

Applications for withholding certificates, and other notices and elections under section 897 and 1445 will be considered incomplete and generally will not be processed by the IRS unless the TIN of the transferor is provided. Amounts withheld under section 1445 must still be reported and paid to the IRS on withholding tax returns (Form 8288, "U.S. Withholding Tax Return for Dispositions by Foreign Persons of U.S. Real Property Interests", and Form 8288-A, "Statement of Withholding on Dispositions by Foreign Persons of U.S. Real Property Interests") if the appropriate TINs are not provided. The final regulations provide that although such amounts have been paid, if the transferor's TIN is not included, a receipt (Form 8288-A) for withholding tax paid to the Service will not be stamped to show receipt and will not be mailed to the transferor.

In many cases, the foreign taxpayer will already have a TIN, because the taxpayer will have already filed a U.S. tax return. If the taxpayer does not already have a TIN, the TIN requirement under the regulations merely accelerates the time to obtain a TIN, because the foreign taxpayer must have a TIN to file its U.S. income tax return for the year of the disposition of the U.S. real property interest. In the case of foreign entities (such as foreign corporations) that are required to have employee identification numbers (EINs), the EINs can be obtained without delay through existing procedures.

Commentators have expressed concern about the time it takes nonresident alien individuals to obtain TINs and how it could effect the timing of transactions. The IRS is aware of this concern and is exploring approaches for addressing it. For example, the IRS is considering implementing a program in which applications for withholding certificates will be processed in conjunction with applications for TINs. The need to obtain a TIN generally should not delay the time it takes to get a withholding certificate under § 1.1445-3. In addition, the portion of these regulations that imposes a requirement concerning TINs, will not be applicable until 90 days after the date of publication in the **Federal Register** in order to permit taxpayers that currently own real property additional time to obtain a TIN, if necessary.

B. Section 1031 Like-Kind Exchanges

Section 1031(a) provides for the nonrecognition of gain or loss on the exchange of like-kind property which is held for productive use in a trade or business or held for investment. Section 1031(a)(3) provides for the exchange of

like-kind property in deferred exchanges, where the taxpayer has 45 days after it relinquishes the property to the transferee to identify replacement property and the transferee has until the earlier of 180 days or the due date of the tax return for the year of transfer to deliver such property to the transferor.

Notices of nonrecognition under § 1.1445-2(d) are limited to exchanges (including section 1031 exchanges) that qualify for nonrecognition treatment in their entirety (thus, a notice of nonrecognition may not be used if the transferor receives money or other property, *i.e.*, boot). Consistent with the proposed regulations, these final regulations provide that in the case of a simultaneous exchange of like-kind U.S. real property interests (where there is no boot), the foreign transferor can provide a notice of nonrecognition under § 1.1445-2(d)(2) to the transferee, and the transferee can rely on such notice, because the like-kind exchange will be fully completed on the day of the exchange. In the case of a deferred like-kind exchange of U.S. real property interests, the transferee cannot rely on a notice of nonrecognition, because the transferee cannot be assured that the exchange will qualify for nonrecognition treatment under section 1031 (*e.g.*, that the property to be received by the foreign transferor will be identified within the 45-day period required under section 1031(a)), or even if the exchange qualifies under section 1031, that the foreign transferor will not receive boot in the transaction. Although a notice of nonrecognition is not available in a deferred like-kind exchange, the transferee may withhold a reduced amount based on a claim of nonrecognition upon receipt of a withholding certificate pursuant to the procedures of § 1.1445-3.

Commentators have proposed that using a notice of nonrecognition for deferred like-kind exchanges should be permitted if a "claim of intent" to engage in an exchange qualifying for nonrecognition under section 1031 is provided. The IRS continues to believe that notices of nonrecognition are inappropriate for deferred like-kind exchanges. In a deferred like-kind exchange, until the replacement property has been identified and a contract for its purchase is executed, the transferor does not know with certainty that the exchange will qualify for nonrecognition under section 1031. Moreover, it is uncertain whether boot will be received in the exchange if the replacement property is not identified at the time the relinquished property is transferred to the transferee. Accordingly, the regulations do not

permit a notice of nonrecognition in the case of a deferred like-kind exchange and require the taxpayer to obtain a withholding certificate.

Special Analyses

It has been determined that this Treasury decision is not a significant regulatory action as defined in Executive Order 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. These regulations impose no new collection of information on small entities; therefore, a Regulatory Flexibility Analysis under the Regulatory Flexibility Act (5 U.S.C. chapter 6) is not required. Pursuant to section 7805(f) of the Code, the proposed regulations preceding these regulations were submitted to the Chief Counsel for Advocacy of the Small Business Administration for comment on its impact on small business.

Drafting Information

The principal author of these regulations is Robert W. Lorence, Jr., Office of Associate Chief Counsel (International). However, other personnel from the IRS and Treasury Department participated in their development.

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

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

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

§ 1.897-1 [Amended]

■ 2. In § 1.897-1, paragraph (p), the first sentence is amended by adding the language "or the identification number assigned by the Internal Revenue Service (see § 301.6109-1 of this chapter)"