

Office of Chief Counsel
Internal Revenue Service
Memorandum

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to: Mary Moore
Senior Associate Advocate
(Philadelphia IRS Campus)

from: Ricardo A. Cadenas
Branch Chief, Br. 7
(Associate Chief Counsel International)

subject: American Samoa -- Social Security Withholding
In re:

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

LEGEND

Taxpayer =

ISSUES

1. Under what provision(s) of the Internal Revenue Code should the Taxpayer's social security benefits be taxed?
2. Whether the Social Security Administration should withhold tax at the rate of 30 percent on the Taxpayer's social security benefits?
3. Is the Taxpayer entitled to a refund of the 30 percent tax withheld?

CONCLUSIONS

As a preliminary matter, the responses to issues 1. and 3. above depend on whether or not the Taxpayer is a bona fide resident of American Samoa, under IRC § 931(d)(3).¹

1. If the Taxpayer is a bona fide resident of American Samoa, then his social security income would be taxed under IRC § 86, in accordance with IRC §§ 1 and 876. On the other hand, if he is not a bona fide resident of American Samoa, and is not a U.S. citizen or a U.S. National, then he would be taxed as a nonresident alien under IRC § 871(a)(3).
2. If the Taxpayer is a nonresident alien for purposes of IRC § 1441, regardless of whether or not he is a bona fide resident of American Samoa, his social security benefits would be subject to withholding under IRC § 1441 and the regulations thereunder. Since the Taxpayer is a citizen of Western Samoa, and not a citizen of the United States or a U.S. National of American Samoa, the Social Security Administration properly withheld tax on the Taxpayer's social security payments, at the rate of 30 percent in accordance with IRC § 1441.
3. If the Taxpayer is a bona fide resident of American Samoa, filing a return with the IRS, he would be entitled to a refund of the 30 percent tax withheld, provided he does not have other income that makes his benefits taxable under IRC § 86. If he is not a bona fide resident of American Samoa, then he would be considered a nonresident alien for purposes of IRC § 871(a)(3), and he would not be entitled to a refund of the 30 percent tax withheld, since the tax on the social security benefits of a nonresident alien would likely equal the amount withheld of 30 percent, under IRC § 871(a)(3), unless he had offsetting deductions.

FACTS

This refers to your request for our advice regarding how to process a return filed by the Taxpayer, who is a citizen of Western Samoa, claiming to be a bona fide resident of American Samoa. The Taxpayer is seeking a refund for taxes withheld at the 30 percent rate by the Social Security Administration (SSA) on his social security benefits.

The facts provided to our office are as follows. The Taxpayer is a citizen of Western Samoa, but claims that he is a bona fide resident of American Samoa. He is retired and is receiving social security benefits. The SSA has been withholding 30 percent tax on his social security income, as a nonresident alien, under IRC § 1441. The Taxpayer has filed a return with the IRS, reporting all his social security income and claiming a refund of the 30 percent tax withheld. You requested our opinion as to whether the IRS should allow the refund.

¹ IRC § 931(d) was amended by the American Job Creations Act of 2004 (P.L. 108-357), which added IRC § 937 (Residence and Source Rules Relating to United States Possessions). IRC 937(a)(2) is effective for taxable years beginning 2004; and IRC § 937(a)(1) is effective for taxable years beginning 2005.

LAW AND ANALYSISIssue 1The provision(s) of the Internal Revenue Code under which the social security benefits are taxed

With regard to nonresident aliens, IRC § 871(a)(3) is the applicable section of the Internal Revenue Code under which social security benefits, received by such individuals, are taxed. IRC § 871(a)(3) contains specific provisions on taxation of social security benefits, and that subsection refers to IRC § 1441, which provides for 30 percent withholding on income of nonresident alien individuals.

IRC § 871(a)(3) provides as follows:

Taxation of Social Security Benefits.—For purposes of this section [Taxation of Nonresident Aliens] and section 1441 [Withholding of Tax on Nonresident Aliens]—

- (A) 85 percent of any social security benefit (as defined in section 86(d)) shall be included in gross income..., and
- (B) section 86 shall not apply

The facts presented to our office, however, indicate that the Taxpayer claims to be a bona fide resident of American Samoa. If the Taxpayer is, in fact, a bona fide resident of American Samoa, then his social security benefits would be taxed under IRC §§ 1 and 86, in accordance with IRC § 876.

IRC § 876(a) provides as follows:

General Rule.—This subpart [tax on nonresident aliens] shall not apply to any alien individual who is a bona fide resident of Puerto Rico, Guam, American Samoa, or the Northern Mariana Islands during the entire taxable year and such alien shall be subject to the tax imposed by section 1.²

IRC § 1 provides for the imposition of tax on income at graduated rates. IRC § 86 contains specific provisions on taxation of social security benefits. IRC § 86(a)(1) provides that gross income includes social security benefits, and the taxable portion is discussed in detail in that section.

Therefore, with respect to an individual who is a bona fide resident of American Samoa, the applicable Internal Revenue Code sections under which his social security benefits will be taxed are IRC §§ 1 and 86, and not IRC § 871(a)(3).

² IRC § 876 is applicable to American Samoa, but not to Guam or the Northern Mariana Islands until an implementing agreement, as contemplated by the Tax Reform Act of 1986, P.L. 99-514, is in effect between the United States and those two possessions.

Issue 2Withholding of the Taxpayer's social security benefits at the 30 percent rate under IRC § 1441

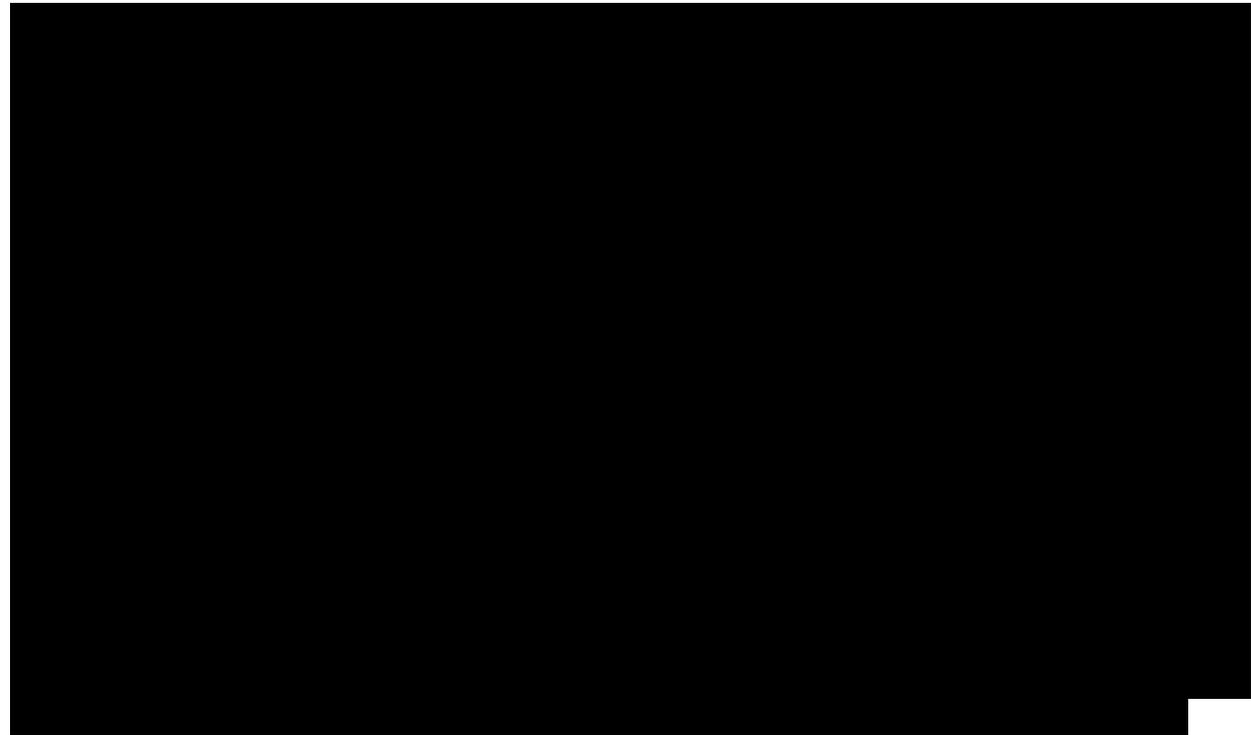
The SSA withheld tax on the Taxpayer's social security benefits at the rate of 30 percent. This would be appropriate, under IRC § 1441, if the Taxpayer is considered to be a nonresident alien for purposes of IRC § 1441. It is likely that the SSA withheld tax at the rate of 30 percent for the Taxpayer because he is a citizen of Western Samoa and not a citizen of the United States or a U.S. National of American Samoa.

Treas. Reg. § 1.1441-1(c)(3)(ii) defines a "nonresident alien individual" as including "an alien individual who is a resident of Puerto Rico, Guam, the Commonwealth of Northern Mariana Islands, the U.S. Virgin Islands, or American Samoa as determined under [sec.] 301.7701(b)-1(d) of this chapter." Section 301.7701(b)-1(d) refers to IRC § 931 and the regulations thereunder for the determination of whether an individual is a bona fide resident of American Samoa. Thus, the regulations under IRC § 1441 appear to treat a bona fide resident of American Samoa as a nonresident alien for purposes of IRC § 1441, if he is not a U.S. citizen or a U.S. National, even though he is not subject to tax liability under IRC § 871(a)(3). Consequently, the Taxpayer's social security benefits are subject to withholding at the rate of 30 percent under IRC § 1441.

Issue 3Whether the Taxpayer is entitled to a refund of the 30 percent tax withheld

As discussed above, if the Taxpayer is a bona fide resident of American Samoa during the entire taxable year, his social security benefits are taxable under IRC §§ 1 and 86, and there would be no substantive tax liability under IRC § 871. The Taxpayer must file a return with the IRS, as social security benefits are considered to be U.S. source income, under IRC §861(a)(8), even if none of the services were performed in the U.S. Consequently, in the case of a bona fide resident of American Samoa, the social security benefits would not be excludable from gross income under IRC § 931(a), and the benefits would be subject to tax under IRC § 86. The Taxpayer, as a bona fide resident of American Samoa, would be entitled to a refund of the 30 percent tax withheld, provided he does not have other income that makes his benefits taxable under IRC § 86. If he is not a bona fide resident of American Samoa, and therefore considered as a nonresident alien for purposes of IRC § 871, then he would not be entitled to a refund of the 30 percent tax withheld, since the tax on his social security benefits under IRC § 871(a)(3) would likely equal the amount withheld of 30 percent, unless he had otherwise offsetting deductions.

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.

Please call _____ if you have any further questions