

Taxing Times

*Loathed by many and loved by a few, withholding tax is back in the spotlight, and this time the knock-on effects could be monumental, writes **Greg Parmley.***



*F*or the modern touring artist, life free from withholding tax would be like an industrial revolution: cheaper, easier, and altogether more productive. Over the last few years, several legal victories have weakened its bite, but now, a series of consultations and discussions at a European level are asking whether this problematic form of taxation should

actually be strengthened. Compared to lights, lasers and loudspeakers, tax may be the least sexy subject of the touring business, but it has the potential to determine much of its future.

The reasons behind withholding tax were understandable: in the mid twentieth century, sportsmen and entertainers were frequently not

disclosing income they had earned abroad or sheltering in tax havens. Given the high fees and high profiles involved, this smarted with the majority of law abiding tax payers. While some countries had already begun to withhold tax from foreign performers, the hole was plugged by Article 17 of the Organisation for Economic Co-operation and Development's (OECD) Model Tax Convention in 1963. But rather than putting a finger in the proverbial dyke, the OECD effectively just slowed the whole river. Gross rates of up to 30% eliminated profit margins on tours, and the administrative burden placed on promoters and touring artists increased. The show went on, but it was hardly an ideal situation.

DICK MOLENAAR AT All Arts Tax Advisors in the Netherlands has been fighting withholding tax for longer than most bands have been on the road. He says: "During the tour the artist receives less money, then it's up to the accountant to offset withholding tax against domestic income tax, but it's troublesome and depends on whether he has the right tax certificates to get the tax credit or not. Every international touring artist I know pays more withholding tax than they can use for their tax credit, and the problem is that the focus is gone. The artists and agent are talking about now or the next tour and album, not withholding tax that can't be credited from 2008 or 2009."

It's not just that the perspectives of both worlds differ wildly – touring's forward-looking nature versus tax's retrospective trawl through dates long gone – but the administrative quagmire groups are forced to wander. And while the bigger names have dedicated tour accountants and revenues that command professional attention, it's the small- and mid-range artists – for whom the difference of a few hundred Euros can mean a successful show or a cancelled date – that suffer most.



"The administration of withholding tax is so problematic that most bands lose money."

– Dick Molenaar, All Arts Tax Advisors

In 2003 and 2006 respectively, Molenaar, together with German tax specialist Harald Grams scored two significant victories with the Gerritse and Scorpio cases, which effectively allowed expenses to be deducted from withholding tax rates. These cases were backed up by a European Supreme Tax Court judgement in 2007 which effectively ordered every European nation to comply. Since that decision, many countries have been

slow to update their tax systems (despite effectively being in breach of European law). Spain and Sweden are the most recent to allow the deduction of expenses, following Austria and Germany, but nations including France, Norway, Italy and Portugal; and outside the EU, Japan and South Africa, still apply gross rates. Already, Molenaar and Grams have saved the industry millions of Euros. Should every European nation fall into line, the figure could easily be billions – a fact they're given little credit for.

"There's no uniformity across Europe at all, and it's a bar to cross-border trade," says accountant Eric Longley at the UK Music Managers Forum (MMF). "If I'm playing Germany I can get a reduced rate but I still have to employ more accountants and it becomes dreadfully expensive. Most of the smaller groups trying to break through just take off in a van and hope nobody notices, but eventually they get caught on the radar and the authorities go back several years, then there's a fine and fees from lawyers and accountants. The whole thing is stupid."

THE QUESTION IS NOT whether artists should be exempt from paying tax, but how much fairer such payments and their administration could be. And Molenaar has a lofty goal in mind when he says, "What I and Harald Grams want is the removal of withholding tax and for artists to be simply taxed in their country of residence." Such a concept would undoubtedly favour touring artists, who could simply file one tax return listing income gained abroad. Molenaar argues that with payments being nearly all made electronically and easily traced, the idea of artists not declaring income is now outdated. Likewise, artists resident in tax havens such as Monaco would still have to pay withholding tax because the principality does not have any reciprocal tax agreements with other nations. In other words, the OECD's arguments for Article 17 no longer apply. "The administration of withholding tax is so problematic that most bands lose money," he says.

Molenaar successfully lobbied the Dutch Government to remove withholding tax in 2007, and with the upcoming consultations, he's hoping to repeat the process on a wider European scale. The OECD recently published a draft discussion about Article 17 to address specific areas such as image rights and sponsorship income; the European Commission is asking for input on more general double taxation issues; and a seminar on whether Article 17 should be strengthened or removed is scheduled at the International Fiscal Association Congress in Rome this August. Each of these gives Molenaar and Grams another crack of the whip.

"We're lining up organisations to help us lobby,"

Withholding Tax

Molenaar says. “We’re using the football association UEFA, arts employees association PEARLE, the Association of British Orchestras and the International Association of Music Agents, among others.” The main target will be the OECD, which coordinates tax treaties internationally although it traditionally favours source taxation. And within the association, not everyone shares Molenaar’s zeal for abolishing the system. Jacques Sasseville is head of the OECD’s tax treaty unit, and he says that there are still problems with artists claiming residence in tax havens to avoid paying.



“A year ago I’d have said that that nuclear deterrents will be done away with before they succeed, but suddenly there have been some changes in that very direction.”

– Ed Grossman, MGR Media

“There are treaties with Switzerland, for example, but some of the cantons there have very preferential treatment for foreigners that basically don’t tax them on their foreign income,” he says. “You can’t rely on every country in the world to always exercise their taxing rights. There’s been preferential treatment of royalties of performers in Ireland for a long, long time. There have been similar treatments for some sportsmen in Spain. And we’re talking about tax payers that are highly visible, it would not look good on tax policy and administration generally if the wealthy did not end up paying their fair share of taxes anywhere.”

“Johnny Hallyday (from France), Michael Schumacher and Boris Becker live in Switzerland, and are using those schemes, but why should the 98% that are behaving normally suffer for the 2% that don’t?” counters Molenaar. But Sasseville is not alone in questioning the wisdom of abolishing withholding tax, and countries that import more talent than they export are liable to be against the idea given that they would lose out on tax income.

Within the rock ‘n’ roll ranks, some tax specialists also agree. “It could all be made fairer and simpler by having a universal flat tax,” says Ed Grossman at MGR Media. “A universal tax could be administered in a very cheap and efficient way, either by country or by a global organisation. Tens of thousands of people like me, Inland Revenue offices and collection societies can go and do much more important things.”

AFTER SUCH EARLY victories with the Gerritse and Scorpio cases, some believe that Molenaar and Grams have bitten off too large a mouthful in trying to abolish

withholding tax altogether, but is there light at the end of the tunnel? “A year ago, I’d have said that nuclear deterrents will be done away with before they succeed, but suddenly there have been some changes in that very direction,” says Grossman. And rather than stem from the (occasionally) politically charged, rebellious world of rock music, it’s sport that may yet make a difference.

The London 2012 Olympic Games will be the first summer games where sportsmen will be exempt from withholding tax (the same situation occurred at the Vancouver Olympics this year). The Olympic charter states that the host country must not impose tax on participating athletes, and in order for London to win the games, the UK Government was forced to relax the rules, proving that movement is possible. Similarly, football association UEFA only agreed to stage the 2011 Champions League final at Wembley Stadium after the UK gave the same concession.

The idea of artists and sportsmen (even via associations) demanding a fairer tax system by threat of boycott is an interesting concept. The same high profile that allows them to be singled out for a heavy-handed tax treatment could potentially prove a weapon in its undoing. But for now at least, there are still many hurdles to vault, not least the deduction of expenses in some countries, and social security issues as well. “In Europe, Italy is currently the worst,” Molenaar says. “The official rule is 30% from gross with no deduction of expenses and they don’t bother about the European Court of Justice; and France is 15% with no official option to deduct your expenses, but it’s very difficult with its social security contributions.”

Withholding tax from entertainers and sportsmen accounts for less than 0.01% of a country’s tax revenue. It’s small fry in the scheme of things, and yet the ability of artists to move between borders efficiently, and served by a tax system that is not only fair but uncluttered by a myriad of domestic interpretations could have nothing short of a monumental impact on the live music industry, regardless of whether it cut down staff at accounting firms or not. It’s not so much a case that touring is broken right now, but that it could instantly be much more profitable. The flip side, if the forthcoming consultations head in the opposite direction, is that it could also become more difficult. Fortunately – and whether many in the industry realise the work that has been done or not – the likes of Molenaar, Grams and other tax specialists are having an ongoing and fundamental benefit to the business.

“I’m still fighting for this. I’m not giving up, because I believe it’s fundamentally unfair,” Molenaar says. ■

America, Tax Yeah

In the US, a relatively new system of withholding tax is finding its feet, and despite the odd teething trouble, specialists say it's an improvement on the old one. "It's 30% gross if you do nothing, or you have to enter into a contract with the IRS – a Central Withholding Agreement – and they'll then lower the withholding to 35% of net profits," says Ted Goetz at tax specialists Phillips Gold. "If artists need that money to tour, it's beneficial to hire a professional for the most part."

However, while still less than five years old, the system is not yet uniformly interpreted. "At the moment you've got Imogen Heap touring in the US, and they're saying that she has to withhold tax on all of the crew," says Eric Longley at the UK's Music Managers Forum. "If they do that, the cash flow will be such that she won't be able

to tour. The crew are self employed and covered by the double tax treaty as it's business profits and they don't have residency there, but if you're told by the US promoters that they're going to withhold if you don't, what do you do? All this does is rack up accountancy fees."

"Canada is similar but we find them more aggressive," continues Goetz. "The tax rates are higher, and they won't give a full deduction, for instance, for hotel costs which are limited to a set dollar amount per night." However, Goetz is adamant that not only is the new US system here to stay, but that it's being intelligently policed. "The IRS is looking at venue websites, or LiveNation.com, and it's quite simple to figure out who's coming," he says. "They're aware of all the major artists coming over."

Artist and Sportsman Tax Rules 2010

	Artist / Sportsman Tax	Deduction of Expenses	Withholding Tax Rate	US Treaty	Tax Return Afterwards
Australia	Yes	Yes	15-45%	\$20,000	Yes
Austria	Yes	Yes	20% (gross) or 25-35% (net)	\$20,000	Yes
Belgium	Yes	Yes, restricted	18%	\$20,000	Yes
Canada	Yes	No	15%	\$15,000	Yes
Czech Republic	Yes	No	21%	\$20,000	No
Denmark	No	---	---	(\$20,000)	---
Estonia	Yes	No	10%	\$20,000	No
Finland	Yes	Travel/Food	15%	\$20,000	No
France	Yes	No	15%	\$10,000	Yes
Germany	Yes	Yes	15% (gross) or 15-30% (net)	\$20,000	Yes
Greece	Yes	No	20%	\$10,000	No
Hungary	Yes	Yes	18-36%	Exemption	Yes
Iceland	Yes	No	10%	\$100/day	No
Ireland	No, but VAT				
Italy	Yes	No	30%	\$20,000	No
Japan	Yes	No	15-20%	\$10,000	No
Netherlands	No, when from treaty country	---	---	(\$10,000)	---
Norway	Yes	No	15%	\$10,000	Yes
Portugal	Yes	No	20%	\$10,000	No
Russia	Yes	No	20%	Exemption	No
Slovak Republic	Yes	No	19%	\$20,000	No
South Africa	Yes	No	15%	\$7,500	No
Spain	Yes	Yes	24%	\$10,000	Yes
Sweden	Yes	Yes	15% (gross) or normal rates (net)	\$6,000	Yes
Switzerland	Yes	Yes	0-32%	\$10,000	Yes
United Kingdom	Yes	Yes	20%	\$20,000	Yes
USA	Yes	Yes	30%	N/A	Yes

In practice, local promoters may have individual arrangements, such as splits in contracts between artiste or sportsman fees and production companies. These local arrangements are not included in this table with the official tax rules.

Tax rules courtesy of All Arts Tax Advisers – Rotterdam, the Netherlands – +31 10 4363 555 – dmolenaar@allarts.nl