

**Office of Chief Counsel  
Internal Revenue Service  
Memorandum**

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date: May 05, 2022

to:

Internal Revenue Agent (LBI IIC)

thru:

Supervisory Internal Revenue Agent (LBI IIC)

from: Associate Area Counsel (Fort Lauderdale)  
(Small Business/Self-Employed)

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subject: Requirement to File Form 5471 / Reasonable Cause for Failure

Taxpayer:

SSN:

Tax Period:

This Chief Counsel Advice responds to your request for assistance. This advice may not be used or cited as precedent.

ISSUES

1. Whether the provisions of the United States—Mexico Income Tax Convention (the Convention) relieve Taxpayer of the obligation to file Forms 5471, Information Return of U.S. Persons With Respect to Certain Foreign Corporations, reporting the information required under I.R.C. § 6038.
2. Whether Taxpayer had reasonable cause for the failure to timely file Forms 5471 for the taxable year .

CONCLUSIONS

1. 

2. [REDACTED]

### FACTS

Taxpayer is a Mexican national who was present in the United States for 234 days in [REDACTED], 291 days in [REDACTED], and 331 days in [REDACTED]. For the taxable year [REDACTED], Taxpayer filed Form 1040NR, U.S. Nonresident Alien Income Tax Return, attaching: Form 8833, Treaty-Based Return Position Disclosure Under Section 6114 or 7701(b); a single Form 8275-R, Regulation Disclosure Statement; and Form 8938, Statement of Specified Foreign Financial Assets.

On Form 1040NR, Taxpayer improperly reported \$ [REDACTED] of income as exempt pursuant to a treaty and reported no other income. On Schedule B, Taxpayer indicated "Yes" in response to the questions on Lines 7a concerning a financial interest in or signatory authority over foreign financial accounts and the requirement to file FinCEN Form 114, Report of Foreign Bank and Financial Accounts (FBAR).

On Form 8833, Taxpayer indicated he was a dual resident of the United States and Mexico and was filing as a nonresident of the United States pursuant to the treaty tie-breaker provision in paragraph 2 of Article 4 (Residence) of the United States – Mexico Income Tax Convention (the Convention). Taxpayer referenced I.R.C. § 7701(b)(1)(A)(ii) as the Code provision overruled or modified.

On the Form 8275-R, Taxpayer disclosed that his return position was contrary to Treas. Reg. § 301.7701(b)-7(a) and that he was not filing Form 5471. Taxpayer left blank the top section which asked for the name and identifying numbers of the foreign entity "If Form 8275-R relates to an information return for a foreign entity (for example, Form 5471)." In the explanation portion, Taxpayer wrote the following:

TREASURY REGULATION SECTION 301.7701(B)-7(A)(3) PROVIDES THAT A DUAL RESIDENT TAXPAYER WHO FILES AS A NONRESIDENT PURSUANT TO A TREATY TIE BREAKER ELECTION IS TREATED AS A RESIDENT FOR ALL PURPOSES OF THE INTERNAL REVENUE CODE OTHER THAN THE COMPUTATION OF THE TAXPAYER'S U.S. INCOME TAX LIABILITY. THIS PROVISION MAY BE INTERPRETED AS REQUIRING A DUAL RESIDENT TAXPAYER WHO FILES AS A NONRESIDENT PURSUANT TO A TREATY TIE BREAKER ELECTION TO FILE CERTAIN INFORMATION REPORTING RETURNS REQUIRED TO BE FILED BY U.S. PERSONS. HOWEVER, THE IRS HAS NO REASONABLE BASIS FOR REQUESTING SUCH INFORMATION FROM A DUAL RESIDENT TAXPAYER WHO FILES AS A NONRESIDENT AND IS, THEREFORE, NOT OBLIGED TO PAY U.S. INCOME TAX. IN ADDITION, THE IRS WOULD NOT DERIVE ANY USEFUL INFORMATION FROM SUCH INFORMATION AS SUCH INFORMATION ONLY IS RELEVANT IN DETERMINING THE U.S. TAX LIABILITIES OF A U.S. TAXPAYER.

THUS, TAXPAYER IS TAKING THE POSITION THAT TREATY REGULATION SECTION 301.7701(B)-7(A)(3) IS INVALID IN SO FAR AS IT MAY REQUIRE A DUAL RESIDENT TAXPAYER WHO FILES AS A NONRESIDENT PURSUANT TO A TREATY TIE BREAKER ELECTION TO FILE CERTAIN INFORMATION REPORTING RETURNS REQUIRED TO BE FILED BY U.S. PERSONS.

Taxpayer filed Form 8938, on which he reported seven deposit accounts and ten other foreign financial assets comprised of interests in various foreign corporations. Taxpayer also filed an FBAR for calendar year .

Following multiple information document requests (IDRs) and a formal document request (FDR) under I.R.C. § 982, Taxpayer identified various entities in which he held an interest, the country of formation, the type of entity, his percentage ownership, and the percentage ownership of other relatives. Taxpayer has identified eleven such entities and indicated the ownership interests of himself, his mother, , and his brother, .

By separate memorandum dated October 26, 2021, our office 



In a response dated February 16, 2021, to a pattern letter concerning the failure to file Form 5471 as to one foreign corporation, Taxpayer provided a one-page reasonable cause statement:

4. The Tax Advisors prepared form 1040NR and Form 8833 for the Taxpayer claiming tax residency in Mexico under the treaty between U.S. and Mexico.

5. The Tax Advisors specifically prepared a statement on form 8275-R attached to Form 1040BR that Form 5471 was not required to be filed and any requirement is not valid. It is the Taxpayer's understanding that the Tax Advisors and other international tax practitioners in the same community believe this position (i.e., no 5471 or other certain information return is required to be filed when a person is a non-resident pursuant to income tax treaty tie breaking rules) is valid. In fact, it is the Taxpayer's understanding that the IRS changed its position in December 2014 relating to Form 8938 and tax practitioners believed the IRS may change its position as to Form 5471.

6. The obligations to file information returns for ordinary U.S. tax residents is complicated but the obligations to file information returns for a non-U.S. resident relating to U.S./Mexico tax treaty tie breaking rules is substantially even more complicated. It is so complicated that even highly knowledgeable and

experienced international tax practitioners dispute the requirement to file 5471 in the case of Taxpayer.

7. The Taxpayer relied exclusively on the advice of his Tax Advisors who have extensive skill, knowledge, and experience in the international tax area.

8. Therefore, and in sum, the Taxpayer had reasonable cause for not filing form 5471 in including reliance on tax advisors, the complexity of the tax area and the dispute whether there is an obligation.

After this submission, Exam requested additional information concerning Taxpayer's reasonable cause position as part of an IDR. The requests were as follows:

In reference to the reasonable cause statement filed on 2/16/2021:

- A. Identify any person involved in the provision of advice to the Taxpayer that:
  1. Treasury Regulation § 301.7701(b)-7(a)(3) is invalid;
  2. The Taxpayer is not required to file Forms 5471 on the grounds that Treasury Regulation § 301.7701(b)-7(a)(3) is invalid or on any other grounds; and/or
  3. The Taxpayer should not file Forms 5471 on the grounds that Treasury Regulation § 301.7701(b)-7(a)(3) is invalid or on any other grounds.
- B. For any person identified as being involved in the provision of the advice described in A. above, provide:
  1. The person's business address, telephone number, and email address;
  2. A listing of the person's licenses and professional credentials;
  3. A description of the person's educational background related to the income tax and information reporting obligations of resident aliens, nonresident aliens, and dual residents;
  4. A description of the person's experience in dealing with matters related to the income tax and information reporting obligations of resident aliens, nonresident aliens, and dual residents; and
  5. State whether the Taxpayer was fully aware of each such person's educational background and experience at the time the advice was rendered and at the time the Taxpayer signed the return.
- C. Provide all facts and documents disclosed by the Taxpayer to any person involved in the provision of the advice described in A. above.
- D. Provide a copy of any and all written opinions or advice communicated to the Taxpayer regarding the advice described in item A. To the extent that any opinion or advice was not in writing, provide a copy of any file memo, notes, or similar record describing the provision of verbal advice. To the extent there is no record of the provision of verbal advice, state the dates and describe in detail the verbal advice provided to the Taxpayer.

Taxpayer's response through the POA included none of the information, instead simply stating:

The lead CPA at (formerly ) for the Taxpayer was . prepared the return. Form 8275-R Part IV of the original return, a copy of which is attached, provides the statement prepared by the Taxpayer's advisors and the statement speaks for itself.

Clearly, the Taxpayer relied on his tax advisors and has no reason to doubt the advisor especially being a non-U.S. person who has no level of sophistication or experience with U.S. tax matters of such a nature.

After three additional pattern letters were issued, Taxpayer provided additional reasonable cause statements substantially the same as that submitted in the response dated February 16, 2021.

Exam has issued Taxpayer a preliminary examination report for the taxable year determining that he had an additional \$ of U.S.-source income for personal services performed while physically present in the United States.

## LAW AND ANALYSIS

### **I. Validity of the Information Reporting Requirement**

#### A. REQUIREMENT TO REPORT INFORMATION

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

B. TREATY TIE-BREAKER PROVISION

[REDACTED]

[REDACTED]

C. PURPORTED CONFLICT BETWEEN THE CODE AND THE TREATY

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]



[REDACTED]

**II. Reasonable Cause**

[REDACTED]

**A. Reasonable Cause Statement**

[REDACTED]

[REDACTED]

**B. TAXPAYER'S EFFORTS AND BACKGROUND**

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

C. RELIANCE ON ADVICE IN GENERAL

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

D. RELIANCE ON ADVICE AS TO REGULATION INVALIDITY

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

E. ANCILLARY MATTER

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

CONCLUSIONS

[REDACTED]

[REDACTED]

[REDACTED]

CASE DEVELOPMENT, HAZARDS AND OTHER CONSIDERATIONS

This writing may contain privileged information. Any unauthorized disclosure of this writing may undermine our ability to protect the privileged information. If disclosure is determined to be necessary, please contact this office for our views.

If you have any questions, please contact the undersigned at .

LAUREN B. EPSTEIN  
Associate Area Counsel (SB/SE)

By: \_\_\_\_\_  
Alexander N. Martini  
Senior Attorney (SB/SE)