

Internal Revenue Service

memorandum

CC:INTL:FREV-107548-97

Br1:CEMurphy

date: JUN 24 1997

to: Acting Chief, Support and Services Branch CP:IN:D:SS

from: Chief, Branch 1, CC:INTL:Br1
Associate Chief Counsel (International)

subject: Proposal for a Withholding and Return Filing Agreement

~~THIS DOCUMENT INCLUDES STATEMENTS SUBJECT TO THE ATTORNEY-CLIENT PRIVILEGE. THIS DOCUMENT SHOULD NOT BE DISCLOSED TO ANYONE OUTSIDE THE IRS, INCLUDING THE TAXPAYERS INVOLVED, AND ITS USE WITHIN THE IRS SHOULD BE LIMITED TO THOSE WITH A NEED TO REVIEW THE DOCUMENT FOR USE IN THEIR OWN CASES.~~

This responds to your memorandum dated April 11, 1997, in which you request our views concerning whether the IRS should agree to enter into an agreement with [REDACTED] ([REDACTED]), a partnership organized in the Netherlands. The agreement would allow [REDACTED] to file a composite income tax return for its nonresident alien employees with respect to wages they receive from [REDACTED].

Background

[REDACTED] partners are Netherlands corporations, [REDACTED] ([REDACTED]) and [REDACTED] ([REDACTED]). [REDACTED] is engaged worldwide in the transportation and installation of [REDACTED] principally construction projects on the (OCS). These projects are generally the [REDACTED]

Members of the crew of up to [REDACTED] nonresident aliens that perform the work for these projects are drawn from various countries throughout the world and there is often a turnover in personnel between and during projects. [REDACTED] states that it "generally" maintains reliable documentation indicating an employee's legal residence in the form of a certificate of residency issued by the resident jurisdiction's taxing authorities.

The length of time that the employees of [REDACTED] spend on the [REDACTED] varies widely from project to project. Consequently, the length of time [REDACTED] employees are present on the [REDACTED]

can be anywhere from several months to a few days or weeks to no time at all in any given year.

██████████ states that although its activities in any particular year may cause it to have a permanent establishment under the U.S.-Netherlands Tax Treaty, the crew members that travel to or from a U.S. port in the course of their stay on the ██████████ are generally issued either a temporary or transit visa. The taxpayer states that the INS does not treat activity on the ██████████ as activity within the U.S. for immigration and naturalization purposes, and therefore the crew members are not issued papers that would enable the Social Security Administration to issue Social Security numbers to the crew members.

~~██████████ states that its employees are "not well positioned to deal with even the modest complexities arising from their cross-border activity" and that consequently the burden for doing so falls upon the partnership.~~

Proposal for withholding and return agreement

██████████ states that due to the transitory cross-border nature of the work it performs, the relatively high turnover of the crew members, and the intermittent nature of its U.S.-related activity, it is extremely difficult for it to comply with the U.S. reporting and filing requirements with regard to its employees. ██████████ is proposing that it be allowed to adopt a procedure that reduces its administrative burden with regard to withholding and return filing. It proposes an agreement with the IRS that would allow it to be responsible for filing a return on behalf of its employees, perhaps in conjunction with Form 1042, that would satisfy the various requirements contained in Forms W-2, W-3, W-7 and 1040NR. ██████████ is willing to pay, in a timely manner, any additional tax relating to an employee's U.S. wages that is not satisfied by withholding.

Discussion

Since terms of the suggested agreement have not been proposed, we will discuss the parameters of authority for entering into such an agreement and the potential pitfalls in doing so.

There is authority for allowing an agent to file a return on a taxpayer's behalf and for filing a composite return. Section 1.6012-1(a)(5) of the Treasury Regulations states:

a return may be made by an agent if the taxpayer requests permission, in writing, of the district director for the internal revenue district in which is located the legal residence...of the person liable for the making of the return, and such district director determines that good

cause exists for permitting the return to be so made...Whenever a return is made by an agent it must be accompanied by a power of attorney...authorizing him to represent his principal in making, executing, or filing the return.

Section 1.6012-5 of the Regulations provides for composite returns, stating in pertinent part that "...a single form and attachment may comprise the returns of more than one such person."

The above regulations are not directly on point because, while they provide authority for a composite return to be filed by an agent of the taxpayers, they do not anticipate a situation, such as ~~as [REDACTED] in which the responsible taxpayer is unaware or~~ uninvolved in the request that a return should be filed by an agent on his behalf. The assumption that the taxpayer is aware and involved in the process is made explicit in the following regulations:

Section 601.504(a) states that a power of attorney is required;

when a taxpayer wishes to authorize a recognized representative to perform one or more of the following acts on behalf of the taxpayer....(4) Closing agreement. Execution of a closing agreement under the provisions of the Internal Revenue Code and the regulations thereunder.

Section 601.202(a)(1) states that:

[u]nder section 7121 of the Code and the regulations an delegations thereunder, the Commissioner, or any officer or employee of the Internal Revenue Service authorized in writing by the Commissioner, may enter into and approve a written agreement with a person relating to the liability of such person (or of the person or estate for whom he acts) in respect of any internal revenue tax for any taxable period. [Emphasis added.]

We have found only limited authority for the IRS to enter into a closing agreement with a person who is not the taxpayer or authorized to enter into closing agreements for the taxpayer. The cases in which the IRS has chosen to enter into a closing agreement with a nontaxpayer are extraordinary and are situations in which no other practicable means exists to collect the liability.

Announcement 95-61

In Announcement 95-61, the IRS adopted a procedure under which the issuers of municipal bonds can enter into a closing agreement with the IRS and pay the additional tax owed by the holders of the bonds as a result of a determination by the Service that all or part of the interest paid on the bonds is not deductible under I.R.C. §103.

The closing agreement procedure in the Announcement is treated as a formal technical advice request. The bond issuer is treated as the taxpayer and is not required to obtain powers of attorney from the bondholders. However, the closing agreement must contain a provision in which the issuer agrees to execute a consent ~~meeting the requirements of section 6103(c) permitting the~~ disclosure to the general public of information concerning the existence and subject matter of the agreement.

[REDACTED]

A series of closing agreements entered into with [REDACTED] is another example of a closing agreement reached with a person who is not a taxpayer. [REDACTED]

[REDACTED] In the case it is at least as beneficial to the Service to allow the filing of a composite return as it is to the taxpayers involved. Without the agreement, the taxpayers, or "names" would be required to file two returns, one a corporate return and one an individual return. The Service has no established procedure to accept or process a corporate return from an individual. The agreement with [REDACTED] was requested by the taxpayers or "names," and backed by numerous provisions and stipulations designed to create certainty and to protect the Service. These provisions include strict penalty provisions, valid powers of attorney from each underwriter, and detailed information on each individual [REDACTED] upon whose behalf the composite corporate return is filed, of such a nature that the IRS may examine and verify the tax liability of any individual [REDACTED]. The agreement also provides the Service with an administrable way to process returns in a situation that, to our knowledge, is not duplicated by any other taxpayers.

Section 7121

Section 7121 authorizes the Commissioner to enter into a closing agreement relating to "any internal revenue tax for any taxable period." Section 301.7121-1(a) further provides, however, that a closing agreement may not be entered into unless

there appears to be an advantage in having the case permanently and conclusively closed, or if good and sufficient reasons are shown by the taxpayer for desiring a closing agreement and it is determined by the Commissioner that the United States will sustain no disadvantage through consummation of such an agreement. [Emphasis added]

In the case of [REDACTED], we are not even sure if its employees know about the proposed agreement, much less that they desire it. In fact, it seems likely, given the rate of turnover of employees, that many of them will not know of it. Although we do not know the exact nature of the terms in the contract [REDACTED] would suggest, if we have no knowledge of the individual taxpayers involved, it is likely that we will run into ~~difficulties if, for instance, the individuals in question have~~ other U.S. tax liabilities, or if they attempt to claim U.S. tax treaty benefits.

Section 6103

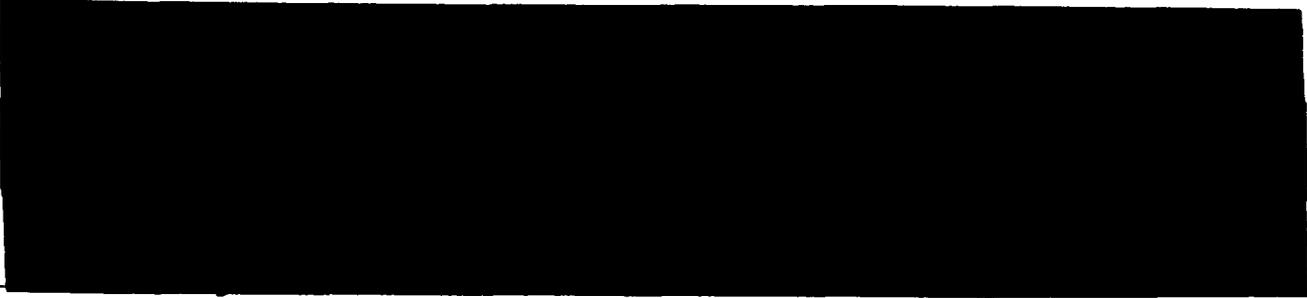
Section 6103 states that returns and return information will not be disclosed by the IRS except as authorized in Title 26 of the U.S. Code. Section 6103(b)(8) defines disclosure as "the making known to any person in any manner whatever a return or return information." Section 6103(e)(6) provides that returns and return information may be disclosed to the taxpayer's attorney in fact¹ or to the attorney in fact of a person otherwise entitled to inspect a return or to receive return information. The attorney in fact must be authorized in writing to inspect a return or to receive return information. Depending upon the provisions of the closing agreement, and upon their proper execution, there is potential that the agreement may violate the disclosure restrictions in section 6103. For instance, if powers of attorney were not properly obtained from the employees of [REDACTED], and there was a reason to question the return, the Service could run afoul of the disclosure prohibition in attempting to verify information.

Conclusion

While there is limited authority for the IRS to enter into a closing agreement with a person who is not the taxpayer, the situations of which we are aware in which this has actually been done are highly unusual and involve cases in which there is no other practicable means to collect the liabilities. Furthermore,

¹. An attorney in fact is "[a]n agent authorized by a principal under a power of attorney to perform certain specified act(s) or kinds of act(s) on behalf of the principal." Treas. Reg. §601.501(b)(1)

it is unlikely that the IRS will sustain no disadvantage from this arrangement. Additionally, the ceding of our immediate authority in the tax filing and withholding area merely to facilitate the administrative convenience of a non-resident foreign partnership seems, at best, to be a dangerous precedent.



If we can be of further assistance in this matter, please call Carol Murphy at 874-1490.


George M. Sellinger