
CHAPTER 6

NON-RESIDENT ARTISTE TAX RULES IN PERFORMANCE COUNTRIES

6.1. Similarities and differences

This chapter will give an overview of the existing national artiste tax rules. Most countries in the world tax the performance income of non-resident artistes for appearances in their country. This is quite normal for some of these countries because they already tax any income from domestic sources that accrues to non-residents,¹ but for other countries it is more exceptional because they normally tax just some portion of the domestic income of non-residents, leaving other income items outside their national tax rules.² These countries need to insert specific tax rules in their legislation to secure taxation for non-resident artistes, especially for the self-employed who would otherwise fall outside any source tax because of the absence of a fixed base or permanent establishment in the country of performance.

For these countries Article 17 of the OECD Model Tax Convention has acted as an immediate catalyst for special national tax rules for non-resident artistes.³ While according to the general theory, as explained in 2.3., bilateral tax treaties only restrict taxing rights, it seems as though some countries use Article 17 to extend their own legislation. And it is true that the text of Article 17 can easily be interpreted as an instruction to create new taxing rights in the national tax rules, even though the article states very politely that performance income “*may be taxed*” in the source country.

It was interesting to discover in the study for this chapter that the various elements of Article 17 of the OECD Model also influence national tax rules about when tax exemptions can be allowed.

1. Examples are the United States, the United Kingdom, Australia, Spain and Germany.

2. Examples are Belgium, Denmark and the Netherlands.

3. An example is the Netherlands, which started the taxation of non-resident artistes in 1972 by referring to bilateral tax treaties that had already been concluded (Law of 16 November 1972, *Staatscourant*, at 613). Earlier court decisions had restricted the tax right to domestic artistes only (e.g. *Hoge Raad* 19 November 1952, *BNB* 1953/12).

Most national artiste tax rules are more or less similar, as will be shown in this chapter. This seems peculiar because no international coordination has taken place, and it is therefore likely that countries have looked beyond their borders to see how their neighbours have handled their (tax) affairs with non-resident artistes.

But on a closer look there are also many differences, such as with deductions for expenses and the computation of taxable income, tax rates, the right to file income tax returns after the year-end and the permitting of unilateral exemptions.

6.2. Survey of the non-resident artiste tax rules in performance countries

The author has undertaken a survey in the period from July 2003 until February 2005, because an overview of the artiste tax rules in the various countries did not exist⁴ and therefore artistes, production companies, orchestras and theatre and dance companies very often did not know what to expect when they went on tour. In each country four kinds of people were interviewed for the study:

- (1) official representatives from the Ministries of Finance;
- (2) general tax experts;
- (3) specialist accountants and tax advisers working in the performing arts business; and
- (4) organizers and promoters of concerts, festivals, theatre plays and other performances.

This information has been brought together and compared, extracting not only the official tax rules but also the best practices that are used. In this paragraph a summary is given of the main characteristics of the national artiste tax rules in 34 countries. For the purposes of this summary a division has been made into five categories, explaining:

- whether the country taxes the performance income of non-resident artistes;
- whether expenses can be deducted prior to performance;

4. See for critical remarks the Report “Mobility in the Cultural Sector”, by Prof. Olivier Adeoud, University of Paris (2002), undertaken at the request of the European Commission. See further Clare McAndrew, *Artists, taxes and benefits – an international review*, Arts Council of England, Research Report 28 (2002), and Council of the European Union, “Work Plan for Culture 2005/2006”, Brussels, 15/16 November 2004.

6.2. Survey of the non-resident artiste tax rules in performance countries

- what withholding tax rate is applicable;
- whether a normal income tax return is allowed; and
- whether there are specific national exemptions (besides treaty exemptions).

	Artiste tax	Deduction of expenses (prior to performance)	Withholding tax rate (%)	Income tax return (after the year)	National exemptions
Australia	yes	yes	29-47	yes	–
Austria	yes	no	20	yes	no
Belgium	yes	no	18	no	yes
Canada	yes	no	15	yes	no
Czech Republic	yes	no	25	no	no
Denmark	no	–	–	–	–
Estonia	yes	no	15	no	no
Finland	yes	no	15	no	no
France	yes	no	15	yes	no
Germany	yes	no	21.1	no/yes	yes
Greece	yes	no	20	no	no
Hungary	yes	yes	38	yes	no
Iceland	yes	no	10	no	no
India	yes	no		no	no
Ireland	no, but ... ^a	(yes)	(21)	–	–
Italy	yes	no	30	no	no
Japan	yes	no	20	no	no
Korea (Rep.)	yes	no	20	no	no
Latvia	yes	no	15	no	no
Lithuania	yes	no	15	no	no
Mexico	yes	no	25	no	no
Netherlands	yes	yes	20	yes	no
New Zealand	yes	yes	20	yes	yes
Norway	yes	yes	15	yes ^b	yes
Portugal	yes	no	25	no	no
Russia	yes	no	30	no	no
Slovak Republic	yes	no	25	no	no
South Africa	yes	no	18	no	no
Spain	yes	no	25	yes	no
Sweden	yes	no	15	no	no
Switzerland	yes	yes	8-21	no	no
Turkey	yes	no	22	no	no
United Kingdom	yes	yes	22	yes	yes
United States	yes	yes	30	yes	no

- a. There is no income tax for non-resident artistes in Ireland, but a VAT deduction is applicable. The VAT rate is 21%, calculated from the gross fee minus expenses, levied from the organizer of the promoter but transferred to the artiste and deducted from the performance. See 6.3.
- b. Change in the Norwegian tax law per 2006.

6.3. Almost complete coverage

The summary provides an interesting international overview of national artiste tax rules. It will not be surprising that almost all countries have special legislation for non-resident artistes, but there are also exceptions to this general rule.

Denmark does not levy a withholding tax on non-resident artistes who perform only occasionally in Denmark. This seems strange when one considers that Denmark has concluded 68 tax treaties with an artiste article comparable with Article 17. But the country believes that the connection of foreign artistes who visit for just 1 or 2 days is too slight and that they make too little use of the country's public facilities to make taxation justifiable.⁵ This is different when artistes stay longer in Denmark and in particular when they can be considered employees of a Danish orchestra, theatre, dance company or any other artiste group, because then the normal tax rules for Danish residents apply.

There is also an exception for festivals, which have to pay a municipal tax to the local community. This tax falls outside the scope of the Danish bilateral tax treaties and can therefore not be used as a foreign tax credit in the country of residence.

Ireland is another exception, not levying income tax on the performance fees of non-resident artistes. But the country levies a concurrent tax, namely VAT of 21% from net performance fees,⁶ i.e. after the deduction of 50% production expenses. This VAT/withholding tax falls outside the

5. This has been confirmed in a Danish court decision about an opera singer who had performed for only 1 day in Denmark, *Tax News Service* 1997/35.

6. The reason for this VAT is that the entrance tickets for concerts and other performances are exempt from Irish VAT. This leads to the effect that input VAT is not refundable for Irish organizers. And because non-resident artistes do not charge the VAT of their country of residence, but the VAT of the place of performance applies (Article 9.2.c of the Sixth EC Council VAT Directive), the organizer is obliged to pay the VAT to the Irish tax authorities on behalf of the artistes.

scope of the Irish tax treaties and can therefore not be credited in the residence country. This is very strange because Ireland has included Article 17 in 43 of its 44 treaties (= 98%) and agreed in almost every treaty that the credit method should eliminate the chance of double taxation.

It is also the case that some smaller countries, and countries with a communist history and little experience with a detailed system of taxation, have not inserted a special non-resident artiste tax (or any non-residents tax in general) in their legislation. But most of these countries are catching up, e.g. because they have entered the European Union in 2004, and are looking at the systems in other countries to improve their own tax systems.

6.4. The deduction of expenses

It is very interesting that a majority of the countries (24 of 32 countries with a source tax (= 75%)) do not allow the deduction of expenses prior to performances, following the “recommendation” of Paragraph 10 of the OECD Commentary on Article 17. They tax gross performance fees, as Paragraph 10 specifies:

10. [-]⁷ The Article says nothing about how the income in question is to be computed. It is for a Contracting State’s domestic law to determine the extent of any deductions for expenses. Domestic laws differ in this area, and some provide for taxation at source, at a low rate based on the gross amount paid to artistes and sportsmen. Such rules may also apply to income paid to groups or incorporated teams, troupes, etc.

This special treatment can be justified by the argument that the determination of deductible expenses for performances is complicated, especially when the production expenses of an international tour need to be allocated over performances in various countries.⁸ Some countries also try to simplify the tax rules for non-resident artistes as much as possible, perhaps even more than for other taxable persons.⁹

7. A 1992 addition.

8. For example, Belgium changed its non-resident artiste tax law in 1993 for this reason.

9. For example, the Netherlands in the year 2000 promoted a “broad taxable base, at a low tax rate”. Later in that year the Ministry of Finance had to change this proposal under pressure from the parliament and made the adjustment that expenses became deductible before the withholding tax was levied.

But the experience in countries that do allow the deduction of expenses prior to artiste performances seems to be quite positive. An administrative procedure is needed for applications for approval of deductible expenses, but with a special department of the tax administration knowledge about the arts business can be brought together and used efficiently.

After it changed its tax rules for non-resident artistes the United Kingdom in 1987 started a special department of the Inland Revenue called the Foreign Entertainers Unit (FEU), which is currently based in Solihull, West Midlands. When a non-resident artiste, group or production company or local promoter of performances wants to apply for a “Reduced Tax Payment Application” (RTPA), they can fill in an application form, attach a budget and information about performing artistes and the responsible promoters and ask for approval. Details of the regulations can be found in publication FEU 50, called “A Guide to Paying Foreign Entertainers”, and the FEU sometimes also publishes a newsletter.¹⁰

If the FEU receives the completed RTPA at least 30 days prior to the performance, it certifies that the approval will be given in proper time. But questions can also arise, especially about the division of expenses between performances inside and outside the United Kingdom, leading to some delay and perhaps even a decision after the date of performance. This decision on the RTPA can then – within reasonable terms – still be taken into account by the responsible withholding agent.

Any RTPA needs to be followed by a tax return at the end of the tax year under the normal income tax scheme; the withholding tax of 22% (and perhaps even more) can then be offset against the final income tax, with refund of excess, if any. The FEU attempts with the approval of RTPAs to come as close to the final income tax obligation as possible. The top rate in the UK income tax is 40% and non-residents are entitled to the general allowance of GBP 4,745 (year 2004/05).

The FEU also allows “middleman” arrangements, which means that one person or organization¹¹ takes responsibility for the payment of the non-

10. A great deal of information about the Foreign Entertainers Unit can be found on its web site www.inlandrevenue.gov.uk/feu.

11. In practice very often a booking agent, management, production company or specialist accountant or tax adviser.

resident artiste tax, covering the original withholding agents for the transfer of their obligations to the “middleman”.¹²

Without an approval for a “reduced artist tax rate”, the artiste can receive GBP 1,000 per year free of tax as deemed reimbursement for expenses. This helps artistes with low performance fees.

The Netherlands started in 2001, after a general change in its tax legislation, with an administrative procedure for non-resident artistes to deduct their expenses from the taxable fee prior to performances. This so-called *kostenvergoedingsbeschikking* (cost reimbursement approval, KVB) gave both domestic and non-resident artistes the opportunity to reduce the taxable performance fee to the level of their real profit. The *Belastingdienst Buitenland* (Tax Office for Foreigners) in Heerlen became responsible for applications. As in the United Kingdom, the application form together with a budget and information about artistes and organizers needs to be sent in to the tax administration. No time limit has been given, leaving room for very late applications to be approved before a performance takes place.

The rules for KVB applications have been relaxed over time, now also offering the chance to apply for a KVB until 1 month after the performance, with the provision of only partial information about performing artistes and fiscal numbers for the artistes involved no longer being necessary. This has considerably reduced the administrative hurdles for the deduction of expenses.

For very small artistes, a threshold of EUR 136 per person per show has been implemented, which can be considered as an approved KVB. This even applies when two or more shows take place a day.

In May 2004 the Ministry of Finance published an evaluation of the artiste and sportsman tax system¹³ as it had existed since the year 2001. The conclusions regarding the KVB were divided, because some of the interviewees were not happy with the system (mainly because they did not know how it worked), while others were very happy with it, because it worked very efficiently and achieved a level of tax obligation for non-domestic artistes that could be credited in the residence state. The Minister

12. A list of approved “middlemen” is published on the web site of the FEU.

13. “Evaluatie van de artiesten- en beroepssportersregeling”, Ministry of Finance, 12 May 2004, WDB 2004-00270M.

of Finance proposed in the evaluation to replace the KVB by a lump sum of 50% expenses, with the opportunity for non-resident artistes with higher expenses to deduct these in a later normal income tax return. This was criticized in the parliament because research had shown that 95% of the non-resident artistes applying for a KVB had more than 50% expenses.¹⁴ Setting the lump sum at 50% was therefore very low. The minister was asked whether the tax earnings from the special rules for non-resident earnings still outweighed the administrative burden for both artistes and the tax administration.¹⁵

Other countries, such as the United States, Australia, New Zealand, Canada, Switzerland, Norway and Hungary also have experience with the deduction of expenses prior to performances. It is interesting to ask why this is not possible for other countries. More discussion will follow in chapter 8 of this thesis.

6.5. The (withholding) tax rate

In the countries that are included in the study the withholding tax rates vary substantially, from 15% to 25% in countries where expenses are not deductible, and from 15% to 47% in countries where deductions for expenses are allowed.

Normal income tax rates normally vary between 20% and 50% in these countries.¹⁶

Can 15% to 25% tax from a gross fee, without the deduction of expenses, be considered “a low tax rate”, as Paragraph 10 of the OECD Commentary on Article 17 requires? Before answering this question, it is important to realize that this flat tax rate needs to be compared with the *average* income

14. See chapter 8 of this thesis for the results of this research, undertaken by All Arts Tax Advisers over the years 2001-2003.

15. This was further calculated and discussed in Dick Molenaar, “De illusies van de artiesten- en beroepssportersregeling”, *Weekblad voor Fiscaal Recht* 2004/6587, at 1111. See also the English article of Dick Molenaar, “The illusions of international artiste and sportsman taxation”, in *A Tax Globalist – Essays in honour of Maarten J. Ellis* (IBFD, 2005), at 90.

16. Exceptions at the low end are the Netherlands, with a starting tax rate of 2%, and the United Kingdom and the United States, with a starting rate of 10%, while at the high end the Netherlands still has a top marginal rate of 52%.

tax rate that results from the normal progressive income tax table and not with the marginal top tax income tax rate.

The answer depends on the size of the production expenses which the artiste incurs for his performances. If the expenses are nil, then a gross tax rate of e.g. 20% will be very low, but with 50% expenses a tax rate of 20% from gross is equal to an effective tax rate of 40% from net (after expenses). This average tax rate will only be met by a higher income.

And when the expenses are 75%, the weighted average outcome from the survey in chapter 8, a gross tax rate of 20% is equivalent to an effective tax rate of 80% from net income (after expenses). There is no progressive income tax regime that reaches an average income taxation of 80% of taxable profit.¹⁷

This issue was also discussed at the end of Seminar D during the 49th IFA Congress in Cannes.¹⁸ The chairman, Dr Jürgen Kilius (Germany), finally stated that non-resident artistes often pay more tax in the country of performance than if they had been ordinary residents in that country.

The conclusion must be that flat tax rates of 15% to 25% from a gross performance fee can very easily become a high tax rate when compared with the normal progressive income tax rates, especially when considerable production expenses are involved. With high production expenses the effective withholding tax rate even exceeds any possible normal average income tax rate.¹⁹

6.6. Income tax return after the taxable year

The summary in 6.2. shows in the fourth column whether a country allows a non-resident artiste to file a normal income tax return at the end of the year. Only 12 out of 32 countries with a source tax in the study (= 37%)

17. More calculations of the break-even point between the gross withholding tax rate and normal income tax rates are provided in Dick Molenaar, "Obstacles for International Performing Artists", 42 *European Taxation* 4 (2002), at 152.

18. *Taxation of Non-Resident Entertainers*, 49th IFA Congress, Cannes, France; *Cahiers de droit fiscal international*, Vol. 20d (Kluwer Law International, The Hague, 1995).

19. The Berliner Zeitung published an article in October 2001 under the title "Auswärtige Künstler zahlen mehr Steuern als Millionäre" (Foreign artistes are paying more taxes than millionaires) after an initiative from the *Deutscher Kulturrat* (German cultural council) to persuade the German government to improve its tax rules.

have created the opportunity to make a comparison between the withholding tax rate and the normal progressive income tax rates. The other 20 countries (= 63%) consider the flat withholding tax as the final tax and do not bring non-resident artistes under their normal tax rates.

Most of the 12 countries have made an income tax return obligatory: some only when the non-resident artiste applies for the deduction of expenses at the withholding stage (such as Canada, the United States, the United Kingdom, Australia, New Zealand); others, such as France, for any other non-resident artiste performing in the country.

An annual income tax return is optional in the Netherlands. Until the year 2000 this country did not allow non-resident artistes to file a normal income tax return and kept the 25% withholding tax as final taxation, but it was forced to change its legislation by a court decision in the year 2000.²⁰ After the change some cultural institutions complained that it had become much more problematic to attract high-earning foreign artistes, such as orchestra conductors, because they had to pay the difference between the 20% withholding tax and the marginal top rate of 52% income tax. The extra administrative burden for the thousands of foreign artistes performing in the Netherlands, who were supposed to file an income tax return, was also a source of complaint. This brought the Ministers of Finance and Culture together in the decision to make an income tax return optional for non-resident artistes as from 1 January 2002. This means that they can decide to file an income tax return and fall under progressive income tax rates, which they will do when they expect a tax refund, but that they can also accept the artiste withholding tax (even with the option to deduct expenses with a KVB) as the final taxation.²¹ This decision in the Netherlands was based on the information that a large majority of the non-resident artistes are normally entitled to a Dutch tax refund and that only a small proportion has to pay extra income tax. And because most of the possible tax refunds are not picked up by non-residents, the tax waiver for high earners can (easily) be paid from the residue of the lower earners.

The Ministers believed that the optional income tax return was an incentive to promoting international culture in the Netherlands.

20. *Gerechtshof Amsterdam* 25 April 2000, *Infobulletin* 2000/489 and *BNB* 2000/369; Harald Grams and Dick Molenaar, “*Gerechtshof Amsterdam*, 25 April 2000, P 99/1188”, *Internationales Steuerrecht* 12/2002, at 420.

21. See also Dick Molenaar and Harald Grams, “Optional Income Tax for Artistes and Sportsmen”, *Intertax* 2002, Vol. 30, at 259.

After the decision of the European Court of Justice in the *Arnoud Gerritse* case,²² every Member State of the European Community had to insert in its national income tax legislation an option (or obligation) for non-resident artistes to compare the progressive income tax rates with the flat withholding tax rate. The ECJ was reacting to the refusal by the German tax authorities to allow the Dutch jazz drummer Arnoud Gerritse to file a normal *Einkommensteuererklärung* to reclaim some German income tax and decided that this was in breach of the freedom principles of the EC Treaty.²³

6.7. Concurrent taxation, other charges or levies

The main objective of the study for this chapter has been the direct taxation of performance income, because the scope of Article 17 is restricted to direct taxes on income (and capital), such as income and corporation tax,²⁴ very often collected by means of a withholding tax. But in practice other taxes and concurrent levies can also be important and some are found in the study. Examples are taxes that fall outside the scope of tax treaties, such as state or municipal taxes, indirect taxes, such as VAT or sales tax, and social security contributions.²⁵

These extra payments sometimes follow the same computation rules as the national direct artiste tax rules, but can also be based partly on other regulations.

The Irish VAT system, which was mentioned in 6.3., is one of the examples of other charges. As mentioned above, this deduction from the performance fee of a non-resident artiste is not a direct income tax. Some EC Member States, such as Germany, Spain, France, Italy and Greece, have the same possible conflict in their VAT systems. Organizers of performances, such as operas, concert halls and theatres, can be exempt from VAT, in accordance with Article 13 of the Sixth EC Council VAT Directive. These organizers cannot reclaim their input VAT, which will normally not be a problem in domestic situations because resident

22. *Arnoud Gerritse*, ECJ, 12 June 2003, C-234/01. See 11.4.

23. Austria and Norway have referred to the *Gerritse* decision when they officially changed their tax legislation to make income tax returns possible for non-resident artistes with short-term activities in the country.

24. As specified in Article 2 of most bilateral tax treaties.

25. See also Michael Lang, "Taxes covered – What is 'Tax' according to Art. 2 of the OECD Model?", 59 *Bulletin for International Fiscal Documentation* 6 (2005), at 216.

orchestras, theatre and dance companies can also be exempt from VAT. But the national VAT legislation very often does not extend this exemption to non-resident orchestras, theatre and dance companies, or individual artistes, conductors, directors or others, which means that their VAT obligation is transferred to the organizer under Article 9.2.c of the Sixth Directive. The organizer considers this as to be an obligation of the non-resident artiste(s) and elects to take this tax from the performance fee.

It is debatable whether or not this is the correct procedure. An option would be for the VAT exemption to be extended to non-resident artistes.²⁶ If this is not possible, it would be the usual procedure under the VAT system for the VAT to be an expense for the organizer of the performance, because an exempt and therefore non-taxable person normally “consumes” the input VAT.

Other examples of concurrent taxation are US state taxes, which are levied in most states. They do not exist in Texas, Nevada, South Dakota, Florida and Alaska, but can rise to 7.7% in New York, 9.3% in California, 9.5% in Vermont and 11% in Montana. The state tax is very often levied as a withholding tax from the gross performance fee, without the right to deduct any expenses. Some states allow non-US artistes to apply for tax refunds after the year-end, but applications are not very often made because of the administrative costs.

Some countries levy a social security contribution from non-resident artistes, either because they are deemed employees (such as in France) or because there is a special social security system for the self-employed (such as in Germany). Contribution rates can vary from 35% (France) to 5.8% (Germany).

Many countries have concluded bilateral social security treaties with each other, while the European Community has issued the EC Directive 1408/71, which is binding on all Member States. Under these agreements the normal allocation rules for social security are that employees are insured in the country of work and that the self-employed are insured in the residence country. When people are working in two or more countries at the same time, the social security of their residence country normally applies. This rule will apply to many internal performing artistes. They travel to other countries for their performance, but are insured in their residence country, to the exclusion of other countries.

26. See *Matthias Hoffmann*, ECJ, 5 April 2003, C-144/00.

Most countries, such as France, give up their social security contribution claims after approval of an E-101 (EC) or D-101 (US) form, showing the residence and status of the non-resident artiste. This seems very formal, because in almost all cases these artistes would qualify for an exemption anyway. Within the European Economic Area²⁷ a formal exemption procedure with an E-101 or D-101 should not be needed.²⁸ Some countries, such as the Netherlands, the United Kingdom and Belgium, have already decided to exempt non-resident, self-employed artistes unilaterally from making contributions to the social security system.

Strangely enough Germany is reluctant to exempt non-residents from its *Künstlersozialversicherung* (social security contribution), even when an E-101 or D-101 is provided. The contribution is 5.8% of the gross performance fee. This creates a considerable expense for a non-resident artiste, while the contribution does not give any right to social security benefits. The German *Künstlersozialkasse* (social security organization) defends this stance by referring to its difficult financial position.

These three categories of other charges have in common that they fall outside the scope of the bilateral tax treaties, which means that the international performing artiste cannot receive a tax credit (or tax exemption) in his country of residence.²⁹

6.8. Unilateral exemptions

Some countries have inserted unilateral exemptions in their national tax legislation. These can be very broad, which means that they cover not only non-resident performing artistes but also residents or people other than artistes. Some examples will be explained in this paragraph.

The German *Orchestererlass* (exemption for orchestras) provides an exemption from the German *Einkommensteuer* (income tax) for groups of more than four non-resident artistes who are subsidized by the national or local government of their residence country. This exemption is not a part of the *Einkommensteuergesetz* (Income Tax Law), but has been introduced

27. The European Community of 25 Member States plus Norway, Iceland and Liechtenstein.

28. This was decided in *Tsomakas Athanasios and others*, EFTA Court 14 December 2004, E-3/04.

29. See 7.5.10.

in a letter of the German Ministry of Finance in 1983.³⁰ To qualify for this exemption under the *Orchestererlass*, a non-resident group needs to apply to the authorities of the German *Bundesland* (state) where the performance takes place to discover whether they meet the conditions for the exemption. With this approval, the organizer of the performances can apply for an official exemption certificate at the local *Finanzamt* (tax office).

The *Orchestererlass* is very often used, but has also been criticized at times because it is not officially inserted in the tax legislation and the different *Bundeländer* have different opinions about who qualifies for the exemption, e.g. non-resident jazz groups are very often excluded, even when they are subsidized and have more than four members.

Austria also has an *Orchestererlass*³¹ (exemption for foreign orchestras), but this is not a unilateral exemption. This measure explains the consequences flowing from the 62 (out of 68) Austrian bilateral tax treaties containing an artiste article, because the content varies from country to country.³²

New Zealand has an exemption for non-resident artistes performing in an event under a cultural programme which is sponsored by a government. Norway has a unilateral exemption for artistic performances taking place as part of a cultural exchange, provided that they are publicly funded. And Norway also has an exemption for artistes participating in films, television or other recordings in Norway, if the person meeting the costs is a non-resident.

Some countries exempt non-profit organizations or amateurs from their non-resident artiste taxation. New Zealand provides an exemption for artistes performing in New Zealand under a programme of a foreign non-profit organization that promotes a cultural activity. In Germany the *Bundesfinanzhof* (Federal Supreme Court) decided that *Liebhabeerei* (hobbies) does not fall under the German non-resident taxation.³³ In the Netherlands the *Hoge Raad* (Federal Supreme Court) decided that musicians with a performance fee which did not cover the costs for the

30. *Bundesfinanzministerium* 20 July 1983.

31. *AÖF* 112/1995 *idF* *AÖF* 54/2000.

32. See survey of 5.1.

33. *Bundesfinanzhof* 7 November 2001, I R 14/01, BStBl. 2002 II S. 861.

performance could not be held to be taxable.³⁴ More about this can be found in 8.5.

Sometimes special, incidental unilateral exemptions are given for special occasions, such as the 1998 World Expo in Lisbon (Portugal) and the 2000 World Expo in Hanover (Germany). Other examples come from the sports world, such as Euro 2004 (Portugal),³⁵ Olympics 2004 (Greece)³⁶ and 2006 Cricket Champions Trophy (India).³⁷ Not much information is available about these unilateral exemptions.

6.9. General discussion and conclusions

Countries can only levy tax from non-resident artistes if they insert taxing rules in their national tax legislation. The allocation rule of Article 17 in most of the bilateral tax treaties does not create these taxing rules, but only allows the country of performance to enforce them.

The non-resident artiste tax rules in the various countries are often comparable but can also be different. The survey of 34 countries published in 6.2. shows that only two countries do not have non-resident artiste tax rules, i.e. Denmark and Ireland, although the latter country levies VAT as a concurrent tax.

The deduction of expenses is not allowed in 24 of the other 32 countries (= 75%). This seems to be in line with Paragraph 10 of the Commentary on Article 17 of the OECD Model, but the United Kingdom and the Netherlands, amongst others, show that it is perfectly possible to implement a well-functioning system for deduction of expenses before withholding tax is calculated.

34. *Hoge Raad* 5 April 1995, *BNB* 1995/218.

35. Paulo Nuncio, Marais Leitão, J. Galvão Teles & Associados, Lisbon, Portugal, www.sportsandtaxation.com.

36. There is no official publication from the Greek government, but Greek tax experts state that the government holds the opinion that it does not have the right to tax tournament earnings which are paid outside Greece.

37. International Cricket Council, 29 June 2005, www.icc-cricket.com. India had lost the right to organize the 2004 Cricket Champions Trophy because the Indian government then refused to waive the withholding tax on the tournament earnings for the foreign teams. England organized the Champions Trophy in 2004.

The withholding tax rate is most often a flat tax rate, varying between 15% and 47%, the rate often depending on whether expenses are deductible. When compared to the normal, progressive income tax rates, these withholding tax rates seem to be reasonably low, unless when they are taken from the gross performance fee. The influence of expenses is inevitable. When the expenses are e.g. 75%, a withholding tax rate of 20% becomes an effective tax rate of 80%, which is higher than any (average) income tax rate.

Income tax returns after the taxable year are not allowed in 20 of the 32 countries with a non-resident artiste taxation (= 63%). In these countries the withholding tax is also the final tax. A minority of countries offer the option to (or impose the obligation on) non-resident artistes to file a normal income tax return. This number will increase within the European Community because of the decision of European Court of Justice in the *Arnoud Gerritse* case.

Other charges, levies or concurrent taxation than direct income taxation are also possible. Ireland does not levy income tax but charges VAT from non-resident artistes, which can also happen in Germany, Spain, Italy and other EC Member States. US state taxes are levied separately from federal income tax. Social security contributions are raised in the absence of the right E-101 or D-101 forms, but also even when these forms are present, as the example of Germany shows.

Countries sometimes introduce unilateral exemptions, either structural, such as the *Orchestererlass* in Germany or the cultural exemptions in New Zealand and Norway, or incidental, such as for the World Expo or bigger sports events. Some countries exclude amateurs and non-profit organizations from the tax rules for non-resident artistes.

In general, the national non-resident artiste tax rules in the various countries are not very clear-cut for an international performing artiste. He will have problems gathering information about whether he is taxable in the country of performance, whether he can perhaps make use of the unilateral exemption, can deduct his expenses and can file a normal income tax return (or is even obliged to file one). The calls by institutions such as the Council of Ministers of the European Union to make the available information more accessible to international performing artistes need to be listened to.