Information Disclosure and Competent Authority: A Proposal

Gregory J. Degulis
Information Disclosure and Competent Authority: A Proposal

by Gregory J. Degulis*

I. INTRODUCTION

One of the perils involved in international business is the possibility of double taxation by two taxing jurisdictions. A plausible method to combat double taxation is through efficient tax planning via access to information concerning the mechanics of tax treaty implementation between the United States and its treaty partners. This information may be restricted, however, so the tax planner must refer to existing resources. In the domestic context, the tax planner may refer to a variety of sources of authority to determine how to structure a particular transaction. The primary sources include the Internal Revenue Code (IRC), Treasury regulations and the case law, supplemented by IRS administrative law such as revenue rulings, revenue procedures, private letter rulings, General Counsel Memoranda (GCM), Action on Decisions (AOD) and

* J.D. Candidate, Case Western Reserve University (1985).

1 The Treasury Secretary shall prescribe all needful rules and regulations for the enforcement of the Internal Revenue Code. I.R.C. § 7805(a) (1982); Treas. Reg. § 301. 7805-1 (1982).

2 The Internal Revenue Code (I.R.C.) and Treasury Regulations are regularly interpreted in the U.S. Federal Courts, the Tax Court and the Court of Claims.


4 A Revenue Procedure is a statement of procedure that affects the rights or duties of taxpayers or other members of the public under the I.R.C. and related statutes, or information that, although not necessarily affecting the rights and duties of the public, should be a matter of public knowledge. Treas. Reg. § 601.601(d)(2)(b).


6 General Counsel Memoranda (GCM) are legal memoranda from the Office of Chief Counsel to the IRS prepared in response to a formal request for legal advice from the Assistant Commiss-
Technical Memoranda (TM).\textsuperscript{8} Taken as a whole, this combination of statutes, regulations and administrative law will be utilized by the tax professional to ensure that business transactions comply with current federal tax law and IRS positions.\textsuperscript{9}

In the international context, however, a tax professional's resources are more limited because U.S. law and IRS administrative releases provide only half of the applicable authority. The other half, of course, consists of the laws and regulations of the foreign tax jurisdiction which must be included as a source of tax planning information. Moreover, beyond the laws of a foreign tax jurisdiction, a tax treaty may be in effect between the United States and the other country. The tax treaty will, for example, govern fiscal relations between a U.S. corporation, its international subsidiary, the U.S. taxing authority (IRS) and the treaty partner's taxing authority.\textsuperscript{10}

Unlike the purely domestic transaction, in which the taxpayer is regulated by only one government authority (IRS), the international transaction has two regulators: the IRS and the treaty partner. Furthermore, the U.S. taxpayer is not exposed to administrative releases which detail the foreign taxing authority's position in the tax treaty process. As a result, the mechanics of tax treaty implementation remain relatively underexposed compared to the IRS' administrative process which is re-

\textsuperscript{8} Technical Memoranda (TM). The preparation of GCMs involves the research of appropriate statutes, regulations, revenue rulings and case law, as well as previous GCMs and briefs prepared by the Office of Chief Counsel. \textit{Taxation With Representation v. IRS}, 646 F.2d 666, 669 (D.C. Cir. 1981). The D.C. Circuit held that the completed GCMs, even though originally advisory materials, are adopted as a final statement of agency policy and function as the "working law" of the agency. The court also concluded, \textit{id.} at 683, that the completed GCMs are not protected under the "deliberative process" privilege in exemption five of the Freedom Of Information Act. 5 U.S.C. § 552(b)(5) (1982).

\textsuperscript{7} AODs are legal memoranda prepared by attorneys in the Tax Litigation Division and directed to the Chief Counsel whenever the IRS loses a case in the Tax Court, a Federal District Court, the Court of Claims or the U.S. Court of Appeals. The AOD sets forth the issue which was decided against the Government, a brief discussion of the fact and the reasons behind a recommendation that the Commissioner acquiesce or nonacquiesce to a decision of the Tax Court or Federal District Court. \textit{Taxation With Representation}, 646 F.2d at 672.

\textsuperscript{8} TMs are memoranda from the Commissioner to the Assistant Secretary of Treasury (Tax Policy) in connection with the preparation of proposed treasury decisions or regulations. A TM summarizes or explains the proposed rules, provides background information, states the issues involved, identifies any controversial legal or policy questions, discusses the approach taken by the draftsperson and gives reasons for that approach. \textit{Taxation With Representation}, 646 F.2d at 671.

\textsuperscript{9} The completed Commerce Clearing House Federal Tax Library now includes the I.R.C., regulations, private letter rulings, and the Internal Revenue Manual. Prentice-Hall publishes Internal Memoranda of the IRS.

\textsuperscript{10} Tax treaties are bilateral conventions designed to eliminate double taxation and promote the free flow of goods between countries. The U.S. currently has 33 tax treaties in effect. See also Rosenbloom & Langbein, \textit{U.S. Tax Treaty Policy: An Overview}, 19 COLUM. J. TRANSNAT'L L. 359, 360 (1981).
revealed in publications such as the Internal Revenue Manual (IRM). This underexposure, in turn, highlights a void in an international tax planner's resources.

A fertile source of information pertaining to the respective positions of tax treaty partners is the treaty mechanism known as competent authority. In a competent authority proceeding, representatives of the treaty partners negotiate a resolution to a double taxation problem arising under the provisions of the applicable treaty. The competent authority negotiations and eventual resolution represent a settlement between the IRS and a treaty partner regarding taxpayer liability on a particular issue and set of facts. This settlement is similar to a private letter ruling in that the taxpayer requests assistance from the IRS. Currently, the only public releases of information on competent authority are two revenue procedures, statistics on the number of cases accepted and resolved, and periodic public statements by treasury officials.

This Note advocates a systematic release of competent authority determinations, with identifying details omitted, to provide the international tax planner with information concerning tax treaty implementation. By deleting identifying details such as names, addresses and tax identification numbers, a competent authority release would violate neither the confidentiality provisions of U.S. tax law nor treaty secrecy clauses. Inevitably, the policy considerations surrounding a competent authority release would cause conflict between the Freedom of Information Act (FOIA) policy of disclosure of agency information

12 Competent authority is a tax treaty process designed to resolve disputes arising under the provisions of the treaty. Each state designates a competent authority who serves as its representative for interpreting and implementing the treaty. The delegated representatives may consult with each other, but the treaty does not require the competent authorities to come to an agreement, nor does it provide any mechanism for binding them to a decision.
13 The treaty provisions are discussed infra notes 34-44.
14 See supra note 5. See also IRC § 6110 (1982).
16 See infra note 45.
19 I.R.C. § 6103 (1982); See also infra notes 114-16.
20 See infra notes 90-93.
and its value to the tax professional on the one hand, and the possibility of releasing confidential or trade secret information and thereby alienating tax treaty partners on the other. Through a process of evaluating policy considerations, this Note will review competent authority history, describe the current status of FOIA/IRS case law and propose a systematic release of competent authority determinations pursuant to a FOIA request. This release would introduce an element of certainty into the process of international tax planning and would also further the tax treaty policy of avoiding double taxation.\(^22\)

II. REVIEW OF COMPETENT AUTHORITY

Commensurate with an increase in international business activity is an increase in the opportunity for tax law conflicts amongst the countries courting international transactions.\(^23\) The potential for double taxation arises from the jurisdictional overlap of two countries on the same items of income. The overlap results from the fact that most countries exercise jurisdiction over tax income on two bases, one derived from the source of the income, the other from the residence of the recipient of that income.\(^24\) In general, there are two forms of double taxation: actual\(^25\) and economic.\(^26\) Actual double taxation occurs where two jurisdictions im-

---

\(^{22}\) The essential long range objectives of the tax treaty program are to eliminate the impediments that double taxation, or the threat of double taxation might pose to the international flow of goods, capital and persons, and to establish fiscal relations between the U.S. and others nations. Rosenbloom & Langbein, *supra* note 10, at 405.


\(^{24}\) Surrey, *United Nations Group of Experts and the Guidelines for Tax Treaties Between Developed and Developing Countries*, 19 HARV. INT’L L.J. 1, 3 (1978). For example, interest received on a loan made by a lender resident in country A to a borrower in country B could be taxed in country A on the receipt of interest and also by country B on the payment of interest. *Id.* The threat of double taxation may arise either in the context of taxes imposed on permanent establishments (a branch) which a corporation or other resident of one country has in another country, or in the context of taxes which are imposed on separate companies which do business in each country and are related in some manner through stock ownership. Schuster & Fichtenholz, *Competent Authority Cases: A Practical Approach to Relief from Double Taxation*, 47 J. TAX’N 288, 290 (1970). *See also 1 Tax Treaties (CCH)* para. 1001.

\(^{25}\) McCawley, *Competent Authority Procedure - Rev. Proc. 82-29, 82-9 TAX MGMT. INT’L J. 3* (1982). "Where a U.S. corporation conducts business operations in a foreign country through a branch, the profits of the branch are included in the taxable income and taxed to the corporation. At the same time, the profits attributable to the operations of the branch are taxed by the foreign jurisdiction." *Id.*

\(^{26}\) Economic double taxation arises primarily when a U.S. corporation conducts foreign operations through a subsidiary organized under the laws of another country. *Id.*
pose a tax on the same taxpayer with respect to the same items of income. This form of double taxation is relieved primarily through the use of foreign tax credits which allow the U.S. corporation to obtain relief for income taxes paid to the foreign jurisdiction.27

Economic double taxation, on the other hand, occurs when the U.S. and a foreign country each tax distinct entities, but the two entities considered as an economic unit have been taxed twice on the same income.28 One of the most common types of economic double taxation stems from the power of the IRS to allocate gross income, deductions, credits or allowances between related organizations under section 482.29 For example, the IRS may allocate income from a wholly-owned foreign subsidiary to a U.S. parent under section 482 because of an unrealistic pricing arrangement. The subsidiary has already reported the income and paid tax to the foreign authority and, as a result of the section 482 allocation, the United States assesses a tax against the parent. Since the U.S. and foreign tax relate to the same income, there is economic double taxation.30

In response to increasing possibilities of actual and economic double taxation, the United States and other developed countries have negotiated bilateral tax treaties.31 The reciprocal nature of tax treaties eliminates double taxation through a system of exemptions, reduced rates of tax and credit provisions which override any conflicting tax laws of the treaty partners.32 To curb the effects of double taxation, the taxing jurisdictions work out a mutually agreeable set of standards for the ultimate

28 McCawley, supra note 25, at 4.
29 Id. Much of the double taxation is a result of section 482 allocations by the IRS to prevent tax avoidance or income distortion. Schindler, The Use of Functional Analysis Approach in 482 Cases, 84-5 TAX MGMT. INT’L J. 141 (1984). Section 482 reads as follows:
In any case of two or more organizations, trades or businesses (whether or not incorpor-
ated, whether or not organized in the United States, and whether or not affiliated) owned or controlled directly or indirectly by the same interests, the Secretary may distribute, apportion, or allocate gross income deductions, credits or allowances between . . . such organizations, trades or businesses, if he determines that such distribution, apportionment, or allocation is necessary in order to prevent evasion of taxes or clearly to reflect the in-
come of any such organizations, trades or businesses.
I.R.C. § 482 (1982).
31 As of December 31, 1984, the U.S. has 34 income tax treaties in force. See Goodrich, supra note 23, at 102.
32 TAX TREATIES, supra note 24, at para. 1001.
determination of tax liability.\textsuperscript{33}

This set of standards is currently contained in the Mutual Agreement Procedure, usually found in article 25 of U.S. bilateral tax treaties.\textsuperscript{34} Article 25 entitles a taxpayer who is faced with a situation without relief from double taxation to ask the U.S. competent authority\textsuperscript{35} to meet with the treaty partner’s competent authority to negotiate a settlement of the taxpayer’s double taxation case.\textsuperscript{36} The term “competent authority” usually refers to the delegated representative of a treaty country who has plenary power to resolve interpretive and administrative disputes within the treaty.\textsuperscript{37} The competent authority’s primary responsibility is to consult and negotiate with a treaty partner to properly determine the respective tax liability in the event of double taxation.\textsuperscript{38} In this way, the competent authority procedure provides flexibility in treaty interpretation without arduous treaty renegotiation.\textsuperscript{39} If the competent authority

\textsuperscript{33} McCawley, supra note 25, at 4.

\textsuperscript{34} OECD COMMITTEE ON FISCAL AFFAIRS, MODEL TAX CONVENTION ON INCOME AND CAPITAL 19-192 (1977). The Current U.S. model is the Treasury Department’s Model Income Tax Treaty of 1981, reprinted in 1 TAX TREATIES (CCH) para. 158. Article 25 states in part:

Where a person considers that the actions of one or both of the contracting states results or will result for him in taxation not in accordance with the provisions of this Convention, he may irrespective of the remedies provided by the domestic law of those states, present his case to the Competent Authority of the Contracting States of which he is a resident or a national.

\textsuperscript{35} In the United States, the Secretary of the Treasury designated the IRS Commissioner as competent authority under the tax treaties. T.D. 150-83, 1973-2 C.B. 508. Subsequently, the Commissioner delegated the competent authority responsibility to the Associate Commissioner (Operations), and Director, Foreign Operations District. Del. Ord. 114 (Rev. 4), 1985-15 I.R.B. 9, superceding Del. Ord. 114 (Rev. 3), 1981-1 C.B. 341. The Associate Commissioner (Operations) possesses broad authority for administering tax treaties & specific exchanges of information. INTERNAL REVENUE SERVICE MANUAL 42(10)(10) 2(a)(b). The Associate Commissioner (Operations) is the U.S. competent authority. IRM DISCLOSURE OF INFORMATION HANDBOOK 25(10(4).

\textsuperscript{36} See 1981 Model Treaty supra note 34, at art. 25(2). See also Schuster & Fichtenholz, supra note 24, at 289.


\textsuperscript{38} 1981 Model Treaty, supra note 34, at art. 25(3). The competent authorities of the contracting states are to resolve by mutual agreement any difficulties or doubts arising as to the interpretation or application of the Convention.

\textsuperscript{39} The new Canada-United States tax treaty, for example, was signed on September 26, 1980, and then amended by protocols on June 14, 1983 and March 28, 1984. The treaty and protocols were ratified by the U.S. Senate on June 28, 1984 and the instruments of ratification were exchanged on August 16, 1984, thereby entering into force that day. 1 TAX TREATIES (CCH) para. 1202(1); see also Brown, CANADA-UNITED STATES TAX ISSUES: THE TAX TREATY, UNITARY TAXATION AND THE FUTURE, 32 CAN. TAX J. 547 (1984); See also Borraccia CANADIAN TAX AUDITS OF MULTINATIONAL CORPORATIONS, 37 TAX. EXEC. 117 (1985).
decides to accept the case, the competent authority will negotiate with the treaty partner's representative in order to reach a satisfactory solution in accordance with the terms of the treaty. During negotiations, the competent authorities exchange information pursuant to tax treaty provisions, and eventually reach a partial or full solution to the double taxation. The U.S. competent authority will then notify the taxpayer of any agreement reached between the two treaty countries with respect to the request for assistance. In addition, under Revenue Procedure 82-29, the taxpayer will be requested to enter into a closing agreement reflecting the terms of the competent authority agreement. The IRS, as the U.S. competent authority, releases only statistical compilations of competent authority requests and reveals other information relating to the program through sporadic public statements by IRS officials.

III. RECENT COMPETENT AUTHORITY HISTORY

Prior to 1970, the most prevalent type of relief for double taxation was unilateral action by the United States in favor of the taxpayer. In a 1971 corporate survey, 127 out of 271 companies indicated that IRC section 482 allocations resulted in double taxation and only 41 of the doubly taxed companies reported recovery of the full amount doubly taxed. These 127 companies were denied recovery from the foreign governments, forcing the companies to recover unilaterally from the U.S. Treasury under the provisions of Revenue Procedure 65-54. Revenue

---

40 The competent authority may decline to assist the taxpayer if double taxation does not exist, the taxpayer is unwilling to accept a competent authority agreement or procedures, or the taxpayer does not furnish sufficient information. Rev. Proc. 82-29, supra note 15, at § 9.01; Rev. Proc. 77-16, supra note 15.

41 1981 Model Treaty, supra note 34, at art. 25(2).

42 1981 Model Treaty, supra note 34, at art. 26. Article 26 states in part: "The Competent Authorities of the Contracting States shall exchange information as is necessary for carrying out the provisions of the Convention or of the domestic laws of the Contracting States concerning taxes covered by the Convention insofar as the taxpayer thereunder is not contrary to the Convention." See also Reiner, How the IRS Exchanges Information with Other Countries, 31 TAX EXEC. 305 (1979); Caribbean Basin Initiative, TAX NOTES, Mar. 22, 1982, at 776.


44 The terms of the closing agreement must be in accordance with sections 6.07 and 6.17 of Rev. Proc. 68-16, 1968-1 C.B. 770.

45 See Goodrich, supra note 23, at 112-14 app. The competent authority case statistics include categories such as total cases received, disposed of, inventory and average duration.


48 Id. at 11.

Procedure 65-54 allowed only unilateral relief for section 482 allocations and also granted the companies a substantial grace period in which to alter related party transactions. Although the U.S. bilateral tax treaties provided for competent authority relief, the pre-1970 procedure was deemed inadequate because of no uniform revenue procedure, the unpredictable treatment of international tax, and the inconsistent competent authority policy due to fragmentation of authority.

In 1970, the IRS released Revenue Procedure 70-18 which provided uniform bilateral tax relief through competent authority procedures. This Revenue Procedure detailed avenues a U.S. taxpayer should follow to invoke competent authority to avoid double taxation. Revenue Procedure 70-18 instructed the taxpayer on the procedures to follow if either the U.S. or the treaty partner's actions resulted in double taxation. Section five of the revenue procedure also outlined specific pieces of information that the taxpayer must supply to the competent authority and, for the first time, raised questions about the treatment of that information. Although Revenue Procedure 70-18 responded to pleas for an IRS statement on tax treaty relief, competent authority procedures were used sparingly until Revenue Ruling 76-508.

Revenue Ruling 76-508, often referred to as the mandatory competent authority ruling, forced the taxpayer to exhaust all effective remedies including competent authority, or face the possible loss of foreign tax

---


See Comment, supra note 37, at 238. The author noted that the competent authority cases were handled on a treaty by treaty basis and that functions of the competent authority were exercised by three officers within the IRS: Office of Chief Counsel, Office of Assistant Commissioner (Technical), and the Office of International Operations. Id. at 237, 238.


From 1970 to 1977, there were approximately 222 requests for competent authority relief. See McGowan, supra note 46, at 281. Another reason for the reluctance of the U.S. taxpayer to invoke competent authority assistance was due to the relatively primitive stage of tax laws in most other countries. McCawley, supra note 25, at 7.

Rev. Rul. 76-508, 1976-2 C.B. 225, amplified by Rev. Rul. 80-231, 1980-2 C.B. 219. Some of the reasons cited for the relatively few requests are: lack of confidence; time restraints; statutes of limitation; fear of foreign government retaliation; and reluctance to disclose profits involved in the transfer of technical advice. See McGowan, supra note 51, at 294 (comments of Mr. Burleson).
The foreign tax credit provision spurred interest in the use of competent authority. In 1977, the IRS released Revenue Procedure 77-16 which prescribed procedures for competent authority assistance in order to resolve conflicts involving foreign tax credits, exemptions and reduced rates of tax under a bilateral tax treaty. Revenue Procedure 77-16 was designed to supplement Revenue Procedure 70-18 which dealt exclusively with allocations of income and deductions by either the treaty country or the IRS. Section four of Revenue Procedure 77-16 revealed the breadth of information to be submitted to the competent authority, including the type of income involved, descriptions of transactions in the treaty country, issues raised by the positions taken by the treaty country and copies of any correspondence from the treaty country.

In 1982, the IRS released Revenue Procedure 82-29 which is the taxpayer's current guide to invoking competent authority in the event of allocations by either the treaty country or the IRS. Revenue Procedure 82-29 applies to allocations of income and deduction between a U.S. taxpayer and a related person subject to the taxing jurisdiction of a country that has entered into an income tax treaty with the United States. If the taxpayer seeks relief under Revenue Procedure 82-29, it is imperative that the taxpayer cooperate fully with the competent authority's request for tax related information.

Mandatory information gathering by the taxpayer is the central source of domestic competent authority documentation and is used primarily by the U.S. competent authority in negotiating the taxpayer's case. One commentator describes the role of the competent authority as an arbitrator attempting to represent the U.S. government and the

---

58 If the taxpayer does not exhaust all remedies, then any overpayment to the treaty country is presumed to be a voluntary contribution and, therefore, is not included in the deemed foreign tax credit. See Rev. Rul. 76-508, supra note 57; see also Treas. Reg. § 1.901-2(e)(5)(i).
59 There was a significant increase in the average number of allocations submitted after 1977, apparently because of Revenue Ruling 76-508. See INSTITUTE ON INTERNATIONAL TAXATION 172 (13th ed. 1982).
61 Id. § 1, 1977-1 C.B. at 573-74.
62 Id.; see Rev. Proc. 70-18, supra note 52.
63 Rev. Proc. 77-16, § 4.04(4), 1977-1 C.B. at 575. Examples include salaries or dividends, additional information such as the amount of treaty country tax originally paid or reported by the taxpayer, and the amount of the particular item involved in the issues raised by the treaty country. Id. § 4.04(4), (5), 1977-1 C.B. at 575.
64 Id.
65 Rev. Proc. 82-29, supra note 15.
66 Id. § 1, 1982-1 C.B. at 481.
67 The U.S. taxpayer has an interest in placing the U.S. competent authority in a position where he can agree to yield U.S. tax priority as judged by U.S. standards of evidence and theory. See McCawley, supra note 25, at 3, 6.
68 Id.
U.S. taxpayer in seeking relief from double taxation. The international source of competent authority information, on the other hand, stems from the active exchange of information programs delineated under U.S. bilateral tax treaties. Together, the taxpayer's domestic information and the information from the treaty partner comprise the bulk of a competent authority file. As this information may be subject to a FOIA request, it is necessary to examine each source of competent authority information.

IV. Obligations of the U.S. Taxpayer

One of the central conditions and concerns of a taxpayer invoking competent authority relief is full disclosure of relevant information. The processes and protections of information submitted to the U.S. competent authority are of concern to the taxpayer, especially when the taxpayer is a multinational corporation which has submitted sensitive intercompany pricing information. The taxpayer must fully cooperate with the U.S. competent authority or face the possibility of a denial of competent authority assistance, thus foregoing any tax treaty relief from double taxation. Section 9.0 of Revenue Procedure 82-29 states in part: “[T]he United States competent authority will not assist the taxpayer if . . . (d) the taxpayer does not furnish, upon request, sufficient information to determine whether the treaty applies to the taxpayer’s facts and circumstances, or the taxpayer otherwise fails to act as required by this procedure . . . .” In addition, the taxpayer is requested to supply any additional information needed to resolve the case and keep the U.S. competent authority informed about proceedings in the treaty country. The taxpayer must also sign a separate statement consenting to disclosure to the competent authority of the treaty country. Failure to follow these provisions for information dissemination, however, will not prevent the U.S. competent authority from disclosing information under the

---

69 Goodrich, Canada-U.S. Tax Accounting: Competent Authority, Section 482 Transfers and Joint Audits, 4 CAN.-U.S. L.J. 151, 156 (1981).
70 See supra note 42 and accompanying text.
71 Rev. Proc. 82-29, §§ 4.04, 5.07, 1982-1 C.B. at 482, 483-84.
72 The major concern is the perceived fear of retaliation by government representatives when sensitive information is released (pursuant to a request of the competent authority) that might otherwise remain undisclosed. Liebman, Review Article: Current Trends in Bilateral Tax Treaties, 13 J. WORLD TRADE L. 367, 375 (1979). See Tax Treaties and Competent Authority, supra note 46, at 294. People were concerned about the amount of information that would be submitted when the competent authority was invoked and about how the information would be handled by the other contracting states. Id.
73 Rev. Proc. 82-29, § 9.01, 1982-1 C.B. at 484-85.
74 Id. § 9.02, 1982-1 C.B. at 485.
75 Id. § 4.04, 1982-1 C.B. at 482.
terms of the tax treaty.  

As a result, the taxpayer gains no advantage from withholding information from the competent authority. Under Internal Revenue Code section 6103(k)(4), tax return information may be disclosed to a foreign competent authority pursuant to an exchange of information agreement, regardless of the taxpayer's consent.

Specifically, under Revenue Procedure 82-29, the taxpayer must submit the following information to the U.S. competent authority: names, addresses and U.S. taxpayer identification numbers and related persons involved, description and control of business relationship between the U.S. taxpayer and related persons, copies of foreign tax returns and the proposed allocations of the foreign country and copies of all correspondence, briefs and other relevant material pertaining to the treaty country. This compilation of data is especially helpful to the competent authority where the facts are complex and multiple adjustments have been proposed. The taxpayer is excluded from the government-to-government competent authority negotiations, but the process of information gathering by the taxpayer ensures that the U.S. competent authority is fully briefed.

V. EXCHANGE OF INFORMATION UNDER TAX TREATIES

The second major source of competent authority materials is the exchange of information through tax treaties. The recently ratified Canada-U.S. Tax Treaty states in part that "The Competent Authorities of the Contracting States shall exchange such information as is necessary for carrying out the provisions of this Convention or of the domestic laws of the Contracting States concerning taxes covered by this Convention insofar as the taxation thereunder is not contrary to the Convention." Another important provision to those who request competent authority is found in the second portion of article XXVII of the Convention: "In-

76 Id.

77 Returns and return information are discussed fully in section VI(b) of the text.

78 See Rev. Proc. 82-29, § 4.04(l), 1982-1 C.B. at 482.

79 Id. § 4.04(b).

80 Id. § 4.04(c).

81 Id. § 4.04(h).

82 Id. § 4.04(i). A summary of the contents of the relief request for foreign allocations is contained in Ruchelman & Imamura, Intercompany Transfer Pricing Including Tax Treaty Relief, 1984 INST. ON FED. TAX'N at 35-32.

83 McCawley, supra note 25, at 6.

84 Id. McCawley suggests that "the core of the information disclosure requirements is the furnishing of a statement of actions taken by, or proposed by, the competent authority of the treaty country because it keeps the U.S. competent authority abreast of treaty developments. Id.

85 Convention Between the United States of America and Canada With Respect to Taxes On Income and Capital, art. XXVII, reprinted in 1 TAX TREATIES para. 1317K (Sept. 26, 1980) [hereinafter cited as Canada-U.S. Tax Treaty].
formation received by a Contracting State shall be treated as secret in the same manner as information obtained under the taxation laws of the State."

Initially, it is necessary to consider the types of information exchanges practiced by the IRS. The two primary methods of exchange are known as "routine" and "specific" requests for information. The U.S. competent authority often conducts specific requests for information through the Simultaneous Examination Program, which allows the treaty countries to commence simultaneous examinations of multinational companies operating within both countries. Currently, the United States maintains a Simultaneous Examination Program with five treaty countries. The United States also participates in a Multilateral Simultaneous Exchange Program which allows the competent authorities of several countries to simultaneously examine a single taxpayer.

---


87 The most prevalent exchanges are known as "routine exchanges" which cover information regarding passive income. In 1982, the IRS provided treaty partners with approximately 500,000 documents and received approximately 800,000 documents. Canada supplies over 90% of the foreign documents. The exchanges involve: 1) Information dealing with U.S. source income sent to the treaty partner (except the Soviet Union) where the alien claims residence; 2) U.S. information taken from the information returns filed by U.S. withholding agents and run through a computer; 3) Each treaty partner is furnished with a copy of the computer printout summarizing information relating to that country. Goodrich, *supra* note 23, at 103. During 1978, for example, the United States furnished to its treaty partners some 425,000 pieces of information concerning passive income. Reiner, *supra* note 42, at 306. The "specific exchanges", on the other hand, usually contain information such as the control of companies, any legal or financial documents and must specifically identify the item or expense of the requesting country. *Id.* at 306. Competent authority information relating to a particular taxpayer is most likely to stem from a specific request. For specific requests the United States seems to have received no more than two hundred requests per year, a smaller number considering the large mass of international transactions. Seeman, *Exchange of Information Under International Tax Conventions*, 17 INT'L L. 333, 338 (1983). If a treaty partner requests information contained in U.S. files, the taxpayer will not be notified that such information was disclosed. The taxpayer will be notified, however, if the IRS believes the information to constitute a trade, business, commercial or professional secret or trade process. The IRS will also notify a taxpayer of the treaty partner request if the information is not in IRS files or the taxpayer is not currently being examined by the IRS. Goodrich, *supra*, at 103. See Note, *Exchange of Information Under the OECD and U.S. Model Tax Treaties*, 5 Loy. L.A. INT'L & COMP. L.J. 129, 133 (1982).

88 *INTERNAL REVENUE SERVICE MANUAL* 43(10)(10.5)(2). During the examination, information is exchanged in accordance with the treaty between the two nations. See Goodrich, *supra* note 23, at 102.

89 Canada, United Kingdom, Federal Republic of Germany, France and Norway.

90 *INTERNAL REVENUE SERVICE MANUAL*, 42 (10)(10.7)(5). The United States, however, will
Within the IRC, section 6103(k)(4) states that return information may be disclosed to the competent authority of a foreign government according to the terms of the convention.\(^9\) The information exchanged is protected from disclosure by secrecy provisions of the treaty which provide for nondisclosure of any trade, business, industrial, commercial, or professional secret or process.\(^1\) In general, the IRS cannot disclose such information to anyone but those concerned with the assessment, collection, enforcement or prosecution.\(^2\) These records, due to the complexity and sensitivity of disclosure relating to records of contact with a foreign government,\(^3\) are subject to an initial determination of release to others by the authority of the Director, Foreign Operations District.\(^4\)

If the Foreign Operations Director (or his delegate) decided after an initial determination that the records are not suitable to be released, then the taxpayer may initiate an administrative appeal procedure within thirty-five days.\(^5\) Once a determination of whether to release records is made by the IRS, this administrative decision will be overturned on judicial review only if the decision to withhold meets the arbitrary or capricious standard of the Administrative Procedure Act (APA).\(^6\) This arbitrary and capricious standard, in contrast with the FOIA, provides the IRS with wide discretion in deciding whether to withhold records. For one who seeks access to such information, the FOIA,\(^7\) and its policy favoring disclosure of agency information, and IRC section 6103\(^8\) pro-

\(^{91}\) I.R.C. § 6103(k)(4) (1982) states in part: A return or return information may be disclosed to a competent authority of a foreign government which has an income tax or estate and gift tax convention, or other convention relating to the exchange of information.

\(^{92}\) **INTERNAL REVENUE SERVICE MANUAL** 42 (10)(10.5)(4).

\(^{93}\) See Canada-U.S. Tax Treaty, *supra* note 85, at art. XXVII: [This information] shall be disclosed only to those persons or authorities (including courts and administrative bodies) involved in the assessment or collection of, the administration and enforcement in respect of, or the determination of appeals in relation to, the taxes covered by the Convention. Such persons or authorities shall use the information only for such purposes.

\(^{94}\) IRM DISCLOSURE OF INFORMATION HANDBOOK, *supra* note 35, at (13)46.

\(^{95}\) Treas. Reg. § 601.702(c)(7)(i) (1984) provides that: “The Chief of Disclosure Operations shall have authority to make initial determination with respect to requests for records of the IRS unless the records are controlled by the Foreign Operations District.”

\(^{96}\) *Id.* at 601.702(c)(7)(iii).

\(^{97}\) 5 U.S.C. § 706(b)(2)(A) (1982). “The reviewing court shall hold unlawful and set aside agency action, findings and conclusions found to be arbitrary, capricious, an abuse of discretion or otherwise not in accordance with law.” *Id.*

\(^{98}\) See *supra* note 21.

\(^{99}\) I.R.C. § 6110(b)(1) (1982). Section 6110 defines written determinations to include “rulings, determination letters and technical advice memorandum.” *Id.*
vide the best opportunity to obtain such competent authority information. Through the FOIA and section 6103, competent authority determinations should be released with identifying details deleted.

VI. Freedom of Information Act

The FOIA was designed to encourage open disclosure of information in the possession of government agencies. The FOIA is the statutory mechanism through which the broadest range of information may be obtained from the IRS. Subject to statutory exemptions, the FOIA requires an agency to make requested records promptly available to any person who follows certain prescribed procedural rules. To supplement the general policy of disclosure, the FOIA requires agency adherence to procedural rules to accelerate the processing of requests at the agency level and mandates strict judicial review of agency refusals to release information. Subject to relatively minor jurisdictional obstacles, a U.S. District Court may enjoin the IRS from withholding agency records and order the production of any agency records improperly withheld from the requesting party. The district court shall review a denial de novo, and may examine the contents of such records to determine whether the records should be withheld under any FOIA ex-


\[101\] Seeigel & Langbein, Extracting Documents and Information From the Internal Revenue Service, 12 CUM.-SAM. L. REV. 303, 304 (1982).

\[102\] The relevant exemptions are found at 5 U.S.C. § 552(b) and are discussed fully infra note 110.

\[103\] 5 U.S.C. § 552(a)(3) (1982). The procedural rules require that the person requesting information reasonably describe such records and comply with rules stating the time, place, fees (if any) and other procedures to be followed. Id. An exhibit of a proper FOIA request for IRS records is contained in Jensen, The Freedom of Information Act, 6 REV. TAX IND. 136, 137 (1982). The request must be in writing, signed and made pursuant to the FOIA. Id. The Treasury regulations specify the form of the request for IRS records in section 601.702(c)(1). See Church of Scientology v. IRS, 561 F.2d 1165 (D.D.C. 1983) (an actionable request under FOIA for records in possession of the IRS is defined under 26 C.F.R. § 601.702(c)(1) as one which conforms in every aspect with the rules and procedures set forth in this subpart).

\[104\] 5 U.S.C. § 552(a)(6)(A)(i) (1982). Each agency must determine within ten days after receipt of such requests whether to comply and shall immediately notify the person of the agency determination and the reasons thereof.

\[105\] See 5 U.S.C. § 552 (a)(4)(B) (1982). If denied, the person requesting information may seek an administrative appeal and the IRS must make such a determination within 20 days. Id. § 552(a)(6)(A)(ii). If, on administrative appeal, the denial is upheld in whole or in part, the IRS shall notify the person of the provision governing judicial review.

\[106\] The district court in the district in which the claimant resides, or has a principal place of business, or in which agency records are located, or the District Court of the District of Columbia. 5 U.S.C. § 552(a)(4)(B) (1982).

\[107\] Id.
emptions. Most importantly, the FOIA shifts the burden of proof from the individual requesting the information to the agency to sustain its decision to withhold information. The IRS can meet its statutory burden of proof only by showing that the information sought is within one of the nine exemptions specified in the FOIA.

A. Exemption Three

Exemption three of the FOIA allows agency non-disclosure of requested information only if the materials are exempted by a statute which meets one of the following two tests: 1) the statute requires the matters to be withheld in such a manner as to leave no discretion on the issue, or 2) the statute establishes particular criteria for withholding information. Exemption three is considered in detail because of the considerable uncertainty as to the working relationship between the FOIA and section 6103. This uncertainty has produced substantial case law on the limits of the IRS' ability to keep tax documentation confidential. Within the IRC, section 6103 is generally considered to be a statute which meets the exemption three tests, thus allowing the IRS to withhold information from a FOIA requester. Section 6103 states the general rule that tax "return" and tax "return information" are confidential and should not be disclosed. In the competent authority context, two issues must be examined in relation to section 6103: 1) whether, according to case law, competent authority materials fit within the scope of pro-

108 Id. § 552(b).
111 Id. § 552(b)(3).
112 See infra notes 113, 114.
113 I.R.C. § 6103(a) (1982).
114 I.R.C. § 6103(a) states:
(a) General Rule.—Returns and return information shall be confidential, and except as authorized by this title—
(1) no officer or employee of the United States,
(2) no officer or employee of any State or of any local child support enforcement agency who has or had access to returns or return information under this section, and
(3) no other person (or officer or employee thereof) who has access to returns or return information under [this section], shall disclose any return or return information obtained by him in any manner in connection with his service as such an officer or an employee or otherwise or under the provisions of this section. For purposes of this subsection, the term "officer or employee" includes a former officer or employee.

tected return information, and 2) whether section 6103 is the sole standard of review governing judicial review of an IRS denial of disclosure.

B. Return Information

In general, tax "return information" is defined quite broadly to ensure the maximum protection of information received by the IRS.\textsuperscript{115} Tax return information is defined as a taxpayer's identity, the nature, source or amount of income or any other data received by, prepared by, or collected by the Secretary with respect to the determination of tax liability.\textsuperscript{116} There is, however, a rather narrowing caveat included at the end of the statute which states that return information does not include data in a form which cannot be associated with, or otherwise identified, directly or indirectly, with a particular taxpayer.\textsuperscript{117} This narrowing construction of return information is known as the Haskell Amendment, named after the Senator who proposed this change in section 6103 in the Tax Reform Act of 1976.\textsuperscript{118} The Haskell Amendment is at the core of interpretive variations within the different circuits and would most likely determine whether competent authority files qualify as "return information" within section 6103(b)(2).\textsuperscript{119}

Currently, there is no direct authority on whether information possessed by the competent authority, either domestic or international, is considered tax "return information." Therefore, it is necessary to review the materials submitted to the competent authority and reconcile these materials with the case law boundaries of "return information." According to Revenue Procedures 77-16\textsuperscript{120} and 82-29,\textsuperscript{121} the taxpayer must submit a description of the control and business relationships between related persons,\textsuperscript{122} a statement of the status of tax liability of the related persons in the treaty country for the years of adjustment\textsuperscript{123} and copies of pertinent correspondence, briefs, protests and other relevant material from the treaty country.\textsuperscript{124} The U.S. competent authority may also re-

\textsuperscript{115} I.R.C. § 6103(v)(2) (1982). Section 6103 is concerned foremost with protecting tax returns and information directly related thereto. Fruehauf Corp. v. IRS, 566 F.2d 574, 579 (6th Cir. 1977).
\textsuperscript{116} I.R.C. § 6103(b)(2) (1982).
\textsuperscript{117} Id.
\textsuperscript{118} Tax Reform Act of 1976, Pub. L. No. 94-555, § 1202(a)(1), 90 Stat. 1520, 1667 (1976) (codified at 26 U.S.C. 6103(b)(2) (1982)). Senator Haskell commented: "The purpose of the amendment is to ensure that statistical studies and other compilations of data now prepared by the IRS and disclosed by it to outside parties will continue to be subject to disclosure to the extent allowed under present law." 122 CONG. REC. S24012 (1976).
\textsuperscript{119} The Haskell Amendment is discussed supra note 118 & infra notes 136-140.
\textsuperscript{120} Rev. Proc. 77-16, supra note 15, at § 6.
\textsuperscript{121} Rev. Proc. 82-29, supra note 15, at § 4.
\textsuperscript{122} Id. § 4.04(e).
\textsuperscript{123} Id. § 4.04(f).
\textsuperscript{124} Id. § 4.04(f).
ceive information about the taxpayer's case from the treaty country which is subject to the secrecy clauses of the convention.\textsuperscript{125} Along with trade or commercial secrets,\textsuperscript{126} information received by the U.S. competent authority from a treaty partner is subject to the secrecy laws of the United States\textsuperscript{127} which, in this case, are codified in section 6103.

This Note seeks to outline the breadth of "return information" in order to show that current case law would support a release of competent authority without violating section 6103. In regard to the boundaries of return information, case law is split into two camps, the IRS position and the Ninth Circuit position. The IRS view of return information originated in \textit{Zale Corp. v. IRS}\textsuperscript{128} in 1979 and has received support as recently as December 1984 in the District of Columbia Federal District Court.\textsuperscript{129} The most extensive discussion of the IRS position, however, is contained in the Seventh Circuit decision, \textit{King v. IRS}\textsuperscript{130} In \textit{King}, the taxpayer utilized a FOIA request to obtain data, memoranda and background information relating to or commenting on certain revenue rulings and regulations issued by the IRS.\textsuperscript{131} The IRS declined to disclose eight documents\textsuperscript{132} on the grounds that the documents constituted return information under section 6103. The \textit{King} court, relying on the comments of Senator Haskell,\textsuperscript{133} held that the return information protects from disclosure all nonamalgamated items and that the Haskell Amendment provides only for disclosure of statutory compilations which are not associated with or do not identify a taxpayer.\textsuperscript{134} In a broad reading of section 6103 the Seventh Circuit held that only statistical studies which do not identify a particular taxpayer may be released.\textsuperscript{135} Several other courts have followed the IRS position which supports the theory that the

\begin{itemize}
  \item \textsuperscript{125} See IRM, 42(10)(10.5)(4), \textit{supra} note 92.
  \item \textsuperscript{126} \textit{Id}.
  \item \textsuperscript{127} Canada-U.S. Tax Treaty, art. XXVII, \textit{supra} note 85.
  \item \textsuperscript{128} \textit{Zale Corp. v. IRS}, 481 F. Supp. 486 (D.C. D.C. 1979).
  \item \textsuperscript{129} \textit{Texas Independent Producers Legal Action Ass'n v. IRS}, 55 AFTR 2d 85-714 (D.C. Cir. 1984); see also \textit{Stephens v. IRS}, No. 82-0421 (N.D. Ill. Jan. 27, 1984). The \textit{Stephens} court treated any information gathered in an investigation of potential taxpayer liability as return information. This is a rather expansive view of the statute. Under a \textit{Stephens} analysis, the information gathering by a competent authority would most likely fall within the definition of return information, and would be protected by section 6103.
  \item \textsuperscript{130} \textit{King v. IRS}, 688 F.2d 488 (7th Cir. 1982).
  \item \textsuperscript{131} \textit{Id} at 489.
  \item \textsuperscript{132} \textit{Id} at 490. The documents consisted of: a) Two taxpayer protests of IRS agents' audit reports; b) A transmittal letter and a portion of an audit; c) A form setting for adjustment to the taxpayer's return and the reasons therefore; d) A form stating a specific taxpayer liability by period and the amount of the adjustments; e) Two IRS interoffice memoranda on a specified taxpayer; and f) A letter from the IRS to the taxpayer asking the taxpayer to alter a method of accounting.
  \item \textsuperscript{133} For the text of Senator Haskell's comment, see \textit{supra} note 118.
  \item \textsuperscript{134} \textit{King}, 688 F.2d at 492.
  \item \textsuperscript{135} \textit{Id}.
\end{itemize}
Haskell Amendment was intended neither to enhance nor to diminish access to information under the FOIA, but only to allow release of statistical studies and compilation of data to, inter alia, committees of Congress.\textsuperscript{136} These courts rely upon the broad language of section 6103(b)(2)—"any other data received by, or prepared by, or collected by the Secretary with respect to a taxpayer"—and the neutral commentary of Senator Haskell\textsuperscript{137} to withhold documents under the umbrella of return information.

The Ninth Circuit, however, has a narrower view of the Haskell Amendment and restricts the scope of confidentiality under section 6103. Commencing with \textit{Long v. IRS}\textsuperscript{138} in 1979, the Ninth Circuit has held that return information, properly defined, includes only information that directly or indirectly identifies a particular taxpayer.\textsuperscript{139} This holding is now embraced explicitly by the D.C. Circuit.\textsuperscript{140} Congress responded to the Ninth Circuit view with an amendment to section 6103 in 1981\textsuperscript{141} in order to protect the confidentiality of IRS tax information.\textsuperscript{142} Despite this amendment, the D.C. Circuit continues to interpret the Haskell

\textsuperscript{136} Currie v. IRS, 704 F.2d 523 (11th Cir. 1983). In \textit{Currie}, the taxpayer sought internal agency memoranda on the scope of the investigation of taxpayer, interviews with witnesses and confidential informants, information from third parties relating to financial transactions of taxpayer and IRS staff members notes and work papers. \textit{Id.} at 531. The \textit{Currie} court felt that this withheld material clearly constituted return information as "data collected by the Secretary with respect to a return." \textit{Id.} The Court quoted the following remarks of Senator Haskell: "Thus the addition by the IRS of easily deletable identifying information to the type of statistical study or compilation of data which, under its current practice, has been subject to disclosure will not prevent disclosure of such a study or compilation under the newly amended section 6103". 122 CONG. REC. S24012 (1976). \textit{See} White v. IRS, 707 F.2d 897, 901 (6th Cir. 1983); Chamberlain v. Kurtz, 598 F.2d 827, 840-41 (5th Cir. 1979) (intraagency communication, memoranda of conferences, various sensitive case reports and testimony of witnesses all constitute return information).

\textsuperscript{137} \textit{See supra} notes 118, 136 and accompanying text.

\textsuperscript{138} Long v. IRS, 596 F.2d 362 (9th Cir. 1979), \textit{cert. denied}, 446 U.S. 917 (1980).

\textsuperscript{139} \textit{Id.} at 368.

\textsuperscript{140} Neufeld v. IRS, 646 F.2d 661 (D.C. Cir. 1981). "Thus, we hold, in accordance with the Ninth Circuit's holding in \textit{Long}, that return information, properly defined, includes only information that directly or indirectly identifies a particular taxpayer, as the Haskell Amendment indicates." \textit{Id.} at 665. \textit{Accord} Moody v. IRS, 654 F.2d 795 (D.C. Cir. 1981); Moody v. IRS, 682 F.2d 266 (D.C. Cir. 1982); Ryan v. Bureau of Alcohol, Tobacco, & Firearms, 715 F.2d 644, 650 (D.C. Cir. 1983) (Wald, J. dissenting).


\textsuperscript{142} The language added by section 701(a) reads as follows:

Nothing in the preceding sentence, or in any other provision of law, shall be construed to require the disclosure of standards used or to be used for selection of returns for examination, or data used or to be used determining such standards, if the Secretary determines that such disclosure will seriously impair assessment, collection, or enforcement under the Internal Revenue laws.

Amendment as restricting confidentiality under section 6103. The IRS is aware of the case law dichotomy between the Ninth and Seventh Circuits, and the Internal Revenue Service Manual (IRM) acknowledges the differing interpretations among the federal courts of appeals.

The next issue to be addressed is whether the information submitted to the U.S. competent authority falls within the case law interpretation of return information under either the IRS or Ninth Circuit view. According to one commentator, the statutory definition of return information is defined broadly enough to include information filed with the competent authority. The statutory definition, however, is subject to differing interpretations. Using the King and IRS analysis, the type of information submitted to the competent authority would probably not be subject to disclosure to a third party FOIA requester for two reasons. First, the information submitted fits the statutory definition of “information collected by the Secretary” and, second, the information is not a statistical compilation which may be released under the current IRS interpretation of the Haskell Amendment. According to the legislative history, the Haskell Amendment intended to allow disclosure only of statistical studies and compilations. Thus, if the information submitted were classified as return information by the IRS pursuant to section 6103(b)(2) and the information did not contain any statistical data, it could not be disclosed to a third party according to the current IRS position.

The Ninth and D.C. Circuits’ interpretation of the Haskell Amendment, however, may allow disclosure of information submitted to the U.S. competent authority to a third party. The Internal Revenue Man-

---

143 Ryan, 715 F.2d at 650. The Court stated that it followed the Neufeld rationale of the Haskell Amendment, which allows information to be disclosed if identifying information is removed before disclosure. *Id.*

144 The IRM states with respect to third party return information:

The meaning of this exclusionary clause (known as the Haskell Amendment) has been the subject of differing judicial interpretations. The Ninth Circuit Court of Appeals in Willamette Indus. v. IRS, 689 F.2d 865 (9th Cir.), *cert. denied*, 460 U.S. 1052 (1982), has construed the Haskell Amendment as requiring the release of federal tax information to a third party FOIA requester after the deletion of taxpayer identifying details. The Service’s interpretation of the Haskell Amendment, as adopted by the Seventh Circuit in *King v. IRS*, 688 F.2d 488 (7th Cir. 1982), is that the Amendment pertains only to statistical studies and other amalgamated compilations of data the disclosure of which would not directly or indirectly identify a particular taxpayer.


146 *King*, 488 F.2d at 488.


148 See supra note 144.

149 See supra note 118.
ual, for example, instructs agents, for a Ninth Circuit request involving a case file not otherwise exempt under the FOIA, to delete all direct or indirect identifying information to the extent necessary to preclude the possibility of association with a particular taxpayer. Under the Ninth or D.C. Circuit view of section 6103, the information submitted to the U.S. competent authority may be released to an unrelated third party pursuant to a FOIA request. In general, the narrower view of tax return information would be more likely to allow release of information in competent authority files.

If the FOIA request does not originate in the Ninth or D.C. Circuits, the information in competent authority files would probably be protected under the more expansive view of section 6103(b)(2). One of the most exhaustive treatments of what constitutes return information under the current IRS position is contained in Chamberlain v. Kurtz. In Chamberlain, the Fifth Circuit had to determine which of sixty-three disputed documents were considered return information. Forty-two of the documents included various interagency memoranda analyzing and discussing Chamberlain’s tax liability, several summaries of the case and letters between IRS officials. The Court summarily held that all the materials collected by the IRS were return information and that the interagency memoranda were part of the deliberative process exemption from the FOIA. The Chamberlain court interpreted return information broadly. Presumably under a Chamberlain-type analysis, the material submitted to the competent authority and the interoffice memoranda concerning competent authority would be protected from disclosure to an unrelated third party.

Due to the conflicting interpretations of section 6103 and the Haskell Amendment, and the lack of symmetry among the federal courts of appeal, it is not apparent that information given to the competent authority or other information relating to the particular taxpayer’s case is protected under section 6103. Even if the IRS determines that materials submitted to the competent authority are return information, the applicable standard of judicial review of the IRS decision to withhold may significantly alter the eventual result. Currently, a controversy exists as

---

150 IRM (13) 52(a) 2, (13 46(3).
151 Williamette Industries, 689 F.2d at 865; Long v. IRS, 54 A.F.T.R.2d (P-H) para. 84,5326 (9th Cir. 1984).
152 Ryan, 715 F.2d at 644.
153 Chamberlain v. Kurtz, 589 F.2d 827 (5th Cir. 1979).
154 Id. at 840.
155 5 U.S.C. § 552(b)(5) (1982) provides that the FOIA does not apply to “inter-agency or intra-agency memoranda or letters which would not be available by law to a party other than an agency.”
to whether the highly deferential APA standard of review\textsuperscript{156} or the FOIA standards\textsuperscript{157} apply to IRS decisions to withhold information under section 6103.

C. Standard of Review of IRS Nondisclosure

If the IRS decides to withhold FOIA-requested competent authority materials pursuant to a broad reading of section 6103, its decision to withhold is potentially subject to differing standards of judicial review. Generally, if section 6103 provides the sole measure of the IRS' duty to disclose, on judicial review, the claimant has the burden of proving an abuse of IRS discretion.\textsuperscript{158} If the FOIA applies and merely incorporates the criteria of section 6103 as an exempting statute, on judicial review, the district court determines the matter de novo\textsuperscript{159} with the IRS bearing the burden of showing that nondisclosure was warranted by one of the nine specific exemptions listed in section 552(b) of the FOIA.\textsuperscript{160}

On its face, section 6103 appears to meet the FOIA exemption three test because it establishes particular criteria for withholding agency information.\textsuperscript{161} Under this interpretation the IRS initially determines whether to withhold information, while the FOIA mandates judicial review procedures of this decision, with the agency bearing the burden of proof.\textsuperscript{162} Due to a controversial decision of the District Court of the District of Columbia in \textit{Zale v. IRS},\textsuperscript{163} the relation of the FOIA and section 6103 remains unsettled. In \textit{Zale}, the district court opined that section 6103 should be the sole standard governing the release of return information.\textsuperscript{164} The \textit{Zale} court ignored the FOIA policy favoring disclosure of agency information and chose to rely on the highly deferential APA standard in which the claimant has the burden of proving abuse of discretion and nondisclosure. The \textit{Zale} court reasoned that the elabo-

\begin{itemize}
  \item \textsuperscript{156} See supra note 97.
  \item \textsuperscript{157} See supra notes 103-11 and accompanying text.
  \item \textsuperscript{158} Linsteadt v. IRS, 729 F.2d 998, 999 (5th Cir. 1984).
  \item \textsuperscript{159} 5 U.S.C. § 552(a)(4)(B) (1982).
  \item \textsuperscript{160} See supra note 110. See also Linsteadt, 729 F.2d at 999.
  \item \textsuperscript{161} Exemption three requires that information must be disclosed unless exempted by statute, and then only if the statute leaves no discretion on the issue, or establishes particular criteria for withholding or refers to particular types of matters to be withheld. 5 U.S.C. § 552(b)(3) (1982).
  \item \textsuperscript{162} See supra notes 103-11 and accompanying text.
  \item \textsuperscript{164} Zale Corp., 481 F. Supp. at 487. There were four FOIA requests by the taxpayer which covered more than 500,000 pages of documents and 350,000 computer cards. Id. The Court, in its own words, was forced with the reconciliation between FOIA preference for public disclosure of government information with a necessity for confidentiality in federal tax administration.
  \item \textsuperscript{165} Zale Corp., 481 F. Supp. at 490. See Linsteadt, 729 F.2d at 1001.
\end{itemize}
rate structure of section 6103, including detailed justifications for disclosing highly sensitive and unique information, should take preference over the generalized structure of the FOIA. Thus, the section 6103 standard of an IRS conclusion that the material constituted return information, would survive judicial review unless determined to be an abuse of discretion. The Zale interpretation has been adopted by several district courts as well as the Seventh Circuit.

The opposing view is represented by a 1984 Ninth Circuit case, Long v. IRS, which culminates years of litigation surrounding the release of Taxpayer Compliance Measurement Program (TCMP) data. In Long, the taxpayer sought computer tapes and other records in connection with the IRS' TCMP. The Long court held that section 6103 is reconcilable under the FOIA and qualifies as an exempting statute under FOIA exemption three. The Ninth Circuit's persuasive rationale was two-fold: 1) prior decisions of the Ninth Circuit held that section 6103 qualifies as a FOIA exemption, and 2) neither section 6103 nor its legislative history indicates that the section was intended to operate independently of the FOIA. The Ninth Circuit's view in Long maintains FOIA procedures for agency determinations of nondisclosure including de novo review by a district court with the IRS bearing the burden of showing that nondisclosure was warranted by exemption three of the FOIA. Thus, if the IRS chose to withhold competent authority materials on the grounds of return information, a district court would

166 Zale Corp., 481 F. Supp. at 489.
167 I.R.C. § 6103(b) (1982).
169 King, 688 F. Supp. at 495. Halsey v. IRS, 497 F. Supp. 617 (N.D. Tex. 1980); Green v. IRS, 556 F. Supp. 79 (N.D. Ind. 1982), aff'd, 734 F.2d 18 (7th Cir. 1984); White v. IRS, 707 F.2d 897, 900 (6th Cir. 1983) ("We are disposed to affirm the district Court [refusal to disclose documents] on the basis of the Zale and King rationale expressed in its decision . . . . Section 6103 we find to be a detailed and specified statutory scheme which essentially controls the disclosure of tax returns"); Check v. IRS, 703 F.2d 271, 272 (7th Cir. 1983) (section 6103 is exclusive as regards the FOIA and the invocation of section 6103 must be reviewed under the Administrative Procedure Act, 5 U.S.C. 701 (1982)).
170 Long, 54 A.F.T.R.2d (P-H) at para. 84,5326.
171 Tax Notes, Nov. 7, 1983 at 515, 516. Susan B. Long, an assistant professor at the School of Management of Syracuse University, has instituted approximately 13 overlapping lawsuits against the IRS and the Bureau of Economic Analysis (BEA) for access to TCMP data and accompanying documents. The most recent Long case, 54 A.F.T.R.2d (P-H) at para. 84,5326, is an attempt to consolidate pending lawsuits and eventually resolve the issue.
172 Long, 54 A.F.T.R.2d (P-H) at 84,5949.
173 Id. at para. 84,5951-2.
174 Williamette Industries 609 F.2d at 867-68; Long v. Bureau of Economic Analysis, 646 F.2d 1310, 1321 (9th Cir. 1981); Long, 596 F.2d at 365-70.
175 Long, 54 A.F.T.R.2d (P-H) at 84,5951.
177 Long, 54 A.F.T.R.2d (P-H) at 84,5954.
determine whether there was a sufficient basis for that decision. In addition, the FOIA provides that any "segregable" portion of a record shall be provided to any person requesting such records after deletion of the portions which are exempt under the FOIA. This release of segregable portions under the FOIA is a foundation for the eventual dissemination of competent authority information which is not considered return information.

VII. RELEASE OF COMPETENT AUTHORITY INFORMATION

To realistically advocate a systematic release of competent authority determinations, it is necessary to show that 1) the release of competent authority information is feasible under current case law interpretation of "return information" without violating U.S. law or a treaty secrecy clause, and 2) such a disclosure would promote the central tax treaty policy goal of eliminating the threat of double taxation. The issue to be resolved in the first problem is whether competent authority rulings would be granted confidential status under the FOIA and the tax "return information" umbrella. In order to release portions of a competent authority file pursuant to a FOIA request, two tests must be satisfied: 1) the materials must not be exempted from disclosure by one of the nine FOIA exemptions (particularly exemption three), and 2) the information received by the U.S. competent authority must not be completely protected from disclosure by treaty secrecy provisions.

The first prong of analysis leads to a discussion of whether competent authority materials meet the "return information" statutory protection and what standard of review applies if the IRS refuses to disclose certain information. Currently, the boundaries of "return information" confidentiality hinge on the interpretation of the Haskell

178 Id. at para. 84,5955. Under Vaughn v. Rosen, 484 F.2d 820 (D.C. Cir. 1983), cert. denied, 415 U.S. 977 (1974), the agency claiming exemption from disclosure of documents under the FOIA furnishes an index as an aid to the court in determining the validity of the claimed exemption. Moody, 682 F.2d at 268. Several courts have held that section 6103 does not preempt FOIA procedures. Tigar & Buffone v. Central Intelligence Agency, 47 A.F.T.R.2d (P-H) para. 81,576 (D.D.C. 1981) (it is beyond dispute that the court must conduct a de novo review of a decision to withhold records subject to a FOIA request). Britt v. IRS, 547 F. Supp. 808 (D.D.C. 1982); Moody, 682 F.2d at 266; Williamette Industries, 689 F.2d at 865; Currie, 704 F.2d 523; Linestead, 729 F.2d at 998.


180 The term "reasonably segregable portion" means any portion of the record requested which is not exempt from disclosure under 5 U.S.C. § 552(b) (1982), and which, after deletion of exempt material, still conveys meaningful information which is not misleading. Treas. Reg. § 601.701(b)(3) (1980).

181 See supra note 110.

182 See supra note 90-94 and accompanying text.

183 See supra note 114 and accompanying text.

184 See supra note 165-69 and accompanying text.
Amendment. According to the Ninth and D.C. Circuits view,\textsuperscript{185} the proper definition of "return information" includes only information that directly or indirectly identifies a particular taxpayer. This reading is based solely on the plain language of the statute\textsuperscript{186} and results in a narrow definition of "return information." This interpretation is based on the rationale that "return information" confidentiality is intended primarily to protect the identity of the taxpayer. The legislative history of section 6103 also indicates that Congress was focusing on protecting taxpayer identity and information pertaining to that taxpayer's return.\textsuperscript{187} Under section 6103, the definition of taxpayer identity includes the "name of the person with respect to whom a return is filed."\textsuperscript{188}

Under this interpretation, which is supported by the plain language of the statute, legislative history and the Ninth and D.C. Circuits, the competent authority materials which identify a particular taxpayer, such as names and addresses,\textsuperscript{189} would constitute "return information" and could not be released. Additional information submitted by the taxpayer, such as the description of the business, proposed allocations by the treaty country, portions of correspondence with the treaty country\textsuperscript{190} and the negotiated settlement, would not constitute "return information" after deletion of identifying details. Once the competent authority materials fall outside the protection of "return information," these materials could be released without violating IRC statutory confidentiality.\textsuperscript{191}

In the event that the IRS refuses to disclose competent authority information under section 6103, that decision is subject to judicial review. The applicable standard of review governing FOIA requests for tax information has been fully discussed in other legal writings.\textsuperscript{192} The

\textsuperscript{185} Williamette Industries, 689 F.2d at 867; Long, 54 A.F.T.R.2d (P-H) at para. 84,5326.

\textsuperscript{186} The relevant statutory language reads: "But such term (return information) does not include data in a form which cannot be associated with, or otherwise identify, directly or indirectly, a particular taxpayer." I.R.C. § 6103(b)(2) (1982).

\textsuperscript{187} "The term 'return information' is to include the following data pertaining to a taxpayer: his identity, the nature, source or amount of his income . . . ." S. REP. No. 938 (part I), 94th Cong., 2d Sess. (1976), reprinted in 1976 U.S. CODE CONG. & AD. NEWS 3439, 3748.

\textsuperscript{188} I.R.C. § 6103(b)(6) (1982). As interpreted by Judge Wald of the D.C. Circuit, this standard applies whether the taxpayer, in fact, would be identified by the information. Ryan, 751 F.2d at 651 (Wald, J., dissenting).

\textsuperscript{189} Rev. Proc. 82-29, supra note 15, § 4.04(b).

\textsuperscript{190} See supra note 186 and accompanying text.

\textsuperscript{191} Section 6103 protects only the statutorily defined "return" and "return information." I.R.C. § 6103(b)(1), (2) (1982).

\textsuperscript{192} Case Comment, supra note 163, at 1283; Note, supra note 163 at 697. The Note illuminates the following counterarguments to the Zale/IRS analysis: unless conflict is demonstrated between the FOIA and section 6103, section 6103 coexistence is not foreclosed. The author also points out that the legislative history indicates that the FOIA still applies to "return information" in other contexts, so it should apply in section 6103(b). In addition, the Haskell Amendment was intended to neither diminish nor enhance the scope of "return information," so the FOIA still applies to section
consensus is that section 6103 should not operate independently of the FOIA because there is no indication in either the FOIA or the IRC that tax information is afforded special treatment to bypass well-established FOIA judicial review procedures. The opposing view held by the Seventh Circuit and the IRS relies primarily on the rationale that section 6103 is a detailed statute which should override a general legislative mechanism such as the FOIA. The IRS view has been rejected by the commentators as an attempt to expand IRC confidentiality in order to circumvent the FOIA policy of agency disclosure.

Under the FOIA standards, the IRS would have the burden of proving that competent authority information met one of the nine exemptions, in particular exemption three which focuses on section 6103. Thus, even if the IRS withheld competent authority information under section 6103, the FOIA judicial review procedures would require the IRS to meet a stringent burden of proof as well as release segregable portions of the withheld information which is not confidential under the IRC. Therefore, a combination of a narrow definition of "return information," followed by the Ninth and D.C. Circuits with stringent FOIA judicial review standards, lays the foundation for the proposition that current case law would support a release of competent authority materials.

Aside from IRS protection of "return information," competent authority materials submitted to the U.S. competent authority from the treaty partner are subject to treaty secrecy clauses. This exchange of information would probably include "specific requests" regarding the taxpayer's business activities in the foreign country, taxes paid, proposed allocations by the treaty partner and details of the negotiated settlement between the IRS and the treaty partner. Tax treaties generally provide

---

193 Note, supra note 163, at 697-99.
194 Id. at 694.
195 Id. at 707-08.
196 See supra notes 176-79. A federal district court may enjoin the IRS from withholding agency records and order the production of any agency records improperly withheld from the requesting party. 5 U.S.C. § 522(a)(4)(B) (1982). The district court must review a denial to disclose de novo, and may examine the contents of the records to determine whether any FOIA exemptions apply. The FOIA also shifts the burden of proof from the requestor to the agency to sustain its decision to withhold information.
197 See supra note 180.
198 See supra notes 86-99 and accompanying text; see also INSTITUTE ON INTERNATIONAL TAXATION 325 (15th ed. 1984).
199 Seeman, supra note 87, at 338. Specific requests are one type of exchange of information between treaty partners.
that trade or professional secrets must not be disclosed and that other information received by the competent authority shall be treated in the same manner as information obtained under the laws of the United States. Therefore, except for trade or professional secrets, information received by the U.S. competent authority is subject to section 6103 and the limitations of the Haskell Amendment.

Under the prevailing analysis of Ninth and D.C. Circuits, the information submitted to the U.S. competent authority which constitutes "return information" such as names, addresses and taxpayer identification number, would be protected as confidential information under section 6103. Additional information which does not identify a particular taxpayer, such as the structure of business transactions, proposed allocations by a treaty partner, and the terms of the negotiated settlement, would not be confidential under section 6103. In this regard, much of the exchanged information is subject to domestic law and the prescribed limits of confidential treatment in that contracting state. As a result, the Ninth and D.C. Circuits' view of return information could well prevent competent authority materials from a foreign country from attaining confidential status under U.S. tax law, thereby increasing the possibility of disclosure.

The next issue is whether a competent authority release would promote the articulated U.S. tax treaty policy, that is:

[A] maximum degree of international tax harmonization, the reduction of tax-based barriers to the free movement of goods, persons and capital . . . with appropriate protections against international tax evasion . . . The essential long range objectives of the tax treaty program are to eliminate the impediments that double taxation, or the threat, might pose to the international flow of goods, capital and persons, and to establish fiscal relations between the U.S. and other nations.

In any release of tax treaty information a conflict would exist be-

---

200 See supra note 92.
201 Canada-U.S. Tax Treaty, art. XXVII, supra note 85.
202 See INTERNAL REVENUE MANUAL (25)20(4): Information which is received by the IRS from a foreign tax authority is subject to secrecy clauses contained in the specific tax treaty. In general, these secrecy clauses provide that information received by the IRS cannot be disclosed to any persons other than those (including courts and administrative bodies) concerned with the assessment, collection, enforcement or prosecution with respect to the taxes, which are the subject of the respective tax treaties. Additionally, to the extent the information relates to the liability or possible liability for tax of a United States taxpayer or otherwise falls within the definition of return information in IRC 6103(b)(2), it is return information subject to the restrictions on disclosure imposed by IRC 6103 as well as the restrictions contained in the treaty clauses.
203 Rev. Proc. 82-29, § 4.04(b), supra note 15.
204 See supra note 186 and accompanying text.
205 See supra note 202 and accompanying text.
206 Rosenbloom & Langbein, supra note 10, at 398, 405.
between two central policies: the taxpayer's ability to avoid double taxation versus maintenance of fiscal relations with treaty partners. The avoidance of double taxation policy would clearly be promoted by a competent authority release. Such a release would provide the international tax planner with information on the operative forces underlying tax treaty administration in much the same manner that IRS administrative releases guide U.S. taxpayers today.\textsuperscript{207} In the last decade, a plethora of tax information has been periodically released which at one time was considered undisclosable, such as private letter rulings,\textsuperscript{208} TM’s,\textsuperscript{209} AOD’s\textsuperscript{210} GCM’s\textsuperscript{211} and the IRM.\textsuperscript{212} These administrative releases now provide the tax practitioner with information on IRS procedure, interpretation and implementation of the tax laws which assist in tax planning.\textsuperscript{213} The private letter ruling process, for example, has illuminated many of the advantages as well as disadvantages of a systematic release of IRS information to the public. Some of the advantages include the use of letter rulings as guidance by tax professionals to support a particular transaction,\textsuperscript{214} additional evidence in litigation, a research tool\textsuperscript{215} and an interpretive guide to the current IRS position.\textsuperscript{216}

Similarly, a competent authority determination release would introduce an element of certainty into international tax planning by revealing the actions of treaty partners with respect to a particular transaction.\textsuperscript{217} At present, there exists no body of tax information which highlights the administrative actions of both treaty partners with regard to a particular transaction.\textsuperscript{218} If the international tax planner perceives similarities be-

\textsuperscript{207} Portney, \textit{supra} note 5, at 754. "Our Tax System is unique in providing a readily accessible well-developed system of advance guidance to taxpayers." \textit{Id.}

\textsuperscript{208} See \textit{supra} note 5.

\textsuperscript{209} See \textit{supra} note 8.

\textsuperscript{210} See \textit{supra} note 7.

\textsuperscript{211} See \textit{supra} note 6.

\textsuperscript{212} See \textit{supra} note 11.

\textsuperscript{213} The IRM, together with the IRS’ Statement of Procedural Rules, revenue procedures, revenue rulings, temporary, proposed and final regulations as well as private letter rulings, sets forth the IRS construction and administration of the tax code. Parnell, \textit{supra} note 11, at 687.

\textsuperscript{214} Holden & Novey, \textit{supra} note 5, at 338.

\textsuperscript{215} Legal Times, Oct. 8, 1984, at 6, col. 3.

\textsuperscript{216} Holden & Novey, \textit{supra} note 5, at 340.

\textsuperscript{217} \textit{Id.} at 337, 345.

\textsuperscript{218} There are sporadic releases of information on foreign transactions involving treaty partners such as private letter rulings, GCMs and case law, but there is no centralized release on treaty partner actions. \textit{See U.S. Activities of Foreigners and Tax Treaties, 37 Tax Law.} 1045 (1984). Private Letter Ruling 8339036 states in part:

> On November 9, 1982, Corporation A requested the assistance of the United States Competent Authority in interpreting Article VII(2), Article II(1)(c), and Article VII(1) of the Tax Treaty with respect to the first and second 1974 dividends and the 1975 dividend. Whether any progress can be made with Country X tax authorities is doubtful . . .

Priv. Rul. 8339036 (June 28, 1983).
tween a competent authority release situation and his/her own, the international tax planner may structure the transaction to avoid a potential conflict. By possessing some ability to anticipate a response by certain treaty partners to particular transactions, the international tax planner may lower the degree of risk attached to double taxation and costly administrative remedies. Eventually, a body of competent authority would emerge, allowing the international tax planner to study past actions of treaty partners as a guide to future conduct. As the risk is lowered, the ability of persons and capital to move to foreign markets without tax impediments is increased, furthering tax treaty goals.

The argument against a competent authority release focuses on the potential alienation of a tax treaty partner if the United States discloses treaty information. In examining the U.S. Model Treaty, however, the treaty partner may be unjustifiably relying upon the breadth of the tax treaty secrecy provisions. Except for trade or business secrets which are specifically mentioned in the treaty, information submitted to the U.S. competent authority is subject to the secrecy law of the United States, which is, in this case, codified in section 6103 of the IRC.

Under the current view of return information in section 6103 and FOIA judicial review, a variety of IRS agency information is now regularly published and available to the public. The treaty country, therefore, should be aware of the liberal disclosure provisions in U.S. law, especially in the FOIA, and allow the dissemination of information. The Canada-U.S. tax treaty, for example, provides that the exchange of information should not be construed to supply information which is not obtainable under the laws or in the normal course of tax administration. This provision highlights the tendency of the tax treaty to defer to domestic secrecy laws to protect information—section 6103 and the boundaries of tax “return information.”

Of course, the proposal creates an additional administrative burden for the IRS, who will prepare and disseminate the competent authority information generated by the competent authority. As a comparison, in the private letter ruling context, much of the criticism surrounding tax professionals’ reliance on the letter rulings as precedent is due to the fact

219 Holden & Novey, supra note 5, at 337, 345.
220 See 1981 Model Treaty, supra note 34.
221 See supra notes 86-99 and accompanying text.
222 See supra note 202 and accompanying text.
223 See supra notes 185-97 and accompanying text.
224 See supra notes 192-97 and accompanying text.
225 For example, private letter rulings, GCMs, TMs, AODs and IRM. See supra notes 1-9 and accompanying text.
226 See supra note 21.
227 Canada-United States Tax Treaty, art. XXVII(3)(b), supra note 85, at para. 1317B.
that only lower level IRS staff members prepare letter rulings. Upper level IRS officials are unable to review the letter rulings because of the high volume of requests, estimated at 6000 per year.\textsuperscript{228} Accordingly, the IRS places a prominent disclaimer on the letter ruling stating that the ruling may not be used or cited as precedent.\textsuperscript{229} In the competent authority situation, however, there are usually under 100 cases resolved annually,\textsuperscript{230} so the IRS could review and release such information without a dramatic increase in the expenditure of resources. In addition, the competent authority is a relatively slow process, averaging about 16 months.\textsuperscript{231} Therefore, the IRS would not be under the extreme time pressure apparent in the letter ruling process.\textsuperscript{232} The IRS burden, then, would be relatively light compared to the benefit to the international tax planner, which would be substantial.

Logistically, a variety of competent authority information could be consolidated into one document which would summarize the case history, illustrate the respective positions of the treaty partners and reveal the eventual resolution of the double taxation issue. All identifying information, such as names and addresses and any other information which could indirectly lead to identification of the taxpayer (a unique product or service), would be deleted to comply with section 6103.\textsuperscript{233} The summary document could be prepared by the Foreign Operations District\textsuperscript{234} or the competent authority staff after a resolution of the issue, and then released to the public. Eventually, the summary document could be published in a loose-leaf service or databank entry to ensure the retrievability of the information. A typical competent authority release would contain identification of the double taxation issue, relevant treaty provisions in dispute, proposed action by the treaty partners and the negotiated settlement (in proportion rather than actual figures). In this manner, the taxpayer's confidentiality is respected, the international tax planner is assisted in tax treaty implementation and the threat of double taxation is appreciably reduced.

\textsuperscript{228} Portney, supra note 5, at 755. Legal Times, supra note 215, at 6.
\textsuperscript{229} I.R.C. § 6110(j)(3) (1982).
\textsuperscript{230} Goodrich, supra note 23, at 112.
\textsuperscript{231} Id.
\textsuperscript{232} Legal Times, supra note 215, at 6.
\textsuperscript{233} I.R.C. § 6103(b)(2) (1982).
\textsuperscript{234} See supra note 35.