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GREEN CARD CHECKLIST

This article provides a comprehensive checklist for a U.S. person prior to renouncing U.S. citizenship or legal permanent residence. It is not intended to teach the technical competence required for self-compliance but it will give the knowledge to determine if a U.S. tax preparer knows all that is necessary to provide technically competent professional services.

Expatriation After June 16, 2008

Effective June 16, 2008, the 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 to the Code.[1] Different rules apply 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 Notice 2009-85, 2009-45 IRB 598.[2]

Expatriation applies to (1) U.S. citizens or (2) long-term residents (LTRs) that have renounced respectively.[3] An LTR is defined as a legal permanent resident ("green card holder") whose status was held in at least any part of eight of the last 15 tax years ending with the year in which residency ends.[4] Not counted is any tax year in which the taxpayer is treated as a tax resident of a foreign country that has an income tax treaty with the U.S. and the taxpayer did not waive treaty benefits.

If (1) or (2) above is met, the expatriation rules will apply and the taxpayer will be deemed a "covered expatriate"' if any of the following apply:

1. Average annual net income tax for the five years ending before the date of expatriation is more than \$162,000 for 2017.[5]
2. Net worth is \$2 million or more on the date of expatriation.
3. Effective June 3, 2004, forward, the taxpayer fails to certify on Form 8854 that he has complied with all U.S. federal tax obligations for the five years preceding the date of expatriation. Effective June 3, 2004, there no longer remains a presumption of tax motivation so the taxpayer can no longer request a private letter ruling to avoid the application of Section 877. Notice 2005-36, 2005-1 CB 1007, removed the presumption of tax avoidance by the introduction of the "net worth" and "income tax test" and the filing of Form 8854.

Taxpayers that meet these tests after June 16, 2008, are subject to the Section 877 and 877A expatriation provisions.

Exceptions

Exception (effective June 3, 2004, forward) to the expatriation rules applies for dual citizens and certain minors[6] (however, the Form 8854 certification regarding U.S. federal tax compliance for the last five years must still be supplied). The exceptions are as follows:

- *Dual citizen.* An individual who was at birth a U.S. citizen, is a citizen of another country and continues to be

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a resident of that country, where he is taxed as a resident, and was not a U.S. resident for more than ten of the last 15 years.

- *Minors.* An individual who expatriates before $18\,{}^1/_2$ years old and was a resident of the U.S. for not more than ten years prior to expatriation.

Effective Date

An individual is considered to have expatriated as of the later of the date that he relinquishes U.S. citizenship or terminates long-term residency. Effective after June 16, 2008, there is no longer a requirement to file a Form 8854 to establish an effective expatriation date.

Former U.S. citizens. Former U.S. citizens are considered to have relinquished U.S. as of the earliest of the following dates:

1. They renounce U.S. citizenship before a U.S. diplomatic or consular officer (provided that this is followed by issuance of certificate of loss of nationality).
2. They furnish the State Department with a signed statement of voluntary relinquishment of U.S. nationality (provided that this is followed by issuance of certificate of loss of nationality).
3. The State Department issues a certificate of loss of nationality.
4. A U.S. court cancels the certificate of naturalization.

Former LTRs. Former LTRs are considered to have terminated long-term residency as of the earliest of the following dates:

1. They voluntarily relinquish/abandon their green card by filing Department of Homeland Security Form I-407 (Record of Abandonment of Lawful Permanent Resident Status) with a U.S. consular or immigration officer.
2. They became subject to a final administrative order for removal from the U.S. under the Immigration and Nationality Act and actually left the U.S.
3. For a dual resident, the country of new residence has an income tax treaty with the U.S. and the individual filed Forms 8854 and 8833 (Treaty-Based Return Position Disclosure Under Section 6114 or 7701(b)).

Expatriation Tax

Effective June 17, 2008, in accordance with the Heroes Earnings Assistance and Relief Tax Act of 2008 (P.L. 110-245, June 17, 2008), Section 877A was added to the Code to abolish the existing expatriation rules with regard to filing U.S. tax returns (Forms 8854 and 1040NR (U.S. Nonresident Alien Income Tax Return) for a period of ten years, to be replaced by a one-time mark-to-market tax on the 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 similar tax rules in other income tax treaty countries. Accordingly, if individuals meet the expatriation rules ("covered expatriates"), they will now be treated as if they sold (deemed sale) all of their property for fair market value on the day prior to the expatriation date. The mark-to-market tax is imposed on the property's net unrealized gain to the extent that it exceeds $699,000 for 2017.[7]

This exclusion amount must be allocated to all built-in gain property that is subject to the mark-to-market regime that the covered expatriate owned on the day before expatriation, regardless of whether the covered expatriate makes an election (see below) to defer tax with respect to any property. The exclusion first must be allocated pro rata to each of the built-in gain properties by multiplying the exclusion by the ratio of built-in gain per asset over 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, 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-year's inflation adjustment) may be applied to a second expatriation.

Gains from the deemed sales must be taken into account for the tax year of the deemed sale. Deemed losses are treated under the existing Code and Regulations.

Basis step-up. For purposes of determining the tax imposed, a stepped-up basis rule applies to property that an individual held on the date that he first became a U.S. resident alien (within the meaning of Section 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, he may make an irrevocable election not to have this rule apply, property by property, 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 latter case the individual was a resident of a U.S. treaty country and 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.).[8]

Mark-to-market exceptions. These include:

- Eligible deferred compensation items.
- Ineligible deferred compensation items.
- Interests in nongrantor trusts.
- Specified tax-deferred accounts.

Eligible deferred compensation. Section 219(g)(5). All basic work-related qualified retirement plans are subject to 30% withholding at source and an irrevocable waiver of any right to claim any reduction in withholding under any treaty with the U.S. These plans include profit-sharing plans, including Section 401(k)/403(b); annuity plans and contracts; simplified employee pension (SEP) plans; simple retirement accounts; foreign pension plans; similar retirement arrangements or programs; any item of qualified deferred compensation "substantially vested"; qualified or unqualified options; restricted stock awards; stock appreciation rights; and Section 83 property.

Ineligible deferred compensation. For any item not covered under eligible deferred compensation, the individual is treated as having received the present value of the accrued benefits the day prior to expatriation.

Interests in nongrantor trusts (domestic or foreign). These are subject to 30% withholding at source and an irrevocable waiver of any right to claim any reduction in withholding under any treaty with the U.S.

Specified tax-deferred accounts. For these accounts, the individual is treated as receiving a distribution of his entire interest in the account the day before expatriation. These accounts include Sections 408(a) and (b) IRAs or annuities (but not Section 408(k) or (p), Section 529 plans (qualified tuition), Coverdell education savings accounts, health savings accounts (HSAs), or Archer medical savings accounts (MSAs).

Specific definitions of the items in the four categories above are in Notice 2009-85, 2009-45 IRB 598, pages 26-31. Eligible deferred compensation items and interests in nongrantor trusts are subject to withholding at source. Ineligible deferred compensation items

1 Heroes Earnings Assistance and Relief Tax Act of 2008 (P.L. 110-245, June 17, 2008), section 301(a).

2 Heroes Earnings Assistance and Relief Tax Act of 2008 (P.L. 110-245, June 17, 2008) (expatriation after June 16, 2008); American Jobs Creation Act of 2004 (P.L. 108-357, October 22, 2004), section 804 (expatriation after June 3, 2004). See Liss and Basha, "Expatriation: Opportunities in a Mist of Uncertainty," 25 JOIT 45 (December 2014).

3 Sections 877(e)(2), 877A(g)(2).

4 Section 877(e)(2).

5 $161,000 for 2016, $160,000 for 2015, $157,000 for 2014, $155,000 for 2013, $151,000 for 2012, $147,000 for 2011, $145,000 for 2010.

6 Sections 877(c)(2) and (3); 877A(g)(1)(B).

7 $693,000 for 2016, $690,000 for 2015, $680,000 for 2014, $668,000 for 2013, $651,000- for 2012, $636,000 for 2011, $627,000 for 2010, $626,000 for 2009 (from the original $600,000 for 2008 when the law was first implemented).

8 The step-up rules to a value of not less than fair market value exclude real property within the meaning of Section 897(c) (USRPIs) and property used or held for use in connection with the conduct of a trade or business within the U.S. Thus, the basis of such property may not be stepped up under Sec 877(A)(h)(2) unless prior to becoming a U.S. resident alien, the NRA was a resident of a country that had an income tax treaty with the U.S. and that NRA held property for use in connection with the conduct of a trade or business within the U.S. not carried on through a permanent establishment in the U.S. In that case, under the applicable treaty, the property is eligible for a step-up in value not less than fair value.

9 See exemption amounts, *supra* note 7.

and specified tax-deferred accounts are subject to immediate taxation as specified above.

In all four cases, Form W-8CE (Notice of Expatriation and Waiver of Treaty Benefits) must be supplied to the payors of the items to either inform them of their 30% withholding responsibilities or request the present value or value of the individual's entire interest so that the proper amount of income may be included on the relevant tax return and the resultant tax paid. No early distribution tax by virtue of Section 72(t) (10% additional tax on early distributions from qualified retirement plans) will be imposed as a result of the above rules.

Expatriation tax return. Individuals subject to the mark-to-market tax must file Form 1040 or dual status Form 1040NR with Form 1040, as appropriate, and attach Form 8854. Once the sale of property occurs, adjustments are made to the 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 exemption.[9]

Tax Deferral

An individual may elect by agreement with the IRS to defer payment of the mark-to-market tax imposed on deemed sales (interest at the prescribed rate would apply). The election is irrevocable and is made property by property. Form 8854 must continue to be filed for all years up to the point where the full amount of the deferred tax and interest are paid. Under this agreement, the deferred tax attributable to the property is due at the earlier of (1) voluntary payment; (2) due date for the return for the tax year in which the property is actually disposed; or (3) death.

Acceptable security must be furnished to the Secretary, which includes a bond or other form of security including letters of credit, conditioned on payment of the tax due plus interest, and in accordance with the Regulation requirements including being accepted by the Secretary. This election is made on Form 8854. In addition, the individual must waive irrevocably any rights under any U.S. treaty that would preclude assessment or collection of the mark-to-market tax. Notice 2009-85 (page 18) addresses these procedures, with a sample tax deferral agreement in Appendix A. The covered expatriate must attach a copy of the deferral request to his tax return that includes the day before the expatriation date and may file the request simultaneously with the return. The IRS contact information for all matters pertaining to the agreement is IRS, SBSE Advisory Office, 7850 SW 6th Court, Mail Stop 5780, Plantation, FL, 33324-3202, phone 954-423-7344.

The covered expatriate also must appoint a U.S. agent to accept communication from the IRS, to permit timely enforcement and generally facilitate implementation. The covered expatriate and agent must enter into a binding agreement (sample in Notice 2009-85, page 20, Appendix B) to be submitted with the deferral request. If the U.S. agent resigns or otherwise terminates its responsibility, the covered expatriate must notify the IRS within 90 days at the same address in the paragraph above. ●