

All-Party Parliamentary Group on Music
Attn. Tom Kiehl
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UNITED KINGDOM

Per e-mail: info@ukmusic.org

8949-TW

Rotterdam, 29 July 2022

Re: Music report "Let the Music Move – A New Deal for Touring": also tax measures

Dear Tom,

This week I have read the music report "Let the Music Move – A New Deal for Touring" of the All-Party Parliamentary Group on Music in association with UK Music. As you may remember from the ILMC and other conferences, I am working as a tax lawyer in the Netherlands for performing artists and sportspersons and am a researcher on this topic at the Tax Law Department of the Erasmus University in Rotterdam, the Netherlands.

In 2021 the APPG on Music decided to undertake an assessment into the effect of leaving the EU on UK music workers looking to operate in EU member states. The report is a very good result of that work and shows the new obstacles for UK artists for performing in the EU. We have discussed this together at various conferences.

This report has been published at the same time as the news article in which "Best For Britain" calculated that this year 45% less British artists perform on music festivals in Europe, compared to 2017- 2019. It is clear, Brexit has made touring through Europe more difficult.

But what I miss in the music report is a tax perspective. As I explained in panels, there are also tax measures, both national and in bilateral tax treaties, causing problems for UK artists performing abroad. I will explain this below.

1. Taxing right for the performance state, no deductions

Most states have a special artist tax for UK and other foreign artists. The UK artists can compensate this with a foreign tax credit in the UK, but then the foreign tax should not be too high, because otherwise they have an excess which cannot be credited. This happens when touring expenses cannot be deducted and it happens often with smaller artists. And unfortunately, most states raise their artist tax on a gross basis.

2. Decisions of European Court of Justice (ECJ)

Solutions have come from three decisions of the European Court of Justice (ECJ), which has decided in 2003 (Gerritse), 2006 (Scorpio) and 2007 (Centro Equestre) that touring expenses should be deductible within the EU, already at the moment of the performance, and that tax returns after the year should be possible to make use of the normal tax rules. These decisions have been very helpful for UK artists to lower the foreign artists to a level for which a UK tax credit can be obtained.

But this not possible anymore after the Brexit, because these ECJ decisions don't apply to UK artists anymore. This means that they are taxed on their gross fees again and have excess tax credits back in the UK again.

3. Better position for US artists

Interesting is that US artists have a better position on the EU market, because they have concluded tax treaties with exceptions with EU Member States. An example is Article 16 of the treaty between the UK and the US, which is comparable to other US treaties, which gives:

- a. Minimum threshold of \$20,000 per artist per year: this is very helpful for smaller and medium-sized artists
- b. Limited approach of Article 16(2): payments to others than the artists or their own companies are not taxable in the performance state.

The text of Article 16 of the UK-US treaty can be found in the attachment, together with the examples of Article 17 in the Germany-US and Austria-US treaties.

4. Deduction of expenses via tax treaties

The UK can achieve the possibility of the deduction of expenses for its artists by improving Article 17 (for entertainers and sportspersons) in its tax treaties with EU (and other) states. The OECD have given the an option in §10 of the Commentary on Article 17 for this:

This could be done through the inclusion of a paragraph drafted along the following lines:

Where a resident of a Contracting State derives income referred to in paragraph 1 or 2 and such income is taxable in the other Contracting State on a gross basis, that person may, within [period to be determined by the Contracting States] request the other State in writing that the income be taxable on a net basis in that other State. Such request shall be allowed by that other State. In determining the taxable income of such resident in the other State, there shall be allowed as deductions those expenses deductible under the domestic laws of the other State which are incurred for the purposes of the activities exercised in the other State and which are available to a resident of the other State exercising the same or similar activities under the same or similar conditions.

5. Conclusion: new UK Tax Treaty Policy to help UK Music abroad

Tax measures can help to overcome the problem of excessive taxation following from shows in the EU (and also elsewhere). Best is when the UK HM Treasury together with HMRC would have the following new Tax Treaty Policy for UK artists:

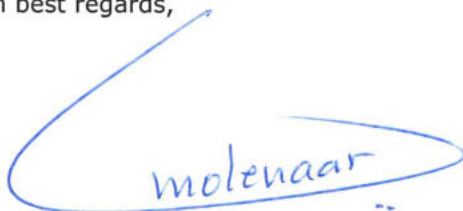
- a. No Article 17 for entertainers and sportsperson anymore in new tax treaties: with this radical measure, no tax problems can arise anymore because then UK artists are only paying tax in the UK and not overseas.
- b. If an Article 17 has to be inserted, then the US treaties can be followed with a minimum threshold of \$20,000 per person per year and a limited approach of Article 17(2). Equal treatment with US artists !
- c. Deduction of expenses and normal tax settlements (net taxation): this can also be included in the text of Article 17 with the option from the OECD Commentary. Then the other states will do the same as the UK does with the Foreign Entertainers Unit (FEU).

6. Final words

The music report "Let the Music Move – A New Deal for Touring" can be strengthened with tax measures. This will remove the existing tax problems, which arose after the Brexit. And it brings the shows of US and UK artists on the EU market on level terms. I hope you can use my analysis and proposals for a better perspective.

Let me know if you want to discuss this further. I can also assist in technical talks with HMRC and HM Treasury, if needed.

With best regards,



Dr. Dick Molenaar

**UK/USA DOUBLE TAXATION CONVENTION
SIGNED 24 JULY 2001**

ARTICLE 16

Entertainers and sportsmen

1. Income derived by a resident of a Contracting State as an entertainer, such as a theatre, motion picture, radio, or television artiste, or a musician, or as a sportsman, from his personal activities as such exercised in the other Contracting State, which income would be exempt from tax in that other State under the provisions of Article 7 (Business Profits) or 14 (Income from Employment) of this Convention, may be taxed in that other State, except where the amount of the gross receipts derived by that resident, including expenses reimbursed to him or borne on his behalf, from such activities does not exceed twenty thousand United States dollars (\$20,000) or its equivalent in pounds sterling for the taxable year or year of assessment concerned.

2. Income in respect of activities exercised by an entertainer or a sportsman in his capacity as such which accrues not to the entertainer or sportsman himself but to another person may, notwithstanding the provisions of Article 7 (Business Profits) or 14 (Income from Employment) of this Convention, be taxed in the Contracting State in which the activities of the entertainer or sportsman are exercised, unless that other person establishes that neither the entertainer or sportsman nor persons related thereto participate directly or indirectly in the profits of that other person in any manner, including the receipt of deferred remuneration, bonuses, fees, dividends, partnership distributions, or other distributions.

CONVENTION
BETWEEN
THE UNITED STATES OF AMERICA
AND

THE FEDERAL REPUBLIC OF GERMANY

FOR THE AVOIDANCE OF DOUBLE TAXATION
AND THE PREVENTION OF FISCAL EVASION
WITH RESPECT TO TAXES ON INCOME AND CAPITAL
AND TO CERTAIN OTHER TAXES

GENERAL EFFECTIVE DATE UNDER ARTICLE 32: 1 JANUARY 1990
FOR FORMER GERMAN DEMOCRATIC REPUBLIC: 1 JANUARY 1991

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2. Notwithstanding the provisions of paragraph 1, remuneration derived by a resident of a Contracting State in respect of an employment exercised in the other Contracting State shall be taxable only in the first-mentioned State if:

- a) the recipient is present in the other State for a period or periods not exceeding in the aggregate 183 days in the calendar year concerned; and
- b) the remuneration is paid by, or on behalf of, an employer who is not a resident of the other State; and
- c) the remuneration is not borne by a permanent establishment or a fixed base that the employer has in the other State.

3. Notwithstanding the foregoing provisions of this Article, remuneration derived by a resident of a Contracting State in respect of an employment as a member of the regular complement of a ship or aircraft operated in international traffic may be taxed only in that State.

ARTICLE 16 Directors' Fees

Directors' fees and other similar payments derived by a resident of a Contracting State for services rendered in the other Contracting State in his capacity as a member of the board of directors of a company that is a resident of the other Contracting State may be taxed in that other Contracting State.

ARTICLE 17 Artistes and Athletes

1. Notwithstanding the provisions of Articles 7 (Business Profits), 14 (Independent Personal Services), and 15 (Dependent Personal Services), income derived by a resident of a Contracting State as an entertainer (such as a theater, motion picture, radio or television artiste, or a musician), or as an athlete, from his personal activities as such exercised in the other Contracting State may be taxed in that other State, except where the amount of the gross receipts derived by such entertainer or athlete, including expenses reimbursed to him or borne on his behalf, from such activities does not exceed \$20,000 (twenty thousand United States dollars) or its equivalent in Deutsche mark for the calendar year concerned.

2. Where income in respect of activities exercised by an entertainer or an athlete in his capacity as such accrues not to the entertainer or athlete but to another person, that income of that other person may, notwithstanding the provisions of Articles 7 (Business Profits) and 14 (Independent Personal Services), be taxed in the Contracting State in which the activities of the entertainer or athlete are exercised, unless it is established that neither the entertainer or athlete nor persons related thereto participate directly or indirectly in the profits of that other person in any manner, including the accrual or receipt of deferred remuneration, bonuses, fees, dividends, partnership income, or other income or distributions.

3. The provisions of paragraphs 1 and 2 shall not apply to income derived from activities performed in a Contracting State by entertainers or athletes if the visit to that State is substantially supported, directly or indirectly, by public funds of the other Contracting State or a political subdivision or a local authority thereof. In such a case the income shall be taxable only in the Contracting State of which the entertainer or athlete is a resident.

ARTICLE 18

Pensions, Annuities, Alimony, and Child Support

1. Subject to the provisions of Article 19 (Government Service; Social Security), pensions and other similar remuneration derived and beneficially owned by a resident of a Contracting State in consideration of past employment shall be taxable only in that State.

2. Subject to the provisions of Article 19 (Government Service; Social Security), annuities derived and beneficially owned by a resident of a Contracting State shall be taxable only in that State. The term "annuities" as used in this paragraph means a stated sum paid periodically at stated times during a specified number of years, under an obligation to make the payment in return for adequate and full consideration (other than services rendered).

3. Alimony paid by a resident of a Contracting State and deductible there to a resident of the other Contracting State shall be taxable only in that other State. The term "alimony" as used in this Article means periodic payment (made pursuant to a written separation agreement or a decree of divorce, separate maintenance, or compulsory support) that are taxable to the recipient under the laws of the State of which he is a resident.

4. Nondeductible alimony, and periodic payment for the support of a minor child (made pursuant to a written separation agreement or a decree of divorce, separate maintenance, or compulsory support), paid by a resident of a Contracting State to a resident of the other Contracting State shall be taxable only in the first-mentioned State.

ARTICLE 19

Government Service; Social Security

1.

a) Wages, salaries, and similar compensation and pensions paid by the United States or by its states or political subdivisions to a natural person, other than a German national, shall be exempt from tax by the Federal Republic of Germany.

b) Wages, salaries, and similar compensation and pensions paid by the Federal Republic of Germany or by its Laender or by municipalities, or pensions paid by a public pension fund thereof to a natural person, other than a citizen of the United States and other than

BUNDESGESETZBLATT

FÜR DIE REPUBLIK ÖSTERREICH

Jahrgang 1998

Ausgegeben am 29. Jänner 1998

Teil III

6. Abkommen zwischen der Republik Österreich und den Vereinigten Staaten von Amerika zur Vermeidung der Doppelbesteuerung und zur Verhinderung der Steuerumgehung auf dem Gebiete der Steuern vom Einkommen samt Notenwechsel und Verständigungsprotokoll
(NR: GP XX RV 213 AB 485 S. 47. BR: AB 5322 S. 619.)
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6.

Der Nationalrat hat beschlossen:

Der Abschluß des nachstehenden Staatsvertrages samt Notenwechsel und Verständigungsprotokoll wird genehmigt.

ABKOMMEN

ZWISCHEN DER REPUBLIK ÖSTERREICH UND DEN VEREINIGTEN STAATEN VON AMERIKA ZUR VERMEIDUNG DER DOPPELBESTEUERUNG UND ZUR VERHINDERUNG DER STEUERUMGEHUNG AUF DEM GEBIETE DER STEUERN VOM EINKOMMEN

Die Republik Österreich und die Vereinigten Staaten von Amerika, von dem Wunsche geleitet, ein Abkommen zur Vermeidung der Doppelbesteuerung und zur Verhinderung der Steuerumgehung auf dem Gebiete der Steuern vom Einkommen abzuschließen,

haben folgendes vereinbart:

Article 17

Artistes and Athletes

1. Notwithstanding the provisions of Articles 7 (Business Profits), 14 (Independent Personal Services) and 15 (Dependent Personal Services), income derived by a resident of a Contracting State as an entertainer, such as a theatre, motion picture, radio or television artiste, or a musician, or as an athlete, from his or her personal activities as such exercised in the other Contracting State, may be taxed in that other State, except where the amount of the gross receipts derived by such entertainer or athlete, including expenses reimbursed to him or her or borne on his or her behalf, from such activities do not exceed twenty thousand United States dollars (\$ 20,000) or its equivalent in Austrian shillings for the taxable year concerned.

2. Where income in respect of activities exercised by an entertainer or an athlete in his or her capacity as such accrues not to that entertainer or athlete but to another person, that income may, notwithstanding the provisions of Articles 7 (Business Profits), 14 (Independent Personal Services), and 15 (Dependent Personal Services), be taxed in the Contracting State in which the activities of the entertainer or athlete are exercised. The preceding sentence, shall not apply if it is established that neither the entertainer or athlete, nor persons related thereto, participate directly or indirectly in the profits of such other person in any manner, including the receipt of deferred remuneration, bonuses, fees, dividends, partnership distributions or other distributions.

3. Where, in cases other than those dealt with in the first sentence of paragraph 2, payment in respect of activities exercised by an entertainer or an athlete in his or her capacity as such is made not to that entertainer or athlete but to another person, that payment may, notwithstanding the provisions of Articles 7 (Business Profits) or 14 (Independent Personal Services), be subject to a withholding tax in the Contracting State in which the activities of the entertainer or athlete are exercised; upon request of that other person the withholding tax shall be refunded insofar as the amount of tax withheld exceeds the tax liability of the entertainer or athlete as determined under paragraph 1. Refund claims must be accompanied by documentation required by that Contracting State.