REPORT #641

TAX SECTION

New York State Bar Association

PROPOSED AND TEMPORARY REGULATIONS RELATING TO REPORTING OF TREATY-BASED RETURN POSITIONS

January 10, 1990

Table of Contents

TAX SECTION

New York State Bar Association

January 10, 1990

The Honorable Fred T. Goldberg, Jr.
Commissioner of Inter
nal Revenue
1111 Constitution Avenue, N.W.
Washington, D.C. 20224

Dear Commissioner Goldberg:

Enclosed is a Report dated January 10, 1990 by the Executive Committee on Proposed and Temporary Regulations Relating to Reporting of Treaty-Based Return Positions. The Report addresses the Temporary and Proposed Regulations under Sections 6114 and 6712 of the Internal Revenue Code of 1986 that were published in the Federal Register on September 8, 1989. The principal draftsman of this Report was Richard O. Loengard, Jr.

The Report concludes that the information required and exemptions provided in the regulations are not well tailored to the purposes behind the enactment of Sections 6114 and 6712. It concludes that the requirements in many cases ineffectually and unnecessarily burden both reporting parties and the Internal Revenue Services in terms of the resources that would have to be expended to provide and evaluate such information. It also argues for a reduction in the penalties provided. For those reasons, the Report recommends that the regulations be withdrawn (and the March 10, 1990 filing date be postponed) and that the regulations be reconsidered principally: (1) to expand the list of exemptions contained in paragraph (c), (2) to reduce the amount of information required to be supplied by paragraph (d), and (3) to reduce the penalties provided in

Reg. Section 301.6712-1T. Specific recommendations are then made for how to modify the reporting requirements and penalties.

Sincerely,

Wm. L. Burke
Chair

WLB/JAPP
Enclosure
4850r

cc(w/encl.):

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Joint Committee on Taxation
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Washington, D.C. 20515

TAX SECTION

New York State Bar Association

January 17, 1990

Ms. Marianne Evans Editor
Tax Notes Today
6830 N. Fairfax Drive
Arlington, Virginia 22213

Dear Ms. Evans:

Enclosed is a Report dated January 10, 1990 by the Executive Committee on Proposed and Temporary Regulations Relating to Reporting of Treaty-Based Return Positions. The principal draftsman of this Report was Richard O. Loengard, Jr.

The Report is summarized in the transmittal letter.

Very truly yours,

Wm. L. Burke

WLB/JAPP
Enclosure
4389r

Tax Report # 641

TAX SECTION

New York State Bar Association

January 17, 1990

Charles Davenport, Esq.
Tax Notes Today
6830 N. Fairfax Drive
Arlington, Virginia 22213

Dear Charles:

Enclosed is a Report dated January 10, 1990 by the Executive Committee on Proposed and Temporary Regulations Relating to Reporting of Treaty-Based Return Positions. The principal draftsman of this Report was Richard O. Loengard, Jr.

The Report is summarized in the transmittal letter.

Very truly yours,

Wm. L. Burke
Chair

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4389r

Tax Report # 641

TAX SECTION

New York State Bar Association

January 17, 1990

Mrs. Sharon W. Potter
American Bar Association
Section of Taxation
1800 M Street, N.W.
Washington, D.C. 20036

Dear Mrs. Potter:

Enclosed is a Report dated January 10, 1990 by the Executive Committee on Proposed and Temporary Regulations Relating to Reporting of Treaty-Based Return Positions. The principal draftsman of this Report was Richard O. Loengard, Jr.

The Report is summarized in the transmittal letter.

Very truly yours,

Wm. L. Burke
Chair

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4389r

January 17, 1990

Ms. Dorothy Coleman
Daily Tax Report
1231 25th Street, N.W.
Room 517
Washington, D.C. 20037

Dear Ms. Coleman:

Enclosed is a Report dated January 10, 1990 by the Executive Committee on Proposed and Temporary Regulations Relating to Reporting of Treaty-Based Return Positions. The principal draftsman of this Report was Richard O. Loengard, Jr.

The Report is summarized in the transmittal letter.

Very truly yours,

Wm. L. Burke
Chair

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TAX SECTION
New York State Bar Association

January 17, 1990

Eric Kracov, Esq.
Silverstein & Mullens
1776 K Street, N.W.
Washington, D.C. 20006

Dear Mr. Kracov:

Enclosed is a Report dated January 10, 1990 by the Executive Committee on Proposed and Temporary Regulations Relating to Reporting of Treaty-Based Return Positions. The principal draftsman of this Report was Richard O. Loengard, Jr.

The Report is summarized in the transmittal letter.

Very truly yours,

Wm. L. Burke
Chair

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4389r

January 17, 1990

Mr. Scott Schmedel
Wall Street Journal
World Financial Center
200 Liberty Street
New York, New York 10281

Dear Scott:

Enclosed is a Report dated January 10, 1990 by the Executive Committee on Proposed and Temporary Regulations Relating to Reporting of Treaty-Based Return Positions. The principal draftsman of this Report was Richard O. Loengard, Jr.

The Report is summarized in the transmittal letter.

Very truly yours,

Wm. L. Burke
Chair

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TAX SECTION

New York State Bar Association

January 17, 1990

Timothy J. McCormally, Esq.
Tax Executives Institute, Inc.
1001 Pennsylvania Avenue, N.W.
Suite 320
Washington, D.C. 20004-2505

Dear Tim:

Enclosed is a Report dated January 10, 1990 by the Executive Committee on Proposed and Temporary Regulations Relating to Reporting of Treaty-Based Return Positions. The principal draftsman of this Report was Richard O. Loengard, Jr.

The Report is summarized in the transmittal letter.

Very truly yours,

Wm. L. Burke
Chair

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Enclosure
4389r

Tax Report # 641

January 10, 1990

NEW YORK STATE BAR ASSOCIATION TAX SECTION

COMMENTS ON

PROPOSED AND TEMPORARY REGULATIONS RELATING TO REPORTING OF TREATY-BASED RETURN POSITIONS*

On September 8, 1989 the Internal Revenue Service (the "Service") issued proposed and temporary regulations (the "September 8 Regulations") implementing Sections 6114 and 6712 of the Internal Revenue Code of 1986 (the "Code") as added by the Technical and Miscellaneous Revenue Act of 1988 ("TAMRA"). These sections impose filing requirements on persons claiming benefits under a tax treaty that reduces taxes otherwise due under provisions of the Code. The September 8 Regulations are effective for taxable years of a taxpayer for which the due date for filing the return (without extensions) occurs after December 31, 1988. If a taxpayer files a tax return for its first such year before November 13, 1989, or if a person is not required to file a tax return for such year (other than by reason of the September 8 Regulations), the September 8 Regulations required that the

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* This report was prepared by Richard O. Loengard, Jr. Helpful comments were received from William L. Burke, John A. Corry, Arthur A. Feder, Stanley I. Katz, Randall K. c. Kau, Richard L. Reinhold, Michael L. Schler, Kenneth R. Silbergleit, David R. Tillinghast, Eugene L. Vogel, David E. Watts and Ralph O. Winger.

Section 6114 filing be made before January 10, 1990, later changed to March 10, 1990. In all other cases, the required filing is to be made with the return.

Sections 6114 and 6712 were added to the Code by TAMRA in 1988. The law as enacted first appeared in the Conference Report. The Senate Finance Committee Bill had contained a more limited version of Section 6114, applicable only in the event of conflicts between a treaty provision and subsequent legislation.

The enactment of these sections was a part of the general consideration by the Congress of the relationship between the Code and U.S. tax treaties. The Senate Finance Committee Report (the “Committee Report”) said of the provision that it was enacted “in the interest of bringing issues to light expeditiously and apprising the Service in a timely manner of treaty claims whose merit is not now known.” Furthermore, the Committee indicated its intention “that the disclosure be made with sufficient specificity to apprise the Secretary of the specific item of income or other amount claimed to be protected by treaty, and the treaty and statutory provisions at issue.”

A. GENERAL COMMENT

Sections 6114 and 6712 were enacted in the course of the general Congressional review of the role of tax treaties and the impact of subsequent legislative changes on the benefits afforded by those treaties. They seem to reflect two Congressional desires: (1) that the Internal Revenue Service know what treaty-based positions taxpayers take, apparently to assist the audit process, and (2) that more information be made available about the impact of treaties.[*] This Executive Committee has already expressed concern over the enactment of laws designed to override existing treaty provisions, pointing out that the United States tax treaty network serves many beneficial purposes and that the unilateral override of treaty provisions may have a negative effect on this country's future ability to negotiate treaties and may lead to foreign retaliation. In reviewing the regulations under Sections 6114 and 6712, we are concerned that the imposition of undue reporting requirements may make it so burdensome to claim the benefits of tax treaties that the practical effect becomes an override of treaty provisions. Similarly, the imposition of such burdens on residents of our treaty partners, especially when coupled with harsh penalties, conflicts with the principal purposes of income tax treaties and places significant impediments to the free flow of goods and services between treaty partners.

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[*] No mention is made in the Committee Report of the regulations under Section 6012 of the Code which have for several years imposed a filing requirement on persons engaged in business in the United States whose income was exempted from U.S. tax by treaty.

In addition, we are concerned about the reporting burden placed on persons, especially foreign persons not required to pay U.S. tax, by the regulations. The estimate, in the preamble of the regulations, of the time required to prepare the requested information seems far too low; in fact, as discussed more fully below, the detail requested is unduly burdensome. Clearly greater consideration should be given to the paperwork burden imposed by these regulations. For example, persons should not be required to develop information merely for purposes of filing under Section 6114, e.g., while a filer might be asked for information as to its gross receipts from a U.S. business which involves no U.S. permanent establishment, it should not be required to develop net income figures merely to comply with Section 6114.

Finally, we believe that the information requirements in the regulations are not well tailored to what is needed or realistically usable for the purposes the regulations are intended to promote. Matters such as the existence of permanent establishment protection, the scope of the shipping or aircraft exemption or the calculation of income attributable to a permanent establishment can be expected to involve routine audit questions. They are very unlikely to involve issues that were not known and considered in the treaty negotiation and ratification process. The same can be said about the provisions for reduced withholding rates (where the regulations do provide a limited exemption). It is not realistic to expect that the information required in the regulations (or that otherwise can be provided on the face of the return) will permit a proper audit of those questions without further inquiry. The administrative burden imposed, both on the reporting party (in developing and providing the information) and on the Internal Revenue Service (if it tried to digest the information requested), will eliminate a major benefit provided by treaties. In these areas, what should be required is simple notice of reliance on the treaty and not the kind of detail that normally would be examined only on audit. More attention and resources could then be focused on those areas, such as perhaps claims based on non-discrimination provisions, where the possibility of unexpected consequences may be greater and where it might therefore warrant requiring a more detailed statement for the basis of the claim (though not a computation of all the consequences) in the return itself.

For these reasons, we recommend that the Temporary Regulations be withdrawn (and the March 10, 1990 filing date be postponed and the new date made applicable to all required filings) and that the Proposed Regulations be reconsidered principally: (1) to expand the list of exemptions contained in paragraph (c), (2) to reduce the amount of information required to be supplied by paragraph (d), and (3) to reduce the penalties provided in Reg. Section 301.6712-1T. Our specific reasons for these recommendations are set forth below.

B. SPECIFIC COMMENTS

The following comments are arranged in the order of the regulations. However, as noted above, many of our most serious concerns relate to paragraphs (c), (d), and (e) of the Section 6114 regulations and the regulations under Section 6712; the order in which our comments are made, therefore, does not reflect the relative seriousness of our concerns.

Section 6114 Regulations

Paragraph (a)

1. In subparagraph (a)(l)(ii), the regulations provide that “the taxpayer’s taxable year should be deemed to be the calendar year (unless the taxpayer has previously established a different taxable year).” This provision should be clarified. For example, if a foreign taxpayer keeps its books on a fiscal year, it should be clearly authorized to report on the basis of that year even if it has not previously established a U.S. taxable year. Most U.S. and foreign taxpayers have the same year for both financial reporting and tax purposes, and there seems no reason to deny foreigners that are not subject to U.S. tax the opportunity to do likewise. This is particularly so because such a person may become a U.S. taxpayer at some later date and in that case should certainly be able to use its normal fiscal year.

2. We are unclear as to the intended import of subparagraph (a)(2)(ii) of the regulations. This should be expanded upon and examples used to demonstrate its import.

3. In subparagraph (a)(2)(iii) a return position is deemed “treaty-based” unless there is “a substantial probability of successful defense” of the same position under the Code. The tenor of this subparagraph seems inconsistent with the language of Section 6712 and the regulations issued under it. If a person does not file under Section 6114 because in good faith he believes he is not required to do so, the Committee does not believe the failure is due to “willful neglect” and hence it recommends that either this subparagraph be deleted or that “good faith” be the standard used in this subparagraph.

In addition, the Committee believes that if a standard other than “good faith” is to be used, the “substantial authority” standard imposed by Code Section 6661 should be used. It is desirable as a matter of principle to use the same standard in the various Code provisions relating to disclosure of return positions, and the “substantial authority” language has already been explained in the regulations and is familiar to taxpayers. Moreover, the “substantial authority” test is, more or less, an objective standard while the “substantial probability” of success standard seems quite subjective and, hence, far more difficult for taxpayers, the Service and the courts to apply.

4. We have considered whether subparagraph (a)(2)(i) and Example (1) in subparagraph (a)(3) should be amended to

require a taxpayer to disclose its treaty-based position only when such position has a favorable tax consequence. While the taxpayer may know that he receives a tax benefit if he has income that would be taxable in the absence of treaty, it is an additional burden to require a taxpayer operating at a loss, for example, to file information relating to a treaty position he has taken in determining the amount of that loss. Furthermore, if the purpose of the information is to aid in audits, it would seem that this information is most useful to the Service if filed with the return for the period in which it is relevant. Under normal tax procedures, disputes over the size of the loss can be litigated only in the year in which the loss is applied. We think it might be better to apply a similar approach in imposing these reporting obligations and recommend that reporting of a position be required only when there is a resulting tax saving.

The legislative history of Section 6114 indicates, however, that an important function of the treaty-based reporting requirement is to provide timely information on the issues posed by treaty provisions. In addition, the time when all the facts are freshest, and thus when it will be easiest for a reporting party to assess the relevant provisions of the Code, is in the year the transaction occurs.

On balance, we support disclosure in the year the transaction occurs, rather than in the year the taxpayer actually obtains a benefit. As reflected below, however, we would temper the burden imposed on the taxpayer by reducing the amount of detail required to be reported in many cases.

5. Example (2) in subparagraph (a)(3) raises an issue that is also raised by subparagraphs (b)(4) and (c)(1), as well as by the last sentence in paragraph (c). The Committee does not think it is inconsistent with the intent of the draftsman of Section 6114 to try to obtain information about dividends and interest payments that the payor believes to be exempt from tax by reason of a treaty of which it is the beneficiary. However, the requirement that these amounts be reported by the payor is potentially fraught with peril, especially if the taxpayer is required to give detailed information with respect to them. For example, if a corporate taxpayer has no permanent establishment in the United States but is engaged in business in the United States, will it be required to calculate how much income would be effectively connected merely to determine whether its dividends might be U.S. source income under Section 861(a)(2)(B) even though no tax can be levied on those dividends under an applicable treaty? Similarly, will it be required to determine what interest, if any, would be a direct obligation of the “branch” if its United States activities were subject to the branch tax in the absence of a treaty?

While the problem raises the question of appropriate exemptions, it may be more effectively diffused by appropriately limiting the scope of the information required to be supplied. We would strongly urge that every effort be made to avoid asking taxpayers to make hypothetical computations. If information as to this use of treaties is felt to be needed, a mere statement that the taxpayer believes its dividends and interest to be exempt under the treaty provision would seem sufficient.

The problem is further complicated in the case of a payment that qualifies for identical treaty relief by reason of the rights of both the payor and the recipient. It seems appropriate in such a case that no filing be required of the payor since a U.S. person would not be required to file under such circumstances (see subparagraph (c)(1)). However, a filer may have difficulty in determining in such a case whether its treaty exemption is being invoked by its shareholders or creditors. For example, if a United States branch of a United Kingdom company which is a qualified resident of the United Kingdom borrows money from a United Kingdom bank and receives a Form 1001 from the lender evidencing the lender's exemption from U.S. withholding tax (which form is not needed to secure exemption from withholding), the borrower would presumably not be required to file under Section 6114; however, if it receives no such form, a filing would be required by it. Again a mere statement that the borrower believes its interest and/or dividends are exempt — without any effort to determine the beneficiaries of that exemption — would seem sufficient. If the Service, having been alerted by the borrower’s invocation of the exemption, wishes additional information, it can, of course, ask for it.

Paragraphs (b) and (c)

1. The list of exemptions set forth in paragraph (c) should be expanded with a view toward balancing the benefits from the information sought against the possible impact that the required filing might have. For example, under domestic law, no estate tax return is required from a foreign decedent if the decedent’s United States assets were less than the $60,000 personal exemption. To require the estate of any deceased person domiciled in the United Kingdom, Germany, etc. to file a form with the United States tax authorities if such decedent owned over $60,000 of U.S. assets may well cause many such people to refuse to hold such assets. One of the principal advantages of the estate tax treaties is that they exempt foreigners from having to deal with local tax authorities and any limitation on that relief, no matter how benign the Internal Revenue Service may think it is, may lead to significant disinvestment.

Similarly, many foreign corporations have a steady stream of executives coming to the United States to provide management and technical aid to their U.S. subsidiaries; any net income from management fees charged generally is tax exempt because of the absence of a United States permanent establishment. The foreign corporation will know it has no permanent establishment and may also be able to determine whether its activities constitute engaging in the conduct of a trade or business in the United States under the Code. But it typically will not know (or have any reason to determine) what income and expenses would be subject to tax in the absence of the treaty. If such activities will require a Section 6114 filing, a vast amount of time will be spent filing forms of little or no significance to the Internal Revenue Service. Similarly, it would appear that a filing is required of every foreign lawyer, accountant or other consultant who does work in the United States and who is exempt from tax solely by reason of the absence of a U.S. fixed base. We believe that in all these cases the inconvenience and burden resulting from this filing requirement will be completely out of proportion to its benefits and an exemption should be granted. [*](Alternatively, if a filing is required in these latter cases, it might not be required to contain substantial information but merely constitute notice to the Service that the activity is taking place.)

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[*] Exemptions already exist in subparagraph (c)(3) for employees sent to the United States on business and for athletes and entertainers; a similar exemption for foreign self-employed professionals seems appropriate.

2. We question whether it is necessary or desirable to require a foreigner to report amounts subject to reduced withholding tax which are received from a related person. Information as to these payments is already required under Section 6038A so that this provision of the regulations will produce massive paperwork but no new information.

We would also recommend that the definition of control in subparagraph (b)(4) be limited by a standard contained in these regulations rather than by the standards set forth in Sections 6038 or 6038A of the Code. As is evident from the pending Congressional amendment to those provisions, the standard of control in them is subject to change for reasons unrelated to Section 6114. We therefore recommend that the present Section 6038 rule for determining “control” (or some similar rule) be set forth in the regulations. In any event, it should be made clear as of what date the test for “control” is made; for the reasons discussed with respect to paragraph (e) below, it should not be changed retroactively.

3. In addition, we are not sure that we understand the reference in subparagraph (b)(6) to “sources of any item of. . . deduction.” An illustration of what the draftsman had in mind would be desirable.

4. Finally, the last sentence in paragraph (c) needs amplification. While that sentence suggests a withholding agent is not required to file, it would seem that subparagraph (b)(4) specifically requires a withholding agent to do so. If this is not the intent of subparagraph (b)(4), amplification of that section would be highly desirable.

Paragraph (d)

We are deeply concerned about the scope of the information required by section (d). It seems to us wrong to require for this purpose far more detailed information than is required in any tax return filed by any U.S. taxpayer. We recognize that the Committee Report seems to suggest that some form of detailed information is desirable, but that comment must be read in context if the statutory treaty network is not to be severely damaged. To ask a foreign seller of goods to the United States, which may be engaged in business in the United States but has no permanent establishment here, to list separately payments from each of its U.S. customers is to impose an incredible hardship. Similarly, such a rule would impose a great burden on any bank that lends money here, any professional or businessman who collect fees from United States sources, etc. It seems to us that a general statement claiming permanent establishment protection, or at most that statement coupled with a statement of the gross amount and type of income involved, is all that is needed.

In addition, we believe it is unnecessary for a taxpayer to be asked for a list of the Code provisions under which he would be taxed if he were not exempt; surely, it cannot be the intent to penalize a person who acknowledges his potential liability because he misstates the basis of his exposure.

The requirement in subparagraph (d)(4)(iv) that the taxpayer indicate the basis for its position under the limitation of benefits provision of a tax treaty introduces an element into the filing which has no justification in Section 6114. The purpose of Section 6114 is to let the Service know when a taxpayer is taking a treaty position which is contrary to a Code provision. There is no suggestion in Section 6114 that the person involved is required to support its claim to the treaty benefit. Obviously, if one claims the benefit of the treaty, one presumably believes he has met the requirements of the limitation of benefits provision and the nature of that claim can be examined on audit.

Finally, the last sentence of paragraph (d) offers no meaningful relief. To ask the filer to list every customer, every person from whom it receives or to whom it pays interest, etc. and the amount of each customer’s payments imposes an incredible burden and the burden is not removed (nor in many cases substantially modified) because a filer need not separately list each payment.

Paragraph (e)

As indicated in the opening paragraph of these comments, Section 6114 was added to the Code late in 1988 and made effective with respect to tax returns filed after December 31, 1988. In addition, the Congress gave much discretion to the Commissioner to decide what information was to be required from taxpayers. Under these circumstances, it imposes an especially harsh burden upon persons -- especially foreigners who are not U.S. taxpayers -- to be asked for the detailed information required in paragraph (d) of the regulations with respect to periods which had already passed at the time the regulations were published. To ask under threat of penalty of perjury for taxpayers -- and non-taxpayers -- to now find and provide information of such great detail and complexity, without prior notice that such detailed information would be required, seems both unnecessary and harsh. It must be kept in mind that, even in the age of computers (perhaps, especially in the age of computers), information is not readily retrievable unless it has been filed in the relevant categories; to ask a taxpayer to produce, after the event, 21 months of detailed information presents them at best with a heavy burden, and, at worst, with an impossible burden. We, therefore, reiterate our concern that it substantially undermines the entire treaty program if the U.S. imposes such requirements on persons whose only fault lies in claiming the benefits of a tax treaty with us. Nor do we think that there is any mandate from Congress to impose these requirements on a retroactive basis; Congress left the Commissioner with wide discretion and we urge that it be exercised with some understanding of the difficulties otherwise imposed upon those required to file.

Section 6712 Regulations

Section 6712 which imposes the penalty for failure to file the return required by Section 6114 is not a model of clarity. It imposes a penalty of $1,000 (or $10,000 in the case of a C Corporation) for each failure to meet the requirements of Section 6114. Furthermore, nothing in the legislative history amplifies the intent of Congress. However, we had hoped that in interpreting this provision due regard would be given to the fact that it applies primarily to persons whose familiarity with our tax law is limited and whose sole “sin” is that they are claiming tax benefits to which they are legally entitled. Unfortunately, the temporary regulations set forth in Section 301.6712-1T, although not entirely clear, seem to go in precisely the opposite direction. Thus, they impose a penalty of “$10,000 for each failure to disclose a position taken with respect to each separate payment or separate income item.” This would seem to mean that if a foreigner, which is engaged in a U.S. business but has no U.S. permanent establishment, has 100 U.S. customers and fails to file a Section 6114 return, he may be subject to a penalty of $1 million, regardless of the amount of income derived from those activities. Moreover, it even appears that the penalty might be due if a taxpayer filed with respect to Section 6114 in a given year but omitted the names of some customers or some items of income, notwithstanding the fact that the position taken with respect to items reported was identical to those not reported.*

The regulations under Section 6712 should be amended. If the taxpayer discloses in a general way the position he is taking and makes a good faith effort to inform the Commissioner of the gross amount involved, e.g., by disclosing at least 75 percent of what is ultimately found to be at issue, there should be no penalty asserted. Moreover, even if the taxpayer fails to file the required return, it seems necessary to restrict the penalty in some fashion lest these provisions undermine our treaty program. While there may be some reason to believe that Congress did not intend that there be only a small penalty, i.e., $1,000

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* As previously noted, a foreigner with no permanent establishment in the United States but which is engaged in business here is already required, under Section 6012 of the Code, to file a return and make disclosures with respect to the income which is exempt from tax. In that case, however, there is no requirement that information be supplied in detail greater than that required of U.S. taxpayers and the penalty for failure to file is limited to 25 percent of the tax due so that it bears some relationship to the offense committed.

or $10,000, for each willful failure to file, it would nonetheless, seem appropriate -- even necessary -- to limit the penalty to avoid confiscatory consequences for infractions having little or no tax avoidance effect. For example, it might be asserted only once each year for each position not substantially disclosed. Thus, a taxpayer who failed to file a statement that he was was relying on the permanent establishment exclusion or that he was not withholding on interest payments, etc. would be subject to only one penalty for each such offense. While it is true that the result may not be a penalty of great severity in the average case, it should be kept in mind that this penalty is in addition to those otherwise imposed by law for failure to file and for failure to pay taxes. Hence, the primary impact of this penalty will be on persons who are not otherwise taxpayers, are entitled to the treaty benefit claimed and whose only failure is to file information returns. In that context, such a limited penalty seems sufficiently harsh and, since it is consistent with both the statutory language and international comity, we urge that the regulations be amended in this or some similar fashion.