Confidential **TSG 10.15**

Taxation of Non-resident Entertainers

Introduction

1. Visiting artists earning income from performances in Ireland have a tax liability under Irish tax law which requires them to file a self-assessment return. However, because they are not tax resident in this country, there are practical difficulties in enforcing that liability.

2. The question of addressing those difficulties through the introduction of a withholding tax regime was examined in 1989/1990 by the Department and the Revenue Commissioners. However, because of the small prospective yield at the time, the capacity of such a regime to discourage artists visiting Ireland and the administrative burden associated with collecting such a relatively small yield, it was decided not to proceed.

3. Other difficulties at the time were perceived to be the identification of the paying agent and imposing an obligation to deduct and account for tax on that agent, the imposition of heavy penalties to enforce compliance by the paying agent and the fact that significant VAT revenues were in any event generated from such performances.

4. Media reports brought this topic to public attention in April 2009 and in a response to a PQ on 23 April 2009, the Minister for Finance advised that a review would be carried out on the question of introducing a withholding tax regime on income earned in Ireland by foreign artists in the light of developments since the last review in the late 1980s/early 1990s.

Review undertaken by the Revenue Commissioners

5. The review was undertaken during 2009 by the office of the Revenue Commissioners and the conclusion was that the historical arguments against the introduction of a withholding tax are still valid today including; the small prospective yield; the fact that foreign entertainers might be discouraged from visiting Ireland resulting in lower VAT yields and the disproportionate administrative burden on collecting a relatively small yield. (A copy of the review is attached).

Views of the Department of Tourism, Culture and Sport.

6. The Department of Tourism, Culture and Sport was consulted and that Department's view is that the yield from a withholding tax would be very small and that the cost of the administrative burden imposed on the economy would far outweigh this yield. They also indicated that the measure would also tend to discourage visiting artists and would diminish the Irish artistic and cultural landscape. They went on to suggest that in the event that a decision was made to introduce a withholding tax, then Government sponsored cultural programmes, non-profit cultural activities and international team sports should be excluded from the withholding tax legislation. (A copy of the Department's views are attached)

7. The Group may wish to discuss the matter further.

Review of Taxation of the Irish Income of Non-Resident Entertainers

6 November 2009

1. **Background**

2. **Key Issues**

3. **Current Irish Tax Obligations of Non-resident Entertainers**

4. **International Position**

5. **Issues Associated with Determining the Liability of Non-Resident Entertainers**

6. **Legislation Drafted in the early '90s**

7. **Issues Associated with Designing a Withholding Tax**

8. **Benefits/Implications of a Withholding Tax**

1. Background

In response to a parliamentary question on 23 April 2009, the Minister for Finance advised that a review would be carried out on the question of introducing a withholding tax regime on income earned in Ireland by foreign artists in the light of developments since the last review in the late 1980s/early 1990s.

The Minister also advised that, because of the small prospective yield at the time of the earlier review, the capacity of such a regime to discourage artists visiting Ireland and the administrative burden associated with collecting a relatively small yield, it was decided not to proceed with the introduction of a withholding tax at that time.

The full text of the PQ and reply is at **Appendix 1**.

The following sections set out the review as announced on 23 April.

2. Key Issues

The argument is made that non-resident entertainers[1] are earning significant income in Ireland without paying tax on that income. Those making the argument point to the fact that, unlike many other countries, we do not have a withholding tax system.

Withholding tax systems are generally designed to ensure that whoever pays the non-resident entertainer deducts a percentage and remits that to the tax authority, as a payment on account of the liability of the entertainer. The general rationale of such withholding taxes is to ensure that the non-resident pays indirectly, what he would otherwise have to pay directly, rather than to impose an additional liability on the non-resident.

Two key, connected, issues arise:

1. the need to identify the extent, under current laws, to which non-resident entertainers, who perform in Ireland, are taxable here, and

2. the need to assess the extent to which a withholding tax would bring about a worthwhile tax yield and improved compliance in the sector.

A scheme of withholding tax, introduced in the UK in 1986/87, addressed both of the key issues referred to above. That scheme went far beyond merely shifting the burden, via withholding tax, from foreign performers who may disappear before meeting their obligations, to residents who facilitate their appearance. It relied on supporting legislation which identified and addressed technical weaknesses in taxing non-resident entertainers. It is important to understand the fundamental changes to the 'ground-rules' in the UK when considering in an Irish context both the current level of compliance in the non-resident entertainers' sector and the possible introduction of a withholding tax as an aid to compliance.

[1] While the PQ of 23 April 2009 referred to "taxing of visiting rock bands and performers", withholding tax schemes generally apply to a wide range of entertainers, covering, for example, pop stars, musicians, conductors, actors, dancers, TV and radio personalities, variety artistes, jockeys and horsemen, golfers, cyclists, boxers, football and rugby players, athletes, snooker players, darts players, performing alone, or in teams, bands, orchestras, choirs, opera companies, ballet companies, troupes or circuses.

3. Current Irish Tax Obligations of Non-resident Entertainers

As a general rule, income earned in Ireland is taxable in Ireland. The residence of the person earning the income is immaterial. Paragraph 1(a)(iii) of Schedule D as contained in Section 18 of the Taxes Consolidation Act (TCA)1997 provides:-

> "Tax…shall be charged in respect of the annual profits or gains arising or accruing to…any person whether a citizen of Ireland or not, although not resident in the State, from any property whatever in the State, or from any trade, profession or employment exercised in the State"

A key requirement is to define when a profession is or is not 'exercised in the State'[2].

Under the self-assessment system, the rules governing the submission of returns and the payment of tax apply equally to residents and non-residents alike. In the absence of a withholding tax regime, and with the vast majority of non-resident entertainers making no income tax return, there is no effective mechanism to quantify the potential tax exposure of such entertainers on the income related to their Irish performances.

The Revenue Commissioners have stated that they have no record of any foreign entertainer registering for income tax in Ireland. There is a record of an Irish-born non-resident sportsperson having made returns. This may not be the indicator of large-scale non-compliance that it initially appears to be, as there may be valid reasons why certain performances in Ireland are not taxable here[3].

Appendix 2 sets out the circumstances in which Irish PAYE will apply, where the non-resident entertainer is an employee of a foreign entity. An entertainer may be within the charge to PAYE, but as the following sections will illustrate there are practical difficulties in quantifying the charge and in enforcement.

[2] Although there are different provisions for companies (Sec 25 TCA brings a non-resident company within the charge to Irish Corporation Tax only if its trade is carried on through a 'branch or agency'), the requirement to exercise a trade in the state effectively applies to companies too. Discussed further in section 5

[3] See section 5

4. International Position

Under Article 17 of the standard Model OECD Tax Treaty (**Appendix 3**), the taxing right in relation to entertainers has been allocated to the performance country (with the residence country being obliged to give a credit for foreign tax). A provision to this effect has been included in almost all of Ireland's treaties.

Most performance countries exercise their taxing rights by collecting some or all of the tax via a withholding regime. In some countries, allowance is made for the expenses of the entertainer before the withholding tax is applied. This places non-residents on an equal footing to residents, who are only taxed on their profit (income minus expenses).

The obligation to allow a deduction of direct expenses before imposing the withholding tax emerged clearly in the decision of the European Court of Justice in the case of *Scorpio_Konzertproduktionen*[4] (2006 - the text of the Judgment is at **Appendix 4**). Since then, Germany has radically changed its withholding tax system and other countries have done likewise. The European Commission is pursuing Belgium, Sweden and Spain to change their systems to allow the deduction of expenses, as required by the Scorpio decision. If Ireland were to consider introducing a withholding tax it is clear from the above that a provision would be required allowing deduction of expenses.

Appendix 5 sets out information for 27 countries, compiled by a Dutch tax practitioner[5]. It identifies different withholding tax rates, de minimis thresholds and other requirements in relation to return filing obligations post-withholding tax. Of the eighteen EU members listed only three (Netherlands, Ireland and Denmark) do not operate a withholding tax.

In 2007, the Netherlands decided to relinquish its taxing right in respect of non–resident entertainers with countries with which they have a double taxation agreement[6]. They considered that the tax take was too small in relation to the administrative expenses involved to justify a special tax treatment for a small category of taxpayers[7]. The Netherlands have relinquished sole taxation in these circumstances to the country of residence of the entertainer. Denmark is another country that does not have a withholding tax on non-resident entertainers although, like Ireland, its treaties allow them to do so.

In the UK, a withholding tax at basic income tax rate (on the gross payment), applies with flexibility within the system to reduce the tax as a result of the performer's expenses. A summary of the UK system is at **Appendix 6**.

The OECD is currently reviewing how its member states interpret the provisions of their double taxation treaties in relation to the practicalities of imposing withholding taxes on non-resident entertainers.

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[4] Case C290/04 FKP Scorpio Konzertproduktionen – Judgment 3rd October, 2006

[5] Dr Dick Molenaar, All Arts tax advisers, Rotterdam (2009) See website: http://www.allarts.nl/articles/2009/Artist

[6] Although The Netherlands retains a withholding tax on payments to entertainers not entitled to the benefits of double taxation treaties, The Netherlands has almost twice as many double taxation treaties as Ireland.

[7] Based on an analysis of 2,500 performances over 3 years, expenses of international performing artistes in NL were shown to average 75% of gross performance fees. NL calculated that withholding tax on artistes would yield annually €6.7m if they allowed no expense deductions, or just €1.5m based on allowing deduction of direct expenses (as required under the Scorpio ruling).
Source 2005 Report - Netherlands Ministry of Education & Culture

5. Issues Associated with Determining the Liability of Non-Resident Entertainers

Under Irish tax law, a non-resident entertainer is liable to income tax here in respect of income arising from the exercise of his profession in Ireland. A number of issues, which are dealt with below, demonstrate the difficulty in establishing, in any particular case, whether a profession is being exercised here:

- significance of the contract
- use of intermediaries
- linking income and performance.

Significance of the Contract

In a case before the Appeal Commissioners in 2006, the appellant, a boxer, argued that if a performance in Ireland by a non-resident entertainer who exercises his profession abroad is governed by a contract which is made abroad, governed by foreign law and provides for payment abroad, the place of activity may not be the decisive factor in determining where the profession is exercised. While the Appeal Commissioner determined the issue before him on other grounds, he appeared to give weight to the significance of foreign contracts. The precedent case relied on by the appellant was the *Cunard Steam Ship Co v Herlihy*, Irish Supreme Court, 1931[8]. In his decision, the Chief Justice[9] stated:-

> "it is impossible to lay down any exhaustive test as to what constitutes an 'exercise of trade' in the curious language of the section, but a crucial question in arriving at a decision must be the question where are the contracts for the sale of the passages made?".

While it is possible to argue that performance by an entertainer has a more vibrant link to exercising the profession than has the contract, the matter is not free from doubt.

Judge[10] states that:-

> *"…income arising from…a foreign contract…is…income from a foreign possession[11] (unless treated as the receipt of a trade or profession carried on in Ireland)."*

The circumstances in which the 'unless' kicks in is somewhat unclear.

The UK legislation of 1986/87 provided that certain payments made in connection with a performance in the UK deemed the performance to be, or to be part of, a trade or profession exercised by the entertainer in the UK. Such a provision here would have

[8] ITR Vol I p.330-358
[9] Ua Cinneidigh CJ
[10] Irish Income Tax by Norman Judge
[11] Income from a foreign possession arising to a non-resident is not taxable in Ireland.

addressed the argument that the existence of a foreign contract meant that the income flowing from it was from a foreign source.

If it is decided to introduce a withholding tax scheme for entertainers in this country, it would seem prudent to include a provision similar to the UK one.

For the purposes of our withholding tax in the construction industry (Relevant Contracts Tax), we put the issue beyond doubt by legislating that the tax applies even if "*the relevant contract…is not subject to the law of the state"*[12] or if *"payment …is made outside the state*"[13].

Use of Intermediaries

As many entertainers derive performance income through intermediate companies, the rules for taxing non-resident companies are relevant.

The basic rule for bringing non-resident companies within the charge to Irish Corporation Tax is set out in Sec 25 TCA, 1997. The company must have a 'branch or agency'[14] in Ireland.

However, the branch or agency rule is modified by the application of general income tax principles[15] to companies. A non-resident company without a branch or agency in Ireland is within the charge to Irish Schedule D income tax if its trade is 'exercised in the State'. In general, however, Double Taxation Treaties relieve business profits[16], unless the trade exercised in the State is carried on through a Permanent Establishment. For entertainers, however, the general Treaty rule of only taxing business profits earned through a Permanent Establishment is dispensed with in situations to which Article 17[17] applies. Article 17 applies to individuals deriving income from their performance activities in the State, whether the individual derives the income directly or through another person (eg a personal services company or a troupe constituted as a legal entity).

Applying these principles to non-resident entertainers who derive their income through intermediary non-resident companies, unless the company has a branch or agency in Ireland, CT will not arise. However, if the company exercises its trade in the State, the company will be within the charge to Irish Schedule D income tax, but only on its own profits[18].

While the precise nature of the contract between the entertainer himself and his company will vary from case to case, if it is a contract of service[19], it brings the employment

[12] Sec 530(4)(b) TCA, 1997
[13] Sec 530(4)(c) TCA, 1997
[14] The term 'branch or agency' is considered to be broadly equivalent to the concept of Permanent Establishment, contained in Article 7 of the Model OECD Treaty.
[15] Sec 18(1) TCA, 1997
[16] Article 7 OECD Model Treaty
[17] Article 17 OECD Model Treaty. See Appendix 3
[18] Payments made by the company to the entertainer will be a deductible expense in calculating the profits of the company.
[19] As opposed to a contract for services

income earned by the entertainer potentially within the Schedule E (PAYE) charge. **Appendix 2** examines some of the issues associated with application of a PAYE charge.

The UK legislation addressed the question of payments made to a non-resident company controlled by a non-resident artist by applying withholding tax to payments made to persons connected to or controlled by the performer, although certain Schedule E charges are not disturbed. In the design of a withholding tax system, the interaction between the withholding tax and the Schedule E charge would need to be clearly defined.

Linking Income and Performance

Performance is usually the culmination of lengthy preparation, training and practice. There may be difficulty attributing the income between performance and these preparatory activities. For example, if a non-resident boxer, contracted to fight in Ireland, trains abroad for three months and then spends three days in Ireland for the fight, how much, if any, of his income, which may be paid from abroad, under a foreign contract, is earned in Ireland? The issue can also be clouded by matters such as retainers, sponsorship, advertisement, cancellations and compensation.

Alternatively, income may be only indirectly linked to performance. For example, a sportsperson may be paid to wear a certain brand of clothes, on the condition that he/she will wear it at a series of specific tournaments.

The difficulties associated with breaking down the income of an international performer by country of source (i.e. is income arising from commercial endorsements organised abroad part of the profits arising from the exercise of an activity in the State?) emerged in the UK Court of Appeal case of tennis player Andre Agassi[20]. The decision in that case was that endorsement income paid abroad to the performer by foreign companies under a foreign contract had to be attributed partly to his appearances at Wimbledon and taken into account in determining his UK tax exposure. The UK legislation of 1986/87 ensured that there would be no argument that Mr Agassi exercised his profession in the UK, the only issue was what receipts fell within UK charge.

[20] *Agassi v Robinson*: House of Lords [2006] UKHL 23

6. Legislation Drafted in the early '90s

When this matter was reviewed in the late 1980s/early 1990s, legislative proposals were drawn up for the introduction of a withholding tax scheme in Ireland. The legislation was broadly similar to a scheme in place in New Zealand. It was not advanced for the reasons stated by the Minister for Finance in his PQ reply of 23 April 2009 (see **Appendix 1**).

In broad terms, the scheme provided that any person making a payment to a non-resident performer or to a connected person in respect of a performance in Ireland would be obliged to deduct standard rate income tax from the gross payment, unless the promoter of the performance obtained a certificate of authorisation from the Revenue Commissioners in respect of that performance and produced that certificate to the payer.

A summary of the main features of the draft legislation is at **Appendix 7**.

The principal differences between the former proposals for Ireland and the UK scheme[21] are:-

- Unlike the UK scheme, the Irish proposal did not extend the ultimate charge beyond that which currently exists under Sections 18 and 25 of the TCA 1997.

- Certain types of performance were excluded from the Irish proposal i.e. government sponsored cultural programmes, non-profit cultural activities and international team sports[22].

- The UK scheme allows for deductions lower than the standard rate where a taxpayer has expenses which reduce his profit from UK performances. The significance of this provision is detailed in section 7.

- The Irish proposal obliged either the promoter or venue owner to obtain a certificate from Revenue before each performance. The UK scheme has no similar certification procedures.

- The Irish proposal was for a final liability scheme[23], whereas a return of income is always required in the UK.

- The Irish proposal provided that the lodging of a bond by a promoter would completely eliminate withholding requirements, whereas in the UK it only eliminates the obligations of persons upstream from the promoter/middleman.

- The UK scheme is more technically complex.

[21] Appendix 6

[22] In 2007, Revenue gave a letter explaining Irish taxation to FIFA who were concerned about the tax implications of staging the 2011 Champions League final here. The exclusion of team sports has also been raised recently in Double Taxation Treaty negotiations with Germany who sought to retain resident country taxation of players participating in European club competitions for any team sport.

[23] Unless the performer chose to make a full return of income

7. Issues Associated with Designing a Withholding Tax

General

It is considered that the Irish proposal of the early 1990s had certain drawbacks and may not be fit for purpose if it were decided to introduce a withholding tax. With its dual certification features, it would give Revenue an overly bureaucratic, and administratively burdensome role at the pre-payment stage in the administration of a withholding tax. Also, it would not address the issues referred to in section 5 above in relation to the charging legislation. Any design would need to address these deficiencies.

The UK system has strengths in terms of the charging of tax. However, it does impose a significant burden on the revenue authorities and the taxpayer. The primary burden lies in the need for speedy determinations on applications for a "reduced tax payment" from performers with significant expenses. Such applications arise where the performer believes that a standard rate deduction (from the gross payment) is excessive by reference to his likely ultimate tax exposure.

Impact of ECJ Rulings

As a result of ECJ rulings, a withholding tax must allow for direct expenses to be taken into account before the deduction is made. If Revenue are to be involved in this process, the entertainer would have to be allowed to submit details of his/her expenses and for a decision to be made on the level of expenses allowable prior to payment being made. As with the UK system, this could give rise to a significant resource requirement whereby applications would require a fast turnaround time. The difficulty of factoring in an appeal mechanism into this relatively short timeframe is considered below.

Of course, the ECJ considerations only apply as respects EU resident performers and companies. It may be possible to have a two-tier system: one fully compatible with ECJ rulings and a simpler one for non-EU residents.

What Withholding Tax Rate should Apply?

Appendix 5 scans a wide range of systems in other jurisdictions where rates can be either gross or net. A rate at the higher end of the range might be considered appropriate where expenses are allowed as a result of the Scorpio ruling[24].

Levels of Expenses

Based on analysis of 2,500 performances over 3 years, the Dutch authorities estimated that approximately 75% of performance income is consumed by related expenses[25].

[24] Austria and Germany have taken such an approach

[25] Treating the remaining 25% as the profit element and assuming an average tax rate of 30%, the average effective rate of tax on gross performance income is 7.5%

However, the Dutch estimate may not reflect the range of expenses of different entertainers. For example, a professional golfer is unlikely to have the same level of expenses as a rock band.

Administrative and Compliance Burden

As stated above, the processing of applications for determinations in respect of expenses within a relatively short timeframe (in advance of payment being made) would give rise to a significant administrative and compliance burden, both for Revenue and the entertainer[26]. In order to reduce that burden, a withholding tax scheme could be designed in such a way that the entertainer would be given an alternative to making a formal application for a determination in respect of expenses. The alternative could take the form of a lesser deduction rate, based on gross income, than the withholding tax rate. Such a lesser rate would apply to the gross payment pending the filing of an annual return and paying any balance outstanding under self assessment. For example taking the Dutch experience, the entertainer could be afforded an option of 20% after deduction of expenses or 5% on the gross.

The level at which the lower deduction rate is set will determine the extent to which entertainers would use this alternative. Depending on the rate, it would be particularly attractive for entertainers with low levels of expenses and those who want to reduce their compliance costs.

Pursuing tax returns

Ensuring equal treatment of residents and non-residents would require that the current obligation on non-residents to file an annual return be retained, whether an entertainer opted for withholding tax on net or gross income.

Pursuing non-compliers poses a particular challenge in the case of non-resident entertainers. The difficulties involved could be reduced through specifying certain information requirements in the withholding tax return e.g. name and address of performer, dates of performance, etc. The withholding tax paperwork could also remind non-residents of their filing obligations. Although a non-resident who has no intention of returning to Ireland could ignore his return filing obligations, the reality is that many entertainers return to Ireland again and again. Where a non-resident fails to make a tax return and subsequently returns to Ireland, Revenue might have issued a tax assessment, obtained a court judgment of debt and considered attachment of funds and criminal charges for non-compliance.

The EU Recovery Directive (Council Directive 2008/55/EC) provides an avenue for the recovery of income tax within the EU (but not outside it).

26 Notwithstanding the additional compliance and administrative burdens, there would be a benefit for Revenue in having contact with the entertainer at pre-payment stage. The information gathered would be useful in establishing and pursuing the entertainer's final liability.

Appeals

It may be necessary to provide an appeal mechanism against Revenue determinations in respect of withholding rates. It is unlikely that the Office of the Appeal Commissioner is currently geared up to provide a service within the timeframes that would be meaningful in the context of a withholding tax. An option of a low rate withholding tax on gross income would be likely to reduce the potential number of such cases.

8. Benefits/Implications of a Withholding Tax

Benefits of a Withholding Tax

Withholding tax schemes usually

(i) collect tax due in respect of persons believed to present a compliance risk; and/or
(ii) accelerate the collection of tax.

There is also a spin-off benefit for compliant taxpayers competing in the same field. However, assessing the benefits of a scheme depends to a large extent on quantifying the expected increase in tax take.

Projected Tax Take

It is difficult to estimate the likely additional tax which would arise from the introduction of a withholding tax in Ireland. This is due in part to the technical considerations which are discussed in this paper. Other jurisdictions have measured the tax take from their withholding tax schemes and their statistics give some indication of what we might expect to collect.

	Yield	Population	Estimated ProportionateYield per 4 million of population
Holland (2005)	€1.5m	16 million	€0.375m
UK (2001/02)[27]	£30m	60 million	£2m

As much as 30% to 40% of the UK yield requires intervention i.e. an assessment following a query/audit/investigation.

In 2007, the Netherlands relinquished its taxing right in respect of non-resident entertainers entitled to the benefit of a double taxation treaty, on account, principally, of the poor withholding tax yield. As stated earlier, apart from the Netherlands and Denmark, all other EU countries surveyed[28] have a general scheme of withholding tax for such entertainers.

Impact of a Withholding Tax on Economic Activity/Business

It would be difficult to gauge the impact that a withholding tax would be likely to have on non-resident entertainers coming to Ireland. If changes in taxation were significantly onerous, they could discourage 'big-name stars' from working here, this could have knock-on effects in areas such as film-making or international sport. The views of the Department of Art, Sport and Tourism will need to be gathered and considered in this regard.

A withholding tax scheme would impose a compliance cost on business. For example, the UK scheme currently has nine different forms that the payer or payee can be required

[27] Most recent year in which the yield can be found in Inland Revenue annual report.
[28] Surveyed by Dr Dick Molenaar, All Arts tax advisers, Rotterdam (2009). See section 4 and Appendix 5.

to complete. However, a limited enough range of businesses would be affected (mainly concert and sports promoters).

Revenue costs

International practice would suggest that a withholding tax scheme should be administered centrally. The number of staff required to administer a centrally-based scheme would be dictated by the level of complexity of the scheme and, in particular, the extent to which entertainers engage with Revenue at pre-payment stage for the purposes of seeking a determination in respect of expenses.

At a minimum, a small dedicated team of between 5 to 7 staff would be required, at a wage cost of approximately €300,000 per annum. The cost of administering a scheme would need to be considered against any prospective yield of perhaps €2 million alongside the opportunity cost of taking staff from other tax enforcement and collection roles.

Conclusions

As stated by the Minister for Finance in his response to the PQ of 23 April 2009, three considerations historically tilted the balance against introducing a withholding tax:-

- small prospective yield;
- foreign artists might be discouraged from visiting Ireland; and
- the disproportionate administrative and compliance burden on collecting a relatively small yield.

These considerations appear to be still valid today.

Were a withholding tax introduced, the processing of applications for determinations in respect of expenses, a requirement following ECJ rulings, (in advance of payment being made) would give rise to a significant administrative and compliance burden, both for Revenue and the entertainer. In order to reduce that burden, a withholding tax scheme could be designed in such a way that the entertainer would be given an alternative to making a formal application for a determination in respect of expenses. The alternative could take the form of a lesser deduction ratethan the withholding tax rate. Such a lesser rate would apply to the full gross payment. For example taking the Dutch experience, the entertainer could be afforded an option of 20% with expenses or 5% on the gross. The level at which the lower deduction rate is set would determine the extent to which entertainers would use this alternative. Depending on the rate, it could be particularly attractive for entertainers with low levels of expenses and those wishing to reduce their compliance costs. In all cases, a full annual return of income would still need to be filed under self assessment.

Before proceeding further with a withholding tax, it would seem necessary to consult more widely with interested groups including relevant agencies and Government Departments such as the Department of Art, Sport and Tourism.

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6th November, 2009

Appendix 1

Dail Question of 23 April 2009

To ask the Minister for Finance if he plans to implement a double taxation treaty to allow for the taxing of visiting rock bands and performers in view of the fact that they are levied in every other country in the world and revenue is being lost as a result of the failure to implement this tax; and if he will make a statement on the matter.

- Seán Sherlock.

* For WRITTEN answer on Thursday, 23rd April, 2009.

Ref No: 15967/09

REPLY

Minister for Finance (Mr Lenihan):

The question of introducing a withholding tax regime on income earned in Ireland by foreign artists was examined in the late 1980's/ early 1990's by my Department and the Revenue Commissioners. However, because of the small prospective yield at the time, the capacity of such a regime to discourage artists visiting Ireland and the administrative burden associated with collecting a relatively small yield, it was decided not to proceed. I have asked that the matter be reviewed given developments since the last review.

I understand that while many countries have arrangements for the taxation of foreign artists it is not universal. For example I am informed that Denmark and the Netherlands do not have such arrangements.

Appendix 2

The PAYE System and Entertainers

The PAYE system of deductions at source is a system of withholding tax from the income of employees and office holders (hereinafter referred to "employees"). The system is applied on the making of a payment by an employer to an employee. In the context of this paper, it is worth emphasising that it does not have effect when a promoter makes a payment to the foreign employer. Rather it "kicks in" when the foreign employer makes a payment to an employee (the individual entertainer).

Non-Resident Entertainers (employees)

Where a non-resident entertainer performs all of the duties of an *Irish* contract of employment outside the State, Revenue will, on application, issue an exclusion order granting the employer a release from the obligation to make the appropriate deductions under the PAYE system. Where some or all of the duties of an Irish contract of employment are performed in the State, an exclusion order will generally not be issued.

Where a non-resident entertainer performs some or all of the duties of a *foreign* contract of employment in the State then the foreign employer must make the appropriate deductions under the PAYE system from the employment income attributable to the performance of the duties of the foreign employment in the State.

Where an entertainer performs the duties of an Irish contract in Ireland, tax will always be due.

Relief Under Double Taxation Agreements – Foreign Contracts Only

As income arising to a non-resident will often be taxed abroad, Ireland's DTA's define circumstances in which employees resident in treaty states on short term visits to Ireland will not be taxed here[29]. These provisions do not apply to employees defined as "artistes and sportsmen" under separate provisions[30] of our DTA's. However, Statement of Practice SP IT 03/2007 (Chapter 4) makes no specific reference to artistes and sportsmen, thus possibly giving the impression that the exclusions from Irish taxation apply equally to non-resident entertainers who perform here as employees.

Practical Difficulties

The first difficulty is determining whether the contract between the entertainer and his employer is one of service or for services. The rules of this Appendix only apply in cases of the former. The wording of each contract will be significant but not decisive.

Secondly, for example, if a promoter makes a payment to Band Ltd following a performance in Ireland, the PAYE system only applies when Band Ltd makes a payment

[29] Article 15, OECD Model Treaty
[30] Article 17, OECD Model Treaty

to a band member (the employee) of income attributable to the performance by the band in Ireland. There are obvious difficulties in determining exactly what income is attributable to the band's performance in the State.

Thirdly, enforcement issues associated with non-residents generally would apply in the event of non-compliance or evasion[31].

[31] But see reference in section 7 to the EU Recovery Directive (2008/55/EC).

Appendix 3

Article 17 – OECD Model Treaty

ARTISTES AND SPORTSMEN

1. Notwithstanding the provisions of Articles 7 and 14, 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, may be taxed in that other State.

2. Where income in respect of personal activities exercised by an entertainer or a sportsman in his capacity as such accrues not to the entertainer or sportsman himself but to another person, that income may, notwithstanding the provisions of Articles 7 and 14, be taxed in the Contracting State in which the activities of the entertainer or sportsman are exercised

Appendix 4

Text of ECJ ruling in the Scorpio case[32]

"…the Court (Grand Chamber) hereby rules:

1. Articles 59 and 60 of the EEC Treaty must be interpreted as not precluding

– national legislation under which a procedure of retention of tax at source is applied to payments made to providers of services not resident in the Member State in which the services are provided, whereas payments made to providers of services resident in that Member State are not subject to such a retention;

– national legislation under which liability is incurred by a recipient of services who has failed to make the retention at source that he was required to make.

2. Articles 59 and 60 of the EEC Treaty must be interpreted as

– precluding national legislation which does not allow a recipient of services who is the debtor of the payment made to a non-resident provider of services to deduct, when making the retention of tax at source, the business expenses which that service provider has reported to him and which are directly linked to his activity in the Member State in which the services are provided, whereas a provider of services residing in that State is taxable only on his net income, that is, the income received after deduction of business expense;

– not precluding national legislation under which only the business expenses directly linked to the activity that generated the taxable income in the Member State in which the service is provided, which the service provider established in another Member State has reported to the payment debtor, are deducted in the procedure for retention at source, and expenses that are not directly linked to that economic activity can be taken into account if appropriate in a subsequent refund procedure;

– not precluding a rule that the tax exemption granted under the Convention of 16 June 1959 between the Federal Republic of Germany and the Kingdom of the Netherlands for the avoidance of double taxation in the area of income, capital, and various other taxes and for regulating other tax matters, to a non-resident provider of services who has carried on activity in Germany can be taken into account by the payment debtor in the procedure for retention of tax at source, or in a subsequent procedure for exemption or refund, or in proceedings for liability brought against him, only if a certificate of exemption stating that the conditions laid down to that end by that convention are satisfied is issued by the competent tax authority.

3. Article 59 of the EEC Treaty must be interpreted as not being applicable in favour of a provider of services who is a national of a non-member country."

[32] Case C290/04 FKP Scorpio Konzertproduktionen – Judgment 3rd October, 2006

Appendix 5
ARTISTE AND SPORTSMAN TAX RULES - 2009[33]

Much has changed in artiste and sportsman taxation over the last years after the decisions of the European Court of Justice (*Gerritse* (2003), *Scorpio* (2006) and *Centro Equestre* (2007)) and the change in the Commentary on Art. 17 of the OECD Model Treaty. Expenses should be deductible at source and normal tax returns should be possible after the year. Many countries have changed their artist and sportsman tax rules and rates, Germany is the latest example with its drastic change per 2009. Some countries are still under pressure from the European Commission, such as Belgium, Sweden and Spain. But only the Netherlands and Denmark are not levying tax anymore. The table below shows the current 2009 situation.

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

(Dr. Dick Molenaar – All Arts Tax Advisers – Rotterdam, the Netherlands)

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

[33] Source: Website of All Arts tax advisers, Rotterdam (October, 2009)

Appendix 6

Outline of the UK legislation[34]

The scheme is based on the principle that any person making a payment to a non-resident entertainer, or to any other person in respect of a performance in the UK by the entertainer, is obliged to deduct standard rate income tax from the payment, unless HMRC[35] have directed that a lesser deduction[36] should be made.

More specifically, the legislation provides that:-

- Entertainer is given a wide meaning and includes sportsmen. It covers pop stars, musicians, conductors, actors, dancers, TV and radio personalities, variety artistes, jockeys and horsemen, golfers, cyclists, boxers, football and rugby players, athletes, snooker players, darts players, appearing alone, or in teams, bands, orchestras, choirs, opera companies, ballet companies, troupes or circuses.

- Recording royalties and payments for ancillary services made to residents not connected with the entertainer are excluded.

- Payments of less than £1,000 in aggregate are excluded.

- Payments coming within the legislation not otherwise comprising income from the exercise by the entertainer of a trade or profession in the UK are brought within the scope of UK taxation by being deemed to be income of the entertainer arising from the exercise of his trade or profession in the UK.

- A person who believes a standard rate deduction, based on gross income, to be excessive by reference to his ultimate UK tax exposure, may apply[37] to HMRC for the application of a 'reduced tax payment'. This requires the entertainer to estimate his profit from UK activities. Where an applicant is successful, HMRC announce a reduced rate or amount of tax to be deducted by the payer. It seems that the objective of the HMRC is to estimate the likely tax liability of an entertainer, over a full year, based on UK tax rates. There is no right of appeal against a determination by HMRC.

- A payer is entitled to reduce the withholding tax deductible by him on any payment to take account of withholding tax suffered by him when receiving the funds out of which the payment is being made. To reduce the incidence of chains of withholding tax, HMRC allow promoters to apply, as 'middlemen', to be treated as the first payer in a chain, absolving persons paying the middlemen from their obligation to withhold.

- A person obliged to deduct tax from a payment makes a quarterly return to HMRC in a prescribed form giving details including name and address of the payee(s).

[34] Sections 555-558 ICTA, 1988 and IT Regulations 1987, SI 530/87
[35] Her Majesty's Revenue & Customs
[36] Including nil
[37] Application must be made at least 30 days before the payment at issue

- A person obliged to deduct and remit tax from a payment who does not do so, is liable to pay the amount himself.

- Where HMRC assesses a person who has failed to deduct or remit tax, that person has a right of appeal.

- Notwithstanding income being subjected to withholding tax, the tax so deducted is not the entertainer's final liability in the UK on that income. The entertainer is obliged to make a full annual return and be assessed under normal rules, with a balance of tax being payable or repayable.

- Withholding tax deducted by a payer is a payment on account of tax due by another person.

- The legislation contains many technical provisions clarifying its interaction with general tax legislation.

Appendix 7

Summary of Main Features of Legislation Drafted for Ireland in the early '90s

The proposed scheme was that any person making a payment to a non-resident performer or to a connected person in respect of a performance in Ireland would be obliged to deduct standard rate income tax from the gross payment, unless the promoter of the performance obtained a certificate of authorisation from the Revenue Commissioners in respect of that performance and produced that certificate to the payer.

- Taxable activities would include sporting events, lectures, speeches, talks, performances by actors, entertainers, musicians, singers, dancers, comperes or other artistes, alone or with others.

- Taxable activities would not include government sponsored cultural programmes, non-profit cultural activities and international team sports[38].

- Payments of less than £5,000 in aggregate would be excluded.

- It would be an offence under the Taxes Act, liable to civil penalties and criminal prosecution, for a promoter to promote a non-resident performance without having first obtained a certificate of authorisation for that performance from the Revenue Commissioners.

- Any person making a payment to a non-resident performer or to a connected person in respect of a performance in Ireland would be obliged to deduct standard rate income tax from the gross payment, unless the promoter produced a certificate of authorisation in respect of that performance to the payer.

- Revenue would grant a certificate of authorisation provided the promoter submitted sufficient documentation to enable Revenue determine the Irish tax liability of the performer in respect of the performance and entered into a bond or other security to guarantee payment of that amount.

- In cases where the promoter does not obtain a certificate of authorisation, it would be an offence under the Taxes Act, liable to civil penalties and criminal prosecution, for the owner of a venue to permit the performance to proceed without having first obtained a certificate of clearance for that performance from the Revenue Commissioners. This was designed to address a situation where an entertainer might seek to avoid withholding tax by virtue of the entertainer, his agent or controlled company getting involved in the sale of tickets or sharing in the gate.

- A person obliged to deduct tax from a payment would make a return to Revenue in a prescribed form giving details including name and address of the payee.

- A person obliged to deduct and remit tax from a payment who did not do so, would become liable to pay the amount himself.

[38] See comments on excluding team sports in section 6.

- Where Revenue assesses a person who has failed to deduct or remit tax, that person would have a right of appeal.

Where, in respect of a performance, all of the income derived by a performer from the State had been subjected to withholding tax, the tax so deducted would be the performers final liability in the State on that income, unless the performer chose to make a full annual return and be treated under normal rules.

24 September 2010

Mr Gary Tobin
Department of Finance
Upper Merrion Street
Dublin 2

Dear Gary,

In response to your letter of 9 August the following are the views of the Department of Tourism, Culture and Sport to your paper on the Review of Taxation of the Irish Income of Non-Resident Entertainers.

The Department has no objection in principle to proposals designed to improve compliance in the taxation of Irish income of non-resident entertainers. There are, however, certain considerations that are relevant.

The administrative burden, imposed as a result of any changes, should not be onerous on either the non-resident entertainer or the promoter. This is particularly important for arts and culture organisations. The totality of regulation, including additional regulation imposed over the past decade has resulted in significant additional administrative costs on grant-aided organisations with the resultant reduction in output and therefore in value for money for the taxpayer. For this reason, Government sponsored cultural programmes, non-profit cultural activities and international team sports should be excluded from any withholding tax legislation, along the lines proposed in the earlier legislation.

Is withholding tax a good idea?
Over the past decade or so, there has been a significant increase in the number of international acts coming to Ireland to perform or to work here for short periods. Foreign based actors come to Ireland to perform in films and plays for levels of pay which might be low relative to the amounts that they could command elsewhere[39]. The Irish Film industry which has expanded considerably in the past decade, is dependent on international actors and film professionals to come to Ireland to work. Many international artists now incorporate one or more Irish dates on British or European Tours.

It is to be expected that any increase in taxes will have a disincentive effect on production - in this case entertainers coming to Ireland to perform.

The additional administrative burden, however, could have a larger disincentive effect than the tax itself. Given the levels of tax collected in the UK and the Netherlands, it is seems obvious that the deductable expenses incurred by the performer has a sizeable negative impact on the tax liability. The Netherlands has a population of 16 million and is much smaller than Ireland and therefore the movement of entertainers and sportspeople

[39] Alan Rickman will appear in the Abbey Theatre in October. Frances McDormand & Ralph Fiennes appeared at the Gate Theatre.

both within and across its borders is much easier and cheaper than across Ireland's borders.

Ireland, on the periphery of Europe, with a low population density, is not the most attractive location from an earnings point of view. There are diseconomies of scale. It is more expensive and time consuming to travel here, especially for musical acts which may have bulky equipment (rock bands) and/or sets (opera companies Glyndebourne) which have to be transported over-land. This is likely to be costly if there are only one or two performances - even Dublin is not a big city in European terms. In some cases, tour dates in Ireland are actually loss-making. This occurs with music acts where live performances act to promote the performers who expect to see the profit in increased CD, DVD and downloads sales. Such acts might need very little incentive to tip the balance against travelling to Ireland. Our cultural, artistic and sporting landscape would be bleaker as a result.

EU initiatives

The European Agenda for Culture includes a priority on the *Promotion of cultural diversity and intercultural dialogue*. One element of the priority is to improve the mobility, within the EU, of artists and other professionals in the cultural field. This includes, inter alia, improving administrative practices on artists' mobility (including visa, tax, social security). While fiscal policy remains the preserve of member states, the principle of ease of mobility of artists should be considered in the context of any additional administrative burden when compared with the potential yield from a withholding tax.

Increased compliance yield

The proposal is to introduce a withholding tax to increase compliance. The level of non-compliance, if any, is not available. The paper prepared by the Department of Finance, however, gives a number of important indicators from which can be gleaned, a broad estimate of the level of the expected yield - at one end of the spectrum.

The UK tax on non-resident sporting and entertainment personnel yielded a total of £30m in 2001/2002. Applying appropriate deflators, in this case UK Whole Economy total wage costs[40], suggests that this would be equivalent to £40.8m in 2009/2010. Adjusting for Irish population size (4 million) would give a figure of £2.7m a year or €3.3m. This annual tax yield figure of €3.3 million must be substantially reduced because

I. Non-resident performers in Ireland would have lower average pay rates than those in the UK. This is because greater populations and population densities mean that payments per performance would be significantly higher, while some very highly paid performers would not perform in Ireland at all;
II. Ireland would not have the same volume of visiting non-resident sporting and entertainment personnel per head of population as has the UK. It is in fact, likely to be much lower implying that the annual yield would be much lower;
III. Expenses both in getting to Ireland and in Ireland would be much higher (Irish wages are higher - for example the hourly minimum wage in the UK is £5.80 (€7) compared to €8.65 here;
IV. The UK tax scheme is much wider than the Irish one and many people who pay tax under the UK scheme would not have a liability under the Irish regime;
V. Ambiguities such as that surrounding the ***exercise of a profession*** in Ireland and whether ***income from a foreign contract*** is or is not ***income from a foreign possession,*** are absent from the UK legislation.

[40] www.statistics.gov.uk Total Wage cost increased by 36% between year ended 31/3/2002 and 31/3/2010.

There is scant evidence on how much these elements would reduce the annual yield figure of €3.3m, but there is no doubt that the combined effects would reduce the figure very significantly.

This leads to the conclusion that the annual yield from the imposition of a withholding tax would be lower than €3.3m and probably very significantly lower than that figure.

Canons of taxation
One of the canons of taxation states that a tax should be cost effective, meaning it should cost less to collect the tax than the tax revenue. The cost of tax collection falls not only on the Revenue Commissioners but also on the organisations who collect it and the individuals who pay it. It is probable that a cost benefit analysis of this proposed tax would show a negative benefit.

A withholding tax while an efficient vehicle for collection in some cases may act as a blunt instrument in this case. If a withholding tax is imposed on loss-making tour dates, then presumably there would be a mechanism whereby the non-resident individual completes a tax-return thus acting as a further disincentive for each non-resident artist to visit Ireland for the first time in each tax year.

Another canon of taxation requires simplicity. It is unlikely that a tax which applies across international borders can be sufficiently simple to offset the very low yield which would be generated from a withholding tax in this case.

Because the paper is highly confidential, this response has been prepared without reference to the Department's agencies who would have a more indepth knowledge of impacts on the sectors.

Conclusion
In conclusion, this Department's view is that the yield from a withholding tax would be tiny. The cost of the administrative burden imposed on the economy would far outweigh this yield.
The measure would also tend to discourage visiting artists and would diminish the Irish artistic and cultural landscape. In the scenario where a withholding tax is proposed, then Government sponsored cultural programmes, non-profit cultural activities and international team sports should be excluded from the withholding tax legislation, as was intended in the earlier legislation.

Yours sincerely

_____
Niall Ó Donnchú
Assistant Secretary
Culture Division