

IN THE UNITED STATES DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF FLORIDA
MIAMI DIVISION

Civil No. **09-20423** *ME* - GOLD

UNITED STATES OF AMERICA,)
)
Petitioner,)
)
v.)
)
UBS AG,)
)
Respondent.)

MEALUEN

DECLARATION OF BARRY B. SHOTT

Barry B. Shott, pursuant to 28 U.S.C. § 1746, declares:

1. I am the duly commissioned Deputy Commissioner (International) with the Large & MidSize Business (LMSB) Division of the Internal Revenue Service. I am employed in the office of the Commissioner, LMSB, and I am the United States Competent Authority. As the Competent Authority, I oversee the international exchange of information between the United States and foreign countries pursuant to tax treaties. Before I was appointed to my present position, I was a Director of Field Operations, and then the Financial Services Industry Director, in the LMSB Division. While with the Financial Services Industry, I was directly responsible for oversight of the Qualified Intermediary Program.

The Qualified Intermediary Program

2. Effective in 2001, the Secretary of the Treasury issued regulations requiring foreign banks to withhold taxes and pay over to the IRS 30% of income earned with respect to US investments maintained in foreign financial accounts. Foreign banks could avoid this

requirement if they identified the beneficial owner of each such account to a US withholding agent.

3. In order to simplify the documentation procedure, the IRS created the Qualified Intermediary Program (QI Program). Under the QI Program, foreign banks that agree to follow certain procedures can – by entering into a QI Agreement – assume the responsibilities of a US withholding agent. Those responsibilities may include determining which customers qualify for treaty benefits (such as reduced or eliminated withholdings, based on documents establishing the identity of the account’s beneficial owner), without disclosing to US authorities the identities of non-US taxpayers. The QI program provided a valuable benefit to foreign banks in maintaining their business with respect to the holdings of US investments by non-US taxpayers.

4. The QI Program governs the responsibilities of foreign banks only as to accounts that contain securities. The QI Program does not apply to cash-only accounts.

5. The purpose of the QI program is to make it easier for the IRS to obtain foreign banks’ compliance with US tax laws, in respect of securities accounts maintained for both US and non-US taxpayers. The QI program was not, however, intended to assist US taxpayers in finding clever ways to avoid their obligations to comply with US tax laws.

6. The QI Program does **not** relieve US taxpayers of their obligation to report all income to the IRS, wherever that income is earned. And the QI Program does **not** relieve US taxpayers of their obligation to disclose to the IRS the existence of all foreign financial accounts over which they exercise signatory or other authority.

7. In order for the QI Program to function as intended, foreign banks must correctly and truthfully ascertain the identity and citizenship/residence of their clients. Thus, the QI

Program requires foreign banks to obtain and maintain IRS Forms W-8BEN, which report the identities of non-US account holders, and IRS Forms W-9, which report the identities of US account holders. Model copies of Forms W-8BEN and W-9 are attached as Exhibits A and B, respectively.

8. Under the QI program, foreign banks must examine formal identification, citizenship, and residency documentation. Clients claiming non-US residence/citizenship must document their status. Because of the potential for abuse, it is especially important that foreign bankers verify the non-US residence/citizenship of customers whom they contact within the United States – such as by meetings in person and contacts via telephone, mail, e-mail and facsimile. Foreign banks may not assist US taxpayers to conceal from the IRS their identities, or the true beneficial ownership of foreign securities accounts.

9. Foreign banks that participate in the QI Program and maintain accounts for US clients must prepare and transmit to the IRS Forms 1099 reporting payments on US investments. Although US taxpayers must report and pay US income tax on all income, regardless of where in the world it is earned, the Forms 1099 issued by foreign banks in the QI Program report only interest, dividends and sales proceeds on US investments. Under the QI Program, the bank must issue the Form 1099 to the US taxpayer, and report to the IRS the information contained on the Form 1099.

10. When a US taxpayer refuses to submit the proper documentation, a foreign bank that is party to a QI Agreement must make backup withholding at 28% of all US-source income. This is the same backup withholding obligation that is imposed on US banks.

11. If a foreign bank that is party to a QI Agreement, (1) knows that an account holder is a US taxpayer who must provide documentation, and (2) is prohibited by law – whether by statute or by contract – from disclosing the identity of the account holder, the foreign bank must request from the account holder the authority either to disclose that person’s identity to the IRS, or to exclude US securities from that account. If, within 60 days, the foreign bank does not receive authority to disclose the owner’s identity or exclude US securities, it must sell the US securities in the account.

12. Even where the foreign account does not contain US securities, the bank must make backup withholdings on all “deemed sales” for those US taxpayers who refuse to submit the proper documentation. “Deemed sales” are sales effected through the use of US jurisdictional means and are, therefore, “deemed” to have occurred within the United States.

13. UBS entered into a QI Agreement with the IRS in 2001. That QI Agreement remained in effect throughout the period covered by the IRS investigation in which the John Doe summons was issued to UBS in 2008.

Access to Swiss Bank Records Is Not Available Through Alternative Means

14. One of my current responsibilities is to engage in exchanges of information under tax conventions (treaties), including the Convention between the United States and the Swiss Confederation for the Avoidance of Double Taxation with Respect to Taxes on Income (the “Swiss Treaty”). Article 26 of the Swiss Treaty (signed in Washington, DC on October 2, 1996) provides for the exchange of information as is necessary, “for the prevention of tax fraud or the like.”

15. In the experience of the IRS, the Swiss Treaty does not provide an alternative way to obtain the information sought in the John Doe summons at issue in this case. Based upon my conversations with the Swiss competent authority, this is because the Swiss government will not exchange information about a taxpayer unless the taxpayer committed an affirmative act of deception (such as falsifying a document), above and beyond a mere failure to report the existence of an account, or income earned in that account. The IRS may ultimately determine that at least some of the “John Does” have engaged in acts that would enable the IRS to obtain information under the Swiss Treaty. But for now, the IRS is investigating US taxpayers who failed to report the existence of Swiss bank accounts – or income earned on those accounts. Absent additional facts, those failures do not enable the IRS to obtain from the Swiss government the information demanded in the John Doe summons issued to UBS.

16. Until recently, with regard to this current matter, Article 26 of the Swiss Treaty had been strictly applied by the Swiss Competent Authority to provide the IRS assistance only in response to specific requests that name a particular taxpayer. As a consequence, it had also been the IRS’s experience that the Swiss Competent Authority would only provide the IRS with information for an examination or investigation that concerns a specifically identified taxpayer. The current IRS investigation is focused on learning the identities of US taxpayers not known to the IRS.

17. Recently, representatives of the Swiss government have indicated to me that, under limited circumstances, they might be willing to consider a request under the Swiss Treaty that did not specifically identify taxpayers whose records are sought. As a consequence, on July 16, 2008, the United States made a formal request under the Swiss Treaty (“Treaty Request”).

Thus far, however, the Swiss government has not produced any documents in response to the Treaty Request.

18. According to the declaration of Daniel Reeves (which I have read), the United States has learned that UBS maintained as many as 52,000 undeclared accounts for US taxpayers, all of which are subject to the summons. Based on the best information presently available to me, it appears that the Treaty Request may only result in the production of records for, at most, about 300 of those 52,000 accounts. According to my conversations with officials of the Swiss Government, this is because (as noted in ¶ 15 above) the Swiss Government interprets the Treaty to require a taxpayer to have committed affirmative acts of fraud or deception, in order to trigger Switzerland's obligation to provide information about that taxpayer to the IRS.

19. I last spoke with officials of the Swiss Government about the Treaty Request on January 21, 2009. During that conversation, I learned that the Swiss Government had made final determinations to provide the requested records for only twelve accounts. The Swiss Government will not, however, provide records to the IRS about those twelve accounts until after the account holders have been given an opportunity to litigate in a Swiss court the Swiss Government's decision to turn their records over to the IRS. During our January 21, 2009, conversation, I learned that the twelve account holders are either exercising their appeal rights, or contemplating exercising their appeal rights. I have also learned from my subordinates that the Swiss Government has determined there is insufficient evidence of "fraud and the like" with respect to two other accounts, and accordingly will not provide information about those two accounts. In sum, the Swiss Government has not provided any records sought under the Treaty Request, and it is not clear when, if ever, it will.

I declare under penalty of perjury, pursuant to 28 U.S.C. § 1746, that the foregoing is true and correct.

Executed this 6th day of February 2009 in Washington, DC.



BARRY B. SHOTT
Deputy Commissioner, *LMSB*
Internal Revenue Service

Shott Declaration Exhibit A



Form **W-8BEN**
(Rev. February 2006)
Department of the Treasury
Internal Revenue Service

Certificate of Foreign Status of Beneficial Owner for United States Tax Withholding

▶ Section references are to the Internal Revenue Code. ▶ See separate instructions.
▶ Give this form to the withholding agent or payer. Do not send to the IRS.

Do not use this form for:

- A U.S. citizen or other U.S. person, including a resident alien individual W-9
- A person claiming that income is effectively connected with the conduct of a trade or business in the United States W-8ECI
- A foreign partnership, a foreign simple trust, or a foreign grantor trust (see instructions for exceptions) W-8ECI or W-8IMY
- A foreign government, international organization, foreign central bank of issue, foreign tax-exempt organization, foreign private foundation, or government of a U.S. possession that received effectively connected income or that is claiming the applicability of section(s) 115(2), 501(c), 892, 895, or 1443(b) (see instructions) W-8ECI or W-8EXP

Note: These entities should use Form W-8BEN if they are claiming treaty benefits or are providing the form only to claim they are a foreign person exempt from backup withholding.

- A person acting as an intermediary W-8IMY

Note: See instructions for additional exceptions.

Instead, use Form:

Part I Identification of Beneficial Owner (See instructions.)

1 Name of individual or organization that is the beneficial owner		2 Country of incorporation or organization	
3 Type of beneficial owner:			
<input type="checkbox"/> Individual	<input type="checkbox"/> Corporation	<input type="checkbox"/> Disregarded entity	<input type="checkbox"/> Partnership <input type="checkbox"/> Simple trust
<input type="checkbox"/> Grantor trust	<input type="checkbox"/> Complex trust	<input type="checkbox"/> Estate	<input type="checkbox"/> Government <input type="checkbox"/> International organization
<input type="checkbox"/> Central bank of issue	<input type="checkbox"/> Tax-exempt organization	<input type="checkbox"/> Private foundation	
4 Permanent residence address (street, apt. or suite no., or rural route). Do not use a P.O. box or in-care-of address.			
City or town, state or province. Include postal code where appropriate.			Country (do not abbreviate)
5 Mailing address (if different from above)			
City or town, state or province. Include postal code where appropriate.			Country (do not abbreviate)
6 U.S. taxpayer identification number, if required (see instructions)		7 Foreign tax identifying number, if any (optional)	
<input type="checkbox"/> SSN or ITIN <input type="checkbox"/> EIN			
8 Reference number(s) (see instructions)			

Part II Claim of Tax Treaty Benefits (if applicable)

9 I certify that (check all that apply):

- a The beneficial owner is a resident of _____ within the meaning of the income tax treaty between the United States and that country.
- b If required, the U.S. taxpayer identification number is stated on line 6 (see instructions).
- c The beneficial owner is not an individual, derives the item (or items) of income for which the treaty benefits are claimed, and, if applicable, meets the requirements of the treaty provision dealing with limitation on benefits (see instructions).
- d The beneficial owner is not an individual, is claiming treaty benefits for dividends received from a foreign corporation or interest from a U.S. trade or business of a foreign corporation, and meets qualified resident status (see instructions).
- e The beneficial owner is related to the person obligated to pay the income within the meaning of section 267(b) or 707(b), and will file Form 8833 if the amount subject to withholding received during a calendar year exceeds, in the aggregate, \$500,000.

10 Special rates and conditions (if applicable—see instructions): The beneficial owner is claiming the provisions of Article _____ of the treaty identified on line 9a above to claim a _____ % rate of withholding on (specify type of income): _____
 Explain the reasons the beneficial owner meets the terms of the treaty article: _____

Part III Notional Principal Contracts

11 I have provided or will provide a statement that identifies those notional principal contracts from which the income is **not** effectively connected with the conduct of a trade or business in the United States. I agree to update this statement as required.

Part IV Certification

Under penalties of perjury, I declare that I have examined the information on this form and to the best of my knowledge and belief it is true, correct, and complete. I further certify under penalties of perjury that:

- I am the beneficial owner (or am authorized to sign for the beneficial owner) of all the income to which this form relates.
 - The beneficial owner is not a U.S. person.
 - The income to which this form relates is (a) not effectively connected with the conduct of a trade or business in the United States, (b) effectively connected but is not subject to tax under an income tax treaty, or (c) the partner's share of a partnership's effectively connected income, **and**
 - For broker transactions or barter exchanges, the beneficial owner is an exempt foreign person as defined in the instructions.
- Furthermore, I authorize this form to be provided to any withholding agent that has control, receipt, or custody of the income of which I am the beneficial owner or any withholding agent that can disburse or make payments of the income of which I am the beneficial owner.

Sign Here

 Signature of beneficial owner (or individual authorized to sign for beneficial owner) Date (MM-DD-YYYY) Capacity in which acting

Shott Declaration Exhibit B

Form **W-9**
 (Rev. October 2007)
 Department of the Treasury
 Internal Revenue Service

Request for Taxpayer Identification Number and Certification

**Give form to the
 requester. Do not
 send to the IRS.**

Print or type See Specific Instructions on page 2.	Name (as shown on your income tax return)	
	Business name, if different from above	
	Check appropriate box: <input type="checkbox"/> Individual/Sole proprietor <input type="checkbox"/> Corporation <input type="checkbox"/> Partnership <input type="checkbox"/> Limited liability company. Enter the tax classification (D=disregarded entity, C=corporation, P=partnership) ▶ <input type="checkbox"/> Exempt payee <input type="checkbox"/> Other (see instructions) ▶	
	Address (number, street, and apt. or suite no.)	Requester's name and address (optional)
	City, state, and ZIP code	
	List account number(s) here (optional)	



Part I Taxpayer Identification Number (TIN)

Enter your TIN in the appropriate box. The TIN provided must match the name given on Line 1 to avoid backup withholding. For individuals, this is your social security number (SSN). However, for a resident alien, sole proprietor, or disregarded entity, see the Part I instructions on page 3. For other entities, it is your employer identification number (EIN). If you do not have a number, see *How to get a TIN* on page 3.

Social security number
or
Employer identification number

Note. If the account is in more than one name, see the chart on page 4 for guidelines on whose number to enter.

Part II Certification

Under penalties of perjury, I certify that:

1. The number shown on this form is my correct taxpayer identification number (or I am waiting for a number to be issued to me), and
2. I am not subject to backup withholding because: (a) I am exempt from backup withholding, or (b) I have not been notified by the Internal Revenue Service (IRS) that I am subject to backup withholding as a result of a failure to report all interest or dividends, or (c) the IRS has notified me that I am no longer subject to backup withholding, and
3. I am a U.S. citizen or other U.S. person (defined below).

Certification instructions. You must cross out item 2 above if you have been notified by the IRS that you are currently subject to backup withholding because you have failed to report all interest and dividends on your tax return. For real estate transactions, item 2 does not apply. For mortgage interest paid, acquisition or abandonment of secured property, cancellation of debt, contributions to an individual retirement arrangement (IRA), and generally, payments other than interest and dividends, you are not required to sign the Certification, but you must provide your correct TIN. See the instructions on page 4.

Sign Here	Signature of U.S. person ▶	Date ▶
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General Instructions

Section references are to the Internal Revenue Code unless otherwise noted.

Purpose of Form

A person who is required to file an information return with the IRS must obtain your correct taxpayer identification number (TIN) to report, for example, income paid to you, real estate transactions, mortgage interest you paid, acquisition or abandonment of secured property, cancellation of debt, or contributions you made to an IRA.

Use Form W-9 only if you are a U.S. person (including a resident alien), to provide your correct TIN to the person requesting it (the requester) and, when applicable, to:

1. Certify that the TIN you are giving is correct (or you are waiting for a number to be issued),
2. Certify that you are not subject to backup withholding, or
3. Claim exemption from backup withholding if you are a U.S. exempt payee. If applicable, you are also certifying that as a U.S. person, your allocable share of any partnership income from a U.S. trade or business is not subject to the withholding tax on foreign partners' share of effectively connected income.

Note. If a requester gives you a form other than Form W-9 to request your TIN, you must use the requester's form if it is substantially similar to this Form W-9.

Definition of a U.S. person. For federal tax purposes, you are considered a U.S. person if you are:

- An individual who is a U.S. citizen or U.S. resident alien,
- A partnership, corporation, company, or association created or organized in the United States or under the laws of the United States,
- An estate (other than a foreign estate), or
- A domestic trust (as defined in Regulations section 301.7701-7).

Special rules for partnerships. Partnerships that conduct a trade or business in the United States are generally required to pay a withholding tax on any foreign partners' share of income from such business. Further, in certain cases where a Form W-9 has not been received, a partnership is required to presume that a partner is a foreign person, and pay the withholding tax. Therefore, if you are a U.S. person that is a partner in a partnership conducting a trade or business in the United States, provide Form W-9 to the partnership to establish your U.S. status and avoid withholding on your share of partnership income.

The person who gives Form W-9 to the partnership for purposes of establishing its U.S. status and avoiding withholding on its allocable share of net income from the partnership conducting a trade or business in the United States is in the following cases:

- The U.S. owner of a disregarded entity and not the entity,