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The Knight Watch

Can Green Card Treaty Tie-Breakers Avoid Filing FBARs (and Other International Information Returns)?

By Alan Granwell, James Dawson, Andrea Cortes, and Joshua Odintz

Recently, a Magistrate Judge, in an evidentiary dispute in a federal district court[1] involving the imposition of penalties arising from the non-filing by the individual of FinCEN Forms 114, *Report of Foreign Bank and Financial Accounts* ("*FBARs*"), ruled that the Internal Revenue Service ("IRS") must produce all portions of the administrative record relevant to Plaintiff's, Alberto Aroeste, residency under the U.S.–Mexico tax treaty (the "Treaty"). In so finding, the Magistrate determined that an individual who is a lawful permanent resident, *i.e.*, a U.S. person, under U.S. internal tax law, but a treaty resident under the tie-breaker provision of a bilateral income tax treaty, is not required to file an FBAR because the individual is an income tax resident of the treaty country and not a "U.S. person" for FBAR filing purposes.

The holding has created a stir among practitioners in the international tax community who deal with offshore disclosure and defense relating to FBARs filings, mandated under Title 31 of the U.S. Code, and international information returns mandated under Title 26 (the Internal Revenue Code)[2] of the U.S. Code. It also has resurrected a policy debate as to whether FBARs and international information returns should be filed by individuals who under the internal laws of the United States and the treaty country are dual tax residents but treaty tie-break and claim residence in the treaty country.

In this column, we explore whether the ruling of the Magistrate Judge is tenable, based on the facts and reasoning set forth in the decision.

The Case

In its most simplified form, the case involves a dual resident individual, *i.e.*, an individual who was a lawful permanent resident of the United States (a so-called Green Card holder) and a resident of Mexico pursuant to its internal laws. In his amended 2012 and 2013 federal income tax filings, the individual determined that under the tie-breaker provisions of the Treaty,[3] he was a resident of Mexico, based on his determination that he had closer connections with Mexico than the United States. Accordingly, he determined his U.S. federal income tax liability as

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a Mexican resident and filed amended U.S. federal income tax returns as a nonresident alien of the United States on IRS Form 1040-NR (*U.S. Nonresident Alien Income Tax Return*) and claimed treaty benefits by filing IRS Form 8833 (*Treaty Based Return Position Disclosure Under Section 6114 or 7701(b)*).

In an evidentiary dispute over how much of the IRS administrative audit file the plaintiff could obtain to prove his case that he was a Mexican income tax resident and thus not required to file an FBAR,[4] the Magistrate Judge ruled that (1) the residency status of the individual under the Treaty was legally relevant to the validity of the IRS' imposition of FBAR penalties and (2) the individual could have access to portions of the IRS administrative file that pertain to the individual's residency under the Treaty for tax years 2021 and 2013.[5]

What caused the stir among international tax practitioners was the statement by the Magistrate Judge in resolving the evidentiary dispute that "tax treaties provide a potential escape hatch that excuses certain 'U.S. persons' from filing FBARs …."

The Magistrate's five-step analysis to reach her conclusion is summarized below:

1. Under Code Sec. 7701(b)(6), anyone allowed to permanently reside within the United States by virtue of U.S. immigration laws is a "lawful permanent resident" for tax purposes ***unless*** an applicable tax treaty allows that person to be treated as a resident of a foreign country for tax purposes only;
2. Under Code Sec. 7701(b)(1)(A)(i), any "lawful permanent resident" is a "resident alien";
3. Under the FBAR provisions of Title 31 §1010.350(b)(2), any "resident alien" is a "resident of the United States";
4. Under the FBAR provisions of Title 31 (§1010.350(b)), any "resident of the United States" is a "U.S. person" required to file an FBAR;
5. *Therefore, any person allowed to permanently reside in the United States by virtue of U.S. immigration laws must file an FBAR unless that person is entitled to be treated as a resident of a foreign country under a tax treaty.* (Emphasis supplied).[6]

Based on a plain reading of the flush language of Code Sec. 7701(b)(6), cited and discussed *infra*, the Magistrate Judge concluded (solely for purposes of resolving the evidentiary dispute) that a treaty tie-breaking individual would not be a lawful permanent resident under the Treaty, which, under her analysis, would excuse that individual from the requirement of having to file FBARs as a "U.S. person." In the Court's words: "The Court concludes a determination of [individual's] tax residency under the Treaty is directly relevant to—indeed it is outcome determinative of—the issue of whether he was required to file the FBARs at issue in this case."

Is the Magistrate Judge's Analysis Truly an Escape Hatch from FBAR Filings?

Short answer: In our view, the analysis and the conclusion of the Magistrate Judge are not quite as clear-cut as the Magistrate Judge suggests. Below, we unpack the court's analysis and our critique thereof, the nub of which centers on the scope and application of Code Sec. 7701(b)(6).

We commence by examining the relevant Code and Treasury Regulation provisions.

Code Definitions

Under the Code, a "lawful permanent resident"[7] is a "resident alien,"[8] and a "U.S. person."[9] A lawful permanent resident's status continues unless it is rescinded or administratively or judicially determined to have been abandoned.[10] Under this rule, the status of an individual as a lawful permanent resident for tax purposes continues even if the lawful permanent resident were to leave the United States and live abroad. The significance of the tax status continuing is that such an individual would continue to be treated as a U.S. taxpayer, taxable on his or her worldwide income and, as a U.S. person, required to file a U.S. tax return and the associated international information returns.[11]

Code Sec. 7701(b)(6)

In 2008, flush language was added to Code Sec. 7701(b)(6) (dealing with lawful permanent residents) that is central to the reasoning of the Magistrate Judge. That language is as follows:

> *An individual shall cease to be treated as a lawful permanent resident of the United States if such individual commences to be treated as a resident of a foreign country under the provisions of a tax treaty between the United States and the foreign country, does not waive the benefits of such treaty applicable to residents of the foreign country, and notifies the Secretary of the commencement of such treatment.*

A plain reading of the above text reflects that lawful permanent resident status is terminated (ostensibly for a calendar

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year) (i) if a lawful permanent resident commenced to be treated as a resident of a foreign country under the treaty tie-breaker provisions of an applicable treaty, (ii) does not waive the benefits of the treaty applicable to residents of that treaty country (by filing IRS Form 8833 (*Treaty-Based Return Position Disclosure Under Section 6114 or 7701(b)*), and (iii) notifies the Secretary (ostensibly by filing Form 1040-NR (*U.S. Nonresident Alien Income Tax Return*)).

Based on the Code Sec. 7701(b)(6) flush language, a treaty tie-breaking individual would lose his or her lawful permanent resident status (ostensibly for that calendar year) even though the lawful permanent status of that person had not been rescinded or abandoned.

In parsing the Code Sec. 7701(b)(6) flush language, it should be noted that it was a conforming amendment to Code Sec. 7701(b)(6), enacted as part of the Heroes Earnings Assistance and Relief Tax Act of 2008 (HEART Act), P.L. No. 110-245. As relevant to the analysis, the HEART Act added new Code Secs. 877A[12] and 2801, dealing with individuals who relinquished U.S. citizenship or ceased to be lawful permanent residents of the United States on or after June 17, 2008.

Since the enactment of the flush language of Code Sec. 7701(b)(6) by the HEART Act, there had been lingering uncertainty by commentators[13] as to the scope and application of that flush language. Does it apply to *any* lawful permanent resident who treaty tie-breaks (and satisfies the administrative conditions therein), as a plain reading of the language would suggest, or is it limited in its application *only* to a lawful permanent resident who comes within the ambit of the expatriation provisions and actually expatriates?[14]

The argument most cited for supporting the position that Code Sec. 7701(b)(6) is limited in application only to lawful permanent residents who actually come within the ambit of the expatriation provisions is based on the language of the effective date provision of the HEART Act, Section 301(g)(1), which provides, in general, that the amendments made by the HEART Act "shall apply to any individual whose expatriation date is on or after the date of enactment of this Act," *i.e.*, June 17, 2008. The rationale for the limitation is that the "expatriation date" is only relevant to a lawful permanent resident who is a" long-term resident," a "covered expatriate," and actually "expatriate" on or after June 17, 2008.[15]

Further support for a limited application of Code Sec. 7701(b)(6) is that the addition of the flush language to Code Sec. 7701(b) is a "conforming" amendment to the expatriation provisions. This is evidenced in Notice 2009-85, entitled Guidance for Expatriates. The Notice identifies the flush language as a conforming amendment and, further, in Section 2, Dealing with Individuals Covered, Definitions, refers to Code Sec. 7701(b)(6), as amended, as defining the term "lawful permanent resident."

Conforming amendments generally should have a limited scope. In that regard, a commentator has written, "courts may be disinclined to construe them as effecting major changes to the statutory scheme, particularly when those changes are not explicit."[16] The writer then supports that proposition by quoting the Supreme Court's words: "Congress generally does not 'hide elephants in mouseholes' by making 'radical—but entirely implicit—change(s)' to the law through technical and conforming amendments."[17]

We also refer to a comment of an individual involved with the expatriation legislation, who wrote that the reason for the conforming amendment of Code Sec. 7701(b)(6) may have been added to eliminate confusion caused under prior law.[18]

If indeed Code Sec. 7701(b)(6) were to have limited application, yet another commentator has made a valid but pointed criticism of the way Congress signaled that limitation, as follows:

> *However, the thought that a provision of the Code has remained undisturbed since 2008 could be inapplicable to a taxpayer in 2014 (or 2024 or 2034), by reason of an effective date restriction that prevents the provision from ever taking effect as to certain taxpayers, is troubling to say the least. Putting the burden on taxpayers and their advisors to look past the clear language of the Code to consider whether there might be a secret "off switch."*[19]

Arguments have been made by others who believe that the flush language of Code Sec. 7701(b)(6) should have a broader application, based on a plain reading of the statute.[20] Their rationale is three-fold:

First, Congress "says what it means and means what it says."[21]

Second, the effective date provision in Section 301(g) of the HEART Act could be read to explain when the changes in Code Sec. 301 apply to lawful permanent residents who are "covered expatriates" and expatriate on or after June 17, 2008, but the effective date language of the HEART Act should not prevent the application of the flush language of Code Sec. 7701(b)(6) to lawful permanent residents who treaty tie-break, based on the general effective date rule of the Code, which is the date of enactment unless otherwise provided.[22]

Third, Congress could have put the flush language of Code Sec. 7701(b)(6) in Code Sec. 877A, but chose not to do so.

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Unfortunately, to date, there has not been additional clarification of the scope and application of Code Sec. 7701(b)(6) and thus we must await a more definitive resolution.

For those who would like to rely on the non-filing of FBARs and international information returns, we urge that a cautious approach be taken in adopting that position, for the reasons cited herein, particularly because of the significant penalties that could result if that position were not to be upheld.

In the context of the *Aroeste* case, as far as we have been able to ascertain from the case and the record, the Magistrate Judge adopted a plain reading of the flush language and did not advert to any possible limitation in the application of the flush language to long-term and expatriating lawful permanent residents. In that regard, we also have no explicit indication as to whether the plaintiff was a long-term resident, a "covered expatriate," or actually expatriated.[23]

FBAR Regulations

As relevant to our discussion, the FBAR Regulations provide that each U.S. person having a financial interest in, or signature authority over, a bank, securities, or other financial account in a foreign country shall report such relationship to the IRS for each year in which such relationship exists.[24] The FBAR Regulations go on to say that the term "resident" of the United States is an individual who is resident under 26 USC §7701(b) and the regulations thereunder, but use a broader definition of the United States than used in the Code.[25] As a result of the reference to Code Sec. 7701(b), under a plain reading of the FBAR Regulations, a lawful permanent resident who treaty tie-breaks (and meets the administrative criteria) no longer would be a resident alien or a U.S. person, at least for that taxable year, notwithstanding that the rescission and abandonment requirements for termination of lawful permanent residency status were not met.[26]

In analyzing the inter-relationship of the FBAR Regulations and the Code and Treasury Regulations, the Magistrate Judge never adverted to two items:

First, to Reg. §301.7701(b)-7(a)(3), which provides that for purposes of the Code *other than the computation of the individual's U.S. income tax liability*,[27] the individual shall be treated as a U.S. resident.[28] This provision makes a distinction about the classification of the treaty tie-breaker for purposes of the application of the treaty (as a nonresident alien) and for purposes of the application of internal U.S. law (as a U.S. resident and U.S. person).

Second, to the Preamble to the FBAR Regulations, which contains this proviso: "A legal permanent resident who elects under a tax treaty to be treated as a non-resident for tax purposes must file the FBAR."[29] Here, we do not dispute that a preamble to regulation is not part of the regulations, does not appear in the Code of Federal Regulations, and is not legally enforceable. Nonetheless, the Preamble represents an important aid in gaining an understanding of how an agency considered matters contained in the regulations.[30]

Thus, the foregoing two items, as well as the uncertainty of the scope and application of the flush language of Code Sec. 7701(b)(6), in our view, limit the reliance on the conclusion of the Magistrate Judge that "tax treaties provide a potential escape hatch that excuses certain 'U.S. persons' from filing FBARs …."

Broader Ramifications of the Case

The analysis of the Magistrate Judge, if sustainable, would have broad ramifications,[31] not only for purposes of Title 31 FBAR filings and penalty defense, but also for the filing of, and penalty defense of, international information returns under Title 26. This point was noted in the opinion by the Magistrate Judge: "There is simply no authority for the government's contention that application of the Treaty's test for tax residency differs on the basis of the taxes or penalties assessed against a taxpayer …. In sum, assessment of the Title 26 (tax and information penalty) issues are resolved on the same factual basis as the Title 31 (FBAR penalty) issues in the audit."

Policy Implications

Under the Treasury Regulations, lawful permanent residents (as well as "substantial presence" residents) who treaty tie-break are treated as nonresident aliens for calculating their federal income tax liability but continue to be treated as resident aliens—U.S. persons—for purposes

of U.S. income tax imposed on other persons and generally (although not specifically mentioned in the text of the Regulations), for purposes of Title 26 international information return filing obligations,[32] which impose significant penalties for non-compliance).

To impose international filing requirements for treaty tie-breakers is somewhat counter-intuitive since, if a lawful permanent resident treaty tie-breaker were treated as a nonresident alien for U.S. federal income tax liability purposes, that individual generally should not be subject to U.S. federal income tax on foreign source income; thus, there seems to be little rationale for filing the various international information returns.[33] However, that observation needs to be balanced against the comment in the Conference Committee Report to the effect that "notwithstanding the treatment of the alien as a resident of the other country for treaty purposes, the conference agreement will treat the alien as a U.S. resident for purposes of the internal tax laws of the United States."

Further, under the Substantial Presence residency test, there is a statutory "closer connection exception"[34] whereby an individual will be considered a nonresident alien for the current year if he or she (i) is present in the United States for fewer than 183 days in the current year, (ii), maintains a tax home in a foreign country during the current year, and (iii) has a closer connection during the current year to a single foreign country in which he or she maintains a tax home than to the United States.[35] In that case, unlike the treaty tie-breaker scenario, the individual is treated as a nonresident alien, and not as a U.S. person for other Code purposes.

The policy arguments for treating treaty tie-breakers as nonresident aliens have been well expressed in various articles and will not be repeated here.[36] Time will tell whether the Treasury policy makers reconsider the requirements of treaty tie-breakers filing the various international information returns.

Conclusion

As to FBAR defense for non-filings, until the order of the Magistrate Judge is modified or appealed, the order creates a potential new defense to consider for lawful permanent residents who treaty tie-break—treaty residency status. Accordingly, practitioners who have clients in this situation should contemplate raising the issue and seeking discovery.[37] The discovery results, as noted by the Court, may, at a minimum, also be of assistance in challenging penalties associated with the filing of international information return(s) under Title 26.

For those who would like to rely on the non-filing of FBARs and international information returns, we urge that a cautious approach be taken in adopting that position, for the reasons cited herein, particularly because of the significant penalties that could result if that position were not to be upheld.[38]

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ENDNOTES

1. *Aroeste et al. v. The United States of America, et al.* ("*Aroeste*"), Case No.: 22-cv-682-AJB-KSC) Filed 2/13/2023).
2. All Section references are to the Internal Revenue Code of 1986 (the "Code") and to the Treasury Regulations promulgated thereunder.
3. Treaty Article 4.2. (based on factors in consecutive order of (i) permanent home, (ii) center of vital interests, (iii) habitual abode, and (iv) competent authority determination). The treaty tie-breaking determination is made by the taxpayer and does not require the advance approval of the tax authorities, but is subject to review through a subsequent audit. *See* Internal Revenue Service, LB&I Virtual Library Practice Unit "Determining an Individual's Residency for Treaty Purposes," July 3, 2018.
4. The bulk of penalty assessments against the taxpayer were for international information returns, but those amounts were not directly at issue in the subject lawsuit.
5. The parties to this evidentiary dispute disagreed as to whether the individual's status under the Treaty has any bearing on whether he was properly considered a "U.S. person" for purposes of FBAR filings. The treaty tie-breaker's attorneys contended that if the individual were treated as a Mexican resident under the Treaty, that fact would negate classification of the individual as a "U.S. person" under the FBAR regulations. The attorneys for the Department of Justice contended that the individual's status under the Treaty for purposes of FBAR filings required under Title 31 was outside the scope and application of the Treaty because the Treaty solely concerns residency for purposes of income tax (and excise tax) assessment under Title 26 (the Code).
6. Note, Code Sec. 7701(b)(6) is limited in application to an alien who is a U.S. resident solely as a result of being a lawful permanent resident (and not a U.S. resident as a result of satisfying the Substantial Presence Test). *See* Code Secs. 7701(b)(1)(A)(i) and (ii) and 7701(b)(3).
7. Code Sec. 7701(b)(1)(A)(i). A lawful permanent resident is an alien (an individual who is not a U.S. citizen or U.S. national, 8 USC §1101) who has been lawfully granted the privilege of residing permanently in the United States as an immigrant in accordance with the immigration laws. A lawful permanent resident can live and work in the United States on a permanent basis. As proof of that status, U.S. Citizenship and Immigration Services (USCIS) grants a person a permanent resident card, commonly called a "Green Card," and hence the designation of a lawful permanent resident as a "Green Card" holder.
8. Code Sec. 7701(b)(1)(A). An alien is a resident alien with respect to a calendar year if the individual is a lawful permanent resident at any time during the calendar year. Code Sec. 7701(b)(1)(A)(i).
9. Code Sec. 7701(a)(30)(A).
10. Reg. §301.7701(b)-1(b)(1). Rescission relates to a final administrative or judicial order of exclusion or deportation. Reg. §301.7701(b)-1(b)(2). Abandonment can occur in one of the three ways: (i) it can be voluntarily initiated by the lawful permanent resident through the filing of a form or a letter to the USCIS; (ii) the USCIS can administratively terminate the lawful permanent resident status, or (iii) a U.S. federal court judicially terminates that status. Reg. §301.7701(b)-1(b)(3).

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[11] Other detrimental U.S. tax and immigration consequences also could result.

[12] One of the authors helped draft Code Sec. 877A and apologizes for some of the issues caused by the statute.

[13] *See*, *e.g.*, Bissell, Portfolio 6400 T.M., *U.S. Income Taxation of Nonresident Alien Individuals*, where, at V.C.2. the author writes: "It is nevertheless conceivable that the rule in §7701(b)(6) only applies to a "covered expatriate" within the meaning of §877A(g)(1), because 7701(b)(6) was enacted with an effective date that is linked to a covered expatriate's "expatriation date" within the meaning of §877A(g)(3).

[14] For a lawful permanent resident to come within the expatriation provisions, that individual (i) must be a "long-term resident" (Code Sec. 877A(g)(5)), which means that the lawful permanent resident must have been a lawful permanent resident of the United States in at least eight out of the last 15 years ending with the year in which the long-term resident ceased to be treated as a lawful permanent resident of the United Sates, (ii) must be a "covered expatriate," which means an expatriate who satisfies the tax liability test, the net worth test, or fails to satisfy the certification test, (Code Sec. 877A(g)(1)), and (iii) expatriates by ceasing to be treated as a lawful permanent resident of the United States (Code Sec. 877A(g)(3)(B)) on or after June 17, 2008.

[15] In a letter by a Senior Technical Reviewer, Branch 1, Associated Chief Counsel (International), dated August 15, 2014, addressing the income taxation of Green Card holders, the writer, in explaining the flush language of Code Sec. 7701(b)(6) writes: "The new language amending Code Sec. 7701(b)(6) is effective for any individual whose expatriation date (as defined under Code Sec. 877A(g)(3)) is on or after June 17, 2008." This sentence seems to confirm that the flush language only applies to expatriations, and not to any lawful permanent resident who treaty tie-breaks. The letter was reprinted in TAX NOTES (*IRS Addresses Rules Affecting Green Card Holders, Expats*, and posted on October 7, 2014).

[16] *See* Victoria L. Killion, Congressional Research Service, "Understanding Federal Legislation: A Section-by-Section Guide to Key Legal Considerations," (May 19, 2022), p. 67 ("CRS Note").

[17] CRS Note, p. 67 and notes to Supreme Court cases in 438 and 439 therein.

[18] Michael G. Pfeifer, United States: The Final State of Expatriation? Part 1" Advanced ALI-ABA Course of Study: International Trust and Estate Planning, October 1 and 2, n 47 ("These provisions, added as 'conforming amendments' by the HEART Act §301(c)(2) may eliminate the confusion caused under prior law by the interaction of Code Secs. 877(e)(1) and 7701(n)"). Note, the concept of covering lawful permanent residents who are long-term residents as expatriating has been in the law since 1996.

[19] Michael J. Miller, *Rethinking Filing Requirements for Certain Dual Residents*, INT'L TAX J. (July–August 2015), p. 14.

[20] This point of view was expressed by Rosy Lor, Managing Director, BDO National Tax Office—Private Client Services, during a STEP (Society of Trust and Estate Practitioners) Webinar on expatriation, held on March 16, 2023.

[21] *Henson v Santander Consumer USA Inc.*, SCt, 137 SCt 1718, 1725 (2017) (cleaned up).

[22] *See Gozlon-Peretz*, SCt, 498 US 395, 404, 111 SCt 840 (1991) ("It is well established that, absent a clear direction by Congress to the contrary, a law takes effect on the date of its enactment.").

[23] The Court in its opinion noted that the plaintiff "is, and for many years has been, a "lawful permanent resident" of the United States as a matter of immigration law," but never referred to the expatriation provisions.

[24] 31 CFR §1010.350(a).

[25] 31 CFR §1010.350(b)(2).

[26] In response to the argument that it does not matter how the treaty tie-breaker was treated under the Treaty because he continues to have lawful permanent residency and has not rescinded or abandoned that residency, the Magistrate Judge stated that the statutory framework explicitly provides that lawful permanent resident status can be abrogated for tax purposes only, by application of the Treaty, without requiring individuals to forsake their immigration status. Note, the Treasury Regulations warn that the filing of a Form 1040-NR by a treaty tie-breaker may affect the determination by the USCIS as to whether the individual qualifies to maintain a residency permit. Reg. §301.7701(b)-7(b).

[27] If a treaty tie-breaker were classified as a treaty country resident, then the individual would be treated as a nonresident alien for all purposes of the Code in calculating his or her own U.S. tax liability. Reg. §301.7701(b)-7(a)(1).

[28] The Conference Committee Report provides that "notwithstanding the treatment of the alien as a resident of the other country for treaty purposes, the conference agreement will treat the alien as a U.S. resident for purposes of the internal tax laws of the United States." H.R. Rep. No 98-861 (1984). The application of this rule applies with respect to characterizing a foreign corporation as a controlled foreign corporation if the treaty tie-breaker were to own a sufficient amount of stock in that corporation, although the treaty tie-breaker should not be subject to U.S. tax on income inclusions. Reg. §301.7701(b)-7(e) Example 1; also, the rule, although not explicitly, has been understood to apply for purposes of requiring treaty tie-breakers who are treated as U.S. persons for purposes of the internal laws of the United States to file the various Code-required international information returns, unless otherwise excepted. *See* n. 33.

[29] Amendment to the Bank Secrecy Act Regulations—Reports of Foreign Financial Accounts, 76 FR 10234, 10238 (February. 24, 2011); *see also* IRM 4.26.16.2.1.2(6) (November 6, 2015).

[30] In §18.12 CFR (Preamble requirements), it is stated that each agency submitting a proposed or final rule document for publication shall prepare a preamble which will inform the reader, who is not an expert in the subject area, of the basis and purpose the rule or proposal.

[31] The Magistrate's Judge's order was subject to the standards of Fed. R. Civ. P. 26(b)(1). Thus, there is a question as to the level of deference that should be given to a Magistrate's Order regarding a discovery dispute.

[32] Reg. §301.7701(b)-7(a)(3).

[33] Currently, Forms 8938 (*Statement of Foreign Financial Assets*) and 8621 (*Information Return by a Shareholder of a Passive Foreign Investment Company or Qualified Electing Fund*) do not have to be filed by treaty tie-breakers who satisfy certain conditions, and there are modifications relating to the company's financial statements related to the filing of Form 5471 (*Information Return of U.S. Persons With Respect to Certain Foreign Corporations*), *see* Reg. §1.6038-2(j)(2)(ii).

[34] Code Sec. 7701(b)(3)(B); Reg. §301.7701(b)-2.

[35] *See* Reg. §301.7701(b)-2 generally.

[36] *See* Michael J.A. Karlin, *Now You See Them: U.S. Reporting Requirements for Tax Treaty Nonresidents*, TAX NOTES (July 16, 2012); Liliana Menzie & Michael J.A. Karlin, *Requesting Guidance for Treaty Nonresidents*, TAX NOTES (September 7, 2015); Michael J.A. Karlin, *The Umpire Strikes Back*, TAX NOTES (March 13, 2023).

[37] The Government will not be able to hide the administrative file by alleging the matter is "*de novo*". Rather the standards of Fed. R. Civ. P. 26(b)(1) will apply.

[38] *See*, *e.g.*, Bissell, Portfolio 6400 T.M., *U.S. Income Taxation of Nonresident Alien Individuals*, where, at VIII.C.2., the author writes: ("[B]ecause of the significant potential penalties for not filing some of the … forms if they are in fact required, a treaty tie-breaker alien should be cautious about taking the position that a filing exemption is available to him/her based on Code Sec. 7701(b)(6).").

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