

**Office of Chief Counsel
Internal Revenue Service
Memorandum**

Number: **201212008**

Release Date: 3/23/2012

CC:INTL:B01:CAEdson

POSTN-146248-11

UILC: 9114.03-20

date: February 02, 2012

to: Michael Richard
Manager
(International Individual Compliance Examination Group 2126)

from: M Grace Fleeman
Senior Technical Reviewer, Branch 1
(International)

subject: Taxation of Green Card Holders at the Italian Embassy

This Chief Counsel Advice responds to your request for assistance. This advice may not be used or cited as precedent.

ISSUES

Whether the compensation of lawful permanent residents of the United States ("green card holders") working for the Italian government in the United States is exempt under:

- 1) the 1878 U.S.-Italy consular convention?
- 2) the 1984 U.S.-Italy income tax treaty?
- 3) section 893 of the Internal Revenue Code ("I.R.C.")?

CONCLUSIONS

- 1) Because green card holders cannot be consular officers, the 1878 U.S.-Italy consular convention does not exempt the compensation of green card holders working for the Italian government in the United States.
- 2) The 1984 U.S.-Italy income tax treaty does not exempt the compensation of green card holders working for the Italian government in the United States. If Italy has the primary right to tax the compensation under Article 19(1)(a) and the

United States taxes by virtue of the saving clause in Article 1(2)(a), the United States will provide a foreign tax credit under Article 23(2).

- 3) I.R.C. § 893(a) does not exempt the compensation of green card holders who are working for the Italian government in the United States and have not signed the USCIS Form I-508 waiver, unless such green card holders establish, under the facts and circumstances, that the enumerated conditions of I.R.C. § 893(a) are met.

FACTS

You have requested guidance on whether the compensation of green card holders working for the Italian government in the United States is exempt from U.S. federal income tax. In particular, you have asked us to focus on the 2006, 2007 and 2008 tax years. You have explained that you have cases involving green card holders working for the Italian Embassy in Washington, D.C. and claiming to be exempt from U.S. income tax as consular officers.

LAW AND ANALYSIS

1. 1878 U.S.-Italy consular convention

The U.S.-Italy convention concerning the rights, privileges, and immunities of consular officers, concluded May 8, 1878 (“U.S.-Italy consular convention”), remains in force today.¹ The second paragraph of Article III of the U.S.-Italy consular convention provides: “Consular officers, citizens of the state by which they were appointed, . . . shall be exempt from all national, state or municipal taxes, imposed upon persons either in the nature of capitation tax or in respect of their property” There may be a question as to whether this provision applies to an income tax, because an income tax is neither a capitation tax nor a tax in respect of property. However, even assuming the provision applies to an income tax, it applies only to “consular officers” who are “citizens of the state by which they were appointed.”²

The interpretation of consular conventions and the determination of who is a “consular officer” are under the jurisdiction of the State Department. In a diplomatic note dated November 5, 1986, the State Department “set forth the general policy of the United States Government regarding consular recognition so that it may be uniformly a matter of record.” Among other things, the diplomatic note states that “[i]n order to be eligible for recognition as a career consular officer, an individual must . . . be the holder of an

¹ 20 Stat. 725. See U.S. Department of State, Treaties in Force, as of January 1, 2011.

² The facts provided do not indicate whether the employees are citizens of Italy. Even if they are citizens of Italy, however, they are not eligible for benefits under the U.S.-Italy consular convention unless they are classified as consular officers by the State Department.

A-1 non-immigrant visa.”³ Individuals who hold green cards rather than A-1 visas are therefore not eligible for benefits under the U.S.-Italy consular convention.

Note that the State Department publishes a complete and official listing of foreign consular offices in the United States, which includes recognized consular officers.⁴ Notably, the list provides no Italian consular offices or recognized consular officers in the District of Columbia. The list notes that the status of persons listed in the publication should be verified with the Office of Protocol. The State Department suggests that IRS employees should contact _____ at _____

2. 1984 tax treaty

The U.S.-Italy income tax treaty signed in 1984 applies to tax years 2006, 2007, and 2008.⁵

Paragraph 1 of Article 19 (Government Service) provides:

- (a) Remuneration, other than a pension, paid by a Contracting State or a political or administrative subdivision or local authority thereof to an individual in respect of services rendered to that State or subdivision or authority shall be taxable only in that State.
- (b) However, such remuneration shall be taxable only in the other Contracting State if the services are rendered in that State and the individual is a resident of that State who:
 - (i) is a national of that State; or
 - (ii) did not become a resident of that State solely for the purpose of rendering the services;provided that the provisions of clause (ii) shall not apply to the spouse or dependent children of an individual who is receiving remuneration to which the provisions of subparagraph (a) apply and who does not come within the terms of clause (i) or (ii).

Under Article 19(1)(a), remuneration paid by Italy to an individual in respect of services rendered to Italy shall be taxable only in Italy. Under Article 19(1)(b)(ii), such remuneration shall be taxable only in the United States if the services are rendered in the United States and the individual is a resident of the United States who did not become a resident of the United States solely for the purpose of rendering the services. If Article 19(1)(b)(ii) applies, the embassy remuneration is taxable only in the United

³ A copy of the diplomatic note is attached to this memorandum. See *also* 81 Am. J. Int'l L. 405, 408 (1987); Cumulative Digest of United States Practice in International Law 1981-1988, Ch. 4, § 2, 1083-85.

⁴ <http://www.state.gov/s/cpr/rls/fco/>.

⁵ The U.S.-Italy income tax treaty signed in 1999 generally applies to tax years beginning with 2010.

States. If only Article 19(1)(a) applies, the embassy remuneration is taxable only in Italy. However, under the saving clause in Article 1, the embassy remuneration will also likely be taxable in the United States.

Article 1 (Personal Scope) provides, in relevant part:

2. Notwithstanding any provision of this Convention except paragraph 3 of this Article, a Contracting State may tax:
 - (a) its residents (as determined under Article 4 (Resident));
 - ...
 - as if there were no convention between the Government of the United States of America and the Government of Italy for the avoidance of double taxation with respect to taxes on income and the prevention of fraud or fiscal evasion.
3. The provisions of paragraph 2 shall not affect:
 - ...
 - (b) the benefits conferred by a Contracting State under Articles 19 (Government Service), ... upon individuals who are neither citizens of, nor have immigrant status in, that State.

A green card holder is treated as a resident of the United States under I.R.C. § 7701(b)(1)(A)(i). Such person would also likely be treated as a resident of the United States under Article 4(1) if he or she is living and working in the United States.⁶

Under Article 1(2)(a), the United States generally may tax its residents (as determined under Article 4) on their worldwide income, as if there were no treaty. Article 1(3)(b) lists Article 19 as an exception to the saving clause, but this exception is only available to individuals who are neither U.S. citizens nor green card holders. Thus, even if Article 19(1)(a) applies, and not Article 19(1)(b)(ii), the United States can also tax the green card holder's embassy remuneration.

If Italy has the primary right to tax the remuneration under Article 19(1)(a), and the United States can also tax by virtue of the saving clause in Article 1(2), double taxation is alleviated by Article 23 (Relief from Double Taxation). Under Article 23(2), the United States will provide a credit against U.S. tax based on the amount of tax paid to Italy on the embassy remuneration and subject to the limitations of U.S. law.

⁶ If such person is also a resident of Italy under Italian law, then he or she must determine his or her residency status under the tiebreaker rules of Article 4(2). Because such person is living and working in the United States, he or she will likely be treated as a resident of the United States for treaty purposes based on the center of vital interests test.

3. I.R.C. § 893

I.R.C. § 893(a) exempts from federal income tax the compensation of employees of foreign governments received for official services if certain enumerated conditions are met. However, the exemption is not applicable to green card holder foreign government employees who have signed the waiver (USCIS Form I-508) provided under section 247(b) of the Immigration and Nationality Act (8 U.S.C. § 1257(b)).⁷ A green card holder employee is no longer entitled to the tax exemption conferred by I.R.C. § 893(a) from the date of signing the USCIS Form I-508 waiver. See Treas. Reg. § 1.893-1(a)(5).

I.R.C. § 893(b) instructs the Secretary of State to certify to the Secretary of the Treasury that the foreign government grants an equivalent tax exemption to U.S. government employees performing similar services in such foreign country and the character of the services performed by employees of the Government of the United States in foreign countries. Although an I.R.C. § 893(b) certification of reciprocity will greatly simplify a foreign government employee's claim of exemption from tax and the IRS's ruling on that claim, it is not a prerequisite for the tax exemption provided under I.R.C. § 893(a). See *Abdel-Fattah v. Commissioner*, 134 T.C. No. 10 (2010) and AOD 2010-04; 2010-47 I.R.B. 1 (November 22, 2010).

Without an I.R.C. § 893(b) certification, a foreign government employee is entitled to the I.R.C. § 893(a) tax exemption only if he or she can establish, under the facts and circumstances, that the enumerated conditions of I.R.C. § 893(a) (*i.e.*, that the employee is not a citizen of the United States, that the services rendered by the employee are of a character similar to the services rendered by employees of the U.S. government in foreign countries, and that the foreign government grants an equivalent tax exemption to such U.S. government employees performing similar services in that country) are met. See *Abdel-Fattah*, *supra*.

In the case of Italy, the State Department has not issued an I.R.C. § 893(b) certification. Accordingly, in order to qualify for I.R.C. § 893 tax exemption, a green card holder working for the Italian government in the United States (who has not signed a USCIS Form I-508) has the burden to establish that all the enumerated conditions of I.R.C. § 893(a) are met. Currently, the IRS is not aware of any Italian statute, regulation, executive order, or other document that demonstrates that Italy grants an equivalent tax exemption to similarly situated U.S. government employees working in Italy (*i.e.*, U.S.

⁷ Under U.S. immigration law, an immigrant (*i.e.*, green card holder) who becomes an employee of a foreign government at the time of his or her entry into the United States or subsequently is required to sign a USCIS Form I-508 waiver if he or she wishes to retain their green card (immigrant status) while working for the foreign government in the United States; otherwise his or her immigration status will be adjusted to that of a nonimmigrant.

government employees working in Italy who do not have diplomatic or consular ranking, regardless of their residency status in Italy).⁸

CASE DEVELOPMENT, HAZARDS AND OTHER CONSIDERATIONS

[REDACTED]

[REDACTED]

[REDACTED]

This writing may contain privileged information. Any unauthorized disclosure of this writing may undermine our ability to protect the privileged information. If disclosure is determined to be necessary, please contact this office for our views.

Please call _____ at _____ if you have any further questions.

⁸ Neither the Italian Income Tax Consolidation Act (1986) nor the Italian Tax Reform Act (2004) contains any provisions that would exempt U.S. government employees working in Italy from Italian income tax. U.S. government employees who have diplomatic or consular rank are exempt from Italian income tax under the Vienna Convention on Diplomatic Relations (23 U.S.T. 3227) and the Vienna Convention on Consular Relations (21 U.S.T. 77), respectively.