AMERICAN CITIZENS ABROAD
THE VOICE OF AMERICANS OVERSEAS

28 October 2013

VIA Email and Post

Danielle Rolfes
Office of International Tax Counsel
United States Department of the Treasury
1500 Pennsylvania Ave, NW
Washington, DC 20220
danielle.rolfes@do.treas.gov

Mr. Steven Musher
Associate Chief Counsel (International)
Internal Revenue Service, CC:INTL
1111 Constitution Ave., N.W.
Washington, DC 20224
steven.a.musher@irscounsel.treas.gov

John Sweeney
Chief, Branch 8
Office of Chief Counsel
Internal Revenue Service
1111 Constitution Ave., NW
Washington, DC 20224
john.j.sweeney@irscounsel.treas.gov

Quyen Huynh
Office of International Tax Counsel
United States Department of the Treasury
1500 Pennsylvania Ave., NW
Washington, DC 20220
Quyen.Huynh@treasury.gov

Brett York
Office of International Tax Counsel
United States Department of the Treasury
1500 Pennsylvania Ave., NW
Washington, DC 20220
brett.york@treasury.gov

Dear Ladies and Gentlemen

RE: "Same-Country" Exception for Accounts of US Taxpayers Residing Abroad

This letter, on behalf of American Citizens Abroad, Inc., proposes a "same country" exception under the FATCA Chapter 4 withholding tax rules (in sections 1471-1474) and the reporting rules in section 6038D, which underlie Form 8938. Our purpose is to alleviate to some degree the problem of Americans being locked out of banking relationships due to banks' reactions to FATCA.

We expect that Treasury Department will want to make some changes to the FATCA regulations, which were issued on January 28, 2013, and corrected and clarified on September 10, 2013. We respectfully request that provisions for a "same-country" exception for certain accounts being added at that time. Similarly, this exception should be included in future IGAs and, thereby, by virtue of the "most-favored" rule, imported in previously signed IGAs.

American Citizens Abroad, Inc. is a non-profit corporation organized under Delaware law. It is a non-partisan, volunteer organization whose mission is to represent the interests of Americans living overseas. It has members in 60 countries around the world and offices in Washington, DC and Geneva.

FATCA Withholding Tax Provisions

FATCA's withholding tax provisions require the identification of US accounts and the reporting of information with respect to them. A US account is any financial account that is held by one or more specified US persons or US-owned foreign entities. Specified US person means any US person other than a narrow list of persons. US individuals, including US individuals residing abroad, are treated as specified US persons. Foreign financial institutions are required to report tax information with respect to these US accounts. In addition, FATCA's disclosure provisions, as they relate to disclosure of information with respect to foreign financial assets, require individuals to report any financial account maintained by a foreign financial institution, including a foreign checking account and savings account.

The FATCA withholding tax rules apply to US taxpayers residing in a foreign country who, because of the requirements of everyday living, have nearby checking and savings/portfolio accounts. Their owning these accounts is no different from people in Kansas, or California, or some other place in the United States owning accounts that they use to conduct their daily affairs. These accounts and the individuals owning them should not be the subject of the FATCA reporting and enforcement rules. FATCA is intended to ferret out US taxpayers that are not reporting income hidden outside the US. Most US individuals residing outside the US are not using accounts with foreign banks and other foreign institutions to hide anything. They own these accounts because the accounts are necessary to go about their normal lives, paying for their living expenses, supporting their families, and so forth.

With respect to accounts owned by individual taxpayers residing abroad, ACA proposes that they be excluded from the definition of "US accounts". If it is thought that this is too broad an exception, the exclusion should be narrowed to cover only accounts in the same country in which the individual resides. Since it is common in many places for people to bank at a bank that is nearby but just over a border, the same-country exception should be drafted to encompass banks within 50 miles of the individual's residence.

In order to implement a "same-country" rule, it will be necessary to define country of residence. "Residence" can be the same foreign country as that used by the individual for purposes of the foreign earned income exclusion (section 911). This normally will be a single foreign country but, under some circumstances, might be more than one. Thus, if an individual qualifies under section 911, that individual will qualify as a foreign resident residing in the country shown on Form 2555. In addition, since this first approach will not pertain to people who are not working and receiving "earned income", such as retirees, a country where the individual is entitled to remain on a permanent basis under local immigration or similar rules should be treated as the foreign country of residence, provided that the individual in fact is not present in the US more than 183 days during the taxable year. There should not be a requirement that the individual be subject to income tax in the foreign country since a number of countries do not impose an income tax. The accounts in question can be easily identified by obtaining from the account holder both a copy of his or her Form 2555, with a verifying attestation, and a copy of his or her visa or work permit showing lawful residence in the foreign country. If the individual is not filing a Form 2555 because, for example, he or she is retired, a copy of the visa or work permit should suffice.

With respect to these "same-country" accounts, for purposes of the FATCA withholding tax rules, they should not be treated as US accounts. As a result, for example, FFIs will not be required to report information with respect to them. The US account holders, therefore, need not be shunned by their bank.

It might be noted that there are presently rules in the FATCA regulations and several IGAs exempting, in effect, certain US accounts in what are defined as Financial Institutions with Local Client Base. Local banks, which fit within a tight set of rules, can be treated as a deemed-compliant FFI even though they have a modest number of US accounts. Because of the wording of these rules, all these accounts will be owned by US persons (individuals) residing in the same country as the country in which the FFI is incorporated or organized.[1] A same-country-account exception approaches the same problem – that is, the application of FATCA to normal local banking relationships – from the direction of the US account holder who, it can be reasonably assumed, is not illegally hiding assets and failing to report income.

FATCA Reporting Rules

FATCA instituted new foreign financial asset reporting rules in section 6038D. US taxpayers, if the aggregate value of all specified foreign financial assets exceeds a certain threshold, are required to file Form 8938 reporting, among other foreign financial assets, their foreign bank accounts. This is required regardless of the fact that the bank account is with a local bank and is used for everyday purposes. Reporting is required even though the account was reported on the individual's Foreign Bank Account Report. The reporting "threshold" is increased if the taxpayer is living abroad. The test for "living abroad" is essentially the same as the residency test under section 911(d)(1).

ACA proposes that same-country accounts simply be excluded from the requirement to report financial accounts on Form 8938. They will still be reported on the individual's FBAR. The definition of "same-country account" should be the same as that set forth in the FATCA withholding tax regulations (see above).

* * *

We hope that you will consider these to be a reasonable treatment of run-of-the-mill accounts belonging to taxpayers living outside the US. The attainment of the objectives of FATCA will not be affected. Americans abroad, such as ACA's members, who are hard-pressed by the many highly-complex tax and reporting rules and the sometimes harsh enforcement programs, will be given some relief.

Kind regards.

Very truly yours,

Charles M. Bruce
Legal Counsel

[1] Regs section 1.1471-5(f)(1)(i)(A)(5), Income Tax Regulations. See, e.g., Agreement Between Switzerland and the US for Cooperation to Facilitate the Implementation of FATCA, Annex II, Paragraph II, A, 1 (Financial Institutions with Local Client Base).