

U.S. RESIDENCY CERTIFICATION: PITFALLS & CONSIDERATIONS

Authors

Sheryl Shah
Galia Antebi

Tags

Form 6166
Form 8802
Residency Certificate

INTRODUCTION

Income from sources within one country paid to residents of other countries often is subject to withholding tax in the source country at a rate that is set by the source country's internal law. The withholding tax rate can be reduced or eliminated if (1) an income tax treaty exists between the source country and the residence country and (2) the taxpayer is a resident of that second country for purposes of the treaty. This article explains how a U.S. resident taxpayer demonstrates that residence classification in order to claim benefits under an income tax treaty.

FORM 6166

For U.S. residents with non-U.S. source income, proving residency in order to obtain an income tax treaty is accomplished by obtaining a Residency Certificate from the I.R.S. This document certifies that the taxpayer is a resident of the U.S. for Federal income tax purposes. The certification is provided on Form 6166, which certifies to the withholding agent that for a specific year, the taxpayer was a resident of the U.S. for U.S. tax purposes. In the case of a fiscally transparent entity, Form 6166 will certify that the entity, when required, filed an information return and its partners, members, owners, or beneficiaries filed income tax returns as residents of the U.S. As partnerships (including L.L.C.'s treated as partnerships) and disregarded entities are not considered U.S. residents within the meaning of the residence article of most U.S. income tax treaties. As a result, the Form 6166 that is issued by the I.R.S. will include a list of U.S. resident partners, members or owners. Each person's ownership percentage does not accompany the names on the list, as with limited exception, the I.R.S. does not have that information.

Upon receiving the Residency Certificate, the taxpayer forwards it to the withholding agent in the treaty partner country. Because residency is not the only requirement for treaty benefits, a U.S. resident must be prepared to meet whatever requirements appear in the treaty.

FORM 8802

Form 6166 is obtained by submitting a Form 8802 Application for United States Residency Certification.

Procedure

The application requires the following information and certifications:

1. Name, address and tax identification number (“T.I.N.”). For individuals the tax I.D. is their social security number; for entities, it is their employee identification number (“E.I.N.”). The I.R.S. will use this tax I.D. to search its records for the applicant’s previous tax returns or other such documents to confirm residence. In the event of a name change, the I.R.S. must be notified of the change prior to requesting a Residency Certificate. Husband and wife may request separate certification if needed.
2. If the applicant is a fiscally transparent entity the application must include:
 - a. The name and T.I.N. of each partner, member, owner or beneficiary for which certification is requested,
 - b. An authorization (for example, Form 8821 (Tax Information Authorization) or Form 2848 (Power of Attorney and Declaration of Representative) from each partner, member, owner or beneficiary explicitly allowing a third party requester to receive the partner, member, owner or beneficiary’s tax information; if the applicant is a lower-tier partnership in a tiered partnership arrangement, information regarding the members of upper-tier partnerships must be provided, and
 - c. Unless the requester is a partner, member, owner or trustee during the tax year for which certification is requested, authorization from the transparent entity must be included allowing the requester to receive information of the transparent entity.
3. If an application on behalf of an individual or a corporation is completed by a third party appointee, in lieu of using Form 2848 or Form 8821, the applicant may sign the application and a written authorization will be deemed to have been provided.
4. The form is prepared under penalties of perjury. All information must be true, accurate, and complete.



It is suggested that the completed Form 8802 and accompanying payment should be submitted at least 45 days before Form 6166 is required. For first time filers, the form typically is submitted shortly after the threat of withholding tax is first made by the payer in the treaty country. The earliest date allowed for submitting Form 8802 is December 1 of the preceding year.

Processing Fee

The taxpayer is required to pay a nonrefundable user fee of \$85 per form. The user fee can be paid by check, money order or electronic payment on the I.R.S. website. The same fee is applied to each Form 8802, regardless of the number of certificates requested or the number of countries listed on the form.

Eligibility

Any individual or entity that is treated as a U.S. resident due to citizenship, place of incorporation, holding a green card, or meeting the substantial presence test may request a Residency Certificate. However, the following taxpayers are not eligible to file Form 8802:

“Filing international can prove to be difficult. A strong suggestion for an electronic system that allows for the filing and the tracking of progress has been made.”

- Taxpayers who did not file a required U.S. tax return for the certifying year,
- Taxpayers that are fiscally transparent with no U.S. partners, members, owners or beneficiaries, and
- Taxpayers who file as nonresidents or who claim nonresidence based on a treaty tiebreaker provision are ineligible to file Form 8802.

CRITICISMS

Issues concerning the collection of the required information and the accuracy of the response process have been raised.

1. Agent Designation – the I.R.S. will contact an applicant after 30 days if a delay in processing the application is anticipated or if further information is required. Inquiries and responses to requests for additional information cannot be sent in to the specific agent at the I.R.S. Instead, the I.R.S. representative who receives the information will make a note on the file and the taxpayer may find that that the note is properly attached to his file.
2. Annual Requirement – Taxpayers have complained that there is no benefit to having to apply each year if no information has changed. The process is unnecessary and cumbersome.
3. Word Truncation – The number of characters that can be entered in the name field on Form 6166 is limited and thus very often entity names are abbreviated. This may cause problems when the Form 6166 is submitted to the paying agent, especially in countries that emphasize form over substance.
4. Electronic Process – Filing international can prove to be difficult. A strong suggestion for an electronic system that allows for the filing and the tracking of progress has been made.

Although many changes and improvements have been made, a need remains for an electronic system to allow instant application upload, response, and tracking of progress. An option for communication and comments on the electronic system will allow for relatively prompt resolution of minor problems and misunderstandings. The efficiency of an electronic system is evident in the introduction of the e-pay system for payment of user fees.

APOSTILLE

An Apostille is the authentication of a public document for use in foreign countries. An authentication certifies the signature and the capacity of the official who has executed the document. The authentication may also authenticate the seal of the official. Under the 1961 Hague Convention on the Requirement of Legalization for Foreign Public Documents, local legalization procedures were replaced by a simplified process of certification among signatory countries. This allows for recognition of public documents, including notarized documents, if such documents carry the internationally recognized form of authentication known as an Apostille.

Certain countries require that the Form 6166 be authenticated by means of an Apostille. This means that once the certificates have been received from the I.R.S., they need to be sent with an accompanying Apostille/Certificate of Authentication. In New York State an Apostille/Certificate of Authentication Request Form¹ is generally used to request Apostille. A \$10 fee for each Apostille request is charged. Documents are processed within 4 business days and returned via prepaid mail in the sender's choice. Documents submitted in person are generally returned on the spot.

CONCLUSION

A U.S. Residency Certificate is an important tool that resident individuals and corporations can use to alleviate their foreign withholding tax. U.S. taxpayers must pursue treaty benefits to reduce tax. Turning one's back on the treaty and claiming foreign tax credits instead may cause the I.R.S. to construe the tax payment as a voluntary contribution that is not a creditable tax. The application process is simple in principle, but may become unnecessarily lengthy if completion of the form is not pristine.

“Turning one’s back on the treaty and claiming foreign tax credits instead may cause the I.R.S. to construe the tax payment as a voluntary contribution that is not a creditable tax.”

¹ NYS Department of State, Division of Corporations, State Records and Uniform Commercial Code. [“Apostille/Certificate of Authentication Request.”](#)