



IRS is Disallowing Teacher/Researcher Benefits in Prospective Loss Situations

The IRS recently began reviewing exemptions from tax claimed by teachers who were from countries with a treaty that included a prospective loss limitation in the Teacher/Researcher Article. An article has a prospective loss limitation if the exemption applies to a resident of the treaty country who is in the United States to teach or engage in research **for a period not expected to exceed two years**. The tax treaties with the following countries include a prospective loss provision: Egypt, Hungary, Israel, Italy, Jamaica, Korea (South), Norway, Philippines, Poland, and Romania. The prior treaty with Italy did not have a prospective loss limitation. Teachers or researchers who were eligible for benefits under the prior treaty when the new treaty became effective on December 16, 2009 may use the carryover benefit of the prior treaty to avoid this problem.

In 2008 and 2009, the IRS began to review and disallow treaty claims by secondary school teachers from the Philippines who were sponsored by a The Amity Institute, a nonprofit organization that sponsors international educators to teach at schools in the United States. The teachers were assessed the taxes plus penalties and interest for the years that they had been teaching in the United States.

Many of the teachers filed an appeal with the U.S. Tax Court which in all eight reported cases held that whether an individual is invited to visit the United States for a period "not to exceed 2 years" is determined on the basis of an objective consideration of all the relevant facts and circumstances elicited from the parties by IRS questionnaires. Facts include:

- The individual's expectation as to how long they reasonably expect to remain in the United States
- The individual's investment in taking the assignment such as costs of moving family, immigration processing costs, etc.
- The financial incentive to remain in the United States as compared to the financial incentive to return home in two years or less
- The terms of contractual agreements entered into
- The initial period specified in immigration documents
- If the initial immigration documents are issued for a period of two years or less, whether additional documents extending the period beyond two years are issued as a matter of course
- Whether credentials issued to the individual by a credentialing agency provide eligibility for longer than two years
- The number of individuals in the organization who are covered by treaties with these limitations and actually return home before the two-year period is exceeded

If you are a teacher or researcher from a country with a prospective loss provision, you may have been allowed a treaty benefit based on the initial period of your immigration documents, because it is your immigration documents that determine your expected stay in the United States in the first instance. However, if an automated analysis of your treaty benefits (including this online Form 1040NR/EZ) allows these treaty benefits, you should decline the treaty benefit if facts (such as those listed above) not collected by the system would cause the IRS to disallow the treaty benefit.

If you are a teacher or researcher from one of these countries, you should not request or accept the treaty benefit from your employer if all of your facts when taken together at the outset of your visit indicate that you expect, or your employer expects you, to be in the United States longer than two years.