



DEPARTMENT OF THE TREASURY  
INTERNAL REVENUE SERVICE  
WASHINGTON, D. C. 20224

OFFICE OF THE CHIEF COUNSEL

IRB No. 2010-47  
November 22, 2010

**ACTION ON DECISION**

**Subject:** Shoukri Osman Saleh Abdel-Fattah v. Commissioner,  
134 T.C. No. 10

**Issue:** Whether the State Department certification required under I.R.C. § 893(b) is a prerequisite for the tax exemption provided for in I.R.C. § 893(a).

**Discussion:**

Shoukri Osman Saleh Abdel-Fattah (Taxpayer), a nonresident alien on an "A-2" visa, was employed at the Embassy of United Arab Emirates (Embassy) in the United States during 2005-2007. The services he performed for the Embassy are services of a sort that are performed by employees of the U.S. Embassy in the United Arab Emirates (UAE). Since its founding the UAE has never imposed any income taxes on individual income, including that of employees of the U.S. Embassy in the UAE. The State Department did not certify this fact pursuant to I.R.C. § 893(b) until 2008.

For each of the years at issue, Taxpayer filed a Form 1040 return on which he reported his Embassy wages. His returns reported overpayments of tax and claimed refunds. The IRS issued a notice of deficiency for those years based on adjustments unrelated to the Embassy wages. In response to the notice of deficiency, Taxpayer filed a petition with the Tax Court. The only issue raised by Taxpayer in his petition, after conceding that he wrongly claimed certain tax credits for which nonresident aliens are ineligible, was that his reported Embassy wages were exempt from income tax under I.R.C. § 893(a). Taxpayer subsequently filed a motion for summary judgment asserting that a certification by the State Department under I.R.C. § 893(b) is not a prerequisite for exemption from taxation, or, in the alternative, that the 2008 I.R.C. § 893(b) certification was retroactive to 2005-2007.

I.R.C. § 893(a) exempts from federal tax the compensation of employees of foreign governments received for official services if certain enumerated conditions are met. 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

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countries. The Service's position in the litigation was that the State Department certification required under I.R.C. § 893(b) is a prerequisite for the tax exemption provided for in I.R.C. § 893(a), and that because no certification was in effect during the years in issue Taxpayer did not qualify for the tax exemption.

While the Tax Court acknowledged that an I.R.C. § 893(b) certification, when present, will greatly simplify an embassy employee's claim of exemption and the Service's ruling on that claim, it rejected the Service's interpretation of the statute. The Court held that under the plain language of I.R.C. § 893, the certification required by the Secretary of State in I.R.C. § 893(b) is not a condition or prerequisite for the tax exemption provided in I.R.C. § 893(a). The Tax Court based its decision, in part, on its review of the legislative history of, and policy reasons for, the I.R.C. § 893 exemption. The Tax Court also considered two alternative forms of certification statutes in the Internal Revenue Code – those where certification is an express prerequisite to a tax benefit provided in the Code, for example, I.R.C. § 3121(b)(12), which provides for a State Department certification requirement in order to obtain exemption from social security taxes, and statutes where certification is not an express prerequisite, for example I.R.C. § 5845(a), which does not preclude claiming exemption from firearms taxes on devices that the Secretary of Treasury has not certified as having certain characteristics. The Court found that I.R.C. § 893 fits within the latter category, concluding that I.R.C. § 893(b) “requires action by the Secretary of State but does not purport to qualify the exemption or to take it away in any instance.”

With the record reflecting that Taxpayer satisfied the enumerated conditions of I.R.C. § 893(a) (*i.e.*, the parties stipulated that Taxpayer was not a U.S. citizen, that the services rendered by Taxpayer to the Embassy were similar in character to services rendered by U.S. government employees in foreign countries, and that the UAE has never imposed any income taxes on individual income), the Court ruled in favor of Taxpayer. The Tax Court did not reach Taxpayer's secondary argument that the I.R.C. § 893(b) certification issued by the State Department in 2008 to his employer, the Embassy, should be applied retroactively to the years in issue, 2005-2007.

Under the Tax Court's holding, an embassy employee is entitled to the I.R.C. § 893(a) tax exemption 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) are met.

In light of the Tax Court's findings, the Service will no longer take the position that the certification required by the Secretary of State in I.R.C. § 893(b) is a prerequisite for the

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tax exemption provided for in I.R.C. § 893(a). However, the employee has the burden of proof to establish the enumerated conditions of I.R.C. § 893(a) are met. In disposing of cases where the State Department has issued an I.R.C. § 893(b) certification, the Service will apply the certification to all taxable years for which the facts and law are the same as those upon which the certification was based. In cases where the State Department has not issued an I.R.C. § 893(b) certification, the Service will continue to challenge a non-U.S.-citizen embassy employee's claim of exemption if the employee fails to establish to the Service that the conditions of I.R.C. § 893(a)(2) and (3) are met as to that employee.

**Recommendation:** Acquiescence

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**Reviewers:**  
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