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DEPARTMENT OF THE TREASURY
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INTERNAL REVENUE SERVICE NATIONAL OFFICE FIELD SERVICE ADVICE

MEMORANDUM FOR

FROM: W. Edward Williams
Senior Technical Reviewer CC:INTL:Br1

SUBJECT:

This Field Service Advice responds to your memorandum dated November 12, 1998. Field Service Advice is not binding on Examination or Appeals and is not a final case determination. This document is not to be used or cited as precedent.

LEGEND:

Taxpayer =

Year A =

Year A-1 =

Year A-2 =

Year A-5 =

Country B =

Date C =

University D =

University E =

Date F =

Amount G =

Amount H =

Amount I =

Amount J =

Date K =

Quantity L =

Quantity M =

Amount N =

Date O =

ISSUE(S):

Whether income that Taxpayer received during Year A from a teaching position in the United States is exempt from U.S. taxation under the Convention Between the United States of America and the Kingdom of Greece for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income (the "Treaty" or the “Convention”), signed on April 20, 1953 ?

CONCLUSION:

Taxpayer’s income from teaching for Year A may be subject to U.S. taxation, depending on whether the saving clause in the Treaty applies to him. The saving clause applies to citizens, subjects, residents or corporations of the United States. Under the saving clause, the United States retains the right to tax these taxpayers as if the Convention had not come into effect. In such case, Taxpayer would be liable to the United States for tax on his income from teaching.

Because the Treaty does not define “resident,” the determination of whether Taxpayer is a resident for purposes of the Treaty is made under the Internal Revenue Code of 1986, as amended, specifically, under the substantial presence test of section 7701(b)(3).

If Taxpayer was an "exempt individual" under clause (ii) or (iii) of section 7701(b)(5)(A) for any two of the years from Year A-5 through Year A-1, as seems likely, he will not be treated as an exempt individual under clause (ii) for Year A. Section 7701(b)(5)(E)(i). If the limitation in section 7701(b)(5)(E)(i) applies to Taxpayer, since the number of days that he was physically present in the United States in Year A, Quantity M, exceeds 183 days, he would satisfy the numerical test for U.S. residency under section 7701(b)(3)(A). If Taxpayer is treated as a resident of the United States during Year A, the saving clause in the Treaty would apply to him, and he may not claim exemption under Article XII from U.S. income tax in Year A on his remuneration for teaching at University E.

In the unlikely event that Taxpayer was not an "exempt individual" under clause (ii) or (iii) of section 7701(b)(5)(A) for any two of the years from Year A-5 through Year A-1 and therefore, the limitation of section 7701(b)(5)(E)(i) is inapplicable, he may qualify as an exempt individual for the days he was physically present in the United States during Year A. That is, as an exempt individual, the days he was physically present in the United States would not be counted in the computation of the numerical test for residency in section 7701(b)(3). Further, if Taxpayer was present in the United States during Year A for less than 183 days and he had a tax home in a foreign country and had a closer connection to such foreign country than to the United States, he will not be treated as meeting the numerical test of residency in section 7701(b)(3)(A). Section 7701(b)(3)(B). If Taxpayer is not treated as a resident of the United States during Year A, the saving clause of the Treaty will not apply to him, and provided he was a resident of Country B just prior to entering the United States to teach at University E, he may claim exemption from U.S. income tax under Article XII on the remuneration he received from teaching at University E.

FACTS:

Taxpayer is a citizen of Country B. He legally entered the United States in Date C as a four-year trainee at University D. In Date F, he accepted a position as an instructor at University E.

On his Year A 1040-NR-EZ, Taxpayer reported his wages on line 3 (wages, salaries, etc.) as Amount G and taxable income of zero claiming exemption from taxation under the Treaty. He also requested a refund of Amount H of previously withheld amounts. Subsequently, Taxpayer filed an amended return for Year A, on which he reported wages exempted by treaty as Amount I and claimed an individual exemption of Amount J, totaling Amount G.

Taxpayer completed the schedule accompanying the Year A return and Year A amended return that is required of taxpayers claiming treaty benefits. On the schedule, Taxpayer indicated that he was not subject to tax in Country B on his

U.S.-earned income. In addition, he told IRS personnel that he paid U.S. tax on his teaching income earned in the United States and that he paid U.S. taxes during Year A-5 through Year A-1, while he was a trainee at University D. In Date K, Taxpayer told IRS personnel that he was in the process of preparing a Country B tax return for Year A that would include the teaching income.

Taxpayer indicated on the schedule that he entered the United States in Date C on a J-1 visa and that he held a J-1 visa through Year A. Under 8 U.S.C. section 1101(a)(15)(J), the J-1 visa is an "exchange visitor" visa. Also on the schedule, Taxpayer estimated that he was present in the United States for Quantity L days in Year A-2, Quantity L days in Year A-1, and Quantity M days in Year A.

Based on the wages Taxpayer reported on his original Year A 1040-NR, Amount G, the Internal Revenue Service Center computed his unpaid U.S. tax liability for Year A as Amount N.

LAW AND ANALYSIS

Under Article XII of the Treaty, a resident of Greece is exempt from U.S. income tax on remuneration received from teaching in the United States:

> [a] professor or teacher who is a resident of one of the Contracting States and who is temporarily present within the other Contracting State for the purpose of teaching, for a maximum period of three years, in a university, college, or other educational institution within the other Contracting State, shall be exempt from taxation by such other Contracting State on his remuneration for such teaching for such period.

Pursuant to Article XIII of the Treaty, a resident of Greece who is temporarily in the United States for the purpose of study is exempt from U.S. income tax on remuneration received from sources outside the United States for the person's maintenance or studies:

> [s]tudents...who are residents of one of the Contracting States but who are temporarily present in the other Contracting State exclusively for the purposes of study... shall not be taxable by such other Contracting State upon remittances received by them from sources without such other State for the purpose of their maintenance or studies.

However, under the saving clause in the Treaty, the United States retains the right to tax residents of the United States as if the Convention had not come into effect. Treaty Article XIV(1) provides:

> Notwithstanding any provision of the present Convention each of the Contracting States, in determining the taxes, including all surtaxes and

> complementary taxes, of its citizens, subjects, residents or corporations, may include in the basis upon which such taxes are imposed all items of income taxable under its revenue laws as though this Convention had not come into effect.

Thus, notwithstanding Article XII, Article XIV(1) permits the United States to deny Treaty benefits to teachers who are "residents" under provisions of the Code.

The Treaty does not define the term "resident of the United States." Therefore, the term is defined under U.S. domestic law. See Article II(2). To determine whether an alien individual is a resident of the United States, the rules of section 7701(b) apply. There are three tests for resident status under this provision: (1) the "green card" test; (2) the "substantial presence" test; and (3) a first-year election test. If a non-U.S. citizen satisfies any one of these tests, he will be treated as a resident for U.S. tax purposes; if he satisfies none of these tests, he will be taxed by U.S. authorities as a nonresident alien. Since Taxpayer does not have a green card and, as far as we know, did not make the "first-year election" to be treated as a resident, the following discussion addresses only the substantial presence test.

The Substantial Presence Test

Under the substantial presence test an alien will be treated as a resident for U.S. tax purposes if: (a) he is physically present in the United States on at least 31 days during the subject tax year and (b) the sum of the days he is physically present in the United States during the subject tax year, plus one-third the number of days he is physically present in the United States during the first preceding calendar year, plus one-sixth the number of days he is physically present in the United States during the second preceding year equals or exceeds 183 days. Section 7701(b)(3)(A). However, if he is physically present in the United States for less than 183 days during the subject tax year and has a tax home in a foreign country to which he maintains a closer connection than he does to the United States, he will not be considered a U.S. resident. Section 7701(b)(3)(B).

Based on Taxpayer's representation that he was present in the United States for Quantity M days in Year A, Quantity L days in Year A-1, and Quantity L days in Year A-2, Taxpayer was a resident of the United States in Year A under the numerical test in section 7701(b)(3)(A), unless all or a portion of his days in the United States are excluded for purposes of the numerical test.

For purposes of the substantial presence test, not all days of actual presence in the United States will count towards resident status. That is, any day that an individual is a qualifying teacher, trainee, student, foreign government-related individual, or professional athlete under section 7701(b)(5)(A) would be excluded from days of presence in the United States. Section 7701(b)(3)(D)(i). A qualifying "student" is any individual who is temporarily present in the United States under a J, Q, F or M visa

(subparagraph J, Q, F or M of section 101(15) of the Immigration and Nationality Act) and who substantially complies with the requirements for being so present. Section 7701(b)(5)(D). For these purposes, a "teacher" or "trainee" is any individual who is temporarily present in the United States under a J or Q visa (subparagraph J or Q of section 101(15) of the Immigration and Nationality Act) and who substantially complies with the requirements for being so present. Section 7701(b)(5)(C).

Further, an individual is not treated as an exempt individual under the substantial presence test in clause (ii) of subsection (b)(5)(A) (a teacher or trainee) for the current year (i.e., Year A) if, for any two calendar years during the preceding six calendar years, such person was an exempt person under section 7701(b)(1)(A)(ii) (teacher or trainee) or (iii) (student). Section 7701(b)(5)(E)(i).

The determination of Taxpayer's U.S. tax liability for Year A depends on whether he was treated as a resident for U.S. tax purposes under the substantial presence test for Year A since apparently he does not have a green card. See section 7701(b)(3). The outcome of this fact-intensive test depends on the number of days that Taxpayer is considered physically present in the United States during the relevant time period. Since days present in the United States on certain types of visas are exempt for purposes of the substantial presence test, Taxpayer's Year A visa status and that of prior years are relevant in determining his Year A U.S. tax liability. However, because, as described below, his visa status during Year A and prior years is not entirely certain, the following discussion addresses the relevant time periods, (1) pre-Year A years and (2) Year A, the various types of visas that Taxpayer may have had and the consequences of each type.

If Taxpayer Was an Exempt Individual for Two of the Six Years Immediately Preceding Year A

On the schedule attached to his Year A tax return, Taxpayer indicated that he was in the United States on a J-1 visa and was employed as a teacher at University E during Year A. Under section 7701(b)(5)(C)(i), Taxpayer's days present in the United States as a teacher, under a J-1 visa, would not be counted as days present in the United States for purposes of the substantial presence test. However, such days would be counted as days present in the United States if Taxpayer was an exempt teacher or student in the United States on a J or Q visa for any two of the six years prior to Year A. See section 7701(b)(5)(E)(i). Thus, the outcome of the substantial presence test depends on Taxpayer's visa status during Year A as well as on whether Taxpayer was treated as an exempt individual during any two of the six years immediately preceding Year A. See section 7701(b)(3).

In the event that Taxpayer was considered an exempt teacher or student for any two of the six years between Year A-5 through Year A-1, that is, if he satisfied the requirements of subparagraph (C) or (D) of subsection 7701(b)(5) for two of the six

years prior to Year A, all of his days present in the United States during Year A would be counted as days present in the United States under the numerical test in section 7701(b)(3). Under the numerical test, Taxpayer would be treated as a resident of the United States if he was physically present in the United States under a J-1 visa for at least 31 days during Year A, and the sum of the number of days that Taxpayer was physically present in the United States in Year A, plus one-third of the number of days he was physically present in the United States during Year A-1 and one-sixth of the number of days he was physically present in the United States during Year A-2 equals or exceeds 183 days. See section 7701(b)(3)(A).

However, under the exception of section 7701(b)(3)(B), if Taxpayer was physically present in the United States for less than 183 days during Year A and had a tax home in a foreign country to which he maintained a closer connection than he does to the United States, he would, nonetheless, not be treated as a U.S. resident under the substantial presence test. See section 7701(b)(3)(B). As a result, the saving clause of the Treaty would not apply to him and the Article XII exemption may be available. If Taxpayer is subject to the limitation in section 7701(b)(5)(E) and he was physically present in the United States for Quantity M days in Year A, section 7701(b)(3)(B) is inapplicable.

Taxpayer states that he was in the United States as a student during the period Date C through Date F. Article XIII of the Treaty provides an exemption for students for remittances received from abroad while they are in the United States as a student. The availability of an exemption under Article XII (Teachers and Professors) immediately following an exemption under Article XIII depends on whether Taxpayer had re-established residency in Country B at the time the exemption was claimed. An individual who is present in the United States as a student may not claim an exemption as a teacher without having left the United States and re-established residency before returning to the United States. The IRS reached this conclusion in Rev. Rul. 56-164, 1956-1 C.B. 848, in which it was held that a resident of the Netherlands could claim the benefits of the teacher exemption under the United States-Netherlands treaty, provided he was absent from the United States for a period of at least one year and still met the requirements of the article during his second stint in the United States. That is, absent re-established residency in the treaty partner country as discussed below, a second exemption as a teacher is not permitted if the period for the second exemption immediately follows the cessation of entitlement to benefits under the student/teacher article.

In Rev. Rul. 89-5, 1989-1 C.B. 353, which explicitly applies to the Treaty, the IRS interprets Article XII of the Treaty as applying the rule that the exemption period for teachers begins on the individual's "date of arrival" in the United States for purposes of teaching. Thus, the applicable authorities require Taxpayer to have re-established residency in Country B at the time the Article XII exemption was claimed.

Re-establishment of residency between consecutive exemptions must be more than inconsequential. Rev. Rul. 56-164. As discussed above, in Rev. Rul. 56-164, the IRS found that a period of a year in the treaty partner country was required to re-establish residency for these purposes. Thus, if Taxpayer was present in the United States as an exempt individual under the Treaty and did not re-establish residency in Country B before returning to the United States, the exemption of Treaty Article XII may not be available to him.

If Taxpayer Was Not An Exempt Individual for Two of the Six Years Immediately Preceding Year A

If Taxpayer was not an exempt individual under the substantial presence test during any two of the six years preceding Year A and was in the United States under a J-1 visa during Year A to teach at University E, it is likely that he would not be treated as a U.S. resident for Year A. This is because days present in the United States under a J-1 visa are generally not counted for purposes of the substantial presence test. See section 7701(b)(3)(D) and (5)(E). As such, it is likely that Taxpayer's total days of presence in the United States during Year A would not reach the thresholds of the numerical test of section 7701(b)(3)(A) for treatment as a U.S. resident. Specifically, since Taxpayer indicated on his Year A return that he spent approximately 340 days in the United States during Year A, if he was here under a J-1 visa to teach at University E, and was not an exempt individual under the substantial presence test during any two of the six years preceding Year A, he would not be treated as being present in the United States for 31 days, as required by section 7701(b)(3)(A)(i). Thus, he would not be treated as a U.S. resident for Year A.

In such case, the saving clause of the Treaty would not apply to Taxpayer and the exemption of Article XII may be available to him, allowing an exemption from U.S. taxation on his income from teaching for a maximum of three years. However, the availability of the exemption depends on whether Taxpayer had re-established residency in Country B at the time the exemption was claimed, as discussed above. That is, an individual who is present in the United States as a student may not claim an exemption as a teacher without leaving the United States and re-establishing residency before returning to the United States. More information about Taxpayer's status between his time here as a student and as a teacher is needed to complete this analysis.

In sum, it is likely that Taxpayer was an exempt teacher or student for two of the six years preceding Year A, and as a result, will not be treated as an exempt individual under clause (ii) of section 7701(b)(5)(A)(ii) for Year A and will thus satisfy the numerical test for U.S. residency under section 7701(b)(3)(A). As such, the saving clause in the Treaty will apply, and Taxpayer will not be able to claim exemption from U.S. income tax in Year A on his remuneration for teaching at University E under Article XII.

In the unlikely event that Taxpayer was not an exempt teacher or student for two of the six years preceding Year A, Taxpayer would qualify as an exempt individual for the days he was physically present in the United States during Year A. In such case, it is less likely that Taxpayer would meet the numerical test for residency in section 7701(b)(3)(A). If Taxpayer does not meet this test, the saving clause in the Treaty will not apply to him. Further, provided Taxpayer was a resident of Country B just prior to entering the United States to teach at University E, he would be able to claim exemption from U.S. income tax under Article XII on the remuneration he received from teaching at University E.

Confirmation of Taxpayer's visa status during Years A-5 through A-1 will facilitate determination of whether or not he was an "exempt individual" during that time.

If you have any further questions, please call the branch telephone number.

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