



OFFICE OF
CHIEF COUNSEL

DEPARTMENT OF THE TREASURY
INTERNAL REVENUE SERVICE
WASHINGTON, D.C. 20224

July 15, 2002

Number: **200235026**
CC:INTL:BR 1
PRESP-165857-01
Release Date: 8/30/2002
UILC: 7701.21-00
871.02-06
86.00-00

INTERNAL REVENUE SERVICE NATIONAL OFFICE TECHNICAL ASSISTANCE

MEMORANDUM FOR MILTON L. FRIEDMAN, APPEALS OFFICER
GENERAL APPEALS AREA 2

RONALD D. PINSKY, ACTING DIRECTOR
SB/SE COMPLIANCE AREA 15

LINDSEY D. STELLWAGEN, SPECIAL COUNSEL
(INTERNATIONAL)
CC:SB:1:WAS:1

FROM: M. Grace Fleeman
Assistant to the Branch Chief CC:INTL:Br1

SUBJECT: Refunds of Tax Withheld on Social Security Benefits Paid to
Certain AGreen Card@Holders

This Technical Assistance memorandum clarifies this office's position with respect to refund claims filed by certain alien individuals living abroad who hold Agreen cards@ issued many years ago by the Immigration and Naturalization Service (AINS@) and who currently receive U.S. social security benefits from which tax is withheld by the Social Security Administration.

ISSUE:

Whether an alien individual who at one time was admitted to the United States as a lawful permanent resident (Agreen card holder@), but would, upon attempted re-entry into the

United States after a prolonged absence, likely be found by the INS to have abandoned his or her status as a lawful permanent resident, is entitled to a refund of U.S. income tax withheld from U.S. social security benefits.

CONCLUSION:

Provided the alien individual's status as a lawful permanent resident has not been revoked or administratively or judicially determined to have been abandoned, the individual may be entitled to a refund of some or all of the tax withheld from his or her social security benefits if (i) the individual files a U.S. income tax return as a resident alien, (ii) the individual refrains from claiming any benefits as a resident of another country under an income tax treaty to which the United States is a party, and (iii) the individual's tax liability as a resident alien is less than the amount that was withheld from the individual's social security benefits.

FACTS:

The taxpayers are alien individuals and residents of a foreign country. At one time they were admitted to the United States as lawful permanent residents (Green card holders), but they have not lived in the United States for many years. When they left the United States, they did not relinquish their green cards. Their green cards have never been revoked or administratively or judicially determined to have been abandoned. However, if they tried to re-enter the United States, the INS would likely make a retroactive determination that they had abandoned their green cards when they left the United States.

The taxpayers are receiving U.S. social security benefits from which tax is being withheld by the Social Security Administration pursuant to section 871(a)(3).¹ They claim that they should be treated as resident aliens for purposes of determining how their benefits are taxed by the United States. If the taxpayers are treated as resident aliens, section 86 will apply and a portion of their benefits (0, 50, or 85 percent, depending on their income level) will be taxed at graduated rates on a net basis. If, on the other hand, the taxpayers are treated as nonresident aliens, section 871(a)(3) will apply and 85 percent of the gross amount of their benefits will be subject to a 30 percent withholding tax. In the case of individuals who have little or no other income, treatment as a resident alien generally reduces the effective tax rate on their social security benefits from 25.5 percent to 0 percent.

LAW AND ANALYSIS:

Section 7701(b)(1)(A) provides, in relevant part, that an alien individual who is lawfully admitted for permanent residence at any time during a calendar year shall be treated as a

¹ Unless otherwise indicated, all references to a section are to sections of the Internal Revenue Code of 1986, as amended (Code).

resident of the United States with respect to that calendar year. Code ' 7701(b)(1)(A)(i). For purposes of section 7701(b), an individual is a lawful permanent resident of the United States at any time if--

(A) such individual has the status of having been lawfully accorded the privilege of residing permanently in the United States as an immigrant in accordance with the immigration laws, and

(B) such status has not been revoked (and has not been administratively or judicially determined to have been abandoned).

Code ' 7701(b)(6). An individual is a nonresident alien if he is neither a citizen of the United States nor a resident of the United States within the meaning of section 7701(b)(1)(A). Code ' 7701(b)(1)(B).

A green card holder may formally abandon his status by filing an INS Form I-407 (Abandonment of Lawful Permanent Resident Status). The INS has advised us that it also is possible that an alien's status as a permanent resident may cease without any formal judicial or administrative procedure. Under the Immigration and Nationality Act, an alien is a permanent resident if the alien has ~~been~~ lawfully accorded the privilege of residing permanently in the United States as an immigrant in accordance with the immigration laws, such status not having changed. Immigration and Nationality Act ' 101(a)(20), 8 U.S.C. ' 1101(a)(20) (emphasis added). The alien's status may change by abandonment. Matter of Huang, 19 I & N Dec. 749 (BIA 1988). Abandonment occurs when the alien leaves the United States for other than a temporary purpose. Id. The intention to abandon permanent residence may be inferred from the length and purpose of the alien's absence, the retention of ties to the United States, and other factors that a given case may present. Id.

The INS has advised us that there may not be a formal determination that an alien has abandoned his permanent residence unless and until the alien tries to return to the United States, claiming to be a permanent resident. Thus, for purposes of the immigration laws, a determination of abandonment may not take place until many years after the actual abandoning act. This reflects the fact that the INS does not need to know the alien's status until he tries to return to the United States.

For tax purposes, however, it is clear that Congress intended an alien to be treated as a lawful permanent resident under section 7701(b)(6) until there has been a formal determination that his status had been abandoned:

The Act defines ~~Lawful permanent resident~~ to mean an individual who has the status of having been lawfully accorded the privilege of residing permanently in the United States as an immigrant in accordance with the immigration laws, if such status has not been revoked or administratively or judicially determined to have been abandoned. Therefore, an alien who comes to the United States so

infrequently that, on scrutiny, he or she is no longer legally entitled to permanent resident status, will be a resident for tax purposes. The purpose for this requirement of revocation or determination is to prevent aliens from attempting to retain an apparent right to enter or remain in the United States while attempting to avoid the tax responsibility that accompanies that right.

Joint Comm. on Taxation, General Explanation of the Revenue Provisions of the Deficit Reduction Act of 1984, 98th Cong., 2d Sess. 463 (1984).

Congress recognized that an individual who would be treated as a resident alien under section 7701(b)(1)(A) might be treated as a nonresident alien under the so-called tie-breaker rules of the income tax treaties to which the United States is a party. The legislative history makes it clear that Congress did not intend for section 7701(b) to override any treaty obligations of the United States:

The conferees do not intend that the conference agreement override treaty obligations of the United States. For example, an alien who is a resident of the United States under the new statutory definition but who is a resident of a treaty partner of the United States (and not a resident of the United States) under a United States income tax treaty will be eligible for the benefits that the treaty extends to residents of the treaty partner.

H.R. Rep. No. 861, 98th Cong., 2d Sess. 967 (1984).

Consistent with the legislative intent, the regulations issued under section 7701(b) allow individuals who would be resident aliens under section 7701(b), but nonresident aliens under an income tax treaty, to claim benefits under the treaty as nonresident aliens. However, if such individuals elect to claim treaty benefits, they will be treated as nonresident aliens for purposes of computing their U.S. tax liability:

Coordination with income tax treaties. **(a) Consistency requirement** **(1) Application.** The application of this section shall be limited to an alien individual who is a dual resident taxpayer pursuant to a provision of a treaty that provides for resolution of conflicting claims of residence by the United States and its treaty partner. A dual resident taxpayer is an individual who is considered a resident of the United States pursuant to the internal laws of the United States and also a resident of a treaty country pursuant to the treaty partner's internal laws. If the alien individual determines that he or she is a resident of the foreign country for treaty purposes, and the alien individual claims a treaty benefit (as a nonresident of the United States) so as to reduce the individual's United States income tax liability with respect to any item of income covered by an applicable tax convention during a taxable year in which the individual was considered a dual resident taxpayer, then that individual shall be treated as a nonresident alien of the United States for

purposes of computing that individual's income tax liability under the provisions of the Internal Revenue Code and the regulations thereunder (including the withholding provisions of section 1441 and the regulations under that section in cases in which the dual resident taxpayer is the recipient of income subject to withholding) with respect to that portion of the taxable year the individual was considered a dual resident taxpayer.

Treas. Reg. ' 301.7701(b)-7(a)(1). A dual resident taxpayer may elect not to claim treaty benefits and to file returns as a resident alien. See Treas. Reg. ' 301.7701(b)-7(e), Ex. 4.

Consistent with the foregoing rules, an alien individual living abroad may be entitled to a refund of some or all of the U.S. tax withheld on social security benefits for a taxable year pursuant to section 871(a)(3) if the individual establishes all of the following:

1. The individual has a green card that has been neither revoked nor administratively or judicially determined to have been abandoned;
2. To the extent required under U.S. law, the individual files a U.S. income tax return for the taxable year as a resident alien and reports his or her worldwide income;
3. The individual has not claimed benefits for the taxable year under an income tax treaty as a nonresident alien; and
4. The individual's tax liability for the taxable year as a resident alien is less than the amount of tax that was withheld from his or her social security benefits.

As in the case of any refund claim, the burden is on the individual to establish that he or she is entitled to a refund. Lewis v. Reynolds, 284 U.S. 281 (1932). The service center may delay payment of the refund while it asks the individual for additional information in support of his or her refund claim.

CASE DEVELOPMENT, HAZARDS AND OTHER CONSIDERATIONS

We have discussed this issue with the Associate Area Counsel in Washington. That office is concerned about the possibility that the Service may be denying refunds improperly in some cases. If an individual establishes that all the criteria set forth above are satisfied, the refund should not be denied. If one of these cases were litigated, the Service would be unable to prevail solely on the grounds that the individual had not lived in the United States for many years and would, upon attempted re-entry to the United States, likely be found by the INS to have abandoned his or her status as a lawful permanent resident. A taxpayer who prevails in one of these cases may be entitled to interest that has accrued with respect to the refund and costs, including attorneys' fees. Code ' ' 6611 and 7430.

If you have any questions, please call (202) 622-3880

M. Grace Fleeman
Assistant to the Branch Chief, Branch 1
Office of the Associate Chief Counsel
(International)