

## § 1.1445-7

## 26 CFR Ch. I (4-1-10 Edition)

real property interests occurring after November 3, 2003.

[T.D. 8113, 51 FR 46648, Dec. 24, 1986; 52 FR 3796, 3917, Feb. 6, 1987; T.D. 9082, 68 FR 46086, Aug. 5, 2003]

### **§ 1.1445-7 Treatment of foreign corporation that has made an election under section 897(i) to be treated as a domestic corporation.**

(a) *In general.* Pursuant to section 897(i) a foreign corporation may elect to be treated as a domestic corporation for purposes of sections 897 and 6039C. A foreign corporation that has made such an election shall also be treated as a domestic corporation for purposes of the withholding required under section 1445, in accordance with the provisions of this section.

(b) *Withholding under section 1445(a)*—

(1) *Dispositions by corporation.* A foreign corporation that has made an election under section 897(i) may provide a transferee with a certification of non-foreign status in connection with the corporation's disposition of a U.S. real property interest. However, in accordance with the provisions of §§ 1.1445-2(b)(2)(ii) and 1.1445-5(b)(3)(ii)(C), such an electing foreign corporation must attach to such certification a copy of the acknowledgment of the election provided to the corporation by the Internal Revenue Service pursuant to § 1.897-3(d)(4) which states that the information required by § 1.897-3 has been determined to be complete.

(2) *Dispositions of interests in corporation.* Dispositions of interests in electing foreign corporations shall be subject to the withholding requirements of section 1445(a) and the rules of §§ 1.1445-1 through 1.1445-4. Therefore, if a foreign person disposes of an interest in such a corporation, and that interest is a U.S. real property interest under the provisions of section 897 and regulations thereunder, then the transferee is required to withhold under section 1445(a).

(c) *Withholding under section 1445(e).* Because a foreign corporation that has made an election under section 897(i) is treated as a domestic corporation for purposes of determining withholding obligations under section 1445, such a corporation is not subject to the requirement of section 1445(e)(2) that a

foreign corporation withhold at the corporate capital gain rate from the gain recognized upon the distribution of a U.S. real property interest. Such a corporation is subject to the provisions of section 1445(e)(3). Thus, if interests in an electing corporation constitute U.S. real property interests, then the corporation is required to withhold with respect to the non-dividend distribution of any property to an interest-holder that is a foreign person. See § 1.1445-5(e). Dividend distributions (distributions that are described in section 301) shall be treated as provided in sections 897(f), 1441 and 1442. In addition, if interests in an electing foreign corporation do not constitute U.S. real property interests, then distributions by such corporation shall be treated as provided in sections 897(f) (if applicable), 1441 and 1442.

(Approved by the Office of Management and Budget under control number 545-0902)

[T.D. 8113, 51 FR 46650, Dec. 24, 1986; 52 FR 3796, Feb. 6, 1987]

### **§ 1.1445-8 Special rules regarding publicly traded partnerships, publicly traded trusts and real estate investment trusts (REITs).**

(a) *Entities to which this section applies.* The rules of this section apply to—

(1) Any partnership or trust, interests in which are regularly traded on an established securities market (regardless of the number of its partners or beneficiaries), and

(2) Any REIT (regardless of the form of its organization).

For purposes of paragraph (a)(1) of this section, the rules of section 1445 (e)(1) and this section shall not apply to a publicly traded partnership (as defined in section 7704) which is treated as a corporation under section 7704(a), or to those entities that are classified as "associations" and taxed as corporations. See § 301.7701-2.

(b) *Obligation to withhold*—(1) *In general.* An entity described in paragraph (a) of this section is not required to withhold under the provisions of § 1.1445-5(c), which states the withholding requirements of domestic partnerships, trusts and estates upon the disposition of U.S. real property interests. Except as otherwise provided in

this paragraph (b), an entity described in paragraph (a) of this section shall be liable to withhold tax upon the distribution of any amount attributable to the disposition of a U.S. real property interest, with respect to each holder of an interest in the entity that is a foreign person. The amount to be withheld is described in paragraph (c) of this section.

(2) *Publicly traded partnerships.* Publicly traded partnerships which comply with the withholding procedures under section 1446 will be deemed to have satisfied their withholding obligations under this paragraph (b).

(3) *Special rule for certain distributions to nominees.* In the case of a person that—

(i) Is a nominee (as defined in paragraph (d) of this section),

(ii) Receives a distribution attributable to the disposition of a U.S. real property interest directly from an entity described in paragraph (a) of this section or indirectly from such entity through a nominee,

(iii) Receives the distribution for payment to any foreign person, or the account of any foreign person, and

(iv) Receives a qualified notice pursuant to paragraph (f) of this section,

then the obligation to withhold in accordance with the general rules of section 1445(e)(1) and this paragraph (b) shall be imposed solely on that person to the extent of the amount specified by the qualified notice. A person obligated to withhold by reason of this paragraph (b)(3) is referred to as a withholding agent.

(4) *Person designated to act for withholding agent.* The rules stated in §1.1441-7(b) (1) and (2) regarding a person designated to act for a withholding agent shall apply for purposes of this section.

(5) *Effect of withholding exemption granted under §1.1441-4(f).* A letter issued by a district director under the provisions of §1.1441-4(f), which exempts a person from withholding under section 1441 or section 1442, shall also exempt that person from withholding under this paragraph (b), if—

(i) The letter identifies another person as the withholding agent for purposes of section 1441 or 1442, and

(ii) Such other person enters into a written agreement, with the district director who issued the letter, to be the withholding agent for purposes of this paragraph (b).

The exemption granted, and the corresponding withholding obligation imposed, by this paragraph (b)(5) shall apply with respect to the first distribution made after execution of the agreement described in the preceding sentence and shall continue to apply to all distributions made during the period in which the exemption granted under §1.1441-4(f) is in effect.

(6) *Payment other than in money.* The rule stated in §1.1441-7(c) regarding payment other than in money shall apply for purposes of this section.

(c) *Amount to be withheld—(1) Distribution from a publicly traded partnership or publicly traded trust.* The amount to be withheld under this section with respect to a distribution by a publicly traded partnership or publicly traded trust shall be computed in the manner described in §1.1445-5(c)(3) (ii) and (iii), subject to the rules of this section.

(2) *REITs—(i) In general.* The amount to be withheld with respect to a distribution by a REIT, under this section shall be equal to 35 percent (or the highest rate specified in section 1445(e)(1)) of the amount described in paragraph (c)(2)(ii) of this section.

(ii) *Amount subject to withholding—(A) In general.* Except as otherwise provided in paragraph (c)(2)(ii)(C) of this section, the amount subject to withholding is the amount of any distribution, determined with respect to each share or certificate of beneficial interest, designated by a REIT as a capital gain dividend, multiplied by the number of shares or certificates of beneficial interest owned by the foreign person. Solely for purposes of this paragraph, the largest amount of any distribution occurring after March 7, 1991 that could be designated as a capital gain dividend under section 857(b)(3)(C) shall be deemed to have been designated by a REIT as a capital gain dividend regardless of the amount actually designated.

(B) *Distribution attributable to net short-term capital gain from the disposition of a U.S. real property interest.* [Reserved]

(C) *Designation of prior distribution as capital gain dividend.* If a REIT makes an actual designation of a prior distribution, in whole or in part, as a capital gain dividend, such prior distribution shall not be subject to withholding under this section. Rather, a REIT must characterize and treat as a capital gain dividend distribution (solely for purposes of section 1445(e)(1)) each distribution, determined with respect to each share or certificate of beneficial interest, made on the day of, or any time subsequent to, such designation as a capital gain dividend until such characterized amounts equal the amount of the prior distribution designated as a capital gain dividend. The provisions of this paragraph shall not be applicable in any taxable year in which the REIT adopts a formal or informal resolution or plan of complete liquidation.

(iii) *Example.* The following example illustrates the rules of paragraph (c)(2)(ii)(C) of this section.

In the first quarter of 1988, XYZ REIT makes a dividend distribution of \$2X. In the second quarter of 1988, XYZ sells real property, recognizing a long term capital gain of \$15X, and makes a dividend distribution of \$5X. In the third quarter of 1988, XYZ makes a distribution of \$3X. In the fourth quarter of 1988, XYZ sells real property recognizing a long term capital loss of \$2X. Within 30 days after the close of the taxable year, XYZ designates a capital gain dividend for the year of \$13X. It subsequently makes a fourth quarter distribution of \$7X. Since XYZ has made an actual designation of prior distributions during the taxable year as capital gain dividends, withholding on those prior distributions will not be required. However, the REIT must characterize, solely for purposes of section 1445(e)(1), a total amount of \$13X of dividend distributions as capital gain dividends. Therefore, the fourth quarter dividend distribution of \$7X must be characterized as a capital gain dividend subject to withholding under this section. In addition, XYZ will be required to characterize an additional \$6X of subsequent dividend distributions as capital gain dividends.

(d) *Definition of nominee.* For purposes of this section, the term “nominee” means a domestic person that holds an interest in an entity described in paragraph (a) of this section on behalf of another domestic or foreign person.

(e) *Determination of non-foreign status by withholding agent.* A withholding

agent may rely on a certificate of non-foreign status pursuant to §1.1445-2(b) or on the statements and address provided to it on Form W-9 or a form that is substantively similar to such form, to determine whether an interest holder is a domestic person. Reliance on these documents will excuse the withholding agent from liability imposed under section 1445(e)(1) in the absence of actual knowledge that the interest holder is a foreign person. A withholding agent may also employ other means to determine the status of an interest holder, but, if the agent relies on such other means and the interest holder proves, in fact, to be a foreign person, then the withholding agent is subject to any liability imposed pursuant to section 1445 and the regulations thereunder for failure to withhold.

(f) *Qualified notice.* A qualified notice for purposes of paragraph (b)(3)(iv) of this section is a notice given by a partnership, trust or REIT regarding a distribution that is attributable to the disposition of a U.S. real property interest in accordance with the notice requirements with respect to dividends described in 17 CFR 240.10b-17(b) (1) or (3) issued pursuant to the Securities Exchange Act of 1934, 15 U.S.C. 78a *et seq.* In the case of a REIT, a qualified notice is only a notice of a distribution, all or any portion of which the REIT actually designates, or characterizes in accordance with paragraph (c)(2)(ii)(C) of this section, as a capital gain dividend in accordance with 17 CFR 240.10b-17(b) (1) or (3), with respect to each share or certificate of beneficial interest. A deemed designation under paragraph (c)(2)(ii)(A) of this section may not be the subject of a qualified notice under this paragraph (f). A person described in paragraph (b)(3) of this section shall be treated as receiving a qualified notice at the time such notice is published in accordance with 17 CFR 240.10b-17(b) (1) or (3).

(g) *Reporting and paying over withheld amounts.* With respect to an amount withheld under this section, a withholding agent is not required to conform to the requirements of §1.1445-5(b)(5) but is required to report and pay over to the Internal Revenue Service any amount required to be withheld pursuant to the rules and procedures of

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section 1461, the regulations thereunder and §1.6302-2. Forms 1042 and 1042S are to be used for this purpose.

(h) *Early refund procedure not available.* The early refund procedure set forth in §1.1445-6(g) shall not apply to amounts withheld under the rules of this section. For adjustment of overwithheld amounts, see §1.1461.4.

(i) *Liability upon failure to withhold.* For rules regarding liability upon failure to withhold under §1445(e) and this section, see §1.1445-1(e).

[T.D. 8321, 55 FR 50553, Dec. 7, 1990; 56 FR 4542, Feb. 5, 1991, as amended by T.D. 8647, 60 FR 66077, Dec. 21, 1995]

**§ 1.1445-10T Special rule for Foreign governments (temporary).**

(a) This section provides a temporary regulation that, if and when adopted as a final regulation will add a new paragraph (d)(6) to §1.1445-2. Paragraph (b) of this section would then appear as paragraph (d)(6) of §1.1445-2.

(b) *Foreign government*—(1) *As transferor.* A foreign government is subject to U.S. taxation under section 897 on the disposition of a U.S. real property interest except to the extent specifically otherwise provided in the regulations issued under section 892. A foreign government that disposes of a U.S. real property interest that is not subject to taxation as specifically provided by the regulations under section 892 may present a notice of nonrecognition treatment pursuant to paragraph (d)(2) of this section that specifically cites the provision of such regulation, and thereby avoids withholding by the transferee of the property. A foreign government that disposes of a U.S. real property interest or the transferee of the property may obtain a withholding certificate from the Internal Revenue Service that confirms the applicability of section 892, but neither is required to do so. Rules concerning the issuance of withholding certificates are provided in §1.1445-3.

(2) *As transferee.* A foreign government or international organization that acquires a U.S. real property interest is fully subject to section 1445 and the regulations thereunder. Therefore, such an entity is required to withhold tax upon the acquisition of a U.S.

real property interest from a foreign person.

(c) *Effective date.* The rules of this section shall be effective for transfers, exchanges, distributions and other dispositions occurring on or after June 6, 1988.

[T.D. 8198, 53 FR 16230, May 5, 1988]

**§ 1.1445-11T Special rules requiring withholding under § 1.1445-5 (temporary).**

(a) *Purpose and scope.* This section provides temporary regulations that, if and when adopted as a final regulation will add certain new paragraphs within §1.1445-5 (b) and (c). The paragraphs of this section would then appear as set forth below. Paragraph (b) of this section would then appear as paragraph (b)(8)(v) of §1.1445-5. Paragraph (c) of this section would then appear as paragraph (c)(2)(i) of §1.1445-5. Paragraph (d) of this section would then appear as paragraph (g) of §1.1445-5.

(b) *Dispositions of interests in partnerships, trusts, and estates.* The provisions of section 1445(e)(5), requiring withholding upon certain dispositions of interests in partnerships, trusts, and estates, that own directly or indirectly a U.S. real property interest shall apply to dispositions on or after the effective date of a later Treasury decision under section 897(g) of the Code except in the case of dispositions of interests in partnerships in which fifty percent of the value of the gross assets consist of U.S. real property interests and ninety percent or more of the value of the gross assets consist of U.S. real property interests plus any cash or cash equivalents. The provisions of section 1445(e)(5), shall apply, however, to dispositions after June 6, 1988, of interests in partnerships in which fifty percent or more of the value of the gross assets consist of U.S. real property interests, and ninety percent or more of the value of the gross assets consist of U.S. real property interests plus any cash or cash equivalents. See paragraph (d) of this section.

(c) *Transactions covered elsewhere.* No withholding is required under this paragraph (c) with respect to the distribution of a U.S. real property interest by a partnership, trust, or estate. Such distributions shall be subject to