

Non-Resident Entertainer Tax Notes

Like many other states, Missouri requires visiting entertainers and professional athletes to pay state income taxes. Thanks to withholding requirements instituted in the 1990s, Missouri collected \$2.8 million from visiting entertainers and \$26.8 million from professional athletes in FY2009.

The tax, known as the "jock tax" in the sports world, is of special interest to nonprofit arts organizations in our state not only because its proceeds fund the Missouri Arts Council Trust Fund but also because presenters are required to withhold 2 percent when nonresident entertainers perform in their venues.

This issue of *Arts Law Memo* provides a brief overview of the tax and explains the withholding and reporting requirements. It also includes a sample contract provision.

A BRIEF HISTORY

Authorized by the Missouri legislature in 1993, the Missouri Cultural Trust Fund was conceived as a public/private partnership designed to support nonprofit arts activities throughout the state.

The tax funds the Missouri Arts Council Trust Fund, and presenters are required to withhold 2 percent when nonresident entertainers perform in their venues.

At the time of its creation, increased demands on general revenue funds and turmoil surrounding federal funding of controversial art were threatening public funding for the arts.

In response to those threats, the Missouri Arts Council, then under the leadership of Executive Director Anthony

Radich, came up with a groundbreaking endowment concept that would make the Council self-sustaining, rather than dependent on annual appropriations from the legislature. It was hailed as a national model.

Radich's plan — a \$200 million corpus by 2008 — was ambitious but sketchy. He moved to Denver in 1996, where he is the executive director of the Western States Arts Federation, without solidifying the plan's financial details.

It took several years for the state to approve a dedicated public revenue stream — income taxes collected from nonresident entertainers and athletes working in Missouri.

Subject to appropriation by the Missouri legislature, a portion (first 50 percent and later changed to 60 percent) of the state income taxes would be allocated to the Trust. The so-called cultural partners — Missouri Public Broadcasting Special Fund, Missouri Humanities Council Trust Fund, Missouri Historic Preservation Revolving Fund and Missouri State Library Networking Fund — would receive the rest (again, subject to appropriation).

Finding the \$100 million in private funds proved to be more problematic. Flora Maria Garcia, who served as the arts council's executive director from 1996 to 2000, quickly learned that private donors were reluctant to give to state government. They also wanted to earmark their contributions.

Eventually, Garcia, her assistant director for administration, Anne Bergeron, and Wolf, Keens & Company (now BrownWolf) a Boston-based consulting firm, devised a capital incentive program. Given its complexity, it is astonishing how well the short-lived program worked.

The Cultural Incentive Program encouraged arts organizations to raise endowment or capital improvement funds from their donors. The money was

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required to be held by a third party, such as a community foundation.

For every dollar arts organizations put aside, the Trust would set aside 50 cents. The Council also promised that an annual cash distribution equal to 5 percent of the matching funds would be paid to the Cultural Incentive Program participants.

Twenty-six participating organizations quickly raised \$26 million before the program was suspended in FY02. The organizations still get an annual check from the Trust (a total commitment of approximately \$600,000). The payments are in addition to any grants received from the Council.

Another Trust program, an organizational capacity building initiative, was planned but never instituted.

In 1999 the Council changed the investment strategy of the Trust fund and began transferring a portion of the balance into the Missouri Investment Trust, anticipating a higher yield on the long-term investment. In all, \$20 million was transferred to the MIT.

Meanwhile, Radich's \$200 million endowment goal was never met; the highest balance was approximately \$28 million.

During Gov. Bob Holden's administration (2001-2005), Missouri was forced to take drastic steps to balance its recession-battered budget. Transfers to the Trust and the Council's

line item appropriation took big hits. From \$11 million in FY01, funding dropped 48 percent in FY02 and another 41 percent in FY03 to \$3.64 million. Then it got really bad: the appropriation was zero in FY04 and \$500,000 in FY05.

With the approval of the legislature and the governor, the Council began spending the trust's corpus and interest on administration, operations and its grant programs. That practice has continued, though appropriations climbed back up during Gov. Matt Blunt's tenure (2005-2009).

Meanwhile, there was lots of drama: a bill introduced during the 2005 legislative session called for a different formula for dividing the nonresident entertainer and professional athlete tax pie, with funds earmarked for sports stadiums and about 15 African-American cultural organizations. The bill did not make it out of committee.

The Trust's board consists of the state treasurer, who is responsible for investing the fund; two members of the Senate, appointed by the president pro tem; two members of the House of Representatives, appointed by the speaker; and the Department of Economic Development-appointed members of the Missouri Arts Council.

In October 2005, the Trust board announced that it was canceling contracts with the CIP partners and would no longer distribute annual

interest payments.

Then in February 2006, just as arts supporters were gathering in Jefferson City for their annual lobbying day, the contracts were reinstated and the Council's new chairman, Richard Winter, abruptly resigned. His unacknowledged absence from the Citizen's Day podium was reminiscent of Soviet party leaders mysteriously missing from official group portraits.

At the end of 2006, arts advocates learned that the Kansas City Symphony Orchestra had filed what seemed like a scary lawsuit against the legislature, alleging that it had shortchanged the Trust by \$83 million. None of the state's other organizations joined the lawsuit. In 2008, Circuit Court Judge Richard G. Callahan dismissed the case declaring that the symphony could not sue the state to demand funding.

The Missouri Court of Appeals-Western District affirmed his decision in February 2010.

Despite the announcement by the Missouri Department of Economic Development that it would withhold nearly \$5.6 million from the Council's FY09 allocation to help close the state's \$261 million budget shortfall, the arts agency is honoring all of its current commitments to its grantees by dipping into the Trust.

Today, there is approximately \$23 million in the Trust. By the end of June there will be \$17.5 million in the Trust.

Non-Resident Athlete and Entertainer Income Taxes Collected in Millions, Amount Transferred to the Missouri Cultural Trust and the General Assembly's Appropriation to MAC

Fiscal Year	Entertainers	Athletes	Transfer to Trust	Gen Rev Appropriation
FY01	\$1.76 M	\$17.88 M	\$5,194,060.00	\$5,540,183.00
FY02	\$1.36 M	\$19.24 M	\$1,737,846.00	\$4,148,237.00
FY03	\$1.28 M	\$22.48 M	\$0.00	\$3,636,405.00
FY04	\$1.85 M	\$21.76 M	\$0.00	\$0.00
FY05	\$1.67 M	\$19.14 M	\$0.00	\$449,819.00
FY06	\$1.70 M	\$22.30 M	\$582,000.00	\$485,000.00
FY07	\$1.70 M	\$26.30 M	\$3,201,000.00	\$485,000.00
FY08	\$2.30 M	\$25.80 M	\$7,566,000.00	\$242,500.00
FY09	\$2.80 M	\$26.80 M	\$5,238,000.00	\$0.00

Non-Resident Entertainer Tax: Compliance

The original legislation presented the Department of Revenue with a challenge: identifying and then collecting taxes from visiting entertainers who receive fees. Examples might include a guest soloist who appears with a symphony orchestra, the star of a touring Broadway production and a rock superstar who performs in a stadium. These headliners are typically incorporated as personal service corporations.

The problem was addressed in 1998. That legislation enabled the Department of Revenue to collect — up front — from these (and other) corporate entities that are paid for entertainment services.

The regulations require any individual or entity that compensates a performer who is not a Missouri resident to withhold state income tax in an amount equal to 2 percent of the total compensation for entertainment performed in Missouri. No withholding is required if payment to the entertainer is less than \$300.

ENTERTAINERS DEFINED

The definition of nonresident entertainer is quite broad. As defined by the legislation, a nonresident entertainer is a person who performs for compensation any vocal, instrumental, musical, comedy, dramatic, dance or other performance in Missouri before a live audience and any other person traveling with and performing services on behalf of a nonresident entertainer.

For purposes of this definition, a performance does not include a presentation for educational purposes, such as a lecture, for which no admission fee, cover charge, purchase minimum or other fee for admission is charged.

If a performer provided both non-entertainment instructional classes and entertainment, the contract should split the compensation on a reasonable basis and submit the tax for the entertainment portion (if it exceeds \$300).

These procedures are not applicable to employees. Instead, they apply to corporations (including nonprofits), limited liability companies or partnerships, independent contractors such as storytellers or comedians who receive a fee, or any other entity, such as a band, that is paid compensation for services provided by nonresident entertainers.

CALCULATING THE TAX

The regulation requires Missouri presenters — both commercial and nonprofit — to withhold 2 percent of the gross compensation paid to nonresident entertainers who perform in their venues; it does not require the presenters to split the withholding between the entity's employees.

Gross compensation is defined as the total contract price; no expenses may be deducted.

Example: Comedy Club hires a comedian. The comedian is a sole proprietor (independent contractor) and is a resident of Florida. The club pays the comedian \$4,000 plus reimburses him \$1,000 for travel expenses. The club must withhold \$100 ($\$5,000 \times .02$) in nonresident entertainer tax.

FORMS AND FILING

There are two forms needed to comply with the collection and remittance of the 2 percent tax. The first, Form MO-2ENT Statement of Income Tax Payments for Nonresident Entertainer, provides information about each entertainer, including name, address, type of business entity, and income subject to the tax.

Copies of this form must be given to the entertainer and sent to the Department of Revenue.

The second form, MO-1ENT Income Tax Payments for Nonresident Entertainers, which must be filed on a quarterly basis, reports the total amount withheld by the presenter. If payment to an entertainer is made over two quarters, the presenter can wait until the second quarter to report the withholding.

To download forms, visit the Missouri Department of Revenue's website: <http://dor.mo.gov/tax/misc/forms/>.

When IRS Form 1099-MISC forms are issued to independent contractors, total compensation paid to the entertainer should be recorded on box 7, "Nonemployee Compensation." Fill in MO in the "State" box and the amount of the entertainer tax withheld in box 11. Cross out "state income tax" in box 11, and write "Nonresident entertainer tax."

NONCOMPLIANCE

Under the current law, presenters could be assessed a non-filer penalty. More likely, the nonresident entertainer will fall under the state's transient employer law.

These regulations require out-of-state employers who temporarily transact any business in Missouri to register by filling out Form 2643, Missouri Tax Registration Application.

In addition, they must file a financial assurance instrument (in an amount not less than \$5,000), such as a bond and withhold 6 percent from each member's wages. Transient employers must also prove that they carry sufficient workers' compensations insurance and are faced with onerous record keeping and reporting requirements.

MORE DETAILS

Booking Agents. The purpose of the law is to make Missouri presenters — not out-of-state booking agents or promoters — responsible for the withholding. The 2 percent should also be withheld from the agent's compensation.

Missouri-based booking agents or promoters can withhold and remit the tax. However, venues should, on a quarterly basis, provide a list of any resident agent/promoter renting their facilities for a performance to the Missouri Department of Revenue, Nexus Section, P.O. Box 295, Jefferson City, MO 65105-0295.

Traveling With. The law is clearly

intended to cover all members of a traveling company.

So, when a New York dance company comes to Missouri to perform, all payments to the company (even if it's a nonprofit), including payments on behalf of the crew, are considered payment to nonresident entertainers and are subject to the withholding requirement.

How about nonresident choreographers or costume designers who work for producing organizations?

Although the wording "traveling with" seems to envision support personnel who are on tour, some organizations are treating designers, directors and other members of their creative teams who work as independent contractors as nonresident entertainers.

By so doing, these artists will not be subject to the burdensome regulations governing "transient employers."

Other organizations are only withholding the tax from those who actually perform on their stages. While the nonresident artists are technically subject to the transient employer registration and tax responsibilities, the law does not require Missouri companies to assist in its enforcement.

Foreign Entertainers. If they are exempt from federal income tax, they also are exempt from the 2 percent withholding.

Taxes. Can nonresident entertainers claim the money withheld by the venue? Individual nonresident entertainers can claim their prorated share of the withholding on line 43 of their state income tax return (Form MO-1040). Corporations can claim the withholding on line 18 of Form MO-1120. Copies of Form MO-2ENT must be attached to these returns.

Missouri does not require nonresident entertainers to file state income tax returns if all the venues at which they have performed have withheld the 2 percent (assuming that the entertainer has no other Missouri source of income).

COMMUNICATE

To avoid unpleasant surprises, entertainers and agents who are not yet familiar with the Missouri withholding requirement should be told about it during negotiations, not when they are handed their checks. Contracts should include a clause addressing the withholding (see below). Making copies of the legislation available on request also is recommended.

Some nonresident entertainers are trying to avoid paying the tax by including provisions in their contracts stating that no taxes can be withheld from their fees. Presenters should inform these entertainers that the law requires withholding. Clauses stating otherwise should be crossed out.

Likewise, presenters should not agree to add the additional 2 percent to the entertainer's total fee. Doing so would, of course, pose a calculation problem.

More importantly, it was not the intent of the legislature to increase production costs for presenters, especially the nonprofit organizations that the state supports with grants from the Missouri Arts Council.

SAMPLE CONTRACT LANGUAGE

Section 143.183.1 of the Revised Statutes of Missouri provides for a 2% tax on compensation if the amount is in excess of \$300 paid by a venue in Missouri to a nonresident entertainer as defined in the statute. The statute requires the venue to withhold 2% of the compensation as a prepayment of the tax. Accordingly, from the compensation payable under this contract Arts Organization will withhold the 2% and will remit it to the Department of Revenue. No additional compensation will be allowed as the result of Arts Organization's withholding obligations.



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