

DEPARTMENT OF THE TREASURY

Internal Revenue Service

26 CFR Parts 1, 301, and 602

[TD 8733]

RIN 1545-AP35

Treaty-Based Return Positions

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Final regulations.

SUMMARY: This document contains final regulations under section 6114 of the Internal Revenue Code of 1986 providing that reporting is specifically required if the residency of an individual is determined under a treaty and apart from the Code.

The IRS concluded, in the process of completing the regulations under section 7701(b), that the rules of section 6114 should apply to individuals determining their residency under a treaty.

These final regulations are necessary to implement the section 6114 rules to individuals determining their residency under a treaty. Also contained in this document are final regulations relating to section 7701(b) and conforming changes to regulations under sections 6038 and 6046.

EFFECTIVE DATE: These regulations are effective December 15, 1997.

FOR FURTHER INFORMATION CONTACT: David A. Juster, telephone (202-622-3850) (not a toll-free number), regarding sections 6114 and 7701(b) and Carl M. Cooper, telephone (202-622-3840) (not a toll-free number) regarding sections 6038 and 6046, both of the Office of Associate Chief Counsel (International), within the Office of Chief Counsel, IRS.

SUPPLEMENTARY INFORMATION:

Paperwork Reduction Act

The collections of information contained in these final regulations have been reviewed and approved by the Office of Management and Budget in accordance with the Paperwork Reduction Act (44 U.S.C. 3507) under control number 1545-1126. Responses to these collections of information are mandatory.

An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless the collection of information displays a valid OMB control number.

The estimated annual burden per respondent varies from 1/2 hour to 3 hours, depending on individual circumstances, with an estimated average of 1 hour.

Comments concerning the accuracy of this burden estimate and suggestions for reducing this burden should be sent to the Internal Revenue Service, Attn: IRS Reports Clearance Officer, T:FP, Washington, DC 20224, and to the Office of Management and Budget, Attn: Desk Officer for the Department of the Treasury, Office of Information and Regulatory Affairs, Washington, DC 20503.

Books or records relating to this collection of information must be retained as long as their contents may become material in the administration of any internal revenue law. Generally, tax returns and tax return information are confidential, as required by 26 U.S.C. 6103.

Background

On April 27, 1992, a notice of proposed rulemaking was published in the **Federal Register** (57 FR 15272) proposing amendments to the final Regulations on Procedure and Administration (26 CFR 301.6114-1), published in the **Federal Register** on March 14, 1990 (55 FR 9438) and on July 12, 1990 (55 FR 28608). The proposed amendments related to § 301.6114-1 (b) and (c) and § 301.7701(b)-7(c)(2). No written comments responding to the notice were received. No public hearing was requested or held. The proposed amendments are adopted without change by this Treasury decision. This Treasury decision also includes modifications to §§ 1.6038-2(j), 1.6046-1(g), 301.6114-1(d), 301.7701(b)-3(b) (3) and (4), 301.7701(b)-7(c)(1) and 301.7701(b)-8(b) (1) and (2).

Explanation of Provisions

Section 301.6114-1(b) is amended by adding paragraph (b)(8) to provide that reporting is required under section 6114 where residency of an individual is determined under a treaty and apart from the Internal Revenue Code (Code). The regulations provide, however, that reporting is waived for an individual if payments or income items reportable by reason of paragraph (b)(8) do not exceed \$100,000 in the aggregate. Section 301.6114-1(d) currently provides that when reporting is required under section 6114, a taxpayer must furnish as an attachment to his or her return a written statement with the information as set forth in paragraph (d). Section 301.7701(b)-7(b) currently provides that a dual resident taxpayer who claims a treaty benefit as a nonresident of the United States must file a statement in the form required by paragraph (c) of that section. Section 301.6114-1(d) is now amended to provide that, when

reporting is required under section 6114, a taxpayer must furnish, as an attachment to his or her return, a fully completed Form 8833 (Treaty-Based Return Position Disclosure Under Section 6114 or 7701(b)) or appropriate successor form. Section 301.7701(b)-7(c)(1) is amended to provide that the written statement required to be furnished under paragraph (b) of that section, as an attachment to a dual resident taxpayer's return, must be in the form of a fully completed Form 8833 (Treaty-Based Return Position Disclosure Under Section 6114 or 7701(b)) or appropriate successor form. Form 8833 was developed to provide standardized reporting of the information currently required by §§ 301.6114-1(d) and 301.7701(b)-7(c).

In an effort to provide standardized reporting of the information currently required to be reported, under § 301.7701(b)-8(b), by taxpayers claiming the closer connection exception and exempt individuals and individuals with a medical condition, the Service has developed Form 8840 (Closer Connection Exception Statement) and Form 8843 (Statement for Exempt Individuals and Individuals with a Medical Condition). Accordingly, § 301.7701(b)-8(b)(1) is amended to provide that the statement filed by alien individuals claiming the closer connection exception, described in § 301.7701(b)-2, must be in the form of a fully completed Form 8840 or appropriate successor form. Section 301.7701(b)-8(b)(2) is amended to provide that the statement filed by exempt individuals and individuals with a medical condition, described in § 301.7701(b)-3, must be in the form of a fully completed Form 8843 or appropriate successor form.

Sections 3121(b)(19), 3306(c)(19) and 3231(e)(1) of the Code provide that "J" class visa holders (teachers and trainees) are exempt from FICA, FUTA and Railroad Retirement Act taxes, respectively. Section 320 of the Social Security Independence and Program Improvements Act of 1994, Public Law 103-296 (108 Stat. 1464), extends the FICA, FUTA and Railroad Retirement Act tax exemptions and certain other tax rules to "Q" class visa holders (participants in international cultural exchange programs). Accordingly, conforming changes have been made to § 301.7701(b)-3(b) (3) and (4) to reflect the revisions in the Code to the definitions of a *teacher or trainee* and *student* contained in section 7701(b)(5).

Section 301.7701(b)-7(c)(2), adopted as proposed, provides that, for purposes of stating the approximate amount of subpart F income to be included in the

statement required to be furnished under paragraph (b) of that section by a dual resident taxpayer who is a shareholder in a *controlled foreign corporation* (as defined in section 957 or section 953(c)), the approximate amount of income may be based on the audited foreign financial statements of the CFC if there are no other United States shareholders in that CFC. Parallel rules with respect to information reporting under sections 6038 and 6046 are added in §§ 1.6038-2(j)(2)(ii) and 1.6046-1(g). Under these rules, a taxpayer who claims a treaty benefit as a nonresident of the United States, but who is a United States person for purposes of the information reporting requirements of sections 6038 or 6046, may satisfy certain information reporting requirements by filing the audited foreign financial statements of the foreign corporation with respect to which the information reporting is required. However, these rules apply only if the taxpayer is the sole United States person for purposes of the information reporting requirements with respect to the foreign corporation. If there are other United States persons for those purposes, then the taxpayer must report the information required by the regulations in the form and manner generally prescribed.

Special Analyses

It has been determined that this Treasury decision is not a significant regulatory action as defined in EO 12866. Therefore, a regulatory assessment is not required. It has also been determined that section 553(b) of the Administrative Procedure Act (5 U.S.C. chapter 5) does not apply to these regulations, and because the notice of proposed rulemaking preceding the regulations was issued prior to March 29, 1996, the Regulatory Flexibility Act (5 U.S.C. chapter 6) does not apply. Pursuant to section 7805(f) of the Code, the notice of proposed rulemaking preceding these regulations was submitted to the Chief Counsel for Advocacy of the Small Business Administration for comment on its impact on small business.

Drafting Information: Various personnel from the Office of Associate Chief Counsel (International), within the Office of Chief Counsel, IRS and the Treasury Department participated in developing the regulations.

List of Subjects

26 CFR Part 1

Income taxes, Reporting and recordkeeping requirements.

26 CFR Part 301

Employment taxes, Estate taxes, Excise taxes, Gift taxes, Income taxes, Penalties, Reporting and recordkeeping requirements.

26 CFR Part 602

Reporting and recordkeeping requirements.

Adoption of Amendments to the Regulations

Accordingly, 26 CFR parts 1, 301 and 602 are amended as follows:

PART 1—INCOME TAXES

Paragraph 1. The authority citation for part 1 continues to read in part as follows:

Authority: 26 U.S.C. 7805 * * *

Par. 2. Section 1.6038-2 is amended by:

1. Redesignating paragraph (j)(2)(ii) as paragraph (j)(2)(iii).
2. Adding new paragraph (j)(2)(ii) to read as follows:

§ 1.6038-2 Information returns required of United States persons with respect to annual accounting periods of certain foreign corporations beginning after December 31, 1962.

* * * * *

(j) * * *

(2) * * *

(ii) If an individual who is a United States person required to furnish information with respect to a foreign corporation under section 6038 is entitled under a treaty to be treated as a nonresident of the United States, and if the individual claims this treaty benefit, and if there are no other United States persons that are required to furnish information under section 6038 with respect to the foreign corporation, then the individual may satisfy the requirements of paragraphs (f)(10), (f)(11), (g), and (h) of this section by filing the audited foreign financial statements of the foreign corporation with the individual's return required under section 6038.

* * * * *

Par. 3. In § 1.6046-1, paragraph (g) is amended by adding a sentence at the end to read as follows:

§ 1.6046-1 Returns as to organization or reorganization of foreign corporations and as to acquisitions of their stock, on or after January 1, 1963.

* * * * *

(g) * * * If an individual who is a United States person required to make a return with respect to a foreign corporation under section 6046 is entitled under a treaty to be treated as

a nonresident of the United States, and if the individual claims this treaty benefit, and if there are no other United States persons that are required to furnish information under section 6046 with respect to the foreign corporation, then the individual may satisfy the requirements of paragraphs (b)(10), (11) and (12), (c)(3)(ii)(d), and (g) of this section by filing the audited foreign financial statements of the foreign corporation with the individual's return required under section 6046.

* * * * *

PART 301—PROCEDURE AND ADMINISTRATION

Par. 4. The authority citation for part 301 continues to read in part as follows:

Authority: 26 U.S.C. 7805 * * *

Section 301.6114-1 also issued under 26 U.S.C. 6114; * * *.

Par. 5. Section 301.6114-1 is amended by:

1. Removing the language "(c)(1)" in paragraph (b)(4) introductory text and adding "(c)(1)(i)" in its place.
2. Removing the language "(c)(1)" in paragraph (b)(5) introductory text and adding "(c)(1)(i)" in its place.
3. Removing the language "(c)(4)" in paragraph (b)(6) and adding "(c)(1)(iv)" in its place.
4. Removing the language "or" at the end of paragraph (b)(6).
5. Removing the period at the end of paragraph (b)(7) and adding "; or" in its place.
6. Adding a paragraph (b)(8).
7. Paragraphs (c)(1) through (c)(6) are redesignated as paragraphs (c)(1)(i) through (c)(1)(vi), respectively.
8. Paragraphs (c)(7) introductory text, (c)(7)(i), (c)(7)(ii), and (c)(7)(iii) are redesignated as paragraphs (c)(1)(vii) introductory text, (c)(1)(vii)(A), (c)(1)(vii)(B) and (c)(1)(vii)(C), respectively.
9. The introductory text of paragraph (c) is redesignated as the introductory text of paragraph (c)(1).
10. Revising newly designated paragraph (c)(1)(ii).
11. Removing the concluding text immediately following newly designated paragraph (c)(1)(vii)(C).
12. Adding paragraphs (c)(2), (c)(3), (c)(4) and (c)(5).
13. Revising paragraph (d).

The additions and revisions read as follows:

§ 301.6114-1 Treaty-based return positions.

* * * * *

(b) * * *

(8) For returns relating to taxable years for which the due date for filing

returns (without extensions) is after December 15, 1997, that residency of an individual is determined under a treaty and apart from the Internal Revenue Code.

(c) *Reporting requirement waived.* (1) * * *

(ii) For returns relating to taxable years for which the due date for filing returns (without extensions) is on or before December 15, 1997, that residency of an individual is determined under a treaty and apart from the Internal Revenue Code.

* * * * *

(2) Reporting is waived for an individual if payments or income items otherwise reportable under this section (other than by reason of paragraph (b)(8) of this section), received by the individual during the course of the taxable year do not exceed \$10,000 in the aggregate or, in the case of payments or income items reportable only by reason of paragraph (b)(8) of this section, do not exceed \$100,000 in the aggregate.

(3) Reporting with respect to payments or income items the treatment of which is mandated by the terms of a closing agreement with the Internal Revenue Service, and that would otherwise be subject to the reporting requirements of this section, is also waived.

(4) If a partnership, trust, or estate that has the taxpayer as a partner or beneficiary discloses on its information return a position for which reporting is otherwise required by the taxpayer, the taxpayer (partner or beneficiary) is then excused from disclosing that position on a return.

(5) This section does not apply to a withholding agent with respect to the performance of its withholding functions.

(d) *Information to be reported*—(1) *Returns due after December 15, 1997.* When reporting is required under this section for a return relating to a taxable year for which the due date (without extensions) is after December 15, 1997, the taxpayer must furnish, in accordance with paragraph (a) of this section, as an attachment to the return, a fully completed Form 8833 (Treaty-Based Return Position Disclosure Under Section 6114 or 7701(b)) or appropriate successor form.

(2) *Earlier returns.* For returns relating to taxable years for which the due date for filing returns (without extensions) is on or before December 15, 1997, the taxpayer must furnish information in accordance with paragraph (d) of this section in effect prior to December 15, 1997 (see § 301.6114-1(d) as contained

in 26 CFR part 301, revised April 1, 1997).

(3) *In general*—(i) *Permanent establishment.* For purposes of determining the nature and amount (or reasonable estimate thereof) of gross receipts, if a taxpayer takes a position that it does not have a permanent establishment or a fixed base in the United States and properly discloses that position, it need not separately report its payment of actual or deemed dividends or interest exempt from tax by reason of a treaty (or any liability for tax imposed by reason of section 884).

(ii) *Single income item.* For purposes of the statement of facts relied upon to support each separate Treaty-Based Return Position taken, a taxpayer may treat payments or income items of the same type (e.g., interest items) received from the same ultimate payor (e.g., the obligor on a note) as a single separate payment or income item.

(iii) *Foreign source effectively connected income.* If a taxpayer takes the return position that, under the treaty, income that would be income effectively connected with a U.S. trade or business is not subject to U.S. taxation because it is income treated as derived from sources outside the United States, the taxpayer may treat payments or income items of the same type (e.g., interest items) as a single separate payment or income item.

(iv) *Sales or services income.* Income from separate sales or services, whether or not made or preformed by an agent (independent or dependent), to different U.S. customers on behalf of a foreign corporation not having a permanent establishment in the United States may be treated as a single payment or income item.

(v) *Foreign insurers or reinsurers.* For purposes of reporting by foreign insurers or reinsurers, as described in paragraph (c)(1)(vii)(B) of this section, such reporting must separately set forth premiums paid with respect to casualty insurance and indemnity bonds (subject to section 4371(1)); life insurance, sickness and accident policies, and annuity contracts (subject to section 4371(2)); and reinsurance (subject to section 4371(3)). All premiums paid with respect to each of these three categories may be treated as a single payment or income item within that category. For reports first due before May 1, 1991, the report may disclose, for each of the three categories, the total amount of premiums derived by the foreign insurer or reinsurer in U.S. dollars (even if a portion of these premiums relate to risks that are not U.S. situs). Reasonable estimates of the

amounts required to be disclosed will satisfy these reporting requirements.

* * * * *

Par. 6. Section 301.7701(b)-0 is amended in the contents listing by:

1. Adding entries for § 301.7701(b)-7, paragraphs (c)(1)(i) and (c)(1)(ii).

2. Removing the language “[Reserved]” in the entry for § 301.7701(b)-7, paragraph (c)(2).

3. Adding entries for § 301.7701(b)-8, paragraphs (b)(1)(i), (b)(1)(ii), (b)(2)(i) and (b)(2)(ii).

The additions read as follows:

§ 301.7701(b)-0 Outline of regulation provision for section 7701(b)-1 through (b)-9.

* * * * *

§ 301.7701(b)-7 Coordination with income tax treaties.

* * * * *

(c) * * *

(1) * * *

(i) *Returns due after December 15, 1997.*

(ii) *Earlier returns.*

* * * * *

§ 301.7701(b)-8 Procedural rules.

* * * * *

(b) * * *

(1) * * *

(i) *Returns due after December 15, 1997.*

(ii) *Earlier returns.*

(2) * * *

(i) *Returns due after December 15, 1997.*

(ii) *Earlier returns.*

* * * * *

Par. 7. Section 301.7701(b)-3 is amended by revising paragraphs (b)(3) and (b)(4) to read as follows:

§ 301.7701(b)-3 Days of presence in the United States that are excluded for purposes of section 7701(b).

* * * * *

(b) * * *

(3) *Teacher or trainee.* A teacher or trainee includes any individual (and that individual's immediate family), other than a student, who is admitted temporarily to the United States as a nonimmigrant under section 101(a)(15) (J) (relating to the admission of teachers and trainees into the United States) or section 101(a)(15)(Q) (relating to the admission of participants in international cultural exchange programs) of the Immigration and Nationality Act (8 U.S.C. 1101(a)(15) (J), (Q)) and who substantially complies with the requirements of being admitted.

(4) *Student.* A student is any individual (and that individual's

immediate family) who is admitted temporarily to the United States as a nonimmigrant under section 101(a)(15)(F) or (M) (relating to the admission of students into the United States) or as a student under section 101(a)(15)(J) (relating to the admission of teachers and trainees into the United States) or section 101(a)(15)(Q) (relating to the admission of participants in international cultural exchange programs) of the Immigration and Nationality Act (8 U.S.C. 1101(a)(15) (F), (J), (M), (Q)) who substantially complies with the requirements of being admitted. For rules concerning taxation of certain nonresident students or trainees, see section 871(c) and § 1.871-9(a) of this chapter.

Par. 8. Section 301.7701(b)-7 is amended by:

1. Revising paragraph (c)(1).
2. Adding text for paragraph (c)(2).

The revision and addition read as follows:

§ 301.7701(b)-7 Coordination with income tax treaties.

(c) * * * (1) *In general*—(i) *Returns due after December 15, 1997.* The statement filed by an individual described in paragraph (a)(1) of this section, for a return relating to a taxable year for which the due date (without extensions) is after December 15, 1997, must be in the form of a fully completed Form 8833 (Treaty-Based Return Position Disclosure Under Section 6114 or 7701(b)) or appropriate successor form. See section 6114 and § 301.6114-1 for rules relating to other treaty-based return positions taken by the same taxpayer.

(ii) *Earlier returns.* For returns relating to taxable years for which the due date for filing returns (without extensions) is on or before December 15, 1997, the statement filed by the individual described in paragraph (a)(1) of this section must contain the information in accordance with paragraph (c)(1) of this section in effect prior to December 15, 1997 (see § 301.7701(b)-7(c)(1) as contained in 26 CFR part 301, revised April 1, 1997).

(2) *Controlled foreign corporation shareholders.* If the taxpayer who claims a treaty benefit as a nonresident of the United States is a United States shareholder in a controlled foreign corporation (CFC), as defined in section 957 or section 953(c), and there are no other United States shareholders in that CFC, then for purposes of paragraph (c)(1) of this section, the approximate amount of subpart F income (as defined in section 952) that would have been

included in the taxpayer's income may be determined based on the audited foreign financial statements of the CFC.

Par. 9. Section 301.7701(b)-8 is amended by revising paragraphs (b)(1) and (b)(2) to read as follows:

§ 301.7701(b)-8 Procedural rules.

(b) * * * (1) *Closer connection exception*—(i) *Returns due after December 15, 1997.* The statement filed by an individual described in paragraph (a)(1) of this section, for a return relating to a taxable year for which the due date (without extensions) is after December 15, 1997, must be in the form of a fully completed Form 8840 (Closer Connection Exception Statement) or appropriate successor form.

(ii) *Earlier returns.* For returns relating to taxable years for which the due date for filing returns (without extensions) is on or before December 15, 1997, the statement filed by the individual described in paragraph (a)(1) of this section must contain the information in accordance with paragraph (b)(1) of this section in effect prior to December 15, 1997 (see § 301.7701(b)-8(b)(1) as contained in 26 CFR part 301, revised April 1, 1997).

(2) *Exempt individuals and individuals with a medical condition*—(i) *Returns due after December 15, 1997.* The statement filed by an individual described in paragraph (a)(2) of this section, for a return relating to a taxable year for which the due date (without extensions) is after December 15, 1997, must be in the form of a fully completed Form 8843 (Statement for Exempt Individuals and Individuals with a Medical Condition) or appropriate successor form.

(ii) *Earlier returns.* For returns relating to taxable years for which the due date for filing returns (without extensions) is on or before December 15, 1997, the statement filed by the individual described in paragraph (a)(2) of this section must contain the information in accordance with paragraph (b)(2) of this section in effect prior to December 15, 1997 (see § 301.7701(b)-8(b)(2) as contained in 26 CFR part 301, revised April 1, 1997).

PART 602—OMB CONTROL NUMBERS UNDER THE PAPERWORK REDUCTION ACT

Par. 10. The authority citation for part 602 continues to read as follows:

Authority: 26 U.S.C. 7805.

Par. 11. In § 602.101, paragraph (c) is amended by adding an entry in numerical order to the table and

revising the entry for 301.7701(b)-7 to read as follows:

§ 602.101 OMB Control numbers.

CFR part or section where identified and described	Current OMB control No.
301.6114-1	1545-1126
301.7701(b)-7	1545-0089
	1545-1126

Michael P. Dolan,

Acting Commissioner of Internal Revenue.

Approved: August 28, 1997.

Donald C. Lubick,

Acting Assistant Secretary of the Treasury.

[FR Doc. 97-25997 Filed 10-6-97; 8:45 am]

BILLING CODE 4830-01-P

DEPARTMENT OF THE TREASURY

Internal Revenue Service

26 CFR Parts 1, 31, 35a, 301, 502, 503, 509, 513, 514, 516, 517, 520, 521, and 602

[TD 8734]

RIN 1545-AU43; 1545-AT77

General Revision of Regulations Relating to Withholding of Tax on Certain U.S. Source Income Paid to Foreign Persons and Related Collection, Refunds, and Credits; Revision of Information Reporting and Backup Withholding Regulations; and Removal of Regulations Under Part 35a and of Certain Regulations Under Income Tax Treaties

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Final and temporary regulations.

SUMMARY: This document contains final regulations relating to the withholding of income tax under sections 1441, 1442, and 1443 on certain U.S. source income paid to foreign persons, the related tax deposit and reporting requirements under section 1461, and the related requirements governing collection, refunds, and credits of withheld amounts under sections 1461 through 1463 and sections 6402 and 6413. Additionally, this document contains final regulations relating to the statutory exemption under sections 871(h) and 881(c) for portfolio interest.