DEPARTMENT OF THE TREASURY

Internal Revenue Service

26 CFR Part 1

[TD 8722]

RIN 1545–AV33

Guidance Regarding Claims for Certain Income Tax Convention Benefits

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Temporary regulations.

SUMMARY: This document contains temporary regulations relating to eligibility for benefits under income tax treaties for payments to entities. The regulations set forth rules for determining whether U.S. source payments made to entities, including entities that are fiscally transparent in the United States and/or the applicable treaty jurisdiction, are eligible for treaty-reduced tax rates. The regulations affect the determination of tax treaty benefits with respect to U.S. source income of foreign persons. The text of these temporary regulations also serves as the text of the proposed regulations set forth in the notice of proposed rulemaking on this subject in the Proposed Rules section of this issue of the **Federal Register**.

DATES: These regulations are effective July 2, 1997.

These regulations apply to amounts paid on or after January 1, 1998.

FOR FURTHER INFORMATION CONTACT: Elizabeth Karzon, (202) 622–3860 (not a toll-free number).

SUPPLEMENTARY INFORMATION:

Background

This document contains temporary regulations relating to the Income Tax Regulations (CFR part 1) under section 894 of the Internal Revenue Code (Code).

Explanation of Provisions

These regulations prescribe rules for determining whether U.S. source income paid to an entity is eligible for a reduced rate of U.S. tax under an income tax treaty. The regulations are designed principally to clarify the availability of treaty-reduced tax rates for a payment of U.S. source income to an entity that is treated as fiscally transparent, including a hybrid entity (i.e., an entity that is treated as fiscally transparent in either (but not both) the United States or the jurisdiction of residence of the person that seeks to claim treaty benefits).

The regulations address only the treatment of U.S. source income that is not effectively connected with the conduct of a U.S. trade or business. Treasury and the IRS may issue additional regulations addressing the availability of other tax treaty benefits, such as the application of business profits provisions, with respect to income of fiscally transparent entities.

Under the regulations, payments of U.S. source income to an entity that is treated as fiscally transparent for U.S. federal income tax purposes are eligible for reduced tax rates under a tax treaty between the United States and another jurisdiction (the applicable treaty jurisdiction) if the entity itself is a resident of the applicable treaty jurisdiction, or if, and only to the extent that, the interest holders of the entity are residents of the applicable treaty jurisdiction and the entity is treated as fiscally transparent for purposes of the tax laws of such jurisdiction.

Accordingly, payments of U.S. source income to an entity that is treated as fiscally transparent for U.S. federal income tax purposes but as non-fiscally transparent for purposes of the tax laws of the applicable treaty jurisdiction are not eligible for a treaty-reduced tax rate under the relevant treaty unless the entity itself is a resident of the applicable treaty jurisdiction. Conversely, under the regulations, a payment of U.S. source income to an entity that is treated as non-fiscally transparent for U.S. federal income tax purposes (other than a domestic corporation) is eligible for a reduced tax rate under the relevant treaty if the entity itself is a resident of the applicable treaty jurisdiction or if, and only to the extent that, interest holders of the entity are residents of the applicable treaty jurisdiction and the entity is treated as fiscally transparent for purposes of the tax laws of such jurisdiction.

Under these temporary regulations, an entity is treated as fiscally transparent by a jurisdiction only if the jurisdiction requires interest holders in the entity to take into account separately their respective shares of the various items of income of the entity on a current basis and to determine the character of such items as if such items were realized directly from the source from which realized by the entity (for purposes of the tax laws of the jurisdiction). Accordingly, entities treated as fiscally transparent by a jurisdiction are entities subject in that jurisdiction to rules analogous to the U.S. rules applicable to entities that are treated as partnerships for U.S. federal income tax purposes.

These regulations are consistent with U.S. tax treaty obligations and basic tax treaty principles. The regulations as applied to hybrid entities are based on the principles discussed below. Treasury and the Service will continue to coordinate these issues with U.S. tax treaty partners in order to resolve any difficulty arising from the application of the principles set forth in these regulations.

Problems Arising From Dual Classification

The United States generally applies its tax rules to determine the classification of both domestic and foreign entities. When U.S. and foreign laws differ on classification principles, a hybrid entity may result. If income is paid to a hybrid entity, the entity may be considered as deriving the income under U.S. tax principles (e.g., as an association taxable as a corporation under U.S. tax principles), but its interest holders, rather than the entity, may be considered to derive the income under foreign tax principles (e.g., as an entity equivalent to a U.S. partnership). This dual classification may give rise to inappropriate and unintended results under tax treaties, such as double exemptions or double taxation, unless the tax treaties are interpreted so as to take into account the conflict of laws.

To avoid inappropriate and unintended tax treaty results with respect to payments to hybrid entities, these regulations rely on the basic principle that income tax treaties are designed to relieve double taxation or excessive taxation. This objective is generally achieved with provisions in treaties that limit the tax that a country may impose on income arising from sources within its borders to the extent that the income is derived by a resident of a jurisdiction with which the source country has an income tax treaty in effect (an applicable treaty jurisdiction). However, the agreement by the source country to cede part or all of its taxation rights to the treaty partner is predicated on a mutual understanding that the treaty partner is asserting tax jurisdiction over the income. Stated simply, tax treaties contemplate that income relieved from taxation in the source country will be subject to tax in the treaty country. This principle is central to the interpretation of treaty provisions in determining the extent to which payments received by a hybrid entity are eligible for benefits under tax treaties. Some treaties have specific rules reflecting this principle that are helpful in deciding how the treaties should be applied in such cases. However, the lack of specific rules in a

treaty does not suggest that this principle does not apply under that treaty.

In order to implement this principle, virtually all U.S. income tax treaties limit the eligibility for treaty benefits on the condition that the person deriving the income must be a resident of the applicable treaty country. Typical of this condition, for example, is Article 12 of the U.S.-German treaty, which provides that ''Royalties derived and beneficially owned by a resident of a Contracting State shall be taxable only in that State.'' Sometimes, the term *paid to* is used instead of the term *derived by*. However, those terms are used interchangeably and a different choice of words does not indicate that a different result is intended. Generally, a resident is defined as a person who is liable to tax in the treaty country as a resident of that country. See, for example, Article 4.1 of the U.S.-German tax convention, which provides that ''the term 'resident of a Contracting State' means any person who, under the laws of that State, is liable to tax therein by reason of his domicile, residence, place of management, place of incorporation, or any other criterion of a similar nature * * *.''

Limiting eligibility for treaty benefits to residents provides assurance to the source country that, when it limits its taxation rights on income arising from within its borders, it does so with the expectation that the income derived by a resident of the treaty country is subject to tax in the residence country.

Application of Principle to Hybrid Entities Generally

Based on the typical residence provisions of U.S. tax treaties, if income is paid to an entity that is treated as fiscally transparent in the treaty country in which it is organized, the entity itself is not eligible for benefits under the applicable treaty because it is not a resident of the treaty country (i.e., by virtue of not being liable to tax in that country). Whether the entity is a resident of the treaty country is determined under the laws of that country and not under the laws of the source country. This observation is important if the entity is a hybrid (i.e., an entity that is treated as fiscally transparent in one jurisdiction and treated as non-fiscally transparent in another jurisdiction). If the entity, treated as fiscally transparent in the treaty country, is treated as a taxable entity in the source country, the entity is considered by the source country as being liable to tax. However, this determination under the source country tax laws does not render the entity a resident of the treaty country. In order for the entity to be a resident of the treaty country, it must be liable to tax in that country, as determined under the laws of that country.

Where the entity is not eligible for treaty benefits (for lack of residence in the treaty country), there is a question as to whether the owners of the entity may be eligible for benefits under an applicable income tax treaty. As stated above, the guiding principle is that income is eligible for a rate reduction or an exemption in the source country if ''derived by'' or ''paid to'' a resident of that country. Where the entity is treated as fiscally transparent, the question is whether the income can be considered ''derived by'' or ''paid to'' the owner of the entity.

If the entity is treated as fiscally transparent by all tax jurisdictions involved (i.e., the source country, the country where the entity is organized, and the country where the owners are resident), it is well established under U.S. income tax treaties that the entity is ignored and a look-through approach is intended, with the result that the entity's owners are treated as the persons who derive the income. This result is consistent with the general principle that eligibility for treaty benefits is conditioned upon the income being subject to tax in the treaty country as the income of a resident of that country. In fact, some treaties clarify this point. For example, Article 4.1(b) of the U.S.-German income tax convention provides, like several other U.S. tax conventions, that ''in the case of income derived or paid by a partnership, estate, or trust, this term [resident] applies only to the extent that the income derived by such partnership, estate, or trust is subject to tax in that State [the State other than the source State] as the income of a resident, either in its hands or in the hands of its partners or beneficiaries.'' Further, even where no provisions are included, the Technical Explanation sometimes explains that the look-through rule applies without the need for a specific provision. See the U.S. Treasury Department's Technical Explanation of U.S.-Japan Income Tax Convention signed March 8, 1971, Article 3 (Fiscal Domicile).

Application of Principle to Reverse Hybrid Entity

If an entity is a ''reverse'' hybrid entity, meaning that it is treated as a taxable entity under the tax laws of the source country but as a fiscally transparent entity in the applicable treaty country, a conflict arises because, under the source country's tax laws, the entity's owners are not treated as deriving the income. Yet, under the tax laws of the jurisdiction where the entity's owners are resident, the owners are treated as deriving the income paid to the entity. Thus, the question is whether the source country's laws or the laws of each owner's jurisdiction of residence should govern the determination of who is the person deriving the income for tax treaty purposes. Making that determination under the tax laws of the applicable treaty jurisdiction where the owners are resident leads to results consistent with the principle discussed earlier that the source country cedes its tax jurisdiction to the treaty partner based on the understanding that the treaty partner asserts tax jurisdiction over the income by insuring that it is taxable in the hands of a resident. In this case, the entity's owners are resident in a treaty country that treats them as liable to tax on the items of income paid to the entity. On the other hand, applying the tax laws of the source country would lead to results inconsistent with that principle. In other words, tax benefits would be denied under the applicable treaty (because, under the source country's tax laws, the entity's owners are not treated as deriving the income paid to the entity), even though the income arising in the source country is subject to tax in the hands of persons who are resident in the applicable treaty jurisdiction.

Application of Principle to Regular Hybrid Entity

The same principle applies to a ''regular'' hybrid entity, i.e., an entity that is treated as fiscally transparent in the source country and as a non-fiscally transparent entity in the applicable treaty jurisdiction. If the entity is organized in a treaty jurisdiction, the applicable treaty with that country generally would treat the entity as a resident. Therefore, under that treaty, the entity should be eligible for treaty benefits as an entity deriving the income as a resident of the treaty jurisdiction. On the other hand, the entity's owners who are resident in that jurisdiction (or in any other jurisdiction that treats the entity as non-fiscally transparent) should not be eligible for treaty benefits under that treaty (or a treaty with the country where they are resident that treats the entity as non-fiscally transparent). This result should occur irrespective of the fact that the source country considers that the taxpayers with respect to the income are the entity's owners and not the entity (by virtue of treating the entity as fiscally transparent under its own tax laws). Again, applying the laws of the

applicable treaty jurisdiction to determine whether the entity or its owners are deriving the income as residents of that country leads to results consistent with the basic principle that the source country cedes its tax jurisdiction over income to the extent the income is subject to tax in the hands of a resident of the applicable treaty country.

Applying the tax laws of the source country to determine the person deriving the income for treaty purposes would not only be inconsistent with the basic principle that income should be treated as derived by the person in the treaty country who is liable to tax on that income, it also potentially leads to tax avoidance under tax conventions, including an inappropriate double exemption. For example, if the entity does not fall within the taxing jurisdiction of the applicable treaty jurisdiction (e.g., because the entity is organized in a third country or as a fiscally transparent entity in the source country), the income could be eligible for a treaty-reduced tax rate in the source country and yet not be subject to tax in the jurisdiction where the owners are resident.

In such a case, the owners may eventually be taxed on the income when the entity makes a distribution of the income derived from the source country. The Treasury and IRS believe that the potential for later taxation should not affect the results under the treaty for two reasons: First, the interposition of a hybrid entity between the income and the owner of the entity allows the taxation event in the treaty jurisdiction to be deferred, perhaps indefinitely; second, the income, when distributed or deemed distributed (for example, pursuant to anti-deferral rules of the treaty jurisdiction), may be transformed. In other words, the income derived by the partner will be treated in the partner's residence country as a distribution (or deemed distribution) of profits from the entity and not as the type of income derived by the entity from the source country. This disparity in treatment may lead to a double exemption if, for example, the dividend distribution is exempt from tax in the country where the entity's owners reside due to double tax relief or a corporate integration regime that grants preferential tax treatment to corporate distributions. Interpreting conventions in a way that allows such a double exemption would not be consistent with the primary goal of treaties to relieve double or excessive taxation. This is especially true where, as is the case here, an alternative interpretation exists that would produce results consistent with basic tax convention principles.

Certain taxpayers have expressed the view that this analysis of the treatment of payments to hybrid entities under tax treaties is inconsistent with the treatment of so-called hybrid securities that are treated differently under the tax laws of the source country and the relevant treaty jurisdiction (e.g., an instrument that is treated as a debt instrument in the source country but as an equity interest in the relevant treaty jurisdiction). In certain cases, the use of hybrid securities can lead to double exemptions, analogous to the double exemptions possible with respect to ''regular'' hybrid entities, based on the availability of an exemption from tax in the relevant treaty jurisdiction. Treasury and the IRS recognize that hybrid securities can produce inappropriate and unintended results under income tax treaties. Although the residence concept of tax treaties, which incorporates the basic ''subject to tax'' principle, generally is satisfied with respect to payments on a hybrid security for the reasons discussed above, Treasury and the IRS are considering whether inappropriate and unintended tax treaty consequences, including both double exemptions and double taxation, can arise with respect to hybrid securities and, if so, what alternative avenues exist for addressing them.

The hybrid entity analysis applies regardless of where the entity is organized and where the owners are resident. One example involves an entity organized in one country and owned by persons residing in a third country. If the third country and the source country treat the entity as fiscally transparent, both the source country and the third country can ignore the entity for purposes of granting treaty benefits under the third country's convention with the source country. In such a case, the entity's owners resident in the third country are treated as deriving the income received by the entity, under both the source country tax laws and the tax laws of the third country. In a three-country situation, there may also be simultaneous application of two treaties to the same flow of income: the treaty with the country where the entity is organized, and the treaty with the country where the entity's owners are resident.

The analysis applicable to fiscally transparent entities does not depend on whether the entity has multiple owners or a single owner. Accordingly, the analysis applies to a wholly-owned entity that is disregarded for federal tax purposes as an entity separate from its owner.

Application of Principle to Entity Organized in Source Country

The same analysis generally applies to entities organized in the source country. If both the source country and the treaty jurisdiction where the entity's owners are resident treat the entity as fiscally transparent, then the entity is ignored and the eligibility for treaty benefits is tested at the owners' level. If the entity, however, is treated as non-fiscally transparent in the treaty jurisdiction, then the income is not treated by the treaty jurisdiction as being derived by the owners. Therefore, the owners are not eligible for benefits under the treaty since they are not deriving the income for purposes of the applicable treaty.

Taxpayers may argue that treaty benefits should be allowed to the owners residing in the treaty country because, viewed from the source country's point of view, the owners are deriving the income from the source country and are resident in the treaty country. While the provisions in current treaties do not explicitly provide for this situation, the situation raises exactly the same issues as in the cases discussed above. For this purpose, it is immaterial that the entity is organized in the country of the owner, in a third country, or in the source country.

The analysis does not apply, however, if the entity is a reverse hybrid organized in the United States because, in such a case, the United States treats the entity as a corporate entity, liable to tax in the United States at the entity level. The right of the United States to tax a domestic corporation is established under the ''savings clause'' of all U.S. tax treaties which preserves the right of the United States to tax its residents and citizens under its domestic law. Distributions from a domestic corporation that is a reverse hybrid are also subject to U.S. tax in the hands of the foreign owners who are treated as shareholders for U.S. tax purposes.

Beneficial Ownership

The principles relied upon in these temporary regulations are consistent with the proposed withholding tax regulations issued under §§ 1.1441–1(c)(6)(ii)(B) and 1.1441–6(b)(4) regarding claims of treaty-reduced withholding rates for U.S. source payments through foreign entities. The temporary regulations, however, do not utilize the same terminology as the proposed withholding tax regulations.

The proposed withholding tax regulations condition eligibility for treaty-based withholding rates for payments to an entity on a

determination of ''beneficial owner'' status for the entity or the interest holders of the entity pursuant to the laws of the applicable treaty jurisdiction. Accordingly, under the proposed withholding tax regulations, the term *beneficial owner* functions as a surrogate for the principle that a person is eligible for tax treaty benefits with respect to a payment received by an entity only if the person is a resident with respect to such payment.

The term *beneficial owner* as used in the proposed withholding tax regulations may be confusing because this term has other meaning in the tax treaty context. Accordingly, the temporary regulations do not utilize the term *beneficial owner* in the same manner as the proposed withholding regulations. Rather, they condition eligibility for treaty-reduced tax rates for income paid to an entity on a determination that the income is ''treated as derived by a resident'' of the applicable treaty jurisdiction. Like the determination of beneficial owner status required in the proposed withholding tax regulations, the determination of whether a payment to an entity is ''treated as derived by a resident'' is determined under the principles in effect under the laws of the applicable treaty jurisdiction. Treasury and the Service intend to conform the final withholding tax regulations to the temporary regulations.

The temporary regulations reflect the fact that the concept of beneficial ownership is an important separate condition for claiming tax treaty benefits. In order to address difficulties where the recipient acts as a ''nominee'' or ''conduit'' for another person or in other situations involving a disconnect between legal and economic ownership, most income tax treaties require that the resident be a beneficial owner of the income. This requirement is entirely separate from the beneficial ownership requirement with respect to U.S. source payments to foreign entities reflected in the proposed withholding tax regulations and the residence requirement with respect to U.S. source payments to all entities reflected in these temporary regulations. As used in tax treaties, the term *beneficial owner* is meant to address ''conduit'', ''nominee'' and comparable situations in which the person receives the payment in form (and may even be taxed on that income in the jurisdiction in which it resides), but is nevertheless not treated as beneficially owning the income for purposes of a particular treaty because, under the beneficial owner rules of the source country, the income is deemed to belong to another person who is determined to have a stronger economic nexus to the income. See, for example, section 7701(l) and §§ 1.7701(l)–1(b) and 1.881–3. Thus, the temporary regulations utilize the term *beneficial owner* in a manner consistent with the treaty approach.

Mutual Agreement

Treasury and IRS intend that the principles of the regulations should be applied in a reciprocal manner by U.S. tax treaty partners. For this reason, the regulations include a special rule that provides that, irrespective of any contrary rules in the regulations, a reduced rate under a tax treaty for a payment of U.S. source income will not be available to the extent that the applicable treaty partner does not grant a reduced rate under the tax treaty to a U.S. resident in similar circumstances, as evidenced by a mutual agreement between the relevant competent authorities or a public notice of the treaty partner. Denial of benefits under this provision would be effective on a prospective basis only.

Effective Date

The temporary regulations apply on a prospective basis only to amounts paid on or after January 1, 1998. Withholding agents should consider the effect of these regulations on their withholding obligations, including the need to obtain a new withholding certificate to confirm claims of treaty benefits for payments made on or after the effective date. Treasury and the IRS recognize that the applicable principles for determining eligibility of reduced treaty rates for income paid to hybrid entities may have been uncertain in the past. Accordingly, the IRS does not intend to challenge any claim of treaty benefits for payments to hybrid entities made before the effective date of these regulations on the basis that the claim was based on principles inconsistent with those upon which these regulations are based.

Special Analyses

It has been determined that these temporary regulations are not a significant regulatory action as defined in EO 12866. Therefore, a regulatory assessment is not required. It has also been determined that section 553(b) of the Administrative Procedure Act (5 U.S.C. chapter 5) does not apply to these regulations and, because these regulations do not impose on small entities a collection of information requirement, the Regulatory Flexibility Act (5 U.S.C. chapter 6) does not apply. Therefore, a Regulatory Flexibility Analysis is not required. Because of rapidly increasing use of hybrid entities for cross-border transactions, immediate guidance is needed on rules for determining whether U.S. source payments made to entities, including entities that are fiscally transparent in the United States and/or the applicable treaty jurisdiction, are eligible for treaty-reduced tax rates. Therefore, good cause is found to dispense with the notice requirement of section 553(b) of the Administrative Procedure Act. Pursuant to section 7805(f) of the Internal Revenue Code, these regulations will be submitted to the Chief Counsel for Advocacy of the Small Business Administration for comment on its impact on small business.

List of Subjects in 26 CFR Part 1

Income taxes, Reporting and recordkeeping requirements.

Adoption of Amendments to the Regulations

Accordingly, 26 CFR part 1 is amended as follows:

PART 1—INCOME TAXES

Paragraph 1. The authority for part 1 continues to read in part as follows:

Authority: 26 U.S.C. 7805 * * *

Par. 2. § 1.894–1T is added to read as follows:

§ 1.894–1T Income affected by treaty (temporary).

(a) through (c) [Reserved]. For further guidance, see § 1.894–1(a) through (c).

(d) *Determination of tax on income paid to entities*—(1) *In general.* The tax imposed by sections 871(a), 881(a), 1461, and 4948(a) on a payment received by an entity organized in any country (including the United States) shall be eligible for reduction under the terms of an income tax treaty to which the United States is a party if such payment is treated as derived by a resident of an applicable treaty jurisdiction, such resident is a beneficial owner of the payment, and all other applicable requirements for benefits under the treaty are satisfied. A payment received by an entity is treated as derived by a resident of an applicable treaty jurisdiction only to the extent the payment is subject to tax in the hands of a resident of such jurisdiction. For this purpose, a payment received by an entity that is treated as fiscally transparent by the applicable treaty jurisdiction shall be considered a payment subject to tax in the hands of a resident of the jurisdiction only to the extent that the interest holders in the entity are residents of the jurisdiction. For purposes of the preceding sentence, interest holders shall not include any

direct or indirect interest holders that are themselves treated as fiscally transparent entities by the applicable treaty jurisdiction. A payment received by an entity that is not treated as fiscally transparent by the applicable treaty jurisdiction shall be considered a payment subject to tax in the hands of a resident of such jurisdiction only if the entity is itself a resident of that jurisdiction.

(2) *Application of beneficial ownership requirement in respect of certain payments received by entities*—(i) *Entities treated as fiscally transparent for U.S. tax purposes.* An entity that is treated as fiscally transparent under the laws of the United States and that is resident in an applicable treaty jurisdiction shall be treated as the beneficial owner of a payment if the entity would be treated as the beneficial owner if it were treated as nonfiscally transparent by the United States.

(ii) *Entity's owners as beneficial owners*—(A) A resident of an applicable treaty jurisdiction that derives a payment received by an entity that is fiscally transparent under the laws of the applicable tax jurisdiction shall be treated as the beneficial owner of the payment unless—

(*1*) Such resident would not have been treated as the beneficial owner of the payment had such payment been received directly by the resident; or

(*2*) The entity receiving the payment is not treated as a beneficial owner of the payment.

(B) For example, persons residing in treaty Country X and treated under the laws of Country X as interest holders in a fiscally transparent entity created under the laws of Country Y are treated as the beneficial owners of the payments received by the entity from sources within the United States unless the interest holders would not have been treated as beneficial owners had they received the payment directly (e.g., the partners act as nominees or conduits for other persons). However, if the entity itself is acting as a nominee or conduit for another person and, therefore, is not itself a beneficial owner, then none of the interest holders can be treated as beneficial owners, even if the interest holders own their interests in the entity as beneficial owners. For this purpose, the determination of whether a person is a beneficial owner of a payment shall be made under U.S. tax laws.

(3) *Application to certain domestic entities.* Notwithstanding paragraph (d)(1) of this section, an income tax treaty may not apply to reduce the amount of tax on income received by an entity that is treated as a domestic corporation for U.S. tax purposes. Therefore, neither the domestic corporation nor its shareholders are entitled to the benefits of a reduction of U.S. income tax on income received from U.S. sources by the corporation.

(4) *Definitions*—(i) *Entity.* For purposes of this paragraph (d), the term *entity* shall mean any person that is treated by the United States or the applicable treaty jurisdiction as other than an individual.

(ii) *Fiscally transparent.* For purposes of this paragraph (d), an entity is treated as *fiscally transparent* by a jurisdiction to the extent the jurisdiction requires interest holders in the entity to take into account separately on a current basis their respective shares of the items of income paid to the entity and to determine the character of such items as if such items were realized directly from the source from which realized by the entity (for purposes of the tax laws of the jurisdiction). Entities that are fiscally transparent for U.S. federal income tax purposes include partnerships, common trust funds described under section 584, simple trusts, grantor trusts, as well as certain other entities (including entities that have a single interest holder) that are treated as partnerships or as disregarded entities for U.S. federal income tax purposes.

(iii) *Applicable treaty jurisdiction.* The term *applicable treaty jurisdiction* means the jurisdiction whose income tax treaty with the United States is invoked for purposes of reducing the rate of tax imposed under section 871(a), 881(a), 1461, and 4948(a).

(iv) *Resident.* The term *resident* shall have the meaning assigned to such term in the applicable income tax treaty.

(5) *Application to all income tax treaties.* Unless otherwise explicitly agreed upon in the text of an income tax treaty, the rules contained in this paragraph (d) shall apply in respect of all income tax treaties to which the United States is a party. However, a reduced rate under a tax treaty for a payment of U.S. source income will not be available irrespective of the provisions in this paragraph (d) to the extent that the applicable treaty partner would not grant a reduced rate under the tax treaty to a U.S. resident in similar circumstances, as evidenced by a mutual agreement between the relevant competent authorities or by a public notice of the treaty partner. The Internal Revenue Service shall announce the terms of any such mutual agreement or treaty partner's position. Any denial of tax treaty benefits as a consequence of such a mutual agreement or treaty partner's position shall affect only U.S. source payments made after announcement of the terms of the agreement or of the position.

(6) *Examples.* This paragraph (d) is illustrated by the following examples. Unless stated otherwise, each example assumes that all conditions for claiming a treaty-reduced tax rate under a U.S. income tax treaty with respect to a payment of U.S. source income are satisfied (other than the condition that the income is treated as derived by a resident of the applicable treaty jurisdiction), including the beneficial ownership requirement and all requirements relating to applicable limitation on benefits provisions. The examples are as follows:

Example 1. (i) *Facts.* Entity A is a business organization formed under the laws of Country X that has an income tax treaty with the United States. Under the laws of Country X, A is liable to tax at the entity level. A is treated as a partnership for U.S. income tax purposes and receives royalties from U.S. sources that are not effectively connected with the conduct of a trade or business in the United States. Some of A's partners are resident in Country X and the other partners are resident in Country Y. Country Y has no income tax treaty in effect with the United States. Article 12 of the U.S.–X tax treaty provides that ''royalties derived from sources within a Contracting State by a resident of the other Contracting State shall not exceed 5 percent of the gross amount thereof * * *''. Article 4.1 of the treaty provides that for purposes of the treaty, ''a 'resident' of a Contracting State means any person who, under the laws of that State, is liable to tax therein by reason of his domicile, residence, place of management, place of incorporation, or any other criterion of a similar nature * * *''. Article 4.2 of the treaty provides that in the case of income ''derived or paid by a partnership * * *'', the term *resident* applies only to the extent that the income derived by such partnership is subject to tax in that State as the income of a resident, either in its hands or in the hands of its partners.

(ii) *Analysis.* Under the U.S.–X income tax treaty, A is a *resident* of Country X within the meaning of Article 4.1 of the treaty. Also, as a resident of Country X taxable on the U.S. source royalty under the tax laws of Country X, A meets the condition under Article 12 of the treaty that it derive the income from sources within the United States. Accordingly, the U.S. source royalty income is treated as derived by a resident of X. Further, A is a beneficial owner of the royalty income, as determined under paragraph (d)(2)(i) of this section. The fact that A's interest holders are also beneficial owners of the royalty income under U.S. tax principles (as partners of A) does not preclude A from qualifying as a beneficial owner for purposes of the treaty. In addition, A may claim benefits under the U.S.–X income tax treaty even though some of its interest holders do not reside in X or reside in a country that does not have an income tax treaty in effect with the United States.

Example 2. (i) *Facts.* The facts are the same as under *Example 1* except that Article 12 of the U.S.–X income tax treaty provides that royalties ''paid'' to a resident of a treaty country from sources within the other may be taxed in both countries but the tax is limited to 10 percent of the gross amount of the royalties in the source country. Further the U.S.–X income tax treaty includes no provision relating to income paid or derived through a partnership.

(ii) *Analysis.* As in *Example 1,* A is entitled to claim the benefit of the U.S.–X income tax treaty with respect to the U.S. source royalty income paid to A. The term *paid* and the term *derived* are used interchangeably in U.S. income tax treaties. Accordingly, the U.S. source royalty income is treated as derived by a resident of X. It is irrelevant that the U.S.–X treaty does not include a provision relating to income paid or derived through a partnership.

Example 3. (i) *Facts.* The facts are the same as under *Example 2,* except that Country Y has an income tax treaty in effect with the United States. Article 12 of the U.S.–Y income tax treaty reduces the rate on U.S. source royalty income to zero if the income is paid to a resident of Country Y who beneficially owns the income. Article 4.1 of the U.S.–Y treaty provides that for purposes of the treaty, ''a 'resident' of a Contracting State means any person who, under the laws of that State, is liable to tax therein by reason of his domicile, residence, place of management, place of incorporation, or any other criterion of a similar nature * * *''. The U.S.–Y treaty does not include a provision relating to income paid or derived through a partnership. Under the laws of Country Y, A is treated as fiscally transparent entity. Thus, A's partner, T, a corporation organized in Country Y is required to include in income on a current basis its allocable share of A's income. T is a beneficial owner of the income paid to A, as determined under paragraph (d)(2)(ii) of this section.

(ii) *Analysis.* As in *Example 2,* A is entitled to claim the benefit of the U.S.–X income tax treaty with respect to the U.S. source royalty income paid to A. However, T is also entitled to claim the benefit of the exemption under the U.S.–Y treaty for its allocable share of the U.S. source royalty income. T meets the conditions of Article 12 because it is a resident of Country Y within the meaning of Article 4.1 of the treaty. Also, as a resident of Country Y taxable on the U.S. source royalty under the tax laws of Country Y, it meets the condition under Article 12 of the treaty that income from sources within the United States be paid to a resident. Accordingly, T's allocable share of the U.S. source royalty income is treated as derived by a resident of Y. It is irrelevant that the U.S.–Y treaty does not include a provision relating to income paid or derived through a partnership.

Example 4. (i) *Facts.* Entity A is a business organization organized under the laws of Country V that has no income tax treaty with the United States. A is treated as a partnership for U.S. tax purposes and receives royalty income from U.S. sources that is not effectively connected with the conduct of a trade or business in the United States. G, one of A's interest holders, is a corporation organized under the laws of Country X. X treats A as an entity taxable at the entity level and not as a fiscally transparent entity. Therefore, G is not required to include in income on a current basis its share of A's income. Instead, G is taxed in X on its share of A's profits when distributed by A and such distribution is taxed to G as a dividend. H, A's other interest holder, is a corporation organized in Country Y. Y treats A as a fiscally transparent entity and requires H to include in income on a current basis its allocable share of A's income. Both X and Y have an income tax treaty in effect with the United States. Article 12 of the U.S.–X income tax treaty provides that royalties paid to a resident of a treaty country from sources within the other may be taxed in both countries but the tax is limited to 5 percent of the gross amount of the royalties in the source country. Article 4.1 of the U.S.–X treaty provides that for purposes of the treaty, a '' 'resident' of a Contracting State means any person who, under the laws of that State, is liable to tax therein by reason of his domicile, residence, place of management, place of incorporation, or any other criterion of a similar nature * * *''. The U.S.–X treaty does not include a provision relating to income paid or derived through a partnership. Article 12 of the U.S.–Y treaty provides that ''royalties derived and beneficially owned by a resident of a Contracting State shall be taxable only in that State''. Article 4.1 of the U.S.–Y treaty provides that, for purposes of the treaty, '' 'resident' of a Contracting State means any person who, under the laws of that State, is liable to tax therein by reason of his domicile, residence, place of management, place of incorporation, or any other criterion of a similar nature * * *''. Article 4.2 of the U.S.–Y treaty provides that in the case of income ''derived or paid by a partnership * * *'', the term resident applies only to the extent that the income ''derived by such partnership is subject to tax in that State as the income of a resident, either, in its hands or in the hands of its partners.

(ii) *Analysis.* A may not claim the benefit of any income tax treaty since it is not a resident of a country with which the United States has such a treaty. This result occurs regardless of how A is treated for U.S. tax purposes or for purposes of the tax laws of Country V. G may not claim the benefits of Article 12 of the U.S.–X treaty. Under the tax laws of X, G's share of the U.S. source royalty income paid to A is not treated as derived by a resident of X since, under X's tax laws, A, rather than G, is required to account for income received by A. This result occurs even if A distributes the royalty amount immediately after receiving it because, in such a case, G would be taxable on an amount treated as a profit distribution from A and not on royalty income received from sources within the United States. The fact that, for U.S. tax purposes, G is treated as the taxpayer for its allocable share of A's income is not relevant for purposes of determining whether, for purposes of Article 12 of the U.S.–X income tax treaty, G's share of the income paid to A is treated as derived by a resident of X. For this purpose, the laws of Country X govern the determination of whether G meets this condition. On the other hand, H may claim an exemption from U.S. tax on its share of the royalty income received by A under Article 12 of the U.S.–Y treaty because, under the tax laws of Y, H rather than A, is required to account for income received by A. Accordingly, H's share of the U.S. source royalty income paid to A is treated as derived by a resident of Y.

Example 5. The facts are the same as in *Example 4,* except that A is a business organization formed under the laws of a U.S. State as a limited liability company. The consequences are the same as described in *Example 4.* G is not eligible for benefits under Article 12 of the U.S.–X income tax treaty since, under X's tax laws, A, rather than G, is required to account for income received by A. Under section 881(a), G is liable for U.S. income tax on its allocable share of A's U.S. source royalty income at a 30 percent rate and A must withhold 30 percent from G's allocable share under section 1442. Similarly, H may claim an exemption from U.S. tax on its share of the royalty income received by A under Article 12 of the U.S.–Y treaty because, under the tax laws of Y, H rather than A, is required to account for income received by A.

Example 6. The facts are the same as in *Example 4,* except that A is a so–called dual organized entity. In addition to being organized under the laws of Country V, A has also been organized under the laws of the United States pursuant to the State Z domestication statute. Accordingly, both Country V and the United States regard entity A as a domestic entity existing only in that jurisdiction. Further, Country X and Country Y regard A as a Country V entity. A is treated as a partnership for U.S. tax purposes. The fact that A is a dual organized entity that is regarded differently in Countries X or Y and the United States does not impact the relevant tax treaty analysis. As in *Example 4,* A may not claim the benefit of any income tax treaty since it is not a resident of a country with which the United States has such a treaty. Similarly, G is not eligible for benefits under Article 12 of the U.S.–X income tax treaty since, under X's tax laws, A, rather than G, is required to account for income received by A. Under section 881(a), G is liable for U.S. income tax on its allocable share of A's U.S. source royalty income at a 30 percent rate. Because A is treated as a U.S. partnership for U.S. tax purposes, A must withhold 30 percent from G's allocable share under section 1442. H may claim an exemption from U.S. tax on its share of the royalty income received by A under Article 12 of the U.S.–Y income tax treaty because, under the tax laws of Y, H rather than A, is required to account for the income received by A.

Example 7. The facts are the same as in *Example 5,* except that A distributes all U.S. source royalty income to its interest holders immediately following A's receipt of such income. The consequences are the same as described in *Example 5.* G remains ineligible for benefits under Article 12 of the U.S.–X income tax treaty since, under X's tax laws, A, rather than G, is required to account for the royalty income received by A. The fact

that A distributes income on a current basis to G is irrelevant even if Country X taxes G on such distributions on a current basis. Country X regards such distributions to G as a distribution of profits from A to G rather than an item of U.S. source royalty income of G. H remains eligible for benefits under Article 12 of the U.S.–Y income tax treaty with respect to H's allocable share of the U.S. source royalty treatment received by A.

Example 8. The facts are the same as in *Example 5,* except that Country X pursuant to a Country X anti-deferral regime requires that G account for on a current basis as a deemed distribution G's pro rata share of A's net passive income. For purposes of the anti-deferral regime, the U.S. source royalty income of G is regarded as passive income. The consequences are the same as described in *Example 5.* G remains ineligible for benefits under Article 12 of the U.S.–X income tax treaty because, under X's tax laws, A, rather than G, is required to account for the royalty income received by A. The fact that G receives a current deemed distribution of net passive income is irrelevant even if Country X taxes G on such deemed distributions on a current basis. Country X regards such deemed distributions to G as a distribution of profits from A to G rather than an allocation to G of G's share of A's U.S. source royalty income. H remains eligible for benefits under Article 12 of the U.S.–Y income tax treaty with respect to H's allocable share of the U.S. source royalty treatment received by A.

Example 9. (i) *Facts.* Entity A is a business organization formed under the laws of Country X that has an income tax treaty with the United States. A has made a valid election under § 301.7701–3(c) of this chapter to be treated as a corporation for U.S. tax purposes and receives royalty income from sources within the United States that is not effectively connected with the conduct of a trade or business in the United States. G, A's sole shareholder, is a corporation organized under the laws of Country X. Under the tax laws of X, A is treated as a fiscally transparent entity and, therefore, G is required to include in income on a current basis its share of A's income. Article 12 of the U.S.–X tax treaty provides that ''royalties derived from sources within a Contracting State by a resident of the other Contracting State shall not exceed 5 percent of the gross amount thereof . . .''. Article 4.1 of the treaty provides that for purposes of the treaty, a '' 'resident' of a Contracting State means any person who, under the laws of that State, is liable to tax therein by reason of his domicile, residence, place of management, place of incorporation, or any other criterion of a similar nature * * * ''. Article 4.2 of the treaty provides that in the case of income derived or paid by a partnership * * *'' the term *resident* applies only to the extent that the income derived by such partnership is subject to tax in that State as the income of a resident, either, in its hands or in the hands of its partners.

(ii) *Analysis.* A does not qualify for benefits under the U.S.–X income tax treaty because A is treated as a fiscally transparent entity under the tax laws of X and thus is not a resident of X for purposes of the treaty. G, on the other hand, qualifies for benefits under the U.S.–X treaty with respect to the U.S. source royalty income received by A because, under the tax laws of X, G is required to account for the income received by A on a current basis. This result applies even though, for U.S. tax purposes, A is treated as a corporate entity. Accordingly, the U.S. royalty income paid to A is treated as derived by G, a resident of X, as determined under the tax laws of X. Based on G's qualification for treaty benefits with respect to the U.S. source royalty income, A, as the taxpayer under U.S. tax laws, may claim that the income that it receives for U.S. tax purposes is eligible for benefit under the U.S.–X treaty.

Example 10. The facts are the same as in *Example 9,* except that A is a corporation organized under the laws of a U.S. State and is, therefore, a domestic corporation. A may not claim under the U.S.–X income tax treaty a reduction of the rate of U.S. tax otherwise imposed on its income under section 11. A reduced rate of tax is unavailable under the U.S.–X treaty based upon the savings clause in Article 1 of the U.S.–X treaty. Thus, A remains fully taxable under U.S. tax laws as a domestic corporation.

Example 11. (i) *Facts.* Entity A is a business organization organized under the laws of Country V that has no income tax treaty with the United States. A is treated as a partnership for U.S. tax purposes and receives royalty income from U.S. sources that is not effectively connected with the conduct of a trade or business in the United States. A is directly owned by H and J. J is a corporation organized in Country Z which treats A as fiscally transparent and J as an entity taxable at the entity level. Accordingly, Country Z requires J to include in income on a current basis J's share of A's U.S. source royalty income. H, A's other direct interest holder, is a corporation organized in Country Y. H, in turn is owned by E and F, both of which are entities organized in Country X. E and F are each wholly owned by C which is a corporation organized in Country V. Y treats both A and H as fiscally transparent entities. X treats A, H, and E as fiscally transparent entities. X treats F as an entity taxable at the entity level. Accordingly, X requires F to include in income on a current basis F's indirect share of A's U.S. source royalty income. H and J are treated as corporations for U.S. federal income tax purposes while E, F, and C are treated as partnerships for U.S. federal tax purposes. X, Y and Z each have in effect an income tax treaty with the United States. Article 12 of the U.S.–X and the U.S.–Z income tax treaty provides that royalties paid to a resident of a treaty country from sources within the other may be taxed in both countries but the tax is limited to 5 percent of the gross amount of the royalties in the source country. Article 4.1 of the U.S.–Z and the U.S.–Z treaty provides that for purposes of the treaty, a '' 'resident' of a Contracting state means any person who, under the laws of that State, is liable to tax therein by reason of his domicile, residence, place of management, place of incorporation, or any other criterion of a similar nature . . .''. Article 4.2 of the U.S.–X and the U.S.–Z treaty provides that in the case of income ''derived or paid by a partnership . . .'', the term *resident* applies only to the extent that the income derived by such partnership is subject to tax in that State as the income of a resident, either in its hands or in the hands of its partners. Article 12 of the U.S.–Y treaty provides that ''royalties derived and beneficially owned by a resident of a Contracting State shall be taxable only in that State.'' Article 4.1 of the U.S.–Y treaty provides that, for purposes of the treaty, a '' 'resident' of a Contracting State means any person who, under the laws of that State, is liable to tax therein by reason of his domicile, residence, place of management, place of incorporation, or any other criterion of Asimilar nature . . .''. The U.S.–Y treaty does not include a provision relating to income paid or derived through a partnership.

(ii) *Analysis.* A may not claim, based on its own status, the benefit of any income tax treaty since it is not a resident of a country with which the United States has such a treaty. This result occurs regardless of how A is treated for U.S. tax purposes or for purposes of the tax laws of Country V. H may not claim the benefits of any treaty, including the benefits of Article 12 of the U.S.–Y treaty, because H does not qualify as a resident of Y or any other treaty jurisdiction. Similarly, neither E nor C may claim the benefits of any income tax treaty, since neither entity qualifies as a resident of X or any other treaty jurisdiction. F, however, may claim the benefit of Article 12 of the U.S.–X treaty with respect to F's indirect share of the U.S. source royalty income received by A. Such income is treated as derived by F, a resident of X, because X qualifies as a resident of X and, under the tax laws of X, F is the first entity in the A, H, F chain that is not itself treated as fiscally transparent in X. J may claim the benefits of Article 12 of the U.S.–Z treaty with respect to J's indirect share of the U.S. source royalty income paid to A because, under the tax laws of Z, J rather than A, is required to account for income received by A. Accordingly, J's share of the U.S. source royalty income paid to A is treated as derived by a resident of Z. As illustrated in this example, the U.S. federal income tax treatment of A, J, H, E, F and C is irrelevant for purposes of determining the extent to which U.S. source royalty income paid to A is eligible for treaty-reduced tax rates under the U.S. income tax treaty with X, Y or Z.

Example 12. (i) *Facts.* Entity A is a business organization formed under the laws of Country X that has an income tax treaty in effect with the United States. A owns all of the stock of a U.S. corporation B. Under the tax laws of X, A is subject to tax at the entity level. For U.S. tax purposes, A is treated as a branch of its single owner, G. G is a corporation organized under the laws of X. A receives dividends from B that are from U.S. sources and are not effectively connected with the conduct of a trade or business in the United States. Article 10 of the U.S.–X tax treaty provides that ''dividends derived from sources within a Contracting state by a resident of the other Contracting State shall not exceed 5 percent of the gross amount thereof . . .''. Article 4.1 of the treaty provides that for purposes of the treaty, a '' 'resident' of a Contracting State

means any person who, under the laws of that State, is liable to tax therein by reason of his domicile, residence, place of management, place of incorporation, or any other criterion of a similar nature . . .''. The U.S.–X treaty contains no provision regarding income paid or derived through a partnership.

(ii) *Analysis.* For U.S. tax purposes, A is treated as a wholly-owned business entity that is disregarded for federal income tax purposes. However, because, under the laws of X and under X's application of the treaty, A is treated as deriving the dividend income as a resident of X, A qualifies for benefits under the treaty with respect to the U.S. source dividend. Thus, G, as the taxable person for U.S. tax purposes, may claim the benefit of a reduced rate under Article 10 of the U.S.–X treaty based on A's eligibility for tax treaty benefits.

(7) *Effective date.* This paragraph (d) applies to amounts paid on or after January 1, 1998.

Michael P. Dolan,

Acting Commissioner of Internal Revenue.

Approved: June 26, 1997.

Donald C. Lubick,

Acting Assistant Secretary of the Treasury.

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DEPARTMENT OF TRANSPORTATION

Coast Guard

33 CFR Part 165

[CGD01–97–047]

RIN 2115–AA97

Safety Zone: New Haven Harborfest Fireworks Display, New Haven, CT

AGENCY: Coast Guard, DOT.

ACTION: Temporary final rule.

SUMMARY: The Coast Guard is establishing a safety zone on July 4, 1997, for the New Haven Harborfest Fireworks Display to be held in New Haven Harbor, New Haven, CT. This safety zone is needed to protect persons, facilities, vessels and others in the maritime community from the safety hazards associated with this fireworks display. Entry into this safety zone is prohibited unless authorized by the Captain of the Port.

DATES: This regulation is effective on July 4, 1997, from 9 p.m. until 10 p.m.

FOR FURTHER INFORMATION CONTACT: Lieutenant Commander J.A. McCarthy, Chief of Port Operations, Captain of the Port, Long Island Sound at (203) 468–4444.

SUPPLEMENTARY INFORMATION:

Regulatory History

Pursuant to 5 U.S.C. 553, good cause exists for not publishing a notice of proposed rulemaking (NPRM) and for making this rule effective in less than 30 days after **Federal Register** publication. The sponsor of the event did not provide the Coast Guard with the final details for the event in sufficient time to publish an NPRM or a final rule 30 days in advance. The delay encountered if normal rulemaking procedures were followed would effectively cancel the event. Cancellation of this event is contrary to the public interest since the fireworks display is for the benefit of the public.

Background and Purpose

The sponsor, City of New Haven, CT, of New Haven, CT, requested that a fireworks display, be permitted in New Haven Harbor, located approximately 1000 feet east of Long Wharf, New Haven, CT. This regulation establishes a temporary safety zone in all waters of New Haven, CT within a 1200 foot radius of the fireworks launching barges. The safety zone is in effect on July 4, 1997, from 9:00 p.m. until 10:00 p.m. and is necessary to protect the maritime community from the safety hazards associated with this fireworks display. Entry into or movement within this zone will be prohibited unless authorized by the Captain of the Port or his on scene representative.

Regulatory Evaluation

This temporary final rule is not a significant regulatory action under section 3(f) of Executive Order 12866 and does not require an assessment of potential costs and benefits under section 6(a)(3) of that order. It has not been reviewed by the Office of Management and Budget under that order. It is not significant under the regulatory policies and procedures of the Department of Transportation (DOT) (44 FR 11040; February 26, 1979). The Coast Guard expects the economic impact of this rule to be so minimal that a full Regulatory Evaluation under paragraph 10e of the regulatory policies and procedures of DOT is unnecessary. Entry into this zone will be restricted for a brief period of time on July 4, 1997. Although this regulation prevents traffic from transiting a portion of the Atlantic Ocean, off New Haven, CT, the effect of this regulation will not be significant for several reasons: the duration of the event is limited; the event is at a late hour; all vessel traffic may pass to the western side of this safety zone; and extensive, advance maritime advisories will be made.

Small Entities

Under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*), the Coast Guard must consider the economic impact on small entities of a rule for which a general notice of proposed rulemaking is required. ''Small entities'' may include (1) small businesses and not-for-profit organizations that are independently owned and operated and are not dominant in their fields and (2) governmental jurisdictions with populations of less than 50,000.

For reasons addressed under the Regulatory Evaluation above, the Coast Guard finds that this rule will not have a significant impact on a substantial number of small entities. If however, you think that your business or organization qualifies as a small entity and that this rule will have a significant impact upon your business or organization, please submit a comment (see **ADDRESSES**) explaining why you think it qualifies and in what way and to what degree this rule will economically affect it.

Collection of Information

This rule contains no collection of information requirements under the Paperwork Reduction Act (44 U.S.C. 3501 *et seq.*)

Federalism

The Coast Guard has analyzed this action under the principles and criteria contained in Executive Order 12612, and has determined that this rule does not have sufficient federalism implications to warrant the preparation of a Federalism Assessment.

Environment

The Coast Guard has considered the environmental impact of this rule and concluded that under section 2.B.2.e. of Commandant Instruction M16475.1b, as revised by 59 FR 38654, July 29, 1994, this rule is categorically excluded from further environmental documentation.

A Categorical Exclusion Determination and an Environmental Analysis Checklist are included in the docket and are available for inspection or copying at the location indicated under **ADDRESSES**. An appropriate environmental analysis of the fireworks program will be conducted in conjunction with the marine event permitting process.

List of Subjects in 33 CFR Part 165

Harbors, Marine safety, Navigation (water), Reports and recordkeeping