

Part III

Administrative, Procedural, and Miscellaneous

Modified Applicability Dates of Certain Provisions Under Chapters 3 and 61

Notice 2014-59

I. PURPOSE

This notice announces the intention of the Department of the Treasury (Treasury) and the IRS to amend certain provisions of the temporary regulations published under sections 1441, 1442, and 6049 of the Internal Revenue Code (Code) on March 6, 2014, to provide modified applicability dates with respect to: (i) the standards of knowledge applicable to a withholding certificate or documentary evidence to document a payee that is an entity under §1.1441-7(b); and (ii) the rules under §1.6049-5(c) providing the circumstances under which a withholding agent or payor may rely on documentary evidence provided by a payee instead of a withholding certificate to document the foreign status of the payee for purposes of chapters 3 and 61. Prior to the issuance of these amendments, taxpayers may rely on this notice regarding the modified applicability dates.

II. BACKGROUND

On March 18, 2010, the Hiring Incentives to Restore Employment Act of 2010, Pub. L. 111-147 (H.R. 2847), added chapter 4 to Subtitle A of the Code (sections 1471–1474 (commonly known as “FATCA”). Chapter 4 generally requires withholding agents to withhold at a 30 percent rate on certain payments to a foreign financial institution

(FFI) unless the FFI has entered into an agreement (FFI agreement) to obtain status as a participating FFI and, among other things, to report certain information with respect to U.S. accounts. Chapter 4 also imposes on withholding agents withholding, documentation, and reporting requirements with respect to certain payments made to non-financial foreign entities (NFFEs). On January 17, 2013, Treasury and the IRS published final regulations under chapter 4 (TD 9610, 78 Fed. Reg. 5873) (final chapter 4 regulations).

On March 6, 2014, Treasury and the IRS published temporary regulations under chapter 4 (T.D. 9657, 79 Fed. Reg. 12812) (temporary chapter 4 regulations) and under chapter 3, chapter 61, and section 3406 (T.D. 9658, 79 Fed. Reg. 12726) (temporary coordination regulations). The temporary coordination regulations modify certain provisions of the regulations under chapters 3 and 61 and section 3406 to coordinate with the chapter 4 regulations, including (i) the standards of knowledge for withholding agents under §1.1441-7(b); and (ii) the conditions under which a withholding agent or a payor (as defined for chapter 61 purposes in §1.6049-5(c)(5)) may rely on documentary evidence to document a payee's foreign status. The temporary coordination regulations are generally effective for payments made by withholding agents and payors beginning on or after July 1, 2014.

The temporary coordination regulations in §1.1441-7(b) amend the standards of knowledge regarding the circumstances under which a withholding agent has reason to know that a payee's claim of foreign status is unreliable or incorrect. These amendments were made to coordinate with the chapter 4 regulations and are consistent with the standards of knowledge that apply for purposes of chapter 4. The temporary

coordination regulations in §1.1441-7(b)(5) and (b)(8) modify the circumstances under which a withholding agent that is described in §1.1441-7(b)(3)(i) (including a financial institution) and that has obtained a withholding certificate or documentary evidence has reason to know that a claim of foreign status made by a direct account holder is unreliable or incorrect for purposes of chapters 3 and 61. In particular, the temporary coordination regulations provide additional U.S. indicia that will cause a withholding agent to have reason to know that a claim of foreign status by a direct account holder is unreliable or incorrect for purposes of chapters 3 and 61. The additional U.S. indicia are as follows: (1) the withholding agent's classification of the account holder as a U.S. person in its account information; (2) a current U.S. telephone number for the account holder if the withholding agent has no telephone number for the account holder outside the United States; and (3) an unambiguous indication of a U.S. place of birth for an individual direct account holder on accompanying documentation or in the withholding agent's account information. See §1.1441-7(b)(5)(i), (b)(5)(ii), (b)(8)(ii), and (b)(8)(iii). The temporary coordination regulations under §1.1441-7(b)(3)(ii) do not require a withholding agent to take into account these additional U.S. indicia for a preexisting obligation if the foreign status of the direct account holder was documented by the withholding agent for purposes of chapter 3 or chapter 61 before July 1, 2014, unless the withholding agent is notified of a change in circumstances with respect to the obligation or, in the case of an individual account holder, reviews documentation that contains a U.S. place of birth.

The regulations under §1.6049-5(c)(1) provide guidance on a payor's use of documentary evidence with respect to an offshore obligation to establish a payee's

foreign status for certain amounts paid outside the United States under §1.6049-5(e). Prior to amendment, an amount was considered paid outside the United States under §1.6049-5(e) if the payor completed the acts necessary to effect the payment outside the United States, provided that the payment was not further described in §1.6049-5(e). Section 1.6049-5(e) describes certain “U.S. tiebacks,” which cause a payment not to be treated as an amount paid outside the United States, such as when a payment is transferred to an account maintained by the payee in the United States or mailed to a United States address when certain other conditions apply. Additionally, prior to amendment, the regulations under §1.6049-5(c)(4) modified the regulations under §1.6049-5(c)(1) regarding the use of documentary evidence for payments of amounts that are not subject to withholding under §1.1441-2(a), other than amounts described in §1.6049-5(d)(3)(iii) (dealing with U.S. short-term original issue discount and U.S. bank deposit interest). The temporary coordination regulations amend §1.6049-5(e) and §1.6049-5(c)(4) to provide further guidance with respect to when an amount is considered paid outside the United States and the types of documentary evidence permitted for establishing a payee’s foreign status with respect to certain payments, including the requirements for maintaining such documentation.

On May 19, 2014, Treasury and the IRS issued Notice 2014-33 (2014-21 I.R.B. 1033), which, among other things, states the intention of Treasury and the IRS to amend the chapter 4 regulations to allow a withholding agent or FFI to treat an obligation held by an entity that is issued, opened, or executed on or after July 1, 2014, and before January 1, 2015, as a preexisting obligation described in §§1.1471-2(a)(4)(ii), 1.1472-1(b)(2), and 1.1471-4(c)(3), except that an FFI may not apply the

documentation exception under §1.1471-4(c)(3)(iii).

III. SCOPE

This notice applies to withholding agents, FFIs, and payors that have withholding or information reporting requirements under chapter 3, chapter 4, chapter 61, or section 3406 with respect to accounts and obligations they open or enter into before January 1, 2015, and provides relief generally consistent with Notice 2014-33. As under Notice 2014-33, the relief provided by this notice may be used with respect to all accounts and obligations to which the relief applies, or separately with respect to any such account or clearly identified group of such accounts (for example, by line of business).

IV. MODIFIED APPLICABILITY DATE WITH RESPECT TO THE STANDARDS OF KNOWLEDGE FOR ENTITIES

Following the publication of Notice 2014-33, some commentators noted that, while the modifications to §1.1441-7(b) in the temporary coordination regulations address the application of the revised reason to know standards for obligations that were documented before July 1, 2014, the Notice does not address how §1.1441-7(b) applies to entity accounts opened on or after July 1, 2014, and before January 1, 2015, that are treated as preexisting obligations by withholding agents and participating FFIs for purposes of chapter 4 under section IV of the Notice. These commentators requested that a similar modified applicability date be added to §1.1441-7(b) for purposes of chapters 3 and 61 (and for chapter 4 purposes by cross-reference to §1.1441-7(b) in §1.1471-3(e)(4)) to effectively implement the Notice's transition relief with respect to the allowance to treat a new entity account as a preexisting entity account. Absent such a modification, a withholding agent that makes a payment that is

subject to withholding under sections 1441 and 1442 to a new account held by an entity that it treats as a preexisting account under the Notice would be required to apply the revised standards of knowledge under §1.1441-7(b) when validating a withholding certificate or documentary evidence furnished by the entity to determine whether withholding under chapter 3 applies, even though the withholding agent may have a longer period of time to apply the documentation requirements (including the revised standards of knowledge) under chapter 4 with respect to the same entity. In response to these comments, Treasury and the IRS intend to modify the revised standards of knowledge in the temporary coordination regulations to allow a withholding agent to apply the rules under §1.1441-7(b)(5) and (b)(8) as in effect and contained in 26 CFR part 1 revised April 1, 2013, to accounts opened, and obligations entered into, by an entity, on or after July 1, 2014, and before January 1, 2015. Therefore, this notice provides additional time for withholding agents to apply the new entity account procedures to document a new obligation held by an entity and further facilitates the relief provided by Notice 2014-33.

In addition, certain commentators stated that the allowance for preexisting obligations provided in section V of Notice 2014-33 and §1.1441-7(b)(3)(ii) would still require a withholding agent to immediately identify a change in circumstances for an entity payee that occurs on any date on or after July 1, 2014, based on the additional U.S. indicia specified in §1.1441-7(b) (and described above). Commentators suggested that, because withholding agents lack existing systems that can identify the new U.S. indicia, additional time should be provided for withholding agents to modify their systems to identify the new U.S. indicia for an existing entity account holder. In

furtherance of the relief provided by Notice 2014-33 with respect to new obligations held by an entity, and to coordinate with the revised applicability date described in the preceding paragraph, Treasury and the IRS also intend to amend the temporary coordination regulations to provide that, with respect to an obligation held by an entity, a withholding agent will not be required to treat the additional U.S. indicia specified in §1.1441-7(b) as a change in circumstances under §1.1441-1(e)(4)(ii)(D) before January 1, 2015.

The amendments described in this section IV apply to withholding agents and FFIs for purposes of determining a payee's or account holder's foreign status for chapter 4 purposes by cross-reference to §1.1441-7(b) in §1.1471-3(e)(4) and are available only with respect to obligations held by entities.

V. ALLOWANCE TO APPLY PRIOR RULES REGARDING DOCUMENTARY EVIDENCE FOR CERTAIN OFFSHORE PAYMENTS

The temporary coordination regulations revise §1.6049-5(c)(1) to make the use of documentary evidence available with respect to offshore obligations (rather than just offshore accounts) and revise §1.6049-5(e) to remove the U.S. tiebacks (described above), thus allowing for a payor's use of documentary evidence without regard to the presence of U.S. tiebacks with respect to a payment. In addition, the temporary coordination regulations in §1.6049-5(c)(1) specify the types of documentary evidence on which a payor can rely, replacing the generalized standard for documentary evidence previously provided in §1.6049-5(c)(1). The types of documentary evidence allowed are consistent with the final chapter 4 regulations under §1.1471-3(c)(5)(i). Finally, the temporary coordination regulations in §1.6049-5(c)(1) specify the types of

withholding agents and payors that may use documentary evidence to document a payee (that is, a financial institution or a broker or dealer in securities). The temporary coordination regulations under §1.6049-5(c)(1) apply to payments made on or after July 1, 2014, except to payments made with respect to preexisting obligations as described in §1.1441-7(b)(3)(ii). An allowance is contained in the temporary coordination regulations under §1.1441-6(c)(4) for when a withholding agent may rely on documentary evidence to provide a reduced rate of withholding under an income tax treaty.

To allow payors additional time to modify their systems to implement the revised requirements of §1.6049-5(c)(1), Treasury and the IRS intend to modify the temporary coordination regulations to allow a payor to continue to use, for accounts opened on or after July 1, 2014, and before January 1, 2015, the rules regarding the use of documentary evidence under §1.6049-5(c)(1) and (c)(4) as in effect and contained in 26 CFR part 1 revised April 1, 2013 (“prior §1.6049-5(c)”), instead of the new rules regarding documentary evidence for offshore obligations under §1.6049-5(c)(1) and (c)(4) of the temporary coordination regulations. For consistency, a payor that applies prior §1.6049-5(c) to an account or obligation will also be required to apply §1.1441-6(c)(2) (to the extent applicable) and §1.6049-5(e) as in effect and contained in 26 CFR part 1 revised April 1, 2013, with respect to the account or obligation.

VI. DRAFTING INFORMATION

The principal author of this notice is Nancy J. Lee of the Office of Associate Chief Counsel (International). For further information regarding this notice, contact Ms. Lee at (202) 317-6942 (not a toll-free call).