

Office of Chief Counsel
Internal Revenue Service
Memorandum

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to: Steven J. Mandelkorn
(Appeals Officer)

from: M. Grace Fleeman
(International)

subject: NIH Visiting Fellow From China

This Chief Counsel Advice responds to your request for assistance. This advice may not be used or cited as precedent.

LEGEND

The Taxpayer
Date 1
Date 2
Date 3

ISSUES

Whether payments made under a Visiting Fellow award granted to the Taxpayer by the National Institutes of Health ("NIH") Visiting Fellow Program are exempt from U.S. federal income tax under the U.S.-China income tax treaty (the "Treaty").¹

¹ Agreement Between the Government of the United States of America and the Government of the People's Republic of China for the Avoidance of Double Taxation and the Prevention of Tax Evasion with Respect to Taxes on Income, effective on October 22, 1986.

CONCLUSIONS

Based on the information provided, it appears that the payments the Taxpayer received under his Visiting Fellow award are exempt from U.S. federal income tax under Article 20(b) of the Treaty.

FACTS

The Taxpayer was a resident of the People's Republic of China immediately before Date 1, the date of his arrival in the United States. The Taxpayer came to the United States on a J-1 visa (Exchange Visitor) to engage in research training as a part of the NIH Visiting Fellow Program. He is not a U.S. citizen, and he has not become a lawful permanent resident of the United States. He participated in the Visiting Fellow Program until Date 2, a date that is more than three years after Date 1.

The Visiting Fellow Program provides research training experience. According to the NIH website,² candidates are required to have a doctoral degree or equivalent in the health sciences and not more than five years of relevant postdoctoral research experience at the start of the fellowship period. Visiting Fellows receive a monthly stipend during the award period to cover living expenses. Awards are generally made for two years, but are renewable for up to five years. Visiting Fellows are not considered employees of NIH.

The Taxpayer took the position that his monthly stipends were exempt from federal income tax under Article 20(b) of the Treaty. However, the Service disallowed the Taxpayer's claim of treaty benefits for the tax period ending on Date 3 on the grounds that he could claim treaty benefits for only the first three years he participated in the Visiting Fellow program. You have asked whether we agree that the Taxpayer is eligible for treaty benefits for only three years.

LAW AND ANALYSIS

There are two potentially applicable treaty articles: Article 19 (Teachers and Lecturers) and Article 20 (Students and Trainees).

Article 19 of the Treaty provides:

An individual who is, or immediately before visiting a Contracting State was, a resident of the other Contracting State and is temporarily present in the first-mentioned Contracting State for the primary purpose of teaching, giving lectures or conducting research at a university, college, school or other accredited educational institution or scientific research institution in the first-mentioned Contracting State shall be exempt from tax in the first-mentioned Contracting State for a period not exceeding three years in the

² <http://www.nih.gov/od/ors/dirs/isb/isb.htm>

aggregate in respect of remuneration for such teaching, lectures or research.

The Technical Explanation³ to Article 19 of the Treaty states:

This article provides that a resident of a Contracting State who goes to the other Contracting State for the primary purpose of teaching, lecturing, or conducting research at an accredited educational institution or scientific research institution in that other State will be exempt from tax in that other State on the remuneration for such activities for a period of up to three years in the aggregate. Thus, for example, a resident of China who visits the United States to conduct research at the National Institute of Health (NIH) for two years, 1986 and 1987, returns to China for a year, and then comes back for another year of research at NIH in 1989 would be exempt from tax on his NIH remuneration for each of the three years. However, if he stayed at NIH in 1990 or returned at a later time the exemption would no longer be available. The exemption provided in this article is not available if the research is not undertaken in the public interest, but for the private gain of a specific person or persons.

This article is excepted from the "saving clause" of paragraph 2 of the Protocol, so its benefits are available to persons who otherwise qualify even if they become U.S. residents.

Article 20 of the Treaty provides:

A student, business apprentice or trainee who is or was immediately before visiting a Contracting State, a resident of the other Contracting State and who is present in the first-mentioned Contracting State solely for the purpose of his education, training or obtaining special technical experience shall be exempt from tax in that Contracting State with respect to:

- (a) payments received from abroad for the purpose of his maintenance, education, study, research or training;
- (b) grants or awards from a government, scientific, educational or other tax-exempt organization; and
- (c) income from personal services performed in that Contracting State in an amount not in excess of 5,000 United States dollars or its equivalent in Chinese yuan for any taxable year.

³ Treasury Department Technical Explanation of the Agreement Between the Government of the United States of America and the Government of the People's Republic of China for the Avoidance of Double Taxation and the Prevention of Tax Evasion with Respect to Taxes on Income.

The benefits provided under this Article shall extend only for such period of time as is reasonably necessary to complete the education or training.

Due to the fact that Article 19 covers researchers and the Technical Explanation included an example involving an NIH research program, you have asked whether Article 19 is the applicable treaty article. If so, then the Taxpayer was eligible for treaty benefits for only the first three years he participated in the Visiting Fellow Program and the disallowance of treaty benefits for subsequent years was correct.

NIH is the sponsor of several different programs that are treated differently for treaty purposes depending on the specific nature of the program. *Compare* Rev. Rul. 80-98, 1980-1 C.B. 368 (amounts received under Visiting Fellow Program exempt under Article 20 of former treaty with Japan) *with* Rev. Rul. 87-40, 1987-1 C.B. 372 (amounts received under Visiting Associate Program and Visiting Scientist Program not exempt under former treaty with Japan). The Technical Explanation to Article 19 of the Treaty does not specify which program was under consideration.

In our view, the payments that the Taxpayer received under the Visiting Fellow Program should be eligible for benefits under Article 20(b) of the Treaty. The Taxpayer was a trainee who, immediately before coming to the United States, was a resident of China and who was present in the United States between Date 1 and Date 2 solely for purposes of his training at NIH. The Taxpayer was not an employee of NIH and his monthly stipend constituted a grant or award from a government, scientific, educational or other tax-exempt organization. The only issue is whether the period of time was reasonably necessary for the Taxpayer to complete his training. Under the circumstances, where a Visiting Fellow award is renewable for up to five years and the Taxpayer participated in the program for fewer than five years, it appears that the period of time the Taxpayer participated in the program can be considered to be reasonably necessary. We recommend that treaty benefits be allowed for the entire period.

CASE DEVELOPMENTS, HAZARDS AND OTHER CONSIDERATION

This writing may contain privileged information. Any unauthorized disclosure of this writing may undermine our ability to protect the privileged information. If disclosure is determined to be necessary, please contact this office for our views.

Please call _____ at _____ if you have any further questions.