



The Ultimate Cookbook

FOR CULTURAL MANAGERS

**TAXATION OF ARTISTS
IN AN INTERNATIONAL CONTEXT**

2016

EFA RISE

The EFA RISE project runs from 2014-2017 with activities which act on exchange of expertise on audiences, management models, artistic and policy making choices (working groups, think tanks, conferences), development of skills (atelier and technical workshops with Pearle), incentive to cooperation (Artistic Collaborations WG) and engagement in policy making (Round Table with Culture Commissioner, Conferences).

EFA / PEARLE* partnership

In the frame of EFA RISE, EFA teamed up with its Synergy Partner PEARLE*-Live Performance Europe to improve knowledge on legal and managerial aspects of Cross-border cultural cooperation.

The partnership on capacity building in the context of internationalisation, cross-border cooperation and mobility encompasses workshops, booklets and four video announcements (visit www.efa-aef.eu or www.pearle.ws)

Author

Dr. Dick Molenaar, All Arts Tax Advisers and the Tax Law department of the Erasmus University Rotterdam.

Dick Molenaar studied fiscal economics at the Erasmus University Rotterdam in the Netherlands and defended his PhD about the "Taxation of international performing artistes" at the same university in 2006. He is partner with All Arts Tax Advisers in Rotterdam, advising many artists and companies about their tax situation, both national and international. He is member of the board of some cultural institutions in the Netherlands and member of the International Association of Entertainment Lawyers (IAEL) and International Fiscal Association (IFA).

Editor

Anita Debaere, Director Pearle*-Live Performance Europe,
Square Sainctelette 19, B-1000 Brussels, tel +32-2-203.62.96, www.pearle.ws
Lies Martens, co-ordination RISE-project, www.liesmartens.eu

Layout brochures

Milton Pereira (Pearle*-Live Performance Europe)

Proofreading

King's translation

Publisher

EFA- European Festivals Association,
Square Sainctelette 17, B-1000 Brussels, tel +32-2- 644 48 00, info@efa-aef.eu, www.efa-aef.eu

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Let's
cheer for
a simpler
legislation for
live performance

Prologue

The European Festivals Association (EFA) and Pearle*-Live Performance Europe have teamed up to improve knowledge on legal and managerial aspects on cross-border cooperation within the EFA RISE project, funded by the Creative Europe Programme from the European Union from 2014 until 2017.

Between April 2014 and March 2017 several workshops, under the experienced guidance of legal and academic experts, were organised on a wide range of issues which either have a cross-border dimension or are of common interest to many artists and cultural managers across Europe. Participants were invited to bring their questions along, and both theoretical approaches and practical cases with suggestions for solutions are assembled now in this booklet.

Cross-border working, touring and international collaboration is in the DNA of the live performance sector. With the Cookbook, we provide you with the necessary ingredients and a number of recipes to "cook this taxation dish". As for all dishes one can add some spices, flavours or other ingredients depending on one's taste and needs.

We thank Dick Molenaar of All Arts Tax Advisers and the Tax Law department of the Erasmus University Rotterdam who during several seminars patiently explained international taxation rules for artists, touring companies, festivals and other players, and who has been a great help in writing this brochure. He gave advice on how to deal with complicated matters, whilst acknowledging that European rules and bilateral tax treaties are not at all appropriate for artists who are mobile.

Introduction

The professional engagements of artists are very often not confined to their own countries. Nowadays artists (and other cultural professionals) are highly mobile and ready to accept job offers or performance engagements abroad.

Take **for example**:

- a dancer on tour with a group for several weeks in different countries;
- an actor engaged by a theatre company in one country and invited as a guest playwright in another country;
- a musician playing in several orchestras and music ensembles in different countries while rehearsing in yet another country;
- a pop group creating its own music, releasing albums, downloads and streams, and performing in various countries;
- the painter with an exhibition on show in different countries, and so on.

Public authorities claim a part of the income earned by levying taxes with the purpose to be able to organise public services. But to avoid that one would not pay taxes, there is a set of special rules created to determine the taxation on income generated in another than the habitual residence country.

So everybody has to pay income taxes, but when earning income in different countries in which country should they pay? How can they avoid double taxation? The same applies when companies are involved, as they may be taxable for (or exempted from) corporate income tax.

There are special tax rules for performing artists and this booklet explains how those rules work, both in the country of work or performance and in the country of residence.



Attention!

It is important to be aware that **the European Union has only limited authority regarding income taxation.**

The EU Treaty has left income taxation out of the areas of common agreement, making this the responsibility of the individual Member States. This means that national tax rules and the bilateral tax agreements between countries (under the coordination of the OECD) contain the main principles for income taxation, as will be explained in this brochure. When the national rule on tax is conflicting with the bilateral agreements, the latter has priority. **The EU can only act when these tax rules are in breach with the EU Treaty**, which it has done for artists in cases regarding the freedom principles and principle of equal treatment for all EU-citizens in all EU-countries, **and when the Member States unanimously decide** to come to binding directives and guidelines.

Consequently, this means also that the EU has limited power when it comes to the taxation of artists.

At international level, it is the OECD, the Paris based “Organisation for Economic Co-operation and Development”, consisting of 35 countries from all over the world, that agreed on a common model of tax convention, explaining rules and giving guidance to these countries on how to set up bilateral tax agreements and how to avoid situations of double taxation (or non-taxation).

In general

To understand how taxation works in the case of income earned abroad there are two steps to follow. Once the general principles are familiar to you, we will then look in more detail to artist taxation.



Step 1

The first step in income taxation is to look at the national tax rules. In most countries these rules follow the following principles:

1. Residents: are taxed on their world-wide income, wherever it has been earned. This means that not only domestic but also foreign earnings are taxable in the country of residence.

2. Non-residents: are only taxable on income earned in the source country (i.e. the country where one undertakes a taxable activity) and not on their other income which has been earned outside the source country. Many countries want to tax all income which has been earned by non-residents, because they are anxious that otherwise it might not be taxed anywhere, and they intend to allocate those tax contributions to their national state's budget.



Step 2

The second step in income taxation is the interpretation **of bilateral tax treaties**. If the only tax rules were national rules, cross-border work would be very unprofitable tax-wise, because the foreign income would be taxed twice and the net result would be minimal. Therefore, over a century ago, countries already started to conclude bilateral tax treaties in which the rights of taxing specific types of income have been allocated and exemptions have been granted to eliminate double taxation. Most countries accept these tax treaties as taking precedence over national law, which means that they put aside their national rules in favour of respecting international agreements. The **OECD coordinates the bilateral tax treaties with its Model Tax Convention plus Commentary**. This Model contains **special rules for performing artists** which have been incorporated into the tax treaties.



Thus: the two steps on foreign taxation are

Step 1: National rules

1. Residents = taxation on worldwide income
2. Non-residents = taxation earned in source country

Step 2: Bilateral tax treaties

Allocation of rights by the two countries on taxation and exemptions



Remember!

- There is no European legislation on income tax rules when working across borders.
- Rules are defined in bilateral tax treaties between countries.
- The OECD has a Model tax convention which allows to coordinate the rules defined in the bilateral tax treaties.
- The OECD has special rules for performing artists (entertainers).
- In the next parts the rules on taxation in the OECD model tax convention will be explained.

Here
is where you
need to step
back, take a deep
breath and
dive into the next
part.

Residence

The distinction between **resident and non-resident status** is important for income taxation, as has been shown in the previous paragraph. In consequence, both national law and the bilateral tax treaties have rules for determining residence status.



What are the rules on residence status?

National rules are not the same everywhere, but **one common factor is that a person should have a home at his disposal for more than temporary use**. Domiciliation (having an official address and being registered in the national database) is also a factor and some countries use a minimum time limit such as six months for determining residence.

In bilateral tax treaties, countries aim to avoid double residence situations, therefore the OECD has provided **a tie-breaker rule** in Article 4 of its OECD Model Tax Convention which is included in almost every bilateral tax treaty.

The result of the tie-breaker is that a **person will be considered as resident of one country** (and for tax reasons only in one country) **and therefore non-resident in the other country**, even in cases where the person has a permanent home available in both countries.

The tiebreaker rule for natural persons as given in Article 4 of the OECD Model is as follows:

For example

1. A person is resident only in the country where he has a permanent home.

—→ *A musician resides with his family in the country where he has a permanent employment with an orchestra*

2. When a person has permanent homes in both countries, he shall be deemed to be resident in the country with which he has closer personal and economic relations (centre of vital interests).

—> A conductor has a house in Germany and a house in the Netherlands, he works in both countries but is music director in Germany, then the resident country will be Germany

3. If the country in which he has his centre of vital interests cannot be determined, or if he currently has no permanent home in either country, he shall be deemed to be a resident only of the country in which he has a principal place of abode.

—> A dancer works with dance companies in different countries, living a few months in one country and then in other countries. The resident country will be considered where he would normally stay.

4. If he has a principal place of abode in both countries, or in neither of them, he shall be deemed to be a resident only of the country of which he is a national.

—> If that doesn't apply, it will be the nationality of the dancer that will be taken into account.

5. If he is a national of both countries or of neither of them, the competent authorities of both countries shall settle the question by mutual agreement.

—> Should there still be a problem, then it is up to the countries to decide which country will be determined as the resident country

Criteria that can help to define the centre of vital interests are :

- The place where your children go to school
- Where is/are your main bank account(s)
- In which country do you claim your social security rights¹ which is the country where you have most of your 'economical interests'
- where do you make mainly use of the public services



Remember!

A person will be considered as resident of one country only



What about the artistic companies?

For other than natural persons, such as **artistic companies**, Article the OECD Model Article 4 determines residence on the basis of the place of **effective management**.

¹ I see the EFA-Pearle* brochure on social security in an international context

Allocation rules

companies, employees, artists and royalties



What or who will be taxed?

When the residence status is clear, **the allocation of taxing rights** is made in accordance with the OECD Tax Model and the bilateral tax treaties. The following income items¹ are dealt with, from which will be discussed those directly relevant for artists (in bold):

Article 6	Income from immovable property
Article 7	Business profits
Article 8	Shipping, inland waterways transport and air transport
Article 9	Associated enterprises
Article 10	Dividends
Article 11	Interest
Article 12	Royalties
Article 13	Capital gains
Article 14	[Deleted]
Article 15	Income from employment
Article 16	Directors' fees
Article 17	Entertainers and sportspersons
Article 18	Pensions
Article 19	Government service
Article 20	Students
Article 21	Other income

In **Article 7**, countries agree on how the rights for taxing **business profits (companies and self-employed)** will be shared out. The main rule is that **these profits are only taxable in the country of residence**. This means that the **source country cannot raise any tax** except for cases where there is a permanent establishment (PE) in the source country, since the profits of this PE are also taxable in that other country. A PE normally comes into existence after more than 12 months. Independent agencies do not create PEs.



Attention!

The rule is different for companies or self-employed in the context of article 17.

Article 12 provides for a separate rule covering **royalties**. This is a broad definition for any copyright income. The OECD Model allocates the right of taxing royalties solely to the **country of residence of the beneficiary /owner of the royalties**, although it also mentions in the official Commentary on the Model that countries can decide to give the source country the right to tax the royalties at a low percentage, such as 5%, 10% or 15%. This exception is being used by many countries such as Italy, Japan, Portugal and many developing countries.

In **Article 15**, the income from **employment** becomes taxable only in the **country of residence, unless the work is done in another country**, whereupon the country where the work is performed has the right to tax the salary earned from the amount of work in that country. This general rule is **set aside** if an employee works for an employer based in one OECD state **but stays fewer than 183 days** in the other country and the salary is not borne by a PE in that other country, because then the taxing right would lie only with the employer's country of residence.

In **Article 17**, a special **taxing rule** has been created for **entertainers and sportsmen**, **allocating the taxing right to the country where the work is performed, regardless of whether this work has been done as a self-employed person or as an employee**. This is also the case when the fee is not paid directly to the entertainer or sportsperson himself but to another person such as an agent, a management body or another company.

The exact formulation of the four above mentioned articles can be found at the end of this brochure.



Comment on difference between performing artists and visual artists

These tax treaty rules create a distinction between performing artists and visual artists, because performing artists will fall under the special Article 17 and be taxed in the country where they perform, while visual artists will fall under the general rule of Article 7 for business profits and will only be taxed in the source country if they have a permanent establishment there.



To summarize

What?	Where taxed?	Who <i>For example</i>	Comment
Business profits (art 7)	Country of residence	Visual artists	EXCEPT when permanent establishment in source country
Royalties (such as copyrights) (art 12)	Country of residence of beneficiary/ owner of the royalties	Visual artists	ALTHOUGH can also be taxed at low tax rate
Employment (art 15)	Country of residence	Technicians, touring personnel, management	UNLESS work is done in another country; BUT this does not apply when less than 183 days (and not by a PE in the other country)
Entertainers and sportspeople (art 17)	Source country, this is the country of the performance	Performing artists The performing arts company/agent/ ...	DOUBLE TAXATION can occur. Therefore tax exemption or tax credit (art 23) => further explanations in chapter 4 and 5



To conclude

- If you're a performing artist following the definition above always look at article 17 of the bilateral tax treaties;
- If you're not a performing artist, look at article 15 if you're an employee or article 7 in case you are an independent worker or self-employed.

When
the taxing right
is allocated
to one country,
double taxation
by the other country
must be avoided.

Tax exemptions or credits



How to avoid double taxation in case of taxation in another country?

This can be done by allowing a tax exemption or a tax credit, as described in Article 23 in the OECD Model.

An **exemption will be given by the source country** (thus a country where a performance takes place) **when it does not have the taxing right under a tax treaty rule**. Then only the country of residence has the right to tax the income as part of that person's worldwide income.

For example

Some source countries such as the Netherlands allow this exemption automatically for any type of income.

Belgium, France and the UK allow exemption for specific types of income.

Other countries such as Germany will only provide the exemption at source to a non-resident after completion of an application procedure. This procedure is normally time-consuming and also involves the country of residence, whose tax authorities need to confirm that the person concerned is resident and taxable in that country.

When the taxing rights have been allocated to the source country, it is easy for double taxation to occur because the country of residence will tax the worldwide income of that person.

There are two ways of eliminating the possibility of double taxation as recommended by the OECD Model Article 23:

- either use the **exemption method for active income** covered by Articles 7 and 15;
- or use the **tax credit method for passive income** covered by Article 12.

This is because active income will be taxed at the normal source country rates, while passive income is very often taxed only at a low tax rate in the source country.

In Article 17 the OECD recommends using the tax credit method in the country of residence to eliminate double taxation. This started in 1992, meaning that in older tax treaties the exemption method can still be found. Some countries such as Belgium do not follow the OECD recommendation, and still use the exemption method in any tax treaty.

The world's Anglo-Saxon countries (UK, USA, Australia, New Zealand and a few others) only use the tax credit method for eliminating double taxation, while most continental European countries follow the OECD demarcation.



Thus to summarize: ways to eliminate double taxation

Exemption method

Tax credit method

Used for active income

Used for passive income

Look at

article 7 business profits

article 15 employment

Look at

article 12 royalties

In some older tax treaties still used for
article 17

Recommended for **article 17** and most
widely spread



Tax exemption

Tax exemption can be a full exemption, because the income is taken completely out of the taxable base. This is the case if a source country (for example the country where you perform as a musician) does not have the right to tax the income. But it can also be a case of "exemption with progression", which occurs in countries of residence in cases where the active income has been taxed abroad and Article 23 of the tax treaty provides for the method of exemption with progression. This means that the

exemption will effectively be the average rate of tax in the country of residence. It rarely happens that a country of residence will allow a full exemption for foreign income.

The outcome of the tax exemption method in the country of residence will differ from the withholding tax in the source country because there is no direct link between these two. It could happen that the exemption is higher, which would create a net tax advantage, but it is also possible that the exemption is lower, which would create a net tax loss. This is not compensated for in future years.

For example

- A German artist has earned €10,000 in France. The income was taxed at 15% = €1,500 French tax.
- In Germany he had to deduct his expenses of €3,000, which gives his profit as €7,000.
- His total German income was €40,000, from which he paid €8,000 German tax (under the progressive tax rates).
- His tax exemption for foreign income will be: €7,000 foreign profit / €40,000 total income = 17.5% exemption x €8,000 German tax = €1,400 exemption from German tax.
- This leads to a net loss of €1,400 exemption minus €1,500 foreign tax = - €100.



Tax credit

Tax credit is most often an ordinary tax credit, which means that the foreign tax can be deducted from the tax in the country of residence



Is it possible to deduct the entire amount?

No. One can only deduct the foreign tax up to the amount of tax due on the foreign income.

This limitation avoids that the country of residence is required to give credit in excess of what it levies from the foreign income. The limit of the ordinary tax credit is the same amount as the outcome of the tax exemption with progression. Some countries allow excess tax credits to be brought forward to the following year. It rarely happens that countries allow a full tax credit, although there are some examples such as those given in the tax treaties between the Netherlands and Belgium and the Netherlands and Germany.

For example

- A UK artist has earned €10,000 in Germany, which was taxed at 15.825% = €1,583 German tax.
- In the UK he had to deduct his expenses of €3,000, which gives his net profit as €7,000.
- His total UK income was €70,000, from which he paid €17,000 UK tax (under the progressive tax rates).
- He claimed a foreign tax credit of €1,583, but had to calculate the upper limit of the ordinary tax credit, which amounts to €7,000 foreign income / €70,000 total income = 10% x €17,000 = €1,700 maximum credit. This means that the foreign tax remains under the maximum limit, so that he is entitled to a foreign tax credit of €1,583.
- There is no net profit or loss in this example.



Special situations

When a bilateral tax treaty specifies a source exemption for a specific type of income, but tax has still been withheld under the national rules (see above section 1), then the country of residence will not allow elimination of double taxation. The residence country will also not allow exemptions or credits. But this is only the case when the treaty is followed. The same is true in the case of royalties when a lower percentage of source taxation has been concluded in the treaty, because then only this percentage will be allowed as a foreign tax credit and not the full percentage from national law. To obtain the difference, the person has to apply for a tax refund in the source country.



What if there is no bilateral tax treaty between the country where I perform and the country where I have my residence?

Most countries have unilateral rules for the elimination of double taxation when no bilateral tax treaty has been concluded with the source country. Unilateral rules closely follow the principles of the treaties, meaning the granting of exemption for active income, credit for passive income and credit for performing artists.

Taxation of entertainers

(previously artistes)

The OECD Model tax convention refers in Article 17 to entertainers and sportspeople. Until 2014 the article used the term 'Artistes', but in the updated Model tax convention it was decided to modify it to the generic term 'entertainers'.

The OECD quotes in Article 17 paragraph 1 a non-exhaustive list of professions : theatre, motion picture, radio or television artiste, musician. In the second paragraph the OECD further specifies that when the income of the activities of an entertainer is taken by another person (for example his manager), that income may be taxed too.

The commentary to article 17 clarifies further areas where questions may arise.

It specifies that article 17 **will apply** in the following cases:

- entertainer who acts for a single event
- remuneration for advertising or interviews that are closely connected with a performance
- preparation, such as rehearsal and training, if an entertainer is remunerated for time spent on preparation, rehearsal or similar preparation in a State
- advertising or sponsorship income, etc which is related directly or indirectly to performances or appearances in a given State

It specifies that article 17 **will not apply** to:

- administrative or support staff (e.g. cameramen for a film, producers, directors, choreographers, technical staff, road crew for a pop group, etcetera)
- the income of a number of enterprises that are involved in the production of entertainment (or sports event) (e.g. the income derived by the independent promoter of a concert from the sale of tickets and allocation of advertising space).
- payments for the simultaneous broadcasting of a performance by an entertainer (or sports person) made to a third party



What if an individual both directs a performance and acts in it?

In such cases one will look at what the individual actually does in the country where the performance takes place. If his activities are predominantly of a performing nature, then Article 17 will apply to all the income that he receives in that country.

If however, the performing element is a negligible part of what he does in the country of the performance, the whole income will fall outside the Article.

In other cases an apportionment will be necessary.



Specific comment

With regard to artists who are paid a **salary** rather than receiving payment for each separate performance. In such case the income directly or indirectly derived from a performance is not paid to the individual, or his impresario or agent directly with respect to the performance. In the case of salaries paid, the country where the performance takes place is entitled to tax the proportion of the musician's salary which corresponds to such a performance.

For the purpose of this brochure and in this context we will refer to performing artists.



Tip for the touring companies

Prepare a list clearly indicating who is part of the tour and the role, function or activity of each person, so that this can be presented to the tax authorities.

Taxation of performing artists



Article 17's broad scope: why is there a special article on artists taxation in most bilateral tax treaties?

Article 17 in the OECD Model provides special coverage for performing artists, but renders cross-border taxation for income from performances really complicated.

This article has been introduced into almost every bilateral tax treaty and is **meant to counteract tax avoidance behaviour by top artists and sportsmen, who have their residence in tax havens** such as Monaco. Examples include singers such as Andrea Bocelli and the late Luciano Pavarotti and sports personalities such as Boris Becker, Steffi Graf and more recently Tom Boonen and Max Verstappen. Monaco does not levy income tax but only VAT. It is unclear why a tax treaty provision would be needed to tax these top stars, because Monaco is not a signatory to any tax treaties, therefore is not affected by Article the OECD Model Article 17.

It would suffice if every country left in place its national withholding tax for artists, sportsmen and others with Monaco as their country of residence.

But the OECD has also given other reasons for Article 17, for example when that the country of residence has problems with obtaining information about foreign income and the source taxation can easily be administered.

Article 17 is a catch-all provision, because it gives the **taxing right to the country of performance on any income** arising from the performance and the work around it, **regardless to whom it will be paid, either the artist himself (Article 17(1)) or another person (Article 17(2))**. This can be an agent, management body, a theatre or dance company, an orchestra or the artist's own personal company. The second paragraph was inserted in the OECD in 1977, was initially intended only to counteract tax avoidance by artistic companies, but was broadened in 1992 to include payments to any person other than the artist himself.



Remember!

- Taxation in country of performance on any income arising from performance and the work around it
- Taxation regardless to whom paid (directly to artist or another person)



Exemption for performances mainly sponsored by public funds

However, the OECD acknowledged as early as 1977 that this very strict provision could also have a **negative effect on cultural exchanges**.

Therefore the Commentary on Article 17 of the OECD Model also contains an option **to exclude** from Article 17's scope all **performances which are mainly financed by government resources**, thus being for more than 50% subsidized. Nowadays around 67% of the bilateral tax treaties have included this restriction as an Article 17(3). The following table shows the agreements between 16 of the European countries.



Remember!

Performances subsidized for more than 50% can be exempt from taxation in country of performance.



Use of article 17(3) by 16 EU Member States

	AUS	BEL	CZE	DEN	EST	FIN	FRA	GER	GRE	ITA	NET	POL	POR	SPA	SWE
Austria															
Belgium															
Czech Republic															
Denmark				Yes											
Estonia	Yes	Yes	Yes	Yes											
Finland			Yes	Yes	Yes										
France	Yes	N/A			Yes										
Germany	Yes		Yes	Yes	Yes										
Greece			Yes												
Italy			Yes	Yes	Yes		Yes	Yes	Yes						
Netherlands	Yes	Yes			Yes			Yes							
Poland		Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes				
Portugal			Yes	Yes	Yes							Yes	Yes		
Spain		Yes					Yes	Yes	Yes					Yes	
Sweden			Yes	Yes	Yes	Yes	Yes	Yes				Yes			
United Kingdom	Yes	Yes			Yes		Yes	Yes			Yes	Yes			



Do not forget!

To utilise the Article 17(3) exemption, an official application procedure is frequently imposed with demands for evidence of earnings and expenses and a confirmation from the government about the subsidy.



Deduction of expenses and income tax returns. About the level of taxation and evidence of the costs.

Many years ago the OECD member states debated the difficulties of raising tax on visiting artists on the normal basis, i.e. their profits. While it was relatively easy to provide evidence of direct costs, **it generally proved harder to distribute the indirect costs and overheads over performances in more than one country.**

This issue is already complex for multinational companies with branches in other countries than the country of their headquarters offices, even though these branches exist the whole year long, whereas performing artists very often only visit other countries for one or a few days!

The next
paragraphs
explain how solutions
were found
over time
to this complex
situation



A lower tax rate on gross income

Many years ago the OECD member states debated the difficulties of The OECD produced the recommendation in the Commentary on Article 17 that countries may determine the gross income as the basis for taxation (without deductions for expenses), but at a lower tax rate than normal.

This scheme has been adopted by many countries.

Around 2002 most of them were raising tax from non-resident artists, on a gross basis, at tax rates of 10% (Switzerland), 15% (France), 18% (Belgium), 20% (UK), 25% (Spain) and 30% (Italy).



Normal tax rate, but deduction of expenses

First the Anglo-Saxon world...

At that time there were exceptions in the UK, the USA, Australia and New Zealand, where visiting artists were able to **deduct expenses** and for which a **special application procedure** was developed with the tax administrations.

The UK created the Foreign Entertainers Unit, which drew upon a wealth of experience for deciding on applications. The US installed a special unit in Las Vegas to decide on applications for a Central Withholding Agreement (CWA).

Withholding tax rates remained 20% (UK) and 30% (USA) of the profit after the deduction of expenses.

However! After a successful application the non-resident artist was still obliged to file a normal income tax return at the end of the year, so that the final taxable income could be taxed at the normal progressive tax rates.

Then also....EU Member States

EU Member States were also forced to introduce the deduction of expenses after the decision of the European Court of Justice (ECJ) in the *Gerritse* case in 2003 and the *Scorpio* case in 2006.

Gerritse was a Dutch jazz drummer who had performed in Germany, where he could not deduct his expenses. He was taxed on his gross

fee at a tax rate of 25% and was not allowed to file a normal income tax return at the end of the year. The ECJ decided that this went against his freedom to provide services, as mentioned in the EU Treaty, and ordered that **deduction of expenses and a normal income tax settlement** should be possible for Gerritse.

The ECJ went further in the Scorpio decision, about a pop music promoter in Germany, ruling that the **direct expenses** should have been deductible already at the time of the performance, meaning that tax could only be levied on the resulting sum, otherwise the foreign artist would have a cash flow disadvantage.

The **indirect expenses** would then be deductible in a normal income tax return at the end of the year, which was also confirmed in the ECJ decision on Centro Equestre da Laziria Grande in 2007.

These decisions have led to many changes in the national tax rules of EU countries. The European Commission was working on this subject during the period 2009–2012, but, unfortunately, **every Member State devised its own procedure for deducting expenses**. UK and Belgium have special central tax offices for such applications, Germany delegates such decisions to local taxation offices, while other countries leave it up to promoters to work out whether or not expenses may be deducted.



Tip

In contracts between a touring company and a festival or local organiser, specify separately the gross artist fee and in the event happening list those expenses which will be covered by the host (such as hotel, flights, catering, ...)



Minimum threshold in USA treaties and recommended by the OECD

These strict rules for taxing artists can easily lead to double taxation for smaller and medium sized artists and artistic companies.

USA tax treaties

This was recognized by the USA many years ago and prompted the US to insert a **minimum threshold** in their bilateral tax treaties.

They started with only \$1,500 per artist per year in the tax treaty with countries such as India (1989), but raised this to \$10,000 in its treaty with the Netherlands (1992). In the first US Model Tax Convention of 1996, the minimum was set at \$20,000, which meant that the US tax treaty policy from that time onwards was to set the threshold at that level in later tax treaties. This was the case in its treaties with Denmark (2000), the UK (2001), Belgium (2006) and others. In the latest 2016 US Model Tax Convention the minimum was raised to \$30,000 in order to take inflation into account in new US tax treaties.

OECD - option to art 17

The OECD adopted this minimum threshold as from 2014, although not stating this directly in Article 17 of the OECD Model, but including it as an option in the Commentary on Article 17.

The example was given of **20,000 IMF Special Drawing Rights, which is valued at around \$20,000 / €17,000 / £15,000**. The option is also given to make the threshold dynamic by setting it every year at 50% of the average GDP in OECD countries, which would come to around €20,000 in the year 2016.



But!

This recommendation has not yet been adopted in new bilateral tax treaties and it would have greater force if it were part of the text of Article 17(1) of the OECD Model.



What does this threshold imply?

The threshold is **not a free taxable amount**, because if it is exceeded during the year the whole fee will be taxed. It is only **meant to help smaller and medium artists to lighten their administrative work for obtaining tax credits in the country of residence and to avoid double taxation for them.**



So if you earn less than the threshold you don't have to go through all the administrative paperwork to obtain the tax credit

Some countries have included **minimum thresholds in their national tax laws**, such as Belgium with €400 per artist per performance and Germany with €250 per artist per performance, while the UK applies the yearly general allowance of £11,000 to non-resident artists. The difference from the US and OECD minimum thresholds is that Belgium and the UK allow their amounts to be valid in any situation, even in cases when the income exceeds the thresholds.



Absence of artist withholding tax in Denmark, Ireland and the Netherlands

Some countries have decided **not to tax foreign artists** when they come to perform in their country. This is mentioned in the national tax laws of **Denmark and Ireland** for many years now and since 2007 also in the national tax law of **the Netherlands**.

These are unilateral measures which are not based on the tax treaties, and they are even applicable when tax treaties allocate the taxing right to one of these three countries.

The Netherlands has set as a condition that the artist should come from a **country with which the Netherlands has concluded a bilateral tax treaty**, so that the other country will have a normal tax system and the Dutch income of those artists will be taxed in their country of residence.

This unilateral national tax exemption at source only works well in combination with the tax credit method in tax treaties; otherwise double non-taxation will occur with the artist being exempted in both the source and the state of residence. With the tax credit method, no foreign withholding tax means no tax credit in the country of residence, thus normal taxation would occur there.



Country- by-country overview of non-resident artist tax rules

The following table summarises the tax rules for visiting artists in various countries.

The first column clarifies if the respective country has introduced Article 17 in its bilateral tax treaties. The second column explains if deduction of expenses are accepted. The third column gives an overview of the applicable rate of taxation in the respective country in case of a performance. In the fourth column a list is found of the threshold provided by the US tax treaty with other countries. The last column specifies if one can apply for a tax return afterwards.

	Artist / Sportsman tax	Deduction of expenses	Withholding tax rate	US Treaty	Tax return afterwards
Argentina	Yes	No	24.5%	No tax treaty	No
Australia	Yes	Yes	20-49%	\$10,000	Yes
Austria	Yes	Yes	20%	\$20,000	Yes
Belgium	Yes	Yes, restricted	18%	\$20,000	Yes
Brazil	Yes	No	25%	No tax treaty	No
Bulgaria	Yes	Yes	10%	\$15,000	Yes
Canada	Yes	No	15%	\$10,000	Yes
Cyprus	Yes	Yes	10%	\$5,000	Yes
Czech Republic	Yes	No	21%	\$20,000	No
Denmark	No	---	---	(\$20,000)	---
Estonia	Yes	No	10%	\$20,000	No
Finland	Yes	Only EU	15%	\$20,000	Yes
France	Yes	No	15%	\$10,000	Yes
Germany	Yes	Yes	15.825%	\$20,000	Yes
Greece	Yes	No	0-25%	\$10,000	No
Hungary	Yes	Yes	18-36%	exemption	Yes
Iceland	Yes	No	10%	\$100/day	No
Ireland	No	---	---	(\$20,000)	---
Italy	Yes	No	30%	\$20,000	No
Japan	Yes	No	15-20%	\$10,000	No
Netherlands	No	Yes	20%	(\$10,000)	Yes
New Zealand	Yes	Yes	20%	\$10,000	Yes
Norway	Yes	No	15%	\$10,000	Yes
Portugal	Yes	No	25%	\$10,000	No
Russia	Yes	No	13%	exemption	No
Slovenia	Yes	No	15%	\$15,000	Yes
Slovak Republic	Yes	No	19%	\$20,000	No
South Africa	Yes	No	15%	\$7,500	No
South Korea	Yes	No	20%	exemption	No
Spain	Yes	No	20%	\$10,000	Yes
Sweden	Yes	No	15%	\$6,000	Yes
Switzerland	Yes	Yes	2-20%	\$10,000	
United Kingdom	Yes	Yes	20%	\$20,000	Yes

Taxation of visual artists

Visual artists will not fall under the special Article 17 but under Article 7 for business profits, given **that visual artists normally work either as self-employed or have their own company**. This means that income from other countries, very often earned after short-term visits, may fall under the national tax rules of that other country, meaning that a withholding tax could be applied, but such income should be fully exempted under Article 7 of the tax treaty between the country of residence and the source country. It could happen that the source country prefers to use an official exemption procedure, but that should only be an administrative matter. The desired result is that only the country of residence will tax the foreign income.

The case may be different if the visual artist also has a **workshop or home in the other country for a longer period**, during which he is working and/or living when in that country. Consequently the residence status needs to be determined first, as discussed in chapter 1, in accordance with which the visual artist will be a non-resident in the other country, in which his house or workshop can be seen as a permanent establishment (PE) from which the profits are taxable in that other country. The country of residence will also tax the profits from the foreign PE as part of the worldwide income, but has to allow a tax exemption (with progression) to eliminate double taxation.

When the visual artist receives **royalties from copyright from the other country**, this income will most often be taxable under the national tax rules of the other country, but it depends on Article 12 of the bilateral tax treaty whether the source country can use this taxing right. Often the tax treaty states that only the country of residence may tax the royalty income, but sometimes the source country has the right to tax the royalties at a low percentage. If so, the country of residence will grant an ordinary tax credit in order to eliminate double taxation. Also for royalties, it may be required in the source country for an application procedure to be completed to decide whether to use the exemption or the low tax rate at source.

Taxation of teaching

or other employment income

Artists (visual, performing or other artists) may also earn income from employment such as teaching, writing or composing or other work. When this is cross-border work, i.e. a person lives in one country and teaches in another country, the **source country** will have a national tax rule under which the salary will be taxed there.

The **country of residence** will tax the same salary again as part of that person's worldwide income. The bilateral tax treaty will allocate the taxing right to the source country, following **Article 15 of the OECD Model**, while the artist/teacher will be entitled to a tax exemption or tax credit in the country of residence, depending on the continental European or Anglo-Saxon system which the country of residence uses. The calculation of these two methods has been explained above in section 3.

When performing artists are working as employees for an artistic company in another country, such as theatre dance, classical music, musical etc, they will not fall under Article 15 but under the special rules of Article 17, because the latter article applies to both self-employed performing artists and employees. In addition, the method of eliminating double taxation connected with Article 17 income will then apply (usually the credit method), even in cases when this would be different (and less profitable) from the method of eliminating double taxation connected with Article 15 income (usually the exemption method).

Tips

Here are some tips for the great variety of mobile people in the artistic sector. This will help you to fulfill your obligations, reduce administrative burdens where possible and aim to avoid double taxation problems.

It is advisable to run through these questions before you negotiate or conclude a contract to make sure everything is clear in advance as regards the final payment of the fee.



Question 1

Is there an artist withholding tax in the country of the performance?

This is for example not the case in Denmark, Ireland, The Netherlands (see table p.33).



Question 2

If so, is there an exemption possible under the national law?

Check this rule with the local organiser or contact the tax authority where you will perform.



Question 3

If not possible under national law, is exemption possible under the bilateral tax treaty?

(For example, because the performance is mainly financed from public funds.)

Attention: requires proof of evidence!



Question 4

If not possible under a bilateral treaty, is there a minimum threshold which can be used, taken from either national law or the bilateral tax treaty?
This is in particular relevant when performing in the USA;
But always check out for other countries as well.



Question 5

If there is no minimum threshold, is any deduction of expenses allowed?
Check this rule with the local organiser or contact the tax authority where you will perform.



Question 6

If expenses deduction is not possible, can the contract be split between production and artist's fee, so that only the latter will be taxed?
It is advisable to make it a practice in any contract

Whenever any tax has been withheld, ask for a tax certificate, including for situations where a net performance fee has been agreed and the tax is paid on top of the net fee. In any case, a tax certificate is needed in the country of residence as evidence of the foreign tax credit.

It is the local organiser that obtains the tax certificate from the ministry of finance. The tax certificate allows the touring artist to use it to obtain tax credit in his residence country



Specific considerations in case of artistic companies!

1. In cases of performance by a group of artists: the taxable income and the withholding tax should both be shared out among the artists in the group, to enable them to make individual applications for their tax exemption or credit.

Therefore attach in annex to the contract the list of people taking part in the tour with their role or function (artist, technician, dresser,...). This is helpful later to calculate the share of applicable taxes afterwards. However, this may be difficult or even impossible for certain artistic companies

2. When tax has been withheld from the foreign group, this tax needs to be deducted from the individual fees of the artists of the group, because they will get the tax relief.

In case taxable income and withholding tax cannot be shared, both the artistic company and the artists in the group will have paid double or excessive taxation in the country of performance.

3. Eliminate double taxation as much as possible, including in case of net fees.



Important!

Try as much as possible to negotiate a gross fees. In the contract you may wish to mention also the net fee to clarify what will be the actual income for the touring company or artist.



For all concerned

- Communicate with each other, be clear about the fees negotiated and the costs or expenses
- Do not hesitate to seek guidance from the tax administration, or other bodies who can give you the right advice
- Report problems or cases to your trade association, employers organisation, union, so that they can address it with the national authorities or supra-national bodies

Summary

Artists (whether visual or performing artists) are highly mobile and it is easy for them to work abroad. But this will lead to taxation both in the country of work and in the country of residence. To cover this, not only national tax rules but also the rules from bilateral tax treaties determine which country has the right to tax an artist's income and how the other country should avoid double taxation. The first question arising if the artist has homes in two countries, is to decide which is his country of residence. National rules may lead to dual residency, but Article 4 of the OECD Model and the bilateral tax treaties contain a tiebreaker rule, which stipulate that the artist is resident in only one country and non-resident in the other country.

National tax rules very often want to tax all income: for residents this would be their worldwide income, wherever it has been earned, and for non-residents this would be everything which has been earned in the source country. However, this would inevitably lead to double taxation therefore most countries have concluded bilateral tax treaties with each other, following the OECD Model Tax Convention. These tax treaties have allocation rules for various types of income: the important articles affecting artists are: Article 7 for business profits (and self-employed income), Article 12 for royalties, Article 15 for employment income and Article 17 for entertainers (and sportspersons).

Visual artists will normally fall under Article 7 and will only be taxed in their country of residence, unless they have a permanent establishment (PE) in the source country. If not, then an exemption in the source Member State could easily be applied. If there is a PE in the source country, the country of residence will also include the foreign income in the taxable base and calculate the tax on the total, but would also allow a tax exemption (with progression) to eliminate double taxation.

All artists may be paid royalties, which are usually governed by Article 12 of the bilateral tax treaties, meaning royalties are not taxable in the source country. In such cases the artists should apply for a tax exemption in the source country and only pay tax in the country of residence. But some tax treaties have given the source country the right to raise a low percentage of tax on the royalties, whereupon the artist is entitled to a foreign tax credit in his country of residence.

Performing artists will come under the scope of the special Article 17 and are taxed in the country of their performance, regardless of whether they are self-employed or employees. This leads to the risk of double taxation, especially if expenses cannot be deducted at source but have to be deducted in the countries of residence. In such cases, the taxable base in the source country is higher than in the country of residence and there is a risk of excessive taxation. However, thanks to three European Court of Justice judgments, performing artists within the EU should not have this problem because they should be allowed to deduct their expenses at source. Once they return to their country of residence, performing artists also have to report their foreign income as part of their worldwide income, so that tax can be raised on the total, after which they will get a tax credit for the foreign withholding tax (or sometimes a tax exemption).

In conclusion, it can be said that the international taxation of visual artists is reasonable, but for performing artists it is complex and can easily lead to excessive or even double taxation. It is extremely important for them to obtain tax certificates showing the foreign income and withholding tax, otherwise most countries of residence would refuse to allow the foreign tax credit. (This is especially important in cases where net performance fees are agreed).

Annex

4 key articles of the 2014 Updated OECD MODEL TAX CONVENTION

Article 7 Business profits

1. Profits of an enterprise of a Contracting State shall be taxable only in that State unless the enterprise carries on business in the other Contracting State through a permanent establishment situated therein. If the enterprise carries on business aforesaid, the profits that are attributable to the permanent establishment in accordance with the provisions of paragraph 2 may be taxed in that other State.
2. For the purposes of this Article and Article [23 A] [23 B], the profits that are attributable in each Contracting State to the permanent establishment referred to in paragraph 1 are the profits it might be expected to make, in particular in its dealings with other parts of the enterprise, if it were a separate and independent enterprise engaged in the same or similar activities under the same or similar conditions, taking into account the functions performed, assets used and risks assumed by the enterprise through the permanent establishment and through the other parts of the enterprise.
3. Where, in accordance with paragraph 2, a Contracting State adjusts the profits that are attributable to a permanent establishment of an enterprise of one of the Contracting States and taxes accordingly profits of the enterprise that have been charged to tax in the other State, the other State shall, to the extent necessary to eliminate double taxation on these profits, make an appropriate adjustment to the amount of the tax charged on those profits. In determining such adjustment, the competent authorities of the Contracting States shall if necessary consult each other.
4. Where profits include items of income which are dealt with separately in other Articles of this Convention, then the provisions of those Articles shall not be affected by the provisions of this Article.

Article 12 Royalties

1. Royalties arising in a Contracting State and beneficially owned by a resident of the other Contracting State shall be taxable only in that other State.
2. The term "royalties" as used in this Article means payments of any kind received as a consideration for the use of, or the right to use, any copyright of literary, artistic or scientific work including cinematograph films, any patent, trade mark, design or model, plan, secret formula or process, or for information concerning industrial, commercial or scientific experience.
3. The provisions of paragraph 1 shall not apply if the beneficial owner of the royalties, being a resident of a Contracting State, carries on business in the other Contracting State in which the royalties arise through a permanent establishment situated therein and the right or property in respect of which the royalties are paid is effectively connected with such permanent establishment. In such case the provisions of Article 7 shall apply.
4. Where, by reason of a special relationship between the payer and the beneficial owner or between

both of them and some other person, the amount of the royalties, having regard to the use, right or information for which they are paid, exceeds the amount which would have been agreed upon by the payer and the beneficial owner in the absence of such relationship, the provisions of this Article shall apply only to the last-mentioned amount. In such case, the excess part of the payments shall remain taxable according to the laws of each Contracting State, due regard being had to the other provisions of this Convention.

Article 15 Income from employment

1. Subject to the provisions of Articles 16, 18 and 19, salaries, wages and other similar remuneration derived by a resident of a Contracting State in respect of an employment shall be taxable only in that State unless the employment is exercised in the other Contracting State. If the employment is so exercised, such remuneration as is derived therefrom may be taxed in that other State.

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 any twelve month period commencing or ending in the fiscal 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 which the employer has in the other State.

3. Notwithstanding the preceding provisions of this Article, remuneration derived in respect of an employment exercised aboard a ship or aircraft operated in international traffic, or aboard a boat engaged in inland waterways transport, may be taxed in the Contracting State in which the place of effective management of the enterprise is situated.

Article 17 Entertainers and sportspersons

1. Notwithstanding the provisions of Article 15, 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 sportsperson, from that resident's personal activities as such exercised in the other Contracting State, may be taxed in that other State.

2. Where income in respect of personal activities exercised by an entertainer or a sportsperson acting as such accrues not to the entertainer or sportsperson but to another person, that income may, notwithstanding the provisions of Article 15, be taxed in the Contracting State in which the activities of the entertainer or sportsperson are exercised.

Usefull addresses and links

OECD

www.oecd.org

OECD model tax convention of 2014

<http://www.oecd.org/ctp/treaties/model-tax-convention-on-income-and-on-capital-2015-full-version-9789264239081-en.htm>

US CWA (Central Withholding Agreement)

<https://www.irs.gov/individuals/international-taxpayers/central-withholding-agreements>

UK FEU (Foreign Entertainers Unit)

<https://www.gov.uk/topic/personal-tax/foreign-entertainer-rules>

European Commission – Taxation and Customs Union

https://ec.europa.eu/taxation_customs/home_en

General EU Helpdesks

- Europe Direct: 00800 6789 10 11 – general information about the EU
www.europa.eu/european-union/contact_en
- EU SOLVIT: this is a helpdesk for specific EU-related problems
www.ec.europa.eu/solvit

Glossary

OECD - Organisation for Economic Co-operation and Development

ECJ - European Court of Justice

GDP - Gross Domestic Product

IMF - International Monetary Fund

EU - European Union

MS - Member State

PE - Permanent establishment

Artiste(s) - is used when referring to the same terminology as in the OECD model taxation convention.

OECD Model Tax Convention on Income and on Capital 2014 (replaces the 2010 version)

Case C-234/01 Arnoud Gerritse v Finanzamt Neukölln-Nord

Case C-290/04 FKP Scorpio Konzertproduktionen GmbH v Finanzamt Hamburg-Eimsbüttel.

Case C-345/04 Centro Equestre da Lezíria Grande Lda v Bundesamt für Finanzen.

European Commission expert group on removing tax problems facing individuals who are active across borders within the EU; Expert group report "Ways to tackle cross-border tax obstacles facing individuals within the EU" – 2015

European Festivals Association

The European Festivals Association (EFA) has been uniting distinguished music, dance, theatre and multidisciplinary arts festivals from Europe and beyond for more than 60 years since its foundation in Geneva, Switzerland, in 1952 as a joint initiative of the eminent conductor Igor Markevitch and the great philosopher Denis de Rougemont.

As the umbrella organisation for arts festivals across Europe and beyond EFA has grown from 15 festivals into a dynamic network representing about 100 music, dance, theatre and multidisciplinary festivals, national festival associations and cultural organisations from 40 countries. EFA's members are the core element that make the Association an open, influential, international place for any festival that wants to be part of a bigger festival community.

Festivals have been working across borders and cultures since the dawn of festivals, before Europe was a project of unity, before Europe was a space that aimed to facilitate cross-border exchanges.

EFA brings festivals together to inspire one another, fosters an exchange of knowledge, helps festivals to speak with one strong voice to shape policy developments, increases networking opportunities, and keeps festivals informed about issues at stake in the festival and cultural world, all under the flag of artistic excellence and internationalisation.

EFA and its members are connected by common beliefs that guide and strengthen the work of festivals in their local contexts. EFA joined PEARLE* in 2005.

www.efa-aef.eu

Pearle* Live Performance Europe

Pearle*-Live Performance Europe is the European federation representing through its members and associations some 7,500 theatres, theatre production companies, orchestras and music ensembles, opera houses, ballet and dance companies, festivals, concert halls, venues and other organisations within the performing arts and music sector across Europe.

Pearle*-Live Performance Europe acts as a forum for exchanging information of relevance to members, for sharing experiences in cultural management and technical skills, for supporting and assisting the formation of employers' associations, in addition to serving as the body to make representations to the European Commission and any other authorities whose deliberations may affect the work of the Performing Arts in Europe.

The Performing Arts Employers Associations League Europe, or Pearle* is an international not-for-profit organisation in compliance with Belgian law.

The aim of this non-profit making international non-governmental organisation is the establishing of a stable environment by supporting sustainability and promotion of the Performing Arts across Europe.

Its objects are as follows:

- the exchange of information, experiences and ideas of common interest to members working in the Performing Arts sector
- the obtaining of information concerning all European issues relating to members' interests
- facilitating collective decisions in areas of common interest
- expressing Pearle*'s views in discussions with bodies whose activities are relevant to Pearle*
- lobbying in accordance with collective decisions reached by the members' representatives to EU and other authorities
- carrying out all activities connected with the above mentioned activities.

A substantial part of the activity of contemporary artists, festivals, venues, touring and production companies, in the live music and performing arts encompasses cross-border cultural cooperation.

Too often when working together on an international artistic programme, unexpected problems arise based on misunderstandings or wrong assumptions about European legislation and procedures ruling bureaucratic aspects needed for this international cooperation to be the best collaboration it can be. This happens for different reasons: a lack of knowledge of the situation in or from another country, differences in administrative practices, forms which are missing, unclear and hermetic language in official texts, etc. For everyone working on the managerial side in the sector, these situations are recognizable and known. What is more regretful is that they may result in performances not being able to take place, financial losses (which might have been avoided) or missed opportunities to save costs or have additional income.

Under the auspices of legal experts with an in-depth understanding and knowledge of the sector, a series of booklets are designed to help you navigate these important procedures on the following topics:

- Social security
- Taxation
- Value added tax
- Copyright

Calling it ourselves as an inside joke, **What you didn't know about Europe - The Ultimate Cookbook for Cultural Managers**, the booklets aim to explain in an easy to read and understandable way what one should know and remember of each specific theme, in other words, what are the ingredients and how to cook the recipe by providing some advice or warnings.

EFA /PEARLE* partnership in the context of the EFA RISE project
EFA - European Festivals Association
PEARLE* - Live Performance Europe



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