

CHANGING TAX STATUS: EMPLOYEE VS. SELF-EMPLOYED

How does Revenue Canada determine whether a musician is self-employed or an employee?

- The Income Tax Act does not specify when a person is an employee or an independent contractor. In order to determine the status of a person for tax purposes, Revenue Canada uses different tests that have evolved under common law, and this determination is made on a case-by-case basis.
- The tests usually used to determine the character of the employment relationship are related to issues of control, ownership of tools, opportunity for profit/risk of loss, and integration. Control refers to control over conditions of service, and integration refers to the extent to which the services performed are integral to the engager's business, as well as the permanence of the relationship. As well, Revenue Canada has developed specific criteria for determining status with respect to performing artists. These include such things as who has the right to decide on or change the size of the group with which the artist performs, whether the engager has the right to choose the nature of the artist's performance without obtaining the agreement of the artist, and whether the engager has the continuing authority to dictate the time and place of the artist's performance including rehearsals, without obtaining the artist's agreement. A complete list can be found in Revenue Canada's Interpretation Bulletin IT-525 (available on the Revenue Canada web site). Legal decisions have normally been based on looking at all factors and determining the "total relationship of the parties".
- In previous cases, the existence of a collective agreement has not been a factor in the determination of status of musicians working in symphony orchestras. However, in the tax decision involving the Thunder Bay Symphony Orchestra, some of the wording included in the master agreement was seen as indicating an employer/employee relationship. The use of the words "employment" and "collective" throughout the agreement were a factor, as well as the fact that all significant terms of the engagement of each core musician were governed by the master agreement. This included such things as a dress code, a minimum weekly fee, a specified number of services, overtime pay, and provisions for termination.

What will change if I become reclassified as an employee?

- In most cases, as an employee you are covered under the Employment Standards Act that applies in your province or territory. Each province has an ESA, which ensures that employees in the province receive a minimum standard of compensation and that minimum conditions of employment are met. The Employment Standards Act is in place to promote the fair treatment of employees and employers, and to contribute in assisting employees to meet work and family responsibilities. While working as employees, musicians are entitled to benefits such as statutory holiday pay, overtime pay, pregnancy leave, parental leave, and annual vacation with vacation pay. They are covered under Workmen's Compensation, and also protected under legislation regarding termination of employment.
- Orchestra management is required as an employer to make contributions on your behalf (in addition to the ones you are required to make) for Employment Insurance (formerly called Unemployment Insurance). The employer contribution is 1.4 times the employee contribution. Employers are also required to assume some of the cost of CPP contributions on your behalf. During the weeks that the orchestra is not working, you may apply for Employment Insurance benefits if you have no other source of income. Specific wording in collective agreements stipulating practice time as work time may help increase the amount available in Employment Insurance benefits. The number of hours you are required to work before applying for EI varies across the country depending on the rate of unemployment in your region or province.

- As employees in a collective bargaining relationship, musicians have the right to go to the Labour Relations Board for mediation and arbitration in the case of disputes with management. They also have the right to strike without jeopardizing job security, and are protected against unfair labour practices. Under labour law, management is obligated to bargain with the representative of a collective bargaining unit. Minimum employment standards and benefits are in most cases, not negotiable, and have to be in place in collective agreements.
- Being considered employees that are covered under a collective agreement puts musicians in a stronger position in the case of bankruptcy proceedings, or in the case of management restructuring.

How will this affect the relationship between orchestra management and the musicians?

- The effect of a change from self-employed to employee tax status will vary depending on past and future choices made by the parties involved at the local level. There are currently two types of "self-employed" situations:
 1. Many symphony orchestra managements have already voluntarily recognized their AFM Local as the bargaining agent for their musicians. In these cases a change in tax status from self-employed to employee will not cause any significant change in the relationship because both parties will have already acknowledged that their agreements are in fact collective agreements covered under the relevant labour laws.
 2. In other cases management has taken the position that the musicians are independent contractors and therefore ineligible for collective bargaining. In these cases, although the agreements in place may in fact be collective agreements, voluntary recognition under the labour laws has not been forthcoming. This is usually because of a concern that recognition might be a factor that would tip the scales with regards to musicians' tax status. A change to employee tax status, whether requested or imposed, would make this strategy unnecessary. The parties could then either (a) move into a voluntary recognition or certification situation, as in #1 above, or (b) reopen their agreements and make fundamental changes in hopes of getting Revenue Canada to reverse the decision. At this time, it is difficult to know how many traditional protections would have to be given away in order to obtain a Revenue Canada ruling retaining self-employed status. The Thunder Bay Symphony is currently working under miscellaneous contracts in order to remain self-employed, but other recent tax rulings have permitted slightly more structure in terms of fees and working conditions. When (and if) this issue arises for an orchestra, both management and musicians will have to weigh the advantages and disadvantages of both options, and in particular decide what they are willing or unwilling to relinquish in terms of work guarantees, tenure and grievance clauses, and other provisions which provide long term job security and stability.

How does employee status affect my tax return?

- It is possible to deduct expenses from employment income, although the rules and limitations are more restricted than for someone who is self-employed. Revenue Canada provides for the deduction of "expenses paid to earn employment income from artistic activity". Allowable deductions under this category include: musical instrument maintenance, rental, and insurance costs; interest on any money borrowed to buy a motor vehicle; and capital cost allowance on both musical instruments and automobiles. Deductions under this particular category are limited to \$1,000 per year, but unused amounts may be carried forward to future years. In addition to these deductions, musicians who are able to prove that they meet the required conditions may be able to deduct accounting and legal fees, motor vehicle expenses, travelling expenses, parking, supplies (for materials used directly in your work), substitute fees and studio-in-the-home expenses (limited to utilities, maintenance, and cleaning). Mortgage interest and property taxes are not deductible; however, a portion of any rent paid is. Revenue Canada provides Form T2200 – Declaration of Conditions of Employment which is filled out by the employer stipulating specific areas of expense, and kept as a part of an employee's tax records. Although this has not been established with Revenue Canada, it is possible that some

employment expenses could be stipulated as part of an orchestra's master agreement (e.g. maintaining a studio/practice space in the home). Specific details may be found in Revenue Canada's Guide to Employment Expenses and the associated interpretation bulletins.

- Revenue Canada has a web site that can be accessed to view and/or download copies of many of the interpretation bulletins that apply to self-employed and employed musicians. This web site is <http://www.cra-adrc.gc.ca>. These documents are also available through local Revenue Canada offices, and provide a more detailed explanation of limitations and calculations.
- On all self-employed income, self-employed deductions and tax rules still apply, and calculations are made separately.
- Employers are required to make deductions on your behalf at source (income tax, EI, and CPP). This could create potential cash flow problems in a transition year for musicians who are used to paying income tax at the end of the tax year, instead of throughout the year, as tax will be deducted from each paycheck. Potential expense deductions as outlined above are not considered in determining the amount of tax that will be deducted during the year at source.