

Information Reporting

A Basic Overview

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Foreign Investors Tax Act (FITA) (11-13-66)

- 1. **Business Income (i.e., “Effectively Connected Income”)**-Income effectively connected with a trade or business in the United States.
- 2. **Non-Business Income (i.e., “Non-Effectively Connected Income”)**-Fixed or determinable annual or periodical (“FDAP”) income from sources within the United States.

Foreign Persons

- 1. **Nonresident Alien Individual**-Any individual other than a **citizen** of the United States or a **resident** of the United States.
- 2. **Foreign Trust**-Any trust other than United States trust.
- 3. **Foreign Corporation**-Any corporation other than a domestic corporation.

Domestic Persons

- 1. **Citizen of the United States**-Every person born or naturalized in the United States and subject to its jurisdiction (Immigration and Nationality Act).
- 2. **Resident Alien**-An alien individual who satisfies either the “green card” test or the “substantial presence” test.

Domestic Persons

- 1. **United States trust**-Any trust that satisfies the court test and control test.
- 2. **Court Test**-A trust meets the court test when a court in the United States exercises primary supervision over the administration of the trust.
- 3. **Control Test**-A trust meets the control test when one or more United States person(s) have the ability to control all substantial decisions of the trust.

Domestic Persons

- 1. **United States corporation**-Any corporation organized in or under the laws of the United States or any State (including District of Columbia).

Level of Activity

Trade or Business

No Trade or Business

Source of Income

Domestic Source

Foreign Source

Taxation of Foreign Persons

I
Domestic Source Business Income

(Tax-34%)

II
**Domestic Source Non-Business
Income**

(Tax-30%)

IV
Foreign Source Business Income
(No Tax)

1. Rents/Royalties (Intangible Property)
2. Dividends/Interest (Bank)
3. Sales of Inventory

III
Foreign Source Non-Business Income

(No Tax)

Regular 30% Withholding Tax

- **Foreign Person:** A withholding agent makes a payment to a foreign person.
- **Gross Income:** Payments consists of gross income (interest, dividends, rent, salaries, wages, premiums, annuities, compensations, remunerations, emoluments, or other FDAP income).
- **Source of Income:** Income is derived from sources within Guam.

Withholding Agent

- **Definition:** Any persons (United States or foreign) that has control, receipt, custody, disposal, or payment of item of income of a foreign person (subject to withholding).
- **Obligation:** A withholding agent must withhold 30% of a payment made to foreign payee.
- **Liability:** A withholding agent shall be liable for tax, penalties, and interest for failure to withhold tax.

Making Payments

- **General rule:** A withholding agent must withhold and pay 30% withholding tax unless it obtains documentation (i.e., withholding certificate) that payee:
- **(1) United States Person:** United States person or domestic person is not subject to 30% withholding tax.
- **(2) Foreign Person:** Foreign person entitled to a reduced rate of withholding.

Withholding Certificates

- **W-8s:** W-8BEN, W-8BEN-E, W-8ECI, W-8IMY, W-8EXP. Foreign person submits one version of the W-8.
- **W-9:** Domestic person (e.g., U.S. citizen or domestic corporation) submits W-9.
- **Period of Validity:** Normally, a withholding certificate is valid for 3 years. In certain cases, the withholding certificate is valid for an indefinite period (subject to change in circumstances).

Withholding Certificates

- **No Withholding Tax:** Withholding agent can reliably associate payment with documentation upon which it can rely to treat the payment as made to a United States person or a foreign person entitled to reduced rate of withholding.
- **Reliability Associating Payment With Withholding Certificate:** (1) Hold valid documentation before payment, (2) Reliably determine amount of payment related to withholding certificate, (3) No actual knowledge or reason to know otherwise.

Withholding Certificates

- **Reliance Rules:** A withholding agent may rely on the information contained in a withholding certificate without verification unless it has *actual knowledge* or *reason to know* that the information is false.
- **Tax Jurisdictions:** (1) Internal Revenue Service, (2) Government of Guam, and (3) Government of the Northern Mariana Islands.

Presumption Rules

- (A) *Status of Payee*: Foreign or Domestic.
- (B) *Other Relevant Characteristics*: Individual, trust, partnership, corporation.

Presumption Rules

- *Type of Entity*
- **(A) Individual:** A payee shall be presumed to be an individual, trust, or estate, if the payee appears to be such person (e.g., based on the payee's name and other indicators).
- **(B) Corporation:** In the absence of reliable indicators that the payee is an individual, etc. the withholding agent must presume that the payee is a corporation.

Presumption Rules

- *Type of Entity*
- **(C) Partnership:** If the withholding agent cannot treat the payee as a corporation or some other specified entity, then payee shall be presumed to be a partnership.
- **Observation:** Always obtain withholding certificate to avoid presumption rules.

Presumption Rules

- *Domestic or Foreign Person*
- (A) **General rule:** A payment that the withholding agent cannot reliably associate with documentation is presumed to be made to a U.S. person.
- (B) **Exempt Recipients:** An exempt recipient (e.g., corporation) shall be presumed to be a foreign person in the absence of any reliable documentation.

Reliance on Presumptions

- (A) **General rule:** A withholding agent may rely on the presumption rules to determine its withholding liability (under §§ 3402, 3405, 3406, and 1441/1442).
- (B) **Special rule:** A withholding agent may not rely on the presumption rules if it has *actual knowledge* or *reason to know* that the amount of withholding is greater than required under the presumption rules.

No Reliance on Presumptions

- (A) **Rebuttal of Presumptions:** A payee (or beneficial owner) may rebut the presumption rules by providing *reliable documentation* (to withholding agent or IRS).
- (B) **Actual Knowledge:** Information that withholding agent already knows (from other sources).
- (C) **Reason To Know:** A withholding agent shall be considered to have reason to know if its knowledge of the relevant facts, etc. is such at a *reasonably prudent person* would question the claims made.

Tax Reporting

- (A) **Tax Return-Form 1042:** Form 1042 is due on or before March 15 (following year) to report payments made to all foreign persons and related withholding tax. (Extended 9/15).
- (B) **Information Return-Form 1042-S:** Form 1042-s is due on or before March 15 (following year) to report payments made to each foreign person and related withholding tax. (Extended for 30 days-automatic; additional 30 days-not automatic).

Information Return

- (A) Form 1042-S: Reports payments made to a foreign person.
- (B) Form 1099: Reports payments made to a domestic person. Note payments made to an employee are reported on Form W-2 (W-2GU or W-2CM).

Information Return (1099)

- (A) **Trade or Business**: Every person engaged in a trade or business shall make a return (i.e., 1099).
- (B) **Amount (\$600 or more)**: Payments for salaries, wages, commissions, fees, and other compensation. Also includes payments for *interest*, rents, royalties, *pensions*, and other gains/income. [Note another provision of the law deals with *\$10 or more* interest payments].

FATCA 30% Withholding Tax

- **Foreign Financial Institution (“FFI”)**: A withholding agent makes a payment to a FFI.
- **Gross Income**: Payments consists of gross income (interest, dividends, rents, salaries, wages, premiums, annuities, compensations, remunerations, emoluments, other FDAP income, and *certain sales proceeds*).
- **Source of Income**: Income is derived from sources within the United States.

FFI

- **FFI:** Any *financial institution* that is a *foreign entity*.
- **Financial Institution:** A financial institution includes a depository institution (or bank) and an insurance company that issue cash value insurance contracts (value greater than \$50,000).
- **Foreign Entity:** Any entity that is not a U.S. person and includes a territory entity.

FATCA 30% Withholding Tax

- **Non-Financial Foreign Entity (“NFFE”)**: A withholding agent makes a payment to an NFFE.
- **Gross Income**: Payments consists of gross income (interest, dividends, rents, salaries, wages, premiums, annuities, compensations, remunerations, emoluments, other FDAP income, and *certain sales proceeds*).
- **Source of Income**: Income is derived from sources within the United States.

NFFE

- **NFFE:** *A foreign entity that is not a financial institution.*
- **Financial Institution:** A financial institution includes a depository institution (or bank) and an insurance company that issue cash value insurance contracts (value greater than \$50,000).
- **Foreign Entity:** Any entity that is not a U.S. person and includes a territory entity.

Coordination of Withholdings

- **Regular 30% Withholding Tax:** A withholding agent may credit Chapter 4 (FATCA) withholding tax against liability for Chapter 3 (Regular) withholding tax.
- **Backup Withholding Tax:** Backup withholding is not required where Chapter 4 withholding tax has been paid. In certain cases, election can be made to pay backup withholding tax (rather than Chapter 4 withholding tax).

Making Payments-FFI

- **General rule:** A withholding agent must withhold and pay 30% withholding tax on payments (*after June 30, 2014*) to an FFI unless it obtains documentation (i.e., withholding certificate) that the payment is not subject to FATCA withholding tax.
- **Payments Not Subject To FATCA Withholding Tax:** Regulations list several types of payments that are not subject to FATCA withholding tax.

Making Payments-NFFE

- **General rule:** A withholding agent must withhold and pay 30% withholding tax on payments (*after June 30, 2014*) to an NFFE unless it obtains documentation (i.e., withholding certificate) that the payment is not subject to FATCA withholding tax.
- **Payment Not Subject To FATCA Withholding Tax:** (1) The beneficial owner of payment is the NFFE (or other NFFE); (2) The NFFE does not have any U.S. owners; (3) The withholding agent files Form 8966 (if there are U.S. owners).

Form 8966 (FATCA Report)

- **Filing Requirement:** (1) Generally, an FFI or a Direct Reporting NFFE must file Form 8966; (2) A withholding agent must file Form 8966 to report substantial U.S. owners of an NFFE (other than an excepted NFFE).
- **Due Date:** For the calendar year ended December 2014, Form 8966 must be filed on or before March 31, 2015. For 2014, the due date will be automatically extended for 90 days. After 2014, an application (Form 8809) for extension of time to file must be filed.

Direct Reporting NFFE

- **Definition:** A Direct Reporting NFFE is an NFFE that elects to report information about its (direct or indirect) substantial U.S. owners to the IRS [DRT] and meets certain requirements.
- **Registration with IRS:** Direct Reporting NFFE must register with IRS on Form 8957 (or other prescribed form) and obtain a Global Intermediary Identification Number (“GIIN”).

Excepted NFFE

- **General rule:** A withholding agent is not required to pay FATCA withholding tax on payments made to an excepted NFFE.
- **Excepted NFFE:**
 - (1) QI (qualified intermediary);
 - (2) WP (withholding partnership);
 - (3) WT (withholding trust);
 - (4) Publicly traded corporation;
 - (5) Affiliate of a publicly traded corporation;

Excepted NFFE

- Excepted NFFE:
- (6) Certain territory entities;
- (7) *Active NFFE*;
- (8) Excepted nonfinancial entities;
- (9) Direct reporting NFFE;
- (10) Sponsored direct reporting NFFE;
- **Observation:** *Active NFFE* is the way to avoid FATCA 30% withholding tax.

United States Corporation

- **I.R.C. § 881(b)**: “for purposes of this section, the term ‘foreign corporation’ does not include a corporation created or organized in Guam or under the laws of Guam.”
- **Mirrored I.R.C. § 881(b)**: “for purposes of this section, the term ‘foreign corporation’ does not include a corporation created or organized in [United States] or under the laws of [United States].”

United States Corporation

- I.R.C. § 1442(c): “for purposes of this section, the term ‘foreign corporation’ does not include a corporation created or organized in Guam or under the laws of Guam.”
- Mirrored I.R.C. § 1442(c): “for purposes of this section, the term ‘foreign corporation’ does not include a corporation created or organized in [United States] or under the laws of [United States].”

United States Corporation

- I.R.C. § 881: Not Foreign.
- I.R.C. § 1442: Not Foreign.
- I.R.C. § 1471/I.R.C. § 1472: Foreign.
- **Observation:** Payments to U.S. corporation would be subject to FATCA withholding tax unless the U.S. corporation is an *active NFFE*.

United States Corporation

- **Active NFFE:** U.S. corporation that is an active NFFE is not subject to FATCA withholding provided Form W-8BEN-E is timely submitted.
- **Passive NFFE:** U.S. corporation that is a passive NFFE is not subject to FATCA withholding provided Form W-8BEN-E is timely submitted AND withholding agent files Form 8966 to report U.S. owners (if any).

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- (A) **Tax Return-Form 1042:** Form 1042 is due on or before March 15 (following year) to report payments made to all foreign persons and related withholding tax.
- (B) **Information Return-Form 1042-S:** Form 1042-s is due on or before March 15 (following year) to report payments made to each foreign person and related withholding tax.



END

- Thanks for your participation.