

IRM PROCEDURAL UPDATE

DATE: 11/03/2023

NUMBER: wi-21-1123-1070

SUBJECT: Adding Information for Form 8288-B MTAX Calculation for Distribution(s) in Excess of Earnings and Profit

AFFECTED IRM(s)/SUBSECTION(s): 21.8.5.4.3

CHANGE(s):

IRM 21.8.5.4.3 - Revised paragraph 1 to better explain MTAX calculation based on LB&I and Counsel request

(1) Applicants for withholding certificates must include the category or the reason the request is being submitted.

- a. **Category 1:** Applications for withholding certificates based on a claim the transferor (seller) is entitled to nonrecognition treatment or is exempt from tax. Additional requirements included in this category follow:
a brief description of the transfer
a brief summary of the law and facts supporting the claim of nonrecognition or exemption
evidence the transferor (seller) has no unsatisfied withholding liability
the Fair Market Value (FMV) or other "good faith" estimate of the property. No supporting evidence concerning the value of the property is required in the application.
- b. **Category 2:** Applications for withholding certificates based solely on a calculation of the transferor's (seller's) maximum tax liability. The following additional requirements must be included. The applicant must include a calculation of the maximum tax (MTAX) that may be imposed on the disposition, including the following information.

Note: Refer to the second box below for distribution(s) in excess of Earnings and Profit (E&P)

Additional Requirements for MTAX Calculation
1. The amount realized by the transferor (seller) with evidence confirming this amount (such as a copy of the signed contract).
2. The adjusted basis of the property with evidence confirming the basis claimed. Example: Schedules of depreciation allowed for tax purposes during the period the property was held and/or settlement sheet when purchased.
3. Amounts recaptured with respect to accelerated depreciation, investment tax credit, or other items subject to recapture.

4. The maximum long-term capital gain tax rate for individuals for gains realized on or after January 1, 2013 is 20 percent. The corporate maximum capital gain tax rate is 21 percent. However, the transferor (seller) may also submit a draft copy (**DO NOT PROCESS the DRAFT COPY**) of their income tax return showing the ESTIMATED MAXIMUM TAX LIABILITY (EMTAXL). The estimated taxes may differ from the above- mentioned maximum tax rates. If so, allow the taxpayer's Maximum Tax Liability (MTAXL). **See Treasury Regulation 1.1445-6(c).**

5. Tentative tax owed.

6. Amount of any increase or decrease of tax to which the transferor (seller) is subject, including any reduction to which the transferor (seller) is entitled, under a provision of a U.S. income tax treaty, as well as evidence supporting the adjustment claimed.

Sufficient information for distribution(s) in excess of Earnings and Profit (E&P)

1. Amount of total distribution(s)
2. U.S. E&P Available (amount treated as dividend, sec. 301(c)(1))
3. Excess Distribution after E&P (total distributions minus US E&P available)
4. Shareholder basis
5. Return of Capital (lesser of line 3 of this box, excess distribution after E&P, or line 4 of this box, shareholder basis, see sec. 301(c)(2))
6. Gain (If line 3 of this box, excess distribution after E&P, exceeds line 4 of this box, shareholder basis, see sec. 301(c)(3))
7. Tax rate on Gain
8. Tax liability (Gain times tax rate on gain)
9. Adjustments, if any, to the tax liability

- c. **Category 3:** Applications for withholding certificates under the special installment sales rules. Generally, the transferee (buyer) is required to fully satisfy the withholding obligations based on the amount realized. However, when the applicant supplies the computation, as described under Category 2, the gain under the installment method can result in reduced withholding. Additional requirements included in this category follow:

Additional Requirements for Installment Sales

1. An agreement signed by the Transferee (Buyer) "under penalties of perjury" to withhold and pay the required tax.
2. Withhold and pay the correct percent of tax or such lesser amount, as determined by IRS, of any down payment, including any liabilities of the transferor (seller) assumed by the transferee (buyer).
3. Withhold the correct percent or such lesser amount of each subsequent payment.
4. Notify IRS prior to the disposition or encumbrance of the subject property and pay over, using Form 8288, U.S. Withholding Tax Return for

Disposition by Foreign Persons of U.S. Real Property Interests, and Form 8288-A, Statement of Withholding on Dispositions by Foreign Persons of U.S. Real Property Interests to the Service the remaining amounts withheld.

Note: See IRM 21.8.5.4, Form 8288-B, Withholding Certificate: Background, for the correct percent of tax.

- d. **CATEGORIES 4, 5 OR 6** are not identified on Form 8288-B, Application for Withholding Certificate for Dispositions by Foreign Persons of U.S. Real Property Interests. Publication 515, Withholding of Tax on Nonresident Aliens and Foreign Entities, instructs the taxpayer to include a statement containing the information pertinent to the specific category for which they qualify.
- e. **Category 4:** Application for withholding based on an agreement for the payment of tax. Include the following information to establish the transferor's (seller's) maximum tax liability, or the amount otherwise required to be withheld, a signed copy of the agreement proposed by the applicant, and a copy of the security instrument proposed by the applicant.
- f. **Category 5:** Applications for blanket withholding certificates. A statement indicating a blanket withholding certificate is in affect which excuses withholding with respect to multiple disposition of property interest by the transferor (seller) during a period of no more than 12 months.
- g. **Category 6:** Applications for withholding certificates based on any other basis. Information stated above for Category 4 must be included, along with a description of the nonconforming security, and a memorandum of law and facts establishing the proposed security is valid and enforceable and adequately protects the government's interest.

Note: If the criteria for Category 4, 5 or 6 are identified, forward the document to the Ogden Campus, using Form 3210, Document Transmittal to:

Internal Revenue Service
Attn: Classification M/S 4160
1973 N. Rulon White Boulevard
Ogden, UT 84404