

### When must the withholding tax for performing artists be paid?

- 1. Requirements regarding the withholding tax:** Germany has concluded double taxation agreements (DTAs) with a number of countries in order to avoid double taxation in cross-border situations. As part of these DTAs, Germany has agreed with the other contracting countries which country has the right of taxation in cases where natural or legal persons earn income in a country other than their country of origin or residence. The following information deals with the **taxation of artists residing abroad who give performances in Germany**. Agreements regarding the granting of rights of use and agreements with choreographers, directors, and authors are not the subject of this checklist.

Germany has largely agreed with the other (especially OECD) contracting states that the fee for performances is taxable in the country in which the performance took place (for example, in the case of performances given in Germany by performing artists residing abroad, the resulting fee is taxable in Germany). This regulation can be found in Article 17 of most DTAs.<sup>1</sup> However, taxes on this income to be levied in Germany must not be paid by the performing artists residing abroad but by the commissioning organizers, or payment debtors (cf. Section 50a (1) German Income Tax Act (EStG)).

In concrete terms, this means that the payment debtors pay only the net fee to foreign artists, withhold the income tax, and pay it to the Federal Central Tax Office (BZSt). This income tax is colloquially called "Ausländersteuer" ("foreigner tax"), hereafter referred to as withholding tax.

**Example:** An organizer agrees to pay an artist from abroad a fee of 10,000.00 euros for her performance in Germany. The organizer must thus pay 10,000.00 euros to the artist and another 1,880 euros to the BZSt in Germany.

- a. Calculation:** The way in which the tax is calculated depends on whether the contracting parties have agreed on net or gross remuneration. The withholding tax amounts to 15.825% of the gross fee or 18.80% of the net fee.

**Artists are advised to agree on a net fee or**, if they agree on a gross fee, to also specify the net fee - the sum actually paid to the artist - in the agreement.

#### **Gross agreement (income tax + solidarity tax: 15.825% of the gross fee)**

Agreed gross fee	10,000.00 euros
15% income tax on the gross fee	-1,500.00 euros
5.5% solidarity tax on the income tax = 0.825% solidarity tax on the gross fee	-82.50 euros
<b>Net fee (amount to be paid to the artist)</b>	<b>8,417.50 euros</b>
<b>Total taxes (amount to be paid to the BZSt by the payment debtor)</b>	<b>1,582.50 euros</b>

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<sup>1</sup> If the relevant regulation is governed in another Article, this Article can be found by searching the DTA for the term "artist."

**Sample contractual phrasing regarding the gross fee:** The fee specified above is the gross fee. The organizer will withhold tax in the amount of 15.825% (1,582.50 euros) from the abovementioned fee in accordance with Sections 49ff. EStG, declare it to the BZSt, and pay it to the BZSt. Only the remaining amount of 8,417.50 euros will be paid to the artist.

**Net agreement (income tax + solidarity tax: 18.80% of the net fee)**

Agreed net fee (amount to be paid to the artist)	10,000.00 euros
17.82% income tax on the net fee	+1,782.00 euros
0.98% solidarity tax on the net fee	+98.00 euros
<b>Gross fee</b>	<b>11,880.00 euros</b>
<b>Total taxes (amount to be paid to the BZSt by the payment debtor)</b>	<b>1,880.00 euros</b>

**Possible contractual phrasing regarding the net fee:** The fee of 10,000.00 euros specified above is the net fee (payout amount). The organizer will declare the tax in the amount of 1,880.00 euros (18.80% of the net fee) to the BZSt in due time in accordance with Sections 49ff. EStG and pay it to the BZSt in addition to the fee paid to the artist.

**b. Taxable base:** The taxable base for calculating the withholding tax is the fee paid to the artist. The following are not included in the taxable base:

- Travel and accommodation expenses, provided they do not exceed the actual costs incurred
- Subsistence expenses, which do not exceed the per diems specified in Section 4 (5) sentence 1 no. 5 EStG.

**2. Who:** payment debtors (i.e. the commissioning organizers)

**3. Where:** BZSt

**4. Deadline:** Tax is incurred at the time at which the remuneration is paid to the artist. The tax withheld in a calendar quarter must be declared and paid to the BZSt by the payment debtor by the tenth day of the following month.

**Example:** The fee is paid to the artist in January 2018. Latest by April 10, 2018, the payment debtor must declare and pay the tax withheld.

**5. Forms/Procedures:**

**a.** In order to be able to declare and pay the withholding tax, a special tax number required for the procedure must first be requested from the BZSt ([download](#) application form here) and an online registration completed. The "Antrag auf (Neu-)Zulassung/Registrierung zur elektronischen Übermittlung von Anmeldungen über die Abzugsteuer nach § 50a Abs. 1 EStG über das BZStOnline-Portal" (Application for (re-)approval/registration for the electronic transmission of withholding tax declarations pursuant to Section 50a (1) EStG via the BZSt online portal) can be found [here](#) under the

heading "Elektronische Abgabe von Steueranmeldungen" (Electronic filing of tax returns).

- b. As a rule, the tax return must be transmitted to the BZSt electronically. The BZSt online portal at [www.elsteronline.de/bportal](http://www.elsteronline.de/bportal) and the Elster online portal at [www.elsteronline.de](http://www.elsteronline.de) can be used for this purpose. The application for approval and registration can be found [here](#) under the heading "Elektronische Abgabe von Steueranmeldungen" (Electronic filing of tax returns).
- c. As part of their tax return, artists may be exempted from taxation in their country of residence (exemption method) or have the tax paid in Germany reflected as a tax credit in their favor (credit method) after the withholding tax has been paid in Germany. Whether and by what method the tax paid will be taken into account depends on the respective DTA (usually specified in Article 22 of the DTA under the heading "Vermeidung der Doppelbesteuerung" (Avoidance of double taxation)) and the regulations in the artist's country of residence. In any case, the payment debtor should issue a tax certificate to the artist detailing the tax withheld so that the tax may be taken into account in the country of residence, if possible.<sup>2</sup>

**Form: Steuerbescheinigung\_Tax Certificate\_§ 50a**

## 6. Information sheets:

[Merkblatt für die Anmeldung über den Steuerabzug](#)

[Merkblatt zur \(Neu-\)Registrierung \(elektronische Abgabe von Steueranmeldungen\)](#)

[Checkliste Registrierungsprozess BOP \(BZSt Online Portal\)](#)

## When is it not necessary to pay withholding tax?

Here are the most relevant grounds on the basis of which performances by artists living abroad may be "exempted" from the withholding tax:

1. **Mitigation rule pursuant to Section 50a EStG:** No withholding tax is levied for fees of up to 250 euros (gross fee agreement) per person per performance (per artist in the case of partnerships under the German Civil Code (GbR), per legal person in the case of limited liability companies (GmbH), associations, and the like).
  - a. **Who; Where; Deadline; Forms/Procedures:** The BZSt must also be notified in the event that the mitigation rule applies. This notification is submitted by sending a so-called nil return to the BZSt. For details of the procedure, cf. *payment of withholding tax* under points 5 a and 5 b of this checklist.
  - b. **Please note:** Rehearsal fees and performance fees are treated as a single payment.<sup>3</sup>

**Example:** A dancer receives a rehearsal fee of 1,000 euros and a gross payment of 250 euros for each of the four agreed performances. Since the fee for the rehearsals and for the performances is considered a single fee, the rehearsal fee (1,000 euros) and the performance fees (4 x 250

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<sup>2</sup> However, if the income of the artist living abroad falls below the tax-exempt threshold of his/her country of residence and the artist living abroad does not have to pay any taxes anyway, the taxes levied in Germany will not be refunded.

<sup>3</sup> Federal Fiscal Court (BFH), Decision of May 30, 2018, I R 62/1; Blümich Wied, 134th edition. 2016, EStG Section 50a Para. 42 and 47.

euros = 1,000 euros) must be added to each other (1,000 euros + 1,000 euros = 2,000 euros) and divided by the number of performances (four) (2,000 euros/4 = 500 euros). The fee therefore amounts to 500 euros per performance and so the mitigation rule does not apply. This means that withholding tax must be paid.<sup>4</sup>

On the other hand, any accommodation and travel costs incurred are not part of the taxable base on which the calculations for the mitigation rule are based.

**Example:** The organizer agrees on a gross fee of 250 euros per performance with an artist. No rehearsal fee will be paid. The organizer also covers the costs for the hotel and the plane ticket for the artist in the amount of 200 euros. In this example, no withholding tax must be paid because the fee does not exceed 250 euros.

## 2. Exemption based on DTA pursuant to Section 50 d EStG

- a. Prerequisites for exemption (grounds for exemption):** The following grounds for exemption may, in practice, be cited in an application for exemption from the obligation to pay the withholding tax to the BZSt. It is important to check whether the grounds for exemption were agreed in the relevant DTA ([list of DTAs](#)).
- Substantial funding from public sources in the country of residence of the artist subject to limited taxation (also for solo artists).
  - Official cultural exchange.
  - De minimis arrangement in the DTA-USA: According to Article 17 of the DTA-USA, the principle of the right of taxation of the performance location (source country principle) does not apply to a performance if the artist's fee in Germany is below \$20,000 in a calendar year (fee = revenue plus refunded travel expenses, transport costs, expenses, etc.). Please note: The refund application can only be submitted after the end of the calendar year.
  - If, contrary to Article 17 (2) OECD-MA, the DTA does not stipulate that payments for performances to an intermediary (agency, organizer, production company) should also remain in the country where the performance takes place, an exemption/refund can be requested. However, it may be necessary to withhold tax at the second level (agency - artist).
- b. Who:** Application submitted by the foreign artist (or German payment debtors authorized by the artist)
- c. Where:** BZSt
- d. Deadline:** Applications for exemption must be submitted prior to payment of the fee (exemption procedure). After payment of the fee, the reimbursement procedure for tax already paid applies. The deadline for the application for reimbursement is four years after the end of the calendar year in which the fees were received (exemption decision, Section 50d (1) sentences 9 and 10 EStG).
- e. Form:** The application pursuant to § 50d EstG for the issuance of an exemption certificate can be found [here](#) under the heading "Artists/Sportsmen" in various languages.

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<sup>4</sup> According to a new ruling of the Baden Württemberg Fiscal Court, the rehearsal fee and the performance fee should not be considered a single payment (Baden-Württemberg Fiscal Court, Decision of May 12, 2016 – 3 K 3974/14). The ruling is currently pending before the Federal Fiscal Court. It therefore remains to be seen how the Federal Fiscal Court will decide.

- f. **Information sheet:** [Guidance Notes on Application § 50 d EStG](#)
- g. **Please note:** The exemption certificate issued by the BZSt is decisive! Without an exemption certificate, the full tax amount must be withheld by the payment debtor, in accordance with Section 50a EstG - regardless of any agreements in the relevant DTA.
3. **Tax abatement pursuant to Section 50 (4) EStG in conjunction with the Kulturorchestererlass (Cultural Orchestra Regulation)** (provided that no other exemptions apply under the relevant DTA):
- a. **Kulturorchestererlass (Cultural Orchestra Regulation) requirements:**
- Foreign cultural associations (the subject of how many people have to be part of a cultural association is a much-disputed one; definitely no solo artists!).
  - The performance must be at least 1/3 funded by domestic or foreign public funds.
- b. **Who:** Foreign cultural associations (or German payment debtors authorized by the cultural association)
- c. **Where:** Tax office of the payment debtor. For tours, the tax office responsible for the first payment debtor (first organizer) is responsible for the entire tour.
- d. **Deadline:** By the day of the respective performance.
- e. **No form**
- f. **Information sheet:** [Kulturorchestererlass \(Cultural Orchestra Regulation\)](#)

## Literature

- BMF (Federal Ministry of Finance) letter dated November 25, 2010: Tax deduction according to Section 50a EstG (can be found [here](#))
- Guidance notes on applications under Section 50d of the Income Tax Act for a certificate of exemption and/or refund of German withholding tax on the basis of Double Taxation Agreements for the Remuneration of foreign Artists and Sportsmen: [Guidance Notes on Application § 50 d EStG](#)
- PEARLE: The Ultimate Cookbook for Cultural Managers – Taxation of Artists in an International Context (2016), can be found [here](#).