resident employee" in subsection 153(6) of the *Act* (as recommended in Comment 1), the relief would be partial for non-resident performing arts companies in countries other than the United States.

    2. Under the Canada-United States Convention with Respect to Taxes on Income and on Capital, non-resident artistes and athletes are tax exempt in Canada if their gross receipts do not exceed $15,000. This allowance is well known by Canadian contractors and non-resident performing arts companies. If the Proposals are adopted as proposed, non-resident performing arts companies and artists from the United States would become subject to two allowances: a $15,000 allowance for the purpose of determining where artistes should be taxed and if waiver is to be granted, as well as a $10,000 allowance for the

purpose of determining if information returns should be filed. This is bound to create confusion among U.S. performing arts companies, especially in those instances where an artist qualifies for a waiver for earning less than $15,000 but still requires information returns filing for earning more than $10,000. For the sake of consistency between the Canada-United States Convention and the *Income Tax Regulations*, we recommended that the allowance under paragraph 200(1.1.b) of the Regulations be increased to $15,000, so that in no instance a U.S. resident performing arts companies would need to file information returns for artists who qualifies for tax exemption.

3. Consequential to our Comment 2, we recommend extending the allowance in paragraph 200(1.1.b) of the *Regulations* to qualified contract staff and other payees.

6. In order to achieve greater streamlining of withholding requirements, we propose waiving the requirement for Individual Tax Numbers to be issued to qualifying non-resident employees, provided that the employer has no reason to believe that the employee will be earning taxable income in excess of the regulatory allowance set in paragraph 200(1.1.b) of the Regulations. If no information return is required for a given employee, then no ITN should be needed either.

7. Even though the Proposals only apply in respect of payments made after 2015, we consider that the CRA should waive all penalties for late filing of information returns for payments made in 2015 and earlier. To our knowledge, the CRA only began to enforce information filing requirements with non-residents a year ago. This has created a lot of confusion among non-resident performing arts companies who were sent penalty notices, and has become yet another deterrent to touring in Canada. If the Proposals acknowledge the need to protect non-resident employers from undue penalties when the employer had no reason to believe at the time of the payment that filing requirements applied to a given employee, then the same logic should apply to non-resident employers who had no reason to believe that filing requirements existed at all and were enforceable.

Although this is beyond the scope of the Draft Tax Legislation Proposals, we strongly believe that similar streamlining of withholding requirements should be made with R105 withholding. Our working group has articulated several recommendations in this respect in a letter sent to Ministers of Revenue and Finance on March 16, 2015. These recommendations are still valid, and we would now like express our support to a few additional recommendations introduced by R.A.M. Management in their June 3rd letter to the Ministers of Revenue and Finance:

A. **Increase Regulatory Allowance for Waiver of Withholding**
In the R105 and R102 waiver processing guidelines, non-resident treaty artists are allowed a maximum of $5,000 CAD in non-taxable annual income. We recommend that this regulatory allowance be increased so as to match the allowance in paragraph 100(1.1.b) of the Proposals (the proposed allowance is $10,000, but we believe it should be increased to $15,000 as per our comment 5.2). If revenues under $10,000 are deemed insignificant enough to waive the T4-type filing requirements, then we believe the same logic should apply to the allowance for waiver processing. This recommendation supplements Recommendation 4 – "Increase and Index Waiver Threshold" in our March 16th letter.

B. **Penalties for Late Filing of T2 Returns**
In keeping with our recommendation in comment 7, we propose the following changes to T2 late-filing penalty assessments for non-resident artists:
- No penalty for first time offense, including where multiple returns are required to restore compliance;
- Maximum late-filing penalty of $500 CAD for subsequent offenses.

C. **T2 Filing Requirement Based on Self-Assessment** (as proposed by R.A.M. Management)
For a vast majority of non-resident artists, the 15% withholding tax levied directly on their performances fees by Canadian buyers exceed their actual tax liability pursuant to the *Income Tax Act of Canada*. For those artists who are taxable in Canada pursuant to a tax treaty and who submit a waiver application based on their income and expenses, many expense categories are not considered in the waiver process such that the CRA's preliminary assessment of such an artist's tax liability remains higher than their actual tax liability.

It is therefore a reality that for most artists operating through a corporate entity, the requirement to file a T2 return does nothing to improve the CRA's assessment of payable tax amounts, and in fact will often result in a refund given the withholding

measures and waiver processing policies mentioned above. With this in mind, we propose that the requirement for T2 filings apply to non-resident corporations on a self-assessment basis as is the case for individuals. In other words, we propose waiving the requirement for non-resident artists operating through a corporate or hybrid entity to file a T2 return unless they have assessed that their tax liability to the CRA for a given calendar year outweighs the withholding tax paid throughout that year.