

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

Number: **201438020**

Release Date: 9/19/2014

CC:INTL:B01:GTArmstrong  
POSTN-123130-14

UILC: 9114.03-07

date: August 01, 2014

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subject: Consecutive Claims under Articles 19 and 20 of the U.S.-China Income Tax Treaty

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

ISSUE

Whether an individual who is present in the United States solely for the purpose of education, training, or obtaining special technical experience and who receives benefits under Article 20 (Students and Trainees) of the U.S.-China Income Tax Treaty (the "Treaty" or the "Chinese treaty") may, without leaving the United States (or without leaving the United States for a period of more than one year), begin employment as a teacher, lecturer, or researcher in the United States and receive benefits under Article 19 (Teachers, Professors and Researchers) of the Treaty.

CONCLUSION

Yes, the individual may receive benefits under Article 19 of the Treaty provided (1) the individual is a resident of China for the year at issue or was a resident of China immediately before visiting the United States as a student or trainee; (2) the individual is "temporarily present" (notwithstanding the fact that the individual was present in the United States in prior years solely for educational or training purposes) in the United States for the year at issue for the primary purpose of teaching, giving lectures, or conducting research; (3) the individual's teaching, lecturing, or research activities take

place at a university, college, school, or other accredited educational institution or scientific research institution in the United States; and (4) the individual has not claimed benefits under Article 19 for more than three years in the aggregate.

### BACKGROUND

Revenue Ruling 56-164, 1956-1 C.B. 848, considered whether a resident of the Netherlands whose income from teaching in the United States was exempt from U.S. income tax under Article 17 of the former U.S.-Netherlands income tax treaty (the “1948 Dutch treaty”), and who left the United States, could upon reentry qualify for a second exemption period under Article 17. At the time, Article 17 of the 1948 Dutch treaty provided that residents of the Netherlands who visited the United States to teach would not be taxed on their remuneration for teaching “for a maximum period of two years.” The revenue ruling concluded that, provided the individual was absent from the United States for a period of at least one year between the first and the second U.S. teaching positions, and still met the requirements of Article 17 with respect to the second such position, the individual could qualify for a second two-year exemption period under Article 17 upon reentering the United States.

The conclusion in Rev. Rul. 56-164 was based on a fact pattern initially set forth in a technical memorandum prepared by the Treasury Department (later incorporated into a Senate Executive Report) that discussed Article 18 of the original U.S.-U.K. income tax treaty (the “1945 U.K. treaty”). Article 18 of the 1945 U.K. treaty contained language similar to Article 17 of the 1948 Dutch treaty. The fact pattern in the technical memorandum involved a teacher who arrived in the United States in July 1945, taught in the United States for two academic years, left the United States during the summer of 1947 for vacation, and resumed his teaching duties in the United States in the fall of 1947. Under these facts, the memorandum concluded that the teacher was not entitled to a second two-year exemption beginning in the fall of 1947, although the memorandum noted that if the individual had left the United States for an entire year or more, he would have been eligible for another exemption period:

It is the purpose of [the exemption under Article 18 of the 1945 U.K. treaty] that such exemption shall cease at the end of 2 years from the date of [the individual’s] initial arrival in the United States. Thus, if [the individual] reaches the United States on July 1, 1945, he is exempt with respect to his remuneration earned in the United States up to June 30, 1947. If he then leaves the United States on vacation but resumes his duties in the United States at the beginning of the school term in the fall of 1947, he is not exempt with respect to his remuneration earned thereafter. If, however, he leaves the United States for an entire year or more and then returns to the United States, it is the intentment of the article that he will then enter upon another exemption period of 2 years.

S. Exec. Rep. No. 6, 79th Cong., 1st Sess. See also S. Exec. Rep. No. 11, 94th Cong., 2d Sess. (discussing Article 17 of the 1948 Dutch treaty).

You have asked whether the one-year rule articulated in Rev. Rul. 56-164 for consecutive claims under the same treaty article in the 1948 Dutch treaty should be applied in a case where a resident of China comes to the United States initially for educational or training purposes and, after completing his education or training, remains in the United States as a teacher, professor, or researcher. In other words, after an individual receives benefits under Article 20 of the Chinese treaty as a student or trainee, must the individual leave the United States for at least one year before he or she is eligible to receive benefits under Article 19 of the Treaty as a teacher, professor, or researcher?

For purposes of this memorandum, we assume that an individual, X, arrives in the United States on an F-1 visa for the sole purpose of obtaining an education at a university in the United States. Immediately before visiting the United States, X was a resident of China pursuant to Chinese domestic law. X is present as a student in the United States for four years, a period of time that is reasonably necessary to complete his education. In each year during that period, X earns \$5,000 from personal services performed in the United States and is entitled to exempt such income from U.S. income tax pursuant to paragraph (c) of Article 20 of the Treaty. After graduating, X remains in the United States and obtains a two-year teaching appointment as a teacher at a university in the United States. There are no facts to suggest that X intends to remain in the United States at the end of the two-year teaching appointment. X teaches at the university for two years and then returns to China. X claims that the remuneration earned from teaching is exempt from U.S. income tax under Article 19 of the Treaty.

#### LAW AND ANALYSIS

Article 19 of the Chinese Treaty provides that:

An individual who is, or immediately before visiting a Contracting State was, a resident of the other Contracting State and is temporarily present in the first-mentioned Contracting State for the primary purpose of teaching, giving lectures or conducting research at a university, college, school or other accredited educational institution or scientific research institution in the first-mentioned Contracting State shall be exempt from tax in the first-mentioned Contracting State for a period not exceeding three years in the aggregate in respect of remuneration for such teaching, lectures or research.

Article 20 provides, in relevant part, that a student who is or was immediately before visiting the United States a resident of China and who is present in the United States solely for the purpose of his or her education is exempt from U.S. income tax with respect to income from personal services performed in the United States in an amount not in excess of \$5,000 for any taxable year. The benefits provided under Article 20 extend only for such period of time as is reasonably necessary to complete the individual's education.

Article 2 of the Protocol to the Treaty provides a “saving clause” that generally preserves the right of the United States to tax its citizens and residents under its domestic law but provides certain exceptions:

Notwithstanding any provision of the Agreement, the United States may tax its citizens. Except as provided in paragraph 2 of Article 8, paragraph 2 of Article 17 and Articles 18, 19, 20, 22, 23, 24 and 26 of this Agreement, the United States may tax its residents (as determined under Article 4).

Because Article 19 and Article 20 are each excepted from the saving clause, a Chinese individual who becomes a U.S. resident (as determined under Article 4) may still be eligible for an exemption under Article 19 or Article 20 if the individual otherwise meets the requirements of those articles.<sup>1</sup>

In 2010, the competent authorities of the United States and China entered into an agreement (the “2010 Agreement”)<sup>2</sup> to clarify the scope and extent of Article 19, specifically its application to individuals who teach in the host country for longer than the three-year exemption period.<sup>3</sup> The 2010 Agreement provides that it is understood that the three-year exemption period begins to run from the first day the individual enters the host state for the primary purpose of teaching. If an individual is present in the host state for the primary purpose of teaching for more than three years following the date he or she enters the host state, the host state may begin to tax the individual’s remuneration for teaching starting with the first day of the fourth year. However, the individual’s remuneration for the first three years will not lose its host state exemption.<sup>4</sup>

Under the fact pattern addressed by this memorandum, X was a resident of China immediately before initially coming to the United States<sup>5</sup> for the sole purpose of obtaining an education. Accordingly, X “is, or immediately before visiting a Contracting State was, a resident of [China],” as required by Article 19. Once X accepted the two-

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<sup>1</sup> Section 7701(b) of the Internal Revenue Code provides rules for determining whether an individual who is not a U.S. citizen is a resident of the United States for domestic law purposes. If an individual is both a U.S. resident under section 7701(b) and a resident of China under China’s domestic law, Article 4 of the Treaty provides a procedure for determining the individual’s residence for purposes of the Treaty.

<sup>2</sup> For the text of the 2010 Agreement, see Announcement 2011-18, 2011-1 C.B. 527.

<sup>3</sup> The 2010 Agreement also applies to individuals who enter the host state for the primary purpose of giving lectures or conducting research.

<sup>4</sup> Under the 2010 Agreement, it is also understood that the three-year period is suspended if the teacher discontinues teaching and departs the host state. The three-year period may resume when the teacher returns to the host state for the primary purpose of teaching.

<sup>5</sup> For this purpose, the initial date of arrival is not affected by prior, de minimis visits to the United States, such as personal vacations, during which the individual was present for personal reasons unrelated to the individual’s claim for Article 19 or Article 20 benefits. See Rev. Rul. 89-5, 1989-1 C.B. 353.

year teaching appointment, he was temporarily present in the United States for the primary purpose of teaching at a university in the United States. Cf. Zhang v. Commissioner, T.C. Memo. 2011-118 (Chinese citizen who had been living and working in the United States for several years was not entitled to benefits under Article 19 because her “presence in the United States could no longer be considered temporary”).

Article 19 requires that an individual be temporarily present in the United States for the primary purpose of teaching. In the usual case, which is reflected in the 2010 Agreement, the individual is a resident of China immediately before coming to the United States for the purpose of teaching. However, Article 19 does not require that an individual enter the United States for the primary purpose of teaching. Therefore, Chinese individuals who originally enter the United States for a temporary purpose other than teaching may be entitled to receive Article 19 benefits as long as they are temporarily present in the United States for the primary purpose of teaching during the year they are claiming benefits under Article 19 and meet the other requirements discussed above.

In X’s case, despite not entering the United States to teach and not leaving the United States after ceasing to be a student, X satisfies the requirements of Article 19 because X is considered to be temporarily present for the primary purpose of teaching. As such, X is entitled to an exemption from U.S. income tax on the remuneration earned from teaching at the university, immediately after having been entitled to an exemption under Article 20 for the income earned as a student. There is no basis in the Treaty for requiring X to leave the United States after receiving benefits under Article 20 for a period of at least one year before obtaining benefits under Article 19. Revenue Ruling 56-164 does not affect this conclusion. That ruling interpreted a different treaty that is no longer in force and its reasoning was based on a legislative report pertaining to another treaty that is also no longer in force. In addition, Rev. Rul. 56-164 relied on specific language in the legislative report that stated a one-year absence was necessary before making a second claim. Such language does not exist with respect to the Chinese treaty.

The only uncertainty in X’s case is the date on which the exemption period begins to run. The relevant date is the date on which X commences to be temporarily present in the United States for the primary purpose of teaching. That date is no later than the date on which X begins to earn remuneration for teaching that would be eligible for exemption under Article 19, but the date could be earlier depending on all the facts and circumstances. In a case in which entitlement to treaty benefits (particularly with respect to a third year of teaching) depends on the precise date on which the exemption period begins to run, we would be happy to provide additional specific advice.

Finally, as noted above, even if, under section 7701(b) of the Code, X were to become a U.S. resident alien who is treated as a U.S. resident for Treaty purposes pursuant to Article 4 of the Treaty, X could still be entitled to benefits under Article 19 because Article 19 is excepted from the Treaty’s saving clause. In order to receive benefits, X

would need to meet the requirements of Article 19, including the requirement that X be “temporarily present” for the primary purpose of teaching.

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