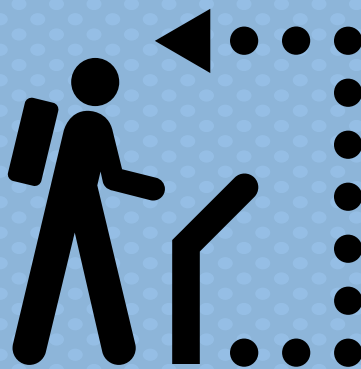


BAM! Complete Guide to Withholding-USA

by Robert Baird



#13

A guide to the 30% withholding
for foreign artists

BAM! Baird Artists Management Consulting

PO BOX 597

Alliston ON L9R 1V7

1-800-867-3281/705-424-6507

www.bairdartists.com

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Introduction

Withholding is a payment on account of a non-resident's potential overall tax liability to the United States. Anyone (a promoter, a venue, a presenter, a manager, an agent, etc.) making a payment (therefore becoming a withholding agent) to a foreign artist (non-resident alien or NRA) for services performed in the United States, other than in the course of regular and continuous employment, is required to withhold 30% of the artist's gross income. Gross income includes deposits, advances, fees, commissions and settlements, as well as expense reimbursements (with certain exceptions) – in short, all compensation to the artist. Failure to deduct or remit the withholding tax may result in an assessment of the outstanding amount, plus interest and penalty against the withholding agent. For more information on withholding refer to [NRA Withholding](#) and [Withholding of Tax on Nonresident Aliens and Foreign Entities](#).

Expense Reimbursement Exceptions: The IRS allows exceptions to the gross income withholding requirement for expenses that meet its [Accountable Plan Rules](#). These are usually hotel, travel and meal expenses and do not need to be included in the withholding amount on an artist's compensation. Note that these expenses should be reasonable, applicable to the contract services and receipts should be provided by the artist.

State Taxation: Note that foreign artists may also be subject to state, and local income taxes for income earned in that state, in addition to or in lieu of the federal 30% withholding, as well as state sales tax or other state levies. Refer to individual state websites to determine state tax requirements, including the filing of state income tax returns.

Individual and Business Withholding

Anyone who has to determine whether or not to withhold needs to understand the difference between individuals and businesses as the IRS sees it. Obviously, a solo foreign artist contracted for a performance will be treated as an individual and subject to withholding. When it comes to individual performers in a group there are two possibilities. Firstly, if the group is unincorporated, then the members of the group will be considered as individuals and withholding will apply. Secondly, if the artist or group of artists is incorporated, then a determination will have to be made as to who benefits from the income (in IRS terms, who is the "beneficial owner" of the income). If the artist(s) do not participate in the profits of the corporation (i.e., are paid a set fee or salary for their work) then they will be regarded as a business and can claim the withholding exemption for businesses. For more information, see [Withholding of Tax on Payments to Foreign Entertainers](#).

Note: If payment is made to a foreign agent for the services of a foreign artist, the payer should request a [Form W-8IMY](#), as well as the appropriate withholding documents noted below for individuals or businesses. See [Instructions for Form W-8IMY](#).

Withholding Requirement Exemptions

1. Tax Treaty Exemptions for individuals, including Internal Revenue Service (IRS) Central Withholding Agreement (CWA)
2. Tax Treaty Exemptions for businesses, including non-profit organizations

Tax Treaty Exemption

The United States has [Income Tax Treaties](#) with 68 foreign countries. Under certain terms of these tax treaties, foreign artists may be able to claim an exception to the 30% withholding requirement. Note that each exemption requires specific documentation (see below). The IRS has published a summary of the tax treaty exemptions for each country in its [Publication 901](#).

Tax Treaty Exemptions for Individuals

Most tax treaties have Articles dealing with “Independent Personal Services” and “Artistes (and Athletes)”, for foreign artists with no “fixed base”, who do not exceed a certain number of resident days annually in the United States. Each treaty should be examined carefully to see when and if income is subject to taxation and therefore withholding. These Articles can provide a tax-free amount for individual performing artists; if the artist earns more than this amount, then all U.S. earnings are subject to tax. To claim this exemption, artists should submit [Form W-8BEN](#) or [Form 8233](#). See [Instructions for Form W-8BEN](#) and [Instructions for Form 8233](#). The IRS cautions that since a withholding agent cannot know what a performing artist might earn in the course of a year, even with the tax-free amount allowed in a tax treaty, there may be no recourse but to apply the required 30% withholding. Even if it turns out that the artist during the year does earn less than the tax-free amount, the artist will be able to recoup the 30% withholding when the mandatory U.S. tax return is filed. (See Taxation below).

There are, however, several countries whose tax treaties exempt all compensation for independent personal services and thus exempt a performing artist from the 30% withholding: Armenia, Azerbaijan, Belarus, Georgia, Hungary, Kazakhstan, Kyrgyzstan, Moldova, Poland, Russia, Tajikistan, Turkmenistan, and Uzbekistan. If a foreign artist is a citizen of any of these countries, and has an Individual Taxpayer Identification Number (ITIN) for the United States, then a properly completed [Form 8233](#) can be accepted to avoid withholding. Refer to [Instructions for Form 8233](#) for more information. Note that Form 8233 is submitted to the IRS for verification.

Central Withholding Agreement (CWA)

A Central Withholding Agreement (CWA) is a process whereby an individual foreign artist can enter into a withholding agreement with the Internal Revenue Service to reduce the 30% withholding, provided that the artist is in compliance for all required Federal Income tax

returns and payment obligations. In the agreement the artist agrees to timely file Form 1040 NR (or Form 1040NR-EZ) for the year in which the CWA covers independent personal services

The agreement is entered into by a foreign artist, a designated withholding agent and an authorized representative of the Internal Revenue Service to reduce the amount of tax withholding. A withholding agent could be the artists' agent, artist's manager, the presenter hiring the artist, a corporation or other entity, a business professional such as an accountant or lawyer, provided they are independent of the artist and acceptable to both the artist and the IRS. The agreement is for a specific tour or series of events and withholding is based upon the budget provided and the net profits estimated as opposed to the gross revenue. The CWA is not effective unless all parties have signed the agreement. If the tour covers a period that spans additional calendar years, more than one CWA will be required. **A CWA can substantially reduce or eliminate withholding.**

Only individual non-resident alien artists may apply for a CWA. A group may have multiple members who are eligible for a CWA, but each must make an individual application.

The advantages of a CWA are many:

1. Designates a single withholding agent to withhold and deposit an agreed upon amount and relieves all other withholding agents from withholding on the specified events for the specified period of time covered in the CWA, thereby avoiding over-withholding from the artist;
2. Allows the IRS to evaluate the income and estimated expense budget, and related documents, to determine a potential net taxable income of the personal services provided;
3. Results in the computation of withholding based on the graduated tax rates used on the tax return and applied to the potential net income determined in the budget analysis; and
4. Provides for withholding that more closely relates to the ultimate tax liability, thus not tying up the artist's funds until a tax return is filed.

A CWA **must** be filed no later than 45 days before the first performance in the United States **or it will not be accepted.**

The NRA must submit the information contained in [Application for a Central Withholding Agreement](#) which includes the following:

1. Application Form 13930 or other written documentation to include at least:
 - a. Name of the NRA to be covered by the central withholding agreement
 - b. SSN or ITIN of NRA, if known
 - c. Tour event or event to be covered
2. Penalty of perjury statement signed by either a valid Form 2848 holder or by the Non Resident Alien (NRA).

3. Form 2848 or Form 8821 unless the NRA is representing himself (if POA is on file for the dates requested, no new POA is needed but statement should be included in application).
4. Preliminary Itinerary for the Events to be covered by the CWA.
5. Preliminary budget for income and expense for the events to be covered by the CWA. The application should include deal memos, contracts or any other income source for which there is a close approximation to the live events.
6. Additional income and expense items requested by the IRS of the applicant must be submitted within the timeframes specified in the request from the IRS to continue the application process.

For more information: [Central Withholding Agreements](#)

Note also that it may not be economically feasible to take the time and trouble to file a CWA, or to pay a professional to have it done, depending upon the fees to be earned as a foreign artist in the United States. The prudent decision may be to accept the 30% withholding and then file a United States tax return the following year to claim a refund or utilize the withholding as a tax credit, if applicable, in your home country.

Tax Treaty Exemptions for Businesses

Most tax treaties contain an Article on business profits which can exempt a business from any tax liability in the United States, provided that the business has no “permanent establishment” (such as a branch office, etc.) in the U.S. To claim this exemption, businesses should submit [Form W-8BEN-E](#). See [Instructions for Form W-8BEN-E](#). However, even though the foreign business may be tax-exempt, it will still be required to withhold the statutory 30% on any payments it may make to foreign artists as independent contractors, or at U.S. taxation graduated rates for employees. See [Taxation of Non-Resident Aliens](#) for more information.

Foreign non-profit or tax-exempt organizations

Foreign non-profit or tax-exempt organizations cannot claim this status in the United States unless and until they either:

1. Apply for and receive an IRS ruling that the organization qualifies for 501(c)(3) status (tax-free) in the United States, utilizing [Form 1023](#) and [Instructions for Form 1023](#); or
2. Obtain a letter from an American attorney indicating that the group would qualify for 501(c)(3) status should they apply.

If the organization is from a country with which the United States has a tax treaty then they could possibly take advantage of the “business profits” exemption, but if there is no treaty, then they would have to acquire non-profit status in the United States or accept the statutory withholding.

Note: Canadian registered charities are automatically recognized as 501(c)(3) organizations in the United States. See page 6 of [Instructions for Form 1023](#).

To claim this exemption, businesses should submit [Form W-8EXP](#). See [Instructions for Form W-8EXP](#).

Taxpayer Identification Numbers

In order to deal with withholding and taxation in the United States a non-resident alien **must** have a taxpayer identification number. For individuals, this is an ITIN (Individual Taxpayer Identification Number) and for a business, it is an EIN (Employer Identification Number)

Individual Taxpayer Identification Number (ITIN)

A foreign artist needs an ITIN in order to be eligible for withholding exemptions, and to file a U.S. tax return. If you are filing a U.S. tax return you can attach a [Form W-7](#) to the return, along with the required documents and get an ITIN. See [Instructions for Form W-7](#). Otherwise, the foreign artist will have to first of all, apply at a [Social Security Administration Office Location](#) for a Social Security Number (SSN). If the foreign artist applies before ten days have elapsed following entry into the U.S., the SSN application will be denied. If the artist applies after the ten-day period, there will have to be at least 14 days remaining on the visa or again, the SSN application will be denied. Once the denial letter is received, the artist can attach it to the Form W-7 and apply for the ITIN. Note that the required identity documents required to be attached to the ITIN application **must** be certified by the government agency that issued the documents. See [General ITIN Information](#). Alternatively, if possible, you can present documents at a [Taxpayer Assistance Center \(TAC\)](#) or utilize the services of an [Acceptance Agent](#).

Employer Identification Number

A foreign business can apply for an EIN by submitting [Form SS-4](#). See [Instructions for Form SS-4](#).

Withholding Procedure

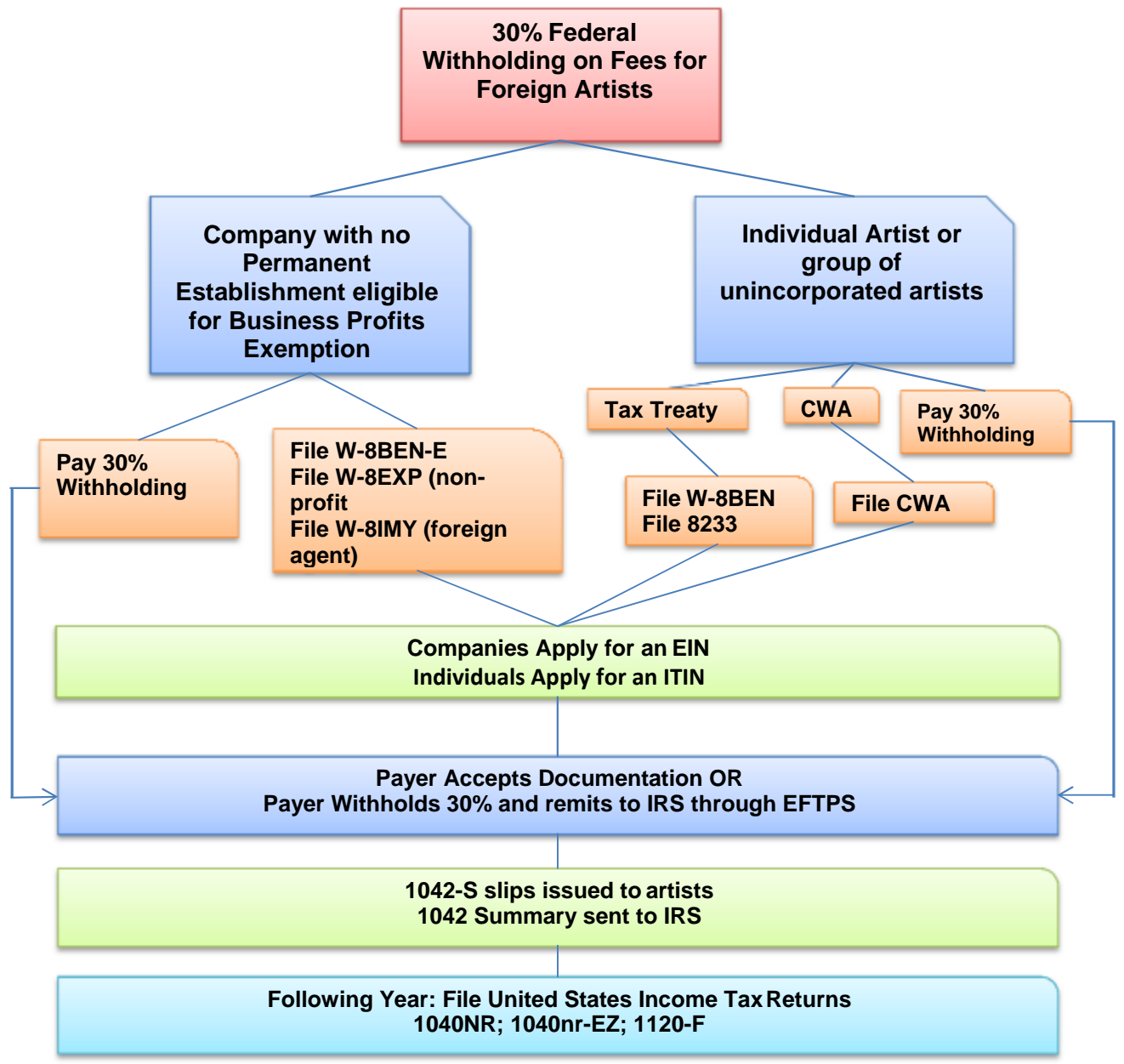
Anyone withholding is required to remit the withheld tax to the IRS via the [Electronic Federal Tax Payment System \(EFTPS\)](#) and file a [Form 1042](#), (See [Instructions for Form 1042](#)) as well as issuing [Form 1042-S](#) to the foreign artist or entity, detailing the amount paid and the tax withholding. See [Instructions for Form 1042-S](#).

Filing Taxes in the United States

A foreign artist is required to file a U.S. tax return to report the U.S. income, using either [Form 1040NR](#) (See [Instructions for Form 1040NR](#)) or [Form 1040NR-EZ](#) (See [Instructions for Form 1040NR-EZ](#)). Even if the foreign artist has not had any withholding, filing a return is mandatory. And, if withholding has been applied, the tax return is the vehicle for declaring the U.S. income, deducting allowable expenses and claiming a refund. Businesses file [Form 1120-F](#).

See [Instructions for Form 1120-F](#). There may come a day when applicants for non-immigrant visas (the O and P visas for artists) will be denied unless and until their tax files are current. See [U.S. Tax Guide for Aliens](#)

Summary Chart of United States Withholding for Non-Resident Artists



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Robert Baird, President of Baird Artists Management, is now available for consultation and advice regarding Canadian and U.S. regulations and information for performers, agents/managers and performing arts venues. Mr. Baird has been in the performing arts for over fifty years and has had distinguished careers in education, publishing and musical theatre. He served on the Board of Directors (2008-2010) and was President (2011-2013) of the North American Performing Arts Managers and Agents (NAPAMA). He was Treasurer and Vice-President of Festivals and Events Ontario (FEO) and served on that Board on various committees (2010-2013). Mr. Baird received the Arts Northwest Coyote Award and the Performing Arts Exchange Mary Beth Treen Award in 2012. He is Chair of Team Agent Network (TAN) and APAP Showcase Coordinator.

Robert is a regular columnist in *International Musician: The Official Journal of the American Federation of Musicians of the United States and Canada* (Circulation 100,000+ Monthly) where he writes a monthly column entitled "Crossing Borders". The column focuses on what artists need to know to get into Canada or the United States. He also writes a monthly column entitled "Artist Manager's Toolkit" for *International Arts Manager*, based in London, England.

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1-800-867-3281 (Toll-free North America)

01-705-424-6507

416-887-2151 (Cell)

robert@bairdartists.com / www.bairdartists.com