

# **Section 1441.—Withholding of Tax on Nonresident Aliens**

*26 CFR 1.1441-1: Requirement for the deduction and withholding of tax on payments to foreign persons.*

**T.D. 9023**

## **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 regulations and removal of temporary regulations.

**SUMMARY:** This document contains final regulations that provide additional guid-

ance needed to comply with the withholding rules under section 1441 and conforming changes to the regulations under section 6109. Specifically, these final 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 and do not possess the required individual taxpayer identification number.

**DATES:** *Effective date:* These regulations are effective November 22, 2002.

*Applicability date:* For dates of applicability, see §§ 1.1441-6(h)(1) and 301.6109-1(g)(3).

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

#### **SUPPLEMENTARY INFORMATION:**

##### **Background**

On January 17, 2002, the IRS and Treasury published a notice of proposed rulemaking by cross reference to temporary regulations (REG-159079-01, 2002-6 I.R.B. 493) in the **Federal Register** (67 FR 2387), and temporary regulations in T.D. 8977, 2002-6 I.R.B. 463 (67 FR 2327), under section 1441 and conforming changes to the regulations under section 6109 of the Internal Revenue Code (Code). Written comments and requests for a public hearing were solicited. Several comments were received and are discussed below. No public hearing was requested. After consideration of all the comments, the proposed and temporary regulations under sections 1441 and 6109 are adopted as final regulations with no changes.

##### **Summary of Public Comments and Explanation of Revisions**

###### **A. § 1.1441-6(c) Exemption from Requirement to Furnish a Taxpayer Identifying Number**

Section 1.1441-6(c) provides an exemption from the requirement to furnish a taxpayer identifying number (TIN) for certain types of income.

One commentator suggested that a foreign individual receiving a distribution of a death benefit from a U.S. retirement plan

should be allowed to claim treaty benefits without obtaining an individual taxpayer identification number (ITIN).

This comment is not directly related to these proposed regulations. Exemptions from the requirement to furnish a TIN were addressed in final regulations promulgated under section 1441 (T.D. 8734, 1997-2 C.B. 109). The IRS and Treasury do not believe that there has been any change in circumstances that warrants a change of the rules contained in § 1.1441-6(c).

###### **B. § 1.1441-1(e)(4)(ii)(B)(1) Indefinite Validity of a Withholding Certificate Provided Certain Conditions are Met**

Under § 1.1441-1(e)(4)(ii)(A), a Form W-8BEN, *Certificate of Foreign Status of Beneficial Owner for United States Tax Withholding*, generally will expire either at the end of the third calendar year following the date the certificate was signed or when a change in circumstances occurs that makes any information on the Form W-8BEN incorrect, whichever is earlier. Section 1.1441-1(e)(4)(ii)(B)(1) permits a Form W-8BEN to remain valid indefinitely, provided the withholding agent reports at least one payment annually and the certificate contains a TIN.

One commentator requested that a Form W-8BEN remain valid indefinitely without regard to the requirement that it contain a TIN. The commentator also proposed that a Form W-8BEN remain valid indefinitely, even if the withholding agent reports no annual payments to the beneficial owner.

This comment is not directly related to these proposed regulations. The period of validity of a beneficial owner's withholding certificate was addressed in final regulations promulgated under section 1441 (T.D. 8734). The IRS and Treasury do not believe that there has been any change in circumstances that warrants a change of the rules contained in § 1.1441-1(e)(4)(ii)(B)(1). The IRS and Treasury continue to believe that it is important for taxpayers to recertify status periodically when no payments are reported because withholding agents would be unaware of any change in the taxpayer's status.

###### **C. § 1.1441-6(h)(2)(i) Special Acceptance Agent Requirement**

The proposed regulations provide that a withholding agent, who is also an accep-

tance agent, may enter into an agreement with the IRS that permits the acceptance agent to request an ITIN on an expedited basis because of the circumstances of payment or the unexpected nature of payments required to be made by the payor (special acceptance agent agreement). One commentator requested that certifying acceptance agents, as described in Rev. Proc. 96-52 (1996-2 C.B. 372), be permitted to utilize the expedited process, described in § 1.1441-6(h)(2), without entering into a special acceptance agent agreement with the IRS.

The commentator's suggestion was not adopted. The purpose of entering into a special acceptance agent agreement with the IRS is to provide notice to the IRS that the acceptance agent is seeking to utilize the expedited process and to have the acceptance agent agree to follow the special procedures necessary to complete that process. In contrast, a certifying acceptance agent agreement permits the acceptance agent to review and certify the applicant's ability to qualify for an ITIN. Because the purpose and scope of a certifying acceptance agent agreement differ from the purpose and scope of the special acceptance agent agreement, a separate agreement permitting the use of the expedited process must be entered into between the acceptance agent and the IRS.

#### D. § 1.1441-6(h)(2)(ii) Unexpected Payment Requirement

In order to lessen the administrative burden on foreign individuals receiving unexpected payments, the proposed regulations provide a limited exception to the requirement that a foreign individual provide a TIN to the withholding agent before obtaining a reduced rate of withholding tax under an income tax treaty. One commentator requested that the IRS should eliminate the unexpected payment requirement of § 1.1441-6(h)(2)(ii) and permit the use of the expedited process by any foreign individual regardless of whether the payor or payee knows of the impending payment.

The commentator's suggestion was not adopted. The expedited process has been initiated in limited circumstances in order to lessen the administrative burden on foreign individuals receiving unexpected payments. Although the IRS is continuing to consider increasing the availability of this expedited process in the future, the par-

ticular administrative issue addressed in these regulations generally does not exist with respect to expected payments. Thus, there is not a compelling reason to extend the expedited process at this time.

#### 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, the proposed regulations preceding these regulations were submitted to the Chief Counsel for Advocacy of the Small Business Administration for comment on its 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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#### Adoption of 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 1.1441-0 is amended by redesignating the entries for paragraph (g) of § 1.1441-6 as paragraph (h) and revising the entry for newly designated paragraph (h), and adding new entries for paragraphs (g) through (g)(5) to read as follows:

#### § 1.1441-0 Outline of regulations provisions for section 1441.

(g) Special taxpayer identifying number rule for certain foreign individuals claiming treaty benefits.

(1) General rule.

(2) Special rule.

(3) Requirement that an ITIN be requested during the first business day following payment.

(4) Definition of unexpected payment.

(5) Examples.

(h) Effective dates.

\* \* \* \*

Par. 3. Section 1.1441-1 is amended by adding paragraph (b)(7)(i)(D) to read as follows:

#### § 1.1441-1 Requirement for the deduction and withholding of tax on payments to foreign persons.

\* \* \* \*

(b) \* \* \*

(7) \* \* \*

(i) \* \* \*

(D) The withholding agent has complied with the provisions of § 1.1441-6(c) or (g).

\* \* \* \*

#### § 1.1441-1T [Removed]

Par. 4. Section 1.1441-1T is removed.

Par. 5. Section 1.1441-6 is amended as follows:

1. The fifth sentence of paragraph (b)(1) is amended by removing the language “and § 1.1441-6T(h)” and adding “and § 1.1441-6(g)” in its place.

2. Paragraph (g) is redesignated as paragraph (h) and new paragraph (g) is added.

3. Newly designated paragraph (h) section heading is revised.

4. Newly designated paragraph (h)(1) is revised.

5. Newly designated paragraph (h)(2) is amended by removing the language “(g)(2)” and adding “(h)(2)” in its place each place it appears in the third and fourth sentences.

The addition and revisions read as follows:

#### § 1.1441-6 Claim of reduced withholding under an income tax treaty.

\* \* \* \*

(g) Special taxpayer identifying number rule for certain foreign individuals claiming treaty benefits—(1) General rule. Except as provided in paragraph (c) or (g)(2) of this section, for purposes of para-

graph (b)(1) of this section, a withholding agent may not rely on a beneficial owner withholding certificate, described in paragraph (b)(1) of this section, that does not include the beneficial owner's taxpayer identifying number (TIN).

(2) *Special rule.* For purposes of satisfying the TIN requirement of paragraph (b)(1) of this section, 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 (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 circumstances 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) because the IRS 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 (g)(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, *Application for IRS Individual Taxpayer Identification Number*) 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 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 (g)(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 (g) are illustrated by the following examples:

*Example 1.* G, a citizen and resident of Country Y, a country with which the United States has an income tax treaty that exempts U.S. source gambling winnings from U.S. tax, is visiting the United States 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 for an expedited ITIN. Pursuant to paragraph (b) and (g)(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 United States has an income tax treaty that exempts certain income earned from the performance of in-

dependent personal services from U.S. tax. It is P's first visit to the United States. 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 for an expedited ITIN. Pursuant to paragraph (b) and (g)(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.

(h) *Effective dates—(1) General rule.* This section applies to payments made after December 31, 2000, except for paragraph (g) of this section which applies to payments made after December 31, 2001.

\* \* \* \* \*

## Section 1.1441–6T [Removed]

Par. 6. Section 1.1441–6T is removed.

## PART 301—PROCEDURE AND ADMINISTRATION

Par. 7. The authority for part 301 continues to read in part as follows:

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

Par. 8. In § 301.6109–1, paragraph (g)(3) is revised to read as follows:

§ 301.6109–1 *Identifying numbers.*

\* \* \* \* \*

(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 assign-

ment 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.

\* \* \* \* \*

## **§ 301.6109–1T [Removed]**

Par. 9. Section 301.6109–1T is removed.

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

Approved November 13, 2002.

Pamela F. Olson,  
*Assistant Secretary of the Treasury.*

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