

June 9, 1998  
L-98-14

TO: James A. Verplaetse  
Chief of Payment Analysis and Systems

FROM: Steven A. Bartholow  
Deputy General Counsel

SUBJECT: Taxation of annuities - non resident aliens

This is in response to your memorandum of May 7, 1998, wherein you inquire about certain changes in the income tax regulations dealing with withholding income tax from U. S. source payments made to nonresident aliens (62 Fed. Reg. 53387 (1997)). We generally concur with your interpretation of these regulations. I will restate your questions followed by our answers.

**Question 1. If we use Form 8233 or if we adapt our existing forms as substitute forms, are we obligated to process copies of the withholding certificates as prescribed for Form 8233?**

**Answer:** Our review of Form 8233 (Exemption for withholding on compensation for independent (and certain dependent) personal services of a nonresident alien individual) indicates that it is not at all appropriate for use with respect to the payments of railroad retirement annuities which may be subject to income tax withholding under section 1441 of the Internal Revenue Code (IRC). The Form W-8 is also inappropriate. Section 1-1441-1(e)(4)(vi) of the IRC regulations provides that a withholding agent may substitute its own form if it is substantially similar to the Form 8233 or W-8, but modified to suit the transaction for which it is furnished. We are of the opinion that the Board may continue to use its present form with modifications to be discussed below. The requirements with respect to the Form 8233 need not be followed.

**Question 2. Is our interpretation correct that a withholding agent may not honor a claim for exemption under a tax treaty if the claimant has not furnished a TIN?**

**Answer:** Yes. Section 1.1441-1(e)(4)(vii) of the IRC regulations provides that the payee must provide a TIN if the payee is claiming a reduced withholding

because of an income tax treaty. A TIN is a social security number, an IRS provided individual taxpayer identification number (ITIN), or an employer identification number (EIN).

**Question 3. Is a withholding certificate valid if it does not contain a TIN, irrespective of any tax treaty exemption claim?**

**Answer:** The payee needs to provide a TIN only if he or she is claiming exemption or reduced withholding under section 1441 of the IRC. For annuitants who do not provide a TIN, the Board must withhold 30% of the non social security equivalent payment and 25.5% of the social security equivalent payment as provided for in section 871(a)(3) of the IRC.

**Question 4. Are we obligated to secure certificates of residence from those individuals claiming a tax treaty exemption?**

**Answer:** No. Section 1.1441-1(e)(4)(viii) of the IRC regulations provides that a withholding agent may rely on the information and certifications stated on withholding certificates without having to inquire into the truthfulness of this information unless it has knowledge or reason to know that the information is untrue. Furthermore, section 1.1441-6(b)(1) provides that a payee's TIN on a withholding certificate is valid for establishing proof of residence of a treaty country if the TIN has been certified by the IRS. However, absent actual knowledge or reason to know otherwise, the withholding agent may rely on the TIN without having to inquire as to whether the TIN has been certified, if the TIN appears correct on its face and the permanent address on the certificate is the country whose tax treaty with the United States is invoked.

**Question 5. Are we obligated to solicit for a TIN from any NRA who has a tax treaty claim in effect and for whom we have no TIN?**

**Answer:** No, but as you indicate, good business practice would indicate that you advise payees that a TIN is necessary to claim the benefits of a tax treaty with the United States.

**Question 6. With what payment must we remove any existing tax treaty claim for an NRA who has not furnished a TIN?**

**Answer:** Section 1.1441-6(g)(2) provides that a withholding agent who on December 31, 1998, holds a Form 1001 that is valid before the effective date of the revised regulations, January 1, 1999, may treat it as a valid withholding certificate until it expires or December 31, 1999, if earlier. Consequently, no reduced withholding based upon a tax treaty may apply with respect any

payments made after December 31, 1999, unless the payee has provided the Board with a TIN. Where the previously valid certificate expires before December 31, 1999, a TIN is required to continue to claim the benefits of a treaty. A certificate which expires at any time in 1998 is valid for the whole year.

However, the withholding agent may solicit new withholding certificates which comply with the revised regulations prior to the expiration of the presently valid certificates. A withholding certificate filed after December 31, 1998 shall remain valid until the end of the third calendar year following the year in which the certificate is signed, 1.1441-1(e)(4)(ii)(A). However, if there is a change of circumstances which makes the certificate incorrect, for example, a change of country of residence, then the payee must notify the withholding agent within 30 days of the change. A withholding certificate should so advise the payee of this requirement. 1.1441-1(e)(4)(ii)(D). Once the withholding agent knows or has reason to know of circumstances that change the correctness of the present withholding certificate, the agent may continue the reduced withholding for a grace period of 90 days.

**Question 7. If you determine that the new provisions direct us to secure special certificates of residence and/or to process multiple copies of our withholding certificates, what are your thoughts about requesting a special ruling from the IRS to ease the administrative burden of implementing these particular aspects of the new regulations?**

**Answer:** As stated earlier, we do not understand the regulations to require the Board to use Form 8233 or to obtain certificates of residence.