

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

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subject: Time for Providing Documentation under Treas. Reg. § 1.871-14(c)(3)(i)

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

ISSUE

Whether a withholding agent that failed to withhold under section 1441 on payments of interest to a nonresident alien individual is barred under Treas. Reg. § 1.871-14(c)(3)(i) from subsequently obtaining the required documentation to qualify the payments as portfolio interest payments when (i) the nonresident alien individual did not file a U.S. tax return nor pay any tax for the year in which the payments were made, or (ii) the nonresident alien individual filed a U.S. tax return and paid tax unrelated to the interest payments for the year in which the payments were made.

CONCLUSION

The withholding agent is not barred under Treas. Reg. § 1.871-14(c)(3)(i) from obtaining the documentation when the nonresident alien individual has not filed a U.S. tax return and has not paid any tax for the year in which the interest payments were made. However, the withholding agent may be required to provide additional proof of entitlement to a reduced rate of withholding under Treas. Reg. § 1.1441-1(b)(7)(ii) to the extent that the reliability of the documentation is affected by the delay in obtaining the documentation.

The withholding agent may be barred under Treas. Reg. § 1.871-14(c)(3)(i) from obtaining the documentation when the nonresident alien individual has filed a U.S. tax return and paid tax for the year in which the interest payments were made. As the filing of the return and the payment of tax both cause the nonresident alien individual's period of limitations under section 6511(a) to begin, the withholding agent has until the expiration of such period to obtain the required documentation.

## FACTS

WA, the withholding agent, is a financial institution that is under examination for the taxable year. During , WA made payments of interest to nonresident alien individuals A and B. WA treated these payments as payments of portfolio interest under section 871(h) and thus did not withhold or deposit any tax with respect to these payments. See Treas. Reg. § 1.1441-1(b)(4)(i) (providing an exemption from withholding for portfolio interest payments). However, WA did not have the required documentation to support a claim for portfolio interest at the time it made the interest payments. See Treas. Reg. § 1.871-14(c)(2) (providing requirements for when a withholding agent is considered to have received the required statement for portfolio interest exemption). In , during an audit, WA secured documentation it represents as sufficient for treating the payments made to A and B in as portfolio interest.

A did not file a U.S. tax return or pay any tax for the taxable year. B timely filed a U.S. tax return reporting taxable income unrelated to the interest payments and paid the tax due on such income.

## ANALYSIS

Section 1441 and Treas. Reg. § 1.1441-1(b)(1) generally require a withholding agent to withhold 30-percent of any payment of U.S. source fixed or determinable, annual, or periodical income made to a nonresident alien individual unless the withholding agent can reliably associate the payment with documentation upon which it can rely to treat the payment as made to a payee that is a U.S. person or as made to a beneficial owner that is a foreign person entitled to a reduced rate of withholding.

Section 1461 states that every person required to deduct and withhold any tax under chapter 3 of the Code is made liable for such tax.

Treas. Reg. § 1.1441-1(b)(7)(ii) provides that proof of a reduced rate of withholding may be established after the date of payment on the basis of a valid withholding certificate or documentary evidence furnished after that date, but states that additional proof may be required "if it is determined that the delays in obtaining the withholding certificate affect its reliability."

Treas. Reg. § 1.1441-1(b)(4)(i) states that portfolio interest described in section 871(h) is exempt from withholding under section 1441(a) provided that documentation establishing foreign status is furnished for interest on an obligation in registered form.

Section 871(h) provides that no tax shall be imposed in the case of portfolio interest received by a nonresident alien individual from sources within the United States.

Treas. Reg. § 1.871-14(c)(3)(i) states that interest on a registered obligation qualifies as portfolio interest if the withholding certificate or documentary evidence that must be provided “is furnished before expiration of the beneficial owner’s period of limitation for claiming a refund of tax with respect to such interest.”

Section 6511(a) states that the limitations period for a taxpayer to claim a refund of tax is “within 3 years from the time the return was filed or 2 years from the time the tax was paid, whichever of such periods expires the later, or if no return was filed by the taxpayer, within 2 years from the time the tax was paid.”

Section 6513(b)(3) provides that when tax is withheld at the source for purposes for chapter 3, the tax is deemed paid by the recipient of the income on the last day prescribed for filing a return under section 6012.

At the time WA made the interest payments to A and B in \_\_\_\_\_, it did not have the required withholding certificate or documentary evidence (“documentation”) to qualify the payments as portfolio interest payments. Thus, these payments were not portfolio interest payments and WA is liable under section 1461 for the tax it was required to withhold, unless it obtains the documentation within the period prescribed under Treas. Reg. § 1.871-14(c)(3)(i). Under that provision, the documentation must have been furnished before the expiration of each beneficial owner’s period of limitation for claiming a refund of tax with respect to the interest.

A did not file a U.S. tax return nor pay any tax for the \_\_\_\_\_ taxable year. Further, because no tax was withheld on the interest payments to A, no tax was deemed paid on them under section 6513(b)(3). Thus, A’s period of limitation under section 6511(a) for claiming a refund of tax for such year cannot have started nor expired. As a result, WA is not barred under Treas. Reg. § 1.871-14(c)(3)(i) from obtaining documentation in \_\_\_\_\_ to support a claim that the interest payments made to A during \_\_\_\_\_ qualify as portfolio interest. However, because WA received the documentation after the date of payment (or any applicable grace period), WA may be required, under Treas. Reg. § 1.1441-1(b)(7)(ii), to provide additional proof to support its claim for a reduced rate of withholding. If WA is unable to obtain the appropriate documentation or provide additional proof required to qualify the interest payments to A as portfolio interest (or as otherwise eligible for a withholding exemption), WA is liable under section 1461 for any deficiency in the amount withheld.

B timely filed a U.S. tax return reporting taxable income unrelated to the interest income and paid the tax due on such income. Because the filing of a tax return and the payment of tax both cause the period of limitations under section 6511 to begin, WA is barred under Treas. Reg. § 1.871-14(c)(3)(i) from obtaining documentation to support a claim of portfolio interest with respect to the interest payments after the later of 3 years from the time the return was filed or 2 years from the time the tax was paid.<sup>1</sup> Even if WA is able to obtain the documentation within this period of limitations, WA may be required, under Treas. Reg. § 1.1441-1(b)(7)(ii), to provide additional proof to support its claim for a reduced rate of withholding. If WA is unable to obtain the appropriate documentation within B's period of limitations under section 6511, or cannot provide the additional proof required under Treas. Reg. § 1.1441-1(b)(7)(ii), WA is liable under section 1461 for any deficiency in the amount withheld.

Please call Subin Seth at (202) 317-5003 if you have any further questions.

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<sup>1</sup> This analysis is consistent with the example provided in Treas. Reg. § 1.871-14(c)(3)(ii), in which a withholding agent, A, did not withhold on an interest payment made in 2001 to a foreign corporation, B, despite not having valid documentation to associate with the payment. B was required to file a 2001 income tax return because it was engaged in the conduct of a trade or business in the United States. B is assumed to have filed its 2001 income tax return and its statute of limitations for that year expires on June 15, 2005. The example concludes that if B has not provided the documentation to A on or before June 15, 2005, and does not pay the tax, A is liable for the tax (even if B provides the documentation to A after June 15, 2005).