



Consultation on Double Tax Conventions and the Internal Market:
factual examples of double taxation cases
Response of Pearle*

Interest Representative Register
ID 4817795559-48

Ref: AD/2010/P6010

Brussels, 29 June 2010

1. Introduction

Pearle* is the European trade federation representing the live performance sector. Through its member associations it represents more than 4,500 profit and non-profit enterprises in the wide range of performing arts or live performance, ranging from small and micro-enterprises to large SMEs in terms of employment. It is estimated that the sector has at least more than double this amount of enterprises which are not affiliated to a national (employers) association. More than 3 million people work in the live performance sector. Pearle* represents the interests of employers and is a recognized social partner within the European sectoral social dialogue committee 'live performance' facilitated by the DG Employment and Social Affairs.

The live performance is a dynamic service sector, whereby the internal market and the globalised world are essential for the selling of its theatre, music, dance and other live performance productions. An important driver is to be able to offer consumers, referred to as public or audiences, the broadest and most diverse cultural offer possible. Culture cooperation and exchange has been supported by the EU for several years, and yet the application of tax legislation across the EU is obstructing that intention. Notwithstanding these and other impediments – in particular administrative burdens and legal obstacles-, the sector has always been a very internationally focused sector. Touring companies may easily have 50 to 100 performances across the EU and other parts in the world and local organizers (venues, festivals, promoters) may also host several foreign productions a year. There are however no exact data available from Eurostat on the number of performances programmed with non-resident companies in the different Member States.

A main area is the double taxation problem of artistes. For many years Pearle* has been calling upon the EU to study this particular problem and has raised its concerns on the application of the OECD Model tax treaty and the specific article 17 that focuses on artistes and sportsmen. In 2004 this was included by Culture Council in its work programme, but has never been carried out. Recently, in November 2009, Pearle* organized a seminar (in the framework of an EU funded project) on mobility and problems related to social security and taxation, to raise attention on specific problems.

Pearle* very much welcomes the initiative from the European Commission to tackle the subject of double taxation as an obstacle to deploy cross-border activities. A policy that aims to deal with these problems shall stimulate growth and jobs, which is an important target of the EU 2020 Strategy. It will equally underpin the 'new strategy for a Single Market' giving new confidence to companies in our

sector and should ultimately reduce administrative burdens and costs. In addition in line with the objectives of the EU to develop a better regulatory environment, including an Action Programme for reducing administrative burdens for enterprises, and the objectives set by the Small Business Act.

Competition in the market of live performances and events is highly determined by the tax level and in particular the double taxation across the EU. As a result cross-border supply of services in one particular country, sometimes even between regions inside a country, may have great variations.

2. International artistes taxation: background

Most countries have concluded bilateral tax conventions aiming at avoiding double taxation and thereby defining which of either country is competent to tax in the case of a cross-border activity.

When artistes perform abroad they have to pay income tax in the country of performance as well as in their residence country, even when bilateral tax conventions have been concluded. The source tax on foreigners varies between 15% and 30% in different countries. Countries levy a source tax on income earned by foreigners in their country, in order to eliminate the risk of tax evasion or to avoid that the person concerned underreports foreign income in the home country.

Most countries follow the general principles of the Model Tax Convention as defined by the OECD. The following two principles assume that when a company or person uses the facilities of a country during a certain period that should result in a contribution to the country's state budget:

- a. Companies and self-employed persons are only paying income tax in their residence country, unless when they have a permanent establishment (PE) in the source country (article 7 OECD Tax convention)
- b. Employees are paying income tax in the country of work, unless when they remain employee in their country of residence, receive salaries from that employer and work for less than 183 days in the other country. If so, only the residence country is allowed to tax the income (article 15 OECD Model).

When double taxation occurs, bilateral tax treaties provide for two ways to eliminate double taxation: either by a tax credit for the foreign tax or by a tax exemption for the foreign income.

But the OECD Model Tax Convention created an exceptional rule for performing artistes and sportsmen in Article 17. This Article states that they have to pay income tax in the country of performance, regardless of the general rule for companies, self-employed persons or employees. Because these groups of people are often very mobile it is assumed that they can easily move their residency to tax havens which levy no income tax. In such way top artistes and sportsmen are prevented from escaping to pay taxes as defined in article 7.

The OECD Model recommends in Article 23 for the residence countries to allow its artistes a tax credit for the foreign source tax, in order to eliminate the double taxation. Whereas most countries are using the tax credit method, some countries have opted to use the exemption method for artiste performance income.

3. The practice

The combination of Article 17 of the OECD Model Tax treaty, allowing countries to tax artistes in the country of performance, and the Article 23 allowing for a tax credit (or exemption) for the residence countries, does not avoid problems related to the double taxation. Not only they are not workable in practice for companies or individuals, they lead to huge administrative and cumbersome burdens and obstacles, and often to a great loss of income for many small companies and the majority of artistes who do not represent the top level of stars with high earnings. In the sector, the average salary of performers ranges across Europe from less than 300€ per month in one country to 2000-3000€ in other countries. In many countries across the EU salaries are negotiated and determined in collective agreements. When touring and performing abroad, employers and their employees face major difficulties to obtain tax credits or exemptions. Also in the case of self-employed artistes that earn comparable income to employed artistes, the practice demonstrates particular problems. In other words, article 17 aims to prevent top stars from evading taxes, but has major effects on all other artistes earning a normal income.

4. The problems

The consultation paper invites stakeholders to identify problems related to double taxation and to give factual examples. As regards the double taxation of artistes the problems are situated in 3 areas:

a. **The content of the bilateral tax convention.**

Questions raise with regard to the:

- Place of taxation of foreign artistes (whether employed or self-employed) or touring companies performing outside their residence country, when there is a bilateral tax convention between the country of performance and the residence country
- Place of taxation of foreign artistes or touring companies when there is no bilateral tax convention
- Definition of artiste and which categories of professions are included in the scope of the definition
- Place of taxation in case of an artistic coproduction between companies of different countries

b. **The scope of the withholding tax in the country of performance.**

The main issues at stake refer to:

- What is the basis for the calculation of the withholding tax? Many tax jurisdictions do not separate the remunerations paid to artistes from expenses linked to the performance, but use a global withholding tax.
- A lack of clear definition at an international level of what remunerations and professional expenses exactly cover
- Difficulties to anticipate the position of the tax administration of the country of performance, that is not always flexible in accepting the deduction of expenses

c. **The modalities to apply for tax credit or tax exemption.**

Problems are reported with regard to :

- Absence of tax certificate not issued by the country of performance

- Duration: a tax certificate given to the touring company who needs to recalculate this to the individual artistes who are employees and to a daily rate which can only be done at the best after a quarterly certification of the social insurance
- Tax certificate given to the individual artistes but there is no tax credit for the touring company, so that the company cannot claim for a tax credit or exemption in the residence country
- The tax certificate has been issued in the language of the country of performance and cannot be immediately used
- The tax of the country of performance does not qualify for a tax credit, such as French social security contributions, US state tax and German artiste social insurance
- The documents requested in order to be able to obtain a tax credit demand major and long administrative procedures both for the company (local venue or organizer) programming a foreign touring company as well as for the touring company itself
- Difficulties for artistes that are resident in a country of performance but are employed by the foreign touring company to prove and obtain exemption when they have performed with a foreign company in their residence country

d. Administrative expenses

- for a company, an artiste or his agent or manager, the expenses to get an exemption or deduction of expenses in the source country where the performance took place : time, efforts, staff, external expertise, tax specialists
- for a company, an artiste or his agent or manager, to obtain the tax credit in the country of residence : time, efforts, staff, external expertise, tax specialists

e. Effects on company's production budgets and final results

- A live performance company, when budgeting a production that will take place outside the residence country, cannot exactly calculate how the foreign tax office will decide on its application for tax exemption. This can lead to a significant difference on a production budget. The same goes for the producer or organizer responsible for paying the withholding tax on a production to the tax authorities.
- Depending on how a company has managed to obtain exemption or deduct expenses and depending on the timing when the foreign tax office has returned the tax paid, can have an important impact on the final result of the live performance company

To illustrate this, an example which happens in practice:

A German chamber orchestra performs in Spain, earning € 25.000. The Spanish non-domestic withholding tax is 25% (from gross) and the touring expenses are 60% (=€ 15.000). The average German income tax rate for the musicians is 35%:

Spanish withholding tax: 25% x € 25.000 =	€ 6.250
German income tax (exempted/maximum tax credit):	
Gross earnings – 60% expenses = € 10.000 income x 35% =	-3.500

International double taxation	€ 2.750

Germany will not allow a higher tax credit than the amount of German tax due on the net amount.

5. A few solutions

Because several countries acknowledge that problems exist, some solutions have been found. These offer a partial answer to solve the difficulty of double taxation following from the article 17 of the OECD tax convention applicable to artistes and sportsmen.

- The OECD in its commentary of article 17 allows countries to exempt subsidized performances from source tax in the country of performance. Some countries make use of this possibility in their bilateral double tax conventions. Although the percentage of subsidy may vary in tax treaties, that exception can help in certain cases.
- Some treaties only tax a part of the performance fee, such as the personal income of the performing artistes and exempt the income accruing to other costs.
- The European Court of Justice has ruled in the Gerritse (12 June 2003, C-234/01) and Scorpio (3 October 2006, C-290/04) cases, that under the EC Treaty expenses should not be taxable in the country of performance. This means that within the EU all countries have to allow for a full deductibility of all expenses and a normal income tax return for non-resident artistes in all member states of the EU. In addition this should happen at the time of the performance and not afterwards. Following the rulings of the ECJ in these cases the European Commission has become active to force Member States to change their legislation.
- Some tax conventions provide an exemption for taxation at source when the income from there activities does not exceed a certain amount (e.g. US \$ 20,000).
- Some tax conventions exempt artistes that are employed by a company in their home country, when they work less than 183 days in the country of performance.
- The Netherlands have unilaterally decided to give up the right to source tax on foreign artistes when those artistes live in a country with which the Netherlands have concluded a bilateral tax treaty. It was calculated that the loss of tax revenue was not more than € 5 million, but as a result also € 1, 6 million in administrative expenses were removed.

6. Factual examples and cases

6.1. Long administrative burdens

A French music ensemble performed in Germany.

In order to receive the tax exemptions following documents were to be sent 5 months in advance of the concert date:

- An attestation of the company and a copy of the license of entrepreneur
- A list of artistes taking part in the concert according to a certified model
- A copy of the contracts between the music ensemble and the artistes
- A copy of the contract signed between the music ensemble and the local organizer in the country of performance (the source country)
- A form which asks for an exemption from source taxation for the concert in Germany completed and signed by the fiscal authorities in France. To obtain this the French music ensemble had to meet with the fiscal authorities and present the whole budget of the production to the services.

6.2. Double taxation due to administrative unclarity

A French music ensemble had a concert in Germany. The concert fee was negotiated as a nett fee and stated as such in the contract. Nevertheless there was a withholding tax taken from this fee. Given the fact that the French ensemble had not sent different documents before the concert, it could no longer apply for a tax exemption. As a result there is a situation of double taxation.

6.3. Absence of double tax convention between two Member States

A Czech orchestra gave in February 2010 a concert in Austria. The concert was negotiated through an agent.

Fee of the performance 36,500 € gross (the contract stipulated a 20% withholding tax, unless the orchestra could not deliver the necessary documents for exemption).

The orchestra provided all necessary documents requested, including:

- Certificate of the tax payers residence
- Confirmation of the establishment of the organization, including a specification that the orchestra receives subsidies which cover around 70-75% of the orchestra's overall expenditure
- Additional certificate of establishment of the organization

Although these documents were delivered in advance, there was a withholding tax of 6,700€ or a final fee of 29,200€.

To recover the taxes paid in Austria, it was proposed that the orchestra could provide a tax declaration providing following documents:

- Each of the 98 musicians in the orchestra would sign and declare that they did not earn more than 440€ per concert
- A list of all the musicians, with their nationalities
- A copy of the passports of each musician
- A tax declaration from the Orchestra management with a statement of the accounts

Four months after the concert it is still not clear whether the local tax authorities will grant the exemption.

6.4. Unclarity with regard to self-employed status when involved in a coproduction

In 2009, a Belgian company in the music initiates a production including a number of foreign co-producers. In the coproduction a self-employed artiste based in Belgium is involved. This artiste works with a Dutch ensemble, that in turn is a co producer. The Dutch ensemble invoices the service of the Belgian self-employed conductor to the Belgian company and pays the fee to the Belgian conductor. The production has performances in Belgium, Netherlands, France and Luxembourg.

The question was where the conductor had to pay taxes, since he was engaged by the Dutch ensemble that in turn had a contract with the Belgian producer, who in turn sold the production to organizers in the four countries.

With regard to the concert in Luxembourg the situation is still unclear.

6.5. Unpractical solutions offered by fiscal authorities for artistic companies and its employees

It took a member of Pearle 16 months to receive a reply from its tax administration regarding the fiscal declaration of employed artistes performing outside their residence country. Employed artistes are paid on a monthly basis on which immediately a withholding tax is applicable. As artistee having a

performance outside the country of residence, following article 17, the country where the performance takes place has a right to source taxation.

In practice the company concludes a contract with an organizer and receives a fee for the performance, in which case the touring company cannot receive a certificate from the fiscal authorities of the country where the performance took place for each one of the individual artistes.

The fiscal authorities suggest to apply the proportionality rule. The company should calculate for each artiste: number of performances done outside the residence country with respect to the total number of days worked. This can be calculated on the basis of the social security quarterly declaration. Once this is known then the calculation can be made and the company needs then to provide each artiste a document with the calculation method.

With regard to self-employed artistes the fiscal authorities proposed the same method, based on a yearly number of performances abroad and the fee that corresponds with it.

In practice this working method is not possible to implement.

6.6. Problem with the status of the company

Live performance organizations in the UK often have a status of charity. In this case they are tax exempted in the UK. A UK based orchestra, with a status of charity, could not obtain tax exemption for a performance in Germany. The double tax convention with Germany stated that exemption could only be applied to companies which "pay tax in full in the country in which they are located".

It took the British orchestra three years to reach an agreement with the German tax authorities.

7. Proposal for solutions

In view of the EU goals to strengthen the single market, Member States of the European Union to consider following actions:

- For employed artistes: include an exemption from source taxation when working less than 183 days in a country of performance
- For companies: exempt subsidized performances in the country of performance
- For self-employed artistes:
 - o change legislation according to the ECJ rulings regarding the deduction of expenses at source
 - o exemption for taxation at source when the income from these activities does not exceed a certain amount
- Any category of artistes or artiste company: consider to abstain from the right on source taxation (example of the Netherlands)
- Introduction by the EU on standardized certificates issued by tax authorities, using same reference codes across the EU

In view of the recently published Discussion Draft by the OECD with regard to Article 17 of the Model tax Treaty, the EU and Member States to call upon the OECD:

- To change article 17, excluding employed artistes. Employed artistes must be treated equally as other employed persons in which case Article 15 becomes applicable.