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Recommendations by the Performing Arts Tax Working Group

These recommendations were defined by members of the Performing Arts Working Group in a series of meeting held since March 2014. They were first published in March 2015 and then revised in December 2015.

The intent behind these recommendations is to achieve both greater efficiency and better risk management in the administration of taxation of non-residents, including R105 and R102 Withholding, information return requirements and tax return requirements. As general guidelines, the working group sought to ensure that efforts to protect the fisc are commensurate with the actual risks of foregoing taxation, that they do not unnecessarily impede the productivity of performing arts organization, and do not interfere with the principles of openness and balance of the UNESCO *Convention on the Protection and Promotion of the Diversity of Cultural Expressions*.

This list of recommendations is non-exhaustive. It only includes those recommendations which are considered to be the most important by the working group at the current time. The list order does not reflect a sense of priority; the recommendations are ordered so as to follow the workflow of the non-resident taxation process:

- recommendations 1-4 address the waiver process;
- recommendations 5-6 speak to return requirements and tax compliance; and,
- recommendation 7 offers overarching considerations at the treaty level.

1 – Develop Performing Arts Specific Guidelines

Many performing arts organizations and non-resident artists and companies are finding it difficult to access information on how to successfully apply for a Regulation 105 or Regulation 102 Waiver, and/or an Individual Tax Number (T1261) and/or a Business Number (RC1), all of which are required as part of the waiver application process. Similarly, CRA officers could benefit from having a better knowledge of the specificities of performing arts business practices. We therefore recommend the joint development, by the CRA and the industry, of performing arts guidelines recognizing industry practices, addressing both risks and processes, and intended for both CRA officers and applicants. We believe this could go a long way in increasing the success rates of R105, R102, T1261, and RC1 applications, thereby enhancing the efficiency of the process as well as the service standards.

It should be noted that similar industry-specific guidelines and approaches exist at Citizenship and Immigration Canada, in regards to work permits requirements for foreign performing artists (R186(g) of the *Immigration and Refugee Protection Regulations*), and also at the CRA, for the Film Industry, specifically in regards to the administration of R105.

2 – Exempt Deposits from Withholding

It is a common practice in the live performance industry for the agent representing the contracted artist or company to require that a deposit be given at the time of signing the engagement contract. Such deposits are a security for the performance of the contract rather than a payment for actual services rendered in Canada. These security deposits are held in trust by the receiving party and remain in the dominion of the depositing party. They are a liability for the receiving party until the services have been rendered and the payment has been made.

In the performing arts sector, it is not uncommon for a deposit to be given a year before the actual services are rendered. This creates situations where a non-resident artist or company may be required to file a Canadian tax return in a fiscal year where no services have been rendered in Canada. Requiring withholding on such deposits effectively deprives the non-resident artist or company of the opportunity to apply a waiver, since the deposit is to be paid before a waiver can even be filed. Finally, these deposits usually do not exceed 50% of the total fees to be paid. This makes it possible for Canadian payers to withhold the full 15% on the actual payment at the time that the services are rendered. We consequently believe that withholding on performing arts deposits is unnecessary and that deposits should be exempted from withholding, information returns and tax return requirements.

3 – Streamline and Centralize the Application Process by Using Electronic Means of Submission and Communication

In its 2015 Pre-budget Report, the Standing Committee on Finance recommended: "In addition to its focus on reducing regulation, the government should direct efforts to modernization, such as reducing the use of paper and utilizing the benefits of technology and digital solutions." Yet, at the present time, R105, R102, T1261, and RC1 forms and support documentation must be filed in paper form – and at different mailing addresses. (Some welcome changes were piloted in the Montreal Office late last spring, by which some forms can be emailed (R105) and all original forms can be mailed to the regional office.) Moreover, applicants do not receive any acknowledgement of receipt and they consequently do not have any reference number with which they can trace the progress of their applications. We believe that a single-window online service for electronic submission of all forms and supporting documentation, including scanned documents in place of certified documents, would resolve all of these issues. Moreover, it would also expedite the reception, treatment and response processes – resulting in much faster turnaround. At a time when the 30-day service standard is becoming the exception rather than the norm, this would be a welcomed change.

4 – Increase and Index the *De Minimis* Threshold for Waivers

Under the current CRA waiver guidelines, if a performing artist (from a treaty other than the United States) earns less than $5,000 in one calendar year including hotel and per diem expenses paid on his/her behalf, then a waiver will be granted on earnings for services rendered. This administrative threshold was introduced as a *de minimis* (low risk) exclusion three decades ago in order to reduce the incidence of second-level withholding tax

(withholding of a non-resident corporation and of its non-resident employees) and therefore to reduce the administrative burden for all parties involved in the withholding and waiver processes. This threshold has never been revised for inflation, and the vast majority of non-resident artists who do any touring in Canada find themselves in situations where their earnings may easily exceed $5,000. As a consequence, second-level withholding is becoming the norm. One could also argue that such a low threshold represents much higher administrative expenses for the CRA than potential lost tax revenues.

This is why we recommend that this administrative exemption threshold be significantly increased and that it then be indexed on a regular basis to account for inflation. Under the Tax Legislative Proposals announced by the Department of Finance on July 31, 2015, revenues under $10,000 are deemed insignificant enough to waive the T4-type filing requirements. We consequently believe that, at the very least, the same logic should apply to the administrative threshold for waivers. We moreover believe that an increase to $15,000 is entirely justifiable since:

a) it would match the tax exemption currently in place for performing artists in the Canada-United States Convention; and,
b) it would be more in line with the limit proposed in the Commentary on Article 17 of the 2014 OECD Model Tax Convention (see Recommendation 7)

5 – Enact the "Legislative Proposals Relating to the Income Tax Act and Regulations"

Further to announcements made in the 2015 budget, the Department of Finance introduced on July 31, 2015 "Legislative Proposals Relating to the Income Tax Act and Regulations." Even if few of the dispositions in the Proposals would apply to performing artists, we believe part 15-18 of the Proposals represent a positive step towards streamlining withholding requirements. The Proposals acknowledge that streamlining is required for withholding, as well as for information return requirements. They thereby address in part the issues arising from the increased enforcement of these requirements by CRA (see Recommendation 6).

We therefore recommend that the proposals be enacted as quickly as possible, with or without amendments in response to the comments made by our Working Group on September 9, 2015.

6 – Adopt a Phased-In Approach in the Enforcement of Penalties for late filing of T4A-NR, T4-NR, T1, and T2 Returns of Non-Residents

While the information returns (T4A-NR, T4-NR) and tax returns (T1, T2) requirements for non-residents have been in place for decades, they have historically not been enforced systematically by the CRA. These requirements were therefore little known to Canadian contractors, and even less so to non-resident artists. As a consequence, many non-resident artists, especially those who were granted withholding waivers, have failed to comply with these requirements.

In the last two years, however, we have observed a growing number of cases where non-resident performing artists were assessed penalties for late filing of information and/or tax returns. In most cases, these performing artists had no tax liability, and in one instance, the CRA even owed a refund to the company.

Since the beginning of 2015 in particular, the enforcement of these penalties has taken a quite a dramatic turn: the CRA has been tracking non-compliant non-resident artists and has attempted to seize their fees when they come back to perform in Canada. This has led to much confusion among both the non-resident performing artists (who were often unaware that they had been assessed a penalty, because of a change of address, a change of corporate entity or simply a lack of capacity to interpret an assessment sent by a foreign country) and the Canadian engagers (who had no responsibility whatsoever in the non-resident's liability and who didn't know how to interpret the collection phone calls from the CRA). One Canadian engager reported that this collection procedure led to the cancellation of a performance by a non-resident artist, which resulted in financial losses much greater than the $2,500 penalty owed by the artist.

At this point we consider the need for education to be greater and more relevant than the need for enforcement. Consequently, we propose the following changes to late-filing penalty assessments for non-residents:

- Waive all penalties for late filing of information returns for payments made in 2015 and earlier (in keeping with the Legislative Proposals discussed in recommendation 5);
- Waive all penalties for late filing of tax returns for 2015 and earlier; and,
- No penalty for first time offense, including where multiple information and/or tax returns are required to restore compliance.

7 – Integrate Exclusions from the Commentary on Article 17 of the 2014 OECD Model Tax Convention into Canada's Tax Treaties

Ultimately, the administrative exclusion described in recommendation 4 is only necessary in the absence of much broader exclusions in Canada's tax treaties.

Article 17 of the OECD Model Tax Convention was introduced and in the 1960s and integrated in the OECD model in 1977 to create an exceptional rule for performing artistes (and sportspersons). Article 17 states that entertainers and sportspersons need to pay income tax in the country of performance, regardless of the general rules for companies, self-employed persons or employees. The main reason for this special treatment is that top artists and athletes are very mobile, and they can easily move their residency to a tax haven in order to avoid taxation.

The original Article 17 was a "one-size-fits-all" and a number of issues have arisen over the years. As a result, OECD-member countries have agreed to introduce several options for the restriction of the scope of Article 17. The 2014 OECD Model Tax Convention includes several

such options, including the following which we deem worthy of inclusion in Canada's tax treaties:

- **Deduction of expenses**
  Paragraph 10 of the Commentary on Article 17 refers to the determination of taxable income. It proposes the deduction of expenses from gross income and taxation of net income under the normal rules of each country. Currently the guideline for the administration or R105 do the exact opposite: waiver applicants are asked to indicate expenses paid by the payer, which are the "grossed up" on the artist fee to determine the eligibility to waiver.
- ***De minimis* rule**
  Paragraphs 10.1 to 10.4 of the Commentary recognize that it would be inappropriate to apply Article 17 to a non-resident artist who would not be taxable in the performance state or who, during a given taxation year, derives only low amounts of income in that state. In order to exclude such low-risks situations, the paragraphs propose a minimum amount 15,000 IMF Special Drawing Rights (the equivalent of $27,000 CAD at current rates). under which artists fees are exempt from tax in the performance state. The existing $15,000 exclusion in the Canada-United States is an example of a *de minimis* rule.
- **Public funds**
  Paragraphs 14 of the Commentary provides an option to exclude from Article 17 events supported from public funds. Canada's tax treaties with France and the United Kingdom include an exemption along these lines. While the option in paragraph 14 may grant an exclusion to non-profit-organizations receiving public funds, the option has not yet been extended so as to specifically include not-for-profit organizations. We however consider that not-for-profit organizations should benefit from this exclusion since they are tax-exempt under the *Income Tax Act*, and they are unlikely to tour Canada on a regular basis or for long durations.

Over the next years, the Trans-Pacific Partnership will require Canada to reopen several bilateral treaties. We hope that this can be an opportunity to integrate these exclusions into Canada's tax treaties.

About the Performing Arts Tax Working Group

The Performing Arts Tax Working Group is a collective of seventeen performing arts organizations representing more than 1,000 Canadian stakeholders. It was formed in 2014 to examine ways to achieve greater efficiency and better risk management in the administration of taxation of non-resident entertainers. CAPACOA was designated by Working Group members to be the facilitator for the group. The Working Group is comprised of the following organizations:

'Arts Common Presents' / Arts Commons Programming
Canadian Arts Presenting Association / Association canadienne des organismes artistiques
Canadian Dance Assembly

Canadian Independent Music Association
CanDance Network
Cusson Management
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

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