

Choosing to Renounce U.S. Citizenship or Legal Permanent Residence (Green Card)

Departures Effective June 17, 2008 Forward

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The goal of this article is to provide a comprehensive checklist of information for the U.S. person to consider prior to choosing to renounce U.S. citizenship or legal permanent residence. This article is not intended to teach you the required technical competence to perform self compliance; however it will certainly arm you with the technical knowledge to determine if your U.S. Certified Public Accountant (CPA) tax preparer knows all that they should know to provide you with technically competent professional services.

Expatriation After June 16, 2008:

Effective June 16, 2008 (different rules applied to expatriation: 1) before June 4, 2004, 2) Between June 3, 2004 and June 17, 2008 and 3) after June 16, 2008 in accordance with IRS Notice 2009-85, emanating from Section 804 of the American Jobs Creation Act of 2004, and then Effective June 17, 2008 in accordance with The Heroes Earnings and Assistance Relief Act of 2008) IRC Section 877- Expatriation to Avoid Tax- and Form 8854- Initial and Annual Expatriation Statement - reporting requirements, were amended and Section 877A- Tax Responsibilities of Expatriation was added.

Expatriation is defined as: 1) applying to U.S. citizens (by filing DS-4083- Certificate of Loss of Nationality of the United States) or 2) Lawful Permanent Residents (“Green Card Holders”) who are Long Term Residents (LTR’s) (by filing I-407- Record of Abandonment of Lawful Permanent Resident Status), who have renounced their statuses respectively.

A long-term resident (LTR) is defined as a lawful permanent resident whose status was held in at least any part of 8 of the last 15 tax years ending with the year that residency ends. Do not count any tax year where you were treated as a tax resident of a foreign country that has an income tax treaty with the U.S. and where you do not waive treaty benefits.

If you meet the above requirements 1) or 2), the expatriation rules will apply and you will be deemed a ‘covered expatriate’ if any of the following apply: 1) Your average annual net income tax liability for the 5 years ending before the date of expatriation is more than \$190,000 for 2023 (\$178,000 for 2022, \$172,000 for 2021, \$171,000 for 2020, \$168,000 for 2019, \$165,000 for 2018, \$162,000 for 2017, \$161,000 for 2016, \$160,000 for 2015, \$157,000 for 2014, \$155,000 for 2013, and \$151,000 for 2012), or 2) Your net worth is 2 million or more on the date of expatriation or 3) (effective June 3, 2004 forward) you fail to certify on Form 8854, Initial and Annual Expatriation Statement, that you have complied with all U.S. federal tax obligations for the 5 years preceding the date of expatriation.

Effective as at June 3, 2004 there no longer remains a ‘presumption’ of tax motivation and therefore you can no longer request a private letter ruling to avoid the application of IRC Sec 877. If you meet these tests after June 16, 2008 you are now subject to the IRC Sec 877 and 877A- Expatriation provisions.

Exceptions- *****New effective after June 16, 2008- definition changes:

An exception (effective June 3, 2004 forward) to the expatriation rules apply for Dual citizens and certain minors, as follows (however the Form 8854, Initial and Annual Expatriation Statement, certification regarding U.S. federal tax compliance for the last 5 years must still be supplied):

1) Dual citizens- defined as: At birth a U.S. citizen and citizen of another country who continues as a citizen of that other country, in addition to being taxed there as a resident of that other country and were not a U.S. resident for more than 10 during the last 15 years *or*

2) Certain minors- defined as: expatriation before 18 ½ years old and who were a resident of the U.S. for not more than 10 years prior to expatriation.

Expatriation Effective Date- *****New effective after June 16, 2008:

You are considered to have expatriated the date you relinquish U.S. citizenship (in part filing the INS Form DS 4083) or terminate long-term residency (in part filing the INS Form I-407). There is no longer effective after June 16, 2008 a requirement to file a Form 8854, Initial and Annual Expatriation Statement, to establish an effective expatriation date.

Former U.S. citizens- You are considered to have relinquished your U.S. citizenship *the earliest of:* 1) The date you renounce U.S. citizenship before a diplomatic or consular officer of the U.S. (provided followed by INS Form DS 4083 issuance of certificate of loss of nationality), *or* 2) date you furnish the State Department a signed statement of voluntary relinquishment of U.S. nationality (provided followed by Form DS 4083 issuance of certificate of loss of nationality), *or* 3) date State Department issues issuance of INS Form 4083 certificate of loss of nationality, *or* 4) date U.S. court cancels your certificate of naturalization.

Former Long-Term Residents- You are considered to have terminated your long-term residency (LTR) *the earliest of:* 1) The date you voluntarily relinquish/ abandon your ‘green card’ by filing with DHS INS Form I-407 with a U.S. consular or immigration officer, *or* 2) date you became subject to a final administrative order for removal from the U.S. under the IN Act and actually leave the U.S., *or* where 3) a dual resident of the U.S. and the country of new residence has an income tax treaty with the U.S., you are resident of that new country and filed Form(s) 8833, Treaty Based Return Position Disclosure Under Section 6114 or 7701(b) and file Form 8854- Initial and Annual Expatriation Statement.

EXPATRIATION TAX:

(*****New tax effective June 17, 2008) New IRC Sec. 877A- Tax Responsibility of Expatriation:-
New Expatriation- Mark-to-Market Exit Tax:

*****Effective June 17, 2008 in accordance with The Heroes Earnings and Assistance Relief Act of 2008, IRC Section 877A- Tax Responsibilities of Expatriation was added to implement the abolishment of the expatriation rules with regards to the filing of U.S. tax returns for a period of ten (10) years, to be replaced by a one-time mark-to-market exit tax on an individual’s net unrealized gain on property over a specified exemption limit, as of the day before the expatriation date.

These new rules align the U.S. with tax rules similar in other income tax treaty countries. Accordingly, if these individuals meet the expatriation rules i.e. are a ‘covered expatriate’, they will now be treated as if they sold (deemed sale) all of their property at fair market value on the day prior to the expatriation date.

The mark-to-market tax is imposed on the property’s net unrealized gains to the extent it exceeds \$821,000 for 2023 (\$767,000 for 2022, \$744,000 for 2021, \$737,000 for 2020, \$725,000 for 2019, \$713,000 for 2018, \$699,000 for 2017, \$693,000 for 2016, \$690,000 for 2015, \$680,000 for 2014, \$668,000 for 2013, and \$651,000 for 2012) from the original 2008 \$600,000 exclusion amount when the law was first implemented.

This exclusion amount must be allocated to all built in gain property that is subject to the mark to market regime and owned by the covered expatriate on the day before expatriation, regardless of whether the *covered expatriate* makes an election (as below) to defer tax with respect to any property. Specifically, the exclusion must be first allocated pro rata to each of the built-in gain property by multiplying the exclusion by the ratio of built in gain per asset over the total built in gains of all assets. The allocated exclusion may not exceed the per asset built in gain. If the built-in gains of all assets are less than the total exclusion, then the exclusion is limited to this total built in gain amount.

The exclusion is once per lifetime; however, any unused initial exclusion subject to a future years inflation adjusted exclusion, may be applied to a second expatriation.

Gains arising from the deemed sales must be taken into taxation for the tax year of the deemed sale. Deemed losses are treated under existing IRC law and regulations.

Step-up in Basis- For purposes of determining the tax imposed, a stepped-up basis rule applies to property that was held by an individual on the date the individual first became a U.S. resident alien (within the meaning of Code Sec. 7701(b)). The individual is treated as having a basis on that date of not less than the fair market value of the property on that date. However, the individual may make an irrevocable election not to have this rule apply on a property by property basis and this rule will not apply to U.S. real property interests and property held or used in connection with the conduct of a trade or business within the U.S. Unless in the later case the individual was a resident of a U.S. treaty country and the nonresident alien held the property in connection with the conduct of a U.S. trade or business that was not carried on through a permanent establishment in the U.S.

Mark-to-market exceptions-:

1) Eligible Deferred Compensation Items (per IRC Sec 219(g)(5)- all basic work related qualified retirement plans- Profit Sharing plans, including 401(k)/ 403(b)/ Annuity Plans and Contracts, SEP's, Simple Retirement Accounts, interests foreign pension plans or similar retirement arrangements or programs, any item of qualified deferred compensation '*substantially vested*' - qualified or unqualified options, restricted stock awards, stock appreciation rights or IRC Sec 83)- are *subject to a 30% withholding at source and making an irrevocable waiver of any right to claim any reduction in withholding under any treaty with the U.S.,*

2) Ineligible Deferred Compensation items- any item not covered or referred to above as Eligible Deferred Compensation- *treated as having received the present value of the accrued benefits the day prior to expatriation,*

3) Interests in Nongrantor Trusts- domestic or foreign - *subject to 30% withholding at source and making an irrevocable waiver of any right to claim any reduction in withholding under any treaty with the U.S. and*

4) Specified Tax Deferred Accounts- (per IRC Sec 408(a) or (b) Individual Retirement Accounts or Annuities, but not 408(k) or (p), IRC Sec 529 plans, Coverdell, HSA or Archer MSA)- *treated as receiving a distribution of your entire interest in the account the day before expatriation.*

Above items 1 and 3 are subject to withholding at source. Items 2 and 4 are subject to immediate taxation as specified above.

In all four (4) cases, Form W-8CE, Notice of Expatriation and Waiver of Treaty Benefits, must be supplied to the payers of all four (4) items above to either inform them of their 30% withholding responsibilities or request the present value or value of the individual's entire interest, such that the proper amount of income may be included upon tax return filing and the resultant tax paid.

Specific definitions of the above items 1- 4 referenced exceptions may be found in IRS Notice 2009-85 pages 26- 31.

No early distribution tax by virtue of IRC Section 72(t) will be imposed as a result of the above.

Expatriation tax return- any covered expatriate subjected to the mark-to-market tax, must file Form 1040 (if Expatriation occurs on December 31) or dual status 1040NR with Form 1040, as appropriate and attach Form 8854, Initial and Annual Expatriation Statement.

Once the actual sale of property occurs adjustments are made to the amount of the actual gain or loss realized to take into account the gain or loss as deemed under these new mark-to-market rules, without regard to the \$821,000 for 2023 (\$767,000 for 2022, \$744,000 for 2021, \$737,000 for 2020, \$725,000 for 2019, \$713,000 for 2018, \$699,000 for 2017, \$693,000 for 2016, \$690,000 for 2015, \$680,000 for 2014, \$668,000 for 2013, and \$651,000 for 2012) from the original 2008 \$600,000 exclusion.

Deferral of Payment of Tax:-

Opportunity exists for an individual to elect by tax deferral agreement with the IRS to defer payment of the mark-to-market tax imposed upon deemed sales, where interest at the prescribed rate would apply. The election is irrevocable and is made on a property-by-property basis. Form 8854, Initial and Annual Expatriation Statement, must be continued to be filed for all years up to the point where the full amount of the deferred tax and interest is paid.

Under this deferment agreement the deferred tax attributable to the property is due the earlier of: i) voluntary, ii) when the return is due for the taxable year in which the property is actually disposed of or iii) death.

However acceptable security must be furnished to the Secretary, which includes a bond or another form of security including letters of credit and be conditioned upon payment of the amount of tax due, plus interest and must be in accordance with the regulation requirements including being accepted by the Secretary. This election is made on Form 8854, Initial and Annual Expatriation Statement. Additionally, you must make an irrevocable waiver of any right under any treaty with the U.S., which would preclude assessment or collection of the mark-to-market tax.

These procedures are addressed by IRS Notice 2009-85 page 18, with a sample agreement in Appendix A to be filed by the due date of the return that includes the day before the expatriation date. The covered expatriate must attach a copy of the deferral request to their tax return that includes the day before the expatriation date and may file such request simultaneously with said tax return.

The agreement is filed and arranged by the IRS, SBSE Advisory Office, 7850 SW 6th Court, Mail Stop 5780, Plantation, FL 33324-3202, telephone number 954-423-7344.

Additionally, the covered expatriate must appoint a U.S. agent to accept communication from the IRS, to permit timely enforcement and generally facilitate the implementation. The covered expatriate and agent must enter into a binding agreement, example in Appendix B to IRS Notice 2009-85. This agreement must be submitted with the deferral request. If the U.S. agent resigns or otherwise terminates the covered expatriate must notify the IRS within 90 days at Advisory, 7850 SW 6th Court, Mail Stop 5780, Plantation Florida 33324-3202. Subject to provisions of Page 20 of IRS Notice 2009-85.

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