

§ 1.1445-4

26 CFR Ch. I (4-1-01 Edition)

amending statement (specifying whether that person is the transferee or transferor).

(ii) *Date of underlying application.* The amending statement must set forth the date of the underlying application for a withholding certificate.

(iii) *Real property interest to be (or that has been) transferred.* The amending statement must set forth a brief description of the real property interest with respect to which the underlying application for a withholding certificate was submitted.

(iv) *Amending information.* The amending statement must fully set forth the basis for the amendment including any modification of the facts supporting the application for a withholding certificate and any change sought in the terms of the withholding certificate.

(g) *Early refund of overwithheld amounts.* If a transferor receives a withholding certificate pursuant to this section, and an amount greater than that specified in the certificate was withheld by the transferee, then pursuant to the rules of this paragraph (g) the transferor may apply for a refund (without interest) of the excess amount prior to the date on which the transferor's tax return is due (without extensions). (Any interest payable on refunds issued after the filing of a tax return shall be determined in accordance with the provisions of section 6611 and regulations thereunder.) An application for an early refund must be addressed to the Assistant Commissioner (International), at the address provided in § 1.1445-1(g)(10). No particular form is required for the application, but the following information must be set forth in separate paragraphs numbered to correspond with the number given below:

(1) Name, address, and identifying number (if any) of the transferor seeking the refund;

(2) Amount required to be withheld pursuant to the withholding certificate issued by Internal Revenue Service;

(3) Amount withheld by the transferee (attach a copy of Form 8288-A stamped by IRS pursuant to § 1.1445-1(c));

(4) Amount to be refunded to the transferor. An application for an early

refund cannot be processed unless the required copy of Form 8288-A (or substantial evidence of the amount withheld in the case of a failure to receive Form 8288-A as provided in § 1.1445-1(f)(3)) is attached to the application. If an application for a withholding certificate based upon the transferor's maximum tax liability is submitted after the transfer takes place, then that application may be combined with an application for an early refund. The Service will act upon a claim for refund within the time limits set forth in paragraph (a) of this section.

[T.D. 8113, 51 FR 46637, Dec. 24, 1986; 52 FR 3796, Feb. 6, 1987]

§ 1.1445-4 Liability of agents.

(a) *Duty to provide notice of false certification or statement to transferee.* A transferee's or transferor's agent must provide notice to the transferee if either—

(1) The transferee is furnished with a non-U.S. real property interest statement pursuant to § 1.1445-2(c)(3) and the agent knows that the statement is false; or

(2) The transferee is furnished with a non-foreign certification pursuant to § 1.1445-2(b)(2) and either (i) the agent knows that the certification is false, or (ii) the agent represents a transferor that is a foreign corporation. An agent that represents a transferor that is a foreign corporation is not required to provide notice to the transferee if the foreign corporation provided a non-foreign certification to the transferee prior to such agent's employment and the agent does not know that the corporation did so.

(b) *Duty to provide notice of false certification or statement to entity or fiduciary.* A transferee's or transferor's agent must provide notice to an entity or fiduciary that plans to carry out a transaction described in section 1445(e) (1), (2), (3), or (4) if either—

(1) The entity or fiduciary is furnished with a non-U.S. real property interest statement pursuant to § 1.1445-5(b)(4)(iii) and the agent knows that such statement is false; or

(2) The entity or fiduciary is furnished with a non-foreign certification

pursuant to § 1.1445-5(b)(3) (ii) and either (i) the agent knows that such certification is false, or (ii) the agent represents a foreign corporation that made such a certification.

(c) *Procedural requirements*—(1) *Notice to transferee, entity, or fiduciary.* An agent who is required by this section to provide notice must do so in writing as soon as possible after learning of the false certification or statement, but not later than the date of the transfer (prior to the transferee's payment of consideration). If an agent first learns of a false certification or statement after the date of the transfer, notice must be given by the third day following that discovery. The notice must state that the certification or statement is false and may not be relied upon. The notice must also explain the possible consequences to the recipient of a failure to withhold. The notice need not disclose the information on which the agent's statement is based. The following is an example of an acceptable notice: "This is to notify you that you may be required to withhold tax in connection with (*describe transaction*). You have been provided with a certification of non-foreign status (or a non-U.S. real property interest statement) in connection with that transaction. I have learned that that document is false. Therefore, you may not rely upon it as a basis for failing to withhold under section 1445 of the Internal Revenue Code. Section 1445 provides that any person who acquires a U.S. real property interest from a foreign person must withhold a tax equal to 10 percent of the total purchase price. (The term 'U.S. real property interest' includes real property, stock in U.S. corporations whose assets are primarily real property, and some personal property associated with realty.) Any person who is required to withhold but fails to do so can be held liable for the tax. Thus, if you do not withhold the 10 percent tax from the total that you pay on this transaction you could be required to pay the tax yourself, if what you are acquiring is a U.S. real property interest and the transferor is a foreign person. Tax that is withheld must be promptly paid over to the IRS using Form 8288. For further information see sections 897 and 1445 of the In-

ternal Revenue Code and the related regulations."

(2) *Notice to be filed with IRS.* An agent who is required by paragraph (a) or (b) of this section to provide notice to a transferee, entity, or fiduciary must furnish a copy of that notice to the Internal Revenue Service by the date on which the notice is required to be given to the transferee, entity, or fiduciary. The copy of the notice must be delivered to the Assistant Commissioner (International) at the address provided in § 1.1445-1(g)(10) and must be accompanied by a cover letter stating that the copy is being filed pursuant to the requirements of this § 1.1445-4(c)(2).

(d) *Effect on recipient.* A transferee, entity, or fiduciary that receives a notice pursuant to this section prior to the date of the transfer from any agent of the transferor or transferee may not rely upon the subject certification or statement for purposes of excusing withholding pursuant to § 1.1445-2 or § 1.1445-5. Therefore, the recipient of a notice may be held liable for any failure to deduct and withhold tax under section 1445 as if such certification or statement had never been given. For special rules concerning the effect of the receipt of a notice after the date of the transfer, see §§ 1.1445-2(b)(4)(iv) and 1.1445-5 (c), (d) and (e).

(e) *Failure to provide notice.* Any agent who is required to provide notice but who fails to do so in the manner required by paragraph (a) or (b) of this section shall be held liable for the tax that the recipient of the notice would have been required to withhold under section 1445 if such notice had been given. However, an agent's liability under this paragraph (e) is limited to the amount of compensation that that agent derives from the transaction. In addition, an agent who assists in the preparation of, or fails to disclose knowledge of, a false certification or statement may be liable for civil or criminal penalties.

(f) *Definition of transferor's or transferee's agent*—(1) *In general.* For purposes of this section, the terms "transferor's agent" and "transferee's agent" means any person who represents the transferor or transferee (respectively)—

(i) In any negotiation with another person (or another person's agent) relating to the transaction; or

(ii) In settling the transaction.

(2) *Transactions subject to section 1445(e)*. In the case of transactions subject section 1445(e), the following definitions apply.

(i) The term "transferor's agent" means any person that represents or advises an entity or fiduciary with respect to the planning, arrangement, or consummation by the entity of a transaction described in section 1445(e) (1), (2), (3), or (4).

(ii) The term "transferee's agent" means any person that represents or advises the holder of an interest in an entity with respect to the planning, arrangement or consummation by the entity of a transaction described in section 1445(e) (1), (2), (3), or (4).

(3) *Exclusion of settlement officers and clerical personnel*. For purposes of this section, a person shall not be treated as a transferor's agent or transferee's agent with respect to any transaction solely because such person performs one or more of the following activities.

(i) The receipt and disbursement of any portion of the consideration for the transaction;

(ii) The recording of any document in connection with the transaction;

(iii) Typing, copying, and other clerical tasks;

(iv) The obtaining of title insurance reports and reports concerning the condition of the real property that is the subject of the transaction; or

(v) The transmission or delivery of documents between the parties.

(4) *Exclusion for governing body of a condominium association and the board of directors of a cooperative housing corporation*. The members of a board, committee or other governing body of a condominium association and the board of directors and officers of a cooperative housing corporation will not be deemed agents of the transferor or transferee if such individuals function exclusively in their capacity as representatives of such association or corporation with respect to the transaction. In addition, the managing agent of a cooperative housing corporation or condominium association will not be deemed to be an agent of the

transferee or transferor if such person functions exclusively in its capacity as a managing agent. If a person's activities include advising the transferee or transferor with respect to the transfer, this exclusion shall not apply.

[T.D. 8113, 51 FR 46641, Dec. 24, 1986; 52 FR 3796, 3917, Feb. 6, 1987]

§ 1.1445-5 Special rules concerning distributions and other transactions by corporations, partnerships, trusts, and estates.

(a) *Purpose and scope*. This section provides special rules concerning the withholding that is required under section 1445(e) upon distributions and other transactions involving domestic or foreign corporations, partnerships, trusts, and estates. Paragraph (b) of this section provides rules that apply generally to the various withholding requirements set forth in this section. Under section 1445(e)(1) and paragraph (c) of this section, a domestic partnership or the fiduciary of a domestic trust or estate is required to withhold tax upon the entity's disposition of a U.S. real property interest if any foreign persons are partners or beneficiaries of the entity. Paragraph (d) provides rules concerning the requirement of section 1445(e)(2) that a foreign corporation withhold tax upon its distribution of a U.S. real property interest to its interest-holders. Finally, under section 1445(e)(3) and paragraph (e) of this section a domestic U.S. real property holding corporation is required to withhold tax upon certain distributions to interest-holders that are foreign persons. Paragraphs (f) and (g) of this section are reserved to provide rules concerning transactions involving interests in partnerships, trusts, and estates that will be subject to withholding pursuant to sections 1445(e) (4) and (5).

(b) *Rules of general application*—(1) *Double withholding not required*. If tax is required to be withheld with respect to a transfer of property in accordance with the rules of this section, then no additional tax is required to be withheld by the transferee of the property with respect to that transfer pursuant to the general rules of section 1445(a) and § 1.1445-1. For rules coordinating the withholding under section 1441 (or