

LAW MEMO

Nonresident Entertainer Tax Notes

It's been more than a year since Governor Mel Carnahan signed Senate Bill 724, the legislation that revised the definition of nonresident entertainer and established new requirements for income tax withholding at the source of payment — the presenter.

This issue of *Arts Law Memo* discusses the new definition and explains the withholding and reporting requirements. It also compares Missouri's nonresident entertainment tax with those imposed by other states.

A BRIEF HISTORY

Established by the Missouri legislature in 1993, the Missouri Cultural Trust is a public/private partnership designed to support nonprofit arts activities throughout the state.

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At the time of its creation, increased demands on general revenue funds and controversy at the National Endowment for the Arts were threatening public funding for the arts. In answer to these threats, the Missouri Arts Council, then under the leadership of Executive Director Anthony Radich, originated the endowment concept.

Nationally, the trust was hailed as a model. In fact, according to arts consultant Morrie Warshawski, more than a dozen states now have cultural trusts with goals ranging from \$10 to \$300 million.

States are "finding the money for

their trusts from every conceivable nook and cranny of the funding world," Warshawski wrote in the Fall 1998 *Grantmakers in the Arts Newsletter*. Examples of public sector revenue streams include legislative appropriations, corporate filing fees, and sales of special arts license plates.

In Missouri, the stated goal for the trust was to raise \$200 million by the year 2008. Half of the money would come from private sources, the other half from state appropriations.

Legislation signed by the Governor in 1994 directed the Missouri Department of Revenue to pursue collection of the existing state income tax on nonresident entertainers and professional athletes who work in Missouri. Fifty percent of the estimated money collected from this source was to be allocated annually — subject to legislative and gubernatorial approval — to the Missouri Cultural Trust. The recent legislation increased the percentage to 60 percent.

At first glance, collecting taxes from entertainers who are treated, for federal and state income tax withholding purposes, as employees did not pose a problem for the Department of Revenue. Actors working for professional theatre companies under a union contract, for example, generally have taxes withheld from their weekly paychecks.

Ironically, the Missouri Department of Revenue does not have a mechanism for identifying these nonresident employees. The MO W-4 Form does not ask new employees if they are entertainers. Likewise, Form MO-941, which employers use to remit state withholding tax, does not have a space to report taxes withheld from nonresident entertainers.

The state income taxes being paid by these nonresident employees are, therefore, not being segregated for allocation purposes. Presumably, the department has another method for

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VLAA helps artists and arts organizations solve and avoid legal and accounting problems by:

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- Publishing *Arts Law Memo* and concise how-to guides;
- Sponsoring seminars and public forums;
- Arranging for guest speakers;
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- Operating an arts space clearinghouse;
- Supplying model contracts and other arts law and business materials;
- Facilitating meetings;
- Conducting and disseminating research on issues affecting the arts;
- Contributing articles to publications;
- Collaborating on arts advocacy initiatives;
- Matching volunteers with arts organizations seeking board members; and
- Providing access to the national VLA network.



This issue was written by Sue Greenberg, VLAA's executive director.

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provided by the Commissioner of Administration.

GREATER CHALLENGE

But the original legislation presented the Department of Revenue with an even greater challenge: identifying and then collecting from the nonresident entertainers who are not employees.

These entertainers are often big names who command big fees that would, in turn, generate substantial taxes. 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 1998 legislation enables the Department of Revenue to collect — upfront — from these (and other) corporate entities that are paid for entertainment services.

ENTERTAINERS DEFINED

The new 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.

Remember, the new 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 new law requires Missouri presenters — both commercial and nonprofit — to withhold 2 percent of

Other States

More than 20 states and several cities, including Philadelphia and Detroit, now currently tax nonresident entertainers and athletes. Some are more aggressive when it comes to collecting than others; Missouri's new withholding requirement is modeled after Minnesota's law.

Tax rates vary: in California the tax is 7 percent; in Wisconsin, it's 6 percent; Connecticut's rate is 4.5 percent; and in Minnesota, it's 2 percent.

Several states have reciprocity agreements with neighboring states. Wisconsin, for example, has agreements with Illinois, Indiana, Kentucky, Michigan and Minnesota, which allow nonresidents from those states to claim exemption from withholding.

In California, withholding is not required when the entertainer is a tax-exempt organization. California also grants an exemption when total payments of California source income to the entertainer are \$1,500 or less for the calendar year.

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 & FILING

There are two types of 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 both the entertainer and 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 order blank forms, contact the Tax Administration Bureau, Nexus Section at 573/526-1808.

IRS FORM 1099-MISC

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 who fail to withhold the tax will not be assessed penalties. However, 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 or

or letter of credit, with the Department of Revenue to secure payment of withholding taxes.

Transient employers must also prove that they carry sufficient workers' compensations insurance and are faced with onerous record keeping and reporting requirements.

CONFUSED?

Although the regulations were drafted to facilitate the payment of the tax, compliance can be frustrating. A few common concerns are discussed below:

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. Thus, 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 Missouri's 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, however, 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.

Contracts. 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

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 17 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).

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.

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.

Some organizations are including written notice that the tax will be withheld with their contracts. Others are making copies of the legislation available on request.

THE TAX PARADE

For many entertainers and most professional athletes, the administrative burden of nonresident taxes is a major nuisance.

They must file returns in numerous states, and, for athletes, the way the tax is calculated varies considerably from state to state. Some states tax athletes based on the number of games played within their states; others count travel days as taxable; and there are different methods used to account for playoff days and bonuses.

A few years ago, athletes who play major league sports and their teams tried to bring some consistency to the way they are taxed. A proposed nationwide tax structure was presented to the Federation of Tax Administration, the national organization serving state revenue commissioners. The proposal was not accepted.

Although most Missouri arts presenters say they are finding the entertainer tax fairly easy to administer, the regulations can be changed by the legislature.

Exempting touring nonprofit companies, as California does, deserves serious consideration. Likewise, granting an exemption for modest payments would ease the filing burden for small presenters and make more efficient use of the Department of Revenue's energies.

State Representative Vicky Riback Wilson, who represents the Columbia area, told VLAA that she intends to file legislation to create an exemption for fees that are lower than \$5,000. In the coming months, she will discuss the practicality of her proposal with the Department of Revenue.



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Additional Resources

MISSOURI DEPARTMENT OF REVENUE

The Department of Revenue publishes "Frequently Asked Questions on Forms MO-1ENT and MO-ENT," a free one-page information sheet. The department also publishes a one-page sheet comparing the transient employer law to the new 2 percent withholding for nonresident entertainers. These materials, as well as the forms needed to comply with the withholding regulations, are available from the Tax Administration Bureau, Nexus Section, Post Office Box 295, Jefferson City, MO 65105-0295; 573/526-1808. If you have specific questions, contact Shelly Flippin at 573/526-1808 or Shelly_Flippin@mail.dor.state.mo.us.

BOOKS

Smucker, Bob. *The Nonprofit Lobbying Guide*. Published by the Independent Sector, this handbook for volunteers and staff of charitable organizations explains what is legal and what is not. It also encourages nonprofits to be bold in their efforts to enact laws and pass appropriations that are in their best interest.

Fisher, Roger, Bruce Patton and William Ury. *Getting to Yes*. Negotiation experts from Harvard offer a concise, step-by-step strategy for coming to mutually acceptable agreements.

Fisher, Roger and Danny Ertel. *Getting Ready to Negotiate*. A companion volume to *Getting to Yes*, this workbook provides negotiators with useful preparation tools.

VLAA LIBRARY

Many books on arts law and business practices are available at the **St. Louis Volunteer Lawyers and Accountants for the Arts library** located within the Regional Arts Commission office, 3540 Washington, in Grand Center. The expansion of VLAA's library (which now includes the **Foundation Center's database on CD ROM**) and promotion of its use is made possible by a generous grant from the Gateway Foundation.