



Latest Developments in Nonresident Alien Taxation

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Agenda

What's New at IRS

Effects of TCJA on NRA Withholding

Forms Update

ITIN Update

Miscellaneous Items

What's New at IRS – Recent Proposed Regulations

See REG-102951-16, published in the 5/31/18 Federal Register

- New regs would remove the non-aggregation rule in Reg. § 301.6011-2(c)(1)(iii)
- Prop Reg § 301.6011-2(b)(4) would require any person required to file 250 or more information returns *in the aggregate* of all types of information returns covered by Reg. § 301.6011-2(b) to do so electronically
- Prop Reg § 301.6011-2(b)(5) would require such person to also submit any amendments of covered information returns electronically
- Would apply to information returns required to be filed on or after January 1, 2019 (Tax Year 2018 reporting forms).
- Ability to request hardship waiver would remain intact
- Comments/public hearing requests must be received by July 30, 2018
- Concerns due to ongoing changes to electronic filing formats since advent of FATCA

What's New at IRS – Recent Regulations

New regulations, Treasury Decision 9808, January 2017 include:

- New rules for electronic signatures on Forms W-8
 - Make sure meets all requirements detailed in Reg. sec. 1.1441-1T(e)(4)(i)(B) including the referenced paragraph (e)(4)(iv)(B)(3)(ii). Still must truly be electronically signed
- Allowance for electronic system use to collect Form 8233
 - § 1.1441-1T(e)(4)(iv)(C); not same as W-8 rules!
- Presumption rule changes
- Clarification of due diligence requirements with respect to treaty claims
- Affirmation of U.S. (not foreign) TIN requirement on Form 8233
- Extended phase-in period for new versions of withholding certificates – can accept prior version
 - “...until the later of six full months after the revision date shown on the updated withholding certificate or the end of the calendar year the updated withholding certificate is issued”

What's New at IRS – Recent Regulations

Regarding presumptions, in many cases the requirement is to presume an undocumented payee is a U.S. person. However, under Reg. sec. 1.1441-1(b)(3)iii(E), a withholding agent can presume for purposes of payment for personal services that an individual is a non-U.S. person if all the following are true:

- (1) The payee of the income is an individual;
- (2) The payer does not know or have reason to know that the payee is a U.S. citizen or a U.S tax resident;
- (3) The payer does not know or have reason to know that the income is (or may be) effectively connected with the conduct of a trade or business in the United States (ECI); and
- (4) All of the services for which the payment is made were performed by the payee outside of the United States.

What's New at IRS – New “Compliance Campaigns”

As part of move toward issue-based examinations, IRS has announced several series of compliance campaigns since November, 2017. Of particular interest:

Forms 1042/1042-S Compliance

- Focusing on proper withholding, timely deposits, and 1042-S reporting

Nonresident Alien Tax Treaty Exemptions

- Focusing on improper tax treaty claims, inaccurate or incorrect forms

Nonresident Alien Schedule A and Other Deductions

NRA Tax Credits

Form 1120-F Chapter 3 and Chapter 4 Withholding Campaign

- Focusing on verification of withholding credits, information returns (i.e. 1042-S) filed by withholding agent

What's New at IRS – Acceptance Agents

IRS still seeking more applicants to be acceptance agents to support ITIN applications/renewals

- Certified acceptance agents can now authenticate passport, birth certificate for dependents
- See <https://www.irs.gov/individuals/new-itin-acceptance-agent-program-changes>

New Form W-7(COA) issued August 2017

- <https://www.irs.gov/pub/irs-pdf/fw7coa.pdf>

Updated Acceptance Agent application, Form 13551, issued September 2017

- <https://www.irs.gov/pub/irs-pdf/f13551.pdf>

Revised Acceptance Agents' Guide for ITINs, Pub. 4520, issued January 2018

- <https://www.irs.gov/pub/irs-pdf/f13551.pdf>

What's New at IRS – NRSA Private Letter Ruling Revoked

Private Letter Ruling (PLR) 201705001 revokes, replaces PLR 200607017

- Issued 10/24/16
- New PLR holds that compensatory non-NRSA (National Research Service Award) grants are in fact wages and subject to social security tax
 - “The Service has recently determined that Private Letter Ruling 200607017 is not in accord with the current views of the Service.”
- <https://www.irs.gov/pub/irs-wd/201705001.pdf>

What's New at IRS – Online FAQs Are Not Legal Authority

Director of Examination – Field and Campus Policy – SB/SE warns examiners on IRS FAQs in IRS Interim Guidance Memorandum SBSE 04-0517-0030:

“The purpose of this memorandum is to issue guidance to remind examiners that frequently asked questions (FAQs) and other items posted on IRS.gov that have not been published in the Internal Revenue Bulletin are not legal authority. The FAQs and other items should not be used to sustain a position unless the items (e.g., FAQs) explicitly indicate otherwise or the IRS indicates otherwise by press release or by notice or announcement published in the Bulletin.”

- Not legal authority unless published in Internal Revenue Bulletin
- The caution was incorporated into Internal Revenue Manual (IRM) at Subsection 4.10.7.2.4 as of January 10, 2018.

What's New at IRS – Impact of TCJA on NRA Withholding

New W-4 (affects everyone)

- No more additional withholding allowances for qualifying taxpayers from Canada, Mexico, South Korea, India, Northern Marianas, American Samoa
 - But Notice 1392 was never updated to reflect changes – 2013 version is outdated

Another new W-4 with more changes expected for 2019

- Will hopefully include more specific guidance for NRAs and fine-tune actual withholding

Revenue Procedure 88-24 essentially rendered unusable

- Due to elimination of miscellaneous itemized deductions subject to 2% floor

Backup withholding rate now 24% (still lower than statutory 30% NRA rate)

TCJA Effects on NRA Withholding – Phantom Gross-Up

2017		2018	
Amount to Add to Nonresident Alien Employee's Wages for Calculating Income Tax Withholding Only		Amount to Add to Nonresident Alien Employee's Wages for Calculating Income Tax Withholding Only	
<u>Payroll Period</u>	<u>Add Additional</u>	<u>Payroll Period</u>	<u>Add Additional</u>
Weekly	\$ 44.20	Weekly	\$ 151.00
Biweekly	88.50	Biweekly	301.90
Semimonthly	95.80	Semimonthly	327.10
Monthly	191.70	Monthly	654.20
Quarterly	575.00	Quarterly	1,962.50
Semiannually	1,150.00	Semiannually	3,925.00
Annually	2,300.00	Annually	7,850.00
Daily or Miscellaneous (each day of the payroll period)	8.80	Daily or Miscellaneous (each day of the payroll period)	30.20

Forms

All W-8 series forms and instructions were updated during 2017, new solicitations must use 2017 versions:

- W-8BEN
- W-8BEN-E
- W-8IMY
- W-8ECI
- W-8EXP

Form W-8BEN: Higher level of detail required on line 10 than before

- Article *and* Paragraph number
- Additional conditions of Article and Paragraph must be explained

New *Instructions for the Requester of Forms W-8BEN, W-8BEN-E, W-8ECI, W-8EXP, and W-8IMY* issued April 2018

Forms

Form 8233 instructions updated

- New fax number: 267-466-1365
- Added e-fax number: 877-824-9781 (for use from within the U.S. only)
- Adds reference to potentially-expiring ITINs

Forms

Form 1042-S, 2017 to 2018 updates

- Boxes 9 and 11 switched
 - 9 is now for overwithheld tax repaid to recipient under adjustment procedures
 - 11 is now for tax paid (not withheld) by withholding agent
- Clarifying language added to boxes 7b (tax not deposited) and 10 (total withholding credit)
- Instructions also revised, expanded information and samples

Forms

Form 1042-S, “Big Four” 2016 to 2017 updates

New “Unique Form Identifier” (UFI) box

New “Amendment No.” box

“Pro-rata reporting” checkbox moved to numbered box 15

Income code 23 is now “Other Income”

- Used to be 54

*Maximum penalty for late filing of correct Form 1042-S increased from \$260 to \$270 by Revenue Procedure 2017-58 (effective for TY 2018 forms filed in 2019)

ITIN Update

ITIN expiration continues (pursuant to PATH Act)

- Lagging behind schedule proscribed under PATH

All ITINs with middle digits of 70, 71, 72, or 80 supposedly expired January 1, 2018

- Started sending CP 48 Notices summer 2017

Renewal processing for numbers expiring in January 2018 began in June 2017

- Renewal experiences to share?

ITIN Update

If not already expired due to non-use, rolling expiration schedule is as follows:

- ITINs issued before 2008 expired January 1, 2017
- ITINs issued in 2008 remained in effect until January 1, 2018
- ITINs issued in 2009 or 2010 will remain in effect until January 1, 2019 (should be renewing these now!)
- ITINs issued in 2011 or 2012 will remain in effect until January 1, 2020

Miscellaneous – Tax Court Cases

Ye v. Commissioner

- F-1 2001 – mid-2006
- Tenure-track teaching/research position accepted, H-1B approved mid-2006
- Later applied to adjust status to LPR
- IRS denied teacher/researcher claim, Tax Court upheld; stay not temporary

Klubo-Gwiezdzinska v. Commissioner

- Hospital “research fellow” denied both Student/ Trainee and Teacher/Researcher treaty benefits
- Was not “recipient of grant, allowance, or award”
- Hospital not a “recognized educational institution”
 - Read treaties carefully
 - Tax treatment must be consistent with underlying documentation, facts, circumstances

Miscellaneous – Tax Court Cases

Kiselev v. Commissioner

- Entered as J-2 August 2005, changed to F-1 December 2008
- IRS denied Russia student fellowship benefits, said income was salary
- Tax Court ruled against IRS, contrary to other documented situations
 - Contradicts historical requirement to re-establish residency
 - Goes against historical definition of “grant, allowance, or award”
 - Also contrary to concept that grant made to an organization loses its character as such if paid to an individual in return for services
 - Implies that pending LPR application does not negate “temporarily present”

Questions?