



LB&I International Practice Service Transaction Unit

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Unit Name	Payee Documentation for Treaty Benefits
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Issue and Transaction Overview

Payee Documentation for Treaty Benefits

The U.S. taxes nonresident alien individuals and foreign corporations on their U.S. source income under either a withholding on a gross income basis or a net taxation basis if engaged in a trade or business within the U.S. The U.S. imposes either a statutory rate of 30% for withholding or the U.S. graduated rates for taxpayers engaged in a trade or business within the U.S. Treaties can reduce the rate of withholding tax and modify U.S. tax law with regards to taxation on a net basis.

Where the income is subject to withholding tax a withholding agent is the party who is responsible for reporting and paying the tax to the IRS and must also furnish a statement to the recipient of the income. A withholding agent is a U.S. or foreign person that has the control, receipt, custody, disposal, or payment of the income to a foreign person. Generally, withholding agents are required to withhold at the statutory rate of 30% and must deposit any tax withheld and file Form 1042 and Form 1042-S with the IRS. If a withholding agent fails to withhold the correct amount of tax or file the respective returns it is liable for the tax, interest, and penalties with regards to the payments.

Furthermore, withholding agents who cannot reliably associate a payment with documentation on the date of the payment are liable under IRC § 1461 for the tax required to be withheld under the Code. In these instances a withholding agent may be liable for as much as 30% of the gross income paid to the payee or beneficial owner. Therefore, it is important that IRS agents understand when the Service can accept a claim for treaty benefits.

In this unit the Repatriation/Withholding IPN will discuss the documentation requirements for treaty claims, including Form W-8 and Form 8233 and other documentary evidence. This unit will also consider the application of the reliance rules which are applicable in cases where a payee or beneficial owner provides documentation. A discussion of the presumption rules is also included in this unit and apply in cases where the withholding agent has received no documentation from a payee or beneficial owner. Additionally, there are also regulations governing the acceptance of late or incomplete documentation and as such, we will discuss how agents can determine whether or not to allow treaty benefits in such cases.

Accordingly, this unit will address the impact on withholding agents for transactions in which a payee or beneficial owner provides little or no documentation as well as the appropriate application of the law and concepts outlined in IRC § 1441 and IRC § 1442, and the regulations thereunder.

This unit should be used only for chapter 3 withholding. An update for the coordination between chapter 3 and chapter 4 withholding is forthcoming.

Transaction and Fact Pattern

Payee Documentation for Treaty Benefits	
Diagram of Transaction	Facts
<p>The diagram illustrates the flow of payments in a transaction. At the top is a white box labeled 'USC'. A black arrow labeled 'ROYALTIES' points down from USC to a blue box labeled 'FP'. To the left of the 'FP' box is a yellow box labeled 'U.S. Financial Institution'. A yellow arrow points down from the 'U.S. Financial Institution' box to a blue rounded rectangle labeled 'Financial Account'. A black arrow labeled 'DIVIDENDS' points from the 'Financial Account' box up to the 'FP' box.</p>	<ul style="list-style-type: none"> ▪ A foreign parent corporation (FP) is created and organized in a treaty country. ▪ FP is a pharmaceutical company and has a U.S. subsidiary which is a U.S. Corporation (USC). ▪ FP has a financial account with a U.S. financial institution and receives dividends for its investments. ▪ FP licensed patents to USC for the manufacture of pharmaceutical products. ▪ USC pays royalties to FP for the patents. ▪ FP furnished Form W-8BEN's after the withholding agents made the dividend and royalty payments to FP. ▪ The Form W-8BEN's furnished after the payments were made were either incomplete or unreliable.

Summary of Potential Issues

Payee Documentation for Treaty Benefits	
<u>Issue 1</u>	What rules must withholding agents consider when relying on documentation?
<u>Issue 2</u>	Can the payee or beneficial owner provide late or incomplete documentation and still be eligible for treaty benefits?
<u>Issue 3</u>	How can an IRS agent determine whether or not to accept late documentation?
<u>Issue 4</u>	What are the consequences for a withholding agent who has relied on insufficient documentation?

All Issues, Step 1: Initial Factual Development

Payee Documentation for Treaty Benefits

The foreign parent corporation (FP) furnished Form W-8BEN's after the withholding agents made the dividend and royalty payments to FP. As such, it must be determined whether FP is entitled to treaty benefits for the dividend and royalty payments.

Fact Element	Resources	6103 Protected Resources
<ul style="list-style-type: none"> ▪ Confirm that the U.S. financial institution is the withholding agent for the dividend payments made to FP. Determine if USC is the withholding agent for the royalty payments made to FP. ▪ Review and reconcile Forms 1042, 1042-S, and 5471/5472 to verify that both the U.S. financial institution and USC reported the dividend and royalty income and paid the withholding tax to the IRS. 	<p><u>Request and/or review:</u></p> <ul style="list-style-type: none"> ▪ Books and records to verify who made the payments and when the payments were made. ▪ IRM 4.10.21.8.10 – Suggested Initial IDR's ▪ IRM 4.10.21.9.5 – Suggested Initial IDR's ▪ IRM Exhibit 4.10.21-1 – Model IDR for Financial Institution Audits ▪ IRM Exhibit 4.10.21-2 – Model IDR for Nonfinancial Institution Audits ▪ Supporting documentation used to prepare the Form 1042's. ▪ IRM 4.10.21.8.1.2 – Review of Form 1042 and 1042-S 	

All Issues, Step 1: Initial Factual Development (cont'd)

Payee Documentation for Treaty Benefits

The foreign parent corporation (FP) furnished Form W-8BEN's after the withholding agents made the dividend and royalty payments to FP. As such, it must be determined whether FP is entitled to treaty benefits for the dividend and royalty payments.

Fact Element	Resources	6103 Protected Resources
<ul style="list-style-type: none"> ▪ Review and reconcile Forms 1042, 1042-S, and 5471/5472 to verify that both the U.S. financial institution and USC reported the dividend and royalty income and paid the withholding tax to the IRS. ▪ Review the Forms W-8BEN that FP provided to both withholding agents to claim benefits under the U.S. Income Tax Treaty. 	<ul style="list-style-type: none"> ▪ IRM 4.10.21.9 – Nonfinancial Institutions Withholding Agent Audit ▪ IRM 4.10.21.9.6 – Use of Forms 5471 and Forms 5472 ▪ IRM 4.10.21.9.6.2 – Form 5472 ▪ Obtain copies of the Forms W-8BEN provided by FP. ▪ IRM 4.10.21.8.4.2 – Account Review ▪ Treas. Reg. 1.1441-1(b)(7) 	

Issue 1, Step 2: Review Potential Issues

Payee Documentation for Treaty Benefits

Issue 1

What rules must withholding agents consider when relying on documentation?

Explanation of Issue	Resources
<p>In general, if a payment is subject to withholding a withholding agent must withhold 30% of the payment unless it can reliably associate the payment with documentation which shows that the payee or beneficial owner is entitled to a reduced rate of withholding.</p> <ul style="list-style-type: none"> ▪ Documentation can include Forms W-8BEN, W-ECI, W-8EXP, W-8IMY, W-8CE, Form 8233 and other documentary evidence. ▪ A withholding agent may rely on documentation without having to inquire about the truthfulness of the documentation unless it has actual knowledge or reason to know that the information contained in the document is untrue. 	<ul style="list-style-type: none"> ▪ IRC 1441 and 1442 ▪ Treas. Reg. 1.1441-1(b)(1) ▪ Form W-8 Instructions ▪ Form 8233 Instructions ▪ Treas. Reg. 1.1441-6 ▪ IRM 4.10.21.8.4.1 – Reliance on Withholding Certificate (Form W-8) ▪ Treas. Reg. 1.1441-1(e)(4)(viii) ▪ Treas. Reg. 1.1441-7(b) ▪ IRM 4.10.21.8.3 – Due Diligence – Standard of Knowledge ▪ IRM 4.10.21.8.3.2 – Actual Knowledge ▪ IRM 4.10.21.8.3.1 – Reason to Know ▪ Pub. 515

Issue 1, Step 2: Review Potential Issues (cont'd)

Payee Documentation for Treaty Benefits

Issue 1

What rules must withholding agents consider when relying on documentation?

Explanation of Issue	Resources
<ul style="list-style-type: none">Where there is no valid documentation provided a withholding agent may rely on the presumption rules to determine whether a payee is a U.S. or foreign person and the payee's other relevant characteristics such as whether the payee is an owner, intermediary, individual, trust, partnership, or corporation.	<ul style="list-style-type: none">Treas. Reg. 1.1441-1(b)(3)IRM 4.10.21.8.3.3 – Application of Presumption RulesPub. 515

Issue 1, Step 3: Additional Factual Development

Payee Documentation for Treaty Benefits

Issue 1

What rules must withholding agents consider when relying on documentation?

Fact Element	Resources	6103 Protected Resources
<ul style="list-style-type: none"> ▪ Confirm that the U.S. financial institution made dividend payments to FP and withheld no tax on the payments. Verify that the U.S. financial institution timely filed Forms 1042 and 1042-S. Ascertain whether FP submitted the Form W-8BEN to the U.S. financial institution after it received the dividend payments. 	<ul style="list-style-type: none"> ▪ Request copies of books and records to verify whether the withholding agent actually withheld and paid tax. ▪ IRM 4.10.21.8.4 – Validation of the Certification of Foreign Status and/or Treaty Claim (Form W-8) ▪ Integrated Data Retrieval System (IDRS) reports including: <ul style="list-style-type: none"> ▪ Business Master File On-Line Tax Module (BMFOLT), ▪ Tax Module A (TXMODA), ▪ Payer Master File On-Line Summary (PMFOLS), ▪ Payer Master File On-Line Detail (PMFOLD), ▪ Information Returns Processing Transcript Requests – Payer Information (IRPTRI), 	

Issue 1, Step 3: Additional Factual Development

Payee Documentation for Treaty Benefits

Issue 1

What rules must withholding agents consider when relying on documentation?

Fact Element	Resources	6103 Protected Resources
	<ul style="list-style-type: none"> ▪ Information Returns Processing Transcript Requests – Information Returns Processing On-Line Summary Request (IRPTRL), ▪ Information Returns Processing Transcript Requests – Payee On-Line Transcript Request (IRPTRO), and ▪ Information Returns Processing Transcript Requests – Payer Hardcopy Transcript Request (IRPTRR). 	

Issue 1, Step 3: Additional Factual Development (cont'd)

Payee Documentation for Treaty Benefits

Issue 1

What rules must withholding agents consider when relying on documentation?

Fact Element	Resources	6103 Protected Resources
<ul style="list-style-type: none"> ▪ Determine if USC paid royalties to FP and withheld the applicable tax per the treaty. Confirm that subsequent to paying the royalties USC received a Form W-8BEN from FP to claim treaty benefits. ▪ Review the supporting documentation for the Form 1042's and verify when and if the royalty payments were made by the withholding agents. Verify the amount of tax actually withheld and paid to the IRS. 	<ul style="list-style-type: none"> ▪ Obtain a copy of the licensing agreement to verify the gross amount of the royalties and whether the royalties are U.S. source income per IRC 861(a)(4) ▪ Treas. Reg. 1.1441-7(b)(1) ▪ Treas. Reg. 1.1441-1(b)(1) ▪ Treas. Reg. 1.1441-1(e)(4)(viii) ▪ Treas. Reg. 1.1441-1(b)(3) ▪ IRM 4.10.21.9.7 – Reconciliation of Audit Findings to Forms 1042 and 1042-S ▪ Pub. 901 ▪ IRC 1441(a) and 1442 ▪ Treas. Reg. 1.1441-1(b)(1) ▪ Treas. Reg. 1.1441-7(b)(1) ▪ Integrated Data Retrieval System (IDRS) reports including: ▪ Business Master File On-Line Tax Module (BMFOLT), 	

Issue 1, Step 3: Additional Factual Development (cont'd)

Payee Documentation for Treaty Benefits

Issue 1

What rules must withholding agents consider when relying on documentation?

Fact Element	Resources	6103 Protected Resources
	<ul style="list-style-type: none"> ▪ Tax Module A (TXMODA), ▪ Payer Master File On-Line Summary (PMFOLS), ▪ Payer Master File On-Line Detail (PMFOLD), ▪ Information Returns Processing Transcript Requests – Payer Information (IRPTRI), ▪ Information Returns Processing Transcript Requests – Information Returns Processing On-Line Summary Request (IRPTRL), ▪ Information Returns Processing Transcript Requests – Payee On-Line Transcript Request (IRPTRO), and ▪ Information Returns Processing Transcript Requests – Payer Hardcopy Transcript Request (IRPTRR). 	

Issue 1, Step 3: Additional Factual Development (cont'd)

Payee Documentation for Treaty Benefits

Issue 1

What rules must withholding agents consider when relying on documentation?

Fact Element	Resources	6103 Protected Resources
<ul style="list-style-type: none">Review the supporting documentation for the Form 1042's and verify when and if the royalty payments were made by the withholding agents. Verify the amount of tax actually withheld and paid to the IRS.	<ul style="list-style-type: none">IRC 1441(a) and 1442Treas. Reg. 1.1441-1(b)(1)Treas. Reg. 1.1441-7(b)(1)	

Issue 1, Step 3: Additional Factual Development (cont'd)

Payee Documentation for Treaty Benefits

Issue 1

What rules must withholding agents consider when relying on documentation?

Fact Element	Resources	6103 Protected Resources
<ul style="list-style-type: none"> ▪ Determine if the Form W-8BEN for the dividend payments is valid by reviewing each line on the form for consistency and completeness and compare the information on the Form W-8BEN with the U.S. financial institution's account file and/or application. ▪ Determine if the Form W-8BEN is a substitute form or was furnished electronically through the U.S. financial institution's system. 	<ul style="list-style-type: none"> ▪ Treas. Reg. 1.1441-7 ▪ Treas. Reg. 1.1441-1(e)(4) ▪ Treas. Reg. 1.1441-1(b)(7) ▪ IRM 4.10.21.8.4.3 – Validation Process ▪ IRM 4.10.21.8.2 – Account Opening/ Updating Procedures ▪ IRM Exhibit 4.10.21-3 – Validity Period of Form W-8 ▪ Treas. Reg. 1.1441-1(e)(4)(iv) ▪ Treas. Reg. 1.1441-1(e)(4)(vi) ▪ Chief Counsel Advice (CCA) Memorandum No. AM2012-008 	

Issue 1, Step 3: Additional Factual Development (cont'd)

Payee Documentation for Treaty Benefits

Issue 1

What rules must withholding agents consider when relying on documentation?

Fact Element	Resources	6103 Protected Resources
<ul style="list-style-type: none"> ▪ Request a hard copy of any electronic Form W-8BEN provided. The hard copy must provide exactly the same information as the paper Form W-8BEN. Check the expiration date of the Form W-8BEN. If the information on the Form W-8BEN is valid the next step will be to determine if the IRS can accept the Form W-8BEN since it was provided after the payments were made to FP. 	<ul style="list-style-type: none"> ▪ Treas. Reg. 1.1441-1(e)(4)(iv) ▪ Chief Counsel Advice (CCA) Memorandum No. AM2012-008 	

Issue 1, Step 3: Additional Factual Development (cont'd)

Payee Documentation for Treaty Benefits

Issue 1

What rules must withholding agents consider when relying on documentation?

Fact Element	Resources	6103 Protected Resources
<ul style="list-style-type: none"> ▪ Apply the due diligence standards by reviewing the accounts payable records and the royalty agreement to ascertain the validity of the Form W-8BEN for the royalty payments. In addition, examiners should verify that the Form W-8BEN is consistent with the other books and records of the taxpayer, including, annual reports, audited financial statements, and operation manuals or written procedures in effect during the year under examination. ▪ Determine whether or not the Form W-8BEN has expired. Additionally, since FP provided the Form W-8BEN after the royalty payments were made, examiners must consider whether or not the Service can accept it. 	<ul style="list-style-type: none"> ▪ Treas. Reg. 1.1441-7 ▪ Treas. Reg. 1.1441-1(e)(4) ▪ Treas. Reg. 1.1441-1(b)(7) ▪ IRM 4.10.21.8.3 – Due Diligence – Standard of Knowledge ▪ IRM 4.10.21.9.3 Payment to Foreign Vendors – Three-Step Audit Procedure ▪ IRM Exhibit 4.10.21-3 – Validity Period of Form W-8 	

Issue 1, Step 4: Develop Arguments

Payee Documentation for Treaty Benefits

Issue 1

What rules must withholding agents consider when relying on documentation?

Explanation of Adjustment	Resources	6103 Protected Resources
<ul style="list-style-type: none"> ▪ The withholding agent is subject to withholding tax unless the incomplete documentation is cured. If the documentation is not cured the withholding agent will be liable for the statutory withholding tax rate of 30%. Please see Issues 2 and 3 of this unit for guidance on the curing provisions. ▪ If FP filed an electronic Form W-8BEN, the regulations generally require a withholding agent to obtain an original withholding certificate from a payee. The regulations do, however, provide authority for a withholding agent to rely upon a withholding certificate that is submitted electronically if the withholding agent's system meets certain specified requirements. The regulations also allow a limited period of reliance on electronically transmitted forms in the absence of an established system ensuring identification of the sender with the information transmitted. 	<ul style="list-style-type: none"> ▪ Treas. Reg. 1.1441-1(e)(1) ▪ Treas. Reg. 1.1441-1(e)(2) ▪ Treas. Reg. 1.1441-1(b)(7) ▪ IRC 1461 ▪ Treas. Reg. 1.1441-1(b)(3)(iv) ▪ Treas. Reg. 1.6049-5(d)(2)(ii) ▪ Treas. Reg. 1.1441-1(e)(4)(iv) ▪ Chief Counsel Advice (CCA) Memorandum No. AM2012-008 	

Issue 1, Step 4: Develop Arguments (cont'd)

Payee Documentation for Treaty Benefits

Issue 1

What rules must withholding agents consider when relying on documentation?


Explanation of Adjustment	Resources	6103 Protected Resources
<ul style="list-style-type: none"> ▪ If the taxpayer provides a substitute Form W-8 it must contain provisions which are substantially similar to the official form. The substitute form must contain the same certifications, which are relevant to the transactions, as the official form and include a signature-under-penalties-of-perjury statement which is identical to the one on the official form. If a substitute form does not contain these provisions it may be acceptable if it contains those provisions that are relevant to the transactions for which it is furnished. 	<ul style="list-style-type: none"> ▪ Treas. Reg. 1.1441-1(e)(4)(vi) ▪ Treas. Reg. 1.1441-4 	

Issue 1, Step 4: Develop Arguments (cont'd)

Payee Documentation for Treaty Benefits

Issue 1

What rules must withholding agents consider when relying on documentation?

Explanation of Adjustment	Resources	6103 Protected Resources
 CONSULTATION: In cases where a substitute Form W-8 or Form 8233 does not contain all the provisions of the official form, Counsel may be consulted to determine if the content of the form is substantially similar to the official form and if it satisfies the certification requirements.	<ul style="list-style-type: none">▪ Treas. Reg. 1.1441-1(e)(4)(vi)▪ Treas. Reg. 1.1441-4	

Issue 2, Step 2: Review Potential Issues

Payee Documentation for Treaty Benefits

Issue 2

Can the payee or beneficial owner provide late or incomplete documentation and still be eligible for treaty benefits?

Explanation of Issue	Resources
<ul style="list-style-type: none"> ▪ When a payee or beneficial owner provides documentation after a payment is made it is considered late. The Service may accept late documentation if the withholding agent has met one of the following requirements. <ul style="list-style-type: none"> – It has appropriately relied on the presumption rules, – It can demonstrate to the Service that the proper amount of tax, if any, was in fact paid, – It can show that no documentation was required under IRC §1441, or – It can show that it has complied with Treas. Reg. §1.1441-6(c) or (g) with regards to requirements to furnish a taxpayer identifying number (TIN). ▪ A withholding agent may prove that the proper amount of tax was paid by providing a Form 4669 – Statement of Payments Received. Form 4669 documents the tax that is actually paid by or for a beneficial owner. 	<ul style="list-style-type: none"> ▪ Treas. Reg. 1.1441-1(b)(7)(i) ▪ Treas. Reg. 1.1441-4(a)(2)(ii) ▪ Treas. Reg. 1.1441-4T(a)(3)(i) ▪ Treas. Reg. 1.1441-6 ▪ IRM 4.10.21.8.4.5 – Forms W-8 Provided After Date of Payment ▪ Treas. Reg. 1.1441-1(b)(7)(ii) ▪ IRC 1461

Issue 2, Step 2: Review Potential Issues (cont'd)

Payee Documentation for Treaty Benefits

Issue 2

Can the payee or beneficial owner provide late or incomplete documentation and still be eligible for treaty benefits?


Explanation of Issue	Resources
<ul style="list-style-type: none"> ▪ Withholding agents can also prove that a reduced rate of withholding was appropriate on the basis of a valid withholding certificate or other documentary evidence provided after the payment date. However, the Service may require additional proof if it is determined that the delays in obtaining such documentation affect the reliability of the documentation. ▪ In the case of incomplete documentation, the Service may accept additional documentation to establish the residency of the entity and the status and identity of the payee or beneficial owner. ▪ Additional documentation may also be accepted by the IRS for offshore accounts as defined in Treas. Reg. §1.6049-5(c)(1). 	<ul style="list-style-type: none"> ▪ Treas. Reg. 1.1441-1(b)(7)(ii) ▪ Treas. Reg. 1.1441-1(b)(7)(i) ▪ Treas. Reg. 1.1441-6 ▪ IRM 4.10.21.8.4.4.3 – Address Cures Using Additional Documentation ▪ Pub. 515 ▪ Treas. Reg. 1.6049-5(e) ▪ Treas. Reg. 1.1441-1(e)(1)(ii)(A)(2)

Issue 2, Step 3: Additional Factual Development

Payee Documentation for Treaty Benefits

Issue 2

Can the payee or beneficial owner provide late or incomplete documentation and still be eligible for treaty benefits?

Fact Element	Resources	6103 Protected Resources
<ul style="list-style-type: none"> Request a complete Form W-8BEN from the U.S. financial institution since FP initially failed to provide a statement regarding the limitations on benefits or deriving the income under IRC §894. Determine if FP is entitled to treaty benefits by verifying that the limitation on benefits tests have been met and that the dividend income was derived by FP pursuant to IRC §894. 	<ul style="list-style-type: none"> Request organizational chart and articles of incorporation. Treas. Reg. 1.1441-7(b)(4) Treas. Reg. 1.1441-6(b)(1) Treas. Reg. 1.1441-6(c)(5)(i) and (ii) U.S. Model Treaty (2006), Art. 10 and 22 	
<ul style="list-style-type: none"> Ascertain whether the Form W-8BEN provided to USC for the royalty payments can be cured since the Form W-8BEN originally submitted has U.S. addresses on Lines 4 and 5 of the form. Request additional documentary evidence along with an explanation for why it used U.S. addresses on the Form W-8BEN. 	<ul style="list-style-type: none"> Treas. Reg. 1.1441-7(b)(5)(i) IRM 4.10.21.8.4.4.3 – Address Cures Using Additional Documentation IRC 7701(a)(4) U.S. Model Treaty (2006), Art. 4 and 12 	
 TREATY IMPLICATION		

Issue 2, Step 4: Develop Arguments

Payee Documentation for Treaty Benefits

Issue 2

Can the payee or beneficial owner provide late or incomplete documentation and still be eligible for treaty benefits?

Explanation of Adjustment	Resources	6103 Protected Resources
<ul style="list-style-type: none"> ▪ FP was required to provide a statement regarding the limitation on benefits or deriving the dividend income under IRC §894 for purposes of determining whether or not FP is entitled to treaty benefits. As such, unless FP can provide such a statement which proves that the dividend income was derived pursuant to IRC §894 and that it is entitled to benefits per Article 22 – Limitation on Benefits of the U.S. Income Tax Treaty, the Service should not allow the reduced withholding tax rate of 0%. In summary, if FP cures the incomplete Form W-8BEN by providing all applicable statements, as previously mentioned, it could be eligible for treaty benefits. 	<ul style="list-style-type: none"> ▪ Treas. Reg. 1.1441-7(b)(4)(i) ▪ Treas. Reg. 1.1441-6(c)(5)(i) and (ii) ▪ Treas. Reg. 1.1441-1(b)(7) ▪ IRC 894 ▪ Treas. Reg. 1.894-1(d) ▪ U.S. Model Treaty (2006), Art. 10 and 22 	

Issue 2, Step 4: Develop Arguments (cont'd)

Payee Documentation for Treaty Benefits

Issue 2

Can the payee or beneficial owner provide late or incomplete documentation and still be eligible for treaty benefits?

Explanation of Adjustment	Resources	6103 Protected Resources
<ul style="list-style-type: none"> ▪ The Form W-8BEN for the royalty payments did not include a foreign address and as such it is not valid. FP may be entitled to treaty benefits if it can provide additional documentation, such as articles of incorporation which show that FP is a resident of the treaty country. The Service may also allow treaty benefits to FP if FP can provide a certificate of residence which includes the name of the entity, the address of FP's principal office in the foreign country, and is an official document authorized by the respective foreign government. In addition, FP must provide a new Form W-8BEN which contains the updated address information. 	<ul style="list-style-type: none"> ▪ Treas. Reg. 1.1441-7(b)(5)(i)(B) ▪ IRM 4.10.21.8.4.4.1 – Permanent Address Form W-8 Line 4 ▪ IRM 4.10.21.8.4.4.2 – Mailing Address Form W-8 Line 5 ▪ IRM 4.10.21.8.4.4.3 – Address Cures Using Additional Documentation ▪ U.S. Model Treaty (2006), Art. 4 and 12 ▪ IRC 7701(a)(4) ▪ Pub. 515 	

Issue 3, Step 2: Review Potential Issues

Payee Documentation for Treaty Benefits

Issue 3

How can an IRS agent determine whether or not to accept late documentation?

Explanation of Issue	Resources
<ul style="list-style-type: none">▪ In cases where the withholding agent, payee or beneficial owner have provided late documentation, the Service may consider accepting the late documentation and allow claims for treaty benefits. However, when documentation is provided after a payment is made the reliability of the documentation may be questionable. As such, examiners may require additional proof if it is determined that the delays in obtaining the withholding certificate affect its reliability. In general, examiners should consider all the underlying facts and circumstances when validating a Form W-8 or Form 8233 provided after the date of payment. Examiners should only accept such documentation if they are entirely satisfied with the reliability and veracity of the documentation.	<ul style="list-style-type: none">▪ Treas. Reg. 1.1441-1(b)(7)▪ IRM 4.10.21.8.4.5 – Forms W-8 Provided After Date of Payment▪ Pub. 515

Issue 3, Step 3: Additional Factual Development

Payee Documentation for Treaty Benefits

Issue 3

How can an IRS agent determine whether or not to accept late documentation?

Fact Element	Resources	6103 Protected Resources
<ul style="list-style-type: none"> ▪ Request a statement from the U.S. financial institution which addresses the requirements under Article 22 – Limitation on Benefits and establishes whether FP is a corporation under the laws of the foreign country and as such, derived the dividend income pursuant to IRC §894. ▪ Request a copy of FP's articles of incorporation to verify FP's country of residence at the time the royalty payments were made. 	<ul style="list-style-type: none"> ▪ U.S. Model Treaty (2006), Art. 10 and 22 ▪ IRC 894 ▪ Treas. Reg. 1.894-1(d) ▪ U.S. Model Treaty (2006), Art. 4 ▪ IRC 7701(a)(4) and (5) ▪ IRM 4.10.21.8.4.4.3 – Address Cures Using Additional Documentation ▪ Pub. 515 	

Issue 3, Step 3: Additional Factual Development (cont'd)

Payee Documentation for Treaty Benefits

Issue 3

How can an IRS agent determine whether or not to accept late documentation?

Fact Element	Resources	6103 Protected Resources
<ul style="list-style-type: none"> ▪ Request any additional information you deem necessary to allow a treaty claim, including an entity's articles of incorporation, partnership agreement, trust agreement, or a certificate of residence issued by the appropriate government official. ▪ Conduct research using the SEC's EDGAR, Capital IQ, online search engines, and other online resources to verify the residence of FP and the investments in USC. ▪ If evidence is difficult to obtain under the normal IDR process, contact the Information Gathering IPN and specifically refer to UIL 9460.02. 	<ul style="list-style-type: none"> ▪ Treas. 1.1441-6(c)(3) ▪ IRM 4.10.21.8.4.4.1 – Permanent Address Form W-8 Line 4 ▪ IRM 4.10.21.8.4.4.3 – Address Cures Using Additional Documentation ▪ Pub. 515 	

Issue 3, Step 4: Develop Arguments

Payee Documentation for Treaty Benefits

Issue 3

How can an IRS agent determine whether or not to accept late documentation?

Explanation of Adjustment	Resources	6103 Protected Resources
<ul style="list-style-type: none"> ▪ If FP provides additional documentation the examiner may consider, among other factors, the following factors. <ul style="list-style-type: none"> – Whether the documentation is consistent with FP’s books and records or account file at the U.S. financial institution. – Whether the Form W-8BEN’s establish facts that were in existence at the time the payments were made. – In general, the examiner should consider all the underlying facts and circumstances when validating a Form W-8 provided after the payment date, and should only accept a late Form W-8 when entirely satisfied with its reliability and veracity. 	<ul style="list-style-type: none"> ▪ Treas. Reg. 1.1441-1(b)(7) ▪ IRM 4.10.21.8.4.5 – Forms W-8 Provided After Date of Payment ▪ Treas. Reg. 1.1441-6(c)(3) ▪ Pub. 515 	

Issue 3, Step 4: Develop Arguments (cont'd)

Payee Documentation for Treaty Benefits

Issue 3

How can an IRS agent determine whether or not to accept late documentation?

Explanation of Adjustment	Resources	6103 Protected Resources
<ul style="list-style-type: none"> ▪ If the Service accepts the late documentation pursuant to the curing provisions under the Treasury Regulations, FP would be entitled to treaty benefits. ▪ If the Service does not accept the late documentation, examiners should proceed with issuing a Form 5701 - Notice of Proposed Adjustment (NOPA) and explain in the NOPA why the Service will not accept the late documentation. Late documentation is not acceptable if there's a change in circumstances and the withholding agent does not provide a new certificate or new documentation within 30 days of the change. 	<ul style="list-style-type: none"> ▪ Treas. Reg. 1.1441-6 ▪ Treas. Reg. 1.1441-1(e)(4)(ii)(D) 	

Issue 3, Step 4: Develop Arguments (cont'd)

Payee Documentation for Treaty Benefits

Issue 3

How can an IRS agent determine whether or not to accept late documentation?

Explanation of Adjustment	Resources	6103 Protected Resources
<ul style="list-style-type: none"> ▪ If a withholding agent chooses to apply the provisions for the 90-day grace period and treats an account holder as a foreign person it must have the following information at the beginning of the grace period. <ul style="list-style-type: none"> – The address that the payor has in its records for the account holder is in a foreign country, – The payor has furnished the information contained in a withholding certificate described in Treas. Reg. §§1.1441-1(e)(2)(i) or (3)(i), or – The payor holds a withholding certificate that is no longer reliable other than because the validity period has expired. 	<ul style="list-style-type: none"> ▪ Treas. Reg. 1.1441-1(b)(3)(iv) ▪ Treas. Reg. 1.6049-5(d)(2)(ii) ▪ Treas. Reg. 1.1441-6(c)(2) ▪ Treas. Reg. 1.1461-1(c)(4)(i)(A) 	

Issue 3, Step 4: Develop Arguments (cont'd)

Payee Documentation for Treaty Benefits

Issue 3

How can an IRS agent determine whether or not to accept late documentation?

Explanation of Adjustment	Resources	6103 Protected Resources
<ul style="list-style-type: none"> ▪ The grace period terminates on the earlier of the close of the 90th day from the date on which the grace period begins or the date that the documentation is provided. ▪ In any case, if the Service determines that a withholding agent did not pay the correct amount of withholding tax it would still be subjected to interest and penalties. 	<ul style="list-style-type: none"> ▪ IRC 1463 ▪ Treas. Reg. 1.1441-1(b)(7)(iii) ▪ IRC 6651, 6656, and 6662 	

Issue 4, Step 2: Review Potential Issues

Payee Documentation for Treaty Benefits

Issue 4

What are the consequences for a withholding agent who has relied on insufficient documentation?

Explanation of Issue	Resources
<ul style="list-style-type: none"> ▪ If the Service determines that a withholding agent relied on insufficient documentation and had actual knowledge or reason to know that a claim of U.S. status or of a reduced treaty rate is incorrect it could be liable for up to 30% of the gross amount of the income subject to withholding. ▪ Withholding agents should apply the due diligence standards pursuant to the regulations. As such, a withholding agent who has actual knowledge or reason to know that a withholding certificate or other documentary evidence is false must report and withhold at the full rate of 30%. ▪ A withholding agent shall be considered to have reason to know if the facts on the withholding certificates or other documentary evidence is such that a reasonably prudent person would question the claims made by a payee or beneficial owner. 	<ul style="list-style-type: none"> ▪ IRC 1461 ▪ Treas. Reg. 1.1441-1(b)(7)(i) ▪ IRM 4.10.21.8.3.2 – Actual Knowledge ▪ IRM 4.10.21.8.3.1 – Reason to Know ▪ Pub. 515 ▪ Treas. Reg. 1.1441-7(b)(1) ▪ IRM 4.10.21.8.3 – Due Diligence – Standard of Knowledge ▪ Treas. Reg. 1.1441-7(b)(1) and (2) ▪ IRM 4.10.21.8.3.1 – Reason to Know

Issue 4, Step 2: Review Potential Issues (cont'd)

Payee Documentation for Treaty Benefits

Issue 4

What are the consequences for a withholding agent who has relied on insufficient documentation?

Explanation of Issue	Resources
<ul style="list-style-type: none"> ▪ Withholding agents must also follow the presumption rules for purposes of determining the classification (corporation, partnership, etc.) and status of a payee. If a withholding agent fails to do so it could be liable for the withholding tax, interest, and penalties. ▪ A withholding agent that withholds at a rate less than applicable under the presumption rules or based on its actual knowledge will be liable for the tax required to be withheld (or backup withheld) without the benefit of a reduced rate, unless the withholding agent is able to demonstrate that the proper amount of tax was paid. ▪ However, a withholding agent may not rely on a payee's presumed status if it has actual knowledge or reason to know that the status or characteristics of the payee or beneficial owner differ from its presumed status and a greater amount of withholding tax would apply based on such knowledge. 	<ul style="list-style-type: none"> ▪ IRC 1461 ▪ IRC 6651, 6656, 6662, and 6721 ▪ Treas. Reg. 1.1441-1(b)(3) ▪ Treas. Reg. 1.1441-5(d) ▪ Treas. Reg. 1.1441-1(b)(3) ▪ Treas. Reg. 1.1441-5(d) ▪ IRM 4.10.21.8.3.4 – Requirement to Rely on Presumption Rules ▪ IRM 4.10.21.8.3.3 – Application of Presumption Rules ▪ Treas. Reg. 1.1441-1(b)(2)(vii) ▪ Treas. Reg. 1.1441-1(b)(3)(ix) ▪ IRM 4.10.21.8.3.3.1 – Classification (Type of Entity) ▪ IRM 4.10.21.8.3.3.2 – U.S. Versus Foreign Status ▪ Pub. 515

Issue 4, Step 3: Additional Factual Development

Payee Documentation for Treaty Benefits

Issue 4

What are the consequences for a withholding agent who has relied on insufficient documentation?

Fact Element	Resources	6103 Protected Resources
<ul style="list-style-type: none"> ▪ Determine if FP, based on the Form W-8BEN and other late documentation provided, is entitled to a reduced treaty rate of 0% under the U.S. Income Tax Treaty for the dividends. ▪ Review the brokerage statements and the account file from the U.S. financial institution to confirm whether or not FP directly owns 10% of the voting stock with regards to the investments it has in its financial account with the U.S. financial institution. ▪ Determine if the documentation including a Form W-8BEN or articles of incorporation for the royalty payments are valid. 	<ul style="list-style-type: none"> ▪ Treas. Reg. 1.1441-1(b)(7) ▪ U.S. Model Treaty (2006), Art. 10, 22, and 25 ▪ U.S. Model Treaty (2006), Art. 10, 22, and 25 ▪ Treas. Reg. 1.1441-1(b)(7)(i)(B) ▪ U.S. Model Treaty (2006), Art. 4 and 12 	

Issue 4, Step 4: Develop Arguments

Payee Documentation for Treaty Benefits

Issue 4

What are the consequences for a withholding agent who has relied on insufficient documentation?

Explanation of Adjustment	Resources	6103 Protected Resources
<ul style="list-style-type: none"> ▪ The withholding agent must apply the due diligence standards which require that it obtain proof that FP has met the requirements of IRC §894 and Article 22 – Limitation on Benefits. Otherwise, if the withholding agent fails to apply the due diligence standards and withholds at a rate of 0% it would be liable for a 30% withholding tax. 	<ul style="list-style-type: none"> ▪ Treas. Reg. 1.1441-7(b)(1) ▪ Treas. Reg. 1.1441-1(b)(1) ▪ IRC 1461 ▪ IRM 4.10.21.8.3 – Due Diligence – Standard of Knowledge 	

Issue 4, Step 4: Develop Arguments (cont'd)

Payee Documentation for Treaty Benefits

Issue 4

What are the consequences for a withholding agent who has relied on insufficient documentation?

Explanation of Adjustment	Resources	6103 Protected Resources
<ul style="list-style-type: none"> ▪ If the facts reveal that a reasonably prudent person would conclude that the Form W-8BEN (including a statement for the requirements under §894 and limitation on benefits) should have been provided to support a treaty rate of 0%, the withholding agent should have withheld 30% in the absence of such statement. In other words, the withholding agent should have known or had reason to know that FP was required to provide a Form W-8BEN, including a statement for the requirements under §894 and limitation on benefits, in order to be eligible for the reduced treaty rate of 0%. 	<ul style="list-style-type: none"> ▪ Treas. Reg. 1.1441-7(b)(1) ▪ Treas. Reg. 1.1441-1(b)(1) ▪ IRC 894 ▪ Treas. Reg. 1.894-1(d) ▪ U.S. Model Treaty (2006), Art. 22 ▪ IRM 4.10.21.8.3 – Due Diligence – Standard of Knowledge 	

Issue 4, Step 4: Develop Arguments (cont'd)

Payee Documentation for Treaty Benefits

Issue 4

What are the consequences for a withholding agent who has relied on insufficient documentation?

Explanation of Adjustment	Resources	6103 Protected Resources
<ul style="list-style-type: none"> ▪ However, if the Form W-8BEN is complete but FP did not provide the required statements for §894 and Article 22 – Limitation on Benefits and the Service determines that FP owned directly 10% of the voting stock relative to the dividends, the U.S. financial institution should have withheld and paid withholding tax on the dividends at a rate of 5%. ▪ If in the final analysis the Service concludes that FP has not met the requirements under Article 22 – Limitation on Benefits and FP asserts that it has met the requirements, examiners should inquire as to whether the taxpayer will request Competent Authority assistance as provided for under the treaty. 	<ul style="list-style-type: none"> ▪ Treas. Reg. 1.1441-1(b)(1) ▪ U.S. Model Treaty (2006), Art. 10 ▪ Treas. Reg. 1.1441-1(b)(7)(i)(B) ▪ U.S. Model Treaty (2006), Art. 10, 22, and 25 ▪ IRC 6651, 6656, 6662, and 6721 	

Issue 4, Step 4: Develop Arguments (cont'd)

Payee Documentation for Treaty Benefits

Issue 4

What are the consequences for a withholding agent who has relied on insufficient documentation?

Explanation of Adjustment	Resources	6103 Protected Resources
<ul style="list-style-type: none"> ▪ Unless Competent Authority decides that the requirements have been met, the U.S. financial institution is liable for the 5% withholding tax. Accordingly, the U.S. financial institution could also be liable for interest and penalties associated with this underpayment of tax. 	<ul style="list-style-type: none"> ▪ Treas. Reg. 1.1441-1(b)(7)(i)(B) ▪ U.S. Model Treaty (2006), Art. 10, 22, and 25 ▪ IRC 6651, 6656, 6662, and 6721 	

Issue 4, Step 4: Develop Arguments (cont'd)

Payee Documentation for Treaty Benefits

Issue 4

What are the consequences for a withholding agent who has relied on insufficient documentation?

Explanation of Adjustment	Resources	6103 Protected Resources
<ul style="list-style-type: none"> ▪ If the facts show that the documents provided for the royalty payments are valid or cured, the Service may allow the taxpayer's claim for a reduced treaty rate of 10%. Additionally, if the Service concludes that the withholding agent, USC, paid the proper amount of tax to the IRS and timely filed Forms 1042 and 1042-S to report the royalty payments made to FP, the Service can allow the claim for a reduced treaty rate of 10% even though the withholding agent relied on insufficient documentation at the time the royalty payments were made to FP. As a result, the withholding agent should not be assessed any additional tax, interest, or penalties with regards to the withholding tax on the royalty payments. 	<ul style="list-style-type: none"> ▪ Treas. Reg. 1.1441-1(b)(7)(i)(B) ▪ U.S. Model Treaty (2006), Art. 4 and 12 	
<ul style="list-style-type: none"> ▪ If the late or insufficient documentation was not cured, the withholding agent would be liable for a 30% withholding tax. 	<ul style="list-style-type: none"> ▪ Treas. Reg. 1.1441-1(b)(7)(i)(B) ▪ U.S. Model Treaty (2006), Art. 4 and 12 	

Training and Additional Resources

Chapter 8.1.1 Financial Intermediary Payer – U.S. Withholding Agent

Type of Resource	Description(s) and/or Instructions for Accessing	References
CENTRA sessions	<ul style="list-style-type: none">07/21/2010 - FIN Withholding on Foreign Payments Auditing Technique06/21/2011 - CAS Withholding on Foreign Payments07/12/2012 - IBC-CPE Non-Resident Alien Withholding	
Podcasts / Videos	<ul style="list-style-type: none">IBC 2011 CPE: Withholding	
Other Training Materials	<ul style="list-style-type: none">Nonresident Alien Withholding Form 1042 Audit Techniques (August 2012)	

Glossary of Terms and Acronyms

Term/Acronym	Definition
BMFOLT	Business Master File On-Line Tax Module
CPE	Continuing Professional Education
EDGAR	Electronic Data Gathering, Analysis, and Retrieval
FDAP	Fixed or Determinable Annual or Periodical
FP	Foreign Parent Corporation
IDR	Information Document Request
IDRS	Integrated Data Retrieval System
IPN	International Practice Network
IPS	International Practice Service
IRM	Internal Revenue Manual
IRPTRI	Information Returns Processing Transcript Requests – Payer Information
IRPTRL	Information Returns Processing Transcript Requests – Information Returns Processing On-Line Summary Request
IRPTRO	Information Returns Processing Transcript Requests – Payee On-Line Transcript Request
IRPTRR	Information Returns Processing Transcript Requests – Payer Hardcopy Transcript Request
NOPA	Notice of Proposed Adjustment
PMFOLD	Payer Master File On-Line Detail

Glossary of Terms and Acronyms

Term/Acronym	Definition
PMFOLS	Payer Master File On-Line Summary
SEC	U.S. Securities and Exchange Commission
TXMODA	Tax Module A
UIL	Uniform Issue List
USC	U.S. Corporation

Index of Related Issues

Issue	Associated UIL(s)	References
Discussion of withholding responsibilities of Qualified Intermediaries.	<ul style="list-style-type: none"> ▪ 9424.01-02 – Financial intermediary payor – foreign withholding agent 	<ul style="list-style-type: none"> ▪ Subchapter 8.1.2.4 – FDAP Payments – Payments by Qualified Intermediaries ▪ DCN: TO BE DETERMINED
Discussion of various types of corporate distributions and the withholding consequences.	<ul style="list-style-type: none"> ▪ 9424.01-03 – Non-financial intermediary payer – Repatriation 	<ul style="list-style-type: none"> ▪ Subchapter 8.1.3.1 – FDAP Payments – Corporate Distributions ▪ DCN: TO BE DETERMINED
Discussion of requirements for beneficial owner to claim a reduced rate or exemption from withholding and branch profits tax under a treaty.	<ul style="list-style-type: none"> ▪ 9424.01-06 – Payee claims for relief under a tax treaty 	<ul style="list-style-type: none"> ▪ Subchapter 8.1.6.1 – FDAP Payments – FDAP Payments/Branch Profits Tax Treaty Benefits/Qualified Resident under Treaty/Limitation on Benefits ▪ DCN: TO BE DETERMINED
Discussion of how to analyze FDAP payments made to entities that are fiscally transparent under either U.S. law or the laws under which the entity is a resident.	<ul style="list-style-type: none"> ▪ 9424.01-06 – Payee claims for relief under a tax treaty 	<ul style="list-style-type: none"> ▪ Subchapter 8.1.6.2 – FDAP Payments – Payments Through Fiscally-Transparent Entities (§1.894-1(d)) ▪ DCN: TO BE DETERMINED
This unit provides an overview of the exemptions to withhold under IRC §1441 on payments of FDAP income to foreign persons.	<ul style="list-style-type: none"> ▪ 9443.01 – Withholding: Payments of FDAP (IRC §1441) 	<ul style="list-style-type: none"> ▪ DCN: TO BE DETERMINED

Index of Related Issues (cont'd)

Issue	Associated UIL(s)	References
This unit provides a review of the forms that may be filed by NRA's with withholding agents that affect withholding requirements under IRC §1441.	<ul style="list-style-type: none"> ▪ 9443.01 – Withholding: Payments of FDAP (IRC §1441) 	<ul style="list-style-type: none"> ▪ DCN: TO BE DETERMINED
This unit provides a review of a withholding agent's liability to withhold under IRC §1441 on payments of FDAP income to foreign persons.	<ul style="list-style-type: none"> ▪ 9443.01 – Withholding: Payments of FDAP (IRC §1441) 	<ul style="list-style-type: none"> ▪ DCN: TO BE DETERMINED
Determination of appropriate treaty withholding rate: Character of Payment	<ul style="list-style-type: none"> ▪ 9450.07 – Determination of appropriate treaty withholding rate 	<ul style="list-style-type: none"> ▪ DCN: TO BE DETERMINED
Determination of appropriate treaty withholding rate: Dividends	<ul style="list-style-type: none"> ▪ 9450.07 – Determination of appropriate treaty withholding rate 	<ul style="list-style-type: none"> ▪ DCN: TO BE DETERMINED
Determination of appropriate treaty withholding rate: Royalties: Definition of Royalties	<ul style="list-style-type: none"> ▪ 9450.07 – Determination of appropriate treaty withholding rate 	<ul style="list-style-type: none"> ▪ DCN: TO BE DETERMINED
Using alternative means to obtain foreign based evidence.	<ul style="list-style-type: none"> ▪ 9460.02 – Information gathering activities 	<ul style="list-style-type: none"> ▪ Issuing a Formal Document Request When a U.S. Taxpayer is Unresponsive to an IDR ▪ DCN: IGA/9460.02_02(2013)