

Section 1441.—Withholding of Tax on Nonresident Aliens

26 CFR 1.1441–6T: Claim of reduced withholding under an income tax treaty (temporary).

T.D. 8977

DEPARTMENT OF THE TREASURY Internal Revenue Service 26 CFR Parts 1 and 301

Taxpayer Identification Number Rule Where Taxpayer Claims Treaty Rate and Is Entitled to an Unexpected Payment

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Final and temporary regulations.

SUMMARY: This document contains temporary regulations that provide additional guidance needed to comply with the withholding rules under section 1441 and conforming changes to the regulations under section 6109. Specifically, these temporary regulations provide rules that facilitate compliance by withholding agents where foreign individuals who are claiming reduced rates of withholding under an income tax treaty receive an unexpected payment from the withholding agent, yet do not possess the required

individual taxpayer identification number. The text of the temporary regulations also serves as the text of the proposed regulations set forth in the cross-referenced notice of proposed rulemaking on this subject (REG-159079-01) on page 493 of this Bulletin.

DATES: *Effective Date:* These temporary regulations are effective January 17, 2002.

Applicability Date: For dates of applicability, see § 1.1441-6T(h)(6).

FOR FURTHER INFORMATION CONTACT: Jonathan A. Sambur (202) 622-3840 (not a toll-free number).

SUPPLEMENTARY INFORMATION:

Background

Payments of U.S. source income to foreign persons create a number of withholding and information reporting obligations for both the payor and the recipient of these payments under the Internal Revenue Code and associated Treasury regulations. Specifically, under section 871(a), nonresident alien individuals are subject to a 30 percent tax on certain items of income they receive from sources within the United States that are not effectively connected with the conduct of a trade or business in the United States. Those items of income include interest, dividends, royalties, compensation, and other fixed or determinable annual or periodical income. The tax liability imposed under section 871(a) on the payment of such items of income is generally collected by way of withholding at the source pursuant to section 1441(a). Withholding agents are generally required to report payments of such income to the IRS on Form 1042-S.

The 30 percent rate of tax can be reduced under an income tax treaty. Under current Treasury regulations, a withholding agent may generally rely on a Form W-8BEN, “*Certificate of Foreign Status of Beneficial Owner for United States Tax Withholding*,” or Form 8233, “*Exemption From Withholding on Compensation for Independent (and Certain Dependent) Personal Services of a Nonresident Alien Individual*,” provided by, or for, the foreign individual certifying

eligibility for a reduced rate of tax under an income tax treaty.

Section 1.1441-1(e)(4)(vii) generally provides that a taxpayer identifying number (TIN) must be furnished on a Form W-8BEN or Form 8233 in order for a foreign individual to obtain the benefit of reduced withholding under an income tax treaty. See § 1.1441-6(b)(2)(ii). Treasury and the IRS have recently become aware, however, of certain unusual cases where an unexpected payment to a nonresident alien individual claiming treaty benefits arises on short notice. In general, a foreign individual receiving such an unexpected payment currently may be unable to obtain a TIN prior to payment. In such a case, unless the foreign individual already has a TIN, the withholding agent would be required to withhold tax at the 30 percent rate, rather than the treaty rate, and the foreign individual would be required to file for a refund in order to obtain the benefits of the income tax treaty.

To alleviate this filing burden on foreign individuals, IRS is putting in place administrative procedures that will allow certain withholding agents, who also are acceptance agents (as defined in § 301.6109-1(d)(3)(iv)) and who make unexpected payments to foreign individuals, to apply for and obtain an individual taxpayer identification number (ITIN) for such individuals on an expedited basis. However, Treasury and IRS recognize that, in certain circumstances, these expedited ITIN procedures will not be sufficient to ensure that foreign individuals receiving an unexpected payment can obtain the benefits of a reduced rate of withholding under an income tax treaty at the time of payment. Accordingly, these temporary regulations will allow, in limited circumstances, withholding agents to rely on a Form W-8BEN or Form 8233 that does not include a TIN for purposes of withholding at the reduced treaty rate.

The proposed rules are published elsewhere in this issue of the Bulletin.

Explanation of Provisions

These temporary regulations amend § 1.1441-1(b)(7) and § 1.1441-6(b)(1) and add new § 1.1441-6T(h) to provide a limited exception to the requirement that a foreign individual provide a TIN to its withholding agent before obtaining a

reduced rate of withholding tax under an income tax treaty. As noted above, under the current regulatory framework, a foreign individual generally is required to put the individual’s TIN on the Form W-8BEN or Form 8233 in order to claim a reduced rate of withholding based upon a tax treaty. If a foreign individual does not have a TIN, a withholding agent who is an acceptance agent, as defined in § 301.6109-1(d)(3)(iv), can aid the foreign individual in obtaining an ITIN.

In order to lessen the administrative burden on foreign individuals receiving unexpected payments, the IRS has decided to permit certain withholding agents to enter into special acceptance agent agreements with the IRS that will allow those withholding agents, in their capacity as acceptance agents, to seek ITINs through an expedited process for these foreign individuals claiming treaty benefits. It is anticipated that any withholding agent who qualifies as an acceptance agent under § 301.6109-1(d)(3)(iv) and who anticipates making unexpected payments will be allowed to enter into such an agreement. However, the IRS intends to allow the use of the expedited process only when an application for an ITIN using the standard process will not generate an ITIN in time for the payment.

These temporary regulations provide that, in limited circumstances, a withholding agent who has entered into such a special acceptance agent agreement may rely on a beneficial owner withholding certificate without regard to the requirement that it include a TIN. Generally, these temporary regulations provide that, in order for a withholding agent to rely on a beneficial owner withholding certificate that does not contain a TIN, the withholding agent must be unable to obtain an ITIN for the foreign individual because the IRS is not issuing ITINs at the time of an unexpected payment to the individual or any time prior to the time of payment when the withholding agent had knowledge of the unexpected payment and the nature of the unexpected payment must be such that it cannot reasonably be delayed until the withholding agent could obtain an ITIN for the foreign individual through the use of the expedited process. The temporary regulations further provide that the IRS must receive the foreign individual’s application for an ITIN on the

first business day following payment. At this time, the IRS intends to issue ITINs through the expedited process from 6 A.M. until 11:30 P.M. E.S.T., except for weekends and holidays. The IRS intends to increase the availability of this expedited process in the future.

Except as provided in these regulations or in § 1.1441-6(c), a foreign individual will continue to be required to provide a TIN on a beneficial owner withholding certificate (Form W-8BEN or Form 8233) in order to obtain the benefit of a reduced rate of withholding under an income tax treaty.

Special Analyses

It has been determined that this Treasury decision is not a significant regulatory action as defined in Executive Order 12866. Therefore, a regulatory assessment is not required. It has also been determined that section 553(b) of the Administrative Procedure Act (5 U.S.C. chapter 5) does not apply to these regulations. These regulations impose no new collection of information on small entities, therefore, a Regulatory Flexibility Analysis under the Regulatory Flexibility Act (5 U.S.C. chapter 6) is not required. Pursuant to section 7805(f) of the Code, these temporary regulations will be submitted to the Chief Counsel for Advocacy of the Small Business Administration for comment on their impact on small business.

Drafting Information

The principal author of these regulations is Jonathan A. Sambur, Office of the Associate Chief Counsel (International). However, other personnel from the IRS and Treasury Department participated in their development.

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Amendments to the Regulations

Accordingly, 26 CFR parts 1 and 301 are amended as follows:

PART 1—INCOME TAXES

Paragraph 1. The authority citation for part 1 continues to read in part as follows:

Authority: 26 U.S.C. 7805 ***

Par. 2. Section 1.1441-1T is added to read as follows:

§ 1.1441-1T Requirement for the deduction and withholding of tax on payments to foreign persons (temporary).

(a) through (b)(7)(i)(C) [Reserved] For further guidance, see § 1.1441-1(a) through (b)(7)(i)(C).

(b)(7)(i)(D) The withholding agent has complied with the provisions of § 1.1441-6(d).

(b)(7)(ii) through (f)(2)(ii) [Reserved] For further guidance, see § 1.1441-1(b)(7)(ii) through (f)(2)(ii).

§ 1.1441-6 [Amended]

Par. 3. In § 1.1441-6, the fifth sentence of paragraph (b)(1) is amended by adding the language “and § 1.1441-6T(h)” immediately following the language “(c)(1) of this section”.

Par. 4. Section 1.1441-6T is added to read as follows:

§ 1.1441-6T Claim of reduced withholding under an income tax treaty (temporary).

(a) through (g) [Reserved] For further guidance, see § 1.1441-6(a) through (g).

(h) *Special taxpayer identifying number rule for certain foreign individuals claiming treaty benefits*—(1) *General rule.* Except as provided in § 1.1441-6(c) or paragraph (h)(2) of this section, for purposes of § 1.1441-6(b)(1), a withholding agent may not rely on a beneficial owner withholding certificate, described in § 1.1441-6(b)(1), that does not include the beneficial owner’s taxpayer identifying number (TIN).

(2) *Special rule.* For purposes of satisfying the TIN requirement of § 1.1441-6(b)(1), a withholding agent may rely on a beneficial owner withholding certificate, described in such paragraph, without regard to the requirement that the withholding certificate include the beneficial owner’s TIN, if—

(i) A withholding agent, who is also an acceptance agent, as defined in § 301.6109-1(d)(3)(iv) of this chapter (hereafter the payor), has entered into an acceptance agreement that permits the acceptance agent to request an individual taxpayer identification number (ITIN) on an expedited basis because of the circum-

stances of payment or unexpected nature of payments required to be made by the payor;

(ii) The payor was required to make an unexpected payment to the beneficial owner who is a foreign individual;

(iii) An ITIN for the beneficial owner cannot be received by the payor from the Internal Revenue Service (IRS), Philadelphia Service Center, because the IRS, Philadelphia Service Center is not issuing ITINs at the time of payment or any time prior to the time of payment when the payor has knowledge of the unexpected payment;

(iv) The unexpected payment to the beneficial owner could not be reasonably delayed to permit the payor to obtain an ITIN for the beneficial owner on an expedited basis; and

(v) The payor satisfies the provisions of paragraph (h)(3) of this section.

(3) *Requirement that an ITIN be requested during the first business day following payment.* The payor must submit a beneficial owner payee application for an ITIN (Form W-7) that complies with the requirements of § 301.6109-1(d)(3)(ii) of this chapter, and also the certification described in § 301.6109-1(d)(3)(iv)(A)(4) of this chapter, to the IRS, Philadelphia Service Center, during the first business day after payment is made.

(4) *Definition of unexpected payment.* For purposes of this section, an *unexpected payment* is a payment that, because of the nature of the payment or the circumstances in which it is made, could not reasonably have been anticipated by the payor or beneficial owner during a time when the payor or beneficial owner could obtain an ITIN from the IRS. For purposes of this paragraph (h)(4), a payor or beneficial owner will not lack the requisite knowledge of the forthcoming payment solely because the amount of the payment is not fixed.

(5) *Examples.* The rules of this paragraph (h) are illustrated by the following examples:

Example 1. G, a citizen and resident of Country Y, a country with which the U.S. has an income tax treaty that exempts U.S. source gambling winnings from U.S. tax, is visiting the U.S. for the first time. During his visit, G visits Casino B, a casino that has entered into a special acceptance agent agreement with the IRS that permits Casino B to request an ITIN on an expedited basis. During that visit, on a Sunday, G wins \$5000 in slot machine play at

Casino B and requests immediate payment from Casino B. ITINs are not available from the IRS on Sunday and would not again be available until Monday. G, who does not have an individual taxpayer identification number, furnishes a beneficial owner withholding certificate, described in § 1.1441-1(e)(2), to the Casino upon winning at the slot machine. The beneficial owner withholding certificate represents that G is a resident of Country Y (within the meaning of the U.S.—Y tax treaty) and meets all applicable requirements for claiming benefits under the U.S.—Y tax treaty. The beneficial owner withholding certificate does not, however, contain an ITIN for G. On the following Monday, Casino B faxes a completed Form W-7, including the required certification, for G, to the IRS, Philadelphia Service Center for an expedited ITIN. Pursuant to § 1.1441-6(b) and paragraph (h)(2) of this section, absent actual knowledge or reason to know otherwise, Casino B, may rely on the documentation furnished by G at the time of payment and pay the \$5000 to G without withholding U.S. tax based on the treaty exemption.

Example 2. The facts are the same as *Example 1*, except G visits Casino B on Monday. G requests payment Monday afternoon. In order to pay the winnings to G without withholding the 30 percent tax, Casino B must apply for and obtain an ITIN for G because an expedited ITIN is available from the IRS at the time of the \$5000 payment to G.

Example 3. The facts are the same as *Example 1*, except G requests payment fifteen minutes before the time when the IRS begins issuing ITINs. Under these facts, it would be reasonable for Casino B to delay payment to G. Therefore, Casino B must apply for and obtain an ITIN for G if G wishes to claim an exemption from U.S. withholding tax under the U.S.—Y tax treaty at the time of payment.

Example 4. P, a citizen and resident of Country Z, is a lawyer and a well-known expert on real estate transactions. P is scheduled to attend a three-day seminar on complex real estate transactions, as a participant, at University U, a U.S. university, beginning on a Saturday and ending on the following Monday, which is a holiday. University U has entered into a special acceptance agent agreement with the IRS that permits University U to request an ITIN on an expedited basis. Country Z is a country with which the U.S. has an income tax treaty that exempts certain income earned from the performance of independent personal services from U.S. tax. It is P's first visit to the U.S. On Saturday, prior to the start of the seminar, Professor Q, one of the lecturers at the seminar, cancels his lecture. That same day the Dean of University U offers P \$5000, to replace Professor Q at the seminar, payable at the conclusion of the seminar on Monday. P agrees. P gives her lecture Sunday afternoon. ITINs are not available from the IRS on that Saturday, Sunday, or Monday. After the seminar ends on Monday, P, who does not have an ITIN, requests payment for her teaching. P furnishes a beneficial owner withholding certificate, described in § 1.1441-1(e)(2), to University U that represents that P is a resident of Country Z (within the meaning of the U.S.—Z tax treaty) and meets all applicable requirements for claiming benefits under the U.S.—Z tax treaty. The beneficial owner withholding certificate does not, however,

contain an ITIN for P. On Tuesday, University U faxes a completed Form W-7, including the required certification, for P, to the IRS, Philadelphia Service Center, for an expedited ITIN. Pursuant to § 1.1441-6(b) and paragraph (h)(2) of this section, absent actual knowledge or reason to know otherwise, University U may rely on the documentation furnished by P and pay \$5000 to P without withholding U.S. tax based on the treaty exemption.

(6) *Effective date.* This paragraph (h) applies to payments made after December 31, 2001.

PART 301—PROCEDURE AND ADMINISTRATION

Par. 5. The authority for part 301 continues to read in part as follows:

Authority: 26 U.S.C. 7805 ***

Par. 6. In § 301.6109-1, paragraph (g)(3) is revised to read as follows:

§ 301.6109-1 *Identifying numbers.*

* * * * *

(g) * * *

(3) [Reserved] For further guidance, see § 301.6109-1T(g)(3).

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Par. 7. Section 301.6109-1T is added to read as follows:

§ 301.6109-1T *Identifying numbers (temporary).*

(a) through (g)(2) [Reserved] For further guidance, see §§ 301.6109-1(a) through (g)(2).

(g)(3) *Waiver of prohibition to disclose taxpayer information when acceptance agent acts.* As part of its request for an IRS individual taxpayer identification number or submission of proof of foreign status with respect to any taxpayer identifying number, where the foreign person acts through an acceptance agent, the foreign person will agree to waive the limitations in section 6103 regarding the disclosure of certain taxpayer information. However, the waiver will apply only for purposes of permitting the Internal Revenue Service and the acceptance agent to communicate with each other regarding matters related to the assignment of a taxpayer identifying number, including disclosure of any taxpayer identifying number previously issued to the foreign person, and change of foreign status. This

paragraph (g)(3) applies to payments made after December 31, 2001.

(h) through (j)(2)(iii) For further guidance, see § 301.6109(h) through (j)(2)(iii).

Robert E. Wenzel,
*Deputy Commissioner of
Internal Revenue.*

Approved December 21, 2001.

Mark Weinberger,
Assistant Secretary of the Treasury.

(Filed by the Office of the Federal Register on January 16, 2002, 8:45 a.m., and published in the issue of the Federal Register for January 17, 2002, 67 F.R. 2327)