OFFICE OF
CHIEF COUNSEL

DEPARTMENT OF THE TREASURY
INTERNAL REVENUE SERVICE
WASHINGTON, D.C. 20224

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INTERNAL REVENUE SERVICE NATIONAL OFFICE CHIEF COUNSEL ADVICE

MEMORANDUM FOR

FROM:

SUBJECT:

This Chief Counsel Advice is issued pursuant to section 8.07(2)(b) of Rev. Proc. 99-1, 1999-1 I.R.B. 6. Chief Counsel Advice is not binding on Examination or Appeals and is not a final case determination. This document is not to be used or cited as precedent.

LEGEND:

Taxpayer =

Country X =
Tax A =
Tax B =
Date 1 =
Year 1 =

Year 2 =

PURPOSE:

By a letter dated August 29, 1997, Taxpayer, a taxpayer within your examination jurisdiction, submitted a private letter ruling request to our office. Taxpayer's submission requested a ruling that Country X's Tax A and Tax B are creditable under section 901 of the Internal Revenue Code (Code). By letter dated December 16, 1998, Taxpayer withdrew

the request. In accordance with section 8.07(2)(b) of Rev. Proc. 1999-1, the purpose of this memorandum is to notify you of Taxpayer's withdrawal of the request for a private letter ruling. In addition, this memorandum states our views of the issue raised by Taxpayer's request.

FACTS:

The private letter ruling request states that Taxpayer is a U.S. citizen who is, and for all relevant periods was, a resident of Country X. Taxpayer is employed by a Country X corporation that has paid Taxpayer wages. Taxpayer requested a ruling applicable to calendar years Year 1, Year 2, and subsequent years.

During the years in issue, Country X imposed either Tax A or Tax B with regard to remuneration paid for services performed in Country X. Tax A applied until Date 1; thereafter, Tax B applied. Both Tax A and Tax B were computed and imposed in the same manner.

Pursuant to Country X law, Tax A and Tax B were "charged on" Country X employers. Moreover, Country X employers paid Tax A or Tax B (as applicable). These taxes were computed as a fixed percentage of each employee's remuneration, up to an annual maximum (employee-by-employee) amount. Country X law provided that employers may, at their discretion, withhold a portion (the statutory portion) of Tax A or Tax B from their employee's remuneration. Employers could not recover the remaining portion Tax A or Tax B from their employees.

Taxpayer's Country X employer withheld the statutory portion of Tax A and Tax B from Taxpayer's wages. Taxpayer has requested a private letter ruling that the Tax A or Tax B amounts withheld from Taxpayer's Country X wages qualify for a foreign tax credit under section 901 of the Code. Taxpayer's private letter ruling request states that Taxpayer claimed a foreign tax credit for the statutory portion of Tax B for Year 2. The submission also states that Taxpayer did not claim a credit for Year 1, but that Taxpayer would so amend the 1995 return if a favorable ruling were received.

LAW AND ANALYSIS

Section 901 of the Code provides that, at the election of a taxpayer and subject to the limitations of section 904, United States citizens may claim a credit for the amount of any income, war profits, and excess

profits taxes paid or accrued during the taxable year to any foreign country or to any possession of the United States.

Section 1.901-2(f)(1) of the Income Tax Regulations provides, in part, that the person by whom tax is considered paid for purposes of section 901 is the person on whom foreign law imposes legal liability for such tax, even if another person remits such tax. Thus, U.S. law determines who may claim a foreign tax credit, based on "an examination of the manner in which the [foreign law] is laid and collected . . . and whether it is the substantial equivalent of payment of the tax as those terms are used in our statute." Biddle v. Commissioner, 302 U.S. 573, 579 (1938).

In Biddle, the Supreme Court identified the following factors as relevant to determining whether a U.S. taxpayer is legally liable for a foreign tax: (1) who pays the tax; (2) who has the legal duty under foreign law to pay the tax; and (3) who can be sued for nonpayment of the tax, both primarily and secondarily. The Supreme Court also stated that the foreign law's identification of a particular party as the taxpayer is a relevant, although not conclusive, factor in determining legal liability for the tax. In contrast, the Court did not consider the question of who bore the economic burden of the tax to be a relevant factor. Id. at 579-81.

An additional factor relevant to whether a taxpayer is legally liable for a foreign tax, not articulated by the Biddle Court but consistent with its reasoning, focuses on who is legally entitled to receive a refund for any overpayment of the foreign tax.

In the present matter, Taxpayer failed to establish legal liability for the statutory portion of Country X Tax A and Tax B. Moreover, our review of the portions of Country X law submitted with Taxpayer's ruling request indicates that Country X employers were legally liable for Tax A and Tax B, including the statutory portions thereof. As stated, the factor of economic burden is irrelevant for purposes of determining legal liability under section 901.

Accordingly, it is our view that the facts submitted did not provide a sufficient basis to provide Taxpayer with the favorable ruling requested.

CASE DEVELOPMENT, HAZARDS, AND OTHER CONSIDERATIONS:

If you have any further questions, please call (202) 622-3850.

IRWIN HALPERN
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Counsel (International)