U.S. TAX TREATIES AND SECTION 6114: WHY A TAXPAYER'S FAILURE TO "TAKE" A TREATY POSITION DOES NOT DENY TREATY BENEFITS

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Prior to 1990[2]and Code Section 6114, a taxpayer simply analyzed the treaty and made an informed decision about its application. If it applied, then a particular tax result followed differently by application of the treaty. If it did not apply, there would be no change in the tax treatment of a particular transaction from the rules of the Code. This applied to both (i) income tax treaties and (ii) estate and gift tax treaties.

Life was a bit simpler prior to Section 6114 which imposes specific reporting requirements on taxpayers. Section 6114, does not, however, change the outcome of particular transactions as will be explained further by this article.

What happens to a taxpayer who does not "take" a treaty position? Does a tax treaty provision not otherwise apply to that person? Is a taxpayer somehow dispossessed of the specific rights provided to them under a bilateral agreement between two countries for failing to file IRS Form 8833?[3] Can a taxpayer somehow avoid the application of a tax treaty, if they so choose, by not "taking" a specific treaty position? Can taxpayers or the Internal Revenue Service (the "Service") choose which law applies and which law does not with respect to transactions impacted by treaties?

WHAT IS "TAKING" A TREATY POSITION?

The lexicon of "taking" treaty positions did not commonly exist prior to Code Section 6114(a), which provides in relevant part as follows:

> (a) IN GENERAL – Each taxpayer who . . . ***takes*** the position that a treaty . . . overrules . . . an internal revenue law . . . shall disclose . . . such position--
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> (1) on the return of tax for such tax . . . or
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> (2) if no return of tax is required to be filed, in such form as the Secretary may prescribe. [*emphasis added*]

What does it mean to "take" a treaty position? It seems to imply that a taxpayer is somehow getting something they are not otherwise entitled to?

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[2] See, Omnibus Budget Reconciliation Act of 1990 (P.L. 101-508, Section 11702(c)), which created Internal Revenue Code ("IRC" or "Code") Section 6114, Treaty Based Return Positions.

[3] IRS Form 8822, *Treaty-Based Return Position Disclosure Under Section 6114 or 7701(b)* http://www.irs.gov/pub/irs-pdf/f8833.pdf

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Tax treaties are, of course, bilateral agreements between two countries and they confer mostly specific benefits on various individuals, companies, trusts and other taxpayers from the other country.[4] These benefits include principally the following two items:

1. Reducing or eliminating the tax rate on various types of income[5]; and

2. Deciding who (which taxpayers) receives the benefits of the treaty.[6]

In addition to determining who and what tax benefits are received, these tax treaties typically provide a specific mechanism by which the two governments can go about collecting and exchanging information to the other tax authorities about various taxpayers.[7]

There are many different types of transactions that can be modified (from a taxation perspective) by a tax treaty. While it is beyond the scope of this article to discuss in detail how transactions can be modified by tax treaties, the following are some common scenarios that taxpayers might often encounter:

- A reduced withholding tax rate on payments of dividends by a U.S. corporation to a foreign shareholder;

- A reduced withholding tax rate on payments of interest by a U.S. obligor to a foreign lender (e.g., a foreign bank or private lender);

- No U.S. federal income taxation on services performed in the U.S. by a foreign provider of services who does not work from either a (a) "fixed base" or (b) a "permanent establishment" in the U.S.;

- No U.S. income tax residency for a non-U.S. citizen individual who spends significant time in the U.S., e.g., 183 days or more, but otherwise is not a "resident" under the applicable income tax treaty;

- No U.S. income tax residency for a non-U.S. citizen individual who has lawful permanent resident status (i.e., a "green card") but who has left the United States to reside principally in a foreign country.

This article will use the last example (above) of the "green card" holder who has left the U.S. to reside principally in a country which has an income tax treaty with the U.S. This example can help demonstrate how an individual taxpayer might be specifically impacted by a tax treaty (regardless of whether or not she or he "take" the treaty position under Section 6114). Some additional background is in order regarding lawful permanent residents and their tax residency status under Treasury Regulation Section 301.7701(b)-1(b).[8]

The definition of who has "lawful permanent residency" for U.S. income tax purposes is based, in large part (but not exclusively), upon U.S. immigration law. The Immigration and Nationality Act (the "Act" or "INA") defines permanent resident status as being lawfully accorded the privilege of permanently residing in the United States as an immigrant.[9] Furthermore, <u>for immigration law purposes</u>, this lawful permanent residency status requires that the person physically

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[4] *See e.g.,* the OECD, AGREEMENT ON EXCHANGE OF INFORMATION ON TAX MATTERS, http://www.oecd.org/dataoecd/15/43/2082215.pdf. and the OECD Model Tax Convention - Electronic Version (eMTC), with commentary "These agreements are entered into by countries to clarify the situation when a taxpayer might find himself subject to taxation in more than one country." http://www.oecd.org/document/37/0,3343,en_21571361_33915056_34681637_1_1_1_1,00.html

[5] See, Articles 6 through 21, 23 and 27 of the 2006 Model U.S. Income Tax Convention. http://www.ustreas.gov/press/releases/reports/hp16801.pdf

[6] See footnote 5 supra and Articles 1 through 5 and 22 of the 2006 Model U.S. Income Tax Convention.

[7] See footnote 5 supra and Article 26 of the 2006 Model U.S. Income Tax Convention.
[8] See P. Martin, FATCA of the HIRE Act Crashes Head On into the 'Twilight Zone' (Lawful Permanent Residents Living Overseas), International Tax Journal, Vol. 36, No. 6, Nov.-Dec. 2010.

[9] INA sec. 101(a)(20); 8 U.S.C. sec. 1101(a)(20).

reside in the territory of the United States in a permanent form.[10] Although a person may have multiple residences, residence in the United States must be a permanent one.

If a lawful permanent resident permanently leaves the United States and takes up permanent residency in their home country, or any other country outside of the United States, he or she will apparently no longer have the lawful privilege (for immigration law purposes) of returning and residing permanently in the United States.[11] Nevertheless, Treasury Regulation Section 301.7701(b)-1(b) provides that these individuals retain their U.S. person status (as a "resident alien") for U.S. income tax purposes. Under the existing regulatory rules, these individuals continue to be taxed on their worldwide income, but for the application of a potential tax treaty position, discussed further in this article.

When Congress enacted section 7701(b), it recognized that an individual who would be treated as a resident alien under section 7701(b)(1)(A) might be treated as a nonresident alien under the so-called "tie-breaker" rules of the income tax treaties to which the U.S. is a party.[12] The remainder of this article explores how these tie-breaker treaty rules can (or not) be impacted by Section 6114.

HOW ARE TAX TREATIES AFFECTED BY DOMESTIC LAW (THE LATER IN TIME RULE)?

There are two specific statutory provisions of the Code that discuss the role tax treaties play on taxpayers. First, Section 894(a)(1) provides that the Code shall be applied with due regard to the provisions of a tax treaty.[13] Second, 7852(d) discusses the relationship between a provision of a treaty and a provision of the Code and a treaty, and provides that neither shall have preferential status by reason of its being a treaty or law.[14]

Section 7852(d) is a rough summation of the "last in time" rule adopted by the U.S., although it does not expressly reference the concept that the later in time (e.g., which of the statute or the treaty provision) should prevail. The Supreme Court in the 19th century, articulated the "last in time" (or "later in time") rule that provides that whenever there is a conflict in the law between a federal statute and an international tax treaty, the last one in time to be adopted will prevail.[15] This means that a treaty is not a law supreme to any federal statute as is the case in many countries. The Supreme Court later clarified the U.S. "later in time" rule when it says it is applicable but that "[a] treaty will not be deemed to have been abrogated or modified by a later statute unless such purpose on the part of Congress has been clearly expressed."[16]

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[10] The Act defines the term "lawfully admitted for permanent residence" as "the status of having been lawfully accorded the privilege of residing permanently in the United States as an immigrant in accordance with the immigration laws, such status not having changed." INA § 101(a)(20) [8 U.S.C. § 1101(a)(20)]. The Act defines a special immigrant "returning resident" as "an immigrant, lawfully admitted for permanent residence, who is returning from a temporary visit abroad." INA § 101(a)(27)(A) [8 U.S.C. § 1101(a)(27)(A)]. An immigrant, whether or not in possession of a valid entry document, may be permitted to enter the United States if he satisfies the definition of a special immigrant returning resident.

[11] The Act does not define "abandonment" or "a temporary visit abroad," and the Act does not otherwise address when an alien's lawful permanent resident ("LPR") status ceases to exist absent an Immigration Judge's finding of removability after the occurrence of removal proceedings. *See United States v. Yakou*, 428 F.3d 241, 247 (D.C. Cir. 2005). The Board of Immigration Appeals (the "Board"), however, has long recognized that an alien's status may change by operation of law, such that an alien may abandon his LPR status without a finding of removability (or, formerly, deportability or excludability) after a formal adjudicatory process. *See Yakou*, 428 F.3d at 247-51 (discussing case law regarding abandonment and holding that an alien may abandon LPR status without formal administrative action); *see also Matter of Quijencio*, 15 I. & N. Dec. 95 (B.I.A. 1974); *Matter of Kane*, 15 I. & N. Dec. 258 (B.I.A. 1975); *Matter of Muller*, 16 I. & N. Dec. 637 (B.I.A. 1978); *Matter of Abdoulin*, 17 I. & N. Dec. 458, 460 (B.I.A. 1980); *Matter of Huang*, 19 I. & N. Dec. 749 (B.I.A. 1988).

[12] *See*, IRS CCA 200235026, IRS CCA 199935058 and IRS FSA 2002 WL 1315688

[13] *See*, IRC § 894(a)(1), which is an express statutory provision that repeats the basic legal principal of interpretation of laws when it explains its application should be made " . . .with due regard to any treaty obligation of the United States which applies to such taxpayers."

[14] *See,* IRC § 7852(d)(1).

[15] *See, Whitney v. Robertson*, 124 U.S. 190 (1888).

[16] *See, Cook v. United States*, 288 U.S. 102, 120 (1933).

Many international practitioners are surprised to learn that the U.S. Congress can merely adopt a new statutory rule to override an international treaty that is bilaterally negotiated between the U.S. and another sovereign country.[17]

However, the Supreme Court has made clear that under U.S. law, the Congress clearly has the power to modify and override any tax treaty position by merely adopting a statutory rule contrary to the treaty provision, provided Congress clearly manifest's its intention to abrogate the treaty rule. Of course, there are several interesting questions raised by the "last in time" rule and its application to Section 6114.

Does this mean that all income tax treaties that have been adopted after Section 6114, do not require taxpayers to file IRS Form 8833? Of course, IRS Form 8833 is not mentioned anywhere in the statute, but is the form created by the IRS to provide taxpayers a means by which to comply with the requirements set forth in Section 6114. Does the "later in time" rule obligate the U.S. Treasury to adopt a specific bilateral treaty provision similar to Section 6114, requiring taxpayers to inform the taxing authorities of a treaty position taken? These questions have no clear answers. Certainly, the Service would likely take the position that the informational reporting requirements of Section 6114 apply to all transactions affected by tax treaties; irrespective of when the bilateral tax treaty was adopted.

OBLIGATION UNDER SECTION 6114 TO FILE IRS FORM 8833

Nevertheless, Section 6114, on its face, requires that any taxpayer who takes the position that a tax treaty overrules or modifies the Code should disclose the position attaching Form 8833 to his, her, or its tax return.[18] This form is to be filed when the residence of an individual is determined under a tax treaty, apart from the Code as is the case in the lawful permanent resident example.[19] Failure to file Form 8833 would give rise to a penalty of US$1,000, in the case of individuals, trusts, partnerships (and presumably all other taxpayers, other than "C" corporations which are subject to a US$10,000 penalty).[20]

In the case of a "dual resident" under a tax-treaty, who is a resident of a foreign country under an applicable tax treaty, they should file a non-resident income tax return (IRS Form 1040NR) and attach Form 8833.[21] The Service has taken the position that a "dual resident" may be treated as a U.S. resident if he or she (i) does not claim treaty benefits to be treated as a nonresident, and (ii) files U.S. tax returns as a U.S. resident and pays tax on his worldwide income.[22]

If the individual fails to timely file Form 8833, he could be subject to the US$1,000 penalty for each failure to file, discussed in more detail below.[23]

FAILURE TO FILE FORM 8833 CARRIES A PENALTY, NOT DENIAL OF TREATY BENEFITS

It is worth highlighting that the language of the statute does not establish that filing Form 8833, is a condition to the application of treaty benefits.[24] On the contrary, the statutory language provides that "each taxpayer who … takes the position that a treaty … overrules (or otherwise modifies) an internal revenue law of the United States shall disclose (in

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[17] For a more detailed discussion of tax treaty overrides and their constitutionality, please see A. Infanti, "Curtailing Tax Treaty Overrides: A Call to Action," 62 U.Pitt.L.Rev. 677 (2001).

[18] *See,* IRC § 6114(a); Treas. Reg. § 301.6114-1(a)(1) and Treas. Reg. § 301.6114-1(d)(1).

[19] *See,* Treas. Reg. § 301.6114-1(b)(8), referring to taxable years for which the due date for filing returns is after December 15, 1997). Moreover, the reporting requirement is waived for residence of individuals under tax treaties, for taxable years for which the due date for filing returns was on or before December 15, 1997. *See* also Treas. Reg. § 301.6114-1(c)(1)(iii). In addition, such requirement is waived for individuals claiming they are non-residents under a tax-treaty if reportable items of income do not exceed $100,000. Treas. Reg. § 301.6114-1(b)(2).

[20] *See,* IRC § 6712(a) and (c) and Treas. Reg. § 301.6172-1(a)(2).

[21] *See,* Treas. Reg. § 301.7701(b)-7(b) and (c)(1).

[22] *See,* IRS CCA 200235026 and IRS CCA 199935058 (lawful permanent resident living permanently abroad, subject to withholding as nonresident on payments for U.S. social security benefits, unless he elected to be treated as resident).

[23] *See,* Treas. Reg. § 301.7701(b)-7(d).

[24] As it is specifically provided in other parts of the IRC, such as in Section 874(a): "A nonresident alien individual shall receive the benefit of the deductions and credits allowed to him in this subtitle only by filing or causing to be filed with the Secretary a true and accurate return …"

such manner as the Secretary may prescribe) such position".[25] This statutory requirement is merely an informational reporting requirement.

The language of the statute expressly provides that a taxpayer shall "disclose a treaty-based position". This necessarily means that the disclosure has to be made after the taxpayer is eligible for the tax treaty based position.[26] A taxpayer cannot, of course, disclose a position that has yet to take place and hence has no have effect. In our example, the lawful permanent resident who continues to reside predominantly in the United States, would not be able to "take" the position of non-residency under an applicable treaty until he or she has actually moved outside of the United States. In other words, the statute does not condition the effectiveness of the treaty benefits to the disclosure of the position, but rather establishes an obligation on the taxpayer that arises after a treaty right is obtained.[27]

LEGISLATIVE HISTORY

The first draft of the disclosure requirement of what was to eventually become Section 6114 provided that it only applied to cases "where the taxpayer takes a position in reliance on a treaty and that position is contrary to the result that a later-enacted statute would have dictated had the treaty not existed."[28] In other words, it was originally contemplated to apply only in cases where the "last in time" rule was implicated when a latter in time statute was adopted after the treaty. The Finance Committee of the Senate gave the following justification:

> "In the interest of bringing issues to light expeditiously and apprising the IRS in a timely manner of treaty claims whose merit is not now know, the bill further provides that any treaty-based position taken by a taxpayer that overrules or otherwise modifies the operation of a statute enacted after the treaty entered into force shall be disclosed on the taxpayer's tax return …"[29]

The proposal had no mention or discussion that a failure to fulfill such disclosure requirement would somehow deny taxpayers of treaty-benefits afforded by the express terms of the bi-national convention. The Finance Committee of the Senate specifically explained that:

> "Failure to disclose in accordance with the provision would result in the imposition of a penalty of $5,000 (in the case of taxpayers that are C corporations) or $500 in the case of other taxpayers, subject to waiver by the Secretary of all or part of the penalty upon a showing by the taxpayer that the failure was due to reasonable cause and that the taxpayer acted in good faith. The penalty is in addition to any other penalty imposed by the Code or other law. …

[25] IRC § 6114(a)

[26] It is worth noting that the "savings clauses" found in all U.S. income and estate tax treaties typically only applies to U.S. citizens, allowing countries to tax their citizens (focusing on the U.S. government which taxes its citizens regardless of residency) without extending any benefits under the treaty to their citizens. The savings clause does not typically extend to lawful permanent residents. The "savings clause" found in the U.S. - Austrian Income Tax Treaty, is fairly typical in this regard and provides as follows in Article 1(4):

> 4. Notwithstanding any provision of this Convention except paragraph 5 of this Article, a Contracting State may tax its residents (as **determined under Article 4 (Resident)), and by reason of citizenship may tax its citizens**, as if this Convention had not come into effect. For this purpose the term "citizen" shall include a former citizen whose loss of citizenship had as one of its principal purposes the avoidance of tax, but only for a period of 10 years following such loss.

[27] Incidentally, in the case of U.S. source payments that are made by U.S. persons that are subject to a lower tax treaty rate, IRS Form 8833 is not the correct form for reporting such reduced treaty rates. Instead, IRS Form 1042 is typically the correct form for the payment of a reduced treaty rate for payments subject to Code Sections 1441 and 1442.

[28] *See,* S. Rep. 100-445 (Aug. 3, 1988)

[29] S. Rep. 100-445

> … The committee does not intend that the disclosure requirement, or the penalty, be waived in a case where the taxpayer is made aware of a potential statutory impediment to claiming treaty protection, there is no published rule excusing disclosure in such circumstances, and yet no disclosure is made because of a prediction by the taxpayer, tax return preparer, or other adviser that there is some probability that the treaty-based position is not inconsistent with the later-enacted statute." (underlined added) [30]

From the Finance Committee explanation the intent of the proposal was clear; an omission to disclose a treaty-based position was to be sanctioned with a monetary penalty. The Senate Report did not mention (or imply) that a failure to comply with the reporting requirement would somehow give rise to the loss of treaty benefits. At most, the Senate Report specified that any willful omission to disclose a treaty-based position would carry a consequence the penalty could not be waived.

Even though the bill was not passed exactly as discussed in the Senate Report, the modification made afterwards did not change the nature of the penalties imposed or somehow cause taxpayers to lose the benefits of a treaty.[31]

From the above explanation, it can be seen that the changes made to the Senate proposal were i) that the disclosure requirement applied to treaty-based positions, regardless if they were modified by a statute enacted later (i.e., the "later in time" rule) or before the treaty, and ii) the penalty for failure to disclose such positions was increased from an initial amount of US$500.

However, the final Section 6114 language did not change the explicit Congressional intent that the consequence of a failure to disclose a treaty-based position would give rise to a monetary penalty, but not the denial of treaty benefits.

U.S. Tax Court - *Dicta*

In *Pekar*,[32] the Tax Court in *dicta* noted the IRS did not question the taxpayer's failure to disclose his treaty-based position as required by Section 6114. Further, the Tax Court noted that "there is no indication that this failure estops a taxpayer from taking such a position."

Citing this case, it has been said by other commentators that a "Failure to file the disclosure should not, however, prevent the taxpayer from relying upon the treaty-based return position in litigation."[33]

This has very important consequences to the lawful permanent resident case study scenario discussed above. What happens to a lawful permanent resident who leaves the United States to live abroad? There are immigration law

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30 Id.

31 The explanation of the changes made to the draft was:

> "First, the agreement provides that where a taxpayer takes the position that a U.S. treaty overrules (or otherwise modifies) an internal revenue law of the United States, then disclosure on the tax return, or in a manner prescribed by the Secretary, shall be made regardless of whether the law purported to be overruled or otherwise modified was enacted before or after the treaty was enacted. The conferees intend this provision to apply in any case where the taxpayer takes a position in reliance on a treaty and that position is contrary to the result that the Internal Revenue Code (or any other internal revenue laws of the United States) would dictate in the absence of the treaty.
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> Second, the agreement provides that the penalty for each failure to comply with the disclosure requirement shall be $10,000 (in the case of taxpayers that are C corporations), or $1,000 in the case of other taxpayers.

… (The agreement does not make any modifications to the Senate amendment provision regarding the Secretary's authority to waive a penalty, with respect to a particular taxpayer, for that taxpayer's failure to disclose those positions for which the disclosure requirements have not been waived.)" *See* H.R. Conf. Rep. 100-1104 (Oct. 21, 1998) – *Joint Explanatory Statement of the Committee of Conference*

32 113 T.C. 158 (1999).

33 *Rhoades & Langer*, U.S. International Taxation and Tax Treaties, Lexis Nexis (2009), p. 43-12; *See* also *Kuntz & Peroni*, U.S. International Taxation, R.I.A. (2009), ¶ C4.22[1] ("A taxpayer's failure to make the required disclosure, however, should not stop the taxpayer from asserting the treaty-based return position in litigation with the Service.")

consequences[34] and federal tax law consequences. The immigration law consequences are not the subject of this article and are therefore not discussed in detail. However, the federal tax law consequences are particularly important and can cause severely adverse tax consequences to any particular taxpayer who may be deemed to have "expatriated" for federal income tax purposes.[35]

The lawful permanent resident may assume they continue to be a resident of the Untied States for U.S. income tax purposes, even though they move outside and live elsewhere in the world. This would be a logical assumption, since the federal tax rule of residency provides that these individuals retain their U.S. person status (as a "resident alien") for U.S. income tax purposes.[36] This is the "default rule", if you may, regarding the tax residency of an individual; before applying the application of any tax treaty. If the individual resides in a country without any federal income tax treaty with the U.S. (e.g., Brazil, Colombia, etc.), they should not have adverse tax consequences. However, if they move to and reside in a U.S. income tax treaty country such as Canada, Mexico, England, France, etc., the results can turn bad quickly because of the application of the income tax treaty.

Although this article does not intend to review in detail the application of Sections 877 and 877A, the key concept that should be considered is that if a lawful permanent resident " . . . is treated as a resident of a foreign country for the taxable year under the provisions of a tax treaty between the United States and the foreign country and does not waive the benefits of such treaty . . . "a host of potentially negative tax consequences can follow.

In other words, a lawful permanent resident cannot pick and chose whether a treaty provision (specifically the so-called "tie breaker" rules of residency[37]) applies to him or her. If it applies (e.g., where a person has no abode or residence in the U.S. and obtains tax residency in the foreign treaty country) then the person ceases to be a resident for purposes of the Code. This means that the consequences of tax expatriation can occur, even if no specific tax filing or tax treaty position is filed under Section 6114. This could be a surprising result to the unwary taxpayer, or his or her tax advisor, who might misinterpret Section 6114 as requiring that a specific IRS Form 8833 be filed before the application of the income tax treaty might apply to them.

This is just one example of how a taxpayer can be negatively affected by thinking that a tax treaty does not apply to them, unless they affirmatively file a tax treaty position with IRS Form 8833.

TREATY DISPOSITIONS – OECD OBSERVATIONS

Tax treaties, in and of themselves, generally do not provide specific procedural requirements that have to be fulfilled in order to claim treaty benefits. However, various countries impose (such as Section 6114) their own procedural laws regarding the treaty. Notwithstanding, when addressing some procedural aspects for the limits on source taxation, the OECD commentaries establish:

> "… the Convention does not settle procedural questions and each State is free to use the procedure provided in its domestic law in order to apply the limits provided by the Convention. A state can therefore automatically limit the tax that it levies in accordance with the relevant provisions of the Convention, subject to possible prior verification of treaty entitlement, or it can impose the tax provided for under its domestic law and subsequently refund the part of that tax that exceeds the amount that it can levy under the provision of the Convention. As a general rule, in order to ensure expeditious implementation of taxpayers' benefits under a treaty, the first approach is the highly preferable method. If a refund system is needed, it should be based on observable difficulties in identifying entitlement to treaty benefits. Also, where the second approach is adopted, it is extremely important that the refund be made expeditiously, especially if no interest is paid on the amount of the refund, as any undue delay in making that refund is a direct cost to the taxpayer."[38]

[34] *See,* footnote 11.

[35] *See,* e.g., IRC Sections 877 and 877A

[36] *See,* Treas. Reg. Section 301.7701(b)-1(b)

[37] These residency rules are typically found in Article 4 of U.S. income tax treaties.

[38] Paragraph 26.2 of the Commentaries on Article 1 of the OECD Model

This explanation does not address directly the procedural requirements that can be imposed by a country when claiming treaty benefits. Notwithstanding, it clearly explains the notion that the procedural requirements imposed by a country should be reasonable, in order to ensure that the taxpayer enjoys the full benefits of a tax treaty.

CONCLUSION

Section 6114 is an informational reporting requirement only. It does not provide either taxpayers or the government with the ability to argue that a particular tax treaty provision does nor does not apply if IRS Form 8833 is not filed by the taxpayer. Section 6114 is also not a condition that must be satisfied for taxpayers to receive the benefits of a tax treaty (or be subject to obligations that might arise out of it). Of course, taxpayers need to be aware of the statutory obligation to file IRS Form 8833 and also of the monetary penalty for any failure to file.

Finally, there are cases, such as lawful permanent residents who move and live outside of the United States in a foreign country with an income tax treaty, who might unwittingly believe that they continue to be a tax resident of the United States unless and until they "take" a treaty position by filing IRS Form 8833. Taxpayers and their advisors need to understand how (i) the federal tax law and (ii) specific provisions of income tax treaties might "automatically" apply by operation of law, thereby causing unintended tax consequences.

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