

**Division of Accounting
Payroll Compliance Group**

**Bulletin # 2012_001
Non-Resident Alien Teachers**

INTRODUCTION

The Division of Accounting Payroll Compliance Group (PCG) was asked to provide advice on the tax exempt status of non-resident alien teachers and professors and whether or not these employees are required to complete IRS Form 8233 for tax exempt status. Based upon review of the facts provided by the requestor and the applicable code, the following guidelines should be followed.

FACTS

A local school district employs teachers who are residents of China, France, or Spain. These teachers are in the United States through the J-1 Visa Exchange Visitor Program that is administered by the Department of Education. The school's payroll office requested guidance on the treatment of taxes and pension for these teachers.

FINDINGS

China, People's Republic of

An individual who is a resident of the China and who is temporarily in the United States primarily to teach, lecture, or conduct research at a university or other accredited educational institution or scientific research institution is exempt from U.S. income tax on income for the teaching, lecturing, or research for a total of **not more than 3 years**. Since China is among the countries listed in IRS Publication 901, teachers who meet the requirements for exemption as a teacher are not required to complete Form 8233. Form 8233 is reserved for individuals who do not meet the requirements for exemption as a teacher or if they are a resident of a treaty country that does not have a special provision for teachers.

Note: The U.S. – China income tax treaty does not apply to Hong Kong.

France

An individual who is a resident of France on the date of arrival in the United States and who is temporarily in the US at the invitation of the US Government, a university, or other recognized educational or research institution in the US primarily to teach or engage in research, or both, at a university or other educational or research institution is exempt from US income tax on income from teaching or research for a maximum of **two years** from the date of arrival in the US.

Spain

Spain is not listed as a treaty country with a special provision for teachers. Therefore, citizens of Spain must determine if they qualify for an exemption from income tax under a personal services income provision; if so, these teachers must complete Form 8233.

Non-Resident Alien Teachers

General Rules

Federal Income Tax

Exemptions are based on country-specific treaties and special provisions for professors, teachers, and researchers.

State Income Tax

If a foreign national has specific earned income that is exempt from Federal taxation it is also exempt for Delaware taxation.

Wilmington City Wage Tax

A nonresident alien temporarily in the United States on a J-1 Visa is subject to Wilmington City Wage Tax if working or living within the taxable limits of the City.

Social Security/Medicare

A nonresident alien temporarily in the United States on a J-1 Visa is not subject to social security and Medicare taxes on pay for services performed to carry out the purpose for which the alien was admitted to the United States. Social security and Medicare taxes should not be withheld or paid on this amount.

Pension

As long as the Position is creditable, the incumbent is subject to Pension contributions.

Unemployment Tax

Wages paid to nonresident aliens on J-1 Visas are subject to Unemployment Tax.

Workers Compensation Deduction

Wages paid to nonresident aliens on J-1 Visas are subject to Workers Compensation.

Organizations must retain all supporting documentation for tax withholding status.

REGULATORY REFERENCES

The guidance in this Bulletin is supported by the applicable Code, Regulations, and laws cited below.

US DEPARTMENT OF STATE

EXCHANGE PROGRAM (J1) OVERVIEW

This program is carried out under the provisions of the Mutual Educational and Cultural Exchange Act of 1961. The purpose of the Act is to increase mutual understanding between the people of the United States and the people of other countries by means of educational and cultural exchanges. At present, there are 15 categories of exchange that include teachers and professors. Foreign nationals participating in exchange visitor programs may only engage in activities authorized for their program.

Foreign teachers have the opportunity to teach in accredited primary and secondary schools in the United States. A teacher must:

- Meet the qualifications for teaching in primary or secondary schools in their country of nationality or last legal residence;
- Have three years of teaching or related professional experience;
- Satisfy the standards of the U.S. state in which they teach;
- Be entering the US for the purpose of teaching full time at a primary or secondary accredited educational institution; and
- Possess sufficient proficiency in English language to participate in the program.

IRS

Pub. 901 – U.S. Tax Treaties (Rev. April 2011)

Publication 901 is a resource for employees to determine if a tax treaty between the United States and a particular country offers a reduced rate of, or possibly a complete exemption from, U.S. income tax for residents of that particular country.

The US has income tax treaties with a number of foreign countries. Under these treaties, residents (not necessarily citizens) of foreign countries are taxed at a reduced rate, or are exempt from US income taxes on certain items of income they receive from sources within the United States. These reduced rates and exemptions vary among countries and specific items of income. If there is no treaty between a country and the US, employees must pay tax on the income in the same way and at the same rates shown in the instructions for Form 1040NR.

Pay of professors and teachers who are residents of the certain countries is generally exempt from U.S. income tax for 2 or 3 years if the employee temporarily visits the US to teach or do research. The period begins on the date of arrival in the US for the purpose of teaching or engaging in research. For many countries, the exemption applies even if the stay in the US extends beyond the applicable period. The exemption generally applies to pay received during a second teaching assignment if both are completed within the specified time, even if the second assignment was not arranged until after arrival in the US on the first assignment. Employees who do not meet the requirements for exemption as a teacher, or are a resident of a treaty country that does not have a special provision for teachers, may qualify under a personal services income provision.

Pub. 515 – Withholding of Tax on Nonresident Aliens and Foreign Entities (For Use in 2012)

A nonresident alien temporarily in the United States on an “F-1,” “J-1,” “M-1,” or “Q-1” visa is not subject to social security and Medicare taxes on pay for services performed to carry out the purpose for which the alien was admitted to the United States. Social security and Medicare taxes should not be withheld or paid on this amount.

Form 8233 – Exemption From Withholding on Compensation for Independent (and Certain Dependent) Personal Services of a Nonresident Alien Individual

This form is used if the employee’s scenario is not covered under Pub. 901 as explained above. The IRS expects the employee to know if a tax treaty exists between the country of residence and the United States. Form 8233 is **completed by the employee** based on the tax treaty terms. Tax treaty terms vary from country to country. The employee must file a statement with Form 8233 providing the specifics from the treaty on which they are basing their claim for exemption from withholding.

Once the employee completes and submits Form 8233, the IRS expects the employer to do due diligence to determine if the exemption from withholding is warranted; and, if so, forward it to the IRS (address provided on the form). The employer is allowed to begin withholding based on the exemptions the employee claims retroactive to the date of the Form; but, there is a 10-day waiting period to see if the IRS has any objections to the Form 8233.

Employers should not begin withholding based on the exemptions claimed, if they have knowledge that statements on the form are false or they have knowledge of circumstances that indicate the employee is not exempt (i.e., has a fixed base or permanent establishment in the United States).

The IRS will review the form and the tax treaty to determine if the tax exemptions are warranted. If they find that the form was filled out incorrectly or that the employee was mistaken to claim the exemptions, the IRS will notify the employer to immediately begin withholding.

Pub. 519 – U.S. Tax Guide for Aliens (For Use in 2011)

Appendix B – Tax Treaty Exemption Procedure for Teachers and Researchers

This appendix contains statements nonresident alien teachers and researchers must file with Form 8233 to claim a tax treaty exemption from withholding of tax on compensation for dependent personal services.

STATE OF DELAWARE-SPECIFIC GUIDELINES

Delaware Code - Title 30, Chapter 11, § 1105 defines taxable income as the entire taxable income of a resident of this State shall be the federal adjusted gross income as defined in the laws of the United States as the same are or shall become effective for any taxable year with the modifications and less the deductions and personal exemptions provided in this subchapter. A non-resident’s taxable income is their federal adjusted gross income as defined in the laws of the United States less modifications laid out in § 1105, which consist of passive income.

Pension Contributions

Federal rules that exempt employees from specific tax withholdings are not applicable to pension benefits from the Delaware Public Employees Retirement System. As long as the Position is creditable, the incumbent is subject to Pension contributions.

TAX ADVICE DISCLAIMER

Although the opinion provided here is presented in good faith and believed to be correct, it is General in nature and is not intended as tax advice. Furthermore, the facts and regulatory references applicable to this scenario may not be applicable to or suitable for other similar scenarios that may require consideration of other factors.

Additionally, personnel of the Department of Finance do not advise on personal income tax requirements or issues. Use of any information provided by PCG is for general information only and does not represent personal tax advice either expressed or implied. State employees are encouraged to seek professional tax advice for personal income tax questions and assistance.



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