Deloitte.

Deloitte Tax LLP | 23 January 2023



Withholding and documentation requirements in final regulations under section 897(l)

Global Information Reporting

On December 29, 2022, the IRS and the Department of the Treasury published final regulations under section 897(l) (the exemption from US tax on gains from US real property interests held by qualified pension funds) including associated provisions that refer to withholding under sections 1445 and 1446 on foreign partnerships held by qualified holders, documentation requirements under section 1445 for qualified holders, as well as coordination rules between section 1445 and sections 1441 and 1442. (For a summary of the final regulations, see our related article on Deloitte tax@hand.)

The final regulations provide that a qualified holder may certify its status as a withholding qualified holder that is not treated as a foreign person for purposes of withholding under section 1445 (and section 1446, as relevant).

The final regulations also allow a foreign partnership, all of the interests of which are held by qualified holders (qualified pension funds (QFPFs) and qualified controlled entities (QCEs)), including through one or more partnerships, to certify that it is a withholding qualified holder (i.e., non-foreign person) for these same purposes. Accordingly, the final regulations clarify that to the extent any nonqualified holders hold interests in a foreign partnership, such a foreign partnership does not qualify as a withholding qualified holder. However, the final regulations provide that qualified holders who hold interests in USRPIs through a foreign partnership that is not a withholding qualified holder would still be eligible for the section 897(l) exemption on their distributive share of FIRPTA gains.

A withholding qualified holder may submit a certification of non-foreign status to establish withholding qualified holder status for purposes of section 1445(a). The requirements of this certification are amended in the final regulations to require the transferor to state that it is not treated as a foreign person because it is a withholding qualified holder, and to permit the transferor to provide its foreign TIN if it does not have a US TIN. The final regulations also clarify that a Form W-8EXP is a type of certification of non-foreign status for these purposes and is therefore subject to the general rules on certifications of non-foreign status, such as the period for retaining the certification and the rules on liability of agents.

The IRS intends to update the Form W-8EXP. Once the revised Form W-8EXP is released, a withholding qualified holder may certify its non-foreign status with either a certification of non-foreign status (but not a Form W-9) or a Form W-8EXP. The final regulations provide similar rules for certifications of non-foreign status that establish withholding qualified holder status for purposes of section 1445(e) withholding.

Finally, regarding the coordination of section 1445 and sections 1441 and 1442, the proposed regulations had stated that distributions made by a United States real property holding corporation (USRPHC) or qualified investment entity (QIE) to a qualified holder were not subject to the coordination rules under Treas. Reg. § 1.1441-3(c)(4) and were instead subject only to the requirements of section 1441. The final regulations, however, amend the coordination rules to clarify that withholding qualified holders are not subject to section 1445 on distributions from USRPHCs that are not treated as dividends and on distributions from REITs or other QIEs that are capital gain dividends that are treated as gain attributable to the sale or exchange of USRPIs. However, dividends from USRPHCs and dividends from REITs or other QIEs that are not capital gain dividends continue to be subject to withholding under section 1441. Further, the final regulations also clarified that a USRPHC (other than a REIT or other QIE) satisfies its obligations under sections 1441

and 1445 by following either the rule that allows withholding only on section 1441 (Treas. Reg. § 1.1441–3(c)(4)(i)(A)) or the rule that allows withholding under both sections 1441 and 1445 (Treas. Reg. § 1.1441–3(c)(4)(i)(B)), but a USRPHC that is a REIT or other QIE must follow the special rule for coordination with REIT/QIE withholding in Treas. Reg. § 1.1441–3(c)(4)(i)(C).

The final regulations also clarify that, to the extent a capital gain dividend from a REIT or other QIE is excluded from withholding under section 1445 because it is made with respect to stock that is regularly traded on an established securities market in the US to an individual or corporation that did not own more than 5% of the stock, withholding will apply under section 1441.

For questions, please consult with the listed contacts below.

Washington National Tax GIR Practice

Susan Segar
Managing Director
Deloitte Tax LLP
+1 703 885 6328

Jonathan Cutler
Senior Manager
Deloitte Tax LLP
+1 704 887 1576

Americas

John Rieger
Partner
Global GIR Leader
Deloitte Tax LLP
+1 212 436 6934

David Charlton
Principal
US GIR Leader
Deloitte Tax LLP
+1 617 437 2118

Denise Hintzke
Managing Director
Global GIR Market Leader
Deloitte Tax LLP
+1 212 436 4792

Duncan Brenan
Managing Director
GIR
Deloitte Tax LLP
+1.571.766.7552

Andrea Garcia Castelao
Principal
GIR
Deloitte Tax LLP
+1 212 436 3785

Rona Hummel
Managing Director
GIR
Deloitte Tax LLP
+1 212 653 7859

Paddy Killimangalam
Managing Director
GIR
Deloitte Tax India Private Ltd
+1 678 299 0119

Kayla Laidlaw
FATCA/CRS Director
Caribbean and Bermuda
Deloitte Ltd
+1 284 394 2814

Peter Larsen
Principal
GIR
Deloitte Tax LLP
+1 415 783 4575

Anthony Martirano
Managing Director
GIR
Deloitte Tax LLP
+1 973 602 6986

Jeanne Murphy
Managing Director
GIR PMO
Deloitte Tax LLP
+1 212 436 5910

Luke Nagle
FATCA/CRS Partner
Canada
Deloitte LLP
+1 416 354 1495

Tim Rappoccio
Managing Director
GIR
Deloitte Tax LLP
+1 203 423 4452

Robert Schlock
Managing Director
GIR
Deloitte Tax LLP
+1 212 436 3541

Susan Schultz
Managing Director
Operations Leader
GIR Global Delivery Center
Deloitte Tax LLP
+1 612 397 4604

Kristen Starling
Managing Director

Sagun Vijayananda
Partner

GIR
Deloitte Tax LLP
+1 212 436 4281

GIR
Deloitte Tax LLP
+1 212 436 7329

Asia-Pacific

Troy Andrews
FATCA/CRS Partner
New Zealand
Deloitte
+64 93030729

Candy Chan
FATCA/CRS Partner
China / Hong Kong
Deloitte Advisory (HK) Ltd
+852 2852 5886

Edmond Lam
FATCA/CRS Director
China / Hong Kong
Deloitte Advisory (HK) Ltd
+852 2238 7564

Alison Noble
FATCA/CRS Partner
Australia
Deloitte Services Pty Ltd
+61 3 9671 6716

Terence Tan
FATCA/CRS Partner
Australia
Deloitte Tax Services Pty Ltd
+61 3 9671 5782

Michael Velten
FATCA/CRS Partner
Singapore
Deloitte & Touche LLP
+65 6531 5039

Europe, Middle East & Africa

Brandi Caruso
Tax Transparency Partner
Switzerland/Liechtenstein
Deloitte AG
+41 58 279 6397

Eric Centi
FATCA/CRS Partner
Luxembourg
Deloitte Tax & Consulting
+352 45145 2162

Owen Gibbs
UK FATCA/CRS/DAC Partner
United Kingdom
Deloitte LLP
+44 20 7007 4819

Michael Grebe
FATCA/CRS Director
Switzerland/Liechtenstein
Deloitte AG
+41 58 279 6248

Alex Law
FATCA/CRS Partner
United Arab Emirates
Deloitte LLP
+971 4 506 4700

Jason McGarvey
Global GIR Technology Leader
United Kingdom
Deloitte LLP
+44 20 7303 0412

Karim Ousta
FATCA/CRS Leader
United Arab Emirates
Deloitte LLP
+971 4 5064700

Karim Schubiger
FATCA/CRS Director
Switzerland
Deloitte AG
+41 58 279 9202

This alert contains general information only and Deloitte is not, by means of this alert, rendering accounting, business, financial, investment, legal, tax, or other professional advice or services. This alert is not a substitute for such professional advice or services, nor should it be used as a basis for any decision or action that may affect your business. Before making any decision or taking any action that may affect your business, you should consult a qualified professional advisor. Deloitte shall not be responsible for any loss sustained by any person who relies on this alert.

As used in this document, "Deloitte" means Deloitte Tax LLP, a subsidiary of Deloitte LLP. Please see www.deloitte.com/us/about for a detailed description of our legal structure. Certain services may not be available to attest clients under the rules and regulations of public accounting.

30 Rockefeller Plaza
New York, NY 10112-0015
United States

To no longer receive emails about this topic please send a return email to the sender with the word "Unsubscribe" in the subject line.

Copyright © 2023 Deloitte Development LLC. All rights reserved.