U.S. Partnerships With Foreign Partners: Navigating Withholding, Informational Reporting and Payment Requirements

THURSDAY, AUGUST 22, 2019, 1:00-2:50 pm Eastern

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U.S. Partnerships With Foreign Partners: Navigating Withholding, Informational Reporting and Payment Requirements

August 22, 2019

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U.S. Partnerships with Foreign Partners

Arthur R. Kerr II
Rita M. Ryan
Overview
U.S. Partnerships with Foreign Partners

I. Introductions

II. Income Taxation - Partnerships with Foreign Partners
   I. Who is a Foreign Partner
   II. Taxation of Nonresident Aliens and Foreign Entities
   III. Withholding
   IV. Tax ID Requirement

III. Tax Planning - Blocker Corporations

IV. Partnership Chapter 3 Withholding and Reporting

V. Partnership Chapter 4 Withholding and Reporting

VI. Filing Requirements
Income Taxation
U.S. Partnerships with Foreign Partners

• Who is a Foreign Partner for US Partnership Purposes?

  – **Nonresident Alien (NRA) - Individual**
    • Foreign National/Citizen
    • W-8BEN used to confirm tax residence and treaty availability
    • Note difference between Resident Alien and Nonresident Alien

  – **Foreign Corporation (FC)**
    • Formed under the laws of a foreign country

  – **Foreign Partnership**
    • Formed under the laws of a foreign country

  – **Foreign Trust**
    • Subject to jurisdiction of foreign court, and/or
    • Controlled by a foreign person
Income Taxation
U.S. Partnerships with Foreign Partners

- U.S. Income Taxation of Nonresident Aliens and Foreign Corporations
  - Taxed ONLY on U.S. Source income

- Effectively Connected Income (ECI) - IRC §871(b)
  - Connected with a U.S. Trade or Business
  - Business Profits, Personal Services Income, US Real Property Gains/Loss
  - Taxed at U.S. Marginal Rates on net income
  - Nonresident Alien can elect to treat rental income as ECI (IRC §871(d)) (W-8ECI)

- Non-Effectively Connected Income (Non-ECI) – IRC 871(a)
  - Generally passive investment income not connected with a U.S. trade or business.
  - Dividends, Rents, Royalties, Gambling Winnings, Social Security
  - Taxed at flat rate of 30% on gross income unless a Tax Treaty applies
  - Interest and Capital Gains generally not taxed unless ECI
Income Taxation
U.S. Partnerships with Foreign Partners

- U.S. Income Taxation of Nonresident Aliens and Foreign Corporations
  - Capital Gains
    - Generally non-taxable to NRAs and FCs unless connected with a US trade or business
    - US Real Property/US Real Property Interest (FIRPTA)
    - Capital Gains Rates
    - 183 Day Capital Gain Rule
Income Taxation
U.S. Partnerships with Foreign Partners

- U.S. Income Taxation of Nonresident Aliens and Foreign Corporations
  
  - **Disposition of Partnership Interest (New Section 1446(f))**
    
    - Sale of capital asset - Is this ECI?
    
    - 10% withholding is required on the amount realized on the disposition of a partnership interest by an NRA or FC that derives *effectively connected gain* (but not loss) under Section 864(c)(8)
    
    - Applies to dispositions occurring on or after December 31, 2018
    
    - Requirements similar to FIRPTA withholding with duty to withhold on the transferee
    
    - Notice 2018-08—suspects Section 1446(f) withholding obligation for sales of interests in publicly traded partnerships (PTPs) until guidance is issued
Income Taxation
U.S. Partnerships with Foreign Partners

- **U.S. Income Taxation of Nonresident Aliens and Foreign Corporations**
  
  - **US Trade or Business**
    - The term “trade or business” is widely used in the U.S. Internal Revenue Code but is not clearly defined anywhere
    - Case law indicates whether one is engaged in a trade or business depends on facts and circumstances
  
  - **Attribution of ECI**
    - All partners in partnerships, are deemed to be engaged in the trade or business the partnership is engaged in (§ 875(1))
  
  - **Permanent Establishment**
    - A partnership will also attribute a permanent establishment to its partners, which can be an issue for foreign partners that rely on treaty planning
Income Taxation
U.S. Partnerships with Foreign Partners

• **Nonresident Alien (Individual) Withholding**
  
  – IRC §1446 – US partnership ECI withholding on Foreign Individual Partner
    • Withheld at highest marginal rates

  – IRC §1441 – NON-ECI withholding
    • 30% Flat Rate on Gross Revenue
    • Reduced Treaty Rates with Form W-8BEN

  – IRC §1445 – FIRPTA Withholding

• **Nonresident Alien Tax ID Requirement**

  – Individual Taxpayer Identification Number (ITIN)
    • Form W-7 – Filed with 1040NR or with copy of Partnership Agreement

  – Social Security Number
Income Taxation
U.S. Partnerships with Foreign Partners

• **Foreign Entity Withholding**
  
  – Withhold on payments to the entity unless the entity is a pass-through

  – **Foreign Corporation**
    – IRC §1442 – NON-ECI
    – IRC §1446 - ECI

  – **Foreign Trust**
    • Withhold on payments to Beneficiaries of Simple Trust
    • Withhold on payments to Grantors of Foreign Grantor Trust
    • Withhold on payments to Trust if Foreign Nongrantor Trust

  – **Foreign Partnership**
    • Withhold on payments to Partners of Foreign Partnership

• **Foreign Entity Tax ID Requirement**
  
  – Federal Tax ID - EIN
Illustration of Passthrough ECI:

- If the USP owns an active investment in a passthrough entity, then the USP will be treated as if it earned the ECI.

- The Foreign Partner is a partner in the Fund which has ECI, therefore under § 875(1), Foreign Partner will have ECI itself.
Solution to ECI:

*Insert a Blocker Corporation*

- US Blocker, Inc. receives the ECI from the USP. Since US Blocker, Inc. is not a passthrough entity, Foreign Partner is not attributed any income received by the corporation.
- There must be a separate distribution to Foreign Partner so it may participate in the income of USP. But, such distributions are not ECI.
Tax Planning
U.S. Partnerships with Foreign Partners

• Issues with Blocker Corporations
  – Personal Holding Company
  – Accumulated Earnings Tax
  – Branch Profits Tax

• Estate Planning Considerations
Chapter 3 Withholding
U.S. Partnerships with Foreign Partners

Types of Chapter 3 Withholding:

– § 1441 – Withholding of Tax on NRA
– § 1442 – Withholding of tax on Foreign Corporations
– § 1443 – Withholding of Tax on Foreign Tax Exempts
– § 1444 – Withholding of Tax on Virgin Island Source Income
– § 1445 – Withholding of Tax on Dispositions of USRPI
– § 1446 – Withholding of Tax on ECI Allocable to Foreign Partners
Chapter 3 Withholding
U.S. Partnerships with Foreign Partners

• Chapter 3 applies a 30% withholding rate on all payments of U.S. Source Income paid to Foreign Persons, unless the payment can be reliably associated with documentation that proves that the payee is:

  • A US Person

  • A foreign person entitled to a reduced rate of withholding under the Internal Revenue Code or a Tax Treaty
**Chapter 3 Withholding**
**U.S. Partnerships with Foreign Partners**

**Withholding Mechanics:**

- Identify Withholding Agent
- Identify Payee and Payee Status
- Identify Amount Subject to Withholding
- Withholding Rates
- Treaty Modifications
- Forms
- Payment to IRS
Chapter 3 Withholding
U.S. Partnerships with Foreign Partners

Identify Withholding Agent

• Generally, the payor of the U.S. source income

• Partnership is Withholding Agent for partnership ECI and partnership Non-ECI allocable to foreign partners

• Responsible for:
  – Identifying each partner’s foreign or US status
  – Withholding the correct amount,
  – Filing a withholding return with the IRS,
  – Providing withholding documents to the foreign partner
  – Paying the withheld amounts to the IRS
Chapter 3 Withholding
U.S. Partnerships with Foreign Partners

Identify Payee and Payee Status

- Obtain Form W-9 from U.S. Partners (citizens, resident aliens, U.S. corporation)

- Obtain appropriate W-8BEN series form from Foreign Partners:
  - W-8BEN Nonresident Alien
  - W-8BEN-E Foreign Corporation

- If no W-9 or W-8, withhold at highest rates.
Identify Amount Subject to Withholding

• Income allocable to each foreign partner
  – Verify in accordance with partnership agreement

• Track allocable income by type:
  – Non-ECI: withhold on gross basis
  – ECI: withhold on net basis
  – FIRPTA: withhold on amount realized

• Partnership Withholding Agent has an obligation to withhold even if no distributions are paid to the foreign partner
Chapter 3 Withholding
U.S. Partnerships with Foreign Partners

Withholding Rates

– 37% Nonresident Alien (ECI)

– 21% Foreign Corporation (ECI)

– 30% NRA and Foreign Corporation (NON-ECI)

– Treaty Modification
Chapter 3 Withholding
U.S. Partnerships with Foreign Partners

Treaty Modifications

• Purpose of Tax Treaties
  – Bilateral agreements between two governments
  – Promote trade by lessening the incidents of double taxation

• Results of Treaty Modification:
  – Reduce or Eliminate Withholding Rates
  – Exempt income from tax
  – Re-source income

• Key Concepts, Articles, and Substantive Provisions
  – Resident/Citizen
  – Business Profits/PE
  – Dividends/Interest/Rents/Royalties/Other Income
  – Limitations on Benefits
  – Savings Clause
Chapter 3 Withholding
U.S. Partnerships with Foreign Partners

Fact Pattern #1 – Non-ECI Income

• BB Squared, LP., is a U.S. investment partnership with $15,000 of dividend income allocated to partner, Yang.

• Yang was a U.S. Green Card Holder but sometime ago relinquished his U.S. Green Card – though he still has his SSN. He is a nonresident alien.

• He is a citizen and resident of China.

• Article 9 of the US/China Tax Treaty provides for a tax rate of 10% on dividends.
Chapter 3 Withholding
U.S. Partnerships with Foreign Partners

Fact Pattern #1 – Non-ECI Income

• Withholding Agent: BB Squared, LP.

• Payee: Nonresident Alien – Form W-8BEN received

• Income Type: Dividend = Non-ECI

• Amount subject to Withholding: $15,000

• Rate of Withholding: 10%

• Applicable Treaty: Article 9 of the US/China Treaty

• Forms to File: Forms 1042-S, 1042, 1042-T
Chapter 3 Withholding
U.S. Partnerships with Foreign Partners
Chapter 3 Withholding
U.S. Partnerships with Foreign Partners
### Chapter 3 Withholding

**U.S. Partnerships with Foreign Partners**

![Image of an IRS form 1042-S]

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**Form 1042-S Details**

- **Part A:** Total gross amounts reported on all Forms 1042-S and 1000
  - **62a:** Total U.S. source FDAP income (other than U.S. source substitute payments) reported
  - **62b:** Total U.S. source substitute payments reported:
    1. **62b(1):** Total U.S. source substitute dividend payments reported
    2. **62b(2):** Total U.S. source substitute payments reported other than substitute dividend payments
  - **62c:** Total gross amounts reported (Add lines 62a-b)
  - **62d:** Enter gross amounts actually paid if different from gross amounts reported

**Third Party Designee**

- Do you want to allow another person to discuss this return with the IRS (see instructions)?
  - **Yes:** Complete the following.
  - **No:**

**Sign Here**

- Under penalties of perjury, I declare that I have examined this return, including accompanying schedules and statements, and to the best of my knowledge and belief, it is true, correct, and complete. Declaration of preparer (other than withholding agent) is based on all information of which preparer has any knowledge.

**Paid Preparer Use Only**

- Print/Type preparer’s name
- Preparer’s signature
- Date
- Check self-employed
- PTIN

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**For Privacy Act and Paperwork Reduction Act Notice, see instructions.**

*Cat. No. 11384V Form 1042 (2018)*
# Chapter 3 Withholding

U.S. Partnerships with Foreign Partners

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<table>
<thead>
<tr>
<th>Form 1042 (2018)</th>
<th>Page 2</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>63</strong> Total tax reported as withheld or paid by withholding agent on all Forms 1042-S and 1000:</td>
<td></td>
</tr>
<tr>
<td>a Tax withheld by withholding agent</td>
<td>63a</td>
</tr>
<tr>
<td>b Tax withheld by other withholding agents:</td>
<td></td>
</tr>
<tr>
<td>(1) For payments other than substitute dividends</td>
<td>63b(1)</td>
</tr>
<tr>
<td>(2) For substitute dividends</td>
<td>63b(2)</td>
</tr>
<tr>
<td>c Adjustments to withholding:</td>
<td></td>
</tr>
<tr>
<td>(1) Adjustments to overwithholding</td>
<td>63c(1)</td>
</tr>
<tr>
<td>(2) Adjustments to underwithholding</td>
<td>63c(2)</td>
</tr>
<tr>
<td>d Tax paid by withholding agent</td>
<td>63d</td>
</tr>
<tr>
<td>e Total tax reported as withheld or paid (Add lines 63a–d)</td>
<td>63e</td>
</tr>
<tr>
<td><strong>64</strong> Total net tax liability</td>
<td></td>
</tr>
<tr>
<td>a Adjustments to total net tax liability</td>
<td>64a</td>
</tr>
<tr>
<td>b Total net tax liability under chapter 3</td>
<td>64b</td>
</tr>
<tr>
<td>c Total net tax liability under chapter 4</td>
<td>64c</td>
</tr>
<tr>
<td>d Excise tax on specified federal procurement payments (Total payments made x 2% (0.02))</td>
<td>64d</td>
</tr>
<tr>
<td>e Total net tax liability (Add lines 64a–d)</td>
<td>64e</td>
</tr>
<tr>
<td><strong>65</strong> Total paid by electronic funds transfer (or with a request for extension of time to file):</td>
<td></td>
</tr>
<tr>
<td>a Total paid during calendar year</td>
<td>65a</td>
</tr>
<tr>
<td>b Total paid during subsequent year</td>
<td>65b</td>
</tr>
<tr>
<td><strong>66</strong> Enter overpayment applied as credit from 2017 Form 1042</td>
<td>66</td>
</tr>
<tr>
<td><strong>67</strong> Credit for amounts withheld by other withholding agents:</td>
<td></td>
</tr>
<tr>
<td>a For payments other than substitute dividend payments</td>
<td>67a</td>
</tr>
<tr>
<td>b For substitute dividend payments</td>
<td>67b</td>
</tr>
<tr>
<td><strong>68</strong> Total payments. Add lines 65 through 67</td>
<td>68</td>
</tr>
<tr>
<td><strong>69</strong> If line 64e is larger than line 68, enter balance due here</td>
<td>69</td>
</tr>
<tr>
<td><strong>70a</strong> Enter overpayment attributable to overwithholding on U.S. source income of foreign persons</td>
<td>70a</td>
</tr>
<tr>
<td>b Enter overpayment attributable to excise tax on specified federal procurement payments</td>
<td>70b</td>
</tr>
<tr>
<td><strong>71</strong> Apply overpayment (sum of lines 70a and 70b) to (check one):</td>
<td></td>
</tr>
<tr>
<td>□ Credit on 2019 Form 1042</td>
<td></td>
</tr>
<tr>
<td>□ Refund</td>
<td></td>
</tr>
</tbody>
</table>
Fact Pattern #2 – ECI

• Duo-8, L.P. is a US partnership engaged in a U.S. business with $100,000 of ECI generated evenly throughout the year.

• Mike, a UK tax resident with a U.S. ITIN, owns a 25% profits and equity interest in Duo-8.

• Partnership income reported on Mike’s K-1
  – Net business income: $25,000
Fact Pattern #2 – ECI

- Withholding Agent: Duo-8, L.P.
- Income Type: ECI from U.S. Partnership
- Amount to Withhold on: $25,000
- Rate of Withholding: 37%
- Applicable Treaty Modification: None
- Forms to File: Form 8804, 8805, 8813
Chapter 3 Withholding
U.S. Partnerships with Foreign Partners

Form 8805
Foreign Partner's Information Statement of Section 1446 Withholding Tax

For partnership's calendar year 2018, or tax year beginning (or ending), 2018, and ending 2020.

1a Foreign partner's name
b U.S. identifying number

c Address (if a foreign address, see instructions)

5a Name of partnership
b U.S. Employer Identification Number (EIN)

c Address (if a foreign address, see instructions)

2 Account number assigned by partnership (if any)

6 Withholding agent's name. If partnership is also the withholding agent, enter "SAME" and do not complete line 7.

3 Type of partner (specify—see instructions)

7 Withholding agent's U.S. EIN

4 Country code of partner (enter two-letter code, see instructions)

8a Check if the partnership identified on line 5a owns an interest in one or more partnerships
b Check if any of the partnership's effectively connected taxable income (ECTI) is exempt from U.S. tax for the partner identified on line 1a

9 Partnership's ECTI allocable to partner for the tax year (see instructions).

10 Total tax credit allowed to partner under section 1446 (see instructions).

Schedule T — Beneficiary Information (see instructions)

11a Name of beneficiary
b U.S. identifying number of beneficiary

c Address (if a foreign address, see instructions)

12 Amount of ECTI on line 9 to be included in the beneficiary's gross income (see instructions)

13 Amount of tax credit on line 10 that the beneficiary is entitled to claim on its return (see instructions)

For Paperwork Reduction Act Notice, see separate Instructions for Forms 8804, 8805, and 8813.
Chapter 3 Withholding
U.S. Partnerships with Foreign Partners

![Image of IRS Form 8804]

**Form 8804** | Annual Return for Partnership Withholding Tax (Section 1446)
---|---
**Part I** | Partnership

<table>
<thead>
<tr>
<th>1a</th>
<th>Name of partnership</th>
</tr>
</thead>
<tbody>
<tr>
<td>1c</td>
<td>Number, street, and room or suite no. If a P.O. box, see instructions.</td>
</tr>
<tr>
<td>1d</td>
<td>City or town, state or province, country, and ZIP or foreign postal code. If a foreign address, see instructions.</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>b</th>
<th>U.S. employer identification number (EIN)</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>For IRS Use Only</strong></td>
<td></td>
</tr>
<tr>
<td>CC</td>
<td>FD</td>
</tr>
<tr>
<td>ND</td>
<td>FF</td>
</tr>
<tr>
<td>CAF</td>
<td>FP</td>
</tr>
<tr>
<td>CR</td>
<td>I</td>
</tr>
<tr>
<td>EDC</td>
<td></td>
</tr>
</tbody>
</table>

**Part II** | Withholding Agent

<table>
<thead>
<tr>
<th>2a</th>
<th>Name of withholding agent. If partnership is also the withholding agent, enter “SAME” and don’t complete lines 2b, 2c, and 2d.</th>
</tr>
</thead>
<tbody>
<tr>
<td>2c</td>
<td>Number, street, and room or suite no. If a P.O. box, see instructions.</td>
</tr>
<tr>
<td>2d</td>
<td>City or town, state or province, country, and ZIP or foreign postal code.</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>b</th>
<th>Withholding agent’s U.S. EIN</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td></td>
</tr>
</tbody>
</table>
Chapter 3 Withholding
U.S. Partnerships with Foreign Partners

<table>
<thead>
<tr>
<th>Part III</th>
<th>Section 1446 Tax Liability and Payments</th>
</tr>
</thead>
<tbody>
<tr>
<td>3a</td>
<td>Enter number of foreign partners</td>
</tr>
<tr>
<td>3b</td>
<td>Enter number of Forms 8805 attached to this Form 8804</td>
</tr>
<tr>
<td>3c</td>
<td>Enter number of Forms 8804-C attached to Forms 8805</td>
</tr>
<tr>
<td>4</td>
<td>Total effectively connected taxable income (ECTI) allocable to foreign partners. See instructions.</td>
</tr>
<tr>
<td>4a</td>
<td>Total ECTI allocable to corporate partners</td>
</tr>
<tr>
<td>4b</td>
<td>Reduction to line 4a for state and local taxes under Regulations section 1.1446-6(c)(1)(iii)</td>
</tr>
<tr>
<td>4c</td>
<td>Reduction to line 4a for certified foreign partner-level items submitted using Form 8804-C</td>
</tr>
<tr>
<td>4d</td>
<td>Combine lines 4a, 4b, and 4c</td>
</tr>
<tr>
<td>4e</td>
<td>Total ECTI allocable to noncorporate partners other than on lines 4i, 4m, and 4o</td>
</tr>
<tr>
<td>4f</td>
<td>Reduction to line 4e for state and local taxes under Regulations section 1.1446-6(c)(1)(iii)</td>
</tr>
<tr>
<td>4g</td>
<td>Reduction to line 4e for certified foreign partner-level items submitted using Form 8804-C</td>
</tr>
<tr>
<td>4h</td>
<td>Combine lines 4e, 4f, and 4g</td>
</tr>
<tr>
<td>4i</td>
<td>28% rate gain allocable to noncorporate partners</td>
</tr>
<tr>
<td>4j</td>
<td>Reduction to line 4i for state and local taxes under Regulations section 1.1446-6(c)(1)(iii)</td>
</tr>
<tr>
<td>4k</td>
<td>Reduction to line 4i for certified foreign partner-level items submitted using Form 8804-C</td>
</tr>
<tr>
<td>4l</td>
<td>Combine lines 4i, 4j, and 4k</td>
</tr>
<tr>
<td>4m</td>
<td>Unrecaptured section 1250 gain allocable to noncorporate partners</td>
</tr>
<tr>
<td>4n</td>
<td>Reduction to line 4m for state and local taxes under Regulations section 1.1446-6(c)(1)(iii)</td>
</tr>
<tr>
<td>4o</td>
<td>Reduction to line 4m for certified foreign partner-level items submitted using Form 8804-C</td>
</tr>
<tr>
<td>4p</td>
<td>Combine lines 4m, 4n, and 4o</td>
</tr>
</tbody>
</table>

For Paperwork Reduction Act Notice, see separate Instructions for Forms 8804, 8805, and 8813.
### Chapter 3 Withholding

**U.S. Partnerships with Foreign Partners**

**Form 8804 (2018)**

<table>
<thead>
<tr>
<th>Question</th>
<th>Description</th>
<th>4q</th>
<th>4r</th>
<th>4s</th>
<th>4t</th>
</tr>
</thead>
<tbody>
<tr>
<td>q</td>
<td>Adjusted net capital gain (including qualified dividend income and net section 1231 gain) allocable to noncorporate partners</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>r</td>
<td>Reduction to line 4q for state and local taxes under Regulations section 1.1446-6(c)(1)(ii)</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>s</td>
<td>Reduction to line 4q for certified foreign partner-level items submitted using Form 8804-G</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>t</td>
<td>Combine lines 4q, 4r, and 4s</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>5</td>
<td>Gross section 1446 tax liability:</td>
<td>5a</td>
<td>5b</td>
<td>5c</td>
<td>5d</td>
</tr>
<tr>
<td>a</td>
<td>Multiply line 4d by 21% (0.21)</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>b</td>
<td>Multiply line 4h by 37% (0.37)</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>c</td>
<td>Multiply line 4l by 28% (0.28)</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>d</td>
<td>Multiply line 4p by 25% (0.25)</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>e</td>
<td>Multiply line 4t by 20% (0.20)</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>f</td>
<td>Add lines 5a through 5e</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>
Chapter 3 Withholding
U.S. Partnerships with Foreign Partners
Chapter 3 Withholding
U.S. Partnerships with Foreign Partners

[Image of the Partnership Withholding Tax Payment Voucher (Section 1446)]
Chapter 3 Withholding
U.S. Partnerships with Foreign Partners

Fact Pattern #3 – FIRPTA

• Debra represents Jon and Thea who are under contract to sell their jointly owned property in Brookline, MA to Beatrice. Beatrice is represented by Nancy.

• Jon and Thea are not residents of the U.S. and are non-residents for U.S. tax purposes – they have also never had a SSN or ITIN.

• The purchase price for the home is $1,200,000 and the closing is in a week.

• Nancy has asked for guidance on the FIRPTA withholding.
Fact Pattern #3 – FIRPTA

- Withholding Agent: Generally the Buyer or the Buyer’s representative
- Income Type: Gain from the sale of an interest in U.S. Real Property
- Amount to Withhold on: $1,200,000
- Rate of Withholding: 15%
- Applicable Treaty Modification: None
- Forms to File: Form 8288-A, 8288, for withholding; and Form W-7 for ITINs
Chapter 3 Withholding
U.S. Partnerships with Foreign Partners

| Withholding agent’s name, street address, city, state, and ZIP code | 1 Date of transfer |
| Identification number of foreign person subject to withholding (see instructions) | 2 Federal income tax withheld |
| 3 Amount realized | 4 Gain recognized by foreign corporation |
| Name of person subject to withholding | |
| Description of property transferred | |
| Foreign address (number, street, and apt. or suite no.) | |
| City, province or state, postal code, and country (not U.S.) | |
| Country code | Mailing address of person subject to withholding (if different) |

Form 8288-A (Rev. 4-2018) Cat. No. 62261L

Attach Copies A and B to Form 8288

Department of the Treasury - Internal Revenue Service

Translation:

**Statement of Withholding on Dispositions by Foreign Persons of U.S. Real Property Interests**

| Withholding agent’s name, street address, city, state, and ZIP code | 1 Date of transfer |
| Identification number of foreign person subject to withholding (see instructions) | 2 Federal income tax withheld |
| 3 Amount realized | 4 Gain recognized by foreign corporation |
| Name of person subject to withholding | |
| Description of property transferred | |
| Foreign address (number, street, and apt. or suite no.) | |
| City, province or state, postal code, and country (not U.S.) | |
| Country code | Mailing address of person subject to withholding (if different) |

Form 8288-A (Rev. 4-2018) Cat. No. 62261L

Attach Copies A and B to Form 8288

Department of the Treasury - Internal Revenue Service
Chapter 3 Withholding
U.S. Partnerships with Foreign Partners

U.S. Withholding Tax Return for Dispositions by Foreign Persons of U.S. Real Property Interests

Complete Part I or Part II. Also complete and attach Copies A and B of Form(s) 8288-A. Attach additional sheets if you need more space.

Part I To Be Completed by the Buyer or Other Transferee Required To Withhold Under Section 1445(a)

1 Name of buyer or other transferee responsible for withholding. See instructions. Identifying number
   Street address, apt. or suite no., or rural route. Do not use a P.O. box.
   City or town, province or state, country, and ZIP or foreign postal code Phone number (optional)

2 Description and location of property acquired

3 Date of transfer

4 Number of Forms 8288-A attached

5 Complete all items that apply. Enter dollar amounts on applicable lines.
   a Amount subject to withholding at 15%
   b Amount subject to withholding at 10%
   c Withholding is at a reduced rate. See instructions

6 Total amount withheld
Chapter 3 Withholding
U.S. Partnerships with Foreign Partners

<table>
<thead>
<tr>
<th>Part II</th>
<th>To Be Completed by an Entity Subject to the Provisions of Section 1445(e)</th>
</tr>
</thead>
<tbody>
<tr>
<td>1</td>
<td>Name of entity or fiduciary responsible for withholding. See instructions.</td>
</tr>
<tr>
<td></td>
<td>Identifying number</td>
</tr>
<tr>
<td></td>
<td>Street address, apt. or suite no., or rural route. Do not use a P.O. box.</td>
</tr>
<tr>
<td></td>
<td>City or town, province or state, country, and ZIP or foreign postal code</td>
</tr>
<tr>
<td></td>
<td>Phone number (optional)</td>
</tr>
<tr>
<td>2</td>
<td>Description of U.S. real property interest transferred or distributed</td>
</tr>
<tr>
<td>3</td>
<td>Date of transfer</td>
</tr>
<tr>
<td>4</td>
<td>Number of Forms 8288-A attached</td>
</tr>
<tr>
<td>5</td>
<td>Complete all items that apply. Enter dollar amounts on applicable lines.</td>
</tr>
<tr>
<td>a</td>
<td>Amount subject to withholding at 15%</td>
</tr>
<tr>
<td>b</td>
<td>Amount subject to withholding at 10%</td>
</tr>
<tr>
<td>c</td>
<td>Amount subject to withholding at 21%</td>
</tr>
<tr>
<td>d</td>
<td>Withholding is at a reduced rate. See instructions</td>
</tr>
<tr>
<td>e</td>
<td>Large trust election to withhold at distribution</td>
</tr>
<tr>
<td>6</td>
<td>Total amount withheld</td>
</tr>
</tbody>
</table>

**Sign Here**

Under penalties of perjury, I declare that I have examined this return, including accompanying schedules and statements, and to the best of my knowledge and belief, it is true, correct, and complete. Declaration of preparer (other than taxpayer) is based on all information of which preparer has any knowledge.

Signature of withholding agent, partner, fiduciary, or corporate officer
Title (if applicable)
Date

Print/Type preparer’s name
Preparer’s signature
Date
Check if self-employed
PTIN

For Privacy Act and Paperwork Reduction Act Notice, see separate instructions.
Cat. No. 62260A
Form 8288 (Rev. 4-2018)
Overview:
Commonly referred to as FATCA withholding

- A separate set of withholding requirements from Chapter 3
- Concerned with payments made to foreign financial institutions (FFIs) and other foreign entities
- FATCA requires FFIs to provide information about their US account holders or face a 30% withholding tax on US source interest, dividends, rents, royalties, and proceeds from the sale of stock or debt of a US issuer – also called “withholdable payments”
Intergovernmental Agreements (IGA)

- IGAs are agreements between a foreign jurisdiction and the US
  - Note: Generally, payments to a compliant FFI in an IGA jurisdiction are not subject to withholding

- There are two standard IGAs in place—Model 1 and Model 2
  - Under Model 1 IGAs, FFIs are responsible for making reports on their account holders to their national tax authorities, and their national authorities make reports to the IRS.
  - Under Model 2 IGAs, FFIs report directly to the IRS
Additional Key Points:

- Chapter 4 withholding is **not** an additional tax as Chapter 4 and Chapter 3 withholding are not duplicative – you only withhold **ONCE**

- Any payment not made to an individual may be subject to Chapter 4 withholding – so withholding agents must accurately identify the payee

- Chapter 4 withholding can be **very** different than Chapter 3 withholding. A withholding agent may be required to withhold under Chapter 4 even when an item of income is specifically exempted under Chapter 3
  - Portfolio interest is not subject to Chapter 3 withholding but is subject to Chapter 4 withholding. Treas. Reg. § 1.1473-1(a)(2)(i)(C)
Filing Requirements
U.S. Partnerships with Foreign Partners

Withholding Agent

Recap of Responsibilities:
- Identify payee and payee status,
- Identify the amount subject to withholding,
- Withhold the correct amount,
- File the return with the IRS,
- Provide the withholding documents to the foreign individual, and
- Pay withholding to IRS

• NRA Withholding
  – Forms 1042/1042-S/1042-T

• ECI Withholding
  – Forms 8804/8805/8813

• USRPI
  – Forms 8288/8288-A
Filing Requirements
U.S. Partnerships with Foreign Partners

**Individual/Corporate Partner**

- **U.S. Individual**
  - Form W-9 – Request for Taxpayer ID Number

- **Foreign Individual**
  - Form W-7 – Application for IRS ITIN
  - Form W-8BEN/W-8BENE/W-8IMY – Certificate of Foreign Status
  - Form 8233 – Personal Service Exemption

- **Withholding Certificates re: FIRPTA Exemption**
  - Form 8288-B

- **Income Tax Returns**
  - Form 1040-NR & 8833 – Treaty-Based Return Position Disclosure
  - Form 1120-F – U.S. Income Tax Return of a Foreign Corporation
### Filing Requirements

#### Personal Information

<table>
<thead>
<tr>
<th><strong>Name</strong> (see instructions)</th>
<th>1a First name</th>
<th>Middle name</th>
<th>Last name</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Name at birth if different</strong></td>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th><strong>Applicant's mailing address</strong></th>
<th>2 Street address, apartment number, or rural route number. <em>If you have a P.O. box, see separate instructions.</em></th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>City or town, state or province, and country. Include ZIP code or postal code where appropriate.</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th><strong>Foreign (non-U.S.) address</strong> (if different from above) (see instructions)</th>
<th>3 Street address, apartment number, or rural route number. <em>Don't use a P.O. box number.</em></th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>City or town, state or province, and country. Include ZIP code or postal code where appropriate.</td>
</tr>
</tbody>
</table>

#### Birth Information

<table>
<thead>
<tr>
<th><strong>Date of birth (month / day / year)</strong></th>
<th><strong>Country of birth</strong></th>
<th><strong>City and state or province (optional)</strong></th>
</tr>
</thead>
</table>

| **Gender** | 5
<table>
<thead>
<tr>
<th></th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>Male</td>
<td>□</td>
</tr>
<tr>
<td>Female</td>
<td>□</td>
</tr>
</tbody>
</table>

#### Other Information

<table>
<thead>
<tr>
<th><strong>Country(ies) of citizenship</strong></th>
<th><strong>Foreign tax I.D. number (if any)</strong></th>
<th><strong>Type of U.S. visa (if any), number, and expiration date</strong></th>
</tr>
</thead>
</table>

<table>
<thead>
<tr>
<th><strong>Identification document(s) submitted</strong> (see instructions)</th>
<th><strong>Passport</strong></th>
<th><strong>Driver's license/State I.D.</strong></th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>USCIS documentation</strong></td>
<td>□</td>
<td><strong>Driver's license/State I.D.</strong></td>
</tr>
<tr>
<td><strong>Other</strong></td>
<td>**********</td>
<td></td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th><strong>Issued by:</strong></th>
<th><strong>No.:</strong></th>
<th><strong>Exp. date:</strong></th>
</tr>
</thead>
</table>

| **Date of entry into the United States (MM/DD/YYYY):** | |

<table>
<thead>
<tr>
<th><strong>Have you previously received an ITIN or an Internal Revenue Service Number (IRSN)?</strong></th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>No/Don't know. Skip line 6f.</strong></td>
</tr>
<tr>
<td><strong>Yes. Complete line 6f. If more than one, list on a sheet and attach to this form (see instructions).</strong></td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th><strong>ITIN</strong></th>
<th><strong>IRSN</strong></th>
</tr>
</thead>
</table>

<table>
<thead>
<tr>
<th><strong>First name</strong></th>
<th><strong>Middle name</strong></th>
<th><strong>Last name</strong></th>
</tr>
</thead>
</table>

<table>
<thead>
<tr>
<th><strong>Name of college/university or company (see instructions)</strong></th>
<th><strong>City and state</strong></th>
<th><strong>Length of stay</strong></th>
</tr>
</thead>
</table>
Filing Requirements

Part II  Claim of Tax Treaty Benefits (for chapter 3 purposes only) (see instructions)
9  I certify that the beneficial owner is a resident of [ ] within the meaning of the income tax treaty between the United States and that country.

10  Special rates and conditions (if applicable—see instructions): The beneficial owner is claiming the provisions of Article and paragraph [ ] of the treaty identified on line 9 above to claim a [ ]% rate of withholding on (specify type of income):

Explain the additional conditions in the Article and paragraph the beneficial owner meets to be eligible for the rate of withholding:

Part III  Certification
Under penalties of perjury, I declare that I have examined the information on this form and to the best of my knowledge and belief it is true, correct, and complete. I further certify under penalties of perjury that:

• I am the individual that is the beneficial owner (or am authorized to sign for the individual that is the beneficial owner) of all the income to which this form relates or am using this form to document myself for chapter 4 purposes,

• The person named on line 1 of this form is not a U.S. person.

• The income to which this form relates is:
(a) not effectively connected with the conduct of a trade or business in the United States,
(b) effectively connected but is not subject to tax under an applicable income tax treaty, or
(c) the partner’s share of a partnership’s effectively connected income,

• The person named on line 1 of this form is a resident of the treaty country listed on line 9 of the form (if any) within the meaning of the income tax treaty between the United States and that country, and

• For broker transactions or barter exchanges, the beneficial owner is an exempt foreign person as defined in the instructions.

Furthermore, I authorize this form to be provided to any withholding agent that has control, receipt, or custody of the income of which I am the beneficial owner or any withholding agent that can disburse or make payments of the income of which I am the beneficial owner. I agree that I will submit a new form within 30 days if any certification made on this form becomes incorrect.

Sign Here

[Signature]

Signature of beneficial owner (or individual authorized to sign for beneficial owner)  Date (MM-DD-YYYY)

[Print name]

Print name of signer  Capacity in which acting (if form is not signed by beneficial owner)
Filing Requirements
Form W-8BEN-E - Certificate of Foreign Status (Entities)
### Filing Requirements

**U.S. Partnerships with Foreign Partners**

<p>| | |</p>
<table>
<thead>
<tr>
<th></th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>6</strong></td>
<td>Permanent residence address (street, apt. or suite no., or rural route). <strong>Do not use a P.O. box or in-care-of address</strong> (other than a registered address).</td>
</tr>
<tr>
<td></td>
<td>City or town, state or province. Include postal code where appropriate.</td>
</tr>
<tr>
<td><strong>7</strong></td>
<td>Mailing address (if different from above)</td>
</tr>
<tr>
<td></td>
<td>City or town, state or province. Include postal code where appropriate.</td>
</tr>
<tr>
<td><strong>8</strong></td>
<td>U.S. taxpayer identification number (TIN), if required</td>
</tr>
<tr>
<td><strong>10</strong></td>
<td>Reference number(s) (see instructions)</td>
</tr>
</tbody>
</table>

**Note:** Please complete remainder of the form including signing the form in Part XXX.

For Paperwork Reduction Act Notice, see separate instructions.
Part XXII Publicly Traded NFFE or NFFE Affiliate of a Publicly Traded Corporation

Check box 37a or 37b, whichever applies.

37a  □ I certify that:
   • The entity identified in Part I is a foreign corporation that is not a financial institution; and
   • The stock of such corporation is regularly traded on one or more established securities markets, including (name one securities exchange upon which the stock is regularly traded).

37b  □ I certify that:
   • The entity identified in Part I is a foreign corporation that is not a financial institution;
   • The entity identified in Part I is a member of the same expanded affiliated group as an entity the stock of which is regularly traded on an established securities market;
   • The name of the entity, the stock of which is regularly traded on an established securities market, is ___________________________; and
Filing Requirements
U.S. Partnerships with Foreign Partners

Part XXV  Active NFFE
39  I certify that:
    • The entity identified in Part I is a foreign entity that is not a financial institution;
    • Less than 50% of such entity’s gross income for the preceding calendar year is passive income; and
    • Less than 50% of the assets held by such entity are assets that produce or are held for the production of passive income (calculated as a weighted average of the percentage of passive assets measured quarterly) (see instructions for the definition of passive income).

Part XXVI  Passive NFFE
40a  I certify that the entity identified in Part I is a foreign entity that is not a financial institution (other than an investment entity organized in a possession of the United States) and is not certifying its status as a publicly traded NFFE (or affiliate), excepted territory NFFE, active NFFE, direct reporting NFFE, or sponsored direct reporting NFFE.

Check box 40b or 40c, whichever applies.
    b  I further certify that the entity identified in Part I has no substantial U.S. owners (or, if applicable, no controlling U.S. persons); or
    c  I further certify that the entity identified in Part I has provided the name, address, and TIN of each substantial U.S. owner (or, if applicable, controlling U.S. person) of the NFFE in Part XXIX.
Penalties

• Updated each year for inflation – review filing year instructions carefully

• Substantial - not de minimis

• Imposed for failure to file (with IRS), as well as failure to furnish to recipient