

U.S. TAX RESIDENCY CERTIFICATION AND SPANISH WITHHOLDING TAX: EARLY APPLICATION RECOMMENDED

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Tags

Form 6166
Form 8802
Spain
Tax Residency
U.S. Tax Residency
Certification
Withholding Tax

Persons resident outside of Spain are subject to Spanish withholding tax on payments received from Spanish sources. This applies, *inter alia*, to payments to foreign authors.

However, the withholding tax may be reduced or eliminated under an applicable income tax treaty. Under the U.S.-Spain income tax treaty, relief from withholding tax for individuals requires that the recipient is a tax resident of the United States. Individuals are considered to be U.S. residents for Federal income tax purposes if they are either U.S. citizens, U.S. lawful permanent residents (“green card holders”), or meet the substantial presence test.¹

To provide evidence on tax-resident status, and thus eligibility for treaty benefits, the U.S. person is required to obtain a Form 6166, *Certification of U.S. Tax Residency*, (“U.S. Certification”) from the Internal Revenue Service (the “I.R.S.”) and furnish the document to the Spanish payor. Unless a U.S. Certification is provided to the Spanish tax authorities on a timely basis – preferably by February of the respective calendar year – the Spanish payor must withhold the Spanish statutory rate on the payments made to the U.S. authors.

This article explains how a U.S. tax resident who receives foreign income – specifically income from Spain – can apply for a U.S. Certification on an early basis, prior to the beginning of a calendar year.

WHO IS ELIGIBLE FOR A U.S. TAX RESIDENCY CERTIFICATION?

In general, a U.S. Certification is issued only when the I.R.S. can verify that, for the year for which certification is requested, one of the following applies:

- The applicant filed an appropriate income tax return.
- If the return for the certification year is not yet due, the applicant filed a return for the most recent year for which a return was due.

The I.R.S. will deny a request for a U.S. Certification if the applicant is an individual taxpayer who

¹ Under this test, the person qualifies as a U.S. resident if he/she is physically present in the U.S. for at least 31 days during the current year and at least 183 days during a three-year period, including the current year. The latter is determined on a weighted basis counting all of the days spent in the U.S. in the current year, 1/3 of the days of the previous year, and 1/6 of the days of the second preceding year. (Code §7701(b)(3)).

“The U.S. Certification is one of the first, and most essential, documents a U.S. resident is required to obtain before he/she can avail the benefits of lower tax rates under the tax treaties.”

- did not file a U.S. income tax return (unless an exemption from filing applies²),
- filed a return as a nonresident, or
- is a dual resident and has made (or intends to make) an election under the so-called tie-breaker rule of an applicable income tax treaty to be treated not as a resident of the United States, but as a resident of the other foreign country.

WHAT TO FILE

An applicant seeking to obtain a U.S. Certification must apply by submitting the following documents to the I.R.S.:

- Form 8802, *Application for United States Residency Certification*
- A copy of the applicant's most recently filed U.S. income tax return
- An \$85 user fee

A copy of the applicant's U.S. income tax return from the current or prior year is needed in order for the I.R.S. to verify that the applicant is in fact a U.S. tax resident during the year for which the U.S. Certification is requested.

If the applicant has filed or intends to file a Form 1116, *Foreign Tax Credit*, to claim either (i) a foreign tax credit amount in excess of U.S. \$5,000 or (ii) a foreign tax credit for any amount of foreign earned income for the tax period for which certification is requested, evidence must be submitted to the I.R.S. to demonstrate that the applicant is a resident of the U.S. and the foreign taxes paid were not imposed because the applicant was a resident of the foreign country. If the tax return has been filed, a copy of the return together with a copy of Form 1116 and information with respect to income (e.g., Form W-2 or Form 1099) must be attached to the application for the U.S. Certification.

For certain foreign countries, foreign claims forms exist, which may be attached to the application. This is, however, not the case for Spain.

The U.S. Competent Authority has agreed to provide the U.S. Certification in line with the language requested by Spain. The U.S. Certification will state, “I certify that, to the best of our knowledge, the above-named taxpayer is a resident of the United States within the meaning of the United States - Spain Income Tax convention.”

WHEN TO FILE

The applicant should file the completed Form 8802 application and the \$85 user fee at least 45 days before the date the applicant needs the U.S. Certification. Although as of June 2016 the applicant should have already filed a Form 8802 requesting a U.S. Certification for the year 2015, the applicant can still file the Form 8802 application for 2015 at this time. On that same Form 8802, the applicant can request a

² An explanation of why the applicant was not required to file a U.S. income tax return needs to be attached to Form 6166.

Form 6166 U.S. Certification for the year 2016. Thus, the applicant can request on one Form 8802 that a U.S. Certification should be issued for the years 2016 and 2015, and any prior year.

However, the applicant must file a separate Form 8802 (and pay additional \$85 user fee) for the year 2017. The earliest the applicant can file a Form 8802 request for a given year is on December 1 of the prior year. Thus, the earliest the applicant can file a Form 8802 request for the year 2017 is on December 1, 2016. The details are explained below for each tax year.

2015 AND 2016 TAX YEARS

As mentioned above, the applicant should have already filed the Form 8802 application for the 2015 tax year. However, the applicant can file the Form 8802 now to request a U.S. Certification be issued for the year 2015 (or any prior years), as well as 2016.

Line 7 of Form 8802

- Line 7 of Form 8802 should state “2015 and 2016” in order to request certifications for those years.
- If the applicant would like to request issuance of the U.S. Certification for years prior to 2015, include those prior years on Line 7.

Line 10 of Form 8802

- Line 10 of Form 8802 requires a penalty of perjury statement.
- If the applicant is requesting U.S. Certifications for 2015 (a prior year) and 2016 (the current year) on the same Form 8802 application, the penalty of perjury statement in Line 10 should be as follows: “[*Name of Individual and Taxpayer Identification Number*] was a U.S. resident for 2015 and will continue to be throughout the current tax year.”

Lines 11 and 12 of Form 8802

- For providing the U.S. Certification to a withholding agent in Spain, Line 11 requires the applicant to state the number of U.S. Certifications requested in Column D to the right of “Spain” (referred to as Code “SP” on the form).

A request for U.S. Certifications to be issued for the years 2015 and 2016 for Spain would require the applicant to enter the number “2” in Column D to the right of Spain in Line 11.

- The applicant may request that a U.S. Certification should be issued for other countries, as well, by following the above steps and stating the number of U.S. Certifications requested under the relevant column to the right of the relevant country.
- The total number of U.S. Certifications requested in all of columns A, B, C, and D of line 11 is shown on line 12.

Copy of U.S. Income Tax Return

- The Form 8802 application should include a copy of the individual's most recently filed U.S. income tax return.
- Special consideration should be given to the following circumstances:
 - If the applicant's 2015 U.S. tax return is (i) on extension or (ii) has not been filed, the Form 8802 application should include a signed copy of the individual's 2014 U.S. tax return.
 - If the applicant (i) recently filed a 2015 U.S. tax return or (ii) a 2015 tax return has not been posted by the I.R.S. by the time the Form 8802 is filed, the Form 8802 application should include a copy of the individual's 2015 U.S. tax return with the words "COPY – Do Not Process" on the return.

User Fee

- Each Form 8802 application must be filed with one non-refundable \$85 user fee.
- The user fee is for the number of Form 8802 applications submitted and not the number of U.S. Certifications requested. Thus, an applicant may file one Form 8802 application and pay one \$85 fee to request that a U.S. Certification should be issued for the current tax year, 2016, as well as any prior years.

2017 AND SUBSEQUENT TAX YEARS

The Form 8802 application for the year 2017 is completed in the manner explained above. However, certain differences exist.

Filing Date

- The earliest an applicant can file Form 8802 to request a U.S. Certification for the current year is on December 1 of the prior year. Applications filed before December 1 are not accepted by the I.R.S.
- To request a U.S. Certification for the year 2017, the earliest acceptable filing date is December 1, 2016.
 - A Form 8802 application for 2017 with a postmark date prior to December 1, 2016 will not be processed.
 - A Form 8802 application for 2017 with a postmark date on or after December 1, 2016 will be processed, provided the appropriate documentation is attached.
- As mentioned above, Form 8802 should be filed at least 45 days prior to the date the applicant needs the U.S. Certification.



“The earliest an applicant can file Form 8802 to request a U.S. Certification for the current year is on December 1 of the prior year. Applications filed before December 1 are not accepted by the I.R.S.”

Line 10 of Form 8802

- Line 10 of Form 8802 requires that the penalty of perjury statement must address the applicant’s residency status in the prior year when the prior year return is not yet required to be filed.
- Thus, if the applicant files a 2017 Form 8802 before April 15, 2018 (*i.e.*, the due date for filing an individual income tax return for the year 2017, in the absence of an extension), line 10 should state, “[*Name of Individual and Taxpayer Identification Number*] was a U.S. resident for 2016 and will continue to be throughout the current tax year.”

Copy of U.S. Income Tax Return

- The Form 8802 application for U.S. Certification for 2017 should include a copy of the individual’s most recently filed U.S. income tax return.
- For the year 2017, the applicant should submit one of the following:
 - If the applicant files the Form 8802 on (i) the earliest date, *i.e.*, December 1, 2016, or (ii) before the 2016 U.S. tax return is filed, the applicant should include a copy of the 2015 U.S. tax return.
 - Otherwise, the applicant should include a copy of the 2016 U.S. tax return as indicated above.

User Fee

- The non-refundable \$85 user fee is required for processing the Form 8802 request.
- This fee is subject to change and should be confirmed with the I.R.S. before submitting the application.

WHERE TO FILE

The method by which the applicant submits the Form 8802 application and supporting documents to the I.R.S. depends upon how the applicant chooses to pay the user fee. The user fee must be paid by check, money order, or electronic payment. The entire application and fee can be submitted by mail, private delivery service, or fax, as outlined below:

- Check or Money Order by Mail or Private Delivery
 - If the applicant is paying the user fee by check or money order, mail the (i) Form 8802 application, (ii) copy of the most recently filed U.S. tax return, and (iii) payment to the following address:

Internal Revenue Service
P.O. Box 71052
Philadelphia, PA 19176-6052

“Without the U.S. Certification in place at the beginning of the year, a Spanish payor is required to withhold tax at the statutory rate.”

- If the applicant is filing by private delivery service, the aforementioned documents should be sent to:

Internal Revenue Service
2970 Market Street
BLN# 3-E08.123
Philadelphia, PA 19104-5016

- Electronic Payment by Mail, Private Delivery, or Fax

- If the applicant is paying the user fee by electronic payment, the electronic confirmation number must be included on page 1 of Form 8802.
- The applicant can mail the Form 8802 application and copy of the most recently filed U.S. tax return to the following address:

Department of the Treasury
Internal Revenue Service
Philadelphia, PA 19255-0625

- Or, these documents can be sent by private delivery service to:

Internal Revenue Service
2970 Market Street
BLN# 3-E08.123
Philadelphia, PA 19104-5016

- The applicant can fax up to ten Forms 8802 (including all required attachments), for a maximum of 50 pages, to the fax numbers below. A fax cover sheet stating the number of pages included in the transmission must be used. The following fax numbers are not toll free:

(267) 941-1035 or (267) 941-1366

All foregoing addresses and fax numbers are subject to change and should be confirmed prior to the submission.

CONCLUSION

The U.S. Certification is the most essential document a U.S. tax resident obtains in order to enjoy the benefits of an income tax treaty – reduced tax rates or complete exemption from foreign tax on foreign income. Without the U.S. Certification in place at the beginning of the year, a Spanish payor is required to withhold tax at the statutory rate. It is highly recommended that a U.S. resident submits a request for the U.S. Certification on or immediately after December 1, 2016 for a 2017 certification.